SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 76011 / September 29, 2015

Admin. Proc. File No. 3-15978

In the Matter of the Application of

MICHAEL NICHOLAS ROMANO

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDINGS

Registered securities association barred associated person in expedited proceeding based on failure to respond to information requests after denying motion to stay proceeding and after associated person's subsequent refusal to participate. *Held*, review proceeding is *dismissed*.

APPEARANCES:

Edward V. Sapone, of *Edward V. Sapone, LLC*, for Michael Nicholas Romano.

Alan Lawhead and *Andrew J. Love* for Financial Industry Regulatory Authority, Inc.

Appeal filed: July 16, 2014
Last brief received: November 17, 2014

Michael Nicholas Romano, formerly a co-founder and executive director of, and a registered representative with, WJB Capital Group, Inc. ("WJB"),[1] a former member firm of the Financial Industry Regulatory Authority, Inc. ("FINRA"), appeals from FINRA disciplinary action barring him from associating with any FINRA member in any capacity, based on his failure to provide information in response to a FINRA Rule 8210 request.[2] Romano's arguments concern "FINRA's wrongful denial of [his] motion to stay the FINRA proceedings." He asks that his bar "be overturned and the matter sent back to FINRA with instructions to stay the proceedings pending the outcome of [a] criminal trial" currently pending against Romano. Based on an independent, *de novo* review of the record, we find that FINRA acted within its discretion in denying Romano's motion and dismiss his application for review.

I. Background

Romano's appeal concerns a FINRA Rule 8210 request for information made in early 2014 and criminal proceedings instituted at that time by local prosecutors in New York. Romano claims that because FINRA and prosecutors coordinated their investigations, the FINRA information request constituted "state action" instead of private action and that, therefore, he should have been allowed to invoke his right against self-incrimination under the Fifth Amendment to the United States Constitution and his "Sixth Amendment right not to give up his attorney-client privilege and divulge his defenses to the pending criminal indictment."[3] He further claims that, because he properly invoked those rights, FINRA wrongfully denied his request to stay proceedings against him that were based on his refusal to provide the requested information. FINRA defends its investigation by stating that its Rule 8210 request pertained to

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[1] WJB ceased operations and filed for bankruptcy in January 2012. Romano also owned between 50% and 75% of WJB.

[2] Rule 8210 requires associated persons, such as Romano, to provide "information or testimony" in connection with a FINRA investigation.

[3] The Fifth Amendment states, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. Where the Sixth Amendment right to the effective assistance of counsel attaches, this right includes the ability to speak candidly and confidentially with counsel free from unreasonable government interference. *See, e.g., Adams v. Carlson*, 488 F.2d 619, 630-31 (7th Cir. 1973) (recognizing confidentiality in the attorney-client relationship as an essential component of the Sixth Amendment right to effective assistance of counsel).

Courts have held that the Fifth Amendment and other constitutional provisions restrict only government conduct and will constrain a private entity such as FINRA only insofar as its actions are found to be "fairly attributable" to the government. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001). Actions are "fairly attributable" to the government where "there is a sufficiently close nexus between the State and the challenged action." *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

"serious allegations that Romano defrauded investors, filed false tax returns, and embezzled and misused funds from his firm." Further, FINRA argues that Romano made "generalized, sweeping allegations that FINRA acted hand-in-hand with prosecutors in his criminal action, without providing the necessary evidence to support such claims" and "chose not to appear at the hearing he had requested."

A. FINRA expelled WJB and barred certain of its officers.

In early 2012, FINRA commenced an investigation of WJB, its former chief executive officer, and its chief financial officer (the "2012 FINRA Investigation"). Pursuant to a Letter of Acceptance, Waiver, and Consent accepted by FINRA in June 2012, WJB was expelled from FINRA membership, its former CEO was barred from association with any FINRA member firm in all capacities, and its CFO was barred from association with any FINRA member firm in any principal capacity. As part of this settlement, FINRA found, among other things, that WJB had: (i) inappropriately booked certain loans and tax obligations and thus misstated its balance sheet and other books and records; (ii) misclassified certain receivables and thus misstated its FOCUS reports and net capital calculations by at least $1 million on a monthly basis for approximately two years; and (iii) at various times during 2011, engaged in securities transactions when it was below its minimum required net capital.[4] FINRA took no disciplinary action against Romano in connection with the 2012 Letter of Acceptance, Waiver, and Consent.

