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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. SUZANNE MARIE CAPELLINI (CRD No. 1357703), Respondent.	Disciplinary Proceeding No. 2020066627202 Hearing Officer–DDM

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

I. Introduction

There are two causes of action in the First Amended Complaint. In the first cause of action, Enforcement alleges that Respondent Suzanne Marie Capellini violated FINRA's anti-money laundering ("AML") rules while she was the AML Compliance Officer ("AMLCO") at First Manhattan Co. ("First Manhattan"). In the second cause of action, Enforcement alleges that Capellini provided false or misleading information in response to three Rule 8210 requests about microcap trading activity in accounts held by Capellini's husband, RB, at First Manhattan.

Capellini moves for summary disposition on both causes of action, seeking dismissal of the First Amended Complaint ("Motion").[1] In her Motion, Capellini makes two main arguments. First, she argues that FINRA lacks jurisdiction over her for this proceeding because FINRA filed its charges more than two years after the effective date on which First Manhattan terminated her registration.[2] Second, Capellini argues that, even if FINRA has jurisdiction over her for this proceeding, she is entitled to judgment as a matter of law on both causes of action because there is no genuine issue of material fact.

[1] With her Motion, Capellini attached an Affidavit of Ian J. McLoughlin ("McLoughlin Aff."), Statement of Undisputed Material Facts, and exhibits ("Exh.").

[2] Capellini first made this argument in a motion to dismiss that she filed along with her Answer to the Complaint. I denied the motion to dismiss with leave for Capellini to make her jurisdictional argument in a motion for summary disposition.

Enforcement opposes the Motion.[3] Enforcement argues that its Complaint was timely because it was filed within two years of when First Manhattan filed a Uniform Termination Notice for Securities Industry Registration (Form U5) for Capellini. Enforcement contends that issues of material fact – particularly, Capellini's credibility – preclude summary disposition of the two causes of action.

For the reasons below, I deny Capellini's Motion for Summary Disposition. As for her jurisdictional argument, I conclude that the Complaint was timely filed by Enforcement. I also conclude that issues of material fact preclude summary disposition on the two causes of action in the First Amended Complaint. The Hearing Panel must resolve these issues after a hearing.

II. Summary Disposition Standard

Under FINRA Rule 9264(e), a Hearing Officer may grant summary disposition on questions of jurisdiction. Otherwise, only a Hearing Panel may grant summary disposition. Rule 9264(e) establishes a two-prong test for the consideration of motions for summary disposition. The rule permits summary disposition only if both prongs are satisfied.

First, there must be no genuine issue about any material fact. Rule 9264(e) states that the facts alleged in the pleadings of the non-moving party must be taken as true, unless modified by stipulations or admissions made by the non-moving party, uncontested affidavits, or declarations, or facts officially noticed under Rule 9145. All reasonable inferences must be drawn in favor of the party opposing summary disposition.[4] Second, the moving party must have a right to summary disposition as a matter of law.[5]

The movant must show that there is no genuine issue of material fact; once the movant meets that burden, the non-moving party must show that there are material facts in dispute.[6] Summary disposition is appropriate "[w]hen the record as a whole could not lead a rational adjudicator to find for the nonmoving party."[7] And summary disposition is improper when "the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case[.]"[8] According to the NAC, with summary disposition motions, "the Hearing Panel's role is

[3] In this Order, I cite to Enforcement's opposition as "Enf. Opp."

[4] *See* OHO Order 17-02 (2014042291901) (Feb. 7, 2017), at 3, http://www.finra.org/sites/default/files/ OHO Order_17-02_2014042291901.pdf (citations omitted).

[5] *See* OHO Order 17-02 (denying summary disposition in part because material facts were in dispute); OHO Order 15-07 (2013036217601) (Apr. 2, 2015), http://www.finra.org/sites/default/files/OHO-Order-15-07-ProceedingNo.2013036217601.pdf (granting in part and denying in part summary disposition based on the standards established in FINRA Rule 9264).

[6] *Dep't of Enforcement v. Walblay*, 2011025643201, 2014 FINRA Discip. LEXIS 3, at *3 (NAC Feb. 25, 2014).

[7] *Id.*

[8] *Id.* (internal quotation omitted).

not to weigh the evidence and determine the truth of the case presented, but to determine whether the evidence presents a disagreement sufficient to require submission to fact finding."[9]

III. Discussion

A. FINRA Has Jurisdiction over Capellini for this Proceeding

Certain crucial facts are undisputed for determining whether Enforcement's Complaint was timely filed. For one, First Manhattan filed its Form U5 for Capellini on June 5, 2020. It is also undisputed that FINRA filed its Complaint within two years of that date – on June 1, 2022. Enforcement argues that these are the only facts necessary to determine whether Capellini is subject to FINRA's jurisdiction for this proceeding.

