SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97701 / June 12, 2023

Admin. Proc. File No. 3-20260

In the Matter of the Application of

ROBERT JUAN ESCOBIO

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

FINRA found that person formerly associated with member firm failed to respond to its requests for information and documents and for testimony at on-the-record interviews. *Held*, FINRA's findings of violations and the sanctions it imposed are *sustained*.

APPEARANCES:

Rhonda A. Anderson, Rhonda A. Anderson, P.A., for Robert Juan Escobio.

Alan Lawhead, *Jennifer Brooks*, and *Ashley Martin*, for FINRA.

Appeal filed: April 8, 2021
Last brief received: August 16, 2021

Robert Juan Escobio, an individual formerly associated with a FINRA member firm, seeks review of a FINRA disciplinary action barring him from association with any FINRA member firm.[1] FINRA barred Escobio after finding that he violated FINRA Rules 8210 and 2010 by failing to respond to five requests for information and documents and by failing to appear for five on-the-record interviews ("OTRs"). Escobio does not dispute that he was properly served with and received the requests for information, documents, and testimony and that he failed to comply. Instead, Escobio contends that FINRA relied on inadmissible evidence to grant summary disposition against him and should not have done so without a hearing on alleged mitigating factors. We reject Escobio's contentions and sustain FINRA's action.

I. Background

Escobio entered the securities industry in 1980.[2] In 2000, he became associated with Southern Trust Securities, Inc., a FINRA member firm, and served as its chief executive officer until April 2014. Escobio remained registered with the firm until July 2017, when the firm terminated his registration. This case concerns FINRA's investigation of his potential involvement with the firm after that termination.

A. FINRA opened an investigation into whether Escobio improperly continued to associate with Southern Trust after the firm terminated his registration with it.

In July 2014, the Commodity Futures Trading Commission ("CFTC") filed a complaint in federal district court against Escobio and two entities he controlled (the "CFTC matter"). On August 29, 2016, the court entered a final judgment in favor of the CFTC, permanently enjoining Escobio and his codefendants from applying for registration or engaging in any activity requiring registration under the Commodity Exchange Act. The court also ordered that the defendants pay a civil money penalty and more than $1.5 million in restitution to the customers they harmed through a metals-derivatives scheme, in which investors' money was invested in metal derivatives instead of metals, as they had been promised.[3]

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[1] *Dep't of Enf't v. Escobio*, Complaint No. 2018059545201 (NAC Mar. 10, 2021), https://www.finra.org/sites/default/files/2021-03/NAC_2018059545201_Escobio_031021.pdf.

[2] *See* BrokerCheck Report for Robert Juan Escobio, https://files.brokercheck.finra.org/individual/individual_703813.pdf. We take official notice of this report pursuant to Commission Rule of Practice 323. *See Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 WL 1071562, at *1 n.1 (Mar. 17, 2016) (taking official notice of BrokerCheck reports and citing Rule of Practice 323, 17 C.F.R. § 201.323).

[3] *See generally CFTC v. S. Tr. Metals, Inc.*, No. 14-CV-22739, 2016 WL 4523851 (S.D. Fla. Aug. 29, 2016) (granting relief to CFTC following bench trial); *see also CFTC v. S. Tr. Metals, Inc.*, 180 F. Supp. 3d 1124 (S.D. Fla. 2016) (granting partial summary judgment in favor of the CFTC). In July 2018, the court of appeals affirmed the district court's judgment in the CFTC matter, except that it reversed the restitution order to the extent that the restitution related to Escobio's codefendant's failure to register as a futures commodity merchant and remanded with instructions to consider other equitable remedies for that violation. *CFTC v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1335 (11th Cir. 2018), *granting petition to rehear and vacating* 880 F.3d

(*continued*…)

On September 7, 2016, FINRA notified Southern Trust that Escobio had been deemed statutorily disqualified as a result of the permanent injunction and was therefore no longer qualified to be registered as an associated person with a FINRA member firm.[4] On September 23, 2016, Southern Trust filed an application for permission to continue its FINRA membership while employing Escobio, notwithstanding his statutory disqualification; FINRA denied that application on July 27, 2017.[5] On August 7, 2017, Southern Trust filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") for Escobio, reporting that he had retired from Southern Trust effective July 31, 2017, and listing a registration termination date of July 27, 2017.[6]

During a 2018 periodic examination of Southern Trust, FINRA staff obtained an email sent on August 21, 2017, from Escobio's Southern Trust email address to another email address that FINRA staff believed belonged to Escobio. Attached to the email, which contained no text, was an image of a passport belonging to an individual who recently had opened an account at Southern Trust. FINRA staff also obtained several emails that other customers appeared to have sent between August 2017 and October 2017 to Escobio's Southern Trust account, which had remained functional following the termination of Escobio's registration with the firm.

1252 (11th Cir. 2018). The court of appeals did not reduce the approximately $1.5 million in restitution attributable to the metals-derivatives scheme. *S. Tr. Metals*, 894 F.3d at 1332-35.

[4] *See* FINRA By-Laws, Art. III, §§ 3(b) & 4 (providing that no person shall continue to be associated with a FINRA member if such person becomes subject to a "disqualification" and defining a "disqualification" as "any 'statutory disqualification' as such term is defined in Section 3(a)(39)" of the Securities Exchange Act of 1934); Exchange Act Section 3(a)(39), 15 U.S.C. § 78c(a)(39), cross-referencing Exchange Act Section 15(b)(4)(C), 15 U.S.C. § 78*o*(b)(4)(C) (providing that a person is subject to a statutory disqualification if enjoined from "acting as an . . . entity or person required to be registered under the Commodity Exchange Act" or "engaging in or continuing any conduct or practice in connection with any such activity").

[5] *Robert J. Escobio*, SD-2130 (NAC July 27, 2017), https://www.finra.org/sites/default/files/NAC_SD-2130_Escobio_072717_0_0_0.pdf; *see also* FINRA By-Laws, Art. III, § 3(d) (providing that a member may file an application to continue in membership while associating with a statutorily disqualified individual); FINRA Rules 9520-27 (providing procedures for member firm to sponsor proposed association of disqualified person). On July 22, 2018, the Commission dismissed Escobio's appeal of FINRA's decision denying Southern Trust's membership continuance application, finding, among other things, that the seriousness of Escobio's misconduct and the recent nature of the injunction entered in the CFTC matter supported FINRA's decision to deny Southern Trust's application. *Robert J. Escobio*, Exchange Act Release No. 83501, 2018 WL 3090840 (June 22, 2018).

[6] On June 28, 2019, Southern Trust amended the Form U5 to state that Escobio retired from the firm effective June 30, 2017, rather than July 31, 2017. Escobio does not argue before us that this amendment changed the July 27, 2017 effective date of the termination of his registration, terminated FINRA's jurisdiction over him, or rendered the disciplinary proceedings instituted against him untimely, although he unsuccessfully argued that before the hearing panel.

The emails prompted FINRA staff to open a separate cause examination to investigate whether Escobio had continued to associate with Southern Trust after July 2017. In March 2019, FINRA staff referred the matter to FINRA's Department of Enforcement ("Enforcement"). Enforcement subsequently identified additional emails that also suggested Escobio may have continued to associate with Southern Trust after it terminated his registration.

B. Escobio did not respond to Enforcement's requests for information and documents or provide requested testimony.

1. Escobio failed to provide information and documents.

a. While he was incarcerated, Escobio did not respond to two initial requests.

