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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Southeast Investments, N.C., Inc. and Frank Harmon Black

For Review of

FINRA Disciplinary Action

File No. 3-19185

FINRA'S BRIEF IN OPPOSITION TO MOTION FOR STAY

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I. INTRODUCTION

Frank Harmon Black seeks to stay the bar imposed pursuant to a May 23, 2019 decision by FINRA's National Adjudicatory Council ("NAC").[1] The NAC found, among other things, that Black falsely testified during a FINRA on-the-record interview that he had inspected several offices of his firm, Southeast Investments, N.C., Inc. (the "Firm"), and produced to FINRA fabricated documents purportedly evidencing such inspections. The evidence convincingly demonstrates that Black lied to FINRA and fabricated documents in support of his untruths. Indeed, four former registered representatives at the Firm credibly and consistently testified that

[1] References to the NAC's decision are cited as "Decision," a copy of which is attached as Appendix A.

Black did not inspect their offices as he had claimed, whereas Black's testimony that he inspected the offices lacked credibility and corroborating documents.

The NAC barred Black for his intentional and highly serious misconduct. It held that Black engaged in a pattern of deceit designed to mislead FINRA to believe that he had conducted office inspections that never occurred, which included fabricating documents on two occasions and repeatedly providing false testimony. Information concerning the Firm's failure to inspect its offices was particularly important: prior to Black's deception, the Commission found that the Firm failed to conduct office inspections, and Black knew that FINRA was focusing on whether the Firm rectified this issue. The NAC found no mitigating factors existed that warranted a lesser sanction.

The Commission should deny Black's motion to stay because he has not shown that extraordinary circumstances warrant a stay of the NAC's bar. First, Black has not demonstrated that he is likely to succeed on the merits of his appeal. The NAC based its findings that Black testified falsely and fabricated documents on the credible and consistent testimony of four individuals, compared to Black's incredible and unsupported testimony. These credibility findings, made by the FINRA Hearing Panel that observed the witnesses testify, are entitled to substantial deference. Black has not shown that they should be set aside. Likewise, Black's procedural arguments, which the NAC soundly rejected, do not show that he is likely to succeed on the merits. Black was afforded ample opportunity to present his defense in the proceedings below, which FINRA conducted fairly and in accordance with its rules. Black's assertions to the contrary ring hollow.

Second, the other factors that the Commission considers in deciding whether to grant a stay tilt decidedly against Black. Black has not shown that he will suffer irreparable harm if the

Commission denies his stay request, and denying his stay request would benefit the investing public and serve the public interest. Black repeatedly lied to his regulator, and attempted to bolster his lies with fabricated documents. Black's misconduct undermined FINRA's ability to detect problems with the Firm's office inspection program (an issue previously flagged by the Commission).

For all of these reasons, FINRA urges the Commission to deny Black's stay request.

II. FACTUAL BACKGROUND

A. Black

Black has approximately 48 years of experience in the securities industry. Decision, 2. He has been associated with the Firm, which he founded, since 1997. Decision, 3.

During the relevant period, Black served as, among other things, the Firm's president and chief compliance officer, and he was ultimately responsible for supervisory issues at the Firm. Decision, 2-3. Black, however, no longer holds an ownership interest in the Firm. *See* Black's Expedited Motion to Stay Sanctions ("Motion"), 19 n.24.

B. The Firm

The Firm is based in Charlotte, North Carolina. Decision, 2. During the relevant period, it had between 114 and 133 registered representatives and 38 FINRA-registered branch offices. Four of those offices—and whether Black inspected them as he claimed or fabricated documents and lied to FINRA about inspecting them—are at issue here.

C. Black Fabricates Documents and Testifies Falsely

FINRA conducted an on-site Cycle Examination of the Firm in September 2012. Decision, 6. FINRA staff focused on the Firm's office inspection program because during the

Commission's 2011 examination of the Firm, it found that the Firm failed to conduct office inspections. Decision, 6, 36. FINRA staff wanted to know whether the Firm had addressed these deficiencies. Decision, 6.

Black informed the examiners that he tracked office inspections using a running list on his computer. Decision, 6. At the examiners' request, Black produced to FINRA a document he created entitled, "Office Inspections Checklist by Due Date" (the "Office Inspections Checklist"). The Office Inspections Checklist listed the purported due dates and completion dates of inspections of 43 Firm representatives' offices. The Office Inspections Checklist showed that the Firm, through Black, inspected the offices of the following four registered representatives: (1) Rocci Ravella on October 1, 2010; (2) Scott Rivard on May 11, 2011; (3) Tom Minor on August 11, 2011; and (4) Anthony Marable on July 16, 2012. As described below, Ravella, Rivard, Minor, and Marable (the "Four Testifying Representatives") credibly and consistently testified that neither Black nor anyone else at the Firm inspected their offices as Black claimed.

In March 2013, FINRA staff conducted an on-the-record interview of Black, and subsequently requested that the Firm produce, pursuant to FINRA Rule 8210, all documents evidencing the 43 office inspections identified on the Office Inspections Checklist. Decision, 6. In response, the Firm produced documents that purported to show at least 10 office inspections (including those for the Four Testifying Representatives). Decision, 7. For each purported inspection, the documents included an "Internal Review Files and Forms Checklist" (which was a checklist that contained compliance-related tasks to be conducted as part of each inspection) and a document entitled, "Office Compliance Inspection." The Office Compliance Inspection

document falsely indicated that Black inspected the Four Testifying Representatives' offices on the dates shown on the Office Inspections Checklist.

On April 3-4, 2014, FINRA staff conducted another on-the-record interview of Black pursuant to FINRA Rule 8210. Decision, 8. Despite acknowledging his obligation to testify truthfully, Black falsely testified that he personally inspected the Four Testifying Representatives' offices on or around the dates set forth in the Office Inspection Checklist. He further falsely testified that he would have the Office Compliance Inspection document in front of him during onsite office inspections and go through the document with each respective representative. Black also falsely testified that the Office Compliance Inspection document accurately reflects that he inspected the Four Testifying Representatives' offices. Black asserted that he drove to the Four Testifying Representatives' offices to conduct the inspections, even though two offices were 11 hours away by car. Decision, 8-9. Black could not produce documents that specified his location, either during travel or at the purported inspections.

III. PROCEDURAL HISTORY

A. Enforcement's Complaint

FINRA's Department of Enforcement ("Enforcement") filed a five-cause complaint against Black and the Firm in September 2015. Decision, 3. Causes one and two are relevant to Black's stay request. Cause one alleged that the Firm, acting through Black, provided to FINRA during the 2012 Cycle Examination fabricated documents, which falsely showed that Black inspected the offices of the Four Testifying Representatives and one other representative, when he did not do so. Cause two alleged that Black and the Firm provided false investigative testimony concerning these alleged office inspections during an on-the-record interview.

B. The Hearing Panel Finds that Black Testified Falsely and Fabricated Documents

After a four-day hearing, during which the Four Testifying Representatives and Black testified, the Hearing Panel found that Black and the Firm violated FINRA Rules 8210, 4511, and 2010 by testifying falsely about the office inspections and providing to FINRA fabricated documents. For this misconduct, the Hearing Panel barred Black and fined the Firm $73,000. Decision, 4-5.

The Hearing Panel based its findings on, among other things, the testimony of the Four Testifying Representatives. Decision, 12, 14. The Hearing Panel found that they credibly testified that Black did not inspect their respective offices, and that their testimony was generally consistent with their responses to previous FINRA Rule 8210 requests concerning the matter.[2] Decision 8-12. Specifically, the Hearing Panel found that:

- Minor testified credibly that he worked by himself in a cottage in his yard in Charlotte, North Carolina and that neither Black, nor any other Firm representative, ever visited his office to inspect it (Decision, 8-9);

- Rivard testified credibly that he maintained an office in Pittsford, New York where he kept all of his customer files and documents. He was the only person who worked there, and testified credibly that neither Black nor any other Firm representative ever visited his office to do an audit or inspection (Decision, 9);

- Ravella testified credibly that he worked alone from his home in Leetonia, Ohio and that neither Black nor any other Firm representative visited his office (Decision, 9-10); and

- Marable testified credibly that during the relevant period, he worked at an office in Mauldin, South Carolina, where he worked alone. Marable testified credibly that Black did not visit him in July 2012 as claimed by Black, and that Black visited him only once "over ten years ago," although Black "didn't really inspect anything." Decision, 10-11.

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[2] Enforcement alleged, and the Hearing Panel found, that the Firm and Black fabricated documents and testified falsely concerning one additional registered representative who did not testify. Decision, 3, 11-12.

In contrast, the Hearing Panel found that Black's testimony that he inspected the offices of the Four Testifying Representatives was false, not credible, and unsupported by any other reliable evidence. Decision, 11-12, 14.

The Hearing Panel emphasized that its findings that the Four Testifying Representatives were credible was based on both the direct and cross-examination of these individuals, stating:

> The brokers testified without contradiction that they did not know each other; thus, there is no evidence that they coordinated their testimony. The Panel considered that if the brokers had intended to provide false testimony—that is, testify that Respondents conducted no inspections of their offices, when in fact they did—Respondents would have been able to impeach them with evidence generated by the inspections. Such proof could reasonably include receipts evidencing Black's travel and hotel expenses, and records of communications about the inspections, that would have exposed each of the brokers in an elaborate lie. Black also would have been able to testify about what activities he engaged in with the brokers during the branch inspections. This did not occur.
>
> The brokers' testimony was consistent with what they told [FINRA examiners] over the telephone and what they submitted in writing in response to Rule 8210 requests for information. The Panel therefore found them credible.[3]

Decision, 12-13.

Finally, with respect to the Four Testifying Representatives, each of whom Black alleged was biased against him, the Hearing Panel found—after having "carefully observed the demeanor of the four brokers at the hearing"—that their ability to be truthful was not impacted by purported disputes with Black. Decision, 15. To the contrary, the Hearing Panel "found no evidence of animosity or bias towards Respondents." Decision, 15.

C. NAC Proceedings

Black and the Firm appealed the Hearing Panel's decision to the NAC. Prior to issuing its decision, the NAC issued an interim order in June 2018 (the "Interim Order"). Decision, 5.

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[3] The Hearing Panel made these additional credibility findings in an order dated August 31, 2018, which we discuss below. *See infra*, Part III.C.

The Interim Order requested that the Hearing Panel direct Enforcement to produce a copy of notes (the "Notes") that a FINRA examiner, Pamela Arnold ("Arnold"), took of conversations she and another examiner, Ray Palacios ("Palacios"), had with the Four Testifying Representatives. The Interim Order directed the Hearing Panel to determine whether the Notes constituted "written statements" under FINRA Rule 9253(a)(2) and if so, whether respondents had shown that the failure to provide the Notes was not harmless error under Rule 9253(b).[4]

Enforcement staff subsequently informed the Hearing Panel that they could not locate the Notes. Decision, 5, 22. Enforcement instead produced emails from Arnold to Palacios, sent six days after their conversations with the Four Testifying Representatives, summarizing those conversations. It also produced a memo from Palacios, dated one day after Arnold's emails, summarizing the phone conversations with the Four Testifying Representatives.

On August 31, 2018, the Hearing Panel issued an order (the "Hearing Panel 2018 Order"). Decision, 5. The Hearing Panel 2018 Order found that: (1) the Notes were not "written statements" pursuant to FINRA Rule 9253(a)(2) because they were not made during a routine exam or inspection; (2) Enforcement was not required to produce the Notes; (3) even if the Notes could be considered written statements, respondents did not show that the failure to produce them was not harmless error; and (4) Arnold's email summaries of the Notes did not contain

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[4] FINRA Rule 9253(a)(2) provides that a respondent may file a motion requesting that Enforcement produce "any contemporaneously written statement made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person" where these individuals are called as witnesses and the written statement directly relates to their testimony. *See* FINRA Rules 9253(a)(2). If a written statement is not made available to a respondent, he is not entitled to a rehearing or issuance of an amended decision unless he shows that the failure to provide the written statement was not harmless error. *See* FINRA Rules 9253(b).

anything that altered the Hearing Panel's findings and "[t]here is no hint that the Notes contained any exculpatory *Brady* material." Decision, 5.

D. The NAC Finds that Black Lied to FINRA and Produced Fabricated Documents

The NAC found that, among other things, the Firm and Black provided to FINRA false testimony and fabricated documents. Decision, 13-18. The NAC held that the credibility of the witnesses who testified about whether Black and the Firm conducted office inspections—the Four Testifying Representatives and Black—was crucial to determining whether Black and Firm engaged in this misconduct. Decision, 14.

The NAC found that Black and the Firm did not present substantial evidence to set aside the Hearing Panel's extensive determinations that the Four Testifying Representatives were credible when they testified that Black did not inspect their offices, and that Black's contrary testimony was not credible. Decision at 14. The NAC rejected Black and the Firm's arguments that the Four Testifying Representatives were biased and unreliable. Decision 14-15. It found that the Hearing Panel carefully considered any potential animosity of these witnesses towards Black and the Firm, and found none. Decision, 15.

The NAC further held that Black and the Firm did not present any reliable evidence to corroborate Black's testimony that he inspected the four offices at issue. Decision, 15. It observed that Black did not submit any receipts documenting his alleged car trips (including trips to Rivard's office and Ravella's office, which were each 11-hour, one-way drives from Charlotte). Nor did Black and the Firm offer any communications, such as emails, to show any pre-inspection planning or scheduling with the Four Testifying Representatives. Instead, they produced Black's expense vouchers for travel that allegedly occurred during a more than two-year period, none of which were linked to a specific office inspection or supported by receipts,

bank statements, or credit card statements.[5] Decision, 15-16. Further, the NAC rejected Black's claim that his descriptions of the four offices and knowledge of how to get to them supported his testimony. Decision, 17. Likewise, the NAC found that Black's testimony that another person, NJ, was present during Black's purported visit to Marable's office was uncorroborated (and inconsistent with Marable's testimony that NJ stopped working in his office years before the purported inspection).

The NAC also rejected several procedural arguments raised by Black and the Firm. Decision, 19-23. For example, they argued that the NAC should reverse the Hearing Panel's decision and vacate the sanctions imposed because the Hearing Panel 2018 Order erred in finding that the Notes were not written statements under FINRA Rule 9253(a)(2) and that Enforcement's failure to produce the Notes was not harmless error. Decision, 20. The NAC declined to do so. It found that even if the Notes were "written statements," Black and the Firm failed to show that Enforcement's failure to produce them was not harmless error. Decision 20-21. The NAC held that Arnold's email summaries of the conversations with the Four Testifying Representatives were consistent with, and corroborated, their testimony and responses to Rule 8210 requests stating that Black did not inspect their offices. Decision, 20-22. It further affirmed the Hearing Panel's determination that Arnold's emails and Palacios's memo did not contain exculpatory material that Enforcement should have produced earlier in the proceedings. Decision, 23.

For Black and the Firm's misconduct, the NAC stated that a violation of FINRA Rule 8210 is "highly serious" because it undermines FINRA's ability to detect misconduct, and

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[5] The NAC held that Black's explanation that he paid his travel expenses in cash "does not address the absence of receipts." Decision, 16, n.23.

determined that "[s]ubstantial sanctions are appropriate to remedy respondents' misconduct." Decision, 36-37. The NAC found no mitigating factors and several aggravating factors in support of Black's bar. It found that Black acted intentionally and engaged in a pattern of misconduct over an extended period. Further, the NAC found that the information FINRA sought concerning whether Black and the Firm had conducted office inspections in compliance with "fundamental supervisory obligations" was important. Decision, 36-37.

IV. ARGUMENT

Black has not demonstrated that the Commission should stay his bar pending resolution of this appeal. He has failed to demonstrate a likelihood of success on the merits (and has failed to raise a "serious legal issue" on the merits). Indeed, he has not come close to showing that the Hearing Panel's credibility findings, upon which the NAC's decision is based, should be set aside on appeal. Similarly, his procedural arguments, which include a claim that these proceedings were unfair because FINRA improperly withheld exculpatory evidence that would have altered the outcome of these proceedings, are meritless.

Moreover, Black is unable to demonstrate that he or anyone else will suffer irreparable harm without a stay or that granting the stay will serve the public interest. Rather, the public interest strongly favors precluding Black from participating in the securities industry. The Commission should keep his bar in place to protect investors.

A. The Standard for Considering a Request to Stay

"[T]he imposition of a stay is an extraordinary and drastic remedy," and the moving party has the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at *6 & n.12 (Nov. 12, 1991). In balancing the

harms that would result from the grant or denial of a stay, the Commission generally considers four factors: (1) a strong likelihood that the movant will prevail on the merits; (2) whether the movant will suffer irreparable harm without a stay; (3) whether there would be substantial harm to other parties if a stay were granted; and (4) whether the issuance of a stay would serve the public interest. *John Montelbano*, Exchange Act Release No. 45107, 2001 SEC LEXIS 2490, at *12 & n.17 (Nov. 27, 2001) (internal citation omitted). "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors." *Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, 2018 SEC LEXIS 1946, at *4 (Aug. 6, 2018) (Order Granting Stay With Conditions); *see also Bruce Zipper*, Exchange Act Release No. 82158, 2017 SEC LEXIS 3706, at *19 (Nov. 27, 2017) (Order Denying Stay) (stating that the D.C. Circuit has suggested that a movant cannot obtain a stay unless he shows both a likelihood of success and irreparable harm).

