FINANCIAL INDUSTRY REGULATORY AUTHORITY OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ROBERT P. DEPALO (CRD No. 2946313),

Respondent.

Expedited Proceeding No. FPI160002

STAR No. 2015044211102

Hearing Officer—KBW

EXPEDITED HEARING PANEL DECISION

August 4, 2016

Respondent is barred from associating with any FINRA member firm in any capacity for failing to provide information and documents requested pursuant to FINRA Rule 8210. Respondent is also ordered to pay hearing costs.

Appearances

For the Complainant: Michael Watling, Esq., William L. Thompson, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For Respondent: Avraham C. Moskowitz, Esq., Christopher Neff, Esq.

DECISION

Respondent Robert P. DePalo, former Chief Executive Officer ("CEO") and president of FINRA member firm Arjent LLC (the "Firm"), failed to appear for testimony in response to Rule 8210 requests issued by the Department of Enforcement. Enforcement issued these requests in connection with an investigation of the Firm and several registered individuals associated with the Firm, including DePalo. The investigation concerned, among other things, the possible diversion of customer funds from issuers to DePalo or entities that he owned or with which he was affiliated.

On March 2, 2016, Enforcement notified DePalo, under Rule 9552, that effective March 28, 2016, he would be suspended from associating with any FINRA member firm because he had failed to appear for testimony in response to two Rule 8210 requests. On March 24, 2016,

DePalo requested a hearing, which stayed his suspension. In his hearing request, DePalo asserted as his sole defense that his failure to appear for testimony in response to the two Rule 8210 requests was justified because his psychiatrist had advised him that his mental and medical condition would be compromised if he was forced to testify.

The Hearing Panel held a hearing on May 11, 2016. Based on this hearing and the parties' submissions, the Hearing Panel rejects DePalo's asserted defense and imposes the sanctions set forth herein.¹

I. Background

DePalo first became registered with FINRA in 1997.² DePalo is currently registered through the Firm as a General Securities Principal, General Securities Representative, Limited Representative-Investment Banking, and Operations Professional.³ DePalo owns the Firm and, until he resigned from his managerial positions at the Firm in May 2015, was its CEO and president.⁴ DePalo "ran the [F]irm very closely."⁵

Enforcement began an investigation in 2013 (the "2013 Investigation"). The 2013 Investigation focused on the possibility that DePalo and others were charging personal expenses to the Firm.⁶

In early 2015, Enforcement began another investigation, based on a referral from District 10 (the "2015 Investigation"). The 2015 Investigation focused on whether: (1) the Firm charged excessive commissions in equity trades; (2) the Firm violated AML "know your customer" requirements in connection with certain bond trades; and (3) funds invested by Firm customers in private placements had been diverted from the issuer to DePalo or entities that he owned or with which he was affiliated.⁷ Enforcement concluded that DePalo created the private placements and approved their sale to the customers who purchased them.⁸

In May 2015, DePalo was named in both a Securities and Exchange Commission ("SEC") enforcement action and a State of New York indictment. The SEC complaint alleged

³ CX-1, at 4.

⁵ Tr. 204.

⁶ Tr. 236.

- ⁷ Tr. 200-01.
- ⁸ Tr. 204.

¹ The hearing transcript is cited as "Tr." Enforcement's exhibits are cited as "CX-." Joint exhibits are cited as "JX-."

² CX-1, at 18.

⁴ Tr. 203-04, 253-54. Arjent LLC has changed its name to McBarron Capital LLC. Tr. 206-07.

that DePalo and others committed fraud in the solicitation and sale of private placements of securities issued by Pangaea Trading Partners LLC, of which DePalo was president and CEO.⁹ The New York indictment charged that DePalo and others committed securities fraud, money laundering, and grand larceny in the solicitation and sale of private placements of securities issued by Pangaea.¹⁰

There were many similarities between (1) the facts that were the focus of Enforcement's 2015 Investigation and (2) the facts alleged in the New York indictment and in the SEC complaint. However, Enforcement's 2015 Investigation focused on conduct that was more recent than the conduct at issue in the SEC enforcement action and the New York indictment and did not focus on Pangaea.¹¹

II. DePalo's Failures to Appear and Testify in Response to FINRA Rule 8210 Requests

Since February 2015, Enforcement has served DePalo with six letters requesting that he appear for testimony. Enforcement made the first two of these requests in connection with the 2013 Investigation and the subsequent four in connection with the 2015 Investigation. Each request was made pursuant to FINRA Rule 8210. In each letter, Enforcement advised DePalo that a failure to provide the requested testimony could expose him to sanctions, including a permanent bar from the securities industry.

DePalo did not appear for testimony in response to any of these letters. In each instance, DePalo cited his medical or mental condition in declining to appear.

A. FINRA Rule 8210 Requests in 2013 Investigation

1. The First Request for Testimony

By letter dated February 11, 2015, Enforcement asked DePalo to appear pursuant to FINRA Rule 8210 at FINRA's New York offices on March 4, 2015, for on-the-record testimony in connection with the 2013 Investigation. On February 26, 2015, DePalo's counsel, Avraham Moskowitz, sent to Enforcement an email stating that DePalo would not be able to testify on March 4 for medical reasons. Moskowitz explained, "I have been advised by Mr. DePalo's doctor, Mark Horowitz, MD, that he is scheduled for extensive abdominal surgery on March 13 and that in the interim, he is experiencing significant pain for which he is taking painkillers that impair his cognitive abilities." Moskowitz added, "The doctor advises that Mr. DePalo will not be able to testify until sometime after his surgery. He will be evaluated by Dr. Horowitz post-surgery, after which we will be able to discuss when Mr. DePalo will be able to testify."¹²

⁹ Tr. 255-56; CX-1, at 14, 24.

¹⁰ Tr. 255-56; CX-1, at 28-29.

¹¹ Tr. 211, 254.

¹² CX-2; CX-3.