On March 26, 2019, Enforcement sent Escobio a letter requesting that he provide certain information "in connection with [FINRA's] investigation" by April 8, 2019. The letter informed Escobio that, under FINRA Rule 8210, he was "obligated to respond to th[e] request fully, promptly, and without qualification."[7] Specifically, Enforcement requested that Escobio provide (1) a list of all email addresses he had used, or that were used on his behalf, from July 1, 2017, through the date of the letter (the "Relevant Period"); (2) all electronic communications over the Relevant Period between Escobio and certain individuals; and (3) all electronic communications that Escobio sent or received regarding securities business during the Relevant Period. The request covered the customer whose passport picture had been forwarded from Escobio's firm email address and individuals who had sent emails to Escobio's firm address during the Relevant Period. Escobio did not respond.

On or about April 2, 2019, the Enforcement attorney who had sent the letter to Escobio became aware that Escobio had been incarcerated on or about April 1, 2019, at the Federal Detention Center in Miami, Florida ("FDC Miami"), after being held in contempt for failing to

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[7] *See* FINRA Rule 8210(a) (permitting FINRA staff to require a person associated with a member firm or a person otherwise subject to its jurisdiction to provide information orally, in writing, or electronically; testify under oath; or make available for inspection or copying records with respect to any matter involved in an investigation or examination).

pay restitution ordered in the CFTC matter.[8] Enforcement sent a second letter to Escobio at FDC Miami on April 10, 2019, that enclosed a copy of the first letter, repeated the requests made in it, and sought a response by April 17, 2019. Enforcement later received proof that the April 10, 2019 letter was delivered to Escobio at FDC Miami on April 16, 2019. Escobio did not respond.

b. Escobio did not respond to requests for information and documents sent after he was released from custody.

On April 26, 2019, Escobio was ordered to be released from FDC Miami.[9] On May 2, 2019, Enforcement sent third and fourth requests for information and documents to Escobio. The third letter sought the same information and documents as Enforcement's first two letters, which it enclosed. The letter informed Escobio that he was in violation of Rule 8210 and that if he failed to deliver the requested information by May 16, 2019, he would be subject to the institution of a disciplinary proceeding with the potential for sanctions, including a bar from the securities industry. The fourth letter sought Escobio's mobile phone records from July 27, 2017, through the date of the request. This letter also sought a response by May 16, 2019, and informed Escobio that failure to comply could subject him to sanctions, including a bar. Escobio neither provided the information and documents nor sought an extension of time.

On May 28, 2019, Enforcement sent an email to an attorney representing Escobio who had contacted Enforcement on May 20, 2019, and represented him from that point onwards with

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[8] In March 2019, the district court in the CFTC matter had held Escobio in civil contempt because he had paid only $3,500 of the more than $1.5 million in outstanding restitution ordered in its judgment. The district court ordered Escobio, at the risk of incarceration, to make an initial $350,000 restitution payment and subsequent monthly payments of $10,000 until he satisfied his restitution obligation. *CFTC v. S. Tr. Metals, Inc.*, Case No. 1:14-CV-22739-JLK (S.D. Fla. Mar. 18, 2019), ECF No. 281. Escobio was incarcerated after he failed to make the initial $350,000 payment. Order Implementing This Court's Order Finding Defendant Robert Escobio in Contempt, *CFTC v. S. Tr. Metals, Inc.*, Case No. 1:14-CV-22739-JLK (S.D. Fla. Mar. 29, 2019), ECF No. 298, *corrected on same date as to address of location of surrender* by ECF No. 299. In January 2020, the Eleventh Circuit vacated the contempt order, but not the restitution obligation underlying it, holding that the restitution provisions of the judgment against Escobio were not enforceable through contempt. *CFTC v. Escobio*, 946 F.3d 1242, 1245 (11th Cir. 2020). We take official notice of this and other orders and opinions cited herein. Rule of Practice 323, 17 C.F.R. § 201.323 (providing that official notice may be taken of "any material fact which might be judicially noticed by a district court of the United States"); *Akers v. Watts*, 589 F. Supp. 2d 12, 15 (D.D.C. 2008) (noting that a court may take "judicial notice of the records of this Court and of other federal courts").

[9] *Escobio*, 946 F.3d at 1248. On August 19, 2019, approximately one month after Enforcement filed its complaint in this matter, Escobio was again ordered incarcerated when he failed to timely make the monthly payments required by the contempt order. *Id.*; Order Granting Plaintiff CFTC's Motion for Coercive Sanctions, *CFTC v. S. Tr. Metals, Inc.*, Case No. 1:14-cv-22739-JLK (S.D. Fla. Aug. 19, 2019), ECF No. 347 (ordering Escobio to surrender on August 20, 2019). After the amount in arrears was paid, Escobio was ordered released from custody on August 22, 2019. *Escobio*, 946 F.3d at 1248.

respect to Enforcement's Rule 8210 requests. In the email, Enforcement stated that "Escobio has altogether failed to respond to several 8210 requests for documents and information." On June 5, 2019, Escobio's attorney acknowledged what she characterized as a "litany" of Rule 8210 requests directed to Escobio but did not produce any of the requested information or documents or seek an extension of the time in which to do so.

On June 6, 2019, Enforcement sent a fifth letter to Escobio and his attorney. The letter repeated and enclosed Enforcement's May 2, 2019 request for his mobile phone records and sought compliance by June 12, 2019. As with the other requests, Escobio never provided any of the requested information and documents or sought an extension of time to do so.

2. Escobio failed to appear for five OTRs.

During approximately the same period that Enforcement requested that Escobio produce information and documents in connection with its investigation, it also sought his testimony.

a. Escobio did not appear for testimony scheduled while he was incarcerated in April 2019.

On March 29, 2019, Enforcement sought Escobio's appearance at an OTR at FINRA's office in Boca Raton, Florida, on April 18, 2019. The letter requesting his appearance enclosed a pretestimony questionnaire and supplemental information pertinent to requests for testimony. The supplemental information stated that failing to appear could lead to disciplinary sanctions, including a bar from the industry. On April 9, 2019, an attorney representing Escobio (different than the one referenced above) sent a letter to Enforcement stating that Escobio was "incarcerated and unable to appear for the requested oral examination or provide the pre-testimony questionnaire."

Enforcement replied by email the next day, explaining that it was willing to discuss moving the OTR to FDC Miami. Enforcement also stated that Escobio's counsel had informed it on a telephone call that Escobio "may elect not to participate based on advice of counsel related to the contempt order in the CFTC action." Enforcement requested that Escobio's attorney "advise as soon as possible" if Escobio was willing to proceed with the OTR, and if so, to identify the contact at FDC Miami for scheduling the OTR there. Escobio's counsel did not arrange for an alternative date or location for the OTR.

b. Escobio subsequently refused to appear for OTRs in May 2019.

On May 2, 2019, following his release from prison, Enforcement sent Escobio a second letter requesting that he appear for an OTR at FINRA's Boca Raton office on the morning of May 20, 2019. Escobio did not appear for the OTR or seek to reschedule it before it was to take place. Instead, after 5:30 p.m. on May 20, 2019, Escobio's attorney emailed a letter to Enforcement that stated: "[B]ased on advice of counsel, Mr. Robert Escobio will not be able to participate in the [OTR] testimony at this time. However, after the appeal pending before the Eleventh Circuit Court of Appeals in the CFTC matter has concluded, Mr. Escobio will make himself available." Enforcement responded the next day with a letter stating that "advice of counsel does not obviate Mr. Escobio's obligation under FINRA Rule 8210 to appear for

testimony," and that refusing to appear could expose Escobio "to sanctions, including a permanent bar from the securities industry." In the same letter, Enforcement scheduled an OTR at FINRA's Boca Raton office on May 29, 2019—its third request for Escobio's testimony.

