BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Market Regulation, Complainant, vs. Marshall J. Field Calabasas, CA, Respondent.	DECISION Complaint No. CMS040202 Dated: September 23, 2008

Respondent made fraudulent misrepresentations and failed to disclose material information when recommending municipal bonds, engaged in unauthorized sales and purchases of municipal bonds, and guaranteed a customer against loss. Held, Hearing Panel's findings affirmed and sanctions modified.

Appearances

For the Complainant: Timothy B. Nagy, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: Sheldon M. Jaffe, Esq.

Decision

Pursuant to NASD Rule 9311(a), Marshall J. Field ("Field") appeals a May 15, 2006 Hearing Panel decision. The Hearing Panel found that during an approximately three-year period, Field engaged in a pattern and practice of fraudulently inducing customers to purchase municipal bonds by making material misstatements and omissions concerning the bonds, executing unauthorized transactions in customer accounts, and guaranteeing a customer against loss in connection with her purchase of a municipal bond. The Hearing Panel barred Field from associating with any member firm in any capacity and ordered that he make restitution to eight customers. The Hearing Panel further ordered that Field offer rescission to those customers who had not sold their bonds at the price customers paid for the bonds, and assessed $5,213.79 in costs.

After a complete review of the record, we affirm the Hearing Panel's findings of violation and the bar imposed upon Field. In light of Field's bankruptcy case, we eliminate the order of restitution, order of rescission, and costs imposed by the Hearing Panel.[1]

I. Factual and Procedural History

A. Respondent's History

Field entered the securities industry in 1989. In 1998, Field founded American National Municipal Corporation ("ANMC" or "the Firm"). Field was the majority owner of ANMC. At all times relevant to the complaint, Field was registered through ANMC as a general securities representative and principal and a municipal securities representative and principal. ANMC withdrew its FINRA membership in August 2004. Field is not currently associated with a FINRA member firm.

B. Factual Background

1. Background of ANMC and Bonds Sold to Customers

Field specialized in the offer and sale of unrated high-yield municipal bonds. Field testified that ANMC was a "one-man show" and that he controlled the Firm and directly supervised ANMC's several employees, including registered representative Stephen Perrone ("Perrone"). Field was the account representative for each of the 11 customers at issue in this case, and was responsible for determining the price and quantity of bonds purchased by his customers and for executing such transactions.

From January 1999 to October 2002, Field recommended to his customers eight special, limited obligation bonds that are the subject of this case (collectively, the "bonds").[2] The bonds

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[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority ("FINRA"). References to FINRA shall include, by reference and where appropriate, references to NASD.

[2] The bonds consisted of the following: (1) Chimney Rock Community Association Certificates of Participation 1999 Series B; (2) Legends Golf Club Community Association Lease Revenue Bonds 2000 Series A; (3) Rancho Lucerne Valley Public Financing Authority Revenue Bonds 1998 Series A; (4) Roddy Ranch Public Financing Authority Revenue Bonds 1998 Series B; (5) Sierra Foothills Public Financing Authority Certificates of Participation 1998 Series A; (6) Sierra Foothills Public Utility District Certificates of Participation 1999 Series A; (7) Sierra Foothills Public Utility District Revenue Bonds 2000 Series A; and (8) Sierra Foothills Public Utility District Certificates of Participation 2000 Series B. Although the parties and the Hearing Panel generally refer to the foregoing investments generically as bonds, several of the investments were certificates of participation. Regardless, there is no question that the investments, whether bonds or certificates of participation, were securities. Section 3(a)(10) of the Securities Exchange Act of 1934 ("Exchange Act") states that "[t]he term 'security' means

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were unrated and payable solely from the anticipated revenue of various real estate ventures, as described in their respective official statements. The bonds were not backed by the full faith and credit of any taxing authority, state, or public agency. Indeed, each bond involved substantial risk, and the official statements for each of the bonds disclosed the following risk factors (collectively, the "risk factors"): (1) an investment in the bonds was speculative; (2) the anticipated revenues may not be sufficient to pay principal and interest, and investors could potentially lose their entire investments; (3) the liens securing the bonds were subordinate to other encumbrances, and the proceeds from any foreclosure on property securing the bonds may be insufficient to repay the bonds; (4) the underlying real estate projects were dependent upon a developer with a limited operating history and no independent sources of revenue; (5) the offerings were subject to remarketing agreements that negatively affected funding of the respective interest accounts; and (6) the bonds might lose their tax-exempt status.[3] Certain official statements further informed potential investors that the developer had not made payments on prior bond issues, that large portions of the funds to be raised by the subject offerings would be utilized to pay outstanding balances on prior bond issues, and that the developer was the subject of legal action.

2. The Bonds' Underwriter

Pacific Genesis Group, Inc. ("Pacific") was the managing underwriter for each of the bonds. Prior to the issuance of the bonds and during at least a portion of the time Field recommended and sold the bonds to his customers, Field had a business relationship with one of Pacific's principals, David Fitzgerald ("Fitzgerald"). For example, in February 1997 Fitzgerald wrote an email to Field (titled, "Mo' Money, Mo' Money"), in which Fitzgerald stated, "Just for you I created a $5MM 2/15/05 maturity yielding 8% . . . Stop waiting for people to call you.

