BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Ronald E. Walblay Delray Beach, FL, Respondent.	DECISION Complaint No. 2011025643201 Dated: February 25, 2014

A registered representative twice failed to appear for testimony. Held, findings affirmed, sanctions vacated, and proceeding remanded for a hearing.

Appearances

For the Complainant: Leo F. Orenstein, Esq., Sarah B. Belter, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Douglas J. Kress, Esq.

Decision

Pursuant to FINRA Rule 9311, Ronald E. Walblay ("Walblay") appeals a November 1, 2012 Hearing Panel decision granting a motion filed by the Department of Enforcement ("Enforcement") for summary disposition. The Hearing Panel found that Walblay twice failed to appear for testimony in violation of FINRA Rule 8210.[1] For that violation, the Hearing Panel barred Walblay from associating with any FINRA member firm in any capacity. After an independent review of the record, we affirm the granting of summary disposition as to liability, reverse the granting of summary disposition with regard to sanctions, vacate the sanctions imposed, and remand for further proceedings concerning the appropriate sanctions.

[1] The conduct rules that apply in this case are those that existed at the time of the conduct at issue.

I. Summary Disposition Standards

Pursuant to FINRA Rule 9264(e), a Hearing Panel 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. When considering a motion for summary disposition, the Hearing Panel's role "is not to weigh the evidence and determine the truth of the case presented, but to determine whether the evidence presents a disagreement sufficient to require submission to fact finding." *Dep't of Enforcement v. Respondent*, Complaint No. C02050006, 2007 NASD Discip. LEXIS 13, at *13 (NASD NAC Feb. 12, 2007). The facts alleged in the pleadings of the party against whom a motion for summary disposition is made shall be taken as true, 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. FINRA Rule 9264(e). Any inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary disposition. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The movant bears the burden of demonstrating the absence of a genuine issue of material fact and, once that burden is met, the non-moving party must then demonstrate the existence of any material, disputed facts. *Dep't of Enforcement v. Harvest Capital Invs., LLC*, Complaint No. 2005001305701, 2008 FINRA Discip. LEXIS 45, at *24 n.14 (FINRA NAC Oct. 6, 2008); *Dep't of Enforcement v. Claggett*, Complaint No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *8 (FINRA NAC Sept. 28, 2007) ("As the nonmoving party, [respondent] had to show that there were specific facts that would create a triable issue."). When the record as a whole could not lead a rational adjudicator to find for the nonmoving party, no genuine issues exist that warrant a hearing. *Respondent*, 2007 NASD Discip. LEXIS 13, at *13. If, however, "the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, then the motion for summary disposition should be denied." *Id.*[2]

II. Facts[3]

A. Walblay

Walblay entered the securities industry in 1994 as an associated person of Energy Securities, Inc. ("Energy Securities"), and was employed by that firm until November 22, 2011. From April 2000 until November 2011, he was registered with Energy Securities as a direct participation programs limited representative and direct participation programs limited principal.

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[2] In cases involving motions for summary disposition, we look to Federal Rule of Civil Procedure 56 for guidance. *Claggett*, 2007 FINRA Discip. LEXIS 2, at *8 n.2.

[3] The following section is intended to be consistent with our obligations in reviewing the Hearing Panel's decision to grant Enforcement's motion for summary disposition. In this regard, it consists of facts that are undisputed or facts that are read in the light most favorable to Walblay. Nothing in this section should be construed to suggest that we have resolved any factual disputes in favor of one party or the other.

Walblay served as the firm's president and, in 2007, Walblay became its sole owner. Walblay is not currently associated with a FINRA member firm.

B. First Request to Appear at an On-the-Record Interview

In August 2011, FINRA conducted a cycle examination of Energy Securities. Energy Securities acted as a broker-dealer for oil and gas direct participation offerings structured by RyHolland Fielder, Inc. ("RyHolland Fielder"), an entity that Walblay created and solely owned. According to AB, one of Walblay's former attorneys, FINRA staff "had extensive access to Mr. Walblay during the initial audit at his offices in Tennessee," and Walblay sat "for hours and hours of questions from August 2, 2011 through August 5, 2011."

