BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of	
Department of Enforcement,	DECISION
Complainant,	Complaint No. 2014041319201
vs.	
Miguel Ortiz New York, NY,	January 4, 2017
Respondent.	

Respondent willfully made material misrepresentations to conceal losses in an account. Respondent also willfully failed to disclose on his Form U4 an unsatisfied judgment. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Jeffrey D. Pariser, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro se

Decision

Miguel Ortiz appeals a November 6, 2015 Hearing Panel decision. The Hearing Panel found that Ortiz made materially false statements and omitted material facts concerning the composition, value, and performance of an investment account and concealed the losses incurred in that account. It further found that Ortiz willfully failed to disclose on his Uniform Application for Securities Industry Registration and Transfer ("Form U4") an unsatisfied judgment against him. The Hearing Panel barred Ortiz for his material misrepresentations and omissions and did not impose additional sanctions for Ortiz's remaining misconduct.

On appeal, Ortiz concedes that he made material misrepresentations and omitted to disclose material facts, but argues that his motivation was not greed or his own monetary gain. Rather, Ortiz argues that he misrepresented the composition, value, and performance of the account in a misguided attempt to shield the account's owners, his longtime friend and her partner, from the "unpleasant reality" of large losses while he purportedly tried to recover the losses. Ortiz urges us to reduce the bar imposed upon him for this misconduct. Ortiz further

argues that he inadvertently failed to amend his Form U4 to reflect a large, unsatisfied judgment against him. After a thorough review of the record, we affirm the Hearing Panel's findings that Ortiz made material misrepresentations with the requisite scienter and failed to amend his Form U4. We also affirm the bar imposed upon Ortiz for his material misrepresentations.

I. Background

A. Ortiz

Ortiz worked in the securities industry in his home country of Venezuela from 1991 until 2010 and founded his own securities firm in Venezuela, Equivalores Casa de Bolsa, C.A. ("Equivalores"), during that time period. Ortiz fled Venezuela and moved to New York City in or around March 2010.[1] In June 2010, Ortiz formed Brickstone Securities, LLC ("Brickstone"). According to Ortiz, he sought to acquire a U.S. broker-dealer through Brickstone and turn Brickstone into a registered broker-dealer. Ortiz negotiated with several broker-dealers, but he never registered Brickstone as a broker-dealer. Brickstone never earned any income and did not provide any professional or financial services.

Ortiz met Jonathan McHale ("McHale"), a registered representative at former member firm John Thomas Financial, Inc. ("JTF"), in September 2010.[2] McHale lived in Ortiz's apartment building, and Brickstone rented office space in the same building as JTF. McHale introduced Ortiz to JTF's owner and chief executive officer, who offered to sponsor Ortiz for a work visa, suggested that Ortiz could register with JTF if he passed the Series 7 examination, and proposed that Ortiz open a Latin American branch of JTF. Ortiz opened a personal account at JTF in December 2010 and began training to take the Series 7 examination shortly thereafter.

JTF prepared and filed a Form U4 signed by Ortiz in July 2011. Although Ortiz was scheduled to take the Series 7 examination in August 2011, he failed to appear for the examination. He took the examination, and failed, in September 2011. JTF filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") terminating Ortiz's association with the firm in early October 2011.

In February 2012, Ortiz entered into an agreement on behalf of Brickstone with member firm First Liberties Financial, Inc. ("First Liberties"). First Liberties filed a Form U4 for Ortiz, which he reviewed and signed, on April 13, 2012. Ortiz was scheduled to take the Series 7 examination in September 2012, but he did not take the exam. First Liberties filed a Form U5 to terminate Ortiz's association with the firm on March 15, 2013. Ortiz's misconduct while associated with First Liberties from April 13, 2012, until March 15, 2013 (the "Relevant Period")

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[1] In August 2012, the U.S. Government granted Ortiz's application for political asylum.

[2] FINRA expelled JTF from membership in October 2013.

forms the bases for the proceeding currently before us.[3] Ortiz is not currently associated with a FINRA member.

B. VE and MV

VE is a Venezuelan citizen. She met Ortiz when they were in college in Venezuela in the late 1980s. They dated briefly and remained friends. Ortiz met MV through VE in 2008 when they all lived in Venezuela. MV is also a Venezuelan citizen. She and VE are business partners and life partners. Neither VE nor MV is sophisticated with respect to financial matters, and neither individual has significant investment experience. As described below, Ortiz made material misrepresentations to VE and MV concerning an account that they opened at JTF.

II. Procedural History

On March 6, 2015, FINRA's Department of Enforcement ("Enforcement") filed a complaint against Ortiz, which was amended in August 2015. As amended, the complaint alleged that during the Relevant Period, Ortiz sent MV and VE four emails that intentionally misrepresented and omitted material information regarding their JTF account to conceal large losses incurred in that account, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. The complaint also alleged that Ortiz willfully failed to amend his Form U4 to disclose an unsatisfied judgment against him, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010.

