BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Market Regulation, Complainant, vs. Robert Marcus Lane North Palm Beach, FL, and Jeffrey G. Lane Darien, CT, Respondents.	DECISION Complaint No. 20070082049 Dated: December 26, 2013

Respondent Robert Marcus Lane engaged in improper interpositioning, resulting in unfair and excessive mark-ups and fraud. Respondent Jeffrey Griffin Lane failed to discharge his supervisory duties. Respondents failed to respond in a timely manner to FINRA requests for information and documents. Held, findings affirmed in part, and sanctions modified.

Appearances

For the Complainant: Gary E. Jackson, Esq., Gerald P. Finn, Esq., and James J. Nixon, Esq., Department of Market Regulation, Financial Industry Regulatory Authority

For the Respondents: Pro Se

Decision

Pursuant to FINRA Rule 9311, Robert Marcus Lane ("Marcus Lane") and Jeffrey Griffin Lane ("Jeffrey Lane") appeal a July 2, 2012 Hearing Panel decision. The Hearing Panel found that, in 12 corporate bond transactions involving 11 different trade sets ("Trade Sets"), Marcus Lane engaged in an improper interpositioning scheme and charged two of his customers unfair prices and excessive mark-ups, which he willfully and fraudulently failed to disclose. The Hearing Panel also found that Jeffrey Lane failed to establish and maintain reasonable written supervisory procedures ("WSPs") and also failed to supervise Marcus Lane's activities. Finally, the Hearing Panel found that respondents each failed to provide requested information to FINRA, and it characterized such failures as complete failures to respond. For Marcus Lane's

fraud, interpositioning, and mark-up violations, and for Jeffrey Lane's supervisory violations, the Hearing Panel barred respondents from associating with a FINRA member firm in any capacity and ordered them, jointly and severally, to pay $317,030.70 in restitution to two of the three customers at issue. Separately, the Hearing Panel barred both respondents for their failures to provide information to FINRA.

After an independent review of the record, we generally affirm the Hearing Panel's findings but modify the sanctions imposed. We affirm the bar imposed on Marcus Lane for all violations except for his failure to respond violation, for which we impose no separate sanction. We reduce the bar imposed on Jeffrey Lane for his supervisory violations to a bar in all principal or supervisory capacities, and we further impose on him a two-year suspension in all capacities and a $25,000 fine for his failure to respond violations. We vacate the restitution award imposed jointly and severally on the respondents, and instead order Marcus Lane to pay disgorgement totaling $218,582, plus prejudgment interest.

I. Marcus Lane and Jeffrey Lane

Marcus Lane and Jeffrey Lane, brothers, owned Greenwich High Yield LLC ("Greenwich High Yield").[1] Marcus Lane owned 80% of the firm, and Jeffrey Lane owned 20%. Marcus Lane was located in Florida, and Jeffrey Lane was located in Connecticut.

Marcus Lane entered the securities industry in 1985. During the relevant period, he was registered with Greenwich High Yield as a general securities representative and a general securities principal, and he was the firm's chief executive officer and sole trader.[2] Of significance to this case, Marcus Lane also solely owned High Yield Partners, LLC, and High Yield Partners Income, LLC (the "High Yield Entities" or, for singular references, "High Yield Entity"), during the relevant period.

Jeffrey Lane entered the securities industry in 1987. During the relevant period, he served as Greenwich High Yield's chief compliance officer and chief financial officer. He was registered with the firm as a general securities representative, a general securities principal, a financial and operations principal, a municipal securities representative, and a municipal securities principal. The record also demonstrates that Jeffrey Lane was responsible for establishing and maintaining Greenwich High Yield's WSPs and that he served as Marcus Lane's supervisor. Neither Marcus Lane nor Jeffrey Lane is currently associated with a member firm.

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[1] According to Greenwich High Yield's Central Registration Depository ("CRD"®) record, of which we take official notice, Greenwich High Yield requested to withdraw its broker-dealer registration on April 24, 2009, and its registration was terminated on June 23, 2009.

[2] All findings concerning the capacities in which respondents were registered during the relevant period are based on information reflected in their CRD records, of which we take official notice.

II. Procedural Background

On April 6, 2011, the Department of Market Regulation ("Market Regulation") filed a six-cause complaint. The first three causes alleged that, in 12 corporate bond transactions (in eleven Trade Sets), Marcus Lane interpositioned the High Yield Entities between the best available market and Greenwich High Yield customers; that such interpositioning resulted in unfair and unreasonable prices and excessive and fraudulent mark-ups; and that Marcus Lane failed to disclose the interpositioning and the excessive mark-ups, in violation of NASD Rules 2120, 2110, 2320(b) and 2440, and Interpretive Material ("IM") 2440, and in willful violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 10b-5. Causes four and five charged that Jeffrey Lane failed to establish and maintain reasonable WSPs concerning interpositioning, mark-ups, and unfair and unreasonable prices, and failed to supervise Marcus Lane, in violation of NASD Rules 3010 and 2110. Cause six alleged that Marcus and Jeffrey Lane failed to provide complete and timely responses to FINRA requests for information and documents, in violation of FINRA Rules 8210 and 2010.[3] On July 2, 2012, the Hearing Panel issued its decision, making the findings and imposing the sanctions described above. This appeal followed.

III. Interpositioning, Mark-ups, and Fraud

A. Facts

Between October 10, 2006, and May 2, 2007, Marcus Lane, on behalf of Greenwich High Yield, executed 11 Trade Sets in corporate bonds issued by Werner, R.J. Tower Corp. ("Tower"), or Collins & Aikman.[4] Each Trade Set generally followed the same, four-legged pattern. In the first leg, Marcus Lane purchased a specific quantity of corporate bonds from a broker-dealer. In the second leg, Marcus Lane immediately sold the bonds to one of the High Yield Entities, which each held an account at Greenwich High Yield.[5] In the third leg, he purchased the bonds back from the High Yield Entity that purchased the bonds in the second leg. Finally, in the fourth leg, he immediately sold the bonds to one of his customers, AE/GE or

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

[4] The record does not reflect the issuers' full corporate names. Marcus Lane described the bonds as being within the "distress[ed] bankruptcy market." According to the confirmations, the S&P rating for the Werner and Collins & Aikman bonds was "D," which is the lowest rating within the "speculative grade" category, and which means "payments default on financial commitments." Standard & Poor's, *Guide to Credit Rating Essentials* 10 (2011). The confirmations involving the Tower bonds did not reflect any ratings but did indicate that the bonds were "in default."

[5] High Yield Partners opened its account in August 2003. There is no evidence concerning when High Yield Partners Income opened its account.

MM.[6] Each four-legged Trade Set was completed within one hour (with durations ranging between nine and 60 minutes) except Trade Set 7, which was completed in 138 minutes. The average time it took to complete each Trade Set was 39 minutes and only 29.5 minutes when excluding Trade Set 7. The price that Marcus Lane either received or paid for the bonds increased on the second, third, and fourth legs in all Trade Sets except Trade Sets 4 and 5, where the price increased on only two of the three legs.[7] The aggregate mark-up—the difference between the first-leg price and the fourth-leg price—ranged between 6.45% and 40.93% and totaled $317,030.70 for all of the transactions.

For example, Trade Set 1 occurred on October 20, 2006. In the first leg, at 12:02 p.m., Marcus Lane bought 1,020 Werner bonds from a broker-dealer at a price of 8.6875.[8] In the second leg, also at 12:02 p.m., he immediately sold 1,020 Werner bonds to High Yield Partners at a price of 9.25. In the third leg, at 12:41 p.m., Marcus Lane bought the 1,020 Werner bonds back from High Yield Partners at a price of 9.75. In the fourth leg, also at 12:41 p.m., he resold the 1,020 Werner bonds to customers GE/AE at 10.00. The aggregate mark-up was 15.11% and totaled $13,387.50.

Marcus Lane denied that he received any customer orders before he made the first-leg purchases. Asked whether he had received any indications of interest from customers, however, Marcus Lane testified, "[y]es, I would assume I probably did . . . . They're interested in buying attractive merchandise." Marcus Lane further testified that the customers "were aware of the [TRACE] and the transactions . . . . They were aware of the prices and . . . were very, very interested on a price basis." Marcus Lane conceded that he was responsible for determining the mark-ups and that he made trading decisions on behalf of the High Yield Entities. The confirmations sent to customers did not disclose the mark-ups. Marcus Lane did not disclose to the customers the mark-ups that had been charged or that the bonds they were buying had been routed through the High Yield Entities. Instead, he testified that "it was on TRACE so they could figure it out."

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6 Only Trade Set 3 diverged from this four-legged pattern. In Trade Set 3, Marcus Lane broke up both the third and fourth legs into two transactions.

7 In Trade Set 4, the first and second leg prices were the same. In Trade Set 5, the third and fourth leg prices were the same.

8 Bond prices are stated as a percentage of the bond's par value. Thus, a stated price of 8.685 for a $1,000 par value bond is $86.85. The price information in the Trade Reporting and Compliance Engine ("TRACE") is inclusive of any mark-ups or mark-downs charged. *See* FINRA, Reporting of Corporate and Agencies Debt Frequently Asked Questions, No. 1.37 http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/FAQ/P125244 (explaining that broker-dealers should report the price to TRACE that is inclusive of any mark-up or mark-down).

B. Discussion

1. Interpositioning

During the relevant period, NASD Rule 2320(b) provided:

> In any transaction for or with a customer, no member or person associated with a member shall interject a third party between the member and the best available market except in cases where the member can demonstrate that to his knowledge at the time of the transaction the total cost or proceeds of the transaction, as confirmed to the member acting for or with the customer, was better than the prevailing inter-dealer market for the security. A member's obligations to his customer are generally not fulfilled when he channels transactions through another broker/dealer or some person in a similar position, unless he can show that by so doing he reduced the costs of the transactions to the customer.[9]

Where an associated person interpositions a third party between the best available market and the customer, "he has the burden of showing that the customer's total cost or proceeds of the transaction is the most favorable obtainable under the circumstances." *Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797, at *26 (Aug. 14, 2009) (quoting *Thomson & McKinnon*, 43 S.E.C. 785, 789 (1968)), *petition for review denied*, 409 F. App'x 396 (2d Cir. 2010).

Market Regulation has demonstrated a prima facie case of interpositioning. Marcus Lane admitted that he received indications of interest from customers to purchase the bonds at issue. The record demonstrates that between acquiring the bonds and selling them to the customers, Marcus Lane sold the bonds to, and bought them back from, the High Yield Entities within a short period of time. Thus, the end result of the 11 Trade Sets was that the High Yield Entities were interposed between Marcus Lane's customers and the best available market. *See Dist. Bus. Conduct Comm. v. Johansen*, Complaint No. C8A940073, 1997 NASD Discip. LEXIS 54, at *20 (NASD NBCC Sept. 18, 1997) (holding that a prima facie case of interpositioning is established when the broker "has interjected a third party between the firm and the best available market").

Given this prima facie case, the burden shifts to Marcus Lane to show that his customers' total cost was the most favorable under the circumstances. He has failed to meet that burden. Marcus Lane offered no evidence to show that the customers' costs were the most favorable, such as evidence of the prevailing market price at the time of the customers' transactions.

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[9] In 2009, after the relevant conduct, NASD Rule 2320(b) was amended and incorporated into NASD Rule 2320(a). *Proposed Rule Change by FINRA, Amendment No. 1*, File No. SR-2007-024, at pp. 4-5 (Apr. 13, 2009), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p118469.pdf; *FINRA Regulatory Notice 09-58*, 2009 FINRA LEXIS 161 (Oct. 2009). The Hearing Panel erroneously relied on the amended version of NASD Rule 2320.

Instead, the prices that the customers paid included layers of added costs that resulted from the interpositioning. Throughout the 11 Trade Sets, the price that Marcus Lane charged for each individual leg, in nearly all instances, was higher than the price of the previous leg. The resulting price that Marcus Lane's customers paid in the 11 Trade Sets was between 6.45% and 40.93% higher than the price that Marcus Lane originally paid to acquire the bonds from the street, on average just 39 minutes earlier. *Cf. Donald T. Sheldon*, 51 S.E.C. 59, 78 (1992) (finding broker's selling municipal bonds to favored customers at close to contemporaneous cost, repurchase at a profit to the favored accounts, and reselling of bonds at a still higher price to non-favored accounts constituted interpositioning), *aff'd*, 45 F.3d 1515 (11th Cir. 1995); *see also Thomas Brown, III*, 43 S.E.C. 285, 286 (1967) (explaining that broker's purchase, re-sale, and re-purchase of stock before selling to customer who had placed an open order constituted interpositioning).

