SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 69766 / June 14, 2013

Admin. Proc. File No. 3-14810

In the Matter of the Application of

JOHN JOSEPH PLUNKETT
476 16th Street
Brooklyn, NY 11215

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority, Inc.

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDINGS

Conduct Inconsistent with Just and Equitable Principles of Trade

Failure to Provide Requested Information

President, chief compliance officer, general securities principal, and general securities representative directed removal of member firm's books and records and erasure of its electronic files before he left the firm following a business dispute. He also failed to respond to FINRA's requests for information made pursuant to Rule 8210. *Held*, registered securities association's findings of violations are *sustained*; the bar it imposed for the first cause of action is *sustained*; the bar it imposed for the second cause of action is *set aside*, and this proceeding is *remanded* so that sanctions for that cause of action may be reassessed.

APPEARANCES:

John Joseph Plunkett, pro se.

Alan Lawhead, *Gary Dernelle*, and *Jante C. Turner*, for the Financial Industry Regulatory Authority, Inc.

Appeal filed: March 21, 2012
Last brief received: June 20, 2012

I.

John Joseph Plunkett, a former president, chief compliance officer, general securities principal, and general securities representative of Lempert Brothers International USA, Inc.,[1] seeks review of a disciplinary action taken against him by the Financial Industry Regulatory Authority, Inc.[2] FINRA found that Plunkett violated NASD Conduct Rule 2110 when he resigned from Lempert in anticipation of being fired and, before leaving, directed others to remove almost all of Lempert's books and records, erase its electronic files, and remove its back-up tapes.[3] FINRA also found that Plunkett violated FINRA Rules 8210 and 2010 by failing to respond to its staff's requests for information.[4] FINRA barred Plunkett for each violation. We base our findings on an independent review of the record. We sustain FINRA's findings of both violations. We further sustain its imposition of a bar for the first cause of action. However, we set aside its imposition of the bar for the second cause of action and remand the case for further consideration in accordance with the analysis in this opinion.

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[1] According to FINRA's BrokerCheck website, the firm terminated or withdrew its registration with FINRA on January 12, 2010. *See* http://brokercheck.finra.org/Support/ReportViewer.aspx?SearchGroup=Firm&FirmKey=128241&BrokerKey=-1 (last visited on March 4, 2013).

[2] FINRA is a private, not-for-profit, self-regulatory organization registered with and overseen by the Securities and Exchange Commission. It was created in July 2007 following the consolidation of the National Association of Securities Dealers, Inc. and the member regulation, enforcement, and arbitration functions of the NYSE Regulation, Inc. Securities Exchange Act Release No. 56751, 2007 SEC LEXIS 2902, at *3−4 (Nov. 6, 2007); *Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Implement Governance and Related Changes To Accomm. the Consol. of the Member Firm Regulatory Functions of NASD and NYSE Reg., Inc.*, Exchange Act Release No. 56145, 2007 SEC LEXIS 1640, at *133 (July 26, 2007).

[3] NASD Conduct Rule 2110 states that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." NASD Rule 2110 applies with equal force to FINRA members and their associated persons. *See* NASD Rule 0115(a). On December 15, 2008, NASD Rule 2110 was superseded by FINRA Rule 2010, though its contents remained the same. Similarly, NASD Rule 0115(a) was replaced by FINRA Rule 0140(a). *FINRA Announces SEC Approval and Effective Date for New Consolidated FINRA Rules*, FINRA Notice to Members 08-57, 2008 FINRA LEXIS 50, at *30, 32 (Oct. 2008). When discussing the first cause of action, this decision relies on NASD Rule 2110, which was the rule that was in place at the time of Plunkett's misconduct.

[4] Effective December 15, 2008, NASD Rule 8210 was superseded by FINRA Rule 8210 as part of the rulebook consolidation process. *See FINRA Announces SEC Approval and Effective Date for New Consolidated FINRA Rules*, 2008 FINRA LEXIS 50, at *1, 16. Because the conduct for the second cause of action occurred after this consolidation took place, FINRA Rules 8210 and 2010 apply.

II.

A. In the midst of a business dispute, Plunkett resigned from Lempert and directed the removal of books and records and the erasure of electronic files.

The facts are largely undisputed. In February 1993, Plunkett entered the securities industry as a registered representative with an NASD member firm. After associating with a few other firms, Plunkett joined Lempert in August 2003 and helped establish the firm. He was a registered general securities principal and representative, and he served as the firm's president and chief compliance officer.

Lempert, a registered broker-dealer, was wholly owned and funded by Lempert Brothers Holding Establishment ("LBHE"), a holding company based in Liechtenstein. LBHE was owned by two Ukrainian brothers, Eduard and Roman Orlov, who lived in Austria. Because they were overseas, the Orlovs authorized their nephew, George Milter, to act as their surrogate in the United States. In addition to Lempert, the Orlovs also owned and operated several other brokerage firms in Europe.

Lempert was never profitable, and by March 2005 the Orlovs stopped paying its expenses—including its employees' salaries. After unsuccessfully seeking back pay, Plunkett and several others at the firm told the Orlovs and Milter that they intended to leave Lempert if its financial situation did not improve. But Plunkett did not disclose that he and two other principals, Mitch Borcherding and Brian Coventry, had already decided to establish their own broker-dealer (later known as Emerald Investments, Inc.). Their plan was to remain at Lempert for as long as they could, building a customer base that they intended to take with them when they left.

On or about March 9, 2006, Plunkett received an e-mail from an individual in Europe who said she was part of a team of lawyers representing certain European investors in a lawsuit against a purported European branch of a United States-based broker-dealer. The e-mail attached a memorandum addressed to Lempert and the other broker-dealer that described in further detail allegations that the Orlovs and the other broker-dealer were involved in defrauding the European investors and binding Lempert to the assumption of the broker-dealer's obligations.[5] On March 23, Plunkett faxed and e-mailed a letter to the Orlovs expressing his concern about the

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[5] On March 31, 2006, FINRA staff faxed a letter to Plunkett requesting information pursuant to Rule 8210 about a customer complaint it received on March 22, 2006. The customer complaint was sent by a European investor who made similar allegations about fraudulent activity involving the same purported European branch of a United States-based broker-dealer and Lempert. Plunkett responded to FINRA's request in a letter dated April 13, 2006. Plunkett also consulted Lempert's attorney, who wrote a response to the European investor on March 31, 2006. Among other things, the letter disavowed Lempert's involvement in the alleged fraud.

allegations, including his belief that documents referred to in the memorandum as involving Lempert were false and/or forged.[6]

As the allegations came to light, Plunkett also learned that the Orlovs intended to fire him. Around March 16, an attorney representing the Orlovs and Milter prepared a draft resolution for Lempert's board of directors to approve, which he e-mailed to Milter. That resolution called for Plunkett's immediate dismissal as Lempert's president. Plunkett learned of this because he reviewed all of Lempert's correspondence in his capacity as president and chief compliance officer.[7]

On or about March 27, Plunkett held a meeting outside of the firm's offices with Coventry, Raymond Thomas (another principal at the firm), and all but three members of Lempert's staff.[8] During that meeting, Plunkett disclosed his plan to leave Lempert and invited each to join him at Emerald Investments. Everyone in attendance agreed. On Friday, March 31, Plunkett wrote fourteen checks from Lempert's bank account totaling approximately $28,000. Some of the checks were for back pay to Plunkett and others who agreed to join him at Emerald. Other checks were made payable to the firm's vendors for amounts in arrears.

