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**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JAMIE K.C. SCHER,

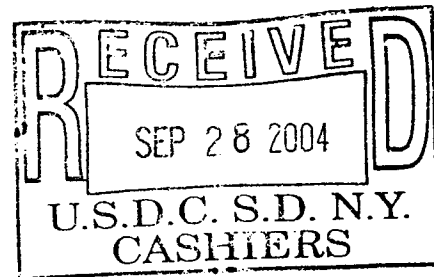
Plaintiff,

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.

CIVIL ACTION NO. 04 CV 06169 MBM



DEFENDANTS' MOTION TO DISMISS

For the reasons set forth in the accompanying Memorandum of Law in Support of Defendants' Motion to Dismiss, Defendants, 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, respectfully request that this Court dismiss with prejudice the entirety of the Complaint of *pro se* plaintiff Ms. Jamie K.C. Scher pursuant to Federal Rule of Civil Procedure 12(b)(6).

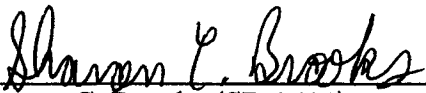
Respectfully submitted, this 28th day of September, 2004.

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*Motions for Pro Hac Vice
Admission Pending*

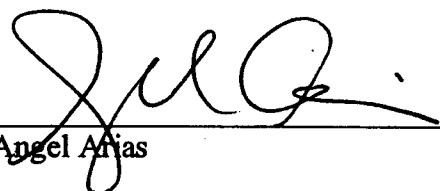

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2004, I caused copies of
DEFENDANTS' MOTION TO DISMISS, the MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS, and DEFENDANTS' RULE 7.1 DISCLOSURE
STATEMENT to be served by UPS next-day mail upon *pro se* plaintiff

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Angel Arias

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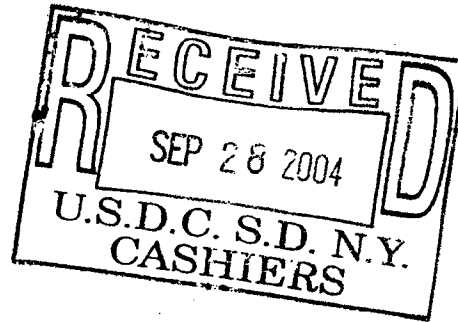
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants, the National Association of Securities Dealers, Inc. (“NASD”), NASD Regulation, Inc. (“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 (unless otherwise indicated, collectively, the “Defendants”), respectfully submit this memorandum in support of their Motion to Dismiss and request that Plaintiff’s Complaint be dismissed with prejudice.

I. INTRODUCTION

Plaintiff Jamie K.C. Scher, who has been convicted of five counts of perjury in connection with her on-the-record testimony in a NASDR investigation, claims that the Defendants violated her constitutional rights. More specifically, Plaintiff, who was disbarred as an attorney following her perjury conviction, claims that the Defendants should have advised her that false testimony under oath could subject her to perjury charges notwithstanding the fact that she was an experienced attorney and was represented by experienced counsel during that testimony. However, numerous clearly established legal principles require dismissal of this action. First, the NASD and its employees 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, Plaintiff’s constitutional claims must fail because the NASD is not a state actor and therefore constitutional claims cannot be sustained. Third, assuming arguendo that the NASD was a state actor, 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 a person has been placed under oath and, Plaintiff’s claims are barred by the applicable statute of limitations. Finally, Plaintiff’s tort claims also must be dismissed because she has failed to allege any duty that was owed to her, failed to allege that any such duty was breached, comes to this Court with “unclean hands,” and her claims are barred by the applicable limitations periods.

II. BACKGROUND

A. The NASD And The Comprehensive Federal Regulatory System For The Securities Market

The NASD is a private not-for-profit Delaware corporation and a self-regulatory organization (“SRO”) registered with the SEC as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. §§ 78o-3, *et seq.*, amending the Securities Exchange Act of 1934 (“Exchange Act”), 15 U.S.C. §§ 78a, *et seq.* See *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001). The NASD has existed since 1939, and it is the nation’s only registered securities association as well as the nation’s largest SRO. As a self-regulatory organization, the NASD is part of the Exchange Act’s highly interrelated and comprehensive mechanism for regulating the securities markets. See *Desiderio*, 191 F.3d at 201. In this regard, the NASD acts under the substantial supervision of the United States Securities and Exchange Commission (“SEC”). See *McLaughlin, Piven, Vogel, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 733 F. Supp. 694, 696-97 (S.D.N.Y. 1990) (Mukasey, J.). For instance, with few exceptions not relevant here, the SEC must approve all NASD rules, policies, practices, and interpretations before they are implemented. 15 U.S.C. § 78s(b). And, at any time, the Commission may “abrogate, add to, [or] delete from” the rules of the NASD. 15 U.S.C. § 78s(c).

