BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of	
Department of Enforcement,	DECISION
Complainant,	Complaint No. 2012034936005
vs.	
David Joseph Escarcega Phoenix, AZ,	July 20, 2017
Respondent.	

Respondent willfully made fraudulent misrepresentations concerning debentures, recommended to customers unsuitable debentures, and caused his firm to make and preserve inaccurate books and records. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Michael J. Rogal, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Paul J. Roshka, Jr., Esq., and Craig M. Waugh, Esq.

Decision

I. Introduction

David Escarcega appeals a February 29, 2016 Hearing Panel decision. The Hearing Panel found that Escarcega willfully made materially false and misleading statements in connection with seven customers' purchases of debentures totaling approximately $516,825. It further found that Escarcega made unsuitable recommendations in connection with 12 customers' purchases of the same debentures totaling approximately $1.5 million, and that he caused his firm to make and preserve inaccurate books and records. For this misconduct, the Hearing Panel barred Escarcega and ordered that he disgorge $52,270, which was the amount of commissions he received in connection with the transactions underlying his misconduct.

Central to each finding of misconduct in this case is a debt product—described by its issuer as involving “a high degree of risk”—that Escarcega recommended and sold to his customers. Escarcega sold these debentures (which he does not dispute were speculative and involved numerous risks as described in the debentures’ offering documents) by making misrepresentations to certain customers about and concerning the debentures’ purported safety and by ignoring his obligation to recommend suitable securities with respect to other customers. Specifically, Escarcega made written misrepresentations to six customers (which essentially memorialized in-person conversations with these customers as they were signing documents necessary to complete their purchases), and oral misrepresentations to one other customer, when he represented to them that the debentures provided a guaranteed rate of return, interest, or income; would maximize liquidity; and were safe. Escarcega’s statements were all intended to convey to his customers that the debentures were significantly less risky than they actually were. He knew, however, that the debentures’ prospectus provided that they carried a high degree of risk, were illiquid, and did not provide guaranteed returns, interest, income or any guarantee against loss. Escarcega admitted that using the word “guaranteed” could help him sell the debentures to these customers, who sought significantly less risky investments and generally had average (according to Escarcega’s definition) or limited experience with alternative investments such as the debentures. Indeed, several of Escarcega’s customers learned of the debentures at lunch or dinner seminars conducted by Escarcega that emphasized safety and growth in retirement.

Escarcega also made unsuitable recommendations of the debentures to 12 customers. These customers had conservative investment objectives overall, low risk tolerances, were mostly retired, had an average age of more than 73 years old, and generally had average or limited experience with products such as the debentures. Further, with respect to the customers’ specific investment objectives for the debentures, none of them listed their goal as “speculation” (the way in which the issuer itself characterized an investment in the debentures); instead, seven of the 12 customers’ had conservative investment objectives for the debentures and the other five customers’ sought “growth” (the middle ground of the firm’s investment objectives scale) with respect to the debentures. Nonetheless, Escarcega recommended the speculative debentures to these customers and failed to consider the customers’ known low tolerance for risk and investment objectives. Escarcega also ignored the specific suitability standards set forth in the debentures’ prospectus, which prohibited for Arizona customers an investment in the debentures that exceeded 10% of a customer’s net worth (and which also violated the firm’s informal 10% limit for all customers). The concentration of the debentures relative to the net worth of these customers’ ranged from 10% to almost 50%.

Finally, we find that Escarcega caused his firm to make and preserve inaccurate books and records in connection with two customers’ purchase of the debentures. Escarcega failed to disclose to his firm that the customers’ purchase involved a product switch, which would have necessitated further firm review of the transaction. He also overstated on firm forms the customers’ net worth, which was relevant to determining whether the debentures were suitable.

We agree with the Hearing Panel that aggravating factors predominate in Escarcega’s misconduct. Consequently, barring Escarcega and ordering that he disgorge the commissions he earned from his violative sales of the debentures are appropriately remedial sanctions for his fraudulent misrepresentations and unsuitable recommendations.

II. Background

A. Escarcega

Escarcega entered the securities industry in 2001, and registered as a general securities representative and investment company and variable contracts products limited representative. From March 2010 to April 2016, Escarcega associated with Center Street Securities, Inc. (the "Firm"). Escarcega is not currently associated with a FINRA member. During the relevant time period, Escarcega conducted his securities business through Strategic Financial Partners, LLC ("Strategic Financial"), a company he formed that "specializ[ed] in retirement planning and estate preservation." A large portion of Escarcega's approximately 130 customers were retirees.

B. The Debentures

GWG Holdings, Inc. ("GWG") was founded in 2006. GWG purchases life insurance policies through its subsidiaries on the secondary market at a discount from the face value of the policy. GWG continues to pay premiums for each insurance policy and collects the insurance benefit payable when an insured dies. GWG finances its "business almost entirely through the issuance of debt." GWG issued the debt instruments at issue in this case, Renewable Secured Debentures (the "Debentures"), in 2012. GWG offered the Debentures in an effort to raise $230 million in net proceeds to pay its operating expenses, purchase more insurance policies, pay premiums on existing policies, and make payments to its lenders. The Debentures paid interest ranging from 4.75 percent per year for a six-month debenture to 9.5 percent per year for a seven-year debenture. Approximately 35 of Escarcega's customers purchased the Debentures. The sales to approximately half of these customers are the subject of this proceeding.

The January 2012 prospectus issued in connection with the Debentures contained numerous disclosures concerning the extensive risks of investing in the Debentures, and warned investors that "an investment in the Debentures involves a high degree of risk, including the risk of losing your entire investment." GWG stated that an investment in the Debentures "may be considered speculative."[1] Among other things, the prospectus warned investors that:

- GWG had a limited operating history, had never earned a profit, had experienced net losses of approximately $8 million from 2009 through 2011, and warned that its earnings may be volatile (which could result in "future losses and uncertainty about our ability to service and repay our debt");

[1] GWG issued another prospectus in May 2012 that also contained these disclosures, and a supplement to the prospectus in August 2012.

- GWG relied primarily on debt to finance its operations and its inability to continue to borrow funds could impact its business;
- The Debentures "are suitable only as a long-term investment for persons of adequate financial means who have no need for liquidity";
- There was no expectation for there to be a public market for the Debentures ("which means that it may be difficult or impossible . . . to resell)";
- An investor could not get his principal back before maturity without a six percent redemption fee unless he became disabled, filed for bankruptcy, or died (and GWG was under no obligation to purchase back any Debentures); and
- Investors likely could not recover their principal if GWG defaulted because the Debentures were subordinate to all other senior debt.

The prospectus also provided specific suitability requirements with respect to an investment in the Debentures, including that pursuant to state law, Arizona residents were required to have a minimum gross income or net worth and an investment in the Debentures could not exceed 10% of a customer's net worth. The Firm also had an unwritten policy that limited all of its customers from placing more than 10% of their net worth in alternative investments such as the Debentures. Escarcega admittedly knew about these limits.

C. Escarcega's Due Diligence Regarding the Debentures and Introduction of the Debentures to Potential Customers

Escarcega first learned of GWG during a prior private offering of its securities. GWG contacted the Firm when it began a public offering of the Debentures in early 2012. Escarcega met with GWG representatives to learn about the Debentures and the details of GWG's offering of the Debentures. The Firm conducted training sessions for registered representatives who were interested in selling the Debentures to customers, and Escarcega traveled to GWG's offices to attend a two-day training. Escarcega also participated in an online training webinar about the Debentures, and he reviewed the prospectuses at issue in this case.

To solicit new customers, Escarcega sometimes sent potential customers an invitation to attend lunch or dinner seminars he hosted.[2] At the seminars, Escarcega would often present information about the Debentures via a PowerPoint prepared by GWG.[3] He would also hand out

[2] The invitation was titled, "Finding Safety in an Unstable Economy" and asked, "Isn't it Time to *Finally* Have Safety & Growth in 'Your' Retirement Strategies?"

[3] The second page of the PowerPoint presentation contained several paragraphs of disclaimers, as well as a statement in bold stating that an investment in the Debentures may be considered speculative and subject to a high degree of risk. Another page near the end of the

[Footnote continued on next page]

GWG sales brochures, the Debentures' prospectus, subscription agreement, a sample interest rate sheet, and a copy of the PowerPoint presentation to interested potential customers. Escarcega would follow up with customers expressing interest in the Debentures. As set forth below, some of the individuals attending Escarcega's seminars purchased Debentures upon Escarcega's recommendation.

D. Forms Completed in Connection with Customers' Purchases of the Debentures

Much of the evidence in this case consisted of Firm forms completed by Escarcega in connection with the customers' purchases of the Debentures (rather than direct customer testimony). Escarcega handwrote, among other things, new account applications for each customer purchase; a suitability verification form; and in instances where a customer sold, within the prior 30 days, an existing investment to fund the purchase of the Debentures, a Universal Switch Letter ("Switch Letter"). He reviewed the forms with the customers, and he had the customers execute the forms prior to their purchases.

