

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Louis Ottimo,
Syosset, NY,

Respondent.

DECISION

Complaint No. 2009017440201

Dated: March 15, 2017

Respondent fraudulently omitted material information in his personal biography in a private placement memorandum and willfully failed to disclose timely on the Uniform Application for Securities Industry Registration or Transfer form unsatisfied tax liens, judgments, and a bankruptcy. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Danielle I. Schanz, Esq., Dale A. Glanzman, Esq.,
Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Paul R. McMenamain, Esq., McMenamain Law Group, Tobin D. Kern, Esq.,
Volant Law, LLC

Decision

Louis Ottimo appeals an Extended Hearing Panel decision issued on July 10, 2015. The Extended Hearing Panel found that Ottimo fraudulently omitted material information in a personal biography in the offer and sale of securities, in violation of Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. It further found that Ottimo willfully failed to disclose or disclose timely on the Uniform Application for Securities Industry Registration or Transfer (“Form U4”) material information related to his unsatisfied tax liens, judgments, and a bankruptcy filing, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA’s By-Laws. For his fraud violation, the Extended Hearing Panel barred Ottimo from association with any FINRA member in all capacities. For his Form U4 violation, the Extended Hearing Panel assessed, but in light of the bar did not impose, a \$25,000 fine and a two-year suspension in all capacities. The Panel also found Ottimo’s misconduct was willful, as a result of which he was statutorily disqualified. On appeal, Ottimo challenges before the National Adjudicatory Council

(“NAC”) the Extended Hearing Panel’s fraud findings and corresponding sanction. He does not challenge the Extended Hearing Panel’s Form U4 findings but requests the NAC to reduce the Panel’s assessed sanctions. Based on an independent review of the record, we affirm the Extended Hearing Panel’s findings of violation and sanctions.

I. Background

Ottimo entered the securities industry in 1995. He was employed with several FINRA member firms before he joined his father’s brokerage firm, EKN Financial Services Inc. (“EKN” or “Firm”), as a general securities representative in 2008. Prior to his association with EKN, Ottimo was the co-owner of Jet One Jets, Inc. (“Jet One Jets”), a broker that arranged private jet charters, and the owner and president of Wheatley Capital Corporation (“Wheatley”), a company that handled back-office operations for EKN. In February 2012, Ottimo created and sold interests in First Secondary Market Fund LLC (“Fund”), a special purpose vehicle created to purchase shares of Facebook Inc. (“Facebook”) in the secondary market before its initial public offering (“IPO”). FINRA expelled EKN in October 2012. Ottimo’s most recent employer terminated his registration in February 2014 and he has not associated with a FINRA member firm since then.

II. Procedural History

On August 22, 2013, Enforcement filed a complaint alleging three causes of action. The first cause of action alleged that, from December 2008 to February 2012, Ottimo willfully failed to disclose, or failed to disclose timely, material facts on his Form U4, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA’s By-Laws.¹ The second cause of action alleged that Ottimo willfully made material misrepresentations and omitted material facts concerning his prior business experience in the Fund’s private placement memorandum (“PPM”), in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. As an alternative to the second cause of action, the third cause of action alleged that Ottimo made material misrepresentations and omitted material facts concerning his prior business experience in the Fund’s PPM, in violation of Section 17(a)(2) and (3) of the Securities Act of 1933 (“Securities Act”) and FINRA Rule 2010. After a four-day hearing, the Extended Hearing Panel found that Ottimo engaged in the violations alleged in the first and second causes of action and it dismissed the alternative third cause of action. This appeal followed.

III. Ottimo’s Fraudulent Omissions

A. Facts

1. Creation and Sale of the Fund

¹ The conduct rules and interpretative materials that apply in this case are those that existed at the time of the conduct at issue.

The Fund was a special purpose vehicle organized to offer membership interests to eligible investors for the primary purpose of acquiring pre-IPO Facebook shares. All eligible Fund investors were both “accredited investors,” as defined in Rule 501(a) of Regulation D under the Securities Act, and “qualified clients,” as defined in Rule 205-3 under the Investment Advisers Act of 1940.² The Fund was managed by First Secondary Managers (“FSM”), a limited liability company that operated out of EKN’s offices. Ottimo owned 85 percent of FSM, was its chief executive officer, and co-managed FSM with NL.³

From March 6 to April 10, 2012, EKN sold member interests in the Fund raising \$3.76 million from 21 investors. The Fund was sold as a private placement in reliance on Section 4(2) of the Securities Act and Regulation D. Investors purchased interests in the Fund with investments ranging from \$25,000 to \$400,000. Ottimo personally solicited and sold \$500,000 of member interests to two investors. FSM used the invested proceeds to purchase approximately 80,000 pre-IPO shares of Facebook through SecondMarket, Inc., an online trading platform that hosted Dutch auctions in the private market for pre-IPO Facebook shares.

Potential investors received offering materials in connection with the sale of the Fund, including a PPM dated February 29, 2012, the Fund’s operating agreement, and subscription documents. The PPM had a section titled, “The Manager,” describing Ottimo’s role as FSM’s managing member and chief executive officer. As Fund manager, Ottimo had sole discretion and control over all decisions related to the Fund. According to the PPM: “All decisions regarding management of the [Fund], including, but not limited to, the selection of Portfolio Securities . . . will be made by and in the sole discretion of the Manager.” The PPM also stated that investors were “relying solely on the investment acumen of the officers of the Manager” and that “no party should make any investment in the [Fund] unless such party is willing to entrust all aspects of the [Fund]’s management to the Manager.”

