BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Market Regulation, Complainant, vs. Jerry William Burch Newport Coast, CA, Respondent.	DECISION Complaint No. 2005000324301 Dated: July 28, 2011

Respondent failed to disclose material information when recommending an investment to customers, falsely represented to his firm that customer purchases were unsolicited, and failed to amend his Form U4 to disclose a FINRA Wells notice. Held, findings and sanctions modified.

Appearances

For the Complainant: Michael J. Dixon, Esq., Lora Alexander, Esq., and James J. Nixon, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondent: John L. Erikson, Jr., Esq.

Decision

Pursuant to NASD Rule 9311, Jerry William Burch ("Burch") appeals the Hearing Panel's decision in this matter.[1] In that decision, the Hearing Panel found that Burch violated

[1] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 74 (Dec. 8, 2008). Because the complaint in this case was filed before December 15,

[Footnote continued on next page]

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110 for failing to disclose certain material facts to customers related to the customers' purchases of shares of a thinly traded, development stage company; NASD Rules 3050 and 2110 for failing to notify his firm of an outside securities account controlled by his wife; NASD Rules 3110 and 2110 and Exchange Act Rules 17a-3 and 17a-4 for causing inaccurate books and records by falsely representing to his firm that customer securities purchases were unsolicited; and NASD Rule 2110, Membership and Registration Rules Interpretive Material ("IM") 1000-1, and Article III, Section 4(f) and Article V, Section 2(c) of FINRA's By-Laws for failing to amend his Uniform Application for Securities Industry Registration or Transfer ("Form U4") to disclose a FINRA Wells notice.[2] The Hearing Panel barred Burch and fined him $28,000 for the fraud violation and imposed two additional bars for his failure to give notice to his firm and causing inaccurate books and records. After a complete review of the record, we modify the Hearing Panel's findings of violation and the sanctions imposed.

I. Background

Burch entered the securities industry in 1986 and has been associated with several FINRA member firms. Burch's conduct relevant to this decision occurred during the time when he was associated with WBB Securities, LLC ("WBB" or the "Firm"). Burch first registered with WBB in February 2002 as a general securities representative, general securities principal, and options principal. In May 2011, WBB terminated him for violating a Firm policy related to the handling of customer correspondence. He is not currently registered with any FINRA member firm.

II. Facts

This case arose out of the Department of Market Regulation's ("Market Regulation") investigation of the March 28, 2003 trading activity of an Over the Counter Bulletin Board ("OTCBB"™) stock, Dogs International, Inc. ("DOGS"). The central issue here is whether

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2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

[2] The Hearing Panel's reference to and the Department of Market Regulation's allegations under Article III, Section 4(f) of "FINRA's By-Laws" are incorrect. Article III, Section 4(f) was a provision that existed in NASD's By-Laws. NASD's By-Laws were amended and became FINRA's By-Laws in July 2007. The amendments of Article III, Section 4, which set forth the definition of disqualification, eliminated the subsections, including subsection (f), contained in NASD's By-Laws and adopted the definition of "statutory disqualification" as the term is defined in Exchange Act Section 3(a)(39). We discuss the substance of the Hearing Panel's findings with respect to this provision in Part IV.D.

Burch committed fraud when he recommended and sold DOGS stock to his customers when his wife, Teri Burch, was selling the stock.

A. DOGS

DOGS, a development stage company, was incorporated in Nevada in 2002 under the name "Juris Travel" with the purpose of "being a travel related business service organization." Juris Travel initiated quotations on the OTCBB on September 20, 2002. There were no reported trades in Juris Travel securities until February 2003 when 12,500 shares changed hands at prices ranging from $0.20 to $0.22 per share. The company changed its name to Bed and Biscuits Inns of America on March 17, 2003, and to DOGS on March 24, 2003. The company also changed its business plan from travel-related services to acquiring a chain of upscale pet care facilities. DOGS began trading on the OTCBB on March 28, 2003. One non-salaried, part-time employee with no experience in the travel or pet care industry served as DOGS' sole officer, director, and shareholder.

The company's business model proved unsuccessful. For example, the company's revenue from sales for the year that ended on December 31, 2002, was $740, and the company incurred a net loss of $8,160. For the quarter that ended on March 31, 2003, the company had no income and it incurred a net loss of $27,000. The company's revenue from sales for the quarter that ended on June 30, 2003, was $10,134, and it incurred a net loss of $35,577. In addition, the company's annual report for the fiscal year that ended on December 31, 2002, and quarterly reports for the periods that ended on March 31, 2003, and June 30, 2003, included "going concern" statements by management, indicating that DOGS may not have the financial resources to remain in business. These statements noted that the company's cash position may be inadequate to pay all of the costs associated with the testing, production, and marketing of products.

Jerry and Teri Burch learned of DOGS in or around February 2003 from DA, a former colleague of Jerry's, and RS, a friend. DA and RS operated Elite Capital Partners, a firm that assisted start-up companies in raising funds. DA was raising money for DOGS and "helping it go public." Burch began recommending DOGS stock to his clients after DA asked him whether any of his clients would be interested in investing. In February and early March 2003, two of Burch's customers, PW and VT, made private investments in Juris Travel and Bed and Biscuits Inns, totaling $200,000.[3]

Burch did not review DOGS' SEC filings prior to recommending the stock to any of his customers. Rather, the only information that Burch had about this investment came from his general view of the pet care industry, conversations with DA and RS, and calling a pet care

[3] *See also infra* note 9. The record is unclear as to the number of shares PW and VT received for their private investments.

facility in Florida owned by RS's mother to verify that the facility existed and that "there was somebody answering the phone [and to] hear dogs barking."[4]

B. Formation of TDB Capital

On March 19, 2003, Teri Burch formed TDB Capital, Ltd. ("TDB"), a Nevada corporation. The Securities Law Institute, a Las Vegas firm, prepared the corporate paperwork.[5] Teri worked as a flight attendant for more than 20 years, had limited securities investment experience, and never before had formed a corporation. Teri served as TDB's sole director, its president, secretary, and treasurer, and was the only person authorized to act on its behalf.[6] When asked at the hearing below about the formation of TDB, Teri testified that she was only "vaguely" familiar with holding the offices of president, secretary, and treasurer, could not explain why she held those offices, and did not recall how she became a director.

Shortly after forming TDB, Teri opened a checking account for TDB at a Bank of America branch near the Burches' home. Teri was the sole signatory on the account and the Burches' home was the mailing address on the checking account.