The Commission has observed that certain courts utilize a somewhat different standard in considering whether to grant a stay. If a movant does not establish that he is likely to succeed on the merits of his appeal, this alternate standard requires that he must at least raise "a serious legal question on the merits" *and* show that the other three factors weigh *heavily* in his favor. *See Scottsdale*, 2018 SEC LEXIS 1946, at *5; *Zipper*, 2017 SEC LEXIS 3706, at *19-21. The Commission emphasized that the overall burden on a movant under this standard "is no lighter than the one it bears under the 'likelihood of success' standard." *Zipper*, 2017 SEC LEXIS 3706, at *21.

As discussed below, Black has not demonstrated that the Commission should grant him the extraordinary relief that he seeks.

B. Black Has Not Shown a Strong Likelihood of Success and Has Not Raised a Serious Legal Question

Black has not shown a strong likelihood that he will succeed on the merits of his appeal. Indeed, he has not even raised a "serious legal question on the merits." For these reasons alone, the Commission should deny his stay request.

FINRA Rule 8210 provides that, for the purpose of an investigation or examination, FINRA staff shall have the right to require a member or person associated with a member to provide information orally, in writing, or electronically and to testify, with respect to any matter involved in the investigation or examination. *See* FINRA Rule 8210(a). Providing false or misleading information to FINRA in the course of an examination or investigation violates FINRA Rule 8210. *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008). A failure to comply with a Rule 8210 request "undermines [FINRA's] ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

FINRA Rule 4511(a) provides that members shall make and preserve books and records as required under FINRA rules, the Securities Exchange Act of 1934 ("Exchange Act"), and applicable Exchange Act rules. The books and records rules "include[] the requirement that the records be accurate, which applies 'regardless of whether the information itself is mandated.'" *See Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *32 (Feb. 27, 2012). Rules that are applicable to members are applicable to associated persons. *See* FINRA Rule 0140(a).

1. The NAC's Liability Findings Are Fully Supported and Are Not Likely to Be Overturned

In its decision, the NAC found by a preponderance of the evidence that Black and the Firm provided false testimony and fabricated documents concerning office inspections, in violation of FINRA rules. Decision, 13-18. The NAC's findings are directly supported by the credible and consistent testimony of the Four Testifying Representatives, who each testified that Black did not inspect their offices as he claimed (compared to Black's incredible and uncorroborated testify that he did inspect the offices). Black has not pointed to substantial evidence necessary to set aside these credibility findings, which the Hearing Panel made after carefully observing each witness testify. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and can be overcome only when "substantial evidence" exists for doing so).

In support of his stay request, Black argues that the Four Testifying Representatives were biased as former Firm representatives with alleged grudges against Black, and were therefore unreliable. Motion, 7. The NAC, however, considered this argument when it evaluated credibility. It held that the Hearing Panel expressly assessed whether these individuals had any bias or animosity towards Black or the Firm—and found none. Black has not presented any new reasons, and certainly no substantial evidence, to set aside the Hearing Panel's credibility findings on these grounds.

The Commission should also reject Black's further attempts to undercut the Hearing Panel's credibility findings. He argues that certain alleged inconsistencies in the Four Testifying Representatives' testimony, which he claims were revealed after the hearing through Arnold's emails and Palacios's memo, demonstrate that that they were not credible. To the extent that there were discrepancies in the testimony of the Four Testifying Representatives, the NAC

specifically found that they were immaterial to the crux of their testimony relevant to this case—that Black did not inspect their offices as he had claimed.[6] Contrary to Black's claims, Arnold's emails and Palacios's memo, which reaffirm that the Four Testifying Representatives told FINRA that Black did not inspect their offices, *support* the Hearing Panel's credibility determinations rather than undermine them. Moreover, as observed by the NAC, Black and the Firm had the opportunity to confront the Four Testifying Representatives during their testimony on the issues raised by Black.

Black also argues that the proceedings were unfair because Enforcement could not produce the Notes, and that Arnold's emails and Palacios's memo contained material exculpatory evidence that Black could have used to impeach the testimony of the Four Testifying Representatives. Black posits that Enforcement's failure to produce this evidence was not harmless error and prevented Black from being able to defend himself. The NAC, however, properly concluded that regardless of whether the Notes constituted "written statements" under FINRA's rules, Black and the Firm did not show that the failure to produce them was not harmless error. The NAC also appropriately concluded that Arnold's emails and Palacios's memo summarizing their conversations with the Four Testifying Representatives did not contain any material exculpatory material. Decision, 23. Black's arguments and his innuendo that the Notes could have contained exculpatory material (despite the absence of exculpatory material in Arnold's emails and Palacios's memo summarizing the conversations at issue), are insufficient to

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[6] For example, Ravella testified that he had never met Black in person, whereas Arnold's emails reflect that Ravella met Black annually at a Firm meeting. Decision, 21. At the hearing, Black had the opportunity to, but did not, question Ravella concerning his testimony that he had never met Black. Regardless, this discrepancy is immaterial to Ravella's testimony that Black did not inspect his office. *See also* Decision, 21 (addressing alleged discrepancy in Marable's testimony and statements contained in Arnold's emails).

set aside the Hearing Panel's extensive credibility findings and demonstrate that he is likely to succeed on the merits.[7]

Black points to several other alleged procedural improprieties in support of his claim that he is likely to succeed on appeal. For instance, he argues that Enforcement's investigation was biased and provided a "skewed sample" by focusing only on former Firm representatives. Motion, 6. Black states that FINRA avoided talking to Firm representatives who would say that Black inspected their offices. Motion, 8. This argument misses the mark. Black's lies to FINRA are at issue, regardless of whether he lied about inspecting one office of a former Firm representative or numerous offices.[8] FINRA's investigative choice to interview former Firm representatives was entirely appropriate to gather evidence on the issue of whether the Firm conducted office inspections. Regardless, Black ignores that the NAC concluded, after a de novo review of the case, that Enforcement proved by a preponderance of the evidence that Black

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[7] For example, Black simply asserts that the Notes "should have been produced pursuant to FINRA Rule 9253(a)(2) and or Rule 9251(b)(3)." Motion, 6 n.8. Later, he summarily argues that Enforcement should have produced Arnold's emails and Palacios's memo because they contain material exculpatory evidence, without addressing why the NAC erred in concluding that these materials did not bear on the pertinent testimony of the Four Testifying Representatives. *See* Motion, 9; *Richard Allen Reimer, Jr.*, Exchange Act Release No. 82014, 2017 SEC LEXIS 3523, at *7 (Nov. 3, 2017) (Order Denying Stay) (finding movant failed to show he was likely to succeed on the merits where he repeated arguments rejected by the NAC and he did "not attempt to rebut FINRA's findings or further develop his arguments, let alone explain why they are now likely to succeed before the Commission").

[8] Similarly, and contrary to Black's arguments, evidence that Black may have inspected other Firm offices does not show that he inspected the Four Testifying Representatives' offices, and importantly, has no bearing on whether he lied to FINRA about inspecting those four offices. Regardless, Black could have called as witnesses current representatives whose offices Black asserts he had inspected. Further, Black's claim that a FINRA Enforcement attorney deliberately made misrepresentations to the NAC during oral argument that he "did not believe" that any former Firm representative confirmed that Black inspected his office is without support and not germane to the issues in the case. *See* Motion, 8-9.

lied to FINRA based upon the credible and consistent testimony of the Four Testifying Representatives.

Black also argues that the NAC improperly shifted the burden to him to show that the office inspections occurred. Motion, 11. Black bases this argument on the fact that the NAC considered, but ultimately discounted, alleged support for his testimony that he inspected the offices of the Four Testifying Representatives. The Commission should reject Black's argument. The evidence that allegedly supports Black's testimony consists of expense vouchers with no supporting documentation and not specifically tied to the four offices at issue, Black's purported ability to describe the offices, Black's testimony that NJ was present at Marable's office inspection (which Marable expressly contradicted), and the documents Black produced to FINRA that allegedly show he inspected the offices (i.e., the fabricated Office Inspections Checklist and Office Compliance Inspection document). The NAC properly weighed this evidence in determining whether Black's testimony, which contradicted the testimony of the Four Testifying Representatives, was credible.

Finally, Black argues that the proceedings were unfair because he did not have notice that office inspections other than the five identified in the complaint (which included the offices of the Four Testifying Representatives) would be at issue and "used against him." Motion, 11-15. This argument is baseless. The NAC found that Black and the Firm violated FINRA rules concerning testifying truthfully and keeping accurate records with respect to office inspections of the Four Testifying Representatives. *See David Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *51 (July 27, 2015) (stating that it is the NAC's decision, and not the Hearing Panel's, that is the final action of FINRA that is reviewable by the Commission). The

NAC did not consider alleged improprieties with respect to other offices,[9] and it is undisputed that Black had notice that his representations to FINRA and related documentation concerning these four offices were at issue.

2. The Bar Is Not Likely to Be Set Aside

Black is also unlikely to have the bar overturned, which is within the range of sanctions recommended in FINRA's Sanction Guidelines and not excessive or oppressive. The NAC found that Black intentionally provided false testimony and fabricated documents, attempted to conceal from FINRA the Firm's failure to inspect its offices, and engaged in a pattern of deceit. Decision, 36-37. The NAC further found that Black's false testimony and fabricated documents concerned important information that FINRA was seeking to determine whether the Firm was complying with fundamental supervisory obligations. Decision, 36. The NAC properly found that no mitigating factors existed that would warrant a sanction less than a bar, which is standard for testifying untruthfully. The record fully supports this conclusion.

Black argues that the bar is punitive considering that Black no longer inspects branch offices and the Firm now preserves proof of office visits, including receipts. Motion, 15. Black's argument misunderstands the reason for the NAC's sanction. The NAC barred Black for testifying untruthfully and fabricating documents, not for failing to inspect offices and maintain records.[10] The Commission should also reject Black's cursory statement that *Kokesh v. SEC* "clouds" the issue of whether FINRA can impose a bar and supports his stay request. Motion,

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[9] The NAC decision pinpointed that, although the issue of whether David Plaxico visited Charles Graham's office was alleged in the background section of the complaint, the NAC was not making a finding on this point. Decision, 18.

[10] Likewise, Black's offer to condition a stay on a prohibition against him conducting branch inspections fails to address his serious, underlying misconduct of lying to FINRA to thwart an investigation.

16. *Kokesh* considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts. *See* 137 S. Ct. 1635, 1642 n.3 (2017). *Kokesh* leaves intact Section 15A of the Exchange Act, which mandates that FINRA have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings. *See* 15 U.S.C. 78o-3(b)(7) (2019); *see also PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175-76 (D.C. Cir. 2009) (sustaining debarment that was "to protect investors" and that redressed a "significant harm to the self-regulatory system").

* * *

Black has not provided any argument or evidence that he has a strong likelihood of success on the merits of his appeal. Nor has he raised a serious legal issue.[11] The Commission should therefore deny Black's stay request.

C. Black Has Not Demonstrated That a Denial of the Stay Request Will Impose Irreparable Harm

Black argues that he will suffer irreparable harm in the absence of a stay because he will have difficulty finding work and will not be able to support himself financially. These potential harms, however, do not constitute irreparable harm sufficient to justify granting a stay request. *See Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at *5 (July 18, 2000) (holding that the movant must show that the NAC's decision will impose injury that is "irreparable as well as certain and great"); *Timpinaro*, 1991 SEC LEXIS 2544, at *8 (stating that "[t]he key word in this consideration is irreparable"). Indeed, the Commission has repeatedly held that allegedly negative economic or financial consequences that may impact

[11] Even assuming, arguendo, that Black has raised a serious legal issue, as set forth below he has not demonstrated that the other three factors weigh heavily in his favor. *See, e.g.*, *Zipper*, 2017 SEC LEXIS 3706, at *19-21.

a movant do not constitute irreparable harm. *See Dawson James Sec., Inc.*, Exchange Act Release No. 76440, 2015 SEC LEXIS 4712, at *10 (Nov. 13, 2015) (Order Denying Stay) ("[M]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough to constitute irreparable harm."); *The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at *17 (June 2, 2014) (Order Denying Stay) (rejecting argument that movant would be irreparably harmed because he "would be barred from a business he has been a part of for over thirty-seven years and [that is] his only source of income").

Black also argues that without a stay, he will lose the benefit of a possible reduction of his bar. Motion, 17. In support, he cites to *Scattered Corp.*, 52 S.E.C. 1314 (1997). That case, however, is distinguishable. In *Scattered*, the Commission granted applicants' stay request, with conditions. *Id.* at 1321. The Commission held that applicants made a substantial case on the merits with respect to several distinct issues. *Id.* at 1318-19. They also showed that the public interest would be served by granting a stay, and made a "credible" contention that an immediate expulsion of the firm might destroy its business and have dire consequences for the securities for which it makes markets and its employees. *Id.* at 1319-20. Finally, the Commission held that the firm's owner would lose the benefit of any reduction in his bar that would result if the findings were modified or reversed as a result of the substantial issues raised on appeal. *Id.* at 1320. Here, Black has not shown that any of these factors support staying his bar. Indeed, Black has failed to show how the loss of the benefit of any hypothetical reduction of his bar, without more, is different from the situation faced by every person who seeks a stay of a bar.

D. Denial of the Stay Request Will Avoid Potential Harm to Others and Will Serve the Public Interest

Turning to the third and fourth criteria in deciding whether to grant a stay, the balance of equities weighs against staying the effectiveness of the NAC's decision. The public interest strongly favors protecting investors based on the NAC's conclusions. Black's false testimony and fabrication of documents directly and negatively affected FINRA's ability to investigate and detect misconduct—in this case, whether supervisory lapses discovered by the Commission in 2011 continued. Black disregarded his obligation to comply with a FINRA investigation and to answer questions truthfully. Instead, Black intentionally attempted to conceal his failure to inspect Firm offices, and did so repeatedly. *See North Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 SEC LEXIS 2894, at *16 (Aug. 12, 2014) (Order Denying Stay) (finding that the public interest supported denying stay of a bar for failing to comply with Rule 8210 request, which subverted FINRA's "ability to execute its regulatory responsibilities").

Black asserts that his misconduct did not harm any customers and thus there is no risk of harm to others if a stay is granted. Motion, 17. Black's assumption that only violations that directly cause customer harm can result in a bar is mistaken. A Rule 8210 violation "will rarely, in itself, result in direct harm to a customer." *PAZ Sec.*, 2008 SEC LEXIS 820, at *17. Nevertheless, Black's violation of Rule 8210 was highly serious because it "undermines [FINRA's] ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents." *Id.*

Black also asserts that the public interest favors a stay because he "will be allowed to continue reporting illegal investment schemes" and continue to "provide a service" to the securities industry by detecting these schemes. Motion, 18. These assertions and any purported past or future benefits to the investing public, even if true and presented in a less speculative

manner, do not outweigh Black's complete disregard for his obligation to provide truthful information to FINRA in connection with an investigation or examination.[12] Black's misconduct is fundamentally incompatible with FINRA's self-regulatory functions and poses an ongoing risk to investors that can only be remedied by keeping the bar in place. *See Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *21-22 (Nov. 8, 2007).

Finally, Black summarily argues that the Firm, its employees, and the Firm's 5,500 customers will somehow suffer if the Commission does not stay the bar. Motion, 18-19. But Black no longer owns the Firm and he has not provided support for these claims. The Commission should therefore reject them. *See* Declaration of Cellie B. Cohen-Smith, a copy of which is attached as Appendix B; *cf. also Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 SEC LEXIS 3121, at *18 (Oct. 7, 2013) (Order Denying Stay) (finding movant's claim of irreparable harm insufficient where it asserted that stay was necessary to prevent harm to the continued existence of the business because the threats allegedly were insufficiently traceable to the action it sought to stay); *Meyers Associates, L.P.*, Exchange Act Release No. 77994, 2016 SEC LEXIS 1999, at *15 (June 3, 2016) (Order Denying Stay) (stating that "[t]he Commission has generally refused to grant stays based on applicants' claims that FINRA's decision will negatively affect, or even close, a business" and finding any alleged harm to customers and employees was outweighed by the risk posed by permitting applicant to continue in the industry).

In balancing the possibility of injury to Black against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to Black or any

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[12] Black does not explain why others at the Firm or in the industry could not, in his absence, report future investment schemes or suspicious activities to regulators.

other parties. *See Montelbano*, 2001 SEC LEXIS 2490, at *12-13. The Commission will further the public interest by denying the stay request.

V. CONCLUSION

For all of these reasons, the Commission should deny Black's request to stay the NAC's bar and permit him to work at the Firm pending this appeal.

Respectfully submitted,

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FINRA
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May 31, 2019

APPENDIX A

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Southeast Investments, N.C., Inc. Charlotte, North Carolina, and Frank Harmon Black Rock Hill, South Carolina, Respondents.	DECISION Complaint No. 2014039285401 Dated: May 23, 2019

A Hearing Panel found that a member and its president testified falsely during an on-the-record interview; provided FINRA with fabricated documents; failed to retain business-related electronic communications; and failed to exercise reasonable supervision to prevent the failure to inspect offices and retain business-related emails. The Hearing Panel found that the respondent firm willfully failed to retain business-related emails. Held, findings affirmed in part and reversed in part. Sanctions affirmed in part, vacated in part, modified in part.

