BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Harvest Capital Investments, LLC Vienna, VA, and Dennis Cotto Vienna, VA, Respondents.	DECISION Complaint No. 2005001305701 Dated: October 6, 2008

Cotto functioned in a principal capacity without being registered; respondents failed to respond completely to written requests for information; and Cotto willfully filed an inaccurate Form U4 and respondents failed to update, and filed false amendments to, Cotto's Form U4 and member firm's Form BD. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondents: Pro Se

Decision

Pursuant to NASD Rule 9311(a), Harvest Capital Investments, LLC ("Harvest Capital" or "the Firm") and Dennis Cotto ("Cotto") (together, "respondents") appeal a September 27,

2007 Hearing Panel decision.[1] The Hearing Panel found that: (1) Cotto functioned in a principal capacity for Harvest Capital, including while he was subject to a six-month suspension, without being registered as a principal, in violation of NASD Rules 1021, 1031, and 2110 and IM-8310-1; (2) Cotto failed to provide requested documents at an on-the-record interview, and respondents failed to respond completely to written requests for information, in violation of NASD Rules 8210 and 2110; (3) Cotto filed an inaccurate Uniform Application for Securities Industry Registration or Transfer ("Form U4") and inaccurate Form U4 amendments, in violation of NASD Rule 2110 and IM-1000-1; and (4) respondents filed false or inaccurate amendments to Harvest Capital's Uniform Application for Broker-Dealer Registration ("Form BD"), in violation of NASD Rule 2110 and IM-1000-1. The Hearing Panel expelled Harvest Capital from FINRA membership and barred Cotto in all capacities for their violations of FINRA's registration requirements. The Hearing Panel imposed a separate expulsion and bar upon Harvest Capital and Cotto, respectively, for their violations of NASD Rules 8210 and 2110, and assessed (jointly and severally) $4,075.70 in costs. The Hearing Panel did not impose additional sanctions upon either respondent for the violations related to the Forms U4 and BD. After a complete review of the record, we affirm the Hearing Panel's findings and sanctions.

I. Factual and Procedural History

A. Respondents' History

Cotto became associated with Harvest Capital in 1998 when he acquired control of the Firm. At the time Cotto purchased Harvest Capital, he was a licensed attorney and real estate developer and knew nothing about the securities industry. Cotto's former college roommate, Eric Darrisaw ("Darrisaw"), ran Harvest Capital until 2004. On August 2, 2004, Cotto authorized the filing of a Form U4 to become a general securities representative of Harvest Capital. Cotto subsequently authorized the filing of five amendments to his Form U4. Cotto was at all times a person associated with Harvest Capital,[2] although Cotto's registration with FINRA

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[1] As of July 30, 2007, NASD consolidated with the member firm regulation functions of NYSE and began operating as the Financial Industry Regulatory Authority ("FINRA"). References to FINRA shall include, by reference and where appropriate, references to NASD.

[2] FINRA's By-Laws define a "person associated with a member" as "(1) a natural person who is registered or has applied for registration . . . ; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration . . . ; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member[.]" FINRA By-Laws, Article I(rr).

never became effective because he did not pass the general securities representative (Series 7) qualification examination.[3]

Harvest Capital became registered with FINRA in September 1996. Harvest Capital is owned solely by Real Estate Technical Advisors, Inc. ("RETA"). Cotto is the sole owner of RETA, and Harvest Capital's limited liability company agreement lists Cotto as the sole member of its board of managers. Since 2000, Harvest Capital's office and records have been located in Cotto's residence. Cotto testified that Harvest Capital is a small firm that serves as an introducing broker-dealer for institutional customers.

B. Respondents' Prior Disciplinary History

In June 2004, FINRA filed a complaint against Harvest Capital, Cotto, and Darrisaw (the "June 2004 Complaint"). The June 2004 Complaint alleged, among other things, that Cotto and Harvest Capital violated NASD Rules 1021 and 2110 because Cotto functioned in a principal capacity without being registered by: (a) hiring and firing Firm personnel; (b) preparing and issuing checks for Harvest Capital; (c) signing contracts on behalf of the Firm in connection with securities related business; and (d) being generally involved in Harvest Capital's day-to-day operations. The June 2004 Complaint further alleged that Cotto violated NASD Rules 8210 and 2110 by failing to appear for an on-the-record interview, and that Harvest Capital violated NASD Rule 2110 and IM-1000-1 by failing to keep its Form BD accurate and current.

In December 2004, FINRA accepted a joint offer of settlement in connection with the June 2004 Complaint. Pursuant to the settlement, FINRA found that from May 2002 through June 2004, Cotto functioned in a principal capacity with Harvest Capital without being registered and failed to timely appear for an on-the-record interview. FINRA further found that Harvest Capital failed to keep accurate and current its Form BD. Cotto was suspended from associating with any member firm in any capacity for six months (effective February 22, 2005, through August 21, 2005) and fined $5,000. Harvest Capital was censured and fined an additional $8,000.

C. Factual Background

1. Cotto's Involvement with Harvest Capital

a. Cotto's Hiring of Principals

Darrisaw ran Harvest Capital's operations until he resigned sometime in 2004. Thereafter, Cotto registered to take the Series 7 qualification examination and started searching for principals to run Harvest Capital. In August 2004, Cotto contacted Jonathan Collett

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[3] Cotto registered to take the Series 7 qualification examination on five different occasions spanning a 22-month period. Cotto failed the exam on his first attempt, and did not report to take the exam or appeared late and subsequently canceled reporting of his score on his four subsequent attempts.

("Collett"), a registered representative with Harvest Capital, and asked whether he would serve as a general securities principal for the Firm. Cotto informed Collett that his responsibilities as a Harvest Capital principal would be limited to ensuring that the Firm complied with its net capital requirements while Cotto prepared to take his Series 7 qualification examination (and, assuming he passed the Series 7 exam, the general securities principal (Series 24) qualification examination). Collett accepted the position understanding that he would serve as a principal of the Firm on a short-term basis until Cotto passed the exams.

Collett's activities as a Harvest Capital principal consisted solely of contacting Harvest Capital's Financial and Operations Principal ("FINOP") each month to ensure that the Firm satisfied its net capital requirements. Collett had no authority to hire or fire employees or enter into agreements on behalf of Harvest Capital, and had no management authority. Further, Collett never filed any documents with FINRA on behalf of Harvest Capital or Cotto, and he understood that Cotto was the sole owner and manager of the Firm. Collett's association with Harvest Capital ended in January 2005.[4]

Cotto actively sought to hire other general securities principals during this time period. In late September 2004, Cotto contacted Joseph Kosinsky ("Kosinsky"), a former municipal securities representative and principal with Harvest Capital. Cotto asked Kosinsky to rejoin Harvest Capital as a principal, and sent Kosinsky a proposed employment agreement. Kosinsky decided not to rejoin the Firm and never signed the agreement. Kosinsky performed no services for Harvest Capital during the relevant time periods. However, in November 2004, FINRA received a Form U4 from Harvest Capital to register Kosinsky as a general securities principal with the Firm. Harvest Capital filed the form without Kosinsky's knowledge or approval. Cotto's electronic signature, as Harvest Capital's representative, was affixed to the Form U4.