The Firm's new account application contained, among other things, the general experience level of each customer and the customer's experience with alternative investment products such as the Debentures,[4] the customer's age, income, net worth, and investment objective. The Firm's president testified that on the account application form a customer's investment objective is meant to "get an overview of a client's overall risk tolerance." In addition to a category for "Other," the categories of investment objectives listed on the Firm's account application were, from most to least conservative: (1) "Preservation of Principal/Income—Focus is on preservation of principal and income. Very conservative"; (2)

[Cont'd]

presentation summarized the risks involved with an investment in the Debentures. Escarcega, however, testified that at the seminars he would not go over the risk factors of the Debentures as set forth in the prospectus.

[4] The new account application sets forth four categories under a customer's knowledge and experience for various categories of products, including alternative investment products such as the Debentures: "None," "Limited," "Average," and "Extensive." Escarcega explained that when he checked that his customers had "Average" experience with alternative investment products, they "either own[ed] the investments in the past or they understand the investments that we're talking about currently." Thus, and according to Escarcega's characterization of what constitutes "Average" experience, even if a customer had never owned a debenture or had no prior experience with investing in a product similar to the Debentures, so long as the customer appeared to understand Escarcega's description of the Debentures that customer would have "Average" experience with alternative investment products. Escarcega, however, testified that he could not recall specifically informing his customers that the Debentures carried a "high degree" of risk but rather that he disclosed to all of his customers "that this is a risk-related product" and that as "a security it did carry a number of risk factors."

"Balanced/Conservative Growth—Focus is on generating current income and/or long-term growth. Conservative"; (3) "Growth—Focus is on generating long-term growth of capital. Moderate"; (4) "Aggressive Growth—Focus is on generating growth and/or income with willingness to assume a high level of risk. Aggressive"; and (5) "Speculation—Focus is on generating highest potential growth and/or income with a willingness to assume highest level of risks. Very aggressive."

In contrast, the Firm's suitability verification form defined "what the particular investment, what [a customer's] objective is with the investment as far as risk tolerance." The categories of investment objectives listed on the Firm's suitability verification form were, from most to least conservative: (1) Income; (2) Balanced/Conservative Growth; (3) Growth; (4) Aggressive Growth; and (5) Speculation. The Firm's suitability verification form also contained the concentration of the investment as a percentage of the customer's overall net worth and the overall investment experience of the customer.

Finally, the Switch Letter (which was used to learn the rationale behind switching a customer from one investment to another) contained information about each customer's existing investment, the basic terms of the new investment in the Debentures, the customer's risk exposure, and the customer's investment objective. Options for the customer's risk exposure on the Switch Letter were, from lowest to highest risk: Low; Moderate; Moderately Ag[g]ressive; Ag[g]ressive; and Speculation. Options for the customer's investment objective for the Debentures were: Income; Balanced Conservative Growth; Growth; Aggressive Growth; and Speculation.

E. Procedural History

FINRA learned of the Debentures in 2012 through an unsolicited letter about the Debentures distributed to potential customers. FINRA's Department of Enforcement ("Enforcement") began investigating sales of the Debentures by member firms (including the Firm). Enforcement learned that Escarcega had sold the second most Debentures of any Firm registered representative, and Enforcement conducted an examination of Escarcega's office in April 2013. Enforcement filed a five-cause complaint against Escarcega in August 2014, which alleged that he: (1) intentionally communicated to customers false information about the Debentures while soliciting them, in willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010;[5] (2) failed to observe high standards of commercial honor and just and equitable principles of trade by making material misrepresentations to customers, in violation of FINRA Rule 2010;[6] (3) made unsuitable recommendations to customers in connection with the Debentures, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010; (4) distributed a misleading GWG sales brochure about the Debentures to customers, in violation of NASD Rule 2210 and FINRA Rule

[5] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

[6] Enforcement pled the second cause of action in the alternative to the first cause.

2010; and (5) caused the Firm to maintain false books and records by submitting inaccurate customer forms, in violation of FINRA Rules 4511 and 2010.

Escarcega denied the complaint's allegations, and the Hearing Panel conducted a three-day hearing in July 2015. Enforcement called three witnesses, including one of Escarcega's customers (JB). Escarcega also testified.

The Hearing Panel issued its decision on February 29, 2016. It found that Escarcega willfully made fraudulent misrepresentations to seven customers in connection with sales of the Debentures.[7] It also found that he made unsuitable recommendations of the Debentures to 12 customers,[8] and found that Escarcega caused the Firm to make and preserve incorrect books and records.[9] The Hearing Panel barred Escarcega for his fraudulent misrepresentations and unsuitable recommendations. It also ordered that he disgorge $52,270, which represented the commissions he earned on the violative sales of the Debentures. In light of the bar, the Hearing Panel assessed, but did not impose, a $5,000 fine and 10 business-day suspension for the books and records violation. The Hearing Panel also ordered that Escarcega pay $5,267.67 in costs. This appeal followed.

III. Discussion

A. Fraudulent Misrepresentations

We affirm the Hearing Panel's findings that Escarcega intentionally or recklessly made written misrepresentations of material facts to six customers, and oral misrepresentations to one other customer, in connection with their purchases of the Debentures, in willful violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.

1. Facts

a. Written Misrepresentations to Six Customers

In November 2012, NZ purchased a three-year term Debenture in the amount of $30,000. In January 2013, she purchased a four-year term Debenture in the amount of $34,500. NZ was 73 years old when she purchased the first Debenture, 74 years old when she purchased the

[7] The seven customers were JB, CM, NZ, RE, NJ and RJ, and MD.

[8] The 12 customers were JB and DB, NH, SC, RS and PM, RL, WJ and SM, PB, and JS and MS.

[9] The Hearing Panel dismissed cause two, as well as Enforcement's allegations that Escarcega violated FINRA's advertising rules.

second, and retired.[10] To partially fund her purchase of the three-year term Debenture, NZ liquidated $10,000 from a managed account, without incurring any surrender charges. Escarcega filled out the Switch Letter together with NZ (which he did generally with each of his customers with regard to the Switch Letters and other account documents) before she signed the Switch Letter acknowledging that she understood the advantages and disadvantages of the product switch. Escarcega described the reason for the exchange on the Switch Letter as follows: "To provide a more predictable rate of return and eliminate management fees. Take advantage of a guaranteed rate of return and then transition it to income." On the Switch Letter related to NZ's January 2013 purchase, Escarcega similarly described the reason for the exchange as follows: "To provide for guaranteed rate of return exclusive of the general stock markets. Also providing for a shorten [sic] maturity in comparison to the time remaining on her existing annuity." Escarcega, when comparing NZ's annuity that she surrendered to the Debenture, wrote that "Phoenix Life provides for protection of principal while also providing for possible market linked growth. GWG Holding provides for non-traded corporate bond based investing while providing a guaranteed rate of return."

In December 2012, RE purchased a seven-year term Debenture in the amount of $67,000. RE used funds invested in a fixed annuity (with a death benefit of approximately $71,000 and five years remaining until maturity) to purchase the Debenture, and incurred $2,401 in surrender charges to do so. At the time, RE was 76 years old and retired. Escarcega described on the Switch Letter the reason for the Debenture purchase as: "To provide for a guaranteed income stream. Given the income needs for the client the current investment was not maintaining client principal balance. Transition allows for client to have a predictable income and maintain principal." Escarcega further explained how the Debenture differed from the fixed annuity: "GWG Holding is an income producing non-traded corporate debt offering. Existing investment is a tax-deferred fixed indexed annuity providing for guarantee of principal and potential growth."

[10] With the exception of customer JB, none of the customers to whom Escarcega made fraudulent misrepresentations were alleged to have also been the subject of his unsuitable recommendations. Nonetheless, certain factors in the record and related to our suitability analysis provide context to Escarcega's fraudulent misrepresentations. For example, Escarcega characterized these customers as having either "Limited" or "Average" experience with alternative investment products such as the Debentures, and several (JB, NJ, and RJ) learned of the Debentures via Escarcega's lunch or dinner seminars that emphasized safe retirement investments. The customers' account forms stated that their investment objectives with regard to the Debentures were generally on the conservative to average side (indeed, none of the customers' account forms listed speculation as their objective with respect to the Debentures), and they generally switched from a more conservative product to purchase the Debentures. Further, and similar to the average age of Escarcega's customers who were the subject of his unsuitable recommendations, the average age of these seven customers was approximately 72 years old and all were retired.

In December 2012, NJ and his wife, RJ, purchased a three-year term Debenture in the amount of $52,875. At the time, they were 75 years old and 70 years old, respectively, and retired. To fund their purchase of the Debenture, NJ and RJ sold a $50,000 indexed zero coupon CD (which had six years remaining until maturity), and incurred no surrender charges for this sale. Escarcega explained on the Switch Letter that NJ and RJ switched investments because they "requested to have guaranteed interest associated with GWG Holdings Debentures. The ability to have returns not dependent on the stock market and shortened maturity." He further explained the differences in the two investments as follows: "Current CD has a 6 year maturity with zero coupon payments (SP500 linked CD). GWG debenture has a 3 year maturity with an 8% annual interest payment."

In February 2013, MD purchased a four-year term Debenture in the amount of $90,000, and a one-year term Debenture in the amount of $21,000. At the time, MD was 65 years old and retired. MD liquidated $42,666 he held in a fixed annuity to help fund his purchase of the Debentures, and incurred surrender charges of $3,160 to do so. On the Switch Letter, Escarcega described the reason for the product switch as: "To provide the client with a guaranteed interest payment to be used for monthly income now that he is fully retired. The interest payment are [sic] now consistent/predictable and [not] dependent on possible market appreciation." Escarcega further described the differences between MD's surrendered annuity and the Debenture as follows: "Existing account provides for possible market index performance and guarantee against market losses. GWG provides for a guaranteed rate of return not dependent on market performance."

