FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MERCER HICKS III (CRD No. 245170), Respondent.	Disciplinary Proceeding No. 2017052867301 Hearing Officer–MC **EXTENDED HEARING PANEL DECISION** May 19, 2021

Respondent Mercer Hicks III is barred from associating with any FINRA member firm in any capacity for making unsuitable recommendations to five senior customers in violation of customer-specific and reasonable-basis suitability obligations. He is ordered to pay disgorgement of $38,812.60 and costs.

Appearances

For the Complainant: Payne L. Templeton, Esq., Michael Perkins, Esq., Matthew Minerva, Esq., and Kay Lackey, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Mercer Hicks III, *pro se*

I. Introduction

The issue in this disciplinary proceeding is whether Respondent Mercer Hicks III violated FINRA's suitability rule when he recommended high-risk, illiquid investments to five senior customers.

FINRA Rule 2111 obligates a broker to evaluate the suitability of an investment before recommending it. The obligation has two prongs. One is customer-specific. It requires the broker to appraise the investment in light of each customer's investment profile—including the customer's age, financial situation, investment objectives, risk tolerance, and needs—to decide if there is reason to believe the investment is suitable for that particular customer. To fulfill customer-specific suitability obligations, a broker's recommendation must align with the

customer's best interests and financial profile.[1] The other prong, referred to as a reasonable-basis obligation, requires the broker to conduct a reasonably diligent investigation of the investment's features and risks to ascertain whether it could be suitable for at least some customers. Reasonable-basis suitability focuses on the broker's understanding of the recommendation, not on the customer.[2]

After carefully reviewing the evidence and testimony presented at a hearing conducted by videoconference, the Hearing Panel concludes that Hicks failed to satisfy both his customer-specific and reasonable-basis suitability obligations in the recommendations he made to the five customers.[3]

II. Findings of Fact

A. The Respondent

Hicks is a veteran broker. He began his career in 1972, and has been continuously engaged in the securities business for almost 50 years.[4] He has been registered as a General Securities Representative through FINRA member firm Southeast Investments, N.C., Inc., since April 2014 and therefore is subject to FINRA's jurisdiction. The firm's headquarters are in Charlotte, North Carolina. Hicks works out of its Pinehurst, North Carolina branch office.[5] Before associating with Southeast Investments,[6] from April 2009 until April 2014, he was registered through FINRA member firm Capital Investment Group, Inc.[7] He associated with a number of firms prior to joining Capital Investment.[8]

Hicks resides in Southern Pines, North Carolina, near Pinehurst, his hometown.[9] In recent years, his clientele has consisted primarily of retired senior citizens.[10] It is his practice to use the directories of residents of retirement communities in and around Southern Pines to identify

---

[1] *Dep't of Enforcement v. McGee*, No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *57, (NAC July 18, 2016), *aff'd,* Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *petition for review denied*, 733 F. App'x 571 (2d Cir. 2018).

[2] *Id.* at *59–61.

[3] The hearing was held by videoconference pursuant to SR-FINRA-2020-027, SR-FINRA-2020-042, and SR-FINRA-2021-006, which temporarily amended FINRA Rules 9261 and 9830 to permit conversion of FINRA's in-person disciplinary hearings to videoconference hearings because of health and safety concerns caused by the COVID-19 pandemic.

[4] Hearing Transcript ("Tr.") 856–57; Joint Stipulations ("Stip.") ¶ 1.

[5] Tr. 56–57; Complainant's Exhibit ("CX-_") 1, at 1.

[6] Tr, 58; CX- 1, at 2.

[7] Tr. 58; CX-1, at 3.

[8] Tr. 66; CX-2.

[9] Tr. 66; CX-1, at 1.

[10] Stip. ¶ 3.

potential customers and then to introduce himself to them by making cold calls.[11] For a number of years before joining Southeast Investments, Hicks primarily recommended that his clients invest in liquid securities like variable annuities, mutual funds, and tax-free bonds.[12]

In 2014, Hicks changed his focus and began to recommend to his clients that they invest in real estate investment trusts, or REITs, and a business development corporation, Business Development Company of America ("BDCA").[13] A REIT is an entity that owns or manages income-producing real estate.[14] BDCA is a finance company that invests in middle-market companies, not real estate.[15] Hicks' rationale for the change was his concern about stock market volatility, so he decided to recommend REITs "thinking they were safer."[16] From June 2014 through September 2017, Hicks derived more than sixty percent of his commissions from recommending and selling investments in REITs and BDCA.[17] They all were "non-traded," that is, not bought and sold on a national exchange.

B. The Origin of the Investigation

In late September 2017, WM, the nephew of Hicks customer MM, called FINRA's Senior Helpline. The Helpline is a resource FINRA provides to senior citizens who have questions or problems relating to their investment accounts at FINRA member firms.[18] WM, handling his aunt's affairs through a power of attorney, was trying to sell the shares of two non-traded REITs she had purchased through Hicks. Then 90 years old, MM was suffering from dementia and needed to sell her shares to help pay the costs of her nursing home care.[19] WM was concerned when he discovered that Hicks had put more than half of MM's cash into the two REITs, the first when she was 87 years old and the second when she was 88. WM contacted the REIT companies but was unable to liquidate the two investments.[20]

When FINRA Principal Examiner Thomas Halstead received the report of WM's Helpline call, he opened an examination into Hicks' recommendations and sales of securities to his customers.[21] During the investigation, Halstead learned of a second call to the Helpline by

---

[11] Tr. 67; Stip. ¶ 2.

[12] Tr. 82.

[13] Tr. 69–70.

[14] Tr. 68–69; Stip. ¶ 4.

[15] CX-10, at 1.

[16] Tr. 226, 907.

[17] Tr. 83–4; CX-117, at 2–3.

[18] Tr. 673.

[19] Tr. 672–75; CX-89.

[20] Tr. 794–95; CX-41.

[21] Tr. 675–76.

PL, who called on behalf of her 85-year old mother, Hicks customer NM, in April 2018.[22] Reviewing the report of the call, Halstead became concerned that Hicks had placed 90 percent of NM's investments into non-traded REITs.[23]

Halstead interviewed customers, reviewed account documents, and conducted an on-the-record interview of Hicks.[24] After completing the investigation, Halstead referred the findings to Enforcement, which then filed the Complaint in December 2019.[25]

C. The Complaint and Answer

The two-cause Complaint alleges that Hicks violated FINRA Rules 2111 and 2010 when he recommended purchases of high-risk, illiquid non-traded securities offered by several REITs and BDCA to five senior customers, ranging in age from 73 to 88 years, without first satisfying the suitability rule's requirements.[26] The first cause of the Complaint addresses Hicks' customer-specific suitability obligations. It charges that Hicks' recommendations were specifically unsuitable for each of the customers considering their ages, financial situations, and investment profiles. It further alleges that Hicks' recommendations overly concentrated the investments of three of the customers in speculative, illiquid investments. It describes all five as having limited investment knowledge and low or moderate risk tolerances.[27]

The second cause of the Complaint addresses Hicks' reasonable-basis suitability obligations. It alleges that Hicks failed to conduct a reasonably diligent investigation of the investments he recommended. Consequently, he was ignorant of significant features of the securities, including their numerous inherent risks, and did not have a reasonable basis to believe the recommendations were suitable for anyone.[28]

In his Answer, Hicks denies the allegations generally.[29] Hicks admits, however, that he made the recommendations. He also admits that he recommended that four of the customers liquidate investments in variable annuities, which he had previously recommended to them, and reinvest the funds in the REITs and BDCA.[30]

---

[22] Tr. 681; CX-90.

[23] Tr. 683.

[24] Tr. 677–80.

[25] Tr. 676; Complaint ("Compl.").

[26] Compl. ¶¶ 1, 3, 7.

[27] Compl. ¶¶ 76, 77.

[28] Compl. ¶¶ 82, 83.

[29] Answer ("Ans.") ¶ 1.

[30] Ans. ¶ 11.

D. The Securities

From June 2014 through July 2017, Hicks recommended eight non-traded REITs to four of his customers and recommended BDCA to two of them. Consequently, the total invested by the five customers came to nearly $665,000: Customer TB made one investment in BDCA for $25,000; Customer NC made an investment in BDCA and another in a REIT, for a total of $42,600; Customer MM invested a total of $50,400 in two REITs; Customer RT invested $87,683 divided among five different REITs; and Customer NM made eight investments in six different REITs for a total of $459,272.[31]

1. The Non-Traded REITs

A REIT uses investors' capital to purchase a portfolio of properties, such as office buildings, hotels, and apartments. Most REITs invest in a specific type of real estate. For example, a REIT may invest in retail properties, apartment communities, office buildings, or healthcare facilities.[32]

There are two types of publicly available REITs: traded and non-traded. Traded REITs are bought and sold on a national securities exchange. Non-traded REITs are not. All of the REITs Hicks recommended were non-traded.[33] Investors in exchange-traded REITs can buy or sell shares relatively easily, but non-traded REITs are illiquid.[34] An investment in a non-traded REIT generally does not become liquid until the REIT liquidates assets or lists its shares on an exchange, and these events, if they happen, may not occur for more than 10 years after an investor purchases shares.[35] A non-traded REIT may allow investors to redeem their shares but redemption opportunities are limited. The REIT may require that shares be redeemed at a discount, so an investor who redeems shares does not recover the amount invested. A REIT has the discretion to terminate a share-redemption program without notice. Non-traded REITs often charge high fees and may make distributions to investors from their offering proceeds—the investors' money—reducing the value of shares and the cash available to the REIT to purchase assets.[36]

The prospectuses of the non-traded REITs Hicks recommended describe the inherent risks of investing in unequivocal terms. Typically, they warn that investing in them "involves a high degree of risk," one of which is "a complete loss" of investments, and refer the reader to a multi-page section titled "Risk Factors." The prospectuses also contain suitability standards

[31] CX-115.

