FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RONALD E. WALBLAY (CRD No. 2171097), Respondent.	Disciplinary Proceeding No. 2011025643201 Hearing Officer – RLP **HEARING PANEL DECISION GRANTING DEPARTMENT OF ENFORCEMENT'S MOTION FOR SUMMARY DISPOSITION** November 1, 2012

For twice failing to appear for testimony, in violation of FINRA Rules 8210 and 2010, Respondent is barred from association with any FINRA member firm in any capacity.

Appearances

Sarah B. Belter, Esq., Senior Regional Counsel, New Orleans, Louisiana, for the Department of Enforcement.

Debra A. Jenks, Esq., SCHWED KAHLE & JENKS, P.A., Palm Beach, Florida, for the Respondent.

DECISION

I. Introduction

The Department of Enforcement filed the complaint in this disciplinary proceeding on February 8, 2012, charging, in a single cause of action, Respondent Ronald E. Walblay with failing to respond to requests for on-the-record testimony, in violation of FINRA Rules 8210 and 2010. On April 24, 2012, after Respondent was twice notified of the complaint and the Hearing Officer issued an order setting a deadline for the filing of a motion for entry of a default decision,

Walblay filed an answer admitting that he had twice failed to appear for requested testimony, but interposing certain defenses.

The parties filed cross-motions for summary disposition on September 20, 2012, and oppositions on October 4, 2012.[1] After careful consideration, and for the reasons set forth below, the Hearing Panel grants Enforcement's motion and denies Walblay's motion.

II. Summary Disposition Standard

Pursuant to FINRA Rule 9264(e):

> The Hearing Panel … may grant the motion for summary disposition if there is no genuine issue with regard to any material fact and the Party that files the motion is entitled to summary disposition as a matter of law. If a Party files a motion [prior to the commencement of the hearing on the merits], the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145.

The standard for assessing motions under Rule 9264 is identical to that set forth in Federal Rule of Civil Procedure 56. Under Fed. R. Civ. P. 56, a moving party bears the initial burden of showing the absence of a genuine issue of material fact and, once the movant meets that burden, the opposing party must come forward with specific facts showing that there is a genuine issue for hearing.[2] Factual disputes that are irrelevant or unnecessary to deciding the

[1] On October 12, 2012, Walblay filed "Respondent Walblay's Additional Opposition to Complainant's Cross-Motion for Summary Disposition Pursuant to FINRA Rule 9264" ("Additional Opposition"). Respondent asserts that the filing is made pursuant to FINRA Rule 9264(a) and the Scheduling and Procedures Order dated July 24, 2012. However, nothing in Rule 9264 or the July 24 Order permitted the filing of an "additional opposition" to a summary disposition motion more than three weeks after the motion. Instead, as Rule 9146(d) requires, oppositions must be filed within fourteen days after service of motions, unless the Hearing Officer orders otherwise, and, as Rule 9146(h) and the July 24 Order state, no replies to oppositions may be filed without leave of the Hearing Officer. Walblay neither sought nor received permission to file his untimely Additional Opposition and it will not be considered. Even if it were, it would not change this decision because it: (1) essentially restates previous argument and factual assertions already addressed in this decision (Additional Opposition ¶¶ 1-4, 6, 11, 12, 14, 18-20); (2) raises objections to the scope of a 2012 OTR and recent information requests, which are irrelevant to the issues involved in this proceeding (Additional Opposition ¶¶ 13-17, 19); or (3) raises new claims about past conduct (Additional Opposition ¶ 5) that are not permitted and do not have a material bearing on the issues involved in this proceeding for the reasons stated *infra* at note 46.

[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

case will not preclude summary disposition; the non-movant must instead identify disputes about material facts—those "that might affect the outcome of the [proceeding] under the governing law … ."[3]

III. Jurisdiction

Although Respondent is not now registered with a FINRA member firm, he is subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because, as set forth below, the complaint: (1) was filed within two years after the termination of Respondent's registration with a member firm; and (2) charges him with failing to respond to requests for information both before the termination and during the following two-year period.