Capellini paints a more complicated picture. It is not enough, she argues, simply to count the days between the filing of the Form U5 and the filing of the Complaint. Instead, Capellini asserts that it is necessary to look at how and when FINRA first learned of when First Manhattan terminated its association with Capellini and the circumstances surrounding that termination. Here, it is undisputed that, in its Form U5, First Manhattan reported that it had discharged Capellini on May 8, 2020.[10] It is also undisputed that First Manhatttan's law firm, WilmerHale, told FINRA about Capellini's termination within a few days of her termination.[11] In fact, on May 11, 2020, WilmerHale made a presentation to FINRA, among others, in which it displayed 280 pages of materials, including the Rule 8210 responses prepared by Capellini that are the subject of this case.[12] Because FINRA knew about the facts surrounding her termination in May 2020, Capellini argues, the Complaint that FINRA filed in June 2020 was untimely.

FINRA's jurisdiction to bring disciplinary proceedings against formerly associated persons is defined by its By-Laws. Article V, Section 4(a)(i) says that FINRA must file a disciplinary complaint against a formerly associated person "within two years after the effective date of termination of registration pursuant to Section 3 [of Article V of the By-Laws] . . . ." In turn, Section 3(a) states that "[f]ollowing the termination of the association with a member of a person who is registered with it, such member shall, not later than 30 days after such termination, give notice of the termination of such association to [FINRA] via electronic process or such other process as [FINRA] may prescribe on a form designated by [FINRA]." The form designated by FINRA is the Form U5.

The key issue for determining jurisdiction is when Capellini's FINRA registration was terminated, not when First Manhattan terminated its association with her. Enforcement argues

[9] *Id.* at *2 (internal quotations and citations omitted).

[10] Enforcement Response to Statement of Undisputed Facts ("Enf. Resp. to SUF") ¶ 54; Aff., Exh. T.

[11] *See* McLoughlin Aff, Exh. Y (emails on May 15 and May 18, 2022 between Enforcement attorneys and WilmerHale about ways to contact Capellini).

[12] *See* Enf. Resp. to SUF ¶ 56-57; McLoughlin Aff., Exh. V, Exh. W, Exh. X.

that her registration was terminated on June 5, 2020, when First Manhattan filed its Form U5. Capellini claims that her registration was terminated in May 2020, when FINRA staff became aware that First Manhattan had terminated her association with the firm and why First Manhattan had done so.

The SEC has held that "[a] person who becomes registered remains registered until FINRA (not the registered person) ends the registration, based, among other things, on the Forms U5 it receives."[13] In other words, the SEC has stated, "[a] registered person cannot unilaterally terminate his or her FINRA registration before FINRA receives the prescribed form."[14] In fact, the Form U5 provides notice to registered persons (as it did with Capellini) that they "continue to be subject to the jurisdiction of regulators for at least two years after your registration is terminated,"[15] and that FINRA "determines the effective date of termination of registration."[16] The SEC has therefore held that "the two-year window opens when FINRA terminates the registration, and FINRA must be able to rely on its receipt of notices to set a date certain for terminating registration."[17] Based on this SEC precedent, the National Adjudicatory Council[18] and Office of Hearing Officers[19] have consistently held that a registered person's registration is terminated when FINRA receives a Form U5 filed by that person's member firm, and that is when the two-year jurisdictional period begins.

Capellini argues, however, that this consistent line of precedent should not apply because none of the cases directly address the "unique and unusual circumstances presented here."[20] WilmerHale made a presentation to FINRA about the timing and circumstances of Capellini's termination before First Manhattan filed its Form U5. "FINRA's receipt of actual notice of termination, and the circumstances of termination," before FINRA's receipt of the Form U5

[13] *David Kristian Evansen*, Exchange Act Release. No. 75531, 2015 SEC LEXIS 3080, at *13 (July 27, 2015).

[14] *Id.*

[15] McLoughlin Aff. Exh. T, at 2 (Form U5, filed June 5, 2020).

[16] McLoughlin Aff. Exh. T, at 3 (Form U5, filed June 5, 2020); *see Evansen*, 2015 SEC LEXIS 3080, at *13 (taking official notice of Form U5 language).

[17] *Evansen*, 2015 SEC LEXIS 3080, at *13.

