FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LOUIS OTTIMO (CRD No. 2606438), Respondent.	Disciplinary Proceeding No. 2009017440201 Hearing Officer—MAD **EXTENDED HEARING PANEL DECISION** July 10, 2015

Respondent fraudulently omitted to disclose material information in a personal biography that was included in a Private Placement Memorandum for the sale of securities, in violation of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. In addition, he willfully failed to timely disclose material information on his Form U4, including tax liens, judgments, and a bankruptcy filing, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws.

For his fraudulent failure to disclose material information in connection with the sale of securities, Respondent is barred in all capacities from associating with any FINRA member. In light of the bar, the suspension and fine associated with Ottimo's Form U4 violation are not imposed. Because his Form U4 violation involved the willful failure to disclose material information, he is subject to a statutory disqualification. Finally, Respondent is ordered to pay costs.

Appearances

Danielle I. Schanz, Esq., Dale A. Glanzman, Esq., and Akinyemi T. Akiwowo, Esq. for the Department of Enforcement, Complainant.

Bradley Schnur, Esq., for Louis Ottimo, Respondent.

DECISION

I. INTRODUCTION

Respondent Louis Ottimo was associated with EKN Financial Services, Inc. ("EKN"), a FINRA member firm co-owned by his father. While he was associated with EKN, he created (i) a special purpose vehicle, First Secondary Market Fund LLC ("First Secondary"), to purchase Facebook Inc. shares prior to Facebook's initial public offering ("IPO"), and (ii) another entity, First Secondary Managers LLC ("Manager"), to manage First Secondary.

Ottimo solicited investors in First Secondary by providing them with a Private Placement Memorandum ("PPM") that included his personal biography. Ottimo's biography identified him as the Chief Executive Officer ("CEO") of Manager and promoted his prior business experience with various companies. However, the biography failed to include significant negative information concerning two of those companies.

Ottimo also failed to disclose significant negative information in his FINRA registration filings. While Ottimo was associated with EKN, he was the subject of several civil judgments and tax liens, and he signed and submitted a bankruptcy petition on behalf of a corporation he controlled. For more than two years, although he made multiple FINRA registration filings, he did not timely report those events on his Uniform Application for Securities Registration or Transfer ("Form U4").

On August 26, 2013, the Department of Enforcement ("Enforcement") filed a three-cause Complaint against Ottimo. One cause of the Complaint charged that Ottimo fraudulently omitted material facts from his biography in the PPM for First Secondary, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. In the alternative, a second cause charged that Ottimo's omissions from his biography violated Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"), and thereby violated FINRA Rule 2010. Finally, a third cause of the Complaint alleged that Ottimo willfully failed to timely disclose material facts on his Form U4, and thereby violated FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. Ottimo filed an Answer denying the charges.[1]

After considering the evidence and the arguments of the parties, the Extended Hearing Panel concludes that Enforcement proved by a preponderance of the evidence that Ottimo's omissions from his biography violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. In light of the Panel's conclusion on that charge, it dismisses the alternative charge that the omissions violated Sections 17(a)(2) and (3) of the Securities Act. The Panel also concludes that Ottimo willfully failed to update his Form U4, and thereby violated FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws.

[1] A four-day hearing was held July 21–24, 2014, in New York, New York.

II. FINDINGS OF FACT

A. Respondent

Ottimo entered the securities industry in 1995. From 1999 until January 2009, he was not registered with any FINRA member firm. During that period, Ottimo was the co-owner with his brother, of Jet One Jets ("Jet One"), a company that acted as a broker arranging private jet charters. Ottimo was also the president of Wheatley Capital Corporation ("Wheatley"), which handled the back office functions of EKN.[2] On January 9, 2009, Ottimo became registered with FINRA as a General Securities Representative through EKN. He remained registered through EKN until October 2012. Ottimo was subsequently registered through two other FINRA member firms. He has not been registered through any FINRA member firm since February 2014.[3]

B. Ottimo Omitted Material Facts About His Background In The First Secondary PPM

1. Creation Of First Secondary

In February 2012, Ottimo created First Secondary to, among other things, purchase shares of Facebook prior to its IPO.[4] He was First Secondary's CEO.[5] Ottimo created Manager to act as the sole manager for First Secondary.[6] He was also Manager's CEO.[7] Ottimo admitted that Manager controlled all aspects of First Secondary's business and operations and had sole discretion over all decisions regarding investments made by First Secondary.[8]

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[2] CX-1; Hearing Transcript ("Tr.") 594-600. Ottimo was the sole employee of Wheatley, which acted as a pass-through for EKN's expenses. EKN's phone bills, car leases, insurance, and office lease were in Wheatley's name. EKN paid Wheatley an amount each month to cover those expenses, plus a salary for Ottimo, and Wheatley then paid the expenses. Wheatley did no other business. Tr. 599, 603-04.

[3] CX-1. Although Ottimo is not currently associated with any FINRA member, he remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after he ceased to be associated with a FINRA member, and the Complaint alleges misconduct committed while he was registered or associated with a FINRA member.

[4] CX-105, at 8.

[5] Tr. 1012-13.

[6] CX-107a; Tr. 634-35. Manager operated out of EKN's offices. Tr. 635-36. NL, EKN's Financial and Operations Principal, owned 15% of Manager and Ottimo owned 85% of Manager. Tr. 1014-15. NL resigned from Manager and EKN in August 2012. Tr. 117, 635.

[7] CX-107a; Tr. 634.

[8] Tr. 635.

2. Solicitation Of Investors In First Secondary

In February 2012, First Secondary commenced a private offering of its shares through EKN, First Secondary's sole placement agent.[9] Solicitations for First Secondary investors were made through a PPM, dated February 29, 2012. Ottimo knew that the PPM was drafted for the purpose of soliciting investors, and all investors in First Secondary received copies of the PPM from EKN in connection with their purchase of First Secondary shares.[10]

From March 6 to April 10, 2012, the First Secondary private placement raised approximately $3.76 million from 20 EKN customers.[11] Ottimo personally sold $500,000 of First Secondary shares to two EKN customers.[12] Ottimo profited from the sales of First Secondary shares through management fees.[13]

a. Scope Of The Offering

Although Ottimo created First Secondary with the immediate goal of obtaining pre-IPO shares of Facebook, the PPM defined a much broader purpose for First Secondary. Specifically, the PPM stated:

> The Company will use the net proceeds of the Offering to acquire any type of securities of companies such as Facebook Inc., Twitter, Inc. or other privately held companies …, either directly or indirectly, to maximize the value of the Company's investments after the Issuers go public.[14]

The PPM explained that Manager had authority to, "at its sole discretion, pursue opportunities for liquidity in the Portfolio Securities in the future by any means it so chooses in its sole discretion …." The PPM advised that "Investors will not be provided with any disclosure materials of any kind regarding the Issuer Securities [but rather] are relying solely on the investment acumen of the officers of the Manager and any advisors they may retain." Therefore, the PPM advised potential investors that "no party should

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[9] CX-105, at 7; Tr. 636. Ottimo admitted that it was his decision to retain EKN as First Secondary's placement agent. Tr. 636.

