UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

No. 10-CV-457 (GLS/DRH)

TIMOTHY M. McGINN and DAVID L. SMITH,

Defendants.

APPEARANCES:

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DAVID R. HOMER
U.S. MAGISTRATE JUDGE

MEMORANDUM-DECISION AND ORDER

Presently pending are the motions of (1) defendants Timothy M. McGinn ("McGinn") and David L. Smith ("Smith") to compel plaintiff Securities and Exchange Commission

("SEC") to serve responses to three interrogatories (Dkt. No. 189),[1] and (2) non-parties Financial Industry Regulatory Authority ("FINRA") and four of its employees (collectively "FINRA") to quash subpoenas for documents and testimony served by McGinn and Smith (Dkt. No. 192).[2] For the reasons which follow, the motion of McGinn and Smith to compel is denied and FINRA's motion to quash is granted.

I. Background

The SEC is a government agency charged with regulating the securities market, including enforcing securities laws. See 15 U.S.C. § 78a et seq.. FINRA was created by statute in 2007 as the only officially registered national securities association. Nat'l Ass'n of Sec. Dealers, Inc. v. S.E.C., 431 F.3d 803, 804 (D.C. Cir. 2005).

> By virtue of its statutory authority, [FINRA] wears two institutional hats: it serves as a professional association, promoting the interests of [its] members ... and it serves as a quasi-governmental agency, with express statutory authority to adjudicate actions against members who are accused of illegal securities practices and to sanction members found to have violated the Exchange Act or [SEC] regulations issued pursuant thereto.

Id. (citing 15 U.S.C. § 78o-3(b)(7)); see also Shorris Decl. (Dkt. No. 192-3) at ¶¶ 2-4. In its self-regulatory role, FINRA may investigate the conduct of a member and impose sanctions. See Karsner v. Lothian, 532 F.3d 876, 880 (D.C. Cir. 2008).

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[1]At the time this motion was filed on November 15, 2010, McGinn and Smith were jointly represented by a single attorney. See Dkt. No. 189. On December 23, 2010, both defendants filed substitutions of counsel and are now represented by the separate and different counsel set forth above. See Dkt. Nos. 239, 240.

[2]The subpoenas were all issued in the Southern District of New York. The motion to quash was originally brought in that district, but at the suggestion of the court there, the motion was dismissed in the Southern District and re-filed in this district. See Dkt. No. 192-2.

For almost thirty years until April 2010, McGinn and Smith owned and operated a business in Albany, New York offering financial services to clients, including investment advice stock brokerage services, and investments in securities sold by McGinn and Smith. Am. Compl. (Dkt. No. 100) at ¶¶ 22-24. As registered brokers, McGinn and Smith were both subject to the standards and procedures of FINRA. FINRA Compl. (Dkt. No. 192-3) at ¶¶ 11-14. In September 2008, FINRA commenced an investigation of McGinn and Smith for violations of securities laws and regulations regarding alleged fraud in four unregistered securities offerings sold between 2003 and 2006. Russo Decl. (Dkt. No. 189-2) at ¶ 3; but see Shorris Decl. at ¶ 9 (investigation commenced in January 2009); see also FINRA Compl. at ¶¶ 1-9.

FINRA's investigation initially focused on the administrative operations of the McGinn and Smith business and its sales practices. Russo Decl. at ¶¶ 7-8. FINRA's investigation included interviews with McGinn and Smith in April 2009 with which McGinn and Smith were required to cooperate as a condition of their FINRA membership and registration. Id. at ¶¶ 7,8. In July 2009, FINRA issued an examination report finding seventeen violations of administrative requirements principally including private placement memoranda and procedures regarding certain sales. Id. at ¶ 10. In September 2009, FINRA advised McGinn and Smith that it had referred the results of the investigation to its Enforcement Division for review and disposition. Id. FINRA interviewed McGinn and Smith a second time over several days in February 2010 concerning not only the violations cited in the June 2009 examination report but also allegations of personal gain by McGinn and Smith at the expense of investors and fraudulent securities offerings. Id. at ¶¶ 22-26, 28, 29. FINRA filed a formal complaint against McGinn and Smith on April 5, 2010 alleging fraud in the four

unregistered offerings in 2003-06. FINRA Compl. The hearing on that complaint is scheduled to commence in May 2011. Shorris Decl. at ¶ 10.

