BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Brian Colin Doherty Fair Haven, NJ, Respondent.	DECISION Complaint No. 2015047005801 June 15, 2020

Registered representative engaged in a fraudulent, prearranged trading scheme to enable his customer, a proprietary trader at another member firm, to evade that firm's aged-inventory policy. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Richard Chin, Esq., Eric Hansen, Esq., Daniel Hibshoosh, Esq., David Monachino, Esq., Leo Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

Decision

I. Introduction

FINRA's Department of Enforcement ("Enforcement") appeals the sanctions imposed in a June 14, 2019 Hearing Panel decision. The Hearing Panel found that Brian Colin Doherty ("Doherty"), a registered representative at an interdealer broker, BGC Financial LLP ("BGC"), engaged in a fraudulent scheme. Specifically, the Hearing Panel found that Doherty and his customer TS, a proprietary trader at FINRA member firm Scotia Capital USA, Inc. ("Scotia"), engaged in a fraudulent scheme, in which Doherty executed 19 prearranged sets of purchases and sales of corporate bonds to help TS evade Scotia's internal aged-inventory policy, and thus increase TS's compensation. For Doherty's misconduct, the Hearing Panel suspended him in all capacities for two years and ordered that he pay Scotia $56,093 in restitution.

On appeal, Enforcement argues that the Hearing Panel should have barred Doherty for his fraudulent misconduct. Enforcement asserts that the Hearing Panel erroneously found mitigating that BGC terminated Doherty for his misconduct. Enforcement argues that this error, along with the presence of numerous aggravating factors, demonstrates that a bar is appropriate for Doherty's significant misconduct. We agree. Doherty has not demonstrated that BGC's decision to terminate him for his fraudulent, prearranged trading scheme has materially reduced the likelihood of his engaging in future misconduct. Consequently, in determining sanctions, we find that Doherty's mitigation credit for his termination should be minimal, that aggravating factors, not mitigating ones, predominate Doherty's misconduct, and that a bar is appropriate for Doherty's misconduct.[1]

II. Facts

A. Doherty and BGC

Doherty entered the securities industry in 1993. He became a registered representative with BGC in September 2004, where he remained until BGC terminated him in August 2015. He is currently registered with another broker-dealer. During the relevant period, Doherty worked on BGC's corporate bond desk.

BGC is an interdealer broker that trades only dealer to dealer. As such, BGC generally does not take positions in any securities and executes trades in a matched principal capacity. BGC's business model did not enable its brokers to execute trades on a proprietary basis, take positions, or execute short sales. BGC's written supervisory procedures ("WSPs"), which Doherty certified his understanding of and compliance with, provided that registered representatives:

> [W]ill not warrant or guarantee the present or future value or price of any security . . . [or] agree to "purchase" securities from a customer and then "resell" them to the customer under arrangements which pose no economic risk to the customer.

The WSPs also stated that:

> An offer to sell coupled with an offer to buy back at the same or a higher price, or the reverse, is a prearranged trade and is prohibited . . . . [A]ny time a customer requests that we execute a purchase or sale or enter into a repurchase or reverse repurchase transaction at other than prevailing market prices, you should discuss the proposed transaction with your supervisor prior to accepting the order.

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[1] As discussed in Part III.B.2. (Restitution), we also affirm the Hearing Panel's order that Doherty pay Scotia restitution of $56,093.

B. Doherty Engages in a Fraudulent, Prearranged Trading Scheme

1. The Origin of the Fraudulent Scheme

Doherty's brother introduced him to TS in 2008, and TS later became Doherty's customer. TS was a registered representative who worked at Scotia and managed a proprietary account at Scotia during the relevant period.[2] Doherty and TS lived near one another and took the same commuter ferry, where they would occasionally see each other.

In April 2015, Doherty and TS had an encounter on the ferry. At that time, TS informed Doherty that Scotia was charging TS for securities positions held for more than six months in the proprietary account that he managed.[3] TS told Doherty that he wanted to "reset the clock" on his aged positions, so he would not be penalized by Scotia's aged-inventory policy, and proposed doing so by selling bonds and repurchasing them on the same day at the same price plus a commission. TS informed Doherty that he would identify these prearranged transactions by using the word, "Melissa," which is Doherty's wife's name.

