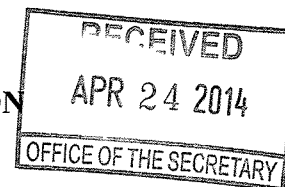


**HARD COPY**

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**



In the Matter of the Application of

John Joseph Plunkett

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-14810r

**BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY  
IN OPPOSITION TO APPLICATION FOR REVIEW**

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April 23, 2014

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**SECURITIES AND EXCHANGE COMMISSION**  
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In the Matter of the Application of  
  
John Joseph Plunkett  
  
For Review of Disciplinary Action Taken by  
  
The Financial Industry Regulatory Authority  
  
File No. 3-14810r

**BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY  
IN OPPOSITION TO APPLICATION FOR REVIEW**

**I. INTRODUCTION**

This narrow appeal involves consideration of the sanction for Applicant John Joseph Plunkett's ("Plunkett") partial but incomplete response to FINRA's requests for information and documents. On remand, FINRA suspended Plunkett for six months and fined him \$20,000. Previously, the Commission found in its June 14, 2013 opinion ("Commission Opinion") that Plunkett put customers and their assets at risk and devastated his employer, Lempert Brothers International USA, Inc. Plunkett, in a self-serving effort to build the business of his new broker-dealer and in anticipation of being fired, directed employees to pack up virtually all of Lempert Brothers' books and records and remove the documents from Lempert Brothers' offices. When Plunkett removed Lempert Brothers' books and records, he also took the firm's checkbook, and directed the employees to erase all of Lempert Brothers' electronic files and computer servers.

Plunkett was not acting, as he maintains, in the best interests of his customers, but rather, as the Commission noted, “his true motivation was his own financial interest.” (RP 2983.)<sup>1</sup>

Plunkett’s conduct had devastating effects on Lempert Brothers and its customers, crippling Lempert Brothers’ operations and making it impossible for the firm to comply with its statutory obligations. When FINRA attempted to investigate Plunkett’s misconduct, as well as allegations of criminal activities by Lempert Brother’s owners Plunkett obstructed FINRA’s investigation by refusing to respond completely. Specifically, the Commission found that Plunkett failed to respond to two FINRA requests for information and documents until four months after the filing of a complaint initiating disciplinary proceedings against him, and then only partially responding, in violation of FINRA Rules 8210 and 2010.

Plunkett offers no legitimate justification for his misconduct and provides no basis for further reducing the sanctions for his partial but incomplete responses to FINRA Rule 8210 requests. Instead, he continues to paint himself as the victim of an international criminal scheme from which he supposedly tried to save his customers. He does so by focusing his appeal on portions of the Commission Opinion that are final and were not remanded. The level of sanctions that the NAC imposed in its December 17, 2013 decision (“2013 Decision”) for Plunkett’s FINRA Rule 8210 violation is the only issue under review. Because the sanctions imposed by FINRA for that violation are consistent with the FINRA Sanction Guidelines, are neither excessive nor oppressive, and were reduced from the NAC’s previous sanction, the Commission should dismiss Plunkett’s application for review.

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<sup>1</sup> “RP” refers to the page numbers in the certified record of this case filed with the Commission.

## **II. FACTUAL BACKGROUND**

The Commission Opinion affirmed FINRA's findings of fact. (RP 2966-2988.) Those findings of fact, therefore, are not under review. We review the facts here to provide context for the Commission's consideration of Plunkett's current appeal of the sanctions that FINRA imposed in its 2013 Decision. The facts related to Plunkett's books and records violation are discussed in detail in the decision issued on February 21, 2012 ("2012 Decision"), as well as the Commission Opinion.

Between May and October 2006, FINRA requested information from Plunkett pursuant to FINRA Rule 8210 concerning Plunkett's separation from Lempert Brothers. FINRA issued these requests on May 23 (RP 1803-5), July 20 (RP 1895), August 18 (RP 1909-1910), and October 20, 2006 (RP 1944.) Specifically, the information sought and provided by Plunkett included, but was not limited to, a catalogue of the records and files that Plunkett removed from Lempert Brothers at the time of his resignation and an explanation as to why Plunkett removed those files; six months' worth of Lempert Brothers' e-mails; documents and information related to Lempert Brother's corporate structure; information related to Lempert Brothers' brokerage and banking accounts; information related to employees' and owners' roles and responsibilities; as well as Plunkett's written explanations for various letters and other correspondence that FINRA had attached to the requests. Plunkett responded to each of these requests, although typically not promptly, and answered all questions, except one concerning his tax returns. (RP 1620.)