IV. Findings of Fact[4]

At all times pertinent to this proceeding, Respondent Walblay was registered as a direct participation programs principal and a direct participation programs representative through his wholly owned broker-dealer firm, Energy Securities, Inc.[5] On November 22, 2011, Energy Securities withdrew from registration as a broker-dealer and Respondent's association with the firm was terminated on that date.[6]

During a cycle examination of Energy Securities in 2011, FINRA staff became concerned that Walblay may have misused funds his customers intended to invest in direct participations in

[3] *Anderson*, 477 U.S. at 248. In addition, inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing summary disposition. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-588 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

[4] The following facts are undisputed. They are drawn from the evidence submitted by the parties in support of their motions (including portions of Walblay's April 25, 2012, on-the-record interview), from Walblay's statement of undisputed facts (which are denominated as "WSUF" ¶ __) and from Walblay's answer. Exhibits attached to Enforcement's statement of undisputed facts are referred to as "CX-__." Exhibits submitted with the Respondent's motion are referred to as "RX-__." Pertinent portions of Walblay's on-the-record testimony are referred to by transcript page (Walblay Tr. __). Walblay's answer is referred to as "Ans. ¶ __."

[5] Ans. ¶ 2; CX-1, CX-2.

[6] CX-1, CX-2.

oil and gas drilling programs sold by his firm.[7] Accordingly, in an effort to investigate these concerns, FINRA staff requested, by letter dated October 6, 2011, that Walblay appear for on-the-record testimony ("OTR") on October 25, 2011.[8] The letter was mailed to Walblay's residential address, as recorded in FINRA's Central Registration Depository ("CRD"), and also to Energy Securities' mailing address, as recorded in CRD.[9]

On October 13, 2011, Walblay's attorney sent FINRA staff a letter advising that he had received a copy of the October 6 letter from Walblay and that Walblay would be unavailable to attend the October 25 OTR because he would "be on site supervising the drilling of … wells … ." According to the letter, Walblay was the only person acting on behalf of the drilling venture who had "the ability, knowledge and expertise to supervise the drilling."[10]

After receiving the October 13 letter, FINRA staff contacted Walblay's attorney and, without releasing Walblay from his obligation to appear on October 25, invited the attorney to propose an alternative date for the OTR. Although Walblay's attorney stated that he would speak with Walblay and by the end of the day on October 17, 2011, provide FINRA staff with a list of alternative dates, he failed to do so.[11] On October 19, FINRA staff again contacted Walblay's attorney and asked that an alternative date for the OTR be proposed. Again, the attorney failed to honor a commitment to provide alternative dates.[12] Accordingly, on October 21, FINRA staff e-mailed Walblay's attorney, informing him that, because FINRA had not

[7] CX-5 ¶ 3. In his opposition to Enforcement's motion, Walblay asserts, as undisputed fact, that during the examination and subsequent on-site visits, FINRA examiners interviewed Energy Securities' personnel and were provided documents. Although Walblay did not timely provide evidentiary support for this assertion, it is treated as undisputed for purposes of this decision.

[8] Ans. ¶ 4; CX-4, CX-5 ¶ 5.

[9] CX-5 ¶ 5. The request also was e-mailed to Walblay. *Id.*

[10] RX-D; *see* WSUF ¶ 9.

[11] CX-5 ¶ 7.

[12] *Id.* ¶ 8.

received any proposed alternative dates, the OTR would take place as scheduled on October 25. Walblay's attorney responded by indicating that continuing efforts to obtain alternative dates had not yet produced results. He reiterated that Walblay "will not be attending" the OTR on October 25.[13]

On October 25, Walblay failed to appear for the OTR.[14] The next day, FINRA staff mailed Walblay's attorney and Walblay a second request that Walblay appear for an OTR, this time on November 30, 2011.[15] As did the first request, the second included an addendum that reminded Walblay of his obligation to provide accurate and complete testimony and warned him that if he failed to appear, he might be subject to disciplinary action and sanctions, including a bar.[16]

On November 16, 2011, FINRA staff e-mailed Walblay's attorney asking that he confirm that Walblay would be attending the November 30 OTR. Walblay's attorney did not reply.[17] However, on November 18, 2011, after FINRA staff learned that Walblay had been admitted to the hospital, Walblay's attorney contacted the staff and asked about what documentation would be required should Walblay not appear for the OTR.[18] He was informed that Walblay would need to forward a letter from a physician and to propose alternate dates for the OTR.[19]

Walblay had checked himself into a hospital on November 16 because his face had started to go numb.[20] After two days in the hospital, he was diagnosed with Bells Palsy, a

[13] *Id.* ¶ 9, CX-9.