Appearances

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

For Southeast Investments, N.C., Inc.: Timothy Feil, Esq.

For Frank Harmon Black: Robert M. Bursky, Esq.

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Decision

In the proceedings below, an Extended Hearing Panel ("Hearing Panel") found that Southeast Investments, N.C., Inc. ("SEI") and Frank Harmon Black ("Black"), the firm's president: produced fabricated documents to FINRA staff and testified falsely during an on-the-record interview concerning Black's purported inspections of five SEI offices; failed to ensure that SEI retained business-related electronic communications from March 2010 to May 2015, and that SEI's failure in this regard was in willful violation of Section 17(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 17a-4; and failed to exercise reasonable supervision to prevent the failure to inspect offices and retain firm emails.

The Hearing Panel imposed on SEI fines totaling $243,000, broken down as follows: a $73,000 fine for providing fabricated documents and false testimony to FINRA; a $50,000 fine for failing to retain firm emails; and a $120,000 fine for supervision failures relating to office inspections and email retention. The Hearing Panel barred Black from associating with any FINRA member in any capacity for providing fabricated documents and false testimony. The Hearing Panel also indicated that Black's failure to retain emails warranted a one-year suspension and a $50,000 fine (joint and several with SEI), and that his supervisory failures relating to office inspections and email retention warranted a bar from associating with any member firm in a principal capacity and a $120,000 fine (joint and several with SEI). The Hearing Panel, however, did not impose the fines, one-year suspension, or principal bar on Black, in light of the bar that it imposed on him. Respondents appealed the Hearing Panel's decision.

Having reviewed the record, we take the following actions, as fully explained in this decision:

- We affirm the Hearing Panel's findings that respondents provided to FINRA fabricated documents and false testimony concerning Black's purported inspections of SEI offices.

- We reverse the findings that respondents failed to establish and maintain a system to ensure that SEI offices were inspected. Although we find that Black did not inspect four SEI offices as he claimed to have done, FINRA's Department of Enforcement ("Enforcement") failed to clearly allege or prove what kinds of offices the SEI offices were and, consequently, failed to demonstrate how frequently SEI was required to inspect each of those offices.

- We affirm the findings that respondents failed to establish and maintain a reasonable supervisory system and failed to establish, maintain, and enforce reasonably designed written supervisory procedures to ensure the retention and review of business-related emails. SEI's so-called "honor system" for retaining business-related electronic correspondence—in which SEI permitted its representatives to use third-party email accounts instead of a central server and required representatives to copy or forward all business-related emails to SEI's home office—was not reasonably designed to comply with the electronic correspondence retention requirements.

- We affirm the findings that SEI and Black failed to retain 16 business-related emails of SEI representative Richard Sebastian ("Sebastian"), but reverse the finding that SEI

"willfully" violated federal securities laws and regulations in failing to retain those 16 emails. Although the preponderance of the evidence demonstrates that SEI and Black failed to retain 16 emails of Sebastian, Enforcement did not prove that this failure was not inadvertent.

- We reverse the Hearing Panel's findings that SEI and Black failed to retain other business-related electronic correspondence. Although Enforcement alleged that SEI and Black failed to retain several other categories of emails (in addition to the 16 emails of Sebastian), Enforcement did not prove those specific allegations by a preponderance of the evidence.

- We affirm the bar imposed on Black and the $73,000 fine imposed on SEI for their providing to FINRA fabricated documents and false testimony. For failing to retain firm emails, we reduce the sanctions to a $500 fine (joint and several). For respondents' supervision failures, we reduce the sanctions to a $73,000 fine (joint and several). We do not impose any of the fines on Black, however, in light of the bar imposed on him.

I. Respondents

A. SEI

SEI has been a FINRA member firm since 1997. SEI's revenues are derived from sales of variable annuities, mutual funds, and miscellaneous products including real estate investment trusts.

SEI has an independent contractor business model. Its home office is in Charlotte, North Carolina, where compliance functions are centered. Its registered representatives are located across the United States. During the relevant period of March 2010 through May 2015, SEI had between 114 and 133 registered representatives and between 7 and 38 FINRA-registered branch offices. SEI has very few multi-broker offices. Typically, SEI's representatives worked out of their homes or in insurance office locations.[1]

B. Black

Black entered the securities industry in 1971, and he formed SEI in 1997. During the relevant period, Black was SEI's president, chief financial officer, chief compliance officer, anti-money laundering compliance officer, financial and operations principal, and 95% owner.[2] Black was ultimately responsible for supervisory issues at SEI, including its system for

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[1] The record contains references to SEI offices using various terms, including "branch offices" and "non-registered office locations." As explained below, it is unclear what kinds of offices are at issue. For that reason, this decision refers to SEI's offices as "offices." When the terms "branch" and "non-registered office locations" are used in this decision, it is not intended to make any finding about what kinds of offices are at issue.

[2] David Plexico ("Plexico"), another firm principal, owns 5% of SEI.

inspecting offices, email retention issues, and its written supervisory procedures. At the hearing, Black acknowledged that he was responsible for "everything that happens at SEI."

Since 1997, Black has been registered with SEI as a general securities representative, a general securities principal, municipal securities representative, municipal securities principal, registered options principal, general securities sales supervisor, and introducing broker-dealer financial and operations principal. Black remains registered with SEI.

II. Procedural History

A. Initial Hearing

This disciplinary proceeding originated from a 2012 FINRA cycle examination of SEI that focused on office inspections and electronic correspondence ("2012 Cycle Examination"), a 2012 FINRA statutory disqualification examination of the office of SEI representative Charles Graham ("Graham") ("2012 SD Examination"), and a 2014 FINRA cycle examination of SEI that focused on SEI's electronic correspondence ("2014 Cycle Examination").

On September 15, 2015, Enforcement filed the five-cause complaint that initiated this disciplinary proceeding. Cause one alleged that SEI, acting through Black, provided to FINRA during the 2012 Cycle Examination a set of "branch inspection documents" (including a document entitled "Office Inspection Checklist by Due Date" and a packet of documents entitled "Southeast Investments, N.C., Inc. Internal Review Files and Forms Checklist") that were fabricated and that falsely reported inspections of five SEI representatives' offices that never took place, in violation of FINRA Rules 8210, 4511, and 2010.[3] The five SEI representatives, all of whom had left SEI by the time of the 2012 Cycle Examination, are Rocci Ravella ("Ravella"), Scott Rivard ("Rivard"), Tom Minor ("Minor"), Anthony Marable ("Marable"), and Joe McCall ("McCall") (together, "the Five SEI Representatives").

Cause two alleged that, on April 3-4, 2014, Black and SEI provided false investigative testimony that Black inspected the Five SEI Representatives' offices on the dates indicated on the "branch inspection documents" that SEI and Black provided to FINRA, in violation of FINRA Rules 8210 and 2010.

Cause three alleged that, from March 2010 through May 2015, SEI and Black had established a deficient supervisory system regarding office inspections, in violation of NASD Rule 3010(a) and (c).[4] Specifically, cause three alleged that neither SEI nor Black conducted inspections of the Five SEI Representatives' "non-registered office locations," either on the dates reflected on "branch inspection documents" or ever, even though the Five SEI Representatives had been associated with SEI "for several years."

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[3] The conduct rules that apply in this case are those that existed at the time of the conduct at issue. Rules that are applicable to members are applicable to associated persons. *See* NASD Rule 0115(a); FINRA Rule 0140(a).

[4] Although the complaint established the relevant period as "March 2010 through May 2015," the Five SEI Representatives had all left SEI by January 18, 2013.

The complaint's allegations of violations in causes one, two, and three pertain only to the purported inspections of the Five SEI Representatives' offices. The complaint's background section, which preceded the causes of action, contained several assertions related to FINRA's exploration during the 2012 SD Examination of whether SEI, and in particular Plexico, was conducting visits to Graham's office required by the terms of a plan of heightened supervision. One assertion in the complaint was that events that occurred during FINRA staff's on-site visit to Graham's office were a reason why FINRA staff had broader concerns regarding SEI's office inspection process.[5]

Cause four alleged that, between March 2010 and May 2015, SEI and Black failed to preserve and maintain all of its business-related electronic communications. Specifically, cause four alleged that SEI failed to retain several email communications with FINRA staff and attachments to several emails; that SEI permitted representatives to utilize any email provider for securities-related correspondence; that SEI and Black knew, or reasonably should have known, that SEI representatives could easily evade its email retention "honor system," which required representatives to copy a designated principal at SEI's main office on all business-related electronic communications; that SEI representatives did not comply with that "honor system" on "several emails"; and that one SEI representative used two email accounts for business purposes that had been deactivated and could not be re-accessed. Cause four further alleged that SEI willfully violated Section 17(a) of the Exchange Act and Exchange Act Rule 17a-4, that SEI also violated NASD Rule 3110 and FINRA Rules 4511 and 2010, and that Black violated NASD Rule 3110 and FINRA Rules 4511 and 2010.

Cause five alleged that, from March 2010 to May 2015, SEI and Black failed to establish, maintain, and enforce written supervisory procedures, or a supervisory system, reasonably designed to supervise SEI's review and preservation of business-related electronic communications, in violation of NASD Rule 3010(a) and (b), and FINRA Rules 3110(a) and (b) and 2010. Specifically, cause five alleged that SEI's system of allowing SEI personnel to utilize their own email providers and SEI's "honor system" was not reasonably designed to supervise SEI's business-related electronic communications. Cause five further alleged that SEI and Black failed to change its email system despite being warned by the SEC that its system was inadequate.

Respondents filed an answer that generally denied the allegations of wrongdoing.

The Hearing Panel held a four-day evidentiary hearing.[6] Subsequently, the Hearing Panel issued a decision that made findings as alleged. For providing false documents and testimony

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[5] Plexico's purported visits to Graham's office are addressed in the discussion section below.

[6] Enforcement called as witnesses three FINRA examiners, Kelly Edwards ("Edwards"), Pamela Arnold ("Arnold"), and Matt Dale ("Dale"); four former SEI representatives, Ravella, Minor, Marable, and Rivard; and Black. Respondents called as witnesses Black, Plexico, and Jeanette Roberts ("Roberts"), who was SEI's operations assistant and later its compliance director.

(causes one and two), the Hearing Panel barred Black and fined SEI $73,000. For failing to retain business-related emails (cause four), the Hearing Panel fined SEI $50,000. For the supervisory deficiencies (causes three and five), the Hearing Panel fined SEI $120,000. The Hearing Panel indicated that Black's failure to retain emails warranted a one-year suspension and a $50,000 fine (joint and several with SEI), and that Black's supervisory failures relating to office inspections and retention of firm emails warranted a bar from associating with any member firm in a principal capacity and a $120,000 fine (joint and several with SEI). The Hearing Panel did not impose the fines, one-year suspension, or principal bar on Black, however, in light of the bar it imposed on him. The Hearing Panel also ordered that respondents pay $8,335.29 in costs (joint and several). Respondents appealed to the NAC.

B. NAC Interim Order

Before the NAC, the parties filed appeal briefs and participated in an oral argument. On June 26, 2018, the NAC issued an interim order, directing the Hearing Panel to conduct further proceedings concerning a discovery issue. Specifically, the NAC ordered that the Hearing Panel direct Enforcement to produce to respondents' counsel a copy of the notes that FINRA examiner Pamela Arnold ("Arnold") took of conversations that she and FINRA examiner Ray Palacios ("Palacios") had with the four former SEI representatives who testified at the hearing (i.e., Ravella, Minor, Marable, and Rivard) (the "Four Testifying SEI Representatives"). The NAC's order also directed the Hearing Panel to determine whether Arnold's notes constitute "written statements" within the meaning of FINRA Rule 9253(a)(2) and, if so, whether respondents have established, pursuant to FINRA Rule 9523(b), that the failure to provide Arnold's notes was not harmless error.

C. Post-NAC Interim Order Proceedings

On June 27, 2018, pursuant to the NAC's interim order, the Hearing Panel directed Enforcement to produce copies of Arnold's notes. In response, Enforcement submitted affidavits from Arnold and Enforcement's counsel stating that, despite a thorough search of the investigative files, they could not locate Arnold's notes. Instead, Enforcement produced: (1) emails that Arnold drafted and sent to Palacios six days after their conversations with the Four Testifying SEI Representatives, summarizing what those four former brokers said in those conversations; and (2) a memorandum prepared by Palacios and dated one day after Arnold's emails, summarizing the phone conversations that he and Arnold had with the Four Testifying SEI Representatives and other former SEI representatives.

On August 31, 2018, the Hearing Panel issued an order that responded to the NAC's interim order. The Hearing Panel found that Arnold's notes were not made during a routine examination or inspection and that, therefore, the notes were not "written statements" under FINRA Rule 9253(a)(2), and Enforcement was not required to produce them. The Hearing Panel also found that, even if Arnold's notes qualified as "written statements" under FINRA Rule 9253(a)(2), respondents did not demonstrate that the failure to produce those notes was not harmless error. The Hearing Panel found that Arnold's summaries of her notes contained nothing that would have altered the Hearing Panel's findings of liability and that "[t]here is no hint that the notes contained any exculpatory *Brady* material."

Upon issuance of the Hearing Panel's order, and pursuant to the NAC's interim order, jurisdiction of this disciplinary proceeding reverted to the NAC. We now address the complaint's allegations.

III. Allegations that Respondents Provided Fabricated Documents and False Investigative Testimony to FINRA and Maintained Inaccurate Firm Records (Causes One and Two)

The Hearing Panel found, as alleged, that SEI and Black provided to FINRA staff fabricated documents and false investigative testimony concerning Black's purported inspections of SEI representatives' offices. As explained below, we affirm.

A. Facts

1. SEI and Black Provided to FINRA Staff Documents Purporting to Reflect Inspections of SEI Offices

FINRA examiners Arnold and Palacios participated in the 2012 Cycle Examination and attended the on-site visit to SEI's home office in Charlotte. Palacios was the lead examiner. FINRA examined, among other things, whether SEI addressed deficiencies that the SEC had noted in its 2011 examination of SEI concerning its office inspections and email retention system, including the SEC's findings that SEI had failed to conduct office inspections.

At some point during the on-site portion of the 2012 Cycle Examination, which ran for two weeks in late September 2012, FINRA staff asked Black how he kept track of SEI's office inspections. Black responded that he keeps a running list of the office inspections on his computer. FINRA staff asked for that list.

The following day, Black produced to FINRA staff a typewritten document titled "Office Inspections Checklist by Due Date" ("Office Inspections Checklist"). That document contains 43 entries that list the purported due dates and completion dates of inspections of 43 SEI representatives' offices. Each entry contains a due date (between May 2010 and August 2012), the name of an SEI representative, and in most instances, the word "done" and a date.[7] Arnold testified that Black explained that the Office Inspections Checklist was an "ongoing document that he kept on his computer" and that contained the offices he inspected and the dates when the inspections occurred. The Office Inspections Checklist purports to reflect, in pertinent part, that the Five SEI Representatives' offices were inspected on the following dates: (1) McCall's office on July 6, 2010; (2) Ravella's office on October 1, 2010; (3) Rivard's office on May 11, 2011; (4) Minor's office on August 11, 2011; and (5) Marable's office on July 16, 2012.

On March 19, 2013, FINRA staff took Black's and Plexico's testimony at on-the-record interviews (sometimes referred to as "OTR"). On April 12, 2013, FINRA staff requested from SEI, pursuant to FINRA Rule 8210, all documentation evidencing the 43 office inspections identified on the Office Inspections Checklist. The Rule 8210 request specified that SEI's

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[7] On two of the entries, the name of the SEI representative is followed by the words, "termed prior to inspection." Some of the entries also reflect SEI representatives' hiring dates.

response should include the name of the individual or individuals who conducted the inspections, all office inspection reviews, all expense reports and supporting documentation submitted with expense reports, and evidence of reimbursement for the submitted expenses.[8] Arnold testified that FINRA staff wanted to see supporting documentation that SEI conducted the office inspections listed on the Office Inspections Checklist.

On May 16, 2013, SEI responded to FINRA staff's request. SEI provided documents that purport to evidence at least ten office inspections, including those for the Five SEI Representatives' offices. The documents included, for each purported inspection: (1) an "Internal Review Files and Forms Checklist" ("Internal Review Checklist"), which was a checklist for purported office inspections that contained 12 compliance-related tasks to be conducted as part of the inspection[9]; and (2) a document titled "Office Compliance Inspection" that, among other things, contains certain information about each purported inspection and purports to reflect that Black inspected the Five SEI Representatives' offices on the same dates listed on the Office Inspection Checklist.[10] For four of the ten purported office inspections, the documents also included one titled "SEI Office Visit Compliance," which purported to document, with nothing but check marks, nine affirmations by the representative who worked at the inspected office.[11] SEI also provided 29 expense vouchers that purport to reflect amounts that SEI reimbursed Black for "travel" expenses, including mileage and meals expenses, from March 2010 to June 2012.[12]

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[8] The request, which was addressed to SEI's counsel, explained that "the firm is obligated to respond to this request fully, promptly, and without qualification. Your client is also obligated to supplement or correct any response that you later learn to have been incomplete or inaccurate. . . . Any failure to satisfy these obligations could expose your client to sanctions, including a permanent bar from the securities industry."

