BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

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| In the Matter of<br><br>Department of Enforcement,<br><br>Complainant,<br><br>vs.<br><br>Robert R. Tweed<br>San Marino, CA,<br><br>Respondent. | Decision<br><br>Complaint No. 2015046631101<br><br>Dated: December 11, 2019 |

**Registered person negligently misrepresented and omitted material facts in connection with the offer and sale of interests in a private investment fund. Held, findings affirmed and sanctions modified.**

## Appearances

For the Complainant: Leo F. Orenstein, Esq., Andrew Boldt, Esq., Dale Glanzman, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Robert I. Rabinowitz, Esq., Sarah Klein, Esq.

## Decision

Robert R. Tweed appeals a July 5, 2018 Extended Hearing Panel decision pursuant to FINRA Rule 9311. The Extended Hearing Panel (the "Hearing Panel") found that Tweed negligently misrepresented and failed to disclose material facts in connection with the sale of interests in Athenian Fund, L.P. ("Athenian"), a private investment fund that he controlled, and that he engaged in a course of conduct that operated as a fraud or deceit on Athenian's investors. The Hearing Panel found that, between November 2009 and March 2010, Tweed misrepresented or failed to disclose (1) all of the fees and expenses associated with an investment in Athenian; (2) his right to receive a portion of those fees and expenses; and (3) how Athenian would invest its assets, and who would have control over them. For these violations, the Hearing Panel barred Tweed from associating with any FINRA member in any capacity and fined him $50,000.

Tweed appeals only the Hearing Panel's findings that this disciplinary proceeding was timely and the sanctions it imposed.

After reviewing the record, we affirm the Hearing Panel's findings of violation and the all-capacities bar. In light of the bar, we do not impose any fine.

I. Factual Background

A. Tweed and Athenian

Tweed entered the securities industry in 1993 and has been associated with several FINRA member firms since. Between November 2009 and March 2010, when the alleged violations occurred, Tweed was registered with CapWest Securities, Inc., as a general securities principal and general securities representative. During that time, Tweed also owned and controlled an investment advisor, Tweed Financial, Inc.

Tweed formed Athenian as a Delaware limited partnership in 2008. Up until then, Tweed's business had focused mainly on real estate-based investments. When the real estate market began to decline, however, Tweed said he "decided to get into some more managed money, that kind of area, and that's when [he] came up with the idea [of] getting into doing managed money like the Athenian Fund." Tweed had no experience forming or managing a private investment fund. Still, he made Tweed Financial Athenian's general partner. Through his control of Tweed Financial, Tweed controlled Athenian.

CapWest approved Tweed's involvement in Athenian. Tweed testified that he "had to run all the [Athenian sales] transactions" through CapWest, and "the [completed] subscription agreements had to be okayed by their [office of supervisory jurisdiction]."

B. Tweed Decides to Invest Athenian's Assets in a Master Fund

Tweed testified that when he formed Athenian, he had been following the progress of a company called Portfolio Management International, Inc. ("PMI"), for several years. PMI and its manager, BH (the "PMI Manager"), had developed a proprietary, algorithmic trading system (the "PMI System") that Tweed described as the "holy grail." PMI claimed its system could trade equities and produce "superior returns" with "substantially reduced risk." Tweed testified that he wanted to "figure out a way to structure [Athenian] in a way that would work" so Athenian could raise money from investors and PMI could manage it using the PMI System.

Rather than managing Athenian's assets directly, PMI wanted Tweed to invest them in PMI's own private investment fund. According to Tweed, he planned to raise about $5 million for Athenian, but PMI "wanted a much bigger amount of money to work with[.]" PMI suggested a structure in which several smaller private investment funds, like Athenian, would invest their assets in a larger fund that PMI would manage using the PMI System. In this arrangement, the smaller funds would be the "feeder" funds and PMI's fund would be the "master" fund.

PMI formed its master fund, PMI Quant Pool I, LLC ("Quant Pool"), as a Utah limited liability company in August 2009. PMI was Quant Pool's managing member. Quant Pool's offering documents stated that investors would pay PMI a monthly management fee at an annualized rate of five percent of the value of their investments in the fund. In or around November 2009, Tweed agreed to invest Athenian's assets in Quant Pool.[1]

Tweed hired an attorney, HT (the "Athenian Attorney"), to serve as Athenian's legal counsel in connection with the offering of Athenian interests. The Athenian Attorney held herself out as an expert in the area of private investment funds.

C. The Athenian Attorney Drafts the Athenian Private Placement Memorandum

The Athenian Attorney completed the offering documents for Athenian, including a private placement memorandum ("PPM") and a partnership agreement, in November 2009. The PPM described in detail how Athenian's assets would be invested in Quant Pool and managed by PMI using the PMI System. The PPM stated that Athenian "was formed to pool investment funds of its investors . . . for the purpose of allocating one hundred percent (100%) of [its] assets to PMI Quant Pool 1, LLC . . . promoted and operated by Portfolio Manager International, LLC, a Utah limited liability company." It further stated that Quant Pool's "competitive advantage" was "based on use of a quantitative trading platform that acts to actively manage the long and short side price cycles in each of the approximately 150 highly liquid securities which collectively make up [Quant Pool's] investment portfolio." The PPM identified the PMI Manager as "the managing member and controlling principal" of PMI. It touted the PMI Manager's experience as an "entrepreneur . . . at the forefront of technology for the past 25 years," and described him as "uniquely qualified to operate a quantitative trading system."

As for fees, the Athenian PPM stated that investors would pay a management fee and a "performance allocation." Investors would pay the management fee monthly at an annualized rate of three-and-a-half percent of the value of their investments in Athenian, and would pay the performance allocation quarterly based on the profitability of their investments compared with a common stock market index. The PPM stated that Tweed Financial and PMI would share the management fee and performance allocation, with PMI receiving "[t]wo-thirds (2.5%)" of the management fee and half of the performance allocation, and Tweed Financial receiving the rest.

Tweed began using the Athenian offering documents to solicit investors in late 2009. Tweed testified that he explicitly represented to prospective investors that an investment in Athenian would be highly liquid. One Athenian investor testified that Tweed told him and his wife that an investment in Athenian "counted as cash . . . because the money could be withdrawn whenever we needed it."

The first two investors in Athenian were Tweed and his stepson, CM, who invested $65,000 and $50,000, respectively. By January 28, 2010, Tweed had raised $968,500 from 14 investors (including himself and his stepson).

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1 Athenian had not yet raised any money from investors.

D. Athenian's Master Fund Dissolves

On January 29, 2010, the PMI Manager informed Tweed that PMI was dissolving Quant Pool. Tweed believed the dissolution was because of a regulatory problem the Athenian Attorney identified earlier that month. According to Tweed, the Athenian Attorney told him there was a "licensing" issue with PMI, and recommended that Tweed withdraw Athenian's money from the fund. Tweed conveyed this information to the PMI Manager, and PMI decided to dissolve Quant Pool shortly afterwards. PMI returned all of Athenian's capital.

