FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF MARKET REGULATION, Complainant, v. ROBERT MARCUS LANE (CRD No. 1411773), and JEFFREY GRIFFIN LANE (CRD No. 1663977), Respondents.	Disciplinary Proceeding No. 20070082049 Hearing Officer—LOM **HEARING PANEL DECISION** July 2, 2012

Respondent Robert Marcus Lane interpositioned separate entities he owned between customers of his FINRA member firm and the contemporaneous market, resulting in unfair and excessive markups which he failed to disclose to the customers. In so doing, he violated NASD Rules 2110, 2120, 2320(b), 2440, and IM-2440 and willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Respondent Jeffrey Griffin Lane violated NASD Rules 3010 and 2110 by failing to establish and maintain reasonable written supervisory procedures regarding markups and failing to supervise Marcus Lane's activities. Both Jeffrey Lane and Marcus Lane violated FINRA Rules 8210 and 2010 by failing to provide timely responses to requests for information and documents pursuant to FINRA Rule 8210.

Marcus Lane is barred from associating with a FINRA member firm in any capacity for the violations relating to the interpositioning scheme and excessive markups. Jeffrey Lane is similarly barred for his supervisory failures. Both Respondents are ordered, jointly and severally, to pay restitution in the total amount of $317,030.70 to the two identified customers injured by their misconduct. Both Respondents also are barred for their failure to provide information and documents requested pursuant to FINRA Rule 8210.

Appearances

Gary E. Jackson, Counsel, Gerard P. Finn, Counsel, and James J. Nixon, Chief Litigation Counsel, FINRA Department of Market Regulation, Rockville, MD, for Complainant.

Respondents, Robert Marcus Lane and Jeffrey Griffin Lane, represented themselves.

HEARING PANEL DECISION

I. INTRODUCTION

This is a disciplinary proceeding brought by the Department of Market Regulation ("Market Regulation") of the Financial Industry Regulatory Authority, Inc. ("FINRA") against Respondent Robert Marcus Lane ("Marcus Lane") and his brother, Respondent Jeffrey Griffin Lane ("Jeffrey Lane") (collectively, "Respondents").[1] Marcus and Jeffrey Lane were the sole owners of a FINRA member firm called Greenwich High Yield LLC ("Greenwich" or the "Firm") that traded in corporate bonds. They owned 80% and 20% of Greenwich, respectively.[2] Marcus Lane was the Firm's Chief Executive Officer and sole trader during the time of the alleged misconduct;[3] Jeffrey Lane was responsible for establishing and implementing the Firm's supervisory procedures.[4] Marcus Lane did business in Florida at the time of the events in issue; Jeffrey Lane was located in Connecticut.[5]

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[1] FINRA is responsible for regulatory oversight of securities firms and associated persons who do business with the public. It was formed in July 2007 by the consolidation of NASD and the regulatory arm of the New York Stock Exchange ("NYSE"). FINRA is developing a new "Consolidated Rulebook" of FINRA Rules in which some NASD Rules have been replaced by new FINRA Rules. Other NASD Rules continue in effect. The first phase of the new consolidated Rules became effective on December 15, 2008. *See* FINRA Regulatory Notice 08-57 (Oct. 2008). Because the Complaint in this case was filed after December 15, 2008, FINRA's procedural Rules apply. The conduct Rules that apply are those that existed at the time of the conduct at issue. FINRA and NASD Rules are available at www.finra.org/Rules.

[2] Hearing Tr. (Leak) 47-49; Hearing Tr. (J. Lane) 324.

[3] Hearing Tr. (Leak) 46-47.

[4] Hearing Tr. (Leak) 48; Hearing Tr. (J. Lane) 324-26.

[5] Hearing Tr. (M. Lane) 118.

The Complaint contains six causes of action. The first three causes of action allege that Marcus Lane engaged in twelve corporate bond transactions with two customers of Greenwich between October 2006 and early May 2007 in which, unbeknownst to the customers, Marcus Lane fraudulently interpositioned separate entities he owned between the customers and the contemporaneous market – with the effect of creating undisclosed, unfair and excessive markups on the Firm’s transactions with its customers. The separate entities were called High Yield Partners and High Yield Partners Income (the “Marcus Lane” entity or entities). Essentially, Greenwich bought the bonds in issue, sold them at a markup to one of Marcus Lane’s wholly-owned entities, bought the bonds back from the Marcus Lane entity at a still higher price, and then sold the bonds to the Firm’s customers after marking them up again – all in less than an hour (or, in one case, a little more than two hours). The Complaint alleges that by this conduct Marcus Lane violated NASD Rules 2120, 2110, 2320(b), 2440, and IM-2440 and willfully violated Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder.[6] In the fourth and fifth causes of action, Jeffrey Lane is charged with failing to establish and maintain appropriate written supervisory procedures for review of markups and with failing to reasonably supervise Marcus Lane in violation of NASD Rules 3010 and 2110.[7] The sixth cause of action charges both Respondents with failing to provide timely responses to requests for information and documents pursuant to FINRA Rule 8210, in violation of that Rule and FINRA Rule 2010.[8]

A two-day Hearing was held on February 28 and 29, 2012, before a three-person panel composed of a FINRA Hearing Officer, one current member of the District 7 Committee, and a

[6] Compl. ¶¶ 1-3, 10-26.

[7] Compl. ¶¶ 1-3, 27-35.

[8] Compl. ¶¶ 1-3, 36-45.

former member of the District 7 Committee. Market Regulation called five witnesses: a FINRA senior regulatory analyst, Market Regulation's director of fixed income, an expert witness, and the two Respondents. Each Respondent separately testified on his own behalf.[9]

As discussed below, the Hearing Panel finds that the Respondents committed the violations alleged and that their misconduct was egregious. The Hearing Panel further finds that it is necessary and appropriate to bar Respondents for their violations in order to accomplish the remedial purposes of disciplinary sanctions and protect the investing public. In addition, the Hearing Panel orders Respondents, jointly and severally, to pay restitution in the amount of $317,030.70 to the two identified customers who were injured by the fraudulent, unfair and excessive markups.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. FINRA Has Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because the Complaint was filed within two years after termination of Respondents' registrations with a FINRA member firm, and the Complaint charges them with misconduct that occurred while they were registered with a FINRA member firm.[10]

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[9] Hearing Tr. 1-511.

[10] According to his Answer (p. 2), Marcus Lane first became registered with FINRA in 1985 and terminated his FINRA registration on April 24, 2009. *See also* CX-35 (M. Lane CRD report). Jeffrey Lane's Answer (p. 3) states that he first became registered with FINRA on April 25, 1987. He was registered through Greenwich from 1995 until April 24, 2009. CX-36 (J. Lane CRD report). Jeffrey Lane's Answer also states (p. 3), "Respondents consent to FINRA's jurisdiction pursuant to the Article V, Section 4 of FINRA's bylaws and on account of the judicial requirement that a full and final determination must be issued by [FINRA] before it may be challenged in a legal proceeding."

B. Respondents' Violations

(1) ***Marcus Lane's Fraudulent, Unfair And Excessive Markups***

(a) The Conduct

The twelve customer transactions in issue involved three types of bonds (Werner, Collins-Aikman, and Tower) and two customers (G.E. and M.M.).[11] Transactions in the Werner and Collins-Aikman bonds were reported on the Trade Reporting and Compliance Engine ("TRACE").[12] The Tower bonds were not required to be reported to TRACE because they were issued in euros, a foreign currency, but they were registered in the United States.[13]

Market Regulation presented a chart that summarizes the various "legs" of the twelve customer transactions in issue, which is attached to this decision.[14] Market Regulation's senior regulatory analyst testified that the chart was based on information from Greenwich's trade blotter and a collection of order tickets and confirmations for each of the transactions.[15] The chart shows the price paid by Greenwich in its initial purchase, the price at which Greenwich sold to one of Marcus Lane's entities, the price at which that entity then sold the securities back to Greenwich, and the price Greenwich charged its customers. Greenwich charged a markup on the bonds sold to the Marcus Lane entities, increasing their price.[16] In every instance, the

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[11] Hearing Tr. (Leak) at 74-75; CX-1.

