SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 100553 / July 18, 2024

Admin. Proc. File No. 3-18999

In the Matter of the Application of

CANTONE RESEARCH INC.,
ANTHONY CANTONE,
AND CHRISTINE CANTONE,

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION — REVIEW OF DISCIPLINARY PROCEEDING

Associated persons and member firm appeal from FINRA disciplinary action finding that one associated person and member firm made material misstatements and omissions in connection with the sales of securities in private placements, and that one associated person failed to reasonably supervise the other. *Held*, FINRA's findings of violations are *sustained in part and set aside in part*, the sanctions imposed are *set aside*, and the case is *remanded* for a reassessment of sanctions.

APPEARANCES:

Heide E. VonderHeide and *Alan M. Wolper*, of Ulmer & Berne LLP, for Cantone Research Inc., Anthony Cantone, and Christine Cantone.

Alan Lawhead, *Gary Dernell*, and *Colleen E. Durbin* for FINRA.

Appeal filed: February 14, 2019
Last brief received: August 12, 2019

Cantone Research Inc. ("CRI"), Anthony Cantone, and Christine Cantone (collectively, "Applicants") seek review of a FINRA disciplinary action. FINRA found that, between 2010 and 2013, CRI and Anthony Cantone violated the federal securities laws and FINRA and NASD rules by making material misstatements and omissions in connection with a series of private placements, and that CRI and Christine Cantone violated NASD rules by failing to supervise Anthony Cantone. FINRA suspended Anthony Cantone for 15 months, suspended Christine Cantone for two years, and imposed fines of $150,000 on Anthony Cantone and CRI and $73,000 on Christine Cantone and CRI, to be paid joint and severally, in addition to $18,773.88 in costs. We sustain the findings of violations in part, set them aside in part, and remand for a reassessment of sanctions.

The case concerns two types of misconduct that FINRA found in connection with a series of five real estate offerings involving developer Christopher Brogdon. First, FINRA found that CRI and Anthony Cantone acted negligently in using a biography of Brogdon in the offering materials for all five offerings. We find that FINRA failed to establish that CRI and Anthony Cantone acted negligently in using the biography and we set those findings of violations aside.

Second, FINRA found that CRI and Anthony Cantone made additional misstatements and omissions in connection with three of the offerings—referred to as Columbia, Oklahoma, and Cherokee. We find that FINRA failed to establish violative conduct with respect to the Columbia and Oklahoma offerings, so we set aside those findings, but we affirm FINRA's findings of violations for the Cherokee offering.

I. Background

CRI was a FINRA member between 1990 and September 2023.[1] Anthony Cantone was CRI's majority owner, president, and CEO, and was in the securities industry between 1982 and September 2023.[2] He is married to Christine Cantone, who was in the securities industry between 1996 and September 2023.[3] Christine Cantone was CRI's CCO and her husband's supervisor from 2010 through 2014, except for a three-month hiatus in spring 2012.

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1 *See* BrokerCheck Report for Cantone Research Inc., https://files.brokercheck.finra.org/firm/firm_26314.pdf.

2 *See* BrokerCheck Report for Anthony J. Cantone, https://files.brokercheck.finra.org/individual/individual_1066139.pdf.

3 *See* BrokerCheck Report for Christine L. Cantone, https://files.brokercheck.finra.org/individual/individual_2687618.pdf. We take official notice of CRI's and the Cantones' BrokerCheck reports pursuant to Commission Rule of Practice 323. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck records and citing Rule of Practice 323, 17 C.F.R. § 201.323).

A. CRI, Anthony Cantone, and Brogdon collaborated on a series of real estate offerings.

1. The Columbia, Chestnut, Oklahoma, and Cedars offerings.

James Friar, then a CRI registered representative, introduced Anthony Cantone to Christopher Brogdon in approximately 2003. Anthony Cantone was interested in exploring deals involving municipal bonds but lacked expertise in the area. Friar had done similar deals with Brogdon in the past and vouched for him. Ultimately, Anthony Cantone and Brogdon conducted a series of nine municipal bond deals together. Michael Gardner, an attorney who had worked with both Brogdon and Friar previously, prepared the prospectuses. Anthony Cantone testified that all nine offerings were ultimately successful, with investors paid the full principal and interest due.

In 2010, CRI, Anthony Cantone, and Brogdon began working on a new type of offering involving nursing homes and assisted living facilities. The plan was for Anthony Cantone to find investors and for Brogdon to acquire, develop, and manage the properties. CRI, Anthony Cantone, and Brogdon conducted the first four offerings between February 2010 and August 2011. For each offering, CRI and Anthony Cantone created a limited liability company (LLC) that issued certificates of participation (COPs) to sell to investors. The offerings were informally referred to by the name of their accompanying LLC: Columbia, Chestnut, Oklahoma, and Cedars. The LLC raised money from investors and provided those funds to Brogdon, who used them to acquire, develop, and manage nursing homes and assisted living facilities. The LLC, in turn, received a promissory note from Brogdon that was sometimes secured by the purchased property. The promissory note had a two- or three-year term with investors expected to earn 10% interest annually, payable quarterly. At maturity, investors expected to receive their principal. If the project was sold or refinanced, investors also expected to receive a share of any profits or realized capital gain.

The first four offerings all included the Brogdon Guaranty Agreement ("Brogdon Guaranty"). The guaranty named Brogdon, his wife, and Brogdon Family, LLC, as guarantors for the offering, all of whom pledged "absolutely and unconditionally" to guarantee "prompt payment and performance." Anthony Cantone explained that he needed the Brogdon Guaranty because he wanted Brogdon to have "skin in the game"—a personal commitment to pay. Anthony Cantone testified that the Brogdon Guaranty was an important selling point for the offerings.

Each offering also included a Confidential Disclosure Memorandum (CDM) describing its features. The CDMs all included a brief biography of Brogdon, noting his twenty years of experience in the development and operation of assisted living and nursing home facilities, as well as his previous leadership positions with various companies. The biography closely resembled that used in the nine earlier municipal bond deals that Anthony Cantone and Brogdon conducted together.

The CDMs also specified that both interest and principal would be paid solely from either revenues from the underlying projects or by Brogdon and his wife pursuant to the Brogdon

Guaranty.[4] Late interest payments would be considered a default on Brogdon's part, but the CDMs provided Brogdon a grace period of either five days after receiving notice from the issuing LLC that the interest was not paid when due or 15 days after payment was due.

For each offering, Anthony Cantone and CRI used the attendant LLC to solicit amounts ranging from $550,000 to $2.8 million. Many investors participated in multiple offerings.

a. Anthony Cantone's due diligence and disclosures in the CDM.

When Anthony Cantone first began working with Brogdon in 2003, he learned from Friar that Brogdon had been barred by NASD in the early 1980s; that a company Brogdon managed declared bankruptcy in 1990; and that Brogdon was indicted for Medicaid fraud in 1999. Anthony Cantone decided not to disclose these facts in the documents for the 2003–2008 municipal bond deals,[5] and Anthony Cantone testified those deals ultimately were successful.

