

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ADAM J. MAKKAI
(CRD No. 425159),

Respondent.

Disciplinary Proceeding
No. 2018058924502

Hearing Officer–DDM

ORDER DENYING MOTION FOR SUMMARY DISPOSITION

I. Introduction

The Department of Enforcement filed a one-cause Complaint alleging that Respondent Adam J. Makkai improperly shared commissions with an unregistered person in violation of FINRA Rules 2040 and 2010.

Along with an Answer, Makkai filed a motion for summary disposition and for sanctions, fees, and costs.¹ He argues that FINRA lacks jurisdiction over this matter because the Complaint was untimely under Article V, Section 4(a)(i) of FINRA's By-Laws. He also claims that Enforcement engaged in contemptuous conduct by filing a "perjurious Certificate of Service." Makkai seeks an Order dismissing the case against him, sanctioning Enforcement under FINRA Rule 9280, and awarding him fees and costs.

Enforcement opposed Makkai's motion for summary disposition and sanctions.² Enforcement also moved to strike the affirmative defenses in Makkai's Answer, along with his "prayer for relief," which largely stems from Makkai's argument that Enforcement engaged in contemptuous conduct. Because Enforcement's motion to strike is not yet fully briefed, this Order applies only to Makkai's motion for summary disposition and for sanctions.

Makkai's motion is denied in its entirety. He failed to establish that the Complaint was untimely. In fact, Enforcement filed the Complaint within two years of the effective date of the

¹ Makkai's motion is cited in this Order as "Makkai Mot." Exhibits to his motion are cited as "RX-".

² Enforcement's opposition brief is cited in the Order as "Enf. Opp." Along with its brief, Enforcement filed a sworn declaration from its counsel of record ("Enf. Decl.") and accompanying exhibits ("CX-").

termination of Makkai's registration with his prior firm. In addition, Makkai failed to show that Enforcement engaged in contemptuous conduct.

II. Makkai's Motion for Summary Disposition is Denied

A. Summary Disposition Standard

FINRA Rule 9264(e) allows Hearing Officers to grant summary disposition with respect to jurisdictional issues.³ The rule establishes a two-prong test for considerations of motions for summary disposition. Summary disposition may be granted only if both prongs are satisfied.

First, there must be no genuine issue of any material fact. To decide a summary disposition motion filed pursuant to FINRA Rule 9264(e), the facts alleged in the Complaint are taken as true, and all inferences from the facts are drawn in favor of the non-moving party.⁴ Second, the moving party must be entitled to summary disposition as a matter of law.⁵

B. FINRA Has Jurisdiction Over Makkai

There do not appear to be any genuine issues of material fact about whether FINRA can properly exercise jurisdiction over Makkai in this proceeding. Makkai has therefore fulfilled the first prong of the summary-disposition test. But Makkai's motion fails under the second prong. He has no right to summary disposition as a matter of law.

Makkai argues that FINRA lacks jurisdiction over him for this proceeding because the Complaint was untimely. The crucial date for Makkai's argument is June 4, 2018, when LPL Financial, LLC ("LPL") terminated his association with the Firm.⁶ Makkai did not re-associate with another FINRA member firm after he left LPL.⁷ Because Enforcement did not file the Complaint until after June 4, 2020, Makkai argues, the Complaint is untimely under Article V, Section 4(a)(i) of FINRA's By-Laws. That provision of the By-Laws allows FINRA to file a complaint against a formerly associated person within "two years after the effective date of termination of registration"

³ See also *Dep't of Enforcement v. Perles*, No. CAF980005, 2000 NASD Discip. LEXIS 9, at *19 (NAC Aug. 16, 2000), *aff'd*, Exchange Act Release No. 45691, 2002 SEC LEXIS 3395 (Apr. 4, 2002) (concluding that it is appropriate to treat a motion to dismiss as allowable under summary disposition rule).

⁴ *Dep't of Enforcement v. Walblay*, No. 2011025643201, 2014 FINRA Discip. LEXIS 3, at *2 (NAC Feb. 25, 2014).