2. The Second Request for Testimony

Enforcement followed up on March 25, 2015. Noting the time that had passed since DePalo's surgery, Enforcement stated that it would like to schedule DePalo's testimony in "the next couple of weeks." Moskowitz promptly responded that "Mr. DePalo is still medically restricted. He is still taking medications that effect [sic] his cognitive abilities." Moskowitz suggested that Enforcement pick a date for the week of April 20, stating that he was confident that by then DePalo "will have returned to work and will be able to testify."¹³

On March 31, 2015, Enforcement sent DePalo a letter requesting, pursuant to FINRA Rule 8210, that DePalo appear at FINRA's New York offices for on-the-record testimony on April 22, 2015, in connection with the 2013 Investigation.¹⁴

Moskowitz sent an email to Enforcement on April 19, 2015, stating, "This afternoon, Mr. DePalo was rushed to the hospital by ambulance, as a result of complications from his surgery." Moskowitz stated that as a result of this medical setback, DePalo would not be able to testify on April 22 as scheduled. Moskowitz added that he would let Enforcement know once he had more definitive medical information. In response, an Enforcement attorney asked for "some documentation that supports this unfortunate event so that I might insert it into" the file and stated that Enforcement would follow up next week. Moskowitz promptly replied that DePalo was meeting with his doctor on April 22, after which Moskowitz would contact the doctor to get a report on DePalo's condition and a letter regarding this latest incident.¹⁵

On April 22, Moskowitz emailed to Enforcement a letter from Dr. Horowitz regarding DePalo's condition. In the letter, Dr. Horowitz stated that DePalo "has a kidney related complication" of his March 13, 2015 surgery and is currently taking pain medication "which will alter his sensorium and cognitive state." Dr. Horowitz estimated that DePalo would require this medication for at least 21 days.¹⁶

B. Indictment and Incarceration

On May 19, 2015, the State of New York indicted DePalo.¹⁷ DePalo was then incarcerated at the Rikers Island Correctional Facility ("Rikers") for ten days.¹⁸

- ¹⁵ CX-6.
- ¹⁶ CX-7; CX-8.

¹³ CX-4.

¹⁴ CX-4; CX-5.

¹⁷ CX-1, at 28.

¹⁸ Tr. 253.

On June 15, 2015, within two weeks of being released from Rikers, DePalo visited Dr. William Hapworth, a psychiatrist. On this visit, Dr. Hapworth observed that DePalo had not slept in days and was crying, expressing remorse regarding his family and children, and suffering heart palpitations.¹⁹ Based on these observations and information that DePalo provided regarding violence he had observed at Rikers, traumas he had endured in his youth, and symptoms he had suffered since his incarceration, Dr. Hapworth diagnosed DePalo first with Acute Stress Disorder ("ASD") and later with Post Traumatic Stress Disorder ("PTSD"). Dr. Hapworth prescribed medications, explaining to DePalo that they would calm his anxiety and help him with his acute stress and depression, and began weekly sessions that continued at least up to the week of the hearing.²⁰ Dr. Hapworth also advised DePalo not to return to work because Dr. Hapworth thought it was important for DePalo to allow himself time to process these issues and heal.²¹

C. FINRA Rule 8210 Requests in 2015 Investigation

Enforcement issued four Rule 8210 requests for testimony in connection with the 2015 Investigation. Enforcement issued each of these requests after DePalo's indictment and incarceration. DePalo declined to appear in response to any of the four requests for testimony, citing his medical or mental condition.

In addition, Enforcement issued two Rule 8210 requests for documents and information regarding DePalo's asserted inability to appear for testimony.²² DePalo provided partial responses to these two requests.

1. The Third Request for Testimony

By letter dated June 3, 2015, Enforcement requested pursuant to FINRA Rule 8210 that DePalo appear at FINRA's New York offices on June 24 and June 25, 2015, for on-the-record testimony.²³ This request was the first of the four requests for testimony that Enforcement would issue to DePalo in connection with the 2015 Investigation. Including the two requests that the FINRA staff had issued to DePalo in connection with the 2013 Investigation, this request was the third request issued to DePalo in 2015.

One week after receiving the third request, Moskowitz contacted Enforcement and stated that he was not available on June 24 or 25 and believed that DePalo would not be able to testify

- ²¹ Tr. 61-62.
- ²² Tr. 221-23.
- ²³ CX-9.

¹⁹ Tr. 33-34, 36-37, 53; RX-3, at 10.

²⁰ Tr. 33-34, 36-40.

on those dates for medical reasons. Moskowitz stated that DePalo had an appointment to see his doctor on June 15. Enforcement promptly responded by asking Moskowitz to let Enforcement know as soon as possible when he had an update and could propose alternative dates for DePalo's testimony.²⁴

On June 23, 2015, Enforcement sent Moskowitz an email asking for an update as soon as possible and for documentation of DePalo's medical condition. Moskowitz promptly replied that he was working on getting the necessary documentation and represented that DePalo was under the care of a psychiatrist and was taking mood altering drugs.

Enforcement sent an email to Moskowitz on July 1, 2015, asking for updates regarding DePalo's status or the documentation from DePalo's doctor. Moskowitz promptly responded by transmitting a letter dated June 25, 2015, from Dr. Gerald Acker, another of DePalo's doctors. In the June 25 letter, Dr. Acker stated that DePalo had been under the doctor's care over the last two years, had undergone "three major surgical procedures," and suffered from "numerous medical conditions that are being treated with counseling and medication." In the letter, Dr. Acker listed three types of medications that DePalo was taking and expressed the opinion that "he is not able to testify at this time. Moreover, I believe that any testimony that he would give would be clearly impaired by the prescription medication that he has currently been prescribed."²⁵

On July 16, Enforcement sent an email to Moskowitz, asking for "a date when Mr. DePalo is expected to be able to provide testimony." When Moskowitz did not respond, Enforcement followed up by email on August 4, asking whether there was a date on or before August 21 when DePalo would be able to testify. Enforcement added that if counsel represents that he does "not expect Mr. DePalo to be able to testify between now and August 21" or it did not hear back from counsel by August 5, Enforcement would issue a request under FINRA Rule 8210 for information and corroboration concerning the medical conditions and medication that prevented DePalo from testifying. Moskowitz responded the next day that he expected to obtain a letter early next week which would explain DePalo's current medical situation and he would provide a copy of the letter to Enforcement. Moskowitz did not state when DePalo would be able to provide testimony.²⁶

During a session with Dr. William Hapworth, DePalo mentioned that FINRA was asking him to testify.²⁷ Dr. Hapworth advised DePalo that testifying would (1) pose a risk to his health in that he could fall back into panic and anxiety and depressive symptoms and (2) place DePalo's

²⁴ CX-10.