Ortiz admitted many of the facts underlying the complaint, and the Hearing Panel conducted a two-day hearing in September 2015. MV and VE testified, as did Ortiz. The Hearing Panel issued its decision on November 6, 2015, which found that Ortiz engaged in the misconduct alleged by Enforcement. The Hearing Panel barred Ortiz for his misrepresentations and omissions. The Hearing Panel stated that a suspension of up to two years and fine would be appropriate sanctions for Ortiz's willful failure to update his Form U4 but did not impose any additional sanctions for this misconduct in light of the bar. The Hearing Panel also ordered that Ortiz pay $5,309.73 in costs. Ortiz appealed the sanctions imposed by the Hearing Panel.[4]

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[3] Although Ortiz has never been licensed as a registered representative with a member firm, Ortiz became associated with First Liberties when it submitted the Form U4 that he signed on April 13, 2012. *See* FINRA By-Laws, Art. I(rr) (providing that a natural person who has applied for registration is an associated person).

[4] Ortiz was represented by counsel throughout the proceedings before the Hearing Panel. Through counsel, Ortiz requested oral argument and filed an opening brief. Ortiz's counsel subsequently filed a notice of withdrawal, and Ortiz filed a reply brief and appeared at oral argument, pro se.

III. Ortiz's Fraudulent Misrepresentations

A. Facts

1. MV and VE Open an Account at JTF

MV and VE had dinner with Ortiz in New York while they were on vacation in March 2011. Ortiz told MV and VE that he was studying to take the Series 7 examination and he hoped to affiliate with JTF and register Brickstone as a broker-dealer. Ortiz further informed them that he had opened an account at JTF that he managed through McHale, and that the account was doing well. MV and VE informed Ortiz that they were considering opening a U.S. brokerage account, and Ortiz suggested that they could open an account at JTF or at Morgan Stanley. Ortiz told them that although McHale would serve as their registered representative if they opened an account at JTF, he would invest their money in the same securities that Ortiz invested his own money.[5]

After this meeting, Ortiz emailed investment recommendations to MV and VE from his Brickstone email address. MV, who served as Ortiz's point of contact, responded by email and stated that she and VE would give Ortiz money to invest. In early April 2011, MV and VE opened an account at JTF and wired $210,000 to open the account. Although McHale was the registered representative assigned to their account, MV corresponded primarily with Ortiz regarding the account and sent him the completed account opening paperwork.[6] MV requested that JTF not send paper account statements, and she accessed the account online shortly after it

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[5] MV and VE testified that they understood that McHale would handle their account as directed by Ortiz and only invest in securities that Ortiz had approved for his own account. The record supports this understanding. Moreover, both MV and VE testified that they relied upon Ortiz to manage their account and trusted him. VE testified that "for me my broker was Miguel" and MV testified that she believed Ortiz would decide how the funds in the account would be invested. The Hearing Panel found generally that MV and VE were "very credible," and found that their testimony regarding their reliance upon, and trust of, Ortiz was "highly credible." We find no evidence to the contrary in the record to disturb these credibility findings, which are entitled to our deference. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and "can be overcome only when there is substantial evidence for doing so") (internal quotation omitted)).

[6] MV and VE never granted Ortiz power of attorney over their account, and he did not have login information to access their account online. Ortiz testified that McHale provided Ortiz with information concerning MV and VE's account whenever Ortiz asked for it. Similarly, Ortiz testified that McHale's replacement registered representative at JTF, Felippe Alves ("Alves"), would also provide Ortiz with information concerning the account whenever Ortiz asked for it. [Ortiz explained that after he complained to JTF's owner that McHale was charging excessive commissions, McHale was replaced with Alves for both Ortiz's personal account at JTF and MV and VE's account in June 2011.

was opened to ensure that their initial deposit had been received. MV testified that she believed Ortiz was making investment decisions for her account and that she and VE trusted him, so she did not access her account online again until August 2013.

Although Ortiz sent MV and VE positive articles and reports concerning the securities held in their account in April and May 2011, the account began to suffer losses almost immediately. By the end of April 2011, the value of the account was approximately $170,000, and by the end of May 2011, it was approximately $131,000. Ortiz knew that MV and VE's account had lost some of its value, and his account at JTF also had declined precipitously during these time periods.

In June 2011, Ortiz suggested that MV and VE move their account from McHale to Alves, another JTF registered representative.[7] Ortiz did not inform MV and VE of the substantial losses in their account that had occurred to date, and by the end of June 2011, the value of the account was approximately $103,855. During the ensuing several months, Ortiz sent MV, VE, and several other Venezuelan contacts emails from his Brickstone email address suggesting that the U.S. economy was improving, but MV and VE's account continued to lose value. By the end of September 2011, their account's value was approximately $55,000. Ortiz knew that the account had lost a substantial amount of its value, but he did not inform MV and VE of this fact.