Tweed kept using the original Athenian PPM to solicit investors after he learned Quant Pool was dissolving. Between January 30, 2010, and March 7, 2010, Tweed raised another $219,000 from four investors.

E. Tweed Invests Athenian's Assets in a New Master Fund

When the PMI Manager told Tweed Quant Pool was dissolving, he also told him that a new master fund to replace it already was in the works. In an email to Tweed, the PMI Manager wrote that the new master fund would not be managed by PMI. Instead, it would be managed by a person named Eric Richardson. PMI, however, "would be given third party trading authorization to trade the fund" using the PMI System.

Tweed testified he was concerned when he learned Richardson was involved in the new master fund. Tweed said he had met Richardson several times. Although Richardson was registered with a FINRA member firm and had no disciplinary history, Tweed knew that he had business dealings with a person named Chris Hales. Tweed explained that he had "heard a few rumors" about Hales, that he had "r[u]n into" him "socially," and that he "didn't really like him." When asked whether Hales "was a person that you would not want connected to the manager of a fund that you were going to invest in," Tweed responded, "There was definitely a question there."[2]

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[2] Tweed's concerns about Hales and Richardson were well founded. In March 2010, Hales was indicted on federal charges of mail fraud, wire fraud, bank fraud, and money laundering in connection with fraudulent purchases of real estate. He eventually pleaded guilty to bank fraud and was sentenced to seven years in prison and ordered to pay $12.7 million in restitution. In May 2012, the U.S. Commodity Futures Trading Commission sued Richardson, Hales, and their company, Bentley Equities, LLC, in federal court alleging fraud and misappropriation in connection with commodity futures trading. The CFTC alleged that, from April 2009 through August 2010, the defendants fraudulently solicited and accepted more than $1 million from investors to trade commodity futures in a commodity pool account and in individual managed accounts. The court entered an order for more than $2.7 million in disgorgement and civil and monetary penalties against Bentley Equities, Hales, and Richardson. In July 2012, Richardson pleaded guilty to one count of bank fraud in connection with his and Hales's involvement in a scheme in February 2010 to obtain fraudulent automobile loans. There is no evidence in the record that Tweed was aware of this misconduct before 2012, or that any of this misconduct was related to Athenian or either of its master funds.

The PMI Manager was aware of Tweed's concerns about Richardson and tried to assuage them. In his email to Tweed, the PMI Manager wrote that he knew Tweed "had some questions about Eric [Richardson], but . . . I have been working closely with Eric over the past several weeks and have great confidence in his abilities. He has disconnected from Chris Hales and expressed his desire to be part of the PMI team."

Tweed testified that he considered hiring PMI to trade Athenian's assets directly rather than investing them in Richardson's new master fund. To do so, however, Tweed needed to open a brokerage account for Athenian at a particular broker-dealer, TS. According to Tweed, PMI told him that TS offered faster execution times and lower fees than other broker-dealers, and that the PMI System would not function properly on any other firm's platform. In early February 2010, Tweed's assistant applied to open an account for Athenian at TS, but TS rejected the application due to pending customer arbitrations against Tweed.

In late February, Tweed decided to move forward with an investment in Richardson's new master fund, Quantitative Analytics Master Fund, LLC ("QAMF"). When asked at the hearing whether, by that time, he had done anything to verify that Richardson had "disconnected" from Hales, Tweed replied, "I mean, I talked to—you know what? I don't remember exactly." When asked whether he had talked to Hales, Tweed replied, "No." When asked whether he had talked to Richardson about Hales, Tweed replied, "I don't remember." [3]

On February 26, 2010, Richardson sent an email to Tweed, Tweed's assistant, and the PMI Manager attaching QAMF's offering documents. QAMF's offering documents stated that the fund would be managed by the investment advisor Richardson controlled, Richardson Performance Management and Investments Company LLC ("RPM"). It further stated that it was "highly likely and anticipated that most of [QAMF's] capital will be dedicated to the [PMI System] operated by [PMI]." As for fees, QAMF's offering documents stated that investors would pay RPM a monthly management fee at an annualized rate of three-and-a-half percent of the value of their investments in QAMF and a quarterly performance allocation based on the profitability of their investments compared with a common stock market index.

The next business day, Tweed's assistant sent an email to the Athenian Attorney attaching QAMF's offering documents. In her email, Tweed's assistant wrote, "Rusty [Tweed] is requesting more revisions. We were not able to open our own account at [TS], so we[']re now part of the enclosed feeder [sic] fund that already has an account established with [TS]."

Sometime between March 4 and March 8, 2010, Tweed executed QAMF's subscription agreement on Athenian's behalf. Around that time, Tweed also executed a "Consulting, Side and Advisory Agreement" with RPM (the "Consulting Agreement"). Under the Consulting Agreement, in exchange for investing Athenian's assets in QAMF, Tweed Financial would

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[3] Despite his concerns about Richardson, it appears that Tweed's diligence on Richardson was limited to reviewing his BrokerCheck report. In his reply brief on appeal, Tweed states that he relied on his assistant to conduct due diligence on Richardson. During the hearing, Tweed testified that he "had [his assistant] pull his records and stuff . . . but the guy [Richardson] had a spotless track record for his, you know, 15 years in the industry."

receive "Success Fee Compensation equal to forty-five percent (45%) of net proceeds received by" RPM as a result of Athenian's investment.

Tweed kept using the original Athenian PPM to solicit new investors after he began investing Athenian's assets in QAMF. Between March 8, 2010, and March 24, 2010, Tweed raised another $513,000 from six investors. By the end of March 2010, Tweed had raised a total of $1,700,500 from 24 investors (including himself and his stepson). Tweed invested all of that money in QAMF. Athenian was QAMF's largest investor and its only outside investor.[4]

F. Athenian's New Master Fund Cannot Return Athenian's Capital

In early May 2010, Tweed learned that PMI had stopped trading QAMF's capital because of a problem with the PMI System. In an email to Tweed, PMI wrote that the system "needed to be recalibrated to trade a more volatile and unpredictable market[.]" All of the securities in QAMF's account were liquidated.

In May or June 2010, Richardson told Tweed that he had placed some of QAMF's cash in a "credit facility" so it could earn interest while they waited for PMI to resume trading in QAMF's account. Tweed said he assumed the credit facility was a short-term, liquid investment through a bank, but admitted he did nothing to verify his assumption—he did not review the credit facility contract or any other documents relating to the transaction.

Around this time, Tweed decided to redeem his entire investment in Athenian. In late June 2010, Tweed asked Richardson to return $165,000 of Athenian's investment in QAMF. Richardson returned the money, and Tweed used it to fully redeem his investment ($65,000) and the investments of two other investors ($50,000 each). Tweed testified that he needed his money back because his "business had just dropped off dramatically," and he needed to "pay expenses and things at that point." Tweed said the other two investors had contacted him, unsolicited, and requested redemptions.