In December 2009, FINRA referred the matter to the SEC for its investigation of what FINRA had found were "potentially serious securities law violations." Shorris Decl. at ¶ 1; see also Russo Decl. at ¶ 13; Paley Decl. (Dkt. No. 205-1) at ¶ 2. The SEC commenced a formal investigation of McGinn and Smith on January 5, 2010. Russo Decl. at ¶ 17. FINRA provided the SEC with evidence obtained during its investigation and has continued to do so since the referral. Russo Decl. at ¶¶ 13-16, 18, 21, 30, 31, 35, 36, 38-40. The evidence provided included transcripts of the testimony given to FINRA by McGinn and Smith. See, e.g., id. at ¶¶ 30.

The SEC commenced the present action on April 20, 2010 alleging that in the four unregistered offerings in 2003-06, McGinn, Smith, and others violated the anti-fraud provisions of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); Rule 10b-5 under the 1934 Act, 17 C.F.R. § 240.10b-5; and related provisions. Compl. (Dkt. No. 1). In preliminary proceedings, the SEC advised that evidence obtained by FINRA and provided to the SEC constituted a portion of the evidence upon which the SEC relied to prove its case, particularly including the testimony given to FINRA by McGinn and Smith. See transcripts of testimony by McGinn and Smith provided by the SEC in support of its motion for a preliminary injunction at Dkt. Nos. 4-26 through 4-31.

As part of their defense in this action, McGinn and Smith contend that the testimony which they gave to FINRA was compelled in violation of their Fifth Amendment right against self-incrimination in that FINRA, a private entity, acted as the agent of the SEC in requiring

their testimony. See, e.g., Defs. Mem. of Law (Dkt. No. 210) at 1. To discover evidence supporting this defense, McGinn and Smith served interrogatories on the SEC which included the following:

> 1. Identify each FINRA employee with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn, [or the securities offerings], including the name, telephone number, address, email address, and title of such individuals.
>
> 2. Identify each person associated with the Department of Justice, including but not limited to persons associated with United States Attorneys' Office for the Northern District of New York with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn, [or the securities offerings], including the name, telephone number, address, email address, and title of such individuals.
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> 3. Identify each person associated with the Federal Bureau of Investigation[] with whom the SEC has had communications concerning McGinn Smith, Smith, McGinn [or the securities offerings], including the name, telephone number, address, email address, and title of such individuals.

Russo Decl. at ¶¶ 42, 43 & Exs. NN (Dkt. No. 189-42) at 7, OO. The SEC declined to serve responses to these interrogatories asserting various privileges and objecting on grounds of relevance. Id. at ¶ 45 & Ex. QQ. McGinn and Smith also served five identical subpoenas on FINRA and four of its employees seeking documents and testimony on FINRA's interaction with the SEC in the investigation of McGinn and Smith. FINRA Mem of Law (Dkt. No. 192-1) at 1. FINRA and its employees declined to testify or produce documents beyond those provided to McGinn and Smith in the FINRA proceedings. These motions followed.

II. Discussion

A. Interrogatories to SEC

The SEC's original response to the three interrogatories asserted as grounds for its objections that the information sought was protected by various privileges and was not relevant. Dkt. No. 189-45. The sole ground asserted by the SEC in response to the present motion is that the information sought is not relevant. Pl. Mem. of Law (Dkt. No. 205). Under Fed. R. Civ. P. 33(a)(2), a party may serve another party with interrogatories which "relate to any matter that may be inquired into under rule 26(b)." Under Fed. R. Civ. P. 26(b)(1),

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. . . .

