

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58632 / September 24, 2008

Admin. Proc. File No. 3-12903

In the Matter of the Application of

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For Review of Disciplinary Action Taken by

NYSE REGULATION, INC.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY
PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm of national securities exchange asserted the privilege against self-incrimination in response to exchange's request for testimony. Held, exchange's findings of violation and imposition of sanctions are sustained.

APPEARANCES:

Graeme W. Bush and Shawn P. Naunton, of Zuckerman Spaeder LLP, for Michael Sassano.

Susan Light, Myles Orosco, and Jacqueline Davis, for Financial Industry Regulatory Authority, Inc., Department of Enforcement, on behalf of NYSE Regulation, Inc.

Appeal filed: December 3, 2007

Last brief received: March 11, 2008

I.

Michael Sassano, a former registered representative of Oppenheimer & Co., Inc. ("Oppenheimer"), a member firm of the New York Stock Exchange, LLC ("NYSE" or the "Exchange"), appeals from NYSE disciplinary action. 1/ The NYSE found that Sassano failed to comply with NYSE requests to provide testimony in connection with NYSE market timing investigations, and thereby violated NYSE Rule 477. 2/ The NYSE censured Sassano and barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any NYSE member or member organization. 3/ We base our findings on an independent review of the record.

II.

a. Initial Failure to Testify. On December 8, 2003, the NYSE's Division of Enforcement ("NYSE Enforcement") notified Sassano that it was investigating allegations that he had "engaged in a trading strategy in which [he] frequently purchased and sold mutual fund shares to capitalize on price discrepancies in different markets commonly known as 'market timing.'" Oppenheimer had previously received a subpoena from the Attorney General of the State of New York ("NYAG") on October 31, 2003 regarding a market timing investigation by the NYAG.

Our Division of Enforcement ("SEC Enforcement") also sent subpoenas throughout late 2003 and 2004 to both Oppenheimer and Sassano in connection with its investigations into

1/ On July 26, 2007, the Commission approved proposed rule changes in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Pursuant to this consolidation, the member firm regulatory and enforcement functions and employees of NYSE Regulation, Inc. were transferred to NASD, and the expanded NASD changed its name to Financial Industry Regulatory Authority, Inc. See Exchange Act Rel. No. 56148 (July 26, 2007), 91 SEC Docket 522. Because the disciplinary action here was taken before the NYSE-NASD consolidation of regulatory operations, we continue to use the designation "NYSE" in this opinion.

2/ NYSE Rule 477 generally states that an NYSE member, or an associated person of an NYSE member, who has been terminated must comply, for up to a year after termination, with an NYSE request to provide testimony or be subject to disciplinary sanctions, including a bar.

3/ Under the NYSE decision, Sassano received a three-month period to testify before the bar would become permanent. The bar commenced on December 3, 2007, and became permanent on March 3, 2008 when he had not testified by that date.

mutual fund trading practices. ^{4/} On August 17, 2004, Sassano's counsel sent SEC Enforcement written confirmation of Sassano's intention to invoke the Fifth Amendment right against self-incrimination in response to an SEC Enforcement subpoena. ^{5/} On September 20, 2004, SEC Enforcement sent a letter rescheduling Sassano's testimony for October 8, 2004, and documenting its accommodation of three separate rescheduling requests by Sassano's counsel.

On September 24, 2004, NYSE Enforcement sent Sassano a request to appear for testimony in connection with the Exchange's market timing investigation. On September 29, 2004, Sassano's counsel requested an adjournment of the scheduled testimony. NYSE Enforcement granted the request, rescheduling the testimony for October 26, 2004. On October 25, 2004, Sassano's counsel requested another adjournment of Sassano's testimony, and NYSE Enforcement again accommodated the request, rescheduling the testimony for November 11, 2004. That same day, on October 25, 2004, Sassano's employment at Oppenheimer terminated.

