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

| | |
|---|---|
| DEPARTMENT OF ENFORCEMENT,<br><br>Complainant,<br><br>v.<br><br>GREGG CHARLES LORENZO<br>(CRD No. 4525167),<br><br>Respondent. | Expedited Proceeding<br>No. FPI130001<br><br>STAR No. 2011030186901<br><br>Hearing Officer—Andrew H. Perkins<br><br>**HEARING PANEL DECISION**<br><br>June 18, 2013 |

**Respondent is barred from associating with any member firm in any capacity for his refusal to appear for an on-the-record interview pursuant to FINRA Rule 8210.**

## Appearances

For the DEPARTMENT OF ENFORCEMENT, Complainant, Jennifer J. Schulp, Esq., and Paul M. Schindler, Esq., Rockville, Maryland.

For Gregg Charles Lorenzo, Respondent, Martin H. Kaplan, Esq., and Robyn D. Paster, Esq., GUSRAE KAPLAN NUSBAUM, PLLC, New York, New York.

## DECISION

Gregg Charles Lorenzo, a registered securities representative with FINRA member firm Charles Vista LLC, requested a hearing after he received a Notice of Suspension from FINRA's Department of Enforcement. Enforcement issued the Notice of Suspension pursuant to FINRA Rule 9552 because Lorenzo had refused to comply with multiple Rule 8210 requests that he appear for an on-the-record interview ("OTR").

Enforcement sought his testimony in connection with an investigation of Charles Vista. Lorenzo refused to testify unless FINRA first assured him in writing that it had not in any way coordinated its investigation with the Securities and Exchange Commission ("SEC") or other

governmental agencies such that his testimony at the OTR would operate as a waiver of his Fifth Amendment privilege against self-incrimination.[1] In the alternative, Lorenzo offered to respond in writing to written questions that could not incriminate him. Lorenzo's concern about potential self-incrimination arose from his claim that the SEC was conducting a concurrent investigation into his activities at Charles Vista. FINRA did not accede to Lorenzo's demands, and he did not appear for the OTR.

By the time Lorenzo filed his hearing request, he had abandoned his argument that the Fifth Amendment privilege against self-incrimination applied to the facts of this case. Instead, Lorenzo raised two other legal challenges to the Notice of Suspension. First, Lorenzo stated that the Notice of Suspension "asserts inappropriate grounds for instituting this proceeding"[2] because the grounds identified in the notice duplicate the issues in a FINRA disciplinary proceeding that is pending against him, thereby requiring him to prematurely address his defenses to the disciplinary action in this expedited proceeding.[3]

Second, Lorenzo stated that FINRA Rule 8210 is unenforceable because, when he signed the Uniform Application for Securities Industry Registration or Transfer (Form U4) to register with FINRA, he did not knowingly waive his right to assert his Fifth Amendment privilege against self-incrimination in connection with Rule 8210 requests for information.[4] Lorenzo argued that to work as a retail securities broker he was compelled to sign the Form U4; therefore, the provision of Form U4 that requires applicants to agree to comply with FINRA's By-Laws

[1] The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

[2] Amended Demand for Hearing ¶ 1.

[3] *Id.* ¶ 7.

[4] *Id.* ¶ 10.

and rules—including Rule 8210—is unenforceable as a matter of law. Specifically, Lorenzo argued at the hearing that the Form U4 is an unenforceable contract of adhesion.

The Hearing Panel rejects Lorenzo's challenges to the Notice of Suspension. The Hearing Panel concludes that Lorenzo failed to produce any evidence that (1) FINRA lacked the authority and valid grounds to issue the Notice of Suspension, or (2) the Form U4 is unenforceable as a matter of law. Accordingly, the Hearing Panel upholds the Notice of Suspension and bars Lorenzo from associating with any FINRA member firm in any capacity.

## I. PROCEDURAL HISTORY

On February 20, 2013, Enforcement sent Lorenzo a Notice of Suspension pursuant to Rule 9552. On March 14, 2013, Lorenzo filed a hearing request with the Office of Hearing Officers.[5] Because the hearing request did not clearly set out his defenses to the Notice of Suspension, the Hearing Officer ordered Lorenzo to file an amended hearing request, which Lorenzo did on April 1, 2013. Lorenzo filed a pre-hearing brief on April 8, 2013, more fully setting out his challenges to the Notice of Suspension.

The Hearing Officer granted Lorenzo's hearing request, and the hearing was held in New York City on April 11, 2013.[6]

## II. FINDINGS OF FACT

Lorenzo does not dispute any material fact.[7] Lorenzo admits that he received each of the Rule 8210 requests and that he nonetheless refused to appear and testify.

---

[5] Pursuant to Rules 9552(d) and 9559(c), the suspension referenced in the Notice was stayed by his filing the hearing request.

