BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Michael Todd Clements Wellington, FL, Respondent.	DECISION Complaint No. 2015044960501 Dated: May 17, 2018

Respondent made material misrepresentations and omissions of material fact in connection with self-offerings to investors and failed to supervise his firm's capital raising. Held, findings affirmed and sanctions affirmed in part, modified in part.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Jeffrey D. Pariser, Esq., Michael Watling, Esq., Carolyn O'Leary, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro se

Decision

This case arose from equity self-offerings by Avenir Financial Group ("Avenir"), a FINRA member, and equity and debt self-offerings by Bull Run Capital Holdings, LLC ("BRCH"), a holding company that owned an Avenir branch office. In a September 20, 2016 decision, the Extended Hearing Panel ("Hearing Panel") found that Michael Todd Clements, Avenir's co-owner, chief executive officer, and chief compliance officer, made material misrepresentations and omissions of material fact in connection with the sale of equity interests in Avenir, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Exchange Act Rule 10b-5 and in violation of FINRA Rules 2020 and 2010. The Hearing Panel also found that Clements failed to supervise capital raising efforts at both

Avenir and BRCH, in violation of NASD Rule 3010(b) and FINRA Rules 3110(b) and 2010.[1] For the fraud, the Hearing Panel barred Clements from association with any FINRA member in all capacities. For the failure to supervise, the Hearing Panel assessed, but did not impose in light of the bar, a $73,000 fine and a bar in all principal capacities.

Clements appeals the Hearing Panel decision pursuant to FINRA Rule 9311. After an independent review of the record, we affirm the Hearing Panel's findings of liability and modify the sanctions to order restitution instead of rescission and also impose the bar in all principal capacities.

I. Facts

A. Background

Clements and David Allen jointly established Avenir in 2008 and initially were equal owners.[2] In March 2012, FINRA approved Avenir's application for membership, and the firm began doing business in the fourth quarter of 2012. Pursuant to its membership application, Avenir was required to maintain minimum net capital of $5,000[3] and was permitted to engage in specific business lines, including retail brokerage of corporate debt and equity securities and private placement of securities. During the relevant period, from October 2013 to May 2015, Avenir had approximately 17 to 24 registered persons in seven or eight branch offices in various states. In September 2016, Avenir was expelled from FINRA membership for failing to pay fines imposed in an unrelated disciplinary matter.

Clements entered the securities industry in 1987 and since then has registered with numerous member firms. Clements is not currently registered with a member firm. At Avenir, Clements served as the firm's chief compliance officer and was registered as a general securities principal, general securities sales supervisor, general securities representative, investment banking representative, municipal securities representative, operations professional, and research professional. Clements was based in Florida. Allen, Avenir's other active co-owner, was the firm's chief operating officer and chief financial officer.

Under the firm's written supervisory procedures and addendums, Clements was responsible for supervising Avenir's investment banking and capital raising activities, including

---

[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[2] By the time of the hearing, Clements's ownership interest was approximately 37 or 38 percent.

[3] Exchange Act Rule 15c3-1, known as the net capital rule, prohibits broker-dealers from engaging in a securities business if their net capital falls below certain amounts.

any self-offerings of securities at Avenir and its branch offices. To that end, Clements was responsible for reviewing the transaction documentation and books and records, reviewing each transaction and related offering documents for fraudulent representations, periodically contacting investors directly, ensuring that all customer disclosures were made, and auditing the use of proceeds of the capital raises. Clements also was responsible for making Avenir's related regulatory filings, including filings made pursuant to FINRA Rule 5122, which governs self-offerings of securities by FINRA members. Clements had the ultimate authority to approve whether a registered representative could conduct outside business activities or engage in private securities transactions. Clements also was responsible for monitoring Avenir's responses to regulators' requests for information, including responses to FINRA's requests.

In August 2013, Clements provided separate telephonic private transaction trainings to two Avenir registered representatives, Karim Ibrahim and Caesar Rodriguez, and certified that they had completed the training to participate in the sale of Avenir equity. Throughout the relevant period, Clements was the direct supervisor of Rodriguez, who ran an Avenir branch office in Bloomington, Illinois. Rodriguez was a general securities representative and the only registered person at the Bloomington branch.[4] Rodriguez owned and operated BRCH, an entity that owned the Avenir Bloomington branch. Ibrahim was supervised by Allen, but Clements remained responsible for supervising Ibrahim's capital raising activities.

B. Avenir's Capital Issues

From its inception, Avenir was thinly capitalized. Avenir permitted its registered representatives to open margin accounts on behalf of firm customers and to recommend that customers trade on margin. When a customer traded on margin, Avenir's clearing firm extended credit to the customer. If a margin transaction resulted in a margin call and the customer failed to make a timely payment, Avenir was liable to the clearing firm for the deficiency.

Ibrahim opened and traded margin accounts at Avenir for his customers. From August 2013 to December 2013, Ibrahim solicited several customers to trade on margin. On October 14, 2013, two of Ibrahim's customers faced large margin calls related to trades in a security. Because these customers failed to make full and timely payments to cover their debit balances, Avenir became liable for the unpaid balances, which created a net capital deficiency at the firm.

On October 23, 2013, Allen, on behalf of Avenir, filed a notice with FINRA reporting that the firm's net capital had fallen below its minimum requirement and reporting a net capital deficiency of $223,000. In the notice, Avenir wrote that, to correct the deficiency, the firm was "in contact with [the] customers" who failed to pay their debit balances, and that "[a]s an alternative we are considering capital contributions." That same day, Clements emailed Avenir's

---

[4] The Bloomington branch office was not an office of supervisory jurisdiction ("OSJ"). An OSJ must have at least one on-site supervisor who is a qualified and registered principal with the firm. *FINRA Regulatory Notice 14-10*, 2014 FINRA LEXIS 17, at *5 (Mar. 2014).

representatives instructing them to suspend conducting a securities business immediately until the firm was back in compliance with the net capital rule.

To regain net capital compliance, Clements sought funds from outside investors through an Avenir equity self-offering. The first investor to purchase an equity interest was Clements's mother, JC. In connection with her purchase, Clements prepared two documents: a purchase agreement and a risk disclosure document entitled "Avenir Financial Group, Inc. Equity Purchase." Under her purchase agreement, which JC signed on October 30, 2013, JC purchased a five percent ownership in Avenir for $13,000 (i.e., $2,600 for each one percent interest). At the time, Clements believed JC's investment would be sufficient for the firm to return to net capital compliance.

JC's risk disclosure document provided that JC's funds would be used for "operating expenses and net Capitalization [sic]." Other than general cautionary language that she was "fully aware of the precarious risk and liquidity issues associated with [the] investment [and] aware that [she] may lose part or all of [her] investment," the risk disclosure document contained no information about the investment-specific risks associated with an equity investment in Avenir. Clements did not create or provide to JC a private placement memorandum or prospectus in connection with her investment. Nor did Clements provide JC with any of Avenir's financial statements or documents prior to her investment, though Clements said that JC had seen all of the financials associated with Avenir since its inception.

Allen, on behalf of Avenir, and FINRA's corporate finance department had nearly daily communications while Avenir was net capital deficient. Upon receipt of JC's $13,000 investment, Allen believed Avenir had regained net capital compliance. FINRA disagreed, so Clements thereafter made a $2,000 capital contribution to Avenir on November 1, 2013, which Allen and Clements believed would be sufficient to cure the net capital deficiency.

On November 4, 2013, a second investor, AC, purchased an equity interest in Avenir. AC was an Avenir customer and 80 years old at the time of his investment. Rodriguez solicited AC's investment. In connection with AC's purchase, Clements prepared two documents, which Rodriguez provided to AC: a purchase agreement and a risk disclosure document entitled "Private Transaction Customer Disclosure Acknowledgment." Under the purchase agreement, AC purchased a one percent ownership in Avenir for $25,000. Clements deposited AC's $15,000 initial payment on November 4, 2013, in Avenir's bank account.

Other than general cautionary language that an investment in Avenir presented "various risks and liquidity issues associated with this type of equity investment," AC's risk disclosure document contained no information about the investment-specific risks associated with an equity investment in Avenir. The document disclosed that Rodriguez would be compensated by the issuer for soliciting AC's investment in Avenir but did not specify the amount of selling compensation that Rodriguez would receive. Rodriguez did not provide AC with a private placement memorandum or prospectus in connection with his investment. Nor did Rodriguez provide AC with any of Avenir's financial statements or other financial information prior to his investment. AC did not receive any written disclosure about how his investment proceeds would be used or that Avenir was unable to operate at the time of his solicitation because of insufficient

net capital. AC also did not know the details about JC's investment only days earlier, in which she paid nearly ten times less for a one percent interest in Avenir.[5]

The morning of November 4, 2013, Allen again advised FINRA that Avenir believed it had regained net capital compliance. Allen did not receive a written response from FINRA, so he sent another net capital computation after receipt of AC's $15,000 payment. The following day, FINRA advised Avenir that it was net capital compliant, and Allen advised its registered representatives that they were permitted to resume business. In total, Avenir was unable to conduct a securities business for 12 days—October 23 to November 4—due to its net capital deficiency.

