FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. BRETT IAN FRIEDBERG (CRD No. 5012184), Respondent.	Disciplinary Proceeding No. 2010024522103 Hearing Officer–DRS **EXTENDED HEARING PANEL DECISION** March 23, 2016

Respondent is barred from associating with any FINRA member firm in any capacity for recommending that his customers purchase securities while lacking a reasonable basis for the recommendations. Respondent is also ordered to pay restitution to the affected customers, disgorge his commissions, and pay hearing costs. In light of these sanctions, no further sanctions are imposed for Respondent's negligent misrepresentations to customers.

The Department of Enforcement did not prove by a preponderance of the evidence that Respondent made reckless misrepresentations to customers Therefore, that charge is dismissed.

Appearances

For the Complainant: Michael J. Watling, Esq., Frank M. Weber, Esq., Aaron Mendelsohn, Esq., Megan Davis, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Brett Ian Friedberg, Pro Se.

DECISION

I. Introduction

Between 2009 and 2011, registered representative and supervisor Brett Ian Friedberg recommended and sold notes ("Notes") to customers, promising in a private placement offering ("Offering") that they would earn a one-year 100 percent rate of return. The issuer of the Notes, Metals, Milling & Mining LLC ("MMM"), purportedly intended to extract precious metals from materials left over from mining operations (known as "ore concentrate"). Friedberg recommended the investment without a sufficient basis to conclude that the Notes were suitable

for any investor. Additionally, when recommending the investment, Friedberg told his customers that the Notes were collateralized by barrels of ore concentrate whose value was sufficient to secure the Notes. Friedberg's representations, however, were false. In fact, the investment was a scam: MMM was neither legitimate nor viable, and it did not own any ore concentrate. Moreover, the ore concentrate that purportedly secured the investment was nearly worthless. In the end, Friedberg's customers lost their entire investment totaling $600,000.

Based on this conduct, the Department of Enforcement brought a disciplinary action against Friedberg. The Complaint charged him with violating FINRA's suitability rule by failing to perform sufficient due diligence before recommending the investment to his customers. The Complaint also charged him with violating the federal and FINRA anti-fraud provisions by recklessly or, alternatively, negligently making misrepresentations to his customers about the sufficiency of the collateral purportedly securing the Notes.[1]

Friedberg answered the Complaint, denied all charges, and requested a hearing. For his defense, Friedberg did not deny that MMM was a fraud or that he made the misrepresentations concerning the collateral. Instead, he asserted that only after he sold the Notes did he learn that MMM and the Offering were illegitimate. He claimed that at the time he recommended the Notes to his customers, he reasonably relied on: (1) his member firm employer to properly structure and vet the Offering; (2) the representations about MMM and the Offering made to him by his firm's Chief Executive Officer, the Investment Banking Department, investment bankers, and others at the firm; and (3) offering materials the firm provided to him.

In May, June and July 2015, an Extended Hearing Panel held an 11-day hearing, followed by post-hearing briefing that the parties completed on November 12, 2015.

After considering the evidence and the parties' arguments, the Extended Hearing Panel rejects Friedberg's defenses. We find that Friedberg violated FINRA rules by recommending the investment without a reasonable basis for concluding that it was suitable for any customer. For these violations, we impose the sanctions ordered below. Further, the Panel finds that Friedberg violated federal and FINRA rules by making grossly negligent misrepresentations to customers regarding the purported collateral securing the Notes. But in light of the sanctions imposed for his suitability violations, we do not impose further sanctions.

II. Findings of Fact

A. Brett Ian Friedberg

Friedberg first became registered with FINRA as a general securities representative through a member firm in August 2005.[2] In February 2009, Friedberg became registered as a

[1] The Complaint also charged five other registered representatives at Friedberg's firm in connection with their sale of the Notes. One respondent settled the charges before the hearing; the remaining respondents settled during the hearing.

[2] Joint Stipulations ("Stip.") ¶ 8; CX-3, at 4–8.

general securities representative through HFP Capital Markets LLC ("HFP" or "Firm").[3] And, beginning in August 2009, he became registered as a general securities principal through the Firm.[4] His principal registration with the Firm was terminated in April 2013,[5] and his general securities representative registration was terminated in October 2013.[6] Friedberg is not currently registered or associated with a FINRA member firm.[7]

B. MMM and HFP's Relationship

Sometime around the late fall of 2009, HFP's managing partner, Vincent Puma, became acquainted with Richard Galvin. Galvin held himself out as having expertise in mining and precious metals. Also, he claimed to own or have access to barrels of ore concentrate from which precious and valuable metals could be extracted through a process called "plasmafication."[8] Galvin needed funding to undertake this process and sought HFP's assistance.[9] And on November 19, 2009, Galvin's company, MMM, engaged HFP to act as the exclusive placement agent for the Offering, a $2 million debt-based private placement.[10] Puma signed the agreement on behalf of HFP as its Managing Partner.[11]

But as reflected in a series of agreements he executed later in November, Puma was also deeply involved with MMM. On November 24, 2009, MMM entered into an agreement with Oxygroup Incorporated to process ore.[12] The agreement contained a signature line for, among other persons, Puma, as representative of Metals Partners LLC ("MMM Partners").[13] Under that agreement, MMM incurred substantial liabilities.[14]

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[3] Stip. ¶ 10; CX-3, at 4–8.

[4] Stip. ¶ 11; CX-3, at 4–8.

[5] Stip. ¶ 12; CX-3, at 4–8.

[6] Stip. ¶ 13; CX-3, at 4–8.

[7] Ans. ¶ 14; Stips. ¶ 14; Hearing Transcript ("Tr.") 1381–82; CX-3, at 4–8. Although Friedberg is no longer registered or associated with a FINRA member, he remains subject to FINRA's jurisdiction for the purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because: (a) the Complaint was filed on June 4, 2014, within two years after the effective date of termination of his last registration with HFP, namely, October 2013; and (b) the Complaint charges him with misconduct committed while he was registered or associated with a FINRA member. Ans. ¶ 15; Stips. ¶ 15.

[8] *See generally* CX-39; CX-40; CX-42.

[9] CX-18, at 1; CX-17.

[10] CX-17, at 1–6. Later, in April 2010, the maximum amount of notes to be sold in the offering was raised to $3 million. Tr. 123, 1413.

[11] CX-17, at 6. *See also* CX-17, at 9 (Agreement extension dated August 25, 2010, executed by Galvin and Puma).

[12] CX-18.

[13] CX-18, at 5.

[14] The processing agreement obligated MMM to pay Oxygroup $3,990,000 in three tranches. CX-18, at 1–2.

A few days later, on November 30, 2009, Puma established MMM Partners and became its sole Managing Member.[15] And, the next day, December 1, 2009, Puma, among others, executed an Operating Agreement for MMM.[16] Puma signed the agreement as a Manager of MMM and as a Managing Member of MMM Partners.[17] The Operating Agreement established MMM's ownership structure: Galvin owned a 75 percent membership interest in MMM; MMM Partners owned a 20 percent membership interest; and another entity owned the remaining five percent.[18] The Operating Agreement further established that Puma and Galvin were the initial Managing Members of MMM.[19]

C. Friedberg's Due Diligence

As to Friedberg, the hearing focused on whether he conducted proper due diligence before recommending the Notes to his customers and before making representations to them about the collateral. Friedberg testified that his due diligence consisted of relying upon certain statements made to him by the Firm and upon certain documents it provided to him.[20]

At the hearing, Friedberg explained that he first learned about the Offering in the fourth quarter of 2009 at a meeting with members of HFP management, including Puma and HFP's head of investment banking, Thomas O. Mikolasko.[21] Before he was introduced to the Offering, Friedberg had no background in geology or physics, no familiarity with MMM or plasmafication, and no experience selling private placements.[22] He also had never encountered zero coupon instruments that were structured similar to the Notes in the Offering.[23]

At the meeting, Puma and Mikolasko provided background information about MMM and discussed the trips they had made to its facilities.[24] Thereafter, Friedberg had various meetings and conversations with HFP management about MMM and the Offering. Specifically, Friedberg testified that he had continued a running dialogue about MMM with Mikolasko, who, according to Friedberg, came across as very knowledgeable and experienced.[25] Friedberg also testified that Puma and Mikolasko told him that the money raised in the Offering would be used to build a plant to process the ore concentrate and extract precious metals.[26] Friedberg claimed that based

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[15] CX-19, at 4.

[16] CX-21.

[17] CX-21, at 68.

[18] CX-21, at 69.

[19] CX-21, at 40, 68.

[20] Tr. 1364.

[21] Tr. 1390–91.

[22] Tr. 1366, 1391–94.

[23] Tr. 1414–16.

[24] Tr. 1547.

[25] Tr. 1534–35.