[6] Lorenzo filed a pre-hearing brief. The Hearing Officer then granted Enforcement leave to respond either before or after the hearing. Enforcement filed a post-hearing brief on April 17, 2013. Lorenzo did not request leave to file a reply brief.

[7] *See* Tr. 76.

### A. Lorenzo

Lorenzo is associated with Charles Vista, a FINRA member firm located in Staten Island, New York, and he is registered with FINRA as a General Securities Representative.[8] Lorenzo first entered the securities industry in 2002 and was associated with five other FINRA member firms before he joined Charles Vista in February 2009.[9] Lorenzo filed a Form U4 with FINRA each time he joined a FINRA member firm.

### B. The Charles Vista Investigation

In late 2011, FINRA staff began investigating Charles Vista, which was the placement agent for an offering of interests in CV Social Media, LP, a limited partnership.[10] CV Social Media's general partner was Vista Ventures, which Lorenzo controlled.[11] According to documents FINRA staff received from Charles Vista, Lorenzo had been very active in the sale of limited partnership interests in CV Social Media. FINRA staff therefore wanted to take Lorenzo's testimony in furtherance of the investigation.[12]

FINRA staff made repeated attempts to obtain Lorenzo's testimony. Lorenzo received the requests, but he refused to appear and testify.

### C. The Rule 8210 Requests

#### 1. First Request Dated August 29, 2012

The staff sent him the first request on August 29, 2012, which required him to appear for an OTR on October 2, 2012.[13] Lorenzo's attorney, David Gehn, requested that the OTR be

---

[8] CX-1, at 3.

[9] *Id.* at 5-9.

[10] Tr. 22-23.

[11] Tr. 23.

[12] Tr. 24.

[13] CX-2, at 1.

continued because he had a scheduling conflict.[14] FINRA staff agreed to Gehn's request and rescheduled Lorenzo's OTR.

### 2. Second Request Dated September 20, 2012

On September 20, 2012, FINRA staff sent Gehn a Rule 8210 request that scheduled Lorenzo's OTR for October 10, 2012, which was one of several dates Gehn had proposed.[15] Nonetheless, on October 4, Gehn told the FINRA investigator that Lorenzo would not appear on October 10.[16] Gehn did not request an adjournment.

On October 8, 2012, Gehn sent a follow-up letter by email to the FINRA investigator who issued the Rule 8210 request letters, asking that the OTR once again be adjourned.[17] Gehn requested that the OTR not be rescheduled until after the completion of a pending FINRA disciplinary proceeding against Lorenzo.[18] Gehn noted that one of the charges in the disciplinary proceeding was that Lorenzo had violated Rule 8210 by failing to appear for an OTR. In the alternative, Gehn restated Lorenzo's previous offer to respond in writing to a written Rule 8210 request if his answers would not cause him to waive his Fifth Amendment privilege against self-incrimination.[19]

Enforcement denied Lorenzo's request for a further adjournment of his OTR because he had not demonstrated good cause for the requested adjournment.[20] Enforcement also noted that

---

[14] CX-3, at 1. Gehn also requested that the OTRs of two other Charles Vista employees be rescheduled.

[15] CX-4, at 1.

[16] CX-5, at 2.

[17] *Id.*

[18] Tr. 34.

[19] CX-5, at 2.

[20] CX-6, at 2.

the disciplinary proceeding[21] was unrelated to its present investigation of Charles Vista's sale of private placements for CV Social Media LP, and Lorenzo had not identified any pending or imminent criminal action that supports his assertion of the Fifth Amendment privilege against self-incrimination. Enforcement concluded by advising Lorenzo that it would not issue a written Rule 8210 request in lieu of testimony and that he must appear on October 30 for his OTR.[22]

On October 12, Gehn replied that Lorenzo would appear for an OTR "provided FINRA has not in any way coordinated its efforts with the SEC, or other governmental agencies."[23] Gehn noted, "FINRA is aware that Mr. Lorenzo asserted his Fifth Amendment privilege on February 17, 2012 at the Securities and Exchange Commission ("SEC")."[24] Gehn concluded by again offering the alternative that Lorenzo was willing to respond in writing to "a written 8210 letter request concerning the circumstances surrounding the instant OTR … if such [request] does not cause a waiver of his assertion of his Fifth Amendment privilege."[25]

On October 15, Enforcement confirmed by email that it had received Gehn's letter and that the OTR would be held as scheduled on October 30.[26] FINRA staff sent a Rule 8210 request letter on October 23, 2012, that required Lorenzo's appearance at the OTR on October 30.[27] However, due to Hurricane Sandy, Enforcement had to reschedule the OTR.[28]

---

[21] *Department of Enforcement v. Lorenzo*, Disciplinary Proceeding No. 20120321124-01, filed August 20, 2012.