⁵ See OHO Order 17-02 (2014042291901) (Feb. 7, 2017), http://www.finra.org/sites/default/files/OHO_Order_17-02_2014042291901.pdf (denying summary disposition in part because material facts were in dispute); OHO Order 15-07 (2013036217601) (Apr. 2, 2015), <http://www.finra.org/sites/default/files/OHO-Order-15-07-ProceedingNo.2013036217601.pdf> (granting in part and denying in part summary disposition based on the standards established in FINRA Rule 9264).

⁶ Makkai Mot. 2.

⁷ CX-F; RX-3.

Enforcement submitted the Notice of Complaint and Complaint to the Office of Hearing Officers (“OHO”) by email on June 12, 2020, copying Makkai’s attorney on the email.⁸ Enforcement also provided a copy of the Notice of Complaint and Complaint to Makkai’s attorney by first-class certified mail.⁹ According to tracking information from the United States Postal Service (“USPS”),¹⁰ the Complaint was not “picked up” and “processed” by the USPS until June 13, 2020.¹¹ Makkai argues, based on New York law, that the “filing date of the Complaint” is therefore June 13, 2020.¹² Enforcement takes a different view, and asserts that the filing date is June 12, 2020, when it placed the Notice of Complaint and Complaint in the mail.¹³

Whether the filing date is June 12, 2020 or June 13, 2020 is irrelevant to deciding Makkai’s motion. Both dates are before June 20, 2020, which is two years from the date that LPL terminated Makkai’s registration by filing a Uniform Termination Notice for Securities Industry Registration (“Form U5”).¹⁴ FINRA’s jurisdiction over Makkai is based not upon when he ended his association with LPL, as Makkai argues, but when his registration was terminated.¹⁵ As the SEC has stated, “[a] person who becomes registered remains registered until FINRA (not the registered person) ends the registration based, among other things, on the Forms U5 it receives.”¹⁶ LPL filed a Form U5 for Makkai on June 20, 2018.¹⁷ Because Makkai’s FINRA registration was not terminated until June 20, 2018, and the Complaint was filed within two years of that date, FINRA has jurisdiction over this proceeding.

III. Makkai’s Motion for Sanctions is Denied

Makkai requests that I sanction Enforcement pursuant to FINRA Rule 9280. That Rule authorizes a Hearing Officer to sanction a party or a person representing a party (such as an attorney) for a “violation of an order of a Hearing Officer . . . or other contemptuous conduct during a proceeding.” A Hearing Officer may, under FINRA Rule 9280, exclude an attorney for

⁸ As addressed below, Makkai seems to assert that his attorney did not receive that email.

⁹ CX-A; Enf. Decl. ¶ 3; RX-1.

¹⁰ CX-A; RX-1.

¹¹ Makkai Mot. 3; RX-1.

¹² Makkai Mot. 9-10.

¹³ Enf. Opp. 3.

¹⁴ CX-B.

¹⁵ Article V, Section 4(a)(i) of FINRA’s By-Laws allows FINRA to file a complaint against a formerly associated person within “two years after the effective date of termination of registration”; *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *21 (July 27, 2015).

¹⁶ *Evansen*, 2015 SEC LEXIS 3080, at *22.

¹⁷ CX-B.

engaging in contemptuous conduct.¹⁸ Other sanctions under the Rule “may include” striking pleadings and precluding claims and evidence.¹⁹

In his motion, Makkai asks that sanctions include an award of “reasonable fees and costs,” together with “such further and other relief, as deemed just and proper.”²⁰ FINRA Rule 9280 does not list monetary sanctions, such as an award of attorneys’ fees and costs, as something that a Hearing Officer may impose for contemptuous conduct. And it is unclear whether a Hearing Officer has the authority under FINRA Rule 9280 to order a sanction other than those listed in Rule 9280(a) or (b).²¹ In any event, it is unnecessary to decide that issue here, because Makkai has not proven that Enforcement engaged in anything even remotely resembling contemptuous conduct.