As to the real estate offerings at issue in this case, Anthony Cantone focused the bulk of his due diligence on the specific properties involved. He visited the property sites himself, and he received from Friar materials concerning the value of the underlying real estate, the development plan, the operational potential of the facility, and the projected earnings. Anthony Cantone performed additional due diligence to confirm the value of the Brogdon Guaranty by reviewing Brogdon's tax returns and financial statements. Anthony Cantone also revisited Brogdon's background. Brogdon's attorney informed Anthony Cantone that the charges in the Medicaid fraud indictment had been dropped and that the NASD bar "did not involve any self-dealing, personal enrichment or loss of customer funds."

Anthony Cantone acknowledged that he was ultimately responsible for the CDMs' contents but testified that he took a "hands-off" approach to deciding what should be disclosed. Instead, he relied on Friar and Gardner. Ultimately, as in the municipal bond deals, the CDMs did not disclose Brogdon's prior NASD bar, corporate bankruptcy, or fraud indictment.

b. Brogdon's failure to make timely payments.

By summer 2011, Brogdon was having trouble making timely interest payments to investors. In many instances, Anthony Cantone and CRI loaned Brogdon money to make the interest payments, though Anthony Cantone did not tell investors when he or CRI provided funds to cover the interest.

While investors usually received the payments within the grace periods set out in the CDMs, Brogdon's late payments worried Anthony Cantone, who believed it jeopardized his ability to raise funds for other projects. After the first interest payment for Chestnut was delayed, at least three investors asked about it, prompting Anthony Cantone to write to Brogdon's assistant that the late payment made it difficult "to convince these same investors" to

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[4] The Columbia CDM also stated that interest and principal payments could be made from any money recovered pursuant to a lien on the underlying property.

[5] The one exception is that the bankruptcy of the company Brogdon managed was disclosed in those municipal bond deals where the same company was a borrower.

invest in the Oklahoma offering. He wrote to the assistant a day later: "It hurts Brogdon's reputation (and my ability to fund future projects) when interest and principal is not paid when due because investors get concerned about this guaranty." Nonetheless, Anthony Cantone did not stop working with Brogdon. The Oklahoma and Cedars offerings occurred in July and August 2011, respectively. When soliciting investors for the Oklahoma offering, Anthony Cantone continued to identify the Brogdon Guaranty as a selling point.

On February 1, 2012, the Columbia note matured but the principal was not repaid. The following month, when emailing Brogdon about his late interest payments for a different offering, Anthony Cantone noted that investors were calling him about Brogdon's failure to pay the Columbia principal. On April 20, Anthony Cantone emailed Brogdon that Brogdon's failure to pay the Columbia principal, along with his tardiness in making a payment in a different completed offering, made it difficult to solicit investments in other upcoming Brogdon offerings.

Brogdon's failure to repay the principal for Columbia caused interest payments to continue to come due. After Brogdon failed to make the next interest payment, which was due May 1, 2012, Anthony Cantone used his own funds to make the payment to Columbia. Brogdon again failed to make the interest payment for Columbia for the next quarter, which was due on August 1, 2012. Anthony Cantone notified Brogdon that he was in default, and again loaned the money to Columbia to make the payment.

During this period, Brogdon also failed to make interest payments in the Chestnut offering. In September 2011, and February, June, September, and November 2012, Anthony Cantone or CRI loaned Brogdon the money to cover those interest payments.

c. The extension agreements.

On October 1, 2012, Anthony Cantone agreed to extend the Columbia maturity date to February 1, 2013. The extension agreement stated that Brogdon's company had been unable to repay the principal because the facility had not achieved sufficient occupancy. The agreement increased Brogdon's interest on the note from 10% to 14% and added additional principal and fees amounting to over $150,000. Anthony Cantone did not send the agreement to investors; rather, he sent a two-paragraph letter that informed investors of the extension but did not mention any missed interest or principal payments, nor the additional fees or interest that were part of the new agreement.

In January 2013, Brogdon informed Anthony Cantone he would not be able to pay the Columbia principal now due February 1, 2013. Anthony Cantone agreed to a second extension to February 1, 2014. The record does not include any evidence that investors were informed about the second extension.

Brogdon also did not repay the principal for Oklahoma when it came due in July 2013. Anthony Cantone extended the maturity date to January 15, 2014, with terms similar to those used in the Columbia extension agreement. Anthony Cantone did not send the extension agreement to Oklahoma investors and instead sent a letter that again lacked numerous details about the terms of the extension agreement.

Brogdon continued having difficulty making interest payments throughout 2013. Anthony Cantone testified that, by March 2013, he was "getting concerned" about Brogdon's ability to honor all his financial obligations. Brogdon missed interest payment deadlines for Columbia in May, August, and November 2013, with Anthony Cantone or CRI covering the payments instead. Brogdon also missed payments in the Chestnut and Cedars offerings, and Anthony Cantone or CRI covered those payments as well. In May 2013, Anthony Cantone sent Brogdon an invoice for Chestnut, noting that he had missed interested payments for March, June, and September 2012 as well as for March 2013. Those payments, combined with interest due June 1, 2013, totaled $350,025.

Some investors complained about—and therefore must have known about—some of Brogdon's late interest payments. Anthony Cantone testified that he called and informed each investor each time he, rather than Brogdon, covered an interest payment. Anthony Cantone's testimony was not consistent in this regard, however, because he also testified that he could not confirm that he had contemporaneously informed Chestnut or Cedars investors each time he covered Brogdon's interest payments. There is no documentary evidence that Anthony Cantone contemporaneously informed investors about the late interest payments or the loans to Brogdon.

Ultimately, Anthony Cantone, CRI, or the relevant LLC sued the Brogdon entities in connection with the Columbia, Chestnut, Oklahoma, and Cedars offerings. A court entered judgment for the investors in each lawsuit. As of the filing of this appeal, investors in Columbia and Cedars were fully repaid their principal and interest. Applicants have filed motions to adduce additional evidence that they claim shows investors in the Chestnut and Oklahoma offerings "continue to be repaid, to this day, as the underlying projects are completed and the underlying real estate sold."[6]

2. The Cherokee offering.

The Cherokee offering differed from the previous offerings in several ways. It involved undeveloped land that was to be used to create a series of townhomes, rather than the redevelopment of a single preexisting facility. Bruce Alexander, a developer with whom Anthony Cantone had previously worked on other projects, was involved as a partner. Finally, whereas all the other offerings occurred in late 2010 or 2011, the Cherokee offering occurred in mid-2013.

a. The "Chelsea Guaranty"

The Cherokee CDM also differed from the others. The $1.825 million promissory note was secured by a deed and had a five-year maturity date, and there was no Brogdon Guaranty. Instead, Chelsea Investments, LLC ("Chelsea"), an entity Brogdon owned and controlled, guaranteed payment of interest and principal ("Chelsea Guaranty"). While previous CDMs contained cautionary language about the value of the Brogdon Guaranty, noting that "there can be no assurance that, if called upon, any of the guarantors would have the liquid assets necessary" to meet their obligations, the Cherokee CDM stated explicitly in bold capital letters

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6 *See infra* Section IV (discussing Applicants' motions to adduce).

that potential investors should not "make their investment decision . . . in reliance upon the Chelsea Guaranty."

