SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 83555 / June 28, 2018

Admin. Proc. File No. 3-17930

In the Matter of the Application of

LOUIS OTTIMO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Former registered representative of former FINRA member firm appeals from FINRA disciplinary action finding that he fraudulently omitted material information in a private placement memorandum and failed timely to update his application for securities industry registration to disclose unsatisfied tax liens, judgments, and a bankruptcy filing. *Held*, FINRA's findings of violations are *sustained in part* and *reversed in part*, and the case is *remanded* to FINRA for a redetermination of sanctions.

APPEARANCES:

Sylvia Scott of Holmes, Taylor, Scott & Jones, LLP, for Louis Ottimo

Alan Love, *Megan Rauch*, and *Lisa Jones Toms* for FINRA

Appeal filed: April 14, 2017
Last brief received: August 28, 2017

Louis Ottimo, a former registered representative with EKN Financial Services Inc. ("EKN"), a former FINRA member firm,[1] seeks review of a FINRA disciplinary action finding that he fraudulently omitted information from his biography in a private placement memorandum (the "PPM") in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. FINRA also found that Ottimo failed timely and accurately to update his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to reflect unsatisfied tax liens, judgments, and a bankruptcy filing in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. For the fraud violations, FINRA imposed a bar. For the Form U4 violations, FINRA assessed—but in light of the bar did not impose—a $25,000 fine and a two-year suspension in all capacities. FINRA also found that Ottimo's misconduct was willful and that he was statutorily disqualified from association with a FINRA member firm as a result.

We affirm FINRA's finding of the Form U4 violations, which Ottimo does not challenge, and affirm in part its findings of fraud as to the PPM. But part of FINRA's fraud findings is not supported by the record. Accordingly, we remand for FINRA to reassess the sanctions.

I. Background

Ottimo entered the securities industry in 1995 and worked for several FINRA member firms before joining EKN. In 2001, also before joining EKN, Ottimo founded Wheatley Capital Corporation and served as its president. Wheatley handled back-office and related administrative operations for EKN, which was co-owned by Ottimo's father. In 2006, Ottimo co-founded Jet One Jets, Inc., which brokered chartered airline flights. Ottimo served as Jet One Jets's CEO and oversaw all financial aspects of the company. Both Wheatley and Jet One Jets ceased operations in 2008, the same year Ottimo joined EKN.

A. Ottimo did not properly report seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing on his Form U4.

When Ottimo joined EKN—after a period of not being associated with a FINRA member firm—he was required to file a Form U4, which is used to register associated persons of FINRA member firms. FINRA rules required Ottimo to keep his Form U4 "current at all times," which meant he had to update his Form U4 within 30 days of "learning of the facts or circumstances giving rise to" the need to amend the form.[2] Question 14.M of Form U4 asks whether an associated person has any unsatisfied judgments or liens, and question 14.K asks whether an associated person, or an organization that one has exercised control over, has filed a bankruptcy petition within the past 10 years. After joining EKN, Ottimo repeatedly failed to timely and accurately report (or, in some cases, report at all) information on his Form U4 related to seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing.

---

[1] FINRA expelled EKN in October 2012. Ottimo is not currently associated with a FINRA member.

[2] FINRA By-Laws Article V, Section 2(c).

1. Ottimo did not timely amend his Form U4 to report seven unsatisfied tax liens.

In 2010 and 2011, the Internal Revenue Service and the New York State Department of Taxation and Finance issued seven tax liens against Ottimo. Between January 2010 and November 2010, the IRS notified Ottimo of five unsatisfied tax liens totaling over $160,000 for his failure to pay personal income taxes for the years 2005 through 2009. In April 2010 and June 2011, New York notified Ottimo of two unsatisfied tax liens totaling over $30,000 for his failure to pay state personal income taxes for the years 2006, 2008, and 2009. Ottimo did not report the first five tax liens issued between January 2010 and April 2010 on his Form U4 until September 2010—well after the 30-day time limit in FINRA's rules. Further, Ottimo did not report an IRS tax lien issued in November 2010, on his Form U4 until June 2011, and he did not report another tax lien that New York issued in June 2011, until April 2012. Although Ottimo acknowledged during the FINRA hearing that he knew FINRA required him to update his Form U4 within 30 days of receiving notice of a tax lien, he failed to do so in these seven instances.

2. Ottimo did not timely and accurately amend his Form U4 to report six unsatisfied civil judgments.

Between March 2008 and April 2010, six civil judgments were entered against Ottimo:

- On April 7, 2010, a judgment in favor of Lake Park 135 Crossways Park Drive, LLC was entered against Ottimo and others in the amount of $300,031.81. Ottimo did not report the judgment on his Form U4 until May 19, 2011.

- On June 4, 2009, a judgment in favor of a creditor was entered against Ottimo and others in the amount of $36,590.15. The court vacated the judgment on September 9, 2009, but Ottimo never reported the unsatisfied judgment on his Form U4 despite amending the form four times between June and August 2009.[3]

- On March 9, 2009, a judgment in favor of Hamilton Equity Group, LLC was entered against Ottimo and another party in the amount of $108,832.94. Ottimo satisfied the Hamilton Equity Group judgment over a year later on May 17, 2010, but he never reported the judgment while it was unsatisfied on his Form U4.

- On December 18, 2008, a default judgment in favor of Stairworld Inc. was entered against Ottimo in the amount of $6,791.40. A copy of the judgment was sent to Ottimo no later than January 13, 2009. Ottimo did not report the judgment on his Form U4 until March 28, 2011—over two years later and after filing 19 amendments to his Form U4.

---

[3] Form U4 requires that unsatisfied judgments be disclosed within 30 days and does "not exempt a matter that is on appeal from the reporting requirement." *Dep't of Enforcement v. Shino*, Disciplinary Proceeding No. E3A20050037-02, 2009 WL 3565800, at *5 (Sept. 22, 2009).

- On October 2, 2008, a judgment in favor of a creditor was entered against Ottimo and Jet One Jets in the amount of $2,211.80. Ottimo did not report the judgment on his Form U4 until November 11, 2010—over two years later and after filing 16 amendments to his Form U4.

- On March 3, 2008, Shelvin Plaza Associates, LLC obtained a judgment against Ottimo and others holding them jointly and severally liable for $161,740.73 of unpaid rent. Although Ottimo reported the judgment on his initial Form U4 after joining EKN, he inaccurately reported the amount as $70,240.06 and the date of the judgment as November 19, 2007. On February 23, 2009, the judgment was reduced to $81,982.66, which included a principal amount of $70,240.06 plus interest. Ottimo did not report this new information until September 13, 2010, when he incorrectly listed the judgment as $41,847.22 and continued to list the judgment date as November 19, 2007.