The standard for relevance under Rule 26(b) is "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978); Barrett v. City of N.Y., 237 F.R.D. 39, 40 (E.D.N.Y.2006) (noting that the information sought "need not be admissible at trial to be discoverable").

"The party seeking the discovery must make a prima facie showing that the discovery sought is more than merely a fishing expedition." Evans v. Calise, No. 02-cv-8430, 1994 WL 185696, at *1 (S.D.N.Y. May 12, 1994); United States v. Int'l Bus. Mach. Corp., 66 F.R.D.

215, 218 (S.D.N.Y. 1974) (holding that burden is on moving party to establish relevance). "Disclosure should not be directed simply to permit a fishing expedition." United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). "In a motion to compel, it is incumbent upon the moving party to provide the necessary linkage between the discovery sought and the claims brought and/or defenses asserted in the case." Palm Bay Int'l, Inc. v. Marchesi Di Barolo S.P.A., No. CV 09-601(ADS)(AKT), 2009 WL 3757054, at *2 (E.D.N.Y. Nov. 9, 2009).[3]

McGinn and Smith contend that various facts and circumstances combine to meet their burden of demonstrating the relevance of the information sought in the interrogatories. They contend that FINRA's initial investigation of McGinn and Smith was concluded with only minor findings of infractions of FINRA regulations but that it was then re-opened at the behest of the SEC to facilitate the SEC's investigation. They further contend that FINRA'S questioning at their second interviews was done at the behest, guidance, and direction of the SEC. They support these contentions with references to undisputed evidence that FINRA shared documents and information obtained in its investigation with the SEC. McGinn and Smith also rely on the nexus in the timing of the investigations and charges in the FINRA and SEC actions.

McGinn and Smith must demonstrate a prima facie basis for finding that the SEC

[3]The three interrogatories seek information related to the admissibility of certain evidence which the SEC has proffered in support of its claims. Those interrogatories do not relate directly either to the SEC's claims or to any defenses asserted by McGinn and Smith. Such interrogatories nevertheless fall within the scope of the "subject matter" of this action for which discovery is permitted under Rule 26(b)(2) upon a showing of "good cause" by the party seeking such discovery. Therefore, for this reason as well, McGinn and Smith bear the burden of demonstrating their entitlement to the discovery sought here.

and FINRA worked together to obtain evidence from McGinn and Smith in the FINRA investigation without McGinn and Smith having access to evidence from either of those parties. Nevertheless, the burden on McGinn and Smith to demonstrate state action here is a difficult one in light of Second Circuit decisions.

For example, in D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002), a securities brokerage firm and individual brokers sued the investigative arm of the National Association of Securities Dealers (NASD), a predecessor of FINRA, to enjoin it from requiring plaintiffs to testify as part of an investigation. The district court denied the injunction and plaintiffs appealed. On appeal, the court of appeals held that plaintiffs had failed to demonstrate that the NASD was acting as an arm of the law enforcement authorities then conducting a parallel investigation of plaintiffs when it compelled plaintiffs to provide testimony in its investigation. 279 F.3d at 162. In its analysis, the court of appeals held that to demonstrate the requisite state action, plaintiffs were required to show 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. . . . That is 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. . . . Actions are fairly attributable to the government where there is a sufficiently close nexus between the State and the challenged action of the regulated entity. . . . That nexus exists either (1) where the state 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) where "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State. . . .

Id. at 161 (internal quotation marks and citations omitted); see also United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975) (finding no state action where private entity had

independent regulatory responsibilities and merely shared the transcript of the defendant's testimony with law enforcement authorities).

