

BEFORE THE NATIONAL ADJUDICATORY COUNCIL
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

Robert Juan Escobio,
Coral Gables, FL,

Respondent.

DECISION

Complaint No. 2018059545201

Dated: March 10, 2021

Respondent failed to respond to FINRA information requests and failed to appear and provide testimony. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Megan P. Davis, Esq., Janine D. Arno, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Rhonda A. Anderson, Esq.

Decision

Robert Juan Escobio (“Escobio”) appeals a February 5, 2020 Hearing Panel decision. The Hearing Panel granted the Department of Enforcement’s motion for summary disposition as to two causes alleging violations of FINRA Rules 8210 and 2010, finding that Escobio violated those rules by failing to respond to five requests for information and documents, and five requests to appear for on-the-record testimony. The Hearing Panel noted there was no dispute that Escobio failed to comply with the Rule 8210 requests, and rejected, as a matter of law, Escobio’s assertions that he should not have been required to respond to the requests. The Hearing Panel imposed a bar for each cause. After an independent review of the record, we affirm the Hearing Panel’s findings and sanctions.

I. Background

A. Escobio

Escobio entered the securities industry in 1980. In 2000, he associated with Southern Trust Securities, Inc. (“Southern Trust” or “the Firm”) as a general securities representative and a general securities principal. Between June 2000 and April 2014, Escobio served as Southern Trust’s chief executive officer. He purportedly retired from Southern Trust in 2017 and is not currently employed in the securities industry.

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

On August 29, 2016, the United States District Court for the Southern District of Florida entered a final judgment against Escobio, Southern Trust Metals, Inc. (“Southern Metals”), and Loreley Overseas Corporation (“Loreley”) based upon a complaint filed by the Commodity Futures Trading Commission (“CFTC”).¹ Escobio had general control over both Southern Metals and Loreley. The court found that Southern Metals engaged in a fraudulent scheme in which it misrepresented to customers that they were purchasing (and owned) physical metals that were held in depositories. Southern Metals further represented that the customers were receiving loans to purchase those metals, for which they were charged interest. In reality, the customers owned no physical metals and had not taken out loans. Instead, Southern Metals transferred customer funds through Loreley to margin trading firms based in London. At those firms, the customer funds were used to purchase off-exchange derivative contracts designed to hedge Southern Metals’ exposure in its customers’ positions.

The district court determined that the defendants’ misconduct violated anti-fraud provisions of the Commodity Exchange Act (“CEA”), as well as CEA provisions prohibiting off-exchange transactions and requiring that futures commission merchants be properly registered.² The court found Escobio jointly and severally liable for these violations, as he had general control over both Southern Metals and Loreley. The court ordered the defendants to pay restitution to the customers they harmed, as well as a civil monetary penalty. In addition, the court permanently enjoined the defendants—including Escobio—from directly or indirectly engaging in several activities governed by the CEA, and from applying for registration or engaging in any activity requiring registration under the CEA.³

¹ *CFTC v. S. Trust Metals, Inc.*, 180 F. Supp. 3d 1124 (S.D. Fla. 2016).

² *See* 7 U.S.C. § 6b(a) and 7 U.S.C. § 9, and 17 C.F.R. § 180.1 (CEA anti-fraud provisions); 7 U.S.C § 6a and 7 U.S.C § 6d(a)(1) (addressing off-exchange transactions and registration for futures commission merchants).

³ The United States Court of Appeals for the Eleventh Circuit affirmed the district court’s judgment, except that it reversed the restitution order to the extent that the restitution related to

On September 7, 2016, FINRA notified Southern Trust that Escobio was statutorily disqualified from associating with a member firm as a result of the district court’s judgment.⁴ Southern Trust filed a Membership Continuation Application (MC-400) on Escobio’s behalf, and the National Adjudicatory Council (“NAC”) denied that application on July 27, 2017.⁵ In its decision, the NAC noted that the scheme leading to the district court’s judgment “involved extremely serious and recent misconduct” and that Escobio’s continued association with the Firm posed “an unreasonable risk of harm” to investors.

On July 29, 2017, FINRA filed a Uniform Disciplinary Action Reporting Form (Form U6) reporting the denial of Southern Trust’s Membership Continuation Application. On August 7, 2017, Southern Trust filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) for Escobio, reporting that he retired from the Firm effective July 31, 2017. The Form U5 listed a registration termination date of July 27, 2017 (the same day the NAC denied the Membership Continuation Application). Nearly two years later, on June 28, 2019, Southern Trust amended the Form U5 to state that Escobio retired from the Firm effective June 30, 2017.⁶

[Cont’d]

Southern Metals’ failure to register as a futures commission merchant. *CFTC v. S. Trust Metals, Inc.*, 894 F.3d 1313, 1335 (11th Cir. 2018).

⁴ FINRA’s By-Laws provide that a person is subject to “disqualification”—and therefore must obtain FINRA’s approval prior to associating with a member firm, or to continue to associate with a member firm—if he is disqualified under Section 3(a)(39) of the Securities Exchange Act of 1934 (“Exchange Act”). *See* FINRA By-Laws, Art. III, Sec. 4. Exchange Act Section 3(a)(39)(F) incorporates Exchange Act Section 15(b)(4)(C) by reference. 15 U.S.C. § 78c(39)(F), 15 U.S.C. § 78o(b)(4)(C). As relevant here, Exchange Act Section 15(b)(4)(C) provides that a person is subject to statutory disqualification if he is enjoined by order or judgment of any court of competent jurisdiction from acting as a person or entity required to be registered under the CEA, or from engaging in or continuing any conduct or practice in connection with such activity. 15 U.S.C. § 78o(b)(4)(C).

