Hard Copy

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Michael Nicholas Romano

For Review of

FINRA Expedited Proceeding

File No. 3-15978

BRIEF OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY IN OPPOSITION TO APPLICATION FOR REVIEW

Alan Lawhead
Vice President and
Director – Appellate Group

Andrew J. Love
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8281 – Telephone
202-728-8264 – Facsimile

November 3, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Federal Decisions

SEC Decisions and Releases

Federal Statutes and Codes

FINRA Rules and Guidelines

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

Michael Nicholas Romano

For Review of

FINRA Expedited Proceeding

File No. 3-15978

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

The narrow issue presented by this appeal is whether a FINRA Hearing Officer abused his discretion by denying Michael Romano's request to stay a FINRA expedited proceeding pending the completion of a criminal action against him. The facts of this case, and well-established legal precedent, lead to the inescapable conclusion that the Hearing Officer properly denied Romano's stay request. The Commission should therefore dismiss Romano's appeal.

FINRA initiated an expedited proceeding against Romano because he refused to respond to two requests for information, issued in February and March 2014 in accordance with FINRA Rule 8210. FINRA sought documents and information concerning Romano's bank and brokerage accounts, funds received by Romano, Romano's tax returns, his outside business activities, judgments and liens entered against him, and serious allegations that he defrauded investors, embezzled funds from his member firm, improperly used firm credit cards and company funds for personal expenses, and filed false tax returns. Rather than comply with his deep-rooted obligation to provide FINRA with documents and information pertaining to an

investigation, Romano refused to respond. When faced with FINRA's expedited proceeding, Romano requested a hearing to present his defenses for his refusals to respond. Romano then moved to stay the proceeding altogether, claiming—without any evidence or specific facts—that FINRA engaged in state action and that participating in FINRA's proceeding would somehow infringe upon his Constitutional rights.

The Hearing Officer found that Romano failed to demonstrate good cause for staying the FINRA proceeding, denied Romano's stay request, and ordered that the hearing previously requested by Romano proceed as scheduled. Romano refused to appear at the hearing and failed to provide any specific factual or evidentiary basis for his claim that FINRA engaged in state action. Consequently, the Hearing Officer found that Romano abandoned his defenses and dismissed the proceeding. Romano's bar from the securities industry became effective shortly thereafter.

Romano does not dispute any of these facts. Nonetheless, he argues that the Hearing Officer erred in denying his request to stay FINRA's expedited proceeding and that he suffered substantial prejudice as a result. The record, however, shows that the Hearing Officer did not abuse his discretion by refusing to stay the expedited proceeding pending resolution of Romano's criminal case, and appropriately concluded that Romano did not demonstrate good cause to stay FINRA's expedited proceeding. The Hearing Officer considered that the nature of FINRA's expedited proceeding, Romano's request for an indefinite stay of FINRA's proceeding, and FINRA's investigation of potentially serious misconduct by Romano, all weighed against issuing a stay. The Hearing Officer also concluded that Romano had not demonstrated that he would suffer substantial prejudice if FINRA's proceeding was not stayed.

On appeal, Romano has failed to demonstrate that the Hearing Officer abused his discretion by denying his stay request. Indeed, Romano's primary argument in support of his appeal—that by participating in a hearing and asserting "his defenses to the FINRA action, [he] would have been forced to give up" his Fifth and Sixth Amendment rights "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"—is fatally flawed for myriad reasons.

First, Romano's claims concerning his purported Constitutional rights are the classic definition of a red herring. Indeed, Romano muddles the issue of his substantive responses to the questions underlying FINRA's Rule 8210 requests (only one of which directly overlaps with his criminal proceeding) with the one and only subject of FINRA's expedited proceeding—whether Romano had a valid defense for his failures to respond because FINRA had engaged in state action. Romano has never articulated exactly how his lawyer's presentation of a defense in FINRA's expedited proceeding would have caused Romano to give up any Constitutional rights, as the evidence required to successfully prove that FINRA engaged in state action does not in any way implicate Romano's Constitutional rights. Romano's substantive responses to FINRA's underlying Rule 8210 requests were not the issue at this hearing or anytime during FINRA's expedited proceeding. Thus, Romano's argument that he suffered substantial prejudice because the Hearing Officer declined to postpone the hearing on Romano's purported defense is a non-starter.

Second, even assuming that Romano's participation in FINRA's expedited proceeding would have implicated his privileges under the Constitution (which it would not have), Romano has not demonstrated that his Constitutional rights even applied to FINRA's proceeding. The record unequivocally shows that FINRA did not engage in state action by issuing Romano Rule

8210 requests or initiating an expedited proceeding against him in 2014. FINRA staff and the prosecutors in Romano's criminal case had no collaboration or communications in connection with FINRA's Rule 8210 requests to Romano, FINRA's investigation of Romano, or FINRA's initiation of an expedited proceeding for Romano's failures to respond. Thus, there is no nexus between FINRA's actions at issue and the prosecutors in Romano's criminal case, FINRA's actions cannot be fairly attributed to the prosecutors, and Romano's Constitutional rights were never applicable to FINRA's actions or its expedited proceeding.

Likewise, Romano's attempt to show that FINRA engaged in state action by providing documents to prosecutors in connection with a 2012 investigation of Romano's firm and other principals at his firm, and meeting several times to discuss such documents, cannot serve as a basis for finding that FINRA engaged in state action with respect to the Rule 8210 requests issued to Romano and the expedited proceeding against Romano in 2014. Factually, Romano has not demonstrated (or even explained) precisely how or why these earlier interactions are connected to FINRA's Rule 8210 requests to Romano in 2014 and the subsequent expedited proceeding. Further, even assuming that Romano had demonstrated that the two matters were related, Commission precedent dictates that these limited interactions fall well short of the high standard required to demonstrate a sufficiently close nexus between FINRA's actions and the prosecutors in Romano's criminal proceeding, and cannot render FINRA an essential agent of the prosecutors.

Third, the Commission should reject Romano's attempt to favorably compare his present situation to a handful of Commission cases finding that respondents were denied an opportunity to demonstrate that FINRA engaged in state action. Unlike that precedent, Romano had ample opportunity to marshal evidence in support of his claim that FINRA engaged in state action and

to participate in the hearing. Instead, he chose not to submit a single piece of evidence or declaration in support of his defense, refused to articulate his state actor defense with specificity, and refused to participate in a hearing. Such refusal, coupled with Romano's reliance on broad and unsubstantiated theories to demonstrate that good cause existed to stay FINRA's expedited proceeding, is telling. For all of these reasons, the Commission should dismiss Romano's appeal and affirm his bar from the securities industry.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Romano's Background

Romano was the majority owner and co-founder of WJB Capital Group, Inc. ("WJB"), a now defunct broker-dealer. RP 070, 215. He was registered through WJB from October 2000 until December 2011 as, among other things, a general securities representative, a limited representative equity trader, and as an investment banking representative. RP 627-28. Romano associated with another member firm from January 2012 until February 2014, but is not currently associated with any broker-dealer. RP 627.

B. FINRA's 2012 Investigation and Action against WJB

WJB ceased operations and filed for bankruptcy in January 2012. Shortly thereafter, FINRA began investigating WJB, its former chief executive officer, and its former chief financial officer (hereinafter, the "2012 FINRA Net Capital Investigation"). RP 070, 102. To resolve matters uncovered during the 2012 FINRA Net Capital Investigation, WJB, its former chief executive officer, and its former chief financial officer entered into with FINRA a Letter of Acceptance, Waiver, and Consent in June 2012 (the "2012 AWC"). The 2012 AWC expelled WJB, barred the firm's former chief executive officer, and barred as a principal the firm's former

chief financial officer, for, among other things, violating net capital rules, misstating FOCUS reports, maintaining inaccurate books and records, and failing to supervise. RP 102-103.