Cotto's search for principals continued, and in December 2004 he placed an advertisement on the website Craig's List for a registered principal. Ultimately, three individuals—David Masson ("Masson"), Tom Kim ("Kim"), and Kiet T. Vo ("Vo")—responded to the advertisement. Masson responded in late 2004, and Cotto contacted him shortly thereafter. Cotto informed Masson that he was the president of Harvest Capital and explained Harvest Capital's efforts, as a minority-owned business, to obtain securities business from pension funds. Masson agreed to serve as a principal, although his actual duties were limited to contacting investment managers of pension funds to convince them to add Harvest Capital to their lists of minority-owned firms with which they were willing to do business. Cotto agreed to pay Masson $200 every time Harvest Capital was added to a pension fund's list.

Masson informed Cotto that he was resigning from Harvest Capital in February 2005, and Masson began working for another FINRA member firm at or around that time. Masson testified that he never performed any supervisory or compliance duties during his short period of

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[4] Collett was dually registered with another member firm during all relevant time periods, and he became re-registered with Harvest Capital in April 2005 as a general securities representative. Collett did not receive any compensation from Harvest Capital for his limited engagement as a principal.

employment with Harvest Capital and that he did nothing further for Harvest Capital subsequent to his resignation. Further, Masson testified that he had no knowledge of a letter to FINRA dated February 17, 2005, purportedly signed by Masson, stating that Masson and Kim would remain "in charge of supervising the firm" during Cotto's suspension for the period beginning February 22, 2005, through August 21, 2005.[5]

Kim also responded to the Craig's List advertisement. Beginning in December 2004, Kim communicated with Cotto on several occasions regarding employment as a Harvest Capital principal and compliance officer. Cotto informed Kim that Harvest Capital was a minority-owned broker-dealer and that Kim would be hired to review and approve Harvest Capital's Financial and Operational Combined Uniform Single Reports ("FOCUS reports"). Kim was already registered with another member firm, and he informed Cotto that he would need his firm's prior approval before he could dually register with Harvest Capital. Kim also informed Cotto that he had no experience with FOCUS reports. Cotto informed Kim that he would be trained at Harvest Capital, and would be paid $250 per month for his services.

Kim agreed to serve as a Harvest Capital principal and its chief compliance officer beginning on February 1, 2005. However, prior to Kim's start date, Kim's firm informed him that he could not be dually registered with Harvest Capital. Kim subsequently informed Cotto that he could not work for Harvest Capital. Despite assurances from Cotto that he would promptly terminate Kim's pending registration application with Harvest Capital, in April 2005 Kim learned that his application for registration with Harvest Capital was still pending. Kim contacted Cotto and Kim's application was terminated immediately thereafter. Similar to Masson, Kim had no knowledge of the statements in the February 17, 2005 letter.

Vo responded to Cotto's Craig's List advertisement in May 2005. Shortly thereafter, Cotto hired Vo to serve as a general principal and the chief compliance officer for Harvest Capital.[6] Vo understood that Cotto owned and managed Harvest Capital. Vo received $250 per month for his services, and his duties were generally limited to filing Forms U4 and U5 for the Firm pursuant to Cotto's instructions. Vo had no management responsibility or authority while a

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[5] Cotto testified that he dictated part of the letter and that his wife (who served as Harvest Capital's administrative assistant from December 2004 through December 2005) wrote the letter pursuant to his direction. Cotto further testified that he signed the letter and did not notice that Masson was mistakenly listed as the letter's signatory.

[6] In addition, Cotto hired Daniel Kiernan ("Kiernan") in May or June 2005 to serve as Harvest Capital's FINOP. Kiernan served in this position for approximately one month at an agreed-upon monthly salary of $500. In late June 2005, FINRA sent to Kiernan (as Harvest Capital's FINOP) an NASD Rule 8210 request for information regarding deficiencies in the Firm's FOCUS reports. The letter also requested that Harvest Capital submit a properly executed Designation of Accountant Form to replace the form signed by Cotto during his suspension. Kiernan resigned after receiving this request because it became apparent to him that the position with Harvest Capital was going to require more time than he was willing or able to commit to the Firm.

principal at Harvest Capital, and had no prior experience as a compliance officer or with financial matters pertaining to securities firms. Vo testified that he acted only at Cotto's direction and performed one to two hours of work per month for Harvest Capital.

b. Cotto's Discussions with Third Parties Concerning Harvest Capital's Securities Business

In September 2004, Cotto represented to FINRA staff that he intended to become registered. However, despite Cotto's assurances and the pending June 2004 Complaint, Cotto executed several commission sharing agreements on behalf of Harvest Capital in October 2004 and again in November 2004. In addition, Cotto executed a directed brokerage agreement in November 2004. Cotto executed each of these agreements as Harvest Capital's chairman.

In April 2005, during Cotto's six-month suspension, Cotto contacted Citigroup Global Markets ("Citigroup") to discuss Harvest Capital becoming part of Citigroup's correspondent clearing network. Cotto informed Citigroup that he was chairman of Harvest Capital and that he had authority to discuss such matters on behalf of the Firm. Cotto forwarded information concerning Harvest Capital to Citigroup and corresponded with Citigroup personnel on numerous occasions. Cotto's efforts resulted in a proposed Fully Disclosed Clearing Agreement from Citigroup. Cotto directed Citigroup to forward the final agreement to Vo, and Cotto directed Vo to sign and return the agreement to Citigroup. Although Vo had no prior knowledge of or involvement with the Firm's discussions with Citigroup, he executed the agreement on or about July 12, 2005. Cotto corresponded with Citigroup personnel and forwarded additional information to Citigroup in August and September 2005.

Similarly, in April 2005, Cotto contacted Goldman Sachs & Co. ("Goldman Sachs") regarding the establishment of a clearing relationship. Cotto represented that he was the owner and chairman of Harvest Capital, and he corresponded with Goldman Sachs on numerous occasions. These discussions resulted in a proposed Fully Disclosed Executing Broker Agreement. Cotto instructed his contact at Goldman Sachs to forward the final agreement to Vo for execution, although Vo had no prior knowledge of or involvement with the Firm's discussions with Goldman Sachs. Cotto directed Vo to sign and return the agreement to Goldman Sachs, and Vo did so in August 2005. After executing the agreement, Cotto continued to have discussions with Goldman Sachs concerning various matters.

c. Cotto's Pursuit of Minority-Owned Business Designations

Cotto also actively pursued various state certifications for Harvest Capital to become a minority-owned business enterprise during Cotto's six-month suspension.[7] The certifications were intended to aid Harvest Capital in obtaining directed commissions as a minority-owned

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[7] In late March 2005, Cotto also signed a letter (on Firm letterhead and as the Firm's chairman) addressed to FINRA requesting a waiver of a fine imposed on the Firm for its failure to file timely its annual report. Cotto also signed, as the Firm's chairman, the affirmation included in Harvest Capital's 2004 annual audit.

broker-dealer. Harvest Capital submitted applications to the states of Indiana and Virginia in March 2005. Cotto communicated with state employees concerning each application and submitted additional information to these states on behalf of Harvest Capital. For example, Cotto submitted forms indicating that he was the sole owner of Harvest Capital and had controlled the Firm since 1998.[8] Additionally, Cotto submitted to Indiana an on-site report for Harvest Capital stating that he spent "lots of time doing management and marketing of [Harvest Capital's] business," that he prepared all documents for the Firm, and that he had the authority to sign contracts and make financial decisions for the Firm. Likewise, Cotto submitted documentation to Virginia stating that he was Harvest Capital's sole owner and chairman, and that the Firm had been under his control since 1998.