[26] Tr. 1433–35.

on meetings at the Firm, Puma and Mikolasko led him to believe that the ore concentrate securing the Notes represented 40–60 percent of their value.[27]

Friedberg also reviewed certain documents that the Firm gave him: (1) a Subscription Agreement,[28] (2) a Purchaser Questionnaire,[29] (3) a Senior Secured Zero Coupon Note,[30] (4) a Repurchase Agreement, and (5) a Business Overview of MMM[31] (collectively, the "Offering Documents").[32] The Subscription Agreement stated, and Friedberg admitted knowing, that MMM had no operating history or "revenue from operations since inception;"[33] and that investors had no basis to evaluate MMM's ability to operate profitably or successfully. Also, Friedberg admitted knowing that the Offering Documents promised investors a one-year, 100 percent rate of return.[34] Based on the Offering Documents as well as meetings with HFP staff, he understood that the Notes were secured by barrels of ore concentrate.[35]

The Offering Documents did not include important information about MMM and the Offering. For example, they (1) did not explain how MMM would use the Offering proceeds,[36] (2) did not include a minimum amount of capital required to be raised in order for the Offering to close,[37] (3) did not identify the owners or management of MMM,[38] (4) did not include details regarding how MMM intended to extract precious metals from ore concentrate through plasmafication or other means, and (5) did not address the technological viability or profitability of the extraction process.[39]

The Firm did not supplement the Offering Documents by providing Friedberg with additional documents or information about MMM or the Offering. Specifically, he did not receive a business plan, financial statements, descriptions of assets and liabilities, or a model or financial projections for the Offering that would have explained how MMM intended to generate income and how much income it anticipated it would generate.[40] He did not receive any written account of how the proceeds of the Offering were to be used, and saw no breakdown, by dollars

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[27] Tr. 1422.

[28] CX-8.

[29] CX-9.

[30] CX-10.

[31] RX-163; Tr. 1399–400, 1622–23.

[32] CX-11; Tr. 1399–400.

[33] Tr. 1399–401; CX-8, at 6.

[34] Tr. 1395; CX-8; CX-10; CX-11.

[35] CX-8; CX-9; CX-10; CX-11; Respondent's. Br. at 6, ¶ 26.

[36] CX-8; CX-9; CX-10; CX-11.

[37] Tr. 127, 1413–14.

[38] CX-8; CX-9; CX-10; CX-11.

[39] CX-8; CX-9; CX-10; CX-11.

[40] Tr. 1406–07.

or percentages, of how or to whom the Offering proceeds were to be distributed.[41] Further, there was no private placement memorandum or prospectus.[42] Finally, before soliciting customers, he was not told by Puma or Mikolasko of Puma's relationship with MMM;[43] he did not know how MMM was capitalized;[44] he had not seen any descriptions of MMM's assets or liabilities,[45] and was unaware that at the time MMM was established, Galvin had numerous unsatisfied state and federal tax liens and judgments entered against him.[46]

D. Friedberg Fails to Conduct Additional Due Diligence

Before recommending the investment, Friedberg understood that the Offering was "highly speculative."[47] He also recognized that he did not have certain information about MMM and the Offering, which was relevant or important to his suitability determinations, namely, MMM's lack of operating history and financial documentation, the lack of a basis for investors to evaluate its ability to operate profitably,[48] and the manner in which MMM intended to use the Offering proceeds.[49]

Nevertheless, besides reviewing the Offering Documents and engaging in some "light Googling,"[50] Friedberg did not conduct additional due diligence regarding the Offering. In particular, Friedberg: (1) failed to conduct additional due diligence or investigation into MMM or its personnel or principals so that he could evaluate MMM's ability to operate or be successful;[51] (2) did not investigate how MMM intended to use the proceeds (rather, he accepted the representations by Puma and Mikolasko that the proceeds would be used to "build the machinery" and "once it was built . . . to go through the process of extracting gold and precious metals");[52] (3) never investigated how MMM was capitalized;[53] (4) took no action to determine whether the amounts raised in the offering were sufficient to capitalize MMM;[54] (5) did not recall attempting to determine who owned MMM;[55] (6) made no attempt to look into the

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[41] Tr. 1432, 1434.

[42] Tr. 128.

[43] Tr. 1486, 1545.

[44] Tr. 1437.

[45] Tr. 1406–07.

[46] Tr. 1440; CX-37; CX-38; CX-1E.

[47] Tr. 1366.

[48] Tr. 1401–02, 1407–08.

[49] Tr. 1434–35.

[50] Tr. 1363–64.

[51] Tr. 1401–03.

[52] Tr. 1432–35.

[53] Tr. 1414, 1437.

[54] Tr. 1414, 1437.

[55] Tr. 1409–1410.

scientific aspects of the Offering;[56] (7) took no steps to determine whether a private placement memorandum was created for the Offering;[57] and (8) did not obtain any written reports from an independent source confirming that the ore had value.[58]

Further, at the hearing, Friedberg could not recall whether he had tried to obtain the Firm's due diligence file concerning MMM.[59] That file contained important information regarding MMM, including its close relationship with principals of the Firm. Among other things, those files contained documents showing that: (1) Richard Galvin owned a 75 percent interest in MMM;[60] (2) Vincent Puma indirectly owned a 20 percent interest in MMM through MMM Metals Partners, LLC;[61] (3) prior to forming MMM, its owners entered into an agreement on behalf of MMM that required it to pay nearly $4 million to a third party contractor, including $590,000 within days of its formation;[62] and (4) HFP investment banker Mikolasko held himself out as a managing member of MMM.[63]

E. Friedberg's Sales of the Notes

From December 2009 through February 2011, in connection with the Offering, Friedberg sold $600,000 in Notes to ten customers. Specifically, from December 2009 through November 2010, Friedberg sold $550,000 of Notes to eight customers, JB, BE, DL, WS, ER, RR, DO, and RK, in ten transactions.[64] In connection with these sales, Friedberg received $36,250 in commissions.[65] Further, as discussed below, Friedberg sold Notes to two additional customers. He sold $25,000 in Notes to customer JW in February 2010 and $25,000 in Notes to customer JG in February 2011. When selling the Notes to his customers, Friedberg discussed the collateral feature with them. Specifically, he told the purchasers that the Notes were collateralized by barrels of ore that had sufficient value to back the investment.[66] The Offering, however, was fraudulent. And the ore concentrate that Puma and Mikolasko told Friedberg would be enough to

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[56] Tr. 1364–65.

[57] Tr. 1500–02.

[58] Ans. ¶ 71.

[59] Tr. 1437.

[60] CX-21, at 69.

[61] CX-21, at 69.

[62] CX-18; CX-19.

[63] CX-138, at 62; RX-1109, at 4.

[64] Tr. 1505–06; CX-50; CX-1B.

[65] Tr. 1398–99; *see also* CX-50, at 6; CX-1C.

[66] Ans. ¶ 68; Tr. 1430–31; Tr. 2402 (Friedberg's closing). *See also* Tr. 1430 (Friedberg testifying that he told his customers that the collateral was valuable). At the hearing, Friedberg explained that "somebody had told me one thing and it turned out to be the other." Tr. 1431.

secure the Notes was worthless.[67] All of the Notes issued in the Offering defaulted upon maturity.[68]

In February 2011, after numerous Notes had matured and defaulted, Friedberg, nevertheless, recommended that Firm customer JG purchase $25,000 of Notes, as referenced above.[69] When Friedberg solicited JG to purchase Notes, Friedberg knew that MMM had defaulted on all of the Notes it had issued to his customers that had matured by February 2011.[70] The funds from JG's purchase were not forwarded to MMM. Instead, they were used to refund a $25,000 Note held by another investor, AS, who had requested a refund because his Note had defaulted.[71]

F. The Customer Witnesses Evidence

Two of Friedberg's customers, EA and JW, testified at the hearing. The Complaint alleged that Friedberg made unsuitable sales and misrepresentations regarding the collateral to both customers.[72] We discuss the evidence relating to them below.

1. Sale to Customer EA

EA was an HFP customer beginning in 2009.[73] It is unclear whether Friedberg or Engler, another broker at the Firm, opened the account.[74] But at some point, Friedberg took over the account and EA then dealt exclusively with him.[75] It also is unclear whether Engler or Friedberg recommended that EA invest in the Offering. EA testified that "they," i.e. Friedberg and Engler, had "put me into a large amount of bonds that went bankrupt . . . . And obviously, I was outraged. And so they said, well, we can try to make it up to you, we have this private placement, which I -- and that's how I came to the private placement."

But when specifically asked "who made that recommendation to you," he was unsure: "I believe it was Friedberg, but it might have been originally Engler, I just don't remember."[76] He went on to say that it was Friedberg who discussed the investment with him both before and after

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[67] Tr. 1430–31, 1514–15.

[68] Tr. 1516.

[69] CX-87; Tr. 1513–14.

[70] Tr. 1513–14.

[71] Tr. 115–16, 1507–08; CX-79; CX-80; CX-81; CX-82; CX-83; CX-87.

[72] *See* Exhibit A to the Complaint, at 2.

[73] Tr. 448–49.

[74] According to Friedberg, he initiated the account but Engler was the broker of record and dealt with EA. Tr. 1376, 1603–04. By contrast, EA testified that he opened the account after receiving a cold call from Jonas Engler. Tr. 448–49.

