

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Darryl Matthew Cohen  
(CRD No. 2786613),

Respondent.

Expedited Proceeding  
No. FPI210005

STAR No. 2020066797301

Hearing Officer–LOM

**EXPEDITED HEARING  
PANEL DECISION**

December 30, 2021

**Respondent is barred from associating with any FINRA member firm in any capacity for his failure to respond fully and completely to multiple FINRA Rule 8210 requests. Respondent is also ordered to pay hearing costs.**

*Appearances*

For the Complainant: Adam N. Stern, Esq., Brad Samuels, Esq., Loyd Gattis, Esq., and Jennifer Crawford, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Brandon S. Reif, Esq., Marc Ehrlich, Esq., Reif Law Group, Los Angeles, California

**DECISION**

**I. Introduction**

This is an expedited proceeding concerning the failure of Respondent Darryl Matthew Cohen, formerly a registered representative at FINRA member firm Morgan Stanley, to respond fully and completely to multiple FINRA Rule 8210 requests seeking documents and information. Starting in late November 2020 and continuing into April 2021, FINRA staff served Respondent Cohen with five FINRA Rule 8210 requests. FINRA sought the documents and information in connection with an investigation into possible conversion and improper use of customer funds. Through counsel, Cohen provided some of the documents and information, but not all. FINRA’s Department of Enforcement served Cohen with a Notice of Suspension on June 16, 2021, but Cohen obtained a stay of the suspension by filing a request for hearing on July 9.

By the time of the hearing on October 25, 2021, Cohen still had not produced three categories of requested documents that were critical to the investigation: (i) communications

(including electronic communications such as emails, texts, and social media postings) regarding his customers and business, (ii) bank account statements, and (iii) telephone logs and records. By showing that these requests remained outstanding, Enforcement established that Cohen failed to comply with Rule 8210.

In his request for a hearing, Cohen asserted one defense. He asserted that he suffers from generalized anxiety disorder and other mental health problems, for which he is being treated by a psychiatrist.

When a respondent asserts a defense to a Rule 8210 violation, the respondent has the burden of proving the defense. Even assuming that a mental health condition could be a defense to a Rule 8210 violation in certain circumstances, Cohen did not carry his burden of proof. He was required first to prove the existence and nature of the condition, and second how it prevented him from complying with the requests. He did neither.

Despite his request for a hearing, Cohen did not appear or testify, did not call any medical professionals to testify, provided no sworn affidavits or declarations, and offered no documentary evidence. His counsel objected on the record to going forward with the hearing, asserting that Cohen was unable to participate because of his medical condition and that FINRA was engaging in unfair disability discrimination if it proceeded with the hearing. Counsel declared that he wanted to preserve the ability to challenge the hearing procedurally and then left. As a result, Cohen did not demonstrate the existence and nature of his condition, or how it interfered with his compliance with the Rule 8210 requests.

As further discussed below, Enforcement showed that Cohen's conduct in partially responding to the Rule 8210 requests was inconsistent with his assertion that his alleged mental health condition prevented him from fully complying with the requests. Cohen engaged in an evasive and dilatory pattern of partially responding to the Rule 8210 requests. Through counsel, he raised various obstacles to the production of documents that were not linked to his mental health condition. Cohen also produced documents selectively in a way that cannot credibly be explained by his purported mental health condition.

The Hearing Panel concludes that Cohen should be barred from associating with any member firm in any capacity. His failure to respond fully and completely to the Rule 8210 requests stymied an investigation into very serious potential misconduct. He flouted his unequivocal duty to comply with the Rule 8210 requests, and but for his request for a hearing, which stayed any sanctions, he would have been barred already. We have no reason to believe that if he were given another opportunity to provide the outstanding documents and information he would comply. In these circumstances, permitting Cohen to continue to evade accountability would undermine FINRA's ability to investigate potential misconduct and protect investors.

## II. Findings

### A. Hearing

The hearing was held by videoconference on October 25, 2021, before a three-person Hearing Panel composed of one Hearing Officer and two industry members. Enforcement presented documentary evidence and the testimony of one witness, Bethany Stoltenberg, a FINRA Senior Principal Investigator involved in the investigation and issuance of Rule 8210 request letters to Cohen. Prior to the hearing, the parties entered stipulations and filed them with the Office of Hearing Officers.<sup>1</sup>

Cohen did not appear or testify. He submitted no affidavits or declarations. He called no witnesses, not even the two medical professionals on his witness list. And he offered no documentary evidence. Instead, Cohen's counsel objected to FINRA's holding the hearing and argued that it should be delayed at least until January 2022, when Cohen's psychiatrist would reevaluate his condition.<sup>2</sup> Counsel asserted that it would be unfair disability discrimination to go forward with the hearing.<sup>3</sup> He declared his intent to leave the virtual hearing room after stating his objection. The Hearing Officer gave counsel the option to stay and participate, even without Cohen, but counsel reasserted his intent to leave.<sup>4</sup> Counsel left the hearing before Enforcement

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<sup>1</sup> Stoltenberg's hearing testimony is referred to with the prefix "Tr." and then the identifying pages. Where reference is to remarks made by participants other than the witness, such as Cohen's counsel, the speaker is identified in a parenthetical. References to stipulations are with the abbreviation "Stip." and a unique identifying number. Most of the exhibits admitted into evidence were joint exhibits, JX-1 through JX-37 (excluding JX-6 and JX-8, which are blank). The parties stipulated that the joint exhibits, minus JX-6 and JX-8, were admissible in evidence. Stip. 19. Two exhibits were admitted as Complainant's exhibits, CX-1 (a summary exhibit) and CX-2 (Stoltenberg's affidavit certifying that her testimony would be truthful).

<sup>2</sup> Tr. (Cohen's counsel) 14–16, 29–40, 49–56. Cohen's counsel based his objection to holding the hearing on letters purporting to be from Cohen's psychiatrist regarding his mental health condition. The letters were part of Cohen's pre-hearing submissions as proposed exhibits, RX-1 (Dec. 9, 2020), RX-3 (Feb. 24, 2021), RX-5 (May 14, 2021), and RX-7 (July 22, 2021). They were admitted into evidence at the request of the Hearing Officer, although they were not authenticated and were not under oath. They are the only support Cohen's counsel cited for his objection to going forward with the hearing. Tr. (Cohen's counsel) 138–141. Cohen's counsel had the misimpression that the July 22 letter was already in evidence. Tr. (Cohen's counsel) 29–30 (“[The] signed letter on letterhead, dated July 22, 2021 . . . was submitted into evidence and it referenced prior letters the doctor has written . . .”); Tr. (Cohen's counsel) 30 (“[T]he doctor's report on file, the one dated July 22, 2021, expressly stated the proper timeline to reevaluate Mr. Cohen.”); Tr. (Cohen's counsel) 40 (referring to the July 22 letter, “I believe it is in evidence”). The four letters purporting to be signed by Cohen's psychiatrist are insufficient by themselves to prove the existence and nature of Cohen's alleged mental health condition or to show that it prevented him from responding fully and completely to the Rule 8210 requests. See the discussion below at 14, 21–22.

<sup>3</sup> Tr. (Cohen's counsel) 38.

<sup>4</sup> Tr. (Hearing Officer) 58 (“I want to make sure that you understand that we will continue and that you do have the option to stay. And that what you do is a matter of your choice.”); Tr. (Cohen's counsel) 58–59 (“So if the hearing is going to proceed, then I will be signing off . . . I think that is procedurally what I need to do so I could take up the issue procedurally.”).

presented its evidence, although he heard Enforcement’s opening statement and heard what Enforcement expected to prove.<sup>5</sup>

## **B. Respondent’s Background**

Cohen passed his Series 7 and Series 63 examinations in 1996, after which he was employed by a series of firms as a registered representative. On June 5, 2015, Cohen joined Morgan Stanley and was registered with FINRA through an association with the firm. About six years later, on March 9, 2021, Morgan Stanley discharged him. As reflected in Cohen’s record in the Central Registration Depository, Morgan Stanley commented that it had concerns about his facilitation of outside client business and transactions not disclosed to or approved by it and concerns about his use of an unapproved platform to engage in inappropriate communications with clients. On April 8, 2021, Cohen’s registration with FINRA ended.<sup>6</sup>

During his time at Morgan Stanley, Cohen was financially successful. On his 2016 income tax statement he reported wages and salary of approximately \$1.8 million.<sup>7</sup> In 2017, he reported wages and salary of almost \$2.27 million.<sup>8</sup> In 2018, he reported wages and salary of \$2.74 million. His taxable income that year was slightly more than \$3 million.<sup>9</sup> In 2019, Cohen reported even more in wages and salary—\$3.4 million.<sup>10</sup> Cohen’s counsel represents that Cohen fervently desires to clear his name and stay in the securities industry.<sup>11</sup>

## **C. Jurisdiction**

Although Cohen is no longer registered or associated with a FINRA member firm, FINRA retains jurisdiction over him pursuant to Article V, Section 4(a) of FINRA’s By-Laws. Under that provision, FINRA retains jurisdiction over a person for two years after the termination of the person’s association with a member firm.