Thus, to meet their burden here, McGinn and Smith must demonstrate that the SEC exercised the degree of direction and control over FINRA's questioning of McGinn and Smith that FINRA's actions "must in law be deemed to be that of the [SEC]." D.L. Cromwell, 279 F.3d at 161. Speculation based on no more than the temporal nexus of certain events, the apparent ebbs and flows of an investigation, or the sharing of information and evidence will not suffice absent evidence of direct SEC involvement in the FINRA investigation, such as the presence of SEC personnel at the testimony of McGinn or Smith, requests to FINRA to obtain certain evidence, or evidence of jointly undertaken activities. See, e.g., In re Quattrone, Rel. No. 53547 (S.E.C. Mar. 24, 2006) (Dkt. No. 189-50) (finding showing of state action sufficient for an evidentiary hearing in SEC administrative proceeding based on evidence of joint cooperation set forth in jointly signed letter which also stated that entities would decide together how to proceed in matter).

Here, McGinn and Smith are the subjects of investigations and proceedings by FINRA and the SEC as well as criminal law enforcement authorities. See Dkt. Nos. 86 at 6 n.10, 190 (motion of McGinn and Smith to prohibit SEC from using evidence obtained by criminal law enforcement authorities). FINRA and the SEC have independent responsibilities and authority. While a government entity such as the SEC cannot direct a private entity such as FINRA in the execution of that entity's responsibilities, the entities are not prohibited from sharing information and evidence independently obtained. Thus, the threshold showing which McGinn and Smith must meet here is not simply cooperation or information-sharing between FINRA and the SEC but joint action, direction, or control of

FINRA's investigative activities with or by the SEC. FINRA and the SEC deny any such conduct. See Paley Decl. (Dkt. No. 2015-1); Shorris Supp. Decl. (Dkt. No. 192-4). McGinn and Smith have offered facts which at best demonstrate information-sharing between FINRA and the SEC but only mere speculation as to joint action, direction, or control. In these circumstances, McGinn and Smith have not met their burden of demonstrating a prima facie basis for the relevance of the information sought in the three interrogatories. Accordingly, their motion to compel the SEC to serve responses is denied.

B. Subpoenas to FINRA and FINRA Employees

The subpoenas to FINRA were served pursuant to Fed. R. Civ. P. 45 which authorizes the responding party to move to quash if the subpoena "requires disclosure of privileged or other protected matter, if no exception or waiver applies . . . ." Fed. R. Civ. P. 45(c)(3)(A)(iii). The subpoenas here required FINRA to produce documents and testimony concerning FINRA's investigation of McGinn and Smith. Dkt. No. 192-3 at 59-90. FINRA contends in this motion that (1) McGinn and Smith failed to exhaust available remedies for obtaining the documents in the FINRA proceeding, and (2) the documents and testimony sought by the subpoenas are protected from disclosure by the investigative privilege. FINRA Mem. of Law (Dkt. No. 192-1.

1. Exhaustion of Remedies

In the FINRA proceedings, the presiding hearing officer issued a scheduling order on July 7, 2010 which required the parties to file all discovery-related motions by August 23,

2010. FINRA provided McGinn and Smith with approximately 31,250 pages of documents plus other materials from its investigative file. Shorris Supp. Decl. at ¶ 6. FINRA declined to produce (a) notes from interviews of investors; (b) internal memoranda and analyses regarding the FINRA action; and (c) internal schedules and analyses. Id. FINRA asserted that these categories of documents were protected from disclosure by various privileges, including the investigative privilege, and by FINRA rules of procedure. Id. at ¶ 6. McGinn and Smith did not move to compel FINRA to produce the withheld documents in the FINRA proceeding as allowed by the scheduling order issued by the hearing officer. FINRA and its employees contend here that McGinn and Smith were required to exhaust all such remedies in the FINRA proceeding before seeking the withheld documents through the Rule 45 subpoenas. FINRA Mem. of Law (Dkt. No. 192-1) at 10-11.

