BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

David Adam Elgart

For Review of

FINRA Disciplinary Action

File No. 3-17925

FINRA's BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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I. INTRODUCTION

This case is about Elgart's failure to disclose on his securities industry registration documents five unreleased tax liens against him, punctuated by his providing to FINRA false information about those liens in bad faith. Between June 2003 and June 2010, Elgart became the subject of at least five tax liens, totaling $388,785. As all registered representatives are expected and presumed to know—especially those with decades of industry experience like Elgart—representatives are required to disclose on Uniform Application for Securities Industry Registration or Transfer ("Form U4") an unsatisfied tax lien within 30 days after learning about it. A tax lien against a representative is materially important financial information to regulators, employers, member firms, and members of the investing public. Elgart, however, did not disclose his tax liens until December 2013, between three and ten years after he was required to do so, and only after FINRA examiners pressed Elgart for details about conflicting information the examiners obtained about his tax liens and asked him to update his Form U4 as necessary.

Some of that conflicting information was false information that Elgart himself had provided to FINRA staff. In November 2013, about a month before Elgart finally disclosed his tax liens on Form U4, FINRA staff asked Elgart to complete and return a "Personal Activity Questionnaire" ("PAQ") that asked—just like Form U4's liens question did—whether Elgart had any unsatisfied liens against him. Elgart falsely answered that question "no." Rather than provide accurate information about his tax liens that might reveal his decade-long disclosure failure and his financial difficulties, Elgart chose instead to conceal the truth from regulators.

As FINRA's National Adjudicatory Council ("NAC") correctly found, Elgart's failure to timely disclose his tax liens on Form U4 violated FINRA's registration disclosure rules, and his providing of false information to FINRA in bad faith violated FINRA's rules requiring the observation of just and equitable principles of trade and high standards of commercial honor. The NAC also correctly found that Elgart willfully failed to disclose material information on his Form U4 and, thus, was statutorily disqualified. Elgart was aware of each tax lien around the time each lien was issued, and he voluntarily chose for years not to disclose the liens on Form U4. And the sanctions that the NAC imposed on Elgart—a six-month suspension and a $15,000 fine for his Form U4 violations, and a 30-business-day consecutive suspension and a $5,000 fine for providing FINRA with false information—are consistent with FINRA's Sanction Guidelines, reflect numerous aggravating factors, and are meaningful enough to deter Elgart from engaging in similar violations.

Elgart's challenges to the NAC's decision fail. Elgart argues that his failure to amend Form U4 was not "willful," because he purportedly had a decade-long mistaken understanding that Form U4's straightforward disclosure question about liens had limitations that are nowhere in the text of the question. Elgart offers the same excuse for why he provided a false answer to

the PAQ's identical liens question. Elgart ignores, however, that the SEC has rejected numerous similar arguments about alleged misunderstandings of Form U4's unambiguous disclosure questions. And he ignores the dispositive facts that the FINRA Hearing Panel that observed his testimony rejected it as not credible and that the NAC properly deferred to that determination.

Elgart also argues that he has not received a fair procedure on the grounds that FINRA's prosecutions of Form U4 violations have created a standard for willfulness that is "vague." Elgart does not cite to or rely on any authoritative sources of guidance for how willfulness has been interpreted, however, but instead props up his argument with cites to a handful of FINRA settlements that have no precedential value and a single Hearing Panel decision. Elgart's arguments lack merit, the record amply supports the NAC's findings, and the sanctions are appropriate. The SEC should sustain the NAC's decision in all respects.

II. FACTUAL BACKGROUND

Since 1998, Elgart has been the president and chief compliance officer of Sequoia Investments, Inc. ("Sequoia Investments") and has been registered as a general securities representative, general securities principal, municipal securities principal, and (since 2011) operations professional. RP 365, 471-72, 921.[1]

A. Elgart's Tax Liens

Between June 2003 and June 2010, Elgart became the subject of six tax liens, totaling $407,931.78. These liens, and the dates they were recorded or filed, were as follows: (1) a June 10, 2003 federal tax lien for $150,843.50; (2) a December 12, 2005 State of Georgia tax lien for

[1] References to "RP ____" are to the pages in the record of this proceeding. References to "Br. _____" are to Elgart's opening brief.

$6,962.92; (3) a January 11, 2007 federal tax lien for $19,175.80; (4) a November 3, 2008 federal tax lien for $130,137.74; (5) an April 6, 2009 State of Georgia tax lien for $27,236.57; and (6) a June 2, 2010 federal tax lien for $73,575.25. RP 366. The January 11, 2007 lien was released on February 7, 2007. RP 366, 538-39. The five other tax liens, however, remain unsatisfied and have not been released.[2] RP 366. Some of Elgart's tax liens related to his 2001 purchase of Sequoia Investments and involved a "question of return of capital as opposed to taxing it as ordinary income." RP 470-71, 483-84, 513-14, 526-27.

Elgart testified that he received the tax liens at or about the time they were issued to him. RP 475.[3] Elgart admitted that he was "receiving a number of notices of liens of pretty substantial amounts of money" over a "period of time," and that "[i]t troubled [him]." RP 525. He "turned [the June 2003 tax lien] over" to his wife and his accountant to "handle." RP 473.

At the end of 2012, Elgart was "getting letters from the IRS" and retained a tax attorney for help in dealing with the tax liens. RP 513-14. Elgart testified that his attorney "took – got all of the notices." RP 514. Elgart stated that he met with his tax attorney for the first time on January 1, 2013, to discuss the liens. RP 514. Elgart stipulated that during that meeting, Elgart

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[2] The complaint filed by FINRA's Department of Enforcement ("Enforcement") did not charge Elgart with any violations concerning the January 11, 2007 lien, or a January 13, 2002 lien in the amount of $4,152 held by DeKalb County to which Elgart also was subject. RP 538-39, 802, 831.

[3] Elgart made a similar admission in a July 14, 2015 letter sent to Deporres Cormier ("Cormier"), a FINRA examination manager, when Elgart represented (through counsel) that he "believes . . . he became aware of the liens on or around the time they were filed." RP 1054. As explained in the argument section below, Elgart provided other versions of when he first became aware of the tax liens that were inconsistent with his admissions that he was aware of the liens around the time they were filed.

was "further advised of the liens" (RP 366), and Elgart testified that the attorney informed him about "how many actual liens there were." RP 514.

B. Elgart's Form U4 Filings Prior to December 23, 2013

Elgart was responsible for ensuring that Sequoia Investments' filings, including Form U4 filings, were kept current and amended as necessary. RP 365. Elgart delegated the responsibility of "handl[ing] . . . all the paperwork for the firm from a compliance perspective, registration perspective," including Forms U4, to the firm's financial and operations principal ("FINOP"). RP 471-72, 490-91, 492. Nonetheless, Elgart admitted that, if he needed to make a change to his own Form U4, he would "[c]all the FINOP and tell them to do that." RP 491.

On or about July 17, 1998, Elgart completed a Form U4 to become associated with Sequoia Investments. RP 365. One of the disclosure questions on Form U4 asked, "do you have any unsatisfied judgments or liens against you?"[4] On that initial Form U4, Elgart did not report that he was subject to any liens. RP 365.

As explained above, Elgart became subject to the five tax liens at issue in June 2003, December 2005, November 2008, April 2009, and June 2010. Between November 2003 and October 2013, Elgart amended his Form U4 13 times. RP 366, 458, 579-791. On those 13 amended Forms U4, Elgart did not change his "No" response to the liens question or disclose any of his tax liens. RP 366, 587, 601, 616, 633, 650, 667, 684, 701, 718, 735, 752, 769, 786. Instead, Elgart amended state registration information. RP 366. Elgart did not even change his "No" response to the liens question on the three Form U4 amendments that were filed just days

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[4] In July 1998, the liens question on Form U4 was Question 22K. *See* Form U4 (Nov. 1997). During the relevant period, the liens question was Question 14M. *See* Form U4 (June 2003); *see, e.g.*, RP 587.

or weeks after Elgart discussed his tax liens with his attorney on January 1, 2013—when the tax liens must have been especially fresh in Elgart's mind. RP 724, 735 (Jan. 3, 2013 Form U4 amendment); RP 741, 752, 758, 769 (Feb. 4, 2013 Form U4 amendments).