Late in the afternoon on May 28, 2019, Escobio's attorney emailed a letter to Enforcement. The letter did not reiterate the advice-of-counsel argument but instead asserted that Escobio and his attorney were not available for the May 29 OTR because they were "working . . . to respond to discovery and other time sensitive matters" in the CFTC matter.[10] The letter also stated that Enforcement had previously attempted to take Escobio's testimony while he was in custody, but provided that Escobio was "available to reschedule for the week of July 1st or July 29th" and asked Enforcement to "[p]lease advise as soon as possible which day during those two weeks is available."

Enforcement replied by email within an hour, advising that it would not postpone the scheduled testimony and stating that "Escobio's testimony has been scheduled several times and he has failed to appear." Enforcement concluded the email by saying that "[s]hould your client decide to appear for testimony at a later date, we request that you provide us with dates of his availability as soon as possible as July is not an option, given we are nearing a jurisdiction deadline." Escobio did not appear for the May 29, 2019 OTR or provide alternative dates.

c. Escobio failed to appear for two other OTRs.

On June 25, 2019, Enforcement sent a fourth OTR request. Based on counsel's prior statement that Escobio would be available the week of July 1, 2019, Enforcement requested that Escobio appear for an OTR at FINRA's Boca Raton office on Tuesday, July 2, 2019.

On Friday, June 28, 2019, Escobio's attorney informed Enforcement during a telephone conference that Escobio would not appear for the July 2, 2019 OTR due to conflicts with his schedule as a flight instructor. Without releasing Escobio from his obligation to appear for the OTR, Enforcement invited his attorney to propose an alternative date. Escobio's counsel did not propose an alternative date during the June 28, 2019 call, and Escobio did not appear for the July 2, 2019 OTR. But his attorney called Enforcement in the late afternoon on July 2, 2019, to advise that Escobio was available to appear for OTR testimony on July 8, 2019.

On July 3, 2019, Enforcement sent its fifth and final OTR request to Escobio and his attorney. The letter requested that Escobio appear for an OTR at FINRA's Boca Raton office on Monday, July 8, 2019, at 9:30 a.m., and stated that this date and time had been mutually agreed upon during a telephone call. After 6:00 p.m. on Friday, July 5, 2019, Escobio's attorney emailed a letter to Enforcement stating that Escobio would not appear at the July 8, 2019 OTR. In the letter, Escobio's counsel stated that Escobio's flight schedule had been revised such that he was required to work in both the morning and the afternoon on the date of the OTR. Escobio's counsel also asserted that if Escobio did not report to work he would permanently lose his employment and that he was unwilling to risk this loss "over the desire of FINRA to OTR him an additional time at this late juncture." The attorney also stated that an Enforcement staff

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[10] Escobio does not raise an advice-of-counsel argument before us.

member had "made it clear" that FINRA intended to file a complaint against Escobio based on his failure to appear for earlier OTRs. Rather than propose an alternative date and time for the OTR, Escobio's attorney stated that Escobio did not intend to seek reregistration with a FINRA member in the future and "hereby agrees to a voluntary bar." Escobio did not appear for the July 8, 2019 OTR, nor did he reach an agreement with FINRA to bar him by consent.

C. FINRA found that Escobio violated FINRA Rules 8210 and 2010 and barred him.

On July 17, 2019, Enforcement filed a complaint against Escobio, alleging that he violated FINRA Rules 8210 and 2010 by failing (1) to respond to five requests for information and documents, and (2) to appear and provide investigative testimony on five occasions. On December 18, 2019, Enforcement filed a motion for summary disposition pursuant to FINRA Rule 9264. Enforcement supported its motion with a declaration of counsel and exhibits, including its Rule 8210 requests and correspondence with Escobio's counsel. The declaration detailed Enforcement's unsuccessful efforts to obtain information, documents, and testimony from Escobio pursuant to Rule 8210 and attached emails sent from, or received from customers at, Escobio's Southern Trust email account after Southern Trust terminated his registration with the firm.

Escobio opposed the motion but did not submit a declaration or affidavit. Instead, he objected to Enforcement's declaration to the extent that it stated that the use of his Southern Trust email account after his registration was terminated provided "evidence that Escobio continued to use his Southern Trust e-mail address." He also asserted that Enforcement's investigation "served one purpose: obtain for the [CFTC] records, documents and potential testimony that it otherwise could not obtain in the [CFTC matter] after discovery had closed." According to Escobio, at the time that the Rule 8210 requests were served, the CFTC "was using illegal means" to collect a money judgment by requesting and obtaining "the coercive sanction of incarceration" for his failure to pay restitution. Escobio attached as his only exhibit a copy of a court of appeals decision vacating the contempt order in the CFTC matter.[11]

On February 5, 2020, a FINRA hearing panel granted Enforcement's motion for summary disposition.[12] The panel found that Escobio violated FINRA Rules 8210 and 2010 by failing to respond to Enforcement's requests for information and documents and its requests for testimony, and imposed a separate bar for each of the two violations. Escobio appealed to FINRA's National Adjudicatory Council (the "NAC"). On March 10, 2021, the NAC affirmed the hearing panel's findings of violations and the sanctions it imposed.[13] This appeal followed.

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11 *See generally supra* note 8.

12 *Dep't of Enf't v. Escobio*, Disciplinary Proceeding No. 2018059545201 (OHO Feb. 5, 2020), https://www.finra.org/sites/default/files/2020-03/OHO_Escobio-DDM_2018059545201_020520.pdf.

13 *See supra* note 1.

II. Analysis

We review a FINRA disciplinary action to determine (1) whether the applicant engaged in the conduct FINRA found, (2) whether that conduct violated the rules specified in FINRA's determination, and (3) whether those rules are, and were applied in a manner, consistent with the purposes of the Securities Exchange Act of 1934.[14] We base our findings on an independent review of the record and apply a preponderance-of-the-evidence standard.[15] Applying this framework, we sustain FINRA's findings of liability.

A. As FINRA found, Escobio did not comply with Enforcement's requests.

We agree with FINRA that the undisputed facts in the record show that Escobio failed to comply with five requests for information and documents and five requests for testimony. First, between March 26, 2019 and June 6, 2019, Enforcement sent five requests for information and documents pursuant to FINRA Rule 8210 to either Escobio or Escobio and his attorney. Escobio does not dispute that he received these requests, did not produce any of the information or documents they requested, and never sought an extension of time to respond to them.

Second, between March 29, 2019 and July 3, 2019, Enforcement sent five requests for testimony pursuant to Rule 8210 to either Escobio or Escobio and his attorney. Escobio does not dispute that he received these requests; indeed, Escobio's attorneys contacted Enforcement to discuss them. The record also shows that Enforcement made multiple attempts to accommodate Escobio, including with respect to an initial OTR that was noticed for a time when Escobio was incarcerated, but that he never gave testimony in response to any of the requests.

B. Escobio's failures to comply violated the rules specified in FINRA's decision.

1. Escobio violated FINRA Rules 8210 and 2010.

The undisputed record also supports FINRA's conclusion that, by failing to provide the requested information and documents and failing to appear for the OTRs, Escobio violated FINRA Rules 8210 and 2010. Rule 8210 provides that FINRA may "require" a member, associated person, or other person subject to its jurisdiction to provide information orally and to testify under oath "with respect to any matter involved" in an investigation.[16] FINRA may also require such a person to provide information in writing or electronically and to permit the inspection and copying of books and records.[17] The language of Rule 8210 is "unequivocal"

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14 15 U.S.C. § 78s(e)(1).

15 *Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *1, *9 (May 27, 2011), *aff'd*, 693 F.3d 251 (1st Cir. 2012).