C. Romano Is Indicted

On February 6, 2014, the Manhattan District Attorney charged Romano, WJB's former chief executive officer, and WJB's former chief financial officer with numerous felonies (hereinafter, the "New York Action"). Specifically, the New York Action charged Romano with: (1) defrauding investors of more than $11 million to keep WJB afloat; (2) convincing at least 15 clients to extend old loans and invest more money with WJB; (3) embezzling more than $7 million from WJB; (4) improperly using WJB credit cards and company funds for personal expenses; and (5) filing false tax returns. RP 215, 219-60. On that same day, Romano's member firm filed a Uniform Termination Notice for Securities Industry Registration, which indicated that he had been terminated based upon "matters that occurred prior to and were unrelated to his employment" with that firm. RP 204.

D. Romano Refuses to Respond to FINRA's Requests for Information and Documents

On February 10, 2014, FINRA commenced its investigation of Romano that is the subject of this appeal. *See* RP 110. On February 18, 2014, FINRA requested from Romano documents and information pursuant to FINRA Rule 8210. The Rule 8210 request sought from Romano 12 separate categories of documents and information, including the following: explanations for Romano's receipt of any funds (including loans or investments in WJB); a list of all bank and brokerage accounts held by Romano or any company he owned or had control over (and all account statements from January 2009 onward); copies of all credit card statements for Romano and WJB; copies of checks or other evidence of credits or debits made to or from accounts that held funds that Romano raised for WJB; a list of Romano's outside business activities; a list of

every compromise or agreement between Romano and creditors, judgments, and liens filed against Romano while at WJB; a list of Romano's personal and business email addresses; copies of Romano's tax returns; and an explanation of the allegations in the New York Action. RP 001-3.[1]

Romano did not provide to FINRA the information and documents it requested. Instead, on February 28, 2014, Romano's attorney emailed FINRA staff to confirm that while Romano had received FINRA's Rule 8210 request, he would "remain silent and he does not want to divulge his defenses" because of the pending New York Action (which he claimed "mirrored" FINRA's investigation). RP 009, 046.

On March 4, 2014, FINRA sent to Romano a second request for information pursuant to Rule 8210. FINRA sought from Romano the same documents and information as it had previously requested on February 18, 2014. FINRA further informed Romano that, notwithstanding the New York Action, his refusal to respond to the request for information violated Rule 8210, and warned Romano that if he did not produce the documents and information requested, he would be subject to an expedited or formal disciplinary proceeding (which could result in a bar from the securities industry). RP 011.

Romano did not provide any documents or information responsive to FINRA's March 4, 2014 request. Similar to his previous response, on March 7, 2014, Romano's counsel informed FINRA that Romano could not at that time provide the information and documents sought and

---

[1] The Rule 8210 request required that Romano provide sworn affidavits concerning two of the requests (a list of all bank and brokerage accounts and all email addresses). RP 002-3. Enforcement subsequently dropped its requirement that Romano provide this information in the form of a sworn affidavit. *See* RP 038-39, 101.

that "Romano is forced to respectfully assert his 5th Amendment privilege against compelled self-incrimination in the FINRA action." RP 014.

E. FINRA Institutes an Expedited Proceeding against Romano for Failing to Respond to Rule 8210 Requests

As a result of Romano's undisputed failures to respond to FINRA's Rule 8210 requests, on March 24, 2014, FINRA's Department of Enforcement ("Enforcement") issued Romano a notice of suspension pursuant to FINRA Rule 9552.[2] RP 015. Enforcement informed Romano that he had failed to provide substantive responses to FINRA's Rule 8210 requests, and that unless he responded to the requests or requested a hearing by April 17, 2014, he would be suspended from associating with any broker-dealer. The notice stated that if Romano requested a hearing, he must state any and all defenses with specificity. The notice further provided that if Romano failed to request the termination of any suspension within three months, he would be automatically barred on June 27, 2014. RP 016.

On April 16, 2014, Romano requested a hearing pursuant to FINRA Rule 9552(e), and the Hearing Officer scheduled a hearing for May 16, 2014.[3] RP 019, 029. Shortly after

---

[2] FINRA Rule 9552(a) provides that, if a member or associated person fails to provide any information requested under FINRA's rules, FINRA staff may provide written notice specifying the nature of the failure and stating that a failure to take corrective action within 21 days after service of the notice will result in a suspension.

[3] Under FINRA Rules 9552(d) and 9559(c), a request for a hearing under Rule 9552 stays the effective date of the suspension. A party requesting a hearing must state, with specificity, any and all defenses to the FINRA action. *See* FINRA Rule 9552(e). In Romano's hearing request, he did not raise any defenses based upon the theory that FINRA engaged in state action. Rather, Romano asserted as a defense that he "strongly disclaims responsibility" for the misconduct that was the subject of FINRA's Rule 8210 requests. *See* RP 019. Romano subsequently raised as a general defense that requiring him to comply with FINRA's requests for information would require him to waive his Fifth and Sixth Amendment rights. *See* RP 047-48 (April 22, 2014 transcript of pre-hearing conference); RP 069 (Romano's request to stay).

Romano's hearing request, and pursuant to FINRA Rule 9559(h), Enforcement turned over to Romano all documents it considered in issuing the suspension notice. *See* RP 305.

F. Romano Seeks to Stay the Hearing and FINRA's Expedited Proceeding

On April 23, 2014, Romano filed a Motion to Stay FINRA Action (the "Stay Motion"). RP 069. The Stay Motion argued, without any elaboration, that the "allegations" set forth in FINRA's Rule 8210 requests are identical to the allegations of the New York Action, and that "[i]f Romano is forced by FINRA to disclose documents and give sworn testimony, he will be stripped of his constitutional rights to remain silent (5th Amendment) and not to be forced to give up his attorney-client privilege and divulge his defenses to the indictment (6th Amendment)." RP 071-72. Romano further argued that he was "faced with the Hobson's choice of choosing between his livelihood and his liberty," and asserted, without any evidence or support, that FINRA and the prosecutors in the New York Action "are sufficiently closely coordinated as to make FINRA an essential agent of the prosecuting authority." RP 072-73. Romano requested that the Hearing Officer stay Enforcement's investigation, the hearing, and the expedited proceeding against him until the conclusion of the New York Action. RP 072. Romano did not include any declarations, documents, or other evidence in connection with the Stay Motion.

Enforcement opposed the Stay Motion and Romano's request for an indefinite stay of FINRA's expedited proceeding. RP 099. Enforcement provided several signed declarations from FINRA staff personally involved with Enforcement's 2014 investigation of Romano underlying these proceedings, as well as staff personally involved with the 2012 FINRA Net Capital Investigation. FINRA staff stated that, in connection with FINRA's 2014 investigation of Romano pursuant to which it issued the two Rule 8210 requests, it did not have any contact with prosecutors in the New York Action. *See* RP 111. Staff also stated that FINRA has been

unable to complete its investigation of Romano because he failed to respond to the requests for information, and that the prosecutors in the New York Action never asked FINRA to use its regulatory authority to obtain information for use in that criminal matter, and FINRA likewise never asked the prosecutors for them to use their authority to obtain documents for use in FINRA's proceedings. RP 109, 111, 113. FINRA staff further stated, however, that they had provided documents to the prosecutors obtained in connection with the 2012 FINRA Net Capital Investigation and met with prosecutors on several occasions in 2012 and 2013 in connection with the 2012 FINRA Net Capital Investigation. *See* RP 108-109, 112-13.

