FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JASON LYNN DIPAOLA (CRD No. 2648836), Respondent.	Disciplinary Proceeding No. 2018057274302 Hearing Officer–MC **HEARING** **PANEL DECISION** March 25, 2022

Respondent Jason Lynn DiPaola is fined $5,000 for (i) failing to disclose an outside account in which he exercised discretionary authority and (ii) failing to answer accurately two annual questionnaire certifications. He is also suspended from associating with any FINRA member firm in any capacity for 30 business days for failing to appear and provide on-the-record testimony.

Appearances

For the Complainant: Payne Templeton, Esq., Gary Chodosh, Esq., Jessica Brach, Esq., and Kay Lackey, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Ernest E. Badway, Esq., and Philip Z. Langer, Esq., Fox Rothschild LLP

DECISION

I. Introduction

FINRA's Department of Enforcement filed a Complaint against Respondent Jason Lynn DiPaola on May 3, 2021. The Complaint has three causes of action. The first two causes of action relate to DiPaola's trading in his mother's securities account at an outside firm without disclosing the account to his employer firm and the executing firm. The third and most serious allegation charges him with failing to appear and provide on-the-record ("OTR") testimony.

On its face, this is a simple case. Many underlying facts are undisputed, including that DiPaola actively traded in his mother's outside account, did not disclose it to his employer firm, and did not provide the requested testimony. Still, DiPaola denies the charges. He maintains that: (1) he did not engage in discretionary trading and therefore was not required to disclose his mother's account to his employer firm; (2) he did not control his mother's account, so he did not give misleading answers on the compliance questionnaires; and (3) FINRA lacked authority to require him to testify.

However narrow their factual disagreements, the parties could not differ more about the merits of the case or its proper outcome. Enforcement considers DiPaola's conduct egregious and wants him barred for failing to appear for an OTR interview, suspended for a lengthy period, and heavily fined for failing to disclose his mother's securities account. DiPaola insists the Complaint is meritless and should be dismissed.

The Hearing Panel finds that Enforcement proved the Complaint's allegations by a preponderance of the evidence. Considering the totality of the circumstances, however, we conclude that the appropriate remedial sanctions are far less severe than Enforcement seeks. Accordingly, the Hearing Panel imposes a $5,000 fine and a 30-day suspension for DiPaola's violations.

II. Background

A. Jurisdiction

DiPaola began his career in the securities industry in 1995 and then became associated with various FINRA firms until his registration was terminated on May 7, 2019.[1] Although DiPaola is no longer registered or associated with any FINRA member firm, he remains subject to FINRA's jurisdiction for the purposes of this disciplinary proceeding. This is because: (1) Enforcement filed the Complaint on May 3, 2021, four days before FINRA's jurisdiction was to expire; (2) the first two causes of action allege misconduct committed while he was registered with FINRA; and (3) his failure to provide OTR testimony as alleged in the third cause of action occurred within two years of the termination of his FINRA registration.[2]

B. DiPaola's Last Employment in the Securities Industry

DiPaola's last stint in the securities industry was with FINRA member firm Chardan Capital Markets, LLC, where he was registered from May 29, 2013, until May 7, 2019, when the firm filed a Uniform Termination Notice for Securities Industry Registration (Form U5) ending his registration shortly after he resigned.[3] DiPaola now works for a hedge fund that is not a FINRA member.[4]

At Chardan, DiPaola was not a trader and had no retail clients.[5] With the job title of senior vice president of institutional sales and trading, he worked in New York City in Chardan's Special Equities Group ("SEG"), in the firm's capital markets division,[6] which raised money for

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[1] Stipulations ("Stip.") ¶¶ 1-4.

[2] *See* FINRA By-Laws, Article V, Section 4.

[3] Hearing Transcript ("Tr.") 45-46.

[4] Tr. 53-54, 146.

[5] Tr. 64.

[6] Tr. 56-58.

publicly traded companies.[7] DiPaola described SEG as an "investment banking group," but did not consider himself to be an investment banker. According to DiPaola, his job at Chardan was to identify publicly traded companies that Chardan might be interested in providing with financing.[8]

C. Origin of the Investigation

This disciplinary proceeding originated with a FINRA Member Supervision Department examination of Chardan in the summer of 2017.[9] The examination encompassed several areas of inquiry, including Chardan's supervisory procedures and controls over its brokers' personal outside trading accounts.[10] While reviewing trading in those accounts, the examiners discovered that brokers traded in stock offered by two issuers with which Chardan had investment banking relationships. This led the examiners to focus on DiPaola.[11] The staff found there were several such accounts held at E*Trade Securities, Inc. in Respondent's name, and one in his mother's name.[12]

D. The Complaint and Answer

Enforcement filed a three cause Complaint against DiPaola. The first cause of action charges DiPaola with trading with discretionary authority in his mother's securities account, from March 2015 through March 2017, without disclosing the account to Chardan, or to E*Trade, in violation of NASD Rule 3050(c) and FINRA Rule 2010.[13] The second cause of action charges him with submitting to Chardan two false and misleading annual employee compliance certification forms on which he failed to disclose that he controlled his mother's account, in violation of FINRA Rule 2010. The third cause of action charges that DiPaola failed to appear and give OTR testimony in April 2021, in violation of FINRA Rules 8210 and 2010.

In his Answer, DiPaola generally denies the allegations. He denies trading with discretion or having any interest in, or control over, his mother's account. As for the Rule 8210 requests for an OTR interview in April 2021, DiPaola claims that Enforcement lacked the authority to require him to appear. Enforcement had obtained his testimony at previous OTR interviews. He claims that the April 2021 request "lapsed" after FINRA's Department of Enforcement issued him a

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[7] Tr. 64.

[8] Tr. 64-65.

[9] Tr. 261.

[10] Tr. 261-62.

[11] Tr. 262-63.

[12] Tr. 267-69.

[13] NASD Rule 3050 was in effect during the period relevant to this case. It was superseded by FINRA Rule 3210 in April 2017.

Wells Notice, which meant the investigation had been "completed" on March 26, 2021. Consequently, DiPaola therefore asserts that "no attendance or reply was required."[14]

III. The E*Trade Accounts (Causes One and Two)

The first two causes of action derive from DiPaola's alleged failures to disclose his trading in his mother's E*Trade account. We consider them together first, and address separately the third cause of action.

A. Discretionary Trading (Cause One)

1. DiPaola's Trading at E*Trade

a. DiPaola's Personal Trading Accounts at E*Trade

DiPaola testified that when he joined Chardan, he tried to open a personal brokerage account but was not permitted to do so.[15] The firm's policy required employees to maintain their personal securities accounts outside the firm.[16] DiPaola informed Chardan of two personal securities accounts he owned at E*Trade in 2015, [17] and three in 2016. [18] He used one of the E*Trade accounts as his "main account" for his personal trading.[19]

DiPaola described himself as "a very active trader"[20] and explained that he traded to generate money to meet his personal needs and pay bills. Characterizing himself as a "a good trader," he paid his living expenses from trading profits.[21]

DiPaola favored trading sub-penny stocks—two in particular. One was issued by Advanced Medical Isotope Corporation, trading under the symbol ADMD.[22] The second was issued by Catasys, Inc., trading under the symbol CATS.[23] He traded these two stocks frequently.[24]

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[14] Answer ("Ans.") ¶¶ 44-59, 62-63.

[15] Complainant's Exhibit ("CX-") 2, at 117.

[16] Tr. 263.

[17] Tr. 198-99; Joint Exhibit ("JX-") 2, at 1.

[18] Tr. 201-02; JX-3, at 12.

[19] CX-2, at 64.

[20] Tr. 146-47.

[21] CX-3, at 26.

[22] Tr. 67.

[23] Tr. 115.

[24] *See, e.g.*, CX-12, at 10-11 (showing the value of securities held in DiPaolo's personal E*Trade account on September 30, 2015, at $131,590, consisting solely of ADMD); CX-13, at 3-4 (showing the account value of securities held on August 31, 2016, at $170,171, consisting of 64.75% ADMD, 32.84% CATS, 2.41% other); CX-

DiPaola learned about ADMD from a friend who was associated with the issuer.[25] At the hearing, DiPaola initially testified that he was not well-acquainted with ADMD. He did not recall details of what the company did,[26] and did not recall when he began purchasing ADMD's stock for his mother's account.[27] In fact, however, DiPaola was quite familiar with the company. In a 2019 OTR interview, he testified that he owned ADMD stock for a long time and invested a significant percentage of his assets in it through both open market purchases and private placements. DiPaola believed the company had a potential cancer treatment with "a good chance of advancing through the clinical stages to get an approval."[28]

b. Creation of DiPaola's Mother's Account at E*Trade

In 2012 or 2013, DiPaola's mother received an inheritance that included securities held in a full-service brokerage account at a firm other than E*Trade.[29] The account contained "a lot of blue chip stocks."[30] According to DiPaola, his mother "knew nothing about" the stocks and often asked for his advice about them.[31] He told her that he did not feel comfortable advising her because the portfolio consisted of "large cap stocks," which were not his "forte."[32]

DiPaola's mother complained to him about the account's high commissions and low profits.[33] Knowing that DiPaola was successfully trading in his account, his mother asked him how to improve the performance of hers. DiPaola suggested that she transfer the account to E*Trade. His mother told him that because she did not own a computer, she would be unable to trade in an E*Trade account herself, and asked DiPaola to help her out.[34]

DiPaola's mother opened the E*Trade account in September 2013, solely in her name. The online account application estimates her net worth to be between $500,000 and $999,000, describes her investment experience as "Good," and the purpose of the account as "Speculation." The form states that only she had authority to trade in the account.[35] Once the account was

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14, at 145-46 (showing the account value of securities held on October 31, 2016, at $124,422, consisting of 51.65% ADMD, 48.35% CATS).

[25] Tr. 236.

[26] Tr. 69-70.

[27] Tr. 74-75.

[28] CX-2, at 113-15.

[29] Tr. 604.

[30] CX-3, at 22.

[31] CX-3, at 23-24.

[32] Tr. 604.

[33] Tr. 604-05.

[34] Tr. 605.

