

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

BRIAN MICHAEL WHITE  
(CRD No. 5126711),

Respondent.

Disciplinary Proceeding  
No. 2012033128703

Hearing Officer—DRS

**HEARING PANEL DECISION**

June 30, 2015

**Respondent Brian Michael White: (1) engaged in undisclosed outside business activities in violation of NASD Rule 3030 and FINRA Rules 3270 and 2010; (2) participated in an undisclosed private securities transaction in violation of NASD Rule 3040 and FINRA Rule 2010; and (3) provided false testimony to FINRA staff at an on-the-record interview in violation of FINRA Rules 8210 and 2010. For providing false testimony, White is barred in all capacities from associating with any FINRA member. In light of the bar, no further sanctions are imposed for White's other violations. White is also ordered to pay hearing costs.**

**Appearances**

For the Department of Enforcement, Complainant, Robin W. Sardegna, Esq., and Gregory R. Firehock, Esq., Rockville, Maryland.

For Brian Michael White, Respondent, Robert Medina, Esq., Houston, Texas.

**DECISION**

**I. Introduction**

While registered with a FINRA member firm, Respondent Brian Michael White engaged in undisclosed outside business activities through an entity named SMW Ventures, LP, a Texas limited partnership. White also participated in an undisclosed private securities transaction involving the sale of a promissory note to his mother. Later, during an investigation conducted by FINRA staff, White testified falsely at an on-the-record interview ("OTR") regarding his knowledge about, and involvement with, SMW Ventures.

Based on this conduct, the Department of Enforcement filed a complaint against White on May 15, 2014, charging him with violating NASD Rule 3030 and FINRA Rules 3270 and 2010 by engaging in undisclosed outside business activities; violating NASD Rule 3040 and FINRA Rule 2010 by participating in an undisclosed private securities transaction; and violating FINRA Rules 8210 and 2010 by providing false testimony at his OTR. White filed an answer denying all charges and requesting a hearing.

A hearing was held on December 17–18, 2014, and February 3–4, 2015, in Dallas, Texas. At the hearing, White maintained that he thought SMW Ventures was a nascent, and later abandoned, in-house producer group at his firm and not an outside business activity. Further, he denied knowing that SMW Ventures engaged in any outside business activities and denied any involvement in them. White also denied participating in the sale of a promissory note to his mother. Finally, he denied testifying untruthfully (except in one respect) at his OTR. The Hearing Panel rejects White’s denials and concludes that Enforcement proved the violations charged in the Complaint.

## **II. Findings of Fact**

### **A. Respondent Brian Michael White**

White first became associated with a FINRA member firm in April 2006.<sup>1</sup> From August 2007 through November 2008, and from December 2008 through August 17, 2011, he was registered as a general securities representative with AXA Advisors, LLC (“AXA” or “Firm”).<sup>2</sup> White was last registered or associated with a FINRA member firm from September 2012 until October 29, 2013.<sup>3</sup>

### **B. White Engages in an Unapproved Outside Business Activity.**

As discussed below, White engaged in an unapproved outside business activity through SMW Ventures. At around the time he began this activity, White also considered forming an AXA producer group named SMW Advisors. That group never materialized. Nevertheless, understanding the nature of SMW Advisors, and how it differed from SMW Ventures, is central to this case. Accordingly, we begin our discussion of White’s activities regarding SMW Advisors.

---

<sup>1</sup> Answer (“Ans.”) ¶ 2; Stipulations (“Stip.”) ¶ 1; Joint Exhibit (“JX-\_\_”) 48, at 2.

<sup>2</sup> Stip. ¶ 23; JX-48, at 1.

<sup>3</sup> Ans. ¶ 2; Stip. ¶ 1; JX-48, at 1. Although White is no longer associated with a FINRA member firm, he remains subject to FINRA’s jurisdiction for the purposes of this proceeding, under Article V, Section 4(a) of FINRA’s By-Laws, because the Complaint (1) was filed within two years after the effective date of the termination of his registration with his last member firm; and (2) charges him with misconduct committed while he was registered with a FINRA member.

## **1. White Considers Forming an AXA Producer Group with Sak and McDonough**

In the summer of 2010, White worked as a registered representative in AXA's office located in The Woodlands, a Houston, Texas suburb.<sup>4</sup> His responsibilities were administrative and back office-related, and did not include prospecting, marketing, or presenting proposals to clients.<sup>5</sup> John McDonough was the sales manager (also referred to as the district manager) for The Woodlands office<sup>6</sup> and had hired White.<sup>7</sup> McDonough was White's direct supervisor, mentor, and trainer.<sup>8</sup> The two worked closely together in the same office and became friends.<sup>9</sup> Brian Sak, another AXA sales manager, also worked in The Woodlands office, among other offices.<sup>10</sup> Sak reported to Jeffrey Moore,<sup>11</sup> the branch manager in charge of the offices in the Houston area.<sup>12</sup> Moore oversaw the registered representatives (including the sales managers) in The Woodlands office.<sup>13</sup> Moore had ultimate supervisory authority over the personnel in that office, including White.<sup>14</sup>

By the summer of 2010, Sak and McDonough decided to withdraw from management and focus their energies on production. To that end, they discussed forming their own producer group at the Firm.<sup>15</sup> Producer groups consisted of producers with complementary skill sets who worked jointly with clients.<sup>16</sup> AXA recognized two types of producer groups: informal and formal.<sup>17</sup> Unofficial or informal groups did not require AXA approval.<sup>18</sup> But if a producer group wished to operate under a "d/b/a" name, or use its own letterhead and stationery separate from the AXA name, then it was considered a formal group, requiring both branch manager and home

---

<sup>4</sup> Hearing Transcript ("Tr.") 58, 60, 194–95.

<sup>5</sup> Tr. 59–60. *See also* Tr. 237–38. White continued in this role in 2011 as well. Tr. 456–57.

<sup>6</sup> Tr. 58, 61, 196.

<sup>7</sup> Tr. 594.

<sup>8</sup> Tr. 782–83. White reported directly to McDonough until McDonough left management on December 31, 2010. Tr. 169–70.

<sup>9</sup> Tr. 582.

<sup>10</sup> Tr. 58–59.

<sup>11</sup> Tr. 590.

<sup>12</sup> Tr. 54–57.

<sup>13</sup> Tr. 61.

<sup>14</sup> Tr. 170.

<sup>15</sup> Tr. 594.

<sup>16</sup> Tr. 88–89.

<sup>17</sup> Tr. 88–89.

<sup>18</sup> Tr. 184–85.

office approval.<sup>19</sup> Additionally, if the group wanted to market itself to the outside public, AXA approval was needed.<sup>20</sup> Finally, any entity-related agreement, such as a partnership agreement, also needed AXA approval prior to formation.<sup>21</sup> There was an economic advantage to working in a producer group—AXA permitted group members to aggregate their production and, accordingly, they received a higher payout than those who were not part of a group.<sup>22</sup>

In July 2010, Sak, McDonough and White attended an AXA “state of the branch” conference in Austin, Texas.<sup>23</sup> During the conference, McDonough and Sak approached White<sup>24</sup> and asked him to join the producer group they were starting and to serve in an administrative role, including overseeing staff.<sup>25</sup> They also agreed upon a name for their group: SMW Advisors,<sup>26</sup> based on the first letter of their last names.<sup>27</sup> Sometime between the summer and fall of 2010, they decided to share business “unofficially” as a partnership under the AXA business model.<sup>28</sup> From around September 2010 to the end of the year, they split commissions.<sup>29</sup> They also created a business plan for SMW Advisors.<sup>30</sup> Meanwhile, Sak and McDonough met with Moore and told him they wanted to transition out of management.<sup>31</sup> At no time, however, did they submit to Moore a request to form a producer group.<sup>32</sup>

In the end, notwithstanding their initial plans, SMW Advisors was never formed<sup>33</sup> and did not materialize as a producer group.<sup>34</sup> Instead, by the end of 2010, McDonough and Sak relinquished their managerial roles,<sup>35</sup> and by January 2011,<sup>36</sup> along with White, joined Granite

---

<sup>19</sup> Tr. 89–90, 95, 97–98, 129–30, 595.

<sup>20</sup> Tr. 596.

<sup>21</sup> Tr. 104.

<sup>22</sup> Tr. 773–74.

<sup>23</sup> Tr. 203.

<sup>24</sup> Tr. 237, 594, 775.

<sup>25</sup> Tr. 204–05, 237–38.

<sup>26</sup> Tr. 594–95.

<sup>27</sup> Tr. 207, 775.

<sup>28</sup> Tr. 587.

<sup>29</sup> Tr. 587, 596.

<sup>30</sup> Tr. 596–97.

<sup>31</sup> Tr. 598.

<sup>32</sup> Tr. 92–93, 595–96. According to White, he thought that Sak and McDonough had kept Moore apprised of their intentions to form a producer group and that Moore had approved it. Tr. 797–98, 802. *See also* Tr. 928, 932.

<sup>33</sup> Tr. 596.

<sup>34</sup> Tr. 345, 774–75.

<sup>35</sup> Tr. 59.

<sup>36</sup> Tr. 134, 599.

Harbor Advisors, an existing producer group at AXA.<sup>37</sup> White and McDonough's involvement with this producer group was short-lived. At the end of May 2011, McDonough resigned voluntarily from AXA,<sup>38</sup> and White, around that time or shortly afterward, left the producer group.<sup>39</sup>

At some point, White went into business with McDonough at an entity named The Studemont Group LP, where White worked until April 2012.<sup>40</sup> According to White, McDonough created Studemont to transact business similar to what they had done at AXA, namely, "[l]ife insurance, annuities, things of that nature."<sup>41</sup> The evidence was conflicting and inconclusive about whether White joined Studemont before or after he left AXA, and whether both he and McDonough had created it, or just McDonough.<sup>42</sup>

But well before Sak, McDonough, and White abandoned their plans to form SMW Advisors in favor of joining Granite Harbor Advisors, they turned their attention to a new venture: they decided to form an outside business activity entity that came to be known as SMW Ventures, LP ("SMW Ventures").<sup>43</sup> The outside business activity charges in this case derive from White's involvement with that entity.

## **2. White Forms SMW Ventures with McDonough and Sak.**

SMW Ventures grew out of McDonough's idea of selling men's blazers bearing professional sports team logos to business professionals, thus combining business and athletic wear.<sup>44</sup> At the end of July, 2010, White and McDonough raised the concept with Sak at a conference.<sup>45</sup> McDonough suggested they form a partnership through which they could work together on a variety of business projects, such as a vitamin distribution venture,<sup>46</sup> and share in the investments.<sup>47</sup> Unlike their plans for SMW Advisors, SMW Ventures was to serve as a vehicle for them to engage in outside business activities.<sup>48</sup>

---

<sup>37</sup> Tr. 92, 589. *See also* Tr. 599.

<sup>38</sup> JX-49, at 2.

<sup>39</sup> Tr. 805.

<sup>40</sup> Stip. ¶ 25.

<sup>41</sup> Tr. 356, 359.

<sup>42</sup> Stip. ¶ 24; Tr. 360, 913, 917; JX-23, at 3, ¶¶ 4.1, 4.2.

<sup>43</sup> Tr. 599–600.

