FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. ROBERT R. TWEED (CRD No. 2339324), Respondent.	Disciplinary Proceeding No. 2015046631101 Hearing Officer—MJD **EXTENDED HEARING PANEL DECISION** July 5, 2018

Respondent Robert R. Tweed negligently made false and misleading statements to customers to induce them to invest in his hedge fund. He misled the investors about the fees and costs they would have to pay and the persons and entities who would control the fund and its trading. Respondent violated Sections 17(a)(2) and (a)(3) of the Securities Act of 1933, which constitutes a violation of FINRA Rule 2010. He also independently violated FINRA Rule 2010. For this misconduct, Respondent is barred from associating with any FINRA member firm in any capacity and fined $50,000. Respondent is ordered to pay hearing costs.

Appearances

For the Complainant: Andrew Boldt, Esq., and Dale Glanzman, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: H. Thomas Fehn, Esq.

DECISION

I. Introduction

FINRA's Department of Enforcement filed a one-cause Complaint alleging that Respondent Robert R. Tweed ("Respondent" or "Tweed") violated FINRA Rule 2010, both independently and by virtue of violating Sections 17(a)(2) and (a)(3) of the Securities Act of 1933 ("Securities Act"). Enforcement alleges that between November 2009 and March 2010 Tweed obtained over $1.6 million from 23 retail customers through a false and misleading private placement memorandum ("PPM") that he used to offer and sell interests in the Athenian Fund LP ("Athenian" or the "Fund"), an investment fund that he created and controlled.

The Complaint alleges that Tweed was supposed to invest Athenian's money in a fund that would use a quantitative stock trading algorithm. When things did not go according to plan, the Complaint charges, Tweed placed the money in other investments that lost money, a fact that he concealed from investors. The sole cause of action charges Tweed with contravening the Securities Act—and thereby violating FINRA Rule 2010—by negligently misrepresenting or failing to disclose four material facts to prospective investors in the PPM. First, he failed to disclose the total potential fees and costs of an investment in Athenian, which would reduce the return on investment. Second, he failed to disclose that he had replaced the entity that would trade Athenian's capital with another entity, controlled by another person who would manage and trade investors' assets. Third, he failed to disclose that the new entity that would trade Athenian's funds would pay him a share of the management fees it earned from Athenian, which would further reduce the return on investors' money. Finally, he failed to disclose that a broker-dealer rejected his application to open a securities account for Athenian because of the number of customer complaints and arbitrations against him.

In his Answer, Tweed admitted many of the factual allegations in the Complaint but denied that his conduct violated federal securities laws and regulations or FINRA Rules. He made several other assertions. He stated that he had no experience drafting PPMs but had hired counsel who had such experience to form the Fund. He explained that he halted trading in Athenian's securities account five months after soliciting its first investors because it was unprofitable. He also stated that he returned approximately $600,000 to 10 of the 23 investors, while he received less than $12,000 in fees or commissions from operating Athenian. Tweed also asserted that the allegations are barred by the federal five-year statute of limitations.

The Extended Hearing Panel finds that Tweed committed the violations alleged in the Complaint.[1] For this misconduct, the majority of the Panel bars Tweed from associating with any FINRA member firm in any capacity and imposes a $50,000 fine.[2]

II. Findings of Fact

A. Respondent

Tweed first associated with a FINRA member firm in 1993. At the time of the events giving rise to this disciplinary proceeding, he was a General Securities Representative and General Securities Principal with CapWest Securities, Inc. ("CapWest"). Tweed is currently

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[1] A three-day hearing in this matter was held in Los Angeles beginning December 4, 2017. Enforcement filed a pre-hearing brief. Tweed did not file a pre-hearing brief and did not identify any proposed exhibits for the hearing. In addition to Respondent Tweed, Enforcement called two customers (SK and BM) who invested in Athenian and two FINRA investigators. Besides testifying in his own case, Tweed did not call any witnesses. With the Panel's leave, Enforcement filed a post-hearing brief and Tweed filed a reply brief.

[2] All three members of the Extended Hearing Panel found Tweed liable on the sole cause of action alleged in the Complaint. One Panel member dissented as to sanctions only. This Panel member determined that the appropriate sanction is a two-year suspension from associating with any FINRA member firm in any capacity and a $50,000 fine instead of a bar and a $50,000 fine.

associated with another FINRA member firm.[3] Since 1999, he also has owned and controlled an investment advisor called Tweed Financial Services, Inc. ("Tweed Financial"), which served as the general partner of Athenian.[4]

Tweed started in the securities industry selling mutual funds and variable annuities, among other products, and providing financial and retirement planning services. Tweed testified that he was "not a stock guy" and had never made recommendations to customers to invest in particular stocks. In approximately 2004, he started offering tax-deferred exchanges of real property under Section 1031 of the Internal Revenue Code, using tenancy-in-common investments in which an investor obtains undivided interests in real property.[5] Tweed estimated that 80 percent of his customers owned rental property. As a result, Section 1031 exchanges generated most of Tweed's business until 2008, when "that part of [Tweed's] business really got hit hard" after the real estate market collapsed.[6] Tweed then came up with the idea of "doing managed money like the Athenian Fund."[7]

B. Tweed Forms the Athenian Fund LP

Tweed organized Athenian as a Delaware limited partnership in January 2008.[8] As the manager and controlling person of the general partner, Tweed Financial, he controlled all of Athenian's operations and activities.[9]

Before he formed Athenian, Tweed had been following a Utah-based company called Portfolio Manager International LLC ("PMI"). For about three years, Tweed met with PMI's principals, who developed trading software that Tweed described as the "holy grail."

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[3] Stipulations ("Stip.") ¶ 1; Complainant's Exhibit ("CX-_") 51, at 7, 10, 12, 15. FINRA has jurisdiction over Tweed under Article V of FINRA's By-Laws because he is currently registered with FINRA through a member firm and the alleged misconduct occurred while he was registered with FINRA.

Tweed was registered with CapWest from February 2007 to September 2010 and again from April 2011 to August 2011. He was registered with another member firm between the two periods of registration with CapWest. CapWest has been out of business since 2011, when it filed a Uniform Request For Broker-Dealer Withdrawal (Form BDW). Hearing Transcript ("Tr.") 309.

This matter originated when another member firm with whom Tweed was associated from 2011 to 2015—Concorde Investment Services, LLC ("Concorde")—contacted FINRA about concerns it had about his sales of interests in investment funds. After receiving this information, Enforcement decided to review all private placement interests that Tweed sold, including Athenian. Tr. 251, 306-07, 311, 314-15; CX-65, at 1-4.

[4] Tr. 43-44; CX-9, at 5. Besides Tweed Financial, Tweed operated at least two other businesses—Tweed Marketing Services, LLC, which he described in the Central Registration Depository ("CRD") as investment related, and Tweed Insurance Services, through which he sold fixed annuities and insurance products, according to CRD. CX-14, at 11; CX-51, at 11, 17. Besides Tweed himself, Tweed Financial had three or four employees in 2010. Tr. 537.

[5] *See* NASD Notice to Members 05-18 (Mar. 2005), http://www.finra.org/industry/notices/05-18.

[6] Tr. 415-17, 493.

[7] Tr. 417. Tweed also had sold interests in private placements as part of his securities practice since 2005. Tr. 41.

[8] Stip. ¶ 2.

[9] Tr. 44; CX-9, at 5, 22.

Specifically, PMI's owner, BH, developed a proprietary computerized quantitative trading system (the "PMI Trading Model") that used an algorithm to rapidly execute trades and, in instances when the market for a particular stock dropped, the software program would be able to "get out real quick,"[10] thereby reducing potential losses.

PMI produced promotional materials touting the PMI Trading Model's ability to generate high returns. It claimed that it randomly selected 50 stocks ("based on their liquidity, volatility and other technical factors") from 1,500 stocks that PMI "pre-qualified" for its simulations.[11] According to one hypothetical "paper trading test," the PMI Trading Model generated returns of 82.4 percent compared to 23.8 percent for the S&P 500.[12] Another simulation generated returns of 72.9 percent, compared to *losses* of 36.4 percent for the S&P 500.[13] Test trading of the PMI Trading Model that purportedly used real money generated far lower returns over shorter periods than the simulated trading. According to PMI's marketing materials, two tests using real money generated returns of 0.7 percent and 7.3 percent using the PMI Trading Model, compared to returns of 0.3 percent and 1.1 percent for the S&P 500 over the same periods.[14]

Tweed intended to use PMI as the investment manager for the Fund. PMI wanted to raise between $20 and $25 million; Tweed's goal was to raise at least $5 million from investors because he had to make enough to cover the management fee.[15] Tweed expected that PMI would trade Athenian's capital in blue chip stocks using the PMI Trading Model.[16]

Tweed testified that he told investors that he had been following the PMI Trading Model and that, even though it was new, it could reduce market volatility and control losses quickly by getting rid of falling stocks, and "hopefully over time" generate returns higher than the S&P 500.[17] Tweed was not shown how the PMI Trading Model worked or how it was able to produce the hypothetical results because the strategy was proprietary to PMI.[18]

Tweed began selling interests in Athenian in November 2009. Tweed testified that he had a large client base to which he could market Athenian. He had hundreds of customers in 2009

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[10] Tr. 44, 417-18.

[11] CX-1, at 1.

[12] Tr. 49; CX-1, at 11. This simulation used the period from April 1 to September 11, 2009.

[13] Tr. 49-50; CX-1, at 10. This simulation used the period from September 1 to December 1, 2007.

[14] Tr. 513-15; CX-1, at 3-7. One test ran from May 16 to July 5, 2007; the other covered November 28 to December 21, 2007.

[15] Tr. 424-25, 524-27; CX-43, at 1-2.

[16] Stip. ¶¶ 3, 12.

[17] Tr. 429-30.

[18] Tr. 50-51, 526. Tweed described the persons working on the PMI Trading Model as "mathematical geniuses." Tr. 51. Tweed told staff of the Securities and Exchange Commission ("SEC") during an examination of Concorde in early 2014 that he anticipated returns of 40 percent per year for Athenian, that 20 percent was realistic, and that they could beat the S&P 500 "consistently" with returns of 10 percent. Tr. 526-27; CX-43, at 2.

and 2010, between 85 percent and 90 percent of whom Tweed believed would qualify as accredited investors in private transactions.[19] Some customers did not invest because they thought Athenian was too risky.[20] He recommended and sold $1,635,500 in Athenian interests to 23 CapWest existing retail customers between November 1, 2009, and March 24, 2010. Before each sale, investors were provided with the November 1, 2009 PPM, which was the only PPM that Tweed ever used to offer and sell Athenian interests to investors.[21] Tweed also invested $65,000 of his own money in Athenian.[22]

C. Tweed Provides the Athenian PPM to All Investors but Fails to Include Certain Information

Tweed had never participated in drafting a PPM before. He hired an attorney experienced in putting together PPMs to prepare one for Athenian. Tweed read each draft of the PPM that his attorney prepared.[23] CapWest's chief compliance officer reviewed the Athenian PPM and approved the sale of interests in Athenian.[24] The firm processed all of the investments and approved each subscription agreement submitted by investors.

