FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ANTHONY WARREN THOMPSON (CRD No. 445556), and TNP SECURITIES, LLC (CRD No. 149178), Respondents.	Disciplinary Proceeding No. 2011025785602 Hearing Officer–MC **EXTENDED HEARING PANEL DECISION** March 30, 2015

By making material misrepresentations and omissions in the sales of private placement securities to investors, Respondent Anthony Warren Thompson violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, NASD Conduct Rules 2120 and 2110, and FINRA Rules 2020 and 2010, and Respondent TNP Securities, LLC, violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. Thompson also violated FINRA Rule 2010 by making material misrepresentations and omissions in a solicitation to investors. In addition, TNP Securities violated NASD Rule 3010 and FINRA Rule 2010 by failing to supervise offerings of private placement securities. Thompson is barred from associating with any FINRA member firm in any capacity. TNP Securities is expelled. Thompson and TNP Securities jointly and severally are ordered to pay costs.

Appearances

Payne L. Templeton, Esq., Los Angeles, California, Justin Chretien, Esq., Rockville, Maryland, and Dean M. Jeske, Esq., Chicago, Illinois, for the Department of Enforcement.

H. Thomas Fehn, Esq., and Sylvia M. Scott, Esq., Los Angeles, California, for Respondents.

I. Introduction

Respondent Anthony Warren Thompson is Chief Executive Officer and sole managing member of Thompson National Properties, LLC ("TNP"), a real estate investment company he

formed in February 2008. From July 2009 to May 2013, Thompson was also the CEO of Respondent TNP Securities, LLC ("TNP Securities"), a wholly owned subsidiary of TNP.[1]

During the relevant period, beginning in 2008 and continuing through 2012, Thompson and TNP promoted and sold investments in a series of private placements to raise operating capital for TNP. TNP unconditionally guaranteed payments of interest and return of principal to investors in three private placements it sponsored through three wholly owned subsidiaries: the TNP 12% Notes Program, LLC ("12% Notes LLC"); TNP 2008 Participating Notes Program, LLC ("PNotes LLC"); and the TNP Profit Participation Notes Program, LLC ("PPP Notes LLC") (collectively, the entities are referred to as the "Guaranteed Notes LLCs"; the notes they issued are collectively referred to as the "Guaranteed Notes").[2] TNP Securities was the wholesale broker-dealer for PPP Notes but was not involved with the other two Guaranteed Notes offerings.[3]

Thompson, as sole managing member and CEO of TNP, which in turn is the direct owner and managing member of TNP Securities, controlled TNP Securities and all three Guaranteed Notes LLCs.[4] Through TNP, Thompson organized a national network for marketing and selling the TNP offerings to retail broker-dealers, raising approximately $50 million through sales of the Guaranteed Notes.[5]

Thompson and TNP Securities are charged with fraud in connection with factual misrepresentations and omissions contained in offering materials distributed while marketing the Guaranteed Notes.[6] TNP Securities is also charged with failure to supervise the PPP Notes offering.

II. Jurisdiction

A. Thompson

Thompson was registered with FINRA from 1972 until September 2013, except for two brief periods. He was not registered from February 9 to September 4, 2008, and November 26, 2008, to January 2, 2009.

[1] Complainant's Exhibit ("CX") 179, Joint Stipulations of Fact ("Stips.") 4-6. Thompson approved a Private Placement Memorandum ("PPM") for one of TNP's offerings, describing TNP as a "real estate advisory company specializing in the development, management and repositioning of real estate investment assets and funds." Hearing Transcript ("Tr.") 348-52; CX-18, at 31.

[2] Stip. 22 (TNP unconditionally guaranteed payment of principal and interest to investors in 12% Notes); Stip. 28 (PNotes featured a guaranty with same provisions); Stip. 40 (PPP Notes featured a guaranty with same provisions).

[3] Stip. 40.

[4] Stips. 5, 7, 52-55, 61, 74, 88.

[5] Stips. 8-10.

[6] Stips. 1-2.

Beginning on July 9, 2009, to May 8, 2013, he was registered through TNP Securities as a General Securities Principal. Thompson was a majority owner of TNP Securities and was associated with it until September 2013.[7]

B. TNP Securities, LLC

TNP Securities was formed as a wholly owned subsidiary of TNP in late 2008. It became a FINRA member broker-dealer in July 2009. TNP Securities' primary purpose was to serve as a wholesale broker-dealer for offerings by TNP and its affiliates, as it did for the PPP Notes.[8] TNP Securities filed a Form BDW withdrawing its registration on September 20, 2013.[9]

C. Respondents' Jurisdictional Challenge

Before the hearing, Respondents stipulated to FINRA's jurisdiction for the purposes of this disciplinary proceeding.[10] At the hearing, they did not raise a jurisdictional challenge. In their Post-Hearing Brief, however, they claimed for the first time that "jurisdiction is wholly lacking" in connection with the allegations relating to the 12% Notes and PNotes offerings.[11]

Respondents argue that "the bulk" of Enforcement's case concerning the 12% Notes and PNotes offerings relates to Thompson acting in his capacity as the CEO of TNP, which was not a FINRA member firm. They argue that the charges in the complaint "have nothing to do with Mr. Thompson's role as a registered person of TNP Securities."[12] They note that the 12% Notes offering began a year before, and the PNotes offering began eight months before, TNP Securities became a FINRA member; TNP Securities was at no time involved with the 12% Notes or PNotes offerings; and the customers who purchased the 12% Notes or PNotes were not TNP Securities customers. As to Thompson, they note that he was not registered with any FINRA member firm when the 12% Notes offering "was conceived and well under way."[13]

Respondents' contentions are unavailing. At the hearing, the evidence established that while Thompson was associated with FINRA member firms, he oversaw the marketing of all three offerings: 12% Notes and PNotes throughout 2009 and into 2010, and PPP Notes in 2010. The parties' stipulations and Enforcement's evidence show that Thompson participated in creating and directed the distribution of the PPMs and other offering materials containing the allegedly material misrepresentations and omissions.[14] During the relevant period, Thompson oversaw sales to broker-dealers that then sold the notes to investors, who paid more than $35

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[7] Stips. 4-5; CX-162, at 5-7.

[8] Stips. 5-7.

[9] Stip. 5.

[10] Stip. 4.

[11] Respondents' Post-Hearing Br. 27-30.

[12] *Id*. at 27.

[13] *Id.* at 27-28.

[14] Stips. 1-2, 4, 5, 7, 40, 51-52, 54, 61, 74, 88; CX-104 at 1-2, 4; CX-105, at 1-2, 5; CX-106, at 1-2, 5; CX-162, at 3, 5-6; CX-167, at 5, 15-16.

million for them.[15] Moreover, while he was registered, Thompson approved 11 separate supplements to the Guaranteed Notes PPMs issued from 2009 through 2011.[16] TNP Securities is not charged with any violations that occurred while it was not a FINRA member.

For these reasons, Respondents' jurisdictional challenge fails. It is irrelevant that Thompson committed the alleged misconduct while he was the CEO of TNP, an unregistered entity, and that the individuals and entities making the investments were not customers of TNP Securities. The evidence establishes that Thompson directed substantial sales of the first two Guaranteed Notes while registered with FINRA, and of the third Guaranteed Notes offering as CEO of member firm TNP Securities, which served as the wholesale broker-dealer for the offering. Thus, the facts clearly establish that Respondents are subject to FINRA's jurisdiction for their alleged misconduct.

III. Procedural Background

A. The Amended Complaint

The Department of Enforcement pursued four causes of action in the Amended Complaint.[17] The first two charge Respondents with fraud, alleging that Thompson made misrepresentations and omissions of material fact in offering documents issued in connection with the 12% Notes and PNotes offerings, and that both Respondents did so in connection with the PPP Notes offering. The offering documents allegedly fail to inform potential investors of material negative facts and risks, chiefly involving the deteriorating financial condition of TNP and the poor investment performance of the Guaranteed Notes.

