FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RICKY ALAN MANTEI (CRD No. 1098981), Respondent.	Disciplinary Proceeding No. 2015045257501 Hearing Officer–DW

ORDER ON MOTION FOR SUMMARY DISPOSITION OF AFFIRMATIVE DEFENSES

I. Introduction

The Department of Enforcement filed a Complaint alleging that Respondent Ricky Alan Mantei acted unethically by circumventing his employer's supervisory systems over a five-month period. According to the Complaint, Mantei worked as a registered representative for FINRA member firm J.P. Turner & Co. ("J.P. Turner"), between March 2010 and May 2015. During this time, J.P. Turner had certain procedures and requirements for cross trades between customers. Mantei allegedly sought to avoid those requirements in three transactions by arranging for an external party to interpose itself in trades between customers.[1] Two of the trade transactions involved structured certificates of deposit ("SCDs") while a third transaction involved a municipal bond.[2]

For the two trades involving SCDs, the first cause of the Complaint charges Mantei with engaging in conduct inconsistent with high standards of commercial honor and just and equitable principles of trade, in violation of FINRA Rule 2010.[3] As to the third trade involving a municipal bond, Enforcement alleges in the second cause that Mantei willfully violated MSRB Rule G-17.[4]

Mantei filed an Answer denying Enforcement's allegations and asserting several affirmative defenses. This Hearing Panel will convene a hearing on the allegations at a future

[1] Complaint ("Compl.") ¶ 1.

[2] Compl. ¶ 18.

[3] Compl. ¶¶ 45–48.

[4] Compl. ¶¶ 49–52

date. In advance of the hearing, Enforcement moves for summary disposition as to each of Mantei's affirmative defenses. Enforcement asserts that the defenses lack substantial basis and should be disposed of before the hearing.[5] Mantei opposes the motion.

For the reasons set forth below, Enforcement's motion is granted in part and denied in part.

II. Legal Standard

Rule 9264(e) governs summary disposition in a FINRA disciplinary proceeding. This rule permits summary disposition as to one or more claims or defenses where there is no genuine issue of material fact and the moving party is entitled to summary disposition as a matter of law.[6] For purposes of deciding a summary disposition motion, the facts alleged by the non-moving party are taken as true, and all inferences from the underlying facts are drawn in favor of Mantei, the party opposing the motion.[7]

III. Discussion

A. Mantei's "Failure to State a Claim" Affirmative Defense

Enforcement challenges Mantei's first affirmative defense that the Complaint fails to state a claim upon which relief can be granted. Enforcement maintains that the facts alleged in support of each of the Complaint's two causes, if proven, establish the claimed violations. Indeed, Enforcement notes that Mantei's challenge to the sufficiency of the first cause has already been rejected. The November 22, 2019 Order Denying Motion for Partial Summary Disposition ("November Order") found that the first cause of action stated a valid claim. Enforcement maintains that its second cause is equally viable, so Mantei's asserted defense should fail as a matter of law.

A "failure to state a claim" defense challenges the legal sufficiency of Enforcement's Complaint. At the pleading stage, such a challenge promotes efficiency by permitting the resolution of a legally defective claim early in the litigation without the need for extended exposition of the factual record in the case. But at the hearing, the central determination is whether the facts established by the evidentiary record satisfy the elements of the charged

[5] Enforcement's Motion for Summary Disposition of Respondent's Affirmative Defenses ("Enforcement's Motion").

[6] *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).

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

violations. In that context, considerations of whether the Complaint's allegations are sufficient and whether those allegations are proven tend to merge.