[22] CX-6, at 2.

[23] CX-7, at 2.

[24] *Id.*

[25] *Id.*

[26] CX-8, at 2.

[27] CX-9.

[28] CX-10.

### 3. Final Request Dated November 19, 2012

On November 5, 2012, Enforcement sent a final Rule 8210 request that Lorenzo appear for an OTR.[29] Although Lorenzo received notice of the OTR, he did not appear for the OTR on November 19, 2012.[30]

### D. Lorenzo Failed To Present Evidence Of State Action To Support His Fifth Amendment Objection To The Rule 8210 Requests

At the hearing Lorenzo conceded that there are no facts that would support a finding of state action in this case. Martin Kaplan,[31] Lorenzo's attorney at the hearing, made that point clear in his opening statement in which he said, "Now, I'm not suggesting that there is state action between FINRA and the [SEC], not my point at all, it's not even an issue in this case, I don't raise it, I don't suggest it, I don't know anything that I could justify it with other than sheer speculation."[32]

The Hearing Panel agrees with Lorenzo's concession—he lacked knowledge of any facts that could have supported a conclusion that FINRA was engaged in state action when it issued the Rule 8210 requests. Therefore, he lacked a factual basis to assert the Fifth Amendment privilege against self-incrimination.

## III. CONCLUSIONS OF LAW

Lorenzo's challenges to FINRA's authority under Rule 9552 and the enforceability of Form U4 are without merit. First, Lorenzo presented no authority, evidence, or argument to support his defense that Enforcement is precluded from issuing a Notice of Suspension under Rule 9552 because one of the issues in his pending disciplinary proceeding—his alleged failure

[29] CX-12, at 1.

[30] CX-11; CX-13.

[31] Kaplan and Gehn are attorneys with the same law firm.

[32] Tr. 16.

to comply with Rule 8210—is also an issue in this proceeding. Nor did Lorenzo present evidence to support his contention that this proceeding in some manner prejudices his defense of the disciplinary proceeding.

Second, Lorenzo's argument that he is not obligated to comply with Rule 8210 because the Form U4 is an unenforceable contract of adhesion fails as a matter of law. Lorenzo did not show, nor can he show, that the Form U4 should not be enforced because it is unconscionable as a matter of law. Nor did he present any evidence that enforcement of Form U4 is somehow unfair or oppressive in this case.

### A. FINRA Had Authority To Institute This Expedited Proceeding Under Rule 9552

FINRA rules (and corresponding earlier NASD Rules)[33] recognize the need for expedited treatment of certain types of actions. "These actions [fall] into two general categories: those that involve[] misconduct capable of causing further harm to the investing public, other members, or the integrity of the markets, and those that [can] be appropriately expedited for administrative ease."[34] In enacting the current Rule 9500 Series governing expedited proceedings, NASD explained that the expedited actions affected by the new rules "generally involve straightforward issues unrelated to complicated securities transactions," such as an individual's failure to provide information requested by the staff.[35] In most such cases the issue presented is whether the respondent provided the requested information. "It is well settled that respondents must fully and

[33] Following the consolidation of NASD and the member regulation, enforcement, and arbitration functions of NYSE Regulation into FINRA, FINRA began developing a new "Consolidated Rulebook" of FINRA Rules. The first phase of the new consolidated rules became effective on December 15, 2008. *See FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50 (Oct. 2008). FINRA's procedural and conduct rules apply to this expedited proceeding.

[34] *NASD Notice to Members 04-36*, 2004 NASD LEXIS 39, at *2 (May 2004).

[35] *Id.*

promptly cooperate with NASD."[36] A respondent cannot second guess FINRA information requests or impose conditions on responding.[37]

FINRA Rule 9552 authorizes FINRA to serve a Notice of Suspension on a person subject to FINRA's jurisdiction who fails to provide any information or testimony requested by FINRA staff.[38] Upon receipt of such Notice of Suspension, the individual may request a hearing, which timely request stays the effective date of suspension.[39] "A request for a hearing must set forth with specificity any and all defenses to the FINRA action."[40] Following the hearing, the Hearing Panel may approve, modify, or withdraw any and all sanctions or limitations imposed by the notice, and may impose any other fitting sanction.[41]

Expedited proceedings under the Rule 9550 Series are entirely distinct from disciplinary proceedings under the Rule 9000 Series. For conduct that can be the subject of either type of proceeding—such as failure to provide information—there is no requirement that FINRA employ one form of action rather than the other. The decision to initiate an expedited proceeding under Rule 9552 rather than a disciplinary proceeding is within Enforcement's prosecutorial discretion. Likewise, there is no rule requiring FINRA to withhold filing an expedited proceeding because an individual is already the subject of a disciplinary proceeding.

