

BEFORE THE NATIONAL ADJUDICATORY COUNCIL  
FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of

Department of Enforcement,

Complainant,

vs.

John Joseph Plunkett  
Brooklyn, NY,

Respondent.

DECISION

Complaint No. 2006005259801

Dated: December 17, 2013

**On remand from the Securities and Exchange Commission for reconsideration of sanctions. Held, sanctions modified.**

**Appearances**

For the Complainant: Elisa Meth Kestin, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Pro Se

**Decision**

This matter is before us on remand from the Securities and Exchange Commission. In a National Adjudicatory Council (“NAC”) decision dated February 21, 2012, we found that John Joseph Plunkett (“Plunkett”), just prior to resigning from Lempert Brothers International USA, Inc. (“Lempert Brothers”), and in anticipation of being fired, directed others to remove the firm’s books and records and erase the firm’s electronic files and computer servers, in violation of NASD Rule 2110. For this misconduct, we barred Plunkett in all capacities.

In our decision, we further found that Plunkett failed to respond to two FINRA requests for information and documents until four months after the filing of a complaint initiating disciplinary proceedings against him, and then only partially responding, in violation of FINRA Rules 8210 and 2010. In assessing sanctions for this misconduct, we applied the presumption articulated in the FINRA Sanction Guidelines (“Guidelines”) that a response to a FINRA Rule 8210 request subsequent to the filing of a disciplinary complaint constitutes a complete failure to

respond, and again barred Plunkett in all capacities.<sup>1</sup>

Plunkett appealed the NAC's decision to the Commission. In an opinion dated June 14, 2013, the Commission sustained the NAC's findings that Plunkett violated FINRA rules as described in the NAC's decision. For Plunkett's misconduct relating to the firm's books and records, the Commission affirmed the bar the NAC imposed. With respect to the sanctions that the NAC imposed concerning Plunkett's failure to respond to FINRA information requests, however, the Commission found that the NAC erred by failing to analyze factors other than the presumptive unfitness indicated by a failure to respond in any manner. The Commission concluded that because Plunkett "meaningfully" responded to several earlier FINRA Rule 8210 requests during the same investigation, his failure to respond to two later FINRA Rule 8210 requests until after the filing of a complaint constituted conduct "closer to" a partial failure to respond. The Commission noted that Plunkett had previously "provided information about Lempert Brothers' accounts, staff, management structure, organizational structure, and contractual arrangements with a third party, and communications regarding the possible improprieties involving the Orlovs and the firm."<sup>2</sup> Some of this information related to the inquiries FINRA posed in its later Rule 8210 requests, and the Commission noted that FINRA failed to take the interrelatedness of the requests into account when it assessed sanctions. The Commission therefore set aside the bar imposed by the NAC and remanded this matter with instructions that the NAC analyze Plunkett's violation of FINRA Rule 8210 under the Guidelines for a partial but incomplete response. The Commission's remand was limited to the issue of sanctions for the Rule 8210 violation and did not include any other findings or sanctions.

After careful consideration, we have determined to modify the sanction that we imposed upon Plunkett for violating FINRA Rule 8210. We reduce the bar to a \$20,000 fine and six-month suspension.

I. Facts

The following facts are pertinent to the Commission's decision to remand this matter to the NAC for further analysis under the Guidelines concerning Plunkett's violation of FINRA Rule 8210. The facts related to Plunkett's books and records violation are discussed in detail in the previously issued NAC decision as well as the Commission's opinion, and we refer to them only as relevant to this decision.

---

<sup>1</sup> *FINRA Sanction Guidelines* 33 (2011) (Requests Made Pursuant to FINRA Rule 8210), <http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038.pdf> [hereinafter *Guidelines*].

<sup>2</sup> *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at \*55 (June 14, 2013).

A. FINRA's Initial Requests for Information to Plunkett

Between May and October 2006, FINRA requested information from Plunkett pursuant to FINRA Rule 8210 concerning Plunkett's separation from Lempert Brothers. FINRA issued these requests on March 31, May 23, July 20, August 18, and October 20, 2006. Specifically, the information sought and provided by Plunkett included, but was not limited to, a catalogue of the records and files that Plunkett removed from Lempert Brothers at the time of his resignation and an explanation as to why Plunkett removed said files, six months' worth of Lempert Brothers' e-mails, documents and information related to Lempert Brother's corporate structure, information related to Lempert Brothers' brokerage and banking accounts, information related to employees' and owners' roles and responsibilities, as well as Plunkett's written explanations for various letters and other correspondence that FINRA had attached to the requests. Plunkett responded to each of these requests, although typically not promptly, and answered all questions, except one concerning his tax returns. Through the testimony of its investigator at the hearing, FINRA acknowledged that with the exception of providing his tax returns, Plunkett fully responded to these requests.

