05-5139-cv

United States Court of Appeals for the Second Circuit

JAMIE K.C. SCHER,

Plaintiff-Appellant,

v.

THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., NASD REGULATION, INC., JAY LIPPMAN, MARILYN S. SCHWARTZ, WILLIAM M. SHIELDS, HOWARD DAVIS, JON HURD, CATHERINE M. FARMER, DENIS MCCARTHY, FRANK ZARB, DAVID LIEBOWITZ, and MEGAN HERMAN,

Defendants-Appellees.

BRIEF FOR DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee, the National Association of Securities Dealers, Inc. ("NASD"), states that it is not publicly traded and has no corporate parent and that no publicly-held corporation owns 10% or more of its stock. Appellee, NASD Regulation, Inc. ("NASDR"), states that it is a wholly-owned subsidiary of NASD.

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INTRODUCTION

Plaintiff Jamie K.C. Scher comes before this Court having been convicted of five counts of perjury in connection with her on-the-record testimony in an NASDR investigation. She claims that the Defendants[1] violated her constitutional rights because they did not advise her explicitly that false testimony under oath could subject her to perjury charges notwithstanding that she was an experienced attorney and was represented by experienced counsel during that testimony. The district court dismissed the Complaint as lacking merit.

Relying on controlling precedent from this Court, the district court found that the entire Complaint is "barred by the absolute immunity granted to the NASD, the NASDR, and their employees for conduct falling within the scope of the NASD's regulatory and oversight functions." *Scher v. Nat'l Ass'n of Sec. Dealers, Inc.*, 386 F. Supp. 2d 402, 406 (S.D.N.Y. 2005) (citation and internal quotations omitted). Independent of this absolute immunity, the court also found that Plaintiff's constitutional claims are fatally defective because the Complaint "failed to demonstrate that in denying [P]laintiff's constitutional rights, the [D]efendants' conduct constituted state action—a prerequisite to establishing a

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[1] Unless otherwise stated, the term "Defendants" refers to NASD, NASDR, Jay Lippman, Marilyn S. Schwartz, William M. Shields, Howard Davis, Jon Hurd, Catherine M. Farmer, Denis McCarthy, Frank Zarb, David Liebowitz, and Megan Herman.

violation of the Fifth Amendment." *Id*. at 407 (citation and internal quotations omitted; bracket removed). Finally, the court found the merits of Plaintiff's constitutional claims to be of "gossamer durability"—indeed, to be "without any merit whatsoever"—because "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." *Id*. at 409 (citation and internal quotations omitted). These, and other, clearly established legal principles compel the same result on appeal.

First, the Defendants are absolutely immune from suits such as this one that relate to actions taken by the NASD in its capacity as a self-regulatory organization. Second, Defendants are not state actors, thus constitutional claims must fail. Third, on the merits, Plaintiff's constitutional claims require dismissal as a matter of law because there is no duty to warn a person not to testify falsely once that person has been placed under oath. Fourth, Plaintiff's constitutional and state tort claims are barred by the applicable statute of limitations. Finally, the Complaint fails to allege a cognizable cause of action under New York law for negligence and gross negligence and her state tort claims are foreclosed by New York's doctrine of "unclean hands."

JURISDICTIONAL STATEMENT

Plaintiff alleges that some or all of the Defendants violated her federal constitutional rights by serving as "unofficial extensions" of the New York District

Attorney's Office. App. 19, 28-29 (Compl. ¶¶ 24, 50). Accordingly, Plaintiff's constitutional claims arise under 42 U.S.C. § 1983. *See Annis v. County of Westchester*, 36 F.3d 251, 254 (2d Cir. 1994) (holding that § 1983 "furnishes a cause of action for the violation of federal rights created by the Constitution"); *Rosa R. v. Connelly*, 889 F.2d 435, 440 (2d Cir. 1989). The district court had original jurisdiction to adjudicate Plaintiff's § 1983 suit pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343(a)(3) (civil rights jurisdiction). The court also had jurisdiction under 15 U.S.C. § 78aa, which grants federal courts exclusive jurisdiction over all suits seeking to enforce any duty or liability created by the Securities Exchange Act of 1934, as amended ("Exchange Act") or the rules or regulations thereunder. *See also* 15 U.S.C. § 78s(g) (obligating NASD to comply with, and enforce compliance with, the Exchange Act, SEC rules, and NASD rules). Finally, the district court possessed supplemental jurisdiction over Plaintiff's state tort claims under 28 U.S.C. § 1367.

The district court's dismissal of the Complaint on July 4, 2005, resulted in a final judgment disposing of all claims. App. 11, 133. Plaintiff filed a timely notice of appeal on July 28, 2005. App. 134. Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Defendants are entitled to absolute immunity against constitutional and state tort claims brought by Plaintiff when Plaintiff's only contact with Defendants occurred during the Defendants' investigation of Plaintiff's employer, a securities firm and NASD member, pursuant to the NASD's mandate under the Exchange Act.

2. Whether the Defendants are private actors to whom constitutional principles do not apply because the Defendants' on-the-record interview of Plaintiff was conducted in pursuit of the NASD's own interests and obligations and because the Complaint does not allege facts that would support an inference that state authorities influenced—or even were aware—of Plaintiff's interview.

3. Whether Defendants had a duty to warn Plaintiff after she had been placed under oath that false sworn testimony carries with it criminal penalties where Plaintiff was an experienced attorney and was represented by experienced counsel.

4. Whether the record independently supports affirming the judgment of dismissal because (a) Plaintiff's constitutional and state tort claims are time barred and (b) Plaintiff fails to articulate cognizable state-law negligence claims and her state tort claims are barred by New York's doctrine of "unclean hands."