Further, in May 2005, Cotto submitted additional information to the state of California in connection with a previously filed application to certify Harvest Capital as a disadvantaged business enterprise. Similar to the applications filed with Indiana and Virginia, the application to California listed Cotto as the sole person with management responsibility and control over Harvest Capital.[9]

d. Cotto Received Compensation from Harvest Capital and Controlled Harvest Capital's Checking Account

Harvest Capital periodically reimbursed Cotto for certain of his expenses, including while he was purportedly serving his six-month suspension. In addition, Cotto used Harvest Capital's account to pay certain personal expenses, including his professional bar dues, credit card bills, utility bills, and other household expenses. Moreover, Cotto was the sole authorized signatory on Harvest Capital's checking account during all relevant time periods. Cotto authorized or directed issuance of all checks and disbursements from Harvest Capital's checking account.

2. FINRA's On-the-Record Interview of Cotto and Requests for Information

In a letter dated July 1, 2005, FINRA requested that Cotto appear for an on-the-record interview pursuant to NASD Rule 8210. The letter stated that Cotto's testimony would concern, among other things, his role, involvement and duties at Harvest Capital since January 2004. FINRA requested that Cotto produce copies of certain documents, including "all correspondence, electronic transmissions or other written communications received or sent from June 1, 2004 to the present that relate to the business of HCI[.]" Cotto testified as scheduled, and provided a limited number of documents to FINRA. However, Cotto failed to produce any documentation

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[8] In addition, in September 2006 and after Cotto received a "Wells" notice from FINRA, Cotto submitted to Indiana on behalf of Harvest Capital a "Statement of No Change" in which he again identified himself as Harvest Capital's chairman.

[9] All three states approved Harvest Capital's applications to be certified as a minority-owned business. California's approval expressly stated that Harvest Capital had sought contracting opportunities in the following areas: investment banking/securities dealing, securities/brokerage, and miscellaneous financial investment activities.

related to Citigroup or Goldman Sachs, including the agreement with Citigroup executed prior to the interview. Further, Cotto failed to produce Harvest Capital's applications (or any documents related to the applications) with the states of Indiana, Virginia, and California. Nor did Cotto produce any correspondence or other documentation related to the hiring of Collett, Mason, Kiernan, or Vo, or his discussions with Kosinsky and Kim.

Beginning in February 2006, FINRA sent five separate letters to Harvest Capital (to Cotto's attention) pursuant to NASD Rule 8210. The letters requested, among other things, the following: (1) copies of Harvest Capital's bank statements and canceled checks from February 2005 through and including August 2005; (2) a detailed account of all communications between Harvest Capital (or any person associated with Harvest Capital) and Citigroup or Goldman Sachs from April 1, 2005, through December 31, 2005; (3) copies of all documents relating to Harvest Capital's status as a minority-owned business; (4) a detailed breakdown of the total amount of commissions and "other costs" listed on Harvest Capital's September 2005 FOCUS Report; (5) an explanation concerning a $1,506 check payable to BMW and drawn on Harvest Capital's account; and (6) an explanation why Cotto did not disclose the June 2004 Complaint and his subsequent suspension on his May 12, 2005 Form U4 amendment.

Cotto eventually provided Harvest Capital's April 2005 bank statement and copies of several checks drawn on Harvest Capital's account that cleared in April 2005, as well as bank statements for February and March 2005, but did not otherwise provide any bank statements or canceled checks. Likewise, Cotto did not provide a detailed account of communications with Citigroup or Goldman Sachs or any documents related thereto, nor did Cotto provide the applications (or any documents related to the applications) filed with Indiana, Virginia, or California.[10] Further, Cotto did not provide a detailed breakdown of the Firm's commissions, an explanation concerning the $1,506 check, or an explanation regarding the lack of disclosure on his May 12, 2005 Form U4 amendment. Although Cotto and Harvest Capital responded, in writing, to FINRA's first four requests for information, respondents did not provide any response to FINRA's fifth and final request dated May 9, 2006.

3. Cotto's Form U4

FINRA received an initial Form U4 for Cotto to become registered as a general securities representative with Harvest Capital on August 2, 2004. Cotto did not disclose the pending June 2004 Complaint in this initial filing. Similarly, on November 3, 2004, and November 26, 2004, FINRA received two Form U4 amendments for Cotto in which Cotto again failed to disclose the pending June 2004 Complaint. FINRA received two additional Form U4 amendments for Cotto dated May 12, 2005, and February 14, 2006, which failed to disclose the June 2004 Complaint and Cotto's six-month suspension in connection with the June 2004 Complaint. Further, Cotto took no action after receiving formal written notice from FINRA on June 29, 2006, that he was

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[10] Respondents did produce a one-page letter from Virginia's Department of Minority Business Enterprise confirming completion of Harvest Capital's onsite review.

the subject of an investigation.[11] Cotto was listed as the signatory on each form, and Cotto was listed as Harvest Capital's signatory on several of the amendments. Masson was listed as the Firm's signatory on the May 12, 2005 amendment, despite having resigned from Harvest Capital several months prior.

4. Harvest Capital's Form BD

On May 12, 2005, Harvest Capital filed a Form BD amendment with FINRA. The amendment falsely listed Masson as the Firm's compliance officer, despite the fact that Masson informed Cotto in February 2005 that he was ending his association with Harvest Capital. Masson testified that he had no knowledge of the amendment to Harvest Capital's Form BD. Cotto's name was shown in the execution section of the document as the Firm's signatory.

On May 20, 2005, Harvest Capital's FINOP, Milmarina Camancho, informed Cotto that she was resigning. However, Harvest Capital did not remove her name from its Form BD until September 2, 2005. Cotto's name was shown in the execution section of the document as the Firm's signatory. Further, Cotto hired Kiernan on or about June 1, 2005. Although Kiernan resigned on June 30, 2005, Harvest Capital did not remove his name from its Form BD until September 21, 2005. Vo's name was shown in the execution section of the document as the Firm's signatory. Moreover, although a Form U5 was filed for Vo on October 26, 2006, Harvest Capital did not file an amendment to its Form BD removing Vo from its schedule of officers until February 2007. Finally, despite entering into new clearing agreements with Citigroup and Goldman Sachs in July and August 2005, Harvest Capital never amended its Form BD to disclose either agreement.

D. Procedural History

On October 19, 2006, FINRA's Department of Enforcement ("Enforcement") filed an eight-cause complaint against Harvest Capital and Cotto. The complaint alleged that: (1) respondents violated NASD Rules 1021, 1031, and 2110 and IM-8310-1 when Cotto functioned in a principal capacity at Harvest Capital from June 2004 to October 2006 (including during his six-month suspension in connection with the June 2004 Complaint) without being registered as a principal; (2) Cotto violated NASD Rules 8210 and 2110 when he appeared at the on-the-record interview without bringing requested documents, and respondents violated NASD Rules 8210 and 2110 by failing to fully and completely respond to FINRA's five requests for information sent in 2006; (3) respondents violated NASD Rules 3110 and 2110, and Harvest Capital violated SEC Exchange Act Rule 17a-4 by failing to preserve certain documents;[12] (4) Cotto willfully

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[11] Cotto filed an amendment to his Form U4 on February 27, 2007, in which he finally disclosed the June 2004 Complaint. Cotto, however, failed to disclose the complaint in this matter.