On appeal, Marcus Lane and Jeffrey Lane advance several purported justifications for why the bonds were routed through the High Yield Entities, including (1) to "limit capital risk to the broker-dealer"; (2) to "prevent missing attractive opportunities and enable capturing the bid/offer spread on distress investments"; and (3) to allow Greenwich High Yield employees to invest in a "trading account" (what the Lanes called the High Yield Entities' accounts) "based on capital committed."[10] Marcus Lane further argues that it was "fair" for the High Yield Entities to be compensated for the "risk" they assumed when they briefly owned the bonds.[11]

These various arguments, however, are not supported by the record. The evidence does not show that Marcus Lane was motivated by the desire to protect Greenwich High Yield's net capital.[12] There is also no evidence that the High Yield Entities were capturing the bid/ask spread (or a greater or lesser amount). And it is not clear whether the High Yield Entities assumed any risk.[13] Regardless, all of these arguments—which essentially focus on how

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[10] Marcus Lane also stated that the routing was to allow "outside investors" to invest in the "trading account," but he solely owned the High Yield Entities during the relevant period.

[11] Marcus Lane contends that "half" of the aggregate mark-ups consisted of a "return on risk capital" for the "trading accounts" which "also offset trading losses." Jeffrey Lane also argues that the risk involved with the Tower bonds, which he alleges were settled through Euroclear, was even greater than the risk involved with the Collins & Aikman and Werner bonds.

[12] Greenwich High Yield's net capital requirement was $100,000. At the end of the first and second quarters of 2007, the firm had excess net capital of more than $2.5 million and $2.2 million, respectively. By themselves, none of the Trade Sets executed during those quarters would have posed a material threat to the firm's net capital. Marcus Lane did not hold on to the bonds overnight, and a firm's net capital is computed at the end of the day. Marcus Lane further undermined his claim that his intent was to protect net capital levels by arguing that his use of the High Yield Entities was to allow him to profit by capturing the bid/ask spread.

[13] Many factors suggest that the High Yield Entities were never taking any market risk. Marcus Lane testified that he had already received indications of interest for the bonds, most of

[Footnote continued on next page]

Greenwich High Yield and Marcus Lane hoped to benefit or profit from the interpositioning—do not address how the customers' cost in each of the transactions was the most favorable under the circumstances.

Marcus Lane and Jeffrey Lane also contend that the customers "most likely" could not have purchased the bonds "except for [Marcus Lane's] actions in positioning bonds [with the High Yield Entities] to facilitate trades," and that the bonds otherwise would "be taken by somebody else." But Marcus Lane has not proved such claims. Marcus Lane conceded that he received indications of interest from his customers before he purchased the bonds, and Jeffrey Lane conceded "that there was a readily identifiable competitive market for the . . . securities" and that the bonds were "readily available." Accordingly, it is not clear why Marcus Lane needed to route the bonds through the High Yield Entities, instead of effecting riskless principal trades, which would have given the customers a far better price. *Cf.* IM-2440(a)(2) (providing that "[a] member may not justify mark-ups on the basis of expenses which are excessive").

Even if riskless principal trades were for some reason not feasible—Marcus Lane testified that "if you are not willing to offer bonds, accounts will not necessarily bid on them"—and even if Greenwich High Yield had some legitimate reason for moving the bonds off its own books before selling them to the customers, that still does not explain why Marcus Lane passed on to the customers the third-leg "compensation" that Greenwich High Yield paid the High Yield Entities for briefly holding the bonds (a cost that also included the second-leg mark-up that the

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the Trade Sets were completed in approximately 39 minutes, and the High Yield Entities profited in all 11 Trade Sets. *Cf. Lake Sec., Inc.*, 51 S.E.C. 19, 23 (1992) (finding that the risk to a firm in holding a mortgage-backed security was "minimal" where the firm sold the security within two hours). In addition, several of the Lanes' arguments concerning the purported risk were not supported by evidence. For example, Marcus Lane argues that the bonds had "uncertain supply," but Jeffrey Lane conceded that there was "a readily identifiable competitive market for the securities" and that the bonds were "readily available."

Nevertheless, the record does not permit the conclusion that no market risk was involved. The TRACE reports for the Werner and Collins & Aikman bonds show a certain amount of volatility within the days and weeks around the trades at issue. Likewise, a Market Regulation analyst testified that the September 2006 trading in Werner bonds "appear[ed] to be volatile." And while the consistent profits earned by the High Yield Entities may suggest that there was never any risk, Marcus Lane testified that customers sometimes backed away from their indications of interest.

Moreover, Marcus Lane attempted to introduce evidence purportedly showing how the High Yield Entities' accounts sometimes incurred losses holding other bonds, which may have shed additional light on whether any market risk was assumed. While we find that the Hearing Panel erred in failing to receive such evidence, that error is harmless. As explained more in the text, the presence of some market volatility is not a ground for charging excessive mark-ups.

High Yield Entities paid to acquire the bonds). "[A] dealer is not entitled to charge excessive prices because it is at risk." *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1014 (1998); *see also Lake Sec., Inc.*, 51 S.E.C. at 23 ("Applicants were not entitled to charge an excessive markdown because [the firm] was in a risk position."); *James E. Ryan*, 47 S.E.C. 759, 763 (1982) (stating that broker-dealer is "not entitled to charge customers excessive mark-ups simply because it is in a risk position"). A logical corollary to this is that a dealer is not entitled to charge excessive prices because of steps it takes to avoid risk or because of the risk to which an affiliated party was subject. *Cf. Inv. Planning, Inc.*, 51 S.E.C. 592, 597 (1993) (holding that applicants could not, "in seeking a profit, . . . pass along to the customer their expenses if the total would unreasonably exceed the prevailing wholesale price").

The Lanes also claim that the absence of customer complaints is evidence that their costs were fair, because those customers were allegedly: (1) "sophisticated"; (2) "experts on distress trading"; (3) aware that Marcus Lane was "invested along with [them]"; (4) given "full price transparency . . . through TRACE"; and (5) of the understanding that "there is a cost" for a broker-dealer's use of capital to purchase distressed investments. Some of these arguments lack sufficient evidentiary support.[14] Others are irrelevant.[15] More importantly, they rest only on speculation. *See Dist. Bus. Conduct Comm. v. U.S. Sec. Clearing Corp.*, Complaint No. C3A920038, 1993 NASD Discip. LEXIS 297, at *30 (NASD NBCC Sept. 14, 1993) (rejecting argument that customer satisfaction is relevant to mark-up where "[t]he claimed absence of customer complaints is most likely due to the fact that the . . . customers did not realize that they were being overcharged").[16]

The Lanes assert that, in the years prior to the trades at issue, they never concealed from, or misrepresented to, FINRA staff the owners of the High Yield Entities, and that FINRA staff "approved" Greenwich High Yield's "business strategy" of "using risk capital through a separate

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[14] For example, TRACE did not provide full transparency of the relevant circumstances because it identified the High Yield Entities only as unnamed "customers" and did not indicate that they were entities owned by Marcus Lane. At best, TRACE showed that Greenwich High Yield's transactions with unnamed customers were not inter-dealer transactions.

[15] The Lanes claim that the customers understood that "there is a cost" when a broker-dealer commits capital to purchase distressed investments, but do not elaborate on what costs the customers thought would be included. And even if the customers were of the understanding that they were paying the mark-up that the High Yield Entities paid, the compensation that Greenwich High Yield paid to the High Yield Entities, and an additional mark-up, that does nothing to show that the customers' cost was the most favorable. *Cf.* IM-2440(b)(5) (noting that "[d]isclosure itself [of the mark-up made in a principal transaction] . . . does not justify a . . . mark-up which is unfair or excessive in light of all other circumstances").

[16] It is also axiomatic that the absence of any complaint does not excuse a violation. *See Dep't of Enforcement v. Cipriano*, Complaint No. C07050029, 2007 NASD Discip. LEXIS 23, at *39 (NASD NAC July 26, 2007) ("[W]e do not consider the fact that no customers complained to NASD to be relevant.").

trading account." Regardless of the truth of the Lanes' claims, they do not assert that FINRA staff approved the passing through to customers of the mark-ups charged to, and premiums paid to, the High Yield Entities in transactions like the ones at issue in this case, or the charging of costs that were not the most favorable.[17] Moreover, members and their associated persons "cannot shift their burden of compliance" to FINRA. *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *35 (June 29, 2007).

Accordingly, we affirm the Hearing Panel's findings that Marcus Lane engaged in interpositioning in violation of NASD Rule 2320(b) and 2110.

2. Unfair and Excessive Mark-ups

FINRA's rules obligate FINRA member firms to deal fairly with customers. *Dep't of Enforcement v. Lee*, Complaint No. C06040027, 2007 NASD Discip. LEXIS 6, at *34 (NASD NAC Feb. 12, 2007), *aff'd in relevant part*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819 (Apr. 11, 2008). NASD Rule 2440 provides, in pertinent part, that "if a member . . . sells for his own account to his customer, he shall . . . sell at a price which is fair, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense involved, and the fact that he is entitled to a profit."[18] FINRA's mark-up policy explains that FINRA adopted the "5% Policy" for transactions executed for customers, based on "studies demonstrating that the large majority of customer transactions were effected at a mark-up of 5% or less." IM-2440.[19] It further states that "[i]t shall be deemed a violation of Rule 2110 and Rule 2440 for a member to enter into any transaction with a customer in any security at any price not reasonably related to the current market price of the security." IM-2440.

IM-2440(a) sets forth five general considerations affecting whether a mark-up is fair. First, "[t]he '5% Policy' is a guide, not a rule." Second, "[a] member may not justify mark-ups on the basis of expenses which are excessive." Third, "[t]he mark-up over the prevailing market price [of the security] is the significant spread," and the "best indication of the prevailing market price" is "a member's own contemporaneous cost" absent "other bona fide evidence of the

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[17] Jeffrey Lane also contends that Marcus Lane engaged in many other Trade Sets like the ones at issue here. Even if Marcus Lane engaged in other interpositioning violations, the fact that Market Regulation did not include those in the complaint does not excuse the violations that were included. *See, e.g.*, *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (stating that FINRA disciplinary proceedings "are treated as an exercise in prosecutorial discretion").

[18] NASD Rule 0115(a) makes rules that apply to members, such as NASD Rule 2440, applicable to associated persons.

[19] In July 2007, IM-2440 was recodified as IM-2440-1. *See NASD Notice to Members 07-28*, 2007 NASD LEXIS 44, at *11-23 (June 2007).

prevailing market."[20] Fourth, a "mark-up pattern of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'" Finally, determining the fairness of mark-ups "must be based on a consideration of all the relevant factors, of which the percentage of mark-up is only one." *See* IM-2440(b) (listing some of the relevant factors).

a. Market Regulation's Prima Facie Case of Unfair and Excessive Mark-ups

Market Regulation provided ample evidence—based on TRACE audit reports, blotters, order tickets, and confirmations—of Greenwich High Yield's first-leg cost in all 11 Trade Sets. Market Regulation also demonstrated that the firm's first-leg cost was "contemporaneous" to when Marcus Lane sold the bonds to his customers in the fourth legs, considering that the average amount of time of each Trade Set was only 39 minutes and that the longest amount of time was only 138 minutes.[21] In addition, the same evidence sufficiently demonstrated that in all instances, the mark-ups that Marcus Lane charged the customers over the firm's contemporaneous cost ranged between 6.45% and 40.93%, which were all higher than 5% and sometimes substantially so. This evidence is sufficient to demonstrate a prima facie case of unfair and excessive mark-ups.

