FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MITCHELL H. FILLET (CRD No. 207546), Respondent.	Disciplinary Proceeding No. 2008011762801 Hearing Officer – RSH **Amended Hearing Panel Decision**[1] December 13, 2011

Respondent violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and IM-2310-2, by misrepresenting and omitting material facts in connection with the sale of securities to an investor. For this violation, he is suspended in all capacities for six months and fined $10,000. Respondent also violated NASD Conduct Rules 3110(a) and 2110 by falsifying firm records and submitting the falsified documents to FINRA. For this violation, he is suspended concurrently for two years, and fined $10,000. Respondent is also ordered to pay costs.

Appearances

David F. Newman and Bonnie S. McGuire, Philadelphia, Pennsylvania, for the Department of Enforcement.

Mitchell H. Fillet, *pro se*.

DECISION

I. PROCEDURAL BACKGROUND

The Department of Enforcement ("Enforcement") filed the two-cause Complaint in this disciplinary proceeding on August 23, 2010. The First Cause of Action charges that Respondent Mitchell H. Fillet ("Fillet") violated Section 10(b) of the Securities Exchange Act of 1934 and

[1] On page 16, the word consecutively was changed to concurrently to reflect that the suspensions shall be served concurrently.

Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and IM-2310-2, by making misrepresentations and omissions of material fact in an offering document in connection with the sales of securities to an investor. The Second Cause of Action charges Fillet with falsifying firm records and submitting the falsified documents to a FINRA examiner, thereby violating NASD Conduct Rules 3110(a) and 2110.[2]

A hearing was conducted on August 3, 2011, before a Hearing Panel composed of the Hearing Officer, a current member of the District 7 Committee, and a former member of the District 9 Committee. Enforcement called as witnesses a FINRA examiner and the investor who purchased the securities at issue in this proceeding. Fillet testified in his own defense, but did not call any other witnesses. Enforcement's 29 exhibits were admitted into evidence. Fillet did not submit any exhibits.[3]

After a thorough review of the record, the Hearing Panel finds that Enforcement proved by a preponderance of the evidence that Fillet committed the violations as charged.

II. RESPONDENT

Fillet first became registered with FINRA as a general securities representative in 1981. From July 14, 2004, through March 4, 2009, he was registered as a general securities representative and principal of The Riderwood Group Incorporated ("Riderwood"), a FINRA-registered broker-dealer that at that time had approximately 40 registered representatives. In addition to typical brokerage activities, Riderwood conducted an investment banking business,

[2] As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision relies on NASD Conduct Rules 3110 and 2110, which were the applicable rules at the time of Respondent's alleged misconduct. The applicable rules are available at www.finra.org/rules.

[3] In this decision, "Tr." refers to the transcript of the hearing; and "CX" to Enforcement's exhibits.

which included private placements and mergers and acquisitions. Fillet ran Riderwood's investment banking business, and was also the firm's CEO and president until the firm withdrew its membership from FINRA in February 2009. Between May 5, 2009, and December 31, 2009, Fillet was associated with another FINRA-registered firm. He has not been employed in the securities industry since December 31, 2009.[4]

III. FINDINGS OF FACT

A. Origin of the Proceeding

This proceeding originated with a routine sales practice examination in 2008. FINRA also initiated an examination for cause after it received a complaint from PM.[5]

B. Misrepresentations and Material Omissions

Enforcement alleged in the First Cause of Action that Fillet misrepresented and omitted material facts to PM in connection with PM's purchase of securities.

On June 4, 2007, Fillet, on behalf of Riderwood, entered into an Engagement Agreement to provide investment advisory services to Catering Acquisition Corp. ("CAC"), whose principal was Allan Sloan ("Sloan"). Under the terms of the Engagement Agreement, Riderwood agreed to conduct due diligence, help structure a financing plan, draft transactional documents, and act as placement agent in connection with CAC's private offering of its securities.[6] Sloan paid Riderwood approximately $30,000 for its investment banking services.[7]

PM testified that he first heard of Sloan in December 2007, when his friend, Edward Schmults, called him. Schmults, who was the CEO of FAO Schwarz ("FAO"), told PM that FAO was working on a venture to develop FAO Sweet Shoppes ("Sweet Shoppes"). Sweet

[4] CX-1; Tr. at 21:24-22:21, 159:10-21.
[5] Tr. at 21:20-23, 23:15-24:14.
[6] CX-2.
[7] Tr. at 186:15-23.

