

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

In the Matter of the Application of

Robert Juan Escobio

For Review of Action Taken by

FINRA

Administrative Proceeding No. 3-20260

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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FINRA’S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Robert Juan Escobio appeals a March 10, 2021 decision of the National Adjudicatory Council (“NAC”). The record unequivocally demonstrates that Escobio failed to comply with five FINRA Rule 8210 (“Rule 8210”) requests for information and documents and five Rule 8210 requests for testimony. FINRA sent these requests to Escobio to investigate whether he continued to associate with a member firm after his statutory disqualification and termination of his registration. After Escobio failed to comply with all 10 requests, FINRA’s Department of Enforcement filed a complaint with two causes under Rule 8210 and sought summary disposition. The NAC affirmed the Hearing Panel’s decision granting summary disposition as to both liability and sanctions, imposing a bar for each cause.

Escobio was statutorily disqualified from associating with a FINRA member due to a federal district court’s civil judgment finding that he engaged in commodities fraud and enjoining him from engaging in several activities governed by the Commodities Exchange Act.

Escobio's FINRA registration terminated on July 27, 2017, when FINRA denied the membership continuation application that his member firm filed on his behalf.

The events immediately leading to this matter began in 2018, when FINRA conducted a cycle examination of Escobio's former firm. If the firm allowed Escobio to associate with it, the firm would be in violation of FINRA rules. During the examination, FINRA discovered emails indicating that Escobio may have used his firm email address to conduct securities business after his registration terminated. Accordingly, FINRA investigated whether Escobio continued to associate with the firm and, to that end, sent Escobio the Rule 8210 requests at issue in this appeal. Escobio complied with none of the 10 requests.

The NAC properly affirmed the Hearing Panel's decision to grant summary disposition as to liability. Escobio does not dispute that he received FINRA's Rule 8210 requests and failed to comply with them. Rather, faced with undisputed facts demonstrating that he violated Rule 8210, Escobio continues to attack the legitimacy of the underlying investigation. The Commission should reject these assertions because they lack supporting evidence and are irrelevant to Escobio's liability for failing to comply with his unequivocal duty to cooperate with Rule 8210 requests.

The NAC also properly affirmed the Hearing Panel's decision to grant summary disposition as to sanctions, as the relevant considerations are undisputed. While Escobio contends that the NAC and the Hearing Panel overlooked evidence that stress was a mitigating factor, he has consistently failed to point to any specific facts or evidence showing how financial, physical, or mental stress caused his complete failure to comply with 10 Rule 8210 requests sent over the course of several months. Because Escobio failed to establish a genuine issue of fact

relevant to mitigation, the Commission should reject his argument that summary disposition was improper.

The sanctions imposed—a bar for each cause—are not excessive or oppressive. The sanctions are consistent with the relevant Sanction Guidelines, and Escobio’s Rule 8210 violations are aggravated by the importance of the information requested and the large number of requests at issue. Considering Escobio’s complete and repeated failure to comply with 10 Rule 8210 requests, a bar is warranted to protect the public interest and deter similar misconduct. FINRA respectfully asks the Commission to follow its well-established precedent and affirm the NAC’s determinations with respect to liability, as well as the sanctions imposed.

I. FACTUAL BACKGROUND

A. Escobio

Escobio entered the securities industry in 1980. RP 5, 160.¹ In 2000, he associated with Southern Trust as a general securities representative and a general securities principal. RP 5, 160. Between June 2000 and April 2014, Escobio served as Southern Trust’s chief executive officer. RP 5, 160. He purportedly retired from Southern Trust in 2017 and is not currently employed in the securities industry. RP 160, 355.

B. FINRA Determines that Escobio Is Statutorily Disqualified as a Result of a District Court Judgment

On August 29, 2016, the United States District Court for the Southern District of Florida entered a civil judgment against Escobio, Southern Trust Metals, Inc. (“Southern Metals”), and Loreley Overseas Corporation (“Loreley”) based upon a complaint filed by the Commodity

¹ “RP” refers to cites to the certified record filed with the Commission on April 21, 2021.

Futures Trading Commission (“CFTC”).² Escobio had general control over both Southern Metals and Loreley.³ The court found that Southern Metals engaged in a fraudulent scheme in which it misrepresented to customers that they were purchasing (and owned) physical metals that were held in depositories.⁴ Southern Metals further represented that the customers were receiving loans to purchase those metals, for which they were charged interest.⁵ In reality, the customers owned no physical metals and had not taken out loans.⁶ Instead, Southern Metals transferred customer funds through Loreley to margin trading firms based in London.⁷ At those firms, the customer funds were used to purchase off-exchange derivative contracts designed to hedge Southern Metals’ exposure in its customers’ positions.⁸ The district court determined that the defendants’ misconduct violated anti-fraud and other provisions of the Commodity Exchange Act (“CEA”), 7 U.S.C. § 1 et seq.⁹

Because Escobio had general control over both Southern Metals and Loreley, the court found him jointly and severally liable for the violations and enjoined him from engaging in a number of activities governed by the CEA, as well as from applying for registration or engaging

² *U.S. CFTC v. S. Trust Metals, Inc.*, No. 14-cv-22739, 2016 U.S. Dist. LEXIS 115663 (S.D. Fla. Aug. 29, 2016), *aff’d in relevant part*, 894 F.3d 1313 (11th Cir. 2018).

³ *Id.* at *4.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at *19.

⁷ *Id.* at *2-3, 19.

⁸ *Id.* at *19.

⁹ *S. Trust Metals*, 2016 U.S. Dist. LEXIS 115663, at *2-4, 17-30.

in any activity requiring registration under the CEA.¹⁰ The court ordered Escobio and the other defendants to pay restitution and a civil monetary penalty.¹¹

On September 7, 2016, FINRA notified Southern Trust that Escobio was statutorily disqualified from associating with a member firm because of the district court's judgment. RP 477-78. Southern Trust filed a Membership Continuation Application (MC-400) on Escobio's behalf, and the NAC denied that application on July 27, 2017.¹² In its decision, the NAC noted that the scheme leading to the district court's judgment involved "extremely serious" and recent misconduct and that Escobio's continued association with the firm posed "an unreasonable risk of harm" to investors.¹³ Escobio's registration was terminated effective July 27, 2017. RP 447-48.