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[20] *See Gonchar*, 2009 SEC LEXIS 2797, at *26 ("We have . . . long held that a dealer that is not a market maker must base its prices on its own contemporaneous cost."); *Michael H. Novick*, 51 S.E.C. 1258, 1261 (1994) (holding that "the prevailing market price (on the basis of which retail markups are computed) means the contemporaneous price at which dealers are trading with one another (i.e., the current inter-dealer market)" and that when a firm is not a market maker, the best evidence of the prevailing market price, absent countervailing evidence, is the firm's contemporaneous cost); *see also* IM-2440(c)(2) (providing that in a transaction in which the member sells a security to a customer from inventory, as happened in this case, "the amount of the mark-up would be determined on the basis of the mark-up over the bona fide representative current market" and "[t]he amount of profit or loss to the member firm from market appreciation or depreciation . . . would not ordinarily enter into the determination of the amount of fairness of the mark-up"). Looking to a broker-dealer's contemporaneous cost "recognizes that the prices paid for a security by a dealer in actual transactions closely related in time to its sales are normally a highly reliable indication of the prevailing market." *First Honolulu Sec., Inc.*, 51 S.E.C. 695, 697 (1993).

[21] *See, e.g.*, *NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *29 (Apr. 1992) (noting that, for equity securities, "wholesale trades on the same day as or closest in time prior to the retail transactions are better indicators of prevailing market price than are trades occurring further away in time to the subject retail trades"); *Thomas F. White & Co.*, 51 S.E.C. 932, 934 (1994) (analyzing markups on debt securities by looking to the firm's "inter-dealer purchases closest in time to its retail sales").

b. Marcus Lane Failed to Provide Countervailing Evidence That the Prevailing Market Price Was Different Than Its Contemporaneous Cost

Given that Market Regulation made a prima facie case of Greenwich High Yield's contemporaneous costs and that the mark-ups were higher than five percent, the burden shifts to Marcus Lane to demonstrate whether: (1) the prevailing market price was different than his firm's contemporaneous cost to acquire the bonds; and (2) whether the facts and circumstances justified the high mark-ups charged here. *Gonchar*, 2009 SEC LEXIS 2797, at *28 (holding that once FINRA presents evidence of contemporaneous cost, the burden shifts to applicants to refute that evidence); *Steven P. Sanders*, 53 S.E.C. 889, 895 (1998) (once FINRA "present[s] evidence that the Firm's markups exceeded 5% over its contemporaneous cost, the burden . . . shift[s] to the applicants to show that the facts surrounding these transactions justified higher markups"); *cf. NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *7 (stating that "if a member seeks to charge its customers more than a 5 percent mark-up or mark-down" in a transaction involving equity securities, "it must be fully prepared to justify its reasons for the higher markup or markdown with adequate documentation"). This burden shifting occurs even in cases, like this one, where the respondents are charged with fraud. *See Gonchar*, 2009 SEC LEXIS 2797, at *28.

Turning to the first of those issues, Marcus Lane failed to demonstrate that the prevailing market price at the time of the customers' transactions was different than his contemporaneous cost of acquiring the bonds. Marcus Lane points to no countervailing evidence that the prevailing market price was anything other than Greenwich High Yield's first-leg cost. The second and third legs of each Trade Set were not reliable indicators of the prevailing market price, considering that they did not involve inter-dealer transactions but, rather, transactions between entities that Marcus Lane either owned solely or substantially. *Sanders*, 53 S.E.C. at 894-95 (rejecting purchases from customers as basis for prevailing market price). Indeed, Marcus Lane testified that his purchase back of the bonds in the third leg was set at a price to ensure that the High Yield Entities—which he solely owned—were "compensated" for purportedly shouldering the risk of market depreciation, illuminating why the price of the third leg was not at all indicative of the prevailing market price.

Likewise, Marcus Lane has not demonstrated that there were any other trades that were more indicative of the prevailing market price than Greenwich High Yield's first-leg cost. Trade Sets 1 through 6 involved bonds issued by Werner or Collins & Aikman, for which there are TRACE audit trail reports.[22] Those TRACE reports show that other transactions occurred in the Werner and Collins & Aikman bonds on the same days as the transactions in Trade Sets 1 through 6, including intervening trades executed between the first and fourth legs of each Trade

[22] Trade Sets 7 through 11 involved bonds issued by Tower, for which no TRACE reports exist. A Market Regulation regulatory analyst testified that trades in the Tower bonds were not required to be reported to TRACE because those bonds were issued in euros. *See* FINRA Rule 6710(a) (requirement that TRACE-Eligible Securities be "United States . . . dollar-denominated").

Set.[23] None of those other transactions, however, provide better evidence of the prevailing market price than Greenwich High Yield's first-leg cost, let alone show that the prevailing market price was higher than the Greenwich High Yield's cost. Specifically, in Trade Sets 3, 4, and 5, there were no other same-day transactions (intervening or otherwise) executed at prices higher than the firm's initial cost. In Trade Sets 1, 2, and 6, there were other same-day transactions executed at a higher price than Greenwich High Yield's initial cost, but Marcus Lane has not demonstrated that any of those other transactions was more reflective of the prevailing market price than the firm's initial cost. In this regard, several factors weigh against any such finding—including the timing and low volume of the same-day transactions, as well as the lack of any evidence that they involved inter-dealer transactions—and Marcus Lane made no attempt to address these circumstances or evidentiary gaps.

Jeffrey Lane argues that Market Regulation did not introduce any evidence of the then-current inter-dealer bids and offers, which he claims might have provided the best evidence of the prevailing market price. But Market Regulation's burden was only to show Greenwich High Yield's contemporaneous cost, which it has done. In contrast, it was Marcus Lane's burden to demonstrate that the contemporaneous cost was not the best evidence of the prevailing market price, with whatever evidence he thought would show that. *Lee*, 2007 NASD Discip. LEXIS 6, at *38 ("Once Enforcement produced evidence that [the firm's] cost represented the prevailing market price, the burden shifted to respondents to prove that cost was not a reliable indicator of the prevailing market."); *see also U.S. Sec. Clearing Corp.*, 52 S.E.C. 92, 99 (1994) (same); *LSCO Sec., Inc.*, 49 S.E.C. 1126, 1127-1128 (1989) (same). In any event, evidence of the quoted bids and offers would not be reliable evidence of the prevailing market price. *Adams Sec., Inc.*, 51 S.E.C. 1092, 1095 (1994) (stating that "[q]uotations only propose a transaction and do not reflect the actual result of a completed arm's-length sale" and "may have little value as evidence of the current market").

Marcus Lane failed to demonstrate that Greenwich High Yield's first-leg cost was not the best evidence of the prevailing market price. Therefore, that first-leg cost is the proper price on which to calculate the mark-ups.

c. Marcus Lane Failed To Demonstrate That the Mark-ups Were Fair

As explained above, Marcus Lane also bears the burden of demonstrating that the mark-ups charged over the prevailing market price were fair. He has failed to do so.

The relevant factors in IM-2440 do not justify mark-ups of the size charged here. One relevant factor is the availability of the security in the market. IM-2440(b)(2) ("In the case of an inactive security the effort and cost of buying or selling the security, or any other unusual circumstances connected with its acquisition or sale, may have a bearing on the amount of mark-up justified"). The record, however, does not give a clear picture of market liquidity. On the one hand, Marcus Lane asserts that there was an "unsure supply," and the TRACE reports show that

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[23] A Market Regulation regulatory analyst testified that there were no intervening trades during Trade Sets 1 through 5, but that testimony is belied by the TRACE reports.

trading in the bonds was light at the times the Trade Sets occurred. On the other hand, Jeffrey Lane claimed that the bonds were readily available, and the TRACE reports show that trading, while light, did occur in the Werner and Collins & Aikman bonds. Irrespective of the bonds' availability, however, Marcus Lane has not documented the effort that it took to acquire or sell them. *Cf. NASD Notice to Members 93-81*, 1993 NASD LEXIS 186, at *6 (Nov. 1993) (explaining that "in the case of an inactive security, the member's effort and cost of buying or selling the security for the customer may have a bearing on the amount of commission" but that "[a]ny special or unusual effort or cost should be documented"). The short amount of time it took to dispose of the bonds suggests there was not much effort expended at that stage.

The amount of money involved in the transactions and the bonds' prices are also relevant factors. *See* IM-2440(b)(4) ("A transaction which involves a small amount of money may warrant a higher percentage of mark-up to cover the expenses of handling."); IM-2440(b)(3) (explaining that the percentage of mark-up or rate of commission "generally increases as the price of the security decreases" and that "[e]ven where the amount of money is substantial, transactions in lower priced securities may require more handling and expense and may warrant a wider spread"). The transactions with the customers here involved significant amounts—between $40,962 and $312,409. Marcus Lane nonetheless argues that because the bonds were "low-priced," looking for the "best opportunities" required "extensive" and "ongoing . . . analysis." Likewise, the Lanes argue that the Tower bonds, which were issued in euros, required even "more work" such as "additional documentation, . . . currency risk with associated conversion costs, more due diligence . . ., [and] increased risk of a trade failing and being undeliverable due to account limitations." But here again, these factual claims were not supported with any documentation. *Cf. Dennis Todd Lloyd Gordon*, Exchange Act Release No. 57655, 2008 SEC LEXIS 819, at *49-50 (Apr. 11, 2008) (finding that applicants failed to show how the asserted extra effort and expense with respect to riskless principal trades in general applied to the particular trades at issue or provide any documentation of any extra effort or expense associated with those trades).

In another price-related argument, Marcus Lane contends that mark-ups when expressed not as a percentage but in "points," which he claims ranged from .25 to 1.3125, were reasonable, contending that mark-ups on secondary bond transactions are "often" 1 to 2 points. Marcus Lane's contention that the mark-ups on a point basis ranged from only .25 point to 1.3125 points, however, is incorrect; the mark-ups on the Tower bonds ranged as high as 3.575 on a point basis. In any event, he points to no authorities stating that the fairness of mark-ups is ever based on points, instead of a percentage, nor are we aware of any.[24]

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[24] Marcus Lane argues that FINRA has historically judged the fairness of mark-ups on low-priced securities by looking to the points, not the percentage. But Greenwich High Yield's 2006 WSPs reflect that it harbored no such understanding of FINRA's "historical" practice. In this regard, the firm's WSPs indicated that the firm had complained to FINRA about its "5% Policy" as it applied to a distressed securities business and that FINRA had not "render[ed] any additional opinion" or adopted another standard that "could be reasonably applied" such as "no mark-up may exceed four points."

Another consideration under IM-2440 is "[a]ny disclosure to the customer, before the transaction is effected, of information which would indicate . . . [the amount of] mark-up made in a principal transaction." IM-2440(b)(5). Marcus Lane argues that the customers were sophisticated and had "full transparency" through TRACE. However, there is no evidence that Marcus Lane disclosed to his customers the size of the aggregate mark-up or that they were otherwise aware of the mark-ups due to TRACE. In any event, "[d]isclosure itself . . . does not justify a . . . mark-up which is unfair or excessive in light of all other relevant circumstances." IM-2440(b)(5).

One factor in IM-2440 that might weigh in favor of a higher mark-up is the "type of security" involved here. IM-2440(b)(1) ("Some securities customarily carry a higher mark-up than others."). Although the Commission has "consistently held" that mark-ups on corporate bonds exceeding five percent are "acceptable in only the most exceptional cases,"[25] the director of FINRA's fixed income department conceded at the hearing that mark-ups on distressed securities "are generally higher than what you see for securities that have a higher credit rating" and "can vary from below five percent to, potentially, above five percent." Nevertheless, Marcus Lane has not met his burden of proving that there were exceptional circumstances involved with the type of security in the transactions at issue. Here again, he has not submitted any documentation quantifying the extent to which his purchases and sales of the distressed bonds at issue here involved exceptional circumstances compared to other types of securities. Thus, the "type of security" factor does not justify the mark-ups that he charged. *NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *7 (noting that a member that "seeks to charge its customers more than a 5 percent markup or markdown . . . must be fully prepared to justify its reasons for the higher markup or markdown with adequate documentation").

