FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. LEGACY TRADING CO., LLC (CRD No. 46598), and MARK USELTON (CRD No. 2229571), Respondents.	Disciplinary Proceeding No. 2005000879302 Hearing Officer—Andrew H. Perkins **AMENDED EXTENDED HEARING PANEL DECISION**[1] March 12, 2009

Respondents violated Procedural Rule 8210 and Conduct Rule 2110 by providing false information to FINRA in connection with an investigation of the Respondent firm, and Respondent Uselton further violated such rules by refusing to answer questions at an on-the-record interview in connection with the investigation of Respondents' short sales activities. For these violations Respondent firm is expelled and Respondent Uselton is barred from associating with any member firm in any capacity. In addition, Respondents violated: (1) Conduct Rules 3370 and 2110 and SEC Rule 203(b) by effecting short sales without first making an affirmative determination that Respondent firm could borrow or otherwise provide for delivery of the securities by the settlement date; (2) Conduct Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4 by failing to maintain certain books and records relating to their short sales and business e-mails related to the firm's business; and (3) Conduct Rules 3010 and 2110 by failing to maintain and enforce written supervisory procedures relating to short sales and e-mail communications. For these violations Respondents are fined a total of $1,007,035.01. In addition, Respondent Uselton violated Conduct Rule 2110 by failing to update his Form U4 timely to

[1] This amended decision is issued to delete reference to the Third Cause of Complaint, which was dismissed on June 11, 2008, at the Complainant's request. In all other respects the decision is unchanged.

reflect FINRA staff's notification that it had determined to commence this disciplinary proceeding. For this violation, Respondent Uselton is fined an additional $2,500. Respondents also are ordered to pay costs.

Appearances

For Complainant: Rory C. Flynn and Gary M. Lisker, FINRA, DEPARTMENT OF ENFORCEMENT, Washington, DC.

For Respondents: Mark Uselton on behalf of himself and Legacy Trading Co., LLC, Edmond, OK.[2]

DECISION

I. INTRODUCTION

The Department of Enforcement ("Enforcement") brought this disciplinary proceeding against Respondents Legacy Trading Co., LLC ("Legacy" or the "Firm") and Mark Uselton ("Uselton"), its President, Chief Financial Officer, and Chief Compliance Officer (collectively "Respondents"). Enforcement alleges that the Respondents violated numerous NASD Conduct Rules[3] and certain provisions of the Securities Exchange Act of 1934 ("the Exchange Act") in connection with the execution and supervision of short sales in 2004 and 2005. In addition, Enforcement alleges that the Respondents failed to cooperate with FINRA's investigation of their short selling and provided false statements to FINRA during the investigation.

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[2] Respondents had been represented by counsel until January 30, 2008, at which time they withdrew. Thereafter, the Respondents did not retain replacement counsel.

[3] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating under a new corporate name, the Financial Industry Regulatory Authority ("FINRA"). References in this decision to FINRA include, where appropriate, NASD. Initially, FINRA adopted NASD's rules and certain NYSE rules, but it is in the process of establishing a consolidated FINRA rulebook. To that end, on December 15, 2008, certain consolidated FINRA rules became effective, replacing parallel NASD and/or NYSE rules, and in some cases the prior rules were re-numbered and/or revised. *See* Regulatory Notice No. 08-57, FINRA Notices to Members, 2008 FINRA LEXIS 50 (Oct. 2008). This Decision refers to and relies on the NASD rules that were in effect at the time of the Respondents' alleged misconduct and cited in the Amended Complaint as the basis for the charges against them.

II. PROCEDURAL HISTORY

Enforcement filed a Complaint with the Office of Hearing Officers on July 27, 2007, and an Amended Complaint on November 30, 2007. The Respondents filed their Answer to the Amended Complaint with the Office of Hearing Officers on December 19, 2007. In addition to denying the charges in the Amended Complaint, the Respondents raised 23 affirmative defenses and requested a hearing.

During the Initial Pre-Hearing Conference on September 20, 2007, the Hearing Officer set this case for hearing in July 2008. On January 30, 2008, counsel for the Respondents filed a Notice of Withdrawal. Thereafter, Uselton represented himself and the Firm.

On July 9, 2008, Uselton notified the Office of Hearing Officers that he "[would] not be in attendance" at the hearing, which was scheduled to begin on July 14, 2008, in Oklahoma City. The Hearing Officer treated the Respondents' notice as a waiver of their right to a hearing and canceled the hearing.

On July 11, 2008, the Hearing Officer entered an Order granting the parties leave to file written submissions in lieu of a hearing. The parties filed their initial submissions on August 8, 2008. Enforcement's submission consisted of sworn declarations from Charlene M. Winegardner, an investigator in FINRA's Department of Enforcement, and Lisabeth P. Heese, the Managing Director for Pink OTC Markets, Inc. (formerly Pink Sheets LLC) ("Pink Sheets"). Uselton filed his own sworn declaration.

On August 13, 2008, Uselton filed a second sworn declaration in response to Enforcement's submissions. Enforcement then filed the Declaration of Gary M. Lisker, one of Enforcement's attorneys in this proceeding, to reply to Uselton's second declaration. And, on September 30, 2008, Uselton filed a third sworn declaration to respond to Lisker's declaration.

Based upon a careful review of the entire record,[4] the Extended Hearing Panel, which is comprised of the Hearing Officer, a current member of the Market Regulation Committee, and a current member of the District 5 Committee, makes the following findings of fact and conclusions of law.

III. BACKGROUND

A. Investigation of Legacy's Trading Practices

In or about March 2005, Enforcement opened the investigation that led to this disciplinary proceeding after FINRA received two complaints concerning Legacy's trading practices. Pink Sheets made the first complaint. Generally, Pink Sheets raised the concern that the Respondents were avoiding the anti-manipulation requirements of SEC Rule 15c2-11 by improperly relying upon the unsolicited-customer-interest exception when submitting quotes.[5]

The second complaint was lodged by an anonymous source. On February 23, 2005, FINRA received a letter that alleged that Legacy had established an improper profit sharing arrangement with Steven Thorp ("Thorp"). According to the complaint letter, Legacy made a market in the stocks Thorp selected to facilitate his short sales without first determining if it could borrow the shares or making an affirmative determination that the shares were available to borrow, in violation of NASD Conduct Rule 3370.[6] Later

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[4] In addition to the declarations the parties filed in lieu of the hearing, the evidentiary record includes Enforcement's exhibits C-1 through 241, C-243-245, C-249 through C-262, and C-267 through C-287. The Respondents did not submit any exhibits.

[5] SEC Rule 15c2-11(f)(2) provides:

> The publication or submission by a broker or dealer, solely on behalf of a customer (other than a person acting as or for a dealer), of a quotation that represents the customer's indication of interest and does not involve the solicitation of the customer's interest; *Provided, however,* that this paragraph (f)(2) shall not apply to a quotation consisting of both a bid and an offer, each of which is at a specified price, unless the quotation medium specifically identifies the quotation as representing such an unsolicited customer interest.

[6] Charlene M. Winegardner Decl. ("Winegardner Decl.") ¶¶ 8, 11. NASD Conduct Rule 3370 was later replaced by SEC Regulation SHO.

letters from the same writer provided additional information about the alleged relationship between Legacy and Thorp.[7]

FINRA's Preliminary Review Group initially reviewed the two complaints, following which it transferred the matter to Enforcement for further investigation.[8] In the course of the ensuing investigation, Enforcement scheduled an on-site examination at Legacy's office for July 12, 2005. In preparation for the on-site examination, Enforcement requested that Legacy produce certain documents pursuant to Procedural Rule 8210.[9] When Enforcement staff arrived at Legacy's office on July 12, 2005, they provided Uselton with a second copy of the document request.[10] Although the Respondents produced some of the requested documents, Uselton advised the staff that most of the requested documents were not available.

Following the on-site examination, Enforcement made repeated attempts to obtain documents from Legacy and Uselton with limited success. The Respondents refused to cooperate fully with the investigation. They could not, or refused to, produce many requested documents. In addition, during the course of the investigation, Uselton testified falsely under oath at his on-the-record interviews. Nonetheless, Enforcement eventually obtained sufficient evidence to file the Complaint against Legacy and Uselton.

B. Respondents

From March 2004 to August 2005 (the "relevant period"), Legacy was a registered broker-dealer and FINRA member located in Edmond, OK. The firm had been a FINRA member since September 1999. Legacy was 90% owned by Legacy Trading Co., Inc., a holding company, which Uselton wholly owned. Uselton also directly owned

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[7] Winegardner Decl. ¶¶ 11, 13.

[8] Winegardner Decl. ¶ 15.

[9] C-134, at 1-6.