[32] CX-84, at 1.

[33] CX-81, at 1.

[34] Tr. 93–94.

[35] CX-84, at 1.

[36] Tr. 97–100; CX-84, at 1–2.

warning that the REITs are suitable only for persons who "will not need immediate liquidity" and repeat that investing "involves a high degree of risk."[37]

2. Business Development Company of America

Business development companies are entities that invest in the debt and equity of small and medium-sized enterprises unable to acquire capital easily. Non-traded business development companies are not publicly traded and, like non-traded REITs, are illiquid and risky investments.[38]

BDCA is a non-traded business development company.[39] As stated on the first page of its prospectus, an investment in BDCA is speculative with "a high degree of risk, including the risk of a complete loss of investment." The prospectus also warns that investors "should not expect to sell" their shares, and if they are able to do so, they will "likely receive less" than they paid for them. It states that the company has a redemption program but explains that it is limited, and investors may not be able to access the funds invested "for an indefinite period of time."[40]

The BDCA prospectus contains a section describing the company's suitability standards. It makes clear that BDCA is a high-risk investment. It states that BDCA's stock is "suitable only as a long-term investment for persons of adequate financial means who have no need for liquidity in this investment."[41] It specifies that BDCA "will not sell shares" to residents of certain states "unless they meet special suitability standards." For North Carolina residents to qualify, they must have, at a minimum, both liquid assets of $85,000 and gross income of $85,000, or a minimum liquid net worth of $300,000 ("North Carolina suitability requirements").[42]

As the parties stipulate, both BDCA and the non-traded REITs Hicks recommended are illiquid and expose investors to a high level of risk.[43]

E. Hicks' Failure to Understand Non-Traded REITs and BDCA

According to Hicks, he was first "introduced" or "exposed" to non-traded REITs and BDCA by Capital Investment in 2013. Capital Investment directed Hicks to "learn this business" from a company, American Realty Capital ("ARC"). Hicks had never recommended REITs

---

[37] *E.g.*, CX-5, at 1, 3, 37–74.

[38] Stip. ¶ 5.

[39] Stip. ¶ 8.

[40] CX-10, at 1.

[41] CX-10, at 3.

[42] CX-10, at 4–5.

[43] Stip. ¶ 5.

before.[44] He testified that Capital Investment "sold" him "on the entire concept" of recommending non-traded REITs. The firm sent him to New York and to Myrtle Beach to attend "sales conferences, due diligence conferences, etcetera."[45] He acquired most of his understanding of non-traded REITs and BDCA from ARC's sales and marketing personnel, who emphasized their potential benefits, not their risks.[46] As a result, he "was led to believe that these were stable . . . income oriented investments"[47] and assumed that they would provide his customers an annual income of six percent of their investment.[48]

Hicks' understanding was seriously flawed. When he recommended BDCA, for example, he testified that he "did not understand the risks, that's for sure." He did not know that BDCA was a non-traded business development corporation.[49] He mistakenly thought BDCA was a non-traded REIT, and made his recommendations of BDCA with that misunderstanding.[50] Hicks considered non-traded REITs to be conservative or moderate investments.[51]

Hicks testified that the reason he believed that BDCA was a REIT was that ARC's owner and wholesalers "introduced" BDCA to him, and he thought ARC offered "nothing but real estate investment trusts." Thus, he "did not catch the fact that BDCA was not a real estate investment trust" even though the BDCA prospectus makes it clear that it is not a REIT but, rather, "a specialty finance company formed to make debt and equity investments in middle market companies."[52] He thought BDCA invested in "real estate of all types,"[53] including "income producing properties, apartments, businesses, offices, what have you."[54]

Hicks testified that ARC's representatives assured him that the shares of BDCA and the REITs would be liquid in three to five years. He did not know that the prospectuses provided very different information about the prospects of near-term liquidity.[55] For example, a standard disclosure in the ARC-sponsored REIT prospectuses states that there is "no guarantee that distributions will be paid . . . there is no guarantee of any return on your investment." Another

---

[44] Tr. 50–51, 95.

[45] Tr. 156.

[46] Tr. 141–43.

[47] Tr. 51.

[48] Tr. 209, 261, 293–94.

[49] Tr. 208–09.

[50] Tr. 201–03.

[51] Tr. 161.

[52] Tr. 203–04.

[53] Tr. 206–07.

[54] Tr. 208.

[55] Tr. 106.

disclosure states "No public market exists for our shares of common stock, nor may a public market ever exist and our shares are, and may continue to be, illiquid."[56]

Hicks testified that he simply "trusted" that Capital Investment's compliance department conducted due diligence reviews of the REITs when they were made public. Yet he conceded that some of the offerings he recommended were not issued until several years after he left Capital Investment.[57] Aside from reading a few pages of a REIT's prospectus, he testified, he left it to his firm's compliance department to review the prospectuses and check into the background of the REITs.[58] Hicks conceded that he did not know what, if any, due diligence either Capital Investment or Southeast Investments performed to ascertain the suitability of the non-traded REITs and BDCA investments he recommended.[59]

F. The Customers and Hicks' Recommendations

1. Customer TB

Customer TB, born in 1933, is a retired minister living alone in Whispering Pines, North Carolina.[60] TB made two investments recommended by Hicks. The first was a variable annuity in 2010.[61] The second was a purchase of BDCA shares in December 2014.[62]

TB and her now-deceased husband first met Hicks ten to twelve years ago when he came to their house and introduced himself.[63] In October 2010, Hicks, then associated with Capital Investment, recommended that TB purchase a variable annuity Hicks favored, offered by Jackson National Life Insurance Company ("Jackson Life"), with a six percent guaranteed income benefit.[64]

In 2014, Hicks, by then associated with Southeast Investments, recommended that TB invest in BDCA.[65] TB made two withdrawals totaling $26,114 from her variable annuity account[66] and in December 2014 purchased shares of BDCA for $25,000.[67]

---

[56] CX-8, at 1.

[57] Tr. 156–57.

[58] Tr. 142–43.

[59] Tr. 147–48.

[60] Tr. 472–73.

[61] CX-34.

[62] Stip ¶ 8.

[63] Tr. 476.

[64] Tr. 185–86.

[65] Stip. ¶ 8; CX-14a., at 1.

[66] Tr. 492–93; CX-34, at 80, 87.

[67] Tr. 188–89; CX-14a, at 10.

On TB's new account form for the investment, Hicks checked the boxes describing her investment profile. He marked preservation of capital as her objective and indicated that she had a conservative risk tolerance, the second lowest of the risk tolerance ratings on the form. Hicks indicated that her investment knowledge was "low." He also checked a box stating that her "time horizon" for the investment was 10 years or more.[68] When asked why he chose that span of time for TB, who was by then 81 years old, Hicks replied that "she was in good health" and he assumed "she would live a long life."[69]

On the form, Hicks estimated TB's annual income to be between $50,000 and $74,999, and her liquid assets in the range of $150,000 to $249,999. Hicks checked the box estimating her net worth at $500,000 but wrote in $650,000.[70] In her testimony, TB confirmed that Hicks' entries on the form accurately reflected her investment objective, annual income, and liquid assets.[71]

TB understood, from incorrect information Hicks provided, that BDCA was involved in "[s]ome kind of real estate" investments she surmised could have been "buildings of some sort."[72] TB confirmed, as Hicks admitted, that he did not explain the risks of investing in BDCA, and did not warn her that she could lose her entire investment.[73]

TB signed the BDCA subscription form under a statement representing that she met the North Carolina suitability requirements.[74] She also initialed six separate acknowledgments, including, again, that (i) she met her state's suitability thresholds for investing in BDCA; (ii) investors may not be able to access their money until BDCA completed a liquidity event, which might not occur; (iii) she did not expect to be able to sell her shares; and (iv) if she did, she would likely receive less than she paid for them.[75] TB testified that she did not know what she was acknowledging at the time. She testified that she wanted "all [her] money to be liquid." TB testified she "can't believe" she would "sign anything that dumb."[76]

Sometime in late 2020 or early 2021, TB wrote Hicks a letter asking him to liquidate her shares so that she could reinvest her funds. Hicks went to her home and told her he could not do it, because BDCA shares were not like stocks that can be traded. Hicks said he would try to get

---

68 Tr. 193–94; CX-14a, at 3.

69 Tr. 195.

70 Tr. 196–99; CX-14a, at 4.

71 Tr. 484–89.

72 Tr. 483.

73 Tr. 495.

74 Tr. 489–91; CX-14a, at 6.

75 CX-14a, at 6–8.

76 Tr. 491.

her money out as soon as he could. At the time of the hearing she was still unable to liquidate her shares.[77]

2. Customer NC

Customer NC, born in 1934, is a widow, retired school nurse and teacher, residing in Pinehurst, North Carolina. Described by her daughter, HH, as having severely impaired hearing and high blood pressure, NC did not testify at the hearing, but HH did.[78] In 2019, HH obtained a power of attorney for NC and has since handled NC's finances.[79]

NC has been Hicks' customer for more than 20 years.[80] She met Hicks in the 1990s when he was a financial advisor to her now-deceased husband.[81] Over the years, Hicks recommended, and NC made, three investments: (i) a Jackson Life variable annuity with a guaranteed income benefit; (ii) BDCA; and (iii) an ARC-sponsored non-traded REIT, Realty Finance Trust, Inc. ("ARC Finance").[82]

NC was satisfied with her annuity.[83] Nonetheless, in October or November 2014, when she was 80 years old, Hicks recommended withdrawing $27,600 from her annuity account to purchase non-traded shares of BDCA, and she did so.[84] At Hicks' request, on October 30, 2014, NC wrote a note "To whom it may concern" stating that she had directed Hicks "to sell a portion of my annuity and invest the money into a real estate trust." The note says NC was "tired of stock market risks" and that she knew she would pay "a penalty of approximately $800" for taking money out of the annuity. She wrote "This is my decision and mine alone."[85] NC told FINRA Principal Examiner Halstead in an interview that Hicks told her what to write in the note.[86] Hicks admitted asking NC to write the note and providing her with the words to describe her investment, incorrectly, as a real estate trust.[87] But when asked if "This is my decision and mine alone" were NC's words or his, he prevaricated. First, he said he did not "precisely recall." Then he said, "They were not my words," while admitting that other customers wrote similar

---

[77] Tr. 496–499.