Anthony Cantone offered several reasons why Chelsea guaranteed the investment instead of Brogdon. First, he pointed to the differences between Cherokee and the other offerings, particularly the fact that it was to be self-sustaining and that he thought Brogdon had a more limited role. He also considered Brogdon to be an unreliable guarantor at this point and had lost confidence in the value of his personal guaranty. In addition, Anthony Cantone testified that Cherokee did not involve the assisted living industry, in which Brogdon had experience, but rather buying and selling individual homes, which was why Alexander managed it. Anthony Cantone also testified that, when drafting the Cherokee CDM, Gardner told him that including the Brogdon Guaranty would necessitate disclosing Brogdon's failure to honor the previous guaranties.

Although Anthony Cantone chose to include the Chelsea Guaranty in the CDM, he had doubts as to the value of the agreement. Unlike previous offerings, where the Brogdon Guaranty was a major selling point, he testified that he "didn't consider Chelsea to be a major factor" in the Cherokee offering. At one point, he testified that the guaranty was in the offering "not for the purpose of informing the investors" but as a message to Brogdon that "he had a fiduciary responsibility."

b. Anthony Cantone's due diligence and disclosures in the CDM

Anthony Cantone examined the project's structure and finances and conducted a site visit. He also reviewed Alexander's net worth and 2012 financial statements for other Brogdon offerings Anthony Cantone had funded; these statements showed net losses for four of the seven projects exceeding $2,000,000. Anthony Cantone testified that he did not spend "a lot of time" looking into Chelsea as part of his due diligence because "it wasn't a material factor."

Although Gardner prepared the other CDMs at issue in this matter, the Cantones retained a new attorney, Christopher Flannery, to assist with the Cherokee CDM. Anthony Cantone testified that they did so because Gardner had failed to file several blue sky state filings on earlier projects, which the Cantones views as reflecting his "incompetence." Gardner continued to be involved in the Cherokee offering, but by mid-May 2013 the Cantones considered him to represent Brogdon's interests, not those of the Cantones, CRI, or Cherokee. Instead, the Cantones viewed Flannery as responsible for protecting the interests of "COP investors, Cherokee as well as CRI in this project." Anthony Cantone testified that after they "fired Gardner and used Flannery, he gave us different advice," which Cantone deemed "better."

Anthony Cantone solicited investors for Cherokee from April to June 2013. The CDM and other written materials did not mention the other projects or Brogdon's repeated missed late payments. Anthony Cantone testified that he could not confirm that he informed prospective investors of Brogdon's missed payments in the previous offerings, but he claimed that many of them had invested in the previous offerings and therefore would have known about Brogdon's late or missed payments (presumably because they had received payments late and, according to Anthony Cantone, had been verbally informed whenever Anthony Cantone covered Brogdon's interest payments). Anthony Cantone also testified that he believed that Brogdon's inability to

pay in the other offerings was not material to Cherokee because the CDM did not contain the Brogdon Guaranty.

Anthony Cantone testified at the August 2016 hearing that, with respect to the Cherokee offering, home sales had begun, generating interest payments and profit shares for investors. The record on appeal does not indicate what happened after the hearing, including whether investors were repaid their principal when the note matured in May 2018. In August 2022, however, Applicants filed a motion to adduce additional evidence that they claim shows Cherokee "recently" repaid $481,860.89 of principal to investors, suggesting that the investors were not repaid when the note matured in 2018.[7]

B. Christine Cantone supervised Anthony Cantone and was involved in the offerings.

Except for a three-month period from March to June 2012, Christine Cantone was the CCO of CRI. As she admitted in her testimony, she was also her husband's supervisor.[8] Under the firm's written supervisory procedures (WSPs), Christine Cantone was responsible for reviewing emails and correspondence; maintaining CRI's WSPs; and ensuring that representatives under her supervision conducted thorough due diligence. She also handled the books for the Brogdon offerings.

Christine Cantone testified that she made sure Anthony Cantone conducted due diligence for the offerings by reviewing his emails daily, including those between him and Gardner, and reviewing any documents Anthony Cantone requested. She did not analyze the merits of the deal because she saw her job as "mak[ing] sure the [due diligence] material was collected . . . [and] reviewed." She was included on many of the email exchanges between Anthony Cantone and Gardner and Anthony Cantone and Brogdon and reviewed drafts of the CDMs, including for Cherokee. Christine Cantone recalled conversations with Gardner regarding whether to disclose Brogdon's NASD bar in connection with an early CDM, but did not recall similar conversations about the CDMs at issue here.

Christine Cantone testified that she was aware of some of the negative aspects of Brogdon's background, as well as his failure to make timely payments of interest and principal. She knew that many of the checks used to cover the late payments came from an account she held jointly with her husband and that the extension agreements contained new interest terms and fees, but she "c[ould]n't say with certainty" what investors were told. She was also unsure what information investors were provided about Brodgon's financial condition. Christine Cantone "overheard" some telephone conversations between her husband and investors about the late payments but could not offer specifics.

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7 *See infra* Section IV (discussing Applicants' motions to adduce).

8 Christine Cantone's liability in this case stems from her role as Anthony Cantone's supervisor and not her role as the chief compliance officer of CRI.

C. Procedural History

During a routine examination of CRI in 2013, FINRA staff noted discrepancies between Anthony Cantone's statements and bank records and emails regarding defaults, late payments, or extensions in the Brogdon offerings. FINRA's Department of Enforcement ("Enforcement") eventually filed a five-count complaint against CRI and the Cantones in November 2015. The complaint alleged:

(1) That CRI and [Anthony] Cantone knowingly or recklessly made material misrepresentations and omissions in connection with the offer and sale of five Brogdon-related offerings, in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, as well as FINRA Rules 2010 and 2020;

(2) In the alternative, that CRI and [Anthony] Cantone negligently made material misrepresentations and omissions in connection with the offer and sale of five Brogdon-related offerings, in violation of Securities Act Sections 17(a)(2) and (3), as well as FINRA Rule 2010;

(3) That CRI and [Anthony] Cantone made improper use of customer funds in violation of FINRA Rules 2150 and 2010;

(4) That, in connection with the Cherokee Offering, CRI and [Anthony] Cantone made unsuitable recommendations to investors, in violation of FINRA Rules 2010 and 2111(a); and

(5) That CRI and Christine Cantone failed to properly supervise [Anthony] Cantone, in violation of NASD Rule 3010 and FINRA Rule 2010.