FINRA relies for its authority on McLaughlin, Peven, Vogel, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc., 733 F. Supp. 694 (S.D.N.Y. 1990). There, a securities brokerage firm brought an action in federal court against FINRA's predecessor for disclosure of the records of an investigation. The defendant moved to dismiss on the ground that the plaintiff's request was subject to the requirement of exhaustion of remedies before commencing an action for disclosure of records. The court granted the motion on that ground. Id. at 696-97. McLaughlin, however, solely concerned the disclosure of records and, therefore, the policies underlying the exhaustion requirement were directly applicable. Here, however, the action was commenced to enforce securities laws, not simply to obtain records, and the records and testimony sought here by McGinn and Smith are ancillary to, not the direct object of, the action.

Where, as here, this action overlaps significantly with the FINRA action, the rights

and procedures governing this action must govern the availability of records unless statutory provisions or binding precedent dictates otherwise. To hold otherwise would allow the rights and procedures applicable in other forums to supplant those applicable here. No such other statutory provisions or binding precedent has been cited which would alter this conclusion. Accordingly, McGinn and Smith were not required to pursue all available remedies to obtain the documents and testimony sought here before resorting to the rights and procedures afforded by Rule 45. FINRA's contention to the contrary is rejected.

2. Investigative Privilege

The investigative privilege asserted by FINRA derives from the law enforcement privilege. In re U.S. Dep't of Homeland Sec., 459 F.3d 565, 569 (5th Cir. 2006) (citing Coughlin v. Lee, 946 F.2d 1152, 1159 (5th Cir. 1991)); In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988); In re Dep't of Investigations of City of New York, 856 F.2d 481 (2d Cir. 1988); Otterson v. Nat'l R.R. Passenger Corp., 228 F.R.D. 205, 207 (S.D.N.Y. 2005); see also United States v. Sixty-one Thousand Nine Hundred Dollars and No Cents, No. 10 Civ. 1866(BWC), 2010 WL 4689442, at *2 (E.D.N.Y. Nov. 10, 2010) ("courts have used 'investigat[ive] privilege' to refer to the law enforcement privilege, . . . interchangeably" and citing Otterson). The privilege is generally limited to the files of civil and criminal law enforcement investigations. See In re U.S. Dep't of Homeland Sec., 459 F.3d at 569.

However, "a similar policy has been recognized with respect to investigative materials generated by industry regulatory organizations. . . ." Apex Oil Co. v. DiMauro, 110 F.R.D. 490, 496-97 (S.D.N.Y.1985). Thus, courts have applied the investigative privilege to FINRA and similar regulatory organizations. See DGM Investments, Inc. v. N.Y. Futures Exch.,

Inc., 224 F.R.D. 133, 140 (S.D.N.Y. 2004); In re Adler, Coleman, Clearing Corp., No. 95-08203, 1999 WL 1747410, at *3 (S.D.N.Y. Dec. 8, 1999); Ross v. Bolton, 106 F.R.D. 22, 23 (S.D.N.Y. 1985), The privilege affords a qualified protection against disclosure of "the investigatory process of [FINRA] from routine scrutiny by a litigant absent a showing of need by the party for the information." Apex Oil, 110 F.R.D. at 496. Like the law enforcement privilege, the investigative privilege exists to encourage and shield the efforts of law enforcement and regulatory agencies to obtain information without fear of premature disclosure to those under investigation. DGM Investments, 224 F.R.D. at 139. Against this interest must be balanced the need of the party seeking disclosure in obtaining the information in connection with the pending law suit. Id. (collecting cases).