[12] Hearing Tr. (Leak) at 81-82.

[13] *Id.* at 82; Hearing Tr. (argument on jurisdiction) 461-62, 465.

[14] CX-1. The chart shows the time and date for each of Greenwich's purchases and the time and date of each sale to a Greenwich customer, along with the price of the initial purchase by Greenwich and the price at which the customer eventually purchased. The chart lists eleven items in the far left column, but the twelfth sale to a Greenwich customer is shown under item three, where a single purchase by Greenwich of 3000 bonds was broken down into two customer sales transactions of 2000 and 1000 bonds. Hearing Tr. (Leak) at 74.

[15] Hearing Tr. (Leak) at 72-73.

[16] Hearing Tr. (Leak) at 74, 113. CX-1.

Marcus Lane entity then sold the bonds back to Greenwich at a higher price than it had paid for it,[17] and Greenwich then sold the bonds to its customers at a still higher price.[18]

The aggregate markup on the twelve sales to customers ranged from a high of 39%-41% in two transactions to a low of 6.45%.[19] A 20% markup was charged in two transactions, and five other transactions involved markups of over 10%.[20] Market Regulation's senior regulatory analyst testified that the aggregate profit on the twelve customer transactions was $317,030.70.[21]

The chart also shows the execution time for each leg of the twelve customer transactions. In eleven instances, the initial purchase by Greenwich, the sale to the Marcus Lane entity, the repurchase by Greenwich, and the final sale to the customer all occurred within an hour or less. In one case, all the legs of the transaction occurred within fifteen minutes. The legs of the twelfth transaction took two hours and fifteen minutes to complete. The Marcus Lane entities did not carry any position in the subject securities for as much as half a day. [22]

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[17] CX-1.

[18] *Id.* Hearing Tr. (Leak) at 57 ("[U]pon review of the [Firm's] trade blotter … what we were able to identify was a pattern, and …[what] we observed was Greenwich would go and buy a certain number bonds from the street or another broker-dealer, and on the same day they would sell those same number of bonds to [a Marcus Lane entity]. On the same day, Greenwich would go and buy back those bonds from [the Marcus Lane entity] eventually selling them to a customer, all taking place on the same day. At each flag– I just described four different legs and at each leg there was an additional increase in price of the bonds. So from beginning purchase to the sale to [the Marcus Lane entity], you have an increase in price. When Greenwich went and repurchased the bonds back from [the Marcus Lane entity], there was an additional increase in price. And finally when Greenwich sold the bonds, there was yet another increase in price. So that's what we were able to observe."

[19] CX-1.

[20] *Id.*

[21] Hearing Tr. (Leak) at 80.

[22] *Id.* CX-1. *See also* Hearing Tr. (Leak) at 75 ("Well, what this chart will show – what this chart shows is that in all but one instance, that being item seven, the transaction pattern from the initial purchase to the final sale [to Greenwich's customer] all took place within an hour or less."). Marcus Lane admitted that all the legs of each subject transaction took place within the same day and that they occurred in less than one hour in eleven of the twelve transactions. Hearing Tr. (M. Lane) at 121, 133.

Market Regulation's senior regulatory analyst and an expert who testified on behalf of Market Regulation each testified that he had reviewed the chart and checked its accuracy.[23] Respondents did not dispute the accuracy of the chart and did not object to its admission into evidence.[24] Greenwich's trade blotter and the underlying trade tickets from which the chart was derived were admitted into evidence.[25]

The analyst testified about several of the transactions, explaining the chart. He said, for example regarding a transaction in Tower bonds on March 29, 2007: "Greenwich purchased 2000 bonds from a broker-dealer at 11:35 a.m. and immediately sold them to a [Marcus Lane] entity at an increased price of 7.85. Twenty-six minutes later, Greenwich repurchased the 2,000 bonds back from the [Marcus Lane] entity at yet another increased price of 9.91 and immediately sold them to a customer denoted here as G.E. at another increased price of 10.33." He further noted, as shown in the chart: "So the aggregate mark-up from the time of the initial purchase of the 2,000 bonds at 7.33 to the final sale at 10.33 was 40.93 percent, which translates into a profit of $60,000."[26]

Market Regulation also presented an audit trail from TRACE showing transactions in the market around the same time as Greenwich's sales of the Werner bond to its customers. The audit trail showed that Greenwich reported each of its initial purchases as a broker-dealer transaction with a named counter-party but reported its subsequent sales to the Marcus Lane entities and purchases back from them as customer transactions in which the identity of the counterparty was not provided. Similarly, the eventual sales to customers were reported as

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[23] Hearing Tr. (Leak) at 72-73; Hearing Tr. (Myers) at 236.

[24] Hearing Tr. (M. Lane; J. Lane) at 73.

[25] CX-2, CX-5 through CX-14.

[26] Hearing Tr. (Leak) at 78-79. Marcus Lane acknowledged in his testimony that Greenwich had completed all the legs of the transaction in which it charged a 39.92% markup in twenty-six minutes. Hearing Tr. (M. Lane) at 200.

customer transactions without identifying the counterparties.[27] As a result, if FINRA or a third-party customer looked at purchases and sales of Werner bonds during the relevant period in a TRACE report the viewer would not know that the Marcus Lane entities were involved or that they were affiliated with Greenwich.[28] Greenwich reported those legs of the customer transactions in issue in a manner identical to the ultimate customer transactions with G.E. and M.M. Market Regulation presented another audit trail from TRACE for contemporaneous transactions in Collins-Aikman bonds, which also reported the legs involving the Marcus Lane entities as customer transactions.[29]

Market Regulation's analyst pointed out instances where the legs of the Marcus Lane transactions were completed and the securities sold to Greenwich's ultimate customer at higher prices without any intervening market transactions by any third-party market participants.[30] He testified that that meant that "other broker-dealers were not participating in the market, thus the [contemporaneous market] price was not affected."[31] In other words, nothing had happened in the market to justify the increased price Greenwich charged its customers.

The audit trail for the Werner bonds also showed that often where third-party transactions in the bonds occurred on the same day as the legs of a Greenwich multi-leg sale of Werner bonds to its customer, the third-party transactions generally occurred at prices lower than the Marcus Lane legs and much lower than the final price to Greenwich's customers. For example, on October 20, 2006, Greenwich purchased Werner bonds at 8.6875 and then sold to one of the

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27 Hearing Tr. (Leak) at 82-83, 85-91. CX-15.

