SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 55942 / June 22, 2007

Admin. Proc. File No. 3-12404

In the Matter of the Application of

WARREN E. TURK
c/o Lawrence Iason, Esq.
Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C.
565 Fifth Avenue
New York, NY 10017

For Review of Disciplinary Action Taken by

the New York Stock Exchange, Inc.

OPINION OF THE COMMISSION

NATIONAL SECURITIES EXCHANGE -- REVIEW OF DISCIPLINARY PROCEEDING

Failure to Provide Requested Testimony

Former associated person of member firm and member of registered securities association asserted the privilege against self-incrimination in response to association's request for testimony. Held, the proceeding is remanded for further consideration.

APPEARANCES:

Lawrence Iason and Kristy Watson Milkov, of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., for Warren E. Turk.

Susan Light, Julie Han Broderick, Marianne Paoli, and Allen D. Boyer, for the Division of Enforcement, New York Stock Exchange, Inc.

Appeal filed: August 14, 2006
Last brief received: November 27, 2006

I.

Warren E. Turk, a former member of the New York Stock Exchange, Inc. ("NYSE" or the "Exchange") and a former specialist with NYSE member firm Van der Moolen Specialists USA LLC ("Van der Moolen"), appeals from NYSE disciplinary action. The NYSE found that Turk failed to comply with requests by the NYSE that Turk provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Van der Moolen, in violation of NYSE Rule 477, and that Turk was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. 1/ The NYSE censured Turk and permanently barred him from membership, allied membership, approved person status, and from employment or association in any capacity with any member or member organization. For the reasons given below, we have determined to remand the proceeding to the NYSE for further consideration consistent with this opinion. To the extent we make findings, we base them on an independent review of the record.

II.

On September 17, 2004, the NYSE Division of Enforcement ("NYSE Enforcement") requested that Turk appear for testimony in connection with NYSE Enforcement's investigation into allegations of improper trading practices by NYSE specialists during the period from 1999 to 2003. Turk initially agreed to testify before NYSE Enforcement, and his testimony was scheduled for November 22, 2004. Our Division of Enforcement also issued a subpoena to Turk in connection with a Commission investigation of improper trading practices by NYSE specialists. On November 8, 2004, Turk appeared before Commission staff and testified. According to Turk, he "testified for a full day before the SEC and answered every question he was asked."

On November 12, 2004, Van der Moolen informed Turk that it was removing him from the NYSE trading floor and placing him on administrative leave. According to Turk, a Van der Moolen official told Turk that Van der Moolen was acting at the request of the office of the United States Attorney for the Southern District of New York (the "United States Attorney"). Soon thereafter, Turk informed the NYSE that he would not be appearing for testimony as scheduled. On November 19, 2004, Turk's counsel sent an email to an NYSE staff attorney that

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1/ NYSE Rule 476(a) provides that NYSE members and employees of NYSE members who violate any provision of any NYSE rule are subject to the imposition of disciplinary sanctions, including censure and bar, by the NYSE. NYSE Rule 477 states that NYSE members, or employees of NYSE members, who do not comply with an NYSE request to provide testimony, while they are a member or an employee of an NYSE member and during the one-year period after the termination of membership or employment by an NYSE member, are subject to the imposition of disciplinary sanctions, including a bar.

read, in its entirety, "I am writing to confirm that Warren Turk will not appear for testimony on Monday, November 22, 2004." 2/

On April 12, 2005, the Commission instituted proceedings against Turk and nineteen other NYSE specialists, charging Turk with violations of the antifraud provisions of the securities laws by inter-positioning orders in Van der Moolen's proprietary account between customer orders and by trading ahead of customer orders using Van der Moolen's proprietary account. 3/ Also on April 12, 2005, the NYSE announced the issuance of charges resulting from its investigation of Turk. 4/ The NYSE press release stated, "The illegal conduct engaged in by the specialists, namely inter-positioning and trading ahead of customer orders, resulted in public-customer orders being disadvantaged and a riskless profit for their firms' dealer accounts." 5/ By letter dated December 21, 2006, Turk informed the NYSE that, because it "now appears" that no criminal charges will be brought against Turk, he would be willing to "appear before NYSE Enforcement and testify on the record." 6/

2/ It is unclear how or when Turk first informed the NYSE that he would not testify, or whether he told the NYSE that he would not testify because, as Turk asserts here, Van der Moolen's action "ma[de] it clear to Mr. Turk that he was a focus of the government's investigation."

Van der Moolen subsequently filed a Form U-5 Uniform Termination Notice for Securities Industry Registration pertaining to Turk, in which it stated that Turk's date of termination from Van der Moolen was December 31, 2004.