2. Ottimo Omits Negative Information in His Biography

Ottimo’s personal biography describing his previous business experience was also included in “The Manager” section of the PPM, which stated the following:

Louis Ottimo – Chief Executive Officer

Louis Ottimo is the Chief Executive Officer of the Manager. In such capacity, Mr. Ottimo is authorized to manage the Manager to effect the objectives and purposes of the [Fund]. Mr. Ottimo has been a registered representative of EKN, where he maintains retail clients, since 2009. Mr. Ottimo currently serves on the board of directors of Bsafe Electrix, Inc. Previously, Mr. Ottimo co-founded Jet One Jets in April 2006 and

² 17 C.F.R. § 230.501(a); 17 C.F.R. § 275.205-3(d).

³ NL resigned from the Fund as co-manager in August 2012, approximately six months after the Fund was created, thereby leaving Ottimo as the Fund’s sole manager from that point forward.

successfully negotiated an exclusive reseller Agreement with American Express to handle the Jet One Jets pre-paid card. Jet One Jets grew to \$18 million in revenues inside approximately 18 months. In April 2001, Mr. Ottimo founded Wheatley Capital, Inc. and was its president until 2011. He also founded North Pacific Capital, LLC in 1996, which was an Office of Supervisory Jurisdiction of Tasin & Company, Inc., a registered broker-dealer. Under his ownership the branch office grew to over \$25 million in annual sales with up to 100 Registered Representatives.

Mr. Ottimo graduated from the University of Maryland in 1987 with a Bachelor of Science degree in Financial Studies. He has passed the FINRA Series 7 and Series 63 exams.

Ottimo's biography contained only positive information regarding his business experiences with Jet One Jets and Wheatley, but omitted important unfavorable information related to their financial condition. Regarding Jet One Jets, Ottimo did not disclose that during its entire existence Jet One Jets never made a profit. In 2006, Jet One Jets reported losses of \$569,964 on its federal income tax return. While Jet One Jets did not file tax returns for 2007 and 2008, Ottimo testified during an on-the-record interview that the company had no taxable income for those tax years. Ottimo also did not disclose that the Department of Transportation ("DOT") in March 2008 issued a consent order against Jet One Jets finding that it engaged in unfair and deceptive practices in violation of statutory licensing requirements.⁴ His biography did not mention that, after investors had invested more than \$1 million in the company, Jet One Jets ceased operations in July 2008 and all investors lost their principal investments. Nor did Ottimo disclose that, in August 2010, Jet One Jets filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of New York, where it reported estimated company assets of less than \$50,000 and liabilities between \$100,000 and \$500,000.

Regarding Wheatley, there was no disclosure that Wheatley had zero operating revenues in 2008, 2009, and 2010. In 2010, Wheatley also filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of New York, where it reported outstanding liabilities of nearly \$1.4 million. Ottimo provided none of these facts in his biography or the Fund's offering documents.

3. Ottimo Retains Counsel to Draft the Fund PPM

At or around February 2012, Ottimo retained counsel, ("ABC Firm"), to provide legal services in connection with the organization of the Fund, which included drafting the Fund's

⁴ Without admitting or denying the findings, Jet One Jets settled a regulatory action where the DOT ordered it to cease and desist and imposed a \$60,000 fine for unlawful advertising practices, stating that Jet One Jet's "[i]nternet website and print advertisements contained statements and omissions that, when considered together, would lead the public to conclude erroneously but reasonably that [Jet One Jets] is a direct air carrier with operational control over flights." Ottimo testified at the hearing that the DOT's fine was later reduced to approximately \$1,500 - \$2,500.

PPM and other offering materials. ABC Firm's retainer agreement defined its scope of representation by stating: "In reliance upon information and guidance provided by you [the client], the Firm will provide legal counsel and assistance." ABC Firm's retainer agreement also stated:

To enable the Firm effectively to render these services, you [the client] agree to fully and accurately disclose to us all facts that may be relevant to the matter or that the Firm may otherwise request, and to keep the Firm apprised of developments relating to the matter.

At the request of ABC Firm, Ottimo drafted and provided his biography to be included in the PPM. ABC Firm provided no legal advice or instruction about the contents of the biography. Ottimo provided no additional information to ABC Firm regarding the Jet One Jets and Wheatley businesses other than what was stated in his biography. ABC Firm made minor technical edits to Ottimo's biography and Ottimo approved the final version of his biography that was provided in the Fund's PPM.⁵

B. Findings

The Extended Hearing Panel found that Ottimo omitted material facts about his business background in the Fund's PPM, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. On appeal, Ottimo does not dispute his failure to include the negative information about Jet One Jets and Wheatley in the PPM. Instead, he argues that his failures did not give rise to the level of intentional fraud upon which the Extended Hearing Panel based its findings. We disagree and affirm the Extended Hearing Panel's findings.

Section 10(b) of the Exchange Act makes it unlawful for any person to use or employ any manipulative or deceptive device or contrivance in connection with the purchase or sale of a security. *See* 15 U.S.C. § 78j(b). Rule 10b-5, promulgated under Section 10(b), makes it unlawful to make material misstatements or to omit material facts in connection with the purchase or sale of a security. *See* 17 C.F.R. § 240.10b-5; *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1466 (2d Cir. 1996); *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998).

A fraud finding under Section 10(b) and Rule 10b-5 requires proof by a preponderance of the evidence that Ottimo: (1) made an omission of a material fact; (2) with scienter; (3) using any means or instrumentality of interstate commerce, the mails or any national securities exchange facility; (4) in connection with the purchase or sale of a security.⁶ *Grandon*, 147 F.3d

⁵ Although Ottimo asserts a reliance on counsel defense in this matter, he does not dispute that he approved and was responsible for the content in the Fund's PPM. In his amended answer to Enforcement's complaint, Ottimo admitted that "he, NL, and TG, [EKN's president], jointly approved the [Fund's] PPM and were jointly responsible for its contents."