STATEMENT OF THE CASE

The Complaint was filed in the U.S. District Court for the Southern District of New York in August 2004, alleging, *inter alia*, that the Defendants violated Plaintiff's constitutional rights by not warning her explicitly on May 28, 1998, that it is wrong to lie under oath and that lying under oath carries with it criminal penalties. App. 12-39. In September 2004, the Defendants filed a motion to dismiss. App. 85-86. On July 4, 2005, the district court issued an opinion and order dismissing the Complaint in its entirety on three independent grounds: (1) the Defendants were absolutely immune from suit for the actions Plaintiff challenged; (2) the NASD is not a state actor and thus constitutional principles do not attach to its proceedings; and (3) on the merits, Plaintiff's constitutional rights were not violated. App. 117-33. That opinion is reported as *Scher v. National Assocation of Securities Dealers, Inc.*, 386 F. Supp. 2d 402 (S.D.N.Y. 2005) (Mukasey, J.). Judgment was entered that same day. App. 11, 133. On July 28, 2005, Plaintiff appealed the district court's order. App. 134.

STATEMENT OF FACTS

I. NASD Plays A Critical Role In Regulating The Securities Markets

Defendant-Appellee NASD is a private, not-for-profit, Delaware corporation functioning as a self-regulatory organization ("SRO") and registered with the Securities and Exchange Commission ("SEC") as a national securities association under the 1938 Maloney Act Amendments to the Exchange Act. *See* 15 U.S.C.

§ 78*o*–3. Other SROs include the New York Stock Exchange and the American Stock Exchange.

As an SRO, the NASD is a key part of the Exchange Act's interrelated and comprehensive mechanism for regulating the securities markets. *See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir. 1999). Congress opted to delegate to SROs the daily regulation and administration of the securities markets, under the close supervision of the SEC. *See D'Alessio v. New York Stock Exch., Inc.*, 258 F.3d 93, 105 (2d Cir. 2001). With few exceptions not relevant here, the SEC must approve all NASD rules, policies, practices, and interpretations before they are implemented. *See* 15 U.S.C. § 78s(b). And, at any time, the SEC may "abrogate, add to, [or] delete from" the rules of the NASD. 15 U.S.C. § 78s(c).

II. The Function Of NASDR And The Use Of On-The-Record Interviews

NASDR, a wholly owned subsidiary of the NASD, is the investigatory and disciplinary arm of the NASD. *D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 156 (2d Cir. 2002). Specifically, it is charged with "conducting investigations and commencing disciplinary proceedings against NASD member firms and their associated member representatives relating to compliance with the federal securities laws and regulations." *Id*. at 157 (quoting *Datek Sec. Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 875 F. Supp. 230, 232 (S.D.N.Y. 1995)). As the

state trial court noted during the course of Plaintiff's criminal proceedings, "the NASD is authorized by law to conduct . . . [on-the-record interviews] and to administer an oath." *People v. Cohen*, 718 N.Y.S.2d 147, 153 (N.Y. Sup. Ct. 2000) (setting forth in detail the legal basis for its statement), *aff'd*, 773 N.Y.S.2d 371 (App. Div. 2004), *appeal denied by*, 2 N.Y.3d 797 (2004). Specifically, pursuant to NASD Rule 8210, NASDR has "the right to require a member to provide information orally, in writing or electronically and to testify at a location specified by [NASD] staff with respect to any matter involved in an NASD investigation." *D.L. Cromwell Inv., Inc.*, 279 F.3d at 158 (ellipses and brackets removed) (quoting *NASD Manual* (CCH), Rule 8210(a)(1)).

III. Facts Alleged Against Defendants

Plaintiff's operative allegations center around her employment at Renaissance Financial Securities Corporation ("Renaissance"), which was a Long Island securities firm and a member of the NASD. App. 15, 22 (Compl. ¶¶ 15, 32). In approximately December 1996, Plaintiff was hired by Renaissance to serve as its general counsel. App. 15 (Compl. ¶ 15). At that time, Plaintiff was licensed to practice law by the State of New York since 1992. App. 15, 21 (Compl. ¶¶ 15, 30). After she became employed by Renaissance, Plaintiff passed the Series 7 and Series 63 securities examinations and became a licensed stockbroker and associated person of the NASD. App. 15 (Compl. ¶ 15). An NASD associated

person and member, respectively, Plaintiff and Renaissance agreed to be subject to the rules and regulations of both the NASD, *see NASD Manual* (CCH), Rule 0115, and the SEC. *See Creative Sec. Corp. v. Bear Stearns & Co*., 671 F. Supp. 961, 966 & n.7 (S.D.N.Y. 1987) ("[C]ourts have recognized that securities exchange members are contractually bound by the regulations of their organizations.").

On May 18, 1998, in connection with an ongoing NASDR investigation of potential NASD violations by Renaissance and Plaintiff's father, Stanley Cohen, Plaintiff was requested to provide an on-the-record interview pursuant to Rule 8210. App. 16 (Compl. ¶ 16). Plaintiff was informed by NASDR that she could be "represented by counsel during the interview." App. 41 (Compl. Exhibit A). Plaintiff, accompanied by her attorney, Mr. William Singer, testified before NASDR on May 28, 1998.[2] App. 46, 48 (Compl. Exhibit C at 1, 3); App. 16, 25-26 (Compl. ¶¶ 18, 40). Mr. Singer, a former regional attorney in the NASD's New York District Office and, at the time, a partner at Singer Frumento LLP, presumably was selected as counsel because of his expertise in the NASD disciplinary process.

[2] Although Paragraph 18 of the Complaint states that the interview occurred on May 18, 1998, Paragraph 40 as well as the portion of the transcript attached as Exhibit C to the Complaint, state that the interview occurred on May 28, 1998.

