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FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. MARK C. COHEN (CRD No. 4534879), Respondent.	Disciplinary Proceeding No. 2014040761001 Hearing Officer–DW

AMENDED ORDER[1] DENYING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DISPOSITION

I. Background

FINRA's Department of Enforcement brought this disciplinary proceeding against Respondent Mark Cohen alleging that he converted funds from his employer by fabricating expense reports and submitting them to his firm for reimbursement. The Complaint alleges that Cohen's conversion violated FINRA Rule 2010, and his falsification of firm records violated FINRA Rules 4511 and 2010. Cohen denies the charges.

Cohen now moves for partial summary disposition on the ground that certain of his alleged false claims for reimbursement are barred by the statute of limitations provided by 28 U.S.C. § 2462.[2] For the reasons explained below, the motion is denied.[3]

II. Legal Analysis

Summary disposition in a FINRA disciplinary proceeding is governed by FINRA Rule 9264. The rule requires that a motion be accompanied by a statement of undisputed facts, a memorandum of points and authorities, and an affidavit or declaration setting forth facts that would be admissible at the hearing. FINRA Rule 9264(e) permits a motion to be granted where

[1] This Order is amended to correct certain typographical errors.

[2] As pertinent here, 28 U.S.C. § 2462 provides that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued."

[3] The Hearing Officer may deny any motion for summary disposition. FINRA Rule 9264(e). Only the Hearing Panel may grant a motion for summary disposition on non-jurisdictional grounds. *Id*.

there is "no genuine issue with regard to any material fact" and, based on undisputed material facts, the moving party is "entitled to summary disposition as a matter of law."

The facts here are not in material dispute. The Complaint alleges that Cohen was improperly reimbursed for expenses on five occasions between March 2012 and November 2013. It is undisputed that two of these reimbursements, one for $1,314.15 on March 28, 2012, and another for $2,700 on June 5, 2012, were paid more than five years before the date this action was filed on July 21, 2017.[4] Cohen further asserts, and Enforcement does not dispute, that FINRA had notice of the alleged misconduct by at least April 30, 2014, when Cohen's employer filed a Form U5 explaining the circumstances surrounding Cohen's termination.[5]

The question is whether this action is timely as to the challenged expenditures. According to Cohen, the claims should be barred by the five-year limitations period provided by 28 U.S.C. § 2462. But the Securities and Exchange Commission has consistently held to the contrary, concluding that "FINRA proceedings are not subject to any statute of limitations."[6] Indeed, there are no "bright line rules about the impact of the length of a delay in filing a complaint on the fairness of [FINRA] disciplinary proceedings."[7] The governing standard is "overall fairness" under the Securities Exchange Act of 1934 measured by whether "respondent's ability to mount an adequate defense had been prejudiced by the delay in his proceedings."[8]

Cohen maintains that these precedents have been overtaken by recent Supreme Court decisions *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) and *Gabelli v. SEC*, 568 U.S. 442 (2013). In *Gabelli*, the Supreme Court held that the SEC cannot avail itself of the "discovery rule" in enforcement actions to delay the commencement of the limitations period in 28 U.S.C. § 2462.[9] In *Kokesh*, the Supreme Court held that 28 U.S.C. § 2462 applies to SEC actions for disgorgement because disgorgement is a penalty.[10] Cohen argues that these Supreme Court decisions stand for the proposition that "monetary penalties" and "disgorgement"—remedies potentially at issue here—are governed by the limitations period found in 28 U.S.C. § 2462. He

[4] *See* Respondent's Statement of Undisputed Facts. The claims for expenses were submitted on the dates indicated and ultimately paid on April 20, 2012, and June 20, 2012, respectively.

[5] Respondent's Statement of Undisputed Facts.

[6] *See, e.g.*, *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *78 n.93 (Feb. 13, 2015) (citing *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *93 (July 2, 2013) (finding that "the disciplinary authority of private self-regulatory organizations … such as [FINRA] is not subject to any statute of limitation") (citation omitted), *petition denied*, 751 F.3d 472 (7th Cir. 2014)).

[7] *See, e.g.*, *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *14 (Feb. 13, 2004).

[8] *Love*, 2004 SEC LEXIS 318, at *16.

[9] *Gabelli v. SEC*, 568 U.S. 442, 449 (2013).

