

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

STOCKKINGS CAPITAL LLC
(CRD No. 164445),

and

GREGORY ANTONIUS LEWIS
(CRD No. 2793976),

Respondents.

Disciplinary Proceeding
No. 2019060648701

Hearing Officer—MJD

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

I. Background

The hearing of this matter is scheduled to begin March 7, 2022. Enforcement filed the Complaint in this disciplinary proceeding on June 28, 2021. On February 11, 2022, more than seven months after the filing of the Complaint and a week after the parties filed their pre-hearing submissions, Respondents StockKings Capital LLC and Gregory Antonius Lewis filed a Motion to Dismiss Complaint for Selective and Vindictive Prosecution ("Motion"). Enforcement filed an Opposition to the Motion ("Opposition") supported by declarations from two FINRA investigators. For the reasons set forth below, I **DENY** the Motion.

The Complaint alleges three causes of action. The first one alleges that StockKings and Lewis violated FINRA Rules 2210(d)(1) and 2010 by disseminating communications that contained false, exaggerated, misleading, or unwarranted statements or claims while soliciting investments in four private placements. Cause two charges StockKings with violating FINRA Rules 5122 and 2010 by failing to make required disclosures to FINRA about the intended use of proceeds, offering expenses, and selling compensation in offering documents for the private placements. Cause three charges both Respondents with books and records violations stemming from Lewis's alleged misclassification of more than \$40,000 in personal expenses as Firm expenses, in violation of FINRA Rules 4511 and 2010. It also charges StockKings with willful violations of Section 17(a) of the Securities Exchange Act of 1934 and Rules 17a-3 and 17-5 thereunder.

In their Answer, Respondents generally deny that their conduct violated FINRA rules and the federal securities laws. Respondents also provide a “preliminary response” in which they suggest that they were excessively scrutinized by FINRA staff because Lewis is African American. Respondents did not assert as an affirmative defense that they were targeted for selective or vindictive prosecution.

II. Respondents' Motion

Respondents claim that the investigation and the initiation of this disciplinary proceeding violated their constitutionally protected rights. Citing what they describe as “overwhelming evidence,”¹ Respondents allege that they were unlawfully discriminated against because Lewis is African American and StockKings has been minority-owned since 2013, when Lewis acquired the firm.² Respondents argue that, notwithstanding Lewis's self-described “stellar compliance record” and his cooperation with FINRA's investigation, Enforcement has made “numerous unfounded vicious character attacks” against Lewis and “engaged in outrageous discriminatory conduct,” even as Respondents were cooperating with the investigation.³ Respondents also claim that Enforcement seeks “draconian penalties” in this case while others similarly situated were given lesser sanctions.⁴ By engaging in a vindictive prosecution, Respondents contend, Enforcement also violated Lewis's Fifth Amendment right against self-incrimination.⁵

Respondents also assume that staff's questions had no legitimate regulatory purpose. They cite as evidence of allegedly improper racial motivation certain questions FINRA staff posed to StockKings's Chief Compliance Officer (“CCO”) and Financial and Operations Principal (“FINOP”) Rafael Arias during an on-the-record interview (“OTR”). They claim that the staff “retaliated” against Lewis by requiring Arias to attend the OTR, after Lewis had exercised his First Amendment right to complain to a local politician about FINRA's “discriminatory tactics.”⁶ The questions Respondents cite as inappropriate relate to Lewis's organizational skills, his outreach to the staff of the U.S. Congress, and reasons why a high net-worth person like Lewis would shop at a 7-Eleven convenience store.⁷ Respondents also refer to three customer complaint letters purportedly addressed to FINRA. They rely on one investor in particular who, according to Respondents, wrote that the staff asked him during a telephone interview if he knew that StockKings was applying for minority brokerage status. Respondents

¹ Respondents' Motion to Dismiss Complaint for Selective and Vindictive Prosecution (“Mot.”) 6.

² Mot. 1-2.

³ Mot. 2-3.

⁴ Mot. 5. To illustrate Enforcement's unduly harsh sanctions against them, Respondents rely on two cases—a settled case involving allegations of violations of FINRA Rule 5122 and an opinion of the National Adjudicatory Council in a litigated proceeding that found an individual respondent had committed similar books and records violations as Lewis is alleged to have committed by misclassifying personal expenses as expenses of the broker-dealer. Mot. 5-6.

⁵ Mot. 7-8.

⁶ Mot. 4.

⁷ Mot. 3.

contend that the question offended the customer because he believed the staff was pointing out that Lewis was African American so that he would draw some negative inference about Lewis.⁸

III. Enforcement's Opposition to the Motion

Enforcement filed an Opposition to the Motion, together with sworn Declarations from Robert Sica ("Sica Decl."), a Principal Investigator with Enforcement, and Scott Karas ("Karas Decl."), a Principal Examiner with FINRA's Department of Market Regulation.