The transcript of the May 28 interview conclusively demonstrates that Plaintiff was sworn in prior to giving testimony. App. 48 (Compl. Exhibit C at 3) ("JAMIE K.C. SCHER, having been first duly sworn, was examined and testified as follows:"). Plaintiff confirms this in her Complaint: "At the interview plaintiff was sworn in under oath." App. 26 (Compl. ¶ 42). Furthermore, the interview commenced with the following colloquy between an NASDR staffer and Plaintiff:

> Because you are bound by oath and Procedural Rule 8210, *you are expected to answer all questions truthfully and to the best of your knowledge*. Any failure to answer . . . *truthfully* may be considered conduct inconsistent with high standards of commercial honor and *could* expose you to *possible sanctions* which *include* a bar, suspension, censure and fine. Do you understand that?
>
> [Plaintiff]: Yes.

App. 49 (Compl. Exhibit C at 7-8) (emphases added); *see also* App. 16, 26 (Compl. ¶¶ 18, 44).

Immediately following this warning, Plaintiff's counsel stated for the record that he disagreed with the staffer that Plaintiff could not invoke the attorney-client privilege during the interview. App. 49-50 (Compl. Exhibit C at 8). Neither Plaintiff nor her attorney raised questions or concerns regarding the applicability of the Fifth Amendment's testimonial privilege. In fact, when an NASDR staffer asked whether Plaintiff or her attorney had "any objections or need[ed] clarification on any issue just discussed," Plaintiff's counsel responded that "we do

understand our obligations to respond and we will do so appropriately." App. 51 (Compl. Exhibit C at 9).

During the preamble to the questioning, an NASDR staffer also provided a description of the nature and purpose of on-the-record interviews, explaining that "NASDR investigations are non-public and confidential and are fact-gathering in nature" and are "not meant to be adversarial proceedings." App. 50 (Compl. Exhibit C at 8); *see also* App. 16-17, 27 (Compl. ¶¶ 18, 44). The staffer continued, "[w]itnesses are required to provide information within the scope of their knowledge. The witness may not determine whether a question asked is relevant." App. 50-51 (Compl. Exhibit C at 8-9). The staffer also emphasized that "this matter is still in the investigatory stage, no conclusion has been made thus far that any violation of NASD rules or the federal securities laws has taken place." App. 51 (Compl. Exhibit C at 9).

Notwithstanding the oath Plaintiff took to testify truthfully and despite her standing as a licensed attorney subject to the New York Lawyer's Code of Professional Responsibility, *see* DR-1-102(A)(1), (3), (4), (5), (7), Plaintiff flagrantly lied to—and therefore misled—NASDR investigators. *See Cohen*, 773 N.Y.S.2d at 381 (setting forth a full description of Plaintiff's perjurious testimony); *see also People v. Cohen*, Ind. No.: 1474/2000, 2001 WL 1537669 (N.Y. Sup. Ct. Nov. 1, 2001) (not reported) (same). Plaintiff was prosecuted in New York state

court for her false sworn testimony and convicted after a jury trial of five counts of perjury in the first degree. *Cohen*, 773 N.Y.S.2d at 387. Specifically, Plaintiff was convicted for lying about the participation of her father and brother in Renaissance, a broker-dealer firm. The father, Stanley Cohen, had previously been permanently barred from associating with any broker-dealer, such as Renaissance, in a proprietary or supervisory capacity. *Id*. at 374. Plaintiff was sentenced to five years probation and ordered to pay a $10,000 fine and to perform 1,500 hours of community service. *Id*. The trial court's judgment was entered on February 5, 2002, and was subsequently upheld by the New York Appellate Division. *Id*. Leave to appeal to the New York Court of Appeals and the United States Supreme Court were both denied. *Cohen*, 2 N.Y.3d at 797; *Cohen v. New York*, 543 U.S. 927 (2004).[3]

[3] Plaintiff's codefendants also were criminally convicted after jury trials for their respective roles in lying to and misleading the NASD. Plaintiff's brother was convicted of six counts of perjury in the first degree. *Cohen*, 773 N.Y.S.2d at 387. Plaintiff's father was convicted of four counts of perjury in the first degree and two counts of securities fraud in violation of New York General Business Law § 352-c(5). *Id.* Their convictions have been upheld and applications for appeal have all been denied. *Cohen*, 2 N.Y.3d at 797; *Cohen*, 543 U.S. at 927.

In this action, Plaintiff alleges that the Defendants violated her Fifth Amendment rights and committed state law torts.[4] With regard to the constitutional claims, the gravamen of the Complaint is that NASDR did not explicitly warn her that "any failure on your part to truthfully answer any questions put before you could expose you to prosecution for perjury under both Federal and New York State perjury statutes." App. 17-18 (Compl. ¶ 21). She avers that the absence of this "additional" warning language, coupled with the allegation that the Defendants conducted an on-the-record interview "without having first provided a warning notice as to the possibility of criminal sanctions," amounts to a violation of her Fifth Amendment testimonial privilege and due process rights. App. 17-18, 19-20, 27, 38 (Compl. ¶¶ 21, 26, 45, 46, 78). Plaintiff's tort claims of negligence and gross negligence are predicated entirely on these alleged constitutional claims. App. 30 (Compl. ¶ 55) ("The conduct of the defendants was negligent or grossly negligent regarding their representations to the plaintiff in connection with the testimony she was forced to provide at the [on-the-record interview]. . . .").

IV. The District Court's Dismissal Of The Complaint

The district court rejected Plaintiff's claims and found as extraordinary Plaintiff's effort to blame others for her perjurious testimony. In dismissing the

[4] Plaintiff is mistaken to allege that her due process claims arise under the Fourth Amendment. *See* App. 38 (Compl. ¶ 78); *see also Scher*, 386 F. Supp. 2d at 402 n.2.

Complaint, the court adopted three arguments advanced by the Defendants. First, the court held that Plaintiff's claims were "barred by the absolute immunity granted to the NASD, the NASDR, and their employees 'for conduct falling within the scope of the [NASD's] regulatory and oversight functions.'" *Scher*, 386 F. Supp. 2d at 406 (quoting *D'Alessio*, 258 F.3d at 105). Second, the court found that Plaintiff's constitutional claims could not stand because the Complaint demonstated only that the Defendants were engaged in private action—not state action—when Plantiff was interviewed on the record. *Id*. at 407-08. Finally, on the merits—and relying on binding precedent from both the Supreme Court and this Court—the district court rejected Plaintiff's claims that the Defendants had a duty to warn her that it is a crime to lie under oath. *Id*. at 409.