<sup>44</sup> Tr. 600, 617.

<sup>45</sup> Tr. 600–01; Respondent's Exhibit ("RX-\_\_") 75.

<sup>46</sup> Tr. 601–02.

<sup>47</sup> Tr. 671. In part, SMW Ventures was also formed so they could sell fixed annuities that could not be sold through AXA. Tr. 654.

<sup>48</sup> Tr. 602–03.

In July and August 2010, the three had several meetings with an attorney to discuss the formation of a partnership relating to SMW.<sup>49</sup> The record is unclear, however, about which meetings focused on forming a producer group (SMW Advisors) and which ones focused on forming an outside business entity, and whether White attended all the meetings with the lawyer. In any event, on July 16 and August 11, 2010, Sak, McDonough, and White met with the attorney that prepared the documents that formed SMW Ventures,<sup>50</sup> and at those meetings they discussed SMW Ventures.<sup>51</sup>

In August 2010, these meetings culminated in Sak, McDonough, and White signing a partnership agreement creating SMW Ventures.<sup>52</sup> The four named parties to the partnership were Sak, McDonough, and White, and a limited liability corporation general partner named SMW Ventures GP, LLC.<sup>53</sup> On August 27, 2010, White signed the partnership agreement,<sup>54</sup> one day after McDonough forwarded it to him, along with instructions from the law firm requesting that the agreement be returned for filing.<sup>55</sup>

When communicating regarding these formation activities, at first White used his AXA email account. But at some point, he stopped using that account for these communications and, instead, began using his personal email accounts, including a Yahoo! email account.<sup>56</sup>

### **3. White Engages in SMW Ventures' Business Activities.**

White was not only involved in the formation of SMW Ventures, he also was involved in its business activities. His responsibilities extended to administrative matters, such as business processing and technology.<sup>57</sup> Additionally, he was involved in, and had knowledge of, its various activities, as set forth below.

---

<sup>49</sup> Tr. 210, 604–07, 612–13; CX-5, at 1–2.

<sup>50</sup> CX-5; Tr. 240, 788.

<sup>51</sup> Tr. 245.

<sup>52</sup> Ans. ¶ 5; JX-5, at 11, 12.

<sup>53</sup> Stip. ¶ 7.

<sup>54</sup> Ans. ¶ 39; Stip. ¶ 6.

<sup>55</sup> JX-4; Tr. 228–29 (White testifying that he interpreted the transmittal email sent to him from McDonough as directing him to sign and return the formation documents).

<sup>56</sup> JX-3; JX-4; Tr. 214–15. When asked by a panelist “why, though initially email communication regarding the formation of SMW Ventures flowed through the AXA email addresses, shortly thereafter, everything started communicating through personal email addresses,” he responded: “I don’t have a clear definition as to why that was, no, ma’am.” Tr. 561.

<sup>57</sup> Ans. ¶ 40.

**a) White Opens Two Checking Accounts for SMW Ventures and Funds the Partnership.**

Around the end of September 2010, SMW Ventures opened two checking accounts,<sup>58</sup> one for SMW Ventures LP, and one for SMW Ventures, GP LLC.<sup>59</sup> In connection with opening these accounts, White (along with Sak and McDonough) signed various documents.<sup>60</sup> SMW Venture's checking account statements bore White's home address,<sup>61</sup> as did the checks<sup>62</sup>—the same address appearing on the bank account opening documents that White signed. All account statements for SMW Ventures were sent to White's personal address.<sup>63</sup> Additionally, after opening these checking accounts, White provided initial funding for SMW Ventures on October 4, 2010, by transferring \$2,400 from his checking account into the partnership's checking accounts.<sup>64</sup>

**b) White Participates in Discussions Relating to SMW Ventures' Planned Activities.**

In September 2010, White, McDonough, and Sak had a telephone call during which they discussed various business activities that SMW Ventures might undertake.<sup>65</sup> Sak created notes based on that call and sent them to White and McDonough. Sak sent the notes to White at his AXA email address on September 14, 2010, and White read them in close proximity to that date.<sup>66</sup> The notes include business-related tasks assigned to White, such as “[c]oordinate conference call with [JK].” (According to Sak, JK was McDonough's personal assistant.<sup>67</sup> But McDonough referred to JK as “a contact that we had that was going to assist us in getting a business, a sports coat, suit, up and running.”)<sup>68</sup> Sak's notes also contain various bulleted items, such as “Jacket Deal,” “Tax Site,” and “Vitamin Site.” Regarding the “Jacket Deal” in particular, the notes contain bulleted items, including “Business Plan,” “45 Days to start of season,” “Marketing,” and “Get TNT broadcasters their own jackets.”<sup>69</sup>

---

<sup>58</sup> Tr. 249, 807.

<sup>59</sup> JX-21; JX-22; Tr. 808. The LP was the SMW Ventures business entity. The LLC was its general partner, and Sak, McDonough, and White were the limited partners of the LP. Tr. 808.

<sup>60</sup> CX-6.

<sup>61</sup> Ans. ¶ 41; Stip. ¶ 8.

<sup>62</sup> Tr. 938.

<sup>63</sup> Tr. 1187; JX-21; JX-22.

<sup>64</sup> JX-21, at 1; JX-22, at 1; Tr. 253–54.

<sup>65</sup> Tr. 619–20.

<sup>66</sup> Tr. 569.

<sup>67</sup> Tr. 608.

<sup>68</sup> CX-3, at 21.

<sup>69</sup> JX-6.

In addition to participating in a conference call that included a discussion of a jacket deal, White attended a meeting at his office at The Woodlands that likely related to that planned venture. On some unspecified date, an unidentified man came into the office carrying a sports blazer. McDonough tried on the blazer, displayed it to the staff, asked their opinion of it, including whether they would purchase such a jacket. McDonough, White, and the unidentified man then went into a conference room for a meeting.<sup>70</sup> These circumstances strongly suggest that the meeting related to the jacket deal.

The jacket deal never came to fruition.<sup>71</sup> Further, it is unclear the full range of activities that Sak, McDonough, and White undertook in connection with it. For example, White denies having ever coordinated a conference call with JK.<sup>72</sup> Regardless, SMW Ventures' planned activities were inconsistent with those of an internal AXA producer group.<sup>73</sup> Moreover, White was aware of some of these activities, and participated in discussions about them.

**c) White Is Informed of SMW Ventures Activities Relating to Troy Barrett's Sausage Business.**

One of SMW Ventures activities involved assisting sausage businessman Troy Barrett restructure his business, TBarrett Enterprises. McDonough notified White of these activities. In December 2010, McDonough sent White emails at his SMW email address,<sup>74</sup> including emails forwarding to him slides and a business plan that McDonough had sent to Troy Barrett regarding the restructuring.<sup>75</sup> Using White's SMW Ventures email address,<sup>76</sup> McDonough also forwarded to White an invoice he had sent to Barrett for services rendered by SMW Ventures relating to the restructuring.<sup>77</sup> The invoice also reflects that SMW Ventures LP had become a new minority partner in Barrett's business.<sup>78</sup> These were not services that would be provided by an internal AXA producer group.<sup>79</sup>

---

<sup>70</sup> Tr. 710–11.

<sup>71</sup> Tr. 667–68.

<sup>72</sup> Tr. 568.

<sup>73</sup> Tr. 234. *See also* Tr. 284.

<sup>74</sup> Tr. 267, 269; JX-9; JX-12.

<sup>75</sup> JX-9; JX-12.

<sup>76</sup> Tr. 641.

<sup>77</sup> JX-12, at 3.

<sup>78</sup> JX-12, at 3.

<sup>79</sup> Tr. 272.



**d) White Receives Payments from SMW Ventures.**

White received two payments from SMW Ventures. On December 30, 2010, a check in the amount of \$9,548 was drawn against SMW Ventures' checking account by McDonough.<sup>80</sup> Meanwhile, on that same date, that exact sum was deposited into White's bank account.<sup>81</sup> Further, on January 10, 2011, White wrote a check to himself drawn on an SMW Ventures checking account in the amount of \$365.<sup>82</sup> He testified that he wrote the check to reimburse himself for his payment to the attorney for drafting the partnership agreement.<sup>83</sup>

**4. White Fails to Disclose His Activities with SMW Ventures.**

The AXA Compliance Manuals dated February 2010 and December 2010 required the Firm's registered representatives to disclose all outside business activities ("OBAs") and to "obtain written approval prior to undertaking any OBA."<sup>84</sup> White, however, never obtained written approval from AXA to participate in outside activities through SMW Ventures.<sup>85</sup> Additionally, he failed to disclose to the Firm either the existence of SMW Ventures or that he was engaged in its activities.

Nevertheless, White's connection with SMW Ventures eventually came to light. At the end of March 2011, White was the subject of an AXA compliance audit.<sup>86</sup> On March 29, 2011, as part of that audit, White completed an "Annual Associate Compliance Questionnaire."<sup>87</sup> On the questionnaire, White stated and verified by signature that he had not engaged in any outside business activities beyond what he had previously disclosed on a September 18, 2009 Outside Business Activities Form.<sup>88</sup> On that September 2009 OBA form, White had certified that before beginning any new OBA, he would advise his branch manager or regional president and complete a new OBA form.<sup>89</sup> Further, on the September 2009 OBA form, White had disclosed the existence of his Yahoo! email account, which, as noted above, he had used to communicate regarding the formation of SMW Ventures.<sup>90</sup> White was aware that he had a continuing

---

<sup>80</sup> JX-21, at 5-6; Tr. 328.

<sup>81</sup> Tr. 340, 342.

<sup>82</sup> Ans. ¶ 42; Stip. ¶ 9; JX-22, at 8. This check bore his home address. Tr. 940-41.

<sup>83</sup> Tr. 349, 819.

<sup>84</sup> Ans. ¶ 9; Stip. ¶ 13; JX-44, at 3; JX-45, at 14.

<sup>85</sup> Ans. ¶ 10.

<sup>86</sup> Tr. 305.

<sup>87</sup> Tr. 305; JX-17.

<sup>88</sup> JX-17, at 5, 18.

<sup>89</sup> JX-1, at 3.

<sup>90</sup> He did not mention SMW Ventures on the form (Ans. ¶ 8; Stip. ¶ 11; JX-1) as it did not come into existence for another six months.

obligation to disclose OBAs.<sup>91</sup> He also knew that he had to disclose any OBA to the Firm in writing and get approval before he could proceed with it.<sup>92</sup>

The audit continued into the next day, March 30, 2011. At that time, the AXA auditor told White that in conducting routine due diligence before the audit, she had pulled a Westlaw report which reflected the existence of SMW Ventures, and listed him, Sak, and McDonough as its managing members.<sup>93</sup> She then told White that, as a result, he needed to complete another OBA form,<sup>94</sup> and he complied with her directive. On the OBA form White signed on March 30, 2011,<sup>95</sup> he disclosed, for the first time, the existence of SMW Ventures to AXA (and to Jeff Moore,<sup>96</sup> who by that time had become White's direct manager).<sup>97</sup> On the form, White certified that the information he provided was accurate.<sup>98</sup>

Nevertheless, White was not forthright in completing the OBA form. He wrote falsely that SMW Ventures "was originally started as DBA for AXA producer group. Was not previously discussed w/me prior to starting."<sup>99</sup> Further, White wrote falsely that he had spent no hours per month on activity connected with it nor had he received any compensation.<sup>100</sup> Additionally, he did not disclose either his SMW Ventures address or his Yahoo! address,<sup>101</sup> although he had sent or received communications through these accounts regarding SMW Ventures.<sup>102</sup> At the time he completed the form, White was aware that the Firm was not surveilling his Yahoo! email address.<sup>103</sup>

---

<sup>91</sup> Tr. 200.