[12] Enforcement pled this cause in the alternative to the cause alleging that respondents failed to respond fully and completely to FINRA's requests for information. The Hearing Panel dismissed this alternative cause.

violated NASD Rule 2110 and IM-1000-1 by filing a false Form U4 that failed to disclose the June 2004 Complaint and by failing to update his Form U4 to reflect the 2004 proceeding, his six-month suspension, and FINRA's investigation of this matter; and (5) respondents violated NASD Rule 2110 and IM-1000-1 by filing a false Form BD amendment and failing to update Harvest Capital's Form BD.[13]

Respondents denied all of the allegations. Enforcement filed a motion seeking summary disposition on each cause of the complaint as well as sanctions. The Hearing Panel granted summary disposition with respect to Enforcement's allegations that Cotto functioned in a principal capacity at Harvest Capital without being registered as a principal, but otherwise denied Enforcement's motion.

The Hearing Panel conducted a two-day hearing on May 8 and 9, 2007. In a decision dated September 27, 2007, the Hearing Panel found that respondents had committed the violations alleged in the complaint. The Hearing Panel expelled Harvest Capital from FINRA membership and barred Cotto in all capacities for their violations of NASD Rules 1021, 1031, and 2110 and IM-8310-1. The Hearing Panel imposed a separate expulsion and bar upon Harvest Capital and Cotto, respectively, for their violations of NASD Rules 8210 and 2110. The Hearing Panel did not impose additional sanctions upon either respondent for the violations related to the Forms U4 and BD. Respondents' appeal followed.

II. Discussion

A. Cotto Acted as a Principal Without Being Registered

The Hearing Panel found that Cotto functioned in a principal capacity for Harvest Capital without being registered as a principal, in violation of NASD Rules 1021, 1031 and 2110 and IM-8310-1. We affirm the Hearing Panel's findings.[14]

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[13] The complaint also alleged that Vo knew or should have known that Cotto was not registered in any capacity and thus violated NASD Rules 1021, 1031 and 2110. FINRA further alleged that Vo violated NASD Rule 2110 and IM-1000-1 for failing to amend his Form U4. Vo settled this matter with FINRA in November 2006.

[14] The Hearing Panel properly granted Enforcement's motion for summary disposition with respect to its allegations that respondents violated FINRA's registration requirements. A hearing panel may grant a summary disposition motion "if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law." *See* NASD Rule 9264(e); *Dep't of Enforcement v. Claggett*, Complaint No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *8 (FINRA NAC Sept. 28, 2007). Because Enforcement requested summary disposition, it bore the burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 586-87 (1986). Enforcement satisfied its burden, and respondents failed to demonstrate the existence of any material, disputed facts. Thus, summary disposition on this issue was appropriate. Regardless, we find that

[Footnote continued on next page]

FINRA's By-Laws state that no member shall permit a person to associate with the member to engage in its investment banking or securities business unless such person has satisfied FINRA's qualification requirements. *See* FINRA By-Laws, Article V, Section 1. NASD Rule 1021 requires that all persons engaged or to be engaged in the investment banking or securities business of a member firm who are to function as "principals" be registered as such. NASD Rule 1021(b) defines the term principal to include all sole proprietors, officers, partners, managers of offices of supervisory jurisdiction, and directors of corporations who are "actively engaged in the management of the member's investment banking or securities business." In order to be registered as a general securities principal, one must first be registered as a general securities representative pursuant to NASD Rule 1031. *See* NASD Rule 1022(a). Interpretative Material 1000-3 provides that "[t]he failure of any member to register an employee, who should be so registered, as a Registered Representative may be deemed to be conduct inconsistent with just and equitable principles of trade." Moreover, Interpretative Material 8310-1 provides that if a person is suspended from association with a member, the member must not allow such person to remain associated with it in any capacity, including a clerical or ministerial capacity, and may not receive any remuneration from a member that results directly or indirectly from a securities transaction.

It is undisputed that Cotto never registered with FINRA as a principal or representative, and never passed any qualification examinations. Thus, the only issue is whether Cotto functioned as a principal for Harvest Capital despite his lack of registrations. We find that he did.

Cotto actively managed Harvest Capital's securities business. For example, Cotto expended considerable effort to hire principals for the Firm. Cotto contacted Collett and Kosinsky to ascertain their interest in becoming principals, and communicated with Masson, Kim, and Vo in connection with the advertisement that he placed on Craig's List and discussed the scope of employment with each potential hire. Cotto made the decision to hire these individuals. *See Kirk A. Knapp*, 50 S.E.C. 858, 861 (1992) (considering the fact that applicant hired individuals in determining that applicant acted in a principal capacity). Further, the record demonstrates that each principal hired by Cotto answered directly to Cotto, and that they acted on behalf of Harvest Capital only at Cotto's direction.[15] Cotto also controlled Harvest Capital's checking account and was the sole authorized signatory on the account. *See Vladislav Steven Zubkis*, 53 S.E.C. 794, 799-800 (1998) (holding that a person controlled a firm and was an

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Enforcement presented ample evidence at the hearing to support a finding that respondents violated FINRA's registration requirements.

[15] Neither Collett nor Vo had any experience as a principal or compliance officer when Cotto hired them.

"associated person" based in part on his payment of firm expenses such as rent, telephone charges, and compensation of brokers).[16]

Moreover, Cotto contacted both Citigroup and Goldman Sachs to discuss potential clearing relationships and communicated with representatives of both firms on numerous occasions. Cotto's efforts resulted in clearing agreements with both firms. *See Dep't of Enforcement v. Lee & Gordon*, Complaint No. C06040027, 2007 NASD Discip. LEXIS 6, at *13-33 (NASD NAC Feb. 12, 2007) (finding that individual who, among other things, negotiated agreements on behalf of member firm acted in principal capacity), *aff'd in relevant part*, Exchange Act Rel. No. 57655, 2008 SEC LEXIS 819 (Apr. 11, 2008). Cotto also actively pursued applications on behalf of Harvest Capital with three different states so that Harvest Capital could be classified as a minority-owned business entity. *See Lee & Gordon*, 2007 NASD Discip. LEXIS 6, at *13-33.

Cotto repeatedly held himself out as Harvest Capital's sole owner and chief executive officer. For example, Cotto informed potential hires, representatives from both Citigroup and Goldman Sachs, and representatives at various state agencies that he was the chairman and sole owner and manager of Harvest Capital. *See L.H. Alton & Co.*, 53 S.E.C. 1118, 1126 n.21 (1999) (finding that fact that applicant held himself out to be a partner of member firm was evidence of need to be registered); *Dist. Bus. Conduct Comm. v. Pecaro*, Complaint No. C8A960029, 1998 NASD Discip. LEXIS 13, at *20 (NASD NBCC Jan. 7, 1998) (holding that individual holding himself out in "a manner that would lead an objective observer to infer that he was intimately involved" with member firm as a principal must register as such). Cotto also held himself out as a Harvest Capital principal in filings with FINRA and the Commission. For example, in October 2004, Cotto executed Harvest Capital's Designation of Accountant Form as the Firm's chairman. Likewise, in March 2005 Cotto signed—as chairman—the oath and affirmation for Harvest Capital's 2004 annual audit report. Further, in March 2005 Cotto wrote to FINRA as Harvest Capital's chairman requesting waiver of a fine that had been imposed upon the Firm. *See Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 SEC LEXIS 971 (May 9, 2007) (holding that owner and president of member firm acted in a principal capacity without being registered where he held himself out to regulators as the firm's principal, executed numerous reports and forms on the firm's behalf as its president or principal, and updated FINRA contact reports stating that he was the firm's chief executive officer and contact).