In June 2012, CM purchased a three-year term Debenture in the amount of $117,000. At the time, CM was a 66 year-old retiree. CM liquidated a $97,000 fixed index annuity (with a death benefit of approximately $120,000 and six years remaining to maturity) to purchase the Debenture, and incurred a $2,497 surrender charge. Escarcega filled out several forms with CM, including a Switch Letter in connection with her investment. On the Switch Letter, Escarcega described the reason for the exchange as "client looking to maximize income and liquidity, existing product did not maximize income needs based on income analysis, positive market value adjustment." In the space on the Switch Letter utilized to describe the differences between CM's existing annuity and the Debentures, Escarcega wrote, "N/A—fixed indexed annuity → debenture offering."

Escarcega testified that he discussed with each of these customers the Debentures' risks and potential investments other than the Debentures. He further testified that he mistakenly used the word "guarantee" on the Switch Letters, and what he meant was that the customers were switching products and purchasing the Debentures to obtain a fixed or stated rate of return compared to the products they were in prior to the switch, and to obtain more consistent returns not dependent upon the fluctuations of the stock market. As for the statements on the Switch Letters that the Debentures would "maintain principal," Escarcega stated that with the Debentures "it doesn't matter whether the stock market goes up or down or sideways. It's nontraded. So it doesn't maintain that feature of having principal volatility." Escarcega further testified that he described the Debentures as maximizing liquidity in the context of CM's then-current investment, and his intent was to convey that the customer was "moving from a longer-term contract to a shorter term."[11]

b. Oral Misrepresentations to JB

JB and his wife, DB, were 77 and 74 years old at the time at issue and lived in Arizona.[12] JB has a high school education and trained as a hairdresser. The couple was referred to Escarcega by his partner at Strategic Financial, and they attended a seminar hosted by Escarcega at which he discussed the Debentures. The discussion of the Debentures at the seminar piqued JB's and DB's interest, and Escarcega subsequently met with JB and DB at their home to discuss the Debentures further.

JB testified that Escarcega told JB and DB that the Debentures "will be safe," paid a "fixed guaranteed rate of return without fear of losing principal," and that they would earn $900 per month for seven years, at which time their principal would be returned.[13] JB further testified that Escarcega acknowledged that they would incur an early withdrawal penalty if they surrendered and liquidated their existing annuity to purchase the Debentures, but that they would "make up the money on the other end." In April 2012, JB and DB purchased a Debenture with a term of seven years for $117,000.[14] To fund their purchase, JB liquidated a fixed annuity with a

[11] In comparison, Escarcega described NZ's switch from an annuity to the Debentures as "providing for a shorten [sic] maturity in comparison to the time remaining on her existing annuity." Similarly, he described NJ and RJ's switch from an indexed CD to the Debentures as providing a "shortened maturity."

[12] Enforcement also alleged that Escarcega's recommendation to JB and DB to purchase the Debentures was unsuitable, and that Escarcega violated FINRA's books and records rules by failing to complete a Switch Letter for JB and DB, failing to indicate that JB and DB's transaction was a product switch, and intentionally misstating JB and DB's net worth on account documents. *See infra* Parts III.B & III.C.

[13] JB testified that he and DB elected to receive this interest from the Debentures on a monthly basis because they needed the money for living expenses. The record, however, shows that the couple elected to roll over the interest at the end of each year. JB testified that his wife handled the couple's financial matters.

[14] Several months after their purchase, JB and DB requested from GWG a distribution of $12,500, and GWG issued them a new Debenture in the amount of $104,500. Further, GWG issued JB and DB a refund in the amount of $51,700 after learning that their purchase exceeded Arizona's concentration limits. GWG also issued the following other customers refunds: PB ($78,500); NH ($209,500); SC ($23,000); and RL ($36,500).

then-current value of approximately $126,000. The record shows that the surrender charge for doing so was approximately $17,000.[15]

On JB's and DB's new account application form (which Escarcega completed and JB and DB then signed), their investment objective was listed as "Balanced/Conservative Growth . . . Conservative" and indicated that they had "Average" investment experience and average experience with alternative investment products.[16] On JB's and DB's suitability verification form that they executed in connection with their purchase of the Debentures, Escarcega listed JB's and DB's net worth as $635,000 (which purportedly consisted of $100,000 in mutual funds, $125,000 in bonds, a life insurance policy with a cash value of $30,000, fixed annuities of $130,000, an RV worth $100,000, and real estate valued at $150,000). Escarcega listed the couple's annual income at $60,000, and described JB's and DB's investment objective with respect to the Debentures as "Balanced/Conservative Growth . . . Conservative."[17]

[15] Escarcega argued that the true surrender charge was approximately $9,000 after taking into account an interest adjustment of $8,677, although he conceded that a $9,000 surrender charge was still too costly to justify the switch. As set forth below, Escarcega testified that he advised JB and DB not to surrender the annuity to purchase the Debentures because of the costs.

[16] As stated above, Escarcega testified that when he described customers as having "Average" experience with alternative investment products such as the Debentures, they either previously owned similar products or understood the Debentures as explained by Escarcega. When asked whether he considered JB to be a sophisticated investor (either in general or with respect to the Debentures), Escarcega testified that he believed JB had average knowledge. The Hearing Panel found that JB testified credibly that his and DB's investment experience generally and experience with alternative investment products was not "Average" as classified on their account forms.

Further, Escarcega could not explain why he checked "Limited" experience with alternative investment products for customers NZ, RE, RL, RS, and PM. Such a categorization suggests that these customers may not have understood the Debentures. *See infra* Part III.B.2.

[17] At the hearing, however, JB testified that the information on JB's and DB's account forms concerning their investment experience, experience with alternative investment products, net worth, and annual income was incorrect. JB testified that he never told Escarcega that the couple's investment experience was average, but rather it was "[n]othing, nil." JB also disputed the net worth figure listed on the forms and testified that their annual income was between $20,000 and $25,000. As described below, the Hearing Panel found that JB testified credibly concerning the couple's investment experience, assets, liabilities, and annual income, and calculated that JB's and DB's net worth was approximately $210,000 (and not $635,000 as listed on the form). At this level, JB's and DB's investment of $104,500 in the Debentures amounted to almost 50% of their net worth. The Hearing Panel further found that the couple's 2012 tax returns generally supported JB's testimony that their annual income was not $60,000 as listed by Escarcega on JB's and DB's suitability verification form.

JB testified that he relied upon Escarcega in connection with his and his wife's investment in the Debentures, and that if he had known that the Debentures were not safe they would probably not have invested, especially considering the $17,000 surrender charge they incurred for liquidating their annuity to purchase the Debentures. JB explained that he and DB could not "afford things like that" and he "worked too hard for my money to throw away $17,000." JB also stated that he and DB are "chicken," "don't take risks," and have a very low tolerance for risk.

Escarcega's testimony conflicted with JB's testimony. Escarcega testified that he never told JB and DB that the Debentures were a safe investment and that they were guaranteed to get their money back. Escarcega also testified that he disclosed to all of his customers that the Debentures were "a risk-related product" and carried a number of risk factors. Further, Escarcega testified that he went over with JB and DB the Debentures' risk disclosures set forth in the prospectuses and subscription agreement, and advised JB and DB not to surrender the annuity to purchase the Debentures because of the costs of the product switch.

The Hearing Panel found JB's testimony credible. It found generally that, "[a]lthough JB had difficulty accurately recalling certain facts and events, that when testifying on the same key material issues, JB's testimony was more credible than Escarcega's testimony." The Hearing Panel specifically found that JB's testimony concerning his and DB's net worth and annual income was credible, as well as his testimony that he never would have invested in the Debentures had he known that they were so risky. Further, the Hearing Panel found not credible Escarcega's claim that he advised JB and DB not to surrender their annuity to purchase the Debentures.

2. Escarcega Intentionally Made Oral and Written Misrepresentations to Customers

We find that Escarcega deceived his customers by portraying the Debentures as safe when they were, in fact, highly risky as described in the Debentures' prospectus. Escarcega described the interest payments as "guaranteed." In doing so, he fostered in his customers the sense that the Debentures were a safe investment. But the interest payments were made by GWG and there was no guarantee against GWG defaulting on those payments. This critically important aspect of making the sale of the Debentures was based on Escarcega's false statements.

Exchange Act Section 10(b) prohibits individuals from using or employing, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance. Exchange Act Rule 10b-5 further prohibits individuals from making "any untrue statement of a material fact or 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 . . . in connection with the purchase or sale of any security."[18] Exchange Act Rule 10b-5(b). To establish a violation under Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that Escarcega misrepresented a material fact, with scienter, in connection with the purchase or sale of securities. *See Dep't of Enforcement v. Ahmed*, Complaint No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *56 (FINRA NAC Sept. 25, 2015), *appeal docketed*, SEC Admin. Pro. File No. 3-16900 (Oct. 13, 2015) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1467 (2d Cir. 1996)).