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<sup>5</sup> Tr. (Cohen’s counsel and Hearing Officer) 58–61. The Hearing Officer instructed Cohen’s counsel to wait until after Enforcement’s opening statement to set forth his objection to the proceeding for the record. Cohen’s counsel reserved and did not waive his objection to the proceeding by following that instruction. Tr. (Cohen’s counsel and the Hearing Officer) 14–16. The Hearing Officer explained, “I think it is most fair for you not to take any step until you hear what Enforcement has to say [in its opening]. It is up to you what you do after that.” Tr. (Hearing Officer) 15–16.

<sup>6</sup> Stip. 1; JX-2, at 3, 9, 11, 29.

<sup>7</sup> JX-35, at 1.

<sup>8</sup> JX-35, at 14.

<sup>9</sup> JX-35, at 30.

<sup>10</sup> JX-35, at 45.

<sup>11</sup> Tr. (Cohen’s counsel) 36–37, 53; Transcript of Oct. 19, 2021 Final Pre-Hearing Conference (“Tr. FPHC”) 26–27, 60–62.

#### **D. Origin of Enforcement’s Investigation and Nature of Alleged Misconduct Under Investigation**

Some of Cohen’s customers at Morgan Stanley filed arbitration claims against the firm, alleging, among other things, that Cohen had mismanaged their accounts and engaged in “selling away” through the facilitation of loans to third parties.<sup>12</sup> Those claims prompted FINRA to commence an investigation in June 2020.<sup>13</sup> Then additional customers whose accounts had been serviced by Cohen filed claims.<sup>14</sup> Most of the complaining customers were current and former professional athletes.<sup>15</sup> FINRA staff had concerns about unusual or suspicious money movement.<sup>16</sup> FINRA’s investigation focused on serious potential misconduct—including conversion and misuse of customer funds.<sup>17</sup>

#### **E. FINRA Rule 8210 Requests and Cohen’s Responses**

In connection with the investigation, FINRA staff issued five Rule 8210 letters requesting information and documents from Cohen, dated November 23, 2020; February 5, 2021; March 2, 2021; March 19, 2021; and April 8, 2021.<sup>18</sup> Enforcement stated at the hearing, however, that it is charging a violation of Rule 8210 based only on three categories of documents requested by specified items in the February 5 Rule 8210 letter:

- Electronic communications to, from, or concerning Cohen’s customers or his business (Items 1, 2, 3, and 7);
- Cohen’s bank statements (Item 8); and
- Telephone logs, bills, and other records for Cohen’s personal and business phones (Item 11).

Cohen never produced these documents, and those requests remain outstanding.<sup>19</sup> Although Enforcement does not allege that Cohen violated Rule 8210 in connection with the November 23 letter, it is discussed here briefly to provide context and a timeline.

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<sup>12</sup> JX-33; Tr. 72–73.

<sup>13</sup> Tr. 66, 73–74.

<sup>14</sup> Tr. 131–33.

<sup>15</sup> Tr. 72–73.

<sup>16</sup> Tr. 72.

<sup>17</sup> Tr. 73–74.

<sup>18</sup> JX-18, at 15–23 (November 23, enclosed as Appendix A to the April 8 Rule 8210 letter); JX-3 (February 5); JX-9 (March 2); JX-10 (March 19); JX-18 (April 8); Tr. 74–75.

<sup>19</sup> Tr. 19–20, 74–75.

## **1. November 23, 2020**

FINRA staff served the November 23, 2020 Rule 8210 request letter on Cohen through his counsel. This letter identified specific customers with whom Cohen had worked and who had filed claims relating to his service of their accounts. It asked him to provide information about his working relationship with the identified customers. Among other things, it specifically asked how and when he met them and about his discussions with the customers regarding their overall financial situation and needs. Additionally, the November letter asked for documents and information regarding a few specific loans made from the accounts based on allegations in the customers' claims. The letter asked for the terms of the specified loans and any relevant documentation, the ways in which Cohen may have participated in the loans, any communications with the customers about the loans and the entities that borrowed the money, and the status of the loans.<sup>20</sup>

Cohen's response was due initially on December 9, 2020. However, in conversations with FINRA staff, Cohen's attorney said Cohen had a medical condition and needed a delay in his response or a modification of the request. The staff granted Cohen an unusually long extension to January 15, 2021, a date Cohen's counsel chose.<sup>21</sup> However, Cohen did not respond in writing until mid-February, because his counsel had a personal emergency.<sup>22</sup> By that time, FINRA had issued the February 5, 2021 letter, which expanded the scope of FINRA's November 23, 2020 Rule 8210 request.

## **2. February 5, 2021**

On February 5, 2021, FINRA staff served Cohen, through counsel, with a second Rule 8210 request letter.<sup>23</sup> It covered a longer period and some requests in the February 5 letter covered all of Cohen's customers and business dealings, not just the persons and entities previously specified in the November letter.

Because Cohen's counsel had raised Cohen's medical condition as a factor in his ability to respond to the first Rule 8210 request, Item 13 of the February Rule 8210 letter requested a detailed description of Cohen's condition and how and why he believed it justified a delay or modification. It further requested medical records sufficient to establish the diagnosis and explain how the medical condition affected his ability to respond to any request. Finally, the staff asked for contact information for the psychiatrist responsible for his diagnosis, care, and

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<sup>20</sup> JX-18, at 15–23 (Appendix A).

<sup>21</sup> Tr. 114–16, 131–32.

<sup>22</sup> Tr. 130–33; Stip. 3; JX-18, at 2.

<sup>23</sup> JX-3. The parties stipulated that service was proper. Stip. 2.

treatment, and a HIPPA waiver signed by Cohen to permit the staff to discuss his condition with the treating physician.<sup>24</sup>

The February 5 letter set a February 19, 2021 deadline for responding.<sup>25</sup> Cohen responded through counsel by the deadline but did not produce the requested medical information and HIPPA waiver (Item 13) or other requested documents such as Cohen's tax records (Item 9).<sup>26</sup> Eventually, in late July, Cohen provided HIPPA waivers and his income tax returns.<sup>27</sup> But Cohen never produced other items the February 5 letter requested.

As noted above, Items 1, 2, 3, 7, 8, and 11 of the February 5 letter are still outstanding; they are the focus of Enforcement's case.<sup>28</sup> In summary, the outstanding items request the following communications and records for the period from January 1, 2016, to the present:<sup>29</sup>

Item 1: All communications to, from, or concerning any of Cohen's customers (including all types of electronic communications, such as emails, text messages, and social media communications on Facebook, Twitter, LinkedIn, Instagram, SnapChat, WhatsApp, Skype, and other software platforms);

Item 2: All communications (including all types of electronic communications, as described in Item 1) to, from, or concerning a dozen identified entities and individuals who may have had a connection to the loans that were the subject of claims by Cohen's customers;

Item 3: Copies of records relating in any way to the entities and individuals listed in Item 2, including organizational materials, business agreements and contracts, marketing materials, donation receipts and other documents;

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Item 7: All communications (including all types of electronic communications, as described in Item 1) relating to Morgan Stanley's business and/or The Cohen Group;

Item 8: Copies of periodic statements for all personal and business bank accounts and other kinds of financial accounts in which Cohen had an ownership or other beneficial interest, or Cohen was an authorized signer or agent, or Cohen had access

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<sup>24</sup> JX-3, at 5.

<sup>25</sup> JX-3, at 2.

<sup>26</sup> Stip. 4; JX-7.

<sup>27</sup> Tr. (Enforcement's counsel) 113. See discussion below at 22–23.

<sup>28</sup> Tr. FPHC 28–32.

<sup>29</sup> CX-1; JX-3, at 2–5.

or authority to act on behalf of the account (specifically including accounts of The Cohen Group);<sup>30</sup>

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Item 11: All call logs, phone bills, and other documents from service providers for Cohen's personal and business telephone accounts.