16 FINRA Rule 8210(a).

17 *Id.*

regarding an associated person's responsibility to comply with FINRA's requests for information.[18]

FINRA Rule 2010 requires members to "observe high standards of commercial honor and just and equitable principles of trade."[19] The rule also applies to associated persons of FINRA member firms.[20] A violation of Rule 8210 also establishes a violation of Rule 2010.[21]

The undisputed record shows that Enforcement was investigating whether Escobio continued to associate with Southern Trust after he became statutorily disqualified and Southern Trust terminated his registration with the firm. Enforcement served requests for information, documents, and testimony on Escobio for the purposes of its investigation. Because he failed to provide the requested information and documents and to testify in response to OTR requests, Escobio violated FINRA Rules 8210 and 2010.

2. Escobio's arguments that FINRA improperly granted summary disposition on his liability under Rules 8210 and 2010 lack merit.

Under FINRA Rule 9264, FINRA may grant a motion for summary disposition "if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law."[22] In its decision affirming the hearing panel's grant of summary disposition, the NAC explained that the party seeking summary disposition bears the burden of demonstrating the absence of a genuine issue of material fact and, once that burden is met, the nonmoving party must then demonstrate the existence of any material, disputed fact.[23] In making this determination, any inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary disposition.[24] We agree with FINRA that summary disposition was appropriate under these standards.

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18 *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 WL 5608531, at *17 (Sept. 24, 2015); *see also* FINRA Rule 8210(c) (providing that "[n]o member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts").

19 FINRA Rule 2010.

20 *See* FINRA Rule 0140(a) (providing that associated persons "shall have the same duties and obligations as a member under the Rules").

21 *See, e.g.*, *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *3 n.10 (July 27, 2015).

22 FINRA Rule 9264; *cf.* Fed. R. Civ. P. 56(a) (providing that a federal court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

23 *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (applying Federal Rule of Civil Procedure 56 regarding summary judgment).

24 *Cf. id.* at 587-88; *Jay T. Comeaux*, Exchange Act Release No. 72896, 2014 WL 4160054, at *2 (Aug. 21, 2014) ("The facts on summary disposition [under Commission Rule of Practice 250] must be viewed in the light most favorable to the non-moving party.") (citing *Robert L. Burns*, Advisers Act Release No. 3260, 2011 WL 3407859, at *9 (Aug. 5, 2011)).

In opposing summary disposition, Escobio did not offer any evidence other than the opinion vacating the district court's contempt order. Based on that opinion, the evidence Enforcement submitted with its motion, and a number of statements in his brief, Escobio argues that FINRA improperly granted summary disposition on liability.[25] We disagree.

a. The record does not show that Escobio was unable to respond to Enforcement's requests.

Escobio contends that the record showed he was entirely unavailable to appear for an OTR and unable to comply with Enforcement's other Rule 8210 requests because he was either incarcerated or subject to the threat of incarceration as a result of the contempt order entered in the CFTC matter. But the record, viewed in the light most favorable to Escobio, does not support his argument.

We recognize that, although Enforcement sent its first OTR request before Escobio was incarcerated, he was incarcerated on the date of that OTR. Nonetheless, Enforcement offered to move the OTR to FDC Miami. Escobio, who was represented by counsel, did not work with Enforcement to reschedule the OTR to FDC Miami or, after his release, to move that OTR to a new date. Timely cooperation with Rule 8210 requests is "essential to the prompt discovery and remediation of industry misconduct."[26] As a result, associated persons must contact FINRA staff "to fully and promptly resolve … scheduling issues" to satisfy their "unequivocal obligation to cooperate fully and promptly with FINRA's information and OTR requests."[27]

Similarly, we recognize that Escobio was at FDC Miami on the dates by which Enforcement's first two requests for information and documents sought responses. Escobio's incarceration likely made it difficult for him to respond to these requests, but he did not seek an extension of time. More importantly, Escobio never produced any documents or information after his release, even after Enforcement brought its requests to his attorney's attention.

We further reject Escobio's assertion that the contempt order in the CFTC matter prevented him from producing any information and documents and appearing at any OTR after he was released from custody. During that period, the contempt order required Escobio to make monthly restitution payments of $10,000 or face further incarceration. According to Escobio, to

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[25] FINRA Rule 9264(e) permits a party opposing summary disposition to rely on facts alleged in its pleadings "except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to [FINRA] Rule 9145." In his brief, Escobio did not rely on his answer to argue that FINRA should not have granted summary disposition, and any such argument is accordingly forfeited.

[26] *Mielke*, 2015 WL 5608531, at *21.

[27] *Evansen*, 2015 WL 4518588, at *4, *9 (rejecting applicant's contention that "FINRA was deliberately scheduling the OTRs to make it impossible for him to comply," and finding that applicant's "consistent pattern of failing to respond to Rule 8210 requests … casts doubt on his claim that he had genuine scheduling … concerns").

avoid repeated incarceration, he had to work all available hours at his job as a flight instructor. In July 2019, Escobio refused to appear for the fourth and fifth scheduled OTRs—each set for a date on which he previously represented through counsel that he would be available—because he was scheduled to work. Escobio asserted that he would lose his employment (and income) as a flight instructor if he appeared for the OTRs.

Viewing the record in the light most favorable to Escobio, we do not see how these facts establish that he could not have responded to Rule 8210 requests at any time after he was released from prison. The record shows that Escobio refused to appear for the final two scheduled OTRs based on his work schedule, but he did not justify his failure to appear for earlier OTRs on that basis. Nor did Escobio ever submit any evidence—such as an affidavit, declaration, or other evidence of his work schedule—to substantiate his claim that he was entirely unavailable to appear for an OTR after he was released. Specifically, no evidence suggests that due to his work schedule there was not a single date on which Escobio could appear for an OTR, nor does the Eleventh Circuit's opinion on which Escobio relies. We conclude that the record, construed in the light most favorable to Escobio, does not show that Escobio could not have cooperated with Enforcement to reschedule his OTR for a date on which he was available.[28]

Escobio similarly fails to establish why he was unable to comply with Enforcement's requests for information and documents. He does not identify, for example, a specific conflict between his work schedule and his ability to comply with Enforcement's requests, let alone present any evidence of such a conflict. Nor does he contend that he could not have responded to Enforcement's requests outside of his scheduled employment hours. Escobio simply never responded to those requests.

In sum, Escobio has failed to point to record evidence sufficient to create a genuine issue of material fact regarding his noncompliance with Rule 8210. Rather, the record shows that Escobio has provided no valid reason for refusing to respond to multiple requests over several months.

b. FINRA was not required to find that Escobio continued to associate with Southern Trust after he was statutorily disqualified.

Escobio argues that the record before FINRA did not support its grant of summary disposition against him because FINRA lacked a sufficient basis to conclude that he continued to associate with Southern Trust after the firm terminated his registration with it. According to Escobio, FINRA's investigation was "solely based" upon "suspicions and speculations" regarding email traffic at his firm email address; was not supported by any customer complaint, eyewitness testimony, or email he sent to any Southern Trust client; and did not consider

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[28] *Cf. Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 WL 611732, at *4 (Sept. 14, 1998) (rejecting argument that applicant's lack of accrued leave time at work excused his nonappearance at an OTR because the NASD was entitled to request his testimony and respondent did not avail himself of "several opportunities . . . to arrange a time or a method for appearance").

alternative explanations for why his email account remained open after his association with the firm was terminated. Escobio also asserts that FINRA never took action against him or Southern Trust based on any continued association with the firm and that, as a result, FINRA's investigation was a "meritless fishing expedition" that cannot support liability under Rule 8210.[29]

Escobio's argument fails because he confuses the basis for FINRA having opened an investigation—his possible continued association with Southern Trust after he became statutorily disqualified and his registration with the firm was terminated—with the violations for which FINRA found him liable—failures to respond to Rule 8210 requests for information, documents, and testimony as part of that investigation.[30] FINRA Rule 8210 requires persons subject to FINRA's jurisdiction to respond to requests that FINRA staff make "[f]or the purpose of an investigation."[31] The rule does not require FINRA staff to make a predicate evidentiary showing regarding the matter being investigated before serving a request. Indeed, it would be illogical to require that FINRA establish that a violation of its rules occurred before it could open an investigation to determine if such a violation had taken place or serve related Rule 8210 requests. Nor was FINRA required to find that Escobio engaged in the alleged underlying misconduct to conclude that he violated Rules 8210 and 2010 by failing to answer those requests.