[10] Winegardner Decl. ¶ 24.

the remaining interest in Legacy. Thus, Uselton directly and indirectly owned 100% of Legacy and controlled its operations.[11]

Legacy never had any retail customers. Legacy's membership agreement did not allow it to handle customer funds. Legacy was authorized to make inter-dealer markets in corporate securities and over-the-counter securities, and to trade securities through its own accounts.[12]

Legacy is no longer a FINRA member. In March 2008, it filed a Form BDW, and on August 12, 2008, FINRA expelled Legacy for failure to pay fines and costs.[13] FINRA nonetheless retains jurisdiction over Legacy because Enforcement filed the Complaint in this proceeding while Legacy was still a FINRA member, and the Amended Complaint charges Legacy with misconduct that occurred while Legacy was a FINRA member.[14]

Uselton entered the securities industry in 1992 at which time he became registered as a General Securities Representative. During the relevant period he was the President, Chief Financial Officer, and Chief Compliance Officer of Legacy, and he was registered as a General Securities Representative, General Securities Principal, Financial and Operations Principal, and Registered Equities Trader.[15] On March 24, 2008, Uselton terminated his association with Legacy and all of his FINRA registrations. Uselton has not been registered with FINRA since March 24, 2008. Nonetheless, FINRA retains jurisdiction over him because Enforcement filed the Complaint in this proceeding while

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[11] Winegardner Decl. ¶ 4.

[12] Winegardner Decl. ¶ 6.

[13] C-3, at 1; C-4, at 1; C-5, at 1-2.

[14] FINRA By-Laws, Article IV, Section 6.

[15] C-1. Uselton's registration as a General Securities Principal was suspended from August 18, 2003, to November 18, 2003, and again from March 15, 2004, to September 14, 2004. Uselton's registration as a Financial and Operations Principal was suspended from August 18, 2003, to February 17, 2004.

he was registered, and the Amended Complaint charges him with misconduct that occurred while he was associated with Legacy.[16]

IV. FINDINGS OF FACT

A. Legacy Provided False Information to FINRA

In connection with the investigation of Legacy's trading practices, FINRA staff sought information from Legacy regarding its financial condition. In particular, FINRA staff sought to determine the extent of the financial relationship between Legacy and Thorp.[17] On July 11, 2005, FINRA staff sent Legacy a request for "all records for all accounts held, controlled by, or maintained on behalf of Steven Thorp … through Legacy."[18] On October 6, 2005, Legacy's counsel responded that there were no such accounts.[19]

FINRA staff also sought information regarding a $300,000 capital contribution Legacy recorded on its books in December 2004. The funds were deposited in Legacy's reserve account with its clearing firm, Sterne, Agee & Leach, Inc. ("Sterne Agee").[20] When first questioned, Stephen P. Boruchin ("Boruchin"), Legacy's Financial and Operations Principal,[21] stated that he had made the capital contribution to the Firm from an inheritance he received from his mother's estate.[22] FINRA staff then sent Legacy a request to provide a written explanation of the deposit.[23] The request for information was dated September 8, 2005, and it required Legacy's response by September 23, 2005.

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[16] FINRA By-Laws, Article V, Section 4(a).

[17] Winegardner Decl. ¶ 13, 31.

[18] C-134, at 3.

[19] C-144, at 5.

[20] Winegardner Decl. ¶¶ 33-34; C-96, at 1.

[21] Boruchin resigned from the Firm effective March 31, 2006, and has since been barred from the securities industry. Winegardner Decl. ¶ 18.

[22] C-241 at ¶ 2.

[23] Winegardner Decl. ¶ 34.

Legacy did not provide the requested information by the due date. Instead, Legacy requested and was granted an extension of time to respond. On October 6, 2005, Legacy's counsel sent the following response:

> The Focus report filed for December 2004 included the requested information. The Firm's NASD examiner questioned Stephan Boruchin at that time. As answered previously, the $300,000 deposit was used to increase the Firm's ability to trade securities. The funds were received by Mr. Boruchin as a gift from his family and paid to Sterne, Agee and Leach for deposit into the Firm's Inventory Reserve Account.[24]

However, through further investigation FINRA learned that Legacy's explanation for the source of the $300,000 capital deposit was false.

After receiving Legacy's written response, FINRA staff sent Legacy's counsel a follow-up letter, which pointed out that the $300,000 check deposited on December 14, 2004, was drawn on the holding company's account at Citizens Bank of Edmond, not on Boruchin's personal account as Legacy had represented.[25] The staff enclosed a copy of the canceled check with the letter. The following day, October 12, 2005, FINRA staff sent Legacy another Rule 8210 request that asked for a written statement outlining the details of any business relationships Legacy, Uselton, Boruchin, or Robert Hoffman, a trader at Legacy, had with Thorp.[26] On October 26, 2005, the due date for Legacy's response, Legacy's counsel sent FINRA a letter saying, "Mr. Boruchin will provide the requested written statement on or before November 10, 2005." However, Legacy did not provide Boruchin's response until November 22, 2005.[27] In the statement, Boruchin acknowledged that he had borrowed the funds from Thorp in December 2004.[28]

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[24] Winegardner Decl. ¶ 35.

[25] C-145, at 1-2.

[26] C-146, at 2.

[27] Winegardner Decl. ¶ 36.

[28] *Id.*

The staff wanted to question Boruchin about the loan from Thorp as well as other matters. Thus, on February 9, 2006, FINRA staff sent Boruchin a Rule 8210 request scheduling his on-the-record testimony for March 22, 2006, in Oklahoma City, OK.[29] Boruchin, however, refused to appear and testify. Rather than testify on the record, Boruchin consented to be barred from the industry.[30] To date, Legacy has not provided all of the requested information concerning its and Boruchin's financial relationships with Thorp.[31]

Legacy also provided false information to FINRA staff about the e-mail accounts it used for business purposes. Legacy and Uselton falsely stated that Uselton used the Mark@lgtd.us e-mail account for personal use only and that Boruchin did not have an e-mail account with Legacy.[32] In fact, Uselton used the Mark@lgtd.us e-mail account for business correspondence with Pink Sheets, and Legacy listed Boruchin's business e-mail address as Skip@lgtd.us.[33] In addition, in response to information requests regarding Legacy's e-mail policies, Legacy falsely represented that it did not generally use e-mail in the course of conducting its business. After repeated requests for information, Legacy finally admitted that Boruchin, Uselton, and Hoffman used the following e-mail addresses in connection with Legacy's business: Skip@lgtd.us; Mark@lgtd.us; and Rob@lgtd.us.[34]

In addition, Legacy provided false information to FINRA in response to the written request for information dated September 8, 2005.[35] The staff had requested information about one of the holding company's bank accounts at Citizens Bank of Edmond. The staff

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[29] C-176.

[30] C-182.

[31] Winegardner Decl. ¶ 38.

[32] C-144, at 3-4.

[33] Winegardner Decl. ¶ 45.

[34] C-147, at 2.

[35] C-141.

requested this information because the $300,000 check Boruchin deposited with Sterne Agee was drawn on this account.[36] On October 6, 2005, Legacy responded to the request for information and indicated that it would not produce any documents associated with the holding company's bank account because the account was not related to Legacy's business.[37]

After FINRA received this response, counsel for Enforcement followed up and explained to Legacy's counsel that the holding company's bank account appeared to be related to Legacy's business. Enforcement then renewed its request for documents concerning the bank account. Legacy did not respond to Enforcement's Rule 8210 request letter.[38]

Enforcement repeatedly renewed its request for the documents regarding the holding company's bank account between November 2005 and February 2006 before Legacy finally complied.[39] Once Enforcement received the requested documents, it found that Legacy's representation that Legacy did not use the holding company's account was false. Indeed, the documents revealed that virtually all of Legacy's financial obligations, including payroll, were paid through the holding company's bank account at Citizens Bank of Edmond.[40] Uselton finally admitted that was the case at his on-the-record interview on May 6, 2006.[41]

B. Legacy and Uselton Failed to Establish, Maintain, and Enforce Adequate Written Supervisory Procedures

Legacy and Uselton did not establish, maintain, and enforce written supervisory procedures reasonably designed to achieve compliance with NASD Conduct Rules.

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[36] C-95.

[37] C-144, at 2.

[38] Winegardner Decl. ¶ 61.

[39] Enforcement exchanged 17 letters with Legacy over six months in its efforts to generate Legacy's compliance with the document request. Winegardner Decl. ¶ 65.

[40] Winegardner Decl. ¶ 66.

[41] *Id.*

Indeed, the evidence demonstrates that Legacy operated without a comprehensive set of written supervisory procedures.

During the investigation, FINRA staff requested that Legacy produce a copy of all written supervisory procedures in effect for the period January 2004 through September 2005.[42] In response, Legacy provided an incomplete draft entitled "Legacy Trading Co., LLC, Written Supervisory Procedures, Work in Progress Beginning November 2004, Edited Quarterly."[43] However, this document was nothing more than a form that Uselton had never adapted to Legacy's business.[44] For example, the section designating the Firm's supervisors was left blank.[45] Moreover, the draft did not contain written supervisory procedures relating to the records that must be retained in connection with its reliance on the unsolicited-customer-interest exception to SEC Rule 15c2-11 or the use and retention of e-mail.

With respect to Legacy's e-mail, FINRA staff requested that Legacy produce copies of e-mails sent and received by Legacy personnel during the relevant period, as well as a copy of the Firm's written supervisory procedures regarding the use and retention of e-mail.[46] Legacy responded that it did not have policies or procedures regarding e-mail retention and usage.[47] Legacy also claimed not to have any business-related e-mail, which proved to be untrue. In fact, Uselton, Boruchin, and Hoffman each had e-mail accounts that were used for business purposes.

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[42] C-191.

[43] C-38.

[44] As Legacy's President, Chief Executive Officer, and Chief Compliance Officer, Uselton was responsible for establishing, maintaining, and enforcing Legacy's supervisory systems and procedures.

[45] C-38, at 3.

[46] C-134.