C. FINRA Investigates Whether Escobio Continued to Associate with Southern Trust After His Statutory Disqualification and Termination of His Registration

During a 2018 cycle examination of Southern Trust, FINRA found evidence suggesting that Escobio may have associated with the firm after he was statutorily disqualified and his registration terminated. RP 244-45. In particular, FINRA examiners discovered emails indicating that Escobio may have continued to use his Southern Trust email address to conduct

¹⁰ *Id.* at 29-32, 39.

¹¹ *Id.* at *40-47. The United States Court of Appeals for the Eleventh Circuit affirmed the district court's judgment, except that it reversed the restitution order to the extent that the restitution related to Southern Metals' failure to register as a futures commission merchant. *S. Trust Metals*, 894 F.3d at 1335.

¹² *Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512, at *7, 33 (June 22, 2018) (affirming the NAC's denial of Southern Trust's application).

¹³ *Id.* at *9-11.

securities business after July 2017. RP 244-45. As a result, the examiners investigated whether Escobio continued to associate with Southern Trust, and ultimately referred the matter to FINRA's Department of Enforcement ("Enforcement"). RP 245. Enforcement sent Escobio the Rule 8210 requests described below, which included five requests for information and documents and five requests for testimony. RP 246-51. The requests warned Escobio that his failure to comply could result in sanctions, including a bar from the industry. RP 498, 507, 519, 525, 543, 553-54, 583-85, 607-10, 653-57, 693-94 (warnings regarding non-compliance).

i. Escobio Failed to Comply with Five Requests for Information and Documents

Between March 26, 2019 and May 2, 2019, Enforcement sent Escobio three Rule 8210 requests asking him to identify any email addresses he used after July 1, 2017, and to provide any electronic communications concerning securities business that he sent or received after that date. RP 497-99, 507, 519. On each occasion, Enforcement sent the request to Escobio's CRD residential address by certified mail, overnight courier, or both.¹⁴ RP 497, 507, 519. Escobio did not provide the information and documents requested or seek an extension of time to do so. RP 247-48, 507, 519.

Enforcement sent two additional Rule 8210 requests for information and documents to Escobio on May 2 and June 6, 2019. RP 525, 544. The requests sought Escobio's mobile phone records from July 27, 2017, through the date of the requests. RP 525, 544. Enforcement sent the

¹⁴ Enforcement sent the March 26 and May 2, 2019 requests to Escobio's CRD address by certified mail and overnight courier. RP 497, 519. Although the certified mailings were returned, the requests sent by overnight courier were delivered. RP 501-02, 505, 530-32, 535. Enforcement sent an April 10, 2019 request by certified mail to Escobio's CRD address and a federal detention center where he was detained between approximately April 1 and April 26, 2019. RP 489, 495, 507. Although the certified mailing to Escobio's CRD address was returned, the request sent to the detention center was delivered. RP 513, 516.

first such request to Escobio's CRD address by certified and first-class mail, as well as by courier.¹⁵ RP 525. Enforcement sent the second such request to Escobio's attorney by certified mail and email, and provided copies to Escobio by first-class and certified mail at his CRD address.¹⁶ RP 543. Escobio did not provide the information and documents requested and did not seek an extension of time to do so. RP 248, 543.

ii. Escobio Failed to Comply with Five Requests for Testimony

On March 29, 2019, Enforcement sent its first request for Escobio's on-the-record testimony ("OTR") to his CRD address by certified mail, first-class mail, and overnight courier. RP 553. The request asked Escobio to appear for an OTR on April 18, 2019, at FINRA's office in Boca Raton, Florida. *Id.* On April 9, 2019, an attorney for Escobio sent a letter to Enforcement stating that Escobio could not appear for the April 18, 2019 OTR because he was detained pursuant to a contempt order entered in the CFTC matter.¹⁷ RP 569. In response, Enforcement offered to move the OTR to the facility where Escobio was detained and advised that Escobio's failure to cooperate could result in a fine, suspension, or bar from the industry. RP 571. Escobio did not arrange for an alternative date or location for the OTR and did not appear for the April 18, 2019 OTR in FINRA's Boca Raton office. RP 249, 577-78.

¹⁵ Although the certified mailing was returned to Enforcement, the copy sent by overnight courier was delivered. RP 530-33, 535.

¹⁶ On May 20, 2019, Escobio's present attorney notified Enforcement that she represented him in this matter. RP 248, 537-38. The certified mailings to Escobio and his attorney were delivered. RP 547, 551.

¹⁷ This was a different attorney for Escobio. RP 569. Based on a telephone call with this attorney, Enforcement's understanding was that the attorney's representation was limited to handling Escobio's response to the March 29, 2019 OTR request. RP 571. While the attorney's letter referred only to Escobio's "incarceration," the record reflects that Escobio was detained at a federal facility pursuant to a contempt order in the CFTC matter. RP 489, 495, 569.

After Escobio was released from detention, Enforcement sent a May 2, 2019 OTR request to him by certified mail, first-class mail, and courier to his CRD address.¹⁸ RP 495, 583. This second OTR request asked Escobio to appear for an OTR at FINRA’s Boca Raton office at 9:30 am on May 20, 2019. *Id.* Escobio did not seek an alternative date for the OTR and did not appear for the OTR. RP 249, 599-600. At 5:44 p.m. on May 20, 2019—over eight hours after the start time for the scheduled OTR—Escobio’s present attorney sent an email to Enforcement stating that Escobio would not participate in an OTR based on the advice of counsel. RP 605-06. The letter referred to Escobio’s pending appeal before the United States Court of Appeals for the Eleventh Circuit (which concerned the contempt order in the CFTC matter) and stated that Escobio would make himself available after that appeal concluded. RP 606.