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any note, stock, treasury stock, security future bond, debenture, [or] certificate of interest or participation in any profit-sharing agreement . . ." For simplicity we refer to the investments as bonds throughout this decision.

[3] The following language appeared in one of the official statements and is representative of similar provisions in the official statements of each bond sold by Field:

> NO REPRESENTATION IS MADE REGARDING THE SUFFICIENCY OF REVENUES . . . EITHER NOW OR IN THE FUTURE . . . TO PAY THE PRINCIPAL OF OR INTEREST ON THE BONDS WHEN DUE. . . . THE BONDS ARE SPECIAL, LIMITED OBLIGATIONS OF THE ASSOCIATION, PAYABLE SOLELY FROM REVENUES . . . NEITHER THE STATE OF CALIFORNIA, NOR ANY PUBLIC AGENCY . . . IS OBLIGATED TO PAY THE PRINCIPAL OF OR INTEREST ON THE BONDS . . . **THIS OFFERING INVOLVES A HIGH DEGREE OF RISK**.

Work that big, fat black book of yours. You already sold $2.5 MM of this very issue. Remember--$5 MM in trades delivers $150,000 in gross commissions by next Friday! That should pay for any outstanding bills . . . ." Fitzgerald also wrote a memorandum to Field in which he stated:

> When Pacific Genesis Group needs someone to place a $5MM order, we turn to the marvelous salesperson down in Woodland Hills [Field]. . . . Guys with class don't make excuses. I fund your ads when I can because I believe in what Marshall Field is about. Your background, your desire, your values and so forth are ones that we can all emulate. . . . Until next Monday, have your guys work from 6:00 a.m. to midnight knocking out orders. . . . So, c'mon slugger. The same way in which Brett Hull carries the Blues, I need you to carry us with $5,000,000 in orders. Knock 'em dead!

In November 1997, the State of California filed a complaint against Pacific, Fitzgerald, and another Pacific principal alleging state securities law violations in connection with municipal securities offerings.[4] Similarly, in December 2000, the Commission filed a complaint against Pacific and Fitzgerald, alleging that they made misrepresentations and omissions of material facts while acting as the underwriter for one of the bonds. A federal district court found that Pacific and Fitzgerald had violated securities laws, as alleged, and entered a permanent injunction against Pacific and Fitzgerald.

Field did not discuss with his customers the various legal actions against Pacific and Fitzgerald. Many of the official statements described some or all of the legal actions against Pacific and Fitzgerald.

3. Sale of Bonds to Customers

Eleven customers are alleged to have been harmed by Field's fraudulent sales practices. Nine customers testified before the Hearing Panel.[5] Many of the customers first became acquainted with Field, and municipal bonds generally, through Field's television advertisements. Most of the customers contacted Field after seeing his ads, although several were solicited directly by Field or Perrone. The majority of Field's customers were unsophisticated and had little, if any, experience with municipal bonds. A number of the customers were elderly, and the majority testified that they informed Field that they were conservative investors interested in earning interest income on their investments.

The customers all generally testified that Field informed them that the bonds were safe,

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[4] The complaint alleged that the defendants' written and oral representations to investors in the bond offerings contained false and misleading statements and omitted material facts. The parties ultimately settled the complaint.

[5] Customers RL and CS did not testify at the hearing, although each provided sworn testimony to FINRA at on-the-record interviews.

liquid, and that the customers would get their principal back. Indeed, several customers testified that Field represented that the bonds were "as good as gold," "paid like clockwork," and "couldn't lose." Further, several customers testified that Field told them that the bonds were highly rated or that the bonds' lack of a rating was not cause for concern.[6] Some of the customers testified that Field used Orange County, California, as an example to support his claim that even when municipal bonds default bondholders are eventually paid in full.[7]

Further, the customers generally testified that Field never disclosed or discussed any of the bonds' risk factors. Customers also stated that they did not receive official statements for the bonds prior to their purchases, and that Field never disclosed the legal actions against Pacific and Fitzgerald.[8] Many of the customers believed that the bonds were similar to municipal bonds backed by the full faith and credit of a state or government agency, savings bonds or certificates of deposit. Most customers stated that had they known the true nature and risk of the bonds they would not have purchased them.

Field admits that he recommended to his customers all of the bonds, although he generally disputes that he failed to disclose the bonds' risk factors. Field further denies that he made any misrepresentations to his customers. Field asserts that the customers lied or had poor memories of the specific transactions and his conversations with each customer. Further, Field asserts that he always sent his customers official statements and that the customers in this case each received an official statement in connection with their respective investments.

Ultimately, all of the bonds defaulted. The customers' total realized losses in connection with the transactions at issue exceeded $62,000,[9] and as of October 2005 the customers'

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[6] Field informed one customer that a rating was an unnecessary "administrative expense."

[7] Several customers testified that Field also informed them that: (1) the bonds were utility bonds or affiliated with Southern California Edison; (2) Pacific had no involvement with the bonds at issue; (3) interest on one of the recommended bonds was guaranteed for at least three years because reserves had been placed in escrow to fund interest payments; and (4) the value of the land securing the bonds exceeded the bonds' value. Several customers also testified that Field stated that he had personally purchased the bonds, that the customers should not worry after the bonds had declined in value, and that the bonds' decrease in value (as reflected on the customers' account statements) was a mistake.