Burch's version of events related to his knowledge of TDB has shifted throughout these proceedings. During his on-the-record interview with FINRA staff, Burch admitted that he saw TDB corporate documents addressed to Teri as they were received on the Burches' home fax line in March 2003. He also stated in this interview that Teri told him that she was "going to" form TDB. At the hearing below, however, Burch claimed that he had no knowledge of TDB until he learned of it during FINRA's investigation in this matter. Teri also testified that she never told Burch that she was forming TDB. The Hearing Panel found Burch's claim of ignorance not credible.

C. The Sequence of Events Beginning on March 28, 2003

On March 28, 2003, the day that DOGS began trading on the OTCBB, Jerry and Teri Burch were at their home together, using the same telephone line and fax machine to conduct many of the transactions that are at issue in this case. At the hearing below, the Burches claimed to recall little about what occurred on that day. The Hearing Panel did not find the Burches' testimony to be credible and considered telephone records and other contemporaneous documentary evidence to reconstruct the day's events.

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4 DOGS purchased this kennel in April 2003 from RS's mother for $500,000.

5 The Securities Law Institute also prepared the corporate paperwork for Juris Travel.

6 For example, Teri signed the IRS form requesting a taxpayer identification number for TDB and listed the Burches' home address as TDB's business address on the form.

Telephone records show that the Burches' home telephone line was used to call DOGS' stock promoter DA five times between 5:43 a.m. and 6:58 a.m. for a total of 22 minutes. Burch testified that although he had no recollection of the calls, he assumed that he made them because they were to DA's number.

At 7:39 a.m., Teri used the Burches' fax machine to send a new brokerage account form for TDB to ACAP Financial Inc. ("ACAP"), a broker-dealer located in Utah and not affiliated with Burch's Firm. Teri signed the new account form as TDB's authorized signatory. The mailing address and telephone numbers for TDB's ACAP account were those of the Burches' home. While Teri disclosed that she was married on the new account form, the form did not disclose her husband's full name, listing Jerry only as "Mr. Burch." Teri also did not disclose that she was related to someone affiliated with a member firm. Nor did she disclose that she and Burch held a joint account at WBB. With respect to Burch's employment, Teri stated on the form that Burch was self-employed and worked from home. At the hearing, Teri testified that she knew Burch was a broker but knew nothing about his business or about the Burches' finances. And when asked if the income and net worth dollar amounts on the ACAP new account form were accurate, Teri testified, "I don't recall, and I don't know. To be honest, I don't even know if I would know." The financial information on the ACAP form was generally consistent with the financial information that Burch provided when opening the Burches' joint account at WBB. Given these facts along with Teri's overall unfamiliarity with TDB's formation, the Hearing Panel concluded that Teri consulted with Burch in completing the ACAP new account form.

Two calls were made from the Burches' home line at 8:45 a.m. (three-minute call) and 10:29 a.m. (one-minute call) to the Securities Law Institute, which had prepared the TDB formation paperwork for Teri and handled the legal documentation for Juris Travel. Both Teri and Burch denied making these calls and provided no explanation for them.

Telephone records evidence that Burch began calling his customers after 9:00 a.m. that morning. Burch called customer CZ at 9:09 a.m. and spoke with him for 19 minutes.[7] Burch again called CZ at 12:11 p.m. and spoke with him for eight minutes. At some time on March 28, 2003, Burch placed for CZ a 6,000-share order to purchase DOGS shares at $5.82 per share, totaling $34,925.

At 10:38 a.m., Burch had a three-minute conversation with customer CG.[8] CG opened an account with Burch and began buying shares of DOGS that day. Burch placed a buy order for CG of 800 shares of DOGS stock at $5.82 per share, totaling $4,661.

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[7] Prior to March 28, 2003, Burch referred CZ to promoters RS and DA to discuss CZ's investment in DOGS. Burch told CZ that he believed DOGS was a good investment.

[8] DOGS' promoter RS introduced CG to Burch.

At 11:27 a.m., Burch called a third customer, VT, who had already made a $50,000 private investment in DOGS' predecessor Bed and Biscuits Inns.[9] Burch spoke with VT for one minute. VT bought 1,000 shares of DOGS stock at $5.89 per share through Burch on April 1, 2003.[10]

One minute after Burch disconnected his call with VT, Teri began selling shares of DOGS stock. At 11:29 a.m., following the deposit of 50,000 shares of DOGS stock into TDB's ACAP account, ACAP executed, in TDB's account, an order to sell 800 shares of DOGS at $5.75 per share for proceeds of $4,600.[11]

In addition to CZ and CG, five more of Burch's customers, including Burch's parents, bought DOGS stock through him on March 28, 2003. These seven customers bought a total of 16,100 DOGS shares on March 28 and constituted 77.5% of the total buy volume that day.[12]

The next business day, on March 31, 2003, Teri, acting on behalf of TDB, sold an additional 1,000 shares of DOGS stock for $5.70 per share. On April 11, 2003, Teri sold 2,000 shares of DOGS stock for $5.90 per share. She made two additional sales of 1,500 shares each for $4.25 per share on June 18 and 20, 2003. From March 28, 2003, through June 2003, Teri sold 6,800 DOGS shares in her TDB account at ACAP for total proceeds of $34,850.[13] Although Teri did not recall ordering the sales, her ACAP broker testified that she placed the orders.[14] On April 14 and June 4 and 23, 2003, Teri instructed ACAP to wire $8,500, $7,500, and $12,000,

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[9] Previously, Burch had referred VT to DOGS' promoters DA and RS for the purpose of VT investing in DOGS (and its predecessors Juris Travel and Bed and Biscuits Inns). Burch told VT that he thought DOGS was a good investment. Subsequently, VT invested $50,000 in Bed and Biscuits Inns around March 12, 2003.

[10] The evidence shows that VT approved Burch's purchase of 1,000 DOGS shares on March 28, 2003, but the trade was not made until April 1.

[11] The records from the transfer agent show that TDB received 50,000 DOGS shares on March 27, 2003, from "BW" and that DOGS' promoter RS signed the stock transfer instructions form.

[12] WBB consolidated these DOGS orders on one ticket.

[13] After June 2003, there were no further sales of DOGS stock from TDB's ACAP account until July 2004, several months after Teri transferred her interest in the ACAP account to KD, stock promoter RS's girlfriend.