[10] CX-105; Tr. 641-42. The EKN compliance department sent the PPM to investors by mail and email. Tr. 642, 906.

[11] CX-110a; CX-110b.

[12] CX-110a; CX-110b; Tr. 711, 713.

[13] CX-105, at 8; CX-110a; CX-110b; CX-125, at 97, 132; Tr. 710-13.

[14] CX-105, at 8. Ottimo testified that the initial purpose of First Secondary was to purchase pre-IPO shares of Facebook, but that the PPM "gave us just the latitude [to invest in other pre-IPO stocks]. Only after the Facebook, our intention was after the Facebook is finished and the fund is open … we were looking to do it pretty much one at a time …." Tr. 631-33.

make any investment in [First Secondary] unless such party is willing to entrust all aspects of [First Secondary's] management to the Manager."[15]

b. Ottimo's Biography In The PPM

Ottimo knew that the PPM was a disclosure document for the First Secondary investors.[16] The PPM included a biography of Ottimo, as Manager's CEO.[17] Ottimo drafted his biography to be included in the PPM.[18] He determined what information to include in the biography.[19] Ottimo used a biography he had prepared for BSafe Electrix, Inc., a company where he served on the board of directors, to create the biography for the PPM.[20] Ottimo's biography stated:

> Mr. Louis Ottimo is the Chief Executive Officer of the Manager. In such capacity, Mr. Ottimo is authorized to manage the Manager to effect the objectives and purposes of [First Secondary]. Mr. Ottimo has been a registered representative of EKN, where he maintains retail clients, since 2009. Mr. Ottimo currently serves on the board of directors of Bsafe Electrix, Inc. Previously, Mr. Ottimo co-founded [Jet One] in April 2006 and successfully negotiated an exclusive reseller Agreement with American Express to handle the [Jet One] pre-paid card. [Jet One] grew to $18 million in revenues inside approximately 18 months. In April 2001, Mr. Ottimo founded [Wheatley] and was its president until 2011. He also founded North Pacific Capital, LLC in 1996, which was an Office of Supervisory Jurisdiction of Tasin & Company, Inc., a registered broker-dealer. Under his ownership the branch office grew to over $25 million in annual sales with up to 100 Registered Representatives.
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> Mr. Ottimo graduated from the University of Maryland in 1987 with a Bachelor of Science degree in Financial Studies. He has passed the FINRA Series 7 and Series 63 exams.[21]

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[15] CX-105, at 9, 23.

[16] Tr. 663-64.

[17] CX-105, at 12. Ottimo testified that the law firm he engaged to assist with the creation of the PPM requested a biography, and he provided it to the law firm for use in the PPM. Tr. 642-43.

[18] Tr. 643-44, 682.

[19] Other than what is reflected in Ottimo's biography in the PPM, Ottimo did not provide the law firm with any other information regarding Jet One and Wheatley. Tr. 660-62. Similarly, NL drafted her own biography and received no input or advice from the law firm. Tr. 1011, 1018-19.

[20] Tr. 643; CX-69.

[21] CX-105, at 12.

(1) Statements Regarding Jet One

While the PPM described Jet One as a successful business, Ottimo failed to include significant information regarding Jet One's financial history and the citation it received from the Department of Transportation for engaging in deceptive and unfair business practices.

The PPM did not accurately reflect Jet One's financial history. Even assuming that it had $18 million in revenues as stated in the biography, Jet One never made a profit and had substantial net operating losses.[22] Jet One's 2006 tax return reflected losses of $570,000.[23] Jet One did not file tax returns in 2007 and 2008, but it also sustained losses in those years.[24]

Ottimo failed to disclose that, although Jet One investors invested more than $1 million in 2007, Jet One ceased doing business in July 2008.[25] He also failed to disclose that those investors received only two or three quarterly interest payments from Jet One.[26] All of those investors ultimately lost their principal investments.[27]

Ottimo also failed to disclose that Jet One filed for bankruptcy on August 5, 2010, with assets of less than $50,000, and liabilities between $100,001 and $500,000.[28]

Finally, Ottimo failed to disclose that the Department of Transportation's Enforcement Office cited Jet One for violating statutory licensing requirements regarding Jet One's website.[29] Specifically, on March 4, 2008, the Department of Transportation issued a consent order against Jet One for "engaging in unfair and deceptive practices and

[22] Tr. 648, 650, 653-55.

[23] CX-117a.

[24] CX-117, at 2; Tr. 648, 650, 654-55. Despite Jet One's losses, Ottimo argued that Jet One's operations were profitable because it made a gross profit on each flight that it booked for customers, and that he and his brother "would take out the profits in fees, or in salary or income," or "put [the profits] into marketing to brand the company." Tr. 648, 651.

[25] CX-120, ¶ 16; CX-122; Tr. 654. Ottimo asserted that Jet One went out of business as a result of improper actions by a competitor. Ottimo stated that there is pending litigation against that competitor that, if successful, could enable the investors to recoup their funds. Tr. 647, 654, 656, 658.

[26] CX-109, at 3; Tr. 657-58.

[27] CX-109, at 3; Tr. 706.

[28] CX-118c, *In re Jet-One Jets, Inc.*, Case No. 810-76126 (Bankr. E.D.N.Y. Aug. 5, 2010).

[29] CX-119.

unfair methods of competition" through statements on its website and imposed a $60,000 civil penalty.[30]

(2) Statements Regarding Wheatley Capital

In the PPM, Ottimo stated that he was the president of Wheatley from 2001 until 2011.[31] However, he failed to disclose that Wheatley's operations wound down in 2008 and the firm had no operating revenue in 2008, 2009, or 2010.[32] He also failed to disclose that Wheatley filed for bankruptcy on April 13, 2010, and had approximately $1.4 million in outstanding liabilities at that time.[33]

C. Ottimo Failed To Timely Disclose Judgments, Liens, And A Bankruptcy Filing

Registered representatives must complete and file with FINRA a Form U4 before they can associate with a FINRA member firm. When Ottimo joined EKN on January 9, 2009, he filed a Form U4 ("Initial Form U4") with FINRA.[34] He amended his Initial Form U4 approximately 36 times between January 2009 and April 2012.[35]

The Forms U4 (the Initial Form U4 and the amendments) that Ottimo signed and submitted while registered with EKN required Ottimo to state whether there were "any unsatisfied judgments or liens against" him. If the answer to that question was "yes," the Forms U4 required Ottimo to complete a Disclosure Reporting Page disclosing the (i) judgment/lien amount; (ii) judgment/lien date; (iii) judgment/lien holder; and (iv) judgment/lien type. The Forms U4 also required Ottimo to state whether, within the past 10 years, he, or any organization over which he exercised control, had filed a bankruptcy petition, and if the answer was "yes," to disclose information regarding the bankruptcy.[36] At the hearing, Ottimo acknowledged that, within 30 days after discovery, a judgment, lien, or bankruptcy must be disclosed on his Form U4.[37]

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[30] CX-119, at 1, 2, 4. Ottimo did not deny that Jet One was cited for the violation; however, he asserted that the Department of Transportation ultimately accepted a "nominal amount" of "$1,500 to $2,500" to satisfy the $60,000 fine. Tr. 645-46.

