

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

KEVIN RICHARD GRAETZ
(CRD No. 1935982),

Respondent.

Disciplinary Proceeding
No. 2014038847602

Hearing Officer-LOM

ORDER DENYING RESPONDENT'S MOTION TO COMPEL DISCOVERY

This case involves allegations that Respondent failed to timely disclose thirteen federal and state tax liens totaling over \$1 million. Respondent is alleged to have acted willfully.

Respondent has filed a motion to compel the Department of Enforcement ("Enforcement") to produce documents. Respondent seeks the documents in order to show, as Respondent alleges in several affirmative defenses to the Complaint, that the decision to file the Complaint and to describe Respondent's alleged misconduct as "willful" was unfair, arbitrary, and inconsistently applied to industry members. Respondent describes the Complaint here as "unfairly selective in enforcement." In essence, Respondent seeks to transform this from a disciplinary proceeding focused on Respondent's alleged misconduct into a challenge to FINRA's decision to bring the case.

What primarily concerns Respondent is that his misconduct is characterized in the Complaint as willful. A finding that his conduct was willful would subject him to a statutory disqualification.

In support of his motion, Respondent cites four settled FINRA disciplinary proceedings involving allegations that respondents failed to disclose tax liens and judgments. Those matters, according to Respondent, were settled for lesser sanctions and no finding of willfulness. Respondent seeks documents from other investigations and proceedings to bolster the perceived imbalance between the sanctions in those cases and the potential consequences in his case if he is proven to have engaged in the alleged misconduct.

Enforcement argues that Respondent's challenge to FINRA's prosecutorial discretion must be rejected. I agree.

This Order has been published by FINRA’s Office of Hearing Officers and should be cited as OHO Order 17-06 (2014038847602).

To the extent that Respondent argues that he was selectively prosecuted, he has failed to assert a valid defense. He has not claimed that he was “singled out for enforcement action while others similarly situated were not and that his selection . . . was based on unjustifiable considerations such as race, religion, national origin, or the exercise of constitutionally protected rights.”¹

To the extent that Respondent simply wants to forage in FINRA’s records in other cases for documents to attack its exercise of prosecutorial discretion here, there is no basis for granting discovery. Respondent has cited no authority for the relief it seeks, and Enforcement correctly points out that its discovery obligations are limited to the requirements of FINRA Rule 9251. Challenges to FINRA’s prosecutorial discretion have been routinely rejected as attempts to deflect attention from the core issue in a disciplinary proceeding²—whether the respondent has engaged in misconduct.

Respondent’s motion to compel is **DENIED**.

Lucinda O. McConathy
Hearing Officer

Dated: March 21, 2017

¹ *Scott Mathis*, Exchange Act Release No. 61120, 2009 SEC LEXIS 4376, at *38 (Dec. 7, 2009); *see also Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217 at *53 (Jan. 30, 2009), *aff’d*, 416 F. App’x 142 (3d Cir. 2010) (“To establish such a claim [of improper selective prosecution], a petitioner must demonstrate that he was unfairly singled out for prosecution based on improper considerations such as race, religion, or the desire to prevent the exercise of a constitutionally protected right.”) (citations omitted).

² *See, e.g., Robert Conway*, Exchange Act Release No. 70833, 2013 SEC LEXIS 3527 at *24 (Nov. 7, 2013) (“Conway and Ng argue that their conduct was consistent with industry norms, and that this disciplinary proceeding makes them ‘scapegoats’ for abuses for which other individuals have not been prosecuted. But FINRA disciplinary proceedings are treated as an exercise of prosecutorial discretion . . . [I]t is no defense that others in the industry may have been operating in a similarly illegal or improper manner.”) (internal quotations and citations omitted); *see also Eagletech Communications, Inc.*, Exchange Act Release No. 54095, 2006 SEC LEXIS 1534 at *14-15 (Jul. 5, 2006) (holding that Enforcement’s decision not to prosecute is an exercise of “prosecutorial and regulatory discretion” that is “presumptively unreviewable”); *Dep’t of Enforcement v. Merhi*, No. E072004044201, 2007 NASD Discip. LEXIS 9, at *34 (NAC Feb 16, 2007) (explaining that NASD, predecessor to FINRA, has wide discretion in deciding against whom to proceed); *Epstein*, 2009 SEC LEXIS 217 at *55, fn.44 (“Epstein’s assertion that other ISAs also engaged in misconduct but were not subject to disciplinary proceedings does not support his claim of improper selective prosecution.”) (citations omitted).