BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Vincent M. Uberti, Fountain Valley, CA, Respondent.	AMENDED REMAND DECISION Complaint No. CAF020048 Dated: January 08, 2008

On remand, sanctions reconsidered and bar imposed on registered person who issued numerous fraudulently misleading research reports.

Appearances

For the Complainant: Gary A. Carleton, Esq., Department of Enforcement

For the Respondent: Pro Se

DECISION

This matter is before us on remand from the Securities and Exchange Commission. On February 20, 2007, the Commission affirmed our findings that Donner Corporation International ("Donner"), Jeffrey Baclet ("Baclet"), and Vincent Uberti ("Uberti") prepared numerous fraudulently misleading research reports about thinly capitalized, small-cap companies that they circulated widely to members of the public on Donner's Internet web site. The Commission also upheld our findings that Donner and Baclet failed to ensure proper review and supervision of the firm's preparation of research reports and that Paul Runyon ("Runyon") and Uberti later posted on the Internet similarly fraudulent research reports under the name Lincoln Equity Research, LLC ("Lincoln"), an independent entity that Runyon and Uberti owned and operated.[1]

[1] Effective as of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA shall include, by reference and where appropriate, references to NASD.

The Commission upheld our expulsion of Donner, bar of Baclet, and imposition of a six-month suspension, $20,000 fine and requalification requirements as to Runyon. The Commission stated, however, that it was unable to determine whether our bar of Uberti (for Donner-related misconduct) was excessive or oppressive in light of the Hearing Panel's findings of mitigation. The Commission remanded the matter to us to reconsider whether a bar of Uberti is appropriate.

After a thorough reconsideration of the record and the other factors that the Commission identified for our consideration, we bar Uberti from associating with any member firm in any capacity for misconduct related to Donner's research reports. For misconduct related to the Lincoln research reports, we fine Uberti $20,000, suspend him for six months in all capacities, and require that he requalify as a general securities representative and principal if he ever re-enters the securities industry.

I. Background

Donner became a FINRA member in October 1996. FINRA cancelled its membership in 2002. Baclet was the firm's president and sole owner. Uberti entered the securities industry in 1995 and joined Donner as a vice president in 1998. Runyon also was associated with Donner. Uberti and Runyon left Donner in July 2001 and formed Lincoln, which they operated as an independent research firm. While operating Lincoln, they associated with member firm Lloyd, Scott & Valenti, Ltd. ("Lloyd"). Uberti is not currently associated with a member firm.

II. Procedural History

The Department of Enforcement ("Enforcement") filed an 11-cause amended complaint on October 21, 2002. After a seven-day hearing, a Hearing Panel issued a decision on June 7, 2004. The complaint alleged, and the Hearing Panel found, that Donner, through Baclet and Uberti, issued 25 research reports (Uberti was responsible for 22) that: failed to disclose material information, in violation of NASD Rules 2110 and 2210(d)(1)(A); contained exaggerated, misleading, and false statements, in violation of NASD Rules 2110 and 2210(d)(1)(B); and were fraudulent due to these omissions and misstatements, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Rule 2120.

The complaint further alleged, and the Hearing Panel found, that in research reports for 50 companies, Donner, Baclet, and Uberti (Uberti was responsible for 43) concealed compensation arrangements with the subject companies, in violation of Section 17(b) of the Securities Act of 1933 ("Securities Act") and NASD Rule 2110. The complaint also alleged, and the Hearing Panel found, that Uberti and Runyon issued two research reports through Lincoln that: failed to disclose material information, in violation of NASD Rules 2110 and 2210(d)(1)(A); contained exaggerated, misleading, and false statements, in violation of NASD Rules 2110 and 2210(d)(1)(B); and were fraudulent due to these omissions and misstatements, in

violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rule 2120.[2]

For violations related to the Donner research reports, the Hearing Panel expelled Donner from membership, barred Baclet in all capacities, and suspended Uberti for two years and fined him $20,000. For Uberti's and Runyon's violations related to the Lincoln research reports, the Hearing Panel suspended them for six months, fined them $20,000 each, and required that they requalify before acting as registered representatives or principals.

Donner, Baclet, Uberti and Runyon appealed the Hearing Panel's decision to us. On March 9, 2006, we issued a decision in which we affirmed the Hearing Panel's findings, expelled Donner, barred Uberti and Baclet, and fined Runyon $20,000, suspended Runyon for six months, and required that he requalify as a general securities representative and principal.[3]

Donner, Baclet, Uberti and Runyon appealed our decision to the Commission. On February 20, 2007, the Commission issued a decision in which it affirmed our findings as to all parties and the sanctions that we imposed as to Donner, Baclet and Runyon. The Commission remanded the matter to us to reconsider whether a bar of Uberti is excessive or oppressive in light of the factors that the Hearing Panel identified as mitigating.[4] On remand, Uberti and Enforcement were given the opportunity to submit briefs.

III. Findings of Fact

The Commission affirmed our findings of fact. *Id*. at **5-28. By way of background, we summarize our factual findings here.