B. In February 2014, Romano was charged with criminal violations.

On February 6, 2014, the New York County District Attorney charged Romano and WJB's former CEO and CFO with seventy-one felony counts, including fraud and embezzlement involving WJB and at least fifteen investors. According to the indictment, the defendants sold fictitious receivables to one of WJB's customers, and Romano withdrew funds from WJB's bank accounts and used them for "payments toward a home mortgage and luxury cars, as well as at nightclubs, hotels, and country clubs." These alleged activities occurred between at least 2008 and 2012.

C. FINRA requested information and Romano failed to respond.

On February 6, 2014, Romano's then-employer, FINRA member firm ICAP Corporates LLC, terminated Romano after learning of his indictment and filed a Form U5 providing notice to regulatory authorities of his termination. A few days later, FINRA commenced its investigation of Romano (the "2014 FINRA Investigation").

On February 18, 2014, FINRA requested, pursuant to Rule 8210, that Romano provide a detailed response regarding, among other things, whether he had defrauded investors of more

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[4] 2012 WL 5281345, at *55-56 (Oct. 15, 2012). WJB and its former CEO and CFO "neither admitted nor denied the charges, but consented to the entry of FINRA's findings."

than $11 million in a bid to prop up WJB, participated in the embezzling of at least $7.1 million from WJB, and filed false tax returns.[5]

On February 28, 2014, Romano's attorney acknowledged receiving the information request, but declined to comply because of the pending criminal action. On March 4, 2014, FINRA sent Romano a second notice repeating its request for the specified information and informed him that a refusal to provide the information would result in disciplinary proceedings against him and potentially Romano's suspension and bar from the securities industry. On March 7, 2014, Romano responded to FINRA's second request, stating again that he would not provide the information while criminal proceedings remained pending.

D. FINRA instituted expedited proceedings against Romano.

On March 24, 2014, FINRA's Department of Enforcement issued Romano a notice pursuant to FINRA Rule 9552(a) (the "Pre-Suspension Notice"), informing him that, pursuant to FINRA provisions for expedited proceedings under its Rule 9550 Series, he would be suspended from associating with any FINRA member in any capacity, effective April 17, 2014, for his failure to respond to the prior Rule 8210 requests.[6] The Pre-Suspension Notice informed Romano that he could take corrective action to prevent the suspension, request a hearing in response to the notice or, if suspended, request termination of the suspension on the ground of full compliance. The Pre-Suspension Notice also stated that if Romano requested a hearing, he was required to state any and all defenses with specificity and that he would be barred automatically on June 27, 2014, if he failed to request a termination of the suspension.[7] On April 16, 2014 (one day before the suspension was to take effect), Romano requested a hearing, which was granted and scheduled for May 16, 2014.[8]

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[5] Other information requested by FINRA included a list of and statements for Romano's banking and brokerage accounts; his credit card statements; a list of his outside business activities and of judgments and liens against him while employed by WJB; a list of his e-mail addresses and phone numbers; and his tax returns.

[6] Under FINRA Rule 9552(a), if a member or associated person fails to provide information requested under Rule 8210, FINRA staff may provide written notice specifying such failure and stating that its continuation for twenty-one days after service of the notice will result in suspension of the member or associated person.

[7] Under FINRA Rule 9552(h), "a member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred."

[8] *See* FINRA Rule 9552(d) (stating that, in expedited disciplinary proceeding for failure to provide information, suspension will take effect twenty-one days after service of the Pre-Suspension Notice, unless stayed by a hearing request); FINRA Rules 9559(a) and (c) (authorizing associated persons who are subject to expedited disciplinary proceedings to request a hearing and stating that such a request stays the effectiveness of a pre-suspension notice). As a result of Romano's hearing request, the effective date of the suspension was stayed.

