

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of	
Department of Enforcement,	<u>DECISION</u>
Complainant,	Complaint No. E9A2004001901
vs.	Dated: July 27, 2007
Douglas J. Toth	
Skillman, NJ,	
Respondent.	

Respondent willfully caused the filing of a Form U4 that contained a misrepresentation of material fact and failed to correct the inaccurate Form U4. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Thomas K. Kilkenny, Esq., and David F. Newman, Esq., Department of Enforcement, NASD

For the Respondent: Robert G. Stevens, Esq.

Decision

Pursuant to NASD Procedural Rule 9311, Douglas Toth (“Toth”) appeals from an August 9, 2006 Hearing Panel decision. The Hearing Panel found that Toth violated NASD Conduct Rule 2110 and IM-1000-1 by willfully causing the filing of a Uniform Application for Securities Industry Registration or Transfer (“Form U4”) that failed to disclose a material fact—that Toth was named as a defendant in a civil action in New Jersey seeking relief for, among other things, fraud in the offer and sale of securities. The Hearing Panel also found that Toth failed to correct the inaccurate Form U4 that had been filed on his behalf. The Hearing Panel suspended Toth for one year in all capacities.¹

¹ The Hearing Panel did not impose a monetary sanction because Toth is the subject of a pending bankruptcy proceeding. The court lifted the automatic stay provisions of the

[Footnote continued on next page]

After a complete review of the record, we affirm the Hearing Panel's finding that Toth willfully caused the filing of a Form U4 that contained a misrepresentation of a material fact and failed to correct the inaccurate Form U4. We also affirm the Hearing Panel's imposition of a one-year suspension in all capacities on Toth.

I. Introduction

There is no dispute that the Form U4 in question failed to disclose the New Jersey civil action against Toth. The controversy here concerns who is responsible for the failure to disclose—Toth, or his former employer. Toth testified that he informed his former employer of all disciplinary actions against him prior to the electronic filing of the Form U4. Toth's former employer testified that Toth did not inform him of the New Jersey civil action, and that Toth did not review and correct a copy of the Form U4 that the former employer forwarded to him, despite repeated requests for him to do so. The Hearing Panel made a credibility determination in favor of the former employer's version of events, which Toth contests on appeal.

II. Background

Toth first registered as a general securities representative (Series 7) in April 1993. In March 1999, he registered as a general securities representative, a general securities principal (Series 24), and an options principal (Series 4) through Somerset Financial Group, Inc. ("Somerset"), a former member firm of which he was the chief executive officer. Toth voluntarily terminated his registration with Somerset in October 2002. On October 30, 2002, Somerset's NASD membership lapsed due to the firm's failure to pay required fees. Toth is currently employed as a business consultant and is not associated with any NASD member firm.

Toth, Nicholas Thompson ("Thompson"), and William Schloth ("Schloth") were shareholders and officers of Somerset Financial Partners, Inc., of which Somerset was a wholly owned subsidiary. On July 3, 2003, the Attorney General of New Jersey and the New Jersey Bureau of Securities filed a civil complaint in the Superior Court of New Jersey ("the July 2003 New Jersey complaint") against Toth, Thompson, Schloth, and Somerset, alleging, among other things, fraud in connection with the offer, sale or purchase of securities in 2001.² The July 2003 New Jersey complaint alleged that Toth and others made materially false and misleading statements and omissions regarding the degree of risk associated with the investment, the intended investment aims of the defendants, and the suitability of the investment for 18 investors. In July 2005, the New Jersey Superior Court dismissed the July 2003 New Jersey complaint without prejudice.

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Bankruptcy Code and allowed NASD's Department of Enforcement ("Enforcement") to proceed, conditioned upon Enforcement's waiving all forms of financial sanction.

² In addition to naming Somerset, the July 2003 New Jersey complaint also named three other wholly owned subsidiaries of Somerset Financial Partners, Inc.

III. Facts

A. Toth's Registration with Bedminster Financial Group, Ltd.

Robert Van Pelt ("Van Pelt") is the president and 76 percent owner of Bedminster Financial Group, Ltd. ("Bedminster"), an NASD member firm in New Hope, Pennsylvania. James Solakian ("Solakian") is a passive investor in Bedminster who owns the remaining 24 percent. In 1998, Toth was attempting to decide whether to form his own securities firm or join an existing one. At that time, Solakian introduced Toth to Van Pelt for possible association with Bedminster. Toth decided against joining Bedminster in 1998, however, and instead, he formed Somerset in March 1999 with Thompson. Solakian invested \$150,000 in Somerset, which Toth personally guaranteed.

After Somerset closed in 2002, Toth faced significant financial difficulties, including his \$150,000 debt to Solakian. In spring 2003, Toth was working as a business consultant on a number of potential investment banking matters. Solakian again suggested that Toth associate with Bedminster. Toth testified that he thought this would be a good idea because profits that Bedminster earned on deals that Toth brought to the firm could partially reimburse Solakian, part owner of Bedminster, for Toth's debt.

1. Meetings Held to Discuss Toth's Association with Bedminster

In May 2003, Solakian met with Van Pelt and Toth to discuss the possibility of Toth joining Bedminster.

