FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BERNARD G. McGEE (CRD No. 1203327), Respondent.	Disciplinary Proceeding No. 2012034389202 Hearing Officer–DRS **AMENDED EXTENDED HEARING PANEL DECISION**[1] December 22, 2014

Respondent is barred in all capacities from associating with any FINRA member for: (1) willfully violating Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and violating FINRA Rules 2020 and 2010, by failing to disclose material information to a customer; and (2) violating NASD Rule 2310, IM-2310-2, and FINRA Rule 2010, by making an unsuitable recommendation to that customer. Respondent is ordered to disgorge his commissions and to pay restitution to the affected customer. Respondent is also ordered to pay hearing costs.

In light of the bar, no additional sanctions are imposed for Respondent's violation of FINRA Rules 3270 and 2010 by failing to disclose his outside business activities; willful violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by failing to timely update his Form U4; and violation of FINRA Rule 2010 and NASD Rule 2110 by providing false information to his member firm.

Enforcement failed to establish that Respondent made a material misrepresentation to a customer regarding a purported impending tax liability, in violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, FINRA Rules 2020 and 2010. Accordingly, that charge is dismissed.

Appearances

For the Department of Enforcement, Complainant, Daniel L. Gardner, Esq., Edwin Aradi, Esq., and Lane Thurgood, Esq., Rockville, Maryland.

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[1] This Amended Extended Hearing Panel Decision is issued to correct a typographical error on page 38 of the original decision in the amount of losses incurred by the affected customer.

For Bernard G. McGee, Respondent, Kevin R. Van Duser, Esq., and Stephen A. Davoli, Esq., Sugarman Law Firm, LLP, Syracuse, New York.

DECISION

I. Introduction

While registered with a FINRA member firm, Respondent Bernard G. McGee recommended to his customer CF that she surrender her four variable annuities ("VAs") and purchase a charitable gift annuity from an entity named 54F. CF's variable annuities were worth approximately $490,000, and represented over half her investment holdings. CF followed McGee's recommendation. In so doing, she incurred surrender charges of more than $36,000 and a tax liability. McGee gave the remaining proceeds, totaling approximately $455,000, to 54F, ostensibly for the purchase of a charitable gift annuity. 54F invested her funds in three fixed index annuities ("FIAs"), and donated approximately $175,000 to various charities. McGee received a commission from 54F of more than $59,000 for CF's investment.

Based on this conduct, as well as McGee's use of a personal email account to communicate regarding securities business; his false responses to firm compliance questionnaires; and his undisclosed business activities with 54F, the Department of Enforcement filed a five-cause Complaint against him.[2] The Complaint charged McGee with: (1) misrepresenting to CF that she faced a tax liability in order to induce her to sell her VAs and invest in a charitable gift annuity, and failing to disclose to her the fee he would receive in connection with her investment with 54F, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and in violation of FINRA Rules 2020 and 2010; (2) making unsuitable recommendations to CF that she sell her VAs and purchase a charitable gift

[2] Enforcement filed the Complaint on November 11, 2013.

annuity, in violation of NASD Rule 2310 and IM-2310-2; (3) not disclosing his outside business relationship with 54F to his employing member firm, in violation of FINRA Rules 3270 and 2010; (4) failing to timely update his Form U4 with his new office address, in willful violation of FINRA Rule 1122 and Article V, Section 2 of FINRA's By-Laws, and in violation of FINRA Rule 2010; and (5) making misrepresentations on firm compliance questionnaires regarding his email address and whether he had processed transactions away from his firm, in violation of NASD Rule 2110 and FINRA Rule 2010.

McGee filed an Answer denying all charges, requested a hearing, and asked that the Complaint be dismissed. McGee denied that he recommended to CF that she sell her four VAs, contending, instead, that they were unsolicited liquidations which she had requested; denied recommending to CF what she should do with the proceeds from the sale of the VAs; asserted that the financial products 54F purchased on her behalf were not securities, and therefore, not subject to SEC or FINRA jurisdiction; and maintained that he properly disclosed all outside business activity to his firm, as well as all office and email addresses.[3]

After a hearing on June 2–6, 2014, in Syracuse, New York, the Extended Hearing Panel[4] finds that, with the exception of the alleged misrepresentation to CF concerning a purported impending tax liability, Enforcement proved the violations charged in the Complaint and imposes the sanctions set forth herein.

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[3] McGee Affidavit in support of Motion for Summary Disposition ¶ 6.

[4] The Hearing Panel consisted of a Hearing Officer and a current member of the District 8 Committee and a former member of FINRA's District 10 Committee.

II. Findings of Fact

A. Bernard G. McGee

McGee is currently associated with a FINRA member firm as a General Securities Representative and a General Securities Supervisor.[5] He first became associated with a member firm in 1988[6] and, since entering the securities industry, has been registered with five member firms.[7]

McGee was associated with Cadaret, Grant & Co., Inc., as a General Securities Representative and a General Securities Supervisor from April 2007 until October 2012, at which time he resigned.[8] Cadaret filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on McGee's behalf stating that he had been permitted to resign during a firm investigation for "failure to disclose an outside business activity, in violation of firm policies and procedures."[9] Cadaret's filing of the Form U5 triggered the investigation that led to this disciplinary proceeding.[10] While registered at Cadaret and his current firm, McGee conducted business through an entity known as M.T. Flanagan & Associates ("M.T. Flanagan").[11] He also acted as an independent insurance agent through M.T. Flanagan.[12] While associated with Cadaret, McGee engaged in misconduct that is the subject of this disciplinary action.

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[5] Ans. ¶ 10; Stip. ¶ 1; CX-12, at 4.

[6] CX-1, at 4.

[7] Ans. ¶ 10.

[8] Ans. ¶ 10; Stip. ¶ 1.

[9] CX-1, at 4, 10–11, 20–21; Tr. (Velez) 286–87 (Wendoly Velez was the FINRA staff principal investigator assigned to the investigation.).

[10] Tr. (Velez) 286–87.

[11] Ans. ¶ 11; Stip. ¶ 2.

[12] Ans. ¶ 11; Stip. ¶ 2.

B. Customer CF

CF first became McGee's customer in 2007, when he was associated with member firm New England Securities.[13] McGee and AR, another broker at that firm,[14] inherited the account when CF's broker left New England Securities in early 2007.[15] At that time, CF was 67 years old.[16] She had become a customer of New England Securities in the late 1990's following her divorce.[17] As part of the divorce settlement, she received a TIAA account, a CREF account, and cash.[18] In 1999, CF used the cash to purchase a VA.[19] CF held these assets at the time McGee became her broker in 2007.[20] In April 2007, at McGee's recommendation, CF purchased a New England Securities VA.[21] Later that month, New England Securities discharged McGee, and he joined Cadaret.[22] CF then transferred her account to Cadaret,[23] which she opened with a "long term growth" investment objective and a "moderate" risk tolerance.[24]

From October 2007 through June 2010, McGee made a number of recommendations to CF, which she followed. These transactions resulted in a substantial overhaul of her account. Among other things, CF sold her New England VA[25] and purchased two Hartford VAs[26] and two

[13] Ans. ¶ 12; Stip. ¶ 3.

[14] Tr. (AR) 1314.

[15] Tr. (McGee) 764, 1109.

[16] Ans. ¶ 12; Stip. ¶ 3.

[17] Tr. (CF) 514–15.

[18] Tr. (CF) 514.

[19] Tr. (McGee) 774.

[20] Tr. (CF) 518–19.

[21] Tr. (McGee) 775–76.

[22] CX-1, at 4–5.

[23] Ans. ¶ 12; Stip. ¶ 3.

[24] Ans. ¶ 12; Stip. ¶ 3.

[25] CX-6, at 3–4; Tr. (McGee) 779–80, 787.

[26] CX-6, at 3–4, 12–13; Tr. (McGee) 779–80, 787–89.

Pacific Life VAs.[27] By March 2011, CF's holdings with McGee totaled approximately $840,000, over half of which was invested in the four Hartford and Pacific Life VAs.[28]

C. McGee Recommends that CF Purchase a Charitable Gift Annuity

By late 2010 or early 2011, McGee decided that CF should embark upon a major new investment course. In March 2011, he recommended that she sell her four VAs and invest in a charitable gift annuity offered by 54F, a Cazenovia, New York-based corporation run by JG, whom McGee had met several years earlier. According to 54F's marketing materials, it offered a product called the 54F Gift Annuity designed for "donors" who have "a tax qualified or other investment that is either underperforming or [are] facing a taxable event." Such persons would use "part of the proceeds from the sale of one of these investments to make a major gift to charity, and use[] the remaining funds to purchase an annuity." Then, the donor could use the annuity proceeds to purchase life insurance or pay for long term care premiums, among other things. According to 54F, the product "permits the donor to offset significant capital gains or regular income tax with a large tax deduction from a charitable donation." Also, the donor "has the option of receiving income for life, or selecting a stream of payments that will continue after their death." [29] McGee's recommendation that CF liquidate her four VAs and purchase a charitable gift annuity offered by 54F is at the core of this disciplinary proceeding.

McGee's recommendation derived from his relationship with JG and 54F. In approximately 2008 or 2009, McGee first met JG,[30] the head of 54F.[31] Thereafter, JG provided

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[27] CX-6, at 20–21, 48–49; Tr. (McGee) 789–92.

[28] Ans. ¶ 13; Stip. ¶ 4.

[29] CX-9, at 3.

[30] Tr. (McGee) 795.

[31] Ans. ¶ 15; Stip.¶ 7.

