UNTED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of the Application of

MICHAEL NICHOLAS ROMANO

For Review of Disciplinary Action Taken by

FINRA

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34-72953; 3-15978

BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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PRELIMINARY STATEMENT

Michael Nicholas Romano appeals to the Securities and Exchange Commission from FINRA's wrongful denial of Mr. Romano's motion to stay disciplinary proceedings which resulted in his Bar from Association with any FINRA Member, pursuant to FINRA Rule 9552(h), effective June 27, 2014.

Mr. Romano was a co-founder and Executive Director of W.J. Bonfanti, Inc. ("WJB"), a privately held institutional broker-dealer that offered agency equity and options execution, a corporate access platform, general market and specialized sector research, and commission management solutions. Mr. Romano was the driving force behind the firm's trading and execution platform on a day-to-day basis.

After suffering financial difficulties, in early January, 2012, WJB voluntarily ceased operations, and shortly thereafter declared bankruptcy.

In the months following WJB closing its doors, FINRA commenced an investigation into WJB, eventually bringing an enforcement action against WJB's Chief Executive Officer and Chief Financial Officer alleging that they had failed to adequately supervise the firm's financial and accounting functions, including its computation of net capital and the preparation of its FOCUS reports, books and records, and employee compensation records, thus violating FINRA Rule 2010 and NASD Rule 3110(a).

The subjects of the investigation submitted a Letter of Acceptance, dated May 2, 2012, and a Waiver and Consent ("AWC"), in which they accepted responsibility for violating FINRA rules in connection with their activities at WJB. The CEO was barred from association with any FINRA firm in any capacity, and the CFO was barred from association with any FINRA firm in a principal capacity.

Importantly, Mr. Romano was not suspended or barred; and in fact, no enforcement action whatsoever was taken against Mr. Romano.

Two years later, on February 6, 2014, Mr. Romano, and WJB's CEO and CFO were charged by indictment (No.: 2014-NY-0051) in the Supreme Court of the State of New York, New York County, with charges of grand larceny, securities fraud, and tax fraud in connection with their activities at WJB. (R. 195)[1]. None of the accusations include allegations connected to the purchase, retention or sale of securities.

The principal allegations allege that the defendants defrauded friends and family members by convincing them to extend old loans and invest new money that was used not only for business expenses, but also on personal expenditures. (R. 191). In addition, Mr. Romano is accused of having under-reported the income on his personal income tax returns. (R. 194).

[1] "R." refers to the Record supplied by FINRA, and all page numbers referenced correspond to the index to the record filed by FINRA on July 30, 2014.

On February 18, 2014, Mr. Romano received a letter notifying him of an investigation initiated by FINRA, pursuant to FINRA Rule 8210 (Matter No. 20140401119), and demanding sworn statements and documents from Mr. Romano by February 25, 2014. (R. 237). That deadline was extended to March 3, 2014. At that time, Mr. Romano indicated that, while he wished to comply, he would be unable to because to do so would require him to waive his Fifth Amendment right against self-incrimination, and his Sixth Amendment right not to give up his attorney-client privilege and divulge his defenses to the pending criminal indictment.

The allegations set forth in the February 18, 2014, letter are exactly the same allegations contained in the indictment against Mr. Romano pending in the New York Supreme Court.

On March 24, 2014, Mr. Romano received a Notice of Suspension pursuant to FINRA Rule 9552 for his failure to provide requested information as required by FINRA Rule 8210. (R. 259). According to the Notice, as of April 17, 2014, he would be suspended from associating with any FINRA member in any capacity. On April 16, 2014, Mr. Romano requested a hearing (R. 1), and on April 17, pursuant to FINRA Rule 9559, governing expedited proceedings, a hearing was scheduled. (R. 5).

On April 23, 2014, Mr. Romano filed a motion to stay the expedited proceeding based on the fact that compliance with FINRA's requests for information and testimony from Mr. Romano would force Mr. Romano to give up his Fifth Amendment right against compelled self-incrimination in his parallel criminal proceeding. (R. 45).

