



UNITED 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

REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

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PRELIMINARY STATEMENT

Michael Nicholas Romano appeals from the denial of his motion to stay FINRA's expedited disciplinary proceeding and his resulting Bar from Association with any FINRA Member, pursuant to FINRA Rule 9552(h). On October 2, 2014, Mr. Romano submitted his brief in support of his application for review. On November 3, 2014, FINRA filed its brief in opposition.

SUMMARY OF ARGUMENT

FINRA's Hearing Officer abused his discretion in failing to stay the disciplinary proceedings against Mr. Romano until the conclusion of his criminal case.

Contrary to FINRA's contentions, a close and ongoing nexus exists between FINRA's two investigations into WJB and its officers, and between FINRA and the New York County District Attorney's Office in its investigation, grand jury presentation, and expected trial preparation, such that FINRA's investigation of Mr. Romano is imbued with state action. For Mr. Romano to have participated in the disciplinary proceedings, either by providing documents or testimony, he 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.

And, while the subject matter sought in the Rule 8210 requests and to be raised at the expedited hearing may have differed, Mr. Romano's participation in either raises the same constitutional concerns.

If Mr. Romano were to have testified at the hearing or provided documents, it would have constituted a waiver of his constitutional rights for all purposes. *See Garner v. United States*, 424 U.S. 648, 653 (1976) (a witness who reveals information instead of claiming their 5th Amendment privilege loses the benefit of the privilege). Therefore, because Mr. Romano cannot selectively use his constitutional rights as a shield, he could not have effectively participated in the hearing and retained his constitutional protections.

FINRA's other arguments similarly miss the mark, often misunderstanding or mischaracterizing Mr. Romano's arguments and the cases cited in support of them. Mr. Romano clearly established good cause for FINRA to stay the proceedings and the substantial prejudice he faces as a result of FINRA's denial of his motion.

Therefore, his bar from association should be overturned and the matter sent back to FINRA with instructions to stay the proceedings pending the outcome of the criminal trial.

ARGUMENT

POINT I

THE FINRA HEARING OFFICER ABUSED HIS DISCRETION IN DENYING MR. ROMANO'S MOTION TO STAY THE DISCIPLINARY PROCEEDINGS

The FINRA Hearing Officer abused his discretion in denying Mr. Romano's request to stay the proceedings, the result of which was Mr. Romano's permanent bar from the securities industry. 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.

A. *Mr. Romano Was Entitled To Assert His Constitution Protections In FINRA's Investigation and Disciplinary Proceedings Because FINRA Is Engaged in State Action*

The close nexus between FINRA and the New York County District Attorney's Office in their investigations of WJB and its officers made FINRA a state actor, entitling Mr. Romano to Constitutional protections not ordinarily afforded in proceedings before private entities.

Under the state-action doctrine, 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). In order to show state action, there must exist a "close nexus between

the State and the challenged action,” such that seemingly private behavior “may be fairly treated as that of the State itself.” *See Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 137 (2d Cir. 2002) quoting *Brentwood Acad.*, 531 U.S. at 295.

FINRA seeks to parse out the different investigations involving WJB and its officers (“2012 FINRA Net Capital Investigation,” and the 2014 Romano investigation), in evaluating FINRA’s interaction with the New York County District Attorney’s Office, in the “New York Action.” But doing so is illusory, because the conduct at the root of the allegations in both FINRA investigations and the New York County indictment are the same. For that reason, the interaction that transpired between FINRA and the New York County D.A.’s Office from 2012-2014 is relevant because the current investigation into Mr. Romano can properly be viewed as an extension of the earlier WJB investigation.

FINRA was involved in a significant investigation into net capital violations by WJB and actions taken by the company’s officers in the months preceding WJB closing its doors at the outset of 2012. That investigation ultimately led to WJB, its CEO and CFO entering into an AWC with FINRA in June 2012. Also in 2012, FINRA employees began providing documents to the NY County District Attorney’s Office and actively assisting in the District Attorney’s Office’s investigation and grand jury presentation, which led to the issuing of the indictment currently pending against WJB’s CEO, CFO, and Mr. Romano.

Following immediately after the indictment, Mr. Romano was served with the Rule 8210 requests.

While the affidavits and declarations provided by FINRA do not indicate consistent ongoing communication between FINRA and the DA's Office in the immediate aftermath of the filing of the indictment when the 8210 requests for information were sent to Mr. Romano¹, there is reason to believe the two offices are still actively cooperating, and that FINRA will be involved in preparing the criminal case for trial, and at the upcoming trial.