Enforcement also was not required to justify its investigation to Escobio. FINRA "disciplinary proceedings are treated as an exercise of prosecutorial discretion," its "decisions to initiate investigations are given wide latitude," and courts generally "will not inquire into" FINRA's motive for commencing an investigation.[32] Consistent with this discretion, we have recognized that individuals subject to FINRA's jurisdiction may not second-guess a Rule 8210

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[29] In a footnote in its brief, FINRA states that a Letter of Acceptance, Waiver, and Consent ("AWC") that Southern Trust entered into with FINRA in November 2020 casts doubt on Escobio's assertions that the underlying investigation against him was unfounded. *See* 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%20%282020-1608423593543%29.pdf. The NAC did not rely on the AWC in the decision under review, nor do we do so here.

[30] *Cf. CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *8 (Jan. 30, 2009) ("Applicants are not charged with violating the Net Capital Rule. The relevant inquiry here is whether Applicants provided documents or information responsive to [FINRA]'s requests at issue.").

[31] FINRA Rule 8210(a).

[32] *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (explaining that courts will only inquire into FINRA's reason for initiating an investigation where "there is a showing of selective enforcement . . . or an attempt to discriminate by arbitrary classification"). Escobio presented no evidence that FINRA opened its investigation as a result of selective enforcement or discrimination.

request or set conditions for their compliance with it.[33] Nor can they unilaterally decide when to respond to requests based on their personal view of the merits of FINRA's investigation.[34] A belief that FINRA does not need the requested information provides no excuse for the failure to provide it.[35] And, as we have repeatedly held in other contexts, Escobio cannot excuse his failures to respond to Rule 8210 requests based on what he claims was a favorable outcome of the investigation with which he refused to comply.[36]

Escobio's claim that the record establishes that he did not continue his association with Southern Trust after he was statutorily disqualified and his registration was terminated is beside the point. Nevertheless, we are not persuaded. Escobio offered no evidence to support his assertion. Nor does he dispute that, after his statutory disqualification and termination of his employment with Southern Trust, his Southern Trust email account remained in use. And because Escobio did not respond to Enforcement's Rule 8210 requests, the record does not include any OTR testimony from Escobio or responses to the requests that might have shed light on whether he had engaged in the misconduct Enforcement was investigating.[37]

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[33] *Mielke*, 2015 WL 5608531, at *21; *see also Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 WL 3306103, at *4 (Nov. 8, 2007) (stating that whether a requested record is "with respect to any matter involved in" a FINRA investigation "is a determination made by the [FINRA] staff" and that Rule 8210 "does not require that [FINRA] explain its reasons for making the information request or justify the relevance of any particular request"), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

[34] *Asensio & Co.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *6 (Dec. 20, 2012).

[35] *Erenstein*, 2007 WL 3306103, at *4 (citations omitted).

[36] *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *7 (Nov. 14, 2008) (finding that to allow applicant "to justify his refusal to testify by using an after-the-fact assessment of the results of [FINRA]'s investigation" would "ignore the fact that refusal to cooperate with an investigation can prevent [FINRA] from determining and establishing whether wrongdoing occurred, undermining [FINRA]'s ability to protect the investing public"); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *5 n.19 (Apr. 11, 2008) (rejecting argument that FINRA's failure to bring enforcement action "establishes the inconsequentiality of the information requested" because "it is the possibility that a request for information may ascertain whether misconduct has occurred that makes the request important"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *cf. CMG Institutional Trading*, 2009 WL 223617, at *9 ("Even if no separate disciplinary action results from [FINRA]'s underlying investigation, a failure to cooperate during that investigation threatens the self-regulatory system and, in turn, investors by impeding [FINRA]'s detection of violative conduct.").

[37] *See CMG Institutional Trading*, 2009 WL 223617, at *9 ("Applicants' failure to give complete and timely responses prevented [FINRA] from fully and expeditiously determining the firm's financial stability and whether misconduct had occurred.").

c. FINRA did not rely on inadmissible evidence.

We reject Escobio's related argument that FINRA relied on inadmissible evidence to "justify" its investigation of his potential continued association with Southern Trust. Escobio contends that portions of a declaration offered by an Enforcement attorney constitute "speculative hearsay" that "cannot be considered on a motion for summary disposition." The attorney explained that, during its 2018 periodic examination of Southern Trust, FINRA discovered emails that were received at or sent from Escobio's firm email address after his registration was terminated. Escobio specifically challenges the attorney's statement that emails from former customers provided "evidence that Escobio continued to use his Southern Trust e-mail address."[38] Escobio also asserts that FINRA "should not have considered" such emails because no evidence establishes that he ever read, responded to, or had access to those messages.

Escobio incorrectly assumes, however, that Enforcement offered the challenged portions of the declaration and the associated emails to establish that he continued to associate with Southern Trust after the firm terminated his registration with it. But Enforcement offered the declaration to support its motion for summary disposition on the Rule 8210 claims against Escobio. It did so by showing that it was conducting an investigation of potential misconduct, that it served its requests in connection with that investigation, and that Escobio did not comply with them.[39] FINRA subsequently held Escobio liable for failing to respond to Rule 8210 requests as part of its investigation, not for continuing to associate with Southern Trust. Accordingly, Escobio's evidentiary arguments are irrelevant.

In any case, the emails sent from and received at Escobio's Southern Trust email address are not inadmissible hearsay, even under judicial rules of evidence,[40] because they were offered to show that they existed and not to establish the truth of their contents or to prove that Escobio

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[38] The attorney did not definitively state that Escobio had continued to use his firm email address. Elsewhere in her declaration she referenced Escobio's "potential" continued association with Southern Trust and other evidence showing that he "may have" continued that association.

[39] To the extent that Escobio contends that the Enforcement attorney lacked personal knowledge of FINRA's investigation and its conclusions, he identified no evidence to dispute the statement in her declaration that she had "personal knowledge of the matters set forth [t]herein."

[40] FINRA disciplinary proceedings employ less formal evidentiary standards than those that would apply in federal district court. *See* FINRA Rule 9145(a) (stating that "formal rules of evidence" do not apply); FINRA Rule 9263(a) (providing admissibility standard); *Meyers Associates, L.P.*, Exchange Act Release No. 86193, 2019 WL 2593825 (June 24, 2019) (stating that hearsay "generally 'is admissible in administrative proceedings'" and identifying relevant considerations for its admission) (quoting *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *14 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010)). Escobio fails to acknowledge this distinction. Accordingly, his evidentiary arguments also fail for this reason. Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (requiring that arguments in briefs "shall be supported . . . by concise argument including citation of such statutes, decisions and other authorities as may be relevant").

continued to associate with Southern Trust.[41] Escobio does not challenge the authenticity of the emails, dispute that his former firm produced them to FINRA, or claim that they were not actually sent or received from his account.

3. Escobio's other arguments against liability are not persuasive.

Escobio challenges FINRA's liability determination on a number of other bases. First, Escobio suggests that it was improper for FINRA to bring charges against him for a violation of Rule 8210 on the "eve of his two-year retirement anniversary." But FINRA's rules expressly allow it to request that persons formerly associated with a member firm provide information, documents, or testimony within two years of the termination of their registration with a member firm and to bring a disciplinary action against them for failure to do so during that same period.[42] FINRA properly did just that.

