SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 81759 / September 28, 2017

Admin. Proc. File No. 3-16900

In the Matter of the Application of

FUAD AHMED
and
SUCCESS TRADE SECURITIES, INC.

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDINGS

Fraud

Unregistered Offer and Sale of Securities

Conduct Inconsistent with Just and Equitable Principles of Trade

Former registered representative of FINRA member firm and former FINRA member firm appeal from FINRA disciplinary action finding that they knowingly engaged in securities fraud and sold securities without registration or the benefit of an exemption. *Held*, association's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

William C. Saacke, of The Saacke Law Group, for Respondents.

Alan Lawhead, *Michael Garawski*, and *Jante C. Turner* for FINRA.

Appeal filed: October 14, 2015
Last brief received: February 17, 2016

Respondents Fuad Ahmed and Success Trade Securities, Inc. ("STS") seek review of a FINRA disciplinary action finding that they violated Section 5 of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and FINRA Rules 2010 and 2020 when they offered and sold promissory notes using material misstatements and omissions and failed to register the transactions or have an exemption from registration available. FINRA barred Ahmed, expelled STS, and imposed restitution and costs. For the reasons explained below, we affirm FINRA's findings of violations and the sanctions imposed.

I. Background

Ahmed entered the securities industry in 1994. After working at a number of different firms, he founded Success Trade, Inc. ("STI") in 1997. STI was a holding company for STS, a deep-discount online broker-dealer that Ahmed founded. STS became a FINRA member in 1999 and operated out of offices in the District of Columbia and McLean, Virginia. STI was also the holding company for BP Trade, Inc., a Canadian company acquired by STI in 2001. BP Trade provided the software and trading platform for STS, its only client after 2007. From March 2009 through the filing of the complaint in this matter in April 2013, Ahmed was STI's CEO, President, sole Director, and largest shareholder, as well as the CEO and President of STS and BP Trade. Until April 2010, Ahmed was also STS's Chief Compliance Officer.

A. STI and Respondents faced financial difficulties.

In 1997 and 1998, Ahmed, on STI's behalf, executed a series of promissory notes with RK, a business acquaintance. The original notes were for hundreds of thousands of dollars with ten-year terms and interest rates of 43.2% and 53%. RK negotiated those terms because he could "see that [Ahmed] need[ed] money." In four of the five years prior to 2009, STI operated with net losses due in large part to the notes. In 2007, Ahmed pledged all of STS's assets as security for another note with RK, as a result of which FINRA fined STS for failing to have the $5,000 minimum net capital required to do business. In June 2010, the notes were restructured after a regulatory audit by FINRA and the Commission. The replacement note was for $800,000 with an annual interest rate of 15% and a maturity date of December 2012, with a balloon payment of $1.5 million. Ahmed was the personal guarantor of the note.

STS faced similar financial difficulties. Although it had positive net incomes from 2004 to 2007, it had a net loss of almost $21,000 in 2008, due in part to events related to its clearing firm, North American Clearing, Inc. Securities regulators froze North American Clearing's customer assets in May 2008. After that firm shut down, STS lost its clearing deposit, four months of commissions, and several customers. The financial crisis of 2008 also affected STS because customers were investing less.

Starting in 2009, Ahmed began loaning money to Jinesh Brahmbhatt, a former colleague, and Jade Wealth Management LLC, a registered investment adviser that Brahmbhatt founded in 2008. Jade's business model focused on clients with high incomes but little financial experience; many of Jade's clients had just been drafted out of college for the NBA and NFL. Soliciting client athletes required the time and expense of traveling around the country to meet with the athletes and convince them to join Jade. Clients who were at the start of their athletic careers also were not able to pay anything until they were drafted or began receiving salaries. Delays in

obtaining the necessary securities registrations to bill clients for certain services further impeded payment. As a result, in its first year Jade could not cover its employees' salaries or other expenses without help. Brahmbhatt also owed a $180,000 personal debt to his former firm. After early 2009, Ahmed and STI regularly provided Jade and Brahmbhatt with funds for Jade's payroll and other expenses, and later paid off Brahmbhatt's personal debt.

Jade and STS became deeply intertwined. On account statements, Jade was labeled as a "Division of Success Trade Securities, Member FINRA/SIPC." Jade operated out of STS's office suite in McLean and kept its books and records at STS's D.C. office. Four of Jade's five employees became registered representatives of STS in the spring of 2009, and Jade purchased and sold securities for its clients through STS. Jade clients held their securities in brokerage accounts at STS. The letterhead or footer on many of Jade's promotional materials and emails read "Securities products offered through Success Trade Securities, Inc., member FINRA/SIPC."

Ahmed understood that by funding Jade, he would gain access to a large pool of potential investors for his businesses. Brahmbhatt estimated to Ahmed in April 2009 that Jade would "have net new assets of [$]20 million" by the end of September, and that "for every client I bring I want them to invest in Success." In total, STI loaned Jade and Brahmbhatt over $1.2 million; while promissory notes and revolving lines of credit memorialized the loans, there is no evidence that Ahmed ever required Jade or Brahmbhatt to repay the principal or interest on any of them.

B. Respondents sold STI promissory notes in an effort to improve their financial situation.

Ahmed decided to raise money for STI through an offering of promissory notes (the "Notes"). He authorized the Notes' offering documents and compiled promotional materials with favorable press about STS to distribute to investors—including a PowerPoint presentation and a letter from him describing his companies in glowing terms. The Notes were then sold by Ahmed or by STS registered representatives at Jade. Ahmed instructed the STS registered representatives to use the offering documents and promotional materials in selling the Notes.

1. Respondents sold the Notes between March 2009 and February 2013.

Between March 2009 and February 2013, 152 STI Notes, totaling $19.4 million, were sold to 65 investors. About three quarters of the investors were professional athletes (about half of whom were young with limited investment experience), and the vast majority were Jade clients. The offering was not registered with the Commission; rather, the offering documents consisted of six private placement memoranda issued in 2009 (the "PPMs"), an accompanying Subscription Agreement, and a supplement issued in June 2010 (the "Supplement").

a. The PPMs

The first PPM, dated January 1, 2009, stipulated a minimum offering of $5 million and a maximum offering of $7.5 million. The remaining PPMs—one dated February 1, 2009, one dated September 29, 2009, and three dated November 30, 2009—each stipulated a maximum offering of $5 million. The PPMs provided for a 12.5% annual rate of return with interest paid monthly, and a 36-month term. The PPMs also limited participation to "'accredited investors' as

defined in Rule 501(a) of Regulation D" of the Securities Act of 1933, and said that the offering was exempt from registration pursuant to Rule 506 of Regulation D of the Securities Act.

Of the 152 STI Notes sold, 25 were issued with one of the earlier two PPMs attached, and 85 were issues with one of the later four PPMs attached. Of the remaining 42 Notes, 26 of them were issued to investors who only received a PPM in connection with an earlier purchase of another Note, and 16 were issued to investors who appear not to have received any PPM. Some Notes, both with and without a PPM, had different interest rates (usually higher) and shorter terms than those indicated in the PPMs. For instance, a number of investors purchased Notes with terms between one and six months, and some of those Notes had annualized interest rates of over 100%. Ahmed, who tried to personally meet with every Note investor, signed all but eight of the Notes, approved each Note's terms, and in a few instances personally guaranteed the Notes. The PPMs designated Ahmed as the main contact for those with questions about the Notes.

The PPMs also included information about the intended use of the proceeds. The precise amounts and uses varied slightly among the PPMs, but all closely resembled those outlined by the February 1, 2009 PPM, which were as follows:

- $1.5 million "to buy out existing shareholders and retire debt";
- $2 million "allocated to an advertising campaign";
- $1.1 million to be "reinvested in technology"; and
- $400,000 to provide STI with "working capital" and offset offering expenses, commissions, and legal and accounting fees.

All of the PPMs stated that officers and directors of STI would not receive "any compensation for their efforts" from the sale of the Notes.

The four PPMs dated September and November 2009 (the "Fall 2009 PPMs") contained additional disclaimers regarding STI's use of offering proceeds. They stressed that there was "no minimum proceeds threshold required for [STI] to utilize offering proceeds," stated that STI reserved the right "to use the funds obtained from this offering for other similar purposes not presently contemplated which it deems to be in the best interest of [STI], its shareholders[,] and its Note holders in order to address changed circumstances or opportunities," and advised investors that they must depend on the "judgment and discretion" of STI's management in this regard. The Fall 2009 PPMs also disclosed the existence of loans to STI from RK and others. But they did not disclose the loans to Jade, which totaled over $125,000 by the end of September 2009. The Fall 2009 PPMs emphasized that neither STI, STS, nor any associated person "will receive any compensation whatsoever in connection with the sale" of the Notes.

Exhibit A to the PPMs was a Subscription Agreement, which included the promissory note itself and additional details regarding the Note offering. Also included was an Accredited Investor Questionnaire with questions about the investor's net worth, income during the previous two calendar years, frequency of investing in securities, and level of sophistication. One registered representative of STS who worked at Jade testified that 20 to 50 of the Note purchasers signed the questionnaire blank and that the representative filled in the financial and other information later. He said that Jade's Chief Operating Officer (who was also an STS registered representative) instructed him to check the box indicating an income of over $200,000 for the previous two years if an athlete's contract guaranteed that amount moving forward.

b. The Supplement

The Supplement, dated June 30, 2010, was intended to accompany the PPM "dated November 30, 2009," but it did not specify which of the three November 30, 2009 PPMs it meant, and the record does not indicate which investors received the Supplement.

The Supplement stated that STI had "made business loans to Jade in the current principal amount of $590,000"; the actual amount of STI's loans to Jade and Brahmbhatt by June 2010 was $619,576, and by the end of the offering that amount had risen to $1.2 million. The Supplement did not mention that the money for these loans came from proceeds of the Note offering. Although the Supplement stated that it attached STI's "unaudited financial statements for the year ended December 31, 2009," there is no evidence that any such documents were appended to the Supplement or otherwise provided to investors.

The Supplement included a table purportedly showing the money raised to date and how it had been spent. It cautioned that "in certain instances [STI has] modified its use of proceeds as [its] business has demanded," noting that the "[m]ost significant[]" difference was that STI had used more of the proceeds than originally planned for data center infrastructure and website development. In reality, the numbers were quite different:

Note Proceeds	Disclosed	Actual
Proceeds from Sale of Notes (3/1/09 - 6/30/10)	$3,445,000	$4,645,347

Application of Proceeds		Disclosed	Actual
Offering Expenses		$35,000	?
Capital Investment in STS	Advertising	$705,000	$210,331
	Website Development	$324,000	$236,629
Capital Investment in BP Trade	Data Center Infrastructure	$447,000	$293,284
	Market Data Feed	$297,000	$174,334
	Software Programming	$195,000	$7,500
	Equipment	$77,000	?
	Payments to BP Trade (Recorded as Other Receivables)	-	$307,411
Share Buyback & Debt Retire		$950,000	$984,007
Legal, Accounting		$165,000	$279,606
Working Capital		$250,000	?