1. The Hearing Panel Decision

The Hearing Panel conducted an eight-day hearing and issued its decision in May 2017. In connection with the material misrepresentations and omissions counts (Counts 1 and 2), the Hearing Panel found Anthony Cantone liable based on his failure to disclose information about Brogdon's background, but the Hearing Panel did not predicate liability on the undisclosed facts about Brogdon that Anthony Cantone knew, including the prior NASD bars. The Hearing Panel found that the NASD bars were immaterial because they were old and because NASDAQ had subsequently approved the listing of a company for which Brogdon was Chairman and CEO, despite the bars. The Hearing Panel instead found that there were three material facts about Brogdon that Anthony Cantone should have known and that should have been disclosed in the biography attached to the offering documents: (1) that while Brogdon was chairman of a company in 1996, approximately $6 million in federal tax liens were filed against the company; (2) that while Brogdon was chairman of a different company in 1999, the company filed for bankruptcy; and (3) that in 2003, a Georgia state appellate court found that Brogdon had failed to honor a stock repurchase agreement made with the bankrupt company. The Hearing Panel found that Anthony Cantone was unaware of these events due to his failure to adequately investigate Brogdon's background and that omission of this information was negligent in violation of Securities Act Sections 17(a)(2) and (3).

In connection with the material misrepresentations and omissions counts, the Hearing Panel also found that certain missed interest payments in the Columbia, Chestnut, and Cedars offerings, as well as the additional fees and interest rate increases from 10% to 14%, were material facts that should have been disclosed to Columbia and Oklahoma investors with the extension agreements related to these offerings. The Hearing Panel further found that Brogdon's repeated failures to pay interest and principal in the first four offerings, as well as the poor financial condition of three of the projects at the end of 2012, were material facts that should have been disclosed to prospective Cherokee investors. The Hearing Panel noted that the use of the Chelsea Guaranty, rather than the Brogdon Guaranty, did not alter the materiality of these misstatements. The Hearing Panel found that CRI and Anthony Cantone made these misstatements with scienter in violation of Exchange Act Section 10(b) and Rule 10b-5 thereunder, as well as FINRA Rules 2020 and 2010.

The Hearing Panel found that there was insufficient evidence to support the claims of improper use of customer funds (Count 3) and unsuitable recommendations (Count 4), so it dismissed those charges.

As to the failure-to-supervise claims (Count 5), the Hearing Panel found that Christine Cantone exercised unreasonable supervision by not directing Anthony Cantone to inform prospective investors of the missed payments and changes in interest in the extension agreements. As a result, the Hearing Panel found that Christine Cantone and CRI violated NASD Rule 3010 and FINRA Rule 2010.

For the violations of Securities Act Section 17(a)(2) and (3), the Hearing Panel imposed a three-month suspension on Anthony Cantone in all capacities and a fine on Anthony Cantone and CRI of $50,000 jointly and severally. For the violations of Exchange Act Section 10(b) and Rule 10b-5, the Hearing Panel imposed a one-year suspension on Anthony Cantone in all capacities and a fine on Anthony Cantone and CRI of $100,000 jointly and severally. For the failure to supervise violations, the Hearing Panel suspended Christine Cantone in all capacities for six months and imposed a fine of $75,000 on her jointly and severally with CRI. The Hearing Panel also assessed costs.

2. The NAC Decision

Applicants and Enforcement both appealed to FINRA's National Adjudicatory Council ("NAC"). In connection with the material misrepresentation or omission counts (Counts 1 and 2), the NAC agreed with the Hearing Panel that Anthony Cantone had negligently omitted material information in communications to investors but additionally found that Anthony Cantone and CRI negligently failed to disclose Brogdon's 1984 and 1985 NASD bars. The NAC noted that, although the "temporal remoteness of an event can abate its materiality," Brogdon's bars were "the most significant sanction NASD could impose" and concluded that "a reasonable investor would want to know" about them since they remained in effect. The NAC faulted CRI and Anthony Cantone for conducting "unreasonably little due diligence with regards to Brogdon's past, despite the red flags." The NAC also found that, if Anthony Cantone had conducted his own research of the NASD bars, he would have learned that they were more serious than others had represented to him. Accordingly, the NAC found that Anthony Cantone and CRI violated Securities Act Section 17(a)(2) and (3) and FINRA Rule 2010.

The NAC also agreed with the Hearing Panel that Anthony Cantone and CRI acted with scienter in failing to disclose Brogdon's late payments to Columbia and Oklahoma investors in connection with the extension agreements and to prospective Cherokee investors in connection with that offering. The NAC found further that Anthony Cantone and CRI acted with scienter in failing to disclose in connection with the Columbia and Oklahoma extension agreements and the Cherokee offering that Anthony Cantone had loaned Brogdon funds to cover some of the past interest payments. The NAC found these omissions material and, accordingly, held that Anthony Cantone and CRI violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

In connection with the failure-to-supervise count (Count 5), the NAC affirmed the Hearing Panel's findings that Christine Cantone exercised unreasonable supervision. The NAC noted that, in addition to Christine Cantone's awareness of Brogdon's failures to pay, she also directed funds from the bank account she owned jointly with Anthony Cantone to make interest payments when Brogdon failed to do so. The NAC affirmed the Hearing Panel's dismissal of Count 3, and Enforcement did not appeal the dismissal of Count 4 to the NAC.

The NAC affirmed the Hearing Panel's sanctions with regard to the material misrepresentations and omissions counts (Counts 1 and 2), but modified the sanctions for the failure to supervise (Count 5). The NAC increased Christine Cantone's suspension from six months to two years. The NAC pointed to Christine Cantone and CRI's previous disciplinary history, and the "troubling" and "serious" supervisory violations in this case, as warranting a lengthier suspension.[9] The NAC also decreased the fine for Count 5 from $75,000 to $73,000 "to comport with the [Sanction] Guidelines." The NAC affirmed the imposition of $17,201.27 in hearing costs, and imposed appeal costs of $1,572.61, jointly and severally among Anthony Cantone, Christine Cantone, and CRI. This appeal followed.

II. Analysis

We review FINRA's disciplinary action to determine: (1) whether Applicants engaged in the conduct FINRA found, (2) whether that conduct violated the provisions specified in FINRA's determination, and (3) whether those provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.[10] We base our findings on an independent review of the record and apply the preponderance-of-the-evidence standard.[11]

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[9] In a 2012 FINRA settlement, Christine Cantone and CRI consented to the entry of findings that Christine Cantone failed to reasonably supervise a CRI registered representative who sold fraudulent investments to firm customers and misappropriated approximately $1.6 million of their funds. FINRA suspended Christine Cantone for three months in any principal capacity, fined her $10,000 jointly and severally with CRI, and ordered her to pay $200,000 in restitution to customers jointly and severally with CRI. CRI was censured and fined $15,000.

[10] 15 U.S.C. § 78*s*(e)(1).

[11] *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 & n.7 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

A. Anthony Cantone and CRI committed fraud in connection with the Cherokee offering.

We find that Anthony Cantone and CRI engaged in the conduct FINRA found in connection with the Cherokee offering and that, as FINRA found, the conduct violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. A person violates Section 10(b) and Rule 10b-5 by making a misstatement or omission of material fact with scienter.[12] Such conduct also violates FINRA Rule 2020, which prohibits members from effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance; and FINRA Rule 2010, which prohibits conduct inconsistent with just and equitable principles of trade.[13]

We agree with FINRA that Brogdon's late payments and defaults prior to the Cherokee offering were material facts that Anthony Cantone and CRI should have disclosed to prospective Cherokee investors. We also agree with FINRA that Anthony Cantone and CRI acted with scienter in omitting this material information. As a result, we find that Anthony Cantone and CRI violated the provisions FINRA found them to have violated, and we find that these provisions are, and were applied in a manner, consistent with the purposes of the Exchange Act.

