

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

JUSTIN WILLIAM KEENER
(CRD No. 2956478),

Respondent.

Expedited Proceeding
No. FPI110005

STAR No. 2011029820501

Hearing Officer – LBB

HEARING PANEL DECISION

July 20, 2012

Respondent, an associated person of a FINRA member firm for purposes of FINRA Rule 8210, refused to respond to Rule 8210 requests issued by FINRA staff. Pursuant to FINRA Rules 9552 and 9559, Respondent is suspended from associating with any FINRA member firm in any capacity. If Respondent has not completely responded to the Rule 8210 requests within three months after the date of this decision, Respondent's suspension will automatically convert to a bar.

Appearances

Cynthia A. Kittle, Senior Regional Counsel, Los Angeles, California, and Robin W. Sardegna, Senior Litigation Counsel, Rockville, Maryland, for the Department of Enforcement.

Irving M. Einhorn, Manhattan Beach, California, for Respondent.

DECISION

Respondent Justin William Keener (“Respondent” or “Keener”) refused to appear and testify at an on-the-record interview (“OTR”) and to provide documents and information requested by FINRA staff pursuant to FINRA Rule 8210. On October 23, 2011, FINRA staff issued a Notice of Suspension to Respondent pursuant to FINRA Rule 9552, informing Respondent that he would be suspended from association with any FINRA member firm in any capacity if he did not comply with the requests by November 18, 2011. Respondent filed a request for a hearing on November 16, 2011, pursuant to FINRA Rule 9552(e).

A hearing was conducted in Los Angeles, California, on May 9 and 10, 2012, before a hearing panel composed of two current members of the District 2 Committee and a Hearing Officer.¹ The parties filed post-hearing briefs on May 25, 2012. The principal contested issue at the hearing was whether Respondent had been an associated person of FINRA member firm Gordon & Company (“Gordon”) at the time of the Rule 8210 requests in 2011, and was therefore subject to FINRA’s jurisdiction for purposes of the Rule 8210 requests that are the subject of this proceeding. For the reasons stated below, the Hearing Panel finds that Respondent was subject to FINRA’s jurisdiction for purposes of the Rule 8210 requests that are the subject to this proceeding, and is required to respond by FINRA’s Rules and By-Laws.

FACTS

I. Respondent and Jurisdiction in this Proceeding

Respondent describes his profession as the financing of small-cap, publicly traded companies. Tr. 399. A substantial part of Keener’s business has been investment in “PIPES.”² Tr. 236. Respondent has never been registered with, or employed by, any FINRA member firm. CX-4, CX-12; Tr. 391-392.

Because the Hearing Panel finds that Respondent was an associated person of a FINRA member firm in 2011 with respect to the Rule 8210 requests, as discussed below, Respondent remains subject to FINRA’s jurisdiction for purposes of this expedited proceeding pursuant to Article V, Section 4 of FINRA’s By-Laws, which provides for continuing jurisdiction over an associated person for two years after the termination of the person’s association with a member

¹ The hearing had been postponed, for good cause, at the request of the Department of Enforcement, with the consent of Respondent.

² “‘PIPE’ stands for ‘private investment in public equity.’ In a PIPE offering, investors commit to purchase a certain number of restricted shares from a company at a specified price. The company agrees, in turn, to file a resale registration statement so that the investors can resell the shares to the public.” <http://www.sec.gov/answers/pipeofferings.htm>

firm, and is a proceeding based upon that person's failure to provide information requested by FINRA while subject to FINRA's jurisdiction.

II. Respondent's Association with Gordon

In early 2011, Gordon was a small, unprofitable member firm with a niche business, primarily writing and repurchasing put and call options. Tr. 38-40, 122. Gordon was organized as a limited partnership. CX-14; Tr. 38.