Shoppes' intended business model would combine toys, food, and party facilities in one store. Sweet Shoppes would be based on the in-store model (which was not called Sweet Shoppes) that had been operating in FAO's Fifth Avenue headquarters. Schmults told PM that Sloan, the person in charge of the Sweet Shoppes venture, had chosen a location in Greenwich, Connecticut to be the first Sweet Shoppe. Because PM lived in Greenwich and was involved in real estate, Schmults asked him to speak to Sloan and advise him on the desirability of the Greenwich location. Sloan then called PM and they discussed the Greenwich location. After several phone calls, Sloan asked PM to meet with Sloan and his investment banker, Fillet, who was putting together a private placement to provide the initial funding for the Sweet Shoppes venture.[8]

PM testified that he met with Fillet in PM's office on January 16, 2008. He could not recall whether Sloan was also present during the meeting, but believed he was there to introduce Fillet.[9] PM said that Fillet "definitely participated" in the discussion at the meeting.[10] PM believed that Fillet, as an investment banker who had "done a lot of offerings," was participating in the meeting "to add credibility to Sloan." PM testified that during their meeting, Fillet told him that, in addition to operating Sweet Shoppes, CAC was on the verge of acquiring Glorious Food, which PM knew was a prominent party catering firm in New York. Fillet also said that a "going business," a food-preparation commissary, was providing the food for Sweet Shoppes.[11] PM testified that, based on the meeting, he understood that CAC and Sweet Shoppes were operating companies.[12] At the meeting, PM was asked to invest $150,000 for a unit of notes and warrants to own an interest in the company running Sweet Shoppes and Glorious Food.[13]

[8] Tr. at 39:18-43:14.
[9] Tr. at 43:19-44:9.
[10] Tr. at 44:25-45:6.
[11] Tr. at 42:17-25, 102:24-104:10.
[12] Tr. at 46:12-15.
[13] Tr. at 44:10-24, 45:21-46:7.

PM testified that a few weeks after his meeting with Fillet, he was sent a subscription agreement and a term sheet in the form of a private placement memo, which described in more detail the transaction that he had discussed with Fillet.[14] The Confidential Term Sheet ("Term Sheet") dated January 14, 2008, corroborated and elaborated on what PM testified he had been told during his meeting with Fillet.[15] Although there was no evidence that Fillet sent the Term Sheet to PM, Fillet admitted that, consistent with his Engagement Agreement with CAC, he drafted the Term Sheet, CAC and Sweet Shoppes promissory notes, and subscription agreement.[16] On the first page of the Term Sheet, Riderwood was prominently identified as the "sole marketing agent" for the $3,000,000 unit offering of 20 units at $150,000 per unit. Each unit consisted of an $80,000 CAC 10% note due December 1, 2009, a $70,000 Sweet Shoppes 10% note due December 1, 2009, and detachable warrants.[17]

The Term Sheet contained numerous statements that were not true. For example, according to the Term Sheet, CAC, which was "national in scope," was founded in 2007 to "create a vertically-integrated, brand-name food service company…that will eventually encompass catering, prepared food-to-go, for service in restaurants and finally a sold-in-supermarkets high-end food brand…" The Term Sheet stated that CAC had acquired MyBefana, a "commissary" that was one of New York's largest food preparation facilities, and that CAC had negotiated an agreement to acquire "one of New York City's largest and oldest catering companies." The Term Sheet also stated that Sweet Shoppes operated "under a global license from FAO Schwarz and the FAO Family Trust," and stated that it was "closely aligned with

[14] Tr. at 47:15-22.
[15] CX-5 at 2-5; Tr. at 50:11-51:3.
[16] Tr. at 169:23-170:10.
[17] CX-5 at 2.

FAO itself."[18] Based on the Term Sheet, as well as what he was told during his meeting with Fillet, and discussions with Sloan, PM invested $150,000 in the CAC/Sweet Shoppes deal on February 21, 2008.[19]

At the hearing, Fillet admitted that the following facts in the Term Sheet were false: (1) that Sweet Shoppes was founded as a brand extension of FAO; (2) that Sweet Shoppes operated under a global agreement with FAO; (3) that Sweet Shoppes was closely aligned with FAO; and (4) that CAC was national in scope. In fact, at the time the Term Sheet was drafted, Sweet Shoppes was just a concept, and its operation was contingent upon an agreement being reached with FAO. Contrary to the claims in the Term Sheet, Sweet Shoppes did not have any agreement with FAO, let alone a "global license."[20] Fillet admitted that CAC was not "national in scope," or an on-going operating company, as stated in the Term Sheet. In fact, it was a shell company set up for the purpose of acquiring food service companies, but had no assets or operations.[21]

