This Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order 14-01 (2011026788801).

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. RESPONDENT Respondent.	Disciplinary Proceeding No. 2011026788801 Hearing Officer - MC

ORDER DENYING SUMMARY DISPOSITION

I. Background

The events described in the Complaint occurred in the summer of 2009, when Respondent as the President and CEO of [G] Securities, Inc., in Oklahoma City, Oklahoma. The factual backdrop to the Complaint is complex but the alleged misconduct essentially concern misrepresentations and omissions of material facts in the purchase and sale of securities involving two clients of [G] Securities, a bank and an individual.

The securities involved are Private Label Collateralized Mortgage Obligations (PL CMOs). Respondent recommended that the bank purchase PL CMOs as part of its investment strategy. Shortly after the purchase, federal and state bank regulators raised numerous serious concerns about PL CMOs as an investment vehicle for banks. The bank informed Respondent in early summer 2009 that it wanted to sell six of its PL CMOs before an upcoming Fourth Quarter FDIC examination.

Respondent formed a company to purchase PL CMOs and pool them with zero coupon

U.S. Treasury securities to enhance their value and create a new security with a "AAA" rating. Respondent planned to sell the pooled mortgage or asset-related securities in a private placement with two classes of notes, the first to be collateralized by pooled PL CMOs, and the second to be collateralized by zero coupon U.S. Treasury securities.

Respondent made the bank an offer to buy the six PL CMOs. The bank accepted the offer in late July 2009, with settlement slated for July 30. Respondent repeatedly delayed settlement. The Complaint alleges that Respondent was unable to find buyers for the notes, without which he was unable to pay the bank for the PL CMOs. In September 2009, Respondent recommended that the bank and the individual customer purchase the notes, hold them for a short time, and then sell them for a profit. The bank sold the PL CMOs to Respondent's company, which then sold the notes to the bank and the individual customer.

The Complaint charges that Respondent made material misrepresentations and omissions about the notes to the bank and the individual customer, and thereby committed fraud in connection with the transactions under Section 10(b), Rule 10b-5 and FINRA Rule 2020. The Complaint charges, in the alternative, that Respondent's misrepresentations and omissions were negligent and violated FINRA Rule 2010.

Respondent has filed a Motion for Summary Disposition, supported by a memorandum and exhibits.

After reciting a number of undisputed facts, Respondent argues that summary disposition must be granted because no material facts are disputed and he is entitled to summary disposition as a matter of law. Respondent also argues that summary disposition should be granted because (i) there is a pending lawsuit arising from the same facts, and he submits that a stay of this FINRA proceeding is appropriate; (ii) Enforcement cannot establish essential elements of the

Complaint because it is unlikely that the individual customer or any representative of the bank will appear to testify in this proceeding; (iii) the private placement memorandum issued in connection with the sale of the notes contained written disclosures disclaiming the alleged material misrepresentations and omissions attributed to Respondent; and (iv) Enforcement's request for disgorgement are misdirected against Respondent because Respondent Securities, not Respondent, received financial benefit from the transactions at issue.

The Department of Enforcement has filed an Opposition to the Motion for Summary Disposition, supported by the Declaration of Gene C. Davis and a Statement of Disputed Facts. Enforcement argues that material facts are disputed, and that Respondent's claimed undisputed facts are immaterial.

Based upon a review of the papers submitted, and applying the legal standard required in reviewing motions for summary disposition, there appear to be material facts in dispute. Therefore, for the reasons stated below, the Motion for Summary Disposition is denied.

II. The Applicable Legal Standard

FINRA Rule 9264 provides that as to "any or all of the causes of action in the complaint," a Hearing Officer may deny a motion for summary disposition. However, only a Hearing Panel may grant summary disposition, and then only "if there is no genuine issue with regard to any material fact and the [p]arty that files the motion is entitled to summary disposition as a matter of law."

Under the applicable federal case law, which provides guidance in resolving summary disposition motions in FINRA disciplinary proceedings, the movant bears the burden of

establishing the absence of a genuine issue of material fact.[1] In assessing the merits of a motion for summary disposition, the issue is "whether the evidence presents a disagreement sufficient to require submission to fact finding."[2] If, after a review of the proffered evidence, there is a question of fact that could affect the outcome of the case, the motion must be denied.[3]

Whether a fact is material is determined by reference to the substantive law of the case, and "only disputes over facts that might affect the outcome of the [proceeding]" preclude the entry of summary disposition.[4] If the party opposing summary disposition is unable to demonstrate that there is a genuine issue requiring a hearing to resolve it, summary disposition is appropriate.[5]

When a party files a summary disposition motion, Rule 9264 (e) directs that "the facts alleged in the pleadings of the [p]arty against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by the non-moving [p]arty, by uncontested affidavits or declarations, or by facts officially noticed." Thus, in this case, the facts alleged in the Complaint, and inferences drawn from those facts, must be viewed in the light most favorable to Enforcement, the party opposing summary disposition.[6]

III. Discussion

[1] *Dep't of Enforcement v. Respondent*, No. C02050006, 2007 NASD Discip. LEXIS 13, at *12 & n.9 (N.A.C. Feb. 12, 2007); *Dep't of Enforcement v. U.S. Rica Fin., Inc.*, No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 (N.A.C. Sept. 9, 2003) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)).