Aside from arguing that the Motion is untimely and procedurally deficient because it does not comply with FINRA Rule 9264(d),⁹ Enforcement further argues that Respondents have made no showing that the underlying investigation and disciplinary action was in fact motivated by a discriminatory purpose. Enforcement says it had good reason to investigate the firm and Lewis. Citing statements by Respondents in their Answer and in their pre-hearing brief, Enforcement argues that Respondents admit some of the allegations in the Complaint, thereby acknowledging that its investigation was warranted. Enforcement notes, for example, that Respondents admit with regard to cause one alleging violations of FINRA's advertising rule, that they misstated to investors that StockKings owned a patent when in fact the patent application was pending.¹⁰ Enforcement also notes that Respondents conceded in their pre-hearing brief that the private placement offering documents did not contain all the information required by FINRA Rule 5122.¹¹ Finally, Enforcement states that in Respondents' Answer, addressing the allegations in cause three, Respondents stated that Lewis "by his own admission . . . stated it is likely that over the years, he might have mistakenly, on occasions, inadvertently used the wrong debit card for some purchases."¹²

Enforcement also disputes Respondents' characterization of staff's conduct during the investigation. It says it properly investigated an allegation from an investor that Lewis had forged a signature. When that investor later provided contradictory evidence, Enforcement ended the inquiry.¹³ Enforcement explains that it interviewed Arias not for the improper purpose of impinging on Lewis's constitutionally-protected First Amendment right to complain to his local politicians, but because, as StockKings's CCO and FINOP, Arias had relevant information about the private placements, the Rule 5122 offerings, and Lewis's classification of his expenses.¹⁴ During Arias's OTR, which lasted five hours, according to Enforcement, the staff "covered a variety of topics," including Arias's "repeated" resignations from StockKings and Respondents'

⁸ Mot. 3-4.

⁹ Enforcement's Opposition to Respondents' Motion to Dismiss the Complaint ("Opp.") 1.

¹⁰ Opp. 2-3 (citing Respondents' Pre-Hearing Brief 13).

¹¹ Respondents' Pre-Hearing Brief 8.

¹² Answer and Affirmative Defenses of Respondents StockKings Capital LLC and Gregory Antonius Lewis 3 ("Preliminary Response").

¹³ Opp. 5; Karas Decl. ¶ 7.

¹⁴ Karas Decl. ¶ 3.

banking practices.¹⁵ It also asked Arias seven “general questions” about whether he believed there was a basis for Lewis’s claim of harassment.¹⁶ Enforcement claims it also asked one question about Lewis’s organizational skills. According to Enforcement, this occurred “only after Arias testified, unprompted, that he believed Lewis was ‘very disorganized, inattentive.’”¹⁷ As for Lewis’s shopping at 7-Eleven, these questions were not improper, according to Enforcement, because the staff had spotted purchases at the store that Lewis had treated as business expenses.¹⁸

Enforcement says it interviewed certain investors and persons whom Lewis had solicited about StockKings’s “certified minority broker-dealer” status after seeing that Lewis referred to it in emails with a customer. According to Enforcement, a change in StockKings’s status “reflected a shift in Lewis’s business plan for StockKings,” which caused the staff to ask investors if they knew about it.¹⁹

IV. Discussion

FINRA’s Code of Procedure does not provide for a “motion to dismiss.” I therefore will treat the Motion as a motion for summary disposition under Rule 9264.²⁰ Rule 9264(d) requires that a motion for summary disposition be supported by a statement of undisputed facts. Under Rule 9264(e), a Hearing Officer may deny a motion for summary disposition if there are genuine issues as to material facts. A Hearing Panel may grant such a motion only if there are no genuine issues with regard to any material fact and the moving party is entitled to summary disposition as a matter of law.

In their Motion, Respondents rely on factual allegations that are not alleged in the Complaint. To support a summary disposition motion, these factual allegations should have been supported by admissible evidence but they were not. Respondents’ failure to support their factual assertions with admissible evidence requires that the Motion be denied. Respondents make a variety of allegations about Enforcement staff’s motivations without supporting the allegations with admissible evidence. For example, they cite as evidence of discriminatory intent certain “unfounded statements and questions” by Enforcement staff that Lewis had impersonated an engineer in a call with investors. They also claim that the staff accused Lewis of forging an

¹⁵ Opp. 4-5; Karas Decl. ¶ 4.

¹⁶ Opp. 4 n.15; Karas Decl. ¶ 5.

¹⁷ Opp. 4-5; Karas Decl. ¶ 5 (emphasis in original).

¹⁸ Opp. 5; Karas Decl. ¶ 6.