[14] Moreover, when she opened the ACAP account, she signed a "penny stock" form indicating that she would be trading DOGS stock, and she was the only person authorized to place orders for the account.

respectively, to TDB's Bank of America account. The wire instructions were sent from the Burches' home fax line.[15]

From March 28, 2003 through June 2003, Burch's customers bought 46,220 shares of DOGS stock, at prices ranging from $4.45 to $8.75 per share. It is undisputed that Burch recommended DOGS stock to several of his customers who purchased the stock during this time from him and that he did not disclose to these customers Teri's sales of DOGS shares.

The Burches have denied throughout these proceedings that Teri had a financial interest in the DOGS shares held in TDB's ACAP account. Rather, the Burches and KD (RS's girlfriend) contended that the shares and the sales proceeds always belonged to KD. At the hearing, however, Burch offered no credible evidence to explain why KD's name failed to appear on any of the ACAP account documentation if she was the account's true owner. The instructions transferring the 50,000 DOGS shares to TDB show that the shares were transferred from BW, and not KD. When KD was asked at the hearing why, if the shares were hers, would she transfer them into an account over which she had no control, KD testified that it was so that Teri "knew she [Teri] had a vested interest in [TDB]." When the Hearing Officer asked Teri why all of the TDB formation documents were in her name and she was made the sole officer of TDB and KD was not an officer, Teri testified that it was to give her (Teri) a "sense of security." Notably, Teri did not resign from TDB and relinquish control over the ACAP account by transferring her interest to KD until after FINRA began its investigation into DOGS trading. The Hearing Panel determined that the Burches and KD fabricated the claim that KD owned the shares of DOGS stock and the ACAP account in an effort to explain away the trading activity.

D. Burch Stated that the DOGS Trades Were Unsolicited

WBB's owner and head trader at the relevant time, Steven Bakerink ("Bakerink"), testified that all transactions at the Firm were assumed to be solicited unless the registered representative placing the order told him that a transaction was unsolicited. It is undisputed that Burch placed customer orders with Bakerink to buy DOGS shares. Based on Burch's representations, Bakerink marked these orders as "unsolicited," including the order for all 16,100 shares of DOGS stock that Burch's customers purchased on March 28, 2003.[16] As a result of the mismarking on the order tickets, some of the corresponding customer confirmations were also incorrectly marked "unsolicited" for DOGS orders that Burch placed between March 31 and June 30, 2003. At the hearing below, Burch admitted that he solicited purchases of DOGS stock, including orders for many of the customers whose purchases were marked "unsolicited" on the order tickets.

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[15] At the hearing below, Teri acknowledged wiring funds from TDB's ACAP account to TDB's Bank of America account. She also acknowledged that she likely received an ATM card linked to the Bank of America account and that she withdrew funds from it but was unable to recall how the funds were used.

[16] The customer confirmations for the March 28, 2003 orders did not reflect that the orders were unsolicited.

E. Burch Received a Wells Notice

Market Regulation sent Burch a Wells notice related to this matter on July 18, 2006. The notice informed Burch that FINRA had determined to initiate disciplinary action against him and expressly stated that Burch "should treat this letter as written notification that he is the subject of an investigation for the purpose of triggering an obligation to update his Form U-4." Burch gave the notice to his WBB supervisor, Myrna LaRae Bakerink ("LaRae Bakerink"), in or about July 2006. LaRae Bakerink testified that she failed to update Burch's Form U4 timely and that the delinquency was her fault.

In October 2007, FINRA sent a deficiency notice to Burch requiring him to update his Form U4 to disclose the Wells notice. On October 8, 2007, WBB updated Burch's Form U4.

III. Procedural History

A. Investigation and Hearing Below

FINRA began its investigation into the trading activity in DOGS when, on March 28, 2003, DOGS' share price rose from $2.50 to a closing price of $5.82 with a daily trading volume over 60,000 shares, despite the company having no material business operations or assets. During the course of its investigation, Market Regulation learned that ACAP had the highest retail selling volume in DOGS on March 28, 2003. Market Regulation also learned that accounts belonging to DA's and RS's (the DOGS promoters) relatives sold DOGS shares beginning on March 28, 2003.

After Market Regulation commenced its investigation, Teri Burch, in September 2003, requested that ACAP send duplicate confirmation statements for TDB's account to Burch's Firm, WBB. Teri disassociated herself from TDB the following month. On October 2, 2003, Teri appointed RS's girlfriend, KD, to the TDB board of directors, resigned from TDB, and transferred her authority over TDB to KD.[17]

Market Regulation filed a four-cause complaint against Burch on September 27, 2007. The first count of the complaint alleged that Burch violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110 by failing to disclose to customers that TDB's brokerage account controlled by Burch's wife was selling shares of DOGS stock at the same time that he was recommending that customers buy it. The second count alleged that Burch failed to notify his Firm of TDB's outside brokerage account, in violation of NASD Rules

[17] In addition to the original 50,000 shares of DOGS stock, TDB's ACAP account was credited with 47,200 shares in June 2003 after a 2-for-1 stock split. In 2004, KD sold 91,400 shares of DOGS stock from the TDB account at ACAP for total proceeds of $171,677. KD wired $166,412 out of the ACAP account into TDB's Bank of America account. KD testified that these proceeds went to her family.

3050 and 2110. The third count alleged that Burch caused WBB's books and records to be inaccurate when he falsely represented to WBB that customer purchases of DOGS shares were unsolicited, in violation of NASD Rules 3110 and 2110 and Exchange Act Rules 17a-3 and 17a-4. The fourth count alleged that Burch failed to update his Form U4 to disclose a FINRA Wells notice, in violation of NASD Rule 2110, IM-1000-1, and Article III, Section 4(f) and Article V, Section 2(c) of FINRA's By-Laws.

The Hearing Panel found Burch liable for all of the alleged violations. The Hearing Panel imposed three separate bars upon Burch for his fraudulent omissions, his failure to give notice of the outside brokerage account, and causing WBB's inaccurate books and records. The Hearing Panel also fined Burch $28,000 for the fraud. This appeal followed.