1. Anthony Cantone and CRI made material omissions.

Section 10(b) and Rule 10b-5 require disclosure where a statement "would be misleading in the absence of the disclosure of additional material facts needed to make it not misleading."[14] Here, the CDM named Brogdon as "the central participant in the transactions described." Arcadia Partners, an entity that Brogdon controlled, was responsible for the interest payments, and investors were told to "rely on their own examination of . . . Christopher F. Brogdon" in making an investment decision. Yet Anthony Cantone knew, and did not disclose to investors, that by the time of the Cherokee offering, Brogdon had made interest payments on the other offerings late, had missed them entirely, and had failed to repay principal. Anthony Cantone and CRI also had covered the interest payments multiple times out of personal or business accounts, and Anthony Cantone knew that Brogdon owed $350,000 in unpaid interest for the Chestnut offering alone. Anthony Cantone even agreed to extensions for the Columbia and Oklahoma offerings because Brogdon could not pay the principal under the terms of the original notes. Indeed, Anthony Cantone himself confirmed that by the time of the Cherokee offering, he was

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[12] *Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th Cir. 2010). To violate Section 10(b) and Rule 10b-5, a person must also act by means of interstate commerce and in connection with the purchase or sale of a security. The record establishes, and Applicants do not dispute, that they acted by means of interstate commerce and in connection with the purchase or sale of a security as part of the Cherokee offering.

[13] *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, at *9 (Mar. 27, 2017), *petition denied*, 733 F. App'x 571 (2d Cir. 2018).

[14] *SEC v. Fehn*, 97 F.3d 1276, 1290 n.12 (9th Cir. 1996) (internal quotation marks, brackets, and italics omitted).

extremely concerned about Brogdon's financial condition. Anthony Cantone and CRI needed to disclose these facts for the Cherokee offering materials to be not misleading.

These facts were material because they "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[15] A reasonable investor would have wanted to know about Brogdon's financial condition and his history of defaulting on both interest and principal payments, as well as Anthony Cantone's own concerns about Brogdon's ability to pay, before deciding whether to invest in an offering in which Brogdon was "the central participant" who owned and controlled the entity that guaranteed payment.[16] Indeed, one of CRI's principals wrote to Brogdon, copying Anthony Cantone, in May 2013 that as a result of Brogdon's repeated missed payments and failure to repay principal on time in connection with the previous offerings, "several" of his customers refused to "do any deals" associated with Brogdon.

It was also materially misleading for Anthony Cantone to include the Chelsea Guaranty in the offerings without disclosing the information that caused him to doubt its value. Anthony Cantone testified that Brogdon had proven himself to be an unreliable guarantor. This was never disclosed to investors, however. Instead, Anthony Cantone obscured the source by calling it the Chelsea Guaranty rather than the Brogdon Guaranty even though Brogdon owned and controlled Chelsea. That the offering documents cautioned potential investors not to make their investment decisions in reliance on the guaranty also does not cure the fact that Anthony Cantone chose to include a promise that he viewed as worthless to investors without informing them of that fact or the information upon which he had formed that belief.

Applicants contend that investors knew about Brogdon's late payments and Anthony Cantone's payments on Brogdon's behalf. In the alternative, they argue that the source of the interest payments was not material. But the record does not reflect that all investors knew about the late payments or the source of the payments. Although there was significant overlap between Cherokee investors and investors in the previous offerings, the record does not show that *all* Cherokee investors knew the material facts that Anthony Cantone omitted.

Nor does the record support a conclusion that the source of the payments was immaterial. Applicants dispute the evidence establishing materiality, noting that several individual investors

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15 *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

16 *See, e.g.*, *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323-24 (11th Cir. 1982) (finding omission of "the close connection of the principals involved in Carriba Air with the bankrupt Air Caribbean and with other failed business ventures" was material); *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980) ("Surely the materiality of information relating to financial condition, solvency and profitability is not subject to serious challenge."); *SEC v. Bravata*, 763 F. Supp. 2d 891, 916 (E.D. Mich. 2011) (finding misrepresentations material where "defendants failed to depict the true financial condition of the company"); *SEC v. Glob. Express Capital Real Estate Inv. Fund I, LLC*, No. 03-1514, 2006 WL 7347289, at *18 (D. Nev. Mar. 28, 2006) (finding misrepresentations material because "they concerned the very viability of the investment that defendants offered"), *aff'd in relevant part*, 289 F. App'x 183, 187 (9th Cir. 2008).

testified or submitted declarations indicating that the source of the payments was not important to them. Applicants also note that several investors were aware of Brogdon's late payments because they personally received several payments in previous offerings late. But, again, not all Cherokee investors had participated in the previous offerings. Even if some investors were aware of some late payments, or that Anthony Cantone had covered some of the interest payments, they had no way of knowing the extent of Brogdon's delinquency. It was Brogdon's repeated failures to make payments—over multiple offerings and an extended period of time—that was material to investors' decision-making. Indeed, several investors who participated in the previous offerings testified that they did not know this information and would have wanted to know it. Moreover, materiality is an objective, not a subjective, inquiry.[17] A reasonable investor would have wanted to know about the full extent of Brogdon's late and missed payments and that, contrary to what the CDMs for the previous offerings had provided, Anthony Cantone, not Brogdon, had made many of the interest payments for these offerings.

2. Anthony Cantone and CRI acted with scienter.

Anthony Cantone acted with scienter when he made these material omissions. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[18] Recklessness satisfies the scienter requirement and is defined as conduct that constitutes "an extreme departure from the standards of ordinary care" such that "the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[19] The scienter of an individual can be imputed to an entity he or she controls.[20]

Anthony Cantone knew about Brogdon's chronic failure to pay interest on time and his inability to fulfill the terms of the notes when due. He had fielded calls from investors expressing frustration about the late payments and the lack of principal, and Anthony Cantone knew that some investors would not do any deals with Brogdon's name on them because of his previous defaults. Indeed, he had his own concerns about Brogdon. Nonetheless, Anthony Cantone did not disclose what he knew about Brogdon to prospective Cherokee investors. Instead, Anthony Cantone replaced the Brogdon Guaranty with the Chelsea Guaranty—an entity Brogdon still owned and operated. Anthony Cantone testified repeatedly that he believed the Chelsea Guaranty to be valueless to investors, but instead of saying as much to investors, or removing it entirely, he worked with his attorneys "to minimize [its] importance." In these

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17 *See, e.g.*, *S.W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *7 (Dec. 5, 2014) ("[T]he reaction of individual investors is not determinative of materiality, since the standard is objective, not subjective.") (internal quotation marks and citations omitted).

18 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

19 *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *6 (Mar. 31, 2016) (internal citations omitted).