B. 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) (discussing the function and role of NASDR). Specifically, NASDR 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 trial court specifically found 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) (attached hereto as Exhibit A), *aff’d*, 773 N.Y.S.2d 371 (App. Div. 2004) (attached hereto as Exhibit B), *appeal denied by*, 2004 N.Y. LEXIS 1817 (N.Y. May 19, 2004) (attached hereto as Exhibit C). 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)).

C. Plaintiff’s Suit Against The Defendants

The operative allegations of this case center around Plaintiff’s employment at Renaissance Financial Securities Corporation (“Renaissance”), which at all times relevant to this action, was a Long Island securities firm and a member of the NASD. Compl., ¶¶ 15, 32. In approximately December 1996, Plaintiff was hired by Renaissance to serve as the firm’s general counsel. *Id.*, ¶ 15. At that time, Plaintiff was licensed to practice law by the State of New York and had been a practicing attorney for approximately five years. *Id.*, ¶¶ 15, 30. After she became employed by Renaissance, Plaintiff passed the Series 7 and Series 63 securities examinations and became a licensed stockbroker and an associated member of the NASD. *Id.*, ¶ 15. As NASD members, Plaintiff and Renaissance agreed to be subject to the rules and regulations of both the NASD, *see NASD Manual (CCH)*, Rule 0115 (2003), and the SEC.

On May 18, 1998, in connection with an ongoing NASDR investigation of Renaissance and Plaintiff's father into potential NASD violations, Plaintiff was requested to provide an on-the-record interview pursuant to Rule 8210. *Id.*, ¶ 16. Plaintiff was informed by NASDR that she could be represented by legal counsel during the on-the-record interview. *Id.*, Exhibit A (“If you desire, you may be represented by counsel during the interview.”). Plaintiff, accompanied by counsel, Mr. William Singer, testified before NASDR on May 28, 1998.¹ *Id.*, ¶¶ 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 familiarity with and expertise in connection with the NASD disciplinary process.

The transcript attached to the complaint shows conclusively that Plaintiff was sworn in before her interview. *Id.*, Exhibit C at 3 (“JAMIE K.C. SCHER, having been first duly sworn, was examined and testified as follows:”). Indeed, Plaintiff avers as much in her Complaint: “At the interview plaintiff was sworn in under oath.” *Id.*, ¶ 42. Furthermore, after being sworn in, the interview commenced with the following explicit warning and affirmation by 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.

Id., Exhibit C at 7-8 (emphases added); *see also id.*, ¶¶ 18, 44.

¹ Although paragraph 18 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.

Immediately following this explicit warning, Plaintiff's counsel then stated for the record that he disagreed with NASDR that Plaintiff could not invoke the attorney-client privilege during the interview. *Id.*, Exhibit C at 8-9. Neither Plaintiff nor her attorney raised questions or concerns regarding the applicability of the Fifth Amendment testimonial privilege. In fact, the interview transcript conclusively demonstrates the *exact opposite*, when asked by an NASDR employee whether Plaintiff or her attorney "have any objections or need clarification on any issue just discussed," Plaintiff's counsel stated for the record that "we do understand our obligations to respond and we will do so appropriately." *Id.*, Exhibit C at 9.

During the preamble to the questioning, NASDR also provided a description of the nature and purpose of on-the-record interviews. NASDR explained that "NASDR investigations are non-public and confidential and are fact-gathering in nature." *Id.*, Exhibit C at 8; *see also id.*, ¶¶ 18, 44. NASDR continued, "[t]hey are not meant to be adversarial proceedings. Witnesses are required to provide information within the scope of their knowledge. The witness may not determine whether a question asked is relevant." *Id.*, Exhibit C at 8-9; *see also id.*, ¶¶ 18, 44. Finally, NASDR reiterated the fact-gathering nature of the interview; it 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." *Id.*, Exhibit C at 9.