[14] Ans. ¶ 12.

[15] CX-5 ¶ 11, CX-10; RX-G.

[16] E.g., CX-10, at 2.

[17] CX-5 ¶ 13, CX-14.

[18] WSUF ¶ 15; CX-5 ¶ 14.

[19] WSUF ¶ 15; CX-5 ¶ 14.

[20] Walblay Tr. 25; RX-H.

condition he had previously experienced while in college. Because he believed that "there is nothing you can do for [Bells Palsy] except take steroids that they give you," he checked himself out of the hospital and, over the next month, embarked on a course of treatment that included acupuncture, diathermy (the use of high-frequency electromagnetic currents as a form of physical therapy), and manual therapy, as well as steroids and antibiotics.[21] At the same time, Walblay was prescribed medications for hypertension, insomnia, and headaches.[22]

In the period immediately following his hospitalization and through the institution of these proceedings, neither Walblay nor his attorney provided FINRA staff with a physician's letter or alternate dates for an OTR.[23] Instead, on November 22, 2011, Walblay filed a broker-dealer withdrawal request with FINRA on behalf of Energy Securities.[24] That same day, FINRA staff contacted Walblay's attorney to inquire about whether Walblay would appear for the November 30 OTR. The attorney would not confirm Walblay's appearance.[25] Thereafter, on November 29, the attorney e-mailed and faxed a letter to FINRA staff (largely reciting what he had written in his October 13 letter concerning the October 25 OTR), stating that Walblay would be unavailable to attend the November 30 OTR because he would "continue to be on-site supervising the drilling of … wells."[26] There was no mention of Walblay's medical condition as a reason for his unavailability.

[21] Walblay Tr. 25-26; RX-J.

[22] Walblay Tr. 29-30; RX-J.

[23] CX-5 ¶ 14.

[24] Ans. ¶ 18.

[25] CX-5 ¶ 15.

[26] CX-15.

On November 30, 2011, Walblay failed to appear for the requested OTR.[27] Accordingly, after two months had passed, on February 8, 2012, Enforcement filed its complaint, and on April 24, Walblay filed his answer. The next day, on April 25, 2012, Walblay appeared for an OTR in FINRA's Boca Raton office and was examined under oath for more than eight hours.[28] Since that time, Walblay also has supplied thousands of pages of documents in response to a number of information requests.[29]

V. Conclusions of Law

A. Introduction

Enforcement urges the Hearing Panel to determine, as a matter of law, that Walblay violated FINRA Rules 8210 and 2010 by twice failing to appear for testimony. Walblay disagrees and moves to have the complaint dismissed or, alternatively, to have the Hearing Panel hold a hearing on the merits. His position rests on four grounds. First, he argues that because he appeared at an OTR on April 25, 2012, and has subsequently produced documents in response to information requests, FINRA staff "cannot show that it has been limited or hindered in any way with respect to [its] investigation … by virtue of the timing of the OTR."[30] Second, he asserts that he believed that the scheduling of any OTR would be handled by his attorney. Third, he argues that he was excused from giving testimony in response to the first Rule 8210 request, because, as his attorney informed FINRA staff, he needed to supervise well drilling. Finally, he contends that his medical condition excused his compliance with the second Rule 8210 request, and that, in any event, his lawyer was dealing with the matter.

[27] Ans. ¶ 20.

[28] RX-C.

[29] WSUF ¶ 21.