The following Monday, April 3, Plunkett and his confederates left their offices at the close of business, waited for the non-resigning personnel to leave, and then returned. That evening, at Plunkett's direction, they took all of the firm's books and records, except those that were in the offices of Milter, Borcherding, and Shah. Among other things, they took Lempert's accounting documents, checkbook and register, bank and brokerage statements, compliance manuals, confidential customer files containing account information and Social Security numbers, employee records, documents of incorporation, order tickets, and documents concerning pending investment deals. After copying all of the firm's electronic records (including its FOCUS reports), they erased the originals and removed the firm's back-up computer tapes. Everything they took was temporarily stored in an attorney's office. The items

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[6] The record does not contain a response from the Orlovs, and Plunkett asserts that they made none. FINRA made no findings as to the accuracy of the allegations against the Orlovs and Milter. *Dep't of Enf. v. John Joseph Plunkett*, Complaint No. 20060052598-01, 2011 FINRA Discip. LEXIS 22, at *13 n.7 (OHO Jan. 4, 2011). Nor do we, as such findings are unnecessary for the issues at hand.

[7] Around this time, Plunkett also had a disagreement with that attorney about the production of documents in connection with a routine compliance examination conducted by the SEC. On March 30, the attorney sent another e-mail to the Orlovs and Milter that explained the circumstances of the disagreement. After summarizing what transpired, the attorney added, "[t]his of course may all be academic as we will soon be relieving [Plunkett] of his position." Plunkett saw this e-mail as well.

[8] Those three were Milter, Borcherding, and Andy Shah. Milter, as the Orlovs' surrogate, was excluded. So, too, was Shah, a registered representative who had ties to Milter. Borcherding, who was unwilling to sever ties with the firm, was also not invited. According to Plunkett's Wells submission, "Mitch was not asked to attend due to his insistence upon wanting to remain on the fund he had created with Lempert even after we left. . . . Mitch stated that he would not leave his fund no matter what! For that reason we decided to leave Mitch behind." Plunkett's Response to Wells Notice at ¶ 10 (June 29, 2009).

were later moved to the office space Emerald Investments had subleased in the same building as Lempert two weeks earlier.

According to Plunkett, he suspected that the Orlovs were going to forge more firm documents in order to transfer the accounts of the fraud victims to Lempert accounts and then reimburse the defrauded investors by filing a false claim with the Securities Investor Protection Corporation.[9] Plunkett claimed that he intended to thwart the Orlovs' plans by removing the firm's books and records and computer files without the Orlovs' knowledge, thereby preventing the Orlovs from forging any firm documents.

Before leaving that night, each of the departing employees submitted a letter of resignation addressed to Plunkett as Lempert's president and chief compliance officer. After accepting those resignations, Plunkett faxed his own letter of resignation to the Orlovs in Vienna.[10] Within 24 hours, Plunkett and the others contacted all of their former firm's customers by letter or telephone. Because FINRA had not yet approved Emerald's membership application, Plunkett and the others briefly joined Success Trade Securities, Inc. Almost all of Lempert's customers agreed to transfer their accounts to Success and, later, to Emerald. When the remaining Lempert employees arrived for work on April 4, they discovered the ransacked offices and called the police. They also stopped payment on the 14 checks Plunkett had written on March 31.

On April 4, Plunkett called FINRA and an SEC examiner who had been on site auditing the firm to explain the resignations and the removal of Lempert's records.[11] On April 11, he met with FINRA representatives for a follow-up conversation. Plunkett never offered to turn over Lempert's books and records to FINRA; nor did FINRA ask him to do so. When FINRA staff learned that Lempert no longer had access to its books and records, however, the staff told Lempert that, until the firm could confirm its compliance with net capital requirements, the firm could only liquidate transactions.

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[9] SIPC was created by the Securities Investor Protection Act of 1970 (SIPA) (15 U.S.C. § 78aaa-lll)

> to protect customers of broker-dealers and maintain confidence in the United States securities markets. These goals are accomplished in two principal ways. First, when a broker is in or approaching financial difficulty, SIPC has the authority to petition the courts for protection of the broker's customers in a "protective proceeding." Such protection can include the court-ordered appointment of a trustee to liquidate the firm and satisfy customer claims from the proceeds of the liquidation (15 USC § 78fff). Second, SIPC is endowed with funds raised by assessments on its members, who are all the brokers registered under Exchange Act section 15(b). From these funds, SIPC can advance monies to the trustee to settle claims.

Sec. Investor Protection Corp. v. BDO Seidman, LLP, 245 F.3d 174, 178 (2d Cir. 2001).

[10] In anticipation of their departure, a Lempert employee filed with FINRA earlier that day Uniform Termination Notices for Securities Industry Registration—commonly known as Forms U-4—on behalf of Plunkett and those who left with him.

[11] The record contains limited information about the nature of this examination.

On April 12, Lempert's attorney demanded that Plunkett immediately return the removed records.[12] But Plunkett refused to do so unless Lempert first agreed to compensate him and the others for back pay and to make other payments. Lempert's attorney tried without success between April and June to negotiate the return of the documents.

Plunkett's actions had a devastating effect on Lempert. During the next four months, the firm struggled to repair the damage and rebuild its business. Initially, it hired a consultant, and then a new principal, to reconstruct its records. After working with its clearing firm for two weeks, Lempert was able to get trading records. When Borcherding eventually spoke to the firm's former customers, he learned that some were confused about where their accounts were and were unaware they had been moved from Lempert.

B. FINRA initiated an investigation and requested information.

Shortly after meeting with Plunkett on April 11, 2006, FINRA initiated an investigation. Between May and October 2006, its staff sent Plunkett several requests for information pursuant to Rule 8210, to which he responded. Though Plunkett's responses to those requests were not perfect, FINRA never took issue with them.[13]

On May 8, 2009, FINRA sent Plunkett a Wells notice informing him that its staff had made a preliminary determination to recommend that a formal disciplinary proceeding against him be filed and giving him the opportunity to explain why the association should not subject him to legal action.[14] On June 29, 2009, Plunkett provided an explanation of the circumstances surrounding his departure from Lempert. He claimed that Lempert and the Orlovs intended to perpetrate a fraud on the investing public, and that he had taken the documents and computer tapes defensively. He also asserted there were documents and individuals that could substantiate his claims.

FINRA was unable to fully test his claims because Plunkett did not provide supporting documentation for all of his assertions or identify relevant fact witnesses. On July 15, 2009, it sent Plunkett a follow-up Rule 8210 request requiring him to answer twenty sets of

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[12] This is the same attorney referenced earlier who prepared the draft resolution calling for Plunkett's dismissal.

[13] As the hearing panel noted:

> Respondent responded to several requests for information from FINRA, although typically not promptly in 2006. FINRA requested information from Respondent pursuant to Rule 8210 on March 31, May 23, July 20, August 18, and October 20, 2006. Respondent submitted responses to all of these requests, answering all questions, except one about his financial situation.

Plunkett, 2011 FINRA Discip. LEXIS 22, at *37 (citations omitted). The March 31, 2006 request focused on the investor allegation concerning fraud by the Orlovs; later requests focused on the removal and erasure of Lempert's records.

[14] *See* FINRA Notice to Members 09-17, 2009 FINRA LEXIS 45, at *5-6 (Mar. 2009) (describing the Wells process).

interrogatories concerning his earlier representations and to produce supporting documentation no later than July 27. In the event any of the requested documents were no longer available, FINRA instructed Plunkett to explain the reasons why.

On July 27, Plunkett asked for more time to conduct his search, and FINRA set a new deadline of August 10. Plunkett did not meet that deadline. Instead, on August 11, without having produced any information, Plunkett asked for another extension, claiming he was ill and would provide the information "as soon as possible."[15] Having received no response by August 20, FINRA sent Plunkett a second Rule 8210 request that directed him to respond by September 3, which Plunkett again failed to do.