With respect to the items requesting communications to, from, and concerning customers, such as emails and the like, and the request for records related to identified persons and entities (Items 1, 2, 3, and 7) Cohen represented that he had "conducted a reasonable, diligent search for the requested communications in his personal possession, custody, and control, and he ha[d] no responsive documents."<sup>31</sup> He did not explain where he had searched or how.

FINRA staff did not view his response as complete. The staff was already aware from information Morgan Stanley provided that some responsive text messages were on Cohen's cell phone when he turned it over to Morgan Stanley. Morgan Stanley hired an outside contractor to make a forensic image or copy of data on the cell phone and produced a subset of responsive documents. FINRA staff believed that there were likely more responsive documents, but Morgan Stanley refused to provide other responsive material from the phone because it did not think it had the appropriate authorization or permission from Cohen to do so.<sup>32</sup>

With respect to the request for periodic statements for bank accounts and other financial accounts (Item 8), Cohen responded through counsel that he had over ten bank and brokerage accounts covered by the February 5 Rule 8210 request. He called the request overbroad and burdensome, and asserted that the request invaded his privacy and covered information that was irrelevant to the investigation. Instead of providing the requested documents, he offered to provide a sworn statement attesting that there were no financial transactions pertaining to the subject matter of the investigation.<sup>33</sup>

With respect to the request for call logs and telephone bills (Item 11), Cohen responded through counsel that he had no records responsive to the request in his personal possession, custody, or control.<sup>34</sup>

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<sup>30</sup> Item 8 covered Cohen's brokerage statements, as well as his bank statements. Enforcement at some point obtained brokerage statements from Morgan Stanley and by the time of the hearing Enforcement believed it had them all. For that reason, Enforcement does not allege Cohen's failure to produce the brokerage statements as part of the Rule 8210 violation. Tr. 104-05; Tr. FPHC 31.

<sup>31</sup> JX-7, at 1-3, 4.

<sup>32</sup> Tr. 82-85. At some point, Morgan Stanley provided a copy of the cell phone data to Cohen, and he now has a copy in his possession. Stip. 9. At that point (or now), he could either give Morgan Stanley permission to produce the responsive communications or work with his counsel to produce them himself.

<sup>33</sup> JX-7, at 5.

<sup>34</sup> JX-7, at 7.



In the February 19 response, Cohen’s counsel represented that his client was “willing to cooperate with FINRA to the best of his ability considering his very serious health condition.”<sup>35</sup> Counsel did not, however, assert that Cohen’s “condition” prevented him from responding fully and completely to any of the requests.

On March 2, 2021, Cohen’s counsel submitted an additional response to the February Rule 8210 request letter.<sup>36</sup> But FINRA staff deemed both responses to the February letter incomplete.<sup>37</sup>

### **3. March 2, 2021**

FINRA staff served Cohen with another Rule 8210 request letter on March 2, 2021. That letter focused on Cohen’s initial responses to Items 1, 2, 3, and 7 in the February letter.<sup>38</sup>

The March 2 letter asked Cohen to describe the steps he took to conduct his search for responsive communications and records. The staff asked him to identify the devices, databases, and other sources he searched and specify the search terms used. In addition, the letter asked him to state whether he had ever sent or received communications to, from, or concerning any of his customers using personal email accounts, text messages, or other social media communications. It asked for the same information related to the dozen entities and persons specifically identified in the February letter. The March 2 letter further asked whether Cohen ever had in his possession, custody, or control any communications or other documents responsive to Items 1, 2, 3, or 7. If he at one time had responsive communications or documents, the March 2 letter continued, he was required to explain why he no longer has them. The March 2 letter asked about any actions he may have taken to delete responsive electronic files and whether he had saved back-up copies of the contents of his personal cell phone.<sup>39</sup>

Through counsel, Cohen submitted a written response on March 19.<sup>40</sup> He produced no documents or records. Instead, he reported that he had turned over his cell phone to Morgan Stanley, which had imaged it, and afterward he had bought a new phone. He claimed that he did not save a back-up copy of the contents of his old cell phone and that he had no responsive communications on the new phone. He said he “believes” that in the past he sent and received emails and text messages with customers and that some of his past communications involved

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<sup>35</sup> JX-7, at 7.

<sup>36</sup> Stip. 5.

<sup>37</sup> JX-10, at 2.

<sup>38</sup> JX-9.

<sup>39</sup> JX-9.

<sup>40</sup> Stip. 7; JX-13.

Morgan Stanley and The Cohen Group's business. But he did not retain communications between himself and others after he replaced his phone.<sup>41</sup>

Enforcement alleges that Cohen failed to comply with Rule 8210 because he still has not produced documents and information sought by Items 1, 2, 3, and 7.<sup>42</sup>

#### **4. March 19, 2021**

Separately, FINRA staff issued another Rule 8210 letter dated March 19, 2021, seeking additional information relating to Items 8, 9, 11, and 13 in the February letter.<sup>43</sup> Cohen still has not produced documents requested by Items 8 and 11, and Enforcement alleges that he thereby failed to comply with Rule 8210.<sup>44</sup>

Specifically, with respect to Item 8, Cohen's counsel had previously said that he would begin producing the requested bank and brokerage statements the week of March 15, 2021. But during a call with FINRA staff on March 17, counsel said that the documents would not be produced that week.<sup>45</sup> With respect to Item 11, in a March 8 written response, counsel said that Cohen would be willing to request records from his wireless phone service provider, but as of March 19 the staff had received no records.<sup>46</sup>

In conversations and emails with Enforcement in late March, Cohen's counsel represented that Cohen would start producing financial statements and tax returns in hard copy the week of March 29.<sup>47</sup> But two days later, in a March 31 written response, Cohen's counsel contradicted himself.<sup>48</sup> Counsel explained that financial accounts between 2016 and 2019 had been joint accounts with Cohen's wife until the couple divorced, and Cohen's ex-wife had refused permission to share the account statements with FINRA.<sup>49</sup> Counsel did not identify any particular accounts and did not explain whether Cohen held both personal accounts and business accounts jointly with his wife.

With respect to the cell phone records requested by Item 11, Cohen's counsel reported that "we" spoke to an AT&T representative and requested the records. Counsel said that it would

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<sup>41</sup> JX-13, at 1–2.

<sup>42</sup> Tr. 28; Tr. FPHC 30–31.

<sup>43</sup> JX-10. The parties stipulated that service was proper. Stip. 6.

<sup>44</sup> Tr. FPHC 31–32.

<sup>45</sup> JX-10, at 3.

<sup>46</sup> JX-10, at 3–4.

<sup>47</sup> JX-14, at 1–4.

<sup>48</sup> JX-15.

<sup>49</sup> JX-15, at 2.

take at least 10 more days for the request to be processed. Counsel did not indicate the date the request was made or who made it, and he provided no documentation of the request.<sup>50</sup>

In early April, Cohen's counsel continued to assert that Cohen's ex-wife refused to allow him to turn over statements for their joint financial accounts. He wrote, "We will forward to FINRA any response we get from [Cohen's ex-wife] and her counsel about why they refuse to allow production of the joint statements."<sup>51</sup> Cohen failed to produce any financial statements. He did not cite his medical condition as the reason.

Enforcement subsequently forwarded to Cohen's counsel a case in which a FINRA Hearing Panel held that a respondent violated Rule 8210 by not producing joint bank account statements and other documents even though the respondent's wife objected.<sup>52</sup> Enforcement argued that Cohen had the right to demand, and ability to obtain, the account statements for the joint accounts from his broker-dealer without his wife's consent. Enforcement pointed out that under Supplementary Material .01 to Rule 8210, Cohen had the obligation to produce documents in the possession of another person or entity if he had the right to demand them.<sup>53</sup>

## **5. April 8, 2021**

Enforcement issued a fifth Rule 8210 request letter to Cohen on April 8, 2021, which set forth a chronology of Cohen's responses to earlier requests and various extensions of time that Enforcement had previously granted.<sup>54</sup> According to Enforcement, despite extensions of time, Cohen failed to provide a full and complete response to the November 23 letter,<sup>55</sup> the February 5 letter,<sup>56</sup> and the March 2 letter.<sup>57</sup> In the April 8 Rule 8210 letter, Enforcement focused on Items 1, 2, 3, and 7, but said in a footnote there were deficiencies in Cohen's responses to Items 8, 9, 11, and 13, as well.<sup>58</sup>

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<sup>50</sup> JX-15, at 3.

<sup>51</sup> JX-16, at 1.

<sup>52</sup> JX-17, at 1, 4–12.

<sup>53</sup> JX-17, at 1. At the Final Pre-Hearing Conference, Cohen's counsel continued to argue that Cohen was prevented from producing his bank statements because his ex-wife has threatened to sue him if he releases them to FINRA. Tr. FPHC 35–36.