During the examination, FINRA staff developed concerns that Walblay may have misused customer funds to meet obligations for previous offerings of RyHolland Fielder sold by Energy Securities and to cover his personal expenses. On October 6, 2011, FINRA staff sent Walblay a letter requesting, pursuant to FINRA Rule 8210, that Walblay appear for an on-the-record interview ("OTR") on October 25, 2011, in FINRA's New Orleans offices. The letter warned Walblay that if he failed to appear and testify, he could be subject to a disciplinary action and the imposition of sanctions, including a bar from the securities industry, a suspension, a censure, or fines. FINRA staff sent the letter to Walblay at the following three addresses: (1) Walblay's residential address as listed in the Central Registration Depository ("CRD") via certified and first-class U.S. mail; (2) Energy Securities' address via first-class U.S. mail; and (3) Walblay's RyHolland Fielder e-mail address. The mailings sent to Walblay's CRD residential address were returned to FINRA stamped "FORWARD TIME EXP RTN TO SEND" and marked with another address in Delray Beach, Florida.

According to Walblay, he informed his attorneys that he could not appear at the scheduled OTR because he would be working "in the field" and did not have time to go. On October 13, 2011, AB sent FINRA staff a letter stating that AB was in receipt of FINRA staff's October 6, 2011 request for testimony. AB explained that Walblay "will be on-site supervising the drilling of Ryholland wells and as a result will be unavailable to attend the OTR on October 25, 2011." AB further wrote that Walblay "is the only Ryholland employee who has the ability, knowledge and expertise to supervise the drilling," that Walblay's "presence at the drill sites is essential to the survival of Ryholland," and that if Walblay "were forced to abandon drilling activities . . ., Ryholland would lose its place in line with a driller and investors would suffer significant losses as a result." AB also asserted that his clients (which included Energy Securities and RyHolland Fielder) were attempting to obtain documents previously requested by FINRA staff that were in the possession of a third-party banking institution and that, until such documents were obtained, Walblay "will likely to be unable to provide complete answers to your inquiries." Stating that FINRA staff had "extensive access to Mr. Walblay during the initial audit," AB requested that FINRA staff "indicate what additional questions need to be asked at the OTR." Finally, AB offered that, "in an effort to cooperate," Walblay could "make himself available to answer your inquiries via written response once he has received and reviewed the documents from [the banking institution]."

The day after FINRA staff received AB's letter, FINRA staff contacted AB and, without releasing Walblay from the obligation to appear on October 25, 2011, invited AB to propose an alternate date for the OTR. AB responded that he would speak with Walblay and provide

FINRA staff with a list of alternative dates by Monday, October 17, 2011. AB failed, however, to provide any alternative dates. On Wednesday, October 19, 2011, FINRA staff contacted AB by telephone and again asked that he propose an alternate OTR date. AB responded that he would provide alternative dates by the end of the week.

On Friday, October 21, 2011, FINRA staff sent an e-mail to AB stating that "we have not received from you any proposed alternative dates" and, "[a]s such, the interview will proceed as scheduled on . . . October 25, 2011." Later the same day, AB responded that he had been unable to obtain alternative OTR dates and was "not comfortable committing [Walblay] to an alternative [date] without confirming first." AB further stated, "I am continuing my efforts to obtain a date" but "Walblay is unavailable on October 25, 2011 and will not be attending that day." On October 25, 2011, Walblay failed to appear for the scheduled OTR.

C. Second Request to Appear at On-the-Record Interview

On October 26, 2011, FINRA staff telephoned AB and informed him that FINRA had prepared a second Rule 8210 request that Walblay appear at an OTR. On the same day, FINRA staff sent the request letter to AB, and it sent copies to Walblay at his CRD residential and Delray Beach addresses, all via certified and first-class mail. In the second request letter, FINRA staff recounted their previous efforts to obtain Walblay's testimony on October 25, 2011, AB's response that Walblay would not be available, FINRA staff's request that AB provide an alternative date, and AB's failure to do so. FINRA staff therefore requested that Walblay appear for an OTR on November 30, 2011, at FINRA's New Orleans offices. The letter again warned Walblay that if he failed to appear and testify, he may be subject to a disciplinary action and sanctions.

