BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Jason Lynn DiPaola

For Review of Disciplinary Action Taken by

FINRA

Administrative Proceeding No. 3-21402

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

From March 2015 to March 2017, Jason Lynn DiPaola exercised discretionary authority in his mother's E*Trade account—placing or canceling thousands of orders in the account during this period—without disclosing the account to his employer firm or his associated status to E*Trade. DiPaola's disclosure failure undermined his firm's ability to effectively monitor and address potential improper trading. DiPaola's failure to disclose the account was compounded by the risk that DiPaola's trading created a conflict of interest because DiPaola frequently traded securities of issuers with whom both he and his member firm had relationships. Moreover, to conceal his misconduct, DiPaola repeatedly made false statements about his involvement in his mother's account to both his firm and FINRA staff.

In addition, DiPaola thwarted FINRA's ability to investigate his misconduct, including the possibility that he had violated federal securities laws, by refusing to testify at an on-the-record interview pursuant to FINRA Rule 8210. The testimony sought from DiPaola was integral to FINRA's investigation. In previous on-the-record interviews, DiPaola repeatedly provided inaccurate or misleading statements about his level of involvement in his mother's account and his relationship to one of the issuers whose stock he frequently traded. He also

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accused staff of "cherry picking" trades to fit their desired narrative without providing relevant market information that would enable him to give more informed answers to their questions. After performing additional analysis to assess the veracity of statements DiPaola had made and the underlying context for DiPaola's trading activity, FINRA staff had heightened concerns that DiPaola had engaged in market manipulation and insider trading and sent another FINRA Rule 8210 request to ask DiPaola about his conduct. DiPaola, however, refused to testify, wrongly claiming that FINRA lacked authority to issue a Rule 8210 request because it had already issued a Wells Notice. FINRA was therefore unable to fully investigate DiPaola's potential engagement in market manipulation or insider trading.

Based upon these facts, FINRA's National Adjudicatory Council ("NAC") found that DiPaola exercised discretionary authority in his mother's brokerage account, which was held outside his firm, without notifying his member firm or the executing member, in violation of NASD Rule 3050(c) and FINRA Rule 2010. The NAC also found that DiPaola's failure to list his mother's account on his firm's compliance questionnaires rendered the forms false and misleading. Finally, the NAC found that DiPaola's refusal to provide on-the-record testimony violated FINRA Rules 8210 and 2010. The NAC imposed a unitary two-year suspension in all capacities and a $25,000 fine for DiPaola's failure to disclose the outside account or list it on his company's compliance questionnaires. It imposed a consecutive two-year suspension and an additional $15,000 fine for his refusal to provide on-the-record testimony. The record supports the NAC's findings of violation and the sanctions it imposed, and the Commission should affirm both.

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II. FACTUAL BACKGROUND

A. DiPaola's Background

DiPaola entered the securities industry in August 1995. RP 353.[1] From May 2013 to May 2019, he was registered as a general securities representative with Chardan Capital Markets LLC ("Chardan"). RP 353-54. DiPaola worked in a division of Chardan called the Special Equities Group, where he held the title of Senior Vice President – Institutional Sales and Trading. RP 618-621. In that role, he was responsible for meeting with executives of publicly traded companies to determine whether those companies might be suitable investments for Chardan's institutional customers. RP 629. One of the companies DiPaola introduced to Chardan was Advanced Medical Isotope Corporation ("AMIC"), a medical development company. RP 632, 1491. DiPaola had maintained an ongoing relationship with AMIC since 2012 or 2013. RP 1599-1600, 1602-03. In October 2016, Chardan and AMIC entered into an agreement for Chardan to provide investor relations support to AMIC. RP 654-56, 2391-98.

On May 7, 2019, Chardan filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") shortly after DiPaola's resignation. RP 1379-1385. DiPaola is not currently associated with a FINRA member firm.

B. DiPaola's Trading Activity

While associated with Chardan, DiPaola actively traded securities in personal brokerage accounts held outside Chardan, including E*Trade accounts. RP 657. Among the stocks DiPaola traded were those of issuers with whom Chardan had engagements. RP 683-85. One of the stocks DiPaola traded frequently in his E*Trade account was AMIC. RP 658-660.

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[1] "RP" refers to the record page in the certified record. "Br." refers to the brief that DiPaola filed with the Commission on August 29, 2023.

C. DiPaola's Mother's E*Trade Account

In 2013, DiPaola's mother inherited a brokerage account at a full-service brokerage firm. RP 1186-87, 1231. DiPaola recommended his mother invest the money in an E*Trade account and helped her open the account because she did not own a computer. RP 1231-32. DiPaola had the username and password for the account but did not have written discretionary authority over the account. RP 676, 729.

DiPaola acknowledged that his mother was not an experienced investor. RP 678. Prior to opening the E*Trade account, DiPaola's mother traded about four times per year. RP 1199-1200. DiPaola's mother asked for DiPaola's help making investment decisions because he was knowledgeable about securities and she trusted him. RP 678, 1197. She gave DiPaola permission to log into her account and place orders, and she told him to trade in her account as he would trade in his own. RP 1200-01.

DiPaola and his mother spoke almost every morning, and DiPaola claimed that, during these calls, they would discuss which stocks to trade in her account. RP 700. DiPaola's mother testified that DiPaola would advise her of the trades he was considering, she would say "fine," and he would place the order. RP 1191. However, there were days when DiPaola traded in his mother's account without obtaining her approval. For example, DiPaola testified that there were instances in which he discussed a proposed trade with his mother the day before the trading took place. RP 732-35. He also would continue to buy a particular stock for a few days after speaking with her if necessary to fulfill a particular order. RP 735-36. On days that DiPaola both bought and sold a particular stock, DiPaola would explain to his mother that the trades would be short in duration, but he did not call her prior to placing the sell order. RP 706-711. DiPaola's mother was comfortable with DiPaola trading in her account in response to movement

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in the market and stated that she did not want to "lose her shirt just because he couldn't make a phone call." RP 1212. When DiPaola's mother needed money, she sometimes relied on DiPaola to determine which stocks she should sell. RP 724-25.

Although DiPaola testified at the hearing that his mother independently researched the stocks traded in her account, this testimony contradicted testimony he provided in an on-the-record interview in which he stated that his mother did not perform her own research. RP 678, 1556. DiPaola's mother's testimony at the hearing did not reflect a strong understanding of the stocks in which she traded, or securities trading in general. While she could describe at a high level the products offered by two of the issuers of stocks she traded, she did not recall anything about the other stocks in which she had invested.[2] RP 1189-1190, 1207. She had "no idea about a limit order" "or any kind of order." RP 1205-06. She testified that the substance of their discussions about trading was generally related to the value of the stock at that time. RP 1206.

DiPaola does not dispute that, over the course of two years—March 2015 to March 2017—he placed or canceled 4,452 orders in his mother's account and executed 95% of the trades.[3] RP 746-47. While the trading that occurred in DiPaola's account and that of his mother's was generally similar, the trading records reflect that the activity in DiPaola's mother's E*Trade account did not always mirror that in his own. RP 1249. There were instances in which he placed a buy order for a security in his own account at or about the same time that he placed a

[2] DiPaola's mother recalled during the hearing that AMIC had developed a treatment for cancer that was showing promising results in testing on animals, and she knew that the issuer of a different stock she traded made a low dose nicotine cigarette. RP 1189-1190.

[3] DiPaola testified that E*Trade's platform automatically reflects the cancelation of an order when an account holder edits an order to set a new limit price. RP 698-99.

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sell order for the same security in his mother's account. For example, on June 12, 2015, at 10:38:38 a.m., DiPaola entered a limit order in his mother's account to sell 613,300 shares of AMIC stock at $0.00380 per share. RP 2730. Less than one minute later, at 10:39:13 a.m., DiPaola entered a limit order in his own account to buy 620,000 shares at the same price. RP 2730.

DiPaola also placed orders in his mother's account—which for several years was undisclosed to Chardan—for stocks that were on Chardan's restricted list but did not place corresponding orders in his own account.[4] For instance, on February 1, 2016, Chardan notified DiPaola's group that one of the stocks in which DiPaola traded in both his and his mother's accounts was on the watch list. RP 2459. Despite this warning, on February 3, 2016, DiPaola placed multiple buy orders for the restricted stock in his mother's account. RP 2876-77. He did not place similar orders in his own account. RP 2876-77.

D. DiPaola Failed to Disclose His Mother's E*Trade Account

Chardan's written supervisory procedures stated that employee and employee-related accounts—the definition of which included accounts of "any other related individual over whose account the person associated with the member has control"—were subject to review by the firm. RP 754. During the relevant period, DiPaola understood that, in accordance with these procedures, Chardan required him to disclose his mother's account if he had "control" over it.

[4] Firms issue restricted lists to make employees aware of "securities in which proprietary, employee and certain solicited customer transactions are restricted or prohibited" as a safeguard against conflicts of interests or rule violations by registered representatives. *NASD Notice to Members 91-45*, 1991 NASD LEXIS 60, at *5 (June 2021).

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RP 756-57. DiPaola did not, however, disclose to Chardan his mother's account or his activity therein until August 2017. RP 671.