After the net capital deficiency, Clements and Allen implemented a series of risk control measures directed at Ibrahim that were "strongly suggested" to Avenir by its clearing firm. On November 19, 2013, Allen sent Ibrahim an email, copied to Clements, titled "New Trading Rules," which set forth several restrictions placed on Ibrahim's sales practices focused on unfunded trading and margin trading.

While Avenir was implementing these risk control measures, Ibrahim continued to solicit Avenir's customers to engage in aggressive margin-based trades. In particular, a few hours prior to receiving the "New Trading Rules" email, Ibrahim solicited RF to purchase on margin more than $500,000 of shares of two over-the-counter securities. Ibrahim was permitted to enter the leveraged trades because RF made an opening deposit of $300,000 in his account on the same day that the trades were executed.

On November 22, 2013, RF's deposit was returned for insufficient funds. That same day, Avenir's clearing firm emailed Clements and Allen demanding a $300,000 wire transfer by November 25 or else it would sell out RF's account. The clearing firm also informed Clements and Allen that RF's account "has $190,000" due by November 27 for his trades and that it would not grant any extensions. That same day, Clements emailed Ibrahim wire instructions for RF to satisfy the debt.

Clements knew that Avenir would have a net capital deficiency if the clearing firm forced a sell-out of RF's trades and Avenir booked the corresponding liability. On November 25, 2013, Clements emailed the clearing firm a "Plan of Action," describing how Avenir would cover the liabilities incurred as a result of the RF trades. Among other things, Clements committed to

---

[5] Neither AC nor JC testified at the hearing. AC's and JC's equity purchases occurred prior to the relevant period, but they provide detail about the firm's financial condition and underlie the fraud allegations at issue. AC later acknowledged in writing that, prior to his equity investment in Avenir, Rodriguez had verbally advised him that his investment proceeds would be used for "operational costs and growth of the broker dealer" and that Rodriguez would receive a 10 percent commission. Clements drafted the acknowledgment, and AC executed it. At the hearing, Rodriguez disputed that he made these disclosures to AC and that AC refused Avenir's offer at the time of the investment to provide him a written copy of the disclosures.

contact RF to collect the amounts that he owed and to "capital raise into the firm [a] minimum [of] $150,000 to $200,000 by 5:00 pm Wednesday [November 27, 2013]." The plan of action also included a section entitled "Proposed Heightened Supervision for Karim Ibrahim," which provided detailed provisions related to Ibrahim's trading. The plan of action also provided that Avenir was willing to terminate Ibrahim if necessary to maintain the clearing firm's "comfortability" with the firm.[6]

RF never paid for the trades he requested on November 19, 2013, making Avenir liable for the unpaid balance.

C. Sales of Avenir Equity to Customer NL

Ibrahim solicited NL, a wealthy, self-employed 92-year-old investor who had opened an account with Ibrahim at Avenir two weeks earlier, to purchase equity in Avenir. Ibrahim opened NL's brokerage account at Avenir on November 11, 2013.[7] Ibrahim filled out a new account application form for NL and sent it to NL for his signature. On the original form, Ibrahim marked that NL's investment objective was "Speculation (Aggressive Risk Only)," that his risk tolerance was "9 – Aggressive" (on a 1-9 scale), and that his level of investment experience in stocks was "high." According to Ibrahim, he filled out the form at the direction of NL. But when NL received the form, he corrected the designations, marking that his investment objective was "Growth & Income," his risk tolerance was "4 – Moderate," and his level of investment experience in stocks was medium. NL signed the corrected version of the form on November 11, 2013, and returned it to Ibrahim.[8]

When soliciting NL, Ibrahim told NL that Avenir was a small start-up company and that Avenir was seeking an equity investment to grow the firm and fund its day-to-day operations. Ibrahim did not tell NL that Avenir had ceased conducting a securities business for 12 days within the past month for insufficient net capital or that the firm was facing an imminent margin call related liability of $190,000, which would cause the firm to again to be net capital deficient.

NL purchased a five percent equity interest in Avenir for $250,000 (i.e., $50,000 for each one percent interest) on November 26, 2013—just over two weeks after he opened his Avenir

---

6 Ibrahim did not see the plan of action until his on-the-record investigative interview with FINRA staff in this matter.

7 NL was unavailable to testify at the hearing, so the videotape of his deposition was played in its entirety before the Hearing Panel. We address the admissibility of the deposition in Part III.C.2.

8 Ibrahim signed the corrected account application form on November 12, but Allen (Ibrahim's supervisor) only signed the original form on November 13. At the hearing, Allen testified he was aware of NL's changes because he would have received the revised form from Ibrahim and the corrected form was in NL's customer file.

brokerage account.[9] Clements drafted the purchase agreement, set the price for NL's equity investment, and was responsible for approving the terms of the investment. The purchase agreement also did not disclose Avenir's intended use of the investment proceeds or any selling compensation to be paid to Ibrahim. Clements did not communicate with NL, either orally or in writing, until well after NL's investment. Other than the purchase agreement, Ibrahim did not provide NL with any written materials. Clements never prepared, and Ibrahim did not provide NL with, a private placement memorandum, prospectus, or term sheet in connection with NL's investment. Ibrahim also did not provide NL with any of Avenir's financial statements or financial information prior to his investment.

At the hearing, Clements (and the other respondents, Avenir and Ibrahim) did not dispute that they failed to tell NL about Avenir's financial difficulties. Ibrahim testified that NL declined his offer to let NL review Avenir's books and records before making his investment. NL, during his deposition, conceded that he did not ask for Avenir's financial information, did not ask how long the firm had been in business, and did not do any independent research on the firm. Ibrahim also testified that he told NL that he was receiving a 10 percent commission for the equity sale, but that NL was not concerned because NL was still receiving five percent equity for his $250,000 purchase, even after Ibrahim's commissions were deducted. NL, on other hand, testified that he was never told that Ibrahim was receiving a 10 percent selling commission, and the percentage was "unreal" and "too high" and would have affected his investment.[10]

While noting that NL "had trouble remembering various details surrounding his investment" and seemingly "down-played his level of sophistication" during his deposition, the Hearing Panel explicitly found NL's testimony about what Ibrahim did not tell him "clear and credible." On the other hand, the Hearing Panel did not find Ibrahim credible, noting that he was combative and evasive at the hearing and that his testimony was frequently impeached.

On November 29, 2013, NL's $250,000 payment posted to Avenir's bank account. On December 5, 2013, Avenir wired $196,600 to its clearing firm to cover the debit balance in RF's account.[11]

---

[9] According to Ibrahim and Clements, Ibrahim had been soliciting NL months prior to NL becoming a customer of Avenir.

[10] After NL's purchase, Ibrahim received an unvested five percent equity interest in Avenir, which vested after Ibrahim remained at Avenir in good standing for three years. Ibrahim never received the five percent interest. According to Ibrahim and Allen, the capital award was not tied to NL's investment and other conditions needed to be met, including Ibrahim increasing his production at Avenir and recruiting brokers. Ibrahim never told NL about the five percent equity interest.

[11] Ibrahim and Clements testified that, at the time Ibrahim was soliciting NL, they both expected that RF would pay for the trades he requested on November 20, 2013. Ibrahim testified that RF had more than one million dollars invested with Ibrahim at his prior firm, and RF assured

[Footnote continued on next page]

On December 15, 2014, more than a year after the sale, Clements sent a letter to NL "to confirm that at the time of and before [NL's investment], you were made aware that [Ibrahim] would receive a [10 percent selling commission] and that the proceeds of your investment will be used for the day to day operations of the firm."[12] On March 15, 2015, Clements, on behalf of Avenir, made the requisite FINRA Rule 5122 notice filing to FINRA in connection with the equity investment.[13]

D. Rodriguez's Sale of Avenir Equity to Customer KK

Rodriguez solicited KK, a retired truck driver with minimal assets with whom Rodriguez had a long-standing, personal relationship, to purchase equity in Avenir. On Thanksgiving Day 2013, KK's only child was killed in a car accident and was survived by a six-year-old daughter, KK's only grandchild. KK received $125,000 from a life insurance policy KK had purchased on his child. Shortly after receiving the insurance proceeds, KK contacted Rodriguez to seek advice on how to best invest the proceeds to safely provide for his granddaughter's future. Rodriguez thereafter sought Clements's advice.

Sometime between November 29, 2013, and December 18, 2013, Rodriguez visited KK at his house and called Clements so the three of them could discuss how KK should invest the insurance proceeds. During the telephone call, KK told Rodriguez and Clements that he wanted a safe long-term investment to provide for his granddaughter. Clements recommended that KK use the insurance proceeds to buy an equity interest in Avenir. Clements described Avenir as a "growth company" that was doing "exceptionally well" and "growing exponentially." Clements spoke about his own experience and credentials and explained that Avenir was backed by a billionaire investor named NL who could supply the firm with additional capital if the firm ever needed it. Clements also led KK to believe that "a deadline was coming up" and that he would "miss out on something great" if he did not "jump on it." Clements presented the terms of the

---

[cont'd]

Ibrahim that he would come up with the funds after his initial $300,000 was rejected for insufficient funds on November 22, 2013—i.e., four days before NL executed his purchase agreement. Clements subsequently visited RF in his home to resolve the debit balance, and RF mailed Clements a $77,000 check, which also was declined. According to Clements, RF's daughter stopped payment on the check.