⁶ Neither party disputes that Ottimo's position as a control person of the Fund and sole author of his personal biography created a statutory duty to disclose all material facts in

at 189. Ottimo has not challenged the third and fourth fraud elements. Based on the record, the Fund investors purchased their securities by either wiring the funds or issuing a check to EKN. Thus, we find that the jurisdictional means element of fraud is satisfied. *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (determining that the jurisdictional requirements of the federal antifraud provisions are interpreted broadly to include the wire or mail transfer of funds between brokerage firms and various banks), *aff'd*, 159 F.3d 1348 (2d Cir. 1998). In addition, Ottimo sold \$500,000 worth of Fund securities to two investors, thereby satisfying the “in connection with the purchase or sale of a security” fraud element. We next address whether Ottimo’s omissions were material and made with scienter—the two fraud elements that are at issue on appeal.

1. Ottimo’s Omissions Were Material

An omission is material if “there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered the ‘total mix’ of information made available.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). Based on the evidence in the record, we find that the negative information about Jet One Jets and Wheatley was material and necessary to make the disclosures regarding his background in the PPM not misleading.

The SEC has held that “[i]nformation relating to those who are responsible for the success or failure of the enterprise is clearly material.” *Thomas J. Fittin, Jr.*, 50 S.E.C. 544, 546 (1991). In this regard, a person’s record of success in connection with the sale of private investment funds is deemed material information because one’s “financial acumen is a fact that would be important to a potential investor.” *Brian Prendergast*, 55 S.E.C. 289, 302 (2001) (finding it material that a hedge fund manager in the PPM touted a successful history of trading programs for which he achieved consistent “top-20” rankings when, more often than not, he failed to achieve such a ranking); *DBCC v. Kunz*, Complaint No. C3A960029, 1999 NASD Discip. LEXIS 20, at *40-41 (NASD NAC July 7, 1999) (finding the omission of the issuer’s president and chief executive officer’s litigation history in offering disclosures material).

As the Fund’s manager, Ottimo held a position of trust and authority. He had complete control and broad discretion over the investors’ funds and Fund operations—including when and how to acquire Facebook pre-IPO shares on behalf of the Fund or seek other social media investment opportunities. As noted in the PPM, the Fund’s success or failure was contingent upon “the investment acumen of the officers of the Manager.” Elsewhere, the PPM advised persons not to invest in the Fund unless “such party is willing to entrust all aspects of the [Fund’s] management to the Manager.” Accordingly, we find that Ottimo’s prior business experience—whether positive or negative—was material information that a reasonable investor would want to know in evaluating the merits of the Fund and making an investment decision. *See SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) (“The test for determining

connection with any statements made in the offer and sale of the Fund. *See Kunzweiler v. Zero.Net, Inc.*, Civil Action No. 3:00-CV-2553-P, 2002 U.S. Dist. LEXIS 12080, at *32 (N. D. Tex. July 3, 2002) (holding that Rule 10b-5 creates an affirmative statutory duty to provide “the full truth when a defendant undertakes to make a statement in the first place”).

materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.”).

Regardless of whether Ottimo had any affirmative obligation to discuss his business experience in the PPM, he chose to disclose only positive information related to his business dealings in his biography.⁷ As a result, Ottimo’s failure to include important facts about the companies’ financial losses, bankruptcy proceedings, and Jet One Jets’ DOT regulatory action, constituted material omissions. *Carriba Air*, 681 F.2d at 1323 (finding omissions in the prospectus regarding affiliations of key principals with a bankrupt company and other failed associated businesses material); *Leaddog Capital Mkts., LLC*, Initial Decisions Release No. 468, 2012 SEC LEXIS 2918, at *42-43 (Sept. 14, 2012) (finding it material when respondent’s biography in the PPM omitted negative business affiliations with “disgraced” firms that were expelled or ceased operations).

2. Ottimo Acted with Scienter

We also find that Ottimo made material omissions with the requisite level of scienter. Scienter is defined as a “mental state embracing intent to deceive, manipulate, or defraud,” *Tellabs Inc. v. Makor Issues & Rights., Ltd.*, 551 U.S. 308, 320 (2007), or at least “knowing misconduct.” *First Jersey*, 101 F.3d at 1467. Scienter under Exchange Act Section 10(b) and Rule 10b-5 is established by showing either intentional or reckless misconduct. *See Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *aff’d*, 595 F.3d 1034 (9th Cir. 2009). Further, “[i]t is certainly true that ‘in a non-disclosure situation, any required element of scienter is satisfied where . . . the defendant had actual knowledge of the material information.’” *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2003) (quoting *Fenstermacher v. Phila. Nat’l Bank*, 493 F.2d 333, 340 (3d Cir. 1974)).

Ottimo does not deny that he had actual knowledge of the omitted negative information. He was the co-owner of Jet One Jets and the sole shareholder of Wheatley. He admitted during his on-the-record interview that Jet One Jets had financial losses and no profitability. He also testified at the hearing that he knew about the DOT’s regulatory action against Jet One Jets and confirmed in testimony that he signed the bankruptcy petitions for Jet One Jets and Wheatley.

