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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. STANLEY CLAYTON NIEKRAS (CRD No. 2417486), Respondent.	Disciplinary Proceeding No. 2013037401001 Hearing Officer–AHP

SUA SPONTE ORDER STRIKING PORTIONS OF RESPONDENT'S ANSWER AND PRECLUDING IMMATERIAL AND IMPERTINENT EVIDENCE

FINRA's Department of Enforcement ("Enforcement") initiated this disciplinary proceeding under FINRA Rule 9211. Enforcement alleges that Respondent Stanley Clayton Niekras acted unethically in violation of FINRA Rule 2010 by falsely claiming that two of his securities customers owed him fees for estate and financial planning services. According to the complaint, Niekras billed his customers for these services knowing that he had not performed the services and that he was not entitled to the fees.

In response to Enforcement's complaint, Niekras filed a rambling answer by which he seeks to expand the scope of the proceeding to address a number of grievances he has with FINRA staff and his former clients' family members. None of these added issues appears to relate to the charge in the complaint, and some appear not to be justiciable. Thus, under Rules 9235, 9263(a), and 9241, I strike portions of Niekras' answer and preclude Niekras from introducing evidence in support of the stricken material at the hearing.

Discussion

Hearing Officers have the authority and responsibility to regulate the course of disciplinary proceedings under FINRA's Code of Procedure. FINRA Rule 9235(a)(2) specifically grants Hearing Officers the authority to regulate the course of the hearing, and FINRA Rule 9241(d) directs Hearing Officers to schedule an initial pre-hearing conference promptly in each case (unless the Hearing Officer determines one is unnecessary) to (1) expedite the disposition of the proceeding, (2) establish procedures to manage the proceeding efficiently, and (3) improve the quality of the hearing through more thorough preparation. Hearing Officers are authorized to take action to simplify and clarify the issues in a proceeding and to undertake

"such other matters as may aid in the orderly and expeditious disposition of the proceeding."[1] Under FINRA Rules 9235(a)(4) and 9263(a), Hearing Officers have the authority to exclude irrelevant and immaterial evidence. Hearing Officers also have the authority under FINRA Rule 9136(e) to strike "[a]ny scandalous or impertinent matter contained in any brief, pleading, or other filing."

Although the Federal Rules of Civil Procedure do not govern FINRA disciplinary proceedings, FINRA adjudicators often consult the federal rules for guidance.[2] Here, I have consulted Federal Rule of Civil Procedure 12(f) and the case law applying the rule in assessing whether to strike portions of Niekras' answer. Fed. R. Civ. P. 12(f) permits a court, on its own motion, or on a timely motion of a party, to "strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." The rule operates as a parallel to Fed. R. Civ. P. 12(b)(6),[3] allowing the court to strike any defense that is legally insufficient either as a matter of pleading or as a matter of law. The purpose of the rule is to allow the court to "clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters."[4]

Courts possess considerable discretion in disposing of motions to strike under Fed. R. Civ. P. 12(f), but "[m]otions to strike are generally disfavored and 'should not be granted unless the matter to be stricken clearly could have no possible bearing on the subject of the litigation.'"[5] Generally, courts have held that a party moving to strike a defense must show that: "(1) there is no question of fact which might allow the defense to succeed; (2) there is no question of law which might allow the defense to succeed; and (3) the plaintiff would be prejudiced by inclusion of the defense."[6] Courts will not strike allegations in a pleading merely because they are "overly narrative" or contain "generalized statements or matters of opinion."[7]

Immaterial allegations are those that either bear no essential or important relationship to the issues in dispute or contain a statement of unnecessary particulars.[8] An impertinent allegation

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[1] FINRA Rule 9241(c)(11).

[2] *See, e.g., Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *3 (Feb. 25, 2014) (applying federal summary judgment standard).

[3] Fed. R. Civ. P. 12(b)(6) provides that a defendant may file a motion to dismiss an action for "failure to state a claim upon which relief can be granted." Such a motion challenges the complaint's legal sufficiency.

[4] *United States v. Educ. Mgmt. Corp*., 871 F. Supp. 2d 433, 460 (W.D. Pa. 2012) (citation omitted).

[5] *Frenzel v. Aliphcom*, 76 F. Supp. 3d 999, 1006 (N.D. Cal. 2014) (quoting *Platte Anchor Bolt, Inc. v. IHI, Inc*., 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)).

