

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2013036217601

Hearing Officer-CC

**ORDER GRANTING IN PART AND DENYING IN PART
ENFORCEMENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION**

I. Background

The Department of Enforcement ("Enforcement") filed the Complaint in this matter on October 30, 2014.¹ Cause one of the Complaint alleges that Respondent recommended unsuitable investments to four customers when he recommended that the customers purchase interests in a limited liability company ("LLC") promoted by Capital City Corp. ("CCC"). Cause two of the Complaint alleges that, by participating in sales of CCC LLC interests, Respondent engaged in private securities transactions without providing his member firm, Allstate Financial Services, LLC ("Allstate"), with prior written notice. Cause three alleges that Respondent provided Allstate with false information regarding private securities transactions. Cause four alleges that Respondent lied to FINRA in response to Rule 8210 requests for information. Cause five alleges that Respondent failed to appear twice for on-the-record ("OTR") testimony.

On February 27, 2015, Enforcement filed a motion for partial summary disposition, requesting that the Hearing Panel grant summary disposition as to the allegations in cause four that Respondent falsely stated, in response to a Rule 8210 request for information, that he had not received money from CCC or a related entity. Enforcement also seeks summary disposition as to all of the allegations in cause five.

Respondent filed an opposition on March 13, 2015, in which he argues that genuine issues of material fact are present.

¹ On March 9, 2015, Enforcement filed an Amended Complaint. Enforcement's amendments are unrelated to the causes of action at issue in this motion, causes four and five.

II. Facts

The Hearing Panel finds, pursuant to FINRA Rule 9264(c), that the following facts appear without substantial controversy.

In May 2002, Respondent associated with Allstate.² Allstate terminated Respondent's association on March 7, 2013.³ Respondent remains subject to FINRA jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) Enforcement filed the Complaint on October 30, 2014, which is within two years of the termination of registration and association with a member firm; and (2) the allegations of the Complaint involve conduct that occurred while Respondent was registered or associated with a FINRA member.⁴

A. Failure to Appear for Two OTR Sessions – Cause Five

On January 22, 2014, Enforcement served Respondent with a request, pursuant to FINRA Rule 8210, for Respondent to appear for OTR testimony at FINRA's Atlanta, Georgia office on February 19, 2014.⁵ Enforcement served the request by sending it to Respondent's counsel by email, first-class mail, and Federal Express delivery.⁶ On February 6, 2014, Respondent's counsel advised Enforcement staff that Respondent refused to appear for testimony on February 19, 2014.⁷ Respondent received proper notice of the request and failed to appear.⁸

On February 19, 2014, Enforcement served Respondent with a request, pursuant to FINRA Rule 8210, for Respondent to appear for OTR testimony at FINRA's Atlanta, Georgia office on March 4, 2014.⁹ Enforcement served the request by sending it to Respondent's counsel by email, first-class mail, and Federal Express delivery.¹⁰ On March 3, 2014, Respondent's counsel advised Enforcement staff that Respondent refused to appear for testimony on March 4, 2014.¹¹ Respondent received proper notice of the request and failed to appear.¹²

² Complaint ("Compl.") ¶ 18; Answer ("Ans.") ¶ 18.

³ Compl. ¶ 18; Ans. ¶ 18.

⁴ Compl. ¶ 18; Ans. ¶ 18.

⁵ Compl. ¶¶ 88, 122; Ans. ¶¶ 88, 122; Enforcement's Summary Disposition Exhibit ("SDX")-4.

⁶ Compl. ¶¶ 88, 122-123; Ans. ¶¶ 88, 122-123; SDX-4; Declaration of Wendoly Velez dated February 24, 2015 ("Valez Decl.") ¶ 6.

⁷ Compl. ¶¶ 89, 123; Ans. ¶¶ 89, 123.

⁸ Compl. ¶¶ 90, 122-124; Ans. ¶¶ 90, 122-124.

⁹ Compl. ¶¶ 91, 122; Ans. ¶¶ 91, 122; SDX-5.

¹⁰ Compl. ¶¶ 91, 122-123; Ans. ¶¶ 91, 122-123; SDX-5; Valez Decl. ¶ 8.