[10] *Kokesh v. SEC*, 137 S. Ct. 1635, 2017 U.S. LEXIS 3557, at *17 (June 5, 2017).

further relies on a recent district court case to support his claim that other pertinent potential remedies, including an associational bar, should also be held to a period of limitations.[11]

But these decisions all involve SEC enforcement actions, not FINRA disciplinary proceedings. And the SEC draws a clear distinction between the two forums in explaining that "§ 2462 does not apply to FINRA disciplinary proceedings *because FINRA is not a government entity*."[12] Neither *Kokesh* nor *Gabelli* dictate a different result, as "[n]either of them held that 28 U.S.C. § 2462 applies to private organizations."[13]

Cohen persists that the principles articulated in *Kokesh* and *Gabelli* should be equally applicable here, because FINRA acts as a *de facto* SEC when it brings a disciplinary proceeding. He contends that prior decisions fail to address this point, and as "FINRA 'stands in the shoes of the SEC,' and exercises SEC-delegated powers in 'disciplinary proceedings,' then it should [be] subject to the SEC's limitations, including § 2462, as a matter of law and equity."[14] But Cohen's argument is not new. In explaining why a similar contention "misconstrues the Commission's role in SRO disciplinary proceedings," the SEC reasoned:

> SRO proceedings are not initiated by a government agency, nor does their initiation require our approval. We do not participate in the disciplinary proceeding before the SRO, and we do not control when the SRO begins or concludes its determination. Our sole responsibility in this context arises when an SRO imposes a final disciplinary sanction on a person who seeks review of the SRO's determination from this Commission. Moreover, enforcement of the sanctions imposed will be the direct responsibility of the SRO, and any fine will be payable to the SRO, not the United States Treasury.[15]

In all of these respects, a FINRA disciplinary proceeding is distinct from an enforcement action initiated by the SEC.[16] Cohen maintains that these distinctions are without a difference: by

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[11] *See SEC v. Gentile*, 2017 U.S. Dist. LEXIS 204883, at *9-10 (D.N.J. Dec. 13, 2017) (applying limitations period provided by 28 U.S.C. § 2462 to "penny stock bar" and injunctive relief sought by SEC because such relief "would only serve to punish Defendant [and] … would not restore any 'status quo ante' nor would it serve any retributive purposes.").

[12] *William J. Murphy*, 2013 SEC LEXIS 1933, at *92 (emphasis supplied). *And see, e.g., United States v. Inc. Village of Island Park*, 791 F. Supp. 354, 367 (E.D.N.Y. 1992) ("Section 2462 applies only to actions brought by the United States."); *Erie Basin Metal Prods., Inc. v. United States*, 150 F. Supp. 561, 566 (Ct. Cl. 1957) ("The limitation of section 2462 applies only to actions instituted by the Government.").

[13] OHO Order 17-15 (2013035345701), at 2, http://www.finra.org/sites/default/files/OHO_Order_17-15_2013035345701.pdf.

[14] Respondent's Motion for Partial Summary Disposition, at 7 (quoting *City of Providence v. Bats Glob. Mkts., Inc.*, 878 F.3d 36, 46-47 (2d Cir. 2017)).

[15] *Murphy*, 2013 SEC LEXIS 1933, at *94.

[16] *Compare Jones v. SEC*, 115 F.3d 1173, 1182 (4th Cir. 1997) ("While its self-regulating powers are supervised by the SEC, which is essentially given a veto power over [FINRA] disciplinary action, that review power does not convert [FINRA's] interest to the same interest as that of the regulating agency."). Although the SEC has the authority to review sanctions imposed by FINRA, it is authorized to reduce a FINRA sanction only where it finds

its terms, 28 U.S.C. 2462 requires that any "action" or "proceeding" —whether instituted by the government or not—be brought within five years when it results in "any civil fine, penalty, or forfeiture." Admittedly, this general proposition is not entirely without support.[17] And according to Cohen, past precedents to the contrary are no longer good law after the D.C. Circuit's decision in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), where the court remanded a FINRA-imposed bar to the SEC for reevaluation of the sanction imposed in light of *Kokesh*.