C. Plunkett and Lempert filed arbitration claims against each other.

Meanwhile, in June 2006, Plunkett and others who had resigned from Lempert filed arbitration claims seeking back pay from the firm and its owners. Lempert counterclaimed, alleging, among other things, that the claimants stole Lempert's property, breached their fiduciary duties, engaged in unfair competition, and tortiously interfered with existing and prospective customer relations. During the proceedings that followed, Plunkett produced some—though not all—of the files he had taken, but only after the firm twice moved to compel their production. On May 16, 2007, the arbitration panel denied the claimants any relief, and instead ordered them to pay Lempert approximately $550,000 in fees and compensatory and punitive damages.[16]

D. FINRA filed a disciplinary proceeding; the hearing panel found Plunkett liable; and the NAC increased sanctions.

On December 1, 2009, FINRA filed a complaint in this matter. On April 29, 2010—nine months after FINRA officially asked for documents and information related to his Wells submission and more than four months after it filed suit—Plunkett sent FINRA a written narrative in response. He did not attach any of the requested documents. Instead, he offered a number of excuses as to why he could not find them, including the general disarray of his office, the departure of his secretary, and Emerald's eviction from its space for nonpayment of rent.

During a two-day hearing that began on September 27, 2010, Plunkett admitted that the Orlovs did not authorize him to remove the firm's books and records or erase its electronic files. Instead, he claimed (as he did in his Wells submission) that his actions were justified. He acted, he said, to protect himself, the employees he supervised, the firm's customers, investors, and SIPC from fraud by Lempert's owners. When asked why he did not turn over to the SEC or

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[15] E-mail from Plunkett to FINRA, Aug. 11, 2009, at 1.

[16] Plunkett never paid that award and, in January 2010, FINRA filed a disciplinary action against him, which eventually resulted in his suspension until such time as he paid what was owed. As of the date of this opinion, Plunkett has not satisfied that obligation.

FINRA the records he removed, Plunkett said it was because he "didn't think of it" and because he did not want to be associated with the Orlovs' purported criminal activity.

On January 4, 2011, the hearing panel issued a decision that found that Plunkett violated NASD Rule 2110 by removing the firm's books and records and erasing its electronic files, fined him $20,000, and suspended him in all capacities for two years. It also found that Plunkett violated FINRA Rules 8210 and 2010 by failing to respond to FINRA's requests for information, fined him $5,000, and suspended him for six months, to be served consecutively with the two-year suspension. One of the stated reasons the hearing panel did not bar Plunkett from the industry for failing to respond was because Plunkett had previously responded to several other requests that touched upon the same subject matter.[17]

Although neither party appealed, a Review Subcommittee of FINRA's National Adjudicatory Council called this matter for discretionary review to examine the sanctions imposed by the hearing panel.[18] Once the case was before it, the NAC had the ability to "affirm, modify, reverse, increase, or reduce any sanction, or impose any other fitting sanction."[19] Plunkett did not participate in that review.

In a decision issued on February 21, 2012, the NAC found that the record "suggest[ed] that the Hearing Panel grossly misjudged the gravity of Plunkett's misconduct and the effect of that misconduct on Lempert['s] customers, the firm, and FINRA."[20] The NAC determined that Plunkett's misconduct "impeded [Lempert's] ability to comply with basic requirements necessary for customer protection" and "hindered the firm's ability to comply with a host of financial and operational rules."[21] It also found that "[t]he fact that Plunkett assumed control of customers' records without their consent, risked their assets to transfer their accounts to Emerald Investments, and held their records hostage for his personal gain is intolerable and presents a significant aggravating factor."[22] The NAC further found that Plunkett's conduct was "intentional and self-serving," and that his relevant disciplinary history, which the hearing panel did not consider, was an aggravating factor.[23] Based on its view of the seriousness of his misconduct toward Lempert, the NAC barred him for the removal and erasure of the Lempert's books and records.

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17 *Plunkett*, 2011 FINRA Discip. LEXIS 22, at *37.

18 *See* FINRA Rule 9312(a).

19 FINRA Rule 9348.

20 *Dep't of Enf. v. John Joseph Plunkett*, Complaint No. 2006005259801, 2012 FINRA Discip. LEXIS 1, at *17 (NAC Feb. 21, 2012).

21 *Id*. at *20−21.

22 *Id*. at *21.

23 *Id*. at *17, 22.

The NAC also found that Plunkett did not respond to FINRA's Rule 8210 requests for information before FINRA filed a complaint, which it treated as a complete failure to respond pursuant to its Sanction Guidelines.[24] It found that "the information and documents that FINRA requested not only were important to determine whether FINRA should proceed with formal disciplinary action against Plunkett, but also to assist FINRA's investigation of the Orlovs."[25] The NAC found no evidence of mitigation and also barred Plunkett for this second violation.

This appeal followed.

III.

A. The removal and erasure of Lempert's books and records and electronic files violated NASD Conduct Rule 2110.

NASD Conduct Rule 2110[26] states that "[a] member, in the conduct of his business, shall observe high standards of commercial honor and just and equitable principles of trade."[27] Pursuant to General Provision 0115(a), that rule applies with equal force to associated persons.[28] The "special focus" of the association's rules is "the professionalization of the securities industry."[29] Rule 2110 "is not limited to rules of legal conduct but [instead] states a broad ethical principle,"[30] giving FINRA the authority to impose sanctions for violations of "moral standards" even if there is no "unlawful" conduct.[31] Scienter is not an element of a Rule 2110 violation,[32] nor is it necessary to ascertain a respondent's motive to find that a violation was committed.[33]

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[24] Those Guidelines state: "When a respondent does not respond until after FINRA files a complaint, Adjudicators should apply the presumption that the failure constitutes a complete failure to respond." *FINRA Sanction Guidelines*, at 33 n.1 (Mar. 2011), at http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf (hereinafter *FINRA Sanction Guidelines*).

[25] *Dep't of Enf. v. John Joseph Plunkett*, 2012 FINRA Discip. LEXIS 1, at *26.

[26] As part of the rule consolidation process following the merger of NASD and the member regulation, enforcement, and arbitration functions of the NYSE, *see supra* note 2, NASD Rule 2110 was renumbered, and is now FINRA Rule 2010.

[27] *See supra* note 3.

[28] *Id.*

[29] *Gustafson v. Strangis*, 572 F. Supp. 1154, 1158 (D. Minn. 1983).

[30] *Timothy L. Burkes*, Exchange Act Release No. 32142, 51 SEC 356, 1993 SEC LEXIS 949, at *10 n.21 (Apr. 14, 1993), *aff'd mem., Burkes v. SEC*, 29 F.3d 630 (9th Cir. 1994).

[31] *Benjamin Werner*, Exchange Act Release No. 9241, 44 SEC 622, 1971 SEC LEXIS 163, at *4, 6–7 & 6 n.9 (July 9, 1971).

[32] *Louis Feldman*, Exchange Act Release No. 34933, 1994 SEC LEXIS 3428, at *6 (Nov. 3, 1994).

[33] *Keith Springer*, Exchange Act Release No. 45439, 55 SEC 632, 2002 SEC LEXIS 364, at *26 (Feb. 13, 2002).

Plunkett does not dispute that the removal and erasure of Lempert's records arose in the conduct of his business. It is well established that FINRA's disciplinary authority under the rule "is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security."[34] We conclude that Rule 2110 applies here because Plunkett's "business" included his relationship with his employer, as well as his commercial relationships with Lempert's customers. We recently so held in a similar case that involved the improper downloading and removal of a member firm's files.[35]

We also find that Plunkett's actions, which put Lempert's customers at risk and crippled its business, were inconsistent with high standards of commercial honor and just and equitable principles of trade. Rule 2110 encompasses "'a wide variety of conduct that may operate as an injustice to investors or other participants in the marketplace.'"[36] Plunkett's misconduct here violated those principles.