[12] Under FINRA Rule 5122(b)(1), Avenir was required to provide each prospective investor with "an offering document" that discloses the "intended use of the offering proceeds" and "[the] offering expenses and the amount of selling compensation that will be paid to the member and its associated persons."

[13] Under FINRA Rule 5122(b)(2), Avenir was required to submit to FINRA's corporate financing department its offering documents at or before the first time they are provided to any prospective investor.

potential investment to KK: KK could purchase a one percent equity interest in Avenir for $50,000 and would be given the opportunity to purchase an additional one percent for $50,000. Clements told KK that his investment proceeds would be used to expand Avenir's business in Florida and internationally.

Neither Clements nor Rodriguez disclosed Avenir's recent net capital deficiency, which caused the firm to suspend operations for 12 days, or its use of NL's investment to avert another net capital deficiency. Clements and Rodriguez did not provide KK with any financial statements or documents showing Avenir's financial condition. They also did not disclose to KK the prices that other investors recently had paid to buy Avenir equity interests.

On December 18, 2013, KK purchased a one percent equity interest in Avenir for $50,000, his first of two equity purchases. The only document KK received at the time was the purchase agreement, which Clements prepared and Rodriguez provided to KK. The December 2013 purchase agreement contained no risk disclosure or financial information regarding Avenir. The purchase agreement also did not disclose that Rodriguez was receiving a 10 percent selling commission for the sale or the intended use of KK's investment proceeds.

On March 3, 2014, KK purchased another one percent equity interest in Avenir for $50,000. In connection with KK's second equity purchase, Rodriguez provided KK with a purchase agreement and a risk disclosure document entitled "Avenir Financial Group, Inc. Equity Purchase." Like the December 2013 purchase agreement, the March 2014 purchase agreement was prepared by Clements and contained no risk disclosure or financial information regarding Avenir. The risk disclosure document, also prepared by Clements, contained no information about the investment-specific risks associated with an equity investment in Avenir. Rather, it stated that KK, through his "own independent due diligence," was "fully aware of the various risks and liquidity issues associated with [his] investment" and "[was] aware that [he] may lose part or all of [his] investment." Neither the purchase agreement nor the risk disclosure document disclosed that Rodriguez was receiving a 10 percent selling commission for the sale or the intended use of KK's investment proceeds.

When KK made his investments, neither Clements nor Rodriguez disclosed Avenir's financial difficulties. Neither Rodriguez nor Clements provided KK with any financial statements or documents showing Avenir's financial condition. They also did not disclose to KK the prices that other investors recently had paid to buy Avenir equity interests.

On December 15, 2014, Clements sent a letter to KK "to confirm that at the time of and before [KK's December 18, 2013 and March 3, 2014 investments], you were made aware that [Rodriguez] would receive a [10 percent selling commission] and that the proceeds of your investments will be used for the day to day operations of the firm."[14] In January 2015, KK

---

[14] On March 15, 2015, Clements, on behalf of Avenir, made the requisite FINRA Rule 5122 notice filings to FINRA in connection with KK's equity investments.

signed an undated statement, prepared by Clements, that provided that at the time of his December 18, 2013 and March 4, 2014 investments, Rodriguez told Clements that his investment was "being used for the operations and growth of the broker dealer" and that Rodriguez would receive a 10 percent selling compensation. According to KK, he signed the statement without reading it because Rodriguez asked him to. According to Rodriguez, this statement was the first time KK found out about the commission because he did not disclose it to KK at the time of his investment.

Clements's version of events with respect to KK's investment differs greatly. Clements denies that he was involved in soliciting KK or that he even spoke to KK until after his second equity investment in March 2014. The Hearing Panel did not find Clements credible and instead chose to rely on the testimony of KK and Rodriguez. In particular, the Hearing Panel found KK's testimony "credible" and "compelling," and noted that his version of key events was corroborated by Rodriguez's testimony. The Hearing Panel also found it credible that KK may have simply followed Rodriguez's instructions to sign the January 2015 statement without reading it, and "[o]n balance, [it] credited KK's version [of events] over Clements's."

E. Rodriguez's Sale of BRCH Promissory Notes and Equity Interests

In April 2014, Clements approved Rodriguez to participate in private securities transactions to raise up to $500,000 through the sale of BRCH promissory notes. Prior to approving Rodriguez's participation, Clements provided a 15 to 20 minute telephonic private transaction training to Rodriguez.

Between April 2014 and January 2015, Rodriguez sold four BRCH promissory notes to four investors, including KK, for a total of $99,600. Clements provided Rodriguez with a promissory note template that Rodriguez used with the BRCH investors. The notes provided that Rodriguez was earning a selling commission related to the offering and disclosed that the investment proceeds would only be used for general operating expenses and growing BRCH. In connection with the sale of the promissory notes, Clements also prepared a Private Transaction Customer Disclosure Acknowledgment, which was signed by at least two investors. The acknowledgment provided that "Avenir has no direct or indirect involvement whatsoever with this offering" and "this investment . . . is not supervised by [Avenir]."

Between May and October 2014, Rodriguez raised an additional $74,500 through the sale of BRCH equity interests to four customers, including KK. The BRCH equity purchase agreements did not provide how the investment proceeds would be used, but Rodriguez testified that he orally informed the investors that he would use the proceeds to expand BRCH's operations in Chicago and New York and for "day to day operations [and] expenditures." Unlike the BRCH promissory notes offering, it is not clear from the record that Clements had advance or contemporaneous knowledge of Rodriguez's sale of BRCH equity interests. We agree with the Hearing Panel that "the evidence of Clements's advance knowledge [of the BRCH equity offering] was conflicting, unclear, and inconclusive."

According to Rodriguez, he sought permission from Clements to sell BRCH equity, and Clements told him to use the same purchase agreement used in connection with the Avenir

equity self-offering. Rodriguez also testified that Clements told him he could sell "personal shares" of BRCH and could use the proceeds for personal expenses as long as he recorded the sales and personal expenses in BRCH's books and records. Clements disputes this version. He testified that Rodriguez never informed him or Avenir that Rodriguez intended to solicit individuals to purchase BRCH equity and never sought permission to do so. According to Clements, Rodriguez intentionally concealed the BRCH self-offering from him, and Clements first learned of the self-offering in March 2015. Clements notes that Rodriguez, in response to a June 16, 2014 FINRA Rule 8210 request for information, sent Clements a draft response for his review that omitted any reference to the BRCH equity offering. Then Rodriguez sent his final response, which provided that he solicited investors to purchase BRCH equity, directly to FINRA on June 30, 2014, and did not provide a copy to Clements or Avenir.

The Hearing Panel was not convinced that Rodriguez "deliberately concealed" the equity offering from Avenir and Clements, finding it implausible that Rodriguez would conceal the offering from them while at the same time disclosing it to FINRA. The Hearing Panel also noted that Clements helped Rodriguez prepare the FINRA Rule 8210 response, which provided that Avenir was providing FINRA with BRCH bank statements and general ledgers—documents that reflected deposits of equity investor funds.

F. Rodriguez Misuses Investor Funds

In total, Rodriguez, on behalf of BRCH, raised $173,800 from the sale of BRCH promissory notes and equity interests. Rodriguez deposited the investment funds in a BRCH bank account and, from April 2014 to February 2015, withdrew $77,287.55 from that account to pay personal expenses. We, like, the Hearing Panel, are unable to trace the source of funds used for each of Rodriguez's personal expense withdrawals because Rodriguez commingled all the funds from each offering in one bank account along with unrelated funds he and others deposited. While we are unable to calculate the exact amount of money that Rodriguez misused, it is clear that Rodriguez's personal expense withdrawals substantially exceeded the deposits unrelated to the offerings.[15]

---

[15] Before the Hearing Panel, Clements and Avenir argued that Rodriguez deposited $42,185.78 in personal funds in the BRCH bank account, so his misuse of investor funds was $35,101.77, not $77,287.55 as argued by Enforcement. At the hearing, Rodriguez testified that he deposited more than $42,185.78 in the BRCH bank account, and those additional funds consisted of the proceeds from the sale of his personal shares in BRCH. In its decision, the Hearing Panel noted that the $35,101.77 amount did not reflect non-investor funds deposited from January 2014 to February 2015 by other individuals and third parties. The Hearing Panel found that Rodriguez paid personal expenses from funds he raised in both the BRCH equity and promissory notes offerings despite being unable to trace the source of funds for Rodriguez's personal expenses. For purposes of our decision, we do not need to ascertain the exact amount of funds that Rodriguez misused to conclude that Rodriguez was using investor funds for personal expenses.