2. Ortiz Begins Sending False Account Statements

From October 2011 until March 2012, Ortiz sent MV and VE four falsified account statements that he created.[8] Each statement misrepresented the composition and value of MV and VE's account. Ortiz knew that he had falsely inflated the value of MV and VE's account and misstated the securities held in the account at the time he sent each of the four false account statements. At no time did Ortiz inform MV or VE of the true value of their JTF account.

On October 19, 2011, Ortiz emailed MV, VE, and several others a document on Brickstone letterhead titled "Recommendations October 2011."[9] MV responded to Ortiz's email and requested that he provide a brief summary "of what happened with [our] money . . . simply

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[7] Ortiz testified that he also moved his JTF account from McHale to Alves because he discovered that McHale was charging excessive commissions.

[8] Although Enforcement did not charge Ortiz for the misrepresentations and omissions he made both prior and subsequent to the Relevant Period, the amended complaint discussed them at length as evidence of his intent. While these misrepresentations do not form the basis for our findings of misconduct, they are relevant to our sanctions analysis. *See* Part V.A *infra*; *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008) (holding that uncharged misconduct may be considered when imposing sanctions).

[9] Ortiz sent all four fabricated account statements during this time period from his Brickstone email account.

what we have, where, how much has been lost." On October 20, 2011, Ortiz responded to MV's email. Ortiz wrote to MV and VE, "I am sending you where we are in these upside-down times. We did this in this way with the objective of staying conservative given what happened during the summer." Ortiz attached to his email a fictitious account statement for MV and VE's JTF account, which falsely showed that the account's value was $179,784.88 (purportedly comprised of cash ($55,127.88), the "JTF Expeculative Fund" (valued at $62,936.50), and the "JTF IPO Fund" (valued at $61,720.50)). Neither of the funds existed, and at the time Ortiz sent MV the false account statement, MV and VE's account held approximately $55,000 in cash.

Ortiz sent MV and VE a second falsified account statement on December 9, 2011. In this statement, Ortiz falsely showed that the account's value was $183,529 (purportedly comprised of Ford Motor Company warrants (valued at $60,900), the "JTF Expeculative Fund (Apple St)" (valued at $63,450), and the "JTF IPO Fund" (valued at $59,179)). At the time Ortiz sent this fictitious account statement, MV and VE's account held only Ford Motor Company warrants (valued at $32,595 as of November 30, 2011).[10]

On February 6, 2012, Ortiz emailed MV and VE a third falsified account statement. This statement falsely showed that the account's value was $192,539 (purportedly comprised of InvenSense Inc. (valued at $63,376.50), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $69,880), and the "Brickstone JTF IPO Fund" (valued at $59,282.50)). At the time Ortiz sent this fictitious account statement, MV and VE's account only contained shares of InvenSense, Inc. (valued at $58,564.40 as of February 3, 2012, and sold for $62,735.39 on February 9, 2012).

On March 27, 2012, Ortiz emailed MV and VE a fourth falsified account statement. Ortiz wrote that MV and VE's "portfolio keeps recovering in a sustained manner[,] we are very positive on the market, we are hoping that at any moment, a very important jump will happen." The statement Ortiz attached to his email falsely showed that the account's value was $200,174 as of March 26, 2012 (purportedly comprised of Yelp, Inc. (valued at $70,200), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $69,990), and the "Brickstone JTF IPO Fund" (valued at $59,984)). MV responded to Ortiz and stated, "[w]hat a relief to see recovery." In reality, on March 27, 2012, shares of Yelp, Inc. were sold from MV and VE's account and shares of GSV Capital Corp. were purchased for a total of $63,750.[11] The value of MV and VE's account as of March 31, 2012 was $58,262.82.

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[10] MV and VE's account also had a margin balance of $64.02.

[11] No other transactions occurred in MV and VE's account until they liquidated the account in late September 2013.

3. Ortiz's Misrepresentations During the Relevant Period

Ortiz's misrepresentations to MV and VE continued once he became associated with First Liberties in April 2012. During the Relevant Period, Ortiz sent MV and VE another four falsified account statements that he created. Ortiz knew that he had falsely inflated the value of MV and VE's account and misrepresented the securities held in the account at the time he sent each of the four false account statements. At no time did Ortiz inform MV or VE of the true value of their JTF account.

On May 9, 2012, MV emailed Ortiz to "see how things are going." Ortiz did not respond. MV emailed him again on May 18, 2012, to ask Ortiz for "a simple and direct number for how much you have recovered and how the portfolio is doing." Ortiz responded that same day and stated that, "at the end of the day, they are running the portfolio, we did well but not so well with Nasdaq today because of the volume, tomorrow I will send you the portfolio so that you can see the growth."