Given the overlap between a "failure to state a claim" defense and a failure-to-prove-your-case defense at this stage,[8] we decline to grant summary disposition as to the defense. Hearing Officers have recognized that "the complainant suffers no harm when the failure-to-state-a-claim defense is used in defensive pleadings."[9] "Failure to state a claim as an affirmative defense is a 'routine practice which is rarely, if ever, stricken by the court as legally insufficient.'"[10]

Although courts have at times gone the other way, there is substantial authority for the proposition that a "failure-to[-]state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer."[11] Indeed, courts have declined to dispose of this affirmative defense even *after* denying a motion to dismiss for failure to state a claim.[12] Given that at this stage the defense is essentially a general denial of Enforcement's claims, there is no reason to dispose of the defense before the hearing. Accordingly, Enforcement's motion as to this defense is denied.

B. Mantei's "Waiver, Estoppel and Laches" Affirmative Defense

Mantei's second affirmative defense is that the Complaint is "barred, in whole or in part, by the doctrines of waiver, estoppel and laches." Enforcement moves for summary disposition as to each of these defenses. Enforcement maintains that the first two affirmative defenses, waiver and estoppel, fail as a matter of law.[13] We agree. The law is clear that the estoppel defense cannot stand, as "FINRA is not estopped from taking action later just because it did not do so immediately after an investigation, and a previous failure to sanction misconduct does not excuse

---

[8] OHO Order 98-29 (CAF980022), at 7 (Oct. 2, 1998), http://www.finra.org/sites/default/files/OHODecision/p007762_0.pdf (Noting that a failure to state a claim affirmative defense "is the equivalent of a general denial and does not demand immediate resolution.").

[9] *Id*.

[10] OHO Order 07-21 (E102003025201), at 7 (June 11, 2007), https://www.finra.org/sites/default/files/OHODecision/p037016_0_0_0.pdf, quoting *New York v. Almy Brothers, Inc.*, 971 F.Supp. 69, 72 (N.D.N.Y. 1997).

[11] *SEC v. Toomey*, 866 F. Supp. 719, 723 (S.D.N.Y. 1992); *County Vanlines Inc. v. Experian Information Solutions, Inc*., 205 F.R.D. 148, 153 (S.D.N.Y. 2002) ("[I]t is well settled that the failure-to-state-a-claim defense is a perfectly appropriate affirmative defense to include in the answer . . . . Although the defense is arguably redundant in that it is essentially a general denial, there is no prejudicial harm to plaintiff and the defense need not be stricken.") (quotation omitted); *Dynasty Apparel Industries Inc. v. Rentz*, 206 F.R.D. 603, 607 (S.D. Ohio 2002) (denying summary judgment as to failure to state claim as an affirmative defense).

[12] *Ventures Edge Legal PLLC v. GoDaddy.com LLC*, 2017 U.S. Dist. LEXIS 41399, at *6 (D. Ariz. Mar. 22, 2017) ("[A]lthough the Court denied the Motion to Dismiss in its entirely, it is appropriate to allow this defense to be pleaded in the Answer.").

[13] Enforcement's Memorandum in Support of It's Motion for Summary Disposition of Respondent's Affirmative Defenses ("Mem."), at 5.

a respondent's failure to comply with the requirements of applicable rules."[14] The waiver defense fares no better. Waiver is the "'intentional or voluntary relinquishment of a known right' and 'result[s] as [a] legal consequence from some act or conduct of [the] party against whom it operates.'"[15] In his opposition to Enforcement's Motion, Mantei does not explain how waiver or estoppel defenses might relate to the facts of this case, much less operate as affirmative defenses.[16] Accordingly, we conclude that these defenses are insufficient as a matter of law.

Mantei also asserts the laches affirmative defense. The doctrine of laches "bars, in equity, claims that are not timely pursued."[17] A successful laches defense requires proof of a lack of diligence by the party against whom the defense is asserted, and prejudice to the party asserting the defense.[18] Enforcement maintains that the defense fails as a matter of law, while Mantei responds that there are questions of fact precluding summary disposition.