[9] Handwritten in an upper corner of each Internal Review Checklist was the name of the representative who worked at the purportedly inspected office.

[10] The Office Compliance Inspection document indicated, for each purported inspection, the date of the inspection, the office's address, and the name of the person who conducted the inspection. The name of the representative who worked in the purportedly inspected office was handwritten in an upper corner of the document. All of the questions on the document were framed to be answered with a "yes" or a "no"; some questions had "yes," "no" and "n/a" options that could be selected with a checkmark.

[11] For example, one affirmation read, "representative affirmed all correspondence with customers including written and electronic means has been sent to [SEI] home office for review, approval, & record keeping maintenance." Although the SEI Office Visit Compliance forms were included with documents pertaining to specific inspections, there is no indication on any of the SEI Office Visit Compliance forms of the inspections to which they pertain.

[12] The complaint makes no specific allegations concerning the expense vouchers. We discuss the vouchers in more detail below.

2. Black Provided on-the-Record Testimony About His Purported Inspections of SEI Offices

On April 3-4, 2014, FINRA staff conducted another on-the-record interview of Black, in connection with a FINRA investigation. At the beginning of that interview, Black acknowledged his understanding that FINRA Rule 8210 required him to answer FINRA staff's questions truthfully and that a failure to do so could be viewed as inconsistent with FINRA Rule 8210 and the basis for the initiation of a disciplinary proceeding that could lead to the imposition of sanctions, including a bar.

At that OTR, Black testified about his purported inspections of SEI offices and the materials that SEI and he provided to FINRA that purportedly evidenced those inspections. Excerpts show that Black testified that: (1) in general, he conducted the inspections of SEI offices; (2) he created the Office Inspection Checklist and maintained it on his computer on an "ongoing" basis; (3) the date that appeared after the word "done" on the Office Inspection Checklist "should be the date the inspection was done"; (4) he "conducted" the Internal Review Checklist at SEI's home office; (5) he would have the Office Compliance Inspection document in front of him and on-site during his office inspections, go through it with the SEI representative, and complete it on the date of an inspection or shortly thereafter; and (6) the Office Compliance Inspection documents that reflect inspections of the Five SEI Representatives' offices contain his handwriting and accurately reflect that he conducted those five inspections. Arnold testified that Black also stated at his OTR (in a portion that is not in the record) that he drove to all of the office inspections, except for one he conducted in Seattle, Washington.

3. Hearing Testimony and Written Statements Concerning SEI's and Black's Purported Inspections of the Five SEI Representatives' Offices

At the hearing, Minor, Rivard, Ravella, and Marable testified about Black's purported inspections of their offices, and Enforcement submitted into evidence a letter that McCall wrote about Black's purported inspection of McCall's office. Black also testified about these purported inspections.

a. Minor

Minor entered the industry in 1973. He is a registered representative and an insurance agent. Minor was associated with SEI as a general securities representative from 2004 to 2005, and again from September 2008 to January 2012. Minor's securities business at SEI involved registered products.

Minor testified that when he worked at SEI, he worked by himself in Charlotte, North Carolina, in a cottage in his backyard, three miles from SEI's home office. Minor testified that neither Black, nor anyone else from SEI, ever visited his office to do any kind of audit or inspection. Minor testified that, on one occasion, Black drove Minor home, stayed in his car, and declined Minor's invitation to see Minor's cottage.

When Minor left SEI in 2005, it was due to a disagreement with Black concerning SEI's oversight of equity-indexed annuities that he had sold. With respect to his departure in 2012,

Minor testified that Black terminated him after a disagreement over his commission rate.[13] After leaving SEI in 2012, Minor registered with another firm. Minor also filed a breach-of-contract claim against SEI in small-claims court seeking $2,894 in unpaid commissions which was dismissed on jurisdictional grounds.

Minor testified that his disputes with Black did not affect his ability to tell the truth at the hearing. Minor's testimony was consistent with his prior responses to a FINRA Rule 8210 request.

b. Rivard

Rivard entered the industry in 1983. From March 2007 to June 2012, Rivard was registered with SEI as a general securities representative, an investment company products and variable contracts representative, and a direct participation products representative. Rivard's business at SEI involved qualified plans almost exclusively, but he also sold some variable annuities; he did very little "individual business."

Rivard testified that, while registered with SEI, he maintained an office in Pittsford, New York, kept all his files there, and was the only person who worked there. Rivard also purchased a condominium in Charlotte in June 2008, lived there up to seven months of the year, and spent "a lot of time" working in SEI's Charlotte office. Rivard testified that his Pittsford office was in a building in an office park, and that he was the only person in that office. He also testified that his customer files and documents were maintained in the Pittsford office. Rivard estimated that Charlotte and Pittsford were 719 miles apart, and that the drive takes 11 hours. Rivard testified that neither Black nor anyone else from SEI ever visited his Pittsford office to do any audit or inspection. Rivard also testified that Black never visited or stayed at his house in the Rochester, New York area.

Explaining why he left SEI, Rivard testified that he decided to look for another broker-dealer after Black did not make him aware of a decrease in his commission payout percentage and after a conversation about the timing of his quarterly compensation check in which Black became "very agitated." After leaving SEI, Rivard registered with three member firms and filed and prevailed in an arbitration action against Black for unpaid commissions.

Rivard testified that his disputes with Black did not affect Rivard's ability to be truthful at the hearing. Rivard's testimony was consistent with responses that he previously provided in response to a FINRA Rule 8210 request.

c. Ravella

Ravella entered the industry in 1991. From October 2007 to October 2011, Ravella was registered with SEI as a general securities representative. Ravella's business involved mutual funds, annuities, life insurance and variable life insurance; when he joined SEI, he was "doing a lot of 457, 403(b)" business.

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[13] In contrast, Minor's Central Registration Depository ("CRD®") record reflects that SEI terminated his registration in 2012 due to a "disagreement over payout based on low production."

Ravella testified that, when he worked at SEI, he worked alone in his home in Leetonia, Ohio. He testified that all the "original" records dealing with his brokerage clients were kept at SEI's office in Charlotte, and that he kept copies in his Leetonia office. Ravella estimated that the driving distance between Charlotte and Leetonia is 11 hours. Ravella testified that neither Black nor anyone else from SEI visited his office during the time Ravella worked for SEI.

Asked why he left SEI, Ravella testified that he had a bad experience with SEI concerning a piece of business, and then "kind of quit trying to write business through there . . . and then I ended up getting a call from Frank."[14] After leaving SEI, Ravella registered with another firm.

Ravella testified that the circumstances of his departure from SEI did not affect his ability to testify truthfully. Ravella's testimony was consistent with responses that he previously provided to FINRA in response to a FINRA Rule 8210 request.

d. Marable

Marable entered the industry in 1999. From October 2003 to January 2013, he was registered with SEI as an investment company products and variable contracts representative. After leaving SEI, Marable registered with another member firm.

Marable testified that, during his time with SEI, he worked at two offices in Mauldin, South Carolina, the first office from 2003 to approximately 2009 or 2010, and the second office from that point forward. He shared the first office with one other person, but did not share his second office with any registered person. Mauldin is 90 to 100 miles from Charlotte. At SEI, Marable sold mutual funds and variable annuities. In his office, Marable maintained computer records of his sales and "copies of everything."

Marable testified that Black visited him only once and "over ten years ago," towards the start of Marable's association with SEI and when Marable was still in his first Mauldin office. Marable testified that during that visit, he and Black "talked but [Black] didn't really inspect anything." Marable testified that, other than that one visit, no one else from SEI ever visited his office to do an audit or inspection. Marable testified that Black did not visit his office in July 2012, and that Marable would remember if Black had done so.

SEI terminated Marable because his production was not high enough. Marable testified that he did not have hard feelings about being terminated, and that "I wasn't doing the numbers, so I understand that's part of it." Marable testified that the circumstances of his termination from SEI did not affect his ability to testify truthfully.

Marable's testimony was generally consistent with his prior written response to a FINRA Rule 8210 request. The only difference was that, in his written response, Marable wrote that he did not recall "Black ever visiting my office, but if he did it surely was only one time." Marable testified that, after responding to the Rule 8210 request, "I went back and really started thinking

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[14] Ravella also testified that he received a letter from Black "telling me off for not producing." Ravella's CRD record reflects that SEI terminated his registration due to "low production."

about it" and that "I do recall now that Mr. Black, he did visit me one time" at "the start of my employment" in 2003. Marable added, "it was a long time ago and I wanted to be accurate on what I was saying. I didn't want to say he did not come if he came."[15]

e. McCall

McCall entered the securities industry in 1981. From October 2005 to December 2012, McCall was registered with SEI as an investment company products and variable contracts representative. McCall's CRD record states that he was terminated for "low production." After leaving SEI, McCall did not register with another member firm.

McCall did not testify at the hearing, but in September 2013 he provided a written response to a FINRA Rule 8210 request for information. In his written response to the FINRA Rule 8210 request, McCall wrote that his office is in Charlotte, and that he was the only person with a securities license at his office. McCall wrote that Black did not visit his office or conduct an on-site audit or review. McCall also wrote that an outside auditor once visited his office, that he assumed he received a call about it from SEI or the auditor, and that "[t]he date of the meeting would be a guess, but it was several years ago." McCall's office was less than three miles from SEI's Charlotte office.

f. Black's Hearing Testimony

At the hearing, Black testified that he understood the importance of providing truthful testimony and accurate records to regulators, and that he told the truth at his OTRs about his purported inspections of SEI offices. Black reaffirmed his OTR testimony that, during the relevant period, he handled office inspections, personally inspected the Five SEI Representatives' offices, drove to those inspections, did so "in general" on the dates reflected on the Office Inspections Checklist, prepared the Office Inspections Checklist, and completed the Office Compliance Inspection documents in connection with those inspections. Black testified that he would take blank Internal Review Checklists and Office Compliance Inspection forms with him to the office inspections and complete them himself. Black also testified that the Office Compliance Inspection form includes "due dates" for office inspections. He testified that the Office Inspections Checklist has "a couple dates that are wrong."

Black testified about what he generally does on an inspection, in addition to completing the Office Compliance Inspection forms:

> [W]hen I walk in that office, I've got copies of every doggone order, I've got copies of every app. So, yes, I'll go through files and say are there any additional apps, but, in general, I know what kind of business he does and I know where he's located. It's not a you walk in cold, now you got to tear the office apart. I'm looking for an SIPC sign, looking for evidence of other brokers, I'm looking for, you know, some kind of literature that says, oh, I'm going to sell you an oil well. . . .
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15 Minor, Rivard, Ravella, and Marable all testified that they did not know each other.

> I'm looking for something amiss. There better not be any high-risk transactions because we don't offer them.

Black testified that he "love[s] to drive," that "[m]y idea of heaven is to be . . . in a car," and that he drove to conduct all office inspections, except for an inspection of SEI representative Damon Vickers' ("Vickers") office in Seattle, Washington, to which he traveled by plane.[16] Black testified that he completed a record of his travel reimbursements and expense vouchers in connection with his visits to offices.

Asked to explain the conflicts between the Four Testifying SEI Representatives' claims that Black did not inspect their offices and Black's claim that he did, Black testified, "I wish I could explain it. . . . [I] do know, in each of these cases, that either we didn't part on good terms or there had been ill feelings before.[17]

g. The Hearing Panel's Credibility Determinations

Noting that it had evaluated the witnesses' sworn testimony, demeanor, and other record evidence, the Hearing Panel found that the Four Testifying SEI Representatives—Ravella, Rivard, Minor, and Marable—testified credibly that Black did not visit their offices, and that Black's hearing and investigative testimony that he did visit their offices was false and not credible. The Hearing Panel also credited McCall's written statement that Black did not visit his office.

In its order responding to the NAC's interim order, the Hearing Panel re-emphasized its credibility determinations:

> The Panel found the [Four Testifying SEI Representatives] credible on the key issue in this disciplinary proceeding, that is: whether Respondents performed the branch inspections at issue. . . . The brokers testified without contradiction that they did not know each other; thus, there is no evidence that they coordinated their testimony. The Panel

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[16] Plexico, who described Black as his "best friend," similarly testified that he sometimes drove with Black to inspect offices, usually in Black's car, and that it was not uncommon for Black to drive long distances. Plexico testified that he and Black had driven together to visit offices in Michigan, Tennessee, and South Carolina, and gave an example where they drove to Michigan and then "turn[ed] around and c[a]me all the way back in the same day."

[17] We discuss respondents' claims of bias in more detail below. In his testimony, Black also countered some of the Four Testifying Representatives' testimony about specific issues. He claimed that Ravella provided false testimony about a bad experience at SEI, saying that "[w]e never had an argument about it and he didn't lose any business," and that Ravella lied when he testified he had never met Black in person. In addition, although Black agreed that he had a dispute with Minor about SEI's oversight of equity-indexed annuities when Minor was registered with SEI the first time, Black challenged Minor's testimony about the nature of the disagreement.

considered that if the brokers had intended to provide false testimony—that is, testify that Respondents conducted no inspections of their offices, when in fact they did—Respondents would have been able to impeach them with evidence generated by the inspections. Such proof could reasonably include receipts evidencing Black's travel and hotel expenses, and records of communications about the inspections, that would have exposed each of the brokers in an elaborate lie. Black also would have been able to testify about what activities he engaged in with the brokers during the branch inspections. This did not occur.

The brokers' testimony was consistent with what they told Arnold and Palacios over the telephone and what they submitted in writing in response to Rule 8210 requests for information. The Panel therefore found them credible.

B. Discussion

The Hearing Panel found that SEI and Black provided to FINRA fabricated documents that purported to show that Black inspected the Five SEI Representatives' offices and false OTR testimony that he conducted those five inspections, in violation of FINRA Rules 8210 and 2010, and that Black and SEI fabricated firm records, in violation of FINRA Rule 4511.[18] We affirm the Hearing Panel's findings that Black and SEI violated FINRA Rules 8210, 4511, and 2010.

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[18] FINRA Rule 8210 provides that, 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 require a member, person associated with a member, or any other 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. The rule further provides that no member or person shall fail to provide information or testimony pursuant to the rule. FINRA Rule 8210(c). Providing false or misleading information to FINRA in the course of an examination or investigation violates FINRA Rule 8210. *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *23 (Aug. 22, 2008) (citing *John Montelbano*, 56 S.E.C. 76, 78 (2003)).

FINRA Rule 4511(a) provides that members shall make and preserve books and records as required under FINRA rules, the Exchange Act and the applicable Exchange Act rules. The books and records rules "include[] the requirement that the records be accurate, which applies 'regardless of whether the information itself is mandated.'" *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *32 (Feb. 27, 2012) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 S.E.C. 892, 901 (1993)), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013). Proof of scienter is not required to demonstrate a violation. *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142, at *48 (May 27, 2015) (discussing predecessor to FINRA Rule 4511 and citing *Joseph G. Chiulli*, 54 S.E.C. 515, 522 (2000)). Pursuant to FINRA Rule 0140, rules like FINRA Rule 4511 that apply to members also apply to persons associated with a member.

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Whether respondents provided false testimony and fabricated documents about the inspections of the Five SEI Representatives' offices depends on whether Black, in fact, inspected all, some, or none of the Five SEI Representatives' offices on the dates on the Office Inspection Checklist. Because the primary evidence on these issues is witness testimony that conflicts—the Four Testifying SEI representatives testified that Black did not inspect their offices, but Black testified that he did—the credibility of these witnesses is the key issue.

The Hearing Panel found that the Four Testifying SEI Representatives credibly testified that Black did not inspect their offices, and that Black's contrary testimony was not credible. A Hearing Panel's credibility determinations are entitled to considerable weight and deference and can be overcome only where there is substantial evidence in the record for doing so. *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *16 (Mar. 27, 2017) (citing *The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at *15 n.17 (June 2, 2014)), *aff'd*, 733 F. App'x 571 (2d Cir. 2018). Respondents have not pointed to substantial evidence in the record to overcome the Hearing Panel's credibility determinations.

In his briefs on appeal, Black argues that the Four Testifying SEI Representatives' assertions were "unequivocally biased" and "totally unreliable," pointing to the same reasons that he offered at the hearing and other reasons.[19] However, the Four Testifying SEIe

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Violations of FINRA rules are violations of FINRA Rule 2010. *See CMG Inst. Trading LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 n.36 (Jan. 30, 2009) (violations of FINRA rules also are violations of FINRA Rule 2010).

