

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 54699 / November 3, 2006

Admin. Proc. File No. 3-12143

In the Matter of the Application of

JUSTIN F. FICKEN
c/o Gary G. Pelletier, Esq.
Denner O'Malley LLP
Four Longfellow Place, 35th Floor
Boston, Massachusetts 02114

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firms of registered securities association asserted the privilege against self-incrimination in response to association's request for certain testimony during an initial on-the-record interview and failed to appear for a subsequent on-the-record interview. Held, the proceeding is remanded for further consideration.

APPEARANCES:

Gary G. Pelletier and Brad Bailey, of Denner O'Malley LLP, for Justin F. Ficken.

Marc Menchel, Alan Lawhead, and Leavy Mathews III, for NASD.

Appeal filed: January 9, 2006
Last brief received: April 24, 2006

I.

Justin Farley Ficken, a former general securities representative of Prudential Securities, Inc. (“Prudential”) and of its successor, Wachovia Securities, LLC (“Wachovia”), both NASD member firms, appeals from NASD disciplinary action. NASD found that Ficken refused to provide requested testimony at an on-the-record interview (“OTR”) and failed to appear for a subsequent OTR, in violation of NASD Procedural Rule 8210 and NASD Conduct Rule 2110. ^{1/} NASD barred Ficken from associating with any NASD member in any capacity. ^{2/} To the extent we make findings, we base them on an independent review of the record.

II.

Ficken was a general securities representative with Prudential from January 2000 until July 2003, when his registration was transferred to Wachovia. On September 29, 2003, Ficken resigned from Wachovia. ^{3/} On October 2, 2003, NASD opened an investigation into Ficken’s

^{1/} NASD Procedural Rule 8210 requires members and associated persons to provide testimony in connection with any NASD investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members and associated persons to observe high standards of commercial honor and just and equitable principles of trade. Violations of NASD rules such as NASD Procedural Rule 8210 constitute conduct inconsistent with the just and equitable principles of trade provisions of NASD Conduct Rule 2110. See, e.g., Elliot M. Hershberg, Securities Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 497 (holding that the failure to provide information requested by NASD constitutes a failure to observe high standards of commercial honor and just and equitable principles of trade), appeal filed, No. 06-1086 (2d Cir.); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (Apr. 6, 2005), 85 SEC Docket 475, 478 (holding that a violation of another NASD rule is also a violation of NASD Conduct Rule 2110); Chris Dinh Hartley, Exchange Act Rel. No. 50031 (July 16, 2004), 83 SEC Docket 1239, 1244 (same); Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999) (same).

^{2/} NASD also assessed costs.

^{3/} Ficken’s departure coincided with increasing regulatory scrutiny of certain Prudential associated persons’ alleged improper market timing and late trading activities in mutual funds. On November 4, 2003, the Commission filed a complaint against Ficken and some of his former Prudential associates in the United States District Court for the District of Massachusetts alleging, among other things, fraud in connection with their market timing trades in numerous mutual funds. See SEC v. Martin J. Druffner, et al., Civil Action No. 03-12154-RCL (D. Mass. Nov. 4, 2003). That same day, the Commission issued a press release announcing the civil fraud action and acknowledging “the assistance of the Secretary of the Commonwealth of Massachusetts, NASD, and the

(continued...)

activities to determine whether he had engaged in, among other things, improper market timing and late trading in mutual fund shares while he was at Prudential. According to a declaration filed by the NASD special investigator responsible for that investigation, NASD decided to investigate Ficken after it learned that Ficken had been terminated by Wachovia “in connection with an already existing NASD investigation into market timing and late trading activity in mutual fund shares” at Prudential. ^{4/}

The OTRs and Ficken’s Assertion of the Fifth Amendment Privilege

On November 20, 2003, NASD sent a letter to Ficken requesting his appearance, pursuant to NASD Procedural Rule 8210, at an OTR scheduled for December 17, 2003. Ficken appeared at the scheduled OTR and answered questions, primarily about market timing, for over three hours. When NASD staff questioned Ficken about his involvement in late trading activity at Prudential, Ficken’s attorney requested that the OTR be adjourned to consider Ficken’s assertion of the Fifth Amendment privilege against self-incrimination. ^{5/} Ficken’s counsel stated that “we are aware there’s a grand jury in Boston and that they’re receiving information from the [Commission]; and we’re aware also that -- we are aware also that members of the NASD have been consulting with the [Commission].” Thereafter, Ficken, on the advice of counsel, asserted his Fifth Amendment privilege against self-incrimination in response to certain questions propounded by NASD staff. The OTR subsequently was adjourned.