[35] CX-7.

established, she provided DiPaola with her online username and password, enabling him to place orders for her.[36]

c. DiPaola's Trading in His Mother's Account

DiPaola used his computer and his mother's username and password to trade in her E*Trade account.[37] He described himself as "simply a son helping a mother execute trades."[38] Although DiPaola testified that his mother conducted research into the stocks he bought for her, he could not say what kind of research she did.[39] He testified that his mother is not a sophisticated investor.[40]

DiPaola's mother testified that she never disapproved of a trade he executed in her account.[41] According to her, DiPaola would call from time to time to tell her what he was thinking of doing in her account, she would agree, and he would place the order. She did not give him specific instructions on how to trade, because it did not matter to her how he handled transactions so long as he was not "costing [her] a fortune."[42] She told him to trade in her account as he traded for himself, stating, "If it was good enough for him, it was good enough for me."[43] So, DiPaola testified, "I would enter the buys and sells for her, since she didn't have a computer."[44] He stated that he would tell her when he bought stock for himself and then "she would say, okay, please buy some for me."[45]

At first DiPaola testified that he had "no idea" what stocks he traded most frequently in his mother's account.[46] He then conceded that he often traded ADMD.[47] DiPaola informed his mother about ADMD and the product the company was developing.[48] When asked about conversations they had about buying or selling the stock, DiPaola's mother said she did not know if they discussed price ranges to consider in placing an order.[49] When there were both purchases

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[36] Tr. 112.

[37] Tr. 112.

[38] Tr. 608.

[39] Tr. 114.

[40] Tr. 114.

[41] Tr. 563.

[42] Tr. 564-65.

[43] Tr. 573-74.

[44] Tr. 606.

[45] Tr. 73-74.

[46] Tr. 117.

[47] Tr. 118.

[48] Tr. 575-76.

[49] Tr. 577-79.

and sales of the stock on the same day, she did not recall what she talked about with DiPaola before the trades.[50]

Account records show that although DiPaola traded 28 stocks in his mother's account from March 2015 through March 2017, he traded ADMD and CATS far more often than any others. Of the 4,685 orders and cancellations in his mother's account in that period, 1,954, or 41%, were in ADMD, and 1,591, or 34%, were in CATS. The two combined to make up 75% of the total.[51] He traded both stocks heavily in his personal account as well.[52]

DiPaola's mother testified that she monitored her account and denied that her son controlled it. But when she wanted to take cash out of the account, she would ask him to withdraw the amount she wanted, or to sell stock that was not doing well.[53] She trusted her son, and considered him to be knowledgeable, unlike herself.[54] DiPaola testified that his mother paid bills using the account and he would calculate the number of shares they had to sell to generate the cash she wanted.[55] When asked if his mother relied on him to decide what stocks to sell or buy, DiPaola answered "not all the time." He described his mother's participation in making decisions about trades in her account by saying sometimes she called to say she needed money and told him to "sell some stock." He testified, "That's her making a decision."[56]

However, when responding to the market, DiPaola did not need to consult with his mother before executing trades in her account. His mother testified that she was "absolutely" comfortable with him making a trade without calling first because she did not "want to lose [her] shirt just because he couldn't make a phone call."[57] When there was movement in the price of a stock during the trading day, she relied on DiPaola to decide whether to buy or sell a given amount.[58] DiPaola's mother claimed that they discussed all of her stocks.[59] But she testified that she relied on him because of his "experience, background." And if her son saw a stock's price changing, he "would have discretion, I guess, to either buy or sell."[60] If the market was volatile,

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[50] Tr. 583.

[51] CX-77a, at 2; CX-78, at 53-60.

[52] Tr. 119-20.

[53] Tr. 567-68.

[54] Tr. 570.

[55] Tr. 158.

[56] Tr. 161.

[57] Tr. 585.

[58] Tr. 587-88.

[59] Tr. 590.

[60] Tr. 591.

she assumed that he would trade "to protect" her account.[61] She added that she did not care how her son executed trades, because he was "the one who has the experience."[62]

DiPaola claimed that he and his mother "spoke almost every morning."[63] When asked to describe a typical conversation with his mother about trading stocks on her behalf, however, DiPaola said, "I can't answer that," and that it was "a ridiculous question."[64]

DiPaola acknowledged that he would buy and sell shares of the same stock on the same day.[65] When asked whether he and his mother discussed the range of prices he should put on limit orders, DiPaola answered "Not really. I don't – I don't remember. Sometimes maybe, yes. Sometimes yes. Sometimes no. I really don't remember."[66] When asked if they discussed prices in general, or share amounts, his answer was the same: he did not recall.[67] According to DiPaola, "typically" he and his mother would discuss proposed trades on the same day that the trading took place.[68] But he conceded that there were times, such as weekends, when she would ask him to purchase a stock for her and he would do so over the next week, with differing executions to fill the order.[69]

2. Discussion (Cause One)

To prevail in the first cause of action, Enforcement must establish by a preponderance of the evidence that DiPaola traded with discretionary authority in his mother's E*Trade account, triggering his obligation to disclose it to both Chardan and E*Trade.

a. Legal Standard

NASD Rule 3050(c) states in relevant part: "A person associated with a member, prior to opening an account or placing an initial order for the purchase or sale of securities with another member, shall notify both the employer member and the executing member, in writing, of his or her association with the other member."

In addition, Rule 3050(e) requires written notice whenever an associated person has either a financial interest in an account, or an order, or exercises discretionary authority to place

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[61] Tr. 593-94.

[62] Tr. 594.

[63] Tr. 136.

[64] Tr. 136-37.

[65] Tr. 143-44.

[66] Tr. 140.

[67] Tr. 141.

[68] Tr. 168-69.

[69] Tr. 169-72; CX-3, at 42-43.

orders.[70] DiPaola did not have any financial interest in his mother's account or the orders he entered in it. The question, then, is whether DiPaola exercised discretionary authority when he traded in the account on her behalf.

During the relevant period, NASD Rule 2510(b) required a broker to obtain written authorization from the customer and approval from the broker's employer firm to be able to trade with discretion in a customer's account.[71] The parties do not dispute that the Rule applied here. Even though DiPaola's trades were in his mother's account—not a typical customer's account—the Rule required him to obtain her written authorization and Chardan's approval. He did not. DiPaola's mother gave him oral permission to trade in her account as he did in his own account. But oral permission is insufficient to properly authorize the exercise of discretionary trading in a customer's account.[72]

b. Arguments of the Parties

Enforcement does not contend that every order DiPaola placed in his mother's account was discretionary. Rather, Enforcement concedes, some orders "were not placed using discretionary authority," but others were. Enforcement's position is that any orders DiPaola placed exercising discretion required written notice to Chardan and E*Trade.[73]

Enforcement credits DiPaola's mother's testimony that she asked her son to trade for her as he did for himself and permitted him to react to market volatility without first speaking with her as evidence that DiPaola exercised discretion in trading in her account.[74] Enforcement also relies on the fact that DiPaola placed thousands of orders in his mother's account. Although DiPaola and his mother both claimed at the hearing that they generally discussed the trades in his mother's account, Enforcement argues that the details of their testimony, coupled with the account trading records, show that he often placed multiple orders at different prices and volumes, over several days, without first consulting with his mother.[75]

Enforcement argues that precedents defining discretionary trading establish that, by placing orders in his mother's account without first discussing each transaction, DiPaola traded with discretion. Even if the customer gives oral authorization for transactions, as DiPaola's mother did here, "oral permission is insufficient (with certain exceptions. . .) to exercise discretionary power in a customer's account" under the applicable rules.[76] For example, in a

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[70] NASD Rule 3050(e) states in full: "Paragraphs (c) and (d) shall apply only to an account or order in which an associated person has a financial interest or with respect to which such person has discretionary authority."

[71] NASD Rule 2510(b). NASD Rule 2510 was in effect during the period relevant to this case, until May 2019 when FINRA Rule 3260 replaced it.

[72] *Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *19, 21-22 (May 7, 2015).

[73] Enforcement's Post-Hearing Brief ("Enf't Post-Hr'g Br.") 18-19.

[74] *Id.* at 3-4, 14.

[75] *Id*. at 4-6.

[76] Enf't Post-Hr'g Br. 16-17 (citing *Pino*, 2015 SEC LEXIS 1811, at *19-22). The exceptions refer to "time and price discretion" that the SEC held did not apply because the customer did not give discretion "as to the sale of

Securities and Exchange Commission opinion, when an account holder gave a broker a password to trade in the customer's outside account, the broker traded with discretion when he decided what to buy and what to sell.[77] There, the broker claimed that he did not violate NASD Rule 3050(c) because the customer gave him permission and it was a "private matter." However, the SEC disagreed, holding that the Rule "requires notice regardless of how or where" the trading occurs to prevent "this kind of 'private matter' that could expose the member firms to risk."[78]

DiPaola disputes the applicability of Enforcement's cited precedents, contending they are distinguishable and inapposite because they involve brokers who, unlike him, did not speak at all to their customers about any of their trading.[79]

3. Conclusion (Cause One)

While the underlying facts in Enforcement's precedents differ from the facts here, the principles applied in determining what constitutes discretionary trading apply to this case. The factual differences go to the egregiousness of the misconduct, not to the relevance of the principles to apply in deciding what constitutes discretionary trading.

A representative exercises discretion by placing orders in an account without the specific approval of the account holder, and it is impermissible to do so without prior written authorization of the customer and the approval of the representative's member firm.[80] The record is replete with evidence that DiPaola placed orders in his mother's account without first discussing them with her. Thus, to properly grant her son discretionary authority to trade in her account, DiPaola's mother would have had to provide written authorization, and this she did not do.[81]

She did give DiPaola oral permission allowing him to trade as he did in her account and had no complaints about his decisions.[82] But his mother's permission does not mean, as DiPaola

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definite amounts of specified securities" in the customer account. DiPaola does not argue that his mother gave him time and price discretion.

[77] *Guang Lu*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117 (Jan. 14, 2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006).

[78] *Id.* at *14.

[79] Respondent's Post-Hearing Brief ("Resp't Post-Hr'g Br.") 11-12 (citing *Dep't of Enforcement v. Zaragoza*, No. E8A2002109804, 2008 FINRA Discip. LEXIS 28 (NAC Aug. 20, 2008)); Respondent's Post-Hearing Reply Brief ("Resp't Post-Hr'g Reply Br.") 2-3.

