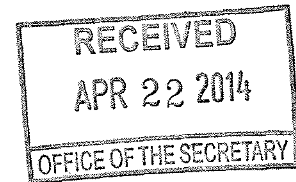

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Robert Marcus Lane

and

Jeffrey Griffin Lane

For Review of

FINRA Disciplinary Action

File No. 3-15701

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Michael Garawski
Associate General Counsel

FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8835

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FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

This case involves a trio of violations that Robert Marcus Lane ("Marcus Lane") committed intentionally—interpositioning, charging excessive mark-ups, and fraud—and the failure of Jeffrey Griffin Lane ("Jeffrey Lane") to supervise his brother Marcus' obvious misconduct. On 11 separate occasions over a six-month period, Marcus Lane, on behalf of Greenwich High Yield, LLC ("Greenwich High Yield"), purchased distressed bonds from another broker-dealer, immediately sold them to an entity he solely owned, bought them back within minutes, and immediately sold them to customers. In the second, third, and fourth legs of these four-legged trade sets, Marcus Lane increased the transaction price nearly every time. As a result, Marcus Lane charged his customers between 6.45% and 40.93% more for the bonds than he paid just minutes earlier to acquire them. Each of the aggregate mark-ups exceeded 5%—

FINRA's longstanding guidepost—by an amount totaling $236,513, and most exceeded the 10% threshold that is fraudulent *per se*. Moreover, Marcus Lane fraudulently omitted to inform his customers that their prices exceeded his contemporaneous cost by excessive amounts or that he interjected his solely-owned entities between Greenwich High Yield and the best available market. Given this record, FINRA's National Adjudicatory Council ("NAC") rightly found that Marcus Lane engaged in interpositioning, charged excessive mark-ups, and made fraudulent omissions. Likewise, the NAC correctly found that Jeffrey Lane, who failed to take *any* supervisory actions in response to his brother's conspicuous misconduct or design written supervisory procedures directed towards ensuring compliance with FINRA's rules requiring fair prices and avoiding disadvantageous interpositioning, failed to perform reasonable supervision.

Separately, the Lanes failed to respond in a timely manner to FINRA's requests for information. The record amply supports the NAC's findings that in 2009, the Lanes repeatedly failed to respond timely to FINRA's requests for information that was critical to its investigation. Ultimately, it took seven months of repeated requests and escalating regulatory pressure before the Lanes finally responded in full, ultimately providing information that was easy to provide.

In briefs that are notable for the lack of any discussion of the legal standards for evaluating the fairness of mark-ups, the Lanes challenge the NAC's decision on grounds that lack any basis in fact or law. Marcus Lane makes assorted arguments that the mark-ups were fair but proffered no documentation of any unusual expenses or efforts involved with the transactions. The Lanes contend that the NAC ignored purported FINRA policies concerning mark-ups charged on sales of distressed securities yet point to no FINRA authorities supporting their position. The Lanes assert they responded to FINRA's requests in a timely manner but do not address the documentary evidence showing otherwise. They claim that FINRA's proceeding

lacked fairness, but overlook the extensive opportunity they had to advocate their positions, inaccurately describe the hearing, and ignore that FINRA followed its rules. And instead of accepting responsibility, the Lanes cast blame on everyone but themselves, including their own customers, whom the Lanes falsely and dismissively claim had full disclosure of the mark-ups through a trade reporting facility.

The NAC imposed on Marcus Lane a bar and a $218,581 disgorgement order, and it imposed on Jeffrey Lane a bar in all principal and supervisory capacities, a two-year suspension in all capacities, and a $25,000 fine. The NAC's sanctions will protect investors and the public interest, are within the sanctions ranges specified in FINRA's Sanction Guidelines, and are neither excessive nor oppressive. The Commission should affirm the NAC's decision in all respects.

II. STATEMENT OF FACTS

A. Marcus Lane and Jeffrey Lane

Marcus and Jeffrey Lane both entered the securities industry in the mid-1980s. RP 42, 55.[1] Each registered with Greenwich High Yield, a broker-dealer, in 1995, and remained registered there during the relevant trading period (October 2006 to May 2007). Marcus Lane was a general securities representative, a general securities principal, and the firm's CEO and sole trader. RP 642-43, 713, 1368, 1858 n.2. Jeffrey Lane was a general securities representative, a general securities principal, and a financial and operations principal, among other registered capacities, and the chief compliance officer and chief financial officer. RP 644, 921, 1377, 1858 n.2. Jeffrey Lane also was responsible for establishing and maintaining the

[1] "RP _____" refers to the record. "M. Br. ____," "M. NOA," "J. Br. ___," and "J. NOA" refer to Marcus Lane's and Jeffrey Lane's briefs and notices of appeal, respectively.

firm's written supervisory procedures ("WSPs") and supervising Marcus Lane. RP 713-14, 921, 932, 1359.

Marcus Lane and Jeffrey Lane owned 80% and 20%, respectively, of Greenwich High Yield. RP 643-45, 713, 921, 1359. Marcus Lane also solely owned High Yield Partners, LLC, and High Yield Partners Income, LLC (the "High Yield Entities"), which, as described below, are the entities he interposed between the market and his customers in the transactions at issue. RP 715.

B. Interpositioning, Mark-ups, and Fraud

Between October 20, 2006, and May 2, 2007, Marcus Lane, on behalf of Greenwich High Yield, executed 11 trade sets ("Trade Sets") in distressed corporate bonds issued by Werner, R.J. Tower Corp. ("Tower"), or Collins & Aikman.[2] RP 1109, 1121-1211. Each Trade Set generally followed the same, four-leg pattern, which on average was completed in 39 minutes from start to finish. RP 1109; *see also* RP 836. In the first leg, Marcus Lane purchased a specific quantity of corporate bonds from a broker-dealer. Marcus Lane testified that, before doing so, he "assume[d]" he had received "indications of interest" from customers who were "interested in buying attractive merchandise" and "very interested on a price basis." RP 806, 814. In the second leg, Marcus Lane sold the bonds, immediately after acquiring them, to one of the High Yield Entities (which owned accounts at Greenwich High Yield). In the third leg, he purchased the same bonds back, shortly after he had just sold them. In the fourth leg, he immediately sold

[2] References to "Trade Set [Number]" are to one of the eleven Trade Sets listed on Market Regulation's Exhibit CX-1. RP 1109.

them to one of his customers, either Alma Elias and Gabe Elias or Moses Marx.[3] RP 1109. Each Trade Set was completed within one hour except Trade Set 7, which was completed in 138 minutes. RP 1109.

Marcus Lane determined the mark-ups and made trading decisions on behalf of the High Yield Entities. RP 677, 714-16. As a result of his choices, the price that Greenwich High Yield received or paid for the bonds increased on the second, third, and fourth legs in all Trade Sets except Trade Sets 4 and 5, in which the prices stayed the same between two of the legs. RP 1109. The aggregate mark-up—the difference between the firm's initial price and the customer's price—ranged between 6.45% and 40.93% and totaled $317,030.70 for all 11 Trade Sets. RP 676, 1109. Marcus Lane did not disclose to customers the mark-ups or that he had routed the bonds through his High Yield Entities. RP 667, 729-31, 750-51.

C. Supervision Violations

Jeffrey Lane supervised Marcus Lane and admittedly knew all the relevant circumstances concerning his misconduct. Jeffrey Lane prepared the order tickets and entered trade information into the system that reported to the Trade Reporting and Compliance Engine ("TRACE"). RP 926, 933-37. He knew the execution times, the quantities of bonds, the prices, and the customers' identities. RP 935-36. He was aware that Marcus Lane sold the bonds to, and bought them back from, the High Yield Entities. He also knew that Marcus Lane owned and controlled those entities. RP 935-36, 938. Jeffrey Lane also reviewed the mark-ups charged. RP 937. Despite this, Jeffrey Lane reviewed only the mark-ups charged in each separate leg of

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[3] Only Trade Set 3, in which the third and fourth legs were broken into two transactions, diverged from this pattern. RP 1109.

the Trade Sets, never questioned or changed the aggregate mark-ups charged, and never considered whether interpositioning was occurring. RP 937-41, 943.

Jeffrey Lane also was responsible for Greenwich High Yield's WSPs and acknowledged drafting the key section titled "COMMISSIONS SCHEDULE AND WRITTEN MARKUP POLICY." RP 922-23, 929, 1387-1416, 1435-65. He conceded that the WSPs did not identify the individual responsible for reviewing mark-ups, describe the steps to determine the fairness of mark-ups, state the frequency of mark-up reviews, explain how to document reviews, or address interpositioning. RP 925-27, 929, 931-32, 1387-1416, 1435-65.

D. Failures to Respond Timely to FINRA Requests for Information

In the spring of 2009, FINRA's Department of Market Regulation ("Market Regulation") was investigating the underlying misconduct. By that point, Market Regulation had identified a pattern of trades with questionable pricing and certain connections between Greenwich High Yield and the High Yield Entities. RP 645-46, 649-50, 653, 1111-15, 1117-19, 1317-21. On March 6, 2009, Market Regulation sought to obtain numerous categories of information concerning the transactions at issue and other trades. The categories included, in pertinent part, the identities of the owners and persons with investment authority for Greenwich High Yield and the High Yield Entities during the 2006-2007 period; the ownership breakdown; High Yield Partners Income's new account form, among other new account forms; and e-mails, texts, and instant messages, among other electronic communications, sent and received by Marcus Lane in 2006 and 2007. RP 658, 1243-46. Market Regulation requested the same information on five subsequent occasions between June 26 and September 24, 2009. Its written requests cited FINRA Rule 8210, set deadlines for responding, and explained that failing to respond may

constitute grounds for disciplinary action. RP 1243-46, 1249-50, 1264, 1269-1271, 1291, 1349-1351, 1359-60.

Instead of providing responsive information by the deadlines, the Lanes offered a litany of excuses, complaints, and non-responses. They claimed they previously furnished all requested information. They asserted that their offices were closed and that they lacked copiers. They offered access to *all* of Greenwich High Yield's historical records, which is not what Market Regulation asked for. They complained about the length of FINRA's investigation and "harassment," and chastised that FINRA "would be better served devoting its time" to investigating other matters. RP 1247, 1263. They emphasized they were no longer registered.[4] RP 1263. They questioned the need for the electronic communications. In many of their written communications with Market Regulation, the Lanes said nothing specifically about these particular requests and even portrayed them as not pending. And sometimes, they just did not respond in writing at all. *See generally* RP 1247-48, 1263-64, 1288-1289, 1310-1312, 1341.