A week later, on April 23, 2014, Romano filed a motion that was captioned "Motion to Stay FINRA Action," arguing that compliance with the information request would violate "his constitutional rights to remain silent" and that participating in the proceeding would "force[] [him] to give up his attorney-client privilege and divulge his defenses to the indictment." According to Romano's motion, the FINRA proceeding was "centered upon the identical alleged unlawful activity with which Mr. Romano is charged criminally," and the two proceedings were "sufficiently closely coordinated as to make FINRA an essential agent of the prosecuting authority."

FINRA's Enforcement staff opposed the motion. As support, it submitted three sworn declarations from FINRA staff members, acknowledging that FINRA staff had met with the New York District Attorney in 2012 and 2013 and provided documents and other information to the District Attorney relating to the 2012 FINRA Investigation. But the staff denied discussing the 2014 FINRA Investigation of Romano with prosecutors. Specifically, a FINRA investigator who had worked on the 2012 FINRA Investigation and met with District Attorney prosecutors declared that the purpose of those meetings was "to review the documents that had been collected by FINRA for FINRA's own investigation [of WJB] prior to May 2012." And a FINRA attorney who worked on the 2012 FINRA Investigation and met with District Attorney prosecutors confirmed that Romano "was not the subject of FINRA discipline in connection with the [2012 FINRA] Investigation" and that the 2012 FINRA Investigation "was completed in the Spring of 2012." The FINRA attorney also stated that neither FINRA nor the District Attorney asked the other to use its authority to obtain information. Further, a different FINRA staff attorney who worked on the 2014 FINRA Investigation of Romano stated, "Neither I, nor anyone assigned to this matter, have had any contact with the District Attorney's office concerning the Romano matter since opening the Romano matter."

E. Romano failed to participate in the hearing and was barred.

In orders issued April 29 and May 2, 2014, the hearing officer denied Romano's motion, finding that Romano had "not shown good cause." The hearing officer based his determination on several considerations, including that Romano sought a stay "of indeterminate length" and that "such an open-ended stay runs counter to the overall purpose of an expedited proceeding." He also noted that the information requested concerned serious allegations, including possible fraud and embezzlement. Moreover, the hearing officer found that Romano had not established that he was "likely to suffer prejudice" without a stay because he had "not shown that asserting his defenses" in the FINRA proceeding "would require him to waive any rights or privileges he claims to possess." The hearing officer simultaneously issued an order directing Romano to supplement his hearing request with a statement "setting forth with specificity the factual basis . . . if [he] intend[ed] to assert a defense based on alleged state action by FINRA." Romano never supplemented his hearing request.

In early May 2014, after his stay request was denied, Romano notified FINRA that he would not participate in the hearing, "as he could not do so without waiving his Fifth Amendment right against compelled self-incrimination and his attorney-client privilege, and divulging his defenses to the pending indictment." On May 7, 2014, based on Romano's refusal

to participate further or provide a more definitive statement of his defense, the hearing officer found that Romano had abandoned his appeal and had waived his prior hearing request.[9] Accordingly, the Pre-Suspension Notice was "deemed to be final FINRA action." Romano filed no further appeals or hearing requests, and on June 27, 2014 (the date specified in the Pre-Suspension Notice), FINRA informed Romano that he was barred.

II. Analysis

Our review of FINRA's action in barring Romano is governed by Section 19(f) of the Securities Exchange Act of 1934.[10] That provision requires us to dismiss Romano's appeal if: (1) "the specific grounds" on which FINRA based its action "exist in fact," (2) the action was taken 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.[11]

A. The specific grounds for the bar exist in fact.

We find that the specific grounds on which FINRA based its bar of Romano, as summarized above, exist in fact. Romano admits, and the record shows, that he violated Rule 8210 by not providing the information FINRA requested, and that, contrary to the hearing officer's orders, he neither participated in the subsequent FINRA hearing in early May 2014 regarding that violation nor supplemented his hearing request with a statement setting forth with specificity, for example, the factual basis supporting any defense based on alleged state action by FINRA.