28 Hearing Tr. (Leak) at 88-89.

29 Hearing Tr. (Leak) at 91. CX-16.

30 Hearing Tr. (Leak) at 88, 93-94.

31 Hearing Tr. (Leak) at 93.

Marcus Lane entities at 9.25, repurchased at 9.75, and finally sold to the customer at 10. On that same day, other reported transactions in Werner bonds ranged in price from 8.125 to 9, well below the price to Greenwich's customers. Similarly, on October 31, 2006, Greenwich purchased Werner bonds at 8.375, sold them to a Marcus Lane entity for 8.75, repurchased them in two separate transactions at 8.875 and 9.25, and sold them to Greenwich's ultimate customer in two transactions at 9.0 and 9.5. The other reported transactions in Werner bonds that day ranged from 8.125 to 8.375. [32]

Market Regulation's expert testified that the average time to complete all four legs of the twelve customer transactions in issue was about half an hour. He said that the significance of this fact was that "the transactions were essentially riskless. So that there wasn't a lot of capital at risk for any period of time."[33] He also testified that the four-leg structure of moving the bonds from Greenwich to a Marcus Lane entity and back to Greenwich for ultimate sale to Greenwich's customer hurt the customers. He said that this structure "essentially caused the customers to pay a higher price to the securities than Greenwich was allowed to charge under the five percent markup policy."[34] The expert testified that there was no evidence that the markups in excess of five percent had been disclosed to the customers.[35] Finally, he testified that structuring the transactions as multi-leg transactions made no economic sense because, although it temporarily removed risk from the broker-dealer, the same people owned the Marcus Lane entities and the

[32] CX-15 at pp. 2 of 8 and 3 of 8. Market Regulation's expert noted that Greenwich had charged its customer 10 for the Werner bonds when other transactions that day were occurring at 8 1/2 to 8 11/16. Hearing Tr. (Myers) at 315-18.

[33] Hearing Tr. (Myers) at 240.

[34] Hearing Tr. (Myers) at 240-41.

[35] Hearing Tr. (Myers) at 241.

broker-dealer. So the risk was not actually transferred economically.[36] He further noted from analysis of the Firm's excessive net capital that the Firm could have carried the bonds in its accounts, rather than trading them out of the broker-dealer to a Marcus Lane entity.[37]

Marcus Lane was the trader for Greenwich and was responsible for determining the markups.[38] At the time of the subject transactions, he was the sole owner of the two Marcus Lane entities that bought and sold the bonds in issue between the time of Greenwich's initial acquisition and the time of its sales to the customers.[39] He also was the trader for the Marcus Lane entities and made trading decisions on their behalf.[40]

(b) <u>The Violations</u>

(i) Unfair And Excessive Markups: NASD Rule 2440; IM-2440

Marcus Lane violated NASD Rule 2440 and IM-2440, which prohibit unfair and excessive markups. NASD Rule 2440 provides that if a member "sells for his own account to his customer, he shall … sell at a price which is fair, taking into consideration all relevant circumstances." The Rule itemizes some of the factors relevant to the analysis, which include market conditions with respect to the security at the time of the transaction, the expense involved, and the broker-dealer's profit.[41]

IM-2440-1 and IM-2240-2 provide additional guidance on pricing and markups and markdowns. For over half a century, since 1943, the NASD has used 5% as a guideline for

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[36] Hearing Tr. (Myers) at 241.

[37] Hearing Tr. (Myers) at 241-42.

[38] Hearing Tr. (M. Lane) at 118-19; Hearing Tr. (Leak) at 81.

[39] Hearing Tr. (M. Lane) at 119.

[40] Hearing Tr. (M. Lane) at 119-120.

[41] NASD Rule 2440.

pricing securities, in what has become known as the “5% policy.” IM-2440-1, which is applicable to all securities transactions, stresses that 5% is a guide, not a rule, and that even prices below 5% can be unfair, depending upon the circumstances. IM-2440-1 specifies that it is a violation of NASD Rules 2440 and 2110 to charge a customer “any price not reasonably related to the current market price of the security.” Relevant factors include: the type of security, its availability, the price, the amount of money in the transaction, any disclosure to the customer, the pattern of markups, and the nature of the broker-dealer’s business and services provided to the customer.[42]

IM-2440-2 specifies with respect to debt securities in particular that the prevailing market price is presumptively established by reference to the broker-dealer’s contemporaneous cost. A dealer’s cost is considered contemporaneous if the dealer’s purchase occurs close enough in time to the sale to the customer that it would reasonably be expected to reflect the current market price for the security. The presumption that contemporaneous cost is the best measure of prevailing market price may be overcome, but the burden is on the member to present evidence sufficient to show that contemporaneous cost is not indicative of the market,[43] as, for example, where market news about the credit or interest rate changes between the dealer’s purchase and the sale to the customer have affected the price of the debt security. “When a dealer is not acting as a market maker, the SEC has consistently held that, in the absence of countervailing evidence, a dealer’s contemporaneous cost [of acquiring the security] is the best evidence of current

[42] IM-2440-1.

[43] IM-2440-2.

market."[44] This standard "recognizes that prices paid for a security by a dealer in actual transactions closely related in time to its sales are normally a highly reliable indication of prevailing market."[45] The Securities and Exchange Commission, NASD, and the federal courts have consistently held that a dealer's contemporaneous cost of acquiring a security provides the best evidence of the prevailing market price, absent any countervailing evidence.[46]

Greenwich's initial purchases were sufficiently close in time to its eventual sales to the customers to presumptively establish the prevailing market price under IM-2440-2. Respondents presented no countervailing evidence of a different contemporaneous market price. Indeed, the evidence actually bolstered the applicability of the presumption, as Market Regulation showed that in some cases no third-party transactions occurred in the period intervening between the initial purchase and ultimate sale to the customers, and in other cases where third-party transactions occurred on the same day as the legs of the Greenwich transactions, those third-party transactions occurred at substantially lower prices than Greenwich charged its customers.

The evidence showed that Greenwich charged its customers unfair and excessive markups on the prevailing market price, for which Marcus Lane was responsible since he set the markups and structured the legs of the twelve transactions. Greenwich charged its customers more than the 5% guideline – sometimes charging as much as a 40% markup. Respondents

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[44] *See, e.g., Escalator Sec.*, 1997 NASD Discip. LEXIS 78, at *19 (Dec. 31, 1997). *See P'ship Exch. Sec. Co.*, 51 S.E.C. 1198, 1204 (Dec. 31, 1994) ("[I]f the dealer is not a market maker, its markups have generally been computed based on the difference between a dealer's net contemporaneous cost of acquisition and the net amount it receives for a complained-of sales transaction.").

[45] *See, e.g., First Honolulu Sec., Inc.*, Exchange Act Rel. No. 32933, 51 SEC 695, 1993 SEC LEXIS 2422, at *4 (Sept. 21, 1993); *Alstead Dempsey & Co.*, Exchange Act Rel. No. 20825, 47 S.E.C. 1034, 1984 SEC LEXIS 1847, at *2 (Apr. 5, 1984).

[46] *See Dep't of Enforcement v. David Lerner Associates, Inc.*, No. 20050007427, slip op. at 38-39 (Apr. 4, 2012) (citing cases) *appeal docketed* (NAC Apr. 27, 2012). *See also Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 187 (2d Cir. 1998); *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1469 (2d Cir. 1996), *cert. denied*, 522 U.S. 812 (1997); *First Independence Group, Inc. v. SEC*, 37 F.3d 30, 31 (2d Cir. 1994); *Orkin v. SEC*, 31 F.3d 1056, 1062 (11th Cir. 1994).

failed to present any evidence of special circumstances or special services that might justify charging the customers such a markup. Market Regulation's expert testified that in his opinion Greenwich's markups were excessive and unfair and were not justified.[47]

Marcus Lane testified that he considered the prices Greenwich charged to be fair and consistent with the prevailing market.[48] That view, however, was contradicted by the facts.

Marcus Lane argued that the entities he owned were reasonably compensated for the risk they undertook in "positioning" the bonds.[49] The expert testified, however, that the Marcus Lane entities bore little risk in light of the short amount of time they held the bonds.[50] Moreover, Marcus Lane conceded that he had indications of interest before he bought the bonds, although he denied having any order in place before Greenwich made the initial purchase.[51] This testimony also suggests that the risk born by the Marcus Lane entities was negligible.