On 12 of those 13 amended Forms U4, Elgart's electronic signature appears as the "amendment individual/applicant" giving his "acknowledgement and consent" and as the "firm/appropriate signatory." RP 588, 602, 617, 634, 669, 686, 703, 720, 737, 754, 771, 788. On one amended Form U4 (dated January 13, 2010), Elgart's electronic signature appears only as the "firm/appropriate signatory." RP 652. Asked how his electronic signatures were placed on these amendments, Elgart testified that he assumed that Sequoia Investments' FINOP had Elgart log in and type his name or instead typed Elgart's signature pursuant to Elgart's authorization. RP 516.

C. FINRA's Cycle Examination and Elgart's Providing of False Information to FINRA

In 2013, FINRA staff conducted a cycle examination of Sequoia Investments. RP 442. In preparation, FINRA staff generated LexisNexis reports for the firm's registered representatives, including an October 16, 2013 report for Elgart. RP 443, 793-815. The LexisNexis report for Elgart reflected that the seven tax liens discussed above had been filed against him. RP 443-44, 799-802.

In advance of the on-site examination of the firm, FINRA staff asked Elgart to complete a Personal Activity Questionnaire ("PAQ"). RP 367, 444, 501. At the bottom of the PAQ was printed, "FINRA -- Member Regulation Examination." RP 997. The PAQ's instructions were to "complete all pages, sign, date and return to your manager immediately." RP 997.

On November 25, 2013, Elgart completed and signed the PAQ. RP 444-45, 997-1000. Question 21 on the PAQ contained the same liens question as on Form U4: "[d]o you have any

unsatisfied judgments or liens against you? If yes, provide detail as to each." RP 1000. Elgart answered that question, "No." RP 1000. Elgart signed the PAQ directly above the statement, "By signing this document, I am attesting that the information provided is accurate and truthful." RP 1000. Elgart stipulated that, at the time he completed the PAQ, he "was on notice of and the subject of five unsatisfied liens, namely the June 2003, December 2005, November 2008, April 2009, and June 2010 liens." RP 367. Elgart provided the PAQ to FINRA staff. RP 35, 367, 444, 479.

FINRA staff noticed the discrepancies between Elgart's "No" response to the PAQ's liens question, Elgart's "No" response to Form U4's liens question, and the LexisNexis report that showed that Elgart was subject to seven liens. RP 446. Cormier, the FINRA examination manager assigned to the cycle examination, testified that FINRA examination staff sought to determine "whether or not these liens that were on the [LexisNexis] report were actually for Mr. Elgart." RP 446. On a December 19, 2013 telephone call, Cormier and William Kallbreier ("Kallbreier"), the cycle examination's lead FINRA examiner, informed Elgart about the seven tax liens on the LexisNexis report and asked Elgart to determine if they should be reported on his Form U4. RP 446-47, 831. Cormier and Kallbreier also asked Elgart to update his Form U4, provide a copy of the amended Form U4 to FINRA staff, and update the PAQ if he decided that the liens should be disclosed or, instead, to provide a written explanation if he determined that he had no liens to disclose. RP 446-47, 831.

Kallbreier followed up that conversation with an email later on December 19, 2013. RP 831. The email summarized the conversation and included a list of the seven tax liens, the text of the Form U4 liens question, and a link to FINRA's website that provided guidance regarding what and when items should be disclosed on Form U4. RP 831. In a Friday, December 20, 2013

email response to Kallbreier, Elgart wrote, "Attempting to contact my accountants to obtain the status of these." RP 1039. In another email sent later that same day to Kallbreier, Elgart wrote, "Just called the accountants and (sorry it took so long) and will have the answer by early Monday a.m. and then will update as necessary." RP 1041.

On Monday, December 23, 2013, Elgart amended his Form U4 to change his answer to the liens question from "No" to "Yes" and to disclose the seven tax liens against him. RP 367, 448-50, 1001, 1012, 1017-23. Because he changed his answer to "Yes," Form U4 required that he provide details about his tax liens on Disclosure Reporting Pages. In response to the fields that requested the "date individual learned of the . . . lien," Elgart responded "January 1, 2013" for all seven liens. RP 1017-23. In a related field that asked whether that date was "exact," Elgart responded, with respect to six of the liens, that January 1, 2013, was the "exact" date he learned of the liens and that his "attorney advised me of liens." RP 1017-23. As for the seventh tax lien (the $73,575 June 2010 tax lien held by the Internal Revenue Service), Elgart did not identify January 1, 2013 as the "exact" date he learned of the lien and explained that his "attorney advised me of liens – I was not aware of." RP 1017.

On January 27, 2014, Kallbreier sent an email to Elgart attaching a blank PAQ and asking Elgart to "complete and update the section about liens" and return the completed PAQ to him. RP 451, 833. Elgart did not do so. RP 451-52.

III. PROCEDURAL HISTORY

On November 10, 2015, Enforcement filed a two-cause complaint against Elgart. RP 1-12. Cause one alleged that Elgart failed to amend his Form U4 to disclose five tax liens, totaling $388,785 and dated between June 2003 and June 2010, until December 23, 2013, in violation of Article V, Section 2(c) of the NASD and FINRA By-Laws, NASD IM-1000-1 and FINRA Rule

1122, and NASD Rule 2110 and FINRA Rule 2010.[5] RP 7-10. The complaint further alleged that Elgart's conduct was willful and that the information omitted from Form U4 was material. RP 11. Cause two alleged that on November 23, 2013, Elgart misled FINRA by falsely completing and submitting to FINRA the PAQ, thus acting in bad faith and failing to observe high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.[6] RP 10-11. Elgart filed an answer denying the allegations. RP 29-37.

On April 6, 2016, a Hearing Panel held a one-day hearing, at which Elgart testified. RP 423-558. In its June 3, 2016 decision, the Hearing Panel found that Elgart failed to timely amend his Form U4 to disclose five unsatisfied tax liens, filed 13 misleading Form U4 amendments that did not disclose the liens, and chose to answer the liens question on the PAQ falsely, unethically, and in bad faith, in violation of FINRA rules. RP 1061-73. The Hearing Panel found that because Elgart's conduct concerning his Form U4 was willful and the information he failed to disclose was material, he was subject to statutory disqualification. RP 1062, 1066-71, 1076. In making its findings, the Hearing Panel determined that Elgart's testimony was not credible. In this regard, the Hearing Panel rejected Elgart's claimed ignorance of what the Form U4 liens question required as "not credible" based upon "Elgart's demeanor at the hearing, and the

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[5] The conduct rules and interpretive materials that apply in this case are those that existed at the time of the conduct at issue. NASD IM-1000-1 applies to Elgart's conduct prior to August 17, 2009; FINRA Rule 1122, which superseded NASD IM-1000-1, applies to Elgart's conduct from August 17, 2009, forward. *FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96, at *1-2, 6-7 (June 2009). NASD Rule 2110 applies to Elgart's conduct prior to December 15, 2008; FINRA Rule 2010, which superseded NASD Rule 2110, applies to Elgart's conduct from December 15, 2008, forward. *FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *1, 32 (Oct. 2008).

[6] On December 21, 2015, Enforcement filed an errata complaint to correct an error in a statement about when the violative period began. RP 89-100.

evidence presented." RP 1071. It found that Elgart's "inconsistent explanations of when he became aware of the liens to be evidence of his lack of credibility." RP 1069. Likewise, the Hearing Panel found that Elgart's claim that he "intended to be truthful in his PAQ answer" was "not credible" and that his assertion that he honestly believed that the PAQ question did not require him to disclose his unsatisfied tax liens was "not believable." RP 1072.