A. The Donner Research Reports

Between March 1999 and May 2002, the period relevant to this case, approximately 70 percent of Donner's business involved a practice that Baclet and Uberti described as "investment banking." Baclet and Uberti solicited this business by cold calling "small-cap" issuers whose stock generally sold for less than $5 per share and offering to prepare research reports about these issuers. Issuers that contracted with Donner agreed to pay Donner a fee (generally, about $2,500) in exchange for Donner's preparing a research report, issuing a press release, and posting the

---

[2] The complaint also alleged, and the Hearing Panel found, that Donner and Baclet violated NASD Rules 2110, 2210(b)(1), and 3010 because they failed to ensure that Donner's research reports were signed by a principal and failed to establish and maintain written supervisory procedures pertaining to the preparation and dissemination of Donner's research reports.

[3] We barred Uberti for misconduct related to the Donner research reports. In light of the bar, we declined to impose additional sanctions for Uberti's misconduct related to the Lincoln research reports.

[4] *See Donner Corp. Int'l,* Exchange Act Rel. No. 55313, 2007 SEC LEXIS 334 (Feb. 20, 2007.

report on the firm's web site. In exchange for an ongoing monthly fee of approximately $3,000, Donner updated the research reports as necessary and discussed the issuers with potential investors.

Donner's research reports generally resembled one another. Across the top of each report, Donner identified itself and included the subheading "Investment Bankers . . . Institutional Research." Immediately under this subheading, Donner listed its recommendation of buy, speculative buy, or strong buy (never sell) and the name and symbol of the issuer. The left-hand column of the first page generally listed basic financial and trading data such as the prior year's price range, trading volume, earnings per share for three previous years, and a yearly revenue figure. Usually, this was the only financial information contained in the research report. The right-hand column included the heading "Investment Thesis" and consisted of several bullet points touting the issuer and providing upbeat forecasts about the issuer's prospects for growth. Donner's research reports had an overall positive tone and included catch phrases such as "undervalued," "well-positioned," and "poised to become a major player." Some of Donner's research reports contained a hyperlink to the covered issuer's most recent financial filings on the Commission's EDGAR web site. The vast majority of Donner's research reports did not disclose that Donner received compensation for preparing the reports and therefore carried an undeserving air of impartiality. Uberti provided pre-release drafts of Donner's research reports to the issuers for comment.

Richard Merrell ("Merrell"), an independent contractor associated with Donner, prepared the majority of Donner's research reports. Merrell was not a financial analyst, had no experience drafting research reports, and had never been registered. Merrell was employed full-time in an unrelated field and drafted research reports for Donner as a second job. He received no training from Donner, and instead relied on an outdated Donner research report as a template. Merrell conducted no independent analysis for any of the research reports and included similar positive phrases in all of his drafts. Merrell's main contact at Donner was Uberti.

Most of Donner's draft research reports went to Uberti for pre-release review and revision. In prehearing, on-the-record testimony, Uberti and Runyon testified that Uberti reviewed all of the issuers' most recent financial filings and Donner's research reports for compliance with NASD rules. Runyon stated that Uberti "had his hands on" every research report that the firm issued. Uberti testified that his main focus in reviewing Donner's research reports was on the financial information. He also reviewed the reports for factual accuracy, the inclusion of news updates, and to ensure that all of Donner's standard disclaimers were included. Although Uberti maintained that Baclet, as president, ultimately was responsible for every research report, Uberti acknowledged that he did not even know if Baclet read the research reports in depth.[5] At the Hearing Panel hearing, Uberti attempted to distance himself from his on-the-record testimony and to minimize his role at Donner.

---

[5] Baclet admitted that he did not read the final drafts of most of Donner's research reports thoroughly and did not analyze the issuers' financial filings.

B. The Lincoln Research Reports

Uberti and Runyon left Donner and formed Lincoln for the purpose of preparing research reports on small-cap companies.[6] Uberti and Runyon shared ownership of Lincoln and operated it much the same way that Donner operated. Like Donner, Uberti and Runyon hired Merrell to draft upbeat research reports for Lincoln and charged issuers for positive research reports. Uberti told Merrell to follow the same format that he had followed in drafting Donner's research reports, and Lincoln's research reports generally resembled Donner's research reports in form and content.

Uberti reviewed Merrell's draft Lincoln research reports, reviewed the issuers' financial filings, and revised the reports as necessary. Uberti generally provided issuers with draft copies of Lincoln's reports before issuance and invited the issuers to suggest revisions. Lincoln made its research reports available to members of the public on its Internet web site and heralded its issuance of research reports in press releases.

IV. Findings of Law

The Commission affirmed our findings that Donner, Baclet, Runyon, and Uberti violated NASD Rules 2210(d)(1)(A) and (B) by issuing omissive and misleading research reports; that this misconduct was fraudulent, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rule 2120; and that the conduct contravened high standards of commercial honor and just and equitable principles of trade, in violation of NASD Rule 2110. The Commission also affirmed our findings that Donner, Baclet, and Uberti violated Section 17(b) of the Securities Act and NASD Rule 2110 by failing to disclose in Donner's research reports that the firm received compensation from the issuers in exchange for issuing the reports. *Donner*, 2007 SEC LEXIS 334, at **28-60.