Makkai asserts that Enforcement staff committed perjury in filing a false Certificate of Service for the Notice of Complaint and Complaint. Makkai does not identify with specificity what was false about the Certificate of Service. He appears to assert that the Certificate of Service was fraudulent because it states that Enforcement sent the Notice of Complaint and Complaint to Makkai’s attorney on June 12, 2020. In fact, Makkai claims, the USPS did not “pick up” the pleadings until June 13, 2020.

But Makkai’s claim that Enforcement committed perjury is unfounded. Enforcement “caused” a copy of the Notice of Complaint and Complaint to be sent by first-class certified mail on June 12, 2020, as the Certificate of Service states.²² Indeed, the tracking information from USPS confirms that Enforcement mailed the pleadings on June 12, 2020.²³ USPS did not process the package until the next day,²⁴ but that does not make the Certificate of Service fraudulent.

It also appears that Enforcement emailed a courtesy copy of the Notice of Complaint and Complaint to Makkai’s attorney on June 12, 2020. On that day, Enforcement filed the Complaint, Notice of Complaint, and Certificate of Service with OHO by sending an email with attachments

¹⁸ FINRA Rule 9280(a)(2).

¹⁹ FINRA Rule 9280 (b)(1).

²⁰ Makkai Mot. 13.

²¹ In the filing to the SEC seeking approval of FINRA Rule 9280, FINRA (then NASD) stated that the Rule was “in part, modeled on SEC Rules of Practice 180.” SEC Release No. 34-38545, 1997 SEC LEXIS 959 (Apr. 24, 1997). As FINRA noted in its Rule filing, SEC Rule 180 authorizes SEC administrative judges to exclude persons from a proceeding for contemptuous conduct and, for uncured deficient filings, to decide issues against an offending party or preclude evidence. Like FINRA Rule 9280, SEC Rule 180 does not list monetary awards, such as attorneys’ fees and costs, among the sanctions available to administrative judges for contemptuous conduct.

²² Enf. Decl. ¶ 3; CX-A.

²³ CX-A; RX-1.

²⁴ CX-A; RX-1.

to the “OHOCASEFILINGS” address.²⁵ Enforcement copied Makkai’s attorney on that filing, using the same email address that Makkai’s attorney used to confirm that he would accept service of the Complaint.²⁶


Makkai seems to claim that his attorney did not receive the email.²⁷ Makkai submitted a screenshot with his motion that suggests that his attorney could not find the June 12, 2020 email in a search of his inbox.²⁸ But Makkai does not explain, in his motion or a declaration, what exactly the screenshot shows. And Makkai concedes he received a copy of the Notice of Complaint and Complaint in the mail on June 16, 2020.²⁹ So he cannot claim any prejudice, even if he did not receive a courtesy copy of the Notice of Complaint and Complaint by email when it was filed.

In short, Makkai has not shown that Enforcement engaged in contemptuous conduct. His request for sanctions is denied.

D. Order

Because Enforcement filed the Complaint within two years of the termination of Makkai’s registration with FINRA, Makkai’s motion for summary disposition for lack of jurisdiction is DENIED. Because Makkai failed to show that Enforcement engaged in contemptuous conduct, his motion for sanctions is DENIED.

SO ORDERED.



Daniel D. McClain
Hearing Officer

Dated: July 31, 2020

²⁵ See CX-A.

²⁶ CX-E. Indeed, Makkai’s attorney has used that same email address throughout this litigation, and it appears above his signature on the Answer and motion for summary disposition.

²⁷ “The four-page Complaint was first received by [Makkai’s attorney] in a six by nine-inch [sic] envelope.” Makkai Mot. 1. “Respondent’s representative first received a copy of the Complaint via USPS on June 16, 2020, at or after 12:09 p.m. (MDT).” Makkai Mot. 4.

²⁸ RX-2.

²⁹ Makkai Mot. 4.

Copies to:

Dochtor D. Kennedy, Esq. (via email)

Joseph E. Strauss, Esq. (via email)

Robert Kennedy, Esq. (via email)

Tiffany A. Buxton, Esq. (via email)

Richard Chin, Esq. (via email)

Jennifer L. Crawford, Esq. (via email)