

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

Gregory Evan Goldstein

For Review of Action

Taken by

FINRA

File No. 3-15183

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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May 15, 2013

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**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

Gregory Evan Goldstein

For Review of

FINRA Expedited Proceeding

File No. 3-15183

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

Gregory Evan Goldstein ("Goldstein"), the president of FINRA member firm Marquis Financial Services, Inc. ("Marquis Financial"), appeals to the Commission to set aside a January 4, 2013 decision issued by a FINRA Hearing Panel in an expedited proceeding. The FINRA Hearing Panel ordered Goldstein to comply fully with outstanding Rule 8210 requests for information and testimony within 21 days of the issuance of its decision or be suspended until he complied. The Hearing Panel further ordered that, if Goldstein failed to comply within three months, the suspension would convert to a bar in all capacities and \$50,000 fine. Goldstein never complied.

FINRA's Department of Enforcement ("Enforcement") began investigating Goldstein because of suspicious trading in penny stocks at Marquis Financial. During the investigation, Enforcement learned that Goldstein was also president of a company named Wall Street At Home.com, Inc. ("Wall Street At Home"). Through Wall Street At Home, Goldstein provided consulting services regarding the viability of issuers of securities. Enforcement learned that Goldstein operated his consulting business and maintained undisclosed brokerage accounts away

from Marquis Financial without alerting Marquis Financial to these facts. Further investigation revealed that Goldstein's Wall Street At Home consulting business is the indirect owner of Marquis Financial, operates out of Marquis Financial's offices, and is owned predominantly by Goldstein.

Enforcement asked Goldstein to provide information regarding Wall Street At Home's brokerage and bank accounts, as well as other information, but Goldstein flatly refused. Goldstein even refused to identify Wall Street At Home's customers and to describe what products or services Wall Street At Home provides to its customers. The basis of Goldstein's appeal is that FINRA should not be able to obtain information about Wall Street At Home because it is not a FINRA firm. Yet FINRA has long had the authority to ask the president of a FINRA firm about his outside business activities, even when he may deny that he engages in outside business or when he claims that his activities do not involve the securities industry or customers of a FINRA firm. As a result of Goldstein's continued refusal to respond to FINRA's Rule 8210 requests, Enforcement has been unable to delve into critical issues such as whether Goldstein used a Wall Street At Home brokerage account to trade ahead of Marquis Financial customers or whether Goldstein received stock from issuers in return for acting as a promoter through Wall Street At Home.

As the FINRA Hearing Panel found, FINRA properly asserted jurisdiction over Goldstein, a registered person and the president of a FINRA firm, and is seeking to investigate his outside business activities which, he admits, are related to his securities activities, and which he concealed from his FINRA firm for many years. Goldstein's arguments on appeal have no basis in the law or fact and should be rejected. The Commission should affirm that FINRA has

the authority to require an associated person to cooperate in its investigation of outside business activities and dismiss Goldstein's appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Goldstein Failed and Refused to Respond to Requests for Information and to Testify on the Record

1. Goldstein Is an Associated Person, Officer and Control Person of Marquis Financial

Goldstein joined Marquis Financial, a FINRA firm, in June 2001 and was registered through Marquis Financial in multiple capacities until February 15, 2013.¹ RP 545-570.² During Goldstein's association with Marquis Financial, he served as the firm's president and one of its principals. RP 244, 320-321. Marquis Financial's Form BD Uniform Application for Broker-Dealer Registration identifies holding company Steven Gregory Securities ("SGS") and Goldstein as control persons of Marquis Financial. *Id.*

Although Goldstein directly owns less than five percent of Marquis Financial, he regularly refers to himself as the owner of the firm.³ RP 297. SGS, in fact, owns 95% of

¹ The Central Registration Depository ("CRD[®]") reports that, on February 15, 2013, the date when Goldstein's suspension was scheduled to commence if Goldstein failed to comply with FINRA's outstanding Rule 8210 requests for information, Goldstein voluntarily terminated his association with Marquis Financial. The Commission may take official notice of Goldstein's current registration capacities as indicated in CRD. *See Douglas I. Toth*, Exchange Act Release No. 58074, 2008 SEC LEXIS 1520, at *3 n.3 (July 1, 2008), *aff'd*, 319 F. App'x 184 (3d Cir. 2009); *see also* 17 C.F.R. § 201.323 (explaining when Commission may take official notice of evidence).

² "RP" refers to the page numbers in the certified record of this case that FINRA filed with the Commission on February 5, 2013.

³ During Goldstein's January 9, 2012 on-the-record testimony, Goldstein identified himself as the owner of Marquis Financial until his attorney corrected him and suggested that Goldstein identify Marquis Financial's "corporate owners," which included SGS and Wall Street At Home. RP 297.

Marquis Financial.⁴ RP 244, 320-321. Wall Street At Home, in turn, owns 100% of SGS. *Id.* CRD identifies only Goldstein as Wall Street At Home's owner. This notwithstanding, Goldstein testified on the record that he owns 80% and the only voting shares of Wall Street At Home and that Marquis Financial conducted a private placement in 2003 in which it sold approximately 20% of Wall Street At Home's shares to approximately 30 of Marquis Financial's customers and other investors. RP 298-99; 628-30. The private placement memorandum for the offering of Wall Street At Home describes SGS and Marquis Financial as wholly owned subsidiaries of Wall Street At Home and states that together they (SGS, Wall Street At Home, and Marquis Financial) operate a full-service retail brokerage business through Marquis Financial.⁵ RP 378-79. Marquis Financial raised approximately \$1 million for Wall Street At Home in the private offering. RP 245.

2. Goldstein Is the Embodiment of Wall Street At Home

Since 2005, Goldstein has performed what he refers to as "consulting work" through Wall Street At Home. RP 245. Goldstein is the president, only officer, and sole voting stockholder of Wall Street At Home. RP 244. Wall Street At Home has no employees and its income is derived solely from Goldstein's consulting work. *Id.* As a consultant at Wall Street

⁴ SGS serves no purpose other than to act as an owner of Marquis Financial and has never engaged in any other business. RP 244. Goldstein is president of SGS, and there have never been any employees of SGS. *Id.*

⁵ Goldstein urges the Commission not to attribute any securities-related significance to the fact that Wall Street At Home includes the words "Wall Street" in its name. Goldstein Brief at 9. Although it is difficult to fathom the conditions under which a business unrelated to the securities industry would name itself "Wall Street At Home," the Commission need only consider Wall Street At Home's private placement memorandum, which states that Wall Street At Home and its subsidiaries operate a full-service retail brokerage business through Marquis Financial, and Wall Street At Home's ownership of Marquis Financial, to understand Wall Street At Home's connections to the securities industry. RP 378-79.

At Home, Goldstein reviews corporate structures, performs corporate due diligence, evaluates issuers whose stock Marquis Financial's customers may purchase, and performs other related functions. *Id.* Goldstein described his outside activities at Wall Street At Home as work that he is qualified to conduct by virtue of "working in the securities industry and looking at due diligence on companies for, you know, 15 years." RP 302. Wall Street At Home operates out of Marquis Financial's offices. RP 413-433. Goldstein is the only individual with access to and control over Wall Street At Home's money. RP 244-45.

In 2010, FINRA Enforcement commenced an investigation of Marquis Financial, Goldstein, and other firm employees concerning suspicious trading of penny stocks in 2008 and 2009. RP 289. The scope of Enforcement's investigation included Goldstein's and other employees' outside business activities, selling away, buying away (which involves an associated person who opens a securities account with another FINRA firm without notifying his firm of the outside account), spinning, front running, market manipulation, fraud, potential conflicts of interest between Marquis Financial and its customers, and possible violations of anti-money laundering rules. *Id.* In the course of Enforcement's investigation, Enforcement discovered that, although Goldstein had conducted outside business activity through Wall Street At Home since approximately 2005, he had never reported it to Marquis Financial.⁶ RP 245-46. At FINRA's

⁶ In fact, on March 3, 2010, and March 29, 2011, Goldstein signed a written attestation in which he represented to Marquis Financial that he was "not currently engaged in any outside business activity." RP 246. On May 28, 2010, he flatly denied this again to a FINRA examiner: "I do not have any outside business activities." *Id.*

insistence, Goldstein first reported his outside business activities to Marquis Financial in August 2011.⁷ *Id.*

3. FINRA Attempted to Investigate Goldstein's Outside Business Activities at Wall Street At Home

On January 9, 2012, Enforcement conducted an on-the-record interview of Goldstein during which it asked Goldstein about his outside business activities at Wall Street At Home. RP 289. During the interview, an Enforcement attorney asked Goldstein questions related to his work at Wall Street At Home, and Goldstein refused to answer. RP 291-303. Goldstein refused to identify any customer for whom he provides services through Wall Street At Home, specify the industry or area in which he provides services, or identify the minority shareholders of Wall Street At Home. RP 47, 298, 303. He also refused to identify or discuss Wall Street At Home's brokerage accounts, contending that such information is "private business." *Id.*