A. Research Reports Issued Under Donner's and Lincoln's Names Were Misleading

Donner, Baclet, and Uberti violated NASD's rules governing communications with the public in 25 research reports; Uberti was responsible for 22 of the Donner reports and, with Runyon, for two reports issued under Lincoln's name. Under the NASD Rule 2200 Series, all member communications with the public, including research reports, must: not omit material facts; be fair and balanced; be based on principles of fair dealing and good faith; and provide a sound basis for evaluating the facts in regard to the particular securities discussed.

The research reports at issue omitted material facts regarding the dire financial circumstances of the issuers that, given the overall positive tone of the research reports and their buy recommendations, rendered them misleading. Perhaps most glaring among these omissions

---

[6] Uberti registered immediately with Lloyd. He testified that he provided Lloyd with copies of Lincoln's research reports and the investment banking agreements that Lincoln and the issuers executed. Lloyd did not, however, conduct a review of the reports to monitor for rule compliance. Lloyd did not compensate Uberti for preparing research reports under Lincoln's name.

was the failure to disclose that each issuer referenced in the reports had been the subject of an auditor's going concern opinion in a recent audit report and the underlying reasons for the going concern opinions.[7] The Donner and Lincoln research reports also hid other important financial information upon which issuers' auditors based their going concern opinions. The Commission concurred with our findings that these omissions alone caused the reports to be misleading. *Donner*, 2007 SEC LEXIS 334, at **29-39.

The Commission further concurred that the fraudulent nature of the Donner and Lincoln research reports extended to the inclusion of false, exaggerated, unwarranted, or misleading statements. *Id*. at **29-39. The Donner and Lincoln research reports falsely depicted many issuers as being well-established entities that were on the brink of overwhelming success when, in fact, many of the issuers were struggling simply to survive. Disregarding dire financial and operational predictors, these research reports painted visions of increasing revenue streams and operational growth. Such statements overall were contrary to the information contained in the issuers' financial filings and created an overly optimistic picture of the issuers that was either unsupported or contradicted by available facts.[8]

We found that Baclet and Uberti were responsible for Donner's research reports, and Uberti and Runyon were responsible for the Lincoln research reports. Uberti was the sole contact for Merrell, the individual who prepared the vast majority of Donner's and Lincoln's research reports. Uberti assigned work to Merrell, provided him with guidance and direction, and accepted draft reports from Merrell. He reviewed and edited Merrell's work, added recent news updates to the research reports, interacted with issuers and provided them with copies of draft reports, and verified the accuracy of the limited financial information that the Donner and Lincoln reports included.[9] Baclet provided FINRA with a document that listed Uberti as responsible for reviewing the research reports at issue. Uberti, after initially admitting in on-the-record testimony that he served a key role at Donner, later denied his responsibilities at Donner. He claimed that his position as a vice president was in name only and that he served merely in an administrative capacity. The Commission concurred with our finding that Uberti's claims were contradicted by significant record evidence and upheld our finding that Uberti held a position of

---

[7] Indeed, the financial statements of the majority of the issuers covered by the Donner and Lincoln research reports reported aggregate net losses, significant operating losses, inadequate working capital, accumulated debt, defaults on payment obligations, limited operating histories, and the need to rely on short-term borrowing and the issuance of stock for operating capital. Yet the research reports, which Uberti reviewed and revised, failed to disclose these facts.

[8] Additionally, Donner's research reports did not disclose important information that would have shed light on the firm's objectivity. Although Donner received compensation from the issuers that it covered, Donner did not disclose that it had received, or contracted to receive, remuneration for preparing the research reports.

[9] Uberti acknowledged that he added financial information to Merrell's draft research reports because "Merrell . . . didn't get too much of the financial part of it. And what he did do, [Uberti] ended up changing anyway." Uberti went on to say that he was responsible for including disclosures, financial information, and risk factors and for overall content.

authority at Donner and was intimately involved in nearly every aspect of Donner's preparation of the research reports at issue.[10] *Id*. at **43-49.

The Commission also concurred with our determination that the omitted information was the kind of information that was material to an investor's decision to invest. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

B. Donner, Baclet and Uberti Failed to Disclose Donner's Receipt of Remuneration in Exchange for Issuing Research Reports

Donner, Baclet and Uberti also violated NASD Rule 2110 and Section 17(b) of the Securities Act by failing to disclose in research reports issued during 1999 and 2000 Donner's receipt of compensation from the issuers in exchange for the firm's preparation of the research reports. Section 17(b) of the Securities Act states that it is unlawful to publish or circulate any communication, including research reports, which describes a security for a consideration received from an issuer, without fully disclosing the receipt and amount of such consideration. Uberti knew that Donner received or contracted to receive remuneration in exchange for issuing research reports. The research reports at issue stated that Donner might perform "investment banking, corporate finance, provide services for, and solicit investment banking, corporate finance or other business from the issuers . . . for a fee." The Commission affirmed our finding that this disclosure is insufficient to comply with the requirements of Section 17(b) of the Securities Act. *Donner*, 2007 SEC LEXIS 334, at **50-56.

