

FINANCIAL INDUSTRY REGULATORY AUTHORITY¹
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

HARVEST CAPITAL INVESTMENTS, LLC
(CRD No. 40367),

and

DENNIS COTTO
(CRD No. 3047293),

Respondents.

Disciplinary Proceeding
No. 2005001305701

**Hearing Panel Decision and
Order Granting, In Part,
Complainant's Motion for
Summary Disposition**

Hearing Officer – SW

Dated: September 27, 2007

The Hearing Panel bars Respondent Cotto from associating with any FINRA member in any capacity, and expels Harvest Capital from FINRA membership, for violating: (1) NASD Membership and Registration Rules 1021 and 1031, NASD Conduct Rule 2110, and IM-8310-1 as set forth in count one of the Complaint; and (2) NASD Conduct Rule 2110 and Procedural Rule 8210 as set forth in counts two and three of the Complaint. No separate sanction is imposed on the Respondents for violating NASD Conduct Rule 2110 and IM-1000-1 as set forth in counts five and six of the Complaint.

Appearances

Thomas M. Huber, Esq., Regional Counsel, and David F. Newman, Esq.,
Regional Counsel, Philadelphia, PA, for the Department of Enforcement.

Dennis Cotto for himself and for Harvest Capital Investments, LLC.

¹ Effective July 30, 2007, the corporate successor to NASD is the Financial Industry Regulatory Authority (FINRA).

I. PROCEDURAL HISTORY

A. Complaint and Answer

On October 19, 2006, the Department of Enforcement (“Enforcement”) filed an eight-count Complaint against (i) Harvest Capital Investments, LLC (“Harvest Capital” or the “Firm”), (ii) Dennis Cotto, and (iii) Kiet Vo.

Subsequently, the National Adjudicatory Council accepted Mr. Vo’s settlement offer as to counts seven and eight of the Complaint. Accordingly, this Decision only addresses counts one through six of the Complaint, *i.e.*, the allegations against Respondents Harvest Capital and Cotto (the “Respondents”).

Count one of the Complaint alleges that the Respondents violated NASD Membership and Registration Rules 1021 and 1031, NASD Conduct Rule 2110, and IM-8310-1 when Respondent Cotto functioned in a principal capacity at Harvest Capital without being registered as a principal during a 28-month period from June 2004 to October 2006, including a six-month suspension period imposed on Respondent Cotto by FINRA.

Count two of the Complaint alleges that Respondent Cotto violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by appearing for an on-the-record interview (“OTR”) with FINRA without bringing all the documents that the FINRA staff had requested.

Count three of the Complaint alleges that the Respondents violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to respond in any manner, failing to respond completely, or failing to respond timely to five requests for information issued pursuant to Rule 8210 by the FINRA staff.

Count four of the Complaint alleges, in the alternative to counts two and three of the Complaint, that the Respondents violated NASD Conduct Rules 3110 and 2110, and Respondent Harvest Capital violated SEC Exchange Act Rule 17a-4, by not preserving the documents referenced in counts two and three of the Complaint.

Count five of the Complaint alleges that Respondent Cotto willfully violated NASD Conduct Rule 2110 and IM-1000-1 by: (i) filing a false Form U-4, which failed to disclose a pending 2004 disciplinary proceeding; (ii) failing to update two Form U-4 amendments filed in November 2006 to disclose the pending 2004 disciplinary proceeding; (iii) failing to update his Form U-4 when his offer of settlement resolving the 2004 disciplinary proceeding was accepted by FINRA on December 29, 2004; (iv) failing to disclose the accepted offer of settlement on Form U-4 amendments filed on May 12, 2005, and February 14, 2006; and (v) failing to update his Form U-4 to disclose FINRA's June 29, 2006 investigation of Respondent Cotto.

Count six of the Complaint alleges that the Respondents violated NASD Conduct Rule 2110 and IM-1000-1 by: (i) filing a false Form BD amendment; (ii) failing to timely update the Firm's Form BD to disclose the resignations of two of the Firm's FINOPs; and (iii) failing to amend the Firm's Form BD to disclose the execution by Harvest Capital of two new clearing agreements.

The Respondents denied the violations.

B. Summary Disposition Motion and Hearing

Enforcement filed a motion for summary disposition as to liability and sanctions for each of the six counts of the Complaint, which the Respondents opposed.

For the reasons set forth below, as to count one of the Complaint, the Hearing Panel granted Enforcement's motion for summary disposition on the issue of liability. The Hearing Panel denied the motion and conducted a Hearing on the issue of sanctions as to count one of the Complaint and on the issues of liability and sanctions as to counts two, three, four, five, and six of the Complaint.

The Hearing Panel, consisting of a current member of the District 8 Committee, a current member of the District 9 Committee, and a Hearing Officer, conducted a Hearing in Philadelphia, PA, on May 8-9, 2007.²

Based on the evidence adduced at the Hearing, the Hearing Panel found that the Respondents had engaged in the misconduct alleged in counts two, three, five, and six of the Complaint. Finding that the Respondents' misconduct was egregious, the Hearing Panel barred Respondent Cotto from associating with any FINRA member and expelled Harvest Capital from FINRA membership for the violations alleged in counts one, two, and three of the Complaint. No separate sanction was imposed on the Respondents for the violations found in counts five and six of the Complaint. Count four of the Complaint was dismissed.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Respondents

1. Harvest Capital Investments, LLC

Harvest Capital, a limited liability company, has been a FINRA member since September 3, 1996. (CX-1, p. 2).

² "Tr." refers to the transcript of the Hearing held on May 8 and 9, 2007; "CX" refers to the exhibits submitted by Enforcement; "RX" refers to the exhibits submitted by the Respondents; and "JX" refers to the exhibits submitted jointly by Enforcement and the Respondents.

2. Respondent Cotto

Respondent Cotto has been associated with Harvest Capital since 1998 when he acquired control of Harvest Capital and was appointed to the Firm's board of managers. (RX-1, p. 10; JX-6, p. 162). On August 2, 2004, Respondent Cotto authorized the filing of a Form U-4 to become a general securities representative of Harvest Capital. (CX-2, p. 3; RX-16). Respondent Cotto authorized the filing of five amendments to his Form U-4 from November 3, 2004 through February 27, 2007. (Id.).

Although Respondent Cotto's registration never became effective, Respondent Cotto continued to be associated with Harvest Capital at all relevant times.