⁵ The SEC affirmed the NAC’s denial of the Membership Continuance Application and dismissed Escobio’s application for review on June 22, 2018. *Robert J. Escobio*, Exchange Act Release No. 83501, 2018 SEC LEXIS 1512 (June 22, 2018).

⁶ Before the Hearing Panel, Escobio argued that his registration ended on June 30, 2017—and, therefore, that FINRA lacked jurisdiction over this matter because Enforcement filed the Complaint more than two years later (on July 17, 2019). Although Escobio does not raise a jurisdictional argument on appeal, we agree with and affirm the Hearing Panel’s conclusion that Southern Trust’s amendment to the Form U5 had no impact on FINRA’s jurisdiction over Escobio, as it is FINRA (and not the registered person or member firm) that determines the date an individual’s registration ended. *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *24 (July 27, 2015); FINRA By-Laws Art. V, Sec. 3(a). FINRA continued to have jurisdiction to file the complaint in this matter for two years after the effective

[Footnote continued on next page]

II. Facts

A. Escobio Fails to Respond to FINRA's Requests for Information and Documents

During a 2018 cycle examination of Southern Trust, FINRA found evidence suggesting that Escobio continued to associate with the Firm after he was statutorily disqualified and his registration was terminated. In particular, FINRA examiners discovered emails indicating that Escobio may have continued to use his Southern Trust email address to conduct securities business after July 2017.⁷ As a result, the examiners investigated whether Escobio continued to associate with Southern Trust, and ultimately referred the matter to Enforcement.

As part of its investigation, Enforcement sent Escobio requests for information and documents pursuant to FINRA Rule 8210. On March 26, 2019, Enforcement mailed Escobio a Rule 8210 request asking him to identify any email addresses he used after July 1, 2017, and to provide any electronic communications concerning securities business that he sent or received after that date. Enforcement sent the request by certified mail and overnight courier to Escobio's residential address listed in the Central Registration Depository ("CRD"®). Escobio did not provide the information and documents requested and did not seek an extension of time to do so.

On April 10, 2019, Enforcement sent a second Rule 8210 request to Escobio's CRD address by certified and first-class mail. Enforcement also sent the request by first-class mail to a federal detention center in Miami, Florida, where Escobio was incarcerated pursuant to a contempt order entered in the CFTC matter.⁸ The second request letter sought the same

[Cont'd]

date Escobio's registration was terminated (July 27, 2017), and the Department of Enforcement ("Enforcement") filed the complaint within that window. FINRA By-Laws Art. V, Sec. 4(a)(i).

⁷ For example, on November 6, 2017, an individual emailed Escobio's Southern Trust email address to confirm a lunch meeting, and asked Escobio to bring materials showing growth in the individual's accounts. The meeting was confirmed in a response sent from Escobio's Southern Trust email account. In another email sent to Escobio's Southern Trust account on February 2, 2018, an individual instructed Escobio to buy certain stocks and requested investment advice. Other emails sent to Escobio's Southern Trust account in 2018 also indicated that he may have continued to conduct securities business.

⁸ Between April 1 and April 26, 2019, Escobio was incarcerated at a federal detention center for contempt of court. The United States District Court for the Southern District of Florida issued the contempt order after Escobio failed to make restitution payments, as required by the court's prior judgment in the CFTC matter. Escobio appealed the contempt order to the U.S. Court of Appeals for the Eleventh Circuit and, on January 6, 2020, that court entered a decision holding that the district court lacked authority to enforce the restitution obligation through its civil contempt power. *CFTC v. Escobio*, 946 F.3d 1242 (11th Cir. 2020).

[Footnote continued on next page]

information and documents as the first. Escobio did not provide the information and documents requested and did not seek an extension of time to do so.

On May 2, 2019, Enforcement sent a third Rule 8210 request to Escobio by certified and first-class mail, as well as by courier, to his CRD address. This third request sought the same information and documents as the prior requests. Again, Escobio did not provide the information and documents requested and did not seek an extension of time to do so.

Enforcement sent an additional Rule 8210 request for information and documents to Escobio on May 2, 2019. In this fourth request, Enforcement sought Escobio's mobile phone records from July 27, 2017, through the date of the request. Enforcement sent this request to Escobio's CRD address by certified and first-class mail, as well as by courier. Escobio did not provide the information and documents requested and did not seek an extension of time to do so.

On June 6, 2019, Enforcement again sent to Escobio the Rule 8210 request seeking his mobile phone records. Enforcement sent the request by certified mail and email to Escobio's attorney, and by certified and first-class mail to Escobio's CRD address.⁹ As with the other requests, Escobio did not provide the information and documents requested and did not seek an extension of time to do so.

In total, FINRA sent five Rule 8210 requests for information and documents to Escobio (three requests seeking email records, and two requests seeking mobile phone records). There is no dispute that Escobio received the requests, and each request advised him that his failure to comply could result in a disciplinary proceeding and sanctions, including a bar from the industry. Escobio never provided any of the information or documents sought by the requests.