B. Motions to Adduce Additional Evidence

Pursuant to NASD Rule 9346, Burch first made a motion to adduce additional evidence in September 2009 before the FINRA National Adjudicatory Council ("NAC") subcommittee ("Subcommittee") empanelled to consider this appeal. NASD Rule 9346(a) permits amendments of the record with new evidence only under the "extraordinary circumstances" enumerated under NASD Rule 9346(b). These conditions require those seeking to introduce additional evidence to describe each item of new evidence proposed, demonstrate good cause excusing the failure to introduce the evidence below, and establish the materiality of the evidence to the issues before the NAC. NASD Rule 9346(b). Leave to introduce new evidence must be sought from the NAC or the Subcommittee not later than 30 days after the Office of Hearing Officers transmits to the NAC the index to the record. *Id.*

Burch sought to introduce eight categories of evidence that existed at the time of the hearing below, including his tax returns and bank statements. Burch cited privacy concerns as to why he did not introduce these items below, arguing that they contain "highly confidential information." Burch did not claim that he did not possess this evidence at the time of the disciplinary hearing, and there is no indication that he was prevented from offering the evidence at that time. The Subcommittee denied Burch's motion as lacking good cause. We adopt the Subcommittee's ruling as our own.

Three days before oral argument in this matter, Burch made a second motion to adduce additional evidence. In his second motion, Burch sought to introduce the declaration of an attorney formerly affiliated with the Securities Law Institute and documents with March 2003 dates purportedly related to the formation of TDB. In denying the motion, the Subcommittee determined that, in addition to the motion being untimely, Burch did not show good cause for failing to introduce the evidence below. Moreover, the trustworthiness of these documents was questionable. For example, the declaration stated that several of the documents were "true and correct," but identified the attached documents as unsigned copies of letters that the attorney sent to Teri Burch. The letters that Burch submitted, however, appear to bear the attorney's signature. We adopt the Subcommittee's ruling and deny the motion.

IV. Discussion

After a thorough review of the record, we affirm the Hearing Panel's findings that Burch engaged in fraud when he recommended and effected purchases of DOGS stock for customers while in possession of material information that he failed to disclose to these customers. We further find that Burch caused his Firm's books and records to be inaccurate and that he failed to amend his Form U4 to disclose a Wells notice. We discuss the violations in detail below.

A. Fraudulent Failure to Disclose

Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rule 2120 prohibit fraudulent and deceptive acts and practices in connection with the purchase or sale of a security.[18] Liability for failing to disclose material information is "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction." *Chiarella v. United States*, 445 U.S. 222, 230 (1980). A registered representative owes such a duty to his clients to disclose material information fully and completely when recommending an investment. *See De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1302 (2d Cir. 2002) ("[T]he broker owes duties of diligence and competence in executing the client's trade orders, and is obliged to give honest and complete information when recommending a purchase or sale."); *Magnum Corp. v. Lehman Bros. Kuhn Loeb, Inc.*, 794 F.2d 198, 200 (5th Cir. 1986) ("The law imposes upon the broker the duty to disclose to the customer information that is material and relevant to the order."); *Hanly v. SEC*, 415 F.2d 589, 596-97 (2d Cir. 1969); *SEC v. Hasho*, 784 F. Supp. 1059, 1106 (S.D.N.Y. 1992); *Dep't of Mkt. Regulation v. Field*, Complaint No. CMS040202, 2008 FINRA Discip. LEXIS 63, at *32-33 (FINRA NAC Sept. 23, 2008).

To establish that Burch failed to disclose material information in violation of Section 10(b) and NASD Rule 2120, it is necessary that Market Regulation prove by a preponderance of the evidence that the omissions involved material information and were made in connection with the purchase and sale of a security.[19] *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir.

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[18] Exchange Act Section 10(b) makes it unlawful for any person "[t]o use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 makes it unlawful, in connection with the purchase or sale of any security, "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. NASD Rule 2120 is FINRA's antifraud rule and is similar to Section 10(b) and Exchange Act Rule 10b-5. *Mkt. Regulation Comm. v. Shaughnessy*, Complaint No. CMS950087, 1997 NASD Discip. LEXIS 46, at *24 (NASD NBCC June 5, 1997), *aff'd*, 53 S.E.C. 692 (1998).

[19] There is no dispute that Burch's conduct occurred in connection with the purchase or sale of securities.

1996); *Dep't of Enforcement v. Gonchar*, Complaint No. CAF040058, 2008 FINRA Discip. LEXIS 31, at *27 (FINRA NAC Aug. 26, 2008), *aff'd*, Exchange Act Rel. No. 60506, 2009 SEC LEXIS 2797 (Aug. 14, 2009), *aff'd*, 409 F. App'x 396 (2d Cir. 2010). A violation of the antifraud provisions also requires a showing that the material omissions were made with scienter.[20] *First Jersey Sec.*, 101 F.3d at 1467; *Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9, at *11 (NASD NAC May 18, 2004).

1. The Burches Were Not Credible

Central to our finding that Burch engaged in fraud is the evidentiary issue of the Hearing Panel's adverse credibility findings in response to Burch's, and his wife Teri's, testimony. The Hearing Panel gave specific, cogent reasons for its disbelief of the Burches, noting that they failed to recall numerous details at the hearing and that their testimony and other evidence exhibited a number of inconsistencies and implausibilities, including: (1) that it was implausible that Burch did not know that Teri was selling DOGS stock while he was recommending and buying it for customers when transactions were being conducted on March 28, 2003, at nearly the same time from the same phone lines at the Burches' home; (2) that Burch was inconsistent regarding his claim to have no knowledge that Teri formed TDB until months later, despite seeing faxes related to TDB's formation; and (3) the Burches' claim that Teri did not own the DOGS stock in her TDB brokerage account at ACAP. Indeed, the Hearing Panel found the opposite to be true. After hearing the testimony and observing the witnesses' demeanor, the Hearing Panel found that Burch knew that Teri was forming TDB, Burch knew that Teri was selling DOGS stock contemporaneous with Burch's recommendations to customers, and that Burch fabricated the claim that Teri did not own the DOGS shares. We, too, find that, when confronted with the inconsistencies and implausibilities, the Burches' explanations and lack thereof are not convincing.

The Hearing Panel's credibility determinations are entitled to deference and can only be overturned by "substantial evidence." *Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005). We find that Burch has not demonstrated the existence of substantial evidence sufficient to overturn the Hearing Panel's credibility determinations.