FINRA staff received a signed receipt for the certified letter sent to AB. The letters sent to Walblay's CRD address were both returned marked "FORWARD TIME EXP RTN TO SEND." The returned first-class mail envelope also was stamped with the Delray Beach address to which FINRA staff had already sent a copy of the letter. A printout from the "track and confirm" section of the USPS.com website indicates that the certified letter sent to Walblay's Delray Beach address was left unclaimed.

According to Walblay, his face started to go numb on the morning of November 16, 2011, and he drove himself to the emergency room at Delray Medical Center in Delray Beach, Florida. Walblay was experiencing facial paralysis on the left side of his face, was admitted to the hospital for two days, and was diagnosed with Bell's palsy. Walblay claimed that his doctors sought to extend his hospital stay, but that he went home because of his belief, based on his prior experience with Bell's palsy during college, that "there is nothing you can do for it except take steroids."

Also on the morning of November 16, 2011, FINRA staff sent AB an e-mail requesting confirmation that Walblay would appear for the OTR on November 30, 2011. FINRA staff received no immediate response. On November 17, 2011, JC, a co-worker of Walblay's, informed FINRA staff that Walblay had been admitted to the hospital and that his doctors were

not releasing him.[4] Later that same day, FINRA staff again spoke to JC, who informed them that Walblay had been diagnosed with Bell's palsy. FINRA staff called the hospital and was told, at that time, that Walblay had been released.

On November 18, 2011, AB contacted FINRA. AB told FINRA staff that Walblay was experiencing medical issues and was recently hospitalized. AB further stated that he was not prepared to say that Walblay would not appear at the upcoming OTR but asked what medical documentation would be required should Walblay be unable to appear. FINRA staff explained that Walblay would need to provide a letter from his doctor stating that Walblay would be unable to appear due to his medical condition and indicating when Walblay would be able to testify.

On November 22, 2011, FINRA staff spoke with AB. FINRA staff's log of that call reads, "[d]iscussed OTR and [W]alblay's apparent inability to operate if unable to appear for OTR." On the same day, Energy Securities terminated Walblay's registration, and Walblay signed on behalf of Energy Securities a Uniform Request for Withdrawal of Broker-Dealer Registration ("Form BDW") withdrawing its broker-dealer registration.[5] Also on the same day, FINRA staff contacted AB to again inquire whether Walblay would appear at the OTR. AB would not confirm Walblay's appearance.

Meanwhile, Walblay—according to medical records that he submitted—was receiving regular medical attention for his facial paralysis, as well as for high blood pressure and other medical problems. Medical records indicate that Walblay visited his treating physician on November 19, 2011, at which time Walblay's symptoms included the following: facial numbness; difficulty with speaking, swallowing and blowing; sleep loss; headaches; and high blood pressure. Such records further indicate that Walblay's treatment included steroids, acupuncture, diathermy, and manual therapy. Walblay had additional appointments with his treating physician on November 21, 23, and 26, 2011.

According to Walblay, either he or JC told Walblay's attorneys that he could not appear for the November 30, 2011 OTR due to his health issues. Neither Walblay nor his attorneys, however, told FINRA staff that Walblay's illness would prevent his appearance. Nor did they provide FINRA staff with the physician's letter that FINRA staff indicated was needed to obtain a postponement of the OTR for medical reasons. Instead, on November 29, 2011, AB sent FINRA staff a letter stating that Walblay would be unable to attend the OTR because he would "continue to be on-site supervising the drilling of Ryholland wells." AB again noted the damage that would result should Walblay be forced to abandon drilling activities, asserted that Walblay would be unlikely to be able to answer all questions until records were received from the third-party banking institution, noted FINRA staff's prior access to Walblay during the cycle examination, and requested the additional questions that FINRA sought to ask at the OTR. AB's

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[4] Walblay claimed that an employee of the law firm he had retained also alerted FINRA staff on November 17, 2011, that Walblay had been hospitalized.

[5] We take official notice of Energy Securities' Form BDW that appears in CRD.

letter made no mention of Walblay's medical condition and did not propose any alternate OTR dates.[6] On November 30, 2011, Walblay failed to appear at the scheduled OTR.

Medical records indicate that Walblay was feeling much better as of December 7 and 20, 2011, but that he continued to receive medical treatment throughout December 2011. Walblay also claimed that he did not travel anywhere for about eight weeks after his diagnosis. There is no evidence that FINRA staff and Walblay had any communications between the date of the second OTR and the initiation of this disciplinary proceeding.