3/ The Commission's Order Instituting Proceedings charged Turk with violations of Section 17(a) of the Securities Act of 1933, Sections 10(b) and 11(b) of the Securities Exchange Act of 1934, and Exchange Act Rules 10b-5 and 11b-1, 15 U.S.C. § 77q(a), 15 U.S.C. § 78j(b), 15 U.S.C. § 78k(b), 17 C.F.R. § 240.10b-5, and 17 C.F.R. § 240.11b-1, respectively.

4/ The record includes the NYSE's press release announcing the issuance of the charges against Turk and against sixteen other NYSE specialists, but does not include the charging document itself.

5/ The NYSE charged Turk and the other specialists with violations of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and various NYSE Rules.

6/ As Turk's letter indicates, the United States Attorney has not brought criminal charges against Turk, although the United States Attorney did bring criminal charges against fifteen other NYSE specialists on April 15, 2005. In a January 10, 2007 letter to Turk's counsel, the NYSE staff acknowledged, but did not accept, Turk's offer to testify, describing the offer as "empty and illusory." In that letter, NYSE Enforcement stated that "the relevant investigation has been completed."

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III.

In order to sustain disciplinary action by a self-regulatory organization ("SRO") such as the NYSE, we must determine whether Turk engaged in the conduct found by the NYSE, whether the conduct violated the NYSE rules he was found to have violated, and whether those rules were applied in a manner consistent with the purposes of the Exchange Act. 7/ As discussed below, we have concluded that we are unable to make all of the findings required to sustain the NYSE's action against Turk and have determined, therefore, to remand the case to the NYSE for further proceedings.

Turk acknowledges that he failed to appear for testimony, as alleged and found by the Exchange. Such a failure establishes a prima facie violation of NYSE Rules 476 and 477. 8/ Turk argues, however, that he could not be forced to testify at the NYSE because he could invoke the Fifth Amendment's right against self-incrimination. 9/ Turk argues that the right against self-incrimination applied to the NYSE because the Exchange is a "state actor" generally or, alternatively, because, under the particular circumstances of this case, the Exchange engaged in "state action" in conducting its investigation of Turk.

According to Turk, the NYSE and other SROs are state actors, subject to the right against self-incrimination, because "Congress has effectively required that anyone who wants to work in the securities business must be a member of a self-regulatory organization or must be employed by a member of a self-regulatory organization." Numerous courts and we have repeatedly held, however, that the SROs generally are not state actors, and we see no basis for deviating from that

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6/ (...continued)
According to Turk, "both [the Commission and NYSE] proceedings have been stayed pending resolution of the criminal proceedings." There is nothing else in the record regarding the current status of the Commission and NYSE proceedings against Turk based on allegations of inter-positioning and trading ahead of customer orders.

7/ See Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1); Justin F. Ficken, Securities Exchange Act Rel. No. 54,699 (Nov. 3, 2006), 89 SEC Docket 685.

8/ See, e.g. Louis F. Albanese, 53 S.E.C. 294, 297-98 (1997) (sustaining NYSE disciplinary action for violation of NYSE Rule 477 where respondent failed to cooperate immediately with NYSE investigation); Wallace E. Lin, 50 S.E.C. 196 (1990) (sustaining NYSE findings of violation of Rule 477 where respondent refused to testify in Exchange investigation). Cf. Ficken, 89 SEC Docket at 690-91 ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule]").

9/ 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.

established precedent. 10/ As the Second Circuit has held, in articulating a standard that would apply equally to other SROs, including the Exchange, "The NASD is a private actor, not a state actor. It is a private corporation that receives no federal or state funding. Its creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee." 11/

Alternatively, Turk argues that the NYSE engaged in state action under the circumstances of this specific case because, according to Turk, "NYSE Enforcement has worked in concert with the SEC and the United States Attorney's office in investigating specialists and coordinating the civil and criminal charges brought against them." We recently addressed the question of whether
an SRO, although not generally a state actor, can, under certain circumstances, engage in state action such that it becomes subject to the right against self-incrimination. In Frank P.

10/ See United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975) ("NYSE's inquiry . . . was in pursuance of its own interests and obligations, not as an agent of the SEC. It is not enough to create an agency relationship that Solomon's conduct violated both a rule of NYSE, thereby subjecting him to disciplinary action by that body, and federal law, with consequent liability to civil and criminal enforcement proceedings by the Government"); Marchiano v. National Ass'n of Secs. Dealers, Inc., 134 F. Supp.2d 90, 95 (D.D.C. 2001) ("[T]he court is aware of no case . . . in which NASD Defendants were found to be state actors either because of their regulatory responsibilities or because of any alleged collusion with criminal prosecutors"); Vladislav Steven Zubkis, 53 S.E.C. 794, 797 n.2 (1998) (stating that privilege against self-incrimination does not apply in SRO disciplinary proceedings).