B. Count One of the Complaint: Respondent Cotto Acted as Principal

1. Acquisition of Harvest Capital

ED, Respondent Cotto's former college roommate, convinced Respondent Cotto to purchase Harvest Capital through his wholly-owned company, Real Estate Technical Advisors, Inc. ("RETA") in 1998. (Tr. pp. 397, 405, 407). At the time of the purchase, Respondent Cotto was an attorney and a real estate developer, but he knew nothing about the securities industry. (Tr. pp. 397-398). Respondent Cotto appointed ED to run Harvest Capital, which was based in New York, NY. (Tr. pp. 405, 407-408). Subsequently, ED moved the offices of Harvest Capital to Washington, DC, and later to the personal residence of Respondent Cotto in Vienna, VA. (Tr. pp. 408-409).

2. 2004 Disciplinary Proceeding

On June 14, 2004, FINRA filed a complaint against Harvest Capital, Respondent Cotto, and ED, which alleged among other things that: (i) the Respondents violated NASD Membership and Registration Rule 1021 and NASD Conduct Rule 2110 as a

result of Respondent Cotto's functioning in a principal capacity at Harvest Capital without being registered as a principal;³ (ii) Respondent Cotto violated NASD Procedural Rule 8210 as a result of his failing to appear for an OTR scheduled by FINRA; and (iii) Harvest Capital violated NASD Conduct Rule 2110 by failing to keep its Form BD accurate and current as required by Article V Section 1(c) of the NASD By-Laws ("2004 Complaint"). (Exhibit A to the Complaint).

In September 2004 and October 2004, after the 2004 Complaint was issued, Respondent Cotto represented to the FINRA staff that he intended to become registered. (Tr. p. 295). Despite the pending 2004 Complaint, which alleged among other things that Respondent Cotto improperly signed documents on behalf of Harvest Capital, Respondent Cotto, without being registered, executed commission sharing agreements on behalf of Harvest Capital with Lynch, Jones & Ryan on October 15, 2004, and with Ryan Beck & Co., Inc. on November 21, 2004. (CX-15; CX-16). On November 22, 2004, Respondent Cotto executed a directed brokerage agreement with Lehman Brothers, Inc. on behalf of Harvest Capital. (CX-14).

On December 29, 2004, FINRA accepted a joint offer of settlement from the Respondents and ED to resolve the 2004 Complaint. (Exhibit B to the Complaint). Pursuant to the offer of settlement, FINRA found that from at least May 2002 through June 2004, Respondent Cotto had functioned in a principal capacity with Harvest Capital, without being registered as a principal, in violation of NASD Membership and

³ Count five of the 2004 Complaint alleged that Respondent Cotto had functioned in a principal capacity because Respondent Cotto had (i) hired and fired broker-dealer personnel; (ii) prepared and issued checks for the broker-dealer; (iii) signed contracts on behalf of the broker-dealer with respect to securities-related business; and (iv) been generally involved in the day-to-day operations of the broker-dealer. (Exhibit A to the Complaint).

Registration Rule 1021 and NASD Conduct Rule 2110, as alleged in count five of the 2004 Complaint. (*Id.*). Respondent Cotto was fined \$5,000 and suspended from associating with any FINRA member for six months effective February 22, 2005 through August 21, 2005.⁴ (Exhibit B to Complaint; JX-6, p. 239).

3. Respondent Cotto's Efforts to Obtain Registered Principals

Describing the Firm's revenues as minimal, Respondent Cotto testified that the Firm could not afford to hire a full-time securities principal. (Tr. p. 410).

On August 23, 2004, Jonathan Collett, who had previously been registered through Harvest Capital as a general securities representative, became registered as general securities principal with Harvest Capital. (Tr. pp. 66-67, 69; CX-3, pp. 3, 8). Upon becoming the general securities principal, Mr. Collett agreed to review the work of Harvest Capital's FINOP, MC, to make sure that Harvest Capital remained in compliance with its net capital requirement.⁵ (Tr. pp. 72, 95). Mr. Collett agreed to undertake these duties, while Respondent Cotto prepared to take the Series 7 and Series 24 exams and looked for another general securities principal. (Tr. pp. 70-71, 84). Mr. Collett emphasized that his being the Firm's general securities principal was a short-term arrangement. (Tr. p. 71). Mr. Collett never filed any documents with FINRA on behalf of Harvest Capital. (Tr. p. 83). Mr. Collett terminated his registration with Harvest Capital in January 2005.⁶ (CX-3, p. 3).

⁴ IM-8310-1 provides that if a person is suspended from association with a member, the member must not allow such person to remain associated with the member in any manner, including a clerical or ministerial capacity.

⁵ MC was registered as the Firm's FINOP in August 2004, and was responsible for generating the Firm's trial balance, income statement and net capital calculation. (Tr. p. 318).

⁶ Mr. Collett became registered with Harvest Capital as a general securities representative again from April 6, 2005 through September 20, 2005. (CX-3, pp. 2-3).

On September 30, 2004, Respondent Cotto provided a proposed contract to Joseph Kosinsky to serve as Harvest Capital's general securities principal (CX-5, p. 1; CX-6, pp. 1, 4). In 1999, Mr. Kosinsky had been registered as the Firm's municipal securities representative and principal. (CX-5, p. 1; CX-6, p. 1). However, Mr. Kosinsky did not sign the contract and did not agree to serve as the Firm's general securities principal. (Id.). Nevertheless, on November 29, 2004, FINRA received and approved a Form U-4 from Harvest Capital for Mr. Kosinsky to become the Firm's general securities principal. (CX-5, p. 1). Harvest Capital filed the Form U-4 without Mr. Kosinsky's knowledge or approval.⁷ (CX-6, p. 2 at ¶ 4).

In December 2004, Respondent Cotto placed an ad on the internet web site "Craig's List" for a registered principal. (Tr. p. 29). Ultimately, three individuals, David Masson, Tom Kim, and Kiet Vo responded to the ad. (Tr. pp. 29, 50, 134).

Mr. Masson responded in late 2004. (Tr. p. 33). Based on his conversation with Respondent Cotto, Mr. Masson understood that his duties were limited to contacting investment managers of pension funds to convince them to add Harvest Capital to the list of minority-owned firms with which they were willing to do business. (Tr. pp. 30, 419). Mr. Masson was to be paid \$200 each time that Harvest Capital was added to a list. (Tr. p. 30). Mr. Masson reported his efforts to Respondent Cotto. (Tr. p. 36). Realizing that he would not make any money at Harvest Capital because investment managers typically reviewed their various lists every six months or once a year, Mr. Masson left Harvest Capital and began working at another FINRA member in February 2005. (Tr. pp. 32, 34-36). The Hearing Panel finds Mr. Masson credible when he states that he was not asked

⁷ The November 29, 2004 Form U-4 amendment was purportedly signed by Mr. Kosinsky on May 1, 1999.

and did not agree to perform any managerial duties at Harvest Capital.⁸ (Tr. pp. 31-32, 36). Mr. Masson was not aware that Harvest Capital amended its Form BD on May 12, 2005, to indicate that Mr. Masson was Harvest Capital's compliance officer. (Tr. p. 43).

