

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JORGE ANTONIO NETTO
(CRD No. 2432661),

Respondent.

Disciplinary Proceeding
No. 2018058537302

Hearing Officer–RES

HEARING PANEL DECISION

June 10, 2022

Respondent Jorge A. Netto is fined \$10,000 and suspended from associating with any FINRA member in any capacity for four months for engaging in two outside business activities without providing written notice to his employer firm and for providing a false and inaccurate answer as to one of the outside business activities on an annual compliance certification. The Department of Enforcement’s allegations as to two other outside business activities and a false and inaccurate answer as to one of those activities are dismissed. Respondent is ordered to pay disgorgement in the amount of \$75,000 plus prejudgment interest.

Appearances

For the Complainant: John R. Baraniak, Jr., Esq., Frank M. Weber, Esq., Frank D. Mazzarelli, Esq., Gina M. Petrocelli, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Coren H. Stern, Esq., Zinober, Diana & Monteverde, P.A.

DECISION

I. Introduction

FINRA’s Department of Enforcement filed a Complaint against Respondent Jorge A. Netto, a registered representative. The Complaint consists of two causes of action. The first cause of action alleges that Netto engaged in undisclosed business activities outside the scope of his relationship with his employer firm, Mora WM Securities Inc. (“Mora WM”), through his

ownership, beneficial interest, or management of four limited liability companies (“OBAs”).¹ The first cause of action also alleges that Netto obtained compensation in the form of a fee for facilitating a transaction through one of the OBAs.² The second cause of action alleges he submitted to Mora WM an annual compliance certification that was false and inaccurate because he failed to disclose his ownership of two of the OBAs.³ According to the Complaint, Netto’s alleged failure to disclose the four OBAs violated FINRA Rules 3270 and 2010, and his allegedly false and inaccurate annual compliance certification violated FINRA Rule 2010.⁴

In his Answer, Netto denies he actively participated in the four alleged OBAs or that he knew of the existence of three of them. He contends his involvement in the OBAs was a passive investment, which is exempt from the disclosure requirement of FINRA Rule 3270.⁵

The parties participated in a hearing before a Hearing Panel. In summary, the evidence in the hearing showed the following:

Netto was a friend, colleague, and business partner of Paul Weiss, then a registered representative. In February 2013, Netto and Weiss formed Sendero Investments, LLC (“Sendero”), a Delaware limited liability company. Netto and Weiss associated with Mora WM in April 2017. In the onboarding process, Netto failed to disclose to Mora WM that he was a member and officer of Sendero.

While at lunch in April 2017, Netto and Weiss briefly discussed a possible business opportunity with “FC” and “AP”, two former registered representatives who had become developers and promoters of real estate projects. This business opportunity was the purchase of a warehouse in Sacramento, California that could be used for the cultivation and storage of medical cannabis (“Sacramento Property”). Netto knew after this lunch that Weiss was talking to FC and AP about the Sacramento Property.

In January 2018, Netto submitted to Mora WM his annual compliance certification, in which he failed to disclose Sendero and another alleged OBA called West Avenue Partners, LLC (“West Avenue”).

In March 2018, Netto decided that one of his brokerage customers, West Hill Strategic Bond Fund LLC (“West Hill Bond Fund”), would invest \$800,125 in a promissory note for which the payor was the prospective purchaser of the Sacramento Property.⁶ Netto took the steps

¹ Complaint (“Compl.”) ¶¶ 1, 41.

² Compl. ¶¶ 3, 43.

³ Compl. ¶¶ 4, 48.

⁴ Compl. ¶¶ 1, 4.

⁵ Answer (“Ans.”), First Affirmative Defense.

⁶ In exchange for this \$800,125 investment, West Hill Bond Fund received a promissory note in the face amount of \$925,000.

necessary to effect his customer's investment in the promissory note. Two days after the purchase of the Sacramento Property, the purchaser wire-transferred an advisory fee in the amount of \$238,000 to Sendero, which transferred this fee to a disclosed company owned by Netto and Weiss, which transferred a \$75,000 share of the fee to Netto. Netto failed to disclose to Mora WM his receipt of this \$75,000 share.

These facts form the basis for Enforcement's claims that Netto engaged in four undisclosed OBAs and made a false and inaccurate statement on his annual compliance certification. After carefully considering the hearing testimony, the hearing exhibits, and the parties' pre-hearing and post-hearing briefs, the Hearing Panel finds, as explained below, that: (1) Netto violated FINRA Rules 3270 and 2010 because he engaged in two OBAs without giving Mora WM written notice; and (2) Netto violated FINRA Rule 2010 because he failed to disclose one of the OBAs, Sendero, in his annual compliance certification. Based on these findings, the Hearing Panel fines Netto \$10,000 and suspends him from associating with any FINRA member firm in any capacity for four months.

II. Findings of Fact

A. Respondent

Netto first registered with FINRA in 1994 through his association with a FINRA member firm.⁷ Netto has continuously been registered with FINRA since that time.⁸ He remains registered with FINRA through his association with Mora WM, which has changed its name to Boreal Capital Securities, LLC.⁹ Netto holds Series 7, Series 24, and Series 63 licenses.¹⁰

B. Netto and Weiss Form Sendero

Netto met Weiss in 2003, when Weiss recruited Netto to join the FINRA member firm Weiss had formed.¹¹ Netto and Weiss entered into an arrangement in which Netto shared with Weiss 50 percent of the commissions he earned as a registered representative, and Weiss shared with Netto 50 percent of the money he earned outside the brokerage business.¹² Netto testified about his commissions, "money was paid to me and then we would put it into, you know, one of our entities . . . and then we paid fees and then split that production 50/50."¹³

⁷ Hearing Transcript ("Tr.") 261, 263.

⁸ Tr. 263-68.

⁹ Tr. 257, 503. This Hearing Panel Decision refers to the employer firm as "Mora WM."

¹⁰ Tr. 261; Complainant's Exhibit ("CX-") 3, at 37.

¹¹ Tr. 341.

¹² Tr. 342-43, 595-96. Enforcement did not allege in the Complaint that this fifty-fifty sharing arrangement constituted an OBA or otherwise violated FINRA Rules.

¹³ Tr. 596.

In February 2013, Netto and Weiss formed Sendero.¹⁴ Netto and Weiss also entered into a Limited Liability Company Operating Agreement for Sendero.¹⁵ According to Schedule A of this Operating Agreement, Netto was a Member of Sendero, holding a 50 percent interest.¹⁶ According to Schedule B, he was a member of Sendero's Board of Managers.¹⁷ According to Schedule C, he was a member of the Investment Committee.¹⁸ According to Schedule D, he was Vice-President, Secretary, and Chief Financial Officer.¹⁹ Netto had signature authority over Sendero's bank account.²⁰ The idea behind Sendero was that Netto and Weiss would split fifty-fifty any money that came into the company.²¹

Netto included amounts received from Sendero on his income tax returns.²² In 2018, Netto reported a nonpassive loss from Sendero in the amount of \$52,021.²³

C. Netto and Weiss Associate with Mora WM

In April 2017, Netto and Weiss associated with Mora WM. While at this employer firm, they continued their fifty-fifty arrangement. Netto supported his customers and came up with new investment ideas, and Weiss pursued other aspects of the business, such as recruiting new registered representatives.²⁴ Part of the arrangement between Netto and Weiss was, again, that Netto shared his commissions with Weiss.²⁵ They disclosed this arrangement to Mora WM when they joined the firm.²⁶

Upon associating with Mora WM, Netto updated his Uniform Application for Securities Industry Registration or Transfer (Form U4).²⁷ The Form U4 asked, "Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or

¹⁴ CX-14; Tr. 105-06, 334.