3. Ottimo did not timely amend his Form U4 to report Wheatley's bankruptcy.

Wheatley filed for bankruptcy on April 27, 2010. Ottimo himself signed and submitted the bankruptcy petition, which was dismissed on August 2, 2010. Ottimo did not report the bankruptcy until April 19, 2012—after filing 22 amendments to his Form U4.[4]

B. Ottimo formed a fund and solicited investors through a PPM that omitted information about Wheatley and Jet One Jets.

In early 2012, while working as a registered representative at EKN, Ottimo created First Secondary Market Fund LLC (the "Fund"). The Fund was a special purpose vehicle with the primary purpose of purchasing shares of Facebook Inc. in the secondary market before its initial public offering. Between March 6 and April 10, 2012, Ottimo and other EKN registered representatives sold member interests in the Fund raising $3.76 million from 20 investors. Ottimo personally sold $500,000 of Fund interests to two EKN clients. Ottimo also assisted in drafting a PPM to solicit interests in the Fund.

Ottimo created a separate entity, First Secondary Managers LLC ("FSM"), to manage the Fund. He owned 85% of FSM and served as its CEO. According to the PPM, FSM was authorized to use the Fund offering's net proceeds to "acquire securities of companies such as Facebook Inc., Twitter, Inc. or other privately held companies" that FSM "deem[s] to be suitable . . . in its sole discretion." Ottimo exercised this authority to purchase pre-IPO shares of Facebook. Ottimo personally received $82,276 in management fees for managing the Fund.

According to the PPM, FSM "ha[d] the sole discretion over all decisions regarding the investments of the [Fund]." Moreover, the PPM provided that Fund investors would not be given disclosure materials regarding Fund investments because they were "relying solely on the

---

[4] As discussed below, Jet One Jets also filed for bankruptcy in 2010. The record does not establish whether Ottimo disclosed Jet One Jets's bankruptcy on his Form U4 and, if not, why he was not charged with the failure to do so as an additional violation.

investment acumen of the officers of" FSM. The PPM also identified "reliance on [FSM]" as a "significant" risk factor because FSM, in its sole discretion, could make "[a]ll decisions regarding management of the [Fund]." For this reason, and because investors could not withdraw their investment in the Fund without the prior consent of FSM, which could be "withheld for any reason or no reason," the PPM advised that "no party should make any investment in the [Fund] unless such party is willing to entrust all aspects of the [Fund's] management to" FSM.

1. The PPM disclosed Ottimo's management role at Jet One Jets and Wheatley but omitted certain adverse information about those companies.

The PPM stated that, as FSM's CEO, Ottimo was "authorized to manage [FSM] to effect the objectives and purposes of the [Fund]." It also provided information about Ottimo's background. Specifically, the PPM noted the significant roles he played in Jet One Jets and Wheatley:

> Previously, Mr. Ottimo co-founded Jet One Jets in April 2006 and successfully negotiated an exclusive reseller Agreement with American Express to handle the Jet One Jets pre-paid card. Jet One Jets grew to $18 million in revenues inside approximately 18 months. In April 2001, Mr. Ottimo founded Wheatley Capital, Inc. and was its president until 2011.

The PPM, however, included little or no information about the companies' operations or histories. For example, Jet One Jets ceased operations in the summer of 2008 and was never profitable. Ottimo conceded that ultimately "there was no profitability" for Jet One Jets and that he "lost hundreds of thousands of dollars as a result of the failure of Jet One's business." Outside investors, who contributed more than $1 million to the venture, lost all of their principal investment. In August 2010, Jet One Jets filed for bankruptcy. The bankruptcy petition, which Ottimo signed, listed estimated company assets of less than $50,000 and liabilities between $100,000 and $500,000. The PPM never disclosed any of this information.

The U.S. Department of Transportation ("DOT") also issued a consent order against Jet One Jets in March 2008. DOT alleged that Jet One Jets's website and print advertisements were misleading because they "contained statements and omissions that, when considered together, would lead the public to conclude erroneously but reasonably that [Jet One Jets was] a direct air carrier with operational control over flights." Jet One Jets settled the action without admitting or denying DOT's findings. These findings included that Jet One Jets had committed "an unfair and deceptive practice" by engaging in air transportation without appropriate authorization. The DOT ordered Jet One Jets to cease and desist from further violations and imposed a $60,000 fine. Again, the PPM did not disclose any of this information. Ottimo testified that the company eventually paid "only . . . like I think [$]1,500 to $2,500." Ottimo did not explain the reason for this asserted reduction or provide supporting documentation.

Furthermore, Wheatley filed for bankruptcy in 2010. The PPM did not disclose this information. According to the bankruptcy petition, Wheatley had outstanding liabilities of nearly $1.4 million. In a sworn affidavit submitted at the time of the 2010 bankruptcy filing, Ottimo stated that Wheatley "had no reported income or expenses" for "the past three years."

Nonetheless, Ottimo testified that the bankruptcy "never hurt a creditor" and was not filed "because the company was illiquid" or "had debtors"; it was filed because Wheatley held the lease for EKN's offices and wanted to prevent EKN's eviction by its landlord. He added that the petition was filed only to "buy [EKN] time" and was voluntarily dismissed once this issue was resolved. Thus, Ottimo testified that Wheatley's bankruptcy was "not a usual bankruptcy."

2. The Fund engaged legal counsel to assist in preparing the PPM.

Around February 2012, Ottimo hired the law firm of Carter, Ledyard & Milburn, LLP ("CLM") to provide advice regarding the Fund's organization and to draft offering documents, including the Fund's PPM. CLM's retainer agreement obligated the Fund to "fully and accurately disclose to [CLM] all facts that may be relevant to the matter." As part of the PPM drafting process, CLM asked Ottimo to provide a biography. Ottimo acknowledged during the hearing that the biography was meant to provide investors information about his "management experience." Ottimo made minor modifications to a biography that he had previously used for an unrelated purpose and submitted it to CLM. CLM lawyers made a few modifications to the biography Ottimo provided, but did not materially alter the substance of the information. Ottimo reviewed the final version of his biography in the PPM before it was sent to potential investors.