2. Doherty Provides Minimal Details of the Proposed Fraudulent Scheme to BGC

A few days later, Doherty approached the head of BGC's corporate bond desk, Jon Eckert ("Eckert").[4] Doherty did so because he felt that TS's request, in which BGC would facilitate Scotia's trading with itself, was unusual and, if carried out, would evade Scotia's internal policies. Despite Doherty's purported concerns, Doherty told Eckert few details of the proposed trades for TS. Instead, he simply informed Eckert that he had an unnamed customer that wanted to sell securities in the morning, buy them in the afternoon, and pay him a commission. Eckert testified that Doherty never mentioned TS, Scotia's aged-inventory policy and TS's interest in evading that policy, or the prices at which trades would occur.

Eckert thought that the request of Doherty's customer was atypical. Although it was not unusual for a customer to buy and sell the same security on the same day, Eckert testified that it was unusual for a customer to indicate in advance that he intended to do so. Eckert therefore suggested that he and Doherty talk to BGC's chief compliance officer, Michael Sulfaro ("Sulfaro"). On the way to Sulfaro's office to discuss the matter, Eckert and Doherty

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[2] TS's Scotia account was Doherty's second largest account, and, in May and June 2015, it generated approximately 25 percent of Doherty's revenues.

[3] Scotia's procedures provided that the firm would require a capital reserve for certain bond positions held more than 180 days. Scotia charged the reserve against the trader's inventory book. Consequently, any reserves the firm required to be held for aged positions reduced the trader's compensation.

[4] Eckert was not Doherty's supervisor, and he was not registered as a general securities principal.

encountered a vice president in compliance, Steven DuChene ("DuChene"). DuChene joined them to discuss the issue with Sulfaro.

Eckert and Doherty stood for the brief meeting, and Eckert did most of the talking. Eckert told Sulfaro and DuChene that Doherty had a customer who wanted to "buy or sell in the morning, vice versa in the afternoon." Eckert had no knowledge and made no mention of TS and Doherty using the word, "Melissa," to identify prearranged trades.[5] Sulfaro advised Doherty that there would not be any issue with a customer buying and selling the same security on the same day, so long as the customer assumed market risk.[6]

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[5] Sulfaro testified similarly to Eckert about this meeting. Sulfaro recalled that Eckert, without mentioning TS or Scotia's aged-inventory policy, asked if there would be an issue if a customer buys and sells the same security on the same day. In contrast, Doherty testified that Eckert identified TS as the customer and informed Sulfaro and DuChene that the purpose of the trades was to evade Scotia's aged-inventory policy. Doherty further testified that, although he did not mention that he and TS would be using "Melissa" as a word to indicate prearranged trades, Eckert told Sulfaro and DuChene that the customer wanted to buy and sell the same security at the same price. Doherty's testimony before the Hearing Panel was substantially similar to his testimony at a FINRA on-the-record interview in connection with his misconduct, as well as a FINRA arbitration proceeding that Doherty brought against BGC for his termination. The Hearing Panel found that Doherty's version of this meeting was not credible, and that Sulfaro's and Eckert's testimony was more credible, although Sulfaro and Eckert had a "regulatory self-interest in denying that Doherty fully disclosed the details of his fraudulent scheme."

[6] Doherty testified that he understood that Sulfaro wanted Doherty to wait "a few hours, three or four hours" so that the customer would be exposed to market risk. His testimony on this point, however, was inconsistent. At various points, Doherty testified that Sulfaro gave him (Doherty) four hours as an example, that Sulfaro "didn't say, you know, in so many, exactly that," but there needed to be "some time in between to make sure there is market risk." Doherty stated that Sulfaro did not provide him "like a line in the sand where it had to be four hours," but told him that there "had to be some time to constitute market risk." Doherty also claimed that Sulfaro told him that the trades would be acceptable, so long as BGC did not hold the positions overnight. Sulfaro denied ever explaining to Doherty that market risk meant holding a security for four hours. He also denied ever informing Doherty that the trades would be acceptable if BGC did not hold them overnight because BGC, as an interdealer broker, rarely held a position overnight (or even intraday). Similarly, Eckert testified that Sulfaro said nothing about holding a security for three or four hours. The Hearing Panel found that Doherty's testimony on these points was not credible. And, notwithstanding Doherty's claims, Doherty held 13 of the 19 bond positions related to the fraudulent transactions for less than four hours.