On June 8, 2012, Ortiz emailed MV and VE a fictitious account statement (the first of the Relevant Period and fifth overall) from his personal email account. This statement falsely showed that the account's value was $190,340 (purportedly comprised of GSV Capital (valued at $69,010), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $65,900), and the "Brickstone JTF IPO Fund" (valued at $55,430)). In reality, MV and VE's account only held shares of GSV Capital (valued at $32,757.96 as of May 31, 2012). MV responded to Ortiz's email containing the fictitious account statement and expressed concerns to Ortiz regarding losses in the account set forth in Ortiz's falsified account statements. MV stated that "we have not seen the light in more than a year and things are going down . . . what we would like to do is to recover the initial investment and get out." Ortiz responded to MV's email on June 12, 2012, stating that he thought "everything would calm down" and suggesting that they talk later that day.

On July 12, 2012, MV again emailed her concerns to Ortiz and stated that "we have been waiting for your call for weeks." MV further informed Ortiz that she had received a large stack of papers from JTF's clearing firm, which "honestly, I do not have the time or the ability to read." MV reminded Ortiz that VE had invested all of her savings in the JTF account, repeated that she wanted to know the status of the account, and asked Ortiz "to send in writing what the situation is in round numbers if we decide to liquidate our positions today." Ortiz emailed that Brickstone was reviewing the account and that he would get MV and VE the information they requested.

On August 13, 2012, Ortiz emailed MV and VE another fictitious account statement from his Brickstone email account (the second of the Relevant Period and sixth overall). In his email, Ortiz falsely stated that the account "keeps growing in value . . . I don't want to get ahead of myself but in the next seven days we will have very good news with one of the positions that would radically change the outlook of the portfolio." The account statement falsely showed that the account's value was $192,949 (purportedly comprised of GSV Capital (valued at $61,305), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $75,570), and the "Brickstone JTF IPO Fund" (valued at $56,074)). In reality, MV and VE's account only held shares of GSV Capital (valued at $31,631.94 as of July 31, 2012).

Ortiz emailed MV and VE another fictitious account statement from his personal email account on October 24, 2012 (the third of the Relevant Period and seventh overall). Ortiz falsely wrote that "in spite of the drop in the market the portfolio held up because the strategy that we have maintained has worked." The account statement falsely showed that the value of MV and VE's account was $192,844 as of September 30, 2012 (purportedly comprised of GSV Capital (valued at $53,935), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $81,570), and the "Brickstone JTF IPO Fund" (valued at $57,339)). In reality, MV and VE's account only held shares of GSV Capital (valued at $26,785.92 as of September 30, 2012).

On January 9, 2013, Ortiz emailed MV and VE another falsified account statement from his Brickstone email account (the fourth of the Relevant Period and eighth overall). The account statement falsely showed that the value of MV and VE's account was $200,794 as of December 31, 2012 (purportedly comprised of GSV Capital (valued at $60,635), the "Brickstone JTF Expeculative Fund (Apple St)" (valued at $81,670), and the "Brickstone JTF IPO Fund" (valued at $58,489)). In reality, MV and VE's account only held shares of GSV Capital (valued at $26,157.39 as of December 31, 2012).

4. Ortiz's Subsequent Misrepresentations

Ortiz's pattern of deceit continued after the Relevant Period. On March 26, 2013, Ortiz emailed MV and VE another fabricated account statement (Ortiz's ninth in total) from his Brickstone email account, which falsely represented that the value of their account was $219,268 as of March 21, 2013. Ortiz wrote that this purported account value did not include "an additional nine percent return which is not reflected in this cutoff." In reality, MV and VE's account was valued at $25,767.25 as of February 28, 2013 (and not the approximately $239,000 stated by Ortiz). Based upon Ortiz's misrepresentations, MV and VE believed that they had earned $29,000 in profits on the account, and they asked Ortiz to transfer the profits to MV's bank account.

Ortiz did not transfer any funds to MV's bank account as requested. Instead, on April 11, 2013, he told MV and VE that Brickstone was transferring their account from the "JTF platform" to a platform with the Royal Bank of Canada because "that platform is more complete in information and services for clients." Although Ortiz fabricated this story, he emailed MV and VE paperwork to complete the purported transfer. MV and VE completed the paperwork and sent it back to Ortiz. Despite receiving these documents, Ortiz required that MV and VE sign the forms a second time (before a notary public) and added another document for them to complete. MV and VE did so, but Ortiz still did not transfer any funds to MV's bank account.

During the next several months, MV continued to express concern regarding the account, and Ortiz reassured her that she would not lose any money and that "the transfer from one place to another takes time." Further, Ortiz continued to make excuses for his inability to send MV and VE their alleged profits, falsely telling them that the FBI had seized JTF's funds causing a delay. On August 11, 2013, MV emailed Ortiz and requested that he "immediately explain once and for all the size of the actual investment, liquidate all of our positions, and send the money according to instructions that I will send you." Several days later, VE emailed Ortiz to express her concerns regarding the JTF account and that all of her savings were invested in the account.

Ortiz assured VE that her and MV's money would be sent within 15 days and urged VE to stay calm.