^{3/} (...continued)
New York Stock Exchange in [the Commission’s] investigation.” See Lit. Rel. No. 18444 (Nov. 4, 2003).

Also on November 4, 2003, the Enforcement Section of the Massachusetts Securities Division of the Office of the Secretary of the Commonwealth of Massachusetts (the “Massachusetts Securities Division”) filed an administrative complaint against Ficken and certain of his former Prudential associates regarding the same allegations charged in the Commission’s complaint. See Docket No. E-2003-259 (Nov. 4, 2003). Ficken subsequently informed NASD in the proceeding below that he had received notice that the New York Stock Exchange was conducting a similar investigation regarding such allegations. The record does not indicate when Ficken received such notice.

^{4/} On October 20, 2003, Wachovia filed a Uniform Termination Notice for Securities Industry Registration for Ficken, stating that he was permitted to resign due to “business practices inconsistent with management philosophy.” Ficken has not been associated with any NASD member since leaving Wachovia.

^{5/} The Fifth Amendment to the United States Constitution provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amen. V.

In early January 2004, NASD scheduled a subsequent OTR with Ficken for later that month. At the request of Ficken's counsel, the OTR was twice postponed and rescheduled ultimately for February 9, 2004. On February 6, 2004, three days before the rescheduled OTR, Ficken's counsel informed NASD in writing that Ficken would "not present himself to the NASD for further testimony on February 9, 2004" because Ficken had been informed by the United States Department of Justice (the "DOJ") that he was a "target of a federal criminal investigation" and was likely to be indicted on "matters similar, or relating, to the same circumstances about which the NASD is seeking his testimony." ^{6/} Ficken did not appear at the February 9, 2004 OTR and has not provided any further testimony to NASD.

The Prehearing Conference

On February 11, 2004, NASD's Department of Enforcement ("NASD Enforcement") filed a complaint against Ficken, alleging that he failed to appear for an OTR and respond to questions relating to allegations of late trading. On March 5, 2004, NASD Enforcement moved for summary disposition.

At a prehearing conference on April 6, 2004, Ficken's counsel stated that he was prepared to show that an NASD employee had worked with the Commission on this case, in support of the theory that NASD was a "state actor." Ficken's counsel also asserted that he believed Ficken could produce evidence of sufficient cooperation among the Commission, NASD, the DOJ, and the New York Stock Exchange (the "NYSE") to show that the nature of the actions being brought by them against him were all the same. NASD counsel countered that NASD had conducted "a separate independent investigation and the NASD has handled it in that way from day one."

Noting that the Hearing Panel lacked authority to subpoena witnesses, the Hearing Officer stated that "[w]e have always had employees come in, never had a case where they have refused." The Hearing Officer suggested that, if Ficken sought to call the NASD employee referred to by Ficken's counsel as a witness at a hearing and NASD declined to make him available, the Hearing Officer might draw an adverse inference against NASD based on its refusal. The Hearing Officer deferred a ruling on NASD Enforcement's motion for summary disposition "pending the completion of discovery" of any evidence supporting the allegation that NASD functioned as a state actor in its prosecution of this case.

On April 30, 2004, Ficken's counsel sent a letter to the Hearing Officer to update him on counsel's attempts to obtain testimony from an NASD employee and a Commission employee,

^{6/} Ficken's counsel had received on January 13, 2004 a formal notification from the DOJ that Ficken was "the target of a federal grand jury investigation in the District of Massachusetts regarding alleged violations of federal securities laws . . . in connection with his activities at [Prudential]" and likely would be indicted. In his most recent brief to the Commission, filed on April 24, 2006, Ficken states that he has yet to be indicted.

both of whom were identified by name. ^{7/} The letter explained that neither the Commission nor NASD would make their respective employees available for testimony.