<sup>92</sup> Tr. 202-03.

<sup>93</sup> Tr. 309-10.

<sup>94</sup> Tr. 310; JX-18.

<sup>95</sup> JX-18.

<sup>96</sup> Tr. 86.

<sup>97</sup> JX-17; Tr. at 75.

<sup>98</sup> This disclosure triggered an update on White's Form U4, which tracked the language he had written about SMW Ventures on his OBA form. JX-18, at 6; Tr.101.

<sup>99</sup> JX-18, at 3.

<sup>100</sup> JX-18, at 3.

<sup>101</sup> JX-18, at 2.

<sup>102</sup> White gave conflicting testimony about when he learned of the existence of the SMW Ventures email account. At his OTR, he testified that he learned of the SMW email address by March 2011. Tr. 213-14, 299. But at the hearing, he claimed that at his OTR he was only speculating or giving a ball park estimate (Tr. 314) and could not specify exactly when he learned that he had an SMW Ventures email address. Tr. 297. Later still, during his testimony, he stated that he did not have access to his SMW emails until January 2011 (Tr. 563-64), which obviously meant that he knew about the account by that date. In short, at the time he completed the OBA, he was aware of the existence of the SMW Ventures email account.

<sup>103</sup> Tr. 969-70.

Had the auditor not discovered the existence of SMW Ventures, White would not have disclosed it to AXA. At the hearing, White explained that he “didn’t think SMW was even an issue. I thought it just kind of fell off whenever we started working with Granite Harbor.”<sup>104</sup> White made it clear that he only disclosed the existence of SMW Ventures on the form because AXA’s compliance officer told him it was showing as an outside activity and he needed to disclose it.<sup>105</sup>

### **C. White Participates in an Unapproved Private Securities Transaction.**

#### **1. White’s Mother Buys a Promissory Note.**

White’s mother, KW, had brokerage and annuity accounts at AXA. McDonough was the broker on the brokerage account, and White was the broker on her annuity account.<sup>106</sup> Sometime in early 2011, White, McDonough, and KW travelled together to the offices of Material Science Technology, Inc. (“MST”).<sup>107</sup> The purpose of the trip was to meet with MC, a director of MST and its chief operating officer.<sup>108</sup> MC was seeking to borrow money for MST to fund its operations until certain contracts materialized.<sup>109</sup> To that end, MC was to issue notes in his personal capacity, and the loaned money would be used by MST.<sup>110</sup> White knew beforehand that the purpose of the visit was a possible investment in the company by his mother.<sup>111</sup>

White, KW, and McDonough toured the MST facility with MC, and White was shown a “Company Overview.”<sup>112</sup> After the tour, White and his mother met in the parking lot, where they discussed the company, and White expressed his views to her about it.<sup>113</sup> Shortly afterward, KW loaned \$100,000 to MC<sup>114</sup> and received a \$100,000 promissory note (“Convertible Note”) from him dated March 23, 2011, payable at a rate of 25% per annum due on September 30, 2011.<sup>115</sup> The Convertible Note, a security,<sup>116</sup> was convertible into MST common stock upon KW’s

---

<sup>104</sup> Tr. 823–26.

<sup>105</sup> Tr. 823.

<sup>106</sup> RX-46, at 4; Tr. 1034–36; JX-25, at 4, 14, 17, 19.

<sup>107</sup> Tr. 382, 391.

<sup>108</sup> Ans. ¶ 14; Stip. ¶ 15.

<sup>109</sup> Ans. ¶ 15.

<sup>110</sup> Ans. ¶ 15.

<sup>111</sup> Tr. 385–87.

<sup>112</sup> Ans. ¶ 16; Stip. ¶ 16; JX-27.

<sup>113</sup> Tr. 885.

<sup>114</sup> Ans. ¶ 17; Stip. ¶ 17.

<sup>115</sup> Ans. ¶ 17; Stip. ¶ 17.

<sup>116</sup> Ans. ¶ 18; Stip. ¶ 17.

request.<sup>117</sup> Other than the Convertible Note she purchased, KW had no connection to MST, and had never been involved in its business operations.<sup>118</sup>

KW paid the \$100,000 to MC via a cashier's check.<sup>119</sup> Not only did White know the method of payment, but he was also involved in facilitating the payment. On March 23, 2011, McDonough forwarded to White, at White's Yahoo! email account, an email from Comerica Bank seeking information relating to the logistics of the payment.<sup>120</sup> Moreover, that day, White sent an email from his Yahoo! email account to a Comerica representative providing details regarding the bank that issued the check and offering to provide additional information if needed.<sup>121</sup>

KW never received any payments on the Convertible Note,<sup>122</sup> and in January 2012, MST filed for bankruptcy.<sup>123</sup> By contrast, White benefitted financially from his mother's transaction. On March 26, 2011, three days after KW signed the Convertible Note, McDonough wrote a \$2,500 check to White drawn on a personal checking account McDonough held with his wife. The letters "MST" were written on the memo line of the check.<sup>124</sup> (Two days earlier, MC had wired \$12,250 to SMW Ventures LP's checking account).<sup>125</sup> The check was cashed on or about March 28, 2011.<sup>126</sup> And, on that date, with White's knowledge, the funds were deposited into his checking account.<sup>127</sup>

## **2. White Fails to Disclose to AXA His Participation in the Sale of the Note.**

AXA's Compliance Manual, dated December 2010, prohibited registered representatives from engaging in private securities transactions unless they provided prior written notice and received prior written permission.<sup>128</sup> The Manual specifically identified the sale of promissory

---

<sup>117</sup> Ans. ¶ 17; Stip. ¶ 17.

<sup>118</sup> Ans. ¶ 20.

<sup>119</sup> JX-31.

<sup>120</sup> JX-32; Tr. 426-27.

<sup>121</sup> JX-33; Tr. 429.

<sup>122</sup> Ans. ¶ 28; Stip. ¶ 19.

<sup>123</sup> Ans. ¶ 28; Stip. ¶ 20. KW filed a complaint with the Firm about the transaction, causing AXA to file a Form U5 amendment on behalf of McDonough disclosing the complaint. The Form U5 amendment triggered the FINRA investigation that led to this disciplinary proceeding. Tr. 728. *See also* Tr. 742-43. KW also filed an arbitration claim against the Firm. Tr. 1064; JX-49.

<sup>124</sup> Stip. ¶ 10 (The date of the check is misidentified as March 23, 2010); JX-35, at 2.

<sup>125</sup> RX-31, at 1; Tr. 972.

<sup>126</sup> Stip. ¶ 10.

<sup>127</sup> Tr. 442-43, 972.

<sup>128</sup> Ans. ¶ 29; Stip. ¶ 21; JX-45, at 20.

notes as within the scope of the prohibition.<sup>129</sup> Nevertheless, White did not provide written notice of, or receive written permission for, his participation in the sale of the Convertible Note to his mother.<sup>130</sup> Moreover, during the above-mentioned AXA annual compliance examination on or about March 29, 2011, White represented and verified by signature on the Firm's Annual Associate Compliance Questionnaire that he had not participated in any private securities transactions.<sup>131</sup> Like the AXA Compliance Manual, the questionnaire included promissory notes as an example of a private securities transaction.<sup>132</sup> Additionally, the questionnaire explained that "[p]articipation is broadly construed and may include uncompensated referrals and customer introductions as well as direct and indirect compensation."<sup>133</sup>

#### **D. White Provides False Testimony at His OTR.**

On January 30, 2013, White appeared for an OTR in response to a testimony request FINRA staff issued to him under FINRA Rule 8210.<sup>134</sup> While under oath at his OTR, White testified that (1) SMW Ventures was an AXA producer group that White was going to form with McDonough and Sak;<sup>135</sup> (2) he first learned of SMW Ventures' August 2010 formation during a March 2011 compliance audit;<sup>136</sup> (3) McDonough had formed SMW Ventures without White's knowledge;<sup>137</sup> (4) the formation of SMW Ventures had not been discussed with him prior to its formation;<sup>138</sup> (5) he never had any responsibilities at SMW Ventures;<sup>139</sup> and (6) when he learned about SMW Ventures' existence during the compliance audit, he immediately went to McDonough's office and, in the presence of the AXA compliance auditor, questioned McDonough about "what SMW [Ventures] was and why it was showing me as a partner and everything of that nature."<sup>140</sup> In response, according to White's OTR testimony, McDonough explained to them that he created SMW Ventures "in preparation for the producer group [but] just hadn't cancelled it out or closed it."<sup>141</sup>

---

<sup>129</sup> Ans. ¶ 29; Stip. ¶ 21; JX-45, at 19.

<sup>130</sup> Tr. 111.

<sup>131</sup> Ans. ¶ 27; Stip. ¶ 18; JX-17, at 9, 18.

<sup>132</sup> JX-17, at 9.

<sup>133</sup> JX-17, at 9.

<sup>134</sup> Ans. ¶ 35; Stip. ¶ 28.

<sup>135</sup> Complainant's Exhibit ("CX-\_\_") 1, at 7-8, 38, 40-41.

<sup>136</sup> CX-1, at 8-9, 12-14.

<sup>137</sup> CX-1, at 9.

<sup>138</sup> CX-1, at 13.

<sup>139</sup> CX-1, at 14.

<sup>140</sup> CX-1, at 9.

<sup>141</sup> CX-1, at 9-10.

This OTR testimony was false, and White knew it was false at the time he testified at the OTR. By the time he, McDonough, and Sak formed SMW Ventures, White knew that it was going to be used to conduct outside business activities and that it was not an AXA producer group. White also was aware of its formation: he actively participated in setting up the partnership; he attended meetings with an attorney; he signed the partnership agreement; he opened its checking accounts; and he provided the initial funding. Additionally, White was aware of, and participated in, certain SMW Ventures activities. For example, he attended meetings regarding planned business deals (including the jacket deal); he was responsible for SMW Ventures' administrative tasks; he received payments from SMW Ventures; and was notified that SMW Ventures, through McDonough, had rendered restructuring services to TBarrett Enterprises. Finally, White was untruthful when he testified that he questioned McDonough during the AXA Compliance audit in the presence of the AXA compliance examiner. White fabricated the entire event, as McDonough was not present in the office on that day.<sup>142</sup> In short, White's testimony was false in numerous respects and was clearly intended to create the misimpression that he was not involved in outside business activities through SMW Ventures.

#### **E. White's Defenses and Witness Credibility**

White's defense to both the outside activities and private securities charges was simple and straightforward: he was not aware of the violative activities and did not participate in them. He maintained that his only mistake was in trusting the Firm, McDonough, and Sak to ensure that he adhered to his regulatory obligations. In the end, he viewed himself as a victim of his youth and inexperience. But White's claims of ignorance were belied by the clear weight of the credible evidence.