G. The Hearing Officer Denies the Stay Motion and Finds that Romano Abandoned his Defenses

On April 29, 2014, the Hearing Officer denied the Stay Motion and issued an abbreviated order to enable the parties to plan for the hearing scheduled for May 16, 2014. RP 135. The Hearing Officer also directed Romano to supplement his request for a hearing if he intended to assert any defenses that FINRA engaged in state action and to state with specificity the factual bases for such defenses. *See* RP 133-34.

The Hearing Officer issued a Supplemental Order Denying Stay (the "Stay Order") on May 2, 2014. The Stay Order found that Romano failed to demonstrate that good cause existed to stay the hearing. RP 145-50. Specifically, the Stay Order found that the following all weighed against granting a stay: (1) the nature of the expedited proceeding at issue, particularly when viewed in light of Romano's request for an indefinite stay; (2) the potential serious rule violations involving investors underlying FINRA's investigation of Romano; and (3) the lack of substantial prejudice to Romano if the stay was denied and his failure to show that he would be required to waive any rights or privileges he claimed to possess if he asserted his defenses for failing to respond to the Rule 8210 requests.

After receiving the Stay Order, Romano informed FINRA that he would not participate in the hearing scheduled for May 16, 2014, and against asserted—without further elaboration—that he could not participate in a hearing to present his defenses as to why he failed to respond "without waiving his Fifth Amendment right against compelled self-incrimination and his attorney-client privilege, and divulging his defenses to the pending indictment." RP 141. Further, Romano did not supplement his hearing request and state with specificity his defenses, as previously directed by the Hearing Officer and required by FINRA's rules. Consequently, on May 7, 2014, the Hearing Officer found that Romano had abandoned his defenses and waived his hearing request. The Hearing Officer dismissed the proceeding and ordered that the March 24, 2014 notice of suspension shall be deemed a final FINRA action. RP 299-302. Pursuant to a letter dated June 27, 2014, FINRA notified Romano that he was barred.[4] RP 615.

On July 16, 2014, Romano filed with the Commission a notice of appeal. RP 621. On appeal, Romano largely repeats the arguments he made in the Stay Motion to assert that the Hearing Officer wrongfully denied his stay request.

III. SUMMARY OF ARGUMENT

Romano has not shown that the Hearing Officer abused his discretion in denying the Stay Motion. He does not dispute that he refused to respond to FINRA's Rule 8210 requests. Rather, Romano argues that the Hearing Officer improperly denied the Stay Motion based largely upon his claims that: (1) he somehow would have been forced to give up his Constitutional rights by

[4] FINRA Rule 9559(m) states that if a respondent fails to, among other things, appear at a hearing requested under the Rule 9550 Series, it shall be considered an abandonment of the respondent's defense and waiver of any opportunity for a hearing and that the original notice shall be deemed to be final FINRA action.

participating in the hearing to prove his defenses for failing to respond to FINRA's requests; and (2) FINRA and the prosecutors in the New York Action were somehow acting together with regard to FINRA's 2014 Rule 8210 requests to Romano, such that FINRA should be considered a state actor.

Romano's assertions, however, are completely unfounded, and he has failed to carry his heavy burden to demonstrate that the Hearing Officer should have stayed FINRA's expedited proceeding. The Hearing Officer properly assessed a number of factors that weighed against issuing a stay, and properly determined that Romano did not suffer any prejudice as a result of the Hearing Officer's denial of his stay request. Indeed, Romano has never explained how or why he would have been required to give up any rights, whether real or illusory, by presenting his claimed defense that FINRA engaged in state action. Moreover, Romano has not demonstrated that his Constitutional rights had any applicability to FINRA's proceeding. Declarations from FINRA staff thoroughly undercut Romano's sheer speculation that FINRA and the prosecutors in the New York Action were acting on each other's behalf such that FINRA could be considered an arm of the prosecutors.

Romano had ample opportunity to present his defense that FINRA engaged in state action, marshal evidence in support of his defense, and to confront FINRA staff and to present his own evidence to support this claim at a hearing. Romano chose not to do so, refused to participate in a hearing, refused to specify any facts that purportedly supported his defense that FINRA engaged in state action, and constructively abandoned his defense. Simply put, Romano presented no valid reason why the FINRA expedited proceeding should have been stayed pending completion of his criminal case. The Commission should therefore affirm the Hearing Officer's denial.

Moreover, while not addressed by Romano on appeal, the Commission should affirm the bar imposed for Romano's failures to respond. Pursuant to FINRA's procedural rules, its suspension notice (and warning to Romano that he would be barred) became FINRA's final action when Romano intentionally abandoned his defenses and his request for a hearing. The specific grounds for the resultant bar exist in fact, and the bar was issued in accordance with FINRA's rules in a manner consistent with the purposes of the Exchange Act. FINRA therefore urges the Commission to dismiss Romano's appeal.

IV. ARGUMENT

Romano has not demonstrated that the Hearing Officer abused his discretion by denying the Stay Motion. Consequently, the Commission should dismiss his appeal.

A. Standard of Review

As an initial matter, the Commission should review the Hearing Officer's denial of the Stay Motion under an abuse of discretion standard. *See, e.g.*, *SEC v. Wright*, 261 F. App'x 259, 262-63 (11th Cir. 2008) (finding that trial court did not abuse its discretion in refusing to stay civil proceedings pending outcome of related criminal proceedings and stating that "the blanket assertion of the privilege against self-incrimination is an inadequate basis for the issuance of a stay"); *Klay v. Pacificare Health Sys., Inc.*, 389 F.3d 1191, 1203 (11th Cir. 2004) (reviewing a district court's denial of a motion to stay litigation under an abuse of discretion standard) (citations omitted); *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004) ("The decision whether or not to stay civil litigation in deference to parallel criminal proceedings is discretionary. Accordingly, we review the denial of a motion to stay for abuse of discretion.") (internal citations omitted); *see also Robert J. Prager*, 58 S.E.C. 634, 664 (2005) (stating that "[i]n NASD proceedings, the trier of fact has broad discretion in determining

whether to grant a request for a continuance"); *Whiteside & Co., Inc.*, 49 S.E.C. 963, 967 (1988) ("The law does not require unlimited postponements of judicial proceedings, and the NASD has broad discretion as to whether or not a continuance should be granted. We find no abuse of discretion here."), *aff'd*, 883 F.2d 7 (5th Cir. 1989).

"A movant must carry a heavy burden to succeed in such an endeavor." *Microfinancial*, 385 F.3d at 77. The abuse of discretion standard gives an adjudicator a range of choices, so long as that choice does not constitute a clear error of judgment. *See, e.g.*, *United States v. Lopez*, 649 F.3d 1222, 1236 (11th Cir. 2011).