B. FINRA acted in accordance with its rules.

We find that FINRA acted in accordance with its rules. As discussed above, FINRA Rule 9559(m) provides that if a respondent fails to support his appeal in an expedited disciplinary proceeding and refuses to participate in a scheduled hearing or to comply with any

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[9] Under FINRA Rule 9559(m), a respondent who fails to appear at a scheduled hearing or fails to comply with any order of the hearing officer shall be considered to have abandoned his defense and waived any opportunity for a hearing provided under FINRA's rules. Upon such a finding, the notice issued, here the initial suspension notice, "shall be deemed to be final FINRA action."

[10] 15 U.S.C. § 78s(f). Section 19(f) provides the standard for our review of expedited disciplinary proceedings for violations of Rule 8210. *See, e.g.*, *Ryan R. Henry*, Securities Exchange Act Release No. 53957, 2006 WL 1565128, at *3 (June 8, 2006) (reviewing bar after expedited disciplinary proceeding under Section 19(f)); *Elliot M. Hershberg*, Exchange Act Release No. 53145, 2006 WL 140646, at *2 (Jan. 19, 2006) (same).

[11] 15 U.S.C. § 78s(f). Section 19(f) further requires that we set aside the challenged action if we find that it "imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title." Romano does not allege, and the record does not suggest, that barring him imposes any burden on competition.

order of a FINRA hearing officer, he will be deemed to have abandoned his appeal and the Pre-Suspension Notice will become the final action of FINRA. The Pre-Suspension Notice barred Romano as of June 27, 2014.

C. FINRA applied its rules consistently with the Exchange Act.

We find that FINRA applied its rules in a manner consistent with the Exchange Act. As we have emphasized, Rule 8210 is essential to FINRA's ability to investigate possible misconduct by its members and associated persons.[12] Given the regulatory importance of Rule 8210, FINRA's bar of Romano for failure to provide the requested information is appropriate and consistent with the purposes of the Exchange Act. The information at issue concerned allegations of significant and far-reaching misconduct, including fraud and embezzlement of millions of dollars, and raised serious doubts about Romano's fitness to continue as a securities professional. In seeking this information, FINRA was properly exercising its self-regulatory role of investigating possible misconduct by an associated person to determine whether disciplinary proceedings were warranted. Further, we have held that the use of expedited disciplinary proceedings for violations of Rule 8210 is consistent with the Exchange Act because it promotes an "efficient disciplinary process."[13]

D. The hearing officer's denial order was not an abuse of discretion.

As noted above, Romano bases his appeal on what he claims is the hearing officer's error in denying his stay request. We review the hearing officer's action under an abuse of discretion standard.[14] We will affirm a denial unless the hearing officer applied the wrong legal standard or

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[12] Rule 8210 is the principal means by which FINRA obtains information from member firms and associated persons in order to detect and address industry misconduct. *See, e.g.*, *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (Nov. 8, 2007) (stating that, because of a lack of subpoena power, Rule 8210 is a "vitally important" tool to acquire information).

[13] Exchange Act Release No. 61242, 2009 WL 5125425, at *1 (Dec. 28, 2009).

[14] *See, e.g., ORS Automation, Inc.*, Exchange Act Release No. 23256, 1986 WL 626182, at *3 (May 20, 1986) (reviewing stay denial in connection with national market system appeal by applying abuse of discretion standard).

Likewise, federal district court denials of analogous stay requests are reviewed for abuse of discretion. *See, e.g., SEC v. Wright*, 261 F. App'x 259, 262-63 (11th Cir. 2008) (applying abuse of discretion standard in reviewing stay denial and holding that the "blanket assertion of the privilege against self-incrimination is an inadequate basis for the issuance of a stay") (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).