B. Escobio Fails to Comply with FINRA's Requests for Testimony

Enforcement also sent Escobio requests for on-the-record testimony ("OTR"), pursuant to Rule 8210. As with the requests for information and documents, each request for Escobio's testimony included a warning that his failure to comply could result in sanctions, including a bar from the industry. On March 29, 2019, Enforcement sent the first such request to Escobio's

[Cont'd]

Accordingly, the Eleventh Circuit vacated the contempt order. The Eleventh Circuit's decision did not affect the original judgment against Escobio, Southern Metals, and Loreley.

⁹ It appears that Escobio did not have legal representation when Enforcement sent the previous four requests for information and documents. Although Enforcement received an April 9, 2019 email from an attorney concerning a March 29, 2019 OTR request it sent to Escobio, it was Enforcement's understanding that the attorney's scope of representation was limited to that particular OTR request. On or near May 20, 2019, Enforcement received notice that Escobio was represented by a different attorney, with no indication that the representation was limited in scope. After that date, Enforcement sent all of its Rule 8210 requests to that attorney.

CRD address by certified mail, first-class mail, and overnight courier. The request asked Escobio to appear for an OTR on April 18, 2019, at FINRA's office in Boca Raton, Florida.

On April 9, 2019, an attorney for Escobio sent a letter to Enforcement stating that Escobio could not appear for the April 18, 2019 OTR due to his incarceration. In response, Enforcement offered to move the OTR to the federal detention facility and advised that Escobio's failure to cooperate could result in a fine, suspension, or bar from the industry. Escobio did not arrange for an alternative date or location for the OTR and did not appear for the April 18, 2019 OTR in FINRA's Boca Raton office.

On May 2, 2019, Enforcement sent a second OTR request to Escobio by certified mail, first-class mail, and courier to his CRD address.¹⁰ The request asked Escobio to appear for an OTR at FINRA's Boca Raton office on May 20, 2019.¹¹ Escobio did not seek an alternative date for the OTR and did not appear for the OTR. At 5:44 p.m. on May 20, 2019, a new attorney for Escobio sent an email to Enforcement stating that Escobio would not participate in an OTR, based on the advice of counsel. The letter referred to Escobio's pending appeal before the Eleventh Circuit in the CFTC matter (which concerned the district court's contempt order for failure to pay restitution), and stated that Escobio would make himself available after that appeal concluded.

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

On May 28, 2019, at 4:12 p.m., Escobio's attorney sent an email to Enforcement stating that she and Escobio were unavailable for the OTR on the following morning because they were "respond[ing] to discovery and other time sensitive matters in the CFTC case." The letter further advised that Escobio would be available during the weeks of July 1, 2019, or July 29, 2019. Enforcement responded at 5:07 p.m. that same afternoon, noting Escobio's repeated failures to comply with Rule 8210 requests and stating that the following day's OTR would not be postponed. Enforcement also asked Escobio to provide dates of availability earlier than his proposed dates in July if he decided to testify later. Escobio did not appear for the May 29, 2019 OTR and did not provide alternate dates.

On June 25, 2019, Enforcement sent a fourth OTR request to Escobio and his attorney by certified mail, first-class mail, overnight courier, and email. The letter noted that Escobio never provided alternate dates for his testimony, as Enforcement had requested in its May 29, 2019

¹⁰ As noted above, *supra* n. 9, it appears to have been Enforcement's understanding that the attorney who contacted Enforcement concerning its March 29, 2019 OTR request represented Escobio only for purposes of that particular request.

¹¹ As noted above, *supra* n.8, Escobio was released from federal detention on April 26, 2019.

email. Based on Escobio's prior representation that he would be available during the week of July 1, 2019, Enforcement asked him to appear for an OTR at FINRA's Boca Raton office on July 2, 2019. On June 28, 2019, Escobio's attorney called Enforcement to advise that Escobio would not appear for an OTR on July 2, and Enforcement responded that the OTR would not be postponed. Escobio did not appear for the July 2, 2019 OTR.

On July 3, 2019, Enforcement sent its fifth and final OTR request to Escobio and his attorney by certified mail, first-class mail, overnight courier, and email. The letter asked that Escobio appear for an OTR at FINRA's Boca Raton office on July 8, 2019 (a Monday) at 9:30 a.m., noting that this time had been mutually agreed upon during a telephone call. At 6:08 pm on the Friday before the OTR (July 5, 2019), Escobio's attorney sent an email to Enforcement stating that Escobio would not appear at the OTR due to a change in his work schedule. Escobio did not appear for the July 8, 2019 OTR.¹²

III. Procedural History

A. Enforcement Brings a Disciplinary Proceeding against Escobio and Seeks Summary Disposition

Enforcement filed a two-cause complaint against Escobio on July 17, 2019, alleging that he failed to: (1) respond to five requests for information and documents, in violation of FINRA Rules 8210 and 2010; and (2) appear and provide investigative testimony on five occasions, also in violation of Rules 8210 and 2010. Escobio filed an answer in which he denied that his conduct violated FINRA rules and asserted affirmative defenses, including that FINRA had pursued its investigation without a solid basis to believe that he conducted securities business after his registration was terminated.