Second, Escobio argues that Enforcement's requests were moot because as a statutorily disqualified individual he was ineligible for reinstatement, and because he never engaged in any inappropriate conduct. But individuals subject to a statutory disqualification are not forever prohibited from associating with FINRA member firms; rather, they may do so if they obtain permission.[43] And because FINRA controls its own investigations, Escobio's assertion that he did not engage in the possible misconduct Enforcement was investigating does not mean its Rule 8210 requests were moot.

Third, Escobio asserts that it would have been futile for him to respond to Enforcement's requests because, regardless of whether he eventually did so, FINRA planned to file a complaint against him seeking disciplinary sanctions for each of his earlier failures to comply with its requests.[44] We reject this argument because a person subject to FINRA's jurisdiction is not excused from complying with a Rule 8210 request simply because he risks disciplinary action for

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41 *See Espedito Realty, LLC v. Nat'l Fire Ins. Co. of Hartford*, 935 F. Supp. 2d 319, 325 n.3 (D. Mass. 2013) (holding that emails were not hearsay because they were offered to show that communications occurred, not to prove truth of matters asserted in them).

42 *See* FINRA By-Laws, Article V, Section 4(a) (providing that a "person whose association with a member has been terminated and is no longer associated with any member . . . shall continue to be subject to the filing of a complaint" for two years after the effective date of the termination of registration for a failure to provide information requested by FINRA during that two-year period); *see also Evansen*, 2015 WL 4518588, at *5 (stating that "FINRA maintains jurisdiction over formerly associated persons for two years after their FINRA registration ends").

43 *See supra* note 5; *Escobio*, 2018 WL 3090840, at *9 (denying Southern Trust's request to continue to associate with Escobio but explaining that "[a]nother member firm that proposed to employ Escobio in a different capacity, that proposed a supervisory plan adequately tailored to Escobio's situation, and that proposed a qualified and independent supervisor, might show that continued employment of Escobio would not be contrary to the public interest").

44 Escobio contends that FINRA told him this after he failed to produce any documents or information in response to five requests and failed to appear for three OTRs.

earlier failures to comply with other requests.[45] And even if Escobio had belatedly complied with Enforcement's requests and FINRA had filed a complaint against him for his earlier failures to comply—a situation that this case does not present—FINRA still would have been obligated to provide him notice of the allegations and an opportunity to defend himself.[46] Compliance with FINRA's requests thus was not futile.

C. FINRA Rules 8210 and 2010 are, and were applied in a manner, consistent with the purposes of the Exchange Act.

Rule 8210 is consistent with the purposes of the Exchange Act because it is essential to FINRA's ability to investigate possible misconduct by its members and associated persons.[47] Rule 2010 is also consistent with the purposes of the Exchange Act because it reflects the Act's mandate that FINRA have rules to "promote just and equitable principles of trade" and "protect investors and the public interest."[48] FINRA's application of these rules to Escobio was consistent with the purposes of the Exchange Act because Escobio's failure to respond to the Rule 8210 requests hindered FINRA's ability to investigate possible misconduct.[49]

We reject Escobio's contention that FINRA applied Rule 8210 improperly. Escobio argues that FINRA engaged in a "disproportionate and expansive application" of Rule 8210 because he was associated with a small firm. But before the Hearing Panel, Enforcement submitted an undisputed declaration stating that it issued each of its Rule 8210 requests as part of its investigation of Escobio's potential continued association with Southern Trust and that it was not motivated by any discriminatory or other improper purpose.

Escobio identifies no evidence in the record supporting his contrary claim. Instead, Escobio cites to an article regarding FINRA's governance structure. This article, which is not in

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[45] FINRA Rule 8210(c) (providing that compliance with requests is mandatory); *Mielke*, 2015 WL 5608531, at *17 (stating that duty to respond to Rule 8210 requests is "unequivocal").

[46] *See, e.g.*, Exchange Act Section 15A(b)(8), (h), 15 U.S.C. § 78*o*-3(b)(8), (h).

[47] *Merrimac Corp. Sec.*, Exchange Act Release No. 10662, 2019 WL 3216542, at *5 (July 17, 2019).

[48] *Newport Coast Sec., Inc.*, Exchange Act Release No. 88548, 2020 WL 1659292, at *3 n.8 (Apr. 3, 2020) (quoting Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6)).

[49] *Rani T. Jarkas*, Exchange Act Release No. 77503, 2016 WL 1272876, at *9 (Apr. 1, 2016) (finding that FINRA applied Rule 8210 and 2010 consistently with the purposes of the Exchange Act where "FINRA requested that Jarkas appear at the OTRs so that it could continue an investigation of potential net capital violations" and "Jarkas failed to appear at two OTRs, which hampered FINRA's" investigation).

the record, does not discuss Rule 8210.[50] Escobio also presents no evidence of any systemic targeting of his former firm or any other small firm, or their associated persons, in Rule 8210 matters.[51] Similarly, there is no record support for Escobio's assertion that FINRA served its Rule 8210 requests solely to provide his responses and testimony to the CFTC after the close of discovery in the CFTC matter.

We also reject Escobio's argument that FINRA's finding that he violated Rule 8210 should be vacated because FINRA allegedly acted overzealously in a separate matter involving his spouse. Escobio complains that FINRA "charged" his spouse with violating Rule 8210 because she did not turn over requested records quickly enough. But this asserted charge does not involve Escobio's compliance with Rule 8210, is not the matter under review, and is not addressed by the record in this proceeding. Escobio has presented no evidence that FINRA has engaged in "overzealous abuses" of Rule 8210 in his case or any other.

Finally, Escobio asserts that Enforcement determined to bar him before it served its Rule 8210 requests and timed its requests to "orchestrate" that result. According to Escobio, Enforcement purposefully waited until after the contempt order had been entered to serve its requests so that he would be unable to respond. There is no evidence in the record to support these claims. Enforcement served its first requests the same month the matter of Escobio's possible continued association with Southern Trust was referred to it and did so before it knew Escobio was incarcerated at FDC Miami. Contrary to Escobio's claims that Enforcement sought only to bar him, it repeatedly attempted to obtain information and documents from him and to secure his attendance at OTRs over more than three months. Escobio never complied with any of those requests; only then did Enforcement bring this proceeding.

III. Sanctions

Under Exchange Act Section 19(e)(2), we sustain FINRA's sanctions unless we find that, giving due regard to the public interest and the protection of investors, the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[52] We consider evidence of any aggravating or mitigating factors, as well as whether the sanctions

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50 *Cf. TMR Bayhead Sec., LLC*, Exchange Act Release No. 88006, 2020 WL 263490, at *6 (Jan. 17, 2020) (rejecting unsubstantiated claims that FINRA was biased against small firms); *Michael David Schwartz*, Exchange Act Release No. 81784, 2017 WL 4335068, at *6 (Sept. 29, 2017) (finding that applicant's reliance on "news articles" about alleged FINRA bias and "generalized speculation" regarding alleged retaliation against him was insufficient to support his claim that proceedings were procedurally improper).

51 *Cf. Mitchell M. Maynard*, Investment Advisers Act Release No. 2875, 2009 WL 1362796, at *9 (May 15, 2009) ("[A]dverse rulings, by themselves, generally do not establish improper bias." (quoting *Epstein*, 2009 WL 223611, at *18)).

52 15 U.S.C. § 78s(e)(2). Escobio does not claim, and the record does not show, that FINRA's action imposed an unnecessary or inappropriate burden on competition.

serve remedial and not punitive purposes.[53] Although they are not binding on us, FINRA's Sanction Guidelines serve as a benchmark in conducting our review.[54]

FINRA imposed identical, but separate, bars on Escobio for his failures (1) to respond to five requests for information and documents and (2) to appear at OTRs on five separate occasions. Each bar prevents Escobio from associating with any FINRA member firm in any capacity. For the reasons discussed below, we find that FINRA's sanctions are neither excessive nor oppressive.