¹⁵ CX-15; Tr. 106-07, 335-36, 509.

¹⁶ CX-15, at 28; Tr. 107, 337, 343, 510.

¹⁷ CX-15, at 29; Tr. 337-38.

¹⁸ CX-15, at 30; Tr. 338.

¹⁹ CX-15, at 31; Tr. 108-09, 338-39.

²⁰ Tr. 340-41. Still, there is no indication in Sendero's bank account statements that Netto took any action with regard to the bank account. Tr. 172; Respondent's Exhibit ("RX-") 22.

²¹ Tr. 343.

²² Tr. 291.

²³ CX-52, at 29; Tr. 459-60.

²⁴ Tr. 735-36, 836-37.

²⁵ Tr. 736, 837.

²⁶ Tr. 735-36.

²⁷ Tr. 278.

otherwise?”²⁸ Netto answered “yes” to this question.²⁹ In the space provided for entering details, Netto disclosed West Hill Realty Services LLC (“West Hill Realty”) and two related West Hill entities (collectively, “West Hill Entities”).³⁰ He also disclosed two family businesses that owned rental properties.³¹ The final OBA Netto disclosed was West Hill Bond Fund.³²

Netto failed to disclose Sendero.³³ Netto testified that this omission was inadvertent:

[I]t was an oversight. I did not include Sendero Investments. It was the furthest thing from my mind when I joined Mora. I formed it in '14, but just had done nothing with it and just had it completely out of my mind.³⁴

Netto admits he should have disclosed Sendero, testifying “I felt like it should have been on there, on the disclosure. It was an oversight.”³⁵ At no time did he include Sendero on his Form U4, and at no time did Mora WM approve his activity with this company.³⁶

Mora WM’s written supervisory procedures (“WSPs”) required registered representatives to disclose to the firm, in writing, any OBA before engaging in it.³⁷ The WSPs provided these examples of OBAs: employment with an outside entity; acting as an independent contractor to an outside party; serving as an officer, director or partner; acting as a finder; referring someone or receiving a referral fee; and receiving other compensation for services rendered outside the scope of employment with Mora WM.³⁸ The WSPs stated that compensation included salary, stock options or warrants, referral fees, or receiving services or products as remuneration.³⁹ The WSPs stated, “Employees requesting approval to engage in outside business activities must complete the Outside Business Activity form and submit it to Compliance **prior to** engaging in the activity.”⁴⁰

Mora WM’s principals informed Netto that the firm’s policy was not to allow registered representatives to pursue OBAs, even if the OBAs were disclosed. In onboarding discussions

²⁸ CX-4, at 8; Tr. 283.

²⁹ CX-4, at 8; Tr. 284, 631-32.

³⁰ CX-4, at 8; Tr. 209, 285-87, 624.

³¹ CX-4, at 8; Tr. 288.

³² CX-4, at 8; Tr. 289.

³³ CX-4, at 8; Tr. 290-91, 634.

³⁴ Tr. 291.

³⁵ Tr. 344.

³⁶ Tr. 346-47.

³⁷ CX-10, at 23; Tr. 328.

³⁸ CX-10, at 23; Tr. 329-30.

³⁹ CX-10, at 23; Tr. 330-31.

⁴⁰ CX-10, at 24 (emphasis in original); Tr. 331-32.

with Mora WM's Chief Executive Officer and Chief Compliance Officer, Netto and Weiss disclosed the West Hill Entities as OBAs they were conducting.⁴¹ The Chief Executive Officer and Chief Compliance Officer responded that they wanted the West Hill Entities to be wound down.⁴² They said they did not want to supervise these OBAs.⁴³ The Chief Compliance Officer testified, "We would not as a firm support any additional business and it was explained and discussed that in order for these individuals to join the firm, that business should go away."⁴⁴ As far as the Chief Executive Officer was concerned, he understood Netto and Weiss would not raise investment funds for any business activity.⁴⁵

D. Netto, Weiss, FC, and AP Discuss the Possible Business Opportunity Presented by the Sacramento Property

Netto first met FC in 1999, when they were both registered representatives at the same FINRA member firm.⁴⁶ AP was FC's business partner. Netto and Weiss sometimes ate lunch with FC and AP.⁴⁷ At one of these lunches in April 2017, the four of them briefly discussed the possible business opportunity presented by the Sacramento Property.⁴⁸ FC and AP, Netto testified, were "pitching for money . . . They were always pitching and they were always asking and seeking for money."⁴⁹ Netto knew after this first lunch that Weiss was talking to FC and AP about the Sacramento Property.⁵⁰ Weiss also traveled to Sacramento.⁵¹

In May 2017, Corporate Creations International Inc. filed articles of organization for West Avenue with the Florida Department of State.⁵² The articles of organization identified Netto, Weiss, FC, and AP as the managers of West Avenue.⁵³ Netto was not aware, however,

⁴¹ Tr. 307-08, 623-24.

⁴² Tr. 309, 566, 624-25.

⁴³ Tr. 310.

⁴⁴ Tr. 625.

⁴⁵ Tr. 822.

⁴⁶ Tr. 349.

⁴⁷ Tr. 350-51.

⁴⁸ Excerpts from the transcripts of Netto's on-the-record ("OTR") interview were admitted into evidence as CX-80 and CX-81. The cites for the text above are CX-80, at 29, OTR Tr. 110; CX-81, at 6, OTR Tr. 199.

⁴⁹ Tr. 362.

⁵⁰ CX-81, at 10, OTR Tr. 212.

⁵¹ Tr. 376.

⁵² CX-17; Tr. 86-87. Corporate Creations International Inc. appears to be a service that incorporates limited liability companies for individuals. The involvement of this firm makes it difficult to determine with certainty who initiated the incorporation of a particular limited liability company.

⁵³ CX-17, at 3.

that organization documents for West Avenue had been filed.⁵⁴ His signature did not appear on the articles of organization.⁵⁵

Enforcement's first witness in the hearing was a FINRA Case Manager ("Case Manager"). This Case Manager admitted there is no document in the record showing Netto was an owner of West Avenue.⁵⁶ Netto testified he was never an owner.⁵⁷ There is no document showing that Netto took any steps to further the interests of West Avenue.⁵⁸

E. Netto's 2018 Annual Compliance Certification

Netto submitted to Mora WM his 2018 annual compliance certification on January 4, 2018.⁵⁹ The annual compliance certification asked, "Are you engaged in any outside business activity, and/or do you serve as an officer, director, or employee [of] another business organization?"⁶⁰ This question defined outside activities to include outside employment; acting as a general partner, finder, director, or referrer; or any activity outside the registered representative's usual responsibilities with Mora WM.⁶¹ Netto answered "yes" to the question.⁶² In response to a question asking him to describe the nature of the OBA, Netto identified an entity called West Hill Real Estate Fund.⁶³ Netto failed to disclose Sendero and West Avenue on his annual compliance certification.⁶⁴

F. The Younger Creek 36 Companies

In January 2018, Corporate Creations Network filed articles of organization for Younger Creek 36 Holdings, LLC ("Younger Creek 36 Holdings") with the California Secretary of State.⁶⁵ The accompanying statement of information identified Sendero as a manager or member of Younger Creek 36 Holdings.⁶⁶ The Case Manager admitted there is no evidence (1) Netto

⁵⁴ CX-17, at 1-4. Netto testified he was unaware of the filing. Tr. 530. Enforcement did not offer testimony or documentary evidence to contradict Netto.