Although Ottimo knew about the financial woes of Jet One Jets and Wheatley, he consciously chose not to include this material negative information when he drafted his

⁷ Offerings sold pursuant to Securities Act Section 4(2) and Regulation D, such as this one, are exempt from the registration requirements but not the antifraud provisions of the Securities Act. Should one choose to provide a disclosure document in connection with the sale of a private placement, any affirmative statements made therein—whether or not required by Regulation D—cannot not be false or misleading. *See, e.g., David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *30 (Dec. 21, 2007) (rejecting arguments against fraud liability for misrepresentations and omissions because the offering was sold pursuant to Rule 504 of Regulation D); *see also* 17 C.F.R. § 230.500(a) (explaining that exempt offerings from the Securities Act registration requirements are not exempt from the antifraud provisions of the federal securities laws and material information must be included to make any provided statements not misleading).

biography to be included in the Fund's PPM. Because Ottimo's biography contained no negative information about the companies, we agree with the findings of the Extended Hearing Panel that Ottimo knew, or was reckless in not knowing, that his biography in the PPM used to solicit investors omitted material information about his prior business experience, which ran the risk of misleading investors. *See GSC Partners CDO Fund*, 368 F.3d at 239 (finding scienter through a reckless statement when the material omission presents a danger of misleading investors and is either known to the respondent or "is so obvious that the actor must have been aware of it"); *Carriba Air*, 681 F.2d at 1324 (finding scienter when respondent materially omitted disclosure in the prospectus about his involvement with a previous bankrupt airline and other failed business ventures); *Leaddog Capital Mkts., LLC*, 2012 SEC LEXIS 2918, at *42-43 (finding omissions about respondent's negative business affiliations were "clearly intentional and intended to keep potential investors from learning information an investor might consider pejorative"). We therefore affirm the finding that Ottimo acted with scienter when he omitted unfavorable material facts about Jet One Jets and Wheatley in the Fund's PPM.

The record supports the Extended Hearing Panel's findings that Ottimo fraudulently omitted material facts about Jet One Jets and Wheatley in his biography, in violation of Exchange Act Section 10(b) and Rule 10b-5. Accordingly, we affirm the Panel's findings. Because Ottimo fraudulently made material omissions of facts in a disclosure document in connection with the sale of securities, we also find that he violated FINRA Rule 2020, which prohibits associated persons from effecting transactions in or inducing purchases or sales of securities by means of any manipulative, deceptive or other fraudulent device or contrivance, and FINRA Rule 2010, which requires associated persons in the conduct of their business to observe high standards of commercial honor and just and equitable principles of trade. *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *14-15 (Mar. 31, 2016) (finding that omissions of material facts that violated Section 10(b) of the Exchange Act also constitutes a violation of FINRA Rules 2020 and 2010), *appeal pending sub nom., Harris v. SEC*, No. 16-1739 (2d Cir., appeal filed May 31, 2016).

3. Ottimo's Arguments for Lesser Fraud Liability is Unavailing

Ottimo argues that his omissions did not give rise to the level of intentional or reckless fraud. He claims that the more appropriate legal standard for his misconduct is negligence. He argues that Enforcement failed to prove that he fraudulently omitted material negative information because the disclosed statements regarding Jet One Jets and Wheatley were truthful and accurate and contained no "positive" statements about Wheatley that required him to balance it with the negative information. He further argues that if he intended to deceive investors he would have omitted references to Wheatley, for example, in its entirety. His arguments miss the mark. Irrespective of the veracity of the statements made in his biography, Ottimo's selected favorable disclosures gave investors the misleading impression that Jet One Jets and Wheatley had no financial setbacks, which he knew was not the case. *See SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) (stating "[s]urely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge"). His failure to disclose all material information regarding Jet One Jets and Wheatley violated the anti-fraud provisions of the federal securities laws and FINRA rules.

Ottimo claims that his statement that Jet One Jets grew to \$18 million in revenues did not imply that the company was profitable, and that a reasonably prudent investor—especially an accredited investor—would know that any business has profits and losses. When purchasing securities offered pursuant to a PPM, however, investors—even sophisticated ones—should not have to perform guesswork or extensive research to discern whether the offering documents fully disclose all material information required not to make the statements therein misleading. *See Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 SEC LEXIS 3773, at *18 (Sept. 30, 2016) (finding that the investor’s level of investment experience did not excuse respondent’s failures to disclose material information). Ottimo, however, knowingly omitted material information about Jet One Jets’ financial losses and bankruptcy, and the DOT’s regulatory action. Without full disclosure of these events, no reasonable investor—sophisticated or otherwise—could discern from his biography the import of his experience at Jet One Jets. *See Prendergast*, 55 S.E.C. at 302 (emphasizing that “[o]ffering document disclosures must be clear and organized so that their significance is readily understood”); *Fittin*, 50 S.E.C. at 549 (rejecting the argument that investors cannot be defrauded because they were sophisticated, wished to speculate, or did not rely on the provided disclosures). Thus, further disclosures were necessary to make the statements in Ottimo’s biography not misleading.

Ottimo also asserts that the following facts should dispel a finding of fraud: (1) Wheatley’s bankruptcy was voluntarily dismissed in approximately 90 days without any harm to creditors and Wheatley continued to operate on a limited basis during the bankruptcy; (2) the DOT fine related solely to misrepresentations on Jet One Jets’ website and was later reduced; and (3) the Jet One Jets’ bankruptcy in August 2010 occurred two years after he had left the company that was co-owned with his brother. None of his assertions, however, dispels our findings that Ottimo committed fraud. The outcomes of the Wheatley bankruptcy petition and DOT regulatory action against Jet One Jets do not negate Ottimo’s duty to fully disclose all material information related to those companies when highlighting his business experience in the PPM. Further, despite his suggestion otherwise, Ottimo continued to be actively involved in the Jet One Jets business. Indeed, on the company’s behalf, Ottimo signed the Jet One Jets bankruptcy petition, which was filed two years after his employment ended. His co-ownership of Jet One Jets with his brother is immaterial to our findings that Ottimo made material omissions of fact in a personal biography that he drafted in the Fund’s PPM.