[78] Tr. 810–11; Stip. ¶ 9.

[79] Tr. 813.

[80] Stip. ¶ 9.

[81] Tr. 809, 812.

[82] Tr. 220–21, 813–16, 822; CX-15a, at 1.

[83] Tr. 703.

[84] Tr. 220–21; Stip. ¶ 10.

[85] Tr. 222–23; CX-15a, at 3.

[86] Tr. 708.

[87] Tr. 223–24.

notes when he recommended they withdraw funds from their variable annuities to invest in BDCA or non-traded REITs.[88]

Hicks filled out the suitability section in the paperwork associated with NC's BDCA purchase.[89] He characterized NC's investment objective as income, her risk tolerance as moderate, and her investment purpose as "save for retirement," although she was already retired. He estimated NC's income to be between $25,000 and $50,000, her net worth more than $500,000, and her liquid assets between $100,000 and $500,000.[90] However, when Halstead interviewed her, NC said her risk tolerance was conservative[91] and that Hicks had overestimated her net and liquid assets.[92] NC's daughter, HH, confirmed this, testifying that NC's net worth was less, not more, than $500,000, and that her liquid assets were in the range of $50,000 to $100,000, not $100,000 to $500,000.[93]

In June 2015, when NC was 81 years old, Hicks made his third recommendation and she invested $15,000 in the non-traded REIT ARC Finance.[94] In the account application for NC's investment, Hicks stated her risk tolerance was moderate and her investment horizon was 10 years or more, despite her age. Hicks estimated NC's liquid net worth at $225,000.[95] Considering the evidence as well as both Hicks' and HH's testimony, we find that Hicks inflated NC's risk tolerance, net worth, and liquid assets, in the account applications he prepared for these two investments.

Hicks told NC that ARC Finance invested in income-producing real estate and would pay her a six percent annual return on her investment.[96] He did not inform her of the risks listed in the prospectus, including that the company had no established sources of financing. He did not inform NC that, according to the prospectus, ARC Finance was an emerging-growth company, investing in it involved "a high degree of risk," and investors should purchase shares only if they could afford a complete loss. He did not inform NC that ARC Finance could pay investors distributions from any source "including unlimited amounts from the offering proceeds."[97]

Even though NC's initials appear in a Southeast disclosure letter acknowledging that she understood ARC Finance involved a high degree of risk and possible loss of her investment, she

---

[88] Tr. 227–28.

[89] Tr. 241; CX-15a at 4, 8–9.

[90] CX-15a, at 8.

[91] Tr. 706; CX-86, at 9.

[92] Tr. 704.

[93] Tr. 818.

[94] Tr. 221; Stip. ¶ 11; CX-16, at 1.

[95] CX-16, at 3, 5.

[96] Tr. 258.

[97] Tr. 262–64; CX-12, at 1.

told Halstead that she did not understand that at the time.[98] She said she trusted Hicks, and signed documents where he told her to.[99]

The ARC Finance prospectus' minimum suitability thresholds include requirements that investors have a net worth of at least $250,000 or gross annual income of $70,000 plus a net worth of at least $70,000.[100] NC, as Hicks conceded, did not meet these minimum suitability requirements.[101] In addition, NC did not meet the North Carolina suitability requirements for investing in BDCA.[102] Hicks did not tell her this, and did not warn her of the risks of investing in BDCA.[103]

3. Customer MM

Customer MM, born in 1927, is a retired civil servant living in a nursing home in Pinehurst, North Carolina. Her nephew, WM, obtained a power of attorney to handle her affairs in 2016 when MM was in a rehabilitation facility recuperating from injuries sustained from multiple falls. She moved to the nursing home in 2017 after the onset of dementia.[104] She did not testify at the hearing.

Hicks acquired MM as a customer in 2010 after introducing himself to her with a cold call. As with other customers, Hicks initially recommended that she purchase a Jackson Life variable annuity, with diversified subaccounts and a guaranteed income benefit, which Hicks thought was a reasonably conservative investment for her. MM continued as Hicks' customer when he associated with Southeast Investments in 2014.[105]

In July 2014, when MM was 87 years old, on Hicks' recommendation she invested $37,900 in a non-traded REIT, American Retail Centers of America, Inc. ("ARC Retail").[106] According to Hicks, MM made the investment within an IRA and he filled out an IRA application for her.[107] In the suitability section, Hicks estimated MM's annual income to be between $25,000 and $50,000, her net worth more than $500,000, her liquid assets between $100,000 and $500,000, and identified her investment objective as capital appreciation. Hicks described MM's risk tolerance as moderate, stated her investment time horizon to be

---

[98] Tr. 707; CX-86, at 9.

[99] Tr. 708; CX-86, at 8.

[100] CX-12, at 3.

[101] Tr. 256–58.

[102] Tr. 238–39.

[103] Tr. 247.

[104] Tr. 780–83.

[105] Tr. 112–113.

[106] Stip. ¶ 13.

[107] Tr. 169–70.

intermediate, and her investment knowledge as good.[108] Where the form asked for a dollar amount of assets held away from Southeast Investments, Hicks wrote zero, indicating that she had no funds held at another firm.[109]

In June 2015, Hicks recommended, and MM purchased, shares of another non-traded REIT, American Realty Capital New York City REIT, Inc. ("ARC NYC") for $12,500.[110] The investment profile he entered on this account application differed from the application he had filled out just eleven months earlier. On this one, Hicks wrote that MM owned $150,000 in short-term assets held away from Southeast Investments.[111] On a Southeast REIT disclosure form accompanying the 2015 account application, he wrote that MM's net worth was $400,000 and her liquid assets were $150,000.[112]

When questioned about his 2015 description of MM's investment profile, Hicks revealed that he did not obtain the information from her. Hicks admitted that, "in hindsight," he should have asked her directly about things like her income and net worth to determine whether MM met the prospectus' minimum suitability requirements.[113] Hicks admitted that MM did not say she had $150,000 in short-term assets held away from Southeast Investments.[114] When pressed, he was unable to explain how, eleven months after her July 2014 investment, she acquired $150,000 in assets held away.[115] MM also did not tell Hicks she had $150,000 in liquid assets. He testified that he inferred the amount of her liquid assets from "her lifestyle" and her recent purchase of a condominium. Hicks conceded that buying a condominium would decrease, not increase, MM's liquid assets.[116] Hicks also admitted that MM never told him she had a net worth of $400,000.[117] As for describing MM's investment objective as capital appreciation, instead of income, Hicks stated that MM, who was then 88, had an objective of "a combination of income and capital appreciation."[118]

After WM obtained the power of attorney to handle his aunt's financial affairs, he had several email exchanges and phone conversations with Hicks. WM asked for help in reissuing some dividend checks that had been sent to MM and never cashed. In a July 2017 email to Hicks, WM explained that his aunt had been diagnosed with dementia and had not cashed dividend

---

[108] CX-17, at 14.

[109] Tr. 175–76; CX-17, at 15.

[110] Stip. ¶ 14.

[111] CX-18, at 4.

[112] CX-18, at 5.

[113] Tr. 122–24.

[114] Tr. 122.

[115] Tr. 175–76.

[116] Tr. 119–20.

[117] Tr. 121.

[118] Tr. 124–25.

checks she received for about a year.[119] The effort was only partially successful. WM sent a final email to Hicks in August 2017 and has had no contact with him since then.[120]

In September 2017, WM contacted Southeast Investments to express his concerns about MM's non-traded REIT holdings. He explained that MM had limited resources and needed to apply for Medicaid to remain at her nursing home. He learned that her ownership of the REITs would prevent her from qualifying for Medicaid assistance. He attempted to liquidate MM's investments to help pay for her care but was initially unsuccessful.[121]

After examining MM's financial situation, WM concluded that when Hicks made his REIT recommendations to his aunt, her financial profile was not as Hicks had portrayed it in the application documents. MM's net worth was less than $200,000, not $400,000. She did not have $150,000 in liquid assets, but less than $100,000.[122] Comparing WM's and Hicks' testimony about MM's investor profile, which Hicks admits he based partly on inference, and considering Hicks' inability to explain the basis for his estimation of her liquid assets, we conclude that Hicks inflated MM's June 2015 financial profile. Thus, we find that MM's two investments in non-traded REITs, totaling $50,400, constituted approximately 50 percent of her liquid assets before she made the investments.[123]

By the end of the year, WM was able to liquidate his aunt's two REITs.[124] He eventually received $34,000 for her investment in ARC Retail, and around $10,000 for the ARC NYC shares.[125]

4. Customer RT

Customer RT, a widow and retired high school teacher, born in 1941, lives with her companion in a retirement home in Burlington, North Carolina.[126] RT had four daughters, one of whom died in 2012.[127] RT inherited part of her daughter's estate. Hicks contacted her by a cold call in early 2013. Having just received funds from the inheritance, RT agreed to meet with Hicks. She thought he could help her decide what to do with the funds.[128]

---

[119] Tr. 789; CX-114, at 15.