---

[36] *Id.* n.2 (citing *Mark Allen Elliott*, 51 S.E.C. 1148, 1150-51, 1994 SEC LEXIS 1765, at *5-6 (1994)).

[37] *Id.* (citing *Joseph Patrick Hannan*, 53 S.E.C. 854, 859, 1998 SEC LEXIS 1955, at *11 (1998) and *Michael David Borth*, 51 S.E.C. 178, 181, 1992 SEC LEXIS 3248, at *7 (1992)).

[38] Rule 9552(a).

[39] Rules 9552(d) and (e).

[40] *Id.*

[41] Rule 9559(n).

### 1. Lorenzo Failed To Show That The Factual Issues In This Proceeding Improperly Duplicate The Factual Issues In The Disciplinary Proceeding

Lorenzo failed to show that the two proceedings allege duplicate facts. Indeed, Lorenzo presented no evidence regarding the disciplinary proceeding, and the little evidence there is shows that the two cases are distinct.

Enforcement submitted a copy of the Complaint in the disciplinary proceeding, *Department of Enforcement v. Gregg Charles Lorenzo*, No. 20120321124-01.[42] The Complaint contains two causes of action. The first cause of action alleges that Lorenzo failed to amend his Form U4 timely to disclose that the SEC had notified him that it was considering initiating an administrative proceeding against him. The second cause of action alleges that Lorenzo failed to appear for an OTR concerning his late Form U4 amendment.

In general, the Complaint alleges that, in February 2012, SEC staff sought to question Lorenzo regarding his role in soliciting and offering a security. However, Lorenzo invoked his Fifth Amendment right against self-incrimination during the SEC depositions. Thereafter, SEC staff notified Lorenzo's attorney that the SEC was considering filing an administrative proceeding against Lorenzo, alleging federal securities laws violations. Specifically, the notice informed Lorenzo that the potential charges related to alleged fraudulent statements made in connection with the solicitation and sale of a security.

At the time Lorenzo received the notice, Charles Vista had a continuing membership application pending before FINRA seeking approval of a change in its ownership structure. FINRA was not aware of the potential SEC action, and Lorenzo did not advise the staff of

[42] CX-14.

FINRA's Membership Application Program of the notice. The Complaint further alleges that Lorenzo did not timely amend his Form U4 to disclose his receipt of the SEC notice.

When FINRA staff sought to ask Lorenzo questions about the late amendment to his Form U4, the Complaint alleges that Lorenzo objected to cooperating unless FINRA staff assured him that there had been no coordination between FINRA and the SEC staff concerning the investigation that precipitated the SEC's notice or provided him with a description of any such coordination. Lorenzo's attorney also sought written assurances that the OTR would not cover matters to which Lorenzo asserted his Fifth Amendment rights before the SEC. FINRA staff denied Lorenzo's demands, and he refused to appear at the OTR.

The Hearing Panel concludes that the disciplinary Complaint shows that this proceeding and the disciplinary proceeding are distinct. The disciplinary proceeding arose from a separate investigation. The disciplinary Complaint centers on (1) Lorenzo's alleged failure to disclose timely that the SEC intended to institute an administrative proceeding against him, and (2) his subsequent refusal to appear at an OTR to answer questions about his late disclosure. On the other hand, this expedited proceeding focuses on Lorenzo's refusal to appear at an OTR to answer questions about his involvement with Charles Vista and CV Social Media. The only similarity between the two cases is Lorenzo's assertion of the Fifth Amendment privilege against self-incrimination to justify his refusal to comply with FINRA staff's Rule 8210 requests.

The Hearing Panel concludes that the two proceedings are distinct and Lorenzo failed to show that FINRA asserted "inappropriate grounds for instituting this proceeding."[43]

[43] Amended Demand for Hearing ¶ 1.

### 2. Lorenzo Failed To Show That This Proceeding Impeded His Defense Of The Disciplinary Proceeding

Lorenzo also asserted that this expedited proceeding "frustrates and prejudices [his] defense of the Disciplinary Proceeding."[44] However, Lorenzo presented no evidence to support this claim.

The only evidence Lorenzo presented at the hearing was (1) a copy of the Form U4 he submitted in February 2009 to become relicensed with Charles Vista, and an amendment to that Form U4 dated March 20, 2009;[45] and (2) the word "no" in answer to the question, "Mr. Lorenzo, at the time that you signed your U4 application for registration as an associated person [with Charles Vista,] were you aware that by signing the U4 you would be waiving your rights to assert your Constitutional right against self-incrimination?"[46] On cross-examination Lorenzo asserted his "Constitutional Right not to incriminate [himself]" and refused to answer any other questions, including whether he recalled his one-word answer on direct examination.[47]

In an expedited proceeding under Rule 9552, where the respondent admits that he did not comply with a Rule 8210 request for information, the respondent has the burden of establishing the specific defenses he set forth in his request for hearing in response to the notice of suspension

---

[44] Amended Demand for Hearing ¶ 8.