The Hearing Panel suspended Elgart from associating with any member firm in all capacities for six months and fined him $15,000 for his Form U4 violations. It imposed an additional 30-business-day suspension (to be served consecutively with the six-month suspension) and a $5,000 fine for providing to FINRA a false and dishonest answer to a question on the PAQ. RP 1073-76.

On appeal, the NAC affirmed the findings that Elgart willfully failed to timely amend his Form U4, that the tax liens Elgart failed to disclose on Form U4 were material information, and that Elgart provided a false and dishonest answer on the PAQ. RP 1243-56. In doing so, the NAC deferred to the Hearing Panel's credibility determinations. RP 1252, 1256. The NAC vacated the Hearing Panel's findings that Elgart filed 13 misleading Form U4 amendments in violation of FINRA rules because the complaint did not allege any such violation. RP 1250. Finally, the NAC affirmed the sanctions. RP 1256-60.

IV. ARGUMENT

The NAC's findings that Elgart willfully failed to timely update his Form U4 with information about his substantial tax liens, that such omitted information was material, and that he provided false information to FINRA in bad faith are amply supported by the evidence. The NAC's sanctions reflect the egregiousness of Elgart's decade-long failure to disclose material information to regulators and the investing public and his willingness to provide false

information to FINRA examiners. The SEC should affirm the NAC's findings and sanctions in all respects.

A. - Elgart Failed for More Than Ten Years to Update His Form U4 with Information About His Substantial Tax Liens, in Violation of FINRA Rules.

The NAC correctly found that Elgart failed to update timely his Form U4, in violation of FINRA rules. Indeed, Elgart concedes that he did not amend his Form U4 in a timely manner, and the SEC can affirm the findings of violation on this basis alone. Br. 1, 3, 5; *see also* RP 1193 (Elgart's counsel representing that there is "no dispute as to liability on the U-4 issue").

Article V, Section 2(c) of the NASD By-Laws and the FINRA By-Laws provided and provides, in pertinent part, that "[e]very application for registration filed with [FINRA] shall be kept current at all times by supplementary amendments" and that "[s]uch amendment . . . shall be filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." NASD IM-1000-1 provided that "[t]he filing with the Association of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade." Similarly, FINRA Rule 1122 provides that "[n]o member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."[7]

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[7] Conduct that violates NASD IM-1000-1 and FINRA Rule 1122 also violates the high standards of commercial honor and just and equitable principles of trade to which FINRA holds its members and their associated persons under NASD Rule 2110 and FINRA Rule 2010.

(Footnote continued on next page)

These registration and disclosure rules "apply to a Form U4, which FINRA uses to screen applicants and monitor their fitness for registration within the securities industry." *McCune*, 2016 SEC LEXIS 1026, at *10-12; *see also Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39 (Mar. 27, 2017) (stating that Form U4 is a "critically important regulatory tool" for regulatory agencies in determining and monitoring the fitness of securities professionals), *appeal docketed*, No. 17-1240 (2d Cir. Apr. 26, 2017). The information on a Form U4 is important not only for regulators, but also for employers and investors. The duty to provide accurate information on a Form U4 and to amend Form U4 to provide current information "assures regulatory organizations, employers, and members of the public that they have all of the material, current information about the registered representative with whom they are dealing." *McCune*, 2016 SEC LEXIS 1026, at *12.

"Because [r]egistration of broker-dealers is a means of protecting the public, every person submitting a Form U4 has the obligation to ensure that the information provided on the form is true and accurate." *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *16 (Oct. 20, 2011) (footnote and internal quotation marks omitted). Likewise, "[a] registered representative has a continuing obligation to timely update information required by Form U4 as changes occur." *McCune*, 2016 SEC LEXIS 1026, at *11.

Elgart failed to comply with his independent obligation to timely amend his Form U4 with accurate current information about his tax liens. Question 14M on Form U4 asks, "Do you have any unsatisfied judgments or liens against you?" When the answer is "yes," Form U4

(Cont'd)

Michael Earl McCune, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *12 (Mar. 15, 2016), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

further requires disclosure of specific information about the judgments or liens, including, in relevant part, the date the individual learned of the judgment or lien and whether that date is "exact." RP 1016-23. Prior to June 2003, Elgart's response to Form U4's liens question was "No." In June 2003, December 2005, November 2008, April 2009, and June 2010, five separate tax liens were recorded against Elgart, and those tax liens remained unsatisfied throughout the relevant period. Thus, from June 2003 until December 2013—when Elgart finally disclosed his liens on Form U4—Elgart's "No" response was inaccurate and misleading.

Elgart was required to disclose each lien on his Form U4 within 30 days after learning of the circumstances that required him to disclose the liens. Elgart admitted on several occasions that he learned of the tax liens around the time they were issued to him. RP 475, 1054, 1118, 1169. Elgart, however, did not update his Form U4 until December 23, 2013, three to ten years after he was required to do so. Elgart has not disputed or denied his obligation to disclose the tax liens. RP 146. And he has admitted and stipulated that he did not amend his Form U4 to disclose the liens within 30 days of his knowledge of the liens.[8] RP 367, 475.

Accordingly, the SEC should sustain the NAC's finding that Elgart failed to timely disclose five tax liens on his Form U4, in violation of Article V, Section 2(c) of the NASD By-

[8] Citing his hearing testimony, Elgart asserts in his brief that "he did not really look at" Form U4's liens question. Br. 4 n.13 (citing RP 500). It is fundamental, however, that "[i]gnorance of [FINRA's] rules is no excuse for their violation. Participants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements." *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *15-16 (Dec. 22, 2008). Moreover, as addressed in more detail below, the Hearing Panel rejected as not credible Elgart's claimed ignorance of what the Form U4 liens question required, "based upon Elgart's demeanor at the hearing, and the evidence presented." RP 1071.

Laws and FINRA By-Laws, NASD IM-1000-1, NASD Rule 2010, and FINRA Rules 1122 and 2010.

B.) Elgart Is Subject to Statutory Disqualification Because He Willfully Failed to Disclose Material Information on His Form U4.

The NAC also correctly found that Elgart was subject to statutory disqualification as a result of his failure to disclose his liens on Form U4. Section 3(a)(39)(F) of the Securities Exchange Act of 1934 ("Exchange Act") provides that a person is subject to a statutory disqualification if such person has, among other things,

> *willfully* made or caused to be made in any application . . . to become associated with a member of . . . a self-regulatory organization . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any *material fact* which is required to be stated therein.

15 U.S.C. § 78c(a)(39)(F) (emphasis added). This statutory provision applies to a representative who has willfully provided on a Form U4 false or misleading statements with respect to a material fact or who willfully failed to amend Form U4 with material information that is required to be stated on Form U4. *See, e.g.*, *McCune*, 2016 SEC LEXIS 1026, at *13-23 (finding that applicant was statutorily disqualified for willfully failing to amend Form U4); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 SEC LEXIS 1148, at *37-41 (Apr. 18, 2013) (finding that applicant was statutorily disqualified for willfully providing material false information on, and excluding material information from, a Form U4), *aff'd*, 575 F. App'x 1 (D.C. Cir. 2014).

Acting "willfully" means to "[v]oluntarily commit[ ] the acts that constitute[ ] the violation." *McCune*, 2016 SEC LEXIS 1026, at *15; *see also Amundsen*, 2013 SEC LEXIS 1148, at *38 ("A failure to disclose is willful under Exchange Act § 3(a)(39)(F) if the respondent

of his own volition provides false answers on his Form U4."). A finding of willfulness "do[es] not require that the actor 'also be aware that he is violating one of the Rules or Acts'" or that he "acted with a culpable state of mind" or "scienter." *McCune*, 2016 SEC LEXIS 1026, at *15, 19 (citing, *inter alia*, *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000), and *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *42-44 (Nov. 9, 2012)). On the other hand, an "inadvertent filing of an inaccurate form" is not something that would support a finding of willfulness. *Mathis v. SEC*, 671 F.3d 210, 218 (2d Cir. 2012); *cf. Amundsen*, 2013 SEC LEXIS 1148, at *38 (noting, in making findings of willfulness, that respondent's false answers on Form U4 were neither "involuntary nor inadvertent").