C. Donner, Baclet, Runyon and Uberti Committed Fraud

The Commission also upheld our findings that Donner, Baclet, Runyon and Uberti committed fraud. *Donner*, 2007 SEC LEXIS 334, at **28-39. Section 10(b) of the Exchange Act and Rule 10b-5 thereunder forbid any person from using, in connection with the purchase or sale of any security, any manipulative or deceptive device or scheme to defraud. The Commission affirmed our finding that Baclet, Runyon and Uberti acted recklessly and therefore with the requisite scienter for a finding of fraud. The Commission held that "Uberti acted recklessly because he himself read the reports that contained positive statements about issuers, reviewed the public filings pertaining to the issuers that included negative financial information, and knew that this negative information was not included in the reports." *Id*. at *46. The Commission stated that Uberti's "failure to include negative financial information likely important to investors in the research reports, despite knowing that the companies' public filings contained such negative information, involved an extreme departure from the standards of ordinary care which presented an obvious danger of misleading buyers and sellers." *Id*. at *45.

---

[10] The Commission specifically noted Uberti's contradictory statements regarding his responsibilities at Donner. The Commission stated that testimony given closer in time to the events at issue such as, in this case, Uberti's investigative on-the-record testimony, should be given greater weight. *Id*. at *10 n.11. The Commission also noted that Uberti's investigative testimony, in which he admitted responsibility for Donner's research reports, was corroborated by Baclet's and Runyon's investigative testimony, both of whom stated that Uberti reviewed Donner's research reports for compliance with NASD rules. *Id*. at *45, n.61.

* * * * *

The Commission affirmed, without modification, all of our findings of violation as to all respondents, including Uberti. Specifically, the Commission concluded that Uberti violated SEC and NASD anti-fraud, advertising and disclosure rules by issuing, under Donner's and Lincoln's names, fraudulently misleading and omissive research reports that he and the other respondents widely circulated to members of the public.

V. Sanctions

For violations related to the Donner research reports, the Commission affirmed our expulsion of Donner and bar of Baclet. For violations related to the Lincoln reports, the Commission affirmed the sanctions that we imposed on Runyon of a $20,000 fine, six-month suspension, and requirement to requalify. *Id*. at **71-72. As to Uberti, the Commission remanded this matter to us to "consider whether a bar is excessive or oppressive" in light of mitigating factors cited by the Hearing Panel. *Id*. at *74. The Commission also noted that we did not impose sanctions on Uberti for the Lincoln violations in light of our bar of Uberti and directed that we reconsider on remand whether to impose sanctions on Uberti for the Lincoln-related misconduct. Although the Commission requested that we reassess our imposition of a bar in light of certain Hearing Panel findings, the Commission also noted that "[c]onduct [like Uberti's] that violate[s] the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions." *Id*. at *71 (*citing Alvin W. Gebhart, Jr.*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *77 (Jan. 18, 2006), *rev'd in part, aff'd in part and remanded*, 2007 U.S. App. LEXIS 27183 (9th Cir Nov. 21, 2007).

A. Sanctions Related to the Donner Research Reports

The Commission stated that "the record suggests that Uberti had less responsibility for the Donner research reports than Baclet" and that it could not determine whether the bar imposed for Uberti's Donner-related misconduct was excessive or oppressive in light of the Hearing Panel's findings that three factors mitigated the severity of Uberti's misconduct. *Donner*, 2007 SEC LEXIS 334, at *73.

First, the Hearing Panel found as a mitigating factor Uberti's purportedly reasonable reliance on Baclet's review of Donner's research reports for regulatory compliance. Second, the Hearing Panel considered mitigating Uberti's claim to have believed that Donner previously had cleared the format used in its research reports with regulatory authorities. Third, the Hearing Panel found credible Uberti's expressions of remorse and assertions that he would not repeat his misconduct. *Id*. at **73-74. As instructed by the Commission, we have considered each of these factors in turn, as well as the parties' arguments on remand,[11] our own Sanctions Guidelines

[11] On remand, Uberti argues in favor of the sanctions that the Hearing Panel imposed (for Donner-related misconduct) of a $20,000 fine, two-year suspension, and order to requalify as a general securities representative and principal. Enforcement argues for imposing a bar.

("Guidelines"),[12] and all other factors pertinent to sanctions determinations.[13] For the reasons discussed below, we conclude that a bar in all capacities is the appropriate sanction in this case.