On April 27, 2015, FINRA barred Rodriguez from association with any FINRA member based on a Letter of Acceptance, Waiver and Consent ("AWC"). Under the terms of the AWC, Rodriguez consented to findings that he defrauded investors by misusing for personal expenses approximately $77,000 of the $173,800 raised from six investors in BRCH equity and promissory note offerings. Rodriguez appeared at the hearing below as a witness for Enforcement.[16]

II. Procedural History

On April 27, 2015, Enforcement filed an expedited complaint against Clements, Avenir, and Ibrahim, which it thereafter amended on May 26, 2015. Only three of the five causes of action were alleged against Clements. Cause one alleged that the respondents made material misstatements and omissions in connection with the sale of Avenir equity interests, in willful violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 and in violation of FINRA Rules 2020 and 2010. More specifically, the complaint alleged that the respondents failed to disclose to NL Avenir's dire financial condition and recent investments in Avenir at lower prices. The complaint further alleged that Clements falsely told KK that Avenir was profitable and an investment in Avenir was safe, and that Clements and Avenir failed to disclose to KK Avenir's dire financial condition, recent investments in Avenir at lower prices, and the plan of action that Avenir submitted to its clearing firm. Cause three of the complaint alleged that Clements aided and abetted violations of Exchange Act Section 10(b) and Exchange Act Rule 10b-5, by assisting Ibrahim in his fraudulent sale of Avenir equity to NL and Rodriguez in his fraudulent sales of BRCH equity and debt to six customers, in violation of FINRA Rules 2020 and 2010. Cause five of the complaint alleged that Clements failed to supervise capital raising efforts on behalf of Avenir and BRCH, in violation of NASD Rule 3010(b) and FINRA Rules 3110(b) and 2010.

After a seven-day hearing, the Hearing Panel issued a decision on September 20, 2016. The Hearing Panel found, among other things, that Clements made material misstatements and omissions in connection with the sale of Avenir equity interests and Clements failed to supervise capital raising efforts on behalf of Avenir and BRCH. The Hearing Panel dismissed the allegations that Clements aided and abetted fraud.[17] The Hearing Panel barred Clements for the

---

[16] On appeal, Clements contends that Rodriguez was "harassed and bullied" into signing the AWC, and that Rodriguez's accountant's documentation showed that Rodriguez did not take money from customers. Rather, Clements says Rodriguez "sold his personal shares of [BRCH] and then took those shares and then made a loan of his money to [BRCH]. And then, when he went and spent any money of [BRCH] that was his personal money, those were then deducted from the loan to the company." Rodriguez's testimony and the record do not support Clements's contention.

[17] The Hearing Panel also found that: (1) Avenir and Ibrahim engaged in fraud in the sale of Avenir interests; (2) Avenir engaged in fraud in the sale of debt and equity interests of BRCH; (3) Avenir failed to provide written disclosures to its customers regarding selling commission

[Footnote continued on next page]

fraud and ordered him to offer rescission to NL's estate and KK of their Avenir equity interests.[18] For Clements's failure to supervise, the Hearing Panel assessed, but did not impose in light of the bar, a $73,000 fine and a bar in all principal capacities.

Only Clements appealed the decision to the National Adjudicatory Council ("NAC").

III. Discussion

We affirm the Hearing Panel's findings that Clements made material misstatements and omissions of material fact in connection with the sale of Avenir equity interests. We further find that Clements failed to reasonably supervise Avenir's and BRCH's capital raising efforts. We discuss the violations in detail below.

A. Clements Committed Fraud

The Hearing Panel found that Clements omitted material facts in connection with the sale of Avenir equity interests to NL and made material misstatements and omitted material facts in connection with the sale of Avenir equity interests to KK, in willful violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 and in violation of FINRA Rules 2020 and 2010. We affirm.

Exchange Act Section 10(b) makes it "unlawful for any person . . . [t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Rule 10b-5(b) makes it unlawful for any person "directly or indirectly" to "make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made . . . not misleading."[19] 17 C.F.R. § 240.10b-5(b).

[cont'd]

and use of proceeds pursuant to FINRA Rule 5122 and failed to make related filings; and (4) Avenir failed to supervise capital raising efforts on behalf of Avenir and BRCH.

[18] NL passed away after the hearing and before the Hearing Panel issued its decision.

[19] Exchange Act Rule 10b-5 implements the Commission's authority under Section 10(b) of the Exchange Act through three subsections. *See John P. Flannery*, Exchange Act Release No. 73840, 2014 SEC LEXIS 4981, at *29 (Dec. 15, 2014), *vacated on other grounds*, 810 F.3d 1 (1st Cir. 2015) (rejecting the Commission's key factual determinations on substantial evidence grounds). To establish liability under Section 10(b) and Exchange Act Rule 10b-5, Clements also must have used "any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange." 17 C.F.R. § 240.10b-5. Respondents did not dispute satisfaction of this element before the Hearing Panel, and Clements does not dispute it on appeal. It is undisputed that NL received the offering documents prepared by Clements either by

[Footnote continued on next page]

Proof of scienter is required to establish a violation of each of the foregoing provisions. *See Dep't of Enforcement v. Luo*, Complaint No. 2011026346206, 2017 FINRA Discip. LEXIS 4, at *20 (FINRA NAC Jan. 13, 2017).

1. Clements Made Omissions of Fact to NL and Made Misstatements and Omissions of Fact to KK in Connection with the Sale of Avenir Equity

The Hearing Panel found that Clements made omissions of fact to NL through the purchase agreement, under which NL purchased a five percent equity interest in Avenir for $250,000. We agree. Clements drafted the purchase agreement, the only written document that Ibrahim provided to NL in connection with his investment, and was responsible for approving the terms of the investment.[20] The purchase agreement did not disclose anything about Avenir's financial condition or Avenir's likely intended use of NL's proceeds to prop up the firm and prevent another net capital deficiency. At the time of NL's investment, Avenir's financial condition was precarious and problematic. Avenir had ceased conducting a securities business for 12 days within the past month for insufficient net capital, and the firm was facing an imminent margin call and related liability of $190,000, which would cause the firm to again to be net capital deficient. Clements was acutely aware that Avenir was raising capital for itself, a situation which is rife with conflicts and is addressed by FINRA Rule 5122. Under this rule, Avenir had a duty to disclose to potential investors two essential facts regarding investing in the private offering: the use of proceeds from the offering, and the offering expenses and the amount of selling compensation that will be paid. But Clements knew that the purchase agreement was the only document that Ibrahim provided to NL in connection with his investment, and he chose to make no additional information available to the potential investor. Instead of making a truthful disclosure that Avernir likely would be using the investor's money for the firm to remain barely above the surface of the water, Clements failed outright in his duty to disclose Avenir's financial condition and that NL's investment likely would be used to prevent another net capital deficiency.

[cont'd]

facsimile or mail. Clements also communicated by telephone with KK, and his offering documents were mailed, faxed, or emailed. *See Dep't of Enforcement v. McGee,* Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *23 n.16 (July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *appeal docketed*, Case No. 17-1245 (2d Cir. Apr. 26, 2017).

[20] As the drafter of the purchase agreement with the ultimate authority over it and its contents, Clements was the maker of the statements therein for purposes of liability under Exchange Act Rule 10b-5(b). *See Janus Capital Group v. First Derivative Traders*, 564 U.S. 135, 142-43 (2011).

The Hearing Panel also found that Clements made misstatements and omissions of fact to KK both orally and through two purchase agreements and a risk disclosure document. During the telephone call with KK and Ibrahim, Clements recommended that KK use his insurance proceeds to buy an equity interest in Avenir, assuring KK that Avenir was doing "exceptionally well" and "growing exponentially," and that the investment was safe. Clements did not disclose that Avenir recently had to suspend operations for 12 days for insufficient net capital or that the majority of NL's investment was used to avoid another net capital deficiency at the firm. Clements prepared two, separate purchase agreements for KK, neither of which disclosed anything about Avenir's financial condition or use of KK's proceeds. In connection with KK's second purchase agreement, KK was given a risk disclosure document, also prepared by Clements. The risk disclosure document made general statements about "various risks and liquidity issues associated with the investment," but contained no information about the investment-specific risks associated with an equity investment in Avenir or the precarious financial condition of the firm.[21]

Clements asserts, as he did before the Hearing Panel, that he did not speak to KK until after KK's second equity investment in Avenir. The Hearing Panel made numerous, adverse credibility findings concerning Clements's testimony and explicitly credited the version of events described by KK and Rodriguez at the hearing, which contradicted Clements's testimony. The Hearing Panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence." *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *15 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, 58 S.E.C. 846 (2005). We find that Clements has not provided substantial evidence sufficient to overturn the Hearing Panel's credibility determinations and agree with the Hearing Panel that the record supports that Clements made these misstatements to KK.[22]

2. Clements's Misstatements and Omissions of Fact Were Material, and Clements Had a Duty to Disclose Material Information

Clements's misstatements that an investment in Avenir was a safe investment and that the company was doing "exceptionally well" and omissions of fact about Avenir's financial condition were material. "[M]ateriality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic v. Levinson*, 485 U.S. 224,

---

[21] As the drafter of both purchase agreements and the risk disclosure document with the ultimate authority over these documents and their contents, Clements was the maker of the statements therein for purposes of liability under Exchange Act Rule 10b-5(b). *See id.*

[22] Clements relies on a January 28, 2015 email from KK to FINRA stating that he was very happy with Rodriguez and asking FINRA not to contact him. This email is insufficient to overturn the Hearing Panel's credibility determinations. At this time, KK likely was unaware of Clements's fraudulent statements and omissions. In fact, months later, KK voluntarily testified at the hearing as Enforcement's witness.

