

**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 ENFORCEMENT'S MOTION TO STRIKE
RESPONDENT'S SECOND AFFIRMATIVE DEFENSE**

In its Complaint, the Department of Enforcement alleges that Respondent Suzanne Marie Capellini violated FINRA's anti-money laundering rules and provided false or misleading information in response to FINRA's requests for documents and information. In response, Capellini moved to dismiss the Complaint for lack of jurisdiction and asserted three affirmative defenses. Enforcement moved to strike the first two of these three affirmative defenses.

Capellini's first affirmative defense is that the Complaint was untimely and that FINRA lacks jurisdiction over this proceeding. Capellini made the same argument in her motion to dismiss, which I denied but allowed Capellini to re-file as a motion for summary disposition. Enforcement opposed the motion to dismiss, and I will rule on Enforcement's motion to strike the first affirmative defense when I decide the motion for summary disposition.

Capellini's second affirmative defense alleges that Enforcement "rushed to judgment" before seeking to bar her from associating with a FINRA member:

The disciplinary proceedings leading up to the filing of the Complaint were fundamentally unfair to Ms. Capellini and in violation of the Securities and Exchange Act insofar as Enforcement, at the influence of FMC and its counsel WilmerHale, rushed to judgment and concluded prior to speaking to Ms. Capellini or taking her testimony that she should be barred from the industry and never seriously entertained her side of the story. This fundamental unfairness risks tainting these proceedings as well and warrants the dismissal of the Complaint.

In its motion to strike this affirmative defense, Enforcement denies that it rushed to judgment. Regardless, Enforcement argues, this is immaterial and does not present a defense to Enforcement's claims in the Complaint. Enforcement points out that respondents may not assert FINRA's misconduct to reduce or eliminate their misconduct.¹ And while the Exchange Act requires that self-regulatory organizations provide a "fair procedure" in disciplinary proceedings, Enforcement argues that requirement does not apply to investigations.² Enforcement requests that I strike Capellini's second affirmative defense "to avoid wasting time litigating irrelevant facts."³

Enforcement's arguments are unavailing. At the outset, it is unclear whether Capellini's second affirmative defense is truly an affirmative defense,⁴ as opposed to a general denial and explanation of why Capellini believes that Enforcement will not establish the elements of its claim.⁵ But at this early stage, it is premature to rule that Capellini's second affirmative defense allegations are immaterial, or that she may not be permitted to present evidence relating to those allegations at the hearing. As Capellini notes in her response to Enforcement's motion, defendants in criminal cases often question the adequacy of the investigations that led to the charges they face. And it is not unusual in our forum.⁶

Further, Capellini's second affirmative defense is related to her third affirmative defense, which Enforcement did not move to strike. Capellini's third affirmative defense alleges that third parties were responsible for the violations in the Complaint, and that Capellini's former firm has offered her up as a scapegoat. Fairly constructed, both the second and third affirmative defense allege that Enforcement's investigation yielded the wrong conclusion, and that Capellini did not violate FINRA Rule 8210 or the AML rules. This goes directly to the merits of the case. On this limited record, I cannot conclude that the second affirmative defense is deficient as a matter of

¹ See *Dep't of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *23-24 (NAC Jan. 7, 2011), *aff'd*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719 (Oct. 20, 2011).

² Motion to Strike ("Mot. to Strike") 4 (citing *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *35 (Oct. 20, 2011)).

³ Mot. to Strike 4-5.

⁴ "An affirmative defense is a respondent's 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.*" *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *87 (NAC Dec. 20, 2007) (quotation omitted, emphasis added).

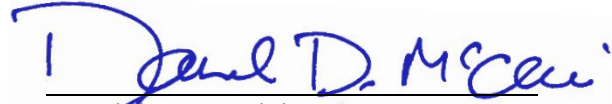
⁵ See, e.g., OHO Order 18-05 (201404186081) (Jan. 10, 2018), at 7-8, https://www.finra.org/sites/default/files/OHO_Order_18-05_2014041860801.pdf. (explaining distinction between affirmative defense and a "negative" defense, where Respondent bears no burden of proof and seeks to show instead that Complainant has not met its burden of proof).

⁶ See, e.g., *Dep't of Enforcement v. Lykos*, No. 2018059510201, 2020 FINRA Discip. LEXIS 23, at *21 (OHO May 1, 2020) ("Lykos argues that the Hearing Panel should disbelieve the evidence presented by Enforcement because Enforcement's investigation was not conducted in good faith, 'had a predetermined goal from the outset,' and was otherwise flawed."), *aff'd*, 2021 FINRA Discip. LEXIS 33 (NAC Dec. 16, 2021), *appeal docketed*, No. 3-20703 (SEC Jan 10, 2022); *Dep't of Enforcement v. McGuire*, No. 20110273503, 2014 FINRA Discip. LEXIS 36, at *35 (OHO Nov. 3, 2014) (respondent alleging that firm compliance officer engaged in "rush to judgment" in internal investigation), *aff'd*, 2015 FINRA Discip. LEXIS 53 (NAC Dec. 17, 2015).

law, or that Capellini should be precluded from introducing evidence related to this defense at the hearing.

Enforcement's motion to strike Capellini's second affirmative defense is **DENIED**.

SO ORDERED.



Daniel D. McClain
Hearing Officer

Dated: August 9, 2022

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