



2010 requires FINRA members to observe high standards of commercial honor and principles of trade in the conduct of their business.<sup>4</sup>

Kenny raised three principal arguments in his defense. First, he asserted that he substantially complied with Market Regulation's Rule 8210 requests for information. Second, he contended that some of the information and documents Market Regulation requested exceeded the scope of Rule 8210. And finally, he contended that he lacked authority to release the disputed information and documents. For these reasons, he requested that the Complaint be dismissed.

The Hearing Panel concluded that Kenny violated FINRA Rules 8210 and 2010 by failing to respond completely to FINRA requests for information and that the appropriate sanction is a bar.

## **I. Findings of Fact**

None of the material facts in this case is disputed. Kenny admits that he did not provide all of the information FINRA staff requested.

### **A. Background**

Kenny entered the securities industry in a registered capacity in December 1996. In February 2006, he associated with Terra Nova Trading, LLC, which later became Lightspeed Trading, LLC. While employed by Lightspeed, he was registered with FINRA as a General Securities Representative and an Equity Trader.<sup>5</sup> Kenny left Lightspeed in December 2013, and his FINRA registrations terminated effective January 21, 2014.<sup>6</sup> Kenny is not now registered with FINRA or associated with any FINRA member firm.

In addition to his work for Lightspeed, Kenny maintained three outside businesses—Third Rail Management, Inc., Horizon Global Management, LLC, and Global Bridge Funding. Kenny disclosed the first two businesses on his Uniform Application for Securities Industry Registration or Transfer (Form U4) dated September 3, 2013. He reported that he was a director of Third Rail Management, which he described as a private investment-related business that he formed “as a personal corporation for business as a registered representative,” and that he was a member of Horizon Global Management, which he described as a private investment-related

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<sup>4</sup> FINRA's Conduct Rules apply to persons associated with a FINRA member firm pursuant to Rule 0140.

<sup>5</sup> Joint Exhibit (“JX-\_\_”) 3, at 3.

<sup>6</sup> JX-3, at 3. Lightspeed filed a Uniform Termination Notice for Securities Industry Registration (Form U5) with FINRA on January 21, 2014.

company that trades futures for its own account.<sup>7</sup> Kenny did not inform Lightspeed about his outside business activities with Global Bridge Funding.<sup>8</sup>

## **B. Market Regulation's Investigation**

In or about November 2012, FINRA received a referral from NASDAQ ONX PHLX LLC ("PHLX") of a complaint it had received from an upstairs market maker about suspected "spoofing."<sup>9</sup> Spoofing is a "sophisticated, manipulative trading strategy ... [that] concerns the use of non-bona fide orders, or orders that a trader does not intend to have executed, to induce others to buy or sell the security at a price not representative of actual supply and demand."<sup>10</sup>

Upon receipt of PHLX's referral, FINRA opened an investigation and soon determined that two of Kenny's customers, Fineline Trading Group LLC and Makino Capital LLC, were responsible for the suspected spoofing activity. FINRA further determined that Fineline Trading was owned by Behruz Afshar and Makino Capital was owned by Shahryar Afshar. Shahryar Afshar had been a registered securities broker and trader at Terra Nova in 2005.<sup>11</sup> Behruz Afshar had been a registered securities broker and trader at Terra Nova between 2000 and 2007.<sup>12</sup>

To investigate the suspect trading by Fineline Trading and Makino Capital, Market Regulation sent inquiry letters to Lightspeed for relevant documents, including copies of Kenny's e-mails with the Afshars. One e-mail dated June 25, 2011, between Shahryar Afshar and Kenny raised a red flag with the staff. Shahryar Afshar referenced money that Kenny had invested in Behruz Afshar's company, Makino Capital, and recommended that Kenny take approximately \$54,400 out of the company because according to Behruz Afshar the money belonged to Kenny.<sup>13</sup>

Market Regulation staff then sent Kenny four requests for information to further investigate the trading activity at Lightspeed, as well as Kenny's outside business activities and financial dealings with his customers. Three of the requests were sent under FINRA Rule 8210, which authorizes FINRA to require associated persons to provide information or documents in an investigation.<sup>14</sup> Kenny complied with the first request,

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<sup>7</sup> JX-2, at 9.