Interest Expense	-	$531,545
Payments Recorded as Officer Loans	-	$246,741
Payments to Jade and Brahmbhatt	-	$619,576
Payments to Ahmed's Brother	-	$56,900
Total	$3,445,000	$3,947,864

In other words, even though more money than disclosed had been raised, less of it had been spent on the main purposes outlined in the PPMs, and at least 30% of the money had gone to recipients and purposes not disclosed in the PPMs or the Supplement.

The June 2010 Supplement was the last update to any offering document. Yet by June 2011, STI's monthly interest obligations on the Notes began to exceed its income, which was essentially limited to the amount STI received from STS's commissions. By fall 2012, approximately $150,000 was due every month in interest to existing STI noteholders. The only way STI was able to keep up on its interest payments was by selling Notes to additional investors. Furthermore, RK's loan was due in December along with the $1.5 million balloon payment. The three-year Notes sold in 2009 were also coming due, which necessitated even more capital that STI did not have. As a result, Ahmed negotiated a new promissory note with RK that increased the debt but extended it until December 2013. And Ahmed and STS began selling more STI Notes with shorter terms, smaller amounts, and higher interest rates than those disclosed in the PPMs. Fifteen of the 42 Notes sold without PPMs were sold in the last three months of 2012.

c. The Note sales and use of proceeds

Ultimately, Respondents raised $19.4 million from the sales of the Notes between March 2009 and February 2013. The record reflects that roughly $2.2 million of that $19.4 million, or 11.3%, was used as outlined by the PPMs:

- $984,000 on share buyback and debt retirement;
- $437,000 on capital investment in STS, including advertising;
- $475,000 on BP Trade software and infrastructure; and
- $279,000 on offering-related fees.

The disposition of the remaining $17.2 million was: $4.9 million on interest to existing investors; $1.3 million on payments to Jade; $830,000 on payments to Ahmed, labeled officer loans; $307,000 on undocumented and unexplained payments to BP Trade; $91,000 on loans to Ahmed's brother; $5.7 million returned to investors; and $4.1 million unaccounted for. These uses of proceeds were not disclosed in the offering documents.

2. Respondents also encouraged noteholders to extend the Notes.

In the fall of 2012, Ahmed and STS, with Jade's help, began to encourage existing noteholders to extend Notes that were coming due, often at higher interest rates, or to convert them into shares of STI common stock. From October 2012 to February 2013, at least 19 noteholders extended or converted their notes. Respondents encouraged the extension of the Notes and conversion to stock by telling investors about: (1) a valuation report of BP Trade, STI's software subsidiary; (2) STI's purported plan to list on a European exchange; and (3) STI's purported pending acquisition of an Australian company that would enhance STI's market value. But Ahmed directed that the BP Trade valuation report be created based upon unwarranted assumptions, never completed the steps necessary to list STI on a European exchange, and withdrew from the Australian acquisition because of a lack of funds that he knew about from the start.

a. The BP Trade valuation report

In September 2012, Ahmed hired a consultant, FD, to prepare a report for STI estimating BP Trade's market value. Ahmed told FD to assume that, by the end of 2013, BP Trade would secure 25 licensing customers; BP Trade had been servicing only STS since at least 2007. Furthermore, Ahmed did not tell FD about STI's liabilities and how they might affect BP Trade's financial condition, and did not provide any historical financial information for STI or STS.

FD's report valued BP Trade at $47.1 million and projected that BP Trade's revenues would more than double from 2013 to 2014. The report qualified its valuation with numerous disclaimers, including that it used certain financial projections and assumptions provided by Ahmed, and that FD had not independently verified any of the information provided. The report cautioned that while it projected rising revenues in the future, "BP Trade is not currently viewed as a going concern." The report also noted that it was not a fairness opinion regarding "whether any third-party should engage in any particular transaction," and stated that the report could not be relied on by anyone other than STI without FD's prior written consent.

Ahmed began disseminating the report to investors the day after he received it. He emailed the report to Jade, and personally emailed a noteholder's business manager with "the detailed valuation report of my company done by an independent advisory firm," whom he said had "valued my company at $47.1 million." Investors who requested current financial information on STI or STS sometimes received copies of the BP Trade report instead, and it became part of the bundle of promotional materials sent to investors. FD told Ahmed in January 2013 that the report was out of date because, among other things, BP Trade had not secured any licensing customers. Yet Ahmed continued to use the report to solicit new investors and to encourage existing investors to extend or convert their Notes.

b. The European exchange listing

Ahmed and the STS representatives at Jade began telling noteholders in late 2012 that STI was arranging to be listed on a European exchange. This "liquidity event" was an opportunity that investors could "really capitalize on." The estimated listing date given to investors varied from March to June 2013 (the estimate got later as the period drew closer), at a price of four or five euros (about 6 USD) per share. The PPMs allowed for conversion of the Notes to STI common stock for $2 a share, and so noteholders were told that they had the opportunity to double or triple their investment. Noteholders were also told that the conversion option would not be exercisable after the company went public; this was a now-or-never opportunity. Nothing in any of the offering documents supported this statement.

FD assisted in the exchange listing efforts by connecting Ahmed with bankers, with whom Ahmed met in London. However, by February 2013, Ahmed had not completed vital preliminary steps for a listing, including forming a European holding company to acquire STI's stock, deciding which exchange would be used for the listing and submitting an application there, registering the stock with European securities regulators, and raising the requisite funds for the listing process. The listing never happened.

c. The Australian company acquisition

Ahmed began discussions to purchase an Australian broker-dealer in the first weeks of 2013. He relayed this news to both Jade and investors. Ahmed claimed the acquisition would enhance the value of his companies, and that the European exchange listing kept being pushed back to provide STI with the benefit of this increased value before the listing occurred.

In February 2013, STI proposed to purchase the Australian company for AU$15 million, with a preliminary AU$3 million installment payment due at the end of March (during this time period, the Australian and American dollars were close to parity). Ahmed received a letter from an Australian bank in mid-March expressing interest in financing the acquisition with AU$6 million of the purchase price. The interest in providing potential financing was contingent on, among other things, the bank "firstly completing to its satisfaction a full assessment and due diligence exercise on the project."

STI did not have sufficient funds to make the March 2013 installment payment. The relevant parties to the funding agreement had a phone call in early April outlining critical steps to take in the following week, including Ahmed agreeing to the due diligence details and paying a AU$20,000 fee to the bank. Ahmed withdrew from the transaction a few days after the phone call and before taking any of the steps discussed, including the fee payment.

3. Respondents became unable to make the interest payments on the Notes.

By March 2013, STI was no longer able to make the interest payments on the Notes. In total, $5.7 million had been returned to the earliest investors. Six investors were repaid in full; the remaining 59 investors were owed $13.7 million.

C. State securities regulators, the Commission, and FINRA all investigated Respondents.

1. State regulators told Respondents to stop selling the Notes, Respondents did not do so, and Respondents eventually settled with the District of Columbia.

In June 2012, securities regulators for the District of Columbia and Virginia conducted a routine on-site examination of STS's books and records. The D.C. regulator wrote to STS informing them that the examination found that STS had offered and sold securities in transactions that were not registered or executed pursuant to an available exemption, and instructed STS to "[i]mmediately cease offering and selling [STI] securities until such [transactions] are registered" or, in the alternative, until documentation was provided showing the requisite registration or exemption. It also found that STI had "made material misstatements or omissions in the offer and sale of its unsecured promissory notes" and reiterated the need to "[i]mmediately cease offering and selling [STI] notes" until the PPMs were corrected. Respondents did not register the Note transactions, did not provide the requisite documentation, and did not alter the PPMs. Nor did they cease, or even slow, in selling the Notes in the face of this instruction to stop sales.

Subsequently, Respondents and STI settled with the District of Columbia's Department of Insurance, Securities and Banking. Among other sanctions in Respondents' and STI's

administrative consent order, Respondents and STI were prohibited from engaging in securities business in the District of Columbia (with allowances to sell STS and transfer its assets) and ordered to pay a civil penalty of $650,000 and restitution of $12,529,804.34.[1]

2. Respondents also settled with the Commission.

Respondents and STI also settled a Commission action alleging material misrepresentations and omissions in the sale of the STI Notes and the unregistered offer and sale of securities. The Commission's consent order revoked STS's registration as a broker-dealer, ordered disgorgement of $12,777,395.80 plus prejudgment interest, and imposed a civil penalty of $12,777,395.80.[2] Following additional proceedings, an administrative law judge issued an Initial Decision permanently barring Ahmed from the securities industry.[3]

3. FINRA found Respondents liable after a hearing.

FINRA's Department of Enforcement filed the Complaint in this matter, as well as a request for a temporary cease and desist consent order ("TCDO"), on April 10, 2013. A Hearing Panel approved the TCDO, with Respondents' consent, two days later, ordering Respondents to stop selling, extending, or converting the Notes. The TCDO is still in effect, and there is no evidence or allegation that Respondents have violated it.

FINRA's Complaint asserted two causes of action against Respondents. First, the Complaint alleged that Respondents committed securities fraud by knowingly misrepresenting and omitting material facts in connection with the sale of the STI Notes. Second, the Complaint alleged that Respondents engaged in the unregistered offer and sale of securities without a valid exemption.

On May 6, 2013, Ahmed signed a letter of intent with RK for RK to buy STS for $10.7 million. FINRA informed Ahmed by phone and email that the transaction raised "significant concerns and questions" and was "per se not approvable as presently constructed." However, FINRA wrote that it would "reserve judgment until an actual application with supporting documentation is filed."

Nonetheless, Ahmed emailed a letter to investors updating them on their investment and appending the letter of intent. He stated that a "purchase agreement arising from the LOI is in the process of being finalized" that would allow for payback of principal amounts due. The

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[1] *Success Trade Securities, Inc.*, Administrative Consent Order No. SB-CO-03-15, at *31-32 (D.C. Dep't of Ins., Sec. & Banking Feb. 19, 2015), *available at* https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Securities-SuccessTradeSecurities-AdmininstrativeOrder-SB-CO-03-15.pdf.

[2] *Success Trade, Inc.*, Exchange Act Release No. 75707, 2015 WL 4865349, at *8-9 (Aug. 14, 2015).