After the close of discovery, Enforcement filed a motion for summary disposition pursuant to FINRA Rule 9264. Enforcement asserted that summary disposition as to both causes was appropriate because it was undisputed that Escobio received notice of the Rule 8210 requests for information, documents, and testimony, and that he failed to comply with any of those requests. Enforcement argued that a bar was the appropriate sanction, as there were several undisputed aggravating factors, and no mitigating factors. Enforcement attached several exhibits to its motion, including the Rule 8210 requests and the correspondence with Escobio's counsel concerning the OTR requests.

¹² In the July 5, 2019 letter, Escobio's attorney stated that he "hereby agrees to a voluntary bar." On appeal, the parties provide differing characterizations of the settlement discussions that followed the July 5 letter. We do not consider those arguments—or any aspect of the settlement discussions that may have transpired—because "settlement negotiations should be candid and frank, a goal that is furthered by keeping those discussions strictly separate from factors we consider in litigation." *Dep't of Enforcement v. Reifler*, Complaint No. 2016050924601, 2019 FINRA Discip. LEXIS 44, at *22 (FINRA NAC Sept. 30, 2019), *appeal docketed*, SEC Proceeding No. 3-19589 (Oct. 12, 2019); *see, e.g.*, Fed. R. Civ. P. 408 advisory committee's note (explaining that the federal rule provides that settlement discussions generally are inadmissible "because public policy favor[s] the compromise and settlement of disputes").

Escobio filed an opposition but did not dispute that he failed to comply with the Rule 8210 requests. Rather, he asserted that FINRA's investigation was improper because Enforcement lacked competent evidence that he continued to use his Southern Trust email address to conduct securities business after his registration was terminated. Escobio also asserted that the purpose of FINRA's investigative requests was to obtain evidence for the CFTC after discovery in the CFTC case closed. Escobio's sole supporting exhibit was a copy of the Eleventh Circuit's January 6, 2020 decision reversing the district court's contempt order in the CFTC matter.

B. The Hearing Panel Grants Enforcement's Motion for Summary Disposition and Bars Escobio

On February 5, 2020, the Hearing Panel granted Enforcement's motion for summary disposition. The Hearing Panel concluded that there was no genuine issue of material fact because it was undisputed that Escobio received notice of all ten FINRA Rule 8210 requests, and that he failed to comply with any of them. The Hearing Panel rejected, as a matter of law, Escobio's attacks on the legitimacy of FINRA's investigation. The Hearing Panel observed that Escobio failed to point to any specific facts to support his assertions that the investigation was improper, while Enforcement pointed to facts (namely, the discovery of emails suggesting that Escobio continued to use his Southern Trust account to conduct securities business) negating any inference that the investigation was motivated by an improper purpose. Moreover, the Hearing Panel explained, the excuses that Escobio offered in response to Enforcement's requests for testimony, such as a preoccupation with the CFTC litigation, were insufficient to excuse compliance with those requests.

The Hearing Panel barred Escobio for each cause under Rules 8210 and 2010. The Hearing Panel noted that a bar is the standard sanction for a complete failure to respond to a Rule 8210 request and explained that there were undisputed aggravating factors, such as the large number of requests at issue. The Hearing Panel observed that the information Enforcement sought in the Rule 8210 requests was important because the investigation concerned serious misconduct—Escobio's possible continued association with Southern Trust after he was statutorily disqualified and his registration was terminated. Finally, the Hearing Panel determined that Escobio pointed to no mitigating factors or genuine issues of material fact that might justify a hearing on the issue of sanctions. This appeal followed.

IV. Discussion

After a de novo review of the record in its entirety, we affirm the Hearing Panel's findings of violation and the sanctions it imposed.

A. Standard for Summary Disposition

Under FINRA Rule 9264, a Hearing Panel may grant a motion for summary disposition "if there is no genuine issue with regard to any material fact" and the moving party "is entitled to summary disposition as a matter of law." "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. Walblay*, Complaint No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *3 (FINRA NAC Feb. 25, 2014); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for [hearing].” *Matsushita*, 475 U.S. at 587 (internal quotation omitted). “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.” *Walblay*, 2014 FINRA Discip. LEXIS 3, at *3 (internal quotation omitted). Conclusory allegations are insufficient to defeat a motion for summary judgment. *Dep’t of Enforcement v. Claggett*, Complaint No. 2005000631501, 2007 FINRA Discip. LEXIS 2, at *9 (FINRA NAC Sept. 28, 2007).

B. The Undisputed Facts Demonstrate that Escobio Failed to Comply with Enforcement’s Rule 8210 Requests

The undisputed facts demonstrate that Escobio violated FINRA Rules 8210 and 2010.¹³ Rule 8210 requires any person subject to FINRA’s jurisdiction to provide information and testimony with respect to any matter involved in a FINRA investigation, complaint, examination, or proceeding.¹⁴ “The rule is at the heart of the self-regulatory system for the securities industry” and “provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008) (quoting *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993)), *aff’d*, 347 F. App’x 692 (2d Cir. 2009), *cert. denied*, 559 U.S. 1102 (2010). “Delay and neglect on the part of members and their associated persons undermine the ability of [FINRA] to conduct investigations and thereby protect the public interest.” *Rouse*, 51 S.E.C. at 588. Consequently, a violation of Rule 8210 is serious and subverts FINRA’s ability to carry out its responsibilities as a regulator, threatening both investors and the markets. *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *33 (June 14, 2013).