[80] *Pino*, 2015 SEC LEXIS 1811, at *17-18; *Dep't of Enforcement v. William J. Murphy and Carl M. Birkelbach*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933 (July 2, 2013), *petition denied sub nom. Birkelbach v. SEC*, 751 F.3d 472, at *21, 27 (7th Cir. 2014); *William J. Murphy*, Exchange Act Release No. 41804, 1999 SEC LEXIS 1731, at *5-8 (Aug. 27, 1999).

[81] Tr. 165.

[82] Tr. 593-94.

argues, "there can be no discretion." The evidence shows that DiPaola had the ability to exercise discretion in his trading on his mother's behalf without consulting with her, and that he did.[83]

For example, after a conversation on a weekend or early in the week, for days afterward DiPaola would enter multiple limit orders in his mother's account at different prices and in different volumes without first checking with her.[84] The trading records show that on numerous occasions, DiPaola would place, cancel, and execute as many as 15 or more trades in his mother's account on a single day.[85]

DiPaola argues that because he disclosed his own personal outside brokerage accounts, including those held at E*Trade, he did not need to disclose his mother's. His point is that Chardan was privy to his trading, which included, DiPaola maintains, "***the same trading found in his mother's account***."[86] He insists that Chardan knew about the trading, voiced no objection in 2015 and 2016, and in August 2017, after DiPaola became co-owner and disclosed the account, Chardan still had no objection.[87] Thus, he implies, the purpose of the Rule—to allow Chardan to monitor for any potential conflicts of interest or other problems—was accomplished.

These facts do not excuse DiPaola's disclosure omissions. DiPaola traded in his mother's account with discretion, and therefore needed to disclose the account pursuant to NASD Rule 3050(c) so Chardan could assess for itself whether DiPaola's trading exposed it to any risks. DiPaola may have thought that what he did for his mother was a private matter and that disclosing his personal accounts sufficed. But his failure to disclose his mother's account frustrated Chardan's ability to monitor his outside trading in it and violated NASD Rule 3050(c) and FINRA Rule 2010.[88]

B. False and Misleading Compliance Certifications (Cause Two)

1. Compliance Questionnaires

In May 2016, DiPaola signed an annual Chardan compliance questionnaire. One question asked if he maintained an "Employee account" at another firm in 2015. The definition of an employee account included one that a Chardan employee has "a direct or indirect interest" in, or "controls."[89] Chardan's written supervisory procedures required duplicate account statements for

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[83] Tr. 585.

[84] Tr. 171-72; CX-3, at 42-43.

[85] CX-76, at 107-10, 114-16, 118-24, 165, 182-84, 198, 372-76, 381-82, 445-47, 491-92, 497-98, 504-09, 518-20, 523-24, 529-30, 542-43, 545-46, 548-52, 556-57. For example, on May 20, 2016, there were more than 90 orders and cancellations in DiPaola's mother's account. CX-76, at 371-76.

[86] Resp't Post-Hr'g Br. 4-5, 14-15.

[87] Resp't Post-Hr'g Br. 14.

[88] *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *15-16, 19-20 (Feb. 24, 2012).

[89] JX-2.

any outside employee account to be sent to Chardan's compliance department.[90] In November 2016, DiPaola signed a similar form asking him to disclose the same information for 2016.[91] On both forms, DiPaola checked the space for "Yes" and disclosed his own accounts at E*Trade and another brokerage firm. He did not, however, disclose his mother's E*Trade account.[92]

DiPaola testified that in the summer of 2017, E*Trade notified his mother that it had discovered that somebody other than she was logging into her account. She told E*Trade that it was her son. E*Trade told her it would block DiPaola from accessing her account unless he became a co-account holder.[93] In August 2017, DiPaola emailed Chardan's chief compliance officer asking for permission to become joint account holder on the account. He explained that "[a]s part of my mothers [sic] estate planning effort, she wants to add my name to her E*TRADE [sic] account and make it a joint acct." DiPaola asked to be allowed to add his name to his mother's account and for assistance in providing E*Trade the forms the firm required. The compliance officer approved the request and DiPaola was added to his mother's account.[94]

2. Discussion (Cause Two)

To prevail in the second cause of action, Enforcement must establish that DiPaola controlled trading in his mother's account, and that his failure to acknowledge this on two Chardan compliance forms rendered them false and misleading.

a. Legal Standard

It is uncontested that failing to disclose outside brokerage accounts on documents a firm requires a broker to submit makes them materially misleading in violation of NASD Rule 3050(c) and FINRA Rule 2010.[95] The requirement gives member firms the ability to monitor their registered representatives' trading in outside brokerage accounts, to ensure compliance with firm procedures and become aware if the activity presents potential conflicts of interest.[96] The issue then is whether DiPaola controlled trading in his mother's account. If so, he needed to disclose his mother's account as an "Employee account" to Chardan on the annual questionnaire/certification forms relating to his outside activities in 2015 and 2016.

An associated person's control over a brokerage account may be established in two ways. Control is established if the associated person (i) trades with discretion in the account or (ii)

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[90] JX-6, at 30-31; JX-7, at 31-32.

[91] JX-3.

[92] Tr. 199, 202; JX-2, at 1; JX-3, at 1, 12.

[93] Tr. 109-10.

[94] CX-56.

[95] *Braff*, 2012 SEC LEXIS 620, at *15-17.

[96] *Id.* at *19-20.

exercises de facto control over trading in the account.[97] We have found that DiPaola exercised discretion in much of the trading in which he engaged on behalf of his mother in her E*Trade account. Although our inquiry could stop there, we also consider whether DiPaola exercised de facto control.

There are several factors recognized as indicating that a broker exercises de facto control over an account. They include:

- customer reliance on a broker's recommendations so much that the broker "controls the volume and frequency of transactions;"
- "routinely" following the broker's recommendations, particularly when a customer lacks the ability to independently evaluate the broker's recommendations;[98] and
- a customer "habitually" following the broker's advice.[99]

De facto control is established when a customer defers to a broker's recommendations of trading strategy for an account, choosing what securities to trade, and in what quantities to trade them.[100] When a customer reposes "trust and confidence" in an associated person, allowing that person to decide "what to buy or sell in the account," the associated person has de facto control.[101] In contrast, a lack of de facto control is likely when a customer actively traded independently in the past, monitors the market, suggests prospective investments to the broker, and rejects some of the broker's recommendations.[102]

b. Arguments of the Parties

Enforcement argues that DiPaola exercised de facto control over his mother's E*Trade account because he was the one who decided the frequency and volume of trades he effected in the account. His mother relied on his expertise, trusted him to act in her best interests, and asked him to trade for her as he did for himself. Taken together, Enforcement concludes these elements

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[97] *Dep't of Enforcement v. Davidofsky*, No. 2008015934801, 2013 FINRA Discip. LEXIS 7, at *28 (NAC Apr. 26, 2013) (a broker has control of an account if the broker has discretionary authority or de facto control).

[98] *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *18 (May 29, 2015) (quoting *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *42 (May 27, 2011)), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

[99] *Calabro*, 2015 SEC LEXIS 2175, at *18 n.18 (quoting *Donald A. Roche*, Exchange Act Release No. 38742, 1997 SEC LEXIS 1283, at *14 n.14 (June 17, 1997)).

[100] *Id.* at *21.

[101] *Joseph J. Barbato*, Exchange Act Release No. 41034, 1999 SEC LEXIS 276, at *39 (Feb. 10, 1999).

[102] *Calabro*, 2015 SEC LEXIS 2175, at *26 n.30 (citations omitted).

establish his de facto control over the account, requiring him to disclose it to Chardan in the 2015 and 2016 compliance questionnaires.[103]

DiPaola does not dispute that if he controlled the account, he had to disclose it to Chardan. But he insists that he "never controlled" his mother's account so his answers on the questionnaires were not incorrect or misleading.[104] He claims that his mother researched the stocks he bought for her,[105] did not rely on him to select the stocks to sell for her,[106] and told him how much money to raise for her by selling stock.[107] He also claims that the allegation that he controlled the account is false "[b]ecause it wasn't my money . . . I was simply a son helping a mother execute trades."[108]

3. Conclusion (Cause Two)

The parties concur that DiPaola's mother is an unsophisticated investor who relied on her son's expertise when she asked him to trade in her account. There is no evidence that DiPaola's mother actively traded in her E*Trade account. Nor is there any evidence that she took the initiative to suggest investments, or that she ever rejected any of her son's recommendations. Instead, the evidence is that she gave DiPaola oral authority to trade for her account as he traded for his own.

DiPaola's mother deferred to DiPaola as to the stocks traded, the quantities bought and sold, and the timing of the trades. We therefore find that, along with exercising discretion in trading in his mother's account, DiPaola also exercised de facto control over it. Accordingly, he incorrectly responded to questions on two Chardan compliance questionnaires by failing to disclose his mother's E*Trade account, in violation of FINRA Rule 2010, as charged in the second cause of action.

We now turn to the Complaint's third cause of action.

IV. Rule 8210 Requests for Testimony (Cause Three)

A. Investigative Chronology

A review of the chronology of the investigation leading to the filing of the Complaint provides factual context for our evaluation of the issues arising from the third cause of action.

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[103] Enf't Post-Hr'g Br. 20-21.

[104] Tr. 192; Resp't Post-Hr'g Br. 6-7.

[105] Tr. 114.

[106] Tr. 161.

[107] Tr. 158.

[108] Tr. 608.