Toth and Van Pelt held two additional meetings on this topic, without Solakian, sometime during July or August 2003.³ Thompson also attended these meetings as Van Pelt was similarly interested in having Thompson associate with Bedminster. Thompson was associated with vFinance Investments, Inc. ("vFinance")⁴ at the time, and these meetings occurred in Thompson's office in Flemington, New Jersey.⁵

³ The certainty of the dates of the subsequent two meetings was not established. All testimony indicated, however, that the meetings were held shortly prior to Toth's August 13, 2003 registration date with Bedminster.

⁴ Thompson became associated with vFinance in 2002, prior to the July 2003 New Jersey complaint.

⁵ Van Pelt testified that the two later meetings were held "in central New Jersey north or Princeton, I believe, across from an airfield I remember." Toth and Thompson testified that the meetings occurred in Thompson's office in Flemington, New Jersey. Toth therefore argues that Van Pelt's credibility is questionable because the referenced "office in Princeton near the airfield" was the former office of Somerset, which had closed by the end of 2002. This argument is addressed in detail in the section entitled "Discussion."

The witnesses gave differing testimony before the Hearing Panel as to the exact matters that they discussed at the meetings in May and July-August 2003.

a. *Van Pelt's Testimony Regarding the Meetings*

Van Pelt testified that he asked Toth if there were any outstanding claims against him and Toth mentioned two arbitration claims. Van Pelt stated that he then inquired as to Toth's role in the claims, and Toth said he was named as "either the deep pocket or because he was president of Somerset." Van Pelt testified that he also asked Toth about the nature of the arbitrations and Toth stated that one was "a group of wealthy people who had lent money to Somerset"⁶ and "the second case was . . . a question of suitability." Van Pelt further testified that Toth did not show him a copy of the July 2003 New Jersey complaint and did not inform him about that lawsuit filed against Toth, Thompson, and Somerset.⁷

b. *Toth's Testimony Regarding the Meetings*

Toth testified that he disclosed the July 2003 New Jersey complaint to Van Pelt during one of the meetings held in July-August 2003. Toth stated that they "sat across from each other at the table," and that Van Pelt "went through documents" that Toth and Thompson supplied to him. When asked if he had "discuss[ed] the merits of the [July 2003 New Jersey complaint] with" Van Pelt, Toth replied: "I don't remember exactly what we discussed as the merits. It was a new situation when I was just obtaining counsel at that time." On cross-examination, Toth maintained that he had informed Van Pelt of the July 2003 New Jersey complaint, and that a copy of that lawsuit was in a folder at their meeting in July-August 2003 for Van Pelt to review. Toth stated that he was not sure if Van Pelt took a copy of the lawsuit from the office, but that "the entire folder of all the arbitrations were [sic] given to him." In response to a question from Enforcement as to whether he had specifically told Van Pelt that "New Jersey's suing [Toth] for securities fraud?", Toth replied: "I said . . . here is everything that is against us, all the arbitrations and all the civil complaints. We picked them out, we talked [sic] an overview of each one of the cases." In response to the Hearing Officer's questions as to whether the July 2003 New Jersey complaint was included with the documents that Toth testified he supplied to Van Pelt, Toth stated: "I believe the complaint, yes, sir, the complaint was in there . . . I believe the complaint was one of the documents that were [sic] in the pile that was given to him." The Hearing Officer then asked if it was possible that the July 2003 New Jersey complaint was not in the group of documents that Toth said he gave to Van Pelt. Toth answered: "It is possible that it

⁶ Van Pelt testified that Toth told him that this claim was an arbitration, but the record shows that the claim was actually a civil lawsuit filed by persons who had loaned money to Somerset.

⁷ The July 2003 New Jersey complaint was filed on July 3, 2003, and thus did not exist at the time of the May 2003 meeting held by Solakian, Van Pelt, and Toth. Therefore, Toth would have had to disclose the July 2003 New Jersey complaint at one of the subsequent two meetings with Van Pelt that Toth stated were held around July-August 2003.

was not, but we discussed it. But I don't remember all the documents." Toth also stated that he did not "remember exactly what [Van Pelt] said" when Toth told him about the July 2003 New Jersey complaint.

c. *Thompson's Testimony Regarding the Meetings and His Filing of Forms U4 with vFinance*

Toth called Thompson to testify as a corroborating witness. Thompson testified that he was also present with Toth and Van Pelt at the two meetings in July-August 2003 in his vFinance office in Flemington, New Jersey because he was considering joining Bedminster at that time. When asked if he and Toth discussed civil lawsuits and arbitrations with Van Pelt at those meetings, he stated: "Yes, everything was discussed on that regard." Thompson testified that he did not "remember the particulars," but that he recalled mentioning every case to Van Pelt. On cross-examination, Enforcement inquired as to what Van Pelt said when he was told of the existence of the July 2003 New Jersey complaint, and Thompson replied: "I don't specifically recall anything other than we talked about it. I don't think he was surprised or upset." When Enforcement asked if Van Pelt was concerned that Toth and Thompson had been accused of securities fraud, Thompson said: "He didn't seem to be."

