

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

she would then "take care of the payment" for him.⁶ Respondent then received an email reply from the customer's email account containing wire instructions requesting that the Bank wire funds to a third-party bank account.⁷

After receiving these instructions, Respondent emailed them to the Bank's wire room. Her email stated that she had met with the customer at his home and, while there, he gave her the wire instructions. Respondent's email explained that because the customer did not have a fax machine at his home, she took the wire instructions to the office to fax them to the Bank's wire room.⁸ These statements were false in two respects. Respondent had not received the wire instructions from the customer at his home; she had received them by email.⁹ And she did not take the wire instructions to the Bank to try and fax them to the wire room.¹⁰ In any event, before wiring funds out of the customer's account, the Bank learned that the wire request was from an imposter and did not execute the wire transfer.¹¹

Several days later, the Bank's investigators interviewed Respondent.¹² Initially, she continued claiming that she had obtained the wire instructions at the customer's home. But eventually, she conceded during the interview that her email to the Bank's wire room contained false statements.¹³ Respondent's member firm employer then terminated her for violating the Bank's Business Standards for Ethical Conduct regarding the untrue statements in her email to the wire room and for not cooperating fully and answering questions truthfully and completely during the Bank's investigation.¹⁴

Based on the allegedly false statements in Respondent's email to the wire room, the Complaint charges Respondent with engaging in conduct inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010. On December 7, 2015, Respondent moved to dismiss the Complaint on the grounds that FINRA lacks jurisdiction under Rule 2010 to bring disciplinary proceedings for an alleged good faith mistake in a non-securities transaction. Respondent further argues that even if this conduct can be regulated by Rule 2010, FINRA's authority is pre-empted by applicable federal banking authorities, which, she asserts, have exclusive authority over such transactions. On January 11, 2016, Enforcement opposed the motion. As I explain below, the Complaint alleges wrongdoing

⁶ Compl. ¶ 12.

⁷ Compl. ¶ 13.

⁸ Compl. ¶ 14.

⁹ Compl. ¶ 15.

¹⁰ Compl. ¶ 16.

¹¹ Compl. ¶¶ 20–21.

¹² Compl. ¶ 22.

¹³ Compl. ¶¶ 23–24.

¹⁴ Compl. ¶ 25.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

that is within FINRA's jurisdiction; states a valid cause of action for violation of Rule 2010; and FINRA's jurisdiction is not pre-empted by federal banking law. Accordingly, I deny the motion.

B. Legal Standard

FINRA's Rules do not address motions to dismiss. But under the summary disposition rule, FINRA Rule 9264, Hearing Officers may grant motions for summary disposition with respect to jurisdictional issues.¹⁵ Further, Rule 9147 provides that a Hearing Officer may rule on procedural motions and administrative matters arising during a case. Finally, the National Adjudicatory Council ("NAC") has concluded that it is appropriate to treat a motion to dismiss as allowable under the summary disposition rule.¹⁶ Therefore, while Respondent's motion does not specifically invoke Rule 9264, I will treat the motion to dismiss as a summary disposition motion. Accordingly, for the purpose of deciding the motion, I will treat the allegations in the Complaint as true.¹⁷ Also, I will treat any inferences drawn from the underlying facts in the light most favorable to the party opposing summary disposition, namely, Enforcement.¹⁸

C. Discussion

1. The Complaint States a Valid Cause of Action Under Rule 2010.

The Complaint charges Respondent with violating FINRA Rule 2010. This Rule requires members, in the course of their business, to "observe high standards of commercial honor and just and equitable principles of trade." Rule 2010 also applies to associated persons.¹⁹ Recently, in the *Dep't of Enforcement v. Grivas*, the NAC addressed the purpose and reach of the Rule:

FINRA Rule 2010 is a broad and generalized ethical provision. FINRA's authority to pursue discipline for violations of FINRA Rule 2010 is sufficiently wide to encompass any unethical, business-related conduct, regardless of whether it involves a security . . . The rule therefore applies "when the misconduct reflects on [an] associated person's ability to comply with the regulatory requirements of

¹⁵ Rule 9264(e).

¹⁶ *Dep't of Enforcement v. Perles*, No. CAF980005, 2000 NASD Discip. LEXIS 9, at *19 (NAC Aug. 16, 2000), *aff'd*, Exchange Act Release No. 45691, 2002 SEC LEXIS 3395 (Apr. 4, 2002).

¹⁷ Rule 9264(e) ("[T]he facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145").

¹⁸ *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *2 (NAC Feb. 25, 2014) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986)).

¹⁹ FINRA Rule 0140 ("The 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 the Rules").