[31] CX-105, at 12.

[32] CX-66; Tr. 605-07, 679.

[33] CX-66. Ottimo also failed to disclose the Wheatley bankruptcy on his Form U4 until April 19, 2012, two months after the PPM was issued. CX-104.

[34] CX-71.

[35] CX-1a.

[36] *See* CX-71 – CX-104 (Forms U4 signed and submitted by Ottimo).

[37] Tr. 730. FINRA By-Laws, Art. V, § 2(c). To ensure that registrants are aware of this requirement, Form U4 expressly requires registrants to acknowledge their obligation to keep their Forms U4 current by filing timely supplemental amendments.

1. Judgments

Ottimo was the subject of six civil judgments between March 2008 and June 2009. He reported the first judgment on his Initial Form U4; however, he reported an incorrect amount and date for the judgment. Ottimo either did not report, or did not timely report, the remaining five judgments.

Shelvin Plaza Associates, LLC Judgment

On March 3, 2008, Shelvin Plaza Associates, LLC obtained a judgment against Ottimo, Wheatley, and EKN's president, holding them jointly and severally liable for $161,740.73 of unpaid rent.[38] When Ottimo filed his Initial Form U4, he disclosed the unsatisfied judgment, but he inaccurately reported the amount of the judgment as $70,240.06 and the filing date as November 19, 2007.[39] On February 23, 2009, the judgment was revised to $81,982.66, which included a principal amount of $70,240.06 plus interest.[40] Despite the revision, in several subsequent Form U4 amendments, Ottimo continued to disclose the amount of the judgment as $70,240.06 and the filing date as November 19, 2007. On September 13, 2010, more than a year after the judgment was revised, he filed an amended Form U4, listing the amount of the judgment as $41,847.22 and reporting the earlier filing date of November 19, 2007.[41]

LM Judgment

On October 2, 2008, a court entered a judgment in favor of creditor LM against Jet One and Ottimo in the amount of $2,211.80.[42] When Ottimo filed his Initial Form U4, he did not report the LM judgment. Although he subsequently filed 16 Form U4 amendments, he did not disclose the judgment until he filed a Form U4 amendment on November 11, 2010.[43]

Ottimo asserted that he first learned of the LM judgment in October 2010, when FINRA took his testimony during its investigation.[44] He stated that he reported the judgment on his Form U4 the next month.[45] The Panel did not find Ottimo's testimony to be credible. Ottimo knew that the dispute with LM had a trial.[46] In fact, Ottimo went to

[38] CX-9. The Shelvin Plaza judgment was recorded on March 10, 2008. CX-9, at 1.

[39] CX-71. With regard to the amount of the judgment that he reported on his Initial Form U4, Ottimo asserted that he believed the principal amount of the judgment was the correct amount to report, rather than the amount that included interest. Tr. 834-37.

[40] CX-10.

[41] CX-84.

[42] CX-46. The judgment was recorded on November 26, 2008. CX-46.

[43] CX-86, at 25.

[44] Tr. 866.

[45] Tr. 866.

[46] Tr. 868.

the courthouse for the trial against LM,[47] although he arrived late and the matter had concluded.[48] On January 14, 2010, Ottimo emailed his counsel referencing LM and $2000, an amount that approximates the judgment awarded to LM.[49]

Stairworld Inc. Judgment

Stairworld Inc. filed a complaint against Ottimo on August 9, 2008, and served the summons and complaint against Ottimo on October 13, 2008, by taping a copy of those documents on the front door of his residence.[50] On October 13, 2008, Stairworld also mailed a copy of the summons and complaint to Ottimo.[51] On December 18, 2008, the court entered a default judgment against Ottimo in favor of creditor Stairworld in the amount of $6,791.40.[52] Stairworld sent a copy of the judgment to Ottimo on January 13, 2009.[53] Although he filed 19 Form U4 amendments after the judgment was recorded on January 20, 2009, Ottimo did not disclose the judgment until he filed a Form U4 amendment on March 28, 2011.[54]

Ottimo claimed that he never received the summons and complaint and only learned of the judgment during his investigative testimony in October 2010.[55] However, Ottimo lied to the Panel. He knew about the judgment in January 2010, if not earlier. On January 4, 2010, Ottimo sent his counsel an email referring to the Stairworld judgment asking, "Stairworld: Vacate Judgment yet?"[56]

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[47] Tr. 868.

[48] Tr. 868.

[49] CX-13.

[50] CX-48.

[51] CX-48. When Stairworld served the summons and complaint on Ottimo, it used the same address as reflected in the Central Registration Depository ("CRD"). *Compare* CX-48 (indicating that counsel for Stairworld served Ottimo at the address reflected in his CRD), *with* CX-1 (reflecting Ottimo's residential address in CRD). Ottimo has resided at the CRD address since 2003. CX-71, at 7.

[52] CX-47. On January 20, 2009, the Nassau County Clerk's Office recorded the Stairworld judgment. CX-47.

[53] CX-48. Stairworld mailed the judgment to Ottimo's CRD address. None of the mailings to Ottimo were returned. CX-48.

[54] CX-91, at 25.

[55] Tr. 848, 851-52.

[56] CX-60, at 2. Ottimo also sent his counsel emails on January 14 and February 23, 2010, referring to the Stairworld judgment. CX-13; CX-14.

Lake Park 135 Crossways Park Drive, LLC Judgment

EKN and Wheatley both conducted business at the same location at 135 Crossways Park Drive, Woodbury, NY.[57] On January 21, 2010, the parties entered into a stipulation and settlement whereby EKN, Wheatley, and Ottimo consented to a money judgment of $300,000 in favor of their landlord, Lake Park 135 Crossways Park Drive, LLC ("Crossways Park").[58] On April 7, 2010, the court entered a judgment against Wheatley and Ottimo in favor of Crossways Park in the amount of $300,031.80 ($300,000 plus costs of $31.80).[59] Ottimo did not disclose the judgment until he filed a Form U4 amendment on May 19, 2011, approximately one year after the court entered the judgment.[60]

Hamilton Equity Group, LLC Judgment

On March 9, 2009, Hamilton Equity Group, LLC obtained a judgment against Ottimo and Wheatley in the amount of $108,832.94.[61] Ottimo satisfied the Hamilton Equity judgment, and the court issued a Satisfaction of Judgment on May 17, 2010.[62] Ottimo never reported the judgment on his Form U4.