[6] *SEC v. Alexander*, 248 F.R.D. 108, 109 (E.D. N.Y. 2007) (quoting *SEC v. McCaskey*, 56 F. Supp. 2d 323, 326 (S.D.N.Y. 1999)). *See also Tucker v. Am. Int'l Grp., Inc.*, 936 F. Supp. 2d 1, 16 (D. Conn. 2013).

[7] *Lynch v. Southampton Animal Shelter Found. Inc*., 278 F.R.D. 55, 65 (E.D.N.Y. 2011) (citing *Kehr v. Yamaha Motor Corp., U.S.A.*, 596 F.Supp.2d 821, 829 (S.D.N.Y. 2008)).

[8] *See Morton & Bassett, LLC v. Organic Spices, Inc.*, 2016 U.S. Dist. LEXIS 120092, at *8-9 (N.D. Cal. Sept. 6, 2016) (quoting *Petrie v. Electronic Game Card, Inc.*, 761 F.3d 959, 967 (9th Cir. 2014)).

is an averment that does not pertain to, or is unnecessary to, the issues in dispute.[9] And "[p]rejudice occurs when the challenged pleading confuses the issues or is so lengthy and complex that it places an undue burden on the responding party."[10]

Here, Niekras filed a 35-page answer[11] that contains insufficient defenses that are based on irrelevant, immaterial, and impertinent allegations. Because (1) no evidence in support of these allegations would be admissible, (2) the allegations have no bearing on the case, and (3) permitting the allegations to remain to stand would result in prejudice to Enforcement, I strike the following matter from Niekras' answer and preclude him from introducing evidence in support of the stricken matter at the hearing.

A. Allegations Regarding Niekras' Lack of Disciplinary History

The first eight or so pages of Niekras' answer can best be summarized as biographical information showing that for 73 years he had acted with honesty and integrity. To make this point, Niekras starts his personal narrative with an incident that occurred while he was in college at Pennsylvania State University in the 1960s. He recounts an instance when he intervened to help an individual who was being assaulted by fellow students. He then gives highlights from his life, including details regarding his marriages and family life. He also refers to awards and commendations he received from the military and his former employers, emphasizing that throughout he suffered no disciplinary action. In the early 1990s, he switched careers and became a financial advisor. In 2005 at age 62, he retired from Morgan Stanley. Niekras again emphasizes that up to that point he did not have a disciplinary history of any kind. Soon thereafter, he reentered the securities industry with MassMutual. According to Niekras, the first complaint against him came in 2013, which caused FINRA to initiate this disciplinary proceeding.

None of the foregoing is relevant and material to this case. First, Enforcement has not alleged that Niekras has a relevant disciplinary history.[12] Second, evidence of specific good deeds—some dating back more than 50 years—does not provide a defense to the charge in this case. The fact that Niekras acted honestly or even nobly in some circumstances does not create a presumption that he did so here. Third, "lack of a disciplinary history is a not mitigating

[9] *See Whittlestone, Inc. v. Handicraft Co.*, 618 F.3d 970, 974 (9th Cir. 2010).

[10] *Karpov v. Karpov*, 307 F.R.D. 345, 2015 U.S. Dist. LEXIS 5412, at *7 (Jan. 15, 2015).

[11] Niekras also filed two volumes of exhibits with his answer.

[12] Enforcement should be prepared to stipulate to this fact at the Case Management Conference.

factor."[13] "Similarly, … lack of customer complaints … is not mitigating.[14] Thus, the allegations in the "Preface" to the answer regarding Niekras' lack of disciplinary history are stricken, and Niekras is precluded from introducing such evidence.

B. Enforcement's "Agendas" to Bar Niekras from the Securities Industry

Niekras contends that this case should be dismissed because one or more of the following agendas motivate this action. These allegations are in the nature of impermissible affirmative defenses.

1. LGBT Agenda

Niekras theorizes that his clients' daughter lodged the complaint against him with FINRA to prevent her parents from learning that she is a lesbian. While it is not at all clear how filing a complaint with FINRA would prevent this information from reaching Niekras' clients, it appears from Niekras' answer that Enforcement spent a significant amount of time during an on-the-record interview questioning Niekras about his theory and his attitude towards gays and lesbians. Because of this line of questioning, Niekras conjectures that Enforcement's prime motive in bringing this action is the Enforcement attorney's sympathy to the LGBT community. Niekras does not explain how this fact can constitute a defense to the misconduct alleged in the complaint.

