

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

CLARK JOHNSTON  
(CRD No. 859781),

Respondent.

Disciplinary Proceeding  
No. 2012032731701

Hearing Officer – CC

**DEFAULT DECISION**

March 18, 2014

**Respondent is barred from associating with any FINRA member firm in any capacity for failing to appear and provide sworn testimony, in violation of FINRA Rules 8210 and 2010.**

**Appearances**

John S. Han, Esq., for the Department of Enforcement, Complainant.

No appearance by or on behalf of Respondent Clark Johnston.

**DECISION**

**I. Introduction**

On October 17, 2013, FINRA's Department of Enforcement ("Enforcement") filed the attached Complaint with FINRA's Office of Hearing Officers. The Complaint alleged that Respondent Clark Johnston ("Johnston") twice failed, in April and July 2013, to appear and provide sworn testimony in response to FINRA's requests issued pursuant to FINRA Rule 8210, in violation of FINRA Rules 8210 and 2010.<sup>1</sup>

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<sup>1</sup> FINRA's Rules are available at [www.finra.org/Rules](http://www.finra.org/Rules).

Johnston failed to answer or otherwise respond to the Complaint. Accordingly, on January 30, 2014, Enforcement filed a Motion for Entry of Default Decision (“Default Motion”).<sup>2</sup> Johnston did not respond to the Default Motion.

For the reasons set forth below, the Hearing Officer finds Johnston in default, grants Enforcement’s Default Motion, and deems the allegations in the attached Complaint admitted, pursuant to Rules 9215(f) and 9269(a).

## **II. Findings of Fact and Conclusions of Law**

### **A. Johnston’s Background**

Johnston first entered the securities industry in 1978.<sup>3</sup> From November 1978 through June 2012, Johnston was registered with FINRA as a General Securities Representative and Principal and Equity Trader Limited Representative and was associated with FINRA member firm Alpine Securities Corporation (“Alpine”).<sup>4</sup> Alpine filed a Uniform Termination Notice for Securities Industry Registration (“Form U5”) reporting Johnston’s voluntary termination on June 19, 2012.<sup>5</sup> Since June 19, 2012, Johnston has not been associated with a FINRA member.<sup>6</sup>

### **B. FINRA’s Jurisdiction**

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4(a) of FINRA’s By-Laws, because (1) Enforcement filed the Complaint within two years after FINRA terminated Johnston’s registration, and (2) the Complaint alleges that Johnston failed,

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<sup>2</sup> Enforcement’s Default Motion is supported by the Declaration in Support of Default Motion of Jacqueline D. Whelan (“Whelan Decl.”) and six exhibits, which are labeled CX-1 through CX-6.

<sup>3</sup> CX-2, at 3.

<sup>4</sup> Whelan Decl. ¶ 4; CX-2, at 3.

<sup>5</sup> CX-2, at 3, 6.

<sup>6</sup> CX-2, at 3.

while subject to FINRA's jurisdiction during the two years following the termination of his registration, to provide information requested by FINRA pursuant to FINRA Rule 8210.<sup>7</sup>

**C. Origin of the Investigation**

FINRA commenced an investigation of a series of transactions and liquidations at Alpine during a period when Johnston was Alpine's trader and the account representative responsible for several accounts involved in the transactions under review.<sup>8</sup> FINRA sought to investigate transactions, such as good until cancelled limit orders on the buy side, and day limit orders on the sell side, that were paired in house and suggested the possibility of prearranged and potentially manipulative trading and liquidations of blocks of recently deposited low-priced equity securities.<sup>9</sup>

**D. Service of the Complaint and Johnston's Default**

On October 17, 2013, Enforcement served Johnston with the Notice of Complaint and Complaint by first-class and certified mail sent to his residential address recorded in the Central Registration Depository ("CRD").<sup>10</sup> Enforcement also sent a copy of the Notice of Complaint and Complaint by first-class and certified mail to an attorney who identified himself to Enforcement as Johnston's counsel.<sup>11</sup> The United States Postal Service ("USPS") did not return either first-class mailing.<sup>12</sup> The USPS provided Enforcement with a certified mail delivery receipt evidencing delivery of the certified mailing delivered to Johnston's CRD address, bearing

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<sup>7</sup> See Article V, Sec. 4(a), FINRA By-Laws, available at [www.finra.org/Rules](http://www.finra.org/Rules) (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

<sup>8</sup> Whelan Decl. ¶ 2, 10.