FINRA Rule 2020 prohibits FINRA members and their associated persons from effecting "any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." A violation of the Exchange Act, the rules promulgated thereunder, or FINRA's rules constitutes a violation of FINRA Rule 2010.[19] *See Ahmed*, 2015 FINRA Discip. LEXIS 45, at *89 n.83.

We affirm the Hearing Panel's findings that Escarcega intentionally made written, material misrepresentations in connection with the purchase of securities to six customers and oral misrepresentations to JB, as the preponderance of the evidence in the record supports this conclusion.[20] A fact is considered material if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation important in making an investment decision and disclosure of the misstated fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). "Material facts include those facts that may affect the desires of investors to buy, sell or hold a particular security." *Dep't of Enforcement v. Apgar*, Complaint No. C9B020046, 2004 NASD Discip. LEXIS 9, at *13 (NASD NAC May 18, 2004) (citing *SEC v. Hasho*, 784 F. Supp. 1059 (S.D.N.Y. 1992)).

Escarcega misrepresented material information. On six customer Switch Letters, Escarcega falsely wrote that the Debentures provided a guaranteed rate of return, guaranteed

[18] Violations of these provisions also must involve the use of any means or instrumentalities of communication in interstate commerce, the mails, or of any national security exchange. *See* Exchange Act Section 10; Exchange Act Rule 10b-5. This element is satisfied here because, among other things, Escarcega admittedly met certain customers outside of Arizona and mailed account documents to the Firm's home office in Tennessee.

[19] FINRA Rule 0140 provides that all of FINRA's rules shall apply equally to members and associated persons and that associated persons shall have the same duties and obligations as member firms.

[20] There is no dispute that the Debentures are securities. *See* Exchange Act Section 3(a)(10) (defining a "security" to include, among other things, debentures). The record also shows, and Escarcega does not contest, that he made the statements at issue in connection with the purchase of securities.

income stream, or guaranteed interest.[21] He also suggested on CM's Switch Letter that the Debentures would maximize liquidity. Similarly, JB credibly testified that Escarcega told JB and DB that the Debentures paid a "fixed guaranteed rate of return without fear of losing principal" and that they would earn money each month and at maturity they would receive their principal back. JB further testified that Escarcega told them that the Debentures "will be safe."

Escarcega mischaracterized the Debentures to his customers as being significantly safer investments than they were (as characterized by the issuer itself) through the use of words and phrases that connote safety. Escarcega's customers, who were seeking more conservative products than the Debentures, had limited to average experience (according to Escarcega's definition of "Average" experience) with such alternative investment products. The phrase "guaranteed" when used to describe the Debentures' payment stream implies that an independent entity, like the FDIC, was guaranteeing the interest payments. The Commission has found that describing a debt instrument as guaranteed can be misleading. *See Larry Ira Klein*, 52 S.E.C. 1030, 1035 (1996) (holding that in connection with high-yield bonds guaranteed by the issuer, respondent should have known that written statements that interest and principal were "guaranteed" in the absence of any information regarding the securities' rating was misleading, "particularly to a relatively unsophisticated investor"); *cf. SEC v. Edwards*, 540 U.S. 389, 394 (2004) (in determining whether a money-making scheme was an investment contract and thus subject to federal securities laws, stating that "investments pitched as low-risk (such as those offering a 'guaranteed' fixed return) are particularly attractive to individuals more vulnerable to investment fraud, including older and less sophisticated investors"). Indeed, at the time Escarcega sold the Debentures to his customers, the prospectus described them as carrying a high amount of risk and, among other things, warned investors that in the event of a default the Debentures were subordinate to senior debt and that they could lose their entire investment.

[21] When asked whether there was a guaranteed rate of return in connection with the Debentures in connection with his statements to that effect on NZ's Switch Letters, Escarcega answered, "No. I previously testified that there's not. It's an error. It should reference a fixed or stated rate of return." Escarcega provided similar testimony regarding his written statements on the other five customers' Switch Letters. He also testified that when he used the word "guaranteed" to describe the Debentures on the Switch Letters, "it was intended to pass along to the clients that this is a fixed stated rate of return. It was never meant to mean anything other than that." The Firm's president also testified that he had never seen anyone else use the word "guaranteed" in connection with the Debentures.

Further, although the Debentures' prospectus refers to a guarantee of the Debentures by a GWG subsidiary, it also notes that the Debentures are not insured by the FDIC or any other governmental agency. Moreover, several other forms executed by customers in connection with their purchases of the Debentures stated that: the Debentures "are not guaranteed or insured by the FDIC or any other entity (other than [the GWG subsidiary] . . ."); "I realize that investments are not guaranteed . . ."; and "I understand that this investment . . . is not insured or guaranteed by the Federal Deposit Insurance Corporation (FDIC), Securities Investor Protection Corporation (SIPC) . . . or any other agency."

Escarcega's representations to his customers were materially inconsistent with, and contrary to, the statements in the prospectus.

Further, Escarcega admitted that using the word "guaranteed" in connection with the Debentures could help him sell them to these customers, and JB testified that he and his wife would probably not have purchased the Debentures had they known the true level of risk involved. *See Levinson*, 485 U.S. at 231-32; *see also Apgar*, 2004 NASD Discip. LEXIS 9, at *13-14 (holding that representations that "an investor is guaranteed a predetermined rate of return or whether the rate of return on an investment may fluctuate are material"); *Dep't of Mkt. Regulation v. Field*, Complaint No. CMS040202, 2008 FINRA Discip. LEXIS 63, at *30-31 (FINRA NAC Sept. 23, 2008) (finding that respondent made fraudulent misrepresentations of material facts when he falsely told customers that, among other things, certain bonds were safe, liquid, and that the customers would get their principal back).

In addition, we find misleading Escarcega's statement on CM's Switch Letter suggesting that the Debentures would maximize liquidity when the prospectus itself informed investors that the Debentures "will not be readily resaleable or transferrable. No public market for the [D]ebentures exists and none is expected to develop . . . The purchase of the [D]ebentures is not suitable for investors desiring liquidity at any time prior to the maturity of the [D]ebentures." Escarcega claims that he intended to convey to CM that the Debentures provided a shortened maturity compared to her existing investment. Escarcega, however, used the words "shortened maturity" to convey that concept to several other customers under similar circumstances. Escarcega has not offered an explanation for this discrepancy.

We also find that Escarcega acted with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining scienter as a "mental state embracing intent to deceive, manipulate, or defraud"); *see also Ahmed*, 2015 FINRA Discip. LEXIS 45, at *77 n.78 (holding that scienter may be established through reckless conduct) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007)). Escarcega knew that these seven customers (who all generally had conservative investment objectives, were retired, and had an approximate average age of 72 years old) were generally seeking safe to moderate investments when he sold them the Debentures. He induced them to purchase the Debentures by misrepresenting that they were safe and guaranteed even though he knew they were speculative products. Escarcega admittedly took several trainings in connection with the Debentures, and testified that he read the Debentures' prospectuses and other documents (all of which extensively described the risks of investing in the Debentures). These facts, coupled with Escarcega's 11 years of industry experience at the times of the sales, support our finding that he acted with scienter. *See Dep't of Enforcement v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *65-66 (Dec. 29, 2014) (holding that an individual's significant industry experience bolsters a finding of recklessness), *aff'd*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209 (Mar. 31, 2016), *appeal docketed sub nom., Harris v. SEC,* No. 16-1739 (2d Cir. May 31, 2016).

Escarcega makes several arguments that he did not intentionally make material misrepresentations to customers. He first argues that because he provided to customers other documents, such as the prospectuses, that described the risks of the Debentures in detail, any alleged misrepresentations that he made cannot be considered material in the context of the total mix of information. We reject this argument. *See Dep't of Enforcement v. Brookstone Sec., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *81 (FINRA NAC Apr. 16, 2015) (rejecting respondents' argument that a broker's misrepresentations are rendered immaterial when written risk disclosures are made available to customers); *see also Klein*, 52 S.E.C. at 1036 ("Klein's delivery of a prospectus to [the customer] does not excuse his failure to inform her fully of the risks of the investment package he proposed."); *Field*, 2008 FINRA Discip. LEXIS 63, at *36 ("[E]ven assuming . . . that he had sent official statements to each customer prior to the customer's purchase, this does not excuse his fraudulent misrepresentations."). Moreover, although the Debentures' prospectuses and other documents provided by Escarcega to his customers described the Debentures' extensive risks, Escarcega's written misrepresentations regarding the Debentures' purported safety were made to customers during in-person meetings just prior to each customer's purchase. *See SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1250 (11th Cir. 2012) (finding that, in considering whether a person has intentionally made material misrepresentations in violation of Exchange Act 10(b) and Exchange Act Rule 10b-5, "[t]he way information is disclosed can be as important as its content").