In analyzing whether a securities professional's conduct is consistent with just and equitable principles of trade, we frequently have focused on whether the conduct implicates a generally recognized duty owed to customers or the firm.[37] Here, Plunkett had a duty to maintain the confidentiality of customer information.[38] A case involving a breach of confidence "'implicates quintessential ethical considerations not necessarily implicated in a breach of

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[34] *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 SEC LEXIS 54, at *17 n.18 (Jan. 6, 2012) (citing *Vail v. SEC*, 101 F.3d 37, 39 (5th Cir. 1996) (per curiam)); *see Daniel D. Manoff*, Exchange Act Release No. 46708, 55 SEC 1155, 2002 SEC LEXIS 2684 , at *12 n.8 (Oct. 23, 2002).

[35] *DiFrancesco*, 2012 SEC LEXIS 54, at *17 (holding that a respondent's actions in downloading and removing confidential, nonpublic information relating to approximately 36,000 of his firm's customers involved both his business relationship with the firm and his commercial relationship with his customers; as such, it was "business-related.").

[36] *Id*. at *18 (quoting *Thomas W. Heath III*, Exchange Act Release No. 59223, 2009 SEC LEXIS 14, at *15 (Jan. 9, 2009), *aff'd*, 586 F.3d 122 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 2351 (2010)).

[37] *Id.* at *19 (finding that applicant's disclosure of customers' material, nonpublic information breached his duty of confidentiality and violated NASD Rule 2110) (citing *Heath*, 2009 SEC LEXIS 14, at *17 (finding that applicant's disclosure of client's material, nonpublic information breached his duty of confidentiality and violated NYSE Rule 476)); *Manoff*, 2002 SEC LEXIS 2684, at *10 (finding that applicant's unauthorized use of customer's credit card constituted breach of his fiduciary duties and violated NASD Rule 2110); *Louis Feldman*, Exchange Act Release No. 34933, 52 SEC 19, 1994 SEC LEXIS 3428, at *22 (Nov. 3, 1994) (finding that applicant's transfer of customer accounts to new firm without prior consent of customers or firm violated NASD Art. III, § I (retitled NASD Rule 2110) because "under fundamental principles of agency law such prior consent is required")).

[38] *See* RESTATEMENT (THIRD) OF AGENCY § 8.05 (2006) (setting forth an agent's duty "not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party"); *see also DiFrancesco*, 2012 SEC LEXIS 54, at *22 (finding that a registered representative's duty to maintain confidentiality of customer information "is grounded in agency law principles"); *Heath*, 2009 SEC LEXIS 14, at *10 ("The duty to maintain the confidentiality of client information is grounded in fundamental fiduciary principles . . . ."); *Jonathan Feins*, Exchange Act Release No. 41943, 54 SEC 366, 1999 SEC LEXIS 2039, at *13 (Sep. 29, 1999) (holding that, "[a]s agent, [applicant] was obligated to act solely for his customer's benefit, and in his customer's best interests, in completing the transaction").

contract case.'"[39] Plunkett breached his duty to his customers when he moved confidential customer files, which included nonpublic information such as their Social Security numbers, from Lempert to Success Trade (and, later, to Emerald Investments) without first receiving the customers' consent.[40] Although many of the customers ultimately agreed to move their accounts to Emerald Investments, they did so only after Plunkett had already removed their account records from Lempert's office.

Plunkett also owed a duty of loyalty to Lempert.[41] He violated that duty when, while employed by that firm, he took steps to transfer its customer base to a competing firm that he began forming while at Lempert and severely undermined Lempert's ability to contact and attempt to reclaim its customers by removing Lempert's books and records and erasing its electronic files.[42] His conduct also gave Emerald Investments unlimited access to models of procedural and operational documents such as compliance manuals, employee files, and FOCUS reports, as well as access to Lempert's proprietary information about investment deals.[43]

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[39] *DiFrancesco*, 2012 SEC LEXIS 54, at *21 (quoting *Heath*, 586 F.3d at 137).

[40] *See id*. at *21 (finding that registered representative breached his duty of confidentiality when he downloaded customers' confidential nonpublic information of former firm, including account numbers and net worth figures, and transmitted that information to his future branch manager at a competing firm); *Louis Feldman*, 1994 SEC LEXIS 3428, at *8 (finding that partial owner, vice president, director, and principal of a firm was required, "under fundamental principles of agency law," to obtain prior consent of customers before transferring mutual fund accounts to another firm with which he was associated); *cf. Heath*, 2009 SEC LEXIS 14, at *42 (finding that registered representative breached his duty of confidentiality when he disclosed to a future colleague at a competing firm material nonpublic information regarding a pending merger).

> As we previously observed:
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> > The [Gramm-Leach-Bliley Act of 1999] required the Commission and other federal agencies to adopt rules implementing notice requirements and restrictions on a financial institution's ability to disclose nonpublic personal information about consumers. *See* 15 U.S.C. § 6801 *et seq*. Under the GLBA, a financial institution must provide its customers with notice of its privacy policies and practices, and must not disclose nonpublic personal information about a consumer to a nonaffiliated third party unless the institution provides certain information to the consumer and the consumer does not opt out of the disclosure.
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> *DiFrancesco*, 2012 SEC LEXIS 54, at *3 n.3.

[41] *See* RESTATEMENT (THIRD) OF AGENCY § 8.01 (setting forth an agent's duty to "act loyally for the principal's benefit in all matters connected with the agency relationship").

[42] *See Michael T. McAuliffe*, Exchange Act Release No. 21649, 48 SEC 86, 1985 SEC LEXIS 2398, at *4 & n.3 (Jan. 14, 1985) (finding that vice president and registered representative had misappropriated firm's property and breached his fundamental duty of loyalty to his employer by benefitting himself and others at his employer's expense) (citing RESTATEMENT (SECOND) OF AGENCY §§ 387-389 (1958)).

[43] Plunkett resigned from Lempert on the same day he removed its books and records. It is not clear, however, which event occurred first. Plunkett testified that he may have removed the books and records and then faxed his resignation to the Orlovs but that he did not "remember what the order was." Tr. of Hearing (Sept. 27, 2010), at 139. But the order does not matter as the events of that day were part of a single course of action. And even if Plunkett had resigned first, he was still obligated by his duties to the customers and the firm. *See* Comments (b) and (c) to RESTATEMENT (THIRD) OF AGENCY § 8.05 ("Termination of an agency relationship does not end an agent's duties

(continued…)

Plunkett's actions to remove Lempert's files also exhibited a blatant disregard for, and interference with, his former employer's ability to comply with statutory and rule requirements related to capital, margin, operations, books-and-records, and reporting obligations.[44] His conduct impeded Lempert's ability to comply with basic requirements necessary for customer protection and put their assets at risk. His misconduct was further compounded by the fact that he failed to produce some of the documents he took—which interfered with FINRA's and the SEC's ability to carry out their regulatory responsibilities with respect to him and others. The fact that Lempert was eventually able to reproduce many of those documents through other sources does not mitigate the seriousness of Plunkett's misconduct.

Plunkett nevertheless asserts that his actions were justified because he needed to take those files to protect himself and others from potential fraud. There is, however, ample support in the record for FINRA's conclusion that he acted out of self-interest,[45] which we also find.

Plunkett also argues—without citing any authority—that he "was under no obligation what so ever [sic] to exhibit commercial honor toward the firm" because, he claims, Lempert violated Rule 2110 which, in turn, "cancelled [Plunkett's] contract" with Lempert.[46] To the contrary, he was required to ensure that his own conduct was consistent with high standards of commercial honor and just and equitable principles of trade regardless of whether others engaged in misbehavior.[47] Moreover, his argument shows a disturbing indifference to the fact that, by

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regarding property of the principal. A former agent who continues to possess property of a principal has a duty to return it and to comply with the management and record-keeping rules stated in § 8.12."; "An agent's duties concerning confidential information do not end when the agency relationship terminates."). In any event, the record demonstrates that Plunkett took many steps detrimental to the customers and the firm while he was a firm employee that ultimately led to the removal of the books and records.

