

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ADAM J. MAKKAI
(CRD No. 425159),

Respondent.

Disciplinary Proceeding
No. 2018058924502

Hearing Officer–DDM

**ORDER GRANTING IN PART AND DENYING IN PART ENFORCEMENT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES AND REQUEST FOR RELIEF**

I. Introduction

The Department of Enforcement filed a one-cause Complaint alleging that Respondent Adam J. Makkai improperly shared commissions with an unregistered person in violation of FINRA Rules 2040 and 2010. Makkai filed an Answer, denying that he violated FINRA Rules. In his Answer, Makkai also asserted five affirmative defenses and a "Prayer for Relief." The Prayer for Relief seeks remedies based on the arguments made in the motion for summary disposition and sanctions that Makkai filed along with his Answer. In his motion, Makkai argued that the Complaint was untimely and should be dismissed, and that Enforcement had engaged in "contemptuous conduct" by filing a false Certificate of Service for its Notice of Complaint and Complaint. Makkai's motion for summary disposition and sanctions was denied.

When it opposed Makkai's motion, Enforcement filed a motion of its own – to strike Makkai's five affirmative defenses and Prayer for Relief. Makkai opposed Enforcement's motion to strike and filed its own cross-motion to strike portions of the Complaint. This Order addresses only Enforcement's motion to strike. For the reasons below, Enforcement's motion to strike is granted in part, and denied in part.

II. Discussion

A. Makkai's Affirmative Defenses

An affirmative defense is an “assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.”¹ As the National Adjudicatory Council noted, “[t]he practice in disciplinary proceedings is to strike those affirmative defenses that do not constitute a valid defense to avoid wasting time litigating irrelevant facts.”² Makkai asserted five affirmative defenses in his Answer: (1) “statute of limitations,” in that the Complaint is barred by Article V, Section 4 of the FINRA By-Laws; (2) unclean hands; (3) waiver; (4) laches; and (5) failure to state a claim upon which relief may be granted.

1. Statute of Limitations

Makkai’s first affirmative defense is entitled “statute of limitations.”³ But its premise is that Enforcement did not file its Complaint within the time allowed under Article V, Section 4 of FINRA’s By-Laws. This was the subject of his motion for summary disposition and sanctions, which was denied. As explained in the Order denying that motion, Enforcement’s complaint was filed within two years of the termination of Makkai’s FINRA registration, as required by the By-Laws.

In his opposition to the motion to strike, Makkai does not argue that this affirmative defense is viable. Instead, he asks that, if Enforcement’s motion to strike this defense is granted, “the Hearing Officer also strike all discussion by the Complainant about this [affirmative defense] from the record as well.”⁴ But Makkai fails to explain why Enforcement’s statement about FINRA’s jurisdiction to bring this action is improper or should be stricken.

Enforcement’s motion to strike is **GRANTED** as to Makkai’s first affirmative defense.

2. Unclean Hands

Makkai’s second affirmative defense is that Enforcement’s “claims are barred by [Enforcement]’s own fraud, deceit, or misrepresentation under the doctrine of unclean hands.”

¹ *Dep’t of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *23-24 (NAC Jan. 7, 2011) (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003)), *aff’d*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719 (Oct. 20, 2011).

² *Neaton*, 2011 FINRA Discip. LEXIS 13, at *24.

³ “[N]o statute of limitations applies to the disciplinary actions of the [e]xchange or other self-regulatory organizations.” *William D. Hirsh*, 54 S.E.C. 1068, 1077 & n.11 (2000); *see also Dep’t of Enforcement v. Mehringer*, No. 2014041868001, 2020 FINRA Discip. LEXIS 17, at *31 (NAC June 15, 2020).

⁴ Respondent’s Answer to Complainant’s Motion to Strike Affirmative Defenses and Prayer for Relief and Cross Motion to Strike (“Makkai Opp.”) 2.