Escarcega further argues that JB's testimony was unreliable, pointing to JB's inability to remember certain specific matters during his testimony and his purportedly inaccurate testimony concerning the amount he and DB invested in the Debentures, their receipt of interest each month, and their household income. He also argues that the remaining evidence to support the Hearing Panel's finding that he intentionally made material misrepresentations was insufficient because it was based solely upon notations on the Switch Letters. Escarcega asserts that he did not have a duty to write out on the Switch Letters all of the Debentures' risks and his notations were directed at specific features of the Debentures compared to existing products that the customers held. Escarcega thus posits that without the context and scope of Escarcega's conversations with these six customers, the Hearing Panel could not find him liable for intentionally making material misrepresentations.[22]

We reject these arguments. As an initial matter, the Hearing Panel found that although JB had difficulty accurately recalling certain facts and events, JB testified credibly on material issues when compared to Escarcega's testimony.[23] Absent substantial evidence to the contrary,

[22] Escarcega also argues that he would not intentionally make misrepresentations on Firm forms, which he knew would ultimately be reviewed by the Firm's compliance department. We reject this argument. The record does not show that the Firm's compliance department would necessarily discover that Escarcega was making material misstatements. Indeed, the record demonstrates that the Firm did not prevent Escarcega and other Firm representatives from exceeding its unwritten policy, and Arizona's securities rules and regulations, of limiting alternative investments such as the Debentures to 10% of a customer's net worth, even though the forms submitted by Escarcega showed that this threshold had been exceeded.

[23] We further note that portions of JB's testimony regarding Escarcega's fraudulent misrepresentations are corroborated by the written misstatements to the other six customers and JB's and DB's August 2013 complaint letter to the Firm, which was drafted with the assistance of their son.

the Hearing Panel's credibility determinations are entitled to our deference. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) ("Credibility determinations by a fact-finder deserve special weight." (internal quotation omitted)). We do not find substantial evidence in the record that warrants disturbing the Hearing Panel's credibility determination concerning JB, and find his testimony reliable.

Moreover, the Switch Letters for the six other customers are sufficient to demonstrate that Escarcega intentionally made material representations to these customers. We can rely upon evidence other than customer testimony to find misconduct. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *48 (Jan. 30, 2009) (stating that "[w]hile the Commission has indicated that customer testimony may be the most compelling evidence in certain cases, it is not essential if the relevant information can be obtained from other sources in the record") (internal citations omitted), *aff'd*, 416 Fed. Appx. 142 (3d Cir. 2010). Indeed, the seven customers at issue were retired and had an average age of approximately 72 years old. *See id.* at *49 (stating that FINRA cannot compel customers to testify and noting the many of the customers in question were elderly). Here, the Switch Letters completed by Escarcega and discussed with six customers who purchased the Debentures show that he made written misrepresentations.

Further, we reject Escarcega's argument that the Switch Letters (internal Firm compliance forms) do not require that he set forth for the customers all of the risks associated with the Debentures, and he was attempting to compare the customers' existing products to the Debentures. This argument misses the point by incorrectly assuming that Escarcega's violation was omitting to disclose the Debentures' risks. Rather, Escarcega affirmatively misrepresented in writing to customers that the Debentures provided guaranteed returns, income, and interest, and that the Debentures would maximize liquidity. Each of these written statements was untrue, regardless of what information the Switch Letter required or did not require. *See Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *71 (stating that "[f]ederal law requires persons to tell the truth about material facts once they commence speaking"). Further, these misrepresentations were made to relatively unsophisticated customers—several of whom learned of the Debentures through Escarcega's seminars promoting "Safety & Growth in 'Your' Retirement Strategies"—who were generally seeking safe investments with higher rates of return than they were earning. Escarcega used phrases that connoted safety and reliability on the forms provided to, and reviewed in person with, these customers.[24] *See Morgan Keegan*, 678 F.3d at 1250.

[24] Escarcega argues that because the Hearing Panel dismissed Enforcement's allegation that he distributed misleading sales literature (a GWG sales brochure stating that the Debentures were secured by life insurance policies but failing to disclose that investors' interests in the Debentures were subordinate), Enforcement's claim that Escarcega created a false air of security and safety around the Debentures is undercut. We reject this assertion. The fact that the Hearing Panel dismissed the fourth cause of the complaint does not disprove that Escarcega created an air of safety around the Debentures using other means (including his own words).

Finally, and as described above, Escarcega asserts that when he wrote on the Switch Letters that the Debentures provided a "guaranteed" rate of return, it was a mistake and "lapse in judgment." He further argues that what he really meant when he used those words to describe the Debentures was that they provided a "fixed rate of return" (which he argues was not a misrepresentation). Similarly, with respect to the statement on CM's Switch Letter that suggested that the Debentures would "maximize liquidity," he asserts that he meant the Debentures would provide for a shortened maturity compared to her existing investment.

We find that the terms "guaranteed" and "fixed rate of return" have distinctly different meanings; using "guaranteed" with relatively unsophisticated customers seeking safer and more conservative investments was misleading in connection with the Debentures.[25] Escarcega's use of the word "guaranteed" with respect to the Debentures implies an independent source of dedicated funds that would replace any missed interest payments, and not that GWG would pay the same amount on a regular basis so long as it was able to do so. Escarcega's intent to make material misstatements to the six customers is best evidenced by the words he used when he induced them to purchase the Debentures, as documented on the Switch Letters. The same holds true for Escarcega's written misstatement to CM that suggested that an investment in the Debentures would maximize liquidity.

For all of these reasons, Escarcega violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. We also affirm the Hearing Panel's findings that Escarcega acted willfully when he intentionally made material misrepresentations, in violation of the Exchange Act and the rules promulgated thereunder. "A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'" *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (*citing Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)). Escarcega knew that his representations that the Debentures were guaranteed and safe were not true, yet he made misrepresentations concerning these material facts to seven customers. Consequently, Escarcega is subject to statutory disqualification. *See* Exchange Act Section 3(a)(39)(F) (incorporating by reference Exchange Act Section 15(b)(4)(D), which together provide that a person is subject to statutory disqualification if he has willfully violated any provision of, among other things, the

[25] The cases cited by Escarcega in support of his argument that "guaranteed" is the equivalent of "fixed" are inapposite. In *Apgar*, 2004 NASD Discip. LEXIS 9, the NAC held that the respondent made material misrepresentations that a particular investment "would earn no less than 7.1%" for the duration of the investment. *Id.* at *12. The investment's prospectus specifically stated that the effective yield would fluctuate. The NAC stated that "representations regarding whether an investor is guaranteed a predetermined rate of return or whether the rate of return on an investment may fluctuate are material." *Id.* at *13-14 (citing *Thomas J. Furnari*, 47 S.E.C. 1074 (1984)). Similarly, in *SEC v. Persaud*, 2013 U.S. Dist. LEXIS 173245, at *2-4 (M.D. Fl. 2013), the respondent promised that investors would earn between 6% and 18% annually, and the court stated that the respondent made promises of "guaranteed" rates of return. Neither of these cases addressed whether "guaranteed" is the equivalent of "a fixed rate of return" in this context.

Exchange Act and its rules and regulations); FINRA By-Laws, Article III Section 4 (providing that a person is subject to statutory disqualification if he is disqualified pursuant to Exchange Act Section 3(a)(39)).

B. Unsuitable Recommendations

The Hearing Panel found that Escarcega made unsuitable recommendations to 12 customers because he failed to take into account the customers' overall financial situations and needs. Specifically, the Hearing Panel found that the Debentures were "clearly unsuitable" for Escarcega's customers "because of the age of the customers, their individual financial situations, investment objectives, low risk tolerance, and the excessive concentration that the Debentures represented in relation to the customers' net worth." We affirm the Hearing Panel's findings.

1. Facts

In addition to customer JB (who was the subject of Escarcega's intentional misstatements of material facts) and his wife DB, the Hearing Panel found that Escarcega made unsuitable recommendations to the customers described below.[26]

NH, an Arizona resident, purchased a seven-year term Debenture in the amount of $329,500 in her retirement account in March 2012. At the time, NH was 65 years old, married, and worked as an executive assistant. NH's account application listed her investment objective as "Balanced/Conservative Growth . . . Conservative" (the second most conservative objective on the account application form) and indicated that she had "Average" investment experience and experience with alternative investments such as the Debentures. NH's suitability verification form listed her investment objective for the Debentures as "Income" (the most conservative objective on the suitability verification form). Her annual income was $98,000 and she had a net worth of $1.2 million. NH's investment in the Debentures amounted to more than 27% of her net worth. Escarcega conceded that this concentration level was "high," "an error," and would raise concern. Similarly, the Firm's president described this concentration level as "extremely high."

[26] Similar to the evidence presented by Enforcement in support of Escarcega's fraudulent misrepresentations, other than JB's testimony the evidence in support of Enforcement's suitability claims was obtained exclusively from the customers' account documents. Escarcega again argues that because JB was the only customer to testify (and JB's testimony was allegedly unreliable), the documentary evidence relied upon the Hearing Panel was insufficient to find that he made unsuitable recommendations, and customer testimony was necessary to support such findings. For the reasons described above, we disagree. *See supra* Part III.A; *see also Gordon Scott Venters*, 51 S.E.C. 292, 295 (1993) (rejecting registered representative's arguments that findings he made unsuitable recommendations should be dismissed because the record did not include any live testimony from a customer and finding that the reliable evidence taken as a whole demonstrated representative made unsuitable recommendations).

SC, an Arizona resident, purchased for her IRA a seven-year term Debenture in the amount of $78,000 in March 2012. She was 73 years old and retired at the time. SC's account application listed her investment objective as "Preservation of Principal/Income . . . Very conservative" (the most conservative objective on the account application), her general investment experience as "Average," and her understanding of alternative investment products as "Average.". SC's suitability verification form listed her investment objective with respect to the Debenture as "Income." SC had a net worth of $550,000 and annual income of $48,000. The Debenture amounted to more than 14% of her net worth, which Escarcega described as an "overage."