20 *See, e.g.*, *SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1089 n.3 (2d Cir. 1972), *abrogation in part on other grounds recognized by SEC v. Ahmed*, 72 F.4th 379, 406 (2d Cir. 2023).

circumstances, Anthony Cantone must have known of the danger of deceiving investors and therefore acted at least recklessly.

We reject Applicants' argument that their reliance on counsel negates any scienter findings. A reliance on counsel defense requires applicants to show they (1) disclosed all relevant facts to their counsel,[21] (2) sought advice as to the legality of their conduct, (3) received advice that their conduct was legal, and (4) relied on that advice in good faith.[22] Applicants have failed to make the required showing.

Applicants submitted emails and documents that they categorized as attorney-client communications concerning Cherokee. These submissions contain drafts of the Cherokee offering materials shared between the Cantones and Gardner and later Flannery. The draft offering materials, however, do not show that the Cantones disclosed to their attorney essential facts—namely, that Brogdon had recently defaulted on obligations to pay interest and principal. Moreover, the Applicants offer no evidence that they specifically asked counsel for advice on whether they were required to disclose the fact of Brogdon's recent defaults in the Cherokee offering materials. Under the circumstances, Applicants cannot show that a reliance on counsel negates their scienter.[23]

Applicants contend that the decision to draft the Chelsea Guaranty as they did "was made in consultation with counsel," and that "the legal advice was reduced to writing." Their evidence, however, is a three-sentence email Gardner sent to Anthony Cantone on April 10, 2013, that does not support their contention. The email (1) inquires whether Anthony Cantone wanted Gardner to draft the documents for the Cherokee offering; (2) advises Anthony Cantone that if he included "a Chris and Connie [Brogdon] guaranty agreement," he would "need to disclose detail about their multiple failures to perform under previous guaranties"; and then (3) states: "Please advise . . ." [ellipsis in original].

This email does not show that Applicants made a complete disclosure to Gardner regarding Brogdon's financial difficulties or that after making such a disclosure they received advice from Gardner that Brogdon's financial difficulties did not need to be disclosed in the offering documents that included the Chelsea Guaranty. The evidence of Applicants' communications with their counsel thus does not negate our finding that Anthony Cantone was at

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21 *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 642 (D.C. Cir. 2008).

22 *Dembski v. SEC*, 726 F. App'x 841, 845 (2d Cir. 2018).

23 *See id.* (holding that respondent who "failed to disclose the [pertinent] information to [his counsel], who lacked independent knowledge of this information," could not establish reliance on counsel); *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *11 (Nov. 14, 2008) ("Courts consider it important that the advice of counsel the client received was based on a full and complete disclosure. Further, it isn't possible to make out an advice-of-counsel claim without producing the actual advice from an actual lawyer.") (citing *SEC v. Merchant Capital*, 483 F.3d 747, 772 (11th Cir. 2007); *SEC v. McNamee*, 481 F.3d 451, 456 (7th Cir. 2007)) (internal quotation marks removed); *Eugene T. Ichinose, Jr.*, Exchange Act Release No. 17381, 1980 WL 22146, at *2 (Dec. 16, 1980) (rejecting advice of counsel defense where the record does not "show with any specificity what advice [Respondent] may have received").

least reckless in failing to disclose what he knew about Brogdon to prospective Cherokee investors.

3. Anthony Cantone and CRI violated provisions of the Exchange Act and FINRA rules, those provisions are and were applied in a manner consistent with the purposes of the Exchange Act, and Anthony Cantone and CRI are subject to a statutory disqualification because they committed their violations willfully.

As a result of the above analysis, we agree with FINRA that Anthony Cantone and CRI violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.[24] We also find that Exchange Act Section 10(b) and Exchange Act Rule 10b-5 are and were applied in a manner consistent with a central purpose of the Exchange Act to protect investors from fraudulent conduct.[25] Here, Applicants' conduct put investors at risk. FINRA acted in the public interest, and consistently with the purposes of the Exchange Act, in applying Section 10(b) and Rule 10b-5 to Applicants' misconduct.

We find further that FINRA Rules 2020 and 2010 are, and were applied in a manner, consistent with the purposes of the Exchange Act. Exchange Act Section 15A(b)(6) requires that FINRA promulgate rules to both "prevent fraudulent and manipulative acts and practices" and "promote just and equitable principles of trade."[26] Rules 2020 and 2010, which are designed to prevent fraud and promote just and equitable principles of trade, are therefore consistent with the Exchange Act's purposes.[27] In finding CRI and Anthony Cantone liable for securities fraud under these rules, FINRA applied these rules consistently with the purposes of the Exchange Act.[28]

Finally, we also agree with FINRA that because Anthony Cantone and CRI acted at least recklessly in making misstatements and omissions, they also acted willfully and are thus subject to a statutory disqualification under Exchange Act Section 3(a)(39).[29]

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[24] *See generally Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 WL 3216542, at *19 (July 17, 2019) ("[I]t is well-established that a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts.").

[25] *See Koch v. SEC*, 793 F.3d 147, 150 (D.C. Cir. 2015) (stating that the Exchange Act "was intended principally to protect investors" from fraud in securities transactions).

[26] 15 U.S.C. § 78*o*-3(b)(6).

[27] *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *6 n.20, *11 (Feb. 13, 2015) (so finding with respect to predecessors to Rules 2020 and 2010).

[28] *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *7 n.16 (Sept. 30, 2016).

[29] *See* 15 U.S.C. § 78c(a)(39)(F) (stating that a person is subject to a statutory disqualification if, among other things, he has committed any act enumerated in Exchange Act Section 15(b)(4)(D), which refers, among other things, to willful violation of the Exchange Act);

B. Christine Cantone and CRI failed to reasonably supervise Anthony Cantone.

We agree with FINRA that Christine Cantone failed to reasonably supervise Anthony Cantone in connection with the Cherokee offering. NASD Rule 3010(a) required member firms to establish and maintain a supervisory system, including WSPs, "reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules."[30] The presence of supervisory procedures alone is not enough because, without sufficient implementation, guidelines and strictures do not assure compliance.[31] Sufficient implementation includes the responsibility to investigate red flags that suggest that misconduct may be occurring and to act upon the results of such an investigation.[32] A violation of NASD Rule 3010(a) also constitutes a violation of FINRA Rule 2010, and a supervisor's violation of the duty to supervise may be imputed to the firm.[33]

Christine Cantone violated these standards by failing to implement CRI's supervisory procedures and ignoring red flags. CRI's WSPs required Christine Cantone to review Anthony Cantone's emails on a daily basis to ensure that all communications with investors and prospective investors were truthful, with fair and balanced disclosures. Yet Christine Cantone knew the extent of Brogdon's financial troubles and did not ensure that Anthony Cantone disclosed them to prospective Cherokee investors in the offering materials.