Once questioning began, Plaintiff flagrantly lied to and deceived 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) (same) (attached hereto as Exhibit D).² Plaintiff adopted this course of conduct notwithstanding the solemn oath she took to testify truthfully and despite her standing as a licensed attorney subject to the New York Lawyers Code of Professional Responsibility.³ See *Douglas v. Chisholm*, 142 Misc. 869, 872 (N.Y. Sup. Ct. 1931) (observing that “attorneys are held to a higher degree of good faith, honesty and fair dealing in their transactions”). Plaintiff’s agreement to “respond” to NASDR questions and to “do so appropriately,” proved to be a hollow

² To the extent the Complaint attempts to recharacterize or perhaps even inconsistently plead issues conclusively resolved by the New York courts in the underlying criminal proceedings, such attempts are both inappropriate and contrary to applicable law. When issues raised in a complaint have been or could have been resolved in previous state court proceedings, the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, requires federal courts to “give preclusive effect to [the] state-court judgments whenever the courts of the State from which the judgments emerged would do so.” *Allen v. McCurry*, 449 U.S. 90, 96 (1980); see also *Migra v. Warren City School Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984). The New York Court of Appeals has long held that a criminal conviction following a jury trial is conclusive proof of its underlying facts in a subsequent civil action where the convicted person is seeking affirmative relief in spite of his own wrongdoing. *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 302, 304-05 (1973); see also *Vavolizza v. Krieger*, 33 N.Y.2d 351, 355-56 (1974) (holding that “a criminal conviction could serve as collateral estoppel insofar as the same issues were revived in subsequent civil litigation”). The law of the Second Circuit is in accord. See *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986); see also *Maietta v. Artuz*, 84 F.3d 100, 102 n.1 (2d Cir. 1996); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978). Accordingly, all issues and findings resolved by the New York courts in Plaintiff’s criminal case cannot be disputed or otherwise recharacterized by Plaintiff for purposes of this action. Indeed, this Court should review Plaintiff’s Complaint against the backdrop of the state court decisions. And, of course, a motion to dismiss is a proper vehicle to raise the applicability of collateral estoppel and/or *res judicata*. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998); see also *AmBase Corp. v. City Investing Co. Liquidating Trust*, 326 F.3d 63, 72 (2d Cir. 2003).

³ Disciplinary Rule 1-102 of the New York Lawyers Code of Professional Responsibility states in part that a lawyer “shall not”: (1) “[v]iolate a disciplinary rule”; (2) “[e]ngage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness, or fitness as a lawyer”; (3) “[e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation”; (4) “[e]ngage in conduct that is prejudicial to the administration of justice;” or (5) “[e]ngage in any other conduct that adversely reflects on the lawyer’s fitness as a lawyer.” DR-1-102(A)(1), (3), (4), (5), (7) (emphasis added).

representation of cooperation. For her false sworn testimony during the on-the-record interview, Plaintiff subsequently was prosecuted in New York state court and convicted after a jury trial of five counts of perjury in the first degree. *Cohen*, 773 N.Y.S.2d at 387. She was sentenced to five years probation and ordered to pay a \$10,000 fine and to perform 1,500 hours of community service.⁴ *Id.* The trial court's judgment was entered on February 5, 2002, and on March 11, 2004, Plaintiff's conviction was upheld by the New York Appellate Division. *Id.* Leave to appeal to the New York Court of Appeals was denied on May 19, 2004. *Cohen*, 2004 N.Y. LEXIS 1817.

In this action, Plaintiff alleges that the Defendants violated her Fifth Amendment rights and also asserts state law tort claims.⁵ With regard to the constitutional claims, the gravamen of Plaintiff's 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." Compl., ¶ 21. Because of the alleged absence of this "additional" warning language, and because the Defendants allegedly conducted

⁴ Plaintiff's codefendants also were criminally convicted after jury trials for their parts in lying to and misleading the NASD. Plaintiff's brother, Adam Cohen, was convicted of six counts of perjury in the first degree and sentenced to six months incarceration and five years probation and ordered to pay a \$10,000 fine and perform 1,000 hours of community service. *Cohen*, 773 N.Y.S.2d at 387. Plaintiff's father, Stanley Cohen, 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), and was sentenced to 1 ½ to 4 ½ years incarceration and ordered to pay a fine of \$15,000. *Id.* All convictions have been upheld by the New York Appellate Division, and applications to appeal to the New York Court of Appeals have all been denied. *Cohen*, 2004 N.Y. LEXIS 1817.

⁵ Plaintiff is mistaken to allege that her due process claims arise under the Fourth Amendment. *See* Compl., ¶ 78 ("In addition to the 5th amendment [sic] violation, defendants violated Plaintiff's 4th Amendment Right [sic] to due process."). The Fourth Amendment protects against unreasonable searches and seizures. *United States v. Place*, 462 U.S. 696, 723 n.3 (1983) ("[A] due process claim [is] not one under the Fourth Amendment.").

an on-the-record interview “without having first provided a warning notice as to the possibility of criminal sanctions,” Plaintiff alleges that her Fifth Amendment testimonial privilege and due process rights were violated. *Id.*, ¶¶ 21, 26, 45, 46, 78. Plaintiff’s state law claims of negligence and gross negligence are predicated entirely on these alleged constitutional claims. *Id.*, ¶ 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.”) (Emphasis added).