Finally, despite the fact that Cotto was prohibited from associating with Harvest Capital in any capacity while serving his six-month suspension, Cotto engaged in many of the activities referenced herein while suspended, in blatant disregard of FINRA's rules and the order imposing the suspension. The record further shows that during Cotto's suspension period, Harvest Capital reimbursed him for expenses and directly paid certain of his personal expenses, in violation of

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[16] Harvest Capital's limited liability agreement lists Cotto as the sole member of its initial board of managers, and a permanent board of managers was never selected.

IM-8310-1. Consequently, we affirm the Hearing Panel's findings that respondents violated NASD Rules 1021, 1031, and 2110 and IM-8310-1.[17]

Cotto argues that he conducted all of the foregoing activities not as a principal or employee of Harvest Capital but rather as RETA's general counsel. Cotto further argues that he made up the title of chairman for Harvest Capital and that such title had no legal significance. Cotto also asserts that certain of his activities (e.g., the applications filed with Indiana, Virginia and California) involved an alleged division at Harvest Capital—Harvest Capital Realty Services—that focused solely on real estate services and was separate and distinct from Harvest Capital's securities business.

The record undercuts Cotto's arguments. For instance, Cotto expressly and consistently identified and held himself out as Harvest Capital's chairman or president, not the general counsel of Harvest Capital or RETA. *See L.H. Alton & Co.*, 53 S.E.C. at 1126 n.21; *Pecaro*, 1998 NASD Discip. LEXIS 13, at *20. Moreover, regardless of the title Cotto held while engaging in such activities on behalf of Harvest Capital (even a purportedly meaningless title), Cotto clearly functioned in a principal capacity. *See NASD Notice to Members 99-49* (June 1999) (stating that "the registration determination does not depend on the individual's title, but rather on the functions that he or she performs").[18] In addition, even if Cotto was not an

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[17] The Hearing Panel properly found both Cotto and Harvest Capital liable for Cotto's registration violations. *See, e.g.*, FINRA's By-Laws, Article V, Section 1 (stating that no member shall permit a person to associate with the member to engage in its investment banking or securities business unless such person has satisfied FINRA's qualification requirements); *Dep't of Market Reg. v. Ryan & Co., LP*, Proceeding No. FPI040002, 2005 NASD Discip. LEXIS 8, *30 (NASD NAC Oct. 3, 2005) (holding that because the respondent was the firm's president and owner, he and the firm were "[f]or all intents and purposes . . . one and the same"). In addition, it is well established that a violation of a FINRA rule also violates NASD Rule 2110. *See Joseph Abbondante*, Exchange Act Rel. No. 53066, 2006 SEC LEXIS 23, at *36 (Jan. 6, 2006). Further, NASD Rule 0115 provides that FINRA rules apply to all members and persons associated with a member and that such persons have the same duties and obligations as a member under the rules.

[18] Cotto purportedly relied upon the guidance set forth in NASD Notice to Members 99-49 in determining that he did not need to register as a principal, arguing that the notice clarifies that an outside director's participation in board meetings does not by itself rise to the level of being actively engaged in a member firm's management. However, this notice also states that, among other things, a general counsel "is required to be registered if he or she sits on the member's board of directors or otherwise participates in the management of the member's securities or investment banking business. . . . If the general counsel . . . is not a director but has management-level responsibilities for supervising any aspect of the member's investment banking or securities business, then he or she would have to be registered as a principal." Cotto had management-level responsibilities for Harvest Capital during all relevant time periods and was never merely an outside director of the Firm. Thus, this notice does not support Cotto's argument that he did not need to register with FINRA as a principal. Cotto also points to

[Footnote continued on next page]

employee of Harvest Capital and did not fall into one of the five enumerated categories of persons required to register as principals as set forth in NASD Rule 1021(b), Cotto actively managed Harvest Capital's business and thus fell within the scope of the rule. *See Lee & Gordon*, 2008 SEC LEXIS 819, at *25 n.31. Further, at no time did Cotto identify himself as acting on behalf of the realty division of Harvest Capital, and the state applications expressly recite that Cotto was in fact pursuing securities business on behalf of Harvest Capital. Indeed, during all relevant time periods all of Harvest Capital's revenues were derived solely from its securities business.

Finally, we reject Cotto's assertion that Harvest Capital did not engage in any securities business during the relevant time periods. Cotto testified that Harvest Capital operated as an introducing broker-dealer, and from 2002 to 2006, Harvest Capital earned revenue derived from securities transactions ranging from between $90,000 to $180,000.[19] Respondents were required to comply with FINRA's registration requirements, and respondents' failure to do so violated FINRA's rules.[20]

B. Respondents Violated NASD Rules 8210 and 2110

NASD Rule 8210 requires persons subject to FINRA's jurisdiction to provide information requested by FINRA and to permit the inspection and copying of books, records or accounts. As has been often observed, because FINRA lacks subpoena power, it must rely upon

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language in NASD Rule 1021(a) stating that "[a] member may, however, maintain or make application for the registration as a representative of a person who performs legal, compliance, internal audit, back-office operations, or similar responsibilities for the member[.]" Cotto argues that because the language in NASD Rule 1021(a) is permissive, it does not require registration in any capacity for a member firm's legal counsel. Under the facts and circumstances Cotto's reliance on NASD Rule 1021(a) is misplaced. The scope of Cotto's activities included management of Harvest Capital's securities business. Thus, Cotto was required to register as a principal, and the fact that he may also have served as Harvest Capital's legal counsel does not negate the requirement that he register as a principal when he was acting as one.

[19] Further, although Cotto claimed that Harvest Capital was merely an introducing broker-dealer for institutional customers, Cotto disseminated promotional literature that portrayed the Firm as providing a wide-array of securities related services for all types of customers.

[20] The record contains no explanation for Cotto's repeated failures to timely appear or appear at all to take the Series 7 qualification examination, which was one of the prerequisites to registration as a principal. We note that this disciplinary proceeding and the resulting sanctions were, in large part, the result of Cotto's failure to become properly qualified despite his knowledge of FINRA's qualification requirements. Unfortunately for Cotto, he bears ultimate responsibility for passing FINRA's qualification examinations and the consequences for failing to abide by FINRA's rules.

NASD Rule 8210 "to police the activities of its members and associated persons." *Joseph Patrick Hannan*, 53 S.E.C. 854, 858-59 (1998). "The failure to respond to NASD information requests frustrates NASD's ability to detect misconduct, and such inability in turn threatens investors and markets." *PAZ Sec., Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *appeal docketed,* No. 08-1188 (D.C. Cir. May 13, 2008). Members and associated persons must cooperate fully in providing requested information. *See Michael David Borth*, 51 S.E.C. 178, 180 (1992). Associated persons "cannot take it upon themselves to determine whether information requested is material to an NASD investigation of their conduct." *Dep't of Enforcement v. Sturm*, Complaint No. CAF000033, 2002 NASD Discip. LEXIS 2, at *9 (NASD NAC March 21, 2002).