[45] RX-1.

[46] Tr. 50. On the other hand, Lorenzo did know that he could not invoke the privilege against self-incrimination by the time he made his final decision not to attend the OTR. First, the four requests for information specifically state that the Fifth Amendment does not apply in FINRA investigations and proceedings because FINRA is not a governmental agency. (E.g., CX-2, at 1.) Second, shortly before the first request for information in this case, Enforcement instituted a disciplinary proceeding against Lorenzo for his failure to appear for testimony, where Lorenzo had invoked the Fifth Amendment privilege against self-incrimination. (CX-14.)

[47] Tr. 51-57. Lorenzo invoked the privilege at the hearing after his attorney conceded that it was not available. Accordingly, the Hearing Panel concludes that Lorenzo's assertion of the Fifth Amendment privilege at the hearing was "legally frivolous." *Cf. Clark v. Commissioner*, 744 F.2d 1447 (10th Cir. 1984) (claim of privilege is "legally frivolous" where there is a failure to "state any facts that demonstrate that a real and substantial danger of incrimination exists").

issued by FINRA staff. However, Lorenzo failed to offer any evidence or argument about how this expedited proceeding has impeded his defense of the disciplinary proceeding, and the Hearing Panel finds no such prejudice.

For the foregoing reasons, the Hearing Panel rejects Lorenzo's defense that FINRA lacked the appropriate grounds and authority to institute this expedited proceeding.

**B. Lorenzo's Constitutional Claim**

Lorenzo's primary argument that the Form U4 (and consequently Rule 8210) are unenforceable because he did not know that by signing the Form U4 he waived his Fifth Amendment privilege against self-incrimination is factually and legally unsupported. Indeed, Lorenzo conceded the argument at the hearing. First, Lorenzo's attorney conceded that it is settled law that FINRA is not a governmental body; it is a private entity.[48] Thus, constitutional protections, such as the Fifth Amendment privilege against self-incrimination, do not apply to FINRA unless a respondent establishes that FINRA's action in a particular case is "fairly attributable" to the government (i.e., "state action").[49] Second, Lorenzo's attorney conceded that Lorenzo had no evidence that FINRA had engaged in state action.[50] Thus, Lorenzo lacked the necessary "reasonable cause" to invoke the privilege.[51]

---

[48] Tr. 12 ("saying FINRA is somehow a governmental body, is not a sound legal theory on which to proceed, not because of what I think, but because of what the courts say"). *See, e.g.*, *United States v. Shvarts*, 90 F. Supp. 2d 219, 222, 2000 U.S. Dist. LEXIS 2350, at *8 (E.D.N.Y. 2000) ("It is beyond cavil that the NASD [now FINRA] is not a government agency; it is a private, not-for-profit corporation."). *See also, e.g., D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002).

[49] Under the "joint action" test developed by the federal courts, private entities engage in state action when they are willful participants in joint action with state officials. *Mathis v. Pac. Gas & Elec. Co.*, 75 F.3d 498, 503 (9th Cir. 1996).

[50] Tr. 16 ("I'm not suggesting that there is state action between FINRA and the [SEC], … it's not even an issue in this case …."); Tr. 74 ("[W]e're not addressing whether there is state action, I conceded that up front ….").

[51] *Hoffman v. United States*, 341 U.S. 479, 486 (1951) (privilege's protection extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer").

For these reasons, the waiver issue Lorenzo posits is not presented by the facts of this case. The Form U4 does not contain a term that requires applicants to waive their constitutional rights, and the facts do not establish an implied waiver because Lorenzo concedes that the Fifth Amendment does not apply either to FINRA generally or to FINRA's actions in this case.

Lorenzo nonetheless argues that the question of whether he had waived his Fifth Amendment privilege by signing his Form U4 is ripe for decision because Enforcement knew from his attorney's letters that he intended to assert the privilege. The Hearing Panel rejects this argument as well.

To invoke the constitutional protection under the Fifth Amendment that bars self-incrimination, courts have held that witnesses must demonstrate that they have a "reasonable cause to apprehend danger" upon giving a direct answer that "would support a conviction," or "would furnish a link in the chain of evidence needed to prosecute" them for a violation of the criminal statutes.[52] To satisfy this requirement, the witness must factually establish that the risks of incrimination resulting from his compelled testimony to be "substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination."[53] The witness cannot avoid answering merely by declaring that he would incriminate himself if he testifies.[54]

Lorenzo has offered no evidence to establish that "injurious disclosure could result" from his testimony at the requested OTR.[55] Lorenzo's attorney made only generalized references to the possibility of self-incrimination because Lorenzo had sought the protection of the Fifth Amendment before the SEC. Such blanket, generalized claims made by a witness's attorney have

---

[52] *Id.*

[53] *Marchetti v. United States*, 390 U.S. 39, 53 (1968).