1. Uberti's Reliance on Baclet Was Unreasonable

We first consider Uberti's claim to have relied on Baclet's review of the research reports and the Hearing Panel's determination that his reliance was reasonable. The Hearing Panel found that "Uberti relied on Baclet's final review of the research report[s] for conformity with the securities laws and NASD rules." *Dep't of Enforcement v. Donner Corp. Int'l*, Complaint No. CAF020048, 2004 NASD Discip. LEXIS 29, at *63 (NASD June 7, 2004). The Hearing Panel further found that "Uberti's reliance on Baclet's review was reasonable because: (i) Baclet was the only registered principal involved in the review process; (ii) Baclet had been in the securities industry twice as long as Uberti; and (iii) Baclet appeared to be reviewing the research reports." *Id*. We overturn the Hearing Panel's finding that Uberti's reliance on Baclet was reasonable. In our view, this finding is inconsistent with the record evidence and with the Hearing Panel's other finding that Uberti acted recklessly.[14]

We have considered the Hearing Panel's findings that Baclet had more experience than Uberti (Baclet entered the industry in 1990 and Uberti entered in 1995), that Baclet was more responsible for the reports than Uberti, and that Baclet was the only registered principal at Donner. We do not find that these factors weigh in favor of finding that Uberti's reliance on Baclet was reasonable, given Uberti's own responsibilities as a registered person and as the person at Donner assigned to perform a review of research reports. Indeed, Uberti acknowledged during on-the-record testimony before Enforcement staff the importance of including in research reports accurate financial information and disclosing going concern opinions. He testified that he specifically focused on financial information during his reviews, yet he made no attempt to halt

---

[12] *See* NASD Sanction Guidelines (2001 ed.).

[13] In connection with our decision to bar Uberti, we also were guided by applicable precedent and have considered: (1) all mitigating factors that Uberti has raised; (2) the seriousness of his offenses; (3) the corresponding harm that he caused to members of the trading public; (4) Uberti's potential gain for disobeying the rules; (5) the potential for repetition of his misconduct in light of the current regulatory and enforcement regime; and (6) the deterrent value to Uberti and others. *See McCarthy v. SEC*, 406 F.3d 179 (2d Cir. 2005).

[14] In this regard, the Hearing Panel concluded that Uberti, who had been a registered representative for more than four years, should have been aware that the research reports were "so obviously one-sided . . .[and] misleading" as to be fraudulent. *Donner*, 2004 NASD Discip. LEXIS 29, at *36. The Hearing Panel also found Uberti's failure to recognize the materiality of negative financial information to be an extreme departure from the standards of ordinary care. *Id*. We find it inconsistent for the Hearing Panel to conclude that Uberti had an independent duty as a registered person to recognize the misleading nature of the reports and ensure compliance with industry standards; yet also find that Uberti's reliance on Baclet's review for compliance was reasonable.

the issuance of research reports that included little financial information, soft-pedaled negative information regarding operations, and failed to disclose the existence of going concern opinions.

Additionally, Uberti was no novice. He had been registered since 1995 and had been associated with Donner as a vice president since 1998. Although Baclet was Donner's president, Uberti was responsible for reviewing Merrell's drafts, examining the issuers' financial information, and inserting financial data into Donner's reports. Baclet failed in his capacity as Uberti's supervisor. But Baclet's supervisory failure neither excuses nor lessens the significance of Uberti's misconduct. Uberti failed in his responsibilities both as a registered person and as the Donner employee responsible for reviewing draft research reports.

Furthermore, Uberti admitted that he did not even know if Baclet actually reviewed the reports. The Hearing Panel concluded that "Baclet appeared to be reviewing the research reports." *Id*. at *63. We overturn this finding as unsupported by the record. Uberti stated during investigative testimony that he did not "know if Baclet took and read the research reports in depth." In fact, Uberti admitted that Baclet "pretty much relied" on his (Uberti's) review of the reports for regulatory compliance.[15] Rather than finding mitigation in Uberti's feeble efforts to shift blame for his own inaction to Baclet, we find his failure to take action to review the reports or otherwise ensure that the firm did not post materially misleading research reports on the Internet to be aggravating.[16]

We also do not agree that there is any appreciable difference in the level of culpability between Baclet and Uberti. In terms of the egregious nature and materiality of the misrepresentations and omissions, the period of time during which the misconduct occurred, and the level of the potential threat to the investing public, Baclet's and Uberti's misdeeds are comparable. Furthermore, Uberti's misconduct did not end with his association with Donner. His proliferation of fraudulent research reports continued when he established his own research firm after he left Donner.[17]

---

[15] Baclet testified that he did not in fact review the Donner research reports or the financial filings of the covered issuers. Runyon testified that Uberti, not Baclet, was responsible for editing Merrell's drafts to ensure regulatory compliance.

[16] The Hearing Panel also found that Baclet instructed Uberti to rely on the legal and compliance personnel at Donner, not Baclet, to ensure that the research reports complied with regulatory requirements. *Id*. at *34. The Hearing Panel described the legal and compliance personnel on whom Uberti relied as "unreliable to perform compliance reviews." *Id*.