Doherty also testified that he made it clear at this meeting that no third party would be involved in the trades, and he therefore suggested that BGC sell these positions to a BGC-affiliated broker-dealer. Sulfaro and Eckert, however, testified that they had no idea that BGC would not have a customer in-between the transactions, and they denied that Doherty mentioned the involvement of a broker-dealer affiliated with BGC. The Hearing Panel found Doherty's testimony on this point not credible.

3. Doherty Engages in Fraudulent Trading

On 19 occasions, during the period from May through June 2015, Doherty executed for TS same-day transactions involving offsetting sales and purchases of corporate bonds. The 19 transactions consisted of 51 separate trades, in which Scotia paid BGC a total of $56,093 in commissions. Doherty and TS discussed at least 17 of the 19 transactions on the telephone, and, during 15 of the 19 conversations, TS used the word "Melissa" to signal to Doherty that the transaction was prearranged.[7] In the two additional recorded calls, TS referred to an earlier trade. In eight of the 19 transactions, there was no communication regarding the return leg of the transaction (i.e., Doherty simply executed the second leg of the trade pursuant to his prearranged understanding with TS).

Moreover, on six occasions, and in connection with aged short positions held by TS, Doherty and TS switched the order of the prearranged trades, with Doherty first purchasing bonds on behalf of TS and later selling them. BGC did not have the bonds at the time, which required Doherty to create a short position for the firm, notwithstanding that BGC did not have a borrowing facility to accommodate short sales on fixed income products.

The following is an example of one of Doherty and TS's calls, which occurred on the morning of May 14, 2015:

TS: All right, CBS 5 1/2s at 33.
Doherty: Yes.
TS: $287k.
Doherty: Mm-hmm.
TS: Project Melissa.
Doherty: Got it.
TS: I sell.
Doherty: I got it.
TS: Uh…
Doherty: What level?
TS: Let's say 190.
Doherty: 190, okay.
TS: Well yeah, put that in this morning, and we'll wrap it around—
Doherty: (Interposing) Yeah.
TS: —this afternoon.
Doherty: Yep.

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[7] BGC was unable to produce recordings of Doherty's and TS's conversations involving the last two transactions executed by Doherty. The Hearing Panel rejected as not credible Doherty's claims that after the first trade, he went to Sulfaro's office and Sulfaro told him to book the trades to BGC's London office (which Doherty allegedly reported to Eckert). It also rejected as not credible Doherty's claims that he often mentioned to Eckert that he "did another one of these trades," and that Eckert directed Doherty to inform Sulfaro about each trade.

Doherty then placed a trade on behalf of TS to sell 287 of the specified bonds for a total of $305,617.69. Later that day, TS and Doherty had another call. During that call, TS told Doherty "don't forget to send me that Melissa, right?" Doherty replied, "Yes, right now, yep." Doherty then placed a trade on behalf of TS to purchase the same bonds for a total of $305,976.44, which included commissions.

Moreover, early on in the prearranged trading scheme, TS and Doherty had the following conversation:

TS: Um. I want to try and do a Melissa here.
Doherty: Yeah.
TS: Um, the one thing I want is on the, on the comeback, can you split the ticket in half?
Doherty: Yeah.
TS: On the, on the comeback? It'll, it'll—
Doherty: (Interposing) Yep, I got you.
TS: It'll, it'll look a little better.
Doherty: Yeah, I'm with you.

After TS gave Doherty the bond he wanted to sell, the price, and size of the trade (2.7 million bonds), Doherty suggested that "on the comeback why don't we just go like a 1 and a 1.7." Doherty then placed a trade on behalf of TS to sell all of the specified bonds for a total of $2,859,921. Later that day, Doherty placed two trades on behalf of TS, spaced approximately one hour apart, to purchase one million of the bonds and 1.7 million of the bonds, for $2,861,919 total, which included commissions. Doherty and TS split the ticket in this fashion in 11 of the 19 transactions. Doherty himself suggested that the ticket be split six times.[8]

4. The Fraudulent Scheme Is Uncovered

In June 2015, Scotia discovered certain of TS's prearranged trades, in which it determined that the trades were not at market risk, and there was no true change of beneficial ownership. Scotia terminated TS in July 2015.[9]

One month later, BGC learned that Scotia terminated TS for suspected prearranged trading involving BGC. Sulfaro then approached Doherty, advised him that TS had been terminated for prearranged trading, asked if he had executed TS's trades, and if so, to pull records of the trades. Doherty did so, and indicated to Sulfaro that he saw no issues with TS's

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[8] Doherty testified that he told Eckert that TS wanted him to split some return tickets, that Eckert told Doherty to seek Sulfaro's approval to do so, and that Sulfaro approved Doherty splitting tickets as long as BGC did not hold positions overnight. Doherty further testified that Eckert and Sulfaro knew about his short sales for TS. Eckert and Sulfaro denied that they ever discussed splitting tickets and denied knowing that Doherty intended to execute short sales for TS. The Hearing Panel did not credit Doherty's testimony on these points.