Mr. Kim also responded to Respondent Cotto's ad. (Tr. p. 410). Based on his conversation with Respondent Cotto in December 2004, Mr. Kim understood that the job would primarily involve reviewing and approving the Firm's quarterly FOCUS reports, for which he would be paid \$250 per month. (JX-4, pp. 1, 4). Mr. Kim agreed to accept the position beginning February 1, 2005, subject to the approval of his other employer. (JX-4, p. 2). On December 16, 2004, Harvest Capital filed a Form U-4 to register Mr. Kim as a general securities principal and general securities representative for the Firm. (Tr. p. 306; CX-7, p. 25). However, Mr. Kim's other employer refused to grant approval, and Mr. Kim notified Respondent Cotto that he would not be working for Harvest Capital. (JX-4, p. 2; JX-6, p. 43, subpages 98-99). Mr. Kim's registration with the Firm never became effective. (Tr. p. 306; CX-7, p. 25). Mr. Kim never worked for Harvest Capital and never performed any compliance or supervisory functions at Harvest Capital. (JX-4, p. 3).

Despite Mr. Masson's departure and Mr. Kim's ultimate decision not to work for Harvest Capital, Harvest Capital sent a letter to FINRA dated February 17, 2005, under the name of Mr. Masson, but signed by Respondent Cotto, which falsely stated that Mr. Masson and Mr. Kim would be in charge of supervising the Firm. (JX-3, p. 4). The

(CX-5, pp. 4, 15). Respondent Cotto admitted that Mr. Kosinsky had no involvement with Harvest Capital since 1999. (JX-6, p. 28, subpage 40).

⁸ Respondent Cotto agreed that Mr. Masson was not lying when Mr. Masson testified that the only thing that he did at Harvest Capital was to attempt to add Harvest Capital to investment managers' lists of minority-owned firms. (Tr. pp. 417-418).

February 17, 2005 letter was sent in response to FINRA's January 25, 2005 inquiry as to who would manage the Firm during Respondent Cotto's suspension. (JX-6, p. 107).

Neither Mr. Masson nor Mr. Kim was aware that Harvest Capital had sent the February 17, 2005 letter to FINRA. (Tr. p. 37; JX-3, p. 4; JX-4, pp. 2-3, 5). Respondent Cotto initially testified that he dictated the letter; subsequently, he testified that Ms. Hernandez, Respondent Cotto's wife and the Firm's administrative assistant, wrote the letter. (Tr. pp. 428-429). Nevertheless, Respondent Cotto admitted that he signed the February 17, 2005 letter. (Tr. p. 427).

Mr. Vo responded to Respondent Cotto's ad on May 16, 2005. (Tr. p. 134; JX-6, p. 158). While his suspension was in effect, Respondent Cotto hired Mr. Vo in May 2005 to take care of any required FINRA filings. (Tr. p. 411). Respondent Cotto wrote to Mr. Vo that he would be expected "to handle any compliance issues or questions [FINRA] might have at any give time." (JX-6, p. 159). Respondent Cotto also wrote, "I expect the time commitment to be no more than 1-2 hours per month." (*Id.*). Respondent Cotto knew that Mr. Vo was inexperienced and would rely on the CRD help desk to make any required filings, and therefore Respondent Cotto had no reasonable expectation that Mr. Vo was qualified to act as the Firm's compliance officer. (Tr. p. 411).

4. Respondent Cotto's Management of Harvest Capital During and After His Suspension

Despite his representation in the February 17, 2005 letter that "Mr. Cotto has been discharged of handling any legal or administrative matters pertaining to the [F]irm," during his suspension, Respondent Cotto signed on March 20, 2005, an application for the State of Virginia for certification of Harvest Capital as a minority business enterprise ("MBE"). (JX-3, p. 4; JX-6, pp. 213-218). Respondent Cotto thereafter communicated

with Virginia about the application, including submitting additional information to Virginia as requested. (JX-6, pp. 219, 221-222). Specifically, on March 25, 2005, Respondent Cotto signed a notarized statement that the Firm had been under his sole control since 1998. (JX-6, p. 219).

In addition, on March 21, 2005, also during his suspension, Respondent Cotto signed an application for the State of Indiana for certification of Harvest Capital as a MBE. (JX-6, pp. 161-167). The application identified Respondent Cotto as Harvest Capital's sole officer, the sole person with management responsibilities, and the sole person authorized to execute contracts on behalf of Harvest Capital. (JX-6, pp. 163, 166). On March 21, 2005, Respondent Cotto signed a notarized statement that he was the sole owner of Harvest Capital and that the Firm had been under his sole control since 1998. (JX-6, p. 171). In September 2006, Respondent Cotto executed and submitted to Indiana a "Statement of No Change." (JX-7, pp. 74-75).

On March 31, 2005, also during his suspension, Respondent Cotto signed a letter to the FINRA staff, on behalf of Harvest Capital, requesting that the \$1,000 fine imposed on the Firm for failing to timely file its annual audit be waived. (JX-6, p. 90). In addition, included in the annual audit, which was filed with FINRA, was an affirmation signed by Respondent Cotto that the financial statements and schedules of Harvest Capital were "true and correct" as of March 31, 2005. (JX-6, pp. 91-92).

In April 2005, during his suspension, Respondent Cotto contacted JF of Citigroup Global Markets ("CGMI") to discuss Harvest Capital becoming part of CGMI's correspondent clearing network. (JX-2, p. 5). Respondent Cotto represented to JF that he was the chairman of Harvest Capital, and he had the authority to discuss Harvest Capital

becoming a correspondent of CGMI. (Tr. pp. 269-270, 274; JX-2, pp. 1, 5-6). On July 12, 2005, Respondent Cotto directed JF to forward the documents for signature to Mr. Vo, who was identified by Respondent Cotto as the chief compliance officer of Harvest Capital. (Tr. pp. 274, 277; JX-2, p. 31). On July 12, 2005, Mr. Vo executed the agreement with CGMI on behalf of Harvest Capital. (JX-2, pp. 12-29). Respondent Cotto engaged in follow-up discussions with CGMI, and executed a Form W-9 for Harvest Capital on August 15, 2005. (JX-2, pp. 33-36).