Ottimo did not seek, and CLM did not provide, advice to Ottimo about what he should include in his biography. According to Ottimo, "They asked me for a bio, and I gave them a bio." Although lawyers at CLM knew, based on a review of his BrokerCheck report, that Ottimo had what CLM lawyers described as a "colorful past," there is no evidence that, at the time the PPM was drafted, the CLM lawyers knew any negative information about the companies mentioned in Ottimo's biography. Indeed, although Ottimo was required to report Wheatley's bankruptcy on his Form U4, he failed to do so until April 19, 2012, after the PPM was distributed to potential investors. Ottimo stated explicitly that he "didn't provide [CLM] with any information but the statement that appears in the biography."

3. Ottimo contacted Fund investors in connection with FINRA's investigation.

In November 2012, after FINRA began its investigation, Ottimo sent a letter that CLM prepared to Fund investors. The letter told investors that FINRA had "suggested that the description of [Ottimo's] biography in [the] PPM was inadequate and should have provided investors more disclosure of [his] personal background and experience." The letter provided information about Wheatley's bankruptcy and Ottimo's tax liens and civil judgments. With regard to Jet One Jets, the letter insisted that the "PPM said nothing about the profitability of Jet One," that the revenue numbers in the PPM were correct, and that Ottimo's "successes and failures in other business, including Jet One, ha[d] no relevance" to his role with the Fund. The letter failed to mention that Jet One Jets was in fact unprofitable, had declared bankruptcy, and was subject to regulatory action by the DOT. The final page of the letter asked investors to sign and return to Ottimo this statement: "I hereby acknowledge that the additional information provided by Mr. Ottimo relating to his personal financial issues would have had no impact on my decision to invest in the [Fund] had they been disclosed as part of his biography in the PPM."

Most of the investors signed the letter, but not all. One investor who did not sign the letter testified at the hearing that the adverse information about Jet One Jets—the DOT's order

"in particular"—would have "given [him] hesitation" to invest with Ottimo. This investor said that Ottimo applied pressure to sign the letter by citing his authority under the operating agreement. Ottimo told the investor that he "was not required" to release the shares under the agreement but that he would do so as a sign of "goodwill"; in return, "he was asking" the investor to "sign this paper." When another investor balked at signing the letter and asked that the shares be transferred to his account, Ottimo's associate replied, "Would you please sign [the letter] and return to me as well." The investor responded that he did not think he needed to sign the letter to get his shares and added "please let me know when the transfer is complete." The associate replied that Ottimo "would like to give you a call."

A FINRA investigator testified that she spoke to "six or seven" of the Fund's investors who all told her "that they would not have signed that letter, but they felt coerced into signing the letter or they wouldn't be allowed to get out of the Fund." Ottimo's associate sent emails to the investors that corroborated this testimony. Investors were told that the signed letter was "needed to open your account" at the brokerage where they would receive their Facebook shares.

C. FINRA found Ottimo liable for fraud and Form U4 violations.

On August 22, 2013, FINRA's Department of Enforcement filed a Complaint against Ottimo alleging three causes of action. First, the Complaint alleged that Ottimo willfully failed to disclose or timely disclose material facts on his Form U4 in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. Second, the Complaint alleged that Ottimo willfully made material misrepresentations and omitted material facts concerning his prior business experience in the Fund's PPM in violation of Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. Third, the Complaint alleged in the alternative that Ottimo negligently made material misrepresentations and omitted material facts concerning his prior business experience in the Fund's PPM in violation of Section 17(a)(2) and (3) of the Securities Act of 1933 and FINRA Rule 2010.

After a four-day hearing, an Extended Hearing Panel found that Ottimo engaged in the violations alleged in the first and second causes of action and dismissed the alternative third cause of action.[5] The Extended Hearing Panel also determined that Ottimo's conduct involved the willful failure to disclose material information required to be disclosed on his Form U4. Thus, Ottimo was subject to a "statutory disqualification" with respect to his association with any FINRA member pursuant to Section 3(a)(39)(F) of the Exchange Act. For the fraud violation, the Extended Hearing Panel barred Ottimo from association with any FINRA member in all capacities. For the Form U4 violations, the Extended Hearing Panel assessed—but in light of the bar did not impose—a $25,000 fine and a two-year suspension in all capacities.

---

[5] FINRA Rule 9231(a) provides for the appointment of "a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision." FINRA Rule 9231(a). A matter "shall be designated an Extended Hearing, and . . . shall be considered by an Extended Hearing Panel," upon "consideration of the complexity of the issues involved, the probable length of the hearing, or other factors." FINRA Rule 9231(c).

Ottimo appealed the Extended Hearing Panel's decision to FINRA's National Adjudicatory Council ("NAC"). His appeal did not challenge the Extended Hearing Panel's Form U4 findings, but requested that the NAC reduce the sanction assessed. Ottimo also challenged the fraud findings. The NAC affirmed the Extended Hearing Panel's findings of violations and imposition of sanctions. In addition, it found that Ottimo's fraud violation also subjected him to statutory disqualification. This appeal followed.

II. Analysis

In reviewing FINRA disciplinary action, we must determine whether the applicant engaged in the conduct FINRA found, whether that conduct violated the statutory provisions or rules specified in FINRA's determination, and whether those provisions and rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[6] We base our findings on an independent review of the record and apply a preponderance of the evidence standard.[7]

A. The Form U4 violations

FINRA found that Ottimo violated Article V, Section 2(c) of FINRA's By-Laws, FINRA Rules 1122 and 2010, and NASD IM-1000-1 by failing to properly amend his Form U4. Section 2(c) of Article V of FINRA's By-Laws requires that "[e]very application for registration filed with [FINRA] . . . be kept current at all times" and directs that amendments be filed "not later than 30 days after learning of the facts or circumstances giving rise to the amendment." NASD IM-1000-1 and FINRA Rule 1122, in conjunction with NASD Rule 0115(a) and FINRA Rule 0140(a), prohibit associated persons from filing or failing to correct registration information that is "incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead."[8] And violating NASD IM-1000-1 and FINRA Rule 1122 also violates FINRA Rule 2010, which requires associated persons to "observe high standards of commercial honor and just and equitable principles of trade" in the conduct of their business.[9] "The duty to provide accurate information on a Form U4 and to amend Form U4 to provide current information assures regulatory organizations, employees, and members of the public that they have all of the material, current information about the registered representatives with whom they are dealing."[10]

---

6 15 U.S.C. § 78s(e)(1).