[9] In June 2017, TS agreed to a bar for failing to appear for a FINRA on-the-record interview.

trades in question. Sulfaro advised Doherty that compliance would review the trades and listen to recordings of Doherty's telephone calls with TS.

At this point, Doherty informed Sulfaro that BGC would find communications between Doherty and TS for only one side of some of the transactions and no calls for the second leg of those transactions. Sulfaro testified that Doherty's explanation confused him, but directed DuChene to review all communications between Doherty and TS, including emails, instant messages, and voice communications. Doherty further told Sulfaro that, when reviewing the tapes, he should listen for the word "Melissa" to identify the calls involving prearranged trades with TS. Sulfaro testified he was shocked to learn that Doherty and TS had used a code word to conceal the prearranged trades. BGC terminated Doherty on August 17, 2015.

C. Procedural History and the Hearing Panel's Findings

1. Enforcement's Complaint

Enforcement filed a complaint against Doherty in April 2018. It alleged that Doherty willfully violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by engaging in a fraudulent, prearranged trading scheme with TS in May and June 2015.[10] Doherty answered the complaint and admitted that he executed the trades at issue on behalf of TS, but claimed that he sought and obtained the approval of BGC's compliance department for the trades and he did not violate federal securities laws or FINRA rules.

2. The Hearing Panel's Decision

The Hearing Panel conducted a three-day hearing in March 2019. In addition to Doherty, Eckert, Sulfaro, and Scotia's director of fixed income compliance (who served as TS's compliance officer) testified.

The Hearing Panel found that Doherty, by participating in a prearranged trading scheme with TS, willfully violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. The Hearing Panel found that, contrary to Doherty's claims, he did not fully disclose to BGC the facts and circumstances of the trades on behalf of TS. It concluded that Doherty did not testify credibly concerning his interactions with Eckert and Sulfaro, whereas their version of events was credible. Further, the Hearing Panel found that even if he had acted with BGC's approval, Doherty still engaged in fraudulent misconduct.

For Doherty's misconduct, the Hearing Panel suspended him in all capacities for two years and ordered that he pay Scotia restitution totaling $56,093, plus interest. The Hearing Panel acknowledged that FINRA's Sanction Guidelines ("Guidelines") for fraud recommend that

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[10] The complaint also alleged, as alternatives to Enforcement's allegations that Doherty engaged in fraud, that Doherty violated: (1) FINRA Rule 2010 by negligently engaging in the scheme, in violation of Section 17(a) of the Securities Act of 1933; and (2) FINRA Rule 2010 by aiding and abetting TS's fraudulent scheme.

adjudicators "strongly consider" a bar in all capacities, but noted that a lesser sanction may apply where mitigating factors predominate. The Hearing Panel found that mitigating factors did not predominate Doherty's misconduct, but nonetheless suspended Doherty for two years. In so doing, the Hearing Panel considered mitigating BGC's termination of Doherty and also noted the absence of several aggravating factors, such as Doherty's lack of a disciplinary history and the lack of public customer harm. It found that BGC's termination of Doherty "has materially reduced the likelihood of misconduct in the future," and that a bar in all capacities was not necessary to remediate Doherty's misconduct and to protect investors.

In support of its two-year suspension, the Hearing Panel considered "many aggravating factors." These included that Doherty attempted to conceal his misconduct from BGC and shift responsibility for his actions to the firm's compliance department; failed to accept responsibility for his misconduct; acted intentionally, or at a minimum, recklessly; harmed Scotia and benefitted himself; and engaged in the misconduct for two months by executing 19 series of prearranged transactions consisting of 51 individual trades. The Hearing Panel further found no remedial value in fining Doherty, but ordered that he pay Scotia restitution of the commissions it paid in connection with the prearranged trades that served no economic purpose.

