BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Vincent P. McCrudden Dix Hills, NY, Respondent.	DECISION Complaint No. 2007008358101 Dated: October 15, 2010

Respondent induced his former employer to file a false Form U5. Held, findings affirmed, sanctions increased.

Appearances

For the Complainant: Gregory R. Firehock, Esq., Leo J. Kane, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Gregory W. Carey, Esq. and Matthew A. Martel, Esq.

Decision

FINRA's Department of Enforcement appeals the October 15, 2009 Hearing Panel decision in this matter.[1] McCrudden cross-appeals. The Hearing Panel found that McCrudden violated NASD Rule 2110 because he sent abusive, intimidating, and threatening communications to his former employer, and induced his former employer to file a misleading and inaccurate Uniform Termination Notice for Securities Industry Registration ("Form U5"). The Hearing Panel fined McCrudden $12,500 and suspended him for 35 business days in all capacities for the violations. After a complete and independent review of the record, we affirm the Hearing Panel's findings as discussed below, but modify the sanctions imposed. We increase the fine to $50,000 and the suspension to one year.

[1] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57* (Oct. 2008). Because the complaint in this case was filed before December 15, 2008, the procedural rules that apply are those that existed on December 14, 2008. The conduct rules that apply are those that existed at the time of the conduct at issue.

I. Procedural and Factual Background

A. Procedural Background

In 2006, FINRA initiated an investigation of McCrudden's former member firm, Hedge Fund Capital Partners, LLC ("HedgeCap"). The investigation involved allegations unrelated to the facts of this case. A FINRA investigator reviewed several email communications between McCrudden and HedgeCap personnel as part of the investigation, which then became focused on the circumstances of McCrudden's separation from the firm.

On June 26, 2008, Enforcement filed a three-cause complaint against McCrudden, HedgeCap, and HedgeCap's owner, Howard Jahre ("Jahre"). The complaint alleged two causes of action against McCrudden.[2] The first and second causes alleged that McCrudden violated FINRA's rules because he sent threatening communications to HedgeCap employees and induced the filing of a misleading Form U5. McCrudden filed an answer to the complaint, denied the allegations, and requested a hearing.

After four days of testimony, the Hearing Panel issued its decision on October 15, 2009, finding that McCrudden violated FINRA's rules as alleged in the complaint. The Hearing Panel suspended McCrudden for 30 business days and fined him $10,000 for the communications, and imposed an additional five-business-day suspension and $2,500 fine for the Form U5 violation. This appeal followed.

B. McCrudden

McCrudden registered with FINRA in March 1998, when he associated with a FINRA member firm as a general securities representative. During the period relevant to the conduct in this case, McCrudden was associated with HedgeCap. McCrudden joined HedgeCap in February 2005, and registered with the firm as a general securities representative and principal, as an equity and options trader, and as an options principal. He worked on the firm's trading desk, executing trades for his own customers, in addition to the firm's hedge fund customers.[3] McCrudden's association with HedgeCap ended on June 30, 2006. McCrudden is not currently registered and has not associated with another FINRA member firm since November 2006.

C. HedgeCap and Penson

HedgeCap raises capital for hedge funds through capital introduction services, manages a trading desk to serve institutional customers and hedge funds, and rents office space to its hedge

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[2] The third cause of action alleged that HedgeCap and Jahre filed a misleading Form U5. On January 30, 2009, HedgeCap and Jahre settled the matter.

[3] While McCrudden worked at HedgeCap, he separately operated and managed a commodity pool named Managed Accounts Asset Management, LLC ("MAAM"). Through MAAM, McCrudden also operated and executed trades on behalf of a commodity pool called Hybrid Fund II, LLP ("Hybrid Fund").

fund customers. Pursuant to a revenue sharing agreement, HedgeCap's clearing firm, Penson Financial Services, Inc. ("Penson"), provided HedgeCap with the office space that it rented to its hedge fund customers. Penson also paid the rent for HedgeCap's office space, provided the capital for the build-out of HedgeCap's office space, and paid the salaries of several employees that it shared with HedgeCap. Penson did not have an ownership interest in HedgeCap, but had the option to purchase it.

Jahre, an attorney, is HedgeCap's owner and managing director. During the period relevant to this case, Frank Napolitani ("Napolitani") headed HedgeCap's institutional sales department, and managed administrative tasks at the firm, such as bookkeeping, hiring, and purchasing. James Scaplen ("Scaplen"), an employee shared between HedgeCap and Penson, managed the back office operations, and acted as HedgeCap's liaison to Penson.

D. McCrudden's and HedgeCap's Dispute

In June 2006, a dispute arose between McCrudden and HedgeCap concerning four issues: McCrudden's floor brokerage expenses, his contribution to HedgeCap's error account, an equity interest he acquired in the firm, and his commissions.

1. The Floor Brokerage Expenses

McCrudden used floor brokers to execute trades for his HedgeCap and personal accounts. Some floor brokers billed McCrudden directly for his personal trades, while other floor brokers sent McCrudden's monthly invoices to HedgeCap. The invoices that HedgeCap received combined McCrudden's floor brokerage expenses for his HedgeCap and personal accounts. When HedgeCap received these combined invoices, Scaplen reviewed HedgeCap's trading blotter, and separated McCrudden's HedgeCap trades from his personal trades.[4] After Scaplen separated the trades, and allocated the expenses, Napolitani deducted the floor brokerage expenses that McCrudden owed, if any, from the commissions that HedgeCap owed him. McCrudden then would receive a check representing his net commissions.

