FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. VINCENT P. McCRUDDEN (CRD No. 1762690), Respondent.	Disciplinary Proceeding No. 2007008358101 Hearing Officer—LBB **HEARING PANEL DECISION** October 15, 2009

For making abusive, intimidating, and threatening communications to his former employer, in violation of Conduct Rule 2110, Respondent is suspended for 30 business days and fined $10,000. For inducing the filing of a misleading and inaccurate Form U5 by his former firm, in violation of Conduct Rule 2110, Respondent is suspended for an additional five business days and fined an additional $2,500. The Hearing Officer dissented as to sanctions, finding that a longer suspension was warranted.

Appearances

For Complainant, Gregory R. Firehock, Esq., and Leo J. Kane, Esq., Department of Enforcement, Washington, D.C.

For Respondent, Matthew A. Martel, Esq., and Gregory W. Carey, Esq., Boston, Massachusetts.

DECISION

The Department of Enforcement filed the Complaint in this proceeding on June 26, 2008, charging Respondent Vincent P. McCrudden with two violations of NASD Conduct Rule 2110.[1]

[1] As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the NASD Conduct Rules that were in effect at the time of Respondent's alleged misconduct. In addition, because the Complaint was filed before December 15, 2008, the NASD Procedural Rules were applied in this disciplinary proceeding.

The First Cause of Action charged Respondent with making threatening, abusive, intimidating, harassing, coercive, and vulgar communications to Hedge Fund Capital Partners, LLC ("HedgeCap"), his former firm. The Second Cause of Action charged Respondent with bargaining for, encouraging, and inducing the filing of a misleading and inaccurate Uniform Termination Notice for Securities Industry Registration (Form U5).[2]

A hearing was held in New York, New York, from May 19 to May 22, 2009, before a Hearing Panel consisting of one current and one former member of the District 10 Committee, and a Hearing Officer.

I. Respondent

Respondent first became registered with FINRA in 1998. He was registered with HedgeCap from February 2005 to June 30, 2006, as a general securities representative and a principal, although he had ceased functioning in any principal capacity at HedgeCap by early October 2005. Respondent worked on the trading desk at HedgeCap, as the firm's head trader. He is not currently registered or associated with any member firm. Stip. 1; Tr. 58.[3,4]

On June 10, 2005, the National Futures Association ("NFA") issued a Final Order Denying Registrations to Respondent and his company, Managed Accounts Asset Management, LLC ("MAAM"). CX-32. The NFA decision was affirmed by the Commodity Futures Trading

[2] The Complaint also named as Respondents Hedge Fund Capital Partners, LLC, and its president, Howard G. Jahre. The Complaint charged the firm and Jahre with filing a misleading and inaccurate Form U5 in violation of IM-1000-1; Article V, Section 3 of FINRA's By-Laws; and Rule 2110. HedgeCap and Jahre settled the matter. HedgeCap was censured and fined $10,000. Jahre was suspended from functioning in a principal capacity for ten days and fined $10,000.

[3] References to the testimony set forth in the transcripts of the hearing are designated as "Tr. __," with the appropriate page number. References to the exhibits provided by the Department of Enforcement are designated as "CX-___," and Respondent's exhibits are designated as "RX-___." The parties filed stipulations on December 18, 2008. Stipulations are designated as "Stip. ___."

[4] Although Respondent has not been registered with any FINRA member firm since the termination of his employment with HedgeCap, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after the termination of his registration with a member firm, and it charges him with misconduct while he was registered with a member firm.

Commission and the United States Court of Appeals for the Second Circuit.[5] Respondent became subject to statutory disqualification when the CFTC issued its order affirming the NFA's decision on December 28, 2006.[6]

Respondent has no disciplinary history with FINRA. Stip. 2; CX-2.

II. Origin of Investigation

The investigation of Respondent started when a FINRA investigator who was investigating HedgeCap reviewed some of the e-mails that are the basis for the charges in the Complaint. The investigator compared an e-mail terminating Respondent's employment for cause to the records in the Central Registration Depository ("CRD"), which showed that Respondent's termination from HedgeCap had been voluntary. The investigator had concerns that the Form U5 that HedgeCap had filed with FINRA, in which it reported that Respondent's termination from the firm had been voluntary, might not have been accurate. Tr. 1067 – 1068.

III. HedgeCap

HedgeCap is a "hedge fund hotel" located in New York City. It provides hedge funds with short-term office space, access to capital, and a trading desk. Sometime before the summer of 2005, HedgeCap entered into a joint venture with Penson Financial. Penson paid the rent for HedgeCap's office space, provided the capital for the build-out of the space, and paid for some shared employees. In return, Penson received 25% of HedgeCap's revenues and all of HedgeCap's clearing business. Penson was not an owner of HedgeCap, although it had an option to purchase an ownership interest. Tr. 53 – 55, 503, 512 – 514.

HedgeCap had fewer than ten employees. Tr. 55. Howard Jahre, an attorney, was the original owner and the firm's managing director. Tr. 54 – 55, 121. Frank Napolitani was hired

[5] CX-2; *Vincent P. McCrudden*, CFTC Docket No. CRAA 05-02, 2006 CFTC LEXIS 132 (Dec. 28, 2006), *aff'd, McCrudden v. CFTC*, 264 Fed. App'x 26, 2008 U.S. App. LEXIS 2571 (Feb. 6, 2008).

[6] Securities Exchange Act of 1934 §3(a)(39)(B)(ii), 15 U.S.C. §78c(a)(39)(B)(ii).

to be in charge of institutional sales, but also became responsible for managing administrative tasks, such as bookkeeping, hiring, and purchasing. He also became an owner of the firm. Tr. 56 – 57, 99, 503. James Scaplen was a shared employee of Penson and HedgeCap. He acted as HedgeCap's back office operations person and also acted as liaison with Penson. Tr. 56.

IV. Respondent's Dispute with HedgeCap

In late June 2006, a dispute arose between Respondent and his firm. The dispute initially concerned the payment of commissions to Respondent and responsibility for the payment of brokerage expenses for Respondent's personal trades. The dispute escalated, and Respondent raised other issues, including whether Respondent was entitled to reimbursement of a contribution he had made to an "error account," and whether Jahre was using the financial dispute to renege on his commitment to grant Respondent an equity interest in HedgeCap. Respondent's communications to HedgeCap became threatening and abusive, and Jahre terminated Respondent's employment with HedgeCap. The abusive and threatening communications continued after the termination as Respondent sought to influence the terms of the termination, primarily the contents of the Form U5 that HedgeCap would file with FINRA to report the termination. The parties agreed on the terms of the termination a few weeks later. A key term of the agreement was HedgeCap's commitment to file a Form U5 falsely reporting to FINRA that Respondent had left HedgeCap voluntarily.

A. The origins of the dispute

The dispute between Respondent and HedgeCap that led to abusive communications involved four issues.

1. Jahre's Promise to Grant an Equity Interest in HedgeCap to Respondent

Respondent was regarded as a good contributor to HedgeCap. He was respected, and tried to bring business into the firm. Tr. 302 – 303. He had a cordial relationship with others in the office. Tr. 71, 301. Respondent was also a mentor to new traders in the office. He trained both Sang Lee and Greg Rachinsky, two new traders who were brought into the office. Tr. 194, 363, 637 – 639. He also provided training to Scaplen in trading. Tr. 988.