¹¹ Compl. ¶¶ 92, 123; Ans. ¶¶ 92, 123.

¹² Compl. ¶¶ 93, 122-124; Ans. ¶¶ 89-90, 93, 122-124.

Respondent contends in his Answer to the Complaint that his reasons for failing to appear involve events that occurred in January 2014.¹³ On October 18, 2013, Enforcement sent a Rule 8210 request for Respondent to appear at FINRA's Atlanta, Georgia office on January 15, 2014, and provide OTR testimony.¹⁴ Enforcement sent the request by certified and first class mail to Respondent at his address indicated in the Central Registration Depository ("CRD"), and the letters were returned as undeliverable.¹⁵ On November 18, 2013, Enforcement contacted Respondent, and he provided Enforcement with a more current address.¹⁶ On November 18, 2013, Enforcement sent a Rule 8210 request for Respondent to appear at FINRA's Atlanta, Georgia office and provide OTR testimony on January 15, 2014.¹⁷ Enforcement sent the request to the address that Respondent provided.¹⁸

On January 14, 2014, Enforcement advised Respondent that Enforcement must reschedule Respondent's OTR testimony because the examiner scheduled to conduct the examination had fallen ill.¹⁹ Enforcement spoke with Respondent's counsel in the evening on January 14, 2014.²⁰ Respondent's counsel refused to provide alternate dates for Respondent's OTR testimony and insisted that Enforcement proceed on January 15, 2014.²¹ Respondent and his attorney appeared at FINRA's Atlanta, Georgia office on January 15, 2014, and Enforcement did not take Respondent's testimony.²²

Respondent states in his opposition to Enforcement's motion for partial summary disposition that, on November 18, 2013, Enforcement requested his appearance on January 15, 2014, to provide on-the-record testimony and that he, in fact, appeared on January 15, 2014. He states that Enforcement contacted him to reschedule the January 15 testimony, but he nonetheless appeared and was willing to proceed. Respondent argues that an attorney from Enforcement whose name also appeared on the request for Respondent's testimony was at FINRA on January 15, 2014, and should have conducted the OTR regardless of the examiner's illness. Respondent also argues that the motion is now moot because he testified on March 4, 2015.

¹³ Ans. ¶¶ 89, 124.

¹⁴ Compl. ¶ 83; Ans. ¶ 83.

¹⁵ Compl. ¶ 83; Ans. ¶ 83.

¹⁶ Compl. ¶ 84; Ans. ¶ 84.

¹⁷ Compl. ¶ 85; Ans. ¶ 85.

¹⁸ Compl. ¶ 85; Ans. ¶ 85.

¹⁹ Compl. ¶ 87; Ans. ¶ 87; Declaration of Joshua R. Doolittle dated February 24, 2015 ("Doolittle Decl.") ¶¶ 7-8. Enforcement learned for the first time during this communication that Respondent was represented by counsel. Doolittle Decl. ¶ 9.

²⁰ Doolittle Decl. ¶¶ 10-11.

²¹ Doolittle Decl. ¶¶ 10-11; SDX-3.

²² Compl. ¶ 87; Ans. ¶ 87; SDX-3.

B. Providing False Information in Response to Rule 8210 Request

On January 22, 2014, Enforcement sent Respondent a FINRA Rule 8210 request for information and documents asking for, among other items, a description of "any monies [Respondent] received" from CCC and a list of its affiliated entities.²³ In response, Respondent stated that he did not receive "any monies" from any of the entities listed in FINRA's request.²⁴ Enforcement appended to its motion for summary disposition copies of five checks payable to Respondent that appear to have been negotiated by Respondent.²⁵ Four checks are from Clean Sweeps Holding Group, LLC ("Clean Sweeps") and one is from CCC.²⁶

Respondent states in his opposition to Enforcement's motion for partial summary disposition that he did not receive compensation from CCC or its affiliated entities for "doing a job." He admits that he received "referral fees" totaling \$11,792 for telling his long-time clients and friends what he learned about CCC. He contends that, when he told his clients and friends about CCC, he had no expectation of receiving any compensation for doing so. He also states that FINRA asked about the money he received four years after his actual receipt of the money. He claims that he "simply forgot" that he received referral fees.

