

15 U.S.C. § 78s(g)).

“As part of its statutory mandate, the NASD (1) is required to maintain records of its member securities firms and their registered representatives, including the data relating to the employment and termination of registered representatives, for at least five years, and (2) established standards for the uniform licensing and registration of securities professionals” Meyers v. NASD, No. 95-CV-75077, 1996 U.S. Dist. LEXIS 6044, *2 (E.D. Mich. March 29, 1996). To do this, the NASD utilizes two forms. See id. at **2-3. The first form is known as a U-4 (“Uniform Application for Securities Industry Registration and Transfer”), and must be filed with the NASD whenever a securities firm employs a registered representative. See id. The second form, which is known as a U-5 (“Uniform Notice of Termination of Securities Industry Registration”), “must be completed by a securities firm upon the termination of a registrant’s employment.” See id. The U-4 and the U-5 forms both require that the securities firm disclose any customer complaints about the registrant. See id. at *3 n.2 & n.3. Both forms also must be amended to change any inaccurate or incomplete information. See id. The NASD maintains the U-4 and U-5 forms in a Central Records Depository (the “CRD”), which is accessible to federal and state regulatory authorities, and to some extent, the investing public. See id. at *3-4.

B. Olick’s Adversary Complaint

On June 7, 1999, Olick filed a pro se adversary complaint against the NASD alleging negligence and breach of contract. In his complaint, Olick stated that he was a registered representative licensed to sell securities. Olick had been associated with John Hancock Distributors Inc. (“John Hancock”), and later with Washington Square Securities, Inc., which was also known as Northwestern National (“Washington Square”).

According to Olick's complaint, Hancock and Washington Square filed with the NASD several inaccurate U-5 forms, containing false customer complaints about Olick. On April 15, 1999, the bankruptcy court for the Eastern District of Pennsylvania ordered the NASD to expunge from the CRD any and all records of complaints filed on behalf of Robert or Irene Martin against Olick. The crux of Olick's complaint was that the NASD was negligent in failing to comply with the court's order in a timely fashion, and also was negligent in allowing inaccurate and incomplete information to be published originally in the CRD. The complaint also asserts a claim for breach of contract.

C. Proceedings Below

The NASD filed a motion to dismiss the plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). In its motion to dismiss, the NASD argued that the complaint failed to state a claim upon which relief could be granted because the plaintiff did not have a private right of action against the NASD under the Exchange Act. The NASD also argued that it was immune from damages for all acts undertaken with respect to the performance of its regulatory duties. Olick filed a memorandum of law in opposition to the defendant's motion to dismiss.

On September 10, 1999, the bankruptcy court granted the NASD's motion to dismiss the plaintiff's complaint for failure to state a claim upon which relief can be granted. Order of Bankr. Ct., Sept. 10, 1999. The bankruptcy court found that the complaint failed to state a claim because "the actions complained of in the complaint were actions taken by Defendant in furtherance of its role as a securities regulator and (a) no private right of action exists against Defendant under the Securities Exchange Act of 1934, 15 U.S.C. § 78a, et seq., or at common

law for actions taken by Defendant in furtherance of its regulatory duties . . . ; and (b) Defendant is absolutely immune from liability for actions taken in furtherance of its regulatory duties”

Id. The court then held that the “portion of the complaint which seeks an Order compelling Defendant to comply with this Court’s April 15, 1999 Order entered in Case No. 96-22123T is MOOT since Defendant complied with this Order on or about June 11, 1999 after being served with same on or about May 10, 1999.” Id.

On October 18, 1999, Olick filed a notice of appeal from the September 10, 1999, order of the bankruptcy court. Olick, as appellant, and the NASD, as appellee, both filed appellate briefs on November 19, 1999. On that same day, Olick filed a motion to extend time nunc pro tunc for the submission of appellant’s brief because his brief was untimely under the court’s scheduling order. The court granted Olick’s motion to extend time nunc pro tunc for the submission of his appellate brief.

II. STANDARD OF REVIEW

The district court, sitting as an appellate tribunal, applies a clearly erroneous standard to review the bankruptcy court’s factual findings and a de novo standard to review its conclusions of law. See In re Siciliano, 13 F.3d 748, 750 (3d Cir. 1994).

Moreover, in deciding a motion to dismiss, the court must “accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994) (citing Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989)). “A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King &

Spalding, 467 U.S. 69, 73 (1984).

Because a motion to dismiss requires the court to make conclusions of law, I will apply the de novo standard in reviewing the decision of the bankruptcy court.

III. DISCUSSION

In its order of September 10, 1999, the bankruptcy court dismissed the plaintiff's complaint because the court found that "the actions complained of in the complaint were actions taken by Defendant in furtherance of its role as a securities regulator," and thus, there was no private right of action against the NASD under the Exchange Act; and the NASD is absolutely immune from liability for actions taken in furtherance of its regulatory duties. See Order of Bankr. Ct., Sept. 10, 1999. I agree and will affirm the bankruptcy court's decision.