²⁵ CX-11; CX-12.

²⁶ CX-13.

²⁷ Tr. 106-09.

fragile recovery in jeopardy.²⁸ This advice was based on symptoms that Dr. Hapworth observed during the first visit, in June 2015, and information that DePalo relayed to Dr. Hapworth.²⁹ DePalo responded to Dr. Hapworth's advice by stating that he needed to think about it and asking Dr. Hapworth to talk to Moskowitz.³⁰

2. The August 6 Request for Documents and Information

By letter dated August 6, 2015, Enforcement requested, pursuant to FINRA Rule 8210, that DePalo provide certain documents and information no later than August 21, 2015.³¹ The purpose of this letter was to obtain information regarding DePalo's asserted inability to testify.³²

The letter requested the following information and documents regarding DePalo's medical condition:

- A detailed written account, signed by DePalo, listing all his medical conditions that prevent him from testifying;
- A written statement signed by DePalo granting FINRA staff permission to contact each doctor who treated DePalo in connection with the listed medical conditions;
- A list identifying by brand or generic name all medications referenced in Dr. Acker's June 25 letter or that otherwise affected DePalo's ability to testify and, for each of the medications, a statement from a doctor describing how the specific medication would affect DePalo's ability to provide testimony; and
- A statement from DePalo's physician identifying when he expected DePalo to be able to provide testimony to FINRA staff and why he cannot provide testimony before that date.

The letter also requested the following information regarding DePalo's activities since March 13, 2015 (the date of DePalo's abdominal surgery):

• A statement describing DePalo's work schedule from March 13, 2015, to the present, including the dates he worked from the Firm's offices, the dates he worked from home, the dates that he traveled for business purposes, the dates he traveled for personal reasons, and the dates he did not work for medical reasons; and

²⁸ Tr. 42-45, 110-11.

²⁹ Tr. 53-55.

³⁰ Tr. 107, 109.

³¹ JX-1.

³² Tr. 223.

• All of DePalo's calendar entries, day planners, or other means, electronic or otherwise, of tracking DePalo's calendar items or events during the period of March 13, 2015 to present.³³

By letter dated August 24, 2015, Moskowitz responded to Enforcement's August 6 letter.³⁴ With respect to the requests relating to DePalo's "current medical psychological condition," Moskowitz transmitted a letter from Dr. Hapworth and two letters from Dr. Horowitz.

The letter from Dr. Hapworth:

- stated that DePalo sought Dr. Hapworth's professional help on June 15 and that DePalo "was suffering from all the classic symptoms of ASD";
- stated Dr. Hapworth had seen DePalo weekly since June 15;
- warned that "[t]he possibility of [DePalo] slipping into PTSD (Post Traumatic Stress Disorder) needs to be guarded against over the next several months";
- explained that "[t]he danger with Acute Stress Disorder is that continued exposure to the circumstances that have precipitated this reaction can lead to a more chronic form of the disorder called PTSD";
- listed the medications that Dr. Hapworth had prescribed to DePalo since the first visit;
- expressed the opinion that "in the initial phases of treatment ... these drugs can cause a degree of sedation and tranquilization making testifying in one's own defense less than effective";
- characterized DePalo's condition as "extremely fragile given the intense circumstances that surround his life";
- stated that Dr. Hapworth wrote the letter to "help protect Mr. [DePalo's] mental state from deteriorating further";
- expressed the belief that "with proper care that Mr. DePalo can be returned to a stable condition regarding his mental status"; and
- recommended that DePalo "not be compelled to testify at this time due to his mental fragility."³⁵

One of Dr. Horowitz's letters listed six conditions for which DePalo was being managed and six medications (with dosages) that he was currently taking. The other letter stated that "Mr.

³³ JX-1.

³⁴ JX-2.

³⁵ JX-2, at 3-4.

DePalo has a kidney related complication of his surgery of 3/13/15" and was therefore taking pain medication "which will alter his sensorium and cognitive state."³⁶

Moskowitz's August 24 letter provided the following limited information in response to the requests relating to DePalo's activities since March 13:

[S]ince March 13, 2015, Mr. DePalo has worked sporadically, as his health has permitted. He does not maintain a calendar, day planner or diary in any form and thus he is unable to provide you with the documentation requested ... It should be noted, however, that since his abdominal surgery on March 13, 2015, he has gone in to the Arjent office occasionally and for limited periods of time rather than for full work days.³⁷

3. The September 3 Request for Documents and Information

Dissatisfied with DePalo's response to its August 6 request, Enforcement sent a letter to Moskowitz on September 3, noting several respects in which his letter had not responded fully to Enforcement's August 6 request, including DePalo's failure to provide:

- the dates he has worked from Arjent's offices;
- the dates he has traveled for business purposes;
- the dates he has traveled for personal reasons;
- the dates he has not worked for medical reasons; and
- the requested written statement, signed by Mr. DePalo, granting FINRA staff permission to contact each doctor who has treated Mr. DePalo in connection with medical conditions that have prevented him from testifying.

Pursuant to FINRA Rule 8210, Enforcement requested, "for a second time, that Mr. DePalo produce all documents and information responsive to the August 6 request."³⁸

Moskowitz responded two weeks later.³⁹ Among other things, Moskowitz stated that DePalo declines to grant FINRA staff permission to contact his doctors to discuss his medical condition. Moskowitz stated that having provided Enforcement with "detailed reports from his treating physician and psychiatrist, Mr. DePalo should not be required to waive his right to keep the rest of his medical history private." Moskowitz also stated that DePalo could not provide detailed information regarding his activities since March 13, because "he does not maintain a

³⁶ JX-2, at 5-6.