[47] C-144, at 4.

Over the course of six months, the staff exchanged 14 or more letters with Legacy concerning Legacy's use of e-mail. Legacy never produced any of the e-mails the staff requested.[48] Finally, Uselton admitted during his on-the-record interview on May 6, 2006, that he deleted e-mail between Legacy and both its clearing firm and Pink Sheets on a daily basis. Neither Legacy nor Uselton preserved any record of the deleted e-mails.[49]

C. Uselton Provided False Information to FINRA and Refused to Respond to a Request that he Appear and Testify at an On-The-Record Interview

In the Eighth and Ninth Causes of Action, Enforcement alleges that Uselton provided untruthful information about his and Legacy's relationship with Warrior Capital, LLC ("Warrior Capital"), a firm owned and operated by Uselton's father, Jack Uselton, and his cousin, Darrel Uselton, and then later refused to appear and answer further questions about those relationships in response to requests for information FINRA staff issued pursuant to Procedural Rule 8210.

In the course of FINRA's investigation into Legacy's trading practices and business operations, the staff noticed that the name Warrior Capital periodically appeared in the e-mail correspondence between Legacy and Pink Sheets. In an effort to learn more about the relationship between Warrior Capital and Legacy, the staff requested that Legacy produce a copy of all account records for Warrior Capital. Legacy did not respond to this request.[50]

The staff then followed up with Legacy and requested that it provide the requested documentation no later than September 23, 2005. On the due date, Legacy asked for an extension of time in which to respond, which the staff granted. The new agreed deadline was October 5, 2005. On October 6, 2005, Legacy responded that no records existed because Legacy did not maintain any accounts for Warrior Capital.[51]

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[48] Winegardner Decl. ¶ 55.

[49] C-237, at 34-37.

[50] C-134, at 3; C-140; Winegardner Decl. ¶ 126.

[51] Winegardner Decl. ¶ 127.

On May 6, 2006, FINRA staff convened an on-the-record interview and questioned Uselton about Legacy's relationship with Warrior Capital. Uselton testified that neither he nor Legacy had any relationship with Warrior Capital.[52]

In or about July 2007, the Securities and Exchange Commission ("SEC") charged Jack and Darrel Uselton with securities fraud, and the State of Texas unsealed several indictments against them.[53] These proceedings were wholly independent of FINRA's investigation of the Respondents. Upon learning of the SEC and Texas cases, FINRA staff contacted the SEC and the Department of Securities for the State of Oklahoma (which also had investigated Legacy) to determine whether they had any documents that showed a connection between Legacy or Uselton and Warrior Capital. In response, FINRA obtained the following documents:

1. An Internal Revenue Service notice of assignment of employer identification number to Uselton of Warrior Capital.[54]
2. A 2004 Form 1099-MISC from Warrior Capital to Uselton showing non-employee compensation of $26,000.[55]
3. E-mails between Uselton and his cousin Darrel Uselton in 2005 concerning stock transactions.[56]
4. Copies of checks and wire transfers in 2004 and 2005 from Warrior Capital to Uselton or his wife, Angela, as well as bank account statements and deposit slips for the accounts where those funds were deposited.[57]

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[52] C-237, at 53-54, 56-57.

[53] C-14 through C-18.

[54] C-99.

[55] C-117.

[56] C-102; C-103; C-104; C-124; C-125; C-126; C-127; C-128; C-130.

[57] C-105; C-106; C-107; C-108, at 2; C-109; C-111; C-112; C-114; C-121; C-122; C-123; C-132; C-133.

5. A 2005 e-mail from Uselton's cousin to Uselton's father discussing an $8,500 wire transfer to Legacy and an agreement between Uselton and his cousin for a $30,000 payment to Uselton to be made by wire transfer to Uselton's wife's account.[58]

6. A copy of a document titled "Strategic Partnership Agreement," dated July 2, 2003, between Legacy and Warrior Capital. The document was signed by Uselton on behalf of Legacy, and by his father and cousin on behalf of Warrior Capital. The stated purpose of the agreement was to develop and add to the operating, management, financial and organizational structure of Legacy Trading, Inc., its subsidiary Legacy Trading Company, LLC, and Warrior Capital, LLC.[59] The agreement further specified that "Darrel, Jack & Mark, as a group, will constitute both company's [*sic*.] (Legacy & Warrior) strategic advisors and oversee the strategic directions of both companies at large."[60]

Legacy had not produced any of the foregoing documents in response to the various Rule 8210 requests FINRA staff sent Legacy despite the fact that most of the documents fell within the scope of those requests.

After reviewing the foregoing documents, FINRA staff concluded that Uselton had testified untruthfully at his on-the-record interview on May 6, 2006, when he denied that there was any connection between Legacy and Warrior Capital. Accordingly, the staff requested that Uselton appear for a second on-the-record interview in September 2007.[61] When Uselton appeared pursuant to Rule 8210 on September 25, 2007, he first

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[58] C-131.

[59] C-100.

[60] *Id.* at 2.

[61] C-195; C-196.

affirmed that the testimony he gave on May 6, 2005, was accurate.[62] But when Enforcement confronted Uselton with documents that contradicted his earlier testimony, Uselton claimed that he lacked any knowledge about the documents. Upon further questioning, he asserted his Fifth Amendment privilege against self-incrimination.[63] Uselton thereafter refused to answer any questions about Warrior Capital.[64]

D. Legacy and Uselton Failed to Comply with the Affirmative Determination Requirements Governing Short Sales in 2004 and 2005

FINRA's investigation of Legacy centered on its short sales practices in 2004 and 2005. As discussed more fully below, before January 2, 2005, NASD Conduct Rule 3370 required a broker-dealer to make "an affirmative determination that [it could] borrow the securities or otherwise provide for delivery of the securities by settlement date" before effecting a short sale for its own account (the "affirmative determination requirement"). In January 2005, NASD Conduct Rule 3370 was replaced by Regulation SHO. SEC Rule 203(b) of Regulation SHO requires a broker-dealer to borrow the security or have reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due before effecting a short sale order in any equity security (the locate-and-delivery requirement").

In the course of the investigation, FINRA staff requested Legacy to produce written records evidencing its compliance with NASD Conduct Rule 3370 and SEC Rule 203(b). Uselton told the staff during his on-the-record interview in May 2006 that he knew Legacy had to comply with the "affirmative determination" rules before shorting stock if it was not acting as a bona-fide market-maker. Uselton also testified that he believed Legacy kept a log of those instances in which Legacy made such an affirmative

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[62] C-239, at 15, 27-33, 36-39.

[63] *Id* at 62-65.

[64] *Id.* at 40-61; Winegardner Decl. ¶ 137.

determination.[65] Accordingly, on May 24, 2006, the staff sent Legacy a request pursuant to Rule 8210 that it produce a copy of its affirmative determination log for short sales effected between March 2004 and September 2005.[66] On June 8, 2006, Legacy responded that it did not maintain such a log; instead, Legacy claimed that it noted affirmative determinations on the applicable order tickets, which FINRA could obtain from Sterne Agee.[67]

The daily Stock Locate logs[68] produced by Sterne Agee, and the order tickets[69] produced by Legacy, showed that Legacy did not satisfy the affirmative determination requirement of former NASD Rule 3370 for 1,002 short sales transacted between May 3, 2004, and January 2, 2005, identified on Schedule A to the Amended Complaint.[70] In each case, Legacy sold securities without sufficient shares to cover the trade. Legacy repeatedly ended the trading day with a negative balance in its account for the securities it sold short, and, in some cases, Legacy carried the negative balance on its books for one or more days.[71] The records further showed that for 955 of those transactions Legacy and Uselton did not attempt to make an affirmative determination that Legacy could borrow the stock or otherwise provide for its delivery by the applicable settlement date.[72] On 41 occasions, Legacy and Uselton attempted to make an affirmative determination, but they were unsuccessful. For each of the remaining six short sales, Sterne Agee had advised

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[65] Winegardner Decl. ¶ 71.

[66] C-191.

[67] C-192.

[68] C-212; C-213; C-214; C-215.

[69] C-219; C-220.

[70] Legacy's short sales during this period involved 14,286,749 shares. Winegardner Decl. ¶ 77.

[71] Winegardner Decl. ¶¶ 72-74, 78; C-267 (Chronological Transaction Analysis for short sales executed before January 3, 2005).

[72] Winegardner Decl. ¶ 89.

Legacy and Uselton that it did not have enough shares available to cover Legacy's short position.[73]

The records further showed that Legacy did not satisfy the locate-and-delivery requirements of SEC Rule 203(b) for 1,190 short sales made between January 3 and August 31, 2005, which are listed on Schedule B to the Amended Complaint.[74] Consistent with the pattern described above, in each case Legacy sold securities without sufficient shares to cover the resulting short position. Also, in many instances, Legacy carried the short position forward for one or more days. Legacy did not attempt an affirmative determination inquiry for 1,110 of these trades. Of the remaining 80 trades where Legacy did make an effort, it was unable to affirmatively determine that it could borrow all of the needed shares. Indeed, for 55 transactions Legacy found that it was unable to borrow any shares.[75]

The Hearing Panel concluded that Legacy and Uselton effected the foregoing 2,192 short sales in connection with their speculative proprietary trading during 2004 and 2005 without first making an affirmative determination that it could borrow all of the needed shares. Uselton was responsible for 1,216 of the trades, which occurred in his trading account at the Firm.