[54] *Hoffman*, 341 U.S. at 486.

[55] *Id.* at 487.

been held to be insufficient to invoke the privilege.[56] This is particularly true here because Lorenzo did not have reasonable cause to believe that FINRA was a willful participant in joint action with the SEC, which was a prerequisite to Lorenzo's ability to invoke the Fifth Amendment privilege. Accordingly, Lorenzo has not presented a real issue in controversy. Under the facts of this case, neither the Form U4 nor Rule 8210 operated to bar Lorenzo from invoking the Fifth Amendment privilege against self-incrimination.

For the foregoing reasons, the Hearing Panel rejects Lorenzo's defense that the Form U4 is unenforceable because it compelled Lorenzo to waive his Fifth Amendment privilege against self-incrimination. The Fifth Amendment does not apply to FINRA investigations and proceedings regardless of the terms of the Form U4. And Lorenzo conceded that under the facts of this case FINRA was not engaged in state action.

### C. Form U4 Is Not An Unenforceable Contract Of Adhesion

Lorenzo insists that the Form U4 he signed when he became associated with Charles Vista is unenforceable because it is an unconscionable contract of adhesion. This contention is without merit and is contrary to settled law.

"A court will find adhesion only when the party seeking to rescind the contract establishes that the other party has used 'high pressure tactics' or 'deceptive language' or that the contract was the product of a gross inequality of bargaining power."[57] In applying these contract principles to the Form U4's requirement that disputes be submitted to binding arbitration, courts

---

[56] *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 398 (1976) (the privilege against self-incrimination is limited to and can only be invoked by "a person who shall be compelled in any criminal case to be a witness against himself."). *See also United States v. Bates*, 552 F.3d 472, 475-76 (6th Cir. 2009) ("This presumption against blanket assertions of Fifth Amendment privilege is premised on the common sense notion that a judge must know what the witness believes is incriminating in order to evaluate whether the witness invokes the privilege with 'reasonable cause.'").

[57] *Aviall, Inc. v. Ryder System, Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996).

have explained that "in the absence of fraud or other wrongful act on the part of another contracting party, a party who signs and accepts a written contract … is conclusively presumed to know its contents and to assent to them."[58]

Adhesion contracts are not automatically void.

> To be considered an unenforceable contract of adhesion, the contract also must inflict substantive unfairness on the weaker party, because its terms are not within the reasonable expectations of that party, or because its terms are unduly oppressive, unconscionable, or contrary to public policy.… A court may refuse to enforce an agreement only if the contract is the product of procedural unfairness *and* suffers from one of the enumerated substantive defects.[59]

The Hearing Panel concludes that the agreement to comply with FINRA rules, including FINRA Rule 8210, contained in the Form U4[60] is not unconscionable as a matter of law.[61] Federal courts have rejected similar challenges to the Form U4's mandatory arbitration clause.

---

[58] *Imperatore v. Putnam Lovell NBF Sec., Inc.*, 2006 U.S. Dist. LEXIS 10598, at *8 (S.D.N.Y. Mar. 15, 2006) (quoting *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 149 (2d Cir. 2004). *See also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (Form U4 arbitration clause not a contract of adhesion; "mere inequality in bargaining power" is not alone sufficient to hold arbitration agreements unenforceable).

[59] *Aviall*, 913 F. Supp. at 831 (citations omitted). *Accord Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 207 (2d Cir. 1999) (citing 8 Samuel Williston, *A Treatise on the Law of Contracts*, § 18:9, at 54 (Richard A. Lord ed., 4th ed. 1998).

[60] Form U4, Section 15A(2), provides in relevant part,

> I apply for registration with the *jurisdictions* and *SROs* indicated in Section 4 (SRO REGISTRATION) and Section 5 (JURISDICTION REGISTRATION) as may be amended from time to time and, in consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the *jurisdictions* and *SROs* as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the *jurisdictions* and *SROs*, subject to right of appeal or review as provided by law.

(RX-1, at 10.)

[61] Lorenzo failed to produce any evidence that the agreement to comply with FINRA's rules, including Rule 8210, was somehow unfair or oppressive.