Ottimo stated that he knew he owed money to Hamilton Equity in connection with a credit line, and he was making payments pursuant to a payment schedule; however, he claimed that he never knew that there was a judgment against him.[63] Ottimo acknowledged that FINRA asked him about this judgment during his investigative testimony in October 2010, February 2013, and March 2013.[64]

Bainton McCarthy, LLC Judgment

On June 4, 2009, the court entered a judgment in favor of creditor Bainton McCarthy, LLC against EKN, Ottimo, his brother, his father, and others in the amount of $36,590.15.[65] The court vacated this judgment on September 9, 2009.[66] Although Ottimo filed four Form U4 amendments from June 2009 through August 2009, he never reported this judgment on his Form U4.

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[57] Tr. 644.

[58] CX-53, at 1.

[59] CX-52. The judgment was recorded on December 17, 2010. CX-52.

[60] CX-93, at 21.

[61] CX-55. The judgment was recorded on March 24, 2009. CX-55.

[62] CX-56.

[63] Tr. 1076-77.

[64] Tr. 1076-81.

[65] CX-57. The judgment was recorded the same day. CX-57.

[66] CX-59.

Ottimo testified that he did not know about this judgment because he was not involved with this lawsuit.[67] He claimed that his father handled everything and "kind of hid it from me."[68] Again, the Panel did not find Ottimo's testimony to be credible. On July 9, 2009, approximately one month after the court entered the judgment, counsel for EKN sent an email to Ottimo and others discussing the need to try to vacate the judgment.[69] Attached to the email were affidavits for Ottimo and others to sign and submit with a motion to vacate the judgment.[70] Ottimo's affidavit stated, "As soon as I learned there was a judgment filed against me, I brought this Motion."[71] Ottimo signed the affidavit.[72] He also filed a motion with the court to vacate the judgment, which was granted on September 9, 2009.[73]

While Ottimo claimed to be unaware of this judgment, he was also questioned about this judgment during his investigative testimony in October 2010, February 2013, and March 2013.[74]

2. Tax Liens

Ottimo was the subject of seven tax liens imposed by the Internal Revenue Service ("IRS") and the New York State Department of Taxation and Finance ("NYSDT").[75] Between January and November 2010, in separate written notices sent by certified mail, the IRS informed Ottimo that he had five unsatisfied tax liens against him, totaling $160,129, due to his failure to pay personal income taxes for years 2005, 2006, 2007, 2008, and 2009.[76] In April 2010 and June 2011, in separate written notices sent by regular first-class mail, NYSDT informed Ottimo that he had two unsatisfied tax liens against him, totaling $32,994, due to his failure to pay his state personal income taxes for years 2006, 2008, and 2009.[77]

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[67] Tr. 1060.

[68] Tr. 1060.

[69] CX-61, at 1.

[70] CX-61.

[71] CX-61, at 18.

[72] Tr. 1066, 1068.

[73] CX-59.

[74] Tr. 1069-72.

[75] Tr. 731.

[76] CX-26; CX-27; CX-30; CX-32; CX-33; CX-35; CX-37; CX-40; Tr. 363-64, 368-69, 370, 372-73, 378.

[77] CX-38; CX-39; Tr. 374-75, 383.

The seven tax liens are:

Lien No.	Creditor	Amount	Tax Year	Date of Lien Filing	Date Form U4 Amended
1	IRS	$6,990	2005	1-15-10	9-13-10
2	IRS	$35,675	2006	1-15-10	9-13-10
3	IRS	$44,486 ($35,675 for 2006 and $8,811 for 2007)	2006 2007	2-26-10	9-13-10
4	IRS	$66,035	2008	4-23-10	9-13-10
5	NYSDT	$14,535	2008	4-27-10	9-13-10
6	NYSDT	$18,459	2006 2009	6-27-11	4-19-12
7	IRS	$42,618	2009	11-18-10	6-23-11

As reflected above, Ottimo did not disclose any of the tax liens in a timely manner. Ottimo did not update his Form U4 to disclose the first five of these tax liens until September 13, 2010.[78] He did not report the IRS November 18, 2010 lien on his Form U4 until June 23, 2011,[79] and he did not report the June 27, 2011 NYSDT lien until April 19, 2012.[80]

Ottimo asserted that he was (i) unaware of the liens at the time the IRS and NYSDT imposed them, and (ii) reported them when he learned of them.[81] He testified that the IRS notices "probably got returned to IRS" because he did not retrieve certified IRS mailings from the post office if he was not at home when the postal service attempted delivery.[82] He further testified that, if the notices were delivered, he did not read them because he did not open mail he received from the IRS or the NYSDT.[83] Rather, he said, he gave all that mail to his accountant unopened.[84]

[78] CX-84; Tr. 376.

[79] CX-96; Tr. 379-80.

[80] CX-104; Tr. 384.

[81] Ottimo asserted that he learned of the first five liens in September 2010 when he obtained a copy of his credit report to negotiate a home equity line of credit. Tr. 765-67. Ottimo did not provide the credit report or any other documentary evidence to support his assertion. Tr. 767-70. During Ottimo's investigative testimony in October 2010, Enforcement questioned Ottimo about his tax liens. Tr. 771.

[82] Tr. 773, 826.

[83] Tr. 733, 735-36, 743-44.

[84] Tr. 735; CX-44, at 2.

Ottimo also stated that his accountant and tax attorney did not notify him of any tax lien notices.[85] Ottimo's accountant confirmed that he did not notify Ottimo of any tax liens.[86] However, the accountant stated that Ottimo was well aware of the liabilities he owed to the federal and state government for unpaid taxes.[87] Ottimo's accountant testified that Ottimo would periodically bring him stacks of mail from the IRS, and possibly NYSDT, and a large portion of it was unopened.[88] The accountant testified that, during a meeting with Ottimo in December 2009, he warned Ottimo that "it could get nastier, [Ottimo] could be facing liens if he doesn't address the issue …."[89] The accountant referred Ottimo to a tax attorney in the hopes of working out a compromise with the IRS for the unpaid taxes.[90]

The accountant and Ottimo met with the tax attorney in December 2009.[91] The tax attorney testified that his representation of Ottimo was precipitated by the threat of a levy action.[92] He stated that he did not inform Ottimo of any IRS tax liens.[93] However, according to the tax attorney, there was no reason to do so as he was engaged strictly for the purpose of working out a compromise with the IRS for Ottimo's outstanding tax liabilities.[94] Ultimately, the tax attorney was not successful in obtaining a compromise with the IRS, and Ottimo discharged him.[95]

As Ottimo's accountant confirmed, throughout this period, Ottimo was well aware of his difficulties with the federal and state tax authorities. Ottimo signed his tax returns, and he knew that he had not paid his taxes for several years.[96] Ottimo confirmed that he received numerous mailings from the tax authorities.[97] According to Ottimo, in the years leading up to the tax liens, he was getting letters from the IRS at a rapid pace and it was overwhelming.[98]

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[85] Tr. 742, 747-48, 755, 810.