Replacement of Hearing Officer

On May 18, 2004, the Hearing Officer in the proceeding was reassigned and a different Hearing Officer designated in his place. ^{8/} On May 25, 2004, the new Hearing Officer held a prehearing conference. Ficken's counsel asserted that "the information that is being developed during an interrogation of Mr. Ficken . . . is being turned over to the [Commission] or the [Commission] has access [to] it and the [Commission] is also cooperating with the [DOJ]." ^{9/}

Ficken's counsel also claimed that the NASD employee in question "had done some calculations with or had given them to the [Commission] and had been in communication with" a Commission employee, and "that the information being developed by the NASD and the calculations and some of the documents that the NASD produced at the earlier testimony of Mr. Ficken is finding its way ultimately into the [DOJ]'s investigation and also to the [Commission]." Ficken's attorney stated further that the DOJ was "looking at emails that were the subject of inquiry made by the NASD to [Ficken] when I was present at the first proceedings. To my knowledge the likely sources that would have produced those e-mails to the [DOJ] have been narrowed down to either the [Commission] or the NASD." NASD counsel countered that Commission access to NASD files does not make NASD a state actor. He argued that even though NASD Enforcement had made available to Ficken's counsel all investigative files that were subject to Ficken's discovery, Ficken provided no detail or support for his claims about shared "calculations." NASD counsel also argued that Ficken previously had provided testimony to Commission staff in the Commission's pending proceeding. He stated that during the OTR, while Ficken answered questions related to market timing, Ficken would not respond to

^{7/} The NASD employee identified by Ficken was one of the NASD staff members who questioned Ficken at the December 17, 2003 OTR.

^{8/} The record does not disclose the reason for the reassignment of this proceeding to a new Hearing Officer.

^{9/} According to Ficken, on May 24, 2004, at a separate prehearing conference in connection with the Massachusetts Securities Division's administrative complaint against him, the Assistant United States Attorney (the "AUSA") involved with the DOJ's criminal investigation moved for a limited stay of discovery in the Massachusetts Securities Division case. Ficken maintains that the AUSA stated that the Massachusetts Securities Division case was "parallel" to the DOJ's criminal investigation of him. According to Ficken, the Massachusetts Securities Division granted a limited stay until September 30, 2004. Ficken also asserts that the DOJ attempted, unsuccessfully, to obtain a stay of the Commission's civil action against him on the purported basis that the Commission's action ran parallel to the DOJ's criminal investigation.

questions about late trading. NASD counsel noted that the Commission's civil action did not allege late trading.

Summary Disposition

On June 14, 2004, a Hearing Panel granted NASD Enforcement's motion for summary disposition and barred Ficken from associating with any NASD member in any capacity. On July 8, 2004, Ficken appealed the Hearing Panel's decision to NASD's National Adjudicatory Council (the "NAC"). Ficken moved to introduce into evidence documents in addition to the correspondence from his counsel that has been discussed above, including a Commission press release. ^{10/} On December 7, 2005, the NAC affirmed the Hearing Panel's findings and sanction. The NAC found that Ficken's "unsubstantiated, generalized assertion" that NASD staff forwarded some of its documents regarding the Ficken investigation to the Commission and the DOJ "demonstrates no government coercion or significant encouragement and does not support a finding that NASD's investigation of him was state action." ^{11/} The NAC also found that Ficken's claims were insufficient to raise an inference that NASD Enforcement's investigation should be attributed to the government. The NAC concluded that Ficken was not excused from his obligation to provide the requested testimony and affirmed the Hearing Panel's decision to grant summary disposition in this matter. Finding no mitigating factors, the NAC affirmed the Hearing Panel's imposition of a bar against Ficken. This appeal followed.

III.

We must determine whether Ficken engaged in the conduct found by NASD, whether the conduct violated the NASD rules he was found to have violated, and whether those rules were applied in a manner consistent with the purposes of the Securities Exchange Act of 1934. ^{12/} Applying this standard, we note that Ficken did not fully respond to the questions propounded by NASD staff at the OTR on December 17, 2003. While Ficken answered questions related to market timing, he invoked his Fifth Amendment privilege against self-incrimination in refusing to answer questions concerning his involvement in late trading activity at Prudential. Moreover, he declined to appear at the subsequent OTR. The failure to respond to NASD's requests for

^{10/} See supra note 3. The other documentary evidence consisted of two news articles regarding NASD sanctions against top executives of other financial firms. Ficken also moved to stay the NAC proceeding for one year in light of his "imminent federal criminal indictment" in the DOJ investigation. Ten months later, on May 13, 2005, the NAC denied Ficken's stay motion and admitted the other evidence, but denied introduction of the Commission press release. On May 19, 2005, the NAC heard oral argument.

^{11/} Dep't of Enforcement v. Justin F. Ficken, Complaint No. C11040006, 2005 NASD Discip. LEXIS 7, at *9 (NAC Dec. 7, 2005).