1. Tweed's Qualifications

The Athenian PPM stated that the general partner, Tweed Financial, "is responsible for all management and investment decisions" of Athenian, and that Tweed controls Tweed Financial. The PPM specified that Tweed "is primarily responsible for the management of [Athenian's] portfolio and he controls all of [Athenian's] operations and activities."[25]

The PPM described Tweed as a specialist in retirement investment planning, managing over $100 million for hundreds of clients, using managed accounts, mutual funds, real estate investment trusts, real estate limited liability corporations, and private trusts. Also according to the PPM, Tweed spoke frequently at seminars on financial planning subjects, estate planning, real estate investing, and general investment strategies. He taught continuing education courses to certified public accountants on investment strategies to lawfully reduce taxes.[26]

[19] Tr. 495, 521-22.

[20] Tr. 429-30.

[21] Stip. ¶ 17; CX-62.

[22] Tr. 229; CX-62. Including his own $65,000 investment, Tweed raised $1,700,500 for Athenian. Tweed's stepson was the first investor and placed $50,000 in Athenian on November 1, 2009. Tr. 232; CX-62. Not all of the customer subscription documents for Athenian identified the purchaser's investment objective; those that did, however, stated that the investor's objective was either "growth & income" or "aggressive growth." *See, e.g.*, CX-57, at 9, 25, 29, 35, 91, 127, 157.

[23] Tr. 425-26.

[24] Tr. 430-31, 506-07.

[25] CX-9, at 22.

[26] CX-9, at 36. Tweed also has been a certified estate advisor since 1995. CX-14, at 12; CX-47, at 5.

2. Investor Qualifications and Required Investment Amounts

According to the PPM, the minimum amount an investor could purchase was $100,000, although Tweed retained the discretion to accept investments in lesser amounts. Existing investors could make additional capital contributions of at least $25,000.[27] Individual investors had to certify that they were accredited investors with either (i) a net worth exceeding $1 million or (ii) $200,000 in income (or $300,000 in combined income if married) over the preceding two years, with a reasonable expectation of reaching the same income level in the current year.[28]

The PPM stated that investors could withdraw a minimum of $25,000 on a quarterly basis upon 30 days' notice. Tweed had sole discretion, however, to reject partial withdrawals if they would reduce an investor's account balance below $100,000. Tweed also had sole discretion to permit withdrawals in other amounts. The PPM stated that Tweed "believes (but cannot guarantee) that the assets of [Athenian] will be invested in a manner which would allow [Tweed Financial] to satisfy withdrawal requests."[29]

3. Investment Objectives and Structure of the Offering: Master Fund

The Athenian PPM stated that it was formed for the purpose of investing all of its assets in PMI Quant Pool 1 LLC ("PMI Quant Pool 1") and did not expect to make other investments, although Tweed retained the discretion to do so. According to the PPM, Athenian's investment objective was "to generate a greater rate of return with lower levels of portfolio volatility than those being generated in the S&P 500 Index."[30] Tweed testified that he believed an investment in Athenian was speculative.[31]

The PMI Trading Model was developed by BH, who owned and controlled PMI. According to the Athenian PPM, BH had "overseen the operation of the PMI market timing system for the past five (5) years" and "was uniquely qualified to operate a quantitative trading system."[32] The PPM stated that the PMI Trading Model had a "competitive advantage" that "is

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[27] CX-9, at 5, 24. Individual investment amounts ranged from $50,000 to $105,000. Only 8 of the 23 investors invested the minimum of $100,000. Some customers, however, made multiple investments in Athenian for their family trust, IRA, or personal accounts that combined exceeded $100,000. CX-62.

[28] CX-11, at 16. Investors could also certify that they were "qualified clients" under Rule 205-3(d)(1) of the Investment Advisors Act of 1940.

[29] CX-9, at 26-27, 57. The PPM also gave Tweed and Tweed Financial the discretion to withdraw all or part of the value of their capital accounts at any time, without the consent of or notice to investors. CX-9, at 28.

[30] CX-9, at 6.

[31] Tr. 454. The PPM described Athenian as a "speculative vehicle" that "may not be appropriate for some investors, especially those with a low tolerance for risk or volatility." It added that "[t]here can be no assurance that [Athenian] will achieve its objectives." The PPM also stated that an interest in Athenian "should be viewed as a non-liquid investment and involves a high degree of risk." CX-9, at 6-7.

[32] Stip. ¶ 4. The PPM described BH as an "entrepreneur and at the forefront of technology for the past 25 years." He created a company that improved technology to bring high-speed Internet services to office buildings, according to the PPM, and designed and oversaw the installation of hundreds of local and wide area computer networks. At the time, he was also a registered investment advisor, according to the PPM. CX-9, at 39.

based on the use of [a] quantitative trading platform that acts to actively manage the long and short side price cycles in each of the approximately 150 highly liquid securities which collectively make up the … investment portfolio."[33] The PPM's claims about the PMI Trading Model's performance were based primarily on simulated trading, with only short test periods of actual trading with small amounts of real money. Before Tweed offered interests in Athenian, beginning in November 2009, the PMI Trading Model was still undergoing testing.[34] Athenian's PPM acknowledged that the PMI Trading Model had no operating history.[35]

The Complaint alleged, and evidence was presented at the hearing, that Tweed initially envisioned that Athenian would serve as its own "master fund," with PMI trading Athenian's capital directly using the PMI Trading Model. The alternative was to use a "feeder fund" and master fund model, which Tweed adopted in the Athenian PPM. Under this model, a feeder fund collects investors in the feeder fund, which in turn "feeds" the fund into a master fund, where investment managers direct the investments in the master fund portfolio.[36] The Complaint further alleged that Tweed was compelled to use the feeder/master fund structure because he was unable to open an account in Athenian's name before he initiated the offering.

PMI told Tweed that the PMI Trading Model worked best using an account at TradesStation Securities ("TradeStation") because that firm offered the fastest trade executions for its software algorithm.[37] According to the Complaint, Tweed tried to open an account for Athenian at TradeStation but the firm rejected his application because of the number of arbitration and customer complaints against him.[38] The Complaint alleges that TradeStation rejected the account in mid-2009, causing Tweed to opt for the feeder/master fund structure, in which Tweed invested Athenian's capital not in its own securities account, but in an account controlled and operated by PMI Quant Pool 1.[39] The parties also stipulated to many of the facts underlying the Complaint on the issue of TradeStation's rejection. However, the evidence at the hearing, including Tweed's testimony, was that TradeStation's rejection occurred no sooner than early February 2010, not in 2009. Tweed testified that TradeStation's rejection had no effect on

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[33] Stip. ¶ 5.

[34] Stip. ¶ 7.

[35] CX-9, at 40.

[36] See discussion of master funds and feeder funds in *Culverhouse v. Paulson & Co*., 133 A.3d 195, 197 n.5 (Del. 2016) (citing *Fund Director's Guidebook*, 52 Bus. Law. 229, 252-53 (1996) (discussing master-feeder fund structures) and Henry Ordower, *Demystifying Hedge Funds: A Design Primer*, 7 U.C. Davis Bus. L.J. 323, 344-45 (2007) (same)).

[37] Stip. ¶ 8; Tr. 52.

[38] Compl. ¶ 32. *See also* Compl. ¶ 62.b.

[39] *See* Stip. ¶¶ 8-11. Tweed admitted many of the allegations about the timing of the TradeStation rejection in his Answer. *See* Compl. ¶¶ 15-18; Ans. ¶¶ 15-18.

the feeder/master fund structure because he had already decided on the structure before the offering.[40]

4. Fees

Pursuant to the PPM, Athenian charged investors an annual management fee of 3.5 percent of the Fund's net assets under management.[41] PMI would get 2.5 percent and Tweed Financial, the general partner, the remaining 1 percent.[42] As is customary with hedge funds, the PPM also provided for additional fees based on the Fund's performance. A performance allocation of 20 percent was charged to investors if Athenian generated quarterly returns that were less than the return of the S&P 500, plus 1 percent. In the event that Athenian generated returns greater than the S&P 500 plus 1 percent in a quarter, investors would be charged a performance allocation fee of 35 percent. The Athenian PPM disclosed to investors that PMI was entitled to receive half of the 20 percent or 35 percent performance allocation.[43]

Tweed was also obligated to ensure that Athenian prepared annual audited financial statements according to generally accepted accounting principles and provide them to investors. The PPM also informed investors they would receive, at Tweed's sole discretion, a "periodic letter discussing the results of" their investments in Athenian.[44] Tweed did not generate audited statements until 2014, when Concorde, his firm at the time, required him to.[45]

PMI also had its own PPM, dated August 2009, through which it offered units in PMI Quant Pool 1, which was a master fund promoted and operated by PMI and controlled by BH.[46] Pursuant to the PPM for PMI Quant Pool 1, Athenian was obligated to pay PMI a 5 percent annual management fee (in addition to sharing half of the performance allocation, as set forth in

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[40] Tr. 62-64, 109-112; CX-14. The evidence indicates that TradeStation decided to reject the account by March 1, 2010. *See* CX-21. Athenian's application to open an account at TradeStation is dated February 1, 2010, as is a BrokerCheck Report about Tweed that was attached to the application. CX-14.

[41] The management fee was to be assessed monthly, equal to 1/12 of the 3.5 percent annualized rate. CX-9, at 6.

[42] Tr. 253-54; CX-9, at 6, 24-25. From March to June 2010, according to monthly unaudited financial statements, investors owed Athenian monthly management fees totaling over $15,600. Tr. 274-77; CX-29, at 2, 8, 14, 20. In October 2012, an accountant calculated that Athenian's accrued monthly management fees for the year ending December 31, 2010, totaled $41,529. CX-32. Tweed testified that he decided not to charge Athenian management fees after June 30, 2010, because of the poor performance of the Fund, however, he had Athenian to pay Tweed Financial $11,891.25 on October 18, 2010 to cover expenses. Tr. 106, 278-79, 441-444. *See also* CX-42, at 7.

[43] Tr. 254-55; CX-9, at 6, 25. Neither Tweed nor CapWest charged investors a sales commission on their purchases of interests in Athenian. Tr. 444.

[44] CX-9, at 32. Tweed and Tweed Financial would determine the net asset value of Athenian at the end of each month in accordance with generally accepted accounting principles. The PPM also stated that Athenian would periodically allocate net income or loss to each investor based on their capital account balances. CX-9, at 28-29.

[45] Tr. 516-17, 539-40; CX-10, at 9; CX-42. The financial statement was dated December 31, 2014, and covered the period December 31, 2008, through December 31, 2013.