McCrudden's and HedgeCap's initial dispute involved approximately $24,850 in floor brokerage expenses incurred in April 2006. McCrudden did not dispute that he owed HedgeCap for floor brokerage expenses, but questioned the amount HedgeCap claimed he owed and the accuracy of HedgeCap's accounting.[5]

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[4] Napolitani testified at the hearing. He stated that it was Scaplen's responsibility to reconcile the floor brokerage expenses and to attribute the expenses to the proper accounts on a monthly basis.

[5] Napolitani admitted that he incorrectly reconciled the invoices when he first calculated the amounts due and initially failed to provide McCrudden with the documentation necessary to compute or confirm the invoice reconciliations.

2. The Contribution to HedgeCap's Error Account

HedgeCap maintained an account at Penson known as the error account, which HedgeCap used to correct transactional errors. For example, if a broker mistakenly purchased a position for a customer who had instructed the broker to sell a position, the error account would cover the losses associated with the transaction.

Earlier in 2006, Scaplen made an error on a trade. McCrudden voluntarily placed a profitable trade into the error account to cover potential losses from Scaplen's error. McCrudden's trade resulted in a $10,000 credit in the error account. Because there was no actual loss to the customer's account, or HedgeCap, McCrudden sought payment of the $10,000 credit. HedgeCap refused to compensate McCrudden.[6]

3. The Equity Interest

In April and May 2006, Jahre told McCrudden, and HedgeCap and Penson personnel, that he intended to grant McCrudden a five percent equity interest in HedgeCap. To effect this transaction, HedgeCap presented Penson with its right of first refusal, and provided McCrudden with a partnership agreement, which McCrudden signed. Jahre, however, did not execute the agreement, and it is unclear from the record whether McCrudden actually acquired the equity interest in HedgeCap.

4. The Commissions

HedgeCap owed McCrudden approximately $4,385 in brokerage commissions.[7] McCrudden requested payment of the brokerage commissions, but HedgeCap refused to pay them until McCrudden reimbursed the firm for the $24,850 in floor brokerage expenses.

E. The Dispute Escalates and HedgeCap Terminates McCrudden

On June 30, 2006, the dispute concerning these four issues escalated. In a series of emails on that date, McCrudden demanded an accounting of the floor brokerage expenses, payment of the commissions he was due, and compensation from the error account. When HedgeCap refused to accede to McCrudden's demands, he sent several profanity-laced emails to Jahre, Napolitani, and Scaplen. On the night of June 30th, Jahre decided to fire McCrudden as a result of the communications.

On July 2, 2006, Jahre sent McCrudden an email to his personal account with the subject, "HedgeCap – Official Notice" (the "Termination Notice"). The Termination Notice stated:

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[6] Napolitani testified that, as a matter of HedgeCap policy, registered representatives did not receive payouts from the error account.

[7] McCrudden testified that, in total, HedgeCap owed him in excess of $100,000 as of June 2006.

> After taking everything into account, most importantly your conduct in your email communications to me and other HedgeCap employees on Friday, June 30th, **this email will serve as your official termination notice of your relationship with Hedge Fund Capital Partners, LLC ("HedgeCap"), effective immediately . . . . You will refrain from making any further threats to me, or any HedgeCap employee from this point forward.**

The Termination Notice detailed the arrangements for the delivery of McCrudden's personal effects, and requested that McCrudden return all HedgeCap property, including his security and identification cards, building pass, and office keys. The Termination Notice demanded that McCrudden pay the outstanding floor brokerage expenses, emphasized that McCrudden would not receive his commission payment until the expenses were paid, and reiterated that there would be no payout on his error account contribution. The Termination Notice also included language for a "to-be-drafted" mutual release of claims. McCrudden did not reenter HedgeCap's offices after June 30, 2006.[8]

F. McCrudden's Email Campaign to Influence the Contents of His Form U5

After HedgeCap terminated McCrudden, he sent numerous emails regarding the event.[9]

On July 3, 2006, at 9:37 a.m., McCrudden sent an email to ST, a potential joint venture partner for HedgeCap:

> DO NOT deal with this scumbag [Napolitani] or [HedgeCap]. They are stealing money from me and are the most unethical firm I have ever dealt with. I will explain later, but when I get done with them for what they have done to me, they will be out of business within a year.[10]

At 9:51 a.m., McCrudden sent an email to Jahre, responding to the Termination Notice. McCrudden instructed Jahre not to touch his personal effects or contact ST. He also requested, "[f]or legal reasons," access to all emails that he sent within the last week and all floor brokerage invoices for the last 11 months. McCrudden ended his email to Jahre as follows:

> I know you take pleasure in being a slimy bastard. After all I have done for you and the firm, to do this to me, you've set a new low. I will put you out of business. And you did this to get out of the 5% shares you owed me? [Jahre], [you're] a slimy piece of shit. I PROMISE you . . . you will not get away with this!

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[8] Napolitani formalized the arrangements for McCrudden's termination and prepared a draft termination letter for Jahre's signature.

[9] Each email has been quoted verbatim.

[10] ST, McCrudden's friend, ran a hedge fund. McCrudden introduced ST to Napolitani as a potential new business partner for HedgeCap.