4. Goldstein Refused to Respond to Written Rule 8210 Requests for Information

After Goldstein's refusal during his on-the-record interview to answer questions related to his activities at Wall Street At Home, Enforcement propounded a written Rule 8210 request for information related to Goldstein's activities at Wall Street At Home.⁸ RP 39-42. Goldstein's

⁷ Goldstein similarly hid an outside brokerage account that he held away from Marquis Financial. RP 246. During some or all of 2008 and through 2011, Goldstein held a brokerage account at UBS Financial Services, Inc. *Id.* UBS mailed the account statements for this account to Goldstein's home, and Goldstein never disclosed this brokerage account to Marquis Financial. *Id.* In fact, during this period, Goldstein signed attestations required by Marquis Financial in which he misrepresented that he did not hold any outside brokerage accounts. *Id.* The vast majority of Goldstein's holdings in the undisclosed account consisted of two penny stocks in which Marquis Financial and its customers were trading during 2009 and 2010. *Id.*

⁸ Enforcement's February 3, 2012 letter requested information related to Goldstein's operation of Wall Street At Home, including (for the period of June 1, 2008 through December 31, 2011) the identity of all owners of Wall Street At Home, the identity of every person or entity

[Footnote continued on next page]

counsel communicated by letter dated February 16, 2012, that Goldstein refused to respond in any manner to any part of Enforcement's request, and Enforcement's investigation of Goldstein's outside business activities through Wall Street At Home stalled. RP 43.

B. Notice of Suspension and Subsequent Proceedings

Faced with Goldstein's abject refusals to comply with his obligations under FINRA Rule 8210, Enforcement warned Goldstein on March 13, 2012 that his refusal to provide information violated Rule 8210 ("Pre-Suspension Notice").⁹ RP 21. The Pre-Suspension Notice further provided that Goldstein would be suspended, effective April 6, 2012, if he did not comply with FINRA's requests for information. *Id.*

Goldstein provided no responses but requested a hearing, pursuant to FINRA Rule 9552(e).¹⁰ RP 669-70. Because the critical facts regarding Goldstein's failure to respond were not in dispute, the parties agreed to resolution of the matter on the basis of stipulated facts and

[cont'd]

for whom Wall Street At Home had provided services, a detailed description of each product, service or business provided by Wall Street At Home and copies of all related documents, an explanation of the compensation that Wall Street At Home received for the services provided, the identity of every person who initiated, reviewed or authorized any financial transaction for Wall Street At Home, identifying information and monthly statements for each of Wall Street At Home's bank and brokerage accounts, copies of financial statements for Wall Street At Home, and copies of federal and state tax returns filed for Wall Street At Home. RP 40-41.

⁹ FINRA Rule 9552 provides that, if a member or associated person fails to provide any information requested under FINRA's rules, FINRA staff may provide written notice specifying the nature of the failure and stating that a failure to take corrective action within 21 days after service of the notice will result in a suspension. *See* FINRA Rule 9552(a).

¹⁰ Under FINRA Rules 9552(d) and (e), a request for a hearing under Rule 9552 stays the effective date of the suspension. *See* FINRA Rule 9552(d).

legal briefs rather than proceeding to an evidentiary hearing. *Id.* On January 4, 2013, the Hearing Panel issued a decision.¹¹ RP 669.

The Hearing Panel found that FINRA had jurisdiction over Goldstein as a registered person and officer of a FINRA firm and that FINRA properly sought to investigate Goldstein's outside business activities conducted through Wall Street At Home. RP 872-80. The Hearing Panel found that the documents and information sought were within Goldstein's possession and control given that Goldstein is a control person of Wall Street At Home and its president and majority shareholder. RP 671, 674-77. Furthermore, the Hearing Panel found that FINRA's information requests were targeted to its investigation of potential fraud and possible wrongdoing related to Marquis Financial's customers. RP 680-87; 693-94. The Hearing Panel held that Goldstein conducts a consulting business and indirectly owns Marquis Financial through Wall Street At Home, he admitted that his consulting work is closely related to his securities work, and he refused to provide any information related to Wall Street At Home. *Id.* The Hearing Panel found that Goldstein failed to comply with Rule 8210. The Hearing Panel considered and rejected Goldstein's jurisdiction objection as a baseless and concocted theory. RP 695.

The Hearing Panel ordered Goldstein to comply fully with all outstanding Rule 8210 requests for information and documents within 21 days of the date of its decision. RP 696. The Hearing Panel further ordered that, if Goldstein failed to comply within that time, he would be

¹¹ The Hearing Panel issued its decision pursuant to FINRA Rules 9552 and 9559, which govern expedited proceedings for failing to respond to Rule 8210 requests for information. FINRA's National Adjudicatory Council did not call for review the Hearing Panel's decision; thus, the Hearing Panel's decision is the final action of FINRA in this proceeding. *See* FINRA Rule 9559(o).

suspended from associating with any member in any capacity. *Id.* Furthermore, the Hearing Panel ordered that, if Goldstein remained non-compliant for three months, the suspension would become a bar in all capacities and Goldstein would be fined \$50,000. *Id.*

On January 18, 2013, Goldstein filed with the Commission a notice of appeal and request for a stay of FINRA's sanctions.¹²

C. Commission Denial of Goldstein's Stay Request

On February 11, 2013, the Commission denied Goldstein's stay request, and FINRA's suspension of Goldstein became effective February 15, 2013.¹³ *See Gregory Evan Goldstein, Order Denying Stay*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552 (Feb. 11, 2013). In the stay denial, the Commission embraced the FINRA Hearing Panel's opinion that the scope of Enforcement's requests in this case is "not even close" to the limits of Rule 8210. 2013 SEC LEXIS 552, at *13. The Commission rejected Goldstein's argument that FINRA sought information from an unrelated third party that is beyond its reach (Wall Street At Home), but rather information related to an associated person, Goldstein himself. *Id.* at *13-14. The Commission further noted that Wall Street At Home is closely tied to both Goldstein and Marquis Financial and concluded that "[s]uch connections place FINRA's requests even more squarely within the scope of Rule 8210." *Id.* at *16.

¹² FINRA Rule 9559(s) provides that the filing of an application for review with the Commission shall not stay the effectiveness of final FINRA action, unless otherwise ordered by the Commission. *See* FINRA Rule 9559(s).

¹³ Pursuant to the FINRA Hearing Panel's decision, if FINRA's suspension of Goldstein is not terminated within three months of February 15, 2013 for full compliance, the suspension becomes a bar in all capacities and FINRA fines Goldstein \$50,000. RP 696. To date, Goldstein has not complied with FINRA's requests. Thus, as of the date of FINRA's filing of this brief, May 15, 2013, Goldstein is barred from associating with any member firm in any capacity and fined \$50,000.

The Commission also rejected Goldstein's argument that FINRA's information requests raise impermissible privacy and confidentiality concerns and rejected his due process claims. *Id.* at *15-21. The Commission similarly rejected Goldstein's argument that Enforcement's information requests were tantamount to an improper "fishing expedition" because an Enforcement attorney acknowledged that FINRA sought to explore the issue of FINRA's jurisdiction over Wall Street At Home. *Id.* at *20. The Commission stated that, "[t]o the contrary, case law makes clear that requests designed to establish jurisdiction are squarely within Rule 8210's scope." *Id.*

II. ARGUMENT

The Commission should dismiss Goldstein's application for review and affirm FINRA's findings that Goldstein failed to respond to information requests. Goldstein does not dispute that he refused to respond to FINRA's Rule 8210 requests for testimony, information and documents related to Goldstein's outside business activities through Wall Street At Home, and he offers no valid reason to excuse his violation of Rule 8210. Goldstein's purported justification for his failures – that FINRA lacks authority to obtain information related to Wall Street At Home – is meritless. The evidence persuasively establishes that Goldstein is subject to FINRA jurisdiction as a registered person and officer of a member firm. It further demonstrates that Goldstein admittedly engages in outside business activities through Wall Street At Home, an entity that he controls and owns, and that the information and documents that FINRA requested are within his possession and control. Enforcement is attempting to investigate potential misconduct that could harm Marquis Financial's customers or undermine the integrity of the securities markets. Goldstein's refusals, however, have halted FINRA's ability to investigate.

Additionally, Goldstein's procedural arguments lack merit and have been considered and rejected by the Commission and the courts in other Rule 8210 cases. The Constitution of the

United States does not grant Goldstein or any other person subject to FINRA jurisdiction the right to refuse to provide FINRA with information, and Goldstein's attempts to cloak his refusals to respond in constitutional due process arguments and privacy concerns must fail.

Goldstein's arguments fall flat and the Commission should affirm FINRA's sanctions, which are neither excessive nor oppressive. Goldstein has stonewalled FINRA's investigation, there are no mitigating factors present in this case, and the sanctions are within the range recommended in the applicable FINRA Sanction Guidelines. FINRA therefore urges the Commission to dismiss Goldstein's appeal.