Marcus Lane makes other arguments, but they all fail to show that the mark-ups were fair.[26] Marcus Lane argues that the mark-ups that were charged allowed the "capture [of] the bid ask spread." But for purposes of the fairness of a mark-up, the bid/ask spread is not a meaningful metric in markets that were as illiquid as the ones at issue here. *Cf. Sacks Inv. Co.*, 51 S.E.C. 492, 496 (1993) (finding that respondents were reckless when they charged their customers mark-ups based on unsubstantiated ask quotations). Marcus Lane also argues that

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[25] *Gonchar*, 2009 SEC LEXIS 2797, at *34-37 (finding that undisclosed mark-ups on convertible bonds as low as 3.5% supported fraud findings); *see also Inv. Planning, Inc.*, 51 S.E.C. at 594 (noting that mark-ups on corporate debt securities "under [five percent] may be subject to sanction" and finding mark-ups ranging from 4% to 7.26% on the sale of corporate bonds to be "extraordinary charges").

[26] Many of Marcus Lane's additional arguments were also advanced to defend against the interpositioning charges, including his argument that there was purportedly a need to "position" the bonds to protect Greenwich High Yield's net capital, that the mark-up included compensation to the High Yield Entities for purportedly taking on risk, and that the customers were sophisticated yet never complained. We have already addressed those arguments and rejected them in our findings above concerning the interpositioning violations.

losses he incurred in other transactions "need[ ] to be factored in." A mark-up may not be justified, however, on the grounds that it helps pay the costs incurred in other transactions. *F.B. Horner & Assocs., Inc. v. SEC*, 994 F.2d 61, 63 (2d Cir. 1993). Marcus Lane contends that the customers profited overall through their dealings with respondents. But he has not proved that and, regardless, "the price charged in each transaction must be fair." *Thomas F. White & Co.*, 51 S.E.C. 932, 936 (1994) (citing *Inv. Planning, Inc.*, 51 S.E.C. 592); *F.B. Horner & Assocs.*, 994 F.2d at 63 (rejecting argument that the "average" mark-up per customer is relevant). Finally, the Lanes argue that the allegations are based on less than 2% of the trades Greenwich High Yield executed in 2006-2007. Even if Greenwich High Yield's other transactions did not involve excessive mark-ups, that does not excuse the mark-up violations in the Trade Sets at issue.

In sum, we find that Marcus Lane charged customers excessive mark-ups, in violation of NASD Rules 2440 and 2110, and IM-2440.[27]

3. Fraud

The Hearing Panel found that Marcus Lane failed to disclose the excessive mark-ups and interpositioning, in violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and NASD Rule 2120, which prohibit the use of any manipulative or fraudulent device in connection with the purchase or sale of a security. We affirm in part and reverse in part those findings. As explained below, although the Hearing Panel found that Marcus Lane engaged in fraud concerning all 12 customer transactions, we limit our findings of fraud to nine of the customer transactions.

"[U]nder § 10(b) of the Exchange Act, a seller has a duty to disclose the details of a markup if the markup is excessive." *Gonchar*, 2009 SEC LEXIS 2797, at *24 n.18 (internal quotation marks omitted; quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000)). "Undisclosed markups on sales of securities to retail customers can violate the antifraud provisions of the securities laws if they are not reasonably related to the baseline against which they are measured and if the responsible parties acted with scienter." *Gordon*, 2008 SEC LEXIS 819, at *52. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *46 (Dec. 10, 2009). Scienter may be established by a showing that a respondent acted recklessly. *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *petition for review denied*, 595 F.3d 1034 (9th Cir. 2009). Recklessness in this context is a "highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* A trader is obligated to know the standards for determining fair

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[27] Market Regulation's expert witness, Charles Myers, gave extensive testimony in support of his opinion that the mark-ups were excessive. Notwithstanding that some of Myers' statements are consistent with the findings we make in this decision, we have not relied on his testimony, considering that his personal experience with the distressed bond market was limited and dated.

prices. *John Montelbano*, 56 S.E.C. 76, 96 (2003) (citing *G.K. Scott & Co.*, 51 S.E.C. 961, 968 (1994), *petition for review denied*, 56 F.3d 1531 (D.C. Cir. 1995) (Table)).

We have already found that the mark-ups charged to the customers in the transactions at issue were excessive. In nine of those transactions, Marcus Lane charged mark-ups exceeding 10%, and we find that his failure to disclose those mark-ups was with scienter. Mark-ups greater than 10% on equity securities "generally are not reasonably related to the prevailing market price." *D.E. Wine Invs., Inc.*, 53 S.E.C. 391, 394 (1998). In fact, undisclosed mark-ups of that size have been held to constitute "fraud per se." *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996); *see Dep't of Enforcement v. Galasso*, Complaint No. C10970145, 2001 NASD Discip. LEXIS 2, at *54 (NASD NAC Feb. 5, 2001) (same), *aff'd in relevant part*, 56 S.E.C. 76 (2003); *James E. Ryan*, 47 S.E.C. 759, 763 (1982) (noting that mark-ups exceeding 10% generally "are fraudulent, even in the sale of low priced securities"); *see also Notice to Members 92-16*, 1992 NASD LEXIS 47, at *8. We find that this is just as true for mark-ups on debt securities. *Gonchar*, 2009 SEC LEXIS 2797, at *34-37 (affirming that undisclosed 3.5% mark-up on convertible bond was fraudulent); *Inv. Planning*, 51 S.E.C. at 595 (stating, in case involving corporate debt securities, that "a 5% markup serves merely as an outside limit" and "lies above what may be permissible in particular instances"); *Lake Sec., Inc.*, 51 S.E.C. at 21 (holding, in a case involving debt securities, that "markups in excess of 7% above the prevailing market price may be fraudulent"). Thus, in all instances in which Marcus Lane charged a mark-up exceeding 10%, he must have known that such mark-ups were excessive, and that he had not disclosed such mark-ups to his customers.

Apart from the sheer size of the mark-ups, other reasons bolster the finding that Marcus Lane's failure to disclose all the mark-ups exceeding 10% was with scienter. Marcus Lane knew that the bonds were routed through the High Yield Entities, knew that the prices he charged his customers included the mark-ups he charged and the "compensation" he paid to effect that interpositioning, and consequently knew that such prices bore no relation to Greenwich High Yield's contemporaneous cost. *Cf. Gonchar*, 2009 SEC LEXIS 2797, at *36 ("[P]ersons engaged in the securities business cannot be unaware . . . that interpositioning is bound to result in increased prices or costs.") (citation omitted); *Sheldon*, 51 S.E.C. at 78 (concluding that applicants' interpositioning resulted in fraudulent mark-ups as much as 10% "demonstrat[ing] clear scienter"). For the bonds that were reported to TRACE, Marcus Lane also knew or recklessly disregarded that there had been no intervening inter-dealer trades in the bonds at issue, displaying "a reckless indifference towards the prevailing market price, and consequently, towards the fairness of the price provided to the customer." *Lake Sec., Inc.*, 51 S.E.C. at 23. While there was no TRACE data for the Tower bonds, there is no evidence that Marcus Lane performed any kind of investigation to determine the prevailing market price for those bonds, further displaying his reckless indifference to the prevailing market price. *Id.* (finding that a lack of investigation to determine the prevailing market price demonstrates scienter). Moreover, Marcus Lane knew, or recklessly disregarded, that the aggregate mark-ups were excessive, yet charged the price anyway.[28] *See Meyer Blinder*, 50 S.E.C. 1215, 1230 (1982) (finding scienter

[28] As explained above, although Marcus Lane claimed that selling the bonds required additional work, he provided no documentation of the extra effort that was involved.

"[w]here a dealer knows the circumstances indicating the prevailing interdealer market price for the securities, knows the retail price that it is charging the customer, and knows or recklessly disregards the fact that its markup is excessive, but nonetheless charges the customer the retail price").

With respect to the Trade Sets in which mark-ups above 10% were charged, the Lanes' defenses fail. Marcus Lane argued that the customers had full transparency through TRACE, but we have already addressed why that was not the case. Although Marcus Lane contends that there was no way to identify the High Yield Entities' accounts on TRACE as anything other than "customer" accounts, that only should have heightened his awareness of the need to disclose the excessive mark-ups himself. Jeffrey Lane argues that the customers knew they were "trading along" with Marcus Lane. Even if true, that does not mean the customers also knew that Marcus Lane was passing along the mark-ups Greenwich High Yield earned from, and the compensation paid to, the High Yield Entities, or that their mark-ups were excessive compared to Greenwich High Yield's contemporaneous cost. Jeffrey Lane also argued that it is "common practice" not to disclose that securities have been "positioned" in trading accounts. But Marcus Lane did not transfer the bonds to a Greenwich High Yield trading account. Instead, he moved the bonds to and from an account held by an outside entity and passed along the costs incurred in doing so to the customer in the form of excessive mark-ups. Those are material facts that Marcus Lane needed to disclose, and his failure to do so with scienter constituted fraud.[29]

We reverse, however, the Hearing Panel's findings that Marcus Lane's failure to disclose the excessive mark-ups in three customer transactions that ranged from 6.45% to 7.46% constituted fraud. The director of FINRA's fixed income department conceded that mark-ups on distressed securities "can vary from below 5% to, potentially, above 5%." Moreover, while an assessment of all of the factors under FINRA's mark-up policy leads us to conclude that these mark-ups were excessive, the fact that these transactions involved distressed securities provided a thin basis on which Marcus Lane could believe—albeit unreasonably—that these three mark-ups were fair. Accordingly, the record does not support the finding that it was an extreme departure from the standard of ordinary care for Marcus Lane not to disclose the three mark-ups ranging from 6.45% to 7.46%.

Accordingly, as to the nine customer transactions where the mark-ups charged exceeded 10%, we find that Marcus Lane violated Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, NASD Rule 2120, and NASD Rule 2110. We reverse the other findings of fraud.

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[29] We also find that Marcus Lane "willfully" violated Section 10(b) of the Exchange Act. A willful violation of the securities laws means intentionally committing the act which constitutes the violation. *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000). Marcus Lane intentionally charged the mark-ups that were excessive without disclosing them. Marcus Lane's willful violation of Section 10(b) of the Exchange Act gives rise to a statutory disqualification. *See* Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act.

IV. Written Supervisory Procedures

A. Facts

Jeffrey Lane was responsible for Greenwich High Yield's WSPs. During the relevant period, there were two versions: the 2005 version, in effect from December 2005 through 2006, and the 2006 version, in effect from December 2006 through 2007. Jeffrey Lane acknowledged that he drafted the section of the WSPs titled "Commissions Schedule and Written Markup Policy." He also conceded that the WSPs did not identify the individual who was to conduct a review of the mark-ups to determine if they were fair and reasonable, describe the steps to be taken to make such a determination, state how often mark-ups would be reviewed, explain how reviews of mark-ups would be documented, or contain any provisions related to interpositioning.

B. Discussion

NASD Rule 3010(a) requires that each member establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with the federal securities laws and FINRA rules, including written procedures to supervise the types of business in which it engaged. *See* NASD Rule 3010(a)(1), (b)(1). NASD Rule 3010(b)(3) requires that the written procedures "set forth the supervisory system" and include, among other things, "the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and [FINRA] Rules." NASD Rule 3010(d) provides that each member shall establish written procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions, designed to reasonably supervise each registered representative. The firm's WSPs "should include a description of the controls and procedures used by the firm to deter and detect misconduct and improper activity" and "identify the specific personnel who perform the various supervisory functions." *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *6 (Dec. 1998). As FINRA has previously explained, supervisory procedures play a critical role in the self-regulation of the securities industry. Reasonably designed WSPs "serve as a 'frontline' defense to protect investors from fraudulent trading practices and help to ensure that members are complying with rules designed to promote the transparency and integrity of the market." *Id.* at *2.

Jeffrey Lane prepared WSPs that were deficient. Although Greenwich High Yield's WSPs included a "commissions schedule and written mark-up policy," which "adopt[ed] by reference" FINRA's mark-up policy, they contained no further details about how the firm would supervise to ensure compliance with FINRA rules requiring fair prices and mark-ups. They did not identify who was responsible for such supervision, the supervisory steps that such person should take, the frequency of supervisory reviews, how such reviews should be documented, or how to document the steps taken as a result of supervisory reviews. *See NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *8-9 (generally describing the requirements of WSPs);[30] *see also Dep't of Mkt. Regulation v. Castle Sec. Corp.*, Complaint No. CMS030006,

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[30] Jeffrey Lane argues that *NASD Notice to Members 98-96* may not be relied on because it is not in FINRA's rulebook. FINRA's notices, however, are often relied on in disciplinary cases

[Footnote continued on next page]

2005 NASD Discip. LEXIS 2, at *14 (NASD NAC Feb. 14, 2005) (finding firm's supervisory procedures to be deficient on similar grounds), *aff'd in relevant part*, Exchange Act Release No. 52580, 2005 SEC LEXIS 2628 (Oct. 11, 2005); *Dist. Bus. Conduct Comm. v. A.S. Goldmen & Co.*, Complaint No. C10960208, 1999 NASD Discip. LEXIS 18, at *41 (NASD NAC May 14, 1999) (holding that supervisory procedures did not discuss relevant mark-up concepts or contain specific procedures to ensure compliance with FINRA's mark-up policy, including what reviews would be conducted or who would conduct them).