The court deemed it unnecessary to address other arguments that had been raised by the Defendants in support of dismissal, including that: (1) Plaintiff's constitutional and state tort claims are barred by the applicable statute of limitations; and (2) Plaintiff's tort claims fail because she alleged no duty owed to her, no breach of any such duty, and went before the court with "unclean hands."

SUMMARY OF ARGUMENT

The district court properly concluded that the Defendants are absolutely immune from Plaintiff's suit. The conduct of which Plaintiff complains occurred during the course of the Defendants' investigation of Renaissance, a securities firm

and a member of the NASD. Plaintiff's allegations, therefore, relate solely to the Defendants' mandate to "conduct[] investigations and [to] commenc[e] disciplinary proceedings against [NASD] member firms and their associated member representatives relating to compliance with the federal securities laws and regulations." *D.L. Cromwell Inv., Inc.*, 279 F.3d at 157. This is precisely when the protections of absolute immunity are needed and when it has been held repeatedly to be available. *See, e.g., Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 58-59 (2d Cir. 1996).

Furthermore, the NASD is not a state actor—it is a private actor—and therefore constitutional principles do not attach to its proceedings. *Desiderio*, 191 F.3d at 206. Indeed, this Court has explicitly held that questioning by the New York Stock Exchange, another SRO, "in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination." *United States v. Solomon*, 509 F.2d 863, 867 (2d Cir. 1975) (Friendly, J.); *see also United States v. Bloom*, 450 F. Supp. 323, 329 (E.D. Pa. 1978) (applying the Second Circuit's reasoning and holding in *Solomon* to the NASD).

Nor has Plaintiff pled facts sufficient to support the existence of a "close nexus" between the New York District Attorney's Office and the Defendants that could carry her over the state action threshold. "[T]o establish the requisite governmental nexus," this Court has held it is not enough that "[t]estimony in an

NASD proceeding may entail exposure to criminal liability." *D.L. Cromwell Inv., Inc.*, 279 F.3d at 162. The Complaint does not even suggest that the District Attorney's Office approached, encouraged or otherwise required Defendants to conduct Plaintiff's on-the-record interview. Indeed, Plaintiff does not so much as allege that any governmental authority was even aware of her interview. Such deficiencies in her pleading are fatal to her constitutional claims. *See id*. at 163; *see also Desiderio*, 191 F.3d at 206. This is especially so here since the information referred to the District Attorney's Office did *not* consist of *self-incriminating* statements made by the Plaintiff, but rather *perjurious* statements that *independently* constituted a criminal offense under New York law.

Plaintiff's constitutional claims also fail on the merits because under this Circuit's precedent, "[o]nce a witness swears to give truthful answers, there is no requirement to warn him not to commit perjury, or, conversely to direct him to tell the truth." *United States v. Winter*, 348 F.2d 204, 210 (2d Cir. 1965). And, within the four corners of the Complaint, Plaintiff admits that she was "sworn in under oath" at her Rule 8210 interview. App. 26 (Compl. ¶ 42). As the Supreme Court has held, "the Fifth Amendment privilege against compulsory self-incrimination provides no protection for the commission of perjury. . . ." *United States v. Apfelbaum*, 445 U.S. 115, 127 (1980).

Finally, the record supports several additional grounds on which this Court could affirm the district court's judgment. Plaintiff's constitutional and state law tort claims are barred by New York's three-year statute of limitations. In addition, Plaintiff's tort claims require dismissal because Plaintiff fails to allege any duty owed to her, fails to allege that any such duty was breached, and comes before this Court with "unclean hands."

STANDARD OF REVIEW

A district court's grant of a motion to dismiss is reviewed *de novo*, *Gmurzynska v. Hutton*, 355 F.3d 206, 210 (2d Cir. 2004), with this Court "accept[ing] all of the [Complaint's] factual allegations as true and draw[ing] all reasonable inferences" in favor of the Plaintiff. *Mason v. Am. Tobacco Co.*, 346 F.3d 36, 39 (2d Cir. 2003). However, this Court must simultaneously ensure that "legal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness." *Id*. Moreover, Plaintiff may not dispute or otherwise recharacterize issues and findings resolved by the New York courts in Plaintiff's criminal case. *See Allen v. McCurry*, 449 U.S. 90, 96 (1980); *Vavolizza v. Krieger*, 33 N.Y.2d 351, 355-56 (1974); *see also Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986). Accordingly, all allegations in the Complaint must be reviewed against the backdrop of the state court decisions.

ARGUMENT

I. The District Court Correctly Held That The Defendants Are Absolutely Immune From Liability For Discharging NASD's Regulatory Functions

This Court has held repeatedly that SROs, such as the NASD and its subsidiary NASDR, along with their officials are "absolutely immune from damages claims arising out of the performance of [their] federally-mandated conduct of disciplinary proceedings." *See, e.g.*, *Barbara*, 99 F.3d at 58-59. Even more broadly, this Court has held that SROs are absolutely immune "from suit for conduct falling within the scope of the SRO's regulatory and general oversight functions." *D'Alessio*, 258 F.3d at 105; *see also P'ship Exch. Sec. Co. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998); *Browne v. Nat'l Ass'n of Sec. Dealers, Inc.*, No. Civ. A. 3:05-CV-2469, 2006 WL 1506711, at *4 & n.5 (N.D. Tex. May 31, 2006).