Respondent was a productive employee for HedgeCap. He was the firm's largest producer, contributing almost $500,000 to the firm above his commission payouts. One of his clients, Dresdner Bank, brought in substantially more revenue to HedgeCap than any other source. Tr. 296 – 300. Respondent's relationship with Dresdner, his biggest account, ended in April 2006. Tr. 1030, 1044.

Because of Respondent's production, Jahre promised Respondent that he would be given an equity interest in HedgeCap. Jahre represented in April, May, and June 2006, and earlier, that he intended to issue a five percent (5%) equity interest in HedgeCap to Respondent. Stip. 6. On May 2, 2006, Jahre told Respondent that he had sent documents to the firm's attorney to memorialize the granting of the 5% equity interest to Respondent. CX-7; Tr. 64 – 65.

The commitment to grant the equity interest to Respondent became part of the dispute between Respondent and HedgeCap after Jahre terminated Respondent's employment, when Respondent accused Jahre of terminating his employment to avoid granting the equity interest.

2. Respondent's Floor Brokerage Expenses

Respondent used floor brokers to execute trades both for his personal trading account and on behalf of HedgeCap's clients. The floor brokers sent monthly invoices to HedgeCap both for Respondent's personal trades and trades for clients, although some floor brokers billed

Respondent directly for his personal trades. The floor brokerage expenses for client accounts were deducted from Respondent's gross commissions in computing Respondent's compensation. Tr. 83 – 85, 116. Napolitani knew that the floor brokerage bills for Respondent's personal trades were coming to HedgeCap. Tr. 1028.

Scaplen computed the commissions owed to HedgeCap for Respondent's personal trades by looking at the trading blotter to see what was done for a client and what was done for Respondent's personal account. Tr. 86, 96. Respondent could not have concealed the charges for his personal trades from the firm because Scaplen allocated the commissions to the appropriate accounts at the end of each month. Napolitani did not regard the practice of initially billing HedgeCap for floor brokerage expenses on Respondent's personal account as improper. Tr. 105 – 108, 114 – 115.

A dispute arose between Respondent and HedgeCap over approximately $24,850 in floor brokerage expenses. HedgeCap claimed Respondent charged these expenses to the firm when they were for the benefit of Respondent's own accounts and accordingly should have been Respondent's responsibility. Stip. 4. Napolitani asserted that Respondent owed HedgeCap for floor brokerage from the prior year for which payment had never previously been requested, and Jahre accused Respondent of improperly billing personal floor brokerage commissions to HedgeCap. CX-14.

3. Respondent's Contribution to HedgeCap's Error Account

HedgeCap maintained an account at Penson known as the "error account." The account was intended to be used as a reserve to cover errors by brokers that resulted in losses to clients, such as when a broker mistakenly bought a position for a client who had instructed the firm to sell a position. In such situations, the firm would cover the losses from funds in the error account. Tr. 505 – 506. In early 2006, Scaplen made an error on a trade, and Respondent put a

trade into the error account to cover possible losses resulting from the error. The trade resulted in a $10,000 credit in the account. Tr. 370 – 371, 379 – 380, 989 – 990; RX-2. As it turned out, Respondent was able to avoid potential losses resulting from Scaplen's error, and there was no actual loss to the client or the firm. Tr. 992 – 993. In June 2006, Respondent sought payment of the $10,000 from the trade he had contributed to the error account. Stip. 3. HedgeCap refused to pay any money related to the error account to Respondent. Stip. 5.

4. Respondent's Request for Commission Payment

In June 2006, Respondent sought payment of approximately $4,385 in brokerage commissions he claimed were owed to him by HedgeCap. Stip. 3. HedgeCap refused to pay brokerage commissions until Respondent reimbursed the firm for the floor broker expenses. Stip. 5.

B. Communications Leading to the Termination of Respondent's Employment with HedgeCap

On June 14, 2006, Scaplen sent an e-mail to Respondent, saying he just wanted to "check in" on the floor broker invoices, although he did not identify the specific invoices about which he was inquiring. Respondent replied that he had told Napolitani not to worry about the invoices, and that Respondent would take care of them. Respondent also asked for repayment of the $10,000 resulting from the trade he had put into the error account earlier in 2006. RX-1. Later that morning, Respondent sent an e-mail to Napolitani and Scaplen, stating that he would take care of the floor broker expenses, but noting some apparent errors in the accounting. He again requested repayment of the $10,000 from the trade that he had put into the error account. RX-2. Napolitani replied that afternoon, agreeing that he had made a mistake in the accounting, and asking Respondent to void the commission payout check he had given to Respondent the previous week. RX-3; Tr. 397.

On June 29, Respondent sent an e-mail to Napolitani, expressing confusion about the status of the floor broker expenses, and again requesting repayment of the $10,000 from the error account. In response, Napolitani stated that HedgeCap did not make payouts from the error account. He asked Respondent to write checks directly to the floor brokers, and told Respondent that he would write a check to Respondent for $4,385.58 as Respondent's April commissions when the payments were made to the floor brokers. CX-13; CX-14.

On the morning of June 30, Respondent e-mailed Napolitani that he would take care of his floor brokerage bills. He asked for the $4,385.58 in April commissions, and noted that he had done the firm a favor by putting a winning position into the error account. Napolitani responded that HedgeCap would not pay Respondent's commissions until it received copies of the checks from Respondent to the floor brokers. With respect to the error account, Napolitani raised a new issue, bringing up Respondent's alleged responsibility for floor brokerage expenses from an earlier period for which Respondent had never been charged. He said that even if there were payouts from the error account, there would be no payout to Respondent because of unpaid floor brokerage charges for Respondent's accounts from August 2005 until February 2006, totaling $25,624.96. Napolitani said that half, or $12,812.48, would be Respondent's responsibility. CX-14; Tr. 93 – 94. HedgeCap had never before raised an issue about brokerage for August 2005 to February 2006.[7] Napolitani offered to "call it even," offsetting the newly discovered brokerage expenses against the $10,000 contribution to the error fund. CX-14; Tr. 401, 997. Napolitani acknowledged at the hearing that if Respondent had failed to pay any brokerage fees for August 2005 through February 2006, it was because HedgeCap had not

[7] There is no explanation in the record for HedgeCap's failure to bill Respondent for those expenses previously. As noted above, the practice was supposed to be that Scaplen would allocate floor brokerage expenses monthly.

presented the invoices to Respondent, and that he had no reason to believe that Respondent would have refused to pay the invoices. Tr. 415 – 418.