[44] *See, e.g.*, Exchange Act § 17(a), 15 U.S.C. § 78q(a); Exchange Act Rule 17a-3, 17 C.F.R. § 240.17a-3; Exchange Act Rules 15c3-1 and 15c303, 17 C.F.R. §§ 240.15c3-1, 15c3-3; *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 1127, at *32 (Feb. 27, 2012) ("The books and records provisions 'require that broker-dealers registered with the Commission make and keep current, for prescribed periods, certain books and records.' That requirement includes the requirement that the records be accurate, which applies 'regardless of whether the information itself is mandated.'") (citations omitted); *Paul Joseph Benz*, Exchange Act Release No. 51046, 58 SEC 34, 2005 LEXIS 116, at *7 (Jan. 14, 2005) (stating that the purpose of Exchange Act Rule 15c3-1, the net capital rule, "is to ensure that a broker-dealer has sufficient liquidity to protect the assets of its customers and to be able to cover its indebtedness to other broker-dealers"); *Fred A. Borries Jr.*, Exchange Act Release No. 31461, 51 SEC 51, 1992 SEC LEXIS 3038, at *2−3 (Nov. 16, 1992) (stating that Exchange Act Rule 15c3-3, the customer protection rule, "requires a broker-dealer to establish a 'special reserve bank account for the exclusive benefit of customers to whom it owes money'" and that the "account protects customer funds and the cash realized through the use of customers' securities from the hazards of the brokerage business").

[45] *See Plunkett*, 2012 FINRA Discip. LEXIS 1, at *22−24.

[46] Plunkett's Opening Br. at 2.

[47] *See Joseph Abbondante*, Exchange Act Release No. 53066, 58 SEC 1082, 2006 SEC LEXIS 23, at *41 n.60 (Jan. 6, 2006) (finding that whether others engaged in violative conduct did not excuse applicant's violations); *Dane E. Faber*, Exchange Act Release No. 49216, 57 SEC 297, 2004 SEC LEXIS 277, at *22 n.22 (Feb. 10, 2004)
(continued…)

rendering Lempert incapable of complying with basic financial and operational rules that are designed for customer protection, he put Lempert's customers at risk.[48]

Plunkett additionally argues that no one at Emerald used the records and other business materials that were taken from Lempert because "[t]he reps used their personal book of business" to contact customers and Emerald had, for example, its own compliance manual that was prepared by a consultant.[49] Whether anyone at Emerald used the information in the manner he describes is beside the point, because as detailed above, Plunkett violated his duty to Lempert in part by disabling Lempert from discharging its duty to its customers and in part by providing Lempert's competitor with access to Lempert's records, whether Emerald used those records or not. Additionally, the information belonged to the customers and Lempert, and neither consented to its removal.[50] We therefore reject Plunkett's arguments and find that he violated the professional standards of ethics covered by NASD Conduct Rule 2110.

B. Plunkett's failure to provide requested information violated FINRA Rules 8210 and 2010.

Rule 8210(a)(1) states, in relevant part, that FINRA has the right to "require a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation . . . ."[51] Rule 8210 "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations."[52] This rule is at the "heart of the self-regulatory system for the securities industry"[53] and is an "essential cornerstone of [FINRA's] ability to police the securities markets and should be rigorously

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(finding that fact that others shared responsibility for violative conduct did not relieve respondent of his responsibility).

48 *See, e.g., Benz*, 2005 SEC LEXIS 116, at *7 (stating that the purpose of Exchange Act Rule 15c3-1, the net capital rule, "is to ensure that a broker-dealer has sufficient liquidity to protect the assets of its customers and to be able to cover its indebtedness to other broker-dealers"); *Borries*, 1992 SEC LEXIS 3038, at *2-3 (stating that Exchange Act Rule 15c3-3, the customer protection rule, "requires a broker-dealer to establish a 'special reserve bank account for the exclusive benefit of customers to whom it owes money'" and that the "account protects customer funds and the cash realized through the use of customers' securities from the hazards of the brokerage business").

49 Plunkett's Opening Br. at 7.

50 *Cf. Feldman*, 1994 SEC LEXIS 3428, at *4–7 (rejecting applicant's argument that he effectively owned accounts he sought to transfer from one firm to another and concluding that the accounts were firm assets).

51 FINRA Rule 8210(a)(1).

52 *Berger*, 2008 SEC LEXIS 3141, at *13.

53 *Id.* at *13.

enforced."[54] "Failures to comply are serious violations because they subvert [FINRA's] ability to carry out its regulatory responsibilities," threatening investors and the markets.[55]

During the investigation that preceded the Wells notice, Plunkett meaningfully responded to the staff's Rule 8210 requests, though his responses often were not timely.[56] After filing his Wells submission, however, Plunkett stopped responding to Rule 8210 requests. As noted, in July and August 2009, FINRA sent two letters to Plunkett pursuant to Rule 8210 asking for specific information about documents and the identities of individuals to whom he had referred generally in his Wells submission.[57] FINRA was entitled to test the accuracy of the assertions Plunkett made. Moreover, the documents and information FINRA asked for were not only important for it to determine whether it should proceed with a formal disciplinary action against Plunkett, but also could have assisted its investigation of others in the industry.

Plunkett did not respond until more than four months after FINRA sued him. When he did finally respond, he produced no documents, offering a variety of excuses as to why they were missing. By waiting as long as he did to respond, Plunkett frustrated not only FINRA's ability to more completely investigate him, but also impeded its ability to investigate the activities of others.

Plunkett does not dispute any of these facts. We therefore find that Plunkett violated Rules 8210 and 2010 by failing to respond to some of FINRA's requests for information.[58]

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[54] *Jay Alan Ochanpaugh*, Exchange Act Release No. 54363, 2006 SEC LEXIS 1926, at *19 (Aug. 25, 2006).

[55] *Hannan*, 1998 SEC LEXIS 1955, at *9. *Accord John A. Malach*, Exchange Act Release No. 32743, 51 SEC 618, 1993 SEC LEXIS 2026, at *7 (Aug. 12, 1993).

> Vigorous enforcement of Rule 8210 helps ensure the continued strength of the self-regulatory system—and thereby enhances the integrity of the securities markets and protects investors—by preventing members and their associated persons who demonstrate their unfitness by failing to respond in any manner to Rule 8210 requests from remaining in the securities industry. Members and their associated persons who fail to respond in any manner to Rule 8210 requests present "too great a risk" to the markets and investors to be permitted to remain in the securities industry.

Berger, 2008 SEC LEXIS 3141, at *15.

[56] *See supra* note 13.

[57] Though Rule 8210 is typically used by FINRA to obtain testimony and documents, by its explicit language it may also be used to obtain "information," which may not exist in a recorded format at the time the request is made. *See, e.g., Dep't of Enf. v. Paul Joseph Benz*, Complaint No. C01020014, 2004 NASD Discip. LEXIS 7, at *8, 18−19 (NAC May 11, 2004) (wherein the staff asked respondent, pursuant to Rule 8210, to provide a net capital computation). Here, FINRA asked Plunkett to respond to twenty sets of interrogatories, and to produce supporting documentation.

[58] A violation of FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010. *E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 58 SEC 231, 2005 SEC LEXIS 764, at *7 (Apr. 6, 2005).

IV.