<sup>54</sup> JX-18. The parties stipulated that service was proper. Stip. 10.

<sup>55</sup> JX-18, at 2.

<sup>56</sup> JX-18, at 2.

<sup>57</sup> JX-18, at 3.

<sup>58</sup> JX-18, at 2 n.1.

Enforcement set April 29, 2021, as the due date for providing the documents and information requested by Items 1, 2, 3, and 7.<sup>59</sup> Enforcement did not extend the deadline for remedying deficiencies in Cohen’s responses to Items 8, 9, 11, and 13.<sup>60</sup>

On April 29, the due date for a response to the April 8 Rule 8210 letter, counsel for Cohen sent Enforcement a written response.<sup>61</sup> It was less than a complete response. With respect to the communications and records at issue in Items 1, 2, 3, and 7, the response promised to provide a “timeframe” for production on May 3, 2021.<sup>62</sup> With respect to Item 8, requesting periodic bank and financial account statements, the response represented that Cohen and his counsel were working on the production of those documents. There was no mention of the ex-wife’s objections to production or of Cohen’s medical condition interfering with production.<sup>63</sup> With respect to Item 11, requesting cell phone logs and bills, the response stated that Cohen had requested copies of his personal cell phone records and again promised to provide a “timeframe” for production on May 3.<sup>64</sup>

On May 5, counsel for Cohen supplemented his response to the April 8 letter. The supplement repeated that Cohen had bought a new cell phone in late October or early November 2020 without backing up his cell phone data from the old phone. Cohen represented that he searched for communications on his cell phone and did not own a personal laptop, iPad, or other tablet computer. He did not mention whether he owned a desktop and had used it during the period covered by the Rule 8210 request. He maintained that he was “not the primary email recipient” of emails concerning customers and the like, but, rather, was copied on emails regarding friends’ dealings with mutual clients.<sup>65</sup> Essentially, Cohen interpreted the Rule 8210 request for communications concerning his customers and his business to cover only those communications in which he was the “primary” email recipient, without defining what that meant. His interpretation excluded from the Rule 8210 request emails involving his customers if he was only copied on the emails.

## **F. Enforcement Issues Notice of Suspension**

On June 16, 2021, Enforcement sent Cohen, through his counsel, a Notice of Suspension for failing to respond to Items 1, 2, 3, 7, 8, 9, 11, and 13. The Notice informed him that he would

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<sup>59</sup> JX-18, at 3.

<sup>60</sup> JX-18, at 2 n.1.

<sup>61</sup> Cohen had counsel throughout the process of responding to the Rule 8210 requests, but in spring 2021 different counsel began responding to Enforcement on his behalf, and that firm later represented him in this expedited proceeding. Tr. FPHC 47–49. We do not distinguish between Cohen’s attorneys here but refer to them throughout this decision as Cohen’s counsel.

<sup>62</sup> JX-21, at 1, 4–5.

<sup>63</sup> JX-21, at 6.

<sup>64</sup> JX-21, at 7.

<sup>65</sup> JX-23, at 1–2.

be suspended on July 12 if he did not take corrective action. It also informed him that he could obtain a stay of the suspension by filing a request for a hearing before the suspension became effective.<sup>66</sup> In compliance with FINRA Rule 9552(c) regarding the contents of such Notices, the Notice cautioned that, pursuant to Rule 9559(n), a Hearing Panel could approve, modify, or withdraw any sanction or limitation imposed by the Notice and could impose any other fitting sanction. If Cohen did not request a hearing and failed to request termination of the suspension on the ground of full compliance within three months, the Notice told him he would be barred on September 20, 2021.<sup>67</sup>

### **G. Cohen Requests a Hearing and Obtains a Stay of the Suspension**

On July 9, 2021, through counsel, Cohen requested a hearing. The request noted that Cohen “is currently suffering from generalized anxiety disorder, panic disorder and post-traumatic stress disorder and is under the care of Dr. [MM], a board-certified psychiatrist.”<sup>68</sup> According to counsel’s letter, the psychiatrist had advised that Cohen’s participation in FINRA’s investigation would be “detrimental to his health and should be avoided.”<sup>69</sup> The request for a hearing purported to enclose a May 14 letter from the psychiatrist regarding Cohen’s condition,<sup>70</sup> but the filing did not include any letter from the psychiatrist.

### **H. Cohen Supplements His Rule 8210 Responses**

On July 23, 2021, Cohen’s counsel sent a letter to Enforcement supplementing Cohen’s responses to Items 9 and 13.<sup>71</sup> He produced personal income tax returns, which Item 9 requested,<sup>72</sup> and the returns were then included in the joint exhibits. He also provided contact information for Cohen’s psychiatrist and psychologist and the HIPPA waivers necessary to allow FINRA staff to speak to them about his condition.<sup>73</sup> The HIPPA waivers were included in the joint exhibits. Although the HIPPA waivers were provided to Enforcement on July 23, they appear to have been signed a couple of weeks earlier, on July 7 and July 8, 2021. Cohen’s counsel provided no explanation for the delay in providing them.<sup>74</sup>

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<sup>66</sup> JX-26, at 2. The parties stipulated that the Notice of Suspension was properly served. Stip. 13.

<sup>67</sup> JX-26, at 3.

<sup>68</sup> JX-28, at 1. The parties stipulated that the request was timely. Stip. 14.

<sup>69</sup> JX-28, at 1.

<sup>70</sup> JX-28, at 1–2.

<sup>71</sup> JX-32; Stip. 17.

<sup>72</sup> JX-10, at 8.

<sup>73</sup> JX-32, at 3.

<sup>74</sup> JX-36; JX-37.

## I. Cohen Repeatedly Seeks to Delay the Hearing

By requesting a hearing, Cohen obtained a stay of the suspension. In accord with Rule 9559(f)(4) for this type of expedited proceeding, the hearing was set within 30 days of the request for August 9, 2021.

Cohen has repeatedly argued that because of his medical condition the hearing should be delayed. At the July 30, 2021 status conference, his counsel asserted that Cohen suffers from a psychiatric condition that rendered him unable to participate in the August 9 hearing.<sup>75</sup> Counsel argued that Cohen has rights under the American Disabilities Act<sup>76</sup> and that “FINRA is obligated to provide accommodations to people that are in its sphere.”<sup>77</sup> The Hearing Officer ordered Cohen’s counsel to submit briefing and documentary support regarding his medical condition and how it might affect his ability to participate in the hearing. She also specifically sought briefing on the disability laws on which counsel relied and gave Enforcement time to respond.<sup>78</sup>

With his briefing, Cohen submitted four letters from MM, his treating psychiatrist. Based on the psychiatrist’s letters, Cohen’s counsel asserted that good cause existed to extend the time for holding the hearing.<sup>79</sup> Counsel sought what amounted to an indefinite delay “until such time as [Cohen’s] doctors declare him fit to attend and testify.”<sup>80</sup>

The psychiatrist’s letters are addressed “To whom it may concern,” and they describe Cohen’s condition in general terms. According to the letters, Cohen suffers from generalized anxiety disorder and other stress-related disorders triggered by problems at work. The letters label his various disorders but do not indicate how he was evaluated or the basis for the conclusions reached. The December 9 letter notes that Cohen is on disability and focuses on when Cohen would, in the view of his psychiatrist, be fit to return to the workplace.<sup>81</sup> The February 24 letter is the only one that mentions an investigation. In the February 24 letter, the psychiatrist declares that Cohen “must not participate at this time in any work-related functions or interviews or investigations concerning his work.”<sup>82</sup> The May 14 letter focuses on when Cohen might be able to return to work, suggesting that it might be possible in January 2022, if he

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<sup>75</sup> Transcript of July 30, 2021 Pre-Hearing Conference (“Tr. July 30 PHC”) 27–28.

<sup>76</sup> Tr. July 30 PHC 24–25.

<sup>77</sup> Tr. July 30 PHC 28–29.

<sup>78</sup> Tr. July 30 PHC 25–27, 28–29, 32, 34; Order Memorializing Rulings at Status Conference, July 30, 2021 (“July 30 Order”).

<sup>79</sup> Respondent Darryl Cohen’s Pre-Hearing Brief (“Cohen Br.”) 6.

<sup>80</sup> Cohen Br. 2.

<sup>81</sup> RX-1.