By September 2010, PMI still had not resumed trading QAMF's capital, and Tweed decided it was time to wind down Athenian and distribute its assets to its investors. As Tweed described it, "it became clear . . . that PMI would not be restarting its trading any time soon, and I decided it would be in [Athenian's] best interest to withdraw [Athenian's] money from the QAMF fund and seek to wind down [Athenian]."

Tweed testified that he was unable to wind down Athenian, however, because QAMF was unable to return all of Athenian's money. According to Tweed, when he asked Richardson to return the remainder of Athenian's investment in QAMF, Richardson told him he had placed $650,000 of Athenian's cash in the purported credit facility, and this money would be "locked up" until June 2011.

[4] According to QAMF's financial statements, RPM invested $100,000 in QAMF. QAMF had no investors other than Athenian and RPM.

Tweed testified he was surprised and angry when Richardson told him this because he believed it violated the terms of QAMF's offering documents. "If you look at the PPM and operating agreement for QAMF," said Tweed, "it was in there that . . . we would have access to the funds, and it had to be liquid within five days, and that was in the documents with QAMF and Athenian Fund."

Tweed and Richardson agreed that QAMF would immediately return Athenian's "current liquid assets," and return the balance of Athenian's money when the credit facility expired in June 2011. In September and October 2010, QAMF returned about $760,000 to Athenian.[5]

Over the next several months, Tweed used some of that cash to make redemptions for certain investors who requested them, one of whom was Tweed's stepson, who received a partial redemption of $25,000, half of his initial investment, in November 2010.

G. Tweed Lends $200,000 of Athenian's Money to an Early-Stage Software <u>Company</u>

In March 2011, Tweed used $200,000 of Athenian's remaining liquid assets to buy a six-month promissory note issued by Teamwork Retail, LLC, an early-stage software company that was a client of Tweed's. While Tweed testified that he was simply trying to generate income to cover Athenian's expenses until QAMF returned the rest of Athenian's money, he admitted that he had already invested his own money in Teamwork Retail, and that he also had "assisted Teamwork Retail with certain capital-raising activities."

H. <u>Athenian's New Master Fund Still Cannot Return Athenian's Capital</u>

When June 2011 arrived, QAMF still could not return Athenian's $650,000. According to Tweed, Richardson told him that the borrower had exercised its option to extend the credit facility for another year.

Over the next several months, Tweed continued making redemptions for investors who requested them. Between June 2011 and September 2011, Tweed returned approximately $80,000 to investors, including his stepson, who received another partial redemption of $12,000 in June 2011.

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[5] Richardson's math did not add up, but Tweed did not notice. Athenian invested $1,700,500 in QAMF. Richardson told Tweed he invested $650,000 of Athenian's money in the purported credit facility. Richardson returned $924,460 to Athenian in June, September, and October 2010, which left $126,040 unaccounted for. When Tweed was asked at the hearing whether he did anything to verify that Richardson "had returned all of the Athenian money except for $650,000," Tweed responded "I don't know." When Tweed was asked what happened to the missing $126,040, he responded, "this was the first time I was made aware that there was any discrepancy. . . . [N]othing has ever come up that we're missing this 100-and-whatever-it-was-thousand dollars. . . . [T]his is the first time I heard about it."

I. The Software Company Defaults on its Debt to Athenian; Tweed Learns Athenian's New Master Fund Used Its Money to Finance a Mining Operation

By September 2011, Teamwork Retail had defaulted on its promissory note to Athenian without making any payments.

By November 2011, Tweed knew that Richardson had lied to him about the credit facility, and that Richardson actually had used Athenian's $650,000 to finance a gold dust mining operation in Ghana. Tweed also knew Richardson was having trouble getting Athenian's money back. In an email to one of Richardson's business associates involved in the transaction, Tweed wrote: "I just need to know that the money will actually be released Dec. 4th. Every conversation we've had [with the borrower], the date keeps moving back 30 days, we started @ Sept. [W]e need to either get some returns or get the money back!!!"

Despite the uncertainty over the whereabouts of more than half of Athenian's remaining capital, Tweed continued making redemptions for certain investors who requested them. In December 2011, Tweed returned approximately $105,000 to investors.

By January 2012, Athenian's cash had dwindled to the point that Tweed could no longer make a redemption for every investor who asked. In late January 2012, one investor sent Tweed a letter asking to redeem her entire $100,000 investment in Athenian. A few days later, the investor followed up with an email to Tweed asking him to confirm receipt of her letter. Tweed responded by email the next day, writing, "Yes, I got the letter and no problem, we'll make sure your funds are redeemed." But Tweed never returned any money to her.

Tweed did manage, however, to return money to several other investors after January 2012, including his stepson, who received the remainder of his Athenian investment, $13,000, plus an additional $103.25, in mid-February 2012.[6] Another investor received a redemption of almost $100,000 (99% of his initial investment) in February 2012. In total, between February and June 2012, Tweed returned approximately $123,000 to investors. There were no further redemptions.

J. The Manager of Athenian's New Master Fund Is Charged with Bank Fraud

In July 2012, Richardson told Tweed that he would be pleading guilty to felony bank fraud in a criminal matter unrelated to QAMF. In a statement filed in federal court, Richardson admitted that, in February 2010 (after he purportedly had "disconnected" from Chris Hales), he and Hales had fraudulently obtained an automobile loan from a bank and used the proceeds to pay their personal expenses.

With Richardson incapacitated, Tweed took over efforts to collect the $650,000 of Athenian's money that Richardson had invested in the gold dust mining operation. At the

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[6] At the hearing, Tweed could not explain why he returned more money to his stepson than his stepson had invested in Athenian. Tweed also returned too much money to another investor, who received $150 more from Athenian than he had invested.

hearing, Tweed testified that he had "tried all kinds of different things to recover" the money, but "in the end, it's pretty obvious it's not coming."

K. The Software Company Files for Bankruptcy

In August 2013, Teamwork Retail filed for bankruptcy without making any payments to Athenian on the promissory note. Athenian filed a claim with the bankruptcy court for $200,000 plus interest. The trustee awarded Athenian $43,000. Tweed testified that, as of the hearing, Athenian had received about $2,000 of that money.

L. Tweed Is Forced to Disclose What Happened to Athenian

From 2010 through 2013, Tweed made no written disclosures to investors about what was happening with their investments. For some period of time, Tweed provided investors with unaudited financial statements that purported to show the value of their Athenian investments.[7] These statements, however, continually showed the value of each investor's capital account as one hundred percent of the money he or she had invested. None of these statements disclosed that Richardson had used $650,000 of Athenian's money to finance a gold dust mining operation, or that Tweed had invested $200,000 of Athenian's money in Teamwork Retail, or that both investments had failed.