III. Procedural History

On February 8, 2012, Enforcement filed a single-cause complaint alleging that Walblay failed to respond to two requests for testimony. Walblay filed an answer, admitting his failure to appear for testimony but raising certain defenses. On September 20, 2012, both parties filed motions for summary disposition. On November 1, 2012, the Hearing Panel granted Enforcement's motion and denied Walblay's motion. The Hearing Panel found that Walblay twice failed to appear for testimony, rejected his defenses, and barred him from associating with any member firm. Walblay then filed this appeal.

IV. Discussion

The Hearing Panel correctly granted Enforcement's motion for summary disposition of its allegations that Walblay violated FINRA Rule 8210. FINRA Rule 8210(a) provides, in pertinent part, that, for the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an adjudicator or FINRA staff shall have the right to require a member, person associated with a member, or any other person subject to FINRA's jurisdiction to provide information orally and to testify at a location specified by FINRA staff with respect to any matter involved in the investigation, complaint, examination, or proceeding. FINRA Rule 8210(c) provides, in pertinent part, that "[n]o member or person shall fail to provide information or testimony pursuant to this Rule."

It is undisputed that FINRA requested that Walblay appear at OTRs in October and November 2011 and provided proper notice of those two interviews.[7] It is also without dispute that Walblay failed to appear at either one. Walblay argues, however, that he was "justified" in not appearing at both OTRs based on "advice of counsel" and in not appearing at the second OTR based on his health condition. These arguments, however, lack merit.

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[6] When it was pointed out that Walblay's attorney informed FINRA staff that Walblay could not attend the second OTR because of his work obligations, Walblay responded, "[h]ow would he know? I didn't talk to him on a daily basis."

[7] By mailing the FINRA Rule 8210 requests to Walblay's residential address as listed in CRD, FINRA staff provided notice to Walblay consistent with the requirements of FINRA Rule 8210(d). Walblay makes no claim that he lacked proper notice of the Rule 8210 requests. In fact, the record shows that Walblay had actual notice of the Rule 8210 requests.

Walblay's purported reliance on advice of counsel does not excuse his failures to appear. While reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions, a respondent's reliance on an attorney's legal advice "is immaterial to an associated person's obligation to supply requested information" to FINRA. *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994); *accord Toni Valentino*, 57 S.E.C. 330, 338-39 (2004).

Moreover, "the person to whom an information request is directed has a duty to respond himself or to supervise others diligently with adequate follow-up to ensure a prompt response to [FINRA]" and "cannot shift responsibility to [another person] for his own failure to provide requested information in a timely fashion." *Dennis A. Pearson*, Exchange Act Release No. 54913, 2006 SEC LEXIS 2871, at *14 (Dec. 11, 2006) (internal quotation marks omitted). "[A] member or an associated person cannot satisfy his obligation to respond to an information request by simply referring the matter to a lawyer . . ., particularly where . . . the member or person fails to act to ensure that the lawyer had provided the requested information." *Id.*; *accord Markowski*, 51 S.E.C. at 557 (holding that a respondent could not delegate to counsel the ultimate responsibility of complying with FINRA requests for information). Thus, even if Walblay delegated to his attorneys the task of communicating with FINRA staff about the requests for his testimony, Walblay remained ultimately responsible for ensuring that he complied with his regulatory obligations.

Those obligations were clear. By registering with FINRA, Walblay "agreed to abide by its rules which are unequivocal with respect to an associated person's duty to cooperate with [FINRA] investigations." *Joseph G. Chiulli*, 54 S.E.C. 515, 524 (2000). Regardless of his work commitments or health problems, Walblay was "not entitled as a matter of right" to postpone the dates of his scheduled testimony. *Dep't of Enforcement v. Valentino*, Complaint No. FPI010004, 2003 NASD Discip. LEXIS 15, at *13 (NASD NAC May 21, 2003) (internal quotation marks omitted), *aff'd*, 57 S.E.C. 330 (2004). If Walblay had a conflict or a personal health issue that prevented his appearance, he should have "raised, discussed, and resolved [it] with [FINRA] staff in the cooperative spirit and prompt manner contemplated by [FINRA] rules." *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *23-24 (Jan. 30, 2009) (internal quotation marks omitted). If an associated person "cannot readily provide the information sought by [FINRA], such a person ha[s] an obligation to explain, as completely as possible, his efforts, and his inability to do so." *Id.* at *23 (internal quotations marks omitted); *accord Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18 (Nov. 8, 2007) ("[R]ecipients of requests under Rule 8210 must promptly respond to the requests or explain why they cannot.").