The first cause of action charges that the misrepresentations and omissions were intentional or reckless, and therefore made with scienter, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, NASD Rules 2120 and 2110, and FINRA Rules 2020 and 2010. The second cause of action charges, in the alternative, that the

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[15] CX-178 reflects sales of PNotes in 2009 for more than $25 million; CX-173 reflects sales of 12% Notes for approximately $7 million in 2009 and 2010. CX-15 shows sales of PPP Notes from June 8, 2010, and February 2, 2012, for more than $3.3 million. Stips. 24, 30, 40, 42, 86.

[16] CX-162, at 3, 5-6; Tr. 277-78. The supplements include: a June 2009 supplement to the 12% Notes PPM, (CX-16, at 45-47; Stip. 24); five PNotes PPM supplements, issued between February and December 2009 (CX-17, at 92-113; Stip. 30); and five PPP Notes PPM supplements, issued between June 2010 and November 2011 (CX-18, at 104-47; Stip. 42).

[17] The initial Complaint contained seven causes of action. Enforcement then filed what it styled its First Amended Complaint ("Amended Complaint") with minor corrections. Subsequently, the Parties filed a stipulation agreeing to the dismissal with prejudice of three causes of action.

misrepresentations and omissions of material fact were negligent in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933, NASD Rule 2110, and FINRA Rule 2010.[18]

The third cause of action charges Thompson with violating FINRA Rule 2010 by sending misleading communications to investors when he circulated a solicitation seeking their consent to increase the level of PNote proceeds that could be used for investing in TNP. The fourth cause of action charges TNP Securities with failing to supervise the offering of PPP Notes in violation of NASD Rule 3010 and FINRA Rule 2010.

B. Enforcement's Summary Disposition Motion

Enforcement filed a motion requesting summary disposition of the first three causes of action as to liability only. Respondents opposed the motion. The Panel reviewed the filings of the Parties, conducted a hearing on the motion, and issued an Order Granting in Part and Denying in Part Enforcement's Motion for Partial Summary Disposition ("Summary Disposition Order").

Enforcement argued that it was undisputed that Thompson, as CEO of TNP and managing member of the Guaranteed Notes LLCs, had actual knowledge of their financial condition. Thompson stipulated that he participated in drafting the offering materials and approved their release,[19] and that he was aware of the financial status of TNP and the three issuing companies.[20] Enforcement argued that the stipulations establish that Respondents were fully aware of the misrepresentations and omissions of fact in the offering materials, proving Respondents possessed the requisite intent or scienter required for fraud; that those misrepresentations and omissions were material; and therefore Respondents' liability for the charged violations was indisputable.[21]

Respondents disagreed. They claimed that Thompson relied on counsel to decide what disclosures had to be made in the offering materials.[22] In a declaration, Thompson asserted that he intended "to make all required disclosures" to investors but that "outside disclosure counsel was primarily responsible" for their content.[23]

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[18] On December 15, 2008, after NASD consolidated with the member regulation and enforcement functions of NYSE Regulation under the newly named Financial Industry Regulatory Authority (FINRA), FINRA Rules 2020 and 2010 superseded NASD Rules 2120 and 2110. NASD Rules 2120 and 2110 apply to Thompson's alleged misconduct occurring in connection with 12% Notes and PNotes prior to December 15, 2008; for the alleged misconduct occurring in connection with all three Guaranteed Notes on or after December 15, 2008, FINRA Rules 2020 and 2010 apply. The applicable rules are available at www.finra.org/industry/finra-rules.

[19] Stip. 1.

[20] Stip. 2.

[21] Enforcement's Motion for Partial Summary Disposition 19-20.

[22] Response of TNP Securities, LLC and Anthony Warren Thompson to Dep't of Enforcement's Motion for Partial Summary Judgment 10-12.

[23] Decl. of Anthony Warren Thompson ¶¶ 2-3.

Taking the facts alleged by Respondents as true, and drawing all reasonable inferences in favor of Respondents, as it was required to do,[24] the Panel concluded that the misrepresentations and omissions of Respondents were material. However, the Panel recognized that reliance on counsel can be "evidence of good faith, a relevant consideration in evaluating … scienter"[25] and may "[tend] to support a defense based on due care or good faith."[26] Therefore, the Panel found that a genuine issue existed concerning Respondents' scienter. Because summary disposition can be granted only "if there is no genuine issue with regard to any material fact"[27] and because scienter is a material fact essential to sustain the fraud charged in the first cause of action, the Panel was required to deny summary disposition and to proceed to a hearing to resolve the issue.

The Panel also found that there was a genuine dispute over whether Thompson used misleading terminology in the consent solicitation he circulated among investors, and therefore denied summary disposition of the third cause of action.

The Panel concluded, however, that there was no genuine dispute with regard to the facts alleged in the second cause of action. The Panel found that Enforcement sufficiently established that Respondents made misrepresentations and omissions concerning the financial health of TNP as guarantor for the three offerings and the financial viability and risks of the offerings; that the misrepresentations and omissions were material; and that the cautionary language in the offering documents describing risks did not cure the misrepresentations and omissions.[28] The Panel therefore granted summary disposition of the second cause of action, finding that Enforcement had met its burden of establishing that Respondents were at least negligent in making misrepresentations and omissions of material fact in violation of Sections 17(a)(2) and (3) of the Securities Act of 1933, NASD Rule 2110, and FINRA Rule 2010.

Consequently, the hearing was largely devoted to the issues of whether: (i) Respondents possessed the requisite scienter, considering Thompson's claim of reliance on counsel, to satisfy the evidentiary requirements of Exchange Act Section 10(b) and Rule 10b-5 thereunder; and (ii) Thompson's consent solicitation to customers was misleading.

C. Respondents' Motion to Reconsider Materiality Finding

As explained above, the Summary Disposition Order determined that the misrepresentations and omissions in Respondents' Guaranteed Notes offering documents, including two TNP balance sheets showing a substantial positive net equity for TNP, were

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[24] FINRA Rule 9264(e) (requiring that "the facts alleged in the pleadings of the Party against whom the motion [for summary disposition] is made shall be taken as true"); *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703, at *18 n.24 (Mar. 24, 2006).

[25] *Howard v. SEC*, 376 F.3d 1136, 1147 (D.C. Cir. 2004).

[26] *Id.* (quoting Longstreth, *Reliance on Advice of Counsel as a Defense to Securities Law Violations*, 30 BUS. LAW 1185, 1187 (1982)).

[27] FINRA Rule 9264(e).

[28] Summary Disposition Order 9-10.

material. During the hearing and in their Post-Hearing Brief, Respondents asked the Panel to reconsider this determination.[29]

Respondents point out that the PPMs for the three offerings describe risks associated with investing in them. For example, the 12% Notes PPM states that "there is no assurance" that TNP would be able to make the interest and principal payments, and that the "net worth of TNP may be insufficient to support its guaranty of the Notes."[30] The PPMs for both PNotes and PPP Notes make similar disclosures.[31] As for the balance sheets, Respondents insist that their inaccuracies were not material and were not misleading. They point out that the Guaranteed Notes were designed for accredited investors. They argue that "a balance sheet speaks only as of its date," and that any investor, particularly an accredited investor, seeing the balance sheets, dated April 30 and September 30, 2008, would realize they were "stale" and therefore not rely on them.[32] Respondents argue that as a result the alleged omissions and misrepresentations were immaterial because even if Respondents had included current, accurate financial statements, there is no "*substantial* likelihood that the total mix of information would have been *significantly* altered."[33]

No FINRA rule permits a motion for reconsideration of summary disposition orders. As Enforcement points out, federal cases hold that once litigants have "battled" and a decision has been issued, reconsideration is only appropriate, and litigants should be required to "battle" again, only when new evidence surfaces, a new development changes the law, the order is clearly erroneous, or reconsideration is required to prevent "a manifest injustice."[34]

Respondents cite no new evidence justifying reconsideration of the Summary Disposition Order. Instead, Respondents claim only that materiality is a difficult term to define, citing a law review article finding that federal case law applying the term "materiality" to facts is "quixotic at best, and fickle at worst."[35]

Importantly, all three Guaranteed Notes programs issued supplements to their original PPMs. 12% Notes issued one in June 2009.[36] PNotes issued supplements periodically through 2009.[37] And PPP Notes issued its last supplement in November 2011.[38] As a witness testified at the hearing, one purpose of a supplement is to inform investors of "material change" to

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[29] Tr. 66, 663; Respondents' Post-Hearing Br. 3.