A. FINRA's Findings that Goldstein Failed and Refused to Provide Information and Documents Regarding His Outside Business Activities Through Wall Street At Home Are Supported by Overwhelming Evidence

1. FINRA Is Authorized Under Rule 8210 to Require Associated Persons to Provide Information and Testimony

Rule 8210 authorizes FINRA to require any person associated with a FINRA member to "provide information orally [or] in writing . . . with respect to any matter involved in [an] investigation, complaint, examination, or proceeding" authorized by FINRA's By-Laws and Rules. Rule 8210 further states that "[n]o . . . person shall fail to provide information . . . pursuant to this rule." An associated person violates Rule 8210 when he fails to provide full and prompt cooperation to FINRA in response to a FINRA request for information. *See Brian L. Gibbons*, 52 S.E.C. 791 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997).¹⁴

¹⁴ FINRA Rule 2010 requires an associated person to act in accordance with just and equitable principles of trade. A refusal to cooperate with a FINRA investigation is also a violation of Rule 2010. *See Stratton Oakmont, Inc.*, 52 S.E.C. 1170, 1173-74 (1997) (finding that attempts to impede FINRA's investigation violated Rule 2010 (formerly Article III, Section 1)).

“Rule 8210 provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.” *PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *11 (Apr. 11, 2008), *aff’d*, 566 F.3d 1172 (D.C. Cir. 2009). “The rule is at the heart of the self-regulatory system for the securities industry” and unequivocally obligates associated persons, such as Goldstein, to comply with FINRA information requests. *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff’d*, 347 Fed. App’x 692 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2380 (2010).

2. Goldstein’s Refusals to Respond Violated Rule 8210

FINRA properly requested information and documents regarding Goldstein’s outside business activities at Wall Street At Home. “[A]ssociated persons ‘may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct.’” *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (citations omitted). Rather, associated persons have an obligation to respond fully to FINRA’s inquiries of their business activities, including those that, like Goldstein’s, are conducted away from member firms yet relate to their securities work. *Id.*

There is no doubt that Goldstein refused to answer certain questions during an on-the-record interview and refused to provide documents and information in response to a subsequent request. *See* Goldstein Brief at 1. In a written response and during on-the-record testimony, Goldstein disputed FINRA’s authority to request information and documents related to Wall Street At Home, the entity through which he conducted outside business away from his member

firm.¹⁵ RP 37-39, 43, 246-49, 298, 302-03. When the issue of Goldstein's outside business activities at Wall Street At Home arose, Goldstein flatly refused to answer any questions.¹⁶ As a result, Goldstein halted FINRA's investigation of possible rule violations involving Marquis Financial's customers including, but not limited to, conflicts of interest, front running, fraud or manipulation, and unmonitored outside business activities.

¹⁵ Goldstein reasserts this argument on appeal to the Commission. Goldstein Brief at 8-9.

¹⁶ Goldstein stated only that he did consulting work on behalf of Wall Street At Home, conducting "due diligence" to see whether companies were "viable," and he stated that his years of experience in the securities industry equipped him to do such "consulting." RP 302. Goldstein refused to identify Wall Street At Home's customers and the minority owners of Wall Street At Home. RP 298. He refused to state if Wall Street At Home has outside brokerage accounts and to provide any additional information regarding Wall Street At Home. RP 47-49, 289, 298, 302. Goldstein refused to state what types of companies and what industries Wall Street At Home served. RP 302. Goldstein's attorney, Mr. Unger, had the following exchanges with Enforcement staff:

[Enforcement]: Okay. So to be clear, the bottom line is we are asking for the information [relating to Wall Street At Home], and you are directing Mr. Goldstein not to answer it?

Mr. Unger: Well, with respect to Wall Street At Home.

RP 298.

[Enforcement]: At what firms were [Wall Street At Home's brokerage] accounts held?

Mr. Unger: That is what I'm not going to let him answer.

[Enforcement]: So you are directing Mr. Goldstein not to answer the question of what firms Wall Street At Home held investment accounts?

Mr. Unger: Right, because I believe that it is beyond FINRA's authority to get information regarding that business.

RP 48-49.

Goldstein is an associated person and officer of a FINRA member firm, and he has been involved in outside business activities through Wall Street At Home since 2005. RP 244. FINRA requires associated persons to disclose outside business activities under FINRA Rule 3270¹⁷ precisely for the purpose demonstrated here -- to enable both member firms and FINRA to oversee and, if necessary, investigate associated persons' activities away from member firms.¹⁸ *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *6 (Nov. 8, 2007) (stating that Rule 3030 was adopted to enable appropriate oversight of associated persons' outside business activities), *aff'd*, 316 F. App'x. 865 (11th Cir. 2008). FINRA's efforts to investigate Goldstein's activities at Wall Street At Home are squarely within FINRA's regulatory mandate, and Goldstein's assertion that he can shield his activities at Wall Street At Home from FINRA is a recipe for disaster.¹⁹

Goldstein attempts to underplay his connection to Wall Street At Home and suggests that FINRA is overreaching in investigating his business activities at Wall Street At Home. Goldstein Brief 8-9. Wall Street At Home, however, is not some unrelated third party, as

¹⁷ Formerly, NASD Rule 3030. Effective December 15, 2010, FINRA Rule 3270 superseded NASD Rule 3030. *See* Exchange Act Release No. 62762, 2010 SEC LEXIS 2768 (Aug. 23, 2010).

¹⁸ FINRA had many reasons to question Goldstein's outside business. Goldstein conducted outside business at Wall Street At Home for more than five years before reporting it to the firm, and then he did so only because FINRA examiners pointed out the requirements of the rule. RP 245-46, 467-69. Indeed, Goldstein not only hid his outside activities, he also lied about their existence on several firm disclosures. RP 246. Goldstein similarly hid his outside brokerage accounts, in which he held penny stocks that Marquis Financial and its customers traded. *Id.*

¹⁹ "Goldstein refused to answer questions about *his* Wall Street At Home Customers, the services *he* provided, and the compensation *his* services generated." *Order Denying Stay*, 2013 SEC LEXIS 552, at *14 (*quoting Dep't of Enforcement v. Gregory E. Goldstein*, Expedited Proceeding No. FPI120005 (FINRA Hearing Panel Jan. 4, 2013)); RP 669.

Goldstein argues. Rather, Goldstein actively conducts outside business through that entity, and the information that FINRA seeks concerns Goldstein's own activities at Wall Street At Home. Goldstein is the only person who works under the Wall Street At Home name and provides services or generates revenue through Wall Street At Home. RP 244-48. Wall Street At Home has no other employees and has never generated income other than from Goldstein's consulting business. RP 244. Goldstein is the majority owner, only voting shareholder, control person, and only officer of Wall Street At Home. RP 244-48. Goldstein's consulting services provided through Wall Street At Home are related to his securities work, and he boasts that he is qualified to conduct his Wall Street At Home business because of his years of experience in the securities industry. RP 302.

Wall Street At Home is also linked to Marquis Financial. Because Wall Street At Home owns 100% of holding company SGS, which owns 95% of Marquis Financial, Wall Street At Home also is an owner of Marquis Financial.²⁰ RP 244-48. Wall Street At Home is hardly an independent or unrelated third party whose privacy should be protected. Indeed, the business and financial affairs that Goldstein operates through Wall Street At Home have a direct relationship to Marquis Financial's customers because at least some of those customers

²⁰ Goldstein argues that the FINRA Hearing Panel erred in suggesting that Wall Street At Home is an owner of Marquis Financial. Goldstein Brief at 8. Goldstein has no basis for criticism. SGS, which owns 95% of Marquis Financial, has no purpose other than to serve as Marquis Financial's holding company, and it has never engaged in any other business. RP 244. Wall Street At Home, in turn, owns 100% of SGS, the entity whose sole purpose is to serve as holding company for Marquis Financial. *Id.* Furthermore, in Wall Street At Home's 2003 private placement, Wall Street At Home proclaimed that its business plan was to operate a full service retail securities brokerage business through Marquis Financial. RP 245. Goldstein has offered no evidence to suggest that this business plan has changed. Goldstein's criticism of the FINRA Hearing Panel for highlighting Wall Street At Home's ownership of Marquis Financial is without substance.

purchased minority interests in Wall Street At Home.²¹ RP 244-48. As the Hearing Panel correctly concluded: “Goldstein’s business and financial affairs operated through Wall Street At Home have a direct relationship to his customers in his securities business.” RP 686.