Thompson also testified that he became associated with vFinance in 2002, after Somerset closed, and that he filed an amended Form U4 disclosure with vFinance shortly after the filing of the July 2003 New Jersey complaint. This testimony was impeached, however, by testimony from NASD examiner Donald Litteau ("Litteau"). Litteau stated that on January 9, 2004, he sent a letter to vFinance, stating that he had reviewed registration records for certain branch offices of vFinance and noted that Thompson's Form U4 had not been amended to disclose the July 2003 New Jersey complaint. In a letter dated January 27, 2004, vFinance responded to Litteau, stating that Thompson had not provided the firm with a copy of the civil action, and thus the firm had been unable to amend his Form U4. The letter also stated that Thompson had informed the firm that he believed that this matter was not reportable on his Form U4 because NASD had reviewed the matter separately and had taken no action. Accordingly, vFinance did not amend Thompson's Form U4 to disclose the July 2003 New Jersey complaint until January 23, 2004.

2. Van Pelt Files Form U4 for Toth

The record contains conflicting accounts of the circumstances surrounding Van Pelt's electronic filing of a Form U4 for Toth to associate with Bedminster on August 13, 2003.

a. *Van Pelt's Testimony Regarding the Filing of Toth's Form U4*

Van Pelt testified that in the second week of August 2003, Toth sent Van Pelt an e-mail stating that Toth had a "deal" with GMAC Guaranteed Northeastern Tax Credit Fund, LLC

(“GMAC”) and wanted a broker-dealer to register him and to complete the deal.⁸ Van Pelt stated that he telephoned Toth, agreed to register him with Bedminster, and asked Toth if there would be “anything different about [the Form U4] except for the arbitrations we talked about in May, and [Toth] said, no, those are the only two items.”⁹ Van Pelt also spoke to his lawyer, who reviewed the GMAC deal and told Van Pelt that it “was okay.” Therefore, on August 13, 2003, Van Pelt electronically filed a Form U4 for Toth, registering him through Bedminster and electronically signing the Form U4 on behalf of himself and Toth. Van Pelt testified that he answered “no” on Toth’s behalf to question 14H(2) on the Form U4 that asked: “Are you named in any pending *investment-related* civil action that could result in a ‘yes’ answer to any part of 14H(1)?”¹⁰ Van Pelt stated that he did not disclose the July 2003 New Jersey complaint because he was unaware of it. According to Van Pelt, his responses on behalf of Toth on the Form U4 were based on his review of Toth’s prior NASD Central Registration Depository (“CRD”[®]) records and Toth’s negative response to Van Pelt’s question as to whether Toth’s current record included anything new except for the two arbitrations they talked about in May.

Van Pelt further testified that on the same day that he electronically filed Toth’s Form U4—August 13, 2003—he faxed a copy of the Form U4 to Toth for his review and signature. The record includes a copy of a letter on Bedminster’s letterhead, dated August 13, 2003, from Van Pelt to Toth stating: “Your registration with [Bedminster] is effective as of yesterday. I registered you both in VA and in NJ. Please review the attached U4 for accuracy. Sign and return the signature page for our records.”

⁸ Toth maintained that he could have completed the GMAC deal as a business consultant, but that he chose to go through Bedminster in order to try to reimburse Solakian and prevent him from suing Toth for the debt.

⁹ Van Pelt testified that he “checked the NASD for a pre-hire, and [he] saw that [Toth’s] brokerage business had gone out of business and . . . [Toth] had been terminated . . . But there were no statutory disqualifications, nor were there any answers to any of the questions that required additional information.”

¹⁰ Question 14H(1), in turn, asks:

Has any domestic or foreign court ever:

- (a) *enjoined* you in connection with any *investment-related* activity?
- (b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)?
- (c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?

Van Pelt stated that he executed an agreement necessary to complete the GMAC deal on August 14, 2003. Bedminster received \$12,500 for the deal and Toth received a gross commission of \$456,500.¹¹

b. *Toth's Testimony Regarding the Filing of His Form U4*

Toth testified that he reached an agreement with Solakian and Van Pelt to register with Bedminster in August 2003 to do the GMAC deal "only to facilitate not getting sued by Solakian and having fees run through Bedminster so Solakian can get paid." Toth stated that Van Pelt handled the registration and that Toth knew he needed to be registered in New Jersey. Toth testified that he did not remember having a conversation with Van Pelt around August 13, 2003, wherein Van Pelt asked him if he needed to make any changes to the Form U4 he was filing for Toth. Toth also stated that he did not discuss with Van Pelt how he was going to register Toth, and that he did not recall Van Pelt telling him that he had filed a Form U4 for Toth electronically or otherwise. On cross-examination, Toth stated that he was aware from his past experience in the securities industry that a Form U4 had to be filed for him to be registered, and he then stated that he "knew a U4 had been filed," but that he did not "remember the date and the time that [Van Pelt] told [Toth] that [Toth's] U4 was effective."

Toth also stated that he never received a faxed copy of the Form U4 from Van Pelt to review on August 13, 2003. Toth testified that the fax number that appears on the letter dated August 13, 2003, that Van Pelt testified was the number to which he faxed the Form U4, was an old fax number for Somerset that was not in service. Toth testified that he never reviewed or signed the Bedminster Form U4, and that he had not even seen it until after NASD filed this action against him.