[18] *Dep't of Enforcement v. Kielczewski*, No. 2017054405401, 2021 FINRA Discip. LEXIS 22, at *5 n.3 (NAC Sept. 30, 2021), *appeal docketed*, No. 3-20636 (SEC Oct. 27, 2021); *Dep't of Enforcement v. Weinstock*, No. 2010022601501, 2016 FINRA Discip. LEXIS 34, at *11 n.5 (NAC July 21, 2016); *Dep't of Mkt. Regulation v. Imbruce*, No. 2008012137601, 2012 FINRA Discip. LEXIS 41, at *31 (NAC Mar. 7, 2012).

[19] OHO Order 20-14 (2018058924502) (July 31, 2020) at 3, http://www.finra.org/sites/default/files/2020-12/OHO_Order_20-14_2018058924502.pdf; OHO Order 10-05 (20080121376) (Aug. 17, 2010) at 2, http://www.finra.org/sites/default/files/OHODecision/p122654_0_0.pdf.

[20] Mot. 18.

distinguishes her situation from existing precedent, Capellini argues.[21]

Capellini is correct that none of the SEC or NAC decisions confront precisely the circumstances that exist here. But she cites no legal precedent to support her position that her FINRA registration was terminated before First Manhattan filed her Form U5. And she fails to offer a persuasive reason to break with the long line of controlling precedent that the filing of a Form U5 terminates a respondent's registration with FINRA. As the SEC has reasoned, "FINRA must be able to rely on its receipt of notices to set a date certain for terminating registration."[22] I therefore conclude that the two-year jurisdictional window here opened on June 5, 2022, when First Manhattan filed a Form U5 for Capellini. Because Enforcement filed its Complaint within two years of that date, it is timely. Capellini's motion for summary disposition based on a lack of jurisdiction is denied.

B. A Hearing is Necessary to Decide Disputed Issues of Material Fact

Aside from her jurisdictional argument, Capellini moves for summary disposition on both causes of action in the First Amended Complaint. After carefully considering the arguments by both parties, I conclude that there are genuine issues of material fact that prevent summary disposition on either cause of action. The appropriate way to resolve these issues is through a hearing.

1. The First Cause of Action

In the first cause of action, Enforcement alleges that Capellini failed to establish and implement a reasonable AML program. Enforcement alleges that Capellini failed to develop and implement a reasonable AML program for the firm's deposit and trading of microcap securities. Enforcement also alleges that Capellini was aware of red flags of potentially suspicious trading activity in RB's accounts at First Manhattan. According to Enforcement, Capellini should have detected and reasonably investigated those red flags and considered whether to report his trading by filing a Suspicious Activity Report ("SAR"). The timeframe for the first cause of action is January 2018 through May 2020, when Capellini was First Manhattan's AMLCO.

[21] Mot. 18. As an example, Capellini distinguishes an Order by a Hearing Panel rejecting a similar argument. OHO Order 98-33 (C9A980032) (Dec. 22, 1998), http://www.finra.org/sites/default/files/OHODecision/p007766_0_0_0_0.pdf. In that case, the Hearing Panel looked to the plain language of the By-Laws to decide that the respondent's registration was terminated when his former member firm filed a Form U5, not when his counsel sent a letter to FINRA disclosing his termination. In the Order, the Hearing Panel also noted that "the Form [U5] provides important regulatory information about the circumstances of the termination[,]" while "[a] letter from counsel does not." OHO Order 98-33, at 3. As Capellini points out, WilmerHale's presentation to FINRA provided much more information about her termination than the Form U5 that First Manhattan later filed. But this alone is insufficient to support breaking with SEC precedent that the filing of the Form U5 establishes the date for termination of registration.

[22] *Evansen*, 2015 SEC LEXIS 3080, at *13.

Capellini argues that the undisputed facts prove that she did not cause and was not responsible for the AML violations alleged in the first cause of action. Capellini's argument rests on two main pillars. First, Capellini argues that the Complaint alleges deficiencies in AML procedures and processes established before Capellini became First Manhattan's AMLCO. As a result, she argues, she cannot be blamed for any of those alleged deficiencies. Second, Capellini argues that Capellini's supervisor, Neal Stearns, and First Manhattan bore ultimate responsibility for the firm's AML policies, even after Capellini became AMLCO in 2018. Stearns was the only one who could adopt new compliance and AML policies, Capellini argues. And she asserts that any purported delegation of supervisory authority to her by Stearns or First Manhattan to monitor the trading in RB's accounts was unreasonable, given the potential conflict of interest.