<sup>8</sup> JX-12, at 17 (OTR transcript excerpts).

<sup>9</sup> Hearing Transcript ("Tr.") 27.

<sup>10</sup> *Visionary Trading LLC*, Exchange Act Release No. 71871, 2014 SEC LEXIS 1246, at \*4-5 (Apr. 4, 2014).

<sup>11</sup> Complainant's Exhibit ("CX-\_\_") 7.

<sup>12</sup> CX-8.

<sup>13</sup> CX-1.

<sup>14</sup> See Rule 8210(a).

but not the remainder. Market Regulation also questioned Kenny at an on-the-record interview (“OTR”), during which he refused to answer some questions regarding the issues under investigation.

### **C. Market Regulation’s Information Requests to Kenny**

#### **1. The First Request**

In a letter dated October 11, 2013, FINRA staff requested that Kenny produce copies of his personal bank account statements, as well as account statements for Third Rail Management and Horizon Global Management for the period of October 2010 through May 2013.<sup>15</sup> The staff made the request pursuant to Rule 8210. Kenny’s attorney provided the requested documents on November 11, 2013; however, pertinent account information had been redacted.<sup>16</sup> Upon receipt of the documents, Market Regulation staff requested that Kenny provide the deleted identifying account information. His attorney provided the missing information by e-mail dated November 22, 2013.<sup>17</sup> By providing this information, Kenny fully complied with the first request for information.

Market Regulation reviewed Kenny’s bank account statements and discovered that substantial sums of money had been transferred in and out of those accounts, sometimes on the same day.<sup>18</sup> Upon further analysis, the staff determined that about \$18 million had been transferred in and out of his account and other Chase checking accounts.<sup>19</sup> The majority of transfers were in and out of the checking account for Third Rail Management.<sup>20</sup>

#### **2. The Second Request**

After the staff reviewed the bank statements provided in response to the first request for information, the staff sent a follow-up e-mail to Kenny’s attorney asking Kenny to identify the owners of 21 bank accounts referenced in the bank statements.<sup>21</sup>

Kenny’s attorney replied by e-mail on December 13, 2013, and objected to providing the names of the owners of all but two of the specified bank accounts. Kenny identified one account as belonging to Third Rail Management and another as one of his personal bank accounts. As to the remainder, Kenny’s attorney wrote, “Mr. Kenny

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<sup>15</sup> JX-1; Tr. 35.

<sup>16</sup> JX-4.

<sup>17</sup> JX-5.

<sup>18</sup> Tr. 40.

<sup>19</sup> Tr. 41.

<sup>20</sup> *Id.*

<sup>21</sup> Tr. 44-45; JX-6. The e-mail did not state specifically that it was sent under FINRA Rule 8210.

respectfully declines to provide this information ....”<sup>22</sup> Kenny’s attorney further questioned whether Market Regulation was entitled to the requested information because the requested records and information were not kept by Kenny in connection with his association with Lightspeed. Kenny’s attorney also pointed out that the additional requested information relates to third parties, and Kenny did not have their authorization to release their identification to FINRA.<sup>23</sup> Thus, Kenny declined to provide the identity of the bank account owners.

### **3. The Third Request and Kenny’s On-The-Record Interview**

At this point, Market Regulation staff narrowed the scope of its inquiry to the 11 unidentified accounts associated with the largest dollar transfers.<sup>24</sup> On January 10, 2014, the staff sent Kenny a Rule 8210 request for further information. First, the staff requested unredacted copies of the bank account statements that Kenny had provided in response to the staff’s first Rule 8210 request. Second, the staff requested that Kenny identify “the contact person for, or the individual/entity that was the intended recipient of transfers to, the following [11 listed bank account numbers].”<sup>25</sup>

Kenny’s attorney responded by e-mail dated January 28, 2014, stating that Kenny was “unable to comply with FINRA’s request for information” because he had been informed that he was not authorized to reveal the account owners’ identities.<sup>26</sup> He also noted that the staff had scheduled an OTR, but Kenny would not disclose the identity of the owners at the OTR.