##### **1. White Was Not Credible When He Denied Knowing About, or Engaging in, SMW Ventures' Outside Business Activities.**

White testified that he believed that SMW Ventures was to be an AXA producer group,<sup>143</sup> and denied knowing that it became anything other than that.<sup>144</sup> This assertion was not credible for numerous reasons. First, although he denied it, when White opened SMW Ventures' bank accounts, he gave the bank his personal, rather than his AXA, address as the mailing address for SMW Ventures. This evidenced an attempt to conceal the existence of SMW

---

<sup>142</sup> Stip. ¶ 12; Ans. ¶ 42 [sic].

<sup>143</sup> Tr. 316, 781, 802.

<sup>144</sup> Tr. 319.

Ventures from the Firm<sup>145</sup> and demonstrated that he knew that SMW Ventures was not an AXA producer group.

Second, Sak testified that White was aware of the formation of SMW Ventures and participated in its activities,<sup>146</sup> including the planning telephone call.<sup>147</sup> Sak's testimony directly contradicted White's claim that he was not present during the planning call,<sup>148</sup> and that until this disciplinary proceeding, he was unaware of the jacket deal.<sup>149</sup> The Panel found Sak credible. During the investigation, Sak testified on the record and acknowledged his role in SMW Ventures and signed an Acceptance, Waiver and Consent ("AWC") agreeing to the entry of findings and the imposition of sanctions.<sup>150</sup> Later, during the hearing, he took responsibility for his involvement with SMW Ventures, describing his failure to disclose it to AXA as the "[b]iggest mistake I've ever made."<sup>151</sup> Finally, during his testimony at the hearing, Sak evidenced no hostility toward, or bias against, White. Indeed, White testified that he was not aware of any motive that Sak had at the time of his testimony to be less than honest and forthright.<sup>152</sup>

Third, Sak sent White his notes from the planning meeting, and White admitted having seen the notes in close proximity to when he received them.<sup>153</sup> White's receipt of these notes undercuts his testimony denying knowledge about SMW Ventures' outside business activities. The notes reflect several different potential business deals and memorialize various responsibilities assigned to White in connection with the planned jacket deal.

Fourth, Rafferty, an administrative assistant at The Woodlands,<sup>154</sup> also placed White at a meeting relating to the jacket deal. She testified that she saw White attend a meeting at The Woodlands with McDonough and an unidentified man who had brought a blazer with him.

---

<sup>145</sup> At the hearing, when asked why the account statements were sent to his personal apartment rather than to his office, he responded: "that's a great question. I don't know." Tr. 558. He then testified that his girlfriend's sister was a teller at the bank and he already had an account there so "I'm assuming that she just assigned the address over there." Tr. 558, 809-10, 937. The Hearing Panel rejected this uncorroborated, self-serving speculation.

<sup>146</sup> Tr. 659.

<sup>147</sup> Tr. 619-20.

<sup>148</sup> Tr. 1139.

<sup>149</sup> Tr. 948.

<sup>150</sup> Tr. 659; JX-61.

<sup>151</sup> Tr. 658-59.

<sup>152</sup> Tr. 1202, 1207. While the Panel generally found Sak credible, it did not agree with his assessment that SMW Ventures was "[d]efinitely limited to ideas" and never conducted any business. Tr. 666. Nevertheless, the Panel did not find that these statements undercut his credibility, as they were simply his characterizations of SMW Ventures' activities and not a denial that SMW Ventures had engaged in them. Instead, he admitted that he mistakenly failed to realize that SMW Ventures' activities were sufficient to trigger a disclosure obligation. Tr. 671-73.

<sup>153</sup> Tr. 569.

<sup>154</sup> Tr. 198, 698.

White denied attending that meeting,<sup>155</sup> but did not discredit Rafferty's testimony. Her recollection was clear; her testimony was not undermined by cross-examination; and she had no apparent reason to testify untruthfully. White tried to minimize it by saying that he doubted that Rafferty "would keep up with each and every one of the meetings, in detail, especially meetings that happened four or five years ago."<sup>156</sup> But White admitted that he was not aware of any motive that Rafferty had to be less than honest, only "maybe a misunderstanding or lack of knowledge or something of that sort."<sup>157</sup> The Panel believed her testimony and, hence, did not find White credible when he denied attending the meeting.

Fifth, the Hearing Panel found White unconvincing when he denied knowing Troy Barrett's identity<sup>158</sup> and that SMW Ventures had performed services for Barrett's company, TBarrett Enterprises.<sup>159</sup> At his OTR, White testified that he, Sak, and McDonough had met Barrett at a golf tournament and was aware of Barrett's business plans.<sup>160</sup> The Panel credits White's OTR testimony over his contrary hearing testimony on this point, as it was given closer in time to the events at issue in this proceeding, before Enforcement notified White that it intended to recommend charges against him and, therefore, before he could better evaluate the impact on him of one answer or response versus another.

Moreover, not only had White met Barrett, but, contrary to White's testimony, White knew that SMW Ventures had performed services for Barrett's company. In December 2010, McDonough sent White an email and attachments reflecting the relationship.<sup>161</sup> Specifically, McDonough sent to White's SMW email address the billing statement from SMW Ventures for services rendered to TBarrett Enterprises.<sup>162</sup>

Finally, White denies receiving compensation related to SMW Ventures.<sup>163</sup> In fact, on December 30, 2010, \$9,548 was withdrawn from the SMW Ventures partnership checking account by McDonough and the same amount was deposited into White's bank account that

---

<sup>155</sup> Tr. 1143-44.

<sup>156</sup> Tr. 1144.

<sup>157</sup> Tr. 1202.

<sup>158</sup> Tr. 260-61.

<sup>159</sup> Tr. 273, 275.

<sup>160</sup> Tr. 262-63.

<sup>161</sup> JX-12; Tr. 275-76.

<sup>162</sup> JX-12, at 3. Consistent with his approach during much of his testimony to any damaging communications sent to him, White testified that he did not receive this billing statement until around late 2011 or early 2012, and when he did receive it, he denied looking at it at the time. Tr. 572. He also claimed that McDonough sent him information at email accounts to which he did not have access. Tr. 276-77. When asked why McDonough would do that, White replied: "I have no answer for that." Tr. 277. The Panel found these denials self-serving and not credible.

<sup>163</sup> Tr. 957.



day.<sup>164</sup> At the time of the deposit, the balance in White's bank account was \$1,162.73.<sup>165</sup> White claims he knew that this sum had been deposited into his account, but denied knowing that it came from SMW Ventures, and never inquired about the source of the funds for that deposit.<sup>166</sup> The Panel did not believe that White would receive a deposit of that size and not be aware of its source and purpose, given that the deposit resulted in an eight-fold increase in his checking account balance.<sup>167</sup>

In conclusion, White was not credible when he denied knowing the true purpose of SMW Ventures and being aware of, and participating in, certain of its outside business activities.

## **2. White Was Not Credible When He Denied Knowing About, or Participating in, the Sale of the Convertible Note to His Mother.**

White's defense to the private securities transaction allegation was similar to his defense to the outside business activities charge: he denied knowing that the conduct had occurred until long afterward. His denials, however, were unconvincing. Specifically, he was not credible in denying that he knew that the purpose of the visit to MST was a possible investment by his mother; denying that he discussed the subject with her before she made the loan; denying that he was aware of and helped facilitate her transfer of the loan funds; and denying receiving compensation for his involvement in the transaction.

### **a) White Was Not Credible When He Denied Knowing that the Purpose of the Visit to MST Was a Possible Investment by KW.**

White denied knowing that the purpose of the visit to MST was a possible investment by his mother. As a threshold matter, White denied that McDonough told him that MC was seeking to borrow money.<sup>168</sup> Further, he claimed that he first learned this in the latter part of 2011 when he first discovered that his mother had loaned funds to MC.<sup>169</sup> This version, however, conflicted with his OTR testimony and the Hearing Panel rejected it. At his OTR, White recalled that he, MC, and McDonough had lunch together in October 2010.<sup>170</sup> And about two months later (which he identified, incorrectly, as March or April 2011)<sup>171</sup> he learned that MC was interested in raising money for MST.

---

<sup>164</sup> Tr. 957-58.

<sup>165</sup> Tr. 343.

<sup>166</sup> Tr. 343-44.

<sup>167</sup> Tr. 343.

<sup>168</sup> Tr. 879, 881-82.

<sup>169</sup> Tr. 978.

<sup>170</sup> Tr. 980.

<sup>171</sup> Tr. 979.

Additionally, certain emails sent to White immediately after KW's transaction demonstrate that White knew that MC was seeking to raise funds and that he was actively involved in helping MC do so. Just days after his mother's transaction, MC sent a promissory note and his personal financial statement to White so he would "have them in hand."<sup>172</sup> He also asked White and McDonough if they could "get a minimum of \$500k in April" and offered certain financial incentives to them "[f]or April deals."<sup>173</sup>

But regardless of exactly when White learned that MC wanted to borrow funds, he did not learn of it in the latter part of 2011, as he claimed at the hearing. The Hearing Panel credits his OTR testimony on this point over his hearing testimony for several reasons: it was given closer in time to the events at issue, before the staff had told White that it was considering recommending that charges be brought against him for participating in an unapproved private securities transaction, and because White provided no reasonable explanation for the difference between his hearing and OTR testimony.<sup>174</sup>

White also denied knowing on the day of the visit to MST that the purpose of the visit was a possible investment in the company by his mother.<sup>175</sup> He testified that he thought the purpose of the trip was to educate his mother about the restructuring of MC's business by McDonough, as this was a structure that she might want to consider for her new consulting business.<sup>176</sup> Later in his testimony, however, he retreated from that position, testifying that he "didn't know exactly the reason. John [McDonough] just wanted to take her out there."<sup>177</sup> Again, this testimony was contradicted by his OTR interview. At his OTR, White testified that he knew the purpose of the trip was a possible investment by his mother in MC's company.<sup>178</sup> He further testified at his OTR that before the visit, McDonough told him that MC was looking for investors and that McDonough was going to invite White's mother to visit MC because he knew she was "looking to invest in income properties."<sup>179</sup> The Hearing Panel credited White's OTR testimony over his hearing testimony on this point, for the reasons previously stated.

---

<sup>172</sup> Tr. 452–53, 460–61, 1196; JX-29, at 1, 3.

<sup>173</sup> JX-34. MC sent these emails to White's Granite Harbor email address. This displeased McDonough, who emailed White at his Yahoo! address telling him that: "Dumbass [i.e. MC] sent it to your granite harbor address! I told him to email your yahoo!" JX-34.

<sup>174</sup> Tr. 385–87. The OTR was conducted on January 30, 2013. The staff notified White on September 26, 2013, that it was recommending charges against him. JX-48, at 11.

<sup>175</sup> Tr. 522.

<sup>176</sup> Tr. 385, 881, 884.

<sup>177</sup> Tr. 982–83.

<sup>178</sup> Tr. 386–87.

<sup>179</sup> Tr. 985.

