

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 08-06 (2005003437102).

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

Respondent.

Disciplinary Proceeding
No. 2005003437102

Hearing Officer – LBB

**ORDER GRANTING DEPARTMENT OF ENFORCEMENT'S MOTION
TO STRIKE RESPONDENT'S UNCLEAN HANDS AFFIRMATIVE DEFENSE**

Respondent has pled an unclean hands defense based on his contention that the Department of Enforcement ("Enforcement") conducted the investigation of this case and filed the Complaint vindictively, and that FINRA damaged his career by issuing an allegedly unfair press release announcing the filing of the case. Enforcement has moved to strike Respondent's unclean hands defense, arguing that there is no such defense in a FINRA proceeding and, in the alternative, that Respondent has inadequately pled the defense if it exists.

The unclean hands defense is generally not recognized as a defense to law enforcement actions. Furthermore, Respondent has not alleged that any alleged prosecutorial misconduct prejudiced his ability to defend this case, nor has he alleged any misconduct that appears to have the potential for prejudice. Accordingly, Enforcement's motion to strike the affirmative defense of unclean hands is granted.¹

¹ By granting this motion to strike, the Hearing Panel expresses no opinion on whether there is any factual basis for Respondent's allegations or whether the allegations would constitute misconduct if proven. The Hearing Panel's order is limited to a decision on whether Respondent has set forth an affirmative defense to the charges in the Complaint. Allegations of misconduct by FINRA staff are generally properly directed to the FINRA Office of the Ombudsman. See FINRA website, www.finra.org/AboutFINRA/CorporateInformation/OfficeoftheOmbudsman/index.htm.

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Relying on both federal court and administrative precedent, including one case striking an unclean hands defense, the National Adjudicatory Council recently held that a respondent “may not maintain, as a matter of law, any defense that rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct.” *Dep’t of Enforcement v. Epstein*, No. C9B040098, slip op. at 33-34, (N.A.C. Dec. 20, 2007), *appeal docketed*, No. 3-12933 (S.E.C. Jan. 31, 2008). A number of other courts have held that the unclean hands defense is unavailable against the government when it acts to protect the public interest. *See, e.g., U.S. v. Manhattan-Westchester Medical Services, P.C.*, 2008 U.S. Dist. LEXIS 5819, at *9 (S.D.N.Y. Jan. 28, 2008); *U.S. v. Philip Morris Inc.*, 300 F. Supp. 2d 61, 75 (D.D.C. 2004); *U.S. v. Cushman & Wakefield, Inc.*, 275 F. Supp. 2d 763, 774 (D. Texas 2002). Although FINRA is not a government agency, the public policy implications of allowing such a defense are the same.

Respondent’s unclean hands defense “rests upon an assertion of FINRA misconduct to reduce or eliminate his own misconduct,” and thus is insufficient as a matter of law.

CONCLUSION

Respondent has alleged that Enforcement engaged in prosecutorial misconduct by engaging in certain actions that allegedly harmed Respondent’s business or reputation, but he has not alleged that Enforcement has engaged in any actions that would prejudice his ability to defend this disciplinary proceeding. The National Adjudicatory Council’s recent *Epstein*

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decision precludes the assertion of an unclean hands defense in a FINRA enforcement action.

The motion to strike the unclean hands defense is granted.

**By the Hearing Panel
SO ORDERED.**

Lawrence B. Bernard
Hearing Officer

Dated: April 4, 2008
Washington, DC