The expert explained that the Lane brothers were mischaracterizing the four legs of each customer transaction when they described the conduct as "positioning." He said, "It's interpositioning when the third party intervenes. It's positioning whenever the firm does it with its own trading account."[52] The Marcus Lane entities were separate, third parties and not part of Greenwich. The Marcus Lane entities "continued to function after Greenwich High Yield went

[47] Hearing Tr. (Myers) at 244, 252.

[48] Hearing Tr. (M. Lane) at 172, 176-77.

[49] Hearing Tr. (M. Lane) at 23.

[50] Hearing Tr. (Myers) at 240.

[51] Hearing Tr. (M. Lane) at 218.

[52] Hearing Tr. (Myers) at 271.

out of business."[53] As noted above, the legs involving the Marcus Lane entities were reported as customer transactions, not as Firm trading account transactions.[54]

Marcus Lane also argued that the excessive markups were justified because of losses he suffered in other transactions.[55] That argument was long ago rejected, however, by the Second Circuit in an NASD disciplinary case involving markups.[56] No NASD or FINRA rule permits a firm to charge excessive markups in one transaction in order to make up losses on other transactions. The reasonableness of a markup is evaluated on the basis of the facts and circumstances regarding that particular transaction.

Finally, Marcus Lane argued that there had been full transparency through TRACE, that there had been no customer complaints, and that the customers had profited overall from their dealings with Respondents.[57] With respect to the claim of full transparency, the evidence contradicts Respondent. As discussed above, TRACE did not disclose the identity of the Marcus Lane entities and so the customers could not have known that the increasing prices of the bonds were the result of trading between Greenwich and the affiliated Marcus Lane entities. The expert explained that the customers may not have complained "[b]ecause they didn't know they were hurt and there may not have been full transparency. Regardless, the firm is still obligated to meet the rules and observe the rules of the association."[58] In any event, FINRA disciplinary actions are not limited to instances of customer complaints, and charging customers excessive

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[53] Hearing Tr. (Myers) at 262.

[54] Hearing Tr. (Myers) at 322-23, Hearing Tr. (J. Lane) 366-67.

[55] Hearing Tr. (M. Lane) at 23-24, 126.

[56] *F.B. Horner & Associates, Inc. v. SEC*, 994 F.2d 61, 1993 U.S. App. LEXIS 11562, at *3 (2d Cir. 1993) ("The facts that [the respondent firm] sometimes lost money on other transactions for the same clients or that some of its markups paid the firm's costs in other transactions does not justify an excessive markup in any one transaction.").

[57] Hearing Tr. (M. Lane) at 22-27.

[58] Hearing Tr. (Myers) at 275.

markups is not permitted regardless of whether the customers have profited over all from the relationship with a respondent.

(ii) Interpositioning: NASD Rule 2320(a)

Marcus Lane also violated the NASD's Rule against interpositioning. NASD Rule 2320(a)(1) provides that a broker-dealer or associated person shall employ "reasonable diligence to ascertain the best market" for a security sold to a customer and shall execute a customer transaction so that the price "is as favorable as possible under prevailing market conditions." NASD Rule 2320(a)(2) expressly states that no member or associated person "shall interject a third party between the member and the best market for the subject security in a manner inconsistent with paragraph (a)(1) of this Rule." [59]

As discussed above, Marcus Lane accomplished the unfair and excessive markups at issue here by means of a scheme of interpositioning the Marcus Lane entities between the customers and the contemporaneous market. The interpositioning was inconsistent with the requirement to obtain as favorable a price as possible for the customer under prevailing market conditions.

(iii) Commercial Honor/Just And Equitable Trading: NASD Rule 2110

In connection with the markups, Marcus Lane violated NASD Conduct Rule 2110, which (like its successor, FINRA Rule 2010) requires that "[a] member, in the conduct of [his] business, shall observe high standards of commercial honor and just and equitable principles of trade." It is inconsistent with the duties imposed by these Rules to violate other NASD and

[59] NASD Rule 2320.

FINRA Rules.[60] Indeed, pursuant to IM-2440-2, charging a price not reasonably related to the prevailing market price at the time of the transaction is expressly deemed a violation of NASD Rules 2440 and 2110.[61]

(iv) Willful And Fraudulent Failure To Disclose: Section 10(b) And Rule 10b-5

Marcus Lane also willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 by failing to disclose the excessive markups and interpositioning. Section 10(b) and Rule 10b-5 prohibit deceptive practices in connection with the purchase or sale of securities. To establish a violation of these provisions in a regulatory proceeding (as opposed to a private action for damages, which requires additional elements of proof), the complainant must prove: (i) a material misrepresentation or omission, (ii) in connection with the purchase or sale of a security, (iii) made with scienter, and (iv) by use of the jurisdictional means.[62] Market Regulation proved these elements.

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[60] The Securities and Exchange Commission has consistently held that a violation of an NASD rule or regulation is inconsistent with NASD Rule 2110. *Alvin W. Gebhart,* Exchange Act Rel. No. 53136, 2006 SEC LEXIS 93, at *54 n.75 (Jan. 18, 2006), *rev'd and remanded in part on other grounds sub. nom Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183 (9th Cir. Nov. 21, 2007). *See also Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *42 (June 29, 2007).

[61] IM-2440-2.

[62] *SEC v. C. Jones & Co.,* 312 F. Supp. 2d 1375, 1379 (D. Col. 2004) (citing cases); *SEC v. Feminella,* 947 F. Supp. 722, 728 (S.D.N.Y. 1996).

First, charging customers excessive markups or markdowns without proper disclosure has long been held to constitute a deceptive practice.[63] This is because a broker-dealer implicitly represents in hanging out its "shingle" that it will treat the customer fairly and honestly. That representation has been deemed to include a promise that the dealer will only charge prices that bear a reasonable relationship to the prevailing market.[64]

As discussed above, Marcus Lane set unfair and excessive markups on the bond transactions in issue. Marcus Lane admitted that he did not disclose the amount of the markups Greenwich charged the customers, or that the markups were excessive, or that he had interpositioned the Marcus Lane entities between the customers and the contemporaneous market.[65] The omission of these facts was material because a reasonable investor would consider the omitted information important in determining whether to purchase the securities.[66]

Second, the deception occurred in connection with the customers' purchases of bonds, which are securities.

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[63] *See, e.g., Banca Cremi, S.A. v. Alex. Brown & Sons, Inc.*, 132 F.3d 1017 (4th Cir. 1997). *See also In the Matter of Gonchar and Polyviou*, 2009 SEC LEXIS 2797, at *24 n.18 (Aug. 14, 2009) ("[W]e and the Second Circuit have consistently held that, '[u]nder § 10(b) of the Exchange Act, a seller has a duty to disclose the details of a markup if the markup is 'excessive.''"). *See also Ettinger v. Merrill Lynch, Pierce, Fenner & Smith*, 835 F.2d 1031, 1033 (3d Cir. 1987) ("the SEC has established through its enforcement actions the principle that charging undisclosed excessive commissions constitutes fraud"); *SEC v. Zwick*, 2007 U.S. Dist. LEXIS 19045, at *21 (S.D.N.Y. Mar. 16, 2007) ("The Court of Appeals for the Second Circuit has long recognized that broker-dealers must disclose excessive markups to their customers."); *Alstead, Dempsey & Co., Inc., Exchange Act Rel. No.* 20825, 1984 SEC LEXIS 1847, at *2 (April 5, 1984) (noting that "[a]s early as 1939, this Commission [the SEC] held that a dealer violates antifraud provisions when he charges retail customers prices that are not reasonably related to the prevailing market price at the time the customers make their purchases.").

[64] *See, e.g., Charles Hughes & Co., Inc. v. SEC*, 139 F.2d 434, 436 (2d Cir. 1943); *In re Duker & Duker*, 6 S.E.C. 386 (1939).