[46] BH organized PMI Quant Pool 1 LLC in Utah on August 24, 2009, with himself as the managing member. CX-5; CX-7.

the Athenian PPM) based on the balance of Athenian's closing capital account at the end of each month. The Athenian PPM did not disclose the additional management fee that its investors would be charged by PMI Quant Pool 1 for trading their capital.[47]

PMI's 5 percent annual management fee would cause a reduction in investors' returns, but Tweed testified that Athenian would not have to pay it. According to Tweed, BH said he included the 5 percent management fee in PMI Quant Pool 1's PPM because he planned to also use PMI Quant Pool 1 as the master fund that would manage money of other feeder funds. The PPM contained the 5 percent management fee, Tweed testified, to give BH the flexibility to charge others the fee. According to Tweed, BH had agreed to waive PMI's 5 percent management fee,[48] but Tweed did not reduce that agreement to writing.[49]

D. Tweed Changes Master Funds and Continues Soliciting Investors

On January 29, 2010, before PMI engaged in any trading on behalf of Athenian, BH informed Tweed that he was dissolving PMI Quant Pool 1.[50] Tweed understood that it was dissolved because of registration issues with the regulatory authorities in Utah.[51] Tweed continued to solicit investors after January 29, 2010, using the November 1, 2009 PPM, even though PMI would no longer control and operate the master fund trading Athenian's money.[52]

After PMI Quant Pool 1 dissolved, Tweed looked into using another master fund. BH proposed to Tweed that he work with ER. In anticipation of acting as the master fund for Athenian, ER formed Quantitative Analytics Master Fund, LLC ("QAMF") on February 11, 2010.[53] Because it was just created, QAMF had no track record in trading securities. BH also proposed that PMI be given trading authority over Athenian's capital held with QAMF.[54] BH

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[47] Tr. 257-58; CX-6, at 17. The PMI Quant Pool 1 management fee would be charged to Athenian on a monthly basis at the rate of 1/12 of 5 percent.

[48] Tr. 438-40. Tweed noted that the PPM for PMI Quant Pool 1 also gave its manager discretion to charge reduced or differently calculated management fees. Tr. 439-40; CX-6, at 17. The Operating Agreement for PMI Quant Pool 1 contained a provision obligating it to pay its manager (BH) a 5 percent management fee. CX-7, at 20.

[49] Tr. 438-41.

[50] Tweed had transferred just $265,000 from Athenian to PMI Quant Pool 1 for it to trade. On February 5, 2010, BH returned the $265,000 that Athenian had wired on January 19, 2010. Stip. ¶¶ 21-22; Tr. 83, 256; CX-52, at 6, 8.

[51] Tr. 83, 132, 432-33; CX-13, at 1; CX-44, at 1.

[52] Tr. 83.

[53] Tr. 434; CX-16, at 6; CX-17, at 6. According to QAMF's PPM, ER was registered with FINRA through a member firm as a general securities principal, general securities representative, investment company and variable contracts products representative, general securities sales supervisor, and investment advisor. CX-16, at 10. ER owned and operated various investment management companies, one of which served as the manager of QAMF, and he was its initial member, according to QAMF's Operating Agreement and its PPM. CX-16; CX-17.

[54] CX-13, at 2.

wanted to continue to use the feeder fund and master fund model with QAMF because he hoped it would allow him to manage more money.[55]

At this point—late January or early February 2010—Tweed had met ER only a few times and so "wanted to know a little more about him."[56] In particular, Tweed wanted to be sure that ER no longer had any dealings with a person about whom Tweed heard unfavorable things. Ultimately, Tweed was assured that ER was qualified to operate QAMF and manage Athenian's money.[57]

QAMF prepared a PPM, dated February 2010, which Tweed did not show to any investors in Athenian.[58] The QAMF PPM provided that Athenian was obligated to pay QAMF a 3.5 percent annual management fee, assessed against the balance of Athenian's capital account at the end of each month.[59] Athenian also agreed to pay QAMF a quarterly performance allocation of 20 percent if QAMF generated returns between zero and 36 percent per year. Athenian would be assessed a 30 percent performance allocation if QAMF generated returns above 36 percent per year.[60] Neither the management fee nor the performance allocation would be shared with Tweed Financial or PMI.[61]

As with the 5 percent management fee contained in PMI Quant Pool 1's PPM, Tweed testified that he had an understanding with ER that QAMF would not charge Athenian the 3.5 percent management fee disclosed in the QAMF PPM. Like BH, according to Tweed, ER wanted the ability to have different fee arrangements with other anticipated feeder funds that placed money in QAMF's master fund.[62] However, no other feeder funds invested in QAMF.

On or about March 3, 2010, on behalf of Tweed Financial, Tweed executed a Consulting, Side and Advisory Agreement ("Side Agreement") with ER's management company, the manager of QAMF. The agreement entitled Tweed to "success fee compensation" equal to 45 percent of the net proceeds received by ER's management company attributable to investments in QAMF through Athenian.[63] Tweed did not disclose this agreement to investors.[64]

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[55] Tr. 434.

[56] Tr. 87, 434-35; Stip. ¶ 26.

[57] Tr. 86-87.

[58] Tr. 85, 91; CX-16.

[59] Tr. 267-69; CX-16, at 6, 18.

[60] Tr. 267-69; CX-16, at 6, 16.

[61] Tr. 268-69.

[62] Tr. 440-41, 464.

[63] Stip. ¶ 23; CX-22, at 2.

[64] Tr. 157; CX-44.

By March 8, 2010, Tweed executed a subscription agreement between Athenian and QAMF.[65] That was also when Tweed began wiring Athenian's capital to a bank account controlled by QAMF, as the new master account.[66] ER controlled QAMF's bank account and neither Tweed nor BH could access or make withdrawals from it.

Tweed believed that ER and QAMF were prohibited from making illiquid investments with Athenian's capital. The QAMF PPM stated that "[b]ecause of the nature of [its] investment strategy," investors (*i.e.*, Athenian) would be "able to liquidate all or part of their investment in" QAMF without a penalty by giving five days written notice.[67] Contrary to the PPM, however, QAMF's Operating Agreement gave ER, as its manager, wide discretion to invest its assets, specifically including investing in illiquid securities.[68] The QAMF PPM and Operating Agreement permitted ER to invest Athenian's money held by QAMF in anything he wanted, notwithstanding the representations Tweed made in the Athenian PPM. Moreover, nothing in the QAMF PPM obligated ER to use just the PMI Trading Model.

From March 8 to April 19, 2010, Tweed transferred all of Athenian's capital—$1,700,500—to QAMF.[69] QAMF opened two accounts in its name at TradeStation to trade securities.[70] Aside from $100,000 of ER's personal funds in one of the two accounts, QAMF did not trade anyone else's funds besides Athenian's funds. According to Tweed, ER controlled the two accounts and only he could withdraw money from them.[71]

QAMF ceased all trading of Athenian's capital in the TradeStation accounts by the end of April 2010.[72] In early May 2010, PMI told Tweed that it was disappointed by the lack of progress with its trading software and had decided to suspend QAMF's trading "because the system needed to be recalibrated to trade a more volatile and unpredictable market."[73] By this time, Athenian's capital in QAMF's securities accounts was all cash.[74] QAMF's short period of algorithmic trading of Athenian's capital resulted in losses of nearly $34,000.[75] Pursuant to its

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[65] Stip. ¶ 24; CX-18. On behalf of Athenian, Tweed also executed separate subscription agreements with QAMF for different amounts. Tr. 95; CX-19.

[66] Stip. ¶ 24; Tr. 97, 100-01; CX-52, at 10; CX-56, at 2-3.

[67] Tr. 165-66, 221; CX-16, at 8.

[68] Tr. 223; CX-17, at 8.

[69] CX-30; CX-64.

[70] Tr. 533-34; CX-54; CX-64. QAMF transferred all but $4,500 of Athenian's capital from its bank account to its TradeStation securities accounts.

[71] Tr. 97-98, 460-61; Stip. ¶ 25.

[72] Tr. 442; CX-54, at 2-3, 11-12.

[73] CX-26, at 2.

[74] Stip. ¶ 28.

[75] Tr. 261; CX-64. As of June 30, 2010, Athenian's unaudited financial statements showed an accrued, or unrealized, net income loss of $90,172 from its investment in QAMF, which included accumulated expenses of $40,361. CX-29, at 19-21.

PPM and Operating Agreement, by June 2010, QAMF also had accrued (but not charged to Athenian) separate and duplicate monthly 3.5 percent management fees totaling over $16,500.[76]

A few months later, in approximately September 2010, Tweed made the decision to wind down Athenian. In early October 2010, Tweed and ER agreed that QAMF would return all of the remaining liquid assets it held to Athenian.[77]

E. ER Invests $650,000 of Athenian's Funds in a Gold Mining Venture

At about the time that Tweed and ER agreed to return money to Athenian, Tweed learned from ER that he had decided on his own in June 2010 to invest $650,000 of Athenian's funds in what ER described to Tweed as a Wells Fargo "credit facility" where it could earn interest. Tweed thought this was a short-term, liquid investment.

In June 2011, Tweed asked ER about the status of the Wells Fargo investment. According to Tweed, ER told him that Wells Fargo had an option to extend the investment for another 12 months, which it decided to exercise. This meant that the $650,000 supposedly would not be available until June 2012.[78]

By mid-2012, ER told Tweed that in fact he had not invested the money with Wells Fargo. Instead, ER had arranged for QAMF to invest the $650,000 in a gold mining venture through an entity called Luminary Investment Services LLC ("Luminary").[79] According to a financing agreement that ER signed on behalf of QAMF with Luminary in June 2010, Luminary had a contract with a third party to supply 50 kilograms of "Aurum Utalium (AU) metal dust" per month for 12 months.[80]

A few months later, ER told Tweed that he had agreed to plead guilty to bank fraud.[81] On July 12, 2012, ER resigned from serving as the co-manager of QAMF. This left Tweed as the

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[76] Tr. 269-73; CX-28, at 3, 9, 14, 19.

[77] CX-31.

[78] Tr. 449-50.

[79] Tr. 178-79, 264; CX-27. In late February 2012, ER amended QAMF's Operating Agreement to formally add Athenian as a co-manager. The purpose, according to Tweed, was to permit him to access QAMF documents and information to aid in the return of the $650,000 from Luminary. Tr. 180; CX-35. Tweed made unsuccessful demands directly with Luminary for the return of the investment. *See* Tr. 181-82; CX-33; CX-34. Tweed testified that Athenian was repaid approximately $10,000 from the $650,000 investment in the gold mining operation. Tr. 178, 193.

[80] CX-27, at 1, 16; Stip. ¶ 29. While "aurum" is Latin for gold, FINRA's investigator could not find a translation or meaning for "utalium." Instead, an Internet search conducted by the investigator led her to multiple sites touting what she considered to be "scams" promoting investments in "aurum utalium." Tr. 265-66. The agreement QAMF signed with Luminary also referred to mining "alluvial gold," which purportedly is gold-bearing soil found in riverbeds. The agreement also stated that the gold originated in Ghana. Tr. 266; CX-27, at 16.