Elgart acted willfully. He has conceded that he was aware of the numerous tax liens around the time that they were issued. *See McCune*, 2016 SEC LEXIS 1026, at *15-16 (finding that respondent willfully failed to amend Form U4 when, among other things, he knew about the bankruptcy and liens that were required to be disclosed). The requirement that Elgart amend the Form U4 is based in FINRA rules—rules that Elgart is "presumed to know and abide by." *Dep't of Enforcement v. Zayed*, Complaint No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *22 n.19 (FINRA NAC Aug. 19, 2010) (rejecting respondent's argument that he mistakenly believed that only bankruptcies and felonies, and not judgments, had to be disclosed on Form U4) (citing *Carter v. SEC*, 726 F.2d 472, 474 (9th Cir. 1983)). The Form U4 and its accompanying instructions warned and reminded Elgart of his continuing obligation to amend the Form U4 with accurate information, and Elgart's counsel represented that Elgart "knew he had to keep his information updated." RP 437; *see Mathis*, 671 F.3d at 218-219 (finding that appellant willfully failed to amend Form U4 to disclose tax liens where, among other things,

Forms U4 that he had filed warned and reminded him that he was under a continuing obligation to disclose changes to previously reported answers).

Furthermore, Elgart *admitted* that he was "aware that the Form U4 asked whether any liens existed." RP 144, 1111; *see McCune*, 2016 SEC LEXIS 1026, at *15-19 (finding that willfully failed to amend Form U4 when respondent was "aware of the requirement to amend his Form U4 to disclose bankruptcies and liens"). That question is unambiguous, straightforward, and clear. And Elgart claimed that the "thought process" he "went through" "when [he] got this series of liens" was that "I don't have to report" liens that are "personal not against the firm"—demonstrating that Elgart *voluntarily chose* not to disclose his tax liens. RP 528-29. For these reasons, Elgart's failure to amend his Form U4 with accurate information about his tax liens was a voluntary act and, therefore, willful.[9]

In addition, the tax liens that Elgart failed to disclose constituted omissions of material facts. "In the context of Form U4 disclosures, a fact is material if there is a substantial likelihood that a reasonable regulator, employer, or customer would have viewed it as significantly altering the total mix of information made available." *McCune*, 2016 SEC LEXIS 1026, at *21-22. Here, such persons "all would have viewed [Elgart's] . . . tax liens as significantly altering the total mix of information." *Id.* Disclosure of tax liens would have "alerted his firm to [his] outside financial pressures," "allowed customers to assess whether the . . . liens had a bearing on

[9] The NAC's finding of willfulness is only bolstered by Elgart's repeated actions to conceal several liens. He repeatedly failed to disclose one lien after another, he repeatedly failed to amend Form U4 on the 13 Form U4 amendments he filed, and he also falsely represented on the PAQ that he had no liens. *See Tucker*, 2012 SEC LEXIS 3496, at *44 n.56 ("Although scienter is not necessary to establish willfulness, . . . efforts to conceal violative conduct demonstrate scienter."); *Amundsen*, 2013 SEC LEXIS 1148, at *38 (noting, in findings that respondent willfully supplied false answers on Form U4, that respondent did so "repeatedly").

his ability to provide them with appropriate financial advice," and "provided his regulators with early notice about his financial difficulties and ability to manage his financial obligations." *Id.*; *see also Tucker*, 2012 SEC LEXIS 3496, at *32 (stating that respondent's serious financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him"). The materiality of Elgart's tax liens is "even more apparent" given their "number and total amount" and "the lengthy period of time during which the information was not disclosed." *McCune*, 2016 SEC LEXIS 1026, at *21-22 (finding that respondent willfully failed to disclose four liens totaling $162,374 and failed to file amendments over periods ranging from one month to six years).

Because Elgart willfully failed to update his Form U4 to disclose material information that was required to be stated on Form U4, the NAC correctly found that Elgart is statutorily disqualified. Elgart makes several challenges to this finding of "willfulness," but as explained below, those arguments are flawed.

1. (Elgart's Argument that He Had a Mistaken Understanding of the Unambiguous Liens Question Fails as a Defense to the Allegations of Willfulness.

In challenging the finding of willfulness, Elgart argues that his omission of his tax liens from Form U4 was the "result of . . . a mistake in his understanding of [Form] U4." Br. 6. Elgart contends that he understood Form U4's liens question to require disclosure only of liens that "could have a financial impact on Sequoia, or its customers," not personal tax liens like the five liens at issue. Br. 6. Elgart also devotes several pages of his opening brief to arguing that a respondent's mistaken understanding of a Form U4 disclosure question constitutes a defense to an allegation of willfulness. Br. 7-10. The controlling case law, however, refutes this argument.

The SEC has rejected defenses to allegations of willfulness that, like Elgart's, were based on interpretations of Form U4 disclosure questions that were contrary to their plain language, limitations that did not exist in the text of the questions, or a respondent's alleged confusion or lack of understanding about the meaning of a Form U4 disclosure question. *See, e.g.*, *Neaton*, 2011 SEC LEXIS 3719, at *29-30 (finding, in a discussion about respondent's willfulness, that a respondent's interpretation of one Form U4 disclosure question was "contrary to its plain language" and that his interpretation of another Form U4 question as "limited to findings arising from investment activity" was not suggested by the question itself); *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *21-22 (Dec. 7, 2009) (holding, in a discussion about respondent's willfulness, that the suggestion that only securities-industry related liens needed to be disclosed was not supported by the plain language of the Form U4 disclosure question, that "if [respondent] found [the Form U4 question about liens] to be ambiguous, it was his duty to determine whether disclosure was required," and that securities industry participants "must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements"), *aff'd*, 671 F.3d 210 (2d Cir. 2012); *Craig*, 2008 SEC LEXIS 2844, at *15-16 (rejecting respondent's arguments, in a discussion about his willfulness, that "he did not understand the questions on the Form U4" and "did not know that he needed to disclose misdemeanors," and holding that "ignorance of the NASD's rules is no excuse for their violation"). Thus, when a respondent's alleged misunderstanding of a Form U4 disclosure question is objectively unreasonable—like Elgart's purported misunderstanding of the unambiguous liens question—providing incorrect answers to those questions, or failing to update the answers with accurate information, is willful conduct.

The only case that Elgart cites in support of his argument is *Dep't of Enforcement v. Harris*, in which an NASD Hearing Panel found that a respondent's failure to disclose his felony charges and misdemeanor conviction on Form U4 was not willful because, among other reasons, the respondent "misread" the relevant criminal disclosure question because he "stopped reading" that question after getting to an italicized term contained in the question. Complaint No. C07010084, 2002 NASD Discip. LEXIS 27, at *12 (NASD Hearing Panel May 31, 2002). The SEC's determination of whether Elgart acted willfully, however, should not be guided by a FINRA Hearing Panel decision like *Harris* that carries little, if any, precedential value. *See* FINRA Rule 9348 (giving the NAC extensive powers of review of Hearing Panel decisions). Instead, the SEC's more recent decisions in *Neaton*, *Mathis*, and *Craig* expressly have rejected arguments similar to Elgart's.[10]

Elgart also cites (Br. 9-10) FINRA's Minor Rule Violation Plan ("MRVP") Guidelines, but they also do not support his argument. The MRVP Guidelines provide guidance concerning the application of FINRA's MRVP to specific rules, including whether a matter is appropriate for disposition under the MRVP. *See NASD Notice to Members 04-19*, at pp. 259, 260 (Mar. 2004), *available at* www.finra.org/sites/default/files/NoticeDocument/p003221.pdf. For failing to timely submit Form U4 amendments, the MRVP Guidelines set forth violation-specific guidelines. Violation-specific Guideline 1 provides that "[a] *willful* misstatement or omission on

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[10] Elgart's reliance on *Harris* is even more misguided for additional reasons. In *Harris*, in the Hearing Panel credited the respondent's claims that he misread the Form U4 disclosure question. In contrast, the Hearing Panel in this case found Elgart's testimony to be not credible. Furthermore, a few years after *Harris*, the NAC found that the criminal disclosure question at issue in *Harris* was "unambiguous" and rejected a respondent's argument that he was "confused" by it. *See Dep't of Enforcement v. Kraemer*, Complaint No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *14, 20 (FINRA NAC Dec. 18, 2009).

