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[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-13605

Non-Argument Calendar

HESLIN GALLAGHER, Plaintiff-Appellant,
versus FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC., Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:21-cv-81394-AMC

(Filed Jun. 3, 2022)

Before ROSENBAUM, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Heslin Gallagher was offered a dream job as an investment counselor. But first she needed to pass certain qualifications examinations, including the "Series

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I.

We review *de novo* an order granting a motion to dismiss on the basis of immunity, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Weissman v. Nat'l Ass'n of Sec. Dealers, Inc.*, 500 F.3d 1293, 1295 (11th Cir. 2007) (*en banc*). To survive a motion to dismiss, the complaint generally must “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010) (quotation marks omitted). That means the complaint’s nonconclusory factual allegations, accepted as true, “must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Id.* (quotation marks omitted). A claim has facial plausibility only when the court can “draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

II.

The Exchange Act delegates substantial regulatory authority over the markets to private, “self-regulatory

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organizations” (“SROs”). *Weissman*, 500 F.3d at 196. And it requires any person who wishes to conduct securities-related business to be associated with a registered securities association and to comply with that association’s rules. 15 U.S.C. § 78o(a)(1), (b)(1); *Turbeville v. Fin. Indus. Regulatory Auth.*, 874 F.3d 1268, 1270 (11th Cir. 2017). As the nation’s only registered national securities association since 1939¹, FINRA, a private, not-for-profit corporation and SRO, “oversees and regulates securities firms who join its membership, individuals who work for those firms, and individuals associated with those firms.” *Turbeville*, 874 F.3d at 1270-71 & n.2.

SROs like FINRA “have dual status as both quasi-regulators and private businesses.” *Weissman*, 500 F.3d at 1296. “Because they perform a variety of vital governmental functions, but lack the sovereign immunity that governmental agencies enjoy, SROs are protected by absolute immunity when they perform their statutorily delegated adjudicatory, regulatory, and prosecutorial functions.” *Id.* In other words, “entities that enjoy absolute immunity when performing governmental functions cannot claim that immunity when they perform non-governmental functions.” *Id.* “Only when an SRO is acting under the aegis of the Exchange Act’s delegated authority does it enjoy [the] privilege” of immunity. *Id.* at 1297 (quotation marks omitted).

¹ FINRA was previously known as the National Association of Securities Dealers or NASD. *Turbeville*, 874 F.3d at 1270 n.2.

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To determine whether an SRO's conduct is quasi-governmental, and thus whether absolute immunity applies, "we look to the objective nature and function of the activity for which the SRO seeks to claim immunity." *Id.* The test does not turn on "an SRO's subjective intent or motivation," but rather the "function being performed." *Id.*

We begin our analysis by "examin[ing] the nature and function of [FINRA's] actions as alleged" in the complaint. *Weissman*, 500 F.3d at 1298. Gallagher's allegations against FINRA relate to the design, administration, and scoring of the Series 7 exam. According to the complaint, FINRA's exam software uses algorithms—essentially a complex set of instructions and calculations for a computer—to "detect the areas in which a candidate is strong and the areas in which a candidate is weak" and adjust the remaining questions mid-exam, and it includes 10 unidentified "pretest" questions in the 135-question test, which purportedly do not contribute to a candidate's score.² The complaint also alleges that FINRA views its exams as having "tremendous economic value" to its "business" and that it seeks to protect the confidentiality of its exams. The complaint then asserts that FINRA uses algorithms and unscored questions purely for the purpose of financial enrichment, by increasing the number of exam failures and generating more business for itself. In

² The complaint's allegations also covered the rules surrounding the test-taking environment, such as the refusal to credit time for bathroom breaks, but Gallagher does not raise those allegations in her briefing on appeal.

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Gallagher's view, these aspects of the Series 7 exam are not for legitimate regulatory purposes and so are not shielded by immunity.

We conclude that the district court correctly granted FINRA absolute immunity from Gallagher's claim. The nature and function of FINRA's alleged wrongful conduct in this case is firmly under the aegis of its delegated authority under the Exchange Act.³ *See Weissman*, 500 F.3d at 1297.