54F marketing materials to McGee.[32] In late 2010, McGee told him about his company and the charitable gift annuity it offered.[33] Around this time, in late 2010 or early 2011, McGee told his partner at M.T. Flanagan, AB, that he had a "perfect client" or "a match for this gift annuity concept."[34] McGee did not identify the client by name, but described her to AB as "elderly," a "widow or something" who "had a lot of money" that she "wasn't spending" and who "didn't have anybody to leave her money to."[35] Further, he told AB, essentially, that this customer "will be our case study to see . . . how this process works . . . and if this thing really works out."[36] The client McGee had in mind for the charitable gift annuity was CF.[37]

In January or February 2011, McGee gave CF 54F marketing materials.[38] At this time, McGee understood little about 54F and charitable gift annuities. Specifically, he knew nothing about 54F's financial condition and did not try to educate himself about charitable gift annuities. Further, he did not speak with any customer who had previously purchased a charitable gift annuity, and he was unaware if anyone else had actually ever purchased a 54F charitable gift annuity,[39] or if 54F sold any products other than charitable gift annuities.[40] By contrast, he

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[32] Ans. ¶ 16; Stip. ¶ 8.

[33] Tr. (McGee) 795–96.

[34] Tr. (AB) 160.

[35] Tr. (AB) 168–69.

[36] Tr. (AB) 182–84 (consisting of AB's investigative testimony, which the Panel credits because it was given closer in time to the events at issue than his hearing testimony in which he stated that he did not recall McGee using these words). At the hearing, McGee did not recall making this statement to AB. Tr. (McGee) at 800–01.

[37] Although AB did not recall McGee mentioning the client by name, it is clear that McGee was referencing CF. In November 2012, he wrote to Cadaret that CF was the only client to whom he "suggested the [charitable gift annuity]." CX-50, at 7; Tr. (McGee) 819. (At the hearing, McGee tried to retreat from that statement, testifying that it was an "error," and that he meant that she was the only client he had ever referred to 54F. Tr. (McGee) 1134).

[38] Tr. (McGee) 814, 970.

[39] Tr. (McGee) 820; *see also* Tr. (McGee) 805–06.

[40] Tr. (McGee) 804.

focused on the compensation he could receive from 54F,[41] learning that it paid brokers a large commission—at least eight or ten percent—for client referrals.[42]

D. CF Surrenders Her VAs and Invests the Proceeds with 54F; McGee Receives a Large, Undisclosed Commission

Many of the facts and circumstances surrounding CF's surrender of her four variable annuities in March 2011 are undisputed.[43] Specifically, McGee admits that he met with CF at her home on March 9, 2011, at which time he prepared and had CF sign surrender forms for CF's four VAs and an application for a Lincoln FIA.[44] As she had done many times in the past, she signed the forms at McGee's direction. McGee also does not dispute that CF incurred charges of $36,202.50[45] when she surrendered the annuities and that the surrender of the annuities created taxable income. However, McGee disputes other circumstances surrounding the surrender of the annuities, including whether it was McGee's or CF's idea to sell them, or whether CF even understood that she was selling her VAs or just transferring funds to 54F to be managed there by McGee.

At or around the time of the meeting at CF's home on March 9, 2011, McGee created a document entitled "[CF] Liquidation Proceeds." The document lists the proceeds from the liquidation of the VAs and states further: "I will assume the following and let me know if this is correct: 1) I will get a check on Thursday from [CF] for the total net of $454,999 . . . 4) I will be

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[41] Tr. (McGee) 920.

[42] Tr. (McGee) 797–98, 828; Tr. (AB) 161–63; *see also* Stip. ¶ 9. McGee testified that after the liquidations he learned from JG that he would receive a ten percent commission. Tr. (McGee) 986–87. The evidence showed, however, that before the liquidations, he knew that his commission would be at least eight or ten percent. Tr. (McGee) 1147–48.

[43] Stip. ¶ 5.

[44] Tr. (CF) 719–20; RX-18–RX-21; CX-29–CX-30.

[45] Ans. ¶ 2; Stip. ¶ 5. The exact amount was $36,202.47, as reflected on the liquidation checks. CX-14–CX-17.

paid based on 10% of the total deductible contribution or $49,262."[46] McGee also prepared a document entitled "[54F] Proposal" which contains a charitable gift analysis; a reference to current and estimated amounts attributable "To Indexed Annuity;" the statement "I, assume, in this case, I will be paid $50,147.00;" and a reference to surrender charges of $35,000.[47]

On or about Thursday, March 17, 2011, McGee called CF and informed her that redemption checks from Hartford and Pacific Life were being delivered to her home.[48] On that date, McGee went to CF's home shortly after the VA liquidation checks arrived.[49] Those checks, totaling $454,998.75, reflect that CF incurred $36,202.50 in surrender charges.[50] While at her home, McGee filled out part of a deposit slip, and then drove CF to her bank to deposit the checks.[51] While at the bank, McGee directed CF to write a check to 54F for the full amount of the liquidation checks,[52] and she complied.[53] Later that day, McGee hand-delivered the check to

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[46] CX-21, at 1.

[47] CX-21, at 2. The record does not permit a precise determination of when McGee created the two documents comprising CX-21. Both are undated. McGee testified he did not know exactly when he prepared CX-21, Tr. (McGee) 851–53, 856, but knew that he created these documents after CF signed the surrender forms and, specifically, that he prepared CX-21, at 1 on March 16—after CF signed the surrender forms but before CF received the proceeds. Tr. (McGee) 853–55. It is likely that McGee prepared CX-21, at 1 after the VA liquidations on Wednesday, March 9, 2011, because the document refers to McGee anticipating receiving a check on Thursday. And, in fact, the checks arrived the next week on Thursday, March 17, 2011. As to CX-21, at 2, Enforcement argued that McGee created this document before the March 9 meeting and, therefore, it shows that McGee prepared in advance to make a recommendation to CF. The Extended Panel makes no finding as to precisely when the documents were prepared or whether CX-21, at 2 was created before the March 9 meeting. But from these documents, it is clear that before McGee received his commission, he had an understanding of how large it would likely be and the potential use that would be made by 54F of the liquidation proceeds.

[48] Ans. ¶ 23.

[49] Tr. (CF) 525.

[50] CX-14–CX-17. The surrender charges reflected on the checks amount to $36,202.47. The parties stipulated to the rounded figure of $36,202.50, referenced above at footnote 45.

[51] CX-18; Tr. (CF) 526–27; Ans. ¶ 23.

[52] CX-19; Tr. (CF) 526–27.

[53] Tr. (CF) 548–49.

54F.[54] McGee created nothing in writing reflecting that the sale of CF's VAs was unsolicited,[55] and never told Cadaret that the transactions were unsolicited.[56]

As to the suitability of the VA sales, McGee admitted at the hearing that he did not perform a suitability assessment in connection with the surrender of the four VAs.[57] To have made that assessment, he testified, he would have needed "a lot more information,"[58] including her "liquidity needs, current income needs, assets, liabilities, a pretty thorough fact finder [sic] of a snapshot of her life."[59] Moreover, because of the surrender charges and tax liability incurred, he thought the surrender of the VAs was a "terrible idea" [60] and unsuitable.[61] He also thought the liquidations were probably unsuitable based on her investment objectives of growth and income.[62] Notably, at the time of the transactions, CF's monthly income was below $1,000 per month and consisted of Social Security payments.[63]

In connection with his referral of CF to 54F to purchase a charitable gift annuity, 54F paid McGee three commission checks totaling $59,264.[64] On March 25, 2011, eight days after he delivered CF's check to 54F, McGee received his first commission check, in the amount of

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[54] Tr. (McGee) 863; Ans. ¶ 23.

[55] Tr. (McGee) 771, 1078, 1090.

[56] Tr. (BLJ) 1291.

[57] Tr. (McGee) 866.

[58] Tr. (McGee) 1355.

[59] Tr. (McGee) 1360. The record reflects the value of CF's investment holdings at the time of the VA liquidations, but not her net worth at that time.

[60] Tr. (McGee) 975–76. The Panel makes no finding regarding the actual tax consequence to CF resulting from the VA liquidations. CF testified that she owed $16,000 in taxes for the 2011 tax year as a result of the sale of the VAs. Tr. (CF) at 575–76. This figure is also mentioned in a letter written to CF by her counsel. But it is not clear from the record what portion of her tax liability derived from the sale of the VAs. It is undisputed, however, that the sale of the VAs created a taxable event for CF.

[61] Tr. (McGee) 1089–90.

[62] Tr. (McGee) 1355.

[63] Tr. (CF) 577.

[64] Stip. ¶¶ 10, 11; *see also* Ans. ¶¶ 3, 19.

$49,264.[65] This initial commission payment represented ten percent of the gross value of the VAs, i.e., before deducting surrender and other miscellaneous charges.[66] McGee admitted at the hearing that a ten percent commission "on the total amount of the customer's account" was "unusually high."[67] Further, he knew that he received his first commission check before any annuity was issued to CF.[68] Two additional checks followed, for $5,000 each, on September 16, 2011, and January 9, 2012. At no time did McGee disclose to CF the commission he would earn as a result of her investment.[69] McGee's total commission was approximately 12 percent of the funds CF paid to 54F.[70]

E. McGee's Defense that He Did Not Recommend the VA Liquidations was Not Credible

The core of McGee's defense to the suitability charges is that he did not recommend that CF surrender her VAs and invest in a charitable gift annuity. Rather, according to McGee, it was all her idea. And, though he tried to dissuade CF from doing so, she insisted on following that course. CF's testimony painted a very different picture. She claimed not to have even known that she was liquidating her VAs and investing in a charitable gift annuity, and thought she was just moving her money to 54F where McGee would manage it for her. The Hearing Panel finds neither McGee nor CF credible in certain respects. Nevertheless, as explained below, considering the weight of the credible evidence, the Hearing Panel finds that McGee recommended that CF liquidate her VAs and invest in a 54F-offered charitable gift annuity.

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[65] Tr. (McGee) 1104–05, 857.

[66] Tr. (Velez) 475; CX-14–CX-17.

[67] Tr. (McGee) 986–87. *But see* Tr. (McGee) 1147 (testifying that his commission from 54F was "a little bit high" compared to the marketing materials he had seen from 54F).

[68] Tr. (McGee) 1104–05.

[69] Ans. ¶¶ 4, 47; Tr. (McGee) 829.

[70] The evidence did not establish, however, that at the time of the recommendation, McGee knew the exact amount of the total commission he would receive.