[2] *Respondent*, 2007 NASD Discip. LEXIS 13, at *13.

[3] *Id.* (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

[4] OHO Order 03-06 (C3B020015) at 2 (*citing Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

[5] OHO Order 07-16 (C11040006) at 4 (*citing Dep't of Enforcement v. Shvarts*, No. CAF980029, 2000 NASD Discip. LEXIS at *10 n.11 (N.A.C. June 2, 2000) (citations omitted)).

[6] *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)).

Fundamentally, Enforcement contends that Respondent fraudulently misrepresented that the notes he sold to the bank were rated "AAA" as to both principal and interest, when actually the security the bank purchased was rated "AAA" solely as to principal. Enforcement also argues that Respondent falsely represented to the bank that he had found specific purchasers for the notes, and that therefore it would be able to sell the notes within days, which was important to the bank. Enforcement alleges that there were no purchasers and the bank was unable to liquidate the notes for approximately three years, when it unwound the purchase of the notes at a loss. Similarly, Enforcement asserts that Respondent also falsely represented that he had found a buyer for the note he sold to the individual customer, and that the customer would be able to sell the note within ninety days of purchase. Like the bank, the customer was unable to liquidate the note for approximately three years, when he succeeded in unwinding the transaction at a loss.[7]

In addition, Enforcement represents that Respondent profited from the transactions in the amount of $750,000. Furthermore, Enforcement maintains that the bank suffered a loss of approximately $32,000, and the individual customer lost over $8 million.[8]

With regard to the issue of the civil lawsuit between the parties, Respondent's suggestion that summary disposition should be granted in order to stay this proceeding until the civil suit between the parties has been resolved is without merit.[9] The sole case Respondent cites in support of this suggestion is not persuasive.[10] FINRA rules do not provide for a stay of

[7] Enforcement's Statement of Disputed Facts 5-6.

[8] *Id.* at 6-7.

[9] *Dist. Bus. Conduct Comm. v. McNeil*, No. C3B960026, 1999 NASD Discip. LEXIS 3, at *18 (N.A.C. Jan. 21, 1999) (a pending collateral matter is not reason to stay a regulatory proceeding).

[10] Respondent cites *SEC v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2005 U.S. Dist. LEXIS 43356 (D. Colo. July 28, 2005). *Nacchio* involved a request by the United States Attorney's Office to be allowed to intervene in an SEC proceeding. The U.S. Attorney sought a limited stay of discovery in the SEC matter because [] it threatened to affect an ongoing criminal investigation, two pending criminal trials, and three pending plea agreements. In *Nacchio*, the Court weighed the competing interests and determined that the public's interest in avoiding potential subversion of the criminal process required the temporary stay. *Id.* at *11-13, *15-17. Respondent claims that he is prejudiced

proceedings, and a request to continue this proceeding is not an appropriate reason to grant summary disposition.

As for Respondent's contention that the individual customer and bank representatives will not appear at the hearing, Enforcement represents that it reasonably anticipates the witnesses will appear. Even if they do not, Enforcement may not need their testimony to prove its case. Enforcement can move to file declarations or testimony taken in other proceedings.[11] These are recognized alternatives when witnesses outside FINRA's jurisdiction decline to testify.[12]

Respondent's claim that the private placement memorandum contained disclosures sufficient to overcome his alleged material misrepresentations and omissions is also without merit. First, Enforcement alleges that the private placement memorandum was not provided to the bank or the individual customer until after the transactions at issue had concluded.[13] Second, the disclosure of risks in a private placement memorandum does not cure material misrepresentations and omissions made by a registered representative.[14]

Finally, Respondent's claim that he did not receive the financial benefit from the sale of the notes does not support summary disposition. As Enforcement notes, whether Respondent profited from the transactions is a matter relevant, should the Hearing Panel reach it, only in consideration of sanctions.[15] In addition, whether or not Respondent profited is a disputed fact.

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because of the potential that a judgment could be issued against him in the civil lawsuit. Mot. for Summ. Disposition 5. As Enforcement properly notes, the rationale Respondent offers in support of a stay does not support a grant of summary disposition in this case. Opp. to Mot. for Summ. Disposition 3.

[11] Opp. to Mot. for Summ. Disposition 8-9.

[12] *See, e.g.*, *Harry Gliksman*, 54 S.E.C. 471, 480-81 (1999), *aff'd*, 24 F. App'x 702 (9th Cir. 2001) (affidavit, declaration, and testimony taken in an arbitration admissible in regulatory proceeding); *Dep't of Enforcement v. Cipriano*, No. C07050029, 2007 NASD Discip. LEXIS 23, *19 n.13 (N.A.C. July 26, 2007).

[13] Opp. to Mot. for Summ. Disposition 16-17.

[14] *Dep't of Enforcement v. Reynolds*, No. CAF990018, 2001 NASD Discip. LEXIS 17, at *35-36 (N.A.C. June 25, 2001).

[15] Opp. to Mot. for Summ. Disposition 17.

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Based upon the representations of the parties, it is clear that there are multiple, genuine issues of material fact, which could affect the outcome of the case, in dispute. For these reasons, Respondent's Motion for Summary Disposition is denied.

SO ORDERED.

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Matthew Campbell
Hearing Officer

June 17, 2014