III. Discussion

A. Summary Disposition Standards

FINRA Rule 9264(e) authorizes a FINRA Hearing Panel to grant a motion for summary disposition 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.²⁷ Rule 9264(e) further states that the facts alleged in the pleadings of the party against whom the motion is made, in this case Respondent, shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145.

When considering a motion for summary disposition, the Hearing Panel may find guidance in Rule 56 of the Federal Rules of Civil Procedure and related case law.²⁸ Inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing

²³ Compl. ¶ 80; Ans. ¶ 80; SDX-7 at 2.

²⁴ Compl. ¶ 81; Ans. ¶ 81; SDX-8 at 1.

²⁵ SDX-9.

²⁶ SDX-9. The four checks from Clean Sweeps total \$11,792. Respondent appears to have endorsed the checks. SDX-9 at 2-5. The CCC check does not include an endorsement but appears to have been negotiated. SDX-9 at 1.

²⁷ See OHO Order 07-37 (2005001919501) (Oct. 16, 2007), <http://www.finra.org/sites/default/files/OHODecision/p037809.pdf> (granting partial summary disposition based on the standards established in FINRA Rule 9264).

²⁸ *Dep't of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at *12 n.9 (NASD NAC Feb. 12, 2007) (citing *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (NASD NAC Sept. 9, 2003)).

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summary disposition which, in this case, is Respondent.²⁹ “[I]f there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed,” summary disposition must be denied.³⁰ “All reasonable inferences must be drawn in favor of the party opposing summary disposition.”³¹

Enforcement, as the movant, bears the burden of establishing the absence of a genuine issue of material fact.³² Accordingly, it is Enforcement’s responsibility to inform the Hearing Panel “of the basis for its motion” and to identify “those portions of ‘the pleadings, depositions . . . and admissions on file, together with the affidavits, if any,’ which it believes demonstrates the absence of a genuine issue of material fact.”³³ Once the movant has done so, the nonmoving party, Respondent, must “come forward with ‘specific facts showing that there exists a *genuine issue*’ for hearing.”³⁴ In assessing the merits of a motion for summary disposition, the issue is “whether the evidence presents a disagreement sufficient to require submission to fact finding.”³⁵ If, after a review of the evidence, there is a factual question that could affect the outcome of the case, the motion must be denied.³⁶

B. Substantive Standards

FINRA Rule 8210 provides FINRA staff with broad discretion to require associated persons to testify concerning any matter involved in a FINRA investigation, complaint, examination or proceeding.³⁷ Respondent possessed an unequivocal duty to cooperate with FINRA, even if he believed that FINRA improperly rescheduled his initial OTR.³⁸ Even if

²⁹ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); OHO Order 07-37 (2005001919501) at 10 (citing *Frank P. Quattrone*, Exchange Act Rel. No. 53547, 2006 SEC LEXIS 703, at *18 n.24 (Mar. 24, 2006)).

³⁰ *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996).

³¹ OHO Order 07-37, (2005001919501), at 10 (citing *Frank P. Quattrone*, Exchange Act Release No. 53,547, 2006 SEC LEXIS 703, at *18, n.24 (Mar. 24,2006)).

³² *Dep’t of Enforcement v. Respondent*, 2007 NASD Discip. LEXIS 13, at *12.

³³ *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

³⁴ *Id.* (citing *Matsushita Elec. Indus.*, 475 U.S. at 587).

³⁵ *Dep’t of Enforcement v. Respondent*, 2007 NASD Discip. LEXIS 13, at *13.

³⁶ *Dep’t of Enforcement v. Respondent*, *supra*, at *12 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

³⁷ *Dep’t of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *29 (FINRA NAC June 3, 2014); *Dep’t of Enforcement v. Gallagher*, No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *17 (FINRA NAC Dec. 12, 2012).