In January 2018, FINRA staff first interviewed DiPaola and gathered information about his outside brokerage accounts.[109] The staff obtained new account forms and account statements for DiPaola's brokerage accounts and his mother's E*Trade account. The staff also obtained more than a million emails from Chardan.[110]

Then, in February 2019, FINRA staff requested DiPaola to provide OTR testimony pursuant to FINRA Rule 8210.[111] The first interview took place on April 16, 2019. DiPaola appeared in person accompanied by an attorney representing both him and Chardan. After a recess, the attorney informed the staff that DiPaola's OTR testimony had made him aware of a potential conflict of interest. He withdrew his appearance on DiPaola's behalf. The interview was suspended until May to permit DiPaola to seek new counsel.[112]

On May 7, 2019, Chardan filed a termination notice with the Central Registration Depository stating that DiPaola "was permitted to resign" after admitting in the OTR interview that he bought and sold securities in his mother's account, at another firm, in violation of Chardan's policy requiring him to disclose the "arrangement."[113]

The staff rescheduled the May interviews for July 2019.[114] On July 17 and 18, 2019, DiPaola appeared and testified, accompanied by his new attorney.[115]

According to a staff witness at the hearing, following the July 2019 interviews, FINRA staff searched the voluminous emails and instant messages it had obtained from Chardan to assess the credibility of DiPaola's testimony.[116] The search revealed communications between DiPaola and the chief executive officer of the issuer of ADMD,[117] for which Chardan had raised money.[118] Based partly on this information, Enforcement decided to question DiPaola further.[119]

On March 11, 2021, a year and eight months after DiPaola's 2019 OTR interviews, counsel for Enforcement sent a Rule 8210 request for DiPaola to appear for a video OTR interview on March 26, 2021.[120]

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[109] Tr. 266.

[110] Tr. 269.

[111] CX-2, at 8-9.

[112] CX-2, at 139-141.

[113] JX-1, at 23-24.

[114] CX-3, at 4, 8.

[115] CX-3, at 4-5; CX-4, at 3-4.

[116] Tr. 292-93.

[117] Tr. 293.

[118] Tr. 281-82.

[119] Tr. 294-95; Enf't Post-Hr'g Br. 10.

[120] JX-13.

Several email exchanges between the parties ensued. On March 16, 2021, Enforcement asked DiPaola's lawyer to confirm that DiPaola would appear for the video interview. That same day, his attorney replied that he had not discussed the date with DiPaola and asked if the OTR interview was just "going to be a rehash" of DiPaola's prior testimony. Enforcement answered that it was "not looking to rehash and will ask questions as to facts we have not covered." Having obtained no commitment that DiPaola would appear, on March 19, Enforcement asked again for confirmation that DiPaola would appear on March 26. His attorney replied that DiPaola was unavailable on March 26, but he would explore alternative dates. The attorney said he was unavailable on the dates Enforcement proposed in late March and early April.[121]

Then, on March 26, 2021, Enforcement issued both a Wells Notice[122] and another Rule 8210 request letter, this one for DiPaola to testify at a video OTR interview on April 5.[123]

On April 1, 2021, Enforcement sent another email, asking DiPaola's attorney to confirm that his client would appear for the April 5 OTR video interview. The attorney responded, "Are you serious? You served a Wells Notice, you cannot take another OTR after serving a Wells Notice. Does your supervisor know what you are doing?" DiPaola's attorney asked the supervisor to withdraw the Wells Notice; she declined.[124] DiPaola did not appear for the OTR on April 5.[125] Enforcement sent another letter pursuant to FINRA Rule 8210 to attend a video OTR on April 15. Respondent received it, but again did not attend.[126]

Enforcement filed the Complaint on May 3, 2021.

B. Discussion (Cause Three)

1. Arguments of the Parties

a. DiPaola's Defenses

DiPaola asserts two main defenses to the third cause of action. First, he claims he should not have been required to testify for a fourth time because the OTR interview would have been "an unnecessary and duplicative rehash of the questions already asked at the 2019 OTRs." DiPaola rejects as false Enforcement's stated rationale for needing another OTR interview: that after the 2019 OTR interviews, it reviewed Chardan's extensive electronic records and

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[121] JX-16.

[122] JX-21.

[123] JX-19.

[124] JX-24; JX-25.

[125] CX-5. DiPaola's unresponsiveness to Enforcement's requests that he confirm his availability on dates set for the OTR interview or offer alternatives may be related to his personal circumstances. DiPaola testified he was experiencing family difficulties, that in early April his "life was falling apart," and his focus was on his personal travails. Tr. 205, 209-10.

[126] Tr. 419-20; JX-26; CX-6.

developed additional questions.[127] DiPaola dismisses Enforcement's claim that it had new questions to pose.

Second, in a novel assertion, DiPaola argues that Enforcement lacked authority to require him to testify in April 2021. Conceding that there is "a dearth of precedent on the issue," DiPaola claims that when Enforcement issued the Wells Notice on March 26, 2021, its "investigation was **concluded.**"[128] DiPaola argues that Enforcement "rejected and waived the opportunity to further question [DiPaola] when it refused to withdraw the Wells Notice so that the OTR could proceed, as Respondent offered." DiPaola charges that Enforcement's issuance of the Rule 8210 request for the April 2021 OTR interview was an "abuse of the regulatory process."[129]

DiPaola derives this defense primarily from what he claims to be binding FINRA policy embodied in FINRA Regulatory Notice 09-17. DiPaola emphasizes that the purpose of the Wells Notice, as described by the Regulatory Notice, is to give a potential respondent an opportunity to make a Wells Submission to persuade Enforcement why formal charges are not appropriate. The Regulatory Notice states that Enforcement will review the submission and may then seek more information and investigate further. To DiPaola, this means that since he did not make a Wells Submission, and Enforcement did not otherwise acquire any new information or documents after issuing the Wells Notice, Enforcement had no new information to explore, and therefore had "no legal or regulatory authority to pursue a post-Wells" OTR interview.[130]

DiPaola accuses Enforcement of deviating from FINRA's "standard practice" and acting "contrary to the basic tenets of the Wells Process," trampling on the "due process rights afforded to respondents in FINRA proceedings."[131] DiPaola argues that Enforcement "cannot point to a single precedent" supporting its position "that a FINRA Rule 8210 request may be pursued" after issuance of a Wells Notice when there has been no Wells Submission. DiPaola asserts that "[t]here is no authority on this issue because it does not happen."[132] He rejects the precedents cited by Enforcement in support of its position as factually inapposite, because they all involve post-Wells Notice Rule 8210 requests FINRA made after Enforcement obtained additional documents or information justifying further investigation, which did not happen here.[133]

To bolster his arguments, DiPaola refers to two publications by securities industry commentators. The first is a former SEC Regional Director who wrote, at the end of a publication on SEC policies:

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[127] Resp't Post-Hr'g Br. 22.

[128] *Id.* at 18.

[129] *Id.* at 3.

[130] *Id.* at 18; Resp't Post-Hr'g Reply Br. 5.

[131] *Id.* at 4.

[132] *Id*.

[133] Resp't Post-Hr'g Reply Br. 3-4.

> Issuance of a Wells notice does not impose any limit on the Staff's ability to conduct further investigation. A Wells submission may show the Staff that their evidence is not as strong as they believed, or that there are relevant facts that the investigation failed to develop. This may prompt the Staff to investigate further to fill these gaps. The Staff may also conduct further investigation to test new factual assertions contained in the Wells submission.[134]

The second is a blog entitled "*Broker-Dealer Law Corner*," whose author wrote:

> Wells Submissions are not privileged. Because they are not privileged, whatever you say in a Wells Submission is subject to further examination by FINRA. So, say, for instance, that you make some assertion in your Wells Submission that is based on some fact of which FINRA was somehow unaware, you can bet that not only will FINRA respond with a follow-up 8210 request, but, if the complaint issues and the matter goes to hearing, you will be thoroughly cross-examined about the assertion.[135]

From these statements, DiPaola extrapolates that a post-Wells Rule 8210 request "is only appropriate if a Wells Submission is made" containing information that FINRA was "somehow unaware" of previously. He then argues that "if it was intended for Enforcement to continue an investigation after issuing a Wells Notice and without a Wells Submission, such a specific process would be enshrined in the Wells Process." Since "[s]uch a procedure does not exist," DiPaola argues, finding him in violation of Rules 8210 and 2010 in this case "would violate Mr. DiPaola's due process rights."[136]

DiPaola claims that in this abuse of the process, Enforcement seeks to "use this case as a vehicle . . . to extend the Wells Process far beyond its current reach, upending the entire Wells Process."[137]

b. Enforcement's Assertion of Rule 8210's Breadth

Enforcement counters that DiPaola's challenge to its authority to issue a post-Wells Rule 8210 request is "directly contrary to the broad and unambiguous text of FINRA Rule 8210(a)(1),"[138] "directly contrary to FINRA's interpretative guidance" relating to FINRA's

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[134] Resp't Post-Hr'g Br. 20. Respondent did not provide a citation for the source of the quote, but it appears to be from a chapter of a work published by the Practising Law Institute, "*The Wells Process at the Conclusion of an SEC Investigation*," at 6-20, found at https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.26605.20.pdf .

[135] *Id.* at 20-21. Respondent did not provide a citation for the article, but it appears to be taken from a blog published by Alan Wolper titled *What In The Wells Is Going On With FINRA's "Wells" Process?*, https://www.bdlaw corner.com/2015/10/what-in-the-wells-is-going-on-with-finras-wells-process.

[136] *Id.* at 21.

[137] Resp't Post-Hr'g Reply Br. 4.

[138] Enf't Post-Hr'g Br. 22.

Uniform Application for Securities Industry Registration or Transfer (Form U4)" and Form U5, and "wholly unsupported by the case law."[139]

Enforcement points out that Rule 8210 does not mention a Wells Notice and contains no language suggesting that issuing a Wells Notice restricts FINRA's ability to issue further requests for information or testimony.[140] And, Enforcement asserts, FINRA's interpretive guidance relating to Forms U4 and U5 makes clear that FINRA may continue an investigation after issuing a Wells Notice. It states that an "investigation is defined to *include* a FINRA investigation *after* the Wells Notice has been given or after an associated person has been advised by the staff that it intends to recommend formal disciplinary action."[141] And, as Enforcement notes, Rule 8210(a) expressly authorizes FINRA staff to issue requests for information and testimony for the purpose of an "investigation, complaint, examination or proceeding."[142] By its terms, then, the Rule countenances the issuance of information and testimony requests after a Wells Notice has been issued.