On April 25, 2014, FINRA's Department of Enforcement filed a response in opposition accompanied by affidavits or declarations from three individuals associated with the investigation of Mr. Romano or the earlier investigation of WJB's CEO and CFO. (R. 75).

An affidavit was provided by Michelle Battaglia, an Examination Director in FINRA's Trading and Financial Compliance (Fin Op) Department. According to Ms. Battaglia's affidavit, she participated in FINRA's investigation into WJB Capital Group which led to the AWC signed by WJB's CEO and CFO on May 2, 2012. Following the completion of FINRA's investigation, Ms. Battaglia met with the New York County District Attorney's Office "six times between October 18, 2012, and December 27, 2013 in order to review the documents that had been collected by FINRA for FINRA's own investigation prior to May 2012, and had been provided to the District Attorney...." (R. 75).

One of the declarations came from Howard Kneller, Esq., Senior Counsel for FINRA's Department of Enforcement. In his declaration, Mr. Kneller states

that FINRA provided documents from its files to the New York County District Attorney's Office on August 20, 2012, July 26, 2013, September 11, 2013, November 6, 2013, and December 26, 2013. (R. 75).

The final declaration came from Ronald Sannicandro, Esq., Senior Counsel for FINRA's Department of Enforcement. According to Mr. Sannicandro, FINRA commenced its investigation into Mr. Romano on February 10, 2014, four days after the indictment was filed against him on February 6, 2014. (R. 75).

On April 29, 2014, Hearing Officer David R. Sonnenberg issued a preliminary Order denying Mr. Romano's motion. (R. 111). On May 2, 2014, Hearing Officer Sonnenberg issued a supplemental Order setting forth his reasons for denying Mr. Romano's motion. (R. 121).

In light of the decision, Mr. Romano indicated his intention to bring the instant appeal and notified FINRA that he would not be participating in the scheduled hearing on advice of counsel. Thereafter, on May 7, 2014, Hearing Officer Sonnenberg issued an Order Dismissing the Expedited Proceeding and formally suspending Mr. Romano from associating with any member firm in any capacity. (R. 275).

On June 27, 2014, Mr. Romano was banned from association with any FINRA member, pursuant to FINRA Rule 9552(h).

ARGUMENT

THE FINRA PROCEEDINGS SHOULD HAVE BEEN STAYED UNTIL THE DETERMINATION OF MR. ROMANO'S PENDING CRIMINAL PROSECUTION

The Hearing Officer's decision and order denying Mr. Romano's request for a stay of the FINRA proceedings for failure to show good cause is flawed for many reasons.

First, the fact that the FINRA proceedings were governed by the Rule 9550 series' expedited procedural mechanism, allowing FINRA to address the allegations of misconduct more quickly than would be possible using the ordinary FINRA disciplinary process should not have weighed against Mr. Romano. Mr. Romano had no opportunity to participate in the decision of which mechanism was utilized in the proceedings, and should not have been penalized for something he had no say in.

Mr. Romano's request for a stay until the conclusion of his parallel criminal proceeding is not unprecedented. *See e.g., Frank P. Quattrone*, Exchange Act Release No. 53547 (Mar. 24, 2006)(respondent given one year following the resolution of his criminal case within which to testify). While Mr. Romano could not provide an exact time frame within which his criminal case would conclude, the time frame is more definite than other cases in which stays were denied, because the proceeding that is parallel to FINRA's proceeding is not merely a

criminal investigation, but is an indicted Supreme Court criminal case heading towards trial. *Cf. SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)(where no indictment has issued, the purpose of staying civil proceedings during the pending criminal proceedings is "a far weaker one"); *In Re Par Pharmaceutical, Inc. Sec. Litig.*, 133 F.R.D. 12, 13-14 (S.D.N.Y. 1992); *United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802, 805-06 (E.D.N.Y. 1992) (federal courts typically will not stay a civil proceeding before a criminal investigation has ripened into an indictment).