240 (1988). A fact is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 231-32 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). 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]." *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 518 (2d Cir. 1994).

First, Clements made materially false statements when he told KK that an investment in Avenir was safe and that Avenir was doing "exceptionally well." A reasonable investor would want to know the level of risk associated with his investment. *Luo*, 2017 FINRA Discip. LEXIS 4, at *21-22 (holding that respondent committed fraud when he misrepresented to customer that investment was safe in spite of red flags and the absence of disclosure documents and financial statements). Although materiality is an objective standard, we note that KK specifically considered the level of risk important because he sought the advice of Rodriguez, and then Clements, about how best to invest his insurance proceeds to provide safely for his granddaughter's financial future.

Second, Clements's omissions of fact to both NL and KK about Avenir's financial condition and the firm's use of proceeds were material.[23] *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *41 (Sept. 28, 2017). "[T]he materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge." *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980). Under FINRA Rule 5122, Avenir, through Clements, had a duty to disclose, among other things, the "intended use of proceeds" of these equity investments. Clements drafted the only offering documents provided to NL and KK, and Clements knew, or should have known, that they did not contain the requisite information. The fact that the firm recently had been shut down for a net capital deficiency and was facing an imminent margin call liability (even if Clements in fact believed it would be paid by the defaulting customer) would have been material to a reasonable investor's assessment of an investment in Avenir. Similarly, the fact that the firm recently had been shut down for a net capital deficiency and narrowly avoided another deficiency by using the majority of an investor's proceeds to pay down a margin call liability also would have been material to a reasonable

---

[23] Clements's arguments that there was not a poor "financial condition" to tell NL at the time of his investment is belied by the record. Avenir's regulatory filings demonstrate that the firm had limited capital since its inception. Moreover, contrary to Clements's protestations, Avenir indeed was net capital deficient and unable to conduct business for 12 days, even if, as Clements asserts, Allen disputed the net capital computation at the time. Further, Clements was aware that Ibrahim had again triggered a large margin call, which would need to be booked as a liability to the firm if it was not repaid. We agree with the Hearing Panel that the situation as described is an "imminent margin call," which necessarily would be material to a reasonable investor's assessment of an investment in Avenir.

investor's assessment of an investment in Avenir. These circumstances reflect that an equity investment in Avenir was inherently risky and, therefore, needed to be disclosed.[24]

Clements dismisses the omissions of material fact he made to KK and NL through their respective offering documents. With respect to NL, Clements argues that NL was a "sophisticated active professional" who was offered financials but refused them. NL's level of sophistication, however, is irrelevant to materiality, which is an objective standard relating to the substantial likelihood that a reasonable investor would have viewed disclosures about Avenir's financial condition as significantly altering the total mix of information. Further, even if an investor refuses financial documents, an associated person nonetheless has an affirmative duty to disclose material information fully and completely when recommending an investment. Likewise, Clements's argument on appeal that KK was an accredited investor and extraordinarily wealthy (which is unsupported by the record) also is irrelevant to the materiality of the omissions to him.

Clements also argues he "never spoke to or solicited anybody" with respect to the Avenir self-offering. As an initial matter, we find, based on the record, that Clements did speak with and solicit KK. Further, Clements's risk disclosure document, given to KK in connection with his second equity investment along with the purchase agreement, made insufficient disclosures about investment-specific risks—i.e., Avenir's financial condition. Clements also prepared and had the ultimate authority over the other purchase agreements provided to NL and KK, which were the only offering documents and which contained omissions of material fact. Clements, who knew that the offering documents contained no information about the firm's financial condition and use of proceeds, had a duty to disclose material information fully and completely in the offering documents. *Cf. Richmark Capital Corp.*, 57 S.E.C. 1, 6 (2003) ("When a securities dealer recommends stock to a customer, it is not only obligated to avoid affirmative misstatements, but also must disclose material adverse facts of which it is aware."), *aff'd*, 86 F. App'x 744 (5th Cir. 2004). Clements failed to do so.

3. Clements Acted with Scienter

Like the Hearing Panel, we find that Clements made these material misstatements and omissions of fact with scienter. Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter may be established by a showing that the respondent acted recklessly. *See Alvin W. Gebhart*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *aff'd*, 595 F.3d 1034 (9th Cir. 2010); *see also SEC v. Fife*, 311 F.3d 1, 9 (5th Cir. 2002). Reckless conduct includes "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*,

---

[24] In comparison, JC's purchase agreement provided that her investment proceeds would be used for "operating expenses and net Capitalization [sic]."

553 F.2d 1033, 1045 (7th Cir. 1977) (internal citation omitted); *see also Meadows v. SEC*, 119 F.3d 1219, 1226 (5th Cir. 1997). Proof of scienter may be "a matter of inference from circumstantial evidence." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983); *Derek DuBois*, 56 S.E.C. 829, 836 (2003).

Clements acted with scienter when he made the material misstatements and omissions of material fact. Clements was acutely aware of Avenir's finances, yet he failed to disclose material information to both KK and NL about Avenir's financial condition and the intended use of investment proceeds. *See GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004) ("[I]n a non-disclosure situation, . . . scienter is satisfied where . . . the defendant had actual knowledge of the material information."). The three purchase agreements and risk disclosure document that Clements prepared, which were provided to NL and KK, did not make any disclosures about Avenir's financial condition or the intended use of investment proceeds.

Similarly, Clements acted at a minimum recklessly when he falsely told KK that Avenir was doing "exceptionally well" and that an investment in Avenir was safe. *See Dane S. Faber*, 57 S.E.C. 297, 305-07, 308 (2004) (holding that respondent acted recklessly, and therefore with scienter, where he knew of a company's unprofitable financial condition but failed to disclose it to investing customers). Clements knew about Avenir's financial situation, that Avenir was thinly capitalized, and that NL's investment had been used to avoid another net capital deficiency, not to grow the company. Despite this knowledge, Clements recklessly made these statements to KK in connection with his solicitation of KK to invest in Avenir.

4. Clements's Conduct Violates FINRA Rules 2020 and 2010

FINRA Rule 2020 is FINRA's antifraud rule. FINRA Rule 2020 prohibits members from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance." The Commission has "held that conduct that violates Exchange Act Rule 10b-5 also violates FINRA Rule 2020."[25] *Ahmed*, 2017 SEC LEXIS 3078, at *53. Conduct that violates other Commission or FINRA rules is inconsistent with high standards of commercial honor and just and equitable principles of trade and violates FINRA Rule 2010. *See Joseph Abbondante*, 58 S.E.C. 1082, 1103 (2006), *aff'd*, 209 F. App'x 6 (2d Cir. 2006). Accordingly, we conclude that Clements's material misstatements of fact and omissions of fact violate FINRA Rules 2020 and 2010.

In summary, we find that Clements committed fraud when he recklessly made material misstatements and omitted material facts in connection with the sale of Avenir equity interests to NL and KK. This conduct was in willful violation of Exchange Act Section 10(b) and Rule 10b-5 and in violation of FINRA Rules 2020 and 2010.[26]

---

[25] FINRA Rule 2020 is made applicable to associated persons pursuant to FINRA Rule 0140(a).

[26] Enforcement alleged that Clements willfully violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5. "A willful violation under the federal securities laws simply means

[Footnote continued on next page]

B. Clements Failed to Reasonably Supervise Avenir's and BRCH's Capital Raising Efforts

The Hearing Panel found that Clements failed to supervise Avenir's and BRCH's capital raising efforts, in violation of NASD Rule 3010(b) and FINRA Rules 2110(b) and 2010. We affirm.

"Assuring proper supervision is a critical component of broker-dealer operations." *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *27 (June 29, 2007). NASD Rule 3010(b) and FINRA Rule 3110(b) require that a member firm "establish, maintain, and enforce written procedures to supervise the types of business in which it engages to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable rules of [NASD and FINRA]."[27] A violation of NASD Rule 3010 or FINRA Rule 3110 is also a violation of FINRA Rule 2010. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *51 n.40 (Sept. 24, 2015). "A supervisor is responsible for reasonable supervision, a standard that is determined based on the particular circumstances of each case." *Dep't of Enforcement v. Pellegrino*, Complaint No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *46-47 (FINRA NAC Jan. 4, 2008) (internal quotation and citations omitted), *aff'd*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843 (Dec. 19, 2008).