[120] Tr. 789–90.

[121] Tr. 790–92; CX-41.

[122] Tr. 790–95.

[123] Tr. 794–95; CX-41.

[124] Tr. 792.

[125] Tr. 798–99.

[126] Tr. 525–26, 530.

[127] Tr, 527.

[128] Tr. 532.

RT's prior investing experience was limited to a retirement account through her school district, into which she made the minimum allowable contributions.[129] RT told Hicks she was interested in "non-risky and conservative" investments and her risk tolerance was "ultra-conservative."[130] Hicks assured RT that he only recommended annuities to his clients and that his recommendations would protect her money so that on her death, her children would inherit it.[131] Shortly after their first conversation, on Hicks' recommendation, RT purchased two Jackson Life variable annuities in February 2013, the first for $40,000 and the second for $28,736.[132] Approximately 90 percent of the funds came from her daughter's estate.[133]

In 2014 and 2015, Hicks recommended five more investments, totaling $87,683, in non-traded REITS: (i) one in American Realty Capital Healthcare II, Inc. ("ARC Healthcare"); (ii) one in ARC Retail; and (iii) three in ARC NYC.[134]

RT does not recall what Hicks told her about the REITs, except that he did not describe them as high risk. If he had, she would not have invested in them. RT considered Hicks reliable, depended on his expertise, and decided to go along with his recommendations so long as they were conservative. She was interested in moderate growth and avoiding risk.[135]

Hicks claimed that RT was "worried about the stock market" and asked him if there was an alternative. Hicks told her that she could earn six percent interest in REITs.[136] He testified that he did not give her specific information about what a REIT invested in, because RT "was relatively naive with investments."[137]

In July 2014 Hicks recommended that RT invest $25,000 in ARC Healthcare and $25,000 in ARC Retail.[138] In the new account applications and subscription agreements for both, Hicks described her investment objective as preservation of capital and her risk tolerance as moderate. Hicks viewed her as a conservative investor with low investment knowledge. He estimated her annual income to be in the range of $25,000 to $49,999, her liquid assets between $100,000 and $149,000, and her net worth between $250,000 and $499,999.[139]

---

[129] Tr. 533.

[130] Tr. 529, 535.

[131] Tr. 535.

[132] Tr. 271–73, 537–39; CX-35; CX-36.

[133] Tr. 528.

[134] CX-115.

[135] Tr. 542–43.

[136] Tr. 292.

[137] Tr. 292–93.

[138] Tr. 275, 551; CX-115.

[139] Tr. 277–81; CX-27, at 3–4; CX-28, at 3–4.

Hicks did not inform RT, because he did not know, that she did not meet the minimum suitability requirements described in the prospectuses. He called this an "oversight," and "poor judgment." Nonetheless, Hicks asserted, RT was living with a companion, "on his premises at his expense" who "could easily afford" the risks.[140] He admitted, however, that RT never told him that he could consider her companion's assets when estimating her net worth.[141]

In the spring of 2015, Hicks recommended that RT make three investments in ARC NYC.[142] The first, in March, was for $10,000. In her new account form for the purchase, Hicks identified RT's investment objective as capital appreciation. When asked if RT told him she had changed her objective from preservation of capital, as stated in her investment profile eight months earlier, Hicks said she had not, but that because RT had moved into a retirement home with her companion, he "was of the strong impression that her finances had improved greatly."[143]

In the new account application, Hicks significantly increased his estimate of RT's liquid assets. Nine months earlier, he represented that her liquid assets were in the range of $100,000 to $149,999. In 2015, however, he valued them between $250,000 and $499,999.[144] In the suitability section of an accompanying Southeast Investments disclosure letter, Hicks wrote "425,000" as the value of RT's net worth and also the total of her liquid assets.[145] When asked, Hicks stated that he did not "know where the number came from," although he claimed he did not "just make [it] up." But he acknowledged that some of his entries to her investment profile were "guesswork."[146]

Hicks recommended, and RT made, two more investments in ARC NYC, both in April 2015. One was for $5,000 that RT funded by a withdrawal from a variable annuity, paying a $160 penalty.[147] The other was for $22,683. Hicks believed RT purchased it with inherited funds.[148] The account documents for all three of RT's ARC NYC investments describe the same objectives and investment profile for RT.[149]

In RT's three ARC NYC account documents, Hicks also elevated RT's investment knowledge from low to moderate. He explained that he "assumed she had learned something

---

[140] Tr. 288–89.

[141] Tr. 289–90.

[142] Tr. 298–99; CX-115.

[143] Tr. 300–01; CX-29, at 3.

[144] Tr. 307; CX-29, at 4.

[145] Tr. 309; CX-29, at 5.

[146] Tr. 311–12.

[147] Tr. 315–17; CX-30, at 3.

[148] Tr. 325–26; CX-31.

[149] Tr. 325; CX-29, at 3; CX-30, at 4; CX-31, at 3.

from having been in the variable annuities for a couple of years" and from inheriting her daughter's investment account.[150] Hicks made other assumptions in filling out documents for RT's ARC NYC investments. He wrote that RT had $250,000 in short-term assets held away from Southeast Investments.[151] He assumed they were short term, and he could not recall if RT told him the amount.[152]

RT's testimony challenged Hicks' changes to her investment profile in 2015. She insisted that her investment objective was preservation of capital and "never varied from that."[153] RT was interested in moderate growth and did not want to "knowingly invest in anything that was high risk." RT "depended on his expertise" and was willing to do whatever Hicks recommended "just so long as it's conservative." If Hicks had described his recommendations as high risk, she "would not have invested in them."[154] Her investment knowledge, which Hicks rated as low in 2014, but moderate in 2015, had not changed: it was always low. Hicks' entry stating she had $250,000 in short-term assets held away was false; she had none.[155]

RT testified that Hicks' estimate of her liquid assets on the new account form for her March 2015 ARC NYC purchase was "inflated," and that Hick's entry showing her net worth to be $425,000 was "much higher" than her actual net worth.[156] Hicks had written that her reason for investing in a REIT instead of a mutual fund or other investment was to "Hedge stock investments." RT said she did not write those words, and had "no idea" what they meant.[157] RT confirmed, as Hicks conceded in his testimony, that he did not inform her that the REITs carried a high degree of risk, and that she should not invest if she could not afford to lose all of her funds. Hicks did not mention that RT might be overconcentrating her funds in speculative securities.[158]

RT made it clear that she "[a]bsolutely" did not tell Hicks he could include her companion's assets in calculating her net worth or liquid assets. RT insisted that Hicks knew that she and her companion kept their assets "[t]otally separated."[159] When RT finished her direct testimony, Hicks did not cross examine. Instead, he stated that RT is "a very honest person."[160]

[150] Tr. 301–02.

[151] CX-29, at 4; CX-30, at 5; CX-31, at 4.

[152] Tr. 306–07.

[153] Tr. 553.

[154] Tr. 543.

[155] Tr. 565–67.

[156] Tr. 570–71.

[157] Tr. 571.

[158] Tr. 542–43, 559–561, 575.

[159] Tr. 531–32.

[160] Tr. 586.

The Hearing Panel agrees. Based on our assessment of RT's forthright demeanor, we find her testimony, where it differs from that of Hicks, to be more credible. We find Hicks' explanations of the changes he made to RT's investment profile in the account applications for her three ARC NYC investments to be inconsistent and unsatisfactory. We conclude that Hicks improperly inflated his representations of RT's net worth and liquid assets in those documents. Hicks made unfounded assumptions that changes had occurred to improve her financial situation, and simply made up the numbers.

5. Customer NM

Customer NM, born in 1932,[161] described by her daughter as a "housewife by trade,"[162] once owned and operated a mobile home park with her first husband. Before meeting Hicks, NM had some investment experience from a brokerage account she obtained from her first husband when they divorced, and another she inherited when her second husband died in 2006.[163] She lived near Pinehurst, North Carolina from 2009 until her death in August 2018.[164]

Hicks acquired NM as a customer after a cold call.[165] Hicks recommended a Jackson Life variable annuity, which she opened in June 2010 with a $172,000 investment. Following Hicks' recommendations, she made additional investments in the annuity.[166] By the end of September 2010 its value had appreciated to $500,802.[167] In February 2012, Hicks recommended that NM purchase a second variable annuity for $50,000.[168] At the time, Hicks considered the variable annuities to be reasonably conservative investments, and appropriate for her.[169]

When Hicks associated with Southeast Investments in April 2014, NM was 81 years old.[170] During the following three years, Hicks recommended, and NM made, eight investments in six different non-traded REITs,[171] five sponsored by ARC: ARC Retail, ARC NYC, American Realty Capital Global Trust, Inc. ("ARC Global"), American Realty Capital Hospitality Trust ("ARC Hospitality"), and Phillips Edison Grocery Center REIT II, Inc. ("Phillips Edison").[172] He also recommended one other non-traded REIT, Steadfast Apartment REIT III

---

[161] Tr. 593.

[162] Tr. 595.

[163] Tr. 596–98.

[164] Tr. 593.

[165] Tr. 594.

[166] Tr. 362–63; CX-33, at 3.

[167] CX-33, at 35.