[65] Hearing Tr. (M. Lane) at 133-135, 199.

[66] *SEC v. C. Jones & Co.*, 312 F. Supp. 2d 1375, 1379 (2004) (materiality is determined by whether "a reasonable investor would consider it important in determining whether to buy or sell" a security) (*citing TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

Third, Marcus Lane engaged in the interpositioning scheme willfully and with scienter.[67] In a markup case like this one, the dealer's knowledge of the facts demonstrating the excessive markups supports a finding of scienter, including the dealer's knowledge of: (i) the prevailing inter-dealer market price of the security, (ii) the price that the dealer is charging, and (iii) the degree to which the markup exceeds the industry norm.[68] Marcus Lane knew the price at which he had Greenwich buy the bonds and the way in which the interpositioning scheme increased the price ultimately charged to Greenwich's customers. The prevailing market price in third-party transactions was publicly available to Marcus Lane on TRACE.[69] Furthermore, Marcus Lane purposefully structured the multi-legged transactions to increase the price charged to Greenwich's customers and make up for losses on other transactions.[70] He set the markups on all the transactions. The transactions were reported to TRACE as though they were customer transactions with third-parties, concealing the connection between Greenwich and the Marcus Lane entities. The expert testified, however, that a customer does not traditionally decide a markup.[71]

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[67] *See, e.g., SEC v. Hal Landberg,* 2011 U.S. Dist. LEXIS 12782, at *9-19 (S.D.N.Y. Oct. 26, 2011) (knowing or reckless material misrepresentation or omission is an element of fraud under Section 10(b) and Rule 10b-5).

[68] *See In re Meyer Blinder*, 1992 SEC LEXIS 2019, 50 S.E.C. 1215, 1230 (1992) ("Where a dealer knows the circumstances indicating the prevailing interdealer market price for the securities, knows the retail price that it is charging the customer, and knows or recklessly disregards the fact that its markup is excessive, but nonetheless charges the customer the retail price, the scienter requirement is satisfied.").

[69] Marcus Lane would be aware which transactions reported on TRACE were third-party transactions and which involved the entities that he owned, but Greenwich's customers would not. This is because the Marcus Lane transactions were reported as customer transactions without any indication of their affiliation with Greenwich. Hearing Tr. (M. Lane) at 215, Hearing Tr. (J. Lane) at 339.

[70] Hearing Tr. (M. Lane) at 23-24.

[71] Hearing Tr. (Myers) at 322-23.

Fourth, Marcus Lane testified that he called the customers (implicitly, by telephone) to offer the bonds for purchase and that orders were memorialized by emails.[72] In the investigation, Respondents repeatedly told FINRA staff that Marcus Lane conducted his transactions by telephone.[73] This evidence established the jurisdictional means element of the violation.

Marcus Lane is also charged with violating an antifraud NASD Rule regarding fair prices and excessive markups that is similar to the antifraud provisions of Section 10(b) and Rule 10b-5. NASD Rule 2120 (like its successor, FINRA Rule 2020) provides: "No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." The SEC has held that a finding of scienter is required to sustain a violation but that recklessness satisfies that requirement.[74] Proof of the Section 10b-5 violation also constitutes proof of this violation.

(2) ***Jeffrey Lane's Supervisory Failures***

(a) The Conduct

Jeffrey Lane was the Chief Compliance Officer of Greenwich and owned 20% of the Firm.[75] He was responsible for supervising his brother's activities and for the Firm's Written Supervisory Procedures ("WSPs").[76] He drafted the WSPs, including the provisions of

[72] Hearing Tr. (M. Lane) at 208-10. *See SEC v. Raginovich & Assoc. LP*, 2008 U.S. Dist. LEXIS 93595, at *10 (S.D.N.Y. 2008) ("[T]he interstate commerce requirement is satisfied because defendants used interstate telephone lines to communicate with investors and mailed fraudulent account statements").

[73] CX-21 (July 1, 2009 email letter from M. Lane) ("Almost all correspondence with customers is done on the phone …."); CX-23 (July 15, 2009 email letter from M. Lane). *See also* CX-28 (Aug. 12, 2009 letter requesting hearing regarding the notice of suspension) at pp. 3 and 4 of 32.

[74] *See In re Meyer Blinder*, 50 S.E.C. 1215 (1992).

[75] Hearing Tr. (J. Lane) at 324.

[76] Hearing Tr. (M. Lane) at 117-18; Hearing Tr. (J. Lane) at 324.

Greenwich's Written Markup Policy.[77] He acknowledged that the WSPs did not describe how he would review markups to determine whether they were fair and reasonable and in compliance with the Firm's Policy, or how he was supposed to document that such a review occurred.[78] He also acknowledged that the supervisory procedures during the relevant time period contained no procedures relating to interpositioning.[79]

Two versions of the WSPs were in evidence, one dated December 2005 and the other dated December 2006.[80] The 2005 version was in effect at the time of the 2006 trading in issue and the 2006 version was in effect at the time of the 2007 trading in issue.[81] Although both versions said that Greenwich "strives" not to exceed the "5% policy," both versions also cautioned that "[i]t is difficult to post a profitable transaction in distressed bond securities costing less than $10 without exceeding the '5% policy.'"[82] The WSPs suggested that Greenwich was likely to charge more than 5% on the kinds of transactions in which it typically engaged. The 2006 version, in addition, asserted that the problem of exceeding 5% had been "addressed to the NASD in prior exit interviews."[83] That version complained that the "NASD has consistently neglected to render any additional opinion or adopt any stricter standard that could be reasonably applied across the board as a rule (example: no mark-up may exceed four points)."[84] Although

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[77] Hearing Tr. (J. Lane) at 325-27; CX-38.

[78] Hearing Tr. (J. Lane) at 329-30.

[79] Hearing Tr. (J. Lane) at 331-34. CX-37, CX-38.

[80] CX-37; CX-38. Hearing Tr. (J. Lane) at 325, 332.

[81] Jeffrey Lane testified that CX-37, the December 2005 WSPs, was in effect from December 2005 through 2006. Hearing Tr. (J. Lane) at 325.

[82] CX-37 at p. 20 of 52; CX-38 at p. 16 of 31.

[83] CX-38 at p. 16 of 31.

[84] *Id.*

the WSPs drafted by Jeffrey Lane copied four of the five general considerations set forth in IM-2440-1(a), both versions eliminated the fifth general consideration – that a "mark-up pattern of 5% or even less may be considered unfair or unreasonable under the '5% Policy.'"[85] In so doing, Jeffrey Lane created WSPs that made it look like the 5% policy was a rough guide that permitted larger markups, instead of a rough guide which even lower markups could violate in certain circumstances. The WSPs quarreled with the applicable guidance and were misleadingly drafted to justify non-compliance with that guidance.

With respect to the transactions in issue, Jeffrey Lane prepared the order tickets and entered the information that was reported in TRACE.[86] He discussed the markups on the legs of the transactions with his brother.[87] He knew that the price of the bonds increased with each leg of the transaction. He even insisted that Greenwich charge a markup on the first leg of the transactions, the sale from Greenwich to one of the Marcus Lane entities.[88] He also knew that his brother set the markups for all the transactions.[89] Furthermore, Jeffrey Lane knew the timing of the transactions and how quickly the bonds moved from Greenwich to a Marcus Lane entity and back to Greenwich before, ultimately, Greenwich sold the bonds to a customer.[90] He never

[85] Compare CX-37 and CX-38 to IM-2440-1(a).

[86] Hearing Tr. (J. Lane) at 329, 339.

[87] Hearing Tr. (M. Lane) at 169-70, Hearing Tr. (J. Lane) 343.