[30] Respondents' Post-Hearing Br. 5 (quoting CX-16, at 12).

[31] *Id*. at 5-6 (quoting CX-17, at 15, and CX-18, at 18).

[32] *Id*. at 4; Tr. 661-62, 669; Stip. 10.

[33] *Id*. at 7 (emphasis in original).

[34] Department of Enforcement's Post-Hearing Br. 6 (quoting *Off. Comm. of Unsecured Creditors of Color Tile v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)).

[35] Respondents' Post-Hearing Br. 3 (citing Dale A. Oesterle, *The Overused and Under-Defined Notion of "Material" in Securities Law*, 14:1 U. Pa. J. Bus. L. 167 (2011)).

[36] CX-16, at 45-47.

[37] CX-17, at 92-113.

[38] CX-18, at 104-47.

information previously provided to investors.[39] The Guaranteed Notes supplements made no such disclosures. None of the supplements updated the balance sheets. None disclosed the significant discrepancies between the financial picture presented by the balance sheets and TNP's actual, seriously distressed financial condition. None of the supplements accurately represented the then-current, precarious financial condition of the Guaranteed Notes LLCs.

As we held in our Summary Disposition Order, the financial deterioration of TNP and the poor financial condition of the Guaranteed Notes LLCs were material facts, substantially likely to be deemed by a reasonable investor as significantly altering the '"total mix' of information" available.[40] As we also found in the Summary Disposition Order, the cautionary language concerning risks contained in the offering materials are general in nature, warning that future unforeseen events might have a negative impact on investing. They do not suffice to overcome the specific misrepresentations and omissions in the offering materials, which fail to convey the real, substantial, negative financial challenges threatening TNP and the Guaranteed Notes LLCs.[41]

IV. Findings of Fact

A. TNP's Financial Condition

The TNP balance sheet dated April 30, 2008, included with the offering materials for the 12% Notes between June 2008 and January 2010, represented to investors that TNP had $8.5 million in equity. The TNP balance sheet dated September 30, 2008, that Thompson sent with the PNotes offering materials from December 2008 through March 2010, represented that TNP had more than $5 million in equity.[42] The PPP Notes offering materials did not include a TNP balance sheet, but represented to investors that TNP had guaranteed the unsecured debt obligations of the 12% Notes and PNotes, that those programs had raised nearly $50 million, and that they "continue to perform at or above expectations."[43]

During the offering periods, TNP's actual financial condition differed dramatically from these representations. From the outset of Thompson's promotion of the Guaranteed Notes, TNP's financial condition rapidly deteriorated, as the company sustained large operating losses and drops in its total equity. TNP suffered operating losses of more than $8 million from February to December 2008.[44] By the end of 2008, audited financial statements, which Thompson did not send to investors, showed that TNP's equity had fallen to approximately $1.2 million,

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[39] Tr. 588.

[40] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Industries v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[41] *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 96-97 (2d Cir. 2004) (general warnings do not exonerate those who knowingly misrepresent historical or current facts).

[42] CX-16, at 39; CX-17, at 49; Stip. 10.

[43] Stips. 91, 92.

[44] Stip. 11.

significantly less than either balance sheet represented.[45] By the end of the third quarter of 2009, because of losses it suffered, TNP's total equity had reached a negative level of almost ($6 million), and by the end of 2009, following losses of more than $25 million for the year, its audited financials estimated that TNP's negative equity had more than doubled to ($13.5 million).[46]

TNP's financial decline continued unabated in 2010. By the end of March, just prior to the close of the 12% Notes and PNotes offerings, and before the launch of the PPP Notes offering, TNP's negative equity was more than ($18 million). By the end of December 2010, as TNP's losses grew, the company's negative equity enlarged to more than ($29 million). Following losses in 2011 of more than $17 million, by the end of December, TNP's negative equity reached approximately ($41 million). By the end of the third quarter of 2012, TNP's total equity value declined to approximately ($47.8 million).[47]

B. The Offerings and the Consent Solicitation

1. 12% Notes LLC

On June 10, 2008, TNP and its wholly owned subsidiary 12% Notes LLC initiated the first private placement offering of Guaranteed Notes. The stated purpose of the offering was to fund loans to and invest in TNP.[48] The offering raised more than $21.5 million between June 2008 and January 2010.[49] It offered investors quarterly interest payments at an annual rate of 12 percent. Thompson had managerial discretion and authority over the offering; as managing member of TNP, which in turn was the managing member of 12% Notes, Thompson could extend the maturity date of the notes and decide how to invest the funds raised through sales of the notes.[50] Thompson extended the original 2011 maturity date to June 2013. Following a post-offering proxy solicitation, he extended it again to June 2016.[51]

The 12% Notes PPM assures investors that "payment of interest and repayment of principal will be unconditionally guaranteed by TNP."[52] It contains a one-page exhibit entitled "Guaranty" over Thompson's signature. The Guaranty states, "In order to induce each prospective purchaser … [TNP] (the 'Guarantor') hereby unconditionally guarantees the performance of all of the Company's obligations under the Notes, including, without limitation the payment of principal and interest …. This Guaranty shall remain in full force throughout the

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[45] Stip. 11.

[46] Stip. 11.

[47] Stip. 12.

[48] Stip. 22.

[49] Stips. 22, 68.

[50] Stip. 61.

[51] Stips. 23, 71.

[52] Stip. 63.

term of the Notes." It goes on to promise "to pay any costs or expenses … incurred by the Noteholders in enforcing this Guaranty."[53]

The offering materials included the unaudited April 30, 2008 TNP balance sheet. The balance sheet represents that TNP had more than $10 million in assets, including more than $4 million in cash, less than $1.6 million in liabilities, and "total equity" of more than $8.5 million.[54]

12% Notes LLC lost money from its inception. By the end of 2008, its total equity was approximately ($160,000); in 2009, it recorded an annual loss of more than $844,000, and its total negative equity increased to more than ($1 million); and by the end of 2010, the losses it sustained caused its negative equity to exceed ($2 million).[55] Meanwhile, from July 2008 until January 2010, 12% Notes used more than $1 million in proceeds from sales to pay interest owed to investors, even though the PPM does not permit investor proceeds to make interest payments to noteholders.[56]

At the same time, as described above, TNP's total equity steadily declined. By December 2008, TNP had only $1.2 million in equity, and by the end of 2009, TNP's equity fell to ($13.5 million).[57]

12% Notes LLC issued two supplements to the offering materials, in July 2008 and June 2009.[58] The supplements do not disclose that both TNP and 12% Notes LLC had suffered these significant losses.[59]

2. PNotes LLC

a. PNotes Offering

Through PNotes LLC, TNP initiated a private placement with three series of promissory notes in December 2008. The offering raised more than $26 million from public investors from December 9, 2008, to March 22, 2010, paying 10%, 12%, or 13% interest. The notes matured on December 9, 2013, subject to extensions at TNP's—and therefore, Thompson's—discretion.[60] The proceeds were supposed to be used to invest in real estate or real estate-related debt.[61]

[53] CX-16, at 40.

[54] Stips. 25, 65.

[55] Stip. 68.

[56] Stip. 69.

[57] Stip. 67.

[58] Stip. 24.

[59] Stip. 70.

[60] Stips. 28-29.

[61] Stips. 28, 75.