**b) White Was Not Credible When He Denied Discussing with KW  
Whether She Should Make a Loan to MC.**

White denied discussing with KW whether she should make a loan to MC. At first, he did not outright deny that he and his mother may have discussed a possible investment in MST, though he said it was not likely they did so, either before or after the visit.<sup>180</sup> But later in his testimony, he directly denied that they had such a discussion either in the parking lot following the tour of the facility or during the car ride back to his office,<sup>181</sup> and that all he did was “[thank] her for going with us.”<sup>182</sup>

In other testimony, however, White recalled that he discussed the company with his mother in the parking lot and that he had told her what he thought of it.<sup>183</sup> This version was consistent with the version he provided at his OTR when he recalled that, right after the meeting, his mother asked him what he thought about the company or a potential loan, and he gave her his views on the subject, telling her that he did not know why the company was “looking for capital . . . [b]ut it’s basically up to you.”<sup>184</sup> The Panel credited this version, which was consistent with the earlier version he gave at his OTR, over his later, conflicting hearing testimony.

Significantly, KW did not contradict this testimony, though she was not consistent in her testimony on this subject, either. When shown her son’s OTR testimony, and asked if such a conversation occurred, she replied: “I could have had a conversation, but I don’t recall it.”<sup>185</sup> In other testimony, however, KW testified that she and White met in the parking lot after the meeting, and McDonough told her that he had other clients who were investing in MST and that the company was looking for short-term operating capital, though she denied that they talked about a loan at that time.<sup>186</sup> In fact, KW claims that she first talked about the Convertible Note with White when she did not get repaid.<sup>187</sup> In conclusion, the Panel finds that White knew the purpose of the trip and, afterward, discussed with his mother a possible loan to MC’s company. White’s hearing testimony to the contrary was not credible.

---

<sup>180</sup> Tr. 388–90.

<sup>181</sup> Tr. 406–07. *See also* Tr. 975.

<sup>182</sup> Tr. 406.

<sup>183</sup> Tr. 885–86.

<sup>184</sup> Tr. 407–10.

<sup>185</sup> Tr. 1061–62.

<sup>186</sup> Tr. 1054.

<sup>187</sup> Tr. 1057.

**c) White Was Not Credible When He Denied Being Aware of and Helping Facilitate KW's Transfer of the Loan Funds.**

As discussed above, KW made the loan to MC via a cashier's check. At the hearing, White testified that even as late as his OTR (January 30, 2013) he did not know the method of payment she used.<sup>188</sup> This testimony was not truthful. As discussed above, not only did White know the method of payment, but he was involved in facilitating the payment. He sent an email to a Comerica representative providing details regarding the bank that issued the check and offering to provide additional information if needed. White claimed to have no recollection of sending that email.<sup>189</sup> And later in his testimony, he directly denied ever having seen it until his OTR.<sup>190</sup> The Panel did not find this denial credible, as it was uncorroborated and self-serving.<sup>191</sup>

**d) White's Explanation of the \$2,500 Payment Was Not Credible.**

White denied that he received compensation in connection with the Convertible Note transaction.<sup>192</sup> He claimed that although the check was deposited into his account, he did not deposit it. Further, he claimed that he believed that the check represented expense reimbursements for trips he had taken for AXA business<sup>193</sup> based on receipts he had submitted three months earlier.<sup>194</sup> At his OTR, White testified that the \$2,500 payment was reimbursement for expenses incurred at an AXA conference that he attended in Austin in January 2011.<sup>195</sup> At the hearing, he claimed that the reimbursement also included an additional conference he attended with Sak in Denver.<sup>196</sup> As proof, he offered receipts totaling \$2,760.66 that he produced to FINRA during the investigation,<sup>197</sup> and which he had purportedly given to McDonough for reimbursement.<sup>198</sup>

---

<sup>188</sup> Tr. 422-23.

<sup>189</sup> Tr. 430-31, 433. KW denied ever mentioning to her son that she was giving a \$100,000 check to MC. Tr. 1078. Nevertheless, it is clear from the email communications referenced above that, at or about the time of the transaction, White knew the identity of the bank on which the cashier's check was drawn.

<sup>190</sup> Tr. 1178-79, 1191.

<sup>191</sup> KW did not deny that her son facilitated the loan transaction, only that she was unaware if he did so. Tr. 1058. Further, she testified that she was not aware that White communicated with Comerica Bank regarding the cashier's check (JX-33; Tr. 1083); she learned for the first time at the hearing that her son had received the \$2,500 payment from McDonough; and she did not know whether it related to her MST transaction. Tr. 1097.

<sup>192</sup> Tr. 445.

<sup>193</sup> Tr. 445, 902, 904, 992.

<sup>194</sup> Tr. 991. *See also* Tr. 1204.

<sup>195</sup> Tr. 994. In fact, the conference was held in July 2010, RX-75, at 1; Tr. 1000, and the only documented expense for that trip was a check for \$350. RX-75, at 2; Tr. 1001-04.

<sup>196</sup> Tr. 992-93.

<sup>197</sup> RX-75; Tr. 995-96.

<sup>198</sup> Tr. 1002-03.

For numerous reasons, the Panel rejected White's characterization of the \$2,500 payment as an expense reimbursement. First and foremost, McDonough wrote the check to White on March 26—three days after KW received the Convertible Note—bearing the letters "MST" on the memo line. It does not bear any notation reflecting that it relates to an expense reimbursement. Second, there are no documents in the record showing that the check was linked to receipts or was for expense reimbursements.<sup>199</sup> For example, the record does not reflect any transmittal documents accompanying either the check or the receipts seeking reimbursement.<sup>200</sup> Third, the timing of this purported reimbursement was inconsistent with the timing of reimbursements White claimed to have previously received from McDonough. According to White, he received this alleged reimbursement a month later than usual.<sup>201</sup> Fourth, White claims that the reimbursement included expenses he incurred in connection with a July 10 conference in Austin. But this did not ring true because it meant that he waited until the following January, i.e., six months later, to seek reimbursement.<sup>202</sup> Fifth, it was not credible that White knew that the check was deposited into his account but did not know who deposited it.<sup>203</sup> White offered no reasonable explanation of who, other than himself, could have deposited the check into his account, or for what purpose. And there was no evidence that anyone else deposited it.

### **3. White's Explanations Regarding His OTR Testimony Were Not Credible.**

White testified falsely in several respects during his OTR, and his attempts at the hearing to justify his OTR testimony were not persuasive. For example, White conceded that he had testified untruthfully at his OTR when he stated that he and the AXA compliance auditor confronted McDonough about SMW Ventures. He explained that after testifying at his OTR, he learned that McDonough had not, in fact, been in the office at the time of the compliance audit.<sup>204</sup> As he now claimed to recall the event, he and the compliance examiner "walked into his office and he was not there and then I confronted him later . . ."<sup>205</sup> This was not believable. White's OTR testimony reflected no hint of confusion or fuzzy recollection. Indeed, he repeated his description of the event more than once. Rather than an innocent mistaken recollection, the Hearing Panel concluded that his false testimony resulted from a calculated attempt to lend credibility to his false story that he was surprised to learn that McDonough had formed SMW Ventures.

---

<sup>199</sup> Tr. 1003.

<sup>200</sup> Tr. 1003, 1204–05.

<sup>201</sup> Tr. 1204–05. *See also* Tr. 1203 (White testified he typically received reimbursements in under 30 days).

<sup>202</sup> Tr. 1211. Additionally, McDonough denied that he had a practice of making reimbursement payments to registered representatives from his personal bank account. CX-4, at 2. But for the reasons explained above, the panel gave little weight to McDonough's evidence.

<sup>203</sup> Tr. 445–46, 990–91.

<sup>204</sup> Tr. 505.

<sup>205</sup> Tr. 517. *See also* Tr. 518–19.

Additionally, the Panel rejected White's explanation about why he testified at the OTR that SMW Ventures was formed without his knowledge. At the hearing, White testified that although he had signed the partnership agreement, he did not know that McDonough had it filed with the state of Texas and, therefore, in his view, did not know that SMW Ventures had been formed.<sup>206</sup> The evidence, however, showed that White signed and returned the partnership agreement fully aware that the attorney intended to file it. Absent learning that the attorney had not filed the partnership agreement, White likely presumed that it had been filed. In any event, even if White did not know with certainty that the attorney had filed the partnership agreement, he made a hyper-technical distinction in an obvious attempt to hide from the staff the true nature of his relationship with SMW Ventures.

#### **4. The Panel Did Not Credit McDonough's Evidence Against White.**

McDonough did not testify at the hearing. Instead, Enforcement introduced excerpts from his two OTRs<sup>207</sup> and a sworn declaration<sup>208</sup> that he submitted after he settled his disciplinary matter with FINRA.<sup>209</sup> In his OTR testimony and declaration, McDonough disputed White's version of events regarding White's involvement in SMW Ventures and the sale of the Convertible Note. McDonough stated that SMW Ventures was formed as a spin-off from his production group "to invest in real estate, provide consulting to businesses and become involved in other opportunities outside of AXA."<sup>210</sup> McDonough further stated that White was "informed and aware of the formation of the partnership and its activities,"<sup>211</sup> and that White had certain administrative responsibilities in connection with SMW Ventures, namely, "behind the scenes" work, including "business processing, technology . . . just the stuff that keeps a business moving."<sup>212</sup>

As to the Convertible Note, McDonough portrayed White as the driving force behind his mother's decision to make the loan to MC.<sup>213</sup> According to McDonough, he told White about MST, and then White told his mother about the possibility of loaning funds to MC. McDonough also claims that White advised his mother to make the loan and was fully aware of it at the time she executed the Convertible Note.<sup>214</sup> Finally, McDonough denied that the \$2,500 check related

---

<sup>206</sup> Tr. 495–97.

<sup>207</sup> CX-2 (Jan. 29, 2013); CX-3 (Jun. 5, 2013).

<sup>208</sup> CX-4 (Oct. 15, 2014).

<sup>209</sup> McDonough's AWC was accepted by FINRA on December 3, 2013. JX-60.

<sup>210</sup> CX-4, at ¶ 3. *See also* CX-2, at 19–20, 27–28; CX-3, at 10.

<sup>211</sup> CX-4, at ¶ 3. *See also* CX-3, at 6.

<sup>212</sup> CX-2, at 23; CX-3, at 4–5.

<sup>213</sup> CX-2, at 35, 42–43, 49, 59.

<sup>214</sup> CX-4, at 2.

to a trip for AXA that White took in July 2010 and also denied it was compensation for the MST transaction.<sup>215</sup>

McDonough's evidence against White was hearsay, which is admissible in FINRA disciplinary proceedings.<sup>216</sup> But "[i]n determining whether to rely on hearsay evidence, 'it is necessary to evaluate its probative value and reliability, and the fairness of its use.'"<sup>217</sup> In connection with this evaluation, the Panel considered various factors such as "the possible bias of the declarant, the type of hearsay at issue, whether the statements are signed and sworn to rather than anonymous, oral or unsworn, whether the statements are contradicted by direct testimony, whether the declarant was available to testify, and whether the hearsay is corroborated."<sup>218</sup>

In weighing these factors, the Panel was mindful that McDonough's OTR testimony and his declaration statements were given under oath; that certain portions were corroborated by Sak's testimony and other credible evidence; and that McDonough was not subject to FINRA's jurisdiction at the time of the hearing.<sup>219</sup> On the other hand, McDonough's statements were not subject to cross-examination and were contradicted by White's hearing testimony. Additionally, McDonough does not appear to have been completely forthright during his investigative testimony. For example, he offered a convoluted and dubious explanation regarding the \$2,500 payment to White, claiming that he had received no compensation from the Convertible Note transaction but used it as an opportunity to give White money, since he was "hurting financially."<sup>220</sup> In truth, the credible evidence showed that the payment was in connection with the Convertible Note transaction.