Finding none of Ottimo’s liability arguments availing, we affirm the Extended Hearing Panel’s findings that Ottimo fraudulently omitted material facts in connection with the sales of securities, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.⁸ We also find that Ottimo’s violation of Exchange Act Section 10(b) and Rule 10b-5 was willful, which subjects him to statutory disqualification.⁹

⁸ We also affirm the Extended Hearing Panel’s dismissal of Enforcement’s alternative allegation that Ottimo’s omissions violated Section 17(a)(2) and (3) of the Securities Act and FINRA Rule 2010. Enforcement did not cross-appeal the dismissal and we affirm the Extended Hearing Panel’s resolution because the cause of action was brought in the alternative.

⁹ Pursuant to Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act, broker-dealers and associated persons are subject to disqualification from the securities industry for willful violations of the federal securities laws. *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. §

IV. Ottimo's Willful Failure to Disclose Timely on Form U4

Ottimo does not challenge on appeal the Extended Hearing Panel's findings that he willfully failed to amend or amend timely his Form U4 to report seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing. We therefore summarily affirm, and adopt as our own for purposes of any further review proceedings permitted under the federal securities laws, the Extended Hearing Panel's findings.

A. Facts

Associated persons are required under FINRA rules to keep their Form U4 "current at all times." See Section 2(c) of Article V of the FINRA By-Laws. From January 9, 2009, to April 19, 2012, Ottimo failed to disclose timely or accurately on his Form U4 seven unsatisfied tax liens, six unsatisfied civil judgments, and a bankruptcy filing. The seven tax liens totaled over \$226,000, ranging in individual amounts from \$7,000 to \$66,000. The five unsatisfied civil judgments totaled \$444,000, ranging in individual amounts from \$7,000 to \$300,000. When Wheatley filed for bankruptcy in April 2010, Ottimo was required to amend his Form U4 to report the bankruptcy as the company's president, which he failed to do.

1. Tax Liens

From January 15, 2010 to June 27, 2011, there were seven tax liens issued against Ottimo by the Internal Revenue Service ("IRS") and the New York State Department of Taxation and Finance ("NYS DT"). From January to November 2010, the IRS sent notices by certified mail informing Ottimo of five unsatisfied tax liens totaling \$160,129. The IRS imposed these liens for his failure to pay personal income taxes for years 2005, 2006, 2007, 2008, and 2009. In April 2010 and June 2011, the NYSDT sent Ottimo written notices by first-class mail informing him of two unsatisfied tax liens totaling \$32,994 for his failure to pay his state personal income taxes for years 2006, 2008, and 2009.

Following is a list of the tax liens:

No.	Issued By	Date Issued	Amount	Tax Year	Form U4 Filing Date
1	IRS	January 15, 2010	\$6,990.29	2005	September 13, 2010
2	IRS	January 15, 2010	\$35,674.93	2006	September 13, 2010
3	IRS	February 26, 2010	\$44,486.84	2006	September 13, 2010

78o(b)(4)(D). Enforcement alleged but the Extended Hearing Panel did not include a finding that Ottimo willfully violated Exchange Act Section 10(b) and Rule 10b-5, which would subject him to statutory disqualification for this misconduct. We modify the Extended Hearing Panel's decision in this regard. A willful violation of the securities laws means that the violator knew what he was doing when he committed the violative act. See *Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000). We find that Ottimo willfully violated the federal securities laws when he, of his own volition, omitted material information related to Jet One Jets and Wheatley. Therefore, he is statutorily disqualified.

				2007	
4	IRS	April 23, 2010	\$66,035.05	2008	September 13, 2010
5	NYS DT	April 27, 2010	\$14,534.77	2008	September 13, 2010
6	NYS DT	June 27, 2011	\$18,459.81	2006 2009	April 19, 2012
7	IRS	November 18, 2010	\$42,618.71	2009	June 23, 2011

Question 14.M of Form U4 specifically asks whether an associated person has any unsatisfied judgments or liens. Ottimo acknowledged that he knew that, within 30 days of receiving notice of the tax liens, he was required to update his Form U4 and report the tax liens. Yet he failed to do so in a timely manner. Ottimo did not update his Form U4 to disclose the first five issued tax liens until September 13, 2010. He did not report the November 18, 2010 IRS tax lien until June 23, 2011. And he did not report the June 27, 2011 NYS DT tax lien until April 19, 2012.

2. Judgments

From March 2008 to May 2011, Ottimo was the subject of six civil judgments. When Ottimo filed his initial Form U4 as an EKN representative, he reported one judgment timely but with an incorrect judgment amount and date. For the remaining five judgments, Ottimo either did not report the judgments on his Form U4 or failed to report them in a timely manner.

a. Shelvin Plaza Associates, LLC Judgment

On March 3, 2008, Shelvin Plaza Associates, LLC obtained a judgment against Ottimo, Wheatley, and EKN's president, holding them jointly and severally liable for \$161,740.73 of unpaid rent. When Ottimo filed his initial Form U4 on January 9, 2009, he disclosed the Shelvin judgment, but he inaccurately reported the amount of the judgment as \$70,240.06 and the filing date as November 19, 2007. On February 23, 2009, the judgment was revised to \$81,982.66, which included a principal amount of \$70,240.06 plus interest. Despite the revision, in several subsequent Form U4 amendments, Ottimo did not update his Form U4 disclosure and continued to inaccurately report the judgment amount as \$70,240.06 and the filing date as November 19, 2007. On September 13, 2010, more than a year after the revised judgment was issued, Ottimo listed the amount of the Shelvin judgment as \$41,847.22, still reporting the earlier filing date of November 19, 2007.

b. LM Judgment

On October 2, 2008, a court entered a judgment in favor of creditor LM against Ottimo and Jet One Jets in the amount of \$2,211.80. When Ottimo filed his initial Form U4 on January 9, 2009, he did not report the LM judgment. In fact, Ottimo subsequently filed 16 Form U4 amendments without disclosing the LM judgment until he reported it on November 11, 2010—over two years later.