At the hearing, Fillet admitted that he knew when he drafted the Term Sheet and other offering documents that they would be given to potential investors in the CAC/Sweet Shoppes offering.[22] He claimed that the Term Sheet and other documents that were given to PM were "just drafts," and that the statements in them were contingent on events to occur in the future.[23] However, the Term Sheet does not indicate in any way that it is a draft or preliminary document. And Fillet stated that he had no other drafts or any other documentation to prove that there were multiple drafts. Fillet claimed that he sent the draft documents to Sloan's lawyer for review, but did not keep the original drafts or any copies of them. Fillet admitted that he had no e-mail cover

[18] CX-5 at 3.
[19] CX-5 at 6-15; Tr. at 47:24-48:3, 54:13-55:5.
[20] Tr. at 175:14-176:25.
[21] Tr. at 167:14-24, 179:9-17,
[22] Tr. at 170:15-171:4.
[23] Tr. at 162:2-3, 173:8-15.

letters to Sloan's attorney or any other documents to substantiate this claim.[24] Sloan's attorney did not testify. The Hearing Panel did not find credible Fillet's claims that the Term Sheet and other documents were "just drafts," or that they had been sent for review by an attorney.

Within a few months of investing in CAC/Sweet Shoppes, PM learned during conversations with Sloan that CAC's acquisition of Glorious Food had not yet occurred. Sloan told PM that he could receive his money back, since the deal was not as PM had understood.[25] Sometime shortly after learning about CAC's failure to acquire Glorious Food, PM received a call from ES (FAO's CEO). ES told PM that the arrangement between FAO and Sloan had been terminated. When PM asked why, ES told PM to "Google Sloan." After having a Google and LexisNexis search conducted, PM learned that Sloan had a criminal record. PM testified, "And I found out that Mr. Sloan had been convicted of at least two felonies, had been in jail twice, had been, you know, sued by the Internal Revenue Service, that he had been found guilty of stealing a car which was apparently a rental car which he just never returned, that he had been disbarred for stealing client money and a number of other things. It was an incredible lengthy—I don't remember, 6, 8, 10-pages long, of his various convictions and prosecutions of Mr. Sloan under various names….Needless to say, I was pretty disturbed by finding that."[26]

A LexisNexis search of Sloan's public record was 41 pages long, and listed a 2003 bankruptcy and 87 judgments and liens.[27] Another LexisNexis search revealed that Sloan had two felony convictions and incarcerations—one in 1987 for filing a false affidavit, and one in 2002 for possession of stolen property. The LexisNexis search also showed that he was

[24] Tr. at 174:8-11, 198:6-7, 206:10-208:20.
[25] Tr. at 56:3-57:5.
[26] Tr. at 58:24-60:3.
[27] CX-11.

disbarred in 1987 for stealing money from and lying to clients.[28] None of Sloan's legal history was disclosed in the Term Sheet or any other offering documents.

The revelations about Sloan's criminal record prompted PM to call Fillet in mid-March, 2008. During the call, PM told Fillet what he had learned about Sloan's criminal background, and asked about getting his investment returned. Fillet told PM that Riderwood was just Sloan's agent, and that it was Sloan's obligation to return PM's money.[29] Fillet never disclosed to PM Sloan's background or criminal record.[30] PM testified that if he had known about Sloan's criminal history, he never would have made the investment.[31] PM never received any of his investment back.[32]

At the hearing, Fillet testified that he first learned about Sloan's conviction for possession of stolen property in late 2007, when Riderwood was conducting due diligence of Sloan under the terms of its Engagement Agreement.[33] At that time, Sloan provided Fillet with a letter from Sloan's criminal defense attorney. The letter stated that, in the attorney's opinion, Sloan's prosecution for possession of stolen property (a rental car) was "absurd," despite his conviction.[34] Apparently taking comfort from the letter from Sloan's attorney, Fillet did not conduct any additional research on Sloan. At the hearing, he said, "That there was a great deal of information sitting out in LexisNexis is unfortunate. But we were not a law firm. LexisNexis is expensive. We were having earnings problems and we only looked back seven years, which was pretty standard procedure at the firm."[35] There was no evidence that Fillet knew before December 2007 about Sloan's extensive legal history; however, if Fillet had conducted even a