As a person formerly associated with a FINRA member firm, Escobio had a duty to “fully and promptly” respond to FINRA’s requests for information and documents. *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *21; *Joseph Patrick Hannan*, 53 S.E.C. 854, 860 (1998)

¹³ A violation of FINRA Rule 8210 is also a violation of FINRA Rule 2010. *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *30 n.36 (Jan. 30, 2009).

¹⁴ Specifically, Rule 8210 provides, “[f]or the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to: require a member, person associated with a member, or any other person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically . . . and to testify at a location specified by FINRA staff.” FINRA Rule 8210(a)(1). The rule further states that “[n]o member or person shall fail to provide information or testimony . . . pursuant to this Rule.” FINRA Rule 8210(c).

(“Hannan, as a former associated person, had an obligation to make himself available and to provide whatever information he possessed to the NASD.”); FINRA By-Laws Art. V, Sec. 4(a) (providing that FINRA retains jurisdiction over formerly associated persons for two years). Yet, he wholly failed to respond to five such requests. The undisputed facts demonstrate that, between March 26 and June 6, 2019, Enforcement sent four requests for information and documents to Escobio’s CRD address, and a fifth request to both Escobio’s attorney and his CRD address.¹⁵ Enforcement properly served the requests by certified mail (among other methods), and Escobio does not contend that he did not receive the requests. *See* FINRA Rule 8210(d) (providing that a Rule 8210 request is deemed to be received by a formerly registered person when it is mailed or otherwise transmitted to his last-known CRD address or transmitted to his attorney); *Dep’t of Enforcement. v. Evansen*, Complaint No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *32-33 (FINRA NAC June 3, 2014) (explaining that service by mail on a formerly registered person’s CRD address was valid), *aff’d*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080 (July 27, 2015). It is undisputed that Escobio failed to provide any of the information sought by the requests and did not seek an extension of time to do so.

Escobio also had a duty to promptly appear and provide testimony requested by FINRA staff. *Evansen*, 2015 SEC LEXIS 3080, at *16-17. He failed to comply with this obligation. It is undisputed that, between March 29 and July 3, 2019, Enforcement sent five requests for testimony to Escobio. He does not challenge his receipt of the requests, all of which were served at his CRD address, on his attorney, or both. *See* FINRA Rule 8210(d). The record shows that Escobio did, in fact, receive the OTR requests, as his counsel contacted Enforcement to discuss them. Despite Enforcement’s efforts to accommodate Escobio’s schedule, he never complied with the OTR requests. Instead, he provided a string of shifting excuses for his unavailability, at times waiting until the last business day before a scheduled OTR to notify Enforcement that he would not appear. Escobio’s failure to comply with the requests for testimony—as well as the requests for information and documents—are prima facie violations of Rules 8210 and 2010. *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *8-9, 24 (Nov. 8, 2007) (concluding that the respondent violated Rule 8210 by failing to comply with a request for information and documents, and by refusing to provide testimony), *aff’d*, 316 F. App’x 865 (11th Cir. 2008); *Howard Brett Berger*, Exchange Act Release No. 55706, 2007 SEC LEXIS 895, at *15-16 (May 4, 2007) (“the failure to respond to [FINRA’s] requests for testimony demonstrates a prima facie violation of . . . Rule 8210”).

C. Escobio’s Arguments that He Should Not Have Been Required to Comply with the Rule 8210 Requests Fail

While Escobio does not dispute that he received—and failed to comply with—the FINRA Rule 8210 requests at issue, he argues that he should not have been required to comply with them. For the reasons discussed below, his arguments fail as a matter of law.

First, Escobio contends that FINRA staff lacked a sufficient basis to believe that he may have associated with Southern Trust after his statutory disqualification and termination of his registration. This argument is irrelevant, as Escobio is not charged with continuing to associate

¹⁵ On one occasion, Enforcement also sent the request to a federal detention center.

with Southern Trust. *See CMG Inst. Trading*, 2009 SEC LEXIS 215, at *28 (explaining that the applicants' argument that they were in net capital compliance was irrelevant, as they were not charged with a net capital violation, but with failure to comply with Rule 8210). Rather, the only misconduct charged in this proceeding is Escobio's failure to respond to Rule 8210 requests. Moreover, Escobio possessed an "unequivocal" duty to cooperate with FINRA's investigative requests. *See Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994). He was not permitted to evade that duty by second-guessing FINRA's decision to proceed with the investigation, or the need for the related Rule 8210 requests. *See Michael J. Markowski*, 54 S.E.C. 830, 838 (2000) ("The determination of when it is appropriate for an investigation to proceed is a matter for [FINRA] to decide, not the respondent."), *aff'd*, 274 F.3d 525 (D.C. Cir. 2001); *Michael David Borth*, 51 S.E.C. 178, 181 (1992) ("The Rules do not permit second guessing the NASD's requests."). Accordingly, Escobio's belief that FINRA's investigation was not warranted does not excuse his non-compliance.¹⁶ *See id.*