Respondent replied in an angry, vulgar e-mail, saying, "Now your bringing floor broker invoices from last year? ... your coming up with another reason not to pay me? Ok Frank. I have your number. Stay away from [ST][8] …. Have my fucking check made out to me by Monday and you can stick the $10k I did out of a favor to Hedgecap and James up your ass. I have been around scumbags in wall street for 20 years. I know what to do." CX-14. Napolitani responded by e-mail, with a copy to Jahre, saying that Respondent was "flying way off the handle." Napolitani told Respondent that he would write a check to Respondent if Respondent got the floor brokerage invoices for his personal trades switched to MAAM. Napolitani said he would stay away from ST, and that he had stated HedgeCap's position on the error account. He said to Respondent, "[I]t doesn't appear that you have any intention of continuing a business relationship with HedgeCap. If that's the case, please let me know via reply email." CX-14.

Respondent replied shortly before noon on June 30, escalating the intimidating rhetoric still further. He insulted Napolitani, told Napolitani to "stay the fuck away from me," and said he would work only with Jahre henceforth. He told Napolitani, "Your petty scumbag methods will eventually get you into trouble." He concluded by saying, "My advice to you is stay out of my way." CX-14.

Jahre responded less than an hour later, telling Respondent that he was "quite shocked at the recent revelations uncovered with respect to your charging your personal floor brokerage to my firm." CX-14. After recounting what Jahre contended to be Respondent's attempt to charge floor brokerage to HedgeCap improperly, he concluded by saying, "I am very disappointed that a

[8] ST was a close friend of Respondent's who ran a hedge fund. Respondent had introduced Napolitani to ST as a potential business opportunity for HedgeCap. Tr. 66 – 67, 528.

man of your supposed professionalism would not only try to stick me with your personal bills, but would stoop to the level of language to anyone, especially my partner, as imprinted below." CX-13; CX-14. In fact, Jahre erred by stating that Respondent had improperly charged floor brokerage to the firm. Respondent did nothing improper with respect to the floor brokerage invoices. Scaplen should have allocated the proper amounts to HedgeCap and Respondent. Tr. 106; 412. As Napolitani testified, "I don't believe he stuck us with his personal bills. That's how HedgeCap was invoiced for business that was done by HedgeCap clients and also by Vince's personal brokerage as well." Tr. 413.

In another angry e-mail, Respondent promptly responded to Jahre, saying that he would "get to the bottom of this next week in person." He told Jahre that he was "tired of people taking advantage of me," and would "not tolerate anyone defaming my name any longer to suit their own needs." CX-14.

At 1:07 p.m. on June 30, shortly after Jahre's e-mail, Respondent sent a threatening instant message to Scaplen. He told Scaplen, "I helped you out with an error out of my own heart…if I found out you are going out of your way to make trouble for me and make up lies…we're going to have a problem…I am being blamed for stuff going back to last year when you were in charge of all billing…if I find out its you behind this crap ..you and I are going to have a major problem..you understand me?" CX-14. Scaplen sent a brief response, saying, "I would also appreciate that you not threaten me ever again, nor speak to me in that manner. … Have a good weekend." CX-14.

C. Jahre Terminated Respondent's Employment with HedgeCap

Jahre and Napolitani spent much of the weekend working on Respondent's termination. Tr. 127; CX-15. On Sunday, July 2, 2006, at 3:24 p.m., Jahre sent an e-mail to Respondent at his personal e-mail address (Tr. 143), with a subject line of "HedgeCap–Official Notice." The e-

mail began, "After taking everything into account, most importantly your conduct in your email communications to me and other HedgeCap employees on Friday, June 30th, **this email will serve as your official termination notice of your relationship with Hedge Fund Capital Partners, LLC ("HedgeCap"), effective immediately**, but not sooner than the time and date that this communication is being sent to you electronically. **You will refrain from making any further threats to me, or any HedgeCap employee from this point forward.**" CX-20 (emphasis in original). The e-mail went on to prohibit Respondent from entering HedgeCap's offices; stated that Respondent's personal effects would be packed up and sent to him; requested the return of passes, keys, and security cards; demanded that Respondent immediately pay all floor brokerage commissions for his personal trades; refused to pay Respondent's April commissions until the floor brokerage was paid; stated that there would be no payout on the error account; stated that a Form U5 would be filed on the following day; and stated that Respondent and HedgeCap would sign mutual releases. CX-20.

That same day, HedgeCap cut off all of Respondent's access to HedgeCap. It shut down Respondent's e-mail account, telephone, access to the HedgeCap server, and access to the office building. Tr. 130, 152 – 153; CX-23. Respondent did not enter HedgeCap's offices again after June 30, 2006.

D. Respondent's Post-Termination Communications

Respondent responded to his termination with a string of profanity-laced, threatening communications. Sometime over the holiday weekend, he left a voice mail for Napolitani, saying substantially, "You mess with the wrong fucking guy, you fat bastard. You are a slimy scumbag. I have dealt with people like you before. You are not going to get away with this." Tr. 162 – 163, 167 – 168. He left a similar voice mail for Jahre. Tr. 166 – 168.

On Monday, July 3, Respondent sent an e-mail to his friend and prospective client, ST, with a copy to Napolitani, saying, "DO NOT deal with this scumbag Frank Napalitani or Hedge Fund Capital Partners. They are stealing money from me and are the most unethical firm I have ever dealt with. I will explain later, but when I get done with them for what they have done to me, they will be out of business within a year. I will explain in more detail when I speak with you." CX-27. He also sent a threatening e-mail to Jahre, saying, "I know you you take pleasure in being a slimy bastard. After all I have done for you and the firm, to do this to me, you've set a new low. I will put you out of business. And you did this to get out of the 5% shares you owed me? Howard, your a slimy piece of shit. I PROMISE you…you will not get away with this!" CX-28. He also sent an instant message to Scaplen, saying, "you and that fat bastard better not touch my stuff…you and I are going to have our day brother..thats I promise you!" CX-29.

Also on July 3, Respondent sent an e-mail to Phil Pendergraft and Don Son, the heads of Penson, as well as to Penson's Liam Cheung, who was the head of the joint venture between HedgeCap and Penson, with copies to Jahre, Napolitani, and Scaplen. CX-30; Tr. 182. The clear purpose of the e-mail was to damage the firm's relationship with Penson, as part of Respondent's effort to improve the terms of the termination of his employment. Respondent told Penson, "I have been released from Hedge Fund Capital Partners, LLC today." His e-mail discussed financial issues and asserted that HedgeCap owed him money. He criticized Jahre for having "limited product knowledge" and stated that Penson was being "dragged down in New York." He accused Jahre and Napolitani of discrimination and harassment of a female employee. He accused HedgeCap of engaging in unprofessional and unethical business practices, citing a number of alleged instances of such practices, including permitting a HedgeCap employee to sell watches at HedgeCap and making payments to unregistered

employees, including people banned from SROs, and said that he would be contacting the regulatory and criminal agencies about HedgeCap's conduct.[9] He described Napolitani as a cook by trade[10] with a very questionable character, and accused him of "theft of funds" in connection with Napolitani's investment in a mutual fund that Respondent managed. He claimed that Scaplen had been hired because of his brother, had a terrible attitude and work habits, and was inept. He also claimed that Scaplen was getting kickbacks from HedgeCap. He concluded by saying, "There are plenty of professionals on Wall Street who wouldn't touch Howard or Frank with a ten foot pole. They don't know the business well enough. One is a low life lawyer, and the other is a cook. And they are supposed to run a multi million dollar business? If I were you, I would take a closer look at your relationship." CX-30.