As discussed below, FINRA's Rule 9550 Series, which governs expedited proceedings such as the disciplinary proceedings against Romano, does not specifically provide applicants

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made a clear error of judgment.[15] And, in reviewing a denial of a motion to stay under the abuse of discretion standard, the moving party "must carry a heavy burden to succeed."[16]

The hearing officer considered Romano's motion under Rule 9559(d)(6), which provides for the extension of time periods in expedited proceedings where the moving party has shown good cause.[17] Although the motion sought a "stay" rather than an extension, there is no provision in FINRA's rules for staying expedited proceedings. Given the absence of any more specific provision and the general fairness of the "good cause" standard,[18] we find that the hearing officer applied the proper standard.[19] We also find that, in applying Rule 9559 to

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with the ability to request a stay. But Rule 9559(d)(6) permits the hearing officer to extend or shorten any time limits prescribed in the expedited proceedings rule "[f]or good cause shown." We have held that such determinations are likewise subject to review under an abuse of discretion standard. *See Robert J. Prager*, Exchange Act Release No. 51974, 58 SEC 634, 2005 WL 1584983, at *13 (Jul. 6, 2005) ("In NASD proceedings, the trier of fact has broad discretion in determining whether to grant a request for a continuance."); *Falcon Trading Grp., Ltd.*, Exchange Act Release No. 36619, 52 SEC 554, 1995 WL 757798, at *5 (Dec. 21, 1995) ("It is well settled that in NASD proceedings, as in judicial proceedings, the trier of fact has broad discretion in determining whether a request for continuance should be granted, based upon the particular facts and circumstances presented."), *petition denied*, 102 F.3d 579 (D.C. Cir. 1996); *Whiteside & Co.*, Exchange Act Release No. 26187, 1988 WL 901551, at *4 (Oct. 14, 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).

[15] *See, e.g., United States v. Lopez*, 649 F.3d 1222, 1236 (11th Cir. 2011) (citing *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004)). In applying the abuse of discretion standard, our "inquiry is limited to determining whether the denial constituted 'an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay.'" *See Falcon Trading*, 1995 WL 757798, at *5 (quoting *Richard W. Suter*, 47 SEC 951, 963 (1983)).

[16] *Microfinancial*, 385 F.2d at 77.

[17] Rule 9559(d)(6) provides that, "[f]or good cause shown, . . . the Hearing Officer . . . may extend or shorten any time limits prescribed by" FINRA's Rule 9500 Series governing hearing procedures for expedited proceedings.

[18] We similarly have considered postponement requests in our own administrative proceedings based on a good cause standard. *See, e.g., John Roger Faherty*, Exchange Act Release No. 41454, 1999 WL 331878, at *1-2 (May 26, 1999) (denying postponement of Commission's review of NASD disciplinary action where moving party failed to show good cause).

[19] In support of his stay request, Romano invoked FINRA Rule 9222, which applies to non-expedited disciplinary proceedings, but which otherwise applies a "good cause" standard identical to the standard in Rule 9559 to a hearing officer's determinations regarding extensions of time and postponements of hearing dates. Romano also acknowledged that FINRA's rules do
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Romano's stay request, the hearing officer did not make a clear error of judgment, as discussed below.

1. The hearing officer properly considered FINRA's interest in proceeding expeditiously.

The hearing officer's decision properly reflected FINRA's interest in proceeding expeditiously in cases in which its members or their associated persons fail to cooperate with investigations.[20] The language of Rule 8210 is "unequivocal" regarding an associated person's responsibility to cooperate with FINRA information requests. Vigorous enforcement of Rule 8210 "helps ensure the continued strength of the self-regulatory system—and thereby enhances the integrity of the securities markets and protects investors."[21] The indefinite stay Romano requested would have delayed FINRA's investigation into, among other things, allegations that he had defrauded investors of $11 million and thereby thwarted this vital FINRA objective and threatened the public interest in prompt and effective regulatory enforcement.