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[20] In addition, there must also be proof that Burch used "any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange." 17 C.F.R. § 240.10b-5. Burch does not dispute that he communicated with his customers through telephone calls and the U.S. mail service, thereby satisfying the interstate commerce requirement. *See SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 865 (S.D.N.Y. 1997) (determining that the jurisdictional requirements of the federal antifraud provisions are interpreted broadly and are satisfied by intrastate telephone calls and the use of the U.S. mail), *aff'd*, 159 F.3d 1348 (2d Cir. 1998).

2. The Fact that Teri Burch Was Selling DOGS Stock Was Material

When a securities salesman recommends stock to a customer, he must avoid not only affirmative misstatements but also "disclose material adverse facts of which he is or should be aware." *Richard J. Buck & Co.*, 43 S.E.C. 998, 1006 (1968), *aff'd sub nom. Hanly*, 415 F.2d at 592; *see also Richard H. Morrow*, 53 S.E.C. 772, 781 (1998). This includes disclosure of "adverse interests" such as self-interest that could influence a salesman's recommendation. *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970). Whether information is material "depends on the significance the reasonable investor would place on the . . . information." *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988). Information is material "if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest] . . . [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.* at 231-32 (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)); *see also Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011) (relying upon materiality standard set forth in *Basic*).

We find that the chronology of events when viewed in totality shows that the Burches engaged in a course of conduct that was not coincidental but rather was for the purpose of allowing them to sell Teri's DOGS shares quickly and at an advantageous price. The day before DOGS began trading on the OTCBB, TDB received 50,000 DOGS shares—a transaction that was facilitated by DOGS promoter RS. The next morning when DOGS began trading, Burch had five conversations with DOGS promoter DA. Minutes later, Teri opened the ACAP brokerage account and immediately arranged for the deposit of the 50,000 DOGS shares into this account. Burch then proceeded to call his customers for several hours and recommend that they purchase DOGS. Once the share price had risen over $5.50, Teri began selling DOGS shares. From March 28, 2003 through June 2003, Burch's customers bought over 45,000 shares of DOGS stock, at prices ranging from $4.45 to $8.75 per share, despite the company having no material business operations or assets. During this same period, Teri sold 6,800 DOGS shares in her TDB account at ACAP, at prices ranging from $4.25 to $5.90 per share. We find that, in the context of the evidence presented here, reasonable investors would have considered the information that Burch withheld from the customers material to their investment decisions. Had the customers known that Burch's wife was selling DOGS shares when Burch was recommending it to them to buy, they could have raised questions about the DOGS stock and Burch's motivation and potential economic interest in recommending it. The omitted facts would alter how customers evaluated their purchases. The customers were deprived of the opportunity to question whether Burch had a genuine, objective belief that the investment in DOGS was in their best interest before effecting their transactions. *See, e.g.*, *Gilbert A. Zwetsch*, 50 S.E.C. 816, 819 (1991) (finding material the fact that a registered representative and that representative's relatives were selling a stock at the same time that the representative was recommending the purchase of that stock to customers).

Burch argues that Teri's sales were not material because she had no financial interest in the shares. We reject this argument. A preponderance of the evidence shows that Teri controlled the DOGS shares in TDB's ACAP account until October 2, 2003, and wired proceeds from the sales of those shares to TDB's Bank of America account that she also controlled. Moreover, the

Hearing Panel found Burch's claim not credible—a finding that Burch has not overcome. *See supra* Part IV.A.1.

Burch's argument that Teri's sales were not material because he bought DOGS stock for himself and other members of his family also is without merit. Personal belief in an investment does not excuse a failure to disclose material information to customers. *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *22-23 (Feb. 10, 2004).

3. Burch Acted with Scienter

We also find, by a preponderance of the evidence, that Burch acted with scienter. Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). Scienter is established if a respondent acted intentionally or recklessly. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007); *Irfan Mohammed Amanat*, Exchange Act Rel. No. 54708, 2007 SEC LEXIS 2558, at *35 (Nov. 3, 2007), *aff'd*, 269 F. App'x 217 (3d Cir. 2008). Reckless conduct includes "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) (internal quotation omitted); *see Meadows v. SEC*, 119 F.3d 1219, 1226 (5th Cir. 1997). Proof of scienter may be "a matter of inference from circumstantial evidence." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390-91 n.30 (1983).

As we noted, Burch has not presented substantial evidence to reverse the Hearing Panel's credibility determination that he knew of his wife Teri's sales of DOGS shares. And Burch admitted that he did not disclose Teri's sales to his customers. In the case of a material omission, "scienter is satisfied where, [as here,] the [respondent] had actual knowledge of the material information." *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004); *Fenstermacher v. Philadelphia Nat'l Bank*, 493 F.2d 333, 340 (3d Cir. 1974); *see also Kenneth R. Ward*, 56 S.E.C. 236, 259-60 (2003) (finding scienter established when representative was aware of material information and failed to make appropriate disclosures to customers), *aff'd*, 75 F. App'x 320 (5th Cir. 2003); *Dep't of Mkt. Regulation v. Field*, Complaint No. CMS040202, 2008 FINRA Discip. LEXIS 63, at *33-34 (FINRA NAC Sept. 23, 2008) (same).

Burch's argument that he acted without scienter because none of the investors complained about their DOGS purchases or Burch and, to that end, that his customers continue to "do business with him" is without merit. Certain investors' belief that Burch did not intend to harm them is irrelevant to a finding of fraud. *See, e.g., Wilshire Disc. Sec., Inc.*, 51 S.E.C. 547, 552 n.15 (1993) ("[E]ven assuming that certain investors ratified or endorsed [respondent's] action, that would not alter the objective fact that [respondent] fraudulently departed from the . . . stated use of proceeds."). Burch's omissions presented a danger of misleading his customers.

We affirm the Hearing Panel's finding that Burch engaged in fraud, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110, when he failed to disclose material information to the investors.[21]

B. Failure to Give Notice of Outside Brokerage Account

The second cause in the complaint alleged, and the Hearing Panel found, that Burch failed to notify his employer, WBB, in writing about the outside brokerage account that his wife Teri opened for TDB at ACAP, in violation of NASD Rules 3050(c) and 2110. NASD Rule 3050(c) requires that an associated person "prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member in writing of his or her association with the other member." While Rule 3050(c) applies to accounts held by a person associated with a member and maintained by another member, Rule 3050(e) extends the written notification requirement of Rule 3050(c) to any accounts over which an associated person has a financial interest.