Enforcement argues that the obligation of associated persons to comply with Rule 8210 information requests is "unequivocal."[143] Enforcement asserts that:

> the controlling SEC and [National Adjudicatory Council ("[NAC]")] case law provides that persons subject to FINRA's jurisdiction violate Rule 8210 *whenever* they fail to fully and truthfully comply with any Rule 8210 requests for testimony, documents, or information—irrespective of whether or not the Rule 8210 requests were issued before or after a Wells Notice and irrespective of whether any Wells Submission was made by the Wells Notice target in response to the Wells Notice.[144]

Enforcement also rejects DiPaola's assertion that the April 2021 OTR interview would have been a "rehash" of questions asked and answered in 2019. According to Enforcement, the purpose of the April 2021 OTR interview was to investigate "areas, including specific communications and specific trading, not previously covered in the 2019 OTR sessions."[145] It argues that the staff developed areas of inquiry following the 2019 OTR interviews, when, searching the "more than one million emails and text messages" provided by Chardan, it "found numerous emails" reflecting DiPaola's involvement in fund-raising and development of a "strategic plan" for ADMD's issuer, Advanced Medical Isotope Corporation. After reviewing transcripts from DiPaola's 2019 OTR testimony, Enforcement concluded that DiPaola

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[139] *Id.* at 23-24.

[140] *Id.* at 22-23.

[141] *Id.* at 23, quoting from FINRA Form U4 and U5 Interpretive Questions and Answers (Answer to Question 14G) at 3 (emphasis added), https://www.finra.org/sites/default/files/Interpretive-Guidance-final-03.05.15.pdf.

[142] Enf't Post-Hr'g Br. 22.

[143] *Id.* (citing *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 (Sept. 24, 2015)).

[144] *Id.* at 24.

[145] *Id.* at 27.

"substantially understated his involvement" with the stock's issuer.[146] Thus it was appropriate, Enforcement contends, to explore further whether DiPaola had engaged in insider trading in his and his mother's accounts, and to question him about his frequent same-day trading.[147]

2. Legal Analysis

The question presented is whether, under the circumstances of this case, DiPaola had to appear and testify in response to Enforcement's March 2021 Rule 8210 requests.

On its face, Rule 8210 is broad. As noted above, Rule 8210(a)(1) empowers FINRA when conducting an investigation to require a person under FINRA jurisdiction "to provide information" and "to testify . . . with respect to any matter involved in the investigation, complaint, examination, or proceeding." And compliance is compulsory. Rule 8210(c) states: "[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule."

We begin by inquiring whether, as DiPaola claims, Regulatory Notice 09-17 excuses DiPaola's failure to provide testimony in April 2021 because it precludes FINRA from requiring him to testify after issuing a Wells Notice, absent a Wells Submission or the acquisition of additional information from another source.

a. Regulatory Notice 09-17

The stated purpose of the Regulatory Notice is "to provide transparency into [FINRA's] enforcement process, and to assist firms and their associated persons with their understanding of how the investigative process works and to highlight procedural safeguards." Topics relevant here that are addressed by the Regulatory Notice include the conduct of investigations, sufficiency of evidence reviews, and the Wells process.[148]

To conduct investigations, the Regulatory Notice explains, FINRA staff "requests documents and takes sworn testimony . . . pursuant to FINRA Rule 8210." Compliance with such requests is compulsory, as "failure to respond may result in a fine, suspension or bar from the industry."[149]

The Regulatory Notice states that "[a]t the conclusion of the investigation, the staff analyzes the evidence and applicable law and makes a preliminary determination of whether or not a violation appears to have occurred. This process is called a Sufficiency of Evidence review."[150]

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[146] Enf't Post-Hr'g Br. 9.

[147] *Id*. at 9-10 nn.34-36.

[148] FINRA Regulatory Notice 09-17 (Mar. 2009), https://www.finra.org/rules-guidance/notices/09-17, at 1.

[149] *Id*. at 2.

[150] *Id*. at 3.

Following this review, the Regulatory Notice states, "[i]f a preliminary determination to proceed with a recommendation of formal discipline is made," the staff begins the "Wells process," which "is used in virtually every case" but is discretionary. FINRA staff "will call the potential respondent"—in what is referred to as a Wells Call—then follow up with a Wells Notice to inform the potential respondent of the proposed charges and supporting evidence. The purpose is to provide the potential respondent with "an opportunity to submit a writing," i.e., a Wells Submission, to explain "why formal charges are not appropriate." [151]

The Regulatory Notice explains that after reviewing the Wells Submission, Enforcement "may ask for additional information or obtain additional evidence in the matter."[152] This is the predicate for DiPaola's argument that "Wells Notices are issued after the conclusion of an investigation." DiPaola insists that FINRA "can't have it both ways."[153] In other words, he argues, by enabling Enforcement to issue a post-Wells Rule 8210 request after a Wells Submission, the Regulatory Notice prohibits Enforcement from issuing one if there is no Wells Submission. This is the keystone of DiPaola's argument, and the basis for his contention that since he did not make a Wells Submission, FINRA lacked the authority to make its post-Wells Rule 8210 request. DiPaola urges us to conclude that the language of the Regulatory Notice controls and limits the broad authority granted to FINRA staff by Rule 8210 to require associated persons to provide information or testify "with respect to any matter involved in the investigation, complaint, examination, or proceeding."

We decline to limit Enforcement's authority in this way. We do not agree with DiPaola that the Regulatory Notice excuses his refusal to comply with Enforcement's March 2021 requests for his testimony. While the Regulatory Notice describes the sufficiency of evidence review as coming after the conclusion of an investigation, it does not prohibit the staff from asking for more information or seeking other evidence after making the preliminary determination triggering a Wells Notice. The purpose of the Wells process, as described in the Regulatory Notice, is to inform potential respondents that ordinarily they will be able to be heard through making a Wells Submission before a decision to file a Complaint is made. The Regulatory Notice does not prohibit further inquiry; it describes procedural safeguards provided to potential respondents.

We do not agree that the procedural guidance provided in Regulatory Notice 09-17 stripped Enforcement of its authority under Rule 8210 to take further testimony in the investigation. That said, simultaneously issuing a Wells Notice and a Rule 8210 request for further testimony, in connection with the same investigation, while not prohibited, unfortunately sent mixed messages to Respondent. We discuss this issue further below.

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[151] *Id.*

[152] *Id.* It also states that "[i]n many cases," upon receiving a Wells notice, instead of making a Wells Submission, a prospective respondent initiates a settlement discussion. *Id*. at 4.

[153] Tr. 664 (DiPaola's closing argument).

b. The Wells Notice and Rule 8210 Request for Testimony

To recapitulate, on March 11, 2021, Enforcement issued its first Rule 8210 request for DiPaola to testify on March 26. Unable to confirm DiPaola's attendance, on March 26, Enforcement issued both a Wells Notice and a renewed Rule 8210 request for DiPaola to testify on April 5. The record contains no explanation of why Enforcement chose to send the Wells Notice simultaneously with the OTR request letter. When DiPaola did not appear, Enforcement reissued the request and rescheduled his testimony for April 15. His failure to appear led to the Complaint.

Enforcement sent the Rule 8210 testimony request letters under the same matter number as the 2019 letters, and they contain standard language informing DiPaola not to construe the requests "as an indication that FINRA or its staff has determined that any violations of federal securities laws or FINRA or NASD Rules have occurred."[154] In contrast, the Wells Notice, sent under the same matter number as the Rule 8210 request letter, informed DiPaola that the staff had made a preliminary determination to recommend disciplinary action against him for three violations:

- engaging in "manipulative trading and trading while in possession of material non-public information in ADMD stock from March 2015 to May 2017," in violation of Section 10(b) of the Securities Exchange Act of 1934, SEC Rule 10b-5, and FINRA Rules 2020 and 2010;

- "failing to promptly disclose" his association with Chardan and "an outside brokerage account" that he used for trading ADMD in violation of Chardan's restricted list, in violation of NASD Rule 3050(c) and FINRA Rule 2010; and

- submitting false and misleading disclosure forms to Chardan, in violation of FINRA Rules 4511(a) and 2010.[155]

As noted above, the Complaint did not charge DiPaola with manipulative or insider trading, or with trading in violation of Chardan's restrictive list.

c. Enforcement's Rationale for the March 2021 Requests

To further defend his refusal to comply with the March 2021 Rule 8210 requests for testimony, DiPaola claims Enforcement had no basis for conducting another OTR interview because in 2019, FINRA staff had asked him "everything Enforcement claims to have wanted to ask about in the 2021 OTR."[156] DiPaola accuses Enforcement of "either lying now" by saying "it

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[154] JX-19.

[155] JX-21.

[156] Resp't Post-Hr'g Br. 23.

wanted to investigate further," or lying earlier "when it issued a Wells Notice indicating the investigation was concluded."[157]

Enforcement's position is that even if DiPaola believed that he had already provided Enforcement with all the information it sought, he had no right to disregard the March 2021 Rule 8210 requests. Moreover, relying on the testimony of its two staff witnesses, Enforcement asserts that the April 2021 OTR interview was going to "cover areas, including specific communications and specific trading, not previously covered in the 2019 OTR sessions." Accepting DiPaola's argument would permit "recipients of Rule 8210 requests" to "routinely second-guess and litigate" them. To Enforcement, DiPaola is asserting that because he "purportedly believed that the 2021 OTR would repeat or rehash" his 2019 testimony, he was "free not to comply."[158]

d. The Relevant Precedents

The facts of the precedents that Enforcement relies on are, as DiPaola argues, distinguishable from this case. Most important, from DiPaola's perspective, is that in the cases Enforcement cites, respondents either made Wells Submissions or Enforcement obtained new information justifying further investigation.[159] To DiPaola, that is dispositive. In this case, DiPaola argues, after the 2019 OTR interviews, Enforcement obtained no new information providing a legitimate investigative purpose for taking his testimony in April 2021.[160]

In making its arguments, Enforcement relies heavily on a 2013 SEC decision, *John Joseph Plunkett*.[161] Enforcement cites *Plunkett* for holding that respondents are required to comply with post-Wells Notice Rule 8210 requests to allow FINRA to complete an investigation and decide "whether to ultimately proceed with a formal disciplinary action."[162] DiPaola counters that the case supports his defense because in *Plunkett*, the respondent made a Wells Submission, and the post-Wells request was properly issued by Enforcement to follow up.[163]

DiPaola is correct on the facts of *Plunkett*. There, the SEC found that the respondent's Wells Submission contained undocumented claims that Enforcement was entitled to test with a further Rule 8210 information request.[164] But the SEC did not address the issue of whether FINRA could have issued the request without the Wells Submission. *Plunkett* does not state that

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[157] *Id.* at 22.

[158] Enf't Post-Hr'g Br. 27.