Most importantly, the Panel took into account the likelihood that McDonough harbored a strong bias against White. White claimed that McDonough "had a personal vendetta" against him because he had sued McDonough for fraud in connection with The Studemont Group. Additionally, KW had brought an arbitration claim alleging fraud against AXA based on McDonough's involvement in the Convertible Note transaction.<sup>221</sup> Also, White suspected that while being investigated by FINRA, McDonough may have tried to shift blame to White and Sak

---

<sup>215</sup> CX-3, at 15; CX-2, at 66–67.

<sup>216</sup> *Dep't of Enforcement v. Padilla*, No. 2006005786501, 2012 FINRA Discip. LEXIS 46, at \*36 (NAC Aug. 1, 2012) (citing *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*46–47 (Jan. 30, 2009)).

<sup>217</sup> *Padilla*, 2012 FINRA Discip. LEXIS 46, at \*37 (quoting *Epstein*, 2009 SEC LEXIS 217, at \*47).

<sup>218</sup> *Id.*

<sup>219</sup> JX-49, at 2.

<sup>220</sup> Tr. 1157–58; CX-2, at 67.

<sup>221</sup> Tr. 1199–1200. In May 2012, KW filed an arbitration claim against AXA alleging, among other things, that it committed fraud through McDonough's actions. Stip. ¶ 26. KW withdrew the claim in May 2013 after reaching a settlement with AXA for \$100,000. Stip. ¶ 26. One year later, in June 2012, White sued McDonough in Texas state court alleging fraud, among other things, in connection with Studemont. White withdrew his suit in March 2013. Stip. ¶ 27; JX-23.

to place himself in a more favorable light.<sup>222</sup> Further, White assumed that later, when McDonough executed his declaration, McDonough was “still extremely upset and bitter” at him, his mother, and Sak.<sup>223</sup> After weighting these various considerations, the Hearing Panel decided, on balance, that McDonough’s hearsay statements were not sufficiently reliable to accord them any weight.

### III. Conclusions of Law

#### A. White Violated NASD Rule 3030 and FINRA Rules 3270 and 2010 by Engaging in Undisclosed Outside Business Activities (First Cause of Action).

NASD Rule 3030 prohibits associated persons from engaging in any business activity outside the scope of their relationship with their employer firm, unless they have provided prompt written notice to the member. NASD Rule 3030 requires actual, written notice of an associated person’s outside business activities,<sup>224</sup> and must be in the form required by the member. The Rule extends to all outside business activity, not just securities-related activity.<sup>225</sup> FINRA Rule 3270, effective December 15, 2010, contains a similar prohibition. Additionally, a violation of NASD Rule 3030 also constitutes a violation of FINRA Rule 2010,<sup>226</sup> which requires members, in the conduct of their business, to “observe high standards of commercial honor and just and equitable principles of trade.” Associated persons are subject to the duties and obligations of FINRA Rule 2010 under FINRA Rule 0140.<sup>227</sup>

The purpose of the outside business activities Rule “is to ensure that firms ‘receive prompt notification of all outside business activities of their associated persons so that the member’s objections, if any, to such activities could be raised at a meaningful time and so that appropriate supervision could be exercised as necessary under applicable law.’”<sup>228</sup> Further, “NASD Rule 3030 prevents harm to the investing public, and to FINRA firms, by allowing FINRA firms to monitor their registered representatives’ outside business activities. When adhered to, [it] is prophylactic and allows FINRA firms to oversee their employees’ outside business activities, or to prohibit the activities altogether.”<sup>229</sup> To comply with the “prompt notification” requirement, the associated person must “disclose outside business activities at the

---

<sup>222</sup> Tr. 1199–1200.

<sup>223</sup> Tr. 1201–02.

<sup>224</sup> *Dep’t of Enforcement v. Giblen*, No. 2011025957702, 2014 FINRA Discip. LEXIS 39, at \*17 (NAC Dec. 10, 2014).

<sup>225</sup> *Dep’t of Enforcement v. Schneider*, No. C10030088, 2005 NASD Discip. LEXIS 6, at \*13 (NAC Dec. 7, 2005).

<sup>226</sup> *Giblen*, 2014 FINRA Discip. LEXIS 39, at \*12.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at \*11–12 (quoting *Dep’t of Enforcement v. Houston*, No. 2006005318801, 2013 FINRA Discip. LEXIS 3, at \*32 (NAC Feb. 22, 2013)).

<sup>229</sup> *Giblen*, 2014 FINRA Discip. LEXIS 39, at \*26–27.



time when steps are taken to commence a business activity unrelated to his relationship with his firm.”<sup>230</sup>

Based on the foregoing conduct, the Hearing Panel finds that White engaged in an outside business activity. He was involved in the formulation of the outside business activity entity (SMW Ventures), became one of its partners, and was aware of, and participated in, certain of its activities. Further, he failed to provide written notification to the Firm of this outside business activity until after he had participated in the activity, and only after the Firm discovered the activity and directed him to disclose it in writing. Accordingly, the Hearing Panel concludes that White violated NASD Rule 3030 for his conduct prior to December 15, 2010, and FINRA Rule 3270 for his conduct on December 15, 2010, and thereafter.<sup>231</sup> The Panel also finds that White’s conduct is contrary to high standards of commercial honor and inconsistent with just and equitable principles of trade in violation of FINRA Rule 2010.

**B. White Violated NASD Rule 3040 and FINRA Rule 2010 by Participating in an Undisclosed Private Securities Transaction (Second Cause of Action).**

NASD Rule 3040 prohibits associated persons from participating in any manner in private securities transactions without providing prior written notice of such to their member firm describing in detail the nature of the proposed transaction and their proposed role in it.<sup>232</sup> A “private securities transaction” is “any securities transaction outside the regular course or scope of an associated person’s employment with a member.”<sup>233</sup> The phrase “participate in any manner” is interpreted broadly to further FINRA’s regulatory purpose,<sup>234</sup> and is “not limited merely to solicitation of an investment.”<sup>235</sup> For example, “the notice requirements set forth in Rule 3040 are triggered ‘when the associated person’s role in a transaction was limited to a client introduction and to eventual receipt of a finder’s or referral fee.’”<sup>236</sup>

---

<sup>230</sup> *Dep’t of Enforcement v. Scholander*, No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at \*76 (NAC Dec. 29, 2014), *appeal docketed*, No. 3-16360 (SEC Jan. 28, 2015) (quoting *Schneider*, 2005 NASD Discip. LEXIS 6, at \*13–14).

<sup>231</sup> Although the record did not establish when SMW Ventures ceased its activities, it is clear they extended beyond December 15, 2010.

<sup>232</sup> NASD Rule 3040(a) and (b).

<sup>233</sup> NASD Rule 3040(e)(1).

<sup>234</sup> *Dep’t of Enforcement v. Love*, No. C3A010009, 2003 NASD Discip. LEXIS 17, at \*30 (NAC May 19, 2003), *aff’d*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318 (Feb. 13, 2004).

<sup>235</sup> *Dep’t of Enforcement v. Calandro*, No. C05050015, 2007 FINRA Discip. LEXIS 17, at \*28–29 (Dec. 14, 2007) (quoting *Joseph Abbondante*, Exchange Act Release No. 53066, 2006 SEC LEXIS 23, at \*28 (Jan. 6, 2006), *aff’d*, 2006 U.S. App. LEXIS 30982 (2d Cir. Dec. 12, 2006)), *set aside on other grounds*, Exchange Act Release No. 58916, 2008 SEC LEXIS 3139 (Nov. 7, 2008).

<sup>236</sup> *Calandro*, 2007 FINRA Discip. LEXIS 17, at \*29 (quoting *John P. Goldsworthy*, 55 S.E.C. 817, 835 (2002)).

Associated persons must also disclose whether they have received, or may receive, selling compensation in connection with the transaction.<sup>237</sup> “Selling compensation” is defined under the Rule as “any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions [and] finder’s fees . . . .”<sup>238</sup> “A violation of any FINRA rule, including NASD Rule 3040, violates NASD Rule 2110 and FINRA Rule 2010.”<sup>239</sup>

“The purpose of NASD Conduct Rule 3040 is to protect ‘investors from unsupervised sales and securities firms from exposure to loss and litigation from transactions by associated persons outside the scope of their employment.’”<sup>240</sup> This Rule not only protects investors, “but also [permits] securities firms, which may be subject to liability in connection with transactions in which their representatives become involved, to supervise such transactions.”<sup>241</sup>

To conclude that White violated NASD Rule 3040, we must necessarily find that the Convertible Note transaction constituted a “private securities transaction”; that White participated in the transaction; and that he did so without providing the Firm with written notice.<sup>242</sup> Here, there is no question that the Convertible Note transaction involved a security; that it was outside the regular course or scope of White’s employment with the Firm; and that White did not notify or provide the Firm with prior written notice of the transaction.

The primary issue in dispute is whether White participated in the transaction within the meaning of the Rule. The Hearing Panel finds that he did. White accompanied his mother and McDonough to MST’s offices, knowing that the purpose of the visit was a possible investment in the company. After the visit, he discussed the merits of the company with her; facilitated the investment by providing banking information relating to the transmittal of the cashier’s check; and received compensation related to the transaction. These activities constituted participation in

---

<sup>237</sup> NASD Rule 3040(b).

<sup>238</sup> NASD Rule 3040(e)(2). Where an associated person has received or may receive selling compensation in connection with the private securities transaction, Rule 3040(c)(1) requires the member to provide the associated person with written approval or disapproval of the associated person’s participation in the private securities transaction. When a member elects to approve the registered representative’s private securities transaction, then, among other things, it must “supervise the person’s participation in the transaction as if the transaction were executed on behalf of the member.”

<sup>239</sup> *Dep’t of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at \*8 (NAC July 18, 2014), *appeal docketed*, No. 3-16022 (SEC Aug. 19, 2014). NASD Rule 0115 subjects associated persons to NASD Rule 2110, and FINRA Rule 0140 subjects associated persons to FINRA Rule 2010. *Mielke*, at \*8.

<sup>240</sup> *Chris Dinh Hartley*, 57 S.E.C. 767, 775 n.17 (2004); *Calandro*, 2007 FINRA Discip. LEXIS 17, at \*28 (“Violation of this rule deprives investors of a member firm’s oversight and due diligence, protections they have a right to expect.”) (quoting *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at \*15 (Nov. 8, 2006)).

<sup>241</sup> *Calandro*, 2007 FINRA Discip. LEXIS 17, at \*28 (quoting *Love*, 2004 SEC LEXIS 318, at \*9 (Feb. 13, 2004)).