On May 8, 2009, FINRA's Department of Enforcement sent Plunkett and his attorney a Wells Notice, informing them that FINRA had made a preliminary determination to initiate formal disciplinary proceedings against Plunkett for his removal of Lempert Brothers' books and

records. (RP 1955-1956.) Plunkett submitted a response to the Wells Notice on June 29, 2009. (RP 1959-1998.) Plunkett's response explained the circumstances surrounding his departure from Lempert Brothers. (RP 1960-1965.) Although Plunkett's response attached some supporting documentation, the response referred to additional documents, which he did not provide, and certain individuals that he did not identify by name. (RP 1959-1998.)

On July 15, 2009, FINRA requested more information about Plunkett's departure and sent him a request for information and documents made pursuant to FINRA Rule 8210. (RP 1999-2002.) The letter examined each paragraph and statement contained in Plunkett's response to the Wells Notice and asked Plunkett to provide copies of the referenced documents and identify the unnamed individuals. (RP 1999-2002.) The request specifically instructed Plunkett to state whether certain documents were unavailable, and if they were unavailable, to explain why. (RP 1999-2002.) The letter requested a response by July 27, 2009. (RP 2002.)

On July 27, 2009, Plunkett requested an extension of time to respond to the request. (RP 2003.) He stated that he required additional time to search for the documents. (RP 2003.) Plunkett explained, "[s]ome items are with previous counsel, some were in storage, some appear to be misfiled and have not been able to be found." (RP 2003.)

FINRA granted Plunkett an extension until August 10, 2009. (RP 2003.) Plunkett, however, did not respond to the request by August 10, 2009. On August 11, 2009, Plunkett requested additional time to respond. (RP 2005.) He stated that he could not respond at that time because he was ill. (RP 2005.)

On August 20, 2009, FINRA sent Plunkett a second request for information and documents made pursuant to FINRA Rule 8210. (RP 2007.) The second request enclosed a copy of the original request from July 15, 2009, and required Plunkett to respond no later than



September 3, 2009. (RP 2007-2011.) The letter advised Plunkett that the “[f]ailure to comply with this request may subject you to disciplinary action.” (RP 2007.) Nevertheless Plunkett did not respond for months.

Seven months later, on April 29, 2010, and more than four months after Enforcement filed the complaint in this case, Plunkett finally submitted a written narrative response to the request for information and documents. (RP 2029-2033.) Although he provided the requested names, he did not explain why he did not provide them earlier. Plunkett, however, did not provide any documents with his response. (RP 2030-2031.) Plunkett attributed his failure to provide the documents to his secretary’s departure from Emerald Investments, Inc., the broker-dealer that Plunkett formed; Emerald Investments’ eviction from its rented office space; the misfiling of some documents; the offsite storage of other documents; and the general disarray of his office. (RP 2030-2031.)

### **III. PROCEDURAL BACKGROUND**

Enforcement filed a two-cause complaint in December 2009. (RP 1.) Enforcement alleged that Plunkett’s removal of Lempert Brothers’ books and records, and his erasure of the firm’s electronic files and computer servers, violated NASD Rule 2110. Enforcement further alleged that Plunkett failed to respond to FINRA’s requests for information and documents, in violation of FINRA Rules 8210 and 2010. (RP 1-13.)

The Hearing Panel issued an amended decision in January 2011, finding that Plunkett violated FINRA’s rules as alleged in the complaint. (RP 2613-2635.) The Hearing Panel fined Plunkett \$20,000 and suspended him in all capacities for two years for his conduct involving the firm’s books and records and imposed an additional \$5,000 fine and consecutive six-month

suspension for the failure to respond to the requests for information and documents. (RP 2634-2635.)

On February 17, 2011, a Review Subcommittee of the NAC called the Hearing Panel's decision for discretionary review, pursuant to FINRA Rule 9312(a)(1), to examine the sanctions that the Hearing Panel imposed for each cause of action for which the Hearing Panel held Plunkett liable. (RP 2637-2638.)

