

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

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

NOBLE FINANCIAL CAPITAL MAKRETS
(CRD No. 15768)

and

NICOLAAS PETRUS PRONK
(CRD No. 1726101),

Respondents.

Disciplinary Proceeding
No. 2013035740901

Hearing Officer—CC

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

I. Background

On November 23, 2016, FINRA's Department of Enforcement filed the Complaint, alleging that Respondents Noble Financial Capital Markets and Nicolaas Petrus Pronk engaged in misconduct in 2011. The Complaint alleges that Respondents (1) intentionally engaged in a scheme to defraud; (2) willfully and aggressively promoted and recommended AdCare Health systems common stock ("ADK") to seven customers without disclosing multiple, material conflicts of interest; (3) executed 53 violative short sales; and (4) issued research reports that failed to disclose material conflicts of interest, in violation of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 203(b)(1) of Regulation SHO under the Exchange Act, Exchange Act Rules 10b-5(a), (b), and (c), and FINRA Rules 2711(h)(2)(A)(ii)c and (iii)b, 2020, and 2010.

On August 21, 2017, Respondents filed a motion for summary disposition arguing that Enforcement's claims are time-barred by federal statutes of limitations, the requirement that FINRA provide Respondents with a fair process, and laches.

II. Facts

Pursuant to FINRA Rule 9264(c), I find that the following facts are without substantial controversy.

Enforcement filed the Complaint initiating this disciplinary action on November 23, 2016.¹ The Complaint alleges that Respondents Noble Financial and Pronk engaged in conduct that violated FINRA Rules and the federal securities laws during the period of April 2011 through September 2011.² Enforcement seeks findings of fact and conclusions of law that Respondents engaged in the misconduct alleged and asks the Hearing Panel to order disgorgement and restitution and assess costs.³ If Enforcement prevails, Respondents may be statutorily disqualified from the securities industry.⁴

III. Discussion

A. Legal Standard for Summary Disposition

FINRA Rule 9264(a) permits any party to a FINRA disciplinary proceeding to file a motion for summary disposition prior to the hearing on the merits. Rule 9264(e) permits summary disposition where there is no genuine issue with regard to any material fact and the party that files the motion is entitled to summary disposition as a matter of law.⁵ Rule 9264(e) further states that the facts alleged in the pleadings of the party against whom the motion is made, in this case Enforcement, shall be taken as true, except as modified by stipulations or admissions made by the non-moving Party, by uncontested affidavits or declarations, or by facts officially noticed pursuant to Rule 9145.

When considering a motion for summary disposition, a Hearing Panel or Hearing Officer may find guidance in Rule 56 of the Federal Rules of Civil Procedure and related case law.⁶ Following this guidance, inferences drawn from the underlying facts must be viewed in the light

¹ Notice of Complaint dated November 23, 2016; Statement of Undisputed Facts ¶¶ 1, 4.

² Statement of Undisputed Facts ¶¶ 2, 5-8. Enforcement noted in its opposition that cause three of the Complaint alleges misconduct through December 2011. The Complaint identifies the "Relevant Period" as April through September 2011. Complaint ("Compl.") ¶ 1; *see also* ¶ 45. It also alleges in cause three and other paragraphs that Respondents omitted information from research reports they published through December 5, 2011. Compl. ¶¶ 40-42, 101-102. For purposes of this order only, the Relevant Period is April through September 2011, as defined in paragraph one of the Complaint. The parties are free to present additional argument on this point in their pre-hearing briefs if they so choose.

³ Statement of Undisputed Facts ¶¶ 10, 11.

⁴ Statement of Undisputed Facts ¶ 12.

⁵ *See* OHO Order 16-29 (2014039839101) (Nov. 4, 2016), http://www.finra.org/sites/default/files/OHO_Order-16-29_2014039839101.pdf (granting partial summary disposition based on the standards established in FINRA Rule 9264); OHO Order 07-37 (2005001919501) (Oct. 16, 2007), http://www.finra.org/sites/default/files/OHODecision/p037809_0_0.pdf (same).