^{12/} See Exchange Act Section 19(e)(1), 15 U.S.C. §78s(e)(1).

testimony demonstrates a prima facie violation of NASD Procedural Rule 8210. In asserting his Fifth Amendment privilege against self-incrimination as a defense against NASD Procedural Rule 8210 and NASD Conduct Rule 2110 violations, Ficken must show that NASD's actions constituted state action.

Ficken contends that he was unable to meet his burden to show that NASD's actions constituted state action, because NASD did not afford him adequate discovery prior to granting summary disposition. Therefore, we next consider whether NASD followed its summary disposition rules in a manner consistent with the Exchange Act. Under NASD's rules, summary disposition is appropriate where there "is no genuine issue with regard to any material fact" and the moving party "is entitled to summary disposition as a matter of law." 13/ NASD's summary disposition rules generally are based on the Federal Rules of Civil Procedure governing summary judgment. 14/ Summary disposition is appropriate against a party that, after adequate time for discovery, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof" at a hearing. 15/

In its decision on summary disposition in this proceeding, NASD observed that courts have held that it may be treated as a state actor if the government has exercised "coercive power" over NASD or "has provided such significant encouragement, either overt or covert" that its actions "must in law be deemed to be that of the State." 16/ NASD concluded that Ficken "offered no evidence that the government compelled NASD's investigation of him." 17/ NASD also concluded that the "government's use of information generated from NASD's independent

13/ NASD Procedural Rule 9264(e).

14/ See, e.g., Dep't of Enforcement v. U.S. Rica Fin., Inc., Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 (NAC Sept. 9, 2003) (stating that federal law provides significant guidance in cases involving motions for summary disposition); Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Amendments to the Code of Procedure and Other Provisions, Exchange Act Rel. No. 43102 (Aug. 1, 2000), 72 SEC Docket 2976, 2978 (approving proposal "to modify NASD Rule 9264(a) to track the language in the [Federal Rules of Civil Procedure] . . .").

15/ Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). All reasonable inferences must be drawn in favor of the party opposing summary judgment. See, e.g., Harris v. Coweta County, Ga., 433 F.3d 807, 810 (11th Cir. 2005); U.S. Rica Fin., Inc., 2003 NASD Discip. LEXIS 24, at *12.

16/ 2005 NASD Discip. LEXIS at *8, quoting D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002).

17/ Id. at *11.

regulatory and enforcement duties does not establish NASD as a state actor.” 18/ Based on these considerations, NASD determined that its denial of a hearing in this matter was consistent with its precedent.

In Frank P. Quattrone, a disciplinary proceeding also considering assertion of the Fifth Amendment privilege, we noted that 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. 19/ A violation of the Fifth Amendment, therefore, requires “state action” on the part of the private entity whose actions are being challenged. 20/

As we noted in Quattrone, the Supreme Court has held that private parties’ actions may constitute state action if there is such a “close nexus between the State and the challenged action” that the seemingly private behavior “may be fairly treated as that of the State itself.” 21/ According to the Court, “no one fact can function as a necessary condition across the board for finding state action; nor is any one set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.” 22/ The Court has identified certain facts “that can bear on the fairness of such an attribution,” such as whether a challenged activity “results from the State’s exercise of its ‘coercive power’”; whether “the State provides ‘significant encouragement, either overt or covert’”; or whether “a private actor operates as a ‘willful participant in the joint activity with the State or its agents.’” 23/ Some courts have described this last fact pattern as the “joint action” test, and have focused on inquiries such as whether “the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity” or whether “the particular actions challenged are inextricably intertwined with those of the government.” 24/

18/ Id.

19/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), __ SEC Docket __, citing D.L. Cromwell, 279 F.3d at 161 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

20/ Id.

21/ Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass’n, 531 U.S. 288, 295 (2001).

22/ Id. at 295-296.

23/ Id. at 296.

24/ See, e.g., Kirtley v. Rainey, 326 F.3d 1088, 1092, 1094 (9th Cir. 2003) (stating that “joint action” test and “government compulsion” test are separate tests for establishing state action and under the former considering whether “the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint

(continued...)