The extent and nature of the red flags demonstrates the unreasonableness of the supervision. Christine Cantone knew that Brogdon was failing to make timely interest payments relating to the Columbia, Chestnut, and Cedars offerings. She wrote many of the checks to cover the late payments, some of them from her joint account with Anthony Cantone. She also knew when Brogdon needed extensions to repay the Columbia and Oklahoma principal. She was also privy to discussions around the drafting of the Cherokee offering and the decision to include the Chelsea Guaranty rather than the Brogdon Guaranty.

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see also, e.g., *Bennett Grp. Fin. Servs*., Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.30 (Mar. 30, 2017) ("Our finding of scienter . . . demonstrates that Bennett's violations were willful."), *abrogated in part on other grounds by Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See generally Robare Grp. v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) (holding that a finding of recklessness is sufficient to prove a violation of Section 207 of the Investment Advisers Act of 1940, which prohibits willfully omitting to state in an investment adviser registration application a material fact that is required to be stated therein).

30 On December 1, 2014, FINRA Rule 3110(a) superseded NASD Rule 3010(a). *Consolidated Supervision Rules*, FINRA Notice to Members 14-10, 2014 WL 1133588 (Mar. 19, 2014). Christine Cantone's conduct occurred before December 2014, so NASD Rule 3010(a) applies.

31 *Meyers Assocs., L.P.*, Exchange Act Release No. 86193, 2019 WL 2593825, at *10 (June 24, 2019).

32 *Id*.

33 *Id*.

Despite all these red flags, Christine Cantone admitted that she took no steps to address them. She did not direct Anthony Cantone to tell investors about Brogdon's missed payments or the true sources of those funds. Anthony Cantone's communications to investors were not truthful and complete, and Christine Cantone, knowing this, did not remedy them. Her inaction enabled Anthony Cantone and CRI to violate securities laws and FINRA rules. Accordingly, Christine Cantone and CRI violated NASD Rule 3010 and FINRA Rule 2010.[34]

Christine Cantone argues, like Anthony Cantone, that the misstatements and omissions were not material and not made with scienter. We reject those arguments for the reasons already explained.

We also find that NASD Rule 3010 is, and was applied in a manner, consistent with the purposes of the Exchange Act. We have long held that "the responsibility of broker-dealers to supervise their employees is a critical component of the federal regulatory scheme."[35] And FINRA correctly found that Christine Cantone's oversight of Anthony Cantone was unreasonable. Therefore, Rule 3010 is and was applied in a manner consistent with the purposes of the Exchange Act. FINRA's application of Rule 2010 to Christine Cantone and CRI's failure to maintain a reasonable supervisory system was also consistent with the purposes of the Exchange Act because it "furthered the objective of promoting just and equitable principles of trade."[36]

C. We set aside FINRA's findings of violations regarding the Columbia and Oklahoma extensions and Brogdon's biography.

Although we sustain FINRA's findings that Anthony Cantone and CRI committed fraud with respect to the Cherokee offering, we do not sustain FINRA's findings that Anthony Cantone and CRI violated the securities laws by misleading investors about the Columbia and Oklahoma extensions and about Brogdon's background in the offering documents.

FINRA found that, by making material omissions and a misrepresentation about the Columbia and Oklahoma extensions, Anthony Cantone and CRI violated Exchange Act Section 10(b) and Rule 10b-5 and thereby also violated FINRA Rule 2010. FINRA failed to establish a necessary predicate for this finding, however—namely, that the alleged omissions and misrepresentation about the Columbia and Oklahoma extensions were "in connection with" the

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[34] *See Robert E. Strong*, Exchange Act Release No. 57426, 2008 WL 582537, at *7 (Mar. 4, 2008) (finding that respondent's "unreasonable inaction effectively nullified the supervisory system" in violation of NASD Rules 3010 and 2110).

[35] *Meyers Assocs. L.P.*, Exchange Act Release No. 86497, 2019 WL 3387091, at *13 (July 26, 2019) (quoting *Wedbush Sec. Inc.*, Exchange Act Release No. 78568, 2016 WL 4258143, at *10 (Aug. 12, 2016) (internal quotations and citations omitted)).

[36] *William H. Murphy & Co.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *16 (Dec. 21, 2020) (internal quotation marks and citation omitted).

purchase or sale of a security.[37] FINRA concluded that the statements were "in connection with" the purchase or sale of a security because Anthony Cantone "invit[ed] investors to agree to the extension agreements." Anthony Cantone, however, testified consistently that investor agreement to the extensions was not required. We have not found any such requirement from our review of the extension agreements, the CDMs, the certificates of participation that investors held, or elsewhere in the record. Further, Anthony Cantone effectuated the extensions without the investors' input or agreement; he did not invite the investors to agree to the extensions.[38] Even assuming the extension of the note was a securities transaction, FINRA never explained how the communications to the investors about the extension were "in connection with" that securities transaction, given that the investors did not have to agree to (and in fact did not agree to) the extension. FINRA did not otherwise establish how Anthony Cantone's actions were "in connection with" the purchase or sale of a security.[39] Thus, we set aside FINRA's finding that Anthony Cantone violated Exchange Act Section 10(b) and Rule 10b-5 and FINRA Rule 2010 by making a misrepresentation and omissions regarding the extensions agreements.

FINRA also found that Anthony Cantone and CRI violated Securities Act Section 17(a)(2) and (3), and thereby also violated FINRA Rule 2010, by negligently omitting material information about Brogdon's biography from the offering documents. Specifically, FINRA found that Anthony Cantone acted negligently by failing to investigate Brogdon's background more than he did, given that Anthony Cantone was aware of certain red flags from Brogdon's past, such as the NASD bars, a 1990 bankruptcy of a company managed by Brogdon, certain

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37 *See* Exchange Act Section 10(b), 15 U.S.C. § 78j(b) (prohibiting use, "in connection with the purchase or sale of any security," of "a manipulative or deceptive device or contrivance"); Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5 (prohibiting certain conduct "in connection with the purchase or sale of any security"); *cf. also* Securities Act Section 17(a), 15 U.S.C. § 77q(a) (prohibiting certain conduct in the "offer or sale of any securities").

38 FINRA did not find that Anthony Cantone's failure to disclose to existing investors Brogdon's late and missing payments and the terms of the extension agreements, along with the fact that he personally covered some of the payments, constituted a standalone violation of FINRA Rule 2010, so we cannot predicate liability on this basis either. *Louis Ottimo*, Exchange Act Release No. 83555, 2018 WL 3155025, at *13 n.47 (June 28, 2018) (declining to consider possibility that applicant committed fraud by violating fiduciary duties where "FINRA never made such a finding and never pursued fraud liability on this basis"); *see also* Exchange Act Section 19(e)(1)(A), 15 U.S.C § 78*s*(e)(1)(A) (providing that, when reviewing FINRA disciplinary action, we must determine whether the misconduct found by FINRA violated the rules specified by FINRA).