On November 9, 2004, two days before the scheduled NYSE testimony, Sassano's counsel proposed a third extension. At this point, NYSE Enforcement stated that the testimony would not be rescheduled a third time. The next day, on November 10, 2004, Sassano's counsel

^{4/} On July 20, 2005, the NYAG and the Commission settled market timing cases against Canadian Imperial Holdings Inc. and CIBC World Markets Corp. and related corporate entities ("CIBC"), which were the parent companies of Sassano's division at Oppenheimer prior to January 2003. The press release announcing the NYAG settlement noted that the settlement "was reached in conjunction with the Securities and Exchange Commission which announced a parallel settlement" the same day. On December 17, 2007, Oppenheimer executed an Acceptance, Waiver and Consent ("AWC") settling the Exchange's enforcement action against Oppenheimer.

NYSE Enforcement has submitted an unopposed motion for leave to adduce the AWC pursuant to Commission Rule of Practice 452. See 17 C.F.R. § 201.452 (stating that a motion for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously"). We have determined to grant NYSE Enforcement's motion.

^{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. amend. V.

Unless otherwise indicated, references herein to Sassano's "counsel" refer to Sassano's attorneys during the period in which the NYSE issued its requests for testimony. Several weeks before the issuance of the NYSE Hearing Board decision, Sassano's then-counsel withdrew from their representation of Sassano before the NYSE. Sassano subsequently retained new counsel.

called again to request an adjournment of the on-the-record testimony and settlement talks in lieu of such testimony. Although NYSE Enforcement staff left voicemail messages with Sassano's counsel that day to discuss the request, their calls were not returned prior to the scheduled start of Sassano's testimony. Sassano did not appear for his still-scheduled testimony on November 11, 2004.

b. Attorney Proffer. Beginning on November 12, and November 29, 2004, after Sassano had failed to appear for his November 11 testimony, his counsel and NYSE Enforcement discussed Sassano's cooperation with the investigation and the possibility that he would supply information through his counsel instead of by on-the-record sworn testimony.

Sassano's counsel also separately suggested the possibility of an "attorney proffer" with SEC Enforcement in connection with the market timing investigation by SEC Enforcement. Sassano's counsel asked SEC Enforcement staff "whether they had any objection to [NYSE] Enforcement attending the attorney proffer." SEC Enforcement staff did not raise any objections, and Sassano's counsel invited NYSE Enforcement to attend the SEC Enforcement proffer. In a written affirmation (the "Affirmation") submitted in connection with the NYSE proceedings, ^{6/} NYSE Enforcement represented that, between January 24, 2005 and March 15, 2005, NYSE Enforcement, SEC Enforcement, and the NYAG "discussed the logistics of scheduling and clarifying the scope of [counsel]'s proposed attorney proffer." The Affirmation further stated that these discussions were "a direct result of [counsel]'s request that the SEC and [NYSE] Enforcement jointly attend his proposed proffer." ^{7/}

Sassano's counsel mandated that the proffer discussion "be based on and limited exclusively to those issues presented to counsel prior to the proffer." Accordingly, on March 8, 2005, SEC Enforcement sent Sassano's counsel a letter listing topics to be addressed at the proffer. On April 6, 2005, NYSE Enforcement informed Sassano's counsel that NYSE Enforcement representatives would be attending the proffer, and requested that the proffer address "market timing activity at Oppenheimer," but did not otherwise supplement the list of proffer topics provided by SEC Enforcement.

^{6/} A Senior Vice President of NYSE Enforcement signed and submitted the Affirmation, which represents that it was prepared based on a review of "[NYSE] Enforcement's confidential investigative file and discussions with Enforcement staff."

^{7/} Although an affidavit by Sassano's counsel represents that he had "engaged in discussions with representatives of" both SEC Enforcement and NYSE Enforcement "[i]n or about March and April 2005" regarding a joint proffer, the Affirmation submitted by the NYSE represents that the discussions between SEC Enforcement, NYSE Enforcement and the NYAG took place "during the period from January 24, 2005 to March 15, 2005" and "[a]s a direct result of [counsel]'s request that" SEC Enforcement and NYSE Enforcement both attend the proffer.