⁶ *Dep't of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at *12 n. 9 (NAC Feb. 12, 2007) (citing *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n. 3 (NAC Sept. 9, 2003)); OHO Order 16-29 (2014039839101), at 4. FINRA's disciplinary proceedings are governed by its own procedures and rules, as promulgated in the FINRA Rule 9000 Series. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence apply in FINRA's disciplinary proceedings, but FINRA's adjudicators may consult them and related case law for guidance. OHO Order 16-27 (201303641201) (Oct. 14, 2016), at 7 n. 33, http://www.finra.org/sites/default/files/OHO_Order-16-27_201303641201.pdf.

most favorable to the party opposing summary disposition.⁷ “[I]f there is a disagreement over what inferences can be reasonably drawn from the facts even if the facts are undisputed,” summary disposition must be denied.⁸

Respondents, as the movants, bear the burden of establishing the absence of a genuine issue of material fact.⁹ Accordingly, it is their responsibility to indicate the basis for their motion.¹⁰ It is Enforcement’s responsibility, as the nonmoving party, to “come forward with ‘specific facts showing that there exists a *genuine issue*’ for hearing.”¹¹

Here, the parties agree as to the material facts relevant to Respondents’ summary disposition motion. That is, there is no genuine dispute that Enforcement filed the Complaint on November 23, 2016, and the Complaint alleges that Respondents engaged in conduct that violated FINRA Rules and the federal securities laws during the period of April 2011 through September 2011. Thus, the remaining question is whether Respondents are entitled to summary disposition as a matter of law.

B. The Parties’ Legal Arguments

Respondents argue that the Complaint should be dismissed for three reasons. First, Respondents contend that Enforcement’s claims are blocked by the five-year statute of limitations set forth in 28 U.S.C. § 2462 or the four-year limitation period set forth in 28 U.S.C. § 1658.¹² Second, Respondents claim fundamental fairness necessitates dismissal of the

⁷ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); OHO Order 07-37 (2005001919501), at 10 (citing *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703, at *18 n. 24 (Mar. 24, 2006)).

⁸ *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996).

⁹ *Dep’t of Enforcement v. Respondent*, 2007 NASD Discip. LEXIS 13, at *12.

¹⁰ *Id.*

¹¹ *Id.* (citing *Matsushita Elec. Indus.*, 475 U.S. at 587).

¹² 28 U.S.C. § 2462 states, in pertinent part:

Except as otherwise provided by Act of Congress, 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

28 U.S.C. § 1658 states, in pertinent part:

Time limitations on the commencement of civil actions arising under Act of Congress

- (a) Except as otherwise provided by law, a civil action arising under an Act of Congress ... may not be commenced later than four years after the cause of action accrues.
- (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of regulatory requirement concerning the securities laws ... may be brought not later than the earlier of –
 - (1) Two years after the discovery of the facts constituting the violation; or
 - (2) Five years after such violation.

Complaint because of Enforcement's considerable delay in filing the Complaint. Third, Respondents invoke the doctrine of laches as a basis for summary disposition.

In support of Respondents' statute of limitations argument, they cite to the recent Supreme Court decision in *Kokesh v. SEC*,¹³ and the 2013 Supreme Court decision in *Gabelli v. SEC*.¹⁴ Respondents also cite to *SEC v. Graham*.¹⁵ In *Gabelli*, the Supreme Court held that the five-year statute of limitations set forth in 28 U.S.C. § 2462 applies when the Securities and Exchange Commission ("SEC") seeks monetary penalties which, the Court held, go beyond compensation and are intended to punish and label defendants as wrongdoers.¹⁶ In *Kokesh*, the Supreme Court determined that the same statute of limitations also applies when the SEC seeks disgorgement because it found disgorgement is also a penalty.¹⁷ In *Graham*, the United States Court of Appeals for the 11th Circuit held that the time limitations contained in 28 U.S.C. § 2462 do not apply to SEC actions for injunctive relief because injunctions are equitable, forward-looking remedies and not penalties.¹⁸