[81] Tr. 186; CX-40.

sole manager of QAMF. By this time QAMF had no money belonging to Athenian, besides its interest in the gold mining investment with Luminary.[82]

F. ER and QAMF Return Some Funds to Athenian

From June to October 2010, QAMF returned $924,460 to Athenian; the remaining $776,040 that Athenian had given QAMF was never returned.[83]

1. Tweed and Athenian Refund Some Investors

As QAMF started returning money to Athenian, Tweed agreed to redeem investors who asked for their money back beginning in July 2010. Some investors told Tweed that if Athenian was going to hold their funds in cash, they wanted their money back.[84] Athenian's Partnership Agreement contained provisions for distributing remaining funds in the event of dissolution or liquidation, based on each investor's capital account balance at the time.[85] Tweed ignored these provisions—which also obligated him to give notice of the dissolution to all investors—and redeemed customers on a first-come, first-served basis. He testified that when he decided to return money to investors, he had "no idea that we were going to not get [sic] all the money back [from QAMF]. I just thought cash everybody out."[86] By assuming that Athenian would get all its capital back from QAMF, Tweed effectively inflated the value of the Fund's assets, which resulted in some investors receiving more money than they were entitled to.

Tweed did not tell investors who did not ask for their money back that he was returning money to investors who wanted it.[87] Tweed made redemptions to himself first. On July 1, 2010, he refunded $15,000 of the $65,000 he invested in Athenian. On July 13, he paid himself the remaining $50,000. From July 2010 to June 2012, Tweed refunded nearly $610,000 to 11 other investors all or most of the money they had placed in Athenian. One person Tweed repaid in full was his stepson, who had invested $50,000.[88]

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[82] Tr. 179-81; CX-39. In an unrelated 2013 case in the U.S. District Court in Utah, ER also consented to findings that he had engaged in a fraudulent commodity pool trading scheme in 2009 and 2010. CX-40, at 52-65.

[83] Tr. 261-63; CX-64. In addition to the investments totaling $1,635,500 made by the 23 customers, the $1,700,500 includes Tweed's $65,000 interest in Athenian. *See* Tr. 298-99, 303; CX-29, at 7.

[84] Tr. 469.

[85] CX-10, at 29-30. *See also* CX-10, at 18-19, concerning investors' capital account calculations.

[86] Tr. 470. Despite distributing $600,000 to investors, Tweed contested Enforcement's argument that he was bound by the terms of Athenian's Operating Agreement to make *pro rata* distributions to investors because he had not technically dissolved or liquidated Athenian, and that it was still in existence. Tr. 470-71. The Panel disagrees and finds that once Tweed decided to wind down Athenian and start reimbursing investors he was obligated to do so equitably and not favor some investors over others.

[87] Tr. 168-69, 241.

[88] Tr. 233; CX-63. Tweed's stepson in fact received $50,103.25, which was $103.25 more than he had invested. The stepson was one of the last investors to be reimbursed in full. After making his stepson whole in February 2012,

By early 2012, Tweed was no longer able to redeem all investors because he had run through nearly all the money QAMF had returned. He seemed to prefer some investors over others. As a result, some investors who asked for their money back received nothing. In January 2012, for example, a customer who had invested $100,000 asked Tweed in writing for her money. He told her, "Yes, I got [your] letter and no problem, we'll make sure your funds are redeemed."[89] The investor never received any of her money back even though Tweed later returned over $123,000 to four other investors, including his stepson.[90]

Approximately 12 customers, who invested a total of about $1 million, did not receive any money back from Athenian.

2. Tweed Invests $200,000 of Athenian's Funds in a Software Company

Using the $924,460 that QAMF had returned by October 2010, in March 2011, Tweed invested $200,000 of Athenian's capital in a six-month promissory note issued by a software company, Teamwork Retail ("Teamwork"), paying 10 percent interest. Tweed previously had helped Teamwork raise money and personally invested in the company.[91] In December 2009, Teamwork had paid him $30,000 for his work.[92]

Tweed testified that Teamwork had been in business for three or four years when Athenian made its investment. At the time of the investment, according to Tweed, the company was no longer a startup but in the early stages of its business. Tweed acknowledged that an investment in Teamwork was therefore "somewhat" speculative.[93] Tweed further testified that he invested Athenian's money in Teamwork because he needed to generate income to pay short-term operating expenses, which included retaining accountants.[94] Tweed did not consider whether the investment in Teamwork presented a conflict of interest because of his previous relationship with the company.[95]

Teamwork did not repay the loan. It filed for bankruptcy protection in August 2013. The bankruptcy trustee awarded Athenian $43,500, which Teamwork was supposed to pay over time

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Tweed made partial refunds totaling $10,500 to two other investors, after which he made no more redemptions. CX-63.

[89] Tr. 236-37; CX-58, at 14-19. The customer continued to ask for the return of her investment as late as 2014. In a May 5, 2014 email, she reminded him that in March he had promised her the return of "a substantial portion" of her $100,000 investment within the month, and all of it by July 1, 2014. CX-58, at 19.

[90] CX-63. Eight days after telling the customer she would get her money back, Tweed redeemed more than $13,100 for his stepson. Tr. 237; CX-56, at 22. A week after telling the investor she would get her money back, Tweed returned $99,911.43 to another investor who had invested $100,000 in Athenian. CX-63.

[91] Tr. 203; CX-52, at 51.

[92] Tr. 207-08, 489-92; CX-52, at 1; CX-59, at 21.

[93] Tr. 204.

[94] Tr. 205-07.

[95] Tr. 203-04.

under a plan of reorganization. As late as 2015, however, Tweed carried the $43,500 as a receivable even though he knew Teamwork could not pay this amount.[96] Athenian ultimately recovered less than $3,000 from Teamwork after the bankruptcy, according to Tweed.[97]

3. Tweed Opens an Account for Athenian at Another Broker-Dealer

After ER and QAMF returned over $924,000 to Athenian by late 2010, Tweed opened a securities account for Athenian at another broker-dealer. In January 2011, he transferred $500,000 to that account. He arranged to have a registered representative at the firm professionally manage the money. Tweed had met the broker through another broker he knew. He testified that he had a "loose agreement" with the broker whereby he would invest in blue chip stocks that paid high dividends. According to Tweed, he opened the account because he needed to generate money to pay for expenses and he did not know what else to do with the funds while he was waiting for ER to return the $650,000.[98]

G. Tweed Makes First Disclosures to Investors About Athenian's Status

In early 2014, while Tweed was registered with Concorde, the SEC conducted an examination of his activities.[99] As a result of the examination, Concorde required that Tweed retain counsel to determine what disclosures, if any, he should make to Athenian investors. The firm instructed Tweed to make all necessary disclosures by April 15, 2014. Up to this point, Tweed had not told investors the status of their investments, aside from providing them with annual unaudited financial statements that failed to disclose the lost investments in the Luminary gold mining venture and Teamwork.[100]

In a letter dated April 30, 2014, Tweed told investors for the first time that he had moved the money they had invested with Athenian from PMI Quant Pool 1 to QAMF so that "Athenian could execute on its original investment objective and strategy."[101] He explained that the plan was for QAMF to use PMI Trading Model as originally set out for the Fund. According to his letter, Athenian's money was placed in a QAMF brokerage account at TradeStation and PMI started trading the account. In the letter, Tweed told investors that within a few months—by May 2010—PMI had determined that it needed to go to cash "so that it could retool its programming

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[96] Tr. 209-11; CX-48, at 25.

[97] Tr. 211, 217-19.

[98] Tr. 202-03, 497-99, 504, 521. On January 27, 2011, Tweed wired $500,000 from Athenian's bank account to the other broker-dealer. CX-52, at 43. In June 2011, Athenian paid the broker over $800 for managing the securities account. Tr. 202-03; CX-52, at 67. No evidence was presented at the hearing as to whether the Fund earned or lost money as a result of the other broker's trading.

[99] CX-43, at 1; CX-45, at 1.

[100] Tr. 123-25. Tweed stopped sending investors annual statements for Athenian after 2013. Tr. 224.

[101] CX-44, at 1. This was Tweed's first letter to investors informing them about developments with Athenian. Tr. 169-71.

in an attempt to improve its software system and generate better results."[102] Tweed also told investors that he did not learn until 2012 that ER and QAMF had invested $650,000 in the gold mining venture, instead of with Wells Fargo. Tweed wrote that he believed some of the money could be recovered, particularly if it had been invested in equipment, "but that [was] by no means assured."[103] The letter also stated that in September 2010 he had determined that PMI would not be re-starting its trading system soon and decided then to end Athenian's operations.[104] The letter did not disclose that he had refunded approximately $600,000 to those investors who wanted out of Athenian.

The letter also informed Athenian investors for the first time that Tweed had invested $200,000 of Athenian's capital in Teamwork. He said he was "familiar" with Teamwork and based on his "experience and knowledge of its business" believed that the investment was appropriate. He did not disclose the compensation he received from Teamwork. He also did not disclose in the letter that he had transferred Athenian's funds to an account he had opened at another broker-dealer which was being managed by another registered representative.

Tweed did not send investors audited statements until 2014. Before then, he occasionally met with some investors and sent limited unaudited statements and K-1 Schedules that led investors to believe their investments were fine. Even after sending investors the April 2014 letter, he continued to mislead the remaining investors who had not been redeemed. He filed a 2015 tax return for Athenian representing it had assets of nearly $700,000 even though the gold mining and Teamwork investments were nearly total losses.[105]

H. Customers SK and BM Describe Their Reactions to the Athenian Investment

At the hearing, Enforcement called two customers—SK and BM—to testify about the circumstances surrounding their purchases of interests in Athenian and their dealings with Tweed.

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[102] CX-44, at 2.

[103] Tweed told investors in the letter that ER had been convicted of bank fraud in 2012. CX-44, at 2. Tweed testified that Athenian was repaid approximately $10,000 from the $650,000 investment in the gold mining operation. Tr. 178-79, 193. Tweed made unsuccessful demands directly with Luminary for the return of all of the $650,000 investment. *See* Tr. 181-82; CX-33; CX-34.

[104] CX-44, at 2.

[105] Tr. 213-16; CX-48, at 7. Because the 2015 tax return contained inflated valuations for Athenian's assets, the corresponding customer K-1 Schedules provided the remaining customers whose investments were not redeemed with inflated valuations of their capital accounts. *See* CX-48, at 9-22, 26.

1. Customer SK

On January 25, 2010, SK and his wife invested $50,000 from their family trust in Athenian. The same day, SK's wife also invested $50,000 from her Individual Retirement Account ("IRA").[106]

SK testified that he was "semi-retired" at the time of these investments. He was a truck driver but had to retire in 2008 because of a back injury. He then started a food vending machine business. SK also owned and managed three properties.[107]

In late 2009 or early 2010, SK met Tweed at an apartment association meeting where Tweed was the featured speaker. He and his wife then went to Tweed's office to discuss investment opportunities. Tweed recommended an investment in Athenian. According to SK, Tweed showed him a video or a colored brochure showing persons at PMI in front of computer screens. Tweed explained that PMI had "real money invested in a model in the market" and six other models it was operating using "pretend money."[108] SK testified that Tweed told him PMI would run various models using pretend money and every few months select the model with the best track record to use to trade for the next few months. Tweed told SK that PMI's model had shown returns of 80 percent, which affected his decision to invest because he "was interested in capital appreciation."[109] SK testified that he "expect[ed] some serious performance out of Athenian because of what [he] had been told [by Tweed about PMI's] model."[110]

Tweed gave SK and his wife a copy of the Athenian PPM. SK read the PPM to learn Athenian's objectives, management compensation, investment risks, and the liquidity of an investment.[111] According to SK, Tweed told him that an investment in Athenian was liquid "because the money could be withdrawn whenever we needed it."[112] SK understood that he and his wife would pay a fee of 3.5 percent annually, but Tweed did not tell him how he and PMI would share the fee. SK was not concerned about paying the fee because, as he put it, he did not "have a problem paying somebody an excellent fee for excellent performance."[113] SK could not recall if Tweed told him whether he had evaluated PMI's Trading Model. Tweed told SK that he

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[106] Tr. 325-26; CX-57, at 55-63, 154-56; CX-62. The subscription documents for both investments stated that SK and his wife sought "aggressive growth" for their investment objectives and they had transferred funds from investments in a money market fund to pay for their interests in Athenian. CX-57, at 57, 154.

