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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. JOHN A. ORLANDO (CRD No. 2002197), Respondent.	Disciplinary Proceeding No. 2019063633301 Hearing Officer–RES

ORDER GRANTING IN PART AND DENYING IN PART DEPARTMENT OF ENFORCEMENT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES AND PORTIONS OF THE ANSWER

I. Enforcement's Complaint

FINRA's Department of Enforcement filed a Complaint against Respondent John A. Orlando, a registered representative. The Complaint consists of five causes of action. The first and second causes of action allege that from September 2016 through July 2019, Respondent churned and excessively traded the account of Customer A.[1] The third cause of action alleges Respondent did not have a reasonable basis to believe the transactions and strategy he recommended to Customer A were suitable for any customer.[2] The fourth cause of action alleges Respondent caused inaccuracies in his employer firm's books and records by mischaracterizing 87 solicited transactions in Customer A's account as "unsolicited."[3] The fifth cause of action alleges Respondent made false statements to his employer firm on an annual compliance questionnaire about how he communicated with Customer A.[4] According to the Complaint, Respondent's alleged actions violated Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)"), Rule 10b-5 thereunder ("Rule 10b-5"), and FINRA Rules 2010, 2020, 2111, and 4511.[5]

[1] Complaint ("Compl.") ¶¶ 1, 63-79.

[2] Compl. ¶¶ 3, 81-87.

[3] Compl. ¶¶ 4, 89-95.

[4] Compl. ¶¶ 5, 97-101.

[5] Compl. ¶¶ 2-5, 72, 79, 87, 95, 101.

II. Respondent's Answer

Respondent filed an Answer in which he denies violating Section 10(b), Rule 10b-5, and FINRA Rules.[6] The Answer contains summary paragraphs.[7] These assert that the causes of action of the Complaint are premised on the demonstrably false allegations of Customer A.[8] Respondent finds it remarkably dubious that Enforcement could file charges against Respondent ostensibly based on the purported allegations of unsuitable trading by a single customer (Customer A).[9] Respondent alleges that Customer A has been a uniquely and remarkably sophisticated investor for over 25 years.[10] According to Respondent, when Customer A's investments are viewed in the context of prior decades of speculative risk-taking, Enforcement's charges are patently absurd.[11] Respondent contends that, to compound the alleged harm and prejudice Enforcement has caused him, Enforcement manufactured Customer A's arbitration complaint by its alleged promise to Customer A that if he sued Respondent, FINRA would help him get his money back.[12] And the summary paragraphs contain many other sentences of similar substance and tone.

The Answer contains six affirmative defenses. These assert:

- Enforcement "fails to state a cause of action upon which relief can be granted." (First Affirmative Defense)
- Enforcement "improperly and fraudulently induced [Customer A] to file a specious Statement of Claim on the quid-pro-quo that Finra would help [Customer A] recover his losses." (Second Affirmative Defense)
- Enforcement "does not maintain its absolute immunity when these improper charges constitute prosecutorial abuse and Respondent has a constitutional right of due process to raise the improper conduct of Finra and its employees outside of their regulatory function to wrongly induce a customer to bring an arbitration claim against his broker." (Third Affirmative Defense)
- "Respondent is entitled to a sufficient amount of due process to show that [Enforcement] is pursued [sic] charges against Orlando in bad faith." (Fourth Affirmative Defense)

[6] Answer ("Ans.") ¶¶ 2-5, 72, 79, 87, 95, 101.

[7] Ans. at 1-2.

[8] Ans. at 1.

[9] Ans. at 1.

[10] Ans. at 1.

[11] Ans. at 1.

[12] Ans. at 2.

- "[Enforcement] does not have the legal authority to pursue charges in a matter where it knows or has reason to believe that the witness upon whom it relies will not appear and testify at the hearing." (Fifth Affirmative Defense)

- "Finra cannot pursue charges which are based, in part, on an OTR which was attended by [an Enforcement] examiner who, at the time, had a conflict of interest arising from a subpoena issued by a hearing panel to testify and produce documents in connection with her actions as to Orlando." (Sixth Affirmative Defense)[13]

III. Enforcement's Motion to Strike and Respondent's Failure to File an Opposition

Enforcement moved to strike Respondent's affirmative defenses and the summary paragraphs in his Answer ("Motion"). In this Motion, Enforcement points out that FINRA Rule 9136 authorizes the Hearing Officer to strike any scandalous or impertinent matter in any brief, pleading, or other filing.[14] While FINRA Rule 9215(b) requires all affirmative defenses to be included in an Answer, the Hearing Officer should strike affirmative defenses that do not constitute a valid defense.[15] Enforcement argues that Respondent's affirmative defenses do not raise valid defenses and should be stricken.[16]

After Enforcement filed its Motion, I issued an order governing Respondent's opposition. In this order, I directed Respondent to "file an Opposition to the Motion ('Opposition') on or before May 24, 2022."[17] I ordered Respondent to "identify by citation, in separate paragraphs corresponding to each affirmative defense in the Answer (except the first affirmative defense), the **controlling legal authority** that supports" each affirmative defense.[18]

Respondent failed to file an opposition to the Motion, on or before May 24, 2022, or at any other time. Thus, I have before me *no* controlling legal authority that supports Respondent's affirmative defenses.