In April 2005, during his suspension, Respondent contacted RM of Goldman, Sachs & Co. (“GSC”) regarding Harvest Capital establishing a clearing relationship with GSC. (JX-1, p. 5). Respondent Cotto represented to RM that he was the chairman of Harvest Capital and he had the authority to discuss Harvest Capital becoming a correspondent of GSC. (JX-1, pp. 1, 5-6). From April 5, 2005 through June 29, 2005, Respondent Cotto conferred with RM of GSC to establish the clearing relationship. (JX-1, pp. 5-6, 24-31). Although Mr. Vo executed the agreement with GSC on behalf of Harvest Capital on August 4, 2005, the agreement provided that notices were to be sent to Respondent Cotto. (JX-1, pp. 32-45). In addition, Respondent Cotto engaged in a number of follow-up discussions with RM regarding the agreement from August 9, 2005 through December 7, 2005. (JX-1, pp. 49-63).

In May 2005, while Respondent Cotto was suspended, Harvest Capital submitted additional information to the California Department of Transportation regarding an application that was filed on January 24, 2005, to certify Harvest Capital as a disadvantaged business enterprise (“DBE”). (JX-6, pp. 189-199, 203). The application,

signed by Respondent Cotto, reflected that Respondent Cotto was the sole person with management responsibility at Harvest Capital. (JX-6, p. 194).

On June 20, 2005, Respondent Cotto forwarded to the State of Indiana an on-site report for the Firm, which stated among other things that: (1) Respondent Cotto spent a lot of time managing and marketing Harvest Capital; (2) Respondent Cotto prepared all documents; (3) Respondent Cotto had the authority to sign all contracts; (4) Respondent Cotto made the financial decisions for Harvest Capital; and (5) Mr. Vo reported to Respondent Cotto. (JX-6, pp. 177-181).

In addition, during the period from June 2004 to October 2006, including the period of his suspension, Respondent Cotto remained the only authorized signatory on Harvest Capital's checking account, and issued, or directed the issuance, of all checks and other disbursements from the Firm's checking account. (JX-6, p. 180; JX-6, pp. 45-46, subpages 109-110). There was no other person at Harvest Capital who exercised authority at the Firm without the approval of Respondent Cotto.⁹

Despite his assertion in the February 17, 2005 letter that "[Respondent Cotto] will be precluded from receiving any compensation from the [F]irm," Respondent Cotto admitted that the Firm was reimbursing him for certain expenses. (Tr. p. 473).

Specifically, Respondent Cotto admitted that he used the Firm's account to pay his professional bar dues, his credit card bills, utility bills, and other household expenses. (Tr. pp. 501-502; JX-7, p. 20).

⁹ In a September 18, 2006 letter, Harvest Capital wrote FINRA that Respondent Cotto was designated to represent the Firm at its FINRA examination scheduled for September 18, 2006. (CX-23, p. 1).

5. **Enforcement Entitled to Summary Disposition with Respect to Count One of the Complaint**

NASD Membership and Registration Rule 1021(a) requires the registration of all persons engaged in the securities business “who are to function as principals.” The Rule defines the functions of a principal as being “engaged in the management of the member’s investment banking or securities business,” including the functions of “supervision, solicitation, conduct of business or the training of persons associated with a member for any of these functions.”

NASD Membership and Registration Rule 1031 requires that all persons engaged in the securities business of a member be registered. IM-8310-1 provides that if a person is suspended from association with a member, the member must not allow such person to remain associated with the member in any manner, including a clerical or ministerial capacity.

Pursuant to NASD Procedural Rule 9264(d), a Hearing Panel may grant a motion for summary disposition when “there is no genuine issue with regard to any material fact and the party that files the motion is entitled to summary disposition as a matter of law.” This rule is identical to the standard under Rule 56(c) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) governing summary judgments. It is well established under Fed. R. Civ. P. 56 that the moving party bears the initial burden of showing “the absence of a genuine issue of material fact.”¹⁰ If the moving party meets the initial burden, the opposing party must come forward with specific facts “showing that there is a genuine issue for trial.”¹¹

¹⁰ Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986).

¹¹ Matsushita Elec. Indus. Corp., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

The Hearing Panel concluded that Respondent Cotto's repeated written representations that he was the owner and the manager of the Firm contained in the state applications and his correspondence to other FINRA members regarding the Firm's clearing relationships presented "compelling evidence" that Respondent Cotto managed Harvest Capital and functioned as the Firm's general securities principal from June 2004 through October 2006.¹² The Respondents' opposition failed to show that there was a genuine issue of fact for trial regarding Respondent Cotto's management of Harvest Capital.

Finding that any rational trier of fact would find that Respondent Cotto managed Harvest Capital, the Hearing Panel granted Enforcement's motion for summary disposition.¹³

At the Hearing, Respondent Cotto described in greater detail his efforts to hire general securities principals for the Firm. However, Respondent Cotto's testimony and the testimony of Messrs. Collett, Masson, and Vo clearly indicated that although Respondent Cotto sought to hire general securities principals for the Firm, he never delegated managerial control of Harvest Capital. As Respondent Cotto indicated in the state applications that he signed, the person who made the major decisions at the Firm was always Respondent Cotto. Messrs. Collett, Masson, and Vo were always subject to Respondent Cotto's authority, and Mr. Kim never had authority at Harvest Capital.

¹² The Hearing Panel also noted that Section 5.1.2 of Harvest Capital's Limited Liability Company Agreement, dated May 12, 1998, listed Respondent Cotto as the sole member of the initial board of managers. (RX-1, p. 10). There was no evidence presented to the Hearing Panel that another board of managers was ever selected.

¹³ Matsushita Elec. Indus. Corp., Ltd. at 586.

The Hearing Panel confirmed its earlier finding that the Respondents violated Membership and Registration Rules 1021 and 1031, NASD Conduct Rule 2110, and IM-8310-1 because Respondent Cotto functioned in a principal capacity at Harvest Capital from June 2004 through October 2006, including the period of his six-month suspension, as alleged in the first cause of the Complaint.

C. Count Two of the Complaint: Respondent Cotto Failed to Provide Requested Documents

By a letter dated July 1, 2005, FINRA staff requested, pursuant to Procedural Rule 8210, that Respondent Cotto appear at FINRA's Washington, DC office for an OTR on July 21, 2005, and produce copies of specified documents, including all correspondence, electronic transmissions or other written communications received or sent from June 1, 2004 to July 21, 2005 that relate to the business of Harvest Capital. (JX-6, pp. 14-15). The letter was successfully sent via facsimile transmission on July 1, 2005, and Respondent Cotto signed for a certified copy of the letter on July 5, 2005. (JX-6, pp. 16-17).

NASD Procedural Rule 8210(a)(1) provides, in part, that:

for the purpose of an investigation, complaint, examination, or proceeding authorized by the NASD By-Laws or the Rules of the Association . . . Association staff shall have the right to: require a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . and to testify . . . 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.