3. Enforcement Appeals the Hearing Panel's Sanctions

Doherty did not appeal the Hearing Panel's decision. Enforcement, however, appealed the sanctions imposed by the Hearing Panel, arguing that the Hearing Panel should have barred Doherty, in addition to ordering that he pay $56,093 in restitution to Scotia.

III. Discussion

A. Doherty Engaged in a Fraudulent, Prearranged Trading Scheme

The parties do not challenge the Hearing Panel's findings. And, after reviewing the entire record on appeal, we affirm the Hearing Panel's findings that Doherty engaged in a fraudulent, prearranged trading scheme.

Exchange Act Section 10(b) prohibits individuals from using or employing, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance. *See* 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 further prohibits individuals from employing, in connection with the purchase or sale or a security, any "device, scheme, or artifice to defraud" or from engaging "in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." *See* 17 CFR § 240.10b-5(a), (c). To establish a violation under Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that Doherty, in connection with the sale or purchase of a security, engaged in a manipulative or "inherently deceptive act" in furtherance of a scheme to defraud and acted with scienter.[11] *See SEC v. Sullivan*, 68 F. Supp. 3d 1367, 1377 (D. Colo. 2014). Exchange Act

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[11] Violations of these provisions also must involve the use of any means or instrumentalities of communication in interstate commerce, the mails, or of any national security exchange. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Doherty's telephonic conversations with TS in connection with their fraudulent scheme satisfies this requirement. *See Dep't of Enforcement v.*

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Rules 10b-5(a) and (c) "capture a wide range of conduct." *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101 (2019). A prearranged trading scheme to evade a firm's aged-inventory policy constitutes a deceptive device, scheme, or artifice to defraud. *See Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 SEC LEXIS 2786, at *21-22 (Aug. 10, 2016) (holding that broker violated anti-fraud provisions of Exchange Act where he engaged in a prearranged trading scheme and sold and quickly repurchased aged bonds to avoid firm's aged-inventory policy); *see also Howard R. Perles,* 55 S.E.C. 686, 698 (2002) (holding that "a recognized vehicle for manipulative activity is prearranged, matched trades").

FINRA Rule 2020 is FINRA's anti-fraud rule. It prohibits FINRA members and their associated persons from effecting "any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." "[C]onduct that violates [Exchange Act] Rule 10b-5 also violates FINRA Rule 2020." *Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *53 (Sept. 28, 2017). A violation of the Exchange Act, the rules promulgated thereunder, or FINRA's rules constitutes a violation of FINRA Rule 2010.[12] *See William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *14-15 (Mar. 31, 2016), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

We find that Doherty engaged in the misconduct alleged in the complaint, and did so with scienter. Doherty's prearranged trading scheme, in which he made it appear as though TS's purchases and sales of corporate bonds were legitimate transactions, rather than prearranged trades designed simply to help TS evade Scotia's aged-inventory policy, is a deceptive scheme under the Exchange Act and FINRA's rules. *See Gonnella*, 2016 SEC LEXIS 2786, at *21-22; *Perles*, 55 S.E.C. at 698. The record also shows that Doherty acted with the requisite scienter. He knew that the trading scheme was designed to enable TS to avoid being penalized under Scotia's policies, and he attempted to conceal his misconduct from being detected. *See, e.g.*, *Gonnella*, 2016 SEC LEXIS 2786, at *32 (stating that efforts to conceal misconduct support a finding that applicant acted with scienter). For example, Doherty and TS used a code word to refer to prearranged trades, and Doherty split the trades on the return leg of many of the transactions to make the trades harder to detect. Consequently, we find that Doherty willfully violated Exchange Act Section 10(b), Exchange Act Rules 10b-5(a) and (c), and FINRA Rules 2020 and 2010.[13]

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Frankfort, Complaint No. C02040032, 2007 NASD Discip. LEXIS 16, *20, n.13 (NASD NAC May 24, 2007).

[12] FINRA Rule 2010 requires FINRA members to observe high standards of commercial honor and just and equitable principles of trade in conducting their businesses. FINRA Rule 0140 provides that all of FINRA's rules shall apply equally to members and associated persons, and that associated persons shall have the same duties and obligations as member firms.

[13] "A willful violation under the federal securities laws simply means that the person charged with the duty knows what he is doing." *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012). Doherty knowingly and intentionally executed prearranged trades—with no economic purpose and no change to beneficial

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B. Sanctions

While we affirm the Hearing Panel's findings, we find that the sanctions that have been imposed are an inadequate response to Doherty's fraudulent misconduct. As explained below, we find that a bar is the appropriate sanction here. We also determine that the Hearing Panel's restitution order is appropriate and affirm it.