E. Legacy Failed to Retain Records Regarding its Submission of Quotes to Pink Sheets

Between March 2004 and August 2005, Legacy and Uselton heavily relied upon the unsolicited-customer-interest exception to SEC Rule 15c2-11 when it submitted quotes to Pink Sheets. Pink Sheets estimated that 25% of the unsolicited customer quotes

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[73] Winegardner Decl. ¶¶ 89-90.

[74] Winegardner Decl. ¶ 76. Legacy's short sales during this period involved 49,504,651 shares.

[75] Winegardner Decl. ¶ 70; C-277 (Chronological Transaction Analysis for short sales executed after January 3, 2005).

it received in 2004 and 2005 came from Legacy.[76] In many instances Legacy failed to comply with Pink Sheets' requirements, which caused the submissions to be rejected. Eventually, Pink Sheets complained to FINRA that it suspected that Legacy was abusing the unsolicited-customer-interest exception.

In connection with its complaints, Pink Sheets gave FINRA staff documents relating to 138 unsolicited-customer-order submissions made by Legacy and Uselton for 135 securities.[77] The staff then requested Legacy to produce its records documenting its reliance on the unsolicited-customer-interest exception for those quotes. The staff specifically requested a copy of all due diligence files and submission forms for all Unsolicited Quote Entry forms Legacy filed with Pink Sheets.[78] Pink Sheets had initiated use of Unsolicited Quote Entry forms in July 2004 to require market makers submitting quote requests to verify that the quotes were based on an unsolicited indication of interest from a customer and that financial and identifying information about the issuer was publicly available.[79]

In addition, the staff requested detailed information relating to Legacy's customers and their ownership of the subject securities. Uselton responded that Legacy did not have the requested information or documents. Uselton further advised the staff that Legacy had not documented its reliance on the unsolicited-customer-interest exception to SEC Rule 15c2-11.

The Hearing Panel found that, other than certain order tickets, Legacy either never made, or failed to retain, documents showing that the orders were either unsolicited or made on behalf of a customer. Legacy did not maintain: (1) copies of the Pink Sheets

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[76] Lisabeth P. Heese Decl. ("Heese Decl.") ¶ 8.

[77] C-61. The securities are listed on Schedule C to the Amended Complaint.

[78] C-134.

[79] Heese Decl. ¶ 10.

submittal forms; (2) copies of the documents Legacy received from the originating broker-dealer; or (3) documents demonstrating that it had conducted any due diligence regarding the quotes it submitted to Pink Sheets. In addition, Legacy could not identify the customer's broker-dealer for many of the unsolicited-customer-order submissions.[80]

F. Uselton Failed to Update his Form U4 Timely to Report that he had Received Notice of the Investigation

On September 26, 2006, FINRA staff orally advised Uselton's counsel that it had made a preliminary determination to recommend that a disciplinary action be brought against him. The staff then sent Uselton a letter confirming its discussion with his counsel.[81] The staff advised Uselton that he could file a written submission setting forth any reasons he had as to why a disciplinary action should not be brought against him for any or all of the proposed violations ("Wells Notice"). The staff also sent a copy of the Wells Notice to Uselton's counsel by facsimile and first-class mail.

Uselton did not update his Form U4 to reflect his receipt of the Wells Notice until December 11, 2006, which was more than 30 days after FINRA staff notified Uselton of its decision to recommend disciplinary action. Uselton did not dispute the foregoing. Instead, he claimed that he was not responsible for the late filing. In his Answer to the Amended Complaint, Uselton claimed that he had relied on an outside consultant to update his Form U4. However, Uselton's consultant submitted a sworn statement that contradicted Uselton's claim. The consultant stated that Uselton first told her about the Wells Notice three or four days before the update was filed on December 11, 2006.[82]

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[80] Winegardner Decl. ¶ 117.

[81] C-193.

[82] C-245.

V. CONCLUSIONS OF LAW

A. Rule 8210 Violations (Causes Four, Eight, and Nine)

Procedural Rule 8210 requires firms and individuals subject to FINRA's jurisdiction to provide information requested by FINRA and to permit the inspection and copying of books, records, or accounts. Because FINRA lacks subpoena power, it must rely upon Rule 8210 "to police the activities of its members and associated persons."[83] Compliance with Rule 8210 is essential to enable FINRA to execute its self-regulatory functions.[84] The failure to respond promptly and completely to information requests frustrates FINRA's ability to detect misconduct, and such inability in turn threatens investors and markets.[85] A member firm that provides false or misleading information to FINRA or that refuses to provide requested information in the course of an investigation violates Procedural Rule 8210 and Conduct Rule 2110.[86]

The Hearing Panel found that: (1) Legacy provided false information in response to FINRA's requests for information regarding its financial condition, including the $300,000 capital contribution it recorded in December 2004, and the e-mail accounts it used for business purposes; and (2) Uselton provided false information and failed to appear for an on-the-record interview concerning Legacy's relationship with Warrior Capital.

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[83] *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141 at *13 (Nov. 14, 2008) (quoting *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998)).

[84] *Paz Sec., Inc. v. Mizrachi*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *appeal docketed*, No, 08-1188 (D.C. Cir. May 13, 2008).

[85] *Id*. at *13.

[86] *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23-24 (Aug. 22, 2008); *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) (providing false information to FINRA is an independent violation of Conduct Rule 2110).

1. Legacy Provided False Information to FINRA

Legacy provided false information in response to FINRA's 2005 written requests for information concerning Legacy's financial condition, and in particular the $300,000 capital contribution Legacy recorded on its books in December 2004. Initially, Legacy through Boruchin, its Financial and Operations Principal, falsely reported that Boruchin made the deposit from funds he had received from his family. Ultimately, Boruchin admitted that Thorp was the source of the funds.[87] However, Boruchin and Legacy refused to provide further detail regarding their relationship with Thorp.

Legacy also provided false information regarding its use of e-mail. Legacy through Uselton claimed that it did not maintain or use e-mail for business purposes. However, after the staff confronted Uselton with copies of e-mails obtained from Pink Sheets and Sterne Agee, Legacy admitted that several principals, including Uselton, used e-mail accounts to conduct firm business. Accordingly, Legacy's initial representations were false.

Finally, Legacy provided false information to FINRA about its bank accounts. In October 2005, Legacy through Boruchin falsely stated in response to a written request for information that accounts at Citizen's Bank of Edmond in the name of Legacy's holding company, Legacy Trading Co., were unrelated to Legacy's business. On that basis, Legacy refused to provide FINRA staff with copies of those bank statements. Later in the investigation, however, Legacy was forced to admit that virtually all of Legacy's banking business, including payment of payroll, was done through the holding company's account.

The Hearing Panel found that Legacy violated Procedural Rule 8210 and Conduct Rule 2110 by repeatedly providing false information to FINRA. Uselton's argument that

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[87] C-153.

he provided accurate information is inconsistent with the documentary evidence and rejected.

2. Uselton Provided False Information to FINRA

The Hearing Panel further found that Uselton provided false information to FINRA in response to FINRA's requests for information about Legacy's relationship with Warrior Capital. The staff first requested copies of all records for any accounts held, controlled by, or maintained on behalf of Warrior Capital in July 2005.[88] Legacy did not provide the requested documents. Three months later, Legacy responded and claimed that no such documents existed.[89]

On May 6, 2006, Enforcement questioned Uselton about his and Legacy's relationship with Warrior Capital. During that on-the-record interview, Uselton testified that neither he nor Legacy had any relationship with Warrior Capital.[90] Uselton's testimony was false. The staff uncovered a number of documents that showed a direct business relationship between Warrior Capital and Legacy, including a document entitled "Strategic Partnership Agreement" dated July 2, 2003, the stated purpose of which was to develop and add to the operating, management, financial and organizational structure of Legacy Trading, Inc., its subsidiary Legacy Trading Company, LLC, and Warrior Capital, LLC.[91] Other documents also show that Uselton testified untruthfully regarding his relationship with Warrior Capital. For example, the staff obtained tax documents showing that Warrior Capital paid him compensation in 2004.[92]

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[88] C-134, at 3.

[89] C-144, at 5.

[90] C-237, at 53-54, 56-57.

[91] C-100.

[92] Winegardner Decl. ¶ 133; C-117.

Accordingly, the Hearing Panel found that Uselton violated Procedural Rule 8210 and Conduct Rule 2110 by providing false information to FINRA.

3. Uselton Failed to Respond to Information Requests

The record further established—and Uselton acknowledged—that he failed to respond fully and completely to FINRA staff's questions during his on-the-record interview on September 25, 2007. At this second on-the-record interview, Uselton refused to answer any questions about Warrior Capital after he was shown a copy of the "Strategic Partnership Agreement" and other documents that contradicted his earlier testimony that neither he nor Legacy had a business relationship with Warrior Capital. Such failure to answer questions in connection with FINRA's investigation establishes a *prima facie* violation of Procedural Rule 8210 and Conduct Rule 2110.[93]

In his defense, Uselton claimed that FINRA could not sanction him for refusing to testify because he had invoked his Fifth Amendment right against self-incrimination.[94] Uselton suspected that FINRA staff had obtained the documents from the "Joint Task Force investigating" his father and cousin, and he demanded the staff confirm his suspicion.[95] Although Uselton states that FINRA staff denied his accusation, he nonetheless refused to answer any further questions about Warrior Capital.[96] Uselton never presented any evidence supporting his suspicion or his implication that FINRA was in some manner acting jointly with one or more government entities.