Chardan also required DiPaola to complete an annual questionnaire that instructed him to disclose any accounts held outside the firm, including "any securities account in which [he] ha[d] a direct or indirect interest including a financial or fiduciary interest, or which [he] control[led]." RP 759, 4291, 4295. DiPaola completed the questionnaires for 2015 and 2016 in May 2016 and November 2016, respectively. RP 760, 765, 4291-93, 4295-97. He disclosed his own accounts on the questionnaires but did not disclose his mother's E*Trade account. RP 763, 765-66, 4291, 4295, 4306.

In August 2017, E*Trade contacted DiPaola's mother after observing that someone else was logging into her account. RP 673, 1566. When she explained that the individual logging into the account was her son, E*Trade advised her that DiPaola's access would be terminated unless she added him as a co-owner of the account. RP 673-74. At that time, DiPaola finally advised Chardan that his mother was adding him to her account, purportedly for estate planning purposes, but did not disclose his previous involvement in the account. RP 675, 2500. He also at that time advised E*Trade of his status as an associated person at Chardan. RP 4317-4326.

E. FINRA Initiates Investigation into DiPaola's Trading in Outside Accounts

In the summer of 2017, FINRA engaged in a cycle examination of Chardan that focused, in part, on Chardan's supervisory procedures and controls over its brokers' personal outside trading accounts. RP 825-26. Based on the results of that examination, FINRA initiated an investigation into DiPaola's and his mother's E*Trade accounts. RP 825, 831.

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1. DiPaola's 2019 On-The-Record Interviews

As part of the investigation of this case, FINRA's Department of Enforcement ("Enforcement") took on-the-record testimony from DiPaola pursuant to FINRA Rule 8210 on three separate occasions, once in April 2019 and twice in July 2019. RP 1387-1662. The April 2019 interview was terminated early after the attorney serving as counsel for both DiPaola and Chardan advised that, based on information that came to light during the testimony, there was a potential conflict of interest in his representation of both DiPaola and the firm. RP 1525-26. Subsequently, on May 7, 2019, Chardan filed a Form U5 in which the firm stated that DiPaola had been permitted to resign on April 26, 2019, after he admitted that, for a period of time, he had traded securities in his mother's brokerage account at another FINRA member firm without obtaining written discretionary authority from his mother or disclosing the account to Chardan. RP 1379-1385. DiPaola obtained new counsel, and FINRA staff questioned him again over a two-day period in July 2019. RP 1533-1662.

During each of the three on-the-record interviews, Enforcement questioned DiPaola regarding his relationship with AMIC, his level of involvement in his mother's account, and specific trading patterns staff had observed, such as placing multiple limit orders in a single day, trading on opposite sides of the market, and trading at market close. DiPaola's testimony evolved over the course of the three interviews, and, at times, DiPaola stated that he could not answer Enforcement's questions without additional information.

a. DiPaola's Changing Testimony Regarding His Involvement in His Mother's Account

DiPaola's description of his involvement in his mother's account changed over the course of the on-the-record interviews. In April 2019, in response to questioning about whether he had ever traded a particular stock in another person's account, he initially answered, "I don't know

what other accounts I would be trading for." RP 1492. After further questioning, DiPaola stated that "maybe" he had traded in his mother's account, but he "d[id]n't know." RP 1492. Enforcement then asked DiPaola directly whether he had traded in his mother's account, and DiPaola replied that it was "a joint account, so [he] trade[d] in that account on her behalf." RP 1493. When asked whether he traded in the account before it was a joint account, he initially replied, "[n]o." RP 1493. He said that before he became a co-owner of the account, he would tell his mother about the trading he was doing, and she would replicate that on her own. RP 1493. After Enforcement reminded him that he was under oath, however, he stated that he "might have entered an order for her before." RP 1493-94. He then admitted that he had done so "on more than one occasion," but it was his belief that the fact that he "entered an order or two" did not require him to disclose the account to Chardan. RP 1495, 1518. Although, as discussed above, his mother added DiPaola to her account so that E*Trade would not terminate his access, DiPaola told Enforcement at the April 2019 interview that his mother added him to the account so that he could be more "hands on" due to her lack of investment expertise. RP 1507.

In the July interviews, DiPaola conceded that he was added as a co-owner only after E*Trade notified his mother that someone else had been logging into her account. RP 1566-67. He also admitted that he probably made "at least half" of the trades that occurred in the account during the relevant period.[5] RP 1633. DiPaola also said in the July interviews that, to his knowledge, his mother was not doing any research regarding the stocks in which she invested, in

[5] As noted above, DiPaola acknowledged at the hearing that he had in fact been responsible for approximately 95% of the trading in the account, which is a far cry from entering "an order or two" in his mother's account.

direct contradiction of his hearing testimony that his mother independently researched the stocks traded in her account. RP 1556.

b. DiPaola Did Not Answer Questions About Specific Transactions

As part of its inquiry, Enforcement asked DiPaola about specific trades he had made during the relevant period. DiPaola, however, could only speculate as to the circumstances associated with the trades, and, on at least four occasions, DiPaola stated that he was unable to answer questions based on "data in a vacuum" or suggested that Enforcement was "cherry picking" and discussing transactions out of context. RP 1634-35, 1644. For example, in the first July 2019 on-the-record interview, Enforcement asked DiPaola about two May 9, 2016 buy orders for 10,000 shares of AMIC stock at a price of 48 cents that took place at 3:57 p.m. and 3:59 p.m., minutes before the market's close. RP 1634. DiPaola stated that he did not remember the circumstances of those trades, although he theorized that he had been purchasing stock for the last half hour of the day and was repeatedly entering orders. RP 1634-35. He then accused the investigators of "try[ing] to twist things" using "cherry picked data." RP 1635.

In another instance, Enforcement asked DiPaola to explain buy and sell orders that he placed within a minute of each other on June 12, 2015, in his and his mother's accounts, respectively. RP 1613-14. DiPaola said that he could not answer questions about that activity without "a videotape of the computer screen and the level two and what was happening in the market at the time," and that it was "impossible" to speculate based solely on trading records as to why he entered or canceled a particular order. RP 1613-14. Similarly, in the second July interview, when asked why, on June 5, 2015, shortly before the close of the market, he placed an order at a higher limit price than several orders executed minutes before, he said he could not

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explain his reasons for wanting to make the trade in question based on "data in a vacuum" "without seeing what happened that day." RP 1643-44.

c. DiPaola's Testimony Regarding His Relationship with AMIC

During DiPaola's 2019 on-the-record testimony, he also downplayed his relationship with AMIC. In his July interviews, he testified that he was introduced to the company in 2012 or 2013 through a friend, that they "ask[ed his] opinion[] from time to time," and that he invested in private placements of AMIC stock in a personal capacity and invited others to invest in the private placements as well. RP 1598-1600. He said that he communicated with AMIC's CEO when AMIC needed funding but did not recall discussing the price of AMIC's stock with him. RP 1602-04. As described below, DiPaola's involvement with AMIC was more extensive than he portrayed.

2. FINRA Staff's Investigation Following DiPaola's On-The-Record Testimony Led to Additional Questions for DiPaola

Prior to the 2019 on-the-record interviews, as part of its investigation into DiPaola's conduct, FINRA staff received more than one million electronic communications from Chardan. RP 1085-86. It was not possible for FINRA staff to review every document in preparation for the 2019 interviews. RP 870-71. FINRA staff therefore performed a more targeted review of the electronic communications provided by Chardan following DiPaola's 2019 on-the-record testimony. RP 856-57. In response to DiPaola's admission that he frequently traded on his mother's behalf, as well as his accusations of "cherry picking," staff also performed a more in-depth analysis of the trading activity in both DiPaola's and his mother's accounts. RP 911-12, 929-30.

FINRA staff testified that this follow-up review led them to question the veracity of some of DiPaola's previous testimony. RP 909-910. Investigators observed frequent communications

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between DiPaola and associates of AMIC, including the company's CEO and an investor relations company AMIC hired to publish opinion pieces that would attract investors to AMIC. RP 857, 883-84. Staff also observed that, prior to AMIC's engagement of Chardan, DiPaola had developed and shared with AMIC associates a "strategic plan" he had developed for AMIC in which he detailed steps the company should follow to increase its stock price. RP 857, 877, 2461-64. In addition, staff testified that, after the 2019 on-the-record interviews, they learned that the share price of AMIC's stock had appreciated in April 2016 and that the price shift coincided with "a number of liquidations and millions of shares" in both DiPaola's and his mother's accounts. RP 927-28.

These observations generated concerns among FINRA staff that DiPaola was potentially involved in insider trading and market manipulation. RP 857-58, 915-16, 926-28, 1157. FINRA staff therefore wanted to further question DiPaola about his trading of AMIC stock, including questions relating to the timing and amounts of the trades in both his and his mother's accounts relative to their substantial cumulative position in the stock. RP 858-59, 1167-1170. Staff also wanted to inquire about the relationship between specific trades DiPaola made and certain communications between DiPaola and individuals associated with AMIC. RP 858-59.

FINRA staff further testified that the additional analysis they performed of DiPaola's trading activity would have enabled them to provide more context when questioning DiPaola about specific trades, such as instances in which he had placed buy orders in his own account, while placing corresponding sell orders in his mother's account. RP 929-930.

3. DiPaola Refused to Testify in a 2021 On-The-Record Interview

Because staff had additional questions after their follow-up investigation, on March 11, 2021, FINRA sent DiPaola a letter, through counsel, requesting that DiPaola appear on March

26, 2021, and provide testimony pursuant to FINRA Rule 8210. RP 6137-39. The letter stated that FINRA Rule 8210 required DiPaola to "answer the staff's questions and to answer them truthfully." RP 6138. The letter warned DiPaola that failure to comply with the request "could be the basis for the initiation of a disciplinary proceeding that could lead to the imposition of sanctions, including a bar from the industry, suspension, censure and/or fine." RP 6138.