There are no material factual disputes as to the sequence of events. Enforcement was on notice of the misconduct at issue because of an April 17, 2015 self-report disclosure by Mantei's former employer, J. P. Turner.[19] Enforcement's investigation began shortly thereafter, in April 2015.[20] Enforcement obtained documents from J. P. Turner and others between April 2015 and October 2016.[21] Enforcement took on-the-record testimony from five individuals between May and September 2016.[22]

Although Enforcement appears to have completed gathering evidence by October 2016, it did not file its Complaint until August 2019.[23] Enforcement points out that during this post-investigative period, it undertook additional case-related activity including discussions with

---

[14] *Dep't of Enforcement v. CSSC Brokerage Services, Inc.*, No. 2015043646501, 2019 FINRA Discip. LEXIS 4, at *43 (OHO Jan. 2, 2019), *appeal docketed sub nom. Eric Smith* (NAC Jan. 29, 2019) (citing *Dep't of Enforcement v. The Dratel Group, Inc.*, No. 2009016317701, 2015 FINRA Discip. LEXIS 10, at *43 (NAC May 6, 2015), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016), citing W. N. Whelen & Co., 50 S.E.C. 282, 284 (1990)).

[15] *Howard Alweil*, 51 S.E.C. 14, 16, n.5 (1992) (quoting Black's Law Dictionary, 494, 1417 (5th ed. 1979)).

[16] Respondent's Memorandum of Law in Opposition to Enforcement's Motion Summary Disposition of Respondent's Affirmative Defenses ("Opp."), at 5–9.

[17] *Talon Real Estate Holding Corp.*, Exchange Act Release No. 87614, 2019 SEC LEXIS 4796, at *22 (Nov. 25, 2019).

[18] *Dep't of Enforcement v. Tretiak*, No. C02990042, 2001 NASD Discip. LEXIS 1, at *50 (NAC Jan. 23, 2001).

[19] Enforcement's Statement of Facts Not Subject to Genuine Dispute ("SOF") No. 1.

[20] SOF No. 1.

[21] SOF Nos. 2, 3, 5.

[22] SOF No. 4.

[23] SOF No. 10.

Mantei's counsel and consideration of Mantei's Wells Submission.[24] Still, Enforcement did not file its Complaint until nearly three years after its investigation was complete.

Enforcement maintains that a delay of this length is insufficient as a matter of law. But the authorities it relies upon are distinguishable. Enforcement points to decisions like *Department of Enforcement v. Newport Coast Securities, Inc.*[25] and *Department of Enforcement v. The Dratel Group, Inc.*,[26] for the proposition that delays of more than four years do not require dismissal of the proceedings.[27] Consequently, it argues, the nearly three-year delay in this case is also insufficient. But the question in those cases was whether dismissal was required on fairness grounds because of the age of the case in light of the Exchange Act requirement that FINRA "provide a fair procedure for the disciplining of . . . persons associated with members."[28]

Mantei does not assert a fundamental fairness defense in his Answer. His laches defense calls for a somewhat different analysis—"There is no fixed period of time that must elapse for a suit to be barred by the doctrine of laches."[29] The question is whether a period of inexcusable delay has prejudiced a party's ability to defend their rights. "[L]aches is much more than time. It is time plus prejudicial harm, and the harm is not merely that one loses what he otherwise would have kept, but that delay has subjected him to a disadvantage in asserting and establishing his claimed right or defense."[30] Given the close relationship between claimed periods of unreasonable delay and resultant prejudice, the length of the delay alone is generally not dispositive of laches.[31] "Courts have found . . . prejudice and, thus, made a laches determination, even where a party's delay in asserting its rights was less than one year."[32]

Here, it is undisputed that nearly three years transpired between the time Enforcement gathered its evidence and the time it filed its Complaint. In its motion, Enforcement does not identify a compelling justification for a delay of this length. And in opposing the motion, Mantei puts forward evidence that he has suffered prejudice resulting from the delay. He asserts that he has been unable to locate witnesses and obtain documents from his former employer, J.P. Turner,

---

[24] SOF Nos. 6, 7, 8, 9.