[17] Uberti's actions at Lincoln contradict his claim to have relied on Baclet and Donner's legal and compliance personnel for regulatory guidance. Uberti left Donner in July 2001 and formed his own independent research firm where he engaged in the same conduct but did not have Baclet or legal and compliance personnel on which he could rely. That did not deter him, however, from issuing Merrell's reports to the public under Lincoln's name just as he had done with Donner's reports.

In our March 2006 decision, we specifically held that the evidence did not support a finding that Uberti's reliance on Baclet was reasonable. We held that, as a registered person assigned to review Donner's research reports, "Uberti had an independent duty to ensure that the information in the reports was not misleading and that material information was not omitted. . . . [Uberti] had a duty to comply with applicable laws, and that duty cannot be avoided by reliance on an employer." *Dep't of Enforcement v. Donner Corp. Int'l*, Complaint No. CAF020048, 2006 NASD Discip. LEXIS 4, at **59-61 (NASD NAC Mar. 9, 2006) (*citing Richard H. Morrow*, 53 S.E.C. 772, 779 n.10 (1998)). The Commission affirmed our finding and rejected Uberti's argument that he reasonably relied on Baclet. In this regard, the Commission noted Uberti's admission that, "if a research report contained 'something that was not accurate[,] then it would be [Uberti's] obligation to point that out.'" *Donner*, 2007 SEC LEXIS 334 at **44-46. The Commission further stated:

> Uberti did not reasonably rely on Baclet or the compliance or legal department to correct the material misstatements and omissions that he recklessly disregarded.

Id. at *46.

Indeed, the Commission consistently has rejected similar arguments regarding reliance on one's supervisor as a defense to underlying misconduct and as a basis for mitigating sanctions. *See Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *21 (Feb. 10, 2004) (holding that applicant's reliance on his employer firm for regulatory compliance does not defeat a finding of scienter); *Morrow*, 53 S.E.C. at 779 (rejecting argument that applicant acted in good faith because of reliance on member firm for due diligence); *Larry Ira Klein*, 52 S.E.C. 1030, 1034 (1996) (holding applicant responsible for inadequate disclosures that were approved by his supervisors and rejecting his reliance on his supervisors as a mitigating factor for sanctions); *Thomas E. Warren, III*, 51 S.E.C. 1015, 1019 (1994) (rejecting applicant's attempts to shift blame to his supervisor for inaccurate and incomplete account information); *Donald T. Sheldon*, 51 S.E.C. 59, 71 (1992) (finding that material misstatements and omissions by a registered representative are not excused or mitigated by the representative's reliance on information provided by his firm), *aff'd*, 45 F.3d 1515 (11th Cir. 1995).

Uberti had an independent obligation, both as a registered person and as the Donner employee assigned to review Merrell's drafts, to ensure accuracy in the research reports, and his responsibility cannot reasonably be abridged by his claims to have relied on Baclet.[18]

---

[18] During prehearing, on-the-record testimony, Uberti readily admitted his responsibility at Donner for reviewing and revising research reports, particularly with respect to adding financial information. He also acknowledged the materiality of going concern clauses and negative financial information. At the Hearing Panel hearing, Uberti attempted to distance himself from his earlier testimony. The Commission noted this inconsistency and held that Uberti's investigative testimony, which was given closer in time to the events at issue and before Enforcement named Uberti in the complaint, should be given greater weight. *Donner*, 2007 SEC LEXIS 334, at *10 n.11.

Additionally, Uberti testified that he did not know if or to what degree Baclet reviewed the research reports, so his reliance was not reasonable. Thus, we reject Uberti's claim of reliance on Baclet's review of research reports as a mitigating factor.

2. The Record Does Not Establish that Uberti Reasonably Believed that Regulators Had Approved Donner's Reports

We turn next to the second factor that the Hearing Panel found to be mitigating – Uberti's purported belief that Donner "had previously cleared the format of the research reports, including the reference to the SEC web site, with regulatory authorities." *Donner*, 2004 NASD Discip. LEXIS 29, at *63. The violations in this case stem from the unsubstantiated and exaggerated statements added to the research reports and the material, negative financial information excluded from the final product. It is illogical to suggest that the regulatory approval of a template or format for research reports provides the writer of the reports a safe haven for misrepresentations. As the Commission stated, the Donner reports "omitted material negative financial information about the recommended companies and misleadingly portrayed the companies as undervalued, poised for growth, and having significant potential for appreciation." *Donner*, 2007 SEC LEXIS 334, at *71. It was the exclusion of material negative financial information and the inclusion of unwarranted superlatives, not the standardized format, that made the Donner reports misleading and fraudulent.

Furthermore, we find no record evidence to support the finding that Uberti believed this or that Donner received any type of regulatory clearance, and we therefore reverse this conclusion.[19] During prehearing, on-the-record testimomy, Uberti testified that Baclet sent a draft of an unidentified research report to FINRA for comment. Uberti testified that FINRA made general suggestions but "didn't comment on what you need to put in there, and what don't you need to put in there." Additionally, Uberti testified before the Hearing Panel that Donner's management had discussed pre-filing requirements with FINRA's Advertising Department and that Donner's legal and compliance personnel sometimes contacted FINRA and the SEC with specific compliance questions, but he never suggested that Donner received regulatory approval of its research report template or the practice of writing research reports based on a template that produced only buy recommendations. The record contains no evidence to support the finding that Uberti believed that Donner had obtained regulatory approval or that such a belief would have been reasonable.