[159] Resp't Post-Hr'g Br. 19; Resp't Post-Hr'g Reply Br. 4.

[160] Resp't Post-Hr'g Br. 22-25.

[161] *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699 (June 14, 2013).

[162] Enf't Pre-Hr'g. Br. 19-20.

[163] Resp't Post-Hr'g Br. 19-20.

[164] *Id*. (citing *Plunkett*, 2013 SEC LEXIS 1699, at *14.)

FINRA's authority to issue its post-Wells Rule 8210 request depended on the respondent's submission of new information after receiving a Wells Notice.[165]

DiPaola similarly challenges Enforcement's reliance on the NAC's *Dep't of Enforcement v. Legacy Trading Co., LLC* decision.[166] It held that a registered representative violated Rule 8210 by failing to respond completely to questions in a post-Wells Rule 8210 OTR interview.[167] In that case, FINRA conducted an OTR interview of the registered representative in May 2006. It issued a Wells Notice to him on September 26, 2006.[168]In mid-2007, FINRA received information suggesting the representative had made some false statements in his testimony, and the staff requested a second OTR interview. The representative appeared for the interview and gave some testimony, then declined to answer further questions, asserting his Fifth Amendment privilege against self-incrimination. The NAC concluded that the representative violated Rule 8210[169] and found the violation to be egregious because it prevented FINRA from confronting the representative with documents to test the credibility of his prior OTR interview.[170]

DiPaola stresses that in *Legacy Trading*, FINRA's post-Wells Rule 8210 request was prompted by its receipt of documents after the earlier OTR interview. Here, without a Wells Submission or the receipt of new information from elsewhere, DiPaola argues, "Enforcement had no legal or regulatory authority" to require him to undergo another OTR interview.[171]

After careful consideration, we conclude that DiPaola infers too much. There is no language in *Legacy Trading* that addresses the issue before us here. In *Legacy Trading*, FINRA properly sought to question the representative to test the credibility of testimony he had given in a prior OTR interview. Here, two FINRA investigators testified that after reviewing DiPaola's 2019 interviews and searching emails, they developed additional questions to ask and concerns to explore to further their investigation. One investigator testified that in the 2019 interviews, when Enforcement asked about certain trades, DiPaola said he was unable to answer "in a vacuum," so Enforcement gathered trading data and prepared exhibits to provide additional context to the questions it planned to ask in 2021.[172] The investigator also testified that reviewing the million or so emails Chardan produced gave the staff a better understanding of DiPaola's communications with ADMD's chief executive officer and involvement in soliciting

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[165] *Plunkett*, 2013 SEC LEXIS 1699, at *33.

[166] *Dep't of Enforcement v. Legacy Trading Co., LLC*, No. 2005000879302, 2010 FINRA Discip. LEXIS 20 (NAC Oct. 8, 2010).

[167] Enf't Post-Hr'g Br. 24-25 (citing *Legacy Trading*, 2010 FINRA Discip. LEXIS 20).

[168] *Legacy Trading*, 2010 FINRA Discip. LEXIS 20, at *40.

[169] *Id.* at *15.

[170] *Id.* at *44.

[171] Resp't Post-Hr'g Reply Br. 5.

[172] Tr. 365-66, 546.

investors,[173] and raised additional questions to probe further into whether he had possessed insider information or material nonpublic information.[174]

DiPaola attacks the credibility of the testimony of both investigators. He claims that the evidence "clearly demonstrates that the 2021 OTR would have been an unnecessary and duplicative rehash of the questions already asked" in 2019.[175] DiPaola accuses Enforcement of engaging in an "abuse of the regulatory process" and labels its Rule 8210 request for his April 2021 OTR interview a "sham."[176]

We disagree. We do not find a sufficient basis in the record to conclude, as DiPaola has, that the investigators lied about their preparations for a 2021 OTR interview. Nor do we find sufficient grounds to disbelieve their testimony describing how they went about preparing further questions, to provide additional context to address questions DiPaola had earlier said he could not answer in a vacuum, and that they felt the need to explore further.

Simply put, DiPaola's refusal to attend and testify pursuant to Rule 8210 in April 2021 cannot be excused because he concluded that the interview would have been unnecessary and duplicative, and that "[t]here was nothing new to be covered."[177] The NAC and the SEC have consistently rejected claims by persons subject to FINRA jurisdiction that they may ignore Rule 8210 requests for information or testimony because they believe the information FINRA seeks is "unimportant,"[178] or that FINRA "no longer needs the requested information."[179] As the SEC held a quarter of a century ago, an assertion that Enforcement had already obtained transcripts of "exhaustive and complete testimony" from a potential respondent does not excuse the person from complying with another Rule 8210 request for OTR testimony.[180] "[R]egardless of what other information" Enforcement may have gathered in prior interviews, a registered person is "required to provide on-the-record testimony" requested under Rule 8210.[181] It is not permissible to "second-guess" FINRA by deciding that it "did not really need the information."[182]

Particularly relevant here is an SEC holding that a registered person must respond to a Rule 8210 request for information even if his response would be "a statement that he believed he had already provided."[183] Registered persons are not entitled to refuse to comply with an

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[173] Tr. 306-07.

[174] Tr. 324-25.

[175] Resp't Post-Hr'g Br. 22.

[176] *Id.* at 1, 3.

[177] *Id.* at 24.

[178] *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 4611, at *16 (Feb. 20, 2014).

[179] *Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 SEC LEXIS 2871, at *17 (Dec. 11, 2006).

[180] *Louis F. Albanese*, Exchange Act Release No. 34-39280, 1997 SEC LEXIS 2243, at *9 n.12 (Oct. 27, 1997).

[181] *Id*.

[182] *Mark Allen Elliott*, Exchange Act Release No. 34194, 1994 SEC LEXIS 1765, at *6 (June 10, 1994).

[183] *Ashton Noshir Gowadia*, Exchange Act Release No. 40410, 1998 SEC LEXIS 1887, at *8 (Sept. 8, 1998).

information request because they consider the information to be irrelevant to industry rules, or to "take it upon themselves to determine whether information is material to [FINRA's] investigation of their conduct."[184] Recipients of Rule 8210 information requests do not have the prerogative of refusing to comply because they believe, as DiPaola claims to, that the request is superfluous, or they "already provided FINRA with other, relevant information."[185] It has been held that FINRA need not "explain its reasons" for making a Rule 8210 request or to justify its relevance, and "an associated person may not 'second guess'" a Rule 8210 request.[186]

DiPaola argues that he told Enforcement he would appear at the 2021 OTR interview if it withdrew the Wells Notice, "but Enforcement refused" and, he claims without citing authority, Enforcement "should be equitably estopped" from proceeding against him because it "waived its right to request an additional OTR."[187] In this, DiPaola essentially placed a condition on his response to the Rule 8210 request: i.e., he would attend the interview if Enforcement withdrew its Wells Notice. He may not do so. "Members cannot impose conditions on their response" to Rule 8210 requests.[188]

Finally, DiPaola claims that failing to dismiss the third cause of action will create a "dangerous precedent"[189] "upending the entire Wells Process,"[190] because the investigation was "not a legitimate inquiry."[191] We are not persuaded by DiPaola's argument.

C. Conclusion (Cause Three)

After carefully reviewing the hearing transcript, the arguments of the parties, the applicable rules, Regulatory Notice 09-17, and relevant case law, we do not accept DiPaola's rationale for concluding that issuing a Wells Notice terminates an investigation and invalidates a post-Wells Rule 8210 request for testimony when the recipient makes no Wells Submission.

We are mindful that Enforcement questioned DiPaola extensively about his trading in his mother's and his E*Trade accounts in the three OTR interviews conducted in 2019, and that Enforcement had previously acquired the large body of emails and other communications from Chardan that it planned to use to question him further in 2021. We are not insensitive to the inconvenience and costs that repeated OTR interviews can impose on associated persons. But we

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[184] *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009). (quoting *Gen. Bond & Share Co. v. SEC*, 39 F.3d 1451, 1461 (10th Cir. 1994)).

[185] *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *27-28 (NAC June 3, 2014), *aff'd*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015).

[186] *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007), *petition for review denied*, 316 F. App'x 865 (11th Cir. 2008).

[187] Resp't Post-Hr'g Br. 21-22.

[188] *Michael David Borth*, Exchange Act Release No. 31602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

[189] Resp't Post-Hr'g Br. 17.

[190] Resp't Post-Hr'g Reply Br. 4.

[191] Tr. 665 (Respondent's closing argument).

do not find, as DiPaola urges, that Enforcement had no valid investigative purpose for requesting the April 2021 OTR interview. And we do not agree that the record supports DiPaola's accusation that Enforcement's staff witnesses lied when they testified that they had questions to ask DiPaola that they developed following the 2019 OTR interviews.

For these reasons, we conclude that by refusing to attend the April 2021 OTR interview as Enforcement requested, DiPaola violated FINRA Rule 8210, and thereby violated FINRA Rule 2010 as well.[192]

V. Sanctions

A. Failing to Disclose Outside Brokerage Account and Submitting Misleading Compliance Questionnaires

Because they are closely related, we impose a unitary fine for the first and second causes of action. We discuss them together.

For the disclosure violations of NASD Rule 3050(c) and FINRA Rule 2010 alleged in the first cause of action, FINRA's Sanction Guidelines recommend consideration of a fine from $1,000 to $39,000; for egregious violations, the Guidelines recommend considering suspension for up to two years, or a bar. The relevant Principal Considerations in Determining Sanctions are whether the undisclosed transactions presented real or perceived conflicts of interest for the respondent's employer firm or for customers, and whether the respondent gave verbal notice to the executing firm and to the employer member firm, and the employer verbally agreed to the transactions. [193]

Since the Guidelines do not specifically address violating FINRA Rule 2010 by submitting misleading compliance questionnaires, as alleged in the second cause of action, we look to the guideline for forgery and falsification of records, which the SEC has recognized as most appropriate to apply to the submission of false statements on a firm's compliance questionnaire.[194] When there is no harm to a customer, this guideline recommends considering a fine in the range of $5,000 to $155,000 and a suspension for two months to two years.[195]

1. Arguments of the Parties

Believing DiPaola's failure to disclose his mother's account to be egregious, for the first cause of action Enforcement asks us to suspend him in all capacities from associating with any

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[192] *Evansen*, 2014 FINRA Discip. LEXIS 10, at *25 n.23.