Tweed also obfuscated when he met with investors to review their accounts. Tweed testified that he never told Athenian's remaining investors that other investors, including himself and his stepson, had withdrawn their money from Athenian. One investor testified that she met with Tweed twice a year to discuss her account, and he did not mention any problems at all with her investment in Athenian. Tweed admitted at the hearing that most of Athenian's investors had other money invested with him, and he feared he would lose their business if they learned the truth.

In April 2014, Tweed finally was forced to tell investors what had happened. Earlier that year, the SEC opened an examination of Tweed Financial's office. As a result of the SEC's examination, Tweed's firm at the time, Concorde Investment Services, LLC, learned about some of the problems with Athenian. The firm ordered Tweed to hire an attorney and make any required disclosures to investors. In April 2014, Tweed sent a letter to the remaining Athenian investors summarizing the events since Quant Pool's dissolution in January 2010.

M. Athenian's Losses

As of the hearing, Athenian had losses totaling more than $1 million. These losses, however, were not shared by all of Athenian's investors. Six investors, including Tweed and his stepson, received full redemptions from Athenian totaling $328,254. Six investors received

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[7] Under Athenian's partnership agreement, Tweed was required to provide investors with "an annual financial statement prepared in accordance with U.S. generally accepted accounting principles and audited by an independent certified public accounting firm."

partial redemptions totaling $346,675; these investors lost $136,825. The remaining twelve investors received nothing back from Athenian; these investors lost $889,000.

## II. Procedural History

### A. Origin of the Investigation

In or around March 2014, Concorde notified FINRA of its concerns about Tweed's private placements, including Athenian. FINRA opened its investigation around that time.

### B. Disciplinary Proceedings

On April 27, 2017, FINRA's Department of Enforcement ("Enforcement") filed a single-cause complaint alleging that Tweed, through his use of the Athenian PPM, negligently misrepresented and failed to disclose material facts while soliciting investors for Athenian and engaged in a course of conduct that operated as a fraud or deceit on Athenian's investors, in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933 (the "Securities Act") and FINRA Rule 2010. Enforcement alleged that, between November 2009 and March 2010, Tweed (1) misrepresented why he chose to operate Athenian as a feeder fund; (2) misrepresented the fees and expenses associated with an investment in Athenian; (3) failed to disclose his right to receive a portion of those fees and expenses; and (4) failed to disclose anything about the change in master funds from Quant Pool to QAMF, including Richardson's involvement in QAMF.

Tweed filed an answer in which he admitted many of Enforcement's factual allegations but denied violating the Securities Act or any FINRA Rule. Tweed also asserted that Enforcement's claims were time barred by the statute of limitations under Title 28, Section 2462 of the United States Code.

A three-day hearing was held in December 2017, and the Hearing Panel issued its decision in July 2018. The Hearing Panel found Tweed liable under Securities Act Sections 17(a)(2) and (3) and FINRA Rule 2010 for all of the alleged misconduct, except that it found Tweed was not liable for misrepresenting why he chose to operate Athenian as a feeder fund.[8] The Hearing Panel rejected Tweed's argument that Enforcement's charges were time barred under the statute of limitations and further found that Enforcement did not bring this disciplinary action unfairly late. The Hearing Panel barred Tweed from associating with any FINRA member in any capacity and fined him $50,000.

Tweed appealed the Hearing Panel's decision. Tweed's appeal is limited to the Hearing Panel's findings on the timeliness of this proceeding and the sanctions it imposed.[9]

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[8] Enforcement did not appeal this finding.

[9] Tweed has waived his right to appeal the Hearing Panel's other findings. *See* FINRA Rule 9311(e) (the NAC may deem waived any issue not raised in the Notice of Appeal).

## III. Discussion

After a de novo review, we affirm the Hearing Panel's findings of violation, including its findings regarding the timeliness of this proceeding, which are well supported by the record.

### A. Timeliness of the Disciplinary Proceeding

Tweed argues that the Hearing Panel erred in finding that Enforcement's charges were not time barred by the statute of limitations under Title 28, Section 2462 of the United States Code and that Enforcement did not bring this action unfairly late.

#### 1. Statute of Limitations

Title 28, Section 2462 of the United States Code provides that, "[e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." Tweed contends Enforcement's charges are time barred because they accrued more than five years before the complaint was filed.

FINRA is not constrained by Title 28, Section 2462, or any other statute of limitations. SEC and FINRA decisions have established "the consistently held principle that no statute of limitations applies to disciplinary actions of [self-regulatory organizations]" like FINRA. *Dep't of Enforcement v. Rooney*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *88 (FINRA NAC July 23, 2015). Indeed, the SEC has stated that applying a limitations period to FINRA actions would "impair [FINRA's] statutory obligation and duty to protect the public and discipline its members." *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993).

Tweed argues that the Hearing Panel erred in finding that the statute of limitations does not apply because, according to Tweed, "FINRA disciplinary decisions are appealable to the Securities and Exchange Commission and the United States Courts of Appeal[s], which make them governmental or, at the very least, quasi-governmental actions subject to" the statute of limitations. The SEC previously has considered and rejected this argument, finding that FINRA is not a governmental entity and therefore not bound by any statutory limitations period. *See, e.g., William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *92-93 (July 2, 2013) ("But [Section] 2462 does not apply to FINRA disciplinary proceedings because FINRA is not a government entity. Indeed, we have repeatedly held that 'the disciplinary authority of private self-regulatory organizations ('SROs') such as [FINRA] is not subject to any statute of limitation."), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

We therefore affirm the Hearing Panel's finding that Enforcement's charges against Tweed are not barred by the statute of limitations under Title 28, Section 2462 of the United States Code.

2. Fairness of the Disciplinary Proceeding

The Securities Exchange Act of 1934 requires SROs like FINRA to "provide a fair procedure for the disciplining of members and persons associated with members[.]" 15 U.S.C. § 78o-3(b)(8). There are no "bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings." *Mark H. Love*, 57 S.E.C. 315, 323 (2004). Rather, the fairness of the proceeding is determined based "on the entirety of the record," and whether the respondent has shown that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him." *Id.* at 324-25.

While the SEC has rejected the application of a mechanical test in assessing overall fairness, it has considered, as part of its review of the entirety of the record, several different time periods. These include the period between the filing of the complaint and (1) the initial misconduct; (2) the last misconduct; (3) notice to the SRO of the misconduct; and (4) the initiation of the investigation. *Jeffrey Ainley Hayden*, 54 S.E.C. 651, 653-54 (2000). In *Hayden*, the SEC found that a disciplinary proceeding was unfair when the charges were not brought until 14 years after the first act of misconduct, six years after the last act of misconduct, five years after the SRO was informed about the misconduct, and three years and six months after the SRO opened is investigation. *Id.*

All but one of the time periods in this case is shorter than those in *Hayden*. The time between the complaint (April 2017) and the initial misconduct (November 2009) was seven years and five months (14 years in *Hayden*). The time between the complaint and the last misconduct (March 2010) was seven years and one month (six years in *Hayden*). The time between the complaint and when FINRA first learned of the misconduct (March 2014) was three years and one month (five years in *Hayden*). The time between the complaint and when FINRA initiated its investigation (March 2014) also was three years and one month (three years and six months in *Hayden*).