Rule 8210 provides a means for FINRA to carry out its regulatory functions in the absence of subpoena power. It is a "key element in FINRA's efforts to police its

members’; failure to respond subverts FINRA’s ability to perform its regulatory responsibilities.¹⁴

Respondent Cotto admitted that he failed to produce correspondence, e-mails and other documents that he had sent and received beginning in early April 2005 concerning a possible clearing relationship with CGMI and GSC. (Tr. pp. 476-477). Respondent Cotto testified that the business relationships with the clearing firms were not finalized at the time of his OTR, and therefore he believed that the correspondence was not relevant. (Id.). The FINRA staff discovered the existence of the clearing agreements because of the testimony provided by Mr. Vo at his OTR. (JX-6, p. 3 at ¶ 7). The Hearing Panel finds that the e-mails and other documents were clearly encompassed by the Rule 8210 request.

Respondent Cotto admitted that he also failed to produce the applications and other documents that he signed and submitted to the States of Virginia, Indiana, and California, to certify Harvest Capital as an MBE or as a DBE. (Tr. p. 490). Respondent Cotto testified that the state applications were filed in pursuit of real estate brokerage business, not securities business.¹⁵ (Tr. pp. 447-448). Respondent Cotto also stated that to the extent that the state applications referred to securities business, they contained typographical errors. (Tr. pp. 453, 460; CX-11, p. 4). The applications themselves contradict Respondent Cotto’s testimony that the applications were not filed to obtain securities business. (JX-6, pp. 162-167, 178-181, 187, 190-197, 200, 207-211, 214-216, 219). For example, the cover letter for the Indiana application signed by Respondent

¹⁴ Richard J. Rouse, 51 S.E.C. 581 (1993); John J. Malach, 51 S.E.C. 618 (1993).

Cotto stated “Harvest Capital is a Hispanic-owned broker-dealer. . . . We are currently licensed and in good standing with the National Association of Securities Dealers.” (JX-6, p. 161). In any event, the Rule 8210 request encompassed documents “that relate to the business of [Harvest Capital]” without limitation. (JX-6, p. 14).

As an alternative explanation, Respondent Cotto stated that his failure to bring the state applications for his OTR was an oversight. (Tr. p. 559). Respondent Cotto stated that he relied “on Ms. Hernandez to put together any documents in preparation for the OTR, and I think, as a result of that, it might have fallen through the cracks.” (Tr. p. 491).

The Hearing Panel finds that the state applications were filed in furtherance of the Firm’s securities business and its real estate business. (RX-9). The Hearing Panel did not find credible Respondent Cotto’s testimony that his failure to produce the requested documents was an oversight because his testimony contradicted his prior statements that he did not produce the documents because he did not believe that the documents were encompassed by the request.

To the contrary, the Hearing Panel finds that Respondent Cotto intentionally decided to withhold information from FINRA staff that would have shown that he was continuing to perform principal functions without being registered. The information that Respondent Cotto withheld was directly relevant to the FINRA staff’s investigation of possible rule violations by Respondent Cotto. By refusing to provide the information, Respondent Cotto concealed his violation of the registration rules, impeded the FINRA

¹⁵ Respondent Cotto argued that if the Firm were going after state securities business, the Firm would have filed with the individual state pension funds, which had their own procurement process apart from the state minority business enterprise programs. (Tr. pp. 447-448).

staff's ability to pursue its investigation, and thereby undermined FINRA's ability to carry out its regulatory mandate.

Based on the evidence presented, including the testimony of Respondent Cotto, the Hearing Panel finds that Respondent Cotto violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110, as alleged in the second cause of the Complaint.

D. Count Three of the Complaint: Harvest Capital, Acting Through Respondent Cotto, and Respondent Cotto Failed to Respond Adequately to Rule 8210 Requests for Information

Pursuant to Rule 8210, the FINRA staff sent five separate letters dated February 21, 2006, March 15, 2006, March 28, 2006, April 12, 2006, and May 9, 2006 to Harvest Capital, to the attention of Respondent Cotto. (JX-7, pp. 10-15, 27-30, 38-42, 63-65). The Respondents did not deny that they received each of the letters. The Respondents provided some documents and information in response to the first four requests but did not respond in any manner to the final May 9, 2006 request for information. (Tr. pp. 506-508).

By the letters, the FINRA staff requested a number of things, including but not limited to: (i) a detailed breakdown of the "other expenses" figure on Harvest Capital's September 30, 2005 Focus Report; (ii) a detailed account of communications that Harvest Capital or any person associated with it had with the two clearing firms, CGMI and GSC, from April 1, 2005 through December 31, 2005; and (iii) bank statements and cancelled checks for February 2005 through August 2005, the period of the suspension. (JX-7, pp. 10-11, 27-29, 38-42, 63-65).

At the Hearing, Respondent Cotto did not dispute that the Respondents did not provide: (i) copies of bank statements and cancelled checks for February 2005 through

August 2005, except for the April 2005 statement and copies of several checks that cleared in April 2005; (ii) a detailed account of communications that Harvest Capital or any person associated with it had with CGMI and GSC from April 1, 2005 through December 31, 2005; or (iii) the state applications. (Tr. pp. 506-508).

As discussed above, NASD Procedural Rule 8210 imposes an unqualified affirmative obligation on members and associated persons to cooperate in FINRA investigations. Finding that the documents that the Respondents did not produce were clearly within the scope of the requests, the Hearing Panel rejected Respondent Cotto's explanation that he narrowly construed the requests for documents.

Based on the evidence presented, the Hearing Panel finds that Respondent Cotto and Harvest Capital had in their possession the documents, which were clearly encompassed by the FINRA staff's requests, and that they failed to provide the documents and information requested pursuant to Rule 8210. As discussed above, the Hearing Panel finds that Respondent Cotto intentionally decided to withhold information from FINRA staff that would have shown that he was continuing to perform principal functions without being registered. Accordingly, the Respondents violated NASD Procedural Rule 8210 and NASD Conduct Rule 2110, as alleged in the third cause of the Complaint.

E. Count Four of the Complaint: The Respondents Possessed the Requested Documents

Count four of the Complaint alleges, in the alternative to counts two and three of the Complaint, that if the Respondents did not have the documents requested in counts two and three of the Complaint, the Respondents violated NASD Conduct Rules 3110

and 2110, and Respondent Harvest Capital violated SEC Rule 17a-4, by not preserving the requested documents.