Jeffrey Lane argues that he was designated a principal and that the WSPs identified him as the executive representative and FINOP. But the WSPs did not specify who was to monitor for compliance with FINRA's rules governing mark-ups and commissions. Jeffrey Lane also argues that interpositioning is "fairly obscure" and that he "had never heard of interpositioning." FINRA's rules, however, contain a provision concerning interpositioning, and Jeffrey Lane admits that Greenwich High Yield routinely "positioned" bonds with the High Yield Entities' accounts before selling the bonds to the customers. Thus, a reasonable supervisory system should have included supervisory procedures to monitor for interpositioning violations.

Jeffrey Lane argues that the WSPs captured the "intent" of FINRA's mark-up rule and "support[ed] the awareness of the rules by how it affect[ed] the particular focus of Greenwich High Yield in trading distressed securities." The relevant section of the WSPs, however, strongly suggested that Greenwich High Yield would often charge more than 5% mark-ups when engaging in the distressed bond securities business.[31] And even if the WSPs drew representatives' attention to the mark-up rule, they failed to provide any procedures for how Greenwich High Yield would supervise compliance with it. For these reasons, the supervisory procedures for which Jeffrey Lane was responsible were deficient, in violation of NASD Rule 3010 and 2110.

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as a source of guidance. For example, the Commission previously relied on *Notice to Members 98-96* in determining that member firms must adopt WSPs that describe the actual supervisory system established by the firm. *Castle Sec. Corp.*, Exchange Act Release No. 52580, 2005 SEC LEXIS 2628, at *7 (Oct. 11, 2005).

[31] Greenwich High Yield's WSPs stated that "[a]s a matter of course, Greenwich High Yield LLC strives to avoid exceeding the '5% policy,' but that "[t]he high yield marketplace is known for illiquid markets in low priced securities for which customers are inclined to trade by appointment with member firms that provide useful research advice" and that "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% policy.'"

V. Supervision of Marcus Lane

A. Facts

Jeffrey Lane was responsible for supervising Marcus Lane's activities. Jeffrey Lane prepared the order tickets and entered trade information into the system that reported to TRACE. Jeffrey Lane was aware of the execution time for each transaction, the number of bonds, the price, and the customers' identities. Jeffrey Lane was further aware that Greenwich High Yield was selling bonds it acquired to the High Yield Entities and buying them back, and that the High Yield Entities were owned and controlled by Marcus Lane. Jeffrey Lane also reviewed the mark-ups.

Jeffrey Lane admitted that he reviewed the fairness of the mark-ups charged in each leg of the Trade Sets only separately. He never reviewed or questioned the aggregate mark-up charged to the customer (i.e., the difference between the first-leg and fourth-leg prices) or whether the use of the High Yield Entities constituted interpositioning, and he never changed any of the mark-ups. Jeffrey Lane testified that he "really hadn't heard of interpositioning" and that "I still don't actually understand the rule." He further stated that "since 2003 . . . Marcus had been buying bonds into the [H]igh [Y]ield account, and then . . . selling them back from the [H]igh [Y]ield account to the customer. And no, I didn't question it."

B. Discussion

In addition to the requirement to establish and maintain an adequate supervisory system, "[t]he duty of supervision includes the responsibility to investigate 'red flags' that suggest that misconduct may be occurring and to act upon the results of such investigation." *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *33 (Dec. 19, 2008) The duty requires "'reasonable' supervision," a standard that is "determined based on the particular circumstances of each case." *Id.*

Jeffrey Lane failed to provide reasonable supervision. Based on his admitted involvement in overseeing the trades, Jeffrey Lane was aware of numerous circumstances that raised obvious concerns. He knew the execution times for each transaction, and that Marcus Lane was selling to and buying from entities he controlled. Because Jeffrey Lane prepared order tickets and entered all trade information into TRACE, he must have noticed, or recklessly disregarded, that the routing of the bonds through the High Yield Entities and to the customers occurred in short periods. Jeffrey Lane knew that the mark-up rules were "one of the most heavily examined and tested aspect[s]" of their business, which should have heightened his attention of the fairness of the mark-ups. He admitted that his job was to review for whether the customers were receiving fair prices, not to "determine whether [the firm's] return on risk capital is fair." He also knew that no other customers besides the High Yield Entities were earning a mark-up on their sales to Greenwich High Yield. And given that the revenues produced by Trade Sets 5 through 10 generated approximately 20% of Greenwich High Yield's revenues in the first quarter of 2007, those transactions must have stood out even more.

Despite the presence of all these red flags, Jeffrey Lane did not respond in a reasonable manner. Jeffrey Lane testified that he would point out to Marcus Lane mark-ups on individual legs of the Trade Sets that exceeded five percent. But Jeffrey Lane's narrow focus on the

individual legs was an extreme departure from reasonable supervision, considering his awareness that the bonds being sold to customers had been routed through entities under common ownership with Greenwich High Yield. Indeed, if Jeffrey Lane had reviewed the TRACE data, he would have easily seen that the various legs of the Trade Sets appeared in sequence, noticed the absence of intervening inter-dealer trades, and understood that the third-leg price was unlikely to be the prevailing market price at the time of the customers' transactions. *Cf. Dep't of Enforcement v. Levitov*, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *26-27 (NASD NAC June 28, 2000) (finding that respondent failed to supervise where red flags of excessive mark-ups should have prompted an investigation); *Dist. Bus. Conduct Comm. v. Stratton Oakmont, Inc.*, Complaint No. C10950081, 1996 NASD Discip. LEXIS 52, at *43 (NASD NBCC Dec. 5, 1996) (holding that president failed to take appropriate steps to prevent excessive mark-ups, where he had real-time access to pricing information and was on notice of the possibility that the IPO at issue would be subject to domination by the firm).[32]

Jeffrey Lane testified in his defense that he "question[ed]" Marcus Lane about whether a mark-up should be charged to the High Yield Entity (in the second leg) and decided—with Marcus Lane's agreement—that "[i]t would not be fair to Greenwich High Yield not to make a profit on those trades." Jeffrey Lane further contends that he was satisfied that those second-leg trades were "legitimate" and "bona fide" trades with "proprietary trading accounts," and that Greenwich High Yield was entitled to payment for its services. But whether Greenwich High Yield could charge any mark-up in the second-leg transactions was a separate issue from the fairness of the fourth-leg prices. Jeffrey Lane's questioning of the mark-ups on the second-leg transactions, therefore, did not satisfy his supervisory obligations.

Jeffrey Lane also argues that he maintained the WSPs, conducted annual operations meetings and annual compliance certifications, and effected accurate trade reporting to TRACE. We must consider, however, whether his supervision "was reasonably designed to prevent the violations at issue, not weigh [his] supervisory performance in other areas against [his] deficiencies in the area under review." *Pellegrino*, 2008 SEC LEXIS 2843, at *50 (citation omitted); *Albert Vincent O'Neal*, 51 S.E.C. 1128, 1135 (1994) (stating that "the test is . . . not . . . whether, if all the many other supervisory functions [respondent] performed were taken into account, his overall supervisory performance somehow earned him a hypothetical passing grade").

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[32] Even Jeffrey Lane's supervision of the mark-ups on individual legs was not that probing. He recalled that when he raised concerns about mark-ups charged on individual legs, Marcus Lane brushed him off by responding, "if they come after me for that, I can justify that." Jeffrey Lane gave no indication that he did anything more than rely on Marcus Lane's unverified claims. *Cf. Michael H. Hume*, 52 S.E.C. 243, 248 (1995) (failure to supervise where supervisor relied on the broker's unverified representations that excessive trading in a customer's account was consistent with customer's objectives).

For the reasons explained above, we find that Jeffrey Lane failed to supervise Marcus Lane, in violation of NASD Rules 3010 and 2110.[33]

VI. Failure to Respond

A. Facts

1. Origins of the Investigation, and FINRA's First and Second Requests for Information

The investigation that led to this proceeding began with an electronic sweep that sought to identify potentially excessive mark-ups during the fourth quarter of 2006. In 2007 and 2008, Market Regulation sent two requests to Greenwich High Yield for information, to which Jeffrey Lane responded. Based on the information received, Market Regulation identified a pattern of transactions in which Greenwich High Yield bought bonds from the street, sold them to the High Yield Entities, bought them back, and then resold them to customers, with increasing prices at each step. It also learned that Greenwich High Yield and High Yield Partners shared the same address, that Marcus Lane had signed High Yield Partners' account application form as both the account holder and the registered representative, and that Jeffrey Lane had authorized the opening of that account.

2. The Third Request

On March 6, 2009, Market Regulation sent a third request for information to Jeffrey Lane, pursuant to FINRA Rule 8210, stating that it was "continuing [its] review" and requesting nine categories of information and documents concerning 22 sets of trades that occurred in 2006 and 2007, including the transactions that are at issue in this proceeding. Among the nine categories were four (the "Four Categories") that would become the primary subject of dispute: (1) documents reflecting or relating to communications concerning the trades, including bids, offers, quotes, notes, e-mails, correspondence, memoranda, or Bloomberg messages, created and received by Greenwich High Yield; (2) electronic communications sent and received by Marcus Lane in 2006 and 2007, including Bloomberg mail, e-mail, and text messages; (3) the identities of all Greenwich High Yield accounts involved in each transaction and the new account forms for such accounts; and (4) the identities of the owners of Greenwich High Yield and the High Yield Entities, the ownership breakdown, and the identities of the individuals with investment authority for the 2006-2007 period. Market Regulation asked that Jeffrey Lane provide responsive information by March 27, 2009.

In a letter dated March 23, 2009, Jeffrey Lane did not send any of the nine categories of documents that FINRA requested. Instead, he characterized Market Regulation's letter as part of a "two year inquiry," and asserted that the requested information "has mostly or all been

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[33] Because we find that Jeffrey Lane failed reasonably to supervise, with a view to preventing violations of Section 10(b) of the Exchange Act and the rules thereunder, he is also statutorily disqualified. FINRA By-Laws Art. III, Section 4; Section 3(a)(39)(F) of the Exchange Act; Section 15(b)(4)(E) of the Exchange Act.

previously requested and had been furnished." He further wrote that Greenwich High Yield had "terminated its office" and that "we could send all of our boxes containing all of our historical records." At some point in May 2009, and after Market Regulation offered to pay copying costs, Jeffrey Lane provided some of the requested documents.

3. The Fourth Request

On June 26, 2009, Market Regulation sent a letter to Jeffrey Lane and Marcus Lane, pursuant to Rule 8210, stating that the Four Categories previously requested had "not been provided" and requesting those items again by July 3, 2009. Market Regulation advised that "your continued failure to furnish the requested information may constitute grounds for disciplinary action."

On July 1, 2009, Marcus Lane responded by e-mail. He wrote that Greenwich High Yield had supplied all customer account statements and trade tickets requested and "[o]ver the past several years . . . ha[d] provided all the voluminous records requested on multiple occasions." He continued that Greenwich High Yield "has closed . . . and no longer has . . . office equipment . . . to continue appeasement of FINRA's repeat requests and continued harassment," and offered to send all of the firm's historical records. Marcus Lane did, however, provide some information responsive to the request for his electronic communications, asserting that "[a]lmost all correspondence with customers is done on the phone" and that "email or texting was never used at all."

4. The Fifth and Sixth Requests

On July 6, 2009, Market Regulation sent Jeffrey Lane and Marcus Lane another Rule 8210 request. Despite the information that Marcus Lane had provided in response to the request for his electronic communications, Market Regulation's letter stated that the Lanes had failed to provide the information and documents that were previously requested in the fourth request, and reiterated its request for the Four Categories. The letter also conveyed Market Regulation's understanding that Marcus Lane was in possession of Greenwich High Yield's hard drive "contain[ing] [the firm's] electronic communications" and stated that "[i]f you provide access . . ., [FINRA] staff will arrange to copy and return it to you." The staff asked the Lanes to coordinate such access and provide all other requested information by July 17, 2009.