A. The bars FINRA imposed on Escobio are consistent with FINRA's Sanction Guidelines.

In barring Escobio, FINRA applied the specific guidelines applicable to failures to respond to requests made pursuant to Rule 8210.[55] When an individual does not respond in any manner, those guidelines recommend a bar as "standard."[56] The undisputed record shows that Escobio completely failed to produce any information or documents in response to FINRA's requests and to appear for any of the OTRs that FINRA scheduled. Accordingly, the Guidelines recommend bars for Escobio's failures to respond to FINRA's requests.

In the case of a complete failure to respond, the Guidelines also provide that a principal consideration in determining sanctions is the importance of the information requested as viewed from FINRA's perspective.[57] The testimony, information, and documents that FINRA requested from Escobio would have shed light on whether he continued to associate with Southern Trust after he became statutorily disqualified and the firm terminated his registration with it. Although Escobio contends that he did not engage in the conduct that FINRA was investigating, FINRA was not required to take his word for it. We agree with FINRA that its requests were important to its regulatory purpose because they addressed a potentially serious violation of its rules.[58]

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53 *See Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013); *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007); *McCarthy v. SEC*, 406 F.3d 179, 188-91 (2d Cir. 2005).

54 *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 & n.68 (June 14, 2013). FINRA applied the version of its Sanction Guidelines in place at the time of the NAC's decision. https://www.finra.org/sites/default/files/2021-10/Sanctions_Guidelines_2020.pdf ("Sanction Guidelines" or "Guidelines"). Escobio does not take issue with FINRA's use of this version of the Guidelines.

55 Sanction Guidelines at 33.

56 *Id.*

57 *Id.*

58 *See Michael F. Flannigan*, Exchange Act Release No. 47142, 2003 WL 60764, at *4 (Jan. 8, 2003) (finding that requirement that persons engaged in the securities business of a member firm must be registered with that firm "provides an important safeguard in protecting public investors" because it "serves a significant purpose in the policing of the securities markets" (internal citations omitted)); *see also Bruce Zipper*, Exchange Act Release No. 84334,

(*continued*…)

The Guidelines also identify as relevant whether the respondent engaged in "numerous acts and/or a pattern of misconduct" or "misconduct over an extended period of time."[59] We agree with FINRA that it is aggravating that Escobio failed to comply with ten requests for information, documents, and testimony over more than three months.[60]

B. FINRA properly granted summary disposition as to the sanctions.

Escobio argues that FINRA erred because it barred him without conducting a hearing to address potentially mitigating factors. Specifically, Escobio contends that the district court's contempt order and his associated imprisonment subjected him to duress, coercion, and stress that prevented him from complying with Enforcement's requests. According to Escobio, FINRA failed to consider his claims of duress and coercion and required him to submit a "psychological report" to support his stress argument.

Contrary to Escobio's assertions, FINRA considered Escobio's argument that "he was under stress due to the CFTC's 'coercive' measures to enforce the restitution order" against him.[61] In reviewing the record, FINRA correctly observed that Escobio "never submitted any evidence addressing his mental state." But it also "surmise[d] that the district court's contempt order (and the resulting incarceration) caused Escobio stress."[62] To analyze that stress, FINRA relied on cases in which we rejected particular claims that stress or medical conditions were

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2018 WL 4727001, at *4 (Oct. 1, 2018) (sustaining FINRA finding that applicant engaged in "serious misconduct" by associating with a member firm during his suspension); *id.* at *10 (stating that "[w]e have considered violations of a bar order to be serious misconduct").

59 Sanction Guidelines at 7 (Principal Considerations in Determining Sanctions, Nos. 8, 9).

60 *Cf. Mielke*, 2015 WL 5608531, at *22 (finding bars imposed for violating Rule 8210 neither excessive nor oppressive where applicants "repeatedly refused to provide responsive documents" and "continuously refused to provide OTR testimony"); *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 WL 1494527, at *11 (Apr. 17, 2014) (concluding that applicant had "no excuse for failing to comply with FINRA's requests, especially considering the numerous opportunities FINRA afforded him to do so before imposing a bar").

61 *Dep't of Enf't v. Escobio*, at 15. Escobio also contends that the Hearing Panel gave insufficient attention to his claims of mitigation. But the Hearing Panel addressed the sole mitigating factor argument that Escobio advanced in his opposition to Enforcement's motion for summary disposition, *i.e.*, that FINRA's investigation was undertaken in bad faith because it was designed solely to obtain documents and testimony for the CFTC after the close of discovery in the CFTC matter. The Hearing Panel properly rejected this argument because Escobio provided no factual support for it. In any event, "it is the decision of the NAC, not the decision of the Hearing Panel, that is the final action of [FINRA] which is subject to Commission review." *William H. Murphy & Co., Inc.*, Exchange Act Release No. 90759, 2020 WL 7496228, at *17 (Dec. 21, 2020) (quoting *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 n.17 (Nov. 8, 2006)).

62 *Dep't of Enf't v. Escobio*, at 15.

mitigating because those conditions did not explain applicants' conduct.[63] FINRA concluded that Escobio's claims of stress were not mitigating because they did not explain his "months-long, complete inability to provide the testimony and records requested," during which he "continued to stonewall" Enforcement's requests after his release from prison.[64]

We agree with FINRA that, construing the record in the light most favorable to Escobio, there is no genuine issue of material fact sufficient to require a hearing on mitigation. In opposing Enforcement's summary disposition motion, Escobio offered no evidence other than the Eleventh Circuit opinion vacating the contempt order, and he does not identify any evidence or testimony he would have offered had FINRA held a hearing. We assume that Escobio suffered significant stress as a result of his incarceration and the contempt order, recognize that Enforcement sought compliance with its initial requests while he was incarcerated, and credit his counsel's statements to Enforcement that Escobio was unavailable on particular dates on which Enforcement scheduled OTRs. But these circumstances do not explain why Escobio never responded to any of Enforcement's requests at any time even after he was released from custody.[65] Indeed, Escobio fails to show that there is a genuine issue of material fact as to the standard specified in his own case, i.e., that he "had no practical alternative open to him" other

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63 *See John M.E. Saad*, Exchange Act Release No. 76118, 2015 WL 5904681, at *6 (Oct. 8, 2015) (crediting applicant's assertion that he was under both professional and personal stress at the time of his relevant conduct but finding that his stress was not a mitigating factor where his "course of conduct was not the type that one might associate with stress, such as an unthinking reaction during a stressful moment that is later redressed" but rather reflected intentional action), *petition denied in relevant part*, 873 F.3d 297 (D.C. Cir. 2017); *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 WL 1324737, at *9 (Mar. 14, 2018) (finding that "a medical disability can be mitigating if it interfered with an applicant's ability to comply with the rule at issue" but rejecting claim of mitigation where condition did not explain applicant's misconduct).

Escobio argues that *Saad* is distinguishable because, as a person subject to "the certainty of indefinite, illegal incarceration," he was subject to greater stress than the applicant in that case. Escobio also attempts to distinguish *Gadelkareem* because the applicant in that case suffered a medical condition only after the period of his misconduct. But we need not find Escobio's situation to be the same as the situations in *Saad* and *Gadelkareem* to reject his claim of mitigation. *Saad* and *Gadelkareem* stand for the proposition that personal circumstances may be mitigating but only if they help to explain the misconduct.

64 *Dep't of Enf't v. Escobio*, at 15.