[75] Tr. 452.

[76] Tr. 450.

he invested in the Offering,[77] and that Friedberg sent him the Offering-related documents to sign and return.[78] Friedberg, however, had a different recollection. He denied recommending the investment, maintaining that his discussions with EA about the Offering were limited to updates occurring after EA's purchase.[79] EA purchased $25,000 of Notes[80] and lost his entire investment.[81]

The Panel finds that Enforcement failed to demonstrate that Friedberg recommended the Notes to EA. In reaching this finding, we considered a number of factors, some of which favor Friedberg's version. First, Friedberg credibly denied recommending the investment to EA. Friedberg conceded that he recommended the investment and misrepresented the collateral to a number of his customers. Having made this sweeping concession, it is not apparent what motive he would have to falsely deny recommending the Offering to EA. Second, EA did not dispute Friedberg's denial. Rather, EA could not recall whether it was Engler or Friedberg who recommended the investment. Third, the documentary record supports Friedberg's testimony. The Firm's records attribute EA's purchase to Engler, not Friedberg.[82] Further, the exhibits do not reflect that Friedberg received any commissions based on EA's purchase.[83] And finally, EA's overall credibility was undermined because he marked on an MMM questionnaire provided to HFP that his income was $200,000, while he later testified that his income was actually $40,000.[84]

Conversely, several factors support a finding that Friedberg recommended the investment. EA clearly recalled that it was Friedberg who discussed MMM with him, before and after he invested in the Offering. And, he recalled that it was Friedberg who sent him the Offering Documents to sign. That recollection was not undermined by cross examination. Additionally, EA did not have an obvious motive to testify falsely about Friedberg. Enforcement is not seeking restitution on EA's behalf.[85] Moreover, EA already filed, and settled, an arbitration

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[77] Tr. 452–56, 460–62.

[78] Tr. 458–59; CX-113.

[79] Tr. 1603–05, 1376.

[80] Tr. 456.

[81] Tr. 462.

[82] CX-50, at 4. The Panel recognizes, however, that CX-50 may not be accurate in all respects. For example, it attributes JW's sale to Engler, CX-50, at 2, while the credible evidence, as discussed below, demonstrated that Friedberg sold the investment to JW.

[83] CX-1B, at 1 and 2, reflects that Friedberg sold the Notes to eight customers. EA is not included on the exhibit as one of those eight customers. CX-1B, Enforcement's summary exhibit, is based on CX-50. The same eight customers are reflected on CX-50. CX-50, at 6, shows that Friedberg received total commissions of $36, 250, and those commissions were derived from the sales to the eight customers.

[84] CX-113; Tr. 446. EA explained that he checked the box reflecting his income was $200,000 because he was told it was just a formality in order to complete the form. Tr. 465. Nevertheless, he checked the box knowing that his representation regarding his income was false.

[85] Enforcement is seeking restitution in connection with Friedberg's sales to eight customers, which did not include EA.

claim against HFP, Engler, and Friedberg, which included claims involving the sale of the Notes.[86]

In sum, the Panel finds that, on balance, the evidence is inconclusive as to whether Friedberg recommended that EA purchase the Notes.

Enforcement also did not establish that Friedberg made false statements to EA about the collateral. It is not clear whether Friedberg had pre-purchase discussions with him about the investment. Additionally, although EA testified that Friedberg made certain statements to him about the investment, including its safety, EA was never asked at the hearing if Friedberg made the specific misrepresentations charged in the Complaint. Therefore, his testimony does not support a finding that Friedberg misrepresented the collateral.

2. Sale to Customer JW

JW became Friedberg's customer in or about 2008 after Friedberg cold-called him.[87] In December 2009, Friedberg solicited JW to purchase $25,000 of Notes.[88] Friedberg told him that there was no risk in investing in the Offering, and mentioned the collateral, among other things. Specifically, JW testified that Friedberg told him that the collateral was worth more than the cost of the investment.[89] Based on Friedberg's recommendation, JW purchased a $25,000 Note.[90] After the one-year term of the Note expired, it defaulted and JW lost his entire investment.[91]

Friedberg did not dispute JW's recollection of these events, and the Hearing Panel accepts them as true.[92] Instead, Friedberg, consistent with his defense to the charges regarding the other customers, maintained that he simply passed on to JW the information he had learned from the Offering Documents and his meetings with Puma and Mikolasko.[93]

G. Friedberg's Defense

Friedberg claimed that he relied on the Firm to tell him what he needed to know and to give him the documents he needed to review regarding MMM and the Offering. In performing

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[86] CX-3, at 11–12; Tr. 463.

[87] Tr. 1955–56.

[88] Tr. 1958, 1961.

[89] Tr. 1960.

[90] Tr. 1961–62.

[91] CX-50; Tr. 1969–70.

[92] There is documentary evidence in the record, however, that conflicts with the finding that Friedberg recommended the investment to JW. That evidence reflects, instead, that Engler sold the Note to JW. *See* CX-50, at 2; CX-1B, at 1. Nevertheless, Friedberg admitted that JW was his client and that JW purchased the Notes based on his advice. *See* Respondent's Post-Hrg. Br. at 13, ¶¶ 54–55. Therefore, we credit this admission, which was corroborated by JW's testimony, over the conflicting documents.

[93] Respondent's Post-Hrg. Br. at 13.

his due diligence and suitability obligations, he testified that he relied on his various meetings with the Investment Banking Department and well as on the Offering Documents.[94]

Friedberg argued that his reliance was reasonable for several reasons. First, he understood that Puma and Mikolasko had substantial experience dealing with private placements, and this led Friedberg to rely on them.[95] Second, at the time, he saw no reason to doubt the truthfulness of what they told him at Firm meetings.[96] (Although, looking back, he concluded that Mikolasko withheld material information from him, as well as from others within the retail sales force.)[97] Third, he claimed that HFP, including the Firm's Compliance Department, told him that under the Firm's Written Supervisory Procedures ("WSPs"), the Offering Documents were all that he would need to sell the Notes. Fourth, he claimed that he was under the impression that the Compliance Department would ensure that the Offering complied with the WSPs.[98] Fifth, he believed that the Firm's Investment Banking Department "fully vetted" the Offering.[99] And, finally, he relied on the Firm, including Puma and Mikolasko, because he had never previously performed investigative work concerning private companies.[100]

Friedberg's confidence in relying on the Firm was later buttressed, he asserted, by his participation in a similar private offering for USPR shortly after he began selling the Notes. USPR was involved in extracting precious metals from land.[101] That offering was structured as a two-year convertible note, paying a 16 percent annual interest rate. Interest would be paid at the end of the two-year term, and investors could convert the note to USPR stock at any time during the two-year span.[102]

Friedberg was introduced to USPR during meetings with Puma and Mikolasko that were similar to those that occurred before the MMM Offering.[103] Also, the manner in which the Firm unveiled and handled the two offerings, including how the Compliance Department processed the paperwork, were almost identical.[104] Friedberg testified that he made several

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[94] Tr. 1364, 1498.

[95] Tr. 1642.

[96] Tr. 1498–99.

[97] Tr. 1413, 1477–78; RX-1109, at 4.

[98] Tr. 1541, 1500–05, 1525.

[99] Tr. 1366. In particular, according to Friedberg, he was justified in not inquiring into MMM's ownership because he believed that others in the Firm vetted the Offering. Tr. 1409. Also, because he trusted the Investment Banking Department's ability to vet the Offering, he did not view MMM's lack of operating history as a red flag. Tr. 1401–02.

[100] Tr. 1402–03.

[101] RX-1105 (82); Tr. 1564, 1676–77.

[102] RX-1105 (82).

[103] Tr. 1572–75.

[104] Tr. 1841–42.

recommendations of the USPR private placement to his clients, several of whom obtained a rate of return exceeding 100 percent on their investment.[105]

Friedberg also offered explanations concerning specific accusations by Enforcement regarding his lack of due diligence and knowledge about MMM and the Offering. As to his lack of knowledge about Puma's conflict of interest, Friedberg testified that Mikolasko did not inform him of the conflict[106] and that he had no reason to be aware of it.[107] Further, Friedberg testified that he did not consider the 100 percent rate of return to be unusual, as he understood that private placements generally provided high rates of return accompanied by high risk.[108] Regarding Galvin's unsatisfied tax liens and judgments, Friedberg conceded that he was unaware of the liens, but claimed he had no reason to know about them and had never previously researched anyone's tax liens.[109] He also blamed Puma and Mikolasko for being aware of Galvin's financial difficulties but not informing the retail staff about them.[110] Finally, he asserted that he had no obligation to review the Firm's due diligence files, and, thus, should not have been expected to know what those files contained.[111]

Friedberg maintained a consistent position regarding the misrepresentations he made about the collateral: he trusted what he was told by Puma, namely, that there had been estimates of the collateral; it was sufficient to back an investment in the Notes; that in the event of a default, the customers could sell off the collateral for its fair market value; and he had no reason to question what he was told.[112]

Finally, regarding his replacement sale to JG, Friedberg defends that sale on the basis that although, by then, Notes had defaulted, Mikolasko continuously assured Friedberg that MMM was still going to be a success.[113] Hence, according to Friedberg, the defaults did not impact his

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[105] Tr. 1551, 1564.