The time periods in this case are generally comparable to those in other cases in which adjudicators have rejected respondents' claims of unfair delay.[10] We agree with the Hearing Panel that the delay here was not so extreme as to warrant dismissal of the charges.

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[10] *See Dep't of Enforcement v. Newport Coast. Sec., Inc.*, Complaint No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *174 (FINRA NAC May 23, 2018) (complaint filed five years and six months after first misconduct, two years and six months after last misconduct, and three years after initiation of investigation), *appeal docketed*, No. 3-18555 (SEC June 25, 2018); *Dep't of Enforcement v. The Dratel Grp., Inc.*, Complaint No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *102-03 (FINRA NAC May 2, 2014) (complaint filed five years after first misconduct, three years after last misconduct, four years after discovery of misconduct, and four years after initiation of investigation), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016)); *Love*, 57 S.E.C. at 323-25 (complaint filed seven years after first misconduct, six years after last misconduct, four years after discovery of misconduct, and three years and six months after investigation initiated).

But that does not end our inquiry. We also must consider whether Tweed's ability to mount an adequate defense was harmed by the delay in the filing of a complaint against him. *See Love*, 57 S.E.C. at 325. We agree with the Hearing Panel that it was not.

The violations against Tweed are established largely on undisputed facts. *See id.* (delay did not unfairly prejudice respondent where FINRA's decision was based on facts that respondent did not dispute). Tweed admitted many allegations in the complaint and stipulated to others before the hearing. Indeed, Tweed concedes that "the facts themselves are largely not at issue in this appeal[.]"[11]

Tweed offers only conclusory assertions in support of his argument that he was unfairly prejudiced by the delay. Tweed cites various instances during his testimony when he claimed he was unable to remember things and contends these memory lapses "unavoidably cast doubt on his truthfulness and caused him actual prejudice in defending himself against this charge." Yet Tweed does not identify any specific adverse credibility finding or any issue decided against him after he was unable to remember a relevant fact. We also note that Tweed testified in some detail about certain events that occurred many years ago, while claiming he could not remember others. For example, Tweed remembered details of a conversation he had with the PMI Manager in early 2010 during which the PMI Manager purportedly assured Tweed that Richardson and Hales had disconnected and "weren't doing anything" together. Yet Tweed claimed he was unable to remember whether, around that time, he talked directly to Richardson about his ties to Hales before investing in QAMF. *See Newport Coast*, 2018 FINRA Discip. LEXIS 14, at *174-75 (rejecting claim of unfair prejudice where respondent "initially professed an inability to recall specific contacts with customers, given the passage of time, but then proceeded to 'recall' self-serving aspects of his interactions with the customers," because it "suggests that [respondent's] memory was not faded, but selective.").

Tweed also complains that FINRA's record retention rules do not require firms to maintain certain books and records for more than six years, and asserts that "it is inherently unfair for Tweed to have to defend formal charges with respect to matters that occurred far beyond the time period that even FINRA and the SEC feel records should reasonably be retained." But Tweed does not identify any particular record, or even any category of records, that was not retained and would have aided his defense. Instead, Tweed baldly asserts "[t]he fact that Tweed could not identify any document that was lost or unavailable begs the question," and that he was "undoubtedly harmed[.]" We decline to establish a de facto statute of limitations based on record retention requirements, and Tweed's unsupported assertions of prejudice do not establish actual unfairness. *See Edward John McCarthy*, 56 S.E.C. 1138, 1159-60 (2003) ("Furthermore, [respondent] makes no claim that any witnesses or documents were unavailable as a result of the alleged delay on the part of the Exchange and, therefore, has failed to establish that he was prejudiced as a result."), *aff'd in relevant part*, 406 F.3d 179 (2d Cir. 2005).

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[11] Similarly, at the appellate oral argument, Tweed's attorney recognized that, during the hearing, Tweed's former attorney "really didn't spend a lot of time arguing the facts," and that "[t]he facts are pretty clear, and there's not a lot of dispute of what happened here and what Mr. Tweed did and what Mr. Tweed didn't do that he should have done[.]"

We find that Enforcement's delay in bringing this action was not so extreme as to warrant dismissal, and that Tweed has failed to show that his ability to mount an adequate defense was harmed. We therefore affirm the Hearing Panel's finding that Enforcement did not bring this action unfairly late.

## B. <u>Alleged Violations</u>

### 1. <u>Securities Act Section 17(a)(2)</u>

Securities Act Section 17(a)(2) applies in the offer or sale of any securities in interstate commerce, and prohibits obtaining money or property by means of any material misstatement of fact or statement that omits a material fact. 15 U.S.C. § 77q(a)(2).[12] Section 17(a)(2) does not require a showing of scienter; negligence is sufficient. *Aaron v. SEC*, 446 U.S. 680, 686-87, n.6 (1980). Enforcement need not prove investor reliance, loss causation, or damages to establish a violation. *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 490-91 (S.D.N.Y. 2002).

A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information. *SEC v. Meltzer*, 440 F. Supp. 2d 179, 190 (E.D.N.Y. 2006). "Nevertheless, to be material, a fact need not be outcome-determinative—that is, it need not be important enough that it would necessarily cause a reasonable investor to change his investment decision." *Id.*

Negligence is a failure "to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation." *SEC v. True N. Fin. Corp.*, 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012).

A violation of Securities Act Section 17(a)(2) also violates FINRA Rule 2010. *See Dep't of Enforcement v. Cantone Research, Inc.*, Complaint No. 2013035130101, 2019 FINRA Discip. LEXIS 5, at *60 (FINRA NAC Jan. 16, 2019).