In finding that Burch failed to give notice of an account over which he had a financial interest, the Hearing Panel adopted Market Regulation's legal theory that California community property law governed the analysis. The Hearing Panel reasoned that because the Burches resided in California, a community property state, Burch had a financial interest in the ACAP account that he was required to disclose in writing to his Firm. We reject this theory. We decline to find a violation of FINRA rules based on how a state legislature has enacted statutes that govern how debt and property should be classified during the dissolution of a marriage—facts that are not relevant to the present matter. Because the parties litigated this allegation based on a flawed legal theory, we dismiss it.

Although we assume that the findings that we made in support of the fraud violation logically support a reasonable inference that Burch controlled Teri's TDB ACAP brokerage account, we decline to make this determination. As a matter of our discretion, we choose not to resolve this allegation by interpreting the facts relating to who controlled Teri's TDB account. We leave for another day the question of what degree of control over an account that is established not in the name of an associated person qualifies for the associated person to have a "financial interest" in that account. The key violations in this appeal are contained in the other allegations in the complaint, which is where we focus our analysis.

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[21] NASD Rule 0115 makes all NASD rules, including NASD Rule 2110, applicable both to FINRA members and all persons associated with FINRA members.

C. False Firm Records

We affirm the Hearing Panel's finding that Burch made false representations to WBB that certain customers' purchases of DOGS stock were unsolicited, resulting in false Firm records.[22]

NASD Rule 3110 requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations and statements of policy promulgated thereunder and with the Rules of this Association and as prescribed by SEC Rule 17a-3. The record keeping format, medium, and retention period shall comply with Rule 17a-4 . . . ." In turn, Exchange Act Rules 17a-3 and 17a-4 require member firms to make and keep current certain books and records relating to their business activities. *See* 17 C.F.R. § 240.17a-3(a)(6)(i), § 240.17a-4(b)(1). NASD Rule 2110 requires FINRA members, in conducting their business, to "observe high standards of commercial honor and just and equitable principles of trade." *Dep't of Enforcement v. Trevisan*, Complaint No. E9B2003026301, 2008 FINRA Discip. LEXIS 12, at *27 (FINRA NAC Apr. 30, 2008) (internal quotation omitted).

Causing a member firm to enter false information in its books or records violates NASD Rule 3110 and also violates NASD Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. *See, e.g.*, *Fox & Co. Inv., Inc.*, Exchange Act Rel. No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005) (finding that entering incorrect information in documents constitutes a violation of NASD Rules 3110 and 2110). Moreover, it is a "long-standing and judicially-recognized policy that a violation of another Commission or NASD rule or regulation . . . constitutes a violation of Conduct Rule 2110." *Stephen J. Gluckman*, 54 S.E.C. 175, 185 (1999); *see also Dep't of Enforcement v. Shvarts*, Complaint No. CAF980029, 2000 NASD Discip. LEXIS 6, at *12-13 (NASD NAC June 2, 2000) ("[V]iolations of federal securities laws and NASD Conduct Rules[ ] are viewed as violations of Conduct Rule 2110 without attention to the surrounding circumstances because members of the securities industry are expected and required to abide by the applicable rules and regulations.").

Burch admits that he recommended DOGS stock to several of his customers and incorrectly identified to the WBB trader their subsequent DOGS' orders as unsolicited. As a

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[22] The complaint alleged, and the Hearing Panel found, that Burch's actions also violated Exchange Act Rules 17a-3 and 17a-4. These rules apply to broker-dealers, not associated persons. *See Davrey Fin. Serv., Inc.*, Exchange Act Rel. No. 51780, 2005 SEC LEXIS 1288, at *12 (June 2, 2005). Individuals may violate NASD Rules 3110 and 2110 when they fail to comply with Exchange Act Rules 17a-3 or 17a-4, or are otherwise responsible for creating and maintaining inaccurate books and records. *See North Woodward Fin. Corp.*, Exchange Act Rel. No. 60505, 2009 SEC LEXIS 2796, at *23 (Aug. 19, 2009). We find that Burch's misrepresentations caused his Firm's books and records to be false and therefore not compliant with these Exchange Act rules and that Burch violated NASD Rules 3110 and 2110.

result of his communication of misinformation that was then entered into WBB's order entry system, Burch caused the creation of false and inaccurate order tickets and customer confirmations. Accordingly, we find that Burch violated NASD Rules 3110 and 2110.

D. Failure to Amend a Form U4

The Hearing Panel also found that Burch failed to amend his Form U4 in violation of NASD rules and FINRA's By-Laws. With the exception of the findings related to Article III, Section 4(f) of the By-Laws, we affirm the findings of violation.

NASD Rule 2110 and IM-1000-1 obligate associated persons to disclose accurately and fully information required in the Form U4 and to observe high standards of commercial honor and just and equitable principles of trade. Self-regulatory organizations, state regulators, and broker-dealers utilize the Form U4 to determine and monitor the fitness of securities professionals.[23] *See Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996). The accuracy and completeness of information contained within the Form U4 also serves an important investor protection role because certain information is made available publicly through FINRA BrokerCheck®, including the disclosure of a Wells notice under the facts here.[24] The failure of a registered representative to fully and accurately disclose all information required by the Form U4, including a pending FINRA investigation against a respondent, violates NASD Rule 2110 and IM-1000-1. *See Dep't of Enforcement v. Harvest Capital Inv., LLC*, Complaint No. 2005001305701, 2008 FINRA Discip. LEXIS 45, at *41-42 (FINRA NAC Oct. 6, 2008). Article V, Section 2(c) of FINRA's By-Laws requires that an associated person keep his Form U4 current at all times and amend the form within 30 days after learning of facts or circumstances giving rise to the amendment. A FINRA form that is inaccurate or incomplete so as to be misleading, or the failure to correct such a filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade. *See* NASD IM-1000-1.

Burch's receipt of a Wells notice triggered his obligation to amend his Form U4. *See NASD Notice to Members 98-27*, 1998 NASD LEXIS 37 (Mar. 1998) (explaining that for purposes of amending a Form U4, an "investigation" is defined to include the period after the Wells notice has been given or after FINRA staff has advised an associated person that it intends to recommend formal disciplinary action). Market Regulation notified Burch that it made a preliminary determination to recommend that charges be brought against him related to this case pursuant to a Wells notice dated July 18, 2006. The Wells notice itself expressly stated that Burch was obligated to update his Form U4 to disclose the notice. Burch, however, did not

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[23] "Because of the importance that the industry places on full and accurate disclosure of information required by the Form U4, we presume that essentially all the information that is reportable on the Form U4 is material." *Dep't of Enforcement v. Knight*, Complaint No. C10020060, 2004 NASD Discip. LEXIS 5, at *13-14 (NASD NAC Apr. 27, 2004).