The Hearing Panel found that: (1) Cotto failed to provide certain documents to FINRA, as set forth in FINRA's July 1, 2005 request that Cotto appear for an on-the-record interview; and (2) Harvest Capital (by and through Cotto) failed to respond fully and completely to the first four of FINRA's five written requests for information sent to Cotto beginning in February 2006, and failed to respond at all to FINRA's fifth written request. For the reasons set forth below, we affirm the Hearing Panel's findings.

1. Cotto Failed to Produce Documents at his On-the-Record Interview

Enforcement sent a letter to Cotto dated July 1, 2005, requesting that he appear for an on-the-record interview and produce certain documents, including "all correspondence, electronic transmissions or other written communications received or sent from June 1, 2004 to the present that relate to the business of HCI[.]" There is no dispute that Cotto neither produced nor brought to his on-the-record interview any documentation regarding his communications with Citigroup or Goldman Sachs. Likewise, Cotto admits that he did not produce any documentation regarding his communications with the states of Indiana, Virginia, or California. FINRA staff only discovered the existence of these documents in November 2005 after interviewing Vo. In addition, Cotto did not provide FINRA with any of his correspondence with potential hires.

Despite Cotto's failure to produce these documents, Cotto argues that because Harvest Capital's relationships with Citigroup and Goldman Sachs were not finalized at the time of the on-the-record interview, he did not believe that any documents or information pertaining to his dealings with these entities were relevant to FINRA's request and thus chose not to produce them. Cotto also argues that the communications and documentation related to Harvest Capital's designation as a minority-owed business were not related to Harvest Capital's securities business, but to Harvest Capital Realty Services' pursuit of real estate brokerage business.[21]

We reject these arguments. As an initial matter, the agreement between Harvest Capital and Citigroup was executed on or about July 12, 2005—nine days prior to Cotto's on-the-record interview. Regardless, FINRA requested "all correspondence, electronic transmissions or other written communications received or sent from June 1, 2004 to the present that relate to the

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[21] Cotto also argues, as he did in connection with his failure to register, that he hired employees while acting as general counsel. This argument is without merit.

business of [Harvest Capital.]" Cotto's communications with Citigroup and Goldman Sachs, as well as his communications with the various state entities and potential employees, fell within the parameters of FINRA's request. This is true regardless of whether arrangements with Citigroup or Goldman Sachs had been finalized at the time of the on-the-record interview. Cotto could not decide which documents were relevant to FINRA's inquiries. *See PAZ Sec.*, 2008 SEC LEXIS 820, at *21.

Further, the record undercuts Cotto's argument that he communicated with various state entities in connection with Harvest Capital's real estate business and not its securities business. The applications with the state entities expressly state that they were on behalf of Harvest Capital Investments, LLC, and were filed in connection with securities related opportunities. Cotto also repeatedly referred to Harvest Capital as a "broker-dealer . . . currently licensed and in good standing with the National Association of Securities Dealers."[22] Regardless, FINRA's request did not limit the production of documents related only to Harvest Capital's securities business. Thus, we find that Cotto failed to produce the documents requested in FINRA's July 1, 2005 request for information, in violation of NASD Rules 8210 and 2110.

2. Respondents Failed to Respond Fully and Completely to Information Requests

We further find that Harvest Capital (by and through Cotto) failed to respond fully and completely to FINRA's 2006 written requests for information. Although respondents assert that they responded completely to all of FINRA's five written requests for information, the record shows that Cotto, on behalf of Harvest Capital, failed to respond fully and completely to four of the five written requests, and that Cotto ignored completely the fifth request. Cotto controlled Harvest Capital and its response to FINRA's requests for information, and was responsible for Harvest Capital's incomplete responses to the first four written requests and the failure to respond at all to the fifth written request.

For example, despite FINRA's requests for bank statements and canceled checks for a seven-month period, respondents admittedly produced less than half of the requested bank statements and canceled checks only for April 2005. Likewise, despite FINRA's request for explanations concerning commissions received by Harvest Capital, a check drawn on Harvest Capital's account made payable to BMW, and Cotto's failure to disclose the June 2004

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[22] Cotto testified that typographical errors caused Harvest Capital to be listed as the entity seeking designation as a minority-owned business, and further attributes his failure to produce documents to administrative oversight. In light of Cotto's rationale for not producing the documents related to Goldman Sachs, Citigroup, and the various state entities (i.e., he determined that such documents were outside the scope of FINRA's requests and intentionally decided not to produce such documents), the Hearing Panel found that Cotto's explanations were not credible. We agree. *See Dep't of Enforcement v. Mizenko*, Complaint No. C8B030012, 2004 NASD Discip. LEXIS 20, at *16 n.11 (NASD NAC Dec. 21, 2004) (stating that a hearing panel's credibility determinations are entitled to deference and can only be overturned by substantial evidence), *aff'd*, Exchange Act Rel. No. 52600, 2005 SEC LEXIS 2655 (Oct. 13, 2005).

Complaint and his subsequent suspension on his Form U4, respondents failed to provide FINRA with any information or explanations. Further, respondents failed to produce any documents regarding Citigroup, Goldman Sachs, or the applications filed with the three states. Finally, respondents provided no response whatsoever to the last of FINRA's five written requests.

Cotto states without any explanation that the documents produced to FINRA constituted all the documents in his possession. The record, however, does not support Cotto's claim. Cotto, Harvest Capital's sole owner, kept Harvest Capital's books and records at his home, and the pertinent documents included correspondence between Cotto and other parties. Regardless, Cotto did not describe in any detail his efforts to obtain documents, nor did he explain why he was not in possession of the requested documents. *See Rooney A. Sahai*, Exchange Act Rel. No. 55046, 2007 SEC LEXIS 13, at *13 (Jan. 5, 2007) ("We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability."). Thus, we find that respondents failed to respond completely and fully to FINRA's requests for information in violation of NASD Rules 8210 and 2110.

C. Form U4 and Form BD Violations

NASD Rule 2110 and IM-1000-1 require associated persons to disclose accurately and fully information required in the Form U4 and to observe high standards of commercial honor and just and equitable principles of trade. Self-regulatory organizations, state regulators, and broker-dealers utilize the Form U4 to determine and monitor the fitness of securities professionals. *See Rosario R. Ruggiero*, 52 S.E.C. 725, 728 (1996). The failure of an applicant for FINRA registration to fully and accurately disclose all information required by the Form U4 violates NASD Rule 2110 and IM-1000-1. *See Dep't of Enforcement v. Zdzieblowski*, Complaint No. C8A030062, 2005 NASD Discip. LEXIS 3, at *13-14 (NASD NAC May 3, 2005). Article V, Section 2(c) of FINRA's By-Laws requires that an associated person keep his Form U4 current at all times and amend the form within 30 days after learning of facts or circumstances giving rise to the amendment.

Similarly, Article IV, Section 1(c) of FINRA's By-Laws requires members to ensure that their membership applications are kept current. A failure to disclose material facts on a Form BD violates IM-1000-1. *See Richard F. Kresge*, Exchange Act Rel. No. 55988, 2007 SEC LEXIS 1407, at *52 (June 29, 2007). A FINRA form that is inaccurate or incomplete so as to be misleading, or the failure to correct such a filing after notice thereof, may be deemed to be conduct inconsistent with just and equitable principles of trade. *See* IM-1000-1.