[193] FINRA Sanction Guidelines ("Guidelines") at 16 (Oct. 2021), https://www.finra.org/sanctionguidelines. This is the Guideline for violations of FINRA Rule 3210, which replaced NASD Rule 3050(c) on April 3, 2017, just after the relevant period for this proceeding, which was from March 2015 through March 2017. The two rules are essentially the same. *See* FINRA Regulatory Notice 16-22 (Apr. 2017), https:/www.finra.org/ rules-guidance/notices/16-22.

[194] *Braff*, 2012 SEC LEXIS 620, at *31.

[195] Guidelines at 37.

FINRA member firm for two years and impose a fine of $25,000.[196] Enforcement points to what it considers to be several aggravating factors. First, many of DiPaola's orders in his mother's account involved ADMD and CATS stock, whose issuers were provided financial services by Chardan, creating real or perceived conflicts of interest for Chardan and its clients. Next, citing the Guidelines' Principal Considerations in Determining Sanctions, Enforcement points out that DiPaola engaged in a pattern of discretionary trading and control over his mother's account, and that his undisclosed trading occurred over a long time.[197] Enforcement argues that the period during which DiPaola engaged in undisclosed trades in his mother's E*Trade account included times when Chardan placed the stocks on its restricted list and when Chardan "was engaged with the issuers."[198] Enforcement finds additionally aggravating that DiPaola's nondisclosure undermined Chardan's ability to monitor the trading in the account for actual or potential conflicts of interest and to detect other misconduct. Finally, Enforcement finds fault with DiPaola's failure to accept responsibility for his violations.[199]

DiPaola refers to the Guidelines' Principal Consideration in Determining Sanctions No. 11, which requires us to weigh the extent and nature of any injury caused by a respondent. DiPaola emphasizes that there is no evidence that his conduct harmed any party directly or indirectly, and that he "was only being a good son, was well-intentioned, his employer was aware of his trading strategy, and he had no financial interest" in his mother's account.[200] He argues that Enforcement "has not set forth a scintilla of evidence" to support its claim that DiPaola's trading in his mother's account presented real or perceived conflicts of interest. Instead, DiPaola claims, the stocks he traded in his mother's account were "the very same securities" he traded in his personal accounts, which Chardan knew about and to which it did not object.[201]

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[196] Enf't Post-Hr'g Br. 31.

[197] *Id.* (citing Guidelines at 7 (Principal Consideration Nos. 8 and 9)).

[198] *Id.* at 31-32, and n.119. Enforcement refers to the testimony of one of its investigators that he found instances when DiPaola traded in the stock of issuers with which Chardan engaged in investment banking transactions. In 2015 and 2016, during the relevant period, Chardan engaged in one investment banking transaction with ADMD and four investment banking transactions with a stock whose symbol is XXII, in which DiPaola traded for his mother. (CX-22). ADMD was on Chardan's restricted list from August 4 to October 13, 2016; CATS was on it from March 6 until March 9, 2015, March 17 to April 20, 2015, and February 29 to March 17, 2016; and XXII was on it from May 27 to May 29, 2015; February 2-3, 2016, July 12 to July 25, 2016, and October 4 to October 14, 2016. (CX-19, at 4, 7, 9, 10).

In the relevant period, when ADMD was on the restricted list, there were 158 executed stock transactions in ADMD in DiPaola's mother's account (115 purchases and 43 sales) (CX-76, at 485-521). When CATS was on the restricted list, there were no transactions in it in the account.(CX-76, at 4, 7-23, 240-55). When XXII was on the restricted list, there were five executed sales and one purchase in the account (CX-76, at 515-17).

[199] Enf't Post-Hr'g Br. 31-32 (citing Principal Consideration No. 2).

[200] Resp't Post-Hr'g Br. 26.

[201] *Id.* at 27.

For the second cause of action, Enforcement asks for a four-month suspension and a fine of $7,500, noting that DiPaola submitted two misleading questionnaires that did not disclose his mother's account as required, and that submission of accurate forms "was essential" for Chardan to be aware of its brokers' outside accounts and detect possible conflicts of interest and other potential misconduct.[202]

DiPaola argues that he was under no obligation to disclose his mother's E*Trade account because he did not control it.[203]

2. Discussion (Sanctions – Causes One and Two)

We agree with Enforcement that the effect of DiPaola's disclosure violation left Chardan unaware of his trading for his mother. As a result, Chardan could not review the account's monthly statements to satisfy itself that it had no objections or concerns about the activity in the account. Protection from the potential risks inherent in unmonitored trading by a firm's brokers is the purpose of the disclosure requirements of Rule 3050(c). The harm caused by DiPaola's nondisclosures was the frustration of that purpose. We also agree that DiPaola's failure to take responsibility is regrettable, but are mindful that throughout his defense against the charges levelled against him, he has consistently insisted that he did not violate FINRA rules, and a respondent is entitled to present a defense.

Under the circumstances, we do not agree with Enforcement that DiPaola's nondisclosure was egregious. As discussed above, the evidence establishes that DiPaola traded in his mother's account on her behalf as he traded in his own accounts, in many of the same stocks, including ADMD and CATS. He did not conceal the trading in his personal accounts from Chardan. There is no evidence that he knowingly traded stocks while they were on Chardan's restricted list. There is no evidence that Chardan objected to DiPaola's personal trading for himself, which Chardan was able to monitor. After DiPaola disclosed his mother's account in August 2017, there is no indication that Chardan found any problems with DiPaola's trading in it. There is no evidence that he traded in his mother's account for his own profit or personally benefitted in any way. Rather, as DiPaola testified, we find that he wanted to assist his mother, an unsophisticated investor, in managing an inheritance that came to her in a brokerage account she felt was costing too much and benefitting her too little.

As for DiPaola's submission of two misleading compliance questionnaires, again we find Enforcement's sanction recommendations unnecessarily excessive. The wide range of the fines recommended in the Guidelines implies that violations of this nature may be committed in many circumstances with significantly variable degrees of seriousness. We find DiPaola's submission of the two violative compliance questionnaires not to be egregious. Under these circumstances, we find Enforcement's recommended four-month suspension and $7,500 are unnecessary to achieve the objectives of protecting the investing public and deterring future misconduct by DiPaola and others who find themselves similarly situated. The misleading forms caused no

[202] Enf't Post-Hr'g Br. 32-33.

[203] Resp't Post-Hr'g Br. 34.

customer harm. He appears to have answered a question on each incorrectly because, having no financial interest in his mother's account, having invested no funds in it, having realized no gain from trading in it, and having his mother's oral permission to trade in it for her, he believed, albeit mistakenly, he did not have to disclose it.

For the reasons stated above, we conclude that a fine at the low end of the Guidelines applicable to the violations in the first two causes of action will suffice to meet the remedial objectives of the Sanction Guidelines. Because the nondisclosure and compliance questionnaire violations arise from the same course of conduct—both involve DiPaola's failure to disclose his trading in his mother's E*Trade account to Chardan—we believe a unitary sanction is appropriate.[204] We conclude that a $5,000 fine is a sufficient sanction for DiPaola's violations in both causes of action. We do not believe it necessary to suspend DiPaola for any period for these violations.

B. Failing to Appear to Provide April 2021 OTR Testimony

We treat DiPaola's Rule 8210 violation as a partial but incomplete response, as does Enforcement. For an individual who provides a partial but incomplete response to Rule 8210 requests, the Sanction Guidelines state that "a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request." If there are mitigating circumstances, the Guidelines recommend considering a suspension in any or all capacities for up to two years.

The Principal Considerations in Determining Sanctions for a partial response are:

(1) Importance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request.

(2) Number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response.

(3) Whether the respondent thoroughly explains valid reason(s) for the deficiencies in the response.[205]

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[204] *Dep't of Enforcement v. McGee*, No 2012034389202, 2016 FINRA Discip. LEXIS 33, at *78 (NAC July 18, 2016), *aff'd*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987 (Mar. 27, 2017), *petition for review denied*, 733 F. App'x 571 (2d Cir. 2018) (approving unitary sanction for related violations).

[205] Guidelines at 33.

1. Arguments of the Parties

Despite conceding that "DiPaola complied with some earlier FINRA Rule 8210 requests for information and documents,"[206] Enforcement argues there are no mitigating circumstances and that we should permanently bar DiPaola from associating with any FINRA member firm in any capacity for "his complete failure to appear and testify on either April 5, 2021 or April 15, 2021." [207] Enforcement proclaims that "case law under the *Guidelines* for Rule 8210 violations is clear," and cites *Department of Enforcement v. Harmon,* an Office of Hearing Officer's Default Decision, to support its position that DiPaola's refusal to testify in April 2021 meant that he "failed to substantially comply with Enforcement's Rule 8210 requests as a whole."[208] In *Harmon*, the respondent provided only a brief handwritten letter in reply to a Rule 8210 request for information. Subsequently Enforcement served two additional requests for information and received no response from Harmon, and she made no showing that the letter constituted substantial compliance with the requests.[209]

Enforcement states that at the 2021 interview, it intended to ask DiPaola about "specific trading not previously inquired about, with more factual context," to obtain DiPaola's testimony about "his trading in ADMD through his mother's undisclosed account and his own accounts." Enforcement ranks this as an important objective, so that it could explore the scope and extent of DiPaola's trading in his mother's account and assess whether DiPaola manipulated ADMD stock and engaged in insider trading.[210]

DiPaola counters by insisting there are multiple mitigating factors weighing against a bar. He rejects Enforcement's stress on the importance of the information it wanted to obtain from the April interview. DiPaola argues that Enforcement had previously gathered all the documents and information in its investigation before questioning him extensively in the three 2019 interviews. DiPaola declares that the topics Enforcement claims it wanted to question him about during a fourth interview in 2021 were "already covered during the 2019 OTRs." And, DiPaola claims, he provided "substantial and overwhelming assistance to FINRA" during the investigation, in the three 2019 interviews, and responses to requests for documents and information.[211]

2. Discussion (Sanctions – Cause Three)

FINRA Rule 8210 is an essential tool FINRA relies on to perform its regulatory responsibilities. That is why the Sanction Guidelines state that "a bar is standard" for failing to

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[206] Enf't Post-Hr'g Br. 28-29.