[8] Field never disclosed to his customers that certain prior bond issuances related to the real estate development projects in question were in default. For example, Field recommended that customer CS purchase Sierra Foothills Public Utility District Certificates of Participation 1999 Series A without disclosing to her that the bonds she had previously purchased in connection with the same development (Sierra Foothills Public Financing Authority Certificates of Participation 1998 Series A) had defaulted.

[9] The Hearing Panel stated that the customers' aggregate realized losses exceeded $68,000. However, the Hearing Panel ordered restitution totaling $63,055.36. This amount did not include customer MS's alleged realized loss of $5,647 because the Hearing Panel could not

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unrealized losses totaled approximately $343,000. Field earned approximately $22,000 on the transactions, approximately $8,400 of which he earned on the unauthorized transactions described below.

4. Unauthorized Transactions

Six customers testified that sales and purchases of bonds were made on their behalf without their prior authorization or knowledge. Almost all of these transactions involved the sale of a bond previously purchased in the customer's account followed by the immediate purchase of another bond on behalf of the customer. One customer (TL) testified that without his prior authorization or knowledge, interest proceeds credited to his account were utilized to purchase $10,000 par value Roddy Ranch Public Financing Authority Revenue Bonds 1998 Series B. Upon discovering the purchase TL immediately contacted Field, who informed TL that these bonds were a good investment. TL demanded the return of his money, and Field complied. The customers all testified that they discovered the unauthorized transactions only after receiving confirmation statements from ANMC's clearing agent or reviewing their account statements.

Field reversed certain of these transactions after customers complained, although in several instances Field never reversed the transaction or subsequently engaged in additional unauthorized transactions.[10] Field told several customers that the transactions in their accounts were simply mistakes. In total, the customers testified that 15 unauthorized purchases and sales had occurred in their respective accounts.

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determine the extent to which MS may have incurred any loss as a result of Field's fraud. In addition, customer MB realized a profit of $617.50 on the sale of his bonds.

[10] For example, BR testified that $10,000 par value Burbank California Waste Disposal Bonds (which had a AAA rating) were sold to satisfy a $400 account debit. Field sold these bonds despite BR's instructions not to sell bonds in her account with an early maturity date, and BR held several bonds with maturity dates longer than the Burbank California Waste Disposal Bonds that could have been sold to satisfy the debit. Further, Field sold the Burbank California Waste Disposal Bonds despite the fact that BR would shortly be receiving $1,487.50 in interest that could have satisfied the debit. Rather than sending BR the proceeds of the bonds less the $400 debit as she had previously requested, Field instead used the proceeds to purchase Sierra Foothills Public Utility 2000 District Series B bonds. A month later, Field sold previously purchased bonds in BR's account and then immediately purchased $10,000 par value Sierra Foothills Public Financing Authority Certificates of Participation 1998 Series A. Likewise, Field sold bonds in RL's account and then immediately purchased different bonds on behalf of RL. RL questioned these transactions, and Field told RL that the transactions were mistakes and reversed them. However, four months later Field again sold certain bonds without RL's prior authorization and immediately purchased other bonds in RL's account.

5. Guarantee Against Loss

In late 2001, Field and Perrone recommended that customer CS purchase Sierra Foothills Public Utility District Certificates of Participation 1999 Series A. These recommendations were made to CS despite the fact that bonds previously issued in connection with the same real estate project and purchased by CS were in default, and neither Field nor Perrone disclosed the risk factors or any other material adverse information concerning any of the bonds recommended to CS. Field, through Perrone,[11] offered to refund CS's principal if she was not satisfied with her investment. CS subsequently purchased a total of $40,000 par value of the bonds.

Shortly thereafter, CS discovered that her previously purchased Sierra Foothills bonds were in default. CS called Field and demanded a refund. Field told her it would take some time to get her money back. CS followed up with a letter to Field stating that "[y]ou agreed to refund the purchase price when I purchased these bonds if requested. In our conversation this morning you stated that you would do this as soon as possible." Over the next several months, Field sold CS's Sierra Foothills bonds purchased in connection with Field's offer to refund her investment and returned to CS most of her principal.

6. Field's Bankruptcy Case

In December 2004, Field filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code. Shortly thereafter, FINRA's Department of Market Regulation ("Market Regulation") sought and obtained relief from the automatic stay in Field's bankruptcy case. The order granting such relief permitted Market Regulation to file a complaint against Field and permitted FINRA to conduct a disciplinary hearing and impose sanctions (including monetary sanctions) against Field. However, the bankruptcy court ordered that FINRA refrain from enforcing or collecting any monetary sanction (including restitution) absent further order from the court.[12] The bankruptcy court granted Field a discharge from his debts in May 2005. Field's bankruptcy estate was fully administered, and his bankruptcy case closed, in 2007.