1. McGee's Description of Events

According to McGee, the idea of selling the VAs originated with CF.[71] McGee testified that he learned that CF had been estranged from her daughters for a number of years, and that by early 2011, their relationship had soured to a point where she wanted to ensure that they did not receive any of her money. [72] Consequently, according to McGee, she wanted to explore some alternatives, and he thought a good place to start was with an expert in charitable giving.[73] Accordingly, he recommended that she talk with JG at 54F,[74] gave her JG's phone number,[75] and "left [it] in her hands."[76]

McGee testified when he met with CF on March 9, she announced for the first time that she had talked to JG[77] and now wanted to sell her annuities and move the money to 54F.[78] Indeed, he said she was adamant about selling the four VAs and placing the funds with 54F.[79] McGee claimed to have had no idea whether, beforehand, JG had recommended that she purchase a charitable gift annuity.[80]

McGee further testified that he objected to her decision and told her so. He claims that he then spent "a couple of hours" presenting her with alternatives, such as annuitizing the VA liquidations to avoid the surrender charges or simply changing the beneficiary designation on the

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[71] Tr. (McGee) 978–79.

[72] Tr. (McGee) 950–56.

[73] Tr. (McGee) 964.

[74] Tr. (McGee) 963, 801.

[75] Tr. (McGee) 967.

[76] Tr. (McGee) 967.

[77] Tr. (McGee) 971.

[78] Tr. (McGee) 973, 981.

[79] Tr. (McGee) 950–56, 981.

[80] Tr. (McGee) 982.

VAs.[81] Nevertheless, according to McGee, CF rejected these proffered alternatives and insisted that she wanted to liquidate her annuities. Because she was steadfast, McGee stated that he was required to comply with her request.[82] He also denied recommending or soliciting CF to purchase a charitable gift annuity[83] and claimed that he had no financial incentive for her to liquidate her VAs. He represented that he did not earn any commission related to their liquidation,[84] was not promised any type of compensation for introducing a customer to JG, and had no agreement to receive such compensation.[85]

2. CF's Description of Events

CF's recollection of events bore no resemblance to McGee's story. CF testified that the liquidation of her VAs had nothing to do with her children and even denied ever telling McGee that she had a bad relationship with them.[86] Rather, on March 9, 2011, during a periodic portfolio review, McGee allegedly told her that she was facing an impending $100,000-plus tax liability.[87] According to CF, he then advised her that she should consider lowering her tax liability by donating to charity[88]—something that she had not previously done[89]—but she told him she was not interested in donating.[90]

CF further testified that at the March 9 meeting, she signed the VA surrender forms but had no idea she was liquidating her VAs. She also maintains that she did not realize that 54F

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[81] Tr. (McGee) 974, 976–78, 1094–95, 1144–45.

[82] Tr. (McGee) 979.

[83] Tr. (McGee) 982.

[84] McGee's Opening Brief at 9; Tr. (McGee) 979.

[85] Tr. (McGee) 966–67.

[86] Tr. (CF) 591.

[87] Tr. (CF) 505–06.

[88] CX-46; Tr. (CF) 508–09, 591.

[89] Tr. (CF) 509, 592–93, 825, 720.

[90] Tr. (CF) 591–92.

would make investments and donations on her behalf. Rather, she testified that she believed that all she was doing was transferring her funds to what she believed was McGee's new business so he could manage her funds there.[91] As to her understanding of 54F, CF stated that in December 2010, McGee first told her about 54F, explaining that it was his new business and that he needed funds for it. She testified that she obliged and gave him $13,000 in cash to assist him.[92] (McGee, however, denied that CF gave him these funds and maintained, instead, that he simply helped her cash two checks and that she then took the money for her personal use).[93]

CF testified that when the VA liquidation checks arrived, McGee came to her home and took the checks. CF did not review the checks herself, and McGee did not review them with her. He then drove her to the bank to deposit the checks.[94] Later, at the bank, she claims that an impatient McGee directed her to give him a check for the full amount of the liquidation proceeds, namely $454,998.75, made payable to 54F. She further stated that McGee never told her what he was going to do with the check.[95] Finally, CF denies that McGee ever gave her JG's phone number; denies he told her to call JG; and states that she only spoke with JG once, in January 2012, when he telephoned her and she hung up on him because he seemed inebriated.[96]

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[91] Tr. (CF) 548–50, 645.

[92] Tr. (CF) 484, 489, 497–98, 501–502; CX-11; CX-12.

[93] The evidence on this issue was conflicting and inconclusive. In any event, the resolution of this issue is not essential to adjudicating the charges in this case.

[94] Tr. (CF) 529, 533, 718.

[95] Tr. (CF) 548–49.

[96] Tr. (CF) 570–73.

3. Hearing Panel's Conclusion

The Panel rejects McGee's account of events for a number of reasons.

First, there was convincing evidence that McGee planned, in advance, to have CF invest in a charitable gift annuity. The Panel credited the testimony of AB that McGee told him that he had the perfect test case customer for the product. From McGee's description of the customer to AB, he was likely referring to CF. This conversation occurred well before McGee's March 9 meeting with CF. AB's recollection was clear, and there was no evidence of a motive for him to be untruthful or biased against McGee, with whom he still works and shares clients. [97] Indeed, McGee testified that AB was a truthful person[98] and, notably, did not directly dispute AB's recollection. Instead, he said he could not remember the conversation.[99]Additionally, McGee provided 54F marketing materials to CF at least one or two months before the March 9 meeting. Finally, when McGee met with CF on March 9, he had with him the necessary VA surrender forms. This constituted evidence that he had planned, before the meeting, to have CF surrender her VAs. McGee testified that he spent much of his time on the road seeing clients and his normal practice was to carry a booklet of forms with him in the car to every client meeting.[100] The Panel rejected as implausibly coincidental that McGee just happened to have with him on March 9 the precise forms necessary for CF to surrender four VAs from two issuers when he claimed to have had no advance notice that she was planning to do so.

Second, McGee had a strong financial motive to recommend the transactions at issue. The evidence showed that McGee knew, in advance of the March 9 liquidations, that he would

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[97] Tr. (AB) 150.

[98] Tr. (CF) 1146.

[99] Tr. (McGee) 800–01.

[100] Tr. (McGee) 981, 1126.

make a commission of at least eight percent, perhaps as high as ten percent, on a referral of CF to 54F.

Third, McGee's version of events lacked corroboration, namely, that CF wanted to disinherit her daughters by liquidating her VAs and giving the proceeds to 54F, and that he tried to dissuade her from doing so. The record reflects no notes or communications by McGee to CF or Cadaret to that effect.[101] While McGee claimed that he created notes memorializing his explanation to CF that surrendering her annuities would result in a "$100,000+" tax liability,[102] his notes did not clearly support his version. They are scant, undated, and ambiguous, and the evidence and inferences concerning them are conflicting regarding when they were prepared. Although they contain certain numbers — "Taxes-$100,000+" and "SC's=$36,516.60"—the notes do not reflect what McGee or CF said about these numbers. Hence, the notes do not corroborate McGee's story. This lack of corroboration undercuts McGee's explanation of events, as it is unlikely that a broker as experienced as McGee would have taken no steps to memorialize such a purportedly strong disagreement with a client's intended course of action or created no record confirming that the transactions were unsolicited.

Fourth, McGee's version of events was inconsistent with his earlier investigative testimony that he did not believe he ever explained to CF the tax implications of liquidating the VAs and had not discussed alternatives with her.[103] The Hearing Panel credited McGee's investigative testimony over his hearing testimony as it was given closer in time to the events at

[101] Tr. (McGee) 771, 1078, 1090–91, 1291.

[102] CX-13, at 1; Tr. (McGee) 971–72.

[103] Compare McGee's hearing testimony, Tr. (McGee) 974, 1094–95, with his investigative testimony presented at the hearing. Tr. (McGee) 1079–80, 958.

issue and was consistent with the lack of corroboration for his claim that he opposed the liquidation and offered alternatives to CF.

Fifth, the Panel was not persuaded that had CF sought to prevent her daughters from receiving any more money from her, that she would have devised the idea, herself, of liquidating her VAs and giving the entire proceeds to 54F. Several facts compel this conclusion: (1) CF never originated her own investment ideas; [104] (2) CF relied on McGee for investment advice; (3) CF never said "no" to a recommendation from him; and (4) liquidating the VAs created sizable surrender charges and a tax liability for a customer whom McGee described as "frugal"[105] and "very nervous about taxes."[106]

In conclusion, the Hearing Panel rejects McGee's version of events and finds that McGee recommended CF liquidate her VAs and invest in a charitable gift annuity.

F. CF's Account of Events was Not Credible in Certain Respects

Although the Hearing Panel rejects McGee's version of events, and finds that he made a recommendation to CF, it did not find CF's recollections credible in a number of respects, including whether McGee made a misrepresentation to her about an impending tax liability.

First, CF's testimony was largely uncorroborated. Moreover, the August 1, 2012 letter from her attorney to Cadaret, written a year and a half after the liquidations, undercuts her version because it omits certain key elements. The letter did not mention: (1) that McGee had told CF that he had a relationship with 54F; (2) that CF was unaware that she was liquidating her VAs; (3) that CF thought she was giving her funds to McGee to manage at 54F; or (4) that

[104] Tr. (CF) 522–24.

[105] Tr. (McGee) 772.

[106] Tr. (McGee) 955. But even if CF had devised this strategy herself, it is unlikely that she would have implemented it in the face of McGee's purportedly strong opposition, given her dependence on him for investment advice.