Following the hearing, Enforcement filed an unopposed motion to supplement the hearing record, which the Hearing Panel granted. Attached to that motion was evidence that the fax number in question did not belong to Somerset, but rather to the Flemington, New Jersey branch office of vFinance, which was managed by Thompson and was the location of at least two meetings attended by Van Pelt, Toth, and Thompson in July-August 2003.

3. Events Leading to Bedminster Terminating Toth on October 24, 2005

a. *Van Pelt's Testimony Regarding Events Leading to Toth's Termination*

Van Pelt testified that after he faxed the Form U4 to Toth on August 13, 2003, he asked Toth on several occasions when he was going to return the signed forms and Toth told Van Pelt that he would do it soon. On September 17, 2003, Van Pelt received a written request from the New Jersey Bureau of Securities for complete explanations of all outstanding complaints against

¹¹ Toth testified that he only received \$6,000 net from the GMAC deal and that the remainder was paid to other involved parties. Van Pelt did not dispute Toth's assertion.

Toth in New Jersey. On Friday, October 3, 2003, Van Pelt met with Toth at Thompson's office in Flemington, New Jersey. Van Pelt testified that he brought the September 17, 2003 New Jersey letter with him to the meeting, as well as another copy of the Form U4 that he had filed for Toth on August 13, 2003. Van Pelt stated that Toth said he would like to review the documents over the weekend.

On Monday, October 6, 2003, Toth told Van Pelt that he was uncomfortable being at Bedminster and that he wanted to resign because Solakian had initiated litigation against him for the Somerset debt. Van Pelt testified that he was sorry to hear that Toth wanted to leave, but that he understood and would file a Uniform Termination Notice for Securities Industry Registration ("Form U5") indicating that Toth's resignation was voluntary, if Toth returned to him a signed Form U4 and responded to the other documents he had been reviewing over the past weekend. The next day, October 7, 2003, Van Pelt sent Toth, via overnight delivery, another copy of the documents he wanted him to sign. The cover letter accompanying this package called Toth's attention to the September 17, 2003 letter from New Jersey and warned Toth that if he failed to respond, Van Pelt would file a Form U5 "for cause" terminating Toth's registration with Bedminster.

Van Pelt testified that he received no response from Toth and therefore on October 24, 2003, he filed a Form U5 terminating Toth for cause. Van Pelt stated that several days thereafter, on October 27, 2003, he received two e-mails from Toth. The first e-mail purported to respond to the inquiry from the New Jersey Bureau of Securities, but it mentioned only "three pending Arbitrations" against Toth and did not disclose the July 2003 New Jersey complaint. The second e-mail purported to be Toth's resignation from Bedminster, but it contained an effective date of August 31, 2003, two months earlier than the date of the e-mail. Van Pelt stated that he had never seen the alleged resignation letter before October 27, 2003. Van Pelt also stated that he never received a signed Form U4 or the other documents he had requested from Toth.

b. *Toth's Testimony Regarding Events Leading to His Termination*

Toth testified that he informed Van Pelt at the end of August 2003 that he did not want to be associated with Bedminster any longer because he was experiencing "a lot more friction" with Solakian. Toth acknowledged that the e-mail that included his purported August 31, 2003 resignation letter was dated October 27, 2003, but he stated that he had orally informed Van Pelt about his decision to resign prior to that time, either by telephone or in person. Toth could not recall exactly when or how he had discussed his resignation with Van Pelt.

Toth stated that he did not remember Van Pelt giving him any documents to sign in person, but he testified that Van Pelt sent him an overnight package containing several documents to sign. Toth stated that he "believed" that he got this package from Van Pelt after Bedminster had terminated him, although he could not remember the date. Toth denied that those documents contained a Form U4, and he stated that he "believ[ed] he did sign those and returned them to [Van Pelt]." There is no documentary evidence in the record that Toth signed or returned any documents to Van Pelt.

B. Toth's Responses to NASD Inquiries About His Form U4 Disclosure

During NASD's routine examination of Bedminster in 2004, NASD staff, among other things, sent Toth a request for information dated July 26, 2004. This request specifically asked for: "A description of all information [Toth] provided [Bedminster] about matters requiring disclosure on [Toth's] Form U4. Include a specific discussion of what [Toth] informed [Bedminster] about the [July 2003 New Jersey complaint]." [Hereinafter "Question Three"].

On August 9, 2004, Toth replied to NASD's staff's first request for information and to Question Three as follows:

I don't recall all that was discussed, but we had many meetings about Somerset and the problems arising from my association with that firm. In addition, all arbitrations and civil cases were discussed and disclosed. Also, [Solakian] first hand knowledge [sic] of Somerset and my litigations and was actively helping me to resolve them.