Form U4 even if it is not material generally requires full disciplinary proceedings." Violation-specific Guideline 2 provides that "[a]n MRV or Letter of Caution should be limited to failure to file Form U4 amendments in a timely way or non-negligent errors on Form U-4 due to inadvertence, *mistake* or incorrect advice from an attorney or member firm after full disclosure by the individual." *Id.* at 267 (emphasis added). Nothing in these violation-specific guidelines, however, defines the terms "willful" or "mistake," suggests that the term "willful" in Guideline Number 1 should be defined in relation to the meaning of the term "mistake" in Guideline Number 2, or suggests that an objectively unreasonable, mistaken understanding of the text of a Form U4 disclosure question precludes a finding of willfulness.

2. Elgart's Claim that He Had a Mistaken Understanding of the Form U4 Liens Was Not Credible.

Elgart's "mistaken understanding" challenge to the willfulness finding also fails for an additional reason. The Hearing Panel considered Elgart's claim that he did not understand he was required to disclose his tax liens and found, based on his "demeanor at the hearing," "the evidence presented," and his "inconsistent explanations of when he became aware of the liens," that Elgart's "claimed ignorance of Question 14M is not credible." RP 1069, 1071. The NAC properly deferred to the Hearing Panel's credibility determination because there is not substantial evidence to the contrary. RP 1252; *see Neaton*, 2011 SEC LEXIS 3719, at *24-25 (explaining that a Hearing Panel's credibility determinations are "entitled to considerable weight because they are based on hearing the witnesses' testimony and observing their demeanor" and that "[s]uch determinations can be overcome only where the record contains substantial evidence for

doing so"). Indeed, there are numerous reasons why the record supports the Hearing Panel's credibility determination.[11]

For starters, Elgart's claimed misunderstanding of the liens question has no basis in the text of the question itself, which the SEC repeatedly has found "unambiguous" and "contains no limitations on the kind of liens required to be disclosed." *Tucker*, 2012 SEC LEXIS 3496, at *36-37, 38 n.44; *see also Mathis*, 2009 SEC LEXIS 4376, at *21-22, 28 (holding that Form U4's liens question "contains no limitations on the kinds of liens required to be disclosed," that "the plain language of the Form U4 . . . asks for 'any' liens," and that "there is nothing ambiguous about whether an IRS tax lien constitutes a 'lien'"); *cf. Amundsen*, 2013 SEC LEXIS 1148, at *31 (finding that respondent's testimony about his interpretations of Form U4 disclosure questions lacked credibility, where the definition of a term in one disclosure question was "written in plain language" and where another disclosure question was "explicit and unambiguous").

In addition, Elgart's vast industry experience makes his claimed misunderstanding of the liens question even more unbelievable. Elgart had decades of industry experience. RP 365, 470. He was a general securities principal, president, and chief compliance officer of his firm. RP 3654, 471-72, 921. He had overarching responsibility for Form U4 registration filings. RP 365. He electronically signed Form U4 amendments as the "firm/appropriate signatory." *See generally* RP 579-791. Elgart's experience strongly undercuts his claimed misunderstanding of the unambiguous Form U4 liens question. *Cf. Philippe N. Keyes*, Exchange Act Release No.

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[11] Elgart contends that "this has nothing to do with credibility" (Br. 7), but Elgart's entire argument about willfulness is premised on his testimony that he had a mistaken understanding of the liens question—testimony that the Hearing Panel and the NAC rejected.

54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (noting that registered representative's "claimed ignorance of his obligations is only aggravated in light of his fifteen years[']' experience in the securities industry"); *Walter T. Black*, 50 S.E.C. 424, 425 (1990) (stating that "it is difficult to credit Black's claim that he did not know he was violating NASD rules" when he had "15 years' experience in the securities business").

Elgart's lack of credibility is further evidenced by his numerous inconsistent explanations of when he became aware of the tax liens—inconsistencies that Elgart conveniently fails to mention in his opening brief. As the NAC explained, between December 23, 2013 (when Elgart finally disclosed his liens on Form U4) and April 6, 2016 (when he testified at the hearing), Elgart provided numerous different and changing accounts of when he became aware of the tax liens:

- In his December 23, 2013 Form U4 amendment, Elgart represented that he first learned of the liens on January 1, 2013, when his "attorney advised me of lien" or when "attorney advised me of liens – I was not aware of." RP 1017-23.
- In a July 14, 2015 letter to FINRA, Elgart represented (through counsel) that he "believes that he became aware of the liens on or around the time they were filed." RP 1054.
- In his December 8, 2015 answer to the complaint, Elgart denied that he was put on notice of the tax liens at or about the time that each was recorded, or at least by January 2013, or at the time he completed the PAQ in November 2013. RP 51, 54 (¶¶ 9, 24).
- At a December 16, 2015 pre-hearing conference, Elgart took the position (through counsel) that "Mr. Elgart was for a very long period of time where those liens were in existence simply unaware of their existence." RP 64.

- In the March 4, 2016 stipulations, Elgart stipulated that "[o]n or about January 2, 2013," he was "further advised of the liens." RP 366.
- At the April 6, 2016 hearing, Elgart first testified that he received the notices of the tax liens at or about the time they were issued to him. RP 475.
- Later at the April 6, 2016 hearing, Elgart testified that he was aware of only some of the tax liens at the time they were filed. RP 483. And when a Hearing Panelist specifically asked Elgart whether there were still some liens of which he was not aware on January 1, 2013, Elgart evasively answered, "[q]uite frankly, I turned all of this over to a tax attorney and delegated, not ignored – delegated the responsibility of coalescing that." RP 483.

In contrast to the reasons why the NAC properly deferred to the Hearing Panel's credibility determinations, Elgart offers no substantial contrary evidence. Elgart asserts that his testimony was "unrebutted." Br. 10. n.24. But as explained above, there are a wealth of reasons why the Hearing Panel's credibility determination was consistent with, and supported by, the evidence.

Citing a snippet of his testimony, Elgart also asserts in his opening brief that his "misunderstanding" of the liens question "may have been" because "he did not really look at that question." Br. 4 n.13 (citing RP 500). But Elgart totally undercuts that assertion when he argues that his mistaken understanding was a "misreading of the English language." Br. 8. Moreover, Elgart's claim that he "never really looked at" the liens question (RP 500, 529-30) is belied by the facts that he nonetheless: (1) was aware that Form U4 asked whether any liens existed (RP 1111); (2) purported to have had the "thought process" "when [he] got this series of liens" that "I don't have to report" liens that are "personal not against the firm" (RP 528); (3) purported to

have "understood the question . . . to be inquiring as to whether any liens existed that could in any way impact Sequoia's business, Sequoia's viability, or any of the firm's investors or investment funds" (RP 144); or (4) knew of numerous other items that needed to be disclosed on Form U4, like "customer complaints," "discrepancies with FINRA" and "the SEC," "problems . . . with the state regulators," "bankruptcies," "certain business affiliations and/or relationships," and "almost any kind of regulatory action." RP 147, 497. Regardless, registered representatives are required to be familiar with FINRA rules and are assumed to have read them, and ignorance of FINRA rules is no excuse. *See Carter*, 726 F.2d at 473-74 (holding that a registered representative is "assumed as a matter of law to have read and have knowledge of" NASD rules); *Craig*, 2008 SEC LEXIS 2844, at *15-16 (rejecting respondent's arguments, in a discussion about his willfulness, that "he did not understand the questions on the Form U4" and "that he did not know that he needed to disclose misdemeanors," and holding that "ignorance of the NASD's rules is no excuse for their violation"); *Black*, 50 S.E.C. at 426 ("[L]ack of familiarity with the NASD's rules cannot excuse [registered representative's] conduct.").