C. Procedural History

On January 26, 2005, Market Regulation filed a four-cause complaint against Field. The complaint alleged that Field: (1) made fraudulent misrepresentations and omissions of material fact in connection with the purchase and sale of the bonds to seven customers, in violation of Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5; (2) did not deal fairly with his customers, in violation of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-17; (3) executed 25 unauthorized transactions in the accounts of six customers, in violation of Section

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[11] CS testified that although she believed that Perrone or some other ANMC employee was the person she spoke with on the phone, she could hear Field in the background telling him what to say.

[12] There is no evidence in the record that FINRA ever sought further relief from the bankruptcy court.

15B(c)(1) of the Exchange Act and MSRB Rule G-17; and (4) guaranteed a customer against loss, in violation of Section 15B(c)(1) of the Exchange Act and MSRB Rule G-25(b). On June 14, 2005, Market Regulation filed an amended complaint, which consolidated the four causes of action alleged in the original complaint into a single cause alleging that Field defrauded customers through the use of unlawful sales practices.[13] Field denied all of the allegations.

The Hearing Panel conducted a four-day hearing from October 31, 2005, through November 3, 2005. In a decision dated May 15, 2006, the Hearing Panel found that Field had engaged in the misconduct alleged in the complaint. The Hearing Panel barred Field in all capacities, ordered him to make restitution to eight customers in the total amount of approximately $63,055 (plus interest), and ordered him to offer rescission to those customers who had not sold their bonds and offer to repurchase the bonds at the original purchase price. The Hearing Panel also assessed $5,213.79 in costs. Field's appeal followed.[14]

II. Discussion

The Hearing Panel found, based on the consistent and credible testimony of Field's customers, that Field engaged in a pattern of making fraudulent misrepresentations and omissions of material fact in recommending the purchase and sale of the bonds, executed unauthorized transactions in the accounts of six different customers, and guaranteed a customer against loss, in violation of Sections 10(b) and 15B(c)(1) of the Exchange Act, Exchange Act Rules 10b-5(b) and 10b-5(c), and MSRB Rules G-17 and G-25(b). After an independent review of the record, we affirm the Hearing Panel's findings.[15]

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[13] The amended complaint also included allegations that Field engaged in similar misconduct with respect to two additional customers, bringing to 11 the total number of customers allegedly harmed by Field's misconduct.

[14] Field represented himself before the Hearing Panel and failed to formally seek to have the documents he used as exhibits at the hearing admitted into evidence. Field subsequently filed, through counsel, a motion to adduce additional evidence in connection with these documents. The subcommittee of the National Adjudicatory Council ("NAC") that heard oral argument in this case granted Field's motion, although it held that Field could only use such documents to support arguments he made before the Hearing Panel and could not rely upon the documents to raise completely new defenses or theories of the case. We adopt this ruling as our own.

[15] Although Market Regulation alleged that Field had also violated Exchange Act Rule 10b-5(a), the Hearing Panel did not expressly make any finding with regard to this rule. In light of our findings that Field violated Exchange Act Rules 10b-5(b) and 10b-5(c), we need not determine whether Field also violated Rule 10b-5(a). In addition, Field argues generally that the Hearing Panel did not review the entire record in rendering its decision. The record does not support Field's argument. Regardless, the NAC independently reviewed the record in its entirety, thus curing any alleged deficiencies in the Hearing Panel's review. *See Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39

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A. The Testifying Witnesses Were Credible

The Hearing Panel relied extensively on its credibility findings in determining that Field engaged in misconduct. The Hearing Panel found that Field's customers consistently testified that Field misrepresented that the bonds were safe, secure and liquid, and failed to disclose or discuss any of the bonds' risk factors. Field's customers also consistently testified that they did not receive official statements from Field prior to their purchases (if at all). Certain of Field's customers, moreover, testified that they never authorized certain purchases and sales of bonds that occurred in their accounts.

Field challenges these credibility findings on various grounds. For instance, Field argues that certain customers' testimony was unreliable because of mistaken recollections of facts.[16] Field also asserts that despite his customers' hearing testimony to the contrary, he sent official statements for the bonds to each of his customers. To support this claim, Field offers Federal Express receipts indicating that he sent unspecified packages to certain of the customers, and also points to various purported contradictory statements made by his customers in prior on-the-record testimony.[17] Further, Field argues that telephone records showing calls with certain customers prior to the dates of the alleged unauthorized transactions prove that the customers falsely testified that they never authorized such transactions. Finally, Field asserts that because certain customers who alleged that Field made unauthorized trades did not immediately close their accounts at ANMC, the customers were not credible.

We reject Field's assertions. The Hearing Panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence." *Dep't of Enforcement v.*

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n.16 (NASD NAC Jan. 28, 1999) (stating that NAC's independent, de novo review of record is intended to insulate proceedings from procedural unfairness), *aff'd,* 54 S.E.C. 655 (2000).

[16] For example, Field argues that CS testified that she thought that the name of the ANMC employee who conveyed Field's guarantee may have been "Paul," and no one by that name worked at ANMC during the time in question. Further, Field argues that MS testified at her on-the-record interview that she would have avoided investments underwritten by Pacific, although she later admitted to previously purchasing bonds underwritten by Pacific. Finally, Field asserts that although BR testified that she informed Field not to buy any bonds with a five-year maturity, her trading history demonstrated that she had purchased bonds with longer maturities.