At 11:23 a.m., McCrudden prepared an extensive email to HedgeCap's clearing firm and joint venture partner, Penson. He explained that he had been "released" from HedgeCap, and also stated:

> [Jahre's] reputation is well known. He has very limited product knowledge and has wedged himself in the [s]ecurities business using other hard working peoples expertise and balance sheets. Penson is [definitely] being dragged down in New York because of their relationship with [Jahre] and [HedgeCap].
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> * * *
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> I know first hand [that a Penson employee] has been discriminated against by them, and also had to endure the vilest off color jokes by [Jahre] and others.
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> [Napolitani] is a cook by trade running a securities business. His character is very questionable.
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> * * *
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> [Scaplen] was hired by Penson because of his brother. He has a terrible attitude and work habit and from what I can tell with my dealings with him, fairly [inept] at his job.
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> * * *
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> In my opinion, you are in business with the wrong people. There are [plenty] of professionals on Wall Street who wouldn't touch [Jahre or Napolitani] with a ten foot pole. They don't know the business well enough. One is a low life lawyer, and the other is a cook. And they are supposed to run a multi million dollar business? If I were you, I would take a closer look at your relationship.

At 1:41 p.m., McCrudden sent an email to a newly hired HedgeCap trader:

> Be very careful with these guys. They are as low as they come. They will use you until they have no further purpose for you. They will try and exploit your client base, and then come up with accounting reasons for not paying you. I am going to try and shut them down and report them to the regulatory and criminal authorities immediately. You are probably witness to them rumbling through all of my records and personal items. You may be called as witness against them in the future. My advice for you . . . is to get out of there before [it's] too late.

McCrudden contacted Jahre and Napolitani at 3:30 p.m.:

> Hey fat Boy . . . I hear [you're] telling stories about me and libeling my name already? "Fuck Me" heh? Ok you fat bastard . . . we'll see about that. You guys screwed with the wrong guy. And now you going through all my personal stuff when everyone is out of the office? And [Jahre], you low life scum bag . . . you think you can go out and play golf as you mess with me and my career at a very difficult time? You for sure have finally messed with the absolute wrong guy at the wrong time! You have made a career out of fucking honest people out of their money. That's all going to end for you my man!

McCrudden then reapproached his primary contact at Penson. McCrudden testified at the hearing below that he contacted the personnel at Penson because he thought that Penson had "power" over HedgeCap as its joint venture partner, and therefore, could influence HedgeCap to accede to the terms of his departure. McCrudden explained:

> Although I am very, very angry, I will move forward if the following criteria are met:
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> * * *
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> I want to be able to resign. I do not want them further effecting my career by putting some bullshit on my [Form] U5. If they do, I will of course fight it, but they will be out of business anyway by then.
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> * * *
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> They are slimy scumbags, and professionals like you and I should have never dealt with people like these in a million years. You still have some power over them. I am urging you to try and get them to enforce my above requests so we can all move on with our careers and lives. If not, I will inflict as much damage as I possibly can for as long as I can in any way shape or capacity that I can use. If I don't hear back today, I will start the process.

McCrudden's contact at Penson stated that he was unable to help with the situation, and that McCrudden should attempt to resolve the matter directly with HedgeCap. McCrudden sent a final email to his Penson contact at 2:38 p.m. on July 5, 2006:

> Ok . . . Am sorry to hear that. I am headed into the city now and this is going to get ugly. [It's] an absolute shame no one is willing to do the right thing. Ok, I will take matters into my own hands. I tried to do it diplomatically. After all I have done for Hedge Cap and Penson, I will absolutely not tolerate this shit. God help the people who get in my fucking way now!

McCrudden had no further direct communications with HedgeCap, Penson, or their employees after July 5, 2006.

G. McCrudden Negotiates for a "Clean" Form U5

In the days that followed, McCrudden obtained counsel to advise him regarding his termination. McCrudden's counsel handled all communications with HedgeCap after July 5th. On July 10, 2006, HedgeCap's counsel prepared the draft mutual release of claims (the "Settlement Agreement") referred to in the July 2nd Termination Notice. Napolitani forwarded a draft of the Settlement Agreement to McCrudden's counsel on July 13th. McCrudden's attorney revised the Settlement Agreement and remitted it to Jahre on July 20th. The revised draft from McCrudden's counsel added the following provision:

> Upon execution of this agreement, [McCrudden] agree[s] to pay [HedgeCap] $20,464.17 (the "Settlement Payment"), which is the difference between the amount [HedgeCap] claims you owe floor brokers and your April 2006 payout [for commissions]. [McCrudden] shall make said Settlement Payment to [Jahre], who shall hold the Settlement Payment in escrow pending the completion of the following events:
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> 1. Filing of a [Form U5], that states that [McCrudden] voluntarily resigned, and contains no explanation or comments. [HedgeCap and McCrudden] acknowledge and agree that such a [Form U5] is truthful and accurate.[11]

Jahre signed the Settlement Agreement on August 2, 2006. McCrudden executed the agreement on August 8, 2006. On August 16, 2006, Napolitani contacted McCrudden's counsel. Napolitani informed him that, "as per our agreement," a Form U5 marked "voluntary" was filed on McCrudden's behalf. Napolitani attached a copy of the filed Form U5 and requested the Settlement Payment. A check for $20,464.17, made payable to HedgeCap, was remitted less than one hour later.