We noted in Quattrone that the court in D.L. Cromwell found no state action where NASD and government regulators “pursued similar evidentiary trails” in their parallel investigations because “their independent investigations were proceeding in the same direction” 25/ The court there found that NASD Enforcement issued its requests for information “as a product of its private investigation” and accepted NASD testimony that “none of the demands [for information] was generated by governmental persuasion or collusion” 26/ However, the court also observed that, although NASD Enforcement had not acted in concert with government regulators when NASD Enforcement issued its information requests in D.L. Cromwell, NASD could in certain circumstances be deemed a state actor. The court noted that NASD's Criminal Prosecution Assistance Unit, which, at the time, was a self-contained group within NASD Enforcement, “was in fact working with the government, and when it does it may well be a state actor.” 27/

In Quattrone, we concluded that NASD’s grant of summary disposition on the issue of liability against Quattrone was inappropriate and not in accordance with its rules. 28/ We stated that “Quattrone did not need to show that NASD” requested his testimony “solely at the Commission's behest, but only that NASD engaged in willful participation in joint action with the Commission.” 29/ It appears to us that in its decision in the current proceeding, NASD similarly did not address the question of joint action in considering whether it was a state actor.

24/ (...continued)
 participant in the challenged activity” and under the latter considering whether “the coercive influence or ‘significant encouragement’ of the state effectively converts the private action into a government action”); Bass v. Parkwood Hospital, 180 F.3d 234, 241-242 (5th Cir. 1999) (similar); Mathis v. PG&E, 75 F.3d 498, 503, 504 (9th Cir. 1996) (in discussing “inextricably intertwined” inquiry, stating, in dicta, that had a private entity's internal investigation produced a coerced confession and been conducted in close cooperation with a county task force, that would likely support a finding of state action on a joint action theory); cf. People v. Sporleder, 666 P.2d 135, 138-39 & n.3 (Col. 1983) (stating, in dicta, that the installation of a pen register on defendant’s telephone line by a telephone company in the context of a joint investigation by the telephone company and the district attorney’s office of harassing telephone calls strongly suggested state action).

25/ D.L. Cromwell, 279 F.3d at 162-63.

26/ Id. at 163.

27/ Id.

28/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), __ SEC Docket __.

29/ Id. at __.

Because we released our Quattrone opinion after NASD issued its decision in this proceeding, NASD did not have the opportunity to evaluate that opinion before ruling on Ficken's claims.

Before us, Ficken contends that any weakness in his opposition to NASD's motion for summary disposition is due to lack of discovery. Ficken argues that, if he had been given sufficient opportunity to conduct discovery, he could have demonstrated that a hearing on the issue of whether NASD was a state actor in this instance was appropriate. In support of this argument, Ficken adverts to the contemporaneous investigations of him by the Commission, the DOJ, NASD, and state authorities. Ficken observes that NASD sought to question him about "identical information" relating to late trading or market timing activities implicated in the Commission's civil action against him, the Massachusetts Securities Division's administrative complaint, and the DOJ's investigation. He notes, moreover, that NASD sought the testimony of two of his co-defendants in the Commission's civil action. 30/ Ficken considers the "most telling evidence" of the cooperation between the Commission and NASD to be the Commission's press release acknowledging the assistance of NASD, the Massachusetts Securities Division, and the NYSE in its investigation. 31/

Ficken asserts further that the NASD employee who participated in the December 17, 2003 OTR either shared certain unspecified calculations with a Commission employee, or relied upon calculations made by a Commission employee, in pursuing NASD's investigation of Ficken. Ficken claims that this NASD employee also shared other documents related to Ficken's activities with the Commission employee and with the DOJ. Ficken maintains that NASD collaborated with the DOJ to "garner testimony that would buttress" the Commission's civil complaint against him and the DOJ's criminal investigation of him.

Ficken complains about the absence of testimony or affidavits from NASD and the Commission refuting his assertions. He asserts that he has been denied the opportunity to discover information that is essential to his opposition. NASD observed in its decision in this proceeding that "the mere absence of an express denial of collusion does not prove that NASD's

30/ According to the declaration filed by the NASD special investigator responsible for NASD's investigation of Ficken, NASD's investigation of Ficken was part of an ongoing investigation into market timing and late trading at Prudential.

31/ See supra note 3. NASD asserts that the reason the NAC denied introduction of the press release is that Ficken offered no reason for his failure to introduce it before the Hearing Panel, other than that he discovered it after summary disposition had been granted. Ficken has not moved to adduce the press release as additional evidence in his appeal before us. Pursuant to Rule 452 of our Rules of Practice, 17 C.F.R. § 201.452, we may adduce additional evidence on our own motion and we do so here to admit the press release into evidence.

actions should be imputed to the government.” 32/ We note, however, that in the past, NASD has made its employees who possess material, non-privileged information available for testimony at a respondent’s request or produced affidavits responding to an issue. 33/

We have observed previously that cooperation between the Commission and NASD will rarely render NASD a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action. 34/ We reiterate that we consider the burden of demonstrating joint activities sufficient to render NASD a state actor to be high, and that burden falls on the party asserting state action. To survive summary disposition, Ficken must produce testimony or affidavits to support his assertions of joint action.