Later on July 3, Respondent sent an e-mail to Sang Lee, one of two new traders at HedgeCap. He warned Lee to be very careful with Jahre and Napolitani, saying they would "use you until they have no further purpose for you," and "come up with accounting reasons for not paying you." He threatened, "I am going to try and shut them down and report them to the regulatory and criminal authorities immediately. … You may be called as witness against them in the future. My advice for you and Greg [the other recently hired trader] is to get out of there before its too late." CX-40; Tr. 193 – 194.

Still later on July 3, Respondent's intimidating rhetoric escalated still further in an e-mail to Napolitani, with a copy to Jahre, on the subject of "hey Fat Boy and Scumbag!" He called Napolitani a "fat bastard," and Jahre a "low life scum bag." He threatened Jahre, "You for sure

[9] Some of Respondent's accusations were not without basis. HedgeCap employed an unregistered person in a capacity that might have required registration and made payments to an unregistered employee who had been barred from associating with any FINRA member firm. In addition, wives may have been "parking licenses" at HedgeCap, and one employee sold an expensive watch to provide investment capital. Tr. 325 – 326, 331 – 336, 1091. As discussed below, the truth of Respondent's allegations is not a defense.

[10] Cooking was Napolitani's hobby. Tr. 189.

have finally messed with the absolute wrong guy at the wrong time! You have made a career out of fucking honest people out of their money. That's all going to end for you my man!" CX-31.

Respondent sent a long e-mail to Cheung on the morning of July 5, with a copy to Jahre and Napolitani, forwarding the termination e-mail that Respondent had received from Jahre on July 2. Respondent used threats to harm HedgeCap as a bargaining tool, telling Cheung that the situation "has taken me totally by surprise," and claimed that he had received additional information that would "shut down" HedgeCap. He told Cheung he was "very, very angry," but would move on if certain conditions were met. He demanded, "I want to be able to resign. I do not want them further effecting my career by putting some bullshit reason on my U5. If they do, I will of course fight it, but they will be out of business anyway by then." He made insulting comments about Jahre and Napolitani, and urged Cheung to intervene so everyone could move on. "If not, I will inflict as much damage as I possibly can for as long as I can in any way shape or capacity that I can use. If I don't hear back by today, I will start the process." He went on to say, "I will make sure [Jahre and Napolitani] don't continue on Wall Street." CX-39.

Cheung responded to Respondent on July 5, saying that Penson would not get involved. Respondent responded to Cheung, with copies to Napolitani, Jahre, and Penson's in-house counsel, saying, "Okay Liam. Am sorry to hear that. I am headed into the city now and this is going to get ugly. Its an absolute shame no one is willing to do the right thing. Ok, I will take matters into my own hands. I tried to do it diplomatically. After all I have done for Hedge Cap and Penson, I will absolutely not tolerate this shit. God help the people who get in my fucking way now!" CX-42; Tr. 240.

E. Respondent and HedgeCap Negotiated a Termination Agreement that Provided for Filing a Form U5 Reporting that Respondent Voluntarily Resigned

Respondent soon met with Doug Hirsch, his attorney, and had no further direct communications with HedgeCap. On July 13, 2006, Napolitani sent an e-mail to Hirsch with a first draft of an agreement on Respondent's termination. The draft did not mention Respondent's Form U5. CX-48; Tr. 252 – 253.

Hirsch responded with a counter-proposal a week later that required Respondent to pay HedgeCap $20,464.17, as Napolitani had proposed. The payment would be held in escrow until the occurrence of three events, including, "Filing of a U-5, that states that [Respondent] voluntarily resigned, [was] not under investigation at the time [he] resigned, and contains no explanation or comments. The Parties acknowledge and agree that such a U-5 is truthful and accurate." CX-49; Tr. 259 – 260. The parties reached an agreement, which Respondent signed on August 8, 2006. The final agreement included the language requiring the filing of a Form U5 reporting that Respondent had resigned voluntarily. RX-67; CX-53.

Hirsch informed Napolitani on August 16 that he would transmit the $20,464.17 payment required by the agreement to HedgeCap as soon as it filed the Form U5. CX-56; Tr. 262 – 263. Napolitani sent an e-mail to Hirsch later in the day, attaching the Form U5 that had been filed with FINRA, noting that the Form U5 stated that the reason for leaving is "**'voluntary'** … as per our agreement," and that June 30 was used as the termination date, consistent with the language in the agreement. CX-57 (emphasis in original). Respondent immediately paid the $20,464.17 to HedgeCap. Tr. 266; CX-58.

V. Respondent Violated Conduct Rule 2110 by Making Intimidating and Threatening Communications to HedgeCap

The Hearing Panel finds that Respondent's communications violated the high standards of commercial honor required by participants in the securities industry. Respondent used his abusive and threatening communications to bargain for the money he felt he was owed and to improve the terms of his termination. He achieved one of his most important objectives by getting HedgeCap to agree to file a Form U5 that falsely reported that he had voluntarily resigned.

FINRA "has a long-standing policy prohibiting members and associated persons from using threats, coercion, or intimidation."[11] Several FINRA and SEC decisions have held that threats, intimidation, and retaliatory conduct violate FINRA's rules.

The most relevant case is *Jay Frederick Keeton*,[12] in which the SEC affirmed a FINRA finding that the respondent's threats violated Rule 2110. In *Keeton*, the respondent formed partnerships to invest in start-up companies and received commissions from one of the start-ups for investments made by the partnerships. When the start-up refused to pay Respondent a commission for a purchase by an individual investor, the respondent attempted to coerce the payment of the commission by threatening to injure the company's reputation by publishing an announcement stating that "[p]roceedings have been instituted and a claim of unfair business practices has been filed initially with the National Association of Securities Dealers" against the start-up. The SEC affirmed FINRA's holding that in making the threat, Keeton had not observed

[11] *Aspen Capital Group*, No. C3A940064, 1997 NASD Discip. LEXIS 53, at *9 (N.B.C.C. Sept. 19, 1997), *aff'd sub nom. Stephen B. Carlson*, Exchange Act Rel. No. 40672, 1998 SEC LEXIS 2463 (Nov. 12, 1998); *Dep't of Market Reg. v. Respondent*, No. CMS030181, at 16 (N.A.C. June 9, 2005) (available on FINRA website at www.finra.org/Industry/Enforcement/Adjudication/NAC/RedactedDecisions/2007/index.htm).