7 *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, 9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

8 *See* NASD IM-1000-1; FINRA Rule 1122; NASD Rule 0115(a); FINRA Rule 0140(a) (stating that associated persons "have the same duties and obligations as a member under the Rules"). FINRA Rule 1122 became effective on August 17, 2009, superseding NASD IM-1000-1 without relevant changes. Accordingly, NASD IM-1000-1 applies to Ottimo's conduct before August 17, 2009 and FINRA Rule 1122 applies to his conduct thereafter.

9 *See, e.g.*, *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *3-4 (Mar. 15, 2016) (finding failure to disclose information on Form U4 violated NASD IM-1000-1, Rule 2110, and FINRA Rules 1122 and 2010), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

10 *Id.* at 4.

As a result, the "failure to update this form 'undermines [FINRA]'s ability to carry out its self-regulatory functions,' and frustrates attempts by customers 'who are or may be interested in doing business with [the registered person]' from gathering 'accurate disclosure information' about such person."[11]

Ottimo does not address the findings of violations related to his failure to disclose information on his Form U4 in his brief to the Commission. In our review of FINRA's disciplinary action, however, we are to determine whether Ottimo engaged in the conduct FINRA found and whether that conduct violates the rules FINRA found it to have violated. Accordingly, there was nothing inappropriate in FINRA addressing these charges in its brief; we too find it appropriate to address them.[12] We sustain FINRA's findings with regard to Ottimo's violation of FINRA rules for his failure to properly amend his Form U4.[13]

1. Ottimo's failure to timely and accurately report tax liens, civil judgments, and a bankruptcy on his Form U4 violated FINRA rules.

Ottimo violated FINRA By-Laws Article V, Section 2(c), because he failed to keep his Form U4 current by not filing amendments disclosing seven tax liens, five civil judgments, and a bankruptcy within the requisite 30 days. Additionally, Ottimo provided inaccurate information with regard to the amount and date of a sixth civil judgment. Ottimo also violated NASD IM-1000-1 and FINRA Rule 1122 because his failure to properly and timely disclose his unsatisfied tax liens and civil judgments, in response to question 14.M, rendered his Form U4 inaccurate and misleading. His failure to disclose Wheatley's bankruptcy, in response to question 14.K, likewise rendered his Form U4 inaccurate and misleading. We find that by violating NASD IM-

---

11 *Cody*, 2011 WL 2098202, at *16 (alterations in original) (internal citations omitted).

12 Ottimo's request that portions of FINRA's brief be stricken is thus denied. In *The Dratel Grp., Inc.*, Exchange Act Release No. 77396, 2016 WL 1071560, at *1 n.2 (Mar. 17, 2016), we declined to address certain findings of violations "because FINRA did not impose sanctions for these violations" in light of the bar it had imposed for other violations. In Ottimo's case, however, it is appropriate to address FINRA's findings of Form U4 violations because we are remanding to FINRA to reconsider sanctions generally. *See infra* Part III; *cf. Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *18 (Feb. 20, 2007) (addressing findings of violations for which NASD did not impose sanctions and remanding for reconsideration of sanctions). In any event, *Dratel* does not stand for the proposition that we cannot review findings of violations when FINRA decides not to impose a sanction for those violations in light of another sanction it has imposed; such review is clearly contemplated under the Exchange Act. *See* 15 U.S.C. § 78s(d)(1) and (d)(2) ("[a]ny action with respect to which" an SRO "imposes any final disciplinary sanction . . . shall be subject to review").

13 We also find that these rules are, and were applied in a manner, consistent with the purposes of the Exchange Act. *See, e.g., Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *10 (Aug. 12, 2016) (finding FINRA By-Laws Article V, Section 2(c) to be consistent with purposes of the Exchange Act when applied to untimely Form U4 amendments).

1000-1 and FINRA Rule 1122 Ottimo failed to "observe high standards of commercial honor and just and equitable principles of trade" as required by FINRA Rule 2010.

2. Ottimo is subject to a statutory disqualification because he acted willfully and he failed to disclose material information on his Form U4.

Because Ottimo acted willfully in failing to timely update his Form U4, and his omissions were material, he is subject to a statutory disqualification.[14] Exchange Act Section 3(a)(39)(F) provides that a person is subject to a statutory disqualification from association with a FINRA member if the person has willfully omitted to state, in an application for association with a member, any required material fact.[15]

To act willfully for purposes of the federal securities laws means only that the individual "intentionally commit[ted] the act which constitutes the violation."[16] Ottimo acted willfully in failing to update his Form U4 to disclose the unsatisfied tax liens, civil judgments, and bankruptcy filing. He testified that he knew that FINRA required him, as an associated person of a FINRA member firm, to update his Form U4 within 30 days, yet he repeatedly failed to do so.

Ottimo's omissions on his Form U4 were also material. "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."[17] In other words, omitted facts on a Form U4 are material "when they 'would have assumed actual significance in the deliberations of' the representative's employees, regulators, and investors."[18] As relevant here, "'[a]ccurate disclosure on Forms U4 regarding a registered representative's serious financial problems' are of 'inarguable importance' in the industry."[19] Ottimo failed to properly report—in some instances for more than two years—seven

---

14 *McCune*, 2016 WL 1039460, at *4-6 (finding applicant statutorily disqualified for willfully failing to amend Form U4); *Joseph S. Amundsen*, Exchange Act Release No. 69406, 2013 WL 1683914, at *8-9 (Apr. 18, 2013) (finding applicant statutorily disqualified for willfully providing false and misleading material information on Form U4).

15 15 U.S.C. § 78c(a)(39)(F).

16 *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)); *McCune*, 2016 WL 1039460, at *5-6 (same).

17 *McCune*, 2016 WL 1039460, at *6 (citing *Mathis v. SEC*, 671 F.3d 210, 219 (2d Cir. 2012) (holding that "[t]he SEC employed the proper and familiar test for materiality set forth in *TSC Indus., Inc. v. Northway, Inc.*, 462 U.S. 438, 449 (1976)," and affirming the Commission's determination that the registered representative's failure to disclose the liens on Form U4 "significantly altered the total mix of information available to [FINRA], other regulators, employers, and investors")).

18 *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *11 (Nov. 9, 2012) (quoting *Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at *10 (Dec. 7. 2009)).