[25] No. 20120030564701, 2018 FINRA Discip. LEXIS 14 (NAC May 23, 2018), *appeal docketed*, SEC Admin. Proc. No. 3-18555 (June 22, 2018).

[26] No. 2008012925001, 2014 FINRA Discip. LEXIS 6 (NAC May 2, 2014), *aff'd*, Exchange Act Release No. 77396, 2016 SEC LEXIS 1035 (Mar. 17, 2016).

[27] Mem. at 9–10.

[28] *Newport*, 2018 FINRA Discip. LEXIS 14, at *172; *Dratel*, 2014 FINRA Discip. LEXIS 6, at 101–02.

[29] *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, 896 F.3d 174, 194 (2d Cir. 2018).

[30] *Id.* at 195.

[31] *N. Pac. R.R. Co. v. Boyd*, 228 U.S. 482, 508 (1913) ("the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another.")

[32] *Kamat v. Kurtha*, 2008 U.S. Dist. LEXIS 107102, at *15 (S.D.N.Y. April 14, 2008).

because the firm went out of business during the period of delay.[33] Other witnesses who are still available no longer recollect the events in question.[34]

Courts have found prejudice sustaining a laches defense where a plaintiff's delay has led to "lost, stale, or degraded evidence, or witnesses whose memories have faded, or who have died."[35] On Mantei's showing, we cannot say that the period of delay or his claimed prejudice is insufficient as a matter of law. "[T]he correct disposition of the equitable defense of laches can only be made by a close scrutiny of the particular facts and a balancing of the respective interests and equities of the parties, as well as of the general public [and, thus,] usually requires the kind of record only created by full trial on the merits."[36] Accordingly, we will grant summary disposition as to Mantei's claims of waiver and estoppel, but deny summary disposition as to his laches defense.

C. Mantei's Statute of Limitations Affirmative Defense

Mantei's third affirmative defense is that the Complaint is "barred, in whole or in part, by the applicable statutes of limitation." Enforcement moves for summary disposition as to the defense on the ground that there is no statute of limitations in this forum.

Enforcement is correct. The National Adjudicatory Council has repeatedly held "that no statute of limitations applies to disciplinary actions of [self-regulatory organizations] like FINRA."[37] The SEC has made equally clear that "the disciplinary authority of private self-regulatory organizations ('SROs') such as FINRA is not subject to any statute of limitations."[38] Notwithstanding Mantei's contrary contentions, this affirmative defense is without merit as a matter of law. Accordingly, we will grant summary disposition as to the defense.

D. Mantei's "Statute of Frauds" Affirmative Defense

Mantei's fifth affirmative defense is that the Complaint is "barred, in whole or in part, by the statute of frauds and/or the parole evidence rule." Enforcement moves for summary disposition as to the defense on the ground that the legal principles Mantei asserts have no relationship to this matter and are insufficient as a matter of law. Mantei responds that the policies and procedures that he is alleged to have violated are clear on their face, and

---

[33] Declaration of Anthony Paduano in Opposition to Enforcement's Motion for Summary Disposition, at ¶ 13.

[34] *Id*.

[35] *Eat Right Foods, Ltd. V. Whole Foods Mkt., Inc*., 880 F.3d 1109, 1120 (9th Cir. 2018) (quotation omitted), *aff'd*, 779 F. App'x 471 (9th Cir. 2019).

[36] *Country Floors, Inc. v. Gepner*, 930 F.2d 1056, 1066 (3d Cir. 1991) (quotation omitted).

[37] *Department of Enforcement v. Tweed*, No. 2015046631101, 2019 FINRA Discip. LEXIS 53, at *21 (NAC Dec. 11, 2019) (quotation omitted), *appeal docketed*, SEC Admin. Proc. No. 3-19652 (Jan. 10, 2020).