[88] Hearing Tr. (J. Lane) at 343.

[89] Hearing Tr. (J. Lane) at 338-39.

[90] Hearing Tr. (Leak) at 63-70, Hearing Tr. (J. Lane) at 336-39.

questioned his brother's use of the Marcus Lane entities in these transactions[91] or changed any of the markups that Marcus Lane charged to customers.[92]

In reviewing the markup on the ultimate sale to a Greenwich customer, Jeffrey Lane looked only to the amount the price increased from the purchase back from the Marcus Lane entity involved in the previous leg of the transaction. He did not look at the price that Greenwich first bought the bonds from the street.[93]

Jeffrey Lane testified that he was unaware of what interpositioning was at the time of the transactions in issue.[94] He said that Marcus Lane "had been buying bonds into the high yield account, and then buying bonds back from the – selling them back from the high yield account to the customer" since 2003.[95]

(b) <u>The Violations</u>

FINRA Rule 3010 sets forth supervisory requirements. Rule 3010(a) provides that each member "shall establish and maintain a system to supervise the activities of each registered representative" that is "reasonably designed to achieve compliance" with the securities laws and regulations and FINRA and NASD Rules.

One aspect of such a supervisory system is the establishment of appropriate Written Supervisory Procedures. Rule 3010(a)(1) requires the establishment and maintenance of written procedures applicable to the type of business in which the member engages. Rule 3010(b) sets forth in some detail what a member's Written Supervisory Procedures should include. In

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[91] Hearing Tr. (J. Lane) at 341.

[92] Hearing Tr. (J. Lane) at 343-44.

[93] Hearing Tr. (J. Lane) at 341-343.

[94] Hearing Tr. (J. Lane) at 331-32, 335.

[95] Hearing Tr. (J. Lane) at 343.

general, the Rule requires that WSPs be established, maintained, and enforced, and that they be "reasonably designed" to "achieve compliance." Rule 3010(d)(1) provides that the WSPs should provide procedures for review of transactions. Evidence that such a review has occurred is required to be kept in writing and to be made available on request to FINRA.

A second aspect of a member's supervisory system is the designation of a principal to supervise the activities of each registered representative. FINRA Rule 3010(a)(5) provides that every registered representative should be assigned to an appropriate registered principal to supervise the representative's activities.

Jeffrey Lane violated both types of supervisory requirements. He does not dispute that he had responsibility for the WSPs or that they did not contain specifications regarding review of markups. Since Greenwich's business largely involved debt securities and markups, the absence of review procedures was a violation of FINRA Rule 3010. Similarly, the failure to create and make available a record of conducting such reviews was a violation. Moreover, Jeffrey Lane did not merely fail to draft appropriate WSPs – he crafted procedures designed to justify non-compliance. The apparently purposeful elimination from the WSPs of the thought that even markups less than 5% could be violations further supports a finding of a violation.

At the Hearing, Jeffrey Lane suggested that documentation of the review procedures to be employed or of having conducted a markup review was unnecessary, since he was the only person performing these tasks. The Rule does not create exceptions. Moreover, if Jeffrey Lane had focused on the markup rules and had developed WSPs for ensuring compliance with the Rules regarding markups, he might not have been ignorant – as he testified he was – of the Rule against interpositioning. He then could have been more alert to the problem posed by Marcus

Lane's trading and could have attempted to do something to correct or prevent excessive markups going forward.

Jeffrey Lane also does not dispute that he was responsible for supervising his brother. He argues only that his brother's trading was not inappropriate. As set forth above, that is incorrect. Marcus Lane engaged in misconduct; and Jeffrey Lane knew about it and did nothing to correct it, despite his supervisory responsibilities.

Accordingly, Jeffrey Lane violated FINRA Rule 3010. By virtue of these violations, as explained above, he also violated FINRA 2010. His conduct did not meet the requisite high standard of commercial honor or just and equitable principles of trade.

(3) ***Respondents'Failure To Respond Timely To FINRA Rule 8210 Requests***

(a) **The Conduct**

Market Regulation's senior analyst explained the history of Market Regulation's interest in the Greenwich markups. The investigation started when an electronic sweep alerted Market Regulation to eight Greenwich transactions in the last quarter of 2006 that appeared to have unusual markups or markdowns. In response to an inquiry pursuant to FINRA Rule 8210, Greenwich produced documents. From those documents, Market Regulation learned that two "customers" – the Marcus Lane entities – shared Greenwich's address. This prompted further inquiries. Eventually, Market Regulation received a trade blotter covering January 2006 through December 2007. The trade blotter revealed a pattern of Greenwich purchases from the street that were sold and bought back from the Marcus Lane entities before being sold to another customer. At this stage of the investigation, Market Regulation investigators were unaware of Marcus Lane's ownership of these entities.

As Market Regulation conducted its investigation, it requested additional information pursuant to FINRA Rule 8210. Two subjects of the ensuing correspondence between Respondents and Market Regulation became the focus at the Hearing – Bloomberg messages and information regarding ownership of the Marcus Lane entities. As discussed below, Respondents failed to assist in retrieving the Bloomberg messages and failed to supply the ownership information, despite repeated requests by Market Regulation, until Market Regulation issued a Notice of Suspension.

On March 6, 2009, Market Regulation staff sent a letter to Jeffrey Lane requesting a number of documents relating to the Werner, Tower, and Collins-Aikman transactions at issue in this proceeding (along with certain other transactions). Market Regulation sought, among other items, any documents related to the transactions and communications concerning the trades. The letter specifically stated that Bloomberg messages were covered by the request. In addition, Market Regulation sought documents and information regarding the owners of Greenwich and the two "customers" that shared its address. Market Regulation staff expressly requested an ownership breakdown and the identity of the individuals with investment authority for Greenwich and the Marcus Lane entities. It sought new account forms related to the identified transactions in Werner, Collins Aikman, and Tower bonds. It also sought monthly account statements for the Marcus Lane "customers."[96]

Jeffrey Lane responded to the March 6, 2009 letter from Market Regulation staff by letter dated March 23, 2009. He characterized the March 6 letter as the third request for additional information from FINRA staff and said that the information requested in that letter "has mostly

[96] CX-17.

or all been previously requested and … furnished."[97] He attached no documents, but suggested instead that he could send all of Greenwich's boxes containing its historical records, since it was no longer in business.[98]

By letter dated June 26, 2009, Market Regulation staff renewed its request for information and documents. The staff provided information about retrieving the Firm's Bloomberg messages. It stated that Bloomberg had agreed to waive any charges for processing the messages but that the Lanes should fill out a form provided by Bloomberg without changing it in any way.[99]

Marcus Lane responded by email letter dated July 1, 2009, without attaching any documents but again offering to send all records for the fifteen years Greenwich had been in business as a broker-dealer. He asserted that a subpoena was the appropriate way to obtain the documents from Bloomberg. The response contained no information regarding ownership of the Marcus Lane entities.[100]

Market Regulation staff sent each of the brothers a letter dated July 6, 2009, by email and FedEx, reiterating its requests for information and documents and enclosing another copy of the June 26, 2009 letter pursuant to FINRA Rule 8210.[101] In addition the staff sent Marcus Lane an email concerning the Bloomberg issue.[102] Marcus Lane's email letter in response to this

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[97] CX-18 at p. 1 of 2.

[98] *Id.* at p. 2 of 2.

[99] CX-19.

[100] CX-20.

[101] CX-22.