II. Discussion

Although the parties appealed different aspects of this case, we exercise our authority to review any portion of a case, and begin by analyzing the Hearing Panel's findings of liability. *See* NASD Rule 9348 (explaining that the National Adjudicatory Council may affirm, dismiss, modify, or reverse with respect to each finding). Specifically, we uphold the finding of liability

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[11] The language in the final version of the Settlement Agreement, although modified slightly through the negotiation process, remained substantively unchanged from the version quoted. The Settlement Agreement required that HedgeCap meet three prerequisites before McCrudden would remit the Settlement Payment. HedgeCap had to: (1) file the aforementioned Form U5; (2) provide McCrudden with access to his emails, files, and personal property; and (3) set up an email alert system to forward McCrudden's incoming emails to his new email address.

on cause two of the complaint, which held that McCrudden violated NASD Rule 2110 because he induced the filing of a false Form U5.[12]

A. McCrudden Violated NASD Rule 2110 Because He Harassed, Intimidated, and Paid HedgeCap to File a False Form U5

McCrudden and HedgeCap had an employment dispute that culminated in McCrudden's termination. After his termination, McCrudden initiated an email campaign to coerce HedgeCap to falsify his Form U5 to label his departure as voluntary.[13] McCrudden continued this attack by harassing and intimidating HedgeCap's employees. He cautioned them, warning that their failure to file the false Form U5, or otherwise failing to accede to his demands, would be met with negative publicity and legal action. When it appeared that HedgeCap might not grant his request for a clean Form U5, McCrudden's tactics became more forceful, as he attempted to reinforce the seriousness of his comments by contacting Penson personnel, a recently hired HedgeCap trader, and ST, a potential joint venture partner for HedgeCap. McCrudden contacted these third parties not only to disparage HedgeCap, but also for the purpose of convincing persons and entities with power over HedgeCap to persuade the firm to permit him to resign. Finally, when all else failed, McCrudden offered – through his counsel – to pay for the clean Form U5 that he wanted.[14]

McCrudden's conduct disrupted FINRA's disclosure and reporting requirements, requirements that are designed to assist FINRA in deciding what activities to investigate. FINRA cannot investigate the veracity of every detail of each document filed with it. *See Robert E. Kauffman*, 51 S.E.C. 838, 839 (1993), *aff'd*, 40 F.3d 1240 (3d Cir. 1994). FINRA necessarily must depend on its member firms and associated persons to report information accurately, clearly, and in a manner that is not misleading. *See id.* It is of particular importance that the Form U5 is accurate because it "serves as a warning mechanism to member firms of the potential risks and accompanying supervisory responsibilities they must assume if they decide to employ an individual with a suspect history." *Henry Irvin Judy*, 52 S.E.C. 1252, 1256 (1997).

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[12] Our analysis relates only to cause two of the complaint. We make no finding with regard to cause one.

[13] The Form U5 at issue provided five potential termination descriptions: voluntary, deceased, permitted to resign, discharged, or other. An explanation of the circumstances surrounding the termination was required if the permitted to resign, discharged, or other category was selected.

[14] The record demonstrates that McCrudden (through counsel) negotiated and paid for a "clean" Form U5. At the hearing, McCrudden testified that HedgeCap owed him in excess of $100,000 when he was terminated. Nevertheless, as a term of the Settlement Agreement, McCrudden agreed to pay HedgeCap $20,464.17 in exchange for the firm's filing of a Form U5 that labeled his departure as voluntary. The record similarly illustrates that McCrudden withheld that $20,464.17 payment until he obtained proof that a Form U5, marked voluntary, had been filed.

The disclosure of truthful information on the Form U5 is crucial to the integrity of the securities industry's public disclosure system and FINRA's and other regulatory authorities' investigatory efforts. *See Dist. Bus. Conduct Comm. v. Nichols*, Complaint No. C01950004, 1996 NASD Discip. LEXIS 30, at *30 (NASD NBCC Nov. 13, 1996). McCrudden's misconduct in this case inhibited FINRA's investigatory system from operating as it should and concealed from potential employers and regulatory authorities the events that actually had transpired at HedgeCap. McCrudden's misconduct transgressed ethical boundaries, in violation of NASD Rule 2110. *See Timothy L. Burkes*, 51 S.E.C. 356, 360 (1993) (Article III, Section 1 of the NASD's Rules of Fair Practice (the predecessor to NASD Rule 2110) considers the ethical implications of the respondent's misconduct), *aff'd*, 29 F.3d 630 (9th Cir. 1994).[15]

In so finding, we emphasize that the Form U5 that HedgeCap filed on behalf of McCrudden was false. McCrudden's Form U5 misrepresented that McCrudden's termination was voluntary when, in fact, he was discharged. The Termination Notice that Jahre sent to McCrudden on July 2, 2006, unequivocally communicated that McCrudden was discharged. The Termination Notice stated, "**this email will serve as your official termination notice of your relationship with [HedgeCap], effective immediately**."

The Termination Notice explained the basis for the discharge, which was McCrudden's "conduct in [his] email communications to [Jahre] and other HedgeCap employees on Friday, June 30th." The Termination Notice informed McCrudden of HedgeCap's intent to sever all ties with him, emphasizing that McCrudden was immediately prohibited from reentering HedgeCap's office. The Termination Notice also stated that McCrudden's corporate email, telephone line, and file server access had been terminated, and noted that all of his personal effects in the office would be packed up and couriered to his home. McCrudden also understood that he had been discharged. At his on-the-record interview and at the hearing, in response to questioning regarding his decision to leave HedgeCap, McCrudden testified, "I didn't leave. I was basically fired and locked out."