On March 16, 2021, DiPaola's counsel asked whether the interview would be a "rehash" of previously covered testimony. RP 6148. Enforcement responded that they were not "looking to rehash," and would "ask questions as to facts [they had] not covered, largely relating to [AMIC stock] and Mr. DiPaola's trading in that security." RP 6147. On March 19, 2021, DiPaola's counsel advised that DiPaola was not available on the requested date and that counsel was in the process of obtaining alternative dates for the interview. RP 6147. In response, Enforcement offered three additional dates in late March and early April. RP 6147. Counsel, however, replied that he was unavailable on those dates, and stated that he would provide some dates later in April. RP 6146. On March 24, 2021, Enforcement requested dates in early April, noting that if counsel did not provide dates that worked, Enforcement would have to issue a notice setting a new date. RP 6145. Counsel replied that he would respond at a later date. RP 6151.

On March 26, 2021, FINRA staff sent DiPaola, through counsel, a second letter pursuant to FINRA Rule 8210, requesting that DiPaola appear and provide testimony on April 5, 2021. RP 6157-58. The letter again warned DiPaola that his failure to answer questions could subject him to a FINRA disciplinary action and the imposition of sanctions, including a bar. RP 6157. On the same day, FINRA staff also sent DiPaola, through his counsel, a Wells Notice notifying DiPaola that he was "the subject of an investigation," and that Enforcement had made "a

preliminary determination" to recommend disciplinary action for: (1) manipulative trading and trading while in possession of material non-public information; (2) failing to disclose an outside brokerage account and status as an associated person; and (3) submitting false and misleading disclosure forms to Chardan. RP 6169-6170. The notice advised that the opportunity to respond to the violations under consideration by Enforcement did not "preclude Enforcement from ultimately recommending disciplinary action that may include different or additional charges." RP 6170.

Thereafter, DiPaola indicated that he would refuse to provide on-the-record testimony pursuant to FINRA's Rule 8210 request. On April 1, 2021, Enforcement sent an email to DiPaola's counsel asking for confirmation that DiPaola would appear for the April 5, 2021 on-the-record interview. RP 6171. DiPaola's counsel replied: "Are you serious? You served a Wells Notice, you cannot take another [on-the-record interview] after serving a Wells Notice. Does your supervisor know what you are doing?" RP 6178. DiPaola's counsel also requested the name of the Enforcement attorney's supervisor. RP 6177. During a subsequent phone call, the supervisor refused DiPaola's counsel's request that FINRA withdraw the Wells Notice. RP 6181. On April 2, 2021, following the phone call, DiPaola's counsel sent an email seeking confirmation that Enforcement did not intend to withdraw the Wells Notice pending DiPaola's on-the-record interview, and Enforcement so confirmed. RP 6181.

DiPaola did not appear for the on-the-record interview on April 5, 2021. RP 1663-68, 6189. FINRA staff then sent a third letter to DiPaola, through counsel, requesting DiPaola appear and provide testimony pursuant to FINRA Rule 8210 on April 15, 2021. RP 6189-6190. The letter included the same warning about the consequences should he fail to appear that was

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included in the March 26, 2021 letter. RP 6189. DiPaola did not appear for the April 15, 2021 interview. RP 1671-75.

III. PROCEDURAL HISTORY

Enforcement filed its three-cause complaint in May 2021. RP 1-24. The first cause alleged that DiPaola violated NASD Rule 3050(c) and FINRA Rule 2010 because he exercised discretionary authority in his mother's E*Trade account without disclosing the account to Chardan or his association with Chardan to E*Trade. RP 18-19. The second cause alleged that DiPaola violated FINRA Rule 2010 when he failed to disclose his mother's E*Trade account on Chardan's compliance questionnaires. RP 19-20. The third cause alleged that DiPaola's refusal to participate in the 2021 on-the-record interview violated FINRA Rules 8210 and 2010. RP 20-21.

A. Proceedings Before the FINRA Hearing Panel

In November 2021, a FINRA Hearing Panel held a hearing that included testimony from DiPaola, his mother, and FINRA staff. RP 565-1377. The Hearing Panel issued its decision on March 25, 2022. RP 6305-6340. The Hearing Panel found that DiPaola had violated FINRA's rules, as alleged in the complaint. RP 6306. For the first two causes, the Hearing Panel imposed a unitary $5,000 fine. RP 6339. For the third cause, the Hearing Panel imposed a 30-day suspension in all capacities. RP 6339. Enforcement appealed the Hearing Panel's decision to the NAC, and DiPaola cross-appealed. RP 6341-46.

B. Proceedings Before the NAC

The NAC's decision affirmed the Hearing Panel's findings of violation but increased the sanctions imposed. RP 6652-53. The NAC reviewed the record, including the relevant excerpts

from the transcripts of DiPaola's 2019 on-the-record interviews, and found DiPaola: (1) exercised discretionary authority in his mother's E*Trade account without disclosing the account to Chardan or his association with Chardan to E*Trade, in violation of NASD Rule 3050(c) and FINRA Rule 2010; (2) submitted false and misleading compliance questionnaires to Chardan through his omission of his mother's E*Trade account in violation of FINRA Rule 2010; and (3) violated FINRA Rule 8210 when he refused to participate in the 2021 on-the-record interview. RP 6635.

With respect to the first two causes, the NAC found that disclosure was required because there was sufficient evidence based on the testimony of DiPaola and his mother, as well as their trading records, that DiPaola both exercised discretionary authority over and controlled his mother's account. RP 6635-6641. With respect to the FINRA Rule 8210 violation, the NAC rejected DiPaola's argument that FINRA was not authorized to issue a request pursuant to FINRA Rule 8210 following the issuance of a Wells Notice. RP 6642-44.

The NAC increased the sanctions imposed on DiPaola, grounding its determination in factors in FINRA's Sanctions Guidelines ("Guidelines"). RP 6644. The NAC found several guideline-specific considerations and Principal Considerations in Determining Sanctions ("Principal Considerations") to be aggravating in its determination of sanctions for the two causes relating to DiPaola's failure to disclose his mother's E*Trade account. RP 6644-48. The NAC highlighted the risk DiPaola's trading presented of conflicts of interest given that Chardan was doing business with several of the issuers of stocks DiPaola traded, as well as DiPaola's repeated dishonesty, both to his firm and to FINRA, regarding his involvement in his mother's account. RP 6648. It also considered the regulatory objectives of NASD Rule 3050(c), noting that the rule is intended to curtail the risks posed by associated persons' unsupervised personal

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trading activities. RP 6647. Based on these factors, the NAC determined that DiPaola's misconduct was egregious. RP 6648. Accordingly, the NAC imposed a two-year suspension from associating with any FINRA member in any capacity and increased the fine imposed to $25,000. RP 6648.

In determining appropriate sanctions for DiPaola's FINRA Rule 8210 violation, the NAC applied the Guidelines for a partial but incomplete response to a Rule 8210 request based on DiPaola's participation in the on-the-record interviews conducted in 2019. RP 6648. The NAC found that the information FINRA sought was important and DiPaola's erroneous belief that he was not required to testify in 2021 due to the issuance of the Wells Notice did not constitute a valid explanation for his refusal to testify. RP 6651. The NAC rejected the Hearing Panel's determination that the issuance of a Wells Notice was an "implicit concession" on Enforcement's part that DiPaola's previous testimony had been "significantly, if not substantially, compliant" and concluded that the Hearing Panel had wrongly treated the Wells Notice as mitigating. RP 6649-6652. Rather, the NAC found that DiPaola's disregard of his obligation to appear for testimony may have contributed to Enforcement's ultimate determination not to allege market manipulation or insider trading in the complaint. RP 6650-51. The NAC therefore imposed a two-year suspension to run consecutive to the suspension imposed for the first two causes and a fine of $15,000. RP 6652-53. This appeal followed.

IV. ARGUMENT

The Commission should sustain FINRA's findings of liability and sanctions imposed. The record overwhelmingly supports the NAC's conclusion that DiPaola's failure to disclose his mother's account or his associated status, and, similarly, his failure to include the account on

Chardan's compliance questionnaires, violated FINRA rules. Moreover, the lengths to which DiPaola went to hide his wrongdoing, including misrepresenting his level of involvement in the account both to his employer and to FINRA, as well as the risk posed by DiPaola's trading in securities of issuers with whom both DiPaola and his employer had relationships, provide ample support for the sanctions the NAC imposed.

The NAC also correctly found that FINRA's issuance of a Wells Notice did not relieve DiPaola of his obligation to provide on-the-record testimony in response to FINRA's request pursuant to FINRA Rule 8210. DiPaola's willingness to flout his obligation to answer questions as part of FINRA's investigation based on his unsupported belief that FINRA lacked the authority to issue the request thwarted FINRA's investigation into potentially serious misconduct, and justified the two-year suspension and fine. As the NAC concluded, a serious sanction "appropriately remediates DiPaola's misconduct and discourages" future respondents from similarly "evad[ing] their FINRA Rule 8210 obligations." RP 6649, 6652.