[106] Tr. 1545. Additionally, Enforcement argues the Friedberg should have identified as a conflict of interest that Mikolasko signed a Note for one of Friedberg's customers, WS, as managing member of MMM. *See* CX-157, at 22. Friedberg explained at the hearing that at the time, he did not identify this as a conflict of interest, and, in any event, he would have expected the Compliance Department to identify conflicts of interest reflected in the documents. At the time, he inferred that Mikolasko signed the Note on behalf of MMM, but viewed that as meaning only that as head of Investment Banking at the Firm, he had authority to sign a document representing the deal. Friedberg added that he did not have reason to believe that the Firm had a conflict of interest and, therefore, did not view Mikolasko's signature as raising a red flag in that context. Tr. 1485–88.

[107] Tr. 1487–88.

[108] Tr. 1396.

[109] Tr. 1440–41.

[110] RX-59.

[111] Respondent's Post-Hrg. Br. at 18, 23.

[112] Tr. 2402–03.

[113] Tr. 1522–23.

assessment of MMM's viability, or affect his recommendation that JG invest in MMM.[114] According to Friedberg, he still felt confident that an investment in MMM was sound.[115]

III. Conclusions of Law

A. Friedberg Violated NASD Conduct Rule 2310 and FINRA Rule 2010 (Reasonable Basis Suitability)

The Complaint charged Friedberg with violating NASD Conduct Rule 2310 and FINRA Rule 2010 by recommending to 21 customers that they buy the Notes, although he lacked a reasonable basis to conclude that the investment was suitable for any customer. NASD Rule 2310, which was in effect during the relevant time period,[116] governed Friedberg's suitability obligations in connection with his recommendations to customers. This rule, sometimes known as the "suitability rule,"[117] provides, in pertinent part, that "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."[118]

This rule requires that a broker "have reasonable grounds to believe that the recommendation is suitable for the specific customer at issue, an obligation that is referred to as customer-specific suitability."[119] But first, a broker must "have an adequate and reasonable basis for believing that the recommendation could be suitable for at least some customers, an

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[114] Tr. 1513–14.

[115] Tr. 1513–14, 1709–10.

[116] On October 7, 2011, NASD Conduct Rule 2310 was superseded by FINRA Rule 2111. *See* FINRA Regulatory Notice 11-02 (Jan. 2011), https://www.finra.org/sites/default/files/NoticeDocument/p122778.pdf.

[117] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *3 n.2 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[118] NASD Conduct Rule 2310(a). Pursuant to NASD Rule 0115(a), NASD rules that apply to "members" are applicable to associated persons.

[119] *Dep't of Enforcement v. Cody*, No. 2005003188901, 2010 FINRA Discip. LEXIS 8, at *18 (NAC May 10, 2010) (internal quotations marks omitted) (quoting *Dep't of Enforcement v. Medeck*, No. E9B2003033701, 2009 FINRA Discip. LEXIS 7, at *31 (NAC July 30, 2009)), *aff'd*, Exchange Act Release No. 64565, 11 SEC LEXIS 1862 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012); *Dane S. Faber*, Exchange Act Release No. 49216, 2004 SEC LEXIS 277, at *23 (Feb. 10, 2004).

obligation that is often referred to as reasonable-basis suitability."[120] This type of suitability "relates to a particular recommendation, rather than to a particular customer."[121]

To comply with this reasonable-basis suitability obligation, a broker must make a reasonable investigation before recommending the investment to his customer.[122] While "[t]he type of due diligence investigation that is appropriate will vary from product to product . . . there are some common features that members must understand," including, in pertinent part, the issuer's creditworthiness, the creditworthiness and value of any underlying collateral, principal, return, or interest rate risks, and the tax consequences of the product.[123]

A registered representative violates the suitability rule if his "understanding of the investment is insufficient to establish a reasonable basis for making a recommendation."[124] Put another way, a broker violates his reasonable-basis suitability obligation "if he fails so fundamentally to comprehend the consequences of his own recommendation that such recommendation is unsuitable for any investor, regardless of the investor's wealth, willingness to bear risk, age, or other individual characteristics."[125]

We conclude that Friedberg did not satisfy his reasonable-basis suitability obligation before recommending the investment to his customers. He relied solely on statements made to him by the Firm and on the information contained in the Offering Documents. This did not constitute a reasonable investigation. Friedberg had an independent duty to investigate the security. He could not simply rely on what he was told by his superiors at the Firm, even though

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[120] *Cody*, 2010 FINRA Discip. LEXIS 8, at *19 (internal quotation marks omitted) (quoting *Michael Frederick Siegel*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459, at *28 (Oct. 6, 2008)), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010); *Dep't of Enforcement v. Brookstone Sec.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *46 n.24 (NAC Apr. 16, 2015) (finding that reasonable basis suitability "requires that a broker have a reasonable basis to believe his recommendation could be suitable for at least some customers by his understanding the potential risks and rewards inherent in that recommendation.").

[121] *Dep't of Enforcement v. Brookstone Sec.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *46 n.24 (NAC Apr. 16, 2015).

[122] *Cody*, 2011 SEC LEXIS 1862, at *30–31 ("[A] broker cannot determine whether a recommendation is suitable for a specific customer unless the broker understands the risks and rewards inherent in that recommendation. Thus, a broker violates the suitability rule when he fails to conduct a reasonable investigation."); *Dep't of Enforcement v. Rooney*, No. 20090109042402, 2015 FINRA Discip. LEXIS 19, at *70 (NAC July 23, 2015) (citations and internal quotation marks omitted) ("[O]ne of the requirements of the suitability rule is that a broker must have a reasonable and adequate basis for any recommendation he makes. Meeting that standard, in turn, requires conducting a reasonable investigation into recommended securities."). *See also Distribution by Broker-Dealers of Unregistered Securities*, Exchange Act Release No. 6721 (Feb. 2, 1962) ("[T]he making of recommendations for the purchase of a security implies that the dealer has a reasonable basis for such recommendations which, in turn, requires that, as a prerequisite, he shall have made a reasonable investigation.").

[123] NASD Notice to Members 03-71 (Nov. 2003), 2003 NASD LEXIS 81, at *5–7, https://www.finra.org/sites/default/files/NoticeDocument/p003070.pdf.

[124] *Cody*, 2011 SEC LEXIS 1862, at *26.

[125] *Cody*, 2010 FINRA Discip. LEXIS 8, at*20 (internal quotation marks omitted) (quoting *Siegel*, 2008 SEC LEXIS 2459, at *28).

he trusted them, understood that the Firm was fully vetting the Offering, and he was inexperienced in the sale of private placements. In short, Friedberg could not shift his investigation obligations to the Firm.[126] Additionally, reviewing the Offering Documents was insufficient, as they lacked key information necessary for Friedberg to appreciate the risks of the investment. As a result, Friedberg did not have a sufficient understanding of the investment to determine if it was suitable for any customer. (His lack of a reasonable basis to recommend the Offering was especially problematic in connection with his sale of Notes to JG in February 2010. By then, MMM had defaulted on those Notes that had already matured, and Friedberg should have viewed this as a red flag about the viability of MMM and the investment).

In short, it was Friedberg's responsibility, and his alone, to determine the suitability of the recommendations that he made to his customers. And he failed to properly discharge that responsibility. Accordingly, Friedberg violated NASD Conduct Rule 2310.[127] Because a violation of this Rule also constitutes a violation of FINRA Rule 2010, which requires registered representative to "observe high standards of commercial honor and just and equitable principles of trade," Friedberg also violated Rule 2010.[128]

We conclude that the credible evidence demonstrates that Friedberg sold Notes to ten customers in violation of these rules.[129] Enforcement's summary exhibit reflected all of the

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[126] *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *82–84 (NAC Dec. 20, 2007), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009) (citing *SEC v. Hasho*, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992) ("A registered representative cannot shift to others his or her responsibility to . . . make suitable recommendations.")); *Cody*, 2011 SEC LEXIS 1862, at *33–34 (rejecting respondent's argument that he was entitled to rely on the information he obtained from his firm about the security without conducting any further inquiry and finding that a broker who recommends securities has an independent obligation to ensure that he understood them); *Dan King Brainard*, 47 S.E.C. 991, at 996–97 (1983) (finding that "statements made by a salesman's superiors [are not] an adequate basis for representations made to investors"); *J. Stephen Stout*, 54 S.E.C. 888, 911–12 & n.53 (2000) (stating that a broker "cannot excuse his failure to conduct [a suitability] inquiry by claiming that he blindly relied on his firm's recommendations"); *Hasho*, 784 F. Supp. at 1107–08 (finding that "[s]alesmen or registered representatives have certain duties that they cannot avoid by reliance on either their employer or issuer" and that "[y]outh or inexperience does not excuse a registered representative's duty to his clients"); *see also Kenneth R. Ward*, Exchange Act Release No. 47535, 2003 SEC LEXIS 687, at *50 (Mar. 19, 2003) ("The complicity of others, whether through overt assistance and encouragement or through neglect, did not relieve [respondent] of his fundamental duty to make suitable recommendations to his customers.").