Similar to the 12% Notes PPM, the PNotes PPM promised that "payment of interest and repayment of principal will be guaranteed by TNP."[62] In addition, it promised that TNP "will pledge all the membership interest in [PNotes LLC] to the Noteholders as collateral for the Guarantee securing the Notes."[63]A Guaranty was attached making promises identical to those in the 12% Notes Guaranty. It guaranteed "all of [PNotes LLC]'s obligations under the Notes," including payments of interest and principal. The offering materials and five supplements issued from February through December 2009 included the September 30, 2008 TNP balance sheet.[64]

The PPM refers to TNP's previous guarantees to investors in the 12% Notes. It discloses that "TNP has agreed to unconditionally guarantee up to $50 million of 12% per annum notes issued by an affiliate of TNP. If TNP is required to perform on this guaranty or future guarantees on other debt obligations or otherwise experiences an adverse financial event, it is possible that TNP may not have sufficient funds or resources to manage [PNotes LLC] or to perform under its guaranty of the Notes."[65] A PNotes supplement issued on April 6, 2009, purports to correct the original PPM, softening the impact of the disclosure by stating that TNP guaranteed only up to $18 million, not $50 million.[66]

Throughout the offering, PNotes LLC, like 12% Notes LLC, operated at a loss. By March 30, 2009, just days before the April 6 supplement was issued, PNotes LLC's equity had dropped to a negative number, greater than ($500,000); by December 2009, it had fallen further, to ($2.5 million); and by the end of the offering in March 2010, its equity had declined to an estimated ($4 million).[67] Meanwhile, TNP's total equity at the start of the offering in December 2008 was only approximately $1.2 million; by the end of the offering, it was deeply negative, exceeding ($18 million).[68]

In sharp contrast, the September 30, 2008 TNP balance sheet distributed to PNotes investors represents TNP's total equity as more than $5 million, with more than $11 million in cash on hand, and more than $21 million in assets.[69] And the five supplements to the PNotes PPM do not disclose to investors the actual, deeply negative financial condition of either TNP or PNotes LLC.[70]

Notably, the PPM's enumeration of permitted uses of proceeds does not include paying interest to noteholders. Yet, presumably because of the poor financial condition of PNotes LLC, sales proceeds were applied to pay interest owed to investors 15 times between February 2009

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[62] Stip. 31; CX-17, at 11.

[63] Stip. 31; CX-17, at 9.

[64] Stip. 72; CX-17, at 50.

[65] CX-17, at 15.

[66] CX-17, at 106.

[67] Stip. 82.

[68] Stip. 81.

[69] Stip. 79.

[70] Stips. 80, 84

and April 2010.[71] In March and April 2012, distribution payments to certain investors were late, and PNotes LLC suspended distributions in June 2012. In March 2013, PNotes LLC defaulted on interest payments.[72]

b. PNotes Consent Solicitation

The PNotes offering closed in March 2010. In October, the company issued a solicitation to noteholders seeking consent to allow the company to increase the amount of proceeds that it could invest in TNP and its affiliates. The solicitation asked for approval to boost the limit from 10 percent to 50 percent of the proceeds. Thompson signed a cover letter explaining the solicitation.[73] He reviewed and approved the consent solicitation, a newsletter, and schedule of investments sent to investors with the cover letter.[74] By the end of October 2010, a majority of investors approved the request.[75]

Thompson's letter significantly understates the extent of PNotes LLC's losses. In it, Thompson represents that PNotes LLC had an annual net operating loss of approximately $1.27 million for 2009, and a net operating loss of approximately $500,000 for the first six months of 2010.[76] The company's balance sheet, however, reveals that the actual losses were much greater: more than $2.5 million for 2009 and more than $3.1 million for the first six months of 2010.[77]

In his letter, Thompson also fails to inform noteholders that TNP's equity, represented to be $5.3 million in the balance sheet in the PNotes offering materials, had plummeted to ($30.4 million). This adverse fact would be important to a noteholder assessing the risks in increasing how much the company could loan to TNP, especially considering that PNotes LLC already had three outstanding loans to TNP.[78]

The Schedule of Investments Thompson included in the consent solicitation also is misleading. It depicts a $186,000 loan PNotes had made to a TNP affiliate, Bruin Fund, as an asset of PNotes, representing that the company had earned $24,000 in interest on it. However, no interest had been paid. The Bruin Fund's only asset was an interest in two properties called Oakwood Tower.[79] Months before sending the solicitation, Thompson knew that the Bruin Fund

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[71] Stip. 83.

[72] Stip. 39.

[73] CX-20, at 5-6.

[74] Stip. 37.

[75] Stip. 38.

[76] CX-20, at 5.

[77] CX-7 at 27, 54; Tr. 163-67.

[78] CX-20, at 18; Tr. 177-78.

[79] Stip. 16.

had defaulted on the mortgage,[80] and that the mortgagor had foreclosed on Oakwood Tower. Instead of being an asset, the loan was a loss.[81]

Thompson's in-house counsel advised him to disclose this adverse information by amending the Schedule to reflect the foreclosure. Thompson refused, stating in an e-mail that it was "not material."[82] Thompson testified that the foreclosure was not material because the loan amounted to only about two percent of PNotes' funds.[83]

The Schedule of Investments also represented to PNotes investors that the company had $836,000 in "Total Interest Earned to Date" from 11 loans to TNP and TNP affiliates.[84] In truth, only two borrowers had made interest payments, totaling only $21,000. Thompson, however, claims that the Schedule's representation that PNotes had "earned" $836,000 in interest was "technically correct," because the Schedule reflected interest computed on an "accrual" basis. Because the interest was owed, even though not paid, Thompson claimed that it was not misleading to represent the interest as having been "earned," even though it was unpaid.[85] The schedule nowhere stated the interest was owed but not received.

3. PPP Notes LLC

TNP launched the private placement offering of PPP Notes in April 2010, with TNP Securities acting as the wholesale broker-dealer. As with 12% Notes and PNotes, funds raised by the sale of PPP Notes were to be used to invest in real estate or real estate-related debt investments. The offering raised more than $3 million, ending on April 26, 2012.[86] The offering issued three series of notes, paying interest at either nine percent or ten percent with the notes scheduled to mature in 2015, subject to two one-year extensions at Thompson's discretion.[87]

As with the other two Guaranteed Notes, the PPP Notes' offering materials include a PPM and a Guaranty. Unlike the other two offerings, the PPP Notes' offering materials do not include TNP's 2008 balance sheets. Instead, the PPM informs investors that they may request financial statements.[88] The PPM acknowledges that TNP had experienced losses, but does not disclose their extent. The PPM represents instead that TNP had guaranteed the obligations of the

[80] Tr. 353-54.

[81] Tr. 353-56.

[82] CX-63, at 22.

[83] Tr. 356-57.

[84] CX-20, at 18.

[85] Tr. 363-64.

[86] Stip. 40.

[87] Stip. 41.

[88] Stip. 44.

two prior Guaranteed Notes offerings, the offerings raised nearly $50 million, and they "continue to perform at or above expectations."[89]

PPP Notes LLC experienced operating losses early on, and by the end of the third quarter of 2012, its negative equity value exceeded ($600,000).[90]

V. Conclusions of Law

A. Material Misrepresentations and Omissions in Violation of Exchange Act Section 10(b), Rule 10b-5 Thereunder, NASD Rules 2220 and 2110, and FINRA Rules 2020 and 2010

1. Scienter and Reliance on Counsel

To prove the violations of Exchange Act Section 10(b) and Rule 10b-5 alleged in the first cause of action, Enforcement must establish that Respondents: "(1) made a material misrepresentation or omission (2) in connection with the purchase or sale of a security (3) with scienter (4) in interstate commerce."[91]

Here, the only contested element is scienter. The Panel determined before the hearing that Respondents made misrepresentations and omissions of material fact, establishing the first element. Turning to the second element, there is no disagreement that the misrepresentations and omissions were made in connection with the sales of securities. The Guaranteed Notes offered investors the opportunity to purchase notes from companies paying interest until the return of principal at maturity, with proceeds being used to fund real estate-related investments. The PPMs accurately describe the offerings as securities.[92] And Respondents do not dispute that they utilized the instrumentalities of interstate commerce to market the notes across the United States, satisfying the fourth element.[93]

Scienter is a "mental state embracing intent to deceive, manipulate, or defraud."[94] It may be proven by evidence that Respondents actually knew their misrepresentations and omissions would mislead investors, or by evidence that Respondents recklessly disregarded a substantial risk of misleading, a risk "so obvious that any reasonable man would be legally bound as knowing."[95] When the fraud involves an omission, the element of scienter is satisfied by proof

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[89] Stips. 44-45.