Regarding the allegations that are the subject of the criminal proceeding, they do not represent the need to proceed with particular haste, since FINRA participated in the grand jury investigation that produced the indictment for more than 15 months without initiating an investigation into Mr. Romano, and while he continued to work in the securities industry. Moreover, none of the accusations include allegations connected to the purchase, retention or sale of securities.

Significantly, the Hearing Officer's conclusion that Mr. Romano was unlikely to suffer prejudice unless a stay was granted is baffling, as is the suggestion that the subject matter of the two proceedings is not similar. Unlike in cases where no indictment has yet issued, and the extent to which the issues in the two proceedings overlap is unclear, here there is an indictment, the allegations from which mirror, nearly word for word, the allegation leveled at Mr. Romano by

FINRA. The subject matter of the expedited proceeding concerns Mr. Romano's failure to produce information and documents in connection with an investigation into the exact same misconduct as is alleged in the criminal indictment. As was conveyed to FINRA, statements made by Mr. Romano, or the act of producing documents in the FINRA investigation, directly affect Mr. Romano's constitutional rights where it is alleged that the two investigating bodies, in this case FINRA and the NY County District Attorney's Office, are so closely connected that FINRA is acting as an arm of the other's investigation.

In order to participate in the hearing, and "assert his defenses to the FINRA action," Mr. Romano would have been forced to give up his Fifth Amendment right against self-incrimination and/or divulge important attorney-client privileged information and his defenses to the criminal indictment which implicate his rights under the Sixth Amendment, in much the same way as if he had to respond to the requests for information and documents that formed the basis for the disciplinary proceedings at the outset.

Mr. Romano suffered substantial prejudice by the denial of his motion to stay the proceedings. He was given the Hobson's choice of participating in the hearing, and thereby giving up his constitutional rights to remain silent (5th Amendment) and to his attorney-client privilege (6th Amendment), or facing a

permanent bar from working in the securities industry. Effectively, he had to choose between his employment and his constitutional rights.

Lastly, as was made abundantly clear in Mr. Romano's motion, the parallel proceeding at issue here is not a typical parallel proceeding, and Mr. Romano does not rely on the mere existence of parallel proceedings to support his application for a stay. While FINRA's disciplinary and regulatory function coexists with other forums of redress, and does not stop when another entity's process begins, when it acts as an arm of the state in furthering such a parallel proceeding, it has greater implications for the individual's participation in the FINRA proceedings, and gives rise to a greater threat of prejudice.

FINRA's disciplinary authority makes it a state actor when, as here, FINRA and the New York County District Attorney's Office are sufficiently closely coordinated as to make FINRA an essential agent of the prosecuting authority.

A person cannot be deprived of his employment for declining to provide testimony that could be used against him in a criminal prosecution. *See Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. State of New Jersey*, 385 U.S. 493 (1967). The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also [protects him against] official questions put to him in any other proceeding, civil or criminal, formal or informal, where the

answers might incriminate him in future criminal proceedings." *Turley*, 414 U.S. at 77.

Because the Constitution largely applies to government actors, private entities generally are not liable for infringing upon constitutional protections. Nevertheless, private entities and individuals are required to comply with constitutional imperatives if they are acting as the state. *See e.g., Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649, 666 (1944); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

The state-actor doctrine requires "such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 137 (2d Cir. 2002) quoting *Brentwood Acad.*, 531 U.S. at 295.

As a preliminary matter, FINRA has a traditional government function of upholding the nation's securities laws and maintaining the integrity of our financial markets. In *In Re Series 7 Broker Qualification Exam Scoring Litigation*, 510 F.Supp.2d 35, 38 (D.D.C. 2007), the court defined the NASD (now FINRA) as "... a registered national securities association under the Securities Exchange Act of 1934 ('Exchange Act'), 15 U.S.C. § 78o-3(b) (2000), and therefore qualifies as an SRO pursuant to 15 U.S.C. § 78c(a)(26)." *See id.* citing *Nat'l Ass'n of Sec. Dealers*

v. SEC, 431 F.3d 803, 804, 806 (D.C. Cir. 2005). As an SRO, FINRA "serves as a *quasi-governmental agency*" (emphasis added), in the exercise of its "'delegated government power … to enforce . . . the legal requirements laid down in the Exchange Act.'" *Nat'l Ass'n of Sec. Dealers*, 431 F.3d at 804 (omissions in original) quoting *Merrill Lynch v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1367 (5th Cir. 1980).