[17] Field argues that although PM testified that she did not receive an official statement for the Sierra Foothills bonds, she admitted receiving a thick book on another bond not at issue in this case. Field further points to BB's prior testimony that she believed she had received an official statement in connection with a bond unrelated to this case, but later stated at the hearing in this matter that she did not receive any official statements. Field also cites to MB's testimony that he received an official statement in 1997 as proof that he received an official statement for the bond that he purchased in 1999.

Mizenko, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We find that Field has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determinations. The Hearing Panel properly noted that although some of the elderly customers may have been mistaken with respect to each and every detail, the customers' testimony was candid, supported in certain instances by written notes, and consistent. Thus, we reject Field's arguments that inconsistencies in the customers' testimony render such testimony incredible. *See Anthony Tricarico*, 51 S.E.C. 457, 461 (1993) (refusing to overturn adjudicator's credibility determination of witness who was unable to recall certain details even though respondent had identified certain inconsistencies in witness's testimony). Further, the one-page Federal Express receipts do not indicate what was included in each package, and Field did not provide receipts for all of the transactions at issue. Similarly, phone records showing only that Field may have had conversations with some of the customers prior to the unauthorized trades, without any information concerning the content of the conversations, do not amount to substantial evidence that Field obtained the customers' authority prior to executing transactions in the customers' accounts. Finally, the fact that customers who alleged unauthorized trades did not immediately close their ANMC accounts does not make the customers' testimony incredible. *See Dep't of Enforcement v. Kaweske*, Complaint No. C07040042, 2007 NASD Discip. LEXIS 5, at *37 (NASD NAC Feb. 12, 2007) (holding that customers' continued trading in their accounts at respondent's firm subsequent to alleged misconduct does not render their testimony concerning such misconduct incredible).

The Hearing Panel, which had the opportunity to hear the testimony and assess the witnesses' demeanor, found that the unrelated customers each testified credibly and consistently, and that the customers had similar recollections of Field's misrepresentations and omissions. *See Alvin W. Gebhart*, Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *19 n.18 (Jan. 18, 2006) (holding that similarities among investors' testimony strengthens the reliability of that testimony), *rev'd in part and remanded on other grounds*, 255 F. App'x 254 (9th Cir. 2007). The Hearing Panel further concluded that Field's contradictory testimony was not credible. Field has not presented substantial evidence to reverse the Hearing Panel's credibility determinations, and we therefore affirm the Hearing Panel's credibility findings.[18]

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[18] Field objects to the use of prior on-the-record testimony of two customers who did not testify at the hearing. The two customers, however, each provided sworn testimony to FINRA at on-the-record interviews, and one of the two customers filed a letter of complaint with FINRA. The record testimony of the customers is probative, consistent with the live testimony of Field's other nine customers, and reliable. Consequently, we find that the Hearing Panel properly admitted these transcripts into evidence. *See Harry Gliksman*, 54 S.E.C. 471, 480-81 (1999) (finding customer affidavit, corroborated by FINRA examiner's testimony regarding his conversations with the customer, was admissible because it was probative and reliable), *aff'd*, 24 F. App'x 702 (9th Cir. 2001); *Allen Mansfield*, 46 S.E.C. 356, 358 (1976) (finding records of complaint letters from customers and customer interviews to be probative and reliable).

B. Field Violated Sections 10(b) and 15B(c)(1) of the Exchange Act, Exchange Act Rule 10b-5, and MSRB Rules G-17 and G-25(b)

Section 10(b) of the Exchange Act makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]" Exchange Act Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, to: (a) employ any device, scheme, or artifice to defraud; (b) make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or (c) engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person.

To establish that Field failed to disclose material information or made fraudulent misrepresentations of material facts in violation of Exchange Act Rule 10b-5(b), Market Regulation must demonstrate by a preponderance of the evidence that: (1) the omission or misrepresentation involved material information; (2) the omission or misrepresentation was made in connection with the purchase or sale of a security; and (3) Field acted with scienter.[19] *See Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9, at *11 (NASD NAC May 18, 2004) (*citing SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450 (2d Cir. 1996)). Whether a fact is material "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that information 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"). "[S]cienter refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976) (internal quotation omitted); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2507 n.3 (2007) (reserving the issue but stating that "[e]very Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required.").

MSRB Rule G-17, the Municipal Securities Rulemaking Board's fair dealing rule, provides that, "[i]n the conduct of its municipal securities activities, each broker, dealer, and municipal securities dealer shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice." MSRB Rule G-17 requires that, prior to a sale, a dealer or associated person must disclose all material facts concerning the municipal security, and

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[19] There is no dispute that Field's misconduct occurred in connection with the purchase or sale of securities. In addition, there is ample evidence in the record to demonstrate that Field used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange," which is also required to establish a violation of Exchange Act Rule 10b-5.

prohibits the omission of any material facts which would render other statements misleading.[20] Indeed, prior to the sale of a municipal security dealers and associated persons must provide their customers with a complete description of the security.[21]

In addition, "making an untrue statement with scienter for fraud is an act to defraud" and violates Exchange Act Rule 10b-5(c). *In re Able Labs. Sec. Litig.*, 2008 U.S. Dist. LEXIS 23538, at *75-76 n.32 (D.N.J. Mar. 24, 2008). "[T]he reach of Rule 10b-5(c) is very broad[.]" *Id.* The deceptive conduct element of the offense is met if the broker fails to "inform the customer of the materially significant fact of the trade before it is made." *Donald A. Roche*, 53 S.E.C. 16, 24 & n.17 (1997).