The NAC's findings of liability are amply supported by the record, and the sanctions the NAC imposed in this case are appropriately remedial, reflect the gravity of DiPaola's conduct, and are neither excessive nor oppressive. The Commission accordingly should dismiss DiPaola's application for review.

A. DiPaola Exercised Discretionary Authority in His Mother's Account Without Disclosing the Account or His Associated Status

The NAC's findings that DiPaola exercised discretionary trading authority in his mother's account without disclosing the account or his associated status, and thus violated NASD Rule 3050(c) and FINRA Rule 2010, are amply supported. The record includes testimony from both DiPaola and his mother, as well as voluminous trading records, all of which reflect that DiPaola was responsible for the majority of the trades in his mother's account.

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DiPaola does not dispute that he failed to notify his employer or E*Trade of his involvement in his mother's account but argues instead that he was not required to make such disclosures because he never exercised discretionary authority in the account. Br. at 14-15. DiPaola's argument is without merit.

NASD Rule 3050(c) is an important safeguard that enables FINRA members to monitor the personal trading activities of their associated persons to prevent improper trading. NASD Rule 3050(c) prohibits associated persons of member firms from opening a securities account with another member without first notifying, in writing, both the employer member and the executing member of "his or her association with the other member." This rule applies to any account "in which an associated person has a financial interest or with respect to which such person has discretionary authority."[6] NASD Rule 3050(e).

Brokers exercise discretion when they make trades in a customer's account without first consulting the customer. *See, e.g.*, *Guang Lu*, 58 S.E.C. 43, 51, 53-55 (2005) (finding respondent exercised discretionary trading authority when he made all decisions regarding which options to buy and sell and changed the passwords on the customer's account). Even in instances in which the broker has communicated with the customer and discussed a general trading strategy, the broker exercises discretion if the broker and customer did not discuss the individual trades. *See Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *34-36 (Nov. 8, 2006) (finding that respondent exercised discretion where he

[6] FINRA Rule 3210, which replaced NASD Rule 3050, is similar to its predecessor although it does not reference discretionary authority. Supplementary material accompanying FINRA Rule 3210 clarifies that "the associated person shall be assumed to have a beneficial interest in, and to have established, any account that is held by . . . (c) any other related individual over whose account the associated person has control."

and the customer had discussed the "general strategy" of selling a particular stock when the price was high and buying it back when the price was lower), *aff'd*, 304 F. App'x 883 (D.C. Cir. 2008). A broker may exercise discretion as to the price or time of a trade for which the customer has directed the purchase or sale of a definite amount of a specific security without triggering certain obligations associated with discretionary trading; such discretion is only in effect, however, until the end of the business day on which the customer granted it. *See* NASD Rule 2510(d).[7]

The testimony DiPaola and his mother provided to the Hearing Panel established incontrovertibly that DiPaola exercised discretionary trading authority in his mother's account and should have disclosed it. DiPaola explained before the Hearing Panel that his mother did not own a computer and she therefore asked that DiPaola open an account on her behalf. RP 1231-32. DiPaola also stated that his mother was an inexperienced investor, and that, because he was a financial professional, she requested his help with her investments. RP 678. DiPaola's mother admitted that she deferred to his planned trading activity in her account without providing any specific instructions. RP 1191. She stated that she instructed him to trade in the account as he traded in his own. RP 1200-01. DiPaola admitted that he placed 95% of the trades in the account on her behalf. RP 747.

In sum, DiPaola's mother asked DiPaola to use his own judgement when trading in her account, and he did so. DiPaola maintains that he did not exercise discretionary trading authority

[7] NASD Rule 2510 (superseded by FINRA Rule 3260 on May 8, 2019) prohibited the exercise of discretionary power in a customer's account absent prior written authorization. While not directly applicable in this case, the rule and cases discussing violation of the rule provide useful guidance regarding what constitutes discretionary authority.

because he spoke to his mother daily and "she made all the buy and sell decisions in her own account." Br. at 16. His own testimony, however, contradicts this assertion. For example, DiPaola testified that his mother would rely on him to determine which stocks to sell when she needed money. RP 725. In addition, DiPaola testified that there were instances in which he would speak with his mother over the weekend about a particular trade and would subsequently carry out that trade over the next several business days, which precludes a finding of time and price discretion. RP 732-36. *See* FINRA Rule 3260(d);[8] *see also Michael Pino*, Exchange Act Release No. 74903, 2015 SEC LEXIS 1811, at *25 (May 7, 2015) (holding that time and price discretion did not apply because discretion was not granted on the same business day the transactions were executed). By his own account, then, DiPaola at times exercised discretionary authority in his mother's account, and he was therefore obligated to disclose the account and his associated status pursuant to NASD Rule 3050(c).

DiPaola's own admissions about trades he made without consulting his mother and trading records that demonstrated that DiPaola frequently executed dozens of orders a day in his mother's account establish that, at least in some instances, DiPaola engaged in discretionary trading authority triggering disclosure obligations. DiPaola argues on appeal that the nature of the trades he was making—specifically, that he was trading in illiquid stocks that required multiple orders to effectuate—somehow contradicts FINRA's determination that DiPaola

[8] Like NASD Rule 2510(d), FINRA Rule 3260(d) provides that authority to trade under time and price discretion is only in effect until the end of the business day on which the customer granted such discretion.

exercised discretionary trading authority in the account.[9] Br. at 15-16. His argument ignores evidence of trading activity that is not limited to that specific factual scenario, such as instances in which DiPaola decided which stocks to sell on his mother's behalf, as described above. It also attempts to ascribe to Rule 3050(c) an exception for illiquid stocks that does not exist. That DiPaola was unable to execute a trade in one day did not relieve him of his obligation to obtain approval for execution of the same trade on subsequent days. *See* NASD Rule 2510(d) (stating clearly that the exception for time and price discretion is "in effect only until the end of the business day on which the customer granted such discretion").

The NAC's finding that DiPaola exercised discretionary trading authority in his mother's account but failed to disclose the account or his associated status is well supported by the record, and the Commission should affirm DiPaola's violation of NASD Rule 3050(c) and FINRA Rule 2010.[10]

B. DiPaola's Failure to List His Mother's Account on Chardan's Compliance Forms Rendered the Forms False and Misleading

The Commission should also affirm the NAC's finding that DiPaola's failure to disclose his mother's account on two annual compliance questionnaires he completed while associated with Chardan violated the high standards of conduct required by FINRA Rule 2010. FINRA Rule 2010 requires that associated persons observe high standards of commercial honor and just

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[9] Even accepting DiPaola's argument that the number of trades he made in the account was exaggerated due to the stock's illiquidity, 4,452 orders over a two-year period still represents an extraordinary trading volume. DiPaola's claim that he did not exercise discretionary authority given this trading activity defies credulity.

[10] A violation of NASD Rule 3050 is a violation of FINRA Rule 2010, which provides that associated persons "in the conduct of [their] business, shall observe high standards of commercial honor and just and equitable principles of trade." *Lu*, 58 S.E.C. at 52.

and equitable principles of trade. An associated person's failure to disclose material information to his firm violates FINRA Rule 2010 and is misconduct that calls into question his "'ability to comply with regulatory requirements fundamental to the securities industry and the protection of the public.'" *Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *17 & n.10 (Feb. 24, 2012) (quoting *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22-23 (Aug. 22, 2008)). The evidence establishes that DiPaola exercised control over his mother's account and therefore he provided false statements on Chardan's 2015 and 2016 annual compliance questionnaires in violation of FINRA Rule 2010.

Chardan's annual compliance questionnaires required DiPaola to disclose "any securities account in which [he] ha[d] a direct or indirect interest including a financial or fiduciary interest, or which [he] control[led]."[11] RP 759, 4291, 4295. DiPaola again does not dispute that he did not disclose his mother's account on the firm's compliance questionnaires. He argues, however, that disclosure was not required because his mother "was in full control over her own account."[12] Br. at 14-15. For reasons similar to those discussed above with respect to DiPaola's NASD Rule 3050(c) violation, DiPaola's argument fails.

Control is established when the representative either has discretionary authority, or exercises de facto control, over an account. *See William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *32-33 (July 2, 2013) (observing that the element of control in

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[11] In his brief, DiPaola misstates Chardan's disclosure requirement, arguing that he was "only required to disclose his own accounts, that of his wife or children[,] or any other [account] he has a financial interest in." Br. at 15.

[12] DiPaola did not have a financial or fiduciary interest in his mother's account, so he was required to report the account only if he "controlled" it.

an excessive trading cause of action was satisfied where the representative exercised discretionary control over the account), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *Ralph Calabro*, Exchange Act Release No. 75076, 2015 SEC LEXIS 2175, at *13-14 (May 29, 2015) (in a churning case, defining the first element of control over the account in question as "control of the customer's account by the broker, either explicit or de facto").

As discussed above, DiPaola had discretionary authority over his mother's account. He also exercised de facto control over the account. De facto control exists when the customer routinely follows the broker's advice "because the customer is unable to evaluate the broker's recommendations and to exercise independent judgment." *Harry Gliksman*, 54 S.E.C. 471, 475 (1999), *aff'd sub nom.*, *Gallagher v. SEC*, 24 F. App'x 702 (9th Cir. 2001). Other factors used to determine whether de facto control exists include whether the customer "relied on [the representative] in determining the frequency and volume of transactions," whether the broker "dictated the strategy for the account," and whether the customer "deferred to [the representative] with respect to establishing (and altering) account strategy, selecting securities, and determining when and in what quantities to trade them." *See Calabro*, 2015 SEC LEXIS 2175, at *13-14.