³⁷ JX-2, at 1.

³⁸ JX-3.

³⁹ JX-5.

calendar or datebook of any kind and thus has no record of the dates on which he worked from Arjent's offices or travelled for business or personal reasons."⁴⁰ Moskowitz did not explain how DePalo tracked his medical, business, and personal appointments without the benefit of a calendar, day planner, or diary. Moskowitz also did not explain why DePalo could not provide information regarding his business and personal travel based on his credit card records and information from travel loyalty programs.

4. The Fourth Request for Testimony

On September 3, 2015, Enforcement sent a letter to Moskowitz requesting, pursuant to FINRA Rule 8210, that DePalo appear at FINRA's New York offices on September 25, 2015, for on-the-record testimony in connection with the 2015 Investigation.⁴¹ On September 17, Moskowitz responded:

Mr. DePalo is currently under the care of a psychiatrist, Dr. Hapworth, who has stated that forcing Mr. DePalo to testify at this time would endanger his mental health. Under the circumstances, I am not prepared to produce Mr. DePalo for an examination under oath. Upon my return in October [from being out of the country], I will contact Dr. Hapworth and inquire whether Mr. DePalo is well enough to testify. As soon as Mr. DePalo receives medical clearance to testify, we can discuss rescheduling his examination under oath.⁴²

5. The Fifth Request for Testimony

Enforcement sent a letter to Moskowitz on September 28, 2015, requesting, pursuant to FINRA Rule 8210, that DePalo appear at FINRA's New York offices on October 22 for on-the-record testimony in connection with the 2015 Investigation. Dr. Hapworth again advised DePalo not to testify because testifying could be hazardous for him given his situation and mental state.⁴³ This advice also was based on symptoms that Dr. Hapworth observed during the first visit, in June 2015, and information that DePalo subsequently relayed to Dr. Hapworth.⁴⁴

On October 21, 2015, Moskowitz sent a letter to Enforcement in which he confirmed that on October 19, Moskowitz had a telephone conversation with Enforcement in which he informed Enforcement that, upon the advice of counsel and the advice of his psychiatrist, DePalo would not appear before FINRA to testify under oath on October 22. In closing the letter, Moskowitz

⁴² JX-6.

⁴⁰ JX-5.

⁴¹ JX-4.

⁴³ Tr. 47.

⁴⁴ Tr. 53-55.

stated, "Finally, please be advised that Mr. DePalo truly desires to appear before FINRA to answer any question that the Enforcement Division may have and he intends to testify as soon as he receives medical clearance to do so."⁴⁵ In addition, Moskowitz attached a letter from Dr. Hapworth dated October 20.

Dr. Hapworth's October 20 letter addressed the impact that testifying in any proceeding could have on DePalo's mental health:

[DePalo] remains extremely fragile given the intense circumstances that surround his life. It is my opinion at the present time that testifying in any proceeding would still place his fragile recovery in jeopardy. As I have previously stated, the possibility of him slipping into PTSD (Post Traumatic Stress Disorder) needs to be guarded against over the next year. The danger with Acute Stress Disorder is that continued exposure to the circumstances that have precipitated this reaction can lead to a more chronic form of the disorder called PTSD I believe Mr. DePalo is returning to a stable condition regarding his mental status. The present risk is that by adding to the stress he is already experiencing you could cause a relapse of his ASD symptoms ... I recommend that he not be compelled to testify at this time due to his mental fragility.⁴⁶

The letter also addressed the possible effect of the prescribed drugs on DePalo's ability to testify effectively:

[DePalo] has been stabilized on Celexa 20 mg PO OD as well as Trazadone 100 mg PO HS It is my opinion that in the initial phases of treatment ... these drugs can cause a degree of tranquilization making testifying in one's own defense less rigorous.⁴⁷

6. The Sixth Request for Testimony

By letter dated January 15, 2016, Enforcement requested that DePalo appear at FINRA's New York offices on February 9 for on-the-record testimony in connection with the 2015 Investigation. The letter stated that if "Mr. DePalo refuses to appear on the date scheduled for his testimony due to his mental condition or medications, we request that Mr. DePalo appear at the office of Robert L. Goldstein, M.D. [at a specified location and time] so that Dr. Goldstein may conduct a psychiatric examination of Mr. DePalo." After describing the three prior FINRA Rule 8210 requests for testimony that Enforcement had issued in the 2015 Investigation, the letter warned, "If Mr. DePalo fails to comply with this request, he may be subject to the institution of

⁴⁵ JX-8.

⁴⁶ JX-8, at 3.

⁴⁷ JX-8, at 3.

an expedited or formal disciplinary proceeding leading to sanctions, including a bar from the securities industry."⁴⁸ From this language and the context, it was clear that Enforcement's request that DePalo appear for testimony was pursuant to FINRA Rule 8210.

Dr. Hapworth again recommended that DePalo not testify. Neither in connection with this request for testimony nor in connection with any of the prior requests for testimony, did DePalo provide Dr. Hapworth with any information about what an on-the-record interview entails.⁴⁹ DePalo and Dr. Hapworth did not discuss whether it would be appropriate for him to submit to an examination by a psychiatrist selected by FINRA.⁵⁰

On February 4, 2016, Moskowitz sent an email to Enforcement transmitting a letter from Dr. Hapworth dated February 4, and stating that in light of Dr. Hapworth's evaluation and recommendation, "Mr. DePalo will not be able to appear for an interview on February 9, as you have requested." With respect to Enforcement's request that DePalo agree to be evaluated by Dr. Goldstein, Moskowitz stated:

this email will serve to reiterate my request that you provide me with legal authority supporting your request If such authority exists, please provide it to me so that I can review it and discuss it with my client. If there is a valid legal basis supporting your request, Mr. DePalo, with my guidance, may consider changing his position. I look forward to hearing from you.⁵¹