Second, Escobio argues that this matter is moot because Enforcement did not charge Southern Trust and its principal with aiding and abetting his continued association with the Firm after he was statutorily disqualified and his registration was terminated.¹⁷ Escobio argues that because FINRA staff ultimately did not pursue such a cause against the Firm, his failure to respond to the Rule 8210 requests is moot. We reject Escobio's argument. As discussed above, the charge at issue here is Escobio's failure to comply with Rule 8210. His failure to comply with investigative requests under that rule "threatens investors and markets" because non-compliance "frustrates [FINRA's] ability to detect misconduct." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). This is particularly true in this case, when the information sought could have shed light on whether Escobio continued to associate with a member firm after his statutory disqualification and FINRA's denial of his application to continue associating with the Firm. Escobio's failure to comply with FINRA's investigative requests presents a threat to the industry

¹⁶ In any event, we agree with the Hearing Panel's conclusion that Enforcement pointed to facts negating any inference that its investigation was unfounded. Escobio does not dispute that FINRA staff reviewed emails contained in his Southern Trust account after the termination of his registration. Escobio argues that the fact that emails were sent to this address does not necessarily mean that he continued to access or use the account, and that it is possible that someone else at the Firm accessed the account after his association with the Firm ended. While that may be true, the emails (some of which were attached to Enforcement's Motion for Summary Disposition) provided a solid basis to investigate whether Escobio used the account to conduct securities business after the NAC denied his application to associate with Southern Trust.

¹⁷ In support of this argument, Escobio cites a Wells notice that Enforcement issued to the Firm *after* the Hearing Panel had issued its February 5, 2020 decision. The Wells notice was not included in the record on appeal. *See* FINRA Rule 9321. Moreover, Escobio did not seek leave to introduce the Wells notice as additional evidence on appeal. *See* FINRA Rule 9346(b). Even if the notice were properly before us, however, we would still reject Escobio's argument based on the notice, for the reasons discussed above. *See* FINRA Rule 9346(a) (limiting the NAC's review to consideration of the record, as supplemented by briefs and oral argument).

regardless of whether Enforcement ultimately filed a complaint against him or the Firm based on the conduct it was investigating. *See id.* Accordingly, the Rule 8210 allegations against Escobio are not moot.¹⁸ *See Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994) (holding that even if the respondent is innocent of any wrongdoing that is the subject of an inquiry, the obligation to respond to Rule 8210 requests for information is independent of his obligation to refrain from misconduct with respect to his customer's accounts).

Third, Escobio contends that Enforcement's Rule 8210 requests were the product of its purported collusion with the CFTC, and were made for the purpose of obtaining evidence for the CFTC after discovery closed in that agency's action against Escobio. At the outset, we note that FINRA's cooperation with a government agency is not improper. *Scher v. NASD*, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (rejecting the plaintiff's argument that a NASD investigator improperly colluded with a district attorney's office by providing that office with information that led to a criminal prosecution). In any event, there is no evidence in this case that FINRA cooperated with the CFTC at all, much less that it acted at the CFTC's behest. Instead, Escobio's argument that FINRA staff colluded with the CFTC is supported only by his conclusory assertions, and such assertions are insufficient to defeat a motion for summary judgment.¹⁹ *Claggett*, 2007 FINRA Discip. LEXIS 2, at *9; *cf. Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) ("We need not ponder petitioner's theories about a conspiracy among 'rogue' staff members, however, because courts will not inquire into a prosecutor's ill motive unless there is a showing of selective enforcement"); *Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *54-55 (Jan. 30, 2009) (rejecting the applicant's argument that FINRA colluded with his former firm, as the argument was supported only by the applicant's own assertions), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

Escobio's other claims of an improper investigation similarly have no merit. To establish a claim of unlawful, selective prosecution, Escobio was required to present evidence that he was unfairly singled out and that FINRA's disciplinary action was motivated by a discriminatory purpose or desire to prevent his exercising a constitutionally protected right. *Evansen*, 2015 SEC LEXIS 3080, at *44; *Nicholas T. Avello*, 55 S.E.C. 1197, 1209 n.19 (2002) (explaining that a

¹⁸ To the extent Escobio asserts that his non-compliance is moot because he has retired from the industry, we also reject that argument, as he could seek to associate with a member firm in the future. *See Evansen*, 2015 SEC LEXIS 3080, *64 (explaining that, although the respondent did "not profess a desire to be associated with a FINRA member firm, he could seek to associate absent a bar," and that his failure to cooperate with Rule 8210 requests demonstrated that such an association would present a danger to investors); FINRA Rules 9520-27 (setting forth procedures for a person to become associated with a member firm, notwithstanding his statutory disqualification).