Plunkett also attacks this proceeding on a number of alternative grounds, none of which has merit. First, Plunkett asserts that he was "persecuted and prosecuted by FINRA to keep [him] silent about their cover up of their failure to act on the evidence of the [Orlovs' purported] Ponzi scheme."[59] Plunkett states that "FINRA instituted a campaign of company and personal harassment directed against [his] new broker dealer, [him]self, and [his] registered representatives" because he "received nonstop requests for information from FINRA" and "FINRA staff questioned [him as to] why [he] had so many African American registered reps in the firm."[60]

To establish a claim for selective prosecution, Plunkett must demonstrate that "he was unfairly singled out and that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right."[61] He has not done so. Instead, the record demonstrates that FINRA's investigation was amply warranted and began in response to Plunkett's accusations of possible illegal activity by the Orlovs and his own admissions concerning the removal and erasure of Lempert's books and records. Far from failing to act, FINRA sent Plunkett multiple requests for information designed to evaluate the merit of Plunkett's claims. In contrast, Plunkett presented no evidence during the proceedings below, called no witnesses, and declined to cross-examine the staff member who gave testimony in FINRA's case-in-chief about its motives in prosecuting or seeking information from him. Though Plunkett alleges that FINRA instituted this action for improper reasons, there is no evidence in the record to support his claim.

Next, Plunkett broadly argues that "[t]he [NAC] as well as the Hearing Panel were prejudiced toward [him]" and rendered their decisions "without a thorough examination of the circumstances, evidence, and facts."[62] We reviewed the record and do not find any evidence of

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[59] Plunkett's Application for Review at 2.

[60] *Id*. at 1.

[61] *John B. Busacca III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, *51 & n.60 (Nov. 12, 2010) (citing *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, *38 (Nov. 8, 2006); *accord United States v. Huff*, 959 F.2d 731, 735 (8th Cir. 1992)), *petition denied*, 304 F. App'x. 883 (D.C. Cir. 2008)); *Fog Cutter Cap. Group Inc. v. SEC*, 474 F.3d 822, 826 (D.C. Cir. 2007); *Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC LEXIS 13, at *17 n.20 (Jan. 5, 2007).

[62] Plunkett's Application for Review at 1. The errors Plunkett claims were committed by the hearing panel are not before us. *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, *8-9 (May 20, 2008) ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.") (citation omitted). Plunkett also "protest[s] in the strongest manner possible the Arbitration Panel" decision. That, too, is not before us as he did not file any formal challenge to that decision and, in any event, it does not fall within any of the four bases for jurisdiction under Exchange Act § 19(d). *Cf. Wedbush Morgan Sec., Inc*. Order Dismissing Proceedings, Exchange Act Release No. 57138, 2008 SEC LEXIS 57, at *9 (Jan. 14, 2008) (finding that Commission lacked jurisdiction to review applicant's request for the Commission to, among other things, find that no interest or costs were due from applicant regarding an NASD arbitration proceeding, because the imposition of interest and costs did not, pursuant to Exchange Act § 19(d), (i) impose a final disciplinary sanction on

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prejudice or unfair treatment of Plunkett during the FINRA proceedings.[63] In addition, our *de novo* review of the evidence cures whatever bias or errors of fact, if any, that may have existed.[64]

Finally, Plunkett asserts that he is "at a disadvantage" in his appeal because FINRA "would not provide [him] with the same material which they had provided to the Commission."[65] In its response, FINRA states that, as required, it provided Plunkett with a copy of the index to the certified record under Commission Rule of Practice 420(e).[66] Plunkett attached several documents to his opening brief that are already in the record. It is unclear what further materials Plunkett seeks, and he has not demonstrated any way in which he was disadvantaged.

V.

Pursuant to Exchange Act § 19(e)(2), we will sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that they are "excessive or oppressive" or "impose[] any burden on competition not necessary or appropriate" to further the purposes of the Act.[67] Plunkett does not claim, and the record does not show, that FINRA's sanctions imposed an unnecessary or inappropriate burden on competition. He does, however, assert that the bars were excessive and oppressive. We examine each violation separately.

A. The bar for the removal and erasure of Lempert's books and records and electronic files was not excessive or oppressive.

Although the Commission is not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act § 19(e)(2).[68] The Guidelines state

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an NASD member; (ii) deny membership or participation to an applicant; (iii) prohibit or limit any person with respect to access to services offered by NASD or an NASD member; or (iv) bar any person from becoming associated with an NASD member).

63 *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 SEC LEXIS 1862, at *75 (May 27, 2011).

64 *Fog Cutter Cap. Group Inc.*, 474 F.3d at 826; *Cody*, 2011 SEC LEXIS 1862, at *75−76; *Guy P. Riordan*, Exchange Act Release No. 61153, 2009 SEC LEXIS 4116, at *69 n.82 (Dec. 11, 2009); *Robert Bruce Orkin*, Exchange Act Release No. 32035, 51 SEC 336, 1993 SEC LEXIS 726, at *19 (Mar. 23, 1993), *aff'd*, 31 F.3d 1056 (11th Cir. 1994)). *Cf. Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, *8-9 (May 20, 2008) ("[I]t is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of NASD which is subject to Commission review.") (citation omitted).

65 Plunkett's Opening Br. at 1.

66 17 C.F.R. § 201.420(e).

67 15 U.S.C. § 78s(e)(2).

68 *E.g.*, *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *31 n.38 (Jan. 30, 2009) (citing *Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at *42 n.56 (Oct. 4, 2007) (stating that the SRO's predecessor, NASD, promulgated them to achieve greater consistency, uniformity, and fairness in its sanctions)). We have also acknowledged that "the Sanction Guidelines 'do not provide fixed sanctions for particular violations' and 'are not intended to be absolute.'" *Houston*, 2011 SEC LEXIS 4491, at *26; *see also*
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that, where there is no specific guideline for a violation, it is appropriate to consider those for analogous misconduct,[69] and if there is no analogous guideline, the General Principles and Principal Considerations may provide direction.[70] FINRA adjudicators also may consider relevant precedent.[71]

Because the Guidelines contain no specific recommendation regarding removal and erasure of a firm's information, FINRA reasonably assessed the remedy for that misconduct by considering the General Principles and Principal Considerations applicable to all violations. Specifically, FINRA concluded that Plunkett's misconduct imposed substantial risk on Lempert's customers and impeded the firm's ability to comply with basic requirements necessary for customer protection.[72] FINRA also found that Plunkett's misconduct was intentional and resulted in the potential for monetary or other gain.[73]

We agree with FINRA that "[t]he fact that Plunkett assumed control of customers' records without their consent, risked their assets to transfer their accounts to Emerald Investments, and held their records hostage for his personal gain is intolerable and presents a significant aggravating factor."[74] As we have stated,

> "The ability to credibly assure a client that [confidential nonpublic information] will be used solely to advance the client's own interests is central to any securities professional's ability to provide informed advice to clients. Disclosure [and use] of such information jeopardizes the foundation of trust and confidence crucial to any professional advising relationship."[75]

(…continued)
FINRA Sanction Guidelines, at 3 ("Adjudicators may determine that egregious misconduct requires the imposition of sanctions above or otherwise outside of a recommended range. For instance, in an egregious case, Adjudicators may consider barring an individual respondent and/or expelling a respondent member firm, regardless of whether the individual guidelines applicable to the case recommend a bar and/or expulsion or other less severe sanctions.").

69 *FINRA Sanction Guidelines*, at 1.

70 *Id.*

71 *Cf. Kirlin Sec., Inc.*, 2009 SEC LEXIS 4168, at *84-86 (Dec. 10, 2009) (noting that FINRA considered Commission precedent regarding gravity of the violation and general considerations in determining sanction, as set forth in the Guidelines, where there was no specific guideline for the violation at issue).

72 *See FINRA Sanction Guidelines*, at 6 (Principal Consideration No. 11).

73 *See id*. at 7 (Principal Consideration Nos. 13 and 17).

74 *See id.* at 6 (Principal Consideration No. 11) (considering whether the misconduct resulted directly or indirectly in injury to the investing public). Although many of Lempert's former customers agreed to move their accounts, they did so only after Plunkett and his confederates had already removed their records from Lempert's offices.

75 *DiFrancesco*, 2012 SEC LEXIS 54, at *34−35 & n.60 (quoting *Heath*, 2009 SEC LEXIS 14, at *43−44).