A. Private Right of Action Under the Exchange Act

Olick contends that the NASD's publication of allegedly false and defamatory material is subject to a private right of action because the NASD published the information in "bad faith." See Appellant's Brief at 3. The NASD argues in response that the complaint must be dismissed because there is no private right of action against the NASD for an alleged violation of its own rules. See Appellee's Brief at 9-12.

The Third Circuit has not yet addressed whether a party may assert a private cause of action against the NASD under the Exchange Act for a violation of the NASD's own rules. Courts in other circuits considering this issue have concluded that parties have no private right of action against the NASD for violations of its own rules, or for its actions taken in conjunction with its regulatory role. These courts have determined that there is no private right of action against the NASD under the Exchange Act. See Desiderio v. NASD, 191 F.3d 198, 207-08 (2d

Cir. 1999) (holding that the plaintiff did not have a private right of action against the NASD under the Exchange Act and dismissing state law claims brought against the NASD); Sparta Surgical Corp. v. NASD, 159 F.3d 1209, 1213 (9th Cir. 1998) (explaining that “[i]t is undisputed . . . that a party has no private right of action against an exchange for violating its own rules or for actions taken to perform its self-regulatory duties under the [Exchange] Act”); Shah v. NASD, No. 98-C-5355, 1999 WL 240342, at *8 (N.D. Ill. April 9, 1999) (noting that “at least three courts have concluded that the NASD is not subject to a private right of action under Sections 15A or 19 of the Exchange Act”); Niss v. NASD, 989 F. Supp. 1302, 1308-09 (S.D. Cal. 1997) (finding that no private right of action exists for the NASD’s violations of its own rules and dismissing plaintiff’s common law negligence claims against the NASD); Meyers v. NASD, No. 95-CV-75077, U.S. Dist. LEXIS 6044, at *14 (E.D. Mich. March 29, 1996) (holding that there is no private cause of action against the NASD for the violation of the NASD’s own rules and dismissing the plaintiff’s complaint for failure to state a claim); Mihalakis v. Pacific Brokerage Servs., Inc., No. 91-CIV-994, 1991 WL 280236, at *4 (S.D.N.Y. Dec. 23, 1991) (holding that § 15A of the Exchange Act does not create an implied private right of action against the NASD); FDIC v. NASD, 582 F. Supp. 72, 74 (S.D. Iowa 1984) (holding that a “customer of a member of a national securities association has no common law cause of action against the association for negligent admission or supervision of the member”); Gustafson v. Strangis, 572 F. Supp. 1154, 1158 (D. Minn. 1983) (holding that there is no private right of action against the NASD for violations of NASD rules).

In Meyers, a case very similar to the case at hand, the court considered whether a plaintiff could maintain a suit against the NASD for the NASD’s alleged failure to investigate the

information contained on the U-4 and U-5 forms filed in the CRD. See Meyers, U.S. Dist. LEXIS 6044, at *13 (explaining that the “crux of [the plaintiff’s] complaint stems from the NASD’s alleged duty to investigate the U-4 and U-5 forms before filing them” in the CRD). The Meyers court observed that “a majority of courts have held that there is no private cause of action against the NASD for a violation of its own rules.” See id. The court then dismissed that section of the plaintiff’s complaint, finding that the plaintiff had made “an unsuccessful attempt to create a private cause of action for the violation of the NASD rules where non [sic] exists.” See id. at *14.

Considering the weight of persuasive authority holding that there is no private right of action against the NASD for a violation of its own rules, I hold that the bankruptcy court was correct in its conclusion that Olick may not maintain a private cause of action against the NASD under the Exchange Act, or at common law, for regulatory actions taken by the NASD. Accordingly, I will affirm the bankruptcy court’s decision and order the plaintiff’s complaint dismissed on this ground.

B. Absolute Immunity for the NASD for Regulatory Actions

The NASD also argues that the court should dismiss the plaintiff’s complaint because the NASD is absolutely immune from liability for actions taken in a regulatory or adjudicatory context. See Appellee’s Brief at 12-15. Olick contends that the NASD is entitled only to qualified immunity. See Appellant’s Brief at 11-12(2).¹

The bankruptcy court held that the NASD was absolutely immune from liability for

¹The appellant’s brief has two pages marked with a page number “12.” To differentiate between the two, I will refer to the first page number “12” as “12(1)” and the second page number “12” as “12(2).”

actions taken in furtherance of its regulatory duties. See Bankr. Ct. Order, Sept. 10, 1999. I agree with the bankruptcy court's conclusion and will affirm on this ground as well.