Goldstein also contends that the information sought is not his. Goldstein Brief at 8. Goldstein states that information regarding Wall Street At Home is owned by that entity and its 20 to 30 unidentified shareholders, not him. Goldstein Brief at 8. Goldstein further states that the evidence does not support the Hearing Panel’s suggestion that the information that FINRA sought from Goldstein “belongs to Goldstein” and “concerns his business activities.” Goldstein Brief at 6. Nothing could be further from correct. Since 2005, Goldstein has been conducting outside business activities through Wall Street At Home, a business in which he holds a majority stake, for which he controls finances, and for which he alone is the sole income producer. RP 244-46. CRD identifies only Goldstein as Wall Street At Home’s owner. RP 320. Goldstein testified on the record that he owns 80% and the only voting shares of Wall Street At Home. RP 244-45; 298-99; 450-52. Goldstein is the only officer of Wall Street At Home, it has no employees, and Goldstein alone operates it out of Marquis Financial’s location. RP 244; 448. Goldstein is “it” in terms of Wall Street At Home.

²¹ Goldstein also criticizes the FINRA Hearing Panel for stating that the minority shareholders of Wall Street At Home are Marquis Financial’s customers and suggests that the evidence does not support this contention. Goldstein Brief at 2 n.3 and 8-9. Goldstein’s argument proves too much. First, Goldstein admits that, in July 2003, Marquis Financial acted as placement agent for the private offering of shares of Wall Street At Home to 20 to 30 customers, some of whom were already customers of Marquis Financial. RP 244-45. Then he refuses to identify who they are. RP 298. The reason the Hearing Panel could not cite current evidence for its reasonable conclusion that Marquis Financial’s customers still hold shares of Wall Street At Home was that Goldstein refused continually to provide this information.

3. Goldstein Violated FINRA's Rule That Was in Place at the Time of His Refusals

The Hearing Panel found that Goldstein violated Rule 8210 as it read in 2012. RP 689. Goldstein's suggestion that FINRA's 2013 amendments to Rule 8210 somehow support his theory that Enforcement's information requests exceeded the scope of Rule 8210 has no merit. Goldstein Brief at 6-7. On December 7, 2012, the Commission approved FINRA's proposed changes to Rule 8210 and the amendments became effective February 25, 2013. See Exchange Act Release No. 68386 (Dec. 7, 2012), 77 Fed. Reg. 74253 (Dec. 13, 2012); *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 3 (January 2013). FINRA filed SR-FINRA-2009-060 to amend Rule 8210, in part, to clarify, not expand, the scope of FINRA's reach under Rule 8210. The amended rule language states that FINRA staff may inspect and copy information and documents in an associated person's possession, custody or control. 77 Fed. Reg. at 74255. The Commission acknowledged that FINRA's intended meaning of the word "control" required persons covered by the rule to produce records that they have the legal right, authority, or ability to obtain on demand. *Id.* To eliminate any existing confusion, FINRA also added supplementary material that clarifies FINRA's existing position that Rule 8210 enables it to request from individuals covered by the rule records relating to FINRA's investigations of outside business and other activities away from the broker-dealer. See *FINRA Regulatory Notice 13-06*, 2013 FINRA LEXIS 8, at *3, 9 (Jan. 2013).

In the Commission's approval order, it acknowledged that FINRA's proposed amendments did not expand the reach of Rule 8210 but, rather, clarified the information subject to Rule 8210 requests and eliminated existing confusion. 77 Fed. Reg. at 74257. Indeed, the Commission approved of FINRA's proposed rule change notwithstanding that three commenters expressed concern that FINRA's proposed amendments expanded current Rule 8210 and

permitted FINRA to compel associated persons to produce documents belonging to a third party. 77 Fed. Reg. at 74255. FINRA noted in its response to comments that this concern incorrectly assumed that FINRA's investigations into the conduct of associated persons currently was strictly limited in scope to the FINRA member or associated person under investigation. It further stated that FINRA's investigations can and do involve non-FINRA members. See FINRA response to comments, dated Dec. 22, 2009, available at <http://www/sec.gov/comments/sr-finra-2009-060/finra2009060.shtml>. The Commission analyzed FINRA's responses to the commenters and approved the amendments.²² 77 Fed. Reg. at 74255.

Congress has given FINRA "significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007). For this reason, and because FINRA lacks subpoena power, "Rule 8210 is an essential tool" for FINRA's enforcement responsibilities under the Exchange Act, and the Commission has taken a "broad view" of the scope of Rule 8210 and the requirement that member firms and associated persons respond to requests without placing conditions on their compliance. *Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13, at *10 (Jan. 5, 2007).

* * * *

²² The Commission approved the proposed rule change on an accelerated basis, noting that FINRA had responded to the concerns of commenters and FINRA's rule filing amendments did not raise novel regulatory concerns. 77 Fed. Reg. at 74257.

The record amply demonstrates that Goldstein failed and refused to respond to FINRA requests for information regarding his outside business activities at Wall Street At Home, and in doing so, violated FINRA's rules. See *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *29-30 (holding that the president of a broker-dealer violated Rule 8210 by refusing to turn over documents within his control relating to the third-party source of firm funds); *Dep't of Enforcement v. Asensio*, Complaint No. CAF030067, 2006 NASD Discip. LEXIS 20, at *45 (NASD NAC July 28, 2006) (finding Rule 8210 violation for respondent's failure to provide information regarding firm's parent company's clients, services, and compensation), *application for review dismissed*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010), *aff'd*, 447 Fed. App'x 984 (11th Cir. 2011); *Dep't of Enforcement v. Respondent Firm 1*, Complaint No. C8A990071, 2001 NASD Discip. LEXIS 6, at *38-39 (NASD NAC Apr. 19, 2001) (holding that the respondent, a natural person and the president and controlling shareholder of the parent and broker-dealer, must produce information in possession of the broker-dealer's parent company). The Commission should affirm the Hearing Panel's findings.

B. Goldstein's Arguments to Reverse FINRA's Findings of Violation Are Without Merit and Should Be Rejected

Goldstein offers other arguments that are equally unsupported and unpersuasive. First, Goldstein contends that he is justified in refusing to respond because FINRA has not demonstrated the materiality of the information that it seeks. Goldstein Brief at 10 (stating that the relevance to FINRA's investigation of the requested information "remains elusive"). FINRA has no requirement to explain its information requests or demonstrate their materiality before an associated person is obligated to respond. *Erenstein*, 2007 SEC LEXIS 2596, at *13. FINRA investigators often commence investigations before they have a clear picture as to the nature and breadth of the potential misconduct.

Here, Enforcement sought to investigate, among other issues, whether customers of Marquis Financial were affected by Goldstein's "consulting" activities through Wall Street At Home.²³ RP 280. Goldstein admitted that he failed for approximately six years to advise Marquis Financial that he conducted outside business activities for which he was compensated through Wall Street At Home. RP 245-46. His failure also shielded his activities from FINRA's scrutiny. Goldstein affirmatively misrepresented to the firm that he did not conduct such activities. *Id.* Now he attempts to prolong his stonewalling by demanding a showing of materiality. Such a requirement does not exist.²⁴

"Associated persons 'may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to [a FINRA] investigation of their conduct.'" *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *21. As the Commission has held, FINRA should not be required to explain the materiality of its requests or justify the relevance of its investigations before receiving cooperation from associated persons. *Erenstein*, 2007 SEC LEXIS 2596, at *12-13 (stating that the question of whether a requested record is "with respect to any matter involved in" a FINRA investigation is a determination made by FINRA staff and that Rule 8210 "does not require that [FINRA] explain its reasons for making the information

²³ It is noteworthy that Steven J. Cohen, a majority stockholder of Wall Street At Home with Goldstein until 2006, testified on the record before FINRA on February 19, 2008, that Wall Street At Home (meaning Goldstein, because he is the only person who conducts business through Wall Street At Home) consulted for companies for which Marquis Financial conducted private placements. RP 244, 466, 468. Cohen's testimony controverts Goldstein's efforts to argue that there is little connection between Wall Street At Home and Marquis Financial's customers and that Goldstein's business activities at Wall Street At Home are unrelated to his work in the securities industry.

²⁴ Enforcement's investigation of Goldstein and Marquis Financial broadened to include potential selling away, buying away, spinning, front-running, market manipulation, anti-money laundering violations, fraud, and other potential conflicts between Marquis Financial and Goldstein and the customers of Marquis Financial. RP 289.

request or justify the relevance of any particular request”); *Sahai*, 2007 SEC LEXIS 13, at *10 (finding that FINRA is not required to justify its information requests). Goldstein should have responded fully and promptly to FINRA inquiries.

Goldstein also relies heavily on the Commission’s decision in *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926 (Aug. 25, 2006), as a defense. Goldstein contends that, in *Ochanpaugh*, the Commission questioned FINRA’s overreaching in relation to Rule 8210. Goldstein Brief at 9. Goldstein misapplies *Ochanpaugh*. In *Ochanpaugh*, the Commission set aside FINRA’s action on factual grounds because FINRA had failed to show that the checks that it sought to obtain from Ochanpaugh were in fact within his possession and control. *Ochanpaugh*, 2006 SEC LEXIS 1926, at *23. There, the Commission did not rule that documents related to an associated person’s outside business activities, such as those at issue in this case, are outside of FINRA’s reach. Indeed, the Commission accepted, for the purposes of that decision, that a “possession and control” standard applied, but concluded that “[FINRA] has not met its burden of proof to meet even that standard.” 2006 SEC LEXIS 1926, at *22. In *Ochanpaugh*, however, the Commission reinforced that “Rule 8210 is an essential cornerstone of [FINRA’s] ability to police the securities markets and should be rigorously enforced.”²⁵ *Id* at *19.