NASD staff noted that Toth's August 9, 2004 response was unsigned and insufficient. Thus, on August 16, 2004, NASD staff sent a second request for information to Toth asking for a signature and a "more complete response" to certain questions, including Question Three. NASD staff asked for "specific information" that Toth provided to Bedminster and its principals regarding the July 2003 New Jersey complaint, "[i]ndicat[ing] which Bedminster principals [Toth] discussed this case with and when those discussions took place." NASD staff also asked Toth to "confirm whether [Toth] provided [Bedminster] a copy of the [July 2003 New Jersey complaint] and when this was done." Moreover, NASD staff told Toth that if he had not provided a copy of the July 2003 New Jersey complaint to Bedminster, then he should "explain how [Toth] provided sufficient details on the [July 2003 New Jersey complaint] so that the matter could be reviewed and accurately reflected on [Toth's] Form U4." NASD staff's second request for information also contained an additional paragraph asking Toth to explain whether he completed a Form U4 or any other application when he registered with Bedminster, and whether Bedminster's principals had ever provided him with his Form U4 application. NASD staff asked Toth to "indicate all times [the Form U4] was received in person, via facsimile, or by mail" and to explain whether he was asked to approve the Form U4, verbally or in writing, if he did so, and if not, to provide the reasons why.

The record shows that Toth responded to NASD staff's second request for information by signing and submitting another copy of his August 9, 2004 response to NASD staff's first request for information, which was received by NASD staff on August 31, 2004. In addition to adding his signature, Toth's response to NASD staff's second request for information differed from his response to the first request for information by including new language in response to certain questions. Toth did not, however, supply any additional response to Question Three as requested, and he did not answer any of the questions regarding his review of a Form U4 posed in the additional paragraph included in NASD staff's August 16, 2004 second request for information.

IV. Procedural History

Enforcement began investigating the circumstances surrounding the filing of Toth's August 13, 2003 Form U4 with Bedminster following NASD's routine investigation of Bedminster in 2004. On October 18, 2005, Enforcement issued a one-cause complaint alleging that Toth willfully caused Bedminster to file a Form U4 that failed to disclose that he was named as a defendant in an action alleging fraud in the offer and sales of securities and failed to correct the inaccurate Form U4. Toth filed an answer to the complaint, denying any wrongdoing and requesting a hearing. The Hearing Panel held a one-day hearing on May 2, 2006, and the parties submitted post-hearing briefs on June 7, 2006. The Hearing Panel issued its decision on August 9, 2006. Toth timely appealed the Hearing Panel's decision to the National Adjudicatory Council.

V. Discussion

After carefully reviewing the record in this matter, we affirm the Hearing Panel's finding that Toth willfully caused Bedminster to file a Form U4 that failed to disclose a material fact and failed to correct the inaccurate Form U4. We also affirm the Hearing Panel's imposition of a one-year suspension in all capacities on Toth.

A. The August 13, 2003 Form U4 Was Inaccurate

Conduct Rule 2110 and IM-1000-1¹² require associated persons to disclose accurately and fully information required in the Form U4 and to observe the high standards of commercial honor and just and equitable principles of trade.¹³ The accuracy of an applicant's Form U4 "is critical to the effectiveness" of a self-regulatory organization's ability "to monitor and determine the fitness of securities professionals." *Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996) (citing *Alton*, 52 S.E.C. at 382); see also *Guang Lu*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005) (recognizing that "the candor and forthrightness of applicants is critical to the effectiveness of the screening process"). Article V, Section 2(c) of NASD's By-Laws requires that every application for registration filed with NASD be kept current.

Based on the evidence in the record, it is undisputed that the Form U4 in question contained inaccurate information as it failed to disclose the July 2003 New Jersey complaint against Toth. "The violation of providing false information to the NASD requires only that the complainant prove that the information was false." *Dep't of Enforcement v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *8 (NAC Apr. 27, 2004) (internal quotation

¹² IM-1000-1 provides that the filing of registration information that "is incomplete or inaccurate so as to be misleading . . . or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade" in violation of Rule 2110. See also *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995).

¹³ NASD Rule 0115 extends NASD rule requirements to persons associated with a member.

omitted). The record shows that on July 3, 2003, the New Jersey Attorney General and the New Jersey Bureau of Securities charged Toth with securities fraud. Therefore, the Form U4 should have had a “yes” answer to question 14H(2) on the Form U4 that asked: “Are you named in any pending *investment-related* civil action that could result in a ‘yes’ answer to any part of 14H(1)?” Toth’s August 13, 2003 Form U4 had a “no” answer to question 14H(2), and thus this Form U4 contained inaccurate information.

B. The Hearing Panel Properly Found that Toth Was Responsible for Causing the Filing of the Inaccurate Form U4

The Hearing Panel found that the preponderance of the evidence in this matter showed that Toth caused the filing of the August 13, 2003 Form U4 that contained a misstatement of material fact. It is axiomatic that the responsibility for maintaining the accuracy of a Form U4 lies with each registered representative. *Dep’t of Enforcement v. Howard*, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16, at *31-32 (NAC Nov. 16, 2000), *aff’d*, 55 S.E.C. 1096 (2002), *aff’d*, 77 F. App’x 2 (1st Cir. 2003). The record fully supports the Hearing Panel’s conclusion that Toth failed to supply Van Pelt with information regarding the July 2003 New Jersey complaint and failed to review and correct the misinformation in the Form U4 that was submitted on August 13, 2003.