[12] Exchange Act Rel. No. 31082, 1992 SEC LEXIS 2002 (Aug. 24, 1992).

high standards of commercial honor and just and equitable principles of trade, in violation of the predecessor to Conduct Rule 2110.[13]

Threats and intimidation have been held to violate Rule 2110 in other contexts. In *Dep't of Market Reg. v. Aaron*,[14] the complaint alleged that the respondent had used abusive tactics in an attempt to gain inside information. The Hearing Panel found that the respondent had overstated his holdings in the stock and threatened to drive the price of the stock down, but his objective was unclear. "While the record did not clearly establish precisely what Respondent was seeking to obtain through his intimidating conduct, this does not absolve Respondent of liability. Respondent's misrepresentations, threats, and intimidation plainly overstepped the bounds of Conduct Rule 2110."[15]

In *Stephen B. Carlson*, the SEC held that the respondent had violated Rule 2110 when he used threats, coercion, and intimidation in an attempt to obtain stock at below-market prices. Carlson threatened to take steps to have the stock delisted from NASDAQ by exposing alleged improprieties unless he received discounted shares. The SEC held that Carlson's conduct was "highly unethical and therefore actionable under NASD [Rule 2110]."[16]

Respondent attempted to cause actual harm to HedgeCap and its principals, telling Penson that the firm and its principals had engaged in unethical and illegal conduct and were incompetent, and that continuing their association would ultimately cause harm to Penson. He also told HedgeCap's two new traders that HedgeCap would treat them unfairly, and that they should leave HedgeCap. He told both Penson and the new traders that HedgeCap would be shut

[13] *Id.* at *16 – *17.

[14] No. CLG050049, 2006 NASD Discip. LEXIS 11 (O.H.O. Mar. 3, 2006).

[15] *Id.* at *12.

[16] *Stephen B. Carlson*, 1998 SEC LEXIS at *9.

down. In addition, he advised his friend, ST, that he should not deal with HedgeCap, again accusing HedgeCap of unethical and illegal conduct, and saying that it would be out of business within a year.

Respondent also made numerous threats. Some were explicit threats to report HedgeCap to regulatory and criminal authorities and to try to shut the firm down. He threatened to end the careers of Jahre and Napolitani. Some of the threats would likely be considered as threats of physical harm by most recipients. He threatened that "you and I are going to have our day brother;" "you are not going to get away with this;" "God help the people who get in my fucking way now;'" "You for sure have finally messed with the absolute wrong guy at the wrong time! ... That's all going to end for you my man;" "I will inflict as much damage as I possibly can for as long as I can in any way shape or capacity that I can use;" and "I am headed into the city now and this is going to get ugly. … God help the people who get in my fucking way now!" All of these messages were sent in e-mails that were written in an angry, irrational tone, strewn with profanity. The use of profanity "underscores the abusiveness and seriousness of his threats and intimidation."[17]

Respondent's belief that HedgeCap treated him unfairly does not excuse his conduct. Abusive conduct violates Rule 2110 even if the respondent believes he has been wronged. Misconduct by the target of the threats is also immaterial.[18]

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[17] *Aspen Capital Group*, 1997 NASD Discip. LEXIS 53, at *10. The Hearing Panel's decision finding that McCrudden violated Rule 2110 is not based on Respondent's pervasive use of profanity. The NBCC has previously declined to decide whether the use profanity, in and of itself, can be a violation of FINRA's Rules. *Id.* at n.5.

[18] *Cf. Dep't of Market Reg. v. Respondent*, slip opinion at 12. ("[M]embers and associated persons may not take matters into their own hands simply because they believe that the other party has engaged in wrongful or anticompetitive conduct. Indeed, the axiom that two wrongs do not make a right obviously applies here."); *Jay Frederick Keeton*, 1992 SEC LEXIS 2002, at *17 ("It is possible that Keeton deserved compensation. Nevertheless, in a dispute over a commission, it was hardly necessary to threaten to place a company's reputation and financial position at risk.").

Respondent's repeated abusive, intimidating, and often threatening communications violated Conduct Rule 2110.

VI. Respondent Violated Conduct Rule 2110 by Bargaining for, Encouraging, and Inducing HedgeCap to File a Misleading Form U5

HedgeCap unequivocally terminated Respondent's employment with the firm on Sunday, July 2, 2006. Jahre's e-mail informed Respondent that HedgeCap was firing him: "**this e-mail will serve as your official termination notice of your relationship with Hedge Fund Capital Partners, LLC ("HedgeCap"), effective immediately** …." CX-20 (emphasis in original). The reason for the termination was equally clear: the basis for the termination was, "most importantly your conduct in your email communications to me and other HedgeCap employees on Friday, June 30th." On that Sunday, HedgeCap did everything possible to sever all ties with Respondent, cutting off his access to e-mail, the firm's server, and even its office building.

Furthermore, Respondent understood that he had been fired. He testified at his on-the-record interview that he had been "fired and locked out." Tr. 588. The day after Jahre's notice, he told Penson that he had been released. Additionally, Respondent made it plain almost immediately after his termination that he was bargaining, threatening, and insulting HedgeCap with the objective of influencing the content of his Form U5. On July 5, he laid out his initial terms for ending the confrontation. One of the explicit terms was, "I want to be able to resign," clearly reflecting his belief that, as of July 5, he had already been fired. CX-39.[19] His attorney's first counter-proposal to HedgeCap included the term that remained in the agreement when it was signed, requiring the filing of a Form U5 that reported that Respondent had resigned from

[19] HedgeCap also saw the contents of Respondent's Form U5 as a bargaining chip. CX-41; Tr. 236 – 237, 288 – 289.

HedgeCap. If he did not think he had been terminated, this negotiation would have been unnecessary.

Respondent and HedgeCap decided that it was in their mutual interest to reach an agreement on the terms of Respondent's termination, but that did not change the fact that Respondent had been fired on July 2. The negotiations between HedgeCap and Respondent's counsel led to an agreement with several undertakings by both HedgeCap and Respondent, including a monetary payment by Respondent to HedgeCap, and the filing of a Form U5 that reported that Respondent had resigned on the Friday before Jahre's termination notice. In fact, Respondent believed that HedgeCap owed him far more than $100,000, yet he agreed to pay HedgeCap $20,464.17. Tr. 715, 717. His willingness to compromise by paying HedgeCap when he believed HedgeCap owed him a substantial sum must have been prompted by the receipt of something in return. What he received was a "clean" Form U5.

Furthermore, pursuant to the terms of the agreement, Respondent's payment to HedgeCap was released to the firm only after the Form U5 was filed with FINRA and sent to Respondent's attorney, reporting that Respondent's termination had been "**'voluntary'** … as per our agreement." CX-57 (emphasis in original). While Respondent denied that the payment was a "quid pro quo," (Tr. 714), the history of the negotiations, the express terms of the agreement, the payment of money to HedgeCap when Respondent believed that HedgeCap owed him money, and the withholding of the payment until a satisfactory Form U5 was filed make it clear that the terms of the Form U5 were the result of bargaining.