The regulatory duties delegated to SROs like FINRA include developing and administering qualifications examinations. Congress mandated that any person trading in securities meet "standards of training, experience, competence, and such other qualification as the [U.S. Securities and Exchange Commission ("SEC")] finds necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78o(b)(7). To that end, the SEC is authorized to administer qualifications tests covering "questions related to bookkeeping, accounting, internal control over cash and securities, supervision of employees, maintenance of records, and other appropriate matter." *Id.*

³ We note that Gallagher does not dispute the district court's secondary ruling—that there is no private cause of action against FINRA for violating its own rules—and says it's irrelevant because she did not raise such a claim. *See Turbeville*, 874 F.3d at 1276 ("Congress did not intend to create a private right of action for plaintiffs seeking to sue SROs for violations of their own internal rules."). Insofar as she attempts to raise a new claim against FINRA for the first time on appeal, it would also be barred by absolute immunity for the same reasons we discuss in this opinion.

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§ 78o(b)(7)(B). That examination authority has been broadly delegated to SROs, which must ensure their members are “registered or approved in accordance with the standards of training, experience, competence, and other qualification standards . . . established by the rules” of the SRO. 17 C.F.R. § 240.15b7-1. “The delegation involves close oversight,” since “the SEC approves all rule changes by an SRO” and “may also amend an SRO’s rules itself.” *In re Series 7 Broker Qualification Exam Scoring Litigation*, 548 F.3d 110, 112 (D.C. Cir. 2008).

In short, FINRA develops, administers, and scores the Series 7 exam under its delegated authority. *See In re Series 7*, 548 F.3d at 112; 17 C.F.R. § 240.15b7-1. Its obligations in that regard “arise only because of regulations under the Exchange Act.” *In re Series 7*, 548 F.3d at 115. And those functions would “otherwise be performed by a government agency,” namely, the SEC. *Weissman*, 500 F.3d at 1297; *see* 15 U.S.C. § 78o(b)(7)(B). Thus, FINRA’s design and administration of the Series 7 exam, including its use of unscored questions and algorithms, arise out of, and directly relate to, its performance of a regulatory duty, for which it enjoys quasi-governmental immunity. *Weissman*, 500 F.3d at 1296-97.

That FINRA also operates as a business and earns money from the Series 7 exam, which it treats as confidential, proprietary information, does not change the nature and function of the activity being performed. *See id.* Gallagher attributes either profit-seeking or more “nefarious” motivations to FINRA’s

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use of algorithms and unscored questions in its exam software. But the test for immunity does not turn on FINRA’s “subjective intent or motivation.” *Id.* at 1297.

And in any event, Gallagher’s complaint fails to plausibly establish that FINRA’s use of algorithms and unscored questions for the Series 7 exam has no legitimate regulatory purpose. Gallagher infers from her experience and research that “the algorithms served no regulatory purpose whatsoever.” We assume without deciding immunity would not apply if that were true. But her factual allegations fail to give rise to more than a “sheer possibility” that FINRA’s use of algorithms is entirely divorced from its legitimate regulatory duties, which is not enough to state a plausible claim. *See Iqbal*, 556 U.S. at 678. At best, Gallagher’s allegations suggest that FINRA *could* employ algorithms for purely profit-seeking purposes or with the intent to “generate[] a particular ‘class’ of deliberately failed persons.” But she offers no reason to believe that FINRA has actually used algorithms in this way. In fact, she admits that the “function of the algorithms” is hidden and “the extent of the harm is unknown.” Accordingly, Gallagher’s allegations do not plausibly connect FINRA’s use of algorithms and unscored questions in the Series 7 exam to a nefarious or non-regulatory purpose.

Of course, we recognize that this lawsuit stems in part from FINRA’s secrecy about its exams, including how they are developed and scored. But there are good reasons why secrecy would be advisable to some degree, including to ensure the integrity of the exam as a

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fair measure of a candidate's qualifications. FINRA could reasonably view greater public disclosure about the test or less restrictive testing environments as increasing the chances of cheating. FINRA's lack of transparency about its algorithms and other aspects of the test alone do not make it reasonable to infer that its purposes are non-regulatory.

Finally, we must make clear that, contrary to Gallagher's suggestions, our decision to affirm the dismissal of Gallagher's complaint is no slight on her intelligence or character. On the contrary, Gallagher has represented herself quite ably in unfamiliar terrain, making relevant and well-presented arguments. And while her difficult experience is no doubt frustrating for her, we cannot say that her complaint states a plausible claim that could pierce FINRA's quasi-governmental immunity for the performance of its delegated regulatory duties, or that she could state such a claim if granted leave to amend.