[90] Stip. 48.

[91] *SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1092 (9th Cir. 2010); *SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008) (citing *Geman v. SEC*, 334 F.3d 1183, 1192 (10th Cir. 2003).

[92] The PPMs for each offering describe the notes as securities. CX-16, at 9; CX-17, at 9; CX-18, at 10.

[93] Stips. 8, 30, 42, 58 (the offerings were marketed through instrumentalities of interstate commerce including telephone and e-mail).

[94] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

[95] *Dep't of Enforcement v. Abbondante*, No. C10020090, 2005 NASD Discip. LEXIS 43, at *28 (NAC Apr. 5, 2005), *aff'd*, 58 S.E.C. 1082 (2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006).

that the respondent had actual knowledge of the omitted material information.[96] Failure to disclose a company's significant monetary losses to potential investors, when aware of the losses, is a material omission made with scienter, because the omission poses a danger of misleading potential investors.[97]

a. Thompson's Claim of Reliance on Counsel

Thompson affirmatively misrepresented the financial condition of TNP and the Guaranteed Notes LLCs. He knew but failed to disclose their precarious financial condition when he participated in the preparation and authorized the distribution of the initial offering materials and the numerous supplements. However, he claims that he relied on counsel to determine what to disclose in the offering materials.

To establish the defense of good-faith reliance on advice of counsel, Respondents must prove that Thompson made counsel fully aware of adverse facts, asked for relevant legal advice about what to disclose, received the advice, and relied on it.[98] Enforcement argues that Respondents failed to prove any of these elements.

As the Panel noted in the Summary Disposition Order, reliance on advice of counsel may be raised, not necessarily as a complete defense to the charges, but for a more limited purpose, as evidence bearing on scienter, to show a respondent's good faith or absence of wrongful intent or recklessness.[99] Nonetheless, when a respondent raises reliance on counsel even for this limited purpose, evidence that he informed counsel of relevant information, and the contents of communications with counsel about that information, are important in evaluating the claim.[100]

At the hearing on summary disposition, Respondents proffered that Thompson would testify that he "turned to his lawyer for guidance on" how to make adequate disclosures in the Guaranteed Note offerings.[101] Respondents proffered that Thompson's "outside securities disclosure counsel" had a "very heavy role" in producing the offering materials, and that the Panel could expect to "hear quite a bit about that" at the hearing.[102] Respondents proffered

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[96] *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004) (quoting *Fenstermacher v. Philadelphia Nat'l Bank*, 493 F.2d 333, 340 (3d Cir. 1974)).

[97] *Dep't of Enforcement v. Frankfort*, No. C02040032, 2007 NASD Discip. LEXIS 16, at *26-29 (NAC May 24, 2007); *Dane S. Faber*, Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at *14-15, 19 (Feb. 10, 2004) (when respondent knew of a company's unprofitable financial condition, failure to disclose it, instead making inflated price predictions, was reckless and evidence of scienter).

[98] Enforcement's Post-Hearing Br. 21, citing *SEC v. Goldfield Deep Mines Co.*, 758 F.2d 459, 467 (9th Cir. 1985).

[99] *Howard v. SEC*, 376 F.3d 1136, 1147-49 (D.C. Cir. 2004).

[100] *Id.* at 1147; *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 642 (D.C. Cir. 2007) (claim of reliance on counsel undermined by failure of respondent to inform counsel of relevant information).

[101] Pre-Hearing Tr. 34.

[102] Pre-Hearing Tr. 8-9.

further that Thompson would testify specifically about what he told counsel, the advice counsel gave him, and his reliance on that advice.[103]

At the hearing, Thompson claimed that he "spent very little time on the preparation of PPMs," relying "100 percent" on his in-house counsel and Thomas Voekler, his outside counsel, "to make those disclosures."[104] Thompson testified that he asked to be included on e-mail chains for discussion of important issues, but said "[t]hat doesn't mean I always read them."[105]

Similarly, when asked about the solicitation seeking noteholders' consent to change the allocation of proceeds, Thompson testified that he relied on counsel and his accountants to produce a "state-of-the-art" consent solicitation.[106] As for his role in creating the consent solicitation, Thompson testified that he "was on e-mails, and [he] might have given some input," but depended on the accountants and "legal people."[107]

Thompson testified that in June 2008 Voekler prepared the first PPM for the 12% Notes. Then it was reviewed by others—"inside counsel and our due diligence people, broker-dealer, accounting, marketing people."[108] Only after the completion of this process did it go to him for approval.[109] Thompson testified that he understood his disclosure responsibilities under the securities laws, and that he "always attempted to provide state-of-the-art best practices disclosure in all offerings."[110]

In their post-hearing brief, Respondents argue that Thompson and TNP cannot be held liable for deficiencies in the Guaranteed Notes PPMs because they relied on "a team of highly qualified professionals," including Voekler and his "premier securities law firm."[111] Respondents argue that Voekler advised Thompson throughout the TNP note programs and cite 12 e-mails as proof that Voekler was "the driving force as to what will and will not be included in the offering materials."[112]

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[103] Pre-Hearing Tr. 34-35.

[104] Tr. 464.

[105] Tr. 464.

[106] Tr. 466-67.

[107] Tr. 467.

[108] Tr. 461.

[109] Tr. 463.

[110] Tr. 463-64.

[111] Respondents' Post-Hearing Br. 11.

[112] *Id.* at 12.

b. Thompson Did Not Rely on Counsel

i. Voekler's Role in Preparing the PPMs

Voekler specializes in securities law and private placements.[113] He worked on the PPMs for all three Guaranteed Notes programs.[114] Voekler testified that he gave TNP a template for the 12% Notes offering, and subsequently the "PNotes template was based on the 12% Notes" template, and the PPP Notes template "was based on the PNotes template."[115]

Voekler testified that he was aware at the outset that TNP was operating at a loss, and that the initial PPM disclosed this.[116] He described TNP's Guaranty as "a marketing piece" without much weight given to the guarantees of interest and principal because they "were just for marketing purposes."[117] According to Voekler, in 2008, there was considerable discussion in the industry as to whether such guarantees should be included in offering materials,[118] and "almost all" products in the industry were "over guaranteed." Voekler testified that if he had been aware that the financial condition of a company sponsoring and guaranteeing a private placement was in serious financial trouble, he would still have issued the guarantee, but he would have added a qualifying disclosure warning that the guarantee would "not be supported."[119]

Voekler testified that he relied "completely" on Thompson and TNP to inform him of material information, and alert him if there were any material misrepresentations in the materials.[120] He does not recall why the PPP Notes offering materials, in contrast to those of 12% Notes and PNotes, did not include a financial statement.[121] He testified that he and his firm did not customarily review documents such as balance sheets.[122]

Before the release of the 12% Notes PPM, in June 2008, Voekler, consistent with his customary practice, sent a "10b-5" letter for Thompson to sign and return. Its purpose was to obtain an attestation by Thompson as the sponsor of the offering that he had provided "all the factual information that we need to generate the PPM" and to declare that Voekler's law firm was not responsible for any "material omissions or mistakes."[123] The letter states that Thompson understood that Voekler "relied on the representations and warranties made by [Thompson] in this letter in connection with the preparation of the final memorandum and related documents"

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[113] Tr. 560.