[30] *Id.*

Because none of these grounds has any bearing on Walblay's liability or the sanctions to be imposed, the Hearing Panel finds, for the reasons stated below, that Walblay violated Rules 8210 and 2010 and, therefore, Enforcement is entitled to summary disposition.[31]

B. Respondent Violated FINRA Rules 8210 and 2010

FINRA Rule 8210(a)(1) requires "a member, person associated with a member, or person subject to FINRA's jurisdiction … to testify at a location specified by FINRA staff, under oath or affirmation … with respect to any matter involved in [an] investigation, complaint, examination, or proceeding." Subsection (c) further provides that "[n]o member or person shall fail to provide information or testimony … pursuant to this Rule."

It is undisputed that Walblay twice failed to attend OTRs requested by FINRA staff. On its face, Walblay's refusal to comply ran afoul of Rule 8210's clear requirements and proscriptions[32] and was inconsistent with Rule 2010's high standards of commercial honor.[33]

C. Respondent Has Failed to Raise a Cognizable Defense to Liability

Walblay raises nothing that excuses his noncompliance with the OTR request. First, neither his recent provision of documents nor his appearance at the April 25, 2012, OTR—six months after he was to have appeared in response to the staff's initial request and nearly three months after this disciplinary proceeding was initiated—cures his earlier failures to give

[31] Walblay has requested that the panel hear oral argument on these motions. Because oral argument would not aid the panel in making its determination, the request is denied.

[32] Because the requests were made as part of an investigation, they were authorized by Rule 8210(a). *See Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *12-13 (Nov. 8, 2007), *pet. denied*, 316 F. App'x 865 (11th Cir. 2008) (stating that whether a requested record is "with respect to any matter involved in" an investigation is a determination made by the staff and the staff is not required to explain its reasons for making the information request or justify the relevance of any particular request). Because it is undisputed that Walblay received actual notice of the first OTR request and because both requests were mailed to the CRD addresses of Walblay and his firm, Walblay received proper notice of both requests under Rule 8210(d). *See generally John H. DeGolyer*, 46 S.E.C. 324, 326-327 (1976), 1976 SEC LEXIS 1939, at *7 ("The obligation of a broker to receive and respond to notices mailed by [FINRA] to the address furnished it has also been established.").

[33] *See Stephen J. Gluckman*, 54 S.E.C. 175, 195 (1999), 1999 SEC LEXIS 1395, at *22.

testimony. Indeed, as the SEC has "emphasized repeatedly[,] … [FINRA] should not have to initiate a disciplinary action to elicit a response to its … requests made pursuant to Rule 8210."[34] Consistent with these cases, Walblay's prolonged noncompliance with the Rule 8210 requests constitutes a complete failure to respond as set forth in more detail below.[35] Furthermore, when Walblay asserts that Enforcement "cannot show that it has been limited or hindered in any way" in its investigation because he appeared at the 2012 OTR, Walblay fundamentally misapprehends the nature of the harm caused by prolonged inaction. As the SEC has stressed, "timely compliance [with Rule 8210 requests] is essential to the prompt discovery and remediation of wrongdoing."[36] Walblay's six-month delay in testifying necessarily prolonged the discovery and remediation of any wrongdoing. His eventual cooperation, months after these proceedings were brought, did not cure his refusal to testify in October 2011 and his failure to testify one month later.[37]

Second, as a long line of precedent establishes, because there is no state of mind requirement for a Rule 8210 violation, reliance on advice of counsel does not excuse a failure to

[34] *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010), *pet. denied*, 436 F. App'x 31 (2d Cir. 2011) (citing *Elliot M. Hershberg*, Exchange Act Rel. No. 53145, 2006 SEC LEXIS 99 (Jan. 19, 2006), *aff'd*, 210 F. App'x 125 (2d Cir. 2006) (agreeing that Hershberg's refusal to testify until the institution of a proceeding constituted a complete failure to respond in violation of Rule 8210); *Toni Valentino*, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *15 (Feb. 13, 2004) (staff should not have to bring a disciplinary proceeding to obtain compliance with its rules governing investigations).

[35] *See infra* note 58.