¹⁹ Moreover, the timing and nature of FINRA's investigation do not suggest that FINRA staff were working with the CFTC. By the time Enforcement issued its first Rule 8210 request on March 26, 2019, the only aspect of the CFTC matter that remained in controversy was Escobio's appeal from the district court's order holding him in contempt for failure to make restitution payments. Enforcement's Rule 8210 requests have no apparent relation to that appeal, or the underlying contempt order.

party claiming selective prosecution “must establish, not merely assert, that the action against him was motivated by an unjust motive”). For example, decisions to institute disciplinary proceedings may not be premised upon an unjustified standard such as race, religion, or other arbitrary classification. *Busacca v. SEC*, 449 F. App’x 886, 891 (11th Cir. 2011) (unpublished) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)). Escobio made no showing that FINRA’s disciplinary action was motivated by a discriminatory purpose, and we find no evidence in the record that FINRA staff unfairly or unlawfully targeted Escobio with discipline.²⁰

In sum, we agree with the Hearing Panel’s conclusion that the undisputed facts demonstrate that Escobio failed to comply with five requests for information and documents, and five requests for testimony. We also agree that Escobio’s arguments that he should not have been required to comply with the requests lack merit, as a matter of law. Accordingly, we conclude that the Hearing Panel properly granted summary disposition as to Escobio’s liability for both causes under FINRA Rules 8210 and 2010.

V. Sanctions

For each cause under FINRA Rules 8210 and 2010, the Hearing Panel imposed a bar from associating with any FINRA member in any capacity. After carefully considering the FINRA Sanction Guidelines (“Guidelines”), including the applicable aggravating factors and lack of mitigating factors, we affirm the Hearing Panel’s sanctions.²¹

The standard for summary disposition is no different for sanctions than for liability—in either context, summary disposition is appropriate if “there is no genuine issue with regard to any material fact” and the moving party is “entitled to summary disposition as a matter of law.” FINRA Rule 9264(e); *see Gary M. Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *41-44 & n.62 (Feb. 13, 2009) (explaining that summary disposition is appropriate as to sanctions where no material fact is in dispute) (citing *Seghers v. SEC*, 548 F.3d 129, 134 (D.C. Cir. 2008)), *aff’d*, 592 F.3d 173 (D.C. Cir. 2010). In the sanctions context, however, the material facts may differ, to some extent, from those that are material to liability. *See, e.g., Dep’t of Enforcement v. Respondent*, Complaint No. C02050006, 2007 NASD Discip. LEXIS 13, at *24-30 (NASD NAC Feb. 12, 2007) (explaining that summary disposition was appropriate as to liability, but not as to sanctions, where certain factors relevant to sanctions required fact-finding). To ascertain which facts are material to sanctions, adjudicators should

²⁰ Escobio attached an appendix to his opening brief, which included opinion pieces criticizing FINRA’s enforcement practices, as well as a blog post published on FINRA’s website. None of these items are properly before us on appeal, as they are not included in the record, and Escobio did not seek leave to introduce new evidence. *See* FINRA Rule 9346(a)-(b). Even if we were to consider the items in the appendix, however, none of them support Escobio’s assertions concerning FINRA’s investigation in this case.

²¹ *See* FINRA Sanction Guidelines (Oct. 2020), http://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf [hereinafter *Guidelines*].

look to the Guidelines, in addition to considering the facts and circumstances of the particular case.²²

Here, upon consideration of the relevant Guidelines and the circumstances of this case, we conclude that the Hearing Panel properly granted summary disposition as to the sanctions for both causes. The Guidelines state that “a bar should be standard” if an individual did not respond to a Rule 8210 request for information or testimony “in any manner.”²³ As discussed above, it is undisputed that Escobio failed to respond to five requests for information and documents (as alleged in cause one), and refused to comply with five OTR requests (as alleged in cause two). Escobio thus failed to respond to the Rule 8210 requests “in any manner,” and a bar is warranted for each cause. *See Evansen*, 2015 SEC LEXIS 3080, at *57 (explaining that the respondent’s complete failure to respond to information requests and OTR requests until after a complaint was filed “each individually merit[ed] a bar”); *Elliot M. Hershberg*, 58 S.E.C. 1184, 1189-91 (2006) (concluding that the respondent failed to respond to a testimony request “in any manner,” and that a bar was warranted, where his attorney communicated with NASD about the request, but the respondent ultimately failed to appear for testimony), *aff’d*, 210 F. App’x 125 (2d Cir. 2006); *Toni Valentino*, 57 S.E.C. 330, 336, 339 (2004) (concluding that a bar was warranted where the applicant engaged in “attempts to delay and ultimately avoid” providing testimony).

The Guidelines provide that when an individual has failed to respond to a Rule 8210 request in any manner, the principal consideration is the “[i]mportance of the information requested as viewed from FINRA’s perspective.”²⁴ Here, the testimony, information, and records requested would have shed light on whether Escobio continued to associate with Southern Trust after his statutory disqualification, and the termination of his registration. Therefore, the requested testimony, information, and records were important to FINRA’s regulatory purpose. *Michael F. Flannigan*, 56 S.E.C. 8, 17 (2003) (explaining that the “registration requirement provides an important safeguard in protecting public investors and strict adherence to that requirement is essential”) (internal quotations omitted); *cf. Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *13 (Oct. 1, 2018) (affirming the NAC’s finding that the applicant engaged in serious misconduct by associating with a member firm during his suspension).²⁵ While Escobio contends that the information sought in the Rule 8210 requests was unimportant, his assertion does not raise a genuine issue of material fact because this consideration is assessed from FINRA’s perspective, not the respondent’s. *See*

²² *See Guidelines*, at 1 (Overview) (explaining that the Guidelines “provide direction for [a]djudicators in imposing sanctions consistently and fairly,” but are not absolute).

²³ *See Guidelines*, at 33.