<sup>9</sup> Whelan Decl. ¶ 10.

<sup>10</sup> Whelan Decl. ¶ 5; CX-3; CX-4.

<sup>11</sup> Whelan Decl. ¶ 5; CX-4.

<sup>12</sup> Whelan Decl. ¶ 5.

an illegible signature.<sup>13</sup> The USPS also provided Enforcement with a certified mail delivery receipt evidencing delivery of the certified mailing delivered to Johnston's counsel, bearing a stamp with the law firm's name in the signature block.<sup>14</sup>

On December 11, 2013, Enforcement served Johnston (at his CRD address) with the Second Notice of Complaint and Complaint via first-class and certified mail.<sup>15</sup> The USPS did not return the first-class mailing.<sup>16</sup> The USPS provided Enforcement with a certified mail delivery receipt evidencing delivery of the certified mailing to Johnston's CRD address, bearing the printed name "Clark Johnston" and a signature that appears to be his.<sup>17</sup> Enforcement also provided a copy of the Second Notice of Complaint and Complaint via first-class and certified mail to Johnston's attorney.<sup>18</sup> The USPS provided Enforcement with a certified mail delivery receipt evidencing delivery of the certified mailing to Johnston's counsel, bearing an illegible signature and the printed name "Leroy Caldez."<sup>19</sup> The USPS did not return the first-class mailing.<sup>20</sup> To date, Johnston has not responded to the Complaint.

The Hearing Officer finds that Johnston received constructive notice of this proceeding.<sup>21</sup> Accordingly, the Hearing Officer finds that Johnston defaulted by failing to answer or otherwise respond to the Complaint.

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<sup>13</sup> Whelan Decl. ¶ 5; CX-3; CX-4.

<sup>14</sup> *Id.*

<sup>15</sup> Whelan Decl. ¶ 7; CX-6. The Second Notice of Complaint warned Johnston that his failure to respond to the complaint could result in the Hearing Officer's treating as admitted the allegations of the complaint and entering a default decision against Johnston.

<sup>16</sup> Whelan Decl. ¶ 7.

<sup>17</sup> Whelan Decl. ¶ 7; CX-6.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Whelan Decl. ¶ 7.

<sup>21</sup> FINRA Rule 9134(b) provides for service on a natural person at the person's residential address as indicated in CRD. See *Dep't of Enforcement v. Moore*, Complaint No. 2008015105601, 2012 FINRA Discip. LEXIS 45, at \*21

### **E. Failure to Appear and Provide Sworn Testimony**

The Complaint alleges that Johnston failed to appear and provide sworn testimony as requested by FINRA pursuant to FINRA Rule 8210. FINRA Rule 8210(a) authorizes FINRA staff, for purposes of an investigation, examination, or proceeding, to require a person subject to FINRA's jurisdiction to testify at a location specified by FINRA staff, under oath, with respect to any matter involved in the investigation, examination, or proceeding. FINRA Rule 8210(d) provides that notice shall be deemed received by a formerly registered person by mailing it to the last known residential address of the person as reflected in CRD. Rule 8210(d) further provides that, if FINRA staff is aware that a person is represented by counsel regarding an investigation, examination, or proceeding that is the subject of a request, then notice shall be served on counsel by mailing or otherwise transmitting to counsel. The Hearing Officer finds that Enforcement complied with the requirements of FINRA Rule 8210, and Johnston failed to appear.

On March 11, 2013, Enforcement sent Johnston a written request that he appear and testify on the record on April 18, 2013, at FINRA's Denver, Colorado office.<sup>22</sup> Enforcement sent the request via certified and first-class mail to Johnston's residential address as indicated in CRD.<sup>23</sup> Johnston accepted delivery of the request, as evidenced by his signed receipt.<sup>24</sup> On April 1, 2013, Enforcement provided Johnston with a second notice of its request for his April 18, 2013, testimony by the same means and at the same address.<sup>25</sup> The USPS provided Enforcement with a certified mail delivery receipt evidencing delivery of the certified mailing to Johnston's

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(FINRA NAC July 26, 2012) (finding constructive notice of a complaint served on respondent at his last known residential address, as indicated in CRD, by first-class and certified mail).