For these alleged constitutional and state tort wrongs, Plaintiff seeks unspecified compensatory damages, \$100 million in punitive damages, consequential and incidental damages for bringing the instant action, attorney’s fees, including all fees paid in connection with her criminal prosecution and subsequent appeals, as well as any further relief this Court deems equitable and just. Compl., Prayer for Relief at 27-28.

III. ARGUMENT

A. The Defendants Are Absolutely Immune From The Complaint

The Second Circuit has held that SROs, such as the NASD and its subsidiary NASDR, and their officials are “absolutely immune from damages claims arising out of the performance of [their] federally mandated conduct of disciplinary proceedings.” *Barbara v. New York Stock Exch., Inc.*, 99 F.3d 49, 58-59 (2d Cir. 1996). Even more broadly, the Second Circuit—like every other federal court to rule on the question—has also 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 v. New York Stock Exch., Inc.*, 258 F.3d 93, 105 (2d Cir.), *cert. denied*, 534 U.S. 1066 (2001); *see also id.* at 104 (holding that an SRO is “immune from liability for claims arising out of the discharge of its duties under the Exchange Act”); *Partnership Exch. Sec. Co. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 169 F.3d 606, 608 (9th Cir. 1999) (holding that the

NASD was protected by absolute immunity for its conduct “under the aegis of the Exchange Act’s delegated authority”) (internal quotation marks omitted); *Sparta Surgical Corp. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998); *American Benefits Group, Inc. v. Nat’l Ass’n of Sec. Dealers*, No. 99 CIV 4733 JGK, 1999 WL 605246, at *8 (S.D.N.Y. Aug. 10, 1999) (Koeltl, J.) (holding that “the NASD is entitled to absolute immunity when exercising its authority within the scope of its official duties”) (attached hereto as Exhibit E).

The scope of this immunity is broad and without exception. As the Second Circuit explained in *D’Alessio*, an SRO “is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder.” 258 F.3d at 106. The immunity of SROs from suits arising from the execution of their regulatory and disciplinary functions is a necessity of the highly reticulated system that Congress established for regulating the securities markets.

Under that system, Congress and the SEC 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. Instead of allocating all regulatory responsibilities to the SEC, Congress opted in the Exchange Act to develop a system of “cooperative regulation” in which private SROs would establish rules and standards of conduct for market participants and would enforce those rules, with all of their actions subject to the ultimate approval of the SEC. *Barbara*, 99 F.3d at 59 (finding that “safeguards exist[] in the regulatory framework of the . . . NASD”; finding further that the NASD is “subject to the SEC’s regulatory requirements, which provide appropriate procedural safeguards to the disciplinary process”). In this way, SROs such as the NASD “perform a variety of regulatory functions that would, in other circumstances, be performed by a government agency.” *Id.* at 59. This being so, the Second Circuit in *Barbara*

squarely held that SROs enjoy “absolute immunity from suits for money damages with respect to the [SRO’s] conduct of disciplinary proceedings.” *Id.*; *see also D’Alessio*, 258 F.3d at 105 (holding that for purposes of absolute immunity an SRO “stands in the shoes of the SEC”). Indeed, the Second Circuit in *D’Alessio* rejected a claim that an SRO or its officials could 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, 106, allegations entirely absent in this case.

Here, the conduct of which Plaintiff complains—failing to warn her that her sworn testimony could subject her to perjury charges—relates completely 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 (fourth set of brackets in original). Thus, the allegations of the Complaint go to the core of the regulatory, investigatory, disciplinary, adjudicatory, and oversight responsibilities that the Exchange Act delegated to the NASD, including NASDR and their employees.

Accordingly, the entire Complaint is barred by the absolute immunity of the NASD, NASDR, and their employees and must be dismissed with prejudice.

B. The NASD Is Not A State Actor And Constitutional Principles Do Not Attach To Its Proceedings

Plaintiff’s constitutional claims must be dismissed for yet another reason. 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 161 (internal quotation and citation omitted); *see also Perpetual Sec., Inc. v. Tang*, 290 F.3d 132, 137 (2d Cir. 2002). 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.” *D.L. Cromwell Inv., Inc.*, 279 F.3d at 161; *see also United States v. Int’l Bhd. of Teamsters*, 941 F.2d 1292, 1295 (2d Cir. 1991). Thus, to make out a constitutional claim, Plaintiff first must establish that the NASD is a “state actor,” or in the alternative, that for purposes of its on-the-record interview with Plaintiff, the NASD was the arm of the Government. Plaintiff makes no such showing and, accordingly, her constitutional claims must be dismissed as a matter of law.