19 *Id.* (quoting *Mathis*, 671 F.3d at 220).

unsatisfied tax liens totaling over $260,000 and six unsatisfied civil judgments totaling over $440,000. There is a substantial likelihood that reasonable customers, employers, or regulators would have viewed these facts as material.[20] "The materiality of such information is particularly evident when, as in this case, their disclosure should have been triggered by specific questions on the Form U4."[21]

B. The fraud violations

FINRA found that Ottimo violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. Exchange Act Section 10(b) makes it unlawful "to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of" Commission rules.[22] Rule 10b-5(b) makes it unlawful, "in connection with the purchase or sale of any security," to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."[23] A violation of Section 10(b) and Rule 10b-5 constitutes a violation of FINRA Rule 2020, which prohibits FINRA members from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."[24] Such conduct also violates FINRA Rule 2010.[25] The statements in the PPM were clearly made "in connection with" the purchase or sale of a security.[26] Thus, Ottimo's

---

[20] *Id.* (finding failures to disclose tax liens, unsatisfied judgments, and bankruptcies material); *see also Mathis*, 671 F.3d at 219-20 (finding the failure to disclose tax liens on Forms U4 material); *McCune*, 2016 WL 1039460, at *6 ("The significance of McCune's bankruptcy and tax liens is even more apparent when viewed in light of the number and total amount of the tax liens . . . , the fact that McCune had filed for bankruptcy before, and the lengthy period of time during which the information was not disclosed.").

[21] *Tucker*, 2012 WL 5462896, at *11.

[22] 15 U.S.C. § 78j(b).

[23] 17 C.F.R. § 240.10b-5(b). A violation also requires the use of means or instrumentalities of interstate commerce. Evidence in the record shows that Fund investors received the PPM via e-mail and purchased their securities by either wiring the funds or issuing a check to EKN. This satisfies the interstate commerce requirement. *See, e.g.*, *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 861, 865 (S.D.N.Y. 1997) (finding that wire and mail transfers of funds satisfied interstate commerce requirement of Exchange Act Section 10(b) and Rule 10b-5), *aff'd*, 159 F.3d 1348 (2d Cir. 1998); *Grubbs v. Sheakley Grp., Inc.*, 807 F.3d 785, 803 (6th Cir. 2015) ("[T]he very act of sending an e-mail creates the interstate commerce nexus necessary for federal jurisdiction.").

[24] *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *4 (Mar. 31, 2016), *petition denied sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. Oct. 25, 2017).

[25] *Id.*

[26] *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (recognizing that the Supreme Court "has espoused a broad interpretation" of "in connection with" in Exchange Act Section 10(b) and noting that "[u]nder [Supreme Court] precedents, it is

(continued…)

liability under Section 10(b), Rule 10b-5, and FINRA Rules 2020 and 2010 turns on whether he made a material misrepresentation or omission in the PPM.

We sustain FINRA's fraud finding with regard to Jet One Jets, but set aside FINRA's fraud finding with regard to Wheatley. Because we find that Ottimo willfully violated Section 10(b) and Rule 10b-5 as to Jet One Jets, we also sustain FINRA's finding that Ottimo is statutory disqualified on that ground.[27] To the extent we sustain the violation of FINRA Rules 2020 and 2010 for Ottimo's fraudulent conduct, we find that these rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[28]

1. Ottimo's omission of material information about Jet One Jets constituted fraud.

a. Ottimo's omissions about Jet One Jets were misleading.

Ottimo omitted information about Jet One Jets in his PPM biography necessary to make the statements he did make about Jet One Jets not misleading. Under Section 10(b) and Rule 10b-5, one who elects to disclose material facts "must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak."[29] In other words, Rule 10b-5 "imposes a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading." "That duty is a general one, and arises whenever a disclosed statement would be 'misleading' in the absence of the 'disclos[ure] of [additional] material facts' needed to make it *not* misleading."[30]

In soliciting investments in the Fund, Ottimo touted that he was Jet One Jets's co-founder, he had "successfully negotiated an exclusive reseller Agreement with American Express," and that "Jet One Jets grew to $18 million in revenues inside approximately 18 months." These statements alone were misleading because Jet One Jets had significant regulatory problems and, as Ottimo conceded, was a "failure" that ultimately generated "no profitability" and resulted in losses to investors of over $1 million.

(…continued)
enough that the fraud alleged 'coincide' with a securities transaction"); *accord McGee v. SEC*, __ F. App'x __, 2018 WL 2126704, at *2-3 (2d Cir. May 9, 2018).

27 *See* 15 U.S.C. §§ 78c(a)(39)(F) & 78o(b)(4)(D) (including as a statutory disqualification from the securities industry willful violations of the federal securities laws).

28 *See, e.g.*, *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 WL 4335036, at *17 (Sept. 28, 2017) ("Rules 2020 and 2010, which are designed to prevent fraud and promote just and equitable principles of trade, are . . . consistent with the Exchange Act's purposes[, a]nd in finding Respondents liable for securities fraud under these rules, FINRA also applied these rules consistently with the purposes of the Exchange Act.").

29 *SEC v. Curshen*, 372 F. App'x 872, 880 (10th Cir. 2010).

30 *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992)).

Ottimo defends the PPM's disclosures regarding Jet One Jets by asserting that the claimed revenue figures were accurate and that he "was not affiliated" with Jet One Jets at the time of its bankruptcy. However, the record contradicts Ottimo's latter claim given that he personally signed its bankruptcy petition. And even if the revenue figures were correct, Ottimo was required to provide additional information because his representations painted a misleading picture of his management acumen given the company's undisclosed problems and eventual failure.[31]

b. Ottimo's omissions about Jet One Jets were material.

Ottimo's omissions concerning Jet One Jets were material. An omission is material if there is a "substantial likelihood" that a reasonable investor would have considered the omitted information important in deciding whether or not to invest and if disclosure of the omitted fact would have "significantly altered the total mix of information" available to the investor.[32] The statements the PPM included about Jet One Jets were clearly relevant to investors' assessment of Ottimo's management abilities, and information about the company's regulatory problems, significant losses, and eventual bankruptcy are all facts that a reasonable investor would want to consider in deciding whether to invest in a venture managed by Ottimo.[33]

Ottimo argues that, given the limited purpose of the Fund to purchase Facebook shares, his experience with Jet One Jets was not material. He insists that the success or failure of Jet One Jets had "no relevance to [his] ability to purchase Facebook in the private market at the best available price and this is all that investors were interested in." But the facts that Jet One Jets had regulatory problems, significant losses, and declared bankruptcy would have "altered the total mix of information available" to investors in the Fund. This is especially so given the broad discretion granted to FSM to manage the Fund and Ottimo's authority to manage FSM. Even Ottimo conceded during the hearing that his biography in the PPM was meant to provide investors with information about his "management experience," and such information was

---

31 *See SEC v. Merch. Capital, LLC*, 483 F.3d 747, 770-71 (11th Cir. 2007) (holding that a duty to disclose all material information relating to a particular subject arises by voluntarily "touting" the subject to investors).