<sup>82</sup> RX-3.

improved.<sup>83</sup> The July 22 letter casts some doubt on Cohen’s ability to return to work in January 2022, saying that the return date would have to be periodically reassessed.<sup>84</sup>

The psychiatrist’s letters do not mention FINRA. They do not evaluate Cohen’s ability to comply with regulatory directives. In particular, they do not address his ability to work with his attorneys to produce documents and information requested pursuant to Rule 8210. Nor do the letters discuss Cohen’s ability to attend and testify at the originally scheduled hearing on August 9 or the hearing eventually held on October 25.

The Hearing Officer held another status conference on August 17. At that conference, Cohen’s counsel argued that the hearing should be postponed 90 days “subject to his doctor’s approval.”<sup>85</sup> In his briefing and at the conference, counsel asserted that FINRA is required to accommodate Cohen’s disability by postponing the hearing.<sup>86</sup> Essentially, counsel made Cohen’s participation in the hearing contingent on his psychiatrist’s approval.<sup>87</sup>

In its response brief, Enforcement asserted that the disability statutes on which Cohen relied are irrelevant to this FINRA regulatory proceeding.<sup>88</sup> In any case, Enforcement further asserted, an indefinite postponement dependent on some undefined improvement in Cohen’s condition, would not be a reasonable accommodation.<sup>89</sup>

The Hearing Officer denied the request for an indefinite postponement of the hearing, concluding it would be inconsistent with FINRA’s regulatory responsibilities, the nature of an expedited proceeding, and the public interest in gathering information about potential misconduct.<sup>90</sup> At the August 17 status conference, she made plain that the psychiatrist’s “approval” would not govern the hearing schedule.<sup>91</sup>

As the Hearing Officer explained in the Order issued after the status conference, the federal and state disability statutes cited by Cohen’s counsel do not require FINRA to delay the

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<sup>83</sup> RX-5.

<sup>84</sup> RX-7.

<sup>85</sup> Transcript of August 17, 2021 Pre-Hearing Conference (“Tr. Aug. 17 PHC”) 9–10.

<sup>86</sup> Tr. Aug. 17 PHC 6–7; Cohen Br. 2, 6–11.

<sup>87</sup> Tr. Aug. 17 PHC 10 (“I just want to make sure his physician says it’s okay.”) 11 (“I would just want to clear it with Mr. Cohen’s physician . . .”).

<sup>88</sup> Enforcement’s Response to Cohen’s Prehearing Brief (“Enf. Resp. Br.”) 7–9.

<sup>89</sup> Enf. Resp. Br. 9–10.

<sup>90</sup> August 19, 2021 Order Setting Hearing and Other Deadlines (“Aug. 19 Order”).

<sup>91</sup> Tr. Aug. 17 PHC 20 (“[W]orking with the psychiatrist and you and Mr. Cohen to make it easier for him to participate in the hearing that he requested does not mean I am turning over the control of the schedule to his psychiatrist. I am not saying that it’s up to her approval.”).

hearing to accommodate Cohen's disability. None of those statutes has any relevance to a FINRA regulatory proceeding.<sup>92</sup>

Nevertheless, the Hearing Officer determined to make use of the concept of reasonable accommodation derived from some of the disability statutes Cohen's counsel cited. She found that the indefinite postponement of the hearing Cohen sought was not a reasonable accommodation. But she offered to provide other reasonable accommodations. She delayed the hearing until October 25, 2021 (a date the parties agreed upon), to provide Cohen at least two more months to prepare and work with his psychiatrist on ways to accommodate his disability consistent with FINRA's regulatory responsibility to resolve this expedited proceeding promptly. She set the hearing for two days rather than one, which provided flexibility for shorter hearing days and more frequent breaks, if necessary. The Hearing Officer also required Cohen to file two status reports in the months preceding the hearing, partly to obtain updated information on Cohen's medical status and partly to determine whether other accommodations would be helpful.<sup>93</sup>

Cohen's counsel filed the first status report four days late, but gave no explanation for why it was late. He reported that Cohen's condition had not improved. However, counsel provided no new letter from the psychiatrist or any other medical professional to assist in understanding Cohen's current condition. The conclusion that Cohen's condition had not improved was counsel's conclusion, not a medical professional's conclusion. Despite the alleged lack of improvement, counsel wrote that Cohen was "doing what he c[ould] to prepare for the hearing set for 10/25/2021" and that Cohen might need more frequent breaks than usual during the hearing.<sup>94</sup> The status report did not request any additional accommodations. Nor did it say that Cohen would not appear at the hearing.

Cohen's counsel did not file the second status report on the date due, or after the Case Administrator reminded him and provided a short grace period until the end of the week it was due. The following week, just 45 minutes before the scheduled Final Pre-Hearing Conference on October 19, 2021, counsel filed the status report without explanation for its tardiness. It was accompanied by a request to delay the hearing by another 90 days. The second status report contained no new medical evaluation. It said that Cohen would be reevaluated in November, which was after the scheduled hearing dates.<sup>95</sup> At the Final Pre-Hearing Conference, counsel asserted that the psychiatrist was currently "unavailable."<sup>96</sup> Counsel claimed that Cohen wanted to cooperate with the Rule 8210 requests and investigation, "but he is under doctor's orders not

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<sup>92</sup> Aug. 19 Order.

<sup>93</sup> Tr. Aug. 17 PHC 20–24; Aug. 19 Order.

<sup>94</sup> September 17, 2021 Status Report.

<sup>95</sup> October 19, 2021 Status Report.

<sup>96</sup> Tr. FPHC 17, 19.



to do so right now.”<sup>97</sup> Counsel added, “He is just following his doctor’s instructions.”<sup>98</sup> “Darryl Cohen does have a story to tell. He is under the doctor’s orders not to do it now.”<sup>99</sup> The four letters from Cohen’s psychiatrist contain no such instructions, however, and counsel proffered no other evidence that the doctor had given those instructions.

Initially, at the Final Pre-Hearing Conference the Hearing Officer denied the request for a 90-day continuance of the hearing.<sup>100</sup> She noted that there was no indication in the filing by Cohen’s counsel that Cohen “ha[d] been working with his medical team on the kind of accommodations that we discussed in our last prehearing conference, accommodations to enable him to participate in the hearing. Instead [counsel’s] letter makes clear that the Respondent has done nothing to facilitate the presentation of his defense at a hearing.”<sup>101</sup>

But Cohen’s counsel continued to argue that it would be unfair to go forward with the hearing,<sup>102</sup> and the Hearing Officer treated the argument as a renewed motion for a continuance. She ordered briefing.<sup>103</sup>

After receiving the parties’ briefs, the Hearing Officer issued an Order denying the renewed request to delay the hearing.<sup>104</sup> In that Order, the Hearing Officer noted that Cohen had submitted no new medical evidence about his mental health condition. Rather, Cohen’s lawyers submitted status reports containing their interpretations of the psychiatrist’s earlier letters, and the lawyers misleadingly described their status reports as “health updates.”<sup>105</sup> Cohen failed to show good cause to postpone the hearing a second time.<sup>106</sup>

At the hearing on October 25, 2021, Cohen’s counsel asserted that Cohen’s psychiatrist deemed him unable to participate in the hearing, and Cohen was following her advice.<sup>107</sup> “[B]ased on my recommendation,” counsel said, “Mr. Cohen is following the doctor’s advice . . . .”<sup>108</sup> As noted above, none of the letters from the psychiatrist mention any hearing. There is

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<sup>97</sup> Tr. FPHC 18.

<sup>98</sup> Tr. FPHC 20.

<sup>99</sup> Tr. FPHC 27.

<sup>100</sup> Tr. FPHC 7.

<sup>101</sup> Tr. FPHC 6.

<sup>102</sup> Tr. FPHC 59–62.

<sup>103</sup> Tr. FPHC 62–66.

<sup>104</sup> October 22, 2021 Order Denying Respondent’s Renewed Request for Another Continuance of the Hearing Date (“Oct. 22 Order”).

<sup>105</sup> Oct. 22 Order 3.

<sup>106</sup> Oct. 22 Order 3–5.

<sup>107</sup> Tr. (Cohen’s counsel) 38.

<sup>108</sup> Tr. (Cohen’s counsel) 34.

no evidence that the psychiatrist ever discussed or considered Cohen’s ability to participate in the hearing.