Representatives of SEC Enforcement and NYSE Enforcement attended the attorney proffer on April 12, 2005. The Affirmation represents that "[a]lthough [Sassano's counsel] discussed areas that [Sassano] could testify about, [counsel] did not offer any specific information" at the proffer. According to an affidavit executed by Sassano's counsel ("Counsel Affidavit") in connection with the appeal before us of the NYSE decision, NYSE Enforcement staff "did not ask any questions about mutual fund trading practices at Oppenheimer" during the proffer and "did not request any information relating to any specific subjects." The Counsel Affidavit also states that, at the end of the proffer, NYSE Enforcement staff asked "if Mr. Sassano would make himself available to the SEC at some point in the future for questioning" and if Sassano "would give truthful answers to the SEC were he to testify."

On April 19, 2005, NYSE Enforcement declined the proposal for cooperation outlined at the attorney proffer. The Affirmation represents that, in so doing, NYSE Enforcement "specifically indicated that [NYSE Enforcement staff] spoke for [NYSE] Enforcement only."

c. Subsequent Failure to Testify. Prior to the April 12 attorney proffer, on March 16, 2005, NYSE Enforcement had issued another request for Sassano's on-the-record testimony in connection with its Oppenheimer investigation. ^{8/} NYSE Enforcement's letter requested that Sassano appear for testimony on April 26, 2005. On April 20, 2005, after NYSE Enforcement had declined Sassano's proposal outlined at the proffer, Sassano's counsel sent written confirmation that Sassano would not appear for his scheduled testimony before NYSE Enforcement. On April 22, 2005, NYSE Enforcement sent a letter to Sassano's counsel memorializing its attempts to schedule Sassano's testimony (the "April 22 Letter"). The April 22 Letter noted that "[d]uring the period November 11, 2004 and March 2005, Enforcement, counsel and other regulatory entities engaged in several telephone conversations regarding Sassano's cooperation in this matter." The April 22 Letter did not provide further detail about these conversations. ^{9/} The April 22 Letter also observed that NYSE Enforcement had previously informed Sassano that failure to comply with the requests for testimony could result in formal disciplinary proceedings. Sassano did not appear for testimony before NYSE Enforcement on April 26, 2005, and to date has not testified before NYSE Enforcement.

^{8/} The initial NYSE Enforcement request for testimony issued on September 24, 2004 indicated that the request for testimony was related to an investigation of allegations that Sassano had himself engaged in market timing. The second NYSE Enforcement request for testimony issued on March 16, 2005 did not directly refer to NYSE Enforcement's investigation of Sassano's trading activities, but instead stated that NYSE Enforcement was investigating "allegations that [Oppenheimer] failed to supervise and control the activities of its employees with regard to its sale of mutual funds."

^{9/} But see supra notes 6-7 and accompanying text.

III.

On November 15, 2005, NYSE Enforcement charged Sassano with violating NYSE Rule 477 by "fail[ing] to provide testimony in connection with matters that occurred during the course of his employment with a member organization." Sassano did not file an answer with the NYSE Hearing Board. ^{10/} However, in a series of letters beginning on March 27, 2006 and citing our March 24, 2006 decision in Frank P. Quattrone, ^{11/} Sassano requested that the Hearing Officer stay the disciplinary action and conduct "a hearing to determine whether the NYSE was engaged in 'state action.'" On December 5, 2006, the NYSE Hearing Officer "direct[ed Sassano] to make an offer of proof . . . that provides the specific factual basis necessary to find 'state action' on the part of the NYSE."

By letter to the parties dated March 27, 2007, the Hearing Officer found, based on a review of submissions by Sassano and NYSE Enforcement, that Sassano had "not made out [his state action] claim but ha[d] alleged sufficient facts to require limited discovery to resolve the matter." The Hearing Officer ordered additional discovery regarding "how [NYSE] Enforcement came to be included in" the attorney proffer with SEC Enforcement; the statement in Sassano's December 19, 2006 submission to the Hearing Officer claiming that "[b]oth the SEC staff and the [NYSE Enforcement] staff advised that they would talk among themselves and make a decision on a joint attendance;" and the reference in the April 22 Letter to "conversations between Enforcement and other regulatory entities during the period November 11, 2004 and March 2005."