In his February 4 letter, Dr. Hapworth stated that "Mr. DePalo has diligently pursued a psychopharmacology/psychotherapeutic solution to his acute stress that has [its] origin in the prosecution of him and his firm by the SEC and the Manhattan District Attorney's office regarding alleged charges of misdealings in his brokerage businesses." Dr. Hapworth stated that DePalo "has shifted much of the Rikers trauma to a newer concern about his family and their well-being His capacity to deal with the stress of his situation remains very marginal and potentially volatile due to the uncertainty of the proceedings he faces." Dr. Hapworth again stated that DePalo "has been stabilized on Celexa 20 mg PO OD as well as Trazadone 100 mg PO HS It is my opinion that in the initial phases of treatment ... these drugs can cause a degree of numbing making testifying in one's own defense less rigorous."⁵² Dr. Hapworth expressed the view that "[d]espite the progress that has been made, [DePalo] remains extremely fragile given the intense circumstances that surround his life. It is my opinion at the present time

⁵² JX-12.

⁴⁸ JX-9.

⁴⁹ Tr. 94-95. Dr. Hapworth assumed that the testimony would be similar to a deposition and would therefore be stressful. Tr. 94-95.

⁵⁰ Tr. 122.

⁵¹ JX-11.

that testifying in any proceeding would still place his fragile recovery in jeopardy." Dr. Hapworth again warned that "the possibility of [DePalo] slipping into PTSD (Post Traumatic Stress Disorder) needs to be guarded against over the next year. The danger with Acute Stress Disorder is that continued exposure to the circumstances that have precipitated this reaction can lead to a more chronic form of the disorder called PTSD."⁵³

D. FINRA Issues a Notice of Suspension to DePalo

On March 2, 2016, Enforcement issued DePalo a Notice of Suspension based on his failure to appear for testimony in response to the fifth and sixth requests for testimony (the "Notice"). The Notice informed DePalo that he would be suspended from associating with any FINRA member firm in any capacity on March 28, 2016, unless, before then, he requested a hearing or complied with the outstanding requests. The Notice further informed DePalo that any hearing request must "state with specificity any and all defenses." The Notice also advised DePalo that if he failed to request termination of the suspension within three (3) months of the date of the letter, he would automatically be barred from associating with any FINRA member in any capacity. Enforcement sent the Notice to Moskowitz.

E. DePalo Requests a Hearing and Asserts as a Defense That He Relied on Advice from His Psychiatrist

DePalo timely requested a hearing on March 24, 2016, thereby staying his suspension.⁵⁴ In his hearing request, DePalo raised one defense-that his failure to appear for testimony in response to the two FINRA Rule 8210 requests was justified because his psychiatrist advised him that his mental and medical condition would be compromised if he was forced to testify. DePalo subsequently confirmed that his sole asserted defense was that he reasonably and in good faith relied on the advice of his psychiatrist and that advice was the reason he did not appear for testimony.⁵⁵ Thus, DePalo is asserting a defense based on Dr. Hapworth's advice, not on his actual medical and mental condition.

III. The Hearing

By letter dated April 28, 2016, Enforcement requested pursuant to FINRA Rule 8210 that DePalo appear as a witness at the hearing. On May 4, 2016, DePalo moved to quash the request, arguing that his decision not to appear was justified because it was based on advice from Dr. Hapworth. The Hearing Officer denied DePalo's motion on May 6, 2016.

⁵³ JX-12.

⁵⁴ Rule 9552(e) provides that a person served with notice of a failure to provide requested information under Rule 9552(a) may file with the Office of Hearing Officers a written request for a hearing. A timely hearing request stays the suspension referenced in the notice unless the Hearing Officer orders otherwise. *See* Rules 9552(d) and 9559(c)(1).

⁵⁵ Tr. of April 13, 2015 Pre-Hearing Conference, at 5-6.

The hearing was held on May 11, 2016, in New York. Dr. Hapworth testified on behalf of Respondent. Dr. Goldstein and a FINRA case manager testified on behalf of Enforcement. DePalo did not appear at the hearing and did not submit any affidavits, declarations, or other statements.⁵⁶

IV. Discussion

A. The Applicable Law

Enforcement requested testimony from DePalo in accordance with FINRA Rule 8210.⁵⁷ Rule 8210(a)(1) authorizes FINRA staff, with respect to any matter involved in an investigation, complaint, examination or proceeding, to require a person subject to FINRA's jurisdiction to testify at a location specified by the staff, under oath or affirmation. Rule 8210(c) also provides, "No member or person shall fail to provide information or testimony ... pursuant to this Rule." This requirement is "unequivocal" and "unqualified," and compliance is mandatory.⁵⁸

The importance of Rule 8210 is paramount.⁵⁹ According to the SEC, Rule 8210 "is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct."⁶⁰ Thus, the SEC considers Rule 8210 "essential to FINRA's ability to investigate possible misconduct by its members and associated persons."⁶¹ This is especially true given that FINRA lacks subpoena power.⁶² As a

⁵⁹ Lundgren, 2016 FINRA Discip. LEXIS 2, at *13.

⁵⁶ The Hearing Panel did not draw any adverse inferences based on DePalo's failure to appear.

⁵⁷ Respondent has not disputed that each of the requests for testimony, including the sixth request, was issued pursuant to FINRA Rule 8210.

⁵⁸ Dep't of Enforcement v. Lundgren, No. FPI150009, 2016 FINRA Discip. LEXIS 2, at *13 (NAC Feb. 18, 2016). See also CMG Inst. Trading, LLC, No. 2008012026601, 2010 FINRA Discip. LEXIS 22, at *12-13 (NAC Oct. 7, 2010) (holding that firms and associated persons must cooperate fully in providing requested information). See also Blair C. Mielke, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *54 (Sept. 24, 2015) (quoting Howard Brett Berger, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), aff'd, 347 F. App'x 692 (2d Cir. 2009)) (holding that "the language of Rule 8210 is 'unequivocal' regarding an associated person's responsibility to cooperate with FINRA information requests.").