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

the securities business and to fulfill his fiduciary duties in handling other people’s money.”²⁰

Respondent concedes that Rule 2010 allows FINRA to bring an action against a registered representative for non-securities related misconduct. But, she argues, such an action is limited to intentional, bad faith conduct.²¹ She further argues that the Complaint should be dismissed because a disciplinary action cannot be maintained for an alleged good faith mistake in a non-securities transaction. Here, Respondent asserts, she had no intent to defraud either her client or the Bank or to benefit herself. And she did not injure a customer. Instead, according to Respondent, she did not act in bad faith but only “acted in earnest in an attempt to fulfill her client’s purported wishes to transfer funds to purchase art work.”²²

Respondent’s arguments misperceive the requirements of a Rule 2010 violation. To state a claim under this Rule, Enforcement need not allege that Respondent engaged in intentional, bad faith, and unethical conduct. Nor must Enforcement allege motive or scienter.²³ Further, there is no requirement that Enforcement allege that Respondent’s conduct injured, or was aimed at injuring, a customer, as customer harm is not a necessary element of a self-regulatory rule violation.²⁴ Indeed, violations of just and equitable principles of trade have been predicated on misconduct committed for the very purpose of benefitting customers.²⁵ Rather, allegations of either bad faith *or* unethical conduct are sufficient.²⁶

²⁰ *Dep’t of Enforcement v. Grivas*, No. 2012032997201, 2015 FINRA Discip. LEXIS 16, at *22 (NAC July 16, 2015), *appeal docketed*, No. 3-16756 (SEC Aug. 14, 2015) (citations and footnotes omitted); *Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 SEC LEXIS 2401, at *22 (Aug. 22, 2008) (“[C]onduct that reflects negatively on an applicant’s ability to comply with regulatory requirements fundamental to the securities industry is inconsistent with just and equitable principles of trade”).

²¹ Mot. at 6–7.

²² Mot. at 7.

²³ *Dep’t of Enforcement v. Golonka*, No. 2009017439601, 2013 FINRA Discip. LEXIS 5, at *24 (NAC Mar. 4, 2013)(quoting *Thomas W. Heath, III*, Exchange Act Rel. No. 59223, 2009 SEC LEXIS 14, at *15 (Jan. 9, 2009), *aff’d*, 586 F.3d 122 (2d Cir. 2009)). *See also Dep’t of Enforcement v. Jennings*, No. 2008013864401, 2013 FINRA Discip. LEXIS 18, at *54 n.142 (NAC Mar. 4, 2013) (“Rule 2110 focuses on the securities professional’s conduct rather than on a subjective inquiry into the professional’s intent or state of mind. Accordingly, a violation of the rule need not be premised on a motive or scienter finding”) (internal quotations omitted).

²⁴ *Cf. Dep’t of Enforcement v. Grey*, No. 2009016034101, 2014 FINRA Discip. LEXIS 31, at *35 (NAC Oct. 3, 2014).

²⁵ *See, e.g., Dep’t of Enforcement v. Bukovcik*, No. C8A050055, 2007 NASD Discip. LEXIS 21, at *10–11 (NAC July 25, 2007); *Dep’t of Enforcement v. Hughes*, No. 2008013391701, 2010 FINRA Discip. LEXIS 5, at *4–5 (OHO Jan. 12, 2010); *Dep’t of Enforcement v. McKinnis*, No. 2007010398802, 2011 FINRA Discip. LEXIS 53, at *9, 17 (OHO Oct. 13, 2011).

²⁶ *Golonka*, 2013 FINRA Discip. LEXIS 5, at *23 (citing *Dante J. DiFrancesco*, Exchange Act Rel. No. 66113, 2012 SEC LEXIS 54, at *17 (Jan. 6, 2012)); *Blair Alexander West*, Exchange Act Rel. No. 74030, 2015 SEC LEXIS 102, at *19–20 (Jan. 9, 2015), *appeal docketed*, No-15-621 (2d Cir. Mar. 3, 2015).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

Here, Enforcement alleged business-related conduct. Additionally, the alleged misconduct reflects negatively on Respondent's ability to comply with the regulatory requirements of the securities business and to fulfill her fiduciary duties in handling other people's money.²⁷ Numerous cases have found that associated persons who provided false information to their member firm employer engaged in unethical conduct in violation of Rule 2010.²⁸ Therefore, taken in a light most favorable to Enforcement, the Complaint alleges that Respondent engaged in unethical conduct. As a result, I find that the Complaint states a cause of action for violating Rule 2010.

2. FINRA's Jurisdiction in this Case is Not Pre-empted by Federal Banking Law

In addition to arguing that Rule 2010's scope does not extend to her alleged misconduct, Respondent asserts that federal banking law pre-empts FINRA jurisdiction in the matter. Specifically, Respondent argues that the gravamen of the action relates to a non-securities related banking transaction subject to the exclusive jurisdiction of federal banking law. Consequently, Respondent requests that the Complaint be dismissed. I reject this argument. First, in her motion, Respondent cites no authority holding that federal banking law pre-empts FINRA's jurisdiction to discipline associated persons for banking-related misconduct.

Moreover, FINRA has often disciplined associated persons for violations of Rule 2010 (or its predecessor rule) even though they were subject to another regulator's jurisdiction.²⁹

²⁷ See *Ortiz*, 2008 SEC LEXIS 2401, at *22.