Respondents argue that the Supreme Court's reasoning in applying 28 U.S.C. § 2462 to SEC actions for monetary penalties and disgorgement is in part based on the conclusion that regulated entities are entitled to a fixed date for when potential exposure to punitive government action ends. They argue that in this action, Enforcement seeks to impose monetary sanctions, label Respondents as "wrongdoers," and secure findings against Respondents that may result in their being statutorily disqualified from the industry. Such outcomes, Respondents argue, are punitive. They contend that, like the SEC's administrative actions, FINRA's discipline should be blocked after five years because it too seeks to impose punitive sanctions.

In support of Respondents' fairness argument, they contend that FINRA's disciplinary authority is derived from the SEC and therefore should not exceed the SEC's. They argue that FINRA should not be allowed to bring a disciplinary action outside the time limitations statutorily imposed on SEC administrative actions. Respondents argue that Enforcement's delay in filing the Complaint denied Respondents procedural fairness because key witnesses previously employed by Noble Financial may have left the firm's employ or may no longer remember pertinent facts. In support of this argument, Respondents cite to *Jeffrey Ainley Hayden*, a case in which the SEC found that the New York Stock Exchange's delay in pursuing disciplinary action was inherently unfair,¹⁹ and *Dep't of Enforcement v. Morgan Stanley DW, Inc.*, a case in which FINRA's National Adjudicatory Council ("NAC") affirmed a Hearing Panel's dismissal of an

¹³ *Kokesh v. SEC*, 137 S. Ct. 1635, 2017 U.S. LEXIS 3557 (2017).

¹⁴ *Gabelli v. SEC*, 568 U.S. 442, 133 S. Ct. 1216 (2013).

¹⁵ *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

¹⁶ *Gabelli*, 568 U.S. 442, 452.

¹⁷ *Kokesh*, 137 S. Ct. 1635, 1642.

¹⁸ *Graham*, 823 F.3d 1357, 1362.

¹⁹ *Jeffrey Ainley Hayden*, Exchange Act Release No. 42772, 2000 SEC LEXIS 946, at *4 (May 11, 2000).

Enforcement action because "Enforcement's delay in filing the complaint exceeded the bounds of fairness that the Exchange Act requires."²⁰

Respondents further argue that laches precludes Enforcement's prosecution of this case. They argue that fundamental fairness necessitates dismissal where there is considerable delay. They note that Enforcement has offered no explanation for its delay in filing the Complaint.

Enforcement opposes Respondents' motion. Enforcement argues that the cases Respondents cite in favor of finality are superseded by SEC and FINRA decisions directly and consistently finding that statutes of limitations do not apply in FINRA disciplinary actions.

With respect to Respondents' reliance on *Hayden*, Enforcement notes that the SEC considered in *Hayden* four different time periods: (1) the time between the first alleged incident of misconduct and the filing of the complaint; (2) the time between the last alleged incident of misconduct and the filing of the complaint; (3) the time between the self-regulatory organization's first notice of the alleged misconduct and the filing of the complaint; and (4) the time between the beginning of the investigation and the filing of the complaint.²¹ Enforcement argues that SEC decisions following *Hayden* focus on the third time period as among the most important. Enforcement notes that, as suggested by the identification number assigned to this case, Enforcement commenced its investigation in 2013, only three years before it filed the Complaint. Additionally, Enforcement notes that, to date, only two such timeliness challenges have been successful, and both have involved time periods of greater than five years between a self-regulatory organization's notice of alleged misconduct and the filing of a complaint.²²

Moreover, Enforcement argues that Respondents' motion must fail because they have not demonstrated that they suffered any actual harm or prejudice from delay in bringing this case. Enforcement cites to several post-*Hayden* SEC decisions indicating that respondents who raise unreasonable delay as a defense must demonstrate that the delay caused prejudice. Finally, in response to Respondents' argument that FINRA should be subject to the same limitations as the SEC because FINRA's power is derivative of the SEC's, Enforcement argues that this view has been repeatedly rejected.