39 The record reflects that at least five investors accepted Anthony Cantone's offer to buy out their positions after the first Columbia extension. While a case might have been made that Anthony Cantone needed to disclose Brogdon's financial difficulties and the terms of the extension agreements in connection with these purchases, FINRA did not predicate liability on this basis, so we do not either. *See Ottimo*, 2018 WL 3155025 *13 n.47.

lawsuits filed in 1997 against another company Brogdon managed, and Brogdon's indictment for Medicaid fraud in 1999.[40]

Brogdon's biography was only one aspect of the real estate offerings at issue, however, and Anthony Cantone investigated other aspects of those real estate projects, including by visiting the sites and by reviewing property appraisals, environmental assessments, financial data, and operating agreements. Even as to Brogdon's background, Anthony Cantone investigated the negative information he knew about Brogdon, consulted with others, and determined that it did not need to be disclosed. For example, Anthony Cantone learned that the NASD bars were old and that NASDAQ had subsequently decided, despite the bars, to list a company for which Brogdon was Chairman and CEO. Indeed, this was the same information that led the Hearing Panel to conclude that the NASD bars were immaterial. Anthony Cantone had also personally worked with Brogdon on nine allegedly successful municipal bond offerings between 2003 and 2008 and had conducted due diligence on Brogdon's financial condition to test the strength of the Brogdon Guaranty. FINRA failed to establish that, given these particular circumstances, Anthony Cantone was negligent in not probing *further* into Brogdon's background.[41] We therefore set aside FINRA's finding that Anthony Cantone and CRI violated Securities Act Section 17(a) and FINRA Rule 2010 by negligently omitting information about Brogdon's background from the offering documents.

For similar reasons, we also set aside FINRA's finding that Christine Cantone failed to supervise Anthony Cantone with respect to the conduct described above. Although FINRA need not establish underlying misconduct to find a failure to supervise,[42] FINRA's finding that Christine Cantone failed to supervise Anthony Cantone regarding the extension agreements and the use of Brogdon's biography rests on the same predicate as FINRA's finding that Anthony Cantone and CRI violated the securities laws in these respects.

III. Sanctions

Exchange Act Section 19(e)(2) requires that we sustain sanctions FINRA imposed unless we find them to be "excessive or oppressive" or to impose an unnecessary or inappropriate burden on competition.[43] In doing so, we must consider any aggravating or mitigating factors, and whether the sanctions are remedial or punitive.[44] Although we are not bound by FINRA's

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40 Out of these red flags, FINRA only found that the NASD bars were required to be disclosed.

41 While a case may have been made that Anthony Cantone should have investigated Brogdon's background further after Brogdon started missing payment deadlines, FINRA did not predicate liability on this basis, so we do not either. *See Ottimo*, 2018 WL 3155025 *13 n.47.

42 *See, e.g.*, *Robert J. Prager*, Exchange Act Release No. 51974, 2005 WL 1584983, at *12 (July 6, 2005).

43 15 U.S.C. § 78*s*(e)(2). There is no argument, and our review of the record does not suggest, that the sanctions imposed an unnecessary or inappropriate burden on competition.

44 *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citing *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

Sanction Guidelines, we use them as a benchmark in conducting our review.[45] Under Exchange Act Section 19(e)(1), we can also remand sanctions determinations to FINRA.[46]

For the scienter-based violations involving the extension agreements and Cherokee offering, FINRA suspended Anthony Cantone in all capacities for one year and ordered him to pay a fine of $100,000 jointly and severally with CRI. For the failure to supervise violations, FINRA suspended Christine Cantone for two years and ordered her to pay a fine of $73,000 jointly and severally with CRI. Because we have partially set aside the violations upon which FINRA predicated these two sets of sanctions, we set the sanctions aside and remand to FINRA so that it may determine the appropriate sanctions for the violations we sustain.[47] We express no opinion as to whether these sanctions are excessive or oppressive; rather, we hold that FINRA should determine in the first instance the appropriate sanctions for the violations we sustain. While we do not intend to suggest any view as to the outcome on remand, "FINRA should be mindful of the need to explain why any sanction it imposes will serve a remedial purpose in light of the particular facts of th[e] case."[48]

For the negligent omission violations related to the Brogdon biography, FINRA suspended Anthony Cantone in all capacities for three months and ordered him to pay a fine of $50,000 jointly and severally with CRI. Because we have set aside FINRA's findings in connection with these violations, we also set aside the corresponding sanctions.[49]

IV. Motions to Adduce Additional Evidence

Finally, Applicants have submitted three motions to adduce additional evidence pursuant to Rule of Practice 452.[50] In the first two motions to adduce, Applicants seek to submit evidence purportedly showing that the Oklahoma and Chestnut investments have continued payments to investors. Part of the third motion to adduce also involves evidence related to the Chestnut offering. Having set aside the findings of violations related to the Oklahoma and Chestnut

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45 *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

46 15 U.S.C. § 78*s*(e)(1).

47 *See, e.g.*, *Bruce Zipper*, Exchange Act Release No. 90737, 2020 WL 7496222, at *19 (Dec. 21, 2020) (remanding matter where "unitary sanctions" were imposed for all of the violations FINRA found where violations were upheld in part and set aside in part); *Merrimac Corp. Sec.*, 2019 WL 3216542, at *22 (remanding for FINRA "to determine the appropriate sanctions for [the remaining] violations that we sustain").

48 *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *14 (June 14, 2013).

49 *See, e.g.*, *Sisung Sec. Corp.*, Exchange Act Release No. 56741, 2007 WL 3254804, at *7 (Nov. 5, 2007) (setting aside NASD sanctions for violations not found to have been proven).

50 17 C.F.R. § 201.452.

offerings, we deny as moot Applicant's first and second motions, as well as the part of the third motion that relates to the Chestnut offering.

In the third motion to adduce, Applicants also seek to introduce evidence purportedly showing that the Cherokee investors have been partially repaid their principal. We deny this part of the third motion to adduce on the merits to the extent that Applicants argue that it is material to the findings of violations we are sustaining about that offering. Applicants' violations stem from their failure to disclose in the Cherokee CDM that Brogdon had failed to make timely payments in other offerings. That investors were eventually partially repaid in the Cherokee offering is immaterial to our determination about Applicants' failing to disclose different failures to timely pay. To the extent Applicants argue this evidence about late repayment to Cherokee investors is material to the issue of what *sanctions* are appropriate for that violation, however, FINRA may consider whether Applicants may adduce such evidence before the NAC on remand of those sanctions.

An appropriate order will issue.[51]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

[51] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 100553 / July 18, 2024

Admin. Proc. File No. 3-18999

In the Matter of the Application of

CANTONE RESEARCH INC.,
ANTHONY CANTONE,
AND CHRISTINE CANTONE,

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING IN PART AND SETTING ASIDE IN PART DISCIPLINARY ACTION TAKEN BY FINRA, AND REMANDING TO FINRA

On the basis of the Commission's opinion issued this day, it is

ORDERED that FINRA's findings of violations against Anthony Cantone, Christine Cantone, and Cantone Research Inc. are sustained in part and set aside in part; and it is further

ORDERED that FINRA's sanctions against Anthony Cantone, Christine Cantone, and Cantone Research Inc., are set aside; and it is further

ORDERED that the proceeding is remanded to FINRA for a redetermination of the appropriate sanctions consistent with the Commission's opinion.

By the Commission.

Vanessa A. Countryman
Secretary