McGee told her she was facing a tax liability of $100,000. Instead, the letter states that her VAs "were liquidated under McGee's supervision."[107]

Second, CF's credibility was undermined because she testified inconsistently with credible testimony from another witness. CF denied that she had ever discussed her daughters with AR, her prior broker, and specifically denied telling him that she had a poor relationship with them.[108] That testimony was flatly contradicted by AR, who testified that he knew CF from April 2007 until August 2007, and she spoke frequently about the animosity between her and her children.[109] The Panel finds AR credible. His recollections were clear and he was not impeached during cross examination. Although CF terminated their relationship abruptly,[110] the Panel detected no hostility on AR's part against her. Further, though he spoke favorably of McGee and considered him a friend,[111] the Panel did not find a sufficient basis for concluding that AR was motived to be less than forthright in his testimony.[112]

Third, the Hearing Panel did not believe that CF was unaware that she was liquidating her VAs. According to AR, when he dealt with her, she "asked questions that a savvy investor would ask;" was "knowledgeable about what she had;" "asked a lot of very good questions;" and read

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[107] CX-48, at 1. CF refused to testify about her dealings with any attorneys. Tr. (CF) 706. Accordingly, the record is silent as to why the letter did not contain these details. As discussed above, Enforcement argues that CX-13—McGee's purported notes of the March 9, 2011 meeting—corroborates CF's version that McGee told her she faced a $100,000 tax liability. But as also discussed above, the notes are inconclusive.

[108] Tr. (CF) 588–89.

[109] Tr. (AR) 1320–24.

[110] Tr. (AR) 1328–29.

[111] Tr. (AR) 1349.

[112] McGee claims that CF's credibility was also impeached because, contrary to her testimony that they spoke only once after March 17, they had, in fact, spoken more than 20 times. McGee testified that his phone records substantiate the existence of these phone calls. But although McGee stated that his attorney possessed these records, Tr. (McGee) 1151, McGee did not offer them into evidence. Accordingly, the Panel did not give weight to McGee's testimony on this point.

and asked questions about documents before signing them.[113] Also, CF signed surrender forms that prominently displayed the words "WITHDRAWAL REQUEST for Variable Annuities" or "Variable Annuity Surrender Request" at the top of a number of the pages,[114] including, in one instance, the signature page.[115] She had previously signed similar forms in connection with other VAs.[116]

Additionally, CF received four checks that reflect on their face that they were issued by The Hartford and Pacific Life.[117] Attachments to the checks also reflect surrender or withdrawal fee deductions. Even a cursory glance at the checks would have revealed this information and, at a minimum, CF would have seen that she was receiving large checks from companies that held her VAs. Even if CF failed to notice the surrender/withdrawal fees, it is unlikely that she looked at neither the surrender forms nor the checks and failed to realize that she was liquidating her VAs.

Finally, CF's testimony was equivocal about what McGee told her regarding a purported $100,000 tax liability. She testified that McGee told her at their March 9 meeting she faced a $100,000 tax liability.[118] But when directly asked if McGee told her she faced that liability "if she did nothing with [her] money," she responded: "I don't recall him saying that."[119] CF's lack of certainty regarding exactly what McGee told her about this purported liability, coupled with a lack of corroboration, and other concerns the Panel had regarding her credibility (*see* discussion

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[113] Tr. (AR) 131, 1337, 1347.

[114] CX-7.

[115] CX-7, at 12.

[116] CX-6.

[117] CX-14–CX-17.

[118] Tr. (CF) 506–09.

[119] Tr. (CF) 594.

above) preclude a finding that McGee misrepresented to CF that she faced a $100,000 tax liability unrelated to liquidating her VAs.

G. 54F Purchases FIAs on CF's Behalf and Makes Charitable Donations

After McGee gave 54F the check from CF in the amount of $454,998.75, there is no dispute regarding the actions 54F then took on her behalf. 54F gave $175,000 to four charities[120] and purchased three Lincoln FIAs on CF's behalf, with initial premium payments totaling $254,998.[121] Lincoln later returned CF's initial premiums[122] after CF hired an attorney to obtain information about the whereabouts of her funds. However, CF did not seek or receive the return of her charitable donations.[123]

H. McGee Engages in Undisclosed Outside Business Activities with 54F

McGee's relationship with JG and 54F began when they played golf together in 2008 or 2009.[124] Thereafter, as discussed above, JG explained the nature of 54F's business to McGee and the charitable gift annuity it offered. Also, he received commission checks from 54F for the CF transaction.

But McGee's relationship with JG and 54F was more extensive than these somewhat limited interactions. 54F owned property located in Cazenovia, New York, which contained both

[120] 54F claimed that it donated $200,000 on CF's behalf to four charities. Ans. ¶ 28. Instead, the evidence substantiated donations to three charities totaling $175,000. *See* CX-54, at 2; CX-55, at 2; CX-28; CX-79, at 10; Tr. (Velez) 373–75, 378 ($40,000); CX-52, at 2, 3, 5, 7, 9; RX-5, at 54, 57, 63, 368–69 ($85,000); and CX-53, at 2; Tr. (Velez) 371; (McGee) 920 ($50,000).

[121] CX-31–CX-33 (containing a $90,000 initial premium with certificate dated July 1, 2011; a $90,329 initial premium with certificate dated January 22, 2012; and a $74,669 initial premium with certificate dated March 22, 2012).

[122] Tr. (CF) 714–15.

[123] Tr. (CF) 715–17.

[124] Tr. (McGee) 795.

a main house and a carriage house.[125] 54F had an office in the main house.[126] McGee occupied an office in the carriage house rent-free; prepared and sent a business/marketing plan to JG that proposed a joint venture whereby he would sell securities products while 54F would sell fixed products; and proposed the creation of joint office on Singer Island, Florida, where JG lived.[127] McGee also traveled to Florida to "meet with potential clients to participate in this charitable program that was being offered."[128]

It was undisputed that McGee did not disclose to Cadaret his activities with 54F. In fact, Cadaret did not learn of McGee's involvement with 54F until August 1, 2012, when it received an inquiry letter from CF's lawyer.[129]

I. McGee Provides False Information to His Firm

While McGee was associated with Cadaret, the firm required its representatives to complete annual compliance questionnaires.[130] McGee completed compliance questionnaires for the years 2007 through 2011.[131] On the questionnaires, McGee certified that he had disclosed all of his business-related email addresses and that he had not been involved in any offers or sales of any type of investment that were not processed through his member firm or that were done

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[125] Ans. ¶ 34.

[126] Ans. ¶ 34.

[127] CX-20; Tr. (McGee) 802, 879, 881, 912–13, 917, 1138–39. *See also* Ans. ¶ 33 (In 2011, McGee submitted a joint business proposal to 54F's CEO, JG. McGee's proposal outlined a plan for 54F and McGee to generate more than $800,000 in commissions and fees by jointly selling $15 million worth of insurance and securities products).

[128] Tr. (SO) 77.

[129] Tr. (SO) 66–67; CX-48; CX-61, at 1.

[130] Ans. ¶ 36; Stip. ¶ 12.

[131] CX-71–CX-74. McGee became registered with Cadaret in 2007 and resigned in October 2012, before he completed a questionnaire for 2012. Tr. (Velez) 310.

without his firm's written permission. [132] In each of these questionnaires, McGee provided false responses.

First, on the 2011 compliance questionnaire (which McGee executed on July 1, 2011) McGee represented that he had not been involved, without the Cadaret's written permission, in the offer or sale of any security or other investment that was not processed through Cadaret.[133] This answer was false, in light of the transactions involving CF, discussed above.

Second, on each compliance questionnaire for the years 2007 through 2011, McGee answered "yes" to the question: "Have you disclosed all business related email addresses, to Cadaret, Grant."[134] These responses were false; McGee did not disclose that he had communicated regarding business matters, including securities business, through his Yahoo! email account, which he had begun using no later than 2007.[135] This was not a Cadaret-authorized email account.[136] According to AB, who was associated with Cadaret from November 6, 2006, until October 12, 2012,[137] he and McGee considered Cadaret's email server slow. Therefore, they typically communicated with each other using McGee's Yahoo! email address (and AB's Gmail address). These communications included securities business and other matters.[138] After McGee signed his last compliance questionnaire on July 1, 2011, he continued

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[132] Ans. ¶¶ 8, 38, 66, 67.

[133] CX-74, at 2.

[134] CX-70, at 5; CX-71, at 5; CX-72, at 4; CX-73, at 4; CX-74, at 5.

[135] Tr. (Velez) 320; *see also* Tr. (McGee) 769.

[136] Tr. (DJ) at 1192–93.

[137] AB's association dates are reflected in the Central Registration Depository, of which the Panel takes official notice. *See, e.g.*, *Dep't of Market Regulation v. Lane*, No. 20070082049, 2013 FINRA Discip. LEXIS 34, at *3 n.1 & *4 n.2 (NAC Dec. 26, 2013), *appeal docketed*, SEC Admin. Proceeding No. 3-15701 (Jan. 22, 2014) (taking official notice of firm's CRD record reflecting the date it requested termination of its broker-dealer registration and the date on which its registration was terminated and taking official notice of the capacities in which respondents were registered during the relevant period based on information reflected in CRD).

[138] Tr. (AB) 206–07.

to communicate using his Yahoo! email account for business matters.[139] McGee also used this email account to communicate with JG regarding CF in at least the spring of 2012.[140]

In his defense, McGee asserts that he used his Yahoo! email account solely for insurance-based business, and, therefore, he did not need to disclose the address because the firm only required the disclosure of accounts used for securities business.[141] Cadaret's Chief Compliance Officer testified that the firm required brokers to disclose securities-related email addresses, but not insurance-related ones.[142] But AB's testimony contradicted McGee's uncorroborated statement that he used the Yahoo! email address only for insurance-based business, and the Panel finds AB persuasive. The record does not reflect any reason to distrust either AB's memory or his motives, and his testimony on this point was not challenged by McGee on cross-examination. Accordingly, the Panel finds that McGee gave false responses on five annual compliance questionnaires by not disclosing a business-related email address.

J. McGee Fails to Timely Update His Form U4 to Reflect His Office's Change of Address

On December 5, 2011, McGee notified Cadaret by email that his M.T. Flanagan office had moved to 5 Ledyard Avenue, the 54F-owned structure known as The Carriage House, in Cazenovia, New York.[143] Later that day, Cadaret filed with FINRA an update to McGee's Form U4 reflecting that change in address. The Panel finds, however, that McGee and AB moved into that address approximately a year before McGee disclosed the change of address to Cadaret. While the record does not fix the exact date of the move, Enforcement demonstrated that the

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[139] *See* CX-63 (February 2012); CX-64, at 1 (May and June 2012).