Goldstein also asserts a privacy argument (Goldstein Brief at 9), quoting the following passage from *Ochanpaugh*:

²⁵ The Commission has rejected similar misreading of *Ochanpaugh*. See *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *26 (holding that refusal of president of a broker-dealer to turn over documents within his control relating to the third-party source of firm funds violated Rule 8210); *Erenstein*, 2007 SEC LEXIS 2596, at *18 (rejecting reliance on *Ochanpaugh* because tax returns requested were within associated person’s possession).

[FINRA's] authority under [Rule 8210] might not extend to documents . . . that may contain a third party's confidential information not closely related to securities trading with a member or associated person . . .

Ochanpaugh, 2006 SEC LEXIS 1926, at *20. He argues that FINRA has not demonstrated the relevance of the information it seeks and therefore has not shown that Wall Street At Home's "confidential and private business information" is closely related to securities trading, as required, Goldstein argues, by *Ochanpaugh*. Goldstein Brief at 9-10. First, Goldstein quotes *Ochanpaugh* out of context. The *Ochanpaugh* decision did not establish a requirement for FINRA staff to "identify what information it believes the requested documents would provide." Goldstein Brief at 9-10. Rather, it acknowledged that the scope of Rule 8210 does have limits and that there *may be* circumstances in which FINRA cannot access documents of third parties. It does not, however, state that FINRA can never obtain documents of third parties, particularly where, as here, the third party is owned almost entirely by the associated person, the associated person conducts outside business related to his securities work through the entity, the associated person is the only source of revenue for the entity, the associated person controls the entity financially and otherwise, and the associated person owns a member firm through the entity.²⁶

²⁶ Goldstein cites *Sykes v. Escueta*, No. 10-3858, 2010 WL 4942608, 2010 U.S. Dist. LEXIS 131174 (N.D. Cal. Nov. 29, 2010), in support of his argument that the information that FINRA seeks from Goldstein is "confidential and private" information belonging to Wall Street At Home. Goldstein Brief at 4-5. His reliance on *Sykes* is misplaced. In *Sykes*, the court considered the request of a FINRA arbitration respondent for a preliminary injunction to stop the arbitration from proceeding because he had never been associated with a FINRA member firm. The court stated that arbitration is a matter of contract between the parties, because FINRA is not a state actor and cannot compel arbitration. 2010 WL 4942608, at *2, 2010 U.S. Dist. LEXIS 131174, at *6. The court determined that the FINRA member had contracted with the arbitration claimant to voluntarily submit to arbitration but that Sykes, who the court determined was not a person associated with a FINRA member under FINRA's Rules, had not entered into such a contract and therefore could not be compelled to submit to arbitration. 2010 WL 4942608, at *3-4, 2010 U.S. Dist. LEXIS 131174, at *7. Although *Sykes* provides guidance on the contract law aspect of arbitration, it is wholly inapplicable to this case.

Indeed, in *Ochanpaugh*, rather than establish hard and fast rules regarding limitations on FINRA's ability to obtain documents and information belonging to third parties, the Commission suggested instead, in a passage that is nonbinding guidance, that "[FINRA] should consider first requesting the personal financial records of the associated person before seeking the documents of a third person." 2006 SEC LEXIS 1926, at *21. Goldstein's efforts to change the meaning of the Commission's decision in *Ochanpaugh* are not supportable and must be rejected.

Ochanpaugh does not authorize Goldstein to refuse to provide documents and information to FINRA.²⁷

Goldstein also propounds more general privacy and confidentiality arguments. He argues that the Commission should not allow FINRA to obtain access to Wall Street At Home's documents and information because FINRA's information requests implicate potential privacy and confidentiality issues that could damage Wall Street At Home's competitiveness. Goldstein Brief at 10-11. Goldstein's concerns in this regard are misplaced. "FINRA investigations are non-public and confidential." FINRA Regulatory Notice 09-17, 2009 FINRA LEXIS 45, at *4 (Mar. 2009). FINRA does not make publicly available the content of its investigative files short of legal compulsion.²⁸ Furthermore, in the event that FINRA's investigation proceeds to a

²⁷ Goldstein continually ignores the fact that, while he criticizes FINRA for its inability to cite to more factual connections between Wall Street At Home, Goldstein, and Marquis Financial (although numerous connections are already established), it is precisely because Goldstein has repeatedly refused to release *any* information about Wall Street At Home that FINRA cannot determine with any certainty what those links are.

²⁸ Goldstein contends that FINRA could be subject to a records subpoena and that Wall Street At Home's confidentiality would then be compromised. Goldstein Brief at 11. This speculative concern does not justify undermining FINRA's investigative tools. "Given that so much of the securities industry involves nonpublic information, allowing such abstract worries about privacy to overcome the critical role of Rule 8210 would eviscerate FINRA's critical regulatory responsibilities." *Goldstein Order Denying Stay*, 2013 SEC LEXIS 552, at *17.

disciplinary proceeding, Goldstein may request a protective order to ensure the confidentiality of particular documents. *See* FINRA Rule 9146(k) (Motion for Protective Order).

Finally, Goldstein also argues unpersuasively that FINRA's Rule 8210 requests in this case raise the question of "whether FINRA is conducting an unduly burdensome investigation or examination on a bad faith basis." Goldstein Brief at 11. There is absolutely no evidence in the record to support Goldstein's inflammatory suggestion that FINRA is harassing him or acting in bad faith. FINRA's case manager from Enforcement swore in an affidavit that FINRA began investigating Marquis Financial in 2010 after receiving a referral from FINRA Member Regulation concerning suspicious trading at the firm in 2008 and 2009 in a penny stock by insiders of the issuer. RP 289. As FINRA's investigation progressed, it determined that Goldstein had been conducting outside business activities through Wall Street At Home since 2005, yet prior to 2011, he had not disclosed it to the firm. RP 245-46, 467. Goldstein's former business associate, Steven Cohen, testified that a FINRA examiner discovered Goldstein's undisclosed outside activities. RP 467-69. FINRA similarly discovered that Goldstein hid an outside brokerage account that he held away from Marquis Financial at UBS Financial Services, Inc. RP 246. During this same period, Goldstein signed attestations required by Marquis Financial in which he stated that he did not hold any outside brokerage accounts and did not engage in outside business away from Marquis Financial, both clear misrepresentations to the firm. *Id.* FINRA had many reasons to question Goldstein's conduct at Marquis Financial and through Wall Street At Home. In contrast, there is zero evidence to support Goldstein's bad faith argument.

The Commission should reject all of Goldstein's arguments, which are unsupported by the law and the facts of this case.

C. The Commission and the Courts Repeatedly Have Held that FINRA Is not a State Actor, and Goldstein’s Constitutional Arguments Therefore Must Be Rejected

Goldstein argues that FINRA is a state actor and that FINRA’s application of Rule 8210 is a violation of his procedural and substantive due process rights under the United States Constitution. Goldstein Brief at 11-16. The Commission has repeatedly held that FINRA is not a state actor, and Goldstein has offered no reason for the Commission to reverse this position here.

As the Commission recently reaffirmed: “It is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor.” *Asensio & Company, Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *6 (Dec. 20, 2012) (citing, inter alia, *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002)). A long line of Commission decisions have held that FINRA and NASD before it are not state actors for due process challenges and other constitutional claims.²⁹

²⁹ See *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011) (finding that constitutional due process requirements do not apply to FINRA because FINRA is not a state actor); *Mission Secs. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *31 (Dec. 7, 2010) (stating that courts have held that self-regulatory organizations such as FINRA are not state actors for purposes of due process claims (citing inter alia *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999)); *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *25 (July 17, 2009) (finding that self-regulatory organizations are not state actors and therefore not subject to the Constitution’s due process requirements); *Fawcett*, 2007 SEC LEXIS 2598, at *14 (rejecting argument that FINRA is a state actor because it exercises a public function, has control over an individual’s right to work in the securities industry, and is closely supervised by the Commission); *Vladislav Zubkis*, 53 S.E.C. 794, 797 n.2 (1998) (finding no Fifth Amendment privilege because self-regulatory organizations are not state actors); *Dan Adlai Druz*, 52 S.E.C. 416, 428-29 (1995) (same as to a securities exchange), *aff’d* 103 F.3d 112 (3d Cir. 1996); *Daniel Turov*, 51 S.E.C. 235, 238 (1992) (same); *Frank W. Leonesio*, 48 S.E.C. 544, 549 (1986) (same); *Lawrence H. Abercrombie*, 47 S.E.C. 176, 177 (1979) (same).