[127] Enforcement alleges that in addition to Friedberg's failure "to investigate and understand the MMM Notes, in light of the 'red flags' surrounding" them, "the MMM Notes were simply not a suitable investment for any investor." Compl. ¶ 97. We agree.

[128] *Cody*, 2011 SEC LEXIS 1862, at *26.

[129] Enforcement has not always been clear about the number of customers to whom Friedberg allegedly sold the Notes. In the Complaint, Enforcement alleges that he sold the Notes to 21 customers. *See* Exhibit A to the Complaint. Exhibit A is a schedule of Note sales by all of the originally-named Respondents. That schedule reflects that Friedberg was responsible for Note sales to 21 customers, namely, DQN Irrevocable Trust, AS, JFB (also referred to as JB), BE, FP, CP, JW, DL, WS, TBE, EA, ER, RR, CY, DO, FP, CP, GLH, JLe, RK, and JG. In closing, however, Enforcement attributes ten sales (from eight customers) to Friedberg (Tr. 2372). In its post-hearing brief, Enforcement reiterates that position. Enf's Post-Hrg. Br. at 30, 32. But Enforcement also argues that Friedberg recommended and sold Notes to three additional customers, JG, EA and JW. Enf's Post-Hrg. Br. at 5, 13–14.

Respondent's sales of Notes. That exhibit identifies Note sales by Friedberg to eight customers from December 2009 through November 2010: JB, BE, DL, WS, ER, RR, DO, and RK.[130] Additionally, Friedberg sold Notes to JW in December 2009,[131] although the summary exhibit attributes that sale to former Respondent Engler.[132] Friedberg also sold Notes to JG in a replacement transaction in February 2011.

B. Enforcement Failed to Prove that Friedberg Violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, or FINRA Rules 2020 and 2010

The Complaint charges Friedberg with making reckless misrepresentations about the collateral to 21 customers regarding the collateral for the Notes in willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and in violation of FINRA Rules 2020 and 2010.[133] Alternatively, the Complaint alleges that if the Panel finds that Friedberg made those misrepresentations negligently, rather than recklessly, then he contravened Section 17(a) of the Securities Act of 1933 ("Securities Act"), thereby violating FINRA Rule 2010, and independently violating FINRA Rule 2010.[134] We conclude, below, that Friedberg made grossly negligent, but not reckless, misrepresentations.

Exchange Act Section 10(b) and Exchange Act Rule 10b-5 prohibit fraudulent and deceptive acts and practices in connection with the purchase or sale of a security.[135] To establish that Friedberg violated Exchange Act Section 10(b) and Rule 10b-5 thereunder, Enforcement must prove by a preponderance of the evidence that Friedberg made material misrepresentations in connection with the purchase or sale of a security and that he acted with scienter.[136] "FINRA

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[130] CX-1B (prepared from CX-50, the MMM subscription log. Tr. 158).

[131] Respondent's Post-Hrg. Br. at 13, ¶ 55.

[132] CX-1B, at 1.

[133] Complaint, First Cause of Action.

[134] Complaint, Second Cause of Action.

[135] Exchange Act Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 makes it unlawful "[t]o employ any device, scheme, or artifice to defraud; to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

[136] *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *18 (NAC Oct. 2, 2013), *aff'd in relevant part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996) and *Dep't of Enforcement v. Gonchar*, No. CAF040058, 2008 FINRA Discip. LEXIS 31, at *27 (NAC Aug. 26, 2008)). Additionally, Enforcement must prove that Friedberg used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange." 17 C.F.R. § 240.10b-5. Friedberg does not dispute that he communicated through telephone calls or the U.S. mail service, thereby satisfying the interstate commerce requirement. Ans. ¶ 85. *See Fillet*, 2013 FINRA Discip. LEXIS 26, at *19 n.7 (citing *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (determining

Rule 2020 is FINRA's antifraud rule. FINRA Rule 2020 prohibits members from 'effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.'"[137] Here, Friedberg violated Rule 2020 if, acting with scienter, he induced the purchase or sale of a security "by means of" a material false statement.[138] A violation of the SEC's or FINRA's anti-fraud rules also violates FINRA Rule 2010.[139]

As discussed above, the evidence showed that Friedberg made the alleged misrepresentations, that they were "in connection with the purchase or sale of a security," and "by means of interstate commerce."[140]

We also find that they were material. "Whether information is material 'depends on the significance the reasonable investor would place on the ...information.'"[141] "Information is material 'if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[142]

There is a substantial likelihood that, in deciding whether to buy a Note, a reasonable investor would consider it important that the Notes were collateralized and that the value of the

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that the jurisdictional requirements of the federal antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls or the use of the U.S. mail), *aff'd*, 159 F.3d 1348 (2d Cir. 1998)).

[137] *Dep't of Enforcement v. Ahmed*, No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *88 (NAC Sept. 25, 2015). *See Fillet*, 2013 FINRA Discip. LEXIS 26, at *38 (explaining that FINRA Rule 2020 "captures a broader range of activity than [Exchange Act] Rule 10b-5(b)").

[138] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *29 (NAC Dec. 29, 2015), *appeal docketed*, No. 3-17076 (SEC Jan. 29, 2015); *Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *31 n.31 (NAC Apr. 26, 2013) ("NASD Rule 2120 [now FINRA Rule 2020] requires a showing of scienter, similar to Exchange Act Rule 10b-5.").

[139] *Ahmed*, 2015 FINRA Discip. LEXIS 45, at *89 n.83 ("Conduct that violates the Commission's or FINRA's rules, including the antifraud rules, is inconsistent with 'high standards of commercial honor and just and equitable principles of trade' and violates FINRA Rule 2010."). "FINRA Rules 2020 and 2010, which generally apply to FINRA 'members,' are applicable to associated persons pursuant to FINRA Rule 0140(a)." *Id.*

[140] The Notes constitute securities under the Exchange Act. *See Dep't of Enforcement v. Gebhart*, No. C02020057, 2005 NASD Discip. LEXIS 40, at *25–32 (NAC May 24, 2005) (citing *Reves v. Ernst & Young*, 494 U.S. 56, 62–63 (1990) (applying the *Reves* factors, *i.e.*, the family resemblance test, to promissory notes to determine whether they are securities under the Exchange Act)), *aff'd*, Exchange Act Release No. 53136, 58 SEC 1133 (Jan. 18, 2006), *aff'd in relevant part*, 255 F. App'x 254 (9th Cir. Nov. 21, 2007). The Exchange Act defines the term "security" as including "any note." 15 U.S.C. §78c(a)(10). *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *21 n.14 ("The definitions of a security under the Securities Act and Exchange Act are virtually identical and may be considered the same.") (citing *Unite Hous. Found., Inc. v. Forman*, 421 U.S. 837, 847 n.12 (1975)).

[141] *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *32 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)).

[142] *Fillet*, 2013 FINRA Discip. LEXIS 26, at *29 (quoting *Basic*, 485 U.S. at 240).

collateral gave the investors a sufficient measure of security in the event of default.[143] To be sure, a reasonable investor would have found the information that Friedberg misrepresented important, if not crucial, to his or her investment decision. This is particularly true here, where Friedberg sold an investment that presented few opportunities and sources to obtain information concerning the subject issuer and Offering.

Enforcement failed, however, to show that Friedberg made the material misrepresentations with scienter. "Scienter is defined as 'a mental state embracing intent to deceive, manipulate, or defraud.'"[144] "Scienter is established if a respondent acted intentionally or recklessly."[145] Enforcement alleged that the misrepresentations were made recklessly. "Reckless conduct includes 'a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'"[146]

The evidence did not show that Friedberg made his misrepresentations about the collateral recklessly, although we find that he acted with gross negligence. Friedberg based his statements about the collateral solely upon what he was told by the Firm and what he read in the Offering Documents. He did not conduct any investigation to confirm his understanding, claiming that he had no obligation to do so because he trusted the Firm to investigate the offering fully and because he saw no reason to question what he was told by Puma and Mikolasko. We are not convinced by this argument.

First, Friedberg had an independent duty to investigate the investment, and more specifically, the facts underlying his representations about collateral. He could not rely solely on

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[143] *See Kevin D. Kunz*, Exchange Act Release No. 45290, 2002 SEC LEXIS 105, at *16–17 (Jan. 16, 2002), *aff'd*, 2003 U.S. App. LEXIS 6011 (10th Cir. Mar 28, 2003) (finding that misrepresentation relating to the value of a land asset owned by the issuer was material because it affected the issuer's ability to repay the notes); *cf. Willard C. Berge*, Exchange Act Release No. 12846, 1976 SEC LEXIS 718, at *6–7 (Sept. 30, 1976) (affirming finding of securities fraud under Section 17(a) of the Securities Act of 1933 where respondent represented that the notes were secured by first mortgages on real property when, in fact, the issuer did not own the bulk of the properties and thus had no right to encumber them, or in other cases it had given multiple mortgages on certain parcels, making the mortgages "of dubious quality as security interests").