[114] Tr. 565-66, 580.

[115] Tr. 601.

[116] Tr. 569-70.

[117] Tr. 570-72.

[118] Tr. 571.

[119] Tr. 598.

[120] Tr. 581-82.

[121] Tr. 576.

[122] Tr. 581-82.

[123] Tr. 302-04, 580-81; CX-96.

and that the PPM "does not contain any untrue statement of material fact or omit to state any material facts or facts required to make the statements made therein, in light of the circumstances under which they are made, not misleading."[124]

Similarly, Voekler relied on Thompson for the accuracy of the figures in the cover letter Thompson sent with the consent solicitation to PNotes investors, and the information in the schedule of investments sent with it.[125]

Voekler testified that when the supplements to the PPMs were issued, Thompson sent him no updates of the financial condition of TNP or of the Guaranteed Notes LLCs. Voekler could not recall Thompson or anyone else from TNP asking him whether TNP should make additional disclosures of more current financial information about TNP's deteriorating financial status to investors, or whether to disclose adverse developments because of their effect on TNP's guarantees.[126]

When asked, Thompson was unable to identify any documentation showing that TNP provided outside counsel with ongoing, complete financial information. As for inside counsel, Thompson's position was that "[i]t was not [his] job" to give inside counsel financial information. According to him, inside counsel "had access to it whenever they wanted it."[127]

ii. Thompson's Role in Preparing the PPMs

The 12 e-mails Respondents cite as proof that Voekler was the "driving force" in drafting the offering materials do not support Thompson's argument. Rather, they demonstrate that Thompson made decisions without counsel's input. He exercised editorial control over the offering materials. The e-mails show Thompson's immersion in details related to the materials; his decisive executive style; and even his readiness to reject, rather than to rely upon, advice of counsel concerning disclosures.

For example, one e-mail from Voekler's law firm relating to the 12% Notes Guaranty states that "we frequently see restrictions placed on the guarantor to provide some assurance that the guarantor can comply with its obligations if the guaranty is called." The attorney points out sample language from a similar offering.[128] However, the final 12% Notes PPM contained no assurances or restrictions on the guarantor, TNP.

In a December 5, 2008 e-mail from Jack Maurer, a former TNP executive, to Thompson related to the PNotes PPM, Maurer raises a number of questions about TNP's Guaranty. He notes that it was not clear that a pledge of collateral by TNP "only amounts to $1,000" and that this was "not much collateral." Maurer states that given the management fees charged by PNotes

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[124] CX-96.

[125] Tr. 583-84.

[126] Tr. 582-83, 597.

[127] Tr. 298-99.

[128] CX-26, at 1.

LLC, he could not "see how 'profit' is going to accrue for the benefit of the note holders." He also asks if the structure of the broker-dealer compensation limits exceeded FINRA limits. Maurer points out that his questions are "pretty basic and obvious" issues, and states that he was "surprised" that counsel had not caught them. All of Maurer's questions had legal and disclosure implications. Yet Thompson chose not to include his outside counsel in a conference call he then scheduled to discuss these issues.[129]

In September 2009, Voekler e-mailed a draft of the fourth supplement to the PNotes PPM to one of Thompson's managers, asking specifically if there was "anything else that needs to be disclosed." The manager forwarded it to Thompson and in-house counsel. Thompson directed the manager to give him the draft at a meeting scheduled several days later.[130] There is no evidence that Thompson informed Voekler of any additional disclosure issues, and Thompson recalls making no further disclosures in the fourth supplement.[131] Thus, the fourth supplement makes no mention of TNP's deteriorating financial condition and does not disclose that in the first half of 2009, TNP lost more than $11 million and PNotes LLC lost almost $1 million.[132]

The record shows few communications directly between Voekler and Thompson. One such communication occurred on April 25, 2010, and depicts Thompson overruling Voekler. Thompson e-mailed Voekler about the PPP Notes PPM that was about to be printed. Thompson expressed dismay that he could not find a detailed description of TNP that included information about its size, the location of its regional offices, the number of its employees, and a description of its portfolio. Voekler agreed to add the information. Thompson wrote Voekler again, stating that it was "[a]mazing" that TNP was not described in detail in the document. Voekler replied that a conscious decision had previously been made not to include such information, so as "to not push TNP" because "[PPP Notes] was a stand alone program that was supposed to make its profits off of its own investments and there was not as much expectation to lend to TNP." Thompson objected emphatically, stating, "Wrong decision … !!! fix it." He directed his staff to include "our standard 7 office 134 assets etc existing in many [locations] of material." Thompson wrote: "people would actually like to know something about the company managing their money and [guaranteeing] their [principal]!!"[133] However, the additional information about TNP did not disclose adverse facts known to Thompson, such as TNP's negative equity of more than ($18 million); 12% Notes LLC's negative equity exceeding ($1.2 million); or PNotes LLC's negative equity that was greater than ($4.1 million).[134]

The record documents Thompson's rejection of counsel's suggestion to include adverse information with the consent solicitation to PNotes investors. In-house counsel recommended disclosing the foreclosure of the Oakwood Tower property that secured the loan PNotes LLC

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[129] CX-31, at 1-2; Tr. 307.

[130] CX-37, at 1.

[131] Tr. 308-10.

[132] CX-173.

[133] CX-52, at 1-2.

[134] CX-173.

made to the Bruin Fund, writing "The schedule of investments shows a loan to Bruin Fund …. We should probably footnote/disclose that entry regarding the foreclosure and note that TNP has guaranteed the loan." Thompson unequivocally rejected the lawyer's advice: "No were at printer not material."[135]

The record also reveals Thompson's active role in editing details of the offering materials. In a December 9, 2009, e-mail exchange concerning the contents of the fifth PNotes PPM supplement, a TNP manager related to Voekler that Thompson had discovered that one section said "the exact same thing as" another section and wanted to "do away with" one of the sections. An attorney working with Voekler made Thompson's changes and asked Thompson for "the final blessing."[136]

During the investigation of TNP, FINRA examiner Jason Freeman reviewed thousands of e-mails, including e-mails between Thompson and his attorneys. Freeman searched for evidence that Thompson relied on counsel to determine what disclosures to include in the offering materials. Freeman testified that Thompson frequently interacted with counsel through e-mails, sometimes on an hourly basis. But Freeman found no e-mails in which Thompson informed the lawyers of the adverse financial developments TNP and the Guaranteed Notes LLCs experienced, and no e-mails from Thompson asking for legal advice about whether the offering materials should disclose adverse information.[137]

Also, Thompson's testimony about deferring to others and not being actively involved in the details of the preparation of the PPMs was contradicted by Maurer's testimony. Maurer testified that Thompson's management style was very controlling, like that of a micro-manager, and that Thompson involved himself in all aspects of the business, including monitoring the sales activities of the note offerings.[138]

The record refutes Thompson's claim that he spent little time and paid little attention to the preparation of PPMs and their supplements. And rather than relying "100 percent" on Voekler, Thompson did not seek advice of when questions arose on what to disclose. The evidence shows, instead, that Voekler relied on Thompson to disclose material adverse information, and that Thompson, not Voekler, was the "driving force" in deciding what would be disclosed or withheld.

Therefore, the Panel concludes that Thompson did not rely on counsel in deciding what to disclose or omit from the offering materials. The evidence establishes that the misrepresentations and omissions of material fact in the PPMs and other offering documents are

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[135] CX-63, at 1-2.

[136] CX-40, at 1-3.

[137] Tr. 128-34.