The NAC initially issued the 2012 Decision, finding that Plunkett just prior to resigning from Lempert Brothers, and in anticipation of being fired, directed others to remove the firm's books and records and erase the firm's electronic files and computer servers, in violation of NASD Rule 2110. For this misconduct, the NAC barred Plunkett in all capacities. (RP 2727-2730.) The NAC further found that Plunkett failed to respond to two FINRA requests for information and documents until four months after the filing of a complaint initiating disciplinary proceedings against him, and even then responded only partially, in violation of FINRA Rules 8210 and 2010. (RP 2731-2732.) In assessing sanctions for this misconduct, the NAC applied the presumption articulated in the FINRA Sanction Guidelines that a response to a FINRA Rule 8210 request subsequent to the filing of a disciplinary complaint constitutes a complete failure to respond, and again barred Plunkett in all capacities. (RP 2721-2732.)

Plunkett appealed the 2012 Decision to the Commission. (RP 2736-2738.) The Commission opinion sustained the NAC's findings that Plunkett violated FINRA rules by removing the firm's books and records and erasing electronic files and computer servers. (RP 2966-2988.) Those findings, regardless of Plunkett's current arguments, are not under review in this appeal.

The Commission determined that Plunkett breached his duty to his customers when he moved confidential customer files from his member firm to the new firm he planned to establish and violated his duty of loyalty to his member firm by taking steps to transfer its customer base to a competing firm that Plunkett was forming, in violation of NASD Rule 2110. (RP 2975-2976.) The Commission rejected Plunkett's argument that his firm's purported misconduct excused his actions, noting that Plunkett showed a disturbing indifference to the fact that he put customers at risk. (RP 2977.)

For Plunkett's misconduct relating to the firm's books and records, the Commission affirmed the bar the NAC imposed. (RP 2981-2985.) The Commission agreed with FINRA that Plunkett's actions were intentional, self-serving, and motivated by his own financial interest, and his misconduct imposed a substantial risk on the firm's customers. (RP 2983.) The Commission, like FINRA, noted that Plunkett's misconduct paralyzed his member firm by rendering it inoperable for four months, and hindered the firm's ability to comply with financial and operational rules, including the ability to ensure compliance with net capital requirements. (RP 2983.)

The Commission also found that Plunkett violated FINRA Rules 8210 and 2010 by failing to provide requested information to FINRA staff. (RP 2978-2979.) With respect to sanctions, however, the Commission remanded the matter to the NAC for further consideration. (RP 2986-2987.) The Commission found that FINRA erred by failing to analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner. (RP 2986-2987.) The Commission concluded that because Plunkett "meaningfully" responded to several earlier FINRA Rule 8210 requests related to the same investigation, his failure to respond to two later FINRA Rule 8210 requests until after the filing of a complaint constituted conduct "closer to" a

partial failure to respond. (RP 2987.) The Commission noted that Plunkett had previously “provided information about Lempert Brothers’ accounts, staff, management structure, organizational structure, and contractual arrangements with a third party, and communications regarding the possible improprieties involving the Orlovs [the firm’s owners] and the firm.” (RP 2986.) Some of this information related to the inquiries FINRA posed in its later FINRA Rule 8210 requests, and the Commission noted that FINRA failed to take the interrelatedness of the requests into account when it assessed sanctions. (RP 2986-2987.) The Commission therefore set aside the bar imposed by the NAC and remanded this matter with instructions that the NAC analyze Plunkett’s violation of FINRA Rule 8210 under the Guidelines for a partial but incomplete response. (RP 2987.) The Commission’s remand was limited to the issue of sanctions for the FINRA Rule 8210 violation and did not include any other findings or sanctions. (RP 2989.)

On remand from the Commission and with the guidance provided in the Commission Opinion, the NAC found that there was extensive overlap between the early FINRA Rule 8210 requests and those later requests at issue in this case. In addition, as recommended by the applicable Guidelines for a partial but incomplete response, the NAC found that the information sought by FINRA was extremely important, that FINRA had to exert the highest level of regulatory pressure to receive the information sought, and that Plunkett provided no valid explanation for his failures to respond. Based on these facts, the NAC fined Plunkett \$20,000 and suspended him for six months for his violation of FINRA Rule 8210. (RP 3046-3051.) On January 16, 2014, Plunkett appealed the 2013 Decision to the Commission.