We conclude not only that McCrudden's Form U5 was false, but also find that his purported reliance on the advice of counsel regarding the negotiation and completion of the Form U5 is irrelevant and does not absolve his misconduct. As an initial matter, the pleaded cause of action in this case was not a scienter-based violation, which means that the advice of counsel defense is not available. *See Dist. Bus. Conduct Comm. v. Goldsworthy*, Complaint No. C05940077, 2000 NASD Discip. LEXIS 13, at *35-36 (NASD NAC Oct. 16, 2000) (explaining that advice of counsel is only available as a defense when scienter is an element of the offense), *aff'd*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279 (May 15, 2002).

Moreover, to the extent that McCrudden relied upon legal counsel to negotiate and complete the Form U5, he failed to establish the factors necessary to prove the defense. To establish an advice of counsel defense, McCrudden must demonstrate that he: (1) completely

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[15] NASD Rule 2110 states that, "A member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade." The rule is not limited to legal conduct, but incorporates broad ethical principles. *See Jay Frederick Keeton*, 50 S.E.C. 1128, 1134 (1992). NASD Rule 0115 subjects associated persons to all rules applicable to FINRA member firms.

disclosed his intended action to the attorney; (2) requested the attorney's advice of the legality of the intended action; (3) received counsel's advice that the conduct would be legal; and (4) relied in good faith on the advice. *See Goldsworthy*, 2000 NASD Discip. LEXIS 13, at *35.

The Hearing Panel found (and the record supports) that McCrudden's testimony regarding his discussions with counsel concerning the negotiation and completion of the Form U5 was "tentative, inconsistent, and unclear." The Hearing Panel stressed this point, stating that McCrudden's most credible testimony concerning his interaction with counsel was as follows, "I only recall that, you know, I had great trust that he was a[n] SEC attorney, that he would know the rules."[16] McCrudden's testimony concerning his discussions and interactions with counsel was, at best, scant and incoherent. McCrudden did not meet the standards necessary to establish an advice of counsel defense in this case.[17]

McCrudden coerced HedgeCap to file the false Form U5 in this case. His tactics – harassment, intimidation, and ultimately, monetary payment – proved successful and resulted in the filing of a false Form U5, which mischaracterized the circumstances surrounding his departure from HedgeCap. McCrudden's misconduct was unethical, contravened the securities industry's high standards of commercial honor and just and equitable principles of trade, and therefore violated NASD Rule 2110.

B. Sanctions

There are no FINRA Sanction Guidelines ("Guidelines") or analogous Guidelines to address the misconduct presented in this case. Consequently, we rely on the principal considerations, which are applicable to every disciplinary case, to guide our formulation of sanctions.[18] The Hearing Panel fined McCrudden $2,500 and suspended him for five business days for the violation at issue. We find, however, that the Hearing Panel grossly misjudged the gravity of this violation. We increase the fine to $50,000 and the suspension to one year.

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[16] We have no basis to disturb the Hearing Panel's finding. *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *18 (Aug. 22, 2008) (stating that the Commission gives great deference to Hearing Panel credibility determinations, which can only be overcome with substantial record evidence).

[17] McCrudden did not obtain counsel until after July 5th, after he had completed his email campaign to coerce HedgeCap to file the false Form U5. Accordingly, the advice of counsel defense has no bearing on the harassing, intimidating, and violative conduct, in which McCrudden engaged between July 3rd and July 5th.

[18] *See FINRA Sanction Guidelines* 6-7 (Principal Considerations in Determining Sanctions) (2007), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

1. Pattern of Similar Misconduct

The evidence in this case demonstrates that McCrudden engaged in a disturbing pattern of similar misconduct.[19] This is a powerful aggravating factor. Enforcement introduced evidence of McCrudden's communications with his former employer, Pali Capital, Inc. ("Pali"), the National Futures Association ("NFA"), and FINRA to demonstrate that McCrudden had a history of similar misconduct.[20]

a. McCrudden's Conduct Toward Pali

Between February 2003 and April 2004, Pali employed McCrudden. Around February 2004, Pali initiated an internal investigation to determine whether McCrudden violated internal trading policies. It is unclear what, if anything, the investigation uncovered. Nevertheless, McCrudden was permitted to resign.

Tensions arose between McCrudden and Pali's president regarding the terms of McCrudden's departure from the firm, and the firm's completion of McCrudden's Form U5. When Pali's president explained that McCrudden's termination was "for cause" (and would be reflected as such on his Form U5), McCrudden wrote:

> What a fucking loser you are . . . . There is obviously a lot more that can be gotten into at a later date if you choose or want to piss me off. You should know better, but I guess [you're] going to learn your lesson the hard way . . . [you're] picking a fight with the wrong fucking guy . . . . Keep pissing me off and [let's] see who has more to lose . . . . Stay the fuck out my families and my life, or keep sending threatening letters and see what happens. If you make me spend more time on this then I am prepared to, I will dedicate my time and effort to fight it . . . . Move on little man. Send one more threatening letter to my home and see what happens. You'll be fucking with the wrong man and family!

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19 *See id.* at 6 (Principal Considerations in Determining Sanctions, No. 8) (considering whether respondent engaged in a pattern of misconduct).