<sup>22</sup> Whelan Decl. ¶ 3; CX-1.

<sup>23</sup> Whelan Decl. ¶ 3; CX-1; CX-3.

<sup>24</sup> Whelan Decl. ¶ 3; CX-1, at 5.

<sup>25</sup> CX-1, at 7-11.

CRD address, bearing the signature of an individual identified as “Susan Johnston.”<sup>26</sup> On April 4, 2013, Enforcement notified Johnston via certified and first-class mail that, to better accommodate his appearance, it had changed the location for his April 18, 2013, on-the-record testimony to the offices of the Utah Division of Securities in Salt Lake City, Utah.<sup>27</sup> Enforcement sent the notice to Johnston’s CRD address.<sup>28</sup> The USPS returned the certified mailing to Enforcement.<sup>29</sup> At the time of these mailings, Enforcement was unaware that Johnston was represented by counsel. Enforcement subsequently learned of his representation.<sup>30</sup> Johnston did not appear to testify on April 18, 2013.<sup>31</sup>

On June 19, 2013, Enforcement sent Johnston a second request that he appear and testify on the record.<sup>32</sup> Enforcement requested that Johnston appear on July 19, 2013, at FINRA’s Denver, Colorado office.<sup>33</sup> Enforcement sent the request via certified and first-class mail to an attorney who represented to Enforcement that he then represented Johnston.<sup>34</sup> The attorney accepted delivery of the request and contacted Enforcement to indicate that Johnston refused to appear to testify.<sup>35</sup>

Enforcement properly served Johnston with multiple requests for testimony, and Johnston, through counsel, refused to appear and testify. By doing so, Johnston violated FINRA

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<sup>26</sup> CX-1, at 10.

<sup>27</sup> Whelan Decl. ¶ 3; CX-1, at 12.

<sup>28</sup> CX-1, at 12-15; CX-3.

<sup>29</sup> CX-1, at 15.

<sup>30</sup> Whelan Decl. ¶ 3.

<sup>31</sup> Whelan Decl. ¶ 3.

<sup>32</sup> Whelan Decl. ¶ 3; CX-1, at 16-19.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

Rule 8210.<sup>36</sup> A violation of FINRA Rule 8210 constitutes conduct inconsistent with just and equitable principles of trade and therefore also violates FINRA Rule 2010.<sup>37</sup>

### **III. Sanctions**

FINRA's Sanction Guidelines ("Guidelines") advise that, if an individual did not respond in any manner, a bar in all capacities should be standard.<sup>38</sup> Here, both Johnston and his attorney received Enforcement's requests that he appear and testify. In addition, Enforcement endeavored to ease the burden on Johnston by relocating the testimony site to Salt Lake City, Utah, which is closer to Johnston's home. Johnston nonetheless refused to testify. Enforcement's investigation involved suspicious trading activities in some of Johnston's customer accounts, and other trading at Alpine during the period when Johnston was the firm's trader. Enforcement represented that, given Johnston's involvement in the trading under review, Johnston's refusal to testify had a significant, negative impact on FINRA's investigation and prevented FINRA from completing its investigation.<sup>39</sup> There are no mitigating factors.

Accordingly, the Hearing Officer bars Johnston from associating with any FINRA member firm in any capacity for violating FINRA Rules 8210 and 2010, as alleged in the Complaint.

### **IV. Order**

Clark Johnston is barred from associating with any member firm in any capacity for failing to respond to FINRA requests that he appear and testify on the record, in violation of FINRA Procedural Rule 8210 and Conduct Rule 2010, as alleged in the Complaint. The bar shall

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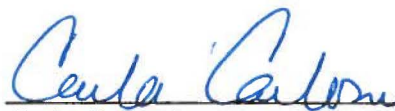
<sup>36</sup> See *Dep't of Enforcement v. Reichman*, Complaint No. 200801201960, 2011 FINRA Discip. LEXIS 18, at \*28-29 (FINRA NAC July 21, 2011) (finding violation of FINRA Rules 8210 and 2110 by failing to appear for on-the-record testimony).

<sup>37</sup> See *CMG Inst. Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at \*30 (Jan. 30, 2009).