On August 21, 2013, MV logged onto her JTF account online for the first time since sending JTF the initial deposit in April 2011, which showed an account balance of $39,413.20. MV emailed Ortiz a screen shot of the account information and stated, "we don't understand." Ortiz continued to mislead MV and VE by telling them that the value of their account was approximately $239,000, reassuring them that they would receive all of their funds, and even providing them with a fictitious confirmation number for a wire transfer to MV's bank account purportedly containing the funds in the JTF account.

In late September 2013, MV and VE traveled to New York and appeared unannounced at Ortiz's office. Ortiz continued to reassure them that they would be made whole, and went so far as to meet them at his bank to give them a cashier's check (which the bank refused to cash because Ortiz's account was overdrawn). On September 26, 2013, MV and VE liquidated the securities in their JTF account and closed it, and received $47,156.09.

B. Legal Analysis

The Hearing Panel found, and Ortiz does not dispute, that he made material misrepresentations and omissions related to MV and VE's JTF account during the Relevant Period. We find that Ortiz made material misrepresentations in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.[12]

Exchange Act Section 10(b) prohibits individuals from using or employing, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance. Exchange Act Rule 10b-5 further prohibits individuals from making "any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security."[13] Exchange Act Rule 10b-5(b). To establish a

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[12] The Hearing Panel found that Ortiz made material misrepresentations and omissions in connection with MV and VE's JTF account. As set forth below, we find that Ortiz violated Exchange Act Section 10(b), Exchange Act Rule 10b-5(b), and FINRA Rules 2020 and 2010 through his intentional misrepresentations of material facts to MV and VE. Consequently, we need not decide whether he also omitted to disclose material facts, in violation of these provisions, because he had a duty to disclose such facts to MV and VE as an unregistered associated person of First Liberties.

[13] Violations of these provisions also must involve the use of any means or instrumentalities of communication in interstate commerce, the mails, or of any national security exchange. This element is satisfied here because Ortiz communicated his misrepresentations through email. *See United States v. Barlow*, 568 F.3d 215, 220 (5th Cir. 2009) (stating that "it is beyond debate that the Internet and email are facilities or means of interstate commerce").

violation under Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that Ortiz misrepresented a material fact, with scienter, in connection with the purchase or sale of securities. *See Dep't of Enforcement v. Ahmed*, Complaint No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *56 (FINRA NAC Sept. 25, 2015), *appeal docketed*, SEC Admin. Pro. File No. 3-16900 (Oct. 13, 2015) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996)).

FINRA Rule 2020 prohibits FINRA members and their associated persons from effecting "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." FINRA Rule 2020 "captures a broader range of activity" than Exchange Act Rule 10b-5. *See Dep't of Enforcement v. Fillet*, Complaint No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *38 (FINRA NAC Oct. 2, 2013), *aff'd in relevant part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015). A violation of the Exchange Act, the rules promulgated thereunder, or FINRA's rules constitutes a violation of FINRA Rule 2010.[14] *See Ahmed*, 2015 FINRA Discip. LEXIS 45, at *89 n.83.

We find that Ortiz violated Exchange Act Section 10(b), Exchange Act Rule 10b-5(b), and FINRA Rules 2020 and 2010 for his material misrepresentations made during the Relevant Period in connection with MV and VE's JTF account. First, the information that Ortiz misrepresented to MV and VE during the Relevant Period was indisputably material. Ortiz repeatedly lied about the account's value, composition, and activity in the account, each of which any reasonable investor would have considered crucial. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (holding that misstated or omitted facts are material if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation or omission important in making an investment decision and disclosure of the misstated or omitted fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available").

Second, Ortiz made his misrepresentations in connection with the purchase and sale of securities. The "in connection with" requirement has been interpreted broadly to effectuate the remedial purposes of the Exchange Act. *See SEC v. Zandford*, 535 U.S. 813, 819 (2002); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 574 U.S. 71, 85 (2006) (stating that for liability under Section 10(b) and Exchange Act Rule 10b-5, "it is enough that the fraud alleged 'coincide' with a securities transaction" and that investors properly alleged fraud in connection with the purchase or sale of securities where misrepresentations caused investors to hold onto securities); *Orlando Joseph Jett*, 57 S.E.C. 350, 392-95 (2004) (holding that "[w]hen fraudulent practices and the purchase or sale of securities are not independent events but instead coincide, they are sufficiently related to give rise to liability for securities fraud. . . . When a person portrays activities as securities purchases and sales that, in fact, are no such thing, that

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[14] FINRA Rule 0140 provides that all of FINRA's rules shall apply equally to members and associated persons and that associated persons shall have the same duties and obligations as member firms.

conduct can, and here does, constitute securities fraud" under Exchange Act Section 10(b) and Exchange Act Rule 10b-5); *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *13-17 (Nov. 4, 2009) (affirming findings that respondent made material misrepresentations to customers who already owned stock at issue, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010), *aff'd*, 416 F. App'x 95 (2d Cir. 2011); *Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9 (NASD NAC May 18, 2004) (finding that respondent violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and predecessor to FINRA Rule 2020 by making misrepresentation regarding a guaranteed rate of return after customer purchased security to lull customer into a false sense of security regarding his investment).