The Third Circuit has not yet addressed the issue of whether the NASD is immune from liability for regulatory actions. The Second, Fifth, and Ninth Circuits have all decided this issue, however, and have held that self-regulatory organizations, such as the NASD, are immune from liability for actions taken in furtherance of their regulatory duties. See Partnership Exchange Securities Co. v. NASD, 169 F.3d 606, 608 (9th Cir. 1999) (dismissing the plaintiff's complaint against the NASD because a "self regulatory organization that exercises quasi-governmental powers within its regulatory capacity" is entitled to absolute immunity); Sparta Surgical Corp. v. NASD, 159 F.3d 1209, 1213 (9th Cir. 1998) (holding that a self-regulatory organization, such as the NASD, is "immune from liability based on the discharge of its duties under the Exchange Act"); Barbara v. New York Stock Exchange, 99 F.3d 49, 59 (2d Cir. 1996) (opining that the doctrine of "absolute immunity is particularly appropriate in the unique context of the self-regulation fo the national securities exchanges" in holding that the New York Stock Exchange was immune from liability for claims arising out of its federally-mandated conduct of disciplinary proceedings); Austin Municipal Securities, Inc. v. NASD, 757 F.2d 676, 692 (5th Cir. 1985) (holding that the NASD "is entitled to absolute immunity for its role in disciplining its members and associates"); see also Shah v. NASD, No. 98-C-5355, 1999 WL 240342, at *7 (N.D. Ill. April 9, 1999) (holding that when the NASD is acting properly within its regulatory role it is immune from claims for tortious interference with business relations). I find the reasoning of these courts persuasive. Therefore, I hold that the NASD is immune from suit when

acting under the aegis of the Exchange Act's delegated authority. See Sparta, 159 F.3d at 1214.²

In this case, the plaintiff's complaint against the NASD revolves around the NASD's inclusion of allegedly defamatory statements in the U-5 forms that were included in the plaintiff's record in the CRD.³ The act of maintaining records, including records containing customer complaints, in the CRD is a regulatory duty of the NASD that is undertaken under the aegis of the Exchange Act's delegated authority. I therefore conclude that the NASD is immune from suit for these actions. Accordingly, I will affirm the decision of the bankruptcy court and will dismiss the plaintiff's complaint for failure to state a claim upon which relief can be

²In his brief, Olick argues that the NASD is entitled only to qualified, not absolute, immunity for the publication of U-5 forms in the CRD. See Appellant's Brief at 5-7 (citing Bravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 708 (7th Cir. 1994), and Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 132-34 (6th Cir. 1996), for the proposition that the NASD's publication of U-5 forms on the CRD is subject to a qualified privilege). The cases cited by Olick, however, do not stand for the proposition that the NASD is entitled only to qualified immunity. Both Bravati and Glennon addressed the issue of whether a securities firm (not the NASD) was entitled to absolute immunity for the filing of U-5 forms in the CRD. See Bravati, 28 F.3d at 708 (holding that under Illinois law a securities firm was entitled to a qualified privilege for statements submitted on a form U-5); Glennon, 83 F.3d at 132-34 (holding that under Tennessee law a securities firm was entitled to a qualified privilege for statements submitted on a form U-5). Thus, these cases are inapposite because they do not address whether the NASD is absolutely immune from liability for statements published in the CRD.

³In his appellate brief, Olick argues that the bankruptcy court failed to consider his claim for violations of the Sherman Antitrust Act. See Appellant's Brief at 7-11. The adversary complaint filed by Olick, however, did not attempt to state an antitrust claim. Instead, Olick's complaint stated claims only for negligence and breach of contract. Thus, I conclude that the bankruptcy court did not err in failing to consider the antitrust cause of action because it was never properly before the bankruptcy court.

Furthermore, as to Olick's breach of contract claim, Olick's complaint does not clearly identify the contractual relationship which he alleges was breached by the NASD (other than a conclusory statement in the plaintiff's complaint that "[i]n 1984, the Plaintiff entered into a contract . . . with the NASD wherein he became licensed as a registered representative to sell securities"). See Compl. ¶7. The alleged contract itself was never made a part of the record and Olick never identified a specific provision of it which he felt had been breached. Therefore, the bankruptcy court's dismissal of the breach of contract claim was also proper for this reason.

granted.⁴

IV. CONCLUSION

Upon consideration of the order of the bankruptcy court of September 15, 1999, and the appellate briefs submitted by the appellant and the appellee, I conclude that the bankruptcy court was correct in its conclusion that Olick's complaint failed to state a claim upon which relief can be granted. Accordingly, I will affirm the bankruptcy court's decision.

An appropriate order follows.

⁴In the bankruptcy court's order, the court found that the NASD had been served on or about May 10, 1999, with the bankruptcy court's order of April 15, 1999 (ordering the NASD to expunge the Martin complaints from Olick's files in the CRD). See Order of Bankr. Ct., Sept. 10, 1999. The bankruptcy court further found that the NASD complied with the court's earlier order on or about June 11, 1999. See id. I do not find that the bankruptcy court's factual findings to be clearly erroneous. See In re Siciliano, 13 F.3d at 750. Accordingly, I will affirm the portion of the bankruptcy court's decision which held that the "portion of the complaint which seeks an Order compelling Defendant to comply with this Court's April 15, 1999 Order entered in Case No. 96-22123T is MOOT since Defendant complied with this Order on or about June 11, 1999 after being served with same on or about May 10, 1999." See Order of Bankr. Ct., Sept. 10, 1999.