1. The NASD Is Not A State Actor

The Second Circuit 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.*, 290 F.3d at 138; *D.L. Cromwell Inv., Inc.*, 279 F.3d at 161 (collecting lower court cases from the Second Circuit); *Graman v. Nat’l Ass’n of Sec. Dealers, Inc.*, No Civ. A. 97-1556-JR, 1998 WL 294022, at *3 (D.D.C. Apr. 27, 1998) (collecting cases from across the country) (attached hereto as Exhibit F). Thus, there can be no doubt that—as a matter of law—the NASD is not a state actor. *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 135 (S.D.N.Y. 1999) (dismissing plaintiffs’ due process claim because the NASD “exercise[s] insufficient state action to trigger constitutional due process”); *McLaughlin, Piven, Vogel, Inc.*, 733 F. Supp. at 696 (noting that the “NASD [is] . . . a private corporation”). Indeed, after an extensive analysis, the New York Appellate Division reached this very same conclusion in its decision 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).

2. No “Close Nexus” Exists 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), in turn quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). That nexus exists when (1) the Government “‘has exercised coercive power over a private decision or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State’;” or (2) “‘the private entity has exercised powers that are ‘traditionally the exclusive prerogative of the State.’” *D.L. Cromwell Inv., Inc.*, 279 F.3d at 161 (brackets removed) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), in turn quoting *Jackson*, 419 U.S. at 351); *see also Perpetual Sec. Inc.*, 290 F.3d at 138; *Desiderio*, 191 F.3d at 206.

In an attempt to satisfy this close-nexus test, 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 with the intent to get participants in the Regulatory Proceedings to change their ‘stories’ and cooperate with the NASD to avoid criminal penalties themselves.” Compl., ¶ 24. The Complaint 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 defendants “Schwartz, Lippman, Shields and Davis acted as ‘unofficial extensions’ to the DA’s office based upon the prior relationship and affiliation Lippman maintained with the prosecutor’s office.” *Id.*, ¶ 50; *see also id.*, ¶ 24. This alleged interaction, Plaintiff concludes, “reaches far beyond that of self regulating [sic] organization as it is now acting in a governmental capacity.” *Id.*, ¶ 50. These

allegations, however, fail to allege the necessary “close nexus” to support a finding of state action.

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 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) (“Nor would a violation of a rule of the NASD which would subject the defendants to sanctions by that Association, and even to civil and criminal enforcement proceedings by the government, suffice to create an agency relationship between the NASD and the government.”). Indeed, over a quarter century ago, the Second Circuit rejected firmly the argument that investigations conducted by SROs (in that case the New York Stock Exchange) pursuant to a statutory grant of authority could fairly be attributable to the Government. As the Court explained, “NYSE’s inquiry into [the target] was in pursuance of its own interests and obligations, not as an agent of the SEC.” *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (Friendly, J.). The Court continued, “[i]t is not enough to create an agency relationship that the [defendant’s] conduct violated both a rule of NYSE, thereby subjecting him to disciplinary actions by the body, and federal law, with consequent liability to civil and criminal enforcement proceedings by the Government.” *Id.*; *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).

Moreover, 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 over 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*, 457 U.S. 1004-05); *see also Perpetual Sec., Inc.*, 290 F.3d at 138 (rejecting a plaintiff’s constitutional challenge to a mandatory arbitration clause because the petitioner “has not alleged that the SEC required or even encouraged NASD or any other self-regulating private organization to adopt compulsory arbitration”); *Desiderio*, 191 F.3d at 207 (same); *Graman*, 1998 WL 294022, at *3 (granting the NASD’s motion to dismiss because plaintiffs failed to allege the requisite government coercion and encouragement necessary to satisfy the close-nexus test). Here, there is absolutely no allegation that the New York District Attorney’s Office (or any other state or federal official for that matter) approached, initiated, encouraged or otherwise required the NASD to conduct an on-the-record interview of Plaintiff or even later requested information from the NASD investigation. Indeed, there is absolutely no allegation that any Government authority was even 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. *First Jersey Sec., Inc. v. Bergen*, 605 F.2d 690, 699 n.5 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (noting that because “NASD is not a state agency. . . [plaintiff] is unable to state a claim under section 1983”).