<sup>242</sup> *Mielke*, 2014 FINRA Discip. LEXIS 24, at \*13–14 (citing *Keyes*, 2006 SEC LEXIS 2631, at \*11–12 (setting out the factors to establish a violation of NASD Rule 3040)).

a private securities transaction.<sup>243</sup> Accordingly, by participating in a private securities transaction without prior written notice, White violated NASD Rule 3040 and FINRA Rule 2010.

**C. White Violated FINRA Rules 8210 and 2010 by Providing False Testimony During His OTR (Third Cause of Action).**

FINRA Rule 8210 requires FINRA members and their associated persons to cooperate with FINRA investigations by providing information when requested by FINRA staff. Under Rule 8210, FINRA may require an associated person “to provide information orally, in writing, or electronically . . .” in connection with any investigation,<sup>244</sup> and no person shall fail to provide requested information.<sup>245</sup> “FINRA Rule 8210 is unequivocal and grants FINRA broad authority to obtain from an associated person information regarding matters that are involved in FINRA’s investigation.”<sup>246</sup> The Securities and Exchange Commission (“SEC”) has stressed the importance of Rule 8210:

Without subpoena power, NASD must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.” Failure to respond to Rule 8210 requests “impedes NASD’s ability to detect misconduct that threatens investors and markets.” It is therefore “critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations.”<sup>247</sup>

Providing false or misleading information to FINRA in connection with an examination or investigation “subverts [FINRA’s] ability to carry out its regulatory functions”<sup>248</sup> and violates Rule 8210.<sup>249</sup> Specifically, giving false testimony during an on-the-record interview violates

---

<sup>243</sup> White also received selling compensation in connection with the transaction, thereby requiring him to have received prior approval from the Firm before engaging in the transaction.

<sup>244</sup> Rule 8210(a)(1).

<sup>245</sup> Rule 8210(c).

<sup>246</sup> *Mielke*, 2014 FINRA Discip. LEXIS 24, at \*47.

<sup>247</sup> *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at \*22 (Feb. 20, 2014) (footnotes omitted).

<sup>248</sup> *Dep’t of Enforcement v. Rogala*, No. C8A030089, 2005 NASD Discip. LEXIS 44, at \*22 (NAC Oct. 11, 2005); *Dep’t of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at \*33 (NAC Oct. 10, 2007), *aff’d*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008).

<sup>249</sup> *Dep’t of Enforcement v. Palmeri*, No. 2007010580702, 2013 FINRA Discip. LEXIS 2, at \*11 (NAC Feb. 15, 2013); *Dep’t of Enforcement v. Harari*, No. 2011025899601, 2015 SEC LEXIS 899, at \*15–16 (Mar. 9, 2015).

Rule 8210.<sup>250</sup> Further, it is well established that a violation of the duty to cooperate and provide information pursuant to FINRA Rule 8210 also violates FINRA Rule 2010.<sup>251</sup>

As described above, while under oath and pursuant to a Rule 8210 request, White provided false and misleading testimony regarding the nature of SMW Ventures, his knowledge about its formation, and his activities related to the entity. He falsely testified that it was an AXA producer group; that it had been formed without his knowledge and without prior discussion with him; that he first learned of its formation in a March 2011 AXA compliance audit; that he never had responsibilities at SMW Ventures; and that when he purportedly learned of its existence, he and the AXA compliance examiner questioned McDonough about it. By virtue of these false and misleading statements, White violated FINRA Rules 8210 and 2010.

#### **IV. Sanctions**

In considering the appropriate sanctions to impose on White, the Panel looked to FINRA's Sanction Guidelines ("Guidelines").<sup>252</sup> The Guidelines contain General Principles Applicable to All Sanction Determinations ("General Principles"), overarching Principal Considerations, as well as guidelines for specific violations. The General Principles explain that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct."<sup>253</sup> Adjudicators are therefore instructed to "design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct."<sup>254</sup> Further, sanctions should "reflect the seriousness of the misconduct at issue,"<sup>255</sup> and should be "tailored to address the misconduct involved in each particular case."<sup>256</sup>

##### **A. For Providing False and Misleading Testimony, White Is Barred in All Capacities from Associating with any FINRA Member.**

According to the SEC, a failure to respond truthfully poses such a high risk of harm to investors and the markets that "it renders the violator presumptively unfit for employment in the

---

<sup>250</sup> *Dep't of Enforcement v. Walker*, No. C10970141, 2000 NASD Discip. LEXIS 2, at \*26–27 (NAC Apr. 20, 2000); *John Montelbano*, Exchange Act Release No. 47227, 2003 SEC LEXIS 153, at \*36–38 (Jan. 22, 2003).

<sup>251</sup> *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*30 (Jan. 30, 2009); *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at \*22 n.9 (NAC Feb. 25, 2014); see also *Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at \*36 n.58 (June 14, 2013); *Palmeri*, 2013 FINRA Discip. LEXIS 2, at \*11–12.

<sup>252</sup> FINRA Sanction Guidelines (2015) ("Guidelines"), <http://www.finra.org/industry/sanction-guidelines>.

<sup>253</sup> Guidelines at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

<sup>254</sup> Guidelines at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

<sup>255</sup> Guidelines at 2 (General Principles Applicable to All Sanction Determinations, No. 1).

<sup>256</sup> Guidelines at 3 (General Principles Applicable to All Sanction Determinations, No. 3).

securities industry.”<sup>257</sup> The SEC reached this conclusion because “supplying false information to [FINRA] during an investigation . . . ‘mislead[s] [FINRA] and can conceal wrongdoing’ and thereby ‘subvert[s] [FINRA’s] ability to perform its regulatory function and protect the public interest.’”<sup>258</sup>

The seriousness of this violation is reflected in the seriousness of the sanctions recommended in the Guidelines. The Guidelines recommend a fine of \$25,000 to \$73,000 for failing to respond truthfully.<sup>259</sup> Also, according to FINRA’s National Adjudicatory Council (“NAC”), because “[t]he failure to respond truthfully to a FINRA Rule 8210 request is as serious and harmful as a complete failure to respond, comparable sanctions are appropriate.”<sup>260</sup> A bar is the standard sanction for a complete failure to respond.<sup>261</sup> Hence, the standard sanction under the Guidelines for the equivalent violation of providing untruthful responses is a bar.<sup>262</sup>

Finally, in assessing sanctions for this violation, the Guidelines direct adjudicators to consider the importance of the information at issue from FINRA’s perspective. The information that was the subject of White’s untruthful testimony was important, as it related directly to White’s role in connection with a possible outside business activity. Additionally, White’s untruthful testimony that he and the AXA compliance examiner approached McDonough during the compliance audit was important, as it led the staff to re-interview McDonough and to seek additional documents from AXA.<sup>263</sup>

Here, the standard sanction of a bar should apply. In response to a series of questions regarding his knowledge of, and involvement in, the activities of SMW Ventures, White repeatedly gave untruthful answers in an attempt to conceal his connection to that entity. His false testimony was intentional, and this is an aggravating factor in assessing sanctions.<sup>264</sup> Additionally, he compounded this misconduct by testifying untruthfully at the hearing by trying

---

<sup>257</sup> See *Geoffrey Ortiz*, 2008 SEC LEXIS 2401, at \*32.

<sup>258</sup> See *id.* (quoting *Michael A. Rooms*, Exchange Act Release No. 51467, 2005 SEC LEXIS 728 (Apr. 1, 2005), *aff’d*, 444 F.3d 1208 (10th Cir. 2006)).

<sup>259</sup> Guidelines at 33.

<sup>260</sup> *Harari*, 2015 SEC LEXIS 899, at \*32; *Walker*, 2000 NASD Discip. LEXIS 2, at \*31 (finding untruthful responses tantamount to complete failure to respond and warranting a bar).

<sup>261</sup> Guidelines at 33.

<sup>262</sup> *Harari*, 2015 SEC LEXIS 899, at \*32. See Guidelines at 33; see also *Ortiz*, 2008 SEC LEXIS 2401, at \*31–32.

<sup>263</sup> Tr. 730–31.

<sup>264</sup> Guidelines at 7, Principal Considerations in Determining Sanctions, No. 13 (“[w]hether the respondent’s misconduct was the result of an intentional act, recklessness or negligence”).

to convince the Hearing Panel that his OTR testimony was accurate.<sup>265</sup> His untruthfulness at the hearing was disturbing and reflects strongly on his fitness to serve in the securities industry.<sup>266</sup>

Finally, there are no mitigating circumstances. White asked the Hearing Panel to take into consideration that he has been out of the securities industry for a while and has been unemployable in the industry because of this disciplinary action, and that he has paid substantial legal fees to defend himself.<sup>267</sup> The Hearing Panel did not accord these arguments any weight, as any economic distress White may have experienced is a result of his own misconduct.<sup>268</sup> In any event, the NAC has held that “[b]eing no longer registered or employed in the securities industry . . . is not mitigating.”<sup>269</sup> Accordingly, the Hearing Panel bars White for his failure to respond truthfully to questions asked during his OTR in violation of FINRA Rules 8210 and 2010.<sup>270</sup>

## **B. In Light of the Bar, No Further Sanctions Are Imposed for White’s Other Violations.**

### **1. Outside Business Activities**

For engaging in undisclosed outside business activities, the Guidelines recommend a fine of \$ 2,500 to \$ 73,000.<sup>271</sup> The Guidelines also recommend a suspension of up to 30 business days, when the outside business activities do not include aggravating conduct. Where there is aggravating conduct, however, the Guidelines suggest a suspension of up to one year. In

---

<sup>265</sup> *Dep’t of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at \*47 (NAC July 28, 2011) (finding respondent’s “lack of candor during these proceedings to be disturbing” and that respondent “provided inaccurate and incomplete information in an effort to minimize his own responsibility”) (citing *Dep’t of Enforcement v. Frankfort*, No. C02040032, 2007 NASD Discip. LEXIS 16, at \*41 (NAC May 24, 2007) (“Providing inaccurate information in an effort to minimize one’s own responsibility serves to aggravate sanctions.”). See also *Thomas S. Foti*, Exchange Act Release No. 31646, 1992 SEC LEXIS 3329, at \*13 (Dec. 23, 1992) (finding that lack of candor at hearing is an aggravating factor); *Dist. Bus. Conduct Comm. v. Goodman*, No. C9B960013, 1999 NASD Discip. LEXIS 34, at \*45–46 (NAC Nov. 9, 1999), *aff’d*, Exchange Act Release No. 43889, 2001 SEC LEXIS 144 (Jan. 26, 2001) (same).

<sup>266</sup> *Burch*, 2011 FINRA Discip. LEXIS 16, at \*47.

<sup>267</sup> Tr. 1317.

<sup>268</sup> See *Houston*, 2014 SEC LEXIS 614, at \*35–36 (rejecting applicant’s argument that he had suffered enough as a result of the disciplinary proceeding because for two years he had been unable “to practice [his] trade.”); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at \*27 (Dec 22, 2008) (“We also do not consider mitigating the economic disadvantages [respondent] alleges he suffered because they are a result of his misconduct.”).

<sup>269</sup> *Dep’t of Market Regulation v. Lane*, No. 20070082049, 2013 FINRA Discip. LEXIS 34, at \*95 (NAC Dec. 26, 2013), *aff’d*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558 (Feb. 13, 2015).