1. A Bar Is Appropriate for Doherty's Fraudulent Misconduct

a. FINRA's Sanction Guidelines and Prior Terminations

Our starting point for determining the appropriate sanctions for Doherty's fraudulent misconduct is FINRA's Guidelines, including the specific Guidelines applicable to fraud, the General Principles Applicable to All Sanction Determinations, and the Principal Considerations in Determining Sanctions.[14] For intentional or reckless fraud, the Guidelines recommend that the adjudicator "[s]trongly consider" barring an individual.[15] The Guidelines reflect the proposition that conduct that violates the antifraud provisions of the federal securities laws is "especially serious and subject to the severest of sanctions under the securities laws."[16] Where mitigating factors predominate, however, the Guidelines recommend suspending an individual in any or all capacities for a period of six months to two years.[17]

The Guidelines further provide that, when assessing sanctions, adjudicators should consider whether a respondent's firm has taken corrective action for the same underlying misconduct.[18] With respect to a firm's prior termination of a respondent based upon the same underlying misconduct, a respondent must show that the termination "has materially reduced the

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ownership—to help TS avoid Scotia's aged-inventory policy. Doherty acted willfully, and he is therefore subject to statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(F) (incorporating by reference Exchange Act Section 15(b)(4)(D), which together provide that a person is subject to statutory disqualification if he has willfully violated any provision of, among other things, the Exchange Act and its rules and regulations); FINRA By-Laws, Article III Section 4 (providing that a person is subject to statutory disqualification if he is disqualified pursuant to Exchange Act Section 3(a)(39)).

[14] *See FINRA Sanction Guidelines* (March 2019), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter "Guidelines"].

[15] *Guidelines*, at 89.

[16] *Scholander*, 2016 SEC LEXIS 1209, at *36 (*citing Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)).

[17] *Guidelines*, at 89.

[18] *Id.* at 5 (General Principles Applicable to All Sanctions Determinations, No. 7).

likelihood of misconduct in the future."[19] The Guidelines further provide that an adjudicator may find, even considering a prior termination, "that there is no guarantee of changed behavior and therefore may impose the sanction of a bar."[20]

As a general matter, "the appropriateness of a sanction depends on the facts and circumstances of each particular case and cannot be precisely determined by comparison with action take in other proceedings."[21] Respondents, however, generally have not received mitigation credit for a prior termination when they engage in deceptive conduct subsequent to termination.[22] In these instances, the respondents' actions subsequent to termination undercut their claims that the likelihood of future misconduct had been materially reduced.

In contrast, we have found a prior termination mitigating when a respondent has expressed true remorse for his actions and made credible assurances against future misconduct.[23] We have also given mitigation credit for a prior termination when a respondent accepted responsibility for his misconduct prior to detection, made no attempt to conceal his misconduct, and promptly and voluntarily made efforts to remediate his misconduct.[24]

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[19] *Id.*

[20] *See id.* (citing *Denise M. Olson*, Exchange Act Release No. 75838, 2015 SEC LEXIS 3629, at *18 (Sept. 3, 2015)).

[21] *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *115-16 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014).

[22] *See, e.g.*, *John M.E. Saad*, Exchange Act Release No. 76118, 2015 SEC 4176, at *18 (Oct. 8, 2015), *aff'd in rel. part*, 873 F.3d 297 (D.C. Cir. 2017) (affirming bar, finding that respondent's termination was not mitigating and did not "overcome the threat [Saad] would pose to investors and other securities industry participants were he to return to the industry," and holding that Saad's continued deception by providing false answers to FINRA investigators showed that his termination "was insufficient to dissuade him from further misconduct"); *Dep't of Enforcement v. Connors*, Complaint No. 2012033362101, 2017 FINRA Discip. LEXIS 2, at *51 (FINRA NAC Jan. 10, 2017) (declining to give respondent mitigation credit for his termination because it was not sufficient to deter him from further misconduct when he "repeatedly used dishonest means to conceal his outside business activities and then, not long after being terminated, chose again to act dishonestly when he provided false information to FINRA staff who were examining his conduct"); *cf. Dep't of Enforcement v. Iida*, Complaint No. 201233351801, 2016 FINRA Discip. LEXIS 32, at *20 (FINRA NAC May 18, 2016) (finding that respondent's termination was entitled to de minimis weight because, among other things, respondent made inconsistent statements about the transactions at issue during his firm's investigation and at the hearing).