[102] CX-21.

correspondence, dated July 15, 2006, attached no documents.[103] He objected to signing a form that would require him to pay to retrieve Bloomberg messages.[104] He did not provide information regarding ownership of the Marcus Lane entities, but said that FINRA had been given information on the "nature" of those entities in connection with its annual audits.[105]

By email, on July 16, 2009, Market Regulation staff again requested pursuant to FINRA Rule 8210 the specific information and documents initially requested in the March 6, June 26, and July 6, 2009 letters and prior email correspondence. The email declared that offering to provide fifteen years of business correspondence did not satisfy Respondents' obligations under Rule 8210. It also reiterated that Bloomberg would not provide the communications sought by the staff without authorization from one of the Lane brothers.[106]

On July 31, 2009, Market Regulation staff issued a Notice of Suspension to each brother, to become effective on August 24, 2009, if a full response to the June 26, 2009 letter of inquiry was not made.[107] On August 14, 2009, Market Regulation staff sent Marcus Lane a letter indicating that the staff was extending the effective date of the suspension to September 8, 2009.[108]

Each brother requested a Hearing in connection with the Notice of Suspension, Jeffrey Lane by letter dated August 12, 2009, and Marcus Lane by letter dated August 24, 2009.[109] Jeffrey Lane's request asserted that he had made copies of the Firm's 2006 records at a Kinko's

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[103] CX-23.

[104] *Id.*

[105] *Id.*

[106] CX-24.

[107] CX-25, CX-26.

[108] CX- 27.

[109] CX-28, CX-29.

and provided them to Market Regulation staff. He asserted that there was no email correspondence and that "at this time" the staff was in possession of those records. He further asserted that "[a]t this time and currently" the only information the staff was lacking was the Bloomberg messages.[110]

On August 24, 2009, Marcus Lane sent the staff an authorization to access Greenwich's Bloomberg messages. He stated that he would not sign a Bloomberg contract that required him to pay at least $2000.[111] The staff responded by letter dated August 28, 2009, that the "self-created" authorization was not acceptable to Bloomberg.[112]

On September 24, 2009, the staff followed up a telephone conversation with Marcus Lane with an email recounting the status of various open requests for documents and information. Among other items, the staff wrote that it understood that Marcus Lane was willing to sign the Bloomberg authorization. The staff also reiterated its request for the new account forms for the Marcus Lane entities. It said that it was willing to accept information in lieu of documents. That information included: the identity of the owners of Greenwich and each of the two Marcus Lane entities, the percentage ownership for each entity, and the individual(s) with investment authority for each entity.[113] This is the same information that was sought in the staff's March 6, 2009 letter.[114]

On September 26, 2009, Marcus Lane responded to the staff's email by email. He said he would sign the Bloomberg letter "now [that] there are no charges." With respect to ownership

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[110] CX-28 at p. 3 of 32.

[111] CX-30.

[112] CX-31.

[113] CX-32.

[114] CX-17.

of Greenwich and the Marcus Lane entities, he said that ownership of the three entities had "fluctuated." He further wrote: "During 2006 and 2007 I was responsible for risk management and investments in [Greenwich and the Marcus Lane entities] and ownership was 80% myself and 20% for Jeff."[115]

On October 20, 2009, Respondents completed production of the information requested by Market Regulation.[116]

(b) <u>The Violations</u>

FINRA Rule 8210(a) provides that FINRA staff has the right to require a person within FINRA's jurisdiction to provide information in connection with an investigation, whether orally, in writing, or electronically. FINRA Rule 8210(c) specifies: "No member or person shall fail to provide information … pursuant to this Rule." In other words, compliance is compulsory.

Rule 8210 is crucial to FINRA's ability to oversee and regulate broker-dealers because FINRA does not have subpoena power. Instead, FINRA must depend on member firms and their associated persons to cooperate fully and promptly with requests for information.[117] A failure to respond promptly and completely to information requests frustrates FINRA's ability to detect misconduct and protect investors and markets.[118] It is well-established that a violation of the

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[115] CX- 32.

[116] CX-33, CX-34.

[117] *See, e.g., Dep't of Enforcement v. Valentino,* No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD [FINRA's predecessor] lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, 54 S.E.C. 515, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for FINRA to effectively conduct its investigations, and emphasizing that FINRA members and associated persons must fully cooperate with requests for information). *See also Morton Bruce Erenstein*, 316 Fed. Appx. 865, 2008 U.S. App. LEXIS 19746, at *13 (11th Cir. Sept. 16, 2008) ("[I]t is critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations, especially because the NASD lacks subpoena power."); *Robert Fitzpatrick*, 55 S.E.C. 419, 2001 SEC LEXIS 2185, at *11-12 (Oct. 19, 2001).

[118] *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *petition for review denied sub nom. Paz Sec. v. SEC*, 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

duty to cooperate and provide information pursuant to Rule 8210 is also a violation of Rule 2010.[119]

In this case, Respondents avoided providing information regarding ownership and investment authority for the Marcus Lane entities until the only choice was to reveal the connection between Marcus Lane and the so-called "customers" or be suspended. Although Market Regulation staff clearly sought the information in its March 6, 2009 letter, it was not until Marcus Lane's September 26, 2009 email, when he admitted that he made the investments for Greenwich and the Marcus Lane entities, that the connection between Marcus Lane and the Marcus Lane entities emerged. This conduct violated FINRA Rule 8210 and Rule 2010.[120]

III. SANCTIONS

A. Marcus Lane's Excessive Markups

The FINRA Sanction Guidelines ("Sanction Guidelines") [121] applicable to Marcus Lane's interpositioning, unfair and excessive markups and willful failure to disclose, include a fine ranging from $5,000 to $100,000, plus the gross amount of the excessive markup (if restitution is not ordered). In the ordinary case, an individual may be suspended for up to thirty business days. In egregious cases, however, a two-year suspension or even a bar may be appropriate. One of the Principal Considerations in connection with this particular type of violation is whether the

[119] *See CMG Inst. Trading, LLC*, 2009 SEC LEXIS 215, at *30 (Jan. 30, 2009); *Stephen J. Gluckman*, 54 S.E.C. 175, 1999 SEC LEXIS 1395, at *22 (July 20, 1999).

[120] Respondents also declined to assist in obtaining the Firm's Bloomberg messages for months. However, at the Hearing Respondents pointed out that, although Market Regulation staff represented that Bloomberg would not charge Respondents for retrieving the Bloomberg messages, there was an ambiguity created by Bloomberg's insistence that Respondents sign a form containing a commitment to pay fees. In light of the finding of a violation due to the failure to reveal the connection between Marcus Lane and the Marcus Lane entities, and the sanction imposed for that violation, it is unnecessary to determine whether the refusal to assist in obtaining Bloomberg messages was a violation or, if so, how severe the sanction should have been. No determination is made here regarding the Bloomberg issues.

[121] FINRA Sanction Guidelines (2011), available at www.finra.org/oho (then follow "Enforcement" hyperlink to "Sanction Guidelines").

respondent had discretion in setting the markups.[122] One of the Principal Considerations in every case is whether the respondent took responsibility for his misconduct or acknowledged it prior to regulatory intervention. Other relevant Principal Considerations applicable to every case include whether: (i) there was a pattern of misconduct, (ii) the respondent engaged in the misconduct intentionally, (iii) the misconduct resulted in potential financial gain, and (iv) respondent deceived one or more customers.[123]

In this case, the misconduct was egregious. Marcus Lane had discretion with respect to all the markups. He intentionally engaged in a pattern of misconduct for his financial gain, and he concealed the excessive markups from his customers by reporting the Marcus Lane entities' trading as though they were third-party customers. Even when confronted with unambiguous evidence that the interpositioning did not benefit the customers, he continued to maintain otherwise.

The Hearing Panel finds it necessary and appropriate to accomplish the remedial purposes of disciplinary sanctions to bar Marcus Lane for violations of NASD Rules 2110, 2120, 2320(b), 2440, and IM-2440 and willful violations of Section 10(b) of the Exchange Act and Rule 10b-5.