[19] Black's arguments were as follows:

- *Minor*. Black testified that Minor had "ill feelings" towards Black stemming from ae dispute over SEI's oversight of Minor's sales of equity-indexed annuities, a seconde dispute concerning Minor's commissions over which Minor filed a small-claims courte action (dismissed for lack of jurisdiction), and Black's decisions to twice "fire" Minor.e Black notes that Minor testified that he had to "be away" from Black's office and did note like Black. Black testified that Minor was "rude" to Jeanette Roberts ("Roberts"), whoe had worked with Black almost continuously since 1977. Roberts testified that Minor wase "[d]ifficult to get along with at best" and was "not a pleasant person to deal with." Blacke also argues that ifehe "had been of a mind not to inspect an office," he still would note have skipped Minor's office because it is only a few miles from Black's office.e

- *Rivard*. Black testified that Rivard had "ill feelings" towards Black over a disagreemente about Rivard's commissions, over which Rivard filed an arbitration action and prevailed.e Black also argues in his brief that Rivard's testimony is "bereft of any corroboration."e

- *Marable*. Black testified that Marable "wasn't happy about" the fact that "hise commission was cut." Black argues in his brief that he terminated Marable "for lack ofe

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Representatives—who did not know each other—all testified consistently that Black never visited their offices. Moreover, the Hearing Panel's decision reflects that it considered the witnesses' potential biases and their testimony that their disputes or issues with Black did not affect their ability to tell the truth, yet found that they were credible. The Hearing Panel reiterated this conclusion in the order that followed our interim order, explaining that it "carefully observed the demeanor of the four brokers at the hearing" and "found no evidence of animosity or bias towards Respondents."[20]

We likewise defer to the Hearing Panel's determination that Black's testimony that he inspected the Four Testifying SEI Representatives' offices was not credible. Black's testimony is directly inconsistent with the credible testimony of the Four Testifying SEI Representatives. Moreover, respondents offered no reliable evidence to corroborate Black's testimony, and we find no reason to disturb the Hearing Panel's conclusion that Black's testimony was not credible. Black drove to the offices he inspected, and two of the purported inspections would have involved substantial driving distances.[21] Yet SEI and Black did not submit any credible documentary evidence to corroborate Black's purported lengthy trips. Although respondents submitted vouchers that Black completed to request reimbursement of $38,044.74 in purported travel-related mileage expenses and $1,139.21 in travel-related meals expenses incurred between March 2010 and June 2012, those vouchers lack any information linking the purported vouchers

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commission production," and that Marable "made repeated false annual attestations to SEI regarding outside businesses."

- *Ravella.* Black testified that Ravella "was fired for doing no business," and respondents claim that Ravella falsely testified that SEI erroneously sent correspondence that caused Ravella to lose a potentially lucrative client. Black also argues in his brief that Ravella "lied under oath about his investment advisor registration status," but the record does not reflect that Ravella gave false testimony about that issue, which is not even a material fact.

[20] Respondents also argue that Arnold's emails, which Enforcement produced pursuant to our interim order, "demonstrate inconsistencies between several witnesses' stories to FINRA and their testimony on the stand." As explained in more detail below, however, we agree with the Hearing Panel that Arnold's emails were consistent with, and corroborated materially, the Four Testifying SEI Representatives' testimony and their written responses to the staff's requests for information under Rule 8210.

[21] From SEI's Charlotte office, Rivard's office was a 719-mile drive, and Ravella's office was a 500-mile drive. Black claimed that to inspect Rivard's office, he drove from Charlotte to Rivard's office in Pittsford, New York, inspected Rivard's office, got back in his car, and drove back to Charlotte, a round trip of 1,438 miles.

to specific office inspections.[22] Moreover, the vouchers are not supported by any receipts, bank statements, or credit card statements.[23] Respondents also did not offer any communications, such as emails, to show any pre-inspection planning or scheduling with the Four Testifying SEI Representatives.[24]

Likewise, although the Internal Review Checklist and the Office Compliance Inspection forms purport to document that the inspections of the Four Testifying SEI Representatives occurred, those records—which contain little more than checkmarks—could easily have been fabricated and do not provide a basis for overriding the Hearing Panel's credibility determinations.[25]

Black argues that the Hearing Panel failed to weigh the documentary evidence that purportedly corroborated Black's claims that he conducted the office inspections. But that is

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[22] Typically, the vouchers reflected that the "purpose" of the expenses was simply "travel," and that the "date and place of expenditure"—if that section was completed at all—was nothing more than a range of dates or months.

[23] Black and SEI argue that the absence of such records" "do[es] not shed light . . . on whether the inspections occurred," that receipts "are not required by FINRA to be maintained," and that the "IRS does not require [receipts] for expenses under $75." Black explained that he generally pays for expenses in cash, is "not comfortable with credit cards," does not like to stay in hotels, and that his travel expenses were not "big enough . . . for me to worry about" requesting reimbursement. Roberts also testified that Black prefers to pay with cash. Explaining the absence of gas expense receipts, Black testified that "mileage" expenses are "kind of simple. It's whatever miles you drove times whatever number it is.'' Some of these explanations strain credulity, and a preference for paying in cash does not address the absence of receipts. Regardless, the absence of any reliable records documenting Black's purported inspections means that respondents have not offered documentary evidence that is contrary to the Four Testifying SEI Representatives' consistent testimony that Black did not conduct such inspections or that corroborates Black's self-serving testimony that he did.

[24] The record contains a 2007 decision by a United States tax court that sanctioned Black for grossly overstating travel expense deductions on his 1991 and 1992 tax returns, including mileage expense deductions, and concluded that his conduct was indicative of his fraudulent intent to avoid taxes. We do not find it necessary to rely on that tax court decision here, because the Hearing Panel's determination that the Four Testifying SEI Representatives were credible, among other reasons, sufficiently demonstrates that Black and SEI provided fabricated documents and false testimony.

[25] For the most part, the Office Compliance Inspection forms for the Four Testifying Witnesses contained only checkmarks or handwritten notes to answer "yes," "no" or "n/a." Very little other writing appears on the forms. For example, the Office Compliance Inspection form for Ravella's office included a handwritten note that reads, "less than 25 transactions. Does not meet with public there."

simply not true. The Hearing Panel considered that evidence and found it unreliable and insufficient.

Black also argues that the Hearing Panel ignored how Black "described in detail how to get to the office locations" and his descriptions of the offices themselves, and his testimony that another person (NJ) was present during Black's purported visit to Marable's office.[26] But none of Black's descriptions was specific enough to corroborate his testimony that he had personally inspected the offices: it is easy to learn basic driving directions using a simple Internet search, to know the directions to an office located just a few miles away, and to describe a building in a manner that is consistent with a Google street-view photo. Respondents also proffered no evidence that corroborated his claim that NJ was present during his purported visit to Minor's office; in fact, Black's claim was inconsistent with Marable's testimony that NJ stopped working in his office years before the time of the purported inspection.

Respondents also proffered the testimony of Jeanette Roberts ("Roberts"), who worked with Black almost continuously since 1977, was involved in setting up SEI's back office functions when SEI was founded in 1997, was operations manager from at least 2008-2013, and served as a general securities representative and SEI's compliance director since March 2014. But Roberts did not corroborate Black's testimony about his office inspections or the accuracy of the inspection-related documents that Black and SEI provided to FINRA. Rather, Roberts testified that she never accompanied Black on an inspection, had no role in conducting inspections, had never visited a "branch" office, and did not know if Black, or anyone else at SEI, drove or flew to office inspections. At best, Roberts testified only that "I just know how our branch exams work in the fact that we do them." That testimony is not specific enough to corroborate Black's claims that he conducted the inspections of the Four Testifying SEI Representatives.

In sum, respondents have not pointed to substantial evidence for overturning the Hearing Panel's credibility determinations, and we therefore defer to the Hearing Panel's determinations that the Four Testifying SEI Representatives' testimony was credible and that Black's testimony was not credible. The credible and consistent testimony of the Four Testifying SEI Representatives that Black never inspected their offices is sufficient—on its own—to find that Black provided to FINRA false information and fabricated documents concerning the purported inspections of the Four Testifying Representatives' offices.

SEI and Black also argue that, by focusing only on former SEI representatives and not investigating "inspections of all [SEI] offices," FINRA investigators "cherry pick[ed]," "turn[ed] a blind eye to exculpatory evidence that was easily ascertained," and conducted a "flawed and . . . biased investigation." Respondents further claim that that this "prejudiced respondents,"

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[26] For example, Black testified: (1) about his familiarity with Ohio driving routes from the trips he used to take through Ohio to visit his wife in Michigan; (2) that Ravella's office was "out in the country"; (3) that Rivard's office was "[i]n a little office complex"; (4) about how to drive the three miles to Minor's office; and (5) that Minor's office was a "little office," "behind [his house]," on a "residential street."

"deprived them of a fair and unbiased hearing," and should have resulted in the Hearing Panel giving the former SEI representatives' assertions "no weight." We reject these arguments. The requirement in Section 15A(b)(8) of the Exchange Act that FINRA provide a "fair procedure" in an adjudicatory proceeding "does not extend to investigations." *Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *61 (May 27, 2011) (rejecting argument that FINRA "was required to acquire additional documentation and investigative testimony before issuing the Complaint"), *aff'd*, 693 F.3d 251 (1st Cir. 2012). Moreover, we find no unfairness in the proceedings below. Respondents received notice of the allegations of violations, a hearing, and the opportunity to present evidence and make written and oral arguments.

SEI argues that it cannot be held liable for Black's violations, because FINRA's request to appear at an OTR was directed to Black individually, and that SEI did not authorize Black to provide false documents or information to FINRA. We disagree. During the relevant period, Black—SEI's president, 95% owner, chief financial officer, chief compliance officer, anti-money laundering compliance officer, and financial and operations principal—was essentially SEI. Furthermore, when Black responded to FINRA's requests for information and testimony, he did so within the scope of his roles as president and chief compliance officer of SEI. Specifically, when Black provided to FINRA staff the list of office inspections he maintained, he did so in direct response to a request made during FINRA staff's 2012 Cycle Examination of SEI. Moreover, FINRA staff's questions during the OTR pertained directly to Black's compliance responsibilities at SEI, and he provided responses pertaining to those compliance responsibilities. We hold SEI accountable for Black's misconduct. *See SIG Specialists, Inc.*, 58 S.E.C. 519, 536-37 (2005); *see also Dep't of Enforcement v. Brookstone Sec., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *66 (FINRA NAC Apr. 16, 2015) (holding firm responsible for suitability violations where firm's founder and chief executive officer recommended unsuitable transactions in collateralized mortgage obligations and played a pivotal role in the firm's CMO program).

Based on the evidence described above, the record demonstrates that Black never visited or inspected the Four Testifying SEI Representatives' offices and that SEI and Black submitted to FINRA false testimony and fabricated documents that claimed otherwise, in violation of FINRA Rules 8210, 4511, and 2010.[27]

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[27] The record also contains evidence concerning whether SEI principal David Plexico made required visits to Graham's office required by a heightened-supervision plan, and concerning Black's conduct in connection with the subsequent 2012 SD Examination that FINRA conducted. Enforcement included assertions about these issues in the complaint, but only in the background section; Enforcement did not allege that they were the basis of any violations. Although the Hearing Panel addressed the issues concerning Plexico's purported visits to Graham's office, we opt not to do so. These issues are not directly relevant to the allegations of violations in the complaint. Even if they have some indirect relevance here, the key evidence showing that respondents committed the alleged violations is the credible testimony of the Four Testifying SEI Representatives.

In addition, because the credibility determinations concerning the Four Testifying SEI Representatives and Black are sufficient to demonstrate respondents' violations, we also opt not

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C. Discovery-Related, Evidentiary, and Procedural Issues

There are several evidentiary, discovery and procedural issues that relate to the allegations in causes one and two.

1. Discovery of Documents Pertaining to SEI's Inspections of Offices that Are not the Subject of the Allegations in the Complaint

The first discovery-related issue is respondents' argument that FINRA did not provide them with evidence of office inspections that SEI did or did not conduct other than the ones charged in the complaint. We reject respondents' argument.

Pursuant to FINRA Rule 9251, Enforcement was required to make available for inspection and copying documents "prepared or obtained by Interested FINRA staff in connection with the investigation that led to the institution of proceedings," except for documents that Enforcement was authorized to withhold pursuant to FINRA Rule 9251(b). If a respondent believes that Enforcement has improperly withheld a document, it may file a motion pursuant to FINRA Rule 9251(c) to require Enforcement to produce a list of documents withheld, but any such motion "shall be based upon some reason to believe that a Document is being withheld in violation of the Code." Respondents never filed a motion to require Enforcement to produce a withheld documents list. Although it filed a motion to compel Enforcement's production of documents, and requested production of two categories of documents that may have been broad enough to cover evidence of office inspections not described in the complaint, nothing in that motion specifically asserted that Enforcement improperly withheld documents evidencing other office inspections or that respondents had any reason to believe that Enforcement was improperly withholding any such documents. Thus, there was no reason for the Hearing Officer to doubt Enforcement's representation that it produced pursuant to FINRA Rule 9251 all the documents it was required to. The Hearing Officer did not abuse its discretion in denying respondents' written motion for production of documents.

2. Respondents' First Motion to Adduce Additional Evidence

On appeal, respondents filed a motion for leave to adduce three categories of additional evidence. The Subcommittee did not rule on the motion but instead has forwarded its recommendation to us concerning the motion. We deny respondents' motion.

FINRA Rule 9346(b) provides that a party that applies for leave to introduce additional evidence must demonstrate that there was good cause for failing to introduce the evidence below and why the evidence is material.

After the Hearing Panel's decision was issued, Black "re-created" evidence of trips to SEI representatives' offices. Respondents seek to introduce this "re-created" evidence to

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to address whether the record also demonstrates that respondents provided false documents and false testimony about Black's purported inspection of McCall's office.

demonstrate that it was feasible for Black to drive the routes in question. Respondents, however, failed to introduce similar evidence during the hearing, despite sufficient notice that Enforcement planned to argue that Black's claim to have driven the routes in question was dubious. Moreover, the fact that Black may have re-created a long driving route after the Hearing Panel issued its decision is not material, because it is not evidence that Black actually drove the routes in question and engaged in the purported inspections.

Respondents also seek to introduce the transcript of Plexico's OTR interview, to provide additional evidence concerning Plexico's purported visits to Graham's office. Because our findings of violations do not concern Plexico's purported visits to Graham's office, respondents' motion to admit Plexico's OTR transcript is immaterial.

Respondents also seek to introduce Black's 1991 and 1992 tax returns and the transcript of one of Black's OTR interviews in support of their argument that the 2007 United States tax court decision discussed above was erroneous. We deny this part of respondents' motion. Respondents have not demonstrated good cause for failing to introduce this evidence below and, because we do not rely on the tax court's decision, the additional evidence is not material.

3. Respondents' FINRA Rule 9253 Arguments

Respondents argue that the Hearing Panel, when responding to our interim order, erred when it found that Arnold's notes were not "written statements" within the meaning of FINRA Rule 9253(a)(2) and that Enforcement's failure to produce those notes was not harmless error. Respondents further contend that, as a result, the Hearing Panel's initial decision should be reversed and Enforcement's complaint should be dismissed or, alternatively, that the sanctions should be vacated and the matter remanded for further proceedings.

FINRA Rule 9253(a)(2) provides that a respondent may file a motion requesting that Enforcement produce for inspection and copying any contemporaneously "written statement" made by an Interested FINRA Staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when (a) either the Interested FINRA Staff member or non-FINRA person is called as a witness by the Department of Enforcement, and (b) that portion of the statement for which production is sought directly relates to the Interested FINRA Staff member's testimony or the testimony of the non-FINRA witness. FINRA Rule 9253(b) provides that, in the event that a statement required to be made available for inspection and copying by a Respondent is not provided by Enforcement, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the respondent establishes that the failure to provide the statement was not harmless error.

We need not resolve whether Arnold's notes were "written statements" within the meaning of FINRA Rule 9253(a)(2). Even if they were, the Hearing Panel correctly decided that respondents have not demonstrated that Enforcement's not producing Arnold's notes was not harmless error.[28] As the Hearing Panel correctly found, the email summaries of Arnold's

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[28] After jurisdiction of this proceeding reverted back to the NAC, Enforcement moved to introduce as additional evidence a June 28, 2013 letter from FINRA's Department of Member Regulation to SEI, in which FINRA notified SEI that it had concluded the 2012 Cycle

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conversations with the Four Testifying SEI Representatives were consistent with, and corroborated, the Four Testifying SEI Representatives' testimony and Rule 8210 responses concerning the main issue—whether Black inspected their offices. Although respondents argue that Arnold's emails reflect "inconsistencies" with the witnesses' testimony, respondents have not identified any material discrepancies. Moreover, the alleged discrepancies all concern issues that were covered in testimony at the hearing, and respondents had the opportunity to confront the witnesses about their testimony on these issues:

- Arnold's emails reflect that Ravella said he "met Black once a year" at an SEI meeting at a hotel conference room. That statement conflicts with Ravella's hearing testimony that he had never seen Black in person until the hearing. We agree with the Hearing Panel, however, that Arnold's emails corroborate Ravella's testimony on the key issue, which was Ravella's claim that Black did not inspect his office. We also agree with the Hearing Panel that respondents had the opportunity to address Ravella's claim that he had never previously seen Black in person. Moreover, after the Hearing Panel reviewed Arnold's emails, it confirmed its determination that Ravella was credible, and nothing in Arnold's emails amounts to substantial evidence to disturb that credibility determination.