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.⁶ In *Solomon*, for example, two days before a target of an investigation was to be deposed by the New York Stock Exchange, the SEC subpoenaed the Exchange for all material developed in the course of its investigation. 509 F.2d at 869. The target provided incriminating testimony during his deposition and, upon its completion, the Exchange thereafter furnished the self-incriminating testimony to the SEC and it was subsequently used before the grand jury and at trial. Notwithstanding this sharing of information, the Second Circuit had no difficulty concluding that the Exchange was “not an agent of the SEC” and that the actions of one could not be imputed to the other. *Id.*; see also *United States v. Szur*, No. S5 97 CR 108 (JGK), 1998 WL 132942, at *15 (S.D.N.Y. Mar. 20, 1998) (rejecting defendant’s claim that NASD investigations were “pretexts” for assisting an ongoing criminal investigation and dismissing as meritless a motion to suppress without even granting an evidentiary hearing) (attached hereto as Exhibit G); *Marchiano v. Nat’l Ass’n of Sec. Dealers, Inc.*, 134 F. Supp. 2d 90, 95 (D.D.C. 2001) (“The court is aware of no case—and [the plaintiff] has presented none—in which NASD Defendants were found to be state actors . . . because of any alleged collusion with criminal prosecutors. In fact, every court that has addressed those issues has rejected [the plaintiff’s] arguments.”) (collecting cases). Accordingly, any alleged sharing of information between Mr. Lippman or any other defendant and the District Attorney’s Office cannot satisfy the Supreme Court’s close-nexus test.

⁶ Nor is Plaintiff’s allegation regarding Mr. Lippman’s former employment with the New York District Attorney’s Office sufficient to alter this legal conclusion. An employee’s status as a former government worker is hardly sufficient to clothe him with the power and authority of the State. Moreover, Mr. Lippman’s alleged referral to the State was not improper; when Plaintiff lied under oath she committed a serious crime—a crime independent of any misconduct being investigated by the NASD. See *Bloom*, 450 F. Supp. at 329 (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”).

C. Plaintiff's Constitutional Rights Were Not Violated

Even if this Court finds it necessary to examine the merits of Plaintiff's constitutional claims beyond the threshold issue of state action, Plaintiff's claims require dismissal as a matter of law. To the extent that Plaintiff alleges that her rights to the Fifth Amendment testimonial privilege were violated, Compl., ¶¶ 26, 46, such allegations are without merit. 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." *Shvarts*, 90 F. Supp. 2d at 222; *Solomon*, 509 F.2d at 867 (holding that "interrogation by the New York Stock Exchange in carrying out its own legitimate investigatory purposes does not trigger the privilege against self-incrimination"). Because the privilege against self-incrimination is not triggered by NASD questioning, then warnings regarding the privilege must necessarily not be required, and alleged due process violations also must necessarily not exist. And, at any rate, Plaintiff's remedy for a violation of the right against compelled self-incrimination "would be the suppression of any evidence gathered in violation of [her] Fifth Amendment rights, not damages under Section 1983." *Jermosen v. Coughlin*, 877 F. Supp. 864, 868 n.2 (S.D.N.Y. 1995). This Court's analysis need not go any further. However, for additional reasons Plaintiff's constitutional claims lack merit.

To the extent Plaintiff alleges that her constitutional rights were violated because the Defendants did not warn her that she could be criminally prosecuted for lying under oath, Compl., ¶¶ 21, 26, 45, this claim should also not be well-taken. The law of the Second Circuit is clear: "Once 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." *United States v. Winter*, 348 F.2d 204, 210 (2d Cir. 1965) (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 the Second Circuit's holding in *Winters*, to reach the same conclusion, namely, 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). As the Court explained, an additional warning "serve[s] simply to *emphasize* the obligation already imposed by the oath." *Id.* (emphasis added); *see also id.* at 582 ("[A] witness subpoenaed to testify before a petit jury and placed under oath has never been entitled to a warning that, if he violates the solemn oath to 'tell the truth,' he may be subject to a prosecution for perjury, for the oath itself is the warning.").

Here, the Complaint states on its face that Plaintiff was sworn in under oath at her on-the-record interview. Compl., ¶ 42; *see also* 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—who was an attorney with approximately half a decade of legal experience and was also represented by legal counsel—was also given a second, "redundant" warning; she was explicitly told that she was "expected to testify truthfully" and that "any failure to answer . . . truthfully 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." *Id.*, Exhibit C at 7-8; *see also id.*, ¶¶ 18, 44. Although there is no duty to warn, these warnings put her on notice that it is wrong to lie under oath and that the provision of false testimony carries with it the potential for criminal sanctions.

Finally, it is important to point out that for purposes of Plaintiff's Fifth Amendment claim, 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.⁷ Instead, 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 United States v. Apfelbaum*, 445 U.S. 115, 117, 127 (1980) (“[P]roper invocation of the Fifth Amendment privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.”) (collecting cases). Plaintiff’s perjury is not excused by a purported failure to warn her not to lie under oath.