The scope of this immunity is sweeping and it is triggered whenever an SRO "engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder." *D'Alessio*, 258 F.3d at 106. Importantly, this Court has rejected the argument that absolute immunity is reserved only for state actors. As explained in *Barbara*, with respect to the New York Stock Exchange, another SRO, "[a]lthough the Exchange is a private, rather than a governmental entity, immunity doctrines

protect private actors when they perform important government functions." 99 F.3d at 58. In this regard, the Court observed that absolute immunity has already been "afforded . . . to such private actors as arbitrators and organizations that sponsor arbitration." *Id.* And, as is the case with the NASD and its employees, "arbitrators . . . and their directives are not subject to the Due Process Clauses of the Constitution." *Yoni Tech. Inc. v. Duration Sys. Ltd.*, 244 F. Supp. 2d 195, 208 (S.D.N.Y. 2002); *see also, e.g.*, *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2000), *abrogated on other grounds by*, *United States v. Coppa*, 267 F.3d 132 (2d Cir. 2001).

The absolute immunity that is afforded to the NASD, NASDR, and their employees is critical to the highly reticulated system established by Congress for regulating the securities markets. Under that system, Congress and the SEC have delegated significant responsibility for front-line regulation of the securities markets to SROs, such as the NASD, including its subsidiary, NASDR, under the supervision of the SEC. *See Barbara*, 99 F.3d at 59. In this manner, SROs "perform[] a variety of regulatory functions that would, in other circumstances, be performed by a government agency." *Id.* This being so, this Court has held squarely that SROs enjoy "absolute immunity from suits for money damages with respect to the [SRO's] conduct of disciplinary proceedings." *Id*. Indeed, in *D'Alessio*, this Court rejected a claim that an SRO or its officials could even be

held liable for "assist[ing] the United States Attorney's Office and the SEC in their investigation and prosecution of [plaintiff] by providing them with 'false, misleading and inaccurate information about the plaintiff," 258 F.3d at 97-98, allegations entirely absent in this case.

The conduct of which Plaintiff complains—failing to warn her that her sworn testimony could subject her to perjury charges—relates singularly to the Defendants' mandate to "conduct[ ] investigations and commenc[e] disciplinary proceedings against [NASD] member firms and their associated member representatives relating to compliance with the federal securities laws and regulations." *D.L. Cromwell Inv., Inc.*, 279 F.3d at 157. As the district court concluded, Plaintiff's allegations go to the "core of the regulatory, investigatory, disciplinary, adjudicatory, and oversight functions delegated to the NASD under the Securities Exchange Act." *Scher*, 386 F. Supp. 2d at 407. Accordingly, the court was correct to hold Plaintiff's entire Complaint is "barred by the absolute immunity granted to the NASD, NASDR, and their employees." *Id*. at 406.

II. The District Court Correctly Held That The NASD Is Not A State Actor And Constitutional Principles Do Not Attach To Its Proceedings

It is axiomatic that to "establish a Fifth Amendment violation, a plaintiff must demonstrate 'that in denying the plaintiff's constitutional rights, the defendant's conduct constituted state action.'" *D.L. Cromwell Inv., Inc.*, 279 F.3d at 162 (citation and internal quotations omitted). This threshold finding is

necessary because the "Fifth Amendment restricts only governmental conduct, and will constrain a private entity only insofar as its actions are found to be 'fairly attributable' to the government." *Id*. at 161; *see also United States v. Int'l Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991). Thus, to plead a constitutional claim, Plaintiff first must establish that the NASD is a "state actor," or alternatively, that for purposes of the on-the-record interview with Plaintiff, the NASD was an arm of the Government. *See Desiderio*, 191 F.3d at 206. Plaintiff makes no such showing. *Scher*, 386 F. Supp. 2d at 408-09.

A. The NASD Is Not A State Actor

This Court has held without exception that "[t]he NASD is a private actor, not a state actor." *Desiderio*, 191 F.3d at 206; *see also Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 138 (2d Cir. 2002) (finding that "[i]t is clear that NASD is not a state actor"); *D.L. Cromwell Inv., Inc.*, 279 F.3d at 162 ("It has been found, repeatedly, that the NASD itself is not a government functionary.") (collecting cases). It is for this reason that in *United States v. Solomon*, this Court had no difficulty concluding that questioning by an SRO in "carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination." 509 F.2d at 867; *see also Shvarts*, 90 F. Supp. 2d at 222 (It is "beyond cavil that questions put to the defendants by the NASD in carrying out its own legitimate investigative purpose do not activate the privilege against self-

incrimination.").[5] Indeed, after an extensive analysis, the New York Appellate Division reached this very conclusion in upholding Plaintiff's perjury conviction: "[T]he fact that the NASD is subject to extensive oversight by the SEC, and ultimately Federal court review, does not metamorphose the NASD into an organ of the Federal government." *Cohen*, 773 N.Y.S.2d at 383 (quoting the trial court in *Cohen*, 718 N.Y.S.2d at 151).

B. Plaintiff's Attempt To Collapse The Absolute Immunity And State Actor Questions Into One Inquiry Is Erroneous And Was Properly Rejected By The District Court

Plaintiff confuses the NASD's absolute immunity with its status as a private actor. As the Plaintiff sees it, the Defendants cannot simultaneously benefit from absolute immunity and remain private actors. It is "inconsistent," Plaintiff asserts, for the Defendants "to argue that constitutional principles do not attach to its proceedings while maintaining the position of absolute immunity, as they can only be one or the other." (Pl.'s Br. 17.) To the contrary, however, as the district court ruled, "it is by no means 'inconsistent' to find that, on the one hand, the NASD exercises insufficient state action to trigger constitutional protections in a case such

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[5] Plaintiff's reliance on *Sparta Surgical Corp.*,159 F.3d at 1209, and *P'ship Exch. Sec. Co.*, 169 F.3d at 606, both cases originating out of the Ninth Circuit, for her state action analysis is misplaced as both decisions involved an inquiry into the NASD's absolute immunity—not the question of state action. Moreover, in each case, the complaint was found to be barred by the NASD's absolute immunity.

as this, while nevertheless holding that the NASD is entitled to absolute immunity in the exercise of its quasi-public regulatory duties." *Scher*, 386 F. Supp. 2d at 408.