⁶⁰ *Mielke*, 2015 SEC LEXIS 3927, at *55 n.46; *see also Dep't of Enforcement v. Jarkas*, No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46 (NAC Oct. 5, 2015), *aff'd*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285 (Apr. 1, 2016) ("Rule 8210 is the primary means by which FINRA investigators obtain the information necessary to conduct investigations and determine compliance with FINRA rules.").

⁶¹ *Mielke*, 2015 SEC LEXIS 3927, at *54.

⁶² See Charles C. Fawcett, IV, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007).

result, failing to provide information "frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."⁶³

It is not at all clear that DePalo's asserted defense of reliance on the advice of his psychiatrist is legally valid. DePalo has cited no decision upholding the assertion of this defense in a FINRA, NASD, or NYSE proceeding. Citing precedent establishing that reliance on counsel is not a legally valid defense, Enforcement argues that reliance on a psychiatrist can never be a legally valid defense to a charge that an associated person violated Rule 8210.⁶⁴

B. DePalo's Refusal to Authorize Dr. Hapworth to Talk with Enforcement and to Submit to Examination By Dr. Goldstein

In recognizing that "there will be situations in which a self-regulatory organization ("SRO") appropriately should postpone an on-the-record interview because the individual adequately establishes that he or she is unable to testify," the SEC stressed that the individual "had the burden of demonstrating to [Enforcement] that his condition rendered him unable to comply and, accordingly, that his interview should be postponed."⁶⁵

DePalo did not meet this burden in connection with the fifth and sixth requests for testimony. Before Enforcement issued its sixth request for testimony, DePalo had twice refused requests by Enforcement that he authorize Dr. Hapworth to talk to Enforcement. Accordingly, in its sixth request, Enforcement provided DePalo the option, in lieu of testifying, of appearing for a psychiatric examination by Dr. Robert Goldstein, an experienced forensic psychiatrist. DePalo refused to appear for either testimony or the psychiatric examination.

DePalo makes three arguments why the Hearing Panel should find that he made the required demonstration to Enforcement even though he refused to authorize Dr. Hapworth to talk to Enforcement and refused to submit to a psychiatric examination by Dr. Goldstein. The Hearing Panel rejects these arguments.

First, DePalo argues that Moskowitz asked Enforcement to cite authority that FINRA Rule 8210 required DePalo to submit to the examination and Enforcement did not cite such authority. However, it was not the obligation of Enforcement to cite authority to Moskowitz.

⁶³ Lundgren, 2016 FINRA Discip. LEXIS 2, at *14 (citation omitted).

⁶⁴ Dep't of Enforcement's Mot. to Strike Resp't's Affirmative Defense and to Preclude Resp't From Offering a New Affirmative Defense or Alternatively to Reconsider Enforcement's Req. to Compel a Psychiatric Examination, at 8-9 (citing *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3 (NASD Feb. 25, 2014), at *16 ("While reasonable reliance on competent legal advice can be mitigating for purposes of assessing sanctions, a respondent's reliance on an attorney's legal advice 'is immaterial to an associated person's obligation to supply requested information' to FINRA.") (quoting *Michael Markowski*, 51 S.E.C. 553, 557 (1993))).

⁶⁵ Louis F. Albanese, 53 S.E.C. 294, 298-99, 301 (1997).

Rather, it was DePalo's obligation to demonstrate to Enforcement that his mental condition justified his failure to appear in response to Enforcement's Rule 8210 Request.⁶⁶

Second, DePalo argues that the examination would have been unduly intrusive. However, DePalo offered no evidence to support this argument. Dr. Goldstein is highly credentialed and has extensive experience treating patients with PTSD.⁶⁷ Dr. Hapworth testified that he did not discuss with DePalo whether it would be appropriate for him to submit to an examination by a psychiatrist selected by FINRA,⁶⁸ and DePalo offered no evidence that he attempted to ascertain the nature and scope of the examination before refusing to submit. In addition, DePalo offered the Hearing Panel no evidence regarding either the questions Dr. Goldstein would have posed or the procedures that he would have been performed.⁶⁹

Third, DePalo argues that the October 20 letter from Dr. Hapworth satisfied DePalo's burden of demonstrating to Enforcement that DePalo was unable to comply with the Rule 8210 request. However, Enforcement has discretion in assessing the evidence necessary to meet this burden. Here, Enforcement could reasonably have had questions about DePalo's mental condition after receiving Dr. Hapworth's letters. Dr. Hapworth's October 20 letter states that in June 2015 DePalo "was suffering from all the classic symptoms of ASD (Acute Stress Disorder)" and warned that "the possibility of him slipping into PTSD (Post Traumatic Stress Disorder) needs to be guarded against over the next year," but it did not clearly state what mental disorder, if any, DePalo was suffering when Dr. Hapworth wrote the letter.⁷⁰ The Diagnostic and Statistical Manual of Mental Disorders (5th Edition) ("DSM-5"), an authoritative work on the diagnosis of mental disorders, states that "[t]he essential feature of [ASD] is the development of characteristic symptoms lasting from 3 days to 1 month following exposure to one or more traumatic events."⁷¹ By October 20, 2015, more than four months had elapsed since DePalo's incarceration at Rikers in May and early June 2015. Thus, to the extent that Dr. Hapworth was implying in his letters that DePalo was currently suffering from ASD, his diagnosis was arguably inconsistent with DSM-5.72

⁶⁷ Tr. 128-33.

⁶⁸ Tr. 122.

⁶⁹ DePalo does not contend that submitting to the requested examination would have posed any risk to his mental health. Indeed, Dr. Hapworth testified that DePalo never asked him whether submitting to an examination by a psychiatrist selected by Enforcement would pose any risks to DePalo's mental health. Tr. 122.

⁷⁰ JX-8.

⁷¹ CX-14, at 13; Tr. 143.