[38] *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *93 (July 2, 2013), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472 (7th Cir. 2014) (quotation omitted).

Enforcement "may not attempt to introduce intrinsic evidence in an attempt to fit [the alleged misconduct] into the four corners of the policy or to 'explain' the reach of that policy."[39]

Based upon this explanation, we understand Mantei to assert that the parol evidence rule should proscribe our consideration of the relevant J.P. Turner policies at issue to the text and language of those policies themselves. As a general matter, "[t]he parol evidence rule bars extrinsic evidence of a prior or contemporaneous oral agreement when offered to contradict, vary, add to, or subtract from the clear and unambiguous terms of a valid, integrated written instrument."[40] Enforcement does not assert in its motion that the rule has no application in this forum.

The gravamen Mantei's alleged misconduct is that he circumvented his employer's procedures. Given the charges, the language of those procedures is obviously highly relevant. That said, we do not believe as a general matter that we are required to limit our consideration of the application of the firm's procedures to the four corners of a written procedures documents themselves.[41] After all, this is not a breach of contract case and the parol evidence rule generally applies only to the parties to a contract.[42] So the non-party Complainant would appear to be beyond the scope of the rule. But the rule is (at least in part) a limitation on evidence to be presented at the hearing. Depending on how the evidence proceeds at the hearing, Mantei may have an argument that representatives of his former Firm should be precluded from contradicting the Firm's unequivocal written policies and procedures. Because we do not know with precision what hearing evidence may bear on the rule, we cannot determine at this stage whether it might have some application. Accordingly, we will deny summary disposition as to this defense.

E. Mantei's "Redundant" Affirmative Defenses

Enforcement also challenges a number of Mantei's remaining asserted affirmative defenses as redundant of his general denials. According to Enforcement, Mantei's fourth, sixth, seventh and eighth defenses are not true affirmative defenses. "An affirmative defense is a respondent's assertion raising new facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true."[43] Mantei asserts that (1) Enforcement's claims are defeated at least in part by "documentary evidence," including J.P. Turner's internal written policies (fourth affirmative defense); (2) the allegations of the

---

[39] Opp. at 15.

[40] *Congress Fin. Corp. v. John Morrell & Co.*, 790 F. Supp. 459, 468 (S.D.N.Y. 1992).

[41] Such a limitation would also presumably preclude Mantei from presenting evidence of his employer's awareness or tacit approval of his conduct.

[42] *U.S. v. Martel*, 792 F.2d 630, 635 (7th Cir. 1986) (in criminal proceedings where the government was not a party to the contract parol evidence rule has no application); *Mesch v. U.S.*, 407 F.2d 1286, 1288 (10th Cir. 1969) (same); *Gibson v. U.S.*, 268 F.2d 586, 589 (D.C. Cir 1959) (same).

[43] *Dep't of Enforcement v. Epstein*, No. C9B040098, 2007 FINRA Discip. LEXIS 18, at *87 (NAC Dec. 20, 2007) (quotation omitted), *aff'd*, Exchange Act Release No. 59238, 2009 WL 223611 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010).

Complaint are precluded because the provisions of FINRA Rule 2010 or MSRB Rule G-17 do not apply to his conduct (sixth affirmative defense); (3) J.P. Turner's policies were not applicable to the transactions at issue (seventh affirmative defense); and (4) the transactions at issue were not cross trades (eighth affirmative defense).