[86] Tr. 1094, 1101, 1105, 1118, 1137, 1138.

[87] Tr. 1143.

[88] Tr. 1135-36.

[89] Tr. 1147.

[90] Tr. 1136.

[91] Tr. 1136.

[92] Tr. 1087.

[93] Tr. 1094.

[94] Tr. 1094, 1101.

[95] Tr. 1102. Another attorney succeeded at getting the IRS to accept a compromise. Tr. 1102.

[96] Tr. 739.

[97] Tr. 738-39; CX-23f; CX-23g; CX-23h; CX-25d; CX-25e; CX-27; CX-28, at 2-3; CX-30, at 2-3; CX-31; CX-32; CX-33, at 2-3; CX-34; CX-36; CX-41; CX-42.

[98] Tr. 734-35, 738.

3. Bankruptcy Filing

On April 27, 2010, Wheatley filed a bankruptcy petition, which Ottimo signed and submitted.[99] In the bankruptcy petition, Ottimo stated that Wheatley had no assets and $1,395,014.97 in liabilities.[100] The petition also listed two pending lawsuits by creditors, including one by Wheatley's landlord seeking eviction and another by Wells Fargo to recover leased office equipment.[101] Wheatley dismissed that bankruptcy petition on August 2, 2010, after resolving its issues with the landlord.[102]

Ottimo failed to amend his Form U4 to disclose the bankruptcy petition until April 19, 2012— two years after the date of the bankruptcy filing.[103] Between the filing of the bankruptcy petition and Ottimo's April 2012 Form U4 amendment, he filed 22 Form U4 amendments, but did not report Wheatley's bankruptcy filing on any of them.[104]

Ottimo argues that the bankruptcy was not a "real" bankruptcy, but merely a "tactical procedural decision" to delay any action by the landlord as a result of unpaid rent for EKN's offices.[105] Ottimo also blames EKN's chief compliance officer for the failure to report the bankruptcy. He argues that, when the compliance officer notarized Ottimo's signature on affidavits that accompanied the bankruptcy filing, the compliance officer failed to advise him that a Form U4 amendment was required.[106] The compliance officer, however, testified that he was simply acting in the capacity of a notary public and that Ottimo never asked him to amend his Form U4.[107]

III. CONCLUSIONS OF LAW

A. Ottimo Fraudulently Omitted Material Facts In Violation Of Federal Securities Laws And FINRA Rules

The Complaint charges Ottimo with violating Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010, by fraudulently omitting material facts from his biography that he included in the PPM for First Secondary.

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[99] CX-66.

[100] CX-66, at 6.

[101] CX-66, at 12, 16.

[102] CX-70.

[103] CX-104; Tr. 607-09. In an April 19, 2012 letter to FINRA, Ottimo acknowledged that he knew about the Wheatley bankruptcy, but claimed that he did not timely disclose it on his Form U4 because he was not aware that he was required to do so. CX-68.

[104] CX-1a; CX-83 – CX-104.

[105] RX-1, at 4; Tr. 611.

[106] RX-2; Tr. 612-16.

[107] Tr. 903-04, 913-14.

Section 10(b) of the Exchange Act prohibits fraudulent and deceptive practices in connection with the purchase or sale of a security.[108] FINRA Rule 2020 similarly prohibits effecting "any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."[109] A violation of Section 10(b) is also a violation of FINRA Rule 2020.[110] Violations of these securities laws also constitute violations of FINRA Rule 2010 because such conduct is inconsistent with "high standards of commercial honor and just and equitable principles of trade."

Section 10(b) of the Exchange Act broadly proscribes securities fraud in violation of rules promulgated by the Securities and Exchange Commission ("SEC"), including Rule 10b-5. Rule 10b-5 provides that it is unlawful to "omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."[111] A Rule 10b-5 violation requires proof of the following: (i) a false statement or a misleading omission of a material fact; (ii) made with the requisite scienter or state of mind; (iii) using the jurisdictional means; (iv) in connection with the purchase or sale of a security.[112]

In this case, it is clear that the last two elements are satisfied. The jurisdictional requirements of Section 10(b) and Rule 10b-5 are satisfied by the distribution of the PPM; and the omissions from the PPM were in connection with the sale of securities—*i.e.*, shares of First Secondary. Accordingly, to establish that Ottimo violated Section 10(b), Rule 10b-5, and FINRA Rules 2010 and 2120, Enforcement must prove the remaining elements by a preponderance of the evidence. Specifically, Enforcement must prove that (i) the negative information regarding Jet One and Wheatley that Ottimo omitted from his biography in the PPM was material and that disclosure of that information was required, under the circumstances, to make the PPM not misleading; and (ii) Ottimo failed to disclose the omitted facts with the required state of mind, or scienter; that is, he knowingly or recklessly failed to disclose the additional facts regarding his past business activities.

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[108] 17 C.F.R. 240.10b-5.

[109] Unlike Exchange Act Rule 10b-5(b), FINRA's antifraud rule language under Rule 2020 does not require that a respondent be the "maker" of a false statement or misleading omission. *See Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *29-20 (May 27, 2015) (discussing the distinction between Rule 10b-5 and NASD Rule 2120 (now FINRA Rule 2020)). Here, both Rule 10b-5 and FINRA Rule 2020 apply to Ottimo's misconduct because he was the "maker" of the omitted material information.

[110] *Dep't of Enforcement v. Thomas Weisel Partners, LLC*, No. 2008014621701, 2013 FINRA Discip. LEXIS 1, at *15 (NAC Feb. 15, 2013).

[111] 17 C.F.R. 240.10b-5(b).

[112] *Gebhart v. SEC*, 595 F.3d 1034, 1040 and n.8 (9th Cir. 2010) (affirming SEC decision in NASD (now FINRA) disciplinary case charging Rule 10b-5 fraud and distinguishing enforcement securities fraud action from private securities fraud action).