¹⁹ Opp. 3 n.9; Sica Decl. ¶ 4. Sica denies that interviews with customers included any racially motivated or discriminatory questions. *Id.*

²⁰ See *Dep’t of Enforcement v. Perles*, No. CAF980005, 2000 NASD Discip. LEXIS 9, at *19 (NAC Aug. 16, 2000) (finding it appropriate to treat a motion to dismiss as a motion for summary disposition), *aff’d*, Exchange Act Release No. 45691, 2002 SEC LEXIS 3395 (Apr. 4, 2002).

investor's signature, but later withdrew that charge, presumably for lack of evidence.²¹ But it is not clear how these claims, even if accepted as true, evidence racial animus on the part of FINRA staff. Nonetheless, Respondents claim without support that "[c]learly this type of investigative conduct would never have occurred if Mr. Lewis was Caucasian."²² Indeed, the only admissible evidence related to selective prosecution has been offered by Enforcement. And that evidence supports a finding that there was no selective prosecution.

Respondents also claim that, by inquiring into Lewis's harassment claims during the Arias OTR and allegedly seeking disproportionate sanctions, Enforcement violated Lewis's constitutional rights contained in the First and Fifth Amendments. However, only a government actor can be held to violate a person's constitutional rights. FINRA and the Securities and Exchange Commission have repeatedly held that FINRA is not a government actor.²³ Accordingly, there is no basis to find that FINRA infringed on Respondents' constitutional rights.

Furthermore, Respondents' Motion is untimely. Respondents claim that they were singled out for investigation and prosecution by Enforcement on the basis of the staff's improper racial motives. The claim implies that they are asserting the affirmative defense of selective prosecution. According to FINRA Rules, Respondents were required to set forth any affirmative defenses in their Answer.²⁴ To prevail on a defense of selective prosecution, Respondents must prove that they were "singled out for enforcement action, while others similarly situated were not and that [their] selection as a target for enforcement was based on an unjustifiable consideration such as [Lewis's] race, religion, national origin, or the exercise of constitutionally protected rights."²⁵ Respondents did not assert such an affirmative defense in their Answer, nor have they produced admissible evidence in support of summary disposition—just the unsworn statements and allegations in their Motion.

The Motion is untimely for another reason. By agreement of the parties, the pre-hearing schedule in this proceeding does not provide for a motion for summary disposition. On August 10, 2021, I held the initial pre-hearing conference in this matter. During the conference, counsel

²¹ Mot. 2-3.

²² Mot. 3.

²³ See *Dep't of Enforcement v. White*, No. 2015045254501, 2019 FINRA Discip. LEXIS 30, at *48 (NAC July 26, 2019) ("FINRA is not a state actor subject to Constitutional restrictions."); *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1026, at *37 n.52 (Mar. 15, 2016) (holding that FINRA is not a state actor and thus could not violate the applicant's due process rights), *aff'd*, 672 F. App'x 865 (10th Cir. 2016).

²⁴ See FINRA Rule 9215(b) ("Any affirmative defense shall be asserted in the answer.")

²⁵ *Dep't of Enforcement v. Ricupero*, No. 20060049953-01, 2009 FINRA Discip. LEXIS 36, at *25 n.15 (NAC Oct. 1, 2009), *aff'd*, 2010 SEC LEXIS 2988 (Sept. 10, 2010), *petition for review denied*, 436 F. App'x 31 (2d Cir. 2011). See also *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 SEC LEXIS 1699, at *37 (June 14, 2013) (to show selective prosecution a respondent must demonstrate that "he was unfairly singled out and that his prosecution was motivated by improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right").

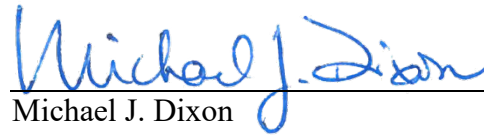
for both parties agreed that the parties would not seek summary disposition.²⁶ On August 13, the parties filed their joint proposed pre-hearing schedule, which did not include a deadline for filing motions for summary disposition, reflecting their agreement on the issue. On August 16, I issued a Case Management and Scheduling Order ("CMSO") in this proceeding based on the pre-hearing schedule the parties had proposed. The CMSO did not provide for the filing of motions for summary disposition.

In addition to finding that Respondents' Motion is procedurally deficient and untimely, I also find that Enforcement properly relied on sworn statements in its Opposition and certain admissions by Respondents. Based on the admissible evidence that Enforcement has presented, I find that Respondents have failed to prove there are no genuine issues as to material facts related to selective prosecution.

V. Conclusion

Respondents have not properly demonstrated that they are entitled to summary disposition on the basis of racially motivated selective prosecution. For the reasons explained above, Respondents' Motion is **DENIED**.

SO ORDERED.


Michael J. Dixon
Hearing Officer

Dated: March 2, 2022

Copies to:

Robert G. Heim, Esq. (via email)
Michael P. Morrissey, Esq. (via email)
Jessica Brach, Esq. (via email)
Kay Lackey, Esq. (via email)
David Monachino, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

²⁶ Transcript of Aug. 10, 2021 Initial Pre-Hearing Conference 33.