But Enforcement has pointed to several issues of material fact that prevent summary disposition. Among the factual issues in dispute are the nature and extent of Capellini's responsibilities for First Manhattan's AML obligations, and the nature and extent of her responsibilities to monitor her husband's trading accounts at the firm for red flags. Enforcement points to the firm's AML procedures, which identified Capellini as "primarily responsible" for the firm's AML program. Enforcement also contests Capellini's contention that Stearns pre-cleared and approved the deposit of low-priced securities in her husband's accounts. These factual issues, as well as other material issues for the first cause of action, must be resolved by the Hearing Panel after a hearing. At this procedural stage, I cannot weigh the evidence and decide the merits of the cases presented by both sides; the evidence presented so far is enough to justify fact-finding by the Hearing Panel after a hearing.

2. The Second Cause of Action

In the second cause of action, Enforcement alleges that Capellini violated FINRA Rule 8210 by providing false or misleading responses to three regulatory requests about her husband's trading in accounts at First Manhattan. Enforcement alleges that each of the regulatory requests sought documents and information that the firm, as part of its due diligence, collected to determine whether the stocks traded by Capellini's husband were freely tradable. And Enforcement further alleges that Capellini's responses were false or misleading because she attached documents that she obtained after receiving the regulatory requests.

Capellini's primary argument turns on the language of the Rule 8210 requests and responses. She argues that a plain reading of the documents shows that her responses were not false or misleading. FINRA's requests were broad, she argues, and she never represented to FINRA that the documents that she produced were from First Manhattan's due diligence files. Indeed, Capellini argues that if FINRA wanted her to produce only documents already contained in First Manhattan's files as of any particular time, it was FINRA's responsibility to make that clear and unambiguous in its requests, and FINRA failed to do so. In short, Capellini asserts that she "did not understand FINRA to be asking for only documents relating to the due diligence the firm had already conducted at the time the shares were deposited[.]"[23] Instead, she thought

[23] Mot. 26-27 (citing McLoughlin Aff., Exh. B) (Capellini On-the-Record Testimony "OTR" Tr. 197).

FINRA was also asking for documentation that she collected after receiving the requests.[24] And Capellini says that she testified truthfully when Enforcement asked her to identify which documents were from First Manhattan's due diligence files and which documents she obtained after the requests.

As her argument suggests, Capellini's understanding of the requests and her intent in providing the responses are critical issues. And Enforcement attacks her credibility about those issues. Enforcement alleges that Capellini provided an altered document in response to one of the requests. Enforcement argues that she did so "in order to conceal the fact that the document was not part of the due diligence files and was instead obtained after the fact."[25] According to Enforcement, Capellini's provision of this altered document "shows that [she] knew very well that the documents she obtained after the fact were not responsive."[26]

As a second argument in support of her motion for summary disposition on the Rule 8210 charges, Capellini contends that Stearns was responsible for the Rule 8210 responses. She asserts that Stearns reviewed and approved the responses before they were submitted to FINRA. She also asserts that she questioned Stearns about whether it was appropriate for her to handle the responses to the requests because they were about trading in her husband's accounts. Capellini argues that Stearns and First Manhattan were responsible for any deficiencies in the Rule 8210 responses.

But Enforcement points to disputed facts that relate to Capellini's second argument. The Rule 8210 requests were addressed to Capellini, who prepared the responses. Enforcement also points to prior testimony that challenges whether Stearns reviewed the exhibits to the Rule 8210 responses or discussed whether someone other than Capellini should respond to the request.[27]

Capellini makes several other arguments about why she is entitled to summary disposition on the second cause of action. I will not address them at length here; it is sufficient to note that they, too, rely on genuine issues of material fact. Viewing all reasonable inferences from the facts in favor of Enforcement, which I must do at this stage,[28] I conclude that a hearing on the merits is necessary for the second cause of action.[29]

[24] Mot. 26-27 (citing McLoughlin Aff., Exh. B) (Capellini OTR Tr. 197).

[25] Enf. Opp. 24.

[26] Enf. Opp. 25.

[27] McLoughlin Aff. Exh. C (Stearns OTR Tr. 151-53, 158-61).

[28] OHO Order 17-02, at 3.

[29] Capellini also filed a motion to strike portions of Enforcement's opposition papers that refer to customer complaints on RB's CRD records and to a lawsuit filed in federal court by the SEC against RB and others. Although I denied Capellini's motion to strike in a separate Order, I concluded that genuine issues of material fact preclude summary disposition without regard to the customer complaints or SEC lawsuit.

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IV. Order

Because the Complaint was filed within two years of the filing of Capellini's Form U5, I conclude that the Complaint was timely. I also find that genuine issues of material fact preclude summary disposition on the two causes of action in the First Amended Complaint. Capellini's Motion is therefore **DENIED.**

SO ORDERED.

Daniel D. McClain
Hearing Officer

Dated: January 13, 2023

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