20 McCrudden opposed Enforcement's introduction of the evidence, but the Hearing Panel overruled the objection, and admitted the evidence solely for the consideration of sanctions. The Hearing Panel properly admitted and considered the evidence. Evidence of misconduct that is not alleged in the complaint, but is similar to the misconduct charged in the complaint, is admissible to determine sanctions. *See Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521, at *22 n.33 (July 1, 2008) (finding, in an unauthorized trading case, that evidence of unauthorized trading, which was not alleged in the complaint, was admissible to gauge aggravating factors to assess sanctions); *Gateway Int'l Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *24 n.30 (May 31, 2006) (stating that, "[a]lthough we are not finding violations based on [other] failures [to file timely reports], we may consider them, and other matters that fall outside the [Order Instituting Proceedings], in assessing appropriate sanctions").

Pali filed McCrudden's Form U5 on April 8, 2004.[21] The Form U5 disclosed that McCrudden was permitted to resign, under internal review when he left, and that the investigation involved allegations of fraud, the wrongful taking of property, or violations of investment-related rules and regulations. McCrudden demanded that Pali amend the contents of his Form U5. When Pali refused, McCrudden sent the following email:

> I have given more than sufficient time for Pali to pay back the money owed me and to "fix" my [Form] U5 back to what it should have read when I resigned. You will hear from my attorney shortly and I will personally be contacting the CFTC, SEC and NASD. You have underestimated me and broken yet again another verbal commitment. At least [you're] consistent. I will make sure you will pay dearly for your lack of ethics and integrity.

McCrudden's attempt to manipulate the contents of his Form U5 when he left Pali demonstrates that his misconduct at HedgeCap was not aberrant, but representative of a pattern of misconduct that aims to control and conceal the information that future employers and regulators receive. Such misconduct is unacceptable in an industry that relies on the truthful and accurate reporting of information to fulfill its regulatory functions. *See Kauffman*, 51 S.E.C. at 839. McCrudden's history of similar misconduct is a significant aggravating factor.

b. McCrudden's Conduct Toward the NFA

We consider it aggravating that McCrudden previously engaged in similar misconduct in proceedings with a regulator. In August 2004, McCrudden filed an application with the NFA for his firm, MAAM, to register as a commodity pool operator. He also filed applications on his own behalf to register with MAAM as an associated person and principal. The NFA denied all three requests for registration in June 2005. McCrudden decided to appeal the NFA's decision to the Commodity Futures Trading Commission ("CFTC"). In order to prepare his appeal, McCrudden requested that the NFA provide him with copies of his email correspondence and telephone logs with the organization. When the NFA denied McCrudden's request, he responded as follows:

> I am coming out to Chicago and fucking getting you and your fucking prick friends . . . you think you can fuck with whoever you want mother fucker? look over your shoulder one day fucker . . . you mother fucking corrupt pieces of shit . . . you splash that corrupt, biased, fixed decision all over the internet so all of my friends and childrens friends can see? And you think I am going to let you . . . get away with it? Think again . . . tell your buddies I'm coming . . . [you're] not getting away with this shit.

NFA staff turned this email over to the United States Attorney's Office in Chicago, who in turn, required that McCrudden attend anger management classes for two years and report to the United States Attorney's Office in Long Island every two weeks.

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[21] Pali closed its investigation in June 2004. No further action was taken against McCrudden.

c. McCrudden's Conduct Toward FINRA

McCrudden's conduct toward FINRA staff during these proceedings also fits into his pattern of misconduct. FINRA staff concluded its investigation of this matter in May 2007. At that time, the staff informed McCrudden that FINRA intended to initiate disciplinary proceedings against him. Upon learning the staff's recommendation, McCrudden left voicemails for both the FINRA investigator and Enforcement attorney handling the matter:

> Yeah . . . this is Vincent McCrudden . . . . Um, I just got off the phone with my attorney. You know you guys are fucking pieces of shit. You really are pieces of shit. Um, I want to know who you report to and obviously this is a set up. You know, I cooperated with the NASD and you guys are gonna fucking do this to me? You are fucking low life fucking scum bags. I want to know who you report to, I'm going to have you and [the investigator] fucking fired. There's no way you guys are getting away with this. Somebody has set this up. There's no way that you ban somebody and there's no threat . . . . Give me your fucking superior's number. And I want to know the guys who made this fucking decision. I want every fucking name, you got that? You scum bag.

In January 2009, McCrudden sent similar communications to Enforcement's lead attorney on this case. When the attorney asked that McCrudden refrain from sending such communications, McCrudden responded:

> [Y]ou're a lowlife, corrupt scumbag and I will find out why you are doing this and whom sent you to do this . . . . I will not go down without a fight, and although you're probably just a stooge and have been told what to do, I am holding you responsible for this corrupt process. I have nothing to lose and am fed up with being targeted. Believe me, profanity and being insulted should be the very least of your concerns you scumbag.

McCrudden's conduct and attitude toward FINRA staff during these proceedings is striking. It is one thing to express disdain for the disciplinary process, but where, as here, that disdain turns to harassing and intimidating conduct, such misconduct cannot be tolerated. The Hearing Officer observed (and the record reinforces) that McCrudden was belligerent during the hearing. His conduct disrupted and interfered with the disciplinary process, inhibiting Enforcement's service of documents on him and its ability to question him at the hearing.[22] McCrudden's conduct was tantamount to obstruction, and aggravates the misconduct presented in this case. *See Joseph J. Barbato*, 53 S.E.C. 1259, 1282 (1999) (finding that representative's conduct during the proceeding, particularly his interference with witnesses, was an aggravating factor and suggested that the representative may engage in additional violative conduct in the future).