But *Saad* did not speak to the distinction between FINRA and SEC sanctions for limitations purposes.[18] True, Judge Kavanaugh's concurring opinion suggested that any distinction is illusory, that because "the federal courts of appeals do not distinguish between SEC orders that affirm FINRA disciplinary sanctions and SEC orders that affirm sanctions imposed through the SEC's administrative hearing system[,] … parties rarely raise the objection that FINRA is not a government body, and if the objection is raised, courts quickly dispense with it."[19] That said, Judge Kavanaugh's view is that of a single member of the three-judge panel. Judge Millett's *dubitante* opinion clearly recognizes a meaningful distinction between the forums, emphasizing that "Commission review … does not involve a governmental entity enforcing an Act of Congress, federal regulation, or any other type of public law," but merely reflects the Commission "exercising discretionary superintendence over the decisions of a

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that the sanction is excessive, oppressive or imposes an unnecessary or inappropriate burden on competition. *See* Exchange Act § 19(e)(2). Notably, the SEC has *no* authority to increase a FINRA-imposed sanction, even if it believes an increased sanction is warranted. *Kevin Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *31 n.28 (Nov. 4, 2009).

[17] *Compare, e.g.*, *Trawinski v. United Techs.*, 313 F.3d 1295, 1298 (11th Cir. 2002) ("Section 2462 by its text is generally applicable to 'proceedings for the enforcement of any civil fine,' and the Trawinskis' citizen suit under the [Energy and Policy Conservation Act] is precisely this sort of action."); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987) ("Because citizen enforcement suits are analogous to EPA enforcement suits …, we hold that [§ 2462] applies to citizen enforcement actions [under the Clean Water Act]."). The SEC finds these authorities distinguishable, as "[t]he independent exercise by SROs of their disciplinary responsibilities contrasts, for example, with citizen suits brought under the environmental laws, in which the individual citizen 'stands in the shoes' of the federal government." *Larry Ira Klein*, 52 S.E.C. 1030, 1039 n.36 (1996).

[18] The sole question on remand in *Saad* was whether the Supreme Court's *Kokesh* analysis, and particularly its understanding of the word "penalty," affected the Commission's prior rejection of a respondent's claim that the associational bar imposed in that case was "impermissibly punitive." *Saad*, 873 F.3d at 304. *Kokesh* (and thus *Saad*) did not speak to the distinction between FINRA and SEC actions in the application of a statute of limitations.

[19] *Saad*, 873 F.3d at 305 n.1. In many contexts, courts have been more receptive to the notion that FINRA is not a governmental body than Judge Kavanaugh suggests. *E.g.*, *Epstein v. SEC*, 416 Fed. Appx. 142, 148 (3d Cir. 2010) (unpublished opinion) ("Epstein cannot bring a constitutional due process claim against [FINRA], because [FINRA] is a private actor, not a state actor."); *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002) ("It has been found, repeatedly, that [FINRA] itself is not a government functionary."); *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999) ("[T]he fact that a business entity is subject to 'extensive and detailed' state regulation does not convert that organization's actions into those of the state."); *U.S. v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (SRO testimony does not implicate fifth amendment protections because "NYSE's inquiry … was in pursuance of its own interests and obligations, not as an agent of the SEC.").

private self-regulatory organization (FINRA)."[20] That distinction is particularly apt in this case, where violations of FINRA rules, but not the federal securities laws, are alleged.[21]

So *Saad* did not upset the consistent line of precedents that reject notions that FINRA stands in the SEC's shoes or that its sanctions are subject to 28 U.S.C. § 2462.[22] And the SEC has long held that the imposition of a limitations period in disciplinary proceedings "would impair [FINRA's] statutory obligation and duty to protect the public and discipline its members."[23] Because these precedents are controlling in this forum,[24] I conclude that the limitations period of 28 U.S.C. § 2462 cannot apply to any of Cohen's alleged misconduct.[25]

Cohen makes the additional argument that even if no formal limitations period applies, the challenged claims must be dismissed for equitable reasons. He states that "equity generally follows the law," and so Enforcement's failure to file within the limitations period provided by 28 U.S.C. § 2462 should be "given great weight in deciding whether claims are barred by [the equitable doctrine of] laches."[26] But Cohen cannot manufacture a statute of limitations by invoking equity. The touchstone of equity is fairness, "a notion that by its very nature requires consideration of the necessities of each particular case," and not a "mechanical analysis" engineered to create a "quasi statute of limitations."[27] Instead, the question is whether any delay or undue passage of time rendered the proceeding "inherently unfair."[28]

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[20] *Saad*, 873 F.3d at 308 ("[A]ll that Saad is charged with violating … is FINRA's rules of professional conduct.").