- Respondents also claim that Arnold's emails reflect a discrepancy between Marable's statements to Arnold and Marable's hearing testimony. Respondents point to Marable's statements to Arnold that he was "not sure whether an onsite exam was ever conducted, probably not," and that someone named Jim "may have come onsite and did a review years ago" but that Marable was "unsure." Nothing in those statements, however, conflicts with Marable's statements and testimony on the key point, which is that Black did not visit his office in July 2012. Furthermore, Marable's statements to Arnold that he was "not sure" whether an onsite exam was ever conducted and "probably not," are not materially different from Marable's statements in his Rule 8210 response—which are in the record—that he did "not recall any onsite internal branch review/audit conducted." Moreover, Marable testified at the hearing about his initial statements in his Rule 8210 response that he did not recall any office inspections or visits by Black or anyone else, and his later recollection that Black had visited his office once "a long time ago . . . like

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Examination and had referred the issue of SEI's branch office inspections "for further investigation" under a separate 2013 examination number, and an accompanying examination report. Respondents assent to Enforcement's motion, but argue that the additional evidence shows that Arnold's notes were made during a "further review" not a "further investigation," and filed an unopposed cross-motion to introduce SEI's response to FINRA's 2012 Cycle Examination report to "prevent any potential prejudice." Given that neither party objects to these motions, the June 28, 2013 letter, the accompanying examination report, and SEI's response to the examination report are all admitted as additional evidence. However, all of this additional evidence relates to the issue of whether Arnold's notes were "written statements" within the meaning of FINRA Rule 9253(a)(2), an issue that we need not resolve.

10 years" but "didn't really inspect anything," and respondents had the opportunity to cross-examine Marable about his changed recollection.

- Respondents also argue that having Arnold's emails would have allowed them to be better prepared to address Minor's testimony about why he left SEI the first time. In Minor's conversation with Arnold, he explained that the first time he was associated with SEI, Black had sent out a memorandum regarding index annuities stating that representatives "had to transfer rep contracts to SEI," which led to a disagreement that caused Minor to leave the firm. Respondents argue that SEI was never listed as the broker-of-record on any index annuity and, if they had Arnold's emails before the hearing, they would have been prepared to prove that Minor was testifying falsely about this. Arnold's emails, however, do not reflect any inconsistency on Minor's key testimony, which was that Black never visited his office to do any kind of audit or inspection. The issues about why Minor left SEI the first time are peripheral to the alleged violations. Moreover, the subject of why Minor left SEI the first time came up at the hearing, Minor's testimony about that topic was consistent with what he told Arnold in his conversation with her, respondents cross-examined Minor about it, and Black testified about it.

Noting that because Enforcement could not locate Arnold's actual notes and instead produced emails that Arnold wrote summarizing her conversations and a memorandum that Palacios wrote based on Arnold's emails, respondents argue that it cannot be determined that Enforcement's failure to produce the notes was not harmless error and that, for this reason, causes one and two should be dismissed.[29] We are aware of no relevant SEC or NAC cases on this topic, but both parties cite *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 418 (S.D.N.Y. 2010), as an example of the standards federal courts use when evaluating arguments that a party has spoliated evidence. *Harkabi* held that where a party seeks a severe sanction for the alleged spoliation of evidence, such as dismissal or an adverse inference, the movant must prove that: (1) the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) the spoilating party acted with a culpable state of mind upon destroying or losing the evidence; and (3) the missing evidence is relevant to the movant's claim or defense. *Id.* (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002)).

Respondents have not demonstrated the second *Harkabi* prong, that Enforcement acted with a culpable state of mind in losing Arnold's notes. Enforcement represents that it had Arnold's notes in its possession earlier in the proceeding and reviewed them in connection with its initial document production. It further asserts that FINRA's Florida District Office recently eliminated its on-site file room and relocated all of its files, including files in this matter, to an off-site location. Enforcement states that it is possible that, in that process, parts of its files, including Arnold's notes, were inadvertently misplaced. These circumstances do not demonstrate a culpable state of mind, and respondents—who bore the burden of proof on its

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[29] Respondents also contend that, for the same reasons, dismissal of cause three also is warranted. As explained below, we find that cause three should be dismissed, but on different grounds.

spoliation claims—made no attempt to demonstrate otherwise. All respondents did was summarily assume that Enforcement's conduct was negligent. The mere fact that Arnold's notes are missing, however, is not evidence that Enforcement had a culpable state of mind.[30] For all the reasons noted above, respondents have not demonstrated that Enforcement's not providing Arnold's notes was not harmless error.

Respondents' other attempts to poke holes in the Hearing Panel's order also fail. Respondents argue that after the Hearing Panel found that Arnold's notes were not "written statements" within the meaning of FINRA Rule 9253, the Hearing Panel then "exceeded authority under the NAC Interim Order" when it further found that, even if the notes were "written statements," respondents failed to demonstrate that the failure to produce Arnold's notes was not harmless error. We find no error. Making this alternative finding was prudent and well within the scope of our interim order. Respondents also contend that the materials that Enforcement produced constitute exculpatory material that should have been produced earlier under *Brady*. We disagree. The Hearing Panel correctly found that the materials do not contain exculpatory material. The emails and memorandum corroborate the Four Testifying SEI Representatives' hearing testimony that Black never performed the inspections of their offices.

* * * * *

In sum, the preponderance of the evidence demonstrates that SEI and Black submitted to FINRA false testimony and fabricated documents. This conduct violated FINRA Rules 8210, 4511, and 2010.

IV.e Supervisory System Concerning Office Inspections (Cause Three)e

Turning to the allegations in cause three of the complaint, the Hearing Panel found thate SEI and Black failed to inspect the Five SEI Representatives' offices and, therefore, failed to exercise reasonable supervision in connection with their responsibility to ensure that SEI conducted such inspections, in violation of NASD Rule 3010(a) and (c). As explained below, we dismiss the allegations in cause three because Enforcement has not clearly alleged what kinds of offices the representatives' offices were or how frequently FINRA rules required SEI and Black to inspect them.

NASD Rule 3010(a) provides that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." NASD Rule 3010(c) sets forth provisions for internal inspections. The required frequency of the inspections depends on the type of office. NASD Rule 3010(c)(1)(A) requires firms to inspect annually "every office of supervisory jurisdiction and any branch office that supervises one or more non-branch locations." NASD Rule 3010(c)(1)(B) requires firms to inspect at least every three years any "branch office that does not supervise one or more non-branch locations." NASD Rule

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[30] Given our finding that respondents have not demonstrated that Enforcement acted with a culpable state of mind, we need not address whether respondents have demonstrated the other prongs of the *Harkabi* standards.

3010(c)(1)(C) requires firms to inspect "every non-branch location" on "a regular periodic schedule."

NASD Rule 3010(g)(2)(A) defines "branch office" as "any location where one or more associated persons of a member regularly conducts the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, or is held out as such." The definition of "branch office" contains a number of exclusions. Those exclusions include, among others: (i) any location that is established solely for customer service and/or back office type functions where no sales activities are conducted and that is not held out to the public as a branch office; (ii) any location that is the associated person's primary residence, provided it meets nine conditions[31]; (iii) any location, other than a primary residence, that is used for securities business for less than 30 business days in any one calendar year, provided the member complies with the same nine conditions noted above; (iv) any office of convenience, where associated persons occasionally and exclusively by appointment meet with customers, which is not held out to the public as an office; and (v) any location that is used primarily to engage in non-securities activities and from which the associated person(s) effects no more than 25 securities transactions in any one calendar year, provided that any advertisement or sales literature identifying such location also sets forth the address and telephone number of the location from which the associated person(s) conducting business at the non-branch locations are directly supervised.

Enforcement has not clearly alleged whether the Four Testifying SEI Representatives' offices were "branch offices that supervised any non-branch locations," "branch offices that do not supervise any non-branch locations," or "non-branch locations."[32] When the complaint refers to the *inspections* that allegedly did not occur, it refers to them as "branch inspections." In contrast, when the complaint refers to the *offices* that were not inspected, it refers to them as "non-registered office locations," a term that is similar to terms that FINRA has used to refer to offices that are not branch offices. *See Notice to Members 05-67*, 2005 NASD LEXIS 37, at *6

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[31] The nine conditions are that: (1) only one associated person, or multiple associated persons who reside at that location and are members of the same immediate family, conduct business at the location; (2) the location is not held out to the public as an office and the associated person does not meet with customers at the location; (3) neither customer funds nor securities are handled at that location; (4) the associated person is assigned to a designated branch office, and such designated branch office is reflected on all business cards, stationery, advertisements and other communications to the public by such associated person; (5) the associated person's correspondence and communications with the public are subject to the firm's supervision in accordance with NASD Rule 3010; (6) electronic communications (e.g., email) are made through the member's electronic system; (7) all orders are entered through the designated branch office or an electronic system established by the member that is reviewable at the branch office; (8) written supervisory procedures pertaining to supervision of sales activities conducted at the residence are maintained by the member; and (9) a list of the residence locations is maintained by the member. NASD Rule 3010(g)(2)(A)(ii)(a)-(i).

[32] We focus only on the Four Testifying SEI Representatives' offices because, as explained above, we have opted not to address whether respondents also failed to inspect McCall's office.

(Oct. 2005) (distinguishing "branch offices" from "unregistered offices/locations"); *NASD Notice to Members 01-81*, 2001 NASD LEXIS 87, at *11 (Dec. 2001) (distinguishing "OSJ" and "branch office" from "unregistered office"). The complaint's recitation of the applicable NASD rule provisions does not clarify what Enforcement's theory is. The complaint includes the provisions from NASD Rule 3010(c) that set forth the frequency of inspections for all types of offices—OSJs, branches, and non-branch locations—leaving it unclear which parts of the rule Enforcement was alleging were applicable. In addition to the allegations' lack of clarity on this issue, Enforcement did not develop the kind of evidence that would be relevant to whether the offices were branch offices or non-branch offices.[33]

The nature of the offices is critical to evaluating Enforcement's allegations that SEI had a deficient supervisory system for office inspections. If the Four Testifying SEI Representatives' offices were branch offices that did not supervise one or more non-branch office locations, it would be clear that SEI and Black failed to conduct required inspections of those offices. Inspections of those kinds of branch offices were required at least every three years, and the Four Testifying SEI Representatives had all worked for SEI for at least three years. If, on the other hand, the Four Testifying SEI Representatives' offices were non-branch locations, it is less clear whether SEI failed to comply with its inspection obligations.

In this regard, SEI was required to inspect non-branch offices on a "regular periodic schedule" and establish such a schedule in consideration of "the nature and complexity of the securities activities for which the location is responsible and the nature and extent of contact with customers." NASD Rule 3010(c)(1)(C). At the relevant time, there was no presumption of how frequent the inspections of non-branch locations should be, and a FINRA notice implied that firms were not required to inspect non-branch offices at least every three years. *See FINRA Regulatory Notice 11-54*, 2011 FINRA LEXIS 99, at *15 (Nov. 2011) ("A broker-dealer must conduct on-site inspections of . . . non-branch offices periodically"; "A broker-dealer must conduct on-site inspections of . . . Office of Supervisory Jurisdictions . . . and non-OSJ branches that supervise non-branch locations at least annually, all non-supervising branch offices at least every three years; and non-branch offices periodically."); *NASD Notice to Members 99-45*, 1999 NASD LEXIS 20, at *31 (June 1999) ("The Rule does not specify the frequency of inspections for unregistered offices," but "should be conducted according to a regular schedule"). The schedule that SEI was required to establish was, therefore, a fact- and office-specific inquiry.[34]

If the Four Testifying SEI Representatives' offices were non-branch locations, Enforcement has not developed the requisite factual predicate to demonstrate systemic violations

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[33] The Hearing Panel summarily referred to the offices as "branches," but did not explain what evidence supported that finding.

[34] In December 2014, which was after the Four Testifying SEI Representatives left SEI, supplementary NASD Rule 3110.13 became effective, which provides that "there is a general presumption that a non-branch location will be inspected at least every three years, even in the absence of any indicators of irregularities or misconduct (i.e., 'red flags')." *FINRA Regulatory Notice 14-10*, 2014 FINRA LEXIS 17, at *26-27 (Mar. 2014). NASD Rule 3110.13 has no applicability here.

of the office inspection requirement. SEI had not inspected Ravella's, Rivard's, and Minor's offices for periods of time ranging between three to five years. Enforcement, however, has not clearly alleged, or proffered evidence concerning why, SEI's failure to inspect those three offices was not consistent with the "regular periodic schedule" requirement during the relevant period. SEI's failure to inspect Marable's office during the 10 years he worked at SEI would have been too long to have been consistent with the "regular periodic schedule" requirement during the relevant period. But we interpret cause three of Enforcement's complaint to allege that SEI failed to establish a compliant supervisory *system* by failing to conduct *several* required office inspections. Enforcement has not made that showing.[35]

For the reasons above, we cannot determine what Enforcement is alleging the office-inspection related supervisory violations are, or whether Enforcement proved them. Accordingly, we reverse the Hearing Panel's findings that SEI and Black maintained a deficient supervisory system regarding office inspections and dismiss the allegations in cause three.[36]

V. Supervisory System and Written Supervisory Procedures Concerning Supervision and Retention of Electronic Communications (Cause Five)

We now turn to the allegations that SEI and Black failed to establish a reasonable supervisory system for retaining and reviewing SEI's electronic correspondence. As explained below, we affirm the Hearing Panel's finding that SEI and Black failed to maintain a supervisory system that was reasonably designed to retain and review all business-related electronic correspondence.

A. Facts

1. SEI Permitted the Use of Private Email Accounts

Respondents admitted that, although they "made available to each broker an SEI email address utilizing SEI's business servers," they "did not require brokers to strictly use their SEI email address." Instead, SEI permitted its representatives to use their own private email accounts for the purpose of conducting SEI business.

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[35] An SEC examination report dated March 19, 2012, indicated that SEI's stated practice was to inspect non-registered locations every three years. Even if SEI had established a three-year inspections schedule, the complaint did not allege supervisory violations based on a failure to abide by a firm-developed inspection schedule.

[36] In analyzing the allegations in cause three that SEI and Black had a deficient supervisory system for office inspections, we have focused only on SEI's alleged conduct concerning the Four Testifying SEI Representatives' offices. We have not looked to SEI's purported inspections of the dozens of other offices reflected in the inspection-related documents or Plexico's purported visits to Graham's office because it appears respondents lacked notice that their conduct regarding those other office inspections and visits was an additional basis of the alleged violations in cause three. *See Wanda P. Sears*, Exchange Act Release No. 58075, 2008 SEC LEXIS 1521, at *13 (July 1, 2008).

2. SEI's Policies Concerning Review and Retention of Electronic Communications

SEI's written supervisory procedures ("WSPs") provided that "[t]he Designated Supervisory Principal shall be responsible for reviewing incoming and outgoing correspondence with the public and for establishing written procedures for such review process which are appropriate in light of the Company's structure and the nature and size of our business and operations." The WSPs further provided that "[r]eview of correspondence shall be evidenced by initialing and dating the Company's file copy of written correspondence." SEI's WSPs identified Black as the supervisor of all SEI registered representatives.

SEI's WSPs also described how SEI was to maintain its electronic correspondence. Those provisions provided as follows:

> Originals of all correspondence shall be maintained at the Main Office for a period of no less than 3 years. Electronic correspondence may be retained in the format in which it was received. All representatives are required to copy the Main Office with all e-mail communications with clients. The e-mails may be either retained as saved mail or printed out and stored after review.

Black testified that SEI created this policy in 2008, pursuant to instructions that he and SEI received from a FINRA examiner named DePorres Cormier ("Cormier"). The record demonstrates that when SEI representatives either forwarded or copied emails to the home office, one of the persons they sent them to was Roberts. At some point, respondents also "require[d] each employee to certify in writing, on at least an annual basis, that they were complying with SEI's procedures for copying" the home office "on all electronic communications."

The allegations of violations relate to the period of time between March 2010 to May 2015. In June 2015—the month after the end of the relevant period—SEI retained Smarsh, Inc., for messaging compliance services that will preserve all firm emails. SEI now requires all representatives to use the central server Smarsh-controlled system when using emails.

B. Discussion

The Hearing Panel found that, "in connection with [SEI's] failure to retain emails," SEI and Black failed to establish and maintain an adequate supervisory system, and failed to establish, maintain, and enforce reasonably designed written supervisory procedures, in violation of NASD Rule 3010(a) and (b), and FINRA Rules 3110(a), 3110(b) and 2010. As explained below, we affirm the Hearing Panel's findings of violations.

NASD Rule 3010 was applicable from the beginning of the relevant period until December 1, 2014. NASD Rule 3010(a) provided that "[e]ach member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules." NASD Rule 3010(b)(1) required that "[e]ach member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives, registered principals, and other associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and

with the applicable Rules of NASD." FINRA Rule 3110, which superseded NASD Rule 3010, contains essentially the same requirements.