[168] Tr. 373–75; CX-32, at 88–89.

[169] Tr. 365–66.

[170] Tr. 337–38.

[171] Tr. 686–87; Stip. ¶ 16.

[172] Tr. 338–39; Stip. ¶¶ 18–22.

("Steadfast").[173] NM funded many of these investments by withdrawals from her variable annuities. She was 84 years old in July 2017 when she made her last REIT purchase for $124,000, bringing her total investments in non-traded REITs to $459,272.[174]

Hicks acknowledged that his recommendations between June 2014 and July 2017 caused NM to move large sums from her liquid variable annuities to illiquid non-traded REITs.[175] Her third non-traded REIT purchase, of ARC NYC for $60,000 in December 2014, entirely liquidated the variable annuity she purchased in 2012. NM's last REIT investment of $124,000 in July 2017 left only $4,000 in her remaining annuity.[176]

Hicks justified the recommendations because, he said, NM told him that "she had invested independently in real estate and had more success than she had in the stock market."[177] Hicks claimed that he and NM shared the view that investing in real-estate-related securities would be preferable to buying stocks because it would expose her to less volatility.[178]

In the account application for her June 2014 investment of $53,850 in the ARC Global REIT, Hicks estimated NM's income as between $50,000 to $100,000; net worth at over $500,000; liquid assets at over $500,000; and her time frame for the investment six to ten years. Hicks claimed the estimates were based on what NM told him, and that his indication of the investment time frame, despite her age, was based on her good health. He indicated that the purpose of the investment was to generate income. Hicks identified NM's investment objectives, in order of priority, as capital appreciation, income, preservation of capital, speculation and trading profits.[179]

In late July 2014, Hicks recommended, and NM purchased, shares of ARC Retail for $39,800. Hicks' estimates for NM's income, net worth, and liquid assets, and the time frame for the investment, were the same as he had indicated on the new account application for her purchase of ARC Global in the previous month: annual income between $50,000 and $100,000; net worth of over $500,000; liquid assets of over $500,000; time frame of six to ten years.[180]

In December 2014, Hicks recommended, and NM purchased, $60,000 in ARC NYC. On the account application for this purchase, Hicks checked a box indicating that NM had an annual

---

[173] Stip. ¶¶ 23–25.

[174] Tr. 631–32; CX-115; Stip. ¶ 16.

[175] Tr. 339–40.

[176] Tr. 377; CX-32, at 78; CX-33, at 364.

[177] Tr. 341.

[178] Tr. 342.

[179] Tr. 414; CX-19, at 2, 6–7.

[180] Tr. 443–44; CX-20, at 7.

income between $75,000 and $99,999; net worth of over $500,000 but wrote in the figure $1,600,000; liquid assets of over $500,000; and no assets held away.[181]

Just over a year later, in July 2015, in the suitability section of the application for NM's investment in Phillips Edison REIT, Hicks estimated NM's annual income at $75,000; net worth at $1.6 million; liquid assets at $800,000; and stated that her reason for investing was to "hedge stock portfolio." Hicks stated that NM had zero assets held away. He also indicated NM, then 83 years old, would not need the principal invested within the next decade.[182] Hicks testified that he could not recall if NM told him her liquid assets were $800,000.[183]

A month after this, in August 2015, in the suitability section of NM's application to invest $40,000 in ARC Hospitality, Hicks estimated NM's liquid assets at $1.1 million, not $800,000. He also stated that she had $800,000 in assets held away.[184]

When asked at the hearing what happened between July and August to change his estimate of NM's liquid assets so dramatically, Hicks testified initially that he presumed she had sold variable annuities.[185] When asked how selling variable annuities, which are liquid, would increase her liquid assets, Hicks at first claimed that he did not know if variable annuities are liquid assets. Hicks then testified that he could not explain how selling a liquid asset can increase one's liquid assets. He testified that he did not know why his estimate of NM's liquid assets increased from $800,000 to $1.1 million in a month.[186] He denied the increase was related to his recommending additional purchases of non-traded REITs.[187]

A year later, in June 2016, Southeast Investments questioned the disparity between two of Hicks' estimates of NM's liquid assets in a single application for a $30,000 purchase of shares of the Steadfast REIT. In the suitability section of the new account application, Hicks wrote that NM had $1.1 million in liquid assets, but on an accompanying document, a REIT purchase disclosure form, Hicks wrote that she had $800,000 in liquid assets. Southeast Investments' operations manager emailed Hicks that the liquid assets figures needed to match.[188] After receiving the email, Hicks crossed out the $800,000 estimate of NM's liquid assets, wrote in the

---

[181] Tr. 445–46; CX-21, at 4.

[182] Tr. 447–48; CX-22, at 4–5.

[183] Tr. 450.

[184] Tr. 452–53; CX-23, at 5–6.

[185] Tr. 418.

[186] Tr. 419–421.

[187] Tr. 421.

[188] Tr. 421–27; CX-100.

figure $1,100,000, and initialed the change.[189] Hicks made the change after NM had signed the application on June 16. NM did not initial the change or acknowledge it.[190]

Hicks knew that NM funded most of her numerous investments in non-traded REITs either from her variable annuities or cash. Thus, between June 2014 and July 2017, NM's liquid assets were decreasing, not increasing.[191] By withdrawing funds from her variable annuities, NM incurred penalties. For example, when NM withdrew $30,000 from an annuity to purchase shares of Steadfast REIT, she wrote a note saying she was aware there was a penalty of $600.[192] This was a surrender fee. But it was only part of the penalty assessed for the withdrawal. There was a second surrender charge in the amount of $638.74, and recapture charges of $199.60 and $196.44, bringing NM's actual penalty to approximately $1,600.[193] NM's note, however, only refers to a $600 surrender charge.

Hicks acknowledged that when he recommended non-traded REITs to NM, he did not warn her of the high degree of risk involved, and that he did not know that investing in them involved a high level of risk,[194] even though the first few pages of each prospectus contain virtually identical warnings making the high risk and illiquidity of investing crystal clear.[195] He also admitted that he did not warn NM of the risk that she was overconcentrating her assets in illiquid non-traded REITs.[196]

Until 2015, NM was vibrant and independent, according to her daughter PL.[197] Then her health declined, and she began to experience seizures. A seizure likely caused a fall resulting in a severe head injury in February 2018.[198] She was hospitalized and then, unable to care for herself, transferred to a skilled nursing facility.[199] At that time PL obtained a power of attorney to handle her mother's finances.[200]

---

[189] Tr. 429–30; CX-24, at 5.

[190] Tr. 430–32.

[191] Tr. 453–54.

[192] Tr. 614–15; CX-24, at 2. The amount of this surrender charge was actually $628.60.

[193] Tr. 616–19; CX-33, at 335–336.

[194] Tr. 442 (ARC Global); 452 (Phillips Edison); 457 (ARC Hospitality); 460 (Steadfast).

[195] CX-5, at 1, 3 (ARC Global); CX-7, at 1–3 (ARC Hospitality); CX-8, at 1–3 (ARC NYC); CX-9, at 1, 3 (ARC Retail); CX-11, at 1, 4 (Phillips Edison); CX-13, at 1, 3 (Steadfast).

[196] Tr. 462–63.

[197] Tr. 598.

[198] Tr. 599–600.

[199] Tr. 603.

[200] Tr. 595.

After PL activated the power of attorney, and as executor of her mother's estate, she familiarized herself with NM's finances and investments.[201] Her assessment of NM's financial profile contrasted starkly with Hicks' varying representations in the account documents. PL noted that when NM made her first REIT purchase in 2014, her annual income was about $60,000 and it remained roughly the same through her last purchase in 2017. NM's REIT purchases decreased her liquid assets dramatically. PL testified that Hicks' estimates of NM's income and assets on the new account forms he completed were inaccurate. Hicks' estimate of $75,000 for NM's annual income was too high. His estimate of NM's liquid assets at $800,000 was also too high. And the estimate of her net worth at $1.6 million was "extremely too high."[202]

After considering the testimony of PL and Hicks, assessing its substance as well as the demeanor of each, the Hearing Panel credits PL's testimony about her mother's investment profile over that of Hicks. Hicks was unable to explain why his estimate of NM's liquid assets jumped so dramatically in a single month. His initial explanation—that he presumed NM sold variable annuities—does not withstand scrutiny. He finally stated that he did not know. We note that Hicks had a financial motive to make NM's assets on her new account applications appear to qualify her for the investments he was recommending. Of the $35,683 in commissions Hicks gained from REIT investments by all five customers, $26,574 came from NM's transactions.[203]

In March 2018, a month after NM was hospitalized, PL sought to liquidate some of NM's REIT holdings to pay for additional treatments for her, and found that she could not.[204] She called FINRA's Helpline for assistance.[205] PL also called the REITs and learned that she could gain access to her mother's funds only if NM was deemed disabled or had died.[206] According to PL, NM could not understand why she was unable to access her funds. PL wanted to hire a private duty nurse to provide care so that NM could return home, as she wished, but PL could not afford the cost and the inability to access NM's investments made it impossible.[207] PL learned that she would have to petition the board of directors of each of the REITs and ask for approval to liquidate shares. The process went on for more than 18 months after NM died in August 2018.[208]

---

[201] Tr. 594–95.

[202] Tr. 641–46.

[203] CX-116.

[204] Tr. 625–26.

[205] Tr. 627–28.

[206] Tr. 628–29

[207] Tr. 659–60.

[208] Tr. 628–30.