[24] *See* http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/. *But see* FINRA Rule 8312(d) (excluding certain information from release through BrokerCheck).

update his Form U4 to reflect FINRA's investigation of him until October 8, 2007—after he received a deficiency notice from FINRA. Burch does not dispute that he did not update timely his Form U4. We affirm the Hearing Panel's findings that Burch failed to amend his Form U4 to reflect FINRA's investigation of the matters that are the subject of this case, in violation of NASD Rule 2110, IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws.[25]

V. Sanctions

The Hearing Panel barred Burch for his fraudulent omissions and for causing WBB's inaccurate books and records. We affirm both bars. We also determine that a 30 business-day suspension for the Form U4 violation is appropriate. We decline to impose the suspension, however, in light of the two bars.[26]

A. Fraudulent Omissions

The FINRA Sanction Guidelines ("Guidelines") for intentional or reckless omissions of material facts recommend a fine of $10,000 to $100,000, and a suspension of 10 business days to two years.[27] In an egregious case, the Guidelines recommend a bar.[28] For the reasons discussed below, we determine that Burch's misconduct was egregious.[29]

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[25] The Hearing Panel also found that Burch "violated" Article III, Section 4(f) of the By-Laws, which provided that a person is subject to "statutory disqualification" from association with a member firm if such person "has willfully made or caused to be made in any application required to be filed with a self-regulatory organization, . . . any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application . . . any material fact which is required to be stated therein." The Hearing Panel, however, made no findings that Burch's failure to amend his Form U4 was willful and that he was statutorily disqualified. On appeal, we decline to reach these issues and therefore dismiss the finding that Burch violated Article III, Section 4(f) of the By-Laws.

[26] The Hearing Panel imposed a third bar for Burch's failure to give notice under NASD Rule 3050. Because we dismiss the findings of violation of Rule 3050, we also eliminate the bar imposed below for this cause of action and the $28,000 fine for the fraud violation.

[27] *FINRA Sanction Guidelines* 90 (2011), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

[28] *Id.*

[29] Despite ordering a bar, the Hearing Panel found that Burch's fraud was serious but not egregious. In reaching this conclusion, the Hearing Panel determined that Teri's sales of DOGS shares were modest, the sales did not involve large blocks of stock, and there were no allegations of manipulation. We disagree with the Hearing Panel's finding that Burch's fraud was not

[Footnote continued on next page]

The Guidelines for omissions of material facts advise that adjudicators consider the "Principal Considerations in Determining Sanctions."[30] We find that several of these considerations apply to Burch's misconduct and serve to aggravate sanctions. Burch's deliberate failure to disclose to his customers that his wife was disposing of DOGS shares was an important circumstance that a reasonable customer would have found material.[31] As a result, the investors could not make informed investment decisions and accurately assess whether an investment in DOGS was in their best interests, and these customers likely suffered losses.[32] Burch's interests were not aligned with his customers; instead, he engaged in a course of self-serving conduct that was a means to another end for him. For example, Burch's sales to customers had at least the potential of facilitating Teri's sales of DOGS stock and of enhancing the price that she obtained for that stock. We find that Burch's disingenuousness to his customers reflects directly on his ability to deal responsibly with the public, including the obligation to disclose material information related to a recommended investment.

The Hearing Panel found aggravating for purposes of sanctions Burch's "attempted cover-up of his activities both before and during the hearing." Burch argues that he did not make any inconsistent statements and that "any apparent inconsistency is the result of ill-founded questions posed by the [Department of Market Regulation]." We disagree with Burch's claims. We find Burch's lack of candor during these proceedings to be disturbing. A preponderance of the evidence shows that Burch provided inaccurate and incomplete information in an effort to minimize his own responsibility.[33] *See Dep't of Enforcement v. Frankfort*, Complaint No. C02040032, 2007 NASD Discip. LEXIS 16, at *41 (NASD NAC May 24, 2007) ("Providing inaccurate information in an effort to minimize one's own responsibility serves to aggravate

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egregious. Burch's misconduct involved several customers, and Burch made a deliberate decision to provide false testimony to FINRA during the proceedings below in an attempt to mask his misconduct.

30 *Id.* at 6-7 (Principal Considerations in Determining Sanctions).

31 *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

32 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 11). While Burch admits that "many" of his customers "incurred significant losses on their DOGS shares," the record is unclear as to whether the customers have sold the shares and realized the losses and the amount of these losses.

33 *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 12).

sanctions."). Burch's untruthfulness reflects strongly on his fitness to serve in the securities industry.[34]

To protect investors and prevent Burch from similar misconduct in the future, we bar Burch from associating with any member firm in any capacity. A bar will also serve to deter others from engaging in similar misconduct by omitting to disclose all material facts to customers. *See Frankfort*, 2007 NASD Discip. LEXIS 16, at *42 (barring respondent for fraudulent omissions and noting that the bar will serve to deter others in the industry who might otherwise engage in similar misconduct).

B. Books and Records Violations

For recordkeeping violations, the Guidelines recommend imposing a fine of $1,000 to $10,000, suspending the firm for up to 30 business days, and suspending the responsible individual for up to 30 business days.[35] In egregious cases, the Guidelines recommend imposing a fine of $10,000 to $100,000, and a lengthier suspension (up to two years) or barring the responsible individual.[36] The Guidelines instruct adjudicators to consider the nature and materiality of inaccurate or missing information.[37] We find Burch's misconduct egregious. The inaccurate customer order information that Burch communicated when placing customer orders of DOGS stock is an important record in the securities industry—and especially so under the facts here. *See Edward J. Mawod & Co.*, 46 S.E.C. 865, 873 n.39 (1977), *aff'd*, 591 F.2d 588

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[34] We reject Burch's arguments in favor of lesser sanctions. For example, the fact that the customers did not complain about their purchases of DOGS stock and continue to do business with him does not mitigate Burch's misconduct. *See Ronald J. Gogul*, 52 S.E.C. 307, 312 n.20 (1995) (finding the fact that no customer complained about an investment was "not persuasive" in support of respondent's argument that sanctions should be reduced); *Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *39 (NASD NAC July 26, 2007) ("[W]e do not consider the fact that no customers complained to NASD to be relevant."). "Ratifications of fraudulent conduct do not limit our ability to sanction that conduct." *Dep't of Enforcement v. Glodek*, Complaint No. E9B2002010501, 2009 FINRA Discip. LEXIS 1, at *23 (FINRA NAC Feb. 24, 2009), *aff'd*, Exchange Act Rel. No. 60937, 2009 SEC LEXIS 3936, at *22-23 (Nov. 4, 2009), *petition denied*, No. 09-5325, 2011 U.S. App. LEXIS 6178 (2d Cir. Mar. 25, 2011). Burch also argues that Market Regulation presented no evidence that the DOGS stock purchases were unsuitable and that WBB, after its internal investigation of Burch's misconduct, found only that he failed to disclose the ACAP account to the Firm. None of these assertions mitigate his fraud or obviated the need for Burch to disclose material facts that he knew to his customers.