Respondent Cotto admitted that he was in possession of the original books and records of the Firm, and he was the person to contact if FINRA needed information. (Tr. p. 320). Respondent Cotto admitted that the Firm's records were maintained at his personal residence, and that the Firm's administrator, Ms. Hernandez, acted subject to his directions. (Tr. pp. 442, 519-520). At the Hearing, Respondent Cotto did not argue that the documents were not available.

The Hearing Panel finds that Respondents Cotto and the Firm had access to the documents and chose not to produce the documents. Accordingly, the Hearing Panel dismisses the alternative allegations of count four of the Complaint.

F. Count Five of the Complaint: Respondent Cotto Filed False or Inaccurate Form U-4 and Form U-4 Amendments

Article V, Section 2(c) of the NASD By-Laws provides that every application for registration¹⁶ filed with FINRA shall be kept current at all times by supplementary amendments via electronic process or such other process as FINRA may prescribe to the original application. Such amendment to the application shall be filed with FINRA not later than 30 days after learning of the facts or circumstances giving rise to the amendment.

¹⁶ A Form U-4 is the Uniform Application for Securities Industry Registration or Transfer. Representatives of broker-dealers must use this form to become registered in the appropriate jurisdictions and/or self regulatory organizations. The Form U-4 requires that significant events such as disciplinary actions, disciplinary proceedings, and disciplinary investigations against the applicant be listed therein, and similarly requires that the Form U-4 be updated when such events occur.

IM-1000-1 provides that:

[t]he filing with [FINRA] of information with respect to membership or registration as a Registered Representative which is incomplete or inaccurate so as to be misleading, or which could in any way tend to mislead, or the failure to correct such filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade. . .

On August 2, 2004, FINRA received an initial Form U-4 for Respondent Cotto to become registered with the Firm as a general securities representative. (Tr. pp. 308-309; JX-6, pp. 1, 6, 231). Under Part 14 of Form U-4 (Disclosure Questions), Respondent Cotto answered “no” to all questions including question 14G(1) (inquiring about regulatory proceedings that could result in a “yes” answer), and thereby failed to disclose the pending June 14, 2004 disciplinary proceeding.¹⁷ (Tr. pp. 308-309; JX-6, pp. 1, 6; CX-10, p. 18; CX-11, p. 9 at ¶ 70).

FINRA received Form U-4 amendments for Respondent Cotto dated November 3, 2004 and November 26, 2004, in which Respondent Cotto again answered “no” to Question 14G and thereby failed to disclose the June 14, 2004 pending disciplinary proceeding. (Tr. pp. 309-310; JX-6, pp. 7, 231; CX-10, pp. 18-19; CX-11, p. 9 at ¶¶ 71-72).

FINRA received Form U-4 amendments for Respondent Cotto on May 12, 2005 and February 14, 2006, and both amendments answered “no” to all questions under Part

¹⁷ Question 14G of Form U-4 reads, in part, as follows:

14G. Have you been notified, in writing, that you are now the subject of any:

(1) regulatory complaint or proceeding that could result in a “yes” answer to any part of 14C, D or E? (If yes, complete the Regulatory Action Disclosure Reporting Page.)

(2) investigation that could result in a “yes” answer to any part of 14A, B, C, D or E? (If yes, complete the Investigation Action Disclosure Reporting Page.)

14 including questions 14E(2) and (4) (concerning self regulatory disciplinary action).¹⁸ (JX-6, pp. 7-8, 231; CX-10, p. 19; CX-11, p. 10 at ¶¶ 74-75).

Respondent Cotto admitted that he took no steps to amend his Form U-4 on December 29, 2004, when his offer of settlement was accepted by FINRA. (Tr. p. 509). Nor did Respondent Cotto take any steps to amend his Form U-4 to disclose FINRA's June 29, 2006 investigation.¹⁹ (Tr. pp. 509-512).

Respondent Cotto asserted that Mr. Vo as the compliance officer was solely responsible for filing the correct Form U-4 and Form U-4 amendments. (Tr. pp. 509-511).

The original August 2, 2004 Form U-4, the amendments filed on November 3, 2004, November 26, 2004 and May 12, 2005, and the obligation to update the Form U-4 occurred prior to Mr. Vo joining Harvest Capital on May 31, 2005. And based on the credible testimony of Mr. Vo, the Hearing Panel finds that any amendments to the Form U-4 filed by Mr. Vo after May 31, 2005 were filed at Respondent Cotto's direction. In any event, the responsibility for ensuring the accuracy of the initial Form U-4 and for updating the Form U-4 rested with Respondent Cotto, the person seeking registration.²⁰ Even if someone else made the filing, the person who provides information for a

¹⁸ Question 14E of Form U-4 reads, in part, as follows:

14E. Has any self-regulatory organization or commodities exchange ever:

(2) found you to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and Exchange Commission)?

(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?

¹⁹ The June 29, 2006 letter explicitly stated that it constituted formal written notice to Respondent Cotto that he was the subject of an investigation, and that he was obligated to update his Form U-4 to disclose that he was the subject of an investigation. (JX-7, p. 70).

²⁰ Dep't of Enforcement v. Howard, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16, at *31-32 (NAC Nov. 16, 2000), aff'd, 55 S.E.C. 1096 (2002), aff'd, 77 Fed. Appx 2 (1st Cir. 2003).

regulatory filing is responsible for ensuring that the information contained therein is accurate.²¹

Moreover, Respondent Cotto's name appears on the Form U-4 and its amendments as both the applicant and as the Firm's appropriate signatory. (JX-6, pp. 6-7). Respondent Cotto admitted that he was the only person registered to use the WEB CRD at the Firm, and that all persons with the Firm utilized the one user identification.²² (Tr. pp. 338-339; CX-11, pp. 2-3). When he permitted his CRD authorization to be used by others to enter the Form U-4 data, Respondent Cotto assumed responsibility that the entry constituted "in every way, use, or aspect, his or her legally binding signature," as stated under the section entitled "Signature Section" of the Form U-4. (CX-5, p. 13).

Based on the evidence presented, including the testimony of Respondent Cotto, the Hearing Panel finds that Respondent Cotto violated NASD Conduct Rule 2110 and IM-1000-1 by filing an inaccurate Form U-4, filing inaccurate Form U-4 amendments, and failing to update his Form U-4, as alleged in the fifth cause of the Complaint.

The Hearing Panel also finds that Respondent Cotto intentionally did not take any action to meet his obligations to file an accurate Form U-4 and therefore his misconduct was willful.²³

²¹ See Robert E. Kauffman, Exchange Act Rel. No. 33,219 (November 18, 1993), aff'd sub nom, Robert E. Kauffman v. S.E.C., 40 F.3d 1240 (3rd Cir. 1994).