Generally, a registered person cannot refuse to respond to FINRA's inquiries by asserting his Fifth Amendment right against self-incrimination because self-regulatory

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[93] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *11-12 (Nov. 8, 2007).

[94] Mark Uselton Decl. ¶ 8.

[95] *Id.*

[96] *Id.*

organizations ("SRO") such as FINRA are not considered state actors subject to the Fifth Amendment.[97] However, under certain limited circumstances an SRO can become subject to the Fifth Amendment when, through its significant involvement with a government investigation, it can be deemed to have engaged in "state action."[98] The Supreme Court has held that private parties' actions may constitute state action "if, though only if, 'there is such a close nexus between the State and the challenged action' that the seemingly private behavior 'may be fairly treated as that of the State itself.'"[99] The Supreme Court has identified a number of facts that can bear on the fairness of such an attribution, including whether the challenged activity "results from the State's exercise of 'coercive power'"; whether "the State provides 'significant encouragement, either overt or covert'"; or whether "a private actor operates as a 'willful participant in joint activity with the State or its agents.'"[100]

In other cases involving respondents' refusals to respond to an SRO's information requests, the SEC has held that "the burden of demonstrating joint activities sufficient to render an SRO a state actor is high, and that burden falls on the party asserting state action."[101] In this case, Uselton failed to carry that burden. Although the Hearing Panel granted Uselton the opportunity to present evidence in support of his defenses after he waived his right to a hearing, he did not present any facts or arguments tending to show that, in this case, there was the kind or degree of cooperation or interaction between FINRA and the government that would justify a finding that FINRA effectively engaged

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[97] *Warren E. Turk*, Exchange Act Release No. 55942, 2007 SEC LEXIS 1355, at *7-8 (June 22, 2007). The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself.

[98] *Gregg Heinze*, Exchange Act Release No. 56100, 2007 SEC LEXIS 1580, at *6 (July 19, 2007).

[99] *Brentwood Acad. V. Tennessee Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 351 (1974)).

[100] *Brentwood Acad.*, 531 U.S. at 296 (citations omitted).

[101] *Heinze*, 2007 SEC LEXIS 1580, at *19. See also *Warren E. Turk*, Exchange Act Release No. 55942, 2007 SEC LEXIS 1355 (June 22, 2007).

in state action. Uselton failed to demonstrate "a nexus between the state and the specific conduct of which [he] complains" — FINRA's request for information about the relationship between Legacy and Warrior Capital.[102] Although the SEC provided FINRA with certain documents showing a relationship between Legacy and Warrior Capital, there is no evidence that FINRA had any other involvement with the SEC's or other government agency's investigation of Uselton's father and cousin. Sharing information derived from an independent government investigation by itself does not constitute joint activity sufficient to render FINRA a state actor.[103] Nor is there any other evidence in the record that would suggest that FINRA had engaged in state action. Accordingly, the Hearing Panel rejected Uselton's Fifth Amendment claim.

B. Short Sales Violations (Cause One and Two)

A short sale is the sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the seller.[104] In order to deliver the security to the purchaser, the short seller will borrow the security, typically from a broker-dealer or an institutional investor. The short seller later closes out the position by purchasing equivalent securities on the open market, or by using an equivalent security it already owned, and returning the security to the lender. In general, short selling is used to profit from an expected downward price movement, to provide liquidity in response to unanticipated demand, or to hedge the risk of a long position in the same security or in a related security.[105]

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[102] *Michael Sassano*, Exchange Act Release No. 58632, 2008 SEC LEXIS 2947, at *18 (Sept. 24, 2008).

[103] *Turk*, 2007 SEC LEXIS 1355, at *18 ("cooperation and information sharing between the [SEC] and an SRO will rarely render the SRO a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action") (citing *Frank P. Quattrone*, Exchange Act Release No. 53547, 87 SEC Docket 2155, 2165 (Mar. 24, 2006).

[104] Regulation SHO, 17 C.F.R. § 240.200(a).

[105] *See Short Sales*, Exchange Act Release No. 50103, 2004 SEC LEXIS 1636, at *3-4 (July 28, 2004).

Rule 3370(b)(2), which governed short-sales before January 3, 2005, differentiates between "customer short sales" and "proprietary short sales." For customer sales (i.e., sales "for any customer"), the member or associated person must make "an affirmative determination that the member will receive delivery of the security from the customer or that the member can borrow the security on behalf of the customer for delivery by settlement date." If the short sale is for the member's "own account," the member or associated person must make "an affirmative determination that the member can borrow the securities or otherwise provide for delivery of the securities by the settlement date."[106] The foregoing affirmative determination requirements prevent short selling by those who do not have, and have no intention of delivering, the stock they are selling.[107]

After January 3, 2005, a broker-dealer seeking to effect a short sale must comply with the locate requirements for short sales in SEC Rule 203(b) of Regulation SHO. Specifically, the rule prohibits a broker-dealer from accepting a short sale order in any equity security from another person, or effecting a short sale order for the broker-dealer's own account unless the broker-dealer has (1) borrowed the security, or entered into an arrangement to borrow the security, or (2) has reasonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due. The broker-dealer must locate the security and document compliance with the rule prior to

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[106] Broker-dealers often rely on "Easy to Borrow Lists" supplied by their clearing firms to meet this requirement. Easy to Borrow lists are prepared by a firm to indicate that firm's ability to supply the identified securities. Therefore, introducing firms may rely on Easy to Borrow lists of the clearing firms through which they clear and settle transactions unless circumstances indicate that it would not be reasonable to rely on such lists. SEC Division of Market Regulation: Responses to Frequently Asked Questions Concerning Regulation SHO, http://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm. In this case, Sterne Agee did not provide Legacy with an Easy to Borrow List for the securities it sold short. Winegardner Decl. ¶ 75.

[107] *John Fiero*, CAF980002, 2002 NASD Discip. LEXIS 16, at *69 (Oct. 28, 2002).

effecting a short sale, regardless of whether the seller's short position may be closed out by purchasing securities the same day.

In this case, the evidence establishes that Legacy and Uselton effected 2,192 short sales in connection with their speculative proprietary trading during 2004 and 2005 and that they failed to comply with either NASD Conduct 3370 or SEC Rule 203(b) in connection with those short sales.

The Respondents contended in their defense that NASD Conduct 3370 and SEC Rule 203(b) did not apply to the 2,192 short sales FINRA identified because Legacy had made them in connection with its bona fide market-making activities. The evidence however showed otherwise.

The SEC provided the following guidance regarding the application of the bona-fide market-making exception when it adopted Regulation SHO:

> Bona-fide market making activities do not include activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security. In addition, where a market maker posts continually at or near the best offer, but does not also post at or near the best bid, the market maker's activities would not generally qualify as bona-fide market making for purposes of the exception.[108]

Moreover, a market maker that continually executed short sales away from its posted quotes generally would not be considered to have been engaged in bona-fide market making.[109]

Legacy's trading was inconsistent with market-making activities. Slightly less than half of the trades (1,035 short sales) involved NASDAQ National Market (NNM), Over-the-Counter Bulletin Board (OTCBB), or Consolidated Quotation System (CQS) securities. The remaining trades involved Pink Sheets securities where Legacy was often

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[108] *Short Sales*, 2004 SEC LEXIS 1636, at *50.

[109] *Id.* at *50, n.68.

the only active market-maker or dealer quoting the security based upon a purported unsolicited customer order.[110] Legacy never posted the inside quote, bid or ask, at the time Legacy effected 810 trades involving NNM securities and 59 trades involving CQS securities.[111] For the 171 trades involving OTCBB securities, Legacy only posted the inside quotes for two of the securities.[112] Moreover, Legacy did not post the inside quotes for 1,062 of the remaining 1,152 trades. The trading records further showed that when the market moved towards Legacy's quote, Legacy typically moved its quote away.[113] Accordingly, the Hearing Panel concluded that the Respondents had not been engaged in bona-fide market making activities and that they therefore violated NASD Conduct 3370 and SEC Rule 203(b) when they effected the 2,192 short sales in 2004 and 2005.

C. Books and Records Violations (Cause Five)

Conduct Rule 3110(a) requires member firms to "make and preserve books, accounts, records, memoranda, and correspondence in conformity with all applicable laws, rules, regulations, and statements of policy promulgated thereunder and with [FINRA's Conduct Rules] and as prescribed by SEC Rule 17a-3." Compliance with the recordkeeping rules is essential to the proper functioning of the regulatory process. Indeed, the SEC has stressed the importance of the records that broker-dealers are required to make and maintain pursuant to the Exchange Act, describing them as the "keystone of the surveillance of brokers and dealers by our staff and by the securities industry's self-regulatory bodies."[114] The SEC has further found that entering inaccurate

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[110] C-267; C-277.

[111] C-267; C-274; C-277; C-284.

[112] C-267, at 1-30; C-274, at 1-5; C-277, at 1-32; C-284, at 1-4.

[113] Winegardner Decl. ¶ 84.