[36] *Howard Brett Berger*, Exchange Act Rel. No. 58950, 2008 SEC LEXIS 3141, at *31 (Nov. 14, 2008), *pet. denied*, 347 F. App'x 692 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 2380 (2010); *Michael David Borth*, 51 S.E.C. 178, 181 (1992), 1992 SEC LEXIS 3248, at *7 (stating that failure to provide information fully and promptly undermines FINRA's ability to carry out its regulatory mandate).

[37] *Dep't of Enforcement v. Ricupero*, No. 200600049953-01, 2009 FINRA Discip. LEXIS 36, at *17 (NAC Oct. 1, 2006), *aff'd*, *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *12 (Sept. 10, 2010), *pet. denied*, 436 F. App'x 31 (2d Cir. 2011) ("The completeness of Ricupero's eventual response … has no impact on the conclusion that Ricupero's prolonged unresponsiveness is tantamount to a complete failure to respond."); *Sundra Escott-Russell*, 54 S.E.C. 867, 872 (2000), 2000 SEC LEXIS 2053, at *9 (stating that eventual cooperation, at hearing, did not cure earlier failure to respond fully and timely to information request).

respond to Rule 8210 requests.[38] Here, Walblay is not, in fact, asserting a cognizable defense of reliance on counsel. He is not asserting that he sought, after full disclosure, legal advice about attending the OTRs, that he relied on that advice, and that his reliance was reasonable. Instead, he is contending that he "assume[d] that his attorney and [FINRA] would resolve the conflict with the OTR date"[39] and such reliance, as he might equally have reposed in an office assistant, satisfied his compliance obligations. But Walblay was not entitled to shift his regulatory responsibilities in that fashion. When associated persons register with FINRA, they agree to abide by its rules, "which are unequivocal with respect to an associated person's duty to cooperate with … investigations."[40] Consequently, as the SEC has stated, "it is the responsibility of an associated person to respond directly to [FINRA's] requests for information, and not the responsibility of counsel."[41] Walblay's "understanding that the scheduling of his OTR would be handled through his counsel"[42] has no bearing on his liability for violating Rules 8210 and 2010. If anything, as discussed below, his hands-off approach to satisfying his regulatory obligations serves only to aggravate the severity of his violations.

Third, nothing in the October 13 letter excused Walblay's refusal to attend the first OTR. Walblay characterizes assertions in that letter about his reasons for failing to attend the October 25 OTR as matters of undisputed material fact—i.e., that he was the person "solely responsible for managing drilling obligations" and that "pulling him away from the work at that time would

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[38] *Berger*, 2008 SEC LEXIS 3141, at *39; *Joseph G. Chiulli*, 54 S.E.C. 515, 524 & n.21 (2000), 2000 SEC LEXIS 112, at *18 & n.21 (citing *Michael Markowski*, 51 SEC 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994) and *Darrell Jay Williams*, 50 S.E.C. 1070, 1072 (1992); *see also Valentino*, 2004 SEC LEXIS 330, at *13-14.

[39] Walblay's Opposition to Complainant's Cross-Motion for Summary Disposition, ¶ 5; *see infra* p. 14.

[40] *Chiulli*, 54 S.E.C. at 524 & n.22 (citing *Barry C. Wilson*, 52 S.E.C. 1070, 1073 (1996), 1996 SEC LEXIS 3012, at *9); *Borth*, 51 S.E.C. at 180.

[41] *Rooney A. Sahai*, Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864, at *29 (Apr. 15, 2005) (citing *Sundra Escott-Russell*, 54 S.E.C. at 873 n.12).

[42] WSUF ¶ 19.

have had a negative material impact on the drilling including but not limited to increased drilling costs, investor tax consequences, and lease lapses."[43] But, even accepting these assertions as undisputed, they do not give rise to a genuine issue of material fact precluding summary disposition. First, as the foregoing demonstrates, staff did not insist that Walblay attend the October 25 OTR or face disciplinary action. Instead, they repeatedly invited Walblay, through his attorney, to propose other, convenient dates for an OTR. Walblay and his counsel disregarded the invitations.[44] Second, even if attendance at a scheduled OTR will cause a hardship, associated persons are not excused from appearing.[45] In sum, Walblay was not at liberty unilaterally to honor his drilling obligations above his regulatory obligations and then to compound that transgression by ignoring the staff's repeated invitations that he provide alternative dates.[46]

Finally, Walblay's medical condition did not excuse his noncompliance with the second request for testimony. Even accepting that Walblay's medical condition precluded him from

[43] WSUF ¶12. *See also* Additional Opposition ¶ 4.