In another apparent attack on the credibility determination, Elgart argues that "it was not at all unreasonable that [he] was not particularly familiar with the questions posed on Form U-4, including Question 14M," because he "delegated the responsibility for the occasional U4 amendment" to the "firm's FINOP." Br. 6. But that is *entirely* unreasonable. It is a registered representative's independent obligation to ensure that his Form U4 is accurate. If someone at the representative's firm has the delegated responsibility for processing the filing of amendments to Forms U4, it is *still* the registered representative's obligation to cause that delegated person to make the required update. *See, e.g.*, *NASD Notice to Members 97-31*, 1997 NASD LEXIS 35, at *2, 5 (May 1997) (explaining that Form U4 "requires applicants for registration to . . . keep all

information on Form U-4 current" and that registered persons "must cause the firm(s) with which he or she is associated to file an amended Form U-4" to update address information); *Dist. Bus. Conduct Comm. v. Haw*, Complaint No. C8A900078, 1993 NASD Discip. LEXIS 241, at *16 (NASD NBCC Sept. 3, 1993) ("The burden of updating Forms U-4 to keep all information current rests with the registered person, not the member firm.").

Thus, just because someone else at a representative's firm has been delegated the administrative responsibility to process Form U4 paperwork does not excuse the representative from making the disclosure. If it did, the result would be a completely unreliable registration disclosure system. Case in point, Sequoia's FINOP could not have updated Elgart's Form U4 with his tax lien information because Elgart never informed the FINOP about his tax liens. RP 515-16, 518-519; *cf. Tucker*, 2012 SEC LEXIS 3496, at *37 (holding that the "[respondent]—not [his] firm—was in the best position to provide accurate information about the judgments, bankruptcies, and liens covered by the questions in the Forms U4, demonstrating why it was appropriate that he bore 'primary responsibility for maintaining [their] accuracy'") (internal footnote omitted); *Neaton*, 2011 SEC LEXIS 3719, at *22-23 (rejecting a respondent's defense to allegations of willfulness that his firm's "failure to advise" him of the duty to amend his Form U4 "reinforced [his] erroneous understanding of [his] duty" because "securities industry registrants must take responsibility for compliance") (internal quotation marks omitted); *Mathis*, 2009 SEC LEXIS 4376, at *22 (finding that if a respondent found a disclosure question to be ambiguous, it is the respondent's responsibility to "determine whether disclosure was required").[12]

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[12] Finally, to the extent that Elgart's assertion that he amended his Form U4 "willingly" and "at FINRA's direction" (Br. 5) is another attack on the Hearing Panel's credibility

(Footnote continued on next page)

Elgart's argument that he did not act willfully because he misunderstood the liens question lacks a factual basis, because his underlying assertion of a mistaken understanding was not credible.

3. FINRA Provided Elgart with a Fair Procedure.

In Elgart's final challenge to the willfulness finding, he argues that "FINRA's standard for willfulness" in its Form U4 disclosure cases has been "inconsistent" and "vague" and that, as a result, FINRA did not provide him with a "fair procedure" as required by the Exchange Act.[13] Br. 11-13. Elgart's argument, however, fails on multiple levels.

As an initial matter, Elgart's conduct fell squarely within the established judicial and administrative interpretations of the term "willfully." *See supra* Part IV.B. Therefore, Elgart has no standing to raise a vagueness challenge to the statutory term "willfully." *See Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *32 n.47 (Apr. 17, 2014) (citing federal cases for the principle that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

In any event, the statutory term "willfully" is not vague or unclear. A statute or regulation is not impermissibly vague unless "the absence of more explicit standards deprives

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(Cont'd)

determinations, it too fails. The fact that Elgart amended his Form U4 when FINRA confronted him does not prove that he previously had a mistaken understanding of the liens question. Rather, it shows that Elgart updated his Form U4 because FINRA detected his misconduct and specifically directed him to do so.

[13] Section 15A(b)(8) of the Exchange Act requires that FINRA's rules, "in general, provide a fair procedure for the disciplining of members and persons associated with members." 15 U.S.C. § 78o-3(b)(8).

persons subject to the challenged statute's prohibitions of 'fair warning.'" *Dillon Sec., Inc.*, 51 S.E.C. 142, 147-148 (1992). The term "willfully" is not (as Elgart posits) "FINRA's standard," but a term in a section of the Exchange Act that sets forth what amounts to a "statutory disqualification." 15 U.S.C. § 78c(a)(39)(F). As FINRA's argument above demonstrates, there is ample judicial and federal administrative guidance on the meaning of the statutory term "willfully." Federal courts, the SEC, and the NAC have defined and interpreted the term—both in Section 3(a)(39)(F) of the Exchange Act and in its statutory counterpart, Section 15(b)(4) of the Exchange Act—in numerous adjudicated decisions, including decisions in which respondents have defended against allegations of willfulness with arguments that they had a mistaken understanding of a disclosure question. *See supra* Part IV.B.

Indeed, Elgart's vagueness argument does not point to *any* inconsistencies in how the federal courts, the SEC, or FINRA has interpreted the term "willfully" in litigated decisions with precedential value.[14] Instead, he relies entirely on the fact that FINRA sometimes settles disciplinary proceedings involving Form U4 disclosure issues without making findings of willfulness in the settlement documents. Br. 11. This fact, however, is neither surprising nor something that makes the term "willfully" vague. The three FINRA settlements that Elgart cites—*Cederberg*, *Searles*, and *Graetz*—have no precedential value and do not serve as a guide

[14] Elgart argues that "[e]ven this Commission has given blurred signals regarding what constitutes willfulness in the context of U-4 disclosure cases," but he cites only a *single* SEC decision (*Michael Earl McCune*) in support of that argument. Br. 11-12. In *McCune*, the SEC affirmed FINRA's finding that McCune willfully omitted a bankruptcy and four tax liens from Form U4 for periods ranging from more than one month to six years. *McCune*, 2016 SEC LEXIS 1026, at *15-21. Elgart does not point to any other cases in which the SEC purportedly provided "signals" about the meaning of willfulness that differed from the ones in *McCune*.

to the meaning of "willfully."[15] "[S]ettlements can be reached for any number of reasons, and settlements are not precedent." *Citizens Capital Corp.*, Exchange Act Release No. 67313, 2012 SEC LEXIS 2024, at *21 n.27 (June 29, 2012) (citing cases); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *55 n.45 (Jan. 30, 2009) (explaining that settlements "reflect pragmatic considerations such as the avoidance of time-and-manpower-consuming adversary litigation"), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

Moreover, none of the three FINRA settlements includes an "opinion issued in connection with a settlement to state views on the issues presented in that case" that FINRA "would apply in other contexts." *See George J. Kolar*, 55 S.E.C. 1009, 1016-17 (2002) (finding it appropriate to refer to an opinion issued in connection with the settlement of *John H. Gutfreund*, 51 S.E.C. 93 (1992)); *Carl L. Shipley*, 45 S.E.C. 589, 591 (1974) (stating that non-adjudicative orders, unaccompanied by an opinion reflecting the SEC's deliberation and analysis akin to that reflected in opinions in contested cases, have "little, if any, precedential weight"). *Cederberg* and *Searles* contain no view on the application of the term "willfully," and *Graetz* contains findings of willfulness that are essentially conclusory in nature.[16]

Elgart's "vagueness" and "fair procedure" arguments are merely a thinly veiled attack on FINRA's prosecutorial discretion. That attack fails. "FINRA has broad prosecutorial discretion

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[15] *Dep't of Enforcement v. Cederberg*, Complaint No. 2014040815101 (Order Accepting Offer of Settlement, Mar. 21, 2017); *Dep't of Enforcement v. Searles*, No. 2014040546101 (Letter of Acceptance, Waiver and Consent, May 15, 2017); *Dep't of Enforcement v. Graetz*, Complaint No. 2014038847602 (Order Accepting Offer of Settlement, May 15, 2017). FINRA settlements are available at FINRA Disciplinary Actions Online, http://www.finra.org/industry/finra-disciplinary-actions-online.