“Unclean hands” is typically not recognized as a defense in FINRA disciplinary proceedings.⁵ Makkai tries to distinguish his affirmative defense by asserting that he is not trying to “reduce or eliminate” his alleged misconduct.⁶ Instead, Makkai says, Enforcement engaged in “repeated misconduct,” which consists of filing a fraudulent Certificate of Service and including irrelevant and false information in the Complaint “to besmirch Respondent’s reputation” and “mislead and confuse the finders of fact.”⁷ Makkai argues that the underpinnings of his “unclean hands” affirmative defense “should be considered by the Hearing Panel” or should result in portions of the Complaint being stricken.⁸

I will rule on Makkai’s cross-motion to strike separately. It is clear, though, that his “unclean hands” defense “rests upon an assertion of FINRA misconduct,” which is impermissible.⁹ Further, I addressed and rejected the allegation that Enforcement filed a false Certificate of Service in the Order denying Makkai’s motion for summary disposition and sanctions.

Enforcement’s motion to strike is therefore **GRANTED** as to Makkai’s second affirmative defense.

3. Waiver

For his third affirmative defense, Makkai asserts that Enforcement’s “claims are barred by the doctrine of waiver, when [Enforcement] failed to adequately effect service of process in a timely manner.” Waiver is the “‘intentional or voluntary relinquishment of a known right’ and ‘result[s] as [a] legal consequence from some act or conduct of [the] party against whom it operates.’”¹⁰ As with his first two affirmative defenses, Makkai based his waiver defense on the argument that Enforcement filed its Complaint outside the time allowed by FINRA By-Laws—an argument I rejected in denying his motion for summary disposition and sanctions. Even if his waiver defense can be construed as asserting that FINRA otherwise failed to act promptly, it is legally insufficient.¹¹ Enforcement’s motion to strike is **GRANTED** as to Makkai’s third affirmative defense.

⁵ *Neaton*, 2011 FINRA Discip. LEXIS 13, at *24; *Dep’t of Enforcement v. Jones*, No. 2015044782401, 2018 FINRA Discip. LEXIS 37, at *66 n.214 (OHO Oct. 17, 2018), *appeal docketed*, (NAC Nov. 13, 2018).

⁶ *See Neaton*, 2011 FINRA Discip. LEXIS, at *24.

⁷ Makkai Opp. 2.

⁸ *Id.*

⁹ *Neaton*, 2001 FINRA Discip. LEXIS, at *24.

¹⁰ *Howard Alweil*, 51 S.E.C. 14, 16 n.5 (1992) (quoting Black’s Law Dictionary, 494, 1417 (5th ed. 1979)).

¹¹ *See Dep’t of Enforcement v. Murphy*, No. 2005003610701, 2010 FINRA Discip. LEXIS 29, at *5 (OHO May 6, 2010) (“FINRA’s failure to act sooner does not provide a basis for this affirmative defense [of ratification, waiver, and estoppel].”).

4. Laches

Makkai also asserts the laches affirmative defense. The doctrine of laches “bars, in equity, claims that are not timely pursued.”¹² To prevail on a laches defense, Makkai must prove a lack of diligence by Enforcement, and prejudice to his case.¹³ Laches is “time plus prejudicial harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense.”¹⁴

The Complaint alleges misconduct from December 2017 through March 2018. LPL terminated Makkai’s registration by filing a Uniform Termination Notice for Securities Industry Registration (“Form U5”) on June 20, 2018. Enforcement filed the Complaint less than two years after LPL filed the Form U5. Enforcement argues that, as a matter of law, Makkai cannot allege that any delay of this length caused him prejudice. As support, Enforcement cites four cases in which longer delays than here did not require dismissal of the proceedings.¹⁵

In his opposition to Enforcement’s motion to strike, Makkai does not attempt to justify his laches affirmative defense. Nor does he address any of the arguments or legal authorities cited by Enforcement to strike this defense. His Answer offers no details about the underpinnings of his laches defense. Although “[t]here is no fixed period of time that must elapse for a suit to be barred by the doctrine of laches[,]”¹⁶ Makkai does not describe any lack of diligence by Enforcement. And aside from his flawed jurisdictional argument, he does not allege any prejudice or disadvantage from any delay. Enforcement’s motion to strike Makkai’s laches defense is therefore **GRANTED**.

5. Failure to State a Claim

Enforcement challenges Makkai’s affirmative defense that the Complaint fails to state a claim upon which relief can be granted. As the case Enforcement relies on states, however, “[n]o ruling is required on the motion to strike this defense because the disposition of the . . . causes of action necessarily includes a ruling on whether the Complaint states a claim upon which relief can be granted with respect to each cause of action.”¹⁷ Hearing Officers have recognized that

¹² *Talon Real Estate Holding Corp.*, Exchange Act Release No. 87614, 2019 SEC LEXIS 4796, at *22 (Nov. 25, 2019).