[44] In light of Walblay's failure to provide alternative dates, Walblay's assertion that the staff acted improperly in convening the October 25 OTR is mistaken.

[45] *See, e.g., Dep't of Enforcement v. Zigler*, No. C01030030, 2004 NASD Discip. LEXIS 37 (OHO Mar. 31, 2004) (Zigler twice advised the staff, in response to two requests for testimony, that he would not appear because it would "require[] a 120-mile trip impinging on [his] work schedule" and offered to testify by phone or sworn interrogatories; Zigler's "willingness to cooperate on his own terms" did not excuse or mitigate his misconduct.); *see also Joseph Patrick Hannan*, 53 S.E.C. 854, 859 (1998), 1998 SEC LEXIS 1955, at *11-12 (rejecting Hannan's contention that, because he had no accrued leave and was travelling for his job, he was justified in refusing to attend the OTR). Although Walblay asserts in his Additional Opposition that *Zigler* is distinguishable, the only factor he points to is that Zigler was proceeding pro se and here, Walblay's counsel, who "was in charge of obtaining a new date for Walblay's OTR," informed the staff about the hardship the October 25 OTR would create. This is a distinction without a difference and, again, an unavailing effort to justify Walblay's lack of compliance with his regulatory obligations by attempting to shift those obligations to another.

[46] In his Additional Opposition, Walblay asserts another reason for failing to attend the October 25 OTR. He now states that "in the interim"—between the October 13 letter and the October 25 OTR—he became "medically unable to attend." He claims that this medical condition is evidenced by a doctor's letter dated *October 10, 2012*, and pictures of a pill bottle appended to his Additional Opposition. Even if this new claim were an undisputed fact, it would be of no consequence. As set forth *infra* at note 52, Walblay cannot, nearly one year after the fact, successfully contend that a new and changed reason for refusing to attend the OTR excuses that refusal.

testifying on November 30[47] and further that he was incapable of travelling until mid-January 2012,[48] Walblay was obligated to contact the staff, explain and document the circumstances, and propose alternative places and dates for his testimony.[49] As the SEC has stated, "recipients of requests under Rule 8210 must promptly respond … or explain why they cannot."[50] Walblay did neither. Instead, one day before the second requested OTR was to have taken place, Walblay's attorney informed FINRA staff that Walblay would not attend because he would be *supervising well drilling*.[51] This is not the prompt and complete explanation of a *health emergency* that might have excused Walblay's failure to attend the OTR.[52]

VI. Walblay Will Be Barred for Violating Rules 8210 and 2010.

Because FINRA lacks subpoena power, it must rely upon Rule 8210 "to police the activities of its members and associated persons."[53] It is therefore well established that when a person fails to respond to FINRA's information requests and thereby "frustrates [FINRA's]

[47] Walblay Tr. 41.

[48] Walblay Tr. 27.

[49] Given that Walblay was able, on November 22, to withdraw Energy Securities from FINRA registration, Walblay was capable of informing the staff of his situation and proposing alternative dates for an OTR.

[50] *Charles C. Fawcett*, Exchange Act Rel. No. 56770, 2007 SEC LEXIS 2598, at *18 (Nov. 8, 2007); *see also, e.g.*, *Richard J. Rouse*, 51 S.E.C. 581, 584 (1993), 1993 SEC LEXIS 1831, at *7-9 (finding that Rouse violated Rule 8210 by failing to respond to information requests; noting that difficulty in locating, and inability to access, records might have warranted an extension of time for responding, but no extension was requested; and finding that, at the "very least," Rouse should have contacted the staff to explain why deadlines could not be met). The obligation to explain includes the requirement that the explanation be as complete as possible. *Sahai*, 2005 SEC LEXIS 864, at *28.