[107] Tr. 321. SK did not open a securities account with Tweed at CapWest. He invested approximately $600,000 with Tweed, including real estate investment trusts and a private placement in a company specializing in advertising on public spaces. SK estimated that his investments with Tweed were worth $400,000 in 2017. Tr. 362-64.

[108] Tr. 323.

[109] Tr. 323-24, 329-30. Tweed testified that he showed SK the results of the trading tests that PMI had performed. Tr. 539.

[110] Tr. 356.

[111] Tr. 351.

[112] Tr. 329.

[113] Tr. 331.

had invested in Athenian himself but that was not a significant factor in SK's and his wife's decision to invest.[114]

SK and his wife received Tweed's April 30, 2014 letter to Athenian investors. SK testified that he was "quite displeased" with the contents of Tweed's letter. He testified that he had agreed to invest in PMI, not in QAMF. But he also believed that if QAMF were using the same trading model, it would be "acceptable" to him. He would not have invested in a gold mining company. Until he received Tweed's letter, SK had no idea that $650,000 was used to invest in a gold mining operation or that Tweed had invested $200,000 in a promissory note with Teamwork.[115] Nor did SK know that Tweed had given some of Athenian's money to a broker at another firm to trade.[116]

SK was also unaware that Tweed had been trying to wind down Athenian's operations and that some of the Fund's capital was locked up. SK did not know that PMI Quant Pool 1 had registration issues with Utah securities regulators until he and his wife had an annual account review with Tweed in approximately 2012.[117] During their annual meetings with Tweed, SK and his wife were given statements showing that their investments were still valued at $50,000 each.[118] Tweed did not give SK copies of the QAMF PPM or tell him about the Side Agreement. SK testified that he would not have invested in Athenian if he knew that Tweed would get 45 percent of the returns generated by QAMF.[119]

SK did not know that Tweed had given some investors their money back. Had he known, he would have asked for his money, too. In 2013, SK told Tweed he wanted to withdraw $20,000 from Athenian. Tweed told him that was not possible, but he took money out of another investment that SK had made through him.[120]

2. Customer BM

On March 2, 2010, BM invested $50,000 from her family trust in Athenian. On March 11, 2010, she invested $100,000 from her IRA account.[121] At the time of the investments, PMI had already dissolved and returned all of Athenian's funds. By March 8, 2010, a few days

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[114] Tr. 331-32. Even though PMI had done no trading of Athenian's capital, SK understood from Tweed that the Fund was already generating returns by the time of his investment in early January 2010. Tr. 355.

[115] Tr. 333-34, 341. SK testified that he would not have invested in Athenian had he known it would loan money to a startup like Luminary. Tr. 341.

[116] Tr. 342-43.

[117] Tr. 335-36.

[118] Tr. 339, 358-59.

[119] Tr. 338.

[120] Tr. 345-46.

[121] Tr. 372; CX-57, at 71-82.

before BM's second investment, Tweed had committed Athenian to using ER and QAMF to trade its capital.

BM and her husband had met Tweed in approximately 1999 at an investment seminar. BM's husband died in November 2009, a few months before she invested in Athenian. At the time of the investments, BM was approximately 67 years old and a secretary to the principal of a middle school in Pasadena, California.[122] BM purchased interests in Athenian with the proceeds of other investments she and her husband had made through Tweed that were liquidated after her husband's death. BM believed that investing in Athenian was like buying a life insurance policy because she was using the death benefits she received after her husband died.[123] She retired in 2013, three years after the investments.[124]

BM received Tweed's April 30, 2014 letter to Athenian's investors. BM was previously unaware of the developments the letter disclosed. Although she met with Tweed twice a year to review her investments, he did not mention any of the issues with Athenian's funds. To the contrary, Tweed sent statements that led her to believe her investments in Athenian were safe. As a result, she did not question her investments before receiving the letter.[125] BM asked Tweed about the letter. He told her "[w]e're working on" getting the money back.[126] He did not tell her that part of the investments may have been lost. According to BM, Tweed did not tell her how much her investments in Athenian were worth. BM tried to withdraw money from her IRA investment in Athenian but Tweed would not let her.[127]

Tweed never told BM that he had withdrawn his own money from Athenian and that some of the other investors had been refunded their investments, too. Had she known of this, she "would have wondered why [she] didn't get any money back," because everyone should have gotten some money back.[128]

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[122] Tr. 370-71.

[123] Tr. 371-72, 528-30. According to BM's Athenian subscription documents, she made the family trust's $50,000 investment using proceeds from the liquidation of another investment. CX-57, at 70. BM made the $100,000 investment in her IRA using proceeds of a death benefit associated with an investment in a money market fund. CX-57, at 78. On the subscription documents, BM's stated objective for both investments was "aggressive growth." At the hearing, BM described her investment objectives as "moderate[] to conservative." Tr. 379, 530-31; CX-57, at 70, 78.

[124] Tr. 370, 378. BM testified that she and her husband had decided on investments together but that she was not "all that up-to-date on all the investments. I leave that up, more or less, to the trust advisor [sic] to help me." Tr. 379.

[125] Tr. 373-74.

[126] Tr. 374.

[127] Tr. 375-76.

[128] Tr. 376-77.

III. Conclusions of Law

Tweed seeks dismissal of the charges against him arguing that they are barred by the federal statute of limitation. Below we address Tweed's argument for dismissal and then turn to the merits of charges against Tweed, namely Tweed's negligent misrepresentations and omissions in connection with the sale of interests in Athenian.

A. Enforcement's Charges Are Not Barred by the Federal Statute of Limitations or the Application of a Fairness Standard

1. Federal Statute of Limitations (28 U.S.C. § 2462)

In his Answer, Tweed asserts that the Complaint's charges are barred by the federal statute of limitations.[129] He argues that the federal five-year statute of limitations in 28 U.S.C. § 2462 prevents FINRA "from seeking any punitive sanctions—including fines, disgorgement, expulsions or suspensions—that may be requested in this hearing."[130] Because the last alleged act of misconduct by Tweed occurred in March 2010, more than seven years before the filing of the Complaint in this disciplinary proceeding on April 27, 2017, Tweed asserts that "no punitive sanctions are available to Complainant in this case."[131] He further argues that "when [FINRA] permanently bars individuals from the securities industry in the same way that the SEC does, it is clearly behaving like a state actor."[132] Because a FINRA disciplinary decision is appealable to the SEC and U.S. Courts of Appeal, according to Tweed, it ultimately becomes a government action subject to § 2462.

Tweed argues that existing legal precedent is "outmoded and no longer good law" in light of two recent cases, *Kokesh v. SEC*[133] and *Saad v. SEC.*[134] In *Kokesh*, the Supreme Court held that in an SEC enforcement action disgorgement constitutes a penalty within the meaning of

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[129] On the last day of the hearing—December 6, 2017—after the presentation of the evidence and the parties' closing arguments, Tweed filed a motion to dismiss, claiming *inter alia* that the federal statute of limitations required that the Complaint be dismissed. On December 20, 2017, Enforcement filed an opposition. On January 12, 2018, the Hearing Officer denied Tweed's motion, primarily on procedural grounds, relying on FINRA's Rules of Procedure, which do not provide for a motion to dismiss. The only dispositive motion authorized under the Rules is a motion for summary disposition pursuant to FINRA Rule 9264. The parties had agreed to a deadline of October 9, 2017, for filing motions for summary disposition. Tweed's motion to dismiss challenged the sufficiency of the allegations in the Complaint, which he could have raised in a timely motion for summary disposition.

[130] Tweed Post-Hearing Brief, at 6. Section 2462 provides, "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued …." 28 U.S.C. § 2462.

[131] Tweed Post-Hearing Brief, at 6.

[132] Tweed Post-Hearing Brief, at 6.

[133] 137 S. Ct. 1635, 2017 U.S. LEXIS 3557 (June 5, 2017).

[134] 873 F.3d 297 (D.C. Cir. 2017). Tweed relies specifically on the concurring opinion. Tweed Post-Hearing Brief, at 6.

§ 2462 because it deprives wrongdoers of their ill-gotten gains.[135] Therefore, in any claim for disgorgement, the SEC must commence an action within five years of the date the claim accrued. Tweed says *Kokesh* accordingly stands for the proposition that "[e]xpulsions and suspensions by FINRA are also punitive in nature, and therefore should also be subject to the five-year statute of limitations." However, *Kokesh* involved an SEC enforcement action, not a review of a FINRA disciplinary proceeding. It did not hold that § 2462 applies to a self-regulatory organization ("SRO") like FINRA.

Shortly after *Kokesh*, the U.S. Circuit Court of Appeals for the District of Columbia Circuit issued its decision in *Saad*. FINRA barred the respondent for converting his employer's funds, in violation of NASD Rule 2110 (the predecessor to FINRA Rule 2010). The SEC sustained FINRA's action. The D.C. Circuit denied Saad's claim that the SEC should have reduced his sanction because it ignored evidence he contended was mitigating. The court nonetheless remanded the case to the SEC with instructions that it determine whether the bar is an "impermissibly punitive" sanction in light of *Kokesh*.[136]

There is ample case law holding that FINRA is not subject to the federal statute of limitations. The D.C. Circuit's opinion in *Saad* did not disturb existing precedents that deny claims that FINRA's sanctions are subject to § 2462. SEC and FINRA decisions "have established 'the consistently held principle that no statute of limitations applies to disciplinary actions of [self-regulatory organizations such as FINRA].'"[137] The SEC has repeatedly rejected respondents' efforts to create a limitations period for FINRA disciplinary actions, stating that § 2462 "does not apply to FINRA disciplinary proceedings because FINRA is not a governmental entity."[138] The SEC has also held that applying a limitations period to FINRA actions would "impair [FINRA's] statutory obligations and duty to protect the public and discipline its members."[139]

Because SEC and FINRA precedents are controlling, the Panel declines to find that the federal statute of limitations applies to Tweed's misconduct.

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[135] The "sole question" answered by the Supreme Court in *Kokesh* "is whether disgorgement, as applied in SEC enforcement actions, is subject to § 2462's limitations period." *Kokesh*, 137 S. Ct. at 1642 n.3.

[136] *Saad*, 873 F.3d at 304.