[3] *Success Trade, Inc.*, Initial Decision Release No. 1005, 2016 WL 1697909, at *8-9 (Apr. 28, 2016).

letter also noted that FINRA had filed a Complaint that STI was "vigorously defending, and which may delay or impede the sale." The letter concluded by saying that interest payments would be suspended until the purchase agreement was signed; in fact, as noted above, interest payments had stopped before the Complaint was filed due to insufficient funds to pay them.

FINRA received a copy of the letter and wrote to Ahmed that the letter was false and misleading, in violation of FINRA Rule 2210(d)(1), in that it "indicates that the transaction is viable and expected to go forward" even after FINRA had informed Ahmed of its concerns. The letter instructed Ahmed to immediately cease using the letter. Ahmed wrote back that he had.

Subsequently, a Hearing Panel found that Respondents had committed securities fraud in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010, and had also unlawfully sold securities without registering the transactions in violation of Section 5 of the Securities Act and FINRA Rule 2010. The Hearing Panel permanently barred Ahmed and expelled STS for engaging in securities fraud, and ordered $13.7 million in restitution, as well as costs. In light of its decision, the Hearing Panel declined to assess additional sanctions for the Section 5 violations.

Respondents appealed to FINRA's National Adjudicatory Council ("NAC"), which affirmed the Hearing Panel's findings of violations and the sanctions imposed. The NAC also imposed additional sanctions for the Section 5 violations, finding that "the barring of Ahmed and expulsion of [STS] are the appropriate sanctions for that violation as well," assessed additional prejudgment interest, and added additional costs for the appeal. This appeal followed.

II. Analysis

In reviewing FINRA disciplinary action, we must determine whether Respondents engaged in the conduct found by FINRA, whether that conduct violates the statutory provisions and FINRA rules that FINRA found Respondents to have violated, and whether those provisions and rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[4] We base our findings on an independent review of the record and apply a preponderance of the evidence standard.[5]

A. Respondents committed fraud.

Respondents engaged in the conduct FINRA found because they knowingly made material misstatements and omissions in connection with the offering documents for the STI Notes and used the offering documents to sell the Notes repeatedly. Such conduct violates the

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[4] 15 U.S.C. § 78s(e)(1).

[5] *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, *9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). Respondents' contention that the Hearing Panel misrepresented certain facts misses the mark. "It is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of FINRA which is subject to Commission review." *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *17 n.89 (Feb. 13, 2015) (internal quotation marks, brackets, and citation removed).

antifraud provisions of Exchange Act Section 10(b) and Rule 10b-5 thereunder. That same conduct also violates FINRA Rule 2020—FINRA's antifraud rule—and FINRA Rule 2010.

1. Ahmed violated Section 10(b) and Rule 10b-5 by making material misstatements and omissions with scienter.

Exchange Act Section 10(b) and Rule 10b-5(b) thereunder prohibited Ahmed from using interstate commerce to, in connection with the purchase or sale of securities, (1) make a false statement or omission; (2) of material fact; (3) with scienter.[6] The record shows, and Ahmed does not dispute, that he used interstate commerce in connection with the purchase and sale of the STI Notes. We also find, and Ahmed does not dispute, that the STI Notes were securities.

Ahmed's control over the statements at issue in this case establishes him as the "maker" of the statements for purposes of primary liability under Exchange Act Rule 10b-5(b). In *Janus Capital Group v. First Derivative Traders*, the Supreme Court held that the maker of a statement for purposes of Rule 10b-5(b) is the person "with ultimate authority over the statement, including its content and whether and how to communicate it."[7] Ahmed was STI's and STS's CEO and only Director, as well as STI's largest shareholder. He was the sole decision maker for STI. He reviewed, authorized, and approved the use of each PPM and the Supplement, and the PPMs directed questions about the offering to Ahmed. Ahmed also controlled all the information that the STS registered representatives received regarding the STI Notes. We find that Ahmed had the requisite "ultimate authority" over the statements in the PPMs and the Supplement and his own statements to investors to render him their maker.[8]

Based upon our independent review of the record, we also find that the statements Ahmed made were false and misleading, material to investors, and made with scienter.[9]

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[6] *See SEC v. Pirate Inv'r LLC*, 580 F.3d 233, 239 (4th Cir. 2009); 17 C.F.R. § 240.10b-5(b) (prohibiting, in connection with securities transactions, "mak[ing] any untrue statement of a material fact or [] omit[ting] 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").

[7] 564 U.S. 135, 142-43 (2011).

[8] *See, e.g.*, *SEC v. e-Smart Techs., Inc.*, 74 F. Supp. 3d 306, 319-20 (D.D.C. 2014) (finding that CEO was the maker of misstatements, even though she was not the one "who first put pen to paper to draft" the misstatements, because the evidence showed that she approved them and "that she was in control, not just generally as CEO, but specifically in relation to the" misstatements); *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 WL 4727517, at *6 n.18 (Sept. 9, 2016) (finding that respondent had requisite "ultimate authority" because he filled in forms containing misstatements himself).

[9] In their application for review, Respondents claimed that the statements at issue are inactionable forward-looking statements. Respondents abandoned this claim by failing to address it in their briefs. *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (stating that in the parties' briefs each "exception to the findings or conclusions being reviewed shall be stated succinctly" and "shall be supported by citation to the relevant portions of the record . . . and by

(*continued*...)

a. Ahmed made multiple misstatements and omissions in the offering documents for the STI Notes and in other communications to investors.

In the offering documents and other communications that he used to sell the STI notes, Ahmed misrepresented the nature of the offering, STI's current financial condition, and its future prospects.[10]

i. Ahmed misrepresented the nature of the offering.

Ahmed misrepresented every significant feature of the Note offering, including the Notes' interest rates and terms, the full amount raised in the offering, the requisite qualities of the investors, and how the proceeds would be used.

The PPMs and the Supplement all stated that the Notes would be offered at 12.5% interest for 36-month terms. But 29% of the Notes were sold with terms less than 36 months, and 20% had annualized interest rates over 12.5%. The PPMs and the Supplement also misstated the size of the offering. Although the first PPM listed an offering size of $7.5 million, there is no evidence that it was used after March 2009. The other PPMs said that the offering would be limited to $5 million, but sales of the Notes exceeded this amount by the fall of 2010. Ultimately, $19.4 million worth of STI Notes were sold, nearly four times what the PPMs stated. As a result, the continued use of PPMs that stated an offering amount of $5 million was a misrepresentation.

The PPMs also stated that the Notes were being offered only to accredited investors. Although the record does not contain sufficient information to assess the status of every investor, at least a third of them did not satisfy the required net worth and historical income thresholds.[11] We agree with the NAC's finding that, contrary to the PPMs' representations, "the Respondents accepted investments from anyone willing to provide them with funding."

(*...continued*)
concise argument"); *mPhase Technologies, Inc.*, Exchange Act Release No. 74187, 2015 WL 412910, at *12 (Feb. 2, 2015) (finding that applicant abandoned argument that it made in its application for review but not in its subsequent briefs). In any case, we reject Respondents' claim for the reasons given by the NAC in rejecting this claim below—that the safe harbor for forward-looking statements is available only for private actions or documents filed with the Commission, neither of which is at issue here.

[10] Although Respondents' application for review discussed the timing of the balloon payment agreement with RK and the existence of a formal *quid pro quo* agreement between Respondents and Jade, the NAC did not base liability on these issues, and neither do we. We agree with Respondents that the PPMs permitted them to sell less than a minimum sales unit to investors, and therefore have not based liability on this issue either.

[11] *See* Rule 501 of Regulation D, 17 C.F.R. § 230.501.

The PPMs and the Supplement further misrepresented the use of the proceeds from the STI Note offering. Although the offering documents disclosed various uses for Note proceeds, most of the proceeds went to uses not disclosed to investors. For example, $4.9 million, or 25% of the total proceeds of the offering, was paid as interest to earlier purchasers of the STI notes. This was never disclosed. Only 11.3% of Note proceeds went to the uses provided for in the PPMs, despite the fact that the PPMs indicated that 100% of proceeds would go to those uses.

Some of the proceeds were spent on things expressly forbidden in the offering documents. For example, all of the PPMs stated that officers and directors of STI would not receive "any compensation for their efforts" in selling the Notes. And the Fall 2009 PPMs stated that neither STI, STS, nor any associated person would receive "any compensation whatsoever in connection with the sale" of the Notes in the offering. Yet Ahmed regularly used Note proceeds to issue himself "officer loans," which were unsecured, interest free, and undocumented, apart from documentation Ahmed provided that was dated August 26, 2013, the first day of the FINRA hearing. Ahmed also distributed Note proceeds to Jade and Brahmbhatt, even though Brahmbhatt and most of Jade's employees were STS registered representatives and thus, at the very least, associated with STS. There is no indication that these "loans" were ever repaid or any interest was collected on them. Accordingly, they were a form of compensation prohibited by the PPMs.[12] In total, 11% of Note proceeds were paid out to Ahmed, Jade, and Brahmbhatt.

The fact that the Fall 2009 PPMs and the Supplement contained some disclaimers regarding the use of the proceeds does not cure these misstatements. The statement in the Fall 2009 PPMs that STI reserved the right to use proceeds for other purposes "not presently contemplated . . . in order to address changed circumstances or opportunities" did not entitle Ahmed to deviate at the start of the offering from the stated use of the proceeds without informing investors. The Supplement's statement that the "[m]ost significant[]" change in how proceeds were used was increased funding of infrastructure and website development plainly misrepresented how funds had already been used; the most significant differences were the undisclosed uses of proceeds in the form of paying interest to earlier investors and compensation to Ahmed, Brahmbhatt, and Jade—infrastructure and website development were both underfunded from offering proceeds.

Moreover, we have held that "in offering documents, specific statements control more general language such as that an allocation plan is 'flexible.'"[13] It is misleading to include

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[12] *See Howard D. Gatliff*, Exchange Act Release No. 16690, 1980 WL 29783, at *2 (Mar. 20, 1980) (finding that "so-called 'loans' . . . were in fact extra compensation" that "should have been disclosed to investors"); *cf. Imperial Fin. Servs., Inc.*, Exchange Act Release No. 7684, 1965 WL 88736, at *8 (Aug. 26, 1965) (finding interest-free loan qualified as compensation).

[13] *Brian C. Prendergast*, Exchange Act Release No. 44632, 2001 WL 872693, at *8 (Aug. 1, 2001) (citing *DWS Sec. Corp.*, Exchange Act Release No. 33193, 1993 WL 478048, at *3-4 (Nov. 12, 1993) (rejecting contention that use of offering's proceeds in manner other than that contemplated by PPMs was permissible because "the PPMs' description of the proposed use of proceeds was sufficiently general" and "informed investors that [respondent] would have some latitude in using the . . . offering proceeds"); *cf. Kenneth Terrell*, Exchange Act Release No.