B. The Hearing Officer Did Not Abuse his Discretion in Denying the Stay Motion

Romano has not demonstrated, and the record does not show, that the Hearing Officer abused his discretion in denying the Stay Motion. Unlike FINRA's general procedural rules governing disciplinary proceedings, FINRA's Rule 9550 Series, which governs expedited proceedings, does not contain any specific provision that permits a respondent such as Romano to move to stay a FINRA expedited proceeding. FINRA Rule 9559(d)(6), however, grants a hearing officer the authority to extend or shorten any time period in an expedited proceeding—including the requirement under FINRA Rule 9559(f)(3) that an expedited hearing for failing to respond to Rule 8210 requests occur within thirty days of the request for a hearing—"[f]or good cause shown."[5] Based on the record before the Hearing Officer, and the evidence (or lack

---

[5] *Cf. SEC v. Dresser Inds., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (refusing to quash an SEC subpoena in light of a parallel criminal investigation into the same matter and stating that "[i]n the absence of substantial prejudice to the rights of the parties involved" parallel civil and criminal proceedings are unobjectionable); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325-26 (9th Cir. 1995) (stating that in the absence of substantial prejudice, simultaneous criminal and civil proceedings are not objectionable, and affirming denial of a stay request after considering the interest of the plaintiff in proceeding expeditiously, the burden imposed on the

[Footnote continued on next page]

thereof) presented by Romano to support his arguments that FINRA's proceedings should have been stayed, the Hearing Officer's denial of Romano's stay request was well within the range of acceptable choices. Romano's assertion to the contrary should be rejected.

1. The Hearing Officer Properly Considered Several Factors that Weighed against a Stay

In determining whether good cause existed to grant the Stay Motion, the Hearing Officer considered several factors that weighed against Romano. For example, the Hearing Officer correctly found that Romano's open-ended request for an indefinite postponement of FINRA's proceeding was at odds with the seriousness of FINRA's investigation into Romano's potential misconduct and the very purpose of FINRA's expedited rules governing Romano's refusal to provide FINRA with information, and weighed against a stay. *See* RP 145-50. The Rule 8210 requests sought information concerning, among other things, Romano's potential fraud, embezzlement, improper use of funds, false tax returns, his outside business activities, and judgments and liens filed against him. The seriousness of these areas of potential misconduct, and Romano's flat out refusal to provide information pursuant to Rule 8210, was reflected in Enforcement's initiation of expedited proceedings under FINRA Rule 9552. *See FINRA Regulatory Notice 10-13*, 2010 FINRA LEXIS 22, at *2 (Feb. 2010) (announcing the Commission's approval of revisions to FINRA's Rule 9550 Series and stating that the rules are "a procedural mechanism for FINRA to address certain types of misconduct in an accelerated timeframe"). The Hearing Officer properly weighed these factors when he determined that

---

[cont'd]

defendant, the convenience of the court in managing its cases, and the interest of others not party to the litigation and the public). As set forth below, the Hearing Officer incorporated many of these factors into his analysis of the Stay Motion.

Romano failed to show good cause for staying FINRA's expedited proceeding until the New York Action concluded.

Moreover, an associated person's vital obligation to comply with FINRA's requests for information supports the Hearing Officer's denial of the Stay Motion. Rule 8210 "provides a means, in the absence of subpoena power, for [FINRA] to obtain from its members information necessary to conduct investigations." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *12 (Apr. 11, 2008), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009). "The rule is at the heart of the self-regulatory system for the securities industry" and unequivocally obligates associated persons, such as Romano, to comply with FINRA information requests. *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). Associated persons have an obligation to respond fully to FINRA's inquiries of their business activities. *CMG Institutional Trading, LLC*, Exchange Act Release No. 59325, 2009 SEC LEXIS 215, at *21 (Jan. 30, 2009) (citations omitted). Romano's failure to respond to FINRA's requests for information flouted the policies underlying Rule 8210 and hampered Enforcement's ability to investigate potentially serious misconduct.

Romano argues that the fact that FINRA chose to bring an expedited proceeding should not have weighed against him and he "should not have been penalized for something he had no say in." *See* Romano's Brief, at 6. Romano misconstrues the Hearing Officer's assessment, in the context of rendering a decision on the Stay Motion, of FINRA's decision to initiate an expedited proceeding. In considering whether to grant the Stay Motion, the Hearing Officer properly assessed and weighed interests other than Romano's to assess the propriety of staying FINRA's proceeding. *See, e.g.*, *Keating*, 45 F.3d at 325 (considering, among other things, the interest of the plaintiff in proceeding expeditiously and the interest of the public and others not

party to the litigation). The fact that Enforcement initiated these proceedings under its expedited rules to litigate this matter more quickly supports the Hearing Officer's refusal to stay FINRA's proceeding pending completion of Romano's criminal case.

Similarly, Romano's attempt to downplay his request to stay FINRA's proceedings for an indefinite duration should be rejected. While confessing that he cannot "provide an exact time frame within which his criminal case would conclude," Romano suggests that an end to his criminal case is in sight because he has been indicted. *See* Romano's Brief, at 6-7. Before the Hearing Officer, however, Romano's counsel stated that he would need three to four months before he could even determine how long Romano's criminal case would take, and then he might need as long as an additional 12-month stay after that. *See* RP 053. Thus, regardless of Romano's indictment, his request for an extended stay was unreasonable.

Moreover, Romano's argument that FINRA's initiation of an expedited proceeding was unnecessary is purely speculative and is belied by the seriousness of FINRA's areas of inquiry set forth in the Rule 8210 requests. Enforcement's decision to initiate an expedited proceeding against Romano for his failures to respond to the Rule 8210 requests was entirely appropriate. *See* FINRA Rule 9552(a) (stating that FINRA staff *may* bring an expedited proceeding for a failure to respond to Rule 8210 request); *Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (holding that FINRA proceedings "are treated as an exercise of prosecutorial discretion . . . decisions to initiate investigations are given wide latitude") (internal citations omitted).

2. Romano Was Not Substantially Prejudiced by the Denial of his Stay Motion

The Hearing Officer also found that Romano had not demonstrated good cause for staying FINRA's expedited proceeding because he failed to show that he would be substantially

prejudiced by a denial of the Stay Motion. *See* RP 147-50. This determination is entirely supported by the record.

a. Romano Has Not Demonstrated that Presenting his Defense for Failing to Respond Would Have Required him to Waive any Rights

As an initial matter, Romano's argument that he would have somehow been forced to give up his purported rights under the Fifth and Sixth Amendments by participating in FINRA's proceeding is a nonsequitur and should be rejected.[6]

In FINRA's expedited proceeding, Romano requested a hearing, the purpose of which was to determine if he violated Rule 8210 (which he did not dispute) and whether he had any valid defense for his failures to respond to the Rule 8210 requests.[7] *See* RP 049-50 (transcript from pre-hearing conference during which Hearing Officer informed all parties that the hearing's purpose would concern Romano's defense for failing to respond). On appeal, Romano argues that "[i]n order to participate in the hearing, and 'assert his defenses to the FINRA action,' [he] would have been forced to give up" his Fifth and Sixth Amendment rights "in much the same

---

[6] The Fifth Amendment to the Constitution provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Sixth Amendment states that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[7] Romano's admission that he failed to comply with FINRA's requests establishes a prima facie violation of FINRA Rules 8210 and 2010. *See* RP 046; *see also Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *11-12 (Nov. 8, 2007); *see also Brian L. Gibbons*, 52 S.E.C. 791 (1996) (holding that an associated person violates Rule 8210 when he fails to provide full and prompt cooperation to FINRA in response to a FINRA request for information), *aff'd*, 112 F.3d 516 (9th Cir. 1997).

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." *See* Romano's Brief, at 8.