[137] *Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *88 (NAC July 23, 2015) (citing *Mark H. Love*, 57 S.E.C. 315, 323 (2004)).

[138] *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *93 (July 2, 2013) (finding that "the disciplinary authority of private self-regulatory organizations … such as [FINRA] is not subject to any statute of limitations") (citations omitted), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *Larry Ira Klein*, 52 S.E.C. 1030, 1039 (1996) ("We do not believe that [§ 2462] applies to disciplinary proceeding brought by a self-regulatory organization.").

[139] *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993).

2. The Fairness of the Disciplinary Proceeding

Even though Tweed does not specifically allege that it was unfair for Enforcement to bring this action because the oldest misconduct occurred seven and one-half years before the filing of the Complaint, we address the fairness argument. The SEC has held that there are no "bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings."[140] Instead, the fairness of a proceeding is based on the "entirety of the record" and whether respondent has shown that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him."[141] The question is whether any inordinate time delays rendered the proceeding "inherently unfair."[142]

In determining whether a proceeding was brought unfairly late, the SEC has considered four time periods between the filing of the complaint and (i) the first incident of misconduct; (ii) the last incident of misconduct; (iii) notice to the SRO of the misconduct; and (iv) the initiating of the SRO's investigation.[143] In this case, the time elapsed between the initial misconduct (early November 2009) and the filing of the Complaint (late April 2017) was seven years and six months. The time between the last misconduct (March 2010) and the filing of the Complaint was seven years and one month. The time between when FINRA first learned of the potential misconduct (March 2014)[144] and the filing of the Complaint was three years and one month. The time between the initiation of the investigation (March 2014)[145] and the filing of the Complaint was also three years and one month. However, evaluating the time lags "does not, in itself, resolve the fairness question."[146]

Tweed does not point to any specific evidence that delay caused him to be disadvantaged in defending himself. Although applying an analysis of elapsed time periods in other cases does

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[140] *Love*, 57 S.E.C. at 323.

[141] *Id.* at 325 (rejecting argument that delay was unfair when respondent failed to show that he was prejudiced).

[142] *William D. Hirsh*, 54 S.E.C. 1068, 1077 (2000).

[143] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *88-89.

[144] Enforcement's investigator testified FINRA first learned of Tweed's potential misconduct when Concorde contacted FINRA in June or July 2015. Tr. 311. However, months earlier, on November 7, 2014, Tweed's counsel wrote to the SEC about Athenian as a result of the on-site examination of Concorde in February 2014. Tweed's counsel copied FINRA on the letter. CX-45. Accordingly, it is more likely that the investigator meant 2014 instead of 2015. The record evidence indicates that the earliest Concorde would have informed FINRA was March 2014, less than a month after the SEC's on-site examination, which uncovered issues surrounding Athenian. Tweed testified that Concorde talked to him about Athenian at around this time. Tr. 120-21. On March 3, 2014, Concorde's chief compliance officer wrote a memorandum addressed to the firm's board of directors concerning Tweed's sales of interests in Athenian. CX-43. Concorde then required that Tweed make disclosures about Athenian to his customers. *See* Tr. 315-18; CX-44; CX-45, at 1.

[145] The earliest date that FINRA could have initiated its investigation was March 2014, when Concorde raised issues regarding Athenians with Tweed. In December 2015, FINRA requested information pursuant to FINRA Rule 8210 from Tweed's then-current employer about Athenian, Teamwork, Tweed Financial, and other subjects. CX-65, at 1.

[146] *Rooney*, 2015 FINRA Discip. LEXIS 19, at *91 (citing *Love*, 57 S.E.C. at 323).

not alone determine whether a proceeding is fair, the Panel finds that, based on the entire record, the periods in this case are not so long that they denied Tweed a fair hearing.

The purported delay in this case was considerably less than in two cases in which the SEC and FINRA dismissed actions because of delays in bringing them. In *Jeffrey Ainley Hayden*, the SEC dismissed charges brought by the New York Stock Exchange ("NYSE"), finding the delay in filing the case—14 years after the misconduct began and six years after the most recent incident of misconduct—was "inherently unfair" to the respondent.[147] Also, five years had passed since the NYSE learned of the misconduct and three and one-half years had elapsed before it filed the complaint. In *Department of Enforcement v. Morgan Stanley DW Inc.*, FINRA dismissed a complaint that was brought eight years after the misconduct began, seven years after it ended, five years and nine months after Enforcement learned of the misconduct, and four years and nine months after Enforcement began the investigation.[148]

The four time periods here are generally comparable to those in other FINRA cases in which adjudicators have rejected respondents' claims of unfair delay.[149] But we find that Tweed was not harmed by the lag in filing the Complaint. To establish unfairness, a respondent must show that the delay caused actual prejudice.[150] Tweed has not demonstrated any prejudice.

The Panel does not find that the time required to bring this case to hearing denied Tweed a fair proceeding.[151] We therefore reject Tweed's efforts to have the Panel dismiss the charges on grounds of delay.

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[147] 54 S.E.C. 651, 654 (2000).

[148] No. CAF000045, 2002 NASD Discip. LEXIS 11, at *15-17 (NAC July 29, 2002).

[149] *See Love*, 57 S.E.C. at 323-25 (delay not unfair where complaint was filed seven years after the first act of misconduct, more than six years after the last act of misconduct, four years after discovery of the misconduct, and three years and six months after investigation initiated); *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *40-42 (NAC Feb. 12, 2007) (delay not unfair where complaint was filed six years and two months after the first act of misconduct, five years and ten months after the last act of misconduct, four years and one month after discovery of the misconduct, and four years and one month after the initiation of investigation); *Dep't of Enforcement v. The Dratel Group*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *102-03 (NAC May 2, 2014), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016) (delay not unfair where complaint was filed approximately five years after the first act of misconduct, three years after the last act of misconduct, four years after discovery of the misconduct, and four years after the initiation of the investigation); *Rooney*, 2015 FINRA Discip. LEXIS 19, at *89-90 (delay not unfair where complaint was filed five years and ten months after the first act of misconduct, five years and eight months after the last act of misconduct, five years and one month after the discovery of misconduct, and four years and nine months after the initiation of the investigation).

[150] *Kaweske*, 2007 NASD Discip. LEXIS 5, at *38 (citing *Dep't of Enforcement v. Apgar*, No. C9B020046, 2004 NASD Discip. LEXIS 9, at *25 (NAC May 18, 2004)); *see also James Gerard O'Callaghan*, Exchange Act Release No. 57840, 2008 SEC LEXIS 1154, at *32 (May 20, 2008).

[151] Tweed does not raise the doctrine of laches as a bar to FINRA's action. The Panel nonetheless notes that to assert the defense of laches successfully, a respondent "must demonstrate a lack of diligence by [FINRA] and that he has been prejudiced." *Robert Tretiak*, 56 S.E.C. 209, 230 (2003). The record shows that Enforcement was diligent in pursuing this case against Tweed. It commenced its investigation shortly after learning from Concorde of Tweed's possible misconduct in 2014.

B. Tweed Made Negligent Misrepresentations or Omissions by Failing to Disclose Material Information to Investors

The Complaint alleges that Tweed made negligent misrepresentations and omissions in connection with the sale of interests in Athenian, in violation of Sections 17(a)(2) and (a)(3) of the Securities Act, which constitutes a violation of FINRA Rule 2010. Enforcement also alleges that his misconduct constitutes an independent violation of Rule 2010, which requires that a member, in the conduct of his business, "observe high standards of commercial honor and just and equitable principles of trade."

Section 17(a)(2) prohibits, in the offer or sale of any securities[152] using interstate commerce,[153] obtaining "money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Section 17(a)(3) prohibits, in the offer or sale of any securities, engaging "in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." Section 17(a)(2) requires that Tweed "obtain[ed] money or property," whereas (a)(3) does not.[154] Sections 17(a)(2) and (a)(3) do not require a showing of scienter; negligence is sufficient.[155] Negligent conduct under Sections 17(a)(2) and (a)(3) is a failure "to use the degree of care and skill that a reasonable person of ordinary prudence and intelligence would be expected to exercise in the situation."[156] Negligent misrepresentations violate Rule 2010.[157]

Tweed does not dispute that interests in Athenian were securities, that the alleged misconduct involved the offer or sale of securities, or that the instrumentalities of interstate commerce were used in the offering. Accordingly, we focus on the materiality element associated with finding violations of Sections 17(a)(2) and (a)(3) and Tweed's negligent conduct.

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[152] The parties stipulated that the interests in Athenian constituted securities. Stip. ¶ 18. The offers of limited partnership interests in the Athenian private placement were made pursuant to the registration exceptions contained in Section 4(2) of the Securities Act and Regulation D. CX-9, at 5, 22.

[153] The parties stipulated that Tweed used the facilities of interstate commerce in connection with the offer and sale of the interests in Athenian and that Tweed received money from investors through the mail and through wire transfers. Stip. ¶¶ 19-20. Tweed resided in California. He invested Athenian's capital in PMI Quant Pool 1 and QAMF, both of which were based in Utah. BH and ER resided in Utah.

[154] Tweed obtained money or property from investors through Athenian, from which he stood to gain personally from management and performance fees by serving as the general partner through Tweed Financial. He also received repayment of his investment of $50,000 and reimbursement of expenses of nearly $12,000, to the detriment of those investors who got none of their money back or only partial redemptions. *See SEC v. Stoker*, 865 F. Supp. 2d 457, 463 (S.D.N.Y. 2012) (finding defendant liable under Section 17(a)(2) where he obtained money or property for his employer while acting as its agent); *SEC v. Syron*, 934 F. Supp. 2d 609, 637-39 (S.D.N.Y. 2013) (holding that a defendant must personally gain money or property from the fraud for a finding of liability under Section 17(a)(2)).

[155] *Aaron v. SEC*, 446 U.S. 680, 701-02 (1980).

[156] *SEC v. True North Fin. Corp.*, 909 F. Supp. 2d 1073, 1122 (D. Minn. 2012).

[157] *See Dep't of Enforcement v. Pellegrino*, No. C3B050012, 2008 FINRA Discip. LEXIS 10, at *13-14 n.13 (NAC Jan. 4, 2008) (citing *Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *44 & *47 (NAC June 25, 2001)).

A fact is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[158] Stated differently, the determination of the materiality of a misstatement or omission "is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor."[159] Material facts include those facts that may affect the desire of investors to buy, sell, or hold a company's security.[160] "The standard is objective—it asks what a reasonable investor would consider material under the circumstances."[161] In an enforcement action, a finding of materiality does not require proof of "actual reliance"—only that there is a substantial likelihood that a reasonable investor would judge the information important in making an investment decision.[162]

The Complaint alleges that Tweed made negligent material misrepresentations or omissions involving four areas: (i) the amount of fees investors could be charged; (ii) the switch from PMI Quant Pool 1 to QAMF; (iii) Tweed's potential additional compensation resulting from his Side Agreement with QAMF; and (iv) TradeStation's rejection of Tweed's account application for Athenian because of the existence of customer arbitrations and complaints against Tweed. The Hearing Panel finds that Tweed made negligent misrepresentations or omissions with regard to the first three allegations, but the Panel does not find that Tweed had an obligation to disclose that TradeStation rejected an Athenian account application. Each allegation is discussed below.