[140] CX-40 (March 2012); CX-42 (April 2012).

[141] Tr. (McGee) at 1014.

[142] Tr. (BLJ) 1280–81; *see also* Tr. (DJ) at 1211–12. However, depending on the substance of an email and the recipient, if the address included the "Cadaret" name, the firm expected a broker to disclose that email address, even if it were used solely for insurance purposes. Tr. (DJ) at 1214–15.

[143] CX-67.

move occurred by late 2010 or early 2011[144] and, specifically, that McGee had moved there by the time of the CF transactions,[145] and by the time he told AB he had the "perfect client" for the 54F charitable gift annuity.[146]

K. McGee was Not Candid with Cadaret During its Internal Investigation

After Cadaret received a letter from CF's attorney in August 2010, it conducted an investigation into McGee's activities regarding CF and 54F. McGee was not candid with Cadaret during its investigation. For example, the firm dispatched SO, an assistant vice president in the compliance department, to McGee's home for an unannounced meeting.[147] At that meeting, McGee originally told SO that he had not received any compensation for his 54F-related activities. As the meeting progressed, however, and as SO pressed for more details, McGee stated that he had been paid a "referral fee" and for "consulting work" unrelated to a specific transaction.[148] McGee later told his supervisor, DJ, the same thing.[149] As to CF and 54F, McGee told SO that he had "just handed [CF] off to [JG], and that was it."[150] This was untrue; McGee had orchestrated the VA liquidations and the payment of the proceeds to 54F to purchase a charitable gift annuity.

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[144] Tr. (Velez) 472–73 (reading into the record the portion of McGee's investigative testimony where he stated that the move occurred in late 2010 or early 2011).

[145] Tr. (AB) 248–49; Tr. (McGee) 889.

[146] Tr. (AB) 160, 164. By contrast, AB testified that a week before the hearing, he found receipts for business cards indicating that he ordered them in January 2012, which, he stated, would have been shortly after he and McGee moved offices. Tr. (AB) 243–44. Based on this evidence, McGee argues that he did not move to Ledyard until December 2011. This evidence was not persuasive. AB's testimony was based on records not offered in evidence and which, in any event, purportedly do not directly show when they moved offices. The Panel finds that AB's hearing testimony regarding the business cards was insufficient to overcome McGee's prior, sworn, investigative testimony—given closer in time to the events at issue—indicating that the move had occurred much earlier, as well as AB's other hearing testimony that the move had occurred earlier.

[147] Tr. (SO) 65, 71.

[148] Tr. (SO) 91–92; CX-85, at 10.

[149] Tr. (DJ) 1198, 1221.

[150] CX-85, at 9; Tr. (SO) 76. *See also* (BLJ) 1247–49 (McGee failed to promptly notify the firm that he had received a complaint from CF's attorney and that the FBI had contacted him about 54F).

III. Conclusions of Law

A. Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and FINRA Rules 2020 and 2010 (First Cause of Action)

1. McGee Willfully Violated Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and Violated FINRA Rules 2020 and 2010 by Failing to Disclose to CF His Expected Compensation

The First Cause of Action charges McGee with fraud, in violation of Section 10(b) of the Securities Exchange Act of 1934[151] and SEC Rule 10b-5,[152] by misrepresenting to CF that she faced a large tax liability and needed to make charitable donations to offset that liability.[153] Additionally, McGee is charged with violating those provisions by failing to disclose to CF that he would make nearly $60,000 on her purchase of a charitable gift annuity from 54F.[154] The Complaint also alleges violations of FINRA Rule 2020—FINRA's anti-fraud rule— and FINRA Rule 2010. But since the Hearing Panel finds that McGee committed Rule 10b-5 fraud, those FINRA rules were also violated and need not be separately discussed here.[155]

Recently, in *Dep't of Enforcement v. Anthony A. Grey*,[156] the National Adjudicatory Council ("NAC") addressed the elements of a federal securities fraud violation under Section

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[151] 15 U.S.C. § 78j(b).

[152] 17 C.F.R. § 240.10b-5.

[153] *See* Compl. ¶ 46.

[154] *See* Compl. ¶ 47.

[155] FINRA Rule 2020 proscribes fraud in language similar to Section 10(b): "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." A violation of Section 10(b) is also a violation of FINRA Rule 2020. *See Dep't of Enforcement v. Thomas Weisel Partners, LLC*, No. 2008014621701, 2013 FINRA Discip. LEXIS 1, at *15 (NAC Feb. 15, 2013). Additionally, "[c]onduct that violates Commission rules or FINRA rules is inconsistent with high standards of commercial honor and just and equitable principles of trade and therefore also violates NASD Rule 2110 (now FINRA Rule 2010)." *Dep't of Enforcement v. The Dratel Group, Inc.*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *28 n.25 (NAC May 2, 2014).

[156] No. 2009016034101, 2014 FINRA Discip. LEXIS 31 (NAC Oct. 3, 2014).

10(b) and Rule 10b-5.[157] According to the NAC, "Section 10(b) of the Exchange Act makes it unlawful for any person to use or employ any manipulative or deceptive device or contrivance in connection with the purchase or sale of a security. Rule 10b-5, promulgated under Section 10(b), makes it unlawful to make material misstatements or to omit material facts in connection with the purchase or sale of a security."[158]

Additionally, to violate Section 10(b), the respondent's misrepresentation or omission must be made with scienter, namely, a mental state embracing intent to deceive, manipulate, or defraud, or at least knowing misconduct.[159] The scienter requirement can be established by showing that the respondent acted recklessly.[160] "Recklessness in this context is a 'highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [respondent] or is so obvious that the actor must have been aware of it.'"[161]

Misrepresentations and omissions are treated differently under these provisions. "Those who make affirmative representations have 'an ever-present duty not to mislead.'"[162] An omission, however, "is actionable under the securities laws when a person is under a duty to

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[157] *See also Dep't of Enforcement v. The Dratel Group, Inc*., No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *27 n.24 (NAC May 2, 2014); 17 C.F.R. § 240.10b-5.

[158] *Grey*, 2014 FINRA Discip. LEXIS 31, at *21. Section 10(b) also requires that the violative conduct use the means or instrumentality of interstate commerce or of the mails.

[159] *Grey*, 2014 FINRA Discip. LEXIS 31, at *22.

[160] *Id*. at *22–23.

[161] *Id.* at *23 (quoting *Alvin W. Gebhart, Jr.*, Exchange Act Rel. No. 58951, 2008 SEC LEXIS 3142, at *26 n.26 (Nov. 14, 2008), *aff'd*, 595 F.3d 1034 (9th Cir. 2009)).

[162] *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *15 (Oct. 2, 2013) (quoting *Basic Inc. v. Levinson*, 485 US. 224, 242 n.18 (1988).

disclose."[163] When recommending an investment, a registered representative has a duty to disclose material information fully and completely.[164]

A fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"[165] Failing "to disclose information related to a registered representative's own self-interest constitutes a material omission."[166] And when the circumstances are not "ordinary," and the compensation that a broker will receive in connection with recommending a transaction is unusually high, the compensation is material and must be disclosed.[167] Failing to do so deprives a customer of the knowledge that the broker's recommendation might be based on the broker's financial self-interest.[168]

By not disclosing his expected compensation, McGee made a material omission that violated Section 10(b), Rule 10b-5, FINRA Rules 2020, and 2010. The omission was material, as it involved McGee's unusually large expected compensation from 54F, an entity with which he had an ongoing business relationship (including receiving rent-free office space). Under these circumstances, his compensation was material, as this information would have been important

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[163] *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *67 (NAC Oct. 13, 2013); *see also Basic Inc.*, 485 U.S. at 239, n.17 ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.").

[164] *Pierce*, 2013 FINRA Discip. LEXIS 25, at *67.

[165] *Pierce*, 2013 FINRA Discip. LEXIS 25, at *69 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[166] *See, e.g.*, *Dep't of Enforcement v. Meyers,* No. C3A040023, 2007 NASD Discip. LEXIS 4**,** at *20 (NAC Jan. 23, 2007) (probable receipt of incentive payment on sale of stock had to be disclosed); *Dep't Enforcement v. DaCruz*, 2007 NASD Discip. LEXIS 1, No. C3A040001, at *24–28 (NAC Jan. 3, 2007); *Richard H. Morrow*, 53 S.E.C. 772, 781–82 (1998) (failing to disclose to prospective investors additional compensation, characterized as an equity kicker was a material omission); *Joseph J. Barbato*, 53 S.E.C. 1259, 1274 (1999) (failing to disclose compensation for selling house stocks was a material omission).

[167] *Meyers*, 2007 NASD Discip. LEXIS 4**,** at *21–24.

[168] *Meyers*, 2007 NASD Discip. LEXIS 4**,** at * 27; *SEC v. Hasho,* 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992).

for a reasonable investor to know, and, therefore, he should have disclosed it.[169] Further, the materiality of this omitted information was so obvious that McGee acted at least recklessly, and therefore with scienter, by not disclosing it to CF.

Finally, McGee's conduct was willful. "A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'"[170] It is clear from the evidence that McGee knew what he was doing.

In reaching these conclusions, the Hearing Panel considered and rejected each of McGee's defenses to this charge. While McGee does not claim he disclosed his commission to CF, he denies that he committed fraud by failing to do so. First, McGee denies that he had any obligation to disclose his commission because he did not recommend to CF that she liquidate her VAs and purchase a charitable gift annuity. The Hearing Panel, however, rejects McGee's version and concludes that, in fact, he had recommended this investment strategy to her.

Second, McGee argues that he did not commit fraud because Cadaret investigated his conduct and did not conclude it was fraudulent.[171] The Hearing Panel, however, is not bound by, and does not accord weight to, Cadaret's conclusions. Rather, it is for the Panel to decide whether McGee engaged in fraud, based on the evidence presented at the hearing. And based on that evidence, the Panel concludes that he committed fraud by material omission.