These defenses do not presume the truth of the Complaint's allegations. They instead restate Mantei's general denials of the Complaint's allegations. Mantei argues, in essence, that the facts underlying each of these affirmative defenses will negate aspects of Enforcement's *prima facie* case. Enforcement moves for summary disposition, maintaining that because the each of the defenses are nothing more than "redundant denials of the Complaint's allegation[s]," they must therefore fail as a matter of law.[44]

It is true that a "negative" defense of this sort, where a respondent undertakes no burden of proof and seeks to "demonstrate[] that plaintiff has not met its burden of proof as to an element plaintiff is required to prove," is not an affirmative defense at all.[45] But Enforcement never explains why these denials cannot nevertheless be maintained. A respondent is permitted to deny Enforcement's allegations, and miscasting those denials as affirmative defenses does no apparent harm.[46] We "fail[] to see how identifying a defense as 'affirmative,' when in actuality it is not, makes that defense legally insufficient."[47]

Because these "negative defenses" are merely rebuttals of the evidence and claims presented by Enforcement, Mantei does not bear the burden of proof on them.[48] Accordingly, although he may "have provided little or no evidence in support of these arguments, they are matters on which [the Complainant] bear[s] the burden of proof at trial, and [the Complainant] cannot show that there is no material dispute with respect to these issues, which largely go to the merits of [its] claims."[49] Accordingly, summary judgment will be denied as to these defenses.

F. Mantei's Subject Matter Jurisdiction Affirmative Defense

Enforcement also challenges a Mantei's ninth affirmative defense, that its claims are barred because FINRA lacks subject matter jurisdiction over the transactions at issue. As Enforcement notes, Mantei previously moved for Partial Summary Disposition on the question of whether the alleged misconduct was beyond the scope of FINRA Rule 2010. The November Order denied that motion, finding that the rule reached the alleged misconduct. As the November

---

[44] Mot. at 15–18.

[45] *Zivkovic v. S. Cal. Edison Co*., 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof [as to an element plaintiff is required to prove] is not an affirmative defense.")

[46] *See* OHO Order 18-05 (2014041860801), at 7–8 (Jan. 10, 2018), https://www.finra.org/sites/default/files/OHO_Order_18-05_2014041860801.pdf.

[47] *Kohler v. Islands Rests., LP*, 280 F.R.D. 560, 567 (S.D. Cal. 2012) (Mislabeling negative defenses as affirmative defenses "is not grounds for striking or granting partial summary judgment on [the] defenses").

[48] *Perrin v. Papa Johns, Int'l., Inc.*, 114 F. Supp. 3d 707, 722 (E.D. Mo. 2015).

[49] *Id*. at 723.

Order explained, "FINRA-registered representatives are governed by FINRA rules, even if their business conduct does not directly involve securities, and even if the respondent or his activity might be subject to another regulator's jurisdiction."[50] Mantei, for his part, opposes the present summary disposition motion challenging his subject matter jurisdiction defense with arguments that seek to re-litigate his previous motion.

Although it appears that jurisdiction exists as to both claims,[51] we nevertheless decline to grant summary disposition as to Mantei's affirmative defense. This adjudicatory forum, like all others, is of limited jurisdiction. As adjudicators, we must always be satisfied of our own subject-matter jurisdiction. In federal courts, a subject-matter jurisdiction objection "may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment."[52] For that reason, courts have concluded that is inappropriate to dispose of a subject-matter jurisdiction affirmative defense on summary judgment.[53] For similar reasons, we decline to make a definitive determination as to subject-matter jurisdiction now. Accordingly, summary disposition is denied as to Mantei's ninth affirmative defense.

G. Mantei's Remaining Affirmative Defenses

Finally, Enforcement challenges Mantei's affirmative defenses that assert various factual circumstances in his defense. Mantei asserts that Enforcement's claims are barred or limited because: (1) there was no damage to the market (tenth affirmative defense); (2) Mantei acted in the best interests of his clients and there was no damage to any client (eleventh affirmative defense); and (3) the transactions were reviewed, and approved, by J.P. Turner supervisors and compliance personnel (twelfth affirmative defense). Enforcement challenges these defenses on the ground that even if each assertion is true, it would not defeat its claims in this case, or mitigate sanctions.[54]

Enforcement is correct. The presence or absence of harm to the market is not an element of any claim and thus not a defense. The absence of investor harm also does not bear on Mantei's

---

[50] November Order, at 4–5.