Walblay (through his attorneys) fell far short of fulfilling his compliance obligations. Although AB, acting on behalf of Walblay, alerted FINRA staff that Walblay had a conflicting work commitment and could not attend the first OTR, AB never supplied alternative OTR dates despite being asked for them several times by FINRA staff. As for the second OTR, we assume for purposes of reviewing the granting of Enforcement's motion for summary disposition that Walblay was too ill to attend, as he claims. Nevertheless, although AB informed FINRA staff that Walblay would not be attending the second OTR, AB failed to explain that the reason why was Walblay's serious health condition, provide the physician's note that FINRA staff had indicated would be required to obtain a medical postponement, or propose alternate OTR dates.

Instead, AB informed FINRA staff—waiting until the day before the scheduled interview to do so—that Walblay would be unable to attend because Walblay again needed to be in the field supervising his company's drilling operations. AB, acting on Walblay's behalf, did not resolve the scheduling of the interviews in a cooperative and prompt manner. *See Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *22-23 (Sept. 10, 2010) (finding that even if respondent had difficulties with obtaining documents requested by FINRA, he failed to raise such issues in a cooperative and prompt manner), *aff'd*, 436 F. App'x 31 (2d Cir. 2011); *Lee Gura*, Exchange Act Release No. 50570, 2004 SEC LEXIS 2406, at *8 (Oct. 20, 2004) (holding that "unsubstantiated personal and medical problems do not excuse an applicant's failure to respond"); *Joseph Patrick Hannan*, 53 S.E.C. 854, 859-60 (1998) (rejecting argument that respondent's lack of accrued leave time at work excused his non-appearance at an OTR where respondent did not avail himself of "several opportunities . . . to arrange a time or a method for appearance"); *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993) (finding that respondent failed to respond to FINRA requests for documents where although difficulties with accessing the documents might have warranted an extension, no extension was requested). Although Walblay criticizes his former attorney's performance and understanding of FINRA rules, Walblay "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." *Howard Brett Berger*, Exchange Act Release No. 59850, 2008 SEC LEXIS 3141, at *44 n.66 (Nov. 14, 2008) (internal quotation marks omitted), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).[8]

That Walblay eventually provided testimony on April 25, 2012, also does not excuse his earlier failures to appear, even if it was fully cooperative. Providing testimony six months after it was first required was not the full and prompt compliance that FINRA Rule 8210 requires. *Michael David Borth*, 51 S.E.C. 178, 180 (1992); *see also Sundra Escott-Russell*, 54 S.E.C. 867, 872 (2000) (stating that a year-long delay in cooperating did not cure earlier failures to respond).

Accordingly, with respect to liability, Enforcement has demonstrated the absence of genuine issues of material fact, and Walblay has not produced sufficient evidence to raise a question as to the outcome. We find that summary disposition of the allegations of liability was appropriate, that Walblay had no excuse for failing to appear at two OTRs, and that his failures constituted violations of FINRA Rules 8210 and 2010.[9]

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[8] The first time Walblay informed FINRA staff that his medical condition prevented his appearance was at his post-complaint OTR on April 25, 2012, which was nearly six months after the second OTR date. Offering a new excuse months after the fact, however, did not excuse his violation. *See Dep't of Mkt. Regulation v. Ryan & Co.*, Complaint No. FPI040002, 2005 NASD Discip. LEXIS 8, at *16 n.10 (NASD NAC Oct. 3, 2005) (holding that respondents "cannot change the reason for their initial failure to comply with staff's requests from a claim that the requests were too burdensome to [respondent's] purported poor medical condition").

[9] A violation of FINRA rules, such as FINRA Rule 8210, "constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of . . . [FINRA] Rule 2010." *See Ricupero*, 2010 SEC LEXIS 2988, at *12-13 n.12. FINRA Rule

[Footnote continued on next page]

V. Sanctions

In contrast to the absence of any genuine issues of material factual concerning liability, there are issues of material fact with respect to the appropriate sanctions. As explained below, we find that summary disposition of the sanctions was not appropriate, vacate the sanctions imposed, and remand for a hearing.