Romano, however, fails to explain how he makes this leap of logic. Romano does not address how he would have waived any rights that he allegedly possessed under the Fifth or Sixth Amendments by participating in a hearing where Romano's only asserted defense for his failure to comply with the Rule 8210 requests—and thus the only issue to litigate—was that FINRA engaged in state action. The evidence necessary to demonstrate that FINRA engaged in state action with the prosecutors in the New York Action is completely independent of Romano's actual, substantive, and hypothetical responses to the requests for information concerning Romano's potential misconduct (only one of which asked questions directly related to the New York Action).[8] Romano has not demonstrated that his Constitutional rights would have been implicated at a hearing to show that FINRA engaged in state action by issuing the Rule 8210 requests and bringing the expedited action. On this basis alone, the Commission should find that Romano did not suffer substantial prejudice and affirm the Hearing Officer's denial.[9]

---

[8] At no time has Romano explained why he could not, based upon the existence of the New York Action, provide FINRA with the remaining information (including information concerning his outside business activities and judgments and liens entered against him). On appeal, Romano ignores this glaring omission and attempts to perpetuate his erroneous assertion that the information sought by FINRA and the allegations in the New York Action were identical. *See* Romano's Brief, at 3 (asserting that the "allegations set forth in the February 18, 2014, letter are exactly the same allegations contained in the indictment"), 7-8 (asserting that the subject matter of the expedited proceeding mirrors the issues raised in the New York Action).

[9] Similarly, the Commission should reject Romano's argument that the fact that he has been indicted in connection with the New York Action (versus merely being under investigation) should have carried some extra weight in determining whether to grant the Stay Motion. *See* Romano's Brief, at 6-7. The Commission has held, without making any distinction regarding whether a criminal proceeding has morphed into an indictment, that an SRO proceeding should not be stayed pending completion of a criminal matter based upon a respondent's Fifth Amendment rights against self-incrimination. *See Dan Adlai Druz*, 52 S.E.C. 416, 428-29

[Footnote continued on next page]

b. Romano Has Not Demonstrated that FINRA Engaged in State Action

Moreover, even assuming that Romano could somehow demonstrate that any rights he possessed under the Constitution could have been implicated by participating in the hearing to present his defense that FINRA engaged in state action (which he cannot), Romano has not demonstrated that FINRA engaged in state action such that Romano's purported Constitutional rights had any applicability in FINRA's proceeding. Consequently, Romano could not have been substantially prejudiced by the Hearing Officer's denial of his Stay Motion because the rights Romano claimed he would have given up had no applicability to FINRA's expedited proceeding.

[cont'd]

(1995) (rejecting appellant's argument that the NYSE improperly denied his motion to stay an NYSE proceeding and stating that appellant "cannot now use the Fifth Amendment privilege against self-incrimination as a shield in this disciplinary proceeding"), *aff'd*, 103 F.3d 112 (3d Cir. 1996); *see also United States v. Kordel*, 397 U.S. 1, 11 (1970) (observing that the Constitution does not provide parties blanket protection from the perils of contemporaneous criminal and civil proceedings).

Further, the authorities cited by Romano making such a distinction do not support his claim that the Hearing Officer abused his discretion. For example, in *Dresser*, 628 F.2d at 1376, the court denied a request to squash a subpoena issued by the Commission, finding that the subpoena did not require Dresser to reveal the basis for his defense (much like Romano's situation in the expedited proceeding). In *United States v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802 (E.D.N.Y. 1992), the movant sought to stay a civil RICO action commenced by the federal government pending completion of a criminal matter; thus there was no question that movant's Constitutional rights may have been implicated in the civil action. Finally, while the court in *In Re Par Pharmaceutical, Inc. Sec. Litig.*, 133 F.R.D. 12 (S.D.N.Y. 1992) stated that the weight of authority in the Second Circuit indicates that courts will stay a civil proceeding when a related criminal proceeding has ripened into an indictment, Romano has not demonstrated that his participation in a hearing concerning whether FINRA engaged in state action would have implicated in any way his Constitutional rights (nor has he demonstrated that FINRA's investigation and the New York Action are related). Thus, whether Romano has been indicted has no bearing on whether he suffered any prejudice or demonstrated good cause in support of his Stay Motion.

i. FINRA Is Not Inherently a State Actor

The Commission should reject Romano's suggestions that FINRA is inherently a state actor by virtue of its role of upholding securities laws and regulations under the Commission's oversight. *See* Romano's Brief, at 10-12. The Commission, in rejecting similar arguments in the past, has stated that although FINRA "plays an important part in the highly regulated securities industry and is subject to SEC oversight," these facts do not render it a state actor. *See Fawcett*, 2007 SEC LEXIS 2598, at *13-15 (rejecting appellant's argument that he was denied his rights under the Fifth Amendment in connection with a FINRA proceeding and holding that FINRA is not a state actor because it exercises a "public function," has control over an individual's right to work in the securities industry, and is closely supervised by the Commission) (internal citations omitted). Romano has not provided the Commission with any legitimate reason to stray from this precedent.

ii. The High Burden Required to Show FINRA Engaged in State Action in This Case

The Commission has "found repeatedly that FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings." *Gregory Evan Goldstein*, Exchange Act Release No. 71970, 2014 SEC LEXIS 1350, at *26 (Apr. 17, 2014) (internal citations omitted); *see also Asensio & Company, Inc.*, Exchange Act Release No. 68505, 2012 SEC LEXIS 3954, at *61 (Dec. 20, 2012) (stating that "[i]t is well established that the requirements of constitutional due process do not apply to FINRA because FINRA is not a state actor.") (citing, inter alia, *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 162 (2d Cir. 2002)). A long line of Commission decisions have held that

FINRA, and NASD before it, are not state actors for due process challenges and other constitutional claims.[10]

Indeed, private entities such as FINRA may be held to Constitutional standards only if their actions are "fairly attributable" to the state. *Goldstein*, 2014 SEC LEXIS 1350, at *24; *Desiderio*, 191 F.3d at 206. The Commission and other adjudicators have stated that actions are "fairly attributable" to the state where "there is a sufficiently close nexus between the State and the challenged action." *Goldstein*, 2014 SEC LEXIS 1350, at *25-26. Factors weighed in this determination include whether: (1) "a challenged action results from the State's exercise of its coercive power;" (2) the state provides significant overt or covert encouragement to the private entity that engaged in the challenged action; or (3) whether the private entity operates as a willful participant in the joint activity with the state. *Id.* at *25. The Commission has cautioned, however, that "mere approval of or acquiescence in the initiatives of a private party is not sufficient" for holding the state responsible for the private entity's challenged action. *Id.* (citing to *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)). Moreover, mere cooperation between FINRA and a governmental agency is insufficient to render FINRA a state actor. *Justin F.*

---

[10] *See Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011) (finding that constitutional due process requirements do not apply to FINRA because FINRA is not a state actor); *Mission Sec. Corp.*, Exchange Act Release No. 63453, 2010 SEC LEXIS 4053, at *31 (Dec. 7, 2010) (stating that courts have held that self-regulatory organizations such as FINRA are not state actors for purposes of due process claims (citing inter alia *Desiderio v. NASD*, 191 F.3d 198, 206 (2d Cir. 1999)); *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 SEC LEXIS 2417, at *25 (July 17, 2009) (finding that self-regulatory organizations are not state actors and therefore not subject to the Constitution's due process requirements); *Vladislav Zubkis*, 53 S.E.C. 794, 797 n.2 (1998) (finding no Fifth Amendment privilege because self-regulatory organizations are not state actors); *Druz*, 52 S.E.C. at 428-29 (same as to a securities exchange); *Daniel Turov*, 51 S.E.C. 235, 238 (1992) (same); *Frank W. Leonesio*, 48 S.E.C. 544, 549 (1986) (same); *Lawrence H. Abercrombie*, 47 S.E.C. 176, 177 (1979) (same).