III. Conclusions of Law

A. Hicks Failed to Fulfill His Customer-Specific Suitability Obligations

The first cause of action in the Complaint alleges that Hicks made unsuitable recommendations to the five senior customers in violation of FINRA Rules 2111 and 2010.

FINRA Rule 2111(a) describes the obligations of a registered representative to ascertain the customer-specific suitability of an investment before recommending it. In pertinent part, it states:

> [A]n associated person must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

Supplementary Material 2111.05(b) states that an associated person must "have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile, as delineated in Rule 2111(a)."

Supplementary Material 2111.01 links the obligation of complying with the suitability rule with the ethical requirement of fair dealing. It states that the "suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct."

These standards require a registered person, before recommending a security, to analyze it in relation to the customer's investment profile. In this case, the key elements of the five customer profiles were age, risk tolerance, investment objectives, financial situation and needs, and investment experience.

FINRA has long recognized that a customer's age and "life stage . . . are important factors to consider in performing a suitability analysis," noting that with age, investors' "time horizons, goals, risk tolerance . . . may change" and liquidity "often takes on added importance."[209] When they invested, the youngest of the five customers was 73 years old. The others were in their 80s, and the eldest was 88. Hicks' repeated 10-year or more estimates of the time horizons for their investments were not reasonable.

---

[209] FINRA Regulatory Notice 07-43, 2007 FINRA LEXIS 42, at *4–5 (Sept. 2007).

None of the five customers had a tolerance for high-risk investments. Yet Hicks made the recommendations even though the REITs and BDCA were all high risk. The prospectuses all warn that investors should be able to afford to lose their entire investments. Such recommendations have been recognized as unsuitable for customers situated similarly to the five here: retired, 73 years old and older, with conservative risk investment objectives.[210]

Hicks simply did not know of or pay attention to the risks the prospectuses made abundantly clear. He did not even review the prospectuses. At best, he testified, he glanced at a few pages. When confronted about his ignorance of the many risks the prospectuses describe, he disparaged risk disclosures in general when he testified that every prospectus he has seen in his long career "usually has similar language."[211] This testimony suggests that Hicks "rashly marginalized" the prospectuses' risk warnings as "boilerplate legalese" of little importance, and heedlessly substituted his own judgment that the recommendations were not high risk.[212]

In almost every instance, by the express terms of the issuers' minimum suitability requirements, and the state-required minimum suitability requirements for some, Hicks' customers did not qualify to make the investments he recommended. Although recommending an investment to a customer who does not meet state-prescribed requirements is not by itself a violation of FINRA's suitability rule, FINRA's National Adjudicatory Council ("NAC") has held that a state's suitability standards are useful guides to making a suitability determination.[213] Similarly, issuers' minimum suitability requirements put a "representative on notice that the issuer has flagged the product as, for example, risky, illiquid, or complex" and a representative should take this into account.[214] Hicks did not.

Furthermore, for three customers—MM, RT, and NM—Hicks' recommendations excessively concentrated their liquid assets in high-risk, illiquid securities. The SEC has held that a broker's recommendations were unsuitable when they resulted in a widow in her late fifties, with a modest income and net worth, investing significant portions of her portfolio in securities that were too risky for her.[215] Similarly, the NAC has held that recommendations to retired senior investors seeking safe investments that excessively concentrate their portfolios in high-risk, illiquid securities are unsuitable.[216]

---

[210] *Dep't of Enforcement v. Escarcega*, No. 2012034936005, 2017 FINRA Discip. LEXIS 32, at *54 (NAC July 20, 2017).

[211] Tr. 295.

[212] *Dep't of Enforcement v. Noard*, No. 2012034936101, 2015 FINRA Discip. LEXIS 29, *8–9 (OHO July 17, 2015), *aff'd*, 2017 FINRA Discip. LEXIS 15 (NAC May 12, 2017) (finding a respondent failed to perform a proper suitability analysis when he discounted the numerous disclosures in the offering documents for a high-risk, illiquid security that was appropriate only for investors who could afford to lose their entire investment).

[213] *Escarcega*, 2017 FINRA Discip. LEXIS 32, at *57 n.33.

[214] *Noard*, 2017 FINRA Discip. LEXIS 15, at *20–21.

[215] *Jack H. Stein*, Exchange Act Release No. 47335, 2003 SEC LEXIS 338, at *9–10, 15 (Feb. 10, 2003).

[216] *Escarcega*, 2017 FINRA Discip. LEXIS 32, at *3–4, 45.

The testimony and evidence presented at the hearing lead us to conclude, as we summarize below, that Hicks failed to comply with the requirement that he tailor his recommendations to ensure they were suitable to each customer's financial situation, needs, and investment objectives.[217]

1. Hicks Made an Unsuitable Recommendation of BDCA to Customer TB

The BDCA prospectus makes clear that it is a high-risk, long-term investment. BDCA's suitability section specifies the company does not sell shares to North Carolina residents who do not meet the state's suitability requirements. When asked if he knew about the suitability thresholds for North Carolina residents when he recommended BDCA to TB, Hicks testified "I don't think I was aware."[218] Hicks admitted that TB did not meet these minimum suitability standards. Hicks testified that he relied on his firm's compliance department, because it was privy to his clients' financial profiles, to determine whether a customer met an offering's suitability requirements. Acknowledging that "[m]aybe it was a mistake," he trusted his firm and "these wholesalers that sold this junk."[219]

TB did not know that the places on the subscription form she initialed were acknowledgments that: (i) she met her state's suitability thresholds for investing in BDCA; (ii) her shares were illiquid; (iii) she did not expect to be able to sell her shares; and (iv) if she did sell them she would probably receive less than she paid for them. When shown the first page of the BDCA prospectus describing the risks, Hicks said he "[p]robably" did not read it. If he had, he testified, he "wouldn't have invested in this stuff."[220] Unaware of these risks, Hicks could not explain them to TB.[221]

It was not until TB asked Hicks to liquidate her shares that he informed her that he could not do so.

We find it relevant that TB did not meet the North Carolina suitability requirements, and that Hicks was unaware and therefore unable to explain that to her. Given TB's investment profile, including her age, investment objective, risk tolerance, and her wish to have all liquid investments, we conclude that Hicks' recommendation of BDCA to TB was unsuitable for her and violated the requirements of Rule 2111(a). Hicks also failed to meet the suitability rule's requirement of fair dealing and therefore failed to abide by the ethical sales practices and high standards of professional conduct required by Rule 2010.

---

[217] *Department of Enforcement v. Newport Coast Securities*, No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *141–42 (NAC May 23, 2018), *aff'd*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911 (Apr. 3, 2020).

[218] Tr. 212–13.

[219] Tr. 216–18.

[220] Tr. 210.

[221] Tr. 209–12.

2. Hicks Made Unsuitable Recommendations of BDCA and the Non-Traded ARC Finance REIT to Customer NC

NC did not meet either the North Carolina suitability requirements for state residents investing in BDCA or ARC Finance's minimum suitability requirements. And, based on NC's age, investment objective of income, moderate risk tolerance, liquid assets and annual income, we find that Hicks' recommendations that NC invest $27,500 in shares of BDCA and $15,000 in ARC Finance were unsuitable.

Again, Hicks was unaware of the risks described in detail in the issuers' prospectuses. According to Hicks, he just "glanced at several pages" of the BDCA prospectus.[222] Hicks assumed, incorrectly, as he had when he recommended BDCA to TB, that BDCA was a REIT. He made the assumption, he said, because BDCA was "sold under the name American Realty Capital," and to him, "Realty means real estate."[223]

Hicks did not inform NC of any of the numerous risks disclosed in ARC Finance's prospectus, including the risk that she might lose her entire investment and the company had no established sources of financing.[224]

Hicks' ignorance of the risks rendered him incapable of meeting the requirements of Rule 2111(a) because he could not have a reasonable basis to believe that these recommendations were suitable for NC based on her investment profile. Making these recommendations, Hicks also failed to comply with his fundamental ethical obligation of fair dealing. Therefore, we conclude that Hicks violated Rules 2111(a) and 2010 in making these recommendations to NC.

3. Hicks Made Two Unsuitable Recommendations of Non-Traded ARC Retail and ARC NYC REITs to Customer MM

Hicks concedes he made a mistake when he recommended illiquid, high-risk securities to MM. The Hearing Panel agrees. Investing more than $50,000 in one year in ARC Retail and ARC NYC, both illiquid and high risk, was clearly unsuitable for MM, given her advanced age, reasonably foreseeable need for liquidity, moderate risk tolerance, limited net worth and liquid assets, and investment objectives that included income.

Hicks claims he did not know that the warning in bold font on the first page of the ARC Retail prospectus describes the REIT as highly risky, and that investors should be able to afford the complete loss of their investments. He cannot recall if he even looked at the first page of the prospectus. When Hicks recommended ARC Retail, he did not then believe it was a high-risk

---

[222] Tr. 205–06.

[223] Tr. 208.

[224] Tr. 208–213.

investment. Thus, he did not tell MM that she could lose all of her investment.[225] Hicks testified that he believed the recommendation was appropriate at the time.[226]

The ARC NYC prospectus' minimum suitability threshold requires investors to have gross annual income of at least $70,000 and a minimum net worth of $70,000, or a net worth, exclusive of home, home furnishings and cars, of no less than $250,000. When asked if he knew this when he made the recommendation, Hicks said he "would assume" that he did not. He testified it was "a mistake" on his part to have MM invest in ARC NYC, based on the "false numbers" he put in her investment profile. He admitted that MM "never had an annual income of $70,000 and I guess her net worth was less than 250,000. Either I wasn't paying attention or did not realize" what the ARC NYC's minimum suitability requirements were.[227]

Hicks' recommendations were also unsuitable because they resulted in an excessive concentration of MM's liquid assets in illiquid, high-risk securities. The two REIT purchases made about 50% of her liquid assets unavailable when she needed them and impeded her ability to qualify for Medicaid assistance to enable her to afford to live in her residence at a nursing home.