(*continued*..)

"specific language describing asset allocation when [the respondent] intend[s] to rely on more general language to authorize a departure from" that description.[14] Indeed, Ahmed misled investors by failing to notify them that he intended to use the proceeds for purposes other than those contemplated in the PPMs.[15] And although the Supplement disclosed loans to Jade in a section titled "Relationship with Jade Private Wealth Management," it did not reveal that this money was being paid from the Note proceeds. This omission rendered the disclosures misleading, and the Supplement's statement that no "associated person of [STS] will receive any compensation whatsoever in connection with the sale of any Notes in this offering" was false.

Respondents contend that almost all the money paid as interest, officer loans, or to Jade did not come from the Note offering, and that any that did was "accounted for under Working Capital." But the record shows that Note offering proceeds were used for all of those purposes. And Respondents' explanation that Note proceeds spent for these purposes were accounted for as "Working Capital" is belied by the numbers in the record because the amount of proceeds that went to interest, officer loans, or Jade exceeded the amount accounted for as Working Capital. Nor does this explanation excuse the use of proceeds in a manner expressly forbidden by the PPMs or constitute a disclosure to investors that the proceeds would be used for these purposes.

Respondents argue that the Supplement depicted the use of the proceeds accurately because the use of proceeds from the Notes that were sold without a PPM should not have been included and did not need to be disclosed. But it was at least misleading to not include all of the proceeds received from sales of the Notes in the Supplement. As the NAC correctly found, regardless of whether an STI Note was sold with a PPM attached, "each dollar raised in the offering represented a dollar promised to the investor when the investor's note matured." Including the use of the proceeds from only some of the sales of the Notes understated STI's obligations to noteholders. Consequently, any disclosures about the offering—including its size, the Note terms, and the use of the proceeds—needed to take into account every STI Note sold.

ii. Ahmed misrepresented STI's financial condition.

Ahmed omitted information about STI's financial condition in both the offering documents and other communications with investors. The first two PPMs, which were used with 16% of the Notes sold, included a section on risk factors that indicated that STI was "exposed to credit risk with clients and counterparties." It was misleading to include this information while omitting the greatest risk STI faced—its then-existing massive debt load.

The disclosures in the Fall 2009 PPMs and the Supplement were also misleading. They disclosed at least $2.8 million in lines of credit and other debts that STI had at the

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42483, 2000 WL 248549, at *2, *9 (Mar. 2, 2000) (finding disclaimers that an event "may" happen to be misleading where anticipated event had already happened).

[14] *Prendergast*, 2001 WL 872693, at *8.

[15] *Id.* (finding that respondent misled investors by changing investment strategy from that stated in fund's PPM without disclosing change to investors).

commencement of the Note offering. But they made no mention of the rising annual losses STI was sustaining: almost $900,000 in 2009, $1.6 million in 2010, and more subsequently. As the NAC opinion pointed out, the Fall PPMs' disclosures also highlighted how "drastically [the first two PPMs] misrepresented and omitted information concerning the amount of [STI's] debt." Nor did any of the PPMs or the Supplement disclose the effect of the mounting interest obligations on STI. Omitting this information while including other debts and stating that STI would be able to pay the loans back with the interest promised misrepresented the significance of STI's growing liabilities.

iii. Ahmed made misrepresentations to encourage investors to extend or convert maturing Notes.

Ahmed made additional misstatements and omissions to encourage investors to convert their Notes into STI stock or to extend their Notes so that no principal payments would be due. He disseminated FD's report on BP Trade to investors and identified it as a "detailed valuation report of my company done by an independent advisory firm." But FD premised his valuation of BP Trade at $47.1 million not on any independent evaluation of his own, but on Ahmed's projection that BP Trade would increase its software licensing customers from zero to 25 by the end of 2013. Ahmed had no factual support for his projection, a fact that was not disclosed to any investor (or even to FD). Moreover, the valuation report did not factor in the impact of STI's debt obligations, as Ahmed did not provide FD with that or any other financial information about STI. Since STI derived all its income from its subsidiaries, its liabilities, which had grown by $13 million over the previous three years, were critical to understanding BP Trade's value. Their exclusion from the analysis was misleading. The report also stated that it did not constitute a fairness opinion and that no one outside STI should rely on it. Providing the report to investors who requested current financial information on STI or STS was misleading and enabled Ahmed to continue avoiding questions about STI's financial condition.

It was also misleading for Ahmed to inform investors about an acquisition of an Australian broker-dealer that would increase the value of his companies. Statements about plans to purchase the Australian broker-dealer were misleading because Ahmed failed to disclose the obstacles to completing the purchase, such as STI's inability to pay for the acquisition. Investors were left with a misleading impression about the acquisition's prospects.

Ahmed's claim that STI would be listed on a European exchange in the spring of 2013 was also misleading because he failed to disclose that STI was in no position to take the necessary steps to meet that deadline. These steps included the need to form a European holding company to acquire STI's stock; decide on and submit an application to a listing exchange; register STI's stock with European securities regulators; identify a market maker for STI's stock; and raise the funds required to pay for the listing process. Furthermore, Respondents point to no basis for telling investors that the option to convert their Notes to stock would be lost once the company went public, or that the opening stock price would be between four and five euros. Nor can we discern any basis from the record. Ahmed's explanation at the hearing of the opening price estimate, which relied, in part, on the flawed BP Trade valuation and the uncompleted Australian company acquisition, did not support an opening price of four to five euros.

b. Ahmed's misstatements and omissions were material.

The misstatements and omissions Ahmed made in connection with the sale of the Notes were material. Material misstatements or omissions are those that "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[16] In other words, information is material "if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell [securities]."[17]

A reasonable investor would have considered important the misrepresentations regarding the use of Note proceeds. These misrepresentations "would undoubtedly have been material to investors in deciding whether to invest . . . because the information relates directly to the use of the investor's money."[18] That so much money from new investors was being used to repay existing investors, rather than for investments that would improve the company and make it more likely that their Notes would be repaid, would have been material to a reasonable investor's assessment of the riskiness of the investment.[19] The misrepresentations regarding the interest rates and terms of the Notes and the size of the offering were also material because the amount of money to be paid, and the speed at which it had to be paid, would have similarly influenced investors' assessments of the risks of repayment.[20] A reasonable investor would have further considered material that STI was not limiting the offering to accredited investors but was "accepting investments from anyone willing to provide them with funding."

The misrepresentations regarding STI's financial condition were also material. "Surely the materiality of information relating to financial condition, solvency, and profitability is not subject to serious challenge."[21] A reasonable investor would have considered it important to know the state of STI's finances during the Note offering, particularly its creditworthiness and debt load, because this information would influence STI's ability to repay the Notes.[22] For

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

17 *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 518 (2d Cir. 1994).

18 *SEC v. Johnson*, No. 01-7874, 2001 WL 37114666, at *4 (S.D. Fla. Dec. 31, 2001).

19 *See, e.g., SEC v. Better Life Club, Inc.*, 995 F. Supp. 167, 176-77 (D.D.C. 1998) (finding material that defendant failed to disclose use of offering proceeds to pay existing investors).

20 *Cf. David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *5 (Dec. 21, 2007) (finding that "misrepresentation of the size of the offering and segregation and use of the offering proceeds . . . constituted material misstatements and omissions").

21 *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980).

22 *See SEC v. Glob. Express Capital Real Estate Inv. Fund I, LLC*, No. 03-1514, 2006 WL 7347289, at *18 (D. Nev. Mar. 28, 2006) (finding that misrepresentations "related to the Fund's financial condition and performance as well as use of investor funds" were material because "they concerned the very viability of the investment that defendants offered"), *aff'd in relevant part*, 289 F. App'x 183, 187 (9th Cir. 2008); *see also SEC v. Bravata*, 763 F. Supp. 2d 891, 916 (E.D. Mich. 2011) (finding misrepresentations in PPMs material where "defendants failed to

(*continued...*)

similar reasons, the misleading statements and omissions about BP Trade's valuation, the European exchange listing, and the Australian company acquisition efforts were material. A reasonable investor would want to fully assess the value of STI's subsidiaries and its future prospects before deciding to convert or extend their Notes.[23]

c. Ahmed acted with scienter.

Ahmed made these material misstatements and omissions with scienter. Scienter is "a mental state embracing an intent to deceive, manipulate, or defraud."[24] This means "that the defendants either knew that the representations they made to investors were false or were reckless in disregarding a substantial risk that they were false."[25]

We find that Ahmed made the misstatements and omissions in connection with the offering documents knowingly because he knew what they stated and that the communications therein were misleading. Ahmed was STI's CEO, sole Director, and only decision maker, and so was intimately familiar with the PPMs the company issued. Ahmed knew what the PPMs stated regarding the use of proceeds, and the actual use of the proceeds; indeed, he was the one who authorized the offering documents. Ahmed knew that the PPMs forbade compensation to STI officers and STS associated persons, and that he was regularly writing checks to himself, Brahmbhatt, and Jade. Ahmed knew that the Fall 2009 PPMs stated a maximum offering of $5 million, and that STI had raised more than $5 million by the end of 2010. Ahmed knew what the stated terms of the STI Notes were, and that he was altering them for some investors. Ahmed knew that the first two PPMs identified risk factors without disclosing STI's debts, and that the Fall 2009 PPMs did not disclose the loans to Jade. Ahmed acted with scienter with respect to these misrepresentations because he "knew the statements at issue to be false when made."[26]

We find that Ahmed was at least reckless when he made the misstatements and omissions to induce investors to convert or extend their Notes. Ahmed knew that his projections to FD for the BP Trade valuation had no basis, that he had concealed STI's debt load from FD, and that by January 2013 the valuation was out of date. Ahmed knew that he had not taken any of the

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depict the true financial condition of the company, particularly the inevitability that the only way investors would see a return or recovery of principal was if new investors paid money into the company").

23 *See, e.g., Robert G. Weeks*, Exchange Act Release No. 48684, 2004 WL 828, at *11 (Oct. 23, 2003) (finding it materially misleading for respondents to claim that mines had "commercial values" of ore "when there was no basis for knowing whether the ore could be extracted economically"); *Prime Inv'rs, Inc.*, Exchange Act Release No. 38487, 1997 WL 163992, at *6 (Apr. 8, 1997) (finding it materially false to value a stock at $70,000 and assert investment was tax free when there was "no basis" for these claims).

24 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

25 *SEC v. Lyttle*, 538 F.3d 601, 603 (7th Cir 2008).