[23] *See Dep't of Enforcement v. Doni*, Complaint No. 2011027007901, 2017 FINRA Discip. LEXIS 46 (FINRA NAC Dec. 21, 2017) (giving mitigation credit for termination where respondent converted a firm's computer source code).

[24] *See Dep't of Enforcement v. McNamara*, Complaint No. 2016049085401, 2019 FINRA Discip. LEXIS 29 (FINRA NAC July 30, 2019) (finding prior termination mitigating where

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b. Doherty's Prior Termination Is Not Mitigating and Does Not Outweigh Numerous Aggravating Factors

Unlike the Hearing Panel, we find that any mitigation credit that Doherty should receive for his termination should be minimal and is heavily outweighed by numerous aggravating factors. Doherty has not demonstrated, and the record does not show, that BGC's termination of him has materially reduced the likelihood that he will engage in future misconduct. As a result, our concern that Doherty "poses a continuing danger to investors and other securities industry participants" has not been assuaged.[25] Indeed, the facts of this case more closely resemble those cases when a respondent has not received material mitigation credit for a prior termination. After BGC fired Doherty, he repeatedly and falsely asserted—in an on-the-record interview during FINRA's investigation, in a FINRA arbitration proceeding, and before the Hearing Panel—that he disclosed fully the details of his prearranged trading scheme to BGC compliance personnel.[26] He repeatedly testified concerning specific details of his purported conversations with Eckert and Sulfaro, details which they flatly denied at the hearing and that the Hearing Panel found were not credible. For example, Doherty falsely claimed that he told Eckert and Sulfaro that TS was the customer at issue; the purpose of his trades was to avoid Scotia's aged-inventory policy; he made it clear that no third party would be involved in the trades at issue; and that he often informed Eckert and Sulfaro that he had executed "another one of these trades" for TS. Doherty also testified that Sulfaro told him that he needed to hold the securities for a period of time, so that TS would be exposed to market risk, and that Doherty should book trades to BGC's London office.

The Hearing Panel thoroughly determined that Doherty's version of events was not credible.[27] After BGC terminated Doherty, he created and repeated a false narrative in an effort to avoid liability for his fraudulent misconduct. Doherty's actions subsequent to his termination belie any claim that the likelihood of future misconduct has materially diminished. And, as set forth below, Doherty concealed the fraudulent trading scheme, showed no true remorse for his

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respondent failed to disclose accounts held at another firm and improperly purchased shares in an IPO).

[25] *See Olson*, 2015 SEC LEXIS 3629, at *19.

[26] *See Saad*, 2015 SEC 4176, at *19; *Connors*, 2017 FINRA Discip. LEXIS 2, at *51; *Iida*, 2016 FINRA Discip. LEXIS 32, at *20.

[27] Like the Hearing Panel, we are cognizant that Eckert and Sulfaro had a regulatory self-interest in denying that Doherty fully disclosed his fraudulent, prearranged trading scheme. Nonetheless, the Hearing Panel found that, on numerous points, Eckert and Sulfaro testified credibly that Doherty disclosed the bare minimum in connection with his scheme, and that Doherty's testimony to the contrary was not credible. On appeal, Doherty has not presented any reason to disturb these findings. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and can be overcome only when "substantial evidence" exists for doing so).

misconduct, and failed to accept any responsibility for his misconduct. These facts distinguish this case from previous instances when we have found a termination mitigating.[28] We therefore find that Doherty should receive minimal mitigation credit for BGC's termination of him for his fraudulent, prearranged trading scheme with TS.

c. Numerous Factors Aggravate Doherty's Fraudulent Misconduct

Moreover, there are numerous aggravating factors here. Doherty concealed his fraudulent scheme from BGC.[29] He did so by using a code word with TS to indicate when to execute a prearranged trade, splitting tickets on 11 of the 19 transactions (six of which Doherty himself suggested), and, occasionally, reversing the order of transactions. All of these actions made it more difficult for BGC to detect Doherty's fraudulent misconduct. Further, prior to engaging in his fraudulent misconduct, Doherty disclosed to Eckert and his firm's compliance department minimal details of the prearranged trading scheme with TS. Had Doherty been forthright with Eckert and BGC's compliance department, Doherty would not have been permitted to engage in the prearranged trades at issue.