I held the Initial Pre-Hearing Conference ("Conference") in this proceeding on May 26, 2022. In this Conference, Respondent's counsel requested a hearing on Enforcement's Motion. In response to this request, I gave Respondent's counsel the opportunity to make his argument right there in the Conference. In his argument, counsel admitted he has no legal authority to support his affirmative defenses. He claimed this is a case of first impression.

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[13] Ans. at 6-7.

[14] Department of Enforcement's Motion to Strike Respondent's Affirmative Defenses and Portions of the Answer ("Mot.") at 4.

[15] Mot. at 5.

[16] Mot. at 5-6.

[17] May 16, 2022 Order Governing Respondent's Briefing of Department of Enforcement's Motion to Strike Respondent's Affirmative Defenses and Portions of the Answer ("Order") at 1.

[18] Order at 1 (emphasis in original).

IV. Discussion

I have read the Complaint, the Answer, the Motion, and the record of this proceeding. I have reached three conclusions with regard to the Motion. First, I conclude that the Motion's objection to the summary paragraphs in Respondent's Answer does not have merit. Second, the Motion's objection to the first affirmative defense, which asserts that Enforcement has failed to state a cause of action on which relief can be granted, does not have merit. Third, the Motion's objections to the rest of Respondent's affirmative defenses have merit. For the reasons stated below, I **GRANT** the Motion **IN PART** and **DENY** the Motion **IN PART**.

A. Respondent's Summary Paragraphs

I first consider the summary paragraphs in Respondent's Answer. FINRA Rule 9136 provides that "[a]ny scandalous or impertinent matter contained in any brief, pleading, or other filing . . . may be stricken on order of an Adjudicator."[19] "Scandalous" matter casts a derogatory light on someone, usually a party to the action, and "impertinent" matter is not responsive or relevant to the issues involved.[20] As for the summary paragraphs, I do not find them to be scandalous or impertinent. The summary paragraphs do not gratuitously reflect on the moral character of any identifiable Enforcement staff member or place any individual in a cruelly derogatory light.[21] It is hard to believe the summary paragraphs will cause harm to the reputation of Enforcement or its employees.

Accordingly, it is unnecessary to strike the summary paragraphs from Respondent's Answer. Enforcement's Motion is **DENIED IN PART**.

B. Respondent's First Affirmative Defense

Next, I consider Respondent's first affirmative defense. An affirmative defense is an 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.[22] To avoid wasting time litigating irrelevant facts, the practice in FINRA disciplinary proceedings is to strike from a respondent's Answer affirmative defenses that do not constitute valid defenses.[23] The Hearing Officer may strike affirmative defenses where (1) no evidence in support of the defenses would be

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[19] FINRA Rule 9136(e); *accord* OHO Order 18-05 (2014041860801) (Jan. 10, 2018), at 5, https://www.finra.org/sites/default/files/OHO_Order_18-05_2014041860801.pdf.

[20] OHO Order 20-12 (2018058924502) (Aug. 19, 2020), at 2, https://www.finra.org/sites/default/files/2020-10/OHO_Order_20-12_2018058924502.pdf.

[21] *Brambila v. Wells Fargo Bank*, No. 12-cv-04224 NC, 2012 U.S. Dist. LEXIS 157203, at *6-7 (N.D. Cal. Nov. 1, 2012).

[22] OHO Order 18-05, at 7.

[23] *Dep't of Enforcement v. Neaton*, No. 2007009082902, 2011 FINRA Discip. LEXIS 13, at *24 (NAC Jan. 7, 2011) (quoting *Saks v. Franklin Covey Co.,* 316 F.3d 337, 350 (2d Cir. 2003)), *aff'd*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719 (Oct. 20, 2011).

admissible; (2) the defenses have no bearing on the case; or (3) permitting the defenses to stand would result in prejudice to Enforcement.[24]

Respondent's first affirmative defense states that Enforcement's Complaint fails to state a cause of action on which relief can be granted. No ruling is required on a motion to strike this affirmative defense because the disposition of the causes of action necessarily includes a ruling on whether each states a claim on which relief can be granted.[25] Enforcement suffers no harm when a failure-to-state-a-claim defense is asserted in the Answer.[26] This is a routine practice that is rarely, if ever, stricken by the Hearing Officer.[27] Indeed, a "defense" where a respondent undertakes no burden of proof and seeks to show that Enforcement has not met its burden of proof on an element, is not an affirmative defense at all.[28]

Accordingly, it is unnecessary to strike Respondent's first affirmative defense before the hearing. Enforcement's Motion is **DENIED IN PART**.