26 *SEC v. StratoComm Corp.*, 652 F. App'x 35, 38 (2d Cir. 2016).

necessary steps to complete the European exchange listing. And Ahmed knew that he had not secured enough funding for the purchase price of the Australian company, and that the limited financing he was negotiating depended on a healthy due diligence report on the debt-ridden STI. In these circumstances, Ahmed knew or must have known of the risk that investors would be misled.[27]

Respondents contend that investors knew the risks of investing in the STI Notes. According to Respondents, they should not be blamed for the investors' losses because the materials that investors were provided and the conversations investors had with Jade alerted them to the risks. But "'boilerplate language warning that investments are risky or general language not pointing to specific risks is insufficient to constitute a meaningful cautionary warning."[28]

Respondents also contend that Jade was provided with STI's financial statements and that therefore it was Jade's fault if investors did not receive this information. For example, Respondents claim that Ahmed hand-delivered STI's 2009 financial statements and instructed Brahmbhatt to provide them to investors along with the Supplement. The only evidence supporting this assertion is Ahmed's testimony, and the Hearing Panel found that testimony lacked credibility and was contradicted by others' testimony. It found further that wherever Ahmed's testimony was not corroborated by independent evidence it was not "sufficiently reliable by itself to establish the facts." "We give great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence."[29] No such evidence exists here. Indeed, Jade employees testified that before the filing of the Complaint they had no idea that STI's financial condition was so dire. In any case, that Jade, an entity Respondents identified to investors as a division of STS, may share in the blame for the misrepresentations to investors does not absolve Respondents of responsibility for their own misconduct.[30]

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27 *See Mitchell H. Fillet*, Exchange Act Release No. 79018, 2016 WL 5571634, at *5 (Sept. 30, 2016) (finding that respondent acted recklessly because he drafted a term sheet for an offering that he knew was "subject to contingencies that had not yet occurred" and yet "failed to use any cautionary language in the Term Sheet alerting investors to the contingencies").

28 *SEC v. Loomis*, 969 F. Supp. 2d 1226, 1236-37 (E.D. Cal. 2013) (rejecting defendant's argument that Commission had "not shown that he acted with scienter" because "the disclosures in the PPM that the investments were risky mitigate the statements he made regarding the anticipated rate of return") (internal citations removed).

29 *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *5 (Aug. 22, 2008) (citations removed).

30 *Cf. Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 WL 5092727, at *10 (Dec. 7, 2010) ("Applicants cannot . . . diminish the wrongfulness of their actions by claiming that others also engaged in wrongdoing."); *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 WL 358737, at *21 (Feb. 1, 2010) ("[Respondent] cannot shift the blame for her violations to others or claim that others' misconduct somehow excuses her own. . . .").

2. STS violated Section 10(b) and Rule 10b-5 by using the material misrepresentations and omissions to sell the STI Notes.

Exchange Act Rule 10b-5(a) prohibited STS from, with scienter and in connection with the purchase or sale of securities, employing "any device, scheme, or artifice to defraud," and Rule 10b-5(c) prohibited STS from engaging in "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[31] STS, under Ahmed's control and supervision, employed devices, schemes, and artifices to defraud, and engaged in a course of business that operated as a fraud because its registered representatives, again at Ahmed's direction, provided Ahmed's false and misleading statements to investors. One STS registered representative, instructed by other STS registered representatives, also falsified the information on the questionnaire that accompanied the Subscription Agreement to indicate that investors had an income of over $200,000 for the previous two years even if the investor only expected to have that income in the future. STS is liable for these actions because the Commission "may properly sanction a broker-dealer for the willful acts of its agents."[32] And since Ahmed is the only officer of STS and controlled the company, his scienter can be imputed to STS as well.[33]

Respondents argue that Jade, rather than STS or Ahmed, sold the Notes and that Jade was responsible for ensuring the accuracy and completeness of the information investors received in its role as investment adviser. But in "any complex securities fraud . . . there are likely to be multiple violators."[34] As discussed above, Ahmed is liable because he had ultimate authority

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[31] 17 C.F.R. §§ 240.10b-5(a), (c).

[32] *Armstrong, Jones & Co. v. SEC*, 421 F.2d 359, 362 (6th Cir. 1970); *accord A.J. White & Co. v. SEC*, 556 F.2d 619, 624 (1st Cir. 1977) (citing *Armstrong*). Acting "willfully" under the federal securities laws means that the actor "intentionally commit[ed] the act which constitutes the violation." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). It does not require that the actor "also be aware that he is violating one of the Rules or Acts"; rather, it is simply the voluntary commission of the acts themselves. *Id*; *see also Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *5-6 (Mar. 15, 2016) (analyzing willful behavior in FINRA appeal to determine if respondent "voluntarily committed the acts that constituted the violation"), *aff'd*, 672 F. App'x 865 (10th Cir. 2016). As discussed above, there is ample evidence that Ahmed and the STS registered representatives intended to undertake the acts that resulted in the fraud. Accordingly, we find that Respondents acted willfully and sustain the NAC's finding that Respondents are subject to statutory disqualification under Section 3(a)(39) of the Exchange Act, which mandates such a disqualification if a person "has willfully violated any provision" of the Exchange Act. 15 U.S.C. § 78c(a)(39); 15 U.S.C. § 78o(b)(4)(D).

[33] *See, e.g., Clarke T. Blizzard*, Investment Advisers Act Release No. 2253, 2004 WL 1416184, at *5 (June 23, 2004) ("A company's scienter may be imputed from that of the individuals who control it."); *Kirk A. Knapp*, Exchange Act Release No. 30391, 1992 WL 40436, at *2 n.7 (Feb. 21, 1992) (finding scienter of firm's primary owner could be attributed to firm).

[34] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 191 (1994); *see also SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998) (stating that liability

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over the misrepresentations, had numerous communications with investors, and personally sold some of the Notes. STS is liable because the four Jade employees selling the Notes were simultaneously STS registered representatives. Indeed, Jade labeled itself as a division of STS in selling the Notes. Those representatives provided investors with the misrepresentations in the PPMs and the Supplement that Ahmed had approved and falsified investor questionnaires in furtherance of the scheme. Jade's liability aside, Respondents are liable because liability under Section 10(b) and Rule 10b-5 extends to any "person or entity" that "commit[s] a manipulative or deceptive act" as part of the fraud.[35]

Respondents maintain that they cannot be held accountable for the actions of the STS registered representatives at Jade because control person liability is inapplicable. But control person liability is irrelevant, because it holds an individual or entity secondarily liable for another's primary violation.[36] It does not apply where, as here, Respondents themselves are primarily liable for the violations.[37] *Hauser v. Farrell*, which Respondents cite in support, involved individuals acting outside the control of their firms where it was undisputed that the firm lacked all knowledge of their misconduct.[38] That is not the case here.

3. Respondents violated FINRA Rules 2020 and 2010.

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." We have held that conduct that violates Rule 10b-5 also violates FINRA Rule 2020.[39] And we have long held that conduct that violates these antifraud rules is inconsistent with the "high standards of commercial honor and just and equitable principles of

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under Section 10(b) is not restricted "to supervisors or directors of securities fraud schemes while excluding from liability subordinates who also violated the securities laws").

35 *Cent. Bank*, 511 U.S. at 191.

36 15 U.S.C. § 78t(a).

37 *See, e.g., SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1472-74 (2d Cir. 1996) (distinguishing between primary and control person liability). As a result, Respondents' contention that their "good faith" excuses their conduct is also inapposite. Good faith is a defense to control person liability, not primarily liability. *See vFinance Invs., Inc.*, Exchange Act Release No. 62448, 2010 WL 2674858, at *12 n.30 (July 2, 2010) (explaining that good faith defense inapplicable in primary liability context). In any case, Respondents did not act in good faith because they acted knowingly and recklessly in committing the misconduct.

38 *See Hauser v. Farrell*, 14 F.3d 1338, 1339, 1342 (9th Cir. 1994).

39 *See, e.g., Donner Corp. Int'l*, Exchange Act Release No. 55313, 2007 WL 516282, at *13 (Feb. 20, 2007) (finding that same conduct violated Section 10(b) and Rule 2020's predecessor).

trade" mandated by FINRA Rule 2010.[40] We therefore agree with the NAC that Respondents violated FINRA Rules 2020 and 2010 through their fraudulent sale of the STI Notes.

We also find that FINRA Rules 2020 and 2010 are, and were applied in a manner, consistent with the purposes of the Exchange Act. Exchange Act Section 15A(b)(6) requires that FINRA promulgate rules to "prevent fraudulent and manipulative acts and practices" and "protect investors and the public interest."[41] It further mandates that FINRA design rules that "promote just and equitable principles of trade."[42] Rules 2020 and 2010, which are designed to prevent fraud and promote just and equitable principles of trade, are therefore consistent with the Exchange Act's purposes.[43] And in finding Respondents liable for securities fraud under these rules, FINRA also applied these rules consistently with the purposes of the Exchange Act.

FINRA also applied Exchange Act Section 10(b) and Rule 10b-5 thereunder consistently with the purposes of the Exchange Act. Section 2 of the Exchange Act declares that regulation of the securities industry is necessary, among other reasons, "to insure the maintenance of fair and honest markets in [securities] transactions."[44] Section 10(b) allows the Commission to promulgate rules and regulations that prohibit the use of "manipulative or deceptive device[s] . . . as necessary or appropriate in the public interest or for the protection of investors."[45] Here, Respondents' conduct put investors at risk and threatened the integrity of the market. FINRA was acting in the public interest, and consistently with the purposes of the Exchange Act, in applying Section 10(b) and Rule 10b-5 to their misconduct.

B. Respondents sold securities without a registration statement or a valid exemption.

The NAC also correctly found that Respondents engaged in unregistered sales of the STI Notes in violation of Section 5 of the Securities Act. That section prohibits the offer or sale of securities in interstate commerce "[u]nless a registration statement is in effect" or an exemption is available.[46] Because Respondents violated Section 5, they also violated FINRA Rule 2010.

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40 *See, e.g., Terrance Yoshikawa,* Exchange Act Release No. 53731, 2006 WL 1113518, at *8 n.39 (Apr. 26, 2006).

41 15 U.S.C. § 78o-3(b)(6).

42 *Id.*

43 *Lane*, 2015 WL 627346, at *6 n.20, *11 (holding predecessors to Rules 2020 and 2010 consistent with purposes of Exchange Act).

44 15 U.S.C. § 78b.

45 15 U.S.C. § 78j(b).

46 15 U.S.C. §§ 77e(a), (c).