Applying these factors, DiPaola clearly exercised de facto control over his mother's account, and, other than his unsupported claims that his mother "was 100% in control of her own account," DiPaola presented no evidence to the contrary. Br. at 14. DiPaola's mother was not an experienced investor. She testified that, prior to opening her E*Trade account, she traded approximately four times per year. RP 1199-1200. DiPaola executed almost all the trades in the account and employed a trading approach similar to that which he employed in his own account. RP 1200-1201, 1249. When DiPaola spoke with his mother to advise her of his planned trades,

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she replied "fine." RP 1191. While DiPaola stated during the hearing that his mother independently researched the stocks she traded (directly contradicting his previous on-the-record testimony), his mother did not provide any specific instructions on how DiPaola should place orders and her testimony demonstrated that her knowledge about trading, and the stocks in which she had invested, was limited. RP 678, 1189-1190, 1205-07, 1556.

The fact that DiPaola's mother did not object to the trades DiPaola made, and that she was aware of what was happening in her account, does not mean that there was not de facto control.[13] While proceedings involving de facto control may frequently involve fact patterns in which the representative conducted transactions without the customer's knowledge or against their wishes, those are not required elements of de facto control. As DiPaola unquestionably "dictated the strategy for [his mother's] account," and DiPaola's mother deferred to him with respect to which securities to purchase and when and in what quantities to trade them, the Commission should affirm the NAC's finding that DiPaola was required to disclose the account on Chardan's compliance questionnaires. *Calabro*, 2015 SEC LEXIS 2175, at *13-14. His failure to do so violated FINRA Rule 2010. *See Howard Braff*, Exchange Act Release No. 66467, 2012 SEC LEXIS 620, at *17 (Feb. 24, 2012) (finding that failure to disclose outside accounts on member firm's compliance questionnaires violates FINRA Rule 2010); *see also Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *39-41 (Mar. 27, 2017) (finding false statements on compliance questionnaire violated FINRA Rule 2010), *aff'd*, 733 F. App'x 571 (2d Cir. 2018).

[13] DiPaola does not make this argument explicitly in his brief but denounces Enforcement for "tell[ing his mother] that she was not in control of her own account, even though she made no complaint to FINRA." Br. at 15.

DiPaola exercised control over his mother's account, yet failed to disclose the account, as required, on two of Chardan's compliance questionnaires, rendering the questionnaires false and misleading. DiPaola's conduct was inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010. The Commission should affirm the NAC's finding of violation.

C. DiPaola's Failure to Respond to FINRA's Request for On-The-Record Testimony Violated FINRA Rules 8210 and 2010

The Commission should also affirm the NAC's finding that DiPaola's failure to respond to FINRA's request for on-the-record testimony violated FINRA Rules 8210 and 2010. DiPaola admits that he did not participate in the 2021 on-the-record interview but argues instead that FINRA's issuance of a Rule 8210 request after its issuance of a Wells Notice (and in the absence of a Wells Submission) constituted an "abusive . . . expansion of [FINRA's] regulatory processes." Br. at 3-4. Contrary to DiPaola's claim, FINRA's authority to request on-the-record testimony from DiPaola in April 2021 is clear, and there was no legitimate basis for DiPaola's refusal to attend the interview.

1. DiPaola Failed to Comply with FINRA's Rule 8210 Request

FINRA Rule 8210 authorizes FINRA, for the purpose of an investigation, to require associated persons to provide information and respond completely and truthfully to FINRA's information requests. Specifically, FINRA Rule 8210(a) requires associated persons to "provide information orally [or] in writing . . . and to testify at a location specified by FINRA staff . . . with respect to any matter involved in [a FINRA] investigation, complaint, examination, or proceeding." FINRA Rule 8210(c) states that "[n]o . . . person shall fail to provide information

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or testimony . . . pursuant to this rule."[14] FINRA Rule 8210 "is at the heart of the self-regulatory system for the securities industry." *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). An associated person's "failure to respond [to a Rule 8210 request] impedes [FINRA's] ability to detect misconduct that threatens investors and markets." *Id.* at *14.

A violation of FINRA Rule 8210 occurs when an associated person fails to fully and promptly cooperate with FINRA in response to a request for information. *See Brian L. Gibbons*, 52 S.E.C. 791, 794 n.11 (1996), *aff'd*, 112 F.3d 516 (9th Cir. 1997). "[A]ssociated persons may not ignore [FINRA] inquiries; nor take it upon themselves to determine whether information is material to an . . . investigation of their conduct." *CMG Inst. Trading*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (internal quotation marks and citations omitted). Rather, they have an obligation to respond fully to FINRA's inquiries. *See id*.

The material facts underlying the NAC's findings of violation are not in dispute. The record demonstrates that FINRA sent multiple requests to DiPaola to provide on-the-record testimony pursuant to FINRA Rule 8210 in March and April 2021. RP 6137-39, 6157-58, 6189-90. During this period, Enforcement issued a Wells Notice. RP 6169-6170. Thereafter, DiPaola, through counsel, indicated that he would not appear for on-the-record testimony based on a mistaken belief that FINRA did not have authority to issue a FINRA Rule 8210 request after issuing a Wells Notice. RP 6177-79, 6181. Contrary to Enforcement's request, DiPaola did not

[14] A violation of FINRA Rule 8210 constitutes a violation of FINRA Rule 2010. *See Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at *41 n.49 (Sept. 24, 2015).

appear for on-the-record testimony on either April 5, 2021, or April 15, 2021. RP 1663-67, 1671-75.

This unrebutted evidence therefore establishes that DiPaola violated FINRA Rule 8210. *See PAZ Secs., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008) ("The failure to respond to [FINRA] information requests frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). The Commission should affirm the NAC's findings of violation.

2. Issuance of a Wells Notice Does Not Preclude a Request Pursuant to FINRA Rule 8210

On appeal, DiPaola again cites FINRA's issuance of a Wells Notice, and the absence of a Wells Submission, as justification for his failure to respond to the FINRA Rule 8210 request. Br. at 6-7, 12-13. The NAC correctly found that this argument lacks merit.

There is no basis for concluding that FINRA's authority to issue a Rule 8210 request is limited—or in any way impacted—by a Wells Notice. The obligation to respond to a FINRA Rule 8210 request is unequivocal. *See Robert Juan Escobio*, Exchange Act Release 97701, 2023 SEC LEXIS 1532, at *18-19 (June 12, 2023). The plain language of the rule authorizes FINRA to require associated persons to testify with respect to "any matter involved in the investigation, complaint, examination, or proceeding," and specifically states that "[n]o person shall fail to provide information or testimony . . . pursuant to the rule." FINRA Rule 8210(a), (c). The rule contains no exception for circumstances in which a Wells Notice has been issued or the information sought was covered by previous Rule 8210 requests. Moreover, it contemplates Rule 8210 requests throughout the entirety of a proceeding, including in furtherance of a complaint. *See* FINRA Rule 8210(a).

Nor can such an exception be found outside of the rule. The term "Wells Notice" originated in 1972 from a committee chaired by former Senator John Wells that was appointed to review and evaluate the Commission's enforcement policies and practices. *FINRA Regulatory Notice 09-17*, 2009 FINRA LEXIS 45, at *6 n.2 (Mar. 2009). The committee recommended providing notice to prospective respondents of charges under consideration by the Commission. *Id.* While the Wells process is common practice, it is discretionary, and there is no requirement that FINRA issue a Wells Notice. *See id.* at *6. The stated purpose of the Wells Notice, according to FINRA Regulatory Notice 09-17, which provides guidance on FINRA's enforcement process, is to "give the potential respondent an opportunity to submit a writing, called a Wells Submission, which discusses the facts and applicable law and explains why formal charges are not appropriate." *Id.* The notice is a procedural safeguard for the respondent, not a constraint on FINRA's ability to continue gathering information related to the potential violations. Indeed, the Wells Notice issued to DiPaola specifically stated that Enforcement had made only a "preliminary determination" to bring disciplinary action and noted that the opportunity to respond did not "preclude Enforcement from ultimately recommending disciplinary action that may include different or additional charges." RP 6169-6170. It also requested the letter be treated as written notification that DiPaola was "the subject of an investigation." RP 6170.

Contrary to DiPaola's argument that the situation here is somehow unique, FINRA has previously issued Rule 8210 requests after issuing a Wells Notice. *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *33-36 (June 14, 2013) (finding a FINRA Rule 8210 violation for failure to appear after issuance of a Wells Notice); *Dep't of Enf't v. Legacy Trading Co.*, Complaint No. 2005000879302, 2010 FINRA Discip.

LEXIS 20, at *18 (FINRA NAC Oct. 8, 2010) (same). There is no regulation or other authority that precludes issuance of a Rule 8210 request after a Wells Notice. *Cf. SEC v. Sears*, No. 05-728-JE, 2005 U.S. Dist. LEXIS 44854, at *4-5 (D. Or. 2005) (rejecting defendants' argument that the SEC's investigation ended when the agency issued a Wells Notice and that the SEC therefore no longer had a valid basis to enforce investigative subpoenas).