But even assuming that Niekras could establish that the Enforcement attorney is sympathetic to the LGBT community, this would not constitute a viable defense. The attorney's personal beliefs have no bearing on the case. Nor can Niekras claim immunity from discipline by claiming that Enforcement harbored ill will against him. To constitute a valid defense of selective prosecution, he would have to allege and prove that the decision to institute this disciplinary proceeding was premised on an unjustified standard such as race, religion, or other arbitrary classification.[15] Niekras makes no such claim. Niekras' therefore failed to assert a viable selective prosecution defense. I therefore strike paragraph 10(a) of Niekras' answer.

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[13] *Dep't of Enforcement v. Geary*, No. 20090204658, 2016 FINRA Discip. LEXIS 13, at *34 (July 20, 2016) (citing *John B. Busacca, III*, Exchange Act Release No. 63312, 2010 SEC LEXIS 3787, at *64 n.77 (Nov. 12, 2010), *aff'd*, 449 F. App'x. 886 (11th Cir. 2011); *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006) (stating that the absence of disciplinary history is not mitigating because "an associated person should not be rewarded for acting in accordance with his duties as a securities professional")).

[14] *Geary*, 2016 FINRA Discip. LEXIS 13, at *35 (citing *Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 9, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate [respondent's] misconduct")).

[15] *See Busacca v. SEC*, 449 F. App'x 896, 891 (rejecting defense that respondent had been singled out for prosecution and punishment because he had criticized FINRA and the securities industry) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)).

2. The FINRA Whistleblower Agenda

Niekras states in paragraph 10(b) of his answer that he inquired about FINRA's whistleblower program before FINRA took any action against him in connection with this disciplinary proceeding. He further states that he met with FINRA staff in May 2014 and provided FINRA with information regarding his belief that MML Investor's Services was failing to protect client personal and confidential information. According to Niekras, he thereafter provided documents to FINRA that supported his complaint about the firm's misconduct, but FINRA never responded. Although Niekras does not set out expressly how or why his complaint about MML Investor's Services relates to this disciplinary proceeding, I infer from his calling it one of FINRA's "agendas" that he claims that FINRA improperly initiated this case to retaliate against him for making the complaint about MML Investor's Services.

I conclude that the allegations in paragraph 10(b) of Niekras' answer are immaterial and impertinent and that receiving evidence in support of these allegations will prejudice Enforcement. I also conclude that this defense is meritless as a matter of law. Niekras' "self-professed whistleblower status does not provide him with immunity from discipline in these proceedings."[16] Thus, I strike paragraph 10(b) of Niekras' answer.

3. MassMutual's Control of FINRA's Boston Office

Niekras contends in paragraph 10(c) of his answer that FINRA's Boston office will not hold MassMutual accountable for anything other than token rule violations involving minor fines and reprimands. And he has indicated in his answer and at the Initial Pre-Hearing Conference that he intends to prove this allegation through the testimony of several former employees of MassMutual Financial Group.

I conclude that the allegations in paragraph 10(c) of Niekras' answer are immaterial and impertinent and that receiving evidence in support of these allegations will prejudice Enforcement. Niekras cannot avoid discipline for his alleged misconduct by demonstrating that others in the securities industry have done worse or have gone undisciplined. These allegations have no bearing on this case. Accordingly, I strike paragraph 10(c) of Niekras' answer.

4. FINRA's Boston Office's Need to Demonstrate Productivity; FINRA is Out to Get Niekras; MassMutual is Masquerading as FINRA

Niekras complains in paragraphs 10(d) through 10(f) of his answer that FINRA's Boston Office is pursuing this case with undue vengeance while failing to pursue issues that are more serious and that MassMutual routinely and improperly masqueraded as FINRA when seeking

[16] *Dep't of Enforcement v. Evansen*, No. 2010023724601, 2014 FINRA Discip. LEXIS 10, at *40 (June 3, 2014) (citing *Raghavan Sathianathan*, Exchange Act Release No. 54722, 2006 SEC LEXIS 2572, at *37-38 (Nov. 8, 2006) ("Even assuming . . . that Sathianathan had knowledge of unlawful activity about which he informed federal or state authorities, the statutes that Sathianathan cites do not provide him with immunity in this disciplinary proceeding.")).

information from its registered representatives. In essence, these allegations are other variants of his rejected defenses that (1) he has been improperly targeted for prosecution, (2) MassMutual acted improperly, and (3) FINRA has not pursued other complaints and investigations. Each of these purported defenses fails for the reasons stated above. I therefore strike paragraphs 10(d), 10(e), and 10(f) of Niekras' answer.

SO ORDERED.

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Andrew H. Perkins
Hearing Officer

Dated: January 30, 2017