#### IV. ARGUMENT

The sanctions that the NAC imposed—a six-month suspension and \$20,000 fine—are fully supported by the record, consistent with FINRA’s Guidelines, and are neither excessive nor oppressive. The Commission previously affirmed the factual findings that Plunkett failed to respond to FINRA’s requests for information. (RP 2978-2979.) The Commission also affirmed FINRA’s findings that Plunkett’s misconduct violated FINRA Rules 8210 and 2010. (RP 2979.) On remand, FINRA imposed a six-month suspension and a \$20,000 fine for Plunkett’s failure to respond to FINRA’s requests for information. (RP 3047.) The Commission should affirm these sanctions.

Exchange Act Section 19(e)(2), 15 U.S.C. § 78s(e)(2), directs the Commission to sustain the sanctions imposed by FINRA unless it finds, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.<sup>2</sup> See *Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). The Commission considers the principles articulated in the Guidelines persuasive and uses them as a benchmark in conducting its review under Exchange Act Section 19(e)(2). See *Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at \*20 (July 1, 2008); *Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at \*21-22 & n.24 (Nov. 8, 2007). The Commission has acknowledged that the Guidelines “do not prescribe fixed sanctions for particular violations” and “are not intended to be absolute.” *Kent M. Houston*, Exchange Act Release No. 71589A, 2014 SEC LEXIS 863, at \*12 (Feb. 20, 2014); FINRA Sanction Guidelines

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<sup>2</sup> Plunkett does not claim, nor does the record show, that FINRA’s action imposed an unnecessary or inappropriate burden on competition.

1 (Overview of FINRA Sanction Guidelines).<sup>3</sup> The Commission also considers any mitigating factors that an applicant raises, giving due regard to the “public interest and the protection of investors.” See *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007), *aff’d in relevant part*, 566 F.3d 1172 (D.C. Cir. 2009); *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005).

The sanctions imposed by FINRA on Plunkett are within the parameters established by the Guidelines and are well justified. In choosing its sanctions, FINRA carefully weighed the Commission’s guidance on remand and the relevant facts, and the resulting sanctions reflect the seriousness of Plunkett’s misconduct. While Plunkett’s responses to FINRA’s requests for information were dilatory and his deficient document production without excuse, the NAC acknowledged that Plunkett ultimately provided information that complied with the requests. Plunkett provides no relevant or material basis upon which the Commission should modify his sanctions, and his arguments for mitigation were previously rejected in the Commission Opinion. Moreover, the sanctions that FINRA imposed are consistent with FINRA’s Guidelines. Accordingly, the Commission should dismiss Plunkett’s application for review.

**A. FINRA’s Sanctions for Plunkett’s Failure to Respond Are Consistent with Commission Directives, FINRA’s Guidelines, the Public Interest, and Are Neither Excessive Nor Oppressive**

**1. The NAC followed Commission Directives and FINRA’s Guidelines**

Plunkett failed to provide FINRA with requested information in violation of FINRA Rule 8210. For this violation, the NAC fined Plunkett \$20,000 and suspended him for six months. The Commission should affirm these sanctions. In making this sanction determination on remand, the NAC followed the Commission’s directive that FINRA consider Plunkett’s

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<sup>3</sup> *FINRA Sanction Guidelines* (2013) [hereinafter *Guidelines*], available at <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf>.

provision of partial but incomplete responses to FINRA’s requests made pursuant to FINRA Rule 8210. (RP 2987.) The Commission previously concluded that Plunkett “meaningfully” responded to several earlier FINRA Rule 8210 requests during the same investigation.

In re-determining sanctions for Plunkett’s failure to respond, the NAC correctly followed the Guidelines for a partial but incomplete response. (RP 3049-3051.) The Guidelines recommend that an adjudicator consider suspending the individual for up to two years and fining him \$10,000 to \$50,000.<sup>4</sup> The \$20,000 fine and six-month suspension of Plunkett are well within the parameters of the Guidelines and consistent with these recommendations.