As set forth above, *see supra* pp. 17-18, this Court has soundly rejected the argument that absolute immunity is not available to private actors. As the *Barbara* court stated: "As a private corporation, the Exchange does not share in the SEC's sovereign immunity, but its special status and connection to the SEC influences our decision to recognize an absolute immunity from suits for money damages with respect to the Exchange's conduct of disciplinary proceedings." 99 F.3d at 59.

Thus, when Plaintiff asks rhetorically, "[s]o which is it . . . [a]re SROs private entities capable of compelling witnesses to waive their Fifth Amendment rights, or are they quasi-governmental entities absolutely immune from lawsuit when acting in such capacity," (Pl. Br. 16) this Court need not look further than *Barbara* to conclude that they are both. 99 F.3d at 59. The NASD's absolute immunity does not transform it into a state actor, and as a private actor, constitutional principles do not apply to its proceedings. Purporting to answer her own question, Plaintiff concludes that "the Defendants should be perceived as *private actors* that are subject to suit." (Pl. Br. 17.) (emphasis added). What Plaintiff overlooks, however, that if the Defendants are *private actors*, then there

was no predicate *constitutional violation*. *D.L. Cromwell Inv., Inc.*, 279 F.2d at 161.

In sum, Plaintiff's arguments seemingly boil down to this: A request that this Court hold that the Defendants are not absolutely immune from her Complaint because they are *private actors* who violated her *constitutional rights*. Plaintiff's request lacks merit and should be rejected.

C. The District Court Correctly Held That Plaintiff Failed To Plead A "Close Nexus" Between The Challenged Conduct And The State

Because the NASD is a private actor, "state action may be found if, though only if, there is a such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Perpetual Sec. Inc.*, 290 F.3d at 137 (quoting *Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001)); *see also D.L. Cromwell Inv., Inc.*, 279 F.3d at 161; *Desiderio*, 191 F.3d at 206.

In an attempt to establish a close nexus, Plaintiff alleges that Mr. Lippman, one of the individual defendants and a former Assistant District Attorney, "began working with the Manhattan, New York District Attorney's Office by improperly sharing information." App. 19 (Compl. ¶ 24). Plaintiff alleges further that this purported interaction resulted in the District Attorney's Office effectively taking "over the NASD's 'prosecution'" but "on a criminal level," and that at least some

of the Defendants "acted as 'unofficial extensions' to the DA's office based upon the prior relationship and affiliation Lippman maintained with the prosecutor's office." App. 28 (Compl. ¶ 50); *see also* App. 19 (Compl. ¶ 24). The district court correctly rejected this argument; it found that Plaintiff failed to plead "improper collusion or collaboration between the NASD and the Manhattan District Attorney's Office." *Scher*, 386 F. Supp. 2d at 408.

Private conduct may be held to constitutional standards "*only when it can be said that the State is responsible for the specific conduct* of which the plaintiff complains" or "*only when [the State] has exercised coercive power or has provided such significant encouragement*, either overt or covert, that the choice must in law be deemed that of the State." *Desiderio*, 191 F.3d at 206 (emphases in original) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)); *see also Perpetual Sec., Inc.*, 290 F.3d at 138. And, although "[t]estimony in an NASD proceeding *may entail exposure to criminal liability*, . . . that in itself is *not* enough to establish the requisite governmental nexus." *D.L. Cromwell Inv., Inc.*, 279 F.3d at 162 (emphases added); *see also Solomon*, 509 F.2d at 869; *Shvarts*, 90 F. Supp. 2d at 222.

Here, there is no allegation that the New York District Attorney's Office (or any other state or federal official for that matter) approached, encouraged or otherwise required the NASD to conduct an on-the-record interview of Plaintiff.

Indeed, there is not even an allegation that any government authority was *aware* that the NASD was questioning Plaintiff at the time of her Rule 8210 interview. *D.L. Cromwell Inv., Inc.*, 279 F.3d at 163 (finding that an NASD Rule 8210 interview could not be imputed to the Government because request for the interview "issued directly from [the NASD] as a product of its private investigation, and . . . none of the demands was generated by governmental persuasion or collusion—either directly or through [an intermediary]"). Thus, it is impossible for any alleged violation of the Fifth Amendment to be regarded as state sponsored.

Additionally, allegations of open and healthy channels of communications between the NASD and state authorities do not make the NASD or its staff "unofficial extensions" of the Government. *Solomon*, 509 F.2d at 869 (holding that the New York Stock Exchange was "not an agent of the SEC" even though the Exchange shared information with the SEC after a target of an investigation made incriminating statements during his deposition and even though that information was later used in criminal proceedings against the target); *see also United States v. Szur*, No. S5 97 CR 108 (JGK), 1998 WL 132942, at *15 (S.D.N.Y. Mar. 20, 1998); *Marchiano v. Nat'l Ass'n of Sec. Dealers, Inc.*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) (collecting cases).

Moreover, contrary to Plaintiff's insistence, there was nothing "improper" or "inappropriate" about Mr. Lippman referring Plaintiff's perjurious testimony to New York authorities. (Pl.'s Br. 19-21.) When Plaintiff lied under oath she committed a serious crime—a crime independent of any misconduct being investigated by the NASD. The NASD was entitled to report that crime to appropriate state authorities no differently than if Plaintiff—by way of hypothetical—assaulted the examiner during the interview. *See Bloom*, 450 F. Supp. at 329 (adopting the Second Circuit's reasoning in *Solomon* to the NASD and holding that the SEC's referral of a matter for criminal prosecution did not violate any due process rights and did not otherwise "offend any constitutional guarantees").