c. Stairworld Inc. Judgment

Stairworld Inc. filed a complaint against Ottimo on August 9, 2008, and served the summons and complaint against Ottimo on October 13, 2008 by mailing it to him and taping a copy of those documents on the front door of his residence. On December 18, 2008, the court entered a default judgment against Ottimo in favor of creditor Stairworld in the amount of \$6,791.40. Stairworld sent a copy of the judgment to Ottimo on January 13, 2009. Ottimo amended his Form U4 19 times after issuance of the judgment but did not report the Stairworld judgment until March 28, 2011—more than two years later.

d. Lake Park 135 Crossways Park Drive, LLC Judgment

EKN and Wheatley both conducted business at the same location in Woodbury, New York. On January 21, 2010, the parties entered into a stipulation of settlement whereby Ottimo, Wheatley, and EKN agreed to pay \$300,000 to their landlord, Lake Park 135 Crossways Park Drive, LLC. On April 7, 2010, the court entered a money judgment against Ottimo and Wheatley in favor of Lake Park in the amount of \$300,031.80. Ottimo did not amend his Form U4 to disclose the Lake Park judgment until May 19, 2011.

e. Hamilton Equity Group, LLC Judgment

On March 9, 2009, Hamilton Equity Group, LLC obtained a judgment against Ottimo and Wheatley in the amount of \$108,832.94. Ottimo satisfied the Hamilton Equity judgment, and the court issued a Satisfaction of Judgment on May 17, 2010, approximately one year later, but he failed to report the Hamilton Equity judgment while it was outstanding on his Form U4 within the requisite 30 days.

f. Bainton McCarthy, LLC Judgment

On June 4, 2009, the court entered a judgment in favor of creditor Bainton McCarthy, LLC against EKN, Ottimo, his brother, his father, and others in the amount of \$36,590.15. Although the court vacated the Bainton McCarthy judgment on September 9, 2009, Ottimo filed four Form U4 amendments between June and August 2009 and never disclosed the judgment on his Form U4.

3. Wheatley Bankruptcy Filing

Question 14.K of Form U4 asks whether an associated person, or an organization that one has exercised control over, has filed a bankruptcy petition within the past 10 years. Wheatley filed bankruptcy on April 27, 2010 in the U.S. Bankruptcy Court for the Eastern District of New York. Ottimo signed and submitted the bankruptcy petition but did not file timely an amended Form U4 to disclose the bankruptcy. The petition identified two pending lawsuits by creditors, including one by Wheatley's landlord seeking eviction. The bankruptcy petition was dismissed on August 2, 2010, after Wheatley resolved issues with the landlord. Ottimo amended his Form U4 22 times before finally reporting the Wheatley bankruptcy petition on April 19, 2012. His Form U4 disclosure was two years late.

B. Findings

Article V, Section 2 of FINRA's By-Laws requires that associated persons applying for registration with FINRA provide "such . . . reasonable information with respect to the applicant as [FINRA] may require" and further states that such applications "shall be kept current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Rule 1122, and its predecessor NASD IM-1000-1, prohibits associated persons from filing or failing to correct registration information that is incomplete or inaccurate so as to be misleading.¹⁰ These provisions are intended to ensure that the Form U4 contains accurate, up-to-date information so that regulators, employers, and members of the public "have all material, current information about the securities professional with whom they are dealing." *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *17-19 (Oct. 20, 2011). A failure to update the Form U4 as required also violates FINRA Rule 2010. *See Dep't of Enforcement v. N. Woodward Fin. Corp.*, Complaint No. 2011028502101, 2016 FINRA Discip. LEXIS 35, at *35 (FINRA NAC July 19, 2016) (finding that respondent's failure to update his Form U4 on a timely basis to reflect an unsatisfied judgment violated FINRA Rules 1122 and 2010).

It is undisputed that Ottimo failed to amend, or timely amend, his Form U4 to report seven tax liens, six judgments, and a bankruptcy filing in accordance with FINRA rules, and we find that this reportable information was material. "The test of materiality is whether the omitted information would have 'significantly altered the total mix of information made available.'" *Id.* at *37 (citation omitted); *see also id.* at *37, n. 31 (presuming all reportable information on the Form U4 material "[b]ecause of the importance that the industry places on full and accurate disclosure of information required by the Form U4"). Accordingly, we affirm the Extended Hearing Panel's findings that Ottimo violated FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. We likewise affirm the Extended Hearing Panel's finding that Ottimo's failure to disclose this material information on his Form U4 on a timely basis was willful and therefore he is subject to statutory disqualification.¹¹

¹⁰ FINRA Rule 1122 became effective on August 17, 2009, superseding NASD IM-1000-1 without substantive changes at issue here. Therefore, NASD IM-1000-1 applies to Ottimo's conduct before August 17, 2009 and FINRA Rule 1122 is applicable to his conduct thereafter. *See FINRA Regulatory Notice 09-33*, 2009 FINRA LEXIS 96 (June 2009).

¹¹ Pursuant to Section 3(a)(39)(F) of the Exchange Act, a person is subject to statutory disqualification from the securities industry if such person has willfully made or caused to be made in any application to be associated with a member of a self-regulatory organization any statement or omission which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact that is required to be stated therein. 15 U.S.C. § 78c(a)(39)(F). We find that Ottimo is subject to statutory disqualification because his failure to disclose unsatisfied liens, judgments and a bankruptcy on a timely basis was willful and involved material information required to be disclosed on the Form U4. The term "willful" in this context means that Ottimo voluntarily chose not to report (or consciously chose to remain ignorant of) the liens, judgments and a bankruptcy discussed above, despite the affirmative disclosures required by FINRA rules. *See Dep't of Enforcement v. McGuire*, Complaint No. 20110273503, 2015 FINRA Discip. LEXIS 53, at *48 (FINRA NAC Dec. 17, 2015) (stating that respondent's willful Form U4 violation does not require a finding that he did

V. Sanctions

The Extended Hearing Panel barred Ottimo from associating with a FINRA member in all capacities for his material omissions of fact. The Extended Hearing Panel also assessed, but did not impose, a \$25,000 fine and two-year suspension in all capacities for his Form U4 violations. For the reasons we discuss below, we affirm these sanctions.