1. Material, Misleading Omissions

Information is material and must be disclosed "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] … [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[113] The SEC has held that a misleading claim about the registered representative's record of success (consistently achieving a top ranking) was "material because [the registered representative's] financial acumen is a fact that would be important to a potential investor." [114]

Here, the PPM stated that "no party should make any investment in [First Secondary] unless such party is willing to entrust all aspects of [First Secondary's] management to the Manager." Ottimo's omissions as to his business background hid material facts that investors deserved to know prior to entrusting their money to First Secondary, a company over which Ottimo exercised unfettered discretion.

Ottimo argued that the omissions in the PPM were not material because many of the First Secondary investors executed letters stating that they would have invested in First Secondary even if they had known about Ottimo's complete background.[115] The Panel finds it unnecessary to determine the motivations of the First Secondary investors who executed letters at Ottimo's request. The test for whether an omitted fact is material is objective, not subjective. In this case, the Panel finds it clear, given Manager's broad discretion and Ottimo's role within Manager, that negative information regarding Ottimo's prior businesses would have been considered significant by a reasonable investor contemplating investing in First Secondary.

The Panel concludes that the negative information regarding Jet One and Wheatley, which Ottimo omitted from his biography in the PPM, was material. The Panel further concludes that disclosure of the negative history of Jet One and Wheatley was necessary, in light of the positive statements in Ottimo's biography touting his past business successes, to make the PPM not misleading. Put simply, Ottimo may not tout his past business successes without providing a balanced disclosure of negative information necessary to allow potential investors to fairly evaluate his business history.[116]

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[113] *Dep't of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *29 (NAC July 28, 2011).

[114] *Brian Prendergast*, 55 S.E.C. 289, 302 (2001).

[115] CX-111; Tr. 694. Ottimo caused the letters to be sent to the First Secondary investors. Tr. 690.

[116] *See Kunzweiler v. Zero.Net, Inc*., No. 00-CV-2553, 2002 U.S. Dist. LEXIS 12080, at *32 (N.D. Tex. July 3, 2002) (explaining that "Rule 10b-5 creates a statutory duty to speak the full truth when a defendant undertakes to say anything in the first place").

2. Scienter

Scienter is defined as a mental state embracing intent to deceive, manipulate, or defraud. Scienter is established if a respondent acted intentionally or recklessly.[117] Reckless conduct includes a highly unreasonable omission, involving an extreme departure from the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the respondent or is so obvious that he must have been aware of it.[118]

Both the SEC and federal courts have found scienter when a respondent withholds important information from investors. In *LeadDog Capital Markets*, the SEC held that where a principal's biography in a PPM excluded his disciplinary history, including his expulsion by FINRA, the principal "had at least a reckless degree of scienter in withholding it." The SEC noted that "[t]hese omissions were clearly intentional and intended to keep potential investors from learning information that an investor might consider pejorative."[119] In *SEC v. Carriba Air*, the 11th Circuit Court of Appeals found scienter where a prospectus pertaining to a new airline did not fully disclose the principal's close connection with a prior bankrupt airline and other failed business ventures. The court stated that the principal was "extremely reckless, to say the least, in not correcting the glaring omissions contained in the prospectus regarding his role in [the prior bankrupt airline]."[120]

Ottimo was Wheatley's president and the co-owner of Jet One. He had actual knowledge of Wheatley's and Jet One's business performance, as well as Wheatley's bankruptcy and Jet One's disciplinary history with the Department of Transportation. He also knew that the PPM was a disclosure document for the First Secondary investors. With that knowledge, when he drafted his biography, he did not disclose any negative information regarding Wheatley and Jet One. He knew, or was reckless in not knowing, that his biography omitted material facts concerning his prior business experience. The Panel finds that Ottimo acted with scienter in failing to disclose material information in his biography.

Ottimo argues that he did not intend to withhold the negative financial information regarding Wheatley and Jet One, and that he relied on counsel to assist him with the PPM.[121] He stated that his counsel should have told him to include the negative information.[122] However, Ottimo offered none of the details required to establish that he

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[117] *Alvin Gebhart and Donna Gebhart v SEC* 595 F.3d 1034, 1041 (9th Cir. 2010) ("Scienter may be established, therefore, by showing that the defendants knew their statements were false, or by showing that defendants were reckless as to the truth or falsity of their statements.").

[118] *Burch*, 2011 FINRA Discip. LEXIS 16, at *32-33 (citations omitted).

[119] *LeadDog Capital Markets, LLC*, 2012 SEC LEXIS 2918 at *41, *43 (Sept. 14, 2012).

[120] *SEC v. Carriba Air, Inc,*, 681 F.2d 1318, 1324 (11th Cir. 1982).

[121] Tr. 714.

[122] Tr. 714.

sought legal advice, received it, and reasonably relied on the advice he was given.[123] He provided no evidence that his counsel were even aware of the negative information regarding Wheatley and Jet One, much less advised Ottimo to withhold the information.[124] Therefore, the Panel rejects Ottimo's advice of counsel defense.

3. Conclusion

Ottimo created First Secondary and Manager, and was the CEO of both entities.[125] He personally sold First Secondary shares to two investors. All First Secondary investors, including the two customers that Ottimo personally sold shares to, received the PPM in connection with their purchases of First Secondary shares.

Ottimo knew that the PPM was utilized to solicit investors and he understood that it was a disclosure document. He drafted his biographical information for inclusion in the PPM. Ottimo had "ultimate authority over [his biography], including its content and how to communicate it."[126] He made the omissions of material fact that caused the biography in the PPM to be misleading.

The Panel concludes that Ottimo fraudulently omitted material facts from his biography in the First Secondary PPM, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

B. Ottimo Willfully Failed To Timely Disclose Material Facts On His Form U4 In Violation Of FINRA By-Laws, Interpretive Memorandum, And Rules

The Complaint charges Ottimo with violating FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws, by willfully failing to amend, or timely amend, his Form U4 to report judgments, tax liens, and a bankruptcy filing.

Article V, Section 2 of FINRA's By-Laws requires that associated persons applying for registration with FINRA provide "such . . . reasonable information with respect to the applicant as [FINRA] may require" and further states that such applications "shall be kept current at all times by supplementary amendments . . . filed . . . not later than 30 days after learning of the facts or circumstances giving rise to the amendment."

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[123] *See Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 SEC LEXIS 2977, at *52 (Sept. 13, 2010) (holding that an assertion of the defense of reliance on counsel requires a respondent to show full disclosure to counsel, seeking and obtaining legal advice, and reasonable reliance on the advice).

[124] Tr. 715-17.

[125] Ottimo had a financial incentive for the success of the First Secondary private placement. At a minimum, he was entitled to management fees pursuant to the agreement between First Secondary and Manager, as well as commissions on shares of First Secondary that he sold.

[126] *Mitchell H. Fillet*, 2015 SEC LEXIS 2142, at *44 (citation omitted).