32 *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32, 240 (1988) (citation omitted).

33 *See Merch. Capital*, 483 F.3d at 770-71 (holding that "a reasonable investor would have been interested in [the defendant's] previous personal bankruptcy, and that it was thus materially misleading to omit the information," particularly when the defendant "had put his experience in issue by touting" it in the offering material); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) (holding that failing to "fully disclose the close connection of the principals involved in Carriba Air with the bankrupt Air Caribbean and with other failed business ventures" was materially misleading). Ottimo contends that *Carriba Air* is distinguishable because the court there found that information about prior bankruptcies and business failures *in the same industry* was material. Although Jet One Jets was not the same type of business as the Fund, Ottimo conceded that the purpose of his biography in the PPM was to provide investors information about Ottimo's management experience. As in *Merchant Capital* and *Carriba Air*, we find that Jet One Jets's failures under Ottimo's management were material information.

particularly relevant given his extensive authority under the Fund's operating agreement. Indeed, the PPM warned investors that they would be "relying solely on the investment acumen of the officers of [FSM]" for the success of their investment and that they should not "make any investment in the [Fund] unless [they are] willing to entrust all aspects of the [Fund's] management to [FSM]."

Ottimo contends that the broad discretion granted to FSM was merely "boilerplate" and "cannot take away from the fact that [the Fund] was formed to buy Facebook stock" and did so. That Ottimo made purchases consistent with investor expectations neither lessens FSM's authority over the Fund, nor makes Ottimo's management experience less relevant. Ottimo himself suggested during the proceedings that who was managing the Fund mattered to investors by stating that he created the Fund because he was concerned about EKN clients entrusting their money to "other alternatives out there" for acquiring Facebook stock. In an effort to get an investor to sign the letter Ottimo prepared regarding the omissions, Ottimo contended that he "was not required" under the Fund's operating agreement to release the investor's Facebook shares. This shows further that the discretion granted to FSM was not boilerplate.

As for the DOT action, Ottimo argues that it was a "technical" infraction involving a fine of a few thousand dollars and is "hardly" something that would interest investors. As discussed above, Ottimo offers no evidence to support his testimony that the fine was reduced from $60,000. In any case, a federal agency's finding that Jet One Jets committed "an unfair and deceptive practice" is a serious matter.[34] A reasonable investor would consider it important, regardless of the fine, because the finding bears directly on Ottimo's management abilities.[35] One investor testified specifically that the DOT finding "in particular" would have made him hesitant to invest with Ottimo had he known about it.

Ottimo argues further that, because his sales of interests in the Fund to EKN customers were "no different from his sales of other securities to EKN customers," his biographical information "should be viewed from the same perspective as the required disclosures on his BrokerCheck Report." But BrokerCheck Report requirements are irrelevant to the information Ottimo was required to disclose once he started speaking in the PPM. Regardless of whether or not BrokerCheck required such a disclosure, once Ottimo decided to reference his significant role at Jet One Jets and the company's revenue growth, he was obligated to do so in a way that was not materially misleading.[36]

---

[34] The DOT order is the type of information an investment adviser, like FSM, is required to disclose on its Form ADV. *See* Form ADV, Part 1A, Item 11.D.(1) (requiring the disclosure of whether "any other federal regulatory agency . . . ever found you or any advisory affiliate to have made a false statement or omission, or been dishonest, unfair, or unethical").

[35] *See, e.g.*, *Philip A. Lehman*, Exchange Act Release No. 54660, 2006 WL 3054584, at *3 (Oct. 27, 2006) ("These omissions were material because a reasonable investor would want to know about recent disciplinary history involving fraud of someone managing his or her investments.").

[36] *See, e.g.*, *Singer v. Reali*, 883 F.3d 425, 440 (4th Cir. 2018) (stating that "'companies can control what they have to disclose [under section 10(b) and SEC Rule 10b-5] by controlling what

(continued…)

Finally, Ottimo points to the letter CLM prepared and that some investors signed stating that "additional information provided by Mr. Ottimo relating to his personal financial issues would have no impact on my decision to invest in [the Fund] had they been disclosed as part of his biography in the PPM." We do not agree that the letter indicates the omissions were immaterial. First, "the reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective."[37] Second, the "additional information" the letter provided did not include the adverse information omitted from the biography about Jet One Jets. The letter contained no reference to Jet One Jets never being profitable, declaring bankruptcy, and being subject to federal regulatory proceedings. Third, investors appear to have signed the letter only because Ottimo pressured them. Not only did several investors tell a FINRA investigator that they "felt coerced into signing," but e-mails sent on Ottimo's behalf show that investors were told that signing the letter was "needed" for their shares to be deposited into their brokerage accounts. And Ottimo directly pressured at least one investor to sign the letter by citing his authority under the Fund's operating agreement to control the release of the underlying securities.

c. Ottimo acted with the requisite scienter.

A violation of Section 10(b) and Rule 10b-5 requires a finding of scienter.[38] Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[39] It may be established by recklessness—conduct representing an "extreme departure from the standards of ordinary care . . . which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[40] We find that Ottimo's omission of material facts about Jet One Jets was at least reckless.

i. The omissions regarding Jet One Jets were at least reckless.

Ottimo understood that the purpose of the PPM was to solicit investors and acknowledged during the hearing that the purpose of his biography was to give investors "fair and balanced" information about his "management experience." Undisputed evidence shows that, at the time he drafted his biography and reviewed the final PPM, Ottimo had actual knowledge of the adverse information about Jets One Jets. Ottimo must have known that his biography presented a substantial risk of misleading investors since it falsely gave the impression

---

(…continued)
they say to the market'" because the "disclosure of material information is required 'when necessary to make statements made, in light of the circumstances under which they were made, not misleading'") (internal citation omitted) (alteration in original).

37 *Richmark Capital Corp.*, Securities Act Release No. 8333, 2003 WL 22570712, *5 (Nov. 7, 2003) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976)).

38 *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

39 *Id.* at 686 n.5 (internal quotation marks omitted).