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[22] When an Enforcement attorney sent McCrudden an email with a courtesy copy of a pleading, McCrudden insulted him, using profanity and calling him a "scumbag." In addition, at the hearing, when the Enforcement attorney questioned him about his employment with Pali,

[Footnote continued on next page]

Similarly aggravating is McCrudden's continued failure to appreciate the gravity of his misconduct. *See Dep't of Enforcement v. Lu*, Complaint No. C9A020052, 2004 NASD Discip. LEXIS 8, at *44-45 (NASD NAC May 13, 2004), *aff'd*, Exchange Act Rel. No. 51047, 2005 SEC LEXIS 117, at *1 (Jan. 14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006). Even as we considered this matter, McCrudden demonstrated an inability (or unwillingness) to act in a manner that is expected of a securities professional, participating in a FINRA disciplinary proceeding. On January 13, 2010, while this appeal was pending, McCrudden sent an email to a FINRA attorney to request information about the Hearing Officer from the proceeding below.[23] When the attorney denied the information request, McCrudden sent that attorney (and the Enforcement attorney handling the case) an email that stated:

> There are many, many eyeballs aware of what has and is still transpiring against me and my family. You will all fucking pay!
>
> * * *
>
> In any case, you know you are all going to be fired at the very least. And I am commencing a PR campaign against you all individually that will dwarf the lies you have all written about me.
>
> * * *
>
> One thing is for sure, I told you that you picked the wrong guy to fuck with. And now you're all about to find out. Why did I [write] this long email? Who could be blind copied. Well, that's going to be the start of the fun part for me.

2. McCrudden's Disciplinary History

McCrudden has aggravating disciplinary history. *See Castle Secs. Corp.*, Exchange Act Rel. No. 52580, 2005 SEC LEXIS 2628, at *18 (Oct. 11, 2005) (disciplinary history is a

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[cont'd]

McCrudden refused to answer, stating, "[n]ot only am I going to refuse [to answer], but I am going to sue you."

[23] On January 14, 2010, Enforcement filed a motion for leave to introduce the email pursuant to NASD Rule 9346(b) (explaining that leave to introduce new evidence on appeal may be granted if a party demonstrates that the evidence is material and there was good cause for failing to introduce the evidence previously). McCrudden opposed the motion, objecting to introduction of the email as prejudicial, irrelevant, and cumulative. The National Adjudicatory Council Subcommittee empanelled to consider this matter granted Enforcement's motion to adduce the evidence. The Subcommittee found that the email was material to the misconduct alleged in the complaint, and that there was good cause for failing to introduce the evidence in the proceedings below because the evidence did not exist at that time. We adopt the Subcommittee's ruling as our own.

significant aggravating factor and an important consideration in weighing sanctions).[24] The NFA's denial of McCrudden's application for registration as an associated person is a disciplinary event that affects the sanctions analysis.[25] The NFA found, and McCrudden admitted, that from November 1996 through at least June 1997, he distributed false periodic statements to participants in the Hybrid Fund commodity pool that he operated. *See McCrudden v. Nat'l Futures Assoc.*, CFTC Docket No. CRAA 05-02, 2006 CFTC LEXIS 132, at *1 (Dec. 28, 2006), *aff'd*, 2008 U.S. App. LEXIS 2571, at *1 (2d Cir. Feb. 6, 2008).

The NFA found that the periodic statements were false because they did not reflect that the Hybrid Fund had incurred substantial trading losses. *See McCrudden*, 2006 CFTC LEXIS 132, at *2-4. The NFA also concluded that McCrudden's misconduct demonstrated "a disregard of or inability to comply with the requirements of the [Commodity Exchange Act] and [the CFTC's] regulations, a lack of honesty, and an inability to deal fairly with the public [and act] consistent[ly] with just and equitable principles of trade." *Id.* at *8. The CFTC and Second Circuit affirmed the NFA's findings. *See id.* at *1; *McCrudden*, 2008 U.S. App. LEXIS 2571, at *1.[26] This disciplinary event is an aggravating factor.

3. Other Considerations for Sanctions

We consider the nature of the information omitted from McCrudden's Form U5. Information concerning the circumstances of McCrudden's termination was significant, signaling to prospective employers that McCrudden should be scrutinized more closely. If McCrudden's termination were properly characterized as the discharge that it was, HedgeCap would have been required to disclose additional information concerning the basis of the discharge. This supplementary information would enable potential employers to make an informed hiring decision, and if they decided to hire McCrudden, to determine what sort of supervision might be appropriate for him considering his employment history. *See Judy*, 52 S.E.C. at 1256 ("In a business that relies heavily on candor and truthful representation, submitting a Form U5 doctored to delete unfavorable information in order to gain employment is serious misconduct."); *NASD Notice to Members 88-67* (Sept. 1988) (failing to provide accurate information on a Form U5 deprives member firms of the ability to make informed hiring decisions). The information also

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[24] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 1) (considering respondent's disciplinary history).

[25] This disciplinary event also results in McCrudden's statutory disqualification. The December 2006 order of the CFTC, which denied McCrudden's application for registration, subjects him to statutory disqualification under Section 3(a)(39)(B)(ii) of the Securities Exchange Act of 1934 and Article III, Section 4 of FINRA's By-Laws.