[35] *Guidelines*, at 29.

[36] *Id.*

[37] *Id.*

(10th Cir. 1979); *see also James F. Novak*, 47 S.E.C. 892, 898-99 (1983) (describing falsification of order tickets as serious misconduct). Had Burch correctly designated the trades as solicited, WBB would have been on notice to evaluate the transactions more closely. Recordkeeping rules are the "keystone of the surveillance of brokers and dealers," and Burch's misinformation undermined the accuracy of WBB's records. *See Mawod*, 46 S.E.C. at 873 n.39. "In an industry that presents so many opportunities for abuse and overreaching, and depends so heavily on the integrity of its participants, [such] behavior cannot be countenanced." *Novak*, 47 S.E.C. at 899.

The Hearing Panel found that Burch intentionally concealed from his Firm that he was soliciting his customers to buy DOGS shares and that his testimony on the issue at the hearing lacked candor.[38] Following an inquiry by FINRA, WBB head trader Steven Bakerink asked Burch directly whether he was soliciting orders for DOGS stock and Burch maintained that the unsolicited designation on the order tickets was correct. According to his supervisor, LaRae Bakerink, Burch was "adamant that he was not soliciting or promoting the stock." At the hearing, Burch could not recall his earlier claim to Steven Bakerink that the orders were unsolicited.

We agree with the Hearing Panel's findings and determine that such intentionality serves to aggravate significantly Burch's misconduct. Burch's role in the mismarked order tickets was part of a deliberate effort to conceal his DOGS-related activities from his Firm. Burch admits that "mistakes were made," but argues that "there was no forethought" and that he "did not intentionally mislead anyone about the true character of [the DOGS] sales." Burch contends that he merely misunderstood the definition of solicitation. We, like the Hearing Panel, find that Burch's inconsistent responses related to the solicitation of DOGS stock supports the finding that he intentionally instructed the WBB trader to mark the DOGS order tickets as unsolicited.

While Burch admitted that he made mistakes, he also suggested that the WBB trader may be to blame because the March 28, 2003 orders were consolidated on one order ticket. We acknowledge the inconsistency in that the March 28, 2003 ticket buying all 16,100 DOGS shares ordered by Burch's customers was marked unsolicited, but the confirmation statements for these orders did not reflect that the orders were unsolicited. We find, however, that this fact provides little mitigative weight. Burch admits that he solicited orders from five of these customers who placed orders on March 28, 2003, and he inaccurately told the WBB trader these orders were unsolicited. Moreover, the evidence shows that there were other DOGS orders placed on other days that Burch falsely indicated were unsolicited that resulted in inaccurate order tickets *and* confirmation statements.

Burch describes his mischaracterization of the orders as "minor mistakes" and asserts that these "errors resulted in no harm." We disagree with Burch's effort to minimize the importance

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[38] *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13). The substantial evidence necessary to reverse the Hearing Panel's findings of credibility is absent; we thus agree with the Hearing Panel's determination. *See Faber*, 2004 SEC LEXIS 277, at *17-18 (stressing that deference is given to initial decision maker's credibility determination "based on hearing the witnesses' testimony and observing their demeanor").

of accurate books and records. Through his misconduct, he evaded a closer inspection of the DOGS orders by WBB and undermined WBB's recordkeeping and the regulatory purpose of FINRA's and the Exchange Act's rules requiring firms to place greater scrutiny on solicited orders of OTCBB securities.

Burch not only deliberately defrauded his customers but compounded his offense by the deliberate deception he practiced on his employer, which included the intentional falsification of his employer's records. We find aggravating for purposes of sanctions that Burch lacked candor in his testimony and was not forthcoming to his Firm when he responded to questions about the nature of the DOGS transactions for customers.[39] Burch's actions call for a significant sanction. Accordingly, we bar Burch for causing WBB's inaccurate books and records.

C. Burch's Failure to Amend his Form U4

For failing to amend a Form U4, the Guidelines recommend that an adjudicator consider a fine ranging from $2,500 to $50,000 and a suspension of the individual in any or all capacities for five to 30 business days.[40] The Guidelines also recommend that we consider the nature and significance of the information, whether the failure resulted in a statutorily disqualified individual becoming or remaining associated with a firm, and whether the respondent's misconduct resulted in any harm.[41] Although the disclosure of FINRA's investigation into Burch's misconduct was important, Burch was not statutorily disqualified and his failure to update did not result in harm. Burch, however, did not update his Form U4 for more than 14 months after Market Regulation sent Burch the Wells notice, a fact that we find aggravates his misconduct.[42] Under the circumstances, we find that it would be appropriate to suspend Burch for 30 business days. In light of the bars imposed upon Burch for his fraudulent omissions and causing inaccurate books and records, we do not impose the suspension.

VI. Conclusion

We affirm the Hearing Panel's findings that Burch made material omissions, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and NASD Rules 2120 and 2110; caused his Firm's inaccurate books and records, in violation of NASD Rules 3110 and 2110; and failed to amend his Form U4, in violation of NASD Rule 2110, IM-1000-1, and Article V, Section 2(c) of FINRA's By-Laws. Accordingly, we bar Burch for the fraud violation and

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39 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10).

40 *Id.* at 71.

41 *Id.*

42 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 9).

impose a separate bar for causing his Firm's books and records to be inaccurate. The bars are effective upon service of this decision.[43]

On Behalf of the National Adjudicatory Council,

_____

Marcia E. Asquith
Senior Vice President and Corporate Secretary

[43] We also have considered and reject without discussion all other arguments of the parties.