²⁰ *Dep't of Enforcement v. Morgan Stanley DW, Inc.*, Complaint No. CAF000045, 2002 NASD Discip. LEXIS 11, at *20 (July 29, 2002).

²¹ In *Hayden*, the SEC found "inherently unfair" a delay of 14 years between the filing of the complaint and the first act of alleged misconduct, more than six years between the last act of alleged misconduct and the filing of the complaint, five years between discovery of the alleged misconduct and the filing of the complaint, and three years and six months between the filing of the complaint and the commencement of the investigation. *Hayden*, 2000 SEC LEXIS 946, at *5-6.

²² See *Hayden*, 2000 SEC LEXIS 946, at *5-6; *Morgan Stanley*, 2002 NASD Discip. LEXIS 11, at *15-21 (holding that Enforcement's delay in filing the complaint "exceeded the bounds of fairness" where eight years passed between the first act of alleged misconduct and seven years between the last act of alleged misconduct and the filing of the complaint, almost six years passed between discovery of the alleged misconduct and the filing of the complaint, and almost four years passed between the beginning of the investigation and the filing of the complaint).

C. Ruling

For the reasons discussed below, I deny Respondents' motion for summary disposition.

1. Statute of Limitations

Respondents argue that I should grant summary disposition because Enforcement filed the Complaint outside the time imposed in federal statutes of limitation. They argue that, because FINRA is subject to SEC oversight, statutory limitations that apply to the SEC should apply equally to FINRA.

Several NAC and SEC cases have considered the effect that FINRA's delay in filing a complaint may have on the overall fairness of a disciplinary proceeding. "These decisions have established 'the consistently-held principle that no statute of limitations applies to disciplinary actions of [self-regulatory organizations such as FINRA].'"²³ On this point, there is no question. FINRA is not an arm of the SEC or its surrogate.²⁴ Its disciplinary authority is not subject to any statute of limitations, including the limitations that apply to the SEC's administrative actions.²⁵ Indeed, the SEC has rejected litigants' efforts to convince the SEC to create a limitation period for FINRA action.²⁶ Nothing that the Supreme Court states in *Gabelli* and *Kokesh* appears to

²³ *Dep't of Enforcement v. Rooney*, Complaint No. 2009019042402, 2015 FINRA Discip. LEXIS 19, at *88 (July 23, 2015) (citing *Mark H. Love*, Exchange Act Release No. 49248, 2004 SEC LEXIS 318, at *14-16 (Feb. 13, 2004)). See also *Stephen J. Gluckman*, Exchange Act Release No. 41628, 1999 SEC LEXIS 1395, at *23 (July 20, 1999) ("The Commission has repeatedly stated ... that the disciplinary authority of private self-regulatory organizations ... such as [FINRA] is not subject to any statute of limitation."); *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *92 (July 2, 2013) (holding that federal statute of limitations does not apply to FINRA because FINRA is not a government entity), *aff'd*, 751 F.3d 472 (7th Cir. 2014); *Henry James Faragalli*, Exchange Act Release No. 37991, 1996 SEC LEXIS 3263, at *35-36 (Nov. 26, 1996) ("[I]t is well established that no statute of limitations applies to the disciplinary actions of ... self-regulatory organizations."); OHO Order 16-11 (2012031496501 (Mar. 10, 2016), http://www.finra.org/sites/default/files/OHO_Order16-11_2012031496501_0_0_0.pdf (denying summary disposition and rejecting reliance on 28 U.S.C § 1658, "which sets time limitations for private litigants – not self-regulatory organizations – to bring actions in cases involving violations of Section 10(b) of the Exchange Act").