Respondent's requests and agreement with HedgeCap to file a misleading Form U5 violated Conduct Rule 2110. At the time of the filing of the Form U5, IM-1000-1 provided:

> The filing with the Association 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 … may be deemed to be conduct inconsistent with just and equitable principles of trade and when discovered may be sufficient cause for appropriate disciplinary action.[20]

The SEC has emphasized the importance of an accurate Form U5:

> In a business that relies heavily on candor and truthful representation, submitting a Form U-5 doctored to delete unfavorable information in order to gain employment is serious misconduct. The Form U-5 serves as a warning mechanism to firms of the potential risks and accompanying supervisory responsibilities they must assume if they decide to employ an individual with a suspect history.[21]

The Form U5 filed by HedgeCap was inaccurate so as to be misleading by reporting that Respondent had resigned voluntarily, when, in fact, he was fired. By bargaining for, encouraging, and inducing the filing of a misleading Form U5, Respondent violated Conduct Rule 2110.[22]

VII. Evidentiary Issue – the Admissibility of Uncharged Misconduct Evidence in the Determination of Sanctions

In its pre-hearing submissions, Enforcement discussed, and listed as exhibits, instances of similar vulgar and threatening communications from Respondent that were not charged in the Complaint. The communications were to: (1) one of Respondent's former employers; (2) the National Futures Association; (3) a hedge fund where Respondent was a customer; and (4) FINRA staff. Enforcement also proposed to offer a printout from a website sponsored by Respondent wherein he discussed his experience with the NFA and CFTC in terms similar to his communications to HedgeCap. Respondent filed a motion seeking to preclude the Department of

[20] Effective August 17, 2009, IM-1000-1 was superseded by FINRA Rule 1122. *See* Reg. Notice 09-33. As noted above, this matter is decided based on the rules that were in effect at the time of Respondent's violations.

[21] *Henry Irvin Judy, Jr.*, Exchange Act Rel. No. 38418, 1997 SEC LEXIS 622 at *11 – *12 (Mar. 19, 1997).

[22] Respondent attempted to invoke an advice of counsel defense, but it is unavailable. The defense is applicable only when scienter is an element of the offense. *Dep't of Enforcement v. Asensio*, CAF030067, 2006 NASD Discip. LEXIS 20, at *40 (July 8, 2006); *Dist. Bus. Conduct Comm. v. Goldsworthy*, No. C05940077, 2000 NASD Discip. LEXIS 13, at *35 (N.A.C. Oct. 16, 2000), *aff'd*, *John Patrick Goldsworthy*, Exchange Act Rel. No. 45926, 2002 SEC LEXIS 1279 (May 15, 2002). Scienter is not a defense to a violation of Rule 2110. *Dep't of Enforcement v. Cooper*, No. C04050014, 2007 NASD Discip. LEXIS 15, at *8 – *9 (N.A.C. May 7, 2007).

Enforcement from introducing evidence of allegedly similar acts that were not charged in the Complaint. The Hearing Officer denied Respondent's motion in part, and deferred ruling on some of the evidence until the hearing.

The SEC has consistently held that it is appropriate to consider uncharged misconduct that is related or similar to the conduct charged in the complaint in determining sanctions.[23] Consistent with these decisions, the Hearing Officer admitted the evidence with respect to similar communications directed at his former employer and the National Futures Association. Evidence with respect to the hedge fund in which Respondent had invested was rejected because communications as a customer are different from communications as a securities professional and not probative, and the evidence was cumulative to the extent it could be deemed relevant. A printout of statements on a website that Respondent sponsored that criticized the NFA and CFTC, making numerous allegations of incompetence and corruption in harsh and vulgar terms, was excluded because Enforcement did not establish that the website had been seen or made available to anyone. Thus, the website was not similar to the direct communications that were the subject of the Complaint.

[23] *See Nature's Sunshine Products, Inc.*, Exchange Act Rel. No. 59268, 2009 SEC LEXIS 81, at *22, n.27 (Jan. 21, 2009); *Wanda P. Sears*, Exchange Act Rel. No. 58075, 2008 SEC LEXIS 1521 (July 1, 2008) *sanctions modified on remand, Dep't of Enforcement v. Wanda P. Sears*, No. C07050042 (July 23, 2009), *appeal filed*, SEC Admin. Proc. No. 3-12881 (Aug. 6, 2009); *Gateway Int'l Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *24, n.30 (May 31, 2006); *Brendan E. Murray*, Investment Advisors Act Rel. No. 2809, 2008 SEC LEXIS 2924, at *35 – *36 (Nov. 21, 2008); *Robert Bruce Lohmann*, Exchange Act Rel. No. 48092, Investment Advisors Act Rel. No. 2141, 2003 SEC LEXIS 1521, at *17 n.20 (June 26, 2003); *Dep't of Enforcement v. CMG Institutional Trading, LLC*, No. E8A20050252, 2008 FINRA Discip. LEXIS 3, at *33 (N.A.C. Feb. 20, 2008), *aff'd*, *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215 (Jan. 30, 2009); *Stephen B. Carlson*, Exchange Act Rel. No. 40672, 1998 SEC LEXIS 2463 (Nov. 12, 1998); *Frank J. Custable, Jr.*, Exchange Act Rel. No. 32801, 1993 SEC LEXIS 2150, at *8, n.9 (Aug. 25, 1993). The National Adjudicatory Council's recent decision in *Dep't of Enforcement v. Wanda P. Sears*, No. C07050042 (July 23, 2009) is not inconsistent with the admissibility of the uncharged misconduct evidence offered by Enforcement. In *Sears*, the NAC found that it would be inappropriate under the facts of that case to consider the uncharged misconduct as an aggravating factor because it had not been alleged as an aggravating factor at the hearing. Using the acts as evidence of aggravation after appeal and remand raised a problem of a lack of notice. By contrast, in this case, Enforcement's pre-hearing brief made it clear that Enforcement would seek to introduce evidence of several allegedly similar acts of threatening behavior in support of its recommended sanction. Respondent had sufficient notice of Enforcement's intent to offer the misconduct evidence, and, in fact, prior to the hearing moved to exclude it.

The Hearing Officer overruled Respondent's objections with respect to his communications with FINRA staff, and received the communications in evidence. Misconduct during a FINRA investigation and even at the hearing itself has been considered in determining sanctions. Obstruction during an investigation has been considered as an aggravating factor in determining sanctions.[24] Similarly, false testimony at a hearing has been considered an aggravating factor.[25] It is not surprising that no SEC or FINRA cases have been found that discuss misconduct during the investigative or pre-hearing process that is similar to Respondent's, because his conduct was extraordinary. While Respondent's misconduct was of a different nature, precedents relating to obstruction and false testimony establish that misconduct during the investigative and hearing process may be considered as an aggravating factor in determining sanctions.

Respondent argued that even if otherwise admissible, the uncharged misconduct should be excluded because of its prejudicial effect, citing Rule 403 of the Federal Rules of Evidence, which provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice …." Rule 403 provides no basis to exclude the evidence. "Rule 403 is an 'extraordinary remedy,' whose 'major function … is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect. The Rule carries a 'strong presumption in favor of

[24] *FINRA Sanction Guidelines*, Principal Consideration #12 (2007); *Joseph J. Barbato*, Exchange Act Rel. No. 41034, 1999 SEC LEXIS 276, at *53 (Feb. 10, 1999) (considering as an aggravating factor that the respondent asked witness to change his testimony).