To implement this provision, FINRA Rule 1122, like its predecessor NASD IM-1000-1, prohibits associated persons from filing or failing to correct registration information that is incomplete or inaccurate so as to be misleading. These provisions are intended to ensure that the Forms U4 of registered persons contain accurate, up-to-date information so that regulators, employers, and members of the public "have all material, current information about the securities professional with whom they are dealing."[127]

Filing a false or incomplete Form U4, or failing to timely amend a Form U4, violates FINRA Rule 1122 and NASD IM-1000-1.[128] FINRA Rule 2010 requires FINRA members and their associated persons to observe high standards of commercial honor and just and equitable principles of trade, which "includes disclosing accurately and fully information required in the Form U4 …."[129]

Ottimo offered a variety of explanations for his failures to amend his Form U4 to disclose the judgments, tax liens, and bankruptcy. Although he knew judgments were reportable, as reflected by the fact that he reported the Shelvin Plaza judgment on his Initial Form U4, for the remaining five judgments Ottimo claimed that he did not know that the legal disputes were reduced to judgments. As noted above, the Panel did not find Ottimo's testimony to be credible. The evidence revealed that Ottimo played a significant role in the underlying legal disputes, such as receiving notices from the court and opposing parties, going to court to contest the claims, communicating with counsel, and taking steps to vacate or settle the judgments.

Regarding the tax liens, Ottimo claimed that he was not aware of any of them because he did not open his mail from the IRS or NYSDT; rather, he forwarded his unopened mail to his accountant and tax attorney. This is not a valid defense. In *Department of Enforcement v. Scott Mathis*, the respondent argued, like Ottimo, that "he did not extensively review the notices of tax liens because he immediately forwarded them to his accountant who was handling negotiations with the IRS on a payment plan to address his federal tax debt."[130] The National Adjudicatory Council ("NAC") rejected respondent's argument and held that the respondent willfully violated his Form U4 obligations, noting that "the obligation to keep the Form U4 current falls squarely on the registered representative."[131]

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[127] *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *17-18 (Oct. 20, 2011).

[128] *See, e.g.*, *Dep't of Enforcement v. Scott Mathis*, No. C10040052, 2008 FINRA Discip. LEXIS 49, at *16-17 (NAC Dec. 12, 2008), *aff'd*, *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376 (Dec. 7, 2009), *aff'd*, *Mathis v. SEC*, 671 F.3d 210 (2d Cir. 2012).

[129] *Dep't of Enforcement v. North Woodward Financial Corp.*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *17 n. 13 (NAC July 21, 2014).

[130] *Mathis*, 2008 FINRA Discip. LEXIS 49, at *11.

[131] *Mathis*, 2008 FINRA Discip. LEXIS 49, at *16.

Ottimo also claimed that, although he knew about the Wheatley bankruptcy, he did not know it required disclosure. Again, the Panel finds that Ottimo's assertion is not credible. Ottimo should have known that bankruptcies were reportable given his familiarity with the Form U4. Between the time that he filed the Wheatley bankruptcy and ultimately reported it on his Form U4, he had read, completed, and submitted 22 Form U4 amendments. In any event, his claim that he did not know that he needed to report the bankruptcy is not a valid defense. A registered representative is presumed to know and abide by FINRA rules.[132]

The Panel concludes that Ottimo violated FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws, by failing to amend, or timely amend, his Form U4 to report judgments,[133] tax liens, and a bankruptcy filing.

The Panel also concludes that (i) Ottimo's failure to disclose, or timely disclose, the judgments, tax liens, and bankruptcy filing was willful, and (ii) the information was material. In holding that his failure to disclose, or timely disclose, was willful, the Panel need not find that he intended to violate FINRA's rules; rather, we need only find that Ottimo knew what he was doing when he did not amend, or timely amend, his Form U4 to make the disclosures.[134]

In making the willfulness determination, the Panel considered the following facts and circumstances. First, the record reveals that Ottimo was aware of the judgments through communications with the parties, the courts, his counsel, and FINRA. With that knowledge, he failed to amend, or timely amend, his Form U4 despite his filing multiple Form U4 amendments during the relevant time period. Second, although he was well aware of his unpaid taxes and difficulties with the taxing authorities, Ottimo deliberately chose not to open important correspondence from the IRS and NYSDT notifying him of tax liens. Third, although Ottimo claimed to be unaware of the need to report the Wheatley bankruptcy, he ultimately reported it on April 19, 2012, over two years late. Ottimo's reporting of the bankruptcy occurred (i) after preparation of the PPM that highlighted his prior business success with companies such as Wheatley, and (ii) approximately one week after First Secondary completed its private placement, raising $3.76 million from 20 EKN customers. All of the information that Ottimo failed to

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[132] *Dep't of Enforcement v. Zayed*, No. 2006003834901, 2010 FINRA Discip. LEXIS 13, at *22 n.19 (NAC Aug. 19, 2010) (citing *Carter v. SEC*, 726 F.2d 472,474 (9th Cir. 1983)).

[133] In light of Ottimo's five other failures to properly disclose civil judgments, the Panel finds it unnecessary to determine whether Ottimo's disclosure of the principal amount of the corrected Shelvin Plaza judgment in his Initial Form U4 was insufficient.

[134] *See Mathis v. SEC*, 671 F.3d 210, 216-18 (2d Cir. 2012) (finding that respondent was statutorily disqualified where he voluntarily failed to amend his Form U4 to disclose tax liens).

disclose, or timely disclose, was material both because it was reportable on the Form U4[135] and critical to assessing his fitness to work in the securities industry.[136]

As a result of the Panel's finding that Ottimo's failure to disclose was willful, Ottimo is subject to statutory disqualification for his failure to amend, or timely amend, his Form U4.[137]

IV. SANCTIONS

A. Fraudulent Omissions

The FINRA Sanction Guidelines ("Guidelines") set forth a range of sanctions for misconduct involving misrepresentations or omissions of material fact. If the misconduct is intentional or reckless, the Guidelines require the adjudicator to strongly consider barring the individual. If mitigating factors predominate, adjudicators should consider suspending the individual in any or all capacities for anywhere between six months and two years and imposing a fine of $10,000 to $146,000.[138]

The Sanction Guidelines also set forth Principal Considerations in Determining Sanctions ("Principal Considerations"). Those relevant to this case include: whether Ottimo's misconduct was the result of an intentional act or recklessness;[139] whether Ottimo accepted responsibility for or acknowledged the misconduct;[140] whether he demonstrated reasonable reliance on competent legal advice;[141] whether the misconduct resulted in the potential for monetary gain;[142] and whether the misconduct resulted in injury to the investing public.[143] Applying these factors leads the Panel to conclude that Ottimo's misconduct was egregious.