⁵⁵ CX-17; Tr. 150-51, 533.

⁵⁶ Tr. 151-52, 225-26.

⁵⁷ Tr. 532.

⁵⁸ Tr. 155.

⁵⁹ CX-8; Tr. 383-84, 643.

⁶⁰ CX-8, at 1.

⁶¹ CX-8, at 1.

⁶² CX-8, at 1.

⁶³ CX-8, at 2. In his Form U4, Netto identified West Hill Real Estate Opportunity Fund as a partnership in which one of his disclosed entities, West Hills Investment Partners, LLC, was the general partner. CX-4, at 8. As of January 2018, Netto and Weiss had not wound down their West Hill Entities as Mora WM had directed them to do.

⁶⁴ CX-8, at 2.

⁶⁵ CX-20, at 2; Tr. 103-04.

⁶⁶ CX-20, at 3; Tr. 104, 228.

knew Sendero was a manager of this company,⁶⁷ or (2) Netto knew of the existence of Younger Creek 36 Holdings at the time the company's articles of organization were filed.⁶⁸

A month later, Corporate Creations Network filed articles of organization for Younger Creek 36, LLC ("Younger Creek 36") with the California Secretary of State.⁶⁹ The accompanying statement of information identified Younger Creek 36 Holdings as a manager or member of Younger Creek 36.⁷⁰ The Case Manager admits that Netto's name does not appear on Younger Creek 36's corporate organization documents.⁷¹ There is nothing in the record to indicate that Netto had any ownership in Younger Creek 36.⁷²

G. Netto Decides That West Hill Bond Fund Will Invest in a Promissory Note for which Younger Creek 36 is the Payor

Netto and Weiss were managers of West Hill Bond Fund, which consisted of three individual investors.⁷³ West Hill Bond Fund was an unconstrained fixed income bond fund that was not bound by maturities.⁷⁴ Netto had decision-making authority for the investments of the Fund.⁷⁵ When Netto and Weiss associated with Mora WM, the Fund opened a brokerage account at that firm.⁷⁶

In March 2018, Netto decided that West Hill Bond Fund would invest \$800,125 in a promissory note for which Younger Creek 36 was the payor ("Promissory Note").⁷⁷ Netto performed due diligence into the Promissory Note and discussed the investment with the three investors in West Hill Bond Fund. As part of his due diligence, he read a confidential offering circular for a securities offering for the Sacramento Property.⁷⁸ The cover page of the confidential offering circular described the Sacramento Property as "Younger Creek Warehouse—36,000 SF Warehouse approved as Medical Marijuana Cultivation Facility in Sacramento, California."⁷⁹

⁶⁷ Tr. 205.

⁶⁸ Tr. 202-03.

⁶⁹ CX-18, at 3; Tr. 102.

⁷⁰ CX-18, at 2.

⁷¹ Tr. 198-99.

⁷² Tr. 199-200.

⁷³ Tr. 407-08, 626-27.

⁷⁴ Tr. 408.

⁷⁵ Tr. 409.

⁷⁶ Tr. 627.

⁷⁷ Tr. 409.

⁷⁸ CX-25, at 5; Tr. 540-41, 582.

⁷⁹ CX-25, at 5.

The cover page of the confidential offering circular stated the offering was presented by West Avenue.⁸⁰ The circular stated the address of West Avenue was the same as the Mora WM branch where Netto and Weiss worked.⁸¹ Younger Creek 36 would have investment and management duties over the Sacramento Property.⁸²

When Netto made the decision that West Hill Bond Fund would invest in the Promissory Note, he knew Younger Creek 36 planned to use the investment funds to purchase a warehouse in Sacramento to be used for the cultivation and storage of medical cannabis.⁸³ Netto knew FC and AP were involved in the transaction.⁸⁴ He testified, “just the fact that these two gentlemen were spearheading this effort gave me comfort based on their track record.”⁸⁵ Netto claims, however, that he did not go deep enough in his due diligence to learn that Younger Creek 36 was managed by Younger Creek 36 Holdings.⁸⁶

Over several days beginning March 6, 2018, Netto executed six separate sale transactions liquidating \$1,038,751 in publicly traded corporate bonds in the Mora WM brokerage account in the name of West Hill Bond Fund.⁸⁷ Netto sold the bonds at a loss of \$61,358.⁸⁸ The purpose of the six sales was to free up funds for investment in the Promissory Note.⁸⁹ Several days later, the amount of \$800,125 was wire-transferred from West Hill Bond Fund’s account at Mora WM to Younger Creek 36’s account at Florida Community Bank.⁹⁰ Weiss signed the wire transfer instructions and addressed them to Netto.⁹¹ Weiss stated in the wire transfer instructions, “For your records, I have attached to this wire transfer instructions [sic] the underlying note that the Fund has decided to invest in.”⁹²

Netto initialed the wire transfer instructions so the transfer could be made.⁹³ Netto wrote, “OK. Confirmed as per personal confirmation.”⁹⁴ With reference to the wire transfer

⁸⁰ CX-25, at 5.

⁸¹ CX-25, at 21.

⁸² CX-25, at 19.

⁸³ Tr. 415.

⁸⁴ Tr. 416.

⁸⁵ Tr. 590.

⁸⁶ Tr. 590.

⁸⁷ CX-27, at 4-5; Tr. 93, 412. All monetary amounts in this Decision are rounded to the nearest dollar.

⁸⁸ CX-27, at 7; Tr. 95, 414.

⁸⁹ Tr. 411-12.

⁹⁰ CX-27, at 1, 5; Tr. 94, 411-13.

⁹¹ CX-29, at 1; Tr. 97, 196-97, 420.

⁹² CX-29, at 1.

⁹³ CX-29, at 1; Tr. 422, 651-52.