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[12] Tweed stipulated that interests in Athenian were securities, that the alleged misconduct involved the offer or sale of securities, and that Tweed received money from investors through the mail and wire transfers. These stipulations are supported by the record. Although Tweed stipulated that he "received" investor funds, he did not stipulate that he "obtain[ed]" money by means of his alleged misrepresentations and omissions. Courts have split on the issue of whether a respondent must personally gain money or property in order to violate Section 17(a)(2). *Compare SEC v. Stoker*, 865 F. Supp. 2d 457, 463 (S.D.N.Y. 2012) (concluding that the defendant may be liable where he obtained money or property for his employer while acting as its agent), *with SEC v. Syron*, 934 F. Supp. 2d 609, 637-39 (S.D.N.Y. 2013) (disagreeing with the analysis in *Stoker* and holding that a defendant must personally gain money or property from the fraud). The Hearing Panel found that Tweed personally obtained money because he "received repayment of his investment of $50,000 and reimbursement of expenses of nearly $12,000, to the detriment of those investors who got none of their money back or only partial redemptions." Tweed does not challenge these findings on appeal and they are supported by the record.

a. <u>Misrepresentation or Failure to Disclose All Fees and Expenses</u>

The Hearing Panel found that Tweed negligently misrepresented or failed to disclose to investors all of the fees and expenses associated with an investment in Athenian. Through the Athenian PPM, Tweed disclosed Athenian's three-and-a-half percent management fee and performance allocation. The Hearing Panel found that Athenian's investors also were subject to other fees and expenses imposed by Quant Pool and QAMF, and that Tweed failed to disclose these additional fees and expenses to investors.

We agree with the Hearing Panel that these undisclosed fees and expenses were material because they would have effectively doubled the cost of investing in Athenian. *See Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 94 (2d Cir. 2010) (noting the SEC's "strongly held belief in the importance of fees and expenses in a typical investor's decision to invest in a fund"). A reasonable investor would consider these additional fees and expenses important in deciding whether to invest in Athenian.

We also agree with the Hearing Panel that Tweed acted at least negligently in not disclosing these fees and expenses. Tweed testified that he did not intend for Athenian's investors to be subject to any fees and expenses beyond those disclosed in the Athenian PPM, but he conceded that "in retrospect . . . the coordination of how the fees were written between the master fund and . . . feeder fund. . . . [T]here's definitely confusion on how those fees are supposed to be divvied up."

We therefore affirm the Hearing Panel's finding that Tweed violated Securities Act Section 17(a)(2) and FINRA Rule 2010 by negligently misrepresenting or failing to disclose all of the fees and expenses associated with an investment in Athenian.

b. <u>Misrepresentation or Failure to Disclose Change in Master Funds</u>

The Hearing Panel found that Tweed negligently misrepresented or failed to disclose to investors anything about the change in Athenian's master fund from Quant Pool to QAMF, including Richardson's involvement in QAMF.

Through the Athenian PPM, Tweed represented to investors that any money invested in Athenian would be invested in Quant Pool, that Quant Pool would be managed by PMI, and that PMI was controlled by the PMI Manager. After January 29, 2010, when Tweed learned that Quant Pool was dissolving, the Athenian PPM's representations about Athenian's master fund were no longer true. Between January 30 and March 6, 2010, Athenian had no master fund. As of March 8, 2010, Athenian's master fund was QAMF, not Quant Pool, and QAMF was controlled by Richardson, not the PMI Manager. As a result, from January 29, 2010, through March 24, 2010, when Athenian received its final investment, Tweed misrepresented the identity of Athenian's master fund, its manager, and the person who controlled its manager. Ten investors contributed capital to Athenian during that period.

We agree with the Hearing Panel that Tweed's misrepresentations about Athenian's master fund were material. The Athenian PPM made clear that Athenian would be a "feeder" fund for a "master" fund. The success of an investment in Athenian, therefore, depended on the success of its master fund. A reasonable investor would consider the identity of Athenian's master fund, and the person who controlled it, important in deciding whether to invest in Athenian. *See, e.g.*, *Schwarm & Co.*, 47 S.E.C. 785, 788 (1982) ("In connection with an investment in a limited partnership, information relating to those who are responsible for the success or failure of the enterprise is clearly material.").

We also agree with the Hearing Panel that Tweed acted at least negligently by not disclosing the changes in Athenian's master fund. At the hearing, Tweed conceded that, in hindsight, he should have revised the Athenian PPM to reflect the changes in Athenian's master fund, but, at the time, he did not consider it significant because both funds were supposed to be traded using the PMI System. Tweed also admitted that he was more focused on getting Athenian's capital invested so that PMI could resume trading it.

We therefore affirm the Hearing Panel's finding that Tweed violated Securities Act Section 17(a)(2) and FINRA Rule 2010 by failing to disclose the change in Athenian's master fund and Richardson's involvement in QAMF.

c. Failure to Disclose the Consulting Agreement

The Hearing Panel found that Tweed negligently failed to disclose the Consulting Agreement between Tweed Financial and RPM, under which Tweed Financial was entitled to 45 percent of the compensation RPM received as a result of Athenian's investment in QAMF.

We agree with the Hearing Panel that Tweed's failure to disclose the Consulting Agreement was material because it likely would have been viewed, if disclosed, as something that could influence Tweed's decision to invest Athenian's money in QAMF. *See Kevin D. Kunz*, 55 S.E.C. 551, 565 (2002) (finding that when a broker-dealer "has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed"), *aff'd*, 64 F. App'x 659 (10th Cir. 2003). We also agree with the Hearing Panel's finding that Tweed's failure to disclose the Consulting Agreement was at least negligent.

We therefore affirm the Hearing Panel's finding that Tweed violated Securities Act Section 17(a)(2) and FINRA Rule 2010 by failing to disclose the Consulting Agreement.

2. Securities Act Section 17(a)(3)

Securities Act Section 17(a)(3) applies in the offer or sale of any securities in interstate commerce, and prohibits engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Section 17(a)(3) does not require a showing of scienter; negligence is sufficient. *Aaron*, 446 U.S. at 686-87, n.6.

The Hearing Panel found that Tweed's overall misconduct fit within the reach of Section 17(a)(3) because, along with his misrepresentations and omissions, "he secretly entered into agreements and transactions with QAMF that operated as a continuing fraud or deceit upon Athenian's investors." *See Stoker*, 865. F. Supp. 2d at 467. The facts and circumstances of this case, as described above, support the Hearing Panel's finding. We therefore affirm the Hearing Panel's finding that Tweed violated Securities Act Section 17(a)(3) and FINRA Rule 2010.

## IV. Sanctions

The Hearing Panel barred Tweed in all capacities and fined him $50,000. We affirm the bar in all capacities. In light of the bar, we do not impose any fine.[13]

For negligent misrepresentations and omissions, FINRA's Sanction Guidelines ("Guidelines") recommend a suspension of up to two years and a fine of $2,500 to $73,000.[14] But we are not strictly bound by the Guidelines; we may impose a more severe sanction if doing so is necessary to reflect the seriousness of the misconduct at issue. *See Peter W. Schellenbach*, 50 S.E.C. 798, 803 (1991) (explaining that there are "instances where the particular case facts and circumstances justify sanctions other than those suggested" in the Guidelines), *aff'd*, 989 F.2d 907 (7th Cir. 1993); *Steven P. Sanders*, 53 S.E.C. 889, 909 n.43 (Oct. 26, 1998) (explaining that the Guidelines "are not meant to prescribe fixed penalties but merely to provide a 'starting point' in the determination of remedial sanctions").[15]

After reviewing all of the evidence, considering the General Principles Applicable to All Sanctions Determinations, and applying the Principal Considerations in Determining Sanctions, we find that Tweed poses a clear risk of future misconduct, and that a bar in all capacities is necessary to protect the investing public.