1. There Is No Substantial Evidence to Overturn the Hearing Panel’s Findings of Credibility

The Hearing Panel based its conclusion, in part, on its explicit finding that Van Pelt’s testimony was more credible than Toth’s and Thompson’s. “Credibility determinations of the initial fact-finder, which are based on hearing the witnesses’ testimony and observing their demeanor, are entitled to considerable weight and deference and can be overcome only where there is substantial evidence for doing so.” *Dep’t of Enforcement v. Gebhart*, Complaint No. C02020057, 2005 NASD Discip. LEXIS 40, at *51 n.18 (NAC May 24, 2005), *aff’d*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93 (Jan. 18, 2006), *appeal docketed*, No. 06-71021 (9th Cir. Feb. 27, 2006).

Here, substantial evidence does not exist for reversing the Hearing Panel’s finding of credibility, and we will not disturb the Hearing Panel’s findings. During the hearing, Van Pelt consistently and credibly testified that Toth never disclosed, either orally or in written form, the existence of the July 2003 New Jersey complaint against him and others. The documentary evidence demonstrates that on August 13, 2003, Van Pelt sent a copy of Toth’s Form U4 to Toth, via facsimile, for Toth to review and sign. This facsimile was sent to Thompson’s office in Flemington, New Jersey, the place where Van Pelt had met at least twice with Toth and Thompson in July-August 2003 to discuss their joining Bedminster. Further, Van Pelt testified that he contacted Toth several times between August 13, 2003, and October 3, 2003, to ask Toth to sign and return the Form U4, and that Toth always responded that he would do so. Van Pelt also testified that he brought another copy of the Form U4 to Toth when they met, again in Thompson’s office in Flemington, New Jersey, on October 3, 2003, and that Toth indicated he would review the documents over the weekend. The documentary evidence shows that Van Pelt sent a letter and package of documents via overnight delivery to Toth on October 7, 2003, asking

again for Toth to review and sign the documents and calling Toth's attention to an enclosed letter to Van Pelt from the New Jersey Bureau of Securities, requesting details of charges against Toth. Yet Van Pelt testified, and the documentary evidence shows, that the only written responses that emanated from Toth during this entire time were two e-mails dated October 27, 2003—one that purported to be a resignation letter dated August 31, 2003, and a second, which only discussed three pending arbitrations against Toth and did not mention the July 2003 New Jersey complaint.

On the other hand, the Hearing Panel found Toth's testimony to be incredible on many points. Toth maintained that he supplied Van Pelt with all of the disciplinary charges against him, including the July 2003 New Jersey complaint, prior to the time when Van Pelt submitted the Form U4 for Toth. Toth and Thompson's testimony on this was vague, however, as they both asserted that they had provided all necessary documentation to Van Pelt without being able to specifically testify that they had drawn Van Pelt's attention to the fact that the July 2003 New Jersey complaint was a civil securities fraud action against them. In addition, Toth testified that he did not remember any specific reaction from Van Pelt regarding the securities fraud charges, and Thompson testified that Van Pelt had little or no reaction to the information and asked no questions. The Hearing Panel implicitly concluded that the lack of a reaction to such information would have been highly unusual for a securities professional, if indeed he had been properly informed about securities fraud charges against a person he was considering hiring. Toth denied that he ever received a copy of a Form U4 from Van Pelt for Toth to review and sign, although Toth admitted that he was aware that Van Pelt would file a Form U4 on his behalf. Toth also denied that Van Pelt had ever sent any documents to him before the overnight package in October 2003, but he maintained that the overnight package did not contain a Form U4 and stated that he thought he signed and returned other documents to Van Pelt. Yet the record contains no evidence that Toth ever sent any documents to Van Pelt other than the two e-mails dated October 27, 2003, discussed above.

The Hearing Panel also noted that Toth's attempt to have Thompson corroborate his testimony failed, and we agree. Thompson testified that he and Toth disclosed the July 2003 New Jersey complaint to Van Pelt, just as Thompson claimed he immediately disclosed it to vFinance when the lawsuit was filed against him in July 2003. Subsequent testimony and documentary evidence showed, however, that vFinance did not know about the July 2003 New Jersey complaint and did not amend Thompson's Form U4 to disclose it until January 2004, after being notified by NASD. Moreover, we concur with the Hearing Panel's assessment of Toth's lack of a full and candid response to NASD's requests for information in 2004 about his disclosures to Van Pelt regarding the July 2003 New Jersey complaint, deeming it to be "consistent with [Toth's] vague and evasive answers to questions put to him during the course of his testimony."

Despite Toth's assertions to the contrary, the Hearing Panel did not make an arbitrary decision to accept all of Van Pelt's testimony and reject Toth's and Thompson's testimony. Rather, the record shows that the Hearing Panel gave a reasoned explanation, and many examples, for its credibility determination in favor of Van Pelt. Further, Toth incorrectly argues that Van Pelt's erroneous reference to a civil lawsuit against Toth as an "arbitration" should place Van Pelt's overall credibility in question. In fact, Toth also mistakenly referred to "an arbitration with the state" during his testimony. Neither Toth's nor Van Pelt's credibility should

be diminished by use of layman's terminology, rather than precise legal terminology. Similarly, Van Pelt's testimony that he met with Toth and Thompson in an office near an airfield, a seemingly mistaken reference to Somerset's old office that closed in 2002, prior to the events at record, is not sufficient to overturn the Hearing Panel's finding that Van Pelt was credible. Accordingly, we find that the record supports the Hearing Panel's determination to accord greater credibility to Van Pelt's testimony than to Toth's and Thompson's.