We affirm the Hearing Panel's findings that Cotto filed a false or inaccurate Form U4 and Form U4 amendments, in violation of NASD Rule 2110 and IM-1000-1. On five different occasions, Cotto filed (or caused to be filed) his Form U4 and amendments thereto without disclosing the June 2004 Complaint.[23] Cotto also failed to disclose FINRA's imposition of a six-

[23] Question 14G of the Form U4 requires that an individual disclose any notification in writing that he has been the subject of a regulatory complaint or investigation. Question 14E

[Footnote continued on next page]

month suspension in connection with the June 2004 Complaint. Likewise, Cotto took no action after receiving formal written notice from FINRA in June 2006 that he was the subject of an investigation and needed to update his Form U4. Cotto's failures to disclose these events violated NASD Rule 2110 and IM-1000-1.

We reject Cotto's attempts to blame several of the principals he hired for the deficiencies in the amendments to his Form U4. *See Dep't of Enforcement v. Howard*, Complaint No. C11970032, 2000 NASD Discip. LEXIS 16, at *31-32 (NASD NAC Nov. 16, 2000) (holding that "the responsibility for maintaining the accuracy of a Form U4 lies with each registered representative"), *aff'd*, 55 S.E.C. 1096 (2002), *aff'd*, 77 F. App'x 2 (1st Cir. 2003). Indeed, the record shows that several of the principals that Cotto blames were not even with the Firm at the time of such filings, and Cotto permitted others at Harvest Capital to use his user identification and password to file documents without reviewing such documents for accuracy at any time. Moreover, Cotto's testimony that he "didn't even know that the [Form] U4 had to be updated" is dubious given that Harvest Capital was previously disciplined for failing to keep its Form BD current, and even if true does not excuse Cotto's misconduct. *See Dist. Bus. Conduct Comm. v. Merz*, Complaint No. C8A960094, 1998 NASD Discip. LEXIS 40, at *33 (NASD NAC Nov. 11, 1998) ("The SEC has repeatedly held that ignorance of the NASD's rules is no excuse for their violation.").[24]

We also find that Harvest Capital, through Cotto, filed false or inaccurate amendments to the Firm's Form BD in violation of NASD Rule 2110 and IM-1000-1. For example, in a May 2005 filing, Masson is falsely listed as the Firm's compliance officer, despite the fact that Masson terminated his association with the Firm several months prior. In addition, Cotto was delinquent in removing the names of the FINOPs and principals who had resigned from the Firm from the Form BD. Failure to promptly update such information was particularly important based upon FINRA's concerns, stated to Cotto in late 2004, that Harvest Capital was operating without the requisite number of principals. As set forth herein, Cotto controlled and managed Harvest Capital during all relevant time periods, and he is accountable for the Firm's violations.

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requires disclosure of any findings by FINRA that the individual violated its rules or a suspension imposed by FINRA.

[24] Cotto implies that any violations by respondents were the result of FINRA having "scared off" and harassed principals and potential principals from working at Harvest Capital. The record, however, contains no evidence supporting such allegations. Further, respondents cannot shift the blame for their misconduct onto FINRA staff. *See Donner Corp. Int'l*, Exchange Act Rel. No. 55313, 2007 SEC LEXIS 334, at *64 (Feb. 20, 2007) (holding that "a broker-dealer cannot shift its responsibility for compliance with applicable requirements to the NASD.").

Moreover, we affirm the Hearing Panel's findings that Cotto's violations were willful.[25] To support a finding that Cotto acted willfully, we need not find that he intended to violate FINRA rules. Rather, "[a] willfulness finding is predicated on [a respondent's] intent to commit the act that constitutes the violation--completing [forms] inaccurately." *See Zdzieblowski*, 2005 NASD Discip. LEXIS 3, at *14. Cotto was aware of each event requiring disclosure on his Form U4 and Harvest Capital's Form BD, yet he failed to update these documents or cause such documents to be updated. Consequently, we affirm the Hearing Panel's findings that Cotto willfully failed to update his Form U4 and Harvest Capital's Form BD, and filed false amendments to each form, in violation of NASD Rule 2110 and IM-1000-1.[26]

III. Sanctions

In connection with respondents' registration violations, the Hearing Panel found that respondents' misconduct was egregious, particularly in light of Cotto's prior suspension for similar misconduct. The Hearing Panel thus expelled Harvest Capital from FINRA membership and imposed a bar upon Cotto in all capacities. The Hearing Panel also found that respondents' violations of NASD Rules 8210 and 2110 were intentional, that no mitigating factors existed, and that several aggravating factors warranted a separate expulsion and bar. The Hearing Panel also ordered that respondents pay, jointly and severally, $4,075.70 in costs. In light of the expulsions and bars imposed upon respondents in connection with their registration violations and violations of NASD Rules 8210 and 2110, the Hearing Panel did not impose any additional sanctions for respondents' Form U4 and Form BD violations. After careful consideration, we affirm the Hearing Panel's sanctions.

A. Respondents' Registration Violations

The FINRA Sanction Guidelines ("Guidelines") for registration violations recommend a fine of $2,500 to $50,000 and a suspension of the responsible individual in any or all capacities for up to six months.[27] In egregious cases, the Guidelines recommend suspending the firm with

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[25] Our finding that Cotto acted willfully causes him to become statutorily disqualified from association with FINRA pursuant to Section 15(b)(4)(A) of the Securities Exchange Act of 1934 and Article III, Section 4 of FINRA's By-Laws.

[26] Cotto also argues that FINRA unfairly targeted Harvest Capital for prosecution. To make a showing that FINRA has engaged in selective prosecution, Cotto must demonstrate that: (1) he and/or the firm was singled out for enforcement while others similarly situated were not; and (2) such prosecution was motivated by arbitrary or unjust considerations (e.g., race, religion, or the desire to prevent the exercise of a constitutionally protected right). *See Terrance Yoshikawa*, Exchange Act Rel. No. 53731, 2006 SEC LEXIS 948, at *28-29 (Apr. 26, 2006), *aff'd*, 235 F. App'x 475 (9th Cir. 2007). The record is devoid of any evidence to support such a contention, and we therefore reject this argument.

[27] *FINRA Sanction Guidelines* 48 (2007), http://www.finra.org/web/groups /enforcement/documents/enforcement/p011038.pdf [hereinafter *Guidelines*].

respect to any activities or functions for up to 30 business days and suspending the responsible individual for up to two years or imposing a bar.[28] In determining the proper remedial sanction, adjudicators should consider whether the respondent has filed a registration application, the nature and extent of the unregistered person's responsibilities, and the general principles and principal considerations applicable to all sanction determinations.[29]

Respondents' violations were egregious.[30] First, Cotto actively engaged in extensive activities as a principal despite not being registered. Cotto engaged in certain of these activities while the June 2004 Complaint alleging registration violations was pending, and much of the misconduct actually occurred during Cotto's six-month suspension for similar misconduct. Respondents are recidivists and severe sanctions are necessary.[31] Second, Cotto knowingly and intentionally engaged in his activities despite his lack of registration.[32] Third, respondents' misconduct occurred over several years and involved numerous and varied instances of misconduct.[33] Fourth, Cotto benefited financially from his continued management of Harvest Capital, as Harvest Capital paid RETA (solely owned by Cotto) a monthly "consulting" fee of $12,000 derived solely from Harvest Capital's commissions earned on securities transactions.[34] Fifth, the record shows that Cotto hired a number of the principals in name only while Cotto continued to manage the Firm, thus concealing his misconduct from FINRA and permitting his misconduct to continue over an extended period of time.[35] For example, Cotto falsely informed

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28 *Id.*

29 *Id.*

30 Cotto is the sole owner and manager of Harvest Capital and had complete control of the Firm during all relevant time periods, including while he purportedly served his six-month suspension and during which time he actively managed Harvest Capital's securities business. Under these circumstances, it is appropriate and necessary to sanction both Cotto and Harvest Capital for this misconduct.