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[169] The other requirements for liability under the federal anti-fraud provisions are met, as well. The omission was made "in connection with" the sale of CF's four VAs. This language is broadly interpreted and includes activity that "touches" or "coincides" with a securities transaction, *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006), or where the sale of a security was necessary to complete the fraud. *SEC v. Pirate Investor LLC*, 580 F.3d 233, 244–45 (4th Cir. 2009). McGee's omission both touched and coincided with securities transactions (the sale of the VAs) and were necessary to complete the fraudulent activity. Finally, the fraudulent activity utilized the instrumentalities of interstate commerce because McGee telephoned CF to set up appointments, mailed her surrender forms to Hartford, and faxed them to Pacific Life. Also, the liquidation checks arrived from outside New York, via FedEx.

[170] *The Dratel Group, Inc.*, 2014 FINRA Discip. LEXIS 6, at *77 (quoting *Robert D. Tucker*, Exchange Act Rel. No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012)).

[171] Tr. (SO) 110–11; (BLJ) 1268–71.

Third, McGee argues that he acted without scienter. Specifically, he claims that he had no motive for CF to liquidate her VAs, as he did not earn a commission based on their liquidation and would have earned more in annual commissions had she retained them.[172] The Panel finds this argument speculative and unpersuasive. Moreover, even if true, it does not demonstrate that McGee was willing to forgo an immediate and large commission in exchange for even larger commissions over time.

Fourth, McGee maintains that Enforcement failed to prove that his omission was made in connection with a securities transaction because he did not receive the commission for the sale of the securities (i.e. the VAs) but, rather, from the purchase of non-securities insurance products (i.e. Lincoln FIAs). This argument construes too narrowly the connection between the omission and the transactions at issue here. McGee implemented a two-part strategy: the sale of VAs and the intended purchase of a charitable gift annuity. The sale of securities was the essential first step in that strategy, as it provided the needed funds for the second step. Accordingly, the omission "touched" or "coincided" with a securities transaction necessary to complete the fraud. This nexus is sufficient to establish that the omission was made in connection with the sale of securities.[173]

2. Enforcement Failed to Establish that McGee Violated Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, FINRA Rules 2020 and 2010 by Misrepresenting to CF that She Faced a Tax Liability

Enforcement failed to establish that McGee represented to CF that she faced a $100,000 tax liability and that she needed charitable deductions to offset that tax liability.[174] Consequently, Enforcement failed to establish that McGee violated Section 10(b) of the Securities Exchange

[172] Tr. (McGee) 960–62.

[173] *See* footnote 169.

[174] Compl. ¶¶ 20, 46.

Act of 1934 and SEC Rule 10b-5, and FINRA Rules 2020 and 2010 by making a material misrepresentation to CF. Therefore, that charge is dismissed.

B. McGee Violated NASD Rule 2310, IM-2310-2, and FINRA Rule 2010 by Making an Unsuitable Recommendation to CF (Second Cause of Action)

When recommending that a customer purchase, sell, or exchange any security, NASD Rule 2310 required that the broker "have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holding and as to his financial situation and needs."[175] Additionally, NASD IM-2310-2 provided that "[i]mplicit in all member and registered representative relationships with customers is the fundamental responsibility of fair dealing." When making a recommendation, "a registered representative must make a 'customer-specific determination of suitability' and tailor his or her recommendations 'to the customer's financial profile and investment objectives.'"[176]

The suitability obligations under NASD Rule 2310 extended to "a broker's recommendation of an 'investment strategy' involving both a security and a nonsecurity."[177] Further, and more specifically, the obligations apply to a broker's recommendation "to liquidate securities to purchase an investment-related product that is not a security."[178]

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[175] A violation of NASD Rule 2310 is also a violation of FINRA Rule 2010. *Dep't of Enforcement v. Watkins*, No. 2009018771602, 2013 FINRA Discip. LEXIS 36, at *6 (NAC Dec. 31, 2013).

[176] *Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *62 (NAC Dec. 20, 2007) (quoting *F.J. Kaufman & Co*., 50 S.E.C. 164, 168 (1989).

[177] Regulatory Notice 12-25 (May 2012) at 8.

[178] Regulatory Notice 12-25 at 8; Notice to Members 05-50, at 5 (Aug. 2005) ("[R]ecommendations to liquidate or surrender a registered security such as a . . . variable annuity. . . must be suitable, including where such liquidations or surrender[s] are for the purpose of funding the purchase of an unregistered EIA.").

These suitability obligations, however, only attach to a transaction if it is recommended by the broker.[179] Whether a broker has made a recommendation "remains a 'facts and circumstances' inquiry to be conducted on a case-by-case basis" based on a number of considerations. [180] Additionally, "the determination of whether a 'recommendation' has been made is an objective, rather than a subjective, inquiry," and, "[i]n this regard, an important consideration is whether the communication—given its content, context, and manner of presentation—reasonably would be viewed as a 'call to action' or a suggestion that the customer engage in a particular transaction." Also relevant is "[t]he degree to which a communication reasonably 'would influence an investor to trade a particular security or group of securities.'" Finally, "a series of actions which may not constitute 'recommendations' when considered individually, may amount to a 'recommendation' when considered in the aggregate." [181]

The record does not firmly establish exactly all that transpired on March 9, 2011, between McGee and CF, including how much CF understood about McGee's strategy to sell her VAs and invest in a charitable gift annuity with 54F. But for the reasons explained above, the Panel was persuaded that McGee, not CF, devised the strategy of selling CF's VAs and giving the proceeds to 54F to invest in a charitable gift annuity. At a minimum, CF acquiesced in that strategy and helped McGee implement it. Conversely, the evidence does not show that CF decided, on her own, to do so, and that McGee tried unsuccessfully to convince her to abandon that course.[182]

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[179] *Epstein*, 2007 FINRA Discip. LEXIS 18, at *61.

[180] *Epstein*, 2007 FINRA Discip. LEXIS 18, at *61 (quoting *NASD Notice to Members 01-23* (Apr. 2001)).

[181] *Epstein*, 2007 FINRA Discip. LEXIS 18, at *61 (quoting *NASD Notice to Members 01-23* (Apr. 2001)).

[182] *Cf. Charles E. Marland & Co.,* 45 S.E.C. 632, 636 (1974) (rejecting broker's assertion that he tried to dissuade his customers from engaging in mutual fund switching, where many of the customers were friends of the broker and would have been unlikely to act contrary to broker's recommendation).

Additionally, the context of McGee's dealings with CF compels the conclusion that McGee made a recommendation to CF. By the time of the transactions, McGee was generally involved with JG and 54F and was seeking to expand his dealings with them. CF trusted McGee as evidenced by her having followed his prior recommendations. Also, the fact that CF gave the liquidation proceeds to 54F after first hearing about that company from McGee further supports the Panel's finding that McGee recommended these transactions to CF.[183]Accordingly, the Hearing Panel finds that McGee made a recommendation to CF that triggered his suitably obligations.

At the time McGee made his recommendation, he knew little about 54F or charitable gift annuities, focusing, instead, on the fee he could earn by directing a customer to 54F. In short, he did not perform sufficient due diligence on either 54F or charitable gift annuities to know whether the product was suitable for any customer, let alone CF, and therefore should not have recommended that CF liquidate her VAs in order to purchase a charitable gift annuities. As the NAC explained, "[A] broker cannot determine whether a recommendation is suitable for a particular customer unless he has a 'reasonable basis' to believe that the recommendation could be suitable for at least some customers." Moreover, "it is self-evident that a broker cannot determine whether a recommendation is suitable for a specific customer unless the broker understands the potential risks and rewards inherent in that recommendation."[184]

Further, during the hearing, McGee testified that the liquidation of CF's VAs was a terrible idea. The Hearing Panel agrees. Given CF's age, investment goals, income, value of her

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[183] *See Dep't of Enforcement v. Siegel*, No. C05020055, 2007 NASD Discip. LEXIS 20, at *32–33 (May 11, 2007).

[184] *Siegel*, 2007 NASD Discip. LEXIS 20, at *37–38 (quoting *F. J. Kaufman and Co.,* 50 S.E.C. 164, 168 (1989).

portfolio and assets,[185] as well as the surrender charges and tax consequences of the liquidations, the Panel finds that McGee's recommendation was unsuitable. Accordingly, McGee violated NASD Rule 2310, IM-2310-2, and FINRA Rule 2010 by making an unsuitable recommendation to CF.

C. McGee Violated FINRA Rules 3270 and 2010 by Failing to Disclose His Outside Business Activities (Third Cause of Action)

FINRA Rule 3270 prohibits registered persons from, among other things, being an employee of another person or being compensated or having the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with their member firm, unless they have provided prior written notice to the member, in such form as specified by the member. The purpose of the Rule "is to ensure that firms receive prompt notification of all outside business activities of their associated persons so that the member's objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law."[186] With respect to the timing of the notification, the registered representative must "disclose outside business activities at the time when steps are taken to commence a business activity unrelated to his relationship with his firm."[187] A violation of Rule 3270 constitutes conduct inconsistent with

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[185] While the record reflects the value of CF's investment portfolio and asset allocations at the time of the VA liquidations, Enforcement did not establish CF's net worth at that time.

[186] *Dep't of Enforcement v. Houston*, No. 2006005318801, 2013 FINRA Discip. LEXIS 3, at *33 (NAC Feb. 22, 2013), *aff'd*, *Kent M. Houston*, Exchange Act Rel. No. 71589, 2014 SEC LEXIS 614 (Feb. 20, 2014) (quoting *Proposed Rule Change by NASD Relating to Outside Business Activities of Associated Persons*, Exchange Act Rel. No. 26063, 1988 SEC LEXIS 1841, at *3 (Sept. 6, 1988)); *see also NASD Notice to Members 88-86* (Nov. 1988) (introducing the substance of the predecessor to Rule 3270 and explaining that the rule is "intended to improve the supervision of registered personnel by providing information to member firms concerning outside business activities of their representatives").