1. Tweed Failed to Disclose PMI Quant Pool 1 and QAMF Master Fund Management Fees That Would Reduce Return on Investment

According to the Complaint, Tweed failed to disclose the total potential fees and costs of investing in Athenian, whose capital would be traded by PMI Quant Pool 1 and later QAMF.[163]

PMI Quant Pool 1's PPM and Operating Agreement provided for an additional 5 percent management fee payable to PMI at the master fund level. This was inconsistent with the Athenian PPM which identified a fee that would be shared with PMI.[164] QAMF's operating

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[158] *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988).

[159] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976).

[160] *SEC v. Hasho*, 784 F. Supp. 1059, 1108 (S.D.N.Y. 1992) (citing *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

[161] *Tretiak*, 56 S.E.C. at 222. *See also Dep't of Mkt. Regulation v. Burch*, No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *23 (NAC July 28, 2011) ("A registered representative owes such a duty to his clients to disclose material information fully and completely when recommending an investment.").

[162] *United States v. Vilar*, 729 F.3d 62, 88 (2d Cir. 2013) (citing *United States v. Contorinis*, 692 F.3d 136, 143 (2d Cir. 2012)). *See also SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) ("The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.").

[163] Compl. ¶ 62.a.

[164] CX-6, at 17; CX-7, at 20.

documents also provided for fees that were not in Athenian's PPM, specifically, the 3.5 percent management fee that would be charged to Athenian at the master fund level.[165] Tweed acknowledged that Athenian's, PMI's, and QAMF's documents created "confusion on how those fees are to be divvied up," and the "PPM could have been a little clearer and a little more accurate."[166] Tweed testified that there should have been better "coordination" between the feeder fund (Athenian) fees and the master fund (PMI Quant Pool 1 and QAMF) fees.[167]

The SEC has determined that fees associated with an investment are objectively material.[168] Here, a substantial likelihood exists that a reasonable investor would view the additional 5 percent or 3.5 percent management fee, owed to PMI and QAMF, as significant alterations of the total mix of information made available to them. The additional fees approximately doubled the management and performance fees Tweed disclosed in the Athenian PPM. Tweed accordingly had an obligation to disclose the PMI and QAMF master fund management fees that investors would be obligated to pay.

Tweed misrepresented the cost of the fees that Athenian could ultimately have to shoulder, thus reducing investors' returns, to all 23 investors in the Fund. He therefore provided materially false information about the potential costs of investing in Athenian. Tweed's failure to make the disclosures was negligent. Tweed argues that the fees were not material because they were never charged to customers because the Fund made no money and ceased the quantitative trading within months.[169] However, PMI and QAMF could have charged the fees to Athenian, increasing costs to investors, and they had a right to know this information before investing.

2. Tweed Did Not Disclose That He Had Replaced Master Funds

The Complaint further alleges that Tweed failed to disclose that he had replaced the PMI Quant Pool 1 master fund, controlled by BH, with the QAMF master fund which was controlled by ER. This "caused the statements about the master fund [PMI] and its controlling principal [BH] in the PPM to be misleading," according to the Complaint.[170] Also according to the Complaint, Tweed "failed to disclose anything about QAMF, including that ER, the person ultimately managing QAMF, would now have immediate control over the Athenian Fund's assets."[171]

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[165] CX-16, at 6, 18; CX-17, at 25.

[166] Tr. 532.

[167] Tr. 532.

[168] *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 94 (2d Cir. 2010) (noting the SEC's "strongly held belief in the importance of fees and expenses in a typical investor's decision to invest in a fund").

[169] Tweed Post-Hearing Brief, at 5 (noting that "[a]ny possibly duplicative fees were waived").

[170] Compl. ¶ 64.a.

[171] Compl. ¶ 64.b.

After January 29, 2010, when BH dissolved PMI Quant Pool 1, Tweed continued to market interests in Athenian using the original PPM. After that date, ten new customers invested a total of $732,000 in Athenian. Tweed did not tell them or the existing investors about the dissolution before they invested.

By March 8, 2010, Tweed had executed the Side Agreement and subscription agreement between Athenian and QAMF, formalizing the switch in master funds from PMI Quant Pool 1 to QAMF. QAMF documents required that Athenian pay a 3.5 percent management fee. Also on that date, Tweed made his first transfer of money from Athenian to QAMF. Tweed did not amend the Athenian PPM to disclose that all of its capital would be invested in QAMF, a new master fund formed a month earlier for the purpose of using Athenian as a feeder fund after PMI Quant Pool 1 dissolved. For four years—until April 2014—Tweed withheld from investors that their money was not invested in a master fund using a supposedly sophisticated trading algorithm, as they were told in the PPM, but had been invested in a gold mining venture (or with Wells Fargo) and a software company he had a personal connection to.[172]

Tweed testified that "[i]nitially when I did this and we changed the master fund … I didn't really think about this whole amended thing. It didn't really come up. Looking back … there should have been an amendment [to the Athenian PPM]. … That should have been done."[173] He added, "I should have been very clear and up front with everyone. [I] stuck my head in the sand because it was something that I just had not ever thought would ever happen."[174] He further acknowledged that a "risk that wasn't accounted for" was giving control to ER.[175]

Tweed and the PPM provided no information sufficient for investors to evaluate the risks of giving their money to QAMF and ER. The SEC has found that failing to disclose information about a person responsible for the success or failure of an investment is material.[176] ER was key to Athenian's investment in QAMF, yet neither the PPM nor Tweed ever said anything about his qualifications to investors, or even that Tweed had changed master funds to QAMF and that it was controlled by ER. These were material, negligent omissions.

The switch to QAMF, besides giving ER control, also imposed another layer of management fees at the master fund level. In the case of an existing PPM already in circulation, federal securities laws required that Tweed disclose new material facts in a supplement or

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[172] After March 8, 2010, by which time Tweed had finalized the switch to QAMF, six customers invested a total of $513,000 in Athenian. CX-63.

[173] Tr. 518. Tweed explained that at the time he believed that QAMF was going implement the PMI Trading Model as PMI was supposed to have done, executing the same trades, but doing so by replacing BH with ER. Tr. 518-19.

[174] Tr. 521.

[175] Tr. 519.

[176] *In re Gallagher & Co.*, 50 S.E.C. 557, 563 (1991).

amendment to make statements in an existing PPM no longer misleading.[177] It was at least negligent of Tweed not to disclose to investors that he had switched to QAMF.

3. Tweed Failed to Disclose the Side Agreement for 45 Percent of QAMF's Compensation

The Complaint further charges that Tweed, by continuing to use the inaccurate PPM in selling interests in Athenian, failed to disclose that on March 3, 2010, he had negotiated a Side Agreement with ER under which he would be compensated as a consultant with 45 percent of QAMF's management compensation.[178] This meant that Tweed increased his total potential gain from Athenian as a result of the new relationship with QAMF, which would have resulted in lower returns for the investors. Tweed's failure to disclose the additional fees he could earn was at a minimum negligent.

The existence of a consulting relationship between Tweed and QAMF, and the anticipated fees associated with it, would have been material to a prospective investor. It likely would have been viewed, if disclosed, as something that could influence Tweed's decision to invest Athenian's money with QAMF and ER.[179] Case law has consistently held that a failure to disclose information related to a broker's self-interest constitutes a material omission.[180] The Panel accordingly finds that Tweed negligently failed to disclose that he was entitled to 45 percent of QAMF's management compensation fee.

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[177] *SEC v. Manor Nursing Centers, Inc*., 458 F.2d 1082, 1095-96 (2d Cir. 1972) (finding that developments after the effective date of a registration statement that materially alter the picture presented in the registration statement must be brought to the attention of investors) (citing *SEC v. Bangor Punta Corp*., 331 F. Supp. 1154, 1160 n.10 (S.D.N.Y. 1971) ("The effect of the antifraud provisions of the Securities Act (§ 17(a)) … is to require the prospectus to reflect any post-effective changes necessary to keep the prospectus from being misleading in any material respect.")). *See also SEC v. Scott*, 565 F. Supp. 1513, 1534 (S.D.N.Y. 1983).

[178] Compl. ¶¶ 38, 44.d, 64.c; CX-22. After Tweed formalized Athenian's relationship with QAMF on March 8, 2010, six investors purchased interests totaling $513,000. They and Tweed's existing customers, were misled by him because he did not disclose the Side Agreement. CX-62.

[179] *See Kevin D. Kunz*, 55 S.E.C. 551, 565 (2002) (finding that when a broker-dealer "has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed") (citing *In re Michael A. Niebuhr*, 52 S.E.C. 546, 552 (1995), *aff'd*, 64 F. App'x 659 (10th Cir. 2003)).

[180] *Hasho*, 784 F. Supp. at 1110 (finding that a broker's own financial interest or economic incentive in connection with a stock recommendation is material) (citing *Chasin v. Smith Barney & Co*., 438 F.2d 1167, 1172 (2d Cir. 1970)). *See also The Dratel Group*, 2014 FINRA Discip. LEXIS 6, at *63-64 ("A reasonable investor surely would find material Dratel's subordination of discretionary customers' interests to his personal interests.") (citing *SEC v. K.W. Brown & Co*., 555 F. Supp. 2d 1275, 1280 (S.D. Fla. 2008) (finding material an investment advisor's allocation scheme that benefitted the firm's account over the customers' accounts and which the advisor failed to disclose to customers)).

4. TradeStation Rejected Tweed's Application to Open a Brokerage Account for Athenian

According to the Complaint, Tweed's failure to disclose in the PPM that TradeStation had rejected Athenian's application to open an account because of his history of customer complaints and arbitration claims was a material omission. Enforcement charges that this information would have been material to a reasonable investor, and Tweed was negligent in omitting it because it was negative information that rendered the positive statements about him in the PPM misleading.

Specifically, the Complaint alleges that Tweed "failed to disclose the reason that Tweed could not open an account for the Fund directly—the arbitration (complaints) against Tweed at that time—which required the Fund (and investors) to shoulder additional (undisclosed) costs and risks …."[181] Therefore, the Complaint does not allege that Tweed should have disclosed the existence of customer complaints—only that TradeStation rejected Athenian's account on those grounds. The Complaint does not allege anything about the outcomes of the customer complaints—whether Tweed lost some cases on the merits after a hearing, or whether some cases were dismissed, or if Tweed agreed to settle some claims with customers.

Enforcement argues that a reasonable investor would want to know that Tweed had been rejected for a trading account because TradeStation had concerns about his history in the securities industry. The rejection, according to Enforcement, was "important negative information about [Tweed] that investors should have been notified about" because, as set forth in the PPM, he was a "key person, and thus his qualifications were material."[182] It asserts that the omitted facts altered the total mix of information presented about him in the PPM.[183]

Furthermore, according to Enforcement, this allegedly negligent omission was material because TradeStation's rejection had secondary effects. It led Tweed to use PMI as the master fund (instead of trading Athenian's money directly through Athenian's own securities account), which in turn led to additional fees to compensate PMI. According to the Complaint, Tweed initially intended for PMI to trade Athenian's capital directly using the PMI Trading Model. When PMI dissolved PMI Quant Pool 1 on January 29, 2010, Tweed then had to engage ER and QAMF, which further undercut Tweed's ability to control Athenian's funds.[184]

The Panel disagrees that information about TradeStation's rejection is material. The investors were Tweed's existing customers. The customer arbitrations and complaints were contained in public disclosures available in FINRA's BrokerCheck system, which investors and

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[181] Compl. ¶ 32. *See also* Compl. ¶ 62.b.