On May 21, 2019, Enforcement sent a letter to Escobio and his attorney (by email, certified mail, and first-class mail) advising that neither advice of counsel nor the unrelated CFTC appeal excused Escobio’s obligation to comply with an OTR request under Rule 8210. RP 607. The letter included a third OTR request, asking Escobio to appear for an OTR at FINRA’s Boca Raton office on May 29, 2019, at 9:30 a.m. RP 607.

On May 28, 2019, at 4:12 p.m. Escobio’s attorney sent an email to Enforcement stating that she and Escobio were unavailable for the OTR on the following morning because they were “respond[ing] to discovery and other time sensitive matters in the CFTC case.” RP 641, 643. The letter further advised that Escobio would be available during the weeks of July 1, 2019, or July 29, 2019. RP 643. Enforcement responded at 5:07 p.m. that same afternoon, noting Escobio’s repeated failures to comply with Rule 8210 requests and stating that the following

¹⁸ Although the certified mailing was returned, the copy sent by courier was delivered. RP 530-32, 535.

day's OTR would not be postponed. RP 645. Enforcement also asked Escobio to provide dates of availability earlier than his proposed dates in July if he decided to testify later. *Id.* Escobio did not appear for the May 29, 2019 OTR and did not provide alternate dates. RP 250, 650.

On June 25, 2019, Enforcement sent a fourth OTR request to Escobio and his attorney. RP 653. The letter noted that Escobio never provided alternate dates for his testimony, as Enforcement had requested in its May 29, 2019 email. *Id.* Based on Escobio's prior representation that he would be available during the week of July 1, 2019, Enforcement asked him to appear for an OTR at FINRA's Boca Raton office on July 2, 2019. *Id.* On June 28, 2019, Escobio's attorney called Enforcement to advise that Escobio would not appear for an OTR on July 2, and Enforcement responded that the OTR would not be postponed. RP 687. Escobio did not appear for the July 2, 2019 OTR. RP 687-88.

On July 3, 2019, Enforcement sent its fifth and final OTR request to Escobio and his attorney. RP 693. The letter asked that Escobio appear for an OTR at FINRA's Boca Raton office on July 8, 2019 (a Monday) at 9:30 a.m., noting that this time had been mutually agreed upon during a telephone call. *Id.* At 6:08 pm on the Friday before the OTR (July 5, 2019), Escobio's attorney sent an email to Enforcement stating that Escobio would not appear at the OTR due to a change in his work schedule. RP 709-10.

D. Enforcement Brings a Disciplinary Proceeding Against Escobio and Seeks Summary Disposition

Enforcement filed a two-cause complaint against Escobio on July 17, 2019, alleging that he failed to: (1) respond to five requests for information and documents, in violation of FINRA Rules 8210 and 2010; and (2) appear and provide investigative testimony on five occasions, also

in violation of Rules 8210 and 2010.¹⁹ RP 1, 16-19. On December 18, 2019, Enforcement filed a motion for summary disposition as to both causes pursuant to FINRA Rule 9264. RP 241.

With respect to sanctions, Enforcement argued that a bar was appropriate because there were several undisputed aggravating factors, and no mitigating factors. RP 268, 292-93. Enforcement supported its motion with exhibits, including the Rule 8210 requests and correspondence with Escobio's counsel concerning the OTR requests. RP 353-714.

Escobio filed an opposition, in which he argued that summary disposition was improper as to both liability and sanctions. RP 715-17, 745-52. In his opposition, Escobio did not dispute that he received and failed to comply with the Rule 8210 requests. RP 715-17. Rather, he argued that the underlying investigation was improper because FINRA lacked competent evidence that he continued to use his Southern Trust email address to conduct securities business after his registration terminated. RP 716. Without citing to evidence, Escobio asserted that the purpose of FINRA's investigative requests was to obtain evidence for the CFTC after discovery in the CFTC case closed. RP 716-17. Escobio's only evidentiary exhibit was a copy of a decision entered by the United States Court of Appeals for the Eleventh Circuit on January 6, 2020, which reversed the district court's contempt order in the CFTC matter. RP 719-44.

E. The Hearing Panel Grants Enforcement's Motion for Summary Disposition, and the NAC Affirms the Decision on Appeal

The Hearing Panel granted Enforcement's motion for summary disposition in a February 5, 2020 decision. RP 789-800. The Hearing Panel concluded that there was no genuine issue of material fact as to liability, as it was undisputed that Escobio received notice of all 10 Rule 8210

¹⁹ A violation of FINRA Rule 8210 is also a violation of FINRA Rule 2010. *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 n.36 (Jan. 30, 2009).

requests but failed to comply with any of them. RP 795-96. The Hearing Panel rejected Escobio's attacks on the legitimacy of FINRA's investigation, observing that Escobio failed to point to any specific facts to support his assertions that the investigation was improper, while Enforcement pointed to facts (namely, the discovery of emails suggesting that Escobio continued to use his Southern Trust account to conduct securities business) negating any inference that the investigation was motivated by an improper purpose. RP 796-97.

The Hearing Panel imposed a bar for each of the two causes. RP 799. The Hearing Panel noted that a bar is the standard sanction for a complete failure to respond to a Rule 8210 request and explained that there were undisputed aggravating factors, such as the large number of requests at issue. RP 798-99. The Hearing Panel observed that the information Enforcement sought in the Rule 8210 requests was important because the investigation concerned serious misconduct—that is, Escobio's possible continued association with Southern Trust after he was statutorily disqualified and his registration terminated. RP 798. Finally, the Hearing Panel determined that Escobio established no mitigating factors or genuine issues of material fact that might justify a hearing on the issue of sanctions. RP 799.