We find Uberti's belief, whether reasonable or not, that Donner had obtained regulatory approval of its "format" for drafting research reports irrelevant and reject it as a mitigating factor.

3. Uberti's Expressions of Remorse Are Not Credible

Last, we consider that the Hearing Panel found Uberti's expressions of remorse and contention that he is not likely to repeat his misconduct to be credible. We acknowledge that the credibility findings of the initial fact finder are entitled to considerable weight and can be

[19] Although the Hearing Panel's decision contains numerous citations to the record, it does not contain a citation to support this finding.

overturned only by substantial evidence. *See Daniel D. Manoff*, Exchange Act Rel. No. 46708, 2002 SEC LEXIS 2684, at *11 (Oct. 23, 2002). This notwithstanding, we find that Uberti has demonstrated during the consideration of this case at every level a fundamental misunderstanding of the role that a securities professional plays and the duty that he owes to his clients to act fairly and ethically. We find that the record contains substantial evidence to contradict the Hearing Panel's credibility finding, and we reverse it.

Uberti has argued throughout the course of this proceeding that the activities that he undertook at Donner -- reviewing and editing Merrell's draft research reports, adding recent developments to the research reports, verifying the accuracy of the financial information, limited as it was, in the reports, and issuing the reports to the public -- were administrative in nature, and should not be considered part of his duties as a registered person. Before the Hearing Panel, the Commission, and us, Uberti has continued to espouse a "buyer beware" mentality that we find particularly troubling. Throughout this proceeding and on appeal to the Commission, Uberti argued that we misinterpreted the meaning of "reasonable investor." He contended that a reasonable investor would not rely on only one source of information (i.e., a research report) to decide whether to buy a security, but would conduct his own due diligence and review financial filings on the Commission's EDGAR web site. Uberti went so far as to contradict his own on-the-record testimony and argue unequivocally that a going concern opinion in an audited financial statement is not material. Uberti could not be more misguided. Uberti's argument regarding the lack of materiality of a going concern opinion is specious and demonstrates to us that he should not be allowed to deal with public customers.

In 1977, the Supreme Court held that "the fundamental purpose of the [Exchange] Act [was] to 'substitute a philosophy of full disclosure for the philosophy of caveat emptor.'" *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477 (1977) (*quoting Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)). Uberti turns this holding on its head. He subscribes to a "*caveat emptor*" theory with respect to the marketplace for low-priced stocks and suggests that investors should not rely on research reports for accurate information. He also suggests that his duties as a registered person do not extend to his providing potential investors with inaccurate and misleading information in research reports. Uberti's position is contrary to every idea espoused in the securities laws and demonstrates that Uberti cannot be trusted to deal fairly with public customers. Investors should not have to search the Internet and create their own research files to determine the reliability (or lack thereof) of research reports.[20] *Cf. Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991) (stating that, in a proxy statement, "not every mixture with the true will neutralize the deceptive"); *SEC v. Rana Research, Inc.*, 8 F.3d 1358, 1363 (9th Cir. 1993) (finding that a "grain of truth" included in an otherwise misleading press release is not curative).

---

[20] The Commission affirmed us on this point. *Donner*, 2007 SEC LEXIS 334, at **33-34. The Commission held that Uberti "omitted facts necessary to make [Donner's] representations in the research reports not misleading, and the public availability of those facts does not cure these omissions." *Id*. at *36.

Regardless of Uberti's purported demonstrations of remorse and promises that he will comply with NASD and SEC rules in the future, it is the "buyer beware" mentality to which Uberti clings that supports our finding that his readmission into the securities industry would be contrary to the public interest and that nothing less than a bar would adequately protect the investing public. For the reasons discussed above, we reverse the Hearing Panel's findings that mitigating factors exist that should reduce the sanctions that we impose.

4. FINRA's Sanction Guidelines Support a Bar for Uberti's Donner-Related Misconduct

We now turn to the applicable Guidelines. The Guideline for use of misleading communications with the public states that, in cases such as this involving numerous acts of intentional or reckless misconduct over an extended period of time, the adjudicator should consider barring the responsible individuals.[21] The Guideline for misrepresentations or omissions of fact states that, in egregious cases of intentional or reckless misconduct, the adjudicator should consider barring the responsible individuals.[22]