The NAC also correctly analyzed and applied the three principal considerations articulated in the Guidelines in determining the proper remedial sanction. As to the first of these considerations, the NAC considered that the information sought through these requests was essential to FINRA’s investigation of Plunkett’s possible misconduct and also to support the claims made by Plunkett in his June 29, 2009 response to FINRA’s Wells Notice. (RP 3050.) Because Plunkett did not initially provide the documents or identifying information in his Wells Notice response, FINRA could not ascertain whether Plunkett was referring to documents he had already produced or to other documents FINRA had not yet seen. (RP 3050.) Plunkett also claimed in that same letter that certain people possessed information relevant to the alleged fraud by Lempert Brothers’ owners and the removal of the documents. (RP 3050.) Because Plunkett did not identify those people by name, Plunkett hindered FINRA’s investigative efforts related to both Plunkett’s violations and the alleged misconduct by Lempert Brothers. The delay that Plunkett caused FINRA in its investigative efforts is an aggravating factor. *See CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*35

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<sup>4</sup> *Guidelines*, at 33.

(Jan. 30, 2009) (finding it aggravating that respondent's failure to give complete and timely responses prevented NASD's efforts to determine the firm's financial stability and if misconduct had occurred); *Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at \*31-32 (Nov. 8, 2007) (holding that the failure to "provide information fully and promptly undermines the NASD's ability to carry out its regulatory mandate"), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

The NAC acknowledged in its re-determination of sanctions that Plunkett did ultimately respond to FINRA's July 15, 2009 request. (RP 3050.) He represented in his April 2010 response that the documents referred to in his June 29 Wells response were ones that he either had already provided to FINRA or did not have. (RP 3050.) He also provided the names of the individuals referenced in his June 29, 2009 Wells Notice response. (RP 3050.) Thus, while the NAC found that the information sought was important as viewed from FINRA's perspective, Plunkett's answers, albeit late, ultimately were responsive to FINRA's requests and provided him with some mitigation.

Next, the NAC determined that FINRA had to exert the highest degree of regulatory pressure by filing a complaint to elicit a response from Plunkett.<sup>5</sup> (RP 3050.) The NAC determined that this was a highly aggravating factor. (RP 3050.) The Commission has long emphasized that FINRA "should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210." *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at \*12 (Sept. 10, 2010), *aff'd*, 436 F. App'x 31 (2d Cir. 2011). FINRA staff attempted to accommodate Plunkett, granting him an extension in addition to sending him a second request, extending his time to respond yet further. (RP 3050.) In

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<sup>5</sup> *See Guidelines*, at 33.



addition, more than four months elapsed between FINRA's filing of its complaint and when Plunkett actually responded. It was not until Plunkett submitted his delinquent responses that FINRA learned that much of the information that he provided was duplicative of his 2006 responses and thus already in FINRA's possession. (RP 3050.) In weighing these factors, the NAC determined that Plunkett's extended delays and the amount of regulatory effort and resources exerted by FINRA to compel his response served to aggravate the level of sanctions.

Finally, the NAC found that Plunkett offered no valid explanation for his delay in responding to FINRA's requests or his failure to produce certain documents.<sup>6</sup> (RP 3051.) *See, e.g., Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13, at \*13 (Jan. 5, 2007) ("We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability."). Before the Commission Plunkett continues to maintain that he had been locked out of his office by his landlord, thereby blocking his access to the documents, and that much of the requested information was eventually destroyed by the landlord upon Plunkett's eviction. (Br. at 3.) The record, however, belies his claims. In reality, Plunkett received FINRA's requests for those documents before the lockout or eviction occurred. Plunkett acknowledged in a letter dated April 29, 2010 that he was evicted for nonpayment for rent around Labor Day 2009." (RP 2030-2031.) However, the responses to the July 2009 requests were originally due on July 29, 2009, more than a month before Labor Day. (RP 2002.) Moreover, these explanations are not mitigating and have no bearing on Plunkett's compliance obligations under FINRA Rule 8210. *See Ricupero*, 2010 SEC LEXIS 2988, at \*20 (rejecting applicant's claim that his inability to locate documents should lessen severity of his violation of FINRA Rule 8210); *Wedbush Sec., Inc.*, 48 S.E.C. 963, 971-972 (1988) (rejecting

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<sup>6</sup> *See Guidelines*, at 33.

applicant's contention that personnel shortages and disarray of firm records mitigated delay in responding to FINRA's requests for information and documents). Thus, as the NAC correctly found, Plunkett failed to provide satisfactory justification for the delay and deficiencies in his responses.