Escobio appealed the Hearing Panel's decision to the NAC. RP 801-02. On appeal, Escobio continued to argue that Enforcement lacked a competent basis for its investigation into whether he associated with Southern Trust after his registration terminated, and that Enforcement issued the Rule 8210 requests for the purpose of obtaining information for the CFTC. RP 855-57, 859, 921-25. Escobio further argued that the Hearing Panel ignored mitigating evidence—namely, his detention pursuant to the contempt order in the CFTC matter. RP 858, 924-25. Finally, Escobio asserted that a bar was unwarranted. RP 859-61, 925-27.

The NAC affirmed the Hearing Panel’s decision after an independent review of the record. RP 1015-23. With respect to liability, the NAC emphasized that Escobio was charged with failing to comply with Rule 8210 requests, not with continued association with Southern Trust—and that his beliefs about the investigation into his possible continued association did not excuse his non-compliance. RP 1018. With respect to sanctions, the NAC concluded that Escobio failed to provide evidentiary support for his assertion that stress related to the CFTC litigation mitigated his failure to comply with the Rule 8210 requests. RP 1022. Moreover, the NAC observed, any stress caused by the contempt order and resulting detention would not explain Escobio’s “months-long, complete inability to provide the documents and testimony requested.” RP 1022. Escobio appealed the NAC’s decision to the Commission. RP 1047-73.

II. ARGUMENT

Escobio undisputedly failed to comply with multiple requests for information, documents, and testimony in violation of Rule 8210. There is no genuine issue of fact relevant to liability or sanctions, and the sanctions imposed are appropriately remedial. Accordingly, the NAC properly affirmed the Hearing Panel’s decision to grant summary disposition as to liability and sanctions, and the Commission should dismiss the application for review. *See* 15 U.S.C. § 78s(e) (the Commission will consider whether the respondent engaged in conduct that violated federal securities laws and FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive).

A. Standard for Summary Disposition

The NAC's decision is well-supported by FINRA's rules and the standard for summary disposition. FINRA Rule 9264 permits a party to a disciplinary proceeding to file a motion for summary disposition prior to a hearing on the merits. FINRA Rule 9264(a). Summary disposition is appropriate as a matter of law when "there is no genuine issue with regard to any material fact." FINRA Rule 9264(e). Here, Enforcement met its "burden of demonstrating the absence of a genuine issue of material fact" and Escobio, as the non-moving party, failed to "demonstrate the existence of any material, disputed facts."²⁰ See *Dep't of Enf't v. Walblay*, Complaint No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *3 (FINRA NAC Feb. 25, 2014); see also *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (setting forth the standard for summary judgment). After reviewing "the record taken as a whole," the Hearing Panel and the NAC properly determined that no "rational trier of fact" could find for Escobio and, therefore, that "no genuine issues exist that warrant a hearing." See *Walblay*, 2014 FINRA Discip. LEXIS 3, at *3; see also *Matsushita*, 475 U.S. at 587.

While Escobio asserts that summary disposition was improper, he fails to support his arguments with evidence or citations to specific facts showing a triable issue. See *Dep't of Enf't v. Claggett*, Complaint No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *8 (FINRA NAC Sept. 28, 2007); cf. *Sands Bros. Asset Mgmt., LLC*, Admin. Proceeding Release No. 3081, 2015 SEC LEXIS 3556, at *3 (Aug. 31, 2015) (applying the Commission's standard for summary

²⁰ In cases involving motions for summary disposition, FINRA looks to Federal Rule of Civil Procedure 56 for guidance because FINRA Rule 9264's "standard is based on the standard for summary judgment motions in civil litigation." *Dep't of Enf't v. Charles Schwab & Co., Inc.*, Disciplinary Proceeding No. 2011029760201, 2013 FINRA Discip. LEXIS 14, at *19 & n.14 (FINRA Hearing Panel Feb. 21, 2013), *aff'd in part, rev'd on other grounds in part*, 2014 FINRA Discip. LEXIS 5 (FINRA Bd. of Governors Apr. 24, 2014).

disposition and explaining that the opposing party must “*must present specific facts* showing a genuine issue [] for resolution at a hearing”) (emphasis added). Because his arguments are supported by nothing more than conclusory accusations, the Commission should reject Escobio’s challenges to the NAC’s decision and dismiss the application. *Claggett*, 2007 FINRA Discip. LEXIS 2, at *9 (“[c]onclusory allegations . . . are insufficient to defeat a motion for summary disposition”).

B. Summary Disposition Was Proper as to Escobio’s Liability

The NAC properly affirmed the Hearing Panel’s decision to grant summary disposition as to both causes under Rule 8210, as Escobio undisputedly failed to comply with his responsibility to provide information, documents, and testimony requested under Rule 8210. *See* RP 1015-20; *Walblay*, 2014 FINRA Discip. 3, at *3; *Matsushita*, 475 U.S. at 585-86. Rule 8210 requires any person subject to FINRA’s jurisdiction to provide information and testimony with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding.²¹ “The rule is at the heart of the self-regulatory system for the securities industry” and “provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (quoting *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993)).

“Delay and neglect on the part of members and their associated persons undermine the ability of

²¹ Specifically, Rule 8210 provides, “[f]or 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.” FINRA Rule 8210(a)(1). The rule further states that “[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule.” FINRA Rule 8210(c).

[FINRA] to conduct investigations and thereby protect the public interest.” *Rouse*, 51 S.E.C. at 588.