[138] Tr. 543-44.

attributable to Thompson, who exercised his authority over their content.[139] Consequently, the evidence establishes that Respondents prepared and issued the offering materials for the Guaranteed Notes knowing that they contained misrepresentations and omissions of material facts concerning the financial condition of TNP and the Guaranteed Notes LLCs. In so doing, as alleged in the first cause of action, Thompson violated Section 10(b)of the Exchange Act, Rule 10b-5 thereunder, NASD Rules 2120 and 2020, and FINRA Rules 2020 and 2010; TNP Securities violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

B. Thompson's PNotes Consent Solicitation Was Misleading.

Making material misrepresentations, including "exaggerated and misleading claims ... and omitting material information" violates the standard of care that is required of registered persons, and is inconsistent with the high standards of commercial honor and the just and equitable principles of trade mandated by FINRA Rule 2010.[140]

As previously described, in October 2010 Thompson circulated a solicitation to PNotes holders to obtain their consent to increase the level of investor proceeds that PNotes LLC could use to lend to and invest in TNP and its affiliates from the PPM's limit of 10 percent to 50 percent of the offering proceeds.[141] Thompson's cover letter and the schedule of investments enclosed with the solicitation were materially misleading. The cover letter greatly understated the operating losses that PNotes LLC experienced in 2009 and the first half of 2010. Thompson knew that PNotes LLC had an operating loss of more than $2.55 million for 2009, but in his letter he told noteholders the loss was $1.275 million. He also knew that the company had an operating loss of over $3.1 million for the first half of 2010, but the letter said it was only $500,000.

When questioned about these discrepancies, Thompson testified that TNP's accounting department gave him the numbers he used; that they were "vetted by internal/external general counsel"; that he "relied solely on my accounting department and my general counsel"; and that he believed the numbers "were accurate at the time" he sent the letter.[142]

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[139] *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *22-25 (NAC Oct. 2, 2013), *appeal docketed*, SEC Admin. Proc. No. 3-15601 (Nov. 1, 2013) (citing *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296, 2301-02 (2011) (The "maker" of a statement liable for material misstatements or omissions in violation of Rule 10b-5 is "is the person or entity with the ultimate authority over the statement, including its content and whether and how to communicate it.")).

[140] *Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *44 (NAC June 25, 2001).

[141] Stip. 37.

[142] Tr. 360.

The Panel rejects Thompson's contention that he relied on his lawyers and accountants for the accuracy of these figures; Thompson was "aware of and monitored, on an on-going basis" the financial status of PNotes LLC.[143]

Thompson also misrepresented other material facts to noteholders in his solicitation. The balance sheet he sent with the PNotes offering materials represented that TNP's net equity was $5.39 million. When Thompson made the solicitation, however, he knew that TNP's net equity had declined dramatically to a large negative number, exceeding ($30 million). The solicitation's schedule of investments also listed a loan as an asset when it actually was a liability because the property collateralizing the loan had been foreclosed on. As discussed above, Thompson refused to disclose this in the solicitation materials, despite his in-house counsel's advice to do so.[144] Finally, the schedule of investments represented that PNotes LLC had earned $836,000 in interest from loans made to TNP and TNP affiliates,[145] when the company had actually been paid less than $21,000 in interest.[146]

These are material and misleading misrepresentations, knowingly and unethically made by Thompson, and by making them, he violated FINRA Rule 2010, as alleged in the Amended Complaint's third cause of action.

C. TNP Failed to Supervise Offerings of Private Placement Securities in Violation of NASD Rule 3010 and FINRA Rule 2010.

NASD Conduct Rule 3010(a) requires members to establish and maintain a supervisory system "reasonably designed to achieve compliance with applicable securities laws and regulations." NASD Rule 3010(b)(1) obligates members to enforce their supervisory procedures.

TNP Securities agreed in April 2010 to serve as the managing broker-dealer for the PPP Notes offering.[147] TNP Securities' written supervisory procedures required the firm to conduct a review to determine that the offering materials for PPP Notes did not contain material misrepresentations or omissions.[148]

The Amended Complaint's fourth cause of action charges TNP Securities with failing to supervise the PPP Notes offering by not establishing, maintaining, and enforcing a supervisory system reasonably designed to ensure compliance with applicable securities laws and regulations pertaining to due diligence. It charges that the firm failed to detect material misrepresentations and omissions in the PPP Notes offering materials, consisting of the misrepresentation that the two prior Guaranteed Notes programs were performing at or above expected levels, and the

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[143] Stip. 2.

[144] CX-63, at 1-2.

[145] CX-20, at 18.

[146] Tr. 183-87; CX-159, at 12 (showing an interest payment of $8,796.89 on November 13, 2009), 14 (showing an interest payment of $11,873.20 on the same date).

[147] Stip. 55; CX-129, at 1.

[148] CX-112, at 40-41.

failure to inform investors of the financial losses and negative equity of TNP and the Guaranteed Notes LLCs.

TNP Securities' Chief Compliance Officer, Wendy Worcestor,[149] testified in an on-the-record interview that she was responsible for reviewing offering materials for TNP Securities. She testified that her purpose in reviewing them was "to make sure they were consistent with the strategic direction and philosophy that [Thompson] wanted that fund to have, and … for accuracy." To her, "accuracy" meant that the materials "were accurate with the strategic vision that [Thompson] wanted"[150] and that the statements in the offering memorandum were true, with no material omissions.[151]

Worcestor testified that she was satisfied that the information provided in the PPP Notes PPM was accurate.[152] She testified that although she analyzed TNP's financial condition, she "was not aware of any significant cash flow difficulties" in 2009.[153] She did not recall that the PPM lacked a TNP balance sheet, and she saw no indication that, as of April 26, 2010, the date the offering was launched, TNP was struggling to meet its financial obligations.[154]

At the hearing, TNP Securities did not present evidence or argument in its defense on the supervision charge, except for a brief comment by counsel in his opening statement that any failure to perform due diligence was the fault of Worcestor, who had "copped to that plea."[155] In their Post-Hearing Brief, however, Respondents argue that the information in the PPP Notes offering materials was "in fact true"; that the firm "relied on counsel"; and that stating that the two prior programs were performing as expected was mere "puffery."[156]

Respondents' arguments lack foundation and are meritless. The financially precarious condition of TNP and the Guaranteed Notes LLCs was material information willfully omitted from the offering materials, and the omissions and misrepresentations were much more than puffery. Worcestor's testimony reveals that TNP Securities failed to implement a reasonable review of the materials for misrepresentations and omissions consistent with the firm's written procedures and the requirements of NASD Rule 3010. Worcestor's deficient supervisory review is attributable to TNP Securities, and through her the firm violated NASD Rule 3010 and FINRA Rule 2010, as alleged in the fourth cause of action.

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[149] Tr. 214-15.

[150] CX-152, at 6-7.

[151] *Id.* at 11.

[152] *Id.* at 13-14.

[153] *Id.* at 14.

[154] *Id.* at 15-16.

[155] Tr. 68-69.

[156] Respondents' Post-Hearing Br. 26.

VI. Sanctions

A. Thompson and TNP Securities: Fraudulent Misrepresentations and Omissions, Causes One and Three

For making intentional misrepresentations and material omissions of fact, FINRA's Sanction Guidelines recommend imposing a fine of $10,000 to $100,000, a suspension of ten days to two years, and, in egregious cases, a bar for an individual and expulsion for a firm.[157]

Characterizing Thompson's misconduct as "intentional, repeated and egregious,"[158] Enforcement seeks imposition of a bar on Thompson and expulsion of TNP Securities.

In sharp contrast, Respondent argues for a sanction "tempered in consideration of the extraordinary mitigating circumstances, including a complete absence of scienter," and requests a sanction within the Sanction Guidelines range for negligent misrepresentations: a suspension of up to 30 business days and a fine between $2,500 and $50,000.[159]

As set forth above, the Panel found evidence of scienter. In addition, the Panel does not find that there are mitigating circumstances. The Panel therefore cannot accept Thompson's recommendation.