For these reasons, we conclude that because Hicks did not conduct a reasonably diligent review, he did not have a reasonable basis to believe that his recommendations were suitable for MM, and therefore violated FINRA Rule 2111(a). By making these recommendations to MM, Hicks also failed to fulfill his obligations of fair dealing, and violated FINRA Rule 2010.

4. Hicks Made Five Unsuitable Recommendations of Non-Traded REITs to Customer RT

After reviewing RT's and Hicks' testimony and the documentary evidence, we conclude that Hicks' recommendations that RT make five investments in non-traded REITs were unsuitable, based on RT's age, investment objective of capital preservation, low risk tolerance, and the actual amount of her liquid assets—far less than the grossly inflated representations Hicks made in her account documents starting in August 2015.

The prospectuses describe these non-traded REITs—ARC Healthcare, ARC Retail, and ARC NYC—as investments with a high degree of risk. When asked why he recommended them to RT, a conservative investor, Hicks testified it was because he "had not read" the prospectuses, at least not the risk disclosures. He testified that he left that task to the compliance officer at Capital Investment.[228] When he made these recommendations, however, he was working at Southeast Investments, not Capital Investment.

---

[225] Tr. 150–53.

[226] Tr. 125–26.

[227] Tr. 130–32.

[228] Tr. 286.

Hicks then testified that he made these recommendations because his experiences at the "various sales conferences" sponsored by ARC led him to trust ARC's compliance department "to do the dirty work" of due diligence before he recommended the investments. Had he read the risk disclosures, Hicks testified, he "[a]bsolutely" would not have recommended these REITs to RT.[229] Hicks admitted that he did not have the "slightest idea" of the risks when he made the recommendations to RT. Hicks did not inform RT, because he did not know, that she did not meet the minimum suitability requirements described in the prospectuses. He called this an "oversight," and "poor judgment." [230]

We also find that Hicks' recommendations overconcentrated RT's assets in high-risk, illiquid securities. After her fifth investment, RT had invested more than half of the liquid assets she had before making the investments. Given her investment profile, this was clearly unsuitable for RT.

For these reasons, we conclude that Hicks did not have a reasonable basis to believe that his recommendations to RT were suitable for her. By his recommendations, Hicks also failed to fulfill his responsibility to deal fairly with RT. By making these recommendations to RT, Hicks violated FINRA Rules 2111(a) and 2010.

5. Hicks Made Eight Unsuitable Recommendations of Non-Traded REITs to Customer NM

In 2012 Customer NM had variable annuities, recommended by Hicks, worth more than $500,000. Starting in June 2014, when NM was 81 years old, through July 2017, Hicks recommended eight investments in six different non-traded REITs. By July 2017 NM had invested $459,272 in non-traded REITs,[231] largely funded by withdrawals from her variable annuities. In doing so, NM liquidated one variable annuity and had less than $4,000 in the other.[232]

Hicks admits that, as with the other four customers, he did not warn NM of the significant risks involved in investing in non-traded REITs, because he was unaware of them. He admits, as well, that he did not warn NM of the risk that she was overconcentrating her assets in illiquid, high-risk securities.

The Hearing Panel finds that Hicks' recommendations were unsuitable because he did not understand the risks they entailed, could not inform NM of those risks, and did not have a reasonable basis to believe the recommendations were suitable for her. They were also unsuitable because they resulted in an unreasonable concentration of her investments in illiquid, high risk REITs. Even if we accept Hicks' inflated estimate that NM had $800,000 in liquid assets, his

---

[229] Tr. 287–88.

[230] Tr. 288.

[231] Tr. 631; CX-115.

[232] Tr. 377.

recommendations led her to place more than half of her liquid assets in high-risk, illiquid REITs. Hicks failed to meet his obligations under the customer-specific prong of the suitability rule, and failed to deal fairly with NM. For these reasons, Hicks violated FINRA Rules 2111(a) and 2010 by making these recommendations to NM.

B. Hicks Violated His Reasonable-Basis Suitability Obligations

The Complaint's second cause of action alleges that Hicks failed to conduct reasonably diligent investigations before recommending the non-traded REITs and BDCA and therefore lacked a reasonable basis to recommend them, in violation of FINRA Rules 2111 and 2010.

According to Supplementary Material 2111.05(a), the reasonable-basis prong of the suitability rule requires an associated person, before making an investment recommendation, to develop:

> "a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least *some* investors. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of and risks associated with the security . . . [an] associated person's reasonable diligence must provide the . . . associated person with an understanding of the potential risks and rewards associated with the recommended security . . . . The lack of such an understanding when recommending a security . . . violates the suitability rule."

The SEC has long held that before making a recommendation, a broker must investigate and understand "the potential risks and rewards inherent in that recommendation."[233] A registered representative cannot shift the responsibility of reasonable diligence to a firm or an issuer. A registered representative has "an independent obligation" to understand the security recommended. A failure to gain an understanding of the recommended security is a *per se* violation of the reasonable-basis suitability obligations.[234] Relying on an issuer's representatives and marketing materials and visiting an issuer's office do not suffice to fulfill the due diligence requirements of the reasonable-basis prong of the suitability rule when the registered representative does not understand the recommended investment's features and risks.[235]

Hicks did not conduct reasonable due diligence to assess the suitability of BDCA and the non-traded REITs. He did not know that BDCA was a business development corporation. He did not understand what it invested in. He did not understand the risks of investing in BDCA.

---

[233] *F. J. Kaufman & Co*., Exchange Act Release No. 27535, 1989 SEC LEXIS 2376, at *9 (Dec. 13, 1989).

[234] *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *31–34 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[235] *McGee*, 2016 FINRA Discip. LEXIS 33, at *59–61.

Nonetheless, he recommended it to customers TB and NC. His lack of understanding when making the recommendations violated the suitability rule.

Similarly, Hicks did not understand the risks of the non-traded REITs he recommended to customers NC, MM, RT, and NM. He did not understand that they were high-risk investments. Hicks did not know that the prospectuses warn that investors should be able to afford to lose their entire investments. He based his recommendations on his belief the REITs would provide annual income to his customers at a rate of six percent of their investments, without understanding that the distributions might not occur for years, or at all. He did not know that the issuers were permitted to pay distributions from any source, including unlimited amounts from offering proceeds, which are investors' principal.

Hicks' lack of understanding of the risks establishes, as Supplementary Material 2111.05(a) makes indisputably clear, that he failed to conduct a reasonably diligent examination of the investments he recommended, and thus failed to fulfill his reasonable-basis suitability obligations.

Hicks' claims that he was "sold" on these investments by Capital Investment and by ARC salespersons and that he relied on Capital Investment and Southeast Investments to conduct reasonable due diligence, are not defenses. First, relying on wholesalers and others representing the issuers is insufficient. Relying on his firm and its compliance staff without making any effort to find out what they did to assess the suitability of the REITs and BDCA is also insufficient. As Hicks acknowledged in his testimony, the due diligence responsibilities of the suitability rule rest on the shoulders of the registered representative making a recommendation. Hicks had a responsibility to personally understand the potential risks of the recommendations he made, and, as he admitted, he "fell down" when he left it to his firm.[236]

By failing to meet his reasonable-basis suitability obligations, we conclude that Hicks violated FINRA Rules 2111 and 2010.

IV. Sanctions

A. Arguments of the Parties

Enforcement urges the Hearing Panel to impose a bar upon Hicks. Enforcement argues that FINRA's Sanction Guidelines recommend strong consideration of a bar for violating Rule 2111 when aggravating factors predominate.[237] In Enforcement's view, there are multiple aggravating factors and no mitigating factors to justify less severe sanctions.[238]

[236] Tr. 147.

[237] Enforcement's Pre-Hr'g Br. 32.

[238] *Id.* at 33; FINRA Sanction Guidelines at 95 (2020), http://www.finra.org/sanctionguidelines.

Enforcement argues that the "most egregious aggravating factor" is the vulnerability of the customers to whom Hicks made his unsuitable recommendations. Enforcement notes that the customers were all senior investors, ranging from 73 to 87 years of age when Hicks made his recommendations, and they were not financially sophisticated. Additional aggravating factors, Enforcement argues, include the pattern and number of unsuitable recommendations, the approximately three-year span of misconduct, and the number and size of the investments Hicks recommended.[239] Finally, Enforcement argues that a "highly aggravating factor" is that Hicks failed to accept responsibility, other than commenting in his testimony that he accepts some responsibility, while at the same time blaming ARC and his former firm, Capital Investment.[240]

Enforcement also recommends that we order Hicks to disgorge the commissions he derived from the transactions resulting from his unsuitable recommendations.

In his defense, Hicks argued "I think I have accepted blame where I am responsible." He expressed regret that he "hurt people" but insisted he did not do so intentionally. He admitted that he "did not read these prospectus pages entirely" and that he takes "responsibility for that."[241] When asked to comment on sanctions, Hicks stated only, referring to his customers, that he "would like to be able to help them get . . . out of this stuff."[242]

B. Discussion

The Sanction Guidelines instruct us that the "overriding purpose of all disciplinary sanctions is to remedy misconduct and protect the investing public."[243] Sanctions therefore should be "meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct."[244] For making unsuitable recommendations, the Guidelines recommend a fine of $2,500 to $116,000, suspension in any or all capacities for 10 days to two years, and disgorgement of ill-gotten gains.[245] When aggravating factors predominate, the Guidelines recommend strong consideration of a bar.