⁹⁴ CX-29, at 1.

instructions, Mora WM's Chief Compliance Officer testified, "Mr. Netto received it and then passed it on to his client services support to process, who then passed it on to compliance for review and approval."⁹⁵

On March 12, 2018, Younger Creek 36 executed the Promissory Note in the face amount of \$925,000 payable to West Hill Bond Fund.⁹⁶ AP signed the Promissory Note on behalf of Younger Creek 36.⁹⁷ Netto knew Younger Creek 36 would own the Sacramento Property.⁹⁸ Netto testified, "I know that [AP] and [FC] were involved and they had a very good track record managing investments like this that had some real estate component, so that was a big part of my calculus."⁹⁹

H. Netto Receives his \$75,000 Share of a \$238,000 Advisory Fee

The purchase and sale of the Sacramento Property closed on March 19, 2018.¹⁰⁰ The buyer was Younger Creek 36.¹⁰¹ The price was \$6.5 million.¹⁰² Two days after the closing, Younger Creek 36 wire-transferred \$238,000 to Sendero.¹⁰³ Netto explained this wire transfer by testifying, "Paul Weiss instructed me that he had got an advisory fee for the project . . . after the fact, when this money had gone into the Sendero account."¹⁰⁴ The \$238,000 was a fee for the closing of the transaction, and the Promissory Note was part of the closing.¹⁰⁵

Younger Creek 36 paid the \$238,000 advisory fee to Sendero as part of an unwritten gentleman's agreement.¹⁰⁶ In an OTR, Netto testified he learned of this gentleman's agreement several days before Sendero received the advisory fee, "when Paul announced to me that we were getting a payment for advising—for his advising on a deal with regards to the Sacramento investment."¹⁰⁷ Weiss told Netto about the gentleman's agreement and about the advisory fee

⁹⁵ Tr. 652.

⁹⁶ CX-29, at 3; Tr. 96-97, 406-07. Again, the difference in the amount of the wire and the amount of the Promissory Note is that the West Hill Bond Fund invested \$800,125 and, in exchange, received a Promissory Note in the face amount of \$925,000.

⁹⁷ CX-29, at 8; Tr. 427.

⁹⁸ Tr. 430.

⁹⁹ Tr. 431.

¹⁰⁰ CX-31; Tr. 110-11, 434.

¹⁰¹ CX-31, at 2; Tr. 111.

¹⁰² CX-25, at 12; CX-31, at 2; Tr. 112, 399, 433. The Sacramento Property had investors in addition to West Hill Bond Fund.

¹⁰³ CX-34, at 1; Tr. 113-14, 434-35.

¹⁰⁴ Tr. 436-37.

¹⁰⁵ Tr. 437-38.

¹⁰⁶ CX-80, at 31, OTR Tr. 120.

¹⁰⁷ CX-81, at 8, OTR Tr. 206.

Weiss would receive once the purchase of the Sacramento Property closed.¹⁰⁸ Weiss told Netto he had been advising FC and AP for a while and they had a deal that Weiss would get paid.¹⁰⁹ Netto knew the \$238,000 payment was part of the gentleman's agreement.¹¹⁰

On March 22 and 23, 2018—the two days immediately following Younger Creek 36's payment of the \$238,000 advisory fee to Sendero—Sendero made four internet transfers totaling \$238,000.¹¹¹ The recipient of these internet transfers was West Hill Realty.¹¹² Netto testified he was entitled to a share of the advisory fee Sendero had received from Younger Creek 36.¹¹³ Accordingly, on March 23, 2018, West Hill Realty made two wire transfers totaling \$75,000 to Netto.¹¹⁴ Weiss initiated the transfers from West Hill Realty to Netto.¹¹⁵

Netto did not disclose to Mora WM Sendero's receipt of the \$238,000 advisory fee from Younger Creek 36, or his own receipt of a \$75,000 share as a result of the Sacramento transaction.¹¹⁶ Netto thought *Weiss* should have disclosed the advisory fee to Mora WM.¹¹⁷

I. Mora WM's Disciplinary Measures and Younger Creek 36's Default

In April 2018, the Securities and Exchange Commission investigated Netto's and Weiss's OBAs.¹¹⁸ As a result of this investigation, Mora WM determined that Netto and Weiss had failed to provide the notification required by FINRA Rule 3270 as well as the firm's WSPs.¹¹⁹ Mora WM took disciplinary measures against Netto because of his failure to disclose and seek prior approval of OBAs.¹²⁰ The firm issued to Netto a formal memorandum of reprimand and ordered him to divest from the West Hill Entities and any other business related to Weiss.¹²¹

¹⁰⁸ CX-81, at 11, OTR Tr. 219.

¹⁰⁹ Tr. 593.

¹¹⁰ CX-81, at 32, OTR Tr. 300.

¹¹¹ CX-34, at 1; Tr. 114, 438-39.

¹¹² CX-35, at 1; Tr. 118-19, 439-40.

¹¹³ Tr. 442.

¹¹⁴ CX-35, at 2; Tr. 120, 440-41.

¹¹⁵ Respondent's Exhibit ("RX-") 23, at 2; Tr. 179. As of March 2018, Netto and Weiss still had not wound down the West Hill Entities, as Mora WM had directed them to do.

¹¹⁶ Tr. 470-71, 656-57.

¹¹⁷ Tr. 471.

¹¹⁸ Tr. 658.

¹¹⁹ CX-47, at 3.

¹²⁰ Tr. 484.

¹²¹ CX-48; Tr. 347, 486, 655, 663-64, 731, 823. This would include West Avenue too, even though Netto had no ownership interest to divest and did not know he had been identified as a manager of that company.

As of May 2021, Younger Creek 36 was in default on its obligations under the Promissory Note.¹²² West Hill Bond Fund did not receive interest payments or the return of principal under the Promissory Note.¹²³ The senior mortgagee took the Sacramento Property into foreclosure.¹²⁴ It appeared all but certain Younger Creek 36 would not survive.¹²⁵

III. Conclusions of Law

A. Netto Failed to Provide Written Notice of Two Outside Business Activities, in Violation of FINRA Rules 3270 and 2010

In the first cause of action of the Complaint, Enforcement charges Netto with violating FINRA Rules 3270 and 2010 by engaging in four undisclosed OBAs outside the scope of his relationship with Mora WM through his ownership, beneficial interest, or management of Sendero, West Avenue, Younger Creek 36 Holdings, and Younger Creek 36. The Complaint also alleges that Netto obtained undisclosed compensation in the form of a fee for facilitating the purchase of the Sacramento Property through Younger Creek 36.

Among other things, FINRA Rule 3270 prohibits a registered person from holding certain positions or being compensated by an undisclosed OBA:

No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of Rule 3280 shall be exempted from this requirement.¹²⁶

FINRA Rule 3270 requires fulsome, prompt, and written disclosure of an OBA to the employer firm.¹²⁷ The Rule applies to all OBAs so that the firm can raise its objections, if any, at a meaningful time and can exercise appropriate supervision.¹²⁸ The Rule is not limited to OBAs

¹²² CX-79, at 1; Tr. 135, 480-81.

¹²³ Tr. 138, 477.

¹²⁴ Tr. 597-98. The senior mortgagee consisted of the investors who had paid \$5.7 million toward the purchase of the Sacramento Property.

¹²⁵ CX-51, at 1; Tr. 479.

¹²⁶ *Accord Dep't of Enforcement v. Mathieson*, No. 2014040876001, 2018 FINRA Discip. LEXIS 9, at *15 (NAC Mar. 19, 2018). FINRA Rule 3280 is the FINRA Rule that governs private securities transactions of an associated person.