When assessing sanctions, we consider FINRA's Sanction Guidelines ("Guidelines"), including the Principal Considerations in Determining Sanctions set forth therein and any other case-specific factors.[10] The Hearing Panel found, and Enforcement argues, that Walblay's conduct constituted a complete failure to respond and that a bar is warranted.[11] Walblay contends, on the other hand, that his conduct should be characterized as failing to respond in a timely manner, that there are mitigating factors, and that any sanction should be limited to a suspension.[12] As explained below, there are several issues of material fact related to potentially mitigating factors concerning which Enforcement has failed to demonstrate the absence of a genuine dispute or which Walblay has demonstrated are disputed.

For example, Walblay has demonstrated that there are disputed factual issues concerning the seriousness of his illness. Enforcement contends that Walblay's claim that his medical condition prevented his appearance at the second OTR is belied by "the circumstances surrounding his medical problems." Enforcement notes that Walblay's attorney, at the time of the second OTR, never claimed that Walblay was unable to appear because of his medical condition. It also notes that on November 22, 2011—just eight days before the second OTR—Walblay was healthy enough to execute a Form BDW withdrawing his firm's broker-dealer registration. Walblay, however, testified at a post-complaint OTR that he was unable to appear at the second OTR because of his illness. Moreover, Walblay submitted significant medical documentation indicating that he was diagnosed with Bell's palsy approximately two weeks prior to the second OTR and that he received ongoing medical treatment in the weeks leading up to

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0140(a) makes rules that apply to members, such as FINRA Rule 2010, applicable to associated persons.

[10] *See FINRA Sanction Guidelines* (2013 ed.), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf [hereinafter *Guidelines*].

[11] *See id.* at 33 ("If the individual did not respond in any manner, a bar should be standard.").

[12] *See id.* (recommending a suspension of an individual in any or all capacities for up to two years and a fine between $2,500 and $25,000 for failures to respond in a timely manner or where mitigation exists).

and following the second OTR. Thus, there are genuine factual disputes concerning the severity of Walblay's illness and its effects on him.

These factual disputes are material because they might provide mitigation. Even though Walblay always retained the responsibility to comply with FINRA staff's requests for his testimony, Walblay was entitled to delegate to his attorneys the task of communicating with FINRA about the scheduling of the OTR provided that he diligently monitored his attorneys' performance. Depending on how severe Walblay's illness was, however, his ability to diligently monitor his attorneys' communications with FINRA in the weeks leading up to the second OTR, or to communicate independently with FINRA concerning the scheduling of the OTR, may have been impacted. If it was, the Hearing Panel would evaluate these facts in their sanctions discussion.

Summary disposition of the sanctions was also inappropriate because Enforcement has not demonstrated the absence of genuine issues of material fact concerning the import of Walblay's eventual appearance at an OTR and his post-complaint production of documents to FINRA. To be sure, there are many reasons that weigh against crediting Walblay's post-complaint compliance with FINRA requests with any mitigation. The Guidelines provide that a voluntary and reasonable attempt to remedy misconduct is mitigating only where it occurs prior to detection and intervention by a firm or a regulator.[13] Walblay did not appear at an OTR, or provide responses to certain pre-complaint requests for information and documents, until *after* FINRA filed a complaint. Moreover, it is a bedrock principle that FINRA "should not have to bring disciplinary proceedings . . . in order to obtain compliance with its rules governing its investigations." *Valentino*, 57 S.E.C. at 339. Likewise, even assuming that Walblay timely responded to FINRA's post-complaint requests for information and documents, when Walblay registered with FINRA "he agreed to abide by its rules, and compliance with his obligation to cooperate with an investigation is not a mitigating factor." *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *25 (Feb. 24, 2012) (internal quotation marks omitted). Nevertheless, the Hearing Panel based the bar imposed, in part, on its finding that Walblay "acted at least recklessly," and Walblay's eventual appearance at an OTR and his post-complaint production of records may have some bearing on his intent in not previously appearing at the OTRs, especially considering the factual disputes concerning the severity of Walblay's illness and the absence of any contention that Walblay was not fully cooperative at his post-complaint OTR. Thus, resolving these factual questions that may have a bearing on Walblay's state of mind are material because they could affect the sanctions determination.[14]

Enforcement also has failed to demonstrate the absence of a genuine dispute concerning the impact that Walblay's delay had on FINRA staff's examination or investigation. Walblay

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[13] *Id.* at 6 (Principal Considerations in Determining Sanctions, No. 4).