Kenny also refused to produce unredacted copies of the bank account statements for the following two reasons. First, Kenny contended that the redacted information was “private and confidential.” Second, Kenny claimed that the redacted information was not maintained in connection with Kenny’s brokerage business and therefore it was not the proper subject of a request under Rule 8210.<sup>27</sup>

On February 4, 2014, Kenny appeared for his OTR at FINRA’s Chicago office. Kenny’s attorney represented him at the OTR. During the OTR, Kenny repeatedly refused to tell the staff who owned the subject bank accounts with two exceptions.<sup>28</sup> Kenny did confirm the identity of the owners of two accounts because it was information

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<sup>22</sup> JX-7.

<sup>23</sup> JX-7.

<sup>24</sup> The transfers totaling approximately \$18 million are summarized on CX-6. The evidence also shows that Kenny received \$165,713.66 more than he transferred to customers from the Third Rail bank account.

<sup>25</sup> JX-8, at 2.

<sup>26</sup> JX-9.

<sup>27</sup> JX-9.

<sup>28</sup> See JX-12.

Market Regulation had gleaned from documents in its possession. Thus, Kenny reasoned, he was not disclosing confidential information by answering the staff's questions about those accounts.<sup>29</sup>

#### **4. The Fourth Request**

After the OTR, on February 12, 2014, Market Regulation sent Kenny another Rule 8210 request for information. Market Regulation renewed its request for information Kenny refused to supply during the OTR and sought additional information and documents relating to his outside business activities and the transfers of money he had made to and from 11 unidentified bank accounts.<sup>30</sup> In particular, Market Regulation again asked Kenny to identify the “contact person for, or the individual/entity that was the intended recipient of transfers to, the following [11 listed bank account numbers].”<sup>31</sup> Market Regulation also requested that Kenny provide: (i) the last four digits of his wife's bank account(s) at Chase bank for the period of October 2010 through May 2013; (ii) copies of all bank accounts for Global Bridge Funding for the same period; (iii) a written confirmation that he was not an owner, co-owner, or authorized signatory of any other bank accounts between October 2010 and December 31, 2013; and (iv) a detailed written explanation of each transfer to and from his bank accounts as listed in Attachment A to the request letter.<sup>32</sup>

Kenny flatly refused to comply with Market Regulation's request.<sup>33</sup> Kenny did not give any reason for his refusal.

#### **5. Kenny's Supplemental Response and Hearing Testimony**

Six months after Market Regulation filed the Complaint against Kenny and one week before the hearing, Kenny supplemented his responses to the outstanding Rule 8210 requests to “lessen the scope of issues to be addressed at the upcoming hearing.”<sup>34</sup> But Kenny did not fully respond to the fourth Rule 8210 request dated February 12, 2014. And Kenny reiterated his position that he refused to provide any documents or information relating to the remaining four unidentified bank accounts. Kenny's attorney wrote in an e-mail dated April 27, 2015: “Mr. Kenny cannot disclose any further

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<sup>29</sup> Tr. 140-41.

<sup>30</sup> JX-10.

<sup>31</sup> JX-10, at 2.

<sup>32</sup> JX-10, at 2.

<sup>33</sup> JX-11.