31 *Id.*; *see also id.*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2); *id.* at 6 (Principal Considerations in Determining Sanctions, No. 1). In addition, in November 2004, FINRA expressed its concerns that Cotto appeared to be running the firm's day-to-day operations and requested a detailed explanation of Cotto's plans to take and pass the Series 7 and Series 24 qualification exams.

32 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

33 *Id.* at 6 (Principal Considerations in Determining Sanctions, Nos. 8 and 9).

34 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 17).

35 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 10). Further, Cotto contacted Vo just prior to Vo's on-the-record interview to inform Vo that Cotto was acting as RETA's counsel during the relevant time periods.

FINRA in February 2005 that during his suspension Masson and Kim would be "in charge of supervising" the Firm. Masson's responsibilities, however, were limited to contacting pension funds and he terminated his association with Harvest Capital shortly after the letter was sent. Kim terminated his association with the Firm prior to performing any services. Finally, Cotto has continuously and repeatedly failed to accept responsibility for his misconduct. Instead, Cotto blames his administrative assistant, the principals he hired, and FINRA staff for his misconduct.[36] FINRA's registration requirements provide important safeguards in protecting investors, and respondents' intentional and extensive misconduct frustrated the purposes of such requirements. *See Michael F. Flannigan*, Exchange Act Rel. No. 47142, 2003 SEC LEXIS 40 at *13-14 (Jan. 8, 2003). Under the circumstances, we find that expelling Harvest Capital from FINRA membership and barring Cotto in all capacities are the only effective remedial sanctions.

B. Respondents' Violations of NASD Rules 8210 and 2110

For failing to respond to a FINRA request for information in any manner, a bar should be the standard sanction.[37] If there are mitigating factors present, or the person did not respond in a timely manner, adjudicators should consider suspending the individual in any or all capacities for up to two years.[38] In the case of a firm, the Guidelines state that in egregious cases, expulsion is the appropriate standard. If there are mitigating factors present, adjudicators should consider suspending the firm with respect to any or all activities or functions for up to two years.[39] The Guidelines instruct adjudicators to consider, in addition to the principal considerations and general principles applicable to all violations, the nature of the information requested and whether the information was provided and, if so, the number of requests made, the time it took the respondent to respond, and the degree of regulatory pressure required to obtain a response.[40]

We affirm the Hearing Panel's expulsion and bar of Harvest Capital and Cotto, respectively, and find that Cotto's failure to produce numerous documents to FINRA at his on-the-record interview and respondents' subsequent failure to respond completely to FINRA's written requests for information were willful and egregious.[41] The information requested by FINRA was crucial to its primary inquiry into Cotto's activities (i.e., whether he was violating FINRA's registration requirements). Despite express knowledge that FINRA was seeking

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36 *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 2).

37 *Guidelines*, at 35.

38 *Id.*

39 *Id.*

40 *Id.*

41 The Hearing Panel properly assessed a single sanction for respondents' separate violations of NASD Rules 8210 and 2110. *See id.* at 4 (General Principles Applicable to All Sanction Determinations, No. 4).

information concerning his role and activities with Harvest Capital, and despite FINRA's prior stated concerns that Cotto was not registered pursuant to FINRA's rules (and Cotto's prior suspension for violation of such rules), Cotto intentionally failed to produce the documentation regarding his dealings with Citigroup, Goldman Sachs, any of the states for which Harvest Capital sought minority-owned business designations, or his hiring of Firm personnel. These documents demonstrated that Cotto was, in fact, acting in a principal capacity. Cotto intentionally chose not to produce these documents and frustrated FINRA's investigation into respondents' violations of important investor safeguards.[42] *See Flannigan*, 2003 SEC LEXIS 40 at *13-14.

Further, with respect to the request that Cotto bring documents to the July 2005 on-the-record interview, FINRA only discovered the existence of the documents during Vo's on-the-record interview in November 2005, which required FINRA to issue its written requests seeking information from respondents beginning in February 2006. With respect to the written requests, FINRA was forced to repeatedly ask respondents for information, and respondents repeatedly failed to produce all requested documents and information despite numerous requests to do so. Indeed, after providing only a small number of requested documents in response to the first four written requests, respondents completely ignored the fifth and final written request from FINRA. Cotto and Harvest Capital's willfully deficient responses to FINRA's requests for information were egregious.

We find additional aggravating factors in this case. Similar to respondents' registration violations, Cotto was previously sanctioned for violations of NASD Rules 8210 and 2110.[43] Cotto again blames his administrative assistant for his failure to bring documents with him to the on-the-record interview, and his intentional withholding of documents from FINRA concealed his registration violations over an extended period of time.[44] For all of these reasons, we find that anything short of expulsion and a bar would be insufficient to remedy respondents' misconduct and to deter respondents from engaging in future misconduct. *See Perpetual Sec., Inc.*, Exchange Act Rel. No. 56613, 2007 SEC LEXIS 2353 (Oct. 4, 2007) (holding that where aggravating circumstances indicate that a respondent is unfit to participate in the securities industry, a bar is appropriate for a failure to respond completely). Respondents have demonstrated that they are unfit to continue to participate in the securities industry, and we therefore expel Harvest Capital from FINRA membership and bar Cotto in all capacities for their intentional and repeated violations of NASD Rules 8210 and 2110.

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42 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 13).

43 *Guidelines*, at 2 (General Principles Applicable to All Sanction Determinations, No. 2); *id.* at 6 (Principal Considerations in Determining Sanctions, No. 1).

44 *Id.* at 6-7 (Principal Considerations in Determining Sanctions, Nos. 2, 9, 10, 12, 13);

C. Respondents' Form U4 and Form BD Violations

In light of the expulsions and bars imposed in connection with respondents' registration violations and failures to respond fully and completely to FINRA's requests for information, we do not impose additional sanctions for respondents' violations related to the Forms U4 and BD.

IV. Conclusion

We affirm the Hearing Panel's findings that respondents violated FINRA's registration requirements, violated NASD Rules 8210 and 2110, and willfully filed false or inaccurate amendments to Cotto's Form U4 and Harvest Capital's Form BD. We further affirm the Hearing Panel's expulsion of Harvest Capital and bar of Cotto for the registration violations and separate expulsion of Harvest Capital and bar of Cotto for their violations of NASD Rule 8210 and 2110. Accordingly, we expel Harvest Capital from FINRA membership, bar Cotto in all capacities, and order that they pay, jointly and severally, $4,075.70 in costs.[45]

On behalf of the National Adjudicatory Council,

Marcia E. Asquith

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

[45] The expulsions and bars are effective as of the date of this decision. We have also considered and reject without discussion all other arguments advanced by the parties.