Third, Ortiz acted with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining scienter as a "mental state embracing intent to deceive, manipulate or defraud"). During the Relevant Period, Ortiz intentionally created four fake account statements for MV and VE's JTF account, and on several occasions, he amplified these misrepresentations in the emails accompanying the fictitious account statements. Ortiz admittedly made misrepresentations to MV and VE to conceal from them that their JTF account had lost much of its value. That he did so to allegedly prevent MV and VE from discovering the losses in their JTF account until Ortiz could recover them (purportedly by getting JTF's owner to make MV and VE whole) does not obviate that he intentionally deceived MV and VE.[15]

Ortiz's misrepresentations concerning the value of MV and VE's account, as well as the purported securities held and purchases and sales in that account, lulled MV and VE into believing that their account was experiencing losses much less significant than were actually occurring and later earning profits. Ortiz's misrepresentations prevented MV and VE from making a fully informed decision regarding whether to liquidate the account and caused them to hold their funds in the account longer than they may have had they known the true value of the account. We thus find that Ortiz violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.[16]

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[15] The record does not substantiate Ortiz's claim that he attempted to recover MV and VE's funds.

[16] Enforcement alleged that Ortiz willfully violated Exchange Act Section 10(b) and Exchange Act Rule 10b-5. The Hearing Panel did not make any willfulness finding with respect to this misconduct, but did so in connection with Ortiz's failure to update his Form U4. For the same reasons that we find Ortiz acted willfully by failing to update his Form U4, we find that he acted willfully when he intentionally made material misrepresentations, in violation of the Exchange Act and the rules promulgated thereunder. *See* Part IV *infra*. Ortiz is thus subject to statutory disqualification. *See* Exchange Act Section 3(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)).

IV. Ortiz Willfully Fails to Amend his Form U4

In July 2010, a former employee of Equivalores filed a complaint against Ortiz and the firm in a Florida state court. It alleged that Ortiz owed the former employee $3.5 million in commissions and that Ortiz issued the plaintiff a worthless check for $1 million in an attempt to pay a portion of the commissions. Ortiz had knowledge of this suit in July 2010. On November 10, 2011, the court entered a default judgment against Ortiz totaling $4,293,196.60. The plaintiff subsequently submitted this judgment to the New York County clerk to enforce it against Ortiz in New York. The New York County Clerk entered judgment against Ortiz on January 5, 2012.

Ortiz had the Florida judgment vacated on April 4, 2012. The plaintiff filed an amended complaint in Florida, which Ortiz answered on June 12, 2012. On September 18, 2012, the Florida court entered a final judgment of $4,983,606.25 against Ortiz. Ortiz was aware of this judgment no later than December 2012. On March 7, 2013, a New York state court issued a final judgment granting full faith and credit to the judgment and entered a judgment against Ortiz in New York for $4,983,606.25, plus interest. This judgment remains unsatisfied.

Question 14.M of Form U4 asks, "Do you have any unsatisfied judgments or liens against you?" When Ortiz first associated with First Liberties on April 13, 2012, he answered "No" to Question 14.M. Ortiz, however, never updated his Form U4 to reflect the judgment entered against him. Every associated person must keep his Form U4 current at all times. *See* FINRA By-Laws, Article V, Section 2(c); FINRA Rule 1122 ("No member or person associated with a member shall file with FINRA information with respect to membership or registration which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or fail to correct such filing after notice thereof."). Amendments to an associated person's Form U4 must be made within 30 days after learning of the facts or circumstances giving rise to the amendment. *See* FINRA By-Laws, Article V, Section 2(c). Form U4 "is critical to the effectiveness of the screening process used to determine who may enter (and remain in) the industry. It ultimately serves as a means of protecting the investing public." *See Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *25-26 (Nov. 9, 2012) (holding that representative's failure to disclose numerous judgments, liens, and bankruptcy filings violated FINRA's rules).

We find that Ortiz failed to amend his Form U4, in violation of FINRA Rules 1122 and 2010 and FINRA's By-Laws. Ortiz knew about the judgment no later than December 2012, but failed to amend his Form U4 to disclose the judgment. Ortiz's claim that he was unaware of his obligation to update his Form U4 does not absolve him of liability for his disclosure failure. *See ACAP Financial, Inc.*, Exchange Act Release No. 70046, 2013 SEC LEXIS 2156, at *82 (July 26, 2013) (rejecting respondent's claims of lack of understanding and ignorance of FINRA's rules), *aff'd*, 783 F.3d 763 (10th Cir. 2015). Further, the record shows that in April 2012, First Liberties explained to Ortiz the importance of his disclosure obligations (including those in response to Question 14 of Form U4). And in September 2012, First Liberties reminded Ortiz that it needed to be informed of any changes in the information on Ortiz's Form U4.