⁷² Tr. 143-47. In fact, Dr. Hapworth testified at the hearing that in October 2015, his diagnosis of DePalo was that he was suffering from PTSD. Tr. 101. However, by warning in the letter that "[t]he possibility of [DePalo] slipping into PTSD (Post Traumatic Stress Disorder) needs to be guarded against," the letter clearly implied that, in Dr. Hapworth's opinion, DePalo was not yet suffering from PTSD in October 2015. JX-8.

⁶⁶ Albanese, 53 S.E.C. at 300-01.

Moreover, some psychiatrists have the view that being subjected to stress unrelated to the traumatic event would not affect a person with PTSD "more than the average person is influenced by stress in [his] life."⁷³ Under this view, DePalo's testifying on the record would not have a close enough relationship to the traumatic events that Dr. Hapworth believed triggered DePalo's ASD and PTSD to serve as a trigger for additional emotional distress; Dr. Goldstein testified at the hearing that DePalo's testifying at a FINRA interview was "so far removed" from the trauma that supposedly caused DePalo's ASD and PTSD that the interview could not serve as a "trigger" to a "reaction of psychological distress."⁷⁴

Furthermore, it would have been reasonable for Enforcement to want to talk to Dr. Hapworth to ensure that his opinion regarding the risk that FINRA testimony posed to DePalo's mental health was based on a full and accurate understanding of potentially relevant facts. For example, Enforcement reasonably could have attempted to determine whether Dr. Hapworth was aware of: (1) differences between the focus of the FINRA's 2015 Investigation and the focus of the New York State indictment and the SEC enforcement action; (2) accommodations that Enforcement could provide to mitigate the risks posed to DePalo's mental health; and (3) information regarding other activities in which DePalo was engaged (*e.g.*, work, participation in the defense of the criminal and SEC enforcement proceedings).

In addition, Dr. Hapworth's letter was conclusory. While Dr. Hapworth's letter cautioned that testifying "would place [DePalo's] fragile recovery in jeopardy," the letter did not state with a reasonable degree of medical certainty that DePalo's testifying would have a significant adverse impact on his mental condition.

In sum, DePalo failed to satisfy his burden of demonstrating to Enforcement that his condition rendered him unable to comply with the fifth and sixth requests for testimony and, accordingly, that his interview should be postponed. DePalo repeatedly blocked Enforcement's efforts to assess whether his mental condition prevented him from testifying. DePalo cannot block these efforts and then rely on his asserted defense.

C. DePalo's Failure to Establish That He Relied on the Advice Given by Dr. Hapworth

To establish a defense based on reliance on advice provided by a professional, a respondent must—at a minimum—establish: (1) a request to the professional for advice, (2) full disclosure to the professional of the relevant facts, (3) receipt of advice from the professional,

⁷³ Tr. 186. Dr. Hapworth's letter suggests that he shared this view to some extent. After referring to Acute Stress Disorder, Dr. Hapworth stated, "The danger with Acute Stress Disorder is that continued exposure *to the circumstances that have precipitated this reaction* can lead to a more chronic form of the disorder called PTSD" JX-2, at 4 (emphasis added).

⁷⁴ Tr. 153-54.

and (4) reliance in good faith on the professional's advice.⁷⁵ Assuming for the purpose of argument that there might be circumstances in which reliance on a psychiatrist can be a valid defense to a failure to appear in response to a Rule 8210 request, DePalo would have the burden of establishing not only that he acted consistently with Dr. Hapworth's advice not to appear for testimony but that he, in fact, relied on the advice.

Given that DePalo did not testify that he relied on Dr. Hapworth's advice in deciding not to appear in response to the fifth and sixth requests for testimony or submit any declaration or affidavit to this effect, it is difficult for DePalo to establish that he relied on Dr. Hapworth's advice in deciding not to appear for testimony.⁷⁶ Moreover, the record contains evidence that DePalo did not rely on Dr. Hapworth's advice. The letter from Moskowitz dated August 24 establishes that DePalo continued to work at least sporadically after Dr. Hapworth advised him to stop working.⁷⁷ DePalo has not established why he decided to continue working but not to testify even though Dr. Hapworth advised against both working and testifying. Specifically, DePalo has not established that his differing decisions resulted from a factor other than his wanting to continue working but his not wanting to testify before FINRA. Accordingly, the fact that DePalo only selectively followed Dr. Hapworth's advice undermines DePalo's position that Dr. Hapworth's advice was the reason he did not appear for testimony in response to the fifth and sixth requests for testimony.

DePalo makes three arguments in support of his position that he nevertheless met his burden of establishing that the advice that Dr. Hapworth provided was the reason that DePalo did not testify in response to the fifth and sixth requests for testimony. For the reasons set forth below, the Hearing Panel rejects these arguments.

First, DePalo argues that the record shows that he initially resisted Dr. Hapworth's advice. DePalo points to Dr. Hapworth's testimony that (1) he thinks his advice to DePalo forced DePalo "to take a look at what his vulnerabilities were in such circumstance" and (2) DePalo responded to the advice by saying that he needed to think about Dr. Hapworth's advice and understand his concerns.⁷⁸ The Hearing Panel finds that this testimony does not establish that DePalo resisted Dr. Hapworth's advice. DePalo has not established that he pushed back against Dr. Hapworth's advice by, for example, asking Dr. Hapworth to quantify the likelihood that testifying would harm his mental health, exploring whether there were accommodations that he could request from Enforcement to mitigate the risk posed by testifying, or explaining to Dr.

⁷⁸ Tr. 108-09.

⁷⁵ Byron G. Borgardt, 56 S.E.C. 999, 1022-23 (2003) (reliance on counsel).

⁷⁶ *SEC v. Mut. Benefits Corp.*, No. 04:CV60573, 2004 U.S. Dist. LEXIS 23008, at *74 & n.18 (S.D. Fla. Nov. 10, 2004) (noting that it would be difficult for individual defendants who did not testify to establish that they made full disclosure to the attorney and that they relied in good faith on the advice of the attorney).