²⁴ *See id.*

²⁵ *See also Dist. Bus. Conduct Comm. v. Paramount Invs. Int’l*, Complaint No. C3A940048, 1995 NASD Discip. LEXIS 248, at *25 (NASD NBCC Oct. 20, 1995) (stating that “the association of the statutorily disqualified person with a member firm is one of the most serious regulatory violations”).

Berger, 2008 SEC LEXIS 3141, at *26-27 (“To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of [FINRA’s] investigation would shift the focus from [FINRA’s] perspective at the time it seeks the information”); *PAZ Sec.*, 2008 SEC LEXIS 820, at *21 (accepting FINRA’s argument on appeal that “[m]itigation cannot be based on a respondent’s second guessing the importance of the investigation”).

In addition, we agree with the Hearing Panel that it is aggravating that Escobio ignored numerous requests for information, documents, and testimony over the course of several months.²⁶ Escobio had multiple opportunities to comply with these requests and, despite receiving notice of the possible sanctions for non-compliance, he persisted in choosing not to cooperate. *See Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *42 (Apr. 17, 2014) (finding it aggravating that the respondent received numerous opportunities to comply with Rule 8210 requests before FINRA imposed a bar).

We also agree that Escobio did not identify a mitigating factor justifying a hearing on sanctions. Escobio asserts that he was under stress due to the CFTC’s “coercive” measures to enforce the restitution order, but he never submitted any evidence addressing his mental state. While one may surmise that the district court’s contempt order (and the resulting incarceration) caused Escobio stress, this would not explain his months-long, complete inability to provide the testimony and records requested. *See John M.E. Saad*, Exchange Act Release No. 76118, 2015 SEC LEXIS 4176, at *20-21 (Oct. 8, 2015) (rejecting the argument that stress caused or mitigated the respondent’s misconduct, as stress could not explain his repeated deception), *petition for review denied in part and remanded in part*, 873 F.3d 297 (D.C. Cir. 2017), *aff’d*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216 (Aug. 23, 2019), *aff’d*, 980 F.3d 103 (D.C. Cir. 2020); *see also Ahmed Gadalkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *29-30 (Mar. 14, 2018) (explaining that a medical issue may be mitigating, but not where it fails to explain the conduct at issue). Indeed, the record undisputedly demonstrates that Escobio continued to stonewall FINRA’s requests for testimony, information, and records after his release from prison.²⁷

²⁶ *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, Nos. 8-9) (providing that adjudicators should consider “[w]hether the respondent engaged in numerous acts and/or a pattern of misconduct” and “[w]hether the respondent engaged in the misconduct over an extended period of time”).

²⁷ For the first time during oral argument, Escobio argued (through counsel) that his wife’s illness was an additional source of stress. We do not consider this argument on appeal, as Escobio failed to present either the argument or any evidence concerning his wife’s condition to the Hearing Panel. *See FINRA Rule 9346(a)-(b)*; *Dep’t of Enforcement v. Mielke*, Complaint No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *24-25 & n.22 (FINRA NAC July 18, 2014) (declining to consider the respondents’ post-hoc explanations for their failure to comply with a FINRA rule, which were raised for the first time on appeal).

We also decline to consider Escobio’s assertion, raised during oral argument, that his failure to comply was excused or mitigated by advice of counsel. Although Escobio responded

Based on the foregoing, we agree with the Hearing Panel that the undisputed facts demonstrate that a bar is the appropriate remedy for each cause under Rules 8210 and 2010. *See Evansen*, 2015 SEC LEXIS 3080, at *57 (explaining that the respondent's complete failure to respond to information requests and OTR requests until after a complaint was filed "each individually merit[ed] a bar"). Escobio's complete failure to comply with five requests for information and documents, and five requests for testimony, demonstrates his unfitness to remain in the industry. *See Berger*, 2008 SEC LEXIS 3141, at *15 (explaining that those who fail to respond to Rule 8210 requests in any matter demonstrate that they are unfit to remain in the industry). He has identified no mitigating factors warranting a hearing on sanctions. Moreover, for each cause, a bar will protect the investing public by encouraging cooperation with Rule 8210 requests. *Hershberg*, 58 S.E.C. at 1189 ("[T]he bar protects investors by encouraging the timely cooperation that assists in the prompt discovery and correction of wrongdoing.").

VI. Conclusion

We affirm the Hearing Panel's findings that Escobio violated FINRA Rules 8210 and 2010 by failing to respond to five requests for information and documents, as alleged in cause one, and failing to comply with five requests for testimony, as alleged in cause two. For each cause, we impose a bar in all capacities. The bars shall become effective upon service of this decision. Escobio is ordered to pay appeal costs of \$1,477.38.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

[Cont'd]

to Enforcement's second OTR request with a statement that he would not comply based on advice of counsel, he did not raise an advice-of-counsel argument before the Hearing Panel, or in his briefs on appeal. *See Mielke*, Complaint No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *24-25 & n.22. Even if we were to consider his argument, advice of counsel is not a defense to liability under Rule 8210, and is not mitigating unless a respondent develops the record to show that he "made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice." *Berger*, 2008 SEC LEXIS 3141, at *38; *Valentino*, 57 S.E.C. at 338 ("We have repeatedly held that reliance on counsel does not excuse an associated person's obligation to supply information or testimony."). Escobio has not attempted to make this showing.