The Panel determined that Ottimo's misconduct was intentional, or at a minimum reckless. Having held key positions in Wheatley and Jet One, Ottimo was clearly aware

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[135] *Dep't of Enforcement v. Knight*, No. C10020060, 2004 NASD Discip. LEXIS 5, at *13 (NAC Apr. 27, 2004).

[136] *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *32 (Nov. 9, 2012) (citing *Mathis*, 671 F.3d at 220).

[137] *See* Section 3(a)(39)(F) of the Exchange Act; Section 4 of Article III of FINRA's By-Laws; *see also Dep't of Enforcement v. Kraemer*, No. 2006006192901, 2009 FINRA Discip. LEXIS 39, at *15 (NAC Dec. 18, 2009) (stating that willful omission of material information on Form U4 results in statutory disqualification).

[138] FINRA Sanction Guidelines at 88 (2015), https://www.finra.org/industry/sanction-guidelines.

[139] Guidelines at 7 (Principal Consideration No. 13).

[140] Guidelines at 6 (Principal Consideration No. 2).

[141] Guidelines at 6 (Principal Consideration No. 7).

[142] Guidelines at 7 (Principal Consideration No. 17).

[143] Guidelines at 6 (Principal Consideration No. 11).

of their financial difficulties and disciplinary history. With that knowledge, he failed to ensure his biography accurately depicted the true nature of his prior business ventures.[144]

The Panel found that Ottimo did not accept responsibility for his misconduct. He continued to argue that the omitted information was not material and that, because he used counsel to help with the creation of the PPM, he should not be liable for the contents of his biography. In addition, he argued that much of the omitted information was available through an internet search. Although Ottimo hired counsel to help create the PPM, he drafted his own biography, and there was no evidence presented that he consulted counsel, or sought their advice, on what should be included. There was no evidence that his counsel were even aware of the negative information regarding Wheatley and Jet One, much less provided advice to Ottimo with regard to it. Accordingly, the Panel finds that Ottimo did not reasonably rely on counsel for the contents of his biography.

Ottimo's misconduct resulted in monetary gain. While Ottimo gained financially, there was no evidence of any investor losses or other injury.

Having considered the above factors, the Panel concludes that a bar in all capacities from associating with any FINRA member is the appropriate sanction for this violation.

B. Failure To Amend, Or Timely Amend, Form U4

The Guidelines for misconduct involving a Form U4 recommend a fine of between $2,500 and $73,000 and a suspension of five to thirty business days.[145] In egregious cases, such as those involving repeated failures to file, untimely filings, or false, inaccurate, or misleading filings, the Guidelines recommend considering a longer suspension of up to two years, or a bar, for the responsible individual.[146]

In evaluating the appropriate sanctions to impose, the Guidelines provide three principal considerations specific to Form U4 violations, only one of which—the nature and significance of the information at issue—is relevant here.[147] The nature of the information Ottimo failed to disclose is significant. The information related to civil judgments against him, personal tax liens, and a bankruptcy filing for a company he

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[144] When Ottimo finally reported the Wheatley bankruptcy on his Form U4, it was approximately two weeks after First Secondary completed its private placement in connection with the Facebook offering.

[145] Guidelines at 69.

[146] Guidelines at 70.

[147] Guidelines at 69. There are two other principal considerations applicable to Form U4 violations: whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm; and whether a firm's misconduct resulted in harm to a registered person, another member firm, or any person or entity. Neither consideration applies in this case.

controlled, implicating Ottimo's financial stability, judgment, and ability to manage his own finances as well as presenting a concern about his ability to handle the finances of others.[148]

When considering the Principal Considerations, the Panel also found the following aggravating factors. First, Ottimo intentionally withheld the requested information, all of which was in his possession and control.[149] Even after FINRA investigators questioned Ottimo about the Hamilton Equity and Bainton McCarthy judgments, he did not amend his Form U4 to disclose the judgments. Second, the evidence shows that this was not an isolated occurrence.[150] Ottimo's failure to disclose, or timely disclose, required information on his Form U4 related to 13 separate matters that occurred over an extended period of time.[151] Third, Ottimo has not acknowledged his misconduct.[152] Instead, he testified that he was unaware of the judgments and tax liens, and did not know that he was required to disclose the bankruptcy. In fact, he blamed others for his misconduct. Ottimo stated that his father kept him in the dark regarding the Bainton McCarthy litigation and the resulting judgment, yet he personally signed and submitted an affidavit and a motion to vacate the Bainton McCarthy judgment. He stated that his accountant and his tax attorney never told him about the tax liens, although it was his decision not to open the IRS and NYSDT letters. Lastly, Ottimo blamed EKN's compliance officer for not telling him to amend his Form U4 after the compliance officer notarized a document associated with the Wheatley bankruptcy filing; however, Ottimo never asked for any advice on whether he should report the bankruptcy.

Ottimo's willful misconduct was not the result of a momentary lapse of judgment, aberrant behavior, or negligence that could establish mitigation. His willful violations of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws warrant a two-year suspension in all capacities and a $25,000 fine. We do not impose such sanctions, however, in light of the bar imposed for Ottimo's fraud violation.

V. ORDER

The Hearing Panel concludes that Ottimo fraudulently omitted to disclose material information in a personal biography that was included in offering documents for the sale of securities, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010. In light of the Panel's conclusion on the fraud charge, the alternative charge that the omissions violated Sections 17(a)(2) and (3) of the Securities Act is dismissed. The Panel also concludes that Ottimo willfully failed to timely disclose material information on his Form U4, including judgments, tax liens,

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[148] *See Dep't of Enforcement v. Tucker*, No. 2007009981201, 2011 FINRA Discip. LEXIS 66, at *30 (NAC Oct. 4, 2011).

[149] Guidelines at 7 (Principal Consideration No. 13).

[150] Guidelines at 6 (Principal Consideration No. 8).

[151] Guidelines at 6 (Principal Consideration No. 9).

[152] Guidelines at 6 (Principal Consideration No. 2).

and a bankruptcy filing, in violation of FINRA Rules 1122 and 2010, NASD IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws.

For his fraudulent failure to disclose material information in the sale of securities, Ottimo is barred in all capacities from associating with any FINRA member. In light of the bar, the suspension and fine associated with Ottimo's Form U4 violations are not imposed. Because Ottimo's Form U4 violations involved the willful failure to disclose material information, he is subject to a statutory disqualification. In addition, Ottimo is ordered to pay costs in the amount of $11,037.51, which amount includes the hearing transcript fees and an administrative fee of $750.

If this decision becomes FINRA's final disciplinary action, the bar shall be effective upon service of this decision. The assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.[153]

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Maureen A. Delaney
Hearing Officer
For the Extended Hearing Panel

[153] The Panel considered and rejected without discussion all other arguments of the parties.