Clements was responsible for supervising both Avenir's and BRCH's capital raising activities. For BRCH, not only was Clements responsible for supervising the capital raises, Clements also was Rodriguez's direct supervisor throughout the relevant period. No Avenir investor received a private placement memorandum, prospectus, or term sheet in connection with his equity investment in Avenir. Clements took no steps to ensure that Ibrahim and Rodriguez disclosed Avenir's financial condition to NL and KK. Clements, who drafted the only

---

[cont'd]

that the person charged with the duty knows what he is doing." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (internal quotation omitted). We need not find that Clements "was aware of the rule he violated or that he acted with a culpable state of mind." *See id.* We find that Clements acted willfully when he recklessly made material misrepresentations and omissions of fact, in violation of the Exchange Act. Clements is thus subject to statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(f) (incorporating by reference Exchange Act Section 15(b)(4)(D), which together provide that a person is subject to statutory disqualification if he has willfully violated any provision of, among other things, the Exchange Act and its rules and regulations); FINRA By-Laws, Article III, Section 4 (providing that a person is subject to statutory disqualification if he is disqualified pursuant to Exchange Act Section 3(a)(39)).

[27] NASD Rule 3010 was superseded by FINRA Rule 3110 effective December 1, 2014. *FINRA Regulatory Notice 14-10*, 2014 FINRA LEXIS 17 (Mar. 2014).

documents provided to NL and KK, knew that the documents did not disclose anything about Avenir's financial condition, including the firm's recent net capital deficiency, and resulting shutdown, or its large margin call liability that nearly led to another shutdown but for NL's investment. The documents also did not disclose the representative's selling commission or the intended use of proceeds. Even though Clements had actual notice that the only documents provided to investors failed to provide any financial information about Avenir, Clements made no effort to ensure that Ibrahim and Rodriguez disclosed Avenir's financial condition to NL and KK.

Clements also failed to supervise BRCH's capital raising activities by failing to detect or ignoring red flags that Rodriguez was conducting an equity offering and misusing proceeds to pay for personal expenses. Among other things, Clements failed to conduct due diligence before the BRCH offering and to audit BRCH's use of the proceeds raised in its offerings.

In March 2014, Clements conducted his first audit of BRCH. According to Clements, Rodriguez did not have financials and was missing account documents—which should have raised supervisory red flags for Clements. Clements testified that he requested that Rodriguez provide him financials at the time, but Rodriguez did not provide them until months later. Despite the lack of financials and missing account documents, Clements nonetheless approved Rodriguez in early April to begin selling promissory notes issued by BRCH in a self-offering. Clements would have been unable to conduct the requisite due diligence before the BRCH offering without reviewing these documents.

After Rodriguez began capital raising on behalf of BRCH, Clements failed to reasonably supervise Rodriguez, including failing to audit Rodriguez's use of proceeds, despite the existence of red flags that Rodriguez was misusing customer funds. Clements could have sought to review BRCH bank statements, financial statements, and the general ledger, which would have demonstrated Rodriguez's misuse of funds. Clements, however, failed to do so.

Clements argues that he should not be found liable for failing to supervise the BRCH offerings because "[e]very BRCH transaction was done hidden away from [him], Allen, and Avenir." Clements was aware, however, that Rodriguez was conducting a debt offering because Clements himself approved it. Regardless of whether Clements knew Rodriguez was also conducting an equity offering, Clements was responsible for supervising the debt offering and was Rodriguez's direct supervisor. Had he discharged those responsibilities reasonably by, among other things, reviewing BRCH's financials, he would have discovered the equity offering and the misuse of funds by Rodriguez.

By June 30, 2014, Clements knew, or should have known, that Rodriguez was selling both promissory notes and equity of BRCH from Rodriguez's response to FINRA's Rule 8210 request. Clements argues that Rodriguez "secretly" sent the responsive BRCH bank statements and general ledger directly to FINRA, so Clements did not see them. Clements concedes, however, that he was responsible for reviewing Avenir's responses to regulators. He was aware of FINRA's request regarding BRCH because he previously had reviewed Rodriguez's draft response. If Rodriguez did not provide Clements the final document he sent to FINRA, Clements, as the person responsible for regulatory responses, should have requested a copy

directly from Rodriguez. Even after Clements learned about Rodriguez's lack of financials, unapproved equity offering, and misuse of funds, Clements took no corrective actions and never sought to discipline Rodriguez.

In connection with the sale of the BRCH promissory notes, Clements also prepared a Private Transaction Customer Disclosure Acknowledgment, which was signed by at least two investors and which Clements knew, or should have known, contained misstatements. In the acknowledgment, the investors represented that through their "own independent due diligence, review of the Offering Document, all other addendums, financials and disclosures, [they were] fully aware of the various risks and liquidity issues associated with this start-up company investment and have deemed it a suitable investment for [their] portfolio." By the time that Clements drafted this acknowledgment and it was signed, Clements knew or should have known that there was no addendum to the offering document because Clements prepared all of the documents related to the offering. He also knew that BRCH's financials were incomplete at best. In other words, the language of the acknowledgment was yet another red flag.

Clements also was responsible for ensuring that Avenir and its associated persons complied with FINRA Rule 5122 in connection with the capital raises. He failed to discharge this responsibility. The Hearing Panel found, and the record provides, that Avenir failed to comply with FINRA Rule 5122 in connection with the Avenir equity self-offering and the BRCH self-offering.[28] Clements failed to ensure that Ibrahim's and Rodriguez's customers were timely provided with the requisite written disclosures in accordance with FINRA Rule 5122 and otherwise complied with the rule.[29]

In light of Clements's actual notice of the lack of disclosure about Avenir's financial condition in the offering documents, as well as numerous other red flags, Clements's supervision was "inadequate, and unreasonable, under the circumstances." *See Robert E. Strong*, Exchange Act Release No. 57426, 2008 SEC LEXIS 467, at *22-23 (Mar. 4, 2008). The fact that Clements may have shared with Allen supervisory responsibilities with respect to capital raising and Ibrahim or Rodriguez does not absolve Clements from also having failed to reasonably

---

[28] The Hearing Panel found that Avenir violated FINRA Rules 5122 and 2010 in connection with the Avenir and BRCH equity self-offerings. At the hearing below, Avenir did not dispute that FINRA Rule 5122 applied to the equity self-offerings or that it failed to make the required disclosures and filings. Rather, Avenir argued that it made the disclosures orally and sought advice from FINRA before engaging in self-offerings. The Hearing Panel correctly concluded that these actions, even if they did occur, did not constitute compliance with the written disclosure and filing requirements of FINRA Rule 5122.

[29] Rodriguez testified that he was not even familiar with FINRA Rule 5122 at the time of the offerings.

supervise.[30] *See Steven P. Sanders*, 53 S.E.C. 889, 904 (1998) (holding that "even where supervisory responsibility is shared between firm executives, each can be held liable for supervisory failure"). Therefore, we find that Clements failed to reasonably supervise Avenir's and BRCH's capital raising efforts, in violation of NASD Rule 3010(b) and FINRA Rules 2110(b) and 2010.

C. Clements Received a Fair Hearing

1. Clements's Bias Claim Is Untimely and Unsupported by the Record

For the first time on appeal, Clements claims that the Hearing Officer's "management of this case was nothing short of EXTREMELY BIASED, APPALING [sic] and a complete disregard for the rules, the law and fair dealing." Clements, however, waived any argument that he may have had concerning the Hearing Officer's bias by failing to file a timely motion to disqualify the Hearing Officer.

Pursuant to FINRA Rule 9233, a party having a reasonable, good faith belief that bias exists may file a motion to disqualify a Hearing Officer no later than 15 days after learning of the facts on which the claim is based. *See* FINRA Rule 9233(b). Clements argues generally that the Hearing Officer's "management of this case" demonstrates bias, but offers the Hearing Officer's July 6, 2015 order denying his motion to postpone the deposition of NL as the only specific example of bias. Clements, however, failed to file a motion to disqualify the Hearing Officer by July 21, 2015. Clements's objection on appeal therefore is untimely, and he waived his right to object to the Hearing Officer's participation in the proceedings below. *See* FINRA Rule 9233(b); *see also Dep't of Enforcement v. Weinstock*, Complaint No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *33 (FINRA July 21, 2016) (failing to make timely motion to disqualify Hearing Officer and Hearing Panelist waives objection on appeal); *Dep't of Enforcement v. Bullock*, Complaint No. 2005003437102, 2011 FINRA Discip. LEXIS 14, at *51-52 (FINRA NAC May 6, 2011) (failing to make timely motion to disqualify Hearing Officer waives objection on appeal).

Even if Clements's assertion of bias was timely, we find it wholly unsubstantiated by the record and thus "an insufficient basis to invalidate" the proceeding below. *Dist. Bus. Conduct Comm. v. Guevara*, Complaint No. C9A970018, 1999 NASD Discip. LEXIS 1, at *39 n.16 (NASD NAC Jan. 28, 1999), *aff'd*, 54 S.E.C. 655 (2000), *aff'd*, 47 F. App'x 198 (3d Cir. 2000) (table). Clements seemingly is basing his claims of bias on the Hearing Officer's adverse rulings. Adverse rulings alone, however, do not evidence bias. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *62 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d

---

[30] Avenir's written supervisory procedures provided that "the chief compliance officer [i.e., Clements] will oversee all compliance functions of the company and will designate supervisory responsibility where deemed appropriate." While Clements testified about a delegation of certain unspecified duties to Allen, he offered no documentation in support and his contention was otherwise not supported by the record.