Ficken, Exchange Act Release No. 54699, 2006 SEC LEXIS 2547, at *24 (Nov. 3, 2006). The burden rests upon the party contending that a private actor's actions are fairly attributable to the state to prove a sufficiently close nexus between the challenged action and the state. *Id.* That burden is high. *Id.* Romano has not met the high burden required to show a sufficiently close nexus between FINRA and prosecutors in the New York Action with respect to FINRA's Rule 8210 requests or the expedited proceeding.

iii. FINRA's Rule 8210 Requests and Expedited Proceeding Are Not Fairly Attributable to Prosecutors in the New York Action

The Commission should reject Romano's argument that FINRA engaged in state action based upon the fact that FINRA provided prosecutors in the New York Action with documents related to the 2012 FINRA Net Capital Investigation and met with prosecutors on several occasions in connection with that investigation. These facts (which are the only facts Romano avers to support his defense) cannot serve as a basis for showing that FINRA engaged in state action in connection with its Rule 8210 requests issued to Romano in 2014 and the expedited proceeding against Romano (such that he possessed rights under the U.S. Constitution in FINRA's expedited proceeding). Romano's unexplained leap of logic—that the Commission should look at FINRA's limited interactions with prosecutors in the years prior to the New York Action in connection with the documents FINRA obtained in the 2012 FINRA Net Capital Investigation to find that FINRA somehow engaged in state action with respect to its Rule 8210 requests made to Romano in February 2014—is a chasm too far to bridge. *See Desiderio*, 191 F.3d at 207 (holding that appellant must show a nexus between the state and the specific conduct of which the appellant complains); *Michael Sassano*, Exchange Act Release No. 58632, 2008 SEC LEXIS 2947, at *28 (Sept. 24, 2008) (holding that the relevant issue in determining whether

NYSE engaged in state action is whether its requests for appellant's testimony may be fairly attributable to the state, not actions that occurred subsequent to such requests).

Romano has not demonstrated that the 2012 FINRA Net Capital Investigation or FINRA's discussions with prosecutors concerning the 2012 FINRA Net Capital Investigation had anything to do with FINRA's 2014 investigation of Romano, the 2014 Rule 8210 requests, or the expedited proceeding. In addition, he does not specifically explain how FINRA's limited interactions with the prosecutors regarding the 2012 FINRA Net Capital Investigation are tied to FINRA's actions in 2014.[11] To the contrary, the record shows that FINRA staff had no contact with prosecutors in the New York Action in connection with the Rule 8210 requests issued to Romano. *See* RP 111. Romano has not demonstrated, and cannot demonstrate, that prosecutors exercised their coercive power over FINRA to initiate its investigation and request information from Romano, encouraged FINRA to do so, or that FINRA willfully participated in a joint action with prosecutors. *See Goldstein*, 2014 SEC LEXIS 1350, at *25.

---

[11] Moreover, to the extent that Romano argues that Enforcement could not seek from him information concerning the allegations in the New York Action, the Commission should reject such argument. FINRA Rule 8210(a) provides that FINRA may seek from an associated person information with respect to any matter related to an investigation, complaint, examination, or proceeding. It was entirely appropriate for FINRA to seek information from Romano in connection with its investigation into whether he, among other things, defrauded investors, filed false tax returns, and embezzled and misused funds from his member firm, even if FINRA's requests touched upon the allegations of the New York Action. *See D.L. Cromwell*, 279 F.3d at 162-63 (affirming findings that FINRA and prosecutors "pursued similar evidentiary trails because their independent investigations were proceeding in the same direction: the possibility of improper trading"); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000) (holding that "questions put to the defendants by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-incrimination"); *Sassano*, 2008 SEC LEXIS 2947, at *24 (holding that overlapping requests for information from FINRA and the Commission do "not establish that these were other than parallel investigations of the same underlying activities").

Further, even if Romano could somehow tie FINRA's limited interaction with the prosecutors in connection with the documents it obtained in the 2012 FINRA Net Capital Investigation to FINRA's subsequent issuance of the Rule 8210 requests and the initiation of the expedited proceeding in 2014 (which he has not done), Romano still falls far short of the high bar required to show that FINRA's Rule 8210 requests and the expedited proceeding are fairly attributable to the government such that his Fifth and Sixth Amendment rights were compromised. *See D.L. Cromwell*, 279 F. 3d at 162-63 (holding that appellants did not demonstrate state action notwithstanding that NASD Regulation and the government had each commenced investigations into the misconduct at issue and NASD Regulation had shared information with the government); *Sassano*, 2008 SEC LEXIS 2947, at *24-25 (holding that while appellant presented evidence of coordination between NYSE and the Commission, such general collaboration or cooperation is insufficient and that appellant must show evidence suggesting an "interdependence" between the government investigation and NYSE's request for testimony). Thus, FINRA's prior interactions with prosecutors, even if somehow related to FINRA's actions in 2014, fall well within the range of activities that FINRA is permitted to engage in without being characterized as a state actor.

Moreover, Romano's unsupported allegations that it is "obvious" that FINRA and the prosecutors worked "hand-in-hand" cannot serve as a basis for his claims that FINRA engaged in state action. *See D.L. Cromwell*, 279 F.3d at 162-63 (finding no direct evidence proving state actor claims and refusing to infer from the chronology of events that appellants had made such as showing); *Sassano*, 2008 SEC LEXIS 3135, at *24 (holding that the timing of simultaneous regulatory investigations is insufficient to prove a causal connection or that a governmental agency guided an SRO's investigation); *cf. Frank P. Quattrone*, Exchange Act Release No.

53547, 2006 SEC LEXIS 703, at *20 (Mar. 24, 2006) (stating that appellant "did not rely on mere conclusory allegations or speculation" to support his argument that FINRA engaged in state action). Romano did not suffer substantial prejudice as a result of the Hearing Officer's refusal to issue a stay because FINRA did not engage in state action; therefore Romano's Constitutional rights did not apply to FINRA's proceedings.[12]

c. Romano's Opportunity and Refusal to Participate in FINRA's Proceedings Distinguish this Matter from *Quattrone*

Perhaps realizing the dearth of evidence supporting his purported defense that FINRA somehow engaged in state action by issuing Romano Rule 8210 requests or initiating an expedited proceeding, Romano attempts to compare the facts and circumstances of this case to a

[12] The Commission should also reject Romano's specious argument that he would have been forced to give up his Sixth Amendment rights if forced to participate in the hearing. *See* Romano's Brief, at 16-17. First, as set forth above, Romano has not demonstrated that any of his Constitutional rights would have been implicated at an evidentiary hearing to present his defense that FINRA engaged in state action. Nor has he demonstrated that FINRA's Rule 8210 requests, or the initiation of the expedited proceeding, constitute state action. Thus, Romano's purported Sixth Amendment rights have no applicability to FINRA's expedited proceeding. Further, it is well established that FINRA proceedings are not criminal proceedings, and that in FINRA proceedings there is no right to counsel. *See Falcon Trading Group, Ltd.*, 52 S.E.C. 554, 559 (1995) (holding that although FINRA proceedings permit the participation of counsel, there is no constitutional or statutory right to counsel in such proceedings), *aff'd*, 102 F.3d 579 (D.C. Cir. 1996); *Pacific On-Line Trading & Sec. Inc.*, 56 S.E.C. 1111, 1123 (2003) (holding that FINRA proceedings are not criminal proceedings); *Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960) (holding that Sixth Amendment is exclusively limited to criminal proceedings).