¹²⁷ *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *44 (NAC Dec. 29, 2015), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

¹²⁸ *Mathieson*, 2018 FINRA Discip. LEXIS 9, at *15; *accord Akindemowo*, 2016 SEC LEXIS 3769, at *31-32 (“[the respondent’s] failure to provide the written notice required by the rule frustrated [the employer firm’s] ability to

related to securities.¹²⁹ OBAs are of serious concern, and the careful monitoring of such activities carries important protections for member firms and investors.¹³⁰ An implicit and important requirement of FINRA Rule 3270 is the registered person’s disclosure of an OBA must be accurate.¹³¹

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.”¹³² A violation of FINRA Rule 3270 constitutes a violation of FINRA Rule 2010.¹³³

The Complaint alleges, “Netto engaged in business activities outside the scope of his relationship with his member firm through his ownership, beneficial interest, or management of Sendero, West Avenue, Younger Creek 36 Holdings, and Younger Creek 36.”¹³⁴ The Complaint also alleges, “Netto obtained \$119,000 in compensation as a fee for facilitating the purchase of the Sacramento Property” through Younger Creek 36.¹³⁵ Below, the Hearing Panel considers Netto’s role in Sendero, West Avenue, Younger Creek 36 Holdings, and Younger Creek 36.

1. Sendero

Netto admits he owned 50 percent of Sendero. Netto was an employee of Sendero in his positions as Vice-President, Secretary, and Chief Financial Officer.¹³⁶ He had signature authority over Sendero’s bank accounts.¹³⁷ He was compensated by Sendero in the amount of \$75,000, which was his share of the advisory fee from the purchase of the Sacramento Property.¹³⁸ On his 2018 personal income tax return, he reported a non-passive loss from Sendero in the amount of \$52,021.¹³⁹ In sum, the evidence shows Netto had ownership and a beneficial interest in Sendero,

assess the risks that his outside business activities may cause harm to potential investors and to manage those risks by taking appropriate action”).

¹²⁹ *Dep’t of Enforcement v. Ghosh*, No. 2016051615301, 2021 FINRA Discip. LEXIS 32, at *31 (NAC Dec. 16, 2021); *Dep’t of Enforcement v. Connors*, No. 2012033362101, 2017 FINRA Discip. LEXIS 2, at *15-16 (NAC Jan. 10, 2017).

¹³⁰ *Ghosh*, 2021 FINRA Discip. LEXIS 32, at *51; *Connors*, 2017 FINRA Discip. LEXIS 2, at *32.

¹³¹ *Ghosh*, 2021 FINRA Discip. LEXIS 32, at *39.

¹³² *Accord Dep’t of Enforcement v. Taboada*, No. 2012034719701, 2017 FINRA Discip. LEXIS 29, at *29 (NAC July 24, 2017), *appeal dismissed*, Exchange Act Release No. 82970, 2018 SEC LEXIS 823 (Mar. 30, 2018).

¹³³ *Dep’t of Enforcement v. Seol*, No. 2014039839101, 2019 FINRA Discip. LEXIS 9, at *36-37 (NAC Mar. 5, 2019) (“A violation of FINRA Rule 3270 constitutes a violation of FINRA Rule 2010”).

¹³⁴ Compl. ¶ 41.

¹³⁵ Compl. ¶ 43.

¹³⁶ CX-15, at 30; Tr. 108-09, 338-39.

¹³⁷ Tr. 340-41.

¹³⁸ CX-34, at 1; CX-35, at 2.

¹³⁹ CX-52, at 29; Tr. 459-60.

that he participated in managing the company, and that he received compensation from the company.

2. West Avenue

When Netto read the confidential offering circular for the Sacramento Property securities offering, he knew the offering was presented by West Avenue.¹⁴⁰ Netto knew the address of West Avenue was the same as the Mora WM branch where he and Weiss worked.¹⁴¹

The Case Manager admits, however, there is no evidence Netto took any steps to further the interests of West Avenue.¹⁴² Netto did not sign any documents showing he was a manager of West Avenue, and there is no document showing he knew he was identified as a manager.¹⁴³ He did not know that corporate organization documents for the company had been filed.¹⁴⁴ The first time he saw such documents was after the purchase of the Sacramento Property.¹⁴⁵ The corporate organization documents do not say he owned any portion of the company.¹⁴⁶ He testified that he was never an owner.¹⁴⁷ Netto did not receive a Form K-1 for West Avenue.¹⁴⁸

3. Younger Creek 36 Holdings

The confidential offering circular that Netto read identified Younger Creek 36 Holdings as the administrator of the Sacramento Property.¹⁴⁹ Upon reading the Promissory Note, Netto knew AP was a manager of Younger Creek 36 Holdings.¹⁵⁰ The Case Manager admits, however, that there is no evidence Netto knew Sendero was a manager of this company.¹⁵¹ There is no evidence that Netto was aware of Younger Creek 36 Holdings at the time the company's articles of organization were filed.¹⁵² There is no indication in the corporate organization documents that Sendero was an owner of Younger Creek 36 Holdings.¹⁵³ There is no evidence that Netto owned

¹⁴⁰ CX-25, at 5.

¹⁴¹ CX-25, at 21.

¹⁴² Tr. 155.

¹⁴³ Tr. 226-27.

¹⁴⁴ Tr. 530.

¹⁴⁵ Tr. 364.

¹⁴⁶ CX-17; Tr. 151-52, 225-26.

¹⁴⁷ Tr. 531-32.

¹⁴⁸ Tr. 552-53.

¹⁴⁹ CX-25, at 19.

¹⁵⁰ CX-29, at 8.

¹⁵¹ Tr. 204-05.

¹⁵² Tr. 202-03.

¹⁵³ CX-20; Tr. 203.

any portion of Younger Creek 36 Holdings.¹⁵⁴ Netto did not receive a Form K-1 for Younger Creek 36 Holdings.¹⁵⁵

4. Younger Creek 36

Netto received \$75,000 in compensation that originated from Younger Creek 36.¹⁵⁶ But the Case Manager admits the corporate organization documents for Younger Creek 36 do not bear Netto's name or signature.¹⁵⁷ There is no evidence he knew of or participated in managing this company.¹⁵⁸ There is nothing in the record to indicate he had any ownership in Younger Creek 36.¹⁵⁹ Netto did not receive a Form K-1 for Younger Creek 36.¹⁶⁰

5. Summary

In sum, the Hearing Panel finds Netto had ownership and a beneficial interest in Sendero and that he was employed by and participated in the management of this company in his corporate positions. Netto received compensation from Sendero and Younger Creek 36 in the form of his \$75,000 share of the \$238,000 advisory fee. He violated FINRA Rules 3270 and 2010 when he failed to disclose to Mora WM his involvement with Sendero and his receipt of \$75,000 in compensation from Sendero and Younger Creek 36. In contrast, he did not have ownership or a beneficial interest in West Avenue or Younger Creek 36 Holdings, he did not participate in the management of these companies, and he did not receive compensation or have the reasonable expectation of receiving compensation from these companies. Netto did not violate FINRA Rules 3270 or 2010 when he failed to disclose West Avenue and Younger Creek 36 Holdings to Mora WM.