Thus, although this Court need not reach the merits of Plaintiff’s allegations in order to dismiss her constitutional claims, it is plain that on the merits her claims require dismissal with prejudice with respect to all of the Defendants.

D. Plaintiff’s Constitutional Claims Are Untimely Under New York’s Three-Year Statute of Limitations

Even if this Court finds it necessary to go beyond the absolute immunity and state action doctrines—which it need not—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. The specific on-the-record interview occurred on May 28, 1998, more than six years before the instant Complaint was filed in August 2004. *Id.*, ¶¶ 18, 40, 42. 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) (holding that New York’s three-year statute of

⁷ Indeed, the focus of NASDR’s investigation did not even concern Plaintiff. NASDR’s on-the-record interview of Plaintiff was to determine whether Plaintiff’s father was employed improperly by Renaissance in violation of NASD Rules.

limitations applies to claims brought under § 1983); *see also Pearl v. City of Long Beach*, 296 F.3d 76, 79 (2d Cir. 2002) (same).

Although state law supplies the statute of limitations for claims under § 1983, “[f]ederal law determines when a section 1983 cause of action accrues.” *Pearl*, 296 F.3d at 80. A claim accrues “when the plaintiff knows or has reason to know of the injury which is the basis of her action.” *Id.* (brackets removed). Here, there is no question that Plaintiff knew or had reason to know of the alleged constitutional wrongs committed by the Defendants at the time that 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.”). Furthermore, Plaintiff’s indictment was unsealed in March 2000 and her motion to dismiss in her criminal case was denied by Judge Fried in November 2000. *See Cohen*, 718 N.Y.S.2d at 147. Thus, based on the allegations set forth in her Complaint, Plaintiff’s constitutional claims are time barred and must therefore be dismissed.

E. Plaintiff’s Negligence Claims Require Dismissal With Prejudice

Plaintiff’s Complaint raises claims against the Defendants that sound in negligence or gross negligence. Compl., ¶ 55. Such claims are without merit and require dismissal for several reasons, including the doctrine of absolute immunity, which has already been discussed at length. *See supra* Part III.A.

1. Plaintiff’s Negligence Claims Are Time Barred

Pursuant to New York Civil Practice Law and Rules § 214(5), which is New York’s residual statute of limitations provision, state law claims sounding in negligence, including gross negligence, that are not brought within three years after the date the cause of action accrues are time barred. CPLR § 214(5); *see Robinson v. Franklin Gen. Hosp.*, 611 N.Y.S.2d 778, 780 (N.Y. Sup. Ct. 1994) (holding that CPLR § 214(5) fixes a three-year limitation period for

negligence and gross negligence claims); *see also DiPietro v. City of New Rochelle*, 658 N.Y.S.2d 319, 320 (App. Div. 1997). Here, the actions of which Plaintiff complains occurred in 1998. Compl., ¶¶ 18, 40, 42. Thus, Plaintiff's state law claims, which were filed some six years after the operative facts are alleged to have occurred, are untimely. *See Jensen v. City of New York*, 734 N.Y.S.2d 88, 89 (App. Div. 2001) (limitation period began to run upon the date that the plaintiff was erroneously informed that the body that was found was not that of his son; "[t]he alleged misidentification was a singular act of negligence from which all potential damages arose"); *DiPietro*, 658 N.Y.S.2d at 320 (finding that the statute of limitation for a negligent conveyance claim began to run "at the time of the conveyance of the property from the City to the plaintiff"). Accordingly, all state law claims sounding in negligence must be dismissed.

2. Plaintiff's Negligence Claims Lack Merit And Plaintiff Lacks A Private Cause of Action Under The Exchange Act

Plaintiff's negligence and gross negligence claims are entirely predicated on her constitutional claims. That is, Plaintiff alleges that because the Defendants allegedly violated her constitutional rights, the Defendants' actions also give rise to claims for negligence and gross negligence. 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.") (emphasis added). However, as set forth above, *see supra* Part III.C., no constitutional wrong can be found to have been committed by the Defendants. Thus, Plaintiff's negligence claims must necessarily fail.