C. Toth is Subject to a Statutory Disqualification

We next consider the separate question of whether Toth acted willfully in failing to disclose material information.¹⁴ If we find that Toth did act willfully and that the July 2003 New Jersey complaint is material information, he is statutorily disqualified from association with any NASD member.

1. Willfulness

To support a finding that Toth acted willfully, we need not find that he intended to violate NASD rules, but only find that he intended to commit the act that constitutes the violation—supplying inaccurate information to Van Pelt to submit the Form U4. *See Jacob Wonsover*, 54 S.E.C. 1, 17-18 & n.36 (1999), *aff'd*, 205 F.3d 408 (D.C. Cir. 2000); *see also Tager v. SEC*, 344

¹⁴ A finding of willfulness causes a respondent to become statutorily disqualified from association with NASD pursuant to Section 15(b)(4)(A) of the Securities Exchange Act of 1934 and the NASD By-Laws. Article III, Section 4(f) of the NASD By-Laws provides:

[a] person is subject to a “disqualification” with respect to . . . association with a member, if such person: . . . has willfully made or caused to be made in any application . . . to become associated with a member of a self-regulatory organization . . . any statement which was at the time, and in light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein.

Because there is no time limitation on such a disqualification, an individual is subject to a disqualification for life.

F.2d 5, 8 (2d Cir. 1965) (stating that there is “no requirement that the actor . . . be aware that he is violating one of the Rules or Acts” to uphold a finding of willfulness).

The Hearing Panel found that a preponderance of the credible evidence demonstrated that Toth willfully failed to disclose to Van Pelt the existence of the July 2003 New Jersey complaint prior to the submission of the Form U4 on August 13, 2003. The Hearing Panel also found that Toth failed to review and correct the inaccurate Form U4 after it had been filed. As a registered representative, Toth had a duty to provide accurate information to his prospective employer and in turn to NASD. *See Alton*, 52 S.E.C. at 382. Toth is “responsible for his actions and cannot shift that responsibility to the firm or his supervisors.” *See Rafael Pinchas*, 54 S.E.C. 331, 338 (1999). The timing of events also demonstrates that Toth’s conduct was willful. New Jersey regulators charged Toth with securities fraud on July 3, 2003, only one month before the inaccurate Form U4 was submitted on August 13, 2003. The record shows that Toth was aware that Van Pelt would be filing a Form U4 to register him with Bedminster in August 2003, and that Toth knew he had to disclose disciplinary actions against him. Toth was also eager, however, for the GMAC transaction to go through Bedminster so that some of his debt to Solakian would be repaid.¹⁵ Moreover, Toth’s subsequent behavior corroborates a finding of willfulness—Toth provided vague and incomplete responses to NASD’s requests for information in 2004 about his disclosures to Van Pelt in 2003. In sum, we affirm the Hearing Panel’s finding that Toth acted willfully.

2. Materiality

Having found that Toth acted willfully, we must now consider whether the Hearing Panel was correct in finding that the information that Toth failed to disclose was material. We find that it was. Because of the importance that the securities industry places on full and accurate disclosure of information required by the Form U4, essentially all of the information that is reportable on the Form U4 may be considered to be material. “The NASD, which cannot investigate the veracity of every detail in each document filed with it, must depend on its members to report to it accurately and clearly in a manner that is not misleading.” *Robert E. Kauffman*, 51 S.E.C. 838, 839 (1993); *see also Dep’t of Enforcement v. Perez*, Complaint No. C10950077, 1996 NASD Discip. LEXIS 51, at *7 (NBCC Nov. 12, 1996) (stating that “[f]ull and accurate disclosures on a Form U4 are critical to the securities industry because member firms must be able to assess properly whether an individual should be employed, and, if so, subject to enhanced supervision”). In the context of SEC Rule 10b-5, a fact is material if a reasonable investor would view the disclosure of the omitted information as “significantly altering the total mix of information available.” *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) (internal quotations omitted). Applying a similar materiality standard to this case, the securities fraud charges in the July 2003 New Jersey complaint posed a significant impediment to Toth’s

¹⁵ Van Pelt testified that he, too, was pleased to associate Toth with Bedminster to obtain the commission from the GMAC deal. Contrary to Toth’s argument, however, this economic incentive on the part of Van Pelt does not provide substantial evidence to overturn the Hearing Panel’s determination that Van Pelt’s testimony was more credible than Toth’s and Thompson’s.

employment in the securities industry. A reasonable employer would have viewed these charges as extremely relevant to any employment decision; therefore, we affirm the Hearing Panel's finding that Toth's non-disclosure of the July 2003 New Jersey complaint altered the total mix of information available and was thereby material.

* * * * *

We affirm the findings of the Hearing Panel and conclude that Toth willfully violated NASD Rule 2110 and IM-1000-1, and as a consequence, Toth is statutorily disqualified from association with any NASD member. The record fully supports a finding that Toth was responsible for causing an inaccurate Form U4 to be filed on his behalf on August 13, 2003 and for failing to correct the inaccurate Form U4.