[14] *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 12, 13) (directing adjudicators to consider whether the respondent "attempted to delay FINRA investigation [or] conceal information from FINRA" and whether the respondent's misconduct "was the result of an intentional act, recklessness or negligence").

ultimately appeared at an OTR six months after he was first required to appear. Although the Hearing Panel concluded that this delay was "protracted inaction," Walblay contends that the six-month delay was relatively short. It is difficult, however, to assess the gravity of a six-month delay only from its length and a general summary of what FINRA staff would have explored at the OTR. Enforcement offered few assertions and no testimony concerning what impact the six-month delay had on FINRA staff's investigation or that illuminates whether Walblay would dispute any of Enforcement's assertions in that regard. Resolving this factual issue could affect the appropriate sanctions.[15]

Enforcement also failed to demonstrate the absence of a genuine dispute concerning factual questions related to Walblay's purported cooperation during the cycle examination of his firm. According to AB, during the cycle examination and prior to the FINRA Rule 8210 requests at issue, FINRA staff "had extensive access to Mr. Walblay" who sat "for hours and hours of questions from August 2, 2011 through August 5, 2011." Although it will be the rare case where an associated person's cooperation during a routine cycle examination affects how such person's subsequent failure to appear at an OTR is categorized under the specific Guidelines for FINRA Rule 8210 violations[16] or otherwise provides any mitigation, we cannot find that Walblay's purported cooperation during the cycle examination has no such mitigating effect absent more facts, which may or may not be disputed. For example, Enforcement provided little evidence or assertions concerning the nature and substance of Walblay's purported prior cooperation during the cycle examination, whether it was responsive to requests that invoked FINRA Rule 8210, or the extent to which it related to what FINRA staff wanted to explore at the OTRs. There also is little evidence concerning whether the OTRs that FINRA staff sought were a continuation of the cycle examination or, instead, an investigation into potential misconduct. The resolution of these factual issues may impact how to categorize Walblay's violations under the Guidelines and whether Walblay provided any cooperation that warrants mitigation.[17]

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[15] We note our disagreement, however, with Walblay's argument that FINRA staff's failure to charge him with any substantive wrongdoing "refutes the Hearing Panel's conclusion" that his actions "impeded" FINRA's investigation. The fact that FINRA has not initiated a disciplinary proceeding is not evidence that Walblay's delays in appearing at an OTR did not impact FINRA's examination or investigation.

[16] *See id.* at 33 (setting forth, for sanctions purposes, three categories of Rule 8210 violations).

[17] In this regard, we are mindful of the SEC's recent opinion in *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699 (June 14, 2013). In *Plunkett*, the SEC found that a representative's failure to comply with FINRA requests for information should not be analyzed under the Guidelines by applying a presumption of a complete failure to respond. On remand, the Hearing Panel should consider, after further factual development, whether *Plunkett* has any relevance to the sanctions analysis here. Nothing in this decision shall be construed to suggest that we have any opinion on this particular issue.

Because there are issues of material fact concerning sanctions, we reverse the granting of summary disposition concerning the sanctions and remand. On remand, the parties may present evidence concerning any and all issues that are relevant to the sanctions determination. This decision should not be interpreted as addressing all factual issues that pertain to sanctions or limiting the scope of factual issues that may be explored on remand. Nor shall it be construed as suggesting that we have resolved the truth of any factual issues or the ultimate outcome of the sanctions aspect of this case.

VI. Conclusion

We affirm the granting of Enforcement's motion for summary disposition on the issue of liability and find that Walblay twice failed to appear for testimony in violation of FINRA Rules 8210 and 2010. We reverse the granting of summary disposition concerning the sanctions, vacate the sanctions imposed, and remand the proceeding for further fact-finding at a hearing that is consistent with this decision.

On Behalf of the National Adjudicatory Council,

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Marcia E. Asquith,
Senior Vice President and Corporate Secretary