<sup>34</sup> JX-13.

information concerning the ownership of these accounts including the purpose of transactions relating to these accounts.”<sup>35</sup>

At the hearing Kenny stated that three of the undisclosed accounts are owned by brokerage customers who are also Lightspeed customers.<sup>36</sup> And he testified that he made undocumented, interest-free loans to these brokerage customers to facilitate their securities transactions.<sup>37</sup> For example, he explained that he made loans to help his customers meet margin calls or to do more trades, which in turn benefited him as their registered representative.<sup>38</sup> As to the fourth account, Kenny testified that he made one \$200,000 loan to the owner of that bank account for trading commodity futures, but the loan was repaid because the futures trading did not materialize as planned.<sup>39</sup>

Kenny testified that he refused to identify the account owners because they all had told him that they wanted him to keep their identities private although he did not know why they made the requests.<sup>40</sup>

## **II. Conclusions of Law**

### **A. FINRA Rule 8210**

FINRA Rule 8210(a)(1) plainly and unqualifiedly requires FINRA members and persons associated with a member to “provide information orally, in writing, or electronically ... *with respect to any matter involved in [a FINRA] investigation ...*”<sup>41</sup> And Rule 8210(a)(2) authorizes FINRA staff to “inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation ... that is in such ... person’s possession, custody or control.”<sup>42</sup>

The scope of Rule 8210 is broad, giving FINRA a critical tool to protect investors and markets in the absence of subpoena power.<sup>43</sup> Indeed, the rule “is at the heart of the self-regulatory system for the securities industry.”<sup>44</sup> And the failure to provide

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<sup>35</sup> JX-13.

<sup>36</sup> Tr. 145-47. These are identified as account numbers ending in 4642, 4644, and 9671. *See* JX-13.

<sup>37</sup> Tr. 153-55.

<sup>38</sup> Tr. 159-60.

<sup>39</sup> Tr. 148. *See also* JX-13. This unidentified account number ends in 0597.

<sup>40</sup> Tr. 150-51, 161.

<sup>41</sup> Rule 8210(a)(1) (emphasis added).

<sup>42</sup> Rule 8210(a)(2). None of the requests at issue directed Kenny to produce the books, records, or accounts belonging to third parties.

<sup>43</sup> *Richard J. Rouse*, 51 SEC 581, 584 (1993).

<sup>44</sup> *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at \*13 (Nov. 14, 2008), *petition denied*, 347 F. App’x 692 (2d Cir. 2009).

information is a serious violation because it “frustrates [FINRA’s] ability to detect misconduct, [which] inability in turn threatens investors and markets.”<sup>45</sup>

## **B. Kenny Violated FINRA Rule 8210**

Kenny does not dispute that he refused to respond to certain Rule 8210 requests and that, as a person associated with a member firm, he was required to comply with Rule 8210. Kenny contends however that he did not violate Rule 8210 because Market Regulation’s requests were beyond the scope of the Rule. The Hearing Panel rejects Kenny’s narrow interpretation of Rule 8210.

Market Regulation’s information requests were undeniably within the scope of Rule 8210 because they were “with respect to any matter involved in the investigation.”<sup>46</sup> Market Regulation was investigating Kenny’s trading activities at Lightspeed and the nature and scope of his outside business activities as an owner of Third Rail Management and Horizon Global Management. Market Regulation’s investigation also included whether there was any misconduct arising from his outside financial dealings, including improper loans to and from his or his firm’s securities clients, private securities transactions, and market manipulation. All of this requested material fell exactly within the ambit of the Rule.<sup>47</sup>

Kenny misconstrues Market Regulation’s requests when he asserts that the requests sought information from non-registered third parties. To the contrary, Market Regulation’s requests centered on information known to Kenny—the identity of the account holders, all or most of which also were his securities customers. Market Regulation did not request Kenny to produce any documents owned or possessed by such individuals or entities. Moreover, Kenny cannot withhold information by claiming that his customers requested that he not disclose their identity.<sup>48</sup>

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<sup>45</sup> See *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).

<sup>46</sup> See Rule 8210(a)(1), which provides that FINRA may, for the purpose of an investigation, “require a ... person associated with a member ... to provide information orally, in writing, or electronically ... and to testify ... *with respect to any matter involved in the investigation.*” (Emphasis added.)