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13 Enforcement alleged all violations in a single cause of action, and the violations arise largely from the same negligent misrepresentations and omissions. We therefore impose a single sanction for all violations. *See Dep't of Enforcement v. Tucker*, Complaint No. 2007009981201, 2011 FINRA Discip. LEXIS 66, at *28 (FINRA NAC Oct. 4, 2011) ("Because we find [respondent's] violations are related and derive from the same underlying issue, we impose a single sanction.").

14 *FINRA Sanction Guidelines*, 89 (Mar. 2019) (Fraud, Misrepresentations or Material Omissions of Fact), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter, "*Guidelines*"].

15 *See also Guidelines* at 2 (General Principles Applicable to All Sanction Determinations, No. 1) ("Sanctions should be a meaningful deterrent and reflect the seriousness of the misconduct at issue. To meet this standard, certain cases may necessitate the imposition of sanctions in excess of the upper sanction guideline.").

A. Aggravating Factors

There are multiple aggravating factors that contributed to our decision to bar Tweed.

1. Tweed's Inequitable Distribution of Athenian's Remaining Liquid Assets

We find highly aggravating Tweed's conduct in handling Athenian's "remaining liquid assets" after he learned that $650,000 of Athenian's money was "locked up" in the purported credit facility. Tweed's actions demonstrated disregard for Athenian's investors, enabled him to conceal his misrepresentations and omissions for years, and caused certain investors to bear all of Athenian's losses while others, including Tweed and his stepson, bore none.[16]

Tweed testified that, in September 2010, he decided it was time to shut down Athenian and return its assets to its investors. As Tweed explained at the hearing, "the idea [] was just cash everybody out, it's over, it's done, and then maybe in another year, we'll come back and see how [the PMI System is] doing and then raise money all over again. But I just couldn't keep people's money any longer and not make money with it." Under Athenian's partnership agreement, upon dissolution, Tweed was required to distribute Athenian's assets pro rata to its investors. Tweed testified that he believed if he "cash[ed] everybody out at this point, they might [only] lose pennies on the dollar[.]"

When Tweed asked Richardson to return Athenian's money, however, Richardson told him he had placed $650,000 of Athenian's money in the purported credit facility, and that money would not be available until June 2011. Tweed testified that he was angry when heard this because he believed Richardson had violated QAMF's offering documents by investing in an illiquid asset. Tweed and Richardson eventually agreed that QAMF would return Athenian's "current liquid assets," and return the rest at the end of the credit facility.

In September and October 2010, QAMF returned about $760,000 to Athenian, but Tweed could not distribute this cash to Athenian's investors pro rata without revealing the change in master funds from Quant Pool to QAMF. Had Tweed distributed Athenian's assets in September 2010, as he had planned, each investor would have received far less than his or her capital contribution. Tweed would have had to explain that the rest of Athenian's money was locked up in an illiquid credit facility until June 2011. That, of course, would be inconsistent with Tweed's representations about the liquidity of an investment in Athenian. In marketing Athenian to investors, Tweed explicitly represented that Athenian's assets would be invested in Quant Pool, where PMI would use its own proprietary PMI System to invest them in "highly liquid securities[.]" Tweed told investors that, as a result of Quant Pool's investment strategy, an investment in Athenian would be as liquid as cash. Tweed could not explain Athenian's unexpected illiquidity without also explaining that Athenian's assets were not invested in Quant Pool.

Tweed was able to avoid disclosing the change in master funds, and maintain the illusion of liquidity, by using Athenian's remaining liquid assets to make redemptions for investors who

[16] *See id.*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 10, 11, 16).

requested them. Tweed kept making these redemptions even as it became more and more obvious that Athenian had incurred significant, unrecoverable losses which, under the terms of its partnership agreement, should have been shared by all investors. Tweed kept making redemptions *after* QAMF was unable to return Athenian's $650,000 in June 2011, *after* Teamwork Retail defaulted on its $200,000 promissory note in September 2011, and *even after* Tweed learned that the purported credit facility did not exist, and that Richardson actually had used Athenian's $650,000 to finance an ill-fated mining operation. Indeed, as late as February 2012, Tweed made a redemption of nearly $100,000 for one investor, while twelve other investors, who had contributed almost $900,000 to Athenian, had yet to receive any of their money back (and never would). As the Hearing Panel noted, through these selective redemptions, Tweed "effectively overpaid some investors at the expense of others."[17]

Tweed argues we should not consider his inequitable distribution of Athenian's remaining liquid assets an aggravating factor. According to Tweed, he had no obligation to treat investors equitably because Athenian "was never dissolved or liquidated pursuant to Article XIII of the Operating [sic] Agreement, and Enforcement could not prove otherwise." Tweed maintains that he "simply was not required to make distributions of the partnership's assets pro rata."

We are deeply disturbed that Tweed would assert he did nothing wrong by distributing Athenian's assets so inequitably, particularly when he and his stepson (who received more money back from Athenian than he contributed) benefitted from it at the expense of Athenian's other investors. Moreover, Tweed is incorrect that he did not have to treat investors equitably until he formally dissolved Athenian. Under Article IX of Athenian's partnership agreement, Tweed had to allocate all losses, expenses, and fees incurred by Athenian pro rata among the capital accounts of all investors on an ongoing basis. Similarly, the Athenian PPM provided that "[t]he interest of the Partners in profits, losses and increases and decreases in Net Asset Value shall be allocated to each Partner in proportion to all Partners' capital accounts for the relevant period," and that "net income and net loss for each month . . . will be allocated to the Limited Partners in proportion to their capital account balances as of the start of such month[.]" Contrary to Tweed's assertion, his obligation to treat investors equitably did not arise only upon formal dissolution of the fund.

2. <u>Tweed's Purchase of Teamwork Retail's Promissory Note</u>

We also find highly aggravating Tweed's decision in March 2011 to use $200,000 of Athenian's remaining liquid assets to purchase a six-month promissory note issued by Teamwork Retail. This investment presented a conflict of interest for Tweed because he already had invested his own money in Teamwork Retail and he also had a business relationship with the company. Moreover, Tweed's purchase of the note was inconsistent with Athenian's investment

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[17] In addition to the losses from QAMF and Teamwork Retail, Athenian's bank records indicate that Athenian paid more than $50,000 in various accounting, compliance, and regulatory fees between 2010 and 2014. Investors who left some or all of their capital invested in Athenian paid all of these fees. Investors who withdrew all of their capital, including Tweed and his stepson, paid none.

program, as described in the Athenian PPM. The PPM represented to investors that their money would be invested in highly liquid securities selected by PMI using the PMI System. Indeed, Tweed assured his customers that an investment in Athenian would be as liquid as cash. A six-month promissory note issued by an early-stage software company does not comport with Tweed's assurances of liquidity.