1. Respondents violated Securities Act Section 5.

To establish a prima facie case of a Section 5 violation, Enforcement had to show that, using interstate commerce, Respondents: (a) offered or sold the securities; and (b) did so when no registration statement was in effect or filed as to the securities.[47] The record establishes that Enforcement made this showing. Once Enforcement did so, the burden shifted to Respondents to show that the transactions at issue were exempt—a showing that they fail to make.[48]

Respondents contend that the Note offering was exempt under the safe harbor provided by Rule 506 of Regulation D of the Securities Act.[49] Rule 506 permits an issuer to sell its securities to an unlimited number of "accredited investors," and up to 35 non-accredited investors. As relevant here, accredited investors, defined under Rule 501 of Regulation D, must meet certain net worth or historical income thresholds. At the time of most of the sales at issue, the investors would have needed to either have a net worth (or joint net worth with a spouse) exceeding $1,000,000, or else an individual income exceeding $200,000 (or joint income with a spouse exceeding $300,000) "in each of the two most recent years . . . and ha[ve] a reasonable expectation of reaching the same income level in the current year."[50]

Additionally, under Rule 506 each non-accredited investor must be sophisticated for the exemption to apply. That is, each non-accredited investor must have "such knowledge and experience in financial and business matters that he [or she] is capable of evaluating the merits and risks of the prospective investment."[51] Rule 506 also requires that each non-accredited investor be provided with certain financial and non-financial information prior to sale.[52]

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[47] *SEC v. Cavanagh*, 445 F.3d 105, 111 n.13 (2d Cir. 2006); *Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 WL 169138, at *7 (Jan. 20, 2012).

[48] *See, e.g.*, *Cavanagh*, 445 F.3d at 111 n.13 (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953)); *World Trade Fin. Corp.*, Exchange Act Release No. 66114, 2012 WL 32121, at *9 (Jan. 6, 2012), *petition denied*, 739 F.3d 1243 (9th Cir. 2014); *Robert G. Leigh*, Exchange Act Release No. 27667, 1990 WL 1104369, at *3 (Feb. 1, 1990).

[49] 17 C.F.R. § 230.506. Respondents originally filed a Form D indicating that they were seeking to rely on the exemption provided by Rule 505, but that Rule limits offerings to $5 million in a twelve-month period. Respondents conceded in testimony and briefs that Rule 505 does not cover the STI Note offering and have abandoned any claim under Rule 505 on appeal. Unlike Rule 506, Rule 505 does not have a sophistication requirement for non-accredited investors to participate in the offering. *Cf.* 17 C.F.R. § 230.506(b)(2)(ii).

[50] 17 C.F.R. §§ 230.501(a)(5)-(6). Effective February 27, 2012, Rule 501(a)(5) was amended to exclude the value of the person's primary residence. *See Net Worth Standard for Accredited Investors*, Securities Act Release No. 9287, 2011 WL 6415435, at *3 n.28 (Dec. 21, 2011), 76 Fed. Reg. 81,793, 81,793 (Dec. 29, 2011).

[51] 17 C.F.R. § 230.506(b)(2)(ii).

[52] *See* 17 C.F.R. § 230.506(b)(1); 17 C.F.R. § 230.502(b).

a. Respondents did not limit sales to accredited or sophisticated investors.

Respondents sold STI Notes to investors who were neither accredited nor sophisticated. At least 23 investors were not accredited because they lacked both the net worth and the historical income required to qualify as accredited under Rule 506. And 18 of these investors were athletes aged 23 or younger. Most left the "investment experience" section blank on their questionnaires, and the seven who did not stated that they had no investment experience and limited investor knowledge. Respondents have not offered any other evidence to show that these investors had the requisite knowledge and experience to make them capable of evaluating the risks of these securities. Nor is there evidence that these investors (or Jade) were provided with the required financial and non-financial information under Rule 506.

Respondents contend that all investors attested to their accreditation and sophistication through the questionnaires they filled out. But an STS registered representative, at the direction of other STS representatives, entered information on the questionnaires that was inaccurate to make it appear that the investors were accredited. For instance, some questionnaires claimed that investors satisfied the historical income requirements by counting anticipated future income toward past income.

The fact that Jade's business plan was based on obtaining clients who were *not* sophisticated further belies Respondents' contention that all investors were sophisticated. In his on-the-record testimony, Brahmbhatt said that many of his early clients had no "experience with any type of financial matters" beyond "basic check writing and things of that nature." Brahmbhatt explained that Jade's role was to minimize the "mistakes" that "the kids are going to make" in their first seasons as professional athletes—to convince them to spend $40,000 on jewelry, for example, rather than $200,000. He said that many of his athlete clients "don't realize that the more money they save, the more cash flow they will have." Evidence in support of Section 5 exemptions "must be explicit, exact, and not built on conclusory statements."[53] The fact that a box was checked on a questionnaire does not render these investors accredited or sophisticated.

b. Respondents cannot blame Jade for their Section 5 violations.

Respondents also contend that it was Jade's responsibility to determine investors' accreditation and sophistication. But Ahmed and STS partnered with Jade because they understood the advantage that access to its particular client base could potentially yield. Jade represented itself as a division of STS to its clients. And it was STS registered representatives at Jade, and Ahmed himself, who sold the STI Notes to Jade clients. In some instances, those same representatives were the ones who filled out the investors' paperwork falsely attesting to their accredited and sophisticated status. Ahmed also personally met with the majority of investors in the STI Notes. Respondents cannot disclaim knowledge that these investors were not sophisticated. Nor based on these facts can Respondents claim that they had established a

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[53] *Midas Sec.*, 2012 WL 169138, at *8 (citations removed); *see also Weeks*, 2004 WL 828, at *12 (same).

reasonable basis to believe that these investors were either accredited or sophisticated, as required by Rule 501(a) and Rule 506(b)(2)(ii).[54]

Respondents also argue that all of the investors are "deemed sophisticated" because they were represented by Jade, a registered investment adviser. While Rule 506 allows sophistication to be assessed for investors "either alone or with [their] purchaser representative(s)," those representatives must satisfy four conditions under Rule 501.[55] The first condition prohibits a purchaser representative from being "an affiliate, director, officer or other employee of the issuer."[56] The four Jade employees who sold the Notes were STS registered representatives, and STS is a subsidiary of STI, the issuer. Those employees were thus employees of the issuer, and thus invalid as purchaser representatives under Rule 501.[57]

Finally, Respondents argue that since they complied with all other aspects of Rule 506 besides the actual filing of a Form D checking the Rule 506 box, the exemption should still be available. But, as shown above, Respondents did not meet several of the Rule's requirements.[58]

2. Respondents violated FINRA Rule 2010.

We have long held that a violation of Securities Act Section 5 is also a violation of FINRA Rule 2010, and so the NAC correctly found that Respondents' unregistered sale of securities without a valid exemption violated that Rule.[59] As explained above, Rule 2010 is itself consistent with the purposes of the Exchange Act.[60] And because we find that Respondents' actions here were inconsistent with just and equitable principles of trade, it is clear that Rule 2010 in this case was applied in a manner consistent with the purposes of the Exchange Act.

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54 *See* 17 C.F.R. § 230.501(a); 17 C.F.R. § 230.506(b)(2)(ii).

55 *See* 17 C.F.R. § 230.506(b)(2)(ii); 17 C.F.R. § 230.501(i).

56 17 C.F.R. § 230.501(i)(1).

57 *See also* 17 C.F.R. § 230.501(b) (defining affiliate as including anyone "controlled by, or is under common control with, the person specified").

58 *See* 17 C.F.R. § 230.506 (requiring those seeking Rule 506 exemption to "satisfy *all* the terms and conditions of [Rules 501 and 502]") (emphasis added); *see also World Trade*, 2012 WL 32121, at *8 ("Evidence in support of a [registration] exemption must be explicit [and] exact[.]").

59 *Midas Sec.*, 2012 WL 169138, at *11 n.63 (stating that violation of Securities Act Section 5 also violates predecessor to Rule 2010); *World Trade*, 2012 WL 32121, at *11 n.56 (same).

60 *See* 15 U.S.C. § 78o-3(b)(6); *see also Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *10 (Apr. 1, 2016) (holding that Rule 2010 is consistent with Exchange Act's purposes).

C. Respondents' procedural arguments fail.

Respondents argue that because STI offered the Notes, rather than Ahmed or STS, FINRA lacked jurisdiction to hear the case and filed it against the wrong parties. However, STS's and Ahmed's conduct is what is at issue in this case, and FINRA's jurisdictional basis for its Complaint was STS's membership in FINRA and Ahmed's status as an associated person of STS. Accordingly, FINRA's jurisdiction was properly exercised.[61]

Respondents also challenge the conduct of the proceeding before FINRA. They contend that FINRA subjected them to selective prosecution, that the Hearing Panel was biased against them, and that the Hearing Officer improperly excluded their expert. These claims lack merit.[62]

1. Respondents have not shown that they were subjected to selective prosecution.

Respondents assert that they were subjected to selective prosecution because of Ahmed's race and religion, as well as the small size of STS compared to "major investment bank[s]" whom, they suggest, are afforded "special treatment" because they "finance FINRA." To establish a claim of selective prosecution, Respondents must demonstrate that FINRA unfairly singled them out for enforcement action when others similarly situated were not, and that the prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.[63] Respondents have made no showing to substantiate their speculation, and our independent review of the record reveals no such evidence.

Respondents claim repeatedly that FINRA discriminated against Ahmed, made him "feel like a Muslim terrorist," and deliberately attempted to shut down STS. According to Respondents, FINRA also took an overly aggressive approach in its on-site examination of their offices. But they offer no evidence or examples to support these assertions.[64] Indeed, the

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[61] *See* 15 U.S.C. §§ 78o-3(b), (h); FINRA By-Laws of the Corporation Articles V, XIII; *see also Anthony A. Grey*, Exchange Act Release No. 75839, 2015 WL 5172955, at *1 n.2 (Sept. 3, 2015) (finding FINRA's jurisdiction predicated on respondent's status as registered and associated when complaint was filed and misconduct charged in complaint occurred).

[62] Contrary to Respondents' assertions, the NAC's decision specifically addressed all 25 issues Respondents raised except for the two issues that had been withdrawn and therefore waived. *See Nicholas T. Avello*, Exchange Act Release No. 51633, 2005 WL 1006827, at *3 (Apr. 29, 2005), *petition denied*, 454 F.3d 619 (7th Cir. 2006).

[63] *See Scott Mathis*, Exchange Act Release No. 61120, 2009 WL 4611423, at *12 (Dec. 7, 2009) (citing *United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992)).

[64] *See, e.g., Daniel Richard Howard*, Exchange Act Release No. 46269, 2002 WL 1729157, at *5 (July 26, 2002) (rejecting allegations of religious and racial slurs by NASD attorney where allegation denied by attorney and no record of it existed); *Hibbard, Brown & Co.*, Exchange Act Release No. 35476, 1995 WL 116488, at *9 n.67 (Mar. 13, 1995) (rejecting selective prosecution argument based on small size of broker-dealer because of lack of factual showing).

testimony of two FINRA investigators contradicted Respondents' characterization of the examination, FINRA's investigation began as a result of complaints FINRA received, and other regulators sanctioned Respondents for the same conduct as FINRA.[65] These facts support the conclusion that FINRA did not single out Respondents or base its decision to file the Complaint on improper considerations.