The Hearing Panel's determinations of whether Netto violated FINRA Rules 3270 and 2010 regarding the specific OBAs alleged by Enforcement presume that a registered person must know of his involvement in an OBA before he is required to disclose it. In Netto's case, because he knew he had ownership and a beneficial interest in Sendero, and knew he had management positions in this company, he had a duty to disclose it. Because he knew he had received a \$75,000 share of the \$238,000 advisory fee originating from Younger Creek 36, he was obligated to disclose this fee and its origin. Conversely, because Netto did not know of any interest or position he had in West Avenue or Younger Creek 36 Holdings (direct or indirect), these were not OBAs he had a duty to disclose.

¹⁵⁴ Tr. 205-06.

¹⁵⁵ Tr. 553.

¹⁵⁶ CX-34, at 1; CX-35, at 2.

¹⁵⁷ Tr. 198-99; CX-18.

¹⁵⁸ Tr. 199.

¹⁵⁹ Tr. 199-200.

¹⁶⁰ Tr. 553.

6. Netto's Defenses

Netto asserts as an affirmative defense that FINRA Rule 3270 exempts passive investments from the requirement to disclose an OBA to the employer firm.¹⁶¹ However, Netto admits he did not know that passive investments were exempt from FINRA Rule 3270.¹⁶²

The Hearing Panel finds the passive investment exemption does not apply to Netto's participation in Sendero and his receipt of \$75,000 in compensation from Sendero and Younger Creek 36. To determine whether Netto made a passive investment in Sendero or Younger Creek 36, we turn for guidance to the definition of "investment contract" that the United States Supreme Court formulated in *SEC v. W.J. Howey Co.*¹⁶³ There, the Supreme Court held that an investment is a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment."¹⁶⁴ Here, there is no evidence Netto placed any capital or laid out any money to be employed in Sendero. This company had no operations from which to generate a return on investment. Instead, Sendero served as a corporate conduit for receiving funds from third parties and distributing the funds to Netto and Weiss. Younger Creek 36 paid Netto his share of an advisory fee—not a dividend or return on investment.

In any event, Netto's participation in Sendero and Younger Creek 36 was more than passive. Netto decided that West Hill Bond Fund would invest \$800,125 in the Promissory Note, for which the payor was Younger Creek 36.¹⁶⁵ He executed the sales of the corporate bonds to generate the funds needed to make the investment. He took the steps necessary to make the wire transfer of the funds to Younger Creek 36. Ten days later, Netto received his \$75,000 share of a \$238,000 advisory fee that originated from Younger Creek 36 and passed through Sendero.

Netto contends *Enforcement* had the burden of proving that the passive investment exemption to FINRA Rule 3270 was unavailable to him. But a general rule of statutory construction is that the burden of proving an exemption to a statute or rule rests on the one who claims the exemption's benefits.¹⁶⁶ In addition, even if *Enforcement* had the burden of proof, there is more than enough evidence showing the exemption for passive investments is not

¹⁶¹ Ans., First Affirmative Defense.

¹⁶² Tr. 555.

¹⁶³ *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

¹⁶⁴ *Id.* at 298 (quoting *State v. Gopher Tire & Rubber Co.*, 177 N.W. 937, 938 (Minn. 1920)).

¹⁶⁵ Tr. 409.

¹⁶⁶ *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("the general rule of statutory construction, that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits, requires that respondent undertake this proof"); see *Dep't of Enforcement v. Spencer Edwards, Inc.*, No. 2013035865303, 2019 FINRA Discip. LEXIS 56, at *14 (NAC Dec. 10, 2019) ("Exemptions from the registration requirements of the Securities Act are affirmative defenses that must be established by the person claiming the exception").

available. Contributing a customer's investment funds to a real estate venture and receiving a share of an advisory fee paid by that same venture are not things a passive investor does.

Netto also contends he did not violate FINRA Rules 3270 and 2010 because Mora WM learned of Sendero's existence through means other than Netto, when the firm conducted an online investigation of Sendero. FINRA Rule 3270, however, requires that the prior written notice of an OBA be "in such form as specified by the member." Mora WM's WSPs required that an employee seeking approval to engage in an OBA "must complete the Outside Business Activity form and submit it to Compliance."¹⁶⁷ Netto never submitted to Compliance an Outside Business Activity form requesting approval to engage in the business of Sendero. At no time did Mora WM approve Netto's activity with Sendero.¹⁶⁸

* * * *

The Hearing Panel finds Netto's asserted defenses do not shield him from liability for failure to disclose Sendero and the receipt of his \$75,000 share of the advisory fee from Sendero and Younger Creek 36. Netto violated FINRA Rules 3270 and 2010 by engaging in two OBAs without giving Mora WM written notice, as alleged in the first cause of action. In contrast, Enforcement failed to meet its burden of proving West Avenue and Younger Creek 36 Holdings were OBAs that Netto was required to disclose.

B. Netto Made a False and Inaccurate Statement in His Annual Compliance Certification, in Violation of FINRA Rule 2010

In the second cause of action, Enforcement charges Netto with violating FINRA Rule 2010 by submitting to Mora WM an annual compliance certification that was false and inaccurate because Netto failed to disclose his ownership of Sendero and West Avenue.¹⁶⁹ FINRA Rule 2010 applies to all business-related misconduct even if it does not involve securities or a securities transaction.¹⁷⁰ The Rule prohibits misconduct that reflects poorly on an associated person's ability to comply with the regulatory requirements of the securities business and to fulfill his fiduciary duties in handling other people's money.¹⁷¹ The Rule requires that an associated person truthfully disclose material information to his employer firm.¹⁷² An associated

¹⁶⁷ CX-10, at 24.

¹⁶⁸ Tr. 346-47.

¹⁶⁹ Compl. ¶ 48.

¹⁷⁰ *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, at *31 (Feb. 7, 2020), *petition for review dismissed in part and denied in part*, 989 F.3d 4 (D.C. Cir. 2021).

¹⁷¹ *Keilen Dimone Wiley*, Exchange Act Release No. 76558, 2015 SEC LEXIS 4952, at *15 (Dec. 4, 2015), *petition for review denied*, 663 F. App'x 353 (5th Cir. 2016).

¹⁷² *Dep't of Enforcement v. Kielczewski*, No. 2017054405401, 2021 FINRA Discip. LEXIS 22, at *26 (NAC Sept. 30, 2021), *appeal docketed*, No. 3-20636 (SEC Oct. 27, 2021).

person's misstatements on his employer firm's annual compliance certification violate FINRA Rule 2010.¹⁷³

On January 4, 2018, Netto submitted to Mora WM an annual compliance certification. In that certification, Netto failed to identify his 50 percent ownership interest and officer positions in Sendero. But there is no evidence he knew of the existence of West Avenue, or that he knew he was an officer, director, or employee of this company. There is no document in the record showing he was an owner of West Avenue.¹⁷⁴ For these reasons, the Hearing Panel finds Netto violated FINRA Rule 2010 when he failed to disclose Sendero in his annual compliance certification, as alleged in the second cause of action. Furthermore, the Hearing Panel finds that Enforcement failed to meet its burden of proving Netto violated FINRA Rule 2010 for his failure to disclose West Avenue, because there is no evidence he had ownership of that company or knew of its existence.