Cir. 2010); *Weinstock*, 2016 FINRA Discip. LEXIS 34, at *34. We find that the Hearing Officer's rulings are well supported by the record. Regardless, the de novo review of the NAC ensures that FINRA's disciplinary matters are fair and without bias.[31] *See Weinstock*, 2016 FINRA Discip. LEXIS 34, at *35 (confirming that the NAC's de novo review cures any alleged Hearing Panel bias).

2. The Hearing Officer Properly Denied Clements's Motion to Postpone the *De Bene Esse* Deposition of NL

Clements argues that the Hearing Officer improperly denied his motion to postpone the *de bene esse* deposition of NL. We disagree.

We briefly review the relevant facts in the record with respect to NL's *de bene esse* deposition. Approximately two weeks after filing the underlying complaint in this matter, Enforcement moved for an order authorizing a videotaped, pre-hearing *de bene esse* deposition of NL, and to allow the use of the video and transcript as hearing testimony if NL was unavailable to testify at the hearing. In its motion, Enforcement stated that NL was 94 years old and had endured two extended hospital stays in the past few months, so it was unclear whether NL would be able to testify later at the hearing. Clements, on behalf of all of the respondents, opposed the motion, arguing, among other things, that the respondents were in the process of retaining counsel. The Hearing Officer granted Enforcement's motion, noting that the respondents "have had ample time to retain counsel" and that "[respondents'] decision to delay this process is not a basis for denying [Enforcement the opportunity] to preserve testimony that may not be available at the hearing." The Hearing Officer ordered Enforcement to provide respondents 14 days advance notice of the date, time, and place of the deposition.

In accordance with the Hearing Officer's order, Enforcement notified the parties that June 17, 2015 was the date of the deposition. Clements, on behalf of himself and Avenir, and Ibrahim's counsel objected to the date. The Hearing Officer then held a pre-hearing conference

---

[31] Clements also argues that the matter against him was "vendetta driven" and a "well-orchestrated plan between Enforcement and the [Hearing Panel]." It is well established that FINRA has broad discretion to determine who should be charged with wrongdoing. *See, e.g.*, *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("[FINRA] disciplinary proceedings are treated as an exercise of prosecutorial discretion."). To the extent Clements is making the argument, the record does not support a claim for selective prosecution. *See Epstein*, 2009 SEC LEXIS 217, at *53 ("To establish [a claim for selective prosecution], a petitioner must demonstrate that he was unfairly singled out for prosecution based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right."). We also find no evidence in the record to support Clements's contention about coordination between Enforcement and the Hearing Panel. The fact that the Hearing Panel decision may have used some of the same language that Enforcement used in its filings and arguments before the Hearing Panel is not evidence of coordination or wrongdoing.

on June 10 to discuss the difficulty the parties were having setting a mutually convenient date for NL's deposition. The following day, the Hearing Officer issued an order directing that NL's deposition be rescheduled to July 9, 2015, a date agreed upon by all parties at the pre-hearing conference. On June 26, 2015, an attorney named Mark Hunter entered an appearance on behalf of Avenir and Clements, and then on July 3, together with his partner and co-counsel Jenny Johnson-Sardella, moved to postpone the deposition because of Hunter's prior commitment involving international travel for another client.[32] The Hearing Officer denied the motion, stating that all of the parties agreed to the rescheduled date and that he specifically advised Clements to advise any attorney he retained of the date.

NL's deposition took place on July 9, and it was videotaped and transcribed. Enforcement staff, Ibrahim's attorney, and Clements were present. The record does not reflect why Johnson-Sardella did not attend on behalf of Clements and Avenir in Hunter's absence.[33] Clements and Ibrahim's attorney both cross-examined NL.

The admissibility of the deposition was addressed at length during the final pre-hearing conference and at the hearing.[34] NL was unable to testify at the hearing either in person or by telephone due to "a grave decline in health." The Hearing Officer admitted NL's deposition over the respondents' objection, and the deposition was played in its entirety at the hearing. We find that the admission of the deposition was proper. The FINRA Code of Procedure grants the Hearing Officer broad discretion to accept or reject evidence. *See Dep't of Enforcement v. Fiero*, Complaint No. CAF980002, 2002 NASD Discip. LEXIS 16, at *89 (NASD NAC Oct. 28, 2002). NL was unavailable to testify at the hearing, a circumstance that Enforcement anticipated and was the basis for seeking to take the *de bene deposition* of NL in the first place. The parties, and Clements specifically, agreed to the date of July 9 for the deposition, and Clements was advised that any counsel he retained should be advised of the date. Clements does not offer a valid reason why another attorney besides Hunter did not appear at the deposition on behalf of Clements and Avenir. In the absence of an attorney, however, Clements was still afforded the right to cross-examine NL and he exercised that right. Based on these facts, we find no unfairness in the proceeding below.

---

[32] According to Clements and Avenir's motion, Hunter was the "only person in [his] law firm with the requisite experience" to defend the deposition.

[33] Another attorney from the same law firm represented Clements and Avenir at the hearing.

[34] In the intervening period between the deposition and the final pre-hearing conference, a new Hearing Officer was assigned to the case.

3. Clements's Polygraph Examination Was Not Offered into Evidence and Is Inadmissible

Clements argues that the Hearing Officer's "refus[al] to accept" a polygraph examination was improper. We disagree.

To support his argument that he did not solicit KK to invest in Avenir and never made material misstatements to KK, Clements proposed to offer at the hearing a document entitled "Clements Lie Detector Test regarding [KK] Avenir Financial Equity purchase." Enforcement moved to exclude the exhibit, and Clements voluntarily withdrew it. Then, days before the hearing was scheduled to begin, Enforcement sought leave to have KK testify telephonically because, according to KK, he had been sick for two weeks and could not commit to traveling from Illinois to New York for the hearing. Clements opposed the motion, stating that he withdrew the polygraph test as an exhibit because he assumed he would be cross-examining KK in person, and if KK were allowed to testify telephonically, he would seek to introduce the polygraph to "rebut" KK's testimony. The Hearing Officer addressed the parties' arguments on the second day of hearing and refused to admit the polygraph test regardless of whether KK testified in person or telephonically, observing that polygraph tests lack reliability. KK testified telephonically, and Clements did not offer the exhibit. Because Clements did not offer the polygraph test as an exhibit, he cannot now complain that the Hearing Officer did not accept it into evidence.

In any event, the Hearing Officer's refusal to admit the polygraph test, had it been formally offered, would have been proper, and we find it inadmissible. "It [is] up to the Hearing Panel, and now the NAC, to determine what weight to accord the testimony." *Weinstock,* 2016 FINRA Discip. LEXIS 34, *39 n.17 (rejecting respondent's argument that the NAC make witnesses submit to polygraph tests). We find that Clements's polygraph test would be of "little probative value." *Mkt. Surveillance Comm. v. R.B. Marich, Inc.*, Complaint No. MS-849, 1992 NASD Discip. LEXIS 106, at *51 n.22 (NASD Jan. 9, 1992). The polygraph test also was commissioned by Clements and administered by his chosen examiner without any input from Enforcement. Courts have been reluctant to admit polygraph evidence where the parties have not stipulated to admissibility and no prior notice of the test was given to the opposing party.[35] *See, e.g.*, *Conti v. Comm'r*, 39 F.3d 658, 662-63 (6th Cir. 1994) ("[U]nilaterally obtained polygraph evidence is almost never admissible under Evidence Rule 403.").

---

[35] Pursuant to FINRA Rule 9346, Clements moved to introduce 18 documents on appeal, including a document entitled "LIE Test – field evaluation of effectiveness of voice stress analysis in a criminal setting." Enforcement initially did not oppose the motion, and a subcommittee for the NAC admitted the documents, stating that it would consider the documents "within the scope of its review and assign the appropriate weight as to relevancy and materiality." Enforcement later filed a letter stating that its failure to file an opposition was an oversight and should not be construed as its having consented to the admission of the proffered material. We have considered the "LIE Test" document, and find it is not material with respect

[Footnote continued on next page]

IV. Sanctions

In assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein and any other case-specific factors.[36] For his fraudulent misrepresentations and omissions of material facts, the Hearing Panel barred Clements from association with any FINRA member in all capacities and ordered him to offer rescission to the defrauded customers. For the failure to supervise, the Hearing Panel assessed, but did not impose in light of the bar, a $73,000 fine and a bar in all principal capacities. We modify these sanctions in part.

A. Fraud

Fraud violations, such as those that Clements committed, are "especially serious and subject to the severest of sanctions under the securities laws." *See Marshall E. Melton*, 56 S.E.C. 695, 713 (2003). The Guidelines for intentional or reckless misrepresentations or omissions of material fact therefore recommend that we strongly consider barring an individual respondent, unless mitigating factors predominate.[37]

Numerous aggravating factors and the absence of mitigating factors support a decision to bar Clements for his fraud. We agree with the Hearing Panel that Clements's actions were egregious. He supervised Avenir's capital raising and drafted all of the offering documents at issue containing the omissions of material fact. NL and KK were not provided a private placement memorandum or prospectus, term sheets, or financial statements in connection with the solicitation. They also were not given written disclosures at the time or before their investment about their representative's selling commission or the intended use of their proceeds. Despite being aware of Avenir's financial condition, Clements, at a minimum, recklessly failed to disclose this material information to NL and KK in the purchase agreements and risk disclosure document.[38] By failing to disclose Avenir's precarious financial condition and the intended use of proceeds, Clements was able to induce NL and KK to provide substantial funds

---

[cont'd]

to these proceedings. Nor does it affect our decision with respect to the admissibility of Clements's polygraph.