As a person formerly associated with a FINRA member, Escobio had a duty to “fully and promptly” comply with FINRA’s requests for information, documents, and testimony. *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *21; *Joseph Patrick Hannan*, 53 S.E.C. 854, 860 (1998) (“Hannan, as a former associated person, had an obligation to make himself available and to provide whatever information he possessed to [FINRA].”).²² It is undisputed that he failed to comply with 10 such requests (five requests for information and documents, as alleged in cause one, and five requests for testimony, as alleged in cause two). The record demonstrates that FINRA properly served all 10 Rule 8210 requests on Escobio at his CRD address and, when applicable, on his attorney.²³ See FINRA Rule 8210(d) (providing that a Rule 8210 request is deemed to be received by a formerly registered person when it is mailed or otherwise transmitted to his last-known CRD address or transmitted to his attorney). Escobio does not assert that he did not receive the requests. See generally Opening Brief of Respondent (“Op. Br.”) at 1-21. Indeed, the record reflects that the five requests for information and documents were delivered.²⁴

²² FINRA retains jurisdiction over a formerly associated person for at least two years after the person’s registration terminates. FINRA By-Laws Art. V, Sec. 4(a). Because Escobio’s registration terminated on July 27, 2017, he was subject to FINRA’s jurisdiction at the time FINRA sent the Rule 8210 requests between March and June 2019. RP 447-48 (terminating Escobio’s registration effective July 27, 2017); RP 497, 507, 519, 525, 543, 553, 583, 607, 653, 693 (Rule 8210 requests).

²³ RP 245, 487 (reflecting Escobio’s CRD address); RP 497, 507, 519, 525, 543, 553, 583, 607, 653, 693 (reflecting service of the Rule 8210 requests).

²⁴ RP 505, 516, 535, 547, 551 (reflecting delivery of the requests for information and documents).

And, it is apparent that either Escobio or his counsel (or both) received the five requests for testimony, as counsel communicated with Enforcement about those requests.²⁵

Despite proper service and delivery, Escobio did not comply—or even partially comply—with any of the Rule 8210 requests. RP 246-52. Escobio did not respond at all to any of the five requests for information and documents. RP 246-48. And, with respect to the five requests for testimony, he provided a string of shifting excuses for his inability to comply, at times waiting until shortly before the OTR to advise that he would not attend. RP 605-06, 641-43, 709-10. Accordingly, the record conclusively establishes that Escobio is liable for the Rule 8210 violations charged in the complaint. RP 16-19; *see Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *15-16 (May 4, 2007) (stating “the failure to respond to [FINRA’s] requests for testimony demonstrates a prima facie violation of . . . Rule 8210”); *Toni Valentino*, 57 S.E.C. 330, 331-36 (2004) (the applicant violated Rule 8210 when she corresponded with FINRA about its requests for testimony but ultimately did not comply).

As before the Hearing Panel and the NAC, Escobio does not dispute that he was properly served and failed to comply with the Rule 8210 requests. RP 715-17, 845-61, 915-28; Op. Br. at 1-21. Instead, he continues to argue that Enforcement lacked a competent basis for the underlying investigation. Op. Br. at 9, 14-18. This argument is irrelevant because Escobio was not charged with the misconduct that was the subject of the investigation—that is, continued association with a member firm after his statutory disqualification and termination of his registration. RP 12-15, 244-46. Rather, Escobio was charged with failing to fulfill his obligation to cooperate with Rule 8210 requests. RP 12-15, 795-98; *see CMG Inst. Trading*, 2009 SEC

²⁵ RP 569, 605, 641-43, 687, 709-10 (communications with counsel concerning the requests for testimony).

LEXIS 215, at *28 (explaining that the applicants' argument that they were in net capital compliance was irrelevant, as they were not charged with a net capital violation, but with failure to comply with Rule 8210). His undisputed failure to comply with any of Enforcement's Rule 8210 requests violated the rule, regardless of whether he considered the underlying investigation to be justified.²⁶ See *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *28; see also *Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994) (explaining that even if the respondent was innocent of any wrongdoing that is the subject of an inquiry, the obligation to respond to Rule 8210 requests for information is independent of his obligation to refrain from other misconduct).

The Commission also should reject Escobio's arguments that Enforcement conducted the investigation for an improper purpose. See Op. Br. at 9, 18. These arguments are insufficient to demonstrate that summary disposition was inappropriate, as they are unsupported by citations to the record or evidence of an improper purpose.²⁷ See *id.*; see also RP 715-79; *Claggett*, 2007 FINRA Discip. LEXIS 2, at *8-9. Moreover, Escobio's beliefs about the purpose of an

²⁶ Because Escobio's failure to comply with Rule 8210 requests is the only issue material to liability, the Commission should reject as irrelevant his assertions that Enforcement improperly supported its motion for summary disposition with hearsay statements concerning the underlying investigation. See Op. Br. at 1, 5, 7, 14. In any event, there is no rule against hearsay in administrative proceedings. *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *46 (Jan. 30, 2009), *petition for review denied*, 416 F. App'x 142 (3d Cir. 2010). And, even if the Federal Rules of Evidence applied to this case, which they do not, Enforcement's statements explaining why FINRA sent the Rule 8210 requests would not qualify as hearsay because they were not offered for the truth of the matter asserted, but to provide context for why FINRA sent the Rule 8210 requests. See RP 244-45; Fed. R. Evid. 801(c); *Woolford v. Rest. Concepts, II, LLC*, No. 07-cv-011, 2008 U.S. Dist. LEXIS 5187, at *21 (S.D. Ga. Jan. 23, 2008) ("Testimony is not hearsay if it is offered only to show the context within which parties had been acting, or to show a party's motive or intent for behavior.") (internal quotation omitted).

²⁷ Before the NAC, Escobio submitted opinion articles discussing FINRA's enforcement practices. RP 865-86. As discussed in more detail below (*infra* at 25-26 & n.34), these articles were not properly introduced into the record and, in any event, are irrelevant to this case.

investigation do not affect his obligation to comply with any related Rule 8210 requests, which is “unequivocal.” *See Michael Markowski*, 51 S.E.C. 553, 557 (1993); *Michael David Borth*, 51 S.E.C. 178, 181 (1992) (“The Rules do not permit second guessing [FINRA’s] requests.”). And, even if the Commission were to consider the propriety of FINRA’s investigation, the exhibits Enforcement attached to its motion for summary disposition demonstrate that the investigation had a solid basis.²⁸ RP 479-86.