B. Information Provided by Plunkett Pursuant to a Wells Notice

On May 8, 2009, Enforcement sent Plunkett and his attorney a Wells Notice, informing them that FINRA had made a preliminary determination to initiate formal disciplinary proceedings against Plunkett for his conduct involving Lempert Brothers' books and records. Plunkett responded to the Wells Notice on June 29, 2009. Plunkett again explained the circumstances surrounding his departure from Lempert Brothers and claimed that the firm and its owners intended to defraud its investors, and that he had purportedly taken the firm's records as a defensive measure. In his response, Plunkett referred to certain documents, which he did not attach, and individuals, that he did not identify by name, that Plunkett asserted corroborated his claims.

C. FINRA's Final Requests for Information and Documents

On July 15, 2009, in reply to Plunkett's June 29 Wells response, FINRA staff sent to Plunkett a FINRA Rule 8210 request for information and documents. FINRA asked Plunkett to provide copies of the documents and identify the individuals he referenced in his June 29 Wells response by July 27, 2009. On July 27, 2009, Plunkett requested an extension of time to respond to the request. He stated that he required additional time to search for the documents. FINRA staff granted Plunkett an extension until August 10, 2009. Plunkett, however, did not respond to the request by August 10, 2009. On August 11, 2009, Plunkett requested additional time to respond. He stated that he could not respond at that time because he was ill.

On August 20, 2009, FINRA staff sent Plunkett a second request for information and documents pursuant to FINRA Rule 8210. The second request enclosed a copy of the original request dated July 15, 2009, and required Plunkett to respond no later than September 3, 2009, which Plunkett failed to do.

On December 1, 2009, FINRA filed the complaint in this matter. On April 29, 2010, nine months after FINRA's July 15, 2009 request for information and documents, Plunkett responded. He did not provide any documents, but rather offered a number of excuses as to why he could not find them. Plunkett nevertheless addressed in his written narrative each of FINRA's requests and represented that the documents referred to in his Wells response were ones that he had either provided to FINRA earlier in its investigation or could not locate or were otherwise unavailable. He also provided the names of the people to whom he had referred to in his Wells response, and indicated that, earlier in the investigation, he had identified some of the people whose names the staff sought.

## II. Discussion

We have considered the complete record in this case, the parties' briefs filed on remand,<sup>3</sup> and their respective sanction recommendations.<sup>4</sup> Consistent with the Commission's instructions that we analyze Plunkett's violation of FINRA Rule 8210 as a partial response under the Guidelines, we modify our prior sanction for Plunkett's FINRA Rule 8210 misconduct and reduce the bar to a six-month suspension. We also impose a fine of \$20,000.<sup>5</sup>

In reaching this conclusion, we take note of the Commission's statement that some of Plunkett's earlier responses to FINRA "related to the inquiries FINRA posed in the Rule 8210 requests it sent after receiving Plunkett's Wells submission." *Plunkett*, 2013 SEC LEXIS 1699, at \*55. Indeed, upon further consideration, we find that there was extensive overlap between the earlier and later requests for information. As the Commission notes, "[t]he March 31, 2006 request focused on the investor allegation concerning fraud by the Orlovs; later requests focused on the removal and erasure of Lempert Brother's records." *Id.*, at \*13 n.13.

---

<sup>3</sup> Upon remand from the Commission, the NAC requested that the parties submit briefs addressing the appropriate sanctions for Plunkett's violation of FINRA 8210. In his brief, Plunkett focused primarily on the NAC's findings and sanctions for his misconduct relating to the firm's books and records violation. Because the Commission affirmed the NAC's findings and the sanction it imposed with respect to that misconduct, Plunkett's arguments in this respect are beyond the scope of the Commission's remand.

<sup>4</sup> Enforcement argues that the appropriate sanctions for Plunkett's violation of Rule 8210 are a six-month suspension and a \$20,000 fine. Plunkett's brief only requests generally that the sanctions be reduced from a bar.