While a party must be afforded “a full opportunity to conduct discovery” to obtain the “affirmative evidence” that is “essential to his opposition” to summary disposition, 35/ he “may not use the discovery process to go on a fishing expedition in the hopes that some evidence will turn up to support an otherwise unsubstantiated theory.” 36/ He is required to state “the precise manner in which [the facts he does possess] support[] his claims,” to explain “why he needs

32/ 2005 NASD Discip. LEXIS at *10.

33/ See, e.g., D.L. Cromwell, 279 F.3d at 163 (noting that Criminal Prosecution Assistance Unit and NASD Enforcement staff “testified consistently” that the latter’s demands for testimony were not generated by “governmental persuasion or collusion . . .”); Robert Fitzpatrick, 55 S.E.C. 419, 428-29 (2001) (noting that NASD had directed staff involved in alleged ex parte contacts to submit affidavits), petition for review denied, 63 Fed. Appx. 20 (2d Cir. 2003); Ashvin R. Shah, 52 S.E.C. 1100, 1104 n.17 (1996) (noting that NASD asked whether respondent wished NASD examiner to testify). See Anderson v. Liberty Lobby, 477 U.S. 242, 250 n.5 (1986) (stating that summary disposition may be denied where the nonmoving party “has not had the opportunity to discover information that is essential to his opposition”). See also NASD Procedural Rule 9252(a) (permitting a respondent to request that NASD invoke its Rule 8210 to compel production of documents or testimony from a person subject to NASD jurisdiction).

34/ Quattrone, __ SEC Docket at __. See also Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (finding, where an NASD investigator shared information with the district attorney’s office with which he once worked approximately one year after plaintiff’s OTR, that “such collaboration,” which ultimately led to plaintiff’s criminal prosecution, “does not in itself demonstrate that a ‘close nexus’ existed between the challenged conduct of the NASD and a state actor”).

35/ See Anderson, 477 U.S. at 250 n.5 & 256-257.

36/ G.K. Scott & Co., Inc., 51 S.E.C. 961, 973 (1994); accord John Montelbano, Exchange Act Rel. No. 47227 (Jan. 22, 2003), 79 SEC Docket 1474, 1493.

additional discovery,” to “state with some precision the materials he hope[s] to obtain with further discovery,” and to explain “exactly how” the further information would support his claims. 37/ To obtain discovery in opposition to a properly supported motion for summary disposition, Ficken must be able to satisfy these standards. To the extent that Ficken satisfies this burden, NASD will be expected to give due consideration to Ficken’s request for additional discovery.

Given the circumstances here, including the fact that our Quattrone opinion had not yet been issued at the time NASD issued its decision in this proceeding and the questions concerning whether Ficken had sufficient access to relevant information, we think it appropriate to remand this proceeding to NASD for further consideration. 38/ We do not intend to suggest any view on the outcome of this remand.

An appropriate order will issue. 39/

By the Commission (Chairman COX and Commissioners ATKINS, CAMPOS, NAZARETH and CASEY).

Nancy M. Morris
Secretary

37/ Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-1443 (5th Cir. 1993).

38/ Ficken raises additional arguments, among them the contentions that NASD improperly replaced the original Hearing Officer in this matter with a new Hearing Officer who was “favorably disposed” toward NASD and that the statements of the original Hearing Officer should bind the subsequent Hearing Officer. In light of our decision to remand this proceeding to NASD, we do not address these arguments.

Ficken also objects to the sanction imposed as unduly harsh under the circumstances. According to the NASD Sanction Guidelines, a bar is the standard sanction for an NASD Procedural Rule 8210 violation where an individual fails to respond in “any” manner; where mitigation exists, the recommended sanction is a two-year suspension. NASD Sanction Guidelines at 39. We note that Ficken appeared at the initial OTR and answered questions for over three hours before invoking his Fifth Amendment privilege.

39/ We have considered all of the parties’ contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
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NASD

ORDER REMANDING DISCIPLINARY PROCEEDING TO REGISTERED SECURITIES
ASSOCIATION

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

ORDERED that this disciplinary proceeding with respect to Justin F. Ficken be, and it hereby is, remanded to NASD for further consideration.

By the Commission.

Nancy M. Morris
Secretary