In response to the discovery issues identified by the Hearing Officer, on April 9, 2007 NYSE Enforcement submitted the Affirmation, ^{12/} which describes the period beginning with NYSE Enforcement's first written request for Sassano's testimony on September 24, 2004 through the issuance of the Charge Memorandum on November 15, 2005 in connection with Sassano's failure to testify. The Affirmation states that Sassano's counsel had first suggested the provision of "'information' to [NYSE] Enforcement in lieu of his testifying" one day before his scheduled testimony on November 11, 2004. According to the Affirmation, the April 22 Letter's reference to "conversations between Enforcement and other regulatory entities during the period

^{10/} On January 6, 2006, NYSE Enforcement filed a motion to deem the facts alleged in the November 15, 2005 charge memorandum (the "Charge Memorandum") admitted as true based on Sassano's failure to file an answer to the Charge Memorandum as required under NYSE Rule 476(d). On January 12, 2006, after the standard deadline for filing an answer, Sassano's counsel sent a letter to trial counsel for NYSE Enforcement disputing allegations in the Charge Memorandum and requesting that NYSE Enforcement "reconsider its commencement of an enforcement proceeding against" Sassano.

^{11/} Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

^{12/} See supra notes 6-7 and accompanying text.

November 11, 2004 and March 2005" identified by the Hearing Officer in ordering additional discovery "merely referenced that conversations were held among all of the parties involved in planning for [Sassano]'s proposed cooperation via the attorney proffer." The Affirmation also states that "there was no flow of information from [NYSE] Enforcement to the SEC regarding [Sassano]'s conduct." 13/

On April 25, 2007, the Hearing Board issued its decision, finding that "[NYSE] Enforcement's attendance at [the] attorney's proffer conducted by [Sassano]'s then counsel for the SEC and [NYSE] Enforcement was not initiated by the SEC or [NYSE] Enforcement" and concluding that "[a]fter reviewing and considering all of the submissions . . . [Sassano] had not made out his claim of 'State Action.'" The Hearing Board accordingly found that Sassano's failure to provide testimony constituted a violation of NYSE Rule 477, and censured and barred Sassano. The NYSE Board of Directors affirmed the Hearing Board decision on October 17, 2007. 14/ This appeal followed.

IV.

Sassano acknowledges that he failed to appear in response to the NYSE's requests for testimony as described above. Such failure establishes prima facie evidence of a violation of

13/ The Affirmation also states that on March 16, 2005, NYSE Enforcement and SEC Enforcement "had a telephone conversation, during which the SEC advised [NYSE Enforcement] about its Wells process" but that NYSE Enforcement "was not invited to join in any proposed issuance of the SEC's Wells notice."

14/ The NYSE Hearing Board found that Sassano violated NYSE Rule 477. The NYSE Board of Directors on appeal stated that Sassano had "requested a review of a Hearing Officer's determination that he had violated NYSE Rule 476(a) by failing to testify as requested by" NYSE Enforcement. The Board of Directors stated that it affirmed the decision of the Hearing Board "in all respects."

NYSE Rule 476(a)(11) requires persons associated with member firms to respond to requests for information from the Exchange. NYSE Rule 477 extends this requirement to persons formerly associated with a member firm for up to one year after the Exchange receives notice of their termination. Although the initial request for Sassano's testimony was sent on September 24, 2004, before his employment terminated in October 2004, he was no longer employed at Oppenheimer at the time of either of the dates of his scheduled testimony on November 11, 2004 and April 26, 2005. Sassano does not raise as an issue, and we do not believe, that the reference to Rule 476(a) as the basis for Sassano's appeal changes the result here. The Board of Directors made clear that it was reviewing whether Sassano provided testimony as requested and affirmed the Hearing Board's decision in its totality.