Further, contrary to DiPaola's assertion, there is precedent for the issuance of a request for information following a Wells Notice in the absence of a Wells Submission. Indeed, in *SEC v. Sears*, the court specifically rejected defendants' argument that the SEC lacked authority to issue a subpoena after issuing a Wells Notice because the defendants had not yet responded with a Wells Submission. The court stated that, "[e]ven when no Wells submission is made in response to the Wells notice, the [investigating body] may thereafter learn of additional facts that warrant investigation, or seek additional documents or testimony to confirm its preliminary understanding of the facts or to clarify any lingering confusion." *Id.* This reasoning is applicable here, and there is no basis on which to conclude that FINRA's authority to issue the 2021 FINRA Rule 8210 request was impacted by its previous issuance of the Wells Submission.[15]

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[15] In DiPaola's notice of appeal, he argued for the first time that FINRA lacked jurisdiction over him at the time FINRA issued the 2021 FINRA Rule 8210 requests because Chardan had incorrectly represented on its Form U5 that it had terminated DiPaola in April 2019, whereas DiPaola had resigned from Chardan in February 2019. RP 6655. In his brief, DiPaola cites April 25, 2021, as the two-year anniversary of his resignation. Br. at 6. This date post-dates FINRA's Rule 8210 requests, however, to the extent that DiPaola is still making a jurisdictional argument based on his resignation date, this claim is waived. *See Gliksman*, 54 S.E.C. at 480 (finding that applicants before the Commission failed to preserve their objection to the introduction of evidence in the proceedings below). It is also baseless. "'[T]he termination upon which [FINRA's] continuing jurisdiction is predicated is not termination of employment or association . . . but termination of *registration.*'" *David Kristian Evansen*, Exchange Act

[Footnote continued on next page]

The record conclusively demonstrates that DiPaola refused to participate in the 2021 on-the-record interview. His defenses are baseless.[16] Based on these facts, the Commission should affirm the NAC's finding that DiPaola violated FINRA Rules 8210 and 2010.

D. The Sanctions the NAC Imposed Are neither Excessive nor Oppressive

Section 19(e)(2) of the Securities Exchange Act of 1934 ("Exchange Act") governs the Commission's review of FINRA's sanctions and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange

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Release No. 75531, 2015 SEC LEXIS 3080, at *12 (July 27, 2015) (emphasis in original) (quoting *Donald M. Bickerstaff*, Exchange Act Release No. 35607, 1995 SEC LEXIS 982, at *5 (Apr. 17, 1995)). Further, "[a] person who becomes registered remains registered until FINRA (not the registered person) ends the registration, based, among other things, on the Form U5 it receives." *Id.* at *13.

[16] DiPaola claims that this proceeding is the result of Enforcement's "crusade" against him. Br. at 2. According to DiPaola, this crusade began when, during the July 18, 2019 on-the-record interview, DiPaola "refuted . . . as a simple Reg FD issue" Enforcement's accusation of insider trading. Br. at 2. Following this "humiliation," DiPaola alleges, Enforcement "painted a bullseye on . . . DiPaola's back and harassed him for the next [two] years." Br. at 2-3. DiPaola's argument is meritless. As an initial matter, DiPaola's assertion of bias on the part of Enforcement is completely without support in the record. Even if the record demonstrated that Enforcement's motive for investigating DiPaola was improper, which it does not, DiPaola did not make the required showing of improper selective prosecution. *See Dep't of Enf't v. Epstein*, Complaint No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *78 (FINRA NAC Dec. 20, 2007) ("Absent a showing of selective enforcement, the motives behind [Enforcement's decision to initiate an investigation and commence disciplinary proceedings] are irrelevant."), *aff'd*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *53 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). Such a showing would require DiPaola to demonstrate that he "was singled out for enforcement, while others who were similarly situated were not, and that the [proceeding] was motivated by arbitrary or unjust considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right." *Terrence Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *28 (Apr. 26, 2006). No such showing was made here.

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Act.[17] *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). In considering whether sanctions are excessive or oppressive, the Commission gives significant weight to whether the sanctions are within the recommended range of sanctions under the Guidelines. *See Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 n.37 (Mar. 29, 2016). In assessing sanctions for DiPaola, the NAC consulted the Guidelines, applied the Principal Considerations and any other case-specific factors, and considered all relevant evidence of aggravating and mitigating circumstances.[18] RP 6609-6617. The resulting sanctions—two consecutive two-year suspensions and an aggregate fine of $40,000—are neither excessive nor oppressive.[19] Consequently, the Commission should affirm the NAC's sanctions and dismiss DiPaola's application for review.

1. The NAC Appropriately Sanctioned DiPaola for His Failure to Disclose an Outside Account and Submission of Misleading Compliance Questionnaires

The NAC fined DiPaola $25,000 and imposed a two-year suspension from associating with any FINRA member in any capacity for failing to disclose an outside account in which he exercised discretion and for failing to accurately complete Chardan's 2015 and 2016 compliance questionnaires. RP 6644. These sanctions, which are within the recommended range under the

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[17] DiPaola does not argue, and the record does not support, that the NAC's sanctions impose an undue burden on competition.

[18] *See FINRA Sanction Guidelines* (2021), https://www.finra.org/sites/default/files/2022-09/2021_Sanctions_Guidelines.pdf [hereinafter "*Guidelines*"]. On September 29, 2022, FINRA issued revised Sanction Guidelines, however, the NAC applied the Guidelines in effect at the time of the Hearing Panel's decision.

[19] DiPaola argues on multiple occasions throughout his brief that imposition of a bar would be inappropriate. *See, e.g.*, Br. at 4 ("To bar Mr. DiPaola in the face of Enforcement's abusive and unannounced expansion of its regulatory processes is completely inappropriate."). As the NAC did not impose a bar, this brief does not address these arguments.

Guidelines, are neither excessive nor oppressive, and they should be affirmed by the Commission.

The NAC began its analysis mindful of the fact that the Guidelines permit the "batching" of multiple violations that result from a single systemic problem. *See Guidelines*, at 4 (General Principles Applicable to All Sanction Determinations, No. 4) (adjudicators may aggregate or batch violations to determine sanctions); *see also Fox & Co. Inv., Inc.*, Exchange Act Release No. 52697, 2005 SEC LEXIS 2822, at *27-28 (Oct. 28, 2005) (affirming NAC's imposition of a single set of sanctions for multiple violations). Although the Guidelines allow for the assessment of individual sanctions for multiple violations, the NAC concluded that DiPaola's violations stemmed from a single source, his failure to disclose an outside brokerage account. RP 6644-45. The NAC determined that these circumstances lent themselves to an aggregation of DiPaola's violations and imposed unitary sanctions. RP 6644-45.

In determining appropriate sanctions, the NAC relied upon the Guidelines for violations of FINRA Rule 3210, which, as discussed above, superseded NASD Rule 3050(c) on April 3, 2017, and the Guidelines related to the falsification of records.[20] RP 6645; s*ee Guidelines*, at 16 (Transactions for or by Associated Persons – Failure to Comply with Rule Requirements), 37 (Forgery and/or Falsification of Records). The Guidelines for individual violations of FINRA

[20] The NAC applied the Guidelines for Forgery and/or Falsification of Records because there is no specific Guideline that addresses DiPaola's omissions and misstatements on Chardan's compliance questionnaires. RP 6645. The Guidelines for Forgery and/or Falsification of Records are sufficiently analogous under the facts presented because DiPaola's misleading answers caused the firm's records to contain false information concerning DiPaola's outside brokerage accounts. *See Guidelines*, at 1 (Overview) (encouraging adjudicators to look to analogous Guidelines to determine sanctions for violations that the Guidelines do not address specifically); *see also John M.E. Saad*, Exchange Act Release No. 62178, 2010 SEC LEXIS 1761, at *23-24 (May 26, 2010) (endorsing NAC's reliance on analogous Guidelines).

Rule 3210 recommend a fine of $1,000 to $39,000, and in egregious cases such as DiPaola's, suggest a suspension of up to two years, or a bar. *See Guidelines*, at 16. The Guidelines for falsification of records recommend a fine between $5,000 and $155,000, and a suspension of two months to two years, in the absence of other violations or customer harm. *See id.* at 37. If the violation was in furtherance of another violation, or if there is customer harm or other aggravating factors, the Guidelines for falsification of records recommend a bar. *See id.*

The NAC also applied the Principal Considerations outlined in the Guidelines, in addition to the specific considerations delineated in the Guidelines for each violation at issue. RP 6645; *see Guidelines* at 7-8 (Principal Considerations in Determining Sanctions), 16, 37. Based on these factors, the NAC determined that the Hearing Panel's sanctions—a unitary fine of $5,000—were insufficient based on the circumstances presented. RP 6645-48. The NAC therefore increased DiPaola's fine to $25,000 and imposed a two-year suspension. RP 6648.

Several of the factors articulated in the Guidelines apply to DiPaola's misconduct and strongly support the NAC's imposition of increased sanctions. First, the NAC considered the purpose of NASD Rule 3050(c). RP 6647. NASD rule 3050(c) "prevent[s] associated persons from engaging in improper trading 'by providing the employer member with more complete knowledge of its associated persons' trading activities.'" *Braff*, 2012 SEC LEXIS 620, at *19 (quoting *NASD Notice to Members 91-27*, 1991 NASD LEXIS 44 (May 1991)). The rule enables member firms "to create and enforce internal compliance procedures and 'facilitate more direct and early detection of . . . potential rule violations,' such as conflicts of interest . . ." *Braff*, 2012 SEC LEXIS 620, at *20 (quoting *NASD Notice to Members 91-27)*. The accuracy and completeness of this information comes not only from associated persons, who provide

information about their outside brokerage accounts to their employers, but also from the firms that execute the transactions. *See id.*

Second, the NAC noted that compliance questionnaires are a critical means by which firms gain assurance that they possess all the information needed to identify activity that might pose a conflict of interest or otherwise harm the firm or investing public. *See Dep't of Enf't v. McGee*, Complaint No. 2012034389202, 2016 FINRA Discip. LEXIS 33, at *88 (FINRA NAC July 18, 2016) (discussing the importance of compliance questionnaires and noting that respondent's failure to answer the questionnaires truthfully "impeded [the firm's] ability to monitor [respondent]"), *aff'd*, 2017 SEC LEXIS 987, *aff'd*, 733 F. App'x 571.