[187] *Dep't of Enforcement v. Schneider,* No. C10030088, 2005 NASD Discip. LEXIS 6, *13–14 (NAC Dec. 7, 2005) (citing *Dep't of Enforcement v. Abbondante*, No. C10020090, slip op. at 12 (NAC Apr. 5, 2005)) (rejecting argument that representative was not required to disclose outside business activity when outside business was formed to conduct future business).

just and equitable principles of trade and, therefore, violates Rule 2010.[188]

The Hearing Panel finds that McGee violated FINRA Rules 3270 and 2010 by failing to disclose his relationship with 54F to Cadaret. This relationship was outside his employment relationship with Cadaret, and was not encompassed within the sole, limited, outside business disclosure he made to his firm, namely, that he was to be an independent insurance agent selling fixed insurance products independent of Cadaret.[189] 54F was not an insurance company, and McGee was not an insurance agent for them. McGee's relationship with 54F, including accepting rent-free office space, taking steps to form a joint venture, and receiving a commission payment for referring a client, triggered a disclosure obligation. McGee is incorrect that the narrow disclosure he made to Cadaret was sufficient, as the firm was not placed on notice, as it should have been, of his extensive intended and actual business activities with 54F.

D. McGee Willfully Violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by Failing to Timely Update His Form U4 (Fourth Cause of Action)

Article V, Section 2 of FINRA's By-Laws requires that associated persons applying for registration with FINRA provide "such . . . reasonable information with respect to the applicant as [FINRA] may require" and further that such applications "shall be kept current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122, in turn, prohibits associated persons from filing or failing to correct registration information that is incomplete or inaccurate so as to be misleading. These provisions required that registered persons ensure that their Forms U4 contain accurate, up-to-date information so that regulators, employers, and members of the

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[188] *See Dep't of Enforcement v. Moore*, No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at *25 (NAC July 26, 2012).

[189] CX-1, at 39, 55, 71.

public "have all material, current information about the securities professional with whom they are dealing."[190] It follows, therefore, that filing a false or incomplete Form U4, or failing to timely amend a Form U4, violates FINRA Rule 1122.[191] Failing to timely and accurately disclose information on a Form U4 also runs afoul of the high standards of commercial honor and just and equitable principles of trade that FINRA members and their associated persons must observe under Rule 2010.[192]

McGee moved his securities business to the 5 Ledyard address in late 2010 or early 2011, but took no steps to update his Form U4 to reflect the change until December 5, 2011.[193] Accordingly, McGee violated Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. Additionally, McGee's violation was willful. To find a willful violation, the Panel must find "that the person charged with the duty knows what he is doing."[194] The Hearing Panel need not find that he intentionally violated FINRA rules or acted with a culpable state of mind, only that he engaged in the misconduct voluntarily.[195] McGee engaged in this conduct voluntarily, and therefore, his violation was willful.

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[190] *Richard A. Neaton*, Exchange Act Rel. No. 65598, 2011 SEC LEXIS 3719, at *17–18 (Oct. 20, 2011).

[191] *See, e.g.*, *Dep't of Enforcement v. Scott Mathis*, No. C10040052, 2008 FINRA Discip. LEXIS 49, at *16–17 (NAC Dec. 12, 2008), *aff'd*, *Scott Mathis*, Exchange Act Rel. No. 61120, 2009 SEC LEXIS 4376 (Dec. 7, 2009), *aff'd*, *Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012).

[192] *Mathis*, 2008 FINRA Discip. LEXIS 49, at *16–17.

[193] CX-67.

[194] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

[195] *See Dep't of Enforcement v. Amundsen*, No. 2010021916601, 2012 FINRA Discip. LEXIS 54, at *16 (NAC Sept. 20, 2012); *Dep't of Enforcement v. Kraemer*, No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *16–17 (NAC Dec. 18, 2009).

E. McGee Violated FINRA Rule 2010 and NASD Rule 2110 by Providing False Information to His Member Firm (Fifth Cause of Action)

It is a violation of FINRA Rule 2010 and NASD Rule 2110 for a registered representative to make false statements to his member firm,[196] including making a false statement on a firm's compliance questionnaire.[197] The Panel finds that McGee made false statements on Cadaret's compliance questionnaires for the years 2007 through 2011. McGee falsely responded on the firm's 2011 compliance questionnaire that he had not engaged, without Cadaret's permission, in any securities transactions or other investment activity that was not processed through Cadaret. Additionally, on each compliance questionnaire for the years 2007 through 2011, he falsely represented that he had disclosed all of his business related email addresses. Accordingly, McGee violated FINRA Rule 2010 and NASD Rule 2110.

IV. Sanctions

In considering the appropriate sanctions to impose on McGee, the Panel looked to FINRA's Sanction Guidelines ("Guidelines"), which contain General Principles Applicable to All Sanctions Determinations ("General Principles"), overarching Principal Considerations, as well as a range of sanctions for particular violations.[198] Among the General Principles are the following: "Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry." Additionally, "[t]he overall purposes of FINRA's disciplinary process and FINRA's responsibility in imposing sanctions are to remediate misconduct by preventing the recurrence of misconduct, improving overall standards in the industry, and protecting the investing public." The General Principles

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[196] *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *22–23 (Aug. 22, 2008); *Dep't of Enforcement v. Hardin*, No. E072004072501, 2007 NASD Discip. LEXIS 24, at *10–11 (NAC July 27, 2007).

[197] *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *42 (NAC July 18, 2014).

[198] FINRA Sanction Guidelines at 1 (Overview) & 2 (General Principle No. 1) (2013) ("Guidelines"), *available at* www.finra.org/sanctionguidelines.

further state that "[t]oward this end, Adjudicators should design sanctions that are significant enough to prevent and discourage misconduct by a respondent, to deter others from engaging in similar misconduct, and to modify and improve business practices."[199]

A. McGee is Barred and Ordered to Disgorge His Commissions and Pay Restitution for: (1) Willfully Violating Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and (2) Violating FINRA Rules 2020 and 2010, and (3) Violating NASD Rule 2310, IM-2310-2, and FINRA Rule 2010

For intentional or reckless material omissions of fact, the Guidelines recommend a suspension in any or all capacities for a period of ten business days to two years. In egregious cases, the panel should consider a bar. Also, the Guidelines recommend a fine of $10,000 to $100,000.[200]

For making unsuitable recommendations, the Guidelines provide that the respondent should be suspended in any or all capacities for a period of ten business days to one year, and, in egregious cases, the panel should consider a suspension of up to two years, or a bar. The Guidelines also recommend a fine of $2,500 to $75,000 and disgorgement.[201] The Guidelines for these two violations do not contain specific principal considerations, but direct adjudicators to take into account the Principal Considerations Applicable to All Sanction Determinations.

The Hearing Panel finds that McGee's unsuitable recommendation and omission of material information violations are related and that the sanctions imposed should be designed and tailored to deter the same underlying misconduct. Thus, the Hearing Panel imposes a unitary

[199] Guidelines at 2 (General Principle No. 1).

[200] Guidelines at 88.

[201] Guidelines at 94.

sanction for these two violations.[202] For the following reasons, the Hearing Panel concludes that McGee should be barred and ordered to disgorge his commissions and to pay restitution to CF.

First and foremost, McGee's misconduct was egregious. He betrayed the trust placed in him by an elderly customer who lived alone[203] and was not close to friends or family.[204] He used her as a "test case" for a product he knew little about, except that it paid him a large commission. To implement this strategy, he had her liquidate securities comprising more than half of her investment holdings and turn the funds over to 54F—a company he also knew little about, but with which he was trying to form a joint venture and from which he was accepting rent-free office space. Although the compensation he was to receive for placing her funds with 54F was a material fact, he never disclosed it to her while recommending these unsuitable transactions. His actions were at least reckless. [205]

Additionally, McGee's misconduct occurred in connection with four VA liquidations totaling close to $500,000,[206] resulted in substantial customer harm,[207] and conferred a substantial benefit on him.[208] CF incurred $36,202.50 in surrender charges. McGee gave to 54F the funds resulting from the VA liquidations, $454,998.75, of which $200,000 has not been returned. Consequently, CF lost $236,202.50 (not including the tax liability she incurred as a

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[202] *Mielke*, 2014 FINRA Discip. LEXIS 24, at *55 (citing *Dep't of Enforcement v. Fox & Co. Inv., Inc.*, No. C3A030017, 2005 NASD Discip. LEXIS 5, at *37 (NAC Feb. 24, 2005) (finding that "where multiple, related violations arise as a result of a single underlying problem, a single set of sanctions may be more appropriate to achieve NASD's remedial goals . . . "), *aff'd*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *36 (Oct. 28, 2005)).

[203] Tr. (AR) 1324.

[204] Tr. (McGee) 764; Tr. (AR) 1331.

[205] Guidelines at 7 (Principal Consideration No. 13).

[206] Guidelines at 7 (Principal Consideration No. 18).

[207] Guidelines at 6 (Principal Consideration No. 11).

[208] Guidelines at 7 (Principal Consideration No. 17).

result of the liquidations) as a direct result of McGee's misconduct. By contrast, McGee earned commissions totaling $59,264 as a result of his misconduct.

Second, McGee failed to accept responsibility for and acknowledge his misconduct to Cadaret or a regulator prior to detection and intervention. Instead, he tried to conceal his misconduct. When Cadaret began investigating him, he was not candid with them about his actions and tried to minimize both his involvement in the CF transactions and his relationship with 54F.[209]

Third, McGee's lack of candor continued through the hearing. He told the Panel the concocted tale that liquidating the VAs and giving the proceeds to 54F was CF's idea and that he had tried to convince her not to do so.[210] McGee's untruthfulness reflects negatively on his fitness to remain in the securities industry.[211]

Fourth, on a related point, McGee showed no remorse for his actions. To the contrary, he never returned his commissions to CF[212] and demonstrated a cavalier attitude toward her plight, testifying that "a lot of people in this country have less than $700,000 and they're doing okay."[213]

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[209] Guidelines at 6 (Principal Consideration Nos. 2, 10); *see, e.g.*, page 24, above.