40 *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008); *accord Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978).

that Jet One Jets was a profitable business. Ottimo therefore was at least reckless in omitting materially adverse information about Jet One Jets from the PPM.

Ottimo insists that he did not intend to deceive investors and that it "was not apparent to" him that the PPM required additional disclosures about Jet One Jets. According to Ottimo, he was, at most, "negligent." But Ottimo had extensive experience as a securities professional, and he knew that the purpose of the biography was to inform investors about his management experience. Ottimo either knew that his biographical statements about Jet One Jets were materially misleading or he was reckless in not recognizing that investors would likely be misled about material information.[41]

Ottimo argues that because others involved with the Fund—CLM, EKN's compliance officer, and the co-manager of the Fund—"didn't know this information was material" he also could not "be expected to know." But Ottimo provides no evidence that those individuals knew about the omitted information at the time the PPM was drafted. And even if others had known, Ottimo cannot shift his responsibility to ensure compliance with the federal securities laws.[42]

ii. Ottimo cannot support a reliance on counsel defense.

Ottimo asserts a reliance on counsel defense to negate the evidence of his scienter. To establish such a defense, Ottimo must show that he "made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith."[43] Ottimo cannot satisfy any of the required elements. First, there is no evidence that Ottimo made a complete disclosure of the relevant facts to CLM. Ottimo confirmed that the only information he gave to CLM about Jet One Jets was the information in his biography. Second, although Ottimo highlights CLM's expertise and the expense involved in having the firm draft the PPM, he provides no evidence that he specifically sought or received advice from CLM about what he was required to disclose regarding his prior business experience. Not having received any advice on the topic, Ottimo could not have relied on that nonexistent advice.[44]

---

41 *See Scholander*, 2016 WL 1255596, at *6 ("Applicants, as experienced securities industry professionals, knew or were reckless in not knowing that the omitted information would be material to a reasonable investor."); *see also Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 918-19 (6th Cir. 2007) (holding that defendant's experience as "a licensed securities professional" was relevant to a determination of scienter); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 10 (D.D.C. 1998) (same).

42 *See, e.g.*, *Scholander*, 2016 WL 1255596, at *6 (holding that "associated persons are responsible for their own compliance and cannot shift that responsibility to" others); *Kirk A. Knapp*, Exchange Act Release No. 31556, 1992 WL 365568, at *13 (Dec. 3, 1992) ("[P]articipants in the industry must take responsibility for their compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements.").

43 *Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994).

44 *Cf. Howard v. SEC*, 376 F.3d 1136, 1147-1149 (D.C. Cir. 2004) (finding that respondent's reliance on counsel demonstrated that he did not act recklessly where he "played no

(continued…)

Ottimo argues that his biography was "the work product of the Law Firm" and that CLM's "Wells Submission" before FINRA shows that the firm "decided to . . . omit information related to [Jet One Jets]" because it "did not think [it] was relevant or material." But CLM did not know about the omitted information before the PPM was distributed so it could not have decided to omit it as immaterial. Indeed, the biography was not the work product of the firm; the record shows that CLM only made minor, non-substantive changes (none of which involved Jet One Jets) to the biography, which Ottimo supplied. Although CLM's Wells Submission argued that the omissions were not material, it was written years after the PPM was distributed and never claimed that the firm's lawyers made a contemporaneous determination regarding the materiality of the alleged omissions. As discussed above, Ottimo himself testified that he "didn't provide [CLM] with any information but the statement that appears in the biography."

Ottimo argues further that he "did not know what disclosures should be included in a PPM biography" and that "it was incumbent upon the Law Firm to take all necessary steps to ensure that they had all the information they needed to draft a biographical section that included all required disclosures." As discussed above, CLM did not draft the biography, but rather relied on Ottimo for the adequacy of the disclosures it contained. "Compliance with federal securities laws cannot be avoided simply by retaining outside counsel to prepare required documents."[45] No more persuasive is Ottimo's suggestion that he needed to be a securities law expert to comply with the law. Ottimo did not need to be a securities law expert to know that his representations in his biography were misleading.[46]

2. Ottimo's omission of information about Wheatley did not constitute fraud.

FINRA found that disclosing negative information about Wheatley, in addition to Jet One Jets, was "necessary to make the disclosures regarding [Ottimo's] background not misleading." As to Wheatley, the PPM stated: "In April 2001, Mr. Ottimo founded Wheatley Capital, Inc. and was its president until 2011." We do not believe on these particular facts that the evidence supports FINRA's finding that Ottimo's failure to disclose Wheatley's unprofitable history and bankruptcy filing rendered this sentence materially misleading.[47]

(…continued)
role in drafting th[e relevant] documents" and was told that counsel had approved the relevant transactions). In *Howard*, the court stated that if "a company president communicates directly with competent outside counsel; makes full disclosure; is advised—incorrectly—that the proposed transaction is entirely lawful; tells junior officers in the company of the legal advice; and instructs them to consummate the transaction," both the president and the junior officers would be able to "us[e] the attorney's advice to prove [their] lack of scienter." *Id.* at 1148. Here, neither Ottimo nor anyone else at EKN, FSM, or the Fund made full disclosure to outside counsel and was told that omitting the negative information about Jet One Jets was lawful.

45 *SEC v. Savoy Indus. Inc.*, 665 F.2d 1310, 1315 n.28 (D.C. Cir. 1981) (citations omitted).

46 *See supra* note 40. Ottimo's long history in the industry only amplifies the fact that he must have known the omitted information would present a danger of misleading investors.