Second, even assuming that the Sixth Amendment has any applicability to FINRA's Rule 8210 requests and the expedited proceeding at issue (it does not), Romano's broad assertions concerning these rights are, at best, puzzling. For instance, it is unclear how Romano's mere participation in a hearing could have infringed upon his attorney-client privilege or required him to divulge privileged conversations with his attorney. Nor is it clear how the fact that Romano may have been forced to divulge defenses (which every successful respondent or defendant eventually must do) makes his case unique or touches upon his Sixth Amendment rights. Romano provides not a single detail, explanation, or fact in support of these sweeping claims. Romano cannot make such a quixotic and broad argument, refuse to elaborate or present a shred of evidence in support of such argument, and then successfully press the same argument before an appellate tribunal.

handful of Commission cases finding that the appellants in those cases did not have an opportunity below to develop their arguments that FINRA engaged in state action. The Commission should flatly reject Romano's invitation to compare his case to this prior precedent. Romano had every opportunity to present and argue his defense below, but chose not to do so.

For example, in *Quattrone*, the Commission set aside a FINRA decision that dismissed, on a motion for summary disposition, appellant's claims that certain Rule 8210 requests constituted state action. 2006 SEC LEXIS 703. In that case, FINRA, the New York Stock Exchange, and the Commission had commenced a joint investigation against Quattrone's firm. FINRA subsequently requested, pursuant to Rule 8210, that Quattrone provide on-the-record testimony. At or around the same time, Commission staff sent Quattrone a letter emphasizing the joint nature of FINRA's investigation into Quattrone, that any settlement discussions would necessarily involve the Commission, FINRA, and NYSE, and that the three regulators would confer to determine how to proceed if no settlement was reached. *Id.* at *8-9. Quattrone refused to testify, and FINRA's Department of Enforcement filed a complaint against him alleging that he violated Rules 8210 and 2110. Enforcement filed a motion for summary disposition, which Quattrone opposed based upon his alleged Fifth Amendment rights that arose by virtue of the joint nature of FINRA's investigation with the Commission. *Id.* at *11-12. A FINRA Hearing Panel granted summary disposition on liability, thus precluding Quattrone from presenting evidence on the issue of FINRA's joint action with the Commission. FINRA's National Adjudicatory Council affirmed the Hearing Panel's liability findings.

On appeal, the Commission held that while its cases as well as federal court opinions consistently hold that FINRA is not a state actor, and that "cooperation between the Commission and NASD will rarely render NASD a state actor," summary disposition on whether FINRA

engaged in state action was inappropriate. *Id.* at *17-18, *22. The Commission found that the joint inquiry into potential wrongdoing by FINRA and the Commission, as well as the Commission's letter to Quattrone emphasizing the joint nature of the investigation, presented a genuine issue of material fact such that summary disposition was inappropriate. *Id.* at *19. The Commission found that Quattrone "did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention" that FINRA engaged in state action. *Id.* at *20.

Similarly, in *Ficken*, the respondent declined to appear at an investigative interview and give testimony to FINRA based upon his likely indictment on criminal charges for matters similar to those relating to FINRA's investigation. 2006 SEC LEXIS 2547, at *4-6. Enforcement sought summary disposition before a FINRA Hearing Panel based upon Ficken's refusal to testify. Ficken's counsel asserted that he was prepared to show that a FINRA employee had worked with the Commission on the case and believed he could produce evidence of sufficient cooperation between FINRA, the Commission, and the Department of Justice to support Ficken's argument that FINRA engaged in state action. *Id.* at *6-7. The Hearing Panel granted Enforcement's summary disposition motion, rejected Ficken's defense, and the NAC affirmed the Hearing Panel's findings.

On appeal, Ficken argued that the Hearing Panel did not afford him adequate discovery prior to granting summary disposition on the issue of whether FINRA engaged in state action. *Id.* at *13-14. The Commission, citing its recent decision in *Quattrone* and reiterating that the burden on the party seeking to show FINRA engaged in state action is high, remanded the matter to permit Ficken to explain precisely how the facts he possessed supported his claims that FINRA engaged in state action, why he needed additional discovery, and directed him to state

with "some precision" the documents and information he hoped to obtain with further discovery and to produce testimony or affidavits to support his assertions of joint action. *Id.* at *24-26.

Finally, in *Warren E. Turk*, the Commission remanded to the NYSE for further proceedings a matter involving a respondent who asserted that the NYSE engaged in state action as a defense to his failure to provide testimony. The Commission remanded the matter because the evidentiary hearing occurred before the Commission's decision in *Quattrone* and it "believe[d] it [was] appropriate to provide Turk an opportunity to develop a full evidentiary record on the state action question." Exchange Act Release No. 55942, 2007 SEC LEXIS 1355, at *19 (June 22, 2007). The Commission warned future litigants in similar situations that, "we expect that, in the future, parties will seek to introduce any evidence related to the state action issue during the initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO." *Id.* at *19 n.27.

Unlike *Quattrone*, *Ficken*, and *Turk*, Romano was presented with ample opportunity to make his case before the Hearing Officer that FINRA engaged in state action. In fact, the Hearing Officer expressly ordered Romano to allege with specificity facts to support his cursory arguments because he had failed to do so in compliance with FINRA's rules. Romano, however, declined to clarify his defense. Romano also refused to participate in the evidentiary hearing that he had requested, and he failed to marshal any evidence to support his claim that FINRA engaged in state action. Under the Commission's reasoning in *Druz* and *Sassano*, because Romano failed to present any evidence to support his defense, his motion to stay was properly denied. *See, e.g.*, *Druz*, 52 S.E.C. at 429 (rejecting appellant's argument that an NYSE proceeding should have been stayed pending completion of a criminal matter and stating that, "Druz was given the opportunity to testify and defend himself; he chose not to do so. He cannot

now use the Fifth Amendment privilege against self-incrimination as a shield in this disciplinary proceeding."); *Sassano*, 2008 SEC LEXIS 2947, at *28, *36 (rejecting Sassano's argument, after considering the totality of the evidence, that NYSE engaged in state action and holding that the NYSE already afforded appellant an opportunity to develop further evidence regarding the degree of cooperation between the NYSE and the Commission). For all of these reasons, Romano's argument that his case resembles *Quattrone*, *Ficken*, and *Turk* is misplaced.[13]

C. FINRA's Bar of Romano Should Be Affirmed

Romano does not directly challenge or contest the bar imposed upon him by virtue of the Hearing Officer's dismissal of the expedited proceeding. On this basis alone, the Commission should affirm Romano's bar from the securities industry. Regardless, a bar is completely appropriate.