In sum, it is undisputed that Escobio failed to comply with Enforcement’s five requests for information and documents (as alleged in cause one) and five requests for testimony (as alleged in cause two). Accordingly, summary disposition was appropriate as to both causes. *See Walblay*, 2014 FINRA Discip. 3 at *3; *Berger*, 2007 SEC LEXIS 895, at *15-16. Faced with undisputed facts establishing his liability, Escobio continues to attack the legitimacy of FINRA’s

²⁸ For example, Enforcement’s exhibits included a November 6, 2017 email addressed to Escobio at his Southern Trust account, in which an individual referred to a lunch meeting that day and asked Escobio to bring materials showing growth in the individual’s accounts. RP 481. The meeting was confirmed in a response sent from Escobio’s Southern Trust email account. *Id.*

In November 2020, Southern Trust (now operating under the name of TradePro Securities) entered into a Letter of Acceptance, Waiver, and Consent (“AWC”) with Enforcement, in which Southern Trust agreed not to contest findings that the firm ignored evidence that a statutorily disqualified founding member of the firm, whose registration terminated in July 2017, continued to access his Southern Trust email account after July 2017. *See* FINRA Discip. Proceeding No. 2018059545203, AWC at 5-6, *available at*: https://www.finra.org/sites/default/files/fda_documents/2018059545203%20Southern%20Trust%20Securities%2C%20Inc.%20%20Susan%20Molina%20Escobio%20CRD%201062322%20CRD%20103781%20AWC%20va.pdf (last visited July 29, 2021). In particular, Southern Trust agreed not to contest findings that the formerly registered individual continued to access his Southern Trust email account from his personal mobile phone after July 2017, and that an “auto-forwarding” rule created in February 2018 automatically copied his personal email account on any emails sent to his Southern Trust account. *Id.* While this AWC was entered in a separate proceeding that did not name Escobio as a respondent, it casts further doubt on Escobio’s present assertions that the underlying investigation leading to this case was unfounded. *See* Op. Br. at 14-17.

underlying investigation. The Commission should reject these arguments because they lack any basis in the record and, in any event, are irrelevant to Escobio's liability for failing to comply with his unequivocal duty to cooperate with Rule 8210 requests.

C. Summary Disposition Was Proper as to Sanctions, and the Sanctions Imposed Are Appropriately Remedial

Escobio challenges the sanctions imposed in two respects—first, by arguing that the NAC and the Hearing Panel overlooked mitigating evidence that justified holding a hearing (Op. Br. at 10-14) and second, by arguing that a bar was unwarranted (Op. Br. at 18-20). For the reasons discussed below, the Commission should reject these arguments.

i. Escobio Failed to Point to Any Specific Facts or Evidence that Would Merit a Hearing as to Sanctions

The NAC properly affirmed the Hearing Panel's decision to grant summary disposition as to sanctions because Escobio failed to establish a genuine issue of fact material to the sanctions analysis. *See* FINRA Rule 9264(e); *cf. Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *41-44 & n.62 (Feb. 13, 2009) (explaining that summary disposition is appropriate as to sanctions when no material fact is in dispute). Escobio contends that the NAC and the Hearing Panel overlooked evidence that the contempt order entered in the CFTC matter caused him patent financial, physical, and mental stress. Op. Br. at 10-13. But Escobio has never established specific facts showing how any stress related to the contempt order caused his complete inability to comply with 10 Rule 8210 requests sent over the course of several months. *See* Op. Br. at 10-13; RP 715-79, 845-62, 915-28; *Claggett*, 2007 FINRA Discip. LEXIS 2, at *8. Rather, the record demonstrates that Escobio's complete failure to comply with the requests continued for more than two months after his release from detention. RP 247-52, 495. During that period, he provided differing reasons for his non-compliance to Enforcement—none of

which were based on his stress level. RP 606 (advice-of-counsel); RP 643 (litigation in the CFTC case); RP 710 (work schedule).²⁹ Indeed, the record is bereft of any evidence that Escobio asked Enforcement for an extension or any other accommodation due to his stress level, and he failed to provide the Hearing Panel with an affidavit or other evidence explaining how stress caused his continued non-compliance.³⁰ *See* RP 569, 605-06, 641-43, 687, 709-10 (Escobio's communications with Enforcement); RP 715-79 (Escobio's opposition to the motion for summary disposition). Accordingly, Escobio's assertion that stress caused his non-compliance is merely an unsupported, post-hoc rationalization that is insufficient to defeat summary disposition.³¹ *See Claggett*, 2007 FINRA Discip. LEXIS 2, at *9 (conclusory allegations are insufficient to defeat summary disposition).

Furthermore, the NAC did not ignore the fact that Escobio was subject to a contempt order when he received some of the Rule 8210 requests at issue. *See* Op. Br. at 10-12. Instead,

²⁹ Notably, while one of Escobio's communications with Enforcement referred to the CFTC litigation as a reason for non-compliance, that letter cited to the time needed for that litigation—and not to any stress caused by the litigation. RP 643.

³⁰ Contrary to Escobio's assertion, the NAC did not state that a litigant necessarily must present medical evidence—or any particular type of evidence—to support a claim that stress mitigated misconduct. *See* Op. Br. at 11-12; RP 1022. Instead, the NAC accurately pointed out that Escobio failed to present *any* evidence to support his claim that stress was a mitigating factor for his extended and complete non-compliance with the Rule 8210 requests. RP 1022. Escobio does not explain why he could not have submitted his own affidavit to support his claim that stress was a mitigating factor. *See* Op. Br. at 10-14.