The Hearing Panel further finds that restitution is appropriate under the Sanction Guidelines. Those Guidelines authorize restitution "when an identifiable person … has suffered a quantifiable loss proximately caused by a respondent's misconduct."[124] In this case two identified customers paid a total of $317,030.70 more than the prevailing market price for the bonds as a result of Marcus Lane's fraudulent, unfair and excessive markups and Jeffrey Lane's

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[122] Sanction Guidelines at 90.

[123] Sanction Guidelines at 6-7.

[124] Sanction Guidelines at 4.

supervisory failures. The exhibit summarizing the aggregate profit earned on each of the transactions, CX-1, identifies which customer paid the unfair and excessive markup on each transaction. The aggregate profit reasonably quantifies the loss suffered by the customer because it indicates the amount in excess of the current prevailing market price that the customer paid. The chart below shows the amount of restitution to be paid to each customer, based on the information in CX-1.[125] The Respondents are ordered jointly and severally responsible for payment of the restitution.

CUSTOMER	*CX-1 ITEM/TRANSACTION*	*RESTITUTION TO BE PAID*
G.E.	CX-1 Item 1 Werner bond issue purchase	$13,387.50
	CX-1 Item 2 Werner bond issue purchase	$15,000.00
	CX-1 Item 3 Werner bond issue, two purchases	$12,500.00 $11,250.00
	CX-1 Item 6 Werner bond issue purchase	$14,250.00
	CX-1 Item 7 Tower bond issue purchase	$42,600.00
	CX-1 Item 8 Tower bond issue purchase	$60,000.00
	CX-1 Item 11 Tower bond issue purchase	$11,200.00
		TOTAL FOR CUSTOMER G.E. $180,187.50

[125] The customers are identified here by their initials. In the addendum to this decision, which is served only on the parties, the customers are identified by name.

CUSTOMER	*CX-1 ITEM/TRANSACTION*	*RESTITUTION TO BE PAID*
M.M.	CX-1 Item 4 Collins Aikman bond issue purchase	$2,825.00
	CX-1 Item 5 Collins Aikman bond issue purchase	$5,000.00
	CX-1 Item 9 Tower bond issue purchase	$76,950.00
	CX-1 Item 10 Tower bond issue purchase	$52,068.20
		TOTAL FOR CUSTOMER M.M. $136,843.20

B. Jeffrey Lane's Supervisory Failures

The Sanction Guidelines for a failure to have adequate Written Supervisory Procedures in violation of NASD Rule 3010 and FINRA Rule 2010 (the successor to NASD Rule 2110 in issue here) vary widely. The Sanction Guidelines suggest a range of monetary sanctions from $1000 to $25,000. In egregious cases, the Sanction Guidelines suggest considering a suspension of the responsible individual in any capacity for as much as a year.[126] One of the considerations particularly pertinent to this type of violation is whether the deficiencies in the WSPs allowed violations to occur or to escape detection.[127]

The Sanction Guidelines for failing to supervise another are similarly broad ranging. The fine may range from $5,000 to $50,000. The responsible individual may be suspended for up to thirty business days, but in egregious cases the suspension may be enlarged to two years or a bar

[126] Sanction Guidelines at 104.

[127] *Id.*

may be imposed. Principal considerations are whether the supervisor ignored red flags and the nature and extent of the underlying misconduct.[128]

In this case, Jeffrey Lane acknowledged his responsibility, both for the WSPs and for supervising his brother. To the extent that he designed the WSPs to justify markups higher than 5%, he acted contrary to the markup policy and contrary to his duties as Chief Compliance Officer. If he was simply ignorant of the interpositioning issue, as he claimed, his failure to have thought in any serious way about markup review in drafting the WSPs contributed to his failure to recognize that his brother's misconduct was a problem. Jeffrey Lane not only was aware of every aspect of his brother's misconduct, but he actually encouraged the misconduct by insisting that each Marcus Lane entity pay a markup to Greenwich after Greenwich's initial purchase. Jeffrey Lane benefited from encouraging the misconduct since he shared in the unfair and excessive profits generated by the scheme as a 20% owner of Greenwich. In light of the clear injury to the customers from paying far more than the current prevailing market price, the supervisory violations were egregious.

The Hearing Panel finds it necessary and appropriate to accomplish the remedial purposes of disciplinary sanctions to bar Jeffrey Lane for violations of NASD Rules 3010 and 2110. His purposeful encouragement of the misconduct and participation in the profits from Marcus Lane's fraudulent and excessive markups warrant more than a supervisory suspension. As noted above, he also is jointly and severally responsible with Marcus Lane for payment of restitution to G.E. and M.M.

C. Respondents' Failure To Provide Information Timely

A failure to respond in a timely manner to a request for information pursuant to FINRA Rule 8210 is a serious violation, because FINRA depends upon the cooperation of its members

[128] Sanction Guidelines at 103.

and associated persons to obtain the information necessary to perform its regulatory mission. The Sanctions Guidelines recommend a fine ranging from $2,500 to $25,000. An individual may be suspended for up to 30 business days. Several Principal Considerations should be examined, including: the importance of the information requested from FINRA's perspective, the number of requests made, the degree of pressure required to obtain a response, and the length of time to respond. A response that is delayed until the filing of a complaint is treated the same as a failure to respond at all and a bar is the standard sanction.[129]

In this case, Respondents refused to provide answers to questions that were simple and easy to answer – who owned Greenwich and the Marcus Lane entities and who had investment authority for them. No great effort was required to provide the information requested. Market Regulation staff made repeated requests from March through July without obtaining that information. The information was important because it revealed the interpositioning scheme and how Marcus Lane was setting unfair and excessive markups on the bonds sold to customers. Respondents did not provide the information until the staff exerted extreme pressure and issued the Notice of Suspension. Their violation of the duty to provide information facilitated Respondents' attempted concealment of the improper, unfair and excessive markups. The Hearing Panel finds that the failure to cooperate was egregious, and the delay until issuance of the Notice of Suspension, like a delay until after the filing of a complaint, should be treated the same as a complete failure to respond.

A bar is thus necessary and appropriate for Respondents' violations of FINRA Rules 8210 and 2010.

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[129] Sanction Guidelines at 33 and n.1.

IV. ORDER

Respondent Robert Marcus Lane is **barred** from associating with a FINRA member firm in any capacity for interpositioning and charging unfair and excessive markups that he failed to disclose to customers, in violation of NASD Rules 2110, 2120, 2320(b), 2440, and IM-2440, and willful violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. Respondent Jeffrey Griffin Lane is **barred** from associating with a FINRA member firm in any capacity for failing to establish and maintain reasonable written supervisory procedures regarding markups and failing to supervise Marcus Lane's markup activities appropriately. In addition, both brothers are ordered, jointly and severally, to pay **restitution** to the two identified customers in the total amount of $317,030.70 ($180,187.50 to G.E. and $136,843.20 to M.M.). Both Respondents are separately **barred** for their failure to provide information and documents requested by Market Regulation's investigatory staff pursuant to FINRA Rule 8210 until after a Notice of Suspension was issued. If this decision becomes FINRA's final disciplinary action, the bars shall become effective immediately. The Respondents are also ordered to pay costs in the amount of $4625.25, which includes a $750 administrative fee and the cost of the hearing transcript.[130]

Lucinda O. McConathy
Hearing Officer
For the Hearing Panel

[130] The Hearing Panel has considered and rejects without discussion any other arguments made by the Parties that are inconsistent with this decision.

Copies to: Robert Marcus Lane (via first-class mail, overnight courier and email)
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