<sup>5</sup> For a partial but incomplete response, the Guidelines also recommend a fine of \$10,000 to \$50,000. *Guidelines*, at 33.

We are guided also by the three principal considerations that are articulated within the Guidelines for FINRA Rule 8210 violations that involve a partial but incomplete response.<sup>6</sup> These considerations include: 1) the importance 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 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 reasons for the deficiencies in the response.<sup>7</sup>

As to the first of these considerations, the information sought via these requests was essential to Enforcement's investigation into Plunkett's possible misconduct and also to support the claims made by Plunkett in his June 29 response to FINRA's Wells Notice. Because Plunkett did not initially provide the documents or identifying information in his Wells response, FINRA could not ascertain whether Plunkett was referring to documents he had already produced or to other documents FINRA had not yet seen. Plunkett also claimed in that same letter that certain people possessed information relevant to the alleged fraud by Lempert Brother's owners and removal of the documents. Because Plunkett did not identify those people by name, Plunkett hindered FINRA's investigative efforts.

Plunkett did ultimately respond to FINRA's July 15, 2009 request. He represented in his April 2010 response that the documents referred to in his June 29 Wells response were ones that he either had already provided to FINRA or did not have. He also provided the names of the individuals referenced in his June 29 Wells response. Thus, while the information sought was important as viewed from FINRA's perspective, Plunkett's answers, albeit late, were responsive to FINRA's requests.

Turning to the second principal consideration, Enforcement had to exert a great deal of regulatory pressure to elicit a response from Plunkett. FINRA staff attempted to accommodate Plunkett, granting him an extension in addition to sending him a second request, extending his time to respond yet further. Ultimately FINRA had to exert the highest level of regulatory pressure available — a complaint— to compel a response. In addition, a great deal of time elapsed between the initial requests and when Plunkett actually responded—over nine months. It was not until Plunkett submitted his delinquent responses that FINRA learned that much of the information provided by Plunkett was duplicative of his 2006 responses and thus already in FINRA's possession. However, Plunkett's extended delays and the amount of effort exerted by FINRA to compel his response is an aggravating factor.

Finally, we consider whether the respondent thoroughly explained valid reasons for the deficiencies in the response.<sup>8</sup> *See Rooney A. Sahai*, Exchange Act Release No. 55046, 2007 SEC

---

<sup>6</sup> *Guidelines*, at 33.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

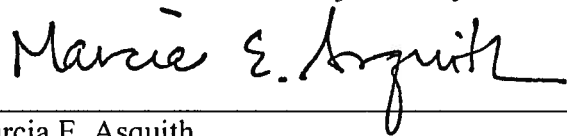
LEXIS 13, at \*13 (Jan. 5, 2007) (“We have long said that if a respondent is unable to provide the information requested, there remains a duty to explain that inability.”). Plunkett has offered no valid explanation for his delay in responding to FINRA’s requests or his failure to produce certain documents. Plunkett maintains that he had been locked out of his office by his landlord, thereby blocking his access to the documents, and that much of the requested information was eventually destroyed by the landlord upon Plunkett’s eviction. The record, however, reflects that Plunkett received FINRA’s requests for those documents before the lockout or eviction occurred. Thus, Plunkett fails to provide satisfactory justification for the delay and deficiencies in his responses.

While Plunkett’s responses to FINRA’s requests for information were dilatory and his deficient document production without excuse, we acknowledge that he ultimately provided information that complied with the requests. Furthermore, it is Enforcement’s position that we give Plunkett credit for eventually complying with the 8210 requests, and that he should not be barred for this violation. Based on the directives from the Commission on remand, we believe that a sanction above the recommended minimum, but not a bar, is an appropriately remedial sanction. For these reasons, we fine Plunkett \$20,000 and suspend him for six months in all capacities for his partial failure to respond to FINRA requests for information and documents, in violation of FINRA Rules 8210 and 2010.

### III. Conclusion

Plunkett responded partially to FINRA’s requests for information and documents, in violation of FINRA Rules 8210 and 2010. For this misconduct, we fine Plunkett \$20,000 and suspend him for six months in all capacities. In light of the bar that the Commission upheld for Plunkett’s misconduct relating to Lempert Brothers’ books and records, however, we decline to impose the fine and suspension. We have considered and reject without discussion all other arguments of the parties.

On behalf of the National Adjudicatory Council,



---

Marcia E. Asquith,  
Senior Vice President and Corporate Secretary