3. Tweed's Failure to Provide Audited Financial Statements

Tweed's failure to provide investors with any audited financial statements between 2010 and 2014 is aggravating because it violated his obligations under Athenian's partnership agreement and enabled him to conceal his misconduct for years.[18]

4. Duration and Scope of Tweed's Misconduct

Last, we find it aggravating that Tweed's misconduct continued over an extended period of time and involved a significant amount of money.[19]

B. Mitigating Factors

Tweed argues that his reliance on the Athenian Attorney is mitigating. The Guidelines provide that a respondent's "reasonable reliance on competent legal or accounting advice" may be mitigating.[20] Tweed contends that he reasonably relied on the Athenian Attorney to draft the Athenian PPM and that, even though he reviewed it, he "did not realize its shortcomings."

We find that Tweed's reliance on the Athenian Attorney is mitigating only with respect to his misrepresentations and omissions relating to Quant Pool's management fee, and this mitigation is not enough to overcome all of the aggravating factors favoring a bar. The record shows that Tweed provided the Athenian Attorney with Quant Pool's offering documents while she was drafting the Athenian PPM, and that Tweed and the Athenian Attorney specifically discussed Quant Pool's management fee. Tweed's reliance on the Athenian Attorney to disclose all applicable fees associated with Athenian's investment in Quant Pool was reasonable. Therefore we give Tweed some mitigation credit.

Tweed is not entitled to mitigation for his misrepresentations and omissions relating to the change in master funds from Quant Pool to QAMF, including his failure to disclose QAMF's fees and expenses, Richardson's involvement in QAMF, and the Consulting Agreement. Although the Athenian Attorney was aware of Quant Pool's dissolution and the change in master funds, there is no evidence that she advised Tweed he could keep using the original Athenian PPM to solicit investors after those events occurred. To the contrary, Tweed testified that he did not discuss the issue with the Athenian Attorney. *See Dep't of Enforcement v. Flannigan*,

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18 *Id.*, at 7 (Principal Considerations in Determining Sanctions, No. 10).

19 *Id.* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 17).

20 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 7).

Complaint No. C8A980097, 2001 NASD Discip. LEXIS 36, at *20 (NASD NAC June 4, 2001) ("Respondents have not demonstrated that reliance on [] counsel could be viewed as 'reasonable' or that they even discussed with [the] attorney the legality of their intended actions."), *aff'd*, 56 S.E.C. 8 (Jan. 8, 2003).

Tweed argues that there are "a multitude" of other mitigating factors that we should consider in determining sanctions. Tweed's arguments are not persuasive.

Tweed argues it is mitigating that he never intended for Athenian's investors to pay any fees and expenses other than those disclosed in the Athenian PPM, "and in fact [they] never did." Tweed also argues that, because Athenian did not pay any additional fees and expenses, he never received any additional compensation as a result of the Consulting Agreement. This argument fails. While lack of intent may be considered a mitigating factor in some circumstances, it is not mitigating here. *See Dist. Bus. Conduct Comm. v. Podesta & Co.*, Complaint No. C8A960040, 1998 NASD Discip. LEXIS 27, at *38 (NASD NAC Mar. 23, 1998). The Guidelines for negligent misrepresentations, which we have applied, already consider the respondent's lack of intent.[21] As for Tweed's assertion that Athenian's investors did not pay the undisclosed fees and expenses, and he did not receive any compensation from them, "the absence of investor harm or personal gain is not mitigating." *Dep't of Enforcement v. Taboada,* Complaint No. 201203471901, 2017 FINRA Discip. LEXIS 29, at *49 (FINRA NAC July 24, 2017).[22]

Tweed argues it is mitigating that, although the change in master funds "should have technically been disclosed," he did not realize it was necessary at the time because, he contends, "the two master funds did the exact same thing," and "Richardson had a years-long, unblemished record in the securities industry" and "appeared to Tweed at the time to be a better choice than [the PMI Manager]." Once again, this argument fails because lack of intent is not mitigating in a case involving negligence. Moreover, Tweed's suggestion that he had no reason to believe that the change in master funds was material is belied by his own testimony at the hearing. Tweed admitted that he was concerned about Richardson's involvement in QAMF due to his ties to Hales. In fact, Tweed was so concerned about Richardson's involvement that he tried to hire PMI to manage Athenian's assets directly rather than investing in QAMF. Tweed decided to invest in QAMF only after he was unable to open a brokerage account for Athenian. Tweed also contends it is mitigating that, under a provision in Athenian's offering documents, he had broad discretion to invest Athenian's assets in a different master fund. We do not find Tweed's inclusion of boilerplate language in Athenian's offering documents mitigating.

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[21] *Guidelines* at 89 (providing different recommendations for negligent misrepresentations versus intentional or reckless misrepresentations).

[22] The record shows that Athenian did not pay any additional fees or expenses on its investment in Quant Pool, but the record does not establish that Athenian did not pay additional fees and expenses on its investment in QAMF. QAMF failed to return approximately $775,000 of Athenian's money, and $126,040 of that amount is unaccounted for. It is impossible to know whether QAMF deducted any fees and expenses from the money it did not return to Athenian.

Tweed argues it is mitigating that "no customers ever complained to FINRA about losing money in the Athenian Fund." Assuming that is true, the absence of customer complaints is not mitigating. *See Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate [respondent's] misconduct"), *aff'd*, 416 F. App'x 95 (2d Cir. 2011).

Last, Tweed argues it is mitigating that he has "accepted responsibility for his actions and made it abundantly clear that he will certainly not be engaging in this kind of behavior in the future." This factor does not apply here. The Guidelines direct us to consider whether the respondent accepted responsibility "prior to detection and intervention" by his firm or a regulator.[23] Tweed did not accept any responsibility until after Concorde detected irregularities with Athenian. Indeed, as explained above, Tweed intentionally concealed his misconduct for years through his inequitable distribution of Athenian's assets and his failure to provide audited financial statements to investors. Additionally, as exhibited by Tweed's argument on appeal that he was not required to treat Athenian's investors equitably, Tweed still has not fully accepted responsibility for his misconduct.

## V. Conclusion

We find that Tweed violated Securities Act Sections 17(a)(2) and (3) and FINRA Rule 2010 by negligently misrepresenting and failing to disclose material facts in connection with the sale of interests in Athenian and engaging in a course of conduct that operated as a fraud or deceit on Athenian's investors. We bar Tweed in all capacities for this misconduct. The bar is effective on service of this decision. Tweed is ordered to pay hearing costs in the amount of $5,195.72.[24]

On behalf of the National Adjudicatory Council,

______________________________________

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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[23] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 3).

[24] We have considered and reject without discussion all other arguments advanced by Tweed.