[26] McCrudden's issuance of the false account statements also resulted in a criminal indictment on charges of federal mail fraud. *See US v. McCrudden*, 222 F. Supp. 2d 352 (E.D.N.Y. 2002). McCrudden was acquitted on all charges. The CFTC emphasized that, although McCrudden's misconduct may not have resulted in criminal liability, the weight of the evidence demonstrated that McCrudden had acted with scienter, engaged in a pattern of deceptive misconduct, and violated the NFA's and CFTC's rules. *See McCrudden*, 2006 CFTC LEXIS 132, at *22-23, 25-26.

would have aided FINRA in determining whether to investigate McCrudden's misconduct. The information omitted from McCrudden's Form U5 was important, and its omission serves to aggravate the misconduct in this case.

We reject McCrudden's argument for mitigation – that he reasonably relied on competent legal advice to negotiate the terms of his departure from HedgeCap and the disclosures made on his Form U5.[27] To establish that advice of counsel is mitigating for purposes of sanctions under the Guidelines, McCrudden must demonstrate "reasonable reliance on competent legal . . . advice." *Dep't of Enforcement v. Fergus*, Complaint No. C8A990025, 2001 NASD Discip. LEXIS 3, at *48 (NASD NAC May 17, 2001). McCrudden failed to meet this standard. *See id.* at *46-47 (rejecting respondent's argument that his reliance on counsel was a mitigating factor because the reliance was not reasonable). McCrudden's discharge was *a fait accompli* by the time he brought his lawyer into the situation. McCrudden has not shown that he received any legal advice. Rather, the record demonstrates that McCrudden retained an attorney to negotiate his settlement with HedgeCap. This does not qualify as a mitigating factor.

The misconduct and aggravating evidence in this case necessitates the imposition of higher sanctions. When we consider McCrudden's pattern of similar misconduct, including his efforts to intimidate NFA and FINRA staff, and his disciplinary history, we conclude that McCrudden's misconduct is egregious. We impose strong sanctions on McCrudden to deter him from continuing his pattern of harassment and intimidation regarding regulatory information. We impose a substantially higher fine and longer suspension than the Hearing Panel to remedy McCrudden's egregious misconduct. We fine McCrudden $50,000 and suspend him for one year in all capacities for the misconduct presented in this case.

C. McCrudden's Appeal of Costs

McCrudden appeals the Hearing Panel's assessment of $10,063.81 in hearing costs. McCrudden argues the imposition of costs on him would be unfair and unreasonable because Enforcement over-litigated the case, forced him to proceed to a hearing, and did not successfully achieve the sanctions requested.

McCrudden's arguments fail. The Hearing Panel has broad discretion to assess costs in FINRA disciplinary proceedings. NASD Rule 8330 provides that associated persons "*shall bear such costs of the proceeding* as the [a]djudicator deems fair and appropriate under the circumstances." (emphasis added); *see also John M. W. Crute*, 53 S.E.C. 1112, 1116 (1998) (upholding the imposition of costs, and recognizing FINRA's broad discretion to impose costs), *aff'd*, 208 F.3d 1006 (5th Cir. 2000).

In addition, McCrudden did not prevail in the proceedings before the Hearing Panel. The Hearing Panel found that McCrudden violated FINRA rules, and assessed the sanctions and costs that they deemed appropriate under the circumstances. *See N. Woodward Fin. Corp.*, Exchange Act Rel. No. 60505, 2009 SEC LEXIS 2796, at *22 (Aug. 14, 2009) (explaining that there was no reason to grant respondents' request for costs because FINRA was justified in bringing the

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[27] *See Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 7) (considering whether respondent demonstrated reasonable reliance on competent legal advice).

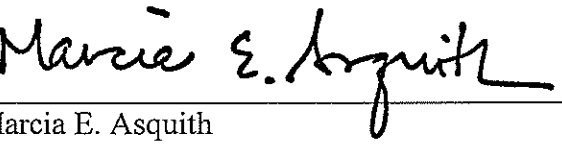
disciplinary proceeding); *E. Magnus Oppenheim & Co.*, Exchange Act Rel. No. 51479, 2005 SEC LEXIS 764, at *20-21 (Apr. 6, 2005) ("NASD acted well within its discretion in assessing the costs following the decision.").

There also is no evidence in the record to support McCrudden's argument that Enforcement over-litigated the case, or compelled McCrudden to participate in a hearing. To the contrary, FINRA has instituted rules that enable respondents to resolve cases without incurring the expense associated with a hearing. *See, e.g.*, NASD Rule 9221(a), (c) (explaining that respondents may waive the right to a hearing, and may have the matter considered on the basis of the record); NASD Rule 9270(f) (providing procedures for contested offers of settlement). The imposition of costs in this case was not unfair or unreasonable. We affirm the assessment of $10,063.81 in hearing costs.

III. Conclusion

McCrudden harassed, intimidated, and paid his former employer to induce the filing of a false Form U5, in violation of NASD Rule 2110. For this violation, we fine McCrudden $50,000 and suspend him for one year in all capacities. We affirm the imposition of $10,063.81 in hearing costs. We have considered, and reject without discussion, all other arguments of the parties.[28]

On behalf of the National Adjudicatory Council,



Marcia E. Asquith
Senior Vice President and Corporate Secretary

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