Counsel described Cohen as “a victim of ADA discrimination, disability discrimination by going forward with this process and it is unfair . . . .”<sup>109</sup> “FINRA Enforcement and the Hearing Officer ha[ve] refused to accommodate his disability which is set forth in the [July 22] letter [signed by Cohen’s psychiatrist].”<sup>110</sup> Counsel urged the full Hearing Panel to reconsider and delay the proceeding until at least January 2022, after Cohen’s psychiatrist could reexamine him.<sup>111</sup> Although Cohen’s counsel had suggested in the second status report filed on October 19 that Cohen might be reevaluated again by the psychiatrist in November, by the time of the hearing on October 25, counsel announced that Cohen “will not be evaluated to return to work until January 1, 2022, at leas[t].”<sup>112</sup> This is illustrative of the ever-changing representations made on Cohen’s behalf throughout the expedited proceeding. In any event, the promised evaluation, like the four earlier letters, was described as focused on a possible return to work, not participation in a FINRA hearing.

The Hearing Officer allowed Enforcement an opportunity to respond and determined that the full Hearing Panel would consider the issue. A recess was taken. After discussing the issue in private, the full Hearing Panel decided to go forward with the hearing.<sup>113</sup>

#### **J. Cohen’s Failure to Produce Documents Requested Pursuant to Rule 8210 Impedes the Investigation**

As of the hearing date, October 25, 2021, Cohen still had not produced any of the requested communications relating to Cohen’s customers and business, his bank statements, or phone logs and records.<sup>114</sup> These are documents that FINRA typically requests when investigating misappropriation and outside business activities,<sup>115</sup> because such documents can provide insight into a respondent’s conduct.

Cohen failed to produce the communications recorded on his cell phone, even though he could have authorized Morgan Stanley to produce the forensic image of the cell phone that it made and, after he obtained that forensic image from Morgan Stanley, he could have produced

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<sup>109</sup> Tr. (Cohen’s counsel) 38.

<sup>110</sup> Tr. (Cohen’s counsel) 32. See also Tr. (Cohen’s counsel) 39–40 (“He would like to present his defense and he asks you as the Hearing Panel . . . [to] consider . . . that Darryl Cohen has a right to contest these charges . . . . He just cannot do so because he suffers from serious disabilities that are protected by the American Disabilities Act . . . .”).

<sup>111</sup> Tr. (Cohen’s counsel) 38–40.

<sup>112</sup> Tr. (Cohen’s counsel) 38. See also Tr. (Cohen’s counsel) 40 (Cohen “will be reevaluated around January 1, 2022.”).

<sup>113</sup> Tr. 40–57.

<sup>114</sup> Tr. 75, 103, 108.

<sup>115</sup> Tr. 75–76.

the requested communications himself.<sup>116</sup> His failure to produce the requested communications hindered FINRA’s investigation.<sup>117</sup> Electronic communications often show contemporaneous events and the parties involved. They give a lot of background for an investigation.<sup>118</sup>

Similarly, Cohen’s failure to produce his bank statements was a significant roadblock to the investigation. The FINRA Principal Investigator, Stoltenberg, testified, “In my experience in investigating misappropriation cases, bank statements are often the evidence to prove what happened.”<sup>119</sup> “[O]ften times personal bank statements are . . . the key evidence to whether or not the misconduct took place and . . . you can prove . . . how much money, over what period of time . . . [and] how many customers were involved.”<sup>120</sup> “Without getting those bank statements,” she concluded, “our investigation was essentially stalled.”<sup>121</sup>

The missing phone logs and records also impeded the investigation.<sup>122</sup> Stoltenberg explained that phone records give a window into interactions between Cohen and his customers and could be used to explore with specific customers the nature of the conversations they may have had with Cohen.<sup>123</sup>

### **III. Conclusions**

#### **A. Cohen Had an Unequivocal Duty to Respond to the Rule 8210 Requests Timely and Completely**

Rule 8210 authorizes FINRA staff to request information from associated persons and inspect their books, records, and accounts if they are in their possession, custody, or control.<sup>124</sup> Account records in the hands of third parties, such as a bank or brokerage firm, are considered within an associated person’s possession, custody, or control if that person has a right to demand the records from the third party.<sup>125</sup> Rule 8210 requires compliance.<sup>126</sup>

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<sup>116</sup> Stip. 9; Tr. 90–93; CX-1.

<sup>117</sup> Tr. 93–95.

<sup>118</sup> Tr. 80.

<sup>119</sup> Tr. 126.

<sup>120</sup> Tr. 96–97.

<sup>121</sup> Tr. 106.

<sup>122</sup> Tr. 110–11.

<sup>123</sup> Tr. 107.

<sup>124</sup> FINRA Rule 8210(a)(1) and (2).

<sup>125</sup> *Dep’t of Enforcement v. Felix*, No. 2018058286901, 2021 FINRA Discip. LEXIS 7, at \*16–19 (NAC May 26, 2021), *appeal docketed*, No. 3-20380 (SEC June 28, 2021).

<sup>126</sup> FINRA Rule 8210(c).

Cohen had an “unequivocal” duty to respond to the Rule 8210 requests timely and completely.<sup>127</sup> A failure to respond timely and completely is a violation of Rule 8210.<sup>128</sup> And it is a serious violation, because it “frustrates [FINRA’s] ability to detect misconduct, and such inability in turn threatens investors and markets.”<sup>129</sup> FINRA Rule 8210 “is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct.”<sup>130</sup> The SEC considers the Rule “essential to FINRA’s ability to investigate possible misconduct by its members and associated persons,”<sup>131</sup> because FINRA lacks subpoena power.<sup>132</sup>

FINRA’s rules provide two avenues to enforce compliance with Rule 8210 requests for information. It can file a disciplinary complaint alleging a violation of Rule 8210, but it also can pursue an expedited procedure to address a violation of Rule 8210 more quickly.<sup>133</sup>

The authorization of an expedited procedure for a failure to cooperate with an investigation reflects the importance of compliance with FINRA’s Rule 8210 requests. The purpose of an expedited procedure is to provide a means of addressing the “misconduct in an accelerated timeframe.”<sup>134</sup> “Vigorous enforcement of Rule 8210 ‘helps ensure the continued strength of the self-regulatory system—and thereby enhances the integrity of the securities markets and protects investors.’”<sup>135</sup>

## **B. Cohen Failed to Provide a Complete Response to Rule 8210 Requests**

Cohen failed to produce any communications to, from, or concerning his customers and business (Items 1, 2, 3, and 7). He also failed to produce periodic bank statements for his bank accounts (Item 9), and telephone logs and records (Item 11). At the time of the hearing, these

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<sup>127</sup> *Michael Nicolas Romano*, Exchange Act Release No. 76011, 2015 SEC LEXIS 3980, at \*19 (Sept. 29, 2015).

<sup>128</sup> *Dep’t of Enforcement v. Reifler*, No. 2016050924601, 2019 FINRA Discip. LEXIS 44, at \*10 (NAC Sept. 30, 2019), *appeal docketed*, No. 3-19589 (SEC Oct. 10, 2019).

<sup>129</sup> *Dep’t of Enforcement v. North Woodward Fin. Corp.*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at \*20 (NAC July 21, 2014) (citing *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at \*13 (Apr. 11, 2008)), *aff’d*, Exchange Act Release No. 74913, 2015 SEC LEXIS 1867 (May 8, 2015), *aff’d*, *Troszak v. SEC*, 2016 U.S. App. LEXIS 24259 (6th Cir. June 29, 2016).

<sup>130</sup> *Blair C. Mielke*, Exchange Act Release No. 75981, 2015 SEC LEXIS 3927, at \*54 n.46 (Sept. 24, 2015).

<sup>131</sup> *Mielke*, 2015 SEC LEXIS 3927, at \*54. *See also Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at \*20–21 (Sept. 10, 2010).

<sup>132</sup> *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at \*23 (Nov. 8, 2007); *Dep’t of Enforcement v. Day*, Expedited Proceeding No. FPI200001, 2020 NASDR OHO LEXIS 107049, at \*6 (Aug. 17, 2020).

<sup>133</sup> *Christine D. Memet*, Exchange Act Release No. 83711, 2018 SEC LEXIS 1876 at \*3–4 (July 25, 2018).

<sup>134</sup> *Id.* at \*19 n.20.

<sup>135</sup> *Id.* at 19 (quoting *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at \*4 (Nov. 14, 2008), *aff’d*, 347 F. App’x 692 (2d Cir. 2009)).

Rule 8210 requests were all outstanding. There can be no dispute that Cohen’s responses to multiple Rule 8210 requests were incomplete.

### **C. Cohen Failed to Establish a Valid Defense**

#### **1. Cohen Was Required to Set Forth Any and All Defenses in His Request for a Hearing**

FINRA Rules 9552 and 9559 together structure an expedited process for suspending and potentially barring a person who violates Rule 8210. The process is initiated under Rule 9552(a) by service of a Notice of Suspension for failure to provide documents or information requested pursuant to Rule 8210. Rule 9552(d) allows a person to obtain a stay of the suspension, however, by requesting a hearing. Rule 9559(f)(4) requires that any such hearing be held promptly within 30 days of the request. Rule 9552(e) provides that a respondent’s hearing request “must set forth with specificity any and all defenses to the FINRA action.”<sup>136</sup>

#### **2. Cohen Raised One Defense in His Request for a Hearing: His Mental Health Condition**

In his hearing request, Cohen set forth one defense. As discussed above, he asserted that he suffers from generalized anxiety disorder and other mental health disorders and is under a psychiatrist’s care. His lawyers represented in the hearing request that Cohen’s psychiatrist had advised him that participation in FINRA’s investigation or appearing for an interview would be detrimental to his health. In support of his defense and his later attempts to delay the hearing, Cohen subsequently provided the four letters in which his treating psychiatrist discussed his mental health and fitness for work.

#### **3. Cohen Had the Burden to Prove That His Condition Prevented Him from Complying with the Rule 8210 Request**

On occasion, respondents charged with violating FINRA Rule 8210 have asserted that personal problems or medical conditions prevented them from complying with the Rule. But we are unaware of any reported case in which such a problem or condition was successfully asserted as a defense, and the parties have cited none. Respondents in the reported cases failed to

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<sup>136</sup> Although Cohen’s counsel asserted at the Final Pre-Hearing Conference that Cohen could not produce his bank statements because his ex-wife objects (Tr. FPHC 35–36), Cohen did not raise his ex-wife’s objection as a defense in his request for a hearing. Under FINRA Rule 9552(e), he waived the defense. But, waiver aside, the defense has no merit. *Dep’t of Enforcement v. Mellon*, No. 2017052760001, 2019 FINRA Discip. LEXIS 28, at \*22–24, 27–28 (OHO July 11, 2019) (husband could not prevent wife from producing bank statements to FINRA because bank confirmed that one joint bank account holder alone could authorize the release of bank statements), *appeal docketed* (NAC July 16, 2019); *Dep’t of Enforcement v. Fox*, 20090195518, 2011 FINRA Discip. LEXIS 55, \*9–11 (OHO Oct. 3, 2011) (husband barred for not producing joint bank account statements despite wife’s objections). If regulated persons could conceal activity in their bank accounts by holding the accounts jointly with spouses and others who could object and block production, FINRA’s ability to investigate and detect misconduct would be eviscerated. Cohen had to produce the bank statements requested pursuant to Rule 8210 regardless of any purported objection by his ex-wife.

establish one or both prongs of a two-pronged analysis. They failed to provide sufficient corroborating evidence of the underlying problem or condition and/or failed to show how it prevented the respondent from complying with Rule 8210.<sup>137</sup>

The analysis is demonstrated in *DePalo*,<sup>138</sup> a case much like the one at hand. There the respondent argued that his failure to appear for testimony in response to two Rule 8210 requests was justified because his psychiatrist had advised him that testifying would endanger his mental health. The respondent relied on the psychiatrist's advice to excuse his failure to comply with the Rule 8210 requests and submitted no other evidence regarding his condition. Notably, other actions by the respondent were inconsistent with the claim that he relied on his psychiatrist's advice. For example, he went to work even though the psychiatrist had told him that it was not advisable. That inconsistency undercut his assertion that the psychiatrist's advice *prevented* him from appearing for Rule 8210 testimony. Essentially, *DePalo* decided whether to follow the psychiatrist's advice, and sometimes he did and sometimes he did not. He failed to show that his medical condition prevented him from complying with the Rule 8210 request for testimony.

In short, unsubstantiated personal or medical problems do not excuse a failure to respond to Rule 8210 requests.<sup>139</sup> And even if a respondent demonstrates that he or she has personal or medical problems, the respondent still has the burden of demonstrating how those problems rendered the respondent unable to comply with the Rule 8210 requests.<sup>140</sup>

#### **4. Cohen Presented No Evidence to Support His Defense**

Cohen did not substantiate his assertion that his mental health condition prevented him from complying with the outstanding Rule 8210 requests for documents. Through counsel, Cohen declined to testify or participate in the hearing in any way. He submitted no affidavit or

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<sup>137</sup> See, e.g., *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at \*10–11 & n.13 (Sept. 21, 2016) (respondent provided no medical records to substantiate her claimed injuries from a car accident or establish that they prevented her from responding to Rule 8210 requests); *Jeffrey A. King*, Exchange Act Release No. 52571, 2005 SEC LEXIS 2516 (Oct. 7, 2005) (respondent failed to substantiate claim that divorce and accompanying stresses prevented him from responding to requests for information under Rule 8210 predecessor rule); *Dep't of Enforcement v. Vedovino*, No. 2015048362402, 2019 FINRA Discip. LEXIS 20 (NAC May 15, 2019) (respondent failed to show how complying with Rule 8210 requests would interfere with his opioid recovery program); *Dep't of Enforcement v. Jarkas*, No. 2009017899801, 2015 FINRA Discip. LEXIS 50, at \*40–41 (NAC Oct. 5, 2015) (respondent showed that he had suffered a series of severe medical problems but failed to show how they prevented him from providing OTR testimony), *aff'd*, Exchange Act Release No. 77503, 2016 SEC Lexis 1285 (April 1, 2016).

<sup>138</sup> *Dep't of Enforcement v. DePalo*, No. FPI160002, 2016 NASDR OHO LEXIS 43 (Aug. 4, 2016).

<sup>139</sup> *Lee Gura*, Exchange Act Release No. 50570, 2004 SEC LEXIS 2406 (Oct. 20, 2004) (unsubstantiated personal and medical problems do not excuse a failure to respond to Rule 8210 request); *John A. Malach*, Exchange Act Release No. 32743, 1993 SEC LEXIS 2026 at \*5 (Aug. 12, 1993) (unsubstantiated personal problems do not excuse a failure to furnish information).

<sup>140</sup> *Louis F. Albanese*, Exchange Act Release No. 34-39280, 1997 SEC LEXIS 2243 at \*9–12, (Oct. 27, 1997) (failure to appear for on-the-record testimony pursuant to NYSE version of Rule 8210 was not excused by evidence of anxiety and a “fragile” condition without evidence that the condition rendered the respondent unable to testify).

declaration. He also failed to call any witnesses, including the two medical professionals who were on his witness list. He offered no evidence at all.

The four unauthenticated letters from Cohen's psychiatrist admitted at the hearing are insufficient to establish his defense. Even assuming they are what they purport to be, they do little more than identify various disorders and symptoms. The letters do not explain how the psychiatrist conducted her evaluation of Cohen and whether her assessment was based on Cohen's own report of his symptoms or something more. They also do not address Cohen's ability to work with his counsel to produce the missing documents, just as he has already done to produce other documents. Cohen's counsel has consistently overinterpreted the psychiatrist's letters to mean more than they do.<sup>141</sup>

### **5. Cohen's Conduct Was Inconsistent with His Defense**

Enforcement showed that Cohen's conduct in responding to the Rule 8210 requests was inconsistent with his defense. Cohen retained counsel and worked with his attorneys to respond partially to the Rule 8210 requests. Through counsel, he produced some information and documents. There is no evidence why other documents could not also have been produced with counsel's assistance. Cohen also personally tried to locate responsive documents such as electronic communications to, from, or concerning his customers. He participated in the investigation even though, according to his attorney, he received advice from his psychiatrist that participation would be detrimental to his condition.<sup>142</sup> This suggests that Cohen, like the respondent in *DePalo*, chose how and when to follow his psychiatrist's advice.

Analysis of what Cohen produced in response to the Rule 8210 requests and what he did not compels the conclusion that he withheld some documents and information by choice, not because his condition prevented him from producing them. For example, he produced his income tax returns (which were unlikely to show improper activities) but not his bank statements (which might have provided evidence of payments and cash flows that could be inculpatory). He provided no explanation why his mental health condition allowed him to produce one but not the other.

Similarly, Cohen failed to provide the signed HIPPA waiver FINRA staff requested in the February 5 Rule 8210 letter. In late July, after the commencement of the proceeding and only a few weeks before the originally scheduled hearing, he provided signed HIPPA waivers for his psychiatrist and psychologist. He never suggested that an improvement in his condition enabled him to finally sign the forms, more than five months after FINRA staff first requested a HIPPA waiver. Rather he continued from the beginning of the proceeding until the hearing on October

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<sup>141</sup> *C.f.*, *Silverman v. Lien*, 2020 U.S. Dist. LEXIS 36639, at \*17–18, 21–22 (N.D. Cal. Feb. 25, 2020) (unauthenticated medical records were only conclusory statements, and, even assuming that they were authentic and admissible, they did not contain the opinions plaintiff ascribed to them).

<sup>142</sup> Tr. 115–21.

25 to claim through counsel that his condition had not improved. Accordingly, his mental health condition did not cause his failure to provide the HIPPA waiver at the outset.

In fact, during the investigation Cohen did not assert his mental health condition as the reason he failed to produce the requested bank statements. Rather, he repeatedly told Enforcement that he could not produce the bank statements because his ex-wife refused to grant him permission to turn over statements for their joint accounts. Cohen's inconsistent theories for not producing requested documents make his assertion that his medical condition prevented him from producing them not credible.

#### **D. The Hearing Was Not Unfair or Discriminatory**

Cohen's counsel objected to holding the hearing without Cohen present and asserted that Cohen could not participate because of his mental health condition until his doctors gave him their approval to participate. Cohen's counsel relied on the July 22 letter primarily, saying that it "meets our burden" and Enforcement had taken no "steps to rebut it."<sup>143</sup>

As previously discussed, the July 22 letter and the earlier letters that purport to be from Cohen's treating psychiatrist were not authenticated, and Cohen offered no sworn affidavits or declarations from either of the medical professionals who were on his witness list. There was no reliable evidence to rebut.

Regardless, even if the psychiatrist's letters are what they purport to be, the letters do not address Cohen's condition at the time of the October hearing. The earliest is dated in December of last year, and the most current is dated in late July of this year. The letters also do not address whether Cohen could testify at the hearing with the accommodations the Hearing Officer granted him (an extra three months from the original hearing date to prepare, an extra hearing day to permit shorter hearing days and more breaks, and an invitation to request additional accommodations if needed).<sup>144</sup>

Cohen's counsel claimed that his client was "deprived" of an "opportunity to present his evidence, including the items requested in a manner that suits him based on his disability and medical condition."<sup>145</sup> But the recipient of a Rule 8210 request is not entitled to respond in his own preferred time and manner.<sup>146</sup> The Rule requires timely and complete responses. And, as plainly set forth in the August 19 Order in this matter and incorporated here by reference, even if Cohen's medical condition is a disability within the meaning of the federal and California

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<sup>143</sup> Tr. 52.

<sup>144</sup> Tr. Aug. 17 PHC 21–24; Aug. 19 Order 1.

<sup>145</sup> Tr. (Cohen's counsel) 36–37.

<sup>146</sup> *Mielke*, 2015 SEC LEXIS 3927, at \*55–56 ("We have held that associated persons may not decide which specific FINRA information requests they will fulfill."); *Day*, 2020 NASDR OHO LEXIS 107049, at \*8, quoting *Fawcett*, 2007 SEC LEXIS 2598 at \*20 (recipients of Rule 8210 requests cannot set conditions on their compliance).



disability statutes his counsel cited, there is nothing in those statutes that applies to a FINRA regulatory proceeding.<sup>147</sup>

Under FINRA Rules 9552 and 9559, Cohen was entitled to a hearing. He was granted a hearing. Cohen's choice not to participate did not render the hearing unfair or discriminatory.

#### **IV. Sanctions**

Under FINRA Rule 9559(n), a Hearing Panel may approve, modify, or withdraw any sanction imposed by a Notice of Suspension. Under that Rule, a Hearing Panel may also impose any other fitting sanction, as listed in FINRA Rule 8310(a). In compliance with FINRA Rule 9552(c), the Notice of Suspension served on Cohen informed him of the range of possible outcomes.

In considering whether to approve, modify, or withdraw the sanctions imposed by the Notice served on Cohen, or whether to impose any other fitting sanction, we are mindful of the primary focus of a Rule 9552 proceeding. An expedited proceeding under FINRA Rule 9552 is designed as a series of escalating steps intended to encourage a respondent to correct deficiencies in his or her Rule 8210 responses. The emphasis on securing compliance focuses on assisting FINRA in performing its investigatory and enforcement functions.<sup>148</sup>

Customarily, a Rule 9552 proceeding starts with a warning in the form of the Notice of Suspension. Under Rule 9552(a), a respondent is given a 21-day window to correct deficiencies in his or her response to the relevant Rule 8210 requests. By complying fully and completely during this period, the respondent can prevent the imposition of any sanction. If the respondent does not comply during this period, however, under 9552(a) and (d) a suspension is imposed. But even after a suspension is imposed, under Rule 9552(f) the respondent can comply and obtain the termination of the suspension. If the respondent fails to comply within three months, under Rule 9552(h) a bar is automatically imposed. The bar is necessary because such defiance of the duty to respond fully and completely to Rule 8210 requests cannot be allowed to persist and generally indicates that the violator is a continuing danger to the investing public.<sup>149</sup>

In the circumstances of this case, Cohen stayed the imposition of a suspension or any other sanction when he requested a hearing. He gained additional time to comply fully with the outstanding Rule 8210 requests when he requested, and was granted, a postponement of the hearing. Cohen refused for five months to produce documents and information FINRA requested in early February, until FINRA staff served him with the Notice of Suspension. And then he continued to refuse to comply with the Rule 8210 requests for another five months, throughout

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<sup>147</sup> Aug. 19 Order 5–7.

<sup>148</sup> *Dep't of Market Regulation v. Lubetsky*, Expedited Proceeding No. FPI140011, 2015 FINRA Discip. LEXIS 14, at \*19–22 (OHO Mar. 12, 2015).

<sup>149</sup> *Dep't of Enforcement v. Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at \*45 (Apr. 17, 2014).

this proceeding. Instead, he sought at every turn to delay and impede any reckoning. He obtained a stay of any sanction by requesting a hearing, but then refused to participate in the hearing or present any evidence in support of his defense. Instead, he asserts through counsel that he should be permitted to present his defense at a time and in a manner of his own choosing. Accordingly, we believe it is highly unlikely that the imposition of a suspension would prompt Cohen to finally comply with the outstanding Rule 8210 requests.

If Cohen had not requested a hearing, he would have been barred automatically on September 20, 2021.<sup>150</sup> He avoided being barred by requesting a hearing. There is no reason that he should be granted still more time before being barred.<sup>151</sup>

After careful consideration, the Hearing Panel imposes the bar that would have been the endpoint of the proceeding if Cohen had not requested a hearing. Over an extended period of more than ten months, Cohen engaged in a pattern of evasive and dilatory tactics that blocked FINRA's investigation into serious potential misconduct—conversion and misappropriation of customer funds. A bar is well justified in these circumstances. The time for coaxing Cohen to comply is over. FINRA cannot fulfill its regulatory responsibilities and protect investors unless regulated persons like Cohen honor their duty to respond timely and completely to Rule 8210 requests.<sup>152</sup>

## V. Order

Respondent Darryl Matthew Cohen failed to respond fully and completely to multiple requests for information and documents in violation of FINRA Rule 8210. Under FINRA Rule 9559(n), a Hearing Panel “may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and . . . may also impose any other fitting sanction . . . and may impose costs.” Pursuant to that authority, the Hearing Panel **ORDERS** Cohen barred from associating with any FINRA member firm in any capacity. The bar shall become effective immediately upon the issuance of this Decision. In addition, the Hearing Panel **ORDERS** Cohen to pay FINRA hearing costs for the hearing he requested. These

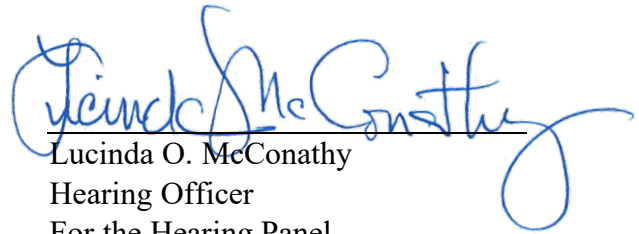
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<sup>150</sup> JX-26, at 3.

<sup>151</sup> Under Section 19(f) of the Securities Exchange Act, the SEC has upheld bars imposed in expedited proceedings for violations of Rule 8210. *See Romano*, 2015 SEC LEXIS 3980, at \*12, 29.

<sup>152</sup> The Hearing Panel has considered and rejects without discussion any of the parties' arguments inconsistent with this decision.

costs total \$2,039.08, which include an administrative fee of \$750 and the hearing transcript cost of \$1,289.08. These costs are due and payable upon the issuance of this Decision.



Lucinda O. McConathy  
Hearing Officer  
For the Hearing Panel

Copies to:

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