[144] *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *33 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976)).

[145] *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007)). *See also Ahmed*, 2015 FINRA Discip. LEXIS 45, at *77 n.78 ("Scienter also is established through a heightened showing of recklessness.") (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007)).

[146] *Fillet*, 2013 FINRA Discip. LEXIS 26, at *35 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (internal quotation omitted)); *Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *45 n.28 (NAC June 25, 2001) (citing *Bd. of Cnty. Comm'rs v. Liberty Grp.*, 965 F.2d 879, 883-84 (10th Cir. 1992) (proper standard for a fraud claim based on SEC Rule 10b-5 is intent or recklessness and not gross negligence, although the line between recklessness and gross negligence is a fine one); *Reiger v. Altris Software, Inc.*, No. 98-CV-528 TW (JFS), 1999 U.S. Dist. LEXIS 7949, at *22–23 (S.D. Cal. May 3, 1999) (gross negligence is not sufficient to prove scienter under SEC Rule 10b-5; conduct must have been at least reckless).

the views of his employer,[147] or on the issuer's offering materials.[148] Second, how much investigation is required depends on the circumstances and the existence, if any, of red flags.[149] Here, the circumstances, including the existence of red flags, should also have prompted Friedberg to independently investigate the Offering. For example, MMM was a small company of recent origin,[150] which lacked an operating history or revenue,[151] or reliable financial information.[152] Further, it offered an investment with an extremely high rate of return.[153] Additionally, there was no private placement memorandum.[154] Also, the Offering Documents failed to include basic information such as (1) the identities and backgrounds of the principals of MMM, (2) an explanation of how the proceeds of the Offering would be used, or (3) a description of the plasmafication process that explained why that process was technologically viable and potentially profitable.[155]

In light of Friedberg's duty to investigate, coupled with the existence of red flags, the Panel concludes that it was unreasonable for him to have relied solely on statements made to him

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[147] *Faber*, 2004 SEC LEXIS 277, at *21 & n.21, 57 SEC at 309 ("[Respondent], as a registered representative, had an independent duty to investigate and could not simply rely on the views of his employer or others."); *Brainard*, 47 S.E.C. at 996–97; *SEC v. Platinum Investment Corp.*, No. 02CV6093(JSR),2006 U.S. Dist. LEXIS 67460, at *10–11 (Sept. 20, 2006).

[148] *Donald J. Anthony*, Initial Decision Release No. 745, 2015 SEC LEXIS 707, at *239–40 (Feb. 25, 2015).

[149] *Id.*, at *241–42.

[150] *Hanly v. SEC*, 415 F.2d 589, 597 (2nd Cir. 1969) (recognizing as a red flag if the securities are offered by "smaller companies of recent origin").

[151] *See Platinum Investment*, 2006 U.S. Dist. LEXIS 67460, at *2, 14 (finding that an issuer's lack of operating history and limited assets and operation revenue constituted red flags).

[152] *Brainard*, 47 S.E.C. at 997 n.18 (finding that brokers must have reliable financial information before recommending an unknown security).

[153] *SEC v. Milan Capital Group, Inc.*, No. 00CV108(DLC), 2000 U.S. Dist. LEXIS 16204, at *15 (S.D.N.Y. Nov. 8, 2000) (recognizing that an unusually high rate of return was a red flag). As addressed above, Friedberg claims that shortly after he began selling the Notes, he participated in what he viewed as a similar private placement offering, USPR. He testified that this offering reinforced his comfort in relying on his Firm to conduct the due diligence for the Offering. This is not a valid defense. First, the USPR offering occurred after the Offering had begun. Second, the annual rate of return for the USPR offering was lower than for the Offering. And, finally, a high rate of return was a red flag in this case, certainly in conjunction with the other red flags, regardless of whether the Firm and Friedberg participated in similar offerings.

[154] *Faber*, 2004 SEC LEXIS 277, at *20, 57 SEC, at 308–09 (finding that the absence of a prospectus was a red flag). Enforcement argued that the WSPs required a private placement memorandum for all private placements. The WSPs, however, do not clearly impose that requirement. Rather, they appear to require that an offering memorandum be provided to all offerees only if Peter N. Christos, the Firm's most senior investment banker (Tr. 2145), determined that one should be prepared for a particular private placement. CX-52, at 57–58. Nevertheless, by not receiving a private placement memorandum, Friedberg was deprived of important information. Thus, the lack of a private placement memorandum—coupled with the overall circumstances and red flags noted above—should have prompted him to conduct a thorough, independent investigation of the Offering.

[155] *Milan Capital Group*, 2000 U.S. Dist. LEXIS 16204, at *15 (recognizing "questionable" promotional materials as a red flag).

by his Firm and upon the information contained in the Offering Documents.[156] Friedberg should have conducted a reasonable investigation before making representations to customers about the collateral.[157]

But not every failure to investigate constitutes recklessness.[158] Here, we find that Friedberg was grossly negligent, and not reckless, in making misrepresentations to his customers about the collateral. For a number of reasons, we conclude that his conduct did not rise to the level of scienter required by the anti-fraud provisions. First, we find it significant that at the time the Offering began, Friedberg had been in the securities industry for less than four and a half years, had no experience selling private placements, and received little guidance or direction from the Firm's management.[159] Further, Friedberg understood Puma and Mikolasko to have been very experienced in connection with private placements. And, while they misled and withheld material information from him, he did not have reason to doubt their truthfulness at the time of the Offering. Nor did Friedberg attempt, in any way, to conceal his misconduct, believing that the Firm had vetted the Offering.[160] Also, there was no other readily apparent source of information about the deal outside the Firm. Finally, the misrepresentations alleged in the Complaint, and demonstrated at the hearing, related to one aspect of the Offering: the collateral. The information Friedberg had on this subject was consistent with what he told the customers. In other words, Friedberg did not possess and ignore information that was either contrary to the representations he made, or that should have raised red flags about the truth of his representations. Therefore, we find that, taken together, these facts negate a showing of

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[156] The Panel did not agree, however, with Enforcement's argument that Friedberg should have discovered other purported red flags. Enforcement argued that Friedberg should have been aware of the liens and judgments filed against Galvin as well as the information, discussed above, contained in the Firm's due diligence files. But we are not persuaded that a reasonable investigation by Friedberg required (1) a records search to determine if Galvin had outstanding liens against him or (2) a review of the Firm's due diligence files. Additionally, we do not find that Friedberg should have recognized as a conflict of interest red flag that Mikolasko signed a Note as a managing member of MMM. As Friedberg explained, in isolation and in retrospect, Mikolasko's signature could be viewed as a red flag. But at the time, he did not recognize it as such. Friedberg went on to say that he had no reason to distrust Mikolasko or believe that he had a conflict of interest. Therefore, when viewed in this context, the Panel was not convinced that Friedberg should have viewed Mikolasko's signature as a red flag. Finally, Enforcement argued Friedberg knew that the WSPs required that the Firm's Investment Committee review and approve any private placement before the Firm could act as a placement agent for the offering. Tr. 1532; CX-52 at 50, § 16.2.1. Therefore, according to Enforcement, Friedberg should have viewed as a red flag that the Firm had not created an HFP Investment Committee Commitment Memorandum about the Offering, CX-175, at 27–32. Enforcement, however, did not demonstrate that Friedberg was, or should have been, aware that the Firm had not created such a memorandum or that the Investment Committee had not approved the Offering.

[157] This was especially the case, as discussed above, in connection with Friedberg's sale of Notes to JG. By then, MMM had defaulted on the Notes which had matured.

[158] *Anthony*, 2015 SEC LEXIS 707, at *241–42.

[159] *Reynolds*, 2001 NASD Discip. LEXIS 17, at *46 (finding that respondent acted with gross negligence, and not with scienter, because, among other reasons, it was significant that the respondent had limited experience in the securities industry and he received little guidance or direction from his supervisor).

[160] *Id.*, at *46–47 (finding it important that respondent did not attempt to conceal his actions and noting that "[h]e thought that he had cleared the advertisement with his supervisor and believed that NASD Regulation had reviewed and not objected to the Report" which he published containing, among other things, misstatements about an issuer).

fraudulent intent or recklessness, notwithstanding that Friedberg's "investigation was inadequate, his reliance was unreasonable, and many of his assumptions were mistaken."[161]

We find, instead, that Friedberg's misrepresentations were grossly negligent.[162] Negligence consists of failing "to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation . . . [Negligence] connotes culpable carelessness."[163] But negligence, even gross negligence, does not rise to the level of recklessness and is less egregious.[164] And in this case, the evidence established that Friedberg's misconduct did not cross the line from gross negligence to recklessness.[165] Accordingly, because we find that Enforcement failed to prove that Friedberg acted with scienter—an essential element of the fraud charges—we dismiss the federal and FINRA scienter-based fraud charges, namely, Exchange Act Section 10(b) and Rule 10b-5 thereunder, and FINRA Rule 2020. We must also dismiss therefore the FINRA Rule 2010 charge that was based on these unproven fraud charges.