[Footnote continued on next page]

1. Immunity From Private Lawsuits Does Not Prove That FINRA Is a State Actor

Goldstein first argues that FINRA is a state actor “on the basis of the rights and protections afforded its personnel when conducting their federally mandated roles.” Goldstein Brief at 12. Neither of the two circuit court decisions that he cites in support of that contention, however, held that FINRA was a state actor.

In *Weissman v. NASD*, 468 F.3d 1306, 1313 (11th Cir. 2006), *reinstated in part*, 468 F.3d 1306 (11th Cir. 2006) (en banc), the court held that NASD (now FINRA) and The NASDAQ Stock Market were entitled to immunity from lawsuits when the “relevant conduct constitutes a delegated quasi-governmental prosecutorial, regulatory, or disciplinary function,” not on state actor grounds. 468 F.3d at 1311. Indeed, the majority opinion did not even touch on the state actor question. *Austin Mun. Secs., Inc., v. NASD*, 757 F.2d 676, 690-91 (5th Cir. 1985), involved

[cont’d]

Goldstein states incorrectly that the issue of whether FINRA is a state actor is unresolved. Goldstein Brief at 2 n.2. In support, he cites *Rooms v. SEC*, 444 F.3d 1208 (10th Cir. 2006). *Rooms* does not support his position. In *Rooms*, the court rejected *Rooms*’ argument that the Commission denied him due process by upholding FINRA’s (then NASD’s) imposition of a bar. 444 F.3d 1208, 1214. The court considered whether NASD Rule 2110 provided *Rooms* with fair warning of the prohibited conduct and concluded that it had. *Id.* The court reached its conclusion without addressing the question of whether FINRA or NASD is a state actor. Goldstein also cites *Erenstein*, 2007 SEC LEXIS 2596. Like the *Rooms* decision, the Commission’s decision in *Erenstein* also fails to find that FINRA or NASD is a state actor. In *Erenstein*, the Commission held that there is no constitutional or statutory right to counsel in FINRA disciplinary proceedings. 2007 SEC LEXIS 2596, at *23. The Commission also held that FINRA nonetheless considered *Erenstein*’s good faith interposition of objections and concluded that FINRA had not denied *Erenstein* the right to counsel. *Id.* In *Erenstein*, the Commission neither considered nor found that FINRA is a state actor. As demonstrated above, numerous courts and the Commission have directly addressed the issue, concluding that FINRA is not a state actor.

an interlocutory appeal wherein the court found that NASD (now FINRA) and its members and staff were entitled to immunity from personal liability for claims arising within the scope of their official duties. 757 F.2d 676, 689-93. Its finding that NASD was entitled to immunity from civil suit was not based on a finding that NASD is a state actor and, as the SEC has explained, *Austin Mun.* does “not controvert the numerous decisions that squarely hold that NASD is a private actor.” *Fawcett*, 2007 SEC LEXIS 2598, at *17 n.19; *see also Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (holding that “it is by no means ‘inconsistent’ to find that, on the one hand, [FINRA] exercised insufficient state action to trigger constitutional protections in a case . . . while nevertheless holding that [FINRA] is entitled to absolute immunity in the exercise of its quasi-public regulatory duties”), *aff’d* 218 Fed. App’x. 46 (2d Cir. 2007).³⁰

³⁰ Goldstein also cites *Crimmins v. AMEX*, 346 F. Supp. 1256, 1259 (S.D.N.Y. 1972), for the proposition that a private entity may be deemed a state actor subject to providing Constitutional protections when performing activities compelled by federal law. Goldstein Brief at 12. But subsequent to the federal district court’s decision in *Crimmins*, the Second Circuit ruled that the testimony in a New York Stock Exchange (“NYSE”) investigation of an officer of a broker-dealer was not entitled to constitutional protection under the Fifth Amendment because the NYSE had not “become in effect the arm of the government.” *U.S. v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975). Years later, the Second Circuit similarly ruled that FINRA “is not a state actor subject to due process requirements.” *D’Alessio v. SEC*, 380 F.3d 112, 120 (2d Cir. 2004). In *Desiderio v. NASD*, 191 F.3d 198 (2d Cir. 1999), the Second Circuit similarly rejected the plaintiff’s argument that NASD (now FINRA) denied her constitutional rights, and flatly stated “NASD is a private actor, not a state actor.” 191 F.3d 198, 206. The Second Circuit further stated that “the fact that a business entity is subject to ‘extensive and detailed’ state regulation does not convert that organization’s actions into those of the state.” 191 F.3d 198, 206 (*citing Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974)).

Goldstein also cites to *Braun, Gordon & Co. v. Hellmers*, 502 F. Supp. 897, 902 (S.D.N.Y. 1980) for a similar proposition. Goldstein Brief at 12. *Braun*, however, is inapposite. The district court in *Braun* addressed the application of the exhaustion of administrative remedies doctrine to NASD (now FINRA). 502 F. Supp. 897, 905. The *Braun* court did not conclude that FINRA is a state actor. *Id.*

2. Federal Case Law Overwhelmingly Supports That FINRA Is Not a State Actor

FINRA is a private corporation that receives no federal or state funding. The Second Circuit has held that private entities such as FINRA may be held to constitutional standards only if their actions are “fairly attributable” to government. *Desiderio*, 191 F.3d 198, 206. In *D.L. Cromwell Invs.*, 279 F. 3d 155, 161, the Second Circuit addressed the issue of whether NASD Regulation (now FINRA) violated the appellants’ Fifth Amendment rights by demanding that they submit to on-the-record interviews. 279 F. 3d at 157-58. The court held that the “Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be “fairly attributable” to the government.” 279 F. 3d at 161. The court held that, in order for actions to be fairly attributable to the government, there must be a “sufficiently close nexus” between the state and the challenged action of FINRA. *Id.* Goldstein has pointed to nothing that would make FINRA’s actions fairly attributable to government and has not established a sufficiently close nexus to prevail in this argument.

Goldstein cites, in support of his argument that FINRA should be considered a state actor, to *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288 (2001). Goldstein Brief at 4. *Brentwood* fails to further his position. *Brentwood* involved a private association organized to regulate interscholastic athletics among public and private schools and held that a private party not otherwise subject to the Fifth Amendment may be deemed to have engaged in state action when there is such a “close nexus between the State and the challenged action” that seemingly private behavior “may be fairly treated as that of the State itself.” 531 U.S. at 295

(citations omitted).³¹ The Commission considered and rejected this argument in *Fawcett*, holding that Fawcett failed to “present any facts tending to show that, in his case, there was the kind or degree of cooperation or interaction between [FINRA] and the government that would justify a finding that [FINRA] effectively engaged in state action.” 2007 SEC LEXIS 2598, at *17. Similarly, Goldstein has made no showing here that would impute FINRA’s actions to the government, and the Commission should reject his arguments in this regard.

Goldstein’s citation to *Skinner v. Railway Labor Execs. Ass’n*, 489 U.S. 602 (1989), is similarly inapplicable. Goldstein Brief at 12. In *Skinner*, the Court considered whether biological sample tests required by railroads of their workers were the result of private or government action. The Court found that, through the action of the Federal Railroad Administration, the government essentially participated in the tests and shared the results such that the tests were deemed government action. 489 U.S. 602, 615-16. In contrast, Goldstein has made no showing here of government participation in FINRA’s investigation.

D. FINRA Provided Goldstein with a Fair Process

Goldstein’s procedural and substantive due process arguments are based primarily on constitutional requirements. Goldstein Brief at 13-16. Because FINRA is not a state actor, the Commission should dismiss these arguments. FINRA is required, however, to “provide a fair procedure for the disciplining of members and persons associated with members” under

³¹ The *Brentwood* Court considered that 84% of the members of the private athletic association were public high schools; public school officials and government administrators made up the voting membership of the athletic association’s governing council and control board; all athletic association staff were eligible to join the state retirement system; and delegates of the State Board of Education sat on the governing bodies of the athletic association. On these facts, the Court concluded that the athletic association was in fact an association of *public* schools whose representatives acted in *official* capacities. The athletic association therefore was required to observe the same constitutional restrictions that would apply to the state’s public schools. 531 U.S. 288, 298-302.

Securities Exchange Act of 1934 Sections 15A(b)(8) and 15A(h)(1). *Neaton*, 2011 SEC LEXIS 3719, at *34. FINRA complied with this requirement.