IV. Sanctions

According to FINRA's Sanction Guidelines ("Guidelines"), the purpose of the disciplinary process is to protect the investing public, support and improve overall business standards in the securities industry, and decrease the likelihood of recurrence of misconduct by the disciplined respondent.¹⁷⁵ The Guidelines contain General Principles Applicable to All Sanction Determinations, Principal Considerations in Determining Sanctions, and Guidelines applicable to specific violations.

The imposition of a unitary, aggregated sanction may be appropriate where the respondent's violations stem from related misconduct.¹⁷⁶ Here, the Hearing Panel decides it is appropriate to aggregate the two causes of action of the Complaint for sanction purposes and to impose a single sanction on Netto for these aggregated causes of action. We find Netto's violations derived from the same underlying problem and arose from a continuous, related course of misconduct.¹⁷⁷

¹⁷³ *Dep't of Enforcement v. Laverty*, No. 2016050205901, 2020 FINRA Discip. LEXIS 47, at *20 (NAC Dec. 22, 2020).

¹⁷⁴ Tr. 225-26.

¹⁷⁵ FINRA Sanction Guidelines ("Guidelines") at 2 (Oct. 2021) (General Principle No. 1), <https://www.finra.org/sanctionguidelines>.

¹⁷⁶ *Dep't of Enforcement v. McNamara*, No. 2016049085401, 2019 FINRA Discip. LEXIS 29, at *30 (NAC July 30, 2019); *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *55-56 (NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927 (Sept. 24, 2015).

¹⁷⁷ *Dep't of Enforcement v. Silver Leaf Partners, LLC*, No. 2014042606902, 2020 FINRA Discip. LEXIS 36, at *72 (NAC June 29, 2020), *appeal docketed*, No. 3-19896 (SEC July 28, 2020).

A. Outside Business Activities

The Sanction Guideline for Outside Business Activities recommends a fine of \$2,500 to \$77,000.¹⁷⁸ As for a suspension, bar, or other sanction, adjudicators should consider suspending the respondent for a period of 10 business days to three months.¹⁷⁹ When the outside business activity involves aggravating factors, adjudicators should consider a suspension of three months up to one year.¹⁸⁰ Where aggravating factors predominate, adjudicators should consider a suspension of one to two years or a bar.¹⁸¹

The considerations specific to this Guideline are:

- Whether the outside activity involved customers of the firm.
- Whether the outside activity resulted directly or indirectly in injury to other parties, including the investing public and, if so, the nature and extent of the injury.
- The duration of the outside activity, the number of customers and the dollar volume of sales.
- Whether the respondent's marketing and sale of the product or service could have created the impression that the employer firm had approved the product or service.
- Whether the respondent misled the employer firm about the existence of the outside business activity or otherwise concealed the activity from the firm.
- The importance of the role played by the respondent in the outside business activity.¹⁸²

B. False and Inaccurate Statements to the Employer Firm

There is no Sanction Guideline applicable to a respondent's false and inaccurate statements to his employer firm in violation of FINRA Rule 2010. If the Sanction Guidelines do not specifically address the violation committed, adjudicators should consider the most closely analogous Guideline.¹⁸³ The National Adjudicatory Council has found that the Guideline for

¹⁷⁸ Guidelines at 13.

¹⁷⁹ Guidelines at 13.

¹⁸⁰ Guidelines at 13.

¹⁸¹ Guidelines at 13.

¹⁸² Guidelines at 13.

¹⁸³ *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *44 (Aug. 12, 2016), *petition for review denied*, 719 F. App'x 724 (9th Cir. 2018).

Forgery, Unauthorized Use of Signatures or Falsification of Records is the analogous Guideline to apply to a false or inaccurate statement in an employer firm's annual compliance certification.¹⁸⁴

The Sanction Guideline for Forgery, Unauthorized Use of Signatures or Falsification of Records recommends, for signatures or falsifications involving a transaction, if the transaction is authorized, without other violations or customer harm, a fine of \$5,000 to \$11,000.¹⁸⁵ When a respondent affixes a signature to or falsifies a document without authorization, in the absence of other violations or customer harm, adjudicators should assess a fine of \$5,000 to \$155,000.¹⁸⁶ As for a suspension, bar, or other sanction, for signatures or falsifications involving a transaction, if the transaction is authorized, in the absence of other violations or customer harm, adjudicators should consider suspending the respondent for a period of 10 business days to six months.¹⁸⁷ Where a respondent affixes a signature to or falsifies a document without authorization or ratification, in the absence of other violations or customer harm, adjudicators should consider suspending the respondent for two months to two years.¹⁸⁸ When a respondent affixes a signature to or falsifies a document without authorization, in furtherance of another violation, resulting in customer harm or accompanied by significant aggravating factors, a bar is standard.¹⁸⁹

The considerations specific to this Guideline are:

- Nature of the document(s) signed or falsified.
- Whether the respondent has a good-faith, but mistaken, belief of express or implied authority.
- Whether the customer possessed or saw the document before the customer's signature was affixed to it, and the customer affirmed the signature.
- If the document pertained to a transaction, whether the transaction was agreed to by an authorized person.
- Whether the customer re-signed the document or ratified the signature.¹⁹⁰

¹⁸⁴ *Seol*, 2019 FINRA Discip. LEXIS 9, at *46 n.34.

¹⁸⁵ Guidelines at 37.

¹⁸⁶ Guidelines at 37.

¹⁸⁷ Guidelines at 37.

¹⁸⁸ Guidelines at 37.

¹⁸⁹ Guidelines at 37.

¹⁹⁰ Guidelines at 37.

C. Aggravating and Mitigating Factors

The Hearing Panel finds both aggravating and mitigating factors present in this case.

Netto's violations of FINRA Rules involved several aggravating factors. Netto's participation in Sendero and Younger Creek 36 affected a customer of Mora WM—namely, West Hill Bond Fund.¹⁹¹ His recommendation to West Hill Bond Fund to invest in the Promissory Note led to the loss of \$800,125.¹⁹² He concealed Sendero from Mora WM when he failed to disclose this OBA in his annual compliance certification.¹⁹³ Netto played an important role in Sendero and Younger Creek 36 by facilitating West Hill Bond Fund's investment of \$800,125 that was used toward the purchase of the Sacramento Property.¹⁹⁴

Netto failed to accept responsibility for or acknowledge his misconduct.¹⁹⁵ Netto acted intentionally when he failed to disclose the receipt of his \$75,000 share of the \$238,000 advisory fee from Younger Creek 36.¹⁹⁶ Netto's nondisclosure enabled him to obtain personal financial benefit.¹⁹⁷

The Hearing Panel also weighs mitigating factors presented in this case. With regard to these mitigating factors, Netto's testimony in the hearing was credible and uncontradicted by other evidence. Netto's testimony, the testimony of Mora WM's Chief Compliance Officer, and the documentary evidence show that Weiss, not Netto, was the driving force behind the participation of Netto and Weiss in the Sacramento Property transaction—a transaction principally handled by two other individuals, FC and AP. Netto's participation was secondary to Weiss's.

Enforcement proved no more than that: (1) Netto was at one lunch at which the business opportunity presented by the Sacramento Property was briefly discussed; (2) Netto

¹⁹¹ Guidelines at 13 (Specific Consideration No. 1: Whether the outside activity involved customers of the firm).

