

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

FINRA TREASURER,

Complainant,

v.

RESPONDENT

Respondent.

Expedited Proceeding
No. DFC140002

STAR No. 20150439957

Hearing Officer—CC

ORDER GRANTING COMPLAINANT'S MOTION TO DISMISS HEARING REQUEST

On December 22, 2014, FINRA issued two notices of intent to suspend Respondent's FINRA membership pursuant to FINRA Rule 9553 for the failure to pay outstanding and past due arbitration fees related to two arbitration proceedings, FINRA Dispute Resolution Arbitration Case No. 14-00851 (Customer No. 1400851-871522) ("the 2014 Case") and FINRA Dispute Resolution Arbitration Case No. 10-03301 ("the 2010 Case") (Customer No. 1003301-822231).¹ In the 2014 Case, FINRA assessed arbitration fees of \$2,450.² In the 2010 Case, FINRA assessed arbitration fees of \$7,400.³ Respondent, through its president and chief executive officer, timely requested a hearing pursuant to FINRA Rule 9559.

On January 30, 2015, the Office of Hearing Officers ("OHO") issued a Revised Order Setting Hearing and Pre-Hearing Schedule in which the Hearing Officer established a deadline for Regulatory Operations to file the motion to dismiss that they orally presented during a pre-hearing conference. Regulatory Operations filed a motion to dismiss Respondent's hearing request on February 9, 2015. Respondent filed an opposition on March 2, 2015. The Hearing Officer granted Regulatory Operations leave to file a reply, which it filed on March 13, 2015.

I. The Parties' Filings

Regulatory Operations moves to dismiss Respondent's request for a hearing based on (1) Respondent's failure, in its request for hearing, to set forth with specificity one of the defenses enumerated in the notice of suspension; and (2) Respondent's collateral attack on the validity of the arbitration fees. Regulatory Operations argues that, based on applicable case law and as

¹ Complainant, FINRA Treasurer, is represented by FINRA's Department of Regulatory Operations ("Regulatory Operations").

² See Exhibit 1 to Regulatory Operation's Motion to Dismiss.

³ See Exhibit 3 to Regulatory Operation's Motion to Dismiss.

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 15-01 (DFC140002).

enumerated in the notices of suspension for the 2014 Case and 2010 Case, the only acceptable defenses to a notice of suspension are Respondent's demonstration that (1) it has paid the balances in full; (2) it has entered into a fully-executed, written installment payment plan with FINRA and the payments are current; (3) it has timely filed an action to vacate or modify any award in an arbitration proceeding through which the outstanding fees were assessed and such motion has not been denied; (4) it has filed for bankruptcy protection and the outstanding fees have not been deemed non-dischargeable; or (5) it has a *bona fide* inability to pay. Regulatory Operations argues that these are the only acceptable defenses to a notice of suspension. Regulatory Operations further notes that Rule 9552(e) requires that requests for hearing set forth with specificity any and all defenses to FINRA's action, and Respondent has failed to set forth any of these defenses. Regulatory Operations accordingly requests that Respondent's request for hearing be dismissed.

Respondent opposes Regulatory Operation's motion to dismiss. Respondent's opposition to the motion to dismiss essentially attacks the underlying assessment of fees. Respondent's request for hearing in the 2014 Case states that the fees are not appropriate because "this case was previously settled with [OHO]." Respondent's request for hearing in the 2010 Case states that the fees are not appropriate because Respondent was "withdrawn from the case and the erroneous charges" would be reversed by FINRA Dispute Resolution. Respondent's opposition to Regulatory Operation's motion to dismiss the 2010 Case states that Respondent was "incorrectly named as a Respondent" in the 2010 Case, FINRA Dispute Resolution made an accounting error when it assessed the fees, and FINRA owes Respondent a refund of arbitration fees that it already paid. As to the 2014 Case, Respondent states that, after it receives a refund from FINRA, it will pay the \$2,450 in fees owed for the 2014 Case.

II. Ruling

For the reasons stated below, the Hearing Officer grants Regulatory Operations' motion to dismiss Respondent's hearing request. As a FINRA member firm, Respondent must comply with FINRA's rules and pay all dues, assessments, and fees imposed by FINRA.⁴ In the 2014 Case, FINRA assessed Respondent a member surcharge of \$1,700 on March 20, 2014, and a member pre-hearing processing fee on June 11, 2014.⁵ FINRA's rules allow for the assessment of a surcharge and process fees as to member firms that are claimants or named as Respondents in FINRA arbitration proceedings.⁶ In the 2010 Case, FINRA assessed Respondent a session fee of \$2,400 on August 6, 2014, and a member processing fee of \$5,000 on August 11, 2014.⁷ FINRA's rules allow for the assessment of session fees and process fees as to member firm

⁴ See FINRA By-Laws, Article IV, Section 1 (stating that, by applying for FINRA membership, an applicant agrees to, among other things, comply with FINRA rules and pay fees and costs assessed by FINRA).

⁵ See Exhibit 2 to Regulatory Operation's Motion to Dismiss.