²² Mr. Vo confirmed that he used Respondent Cotto's name and password when accessing CRD to make required filings for Harvest Capital. (Tr. p. 146).

²³ Based on the Hearing Panel's finding that Respondent Cotto willfully failed to disclose his disciplinary history, Respondent Cotto is deemed a statutorily disqualified person pursuant to Article III, Section 4(f) of the NASD By-Laws

G. Count Six of the Complaint: The Respondents Filed False and Inaccurate Form BD and Form BD Amendments

The Form BD is the membership application form prescribed by FINRA for broker/dealer member registration. Article IV, Section 1(c) of the NASD By-Laws requires a member to keep its membership application current at all times. A member must file a Form BD within 30 days after learning of facts or circumstances that necessitate filing an amendment. The Form BD must be updated when significant events occur, such as changes in executive officers, or changes in introducing and clearing arrangements. As discussed previously, IM-1000-1 provides that filing inaccurate information on a membership application is conduct inconsistent with just and equitable principles of trade.

The Form BD amendment filed by Harvest Capital on May 12, 2005, which identified Mr. Masson as the Firm's compliance officer, was materially false and misleading. (JX-6, p. 10 at ¶ 27). Mr. Masson had told Respondent Cotto over two months earlier in February 2005 that he was ending his association with Harvest Capital. (Tr. pp. 34-35). Harvest Capital did not remove Mr. Masson from its Schedule A of executive officers until September 2, 2005. (JX-6, p. 11 at ¶ 34).

Harvest Capital also failed to update its Form BD to promptly disclose several other material changes in executive officers. On May 20, 2005, MC wrote Respondent Cotto that she was resigning her position as the Firm's FINOP. (CX-10, p. 20 at ¶ 80). Harvest Capital did not remove her from the Form BD's Schedule A until September 2, 2005. (JX-6, p. 11 at ¶ 34).

On June 1, 2005, Respondent Cotto hired DK as the Firm's new FINOP to replace MC. (JX-5, pp. 1, 4). On June 30, 2005, DK wrote Respondent Cotto that he was

resigning as the Firm's FINOP. (JX-5, p. 5). However, Harvest Capital did not remove DK from the Form BD's Schedule A until September 21, 2005. (JX-6, p. 11 at ¶ 37).

On July 12, 2005 and August 4, 2005, Harvest Capital entered into new clearing agreements with CGMI and GSC, which Respondent Cotto had initiated. (CX-10, p. 21 at ¶¶ 82, 83). Harvest Capital did not amend its Form BD to disclose either clearing agreement. (Id.).

The Hearing Panel also finds that although Respondent Cotto was not registered and was subject to a suspension for part of the time, he is still accountable for the violations because: (1) he managed and controlled the Firm at the relevant times; (2) he initiated the clearing agreements with CGMI and GCS that were not disclosed on the Firm's Form BD; (3) his name appears in the execution section of the Form BD adding Mr. Masson to the Schedule A when he knew at the time of the filing in May 2005 that Mr. Masson was no longer working at Harvest Capital; and (4) he received the resignations of the two FINOPs.

Accordingly, the Hearing Panel finds that Harvest Capital and Respondent Cotto violated NASD Conduct Rule 2110 as alleged in the sixth cause of action.

The Hearing Panel also finds that Respondent Cotto and Harvest Capital, acting through Respondent Cotto, intentionally failed to meet Harvest Capital's obligations to file an accurate Form BD and therefore the Respondents' misconduct was willful.

III. SANCTIONS

A. Harvest Capital Permitted Respondent Cotto to Act, and Respondent Cotto Acted, as the Firm's Unregistered Principal

For registration violations, FINRA Sanction Guidelines ("Guidelines") recommend a fine of \$2,500 to \$50,000, and, in the case of an individual, consideration of a suspension for up to six months.²⁴ In egregious cases of registration violations, the Guidelines recommend that the Adjudicator consider suspending the Firm in any or all capacities for 30 business days and suspending the individual for up to two years, or consider barring the individual.²⁵

Compliance with FINRA registration requirements is fundamentally important.

The National Business Conduct Committee stated:

The requirement that a person . . . must register as a principal when actively engaged in a firm's securities business is an important one. This requirement assists in the policing of the securities markets. It also ensures that a person in a position to exercise some degree of control over a firm has a comprehensive knowledge of the securities industry and its related rules and regulations. This, in turn, enhances investor protection. We deem it essential to the well-being of the investing public that persons engaged in a firm's securities business strictly adhere to the proper registration requirements.²⁶

Enforcement argued that the Respondents' conduct was an egregious violation because although the Respondents were sanctioned for similar conduct in the 2004 disciplinary action, they did not discontinue the violative conduct.²⁷

²⁴ FINRA Sanction Guidelines, p. 48 (2007).

²⁵ Id.

²⁶ DBCC v. Pecaro, No. C8A960029, 1998 NASD Discip. LEXIS 13, at *22 (NBCC Jan. 7, 1998).

²⁷ The 2004 Complaint did not allege violations of Rule 1031. (Exhibit A to Complaint).

The principal factors to be considered in determining the appropriate sanction for registration violations are (1) whether the respondent has filed a registration application, and (2) the nature and extent of the unregistered person's responsibilities.²⁸

General factors to be considered include: (1) the respondent's relevant disciplinary history; (2) whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator; (3) whether the respondent engaged in numerous acts and/or a pattern of misconduct; (4) whether the respondent engaged in the misconduct over an extended period of time; (5) whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated; (6) whether the respondent's misconduct was the result of an intentional act, recklessness or negligence; (7) whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations; and (8) whether the respondent's misconduct resulted in the potential for respondent's monetary or other gain.²⁹

The Hearing Panel notes that Respondent Cotto filed an application to register as a general securities representative, but he failed to pass the examination.³⁰ Nevertheless,

²⁸ Guidelines at p. 48.

²⁹ Id. at 6-7.

³⁰ Respondent Cotto (i) failed the Series 7 exam on August 27, 2004, (ii) was late for the exam on February 23, 2005, (iii) failed to appear for the exam on March 30, 2005 and September 7, 2005, and (iv) was late for the exam on June 5, 2006. (CX-2, p. 4).

Respondent Cotto affirmatively performed extensive managerial duties and Harvest Capital, acting through Respondent Cotto, permitted Respondent Cotto to perform extensive managerial duties, in part, in order for Respondent Cotto to recoup the funds that he had invested in Harvest Capital.