¹⁹² Guidelines at 7 (Principal Consideration No. 11: With respect to other parties, including the investing public, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury); Guidelines at 13 (Specific Consideration No. 2: Whether the outside activity resulted directly or indirectly in injury to other parties and, if so, the nature and extent of the injury).

¹⁹³ Guidelines at 7 (Principal Consideration No. 10: Whether the respondent attempted to conceal his misconduct or to lull into inactivity, mislead, or deceive the member firm with which he was associated); Guidelines at 13 (Specific Consideration No. 5: Whether the respondent misled his employer firm about the existence of the outside activity or otherwise concealed the activity from the firm).

¹⁹⁴ Guidelines at 13 (Specific Consideration No. 6: The importance of the role played by the respondent in the outside business activity).

¹⁹⁵ Guidelines at 7 (Principal Consideration No. 2: Whether the respondent accepted responsibility for and acknowledged the misconduct to his employer prior to detection and intervention by the firm).

¹⁹⁶ Guidelines at 8 (Principal Consideration No. 13: Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence).

¹⁹⁷ Guidelines at 8 (Principal Consideration No. 16: Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

recommended that West Hill Bond Fund invest in the Promissory Note; and (3) after the purchase of the Sacramento Property, Netto received a \$75,000 share of an advisory fee that had been earned by Weiss. In the one-year interval from the lunch to the Promissory Note, Netto did nothing to further the Sacramento Property transaction. He did nothing after the Promissory Note. West Avenue, Younger Creek 36 Holdings, and Younger Creek 36 were formed without his knowledge. He testified that Weiss did not inform him of the advisory fee before West Hill Bond Fund invested in the Promissory Note,¹⁹⁸ and Enforcement offered no evidence to contradict his statement. Netto learned of the advisory fee at around the time it was paid.

Based on the foregoing, the Hearing Panel's balancing of aggravating and mitigating factors weighs in favor of imposing sanctions on Netto at the lower range of the recommended Sanction Guidelines. For Netto's violations of FINRA Rules 3270 and 2010, the Hearing Panel imposes a \$10,000 fine on Netto and suspends him from associating in any capacity with any FINRA member firm for four months.

D. Disgorgement

Enforcement requests that the Hearing Panel order Netto to disgorge his share of the \$238,000 advisory fee from Younger Creek 36. The Sanction Guidelines provide that when the record shows a respondent obtained a financial benefit from his misconduct, adjudicators may require disgorgement of some or all of that financial benefit.¹⁹⁹ Disgorgement serves to remedy violations of FINRA Rules by depriving violators of the fruits of their misconduct.²⁰⁰ The amount of disgorgement must be a reasonable approximation of profits causally connected to the violation.²⁰¹ When disgorgement is imposed, prejudgment interest is usually assessed, calculated at the rate in Section 6621(a)(2) of the Internal Revenue Code.²⁰²

There is a dispute over the amount of money Netto received from Sendero and Younger Creek 36 as his share of the \$238,000 advisory fee. Enforcement contends Netto should be bound by the admission in his Answer that he received \$119,000.²⁰³ Netto contends the documentary evidence shows he received only \$75,000. The Hearing Panel finds that a reasonable approximation of Netto's financial benefit from his FINRA Rule violations is \$75,000. According to federal case law, if a party contends that an admission was due to fraud or

¹⁹⁸ Tr. 543, 554-55.

¹⁹⁹ Guidelines at 5 (General Principle No. 6: "To remediate misconduct, Adjudicators should consider a respondent's ill-gotten gain when determining an appropriate remedy").

²⁰⁰ *Dep't of Enforcement v. William H. Murphy & Co.*, No. 2012030731802, 2018 FINRA Discip. LEXIS 24, at *80 (NAC Oct. 11, 2018), *remanded*, Exchange Act Release No. 90759, 2020 SEC LEXIS 5218 (SEC Dec. 21, 2020).

²⁰¹ *Springsteen-Abbott*, 2020 SEC LEXIS 2684, at *40.

²⁰² 26 U.S.C. § 6621(a)(2).

²⁰³ *See Ans.* ¶ 29.

mistake, the admission may not be binding.²⁰⁴ Netto's admission in his Answer was a mistake he made when he did not have the relevant bank records in front of him. Enforcement's Case Manager testified that, after Netto and Weiss received \$75,000 each, the rest of the \$238,000 remained in West Hill Realty:

The document [a bank account statement] shows that \$238,000 going to [Sendero] that Mr. Netto and Mr. Weiss owned 50/50. They each, they meaning Mr. Weiss and Mr. Netto, appears as though used 75,000 apiece to take care of personal whatever they were through their personal interest and bank accounts and the remainder stayed in the business that they also owned.²⁰⁵

Because the remainder of the \$238,000 advisory fee "stayed in the business," the Hearing Panel determines it is better to take a conservative approach and focus on the \$75,000 share that Netto received. The requirement that the amount of disgorgement be a reasonable approximation of a respondent's financial benefit would be undermined if we ordered Netto to disgorge funds he did not receive.²⁰⁶

For the above reasons, and for Netto's violation of FINRA Rules 3270 and 2010 as alleged in the first cause of action, the Hearing Panel orders Netto to disgorge his \$75,000 share of the \$238,000 advisory fee that he received from Sendero and Younger Creek 36. We also order that Netto pay interest on the \$75,000 disgorgement amount, accruing from March 23, 2018 (the date he received the disgorgement amount) until paid in full.

V. Order

The Hearing Panel orders that, for violating FINRA Rules 3270 and 2010 by engaging in two OBAs without providing prior written notice to his employer firm, and for violating FINRA Rule 2010 by giving a false and inaccurate answer on his annual compliance certification, Respondent Jorge Netto is fined \$10,000 and suspended from associating with any FINRA member firm in any capacity for four months. Netto is ordered to pay disgorgement in the amount of \$75,000 plus prejudgment interest on the unpaid balance from March 23, 2018 until paid in full. The prejudgment interest shall be calculated at the rate in Section 6621(a)(2) of the Internal Revenue Code. Also, Netto shall pay the hearing costs of \$7,770.62, consisting of a \$750 administrative fee and \$7,020.62 for the cost of the transcript.

If this decision becomes FINRA's final disciplinary action, the suspension shall become effective with the opening of business on Monday, August 1, 2022 and end at the close of

²⁰⁴ *Marathon Enters. v. Schroter GmbH & Co.*, No. 01 Civ. 0595 (DC), 2003 U.S. Dist. LEXIS 2274, at *11 (S.D.N.Y. Feb. 13, 2003).

²⁰⁵ Tr. 207.

²⁰⁶ While comparisons to sanctions in settled cases are usually inappropriate, the Hearing Panel takes note that Weiss, in the same facts and circumstances as Netto, entered into an Acceptance, Waiver and Consent in which he was not required to pay any amount of disgorgement. CX-53, at 4.

business on Wednesday, November 30, 2022. The disgorgement and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.²⁰⁷



Richard E. Simpson
Hearing Officer
For the Hearing Panel

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²⁰⁷ The Hearing Panel has considered and rejects without discussion all other arguments of the parties.