By agreement dated April 27, 2011, Respondent and the Cobblestone Trust ("Cobblestone") became Class B limited partners of Gordon, each paying \$150,000 for 12.5% ownership of the firm. CX-14 ("Amended and Restated Certificate of Limited Partnership of Gordon & Co."); Tr. 43, 75, 180, 254.³ Keener wired his \$150,000 capital contribution to Gordon on April 29, 2011. Tr. 64, 254, 317; CX-17, CX-14 at 22.⁴

In about May or June 2011, FINRA staff became aware that the firm had started to engage in the sale of microcap securities. Tr. 38. On September 9, 2011, FINRA staff conducted an unannounced visit to Gordon's offices. Tr. 56, 127. Gordon's president informed the staff that Keener and Cobblestone were going to buy the firm, and that the firm would be filing a Continuing Membership Application, pursuant to NASD Rule 1017.⁵ Tr. 131. The staff also saw account statements showing Keener's account selling millions of shares of sub-penny stock. CX-21; Tr. 135-136, 178-179; CX-42.

On September 27, FINRA staff sent a letter to Gordon, informing the firm that upon review of the limited partnership agreement and other documents and information, the staff had

³ The trustee of Cobblestone was Pauline Fife. Her husband, John Fife, had been barred by the SEC from being an investment advisor for 18 months, and therefore was statutorily disqualified. Tr. 43-44.

⁴ Pursuant to side agreements with Gordon, Keener and John Fife agreed to pay a minimum of \$30,000 monthly to Gordon in commissions for five months, starting in April 2011. CX-15, CX-16; Tr. 255, 352. Each also agreed to keep accounts at Fidelity, with \$1,150,000, to cover positions created by their respective securities trading, and to be used to pay commissions to Gordon. CX-15, CX-16; Tr. 351-352.

⁵ See NASD Rule 1017, "Application for Approval of Change in Ownership, Control, or Business Operations."

determined that Gordon must file Continuing Membership Application reflecting the ownership and control interests of Keener and Cobblestone; register Keener and John Fife as principals; and file an application for Fife to be associated with the firm despite being statutorily disqualified. CX-19.

Gordon filed a Form U4 for Keener dated September 26, 2011. CX-12; Tr. 331. Keener did not know it was filed. Tr. 383-384. Gordon also filed a Form BD amendment dated September 27, 2011, reflecting Keener's ownership interest in Gordon. The amended Form BD listed Keener and Cobblestone as direct owners, reporting that each was a limited partner with an ownership interest of at least 10% but less than 25%. CX-11 at 9. The firm reported on Schedule A to the Form BD that Keener was a limited partner. CX-11.

On October 19, 2011, Gordon's president informed FINRA staff that Gordon would no longer be trading for Keener and Fife. Tr. 76. Gordon closed Keener's account in October 2011, without Keener's consent. Tr. 333, 419. In December 2011, Gordon redeemed the partnership interests in Gordon of Keener and Cobblestone, paying them \$60,000 each. CX-29; Tr. 88, 334-335. Gordon filed a Form BDW on January 3, 2012. CX-31.

III. The Investigation of Firm W Leading to the Rule 8210 Requests to Keener

In 2011, FINRA's Los Angeles office was engaged in an investigation of Firm W, a FINRA member firm, looking at the firm's activities with respect to receipt and liquidation of securities certificates. The investigation has not been completed. Tr. 157, 159, 196. The sole focus of the investigation of Firm W is Keener's trading, which was the bulk of Firm W's activity during the time period relevant to the investigation. Tr. 164. The investigators are looking at the circumstances of the delivery and liquidation of a significant quantity of stock certificates for Keener's account, with the proceeds wired to Keener almost immediately upon liquidation. FINRA's investigators are concerned that the trading might have been unregistered

distributions of securities in violation of Section 5 of the Securities Act of 1933. Tr. 158, 179-180.⁶

On September 22, 2011, FINRA staff served a request on Keener, pursuant to FINRA Rule 8210, to appear and testify at an OTR at FINRA's Los Angeles office on October 20 and 21. CX-1; Tr. 180, 389; Stipulation No. 3.⁷ Keener's counsel responded on Keener's behalf by letter of September 26, 2011, asking to discuss the request with FINRA staff. CX-2; Tr. 181, 390.