<sup>270</sup> In light of the bar, no fine is imposed. See Guidelines at 10.

<sup>271</sup> Guidelines at 13.

egregious cases, such as those involving a substantial volume of activity or significant customer injury, the Guidelines recommend a longer suspension, or a bar.<sup>272</sup>

In assessing sanctions for cases involving undisclosed outside business activities, the Guidelines advise adjudicators to consider five factors: (1) whether the outside activity involved customers of the firm; (2) whether the outside activity resulted directly or indirectly in injury to customers of the firm; (3) the duration of the outside activity, the number of customers, and the dollar volume of sales; (4) whether the respondent's marketing and sale of the product or service could have created the impression that the firm had approved the product or service; and (5) whether the respondent misled the firm about the existence of the outside activity or otherwise concealed the activity from the firm.<sup>273</sup>

Certain of these aggravating factors are present here.<sup>274</sup> SMW Ventures' activities occurred over a period of several months and could have created the impression that the Firm approved of those activities. Further, while SMW Ventures never moved beyond the start-up phase, it did undertake certain activities related to a jacket deal and it provided services to TBarrett Enterprises.<sup>275</sup> Significantly, White misled the Firm by concealing his outside business activities. He failed to disclose his relationship with SMW Ventures on his annual compliance questionnaire and falsely completed the OBA form. He also engaged in email communications regarding the entity through email accounts that he had either not disclosed to the Firm or that he knew the Firm was not monitoring.<sup>276</sup>

There are additional aggravating factors. White refused to accept responsibility for his misconduct. During the hearing, he tried to shift responsibility to his Firm for fulfilling his compliance obligations. He explained that by working for "a pretty reputable company . . . I would hope through the ongoing resources that we had there, they would actually have supervision and safeguards in place to make sure no one fell outside of their obligations to FINRA or anybody else in that industry." Further, he felt justified in "[p]rimarily" relying on the Firm to ensure his compliance because "if there was something that I was not doing correctly, that they would inform me . . . They are the ones that are licensed to do so, and they would understand each and every FINRA rule and regulation more than just a general kid that took one exam and now he's in the industry."<sup>277</sup>

---

<sup>272</sup> Guidelines at 13.

<sup>273</sup> Guidelines at 13.

<sup>274</sup> The absence of an aggravating factor "does not draw an inference of mitigation." Guidelines at 6.

<sup>275</sup> SMW Ventures also received a \$12,250 payment from MC (though the exact nature of the services rendered, if any, relating to the payment are unclear). See footnote 125, above.

<sup>276</sup> White claimed that once he disclosed the existence of the Yahoo! email account, he did not think there was anything wrong with one of his partners sending him emails "outside of AXA" and "assumed it was one and the same as far as AXA or Yahoo!" Tr. 562. This is not credible in light of his admission that he knew the Firm was not surveilling that email account.

<sup>277</sup> Tr. 929-30.

Not only did White try to shift blame to the Firm, but he also specifically blamed McDonough and Sak:

I thought everything was above water; it was amazing. This guy is giving me an opportunity to work directly with him. I can't believe my chances, being this young in the industry, everything of that nature. I was kind of more caught up on the hype of it, and I didn't actually stop to, you know, worry about the compliance aspect because I knew he was in compliance and the other individual supervisor as well, and I figured that they wouldn't be put in that position or role if they weren't on top of their compliance and doing everything by the book.<sup>278</sup>

The only mistake White acknowledged was placing too much trust in McDonough who, he concludes, took advantage of him.<sup>279</sup>

None of White's arguments are mitigating. A registered representative is responsible for his own actions and cannot shift that responsibility to the firm or his supervisors.<sup>280</sup> And, "whether new or experienced, '[p]articipants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements.'"<sup>281</sup> "Neither a respondent's claimed ignorance of the securities laws, nor a respondent's attempt to shift responsibility for a failure to comply with the securities laws to inadequate training or incompetent supervision, will serve to lessen the sanction imposed."<sup>282</sup> Further, "youth and inexperience do not shield registered representatives from liability and we do not consider such factors as evidence of mitigation."<sup>283</sup>

White's blame-shifting arguments do more than fail to mitigate his misconduct. They also demonstrate that he fails to accept responsibility for his actions, and that even as late as the

---

<sup>278</sup> Tr. 1206-07.

<sup>279</sup> Tr. 1207.

<sup>280</sup> *Craig*, 2008 SEC LEXIS 2844, at \*15.

<sup>281</sup> *Dep't of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at \*20 (NAC Jan. 7, 2011), *aff'd*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719 (Oct. 20, 2011) (quoting *Richard J. Lanigan*, 52 S.E.C. 375, 378 n.13 (1995)).

<sup>282</sup> *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at \*97 (NAC Dec. 20, 2007), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

<sup>283</sup> *Dep't of Enforcement v. Cuzzo*, No. C9B050011, 2007 NASD Discip. LEXIS 12, at \*37 (NAC Feb. 27, 2007).



hearing, he did not appreciate his obligations to comply with the outside business activities rule. This was an aggravating factor the Panel took into account in assessing sanctions.<sup>284</sup>

Also, the Hearing Panel took into account White's evasiveness and lack of candor during the hearing.<sup>285</sup> His hearing testimony conflicted, at times, with his OTR testimony. And, when confronted with inculpatory communications, he often denied receiving or reading them, or reading them in a timely manner. Moreover, his defense rested on a false narrative in which he portrayed himself as a victim, kept in the dark by McDonough about the true purpose and activities of SMW Ventures. The Panel found his false testimony deeply troubling and a major aggravating factor.

Finally, Enforcement argued that White engaged in an additional OBA violation while associated with AXA and this should aggravate his sanctions. Enforcement attempted to demonstrate that White received \$20,000 in unreported commissions from Studemont while still associated with AXA. White testified that he had received compensation from Studemont in July 2011 but did not report this to the Firm. White claimed that he failed to notify the Firm because he believed that, by then, he had resigned from AXA (though he was still associated with it until August).<sup>286</sup> In light of White's explanation, however, and given how close the violation occurred in relation to his termination, the Panel considered, but did not give substantial weight to, this apparent additional outside business activities violation.

Weighing the above considerations, the Hearing Panel finds that an appropriate remedial sanction would be a fine of \$25,000 and a one-year suspension in all capacities from association with a member firm. But in light of the bar for providing untruthful OTR testimony, the Hearing Panel imposes no additional sanctions for White's violation of NASD Rule 3030 and FINRA Rules 3270 and 2010 by engaging in undisclosed outside business activities

## **2. Private Securities Transactions**

To determine sanctions for private securities transactions, the applicable Guideline provides for a two-step process. First, it advises adjudicators "to assess the extent of the selling away, including the dollar amount of sales, the number of customers and the length of time over which the selling away occurred." Here, the selling away involved the sale of a \$100,000 note to one customer of the Firm. The Guideline recommends that, with these factors in mind, the

---

<sup>284</sup> *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at \*73 (Jan. 30, 2009) (finding that respondent's blame-shifting arguments demonstrate failure to accept responsibility for own actions), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *Epstein*, 2007 FINRA Discip. LEXIS 18, at \*98-99 ("Epstein's failure to accept responsibility for his own actions and his continued blame of others for the circumstances that have occurred are aggravating factors that we have considered in reaching our conclusion that a bar is an appropriate sanction in this case.").

<sup>285</sup> *Dep't of Enforcement v. Galasso*, No. C10970145, 2001 NASD Discip. LEXIS 2, at \*76-77 (NAC Feb. 5, 2001) (finding false and evasive responses to be an aggravating factor).

<sup>286</sup> Tr. 1197-99.

adjudicators consider a suspension of ten business days to three months. Following that assessment, the Guideline directs the adjudicators to consider other factors contained in the Principal Considerations for the Guidelines and the General Principles applicable to all Guidelines. The Guideline stresses that one or more mitigating or aggravating factors may raise or lower the sanctions. Additionally, the Guidelines recommend a fine of \$5,000 to \$73,000 and disgorgement.<sup>287</sup>

While White's violative conduct involved only one customer, several aggravating factors are nonetheless present. The transaction was sizeable,<sup>288</sup> and resulted in \$100,000 of injury to a Firm customer (although ultimately the Firm made restitution to KW).<sup>289</sup> Additionally, White misled and concealed the existence of the selling away activity from the Firm by not disclosing it, as required, on the Firm's questionnaire. Also, given that White received selling compensation, he not only failed to notify the Firm, but failed, as the Rule required, to obtain the Firm's prior approval to participate in the sale.<sup>290</sup> Finally, the Panel also took into account White's lack of candor during the hearing and his failure to accept responsibility, all the while continuing to maintain that he did not participate in the transaction when the evidence plainly showed otherwise.

Accordingly, after considering the various factors, and finding that there is no mitigation, the Hearing Panel concludes that for engaging in an undisclosed private securities transaction, White should be fined \$25,000, suspended in all capacities for three months, and required to disgorge the \$2,500 payment he received from McDonough relating to the transaction. We do not impose such sanctions, however, in light of the bar imposed for White's untruthful testimony in violation of Rules 8210 and 2010.

## **V. Order**

Respondent Brian Michael White is barred in all capacities from associating with any FINRA member for providing false testimony at his OTR, in response to a FINRA Rule 8210 request in violation of FINRA Rules 8210 and 2010. In light of the bar, no further sanctions are imposed for White's violations of NASD Rule 3030 and FINRA Rules 3270 and 2010 by engaging in undisclosed outside business activities, and NASD Rule 3040 and FINRA Rule 2010 by participating in an undisclosed private securities transaction. White is also ordered to pay the

---

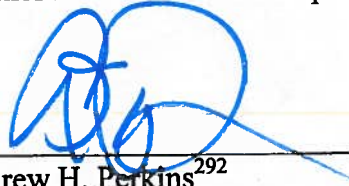
<sup>287</sup> Guidelines at 14.

<sup>288</sup> Guidelines at 14 (Principal Considerations in Determining Sanctions, No. 1).

<sup>289</sup> Guidelines at 15 (Principal Considerations in Determining Sanctions, No. 7).

<sup>290</sup> See NASD Rule 3040(e)(2).

costs of the hearing in the amount of \$11,590.76, which includes a \$750 administrative fee and the cost of the hearing transcript.<sup>291</sup> If this decision becomes FINRA's final disciplinary action, the bar shall become effective immediately.



Andrew H. Perkins<sup>292</sup>  
Chief Hearing Officer  
For the Hearing Panel

Copies to:     Brian Michael White (*via overnight courier and first-class mail*)  
                   Robert Medina, Esq. (*via electronic mail, overnight courier and first-class mail*)  
                   Gregory R. Firehock, Esq. (*via electronic and first-class mail*)  
                   Robin W. Sardegna, Esq. (*via electronic mail*)  
                   Perry C. Hubbard, Esq. (*via electronic mail*)  
                   Jeffrey D. Pariser, Esq. (*via electronic mail*)

---

<sup>291</sup> The Hearing Panel considered and rejected without discussion all other arguments by the parties.

<sup>292</sup> The Chief Hearing Officer issues this Decision in the absence of the Hearing Officer, pursuant to Rule 9235(b).