The Securities and Exchange Commission ("SEC") retains close oversight of SROs. *See id.* For example, the SEC approves of all SRO rule changes, however minor, and may amend the SRO rules if deemed necessary. *See id.* citing 15 U.S.C. § 78s(b), (c). If an SRO does not comply with the Exchange Act, the SEC rules, or its own rules, as required by § 78s(g), it faces the suspension or revocation of its SRO registration, as well as other sanctions. *See id.*

Many of FINRA's powers and functions have been delegated by the SEC, transforming it into the "gatekeeper to participation in the securities industry". *In Re Series 7 Broker*, 510 F.Supp.2d at 38.

FINRA may "bar any person [including Mr. Romano] from becoming associated with a member if such person does not agree (i) to supply [FINRA] with such information with respect to its relationship and dealings with the member as may be specified in the rules of [FINRA]". 15 U.S.C. §78o-3(g)(3)(b); *see also* FINRA Rules 8210, 8310.

In addition, quasi-governmental powers (in the form of sovereign immunity, for example) have been extended to SROs, when the court deemed the organization's actions to be federally mandated, such as when exercising prosecutorial, arbitral, adjudicatory or other acts. *See Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998); *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49, 58 (2d Cir. 1996).

Furthermore, Roberta S. Karmel, a former Commissioner of the SEC, a former director of the New York Stock Exchange, and a former member of the National Adjudicatory Council of the NASD, has written that, while FINRA did not originate as an agency created by the government, it has "gradually transformed into an agency which exercises governmental functions." *See* Karmel, Roberta S., SHOULD SECURITIES INDUSTRY SELF-REGULATORY ORGANIZATIONS BE CONSIDERED GOVERNMENT AGENCIES?. Brooklyn Law School , Legal Studies Paper No. 86, at 11[2].

According to Professor Karmel, because FINRA performs governmental functions in the areas of *disciplinary actions* and rule making, the issue then becomes whether persons affected adversely by such actions have been accorded necessary or appropriate constitutional or other rights. *See id.* at 13.

[2] Ms. Karmel's paper can be found online at http://works.bepress.com/roberta_karmel/88/.

While historically, courts have treated the NYSE, and the NASD as private entities, and rejected claims based on the Fifth Amendment's privilege against compelled self-incrimination[3] and the Double Jeopardy Clause[4], in recent years, the SEC has begun to acknowledge that under some circumstances, an SRO may be acting as an agent for the government in conducting an investigation. *See e.g., Frank P. Quattrone*, Exchange Act Release No. 53547 (Mar. 24, 2006); *In the Matter of the Application of Justin F. Ficken*, Exchange Act Release No. 54699 (Nov. 3, 2006).

In *Frank P. Quattrone*, a person under investigation acknowledged that he failed to respond to an NASD request for information. He contended that he had a Fifth Amendment right not to respond, because his requested testimony related to a joint investigation by the SEC, the NASD and the NYSE into conflicts of interest at 12 broker-dealer firms, and therefore the NASD investigation was "state action". *See Frank P. Quattrone* at 5.

NASD Enforcement commenced a Rule 8210 proceeding, and Quattrone refused to testify before the hearing panel, in view of a related pending criminal indictment against him. *See id.* at 6. Because Quattrone refused to testify, the hearing panel imposed on Quattrone a one-year suspension and a $30,000 fine, including in its decision a provision that Quattrone would be barred in all

[3] *See e.g. United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975).
[4] *See e.g. Jones v. SEC*, 115 F.3d 1173, 1182-83 (4th Cir. 1997).

capacities if he failed to testify within one year of the resolution of his criminal case. *See id.* at 7.