FINRA staff served a request for documents and information on Keener's counsel on September 28, 2011, pursuant to FINRA Rule 8210. CX-3; Stipulation No. 4. The request directed Keener to produce certain financial documents and information by October 12, 2011, including identification of bank accounts; copies of checks; wire transfers; financial information for JMJ Financial, the entity through which Keener conducted his securities investing;⁸ tax returns for Keener and JMJ; all agreements to acquire debt or equity interest in any entity not listed on a national exchange; and all documents relating to twelve entities and Fife. The request covered a period from January 1, 2008, to the date of the request. CX-3; Tr. 390. The purpose of the request was to gather documents and information relevant to the staff's investigation of whether Keener was a statutory underwriter in his securities transactions at Gordon and Firm W. Tr. 181-182. Keener's counsel responded by letter of September 30, 2011, stating that Keener

⁶ If the distribution was unlawful, Firm W, and its registered representatives, might also have violated Section 5 and FINRA's Rules. Anyone who is a "necessary participant" or a "substantial factor" in an unlawful distribution, including a registered representative, violates Section 5. See *SEC v. Calvo*, 378 F.3d at 1215; *SEC v. Murphy*, 626 F.2d 633, 649-52 (9th Cir. 1980); *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412, 422 (S.D.N.Y. 2007), *aff'd sub nom. SEC v. Altomare*, 300 Fed. Appx. 70 (2d Cir. 2008) (per curiam) (unpublished), *cert. denied*, 129 S. Ct. 2745 (2009); *Owen V. Kane*, Exchange Act Rel. No. 34-23827, 1986 SEC LEXIS 326, at *11 (Nov. 20, 1986).

⁷ The parties filed a set of stipulations on May 8, 2012.

⁸ Keener's account at Firm W was opened in March 2009, on behalf of an entity called JMJ Financial. Stipulation No. 1. Keener was JMJ Financial's sole proprietor. Stipulation No. 2. The new account forms show the owner of the account as "Justin Keener d/b/a JMJ Financial." CX-20.

had never agreed to be subject to FINRA's jurisdiction, was not subject to FINRA's jurisdiction, and would not respond to either Rule 8210 request. CX-4; Tr. 182; Stipulation No. 5.

FINRA staff sent a letter to Keener's counsel on October 4, 2011, asking counsel to confirm that Keener would appear for the OTR scheduled for October 20 and 21, and attaching the original September 22, 2011, request to appear and testify at an OTR. CX-5; Tr. 183; Stipulation No. 6. FINRA staff sent another letter to counsel on October 11, 2011, stating that the staff's Rule 8210 requests remained in force. CX-6; Tr. 183; Stipulation No. 7. Counsel responded on October 11, 2011, saying Keener would not respond to either Rule 8210 request. He reiterated his position that Keener had not agreed to be subject to FINRA's jurisdiction, and asserted that FINRA had no power to compel Keener to appear or produce documents. The letter stated that Keener would not respond to either Rule 8210 request until a court of competent jurisdiction finds that he is subject to FINRA's jurisdiction. CX-7; Stipulation No. 7.

On October 25, 2011, FINRA staff issued a Notice of Suspension to Respondent pursuant to FINRA Rule 9552, informing him that he would be suspended from association with any FINRA member firm in any capacity if he did not comply with the requests by November 18, 2011. CX-9; Stipulation No. 8.