³¹ Escobio's assertion that he faced a continual threat of reincarceration does not change this analysis. *See* Op. Br. at 11-13. The assertion is contrary to the reasons Escobio offered for his non-compliance in his correspondence with Enforcement, and Escobio did not develop the record in this respect when he was before the Hearing Panel. *See* RP 606, 643, 710, 715-79. Moreover, the record does not support any assertion that Escobio faced multiple contempt motions during the relevant period, as the CFTC filed one additional contempt motion after Escobio's April 26, 2019 release from detention, and that motion was filed over a month after FINRA sent its final Rule 8210 request. RP 693, 728-29.

the NAC assumed that the contempt order caused Escobio some level of stress, but aptly noted that Escobio presented no evidence showing how any such stress caused his months-long, complete inability to comply with multiple Rule 8210 requests—even after his release from detention. RP 715-79, 1022. A condition such as stress is not mitigating if it does not explain the conduct at issue. *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *29-30 (Mar. 14, 2018). Here, even assuming that Escobio experienced stress during the relevant time period, that does not explain his extended and complete failure to comply with the Rule 8210 requests following his release from detention, nor his failure to contact Enforcement to explain the purported problem and make alternative arrangements. *See id.*; *see also Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *73-74 (Sept. 24, 2015) (explaining that the applicant’s “significant health issues” did not mitigate his Rule 8210 violations because he failed to explain the problem to FINRA and propose different arrangements). Accordingly, Escobio failed to demonstrate that this purported mitigating factor merited a hearing. *See Claggett*, 2007 FINRA Discip. LEXIS 2, at *8 (the non-moving party must establish “specific facts that would create a triable issue”) (citing *Matsushita*, 475 U.S. at 586-87).

Escobio points to no other factors that, in his view, would have merited a hearing as to sanctions. Op. Br. at 10-14. And, the record reflects that the considerations relevant to sanctions are undisputed. There is no dispute that Escobio entirely failed to comply with 10 Rule 8210 requests sent over the course of several months. *See FINRA Sanction Guidelines*, at 7 (Oct. 2020) (“*Guidelines*”) (referring to the number of instances of misconduct and the length of time

at issue as relevant considerations).³² There is also no genuine issue of fact as to the purpose of the underlying investigation—that is, to investigate whether Escobio continued to associate with a FINRA member after his statutory disqualification and termination of his registration. *See Guidelines*, at 33 (listing the importance of the information requested as a principal consideration); RP 244-45. Because the considerations relevant to the sanctions analysis are undisputed—and because Escobio raised no genuine issue of fact concerning a mitigating factor—the NAC properly affirmed the Hearing Panel’s grant of summary disposition as to sanctions. *See Walblay*, 2014 FINRA Discip. LEXIS 3, at *3; *cf. Kornman*, 2009 SEC LEXIS 367, at *41-44 & n.62.

ii. The Sanctions Imposed Are Neither Excessive Nor Oppressive

The Commission should affirm the NAC’s sanctions, which are well-supported and are neither excessive nor oppressive. Section 19(e)(2) of the Exchange Act provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). “Under this standard, [the Commission] consider[s] any aggravating or mitigating factors and whether the sanctions are remedial and not punitive.” *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 SEC LEXIS 911, at *24 (Apr. 3, 2020). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are consistent with the framework provided in FINRA’s Guidelines. *See John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *42 (June 14, 2013) (noting that

³² Available at: <https://www.finra.org/rules-guidance/oversight-enforcement/sanction-guidelines> (last visited July 29, 2021).

while the Guidelines are not binding on the Commission, they serve as a “benchmark” in the Commission’s review of sanctions).

The Commission should affirm the NAC’s decision to bar Escobio for each cause because these sanctions are consistent with the Guidelines and, considering the circumstances of this case, appropriately remedial. *See Newport Coast Sec.*, 2020 SEC LEXIS 911 at *24; *Plunkett*, 2013 SEC LEXIS 1699 at *42. The relevant Guidelines provide that a bar is the standard sanction when, as here, a respondent wholly failed to comply with a Rule 8210 request. *Guidelines*, at 33. This sanction appropriately reflects the serious nature of a Rule 8210 violation, as a person’s failure to comply with requests for information, documents, and testimony under the rule “subverts FINRA’s ability to carry out its regulatory responsibilities, threatening investors and the markets.” *Plunkett*, 2013 SEC LEXIS 1699, at *33 (internal quotation omitted); *see also Valentino*, 57 S.E.C. at 339 (explaining that the applicant’s “attempts to delay and ultimately avoid her appearance [at an interview were] especially troubling given the importance of Rule 8210”). Moreover, Escobio’s Rule 8210 violations were aggravated by the importance of the information requested. *See Guidelines*, at 33 (providing that a principal consideration is the “[i]mportance of the information requested as viewed from FINRA’s perspective”). In particular, the information, documents, and testimony Enforcement requested would have shed light on whether Escobio continued to associate with a FINRA member after his statutory disqualification and termination of his registration—which would constitute serious misconduct. *See Michael F. Flannigan*, 56 S.E.C. 8, 17 (2003) (explaining that the “registration requirement provides an important safeguard in protecting public investors and strict adherence to that requirement is essential”) (internal quotations omitted); *see also Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *13 (Oct. 1, 2018)

(affirming the NAC’s finding that the applicant engaged in serious misconduct by associating with a member firm during his suspension). Accordingly, the NAC’s decision to impose a bar for each cause is consistent with the relevant Guidelines. *See Guidelines*, at 33.

While the Guidelines are not absolute or binding on the Commission, the facts and circumstances of this case otherwise demonstrate that a bar is appropriately remedial. *Guidelines*, at 1 (explaining that the Guidelines are not absolute, and that adjudicators may impose sanctions above or below the recommended range); *Plunkett*, 2013 SEC LEXIS 1699 at *42. Escobio had ample opportunity to comply with the 10 Rule 8210 requests Enforcement sent to him over the course of several months. *See* RP 246-52. Despite repeated opportunities, Escobio did not even partially comply with the requests—all of which warned him that his failure to comply could result in sanctions.³³ RP 246-52. Instead, he entirely failed to respond to five requests for information and documents. RP 246-48. Although he replied to Enforcement’s OTR requests, he did so only to delay and ultimately avoid appearing at an OTR. RP 606, 643, 687, 710. As a result of Escobio’s failure to comply with the Rule 8210 requests, Enforcement was unable to obtain from him information relevant to its investigation into potentially serious misconduct. RP 244-46; *see Flannigan*, 56 S.E.C. at 17. Under these circumstances, Escobio’s Rule 8210 violations posed a threat to investors and a bar is appropriate to protect investors and deter others from engaging in similar violations. *See David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 at *63-64 (July 27, 2015) (explaining that a bar was appropriately remedial because the applicant’s “longstanding failure to cooperate” with Rule 8210 requests posed “a continuing danger to the public interest”); *Elliot M. Hershberg*, 58 S.E.C.