³⁸ See *Dep’t of Enforcement v. Mielke and Shultz*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *47 (FINRA NAC July 18, 2014) (“Associated persons therefore must cooperate fully in providing FINRA with information and may not take it upon themselves to determine whether the information FINRA has requested is material.”); *Dep’t of Enforcement v. Evansen*, 2014 FINRA Discip. LEXIS 10, at *28 (finding that Evansen possessed an unequivocal duty to appear and testify even if he viewed FINRA’s requests as superfluous in light of his earlier responses); *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21

FINRA had taken Respondent's testimony on January 15, 2014, when it originally was scheduled, Respondent would have been obligated to appear again and provide more testimony if requested.³⁹ His appearance on January 15, 2014, in FINRA's Atlanta, Georgia office did not excuse him from his responsibility to appear and testify subsequently, particularly given FINRA's notice to him that the OTR would be rescheduled.⁴⁰ "Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest."⁴¹

C. Ruling

The Hearing Panel grants Enforcement's motion for partial summary disposition as to cause five, which alleges that Respondent violated FINRA Rules 8210 and 2010 by failing to appear twice for OTR testimony. Respondent admits that he received the requests that he appear on two different dates and that he failed to appear in both instances. His only defense, that Enforcement should not be allowed to reschedule OTR testimony and that, if Enforcement reschedules, a registered person can choose not to appear, is not supported by the myriad decisions involving Rule 8210.⁴² Thus, on this issue, there are no genuine issues with regard to any material facts, and Enforcement is entitled to summary disposition as a matter of law.

The Hearing Panel denies Enforcement's motion for partial summary disposition as to cause four's allegations that Respondent provided false information in response to FINRA's Rule 8210 request regarding whether he received financial remuneration from CCC or its affiliates. The Hearing Panel finds that there are questions of fact including whether Respondent received and negotiated the five checks offered as SDX-9 or only four checks and the circumstances surrounding Respondent's receipt of the checks. Thus, genuine issues of material fact exist and fact finding is necessary as to these allegations.

(Jan. 30, 2009) (stating that associated persons "may not ignore NASD inquiries . . . nor take it upon themselves to determine whether information is material to an NASD investigation of their conduct").

³⁹ See *Dep't of Enforcement v. Evansen*, 2014 FINRA Discip. LEXIS 10, at *29 ("FINRA staff was under no obligation to justify or explain to Evansen its several requests that he appear and testify."); *Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998) (holding that, while the NAC found that Hannan's partial cooperation mitigated his subsequent refusal to appear for testimony, his cooperation did not excuse that subsequent failure).

⁴⁰ *Toni Valentino*, 57 S.E.C. 330, 337 (2004) ("members and associated persons may not impose conditions, such as the location of an interview, under which they will respond to NASD requests for information"); *Dep't of Enforcement v. Fawcett*, No. C9A040024, 2007 NASD Discip. LEXIS 2, at *25 (NASD NAC Jan. 8, 2007) ("Associated persons also are not free to determine the appropriate time to respond to staff's requests for information and are not entitled as a matter of right to adjourn the dates set for their Rule 8210 testimony.") (citing *Dep't of Enforcement v. Levitov*, No. CAF980025, 1999 NASD Discip. LEXIS 30, at *12-13 (NASD NAC Nov. 1, 1999)).

⁴¹ *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12-13 (Apr. 11, 2008).

⁴² See *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007) (finding that Rule 8210 does not require FINRA to explain its reasons for making an information request or justify the relevance of any particular request); *Ashton Noshir Gowadia*, 53 S.E.C. 786, 790 (1998) (finding that, once respondent knew that FINRA was seeking information from him, he had a responsibility to provide the information, even if he believed he already had answered sufficiently).

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D. Sanctions

The Hearing Panel will defer imposing sanctions for Respondent's violations under cause five until the issuance of its Decision in this matter.

IV. Conclusion

As to cause five of the Complaint, Enforcement has demonstrated that there are no genuine issues of material fact and that summary disposition is appropriate as a matter of law. Enforcement's motion for partial summary disposition therefore is granted as to cause five. As to cause four's allegations that Respondent provided false information to FINRA in response to Rule 8210 requests for information, the Hearing Panel finds that there are genuine issues as to material facts. These questions are best resolved by evidence presented at a hearing. Accordingly, Enforcement's motion for partial summary disposition is denied as to cause four. The Hearing Panel will impose sanctions for Respondent's violations under cause five in its Decision.

SO ORDERED.

Carla Carloni
Hearing Officer
For the Hearing Panel

Dated: April 2, 2015