Third, the NAC properly found that DiPaola's misconduct was accompanied by multiple aggravating factors. DiPaola's trading activity presented at least a risk of perceived conflicts of interest for Chardan. *See Guidelines*, at 16 (considering whether violative transactions presented a real or perceived conflict of interest). Chardan was doing business with several of the issuers of the stocks DiPaola traded most frequently. Indeed, the evidence demonstrated that DiPaola, on his mother's behalf, bought and sold stocks that were at the time on Chardan's restricted lists, the very purpose of which is to avoid trading that might present a conflict of interest to the firm. These trades were hidden from Chardan. Moreover, DiPaola's misconduct continued over an extended period of time, from account opening in 2015, through E*Trade's discovery of the activity in 2017, despite multiple opportunities to disclose the account, including the 2015 and 2016 compliance questionnaires. *See Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 9). DiPaola, however, did not notify Chardan or E*Trade of his trading, either orally or in writing, prior to 2017, when E*Trade discovered that DiPaola had been logging into

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his mother's account. *See Guidelines*, at 16 (considering whether respondent provided oral notification to the member or executing firms).[21]

Moreover, DiPaola's repeated misstatements regarding his involvement in his mother's account demonstrated that the misconduct was not the result of a misunderstanding of his obligations as an associated person. *See Guidelines*, at 37 (considering whether respondent had a good-faith but mistaken belief of express or implied authority). As noted by the NAC, DiPaola had been in the securities industry for 20 years when the misconduct began, and there is no dispute that he understood the disclosure requirements relating to outside accounts. RP 6646. *See Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *21 (Nov. 8, 2006) (considering representative's lengthy securities industry experience in determining sanctions). He nonetheless attempted to conceal his involvement in the account from both Chardan and FINRA staff. *Guidelines*, at 7 (Principal Considerations in Determining Sanctions, No. 10). In addition to omitting the account on Chardan's compliance questionnaires, when DiPaola ultimately advised Chardan of the account, he did not admit to having previously traded in the account but instead stated, falsely, that his mother was adding him for estate planning purposes. RP 6646. DiPaola not only attempted to mislead Chardan, he also misrepresented his involvement in his mother's account to FINRA during his on-the-record interviews, initially denying that he had traded in his mother's account before he became a co-owner, and ultimately

[21] DiPaola suggests that his disclosure of his own account obviated the need for him to disclose his mother's account since he traded the same securities in both. Br. at 15. The NAC correctly rejected this line of reasoning, observing that DiPaola's failure to also disclose his mother's account deprived Chardan of a holistic view of DiPaola's trading, including instances when DiPaola traded the same security in both accounts on opposite sides of the market or traded in his mother's account stocks on Chardan's restricted list. RP 6647.

admitting the full extent of his trading activity only when confronted with IP address evidence. RP 6646-47.

For these reasons, the NAC appropriately determined that DiPaola's egregious misconduct warranted sanctions at the high end of the applicable Guidelines. The sanctions the NAC imposed for DiPaola's failure to disclose his mother's account and his submission of misleading compliance questionnaires—a fine of $25,000 and a two-year suspension—are within the range that the Guidelines recommend for egregious violations and are neither excessive nor oppressive.

2. The NAC Appropriately Sanctioned DiPaola for His Failure to Testify

The Commission should also affirm the $15,000 fine and consecutive two-year suspension from associating with FINRA members in any capacity the NAC imposed for DiPaola's failure to testify, in violation of FINRA Rule 8210.[22] After weighing all relevant factors, the NAC appropriately concluded that DiPaola's refusal to testify at an on-the-record interview in 2021 warranted significant sanctions, and the sanctions the NAC imposed are neither excessive nor oppressive.

The NAC properly applied the Guidelines for individuals who provide a partial but incomplete response to a request made pursuant to FINRA Rule 8210, which instruct that "a bar is standard" unless the respondent can demonstrate that the information provided substantially complied with all aspects of the request. *Guidelines*, at 33 (Providing a Partial but Incomplete

[22] Because DiPaola's failure to provide testimony and his disclosure failure are different kinds of misconduct and raise separate and serious regulatory concerns, the NAC properly ordered DiPaola to serve the suspensions consecutively. *See, e.g.*, *Siegel v. SEC*, 592 F.3d 147, 157-58 (D.C. Cir. 2010) (affirming imposition of consecutive suspensions for violations involving different kind of misconduct).

Response to Requests Made Pursuant to FINRA Rule 8210). When mitigation exists, adjudicators should consider suspending the individual in any or all capacities for up to two years. *Id.* The Guidelines also recommend a fine of $10,000 to $77,000. *Id.* The Guidelines provide three guideline-specific considerations that apply when an individual has provided a partial but incomplete response to FINRA Rule 8210 requests: (1) the "[i]mportance of the information requested that was not provided as viewed from FINRA's perspective, and whether the information provided was relevant and responsive to the request"; (2) the "[n]umber of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response"; and (3) "[w]hether the respondent thoroughly explains valid reason(s) for the deficiencies in the response." *Id*.

The NAC first determined, correctly, that DiPaola failed to demonstrate that he had substantially complied with all aspects of FINRA's Rule 8210 requests. RP 6649-51. The NAC noted FINRA staff's testimony that, based on the answers DiPaola provided at the 2019 interviews, they had additional questions for him. RP 6649. Specifically, staff wanted to ask DiPaola about certain transactions investigators believed may have violated securities laws that prohibit market manipulation and insider trading and solicit further detail concerning DiPaola's involvement with AMIC. RP 6649. In support of this testimony, the NAC noted that, on multiple occasions during the 2019 on-the-record interviews, DiPaola stated that he required additional context to answer questions regarding specific transactions in his outside accounts. RP 6649. In addition, electronic communications staff reviewed, such as communications in which DiPaola circulated a strategic plan he had developed for AMIC, indicated that DiPaola's relationship with the company may have gone beyond the provision of occasional advice he described in the 2019 interviews. RP 6649. The investigator's ability to delve deeper into these

topics after performing additional analysis was material to FINRA's investigation into whether DiPaola engaged in improper trading. As noted by the NAC, finding substantial compliance here—when DiPaola stated that he was unable to answer certain questions because he had insufficient context only to refuse to testify once FINRA staff had gathered additional information that enabled them to provide the requisite context—would create a damaging incentive for respondents to evade their FINRA Rule 8210 obligations by providing misleading testimony or falsely claiming an inability to recall the events in question.[23] RP 6649.

The NAC then detailed the aggravating factors surrounding DiPaola's misconduct. RP 6651. From FINRA's perspective, the information sought was important. *See Guidelines*, at 33 (considering the importance of the information requested but not provided as viewed from FINRA's perspective). FINRA's investigator had noted red flags for potential market

[23] DiPaola argues that "[t]here is not a scintilla of evidence in the record that . . . DiPaola's prior responses were not significantly or substantially compliant," and that, "[i]n fact, Enforcement literally conceded to the Hearing Panel in its Post-Hearing Brief that 'DiPaola complied with some earlier FINRA Rule 8210 requests for information and documents.'" Br. at 8 (quoting RP 6240). To the extent DiPaola argues that there was in fact substantial compliance, he is incorrect. Adjudicators have defined substantial compliance to mean actual compliance with the essential objectives of a statute or regulation, such that the intent of the statute or regulation is fulfilled. *See, e.g.*, *Mo. Veterans Comm'n v. Peake*, 22 Vet. App. 123 at 127 (May 2008); *United States v. San Ysidro Ranch*, 1 OCAHO 183, 1990 OCAHO LEXIS 1, at *13 (1990); *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis. 2d 192, 1987 Wisc. App. LEXIS 3582, at *200 (Wis. Ct. App. 1987). The objective of FINRA Rule 8210 is to provide FINRA with a means to obtain the information necessary to carry out its investigations and fulfill its regulatory mandate to ensure that members and their associated persons adhere to FINRA's rules. *Dep't of Enf't v. Jarkas*, Complaint No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at *46 (FINRA NAC Oct. 5, 2015), *aff'd*, Exchange Act Release No. 77503, 2016 SEC LEXIS 1285 (Apr. 1, 2016). FINRA requested additional on-the-record testimony in 2021 because its investigation of DiPaola's conduct was incomplete, in part because of DiPaola's inability to answer questions about his trading activity, as well as his failure to be forthcoming with respect to topics such as his relationship with AMIC. DiPaola's flat refusal to participate in the 2021 on-the-record interview therefore thwarted the objective of FINRA Rule 8210. *See Berger*, 2008 SEC LEXIS 3141, at *14.

manipulation and insider trading—serious violations of federal securities laws—associated with DiPaola's unmonitored trading in his mother's account. RP 6651. FINRA's investigator therefore sought a better understanding of the purpose behind certain transactions executed in the outside account and the connection between those transactions, trading occurring in DiPaola's own account, DiPaola's communications with AMIC, and the concurrent market activity. RP 6651. DiPaola's refusal to testify at the 2021 on-the-record interview frustrated staff's ability to determine whether he had engaged in illegal trades.