It is unnecessary for the Panel to impose sanctions for the second cause of action, which Enforcement included as an alternative to the first cause of action, because the Panel has found Respondents liable as charged in the first. Furthermore, because Thompson's misrepresentations and omissions in the Guaranteed Notes offering materials and those in the consent solicitation are so similar in nature, and are part of a continuing course of conduct, the Panel concludes that it is appropriate to apply a single set of sanctions for the violations in both the first and third causes of action.

At the outset, the Panel is mindful that in attempting to fashion appropriate sanctions, we must endeavor to prevent future misconduct by Respondents and others, to improve overall industry standards, and to protect the investing public.[160] We must also consider the relevant Principal Considerations in Determining Sanctions enumerated in the Guidelines.

Doing so, the Panel must consider that Respondents did not accept responsibility for their misconduct prior to its detection by FINRA.[161] Thompson still does not accept responsibility. He insists that he "didn't do anything intentionally wrong, never have, never will."[162] While acknowledging that he, as CEO of TNP, was the person ultimately responsible for information

[157] FINRA Sanction Guidelines at 88 (2013), www.finra.org/industry/sanction-guidelines.

[158] Enforcement's Post-Hearing Br. 42.

[159] Respondents' Post-Hearing Br. 30.

[160] Guidelines at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

[161] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

[162] Tr. 469.

included and omitted from offering materials, he maintains that the misrepresentations and omissions resulted from his good-faith reliance on information and advice he received from others, particularly his accountants and counsel. When asked directly whether he or his counsel was responsible for the contents of the offering materials, he answered, "I rely on other people."[163]

The Panel also must consider that Respondents engaged in a pattern of misconduct over a period extending from mid-2008 into 2012, with repeated offerings followed by numerous supplements that reinforced the initial misstatements and omissions.[164] And Respondents' conduct was knowing and intentional, not merely negligent.[165] The sales of the Guaranteed Notes raised substantial sums of money from a large number of transactions; the programs were nationwide.[166] Furthermore, the misconduct was intended to result in financial gain, and Thompson and TNP received substantial sums from the sales of the Guaranteed Notes.[167]

Finally, the Panel notes that despite TNP's overwhelming debts, at the time of the hearing Thompson and TNP were promoting yet another private placement. They made a Form D filing with the Securities and Exchange Commission on March 12, 2014, for TNP's promotion of a private placement to sell interests in a Delaware Statutory Trust, with an offering amount of $3.7 million, through an issuer named TNP Northgate Boise, DST.[168] Given Thompson's refusal to accept responsibility for his misconduct in previous TNP promotions, his apparent engagement in further such ventures poses a potential risk of harm to the investing public.

For all of these reasons, the Panel concludes that the appropriate sanction for Thompson's misconduct as described in the first and third causes of action is a bar, and the appropriate sanction for the misconduct of TNP Securities described in the first cause of action is expulsion.

1. Restitution

Enforcement seeks the entry of a restitution order against Thompson in the amount of $36,207,283.31 to return their principal to all investors who purchased Guaranteed Notes starting in January 2009. Enforcement also seeks the entry of a restitution order against TNP Securities in the amount of $3,386,983.35, to return their principal to all purchasers of the PPP Notes. Enforcement argues that restitution is required because "[a]s a result of the Respondents' misconduct, every investor that purchased any of the notes issued by the Guaranteed Notes LLCs after January 1, 2009 was misled and, at a minimum, has unjustly suffered the loss of the principal amount of their investment."[169]

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[163] Tr. at 279-80.

[164] Guidelines at 6 (Principal Considerations Nos. 8-9).

[165] *Id.* at 7 (Principal Consideration No. 13).

[166] *Id.* (Principal Consideration No. 18).

[167] *Id.* (Principal Consideration No. 17).

[168] CX-176.

[169] Enforcement's Pre-Hearing Br. 23.

FINRA's Sanction Guidelines provide guidance to adjudicators concerning restitution. They state:

> Adjudicators may determine that restitution is an appropriate sanction where necessary to remediate misconduct. Adjudicators may order restitution when an identifiable person, member firm or other party has suffered a quantifiable loss *proximately caused* by a respondent's misconduct. Adjudicators should calculate orders of restitution based on the actual amount of the loss sustained by a person, member firm or other party, as demonstrated by the evidence.[170]

To justify an order of restitution, the evidence must "demonstrate a causal connection" between the misconduct and "any loss at issue," and demonstrate "that the customers' losses came 'as a result of'" the deficiencies in the offering documents.[171] Enforcement has identified investors who purchased the Guaranteed Notes, and has quantified losses they suffered—the principal they invested.[172] But Enforcement has not sufficiently established that the losses were proximately caused by Respondents' misconduct.

Respondents did not sell to individual investors. They marketed the Guaranteed Notes to third-party and wholesale broker-dealers whose representatives then sold them to their customers.[173] Some of the broker-dealers obtained third-party due diligence reports on the offerings, which contained evaluations of the Guaranteed Notes offerings and their inherent risks.[174] There is no evidence of to what extent, if any, the broker-dealers selling Guaranteed Notes provided information additional to Thompson's offering materials to investors, and to what extent investors were induced by Thompson's offering materials to make their investments. There is therefore an insufficient basis for finding that the investors' losses were proximately caused by Respondents' material misstatements and omissions. Thus, the Panel cannot order restitution.[175]

B. TNP Securities: Failure to Supervise, Cause Four

For failing to supervise, the Guidelines recommend a fine ranging from $5,000 to $50,000, and a suspension for up to 30 business days or, in an egregious case with systemic supervision failures, expulsion.

The Panel found that TNP Securities failed to properly supervise the PPP Notes offering. The firm's Chief Compliance Officer essentially conducted no substantive review of the offering

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[170] Guidelines at 4 (General Principle No. 5) (emphasis supplied).

[171] *Siegel v. SEC*, 592 F.3d 147, 159, 161 (D.C. Cir. 2010).

[172] CX-6; CX-11.

[173] Stip. 8; *see, e.g.*, CX-16, at 17 n.1.

[174] Tr. 448-49, 453-54.

[175] *Fillet*, 2013 FINRA Discip. LEXIS 26, at *56 n.31 (upholding Hearing Panel decision not to order restitution where it was not clear that respondent was the proximate cause of investor losses, where Hearing Panel found respondent responsible as the maker of misrepresentations and omissions in offering documents for a private placement in violation of Exchange Act Section 10(b), Rule 10b-5, NASD Rules 2120 and 2110, and IM-2310-2).

materials, and therefore failed to identify the material misrepresentations and omissions they contained. Through the CCO, TNP Securities failed to follow the firm's written policies and procedures, and violated NASD Rule 3010 and FINRA Rule 2010.

Taking into consideration that the offering period lasted two years, raising over $3.38 million from investors with three series of notes, with five supplements,[176] all flawed by material misrepresentations and omissions, the Panel concludes that expulsion is the appropriate sanction to impose.

VII. Order

For violating Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, NASD Conduct Rules 2120 and 2110, and FINRA Rules 2020 and 2010 by making material misrepresentations and omissions in the sales of securities, as alleged in the Amended Complaint's first cause of action, and for violating FINRA Rule 2010 by making material misrepresentations and omissions in a consent solicitation communicated to investors, as alleged in the third cause of action, Respondent Anthony Warren Thompson is barred from associating with any FINRA member firm in any capacity. For violating Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 by making material misrepresentations and omissions in the sales of securities, as alleged in the first cause of action, Respondent TNP Securities, LLC is expelled from membership in FINRA.[177] Respondent TNP Securities also is expelled from membership in FINRA for its failure to supervise the PPP Notes offering, in violation of NASD Rule 3010 and FINRA Rule 2010, as charged in the fourth cause of action.

Respondents are jointly and severally assessed costs in the amount of $6,082.04, including a $750 administrative fee.

If this decision becomes FINRA's final disciplinary action in this proceeding, the bars and the expulsions shall become effective immediately.

EXTENDED HEARING PANEL.

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By: Matthew Campbell
Hearing Officer

[176] Stips. 40, 86.

[177] The Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this Decision.