We find that Field made material misrepresentations and omissions to customers and engaged in unauthorized transactions in his customers' accounts in connection with purchases and sales of the bonds, in violation of Sections 10(b) and 15B(c)(1) of the Exchange Act, Exchange Act Rules 10b-5(b) and 10b-5(c), and MSRB Rule G-17. Field misrepresented that the bonds were safe, liquid, and that the customers would get their principal back. Field falsely informed customers that the bonds were "as good as gold," "paid like clockwork," and "couldn't lose." Field also made other, more detailed misrepresentations. For example, Field told several customers that the bonds were highly rated or the bonds' lack of a rating was not a cause for concern. Field informed several customers that the bonds were utility bonds or affiliated with Southern California Edison, and that funds had been set aside in an escrow account to pay interest on the bonds. Field informed another customer that Pacific had no involvement with the bonds at issue, despite the fact that it served as the bonds' underwriter.[22]

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[20] *See Rule G-17 Interpretation-Educational Notice on Bonds Subject to "Detachable" Call Features*, May 13, 1993, *available at* http://www.msrb.org/MSRB1/rules/notg17.htm. Further, Section 15B(c)(1) of the Exchange Act provides that, "[n]o broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the [MSRB]."

[21] *Id.*; *Interpretative Notice Regarding Rule G-17, on Disclosure of Material Facts*, Mar. 20, 2002, *available at* http://www.msrb.org/msrb1/rules/notg17.htm (hereinafter, *Rule G-17 Interpretation*) (stating that MSRB Rule G-17 is essentially an antifraud prohibition and also imposes a duty to deal fairly, including an affirmative obligation to disclose all material facts and give a complete description of the security prior to the sale of such security).

[22] In addition, Field failed to disclose the suits filed by the State of California and the Commission against Pacific and Fitzgerald. In light of Field's admitted long-standing and ongoing relationship with Pacific and Fitzgerald at the time he made at least some of the sales of the bonds to customers, we find that the legal actions against Pacific and Fitzgerald were material. We reject Field's argument that he did not have an obligation to disclose the legal actions to his customers.

Further, Field failed to inform his customers of numerous material facts concerning the bonds. For example, Field never disclosed or discussed any of the bonds' risk factors, and never disclosed that the bonds were special, limited obligations not backed by the full faith and credit of a state or municipality. Field recommended, and customers purchased, a number of bonds for which he failed to disclose that prior issuances of bonds for the real estate development projects in question were in default.

Without question, these misrepresentations and omissions were material, and Field had a duty to give full and complete disclosure to his customers in connection with the bonds he recommended. *See Rule G-17 Interpretation* (stating that municipal securities dealers and associated persons have an affirmative obligation to disclose to customers all material facts); *SEC v. Hasho*, 784 F. Supp. 1059, 1109 (S.D.N.Y. 1992) (holding that negative financial and performance information is material); *Dep't of Enforcement v. Gebhart*, Complaint No. C02020057, 2005 NASD Discip. LEXIS 40, at *40-41 (NASD NAC May 24, 2005) (holding that failures to disclose risks associated with an investment involved material omissions), *aff'd*, 2006 SEC LEXIS 93, *rev'd in part and remanded on other grounds*, 255 F. App'x 254 (9th Cir. 2007). Field violated this duty. Indeed, many of his customers falsely believed that the bonds were safe and akin to certificates of deposit or highly rated municipal bonds backed by the full faith and credit of a state agency, and had no knowledge that the bonds they purchased carried substantial risk. Many of the customers testified that they would not have purchased the bonds recommended by Field if they had full knowledge of the risk and nature of the bonds.

We further find that Field acted with scienter and knew that the bonds carried substantial risk at the time he made his misrepresentations and omissions of material facts to his customers. Indeed, Field reviewed all of the bonds' official statements, which clearly and repeatedly disclosed the bonds' risk and other material facts. Field also claimed to have performed substantial due diligence on the bonds and the underlying real estate projects. Despite his extensive knowledge of the bonds, Field misrepresented material facts and omitted other key facts while recommending and selling the bonds to his customers. In so doing, Field acted intentionally.[23]

We also find that Field engaged in 15 unauthorized sales and purchases of bonds in the accounts of six different customers. Almost all of these transactions involved sales of the bonds previously purchased by Field's customers (through Field's intentionally fraudulent misrepresentations and omissions), followed by the immediate purchase of other bonds in the customers' accounts. Field engaged in these transactions without the customers' prior knowledge or authority. Indeed, the customers only discovered the unauthorized transactions upon receipt of trade confirmations or their account statements. Although Field attempted to