As FINRA found, Plunkett's misconduct "not only rendered the firm inoperable for four months, but also hindered the firm's ability to comply with a host of financial and operational rules," including, for example, the inability to ensure that it met net capital requirements or provide customers with its usual services.[76] Moreover, Lempert had to expend significant resources to resume its business and never regained some of its own records. Plunkett asserts that his conduct served the goals of "investor protection and market integrity." [77] But we conclude that such detrimental conduct undermined those goals.[78]

The record also supports FINRA's finding that Plunkett's conduct was intentional and self-serving.[79] Notwithstanding Plunkett's testimony that his actions were motivated by his interest in protecting Lempert's customers, we find that the evidence supports FINRA's conclusion that his true motivation was his own financial interest. Plunkett had not been paid and knew the Orlovs intended to fire him. In anticipation of leaving, he formed Emerald Investments and took steps to ensure that his new firm had working capital, office space, a contract with a clearing firm, a pending application for FINRA membership, and administrative and sales personnel. Concerned about following through with his promise to his financial backers to bring an established customer base to Emerald, Plunkett took Lempert's customer records and eventually transferred most of their accounts. The fact that he went to the trouble of erasing Lempert's electronic files and removed its back-up tapes underscores the point that his intent was to have exclusive access to those customers.

Plunkett states that "[t]he NAC statement of my [disciplinary] history again shows bias and is prejudiced" because it is not "relevant to this case."[80] We disagree. "Relevant" disciplinary history includes "past misconduct similar to that at issue" *or* past misconduct that "evidences disregard for regulatory requirements, investor protection, or commercial integrity."[81] "We have long recognized that prior disciplinary history . . . provides evidence of whether an applicant's misconduct is isolated, the sincerity of the applicant's assurance that he will not commit future violations and/or the egregiousness of the applicant's misconduct."[82] FINRA routinely considers

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76 *Plunkett*, 2012 FINRA Discip. LEXIS 1, at *21.

77 Plunkett's Opening Br. at 3.

78 *See FINRA Sanction Guidelines*, at 6 (Principal Consideration No. 11) (considering whether the misconduct resulted directly or indirectly in injury to the firm).

79 *See FINRA Sanction Guidelines*, at 7 (Principal Consideration Nos. 13 and 17) (considering whether misconduct was the result of an intentional act or resulted in the potential for monetary or other gain).

80 Plunkett's Opening Brief at 7.

81 NASD Notice to Members 03-65, 2003 NASD LEXIS 75, at *2 (Oct. 2003). *Accord FINRA Sanction Guidelines*, at 2; *Dep't of Enf. v. J. Alexander Sec., Inc.*, Complaint No. CAF010021, 2004 NASD Discip. LEXIS 16, at *70 (NAC Aug. 16, 2004); *Dep't of Enf. v. Michael F. Flannigan*, Complaint No. C8A980097, 2001 NASD Discip. LEXIS 36, at *25 (NAC June 4, 2001).

82 *Consolidated Inv. Servs., Inc.*, Exchange Act Release No. 36687, 52 SEC 582, 1996 SEC LEXIS 83, at *24 (Jan. 5, 1996).

an applicant's disciplinary history in determining the appropriate sanction. Such consideration is consistent with the Guidelines, which state that "[a]djudicators should always consider a respondent's disciplinary history in determining sanctions."[83]

Plunkett is currently under suspension for failing to pay the arbitration award that was rendered in connection with the conduct at issue here. Also, in May 2000, Plunkett settled another disciplinary action for acting as a general securities principal without the proper qualifications and registrations, agreeing to a fifteen-day suspension in all capacities and a $7,500 fine.[84] FINRA properly considered these matters in assessing sanctions because they evidence a disregard for regulatory requirements and are further evidence that he poses a risk to the investing public absent a bar.[85]

Plunkett states that he and the other individuals who left Lempert acted "in the manner that [they] did in order to protect the clients, [their] good name, and avoid possibly massive claims against SIPC."[86] He asserts that "[his] intention was not to irreparably harm and forever shut down Lempert."[87] Plunkett contends that the firm was not harmed because all of its information was available through other sources, and the customers who transferred "did no business."[88] Plunkett believes that "[n]o customers were placed in jeopardy, nor injured in any way."[89] Plunkett argues that he "did not want to seek the back pay owed" and that the attorney for Lempert "duped" him into delaying return of the books and records under the pretext that the firm "would accept the documents and in the spirit of cooperation re-issue the checks which had

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83 *See FINRA Sanction Guidelines*, at 2 (Principal Consideration No. 2); *see also Midas Sec., LLC*, Exchange Act Release No. 66200, 2012 SEC LEXIS 199, at *66-67 (Jan. 12, 2012).

84 While disciplinary actions that go back more than a decade may be too stale for consideration, they may be taken into account when, combined with more recent violations, they evidence a pattern of disregard for regulatory compliance matters. *See, e.g.*, *Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *59 n.73 (July 6, 2005) ("We reject Alexander's argument that certain of his past disciplinary actions are too stale to be considered for purposes of determining sanctions. His past disciplinary history is important because, as NASD found, it establishes 'a disturbing pattern of disregard for regulatory compliance matters'"). We find that the types of violations Plunkett accumulated evidence such a pattern.

85 *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *24 (Sep. 10, 2010) (considering applicant's disciplinary history and finding that it was further evidence that he posed a risk to the investing public should he re-enter the industry), *petition for rev. denied*, 436 Fed. App'x 31 (2d Cir. 2011). Even if a respondent has no relevant disciplinary history, the misconduct at issue may be serious enough on its own to warrant severe sanctions. *FINRA Sanction Guidelines*, at 2. Plunkett's misconduct here falls into that category and warrants a bar even without regard to his disciplinary history.

86 Plunkett's Application for Review at 2.

87 Plunkett's Reply Br. at 2.

88 Plunkett's Opening Br. at 8.

89 Plunkett's Reply Br. at 3.

been stopped."[90] According to Plunkett, "[t]hese facts outweigh and should over-shadow the technical violations."[91]

The record does not support Plunkett's assertions, and we conclude he fails to appreciate his obligations as a securities professional. As FINRA stated, Plunkett "had far less drastic alternatives at his disposal to address the situation, including notifying FINRA or the Commission."[92] "Instead, he initiated an intentional and risky course of conduct, which by design benefitted him and his newly-formed broker-dealer, at the expense of Lempert Brothers and its customers."[93] Indeed, Plunkett still had not returned the books and records to the firm after FINRA and SEC staff were made aware of the situation, and he returned only a portion of them after Lempert twice moved to compel their return during the arbitration proceeding.

Plunkett objects to a bar, stating that he has been out of work, he cannot find employment, and his family is suffering. But any negative consequences for Plunkett resulting from the violation he committed, or from the disciplinary proceeding that followed, are not mitigating. This matter involves very serious misconduct. We find that a bar will have the remedial effect of protecting the investing public from harm by removing him from the industry and impressing upon Plunkett and others the importance of maintaining the privacy of customers' confidential nonpublic information and refraining from self-interested actions at an employer's expense.[94] The securities industry "presents continual opportunities for dishonesty and abuse."[95] The hardship Plunkett asserts he has and will continue to suffer is outweighed by the necessity of ensuring that public investors are protected from him.[96] We conclude that the bar FINRA imposed serves a remedial purpose.

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[90] *Id*. at 2; Plunkett's Opening Br. at 8.

[91] Plunkett's Reply Br. at 3.

[92] *Plunkett*, 2012 FINRA Discip. LEXIS 1, at *23.

[93] *Id*.

[94] "Although general deterrence is not, by itself, sufficient justification for a bar, it may be considered as part of the overall remedial inquiry." *McCarthy v. SEC*, 406 F.3d 179, 189 (2d Cir. 2005); *PAZ Sec., Inc.*, 494 F.3d 1059, 1066 (D.C. Cir. 2007) (citing *McCarthy*, 406 F.3d at 189).