⁷⁷ DePalo's resignation from his managerial positions at the Firm does not indicate reliance on Dr. Hapworth's advice because he resigned in May 2015, before he met Dr. Hapworth. Tr. 253-54.

Hapworth that failure to appear for testimony could result in his being barred from associating with broker-dealer firms.

Second, DePalo argues that Moskowitz's August 24 letter to Enforcement establishes that Dr. Hapworth's advice was the reason that DePalo did not appear for testimony in response to the Rule 8210 requests. Moskowitz stated in this letter:

Finally, please note that Mr. DePalo has always cooperated with FINRA and intends to continue to do so in the future. He looks forward to the time when he will be well enough to testify under oath, unhindered by medication and without jeopardizing his health.⁷⁹

The Hearing Panel views this paragraph as attorney advocacy, not a representation of fact. In addition, although the paragraph conveys an overall impression that DePalo plans to testify once his mental health recovers, neither sentence states that this is his intention. The first sentence is a vague statement that DePalo intends to continue cooperating with FINRA. The second sentence states that he hopes to become well enough to testify under oath, not that he intends to testify once he becomes well enough to do so. Moreover, Moskowitz does not set forth the factual basis, if any, for the statements in the paragraph, and Moskowitz opted not to testify at the hearing regarding the factual basis, if any, for his statements.

Third, DePalo argues that his decision to risk "a potential bar from the industry ... is powerful evidence of ... the degree of his reliance on Dr. Hapworth's expertise in giving informed medical advice."⁸⁰ DePalo did not provide the Hearing Panel with sufficient evidence to determine the extent, if any, to which his decision resulted from factors other than Dr. Hapworth's advice. For example, DePalo has not established that Dr. Hapworth's advice, rather than the pending criminal indictment or the SEC enforcement action, was the key factor in DePalo's deciding not to testify. Similarly, DePalo has not established that he was advised that his asserted defense was unlikely to be successful.

In sum, even if there might be circumstances where an associated person could assert reliance on the advice of a psychiatrist as a defense to a charge that the person violated FINRA Rule 8210, Respondent has not established the presence of those circumstances in this proceeding.

V. Sanctions

Rule 9559(n)(1) governs sanctions in this expedited proceeding. The Rule provides that the Hearing Panel "may approve, modify or withdraw any and all sanctions, requirements,

⁷⁹ JX-2.

⁸⁰ DePalo's Post-Hearing Submission dated June 3, 2016, at 7.

restrictions or limitations imposed by the notice and ... may also impose any other fitting sanction."

FINRA's Sanction Guidelines ("Guidelines") recommend that, if an individual did not respond in any manner to requests made pursuant to Rule 8210, a bar should be standard.⁸¹ The Guidelines further provide that where an individual provided a partial but incomplete response, a bar is standard unless the person can demonstrate that the information provided substantially complied with all aspects of the request.⁸² Additionally, the Guidelines set forth three Principal Considerations in Determining Sanctions for a Partial but Incomplete Response: (1) the importance of the information requested but not provided (as viewed from FINRA's perspective), and whether the information provided was relevant and responsive to the request; (2) the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response; and (3) whether the respondent thoroughly explained valid reason(s) for deficiencies in the response.⁸³

Enforcement recommends that DePalo be barred from associating with any FINRA member firm in any capacity. Enforcement argues that a bar is the standard sanction for failing to appear, there are no mitigating circumstances, and DePalo failed to work with FINRA staff in a cooperative spirit to resolve the issues relating to the requests that he appear for testimony.

DePalo provided a partial response to Enforcement's two requests for documents and information. Therefore, the Hearing Panel applies the Guidelines for a partial failure to respond in determining the appropriate sanctions in this proceeding. DePalo has not demonstrated that he substantially complied with all aspects of the Rule 8210 requests. DePalo's failures to respond to the fifth and sixth requests for testimony significantly impeded Enforcement's 2015 Investigation. The 2015 Investigation focused on the Firm's activities, including whether customer investments in private placements had been diverted from the issuer to DePalo or entities that he owned or with which he was affiliated.

The information that DePalo provided in response to Enforcement's August 6 and September 3 requests for information and documents were responsive, but related to DePalo's claims regarding his medical and mental condition and therefore were of little, if any, relevance to whether DePalo and others had committed the potential violations being investigated. The potential violations being investigated were very serious. Given Enforcement's understanding of DePalo's role at the Firm and in the private placements, the information sought from DePalo was very important from Enforcement's perspective. Enforcement repeatedly asked DePalo to appear for testimony, and DePalo did not comply with any of the requests.

⁸³ Id.

⁸¹ FINRA Sanction Guidelines at 33 (2015), http://www.finra.org/industry/sanction-guidelines.

⁸² Id.

DePalo argues that a bar is inappropriate because he cooperated with the FINRA staff by providing the letters from Dr. Hapworth and acted reasonably in following Dr. Hapworth's advice not to testify before FINRA. However, DePalo did not cooperate with Enforcement, refusing both to authorize the FINRA staff to talk with Dr. Hapworth and to submit to the psychiatric examination after providing only a limited response to the two requests for documents and information. In addition, although DePalo's decision not to appear for testimony was consistent with Dr. Hapworth's advice, DePalo has not established that Dr. Hapworth's advice was the reason he did not comply with Enforcement's requests that he appear for testimony.

After careful consideration, the Hearing Panel concludes that the appropriate sanction is to bar DePalo from associating with any FINRA member firm in any capacity.

VI. Order

Respondent Robert P. DePalo is barred from associating with any FINRA member firm in any capacity for failing to provide testimony requested pursuant to Rule 8210. DePalo is also ordered to pay costs in the amount of \$3,336.41, which includes a \$750 administrative fee and the cost of the hearing transcript. The costs shall be payable on a date set by FINRA. DePalo's bar shall be effective upon service of this Decision.⁸⁴

Kenneth Winer Hearing Officer For the Hearing Panel

⁸⁴ Rule 9559(n)(4) permits the Hearing Panel to impose costs. The Hearing Panel has considered and rejects without discussion all other arguments made by DePalo.