²⁴ See *Behnam Halali*, Exchange Act Release No. 79722, 2017 SEC LEXIS 31, at *11-12 (Jan. 3, 2017) ("[I]t has been found, repeatedly, that [FINRA] itself is not a government functionary.") (citing *D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002)); *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 4625, at *24 (Apr. 17, 2014) (rejecting argument that FINRA is a state actor because it exercises power granted derivatively by Congress through the SEC to enforce federal securities laws); *Martin Lee Eng*, Exchange Act Release No. 44224, 2001 SEC LEXIS 807, at *5-6 (Apr. 26, 2001) (rejecting application to FINRA of restrictions imposed by the First Amendment because FINRA is not a government entity); *Dep't of Enforcement v. Guang Lu*, No. C9A020052, 2004 NASD Discip. LEXIS 8, at *38 (May 13, 2004) ("[FINRA] is not a state actor, but a private corporation."), *aff'd in part*, Exchange Act Release No. 51047, 2005 SEC LEXIS 117 (Jan. 14, 2005).

²⁵ See *Murphy*, 2013 SEC LEXIS 1933, at *92-93 (rejecting application of 28 U.S.C § 2462 to FINRA disciplinary proceedings and holding that FINRA is "not subject to any statute of limitation"); *Larry Ira Klein*, Exchange Act Release No. 37835, 1996 SEC LEXIS 2922, at *21-22 (Oct. 17, 1996) (rejecting argument that 28 U.S.C. § 2462 applies to FINRA disciplinary proceedings); *Steven B. Theys*, Exchange Act Release No. 32358, 1993 SEC LEXIS 1348, at * 16 (May 24, 1993) (rejecting argument that statute of limitations applicable to private rights of action under Section 10(b) of the Exchange Act should apply to FINRA's disciplinary actions).

²⁶ See *Gluckman*, 1999 SEC LEXIS 1395, at *187-88 (declining "Gluckman's invitation to create a limitations period for [FINRA] disciplinary proceedings" and holding that doing so would impair FINRA's statutory

alter this reading of SEC case law. I decline to apply a statute of limitations to this disciplinary action and deny Respondents' motion in so far as it relies on this argument.

2. Fairness of Proceeding

Citing to the *Hayden* and *Morgan Stanley* decisions, Respondents argue that fairness dictates I grant summary disposition because the period of alleged misconduct occurred five years and several months before Enforcement filed the Complaint. "There are no 'bright line rules about the impact of the length of a delay in filing a complaint on the fairness of the disciplinary proceedings.'"²⁷ In assessing fairness, the NAC and the SEC have considered the entirety of the record and, following *Hayden*, have reviewed a variety of factors including time lags.²⁸ Furthermore, both the SEC and the NAC held that, to demonstrate unfairness, a respondent must show that his ability to mount a defense was harmed by delay in the filing of the complaint.²⁹

obligations and duty to protect the investing public); *Frederick C. Heller*, Exchange Act Release No. 31696, 1993 SEC LEXIS 14, at *12 (Jan. 7, 1993) (declining to create a statute of limitations applicable in FINRA disciplinary proceedings because to do so would impair FINRA's "duty to protect the public and discipline its members").

²⁷ *Rooney*, 2015 FINRA Discip. LEXIS 19, at *88.

²⁸ *See Love*, 2004 SEC LEXIS 318, at *14-16 (rejecting fairness argument where Enforcement filed a complaint almost seven years after the first act of alleged misconduct, more than six years after the last act of alleged misconduct, nearly four years after discovery of the alleged misconduct, and three years and six months after Enforcement commenced its investigation); *William D. Hirsh*, Exchange Act Release No. 43691, 2000 SEC LEXIS 2703, at *17-19 (Dec. 8, 2000) (rejecting argument that delay was unfair where the time between the first act of alleged misconduct and the filing of the complaint was nearly nine years, the time between the last act of alleged misconduct and the filing of the complaint was eight years, the time between discovery of the alleged misconduct and the filing of the complaint was 20 months, and the time between the commencement of the investigation and the filing of the complaint was one year); *Dep't of Enforcement v. Kaweske*, No. C07040042, 2007 NASD Discip. LEXIS 5, at *40-42 (Feb. 12, 2007) (rejecting argument that proceeding was fundamentally unfair where the period of time from the first act of alleged misconduct to the filing of the complaint was six years and two months, from the last act of alleged misconduct to the filing of the complaint was five years and ten months, and from Enforcement's discovery of the alleged misconduct and the start of its investigation to the filing of the complaint was four years and one month).