RS and PM, a married couple, resided in Arizona, and purchased a total of $65,000 of Debentures (a one-year term Debenture in their joint account in the amount of $25,000 in March 2012 and a seven-year term Debenture in the amount of $40,000 for RS's IRA in April 2012). At the time, RS was 81 years old and PM was 61 years old, and both were retired. Their account applications listed their investment objective as "Balanced/Conservative Growth . . . Conservative" (similar to what was listed on their suitability verification forms) and their investment experience as "Average." The documents further stated that their experience with alternative investments was "Limited." RS and PM's annual income was $70,000 and their net worth was $650,000. The Debentures represented 10% of their net worth.

RL, an Arizona resident, purchased a $99,000 three-year term Debenture for his IRA account in April 2012.[27] At the time, he was 65 years old and retired. RL's account application described his investment objective as "Preservation of Principal/Income . . . Very conservative." It also described RL's overall investment experience as "Average," and his experience with alternative investments as "Limited." RL's suitability verification form described his investment objective with respect to the Debenture as "Income." RL's annual income was $55,000 and his net worth was $625,000. The Debenture amounted to 16% of RL's net worth.

WJ and SM resided in California. They were a married couple who purchased in their joint account Debentures totaling $156,300 in July 2012 (a one-year term Debenture for $22,300 and a five-year term Debenture for $134,000). At the time of the purchases, WJ was 73 years old, SM was 81 years old, and both were retired. Their account application stated that their investment objective was "Balanced/Conservative Growth . . . Conservative," and described their investment experience and experience with alternative investment products as "Average." Their suitability verification form stated that their investment objective with regard to the Debentures was "Growth" (the middle ground for investment objectives). Their annual income was $70,000, and WJ and SM had a net worth totaling $1.04 million. The Debentures represented 15% of their net worth.

PB, an Arizona resident, purchased Debentures totaling $267,000 (a seven-year term Debenture in the amount of $148,000 in August 2012, and another seven-year term Debenture in

[27] The record shows that RL learned of the Debentures via one of Escarcega's lunch or dinner seminars that emphasized safe retirement investments.

the amount of $119,000 in her IRA in January 2013). PB was 76 years old and retired at the time of the purchases. For each of the Debentures, PB's account applications stated that her investment objective was "Balanced/Conservative Growth . . . Conservative," and the suitability verification forms executed in connection the Debentures listed "Growth" as PB's investment objective. The forms also listed PB's investment experience and experience with alternative investments as "Average." PB had an annual income of $60,000, and as of January 2013, PB's suitability verification form stated that her net worth was $1.025 million. PB's total investment of $267,000 in the Debentures amounted to 26% of her net worth.

Married couple JS and MS resided in Washington. They purchased Debentures totaling $383,014 (a seven-year term Debenture in their joint account in the amount of $231,014 in August 2012, and a seven-year term Debenture in MS's IRA account in the amount of $152,000 in September 2012). At the time, JS was 77 years old and MS 75 years old, and they were both retired. Their stated investment objective for both accounts was "Balanced/Conservative Growth . . . Conservative," and their suitability verification forms for both purchases listed "Growth" as their investment objective for the Debentures. JS's and MS's account applications stated that they had "Extensive" general investment experience but only "Average" experience with stocks, bonds, mutual funds, and annuities. Their account applications also stated that they had "Average" experience with alternative investment products. The couple had annual income of $65,000, and a net worth of $1.165 million. Their investments in the Debentures constituted 33% of their net worth.

2. Escarcega Made Unsuitable Recommendations

FINRA Rule 2111 (which replaced NASD Rule 2310 in mid-July 2012),[28] requires that a registered representative's recommendation to a customer be suitable based upon the customer's financial needs and circumstances and that the registered representative "tailor his recommendation to the customer's financial profile and investment objectives." *See Epstein*, 2009 SEC LEXIS 217, at *43; *see also Dep't of Enforcement v. Siegel*, Complaint No. C05020055, 2007 NASD Discip. LEXIS 20, at *37 (NASD NAC May 11, 2007) (providing that customer-specific suitability requires that a "recommendation be consistent with the customer's best interests and financial situation"), *aff'd*, Exchange Act Release No. 58737, 2008 SEC LEXIS 2459 (Oct. 6, 2008), *aff'd in relevant part*, 592 F.3d 147 (D.C. Cir. 2010); *Dep't of Enforcement v. McGee,* Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33 (FINRA NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017).

[28] *See Regulatory Notice 11-25*, 2011 FINRA LEXIS 45, at *2-4 (May 2011). Because Escarcega's recommendations of the Debentures occurred between March 2012 and January 2013, both NASD Rule 2310 and FINRA Rule 2111 apply.

Specifically, NASD Rule 2310(a) provided that:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

Similarly, FINRA Rule 2111(a) provides that:

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

FINRA Supplementary Material 2111.01, which replaced NASD Interpretative Material ("IM") 2310-02(a)(1), provides that fair dealing is implied in a registered representative's relationship with customers. It further states that the "suitability rule is fundamental to fair dealing and is intended to promote ethical sales practices and high standards of professional conduct."[29] Importantly, "suitability is determined at the time of the recommendation. Profit is not a defense to a suitability violation." *Cody*, 2011 SEC LEXIS 1862, at *55.

We agree with the Hearing Panel's finding that Escarcega's recommendations to the customers were unsuitable based upon the customers' investment objectives and low risk tolerances as indicated on their account documents, as well as the excessive concentration of the Debentures compared to the net worth of the customers. At the time Escarcega made his recommendations, GWG described the Debentures as high risk, speculative securities, and it stated that, among other things, they were suitable only for those individuals who could afford to lose their entire investment. It also stated that there was no expectation for there to be a public market for the Debentures ("which means that it may be difficult or impossible . . . to resell [the Debentures]"). Escarcega does not dispute any of these facts.

[29] NASD IM-2310-2(a)(1) explained that, "[i]mplicit in all member and registered representative relationships with customers and others is the fundamental responsibility for fair dealing. Sales efforts must therefore be undertaken only on a basis that can be judged as being within the ethical standards of [FINRA's r]ules, with particular emphasis on the requirement to deal fairly with the public." *See also Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *26 (May 27, 2011) (providing that a violation of FINRA's suitability rule also violates FINRA Rule 2010), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

Nonetheless, Escarcega recommended these products to 12 customers. In sum, Escarcega's 12 customers purchased approximately $1.5 million of Debentures. Eleven of the 12 customers were retired at the time they purchased the Debentures, and the average age of the customers was more than 73 years old.[30] Ten of the customers' new account applications listed "Balanced/Conservative Growth . . . Conservative" as their overall investment objective (the second most conservative investment objective on their account applications), and the other two listed the most conservative investment objective ("Preservation of Principal/Income . . . Very conservative"). With respect to their investment objectives for the Debentures, none of the 12 customers' suitability verification forms listed "Speculation" (i.e., the nature of an investment in the Debentures as described by GWG); instead, seven of the 12 customers' forms listed "Income" or "Balanced/Conservative" (the most and second most conservative categories on the form) and the other five customers' suitability verification forms listed "Growth" (the middle ground on the form). Escarcega listed "Average" as the understanding of investments generally for ten customers, nine customers were listed as having an "Average" understanding of alternative investments such as the Debentures,[31] and three were listed as having "Limited" understanding of alternative investments.

Under these circumstances, Escarcega failed to adequately consider the customers' investment objectives, financial situations, and risk tolerance when recommending the risky and speculative Debentures.[32] This is true even if the customers expressed a desire for an investment with a higher rate of return that also preserved principal. *See Rafael Pinchas*, 54 S.E.C. 331, 342 (1999) (stating that even if the customer wanted to "double her money," a registered representative is not relieved of his suitability obligations); *Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *55-58 (rejecting argument that recommendations were suitable because customers sought greater interest income than they were receiving).

[30] *See FINRA Regulatory Notice 07-43*, 2007 FINRA LEXIS 42, at *4 (Sept. 2007) (stating that a customer's age or life stage are "important factors to consider in performing a suitability analysis . . . depending upon their particular circumstances, seniors and retirees may have less tolerance for certain types of risk than other investors").

[31] As stated above, despite Escarcega's characterizations to the contrary, the Hearing Panel found that JB testified credibly that his and DB's investment experience and experience with alternative investment products was not "Average" as classified by Escarcega on their account forms.

[32] To show that he did not make unsuitable recommendations, Escarcega argues that none of the customers needed income on a current basis from the Debentures at the time they purchased them. JB, however, testified that he and DB needed the income from the Debentures. Further, Escarcega testified that SC and RL planned to use the Debentures to take income, and the record shows that JS and MS and WJ and SM opted to receive interest payments from the Debentures on a monthly basis. Regardless, FINRA Rule 2111 requires consideration of numerous factors in addition to the customer's need for income to determine whether a product is suitable.