It was not until early-to-mid July 2009—four months after Market Regulation's first request, after Market Regulation made its second request, and around the time of the third request—when the Lanes first offered a modicum of cooperation with the request for Marcus Lane's electronic communications. Marcus Lane, in e-mails dated July 1 and 15, 2009, informed Market Regulation that he never used e-mail, texts, or instant messages when communicating with customers or for business. RP 1263, 1288. And on July 16, 2009, Market Regulation indicated that Jeffrey Lane had informed it that "the firm used email" and that Marcus Lane

[4] The Lanes terminated their registrations in April 2009, the month following Market Regulation's March 6, 2009 request, and just as the Lanes could see that FINRA had zeroed in on the violative trades. RP 56, 1368, 1377.

"retained the hard drive that contains the firm's electronic communications." RP 1269-70, 1291. Jeffrey Lane still did not provide, however, any information about the requested texts or instant messages, and neither Lane brother addressed the requests for the new account form or the ownership and investment authority information.

The stalling continued after Market Regulation clarified on July 16, 2009, that its request was "not limited to emails between you and a customer" but included "any emails that you sent or received at [Greenwich High Yield]." RP 1291-92. Market Regulation directed the Lanes either to state why they no longer had access to the e-mails if they lacked access, or contact Market Regulation "immediately to make arrangements for FINRA to copy the communications." RP 1291. Neither Jeffrey nor Marcus Lane responded immediately and, on July 31, 2009, Market Regulation filed an expedited proceeding against them for their failures to respond. RP 1295-1307.

Jeffrey Lane waited until August 12, 2009, when he requested a hearing in the expedited proceeding, to provide what was essentially another non-response. RP 1309-12. Despite having previously informed Market Regulation that the firm used e-mail and maintained e-mails on its hard drive, Jeffrey Lane changed course to assert that Marcus Lane never used e-mail to conduct business. RP 1311. Jeffrey Lane also second-guessed FINRA's need for the electronic communications, stating that they "will not add anything materially." RP 1311-1312. He provided no e-mails, authorization forms, or access to the hard drives, and remained silent about the requests for texts and instant messages. Marcus Lane waited until August 24, 2009—39 days after Market Regulation asked for an "immediate" response—to finally provide letters

authorizing FINRA to access any e-mails or texts that the firm's e-mail and wireless providers maintained.[5] RP 1343, 1346-47.

It was not until late September or mid-October 2009 when the Lanes finally complied with the other outstanding requests. On September 26, 2009, Marcus Lane finally agreed to "have Jeff look for the new account forms," and the Lanes fulfilled their obligations concerning that particular request by October 20, 2009. RP 1359, 1362. Likewise, on September 26, 2009, Marcus Lane finally responded to the request for ownership and investment authority information in just two sentences, providing information—that he was the sole owner of the High Yield Entities and 80% owner of Greenwich High Yield and had sole investment authority—that was always easily within his ability to provide. RP 1359.

Ultimately, the Lanes did not fully respond to Market Regulation's requests until more than six months after the first request to Jeffrey Lane and three months after the first request to Marcus Lane, well past the required deadlines. RP 1244, 1250.

III. PROCEDURAL BACKGROUND

Market Regulation filed the complaint on April 6, 2011. RP 1-38. After presiding over a hearing, a Hearing Panel found that, in 12 corporate bond transactions with customers (involving 11 Trade Sets), Marcus Lane engaged in improper interpositioning and charged unfair prices and excessive mark-ups, which he willfully and fraudulently failed to disclose. The Hearing Panel

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5 Subsequently, Market Regulation learned that neither the wireless provider or e-mail host maintained the requested texts or e-mails. RP 1350. On August 28, 2009, Market Regulation wrote Marcus Lane (and sent a copy to Jeffrey Lane) requesting that he provide access to the firm's hard drives as an alternative to producing the e-mails. On September 24, 2009, when a hearing was approaching in the expedited proceeding, Marcus Lane agreed to grant access to the hard drives. RP 1359. On October 20, 2009, Market Regulation copied the firm's electronic communications from the hard drives. RP 265.

also found that Jeffrey Lane failed to supervise Marcus Lane or establish reasonable WSPs directed at ensuring compliance with the interpositioning and mark-up rules. Finally, the Hearing Panel found that the Lanes failed to respond to FINRA requests for information. The Hearing Panel barred both Marcus and Jeffrey Lane in all capacities, and ordered them, jointly and severally, to pay restitution totaling $317,030.70. RP 1491-1529.

On appeal, the NAC generally affirmed the Hearing Panel's findings except for reversing fraud findings with respect to three of the 12 customer transactions, where the mark-ups were less than 10%. The NAC affirmed the bar on Marcus Lane for his interpositioning, excessive mark-ups, and fraud. For Jeffrey Lane's supervisory violations, the NAC reduced the sanction to a bar in all principal or supervisory capacities. The NAC vacated the restitution award and instead ordered Marcus Lane to pay to customers disgorgement of $218,581 (representing the mark-ups over 5% that he personally earned) plus prejudgment interest from the date of the last transaction at issue. For the failure to respond violations, the NAC characterized them as untimely failures and imposed on Jeffrey Lane a two-year suspension in all capacities and a $25,000 fine. RP 1813-1894. It did not impose similar sanctions on Marcus Lane considering the bar imposed for his other violations. This appeal followed.

IV. ARGUMENT

The NAC's findings of violations against Marcus and Jeffrey Lane are well-supported by the record. In 11 Trade Sets involving sales of distressed bonds to three customers, Marcus Lane intentionally caused the customers to pay excessive mark-ups ranging from 6.45% to 40.93%, and totaling $236,513 more than the customers would have paid for a 5% mark-up. Marcus Lane did so by interposing companies that he solely owned between Greenwich High Yield and the best available market, passing on to customers mark-ups and costs that resulted from the

interpositioning, and failing fraudulently to disclose the resulting excessive mark-ups. In the process, Marcus Lane personally reaped $218,581 in ill-gotten gains. Jeffrey Lane turned a blind eye to his brother's obvious misconduct and failed to create WSPs that were reasonably designed to ensure compliance with the mark-up and interpositioning rules. The Lanes also failed to respond timely to FINRA's requests for information. The NAC's sanctions reflect the egregiousness of the Lanes' misconduct and will protect investors. The Commission should sustain the NAC's decision in all respects.

A. The NAC Correctly Found that Marcus Lane Engaged in Interpositioning, Charged Excessive Mark-Ups, and Engaged in Fraud.

1. Market Regulation Demonstrated a Prima Face Case of Interpositioning and Excessive Mark-Ups.

During the relevant period, the interpositioning and mark-ups provisions were contained in NASD Rules 2320, 2440, and IM-2440. NASD Rule 2320(b) precluded Marcus Lane from interjecting a third party between Greenwich High Yield and the best available market in any transaction for or with a customer, "except in cases where [he] can demonstrate that to his knowledge at the time of the transaction the total cost or proceeds of the transaction . . . was better than the prevailing inter-dealer market for the security." NASD Rule 2440 provided, in pertinent part, that "if a member . . . sells for his own account to his customer, he shall . . . sell at a price which is fair." IM-2440 elaborated that it is a violation of NASD Rules 2440 and 2110 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 further explained that FINRA's "5% Policy" is based on the fact that the large majority of mark-ups in customer transactions are "5% or less." IM-2440(a) also set forth general considerations guiding the fairness of mark-ups. Among them: the 5% Policy "is a guide, not a rule"; "[t]he mark-up over the prevailing market price [of the security] is the significant spread"; the "best indication of the prevailing market price" is "a

member's own contemporaneous cost" absent "other bona fide evidence of the prevailing market"; "[a] member may not justify mark-ups on the basis of expenses which are excessive"; "[a] mark-up pattern of 5% or even less may be considered unfair or unreasonable"; and 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." IM-2440(b) (listing some of the relevant factors).[6]

As the NAC found, Market Regulation demonstrated a prima facie case of interpositioning and excessive mark-ups. With regard to interpositioning, Marcus Lane admitted receiving indications of interest from customers to purchase the bonds at issue.[7] RP 806, 814. But instead of selling the bonds directly to his customers after acquiring them in the market, he first routed the bonds to and from the High Yield Entities within short periods, as shown by the order tickets, confirmations, the firm's blotter, and TRACE reports. RP 1109, 1116, 1121-41. Thus, Marcus Lane interposed his High Yield Entities between Greenwich High Yield 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 exists when the broker "has interjected a third party between the firm

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6 Marcus Lane asserts that FINRA account representatives "always assured" him that the 5% Policy "is a guideline and low priced debt transactions can be exempt . . . as long as the mark-up is fair and reasonable." M. Br. 2; M. NOA 1, 2. He and Jeffrey Lane also refer to Patrick Geraghty, Director of FINRA's fixed income department, who testified that mark-ups are generally higher for distressed securities than securities with higher credit ratings and can vary from below to potentially above 5%. M. Br. 2; M. NOA 2; RP 1047-1048; J. Br. 14; J. NOA 5. Such arguments, however, do nothing more than restate that FINRA's 5% Policy is a guide, not a rule. As Geraghty further testified, whether a mark-up exceeding 5% is fair is a "facts and circumstances analysis." RP 1048. Marcus Lane does not claim that FINRA staff ever informed him that he would not have to demonstrate *why* a mark-up exceeding 5% was fair.

7 Marcus Lane's receipt of indications of interest is further supported by the fact that many of the Trade Sets involved sales to customers who had purchased the same bonds previously. RP 1109.

and the best available market"); *cf. Thomson & McKinnon*, 43 S.E.C. 785 (1968) (holding that where broker interposes another broker-dealer between himself and a third broker-dealer, "he prima facie has not met [his] obligation" to "obtain the most favorable price for his customer").

As for the excessive mark-ups, the same evidence shows: (1) Greenwich High Yield's first-leg cost in all 11 Trade Sets; (2) that the first legs were executed, on average, just 39 minutes before, and "contemporaneous" to when, Marcus Lane sold the same bonds to his customers;[8] and (3) that Marcus Lane charged his customers mark-ups over the firm's contemporaneous cost ranging between 6.45% and 40.93%, all higher than 5% and often substantially so. *Steven P. Sanders*, 53 S.E.C. 889, 895 (1998) (holding that once FINRA shows mark-ups exceeding 5% over contemporaneous cost, the burden shifts to the applicants to show facts justifying higher mark-ups).