[210] *See Dep't of Market Regulation v. Jerry William Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *47 (NAC July 28, 2011) (finding respondent's "lack of candor during these proceedings to be disturbing" and that respondent "provided inaccurate and incomplete information in an effort to minimize his own responsibility") (citing *Dep't of Enforcement v. Frankfort*, No. C02040032, 2007 NASD Discip. LEXIS 16, at *41 (NAC May 24, 2007) ("Providing inaccurate information in an effort to minimize one's own responsibility serves to aggravate sanctions."). *See also Thomas S. Foti*, Exchange Act Rel. No. 31646, 1992 SEC LEXIS 3329, at *13 (Dec. 23, 1992) (finding that lack of candor at hearing is an aggravating factor); *Dist. Bus. Conduct Comm. v. Goodman*, No. C9B960013, 1999 NASD Discip. LEXIS 34, at *45–46 (NAC Nov. 9, 1999) *aff'd, Steven D. Goodman*, Exchange Act Rel. No. 43889, 2001 SEC LEXIS 144 (Jan. 26, 2001) (finding that false hearing testimony is an aggravating factor).

[211] *Burch*, 2011 FINRA Discip. LEXIS 16, at *47.

[212] Tr. (McGee) 1089.

[213] Tr. (McGee) 1094.

The Guidelines authorize adjudicators to order restitution when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct. The Guidelines direct adjudicators to calculate restitution orders based on the actual amount of the loss sustained by a person, as demonstrated by the evidence.[214] Additionally, "[r]estitution . . . is a particularly fitting sanction in cases of unsuitable recommendations."[215] Here, CF suffered quantifiable losses of $236,202.50 proximately caused by McGee's misconduct. Accordingly, McGee is ordered to pay CF restitution in this amount, plus prejudgment interest.[216]

Finally, an order of disgorgement against McGee is appropriate in order to deprive him of the benefits of his misconduct. Both the General Principles[217] and the Suitability Guidelines[218] authorize disgorgement to deprive wrongdoers of their ill-gotten gains.[219] Therefore, the Hearing Panel orders McGee to disgorge his commissions in the amount of $59,264, plus interest. There are no mitigating factors warranting lesser sanctions.

B. In Light of the Bar, No Further Sanctions are Imposed Against McGee for His Other Violations

1. Undisclosed Outside Business Activities, in Violation of FINRA Rules 3270 and 2010

The Guidelines provide that when the outside business activities do not involve aggravating conduct, the Panel should consider a suspension for up to 30 business days; a longer suspension of up to one year where there is aggravating conduct; and, in egregious cases,

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[214] Guidelines at 4 (General Principle No. 5).

[215] *David Joseph Dambro*, Exchange Act Rel. No. 32487, 1993 SEC LEXIS 1521, at *14 (June 18, 1993).

[216] Guidelines at 11.

[217] Guidelines at 5 (General Principle No. 6).

[218] Guidelines at 94 n.2.

[219] "Disgorgement is appropriate in all sales practice cases, even where an individual is barred, if, among other things, 'the respondent has retained substantial ill-gotten gains.'" *Dep't of Enforcement v. Murphy*, No. 2005003610701, 2011 FINRA Discip. LEXIS 42, at *116 (NAC Oct. 20, 2011) (citing Guidelines at 10 (Technical Matters)).

including significant injury to customers, a longer suspension, or a bar. The Guidelines also recommend a fine of $2,500 to $50,000 and state that the panel may also order disgorgement.[220]

In determining the appropriate sanction in this case, the Panel considered several aggravating circumstances. The outside activity involved a customer of the firm[221] and resulted in injury to a firm customer.[222] Further, McGee's conduct could have created the impression that Cadaret had approved the product or service, as the record does not reflect that he made it clear to CF that his recommendation was outside his role as a Cadaret registered representative.[223] And, finally, during Cadaret's investigation of his conduct, he misled the firm about the existence and scope of his outside activities.[224] There are no mitigating factors.

Accordingly, for this violation, the Hearing Panel would impose a one–year suspension and a $25,000 fine, and would order McGee to disgorge the commissions he received from 54F related to CF's transactions. But in light of the bar and the disgorgement order imposed for McGee's material omission and unsuitable recommendation violations, no further sanctions are imposed for this violation.

2. Failure to Timely Update Form U4, in Willful Violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010

For failing to timely update a Form U4, the Guidelines recommend a fine of between $2,500 and $25,000 and, additionally, for egregious violations, a suspension longer than 30 days of up to two years or a bar. [225] The relevant principal consideration in this Guideline is the nature and significance of the information at issue. Enforcement argues that the non-disclosure was

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[220] Guidelines at 13.

[221] Guidelines at 13 (Principal Consideration No. 1).

[222] Guidelines at 13 (Principal Consideration No. 2).

[223] Guidelines at 13 (Principal Consideration No. 4).

[224] Guidelines at 13 (Principal Consideration No. 4).

[225] Guidelines at 69–70.

significant—by not promptly disclosing that he had moved his offices to the Ledyard address, McGee hide his affiliation with 54F from his employer. But Enforcement failed to demonstrate that Cadaret would have learned of his outside business activities had McGee made timely disclosure of his office move. (In fact, even when McGee did disclose the address change, the disclosure did not lead his firm to discover his relationship with 54F. That revelation occurred only after CF's attorney wrote a letter to Cadaret). Therefore, the Panel concludes that a fine of $10,000 and a suspension of 15 business days is appropriate. In light of the bar imposed above, however, no additional sanctions are imposed for this violation.

3. Providing False Information to Cadaret on Firm Compliance Questionnaires, in Violation of FINRA Rule 2010 and NASD Rule 2110

There is no Guideline specifically addressing this violation. However, the Panel may look to the Guidelines relating to falsification of records[226] and recordkeeping violations.[227] For falsification of records, the Guideline recommends a fine of $5,000 to $100,000. Additionally, where mitigating factors exist, the Guideline recommend a suspension for up to two years or a bar in egregious cases.[228] The recordkeeping Guideline recommends a fine of $1,000 to $10,000, and in egregious cases, a fine of $10,000 to $100,000. Also, that Guideline directs adjudicators to consider a suspension for up to 30 business days or a lengthier suspension (of up to two years) or a bar.[229]

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[226] *Mielke*, 2014 FINRA Discip. LEXIS 24, at *69–70 (citing *Dep't of Enforcement v. Braff*, No. 2007011937001, 2011 FINRA Discip. LEXIS 15, at *26–27 (NAC May 13, 2011) (applying the Guidelines related to the falsification of records where the respondent made false statements on firm compliance questionnaires concerning outside brokerage accounts), *aff'd*, Exchange Act Rel. No. 66467, 2012 SEC LEXIS 620, at *1 (Feb. 24, 2012).

[227] *John E. Mullins*, Exchange Act Rel. No. 66373, 2012 SEC LEXIS 464, at *83 (Feb. 10, 2012).

[228] Guidelines at 37.

[229] Guidelines at 29.

The Guidelines instruct adjudicators to focus on the nature of the documents falsified[230] and the nature and materiality of the inaccurate or missing information.[231] Both are aggravating factors, here. As the firm's questionnaires stated on the first page, the questionnaires were "an integral part of [Cadaret's] Compliance and Supervision Program," and their "primary objective . . . is to verify [brokers'] sales activities and other business activities, as well as their compliance with regulatory requirements and [firm] policies."[232] Also, the false information was important, as McGee's false responses enabled him to escape firm oversight of CF's transactions and his email communications.

Additionally, the Panel was troubled by McGee's use of an unauthorized email address that contained Cadaret's name, as this had the potential to mislead recipients into believing that the firm had authorized emails sent from that address.

After considering these Guidelines, the Panel would impose a fine of $10,000 and a 30 business day suspension. However, in light of the bar imposed for McGee's violations above, no further sanctions are imposed for this violation.

V. Order

McGee is barred for: (1) willfully violating Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and violating FINRA Rules 2020 and 2010, by failing to disclose material information to a customer; and (2) violating NASD Rule 2310, IM-2310-2, and FINRA Rule 2010, by making an unsuitable recommendation to the customer. For these violations, McGee is also ordered to: (1) pay restitution to CF in the principal amount of $236,202.50 (representing the unreturned portion of CF's payment to 54F, plus the surrender charges she

[230] Guidelines at 37 (Principal Consideration No. 1).

[231] Guidelines at 29 (Principal Consideration No. 1).

[232] CX-70, at 1; CX-71, at 1; CX-72, at 1; CX-73, at 1; CX-74, at 1.

incurred), plus interest thereon from March 9, 2011, until paid; and (2) disgorge his commissions, in the amount of $59,264, plus interest thereon from the date on which he received his last commission check, January 9, 2012,[233] until paid. Interest shall accrue at the rate set in 26 U.S.C. § 6621(a)(2).[234] If this decision becomes FINRA's final disciplinary action, the bar will take effect immediately.

In light of the bar, no additional sanctions are imposed for: (1) McGee's violation of FINRA Rules 3270 and 2010 by failing to disclose his outside business activities; (2) willfully violating Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010 by failing to timely update his Form U4; and (3) violating FINRA Rule 2010 and NASD Rule 2110 by providing false information to his member firm.

McGee is also ordered to pay the costs of the hearing in the amount of $12,325.34, which includes a $750 administrative fee and the cost of the hearing transcript.[235]

Finally, Enforcement failed to establish that McGee made a material misrepresentation to a customer in willful violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC

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[233] Stip. ¶ 11.

[234] This rate is used for calculating interest on orders of both disgorgement and restitution, and is the rate set in Section 6621(a)(2) of the Internal Revenue Code is used by the Internal Revenue Service to determine interest due on underpaid taxes, is adjusted each quarter, and reflects market conditions. In the event that customer CF cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state in which CF last known to reside. Satisfactory proof of payment of the restitution (with accrued interest), or of reasonable and documented efforts undertaken to effect restitution (with accrued interest), shall be provided to the staff of FINRA's Department of Enforcement no later than 90 days after the date when this decision becomes FINRA's final action. The customer is identified here by her initials. In an addendum to this decision, which is served only on the parties, the customer is identified by name.

[235] The Hearing Panel considered and rejected without discussion all other arguments by the parties.

Rule 10b-5, and in violation of FINRA Rules 2020 and 2010. Accordingly, that charge is dismissed.

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David R. Sonnenberg
Hearing Officer
For the Extended Hearing Panel