As detailed in the NAC's decision in this matter, the NAC, after carefully considering the sanction ranges suggested in the applicable Guidelines and applying the aggravating and mitigating factors, found that a \$20,000 fine and six month suspension were appropriately remedial sanctions. The Commission should affirm these sanctions.

## **2. The Sanctions Are Neither Excessive Nor Oppressive and in the Public Interest**

The sanctions imposed by the NAC on remand are remedial and not punitive. They also reflect the importance of FINRA's Rule 8210 in fulfilling its regulatory mandate, as failures to comply with FINRA Rule 8210 threaten both investors and the market. The Commission has "stressed the importance of FINRA Rule 8210 in connection with NASD's obligation to police the activities of its members and associated persons." See *Kent M. Houston*, 2014 SEC LEXIS 863, at \*22. A failure like Plunkett's to respond to Rule 8210 requests "impedes NASD's ability to detect misconduct that threatens investors and markets." *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13-14 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

Based on all of the facts, the NAC properly concluded that Plunkett's dilatory tactics and partial but incomplete responses warranted a \$20,000 fine and six-month suspension. Plunkett's delay tactics posed the risk that evidence would be lost or destroyed, potentially allowed ongoing misconduct to continue in the intervening period, and required FINRA to use resources unnecessarily, all of which pose a potential threat to the investing public. See *Toni Valentino*, 57

S.E.C 330, 339 (2004) (finding that respondent's "attempts to delay and ultimately avoid her appearance . . . especially troubling given the importance of Rule 8210."). These sanctions emphasize how it is "critically important to the self-regulatory system that members and associated persons cooperate with NASD investigations." *See Houston*, 2014 SEC LEXIS 863, at \*22.

Plunkett's misconduct was serious, and the sanctions imposed are necessary to protect the public by encouraging Plunkett and others to respond to FINRA Rule 8210 requests completely and in a timely manner. *See Joseph Patrick Hannan*, 53 S.E.C 854, 858-859 (1998) ("We have repeatedly stressed the importance of cooperation in NASD investigations . . . Failures to comply [with Rule 8210 requests] are serious violations because they subvert the NASD's ability to carry out its regulatory responsibilities."). The sanctions imposed by the NAC are appropriately remedial and neither excessive nor oppressive. Therefore, the Commission should affirm the imposed sanctions.

#### **B. Plunkett's Disciplinary History Is Not Currently at Issue**

Plunkett argues on appeal that it was unfair for FINRA to consider his disciplinary history in its assessment of sanctions because of the facts and circumstances surrounding those prior proceedings. (Br. at 9-10.) As an initial matter, the NAC's remand decision did not rely on Plunkett's disciplinary history when determining sanctions for the FINRA Rule 8210 violation. Rather, as described above, the NAC considered the Guideline-specific considerations for a partial but incomplete response and found that those factors amply supported a \$20,000 fine and six-month suspension. Thus, the Commission should reject Plunkett's argument outright.

In general though, consideration of a respondent's disciplinary history is appropriate under the Guidelines. *Guidelines*, at 2. As the Commission found in affirming the NAC's bar of

Plunkett for his theft of Lempert Brothers' books and records and erasure of its electronic files, Plunkett's disciplinary history was appropriately considered an aggravating factor in the assessment of sanctions because it demonstrates a pattern of "disregard for regulatory requirements, investor protection, or commercial integrity." (RP 2983); *see also Ricupero*, 2010 SEC LEXIS 2988, at \*8-9 (affirming bar and FINRA's consideration of applicant's disciplinary history in assessment of sanctions); *Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at \*44-45 (Oct. 4, 2007) (finding that applicants' disciplinary history was a significant aggravating factor for purposes of sanctions). The Commission explained that the NAC properly considered Plunkett's failure to pay an arbitration award and his settlement in another matter for acting as a general securities principal without the proper qualifications and registrations in assessing sanctions "because they evidence a disregard for regulatory requirements and are further evidence that he poses a risk to the investing public absent a bar." (RP 2984.) Thus, the NAC's consideration of Plunkett's disciplinary history in the 2012 Decision was wholly appropriate.