<sup>47</sup> See *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at \*14-15 (Apr. 17, 2014) (holding that even under a narrow interpretation of Rule 8210’s scope, information regarding respondent’s outside business activities—including the identity of customers of the outside business—fell squarely within the language of the Rule). See also *North Woodward Fin. Corp.*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867, at \*15 (May 8, 2015) (“FINRA was within its authority to investigate the circumstances surrounding [customer] loans regardless of whether they are securities.”).

<sup>48</sup> See *Goldstein*, 2014 SEC LEXIS 1350, at \*36 (“[M]uch of the information that FINRA needs to conduct its investigations is non-public and confidential, [thus] FINRA’s ability to police the activities of its members and associated persons would be eviscerated if FINRA could not request such information under Rule 8210.”).



For the foregoing reasons, we conclude that Kenny violated FINRA Rules 8210 and 2010.<sup>49</sup>

### III. Sanctions

In determining the appropriate sanction we first considered FINRA's Sanction Guidelines ("Guidelines") for providing an incomplete response under Rule 8210. The Guidelines provide that a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.<sup>50</sup> If mitigation exists, the Guidelines recommend that the adjudicator consider suspending the individual in any or all capacities for up to two years.<sup>51</sup> The Guidelines also recommend a fine of \$10,000 to \$73,000 where a bar is not imposed.<sup>52</sup>

The applicable Guidelines also set forth three principal considerations in determining sanctions for a partial but incomplete response under Rule 8210: (1) the importance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explained valid reasons for the deficiencies in the response.<sup>53</sup>

Applying the Guidelines, we first determined that the information Kenny provided did not comply substantially with all aspects of the Rule 8210 requests. Kenny withheld the identity of four individuals or entities that received substantial amounts of money from Kenny. Kenny's refusal to provide the withheld information impeded Market Regulation's investigation into whether he had engaged in serious misconduct, such as spoofing, unapproved private securities transactions, unapproved outside business activities, sharing in customers' profits, and improper loans with customers.<sup>54</sup>

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<sup>49</sup> A violation of Rule 8210 also constitutes a violation of the standard of just and equitable principles of trade embodied in FINRA Rule 2010. *See CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*30 (Jan. 30, 2009).

<sup>50</sup> FINRA Sanction Guidelines at 33 (2015), <http://www.finra.org/industry/sanction-guidelines>.

<sup>51</sup> Guidelines at 33.

<sup>52</sup> *Id.* *See also* Guidelines at 10 (instructing that adjudicators generally should not impose a fine if an individual is barred and there is no customer loss in cases involving failure to respond under Rule 8210).

<sup>53</sup> Guidelines at 33.

<sup>54</sup> *Cf. Dep't of Enforcement v. Eplboim*, No. 2011025674101, 2014 FINRA Discip. LEXIS 8, at \*34 (NAC May 14, 2014) ("When an investigator seeks to verify the proper use of funds by an associated person, any missing documents can frustrate the investigation."). *See also PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at \*13 (explaining that a failure to respond to information requests frustrates FINRA's ability to detect misconduct and threatens investors).

We next considered the specific principal considerations for this violation. We concluded that the information Market Regulation requested and Kenny refused to provide was vitally important to FINRA. Market Regulation's investigation concerned very serious misconduct, ranging from market manipulation to improper loan transactions with customers. And the investigation encompassed misconduct by others at Lightspeed as well as Kenny. Thus, the identity of the individuals or entities Kenny funded was essential information Market Regulation needed to understand the true nature of Kenny's trading activities.