The Guidelines also recommend that we consider several relevant factors, including whether: respondent engaged in numerous acts or a pattern of misconduct; respondent engaged in misconduct over an extended period of time; respondent acted recklessly; respondent's misconduct resulted in the potential for monetary gain; and the research reports were widely circulated.[23] Here, Uberti was responsible for issuing 22 fraudulently misleading reports that omitted material information and included exaggerated and unsubstantiated claims and for failing in 43 instances to disclose Donner's pecuniary interest in issuing positive reports. These are serious offenses that could potentially mislead the investing public and ultimately threaten the integrity of our financial markets. The record is silent as to whether and how many customers were harmed by Uberti's misconduct, but an absence of customer harm would not negate the seriousness of his violations. *See Edward J. Mawod & Co.*, 46 S.E.C. 865, 871 (1977) ("The evil sought to be remedied [by the Exchange Act] is not victimization [of investors] but deception."), *aff'd*, 591 F.2d 588 (10th Cir. 1979). Uberti placed his and Donner's interests[24] before those of the investing public and, as such, committed a serious infraction of the securities laws and NASD's rules. Furthermore, Uberti's violations occurred during a period spanning several years, and Donner's research reports were widely accessible to all members of the public on Donner's web site.

---

21 *See* Guidelines, 88 (Communication with the Public – Late Filing; Failing to File; Failing to Comply with Rule Standards or Use of Misleading Communications).

22 *See id.* at 96 (Misrepresentations or Material Omissions of Fact).

23 *See id.* at 9-10 (Principal Considerations in Determining Sanctions).

24 Donner received remuneration for every research report and additional funds for follow-up coverage of issuers. Uberti received a salary of 50 percent of the revenue generated from the issuers that he helped Donner to cover.

Uberti was motivated by profit when he published research reports under Donner's name, and his actions throughout this portion of his securities career were reckless and contrary to industry standards. We find Uberti's misconduct to be so egregious and his misunderstanding of his duties and obligations as a registered person to be so pervasive that we conclude that a bar of Uberti is necessary in order to protect the investing public. Thus, we bar Uberti for his violations related to the Donner research reports. This sanction is within the range recommended in the applicable Sanction Guidelines.

B. Sanctions Related to Lincoln Research Reports

For misconduct related to the Lincoln research reports, we fined Runyon $20,000, suspended him for six months, and required that he requalify as a general securities representative and principal. The Commission affirmed these sanctions as to Runyon. *Donner*, 2007 SEC LEXIS 334, at *72. In light of our imposition of a bar of Uberti for Donner-related misconduct, we held that a suspension, fine, and requalification requirement would be redundant, and we declined to impose them as to Uberti. *Donner*, 2006 NASD Discip. LEXIS 4, at *95. On remand, the Commission directed us to reassess our decision not to impose sanctions on Uberti for Lincoln-related misconduct. *Donner*, 2007 SEC LEXIS 334, at *74. We have reconsidered our position on remand and have determined to impose sanctions for Lincoln-related misconduct on Uberti, in addition to the bar that we impose for Donner-related misconduct. Thus, in addition to the bar, we fine Uberti $20,000, suspend him for six months, and require that he requalify as a general securities representative and principal should he ever re-enter the securities industry.

We have considered the principal considerations listed in the Guidelines and find that several aggravating factors and no mitigating factors exist with respect to Uberti's actions at Lincoln. The Lincoln research reports were widely circulated because Uberti published them on Lincoln's web site and made them available to all members of the public who were interested in viewing them. The Lincoln research reports omitted material information, including that company auditors had expressed doubt about the issuers' ability to continue as going concerns, and contained exaggerated and unsubstantiated claims. As with the Donner research reports, we find reprehensible Uberti's steadfast insistence that, provided he included in the research reports hyperlinks to the issuers' financial filings, buyers were "on notice" of auditors' going concern opinions. Uberti was motivated by profit to leave Donner and perpetuate his fraudulent conduct by publishing equally outlandish research reports under Lincoln's name. Uberti's actions were reckless and contrary to industry standards. We find his Lincoln-related misconduct to be serious and deserving of the sanctions imposed.

As instructed by the Commission, we have reconsidered our decision not to impose sanctions for Uberti's Lincoln-related misconduct and have determined to impose the same sanctions affirmed by the Commission with respect to Runyon.[25] Thus, for misconduct related to

[25] There is nothing in the record to distinguish Uberti's level of culpability from Runyon's level of culpability for Lincoln-related misconduct. The record demonstrates that both were responsible equally for the Lincoln research reports.

the Lincoln research reports, we fine Uberti $20,000, suspend him in all capacities for six months, and require that he requalify as a general securities representative and principal should he ever re-enter the securities industry.

VI. Conclusion

The Commission affirmed our findings holding Uberti responsible for issuing under Donner's and Lincoln's names numerous research reports that included fraudulently misleading misrepresentations and omissions of material facts and failed to include information regarding Donner's receipt of remuneration from issuers.

For the violations related to Donner's research reports, we bar Uberti from associating with any member firm in any capacity. For the violations related to the Lincoln research reports, we fine Uberti $20,000, suspend him for six months, and require that he requalify as a general securities representative and principal should he ever re-enter the securities industry. We reaffirm the Hearing Panel's assessment of $5,090.12 in hearing costs and our assessment of $931.49 in appeal costs. The bar shall be effective upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

_____

Marcia E. Asquith, Vice President
and Deputy Corporate Secretary