2. Marcus Lane Did Not Meet His Burdens on the Allegations of Interpositioning and Excessive Mark-Ups.

With these prima facie showings, the burdens shifted to Marcus Lane. With respect to the interpositioning allegations, Marcus Lane's burden was to show that his customers' total cost was the most favorable. *Andrew P. Gonchar*, Exchange Act Release No. 60506, 2009 SEC LEXIS 2797, at *26 (Aug. 14, 2009) (holding that where an associated person interpositions he "has the burden of showing that the customer's total cost . . . is the most favorable obtainable") (quoting *Thomson & McKinnon*, 43 S.E.C. 785, 789 (1968)), *aff'd*, 409 F. App'x 396 (2d Cir.

[8] *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").

2010). As for the excessive mark-ups allegations, Marcus Lane had to demonstrate whether the prevailing market price was different than his firm's contemporaneous cost and whether the circumstances justified the high mark-ups charged. *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); *Sanders*, 53 S.E.C. at 895; *NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *7 (providing that member "must be fully prepared to justify its reasons for the higher mark-up"). This burden-shifting occurs even in cases, like here, where the respondents are charged with fraud. *See Gonchar*, 2009 SEC LEXIS 2797, at *28.

Marcus Lane failed to meet his burdens. He offered no evidence showing that his customers' costs were the most favorable despite the interpositioning. Marcus Lane claims that his customers' prices were "within the constraints of the market." M. NOA 1, 7; *see* J. NOA 5. But those claims are not only unsupported, the mark-up over the prevailing market price is the significant spread, and Marcus Lane points to no countervailing evidence that the prevailing market price was anything other than Greenwich High Yield's first-leg cost. *See* IM-2440(a)(3). In this regard, the second and third legs of each Trade Set did not establish a new prevailing market price, considering that those transactions were not between dealers but between entities that Marcus Lane either owned solely or substantially. *See, e.g., Sanders*, 53 S.E.C. at 894-95 (rejecting purchases from customers as basis for prevailing market price where there was no indication the inter-dealer trades were not legitimate). And Marcus Lane points to no other trades—such as those on TRACE, which he conceded is a "good definer of the constraints of the marketplace"—that were more indicative of the prevailing market price than Greenwich High Yield's first-leg cost. RP 767.

Nor could he. The only reasonable conclusion is that the customers' prices were marked up over the price of the third leg, which incorporated unnecessary and unsubstantiated layers of costs, mark-ups, and purported risk premiums resulting from Marcus Lane's interpositioning. The price that Marcus Lane charged in the second, third, and fourth legs of the 11 Trade Sets was almost always higher than the price of the previous legs. Indeed, Marcus Lane continues to vaguely characterize half of the aggregate mark-ups as "compensation" for "committing risk capital" and for the purported "short term risk," illuminating why Marcus Lane could not treat the price of the third leg—into which Marcus Lane baked all such "compensation" expenses—as the prevailing market price. RP 773, 1668; M. Br. 2, 3; M. NOA 4, 7; *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 at a still higher price to non-favored accounts constituted interpositioning that led to fraudulent mark-ups as high as 10%), *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 to another dealer, and re-purchase of stock for a customer who placed an open order constituted interpositioning); NASD Rule 2320(b) (providing that 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").[9]

[9] Contrary to Jeffrey Lane's assertion, Charles Myers, Market Regulation's expert witness, never testified that the customers' prices were "in line with the market." J. Br. 13. The only prices Myers described as being "in line" with the market concerned transactions not at issue. RP 893-94. Jeffrey Lane also argues that the customers' prices for the Tower "euro-clear bonds," which were not TRACE-reportable, were the "same . . . or less" as the prices for unspecified "Tower corporate bonds" that were TRACE-reportable. J. Br. 23, 24. He introduced no evidence, however, showing the relevance of the TRACE-reportable prices for "Tower corporate bonds" to the Tower "euro-clear" bonds at issue, let alone any TRACE data. *Cf. Sanders*, 53 S.E.C. at 897-98 (rejecting arguments that prices charged for warrants correlated with prices of common stock and units).

Marcus Lane argues that selling low-priced bonds generally justifies higher mark-ups but failed to provide any evidence showing what, if anything, justified higher mark-ups here. For example, he asserts that selling low-priced bonds generally requires "more costly analysis"; that the bonds involved had "questionable availability"; that selling the Tower bonds involved "higher costs" and "uncertainty" because of a "nontransparent" market; and that the mark-ups covered "other services . . . not directly compensated" and the cost of "debt procurement." M. Br. 2, 3, M. NOA 1, 2, 3, 4, 5; *see also* J. Br. 23. While his assertions generally relate to certain considerations in IM-2440(b) that can affect a mark-up's fairness (i.e., the security's type, availability, and price), he failed to submit documentation showing how these considerations affected the fairness of the specific mark-ups at issue. Marcus Lane simply giving his say-so about general costs does not carry his burden. *Cf. NASD Notice to Members 93-81*, 1993 NASD LEXIS 186, at *6 (Nov. 1993) (explaining that "the member's effort and cost of buying or selling [an inactive] security for the customer may have a bearing on the amount of commission" but that the member "bears the burden of adequately documenting any . . . claim" of "special or unusual effort or cost"); *NASD Notice to Members 92-16*, 1992 NASD LEXIS 47, at *7 (noting that a member "must be fully prepared to justify" a mark-up higher than 5% "with adequate documentation"); *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 or document how the asserted extra effort and expense generally involved with riskless principal trades applied to the trades at issue); *Sanders*, 53 S.E.C. at 896 (holding that "markups above 5% generally are not justified even in the sale of lower-priced securities").

Moreover, Marcus Lane does not address other relevant considerations, contained in IM-2440(b) or otherwise, that clearly did *not* support exceeding the 5% Policy. For example, IM-

2440(b)(4) explained that "[a] transaction which involves a small amount of money may warrant a higher percentage of mark-up to cover the expenses of handling." The customer transactions here, ranging from $40,962 to $312,409, did not involve small amounts. RP 1121-12; *cf. Century Capital Corp. of S. Carolina*, 50 S.E.C. 1280, 1283-84 n.10 (1992) (indicating that mark-ups greater than 5% may be appropriate for low-priced securities "only" if the transaction size is small and the "total compensation is equal to or less than a reasonable minimum ticket charge"), *aff'd*, 22 F.3d 1184 (D.C. Cir. 1994); RP 1121-1212; *see also* RP 1047 (Geraghty testifying that higher mark-ups on distressed securities may occur where the transaction size is so small it does not cover transaction costs).

Likewise, IM-2440(b)(5) provided that "[a]ny disclosure to the customer" of information which would indicate the mark-up made in a principal transaction is relevant, but Marcus Lane made no such disclosure. Marcus Lane claims the customers were aware he "would invest along with them" through a "trading account" (what he calls the High Yield Entities' accounts). M. Br. 2; M. NOA 5. He offered no evidence, however, that he told the customers they would pay mark-ups substantially exceeding his contemporaneous cost. Similarly, he claims that the customers had full "transparency" of the mark-ups through TRACE and "could figure it out." M. Br. 2; M. NOA 2; RP 750-51. But that cavalier statement lacks evidentiary support. There was no TRACE data for the Tower securities. While TRACE data existed for the other bonds, there is no evidence that the customers had access to TRACE or were reviewing it, let alone that the Lanes directed their attention to it. Moreover, TRACE identified the High Yield Entities only as unnamed "customers" and gave no indication they were entities owned by Marcus Lane. Thus, TRACE did not reveal some of the most troubling aspects of the transactions. In any event, even if Marcus Lane had disclosed the excessive mark-ups, "[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).

Marcus Lane also does not address other circumstances that suggest the transactions did not require any unusual efforts. In this regard, the Trade Sets included repeated sales of the same three bonds, Marcus Lane was able to sell the bonds in extremely short periods of time, and he often sold the same bonds to the same customers.

Marcus Lane repeats the refrain that higher mark-ups were justified by the risk and volatility. M. Br. 1, 2, 3; M. NOA 3, 4. The evidence casts serious doubt, however, concerning whether any risk was involved. Marcus Lane admitted that no risk was borne by Greenwich High Yield, which *immediately* sold the bonds after acquiring them. RP 696. The claim that the High Yield Entities were exposed to risk is questionable, considering that Marcus Lane had received customers' indications of interest, the Trade Sets were completed in short periods, and the High Yield Entities profited in all 11 Trade Sets.[10] Even if the High Yield Entities were briefly exposed to risk, that is no basis for an excessive mark-up. "[A] dealer is not entitled to charge excessive prices because it is at risk." *Shamrock Partners, Ltd.*, 53 S.E.C. 1008, 1014 (1998); *Lake Sec., Inc.*, 51 S.E.C. 19, 23 (1992) (same). Nor should a dealer be able to circumvent that principle simply by shifting any such risk to a closely related entity, such as the High Yield Entities. If Marcus Lane sought to avoid risk exposure, he could have effected riskless principal trades or declined to execute the trades altogether. Instead, he simply passed along a purported risk premium as part of an excessive mark-up, without telling the customers he was doing so, and charged significant amounts of cash along the way.

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[10] Marcus Lane argues that he did not receive "orders" to purchase bonds prior to selling bonds to the High Yield Entities' accounts, but the NAC made no finding otherwise. M. NOA 5.

Marcus Lane also argues that the firm previously informed FINRA of the "trading accounts" and their purpose and that FINRA examiners purportedly "approved the . . . operations for the [relevant] period." M. Br. 1, 2, 3; M. NOA 2, 5, 7; J. Br. 4. The only evidence proffered in support of such claims, however, was a January 1997 letter that predated the opening of High Yield Partners' brokerage account by years and that did not mention the High Yield Entities, "positioning," or FINRA's approval of anything. RP 1477, 1117. In any event, associated persons cannot shift their burden of compliance to FINRA. *Sanders*, 53 S.E.C. at 898 (holding that NASD's previous failure to identify pricing deficiencies is no excuse for pricing violations).

Marcus Lane's other arguments can be quickly dismissed. He claims the mark-ups were between one-quarter and one-and-three-eighths points. M. Br. 2; M. NOA 2, 4. However, he not only excludes the greater "point" mark-ups charged in the Tower transactions, he cites no authorities showing that a mark-up's fairness is determined with reference to "points," not percentages. He asserts that the customers were "cost conscious and experienced in distress investments," but those characteristics, even if true, say nothing about the prevailing market price or whether Marcus Lane disclosed the excessive mark-ups. M. NOA 1, 5. He contends that the transactions "were inputted and time stamped properly," but the firm's compliance with recordkeeping and reporting rules is beside the point. M. Br. 1; M. NOA 5. Finally, he claims that Geraghty testified that the only unreasonable mark-up at issue involved the "Tower" transaction, but Geraghty made no such testimony. M. NOA 2, 4.