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[23] We have previously stated that MSRB Rule G-17 requires a showing of at least negligence to establish a violation. *See Dep't of Enforcement v. Sisung Sec. Corp.*, Complaint No. C05030036, 2006 NASD Discip. LEXIS 16, at *53 n.40 (NASD NAC Aug. 28, 2006), *aff'd in part*, Exchange Act Rel. No. 56741, 2007 SEC LEXIS 2562 (Nov. 5, 2007). Market Regulation satisfied its burden and demonstrated that Field violated MSRB Rule G-17.

explain away these transactions during the hearing, the Hearing Panel found his explanations not credible, and found the customers' testimony that they did not authorize the transactions credible. Unauthorized trading accompanied by deception, misrepresentations, or omissions violates Exchange Act Rule 10b-5. *See Hasho*, 784 F. Supp. at 1110; *J.W. Barclay & Co., Inc.*, Admin. Proc. File No. 3-10765, 2003 SEC LEXIS 2529, at *34 (Oct. 23, 2003). Further, "the practice by a municipal securities dealer of knowingly issuing confirmations of sales to customers who have not placed orders to purchase the bonds is a deceptive, dishonest, and unfair practice under rule G-17." *Interpretative Letter Regarding Rule G-17*, Mar. 3, 1981, *available at* http://www.msrb.org/MSRB1/rules/interpg17.htm. Consequently, Field's pattern and practice of fraudulent misrepresentations and omissions accompanied by unauthorized transactions violated Exchange Act Rule 10b-5(c) and MSRB Rule G-17.

Field argues that the bonds' risk factors were clearly disclosed in the official statements, which he asserts he sent to each customer, and that each customer should have read the official statements to understand the nature of the bonds. However, the customers credibly testified that in many instances Field did not send them official statements.[24] Moreover, even assuming, arguendo, that he had sent official statements to each customer prior to the customer's purchase, this does not excuse his fraudulent misrepresentations. *See Larry Ira Klein*, 52 S.E.C. 1030, 1036 (1996) (holding that "Klein's delivery of a prospectus to Towster does not excuse his failure to inform her fully of the risks of the investment package he proposed").[25]

Finally, we find that Field guaranteed customer CS against loss in connection with her purchase, in violation of MSRB Rule G-25(b). MSRB Rule G-25(b) provides that "no broker, dealer, or municipal securities dealer shall guarantee or offer to guarantee a customer against loss in (i) an account carried or introduced by such broker, dealer, or municipal securities dealer in which municipal securities are held or for which municipal securities are purchased, sold or exchanged or (ii) a transaction in municipal securities with or for a customer." Despite this prohibition, Field (through his employee Perrone) told customer CS that he would refund CS's principal if she was not satisfied with her investment in the bond that Field had recommended.

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[24] Field also argues that he was not legally required to send official statements to his customers, and thus concludes that he cannot be found liable for failing to deliver the official statements. Field misconstrues the Hearing Panel's findings. Regardless of Field's obligations to deliver official statements, Field had an obligation to fully disclose all material facts to his customers prior to their purchases of the bonds. Field failed to do so, and made misrepresentations and omissions of material facts to customers.

[25] Field insinuates that because the customers (or at least some of the customers) had a high tolerance for risky debt securities and some had extensive experience with municipal bonds, his fraudulent sales practices are somehow excused. The record shows that the customers generally sought safe investments, had a low tolerance for risk, and had little experience with municipal bonds. Moreover, even assuming that Field's factual assertions are correct, neither a customer's desire for high risk securities nor his or her experience or sophistication give a broker license to make fraudulent representations. *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986).

Shortly after purchasing the bond, CS demanded the return of her principal when she discovered that other bonds she had purchased from Field several years earlier had defaulted. Field returned almost all of CS's principal in accordance with the prior guarantee. Field's actions violated the prohibition against guaranteeing customers against losses set forth in MSRB Rule G-25(b).

* * *

Consequently, we find that Field violated Sections 10(b) and 15B(c)(1) of the Exchange Act, Exchange Act Rules 10b-5(b) and 10b-5(c), and MSRB Rules G-17 and G-25(b).

III. Sanctions

The Hearing Panel aggregated Field's misconduct because the violations all arose out of Field's pattern and practice of fraudulently inducing customers to purchase the bonds through similar material misstatements and omissions. The Hearing Panel barred Field from associating with any member firm in any capacity, ordered him to pay restitution totaling $63,055.36 to eight customers, and ordered him to offer rescission to those customers who had not sold their bonds at the original purchase prices. The Hearing Panel also assessed $5,213.79 in costs. We affirm the bar imposed upon Field. However, for the reasons set forth herein, we eliminate the order of restitution, rescission, and order to pay costs.

A. A Bar is Appropriate

The FINRA Sanction Guidelines ("Guidelines") for intentional misrepresentations or omissions of material facts recommend a suspension for a period of 10 business days to two years, and a bar in egregious cases.[26] For effecting unauthorized transactions in customer accounts and for guaranteeing a customer against loss, the Guidelines for each form of misconduct recommend a suspension of up to two years or a bar in egregious cases.[27] In determining the proper remedial sanction, adjudicators should consider the general principles and principal considerations applicable to all sanction determinations.[28] In addition, and in connection with unauthorized transactions, adjudicators should consider whether the respondent misunderstood his authority and whether the unauthorized trading was egregious.[29] In

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26 *FINRA Sanction Guidelines* 93 (2007), http://www.finra.org/web/groups /enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

27 *Id.* at 91, 103.