[25] *Thomas S. Foti*, Exchange Act Release No. 31646, 1992 SEC LEXIS 3329, at *13 (Dec. 23, 1992) (lack of candor at hearing as an aggravating factor); *Dep't of Enforcement v. Josephthal & Co.*, No. C3A990071, 2001 NASD Discip. LEXIS 15, at *80 (O.H.O. May 15, 2001) (false testimony at hearing considered as an aggravating factor); *Dist. Bus. Conduct Comm. v. Goodman*, No. C9B960013, 1999 NASD Discip. LEXIS 34, at *45 – *46 (N.A.C. Nov. 9, 1999) *aff'd*, *Steven D. Goodman*, Exchange Act Rel. No. 43889, 2001 SEC LEXIS 144 (Jan. 26, 2001) (false hearing testimony aggravating factor).

admissibility.'"[26] Especially in light of the fact that the evidence was presented to a Hearing Panel and not a jury,[27] and the many cases relying on uncharged misconduct, there is no basis for finding that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

VIII. Sanctions

A. Sanctions for vulgar, intimidating and threatening communications

The Hearing Panel looked for guidance to the Sanction Guideline for violations of Rule 2110 and IM-2110-5, for violations of the proscriptions against intimidation and harassment.[28] *FINRA Sanction Guidelines* at 50 (2007) ("Guidelines"). For intimidation or harassment, the Guidelines recommend a fine of $5,000 to $50,000, or more in egregious cases. In addition, the Guidelines recommend a suspension of ten business days to two years, and in egregious cases involving intimidation, the Guidelines recommend consideration of a bar.

The majority of the Hearing Panel finds that a suspension of 30 business days and fine of $10,000 are a sufficiently remedial sanction. As discussed in a dissenting opinion attached to this Decision, the Hearing Officer believes that Respondent should be suspended for two years.

1. Principal Considerations

One of the principal considerations for intimidation or harassment is the nature and content of respondent's communications. The majority of the Hearing Panel considered the communications to HedgeCap to be offensive and "over the line," but not the kind of direct threat that would be an aggravating factor in determining the appropriate sanctions.

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[26] *U.S. v. Grant*, 256 F.3d 1146, at 1155 (11th Cir. 2001) (citations omitted).

[27] *See, e.g., Suter v. Gen. Accident Ins. Co. of Am.*, 424 F.Supp.2d 781(D.N.J. 2006); *U.S. v. Gilmer*, 534 F.3d 696 (7th Cir. 2008).

[28] FINRA has held that IM-2110-5 is not limited to anticompetitive conduct. *See, e.g., Dep't of Market Reg. v. Respondent*, No. CMS030181, at 16 (N.A.C. June 9, 2005) ("IM-2110-5 and Rule 2110 prohibit harassing, intimidating and retaliatory conduct directed at members, associated persons or customers. Neither the IM nor the rule requires a showing that the conduct was anticompetitive.")

A second principal consideration is whether the behavior was repetitive or a single impulsive action. Respondent's behavior took place over a short period of time, but was not a single impulsive action. He sent abusive communications to several people over a period of several days, from June 30 until July 5, 2006.

2. Respondent's History of Similar Conduct

The Hearing Panel considered, for purposes of sanctions only, Respondent's history of similar conduct that was not charged in the Complaint. The Hearing Panel considered these communications to be an aggravating factor.

Pali Capital

Respondent was employed by Pali Capital from February 10, 2003, until April 8, 2004, according to his CRD records. CX-2.[29] At about the time of the termination of his employment with Pali, Respondent sent a number of e-mails to Brad Reifler, the president of Pali, that were very similar to the e-mails that he sent to HedgeCap. The e-mails are laced with profanity, accusations of personal and legal improprieties by Pali and its executives, insults, and confrontational statements, clearly intended to intimidate Reifler. Tr. 819; CX-64; CX-65. Several statements were especially egregious. On March 13, 2004, in response to a letter from Reifler that Respondent regarded as threatening, he told Reifler, "Send one more threatening letter to my home and see what happens. You'll be fucking with the wrong man and family!" CX-64.[30] On March 14, 2004, Respondent told Reifler that he was not "picking a fight," but that "I will finish it if you just don't fade off into the sunset and shut the fuck up. I promise you that I will not let you off nearly as easy as those other rich fucks that made my life miserable for so

[29] There is a suggestion in an e-mail from Respondent to the president of Pali that his employment actually ended before March 13, 2004. CX-64.

[30] Enforcement did not offer in evidence the correspondence from Reifler to Respondent.

many years." He concluded by saying, "If you want to banter any more, I'll meet you and Bert any time, anyplace. Tell Bert he can 'jump over the table' any time he wants at me. … Not that I would want to defend myself against a 75 year old man. Your choice little man, go home, or bring it on…I'm not going anywhere." CX-65. On May 26, he threatened to contact regulators about alleged improprieties. He attempted to influence the contents of the Form U5 reporting his departure from Pali: "I have given more than sufficient time for Pali to pay back the money owed me and to 'fix' my U5 back to what it should have read when I resigned." CX-68.

National Futures Association

On June 10, 2005, the National Futures Association denied registration to Respondent and his firm, MAAM, finding that "McCrudden engaged in conduct that demonstrates a disregard or inability to comply with requirements of the [Commodity Exchange] Act and the Commission's regulations, a lack of honesty and an inability to deal fairly with the public and act consistently with just and equitable principles of trade." CX-32 at 17 – 18. After receipt of the NFA's decision, Respondent sought telephone logs from NFA. His request was denied. Tr. 883 – 885; CX-61. After a telephone call with the NFA official who denied the request, Respondent sent an e-mail to the official, saying:

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

CX-61. Respondent did not carry out these threats; rather he retained counsel in the matter. Tr. 892.

Communications with FINRA

On May 31, 2007, after receiving the "Wells Notice" from FINRA staff informing him that the staff intended to recommend the initiation of a disciplinary proceeding against him, Respondent left voice mail messages for the FINRA investigator who had conducted the investigation and the Department of Enforcement attorney assigned to the matter in a tone similar to his communications with HedgeCap. The voice mails were filled with profanity and insults to the investigator and attorney. Respondent said that he was going to have them fired, and that he wanted the names and telephone numbers of their superiors. He also asked for the identity of the people at FINRA who made the decision to file the Complaint against him. He said that "it's fucking over," and that he was going to the press and not going to stop until "you fucking guys are stopped." CX-76; CX-77.

On January 13, 2009, an attorney representing the Department of Enforcement in this disciplinary proceeding sent an e-mail serving a document on Respondent, who was not represented by counsel at the time. Respondent responded with an e-mail calling the attorney "a fucking lowlife corrupt scumbag!" and saying, "And you're not getting away with this crap." CX-75. When the attorney responded by telling Respondent not to send any further such communications, Respondent replied with an e-mail again filled with profanity, saying, "Greg, you're a lowlife, corrupt scumbag and I will find out why you are doing this and who sent you to do this. … I have nothing to lose and am fed up with being targeted. Believe me, profanity and being insulted should be the very least of your concerns you scumbag." CX-75.[31]

[31] Respondent also was angry and, at times, belligerent at the hearing. For example, when asked about Pali, he initially refused to answer, saying, "Not only am I going to refuse but I am going to sue you. If this gets published anywhere and anybody who is – who is cited in this process, this goes anywhere – so that's what I am going to do." Tr. 798.

3. Majority Decision on Sanctions for the Abusive Communications

The majority of the Hearing Panel considered the foregoing, and determined that a fine of $10,000, and a suspension of 30 business days, is appropriate.