DiPaola also could not offer a valid explanation for his refusal to testify. *See Guidelines*, at 33 (considering whether the respondent provided valid reasons for their deficient response). Neither an erroneous belief that FINRA lacked authority to issue a Rule 8210 request after a Wells Notice nor his claim that he was willing to testify if FINRA would withdraw the Wells Notice excuses DiPaola's disregard for the Rule 8210 process.[24] *See, e.g.*, *Berger*, 2008 SEC LEXIS 3141, at *20 (rejecting the argument on remand that a bar is excessive because respondent had a purported "objectively reasonable" belief that he was not subject to NASD's jurisdiction).[25]

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[24] DiPaola also argues that he initially did not comply because he was waiting for FINRA to provide "new evidence" warranting another on-the-record interview. Br. at 6. FINRA, however, is not required to "explain its reasons for making the information request or justify the relevance of any particular request." *See Morton Bruce Erenstein*, Exchange Act Release No. 56768, 2007 SEC LEXIS 2596, at *13 (Nov. 8, 2007), *aff'd*, 316 F. App'x 865 (11th Cir. 2008).

[25] DiPaola challenges Enforcement's contention before the NAC that the Hearing Panel should have treated as aggravating the regulatory pressure required to secure DiPaola's response, in accordance with the second guideline-specific consideration that applies to a partial but incomplete response to a FINRA Rule 8210 request. Br. at 12-13. The NAC, however, agreed with the Hearing Panel that the number of FINRA Rule 8210 requests and the length of time of the Rule 8210 process were not aggravating factors. RP 6616. As such, DiPaola's argument is misplaced.

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There are no mitigating factors that would justify imposing sanctions at the low end of the Guidelines' recommended range. DiPaola has not accepted responsibility for his failure to respond to the FINRA Rule 8210 requests and, in fact, continues to assert that Enforcement is to blame because it "intentionally obstructed the 2021 [on-the-record interview]" by refusing to withdraw the Wells Notice. Br. at 13. *See, e.g.*, *Ortiz*, 2008 SEC LEXIS 2401, at *28 (finding that the fact that respondent blamed others for what occurred supported a serious sanction); *Michael G. Keselica*, 52 S.E.C. 33, 37 (1994) (determining that "attempts to blame others for his misconduct . . . demonstrate that [the respondent] fails to understand the seriousness of [his] violations"), *aff'd*, No. 95-1012, 1995 U.S. App. LEXIS 40288 (D.C. Cir. 1995). As the NAC correctly noted, DiPaola did not claim that his refusal to comply was based on legal advice, and none of the other potentially mitigating Principal Considerations are applicable here.[26] RP 6652.

DiPaola claims he went to great lengths to satisfy FINRA's previous Rule 8210 requests and cites as mitigating the extensive overlap between the topics covered in 2019 and those

[26] It is possible to construe DiPaola's assertions in his brief that he could not have intentionally failed to appear at the on-the-record interview because FINRA had communicated solely with his attorney, and that he was dependent on his attorney to schedule the interview, as arguing that he relied on advice of counsel. Br. at 5-6. DiPaola has, however, waived any such argument. *See Gliksman*, 54 S.E.C. at 480. In any event, FINRA was permitted to correspond with counsel. *See* FINRA Rule 9133(d) (requiring service upon counsel when respondent has legal representation). Moreover, a respondent's reliance on legal advice "is immaterial to an associated person's obligation to supply [FINRA] requested information." *Michael Markowski*, 51 S.E.C. 553, 557 (1993), *aff'd*, 34 F.3d 99 (2d Cir. 1994). Respondents cannot delegate to counsel their responsibility to comply with FINRA's information requests. *Id.* at 557-58. DiPaola also has not made the requisite showing for mitigation based on a valid reliance on advice of counsel. *Berger*, 2008 SEC LEXIS 3141, at *40-41 (valid reliance on advice of counsel requires evidence that the respondent consulted with and made full disclosure to counsel; asked for advice on the legality of a proposed course of action; received advice that it was legal; and relied on the advice in good faith).

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FINRA staff wished to cover in 2021.[27] Br. at 9-12. He sets forth broad categories of questioning that were covered in his 2019 interviews, such as his trading activity and records, the specific securities in which he traded frequently, including AMIC's stock, and concerns about market manipulation and insider trading, that FINRA staff would also have covered in the 2021 interview. Br. at 11-12. This overlap, he suggests, is evidence that the 2021 interview would have been "duplicative." Br. at 12. FINRA does not dispute that there was overlap between the 2019 interviews and the requested 2021 interview. The NAC specifically acknowledged DiPaola's previous participation in on-the-record interviews and the level of overlap between the testimony DiPaola previously provided and that which FINRA sought in 2021. RP 6617. The fact that the interviews in 2019 covered, at a high level, the same subject matter FINRA sought to cover in 2021 in no way undermines FINRA's position that it still had unanswered questions in 2021 notwithstanding the testimony he provided in 2019. Indeed, it was DiPaola's inability to provide satisfactory answers to questions concerning the topics DiPaola now cites as duplicative—for example, "the volume of [DiPaola's] trades and his end-of-day trading" and "multiple bid offers at different prices," Br. at 12—that drove the need for further inquiry. DiPaola's previous testimony did not absolve him of his obligation to comply with the 2021 FINRA Rule 8210 request, which was due, in large part, to DiPaola's stated inability to answer

[27] DiPaola also claims that where "prior efforts [to] assist[] Enforcement . . . have been made, failure to respond to a subsequent FINRA Rule 8210 request should *not* result in a bar." Br. at 9 (emphasis in original). As discussed above, FINRA does not address this argument as the NAC did not impose a bar.

certain questions during the 2019 interviews. *CMG Inst. Trading*, 2009 SEC LEXIS 215, at *21.[28]

DiPaola's refusal to participate in a 2021 on-the-record interview frustrated FINRA's investigation into whether DiPaola engaged in illegal trades. The Commission should affirm the $15,000 fine and two-year suspension from associating with a FINRA member in any capacity the NAC imposed. Such sanctions are appropriately remedial and reinforce the importance of complying with FINRA Rule 8210, and they are neither excessive nor oppressive.

[28] DiPaola states that "a suspension of any length can (and will) have an inordinate effect . . . as his job at the hedge fund is now on the line" and "any suspension . . . would cause him to lose his current job as a Portfolio Manager." Br. at 7. To the extent he offers this as a basis on which to modify his sanctions, it is well established that any collateral consequence that a respondent suffers "as a result of his misconduct or from the disciplinary proceeding that followed, such as the impact on his reputation, career, or finances, is not a mitigating factor." *Kent M. Houston*, Exchange Act Release No. 71589, 2014 SEC LEXIS 614, at *35-36 (Feb. 20, 2014) (citing *Jason A. Craig*, Exchange Act Release No. 59137, 2008 SEC LEXIS 2844, at *27 (Dec. 22, 2008); *Ramiro Jose Sugranes*, Exchange Act Release No. 35311, 1995 SEC LEXIS 234, at *4 (Feb. 1, 1995)). DiPaola also cites as mitigating the length of time between the 2019 on-the-record interviews and the 2021 FINRA Rule 8210 request. Br. at 13. While a lengthy delay in FINRA's investigation of potential misconduct can violate fundamental principles of fairness, the 20-month period between the 2019 on-the-record interviews and the 2021 FINRA Rule 8210 request is significantly shorter than the time periods the Commission has previously found to be inherently unfair. *See, e.g.*, *Jeffrey Ainley Hayden*, 54 S.E.C. 651, 653-54 (2000) (almost 14 years between first instance of misconduct and filing of complaint; more than six years between last instance of misconduct and filing of complaint; five years between filing of complaint and when FINRA first had notice of misconduct; and three and a half years between filing of complaint and when FINRA began its investigation). Moreover, DiPaola has failed to articulate any connection between this delay and the remedial purpose served by the sanctions imposed. *See Guidelines*, at 4 (discussing role of aggravating and mitigating factors when determining appropriate sanctions and directing that sanctions be tailored to the misconduct at issue).

V. CONCLUSION

The record in this case demonstrates that DiPaola failed to disclose an outside account to his employer firm and the executing firm and to list the account on annual compliance questionnaires. He also refused to respond to FINRA's requests for on-the-record testimony. DiPaola violated FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA's sanctions are neither excessive nor oppressive under the circumstances presented. Accordingly, FINRA's disciplinary action comports fully with Section 19(e) of the Exchange Act, and the Commission should dismiss DiPaola's application for review.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Elizabeth Sisul, certify that this Brief in Opposition to the Application for Review (File No. 3-21402) complies with the length limitations set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 13,725 words.

I further certify that I have complied with the Commission's Rules of Practice by filing a brief that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

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CERTIFICATE OF SERVICE

I, Elizabeth Sisul, certify that on this 28th day of September 2023, I caused a copy of FINRA's Brief in Opposition to the Application for Review, in the matter of Application for Review of Jason Lynn DiPaola, Administrative Proceeding File No. 3-21402, to be filed through the SEC's eFAP system and served by electronic mail on:

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