[51] CX-15.

[52] That Walblay submitted documentation of his medical condition and one-month treatment regimen with his motion (nearly 10 months after the fact) is immaterial. *Cf., e.g., Dep't of Market Regulation v. Ryan & Co.*, No. FPI040002, 2005 NASD Discip. LEXIS 8, at *16 n.10 (NAC Oct. 3, 2005) (holding that respondents cannot, as Walblay has, change the reason for their initial failure to respond to Rule 8210 requests from one claim to another, and further holding that Ryan's newly minted claim of a chronic knee condition requiring surgery did not excuse his earlier failure to furnish requested information.).

[53] *Berger*, 2008 SEC LEXIS 3141, at *13 (quotation omitted).

ability to detect misconduct, and such inability in turn threatens investors and markets,"[54] the person commits a "serious violation justifying stringent sanctions … ."[55] For this reason, the Sanction Guidelines provide that, when an individual does not respond in any manner to a Rule 8210 request, a bar should be standard and that when the individual does not respond until after the filing of a complaint, it should be presumed that the failure constitutes a complete failure to respond.[56]

Based on the undisputed facts, the Hearing Panel concludes that a bar is appropriate in this case. Respondent twice flouted his obligation to attend requested OTRs. And, just as Respondent's 2012 OTR testimony, reliance on counsel, well drilling obligations, or medical condition do not serve to exonerate him from liability for his violations, neither do they mitigate the severity of his violations.

First, his belated testimony and production of documents is not a mitigating factor. Walblay did not provide some testimony in response to the staff's 2011 OTR requests and later complete or supplement that testimony.[57] Instead, he failed to provide any on-the-record testimony in 2011 and only attended the OTR in 2012, nearly three months after the filing of the

[54] *PAZ Securities, Inc.*, Exchange Act Rel. No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *pet. denied*, 566 F.3d 1172 (D.C. Cir. 2009).

[55] *Hershberg*, 2006 SEC LEXIS 99, at *10.

[56] *FINRA Sanction Guidelines* 33 & n.1 (2011).

[57] *See, e.g., Dep't of Enforcement v. Erenstein*, No. C98040080, 2005 NASD Discip. LEXIS 51 (NAC Dec. 15, 2005), *aff'd*, *Morton Bruce Erenstein*, Exchange Act Rel. No. 56768, 2007 SEC LEXIS 2596, at *12-13 (Nov. 8, 2007), *pet. denied*, 316 F. App'x 865 (11th Cir. 2008). That Walblay supplied information and Energy Securities' staff was interviewed during the examination (*see supra* note 7) has no bearing on Walblay's obligation to respond to the OTR requests made in connection with the investigation generated by the examination.

complaint. Under these circumstances, treating Walblay's conduct as a complete failure to respond is fully warranted.[58]

Second, his assertion of reliance on counsel does not justify a sanction less than a bar. Again, his testimony shows that he did not rely on counsel's advice about whether he needed to attend the OTRs but simply that he attempted to shift his own responsibility to comply with regulatory obligations onto counsel. Indeed, he stated that he considered it his counsel's responsibility to respond to FINRA's requests,[59] and that "as long as they were responding [and not] … ignor[ing] FINRA," he felt that was sufficient.[60] As he further stated, he "assumed that they were responding in the correct manner."[61] And when counsel broached the topic of appearing for testimony, Walblay responded that he "was extremely busy with fulfilling my obligations and doing the things that I had to do to keep the company going. And then … I was sick."[62] As is well established:

> the person to whom an information request is directed has a duty to respond himself or to supervise others diligently with adequate follow-up to ensure a prompt response to [FINRA] … [Moreover,] the person to whom such a request is made is responsible for responding directly to … requests for information and cannot shift responsibility to [another person] for his own failure to provide requested information in a timely fashion. Thus, a member or an associated person cannot satisfy his obligation to respond to an information request by simply referring the matter to a lawyer, particularly where, as here, the member or person fails to act to ensure that the lawyer had provided the requested information.[63]

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[58] *See, e.g.*, *PAZ Securities*, 2008 SEC LEXIS 820, at *16; *Dep't of Enforcement v. Ricupero*, 2009 FINRA Discip. LEXIS 36, at *17; *see also Sanction Guidelines* 33 & n.1. Although the period of noncompliance here was shorter than those in *PAZ* and *Ricupero*, it is of sufficient length so as to treat Walblay's protracted inaction as complete noncompliance, particularly given Walblay's attempt to shift to counsel his own responsibility to comply with the requests.