C. Friedberg Contravened Section 17(a)(2) of the Securities Act, thereby Violating FINRA Rule 2010 and also Independently Violating FINRA Rule 2010

As an alternative to the scienter-based fraud charges, the Complaint alleges that Friedberg made negligent misrepresentations about the collateral. Specifically, Enforcement alleges that Friedberg's misrepresentations violated Section 17(a)(2) of the Securities Act and

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[161] *Reynolds*, 2001 NASD Discip. LEXIS 17, at *47 (citing *Kevin D. Kunz*, No. C3A960029, 1999 NASD Discip. LEXIS 20, at *45 n.21 (July 7, 1999) (finding that respondent's reliance on issuer's comments and a misleading audited financial statement, although unreasonable, negated finding of scienter)).

[162] Enforcement cites cases finding that brokers acted recklessly by not first investigating the truth of their representations to clients in the face of red flags. Enf's Post Hrg. Br. at 19–20. *See, e.g.*, *Faber*, 2004 SEC LEXIS 277, at *18; *Anthony*, 2015 SEC LEXIS 707, at *224–25; *Platinum Investment*, 2006 U.S. Dist. LEXIS 67460, at *16; *Hasho*, 784 F. Supp. at 1108; *Brainard*, 47 S.E.C. at 999–*200*; *Capital Group*, 2000 U.S. Dist. LEXIS 16204, at *15–16. We do not find these cases instructive on the issue of whether Friedberg acted with scienter. Each involved unique circumstances more egregious than presented here, including clearer and more compelling red flags. Conversely, they lacked a combination of facts similar to those here that caused the Panel to conclude that Friedberg had not acted with scienter.

[163] *John P. Flannery*, Initial Decision Release No. 438, 2011 SEC LEXIS 3835, at *104 (Oct. 28, 2011) (quoting *Black's Law Dictionary* 1056 (7th ed. 1999)), *rev'd in part, on other grounds*, 2014 SEC LEXIS 4981 (Dec. 15, 2014), *pet. granted and vacated on other grounds*, 810 F.3d 1 (1st Cir. Dec. 8, 2015).

[164] *Reynolds*, 2001 NASD Discip. LEXIS 17, at *44–45 (finding respondent's grossly negligent conduct violated NASD Rule 2110 but without scienter required to render it fraudulent); *Dep't of Enforcement v. Kevin D. Kunz*, No. C3A960029, 1999 NASD Discip. LEXIS 20, at *45 (NAC July 7, 1999), *aff'd*, Exchange Act Release No. 45290, 2002 SEC LEXIS 105 (finding that "respondents' conduct—albeit negligent and inconsistent with high standards of commercial honor and just and equitable principles of trade—did not rise to the level of recklessness."), *aff'd*, 2003 U.S. App. LEXIS 6011 (10th Cir. Mar. 28, 2003).

[165] A finding of gross negligence but not recklessness is not inconsistent. As the NAC explained, "it is often difficult to draw the line between the two standards, they are not synonymous, and courts have clearly made the distinction in cases involving allegations of fraud." Nevertheless, according to the NAC, the proper standard for a fraud claim based on SEC Rule 10b-5 is intent or recklessness and not gross negligence. *Reynolds*, 2001 NASD Discip. LEXIS 17, at *45 n.28 (and cases cited therein).

thereby violated Rule 2010. According to Enforcement, this misconduct also constitutes an independent violation of Rule 2010.

Section 17(a)(2) of the Securities Act makes it unlawful in the offer or sale of securities "to obtain money or property by means of any untrue statement" or omission of a material fact. No scienter requirement exists for violations of Section 17(a)(2) of the Securities Act;[166] negligence alone is sufficient.[167] Accordingly, by acting at least negligently in making misrepresentations about the collateral, Friedberg violated Section 17(a)(2) of the Securities Act, and therefore, as a result, violated FINRA Rule 2010. Finally, these misrepresentations also constitute an independent violation of Rule 2010 because negligent misrepresentations are inconsistent with just and equitable principles of trade.[168] We find that Friedberg committed these violations with respect to the same customers identified above in connection with the suitability violations.

IV. Sanctions

In considering the appropriate sanctions to impose on Friedberg, the Extended Hearing Panel looked to FINRA's Sanction Guidelines ("Guidelines").[169] The Guidelines contain General Principles Applicable to All Sanction Determinations ("General Principles"), overarching Principal Considerations in Determining Sanctions, 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."[170] 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."[171] Further, sanctions should "reflect the seriousness of the misconduct at issue,"[172] and should be "tailored to address the misconduct involved in each particular case."[173]

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[166] *Dep't of Enforcement v. Golub*, No. C10990024, 2000 NASD Discip. LEXIS 14, at *22 (NAC Nov. 17, 2000) (citing *U.S. v. Aaron*, 446 U.S. 680, 686–87 n.6 (1980)).

[167] *Aaron*, 446 U.S. at 697–700 (1980); *Anthony*, 2015 SEC LEXIS 707, at *265.

[168] *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *14–15 (quoting *Faber*, 57 S.E.C. 297 at 306 (2004)); *Dep't of Enforcement v. Pellegrino*, No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *14 n.13 (NAC Jan. 4, 2008), *aff'd*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008).

[169] FINRA Sanction Guidelines (2015) ("Guidelines"), http://www.finra.org/industry/sanction-guidelines.

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

[171] *Id.*

[172] *Id.*

[173] Guidelines at 3 (General Principles Applicable to All Sanction Determinations, No. 3).

A. For His Suitability Violations, Friedberg is Barred From Associating with Any FINRA Member Firm in Any Capacity and Ordered to Pay Restitution and Disgorge His Commissions

The Guidelines for making unsuitable recommendations recommend suspending an individual respondent in any or all capacities for a period of ten business days to two years. But where aggravating factors predominate, adjudicators should strongly consider barring the respondent. The Guidelines also recommend a fine of $2,500 to $110,000 and ordering disgorgement.[174]

The Extended Hearing Panel finds that numerous principal considerations in the Guidelines are relevant to our sanctions' determination and that aggravating factors predominate. First, Friedberg has a relevant disciplinary history.[175] In February 2013, the Arkansas Security Department issued a Consent Order finding that Friedberg made unjustified or untruthful representations to a client or prospective client, and made an unsuitable recommendation to a customer in connection with the purchase of corporate bonds.[176] Based on those findings, the State of Arkansas revoked his license as a broker dealer agent in Arkansas for three years and ordered him to pay a $5,000 fine.[177]

Additional aggravations factors include the following: Friedberg has not accepted responsibility for his misconduct, and, instead, blamed the principals at the Firm;[178] his misconduct involved ten customers, extended over a year, and demonstrated a pattern of misconduct;[179] his misconduct resulted in serious injury to ten customers, namely, they lost their entire principal investment totaling $600,000;[180] his misconduct was grossly negligent;[181] and it

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[174] Guidelines at 94.

[175] Guidelines at 94.

[176] CX-3, at 21–25.

[177] Based on the Arkansas action, in August 2013, the State of New Hampshire Bureau of Securities Regulation suspended Friedberg's registration in that state for one year and ordered that he be subjected to heightened supervision for two years upon his reinstatement. CX-3, at 26–30.

[178] Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 2) (whether respondent accepted responsibility for and acknowledged the misconduct to his employer or a regulator prior to detection and intervention); *see also Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *28 (Aug. 22, 2008) (finding that respondent's failure to accept responsibility for his misconduct and his attempt to blame others for what occurred were factors that supported a bar); *Akindemowo*, 2015 FINRA Discip. LEXIS 58, at *48 ("His failure to appreciate the requirements of the securities business and the gravity of his misconduct and the harm it caused warrants significant sanctions.").

[179] Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 8) (whether the respondent engaged in numerous acts and/or a pattern of misconduct); Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 9) (Whether the respondent engaged in the misconduct over an extended period of time); Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 18) (The number, size, and character of the transactions at issue).

[180] Guidelines at 6 (Principal Considerations in Determining Sanctions, No. 11) (whether respondent's misconduct resulted directly or indirectly in injury to another party and the nature and extent of the injury).

resulted in monetary gain for Friedberg, namely, he received commissions totaling $36,250 in connection with the sale of the Notes.[182] Finally, Friedberg was not only a registered representative, but, at the time of the misconduct, he was also a supervisor. Thus, he should have had a heightened appreciation for his suitability obligations in connection with the sale of the Notes. These aggravating factors, viewed in their totality, and the lack of mitigation,[183] demonstrate that Friedberg poses too great a risk to the investing public to remain in the industry. Accordingly, to remedy the misconduct, to deter future misconduct, and to protect the investing public, we find that Friedberg should be barred in any capacity from associating with a FINRA member firm.