We also considered Kenny's recalcitrance in responding to Market Regulation's Rule 8210 requests. Market Regulation sent Kenny four written requests for information and conducted a day long on-the-record interview trying to ascertain the identity and nature of his activities. Kenny consistently limited the amount of information he supplied in response to Market Regulation's requests for information in an effort to hide the true nature of his activities. He improperly redacted some information and obstinately refused to provide other information despite the fact that the requested information related to his and Lightspeed's securities customers. Kenny also prevaricated when answering questions at his on-the-record interview in an effort to hinder Market Regulation's investigation. We find this course of conduct aggravating. And we find no mitigation in the fact that Kenny provided some additional information immediately before the start of the hearing.<sup>55</sup> The Securities and Exchange Commission ("SEC") has long emphasized that FINRA "should not have to initiate a disciplinary action to elicit a response to its information requests made pursuant to Rule 8210."<sup>56</sup>

Finally, we considered the reason Kenny gave for refusing to provide the names of his customers. Kenny asserted that he was obligated to withhold their identities because they wished to remain anonymous and considered this information confidential. Kenny's reasoning is specious. As an experienced registered broker, Kenny knew or should have known that he was obligated to provide this information. FINRA is not precluded from requesting confidential and private information, and the SEC has rejected assertions of privacy and confidentiality as justifiable reasons for failing to provide FINRA with that information.<sup>57</sup> Moreover, "FINRA investigations are non-public and confidential."<sup>58</sup>

We also find that several other principal considerations under the Guidelines are relevant to Kenny's misconduct and serve to aggravate sanctions. First, Kenny acted

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<sup>55</sup> *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at \*12 (Sept. 10, 2010).

<sup>56</sup> *CMG Institutional Trading*, 2009 SEC LEXIS 215, at \*20.

<sup>57</sup> *See North Woodward*, 2015 SEC LEXIS 1867, at \*26 (quoting *Goldstein*, 2014 SEC LEXIS 1350, at \*36) (rejecting applicant's argument that FINRA was precluded from requesting confidential information)).

<sup>58</sup> FINRA Regulatory Notice 09-17, 2009 FINRA LEXIS 45, at \*4 (Mar. 2009).

intentionally.<sup>59</sup> Kenny received and understood each request. Nonetheless, he deliberately refused to provide all of the requested information. Moreover, it became clear at the hearing that Kenny knew the identity of each of the unidentified account holders involved in the transfers of funds Market Regulation was investigating, yet he continues to refuse to provide their identity.

Second, Kenny has not accepted responsibility for his misconduct, asserting that FINRA lacks authority to investigate his securities transactions with customers away from Lightspeed.<sup>60</sup> This is extremely troubling behavior that demonstrates the very real threat he poses to investors and the markets. Kenny demonstrated no appreciation for the seriousness of the misconduct Market Regulation was investigating.

Under the totality of the circumstances considered, we conclude that a bar is appropriate for Kenny's failure to provide FINRA with complete responses to its requests. We also determine that, in the absence of mitigating factors, this is an egregious case, and accordingly we bar Kenny in all capacities.<sup>61</sup>

#### **IV. Order**

Respondent Richard Francis Kenny, Jr. (also known as Richard Francis Kenny) is barred from associating with any FINRA member firm in all capacities for his failures to comply fully with FINRA's requests for information in violation of FINRA Rules 8210 and 2010.

In addition, Kenny is ordered to pay costs in the amount of \$2,189.39, which includes the hearing transcript fees and an administrative fee of \$750.

If this decision becomes FINRA's final disciplinary action, the bar shall become effective immediately. The assessed costs shall be due on a date set by FINRA, but not sooner than 30 days after this decision becomes FINRA's final disciplinary action in this proceeding.<sup>62</sup>

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Andrew H. Perkins  
Hearing Officer  
For the Hearing Panel

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<sup>59</sup> Guidelines at 7 (Principal Considerations in Determining Sanctions, No. 13).

<sup>60</sup> Guidelines at 6 (Principal Considerations, No. 2).

<sup>61</sup> We also determine it would be appropriate to fine Kenny \$73,000, but decline to do so in light of the bar.

<sup>62</sup> The Hearing Panel considered and rejected without discussion all other arguments of the parties.