A. Material Omissions of Fact

“[C]onduct that violates the antifraud provisions of the federal securities laws is especially serious and subject to the severest of sanctions under the securities laws.” *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 SEC LEXIS 3413, at *52 (Sept. 9, 2016); *Scholander*, 2016 SEC LEXIS 1209, at *36. For intentional or reckless material omissions, FINRA’s Sanction Guidelines (“Guidelines”) recommend that adjudicators consider imposing a fine between \$10,000 to \$146,000, and strongly consider a bar.¹² We also considered the Principal Considerations in Determining Sanctions and found several aggravating factors that weigh in favor of a bar.

Ottimo intentionally omitted negative information from his biography in connection with selling private placement securities.¹³ Ottimo’s fraudulent omissions impacted the entire Fund offering period—over the course of several weeks he raised almost \$4 million in sales from 21 investors.¹⁴ He also gained monetarily from his misconduct, personally earning \$82,276 in management fees and \$30,000 in commissions for his sales to two investors.¹⁵ Additionally, although Ottimo admitted approving the final PPM, drafting his biography, and not raising the material omissions with his counsel, Ottimo continues to blame others rather than accepting responsibility for his actions.¹⁶ Because Ottimo has expressed no recognition of his wrongful

so with awareness or a culpable state of mind). There is no requirement that Ottimo be aware that he was violating a particular rule or regulation. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (holding that the term “willful” means that the person with the duty knows what he is doing, but does not require that one know that he is breaking the law).

¹² *See FINRA Sanction Guidelines*, 87 (2016) [hereinafter *Guidelines*]. If mitigating circumstances predominate, however, the Guidelines recommend a suspension in any or all capacities for a period of six months to two years and a fine between \$10,000 and \$146,000. *Id.*

¹³ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13); *cf. Scholander*, 2016 SEC LEXIS 1209, at *37 (finding intentional, or at least reckless, fraudulent omissions of material fact also aggravating for purposes of determining sanctions).

¹⁴ *See Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 9 and 18).

¹⁵ *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

¹⁶ *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

conduct, we also find a propensity for future wrongdoing. *See Guidelines*, at 2 (providing that, for the protection of investors, disciplinary sanctions should be tailored to deter future misconduct); *Fillet*, 2016 SEC LEXIS 3773, at *18 (finding that respondents “refusal to acknowledge his misconduct and attempts to deflect blame increase the likelihood that he would engage in similar misconduct in the future”). These factors support our finding that it is remedially appropriate and in the public interest to bar Ottimo for his fraud violation.

The arguments Ottimo raises on appeal do not mitigate against barring him. Ottimo, in arguing for lesser sanctions, claims that the Extended Hearing Panel gave little to no weight to certain principal considerations under the Guidelines. He first contends that the Extended Hearing Panel mischaracterized his failure to accept responsibility for his actions;¹⁷ he argues that the Panel should have given him substantial credit for disclosing the Wheatley bankruptcy to EKN’s chief compliance officer, which was evidence that he was not trying to conceal his omissions. EKN’s chief compliance officer testified, however, that Ottimo merely asked him to notarize the Wheatley bankruptcy petition and Ottimo did not reveal any details regarding Wheatley’s or Jet One Jets’ financial condition. In any event, with respect to Ottimo’s bar, the relevant question is whether Ottimo knowingly failed to disclose material information to the Fund investors, and not EKN compliance personnel. We find this to be the case.

Next, Ottimo argues that he retained counsel, ABC Firm, to advise and prepare the Fund PPM and thus reasonably relied on competent legal advice with regard to the contents of his biography. His reliance on counsel defense, however, is not proven by the record. Principal Consideration No. 7 of the Guidelines recommends that adjudicators consider whether the respondent “demonstrated reasonable reliance on competent legal or accounting advice.” *Guidelines*, at 6. To succeed on a reliance on counsel claim, Ottimo must demonstrate that he: (1) made complete disclosure of the relevant facts of the intended conduct to counsel; (2) sought advice on the legality of the intended conduct; (3) received advice that the intended conduct was legal; and (4) relied in good faith on counsel’s advice. *See Markowski v. SEC*, 34 F.3d 99, 105 (2d Cir. 1994).

ABC Firm’s legal retainer required Ottimo to fully and accurately disclose all relevant facts within the scope of its legal representation. Ottimo admitted at the hearing, however, that he told no one at ABC Firm about Jet One Jets’ and Wheatley’s bankruptcies and financial condition or about the DOT regulatory action. In addition, he provides no evidence that he sought or received legal advice from ABC Firm about whether he could omit these facts from his biography.¹⁸ Ottimo claims that ABC Firm used his employment information from BrokerCheck

¹⁷ Principal Consideration No. 2 recommends that adjudicators consider “[w]hether an individual or member firm respondent accepted responsibility for and acknowledged misconduct to his or her employer . . . or a regulator.” *Guidelines*, at 6.

¹⁸ ABC Firm’s billing statements described the legal services it rendered in connection with the Fund offering as researching the Fund’s formation, structure, and the trading of private placement securities, reviewing sample offering documents, and drafting the Fund’s PPM. The billing statements provided no references to research or advice about the materiality of omitted negative information concerning Jet One Jets and Wheatley.

to revise his biography. That report, however, does not contain the material information at issue and therefore does not prove Ottimo's claim that he reasonably relied on his counsel's advice to omit negative information about Jet One Jets and Wheatley from his biography. *See Kunz*, 1999 NASD Discip. LEXIS 20, at *38-40 (rejecting respondent's claim that his counsel was "generally aware" of the omitted facts and finding no evidence he affirmatively sought his counsel's advice on whether disclosure was appropriate). For these reasons, we reject his reliance on counsel claim as mitigating.