Romano contends that FINRA had no "need to proceed with particular haste" in making its Rule 8210 requests, given the length of the criminal investigation (approximately fifteen months) prior to Romano's indictment. We disagree. Whatever delay there may have been in the institution of criminal proceedings did not justify a further delay in FINRA's investigation and its efforts to protect the public interest. And it is undisputed that granting Romano's motion would have caused a substantial delay. In his response to questions regarding the length of the proposed stay, Romano's counsel stated that he "would have a much better outlook on the

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not specifically authorize a hearing officer to grant an indefinite stay of a disciplinary proceeding.

[20] FINRA's Rules expressly permit it to bring expedited proceedings for Rule 8210 violations. *See* FINRA Rule 9552(a) (authorizing expedited proceedings for failure to respond to requests for information). The purpose of expedited proceedings in cases like this is to provide "a procedural mechanism for FINRA to address certain types of misconduct in an accelerated timeframe." *See FINRA Regulatory Notice 10-13* (Feb. 2010), at 1, 2. In general, FINRA decisions regarding the initiation of proceedings and the sanctions sought are entitled to considerable deference. *See Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (stating that NASD proceedings are "an exercise of prosecutorial discretion [and] . . . are given wide latitude").

Expedited disciplinary proceedings in failure-to-respond cases are consistent with the purposes of the Exchange Act because they promote an efficient but fair and reasonable process. *Cf.* Exchange Act Release No. 61242, 2009 WL 5125425, at *1 (finding that Rule 9552's shortened suspension period—from six months to three months—is consistent with the purposes of the Exchange Act "because it is designed to promote a reasonable, fair, and efficient disciplinary process").

[21] *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 WL 4899010, at *4 (Nov. 14, 2008), *aff'd*, 347 F. App'x 692 (2d Cir. 2009).

criminal case . . . within three to four months," at which point he would "likely know whether [he] only need[ed] another three to four months or another nine to twelve months."

2. The hearing officer properly considered the seriousness of the charges against Romano.

We also agree with the hearing officer's finding that the seriousness of the allegations weighed against Romano's motion. Romano seeks to minimize the significance of these allegations by asserting that they do not "include allegations connected to the purchase, retention or sale of securities." But FINRA has a strong interest in, and a long history of, investigating indications of dishonesty in business-related conduct, even when not related to securities transactions.[22] As the hearing officer noted, the allegations against Romano raised serious questions about Romano's fitness to continue in the securities industry. In our view, FINRA would have been remiss in not investigating such matters or in doing so on the delayed schedule proposed by Romano.

3. The denial did not prejudice Romano.

We also find no error in the hearing officer's determination that the denial would not prejudice Romano. Romano challenges this holding by asserting that "[i]f Romano were to have testified at the hearing or provided documents, it would have constituted a waiver of his constitutional rights for all purposes." Romano argues that he could not participate in the hearing for *any* purpose (including the introduction of evidence to support his state-action claims) because, according to his interpretation of cases applying the attorney-client privilege, "[t]here is no selective waiver [of the privilege] that can be made; a knowing, intentional waiver is a waiver for all purposes and all times."[23] Thus, according to Romano, he did not abandon his appeal by refusing to participate in the hearing, but took "a necessary step in preserving his constitutional arguments."

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[22] *See, e.g., John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *7 (June 14, 2013) ("It is well established that FINRA's disciplinary authority . . . 'is broad enough to encompass business-related conduct . . . even if that activity does not involve a security.'") (quoting *Dante J. DiFrancesco*, Exchange Act Release No. 66113, 2012 WL 32128, at *5 n.18 (Jan. 6, 2012)).

[23] A selective waiver occurs when a client discloses privileged attorney communications to one party but seeks to continue asserting the privilege with respect to those same communications against other parties. *See Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 & n.7 (3d Cir. 1991) (citations omitted). Romano has not explained why he would have had to divulge *any* privileged information to support his state-action claims. But if Romano had testified or provided documentation regarding the state-action issue at the FINRA hearing in such a way that required him to divulge privileged communications, he could have argued that it was a partial waiver that applied only to the information actually disclosed. *Id.*, 951 F.2d at 1426 & n.12 (citing *In re Von Bulow*, 828 F.2d 94 (2d Cir. 1987)) ("When a party discloses a portion of otherwise privileged materials while withholding the rest, the [attorney-client] privilege is waived only as to those communications actually disclosed. . . .").