Jeffrey Lane's arguments are also unpersuasive. He argues that Greenwich High Yield properly charged the High Yield Entities a mark-up "as it would . . . another customer," but he does not address why the firm did not also charge a mark-down when purchasing the bonds back.

J. Br. 4, 24. In any event, the relevant issue is not the fairness of the mark-ups charged to the High Yield Entities, but the fairness of the mark-ups charged to the customers.

Jeffrey Lane contends that Marcus Lane initially acquired the bonds with "below the market bids" and was "free to mark [them] up and offer them to customers still within the confines of the current bids and offers." J. NOA 5. The primary flaw with that argument, however, is that it pretends as if the first-leg transactions never happened. Regardless of whether Marcus Lane made "below-the-market bids"—and the Lanes point to no evidence showing that was so—his first-leg prices were inter-dealer prices and contemporaneous to the customers' transactions and were, therefore, the best evidence of the prevailing market price on which a mark-up's fairness is based. IM-2440(a)(3).

Jeffrey Lane claims that the so-called "positioning" of bonds with the High Yield Entities facilitated trades with the customers that Greenwich High Yield "may not otherwise have been able to transact." J. Br. 9, 14. But he does not explain why that was so or address why the firm could not have sold the bonds through riskless principal transactions with customers, who had given indications of interest.[11] Jeffrey Lane's related contention that the interpositioning protected the firm's net capital also does not hold water. J. Br. 14, 24. None of the trades was of a size that would have threatened the firm's ability to meet its $100,000 net capital requirement.[12] In any event, even if there was some legitimate reason for routing the bonds through the High Yield Entities, the fairness of the mark-ups charged is based on the firm's

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[11] Indeed, the firm's trade blotter shows that, on at least two of the trade dates at issue (January 10 and February 23, 2007), Greenwich High Yield sold Werner and Collins-Aikman bonds to customer Marx *directly* after acquiring them from a broker-dealer (Garban). RP 1114.

[12] At the end of the first and second quarters of 2007, the firm had excess net capital of $2.5 million and $2.2 million respectively. RP 1475.

contemporaneous cost, which did not change as a result of the interpositioning. *Cf. Johansen*, 1997 NASD Discip. LEXIS 54, at *16-17 (noting that respondents could have used interpositioned trades to control inventory without using them as an excuse for an additional mark-up, but did not).

Jeffrey Lane also argues that "positioning" is a practice at large broker-dealers. J. Br. 9. The Lanes offered no evidence, however, that interjecting closely related entities between a broker-dealer and the best available market, and then passing along undisclosed costs that result in an excessive mark-up, is a common industry practice.

In sum, the Commission should sustain the NAC's findings that Marcus Lane engaged in interpositioning and charged excessive mark-ups, in violation of NASD Rules 2320(b), 2440, IM-2440, and 2110. These findings are amply supported by the record, and the Lanes have not shown otherwise.

3. Marcus Lane Fraudulently Omitted Material Facts.

The NAC also correctly found that Marcus Lane engaged in fraud. "[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). Charging undisclosed markups can rise to fraud if they are "not reasonably related to the [relevant] baseline . . . and if the responsible parties acted with scienter." *Gordon*, 2008 SEC LEXIS 819, at *52. Scienter is an "intent to deceive, manipulate, or defraud" and can be established through reckless conduct. *Robert Tretiak*, 56 S.E.C. 209, 224 (2003).

The NAC correctly found that Marcus Lane committed fraud in the nine customer transactions in which he failed to disclose mark-ups exceeding 10%. Mark-ups greater than 10% on equity securities, even low priced securities, "generally are not reasonably related to the

prevailing market price" and have been found to be "fraud per se." *D.E. Wine Invs., Inc.*, 53 S.E.C. 391, 394 (1998); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996); *James E. Ryan*, 47 S.E.C. 759, 763 (1982); *Notice to Members 92-16*, 1992 NASD LEXIS 47, at *8. The NAC properly found that that is just as true for mark-ups on debt securities. *See, e.g.*, *Gonchar*, 2009 SEC LEXIS 2797, at *34-37 (affirming that undisclosed mark-ups as low as 3.5% on convertible bonds were fraudulent); *Lake Sec.*, 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"); *cf. Inv. Planning, Inc.*, 51 S.E.C. 592, 594 (1993) (finding mark-ups of 4% and above on various corporate bonds to "represent extraordinary charges").

Marcus Lane's scienter is demonstrated through his deliberate passing on of layers of additional costs to customers. He knew he routed the bonds through his High Yield Entities and that his customers' prices included the mark-ups he charged and the compensation he had paid the High Yield Entities and, therefore, bore no reasonable relation to his 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.") (internal quotations omitted); *Sheldon*, 51 S.E.C. at 78 (concluding that interpositioning resulting in mark-ups as much as 10% "demonstrat[ed] clear scienter"). Marcus Lane also displayed "a reckless indifference towards the prevailing market price, and consequently, towards the fairness of the [customer's] price." *Lake Sec.*, 51 S.E.C. at 23 (finding recklessness where respondent chose price to beat a competitor's bid, not based on an investigation of the prevailing price). For the TRACE-reportable bonds, he knew or recklessly disregarded that there had been no intervening inter-dealer trades. *Meyer Blinder*, 50 S.E.C. 1215, 1230 (1992) (finding scienter "[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"). And for the Tower bonds, Marcus Lane made no assertion that he investigated the prevailing market price. *Lake Sec.*, 51 S.E.C. at 23 (finding that a lack of investigation to determine the prevailing market price demonstrates scienter).[13]

Marcus Lane argues that his customers had full "transparency" through TRACE but, as explained above, that lacks evidentiary support. M. Br. 2; M. NOA 2. In any event, the availability of TRACE data is no substitute for a representative's disclosure of an excessive mark-up. *Cf. Richmark Capital Corp.*, 57 S.E.C. 1, 15 (2003) (holding disclosure obligations are not satisfied by pointing to information "that appeared in the media or elsewhere and [was] never brought to the customer's attention"); *Blinder*, 50 S.E.C. at 1229 (suggesting that disclosure should be "calculated to inform").

Accordingly, the Commission should sustain the NAC's findings that Marcus Lane fraudulently omitted to disclose to customers the mark-ups charged in nine transactions that exceeded 10%, in violation of Section 10(b) of the Exchange Act, Rule 10b-5 thereunder, and NASD Rules 2120 and 2110.[14]

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[13] The Lanes again argue that the Tower transactions are "outside FINRA['s] [r]egulatory [a]uthority." M. Br. 3; J. Br. 23. But these transactions were domestic and clearly within FINRA's jurisdiction. *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").

[14] For statutory disqualification purposes, the Commission should affirm the finding that Marcus Lane's violation of Section 10(b) of the Exchange Act was "willful." *See Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (holding that willful conduct means intentionally doing the wrongful acts).

B. The NAC Correctly Found That Jeffrey Lane Failed to Supervise and Prepared Deficient WSPs.

Jeffrey Lane failed to reasonably supervise Marcus Lane in violation of NASD Rules 3010 and 2110. "[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." *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *33 (Dec. 19, 2008) (internal quotation marks omitted). Based on his involvement in overseeing the relevant trades, Jeffrey Lane was aware of numerous circumstances raising obvious concerns. He knew the transaction execution times and that Marcus Lane was routing the bonds to and from entities he owned. Jeffrey Lane must have noticed, or recklessly disregarded, that this routing took only short periods. He knew the firm had no other customers like the High Yield Entities who earned mark-ups (and avoided mark-downs) on their sales to Greenwich High Yield. RP 964. Other warning signs included the TRACE data, which showed the absence of intervening inter-dealer trades between Marcus Lane's initial purchases and his sales to customers, and the revenues produced by Trade Sets 5 through 10, which generated approximately 20% of Greenwich High Yield's revenues in the first quarter of 2007. RP 725, 1475. Indeed, these facts would have been hard to miss; on each relevant trading day, the firm handled very few other fixed income trades, if any. RP 1113-1114.

Despite the obviousness of the misconduct, Jeffrey Lane turned a blind eye and reviewed only the mark-ups charged on each individual leg, not the aggregate mark-ups. RP 941-942. He never questioned or changed any of the aggregate mark-ups. Not even on March 29, 2007, when in just three customer transactions within three hours, Marcus Lane charged mark-ups of 20.02%, 40.93%, and 39.92% in an aggregate amount totaling $189,000. RP 941-942, 1109.

Jeffrey Lane's intentional inattention epitomizes unreasonable supervision.[15] *Cf. Dep't of Enforcement v. Levitov*, Complaint No. CAF970011, 2000 NASD Discip. LEXIS 12, at *26-27 (NASD NAC June 28, 2000) (respondent failed to supervise where red flags of excessive mark-ups should have prompted an investigation); *Sanders*, 53 S.E.C. at 906 (president failed to supervise mark-ups where he had supervisory responsibilities and knew the firm's pricing approach).

Jeffrey Lane also prepared deficient WSPs. He argues the WSPs "were written to emphasize the nature of the firm's business and the relationship between transacting low dollar securities and compliance with the 5% mark-up policy." J. Br. 8-9; J. NOA 3. But the WSPs contained no details about *how* the firm would supervise to ensure compliance with FINRA mark-up rules. RP 1401, 1449. The WSPs did not identify who had supervisory responsibilities, the supervisory steps such person should take, the frequency of reviews, or how to document them. *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *6, 8-9 (Dec. 1998) (setting forth such requirements). Moreover, Jeffrey Lane included no procedures concerning interpositioning, which Geraghty testified was a "fundamental component to be evaluated" considering the firm's use of the High Yield Entities and its potential to impact customers' prices. RP 994-995. This was woefully inadequate. *See* NASD Rule 3010(b)(3) (requiring written procedures to "set forth the supervisory system" including "the responsibilities of each supervisory person" as they relate to the types of business engaged in and applicable securities laws and rules); NASD Rule 3010(d) (requiring written procedures for a principal's review and

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[15] Jeffrey Lane claimed he questioned the mark-ups on individual legs that exceeded 5%. But all he did was point them out to Marcus Lane and accept his word that "if they come after me . . ., I can justify that." RP 941, 942, 943. That too was unreasonable.

endorsement of transactions); *NASD Notice to Members 98-96*, 1998 NASD LEXIS 121, at *6, 8-9 (Dec. 1998) (requiring that WSPs "descri[be] . . . the controls and procedures used . . . to deter and detect misconduct and improper activity" and "identify the specific personnel" who perform the supervisory functions); *see also Dep't of Mkt. Regulation v. Castle Sec. Corp.*, Complaint No. CMS030006, 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*, 58 S.E.C. 826 (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 what mark-up reviews would be conducted or by whom); *Sanders*, 53 S.E.C. at 900 (finding that firm's "inadequate" pricing procedures summarized rules but provided no procedures); *Sheldon*, 51 S.E.C. at 80 (failure to provide a supervisory mechanism to detect interpositioning).