On July 15, 2009, Marcus Lane sent an e-mail to Market Regulation responding to the July 6, 2009 request. He repeated his prior assertions: that he responded numerous times to FINRA's requests; sent all customer account information, trade tickets and "other documentation"; lacked office equipment to make further responses; and offered to provide all of Greenwich High Yield's historical records. He added that "the nature of [the High Yield Entities] . . . has been provided on several occasions in the annual audit" and that he "resent[s] any implication of wrong doing." And he again provided a response to the request for his electronic communications, stating that the firm "only conducts institutional business and has no discretionary authority," that its "[i]nstitutional accounts do not give standing orders," that "[a]lmost all business" is done "via the phone," and that he "never used Email, instant messaging or texting for business."

5. The Seventh Request

On July 16, 2009, Market Regulation responded by sending an e-mail to Marcus Lane pursuant to Rule 8210, with a copy to Jeffrey Lane. Market Regulation clarified that its request for e-mails was "not limited to emails between you and a customer." It also shared its understanding from Jeffrey Lane "that the firm used email" and that Marcus Lane "retained the hard drive that contains the firm's electronic communications." It requested that the Lanes, if they no longer had access to the firm's e-mails, state so in writing and explain why they lacked access. Market Regulation further asked the Lanes that, if they still had access to the firm's e-mails, to "immediately . . . make arrangements for FINRA to copy the communications." Finally, Market Regulation wrote that "[w]hether information was provided during FINRA 'audits' does not excuse your obligation[s]" and that "[o]ffering to provide all of the firm's records for 15 years of business . . . does not satisfy your obligations." Market Regulation concluded by warning that "[f]ailure to comply could result in disciplinary action."

6. The Notice of Suspension and the Lanes' Responses

On July 31, 2009, Market Regulation notified Jeffrey Lane and Marcus Lane, pursuant to FINRA Rule 9552, that they would be suspended on August 24, 2009, because they had failed to comply with its requests for information and documents. The notices stated that if they took corrective action by complying with the requests before the suspension date, the suspension would not take effect. Subsequently, Market Regulation extended Marcus Lane's suspension date to September 8, 2009, when his Notice of Suspension was returned with a forwarding address.

On August 14 and 24, 2009, Jeffrey and Marcus Lane, respectively, filed requests for a hearing pursuant to FINRA Rule 9552(e), which stayed the suspensions. Jeffrey Lane asserted, in relevant part, that "currently, the only thing that . . . FINRA lack[s] [is] [Marcus Lane's] e-mail correspondence." Jeffrey Lane continued that his brother "conducts almost all of his transactions by telephone" and "has never once used his e-mail . . . to conduct any business." In Marcus Lane's request for hearing, he again stated that he and Greenwich High Yield had provided "voluminous responses [i]n this ongoing 3 year . . . inquiry," and that the requested documents are "now more difficult to obtain." On the same day he requested a hearing, Marcus Lane also provided Market Regulation with "authorization letters" to his wireless provider (Verizon) and his e-mail hosting service (Half-Price Hosting) for the "retrieval of any information by FINRA" for the 2006-2007 period.

7. The Eighth Request

On August 28, 2009, Market Regulation responded by letter to Marcus Lane, with a copy to Jeffrey Lane. It thanked him for providing the authorization forms, explained that it had learned that his wireless provider and email hosting service did not maintain text messages or e-mails from the requested time period, and stated that nothing more was required in connection with the wireless provider. Market Regulation conveyed, however, that it "continued to request access" to Greenwich High Yield's hard drive "as an alternative to . . . producing the emails," and that its requests for the remainder of the Four Categories—the identities of all Greenwich High Yield accounts involved in the identified transactions, the new account forms for such

accounts, and ownership and investment authority information concerning Greenwich High Yield and the High Yield Entities—remained outstanding.[34]

8. Marcus Lane Responds to the Outstanding Requests

On September 24 and 26, 2009, Marcus Lane agreed to provide FINRA with access to the three hard drives in his possession and "have Jeff look for" High Yield Partners Income's new account application.[35] He also provided—in just a few sentences—ownership and investment authority information concerning Greenwich High Yield and the High Yield Entities. On October 23, 2009, Market Regulation moved to dismiss the Rule 9552 proceeding on the grounds that the Lanes had "completed production" on October 20, 2009, just ten days before the scheduled hearing.[36] The Rule 9552 proceeding was dismissed on October 28, 2009.

B. Discussion

FINRA Rule 8210(a) provides, in pertinent part, that, for the purpose of an investigation or proceeding authorized by the FINRA By-Laws or rules, FINRA staff shall have the right to "require a . . . person associated with a member, or . . . person subject to FINRA's jurisdiction to provide information . . . in writing . . . or electronically . . . with respect to any matter involved in the investigation . . . or proceeding." It further authorizes FINRA staff to "inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation . . . or proceeding." FINRA Rule 8210(c) provides that "[n]o member or person shall fail to provide information . . . or to permit an inspection and copying of books, records, or accounts pursuant to this Rule."

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[34] In its August 28, 2009 letter, Market Regulation informed Marcus Lane that he would be suspended unless he took corrective action or requested a hearing by September 8, 2009. Marcus Lane, however, had already requested a hearing.

[35] An e-mail dated September 24, 2009, from Market Regulation memorialized its understanding of Marcus Lane's agreement. The e-mail contained nothing concerning whether Market Regulation continued to request any new account forms besides the one for High Yield Partners Income's account.

[36] Although Market Regulation indicated that the Lanes had "completed production," it is unclear exactly what that meant concerning its request for the various new account forms. With respect to the new account form for High Yield Partners Income's account, a Market Regulation analyst testified that the Lanes never produced a new account form for High Yield Partners Income's account. Evidently, the Lanes satisfied that request in some other fashion. The record contains the new account form for High Yield Partners' account, but the record also suggests that it could have been a copy that was already produced in response to an earlier request in 2007. As for MM's, GE's, or AE's new account forms, there is no indication whether the Lanes ever produced those forms, whether they satisfied the request for those forms in some other fashion, or whether Market Regulation simply dropped its request for them.

FINRA Rule 8210 "is at the heart of the self-regulatory system for the securities industry." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009). It "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations." *Id.* (citation omitted). The failure to respond to FINRA information requests "frustrates [FINRA]'s ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008) (citation omitted), *petition for review denied*, 566 F.3d 1172 (D.C. Cir. 2009). Likewise, "[d]elay and neglect" in responding to Rule 8210 requests "undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *Berger*, 2008 SEC LEXIS 3141, at *13; *see also Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *25-26 (Sept. 10, 2010) (explaining the importance of "timely cooperation" and barring respondent who responded to request for information only after a complaint was filed), *petition for review denied*, 436 F. App'x 31 (2d Cir. 2011).

If an associated person "cannot readily provide the information sought by [FINRA], such a person ha[s] an obligation to explain, as completely as possible, his efforts, and his inability to do so." *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *23-24 (Jan. 30, 2009) (internal quotation marks omitted). If the associated person does not have the information, he has "a responsibility to provide a detailed explanation of [his] efforts to date to obtain the information requested and the problems [he] encountered." *Id.* If there is a problem meeting any deadlines set by FINRA, applicants should raise and resolve such problem with FINRA staff in a cooperative and prompt manner. *Id.*; *see also Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18 (Nov. 8, 2007) ("[R]ecipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot."); *cf. Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, slip op. at 9 (Dec. 11, 2006) (holding that a member or an associated person has "an obligation to respond to [a FINRA] request even if his response [is] a statement that he believed he had already provided [FINRA] with the information it had requested").

As explained below, we agree with the Hearing Panel's findings that the Lanes failed to provide the requested ownership and investment authority information, and we further find that the Lanes failed to comply with Rule 8210 in a number of other respects.

1. Ownership and Investment Authority Information

On six separate occasions between March 6 and August 28, 2009, Market Regulation asked for information concerning the ownership of, and the persons with investment authority for, Greenwich High Yield and the High Yield Entities. Instead of providing the information requested, the Lanes repeatedly asserted that the information had already been provided and offered access to all of Greenwich High Yield's historical records. Those responses were not responsive, helpful, or cooperative. Marcus Lane did not provide the requested information until September 26, 2009, more than six months after it was first requested of Jeffrey Lane, three months after it was first requested of Marcus Lane, and with a hearing in the expedited proceeding about to be held. The Lanes' repeated failures to respond to this aspect of the request was a violation of Rule 8210.

2. Marcus Lane's Electronic Communications

In addition, the Lanes failed to respond in a timely manner to Market Regulation's request for Marcus Lane's electronic communications. Market Regulation first requested these documents from Jeffrey Lane on March 6, 2009, and it took nearly four months to get even a minimal amount of cooperation from him. In his March 23, 2009 response, Jeffrey Lane neither produced the electronic communications, nor made any specific representations about why he failed to do so. In May 2009, after producing documents that were responsive to other portions of the Rule 8210 request, Jeffrey Lane attempted to wash his hands of his outstanding compliance obligations, informing Market Regulation that he needed to "focus all of my attention and energy" on taking the Connecticut Bar Examination in July and asking it to direct future requests to Marcus Lane.

In July 2009, the Lanes provided some cooperation with the request for electronic communications. In two timely responses to Market Regulation's June 26 and July 6, 2009 requests for those documents, Marcus Lane informed Market Regulation that he never communicated with customers via e-mail, text messages, or instant messages, and that almost all his business was done over the phone. And sometime before July 16, 2009, Jeffrey Lane finally made an attempt to respond and explain why he could not provide the requested electronic communications, informing Market Regulation that Greenwich High Yield used email and that Marcus Lane retained the hard drive that maintained the firm's electronic communications.[37]

Subsequent requests by Market Regulation for the electronic communications, however, met with more untimely responses. In a July 16, 2009 e-mail to Marcus Lane, of which a copy was sent to Jeffrey Lane, Market Regulation clarified that its request was "not limited to e-mails between you and a customer" but included any "that you sent or received at [Greenwich High Yield]."[38] Market Regulation also referred to the hard drive, requested a statement concerning whether the Lanes no longer had access to the requested e-mails, and asked that they either explain why they lacked access or "immediately . . . make arrangements for FINRA to copy the communications." On July 31, 2009, having received no response, Market Regulation filed the Notice of Suspension. The Lanes did not respond until August 24, 2009, when Marcus Lane provided the authorization letters to his wireless provider and his email hosting service. While this was a reasonable response—FINRA staff also had been amenable to receiving an authorization form to retrieve Bloomberg messages instead of the messages themselves—it was still untimely, given that it came 39 days after Market Regulation had asked for an "immediate" response.

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[37] While the Lanes' statements about the use of electronic communications differed, there is no evidence that either Jeffrey Lane or Marcus Lane was being untruthful. In this regard, the record contains no e-mails of Marcus Lane's during the relevant period or any evidence that the hard drive contained any of his electronic communications.

[38] Marcus Lane's initial interpretation of the request as being limited to business communications was not unreasonable, given that, by its terms, it pertained to referenced securities transactions.

In sum, there were two failures to respond timely to the request for electronic communications: (1) Jeffrey Lane's failure to inform Market Regulation about the firm's hard drive until around July 16, 2009, more than four months after the first request for the electronic communications; and (2) the Lanes' joint failure to provide the authorization forms for the e-mail hosting service and wireless communications carrier until August 24, 2009, which was 39 days after FINRA asked for an "immediate" response. This conduct violated Rule 8210.[39]

3. High Yield Partners Income New Account Form

In its Rule 8210 requests dated March 6, 2009, June 26, 2009, July 6, 2009, and August 29, 2009, Market Regulation repeatedly requested High Yield Partners Income's new account form. The Lanes did not ultimately respond to that request (in some fashion) until sometime between September 24 and October 20, 2009, more than six months after it was first requested from Jeffrey Lane and three months after it was first requested from Marcus Lane. Before they ultimately provided some form of response (they never provided the actual document), the Lanes offered only months of excuses, unreasonable offers, and arguments, including that Greenwich High Yield had boxed its records, that they would send to FINRA all of Greenwich High Yield's historical records, and that they had already provided FINRA with the requested information. The Lanes' failure to respond to the request for the High Yield Partners Income new account form until sometime between September 24 and October 20, 2009, was a violation of Rule 8210.