[28] CX-27.
[29] Tr. at 57:6-58:3, 60:4-61:5, 64:12-15.
[30] Tr. at 61:6-9.
[31] Tr. at 107:3-12.
[32] Tr. at 63:13-15.
[33] Tr. at 202:13-18.
[34] CX-10 at 8.
[35] Tr. at 161:9-14.

minimally sufficient amount of research, he would have discovered Sloan's history. Fillet testified that when he learned about Sloan's criminal conviction, he told Sloan that he should tell PM and ES about the conviction.[36]

C. False Documents

In the Second Cause of Action, Enforcement alleged that in July 2008, Fillet falsified new account forms, applications, acknowledgment forms, and related documents for ten variable annuity transactions that Riderwood had executed for seven customers of the firm. Fillet falsified the variable annuity documents by signing his name in those sections of the documents requiring his supervisory approval and then backdating the documents to make it appear that he had conducted a timely supervisory review of the documents. Fillet then provided the falsified documents to FINRA staff during a routine examination. Enforcement alleged that Fillet's actions violated both Rule 2110 (falsification of documents) and Rule 3110 (recordkeeping violations).

Stephen Marchese ("Marchese"), a FINRA examiner, testified that he had requested a sampling of variable annuity account documents during his examination of Riderwood in July 2008. Fillet told Marchese that most of the variable annuity business was done in Riderwood's Michigan and Indiana branches. Fillet conducted his supervisory review of the annuities by having the registered representatives fax the forms to Fillet at Riderwood's main office. Fillet would then review the documents, sign them to evidence his review, and return the documents to the branches, where they would be kept. Marchese testified that during the course of his examination, he realized that the variable annuity documents were being produced extremely slowly. He discovered the reason for the slowness was that the documents being faxed from the Riderwood branches had not been signed by Fillet. Fillet signed and backdated the documents

[36] Tr. at 193:7-15,

while Marchese waited, then presented the documents as though he had signed them on the appropriate dates.[37]

During his OTR and before the hearing, Fillet consistently denied falsely signing and backdating the variable annuity documents. At the hearing, however, after Marchese testified, Fillet admitted that he had falsified the variable annuity documents, as Enforcement alleged.[38] By way of explanation, Fillet testified, "And had I personally had any inkling that this was such a big deal…I would not have done what I did. I did what I did in part to protect Gary [a registered representative in the Indiana branch office]. He was a little sloppy in his procedures. It was not unusual for him to hold onto contracts and send them through at some fairly late date. We had numerous phone calls in the course of the, of the firm examination where he asked me if I would just date them somewhere around where the contract was written. So he didn't look like he was being bad at getting them back to us….And I, frankly, just didn't think that it was just that big of a deal….I did have one bad habit which I have to admit to, which is that I was not careful about dating things. I think even, frankly, even blotters, you know, I might have reviewed them a week later, two weeks late and dated them the date of the blotter. I just never even thought about it. I mean, the date came into my head and I used it."[39]

IV. CONCLUSIONS OF LAW

A. Misrepresentations and Omissions of Material Fact

The Panel finds that Fillet violated Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110 by misrepresenting and failing to disclose material information in connection with the sale of units of CAC and Sweet Shoppes to PM.

[37] Tr. at 117:11-131:10; CX-13-CX-23.
[38] Tr. at 163:24-164:22, 187:7-189:10.
[39] Tr. at 164-165.

Applicable Legal Standards

Exchange Act Section 10(b), and Rule 10b-5 thereunder, and NASD Conduct Rule 2120 prohibit fraudulent and deceptive practices in connection with the offer, purchase, or sale of a security.[40] "The [SEC's] and NASD's antifraud rules are designed to ensure that members of the securities industry fulfill their obligation to the public to be complete and accurate when making statements about securities."[41] A finding of a violation requires a showing that persons acting with scienter misrepresented or omitted material facts in connection with securities transactions.[42] A fact is material if there is a substantial likelihood that a reasonable investor would have considered the fact important in making an investment decision, and disclosure of the omitted fact would have significantly altered the total mix of information available.[43] Scienter is the "intent to deceive, manipulate or defraud."[44] Scienter may be established by a showing of recklessness that involves an '"extreme departure from the standards of ordinary care,… which presents a danger of misleading buyers and sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it.'"[45]

---

[40] *Alvin W. Gebhart*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *59 (Jan. 18, 2006). *See also Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Misrepresentations and omissions are also inconsistent with just and equitable principles of trade and therefore are a violation of NASD Conduct Rule 2110.