Besides these basic deficiencies, Jeffrey Lane wrote the WSPs so as to undermine the relevance of FINRA's 5% Policy to the firm's business in distressed securities. *See generally* RP 983-992. In the WSPs, he wrote "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% policy.'" RP 1402, 1450. He omitted from a list of the general considerations in FINRA's mark-up policy the important considerations that "[a] mark-up pattern of 5% or even less may be considered unfair or unreasonable" 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." RP 1401-1402, 1448-1450; IM-2440(a)(3) and (4). He wrote, "a higher percentage of mark-up customarily applies to a distressed bond transaction than for an investment grade bond transaction." RP 1401, 1449. He wrote that the firm "addressed" to FINRA the purported

difficulties of applying the 5% Policy to sales of distressed bonds and that FINRA "neglected" to adopt another standard that "could be reasonably applied." RP 1450. He also signaled that a reasonable standard would be "no mark-up may exceed four points." RP 1450. While Jeffrey Lane posits that his "biggest mistake" was not "simply copy[ing] verbatim the 5% Policy," the WSP's entire context shows that his drafting choices were not mistakes but consistent with an attempt to portray the 5% Policy as unreasonable for the firm. J. Br. 8-9; J. NOA 3.

Jeffrey Lane contends that FINRA noted only one deficiency with its WSPs during the firm's 2007 annual examination. J. Br. 6, 7; J. NOA 2. Associated persons, however, cannot shift compliance responsibilities to FINRA. *Rita H. Malm*, 52 S.E.C. 64, 75 n.40 (1994) (rejecting contention that "because the NASD noted no markup, pricing or other 'exceptions' during its audit . . . NASD was subsequently precluded from bringing markup or supervisory charges").

Accordingly, the Commission should sustain the NAC's findings that Jeffrey Lane failed to supervise and prepared deficient WSPs.[16]

C. The Lanes Failed to Respond Timely to FINRA's Requests for Information.

The Lanes failed to respond to FINRA's requests in a timely manner, in violation of FINRA Rules 8210 and 2010. FINRA Rule 8210 provides that FINRA may require a person subject to its jurisdiction to provide information, and may inspect and copy the books, records, and accounts of such person. FINRA Rule 8210(a) and (c). Failing to provide a timely response to FINRA's requests violates Rule 8210. *Morton Bruce Erenstein*, Exchange Act Release No.

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[16] For statutory disqualification purposes, the Commission should affirm the finding 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.

56768, 2007 SEC LEXIS 2596, at *24 (Nov. 8, 2007), *aff'd*, 316 F. App'x 865 (11th Cir. 2008); *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007). The Lanes failed to respond timely to Market Regulation's requests for several categories of information.

On six separate occasions between March 6 and August 28, 2009, Market Regulation asked the Lanes to provide information concerning the ownership of, and the persons with investment authority for, Greenwich High Yield and the High Yield Entities and provide High Yield Partners Income's new account form. It was not until late September or October 2009—after six requests, the initiation of an expedited proceeding, and a hearing looming—when the Lanes finally complied. On September 24, 2009, Marcus Lane finally agreed to "have Jeff look for the new account forms," and on or before October 20, 2009, the Lanes fulfilled their obligations concerning that request. RP 1359, 1362. The Lanes finally provided the responsive ownership and investment authority information—always easily within their ability to provide—on September 26, 2009, more than six months after Market Regulation requested it from Jeffrey Lane and three months after it requested it from Marcus Lane. RP 1359.

Instead of providing the information requested when required, the Lanes were uncooperative, claiming that the information had already been provided, complaining that FINRA had not disclosed the investigation's purpose, offering unhelpfully to give FINRA access to all of Greenwich High Yield's historical records, and essentially telling FINRA it was wasting its time. None of these points, however, excuses the Lanes' late responses. *See Erenstein*, 2007 SEC LEXIS 2596, at *13 (stating that FINRA does not have to explain its reasons, an associated person may not "second guess" a request, and "[a] belief that NASD does not need the requested information provides no excuse for a failure to provide it") (internal quotation marks omitted);

Robert Fitzpatrick, 55 S.E.C. 419, 426 & n.18 (2001) (finding that "put[ting] the burden of finding and identifying the requested records on the NASD" did not satisfy Rule 8210).

The Lanes were similarly late in responding to Market Regulation's requests for Marcus Lane's e-mails, texts, and instant messages. After initially requesting these electronic communications, FINRA received no responsive information from the Lanes for four months, and then received conflicting information from them about the requested e-mails. After FINRA clarified the scope of its request and asked for an "immediate" response, Marcus Lane did not provide forms authorizing FINRA to access e-mails and texts maintained by the firm's e-mail host or wireless provider for 39 days, and he did so only after Market Regulation brought the expedited proceeding against him. Likewise Jeffrey Lane provided information that conflicted with his prior acknowledgment about the firm's e-mails and ultimately did nothing personally to comply with the request for texts and instant messages.

Jeffrey Lane argues that he responded in writing by the deadlines and produced all information under his control. J. Br. 22; J. NOA 3. But those assertions are demonstrably false. Jeffrey Lane never personally provided written responses to Market Regulation's requests to him dated June 26 or July 16, 2009. J. Br. 22; J. NOA 5. Any claim that he lacked control over the new account form is belied by Marcus Lane's late-September 2009 promise to "have Jeff look for" it. RP 1359. Likewise, when Jeffrey Lane testified about why he did not provide the ownership information, he cited not a lack of knowledge, but an "assum[ption]" that Market Regulation already had the information and "just wanted it in writing." RP 965-966. And contrary to his claim that they "held out" the hard drive, he was not promptly forthcoming about its existence, and Marcus Lane did not give FINRA access to it until September 26, 2009, more than six months after FINRA's initial request. J. Br. 22.

Even on the few occasions when Jeffrey Lane provided something in response by the required deadline, he did not meet his obligations by "responding" to requests with *non*-responses. If Market Regulation requested Jeffrey Lane to provide information or documents that were not within his knowledge or control, his responsibility was "to explain, as completely as possible, his efforts, and his inability" to respond. *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *23-24 (Jan. 30, 2009); *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18 (Nov. 8, 2007) (recipients must promptly respond or explain why they cannot). Jeffrey Lane did not do so. He never claimed to be unable to provide the requested ownership and investment authority information, supply authorization forms for the firm's e-mail and wireless providers, or search for new account forms.

The Lanes argue that Market Regulation requested "duplicate information" and failed to review its files or communicate with FINRA employees who examined the firm. M. Br. 1, 3; M. NOA 1, 6; J. Br. 19, 22; J. NOA 7. But the Lanes presented no evidence that they previously provided the responsive information. Moreover, Market Regulation informed the Lanes that, even if they had produced similar information during a FINRA examination, it "does not excuse your obligation to provide" it. RP 1291. Indeed, a belief that FINRA already possessed the responsive information or "no longer needs [it] 'provides no excuse for a failure to provide it.'" *Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 SEC LEXIS 2871, at *16-17 (Dec. 11, 2006) (holding that belief that NASD already possessed responsive materials was no excuse).

In sum, the Lanes' untimely responses violated FINRA Rules 8210 and 2010, and the Lanes have pointed to nothing that excuses their conduct.[17]

D. FINRA Provided a Fair Procedure.

FINRA is required to provide a fair procedure for disciplining associated persons. This is achieved by filing specific charges, notifying a respondent of those charges, giving him a chance to defend himself, and keeping a record of the proceedings. *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *48 (Nov. 9, 2012). FINRA did this, but the Lanes nevertheless press assorted arguments that they were not afforded a fair procedure. None is persuasive.

Marcus Lane complains that FINRA wrongfully suspended him on July 31, 2009, but he was not suspended. M. Br. 1, 3; M. NOA 5-6. On that date, Market Regulation initiated a FINRA Rule 9552 expedited proceeding, but it was dismissed before any suspension was imposed. RP 1295, 1305, 1351, 1361-66.

The Lanes point to "delays" in the filing of the complaint, but they cannot be heard to complain about delays in an investigation in which they failed to respond timely to FINRA's requests. M. Br. 1; J. Br. 11, 12, 19, 20; J. NOA 7. In any event, the record reflects no unfairness. Market Regulation filed the complaint four and one-half years after the first incident of misconduct, four years after the last, and more than four years after FINRA commenced its

[17] Market Regulation's request for Marcus Lane's 2006 and 2007 electronic communications included a request for Bloomberg mail. RP 1243. Although the NAC did not find that the Lanes failed to respond to that request in violation of FINRA rules (RP 1884), the Lanes misrepresent the relevant facts. They argue that Market Regulation requested the Bloomberg mail in "disregard of . . . documents in their possession on Bloomberg Authorization." M. NOA 1, 8; J. Br. 19, 22; J. NOA 7. In reality, while Jeffrey Lane had provided a Bloomberg authorization form in 2007, its scope was far more narrow than the Bloomberg mail sought by FINRA in 2009. RP 1479.

investigation. RP 1, 223, 1109. These periods do not suggest any unfairness. *Cf. Mark H. Love*, 57 S.E.C. 315, 324 n.20 (2004) (holding that no statute of limitations applies to FINRA disciplinary proceedings and rejecting claims of unfairness where the complaint was filed seven years after initial misconduct, six-and-one-half years after the end of the relevant period, and approximately three-and-one-half years after FINRA's investigation commenced). Moreover, the Lanes have shown no prejudice. Jeffrey Lane claims the delays precluded him from providing relevant market information. J. Br. 20. But the record contains TRACE data for two of the bonds at issue—which he appeared to agree contained accurate price information—and he does not describe what other documents he sought to provide, let alone whether or why they were unavailable. RP 712.

