

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

TITAN SECURITIES
(CRD No. 131392),

BRAD C. BROOKS
(CRD No. 1584633),

and

RICHARD WAYNE DEMETRIOU
(CRD No. 828433),

Respondents.

Disciplinary Proceeding
No. 2013035345701

Hearing Officer– RES

ORDER DENYING RESPONDENTS' MOTION UNDER FINRA RULE 9146

The hearing in this disciplinary proceeding is scheduled to begin November 6, 2017 and last two weeks. The multi-count Complaint alleges false communications and misstatements to potential investors, an undisclosed outside business activity, failure to supervise, lapses in the retention of securities-related emails, the use of personal email addresses to conduct securities-related business, and the completion of an “all or none” securities offering even though (the Complaint alleges) all of the securities had not been sold at the specified price and at the specified time. Respondents have filed a motion (the “Motion”) under FINRA Rule 9146. Although it is styled as a motion to dismiss, the Hearing Officer treats the Motion as a motion for summary disposition. As grounds for the Motion, Respondents contend that the Department of Enforcement's claims for alleged actions that occurred before October 17, 2011 are time-barred under decisions of the United States Supreme Court in *Gabelli v. SEC*¹ and *Kokesh v. SEC*.² Those decisions, in different ways, applied the five-year statute of limitations in 28 U.S.C. § 2462. The Hearing Officer denies the Motion, for two reasons.

¹ 568 U.S. 442 (2013).

² 137 S. Ct. 1635 (2017).

First, 28 U.S.C. § 2462 does not apply to FINRA proceedings because FINRA is not a government entity.³ In fact, the disciplinary authority of FINRA is not subject to any statute of limitations.⁴ The Supreme Court’s decisions in *Gabelli* and *Kokesh* do not change this result. They are inapposite. In *Gabelli*, the Supreme Court held that the Securities and Exchange Commission cannot avail itself of the “discovery rule” to delay the commencement of the limitations period in 28 U.S.C. § 2462.⁵ In *Kokesh*, the Supreme Court held that 28 U.S.C. § 2462 applies to SEC actions for disgorgement because disgorgement is a penalty.⁶ Both of these decisions applied 28 U.S.C. § 2462 to the SEC, a government entity, not to a private organization like FINRA. Neither of them held that 28 U.S.C. § 2462 applies to private organizations.

Second, Respondents did not meet and confer with the Department of Enforcement before filing the Motion. This is required by the Case Management and Scheduling Order.⁷ In an Order issued June 7, 2017, the Hearing Officer reminded Respondents’ counsel of this requirement after they failed to abide by it in moving for an adjournment of the hearing date and extensions of certain pre-hearing deadlines—including the deadline for the Motion. It is regrettable that the Hearing Officer and Enforcement have to continue spending time dealing with Respondents’ failure to comply with this simple requirement. Their disregard of the Case Management and Scheduling Order provides another ground for the denial of the Motion.

³ *Dep’t of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *100 (NAC July 23, 2015) (28 U.S.C. § 2462 “does not apply to FINRA disciplinary proceedings because FINRA is not a government entity”) (quoting *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *92-93 (July 2, 2013)), *aff’d sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014); *accord mPhase Technologies, Inc.*, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *51 (Feb. 2, 2015) (“we have long held that FINRA, a private organization, is not subject to the requirements of 28 U.S.C. § 2462, applicable to government agencies”).

⁴ *Rooney*, 2015 FINRA Discip. LEXIS 19, at *100 (“the disciplinary authority of private self-regulatory organizations ... such as [FINRA] is not subject to any statute of limitation”) (quoting *Murphy*, 2013 SEC LEXIS 1933, at *92-93).

⁵ 568 U.S. at 449 (“we have never applied the discovery rule ... where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties”). Under the discovery rule, the running of the limitations period is delayed until the plaintiff has “discovered” its cause of action through discovery of its injury or the defendant’s wrongdoing.

⁶ 137 S. Ct. at 1644 (“SEC disgorgement thus bears all the hallmarks of a penalty ... The 5-year statute of limitations in § 2462 therefore applies when the SEC seeks disgorgement.”). The Supreme Court held that SEC disgorgement is a penalty because disgorgement orders “go beyond compensation, are intended to punish, and label defendants wrongdoers’ as a consequence of violating public laws.” *Id.* at 1645 (quoting *Gabelli*, 568 U.S. at 451-52).

⁷ Case Management Order and Scheduling Order, issued January 11, 2017, ¶ III.D (“Motions must include a certification that the moving party has made a reasonable, good faith effort to meet and confer with the opposing party to resolve each issue in the motion informally.”).

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 17-15 (2013035345701).

For the above two reasons, the Motion is denied.

SO ORDERED.



Richard E. Simpson
Hearing Officer

Dated: July 27, 2017