Therefore, FINRA's ongoing role in the New York County criminal case, and the substantial role that FINRA's investigation has already played in the securing and filing of the indictment, creates a de facto nexus between the two investigations which would penalize Mr. Romano's participation in the FINRA investigation while the criminal charges surrounding the same allegations are still pending.

Therefore, FINRA is engaged in state action as defined by the state-action doctrine, and Mr. Romano had a right to assert his constitutional protections in the FINRA investigation and disciplinary proceedings.

¹ According to Michelle Bataglia, she had last met with the D.A.'s Office on December 27, 2013, in advance of the February 6, 2014 Indictment and February 10, 2014, commencement of the investigation into Romano. (R.75).

B. *Mr. Romano Could Not Meaningfully Participate in The Hearing Without Waiving His Constitutional Rights*

Mr. Romano would have been in danger of waiving his constitutional protections by engaging in the hearing.

The Fifth Amendment privilege is not self-executing; if not invoked it may be deemed to have been waived, *Maness v. Meyers*, 419 U.S. 449, 466 (1975), including by litigation conduct short of a "knowing and intelligent waiver." *Garner*, 424 U.S. 648, 654 n.9 (1976). A witness who reveals information instead of claiming the privilege loses the benefit of the privilege. *See id.* at 653, citing *United States v. Kordel*, 397 U.S. 1, 7-10 (1970).

Similarly, 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.*

While the subject matter of the hearing differed from the information specifically requested in the Rule 8210 requests for information, Mr. Romano's participation, either testimonial or through the production of documents², could have constituted a waiver of his Fifth and Sixth Amendment rights.

² While the contents of a document may not be privileged, the act of producing the document may be. *See United States v. Doe*, 465 U.S. 605, 612 (1984). Document production "tacitly

Therefore, because Mr. Romano cannot selectively use his constitutional rights as a shield, he could not effectively participate in the hearing and later assert his Fifth and Sixth Amendment rights. As such, his intention to seek review of the hearing officer's decision not to stay the proceeding, in lieu of proceeding with the hearing, should not be construed as an abandonment of his defenses, but as a necessary step in preserving his constitutional arguments.

C. *FINRA's Other Arguments Are Unavailing*

The fact that Mr. Romano is facing an indicted parallel criminal case does distinguish this case from myriad others where stays were not granted.

FINRA argues that the fact that Mr. Romano has been indicted should not carry any weight in determining whether the Hearing Officer erred in failing to grant a stay. However, there are two reasons that this fact is significant in weighing a motion to stay. Firstly, it makes Mr. Romano's request for a stay not merely speculative, because there is an active parallel proceeding and not merely an investigation which has yet to ripen, and which may never ripen, into a criminal prosecution. And secondly, it makes the duration of a requested stay more definite because there are real time constraints placed on an indicted criminal case which

concedes the existence of the papers ... and their possession or control" by the person producing the documents, and thus "has communicative aspects of its own." *Fisher v. United States*, 425 U.S. 391, 409 (1976).

are not present in a mere investigation which may or may not ever result in a criminal prosecution.

Contrary to FINRA's contention, the cases cited by Mr. Romano, while not dispositive, support this proposition: courts have drawn distinctions between related criminal proceedings that are merely in the investigatory stages, and those that have ripened into an indictment, when determining whether to grant a stay. *See generally 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).

Similarly, FINRA's argument that the decision to bring an expedited proceeding was properly weighed against Mr. Romano's request for a stay because of the need to protect interests other than Mr. Romano's (i.e. the public), is belied by the facts. FINRA actively participated in the grand jury investigation that produced the indictment against Mr. Romano for more than 15 months without initiating its own disciplinary proceedings against 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, and the company, WJB, that the allegations relate to has been defunct since early 2012.

Therefore, Mr. Romano should not be penalized for FINRA's decision to proceed on an expedited basis.

Lastly, FINRA's assertion that Mr. Romano was not prejudiced by the denial of his stay motion is simply absurd.

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.

As detailed above, and in his October 2, 2014 brief in support, Mr. Romano was forced by FINRA to make a choice between defending his livelihood and continued ability to make a living in the securities industry, and in so doing give up his constitutional rights, or to maintain his rights and face a permanent bar from the securities industry. That is the definition of substantial prejudice.

CONCLUSION

For the reasons stated above and in his October 2, 2014, brief in support, Mr. Romano hereby requests that his bar from associating with any FINRA firm be overturned and FINRA's disciplinary proceedings be stayed until the resolution of his parallel criminal case.

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November 17, 2014

Respectfully submitted,

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