Plaintiff maintains, however, that she has satisfied the close-nexus test because the "[D]efendants did not complete their internal regulatory proceeding before improperly requesting that the District Attorney's Office 'take over' the investigation." (Pl.'s Br. 19.) As Plaintiff puts it, the "[D]efendants never exhausted the administrative remedies as required under SEC Rules and Guidelines." *Id.*; App. 28 (Compl. ¶ 50). This alleged "premature referral," Plaintiff explains, is "precisely what [her] complaint is based upon." (Pl.'s Br. 19.) However, in the context of NASD proceedings, the exhaustion doctrine requires *members* of the broker-dealer industry to rely upon the administrative review

provisions of the Exchange Act before filing suit in federal court. 15 U.S.C. § 78s(d)(2); *see Barbara*, 99 F.3d at 56 ("The Act specifies that *persons* aggrieved by the disciplinary actions of a national securities exchange may seek review by appeal to . . . the SEC.") (emphasis added); *see also Datek Sec. Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 875 F. Supp. 230, 233 (S.D.N.Y. 1995). The exhaustion doctrine has no application to the NASD itself, and Plaintiff cites no case to the contrary. And, in any event, the NASD did not cut short its proceedings; it simply referred separate criminal activity to proper authorities.

III. The District Court Correctly Held That Plaintiff's Constitutional Rights Were Not Violated

With respect to Plaintiff's failure-to-warn and due process allegation, it is the settled law of this Circuit that "[o]nce a witness swears to give truthful answers, there is no requirement to warn him not to commit perjury, or, conversely to direct him to tell the truth. It would render the sanctity of the oath quite meaningless to require admonition to adhere to it." *Winter*, 348 F.2d at 210 (finding that a prosecutor is under "no legal duty to warn" a witness placed under oath against committing perjury). Indeed, in *United States v. Mandujano*, the Supreme Court relied on *Winters*, to reach an identical conclusion: That once a person is "under oath to testify truthfully," a "further explanation . . . that [such a person] could be prosecuted for perjury if he [or she] testified falsely" is "redundant." 425 U.S. 564, 581 (1976) (plurality opinion).

Here, the Complaint states on its face that Plaintiff was sworn in under oath at her on-the-record interview. App. 26 (Compl. ¶ 42); *see also* App. 48 (Exhibit C at 3). This fact alone requires the dismissal of Plaintiff's constitutional-failure-to-warn-of-perjury claim. However, in this case, Plaintiff—an attorney who was represented by experienced counsel—was also given a second, "redundant" warning; she was explicitly told that she was "expected to testify truthfully" and that failure to do so "may be considered conduct inconsistent with high standards of commercial honor and could expose [her] to possible sanctions which include a bar, suspension, censure and fine." App. 48 (Exhibit C at 7-8); *see also* App. 16, 26 (Compl. ¶¶ 18, 44).

Finally, it is important to emphasize that for purposes of Plaintiff's Fifth Amendment claims, including her due process claim, Plaintiff was *not* convicted of any crime due to a *self-incriminating* statement she made during the on-the-record interview. Plaintiff was convicted of a *separate* crime; providing false material testimony under oath in a proceeding in violation of New York Penal Law § 210.15. *See Cohen*, 773 N.Y.S.2d at 385. It is a well settled rule of Supreme Court jurisprudence that "neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." *Brogan v. United States*, 522 U.S. 398, 404 (1998) (collecting cases); *see also Apfelbaum*, 445 U.S. at 127 (same) (collecting cases).

This rule, the Supreme Court has held, is "firmly established constitutional law." *Id*. at 127.

IV. Additional Grounds Justify Affirming The District Court's Judgment

The Court need not consider any of the arguments of this section to affirm the dismissal of the Complaint. However, if necessary, each of these arguments were briefed below and provide an alternative basis for dismissal. *See Palmer v. Occidental Chem. Corp.*, 356 F.3d 235, 236 (2d Cir. 2004).

A. Plaintiff's Constitutional Claims Are Time Barred

Plaintiff's constitutional claims, if they even exist, are time barred. The statutory vehicle for Plaintiff to allege her constitutional claims is 42 U.S.C. § 1983. *Rosa R.*, 889 F.2d at 440. Plaintiff disagrees and contends that her cause of action arises under the federal question jurisdiction statute of 28 U.S.C. § 1331 and the civil rights jurisdictional grant of 28 U.S.C. § 1343. (Pl.'s Br. 24.) However, Plaintiff has provided no cogent argument or relevant legal authority explaining why her constitutional claims have not lapsed and therefore she should be found to have waived this undeveloped argument. *See Tolbert v. Queens College*, 242 F.3d 58, 75 (2d Cir. 2001).

As to substance, § 1331 "merely provides the basis for jurisdiction, it does not create a cause of action in and of itself." *Thomas v. Shipka*, 818 F.2d 496, 504 (6th Cir. 1987), *vacated on other grounds by* 488 U.S. 1036 (1989), *remanded to*

872 F.2d 772 (6th Cir. 1989). The same holds true for § 1343. *See Meyer v. Frank*, 550 F.2d 726, 728 & n.3 (2d Cir. 1977) (describing § 1343(a)(3) as the "jurisdictional implementation" of the Civil Rights Act).[6]

The statute of limitations for § 1983 claims in New York is three years pursuant to New York Civil Practice Law § 214(5). *Owens v. Okure*, 488 U.S. 235, 236, 251 (1989). A cause of action accrues "when the plaintiff knows or has reason to know of the injury that is the basis of [her] action." *Pearl v. City of Long Beach*, 296 F.3d 76, 80 (2d Cir. 2002). Here, Plaintiff knew or had reason to know of the alleged constitutional wrongs committed by the Defendants at the time the alleged wrongs occurred. *Id*. at 85 (holding that the plaintiff was "obviously aware of this cause of action for police brutality at the time of the [brutality] episode").