VII. Procedural Issues

The Lanes raise a variety of procedural issues, but they all lack merit. The Lanes argue that the transactions concerning the Tower bonds (Trade Sets 7-11) are outside of FINRA's jurisdiction because they were "foreign bonds" and because Market Regulation did not prove that such bonds were registered in the United States. FINRA has jurisdiction over the transactions, however, because they were domestic transactions. *Morrison v. Nat'l Australia Bank*, 130 S. Ct. 2869, 2884 (2010) (holding that Section 10(b) applies to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities").[40]

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[39] Included within Market Regulation's request for Marcus Lane's electronic communications was a request for Bloomberg messages. Market Regulation later changed that request to one for a signed form authorizing FINRA to retrieve such Bloomberg messages. Market Regulation did so in response to the Lanes explaining that they no longer had a contract with Bloomberg and that, therefore, the costs they would incur to retrieve the requested Bloomberg messages would be substantial. We do not find that the Lanes' failure to produce the Bloomberg authorization form earlier than they did was a violation of Rule 8210. Market Regulation agreed to modify its request based on cost considerations, and the Lanes provided the Bloomberg authorization form once Market Regulation addressed those cost concerns in a clear manner.

[40] Jeffrey Lane argues that *Morrison* is not authoritative because it was decided after the trades at issue. Judicial decisions usually apply retroactively, however, and we see no reason why that should not be the case here. Moreover, the Lanes have pointed to no pre-*Morrison*

[Footnote continued on next page]

The Lanes also generally complain about the length of Market Regulation's investigation. Section 15A(b)(8) requires a "fair procedure for the disciplining of members and persons associated with members"). The Commission has held that, "under certain circumstances inordinate time delays can render a proceeding inherently unfair and be cause for dismissal." *William D. Hirsh*, 54 S.E.C. 1068, 1077 (2000). There is nothing to indicate, however, that the amount of time it took Market Regulation to complete the investigation resulted in an unfair disciplinary proceeding.

The time between the first violative conduct in October 2006 and the April 2011 filing of the complaint was approximately four and one-half years. This time period does not, on its face, suggest any unfairness. *Cf. Hirsh*, 54 S.E.C. at 1077 (rejecting argument that proceedings should be dismissed where FINRA brought disciplinary proceedings more than seven years after the underlying misconduct). This is all the more so considering that the Lanes caused some delays through their failures to respond timely to FINRA's Rule 8210 requests. Moreover, the Lanes have not demonstrated any resulting prejudice. Jeffrey Lane complains that Market Regulation did not provide sufficient notice of the allegations and that "all of the market levels, indications of bids and offers, and relative pricing are long gone." With regard to the trades in Werner and Collins-Aikman bonds, however, the TRACE audit trail reports in the record provide detailed price information and, as explained above, bids and offers are not reliable measures of the prevailing price. With regard to the trades in Tower bonds, Jeffrey Lane's assertions of prejudice lack any specifics. He has not explained the available sources of historical price information or any steps he took to obtain such information. Moreover, Marcus Lane was always required to be prepared to justify a mark-up greater than five percent with documentation. The fact that he may not have maintained historical pricing information does not thereby strip FINRA of the ability to bring an enforcement action. In sum, this record does not reflect unfairness resulting from the length of Market Regulation's investigation. *Cf. Mark Love,* Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *16 (Feb. 13, 2004) (rejecting assertions of unfairness where the record did not show that respondent's ability to mount an adequate defense was harmed by any delay in the filing of a complaint).

Marcus Lane complains that the Hearing Panel members lacked experience in institutional sales and trading or distressed investing. While FINRA Rule 9232(d) provides that panelists shall be chosen from a designated pool of persons based on, among other factors, their "expertise," there is no evidence from the hearing concerning the panelists' expertise or any indication that their appointment constituted procedural error. Regardless, the Hearing Panelists' expertise had no effect on the Lanes' ability to introduce evidence in support of their cases, and our de novo review of that evidence cures whatever procedural error existed below, if any. *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *38 (Oct. 20, 2011).

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authority holding that the Exchange Act and FINRA rules did not apply to the transactions involving bonds like the Tower bonds, nor are we aware of any.

Jeffrey Lane contends that the Hearing Officer exhibited bias at the hearing, including sustaining Market Regulation's objections while overruling the Lanes' objections and creating a situation where the Lanes were "rushed." We see no such unfairness. "[A]dverse rulings, by themselves, generally do not establish improper bias." *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *43-44 (Dec. 7, 2010) (citation omitted) (explaining that to prevail on a claim of adjudicatory prejudice, an applicant must demonstrate that the bias stemmed from an extrajudicial source and resulted in a decision on the merits based on matters other than those gleaned from participation in a case). Moreover, FINRA Rule 9235 authorizes a Hearing Officer "to do all things necessary and appropriate to discharge his or her duties," including "regulating the course of the hearing," and our review of the hearing transcript shows that the Hearing Officer gave the Lanes a sufficient opportunity over two hearing days to present their case.[41] *Cf. Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *63-64 (Jan. 30, 2009) (rejecting claim that the Hearing Officer set too short a schedule), *petition for review denied*, 416 F. App'x 142 (3d Cir. 2010).

Finally, the Lanes argue that the Hearing Panel issued its decision late. But FINRA Rules do not set a deadline for the issuance of the Hearing Panel's decision. Rather, FINRA Rule 9268(a) requires only that the Hearing Officer prepare a written decision that reflects the views of the Hearing Panel within 60 days of the hearing. *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *77 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). There is no evidence that the Hearing Officer did not comply with that deadline. Accordingly, the Lanes' various procedural challenges fail.[42]

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[41] For example, the Hearing Officer permitted Marcus Lane to make an extensive opening statement, stating that she "wanted [him] to be able to make [his] complete story." As another example, the Hearing Officer gave Jeffrey Lane "leeway" to resume his cross-examination of Market Regulation's analyst, after Jeffrey Lane indicated that he had "miss[ed] a couple of questions." As a third example, the Hearing Officer overruled several of Market Regulation's objections to Jeffrey Lane's questioning of the expert witness and offered to give him an overnight opportunity "to focus on whatever remaining questions [he] might have." In a fourth example, when Marcus Lane's questioning of a FINRA analyst drew objections, the Hearing Officer explained at length why his questioning was inappropriate and guided him on what proper questioning would consist of.

[42] In his brief, Jeffrey Lane requests that the NAC amend the record to include numerous communications between the Lanes and FINRA. That request is denied. Assuming that his request is for leave to introduce additional evidence into the record, it was late, and he has not explained why there is a good cause to grant an extension of time, let alone explain why there was good cause for not introducing such evidence below. *See* FINRA Rule 9346(b).

VIII. Sanctions

In assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein and any other case-specific factors.[43]

A. Interpositioning, Excessive Mark-ups, and Fraud

For Marcus Lane's interpositioning, mark-ups, and fraud violations, the Hearing Panel barred Marcus Lane from associating with any member firm and ordered him to pay $317,030.70 in restitution to three customers (jointly and severally with Jeffrey Lane). As explained below, we affirm the bar, vacate the restitution order, and require Marcus Lane to disgorge $218,582 in ill-gotten gains.

Because these violations result from the same course of conduct, a unitary sanction is appropriate. There are no Guidelines for interpositioning violations. For excessive mark-ups/mark-downs, the Guidelines recommend a fine of $5,000 to $100,000 plus, if restitution is not ordered, the gross amount of the excessive mark-ups or mark-downs. In addition, the Guidelines recommend suspending the respondent in any or all capacities for up to 30 business days. In egregious cases, we are to consider imposing a suspension in any or all capacities for up to two years or a bar.[44]

For negligent misrepresentations or material omissions of fact, the Guidelines recommend a fine between $2,500 and $50,000, and a suspension in any or all capacities for up to 30 business days.[45] For intentional or reckless misrepresentations or material omissions of fact, the Guidelines recommend that adjudicators consider imposing a fine between $10,000 to $100,000, a suspension in any or all capacities of 10 business days to two years, and, in egregious cases, a bar.[46]

1. Bar

There are several aggravating factors. Marcus Lane had discretion as to the amount of the mark-ups on each trade.[47] He engaged in numerous acts of misconduct over a period of

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

44 *Id.* at 90.

45 *Id.* at 88.

46 *Id.*

47 *Id.* at 90 (Principal Considerations in Determining Sanctions, No. 2).

several months.[48] By omitting to disclose the excessive mark-ups from his customers, he concealed his misconduct.[49] His violations caused three customers to pay substantial amounts of excessive mark-ups and resulted in the potential for his monetary gain as an 80% owner of Greenwich High Yield and a 100% owner of the High Yield Entities.[50] He acted intentionally.[51] Moreover, Marcus Lane has expressed that he has no remorse.

Marcus Lane argues that he never had a customer complaint since he entered the industry. However, a "lack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional." *Dep't of Enforcement v. Craig*, Complaint No. E8A2004095901, 2007 FINRA Discip. LEXIS 16, at *24 (FINRA NAC Dec. 27, 2007) (rejecting argument that absence of disciplinary history and prior customer complaints deserved mitigation), *aff'd*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844 (Dec. 22, 2008). It is also not mitigating that the customers at issue here may not have complained. *Mission Sec. Corp.*, 2010 SEC LEXIS 4053, at *23 (holding that FINRA's "power to enforce its rules is independent of a customer's decision not to complain") (citation omitted).

Another consideration is the level of sophistication of the injured or affected customer.[52] In its brief, Market Regulation emphasizes that the customers were "elderly." While Marcus Lane agreed that the customers were "older gentlemen," he contends that they were experts in distressed bond trading and highly sophisticated investors.[53] Given that Marcus Lane's claims in this regard are uncontradicted, we find that the customers were sophisticated, which provides some mitigation. Nevertheless, the customers' sophistication did not give Marcus Lane free reign to fraudulently omit the material fact that he was charging them excessive mark-ups totaling hundreds of thousands of dollars. *Cf. Dep't of Enforcement v. Glodek*, Complaint No. E9B2002010501, 2009 FINRA Discip. LEXIS 1, at *24 (FINRA NAC Feb. 24, 2009) (granting

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48 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 18).

49 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

50 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 17).

51 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

52 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 19).

53 Marcus Lane claimed that customer GE was worth more than $100 million, owned three or four entities that held institutional accounts, had a law degree, and had done "a lot of bankruptcy work over a 60 year career." He claimed that customer MM had purchased approximately "50 million of United bonds" from Marcus Lane during the course of their relationship, had sold "every share . . . through the exchange" where he has a seat, and was a former "NASD broker." Marcus Lane also testified that both customers had "a lot of dealer relationships," would "check around with multiple dealers," and that GE had been "doing this for 60 years."

some mitigation based on the sophistication of the customers but stating that, "[i]rrespective of the customers' sophistication, [respondent] was not free to make material misrepresentations"), *aff'd*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936 (Nov. 4, 2009); *Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (stating that a customer's investment experience does not give a representative "license to make fraudulent representations"), *petition for review denied*, 828 F.2d 844 (D.C. Cir. 1987).

Considering the totality of these facts and circumstances—and notwithstanding our reversal of certain findings of fraud—we find that Marcus Lane's interpositioning, excessive mark-ups, and fraudulent omissions were egregious, and that he poses a serious threat to the investing public. To remedy these violations, we bar Marcus Lane from associating with any member firm.

2. Disgorgement

Although the Hearing Panel ordered restitution, we find this case to be more suitable for a disgorgement analysis. To remediate misconduct, the Guidelines instruct us to consider a respondent's ill-gotten gains when fashioning an appropriate sanction.[54] "[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched." *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991). "We may order disgorgement after a reasonable approximation of a respondent's unlawful profits." *Dep't of Enforcement v. Evans*, Complaint No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *40 n.42 (FINRA NAC Oct. 3, 2011); *Laurie Jones Canady*, 54 S.E.C. 65, 84 (1999) (noting that "courts have held that the amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation") (internal quotation marks omitted), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000). Any risk of uncertainty in calculating disgorgement "falls upon the wrongdoer whose misconduct created the uncertainty and who bears the burden of proving that the measure is unreasonable." *Evans*, 2011 FINRA Discip. LEXIS 36, at *40 n.42.