Ottimo further argues that, pursuant to Principal Consideration No. 13 of the Guidelines, his sanction should be based on negligent, rather than intentional, misconduct.¹⁹ In support of his contention, he cites to *Dep't of Enforcement v. Manaia*, Complaint No. 2009018818101, 2013 FINRA Discip. LEXIS 23, at *48 (FINRA OHO June 28, 2013), where the respondent was suspended for 30 business days and fined \$54,472 for negligent, rather than intentional, misrepresentations and omissions. His argument is baseless.

As a preliminary matter, it is well recognized that sanctions rendered in each case are based on individual facts and circumstances. *See, e.g., Arthur Joseph Lewis*, 50 S.E.C. 747, 751, n. 15 (1991) (stating it is well-established that appropriate sanctions depend on the "facts and circumstances of each particular case and cannot be precisely determined by comparison with the action taken in other proceedings"); *see also Guidelines*, at 3 (directing adjudicators to impose sanctions tailored "to address the misconduct involved in each particular case"). In any event, we distinguish *Manaia* from the present case in two notable ways. First, the respondent in *Manaia* that sold private placement securities was a selling agent of a broker-dealer selling group and not a principal or control person of the issuer. Second, although the respondent negligently and unethically sent an embellished cover letter to investors while omitting disclosure about issuer defaults in prior programs, other documents accompanying his cover letter did disclose the negative information. *See Manaia*, 2013 FINRA Discip. LEXIS 23, at *33-34 (finding that respondent lacked scienter because his customers did not receive the cover letter alone but with a hold harmless letter that explicitly informed investors of the issuer's defaults). Conversely, Ottimo as the Fund's chief executive officer and manager had firsthand knowledge about Jet One Jets' and Wheatley's financial condition and deliberately omitted the negative information from his personal biography. Therefore the *Manaia* case provides no precedential support for reduced sanctions.

Lastly, Ottimo argues that his material omissions in his biography only affected accredited investors who suffered no financial harm.²⁰ But "the fact that a customer may have suffered no loss or made money does not excuse the serious fraud shown." *Mark E. O'Leary*, 43 S.E.C. 842, 850 (1968) (citation omitted). Moreover, investors—accredited or otherwise—are entitled to full disclosure of all material information required under the federal securities laws and FINRA rules. *See Fillet*, 2016 SEC LEXIS 3773, at *18 (finding that the investor's level of

¹⁹ Principal Consideration No. 13 considers "[w]hether the respondent's misconduct was the result of an intentional act, recklessness or negligence." *Guidelines*, at 7.

²⁰ Principal Consideration No. 19 recommends that adjudicators consider the "level of sophistication of the injured or affected customer." *Id.*

investment experience did not avail respondent's fraudulent omissions). We therefore affirm the Extended Hearing Panel's sanction and bar Ottimo.

B. Form U4 Violations

The Extended Hearing Panel determined that Ottimo willfully failed to amend or to amend timely his Form U4, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. For his violations, the Extended Hearing Panel assessed a \$25,000 fine and a two-year suspension. On appeal, Ottimo asks that we lessen the Panel's assessed sanctions. Taking the Guidelines into consideration, including the three principal considerations specific to Form U4 violations, we affirm the Extended Hearing Panel's determination.

For Form U4 violations by individuals, the Guidelines recommend a fine ranging between \$2,500 and \$73,000 and a suspension in any or all capacities of five to 30 business days.²¹ For egregious cases, the Guidelines instruct us to consider a longer suspension of up to two years, or a bar.²² The principal considerations in determining an appropriate sanction for a Form U4 violation are: (1) the nature and significance of information at issue; (2) whether the failure resulted in a statutory disqualified individual becoming associated with or remaining with a firm; and (3) whether the misconduct resulted in any harm to any other person or entity.²³ For over three years, Ottimo failed to disclose or disclose timely 14 reportable events related to unsatisfied tax liens, civil judgments, and a bankruptcy on his Form U4. His repeated reporting failures reflect a blatant disregard of FINRA rules that we find to be egregious. Ottimo's reporting deficiencies involved important information related to his financial condition, for which he was statutorily disqualified. Ottimo's misconduct also deprived the investing public and "potential employing firms and regulators of significant information concerning [his] financial condition" over a substantial period of time. *Dep't of Enforcement v. Ortiz*, Complaint No. 2014041319201, 2017 FINRA Discip. LEXIS 5, at *39 (FINRA NAC Jan. 4, 2017). Accordingly, we find the Extended Hearing Panel's assessed sanctions of a two-year suspension and \$25,000 fine to be appropriate and well within the Guidelines. We do not impose such sanctions, however, in light of the bar imposed for his fraud violation.

VI. Conclusion

We affirm the Extended Hearing Panel's findings that Ottimo fraudulently omitted to disclose material information in a personal biography in the offer and sale of securities, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010, and willfully failed to disclose or disclose timely on his Form U4 material information related to his unsatisfied tax liens, judgments, and a bankruptcy filing, in violation of FINRA

²¹ See *id.*, at 69.

²² See *id.* at 70.

²³ See *id.* at 69.

Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. Because the violations were willful, Ottimo is statutorily disqualified.

For his fraud violation, Ottimo is barred from association with any FINRA member in all capacities and is ordered to pay hearing costs totaling \$11,037.51 and appeal costs totaling \$1,692.50. The bar will become effective immediately upon issuance of this decision.

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith
Executive Vice President and Corporate Secretary