[114] *Edward Mawod & Co*., Exchange Act Release No. 13512, 1977 SEC LEXIS 1811, at *16 (May 6, 1977), *aff'd*, 591 F.2d 588 (10th Cir. 1979). See also *Statement Regarding the Maintenance of Current Books and Records by Brokers and Dealers*, Exchange Act Release No. 10756, 1974 SEC LEXIS 3290 (Apr. 6, 1974), in which the SEC emphasized the importance of the records required by the rules.

information in a member firm's books or records violates both Conduct Rule 2110's requirement that members observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business and Conduct Rule 3110's requirement to keep accurate books and records.[115]

SEC Rule 15c2-11 regulates the initiation or resumption of quotations in a "quotation medium" (such as Pink Sheets) by a broker or dealer for over-the-counter securities. The Rule generally requires that, prior to entering the quotation, a broker or dealer have on hand specified information about the security and its issuer. The purposes of the Rule are to deter manipulative and fraudulent behavior in connection with the distribution and trading of unregistered securities of corporations having little or no earnings, assets or operations ("shell corporations"), and to prohibit broker-dealers from establishing arbitrary quotations for infrequently traded over-the-counter securities. The Rule's information retention requirement is intended to help ensure that quotations for those securities (and any upward movement in such quotations) are not clearly inconsistent with current financial and other information about the quoted security and its issuer.[116]

SEC Rule 15c2-11(f)(2) exempts quotations submitted by a broker-dealer for a customer's account, which is known as the unsolicited-customer-interest exception. This exception permits securities that have been delisted by an exchange to be quoted, so owners of those securities continue to have a market for their shares. It also permits the owners of securities that have never been listed on any exchange to be quoted, thereby providing them a publicly-quoted market.

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[115] *Fox & Co. Inv., Inc.*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *30-32 (Oct. 28, 2005).

[116] *Initiation or Resumption of Quotations without Specified Information*, Exchange Act Release No. 21470, 1984 SEC LEXIS 2511, at *3 (Nov. 8, 1984).

When a broker-dealer relies on the unsolicited-customer-interest exception, it must maintain documents demonstrating its knowledge that the underlying orders were unsolicited and entered on behalf of a customer. Specifically, the firm must create and maintain a memorandum of the customer order regardless of whether the order is ultimately executed. FINRA alerted member firms to these obligations in its Fall 2000 Regulatory and Compliance Alert.[117] Legacy did not maintain these required records when it submitted quotations to Pink Sheets in reliance on SEC Rule 15c2-11(f)(2).

Legacy also did not maintain required e-mail records. SEC Rule 17a-4(b)(4) requires member firms to "preserve for a period of not less than 3 years, the first two years in an accessible place … [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such." Internal e-mail communications relating to a broker-dealer's business fall within the purview of the Rule. The content of the e-mail is determinative as to whether a particular communication is required to be retained and accessible.[118]

The Hearing Panel finds that the e-mail communications with Pink Sheets, Warrior Capital, and Sterne Agee were related to Legacy's business and therefore should have been retained. However, as discussed above, Uselton and Legacy routinely deleted such e-mail and failed to preserve any records of those communications.

The Hearing Panel concluded that the Respondents violated NASD Conduct Rules 3110 and 2110, as well as SEC Rules 17a-3 and 17a-4.

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[117] Regulatory and Compliance Alert (Fall 2000), *available at* http://www.finra.org/Industry/Regulation/Guidance/RCA/index.htm.

[118] *Reporting Requirements for Broker or Dealers under the Securities Exchange Act of 1934*, Exchange Release No. 38245, 62 FR 6469, 6472 (Feb. 5, 1997).

D. Supervisory Violations (Cause Six)

"Assuring proper supervision is a critical component of broker-dealer operations."[119] NASD Rule 3010**(**a) provides that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." Whether a particular supervisory system or set of written procedures is in fact reasonably designed to achieve compliance depends on the facts and circumstances of each case.[120] Conduct Rule 3010(b) further requires that a member "establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of [FINRA]."[121] Conduct Rule 3010(d)(1) specifically requires that member firms establish procedures for the review and endorsement by a registered general securities principal in writing, on an internal record, of all transactions and all incoming and outgoing written and electronic correspondence of their registered representatives with members of the public relating to the firms' securities business.

The Respondents did not establish and maintain an adequate supervisory system and procedures, as required by Conduct Rule 3010. Legacy did not have any procedures regarding its registered representatives' use of e-mail before June 8, 2006, and the Respondents also did not preserve copies of Legacy's related e-mails.[122] Nor did Legacy maintain procedures relating to the review and endorsement by a registered principal of

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[119] *Richard F. Kresge*, Exchange Act Release No. 55988, 2007 SEC LEXIS 1407, at *27 (June 29, 2007).

[120] *Ronald Pellegrino*, Exchange Act Release No. 59125, 2008 SEC LEXIS 2843, at *32-33 (Dec. 19, 2008).

[121] NASD Conduct Rule 3010(b).

[122] Winegardner Decl. ¶¶ 42-43, 144. Legacy finally adopted e-mail procedures only after FINRA staff insisted it needed such procedures.

unsolicited customer orders.[123] Uselton, as Legacy's President, Chief Executive Officer, and Chief Compliance Officer, was responsible for establishing, maintaining, and enforcing Legacy's supervisory systems and procedures.[124] There is no evidence that Uselton delegated this responsibility to anyone else at the firm.[125] Accordingly, the Hearing Panel concluded that the Respondents violated Conduct Rules 2110 and 3010(d).

E. Form U4 Violation (Cause Seven)

A registered representative's Form U4 must be kept current at all times by supplementary amendments filed with FINRA within 30 days of learning of facts or circumstances giving rise to the amendment.[126] A Form U4 that is inaccurate or incomplete so as to be misleading may be deemed to be conduct inconsistent with just and equitable principles of trade in violation of NASD Rule 2110.[127] Because the Form U4 is used by FINRA and other self-regulatory organizations, state regulators, and broker-dealers to determine and monitor the fitness of securities professionals, "the candor and forthrightness of applicants is critical to the effectiveness of the screening process."[128]

The Form U4 requires registered representatives to update their Form U4 in the event they receive written notification that they are subject to a FINRA investigation.[129] Form U4 defines the term "investigation" to include a FINRA investigation after the Wells notice has been given or after an associated person has been advised by the staff

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[123] *Id.* ¶¶ 121-22.

[124] *Id.* ¶ 121.

[125] *Dep't. of Mkt. Regulation v. Kresge*, No. CMS030182, 2008 FINRA Discip. LEXIS 46, at *9 (N.A.C. Oct. 9, 2008).

[126] Article V, Section 2(c) of the FINRA By-Laws.

[127] *See* IM-1000-1; *Thomas R. Alton*, 52 S.E.C. 380, 382 (1995), *petition for rev. denied*, 105 F.3d 664 (9th Cir. 1996).

[128] *Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117, at *19-20 (Jan. 14, 2005), *aff'd*, 179 Fed. Appx. 702 (D.C. Cir. 2006).

[129] Form U4, Question 14G(2).

that it intends to recommend formal disciplinary action. Here, FINRA informed Uselton's attorney on September 26, 2006, that Enforcement had made a preliminary determination to recommend that disciplinary action be brought against Uselton.[130] Following that telephone conversation, Enforcement followed up the same day by sending Uselton a Wells notice.[131] Accordingly, Uselton was obligated to update his Form U4 no later than October 26, 2006, to disclose that he had received the Wells notification. However, Uselton did not update his Form U4 until December 11, 2006, after Enforcement counsel reminded him that he needed to do so.[132]

Uselton claimed that he was not responsible for the late filing. He claimed that he had relied on an outside consultant to make such filings and that he thought she had made the required update. The evidence however undercuts Uselton's claim. Enforcement obtained a sworn declaration from Uselton's outside consultant, who stated that Uselton never informed her of the Wells notice.[133] In any event, Uselton cannot escape liability by claiming that he relied on his outside consultant to handle his obligation to keep the Form U4 current because this obligation fell squarely on Uselton. It was Uselton's responsibility to update his Form U4 with the requisite information about the Wells notice.[134]

Uselton's failure to amend timely his Form U4 to disclose that he had received the Wells notice constitutes a violation of Conduct Rule 2110 and IM-1000-1.

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[130] Winegardner Decl. ¶ 138.

[131] *Id.*; C-193.

[132] Winegardner Decl. ¶ 139.

[133] Winegardner Decl. ¶ 141.

[134] *See Dep't. of Enforcement v. Mathis*, No. C10040052, 2008 FINRA Discip. LEXIS 49, at *16 (Dec. 12, 2008).

VI. SANCTIONS

A. Rule 8210 Violations (Causes Four, Eight, and Nine)

The evidence in this case documents the Respondents' persistent pattern of obstruction of FINRA's investigation over a substantial period. The Respondents repeatedly provided false information to Enforcement in response to Rule 8210 requests for documents and information. Legacy provided false information to Enforcement in response to requests for information about the following four subjects: (1) the source of the $300,000 deposit made by Boruchin; (2) Legacy's use of e-mail for business purposes; (3) Legacy's use of the holding company bank account for business purposes; and (4) Legacy's relationship with Warrior Capital. Uselton provided false testimony under oath during two on-the-record interviews, conducted 16 months apart, and then refused to answer additional questions about Warrior Capital after he was confronted with documents that contradicted his prior testimony.