We also find that Ortiz's failure to amend his Form U4 was willful. "A willful violation under the federal securities laws simply means that the person charged with the duty knows what he is doing." *See Tucker*, 2012 SEC LEXIS 3496, at *41 (internal quotes omitted). We need not find that Ortiz "was aware of the rule he violated or that he acted with a culpable state of mind." *See id.* Rather, Ortiz's failure to disclose the judgment is willful if he "of his own volition provides false answers on his Form U4." *See id.* Here, although Ortiz knew about the judgment, he never amended his Form U4 to disclose it. We further find that Ortiz omitted material information from his Form U4 when he failed to disclose the judgment. *See id.* at *47 (holding that respondent's judgments, liens, and bankruptcies were material information because it "significantly altered the total mix of information made available" and cast doubt on respondent's ability to manage his financial affairs). Ortiz's willful failure to update his Form U4 to include this material information renders him statutorily disqualified. *See* Exchange Act Section 3(a)(39)(F) (providing that a person is subject to statutory disqualification if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization); 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)).

V. Sanctions

A. Fraudulent Misrepresentations

The Hearing Panel barred Ortiz for his misrepresentations and omissions. On appeal, Ortiz concedes that he should be sanctioned for his misconduct, but argues that a bar is excessive. We disagree and bar Ortiz for his fraudulent misrepresentations.

Conduct that violates the antifraud provisions of the federal securities laws is "especially serious and subject to the severest of sanctions under the securities laws." *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *36 (Mar. 31, 2016) (*citing Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)). In determining the appropriate sanctions for this misconduct, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions.[17] For intentional misrepresentations or material omissions of fact, the Guidelines recommend that the adjudicator strongly consider barring an individual.[18] Where mitigating facts predominate, the guidelines recommend suspending an individual in any or all capacities for a period of six months to two years.[19]

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17 *See FINRA Sanction Guidelines* (2015) [hereinafter "Guidelines].

18 *Guidelines*, at 88.

19 *Id.*

We find that barring Ortiz is appropriate under the circumstances and is supported by the presence of numerous aggravating factors. Ortiz intentionally engaged in a pattern of deceit both before, during, and after the Relevant Period.[20] In total, Ortiz created and sent MV and VE nine fictitious account statements, a number of which were accompanied by additional misrepresentations designed to reassure MV and VE and lull them into believing that their JTF account was performing much better than it actually was and to conceal the large losses sustained in the account.[21] Ortiz also sent MV and VE emails separate from his fictitious account statements that contained additional misrepresentations, and he continued to lie to and mislead MV and VE even after they discovered the true value of their account. MV and VE, who were unsophisticated investors, trusted Ortiz and relied upon him to invest their money.[22] Indeed, Ortiz's long friendship with VE allowed Ortiz to make his fraudulent misrepresentations to MV and VE for as long as he did. Ortiz has blamed McHale, JTF's owner, and even MV and VE for not reviewing their account online to discover its true value.

We reject Ortiz's alleged mitigating factors, and find that aggravating—not mitigating—facts predominate. Ortiz claims that he attempted to initially help MV and VE with their investment and then attempted to shield them from the large losses in their account while he attempted to make them whole behind the scenes. He thus argues that because he was not motivated by financial gain or greed (and earned nothing from MV and VE's account), a sanction of less than a bar is appropriate. We disagree. Even if Ortiz's primary motivation was not his own direct financial gain, this does not mitigate Ortiz's pattern of misrepresentations during the course of almost two years. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *26 (Feb. 24, 2012) (rejecting respondent's argument that he never acted in an attempt to gain monetarily and never gained anything monetarily and holding that "[t]he absence of monetary gain . . . is not mitigating, as our public interest analysis focus[es] . . . on the welfare of investors generally") (internal quotations omitted). Likewise, we reject Ortiz's claim that he accepted responsibility for his misconduct and offered to make MV and VE whole (through his offer that they join him in a lawsuit against JTF, its owner, and McHale). Ortiz only reluctantly accepted responsibility when he could no longer continue to lie to MV and VE after his bank informed the parties that Ortiz's account was overdrawn. We do not find this

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[20] *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 13). We reject Ortiz's argument that his wrongdoing was "not the product of some thought-out plan" and began in October 2011 as "an impetuous response to an inquiry." Ortiz's initial misrepresentation was in response to MV's straight forward request that he provide her with the value of the account. Ortiz did not immediately respond to this request, but instead waited almost 24 hours until he began the first in his long string of misrepresentations. And after his initial misrepresentation, Ortiz intentionally and knowingly continued his pattern of misrepresentations to MV and VE until September 2013.