⁶ See FINRA Rule 12901 (allowing imposition of a member surcharge); FINRA Rule 12903 (allowing the imposition of member process fees).

⁷ See Exhibit 4 to Regulatory Operation's Motion to Dismiss.

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claimants and Respondents in FINRA arbitration proceedings.⁸ Arbitration fees are due when assessed and become delinquent if unpaid for 60 days.⁹ Furthermore, surcharge fees and process fees are non-refundable, and if a member concludes its involvement in an arbitration case through dismissal or settlement, FINRA assesses the fees that have accrued to that point.¹⁰ FINRA may deduct overdue, unpaid arbitration fees from a member firm's Central Registration Depository ("CRD") account.¹¹ When Respondent's fees became delinquent, the firm had insufficient funds in its CRD account to cover the amount due.¹²

FINRA Rule 9553(a) provides that, if a member fails to pay any fees, dues, assessment or other charge required to be paid under FINRA's By-Laws or rules, FINRA may issue a written notice to the member stating that the failure to pay the amount due within 21 days will result in suspension or cancellation of membership. FINRA Rule 9553(e) states that a member served with a notice of suspension or cancellation under the rule may request a hearing pursuant to Rule 9559 and requires that the request "set forth with specificity any and all defenses to the FINRA action." Thus, in order for this matter to proceed on Respondent's request for a hearing on the suspension notices in the 2010 Case and the 2014 Case, Respondent was required to provide a detailed explanation of all its defenses in its hearing request.

The defenses available under Rule 9553 are quite limited.¹³ The defenses available under Rule 9553 are that Respondent has (1) paid the amounts due in full; (2) entered into a fully-executed, written installment payment plan with FINRA and the payments are current; (3) timely filed an action to vacate or modify the award that was issued in the arbitration proceeding for which outstanding fees were assessed, and the motion has not been denied; or (4) filed for bankruptcy protection and the outstanding fees have not been deemed by a federal court to be non-dischargeable.¹⁴ Additionally, "[a] *bona fide* inability to pay arbitration fees may be a factor in determining whether any sanction for failure to pay fees is excessive or oppressive."¹⁵ RESPONDENT has not set forth with specificity, nor even asserted, any of these recognized defenses to FINRA's suspension under FINRA Rule 9553.

⁸ See FINRA Rule 12902 (allowing the imposition of session fees); FINRA Rule 12903 (allowing the imposition of member process fees).

⁹ See FINRA Regulatory Notice 08-45 (Aug. 2008), 2008 FINRA LEXIS 42, at *5 (stating that arbitration fees are considered delinquent if they are not paid within 60 days after the date of an invoice).

¹⁰ OHO Redacted Decision No. DFC020014 (Oct. 3, 2002), at 5, *available at* http://www.finra.org/sites/default/files/OHODDecision/p006700_0.pdf.

¹¹ *Id.* at *7.

¹² See Exhibit 7 to Regulatory Operation's Motion to Dismiss.

¹³ See *NASD Treasurer v. Fisher*, No. DFC050011 (FINRA OHO Apr. 5, 2006), at 4, *available at* http://www.finra.org/sites/default/files/OHODDecision/p017099_0.pdf; OHO Redacted Decision No. DFC20014, at 2 n.2.

¹⁴ See *NASD Treasurer v. Fisher*, No. DFC050011, at 4; FINRA's December 22, 2014 KJM Notice of Suspension (the 2014 Case); FINRA's December 22, 2014 KJM Notice of Suspension (the 2010 Case).

¹⁵ *NASD Treasurer v. Fisher*, No. DFC050011, at 4.

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Respondent, instead, attempts to collaterally attack the validity of the fees assessed and the underlying arbitration process. For example, Respondent claims that FINRA has made an accounting error in assessing arbitration fees against the firm. Collateral attacks, however, are not allowed in this forum in that the Hearing Officer is not permitted to reconsider rulings and assessments related to the underlying arbitration award.¹⁶ Furthermore, Respondent already challenged the fairness of the arbitration fees with FINRA Dispute Resolution, and Dispute Resolution determined that FINRA properly assessed the fees.¹⁷

III. Conclusion

Accordingly, the Hearing Officer grants Regulatory Operations motion to dismiss Respondent's hearing request. The March 31, 2015 hearing in this matter is cancelled. FINRA's December 22, 2014 notices of suspension will become effective 21 days after issuance of this Order and shall constitute final FINRA action.

SO ORDERED.

Carla Carloni
Hearing Officer

Dated: March 18, 2015

¹⁶ See OHO Order 06-56 (DFC060004) (Dec. 20, 2006) (citing *John G. Pearce*, 52 S.E.C. 796, 798 (1996)).

¹⁷ See Exhibit 1 to Regulatory Operations Reply Brief in Response to Respondent's Opposition to Complainant's Motion to Dismiss Expedited Proceeding. Furthermore, in a January 13, 2015 notice to CEO, a FINRA Dispute Resolution Case Administrator advised CEO that Respondent could request a waiver of forum fees, fee reduction, or payment plan due to financial hardship by submitting a request to FINRA's Finance Department. *Id.*