Upon completion of his criminal trial, Quattrone complied with the hearing panel's condition and testified before NASD. *See id.* While the NASD confirmed that Quattrone satisfied his obligations, NASD's National Adjudicatory Council ("NAC") increased Quattrone's sanction to a bar in all capacities because it "found that Quattrone's misconduct in refusing to testify was egregious". *See id.* at 8.

The SEC reversed and remanded the NAC's decision, holding that Quattrone had the right to present evidence that the NASD's role in the joint investigation rendered its request for information and testimony state action. *See id.* at 11.

Similarly, In *Justin Ficken*, a former broker asserted his Fifth Amendment privilege when he failed to appear for an on-the-record interview ("OTR") in violation of NASD Rule 8210. *See Justin Ficken* at 3.

Mr. Ficken claimed the privilege after learning that a federal grand jury had received information from the SEC about him and that members of the NASD had been consulting with the SEC about his case. *See id.* A hearing panel barred him from associating with any NASD member in any capacity, and the NAC affirmed. *See id.* at 6.

The SEC reversed and remanded, giving Ficken the opportunity to conduct discovery to prove his allegations of joint action between the NASD and the SEC, constituting state action. *See id.* at 11.

Lastly, a similar opportunity to prove state action was afforded in *Warren E. Turk*, Exchange Act Release No. 55942 (June 22, 2007). There, a specialist was barred for asserting the Fifth Amendment during a NYSE investigation.

Here, it is obvious that FINRA has actively assisted the District Attorney's Office in its investigation of WJB and its principals, including Mr. Romano, which culminated in the February 6, 2014 indictment. The affidavits and declarations provided by FINRA show that FINRA provided documents to the District Attorney's Office on multiple occasions, that FINRA employees met with the District Attorney's Office to explain the documents provided. There is also reason to believe that representatives from FINRA provided expert testimony before the grand jury at the request of the District Attorney's Office, and that the current FINRA investigation, which asserts the same allegations contained in the pending criminal indictment, stem from ongoing communication and cooperation between FINRA and the District Attorney's Office.

The connection between FINRA and the District Attorney's Office extends beyond the mere sharing of information. Mr. Romano believes that FINRA has worked hand in hand with the District Attorney's Office to develop the prosecution

theory, to amass evidence to support that theory, and to provide expert assistance in explaining to the grand jury that the evidence supplied and admitted before the grand jury amounts to violations of law.

Therefore, because FINRA and the New York County District Attorney's Office are sufficiently closely coordinated as to make FINRA an essential agent of the prosecuting authority in this case, Mr. Romano's Fifth Amendment right against compelled self-incrimination would be violated by requiring him to participate in a hearing and actively defend the FINRA proceedings until the completion of his criminal case.

Similarly, Mr. Romano would have been severely prejudiced if forced to participate in the hearing and give his defenses to FINRA because it would have forced him to waive his attorney-client privilege for all purposes.

The case law is clear that once the attorney-client privilege has been waived, it cannot be reasserted. *See Westinghouse Electric Corporation v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991); *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987). There is no selective waiver that can be made; a knowing, intentional waiver is a waiver for all purposes and for all times. *See id.*

Here, Mr. Romano and counsel have spoken extensively about the FINRA investigation and proceedings, including all relevant topics. Given the Mr. Romano is imminently facing a complex criminal trial, it would be the height of unfairness

to force Mr. Romano to disclose what amount to private, otherwise privileged, strategic communications with counsel, when doing so will constitute a waiver of Mr. Romano's attorney-client privilege for all purposes.

Therefore, for all the reasons enumerated above, contrary to the findings of the FINRA Hearing Officer, Mr. Romano made a sufficient showing of substantial prejudice and established good cause why the FINRA proceedings should have been stayed pending the outcome of the parallel criminal proceeding. As such, the FINRA hearing officer erred in failing to stay the proceedings, the result of which was Mr. Romano's permanent bar from the securities industry.

CONCLUSION

For the reasons stated above, Mr. Romano hereby requests that his bar from associating with any FINRA firm be overturned and any FINRA disciplinary proceedings be stayed until the resolution of his parallel criminal case.

Dated: New York, New York
October 1, 2014

Respectfully submitted,

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