36 *See FINRA Sanction Guidelines* (2017), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter "Guidelines"].

37 *Guidelines*, at 89. They also recommend a fine of $10,000 to $146,000. *Id.*

38 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

to help prop up his cash-strapped broker-dealer.[39] Clements, as co-owner and chief executive officer of Avenir, benefited from the fraudulent sales to NL and KK while both customers suffered substantial losses.[40]

Clements has not accepted responsibility for his actions and has shown little, if any, remorse.[41] Rather, he continues to argue that NL was a sophisticated investor to whom disclosure was not warranted and that NL should have reviewed Avenir's financials at the time of his investment. But "the protection of the antifraud provisions of the securities laws extends to sophisticated investors as well as those less sophisticated." *Dolphin and Bradbury, Inc.*, Exchange Act Release No. 54143, 2006 SEC LEXIS 1592, at *36 (Jul. 13, 2006). Indeed, even a sophisticated investor would have had no way of knowing, absent disclosure, about the margin call liability because Avenir had not booked the liability as of the date of NL's investment.

Clements's actions toward KK are particularly offensive. KK was an unsophisticated investor who only weeks earlier had lost his only child and sought advice from Rodriguez on how to best invest the proceeds from an insurance proceeds to provide for his granddaughter's future.[42] Rodriguez turned to Clements, who took advantage of the situation and induced KK to invest in Avenir based on materially false statements about the safety of the investment and Avenir's financial well-being.

Clements fails to demonstrate any mitigating factors. The record belies Clements's argument that he "had nothing to do with the financial or operational side of the firm." Clements was responsible for supervising and training the firm's representatives with respect to capital raising and was the drafter of all of the offering documents at issue. The fact that Allen, the chief financial officer and FINOP, may have shared some executive, supervisory, or other responsibility does not shield Clements from liability for his own failure to comply with the disclosure obligations of an associated person in the securities industry. *See Castle Sec. Corp.*, 58 S.E.C. 826, 834-35 (2005) (considering blame-shifting arguments as relevant to sanctions determination); *cf. Dep't of Enforcement v. North*, Complaint No. 2012030527503, 2017 FINRA Discip. LEXIS 28, at *20, 27-40 (FINRA NAC Aug. 3, 2017) (sanctioning respondent with shared responsibility for his failure to enforce supervisory procedures), appeal docketed, SEC Admin. Proceeding No. 3-18150 (Sept. 7, 2017).

Clements points to his 30-year career without a regulatory infraction. The lack of disciplinary history, however, is not mitigating. *See Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *29 (Mar. 14, 2018).

---

39 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 8).

40 *Id.* at 8 (Principal Considerations in Determining Sanctions, Nos. 16, 17).

41 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 2).

42 *Guidelines*, at 8 (Principal Considerations in Determining Sanctions, Nos. 18, 19).

Clements's actions demonstrate that he is fundamentally unfit to continue as an associated person of a FINRA member. Serious sanctions are appropriate to remedy the violations, protect investors, and deter others from engaging in similar misconduct. Accordingly, we bar Clements from associating with any FINRA member in any capacity.

We also order restitution.[43] The Guidelines instruct adjudicators to order restitution where it is appropriate to remediate misconduct and necessary to "restore the status quo ante for victims who would otherwise unjustly suffer loss."[44] We may order restitution "when an identifiable person . . . has suffered a quantifiable loss proximately caused by a respondent's misconduct."[45] The losses suffered by NL and KK were the "foreseeable, direct, and proximate result" of Clements's misconduct. *See Dep't of Enforcement v. Brookstone Secs., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *147-153 (FINRA NAC Apr. 16, 2015). As a result of Clements's misconduct, NL's estate suffered a loss of $250,000 and KK suffered a loss of $100,000. Given that Avenir is no longer in business, there is no indication that these losses will be repaid. Accordingly, we order Clements to pay restitution to NL's estate in the amount of $250,000 and to KK in the amount of $100,000, plus prejudgment interest calculated from the date of each sale to NL and KK. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), and the interest shall continue to accrue until the full amount is paid.[46]

B. Failure to Supervise

For the failure to supervise, the Hearing Panel assessed, but did not impose in light of the bar for fraud, a $73,000 fine and a bar in all principal capacities. We modify these sanctions in part.

For a failure to supervise, the Guidelines recommend a fine of $5,000 to $73,000.[47] In evaluating the appropriate sanctions to impose, the Guidelines provide three principal considerations, two of which are relevant here: whether respondent ignored "red flag" warnings that should have resulted in additional supervisory scrutiny and the quality and degree of the

---

43 The Hearing Panel ordered Clements to offer rescission of their Avenir equity interests to NL's estate and to KK. We disagree and find that restitution is the appropriate remedy to remediate Clements's misconduct.

44 *Guidelines,* at 4 (General Principles Applicable to All Sanction Determinations, No. 5).

45 *Id.*

46 In the event that NL's estate or KK recover or have recovered any amount of their losses through arbitration, that amount should be deducted from these totals for purposes of restitution.

47 *Guidelines*, at 104.

supervisor's implementation of the firm's supervisory procedures.[48] In egregious cases, the Guidelines instruct adjudicators to consider suspending the responsible individual in any or all capacities for up to two years or barring the responsible individual.[49]

We agree with the Hearing Panel that Clements's failure to supervise was egregious. He was responsible for supervising capital raising at Avenir, and he was Rodriguez's direct supervisor. Clements prepared the offering documents for the Avenir equity sales to both NL and KK, so he knew they did not disclose anything about Avenir's financial condition, the use of the proceeds, or selling compensation. Despite having actual notice (as opposed to just red flag warnings) of the deficiencies in the offering documents, Clements took no supervisory steps to ensure that Ibrahim and Rodriguez made the proper disclosures. His conduct was at a minimum reckless.[50]

Clements also ignored red flags that Rodriguez was conducting an unauthorized sale of BRCH equity and misusing customer funds.[51] Despite the fact that Rodriguez lacked basic BRCH financial documents, Clements approved Rodriguez to raise capital on behalf of BRCH. Clements was unable to properly supervise Rodriguez's capital raising without these documents, and their lack of existence should have been a red flag to Clements. That Rodriguez was allegedly concealing his misconduct does not mitigate against Clements's complete abdication of his supervisory obligations.[52]

Clements also took no steps to ensure that Avenir was complying with the disclosure obligations under FINRA Rule 5122.[53] As a result of Clements's own actions and supervisory failures, Avenir and BRCH customers were harmed and suffered substantial losses.

Clements seeks to compare the sanctions the Hearing Panel imposed to sanctions imposed in other cases. But "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases." *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 SEC LEXIS 3225, at *41 (Sept. 16, 2011). Moreover, "comparisons to sanctions in settled cases are inappropriate because pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement such as the avoidance of time-and-manpower-consuming adversary

---

48 *Id.*

49 *Id.*

50 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

51 *Id.* at 104.

52 *Id.*; *id.* at 7 (Principal Considerations in Determining Sanctions, No. 8).

53 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 8).

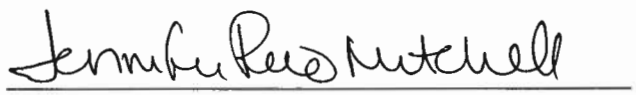
proceedings." *Kent M. Houston*, Exchange Act Release No. Release No. 71589, 2014 SEC LEXIS 614, at *33 (Feb. 20, 2014) (internal quotation omitted).

We impose a bar in all principal and supervisory capacities for Clements's failure to reasonably supervise capital raising. We believe that a bar in all principal and supervisory capacities is appropriately tailored to fit Clements's misconduct and his troubling disregard for supervision in general. It also is consistent with the Guidelines. We also find it appropriate to assess a fine of $73,000 (i.e., the highest fine within the range suggested by the Guidelines) but decline to impose it in light of the bar in all capacities for fraud.

V. Conclusion

Clements made material misrepresentations and omissions of material fact in connection with the sale of equity interests in Avenir, in willful violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 and in violation of FINRA Rules 2020 and 2010. Clements also failed to supervise capital raising at Avenir and BRCH, in violation of NASD Rule 3010(b) and FINRA Rules 3110(b) and 2010. For his misconduct, we bar Clements from associating in any capacity with any FINRA member and separately bar him from associating in any principal or supervisory capacity. We also order Clements to pay restitution to his customers as described herein. We also affirm the Hearing Panel's order that Clements pay $19,130.96 in hearing costs and order him to pay appeal costs in the amount of $1,545.60.[54]

On Behalf of the National Adjudicatory Council,



Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

---

[54] The bars are effective upon service of this decision.