The laws and rules with which SEI was required to supervise SEI's compliance included ones requiring the retention and review of business-related electronic correspondence. Section 17(a)(1) of the Exchange Act provides, in pertinent part, that a broker-dealer "shall . . . keep for prescribed periods such records . . . as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of" the Exchange Act. Exchange Act Rule 17a-4(b)(4) requires, in pertinent part, that a broker-dealer retain originals of all communications received or sent by the broker-dealer relating to its business for not less than three years, the first two years in an easily accessible place. This retention requirement applies to electronic communications, including emails, relating to a broker-dealer's "business as such." *NASD Notice to Members 03-33*, 2003 NASD LEXIS 40, at *2 (June 2003). NASD Rule 3110 (which applied from the beginning of the relevant period until December 4, 2011) and FINRA Rule 4511 (which governed from December 5, 2011 forward) requires, in pertinent part, each member firm to preserve books and records in conformity with the Exchange Act, applicable Exchange Act rules, and FINRA rules. FINRA rules also required SEI to review incoming and outgoing correspondence.[37]

Because SEI allowed its representatives to use private email providers of their choice, SEI's system for supervising and retaining its representatives' electronic communications depended on an "honor system" that required SEI representatives to copy or forward their electronic correspondence to SEI's home office. The unreasonableness of SEI's reliance solely on its "honor system" is obvious. For most of the relevant period, SEI permitted its numerous independent-contractor representatives, who were located throughout the United States, to use their own private email accounts to conduct business for SEI. Given that, and that most of SEI's independent contractor representatives typically worked alone in their offices, SEI's system of supervising and retaining emails—which Black was primarily responsible for establishing and maintaining—was clearly vulnerable to SEI representatives simply not copying or forwarding their emails to the home office, whether due to oversight or bad faith. SEI's honor system also presented the risk that access to SEI representatives' emails might be lost before they forwarded or copied their emails to the home office, as a result of loss of access to email accounts with third parties. Making the system even worse, SEI lacked strong supervisory controls over its honor system for email retention.

Respondents' defenses against these allegations are unpersuasive. SEI argues that FINRA's rules do not mandate a specific system for email retention and that the allegations are "after-the-fact criticism" of SEI's system for maintaining emails. FINRA's rules required, however, that SEI maintain a supervisory system that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with FINRA rules. An "honor" system that relies on individual representatives to copy or forward their incoming and outgoing electronic correspondence to the home office and that lacks strong supervisory controls clearly does not meet that standard. As for SEI's calling this "after-the fact-criticism," regulators (including the SEC and FINRA) informed SEI, years *before* the complaint was filed, that SEI's

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37 *See* NASD Rule 3010(d)(1) and (d)(2); FINRA Rule 3110(b)(4).

email retention system was inadequate. The SEC provided that warning in 2011. FINRA provided a similar warning in 2014. This disciplinary proceeding could not have been a surprise.

In further defense of their "honor system" of email retention, respondents contend that SEI's representatives can evade a requirement to use a central email provider by setting up their own email addresses. The fact that representatives can or may try to evade email retention requirements, however, does not excuse SEI from its obligation to design a reasonable supervisory system for retaining emails and to supervise the representatives for compliance. Moreover, although respondents focus on persons who might try to "evade" email retention requirements, a big risk of SEI's "honor system" was that it would not retain emails that representatives failed to copy or forward to the home office due to simple oversight or neglect.

SEI argues that "with respect to e-mails, SEI has a separate existence from Mr. Black," and for that reason suggests that it may not be held liable for the failure to have an adequate supervisory system for retaining emails. It is proper, however, to hold SEI accountable for its inadequate supervisory system. FINRA rules place the responsibility of having a reasonably designed supervisory system on the member firm. Moreover, a firm may be held accountable for the misconduct of its associated persons because it is through such persons that a firm acts. *S.I.G. Specialists, Inc.*, 58 S.E.C. 519,536 (2005). Black—who designed SEI's email retentione system—was not just any associated person but was SEI's founder and president. *Dep't of Enforcement v. Brookstone Sec., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip.e LEXIS 3, at *66-67 (FINRA NAC Apr. 16, 2015) (holding firm accountable for representatives'e unsuitable recommendations of CMOs where the firm's founder and chief executive officere "played a pivotal role in [the firm's] CMO program"). In creating SEI's supervisory system fore email retention, Black was acting within the scope of his employment. *See Dep't of Enforcement v. Avenir Fin. Group*, Complaint No. 2015044960501, 2016 FINRA Discip. LEXIS 60, at *70e (FINRA NAC Sept. 20, 2016) (holding a firm responsible for representative's fraud ine connection with sales of equity interests and promissory notes because he acted within the scopee of his employment and was subject to the firm's supervision and control). It is proper to holde SEI responsible.e

SEI also argues that the Hearing Panel erred when it found that SEI "willfully" failed to adopt supervisory procedures to maintain email correspondence. However, the complaint made no such allegations, and the Hearing Panel made no such findings. Nor do we.

Black and SEI argue that they were deprived of the ability to fully defend themselves on the email retention issues because the Hearing Panel denied their motion to compel FINRA to produce information to which they were entitled. In this regard, respondents claim that FINRA examiner Cormier informed respondents after FINRA's 2015 Cycle Examination of SEI ("2015 Cycle Examination") that SEI's email retention system did not violate FINRA rules and that he would "not address the issue" in the 2015 Cycle Examination report "because SEI had agreed to implement [the] Smarsh [system] for email retention," but that Cormier later informed Black that he had been "overruled by his [FINRA] supervisors" and was "required to 'write up' SEI on this issue." Respondents "believe that this may have been reflected in some sort of note, memorandum, or internal correspondence," that such a document would be "exculpatory material" because it would relate to SEI's "good faith reliance by SEI on its examiner's spoken word," and that the Hearing Panel erred in not ordering FINRA to produce anything, including a withheld documents log.

We reject respondents' argument. FINRA Rule 9251 governs Enforcement's discovery obligations. FINRA Rule 9251(a)(1) provides that Enforcement "shall make available for inspection and copying by any Respondent, Documents prepared or obtained by Interested FINRA staff in connection with the investigation that led to the institution of proceedings." FINRA Rule 9251(b) further provides, in pertinent part, that Enforcement may withhold a document if it is "an internal memorandum, or other note or writing prepared by a FINRA employee that shall not be offered in evidence," but not if it "contains material exculpatory evidence." FINRA Rule 9251(b)(1)(B) and (b)(3).

Other than respondents' speculation, there is no evidence that Cormier made any documents memorializing that he informed respondents during the 2015 Cycle Examination that SEI's email retention system was compliant with FINRA rules, and Enforcement asserts in its brief that no such document exists. But even if such a document did exist, Enforcement was required to make available documents prepared "in connection with the investigation that led to the institution of proceedings," and this proceeding did not result from FINRA's 2015 Cycle Examination of SEI. Moreover, even if any notes that Cormier made during the 2015 Cycle Examination were a document prepared in connection with the investigation that led to this proceeding, those notes would not be material exculpatory evidence because a firm cannot shift its regulatory compliance to FINRA staff. *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *56 (Feb. 13, 2015).[38]

Accordingly, we find that SEI and Black, who was primarily responsible for establishing SEI's supervisory system, failed to establish and maintain a reasonable supervisory system, and failed to establish, maintain, and enforce reasonably designed written supervisory procedures, to ensure that SEI reviewed and retained electronic correspondence, in violation of NASD Rule 3010(a) and (b), and FINRA Rules 3110(a), 3110(b) and 2010.

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[38] For similar reasons, we reject respondents' suggestion that any statements during the 2015 Cycle Examination by Cormier that SEI's system was "compliant" excuses their failure during the review period to have an adequate supervisory system for retaining email.

VI. Preservation and Maintenance of Electronic Correspondence (Cause Four)

The Hearing Panel also found that, as alleged, SEI and Black failed to maintain specific emails—including specific email attachments, specific email strings in their entirety, emails in two email accounts of SEI representative Sebastian that were de-activated, sixteen emails of Sebastian, and six emails of SEI representative Vickers—and that SEI's failure to do so was willful. As explained below, we find that the only emails that Enforcement proved that SEI and Black failed to retain were 16 emails that Sebastian failed to forward to SEI, but we reverse the finding that SEI's failure to retain these emails was willful. We also reverse the findings that SEI and Black failed to retain any other emails besides the 16 emails of Sebastian.

A. Facts

1. Issues Concerning SEI's Retention of Email Attachments and Entire Email Strings

During the on-site review portion of the 2012 Cycle Examination, FINRA staff requested emails "for a period of time" within the examination's review period. In response, Black provided staff "a stack of hard copy emails," about one foot high, that Black said he had received copies of, printed, signed, and maintained. When reviewing those hard-copy emails, FINRA staff discovered that they were missing approximately 120 attachments. FINRA staff also checked to see if the stack of hard-copy emails included printouts of each individual email in email conversation strings. FINRA staff discovered that the stack did not contain separately printed copies of "about 80" original emails.

FINRA examiner Arnold's understanding of whether SEI retained emails electronically differed from Roberts' and Black's understandings. Arnold testified that SEI "required that the brokers copy Mr. Black on incoming [correspondence] and outgoing [correspondence]," a policy that was referred to as the "honor system." Arnold also testified that Black, after receiving copies of electronic correspondence, "prints off the email," signs the email as "evidence of a review," and "maintains it in [a] stack."

Roberts testified that SEI prints out emails and gives them to Black for review, but that SEI *also* stores and maintains electronically the emails, and that she informed FINRA staff about this during the 2012 Cycle Examination. Roberts further testified that SEI did not always print each string of an email conversation.

Similarly, Black testified that email was "[a]lways . . . retained electronically" and that FINRA staff did not ask to see the electronically retained emails. Testifying why he did not print out all the emails, Black stated, "I'd be wasting an awful lot of paper." During the 2012 Cycle Examination, Black informed FINRA staff that SEI "retained emails in electronic format," "printed most," printed "the first page or two as samples," and maintained some emails to and from FINRA in an "electronic folder labeled FINRA." Likewise, in July and October 2014, SEI informed FINRA staff that it does not rely solely on hard-copy maintenance of email, but prints out the email and retains an electronic copy.

2. Issues Concerning the Forwarding of Emails to SEI's Home Office

FINRA examiner Dale testified that, during the on-site review portion of the 2014 Cycle Examination, FINRA staff requested SEI's emails for calendar year 2013. In response, FINRA

staff "received a box of paper" that contained a "large amount" of emails. Those emails included emails from SEI representative Sebastian. When FINRA staff informed SEI that the box of emails did not contain any from SEI representative Vickers, SEI responded that it maintained Vickers' emails separately "[d]ue to volume." At some point during the on-site portion of the examination, SEI brought the stack of Vickers' emails to FINRA staff.

a. SEI Representative Sebastian

Dale testified that, during the 2014 Cycle Examination, FINRA staff visited Sebastian's office in Bluffton, South Carolina. Dale testified that Sebastian said he was aware of SEI's policy to forward all business-related emails to SEI's home office and claimed that he was "fully compliant" with that policy. FINRA staff was "able to . . . review" one month's worth of Sebastian's emails on his laptop, and Dale testified that FINRA staff discovered 16 business-related emails, in Sebastian's Gmail account, that Sebastian had not forwarded or copied to SEI's home office.[39] Dale testified that FINRA staff asked Sebastian why the 16 emails had not been forwarded to SEI's home office, and that Sebastian responded that it "was simple oversight."

b. SEI Representative Vickers

During the 2014 Cycle Examination, FINRA staff visited Vickers' office in San Juan, Puerto Rico, in February 2014. Dale testified about this visit. According to Dale, Vickers told FINRA staff that he was aware of SEI's email policy that required him to forward emails to SEI's home office and that he was complying with that policy. When FINRA staff sought to review Vickers' emails, Vickers was resistant and allowed FINRA staff only to review a sample of emails that was smaller than FINRA staff wanted to review.

Dale testified that, even based on that limited review, FINRA found approximately six emails from the 2013 time period that Vickers had not forwarded to SEI's home office. Dale testified that FINRA staff concluded that Vickers had not forwarded those six emails "based on the fact that there are no email addresses for Mr. Ferguson or Mr. Black in the addressee line." Dale testified that Vickers told FINRA staff that he had not forwarded the six emails to SEI's home office due to "simple oversight."[40]

Dale testified that Enforcement's Exhibit CX 30 contained the six emails that Vickers did not forward. That exhibit contains, however, only five readable emails. Moreover, those five emails are not Vickers' outgoing emails, but incoming emails from persons to Vickers.

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[39] FINRA staff concluded that those 16 emails had not been forwarded to SEI's home office because: (1) the addressee lists on the emails did not include the email addresses of Black or Craig Ferguson ("Ferguson"), who worked at the home office in operations and compliance and to whom SEI representatives could send copies of emails during the time the 16 emails were dated; and (2) FINRA staff looked for, but did not find, evidence of a separate forwarding email from Sebastian to the home office.

[40] Roberts similarly testified that Vickers informed her that he had forgotten to send "some of the emails," but there is no indication that Roberts was talking about these six emails.

There is no apparent reason why the senders of those emails would have addressed Black, Ferguson, or anyone in SEI's home office.

3. Issues Concerning SEI Representatives' Use of Private Email Accounts

As explained above, when FINRA staff visited Sebastian's office in Bluffton, South Carolina, the staff was only able to review one month's worth of Sebastian's emails. Explaining why, Dale testified that FINRA staff was not able to review Sebastian's emails associated with two of his prior email addresses because Sebastian had been "locked out of" and "could no longer access" those accounts.[41]

Black testified that SEI had copies of emails that Sebastian had sent through the cancelled email accounts, but that FINRA never asked to see them. In response to FINRA's exit meeting report and its examination report about this issue, SEI responded that "the firm has copies of the emails which Mr. Sebastian sent to the Main Office."

B. Discussion

The Hearing Panel found that, as alleged in cause four of the complaint, SEI and Black failed to preserve and maintain electronic correspondence, and that SEI's conduct was in willful violation of Section 17(a) of the Exchange Act of 1934 ("Exchange Act") and Exchange Act Rule 17a-4, and in violation of NASD Rule 3110 and FINRA Rules 4511 and 2010, and that Black violated NASD Rule 3110 and FINRA Rules 4511 and 2010. We affirm in part and reverse in part.

1. Email Attachments and Entire Email Strings

Some of Enforcement's allegations that SEI and Black failed to preserve and maintain electronic correspondence were premised on Enforcement's contention that SEI "relied only on 'hard copy' maintenance of email correspondence at the main office," and Enforcement's assertions that respondents failed to retain 120 attachments to emails and 80 original emails within email conversation strings.[42] Enforcement's factual assertions were based on FINRA staff's review of a stack of printed emails that SEI provided to them. But SEI's WSPs provided that electronic correspondence "may be *either* retained as saved mail *or* printed out and stored" (emphasis added), and there is no evidence that FINRA staff examined completely for whether SEI retained electronically the emails with the 120 purportedly missing attachments or the 80 individual emails. Arnold testified that FINRA staff did not "check into" whether SEI retained emails electronically because FINRA staff was "told" that SEI maintained the hard copies. But

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[41] Dale testified that, during the 2014 Cycle Examination, Sebastian informed FINRA staff that one of his internet providers had "stopped allowing private third party [email] providers . . . through their system" and cut off his access to his email provider (Fat Cow) "without notice," and that Yahoo had de-activated his Yahoo email account as the result of circumstances related to password changes that Yahoo had required.

[42] Although Enforcement alleged in its prehearing brief that there were 123 missing attachments and 103 missing original emails, Arnold testified that there were 120 missing attachments and 80 missing original emails.

SEI's written policies provided that it could save electronic mail electronically, and SEI informed FINRA during the 2012 and 2014 Cycle Examinations that it maintained emails electronically. We find that FINRA examiners did not fully examine as to whether SEI was retaining *electronically* the missing attachments and original emails. As a result, we find that that Enforcement has not met its burden of proving that SEI was not retaining the 120 attachments or the 80 original emails. To the extent that the Hearing Panel's findings were based on the 120 attachments and the 80 individual threads of email conversations, we reverse them.

2. Sebastian's Two Deactivated Email Accounts

Some of Enforcement's allegations relied on the fact that two of Sebastian's email accounts that he used for business purposes had been deactivated and could not be re-accessed. Although permitting SEI representatives to use private email accounts is evidence of a deficient system for supervising and retaining emails (as explained above), Enforcement did not prove that SEI and Black failed to retain and preserve any of the emails that Sebastian sent or received through those two deactivated email accounts. To the extent the Hearing Panel found that the deactivation of Sebastian's two email accounts amounted to a failure to retain electronic correspondence, we reverse those findings.

3. Vickers' and Sebastian's Emails

Enforcement's allegations also were based on the assertion that SEI representatives "did not copy a designated principal or anyone from SEI's home office on several emails involving securities business." The only attempt Enforcement made to prove this, however, related to Vickers' purported failure to forward six emails and Sebastian's purported failure to forward 16 emails to SEI's home office. We reverse the Hearing Panel's findings that were based on the six Vickers emails. As explained above, Dale's belief that Vickers had not forwarded those six emails was based on the fact that no one from the SEI home office was listed as an addressee, but the only emails that Enforcement proffered to prove this were emails *received* by Vickers, and there is no apparent reason why the senders had any reason to address anyone in SEI's home office.[43]

This leaves only Sebastian's 16 emails, which were in his Gmail account. The preponderance of the evidence demonstrates that Sebastian did not send those 16 emails to SEI's home office as SEI's policy required him to do. Sebastian's failure to do so meant that SEI was not retaining these email communications. SEI's failure to retain these 16 emails (all from the year 2014) was a violation of Exchange Act Section 17(a), Exchange Act Rule 17a-4, and FINRA Rules 4511 and 2010. Black's failure to retain the 16 emails was a violation of FINRA Rules 4511 and 2010.