[41] *Department of Enforcement v. Donner Corp. Int'l*, No. CAF020048, 2006 NASD Discip. LEXIS 4, at *50 (N.A.C. Mar. 9, 2006) (quoting *District Bus. Conduct Comm. V. Euripides*, No. C9B950014, 1997 NASD Discip. LEXIS 45, at *16-17 (N.B.C.C. July 28, 1997)), *aff'd Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 SEC LEXIS 334 (Feb. 20, 2007).

[42] *Donner Corp.*, 2006 NASD Discip. LEXIS 4, at *50. In addition, violations of Section 10(b) and Exchange Act Rule 10b-5 must involve the use of any means or instrumentalities of transportation or communication in interstate commerce, or the mails, or any facility of any national securities exchange. *See, e.g.*, *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992). In this case, the requirement of interstate commerce is satisfied, *inter alia*, because Impellizeri and Jaloza made interstate telephone calls in connection with the subject sales.

[43] *Basic*, 485 U.S. at 231-32.

[44] *Ernst & Ernst v. Hochfelder*, 425 U.S. at 193.

[45] *The Rockies Fund, Inc. v. SEC*, No. 04-1255, 2005 U.S. App. LEXIS 24521, at *12 (D.C. Cir. Nov. 15, 2005) (citing *Steadman v. SEC*, 967 F.2d 636, 641-42 (D.C. Cir. 1992) (quoting *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044-45 (7th Cir. 1977))). Proof of scienter is not required to establish that a misrepresentation or omission violates Conduct Rule 2110.

Fillet's Material Misrepresentations and Omissions

Fillet admitted that numerous representations made in the Term Sheet he drafted for potential investors in CAC and Sweet Shoppes were false at the time they were made. The most significant misrepresentations were that CAC and Sweet Shoppes were ongoing businesses and that Sweet Shoppes operated under a global license from FAO Schwarz. The Hearing Panel did not credit Fillet's claim that the Term Sheet was merely a draft. Moreover, PM testified that the Term Sheet reiterated and elaborated on what he had been told during his earlier meeting with Fillet. These facts were clearly material to PM; his main reason for investing in CAC and Sweet Shoppes was that he believed the companies were established credible businesses that were going to be expanding on the FAO brand.

Fillet also failed to disclose that Sloan, the CEO of CAC and Sweet Shoppes, and the person upon whom the success of the enterprise depended, had a criminal record and had served time in prison for the rental car theft. This information was material because it would have caused PM to inquire further into Sloan's background, and he would have discovered Sloan's extensive legal history. Fillet himself was negligent, if not reckless, by failing to conduct additional research into Sloan's background before drafting the Term Sheet and participating in the solicitation of PM. As Fillet knew, or should have known, even one criminal conviction might reasonably deter other people from investing, thereby jeopardizing the success of the project and PM's investment. The information was clearly material to PM—he testified that he would not have invested in CAC and Sweet Shoppes if he had known about Sloan's criminal record.

Fillet Acted with Scienter

The Hearing Panel concluded that Fillet intentionally failed to tell PM about Sloan's criminal conviction. In addition, with respect to the misrepresentations in the Term Sheet, Fillet acted, at a minimum, recklessly, thereby satisfying the scienter requirement under the antifraud rules.[46] The courts have defined recklessness as "an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it."[47]

There was no evidence that Fillet himself provided the Term Sheet to PM; however, Fillet admitted that he drafted the document. Fillet knew when he drafted the Term Sheet that the representations contained in it were not true as of the date on the cover page. Yet, despite knowing that Sloan intended to use the Term Sheet to solicit investors, Fillet did not mark the Term Sheet as a draft, and did not take any steps to safeguard it from being disseminated. Without such safeguards in place, it was reckless to have given the Term Sheet to Sloan, when he knew Sloan planned to use the document to solicit investors.

In sum, the Panel finds that, with scienter, Fillet made material misrepresentations and omitted material information in connection with the sale of CAC/Sweet Shoppes units to PM, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Conduct Rules 2120 and 2110.

B. Fillet Falsified Documents

NASD Conduct Rule 3110(a) provides, in part: "Each member shall make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of

[46] *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (en banc).
[47] *See, e.g., Howard v. Everex, Inc.*, 228 F.3d 1057, 1063 (9th Cir. 2000).

this Association and as prescribed by Exchange Act Rule 17a-3…." Entering inaccurate information in a member firm's books and records violates the requirement of NASD Conduct Rule 3110 to keep accurate books and records.[48] NASD Conduct Rule 2110 (now FINRA Conduct Rule 2010) requires members to observe high standards of commercial honor and just and equitable principles of trade. Falsifying customer account documents, then giving them to a FINRA examiner, is unethical and violates the standards demanded by Rule 2110.