1. Goldstein Had an Opportunity to Challenge FINRA's Findings and Sanctions

Goldstein complains that “[t]he real problem” concerning the fairness of the proceeding “is that [he] needs to be suspended and/or barred, even though FINRA is without authority to do so . . . before he can [appeal]” to the SEC, and that absent a stay (which the Commission denied Goldstein), “such suspension or bar remains during the course of the Commission review.” Goldstein Brief at 13. In *Howard Berger*, however, the Commission rejected the argument that, to meet the Exchange Act requirement of fundamental fairness, FINRA must provide a respondent with an opportunity to challenge FINRA’s jurisdiction prior to responding to a Rule 8210 request. *Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *29-31 (May 4, 2007) (holding that, because FINRA does not have a mechanism for resolving questions of jurisdiction, submitting to FINRA’s disciplinary process is the appropriate method for challenging jurisdiction), *remanded*, No. 07-2692 (2d Cir. Sept. 13, 2007), *supplemental decision issued*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141 (Nov. 14, 2008), *aff’d*, 347 F. App’x 692 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2380 (2010). Rather, “subjecting oneself to [FINRA’s] disciplinary process, interposing one’s objection, and relying on [FINRA’s] procedures is the appropriate route to challenge [FINRA] jurisdiction.” *Id.* at *20; *cf. Dist. Bus. Conduct Comm. V. Gurfel*, Complaint No. C9B950010, 1998 NASD Discip. LEXIS 52, at *19 n.7 (NASD NAC June 12, 1998) (holding that appearing before FINRA does not preclude raising jurisdictional defenses), *aff’d*, 54 S.E.C. 56 (1999), *aff’d*, 205 F.3d 400 (D.C. Cir. 2000).

Furthermore, Goldstein cannot ignore his motion to stay merely because he lost. The fact that a sanction may remain in effect during the pendency of an SEC appeal where an applicant is unable to obtain a stay does not demonstrate unfairness, given that such an applicant will have had the opportunity to advocate his or her interests before *two* adjudicatory bodies—the FINRA Hearing Panel and the SEC (in reviewing a stay motion). Goldstein received a fair proceeding because he had the opportunity to advocate for a stay of the sanctions before the SEC, an independent adjudicator. The Exchange Act requires that respondents be given “an opportunity to defend” against FINRA’s allegations, not that they are guaranteed a victory. *See* Exchange Act Section 15A(h)(1). In sum, FINRA’s procedure, which allowed Goldstein to argue that FINRA’s requests were invalid but could also result in Goldstein receiving a sanction for violating FINRA’s rules, were fair.³²

2. FINRA Gave Goldstein Repeated Warnings That His Failure to Provide Information Would Violate Rule 8210

To the extent that Goldstein’s argument concerning the alleged “vagueness” of Rule 8210 concerns the fairness of the proceeding, it also lacks merit.³³ Goldstein Brief at 13. Goldstein contends that the clause “*any matter involved* in the investigation” in FINRA Rule 8210

³² Although the Hearing Panel gave Goldstein a 21-day period to comply with the Rule 8210 requests before being subject to sanctions, it also would have been consistent with fairness principles for the Hearing Panel to make its sanctions *immediately* effective. *Berger*, 2007 SEC LEXIS 895, at *32 (rejecting the argument that, where a respondent loses a jurisdictional challenge, fairness requires that any sanctions be “conditional” on a continued failure to comply).

³³ The cases that Goldstein cites in support of his argument that FINRA Rule 8210 is vague and unenforceable do not further his cause. *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926), is an 87-year-old case that assessed the enforceability of a state statute that imposed minimum wage requirements for workmen. *Hill v. Colorado*, 530 U.S. 703 (2000), held that a Colorado statute regulating speech-related activities near health-care facilities did not violate free speech rights. Neither is on point with respect to the issues currently before the Commission.

incorrectly suggests that “that the Rule governs everything in the world and thus has no limits,” and that the vagueness of that clause “is compounded” because the rule does not require FINRA “to set forth the basis and materiality of the request.”³⁴ *Id.* at 5, 14-15. Goldstein ignores, however, that Rule 8210 expressly states that its scope applies to “an investigation . . . authorized by the FINRA By-Laws or rules.” In turn, FINRA’s By-Laws authorize FINRA to impose sanctions for, among other things, “violation by a member or person associated with a member” of the FINRA By-Laws, FINRA rules, or the federal securities laws, including the rules and regulations adopted thereunder. FINRA By-Laws, Art. XIII, Sec. 1. Thus, FINRA’s rules provide fair notice that requests that are part of an investigation into whether a member or a person associated with a member has engaged in any violations of FINRA rules, FINRA By-Laws, or federal securities laws and regulation—such as FINRA’s requests directed to Goldstein—are authorized.³⁵

³⁴ FINRA Rule 8210(a) provides, in pertinent part:

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

- (1) require a member, person associated with a member, or person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . and to testify at a location specified by FINRA staff . . . with respect to *any matter involved* in the investigation, complaint, examination, or proceeding; and
- (2) inspect and copy the books, records, and accounts of *such member or person* with respect to *any matter involved* in the investigation, complaint, examination, or proceeding.

³⁵ Goldstein argues that “[c]ertainly, the FINRA by-laws do not encompass documents and information of third-parties.” Goldstein Brief at 5. Goldstein’s argument misses the mark. FINRA requires associated persons to disclose outside business activities under FINRA Rule 3270 precisely for the purpose demonstrated here -- to enable both member firms and FINRA to oversee and, if necessary, investigate associated persons’ activities away from member firms. See *Erenstein*, 2007 SEC LEXIS 2596, at *6 (stating that Rule 3030 (now Rule 3270) was

[Footnote continued on next page]

Goldstein's vagueness challenge to the clause "of such member or person" in Rule 8210(a)(2) also lacks merit. Goldstein contends that the "of such member or person" clause leaves it unclear whether FINRA has jurisdiction to request documents that "belong to a non-member, non-associated person third party, not Goldstein." Goldstein Brief at 15. FINRA's rules must give fair warning of prohibited conduct before a person may be disciplined for that conduct. *See Gen. Bond & Share*, 39 F.3d 1451, 1455 (10th Cir. 1994) (citing *Handley Inv. Co. v. SEC*, 354 F.2d 64, 66 (10th Cir. 1965)). As the Hearing Panel held, FINRA's requests for information did not "seek[] information of an unrelated third party but, rather, information of an associated person, Goldstein." RP 685. For example, Goldstein refused to answer questions about *his* Wall Street At Home customers, the services *he* provided, and the compensation *his* services generated. RP 681, 683-684. *Cf. Dep't of Enforcement v. Gallagher*, Complaint No. 2008011701203, 2012 FINRA Discip. LEXIS 61, at *17 (FINRA NAC Dec. 12, 2012) (rejecting argument that FINRA lacked jurisdiction to request information about respondent's involvement with an outside issuer); *CMG Institutional Trading*, 2009 SEC LEXIS 215, at *29-30 (holding that the president of a broker-dealer must turn over documents relating to the third-party source of firm funds). As applied here, FINRA's rules gave Goldstein fair warning of prohibited conduct. *See Rooms v. SEC*, 444 F.3d 1208, 1214 ("The complaint in this case alleged that Mr.

[cont'd]

adopted to enable appropriate oversight of associated persons' outside business activities). FINRA's efforts to investigate Goldstein's activities through Wall Street At Home are squarely within FINRA's regulatory mandate. Below, Enforcement itemized the numerous potential violations of FINRA rules and federal securities laws that its Rule 8210 requests are directed towards investigating: outside business activities, selling away, buying away, spinning, front-running, market manipulation, AML rule violations, and fraud. RP 289. Yet Goldstein makes no attempt to argue why, considering the kinds of violations that FINRA is investigating, FINRA's requests are not legitimate lines of inquiry.

Rooms violated both Rule 8210 *and* Rule 2110 by his obstructing conduct. This alone was sufficient warning.”).

Moreover, as the control person, majority owner, and sole officer of Wall Street At Home—as well as the only person who had access to, and control of, Wall Street At Home’s funds and accounts—Goldstein, possessed and controlled Wall Street At Home’s documents and information. The SEC has suggested that such circumstances permit the Rule 8210 requests at issue here, especially considering that Wall Street At Home—with its ownership interest in Marquis Financial—has a close connection to securities trading. *See Ochanpaugh*, 2006 SEC LEXIS 1926, at *20; *CMG Institutional Trading, LLC*, 2009 SEC LEXIS 215, at *25 (finding a Rule 8210 violation where respondent “failed to establish that he did not have access to and control over responsive documents in possession of [a non-member firm] since he was that firm’s CEO and president”).³⁶

In fact, in analogous circumstances, the NAC held that an associated person and control person of a member firm violated Rule 8210 where he refused to provide information about a non-member firm: (1) of which he was the chairman, president, chief executive officer, and

³⁶ Moreover, notwithstanding the Hearing Panel’s suggestions and Goldstein’s arguments otherwise (Goldstein Brief at 5), the record suggests that FINRA may have been authorized to seek the requested information from Wall Street At Home *directly*. Article I(rr) of FINRA’s By-Laws defines “associated person of a member” to include “for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member.” Schedule A of Form BD, in turn, directs broker-dealers that are corporations (such as Marquis Financial) to list “any person that . . . has the power to sell or direct the sale of . . . 5% or more of a class of a voting security of the applicant.” Because Wall Street At Home was the 100% owner of the SGS, the holding company which in turn was the 95% owner of Marquis Financial, Wall Street At Home had “the power to . . . direct the sale of . . . 5% or more of a class of a voting security of” Marquis Financial. RP 244-48. Thus, the record suggests that Wall Street At Home should have been identified as a “direct owner” on Marquis Financial’s Schedule A and was, therefore, an “associated person.”

majority owner; and (2) that was the 100% owner of his member firm. *See Dep't of Enforcement v. Asensio*, 2006 NASD Discip. LEXIS 20 (involving requests for information about the services a non-member firm provided, how it was compensated, changes to a web site that it owned, and letters written on its letterhead); *Dep't of Enforcement v. Respondent Firm 1*, 2001 NASD Discip. LEXIS 6, at *38-39 (holding that the president and controlling shareholder of the parent and broker-dealer must produce information in possession of the broker-dealer's parent). While Rule 8210 has limits, the requests directed to Goldstein fell well within them. *See Gregory Evan Goldstein, Order Denying Stay*, Exchange Act Release No. 68904, 2013 SEC LEXIS 552, at *13 (Feb. 11, 2013) (denying stay of sanctions and holding that FINRA's requests to Goldstein are not even close to the limits of Rule 8210's scope).³⁷

The Commission should reject Goldstein's unsupported due process arguments.