VI. Sanctions

The Hearing Panel found that Toth's misconduct was egregious and suspended him in all capacities for one year. The Hearing Panel did not impose a fine or costs due to Toth's pending bankruptcy petition. We affirm the sanction imposed by the Hearing Panel.

We have considered the NASD Sanction Guidelines ("Guidelines") in determining the appropriate sanction. The Guideline for filing a false or inaccurate Form U4 provides for fines ranging from \$2,500 to \$50,000 and a suspension in any or all capacities for five to 30 business days.¹⁶ In egregious cases, such as those involving false, inaccurate, or misleading filings, the Guideline recommends consideration of a longer suspension (of up to two years) or a bar.¹⁷ The Guideline for submission of an inaccurate Form U4 also provides three considerations in determining the appropriate sanction: 1) whether the information at issue was significant and the nature of that information; 2) whether the respondent's failure to disclose information resulted in a statutorily disqualified individual associating with a firm; and 3) whether the respondent's misconduct resulted in harm to a registered person, another member firm, or any other person or entity.¹⁸

The Hearing Panel found that Toth's misconduct warranted sanctions in the higher range of the applicable Guideline because it involved an inaccurate filing and one of the Guideline's specific considerations applied: the information was significant.¹⁹ We agree that the undisclosed

¹⁶ *NASD Sanction Guidelines* 73 (2006), http://www.nasd.com/web/groups/enforcement/Documents/enforcement/nasdw_011038.pdf [hereinafter *Guidelines*].

¹⁷ *Id.* at 74.

¹⁸ *Id.* at 73.

¹⁹ The Hearing Panel specifically found that the two remaining specific considerations did not apply to Toth's misconduct, and we affirm those findings. The record shows that Toth was

[Footnote continued on next page]

July 2003 New Jersey complaint that alleged securities fraud against Toth may have had a serious consequence upon Toth's employment in the securities industry; therefore, the nondisclosure is significant and an aggravating factor. Moreover, Toth's willful failure to disclose those charges against him is an aggravating circumstance. The record shows that Van Pelt repeatedly requested that Toth review and sign the Form U4 and respond to the inquiry from the New Jersey Bureau of Securities regarding actions against him. Van Pelt continued to ask for these items even after Toth informed him that he would be resigning from Bedminster so that Van Pelt could file a Form U5 for Toth indicating voluntary resignation. Because he did not receive answers from Toth, Van Pelt filed a Form U5 "for cause" terminating Toth's registration on October 24, 2003. In turn, Toth repeatedly ignored Van Pelt's requests and provided only useless information, belatedly, in the form of the two October 27, 2003 e-mails that purported to be Toth's August 31, 2003 resignation from Bedminster and a response to the New Jersey inquiry that only mentioned "three pending Arbitrations" against Toth. We consider Toth's continuing attempts to conceal his failure to disclose the July 2003 New Jersey complaint to be nothing less than a tacit admission of his misconduct and an aggravating factor in assessing sanctions.

Similarly, Toth's attempts to conceal his failure to disclose from NASD are relevant in assessing the appropriate remedial sanction for Toth's misconduct. Principal Consideration No. 12 of the Guidelines instructs us to consider: whether Toth provided substantial assistance to NASD in its investigation of the underlying violation, or whether he attempted to conceal information from NASD or to provide inaccurate documentary information to NASD.²⁰ The record shows that Toth submitted vague and incomplete responses to NASD staff's requests for information in 2004 regarding Toth's disclosures to Van Pelt prior to the submission of the August 13, 2003 Form U4, and we consider this an aggravating factor.

Full and accurate disclosure is vital, not only to NASD and other self-regulatory organizations, but also to state regulators and broker-dealers who use the information to determine the fitness of an applicant for registration as a securities professional. *See David B. Harman*, 48 S.E.C. 950, 952 (1988). Given the utmost importance of complete and truthful disclosures on Forms U4, we find Toth's nondisclosure egregious.²¹

[cont'd]

only charged with securities fraud, and not temporarily or permanently enjoined by a court. Therefore, the charges alleged against him in the July 2003 New Jersey complaint did not cause him to be a statutorily disqualified individual associating with a firm. *See* NASD By-Laws Article III, Section 4(h). Moreover, there is no evidence in the record that Toth's nondisclosure resulted in any harm to a registered person, another member firm, or any other person or entity.

²⁰ *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 12).

²¹ We also have considered and reject without discussion all other arguments of the respondent.

Accordingly, we affirm the Hearing Panel's sanction of a one-year suspension in all capacities for Toth's willful failure to provide material information on his Form U4 and his failure to correct the inaccurate Form U4, in violation of Conduct Rule 2110 and IM-1000-1. Toth is also statutorily disqualified. In order for him to seek readmission to NASD, a firm must sponsor him through the process known as the Membership Continuation Application or the MC-400.

VII. Conclusion

We affirm the Hearing Panel's finding that Toth violated Conduct Rule 2110 and IM-1000-1 by willfully causing the filing of a Form U4 that failed to disclose a material fact and by failing to correct the inaccurate Form U4. We also affirm the Hearing Panel's sanction and hereby impose a one-year suspension in all capacities on Toth for this misconduct.

On Behalf of the National Adjudicatory Council,

Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary