BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Dennis Thomas Palmeri, Jr. Rumson, NJ, Respondent.	DECISION Complaint No. 2007010580702 Dated: February 15, 2013

The Department of Enforcement failed to prove that respondent was responsible for his firm providing false information in response to a FINRA information request pursuant to Rule 8210. Held, dismissal affirmed.

Appearances

For the Complainant: Christopher Perrin, Esq., David R. Sonnenberg, Esq., Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Benjamin E. Rosenberg, Esq., Dechert LLP; Sarah Mendola, Esq., Tannenbaum Helpern Syracuse & Hirschtritt LLP

Decision

The Department of Enforcement ("Enforcement"), pursuant to FINRA Rule 9311, appeals a November 18, 2011 Hearing Panel decision that dismissed the amended complaint in this matter. The Hearing Panel found, among other things, that Enforcement failed to prove by a preponderance of the evidence that Dennis Thomas Palmeri, Jr. ("Palmeri") violated NASD Rules 8210 and 2110 by making a false statement to his firm, Ramius Securities, LLC ("Ramius"), or failing to correct a false statement, in connection with the firm's response to a Rule 8210 request for information issued during a FINRA investigation into the firm's use of stock finders.[1] After an independent review of the record, we affirm the Hearing Panel's findings, in part, and concur with its decision to dismiss the amended complaint.

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[1] The conduct rules that apply are those that existed at the time of the conduct at issue.

I. Procedural History

Enforcement filed a three-cause amended complaint in this matter on May 17, 2011. In the first cause of action, Enforcement alleged that Palmeri participated in his firm's false response to a request for information issued by FINRA pursuant to NASD Rule 8210. Specifically, Enforcement alleged that Palmeri falsely told John Fiorello ("Fiorello"), the firm's chief compliance officer, that Ramius did not use stock finders, and Fiorello included that false statement in a draft response to the FINRA request for information. Enforcement further alleged that, when Palmeri reviewed the draft response prepared by Fiorello, Palmeri failed to tell Fiorello that the draft response was inaccurate and failed to correct the false statement before Fiorello sent the firm's response to FINRA staff. These actions, Enforcement alleged, violated NASD Rules 8210 and 2110, separately and distinctly.

The second cause of action alleged that Palmeri made additional, false statements to his firm concerning his use of stock finders at the firm in connection with the firm's response to a second, subsequent FINRA request for information. Enforcement claimed that these alleged misstatements hindered FINRA's investigation and violated NASD Rule 2110.

The third cause of action alleged that Palmeri provided false on-the-record ("OTR") testimony to FINRA staff. Enforcement alleged that, when FINRA staff asked him whether Ramius ever paid a stock finder, Palmeri falsely responded that the firm did not, thereby violating FINRA Rules 8210 and 2010.

The Hearing Panel held a disciplinary hearing on June 28-29, 2011. Enforcement called as witnesses Fiorello, Marran Ogilivie ("Ogilivie"), Ramius's chief operating officer and former general counsel, Palmeri, and a FINRA case manager. Palmeri testified on his own behalf and called as witnesses his former Ramius stock lending desk co-workers, Janah Angelou ("Angelou") and Ron Lucien ("Lucien").

The Hearing Panel issued its decision on November 18, 2011. The Hearing Panel found Fiorello, whose testimony was central to Enforcement's claims, incredible and unreliable. The Hearing Panel concluded that Enforcement failed to prove by a preponderance of the evidence that Palmeri, who the Hearing Panel found honest and credible, violated FINRA's rules as alleged in each of the three causes of action set forth in the amended complaint. Accordingly, the Hearing Panel dismissed the complaint in its entirety.

Enforcement appealed the Hearing Panel's dismissal of the first and third causes of the amended complaint. Prior to briefing its appeal, however, Enforcement withdrew its request that we review the Hearing Panel's decision concerning the amended complaint's third cause of action. We therefore limit our review to Enforcement's request, on appeal, that we reverse the Hearing Panel's findings concerning the first cause of action only and impose a bar upon Palmeri.

II. Facts

A. Background

Palmeri first associated with a FINRA member firm in 1996. Palmeri was registered through Ramius as a general securities representative from January 2001 until October 2008, when he was laid off as part of a reduction in the firm's workforce. Palmeri's last association with a FINRA member firm ended voluntarily in June 2010.

Ramius is a hedge fund and FINRA member firm founded in 1994 by Peter Cohen ("Cohen") and Jeffrey Solomon ("Solomon"). Prior to forming Ramius, Solomon and Cohen previously worked for Palmeri's father, Dennis Palmeri, Sr. ("Palmeri Sr.") at another FINRA member firm. After leaving this firm, Palmeri Sr. worked as a stock finder through his company, Shields Institutional Services ("SIS").[2]

In early 2001, Solomon hired Palmeri as the first member of the stock lending group at Ramius. On account of his relationship with Cohen and Solomon, Palmeri Sr. provided his services as a finder in transactions involving Ramius both before and after Palmeri began working at the firm. Several people at Ramius, including Fiorello, Ogilivie, and Palmeri's stock lending desk co-workers, knew that Palmeri Sr. was a stock finder.

B. Ramius's Stock Lending Desk and Interactions with Finders

In or about the summer of 2002, Ramius established its stock lending desk. Palmeri and Allen Wolkow ("Wolkow") were co-managers of the desk and reported to Ramius's co-founder and executive Solomon. In 2003, the stock lending desk began to execute "matchbook" transactions, in which Ramius borrowed securities from one firm and immediately loaned them to another firm, earning revenues on the difference between the rate that Ramius paid to borrow the securities and the rate it received when it loaned the securities.

When Ramius created the stock lending desk, Ramius management implemented a new, unwritten policy with respect to stock finders.[3] The policy was orally articulated by Solomon and Ogilivie to the firm's personnel. Because the firm's policy was never reduced to writing, there was confusion among the firm's personnel concerning its exact proscriptions. Palmeri and other members of the stock lending desk who testified at the hearing believed that Ramius's policy permitted them to use the services or otherwise receive the assistance of finders as long as the finders were paid by someone other than Ramius, typically a counterparty. Solomon, the supervisor of the stock lending desk who, along with Ogilivie, communicated the policy to the firm's personnel, had the same understanding as Palmeri. Ogilivie, the chief operating officer, believed that the policy prohibited Ramius from doing business with finders or using finders to source securities, but it was not inconsistent for Ramius to be involved with transactions with finders.

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[2] A stock finder is a non-registered person or entity that acts as an intermediary between two brokers-dealers to find hard-to-locate securities.

[3] The firm did not have any policy with respect to finders, written or unwritten, prior to implementation of this new policy.

Fiorello, the chief compliance officer, believed that the policy prohibited Ramius from engaging in a transaction in which it knew a finder was involved and prohibited Ramius from engaging in a transaction that a finder initiated.[4]

During the relevant time period, members of the stock lending desk used finders consistent with their understanding of the firm's policy. Palmeri, specifically, used Palmeri Sr. and SIS as a source of securities.[5] Among other things, members of the stock lending desk used finders to locate securities for Ramius transactions. If the finder had or was able to locate particular securities that Ramius sought, the finder would loan the securities to another broker-dealer, and then the broker-dealer would loan the securities to Ramius. By doing so, members of the stock lending desk did not pay the finder for its services, but instead transacted with another broker-dealer, which was consistent with their understanding of the firm's policy regarding finders. Occasionally, finders also would instead call Ramius and offer certain securities to Ramius.

After the creation of the stock lending desk in 2002, Ramius never paid a finder for its services. Ramius instead transacted with the broker-dealer to which the finder had loaned the securities. Members of the stock lending desk assumed the finder was compensated by someone other than Ramius, but they did not know specific details of any compensation arrangements.

C. FINRA's March 2007 Rule 8210 Request for Information

On March 30, 2007, in a letter addressed to Fiorello issued under NASD Rule 8210, FINRA requested that Ramius provide "[c]opies of all written policies and procedures, instructions, memoranda and other documents . . . concerning the hiring, retention or use of, and/or payment to, a stock finder" for the period January 1, 2005 through December 31, 2006.

On April 13, 2007, in a letter drafted and signed by Fiorello, Ramius responded "[n]either during the time period in question, nor at any time since, has [Ramius] used the services of finders for its securities lending activities." The response concluded with the statement: "[Ramius] neither utilizes the services of, nor acts as, a finder."

Fiorello consulted with Palmeri, among others, before he drafted the firm's April 2007 response. Fiorello, however, could not recall any specific conversations with Palmeri or any other employees concerning the request for information. After Fiorello drafted the response, Palmeri reviewed it prior to Fiorello finalizing the response and sending it to FINRA. Palmeri did not suggest or make any changes or corrections to the draft response he reviewed.

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[4] In early 2010, Ramius entered into a Letter of Acceptance, Waiver and Consent ("AWC"), in which the firm consented to findings that it "had no written procedures or guidelines addressing the Firm's use of finders. Additionally, no clear oral guidance regarding the use of finders was provided. These failures caused employees to have conflicting understandings as to what was and was not permitted regarding the use of finders." Fiorello testified that until he read the AWC in 2010, he did not know that Ramius employees had different understandings about the firm's policy with respect to finders.

[5] Angelou used a different finder as a source of securities during the relevant time period. In 2007, Palmeri stopped using Palmeri Sr. and SIS as a finder because Palmeri Sr. retired.

III. Discussion

The first cause of Enforcement's amended complaint alleged that, in connection with FINRA's March 2007 request for information concerning Ramius's use of stock finders, Palmeri falsely told Fiorello that the firm did not use stock finders for its stock lending activities and failed to correct this false statement when Fiorello showed him a draft of the firm's April 2007 response before sending it to FINRA. Because of the foregoing, Palmeri allegedly violated NASD Rules 8210 and 2110.

The Hearing Panel found that Enforcement failed to satisfy its burden of proof with respect to these allegations. Although we disagree with certain of the Hearing Panel's findings, after careful consideration of the unique facts presented, we affirm its decision to dismiss Enforcement's claims as alleged in the first cause of the amended complaint.

A. NASD Rules 8210 and 2110

NASD Rule 8210 requires FINRA members and their associated persons to provide information orally or in writing in response to requests for information issued by FINRA staff with respect to any matter involved in an investigation. The duty of members and their associated persons to cooperate with FINRA investigations and respond fully to Rule 8210 requests is unequivocal. *See Dep't of Enforcement v. Fawcett*, Complaint No. C9A040024, 2007 NASD Discip. LEXIS 2, at *12 (NASD NAC Jan. 8, 2007). "[FINRA's] regulatory mandate is thwarted if respondents can selectively determine which facts to omit." *Dep't of Enforcement v. Duma*, Complaint No. C8A030099, 2005 NASD Discip. LEXIS 46, at *30 (NASD NAC Oct. 27, 2005). Providing false or misleading information to FINRA in the course of an investigation violates NASD Rule 8210.[6] *See Dep't of Enforcement v. Ortiz*, Complaint No. E0220030425-01, 2007 FINRA Discip. LEXIS 3, at *32 (FINRA NAC Oct. 10, 2007), *aff'd*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401 (Aug. 22, 2008). Such conduct also is inconsistent with just and equitable principles of trade and independently violates NASD Rule 2110.[7] *See id.* at *33 n.26.

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[6] In those instances when FINRA staff does not direct a request for information to a specific associated person, an individual may nevertheless violate NASD Rule 8210 when he is aware that the false information is being provided by the member firm to FINRA in response to a request for information issued pursuant to NASD Rule 8210. *See Michael A. Rooms*, Exchange Act Rel. No. 51467, 2005 SEC LEXIS 728, at *11 (Apr. 1, 2005) ("Liability under [Rule 8210] may possibly extend to associated persons of a firm who are aware of an 8210 request directed to the firm and seek to falsify or impede the firm's response."), *aff'd*, 444 F.3d 1208 (10th Cir. 2006). The parties do not dispute that Palmeri knew, in connection with the allegations leveled against him in this case, that Ramius received and was responding to a request for information issued by FINRA pursuant to NASD Rule 8210.

[7] NASD Rule 2110 is applicable to associated persons pursuant to NASD Rule 0115(a), which provides that "[t]hese Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under these Rules."

B. Ramius Falsely Responded to FINRA's Request for Information

The Hearing Panel dismissed Enforcement's first cause of action, in part, because it concluded that Enforcement failed to prove that Ramius's response to FINRA's March 2007 request for information was plainly false. We disagree with this aspect of the Hearing Panel's findings.

FINRA's March 2007 request for information requested that Ramius provide documents "concerning the hiring, retention or *use* of, and/or payment to, a stock finder" for the period January 1, 2005, through December 31, 2006. (emphasis added). The firm's April 2007 response stated unequivocally that "[n]either during the time period in question, nor at any time since, has [Ramius] *used* the services of finders for its securities lending activities." (emphasis added). The firm further stated that "[Ramius] neither utilizes the services of, nor acts as, a finder."

It is undisputed that Ramius used finders during the relevant time period to source securities for its stock lending activities. Giving plain meaning to FINRA's request for information concerning the firm's "use" of stock finders, we conclude that the firm's response was clearly false.[8] *Cf. Richard A. Neaton*, Exchange Act Rel. No. 65598, 2011 SEC LEXIS 3719, at *29-30 (FINRA NAC Oct. 20, 2011) (rejecting respondent's interpretation of a Form U4 question which was contrary to the "plain language"); *Dep't of Enforcement v. Beloyan*, Complaint No. 2005001988201, 2011 FINRA Discip. LEXIS 44, at *19 (FINRA NAC Dec. 20, 2011) (relying on the "plain meaning" of respondent's e-mails to conclude that respondent's communications were unbalanced, misleading, included material misrepresentations, and omitted material facts).

The Hearing Panel concluded that Ramius's response was not plainly false, in part, because of the ambiguity of the word "use." Although the record established there was widespread confusion at Ramius and uncertainty among employees about the "use" of finders,[9] we disagree that

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[8] If there is any confusion about the information that FINRA seeks in a Rule 8210 request, the member firm or associated person has a duty to seek further clarification from FINRA staff. *See Richard J. Rouse*, 51 S.E.C. 581, 584 n.9 (1993) ("Any problems or concerns that a member firm or its associated persons might have in responding to an information request in a timely or complete manner should be raised, discussed and resolved with [FINRA] in the cooperative spirit and prompt manner contemplated by the Rules.").

[9] According to Palmeri, in 2007, using a finder, for him, implied that Ramius made some type of payment to the finder. When Angelou was asked at her OTR whether Ramius ever used finders for its stock loan transactions, she testified "It would depend on what you mean by use." Ogilivie testified, "What I mean by 'use' is that we, meaning the firm, would not interact from a business perspective directly with finders." At the hearing, Ogilivie further testified "[Ramius] should have better drawn the line as to when are you using a finder and when are you not." Fiorello acknowledged that his understanding of the word "use" with respect to finders changed over time. As the result of various Ramius employees expressing confusion and uncertainty about the word "use" at their OTRs, the FINRA investigator ultimately concluded that her definition of the word "use" may not be a "fully understood and accepted one." The FINRA investigator also acknowledged that the stock lending desk's supervisor, Solomon, was adamant in his OTR that "use" implies "payment."

[Footnote continued on next page]

the word "use," as employed in the March 2007 request, is ambiguous. Accordingly, we do not excuse Ramius's narrow interpretation of an otherwise clear request for information and conclude that the response contained a false statement.

C. Enforcement Did Not Prove That Palmeri Made the False Statement in the Firm's April 2007 Response

Having concluded that the firm's April 2007 response contained a false statement, we must decide whether the record demonstrates Palmeri is responsible for it. We find he is not.

First, we find that there is no direct or circumstantial evidence to support Enforcement's claim that Palmeri falsely told Fiorello that Ramius did not use stock finders to source securities for its stock lending transactions. At the hearing, Fiorello testified generally that, during his initial discussion with Palmeri concerning the March 2007 request, they discussed whether Palmeri ever used a finder in any capacity, but Fiorello was unable to recall with any specificity the actual conversation. Once the draft response was complete, Fiorello testified he showed it to Palmeri, along with Wolkow, but he did not recall if either had any comments or suggested any changes.[10]

Indeed, Fiorello had "no direct recollection of anyone saying anything about [the request at issue from the March 2007 request]." Moreover, Fiorello did not have any notes or documents concerning any conversations he had regarding the March 2007 request for information or Ramius's response. In fact, the record is devoid of any documents relating to the March 2007 request or April 2007 response, such as e-mails relating to the request or even drafts of the response.[11]

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Even FINRA staff, at times, appeared to equate "use" with hiring and payment, as evidenced by another question contained in the same March 2007 FINRA request for information that requested that Ramius provide "a detailed description of the process the firm undertakes in determining whether or not a finder will be used in conjunction with a stock loan transaction and the methods by which a finder's compensation is calculated." Ramius responded that "[t]he Firm does not hire finder's [sic] for its securities lending activities. The Firm has never been involved in any process or discussion concerning a finder's compensation." Fiorello, who drafted the response, testified that a fair understanding of the specific request was that if the firm is using a finder, then the firm will pay a finder compensation, and he responded accordingly.

[10] After showing it to Palmeri and Wolkow, Fiorello showed the draft response to Baum and Ogilivie. Again, Fiorello did not recall if Baum (who was a heavy editor according to Fiorello) or Ogilivie had any comments, but he admitted it was possible they had comments or made changes.

[11] Considering the lack of drafts in the record and possible edits by Fiorello, Ogilivie, and Baum after Palmeri reviewed the draft response to the March 2007 request, the Hearing Panel found there was no credible evidence that the draft response Palmeri reviewed contained the false statement. We disagree. At his OTR, Palmeri testified he was aware prior to the submission of the April 2007 response that the statement "Neither during the time period in question, nor at any time since has [Ramius] used the services of finders for its securities lending activities" was being provided to FINRA. Accordingly, the draft Palmeri reviewed contained the false statement.

Therefore, because of the lack of any evidence in the record linking Palmeri to the false statement contained in the April 2007 response, we find Palmeri is not liable under NASD Rules 8210 and 2110 for making a false statement to Fiorello in connection with Ramius's response to the March 2007 request for information.

D. Enforcement Did Not Prove That Palmeri Is Liable for Failing to Correct the False Statement

We are left to consider whether Palmeri is liable under NASD Rules 8210 and 2110 for failing to correct the false statement in the firm's response to the March 2007 request for information. We conclude he is not.

Since the Hearing Panel issued its decision, Enforcement has shifted its theory of liability from an affirmative misrepresentation to an omission. The complaint alleged that Palmeri falsely told Fiorello that Ramius did not use stock finders, and that he later failed to correct his false statement in a draft response to the March 2007 request for information. On appeal, Enforcement now argues that Palmeri failed to tell Fiorello that Ramius used finders and failed to correct the false statement in the firm's response to FINRA staff. For his alleged omissions, Enforcement argues that Palmeri should be barred. Whether to impose liability on a respondent for his failure to speak and correct another's misstatement in response to a FINRA request for information is an issue of first impression, which we have not decided in a previous FINRA disciplinary case.

According to Enforcement, Fiorello and Ogilivie lacked knowledge of the relevant facts regarding Ramius's use of finders that would have led to an accurate response to the March 2007 request for information, and Fiorello relied on Palmeri to supply the necessary information. This allegation requires us to rely heavily on the testimony of Fiorello, which the Hearing Panel found incredible and unreliable and "largely discredited."

For instance, at the hearing, Fiorello testified that, after he received the March 2007 request, he gave copies to Ogilivie, Baum, and the four employees of the stock lending desk (including Palmeri). Before drafting the April 2007 response, Fiorello testified he interviewed Palmeri, Wolkow, Angelou, and Lucien, and each of the four employees of the stock lending desk told him that he or she did not hire, retain, use, or pay a finder and were not aware of any other member of the stock lending desk that did so.[12] Fiorello's testimony, however, was directly contradicted by the testimony of Angelou and Lucien. At the hearing, Angelou testified that Fiorello never showed her the March 2007 request or the April 2007 response and Fiorello never interviewed her because she was out of the country on her honeymoon during the relevant time period. Lucien similarly testified unequivocally that Fiorello never showed him the March 2007 request or the April 2007 response, and Fiorello never interviewed him. The Hearing Panel found Angelou and Lucien were "direct,

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12 The same account of events also was included in a response prepared by Ramius's counsel to an August 2009 Rule 8210 request for information concerning the steps Ramius took to prepare the response at issue in the April 2007 response. At the hearing, Fiorello acknowledged that he made the representations to counsel who prepared the letter, that the representations were accurate, and that he interviewed all four employees.

honest and straightforward and that their testimony was credible." On appeal, we find nothing in the record to disturb these credibility findings. *See Geoffrey Ortiz*, Exchange Act Rel. No. 58416, 2008 SEC LEXIS 2401, at *18 (Aug. 22, 2008) ("We give great weight and deference to credibility determinations by a Hearing Panel, which can only be overcome by substantial record evidence."); *Dane S. Faber*, Exchange Act Rel. No. 49216, 2004 SEC LEXIS 277, at *17-18 (Feb. 10, 2004) ("Credibility determinations of an initial fact-finder, which are based on hearing the witnesses' testimony and observing their demeanor, are entitled to considerable weight and deference.").

Besides the important contradiction concerning preparation of the April 2007 response, we also are troubled about Fiorello's alleged lack of knowledge concerning the business of the stock lending desk and its interaction with finders. At the hearing, Fiorello admitted his understanding of how business was conducted at the stock lending desk during the relevant period was "fundamentally wrong." According to Fiorello, the policy regarding finders prohibited Ramius from engaging in a transaction, which a finder may have initiated, or one in which a finder was involved. But an earlier response to a separate inquiry from NYSE directed to Ramius, which Fiorello drafted and signed, contradicted Fiorello's alleged understanding of the policy. On September 6, 2006, NYSE requested information from Ramius about certain stock loan transactions involving securities of the company Cemex during the period from April 2004 to June 2004 (the "Cemex Request"). Fiorello responded by letter dated September 19, 2006 (the "Cemex Response"). Palmeri was involved in the Cemex transaction, and he provided information to Fiorello to prepare the Cemex Response. Pursuant to firm policy, prior to being submitted to NYSE, Ogilivie would have reviewed the Cemex Response.

The Cemex Response disclosed that SIS had operated as a finder on behalf of Ramius's counterparty in the transactions. The Cemex Response also provided that Palmeri did not recall who initiated the transactions in question, and "[a] review of the Firm's records did not reveal whether any of the transactions were initiated by the Firm, the counterparty, or a finder." In other words, the Cemex transaction was a transaction that involved a finder and that a finder indeed may have initiated, both actions that Fiorello testified were prohibited by the firm's policy. As of the Cemex transaction, Fiorello and Ogilivie undoubtedly were on notice that Ramius was involved in transactions that involved a finder and that a finder may have initiated.[13]

When asked at the hearing why he failed to include the Cemex transaction in the April 2007 response, Fiorello initially testified he had "forgotten" it. On cross-examination, however, Fiorello admitted that, after he received the March 2007 request for information, he called FINRA staff to see whether the Cemex Request was the same as the March 2007 request and offered to FINRA

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[13] Fiorello testified that the Cemex transaction was described to him by Ogilivie and Baum as a "one-off transaction" and an exception to Ramius's policy regarding finders. At the hearing, however, Ogilivie testified that she did not recall telling Fiorello that the Cemex transaction was an exception. Ogilivie also testified that the Cemex transaction was inconsistent with Ramius's policy concerning finders, as she understood it. Despite the Cemex transaction supposedly being an exception to the policy, there was no documentary evidence to support this understanding, and neither Fiorello nor Ogilivie discussed the policy with Palmeri or documented Ramius's policy regarding finders after submitting the Cemex Response to NYSE.

staff the Cemex Response. It seems implausible that Fiorello forgot about the Cemex transaction less than two weeks later when he drafted the April 2007 response.[14]

The Hearing Panel specifically questioned Fiorello's veracity and concluded that Fiorello had a strong motive to blame Palmeri for any inaccuracies in the April 2007 response. We share the significant credibility concerns of the Hearing Panel with respect to Fiorello, which are well supported by the record and, in particular, the testimony of Angelou and Lucien. On appeal, Enforcement has not provided substantial evidence sufficient to overturn the Hearing Panel's credibility determinations. *See Ortiz*, 2008 SEC LEXIS 2401, at *18; *Faber*, 2004 SEC LEXIS 277, at *17-18.

In further support of our finding that Enforcement failed to prove that Palmeri is liable for his failure to correct the false statement, we note that Palmeri did not conceal from Ramius his dealings with finders and, specifically, SIS and Palmeri Sr.[15] The employees at the stock lending desk who testified and upper management were aware, or should have been aware, of Palmeri's interactions with SIS. First, Palmeri was hired on account of his father's relationship with the firm's founders, Solomon and Cohen. Second, Palmeri spoke to Palmeri Sr. openly on the main phone line of the stock lending desk in an office shared by all the stock lending desk employees and supervised by Solomon, and other employees at the desk often answered the phone before transferring the call to Palmeri.[16] Third, Palmeri presented to Ramius upper management multiple transactions proposed by Palmeri Sr. in which Palmeri Sr. was acting as a finder.[17] Fourth, when Ramius received the Cemex Request, Palmeri assisted with the response by explaining to Fiorello SIS's role in the transaction. Finally, when Ramius received another more broadly drafted Rule 8210 request eight months later concerning the firm's use of finders, Palmeri told Fiorello and

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[14] Although the Cemex transaction was outside the scope of the March 2007 request, Fiorello testified that he believed he should have included it in the April 2007 response.

[15] Like Palmeri, Angelou also openly interacted with another finder during the relevant time period. Like SIS, the finder would offer Angelou a security, and if Ramius was interested, the finder would lend the stock to another broker-dealer which would loan it to Ramius. Angelou testified that finders also would call Ramius and offer stocks. Ramius did not pay the finder for its services; Angelou assumed the finder was compensated by someone other than Ramius, but she did not know the specific compensation arrangements.

[16] The four employees of the desk were in a small room together with an open layout. When Palmeri Sr. or anyone from SIS called, any of the four employees would answer the phone and tell Palmeri that Palmeri Sr. or SIS was on the phone.

[17] Ogilivie testified that Palmeri presented to upper management, including Ogilivie, two to four large transactions that Palmeri Sr. had proposed. At the time, Ogilivie did not believe that Ramius engaging in such transactions violated Ramius's policy concerning finders. According to Ogilivie, it never crossed her mind that Palmeri Sr. was acting as a finder in the proposed transactions, but now, "as a technical matter," she understood Palmeri Sr. was acting as a finder.

Ogilivie that there would be responsive transactions and proceeded to assist Ramius in preparing its response.[18]

Such open and notorious dealings are not the actions of someone who is concealing his interactions with finders from his firm and his superiors, including Fiorello and Ogilivie. It further defies a reasonable explanation as to why Palmeri would be forthcoming to Fiorello regarding his interactions with SIS when assisting with the Cemex Response and the response to the subsequent Rule 8210 request concerning the firm's use of finders, but purposely conceal his interactions with finders with respect to the March 2007 request. Whereas we are unable to determine a motive for Palmeri to conceal from Fiorello the stock lending desk's interactions with finders, Fiorello, as the signatory of the April 2007 response and the chief compliance officer of a firm without written procedures and guidelines addressing the use of finders, had a strong motive to blame Palmeri for any inaccuracies.

Fiorello drafted the April 2007 response, and Ogilivie and Baum, the firm's chief operating officer and general counsel, helped to finalize the response. Fiorello, Ogilivie, and Baum, not Palmeri, ultimately decided how to incorporate any information provided by Palmeri to Fiorello and any information regarding the firm's interactions with finders otherwise known to Fiorello and the other parties responsible for the response. At the hearing, Fiorello testified that Palmeri never told him the April 2007 response was inaccurate, and, if he had known that Palmeri had been contacting Palmeri Sr. to locate securities, Fiorello would have drafted the April 2007 response differently. But the information that should have led to an accurate response was readily available to both Fiorello and Ogilivie.

To summarize, this is not a case in which FINRA staff asked Palmeri for information via a Rule 8210 request. In such a case, an associated person must fully cooperate in answering FINRA's questions and must diligently gather responsive information. *See Rooney A. Sahai,* Exchange Act Rel. No. 51549, 2005 SEC LEXIS 864, at *28 (Apr. 15, 2005). Nor is this a case where, for example, an associated person directly gives a false answer to FINRA during its investigation. "An associated person who provides false or misleading information to [FINRA] in the course of an investigation violates NASD Rule 8210." *Ortiz*, 2008 SEC LEXIS 2401, at *23. Rather, this case involves a different legal theory and the evidentiary problems we have highlighted. Based on the totality of the circumstances, including the Hearing Panel's credibility findings and the availability

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[18] On December 13, 2007, in a letter addressed to Fiorello issued under Rule 8210, FINRA requested that Ramius identify each transaction in which Ramius, Palmeri Sr., or SIS "participated in any capacity" for the period January 1, 2003 through December 31, 2004. That same day, FINRA, in a separate Rule 8210 request for information directed to Palmeri, requested that Palmeri identify each stock loan transaction in which he, Ramius, Palmeri Sr., or SIS "participated in any capacity" for the period January 1, 2003 through December 31, 2004. Ramius and Palmeri separately responded to their respective December 2007 requests. Both responses identified approximately 121 transactions in which Ramius, Palmeri Sr., or SIS participated for the period January 1, 2003 through December 31, 2004. After receiving his and his firm's request, Palmeri immediately told Fiorello and Ogilivie there would be responsive transactions. To prepare the responses, Palmeri then manually reviewed all of Ramius's stock loan transactions during the time period, identified the relevant transactions, and provided the information to Ramius for its response.

of the information to Fiorello and Ogilivie that should have led to an accurate response, we find Enforcement failed to put forward sufficient evidence to conclude that Palmeri should be liable for the failure to correct the false statement in the April 2007 response to the FINRA request for information.[19]

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Under these particular facts and circumstances, we find the record supports the Hearing Panel's finding that Enforcement failed to prove by a preponderance of the evidence that Palmeri made a false statement or that his failure to correct the false statement in the April 2007 response constituted a violation of NASD Rule 8210. For the same reasons, we do not find Palmeri liable under NASD Rule 2110 because, based on the totality of the circumstances, Enforcement failed to put forth credible evidence of conduct by Palmeri inconsistent with just and equitable principles of trade.

IV. Conclusion

Enforcement failed to prove by a preponderance of the evidence that Palmeri violated NASD Rules 8210 and 2110 by giving a false statement to his firm and failing to correct a false statement to FINRA in connection with his firm's response to a Rule 8210 request. Accordingly, we dismiss the amended complaint.[20]

On Behalf of the National Adjudicatory Council,

Marcia E. Asquith,
Senior Vice President and Corporate Secretary

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[19] Given Enforcement's failure of proof, we find the facts of this case to be unlike *Rooms* and emphasize that an associated person who knows that his firm's response to a Rule 8210 request contains a false statement cannot stay silent while his firm misleads. *See Rooms*, 2005 SEC LEXIS 728, at *11 ("Liability under [Rule 8210] may possibly extend to associated persons of a firm who are aware of an 8210 request directed to the firm and seek to falsify or impede the firm's response.").

[20] We have considered and reject without discussion all other arguments advanced by the parties.