Other factors rendering the violation egregious include: (1) Respondent Cotto's prior suspension for the same misconduct; (2) the Respondents' continued failure to accept responsibility for, or acknowledge, the misconduct; (3) the numerous applications and affidavits that Respondent Cotto executed on behalf of Harvest Capital; (4) the extensive 28-month period over which the misconduct occurred; (5) the Respondents' efforts to obtain general securities principals, in name only, in an attempt to conceal Respondent Cotto's misconduct and to lull the FINRA staff into inaction; (6) the intentional, rather than negligent or inadvertent, nature of the Respondents' actions; (7) the prior disciplinary action representing a clear warning of the types of activities that FINRA treated as a violation of FINRA rules; and (8) the financial benefit that Respondent Cotto derived from his continued management of Harvest Capital.³¹

The Hearing Panel finds that Respondent Cotto's prior suspension is especially relevant because his continued management of Harvest Capital during the period of his suspension evidenced a total disregard for regulatory requirements. Moreover, the Hearing Panel finds that Respondent Cotto's attempts to mislead the FINRA staff regarding who was managing the Firm demonstrate a lack of integrity.³²

³¹ During the period 2005 to 2006, Harvest Capital's earnings grew to \$90,000 to \$180,000, of which 99.9% were commissions. (Tr. pp. 436, 486).

³² Respondent Cotto argued that the board of directors of RETA held the ultimate authority over Harvest Capital. (Tr. pp. 356, 463-464). RETA is wholly-owned by Respondent Cotto. (Tr. p. 23). Respondent Cotto is the president of RETA and the three board members of RETA consist of Respondent Cotto, his brother, and his sister. (Tr. pp. 404-405, 467).

Respondent Cotto's egregious conduct indicates that a bar is the only effective remedial sanction. Since Respondent Cotto is responsible for the Firm's violations and since he owned (and still owns) Harvest Capital, expelling Harvest Capital is imperative to achieve the purpose of this disciplinary process. The Hearing Panel finds that failure to expel Harvest Capital would allow the violations to continue, and would allow Respondent Cotto to continue accessing funds generated by commissions on securities transactions without being registered.

Accordingly, in order to protect the public interest, the Hearing Panel bars Respondent Cotto from associating with any FINRA member in any capacity and expels Harvest Capital from FINRA membership for violating NASD Membership and Registration Rules 1021 and 1031, NASD Conduct Rule 2110, and IM-8310-1 as alleged in count one of the Complaint.

B. Respondent Cotto and Harvest Capital Violated NASD Rules 8210 and 2110

The applicable Guideline for violations of NASD Rules 8210 and 2110 recommends that, where an individual respondent does not respond in any manner, a bar should be standard and a fine ranging between \$25,000 and \$50,000 should be imposed.³³

³³ Guidelines at 35.

The Guidelines also provide that adjudicators generally should not impose a fine if the individual is barred in a failure to respond case when there is no customer loss.³⁴ Enforcement requested that Respondent Cotto be barred and Harvest Capital be expelled for their conduct.

Prior to the 2006 Complaint, FINRA had sanctioned Respondent Cotto for violating NASD Procedural Rule 8210 and NASD Conduct Rule 2110 by failing to appear to give testimony on November 12, 2003 as requested, and delaying his compliance with the request until November 4, 2004 after the FINRA staff issued the 2004 Complaint. Accordingly, the Respondents were well aware of the importance that FINRA placed on compliance with NASD Procedural Rule 8210 and NASD Conduct Rule 2110. Although Respondent Cotto was previously sanctioned for violating Rule 8210, the Respondents did not respond in any manner to the May 9, 2006 request for information.

The information and documents that the Respondents failed to provide included information that was material to the investigation into whether Respondent Cotto was violating his suspension and engaging in activities requiring registration without being registered. By not producing the documents, Respondent Cotto and Harvest Capital, acting through Respondent Cotto, substantially impeded the investigation into his conduct and activities at the Firm. Respondent Cotto has not at any point acknowledged any impropriety regarding his lack of responsiveness to the requests for information and documents, or accepted responsibility for his misconduct. It is not mitigating that the misconduct did not harm customers. The Hearing Panel finds that Respondent Cotto and

³⁴ Id. at 10.

Harvest Capital's violations of Rule 8210 were calculated and intentional. The Respondents provided no credible explanation for their failure to comply with NASD Procedural Rule 8210 and NASD Conduct Rule 2110.

Considering the importance of Rule 8210 and noting the extensive case law addressing the need to respond to Rule 8210 requests, the Hearing Panel finds no mitigating factors and no reasons to impose a sanction below those recommended by the Guidelines. Accordingly, the Hearing Panel bars Respondent Cotto from association with any FINRA member in any capacity, and expels Harvest Capital from FINRA membership for violating Rules 8210 and 2110 as alleged in counts two and three of the Complaint.

C. The Hearing Panel Imposes No Separate Sanction for the Respondents' Willful Filing of False and Inaccurate Form U-4, Form BD, and Amendments Thereto

Because the Hearing Panel barred Respondent Cotto and expelled Harvest Capital for violating: (1) NASD Membership and Registration Rules 1021 and 1031, NASD Conduct Rule 2110, and IM-8310-1 as set forth in count one of the Complaint; and (2) NASD Conduct Rule 2110 and Procedural Rule 8210 as set forth in counts two and three of the Complaint, the Hearing Officer will impose no separate sanction for the Respondents' violation of NASD Conduct Rule 2110 and IM-1000-1, by willfully filing false and inaccurate Form U-4, Form BD and amendments thereto.

IV. CONCLUSION

The Hearing Panel bars Respondent Cotto from association with any FINRA member in any capacity, and expels Harvest Capital from FINRA membership for violating: (1) NASD Membership and Registration Rules 1021 and 1031, NASD

Conduct Rule 2110, and IM-8310-1 as set forth in count one of the Complaint; and (2) NASD Conduct Rule 2110 and Procedural Rule 8210 as set forth in counts two and three of the Complaint. The Hearing Panel also orders that the Respondents jointly and severally pay the \$4,075.70 costs of the Hearing, which include an administrative fee of \$750 and hearing transcript costs of \$3,325.70.

The costs shall be due and payable when, and if, the Respondents seek to return to the securities industry. If this Hearing Panel Decision becomes the final disciplinary action of FINRA, the bars shall become effective immediately.³⁵

HEARING PANEL.

By: _____
Sharon Witherspoon
Hearing Officer

Dated: Washington, DC
September 27, 2007

Copies to:

Dennis Cotto (via Federal Express, electronic, and first class mail)
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John M. D'Amico, Esq. (via electronic and first class mail)
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Rory C. Flynn, Esq. (via electronic and first class mail)

³⁵ The Hearing Panel considered all of the arguments of the Parties. They are rejected or sustained to the extent they are inconsistent or in accord with the views expressed herein.