[51] In his papers, Mantei challenges subject-matter jurisdiction only as to the FINRA Rule 2010 claim, on the ground that the rule should not reach his trading in SCDs because they are not securities. Opp. at 22–24. The November Order rejected that argument, concluding that FINRA Rule 2010 reached Mantei's business-related conduct. Mantei makes no jurisdictional argument related to his alleged violation of MSRB Rule G-17, as set forth in cause two of the Complaint. That rule requires representatives to "deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice" in the conduct of municipal securities or municipal advisory activities. Mantei allegedly violated MSRB Rule G-17 by engaging in a municipal bond trade in a manner inconsistent with J.P. Turner's policies.

[52] *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006).

[53] *Perrin*, 114 F. Supp. 3d at 723, n.11; *see Acosta v. Luxury Floors, Inc*., 2018 U.S. Dist. LEXIS 221484, at *23 (D. Minn. Dec. 7, 2018) ("[S]triking this affirmative defense does not preclude Defendants from bringing a good faith motion to dismiss for a lack of subject matter jurisdiction in accordance with the law").

[54] Mem. 18–19.

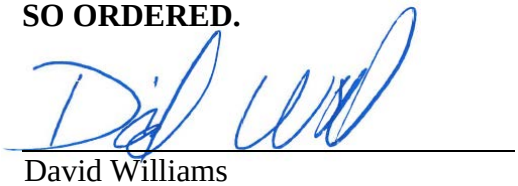
liability here.[55] Nor does the review or approval of the transactions by J.P. Turner supervisors.[56] Accordingly, these "affirmative defenses" are not defenses at all. So we will grant summary disposition as to Mantei's tenth, eleventh and twelfth affirmative defenses.

That said, our determination that these factual assertions are legally insufficient as affirmative defenses is not a determination that the assertions are irrelevant for all purposes. Accordingly, Mantei may still offer proof of these factual assertions to the extent they are relevant to potential sanctions, or any other disputed issue at the hearing.[57]

IV. Order

For the reasons set forth above, Enforcement's Motion for Summary Disposition of Respondent's Affirmative Defenses is **GRANTED IN PART AND DENIED IN PART**. Summary Disposition is **GRANTED** as to Mantei's third, tenth, eleventh and twelfth affirmative defenses, and **GRANTED IN PART** as to Mantei's second affirmative defense as provided above. In all other respects, the motion is **DENIED**.

SO ORDERED.



David Williams
Hearing Officer
For the Extended Hearing Panel

Date: March 26, 2020

Copies to:

Anthony Paduano, Esq. (via email)
Katherine B. Harrison, Esq. (via email)
Lori Vinciguerra, Esq. (via email)
Andrew C. Boldt, Esq. (via email)
Douglas Ramsey, Esq. (via email)
Jennifer L. Crawford, Esq. (via email)

---

[55] *Wheat, First Securities*, 56 S.E.C. 894, 913, n.29 (2003) (neither market nor investor harm is an element of MSRB Rule G-17); *Ahmed Gadelkareem*, Exchange Act Release No. 82879, 2018 SEC LEXIS 729, at *23 (Mar. 14, 2018) (neither market nor investor harm is an element of FINRA Rule 2010).

[56] *Guang Lu*, 58 S.E.C. 43, 56 (2005), *aff'd*, 179 F. App'x 702 (D.C. Cir. 2006) ("a registered representative is responsible for his actions and cannot shift that responsibility to the firm or his supervisor.").

[57] OHO Order 98-29 (CAF980022), at 8 (Oct. 2, 1998), http://www.finra.org/sites/default/files/OHODecision/p007762.pdf ("Facts to be presented solely in mitigation of sanctions do not constitute a defense to the charge; therefore, they are not properly raised in the pleadings as an affirmative defense . . . . However, [Respondent] is not be precluded by this ruling from presenting any relevant and material mitigating facts at the hearing.").