<sup>38</sup> FINRA Sanction Guidelines at 33 (2013), available at [www.finra.org/Industry/Enforcement/SanctionGuidelines](http://www.finra.org/Industry/Enforcement/SanctionGuidelines).

<sup>39</sup> Whelan Decl. ¶ 10.

become effective immediately if this Default Decision becomes the final disciplinary action of  
FINRA.



Carla Carloni  
Hearing Officer

Copies to: Clark Johnston (*via overnight courier and first-class mail*)  
Jeffrey Pariser, Esq. (*via electronic mail*)  
John S. Han, Esq. (*via electronic and first-class mail*)



# **EXHIBIT A**

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**  
**OFFICE OF HEARING OFFICERS**

Department of Enforcement,

Complainant,

v.

Clark Johnston,  
(CRD No. 859781),

Respondent.

DISCIPLINARY PROCEEDING  
No. 2012032731701

**COMPLAINT**

The Department of Enforcement alleges:

**SUMMARY**

1. Respondent failed on April 18, 2013, and again on July 19, 2013, to appear for sworn testimony requested by FINRA staff pursuant to FINRA Rule 8210 in connection with a FINRA investigation.

**RESPONDENT AND JURISDICTION**

2. Respondent first became associated with a FINRA-member broker-dealer in November 1978 when he joined Alpine Securities Corporation (the Firm) in Salt Lake City, UT as a General Securities Representative. He became a General Securities Principal of the Firm in October 1980. His association with the firm ended on June 13, 2012, as a result of his voluntary termination. At the time his registrations were terminated, Respondent was the Firm's president. Although Respondent is no longer

registered or associated with a FINA member, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the effective date of termination of Respondent's registration with the Firm, namely, June 19, 2012 and (2) the Complaint charges him with failing to appear for on-the-record testimony during the two-year period after the date upon which he ceased to be registered with a FINRA.

#### FIRST CAUSE OF ACTION

(Failure to Appear for Testimony – FINRA Rules 8210 and 2010)

3. The Department realleges and incorporates by reference paragraphs 1 and 2 above.
4. On March 11, 2013, FINRA staff sent to Respondent a written request pursuant to FINRA Rule 8210 that Respondent appear and testify on April 18, 2013, at the Denver District Office. The request was made in connection with an examination pertaining to transactions occurring in Firm customer accounts while Respondent was employed at the Firm. The March 11, 2013 request also asked that Respondent contact FINRA staff on or before March 25, 2013, to confirm his intention to appear. The March 11, 2013, request was sent to Respondent at his most recent residential address in the Central Registration Depository (CRD Address) by first-class and certified mail. Respondent accepted delivery of the certified mailing at the CRD Address on March 14, 2013.
5. On April 4, 2013, FINRA staff sent to Respondent a letter notifying him that the April 18, 2013, testimony would take place in Salt Lake City, UT, rather than Denver, CO and requesting, pursuant to Rule 8210, that he appear at the designated location in

Salt Lake City to testify on the date and at the time previously specified. Respondent was also asked to confirm to the staff on or before April 11, 2013, that he would appear. The April 4, 2013, request was sent to Respondent at his CRD Address by first-class and certified mail. The first-class mailing was not returned to the staff. The certified mailing was returned unclaimed.

6. Respondent did not appear for testimony on April 18, 2013.
7. On June 19, 2013, FINRA staff sent to Respondent, through his then-counsel, a request that Respondent appear and testify on July 19, 2013, in Denver, CO in connection with the above-referenced examination. The request was made pursuant to Rule 8210 and sent by first-class and certified mail to Respondent's counsel. Counsel received the June 19, 2013, request. Counsel informed FINRA staff by telephone that Respondent would not appear for his OTR.
8. Respondent did not appear for testimony on July 19, 2013.
9. By failing to appear for testimony requested pursuant to FINRA Rule 8210, Respondent violated FINRA Rules 8210 and 2010.

### **RELIEF REQUESTED**


WHEREFORE, the Department respectfully requests that the Panel:

- A. make findings of fact and conclusions of law that Respondent committed the violations charged and alleged herein;
- B. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed; and

- C. order that Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

**FINRA DEPARTMENT OF ENFORCEMENT**

Date: October 17, 2013

  
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