²⁹ *See Love*, 2004 SEC LEXIS 318, at *13-16 (rejecting argument that delay caused proceeding to be unfair where Love failed to prove that he suffered prejudice); *Edward John McCarthy*, Exchange Act Release No. 48554, 2003 SEC LEXIS 3165, at *35 (Sept. 26, 2003) (rejecting argument that NYSE unfairly and unreasonably delayed disciplinary action where respondent failed to demonstrate negative affect of delay on his defense); *Rooney*, 2015 FINRA Discip. LEXIS 19, at *88 (holding that a respondent must demonstrate that his ability to mount a defense has been harmed in order to prove unfairness based on a delay in filing the complaint); *Dep't of Enforcement v. The Dratel Group, Inc.*, No. 2008012925001, 2014 FINRA Discip. LEXIS 6, at *102 (May 2, 2014) ("The proponent of the [fairness] defense must demonstrate that the alleged undue delay caused prejudice."), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016); *James Gerard O'Callaghan*, Exchange Act Release No. 57840, 2008 SEC LEXIS 1154, at *31-32 (May 20, 2008) (finding "no unreasonable delay" where respondent had not made "the required showing of prejudice resulting from a delay"); *Kaweske*, 2007 NASD Discip. LEXIS 5, at *39 ("While earlier SEC cases such as *Hayden* and [*Hirsh*] focused on several different time periods to assess the impact of a delay on the fairness of a proceeding, '[i]n subsequent cases the SEC has emphasized that the proponent of a *Hayden/Hirsh* defense must demonstrate that he or she was prejudiced by the allegedly undue delay.") (citing *Dep't of Enforcement v. Apgar*, No. C9B020046, 2004 NASD Discip. LEXIS 9, at *25 (May 18, 2004)); *Apgar*, 2004 NASD Discip. LEXIS 9, at *26-27 (finding no unfair delay where NASD did not cause delay, the most significant *Hirsh* time period, the time between the discovery of the alleged misconduct and the filing of the complaint, was one year and four months, and respondent failed to demonstrate that he was prejudiced by the delay).

Here, Respondents argue that witnesses' memories may have faded and some may be unavailable to testify. These conjectures, even if true, are not sufficient to prove a denial of fair process. Furthermore, the time lags here are less than those that the NAC and the SEC have found fair. I deny Respondents' motion for summary disposition based on lack of fair process.

3. Laches

Respondents also seek to obtain summary disposition by invoking laches. "A successful laches defense requires a lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense."³⁰ The undisputed facts do not demonstrate lack of diligence on the part of Enforcement or prejudice to Respondents. Respondents therefore cannot rely on laches as a basis for summary disposition.

IV. Conclusion

For the reasons stated in this Order, I deny the motion for summary disposition filed by Respondents Noble Financial Capital Markets and Nicolaas Petrus Pronk.

SO ORDERED.



Carla Carloni
Hearing Officer

Dated: September 8, 2017

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³⁰ *Gluckman*, 1999 SEC LEXIS 1395, at *29. See also *Robert Tretiak*, Exchange Act Release No. 47534, 2003 SEC LEXIS 653, at * 34 (Mar 19, 2003) (holding that to succeed with a laches defense, respondent must demonstrate "a lack of diligence by [FINRA] and that he has been prejudiced"); *Klein*, 1996 SEC LEXIS 2922, at * 20 (same).