²⁸ See, e.g., *Dep't of Enforcement v. Mielke*, No. 2009019837302, 2014 FINRA Discip. LEXIS 24, at *40 (NAC July 18, 2014), *aff'd*, Exchange Act Release No. 75981, 15 SEC LEXIS 34 (Sept. 24, 2015), *appeal docketed*, No. 05-1234 (11th Cir. Nov. 19, 2015) (misstatements on firm's compliance questionnaires violated predecessor to Rule 2010); *Dep't of Enforcement v. Butler*, No. 2012032950101, 2015 FINRA Discip. LEXIS 35, at *26 (NAC Sept. 25, 2015), *appeal docketed*, No 3-16912 (SEC Oct. 20, 2015) (affirming finding that respondent violated FINRA Rule 2010 by making a false statement on an annuity beneficiary change form); *Dep't of Enforcement v. Skiba*, No. E8A2004072203, 2010 FINRA Discip. LEXIS 6, at *13-14 (NAC Apr. 23, 2010) (holding that Skiba violated NASD Rule 2110 by failing to submit accurate and complete information on a variable annuity application and structuring variable annuity transactions so that they would not appear to be replacements in circumvention of the Firm's variable annuity procedures); *Dep't of Enforcement v. Pierce*, No. 2007010902501, 2013 FINRA Discip. LEXIS 25, at *65-66 (NAC Oct. 1, 2013) (affirming finding that Pierce violated NASD Rules 2110 and 3110 by falsifying firm records, failing to follow firm procedures with respect to seven customers' annuity transactions, and actively concealing from his firm seven annuity switches); *Dep't of Enforcement v. Davenport*, No. C05010017, 2003 NASD Discip. LEXIS 4, at *8-9 (NAC May 7, 2003) (finding that respondent violated NASD Rule 2110 by violating his firm's policy against borrowing from customers and trying to conceal his violation by misrepresenting to his firm that he had not borrowed from customers).

²⁹ See, e.g., *Thomas E. Jackson*, Exchange Act Release No. 11476, 1975 SEC LEXIS 1404, at *4 (June 16, 1975) (involving an insurance salesman who had forged signatures on insurance applications); *Dep't of Enforcement v. Harari*, No. 2011025899601, 2015 SEC LEXIS 899, at *23, 25 (Mar. 9, 2015) (involving an investment advisor who induced a customer to pay advisor fees directly to him and then converted the funds); *Dep't of Enforcement v. Fretz*, No. 2010024889501, 2015 FINRA Discip. LEXIS 54, at *58 (NAC Dec. 17, 2015) (involving two hedge fund managers who misused funds belonging to the hedge fund they operated); *Dep't of Enforcement v. Fitzgerald*, No. 20100242409, 2012 FINRA Discip. LEXIS 38, at *7-8 (OHO Apr. 17, 2012) (finding that Rule 2010 was broad enough to encompass a bank employee's misappropriation of funds from bank customers).

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

Especially instructive is *Keilen Dimone Wiley*.³⁰ In that case, the SEC explicitly rejected the argument that because the respondent was subject to state insurance regulation, FINRA lacked jurisdiction to bring a disciplinary action against him. FINRA had disciplined Wiley, an associated person who, in his position as an independent insurance agent, used customer insurance premiums to pay personal and business expenses. On appeal, the SEC concluded that respondent violated Rule 2010 because his conduct showed that he was “unable to fulfill the basic duties of a securities professional, which include being entrusted to handle customer funds.”³¹ In challenging FINRA’s jurisdiction, Wiley contended that “FINRA’s jurisdiction is limited to the securities industry and that it improperly ‘ventured into the distinctly separate and different realms of insurance and Texas independent contractor and contract law.’” Further, Wiley maintained “that only the states can regulate the insurance industry and resolve disputes that involve independent contractors or contract law.”³²

The SEC rejected this argument, finding instead that “state laws governing insurance business practices and independent contractors are irrelevant in this case because FINRA brought this disciplinary action against Wiley for violating FINRA Rules.”³³ The SEC noted that it had “repeatedly held that FINRA’s disciplinary authority is broad enough to encompass business-related conduct that is inconsistent with just and equitable principles of trade, even if that activity does not involve a security.”³⁴ In short, the SEC concluded that “Wiley’s unethical business-related conduct, even while performing insurance-related activities, falls under FINRA’s jurisdiction.”³⁵

Similarly, here, it is irrelevant whether another regulator may exercise jurisdiction over Respondent for the misconduct alleged in this case. Enforcement is not prosecuting Respondent in her capacity as a bank employee who allegedly violated banking regulations. Rather, she is charged with violating FINRA Rule 2010. Respondent’s status as a bank employee does not shield her from complying with Rule 2010 or preclude Enforcement from prosecuting her for allegedly engaging in non-securities, business-related conduct that violates that Rule.

³⁰ Exchange Act Release No. 76558, 2015 SEC LEXIS 4952 (Dec. 4, 2015).

³¹ *Id.*, at *1–2.

³² *Id.*, at *12.

³³ *Id.*

³⁴ *Id.*, at *11.

³⁵ *Id.*

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 16-03 (2015044379701).

D. Order

Because the Complaint states a valid cause of action under Rule 2010, and FINRA's jurisdiction is not pre-empted, I **DENY** the motion.

SO ORDERED.

David R. Sonnenberg
Hearing Officer

Date: January 28, 2016