As the law has developed, a burden-shifting analysis has evolved requiring the party asserting the privilege first to demonstrate the applicability of the privilege to the materials sought. See DGM Investments, 224 F.R.D. at 139-40 (following In re Sealed Case, 856 F.2d 268, 270 (D.C. Cir. 1988). To meet this burden, a party asserting the privilege must demonstrate (1) a formal claim of privilege through the individual who controls the requested materials and information, (2) that the individual has asserted the privilege based on personal consideration, and (3) why the material and information at issue is protected by the privilege. Id. If this burden is satisfied, the requesting party must then demonstrate a compelling need for the material and information which outweighs the responding party's interest in protecting it. In re Adler, Coleman, Clearing Corp., 1999 WL 1747410, at *6; see also United States v. Sixty-one thousand Nine Hundred Dollars and No Cents, 2010 WL 4689442, at *2 (describing similar procedure for asserting the law enforcement privilege as "a rather elaborate mechanism").

To meet its initial burden, FINRA has submitted the declarations of James S. Shorris, FINRA Executive Vice President and Acting Director of Enforcement. Shorris Decl. at ¶ 1; Shorris Supp. Decl. at ¶ 2. In those capacities, Shorris heads the division of FINRA which maintains control over the materials and information at issue here and has formally asserted the investigative privilege against their production. Shorris Decl. at ¶¶ 16-17. Shorris demonstrates sufficient personal consideration of the materials and information at issue, the FINRA investigation which generated them, and the impact disclosure will have on FINRA's investigation of McGinn and Smith and on other investigations. Id. at ¶¶ 9, 14, 16-21; Shorris Supp. Decl. at ¶¶ 6, 7.

As to the third element of FINRA's preliminary showing, FINRA has limited its privilege claim to (a) notes from interviews of investors,(b) internal memoranda and analyses regarding the FINRA action,[4] and (c) internal schedules and analyses. Shorris Supp. Decl. at ¶ 6.[5] It thus appears from the record that FINRA has disclosed to McGinn and Smith the materials and information in its possession containing factual matters but withheld that containing the observations of investigators and attorneys about the investigation, analyses of factual matters that would constitute FINRA work product, the

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[4]FINRA has submitted for ex parte, in camera review a privilege log of its communications with the SEC. That submission will be filed under seal in the docket of this case. See also note 5 infra.

[5]McGinn and Smith contend that FINRA should be required to serve complete privilege logs of the withheld documents as required by Fed. R. Civ. P. 45(d)(2)(A)(ii). See also Fed. R. Civ. P. 26(b)(5)(A)(ii) (same). However, that rule requires a party asserting a privilege to identify the documents and information withheld in a manner sufficient to assess the claims of privilege. Given the volume of documents at issue here, FINRA has satisfied the requirements of this rule with its descriptions of the categories withheld.

identities of all those who provided information to FINRA in its investigation, descriptions of the methodology of FINRA's investigation, and a preview of FINRA's case for the May 2011 hearing. Shorris Decl. at ¶¶ 15-21; Shorris Supp. Decl. at ¶¶ 6, 7. Such a showing suffices to satisfy FINRA's initial burden.

The burden then shifts to McGinn and Smith to demonstrate "a need for the privileged information that outweighs the competing interest in non-disclosure." DGM Investments, 224 F.R.D. at 140; see also Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1342 (2d Cir. 1984). The party seeking disclosure must establish a particularized need for the material and information at issue and may not rely on unsupported allegations. DGM Investments, 224 F.R.D. at 140; In re Adler, Coleman, 1999 WL 1747410, at *6. "Nor will speculation as to the 'mere possibility' of useful information be deemed sufficient to overcome the protection for investigative files . . . ." DGM Investments, 224 F.R.D. at 140 (citing Apex Oil, 110 F.R.D. at 498). However, where the information sought is narrowly tailored to the requesting party's need and is crucial to that party's claim or defense, the requesting party's need may outweigh the responding entity's interests in non-disclosure and production may be compelled. Id.