³³ RP 498, 507, 519, 525, 543, 553-54, 583-85, 607-10, 653-57, 693-94 (warnings regarding non-compliance).

1184, 1189 (2006) (concluding that a bar was appropriate for the applicant’s Rule 8210 violation because it would “serve as a deterrent to others who may be inclined to ignore [FINRA’s] information requests” (internal quotation omitted)), *aff’d*, 210 F. App’x 125 (2d Cir. 2006).

Escobio’s arguments to the contrary lack merit. While Escobio continues to argue that Enforcement’s investigation was conducted for an improper purpose, he has failed to identify specific facts or evidence supporting this allegation. Op. Br. at 18-19; RP 715-79, 845-62, 915-28. Although Escobio attempts to support this argument by attaching as an appendix to his brief and citing opinion articles and a FINRA webpage, his reliance on these sources is misplaced for several reasons. First, Escobio did not properly introduce these materials into the record by either submitting them to the Hearing Panel or seeking leave to introduce them into the record either before the NAC or the Commission. RP 715-79, 801-929, 1020; FINRA Rule 9346(a)-(b) (providing that a party may submit additional evidence only with the NAC’s approval); Commission Rules of Practice 452, 460 (providing that the Commission will “determine each matter on the basis of the record” but may grant a motion to submit additional evidence). But even if the Commission were to overlook this procedural defect, the items Escobio cites are irrelevant because they say nothing about the circumstances of this specific case.³⁴ See Op. Br., Appendix, Section Nos. 2-3, unnumbered at 18-36; *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 SEC LEXIS 2684, *50-51 (Feb. 7, 2020) (explaining that all sanctions are evaluated on a case-by-case basis), *petition for review dismissed in part and denied in part*,

³⁴ For this reason, Escobio cannot meet the applicable standard, which requires that the party seeking to adduce additional evidence “show with particularity that such additional evidence is material.” Commission Rule of Practice 452. In addition, Escobio fails to identify “reasonable grounds for [his] failure” to properly introduce these materials into the record before the Hearing Panel or the NAC. See Op. Br. at 18-20; Commission Rule of Practice 452.

989 F.3d 4 (D.C. Cir. 2021). For the same reasons, the Commission should not consider Escobio's statements concerning a separate proceeding involving his wife. *See* Op. Br. at 19-20; *Springsteen-Abbott*, 2020 SEC LEXIS 2684 at *50-51; Commission Rules of Practice 452, 460.

The Commission should also disregard Escobio's assertions about any settlement discussions he may have had with Enforcement. *See* Op. Br. at 19. Any such discussions are not part of the record and, in any event, should not be considered because FINRA "had no obligation to settle this proceeding on [Escobio's] terms, and settlement negotiations are irrelevant to the sanctions determination." *Richard Allen Reimer, Jr.*, Exchange Act Release No. 84513, 2018 SEC LEXIS 3022, at *34 (Oct. 31, 2018) (internal quotation and alteration omitted).

Finally, Escobio argues that a bar is unwarranted because there is no evidence of customer harm in this case, and he is both retired and statutorily disqualified from the industry. Op. Br. at 20. These arguments lack merit. A lack of customer harm is not a mitigating factor in a Rule 8210 case. *Guidelines*, at 33 n.2; *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *17 (Apr. 11, 2008), *petition for review denied*, 566 F.3d 1172 (D.C. Cir. 2009). And, while Escobio is statutorily disqualified and has purportedly retired from the industry, he could seek to associate with a member absent a bar. *See Evansen*, 2015 SEC LEXIS 3080, at *63; FINRA Rules 9520-27 (setting forth procedures for a person to become associated with a member firm, notwithstanding his statutory disqualification). Because Escobio's Rule 8210 violations pose a danger to the investing public, a bar is appropriate to protect the public from a possible future association. *See id.*

Summary disposition was appropriate as to sanctions because the relevant considerations are undisputed, and Escobio fails to establish specific facts that would justify a hearing. Moreover, the sanctions imposed are appropriately remedial because Escobio's demonstrated

disregard for his obligation to comply with Rule 8210 requests poses a threat to the industry, and others should be deterred from engaging in similar misconduct.

III. CONCLUSION

It is undisputed that Escobio wholly failed to comply with five Rule 8210 requests for information and documents and five Rule 8210 requests for testimony. The record demonstrates that the information sought by the requests was important because it pertained to potentially serious misconduct. While Escobio continues to make unsupported allegations that the underlying investigation was unjustified, and that stress impacted his non-compliance, he fails to establish any specific facts or evidence that would justify a hearing. Accordingly, the NAC properly affirmed the Hearing Panel's decision to grant summary disposition as to both liability and sanctions.

Escobio's complete failure to comply with multiple Rule 8210 requests renders him unfit to remain in the securities industry, as his disregard for this critical obligation poses a threat to investors. Accordingly, the bars imposed by the NAC are warranted, and the Commission should dismiss the application for review.

Respectfully submitted,

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August 2, 2021

CERTIFICATE OF COMPLIANCE

I, Ashley Martin, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Ashley Martin, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 8,432 words.

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CERTIFICATE OF SERVICE

I, Ashley Martin, certify that on this 2nd day of August 2021, I caused a copy of the foregoing "FINRA's Brief in Opposition to Application for Review," Administrative Proceeding File No. 3-20260, to be filed through the SEC's eFAP system and served by electronic mail on:

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