For these reasons, we affirm the dismissal of Gallagher's complaint as barred by FINRA's quasi-governmental immunity.

AFFIRMED.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 21-81394-CIV-CANNON**

HESLIN GALLAGHER,

Plaintiff,

v.

**FINANCIAL INDUSTRY
REGULATORY AUTHORITY, INC.,**

Defendant.

/

**ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS**

(Filed Oct. 14, 2021)

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss [ECF No. 9], filed on September 13, 2021. The Court has considered the Motion, Plaintiff's Response in Opposition [ECF No. 10], Defendant's Reply [ECF No. 11], and the full record. For the reasons set forth below, Defendant's Motion to Dismiss [ECF No. 9] is **GRANTED**.

FACTUAL BACKGROUND

Plaintiff Heslin Gallagher alleges that Defendant Financial Industry Regulatory Authority, Inc. ("FINRA") engaged in an "exam churning scheme" by using algorithms to unfairly rig the Series 7 exam, thereby violating the Securities Exchange Act, 15 U.S.C. § 78j(b)

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[ECF No. 1 pp. 24-25]. FINRA is a self-regulatory organization (“SRO”) in charge of administering the Series 7 examination, one of the prerequisite requirements for becoming a securities broker. In hopes of becoming an investment consultant at a brokerage firm, Plaintiff took and failed the Series 7 test three times [ECF No. 1 ¶¶ 40-66]. After Plaintiff failed the exam the third time, the brokerage firm fired her [ECF No. 1 ¶ 65]. Plaintiff filed her Complaint on August 10, 2021, alleging that FINRA fraudulently misstated the purpose of the Series 7 exam and administered the exams in a manner that caused her to fail, ultimately resulting in the loss of her job [ECF No. 1 ¶¶ 100-04].

Plaintiff’s complaint alleges a single cause of action for violating Section 10(b) of the Securities and Exchange Act (“Exchange Act”), 15 U.S.C. § 78j(b), and implementing regulations [ECF No. 1 ¶ 105]. Plaintiff seeks compensative and punitive monetary damages [ECF No. 1 p. 25]. Defendant argues that the Complaint should be dismissed on three separate bases: (1) Plaintiff failed to properly effect service of process; (2) Plaintiff’s Complaint fails to state a claim because FINRA is absolutely immune from lawsuits for monetary damages that challenge its regulatory actions; and (3) Plaintiff expressly waived her claim by signing form U4, a uniform application form for registering with FINRA that all registered securities representatives are required to file and keep current [ECF No. 9 pp. 6-14].

LEGAL STANDARD

To avoid dismissal under Rule 12(b)(6), a complaint must allege facts that, if accepted as true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim for relief is plausible if the complaint contains factual allegations that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal. *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

DISCUSSION

The Court finds that Plaintiff's Complaint must be dismissed with prejudice because FINRA, as an SRO acting in its regulatory capacity, is entitled to absolute immunity from Plaintiff's claim brought in this case. As previously stated, Defendant FINRA is a self-regulatory organization ("SRO") registered as a national securities association with the SEC under the Exchange Act. See 15 U.S.C § 78o-3. Within the regulatory scheme established by the Exchange Act, FINRA plays a key role by administering the Series 7 broker qualification examination to measure the competency of applicants. See 17 C.F.R. § 240.15b7-1; 15 U.S.C. § 78o(b)(7).

"When an SRO acts under the aegis of the Exchange Act's delegated authority, it is absolutely

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2. Plaintiff's Complaint [ECF No. 1] is **DISMISSED WITH PREJUDICE**. No amendment is warranted because any amendment would be futile. *See generally Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).
3. The Clerk of the Court is instructed to **CLOSE** this case.

DONE AND ORDERED in Fort Pierce, Florida, this 14th day of October 2021.

/s/ Aileen Cannon

AILEEN M. CANNON

UNITED STATES DISTRICT JUDGE

cc: counsel of record

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-13605-BB

HESLIN GALLAGHER,

Plaintiff - Appellant,

versus

FINANCIAL INDUSTRY REGULATORY
AUTHORITY, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(Filed Jun. 21, 2022)

Before: ROSENBAUM, LUCK, and LAGOA, Circuit
Judges.

BY THE COURT:

Before the Court are: (1) the “Motion by Appellee, Financial Industry Regulatory Authority, Inc., to Publish Opinion;” and (2) the “Motion of Appellant Heslin Gallagher to Publish Opinion.”

The motions are DENIED.