2. Respondents have not shown bias by the Hearing Panel.

Respondents argue that one of the members of the Hearing Panel ("the Panelist") should have recused himself because of his prior business relationship with Ahmed. But the Panelist's previous association with Ahmed was disclosed twice, and Respondents did not object either time.

The first time was during a conference call discussing the TCDO. The Hearing Officer disclosed that more than 10 years ago, the Panelist was a marketing manager at Computer Clearing Services and set up a clearing agreement for Respondents. His only contact was either by telephone or when Ahmed came into the offices of Computer Clearing Services. The Hearing Officer concluded that this contact was insufficient to present a conflict of interest, but "in an abundance of caution and a concern that the parties be fully informed" made the disclosure to Respondents. After a few moments, Ahmed stated "I don't have any objection."

The second time was at the hearing. On the first day of the hearing, the Hearing Officer noted that she had previously disclosed the Panelist's past encounter with Ahmed, and had the Panelist disclose it again for the record. The Hearing Officer asked the parties if they had "any other issue" to address before calling the first witness. Counsel for Respondents stated no.

Under FINRA Rule 9234(b), a party to a disciplinary proceeding may move to disqualify a panelist if the party believes the panelist is biased, but the motion must be made within fifteen days of learning the facts that are the grounds for disqualification. Respondents made no such timely motion; rather, they waited until after the Hearing Panel had issued its decision to raise the issue. "We have required that objections to the composition of the Hearing Panel be raised first to the Hearing Panel so that the situation can be considered and, if appropriate, remedied as soon as possible."[66] This is because "a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action."[67]

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[65] *See Frank J. Custable, Jr.*, Exchange Act Release No. 32801, 1993 WL 328188, at *5 (Aug. 25, 1993) (rejecting selective prosecution argument, in part, because NASD's investigation was prompted by customer complaints and third-party filings).

[66] *Robert Fitzpatrick*, Exchange Act Release No. 44956, 2001 WL 1251680, at *5 (Oct. 19, 2001); *accord Stephen Russell Boadt*, Exchange Act Release No. 32905, 1993 WL 365355, at *2 (Sept. 15, 1993).

[67] *Stuart K. Patrick*, Exchange Act Release No. 32314, 1993 WL 172847, at *4 (May 17, 1993) (rejecting respondent's objection to NYSE panelist raised for first time on appeal)

(*continued...*)

Respondents had two opportunities to object to the Panelist's participation on the Hearing Panel. They neither objected nor filed a motion pursuant to FINRA Rule 9234(b). Accordingly, Respondents have waived their challenge to the Panelist.

Respondents now argue that the Panelist's bias against Ahmed resulted from subsequent, undisclosed, activity. They claim that the Panelist was denied certain employment opportunities because of STS's departure from Computer Clearing, and that later, as Director of Clearing for North American Clearing, the Panelist was in "a position of power and control over Ahmed" during a time when Respondents' relationship with North American Clearing "became acrimonious." They argue that the Panelist's participation was particularly problematic because the Hearing Panel's analysis of Respondents' disciplinary history included net capital violations that Respondents claim resulted from the closing of North American Clearing.

Respondents' claim that they did not discover these issues until they "review[ed] legal files" in anticipation of an appeal does not cure their waiver. Respondents could have easily discovered these facts before the Hearing Panel issued its decision. They had the name of the Panelist, his current employer, the fact that he was registered with FINRA, and disclosure of an earlier relationship with Respondents. This information was sufficient to enable Respondents to discover any employment position the Panelist may have had at North American Clearing.[68]

Respondents also offer no evidence that the Panelist had any interactions or involvement with Respondents after leaving Computer Clearing or even that the Panelist was aware that Respondents were clearing through North American Clearing at the same time he is purported to have been employed there. In addition, STS's net capital violation covered the ten months in 2007 and 2008 that preceded North American Clearing's shutdown, and resulted from Ahmed's decision to pledge all of STS's assets as security in a promissory note to RK. Thus, it is unclear how North American Clearing was involved in the net capital violation or why there would be a duty for the Panelist to disclose any more than he did.[69]

In any event, our independent review of the record offers no indication that the Panelist exhibited any bias toward Respondents or formed his opinion on the basis of anything other than

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(*...continued*)
(quoting *David T. Fleischman*, Exchange Act Release No. 8187, 1967 WL 87757, at *3 (Nov. 1, 1967)).

[68] *Cf. Luis Miguel Cespedes*, Exchange Act Release No. 62374, 2010 WL 2546827, at *3 (June 24, 2010) (rejecting as waived new arguments that "do not depend on newly discovered evidence or an intervening change in the governing law").

[69] *See Mayer A. Amsel*, Exchange Act Release No. 37092, 1996 WL 169430, at *5 (Apr. 10, 1996) (rejecting bias arguments against hearing panel member where "we have only [Respondent's] unsubstantiated assertion that [panelist] might have considered [purported event] damaging had he been aware of it"); *see also Robert E. Gibbs*, Exchange Act Release No. 32401, 1993 WL 190913, at *2 (June 2, 1993) (rejecting bias allegation that was "completely unsubstantiated in the record" and respondent offered no evidence for his factual assertions, "much less evidence demonstrating that the panel member had any improper bias").

the case presented. Rather, the record demonstrates that the Hearing Panel formulated its unanimous opinion based on extensive consideration of the testimony and other evidence.[70] And it is that testimony and other evidence on which the NAC relied to uphold the Hearing Panel's findings and on which we rely to sustain the NAC's determinations.

To the extent that Respondents intend to argue that the Hearing Panel was biased against them for other reasons beyond the Panelist's participation, these arguments also fail. The record offers no evidence that the Hearing Panel discriminated against Respondents because of race, religion, or the small size of STS.[71] On the contrary, the Hearing Officer responded to Ahmed's request to continue the hearing date because of the Muslim holiday of Ramadan by rescheduling the hearing. She also denied Enforcement's request to hold the hearing in Maryland rather than in downtown Washington D.C., in part because of Respondents' stated need to be close to the STS office so that business could continue during the hearing.

We also do not find bias from the Hearing Panel's use of the term "Ponzi scheme" to describe Respondents' conduct. According to Respondents, the use of that term was a knowing falsehood on the part of the Hearing Panel, revealed the Hearing Panel's bias, and demonstrated the need for expert testimony to explain why there was no Ponzi scheme. But characterizing an enterprise as a Ponzi scheme "has no bearing on [respondents'] underlying liability and plays no role in our determination."[72] The NAC's decision, which is the subject of our review, focused on "the actual conduct . . . —not merely the labels used."[73] As discussed above, we sustain the NAC's decision because the evidence demonstrates that Respondents in fact misrepresented material information—including the use of the proceeds—about the STI Note offering.

3. The Hearing Officer did not abuse her discretion in excluding Respondents' expert.

Respondents contend that the Hearing Officer erroneously denied their motion to present expert testimony by a finance professor. The expert's proposed testimony was that (a) it was reasonable to conclude at the time of the Note sales that STI could honor its debt obligations; (b) the terms of the Notes were reasonable when compared to the financing practices of other

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70 *Cf. Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *18 (Jan. 30, 2009) (requiring respondents to show that hearing officer's bias "stems from an extrajudicial source *and* results in a decision on the merits based on matters other than those gleaned from participation in a case") (emphasis added) (internal quotation marks and citations removed).

71 *Cf. Dillon Sec., Inc.*, Exchange Act Release No. 31573, 1992 WL 383783, at *7 n.29 (Dec. 8, 1992) (noting that because "NASD staff does not decide cases," any "allegations of bias" premised on their conduct "do not suggest that the fairness of the hearing itself was compromised").

72 *Shreyans Desai*, Exchange Act Release No. 80129, 2017 WL 782152, at *5 (Mar. 1, 2017).

73 *See id.* (quoting *Vladimir Boris Bugarski*, Exchange Act Release No. 66842, 2012 WL 1377357, at *5 (Apr. 20, 2012)).

firms; (c) it is common for firms to use proceeds of debt sales to refund other debts which have come due; and (d) the average U.S. company conducting an IPO has negative net income during the year of the offering. The Hearing Officer found that Respondents had failed to demonstrate that the proposed expert's opinions were relevant, reliable, or helpful.

FINRA Rule 9263(a) affords a Hearing Officer discretion in determining whether to reject evidence as "irrelevant, immaterial, unduly repetitious, or unduly prejudicial." And in "determining whether securities law violations have occurred, 'neither we nor [FINRA] is hindered by the lack of, or is bound by, expert testimony.'"[74] In addition, "the Supreme Court has made clear that judges have broad discretion in determining whether to admit or exclude evidence, and this is particularly true in the case of expert testimony."[75]

The Hearing Officer properly excluded Respondents' expert witness. The proposed testimony did not concern the central inquiry in this case: whether Respondents' representations in connection with the unregistered sale of the STI Notes were fraudulent. Whether STI could pay its debts or whether its practices were typical is not relevant to this inquiry. Rather, the relevant evidence concerned the representations that Respondents made in offering the STI notes. "Both FINRA and the Commission . . . have the expertise to evaluate such evidence without expert testimony."[76] The Hearing Officer did not abuse her discretion in excluding the expert.

III. Sanctions

Section 19(e)(2) of the Exchange Act requires that we sustain the sanctions FINRA imposed unless we find that they are "excessive or oppressive" or impose an unnecessary or inappropriate burden on competition.[77] We consider any aggravating or mitigating factors and whether the sanctions are remedial and not punitive.[78] While we are not bound by FINRA's Sanction Guidelines, they serve as a benchmark in conducting our review.[79]

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[74] *Cody*, 2011 WL 2098202, at *17 (citation removed).

[75] *Scott G. Monson*, Investment Company Act Release No. 28323, 2008 WL 2574441, at *6 n.27 (June 30, 2008) (internal quotation marks and citations removed).

[76] *Cody*, 2011 WL 2098202, at *18.

[77] 15 U.S.C. § 78s(e)(2). There is no argument, and our review of the record does not suggest, that the sanctions imposed an unnecessary or inappropriate burden on competition.

[78] *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007). In their application for review, Respondents challenged the Hearing Panel's assessment of aggravating and mitigating factors in assessing sanctions and the NAC's adoption of that assessment. They abandoned that challenge by failing to develop it in their briefs. *See supra* note 9. In any case, based on our *de novo* review of the record, we conclude that the NAC's analysis of the aggravating and mitigating factors was proper.

