

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT,

Respondent.

Disciplinary Proceeding
No. 2011030781201

Hearing Officer—MAD

ORDER (1) DENYING RESPONDENT'S MOTION TO DISMISS, (2) GRANTING IN PART ENFORCEMENT'S MOTION TO STRIKE, AND (3) DIRECTING RESPONDENT TO FILE AN AMENDED ANSWER

I. Background

On September 3, 2014, FINRA's Department of Enforcement filed the Complaint in this disciplinary proceeding. It alleges that Respondent (i) converted over \$18,000 from a customer, (ii) commingled the customer's funds, and (iii) failed to amend her Uniform Application for Securities Industry Registration or Transfer (Form U4) to disclose an unsatisfied judgment. On October 22, 2014, Respondent filed an Answer, affirmative defenses, and a motion to dismiss. On November 5, 2014, Enforcement filed (i) an opposition to Respondent's motion to dismiss and (ii) a motion to strike. Respondent filed her opposition to Enforcement's motion to strike on November 26.

For the reasons discussed below, the Hearing Officer denies Respondent's motion to dismiss and grants, in part, Enforcement's motion to strike. The Hearing Officer also orders Respondent to file an amended answer.

II. Respondent's Motion to Dismiss

In Respondent's motion to dismiss, she argues that the Complaint must be dismissed because FINRA agreed to settle this matter and then breached that agreement in bad faith. Respondent asserts that "the case had settled and that [s]he was examining a proposed modification and not a counter-offer regarding language in [the settlement]." ¹ Conversely, Enforcement argues that no settlement occurred. ²

As Enforcement points out, the FINRA Code of Procedure does not expressly permit a "motion to dismiss." Nonetheless, the Hearing Officer considered the parties' arguments. Putting aside the parties' disagreement about whether there was an agreed upon settlement, in this instance, a finalized settlement was not issued pursuant to FINRA's review and approval process for settlements. In Regulatory Notice 09-17, FINRA informed its membership about the review process for proposed settlements. ³ The Notice described FINRA's Office of Disciplinary Affairs (ODA) and its important role in the settlement process. ⁴ As the Notice explained, ODA is independent of Enforcement and not involved in the investigation or litigation of cases. ODA is charged with reviewing and, if appropriate, approving each proposed settlement before it can be issued. ⁵ Here, during the November 27, 2014 initial pre-hearing conference, Respondent, through counsel, admitted that she did not have a finalized settlement, approved by ODA.

In light of the foregoing, Respondent's motion to dismiss is denied.

III. Enforcement's Motion to Strike

In Respondent's Answer, she pleads four affirmative defenses, all of which depend on the purported settlement between Enforcement and Respondent. The four affirmative defenses are:

¹ Respondent's Answer, at 16.

² Enforcement's Oppos. at 4.

³ Regulatory Notice 09-17, at 4.

⁴ *Id.*

⁵ *Id.*

This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 14-07 (2011030781201).

1. Claimant should be estopped from bringing this action based on the parties previously agreeing to settle this matter.
2. The Complaint should be dismissed because the Office of Hearing Officers does not have jurisdiction based on FINRA's agent's agreement to settle this matter.
3. FINRA's agent had the actual authority and/or the apparent authority to settle this matter. That being the case and with Respondent having detrimentally relied on the same, FINRA waived its opportunity to bring a disciplinary action.⁶
4. FINRA has agreed to orally release Respondent. So therefore, this matter should be dismissed.

Enforcement argues that the affirmative defenses should be stricken from Respondent's Answer because the settlement never occurred and references to the purported settlement are prejudicial to Enforcement. Enforcement also emphasizes that litigating whether the settlement actually occurred would be a waste of the Hearing Panel's time.⁷

"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."⁸ Here, all of Respondent's affirmative defenses hinge on the purported settlement between the parties that was never approved by ODA or issued. Accordingly, the Hearing Officer strikes Respondent's four affirmative defenses.

Enforcement's motion to strike also requests that the Hearing Officer strike Respondent's motion to dismiss and the attached exhibits. The Hearing Officer denies this request.

⁶ Although Respondent argues that FINRA's agent, an Enforcement attorney, settled this case under his actual or apparent authority, she is wrong. The authority to approve settlements rests with FINRA's independent ODA. See Regulatory Notice 09-17.

⁷ Enforcement's Oppos. at 4.

⁸ *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *88 (NAC Dec 20, 2007).

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IV. Amended Answer

Enforcement seeks an order directing Respondent to file a rule-compliant amended answer. Respondent's Answer included the four affirmative defenses and a motion to dismiss.⁹ In light of the Hearing Officer's rulings above, Respondent is ordered to file an amended answer that excludes the four affirmative defenses and any reference to a purported settlement or settlement negotiations.

V. Conclusion

For the reasons stated herein, Respondent's motion to dismiss is DENIED and Enforcement's motion to strike is GRANTED, in part. The Hearing Officer ORDERS Respondent to file an amended answer on or before December 22, 2014.

SO ORDERED.

Maureen A. Delaney
Hearing Officer

Dated: December 8, 2014

⁹ Respondent's Oppos. at 5 (explaining that Respondent's pleading contained three parts: (i) the answer, (ii) the affirmative defenses, and (iii) the motion to dismiss with exhibits).