The Guidelines advise that even if an individual is barred in a sales practice case, the adjudicator should require payment of restitution and disgorgement if the case involves widespread, significant, and identifiable customer harm or the respondent has retained substantial ill-gotten gains.[184] Therefore, we also order restitution and disgorgement. As to restitution, the Guidelines explain that this "is a traditional remedy used to restore the status quo ante where a victim otherwise would unjustly suffer loss."[185] Further, "[a]judicators may order restitution when an identifiable person . . . has suffered a quantifiable loss proximately caused by a respondent's misconduct."[186] "Proximate causation generally refers to '[a] cause that directly produces an event and without which the event would not have occurred.' Neither the Commission nor the courts, however, have adopted a single, definitive expression of what constitutes 'proximate causation.'" [187] Nor has the National Adjudicatory Council ("NAC").[188] Nevertheless, the losses suffered by the ten customers were the foreseeable, direct, and proximate result of Friedberg's misconduct. The customers' losses arose out of and were

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[181] Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 13) (whether respondent's misconduct was the result of an intentional act, recklessness, or negligence). Although we do not find that the misconduct was intentional or reckless, we do find that it resulted from gross, and not simple, negligence.

[182] Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 17) (whether respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

[183] We do not find any mitigation. That the Firm may have withheld information from Friedberg or made misrepresentations to him is not mitigative; Friedberg had an independent obligation to comply with the provisions at issue here and cannot shift this responsibility to others. *Cody*, 2011 SEC LEXIS 1862, at *65 & 66 n.63. Further, his ignorance of his obligations and his inexperience also do not mitigate his violations, although, as discussed above, the Panel took this into account in determining whether he acted with scienter. *Dist. Bus. Conduct Comm. v. Moore*, No. C0197000119 99, 1999 NASD Discip. LEXIS 27, at *18 (NAC Aug. 9, 1999) (in affirming suitability violations, the NAC found that respondent's "ignorance of his obligations and his inexperience in the industry do not mitigate his violations").

[184] Guidelines at 10. The guidelines also state that under these circumstances, a fine should generally be imposed. Guidelines at 10. But in the exercise of its discretion, the Panel declines to do so, as it concludes that the imposition of a bar, restitution, and disgorgement order sufficiently address the misconduct at issue.

[185] Guidelines at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[186] Guidelines at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

[187] *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *148.

[188] *Id.*, at *149–50.

substantially the result of Friedberg's decision to recommend Notes without a reasonable basis for concluding they were suitable for any customer. [189] In short, the customer losses were a direct result of Friedberg's unsuitable recommendations and, therefore, restitution is appropriate.

Disgorgement is also appropriate. The Guidelines direct Adjudicators to consider a respondent's ill-gotten gain when determining an appropriate remedy. And, when the respondent has obtained a financial benefit from the misconduct, Adjudicators may, where appropriate, order disgorgement of some or all of the financial benefit derived, directly or indirectly. [190] Here, given the aggravating factors described above, we find that it is appropriate to strip Friedberg of his ill-gotten gains, namely, the commissions he derived from his misconduct.

Therefore, we find that in addition to the bar, Friedberg should be ordered to pay restitution to the ten customers and to disgorge his commissions from those sales.[191] In light of the bar, and our order requiring restitution and disgorgement, however, we refrain from also imposing a fine.[192] Finally, we exercise our discretion under the Guidelines and impose post-judgment interest on the restitution[193] and disgorgement. [194]

B. In Light of the Bar and Related Sanctions, We Impose No Additional Sanctions for Friedberg's Grossly Negligent Misrepresentations

The Guidelines addressing negligent misrepresentations recommend suspending an individual respondent in any or all capacities for 31 calendar days to two years and imposing a fine of $2,500 to $73,000. In cases involving misrepresentations to multiple customers, the Adjudicators may impose a set fine amount per investor rather than in the aggregate. The Adjudicators may also order disgorgement.[195]

The Panel finds that the principal considerations applicable to the suitability violations apply here, as well, to the negligent misrepresentations. Applying those considerations leads the Panel to conclude that Friedberg's violations are very serious. And, given the lack of mitigation, Friedberg's misconduct warrants the imposition of sanctions at the top of recommended range. We therefore find that the appropriate remedial sanctions are a two year, all capacities suspension, a $73,000 fine, as well as an order requiring restitution, disgorgement, and

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[189] *Brookstone*, 2015 FINRA Discip. LEXIS 3, at *150.

[190] Guidelines at 4–5 (General Principles Applicable to All Sanction Determinations, No. 6).

[191] Guidelines at 4–5 (General Principles Applicable to All Sanction Determinations, No. 4) (Adjudicators should consider requiring respondent to disgorge ill-gotten gains).

[192] Guidelines at 10.

[193] Guidelines at 10 n.4.

[194] *See Davidofsky*, 2013 FINRA Discip. LEXIS 7, at *43 ("When assessing disgorgement, FINRA adjudicators should require payment of prejudgment interest on the amount to be disgorged, or explain in their decision why the payment of prejudgment interest is not appropriate to effectuate the purposes of equitable disgorgement. The rate of prejudgment interest is the rate established for the underpayment of income taxes in the Internal Revenue Code, which is the same rate we use when ordering interest on a restitution award.").

[195] Guidelines at 88 n.2.

prejudgment interest, as discussed above in connection with the suitability violations. But in light of the bar and related sanctions imposed for those violations, we do not impose additional sanctions for Friedberg's grossly negligent misrepresentations.

V. Order

The Extended Hearing Panel orders as follows:

1. Respondent Brett Ian Friedberg is barred from associating with any FINRA member firm in any capacity for recommending that his customers purchase securities while lacking a reasonable basis for the recommendations, in violation of NASD Conduct Rule 2310 and FINRA Rule 2010. The bar shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding.

2. For these violations, Friedberg shall pay restitution in the amounts set forth in the below chart to customers JB, BE, DL, WS, ER, RR, DO, RK, JW, and JG,[196] plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2).[197] Interest shall run on the restitution owed to each customer from the dates on which they purchased their investments, as shown below, until paid.[198]

Customers	Date of Purchase	Loss Amount
JB	Dec. 10, 2009	$25,000
BE	Dec. 10, 2009	$25,000
JB	Apr. 4, 2010	$25,000
DL	Apr. 4, 2010	$50,000
WS	Apr. 4, 2010	$25,000
BE	Apr. 4, 2010	$25,000
ER and RR	Apr. 27, 2010	$50,000
DO	June 2, 2010	$25,000
RK	Nov. 29, 2010	$250,000
DO	Nov. 29, 2010	$50,000
JW	Feb. 1, 2010	$25,000
JG	Feb. 3, 2011	$25,000
Total		**$600,000**

[196] These customers are identified in the Addendum to this Decision, which is served only on the parties.

[197] *See* Guidelines at 11 (directing that this provision applies to calculating interest on restitution).

[198] The information in the above chart as to all customers other than JG was derived from CX-1B. JG's information was obtained from CX-87.

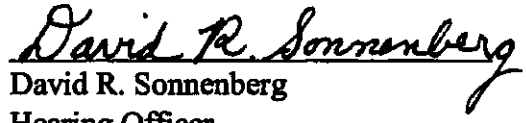
3. In the event that these customers cannot be located, unpaid restitution plus accrued interest should be paid to the appropriate escheat, unclaimed-property, or abandoned-property fund for the state of these customers' last known address. Satisfactory proof of payment of the restitution, or of reasonable and documented efforts undertaken to effect restitution, shall be provided to the staff of FINRA's Department of Enforcement, District 10, no later than 90 days after the date when this decision becomes final.

4. For violating NASD Conduct Rule 2310 and FINRA Rule 2010, Friedberg shall disgorge to FINRA the commissions he earned on the sale of the Notes to customers JB, BE, DL, WS, ER, RR, DO, RK, namely, $36,250, plus interest at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), from November 29, 2010, the date of the last sale to these eight customers,[199] until paid.

5. Respondent is ordered to pay hearing costs in the amount of $18,910, consisting of an administrative fee of $750 and the cost of the transcript. The assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.

6. In light of these sanctions, no further sanctions are imposed for Respondent's grossly negligent misrepresentations to customers, which contravened Section 17(a)(2) of the Securities Act of 1933, thereby violating FINRA Rule 2010 and also independently violating FINRA Rule 2010.

7. Because Enforcement failed to prove by a preponderance of the evidence that Friedberg violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, or FINRA Rules 2020 and 2010, those charges are dismissed.[200]



David R. Sonnenberg
Hearing Officer
For the Extended Hearing Panel

[199] The record does not reflect the date on which Friedberg received his last commission payment on the sales to the eight customers. Therefore, the Hearing Panel used the date of the last sale of Notes to these eight customers as a reasonable estimate of the date on which he received his last commission payment.

[200] The Extended Hearing Panel considered all of the parties' arguments. Arguments not specifically discussed herein are rejected or sustained to the extent that they are inconsistent or in accord with this Decision.

Copies to:

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