Certainly, Plaintiff was aware or should have been aware of these alleged wrongs when her indictment was unsealed in March 2000 and her motion to

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[6] To the extent Plaintiff is attempting to bring an implied cause of action directly under the Constitution, such a suit is not available "when § 1983 provides a remedy." *Pauk v. Bd. of Trs. of City Univ. of New York*, 654 F.2d 856, 865 (2d Cir. 1981), *questioned on other grounds by Okure v. Owens*, 816 F.2d 45, 46-47 (2d Cir. N.Y. 1987), *overruled on other grounds by Owens v. Okure*, 488 U.S. 235, 251 (1989). In any event, whether Plaintiff proceeds by a direct action under the Constitution or a § 1983 claim, a single statute of limitations of three years applies. *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987). However, because the "NASD is not a state agency . . . [a plaintiff] is unable to state a claim under section 1983" or the Constitution. *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979).

dismiss her criminal case was denied in November 2000. *See Cohen*, 718 N.Y.S.2d at 147. In this way, Plaintiff's case is similar to *Pauk*, where this Court held that the statute of limitation in the plaintiff's case began to run when the plaintiff "knew of his injury, the alleged improper denial of tenure, . . . when he received notice of termination of his employment," not as plaintiff contended, "the date of his actual discharge." 654 F.2d at 856.

B. Plaintiff's State Law Negligence Claims Are Time Barred

Plaintiff's state tort claims are also time barred. Under New York law, state law claims sounding in negligence and gross negligence must be brought within three years after the date the cause of action accrues. N.Y. C.P.L.R. § 214(5); *Robinson v. Franklin Gen. Hosp.*, 611 N.Y.S.2d 778, 780 (N.Y. Sup. Ct. 1994).

Here, all the conduct of which Plaintiff complains occurred between 1997 and 1998, *see* App. 16, 23, 26 (Compl. ¶¶ 18, 36, 42), some six years before Plaintiff filed her Complaint. Without citing to a single case, however, Plaintiff argues that her state negligence claims have not expired because the Defendants' allegedly negligent acts were not "discovered" or "could not have been confirmed until after all the appeals of the plaintiff's criminal conviction were exhausted and penalties against plaintiff were assessed." (Pl.'s Br. 25.) Plaintiff's argument is foreclosed by the reasoning of *DiPietro v. City of New Rochelle*, where the court held that the statute of limitations for a negligence claim began to run "at the time

of the conveyance of the property from the City to the plaintiff," not at the time that the plaintiff allegedly learned of the reverter condition nearly a decade later. 658 N.Y.S.2d 319, 320 (App. Div. 1997); *see also Jensen v. City of New York*, 734 N.Y.S.2d 88, 89 (App. Div. 2001).

Finally, this Court should reject Plaintiff's invitation to convert her state tort claims into a breach of contract claim to avoid New York's three-year statute of limitation. Plaintiff did not raise a breach-of-contract claim in her Complaint. Accordingly, she may not amend her Complaint now on appeal. *See Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998). In any event, her claim would be barred since the Complaint was filed on August 10, 2004, more than six years after her on-the-record interview on May 28, 1998.

C. Plaintiff Failed To Plead The Elements Of A Negligence Claim

Plaintiff's negligence claims are predicated entirely on her constitutional claims. App. 30 (Compl. ¶ 55) ("The conduct of the defendants was negligent or grossly negligent regarding their representations to the plaintiff in connection with the testimony she was forced to provide at the OTR, and plaintiff has been harmed."). However, because no constitutional wrong can be found to have been committed by the Defendants, *see supra* pp. 27-28, Plaintiff's negligence claims must necessarily fail.

Moreover, as a matter of law, Plaintiff has failed to plead a cause of action sounding in negligence, which requires both a duty owed to the plaintiff and a breach of that duty by the defendant. *See Amodei v. New York State Chiropractic Ass'n*, 553 N.Y.S.2d 713, 716 (App. Div. 1990). Here, the Defendants owed Plaintiff no "duty" with regard to any purported "representation" made during her interview. In the absence of a "duty . . . there can be no breach of duty, and without breach of duty there can be no liability." *Kimbar v. Estis*, 1 N.Y.2d 399, 405 (1956). Furthermore, even if a duty did exist, Plaintiff has failed to allege any breach of that duty. The alleged "representations" made by the Defendants were all entirely accurate.[7] And, in any event, Plaintiff's "unclean hands" bar her from recovering for her actions during the on-the-record interview. *See Nat'l Distillers & Chemical Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16 (1966); *see also Seagirt*

[7] Plaintiff was represented by experienced counsel during her on-the-record interview. In fact, Plaintiff's counsel once served in the same NASD regional office that was conducting Plaintiff's interview. In any event, all persons are presumed to know the law, particularly experienced attorneys such as Plaintiff. *See People v. Fernandez*, 402 N.Y.S.2d 940, 945 (N.Y. Sup. Ct. 1978) (noting that it is "one of the oldest legal homilies" "that all persons are presumed to know the law (not just lawyers)"); *see also Pyramid Controls Inc. v. Siemens Indus. Automation, Inc.*, 172 F.3d 516, 519-20 (7th Cir. 1999) ("All lawyers are presumed to know the law, and if they don't know a specific area of law well, they are obligated to consult with other lawyers who do."). And, of course, "[i]t is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally." *Barlow v. United States*, 32 U.S. 404, 411 (1833).

Realty Corp. v. Chazanof, 13 N.Y.2d 282, 285-87 (1963); *Youshah v. Staudinger*, 604 N.Y.S.2d 479, 480 (N.Y. Sup. Ct. 1993).

Finally, to the extent that the Complaint can be read to plead that any or all of the Defendants violated the NASD's own internal rules—and that such violations thereby give rise to claims for negligence or gross negligence—such claims are barred for the independent reason that there is no implied private right of action to sue SROs for failure to follow the Exchange Act, SEC rules, or the SRO's own rules or regulations. *Desiderio*, 191 F.3d at 208; *Feins v. American Stock Exch., Inc.*, 81 F.3d 1215, 1216 (2d Cir. 1996).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the district court's opinion, the judgment should be affirmed.

Respectfully submitted,

/s/ Michael F. Flanagan

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