[59] Walblay Tr. 22.

[60] Walblay Tr. 22-23.

[61] Walblay Tr. 40.

[62] Walblay Tr. 41.

[63] *Dennis A. Pearson*, Exchange Act Rel. No. 54913, 2006 SEC LEXIS 2871, at *14 (Dec. 11, 2006) (quotations omitted).

Walblay's assumption that counsel was handling FINRA's requests is not mitigating.[64]

Finally, Walblay has not stated reasons for non-attendance that warrant a lesser sanction. Even if it was essential that Walblay supervise well drilling in October and even if he could not speak in November, he needed to take action to ensure that alternative dates for his testimony were proposed and accepted. As the foregoing facts establish, FINRA staff made every effort to accommodate Walblay by repeatedly asking Walblay's attorney to propose alternative dates. Even assuming that Walblay's attorney did not diligently follow up, Walblay himself was required to keep informed of the status of the Rule 8210 requests and facilitate compliance with those requests.[65] At a minimum, he should have ensured, with respect to the November OTR, that FINRA received explanation and documentation of his medical emergency and proposed alternative dates for an OTR. And it bears emphasizing that, regardless of his health problems in November, Walblay was not at liberty to prioritize his business concerns over his regulatory obligations as he did in the October 13 letter.[66]

Throughout this decision, the Hearing Panel has touched on many of the principal considerations in determining sanctions for Walblay's violation. All point to the propriety of a bar. It aggravates the severity of his misconduct that he refuses, to this day, to take responsibility for what clearly constituted misconduct, and instead continues to assert that he assumed his counsel was satisfying any regulatory obligations.[67] Indeed, that Walblay deliberately chose to

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[64] *Markowski*, 51 S.E.C. at 560 ("There is also no basis for mitigation because Markowski purportedly relied on Global America's counsel to furnish the requested records. As we have already noted, it was ultimately Markowski's responsibility to make the records available.").

[65] *See, e.g.*, *Robert Fitzpatrick*, 55 S.E.C. 419, 425 (2001), 2001 SEC LEXIS 2185, at *10 (Fitzpatrick's "only apparent response" to information requests—referring them to outside counsel—was not adequate, particularly in light of his failure to follow up on his referral, seek additional resources for help in responding to the request, or search for the documents himself).

[66] *See supra* note 45.

[67] *Sanction Guidelines* 6 (Principal Consideration 2).

abdicate his compliance responsibility is, in itself, aggravating, because it demonstrates that Walblay acted at least recklessly in failing to honor the OTR requests.[68] Walblay's failure to attend the OTRs in the face of repeated warnings that such failure might subject him to disciplinary action and the imposition of sanctions also aggravates the severity of his misconduct, as does the degree of regulatory pressure ultimately needed to obtain the cooperation he should have provided from the outset.[69]

VII. Order

For the foregoing reasons, the Department of Enforcement's Motion for Summary Disposition is granted, and Ronald Walblay's Motion for Summary Disposition is denied.[70]

The Hearing Panel finds, with respect to the complaint's sole count, that Walblay violated FINRA Rules 8210 and 2010 by failing to respond to requests for testimony, and, for those violations, hereby bars him from associating with any FINRA member in any capacity. The bar shall become effective immediately if this decision becomes FINRA's final disciplinary action.

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Rada Lynn Potts
Hearing Officer
For the Hearing Panel

Copies to:

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[68] *Sanction Guidelines* 7 (Principal Consideration 13).

[69] *Sanction Guidelines* 7 (Principal Considerations 12, 14).

[70] The Hearing Panel has considered and rejects without discussion all other arguments of the parties.