Fillet admitted that he falsified ten sets of variable annuity account documents that were submitted for seven Riderwood customers. Therefore, the Hearing Panel finds that Fillet violated NASD Conduct Rules 3110 and 2110.

V. Sanctions

A. Material Misrepresentations and Omissions

For intentionally making misrepresentations and omissions of material facts, the FINRA Sanction Guidelines ("Guidelines") call for a fine between $10,000 and $100,000, and a suspension for a period between 10 business days and two years, or a bar in egregious cases.[49]

The Hearing Panel finds that Fillet's violation is serious. His conduct was a factor in a public investor's loss. Even if Fillet did not intend for the Term Sheet to be given to investors, he was reckless in providing the document to Sloan. The Hearing Panel finds that Fillet should be fined $10,000 and suspended from associating with any FINRA-regulated firm in any capacity for six months.[50]

---

[48] *Dep't of Enforcement v. Nouchi*, No. E102004083705, 2009 FINRA Discip. LEXIS 8 (N.A.C. Aug. 7, 2009); *see also*, *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005); *Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *17 (Aug. 22, 2008).

[49] *FINRA Sanction Guidelines*, p. 90 (2011).

[50] The Hearing Panel is not ordering restitution to PM because it was not clear that Fillet was the proximate cause of PM's loss; PM's decision to invest was based on discussions with his friend, ES as well as those he had with Fillet and Sloan. The immediate cause of PM's loss was Sloan's conduct.

B. Falsification of Records

For forgery or falsification of records, in violation of Rule 2110, the Guidelines recommend consideration of a fine of $5,000 to $100,000. When mitigation is present, the Guidelines recommend consideration of a suspension in any or all capacities for up to two years. In egregious cases, the Guidelines recommend consideration of a bar. Principal Considerations include the nature of the falsified document and whether the respondent had a good-faith, but mistaken, belief of authority.[51] For recordkeeping violations, as proscribed by Rule 3110, the Guidelines recommend, in egregious cases, a fine of up to $100,000 and a suspension of up to two years or a bar.[52]

The Hearing Panel found this to be an egregious case. The nature of the documents is an aggravating factor, because the variable annuity documents were customer records and Fillet's signature and backdating falsely indicated that he had reviewed and approved the transactions, when he had not. He had no belief in his authority to falsify the documents. He compounded his violation by repeatedly lying to FINRA about his conduct, until, after the FINRA examiner's testimony, when Fillet could no longer deny his actions. The fact that Fillet falsified the documents in order to mislead FINRA's examiner is a significant aggravating factor.

For this violation, Fillet should be fined $10,000 and suspended from associating with any FINRA-regulated firm in any capacity for two years. This suspension is to be served concurrently with his six-month suspension.

VI. ORDER

For violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and NASD Conduct Rules 2110, 2120, and IM-2310-2, Fillet is suspended from

[51] *Guidelines* at 37.
[52] *Guidelines* at 29.

associating with any FINRA-regulated firm in any capacity for six months, and fined $10,000. For violating NASD Conduct Rules 3110 and 2110, he is suspended from associating with any FINRA-regulated firm in any capacity for two years, and fined $10,000. The suspensions shall be served concurrently. Fillet is also ordered to pay the costs of the hearing in the amount of $2,584.65, which includes a $750 administrative fee and the cost of the hearing transcript. The fine and costs shall be payable on a date set by FINRA, but not less than 30 days after this Decision becomes FINRA's final disciplinary action in this matter. If this Decision becomes FINRA's final disciplinary action, the suspension shall begin on the start of business on February 6, 2012, and end at the close of business on February 6, 2014.[53]

_____

Rochelle S. Hall
Hearing Officer
For the Hearing Panel

Copies to:

Mitchell H. Fillet (*via overnight courier and electronic mail)*
David Newman, Esq. *(via electronic and first-class mail)*
Bonnie McGuire, Esq. (*via electronic mail)*
John M. D'Amico, Esq. *(via electronic mail)*
David R. Sonnenberg, Esq. *(via electronic mail)*
Mark Dauer, Esq. *(via electronic mail)*

[53] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.