[95] *Eric J. Brown*, Exchange Act Release No. 66752, 2012 SEC LEXIS 1127, at *7 (Apr. 5, 2012) (citation omitted).

[96] *Conrad P. Seghers*, Investment Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *36 (Sept. 26, 2007) (affirming bar despite respondent's suggestion that the Commission should consider "the financial circumstances and hardship suffered by Seghers and his family" by noting, in part, "that the sanctions that we impose are not intended to punish, but 'to protect the public interest from future harm at his hands'") (quoting *Leo Glassman*, Exchange Act Release No. 11929, 46 SEC 209, 1975 SEC LEXIS 111, at *7 (Dec. 16, 1975)), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008); *see also William Louis Morgan*, Exchange Act Release No. 32744, 51 SEC 622, 1993 SEC LEXIS 2027, at *19 (Aug. 12, 1993) (affirming bar despite applicant's claim "that because of the bar he and his family are suffering undue hardship"); *Bernard D. Gorniak*, Exchange Act Release No. 35996, 52 SEC 371, 1995 SEC LEXIS 1820, at *6−7 (July 20, 1995) (affirming bar despite applicant's asserted inability to earn a living and finding that "any hardship visited on Gorniak is outweighed by the necessity of ensuring that public investors are protected from him").

B. FINRA erred in its assessment of sanctions for Plunkett's failure to provide requested information.

In assessing the sanction for the Rule 8210 violation, FINRA properly looked to the Guidelines that were in effect in February 2011. Those Guidelines state that in the absence of mitigating circumstances, a bar should be the standard sanction when an individual fails to respond in any manner.[97] We have recognized the remedial justification for such a sanction:

> The imposition of a bar as the standard sanction for a complete failure to respond to [FINRA] information requests "reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with [FINRA] requests for information or testimony is so fundamentally incompatible with [FINRA's] self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar."[98]

Where "a respondent does not respond until after FINRA files a complaint," the Guidelines further recommend that "[a]djudicators should apply the presumption that the failure constitutes a complete failure to respond."[99]

FINRA found that "Plunkett did not respond to the information requests until April 2010, four months after Enforcement had filed the complaint in this matter," and applied the presumption that this constituted a complete failure to respond.[100] It then examined the record for evidence of mitigation, concluded that no such evidence existed, and found that "the record supports assessing Plunkett with the standard sanction [*i.e.*, a bar] for failing to respond in any manner to a request for information and documents."[101]

We disagree with FINRA's analysis. Plunkett correctly asserts that he complied with several earlier Rule 8210 requests made during the course of the same investigation, which addressed a wide range of potential violations involving numerous entities and individuals, including Plunkett. In response to those earlier requests, Plunkett provided information about Lempert's accounts, staff, management structure, organizational structure, and contractual arrangements with a third party, and communications regarding the possible improprieties involving the Orlovs and the firm. Some of this related to the inquiries FINRA posed in the Rule

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97 *FINRA Sanction Guidelines*, at 33. "Where mitigation exists," Adjudicators may "consider suspending the individual in any or all capacities for up to two years." *Id.*

98 *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *9 (Apr. 11, 2008) (quoting *Charles C. Fawcett IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *22 n.27 (Nov. 8, 2007)).

99 *FINRA Sanction Guidelines*, at 33 n.1.

100 *Plunkett*, 2012 FINRA Discip. LEXIS 1, at *24-25.

101 *Id*. at *27-28.

8210 requests it sent after receiving Plunkett's Wells submission. FINRA failed to take any of this into account when assessing sanctions.

We faced a similar situation in *Kent M. Houston*,[102] where NASD's determination that a bar was warranted appeared to have been based on its finding that Houston failed to appear at an on-the-record interview and was therefore presumptively unfit to remain in the securities industry. But Houston had responded to previous Rule 8210 requests that were part of the same investigation by NASD regarding possible improprieties in Houston's conduct.[103] Because we determined that Houston responded in some manner to NASD's requests in connection with that investigation, we concluded that NASD should have analyzed factors other than the presumptive unfitness indicated by a failure to respond in any manner.[104]

Viewing the totality of the circumstances, we find that Plunkett's conduct is closer to the partial failure to respond in *Houston* and *Sahai*. Accordingly, we remand so that FINRA may, in the first instance, analyze Plunkett's violation of Rule 8210 under its Guideline for a partial response.[105]

* * *

[102] Exchange Act Release No. 66014, 2011 SEC LEXIS 4491 (Dec. 20, 2011).

[103] *Id*. at *27.

[104] *Id*. at *25. *See also Sahai*, 2007 SEC LEXIS 13, at * 14 (on review after remand, rejecting NASD's finding that Sahai failed to respond "in any manner" to Rule 8210 requests where, although Sahai failed to respond to two letter requests, he had responded to five other requests for information to some extent, and reducing a permanent bar to a two-year suspension).

[105] *See FINRA Sanction Guidelines*, at 33 (listing as categories of conduct "Failure to Respond or Respond Truthfully," "Providing a Partial but Incomplete Response," and "Failure to Respond in a Timely Manner").

We do not intend to suggest any view as to the outcome of that analysis, but FINRA should be mindful of the need to explain why any sanction it imposes will serve a remedial purpose in light of the particular facts of this case.[106]

An appropriate order will issue.[107]

By the Commission (Chair WHITE and Commissioners AGUILAR, PAREDES and GALLAGHER); Commissioner WALTER not participating.

Elizabeth M. Murphy
Secretary

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[106] *See PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007) (remanding after finding that the Commission imposed "'the most drastic remed[y] at [the Commission's] disposal [*i.e.*, a bar for a complete failure to respond]'" and that, in such circumstances, the Commission "'has a greater burden to show with particularity the facts and policies that support those sanctions and why less severe action would not serve to protect investors'") (quoting *Steadman v. SEC*, 603 F.2d 1126, 1137 (Oct. 4, 1979); *see also id.* at 1065-66 (finding that "'as the circumstances in a case suggesting that a sanction is excessive and inappropriately punitive become more evident, the Commission must provide a more detailed explanation linking the sanction imposed to those circumstances if it wishes to uphold the sanction'") (citing *Edward John McCarthy*, 406 F.3d 179, 190 (2d Cir. 2005) (remanding after finding that the Commission did not provide a meaningful explanation for upholding a two-year suspension of a floor trader who violated trading and recordkeeping provisions and that "the record contains mitigating facts and circumstances from which a compelling argument can be made that suspending McCarthy now will not serve remedial interests and will work an excessive and punitive result—namely, the destruction of the brokerage practice McCarthy has built during several years of rule-abiding trading").

[107] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 69766 / June 14, 2013

Admin. Proc. File No. 3-14810

In the Matter of the Application of

JOHN JOSEPH PLUNKETT
476 16th Street
Brooklyn, NY 11215

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority, Inc.

ORDER SUSTAINING DISCIPLINARY ACTION IN PART

On the basis of the Commission's opinion issued this day, it is

ORDERED that the findings of violations made by FINRA against John Joseph Plunkett be, and they hereby are, sustained; and it is further

ORDERED that the bar imposed by FINRA on John Joseph Plunkett for violating NASD Conduct Rule 2110 is sustained; and it is further

ORDERED that the bar imposed by FINRA on John Joseph Plunkett for violating FINRA Rules 8210 and 2010 be, and it hereby is, set aside; and it is further

ORDERED that this proceeding be, and it hereby is, remanded to FINRA for further proceedings in accordance with the opinion; and it is further

ORDERED that FINRA's imposition of costs on John Joseph Plunkett be, and it hereby is, sustained.

By the Commission.

Elizabeth M. Murphy
Secretary