¹³ *Mehring*, 2020 FINRA Discip. LEXIS 17, at *3; *See also Dep’t of Enforcement v. Tretiak*, No. C02990042, 2001 NASD Discip. LEXIS 1, at *50 (NAC Jan. 23, 2001).

¹⁴ *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, 896 F.3d 174, 195 (2d Cir. 2018).

¹⁵ *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *14-16 (Feb. 13, 2004); *Hirsh*, 54 S.E.C. 1068 (2000); *Mehring*, No. 2014041868001, 2020 FINRA Discip. LEXIS 17, at *33; *Dep’t of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *38-39 (NAC Feb. 12, 2007).

¹⁶ *Leopard Marine & Trading, Ltd.*, 896 F.3d at 195.

¹⁷ *Murphy*, 2010 FINRA Discip. LEXIS 29, at *4.

“the complainant suffers no harm when the failure-to-state-a-claim defense is used in defensive pleadings.”¹⁸ Pleading a failure to state a claim as an affirmative defense is “a ‘routine practice which is rarely, if ever, stricken by the court as legally insufficient.’”¹⁹

At this stage, the defense is essentially a general denial of Enforcement’s claims. It is thus unnecessary to strike the defense before a hearing. Enforcement’s motion to strike Makkai’s fifth affirmative defense is **DENIED**.

B. Makkai’s Prayer for Relief

Makkai’s Answer sets forth a Prayer for Relief. The Prayer for Relief consists of seven requests. His seventh request is for a hearing, if the Complaint is not dismissed. Enforcement moves to strike all the requests except for the request for a hearing.

The Prayer for Relief consists of three primary requests:

- That the Complaint be dismissed for lack of jurisdiction because the Complaint was not timely filed under FINRA’s By-Laws;
- For “indemnification from Complainant for all fees and costs incurred as a result of Complainant’s contemptuous conduct (i.e., suborning perjury of his paralegal in re the fraudulent Certificate of Service”); and
- That the panel “transmit the documents and evidence demonstrating [Enforcement counsel]’s misconduct to” the New York Supreme Court’s Disciplinary Committee.

Makkai also asks for these three items in the Prayer for Relief, along with a hearing, if the Complaint is not dismissed:

- That Enforcement’s counsel “be excluded from further participation in the immediate proceeding” under FINRA Rule 9280(a)(2);
- That Enforcement be “prohibited from supporting or opposing particular claims or defenses or from introducing particular matters into evidence”; and
- That “all, or a significant portion of, the Complainant’s pleading be struck from the record” under FINRA Rule 9280(b)(2).

¹⁸ OHO Order 98-29 (CAF980022), at 7 (Oct. 2, 1998), http://www.finra.org/sites/default/files/OHODecision/p007762_0.pdf (affirmative defense of failure to state a claim “is the equivalent of a general denial and does not demand immediate resolution”).


¹⁹ OHO Order 07-21 (E102003025201), at 7 (June 11, 2007), http://www.finra.org/sites/default/files/OHODecision/p037016_0_0_0.pdf, (quoting *New York v. Almy Bros., Inc.*, 971 F. Supp. 69, 72 (N.D.N.Y. 1997)).

These requests all stem from arguments made in Makkai's motion for summary disposition and sanctions. That motion was denied. For the reasons set forth in the Order denying Makkai's motion, FINRA has jurisdiction over this proceeding. And Makkai failed to show that Enforcement engaged in contemptuous conduct in violation of FINRA Rule 9280. As a result, he has no right to any of the first six items of his Prayer for Relief. In his opposition to Enforcement's motion to strike, Makkai offers no reason why these items in his Prayer for Relief should survive Enforcement's motion to strike. Enforcement's motion to strike is therefore **GRANTED**, and Makkai's Prayer for Relief is stricken, except for his request for a hearing.

C. Order

For the reasons set forth above, Enforcement's motion to strike is **GRANTED IN PART**, and **DENIED IN PART**.

SO ORDERED.


Daniel D. McClain
Hearing Officer

Dated: August 14, 2020

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