> The strong federal policy favoring arbitration, coupled with the extensive regulatory oversight performed by the SEC in this area, compel the conclusion that agreements to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law.[62]

This rationale applies with even greater force to the agreement in Form U4 to comply with FINRA Rule 8210. Rule 8210 is widely accepted as FINRA's most important tool for investigating potential wrongdoing primarily because FINRA lacks subpoena authority and has limited power to compel the production of evidence from its members.[63] Rule 8210 enables FINRA to conduct meaningful examinations and investigations in order to detect misconduct and protect the public interest. FINRA relies heavily on Rule 8210, and the SEC has "repeatedly stressed the importance of cooperation in [FINRA] investigations ... [and] emphasized that the failure to provide information undermines [FINRA's] ability to carry out its self-regulatory functions."[64]

The agreement to comply with FINRA rules is not oppressive or unfair. Form U4 developed from a concurrent effort directed principally by NASD and other self-regulatory organizations.[65] The SEC believed that a uniform registration form would "enhanc[e] the flow within the securities industry of information needed for regulatory purposes while at the same time alleviating a substantial and particularly duplicative paperwork burden imposed on broker-

---

[62] *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 (5th Cir. 1992) (quoting *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) and citing other cases).

[63] *See John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *57 n.67 (Nov. 12, 2010), *petition for review denied sub nom. Busacca v. SEC*, 449 F. App'x 886; 2011 U.S. App. LEXIS 25933 (11th Cir. Dec. 28, 2011).

[64] *Joseph Patrick Hannan*, Exchange Act Release No. 40438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998) (internal citations omitted); *Joseph Ricupero*, Exchange Act Rel. No. 62891, 2010 SEC LEXIS 2988, at *21 (Sept. 10, 2010) ("Without subpoena power, [FINRA] must rely on Rule 8210 to obtain information from its members necessary to carry out its investigations and fulfill its regulatory mandate.").

[65] *See* Adoption of Form U-4, Exchange Act Release No. 11424, 1975 SEC LEXIS 1592, at *3-4 (May 16, 1975).

dealers registered with more than one organization or state."[66] In addition, Form U4 requires applicants to comply with the rules of the SROs and jurisdictions in which they seek to be licensed. The SROs' rules are subject to SEC approval and oversight. This comprehensive application and oversight precludes a finding of substantive unfairness as a matter of law.

FINRA's National Adjudicatory Council ("NAC") rejected the identical claim in a disciplinary proceeding brought for failure to comply with Rule 8210. In *Department of Enforcement v. Sturm*, the NAC held that Sturm wrongly claimed "that the Form U-4 that he signed when he became associated [with an NASD member firm] constitutes an 'adhesion contract,' and therefore, that NASD Regulation owes him a higher duty than that owed to signatories of other commercial contracts."[67] In so holding, the NAC noted that federal courts have consistently rejected the claim that the Form U4 is a contract of adhesion.[68]

**D. Lorenzo Violated Rule 8210**

The Hearing Panel concludes that Lorenzo improperly refused to appear at the OTR, and he thereby violated Rule 8210. As found above—and as Lorenzo admitted—he lacked a legitimate basis to refuse to comply with the Rule 8210 requests. Lorenzo invoked the privilege against self-incrimination despite the fact that he had no reasonable grounds to believe that FINRA was engaged in state action. FINRA was therefore entitled to his "full and prompt

---

[66] *Id.* at *4.

[67] *Department of Enforcement v. Sturm*, No. CAF000033, 2002 NASD Discip. LEXIS 2, at *15 (Mar. 21, 2002).

[68] *See Porzig v. Dresdner Kleinwort Benson N. Am. LLC*, 1999 U.S. Dist. LEXIS 11067, at *15 (S.D.N.Y. July 21, 1999) (finding that plaintiff failed to allege or substantiate that his employer exerted any undue influence or coercion on him to sign the Form U4); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 182 (3d Cir. 1998) (finding that "[t]he terms of the Form U-4 that [the plaintiff] signed were not oppressive, unconscionable, or unreasonably favorable to either the NASD or [the defendant]"); *cf. Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999) (rejecting argument that the Form U4 was an unconscionable contract of adhesion).

cooperation."[69] FINRA was not "required to justify its information requests," and Lorenzo was not entitled to dictate the methodology FINRA could employ in its investigation.[70] "The requirement to comply with Rule 8210 is not reduced or abandoned because of the grounds on which an associated person refuses to comply, even if the refusal is in good faith."[71] Furthermore, FINRA's four Rule 8210 requests each countered Lorenzo's constitutional argument and warned Lorenzo that his failure to respond could result in formal disciplinary action and possibly a bar from the securities industry. Lorenzo was aware of the potential repercussions from a failure to respond and chose nonetheless not to cooperate.