Jeffrey Lane argues that Market Regulation "manufacture[d] a case" after he questioned the delays. J. Br. 3, 12, 19. To the extent he claims to be a target of selective prosecution, he has not established the elements of a selective prosecution claim. *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *75 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012). To the extent his arguments concern the investigation, the statutory fair procedure requirement "does not extend to investigations." *Id.* at *61. Moreover, there is no evidence the complaint was motivated by anything other than seeking to remedy egregious violations and protect investors. In any event, "the hearing panels and the NAC . . . made the final decisions," not Market Regulation staff, and the Commission's "de novo review dissipates even the possibility of unfairness." *Tretiak*, 56 S.E.C. at 232.

Marcus Lane complains that Market Regulation "hire[d] a judge and jury." M. NOA 5. FINRA, however, chose all adjudicators pursuant to its rules, which ensure the selection of neutral and independent adjudicators. Under FINRA rules, the authority to appoint adjudicators

lies with the Chief Hearing Officer, the Review Subcommittee, and FINRA's Board of Governors to appoint a Hearing Panel, a NAC Subcommittee, and the NAC, respectively. FINRA Rules 9231(a), 9232, 9331; FINRA Regulation By-Laws, Art. V. Market Regulation plays no part in that process. Moreover, FINRA Rule 9144 contains separation of functions provisions that preclude interested FINRA staff from advising an adjudicator regarding a decision or otherwise participating in an adjudicator's decision. And the combination of investigatory, prosecutorial, and quasi-judicial functions at FINRA does not prevent a fair procedure. *Sanders*, 53 S.E.C. at 906.

In a more narrow attack, Marcus Lane faults the Hearing Panelists, whom he claims lack experience in trading, sales, and distressed debt analysis. M. NOA 4. However, no evidence was presented at the hearing concerning the panelists' expertise. Further, FINRA Rule 9232(d) provides that "expertise" is only one of several factors on which the Chief Hearing Officer shall base panelist selection—others include availability, the frequency a person has served, and the absence of conflicts—and nothing in FINRA's rules dictates how to weigh such factors. Indeed, panelist selection should be among the many decisions over which hearing officers have broad discretion, such as procedural and evidentiary decisions. *Cf. Dep't of Enforcement v. Strong*, Complaint No. E8A2003091501, 2008 FINRA Discip. LEXIS 19, at *17 (FINRA NAC Aug. 13, 2008) (evidentiary determinations); *Dep't of Enforcement v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *92 (FINRA NAC Dec. 20, 2007) (scheduling), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 (Jan. 30, 2009). Moreover, nothing about the panelists' expertise prevented the Lanes from introducing evidence, it is the

NAC's decision (not the Hearing Panel's decision) that is on appeal, and the SEC's de novo review cures whatever procedural error existed.[18]

The Lanes' complaints about purported delays during the disciplinary proceeding also lack merit. Jeffrey Lane's contention that Market Regulation "dragged out" the review by informing the Hearing Officer it could not attend a hearing in July 2011 is inaccurate. J. NOA 3. Market Regulation filed its complaint in April 2011, reasonably requested that the hearing be held just six months later, and *also* indicated its availability for the Lanes' preferred July 2011 hearing dates if necessary. RP 100. Equally unpersuasive is Marcus Lane's complaint that the Hearing Panel and NAC decisions were required to be "submitted within 60 days." M. NOA 6. FINRA rules contain no such deadlines. *Cody*, 2011 SEC LEXIS 1862, at *76-77 (holding that the 60-day deadline in FINRA Rule 9268 applies to the hearing officer's distribution of a draft opinion).

Jeffrey Lane also attacks the Hearing Officer, whom he claims did not afford a fair hearing and was biased, but there is no evidence of bias or unfairness. J. Br. 13-15. FINRA Rule 9235 grants Hearing Officers broad discretion to "do all things necessary and appropriate to discharge his or her duties," including "regulating the course of the hearing" and "resolving any and all procedural and evidentiary matters." The Hearing Officer gave the Lanes the opportunity to file pre-hearing briefs (which they did not file), make opening and closing statements, present testimony and evidence, and cross-examine witnesses. Jeffrey Lane maintains that Market Regulation usurped most of the hearing and that he felt "rushed." But the transcript contains no indication that he was not afforded a fair amount of time, and his description of being "rushed"

[18] Marcus Lane similarly asserts that Market Regulation's attorneys lack relevant industry experience (M. Br. 2), but no FINRA rules require them to have such experience.

when cross-examining Market Regulation's expert witness is at complete odds with what happened.[19] Jeffrey Lane's claim of being "rushed" is further belied by his own efforts to move things along. On the second of three days scheduled for the hearing, he stated, "I'd just as soon wrap this up today if we can." RP 469, 1024.

Jeffrey Lane ascribes the Hearing Officer's adverse rulings against him to bias but overlooks the occasions when the Hearing Officer ruled in the Lanes' favor or gave them latitude.[20] J. Br. 13-16. In any event, adverse rulings generally do not establish improper bias. *See Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *43-44 (Dec. 7, 2010). Jeffrey Lane complains specifically that he was not permitted to ask about certain legal precedents, but the Hearing Officer correctly sustained an objection to the only such question he asked because it was a legal question directed towards a non-lawyer. RP 1034. Moreover, the Lanes were free to argue about precedents in their briefs and opening and closing statements.

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19 Jeffrey Lane claims that Market Regulation had "most of the first [hearing] day" to examine Myers and that the Lanes were "forced . . . to make a rushed cross examination." J. Br. 15-16. In fact, Market Regulation did not call Myers until late in the first hearing day. The Lanes began their cross-examination towards the end of that day, had an overnight opportunity to prepare for continued cross-examination, and resumed the following day. RP 817, 870. Based on transcript page count, the Lanes' cross-examination was more than 50% longer than Market Regulation's direct examination. RP 817-915.

20 *See, e.g.*, RP 83 (order granting Jeffrey Lane's motion to extend a prehearing conference); 445, 461, 469 (order granting Marcus Lane's request to continue the hearing and move it to Florida); 481-83 (Hearing Officer denying Market Regulation's objection to questioning of FINRA regulatory analysts); 632 (Hearing Officer explaining after Marcus Lane's lengthy opening statement that "I wanted you to be able to make your complete story"); 710 (Hearing Officer giving Jeffrey Lane "leeway" to ask more questions of FINRA's regulatory analyst); 857 (overruling Market Regulation's objection to Jeffrey Lane's questioning).

Leaving no stone unturned, Jeffrey Lane claims that NAC counsel is "non-neutral." J. Br. 13; J. NOA 6. But he points to nothing specific, and FINRA Rule 9120(d) defines "Counsel to the NAC" as being responsible for advising the NAC. Moreover, his claims of bias are in sharp contrast with how the NAC modified the Hearing Panel's decision in the Lanes' favor. The NAC reversed certain findings of fraud, recharacterized the Rule 8210 violations from "complete" failures to "untimely" ones, and reduced the sanctions. *Cf. Erenstein*, 2007 SEC LEXIS 2596, at *28 (citing reduction in sanctions as reason why no prejudice was shown). In any event, FINRA Rule 9313(a) provides that NAC counsel's authority is limited to taking "ministerial and administrative actions," and it is the NAC, not NAC counsel, that makes the final decisions. FINRA Rule 9349. Finally, the SEC's de novo review of the evidence cures whatever bias, if any, may have existed.

In sum, FINRA provided the Lanes with a fair procedure, and the Lanes point to nothing to show otherwise.

E. The Sanctions Are Consistent with the FINRA Sanction Guidelines and Are Neither Excessive Nor Oppressive.

1. The Bar and $218,581 Disgorgement Order Imposed on Marcus Lane Will Protect Investors and Are Appropriately Remedial.

FINRA imposed on Marcus Lane a bar and a $218,581 disgorgement order, with prejudgment interest, for his interpositioning, mark-ups, and fraud violations. These sanctions are appropriate for his egregious misconduct.

For excessive mark-ups, the FINRA Sanction Guidelines ("Guidelines") recommend a suspension in any or all capacities for up to 30 business days or, in egregious cases, for up to two years or imposing a bar. They also 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.[21] For intentional or reckless misrepresentations or material omissions of fact, the Guidelines recommend 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.[22] There are no Guidelines for interpositioning violations.

Marcus Lane's violations were accompanied by numerous aggravating factors. He had discretion as to the amount of the mark-ups.[23] He engaged in numerous acts of misconduct over several months.[24] By not disclosing the excessive mark-ups, he concealed his misconduct.[25] He personally earned $218,581 in ill-gotten gains, and he caused three customers to pay excessive mark-ups of an even greater amount.[26] RP 733-734. He acted intentionally.[27] While the NAC found that the customers' apparent sophistication provided some mitigation, it also found that that did not excuse Marcus Lane's failure to disclose excessive mark-ups totaling hundreds of thousands of dollars. RP 1888-1889; *cf. Dep't of Enforcement v. Glodek*, Complaint No. E9B2002010501, 2009 FINRA Discip. LEXIS 1, at *24 (FINRA NAC Feb. 24, 2009) (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,

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[21] *FINRA Sanction Guidelines* (2013) [hereinafter *Guidelines*], at 90, *available at* http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/ industry/p011038.pdf.

[22] *Id.* at 88.

[23] *Id.* at 90 (Principal Considerations in Determining Sanctions, No. 2).

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

[25] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10).

[26] *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 11, 17). The $218,581 figure reflects the NAC's independent calculation.

[27] *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

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"), *aff'd*, 28 F.2d 844 (D.C. Cir. 1987).[28]

The Lanes assert that Marcus Lane's customers historically earned "extraordinary returns." M. Br. 2; M. NOA 1, 5; J. Br. 2, 10. There is no evidence, however, showing how his customers fared over the life of their accounts. Even if the customers profited overall, to find that fact mitigating would ignore how the misconduct reduced the customers' profits. *Peter C. Bucchieri*, 52 S.E.C. 800, 806 (1996). Considering the aggravating factors and near complete absence of mitigating ones, the bar imposed on Marcus Lane is appropriate to protect investors and is neither excessive nor oppressive.