Respondent has stipulated that he that will not submit to FINRA jurisdiction, will not appear at an OTR, and will not respond to Rule 8210 requests. Tr. 393-395. Respondent has not produced any documents, and has not appeared to testify at an OTR. Tr. 395. Prior to the hearing, Keener did not offer to produce any documents at any time. Tr. 184. He did not appear for testimony. Tr. 395. He does not intend to respond to the Rule 8210 requests regardless of the Hearing Panel's decision. Tr. 397.

IV. Respondent Became an Associated Person of Gordon, Subject to FINRA’s Jurisdiction for Purposes of Rule 8210, as a Result of his Transactions with Gordon and His Listing on Schedule A of Gordon’s Form BD

Under Article I, Section (rr) of FINRA’s By-Laws, a “person associated with a member” or “associated person of a member” includes “a natural person engaged in the ... securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and ... for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member....” In 1999, FINRA changed the definition of “person associated with a member” in the By-Laws to its current language by expressly providing for jurisdiction for purposes of Rule 8210, explaining that the revised definition “gives the staff the authority to require information and testimony under Rule 8210 from any person – including a natural person or corporate or other entity – who holds a five percent or greater interest in a member firm....”⁹

Enforcement argues that there are three bases for finding that Respondent was subject to FINRA’s jurisdiction with respect to the Rule 8210 requests that are the subject of this proceeding. First, Enforcement argues that Respondent was subject to Rule 8210 when Gordon amended its Form BD, listing Respondent as an owner on Schedule A. Second, Enforcement argues that Respondent was subject to FINRA’ jurisdiction prior to Gordon’s amendment of Schedule A of its Form BD because Gordon should have listed Respondent on Schedule A promptly. Third, Enforcement argues that Respondent was an associated person for all purposes because he was engaged in Gordon’s securities business, and controlled Gordon as a result of his

⁹ NTM 99-95.

rights under the limited partnership agreement and the importance to Gordon of the revenue generated by his trading activity.

Under the express language of FINRA's By-Laws, Keener was subject to FINRA's jurisdiction for purposes of Rule 8210 starting on September 27, 2011, when Gordon listed him on Schedule A to Gordon's Form BD. Although the original request for testimony was served before Respondent was listed on Schedule A, the letter of October 4 confirmed that Respondent was required to appear at the OTR, effectively renewing the request for testimony. The request for documents and information was served after the filing of the amended Form BD, and thus at a time when Respondent was clearly subject to FINRA's jurisdiction for purposes of Rule 8210. All the requests were affirmed in the staff's letter of October 11, 2011, causing the request to appear and testify at an OTR also to be effective when Respondent was listed on Schedule A.

The request to appear and testify would be valid even if the staff had not renewed its requests in the October 4 letter. Gordon's Schedule A should have been amended promptly after Respondent became a limited partner, and contributed his capital, in April 2011. The instructions for Form BD provide, "By law, the applicant must promptly update Form BD information by submitting amendments whenever the information on file becomes inaccurate or incomplete for any reason." The instructions require an applicant to list all partners that have contributed more than five percent of the firm's capital on Schedule A. CX-13. Gordon should have filed the amendment promptly, as of April 29, 2011, when Keener and Cobblestone each contributed 12.5% of the firm's capital. Tr. 75. Although Gordon failed to file Schedule A promptly, Keener was a "Schedule A person" when he acquired his interest in Gordon. The purpose of the By-Law is not a mechanical reference to a list, dependent upon the good faith and

diligence of the firm, but to require a specific class of participants in the securities industry to provide documents and information that FINRA requires in the conduct of its investigations.¹⁰

Because Respondent is clearly subject to FINRA's jurisdiction for purposes of Rule 8210 as an owner of more than five percent of Gordon and was listed on Schedule A of Gordon's Form BD, the Hearing Panel does not decide if Respondent was also subject to FINRA's jurisdiction due to the terms of the limited partnership agreement and the importance of his revenue to Gordon.