The *FINRA Sanction Guidelines* ("*Guidelines*") for "Failure to Respond or Failure to Respond Truthfully, Completely or Timely to Requests Made Pursuant to FINRA Procedural Rule 8210" provide that if a person does not respond to a request for information in any manner, a bar should be the standard sanction. If there are mitigating factors present, or the person did not respond in a timely manner, adjudicators should consider suspending the individual in any or all capacities for up to two years. For firms, the *Guidelines* state that in egregious cases expulsion is the appropriate standard. If there are mitigating factors present, adjudicators should consider suspending the firm with respect to any or all activities or functions for up to two years. The *Guidelines* further suggest a fine of $10,000 to $25,000 for failing to respond completely.[135]

[135] *FINRA Sanction Guidelines* 35 (2007), http://www.finra.org/RegulatoryEnforcement/index.htm (then follow "FINRA Sanction Guidelines" hyperlink).

The *Guidelines* list two principal considerations for adjudicators to assess in determining appropriate sanctions for violations of Rule 8210, as well as the principal considerations and general principles applicable to all violations. First, adjudicators should consider the nature of the information requested. Second, adjudicators are advised to consider whether the information was provided and, if so, the number of requests made, the time it took the respondent to respond, and the degree of regulatory pressure required to obtain a response.[136]

The Hearing Panel concludes that the egregious nature of the Respondents' violations coupled with the lack of any mitigating factors warrant Legacy's expulsion from FINRA membership and Uselton's bar from the securities industry. The risk of harm to investors and the markets posed by providing false information and obstructing FINRA's investigation renders the violators presumptively unfit for employment in the securities business.[137] FINRA's ability to request and obtain information from its members and their associated persons is crucial to FINRA's performance of its regulatory mission.[138] Refusing to respond at all to FINRA's requests for information and supplying false information to FINRA during an investigation subvert FINRA's ability to perform its regulatory function and protect the public interest.[139] Here, the evidence amply demonstrates Uselton's untruthfulness and his unwillingness to comply with FINRA's Conduct Rules, which support the Hearing Panel's conclusion that he poses too great a threat to the investing public to permit him to remain in the securities industry. Accordingly, the Hearing Panel will expel Legacy and bar Uselton for providing false

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[136] *Guidelines* 35.

[137] *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32 (Aug. 22, 2008).

[138] *Dep't of Enforcement v. Ortiz*, No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *33 (N.A.C. Oct. 10, 2007) *aff'd*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008).

[139] *Id.*

information in response to requests for information pursuant to Rule 8210, and will bar Uselton for his failure to respond to questions at his on-the-record interviews.[140]

B. Short Sales Violations (Causes One and Two)

The *Guidelines* for short sale violations, including violations of Regulation SHO, recommend a scale of fines: $5,000 to $10,000 for a "first action," $10,000 to $50,000 for a "second action," and $10,000 to $100,000 for "subsequent actions." In all egregious cases, whether a first, second, or subsequent action, adjudicators may consider a fine greater than or equal to the high end of the range for a first, second, or subsequent action. In addition, adjudicators may consider imposing a fine on a "per violation" basis.[141]

The *NASD Sanction Guidelines* that addressed violations of former NASD Rule 3370 recommended a slightly different scale of fines: $1,000 to $2,000 for a "first action," $2,000 to $10,000 for a "second action," and $5,000 to $100,000 for "subsequent actions."[142]

Both sets of *Guidelines* further provide that in instances where the short-selling customer is not subject to FINRA jurisdiction, in egregious cases, or where there is evidence of willful misconduct, adjudicators may consider adding the amount of the short-selling customer's "transaction profit" to the fine for the executing member and associated person. And in egregious cases, adjudicators may "consider suspending the firm with respect to any and all activities or functions and/or suspending the responsible individual … for up to two years or expelling the firm and/or barring the responsible individual."[143]

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[140] The Hearing Panel did not fine the Respondents in light of the imposed sanctions. *See* NASD Notice to Members 99-86, 1999 NASD LEXIS 63 (Oct. 1999).

[141] *Guidelines* 67.

[142] *NASD Sanction Guidelines* 66 (2005).

[143] *Guidelines* 67; *NASD Sanction Guidelines* 66.

Enforcement suggested that the appropriate sanction for the Respondents' violations of the short sales rules was a $10,000 fine plus disgorgement of their trading profits. In reaching this recommendation, Enforcement referred to the current *Guidelines* for a "first action," but did not analyze whether the Respondents' misconduct was egregious or whether they acted willfully, which factors would warrant a more severe sanction.[144]

The Hearing Panel agrees that this proceeding constitutes a "first action" for the purposes of the *Guidelines*.[145] However, the Hearing Panel further concludes that this is an egregious case, involving willful misconduct. "In order to commit a willful violation, a respondent need only have intentionally committed the act that constitutes the violation."[146] Nonetheless, the evidence demonstrates that Uselton did intentionally effect short sales without first making the affirmative determinations required under NASD Conduct Rule 3370. For 955 transactions, the Respondents made no effort to determine if Legacy could borrow the subject stock or otherwise provide for its delivery by the applicable settlement date. In addition, on no fewer than 41 occasions the Respondents were unsuccessful in making an affirmative determination, yet they nonetheless proceeded with the short sales; and on other occasions they proceeded to sell stock short

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[144] The *NASD Sanction Guidelines* however only require a showing of willful misconduct if the respondent's customers—rather than the respondent himself—realized profits from the short sales. *See* Notice to Members 01-27 (Apr. 2001) (NASD revised the monetary sanction of the short sales guideline to account for profits made by a short selling customer who did not execute the short sales and is not subject to NASD jurisdiction.)

[145] The *Guidelines* define "action" as a Letter of Acceptance, Waiver and Consent, a settled case, a Minor Rule Violation Plan Letter, or a fully litigated case, as distinguished from a violation. In this case, there is no evidence that the Respondents were formally charged with a violation of the short sales rules before the current action. *Guidelines* 9. *See also Dep't of Mkt. Regulation v. Ko Sec., Inc.*, No. CMS000142, 2001 NASD Discip. LEXIS 56, at *21-22 (Oct. 15, 2001), *aff'd*, Exchange Act Release No. 48550, 2003 SEC LEXIS 2291 (Sept. 26, 2003), *aff'd*, Exchange Act Release No. 48550, 2005 SEC LEXIS 1800 (July 22, 2005), *aff'd*, 235 Fed. Appx. 475 (2007).

[146] *Dep't of Mkt. Regulation v. Ko Sec., Inc.*, No. CMS000142, 2004 SEC LEXIS 21, at *8-9 (Dec. 20, 2004) (reconsideration of sanctions on remand from SEC).

even after Legacy's clearing firm advised the Respondents that it did not have enough shares available to cover Legacy's short position.[147]

The evidence further shows that the Respondents followed an identical pattern of conduct after January 3, 2005, when SEC Rule 203(b) became effective. In 1110 of the 1190 short sales effected after January 3, 2005, identified in the Second Cause of the Amended Complaint, the Respondents did not attempt to locate shares of the stock they shorted. And, for 55 transactions where they did attempt to locate the required shares the Respondents were not able to borrow the needed shares, but nonetheless went forward with the short sales.[148]

The Hearing Panel also considered the "principal considerations" listed in the *Guidelines* that adjudicators should consider in conjunction with the imposition of sanctions in addition to those that may be specified for a particular violation. Under these principal considerations, there are a number of additional aggravating factors that support an increase in the base fine amount for the Respondents' short sales violations. First, the Respondents' misconduct involved a substantial number of trades (2192) and a significant amount of money.[149] Legacy made a profit of $897,035.01 from its short-selling transactions in 2004 and 2005.[150]

General Principle No. 6 in the *Guidelines* advises where a respondent "obtained a financial benefit from [the] misconduct, … Adjudicators may require the disgorgement of such ill-gotten gain by fining away the amount of some or all of the financial benefit derived, directly or indirectly" by the respondent where appropriate to remediate

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[147] Winegardner Decl. ¶¶ 89-90.

[148] Winegardner Decl. ¶ 70.

[149] *Guidelines* 7, Principal Consideration No. 18 ("The number, size and character of the transactions at issue.")

[150] Winegardner Decl. ¶ 110. *Guidelines* 7, Principal Consideration No. 17 ("Whether the respondent's misconduct resulted in the potential for respondent's monetary or other gain.")

misconduct.[151] Adjudicators may also add prejudgment interest to the fine to take the profit out of the crime.[152]

Based on the foregoing considerations, the Hearing Panel concludes that the egregious and willful nature of the Respondents' short sales violations coupled with the lack of any mitigating factors warrant a fine of $907,035.01, which represents a base fine of $10,000 plus a fine equal to the amount of the Respondents' profits from the short sales.[153] Accordingly, the Respondents will be jointly and severally fined $907,035.01, plus interest thereon at the rate of interest established under Section 6621(a)(2) of the Internal Revenue Code from September 1, 2005, until paid.[154]

C. Books and Records (Cause Five)

For recordkeeping violations, the principal consideration in determining sanctions is the nature and materiality of inaccurate or missing information. The *Guidelines* provide for a fine of $1,000 to $10,000, and suggest an increased fine of $10,000 to $100,000 in egregious cases. They further suggest that adjudicators consider suspending the firm and the responsible individual for up to 30 business days. In egregious cases the *Guidelines* suggest that adjudicators consider suspending the firm and responsible individual for up to two years, or barring the individual and expelling the member firm.[155]

The Hearing Panel finds that Respondents' violations were egregious and therefore require serious sanctions. The recordkeeping requirements for quotations

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[151] *Guidelines* 5. "Financial benefit" is defined to include any "revenues, profits, gains, compensation, income, fees, other remuneration, or other benefits received by the respondent, directly or indirectly, as a result of the misconduct." *Id.*

[152] *See, e.g., SEC v. First Jersey Secs., Inc.*, 101 F.3d at 1476-77; *SEC v. Drexel Burnham Lambert Inc.*, 837 F. Supp. 587, 612 (S.D.N.Y. 1993).