[16] And contrary to Elgart's suggestion, nothing in *Cederberg* and *Searles* shows that FINRA "agree[d]" that the Form U4 omissions were "not willful." Br. 13.

in deciding against whom charges should be brought and what those charges should be." *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *59 (Aug. 12, 2016), *appeal docketed*, No. 16-73284 (9th Cir. Oct. 10, 2016); *see also Epstein*, 2009 SEC LEXIS 217, at *55 & n.44 (holding that FINRA disciplinary proceedings "are treated as an exercise of prosecutorial discretion" and stating that "[i]t is no defense that others in the industry may have been operating in a similarly illegal or improper manner") (citing cases). Elgart received a fair procedure.

In conclusion, Elgart's challenges to the NAC's finding that he acted willfully are all without merit. Elgart was aware of his tax liens and of the unambiguous requirement to disclose tax liens on his Form U4, yet he voluntarily chose not to update timely his Form U4 to disclose his tax liens. The SEC should affirm the NAC's findings that Elgart willfully failed to timely amend his Form U4, omitted material facts from his Form U4, and is statutorily disqualified.

C. Elgart Provided False Information to FINRA.

The SEC should also affirm the NAC's findings that Elgart provided false information to FINRA, in bad faith, in violation of FINRA Rule 2010. Those findings are amply supported by the record.

FINRA Rule 2010 provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."[17] The rule is "designed to enable [FINRA] to regulate the ethical standards of its members." *Heath v. SEC*, 586 F.3d 122, 132 (2d Cir. 2009). The SEC has "long applied a disjunctive bad faith or unethical

[17] Pursuant to FINRA Rule 0140, "[p]ersons associated with a member shall have the same duties and obligations as a member under [FINRA] rules."

conduct standard to disciplinary action" under FINRA's just and equitable principles of trade rule. *Blair Alexander West*, Exchange Act Release No. 74030, 2015 SEC LEXIS 102, at *20 (Jan. 9, 2015) (internal quotation marks omitted), *aff'd*, 641 F. App'x 27 (2d Cir. 2016); *see also Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993), *aff'd*, 40 F.3d 1240 (3d Cir. 1994) (unpublished table decision).

Providing false information in response to a FINRA request, including requests like the PAQ that do not specifically cite FINRA Rule 8210, is inconsistent with high standards of commercial honor and just and equitable principles of trade. *See Brian L. Gibbons*, 52 S.E.C. 791, 795 (1996) ("Providing misleading and inaccurate information to the NASD is conduct contrary to high standards of commercial honor and is inconsistent with just and equitable principles of trade."), *aff'd*, 112 F.3d 516 (9th Cir. 1997) (unpublished table decision); *Mkt. Regulation Comm. v. Zubkis*, Complaint No. CMS950129, 1997 NASD Discip. LEXIS 47, at *3 n.2 (NASD NBCC Aug. 12, 1997) (finding that FINRA staff are not required to cite Rule 8210 to hold a person liable for failure to cooperate with a FINRA investigation), *aff'd*, 53 S.E.C. 794 (1998); *Dist. Bus. Conduct Comm. v. Pelaez*, Complaint No. C07960003, 1997 NASD Discip. LEXIS 34, at *9-11 (NASD NBCC May 22, 1997) (finding that respondents, after being asked by NASD staff to provide documentation substantiating an addition to capital, submitted two forged documents in violation of NASD's just and equitable principles of trade rule). Providing false information to FINRA during an examination or investigation "subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest." *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

Here, Elgart's provision of a false answer on the PAQ was unethical, in bad faith, and a violation of FINRA Rule 2010. The PAQ asked the same simple and straightforward question

about liens that Form U4 does: "Do you have any unsatisfied liens or judgments against you?" RP 1000. As the NAC correctly found, this unambiguous question was not subject to misinterpretation. Elgart admitted that, at the time he completed the PAQ, he "was on notice of and the subject of five unsatisfied liens." RP 367. Indeed, just months before he completed the PAQ, Elgart had discussed the liens with his tax attorney. RP 366, 514. Elgart also understood that it was FINRA staff who asked him to complete the PAQ, and that his responses to the PAQ would be provided to FINRA staff. RP 35, 367, 479. Rather than responding truthfully to FINRA's straightforward liens question—as he attested on the PAQ that he had—Elgart chose to respond that he was *not* subject to any liens. RP 1000. This answer was false. And at the time he answered the PAQ, Elgart had already voluntarily chosen for years not to disclose the liens on his Form U4. RP 579-791. Considering all of these facts, the NAC correctly found that Elgart chose to answer the liens question on the PAQ dishonestly to mislead FINRA.[18] Providing accurate information about his liens would have alerted FINRA to Elgart's years-long disclosure violation. Instead, Elgart lied about his liens in an attempt to conceal his violations from regulators.

Elgart objects to the NAC's finding that the liens question on the PAQ was "not subject to misinterpretation," on the grounds that it "eliminates" the defense of a mistaken understanding

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[18] Elgart argues that "FINRA's claimed concern that Elgart's questionnaire somehow 'misled' the examiners is patently false." Br. 14. The NAC, however, made no findings that Elgart's answer to the PAQ's liens question ever caused the examiners to have the mistaken belief that Elgart had no liens. Rather, the NAC found that Elgart "chose to answer [the question on the PAQ] dishonestly *to mislead* FINRA," a finding that was about Elgart's bad faith and unethical purpose. RP 1256 (emphasis added). Moreover, Elgart's false response misled FINRA examination staff in the wrong investigative direction. Instead of making it clear that he had tax liens against him, Elgart's PAQ response forced FINRA staff to spend additional examination time and resources investigating the issue.

of the question. Br. 13-14. But Elgart's underlying argument before the NAC was that he misunderstood the PAQ's liens question because it "used the same exact language as the Form U4." RP 145, 1112. Just as Elgart's claim that he failed to amend his answer to the Form U4 liens question because he did not understand the question failed, he cannot be excused from providing a false answer to the identically worded question on the PAQ.

The Hearing Panel found that Elgart's claims that he "intended to be truthful in his PAQ answer" were "not credible." RP 1072. For all the same reasons why there is not substantial evidence to overturn the Hearing Panel's determination that Elgart's testimony about his understanding of the Form U4 liens question was not credible, there is not substantial evidence to overturn the Hearing Panel's determination that Elgart's claims about his answer to the PAQ's identical liens question were not credible.

Accordingly, the NAC's findings that Elgart provided a false answer to FINRA on the PAQ in bad faith, in violation of FINRA Rule 2010, are supported by the record and should be affirmed. The SEC should sustain those findings.

D. 9 The NAC's Sanctions Will Deter Elgart from Engaging in Similar Violations, Support Overall Standards in the Securities Industry, and Protect the Investing Public.

1. 9 A $15,000 Fine and a Six-Month Suspension Are Appropriate to Remedy Elgart's Late Filing of Form U4 Amendments.