V. Respondent Failed to Appear for Testimony, and to Provide Documents and Information, Requested Pursuant to FINRA Rule 8210

FINRA Rule 8210(a)(2) provides that, for purposes of an investigation, FINRA staff has the right to inspect and copy the books and records of a person associated with a member with respect to any matter involved in the investigation, and to require an associated person to appear and testify. There is no dispute, and the evidence clearly establishes, that Respondent has failed and refused to testify, and to provide documents and information requested by FINRA staff pursuant to FINRA Rule 8210.

Respondent argues that the staff's request is unreasonably broad. The scope of a request is not a basis to challenge a Rule 8210 request. As the Securities and Exchange Commission held in affirming FINRA's finding that a registered person and member firm had violated NASD Rules 8210 and 2110 by failing to provide documents and information, "We have held

¹⁰ See Self-Regulatory Organizations: Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Definition of 'Person Associated with a Member,' 64 Fed. Reg. 49261 (1999) (Under the proposed amendment to the NASD By-Laws, "[A]n owner who falls within the associated person definition but fails to comply with a Rule 8210 request may be disciplined by the NASD."); NTM 99-95 ("The amendment to the definition gives the staff the authority to require information and testimony under Rule 8210 from any ... regardless of whether they 'control' the member firm or are actively engaged in its securities or investment banking business.")

repeatedly that members and their associated persons may not ‘second guess’ NASD’s requests for information or ‘set conditions on their compliance.’”¹¹

VI. Decision and Order

At the time he was served with requests for testimony, documents, and information pursuant to FINRA Rule 8210, Respondent was subject to FINRA’s jurisdiction for purposes of Rule 8210. He has failed and refused to respond to the requests. Respondent has not presented any valid defense to the Notice of Suspension, and the appeal is rejected.

Pursuant to FINRA Rule 9559(n), the Hearing Panel may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and, pursuant to Rule 8310(a), may also impose any other fitting sanction. The Hearing Panel finds that the Notice of Suspension was properly served, and hereby lifts the stay of the Notice. Respondent is suspended from association with any member firm in any capacity. Respondent is ordered to provide the documents and information requested by the Rule 8210 requests within three months of the date of this decision, and to make himself available for an on-the-record interview for two days at FINRA’s Los Angeles office within three months of the date of this decision.¹²

Enforcement requests the imposition of a bar. The Hearing Panel finds that Respondent should be barred only after being given the opportunity to comply with the requests and the terms of this order. If Respondent fails to comply with the Rule 8210 requests that are the

¹¹ *CMG Institutional Trading, LLC*, Exchange Act Rel. No. 59325, 2009 SEC LEXIS 215, at *26 (Jan. 30, 2009); see also *Dep’t of Enforcement v. Houston*, No. 2006005318801, 2010 FINRA Discip. LEXIS 38 (N.A.C. Dec. 22, 2010), *aff’d*, Exchange Act Rel. No. 66014, 2011 SEC LEXIS 4491 (Dec. 20, 2011).

¹² In his post-hearing memorandum, Respondent states, through counsel, that if the Hearing Panel finds that he is subject to FINRA’s jurisdiction, the Hearing Panel should order Respondent to produce information documenting his payment for the securities that were in his account at Firm W. The Hearing Panel declines to second-guess staff’s determination of the appropriate scope of the Rule 8210 requests.

subject of this proceeding within three months, as set forth above, the suspension shall automatically convert to a bar.

VII. Conclusion

Pursuant to FINRA Rules 9552 and 9559(n), Respondent is suspended from associating with any FINRA member firm in any capacity. If Respondent has not completely responded to the requests for information and documents, and has failed to be available to testify at an on-the-record interview, within three months after the date of this decision, Respondent's suspension will automatically convert to a bar.

In addition, Respondent is ordered to pay costs of \$4,231.90, which include an administrative cost of \$750 and the cost of the hearing transcript. The costs shall be due as of a date established by FINRA.

HEARING PANEL

By: Lawrence B. Bernard
Hearing Officer

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