NYSE Rule 477. ^{15/} Sassano argues, however, that he could not be forced to testify because he was entitled to invoke his Fifth Amendment right against self-incrimination. ^{16/} Sassano argues that NYSE Enforcement's investigation was "inextricably intertwined" with investigations by SEC Enforcement and the NYAG, and that the requests for testimony issued by NYSE Enforcement accordingly constituted "state action" entitling him to invoke his right against self-incrimination. On appeal, Sassano requests reversal of the NYSE decision or, alternatively, a remand of his case to the NYSE for further discovery regarding his state action claim.

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." ^{17/} The U.S. Supreme Court has held that a private party's actions may constitute state action only 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.'" ^{18/} The factors considered by the Court as "bear[ing] on the fairness of such an attribution" include whether a challenged activity "results from the State's exercise of its 'coercive power;'" ^{19/} whether "the State has provided such significant encouragement, either overt or covert, that the [private] choice must in law be deemed to be that of the State;" ^{20/} or whether "a private actor operates as a 'willful participant in

^{15/} See, e.g., Warren E. Turk, Exchange Act Rel. No. 55942 (June 22, 2007), 90 SEC Docket 2802, 2805 (stating that a failure to appear for testimony establishes a prima facie violation of NYSE Rule 477); Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where applicant failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196, 199 (1990) (sustaining NYSE disciplinary action for violation of Rule 477 where applicant refused to testify in Exchange investigation), aff'd, 933 F.2d 1014 (9th Cir. 1991)(Table); cf. Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 690-91 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule].").

^{16/} See supra note 5.

^{17/} D.L. Cromwell Inv., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161 (2d Cir. 2002) (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)).

^{18/} Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351(1974)).

^{19/} Id. at 296.

^{20/} Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (stating that "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment").

joint activity with the State or its agents." 21/ Some courts have described this last fact pattern as the "joint action" test, 22/ 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" 23/ or whether "the particular actions challenged are inextricably intertwined with those of the government." 24/

The "burden of demonstrating joint activities sufficient to render [a self-regulatory organization ("SRO")] a state actor is high, and that burden falls on the party asserting state action." 25/ In order to meet this burden, Sassano must demonstrate "a nexus between the state and the specific conduct of which plaintiff complains." 26/ Accordingly, in this case, Sassano must demonstrate a specific nexus between the government and the Exchange's requests for testimony triggering Sassano's invocation of the Fifth Amendment.

Sassano claims that NYSE Enforcement conducted its investigation jointly with investigations by SEC Enforcement and the NYAG, and that the NYSE requests for testimony thereby constituted "state action." In support, Sassano claims that NYSE Enforcement, SEC Enforcement, and the NYAG "shared information, attended meetings and worked together extensively" and that this cooperation continued "throughout a three-year period beginning in late 2003." We have explicitly said, however, that "cooperation and information sharing between the Commission and an SRO will rarely render the SRO a state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action." 27/

21/ Brentwood Acad., 531 U.S. at 296. See also Quattrone, 87 SEC Docket at 2164 n.25 ("NASD asserts correctly that no evidence existed that the Commission coerced, directed, or encouraged NASD to issue the [request pursuant to analogous NASD rule], but no hearing was held on this issue. Moreover, Quattrone did not need to show that NASD made the request solely at the Commission's behest, but only that NASD engaged in willful participation in joint action with the Commission.").

22/ Turk, 90 SEC Docket at 2807.

23/ Kirtley v. Rainey, 326 F.3d 1088, 1093 (9th Cir. 2003); see also Turk, 90 SEC Docket at 2807.

24/ Mathis v. PG&E, 75 F.3d 498, 503 (9th Cir. 1996); see also Turk, 90 SEC Docket at 2807.

25/ Turk, 90 SEC Docket at 2809.

26/ Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999) (emphasis in original).

27/ Turk, 90 SEC Docket at 2809-10; see also Desiderio, 191 F.3d at 207; Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005) (Mukasey, J.) (finding, where an NASD

(continued...)