## IV. SANCTIONS

The Hearing Panel concludes that a bar is the appropriate sanction.[72] The Hearing Panel first looked to the FINRA Sanction Guidelines ("Sanction Guidelines"), which state that a bar should be the standard sanction where an individual does not respond in any manner to a request for information pursuant to Rule 8210, and that a fine may be imposed of $25,000 to $50,000.[73] Even where an individual provides a partial but incomplete response, a bar is standard unless the

---

[69] *Michael David Borth*, Exchange Act Release No. 31602, 1992 SEC LEXIS 3248, at *7 (Dec. 16, 1992).

[70] *See Toni Valentino*, 2004 SEC LEXIS 330, at *11 & n.7 (Feb. 13, 2004) ("members and associated persons may not impose conditions … under which they will respond to [FINRA] requests for information"); *Robert Fitzpatrick*, 55 S.E.C. 419, 425 n.16 (2001), *aff'd*, 2003 U.S. App. LEXIS 8767 (2d Cir. May 9, 2003).

[71] *See Dep't of Enforcement v. Reichman*, No. 200801201960, 2011 FINRA Discip. LEXIS 18, at *40 (July 21, 2011); *Charles C. Fawcett IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *18-19 (Nov. 8, 2007) (holding that there is no distinction between those who refuse to comply with Rule 8210 on substantive grounds and those who refuse to comply on other grounds).

[72] Rule 9559(n) allows the Hearing Panel to approve, modify, or withdraw any sanctions or requirements imposed by a Notice of Suspension and to impose any other fitting sanctions pursuant to Rule 8310(a). Rule 8310(a) authorizes various sanctions against an associated person who violates FINRA's rules, including fines, suspensions, and bars.

[73] *FINRA Sanction Guidelines* 33 (2011), *available at* www.finra.org/sanctionguidelines.

person can demonstrate that he or she substantially complied with the information requests. In addition, a fine may be imposed of $10,000 to $50,000.

The principal consideration in determining sanctions for this type of violation is the importance of the information requested but not provided, as viewed from FINRA's perspective.[74] Here FINRA staff's investigation was undertaken in response to concerns about Charles Vista's sales of interests in CV Social Media, which held pre-IPO shares in Facebook. Lorenzo's testimony was important because the staff had learned from Charles Vista that Lorenzo was actively involved in the activity under investigation. Lorenzo's refusal to provide investigative testimony impeded the staff from determining whether Lorenzo had participated in any fraudulent or other sales violations. Lorenzo's decision to delay and ultimately avoid testifying is "especially troubling given the importance of Rule 8210."[75] Lorenzo did not introduce evidence of any factors that would mitigate his refusal to appear and testify.

The Hearing Panel also considered the strong public policy reasons that support a bar in this case. Lorenzo and others must be deterred from flouting their obligation to cooperate in FINRA's investigations and examinations. FINRA simply cannot perform its oversight function effectively if persons subject to its jurisdiction refuse to provide information when requested to do so pursuant to Rule 8210. As the SEC said in its decision in *PAZ Securities*, later upheld on appeal, "A complete failure to respond to a request for information issued pursuant to Rule 8210 renders the violator presumptively unfit for employment in the securities industry because the self-regulatory system of securities regulation cannot function without compliance with Rule

[74] *Id.*

[75] *Valentino*, 2004 SEC LEXIS 330, at *15.

8210 requests."[76] Lorenzo's refusal to cooperate is all the more egregious because FINRA staff repeatedly advised him that he could not avoid testifying by making a blanket assertion that he anticipated testimony might incriminate him. This is particularly true where, as he now admits, he lacked any factual basis for claiming that FINRA was engaged in state action.

Finally, the Hearing Panel concludes that the evidence shows that a lesser sanction would be inadequate. Not only did Lorenzo fail to appear for his OTR, but he refused to answer any questions at the hearing, again invoking the Fifth Amendment privilege against self-incrimination, although he admitted through his attorney at the beginning of the hearing that he had no basis to make the assertion. His decision to continue to refuse to cooperate is a strong indication that it would be futile to grant him additional time to testify at an OTR.[77] Accordingly, an immediate bar is appropriate.

## V. ORDER

Gregg Charles Lorenzo is barred from associating with any FINRA member firm in any capacity for refusing to comply with multiple Rule 8210 requests that he appear for an on-the-record interview. The bar is effective immediately.

_____

Andrew H. Perkins
Hearing Officer
For the Hearing Panel

[76] *PAZ Securities, Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *10 (Apr. 11, 2008), *petition for review denied sub nom. PAZ Securities v. SEC*, 566 F.3d 1172, 2009 U.S. App. LEXIS 11500 (D.C. Cir. May 29, 2009).

[77] The Hearing Panel has not considered this an aggravating factor for the purposes of determining sanctions. It is only considered in assessing the likelihood that Lorenzo would fully answer all of Enforcement's questions promptly if he were suspended rather than barred. *See* Rule 9552(h) (suspension automatically converts to bar after three months where respondent has not complied with the Notice of Suspension).