[153] *Ko Secs., Inc.*, Exchange Act Release No. 48550, 2005 SEC LEXIS 1800, at *22-23 (July 22, 2005), *aff'd*, 235 Fed. Appx. 475 (2007).

[154] 26 U.S.C. § 6621(a)(2).

[155] *Guidelines* 30.

submitted in reliance on the unsolicited-customer-interest exception to SEC Rule 15c2-11 are designed to enable FINRA to verify that broker-dealers are not improperly claiming the exception to circumvent the Rule's important antifraud provisions. By failing to maintain these records, the Respondents impeded FINRA's investigation into Legacy's suspected abuse of the unsolicited-customer-interest exception and the Pink Sheets' complaint.

The Respondents also frustrated FINRA's investigation by failing to maintain records of e-mail communications. In particular, Enforcement was not able to fully investigate the Respondents' relationship with Warrior Capital. It was not until after Enforcement filed the Complaint that it received documents from the SEC that showed the nature and degree of the relationship between Legacy and Warrior Capital. The Hearing Panel also finds the fact that the Respondents irrevocably destroyed all records of their e-mails to be an aggravating factor. As FINRA recently acknowledged, such intentional action by a violator may be considered an important factor in assessing sanctions for recordkeeping violations.[156]

The Hearing Panel also took into consideration the Respondents' relevant disciplinary history, which included the following actions:

- In June 1998, Uselton was found to have violated various SEC and NASD rules by inaccurately and untimely failing to transmit last sales reports through the Automated Confirmation Transaction Service ("ACT"). Uselton also failed to implement, enforce, and maintain reasonable and proper supervisory procedures related to his firm's trading and market making activities. He was fined $8,000, jointly and severally with other respondents, and ordered to undertake a review of the firm's supervisory procedures.[157]

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[156] *Cf. North Woodward Fin. Corp.*, No. E8A2005014902, 2008 FINRA Discip. LEXIS 47, at *26 (N.A.C. Dec. 10, 2008) (if the records had been irrevocably destroyed, the negligent, reckless, or intentional actions of the violator would be far more important in determining sanctions).

[157] C-1, at 15-17; C-2, at 28-29; C-37, at 6-7.

- On April 20, 2001, NASD suspended Legacy's membership for failing to file its Annual Audit Report for 2000 after it ignored NASD's requests that it do so.[158]

- On April 15, 2002, NASD suspended Legacy's membership for failing to file its Annual Audit Report for 2001 after it ignored NASD's request that it do so.[159]

- In July 2003, Legacy and Uselton were each fined $7,500 by NASD for violating SEC Rule 15c3-1 by failing to notify NASD that the firm was below its minimum net capital; engaging in securities business without the minimum required net capital; failing to timely file its audited financial statements; failing to maintain copies of financial statements; filing an inaccurate FOCUS Part IIA Report; failing to accurately report transactions through ACT; executing proprietary short sales in NASDAQ National Market securities at or below the current inside bid; and failing to make an affirmative determination as to whether the shares were borrowable. Uselton was suspended for six months in the capacity of Financial and Operations Principal and for three months in the capacity of a General Securities Principal.[160]

- In February 2004, NASD fined Uselton $5,000 and suspended him in a principal capacity for six months for violations of NASD's Conduct Rules, including net capital violations; filing inaccurate FOCUS Part II reports; and failure to ensure the preparation and maintenance of accurate books and records.[161]

The Hearing Panel concludes that the egregious nature of the Respondents' recordkeeping violations, coupled with the lack of any mitigating factors, warrant that Legacy be fined $50,000 and that Uselton be suspended in all principal capacities for one year for their violations of Conduct Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4.[162]

D. Supervisory Violations (Cause Six)

The rules that the Respondents violated serve fundamental regulatory purposes. "Assuring proper supervision is a critical component of broker-dealer operations."[163]

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[158] C-2, at 5-6; C-33, at 1; C-34, at 1.

[159] C-2, at 7-8; C-29, at 1; C-30 at 1.

[160] C-1, at 17-19; C-2, at 10-12; C-24, at 5-7.

[161] C-1, at 20-21; C-2, at 13-14; C-23, at 9-10.

[162] It is appropriate to sanction both Respondents because the firm's failure to maintain the required records is attributable to him. *See James S. Pritula*, 53 S.E.C. 968, 976 (1998).

[163] *Kresge*, 2007 SEC LEXIS 1407, at *27.

Accordingly, the *Guidelines* recommend strong ranges of sanctions for supervisory violations.

The *Guidelines* for failing to supervise recommend, in egregious cases, suspending the responsible individual in any or all capacities for up to two years or imposing a bar. The *Guidelines* further recommend a fine of $5,000 to $50,000, which amount may be increased by the amount of the respondent's financial benefit.[164] In a case against a member firm involving systemic supervision failures, the *Guidelines* recommend suspending the firm with respect to any or all activities or functions for up to two years or expulsion of the firm.[165]

The *Guidelines* for deficient written supervisory procedures recommend that adjudicators impose a fine between $1,000 and $25,000 and that they consider suspending the responsible individual and the firm in egregious cases. The *Guidelines* further recommend that adjudicators consider whether the supervisory deficiencies allowed violative conduct to occur.[166]

The evidence in this case demonstrates a substantial disregard of Conduct Rule 3010. Uselton made little or no effort to develop and enforce a comprehensive and effective set of supervisory procedures. In fact, Legacy operated without supervisory procedures covering many elements of its business, including its heavy use of the unsolicited-customer-interest exception to SEC Rule 15c2-11[167] and its use of e-mail communications in connection with its operations. Legacy had no procedures governing either aspect of its business. Moreover, when these omissions are viewed together with

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[164] *FINRA Sanction Guidelines* 108 (2007) (Failure to Supervise), http://www.finra.org/RegulatoryEnforcement/FINRAEnforcementMarketRegulation/FINRASanctionGuidelines.

[165] *Id.*

[166] *Id*. at 109.

[167] Pink Sheets reported that Legacy submitted 25% of the unsolicited customer orders it received in 2004 and 2005. Heese Decl. ¶ 8.

the manner in which Uselton conducted Legacy's business, including his efforts to avoid complying with FINRA's investigatory requests for information, the Hearing Panel concluded that Uselton intentionally disregarded his supervisory obligations.

Based on the foregoing, and in the absence of any mitigating factors, the Hearing Panel concludes that it will suspend Uselton from associating with any member firm in any capacity for two years, and fine the Respondents $50,000, jointly and severally.

E. Form U4 Violation (Cause Seven)

The *Guidelines* for the late filing of an amendment to a Form U4 by an individual recommend a fine in the range of $2,500 to $25,000.[168] The principal considerations for this violation direct adjudicators to consider the nature of the information requested and whether the violation allowed a statutorily disqualified person from remaining registered.[169] In this case, as Enforcement points out in its Pre-Hearing Brief, neither of these factors is relevant. Uselton was not statutorily disqualified at the time, and disclosure of the Wells notice was unlikely to impact his employment status at Legacy. Accordingly, the Hearing Panel finds that the appropriate sanction under these facts and circumstances is a $2,500 fine.

VII. ORDER

The Hearing Panel imposes the following sanctions:

1. Legacy is expelled and Uselton is barred from associating with any member firm in any capacity for providing false information to FINRA staff in violation of Procedural Rule 8210 and Conduct Rule 2110. In addition, Uselton is barred from associating with any member firm in any capacity for refusing to answer questions during an on-the-record interview in violation of Procedural Rule 8210 and Conduct Rule 2110.

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[168] *Guidelines* 73.

[169] *Id.*

2. Legacy and Uselton are fined $907,035.01, plus interest thereon from September 1, 2005, until paid, calculated at the rate established under Section 6621(a)(2) of the Internal Revenue Code, for effecting short sales in violation of Conduct Rules 3370 and 2110 and SEC Rule 203(b).

3. Legacy and Uselton are fined $50,000, jointly and severally, for their recordkeeping violations in violation of Conduct Rules 3110 and 2110 and SEC Rules 17a-3 and 17a-4.

4. Legacy and Uselton are fined $50,000, jointly and severally, for their failure to establish, maintain, and enforce required written supervisory procedures in violation of Conduct Rules 3010(d) and 2110.

5. Uselton is fined $2,500 for failing to amend his Form U4 timely in violation of Conduct Rule 2110.

The Respondents are also ordered to pay an administrative fee of $750.

The monetary sanctions will be due and payable on a date set by FINRA, but not less than 30 days after this decision becomes FINRA's final disciplinary action in this matter, and if this becomes FINRA's final action, the expulsion of Legacy and the bars of Uselton shall become effective immediately.[170]

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Andrew H. Perkins
Hearing Officer
For the Extended Hearing Panel

[170] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.

Copies to:

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