The NAC's sanctions for Elgart's Form U4 violations are appropriate, not excessive or oppressive. The SEC uses FINRA's Sanction Guidelines ("Guidelines") as a benchmark for its review. *McCune*, 2016 SEC LEXIS 1026, at *29. For the late filing of Form U4 or

amendments, the Guidelines recommend a fine of $2,500 to $37,000.[19] In egregious cases, such as this one involving repeated untimely filings, the Guidelines recommend that adjudicators consider a suspension in any or all capacities of up to two years or a bar.[20]

There are several aggravating factors. The nature and significance of the information that Elgart failed to disclose—his numerous and sizeable tax liens—was material.[21] Elgart's violations amounted to a pattern of misconduct over ten years that reflected ongoing concealment of his tax liens.[22] Elgart's failure to amend his Form U4 was intentional, considering the number and size of tax liens that Elgart failed to disclose, the number of years he failed to disclose them, the straightforward nature of the liens question, the number of Form U4 amendments that he filed without disclosing the liens, and his false response to the PAQ's liens question.[23] Elgart—who has blamed others for his own disclosure failures and has consistently advanced a false explanation for his misconduct—has failed to accept responsibility.[24] RP 491, 500, 521, 530, 1025 (blaming his accountant, his FINOP, his lawyer, and his firm, and stating that "no one at Sequoia ever brought this to my attention" and that "I had never quite frankly looked at the form because we were paying people to do that"). Elgart also attempted to conceal

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19 *FINRA Sanction Guidelines*, 69 (2016), http://www.finra.org/sites/default/files/2016_Sanction_Guidelines.pdf [hereinafter *Guidelines*].

20 *Id.* at 70.

21 *See id.* at 69 (Principal Considerations in Determining Sanctions, No. 1).

22 *See id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9); *see also id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (providing that "numerous, similar violations may warrant higher sanctions").

23 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

24 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

his Form U4 disclosure failures when he provided FINRA with a false response to the liens question on the PAQ.[25]

The very few sanctions-related arguments that Elgart makes in his opening brief do not establish any mitigating factors. Elgart emphasizes that he "has no disciplinary history" (Br. 2), but it is well-established that the absence of a disciplinary history is not mitigating.[26] Elgart argues that he amended his Form U4 "willingly" and "at FINRA's direction" (Br. 5), but efforts to remedy misconduct are only mitigating if they are voluntary and reasonable and done "prior to detection and intervention."[27] Elgart did not amend his Form U4 until FINRA detected his potential disclosure failures, confronted Elgart, and directed him to amend his Form U4 if necessary. None of these actions qualifies as mitigation.

Elgart's plea to reduce his sanction to "something not to exceed $2,500" (Br. 15) reflects that he still does not grasp the seriousness of his disclosure failures. "A representative's truthfulness in answering the financial disclosure questions on the Form U4 is a particularly critical measure of fitness for the industry because a commitment to accurate, complete, and non-misleading financial disclosure is central to any securities professional's responsibilities." *Tucker*, 2012 SEC LEXIS 3496, at *34-35. "Untruthful answers call into question an associated person's ability to comply with regulatory requirements." *Id.* at *26. Considering the nature of Elgart's violation, the numerous aggravating factors, and the absence of any mitigation, the NAC correctly found that Elgart's failure to timely amend his Form U4 was egregious. A strong

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25 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

26 *See id.* at 6 n.1 (quoting *Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006)).

27 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 4).

sanction is appropriate to remedy Elgart's violation and deter him from engaging again in similar violations.

The SEC should sustain the six-month suspension and the $15,000 fine imposed on Elgart for his Form U4 violations. Considering the aggravating factors, the absence of mitigation, and that the Guidelines recommend suspensions of up to two years or a bar for "repeated untimely filings," the sanctions imposed on Elgart are not excessive or oppressive.

2. * A 30-Business Day Suspension and a $5,000 Fine Are Appropriate to Remedy Elgart's Providing a False Statement to FINRA.

The NAC also imposed appropriate sanctions for Elgart's provision of false information to FINRA on the PAQ.[28] This too was serious misconduct and reflective of his ongoing willingness to hide his financial strain. "[S]upplying false information to [FINRA] during an investigation . . . mislead[s] [FINRA] and can conceal wrongdoing," and it "subvert[s] [FINRA's] ability to perform its regulatory function and protect the public interest." *Ortiz*, 2008 SEC LEXIS 2401, at *32-33; *see also Michael A. Rooms*, 58 S.E.C. 220, 229 (2005) (noting that providing false information to FINRA may be more damaging than refusing to respond to a request for information because it misleads FINRA and can conceal wrongdoing), *aff'd*, 444 F.3d 1208 (10th Cir. 2006).

Several factors are aggravating. Elgart intentionally and dishonestly provided the false response on the PAQ.[29] Elgart did not correct the false response even after FINRA twice

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[28] When assessing the sanctions for Elgart's provision of false information to FINRA, the NAC did not apply a violation-specific Guideline, but considered the Guidelines' Principal Considerations in Determining Sanctions. RP 1259-60; *see Guidelines*, at 6-7.

[29] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

requested that he do so. Elgart's conduct continued a pattern of withholding information about his numerous liens from regulators.[30]

Moreover, the lien information that FINRA requested on the PAQ was important. Truthful information about the liens would have informed FINRA about Elgart's large financial obligations and shown FINRA that Elgart had withheld material information from the public, member firms, and regulators for years, in violation of his disclosure obligations. Elgart presses that his false answer had "zero impact" on FINRA's examination, contending that FINRA "was aware of the liens" and "Elgart's CRD record" and "could plainly see for itself Mr. Elgart's omissions." Br. 14. But this assertion is refuted by the testimony of FINRA examination manager Cormier. Cormier testified that, after receiving Elgart's answer to the PAQ, FINRA examiners did not know "whether or not these liens that were on the [LexisNexis] report were actually for Mr. Elgart." RP 446. Cormier also testified that he and the lead FINRA examiner had to take the additional examination steps of telephoning Elgart to ask about the discrepancies between the LexisNexis report, his Form U4 answers, and his PAQ answer, following up that call up with an email, and waiting for Elgart to address the discrepancies. RP 446-48. Contrary to Elgart's efforts to minimize his misconduct, Elgart's false answer on the PAQ had the impact of prolonging FINRA's examination and requiring FINRA to expend additional investigative resources.[31]

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[30] *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 8). Although Elgart argues that the only "pattern" was one of not understanding the need to disclose his liens (Br. 14), the Hearing Panel and the NAC rejected his testimony about his understanding as not credible.

[31] Moreover, even after Elgart provided a false answer on the PAQ, Elgart continued to impact FINRA's examination when he provided inaccurate information on Form U4 about the date he learned of his tax liens. FINRA examiners spent even more time investigating that

(Footnote continued on next page)

In light of the aggravating factors and the absence of mitigation, a consecutive 30-business-day suspension and a $5,000 fine are neither excessive nor oppressive sanctions. These sanctions will deter Elgart from again providing false information to FINRA, and they will deter others from engaging in similar misconduct. The SEC should sustain the sanctions.

V. CONCLUSION

The NAC correctly found that Elgart willfully failed to timely disclose on his Form U4 material information about tax liens totaling hundreds of thousands of dollars, and provided a false answer about those liens to FINRA in bad faith. Elgart's decade-long willingness to conceal material information about his substantial financial obligations from regulators, member firms, and the investing public violated FINRA's cardinal principles of disclosure and cooperation, and undermined the investor protection purposes of FINRA's rules. The SEC should sustain the findings and the meaningful sanctions that the NAC imposed.

Respectfully submitted,

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Dated: July 14, 2017

(Cont'd)

particular issue. RP 509; RP 1054 (reflecting that Cormier requested information about when Elgart became aware of the liens).

CERTIFICATE OF COMPLIANCE

I, Michael Garawski, certify that the foregoing FINRA's Brief in Opposition to Application for Review (File No. 3-17925) complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 11,552 words.

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CERTIFICATE OF SERVICE

I, Michael Garawski, certify that on this 14th day of July 2017, I caused a copy of the foregoing FINRA's Brief in Opposition to Application for Review (File No. 3-17925) to be sent via overnight delivery (and a courtesy copy by email) to:

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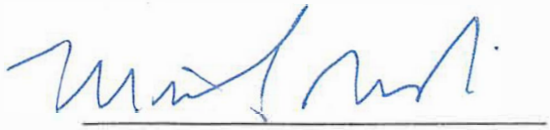
Service was made on the Commission by messenger and on the Applicant's counsel by overnight delivery service due to the distance between the offices of FINRA and Applicant's counsel.



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