Disgorgement also is appropriate. The Guidelines instruct that a respondent's ill-gotten gains should be considered when fashioning a sanction.[29] Disgorgement may be ordered of "a reasonable approximation of a respondent's unlawful profits." *Laurie Jones Canady*, 54 S.E.C. 65, 84 n.35 (1999), *aff'd*, 230 F.3d 362 (D.C. Cir. 2000). Disgorgement "force[s] wrongdoers to give up the amount by which they were unjustly enriched." *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991). Ordering prejudgment interest prevents the purpose of ordering disgorgement from being defeated. *Id.*

The NAC's disgorgement award to be paid to customers reflects a careful calculation of a reasonable approximation of Marcus Lane's ill-gotten gains. The NAC distinguished between

28 Jeffrey Lane argues that Greenwich High Yield sought to trade with investors who "understand [the substantial] market risk" involved with distressed bonds. J. Br. 10. Even if true, there is no evidence that the customers were aware of or understood the excessive mark-ups they were paying in the transactions at issue, which Marcus Lane never disclosed.

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

three amounts: (1) the gross aggregate mark-ups ($317,030); (2) a conservative approximation of the excessive mark-ups (i.e., the mark-ups exceeding 5%, totaling $236,513); and (3) the portion of the excessive mark-ups that Marcus Lane retained as result of (a) his 80% ownership of Greenwich High Yield and (b) his sole ownership of the High Yield Entities ($218,581).[30] Moreover, the NAC ordered prejudgment interest to run from the date of the *last* excessive mark-up charged. The disgorgement award is not oppressive or excessive, especially considering that the NAC could have ordered a much higher fine and prejudgment interest running from the dates of each individual transaction. *See Guidelines* at 90 (recommending a fine of $5,000 to $100,000 plus the gross amount of the excessive mark-ups or mark-downs).

Marcus Lane's challenges to the disgorgement order are easily dismissed. He states that it does not account for taxes previously paid, but he is "entitled to no . . . modification . . . based upon taxes . . . paid." M. NOA 8; *Canady*, 54 S.E.C. at 84. He complains that the order's purpose is "to extort payoffs," but it is to ensure he retains no ill-gotten gains. M. NOA 5. He questions being ordered to direct payment to his customers, noting that they "are not requesting reimbursement" and speculating that they would have difficulty claiming damages in a "court." M. NOA 1-2, 5. Regardless of the merits of those assertions, FINRA's ordering Marcus Lane to direct payment to the harmed customers and not to FINRA was consistent with the Guidelines

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[30] The NAC's $218,581 figure assumes that, based on his ownership interests, Marcus Lane earned 80% of the excessive mark-ups earned by Greenwich High Yield on the second and fourth legs of the Trade Sets and 100% of the excessive mark-ups earned by the High Yield Entities in the third legs. To calculate the excessive mark-ups that were earned in each Trade Set by Greenwich High Yield (2nd & 4th legs) and the High Yield Entities (3rd legs), the NAC's calculation: (1) divides each of the three mark-ups charged in the second, third, and fourth legs of a Trade Set by the Trade Set's aggregate mark-up; (2) multiplies each of the resulting three percentages by the amount that the aggregate mark-up for the Trade Set exceeded 5%. (The NAC allocated Marcus Lane's ill-gotten gains from Trade Sets 1, 2, 3, 6, 7, 8 and 11 to customers Gabe and Alma Elias, and the balance to customer Marx.)

and SEC precedent. *See Guidelines*, at 5 (indicating that, in appropriate cases, disgorged funds should be used to redress harms suffered by customers); *Sweeney*, 50 S.E.C. at 769 (endorsing FINRA's policy).

In sum, the bar and disgorgement order imposed on Marcus Lane are appropriate to protect investors and remedy his violations.

2. The Bar in All Principal and Supervisory Capacities Imposed on Jeffrey Lane for His Supervisory Violations Is Appropriate.

Preventing Jeffrey Lane from acting in a supervisory or principal capacity is an appropriately tailored sanction for his supervisory violations. For supervisory failures, the Guidelines recommend a fine of $5,000 to $50,000, and a suspension in all supervisory capacities for up to 30 business days or, in egregious cases, a suspension in any or all capacities for up to two years or a bar.[31] For deficient WSPs, the Guidelines recommend a fine between $1,000 and $25,000 and, in egregious cases, a suspension in any and all capacities up to one year.[32]

This was an egregious case of supervisory violations, with numerous aggravating factors. Jeffrey Lane ignored repeated red flags that should have resulted in additional supervisory scrutiny.[33] His failures allowed Marcus Lane to engage in repeated misconduct. Despite Jeffrey Lane's attempt to minimize the underlying fraudulent misconduct's significance, it occurred over several months, involved numerous transactions, and resulted in substantial harm to customers

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31 *Guidelines*, at 103.

32 *Id.* at 104.

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

and substantial gains for Marcus Lane.[34] J. Br. 24; J. NOA 5. Because Jeffrey Lane was a 20% owner of Greenwich High Yield, his supervisory failures resulted in the potential for his gain.[35] And the WSPs that Jeffrey Lane drafted, which included nothing regarding interpositioning and no procedures for monitoring for excessive mark-ups, may have allowed Marcus Lane's violative conduct to occur.[36] Moreover, Jeffrey Lane acted intentionally. The excessive mark-ups were obvious, yet he did nothing in response. His intent is further reflected by how he drafted the WSPs to undermine FINRA's 5% Policy, as described above.[37]

Jeffrey Lane argues that he performed other supervisory responsibilities. J. Br. 6-7, 20; J. NOA 2. The relevant task at hand, however, is to determine 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 (internal quotation marks omitted).

Jeffrey Lane claims he "confined his activities to operations, record keeping and compliance" and "never made any pretense to understanding the complexities of th[e] [distressed securities] market." J. NOA 4-5. Likewise, he claimed below that he had "never heard of interpositioning." RP 634, 928. "[P]articipants in the securities industry," however, "must take

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34 *Id.* at 103 (Principal Considerations in Determining Sanctions, No. 2). Jeffrey Lane likewise argues that FINRA ignored years of purportedly compliant trades. Even if Marcus Lane's other trades were compliant, "it is no defense to a claim of securities fraud in handling a customer's account that, during some periods of time, the broker managed to handle the account without committing securities fraud." *Canady*, 54 S.E.C. at 75.

35 *Guidelines,* at 7 (Principal Considerations in Determining Sanctions, No. 17).

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

37 Jeffrey Lane's failure to prepare sufficient WSPs also was intentional. He conceded that "I didn't feel that [supervisory] steps actually had to be written out." RP 931.

responsibility for compliance with regulatory requirements and cannot be excused for lack of knowledge, understanding, or appreciation of these requirements." *Epstein*, 2009 SEC LEXIS 217, at *73-74. Moreover, his professed lack of understanding rings hollow. He was an industry veteran, a registered principal, the chief compliance officer, a supervisor with responsibility for reviewing mark-ups charged on sales of distressed bonds, and the author of the firm's WSPs. And from 1991 through the relevant period, he worked continuously with firms that engaged in the distressed securities business. RP 168-169. Given Jeffrey Lane's experience, his attempt to plead lack of understanding only demonstrates his failure to accept responsibility. *Epstein*, 2009 SEC LEXIS 217, at *73-74. Considering the nature of Jeffrey Lane's supervisory violations, a sanction that prevents him from acting in a principal or supervisory capacity is appropriate to protect investors and remedy his misconduct.

3. The Lanes' Rule 8210 Violations Warrant a Two-Year Suspension and a $25,000 Fine.

The sanctions imposed on Jeffrey Lane for his failure-to-respond violations (but not on Marcus Lane in light of the bar imposed for other violations) are appropriate. For failing to respond timely, the Guidelines recommend a fine between $2,500 and $25,000 and a suspension in any or all capacities for up to two years.[38] The aggravating factors present here warrant sanctions at the high end of this range.

From FINRA's perspective, understanding who owned Greenwich High Yield and the High Yield Entities, and who could make investment decisions for them, was critical to its

[38] *Guidelines*, at 33.

investigation.[39] Such information could have shed light on who was responsible for the transactions and the mark-ups, who retained gains, possible motivations, and the prevailing market prices. Indeed, Geraghty testified that reviewing the accounts associated with questionable transactions is "standard," that Market Regulation was aware the High Yield Entities were "contra-parties" in the transactions and shared the same address as Greenwich High Yield, and that "we needed to know who was the controlling interest of those accounts." RP 1000. Likewise, Marcus Lane's electronic messages could have shed light on the nature and timing of any relevant communications with customers or other relevant entities, the effort expended in acquiring and selling the bonds, any due diligence to discern prevailing market prices, and Marcus Lane's intent.

The degree of regulatory pressure that Market Regulation had to apply—six requests and an expedited proceeding—was substantial. It took months for the Lanes to fully comply, and they did not do so until the hearing in the expedited proceeding was approaching.[40] The Lanes' obstinate behavior is even more troubling considering how easy it was to provide responsive information. The responsive ownership and investment authority information was always easily within their knowledge. And responding to the request for texts, instant messages, and e-mails required only two one-page authorization letters and giving access to hard drives.

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39 *Id.* at 33 (listing the importance of the information requested as viewed from FINRA's perspective as a principal consideration).

40 *Id.* at 33 (listing as principal considerations the number of requests made, the degree of regulatory pressure required, and the length of time to respond).

Moreover, each brother tried to avoid responsibility for his obligations.[41] Jeffrey Lane admitted, "I sort of removed myself from providing any more information" and told Market Regulation at one point, "I'm busy." RP 967, 1311. And Marcus Lane's excuses for not complying included that "I didn't want to have to do . . . it" and that his brother was "in charge of complying." RP 742, 744. Such gamesmanship warrants the sanctions imposed by the NAC.

The Lanes note that they responded to several Rule 8210 requests during the investigation. M. Br. 1; M. NOA 6; J. Br. 22; J. NOA 3. They ignore, however, that the NAC *agreed* that the Lanes provided responses to some Rule 8210 requests and, as a result, did not find that the Lanes completely failed to respond. RP 1892. Instead, the NAC characterized their conduct as a failure to respond in a timely manner, applied the less rigid Guidelines that apply, and reduced the sanctions to a two-year suspension and a $25,000 fine.[42]

In sum, the Lanes' failures to respond timely to FINRA's requests are accompanied by numerous aggravating factors and no mitigating ones and warrant serious sanctions. "Delay and neglect" in responding to Rule 8210 requests "undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d

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[41] *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 2).

[42] Jeffrey Lane asks that the Rule 8210 requests made in 2007 and 2008, and his corresponding responses, be admitted into the record. J. Br. 18. Portions of Market Regulation's April 2007 request and Jeffrey Lane's response are already in the record. RP 1317, 1321. As for the other documents, the NAC correctly rejected Jeffrey Lane's attempt to admit them as additional evidence. FINRA Rule 9346(b); *see* RP 1682-1683, 1886. In any event, the proposed evidence is not material because the NAC already found that the Lanes complied with the 2007 and 2008 requests.