**C. Plunkett's Attempts to Re-litigate the Commission's Conclusive Findings Should Be Rejected**

Plunkett argues at length for a reversal of the Commission's findings related to his removal of Lempert Brothers' books and records and erasure of its electronic files and an elimination of the bar for this misconduct.<sup>7</sup> (Br. at 4-12.) The Commission Opinion constitutes

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<sup>7</sup> Plunkett also faults the Commission Opinion for making certain factual misstatements in the footnotes and counters with facts of his own. (Br. at 4-7.) He states, however, that his "facts" are part of the records of the arbitrations between Lempert Brothers and Emerald Investments. Those facts, even if part of the record in other matters, are immaterial to the instant case and not part of this record. Plunkett provides no specific factual information from the

[Footnote Continued on Next Page]

the Commission's final decision on Plunkett's liability and sanctions for the books and records violations. Those findings were not remanded, are not now before the Commission, and should remain undisturbed.

The Commission undeniably found that Plunkett violated NASD Rule 2110 when he directed others to remove Lempert Brothers' books and records, erase its electronic files, and remove its back-up tapes. (RP 2975-2976.) Plunkett's conduct represented a gross deviation from the standards of commercial honor required of individuals employed in the securities industry. The Commission noted that Plunkett showed a "disturbing indifference to the fact that, by rendering Lempert Brothers incapable of complying with basic financial and operational rules that are designed for customer protection, he put Lempert Brothers' customers at risk." (RP 2977-2978.) The Commission determined that the egregiousness of Plunkett's misconduct warranted a bar. The Commission found that Plunkett's actions were intentional and self-serving, and that his true motivation was his own financial interest. (RP 2983.) "[T]he fact that Plunkett went to the trouble of erasing Lempert's electronic files and removed its back-up tapes underscores the point that his intent was to have exclusive access to those customers." (RP 2983.) The Commission should reject Plunkett's collateral attack on the Commission's final order sustaining FINRA's actions. (RP 2989); *see Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at \*18 (May 20, 2008) (rejecting collateral attack of underlying disciplinary action); *cf. Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991)

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record presently before the Commission to justify his removal of Lempert Brothers' books and records.

(explaining that once an appellate tribunal decides an issue, that decision becomes the law of the case and “binding upon all subsequent proceedings in the same case”).<sup>8</sup>

Plunkett, moreover, waived his right to seek reconsideration of these matters when he chose not to file a timely motion for reconsideration or to appeal to the appropriate circuit court. *See* Commission Rules of Practice 470, 490, 17 C.F.R. 201.470, 201.490. Consequently, Plunkett’s arguments and objections to the findings of misconduct and sanctions relating to the firm’s books and records should not be heard now. The Commission Opinion with respect to the books and records findings and sanctions is final. Accordingly, his arguments related to these violations and should be disregarded.

**D. The Commission Should Reject the Additional Evidence that Plunkett Impermissibly Appended to His Brief**

Related to his attempts to seek de facto review of the portions of the Commission’s Opinion that is not subject to this appeal, Plunkett appears to be seeking to introduce new evidence into the record. Plunkett appended to his brief to the Commission seven documents, one of which (the 2013 Decision) is already part of the record and others of which are not. Plunkett has not filed with the Commission a motion to adduce these documents and has not complied with the other requirements of Commission Rule of Practice 452, 17 C.F.R. 201.452. The Commission therefore should reject the documents appended to Plunkett’s brief.

Rule 452 of the Commission’s Rules of Practice governs attempts to introduce additional evidence in appeal proceedings. Rule 452 provides that a party who seeks to introduce new

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<sup>8</sup> The theories under which Plunkett now claims he should be exonerated, the intervening indictments and guilty pleas of former Lempert Brothers’ employees (Br. at 10-12), do not depend on newly discovered evidence related to Plunkett’s violations or an intervening change in the governing law and are not, therefore, within an exception to the law of the case doctrine. *Cf. Key*, 925 F.2d at 1060 (exceptions to law of the case doctrine).

evidence on appeal shall (1) file a motion for leave to adduce additional evidence; (2) show with particularity that such additional evidence is material; and (3) demonstrate reasonable grounds for failing to adduce the evidence previously. *See Sidney C. Eng*, 53 S.E.C. 709, 720 (1998). Plunkett has not complied with any portion of Rule 452.