In the 11 Trade Sets, Marcus Lane charged the two customers aggregate mark-ups totaling $317,030.70. Allowing for a five percent mark-up over Greenwich High Yield's contemporaneous cost in each transaction with the customers—which still might be excessive—the aggregate excessive mark-ups totaled $236,513.60. After accounting for the different portions of such mark-ups that Greenwich High Yield and the High Yield Entities earned, and considering that Marcus Lane was an 80% owner of Greenwich High Yield and a 100% owner of the High Yield Entities, a reasonable approximation of his ill-gotten gains is $218,582. He contends that the mark-ups he earned were "depleted" through taxes, trading losses, and business losses. Such factors do not, however, justify a modification of the disgorgement award. *See Canady*, 54 S.E.C. at 84.

The Guidelines indicate that, in appropriate cases, disgorged funds be used to redress harms suffered by customers.[55] Therefore, instead of ordering that the disgorgement amount be

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[54] *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

[55] *Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

paid to FINRA, we order that Marcus Lane pay disgorgement of $117,284 to GE/AE and $101,297 to MM, including prejudgment interest on these amounts calculated from May 2, 2007, the date of the last transaction at issue.

B. Deficient Supervisory Procedures and Failure to Supervise

We now turn to the appropriate sanctions for Jeffrey Lane's supervisory violations. For deficient WSPs, the Guidelines recommend that we consider imposing a fine between $1,000 and $25,000 and, in egregious cases, a suspension in any and all capacities for up to one year.[56] For failures to supervise, the Guidelines recommend imposing a fine of $5,000 to $50,000 and suspending the responsible individual in all supervisory capacities for up to 30 business days.[57] In egregious cases, the Guidelines recommend a suspension in any or all capacities for up to two years or barring the responsible individual.[58] The Hearing Panel barred Jeffrey Lane and imposed a restitution order. We find, however, that barring him from associating with any member firm in any principal or supervisory capacities is a more appropriately tailored sanction.

There are numerous aggravating factors. Given that the WSPs Jeffrey Lane drafted failed to include anything regarding interpositioning or any procedures concerning how to monitor for excessive mark-ups, the supervisory procedures may have played some part in allowing Marcus Lane's violative conduct to escape detection.[59] Jeffrey Lane ignored repeated warnings that should have resulted in additional supervisory scrutiny.[60] The underlying misconduct that Jeffrey Lane failed to supervise occurred over several months, involved numerous transactions, and resulted in substantial harm to customers.[61] Because Jeffrey Lane was a 20% owner of Greenwich High Yield, his failure to supervise resulted in the potential for his monetary or other gain.[62]

Jeffrey Lane admits that the WSPs contained nothing about interpositioning but maintains that he considered Marcus Lane's activity to be "valid risk trading." To the extent that Jeffrey Lane is arguing that he did not understand what interpositioning was, such lack of awareness is not mitigating. At the time, he had significant industry experience. Furthermore, registered representatives are responsible for understanding their regulatory obligations, and ignorance of those obligations does not excuse a violation of FINRA's Rules. *Harry Friedman*,

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56 *Guidelines*, at 104.

57 *Id.* at 103.

58 *Id.*

59 *Id.* at 104 (Principal Considerations in Determining Sanctions, No. 1).

60 *Id.* at 103 (Principal Considerations in Determining Sanctions, No. 1).

61 *Id.* (Principal Considerations in Determining Sanctions, No. 2).

62 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

Exchange Act Release No. 64486, 2011 SEC LEXIS 1699, at *33 (May 13, 2011). And even if Jeffrey Lane did not understand that the conduct had resulted in interpositioning, he was still aware that the mark-ups being charged to the customers were not based on Greenwich High Yield's contemporaneous cost, and should have known that he was not entitled to charge an excessive mark-up based on the fact there may have been some risk involved.

Moreover, the record demonstrates that Jeffrey Lane's supervisory failures were intentional.[63] The excessive mark-ups are obvious based on just a cursory review of the transactions. Jeffrey Lane's intent is further reflected by the way in which he drafted Greenwich High Yield's WSPs. Specifically, those WSPs expressly stated that "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% policy'" and conveyed that the firm had raised this very complaint with FINRA. The WSPs also listed some of the general considerations in FINRA's mark-up policy but omitted the important considerations that "[a] mark-up pattern of 5% or even less may be considered unfair or unreasonable under the '5% Policy'" and that "[i]n the absence of other bona fide evidence of the prevailing market, a member's own contemporaneous cost is the best indication of the prevailing market price of a security." IM-2440(a)(3) and (4). The way in which Jeffrey Lane wrote the WSPs—which undermined the 5% Policy and cast aside the importance of a firm's contemporaneous cost—bolsters the finding that his supervisory failures were intentional ones.

Jeffrey Lane advances several claims of mitigation, but they lack merit. He argues that it is mitigating that he has never been subject to a customer complaint. As explained above, however, the absence of prior customer complaints is not mitigating. Jeffrey Lane also argues that Market Regulation's allegations have been published in Florida, causing "significant harm." Such considerations, however, do not warrant a reduction in the sanctions. *See, e.g.*, *Dep't of Enforcement v. Jordan*, Complaint No. 2005001919501, 2009 FINRA Discip. LEXIS 15, at *53-54 (FINRA NAC Aug. 21, 2009) (rejecting as mitigating that respondent's "personal and business reputation [was] besmirched and livelihood threatened by attention seeking reporters and zealous regulators"). He also argues that his registration was terminated in 2009 and that he has already served the equivalent of a suspension more than two years. Being no longer registered or employed in the securities industry, however, is not mitigating. *Cipriano*, 2007 NASD Discip. LEXIS 23, at *40-41 (determining that the impact that a matter has upon a respondent's career does not mitigate sanctions).

Considering the aggravating factors, we find that Jeffrey Lane's supervisory failures were egregious and that he poses a risk to investors were he to act as a principal or supervisor again. For these reasons, we bar Jeffrey Lane from associating with any member firm in any principal or supervisory capacity.

C. Failing to Respond

The Guidelines for failures to respond are divided into three categories: (1) failing to respond or respond truthfully; (2) providing a partial but incomplete response; and (3) failing to

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63 *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 13).

respond in a timely manner.[64] The Hearing Panel, which focused on the Lanes' failure to provide responses to a single portion of the Rule 8210 requests made in 2009, found that the Lanes' Rule 8210 violations fell into the first category, a failure to respond. We find, however, that the most appropriate characterization of the Lanes' violations is that they failed to respond in a timely manner.

The record precludes a finding that the Lanes failed to respond completely. Market Regulation's investigation spanned several years, during which time the Lanes partially complied with the Rule 8210 requests. Jeffrey Lane provided responsive information to two requests made in 2007 and 2008, and the Lanes provided timely responses to numerous portions of the 2009 requests.[65] But as explained above, the Lanes did not finally provide all of the information requested in 2009 until months after it was first requested and well beyond the required deadlines. Based on these facts, the most appropriate characterization of the Lanes' conduct is that it was a failure to respond in a timely manner.

For such violations, the Guidelines recommend imposing a fine between $2,500 and $25,000.[66] The Guidelines further recommend imposing a suspension in any or all capacities for up to two years.[67] The Principal Considerations include, among other things: (1) the importance of the information requested as viewed from FINRA's perspective; (2) the number of requests made and the degree of regulatory pressure required to obtain a response; and (3) the length of time to respond.[68]

From FINRA's perspective, obtaining the requested ownership and investment authority information was critical to its investigation of the interpositioning scheme. Moreover, the degree of regulatory pressure that Market Regulation had to bring to obtain that category of information

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64 *Guidelines*, at 33.

65 For example, in its March 6, 2009 request, Market Regulation asked Jeffrey Lane to produce, by March 27, 2009 many documents from the 2006 and 2007 time period. Although Jeffrey Lane did not produce any of those 2006-2007 documents by the deadline—and notwithstanding the complaints he made about FINRA's inquiries—he made a timely attempt to explain the deficiencies in his response (explaining that the firm's records were boxed off-site), subsequently engaged in discussions with Market Regulation, and provided some responsive documents approximately two months after the deadline. As another example, on August 28, 2009, Market Regulation requested access to the firm's hard drive. Although Market Regulation had previously discussed the hard drive with the Lanes, the August 28, 2009 request was the first time Market Regulation *required* that the Lanes provide access to it. Marcus Lane did so in late September 2009, and there is no evidence that this was an untimely response.

66 *Guidelines*, at 33.

67 *Id.*

68 *Id.*

was substantial and is a highly aggravating factor. Specifically, Market Regulation made six requests and filed an expedited proceeding, and the Lanes did not complete their responses until the hearing in the expedited proceeding was approaching. In addition, it took months for the Lanes to fully comply with the request. Even if the Lanes had previously provided the requested information, that was no excuse for not providing it again, especially considering that it required only two written sentences to convey.

Moreover, the way in which each brother attempted to blame, or pass off his responsibilities to, his other brother reflects a failure to accept personal responsibility.[69] For example, at one point Jeffrey Lane asked that FINRA direct all future requests to Marcus Lane citing a personal need to study for the bar exam. And one of Marcus Lane's excuses for not complying with the Rule 8210 requests directed to him and his brother was that his brother Jeffrey was "in charge of complying."

The Lanes' Rule 8210 violations warrant sanctions at the upper end of the sanctions range. It would be appropriate to impose a two-year suspension in all capacities and a $25,000 fine on Marcus Lane, and a two-year suspension in all capacities and a $25,000 fine on Jeffrey Lane. We impose these sanctions on Jeffrey Lane, but do not impose them on Marcus Lane in light of the bar that we have imposed on him for his interpositioning, excessive mark-ups, and fraud violations.[70]

IX. Conclusion

Accordingly, we find that: (1) Marcus Lane engaged in interpositioning, charged excessive mark-ups, and willfully failed to disclose (in nine of the transactions with customers) the excessive mark-ups that resulted from the interpositioning, in violation of NASD Rules 2120, 2110, 2320(b), 2440, and IM-2440, and in willful violation of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder; (2) that Jeffrey Lane was responsible for deficient supervisory procedures and failed to supervise Marcus Lane, in violation of NASD Rules 3010 and 2110; and (3) that both Marcus Lane and Jeffrey Lane violated FINRA Rules 8210 and 2010 in a number of respects. We reverse the findings that Marcus Lane fraudulently omitted to disclose the excessive mark-ups in three of the transactions with customers.

Marcus Lane is barred from associating with any member firm in all capacities and ordered to pay disgorgement of $117,284 to GE/AE and $101,297 to MM, including prejudgment interest on these amounts calculated from May 2, 2007, for his interpositioning, excessive mark-ups, and fraudulent omissions.[71] No separate sanction is imposed on Marcus

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69 *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

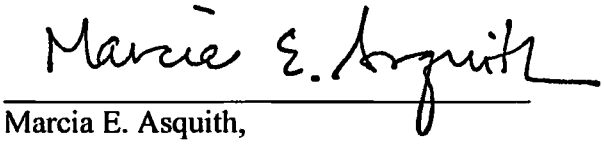
70 The sanctions we impose are designed not only deter the Lanes specifically, but also to deter future misconduct and improve overall business standards in the industry. *See Guidelines*, at 2 (General Principles applicable to All Sanction Determinations, No. 1).

71 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), the same

[Footnote continued on next page]

Lane for his Rule 8210 violations. Jeffrey Lane is barred from associating with any member firm in any principal or supervisory capacity for his supervisory violations, and he is suspended for two years from associating with any member firm in any capacity and fined $25,000 for his failures to respond. We vacate the restitution order imposed by the Hearing Panel. Finally, we affirm the order that respondents pay $4,282.65 in hearing costs (jointly and severally).[72]

On Behalf of the National Adjudicatory Council,



Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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rate that is used for calculating interest on restitution awards. *Guidelines*, at 11 (Technical Matters).

[72] We also have considered and reject without discussion all other arguments advanced by the parties.

Pursuant to FINRA Rule 8320, the registration of any person associated with a member who fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be revoked for non-payment.