Moreover, the concentration of the risky Debentures for the 12 customers ranged from 10% to nearly 50%, which under the circumstances was more aggressive than the customers' circumstances dictated.[33] *See Jack H. Stein*, 56 S.E.C. 108, 117 (2003) (finding that broker made unsuitable recommendations because he "concentrated an excessive portion of [the customer's] portfolio in a non-diverse, limited number of speculative securities, thereby increasing [her] risk of loss"); *James B. Chase*, 56 S.E.C. 149, 156-57 (2003) ("We have repeatedly found that high concentration of investments in one or a limited number of securities is not suitable for investors such as [the customer]."); *Clinton Hugh Holland, Jr.*, 52 S.E.C. 562, 565-66 (1995) (finding that broker made unsuitable recommendations to his 82 year-old customer when he recommend high risk or speculative securities that made up 25% of customer's net worth).[34]

Escarcega argues that the risks of investing in the Debentures were disclosed in the prospectus and other documents, which each of the 12 customers received. Merely disclosing to a customer the risks of a particular investment, however, does not satisfy a registered representative's requirements under FINRA's suitability rules. *See Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *38 (Dec. 19, 2008) (holding that "the delivery of a prospectus and the disclosure of risks does not demonstrate that an MIS registered representative's recommendation to any particular customer was suitable or that the individual customer was able to take the risks involved with" the investment); *Chase*, 56 S.E.C. at 162 (holding that Chase's "testimony that his only responsibility to his clients is risk disclosure shows a profound misunderstanding of his professional obligations").

Similarly, Escarcega argues that the customers all signed forms attesting to the suitability of the Debentures and he verbally disclosed to them that the Debentures were "a risk-related product" and this product was a security that "carried a number of risks." These facts, however,

[33] Although we have not adopted a rule that violating a state's suitability requirements is a per se violation of FINRA's suitability rule, here we are guided by Arizona's concentration standard (as expressly set forth in the Debentures' prospectus) and the Firm's policy regarding alternative investments such as the Debentures, and find that for all 12 customers, a concentration in the Debentures of 10% or more was unsuitable.

[34] Escarcega concedes that he inadvertently exceeded Arizona's concentration limits with respect to Arizona customers. Intent, however, is not required to demonstrate liability for an unsuitable recommendation. *See Stein*, 56 S.E.C. at 119.

Further, while we note that certain customers had a relatively high net worth when they purchased the Debentures, this does not render Escarcega's unsuitable recommendation suitable. *See Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *65 n.32 (rejecting argument that the "relative wealth" of some customers justified their recommendations as suitable and stating that "[w]hile some customers may have accumulated comfortable retirement savings, this did not make CMO investments suitable for them"); *Siegel*, 2007 NASD Discip. LEXIS 20, at *36 n.19 ("A customer's wealth or sophistication does not warrant a less stringent suitability standard.").

do not render Escarcega's recommendations suitable. "The test for whether [a registered representative's] recommended investments were suitable is not whether [the customer] acquiesced in them, but whether [the registered representative's] recommendations to him were consistent with [the customer's] financial situation and needs." *See Wendell D. Belden*, 56 S.E.C. 496, 503 (2003)); *Patrick G. Keel*, 51 S.E.C. 282, 284, 286 (1993) (finding that the fact that the customer consented to certain unsuitable recommendations does not render them suitable and holding that "before a registered representative recommends a risky or speculative investment, he must be satisfied that they are appropriate for the particular customer" and "satisfied that the customer fully understands the risks involved and is not only able but willing to take those risks") (internal citations omitted).

Indeed, JB testified that he signed the forms from Escarcega without reading them and did not understand how risky the Debentures were. The account documents for the other customers also show that they mostly had average investment knowledge and experience and had mostly average experience with products such as the Debentures (according to Escarcega). Moreover, the customers' account documents show that their overall investment objectives and objectives with regard to their specific investments were inconsistent with the risky and speculative nature of the Debentures (as described in the prospectus).[35] Seven of the 12 customers' forms listed "Income" or "Balanced/Conservative" (the most and second most conservative categories on the form) as their investment objectives for the Debentures, which is undoubtedly at odds with the way in which the prospectus described the Debentures. Even with respect to the five customers whose suitability verification forms showed an increased risk tolerance with respect to their purchases of the Debentures (from "Balanced/Conservative Growth" to "Growth"), the investment objectives for the Debentures were inconsistent with the risk of these products. "Growth"—the middle ground on the suitability verification form—does not encompass high-risk, speculative securities such as the Debentures.[36] We also note that the suitability verification form for one customer (NH) listed a more *conservative* investment objective for her investment in the Debentures than her overall investment objective (from "Balanced/Conservative Growth" to "Income").

[35] *Cf. Regulatory Notice 12-25*, 2012 FINRA LEXIS 32, at *44-45 (May 2012) (providing that in instances where a customer seeks a portfolio composed of securities with different levels of risk, a broker may make recommendations consistent with the customer's desire for risk diversity provided the customer is in agreement with such an approach); *Paul F. Wickswat*, 50 S.E.C. 785, 786-87 (1991) (stating that even if a particular investment is a change in a customer's overall investment strategy, a registered representative must fully describe the risks of the investment and obtain "meaningful" consent to the new objective or "assent to a limited departure from her general objectives").

[36] Indeed, on the new account form, the Firm defined "Growth" as "[f]ocus is on generating long-term growth of capital. Moderate[.]" It defined "Speculation" as "[f]ocus is on generating highest potential growth and/or income with a willingness to assume highest level of risks. Very aggressive." Escarcega did not explain why he did not check the box for "Speculation" on any of the 12 customers' suitability verification forms in connection with the Debentures.

We also reject Escarcega's assertion that the Firm's review and approval of all the transactions at issue absolves him from liability for making the unsuitable recommendations. Escarcega correctly acknowledged that he had a duty, independent from the Firm, to ensure that he made suitable recommendations. *See also Cody*, 2011 SEC LEXIS 1862, at *29 n.13 ("Regardless of whether a firm monitors transactions by its representatives, the representatives are responsible for the suitability of the recommendations they make to their customers."); *Klein*, 52 S.E.C. at 1038 n.30 (holding that registered representative cannot use a firm's general approval of a product as a substitute for a determination that the product is suitable for an individual customer). Escarcega did not comply with his suitability obligations.

Under the circumstances, we find Escarcega's arguments unpersuasive, and find that he made unsuitable recommendations to customers in violation of FINRA Rules 2111 and 2010 and NASD Rule 2310.

C. Books and Records Violations

The Hearing Panel found that Escarcega violated FINRA Rules 4511 and 2010 by failing to disclose to the Firm that JB and DB liquidated a fixed annuity to purchase the Debentures and by intentionally overstating on their account forms the couple's net worth, which caused the Firm to maintain inaccurate books and records. The Hearing Panel stated that "[o]verstating JB and DB's net worth helped Escarcega justify to his firm their [initial] $117,000 investment in the Debentures." We find that Escarcega failed to disclose to the Firm that JB's and DB's investment in the Debentures was a product switch, failed to complete a Switch Letter for JB and DB, and overstated the couple's net worth on their suitability verification form.[37]

FINRA Rule 4511(a) requires FINRA members to "make and preserve books and records as required" under FINRA's rules, the Exchange Act, and Exchange Act rules. Exchange Act Rule 17a-3(a)(17) requires member firms to maintain records for their customers. Falsifying a firm's required books and records violates FINRA Rules 4511 and 2010. *See Mitchell T. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *48-49 (May 27, 2015) (stating that FINRA's recordkeeping rules include the requirement that the records be accurate, which applies "regardless of whether the information itself is mandated") (internal citations omitted); *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *35 n.36 (Aug. 12, 2016) (stating that a violation of FINRA's recordkeeping rules is also a violation FINRA Rule 2010).

[37] The record, however, does not support a finding that Escarcega intentionally misrepresented JB's and DB's net worth to help justify to the Firm JB's and DB's investment. Nonetheless, we find that Escarcega violated FINRA Rules 4511 and 2010. *See The Dratel Group, Inc.*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *54 (Mar. 17, 2016) (stating that proof of scienter is not required to establish violations of FINRA's recordkeeping provisions).

There is no dispute that Escarcega filled out account forms for JB and DB that contained inaccurate information. We thus find that Escarcega violated FINRA's recordkeeping rules.

IV. Sanctions

The Hearing Panel imposed a unitary sanction for Escarcega's fraudulent misrepresentations and unsuitable recommendations. For this misconduct, it barred Escarcega in all capacities and ordered that he disgorge $52,270 (the amount of commission he earned on the violative Debenture sales, after returning to the Firm commissions he earned related to refunds issued by GWG on sales that violated Arizona's concentration requirements). For Escarcega's books and records violation, the Hearing Panel assessed, but did not impose in light of the bar, a $5,000 fine and 10 business-day suspension in all capacities. For the reasons set forth below, we affirm these sanctions.

A. Fraudulent Misrepresentations and Unsuitable Recommendations

Conduct that violates the antifraud provisions of the federal securities laws is "especially serious and subject to the severest of sanctions under the securities laws." *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *36 (Mar. 31, 2016) (*citing Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)). In determining the appropriate sanctions for this misconduct, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions.[38] For intentional misrepresentations or material omissions of fact, the Guidelines recommend that the adjudicator strongly consider barring an individual.[39] Where mitigating facts predominate, the guidelines recommend suspending an individual in any or all capacities for a period of six months to two years.[40]

Violating FINRA's suitability rule breaches "an important duty that is fundamental to the relationship between registered representatives and their customers." *Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *128. For cases involving unsuitable recommendations, the Guidelines advise adjudicators to consider suspending the individual in any or all capacities for a period of 10 business days to two years.[41] Where aggravating factors predominate, however, the Guidelines recommend that adjudicators strongly consider barring the individual.[42]

[38] *See FINRA Sanction Guidelines* (2016), http://www.finra.org/sites/default/files/2016_Sanction_Guidelines.pdf [hereinafter "Guidelines].