As noted, McGinn and Smith contend that FINRA violated their respective Fifth Amendment privilege against self-incrimination when it compelled them to provide testimony in the FINRA investigation because FINRA acted as an agent of the SEC. Defs. Mem. of Law at 23. The subpoenas to FINRA seek materials and information which would support this defense and provide cause to suppress at least the testimony given by McGinn and Smith in the FINRA investigation. In support, McGinn and Smith cite the same events which they cite in support of their contention that the interrogatories to the SEC sought

relevant information. For the same reasons noted in subsection II(A) supra, however, the allegations, subjective perceptions, speculation, and beliefs of McGinn and Smith, unsupported by facts, are insufficient to demonstrate a particularized need for the material and information in question.

McGinn and Smith principally contend that purported anomalies in the conduct and course of the FINRA investigation support their contention of SEC direction and control. They contend that an expansion of the scope of the FINRA investigation after its initial phase appeared completed, the exploration of the personal assets of Mcginn and Smith, communications between FINRA and the SEC during the FINRA investigation, and the temporal nexus of the commencement of formal proceedings in the FINRA and SEC actions all point to SEC control. However, FINRA categorically denies the contention that it took any action in its investigation at the behest of the SEC. Shorris Decl. at ¶ 13;[6] see also Paley Decl.

More significantly, the import which McGinn and Smith impute to these events is unsupported by any fact or evidence in the record. No evidence has been offered that FINRA and the SEC acted jointly at any stage, let alone at the questioning of McGinn or Smith. No evidence has been offered that the SEC requested FINRA to obtain certain

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[6]FINRA did not take direction from the SEC concerning FINRA's investigation of the Defendants and their Firm, nor did FINRA coordinate its on the record interviews of defendants and others with the SEC. FINRA and the SEC did not exchange outlines, questions, or documents with respect to testimony taken in either the FINRA Action or the SEC Proceeding. Pursuant to its authority to refer investigations, FINRA provided the SEC with copies of transcripts of relevant testimony after such testimony had been taken in the FINRA Action.

Shorris Decl. at ¶ 13.

evidence, was present when McGinn and Smith gave their FINRA testimony, or suggested any questions for them. Compare In re Quattrone, Rel. No. 53547 (finding that party in an SEC administrative proceeding had offered sufficient evidence to obtain an evidentiary hearing where evidence included joint communications from the two entities and a joint statement that any resolution would require the agreement of both entities). Accordingly, McGinn and Smith have failed to meet their burden of demonstrating a particularized need for the material and information they seek.

McGinn and Smith further contend, however, that even if the material sought by the subpoenas is protected from disclosure, they are still entitled to take the depositions of the FINRA employees concerning non-privileged matters. The employees include the prosecuting attorney, the supervising examiner, two examiners, and the custodian of records. Dkt. No. 192-3 at 59-90. Where, as here, the investigative files sought by the requesting party are protected by privilege, courts have prohibited the requesting party from deposing those involved in the investigation because "[i]t would make little sense to protect the actual files from disclosure while forcing the [producing entity] to testify about their contents.". In re Sealed Case, 856 F.2d at 271; see also In re Adler, 1999 WL 1747410, at *5 (finding that investigative privilege protects both investigatory files and testimony concerning those files and declining to compel testimony even where sought only as to factual matters). Moreover, where materials containing such factual matters have already been provided to McGinn and Smith in substantial volume by FINRA, the limited, non-privileged testimony which could be adduced concerning those matters would be merely cumulative. Therefore, the request of McGinn and Smith to compel the testimony of the FINRA employees concerning non-privileged matters must also be denied.

III. Conclusion

For the reasons stated above, it is hereby

ORDERED that:

1. The motion of McGinn and Smith to compel the SEC to serve responses to three interrogatories (Dkt. No. 189) is **DENIED** in its entirety; and

2. The motion of FINRA and its employees to quash five subpoenas served on them for materials and testimony (Dkt. No. 192) is **GRANTED** in its entirety.

IT IS SO ORDERED.

DATED: January 5, 2011
Albany, New York

David R. Homer
U.S. Magistrate Judge