[21] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

[22] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 19).

mitigating, and we do not give any credit to Ortiz's belated offer that MV and VE join him in suing other parties.[23]

We further reject Ortiz's claim that because his wrongdoing arose out of a personal relationship rather than a professional one, a sanction less than a bar is appropriate. As set forth above, we find it aggravating that Ortiz made his misrepresentations in the context of his longtime friendship with VE, which enabled him to continue his misconduct for an extended period.[24] Ortiz's claim that he provided MV and VE with professional help and money at some point has no bearing on our analysis and is unrelated to the egregious nature of Ortiz's misrepresentations. Nor does the fact that Ortiz fled Venezuela under stressful circumstances and started over in the United States. *See John M.E. Saad*, Exchange Act Release No. 76118, 2015 SEC LEXIS 4176, at *20-21 (Oct. 8, 2015) (rejecting argument that outside stress caused respondent's misconduct and serves to mitigate such misconduct and stating that respondent's "course of conduct was not the type that one might associate with stress, such as an unthinking reaction during a stressful moment that is later redressed; instead, his deceptive conduct demonstrated a high degree of intentionality over a long period of time"), *appeal docketed*, No. 15-1430 (D.C. Cir. Nov. 20, 2015). Ortiz's losses in his own JTF account and claim that he "was a victim" of JTF, its owner, and McHale, are similarly not mitigating.[25]

Finally, Ortiz argues that he has had an "unblemished career" and in 2002 was elected to a two-year term to the board of directors of the Venezuelan broker-dealer association. It is well-established that a lack of disciplinary history is not mitigating, and any positions that Ortiz may have held do not serve to mitigate his misconduct. *See Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006).

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[23] *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 2). Ortiz further argues that he did not cause the losses in MV and VE's account. Although the record does not support a finding that Ortiz was the proximate cause for MV and VE's substantial losses (such that restitution is an appropriate remedy), we note that Ortiz's misrepresentations deprived MV and VE of the opportunity to make a fully informed decision to liquidate their account, and to take potential action against JTF while it was still in business, prior to their discovery of Ortiz's misconduct in September 2013.

[24] We also reject Ortiz's claims that we should consider that he was never a JTF employee and "has never been employed by or at, or done any work for, any broker-dealer." During the Relevant Period, it is undisputed that Ortiz was an associated person of First Liberties, and as such, he was obligated to comply with the securities laws and regulations at issue here. Moreover, we reject Ortiz's argument given the role that he played for MV and VE in connection with their JTF account.

[25] Ortiz's argument that he should not be barred because JTF's owner and McHale purportedly were never barred is also without merit. *See Christopher J. Benz*, 52 S.E.C. 1280, 1285 (1997) ("It is well recognized that the appropriate sanction depends upon the facts and circumstances of each particular case and cannot be determined precisely by comparison with actions taken in other proceedings or against other individuals in the same proceeding.").

B. Willful Failure to Disclose Judgment

The Hearing Panel stated that it would have imposed upon Ortiz a suspension of up to two years and a fine of an unspecified amount for his willful failure to disclose the judgment filed against him. The Guidelines for failing to amend Form U4 suggest a fine of $2,500 to $73,000 and that we consider suspending the individual for five to 30 business days. In egregious cases (such as those involving repeated failures to file, failing to disclose a statutory disqualifying event or customer complaint, or where the failure to disclose delayed a regulatory investigation), the Guidelines recommend a longer suspension or a bar.[26] Factors to consider include, among other things, the nature and significance of the information.[27]

We find that Ortiz's failure to amend his Form U4 was serious. Ortiz failed to disclose a large, unsatisfied judgment entered against him, which deprived potential employing firms and regulators of significant information concerning Ortiz's financial condition. *See N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at *30 (May 8, 2015) (stating that "the duty to amend a Form U4 assures regulatory organizations, employers, and members of the public that they have all material, current information"), *aff'd*, No. 15-3729 (6th Cir. June 29, 2016); *Tucker*, 2012 SEC LEXIS 3496, at *32 (stating that an individual's financial problems "raise concerns about whether [he] could responsibly manage his own financial affairs, and ultimately cast doubt on his ability to provide trustworthy financial advice and services to investors relying on him to act on their behalf as a securities industry professional."). Ortiz knew about the judgment, and First Liberties told him that he needed to keep the information on his Form U4 current, but he failed to do so. Under the facts and circumstances, we find that a $10,000 fine and 30 business-day suspension in all capacities are appropriately remedial sanctions. However, in light of the bar imposed for Ortiz's misrepresentations, we do not impose these sanctions.

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[26] *Guidelines*, at 69-70.

[27] *Id.* at 69.

VI. Conclusion

We find that Ortiz willfully violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by making material misrepresentations. We further find that Ortiz willfully failed to disclose on his Form U4 an unsatisfied judgment, in violation of Article V, Section 2(c) of FINRA's By-Laws and FINRA Rules 1122 and 2010. Accordingly, we bar Ortiz in all capacities and order that he pay costs in the amount of $5,309.73, plus appeal costs of $1,207.26.[28]

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[28] The bar is effective as of the date of this decision.