Even if Plaintiff's state law claims are not entirely predicated on her constitutional allegations, however, Plaintiff has failed to plead a cause of action sounding in negligence as a matter of law. To properly allege a claim for negligence, a plaintiff must allege that the

defendant owed a duty to the plaintiff. *Palsgraf v. Long Is. R. R. Co.*, 248 N.Y. 339, 342 (1928); see also *Kimbar v. Estis*, 1 N.Y.2d 399, 403 (1956). Here, the Defendants owed Plaintiff no “duty” with regard to any purported “representation” made during her interview.⁸ In the absence of a “duty . . . there can be no breach of duty, and without breach of duty there can be no liability.” *Kimbar*, 1 N.Y.2d at 405. Furthermore, even if a duty did exist—which it did not—Plaintiff has failed to allege any breach of that duty. The alleged “representations” made by the Defendants were all entirely accurate.

Also, it is important to highlight once again that Plaintiff was not criminally convicted due to any self-confessional statement; she was convicted of the independent crimes of perjury, the *actus reus* and *mens rea* of which occurred during her on-the-record interview. And, the law of New York is clear on this point: One who comes into court seeking affirmative relief must do so with “clean hands;” a plaintiff guilty of immoral, illegal or unconscionable conduct may never recover when such conduct “directly relate[s] to the subject matter in litigation and the party seeking to invoke the doctrine [of unclean hands] was injured by such conduct.” *Nat’l Distillers*

⁸ A duty, if one exists, was owed to Plaintiff by her attorney, Mr. Singer, who accompanied Plaintiff to the on-the-record interview and should have ensured that she was aware of the purpose and function of the interview and the importance of testifying truthfully under oath. In any event, all persons are presumed to know the law, particularly experienced attorneys such as Plaintiff. See *People v Fernandez*, 93 Misc. 2d 127, 133 (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)”); *Flagler v. Lipman*, 2 Misc. 417, 418 (N.Y. Comm. Pleas 1893) (observing as a “fact” that because the defendant is “a lawyer, [he is] presumed to know the law”); 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.”); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F. Supp. 2d 270, 277 (D.D.C. 2002) (“An attorney is presumed to know the law.”). 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).

& Chemical Corp. v. Seyopp Corp., 17 N.Y.2d 12, 15-16 (1966); *see also Seagirt Realty Corp. v. Chazanof*, 13 N.Y.2d 282, 285-87 (1963) (explaining that the “unclean hands doctrine bars only causes of action founded in illegality or immorality” and finding further that the “maxim must be applied only where the plaintiff has dealt unjustly in the very transaction of which he complains”); *Youshah v. Staudinger*, 159 Misc. 2d 350, 352 (N.Y. Sup. Ct. 1993) (holding that a “court will not aid a party who came in with unclean hands”). Here, there can be no doubt that Plaintiff’s perjurious testimony and obstructionist behavior during her on-the-record interview relates directly to the matter at hand. There can equally be no doubt that society as a whole, and the Defendants in particular, were injured by Plaintiff’s conduct, which impeded NASDR’s investigatory, disciplinary and regulatory mandates. Thus, Plaintiff’s immoral, illegal, and unconscionable behavior—all conclusively proven by her criminal conviction—bars her from now seeking relief in this Court in connection with her on-the-record interview.

In sum, Plaintiff has failed to allege the existence or breach of any duty owed to her and, Plaintiff comes to this Court with unclean hands. Thus, Plaintiff’s negligence claims must be dismissed as a matter of law.

Finally, to the extent that Plaintiff’s 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); *see also, e.g., Sparta Surgical Corp.*, 159 F.3d at 1213 (holding that “to the extent that [plaintiff] seeks private relief for NASD or NASDAQ’s breach of their own rules, its claims are barred”); *Jablon v. Dean Witter & Co.*,

614 F.2d 677, 681 (9th Cir. 1980); *Mihalakis v. Pacific Brokerage Servs., Inc.*, No. 91-994, 1991 WL 280236, at *4 (S.D.N.Y. Dec. 23, 1991) (Haight, J.) (finding that the Exchange Act “does not create an implied private right of action . . . against the NASD”) (attached hereto as Exhibit H); *FDIC v. Nat’l Ass’n of Sec. Dealers*, 582 F. Supp. 72, 75 (S.D. Iowa) (holding that “a customer of a member of a national securities association has no common law cause of action against the association for negligent admission or supervision of the member”), *aff’d*, 747 F.2d 498 (8th Cir. 1984); *Gustafson v. Strangis*, 572 F. Supp. 1154, 1155 (D. Minn. 1983); *Colman v. D.H. Blair & Co.*, 521 F. Supp. 646, 654 (S.D.N.Y. 1981).

V. CONCLUSION

For all the foregoing reasons, Plaintiff’s Complaint should be dismissed with prejudice with respect to all the Defendants.

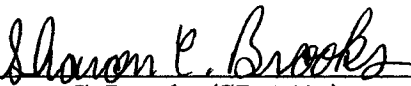
Respectfully submitted, this 28th day of September, 2004.

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