Violations of FINRA's suitability rule are serious. The suitability rule imposes "an important duty that is fundamental to the relationship between registered representatives and their customers."[246] As we have noted above, failure to meet the requirements of the suitability rule before making a recommendation, by having an insufficient understanding to provide a

---

[239] Enforcement's Pre-Hr'g Br. 32.

[240] Tr. 903–05.

[241] Tr. 907–08.

[242] Tr. 908–09.

[243] Guidelines at 10.

[244] *Id.* at 2.

[245] *Id*. at 95.

[246] *Dep't of Enforcement v. Brookstone Securities, Inc.*, No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *128 (NAC Apr. 16, 2015).

reasonable basis for it and inadequately assessing whether it is appropriate for the particular investor, violates the suitability rule and the ethical requirement to abide by the high standards of professional conduct required of all registered representatives.[247]

Hicks clearly failed to fulfill his obligations under both prongs of the suitability rule with the recommendations he made to all five customers to invest in high-risk, illiquid, non-traded REITs and BDCA. Consequently, he failed to ensure that his recommendations were in any way consistent with each of his customer's "best interests and financial situation."[248] Hicks failed to do anything approximating an acceptable level of due diligence.

We have no reason to dispute Hicks' claim that he did not intend to harm any of his customers. When Hicks testified that "maybe it was a mistake" to have recommended BDCA to NC and TB, but he "did not do any of this intentionally," Enforcement stated "no one's suggesting you did it intentionally."[249] And TB testified that she did not believe Hicks had "deliberately" recommended "something that I was going to lose money in. I just can't believe that of [Hicks]."[250]

However, Hicks' lack of intent to harm his customers is not a relevant mitigating factor. It does not reduce the weight of the aggravating factor of the advanced ages of the customers, which we must consider.[251] It does not overcome the aggravating nature of 18 unsuitable recommendations over three years and transactions totaling more than $660,000, which, taken together, establish a clear pattern of misconduct.[252] It does not erase the fact that Hicks' misconduct, even if he did not intend it, harmed his customers.[253] TB was unable to liquidate her shares of BDCA when she wished, and MM and NM were unable to liquidate and recover their principal to afford the care that, at their advanced ages and stages of life, was reasonably foreseeable when Hicks recommended illiquid REITs. It does not rectify the risks of the unsuitable overconcentration of MM, NM, and RT's liquid assets to which Hicks' recommendations exposed them.

Enforcement argues that Hicks acted "at the very least" recklessly by making his recommendations and that his misstatements of customers' net worth and liquid assets on account documents were intentional.[254] As shown above, Hicks made varying and inaccurate

---

[247] *Cody*, 2011 SEC LEXIS 1862, at *26–28.

[248] *Dep't of Enforcement v. Siegel,* No. C05020055, 2007 NASD Discip. LEXIS 20, at *37 (NAC May 11, 2007), *aff'd*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008), *aff'd in relevant part*, 592 F.2d 147 (D.C. Cir. 2010).

[249] Tr. 217–18.

[250] Tr. 500.

[251] Guidelines at 8 (Principal Consideration No. 20).

[252] *Id.* at 7–8 (Principal Consideration Nos. 8, 9, 17).

[253] *Id.* at 7 (Principal Consideration No. 11).

[254] Enforcement's Pre-Hr'g Br. 33.

representations in their account documents about the financial profiles of RT, MM, and NM. He did so knowingly. In doing so, Hicks violated another of his obligations under the suitability rule, requiring a registered representative to "make recommendations only on the basis of the concrete information that [the customer supplied] and not on the basis of guesswork as to the value" of the customer's assets.[255] By making recommendations ignorant of the risks and features of the securities, and by groundlessly inflating representations of his customers' net worth and liquid assets, Hicks acted recklessly.[256]

Hicks benefitted from his wrongdoing. Purchases of non-traded REITs generated gross commissions to Hicks and Southeast Investments of seven percent of the purchase price. At Southeast Investments, Hicks received a payout of 85 percent of those commissions.[257] From 2014 through July 2017, 62 percent of Hicks' commissions came from his customers' purchases of non-traded REITs and BDCA.[258] From June 2014 through July 2017, the five senior customers named in the Complaint invested a total of $664,955 in non-traded REITs and BDCA. From those investments, Hicks netted $38,812 in commissions.[259]

Had Hicks recommended traded REITs, he would not have received commissions of seven percent on their sales.[260] If he was concerned about his customers' exposure to the volatility of the stock market, he could have offered to rebalance the subaccounts of their existing variable annuities, but if he had, he would not have been paid any commissions.[261]

We agree with Enforcement that Hicks' claim that he has "accepted blame where I am responsible"[262] does not rise to the level of a mitigating factor. Acceptance of responsibility may mitigate when a respondent acknowledges misconduct and accepts responsibility for it prior to detection or the intervention of a regulator.[263] As Enforcement points out, Hicks did not accept responsibility or acknowledge his misconduct before the Complaint was filed, or when he filed his Answer, and his assertions of personal responsibility at the hearing were half-hearted and included blaming ARC and his firms for not conducting the due diligence he testified he relied on them to do.[264] Indeed, Hicks accompanied his explanations for his suitability rule failures with argumentative assertions that he is "not a compliance officer"[265] and he is "not a lawyer"

---

[255] *Eugene J. Erdos*, Exchange Act Release No. 20376, 1983 SEC LEXIS 332, at *7 (Nov. 16, 1983).

[256] Guidelines at 8 (Principal Consideration No. 13).

[257] Tr. 85–86.

[258] CX-45.

[259] CX-116.

[260] Tr. 349–50.

[261] Tr. 236–37.

[262] Tr. 907.

[263] Guidelines at 7 (Principal Consideration No. 2).

[264] Tr. 905.

[265] Tr. 145.

but "a salesman."[266] These statements suggest that Hicks even now does not appropriately recognize and accept his responsibilities under the suitability rule, and the degree to which he failed to fulfill them.

Taking into consideration the many aggravating factors, and the absence of mitigating circumstances, we conclude that the only appropriate outcome with the potential to deter serious violations of Rules 2111 and 2010 by Hicks and other registered representatives similarly situated is to impose a bar for each cause of action. Because both causes of action are based on the same underlying facts, we conclude that a single bar is the appropriately remedial sanction.[267]

As noted above, Enforcement recommends that we order Hicks to disgorge the commissions he earned from the transactions he recommended.[268] Hicks profited substantially from the recommendations. His commissions totaled $38,812.60.[269] He received an 85 percent payout on a seven percent gross commission on each investment. In a number of instances Hicks recommended that customers fund their investments by withdrawing money from variable annuities that he had previously recommended to them, on which he had already been paid the same commissions.[270]

The Guidelines instruct that when a respondent obtains a financial benefit from the misconduct, to remediate that misconduct, adjudicators may order such ill-gotten gains to be disgorged to FINRA.[271] We find that disgorgement is appropriate here, and therefore order Hicks to disgorge to FINRA the $38,812.60 that he received in commissions from his unsuitable recommendations to his five senior customers.

---

[266] Tr. 218.

[267] *Escarcega*, 2017 FINRA Discip. LEXIS 32, at *67 (unitary sanction appropriate when misconduct all relates to inappropriate sales of debentures).

[268] Enforcement's Pre-Hr'g Br., at 32. Enforcement does not recommend a restitution order. We agree that restitution is unworkable here. The record does not provide us with a basis on which to calculate monetary losses suffered by the customers as a result of Hicks' recommendations. Customers TB, NC, and RT have been unable to recover any of their principal invested and still hold shares that presumably have some value, but there is no way of knowing how much they may recover. WM testified that he was able to recover approximately $40,000 of the $50,400 MM invested. PL testified that her efforts to recover NM's REIT investments continued more than 18 months after her death, but there is no evidence how much of her principal was returned. Under these circumstances, we are unable to order restitution.

[269] CX-116.

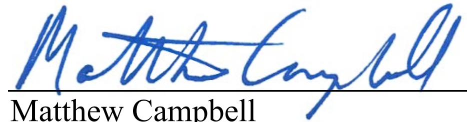
[270] Tr. 899–900.

[271] Guidelines at 95. When FINRA collects disgorgement, it routinely contributes what is collected to the FINRA Investor Education Foundation. *Id.* at 5 (General Principles No. 6).

V. Order

For making unsuitable recommendations to five senior customers in violation of FINRA Rules 2111 and 2010, as alleged in the first cause of the Complaint, and for lacking a reasonable basis to recommend investment in non-traded REITs and BDCA in violation of FINRA Rules 2111 and 2010, as alleged in the second cause of the Complaint, Respondent Mercer Hicks III is barred from associating with any FINRA member firm in any capacity. He is also ordered to disgorge $38,812.60 in ill-gotten gains to FINRA, and pay $7,636.25 for the costs of this proceeding, which includes an administrative fee of $750 and $6,886.25 for the hearing transcript.

The bar shall become effective immediately if this decision becomes FINRA's final action in this disciplinary proceeding. The disgorgement and costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final action in this disciplinary proceeding.[272]



Matthew Campbell
Hearing Officer
For the Extended Hearing Panel

Copies to:

Mercer Hicks III (via email, first-class mail, and overnight mail)
Payne L. Templeton, Esq. (via email)
Michael Perkins Esq. (via email)
Matthew Minerva, Esq. (via email)
Kay Lackey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

[272] The Panel considered and rejected without discussion all other arguments by the parties.