We agree with the hearing officer that Romano failed to show "that asserting his defenses would require him to waive any rights or privileges he claims to possess or would otherwise prejudice him." The sole basis for Romano's defense to the Rule 8210 violation is his claim that FINRA engaged in state action—triggering constitutional limitations—by conducting its investigation in a "closely coordinated" manner on behalf of New York prosecutors. We have held that, if state action is established, an associated person otherwise subject to Rule 8210 may refuse information requests based on the Fifth Amendment.[24] But proving that status would require evidence of a high degree of integration between FINRA and the government, such as indications that FINRA sought information from Romano at the direction or behest of the District Attorney. And there is no direct evidence of such an interdependent relationship here.

Romano argues that the similar subject matter and close timing of the criminal charges against him and the FINRA information request show that FINRA engaged in state action. But we have held that "general collaboration or cooperation between the SRO and a government agency" does not demonstrate state action in the absence of "evidence suggesting an 'interdependence' between the government investigations and the SRO's [information] requests."[25] Romano also suggests that our "close oversight of SROs" and what Romano describes as "quasi-governmental powers" that FINRA exercises support his claim of state action, but reviewing courts have rejected similar claims.[26] Further, it is well established that close timing of FINRA and government investigations by themselves do not establish state action.[27]

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[24] *See, e.g., Warren E. Turk*, Exchange Act Release No. 55942, 2007 WL 1800481, at *3 (June 22, 2007) (stating that "[a]lthough SROs are not . . . generally state actors, under certain limited circumstances, they may engage in state action" and thereby become subject to the Fifth Amendment right against self-incrimination). *See also supra* note 3 (discussing authority regarding when a private entity can be found to have engaged in state action).

Romano challenges the stay denial by arguing that "[a] person cannot be deprived of his employment [i.e., barred,] for declining to provide testimony that could be used against him in a criminal prosecution." But we have rejected similar arguments, holding that state-action defenses related to the loss of employment apply only when a private entity both engages in state action *and* forces an individual to choose between testifying and losing his employment. *See Turk*, 2007 WL 1800481, at *2 & n.11.

[25] *Michael Sassano*, Exchange Act Release No. 58632, 2008 WL 4346410, at *9 (Sept. 24, 2008).

[26] Courts have generally found that self-regulatory organizations, including FINRA's predecessor, NASD, are not inherently state actors based on their regulatory function, even where evidence suggests some degree of governmental cooperation in its investigations. *See, e.g., D.L. Cromwell*, 279 F.3d at 162-63.

[27] *See, e.g., id.* (declining to find state action based on the fact that Rule 8210 requests "followed shortly after individual appellants contested grand jury subpoenas" and that NASD "refused to delay the Rule 8210 interviews until after completion of the . . . criminal investigation"); *Sassano*, 2008 WL 4346410, at *7 (finding that "the timing of the actions in the

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Given Romano's failure to proffer what specific testimony or other evidence would have established state action (or otherwise provided a defense to the Rule 8210 allegations against him), we see no basis for finding that his constitutional rights were implicated in the hearing officer's denial of his motion. Accordingly, we find that Romano failed to show any error in the hearing officer's determination that asserting his defenses would have required him to waive any constitutional rights or privileges or would otherwise have prejudiced Romano.

4. Precedent does not support Romano's appeal.

Romano cites several of our prior decisions regarding state-action claims to support his argument that FINRA erred. But the precedent he cites is readily distinguishable. For example, he cites *Frank P. Quattrone*,[28] where we remanded an NASD disciplinary action based on an alleged violation of Rule 8210. Romano argues that the applicant in that case was given the "opportunity to prove state action" on remand to NASD and suggests that he should be afforded the same opportunity. But in *Quattrone*, the applicant had not had an opportunity before the remand to introduce evidence regarding his state-action defense. Romano's situation is different because he had an opportunity to participate in the hearing and present evidence on his state action claim but chose not to take it.