Section 19(f) of the Exchange Act governs the Commission's review of FINRA's bar of Romano. *See William J. Gallagher*, 56 S.E.C. 163, 167 n.5 (2003) ("The Commission previously has held that Section 19(f) governs its review of SRO action imposing an indefinite suspension, where that suspension is contingent on the fulfillment of a condition, such as the payment of an arbitration award."); *Tony R. Smith*, 54 S.E.C. 1097, 1100 (2000) ("Our review of Smith's appeal of his suspension is governed by Section 19(f) of the Securities Exchange Act of 1934."); *Richard R. Pendleton*, 53 S.E.C. 675, 677 (1998) ("The standards governing our review

---

[13] Given Romano's opportunities to present evidence that FINRA engaged in state action when it issued the Rule 8210 requests, and his refusal to do so, the Hearing Officer properly determined that Romano abandoned his defenses. Under the circumstances, further discovery on the issue is inappropriate. *See Sassano*, 2008 SEC LEXIS 2947, at *38-40 (rejecting request for further discovery to substantiate theory that NYSE engaged in state action and holding that NYSE already had afforded appellant sufficient opportunity to present and develop his state action claim; appellant had "not made any such attempt to focus the scope of his requested further discovery").

of Pendleton's appeal of this revocation proceeding are governed by Section 19(f) of the Securities Exchange Act of 1934."). Just as an applicant was warned that he would be suspended indefinitely for failing to pay an arbitration award, so too was Romano warned that his failure to present a defense here would result in a bar. *See Gallagher*, 56 S.E.C. at 166-67 (holding that because FINRA effectively barred applicant in connection with an expedited proceeding for failure to pay an arbitration award by imposing an indefinite suspension pending his fulfillment of certain requirements, Section 19(f) governs the Commission's review on appeal).

Section 19(f) provides that if the Commission finds that: (1) the "specific grounds" upon which FINRA based its action "exist in fact;" (2) such action is in accordance with FINRA's rules; and (3) such rules are, and were applied in a manner consistent with the purposes of the Exchange Act, it shall dismiss the proceeding, unless it finds that FINRA's action imposes a burden on competition not necessary or appropriate in furtherance of the Exchange Act's purposes. *See Gallagher*, 56 S.E.C. at 166-67.

The Commission should dismiss Romano's appeal and affirm the bar imposed upon him. The specific grounds upon which FINRA based its action—his failures to respond and failure to present any defense for such failures—exist in fact. FINRA also acted in accordance with its rules, and it applied its rules in a manner consistent with the Exchange Act.[14] FINRA's procedural rules governing expedited actions specify that where a respondent abandons his defenses and fails to participate in a hearing, FINRA's original suspension notice shall be deemed to be FINRA's final action in the matter. *See* FINRA Rule 9559(m). The suspension notice issued to Romano expressly stated that he would be barred effective as of June 27, 2014,

[14] Romano does not argue, and the record does not show, that FINRA's action imposed an unnecessary burden on competition. Further the record shows that FINRA complied with the FINRA Rule 9550 Series in all respects in connection with Romano's failures to respond.

if he failed to comply with the terms of the suspension notice. *See* RP 15-16. Thus, FINRA's suspension notice properly imposed a bar upon Romano after he failed to participate in the hearing below, failed to state with specificity the basis for his defense, and failed to provide any evidence in support of his defense. Romano could have avoided the bar by presenting his defense, but chose not to do so and instead abandoned his defense. The Commission should dismiss this appeal.

Moreover, Romano's bar is entirely consistent with the purposes of the Exchange Act and is in the public interest. FINRA Rule 8210 plays a critical role in FINRA's self-regulatory efforts. Because FINRA lacks subpoena power, the failure by associated persons to comply with Rule 8210 requests for information subverts FINRA's "ability to carry out its regulatory responsibilities and must be viewed as a serious violation." *Charles R. Stedman*, 51 S.E.C. 1228, 1232 (1994). "[C]ompliance with [FINRA's] rules requiring cooperation in investigations is essential to enable [FINRA] to carry out its self-regulatory functions." *Toni Valentino*,57 S.E.C. 330, 339 (2004); *see also Joseph Ricupero*, Exchange Act Release No. 62891, 2010 SEC LEXIS 2988, at *21 (Sept. 10, 2010) (sustaining bar imposed for failure to respond to an information request and stating that such misconduct "is a serious violation because it subverts [FINRA's] ability to execute its regulatory responsibilities."), *aff'd*, 436 F. App'x 31 (2d Cir. 2011); *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13 ("The failure to respond to [FINRA] information requests frustrates [FINRA's] ability to detect misconduct, and such inability in turn threatens investors and markets."). As a result, individuals who violate Rule 8210 "present too great a risk to the markets and investors to be permitted to remain in the securities industry." *PAZ Sec.*, 2008 SEC LEXIS 820, at *13.

Rather than respond to any of FINRA's requests, Romano made unsupported, blanket assertions that FINRA engaged in state action. Indeed, when pressed on his defenses, Romano continued to make generalized, sweeping allegations that FINRA acted hand-in-hand with prosecutors in his criminal action, without providing the necessary evidence to support such claims. He later chose not to appear at the hearing he had requested. A bar is appropriate under these circumstances.[15]

V. CONCLUSION

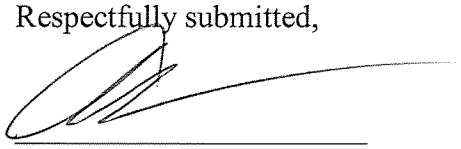
The Commission should affirm FINRA's action in its expedited proceeding against Romano. The Hearing Officer did not abuse his discretion by denying Romano's request to stay FINRA's proceedings pending completion of his criminal case. Romano's convoluted and unsubstantiated assertions that he would have been forced to give up his Constitutional rights by participating in a hearing to determine whether FINRA engaged in state action, and that FINRA somehow engaged in state action in connection with the Rule 8210 requests issued to Romano (and the subsequent expedited proceeding for Romano's failures to provide any documents or

---

[15] In addition, a bar is entirely consistent with FINRA's Sanction Guidelines and, under the circumstances, is neither excessive nor oppressive. *See FINRA Sanction Guidelines* 33 (2013), http://www.finra.org/web/groups/industry/@ip/@enf/@sg/documents/industry/p011038. pdf (providing that where a respondent has failed to respond in any manner to a request for information, a bar is standard). It is undisputed that Romano did not provide any documents or information to FINRA in connection with its Rule 8210 requests, which sought information and documents important to its investigation into (among other things) serious allegations that Romano defrauded investors, filed false tax returns, and embezzled and misused funds from his firm. Romano's failure to provide to FINRA any documents or information hampered FINRA's investigation into serious allegations of misconduct. *See* RP 111. Romano's bar should be affirmed. *See Fawcett*, 2007 SEC LEXIS 2598, at *20-25 (affirming bar for appellant's complete failure to respond to Rule 8210 requests because his proffered reason for refusing to respond, claims that FINRA engaged in state action, were meritless and stating that "Fawcett's misconduct demonstrates that he poses too great a risk to the self-regulatory system . . . to remain in the securities industry.").

information), provide no defense for his failures to respond. Romano's refusal to state with specificity any facts or evidence in support of his purported defense, and subsequent abandonment of the hearing he requested, should not provide Romano any refuge from his obligations to provide FINRA with information and documents pertinent to an investigation. Accordingly, the Commission should uphold FINRA's action and dismiss Romano's appeal.

Respectfully submitted,



Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281

Dated: November 3, 2014

CERTIFICATE OF COMPLIANCE

I, Andrew Love, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450. I have relied on the word count feature of Microsoft Word in verifying that this brief contains approximately 10,882 words, exclusive of tables of contents and authorities.

Andrew Love
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8281