[21] *See Kokesh*, 2017 U.S. LEXIS 3557, at *93 (limitations period of 28 U.S.C. § 2462 applicable to penalties that flow from an "infraction of a public law"). No infraction of a public law is charged here. *E.g.*, *Apollo Property Partners, LLC v. Newedge Fin., Inc*., 2009 U.S. Dist. LEXIS 56018, at *5-6 (S.D. Tex. Mar. 20, 2009) ("As many courts have held, 'a breach of [FINRA] rules is simply a breach of a private association's rules, although that association is one which is closely related to the SEC, and therefore does not present a question which arises under the laws of the United States.'").

[22] *E.g.*, *MPhase Technologies, Inc.*, Exchange Act Release No. 74187, 2015 SEC LEXIS 398, at *51 (Feb. 2, 2015) (collecting authorities, noting that "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").

[23] *Frederick C. Heller*, 51 S.E.C. 275, 280 (1993).

[24] *Dep't of Enforcement v. Iida*, No. 2012033351801, 2016 FINRA Discip. LEXIS 32, at *20 n.11 (NAC May 18, 2016) ("[W]e are bound to obey the precedent established by the Commission.").

[25] Because Cohen challenges only two of the five alleged conversions, it is not clear that Enforcement's claims as to those acts should be precluded even if a limitations period *did* apply. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) ("[W]here a plaintiff … challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period relevant to] the last asserted occurrence of that practice.").

[26] Respondent's Motion for Partial Summary Disposition, at 8-9 (quoting *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 645 (Del. Ch. 2013)).

[27] *Dep't of Enforcement v. Morgan Stanley DW Inc.*, No. CAF000045, 2002 NASD Discip. LEXIS 11, at *21-24 (NAC July 29, 2002).

[28] *William D. Hirsh*, Exchange Act Release No. 43691, 2000 SEC LEXIS 2934, at *18 (Dec. 8, 2000).

In that regard, Cohen must support his equitable defense[29] with proof that his "ability to mount an adequate defense was harmed by any delay in the filing of a complaint against him."[30] Cohen emphasizes the length of the delay at issue, highlighting the fact that the proceeding was not brought for more than three years after FINRA had notice of the misconduct and commenced its investigation.[31] But a delay of this length does not necessarily establish prejudice.[32] And Cohen's remaining claims of prejudice rest on generalized and vague assertions, not specific facts. He makes no substantial showing, for instance, that evidence was diminished or his defense was materially hampered by any delay.[33]

And Enforcement maintains that there was no prejudice, noting that it sent Rule 8210 requests to obtain relevant documents and secure the testimony of all pertinent witnesses.[34] Because Cohen fails to adequately demonstrate otherwise, he fails to meet his burden.

III. Conclusion

For the foregoing reasons, Cohen's motion for partial summary disposition is DENIED.

SO ORDERED.

David Williams
Hearing Officer

Dated: April 11, 2018

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[29] Cohen asserted as his first affirmative defense the equitable doctrine of laches. "A successful laches defense requires the applicant to show both a lack of diligence by the party against whom the defense is asserted and prejudice to the applicant." *Klein*, 52 S.E.C. at 1038.

[30] *Love*, 2004 SEC LEXIS 318, at *16.

[31] Respondent's Motion for Partial Summary Disposition, at 9.

[32] *Dep't of Enforcement v. Rooney*, No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *90-96 (NAC July 23, 2015) (more than five-year lag between notice of misconduct and filing of Complaint not dispositive of prejudice).

[33] *See* Respondent's Motion for Partial Summary Disposition, at 9-10, n.4. Cohen's only suggestion of specific witnesses or evidence that may have been lost because of delay was at oral argument, where he made a number of assertions about unavailable evidence. But Enforcement disputed that any evidence has been lost, and ultimately oral argument is not the time to establish undisputed facts on the point. FINRA Rule 9264(e).

[34] Enforcement's Opposition to Motion for Partial Summary Disposition, at 5.