We reverse the findings, however, that SEI "willfully" violated the recordkeeping rules by failing to retain Sebastian's 16 emails. Dale testified that Sebastian informed FINRA staff

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[43] The Hearing Panel noted that respondents, in a pre-hearing brief, acknowledged that they "did not maintain electronic copies of all electronic communications." But that is not an admission that respondents did not maintain any electronic versions, and it is not an admission of any of the specific allegations of specific failures on which Enforcement based its case.

that his failing to forward all of his emails was an oversight, and Enforcement did not demonstrate otherwise. The 16 emails that Enforcement demonstrated that Sebastian failed to forward are few in number, and there is no evidence showing how they compare to the number of business-related emails that Sebastian did forward or send, or should have forwarded or sent, to SEI during the same time period.[44] For these reasons, Enforcement did not prove, by a preponderance of the evidence, that Sebastian's failure to forward the 16 emails was not inadvertent, and we reverse the findings that SEI's violation was willful and the related finding that SEI is statutorily disqualified. *See Dep't of Enforcement v. The Dratel Group, Inc.*, Complaint No. 2009016317701, 2015 FINRA Discip. LEXIS 10, at *27-28 (FINRA NAC May 6, 2015) (finding that a failure to preserve email was "inadvertent, and therefore not willful").[45]

VII. Procedural Issue

SEI argues that the "cumulative effect" of the Hearing Panel's "reversible errors and findings" created an "unfair factual record and hearing" that "prevented [respondents] a full and fair opportunity to present all defenses and proofs" in support of their arguments. Although we have reversed some of the Hearing Panel's findings, the record does not demonstrate that the Hearing Panel did not provide respondents with a fair procedure. Respondents were on notice of the allegations, and they had a full opportunity to be heard and to present evidence in support of their defenses. Respondents also have had the opportunity to appeal the Hearing Panel's decision, file briefs in this appeal, and present oral arguments.

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[44] Dale testified that he took "screen shots" of Sebastian's email box that "isolate any emails that were sent to" SEI's home office, and that those screen shots were in evidence. The screen shots in the record—some of which appear to be of a filtered subset of Sebastian's inbox and sent mail, and some of which appear to show a subset of the entirety of Sebastian's sent mail and inbox—show as many as 326 emails, only a fraction of which are visible in the exhibit itself. There also is no exhibit showing how many business-related emails Sebastian sent or received during the same time period. Although FINRA staff's 2014 Cycle Examination Report states that it was able to access only "158 emails" during a one-month period, the screen shots alone of Sebastian's email box show as many as 326 emails.

[45] Prior to June 2015, when SEI contracted with Smarsh for messaging compliance services, SEI did not, among other requirements, have a system for preserving its emails in a non-rewriteable, non-erasable format as required by Exchange Act Rule 17a-4(f)(2)(ii)(A). Cause four of Enforcement's complaint, however, made no specific allegations that SEI failed to comply with the non-rewriteable, non-erasable format requirements or other similar requirements. Cause four also included an assertion that SEI "failed to retain several email communications with FINRA staff," but Enforcement did not proffer any proof of this at the hearing.

VIII. Sanctions

A. Providing False Testimony and Fabricated Documents to FINRA

For providing false testimony and fabricated documents to FINRA staff, the Hearing Panel barred Black and fined SEI $73,000. We affirm these sanctions. Substantial sanctions are appropriate to remedy respondents' violations.

For failing to respond truthfully to requests made pursuant to FINRA Rule 8210, the FINRA Sanction Guidelines ("Guidelines") recommend a fine of $25,000 to $73,000.[46] Failing to provide truthful responses to requests for information is just as serious as failing to respond in any manner, for which a bar is the standard sanction when the respondent is an individual and where there are no mitigating factors mitigating the risk of future harm.[47] Where mitigation exists, the Guidelines recommend that we consider suspending the individual for up to two years.

There are several aggravating factors in this case. The information that FINRA requested—which went directly towards whether SEI and Black were complying with fundamental supervisory obligations to inspect the firm's geographically dispersed offices—was important from FINRA's perspective.[48] Black engaged in a pattern of misconduct over an extended period of time: he provided the fabricated Office Inspections Checklist document to FINRA staff in September 2012, provided fabricated Internal Review Checklists and Office Compliance Inspection documents in May 2013, and then repeatedly provided false testimony in April 2014.[49] His conduct also reflected an attempt to mislead or deceive regulatory authorities that he had conducted office inspections that, in fact, never occurred.[50]

Moreover, Black acted with intent.[51] When Black chose to provide FINRA with fabricated documents, he knew that the SEC's 2011 examination had included findings that SEI had failed to conduct office inspections, knew that FINRA staff was asking him questions about Black's and SEI's office inspections, and knew that FINRA staff wanted to see documents that Black used to keep track of the office inspections he purportedly conducted and that corroborated his claims that the inspections occurred. Faced with this level of regulatory scrutiny around his conduct, Black chose not to provide truthful information, but to provide fabrications and lies in an ongoing attempt to hide the truth and avoid responsibility.

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46 *FINRA Sanction Guidelines* 33 (2018) [hereinafter *Guidelines*], http://www.finra.org/sites/default/files/2018_Sanctions_Guidelines.pdf.

47 *Id.* at 33; *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *32-33 (Aug. 22, 2008).

48 *Guidelines*, at 33 (Principal Considerations in Determining Sanctions, Failure to Respond or to Respond Truthfully, No. 1).

49 *Id.* at 7 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

50 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 10).

51 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

There are no mitigating factors. SEI argues that no one was harmed, but that is not mitigating. As the Commission has explained, a Rule 8210 violation "will rarely, in itself, result in direct harm to a customer." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). Nevertheless, a Rule 8210 is a highly serious violation because it "undermines [FINRA's] ability to detect misconduct that may have occurred and that may have resulted in harm to investors or financial gain to respondents." *Id.* Moreover, it is well established that the lack of customer harm from a violation is not mitigating. *Dep't of Enforcement v. Gadelkareem*, Complaint No. 2014040968501, 2017 FINRA Discip. LEXIS 11, at *24 (FINRA NAC Mar. 23, 2017), *aff'd*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729 (Mar. 14, 2018).

Given the seriousness of a failure to provide truthful responses to FINRA requests, the aggravating factors that are present, and the absence of any mitigation, substantial sanctions are warranted. For their violations of FINRA Rules 8210, 4511, and 2010, we bar Black from associating with any member firms, and we fine SEI $73,000. These sanctions are appropriate to remedy Black's and SEI's failures to provide truthful responses in response to FINRA requests for information and testimony. They also will deter other individuals and firms in the industry from engaging in similar violations.

B. E-Mail Retention

For respondents' email retention violations, the Hearing Panel fined respondents, jointly and severally, $50,000, but did not impose that fine on Black in light of the bar that was imposed on him. As explained below, we reduce the fine to $500.

For recordkeeping violations, the Guidelines recommend a fine of $1,000 to $15,000; where aggravating factors predominate, a fine of $10,000 to $146,000; and where significant aggravating factors predominate, a higher fine.[52] The Guidelines further recommend that an adjudicator consider suspending the responsible individual for 10 business days to three months or, where aggravating factors predominate, a longer suspension or a bar.[53] For firms, the Guidelines recommend that adjudicators consider, where aggravating factors predominate, suspending the firm for 10 business days to two years or expulsion.[54]

There are several reasons why we think a substantially lower fine is warranted for respondents' failure to retain emails. As explained above, our findings that the respondents failed to retain emails rest on far narrower grounds than the Hearing Panel's findings. Enforcement proved that SEI and Black failed to retain 16 emails—a relatively small number—all sent or received during a one-month period.[55] Enforcement did not prove that respondents'

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52 *See Guidelines*, at 29.

53 *Id.*

54 *Id.*

55 *See id.* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 9, 17), 29 (Principal Considerations in Determining Sanctions, No. 2).

failure to retain the 16 emails was not inadvertent.[56] Considering these circumstances, we reduce the fine to $500. We impose this fine on SEI, but do not impose it on Black in light of the bar that we have already imposed on him.

C. Deficient Supervisory System and Deficient Written Supervisory Procedures Concerning Supervision and Retention of Electronic Communications

The Hearing Panel imposed a $120,000 fine against respondents and barred Black from associating with any member firm in a principal capacity for failing to exercise reasonable supervision to ensure that five office inspections were performed and for failing to retain email communications, but it did not impose those sanctions on Black in light of the bar. As explained above, we find that Enforcement failed to prove that respondents engaged in supervision violations concerning office inspections. We therefore consider what the appropriate sanction is for respondents' failing to establish a reasonable supervisory system and reasonable written supervisory procedures for the supervision and retention of emails.

The Guideline for "Supervision—Failure to Supervise" recommends a fine between $5,000 to $73,000, and the consideration of independent (rather than joint and several) monetary sanctions for a firm and responsible individuals.[57] It further recommends that adjudicators consider suspending the responsible individual in all supervisory capacities for up to 30 business days and limiting activities of the appropriate branch office or department for up to 30 business days.[58] In egregious cases, the Guideline recommends that adjudicators consider limiting activities of the branch office or department for a longer period or suspending the firm with respect to any or all activities or functions for up to 30 business days, and also to consider suspending the responsible individual for up to two years or barring the responsible individual.[59]

The Guideline for "Supervisory Procedures—Deficient Written Supervisory Procedures" recommends a fine of $1,000 to $37,000.[60] It also recommends, in egregious cases, that adjudicators consider suspending the responsible individual in any or all capacities for up to one year; and consider suspending the firm with respect to any or all relevant activities or functions for up to 30 business days and thereafter until the supervisory procedures are amended to conform to rule requirements.[61]

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56 *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 13).

57 *Id.* at 104.

58 *Id.*

59 *Id.*

60 *Id.* at 107.

61 *Id.*

There are significant aggravating factors. Respondents maintained a deficient supervisory system for email retention over a period of years.[62] The deficiencies allowed violative conduct to occur.[63] And it is especially troubling that although both the SEC and FINRA informed SEI, in 2011 and 2014 respectively, that SEI's email retention system was inadequate, respondents ignored those warnings and continued to use the "honor system" of email retention.[64]

Respondents argue that there are numerous mitigating factors, but those arguments fail. For example, SEI argues that it used its email procedures since 2008 when FINRA advised the firm that its system was compliant. It likewise contends that its delay in installing Smarsh was because its email procedure was one suggested by a FINRA employee. Whatever representations FINRA staff made in 2008, however, those representations could not be treated as a source of reliable guidance after FINRA and the SEC in 2011 and 2014 warned the firm about its email retention system.

SEI also argues that it is mitigating that, in June 2015, it installed the "Smarsh" system to retain all emails, and that procedures relating to that have been updated. The employment of subsequent corrective measures is mitigating, however, only when the corrective measures were implemented "prior to detection or intervention" by a regulator.[65] That is not the case here. SEI did not install Smarsh until after FINRA was investigating this matter, and after SEI had received a Wells Notice from Enforcement, just three months before FINRA filed the complaint.

SEI argues that no one was harmed. It is well established, however, that the lack of customer harm is not mitigating. *Gadelkareem*, 2017 FINRA Discip. LEXIS 11, at *24.

SEI claims that the fine imposed by the Hearing Panel would threaten the firm's net capital. We do not know if the firm still presses this argument, considering that the total fines we are imposing in this decision are substantially lower than what the Hearing Panel imposed. Regardless, the amount of a fine need not be related to or limited by the amount of a firm's required net capital. *Dep't of Market Regulation v. Castle Sec. Corp.*, Complaint No. CMS030006, 2005 NASD Discip. LEXIS 2, at *32 n.25 (NASD NAC Feb. 14, 2005).

SEI blames its email retention failures on representatives evading the firm's email retention system.[66] The record, however, does not demonstrate that the reason why SEI failed to retain Sebastian's 16 emails was evasion. And to whatever extent SEI failed to retain other

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62 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 9).

63 *Id.* at 107 (Principal Considerations in Determining Sanctions, No. 1).

64 *Id.* at 8 (Principal Considerations in Determining Sanctions, No. 14).

65 *Id.* at 7 (Principal Considerations in Determining Sanctions, No. 3).

66 *See Guidelines*, at 104 (Principal Considerations in Determining Sanctions, No. 1) (directing adjudicators to consider whether individuals responsible for underlying misconduct attempted to conceal misconduct from respondent).

emails, respondents did not demonstrate that evasion was the cause of any or all such failures. Moreover, our overarching concern with SEI's supervisory system is not related to what may have motivated any failures to retain specific emails. Rather, it is that the entire email retention system was not reasonably designed to comply with the email retention requirements.

SEI and Black also argue that they assisted on numerous occasions in "rooting out fraud." Regardless of the truth of these assertions, it is not "substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct," which is the kind of assistance that can be mitigating.[67]

Black argues that no SEI representatives were sanctioned by FINRA for any email retention failures. Enforcement, however, has "broad prosecutorial discretion in deciding against whom charges should be brought and what those charges should be." *Wedbush Sec., Inc.*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794, at *59 (Aug. 12, 2016), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). Moreover, SEI and Black had supervisory responsibilities for the email retention system and had a greater degree of responsibility to act to ensure the firm's compliance with its regulatory obligations.

Having considered the nature of respondents' violation, the aggravating factors, and the absence of any mitigation, we fine respondents (jointly and severally) $73,000. This fine, at the top end of the Guidelines' relevant fine range, is appropriate to deter respondents from again failing to establish and maintain a reasonable supervisory system for retaining email. We do not impose this fine on Black, however, in light of the bar that we have imposed on him.

IX. Conclusion

Accordingly, we affirm the findings that SEI and Black provided false testimony and fabricated documents; reverse the findings of violations that SEI and Black maintained a deficient supervisory system concerning office inspections; affirm the finding that SEI and Black maintained a deficient supervisory system for retaining and reviewing emails; affirm the findings that respondents failed to maintain 16 business-related emails of SEI representative Sebastian, but reverse the finding that SEI's failure to maintain Sebastian's 16 emails was willful; and reverse the findings that SEI and Black failed to maintain any other business-related emails. For respondents' providing false testimony and fabricated documents, we affirm the bar imposed on Black and the $73,000 fine imposed on SEI. For failing to retain firm emails, we reduce the fine to $500 (joint and several). For respondents' supervision failures, we reduce the sanctions on respondents to a $73,000 fine (joint and several). We do not impose any fines on Black, however, in light of the bar we have imposed on him. We affirm the $8,335.29 in costs imposed

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[67] *See id.* at 8 (Principal Considerations in Determining Sanctions, No. 12); *cf. David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *61 (July 27, 2015) (finding that respondent's "self-professed willingness to expose misconduct by others does not . . . mitigate the seriousness of his violations).

against respondents (joint and several), and we impose $1,991.17 in appeal costs against Black.[68] The bar imposed on Black is effective upon service of this decision.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell
Vice President and Deputy Corporate Secretary

[68] Pursuant to FINRA Rule 8320, any member that fails to pay any fine, costs, or other monetary sanction imposed in this decision, after seven days' notice in writing, will summarily be suspended or expelled from membership for non-payment.

APPENDIX B

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Southeast Investments, N.C., Inc.
and Frank Harmon Black

For the Review of Disciplinary Action

File No. 3 – 19185

DECLARATION OF CELLIE COHEN-SMITH

I, Cellie B. Cohen-Smith, declare under penalty of perjury that the following is true and correct to the best of my knowledge, information, and belief:

1. I am a Principal Examiner and Regulatory Coordinator in FINRA's Member Supervision department. As a Principal Examiner, I participate in examinations and investigations of registered broker-dealers, including planning, defining the scope of, and conducting these examinations and investigations. I submit this Declaration in support of FINRA's Opposition to Frank Black's Expedited Motion to Stay Sanctions.

2. I joined FINRA in 2008 and I have experience working as an examiner or analyst for self-regulatory organizations for over twenty-one years. I earned a Bachelor of Science Degree as an accounting major from the State University of New York at Albany.

3. I am familiar with FINRA member firm Southeast Investments, N.C., Inc. ("Southeast Investments") and I have reviewed FINRA's regulatory information system and the current status of this firm. FINRA's regulatory information system contains a family of

applications that supply data from several FINRA systems and includes financial reports, examination information, and management and contact information, among other information. I routinely use FINRA's regulatory information system in the course of my day-to-day work as a Principal Examiner to review the financial condition of firms and understand who fills its key roles. The information on firm management and contacts in FINRA's regulatory information system is supplied to FINRA by the firm.

4. I reviewed FINRA's regulatory information system for Southeast Investments on May 30, 2019. It shows that the following positions are held by Jonathan H. Black, not Frank Black: Chief Executive Officer, AML compliance contact (primary), Chief Compliance Officer, CFO and Financial and Operations Principal. The system shows that the firm's contact for regulatory inquiries is Jeanette Roberts. The system also reflects that Frank Black has the roles of research, sales and marketing, and training of registered representatives for the firm.

Executed on May 31, 2019
at Atlanta, Georgia

Cellie Cohen Smith
Cellie B. Cohen-Smith

CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this Brief of FINRA in Opposition to Request for Stay complies with the limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 6,722 words.

Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281

Dated: May 31, 2019

CERTIFICATE OF SERVICE

I, Andrew Love, certify that on this 31st day of May 2019, I caused a copy of the foregoing FINRA's Brief in Opposition to Request for Stay to be served by messenger on:

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-5400

On this date, I also caused a copy of the opposition to be served via overnight FedEx (and a courtesy copy via electronic mail) on:

Alan M. Wolper, Esq.
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Different methods of service were used because courier service could not be provided to applicant's attorneys.

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