Further aggravating Doherty's fraudulent misconduct, he has repeatedly attempted to shift the blame for his misconduct to BGC and has not taken responsibility for his actions.[30] He acted intentionally to assist his customer's avoidance of Scotia's aged-inventory policy, engaged in a pattern of misconduct (19 transactions consisting of 51 separate trades over a period of several months), and harmed Scotia by executing trades with no economic or legitimate purpose.[31] Doherty also benefited from his misconduct by earning commissions on the prearranged trades and by accommodating his admittedly difficult customer, who generated a large portion of Doherty's revenues.[32] In sum, aggravating factors predominate here and warrant barring Doherty for his fraudulent scheme.[33]

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[28] *See, e.g.*, *Doni*, 2017 FINRA Discip. LEXIS 46; *McNamara*, 2019 FINRA Discip. LEXIS 29.

[29] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 10).

[30] *See Dep't of Enforcement v. Clements*, Complaint No. 2015044960501, 2018 FINRA Discip. LEXIS 11, at *66-68 (FINRA NAC May 17, 2018) (finding aggravating that respondent did not accept responsibility for his misconduct and instead attempted to shift blame to others); *cf. Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 2) (instructing adjudicators to consider whether an individual has accepted responsibility for his misconduct prior to detection).

[31] *See Guidelines*, at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 11, 13).

[32] *See id.*, at 8 (Principal Considerations In Determining Sanctions, No. 16).

[33] In determining that a two-year suspension was appropriate for Doherty's fraudulent misconduct, the Hearing Panel noted that Doherty does not have any disciplinary or regulatory history and that Doherty's fraudulent misconduct did not harm a public customer. It is well

[Footnote continued on next page]

d. The Collateral Consequences of These Proceedings Are Not Mitigating

On appeal, Doherty argues that these proceedings have taken a significant financial toll on him and his family. He further argues that the "blemish of a total bar" will make it difficult for him to find employment, and he already has sat out of the industry for two years while he searched for employment after BGC terminated him. These factors, however, are collateral consequences of these proceedings and BGC's termination. We do not consider them mitigating.[34]

2. Restitution

We also affirm the Hearing Panel's order that Doherty pay $56,093 in restitution (plus interest) to Scotia, which the parties do not challenge on appeal. The Guidelines provide for restitution "to restore the status quo ante where a victim otherwise would unjustly suffer loss" and is appropriate when an identifiable person has suffered a quantifiable loss proximately caused by a respondent's misconduct.[35] We find all conditions are satisfied here. Scotia incurred $56,093 in unnecessary commissions as a direct result of Doherty's prearranged trading scheme, and order that Doherty pay this amount to Scotia, plus prejudgment interest.

[cont'd]

settled, however, that the absence of disciplinary history or customer harm are not mitigating factors in determining sanctions. *See Olson*, 2015 SEC LEXIS 3629, at *32 (rejecting argument that lack of disciplinary history is mitigating "because an associated person should not be rewarded for acting in accordance with her duties as a securities professional"); *Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *23 (FINRA NAC Dec. 27, 2007) (holding that absence of customer harm is not mitigating), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008). Further, it is undisputed that Scotia paid $56,093 in unnecessary commissions for trades that served no economic purpose. Consequently, we have not considered these factors in determining that barring Doherty and ordering that he pay restitution are appropriately remedial sanctions.

[34] *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *51 (June 14, 2013) ("[A]ny negative consequences for Plunkett resulting from the violation he committed, or from the disciplinary proceeding that followed, are not mitigating."); *Guidelines*, at 5 (General Principles Applicable to All Sanctions Determinations, No. 7) ("FINRA has determined that how long a respondent takes to regain employment, loss of salary, and other impacts of an employment termination are merely collateral consequences of being terminated and should not be considered as mitigating by Adjudicators.") (*citing Olson*, 2015 SEC LEXIS 3629)).

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

IV. Conclusion

We affirm the Hearing Panel's findings that Doherty engaged in a fraudulent scheme, in willful violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. For this misconduct, we bar Doherty in all capacities and order that he pay $56,093 (plus interest) in restitution to Scotia.[36] Doherty is also ordered to pay $7,897.48 in costs.

On Behalf of the National Adjudicatory Council,

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Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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[36] Interest shall accrue from June 30, 2015, until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 9 (Technical Matters). The bar is effective as of the date of this decision.