[207] Enf't Post-Hr'g Br. 29-30.

[208] *Id.* at 29 n.107 (citing *Dep't of Enforcement v. Harmon*, No. 2009021041501, 2012 FINRA Discip. LEXIS 15, at *11-12 (OHO Feb. 15, 2012)).

[209] *Harmon*, 2012 FINRA Discip. LEXIS 15, at *8, 11.

[210] Enf't Post-Hr'g Br. 30.

[211] Resp't Post-Hr'g Br. 27-28.

provide a complete response to information requests. But the Sanction Guidelines also emphasize in the introductory General Principles Applicable to All Sanction Determinations that we must tailor sanctions to address the circumstances of each individual case.[212] Because the "overriding purpose of all disciplinary sanctions is to remedy misconduct and protect the investing public,"[213] recommended guideline ranges "are not absolute" and they "do not mandate" specific sanctions. Thus, we must consider all "the facts and circumstances of a case" and "may determine that no remedial purpose is served by imposing a sanction within the range recommended in the applicable guideline" but that "a sanction below the recommended range, or no sanction at all" would be appropriate.[214]

With these principles in mind, we also look to precedents addressing sanctions in cases involving, as this one does, partial but incomplete responses to Rule 8210 requests for information or testimony. Fortunately, several are instructive.

In *Plunkett*, discussed earlier, the respondent complied with several Rule 8210 requests for information in an investigation. FINRA then sent a Wells Notice and the respondent made a Wells Submission. In it, he made claims that there were documents and witnesses that would substantiate innocent explanations of his conduct. FINRA wanted to test those claims, and issued post-Wells Notice Rule 8210 requests for the respondent to answer interrogatories and to provide supporting documents. Plunkett asked for and was granted several extensions of the response deadline.[215] Nine months after making the Rule 8210 requests, FINRA filed a complaint. Four months later, the respondent provided a narrative response to the interrogatories, with no supporting documents. The hearing panel found that he violated Rules 8210 and 2010 by failing to respond to the information requests, but, because he had responded earlier to other requests relating to the same subject matter, declined to bar him. Instead, the panel fined him $5,000 and suspended him for six months.[216]

When the NAC reviewed the *Plunkett* decision, it treated Plunkett's response to the post-Wells Rule 8210 interrogatories, four months after the filing of the complaint, as a complete failure to respond, making him presumptively unfit to be a securities professional, and barred him.[217] On appeal, the SEC disagreed with the NAC's sanction analysis underpinning the bar. The SEC observed that during the investigation, Plunkett had complied with several Rule 8210 requests, some of which related to the inquiries FINRA made in its post-Wells Notice information requests, and held that the NAC erred by not "taking any of this into account." The respondent's conduct, it concluded, did not justify the NAC in assuming that Plunkett was

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[212] Guidelines at 3 (General Principle No. 3).

[213] Guidelines at 10.

[214]-Guidelines at 4 (General Principle No. 3).

[215] *Plunkett*, 2013 SEC LEXIS 1699, at *13-15.

[216] *Id.* at *18.

[217] *Id.* at *20-21.

"presumptively unfit" to be a securities industry professional because he had failed "to respond in any manner."[218]

On remand, the NAC reconsidered and replaced the bar with the six-month suspension in all capacities that the hearing panel had initially imposed, and a fine of $20,000.[219] The NAC acknowledged the SEC's assessment that FINRA's post-Wells Notice Rule 8210 requests sought information related to earlier Rule 8210 information requests to which Plunkett had provided responses, and that "there was extensive overlap between the earlier and later requests."[220]

In *Plunkett*, the SEC referred to its opinions in *Kent M. Houston*[221] and *Rooney A. Sahai*,[222] two cases in which the respondents were barred as "presumptively unfit" to remain in the securities industry for failing to appear for an OTR interview. There, too, FINRA failed to credit respondents for providing information in reply to earlier Rule 8210 requests during the same investigations, and the SEC remanded the cases for reconsideration of the bars.[223]

With these precedents and principles in mind, we address the question of what sanctions are appropriate here. We begin with the Guidelines provision that a bar is standard for a partial response unless (i) the response "substantially complied with all aspects of the request," or (ii) mitigating factors are present. We also note that the Guidelines' Principal Considerations in Determining Sanctions for Rule 8210 violations require us to assess, from FINRA's perspective, the importance of the information sought but not provided, the number of requests made, and whether DiPaola gave valid reasons for not fully responding.[224]

On the record of this case, we have no basis for disregarding Enforcement's view that the matters it sought to question DiPaola about in April 2021 were important. We accept its assertions that after the 2019 OTR interviews, it developed additional questions it wanted to ask DiPaola about the topics it believed he had not sufficiently covered in 2019.

That prompted the series of requests starting March 11, 2021, to schedule a fourth OTR interview. DiPaola's counsel did not agree to Enforcement's proposed dates but did not suggest dates on which he and his client would be available. Meanwhile the jurisdictional clock continued to tick. Then Enforcement scheduled two April interview dates on which DiPaola did not appear. Enforcement's unsuccessful efforts to find a mutually agreeable date to conduct the interview occurred over slightly more than a month, from March 11 to April 15, the second of Enforcement's proposed interview dates. Thus, the number of requests and the length of time of

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[218] *Id.* at *55-57.

[219] *Id*. at *14.

[220] *Id.* at *9.

[221] *Kent. M. Houston*, Exchange Act Release No. 66014, 2011 SEC LEXIS 4491 (Dec. 20, 2011).

[222] *Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13 (Jan. 5, 2007) (following remand, the NAC reduced a bar to a two-year suspension).

[223] *Id.* at *55-56.

[224] Guidelines at 33.

this process were not inordinate and do not appear to us to constitute an aggravating circumstance. As noted above, Enforcement did not launch its effort to re-interview DiPaola until a year and eight months after the 2019 OTR interviews, a lapse of time attributable to Enforcement, not DiPaola.

We agree with Enforcement that DiPaola failed to offer a valid reason for his failure to provide testimony in April. DiPaola's assumption that FINRA lacked authority to require a post-Wells Notice interview absent a Wells Submission, and his assertion that Enforcement had nothing new to ask him, did not excuse him from complying with the Rule 8210 interview request. As we have discussed above, our understanding of the controlling precedents and the language of the Rule lead us to conclude that a Rule 8210 request is permissible at any stage of an investigation or proceeding, and was permissible here.

But we disagree with Enforcement's insistence that a bar is appropriate. Enforcement emphasizes DiPaola's "complete failure to appear and testify on either April 5, 2021, or April 15, 2021."[225] True, and regrettably, he refused to testify. But it was a refusal at the end of a long investigation, during which he had provided testimony on three days and after he had complied with other Rule 8210 information requests. We do not consider DiPaola's refusal to testify a fourth time to be a "complete failure."

Furthermore, we find here, as the SEC found in *Plunkett*, that there was extensive overlap between Enforcement's interrogations of DiPaola in 2019 and what it intended to question him about in 2021. Enforcement wanted to question DiPaola further about possible market manipulation, insider trading, conflicts of interest, patterns of trading, and the timing and volume of trading in ADMD in his mother's E*Trade account.[226] These were not new topics. In 2019 Enforcement questioned DiPaola about his trading in his and his mother's E*Trade accounts;[227] about conflicts of interest in his trading;[228] and probed whether DiPaola had access to nonpublic information when he traded and whether he had engaged in market manipulation.[229]

We also cannot ignore the fact that the Wells Notice told DiPaola that Enforcement had reached a preliminary determination to recommend formal discipline against him for manipulative trading and trading while possessing material nonpublic information.[230] This was, at least, an implicit concession by Enforcement that during its 2019 OTR interviews and information requests, it had gathered sufficient information to satisfy itself that it had obtained evidence supporting those charges. Enforcement changed its mind and did not include them in the Complaint, as was its prerogative. But to us, Enforcement's preliminary decision to recommend the charges suggests that Enforcement considered DiPaola's testimony and

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[225] Enf't Post-Hr'g Br. 20.

[226] Tr. 278-79, 347-48, 351-52, 363-64.

[227] Tr. 447-48.

[228] Tr. 448-49.

[229] Tr. 448.

[230] JX-21.

information responses before April 2021 significantly, if not substantially, compliant with Enforcement's Rule 8210 requests. They were significant enough to support a preliminary decision to recommend charges. We disagree, therefore, with Enforcement's conclusion that there are no mitigating circumstances present.

For these reasons, we find that a bar is inappropriate for DiPaola's failure to comply with the Rule 8210 request to testify in April 2021. Considering all the circumstances, we conclude that we may best serve the remedial purposes of FINRA's Sanction Guidelines by imposing a suspension for 30 business days in all capacities upon DiPaola for violating FINRA Rules 8210 and 2010 by refusing to appear for a fourth OTR interview in April 2021 in the investigation Enforcement started in January 2018.

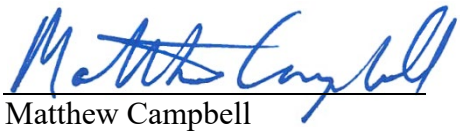
VI. ORDER

Respondent Jason Lynn DiPaola is fined $5,000 for (i) failing to disclose an outside account in which he exercised discretionary authority, in violation of NASD Rule 3050(c) and FINRA Rule 2010, and (ii) failing to answer accurately two annual questionnaire certifications, in violation of FINRA Rule 2010. He is also suspended from associating with any FINRA member firm in any capacity for 30 business days for failing to appear and provide on-the-record testimony, in violation of FINRA Rules 8210 and 2010.

DiPaola is assessed hearing costs in the amount of $2,848.09,[231] which includes an administrative fee of $750.

If this Decision becomes FINRA's final disciplinary action, the suspension shall become effective with the opening of business on Monday, May 16, 2022, and end at the close of business on Tuesday, June 28, 2022. The fines and assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this Decision becomes FINRA's final disciplinary action in this proceeding.[232]

SO ORDERED.



Matthew Campbell
Hearing Officer
For the Hearing Panel

[231] Pursuant to FINRA Rule 8330, we are imposing upon the Respondent, one-half of the costs as being fair and appropriate under the circumstances of this case.

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

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