C. Respondent's Second Through Sixth Affirmative Defenses

I now turn to Respondent's other five affirmative defenses. These assert that Enforcement improperly and fraudulently induced Customer A to file a specious statement of claim in a FINRA arbitration; that Enforcement does not maintain its absolute immunity when it has engaged in improper conduct outside its regulatory function to wrongly induce a customer to bring an arbitration claim against his broker; that Respondent is entitled to a sufficient amount of due process to show that Enforcement is pursuing charges against him in bad faith; that Enforcement lacks authority to pursue charges in a matter where it knows or has reason to believe that the witness on whom it relies will not appear and testify at the hearing; and that Enforcement cannot pursue charges that are based on on-the-record testimony that was attended by an Enforcement examiner who had a conflict of interest.[29]

To rule on these affirmative defenses, I consider the decision of the National Adjudicatory Council in the case of *Dep't of Enforcement v. Neaton*.[30] In this controlling legal authority, the respondent alleged in affirmative defenses that FINRA staff had failed to attach an addendum to its FINRA Rule 8210 request that he appear for an on-the-record interview, which

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[24] OHO Order 17-01 (2013037401001) (Jan. 30, 2017), at 3, https://www.finra.org/sites/default/files/OHO_Order-17-01_2013037401001.pdf.

[25] *Dep't of Enforcement v. Murphy*, No. 2005003610701, 2010 FINRA Discip. LEXIS 29, at *4 (OHO May 6, 2010) *aff'd*, 2011 FINRA Discip. Lexis 42 (NAC Oct. 20, 2011).

[26] OHO Order 20-05 (2015045257501) (Mar. 26, 2020), at 3, https://www.finra.org/sites/default/files/2020-10/OHO_Order_20-05_2015045257501.pdf.

[27] OHO Order 07-21 (E102003025201) (June 11, 2007), at 7, https://www.finra.org/sites/default/files/OHODecision/p037016_0_0_0.pdf.

[28] OHO Order 18-05, at 7-8.

[29] Ans. at 6-7.

[30] *Neaton*, 2011 FINRA Discip. LEXIS 13.

addendum would have advised him of his right to bring an attorney to his interview, and that FINRA staff had maneuvered to prevent him from settling the proceeding prior to the filing of the Complaint.[31] Rejecting these affirmative defenses, the NAC held that allegations of FINRA misconduct do not defeat Enforcement's claims of FINRA Rule violations:

> The practice in disciplinary proceedings is to strike those affirmative defenses that do not constitute a valid defense to avoid wasting time litigating irrelevant facts.… Neaton may not maintain, as a matter of law, any defense that rests on an assertion of FINRA misconduct to reduce or eliminate his own misconduct.[32]

With regard to Respondent's affirmative defenses, I am unaware of any controlling legal authority holding that a respondent can defeat Enforcement's claims of FINRA Rule violations by asserting that (1) Enforcement improperly and fraudulently induced a customer to file a specious statement of claim in a FINRA arbitration, (2) Enforcement acted improperly and outside of its regulatory function to wrongly induce a customer to bring an arbitration claim against his broker, (3) Enforcement pursued charges against a respondent in bad faith, (4) Enforcement pursued charges in a matter where it knows or has reason to believe that the witness on whom it relies will not appear and testify at the hearing, or (5) Enforcement pursued charges that are based on on-the-record testimony that was attended by an Enforcement examiner who had a conflict of interest. I ordered Respondent to submit such controlling legal authority in a written opposition to Enforcement's Motion, but Respondent simply failed to file an opposition. Respondent has not cited any authority that has reversed the NAC's controlling decision in *Neaton*. Indeed, the *Neaton* decision seriously undermines Respondent's contention that this is a case of first impression.

Alleged Enforcement misconduct is not recognized as a defense in FINRA disciplinary proceedings.[33] Respondent's second through sixth affirmative defenses are impermissible because they rest on allegations of Enforcement misconduct.[34] Enforcement's Motion is **GRANTED IN PART**.

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[31] *Id.* at *25-26.

[32] *Id.* at *24 (citation omitted).

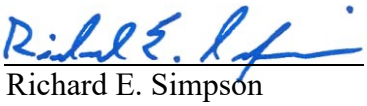
[33] *Dep't of Enforcement v. Jones*, No. 2015044782401, 2018 FINRA Discip. LEXIS 37, at *66 n.214 (OHO Oct. 17, 2018), *aff'd*, 2020 FINRA Discip. Lexis 45 (NAC Dec. 17, 2020), *appeal docketed*, No. 3-20209 (SEC Jan. 19, 2021); OHO Order 20-16 (2018058924502) (Aug. 14, 2020), at 3, https://www.finra.org/sites/default/files/2020-12/OHO_Order_20-16_2018058924502.

[34] *Neaton*, 2011 FINRA Discip. LEXIS 13, at *24.

V. Order

For the reasons stated above, Enforcement's Motion is **GRANTED IN PART** and **DENIED IN PART**.

SO ORDERED.



Richard E. Simpson
Hearing Officer

Date: June 3, 2022

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