Similarly misplaced is Romano's reliance on *Justin F. Ficken*,[29] where we remanded disciplinary proceedings based in part on our finding that Ficken may not have "had sufficient access to relevant information" on the state-action question. Unlike Ficken, Romano has made no claim that FINRA inhibited any efforts to obtain evidence of state action.[30]

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simultaneous regulatory investigations is insufficient to prove a 'causal connection between the requests for testimony' in the separate investigations").

[28] *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 WL 768606, at *5-6 (Mar. 24, 2006).

[29] *Justin F. Ficken*, Exchange Act Release No. 54699, 2006 WL 3147424 (Nov. 3, 2006).

[30] In *Ficken*, we emphasized that the burden to establish state action was high and rested on the party asserting it, noting that the applicant "may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory." *Id.* at *6 & n.36 (citing *G.K. Scott & Co.*, Exchange Act Release No. 33485, 51 SEC 961, 1994 WL 17114, at *8 (Jan. 14, 1994); *John Montelbano*, Exchange Act Release No. 47227, 2003 WL 147562, at *12 (Jan. 22, 2003)). Although some of Ficken's claims relating to state action are similar to those asserted by Romano, including overlap between the subject matters of the two investigations and cooperation between governmental and non-governmental regulatory authorities, we did not find that they established state action. Instead, we found that Ficken should be given the opportunity to develop his state-action defense with the benefit of our decision in *Quattrone*, which was issued after the underlying decision in *Ficken*.

Romano also cites *Warren E. Turk*, another SRO proceeding that was remanded based on the applicant's claim of state action. But in *Turk*, although the applicant cited certain specific evidence, we found that the evidence he cited was "insufficient to establish state action."[31] That evidence included: (1) that Commission staff and the NYSE had sought the applicant's testimony within one month of each other; (2) that the Commission and the NYSE instituted proceedings on the same day and federal prosecutors filed criminal charges three days later; (3) that press releases indicated that the government agencies had cooperated with and assisted each other; and (4) that the applicant's former employer had told the applicant that federal prosecutors had requested that his employer member firm remove the applicant from the NYSE trading floor.[32]

Like Turk, Romano has failed to show state action. Romano's state-action arguments are less specific than Turk's and are unsupported. Given this failure and Romano's refusal to participate in a hearing where he could have introduced evidence to support his state-action claim, a remand is unwarranted here.

* * *

Based on our determination that FINRA's action in barring Romano satisfied the elements identified in Exchange Act Section 19(f) and that the hearing officer's determination to deny Romano's stay motion was not an abuse of discretion, we will dismiss this review proceeding. An appropriate order will issue.[33]

By the Commission (Chair WHITE and Commissioners AGUILAR, GALLAGHER, STEIN, and PIWOWAR).

Brent J. Fields
Secretary

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31 *Turk*, 2007 WL 1800481, at *5.

32 Although we found no state action based on the record that had been developed, we nevertheless held that Turk "should have a further opportunity to develop and present his state action claim" because his evidentiary hearing occurred before the issuance of the decisions in *Quattrone* and *Ficken*. *Id.* at *5. In *Turk*, to support our finding that Turk had failed to show state action, we relied on *Quattrone* and *D.L. Cromwell*, which held that mere cooperation between a private actor and the government does not establish the existence of state action. *Id.* at *4.

33 We have considered all the arguments advanced by the parties. We reject or sustain them to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 76011 / September 29, 2015

Admin. Proc. File No. 3-15978

In the Matter of the Application of

MICHAEL NICHOLAS ROMANO

For Review of Action Taken by

FINRA

ORDER DISMISSING REVIEW PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Michael Nicholas Romano be, and it hereby is, dismissed.

By the Commission.

Brent J. Fields
Secretary