47 FINRA disavowed explicitly any reliance on a theory that "Ottimo had any affirmative obligation to discuss his business experience in the PPM" and instead relied solely on the theory
(continued…)

As the Supreme Court has noted, "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'"[48] Unlike Ottimo's statement in his biography about Jet One Jets, which misleadingly implied it was a profitable business, the Wheatley statement neither states nor implies anything about Wheatley's profitability. Although "the literal truth of an isolated statement is insufficient" to show it was not misleading, and disclosures when viewed "holistically and in their entirety" must be "complete and accurate," merely mentioning Wheatley in his biography "did not trigger a generalized duty requiring [Ottimo] to disclose the entire corpus of [his] knowledge regarding [Wheatley]."[49] Under these circumstances the failure to disclose negative information about Wheatley did not "'affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists.'"[50]

The nature of the information that FINRA found should have been disclosed with respect to Wheatley further supports our determination to dismiss this portion of its fraud findings. The fact that Wheatley disclosed in its bankruptcy petition in 2010 that it had no revenues in 2008, 2009, and 2010 would not appear to be significant information for Fund investors given that Wheatley ceased operations in 2008. Likewise, the undisputed evidence is that Wheatley filed for bankruptcy to prevent EKN's eviction and that, once its dispute with the landlord was resolved, the bankruptcy was voluntarily dismissed and no creditors were harmed. As discussed

---

(…continued)
that he had to disclose his business experience to make the statements he made not misleading. Although it appears that Ottimo could qualify as an investment adviser at least with respect to the two clients he personally solicited to invest in the Fund, *see* 15 U.S.C. § 80b-2(a)(11) (defining an "investment adviser" broadly to include "advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities"); *SEC v. Lauer*, 478 F. App'x 550, 557 (11th Cir. 2012) (stating that "not all hedge fund investors are automatically to be treated as clients of a hedge fund adviser" but holding that "a client-adviser fiduciary relationship can arise when a hedge fund investor receives direct investment advice from a hedge fund adviser"), and would therefore have had heightened disclosure obligations, *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (investment advisers have "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts" (internal quotation marks omitted)), FINRA never made such a finding and never pursued fraud liability on this basis. Pursuant to Exchange Act Section 19(e)(1), we evaluate Ottimo's liability "as [it] has been specified in [FINRA's] determination." 15 U.S.C. § 78s(e)(1)(A).

[48] *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 CFR § 240.10b-5(b)). A duty to disclose also "arises when one party has information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them.'" *Chiarella v. United States*, 445 U.S. 222, 228 (1980) (citation omitted).

[49] *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010).

[50] *Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1278 (9th Cir. 2017) (quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)).

above, Ottimo was required to disclose the bankruptcy on his Form U4. In the context of the statements that Ottimo made in his biography in the PPM, however, we do not find that the failure to disclose the bankruptcy constituted a material omission.

C. FINRA's jurisdiction

Ottimo argues that FINRA lacks jurisdiction to bring an enforcement action based on his conduct as a principal of a private fund adviser. According to Ottimo, only his sales of Fund interests to "two EKN customers as a registered representative" come within the scope of FINRA's jurisdiction to discipline him for the alleged fraud because the "regulation of investment advisers rests with the Commission, not FINRA." But FINRA has jurisdiction to discipline all associated persons of a member firm.[51] And "FINRA is empowered to bring disciplinary actions and impose sanctions to enforce its members' compliance with federal securities laws, SEC regulations, and FINRA's own rules and regulations."[52] Thus, FINRA had the authority to discipline Ottimo for violating the antifraud provisions of the Exchange Act and FINRA rules—regardless of whether he was acting in his role as a registered representative at the time of the misconduct (which he concedes he was in certain respects). Indeed, we have held that FINRA has the authority to discipline associated persons who engage in misconduct in connection with their management of an investment fund where the misconduct is "business-related . . . , even if that management was not of a FINRA member firm."[53]

III. Remand

Under Exchange Act Section 19(e)(1), if we do not find that the applicant's conduct violated the statutes or rules FINRA found it to have violated, we shall "set aside the sanction imposed . . . and, if appropriate, remand to [FINRA] for further proceedings."[54] Here, FINRA barred Ottimo in all capacities for the fraud violations and assessed, but did not impose, a two-year suspension in all capacities and $25,000 fine for the Form U4 violations. Because we reverse a portion of FINRA's fraud findings, we set aside the bar and remand to FINRA for further proceedings. FINRA imposed a single sanction for all of its fraud findings; therefore, it is appropriate for FINRA to determine what sanctions are appropriate for the portion of the fraud

---

51 *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *5 n.15 (Mar. 29, 2016) (citing 15 U.S.C. § 78o-3(b) and (h); FINRA By-Laws Articles V and XIII); *see also, e.g.*, *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 WL 7873431, at *4 (finding that an associated person's "unethical business-related conduct, even while performing insurance-related activities, falls under FINRA's jurisdiction").

52 *Birkelbach v. SEC*, 751 F.3d 472, 475 (7th Cir. 2014).

53 *Grivas*, 2016 WL 1238263, at *5.

54 15 U.S.C. § 78s(e)(1).

violation we sustain.[55] In doing so, FINRA may also revisit its decision not to impose sanctions for the Form U4 violations.[56] We do not suggest any view as to the outcome on remand.

An appropriate order will issue.[57]

By the Commission (Chairman CLAYTON and Commissioners STEIN, PIWOWAR, JACKSON and PEIRCE).

Brent J. Fields
Secretary

---

[55] *See Mitchell H. Fillett*, Exchange Act Release No. 75054, 2015 WL 3397780, at *13 (May 27, 2015) ("Because we are setting aside a portion of the fraud violations, we remand the sanctions for these violations to FINRA for reconsideration in light of this dismissal.").

[56] *See Donner*, 2007 WL 516282, at *18 (Feb. 20, 2007) ("Although . . . NASD did not impose the sanctions for [certain violations] in light of the bar it imposed for [other] violations, on remand NASD should consider whether imposing such sanctions . . . is warranted.").

[57] Because our decisional process in this case would not be significantly aided by oral argument, Ottimo's motion for oral argument is denied. Rule of Practice 451, 17 C.F.R. § 201.451. Rule 451 provides that absent exceptional circumstances motions for oral argument with respect to a petition for review of an initial decision of an administrative law judge will be granted. *Id.* Contrary to Ottimo's argument, an application for review of a FINRA disciplinary action is not an appeal of an initial decision by an administrative law judge.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83555 / June 28, 2018

Admin. Proc. File No. 3-17930

In the Matter of the Application of

LOUIS OTTIMO

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART AND REVERSING IN PART DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION AND REMANDING PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is

ORDERED that FINRA's findings that Louis Ottimo violated FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws by failing to timely and accurately update his Form U4 are sustained; and it is further

ORDERED that FINRA's findings that omissions in Ottimo's biography regarding Jet One Jets, Inc., in a private placement memorandum violated Section 10(b) of the Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 are sustained; and it is further

ORDERED that FINRA's findings that omissions in Ottimo's biography regarding Wheatley Capital Corporation in a private placement memorandum violated Section 10(b) of the Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 are set aside; and it is further

ORDERED that the sanctions imposed by FINRA are set aside; and it is further

ORDERED that the proceeding is remanded to FINRA for reconsideration of sanctions.

By the Commission.

Brent J. Fields
Secretary