E. FINRA's Sanctions of a Bar and a Fine Are Consistent with the Sanction Guidelines and the Public Interest and Are Neither Excessive Nor Oppressive

The Hearing Panel ordered Goldstein to comply fully with all outstanding Rule 8210 requests for information and documents within 21 days of the date of its January 4, 2013 decision. RP 696. The Hearing Panel further ordered that, if Goldstein failed to comply within that time, Goldstein would be suspended from associating with any member in any capacity. *Id.*

³⁷ Goldstein argues that he was not on notice that Rule 8210, prior to the recent amendments, applied to third-party documents. Goldstein Brief at 7. As cited above, Commission and NAC decisions clearly provided Goldstein with notice of the requirement, under Rule 8210, that he produce information and documents related to his outside business activities at Wall Street At Home. Furthermore, FINRA staff alerted Goldstein as to the potential repercussions from his refusals to respond. FINRA advised Goldstein by letter dated February 3, 2012, that the documents requested were within FINRA's authority to request. RP 39. The March 13, 2012, Pre-Suspension Notice provided Goldstein with additional opportunity to provide information related to his outside business activities before being suspended. RP 21. Goldstein could have answered then, but refused to respond.

Furthermore, the Hearing Panel ordered that, if Goldstein remained non-compliant for three months, the suspension would become a bar in all capacities and Goldstein would be fined \$50,000.³⁸ *Id.* The Commission should affirm the sanctions imposed by the FINRA Hearing Panel, which are consistent with the public interest and neither excessive nor oppressive.

FINRA Rule 8210 plays a critical role in FINRA's self-regulatory efforts. Because FINRA lacks subpoena power, the failure by associated persons to comply with Rule 8210 requests for information subverts FINRA's "ability to carry out its regulatory responsibilities and must be viewed as a serious violation." *Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994). "Compliance with [FINRA's] rules requiring cooperation in investigations is essential to enable [FINRA] to carry out its self-regulatory functions." *Toni Valentino*, Exchange Act Release No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004). Here, Goldstein had three months after the start of the suspension to respond to FINRA's requests, and FINRA's subsequent bar of Goldstein was conditional. RP 696. Avoidance of the bar was completely within Goldstein's control: if he complied fully with FINRA's Rule 8210 requests within three months, then the bar would not have taken effect. *Id.* To date, Goldstein has chosen not to take this path and his continued refusal resulted in a \$50,000 fine and bar, which is an appropriate sanction for a failure to respond. *See PAZ Secs., Inc.*, 2008 SEC LEXIS 820, at *9 (noting that failure to cooperate with FINRA's information requests is properly remedied by a bar) (quotation omitted).

³⁸ FINRA brought this action for Goldstein's failure to comply with Rule 8210 requests pursuant to FINRA Rule 9552, which authorizes FINRA to suspend an associated person, after 21 days' notice, for failing to provide any information or testimony requested pursuant to FINRA rules. Goldstein requested, and was granted, a hearing pursuant to Rule 9559. FINRA Rule 9559(n) states that, in any action brought under the Rule 9550 Series, the Hearing Panel who presides over the hearing may impose any fitting sanction.

Furthermore, the sanctions that the Hearing Panel imposed are well within the ranges recommended in FINRA's Sanction Guidelines for the failure to respond to requests made pursuant to Rule 8210. *See FINRA Sanction Guidelines*, at 33 (2011), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf>. Goldstein responded to FINRA's questions about Marquis Financial, but abjectly refused to provide any meaningful information about Wall Street At Home, other than to admit that he conducts outside business activities, admittedly related to his securities activities, through Wall Street At Home. RP 37-39, 43, 298, 302-03. The Hearing Panel treated Goldstein's actions as a failure to respond in any manner and, according to the Sanction Guidelines, a bar should be standard. *Guidelines*, at 33. Goldstein stonewalled FINRA with respect to Wall Street At Home, and his willingness to answer questions about Marquis Financial should not result in his failing to respond to be treated, for sanctions purposes, as a partial response. In any event, even partial or incomplete responses warrant a bar under FINRA's Sanction Guidelines unless the person can demonstrate substantial compliance. *Id.* Because Goldstein has refused to provide any meaningful information regarding Wall Street At Home, he did not provide substantial, or any, compliance with respect to FINRA's efforts to obtain information regarding his outside business activities at Wall Street At Home.³⁹

A failure to comply with an information request, the Commission has repeatedly noted, "is a serious violation because it subverts [FINRA's] ability to execute its regulatory responsibilities." *Joseph Ricupero*, Exchange Act Release No.62891, 2010 SEC LEXIS 2988, at *21 (Sept. 10, 2010) (sustaining bar imposed by FINRA's predecessor, NASD, for failure to

³⁹ Goldstein admits in his brief to the Commission that he "refused" to answer all questions and provide information and documents related to Wall Street At Home. Goldstein Brief at 1-4.

respond to an information request); *see also PAZ Secs., Inc.*, 2008 SEC LEXIS 820, at *13 (“The failure to respond to [FINRA] information requests frustrates [FINRA’s] ability to detect misconduct, and such inability in turn threatens investors and markets.”). As a result, individuals who violate Rule 8210 “present too great a risk to the markets and investors to be permitted to remain in the securities industry.” *PAZ Secs., Inc.*, 2008 SEC LEXIS 820, at *13.

Moreover, Goldstein’s noncompliance with Rule 8210 here poses a particularly significant risk. FINRA represents that it is seeking information related to potentially serious securities violations, including selling away, front running, market timing, fraud, and outside business activities that may implicate or harm the integrity of the markets and Marquis Financial’s customers.⁴⁰ Goldstein also previously failed to report his outside business at Wall Street At Home, as required by Rule 3270, and his outside brokerage accounts that held penny stocks that Marquis Financial customers traded. RP 245-47. These factors further highlight the risk of harm posed by allowing Goldstein to return to the industry and the need for a bar and a fine to adequately protect the investing public.

The Commission should affirm the sanctions imposed by the FINRA Hearing Panel, which are neither excessive nor oppressive and in the public interest.

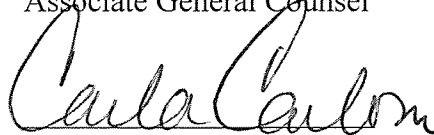
⁴⁰ *Cf. e.g., Chris Dinh Hartley*, Exchange Act Release No. 50031, 57 S.E.C. 767, 2004 SEC LEXIS 1507, at *15 (July 16, 2004) (explaining that failing to disclose outside activities thus deprives investors of “protections investors have a right to expect” and “illustrates the potential for harm to public investors”); *Anthony H. Barkate*, Exchange Act Release No. 49542, 2004 SEC LEXIS 806, at *21-22 (Apr. 8, 2004) (same); *Micah C. Douglas*, 52 S.E.C. 1055, 1060 (1996) (finding that applicant’s failure to inform his employer firm of his outside business activities “deprived potential customers of the oversight and supervision provided by [applicant’s] employer firm”).

III. CONCLUSION

The Commission should affirm FINRA's action in its expedited proceeding against Goldstein. The Hearing Panel correctly determined that Goldstein was subject to FINRA's jurisdiction and failed to respond to FINRA's information requests regarding his outside business activities through Wall Street At Home, an entity he owned and controlled. The Hearing Panel correctly concluded that suspending Goldstein until he fully complied with such requests was appropriate. Given the important function that Rule 8210 serves in FINRA investigations, the Hearing Panel's imposition of a suspension and conversion to a bar and fine for Goldstein's continued failure to comply with a rule essential to FINRA's core mission is fully warranted in this case. Accordingly, the Commission should uphold FINRA's action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Carla Carloni, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450. I have relied on the word count feature of Microsoft Word in verifying that this brief contains approximately 12,755 words, exclusive of tables of contents and authorities.

A handwritten signature in black ink that reads "Carla Carloni". The signature is written in a cursive style and is positioned above a horizontal line.

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