28 *Id.* at 15.

29 *Id.* at 103. We have previously identified three categories of egregious unauthorized trading: (1) quantitatively egregious unauthorized trading; (2) unauthorized trading accompanied by aggravating factors; and (3) qualitatively egregious unauthorized trading, which is measured by the strength of the evidence and the respondent's motives in effecting the trades (i.e., whether the respondent acted in bad faith or as a result of a reasonable misunderstanding). *See Dist. Bus.*

[Footnote continued on next page]

connection with a respondent's guaranteeing a customer against loss, the Guidelines provide that adjudicators should consider the purpose and timing of the guarantee and whether the respondent received a financial benefit from the guaranteed transactions.[30]

As an initial matter, we agree that the violations are related and arise from the same underlying misconduct as alleged in Market Regulation's one-cause complaint. Thus, we treat Field's multiple rule violations in the aggregate for purposes of imposing sanctions. We further agree that Field's violations were egregious. Field knowingly and intentionally provided his customers with false information while recommending the bonds and abrogated his duty to provide full disclosure to his customers.[31] Field's misconduct occurred over a several-year period and involved 11 different customers.[32] Further, Field earned more than $22,000 on the subject transactions while his customers incurred $63,000 in realized losses.[33] Field attempted to lull certain of his customers into inactivity by falsely asserting that the unauthorized transactions were simply mistakes and that the decline in the bonds' value was nothing to be concerned about.[34] Many of the customers were unsophisticated and elderly, and had little or no experience with municipal bonds.[35] In addition, Field has failed to accept responsibility for his misconduct. Instead, Field accuses his customers of testifying falsely and failing to read the bonds' official statements.[36]

We also find that Field's unauthorized transactions were both quantitatively and qualitatively egregious. Over a period of approximately 17 months, Field executed 15 unauthorized transactions (including seven sales of bonds followed immediately by seven purchases of different bonds) in six customer accounts. The total number of unauthorized trades executed by Field is consistent with our prior findings of quantitatively egregious unauthorized trading, whether we view the seven sales and purchases as single transactions or as independent

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Conduct Comm. v. Hellen, Complaint No. C3A970031, 1999 NASD Discip. LEXIS 22, at *15-24 (NASD NAC June 15, 1999); *see also Guidelines*, at 103.

30 *Guidelines*, at 91.

31 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

32 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

33 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8 and 17). Approximately $760 of the total amount earned by Field was earned in connection with his 2001 sale of bonds to CS for which he guaranteed CS against loss.

34 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

35 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 19).

36 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

transactions. *See, e.g., Dep't of Enforcement v. Bond*, Complaint No. C10000210, 2002 NASD Discip. LEXIS 6, at *12 (NASD NAC Apr. 4, 2002) (finding quantitatively egregious conduct for 12 unauthorized trades); *Dist. Bus. Conduct Comm. v. Levy*, Complaint No. C07960085, 1998 NASD Discip. LEXIS 22, at *11 (NASD NAC Mar. 6, 1998) (finding quantitatively egregious conduct for 16 unauthorized trades).

Further, Field's unauthorized trading was qualitatively egregious, and the unauthorized trades were accompanied by numerous aggravating factors. Field informed some of his customers that the transactions were simply mistakes and did not reverse all of the transactions when detected. None of the transactions occurred as the result of a misunderstanding, and Field profited from his misconduct. Similarly, in connection with Field's guarantee to CS, the purpose of the guarantee was to fraudulently induce CS to purchase risky securities. Under the circumstances, and in light of the numerous aggravating factors associated with Field's egregious misconduct, we find that barring Field in all capacities is the only effective remedial sanction.

B. Imposition of Monetary Sanctions Is Inappropriate Under the Circumstances

In light of Field's bankruptcy case and discharge, we eliminate the Hearing Panel's orders of restitution, rescission, and costs. Market Regulation obtained relief from the automatic stay in Field's bankruptcy case to file the complaint and initiate disciplinary action against Field. However, Market Regulation did not seek further relief as ordered by the bankruptcy court to enforce and collect monetary sanctions. Field's bankruptcy estate has been fully administered, and the case is now closed. Under the unique facts and circumstances of this case, we eliminate the Hearing Panel's orders that Field make restitution, rescission, and pay costs.[37]

IV. Conclusion

We affirm the Hearing Panel's findings that Field engaged in a pattern and practice of fraudulently inducing customers to purchase municipal bonds by making material misstatements and omissions concerning the bonds, executing unauthorized transactions in customer accounts, and guaranteeing a customer against loss in connection with her purchase of a municipal bond. We further affirm the Hearing Panel's bar imposed upon Field, although we eliminate the

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[37] Restitution or other monetary relief against a respondent who has filed for bankruptcy may, under certain circumstances, be appropriate.

Hearing Panel's orders of restitution, rescission, and costs. Accordingly, we bar Field in all capacities.[38]

On behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[38] The bar is effective as of the date of this decision. We have also considered and reject without discussion all other arguments advanced by the parties.