[79] *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

For intentional or reckless misrepresentations or omissions of material fact, the Guidelines recommend barring an individual from association with a member; they recommend suspending a firm for up to two years or expelling the firm in egregious cases.[80] For the unregistered sale of securities, the Guidelines recommend suspending an individual for 10 business days to six months and a firm for up to 30 days.[81] In egregious cases, "[w]here aggravating factors predominate," the Guidelines suggest barring the individual and expelling the firm.[82]

We agree with the NAC that Respondents' behavior was egregious. They misrepresented material information about the use of the proceeds from the STI Note offering, STI's current financial condition, and STI's future prospects, and did so at least recklessly and in some cases knowingly.[83] This fraudulent and unregistered offering lasted four years and procured almost $20 million, which Respondents misappropriated for a variety of undisclosed purposes, including personal gain.[84] Dozens of investors, many of them unsophisticated, suffered substantial losses.[85] Respondents also ignored regulators' instructions to stop selling the Notes.[86]

Respondents' disciplinary history serves as an aggravating factor that further justifies the sanctions imposed. FINRA censured STS for Order Audit Trail System (OATS) violations in 2004 and 2014, and in 2009 found that STS had failed to abide by the net capital requirements required of a securities business. In 2012, Respondents settled a regulatory action with FINRA that found that they violated a host of Commission and FINRA rules, including failing to implement an anti-money laundering program, failing to report customer complaints, and failing to maintain accurate books and records. And in 2015, the securities regulators for the states of Utah and Alaska denied Respondents' applications for broker-dealer and broker-dealer agent registrations because of misrepresentations in their applications. FINRA did not, as Respondents argue, place excessive weight on this history. These were not isolated events "relatively minor in nature," but rather demonstrate Respondents' ongoing disregard for rules designed to protect investors.

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80 *See* Sanction Guidelines at 89 (April 2017 ed.).

81 *See id.* at 24.

82 *Id.*

83 *See id.* at 7-8 (considering number, size, and character of transactions at issue and whether respondents engaged in numerous acts and/or a pattern of misconduct).

84 *See id.* (considering whether respondents engaged in misconduct over extended period of time and whether misconduct resulted in potential for respondents' monetary gain); *id.* at 24 (considering dollar amount of transactions involved in unregistered sales of securities).

85 *See id.* (considering nature and extent of injury resulting from respondents' misconduct and level of sophistication of affected customers).

86 *See id.* at 8 (considering whether respondents ignored prior warnings from regulators).

Respondents' failure to respond completely and timely to FINRA's requests for information and documents is also aggravating.[87] In particular, emails from Ahmed's personal email account were never fully provided. In some instances, Respondents provided documents created ad hoc and seemingly for the purpose of bolstering their case. For example, Respondents provided a promissory note signed by Ahmed indicating a debt of $529,936.37 to STI to counter the accusation that the officer loans he took from Note proceeds were undocumented compensation. The note is dated August 26, 2013, which was the first day of the hearing. Respondents also provided two "services agreements" to show that BP Trade was successfully securing licenses, both of which were signed by the same individual on August 27, 2013.

Respondents' communications with investors after the filing of the Complaint are another aggravating factor. The letter Ahmed provided investors improperly suggested that FINRA's disciplinary action might "delay or impede the sale" of STS to RK and that the FINRA proceeding was the reason Respondents stopped making interest payments on the Notes. Such untrue statements made it less likely that investors would cooperate in the investigation.[88]

Based on this record, the NAC properly concluded that Ahmed and STS "pose too substantial a risk to investors to continue with their activities in the securities industry." Given Ahmed's misconduct, we have no confidence that any sanction less than a bar would protect investors from the possibility of future violations of the securities laws and FINRA regulations. It is necessary for the protection of investors to remove him from the broker-dealer industry, and STS must be expelled to prevent its use as a conduit for misconduct in the future.[89] We agree with the NAC that this sanction is neither excessive or oppressive.

We also uphold FINRA's order of restitution. Restitution is appropriate "when an identifiable person . . . has suffered a quantifiable loss proximately caused by a respondent's misconduct."[90] "An order requiring restitution . . . seeks primarily to return customers to their prior positions by restoring the funds of which they were wrongfully deprived."[91]

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87 *See id.* (considering whether respondents attempted to delay FINRA's investigation, conceal information from FINRA, or provide inaccurate or misleading testimony or documentary information to FINRA). Another aggravating factor is Respondents' attempts to evade regulatory oversight by directing registered representatives to use personal emails to conduct all STI Note communications. *See id.* at 24 (considering whether unregistered sales of securities were made in connection with an attempt to evade regulatory oversight).

88 *See id.* (considering whether respondents attempted to delay FINRA's investigation).

89 *See id.* at 2 (stating that sanctions should prevent recurrence of misconduct, improve overall standards in industry, and protect investing public).

90 *See id.* at 4.

91 *Kenneth C. Krull,* Exchange Act Release No. 40768, 1998 WL 849545, at *6 (Dec. 10, 1998); *see also United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) ("[B]ecause the full amount of restitution is inherently linked to the culpability of the offender, restitution orders that require full compensation in the amount of the loss are not excessive.").

FINRA ordered Respondents jointly and severally to pay restitution totaling $13,684,105.19 to 59 investors, plus prejudgment interest.[92] This figure properly accounted for the principal invested by each investor as well as the principal returned and the interest paid to each investor; in cases where the full principal was returned, no restitution was ordered. Accordingly, the restitution order restores victims to the position they would have been in had they not been subject to Respondents' misconduct.[93]

The restitution order also redresses the harm Respondents caused. The vast majority of the 59 investors either received a PPM with material misrepresentations and omissions or had personal communications with Ahmed where he made material misrepresentations to convince them to buy, extend, or convert their Notes. Two investors received and signed a Note purchase agreement that indicated they received a PPM and were given access and opportunity to examine STI books and records, although they received neither. As for six investors who did not receive a PPM, Respondents caused their losses because they (like the other investors) purchased STI Notes in transactions Respondents failed to register in violation of Securities Act Section 5 and FINRA Rule 2010. Indeed, the NAC opinion explained how Respondents perpetuated the fraud by not registering the securities offering. Respondents arranged with Jade to access an unsophisticated and unquestioning client base, and since the STS registered representatives sold the Notes through Jade without a registration statement, investors were left unprotected.[94]

Respondents object to the inclusion in the restitution award of two Jade employees who purchased STI Notes. However, these individuals, who were not charged, suffered quantifiable losses proximately caused by Respondents' misconduct; therefore it was not inappropriate for the NAC to include their losses in the restitution order.

Respondents also argue that FINRA does not have the authority "to award or enforce an award of restitution." FINRA is authorized to award restitution under FINRA Rule 8310(a), which, like Exchange Act Section 15A(b)(7), allows it to impose "any other fitting sanction" to enforce compliance with its rules.[95] Indeed, it is not uncommon for FINRA to order both bars

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[92] The amount of restitution ordered includes prejudgment interest through August 31, 2013. The NAC ordered that interest should accrue until paid. Additional interest shall be calculated from September 1, 2013, through payment, at the rate the NAC indicated.

[93] *Cf. United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011) ("[R]estitution is inherently proportional, insofar as the point of restitution is to restore the victim to the status quo ante.").

[94] *See SEC v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 328 (6th Cir. 2013) ("The Securities Act and the required filing of registration statements under Section 5 exist to protect investors by requiring they receive sufficient information to make informed investment decisions.").

[95] *See* 15 U.S.C. § 78o-3(b)(7); *see also Toney L. Reed*, Exchange Act Release No. 33676, 1994 WL 62111, at *3 (Feb. 24, 1994) (noting NASD's authority to award restitution).

and restitution.[96] As for Respondents' objection to FINRA's ability to enforce its award of restitution, that objection is best raised in any proceeding FINRA employs to enforce the award.

Respondents contend further that since Note proceeds were paid to STI, "an order to disgorge as to either Ahmed or STS is improper." Respondents confuse disgorgement and restitution. Restitution seeks primarily to compensate victims; disgorgement focuses on depriving a wrongdoer of ill-gotten gains. As a result, a restitution order "may exceed the amount by which the wrongdoer was unjustly enriched, if equity would demand that the wrongdoer, rather than the customer, bear the loss."[97] Here, STS is wholly owned by STI, and Ahmed is STI's largest shareholder and controls both STI and STS. Because Ahmed and STS executed the fraud, the restitution order against Respondents is proper. We also sustain FINRA's imposition of costs, which Respondents have not challenged.

As discussed above, Ahmed has settled actions with the District of Columbia and the Commission premised on the same misconduct at issue here. Those settlements included orders of disgorgement or restitution payable to Note investors.[98] FINRA has represented that if Respondents produce valid proof of payment under those orders they shall be credited that amount here and not be required to make duplicative payments to the same investors.[99]

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[96] *See, e.g., Alfred P. Reeves, III*, Exchange Act Release No. 76376, 2015 WL 6777050, at *5-6 (Nov. 5, 2015) (upholding bar and restitution award); *Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 WL 1697151, at *13 (Apr. 11, 2008) (same).

[97] *See Reed*, 1994 WL 62111, at *4.

[98] *See Success Trade, Inc.*, Administrative Consent Order No. SB-CO-03-15, at *31-32 (ordering Respondents to pay $12.53 million in restitution to 58 investors); *Success Trade, Inc.*, 2015 WL 4865349, at *8-9 (ordering Respondents to pay disgorgement of $12.78 million into fund to be distributed to 57 investors).

[99] *See SEC v. Palmisano*, 135 F.3d 860, 864 (2d Cir. 1998) ("[T]o the extent [the defendant] pays or has paid restitution [elsewhere] . . . such payments will offset his disgorgement obligation under the present judgment."); *see also United States v. Elson*, 577 F.3d 713, 734 (6th Cir. 2009) ("The burden of proving an offset [for restitution] should lie with the defendant.") (internal quotation marks, brackets, and citations removed). *Cf. First Jersey*, 101 F.3d at 1475 ("A [private litigation] settlement payment may . . . be taken into account . . . in calculating the amount to be disgorged."); *Charles Trento*, Exchange Act Release No. 49296, 2004 WL 329040, at *2 n.11 (Feb. 23, 2004) (allowing modification of disgorgement claim where duplicative).

An appropriate order will issue.[100]

By the Commission (Chairman CLAYTON and Commissioners STEIN and PIWOWAR).

Brent J. Fields
Secretary

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[100] Respondents requested oral argument. Because our decisional process would not be significantly aided by oral argument, that request is denied. Rule of Practice 451(a), 17 C.F.R. § 201.451(a). We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.