[39] *Guidelines*, at 88.

[40] *Id.*

[41] *See Guidelines*, at 94.

[42] *See id.*

We affirm the Hearing Panel's bar of Escarcega for his fraudulent misrepresentations and unsuitable recommendations. As an initial matter, it is appropriate to assess a unitary sanction for Escarcega's misconduct, which all relates to his inappropriate sales of the Debentures. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (providing that batching of violations may be appropriate for determining sanctions if the violations resulted from a single underlying problem); *Blaire C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *59 (Sept. 24, 2015) (affirming FINRA's imposition of a single sanction for violations that are based on the same facts).

We further find that multiple aggravating factors support a bar. During a 10-month period, Escarcega engaged in numerous transactions with numerous customers, which resulted in customer investments totaling approximately $1.89 million.[43] Escarcega intentionally misrepresented to seven customers the safety and features of the Debentures. To 12 customers, he recommended a risky, speculative product, without considering the customers' risk tolerance, investment objectives, and financial profiles. Indeed, for the 12 customers to which Escarcega made unsuitable recommendations, ten of them selected "Balanced/Conservative Growth . . . Conservative" as their overall investment objective (the second most conservative investment objective on their account applications), and the other two selected the most conservative investment objective ("Preservation of Principal/Income . . . Very conservative."). The speculative Debentures were inconsistent with these objectives, and also diverged widely from seven of the 12 customers' objectives for the Debentures as disclosed on their suitability verification forms (i.e., those who selected "Income" or "Balanced/Conservative" as their investment objectives for the Debentures). Even for the remaining five customers who selected "Growth" as their investment objectives for the Debentures (which was more aggressive than their overall investment objectives and risk tolerances), we find that the highly risky and speculative Debentures (as described in the prospectus) were inconsistent with an objective of "Growth." Escarcega also admittedly and unduly concentrated the Debentures in the accounts of customers (ignoring the Debentures' prospectus and the Firm's unwritten concentration policy).

Moreover, most of his customers had average or limited general investment experience and experience with alternative investment products (according to Escarcega's definition of what constitutes "average" knowledge of a product).[44] At a minimum, Escarcega engaged in this

[43] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 18). JB was the subject of Escarcega's oral misrepresentations, and JB and DB were the subject of Escarcega's unsuitable recommendation. Consequently, the total number of customers to whom Escarcega made misrepresentations does not include DB, and we do not double count their $104,500 investment in the Debentures.

[44] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 19). Although we acknowledge that certain customers had a relatively high net worth when they purchased the Debentures, we find that Escarcega has not demonstrated that these customers were sophisticated. *See Scholander*, 2014 FINRA Discip. LEXIS 33, at *82 (stating that "[f]or purposes of the Guidelines, however, the amount of a customer's net worth does not provide

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misconduct recklessly.[45] Escarcega ultimately earned $52,270 in commissions as a result of his violative sales of Debentures, and he did not show remorse for his misconduct.[46]

We reject Escarcega's argument that it is mitigating that the customers have not lost any money in connection with their investments in the Debentures. *See Cody*, 693 F.3d at 260 (holding that the fact that investments turned a profit does not render the investments suitable); *Coastline Fin., Inc.*, 54 S.E.C. 388, 395-96 (1999) (rejecting argument that absence of customer harm in connection with material misstatements is mitigating). The fact that customers have not suffered losses on the Debentures does not ensure that this will continue for the duration of each Debenture. Further, we do not consider it mitigating that most of the customers remain invested in the Debentures, especially considering the six percent redemption fee as set forth in the prospectus.

We also reject Escarcega's attempt to blame his Firm for inadequate supervision, and the fact that he was "a young man . . . not experienced selling alternative securities."[47] Similarly, the fact that GWG returned money to customers who exceeded Arizona's 10% concentration limit for the Debentures (and Escarcega surrendered commissions in connection therewith) after FINRA began investigating sales of the Debentures is not mitigating. Nor is his argument that he did not conceal any information from the Firm in connection with these transactions. *See Dep't of Enforcement v. DaCruz*, Complaint No. C3A040001, 2007 NASD Discip. LEXIS 1, at *51 (rejecting as mitigating that respondents did not conceal misconduct from firm) (NASD NAC Jan. 3, 2007). Finally, we reject Escarcega's comparison of his sanctions to the sanctions imposed upon the Firm and other registered representatives via settlement for misconduct related

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information about that customer's level of sophistication"). In fact, the record shows that they were not sophisticated (at least with respect to the Debentures).

[45] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

[46] *See id.* at 7 (Principal Considerations in Determining Sanctions, No. 17). When asked what he had learned from these proceedings, Escarcega testified that he learned not to use, "quote/unquote, a 'naughty word."'

[47] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2); *Dep't of Enforcement v. Conway*, Complaint No. E102003025201, 2010 FINRA Discip. LEXIS 27, at 50-51 (FINRA NAC Oct. 26, 2010) (holding that "[n]either a claimed ignorance of the securities laws, nor an attempt to shift responsibility for a failure to comply with the securities laws to inadequate training or incompetent supervision, will serve to lessen the sanction imposed") (citing *Thomas C. Kocherhans*, 52 S.E.C. 528, 531-532, 534 (1995), *aff'd*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527 (Nov. 7, 2013)); *Epstein*, 2009 SEC LEXIS 217, at *73-74 (rejecting argument that respondent's youth and inexperience are mitigating). Moreover, the record shows that at the time of Escarcega's misconduct, he had been a registered representative for 11 years and had at least several trainings related to the Debentures.

to the Debentures. *See Steven Robert Tomlinson*, Exchange Act Release No. 73825, 2014 SEC LEXIS 4908, at *40 (Dec. 11, 2014) (rejecting respondent's comparison of sanctions imposed in his case to other cases); *Guidelines*, at 1 (providing that settled cases generally result in lower sanctions than litigated cases).

Simply put, Escarcega engaged in egregious misconduct and is unfit to continue in the securities industry. A bar is an appropriate sanction under the circumstances. Further, we order Escarcega to disgorge $52,270, the amount he earned in commissions in connection with the customers' purchases of Debentures in this case, plus interest from February 6, 2013 (the date of Escarcega's last sale of the Debentures to customers) until paid. Disgorgement of Escarcega's commissions will remediate Escarcega's misconduct in light of his ill-gotten gain.[48]

B. Books and Records Violations

The Hearing Panel assessed, but did not impose in light of the bar, a $5,000 fine and 10 business-day suspension for Escarcega's violation of FINRA Rules 4511 and 2010. We affirm these sanctions.

The Guidelines advise adjudicators to consider the nature and materiality of the inaccurate information, and to consider suspending the responsible parties in any or all capacities for up to 30 business days.[49] They further advise adjudicators to consider a lengthier suspension or a bar in egregious cases, and to consider a fine of $1,000 to $15,000 (or $10,000 to $146,000 in egregious cases).[50]

Escarcega misstated JB's and DB's net worth on a Firm form and erroneously failed to indicate that their investment in the Debentures was a product switch (which would have required an additional form to be completed and additional review by the Firm's compliance department). While this misconduct was serious, we agree with the Hearing Panel that sanctions on the lower end of those set forth in the Guidelines are appropriate and assess (but do not impose) a $5,000 fine and 10 business-day suspension for this misconduct.[51]

[48] *See Guidelines*, at 4-5 (General Principles Applicable to All Sanction Determinations, No. 6); *see also Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *50-51 (FINRA NAC Dec. 29, 2015), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016). Although the parties stipulated that Escarcega sold the Debentures from March 2012 until January 2013, the record shows that he sold the Debentures to MD on February 6, 2013.

[49] *See Guidelines*, at 29.

[50] *Id.*

[51] Unlike the Hearing Panel, we do not find that Escarcega intentionally misrepresented the net worth of JB and DB. Regardless, given that a Firm form completed by Escarcega contained two mistakes (one of which would have required him to fill out another Firm form that would

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V. Conclusion

We affirm the Hearing Panel's findings that Escarcega made fraudulent misrepresentations, in willful violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. We further affirm the Hearing Panel's findings that Escarcega made unsuitable recommendations, in violation of NASD Rule 2310 and FINRA Rules 2111 and 2010, and caused his Firm to maintain inaccurate books and records, in violation of FINRA Rules 4511 and 2010. Accordingly, we bar Escarcega in all capacities for his fraudulent misrepresentations and unsuitable recommendations, and order that he disgorge $52,270 (plus interest).[52] Escarcega is also ordered to pay hearing costs in the amount of $5,267.67, plus appeal costs of $1,285.49.[53]

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

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have resulted in additional scrutiny by compliance), we affirm the Hearing Panel's sanctions for this misconduct (which we note are on the lower-end of the range provided in the Guidelines).

[52] Interest shall accrue from February 6, 2013 until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 9 (Technical Matters).

[53] The bar is effective as of the date of this decision.