None of the documents appended to Plunkett's brief are material, nor do they serve to extinguish or even diminish Plunkett's books and records violations. The documents Plunkett appended to his brief include articles, press releases, and court documents concerning the indictment and guilty pleas of two former Lempert Brothers' employees, whose criminal activity Plunkett maintains justified his decision to remove and erase Lempert Brothers' books and records and electronic files. (Br. at 10-12.) The criminal activity of others does not absolve Plunkett of his egregious violations of FINRA rules or mitigate the sanctions imposed. *Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at \*69-70 (Feb. 1, 2010) ("Katz cannot shift the blame for her violations to others or claim that others' misconduct somehow excuses her own misdeeds"), *aff'd*, 647 F.3d 1156 (D.C. Cir. 2011); *see John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at \*31 (July 25, 2008) (holding that an applicant "cannot shift the blame for his violations to his firm"); *Barry C. Wilson*, 52 S.E.C. 1070, 1073 n. 12 (1996) (noting that "failings on the part of certain firm personnel do not excuse misconduct by others"). As the Commission already stated in this case, Plunkett "was required to ensure that his own conduct was consistent with high standards of commercial honor and just and equitable principles of trade regardless of whether others engaged in misbehavior. Moreover, his argument shows a disturbing indifference to the fact that, by rendering Lempert incapable of complying with basic financial and operational rules that are designed for customer protection, he put Lempert's customers at risk." (RP 2977-2978.)

In addition, Plunkett makes no arguments that demonstrate reasonable grounds for failing to adduce the evidence previously. Plunkett failed to comply with SEC Rule of Practice 452, and the Commission should reject all of the documents appended to his brief.

**E. Plunkett's Requested Remedies are Not Available in this Proceeding**

Plunkett requests that the Commission remediate the wrongs he alleges he has suffered throughout these and other related FINRA proceedings. For example, he argues for the elimination of the bar, suspension, and monetary fine; dismissal of the arbitration verdict against Emerald Investments; and an order requiring FINRA to pay Plunkett \$10 million. (Br. at 12.) Not only are few of these remedies remotely relevant to the instant appeal, they are also statutorily unavailable.

Exchange Act Section 19(e) describes what the Commission may do in response to a final disciplinary sanction imposed by FINRA. For instance, Section 19(e)(1) provides that there must be, among other things, “opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction.” Moreover, Section 19(e)(1)(A) provides that if FINRA acted appropriately, the Commission “shall so declare and, as appropriate, affirm the sanction imposed by [FINRA], modify the sanction . . . , or remand to [FINRA] for further proceedings.” And similarly, Section 19(e)(1)(B) provides that if a self-regulatory organization (“SRO”) such as FINRA did not act appropriately, the Commission “shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.” Section 19(e) does not contemplate a remedy other than affirmation, dismissal, setting aside, or remand. *See Beatrice J. Feins*, 51 S.E.C. 918, 922 n.14 (1993) (declining to reach state law or claims for monetary damages because “[w]e are not authorized under statute to award damages”); *see also Gregory W. Gray*, Exchange Act Release

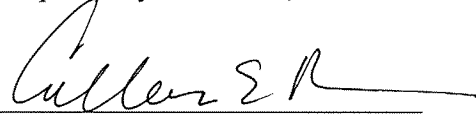


No. 60361, 2009 SEC LEXIS 2554, at \*39 n.41 (July 22, 2009) (noting that the Exchange Act does not authorize the Commission to increase SRO disciplinary sanctions). The Exchange Act does not authorize the Commission to award Plunkett the relief that he requests, and, accordingly, the request should be denied.

## V. CONCLUSION

Plunkett's partial but incomplete responses to FINRA's requests for information and documents concerning an extremely important investigation runs contrary to FINRA Rule 8210's fundamental requirement that members and their associated persons cooperate fully and promptly with FINRA investigations. As the 2013 Decision reflects, the NAC weighed the relevant considerations under the Guidelines and acted reasonably by fining Plunkett \$20,000 and suspending him for six months for this misconduct. These sanctions are appropriately remedial and neither excessive nor oppressive, and the Commission should affirm them. Plunkett makes no arguments that support lesser sanctions, and his efforts to re-litigate matters not under review should be disregarded as immaterial. Accordingly, Plunkett's application is without merit and should be dismissed.

Respectfully submitted,



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