Cir. 2009). The two-year suspension and $25,000 fine imposed on Jeffrey Lane will deter him from engaging in similar Rule 8210 violations again.[43]

V. CONCLUSION

The NAC's findings that Marcus Lane and Jeffrey Lane engaged in violations are supported by the record, and the sanctions imposed for their violations are appropriate to deter the Lanes from engaging in future misconduct and to improve overall business standards in the industry. The Commission should sustain the NAC's decision in all respects.

Respectfully submitted,

Michael J. Garawski
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
Tel.: (202) 728-8835

Dated: April 21, 2014

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[43] The Lanes' other claims of mitigation also lack merit. They contend they have lost their registrations, been prevented from finding employment as registered representatives, and experienced loss of business. M. Br. 1, 3; M. NOA 1, 6, 7; J. Br. 12. The Lanes, however, voluntarily chose to terminate their registrations years before the Hearing Panel and NAC decisions. Moreover, any collateral consequence suffered as a result of misconduct or the disciplinary proceeding that followed is not mitigating. *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *35 (Feb. 20, 2014). The Lanes also assert they have never been the subject of a customer complaint, and Jeffrey Lane notes that he has never been cited for a rule violation. M. Br. 2, 3; M. NOA 1, 2, 4; J. Br. 2, 10. But a lack of disciplinary history and customer complaints is not mitigating. *Epstein*, 2009 SEC LEXIS 217, at *74; *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).

APPENDIX OF FINRA AND NASD RULES

This appendix sets forth the relevant text of the NASD and FINRA rules that the applicants are alleged to have violated, as they existed during the relevant time period. The sources of the reproduced rule text are indicated.

FINRA RULES

2010. Standards of Commercial Honor and Principles of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

(Source: FINRA Rule 2010 (Dec 15 2008 – Present Version), http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=6905)

8210. Provision of Information and Testimony and Inspection and Copying of Books

(a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) require a member, person associated with a member, or person subject to FINRA's jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding.

* * *

(c) Requirement to Comply

No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to this Rule.

(d) Notice

A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

* * *

(Source: FINRA Rule 8210 (Dec. 15, 2008 – Dec. 28, 2010 Version), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&record_id=4561)

NASD RULES

2110. Standard of Commercial Honor and Principles of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

(Source: NASD Manual April 2007)

2120. Use of Manipulative, Deceptive or Other Fraudulent Devices

No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.

(Source: NASD Manual March 2006)

2320. Best Execution and Interpositioning

* * *

(b) 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.

* * *

(Source: NASD Manual March 2006)

2440. Fair Prices and Commissions.

In "over-the-counter" transactions, whether in "listed" or "unlisted" securities, if a member buys for his own account from his customer, or sells for his own account to his customer, he shall buy or 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; and if he acts as agent for his customer in any such transaction, he shall not charge his customer more than a fair commission or service charge, taking into consideration all relevant circumstances, including market conditions with respect to such security at the time of the transaction, the expense of executing the order and the value of any service he may have rendered by reason of his experience in and knowledge of such security and the market therefor.

(Source: NASD Manual March 2006)

IM-2440. Mark-Up Policy

The question of fair mark-ups or spreads is one which has been raised from the earliest days of the Association. No definitive answer can be given and no interpretation can be all-inclusive for the obvious reason that what might be considered fair in one transaction could be unfair in another transaction because of different circumstances. In 1943, the Association's Board adopted what has become known as the "5% Policy" to be applied to transactions executed for

customers. It was based upon studies demonstrating that the large majority of customer transactions were effected at a mark-up of 5% or less. The Policy has been reviewed by the Board of Governors on numerous occasions and each time the Board has reaffirmed the philosophy expressed in 1943. Pursuant thereto, and in accordance with Article VII, Section 1(a)(ii) of the By-Laws, the Board has adopted the following interpretation under Rule 2440.

It 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 or to charge a commission which is not reasonable.

(a) General Considerations

Since the adoption of the "5% Policy" the Board has determined that:

(1) The "5% Policy" is a guide, not a rule.

(2) A member may not justify mark-ups on the basis of expenses which are excessive.

(3) The mark-up over the prevailing market price is the significant spread from the point of view of fairness of dealings with customers in principal transactions. In 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.

(4) A mark-up pattern of 5% or even less may be considered unfair or unreasonable under the "5% Policy."

(5) Determination of 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.

(b) Relevant Factors

Some of the factors which the Board believes that members and the Association's committees should take into consideration in determining the fairness of a mark-up are as follows:

(1) The Type of Security Involved

Some securities customarily carry a higher mark-up than others. For example, a higher percentage of mark-up customarily applies to a common stock transaction than to a bond transaction of the same size. Likewise, a higher percentage applies to sales of units of direct participation programs and condominium securities than to sales of common stock.

(2) The Availability of the Security in the Market

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.

(3) The Price of the Security

While there is no direct correlation, the percentage of mark-up or rate of commission generally increases as the price of the security decreases. Even where the amount of money is substantial, transactions in lower priced securities may require more handling and expense and may warrant a wider spread.

(4) The Amount of Money Involved in a Transaction

A transaction which involves a small amount of money may warrant a higher percentage of mark-up to cover the expenses of handling.

(5) Disclosure

Any disclosure to the customer, before the transaction is effected, of information which would indicate (A) the amount of commission charged in an agency transaction or (B) mark-up made in a principal transaction is a factor to be considered. Disclosure itself, however, does not justify a commission or mark-up which is unfair or excessive in light of all other relevant circumstances.

(6) The Pattern of Mark-Ups

While each transaction must meet the test of fairness, the Board believes that particular attention should be given to the pattern of a member's mark-ups.

(7) The Nature of the Member's Business

The Board is aware of the differences in the services and facilities which are needed by, and provided for, customers of members. If not excessive, the cost of providing such services and facilities, particularly when they are of a continuing nature, may properly be considered in determining the fairness of a member's mark-ups.

(c) Transactions to Which the Policy is Applicable

The Policy applies to all securities handled in the over-the-counter market, whether oil royalties or any other security, in the following types of transactions:

(1) A transaction in which a member buys a security to fill an order for the same security previously received from a customer. This transaction would include the so-called "riskless" or "simultaneous" transaction.

(2) A transaction in which the member sells a security to a customer from inventory. In such a case the amount of the mark-up would be determined on the basis of the mark-up over the bona fide representative current market. The amount of profit or loss to the member from market appreciation or depreciation before, or after, the date of the transaction with the customer would not ordinarily enter into the determination of the amount or fairness of the mark-up.

(3) A transaction in which a member purchases a security from a customer. The price paid to the customer or the mark-down applied by the member must be reasonably related to the prevailing market price of the security.

(4) A transaction in which the member acts as agent. In such a case, the commission charged the customer must be fair in light of all relevant circumstances.

(5) Transactions wherein a customer sells securities to, or through, a broker/dealer, the proceeds from which are utilized to pay for other securities purchased from, or through, the broker/dealer at or about the same time. In such instances, the mark-up shall be computed in the same way as if the customer had purchased for cash and in computing the mark-up there shall be included any profit or commission realized by the dealer on the securities being liquidated, the proceeds of which are used to pay for securities being purchased.

(d) Transactions to Which the Policy is Not Applicable

The Mark-Up Policy is not applicable to the sale of securities where a prospectus or offering circular is required to be delivered and the securities are sold at the specific public offering price.

(Source: NASD Manual March 2006)

3010. Supervision

(a) Supervisory System

Each member shall 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 applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following:

(1) The establishment and maintenance of written procedures as required by paragraphs (b) and (c) of this Rule.

(2) The designation, where applicable, of an appropriately registered principal(s) with authority to carry out the supervisory responsibilities of the member for each type of business in which it engages for which registration as a broker/dealer is required.

(3) The designation as an office of supervisory jurisdiction (OSJ) of each location that meets the definition contained in paragraph (g) of this Rule. Each member shall also designate such other OSJs as it determines to be necessary in order to supervise its registered representatives, registered principals, and other associated persons in accordance with the standards set forth in this Rule, taking into consideration the following factors:

(A) whether registered persons at the location engage in retail sales or other activities involving regular contact with public customers;

(B) whether a substantial number of registered persons conduct securities activities at, or are otherwise supervised from, such location;

(C) whether the location is geographically distant from another OSJ of the firm;

(D) whether the member's registered persons are geographically dispersed; and

(E) whether the securities activities at such location are diverse and/or complex.

(4) The designation of one or more appropriately registered principals in each OSJ, including the main office, and one or more appropriately registered representatives or principals in each non-OSJ branch office with authority to carry out the supervisory responsibilities assigned to that office by the member.

(5) The assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities.

(6) Reasonable efforts to determine that all supervisory personnel are qualified by virtue of experience or training to carry out their assigned responsibilities.

(7) The participation of each registered representative and registered principal, either individually or collectively, no less than annually, in an interview or meeting conducted by persons designated by the member at which compliance matters relevant to the activities of the representative(s) and principal(s) are discussed. Such interview or meeting may occur in conjunction with the discussion of other matters and may be conducted at a central or regional location or at the representative's(') or principal's(') place of business.

(b) Written Procedures

(1) Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of NASD.

* * *

(3) The member's written supervisory procedures shall set forth the supervisory system established by the member pursuant to paragraph (a) above, and shall include the titles, registration status and locations of the required supervisory personnel and the responsibilities of each supervisory person as these relate to the types of business engaged in, applicable securities laws and regulations, and the Rules of this Association. The member shall maintain on an internal record the names of all persons who are designated as supervisory personnel and the dates for which such designation is or was effective. Such record shall be preserved by the member for a period of not less than three years, the first two years in an easily accessible place.

* * *

(d) Review of Transactions and Correspondence

(1) Supervision of Registered Representatives

Each member shall establish procedures for the review and endorsement by a registered principal in writing, on an internal record, of all transactions and for the review by a registered principal of incoming and outgoing written and electronic correspondence of its registered representatives with the public relating to the investment banking or securities business of such member. Such procedures should be in writing and be designed to reasonably supervise each registered representative. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to the Association upon request.

* * *

(Source: NASD Manual April 2007)

CERTIFICATE OF COMPLIANCE

I, Michael J. Garawski, certify that the foregoing FINRA's Brief in Opposition to Application for Review (File No. 3-15701) complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,924 words.

Michael J. Garawski
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8835

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