65 *See supra* Section II.B.2.a. (rejecting Escobio's claims that incarceration and work schedule prevented him from appearing for an OTR or providing requested documents and information); *Saad*, 2015 WL 5904681, at *6 (finding stress not to be mitigating where misconduct was not an "unthinking" reaction to stress); *see also Jarkas*, 2016 WL 1272876, at *12 (assuming that applicant was under stress, but finding that the record did not show that stress affected his decision not to attend the OTRs, and finding that even if he were unavailable, he was required, but failed, to agree with FINRA staff on another date and time); *cf. Toni Valentino*, Exchange Act Release No. 49255, 2004 WL 300098, at *4, *5 (Feb. 13, 2004) (sustaining bar for failure to appear for NASD interviews, where NASD had rescheduled the interview three times).

than to disregard Enforcement's requests.[66] To the contrary, even viewed in the light most favorable to Escobio, the record shows that he had several months during which he could have responded to any of Enforcement's multiple requests but completely failed to do so. As a result, we find no genuine issue of material fact that required FINRA to hold a hearing addressing whether the contempt order and related stress, coercion, or duress mitigated Escobio's misconduct.[67]

C. Escobio's additional contentions that bars are "unwarranted" lack merit.

We also are not persuaded by Escobio's additional arguments that bars are "unwarranted." First, Escobio contends that barring him serves no purpose because he has retired from the securities industry, is statutorily disqualified, and was willing to agree to a voluntary bar. Escobio claims that Enforcement sought to bar him merely to enhance its reported "statistical disciplinary achievements," and we should vacate the bars to remedy this "waste of enforcement resources."

This argument is unconvincing. Escobio's claim that his retirement renders a bar unnecessary fails because retirement does not prevent him from reentering the industry in the future.[68] And although Escobio would still be subject to a statutory disqualification absent a bar, a bar would be relevant should Escobio seek permission to associate with a member firm notwithstanding the disqualification.[69] As for Escobio's proposed "voluntary bar," his offer, made during settlement discussions with FINRA, is irrelevant to our review of FINRA's

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66 *Korn v. Franchard Corp.*, 388 F. Supp. 1326, 1333 (S.D.N.Y. 1975). We assume for purposes of this opinion only that the standard in *Korn*, which Escobio cited, is applicable in FINRA disciplinary proceedings.

67 *See, e.g.*, *Kornman v. SEC*, 592 F.3d 173, 188 (D.C. Cir. 2010) ("Because Kornman presented no ground for an evidentiary hearing on mitigation . . . the Commission could reasonably conclude that an evidentiary hearing on mitigation was unnecessary."); *Gibson v. SEC*, 561 F.3d 548, 554 (6th Cir. 2009) (holding that where evidence respondent claimed mitigated his violations did "not create a material issue of fact," and where respondent proffered no additional evidence that he hoped to prove at a hearing," Commission "did not err" in granting summary disposition on the issue of sanctions "without a full evidentiary hearing"); *cf. Gately & Associates, LLC*, Exchange Act Release No. 62656, 2010 WL 3071900, at *14 (Aug. 5, 2010) (rejecting applicants' argument that, by granting summary disposition, Public Company Accounting Oversight Board inappropriately denied them the opportunity to present testimony regarding alleged mitigating factors relevant to their failure to cooperate with Board requests because applicants failed to establish a genuine issue of material fact).

68 *See Joseph Ricupero*, Exchange Act Release No. 62891, 2010 WL 3523186, at *7 (Sept. 10, 2010) (rejecting argument that a bar was unnecessary because applicant had left the securities industry since applicant could seek to reenter the industry).

69 *See Commonwealth Capital Sec.*, Exchange Act Release No. 89260, 2020 WL 3868981, at *9 (July 8, 2020) (recognizing that a bar is itself a disqualifying event and that where an individual is subject to an unqualified bar "the nature and seriousness of the misconduct underlying the bar" may itself be sufficient to deny permission to associate).

disciplinary action.[70] We also find no evidence in the record that FINRA sent Escobio Rule 8210 requests for the sole purpose of barring him.[71]

Second, Escobio asserts that FINRA should not bar a person for violation of Rule 8210 "when there is no separate violation that relates to a customer complaint, material losses or a violation of a rule requiring a showing of malfeasance and/or scienter." But a failure to comply with Rule 8210 is itself a "serious violation" because it subverts FINRA's ability to execute its regulatory responsibilities.[72] This is true even though a violation of Rule 8210 will rarely, in itself, result in direct injury to a customer or direct monetary gain for a violator.[73]

We find that the bars FINRA imposed are remedial and not punitive. Without subpoena power, FINRA must rely on Rule 8210 to obtain information "to carry out its investigations and fulfill its regulatory mandate" and its "obligation to police the activities of its members and associated persons."[74] Failure to respond to Rule 8210 requests "impedes [FINRA]'s ability to detect misconduct that threatens investors and markets."[75] It is therefore "critically important to the self-regulatory system that members and associated persons cooperate with [FINRA] investigations."[76] Escobio's failure to cooperate with FINRA for months during which it issued ten Rule 8210 requests and repeatedly attempted to accommodate his schedule demonstrates that absent a bar he "would present a continuing danger to the public interest in securing voluntary cooperation with investigations and, ultimately, detecting and preventing industry misconduct."[77] We agree with FINRA that the bars will protect the public by preventing Escobio from impeding

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70 *Richard Allen Riemer, Jr.*, Exchange Act Release No. 84513, 2018 WL 5668898, at *10 & n.57 (Oct. 31, 2018) (recognizing that FINRA was not required to accept applicant's settlement offer, that it had no obligation to settle on his terms, and that settlement negotiations are irrelevant to the sanctions determination). We accordingly do not address Escobio's contention that, as a condition of settlement, FINRA required him to agree to unidentified false allegations of fact, an assertion that FINRA disputes in its brief.

71 Escobio cites a blog post that is outside the record and does not address his case.

72 *Ricupero*, 2010 WL 3523186, at *6; *accord Hannan*, 1998 WL 611732, at *3.

73 *PAZ Sec.*, 2008 WL 1697153, at *5; *PAZ Sec.*, 566 F.3d at 1175 (holding that "the Commission did not abuse its discretion in determining the lack of direct harm or benefit does not mitigate a complete failure to respond in violation of [FINRA] Rule 8210"); *see also Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *5 n.27 (Nov. 8, 2017) (explaining that Rule 8210 violations are one of very few violations for which the Sanction Guidelines propose a bar as the standard sanction, that the others include conversion of customer funds and cheating during broker-dealer qualification examinations, and that in each case "the misconduct (absent mitigating factors) poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry").

74 *CMG Institutional Trading*, 2009 WL 223617, at *5 (citation omitted).

75 *Berger*, 2008 WL 4899010, at *4.

76 *Jarkas*, 2016 WL 1272876, at *13 (internal quotation marks and citation omitted).

77 *Evansen*, 2015 WL 4518588, at *15.

regulatory investigations, and we find that the bars will serve as a deterrent to other securities professionals tempted to evade FINRA's investigations.[78]

An appropriate order will issue.[79]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

[78] *See id.*; *see also Siegel v. SEC*, 592 F.3d 147, 158 (D.C. Cir. 2010) (noting that deterrence may be considered as part of the overall remedial inquiry in determining sanctions).

[79] We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97701 / June 12, 2023

Admin. Proc. File No. 3-20260

In the Matter of the Application of

ROBERT JUAN ESCOBIO

For Review of Disciplinary Action Taken by

FINRA

ORDER SUSTAINING DISCIPLINARY ACTION

On the basis of the Commission's opinion issued this day, it is ORDERED that the disciplinary action taken by FINRA against Robert Juan Escobio is sustained.

By the Commission.

Vanessa A. Countryman
Secretary