B. Sanctions for Inducing the Filing of Misleading Form U5

There is no Guideline that specifically addresses inducing the filing of a misleading Form U5. The Department of Enforcement recommended a 30-day suspension in all capacities and a $10,000 fine.

Respondent argued that his reliance on counsel was a mitigating factor. Under the Guidelines, reasonable reliance on competent counsel can be a mitigating factor, but the evidence of Respondent's reliance on counsel did not support mitigation.[32] Respondent testified that he relied on the advice of counsel in his negotiations with HedgeCap, but his testimony on what he discussed with and provided to his counsel was tentative, inconsistent, and unclear. Tr. 967, 711 – 712, 728 – 729, 759 – 760, 1017 – 1019. Respondent's most credible testimony on this subject was, "I only recall that, you know, I had great trust that he was a SEC attorney, that he would know the rules." Tr. 1043 – 1045. To the extent that Respondent relied on his counsel, his reliance was not reasonable. His firing was a simple fact, and not an issue that required the advice of an attorney.

For inducing the filing of a misleading and inaccurate Form U5 by his former firm, Respondent is suspended for an additional five business days and fined an additional $2,500.

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[32] *Guidelines* at 6; *Dep't Enforcement v. L. H. Ross & Co.*, No. CAF040042, 2004 NASD Discip. LEXIS 57, at *22 – *23 (O.H.O. Dec. 15, 2004). Reliance on the advice of counsel may be considered as a mitigating factor in assessing sanctions, even where the advice of counsel is not available as a defense. *Dep't of Enforcement v. Fergus*, No. C8A990025, 2001 NASD Discip. LEXIS 3, at *46 – *47 (N.A.C. May 17, 2001); *Dep't of Enforcement v. Respondent Firm*, No. C01040001, 2005 NASD Discip. LEXIS 47, at *29 – *31 (N.A.C. Sept. 6, 2005); *see also Dep't of Enforcement v. Erenstein*, 2006 NASD Discip. LEXIS 31, at *19 n.14 (N.A.C. Dec. 18, 2006), *aff'd, Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596 (Nov. 8, 2007).

The suspension shall run consecutively with the suspension for harassing, vulgar, and threatening communications.

IX. Conclusion

For making abusive, intimidating, and threatening communications to his former employer, in violation of Rule 2110, Respondent is suspended for 30 business days and fined $10,000. For inducing the filing of a misleading and inaccurate Form U5 by his former firm, in violation of Rule 2110, Respondent is suspended for an additional five business days and fined an additional $2,500. The suspensions shall be served consecutively. In addition, Respondent shall pay costs in the amount of $10,063.81, which represents the cost of the hearing transcripts together with a $750 administrative fee.[33] If this decision becomes FINRA's final action in this matter, Respondent's suspension will commence with the opening of business on Monday, December 7, 2009, and end at the close of business on Wednesday, January 27, 2010. The fines will be due and payable at such time as Respondent seeks to return to the securities industry.

HEARING PANEL.

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By: Lawrence B. Bernard
Hearing Officer

Copies to: Vincent P. McCrudden (*via overnight courier and first-class mail*)
Matthew A. Martel, Esq. (*via e-mail and first-class mail*)
Gregory W. Carey, Esq. (*via e-mail and first-class mail*)
Gregory R. Firehock, Esq. (*via e-mail and first-class mail*)
Leo J. Kane, Esq. (*via e-mail and first-class mail*)
David R. Sonnenberg, Esq. (*via e-mail*)

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

Statement of Dissent by Hearing Officer with Respect to Sanctions

I dissent with respect to the length of the suspension imposed for Respondent's threats, intimidation, and harassment. A suspension of 30 business days is not sufficiently remedial. Respondent should be suspended for two years. I concur in the decision in all other respects.

Respondent's behavior was "a profound departure from the high standards of commercial honor that the Association demands of its members and associated persons." *Aspen* at *11. His communications were insulting, profane, accusatory, threatening, and intended to injure. Respondent accused Napolitani, Jahre, and HedgeCap of incompetence and unethical and illegal behavior, not only in communications to HedgeCap, but to Penson and HedgeCap's employees. Respondent encouraged Penson to end its relationship with HedgeCap, and warned HedgeCap's employees that they should leave the company. He made explicit threats of legal and regulatory actions. While there were no explicit threats of violence, a number of statements suggested that violence was a possibility. The profanity and extraordinarily angry tone of the e-mails would naturally lead recipients to be concerned about possible violence, even in the absence of explicit threats. Furthermore, Respondent did not engage in this misconduct merely out of uncontrolled anger, but as a campaign of intimidation designed to bludgeon HedgeCap into accepting his views of the disputes between Respondent and HedgeCap, and to file a Form U5 that falsely reported that he had left voluntarily.

Respondent completely fails to understand that his behavior was inappropriate, and a substantial suspension is necessary to impress upon him that he cannot behave this way in the future. He showed no remorse. He denied that there was anything wrong with his conduct, other than that he might have used inappropriate language. Tr. 650 – 651, 698. The absence of

remorse has been considered an aggravating factor.[34] The NAC has held that a respondent's "continued failure to appreciate the gravity of his misconduct and the potential threat that his actions posed [are] significant aggravating factors."[35]

Respondent's history of similar conduct reinforces the need for a substantial suspension.[36] When Respondent has felt that he is being mistreated, he has resorted to vulgar, angry, and threatening communications to those who he believed were treating him unjustly. He has shown a pattern of attempting to intimidate those who cross him. His behavior toward Pali and the National Futures Association was substantially the same as it was toward HedgeCap.

Respondent's communications with FINRA staff are especially troubling. Respondent's first reaction upon learning that FINRA staff had recommended disciplinary action based on vulgar, harassing, and threatening communications was not to reflect on the possibility that he might have exceeded the bounds of acceptable behavior, but to direct vulgar, harassing, and threatening communications toward the staff. Even after the Complaint was filed, Respondent communicated with the Department of Enforcement in a similar manner. These communications show that Respondent completely fails to understand that such behavior is improper.

For these reasons, I dissent with respect to the length of the suspension imposed for Respondent's vulgar, harassing, intimidating, and threatening communications. The most relevant Guideline recommends a suspension of ten business days to two years, and in egregious cases involving intimidation, the Guideline recommends consideration of a bar. *Guidelines* at

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[34] *See, e.g., Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *48 (N.A.C. Feb. 12, 2007).

[35] *Dep't of Enforcement v. Lu*, No. C9A020052, 2004 NASD Discip. LEXIS 8, at *44 – *45 (N.A.C. May 13, 2004), *aff'd, Guang Lu*, Exchange Act Rel. No. 51047 (Jan. 14, 2005), 2005 SEC LEXIS 117 (Jan.14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006).

[36] I gave substantially less weight to these other communications, especially those to Pali and the NFA, than I would have if they had been charged in the Complaint.

50. Respondent's conduct was clearly egregious. A suspension of two years is required to impress upon Respondent that he has engaged in serious misconduct.

_____
Lawrence B. Bernard
Hearing Officer