[182] Enforcement Post-Hearing Brief, at 20.

[183] Enforcement Post-Hearing Brief, at 15.

[184] Compl. ¶¶ 33-34.

the public could easily review. Furthermore, the allegation that the account rejection is the cause of a domino effect that led to Tweed's use of a feeder fund and master fund model is speculative.

In any event, Enforcement's allegations rely on the timing of the TradeStation rejection. The evidence at the hearing showed that TradeStation's rejection occurred after January 29, 2010, when BH shut down PMI Quant Pool 1. Therefore, the account rejection had no bearing on the feeder fund and master fund model because, as Tweed testified, he had already decided on the structure before the offering. PMI already had dissolved when Tweed considered opening a TradeStation account for Athenian and was turned away.

Moreover, the PPM says nothing about Tweed's planning to operate Athenian as its own master fund. The PPM told investors that Athenian intended to invest all of its capital in PMI Quant Pool 1, which it identified as the master fund.[185] Accordingly, the Panel concludes that investors were not misled by the PPM in that it did not disclose that Tweed may have initially considered operating Athenian as the master fund before deciding on using PMI Quant Pool 1.[186]

5. Conclusion

The Hearing Panel finds that Tweed made negligent misrepresentations or omissions by failing to disclose to investors the following material information: (i) PMI Quant Pool 1's and QAMF's management fees associated with an investment in Athenian; (ii) the switch of master funds from PMI Quant Pool 1, managed by BH, to QAMF, managed by ER; and (iii) the Side Agreement under which he would receive 45 percent of QAMF's management compensation.[187]

The Panel does not find that Tweed had an obligation to disclose that TradeStation had rejected an Athenian account application because of the existence of customer arbitrations or complaints against Tweed.

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[185] CX-9, at 5, 21, 38.

[186] Because we find that TradeStation's account rejection was not material—and Tweed did not have to disclose it—we do not address Tweed's argument that the Complaint failed to charge him with a failure to meet the requirements of SEC Regulation S-K, Item 401(f), concerning required disclosures about control persons. Tweed Post-Hearing Brief, at 4-5.

[187] The Panel rejects Tweed's argument, in which he cites *WPP Lux. Gamma Three Sarl v. Spot Runner, Inc*., 655 F.3d 1039, 1057 (9th Cir. 2011), that the Complaint fails to state a claim for violations of Section 17(a)(3) based on "scheme liability" because it does not allege misconduct beyond the negligent misrepresentations and omissions. Tweed Post-Hearing Brief, at 6-7. The Panel finds that the facts and circumstances in this case support the claim that Tweed's overall misconduct fits within the reach of both Sections 17(a)(2) and (a)(3) because he secretly entered into agreements and transactions with QAMF that operated as a continuing fraud or deceit upon Athenian's investors. *See SEC v. Jankovic*, 2017 U.S. Dist. LEXIS 40573, *39 n.5 (S.D.N.Y. Mar. 21, 2017) (finding that the "breadth" of defendant's misconduct supports liability under both sub-sections and focusing on defendant's misconduct "in the aggregate, rather than attempt to place [d]efendant's misdeeds in either a Section 17(a)(2) or (3) bucket").

Accordingly, the Panel finds that Tweed violated Sections 17(a)(2) and (a)(3) of the Securities Act, which is a violation of Rule 2010. We also find that his negligent conduct constitutes an independent violation of FINRA Rule 2010.

IV. Sanctions

In determining the appropriate sanctions for Tweed's misconduct, the Panel considered FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations ("General Principles") and the Principal Considerations in Determining Sanctions ("Principal Considerations").[188] We also considered all relevant facts and circumstances, including the seriousness of the misconduct, any aggravating or mitigating factors, the risk of future harm to the investing public posed by Tweed, and the deterrent value to Tweed and others who may be similarly situated.

For misrepresentations or material omissions of fact involving non-scienter based, negligent misconduct in violation of Rule 2010, the Guidelines recommend suspending an individual in any or all capacities for between 31 calendar days and two years and imposing a fine of $2,500 to $73,000.[189] There are no principal considerations specific to this Guideline. The Panel accordingly applied the General Principles and Principal Considerations for all rule violations.

Two General Principles are applicable here. General Principle No. 1 states that "sanctions should be designed to protect the investing public by deterring misconduct and upholding high standards of business conduct." Adjudicators accordingly should "design sanctions that are meaningful and significant enough to prevent and discourage future misconduct by a respondent and deter others from engaging in similar misconduct." Sanctions should "reflect the seriousness of the misconduct at issue."[190] General Principle No. 3 instructs adjudicators to "tailor sanctions to respond to the misconduct at issue," so that the sanctions imposed "address the misconduct involved in each particular case."[191] It also provides that adjudicators "may determine that

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[188] *See* FINRA Sanction Guidelines (2018), http://www.finra.org/industry/sanction_guidelines. In May 2018, FINRA revised its Guidelines by amending General Principle No. 2 to instruct adjudicators in disciplinary proceedings to consider customer-initiated arbitrations that result in adverse arbitration awards or settlements when assessing sanctions. These revisions apply only to complaints filed in FINRA's disciplinary system beginning June 1, 2018. *See* Guidelines at 2-3. Accordingly, the Panel did not consider Tweed's customer complaints in determining sanctions. No other revisions were made to the Guidelines. *See* FINRA Regulatory Notice 18-17 (May 2, 2018), http://www.finra.org/industry/notices/18-17.

[189] Guidelines at 89. This guideline should be applied in cases alleging a violation of FINRA Rule 2010 if the cause of action in the complaint is based on negligent misrepresentations or negligent omissions of fact. Guidelines at 89 n.3.

[190] Guidelines at 2 (General Principle No. 1).

[191] Guidelines at 3 (General Principle No. 3).

egregious misconduct requires the imposition of sanctions above or otherwise outside of a recommended range."[192]

The Panel finds that Tweed's conduct was egregious. He continued to use an inaccurate and misleading PPM to market Athenian to investors even after his plans for the Fund fell apart. A number of Principal Considerations are relevant in this case. Tweed could have earned a substantial amount of money had Athenian succeeded.[193] Had he been able to preserve the principal invested by his customers, he could have earned $17,000 per year in management fees (equal to 1 percent of principal).[194] He also could have received performance allocations of between 20 and 35 percent and an undisclosed 45 percent share of QAMF's net fees and performance allocation.[195]

Tweed's misconduct involved a large number of customers and significant amount of money.[196] He persuaded 23 customers to invest over $1.6 million. He did this even though he had little experience in managing a hedge fund and trading securities, which was the purported basis of the PMI Trading Model's appeal and upon which he relied in selling Athenian. The PMI Trading Model was abandoned almost immediately after Tweed had collected some of the investors' money. Ultimately, 14 investors whose investments Tweed did not fully redeem lost approximately $1,040,000.

After soliciting customers to invest, Tweed's misconduct extended over a considerable time.[197] He waited four years before making any disclosures to correct his misrepresentations and omissions. He only did so after his actions came to light in connection with an SEC exam and when his employer firm required that he come clean with Athenian's remaining investors.

The Panel finds disturbing the decisions and actions Tweed undertook after he realized that his plans for Athenian were not going to materialize. Within a few months, Tweed began redeeming some investors in full while giving others no money or partial refunds. It is particularly troubling that the first person Tweed repaid in full was himself and that he ensured that his stepson was ultimately made whole. He effectively overpaid some investors at the

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[192] Guidelines at 3 (General Principle No. 3). General Principle No. 3 also states that, in an egregious case, adjudicators "may consider barring an individual respondent … regardless of whether the individual guidelines applicable to the case recommend a bar … or other less severe sanctions."

[193] Guidelines at 8 (Principal Consideration No. 16) (whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain).

[194] The Athenian PPM provided that the general partner, Tweed Financial, would receive a monthly management fee of 1 percent, which was the difference between the 3.5 percent total annualized fee and the 2.5 percent fee paid to PMI. *See* CX-9, at 6.

[195] CX-9, at 6.

[196] Guidelines at 8 (Principal Consideration No. 17) (the number, size, and character of the transactions at issue).

[197] Guidelines at 7 (Principal Consideration No. 9) (whether the respondent engaged in the misconduct over an extended period of time).

expense of others. At least ten investors received no redemptions; four others were only partly redeemed.[198] Tweed made redemptions without informing all investors.

Tweed failed to tell investors that the quantitative trading strategy he had envisioned was not implemented. He also did not inform investors that by September 2010 he had decided to wind down the Fund or that, by 2012, he had determined that the gold mining investment was likely a bust. Tweed hid bad news from investors to avoid having to deal with the repercussions.

After considering multiple aggravating factors, a majority of the Panel determines that it is appropriate to bar Tweed in all capacities and fine him $50,000 for negligently making material misrepresentations and omissions to customers in connection with sales of interests in Athenian. Simply put, the majority of the Panel believes that Tweed is unfit to work in the securities industry.

One panelist dissents on the issue of sanctions. The panelist believes that, after consideration of the facts and circumstances present in this case and applying the General Principles and Principal Considerations set forth in the Guidelines, as we discuss above, the appropriate sanction is a two-year suspension in all capacities from associating with any FINRA member firm. The panelist agrees that Tweed's misconduct was egregious but finds that a two-year suspension is appropriately remedial and is sufficient as a deterrent to Tweed and others in the securities industry. The dissenting panelist concurs with the majority that a $50,000 fine is also appropriate in this case.

V. Order

Respondent Robert R. Tweed violated FINRA Rule 2010 by contravening Sections 17(a)(2) and (a)(3) of the Securities Act. His misconduct also constitutes an independent violation of Rule 2010. For these violations, Tweed is barred from associating with any FINRA member firm in any capacity and fined $50,000. He is also ordered to pay the costs of the hearing in the amount of $5,195.72, consisting of a $750 administrative fee and $4,445.72 for the cost of the transcript.

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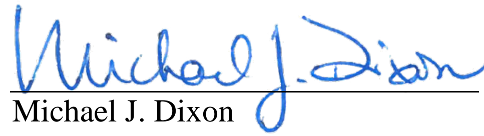
[198] CX-63.

If this Decision becomes FINRA's final disciplinary action, the bar will take immediate effect. The $50,000 fine shall be due on a date set by FINRA, but not sooner than 30 days after this Decision becomes FINRA's final action.[199]



Michael J. Dixon
Hearing Officer
For the Extended Hearing Panel

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[199] The Extended Hearing Panel has considered and rejects without discussion any other arguments made by the parties that are inconsistent with this Decision.