11/ D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 162 (2d Cir. 2002) (citing Desiderio v. National Ass'n of Secs. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999), cert. denied, 531 U.S. 1069 (2001)). See also Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 138 (2d Cir. 2002) (citing Desiderio and stating, "It is clear that NASD is not a state actor . . .").

Turk further argues, "The Supreme Court of the United States has repeatedly ruled that a witness cannot be deprived of his or her employment for declining to provide testimony that could be used against the witness in a criminal prosecution," citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977); Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Uniformed Sanitation Men Assoc. v. Comm'r of Sanitation, 392 U.S. 280 (1968); Garrity v. State of New Jersey, 385 U.S. 493 (1967); and Spevack v. Klein, 385 U.S. 511 (1967). However, those cases all involved the government, rather than a private entity such as the NYSE, forcing an individual to choose between testifying and losing his employment. This precedent has possible relevance to the NYSE only to the extent that it engages in state action.

Quattrone, 12/ where we set aside NASD's action based on procedural deficiencies, 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. 13/ A violation of the Fifth Amendment, therefore, requires "state action" on the part of the private entity whose actions are being challenged. 14/

Although SROs are not, as discussed above, generally state actors, under certain limited circumstances, they may engage in state action. 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." 15/ 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." 16/ 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.'" 17/ 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." 18/

12/ Exchange Act Rel. No. 53547 (Mar. 24, 2006), 87 SEC Docket 2155.

13/ Id., 87 SEC Docket at 2163 n.22 (citing D.L. Cromwell Invs., 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))).

14/ Id.

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

16/ Id. at 295-296.

17/ Id. at 296.

18/ 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 participant in the challenged activity" and under the latter considering whether "the coercive influence or 'significant encouragement' of the state effectively converts the

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In D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., the court found that NASD Enforcement issued certain 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 . . . ." 19/ 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 that case, NASD could nevertheless, 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." 20/

In another recent decision involving the question of whether NASD can become subject to the right against self-incrimination by engaging in state action, Justin F. Ficken, we determined to remand the case to NASD for further development of the evidentiary record where the applicant had been limited in his ability to introduce evidence on that question. 21/ In remanding that case to NASD, we noted, among other things, that the case had been considered by NASD prior to the issuance of our decision in Quattrone.

Turk argues that our decisions in Quattrone and Ficken support setting aside the Exchange's action against him or, at a minimum, justify remanding the case to the Exchange for further proceedings. The record shows that the parties did not litigate extensively the issue of state action before the Exchange and introduced only limited evidence regarding this issue. Turk notes, however, that the evidentiary hearing in this case occurred before either Quattrone or Ficken had been decided.

18/ (...continued)
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).

19/ D.L. Cromwell, 279 F.3d at 163.

20/ Id.

21/ Ficken, 89 SEC Docket at 696. 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. Quattrone, 87 SEC Docket at 2166.

The evidence Turk identifies to support his contention that the Exchange engaged in state action includes: (1) that the Commission and the NYSE requested Turk's testimony concerning his activities as a specialist within one month of each other; (2) that the Commission and the NYSE brought charges in connection with their respective investigations of NYSE specialists on the same day in April 2005 and that the United States Attorney brought criminal charges against other NYSE specialists three days after the Commission and the NYSE brought their proceedings; 22/ (3) that press releases issued by the Commission, the NYSE, and the United States Attorney in connection with their investigations indicated that the regulators cooperated with and assisted each other; 23/ and (4) that Van der Moolen told Turk, at the time that Van der Moolen informed Turk that it placed him on administrative leave, thus removing him from the NYSE trading floor, that it was acting upon a request by the United States Attorney's office. Turk has also indicated at various points in the proceeding that he hoped to develop additional unspecified evidence beyond what he has cited on appeal if the proceeding were remanded to the NYSE for further fact-finding.

We have held that the burden of demonstrating joint activities sufficient to render an SRO a state actor is high, and that burden falls on the party asserting state action. 24/ The evidence Turk has presented to date does not meet that standard. That evidence by itself indicates that, in investigating Turk, government and NYSE personnel cooperated to some extent. We have observed previously 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

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22/ As noted above, the United States Attorney has not brought charges against Turk.

23/ The press releases to which Turk refers were issued on April 12, 2005. The Commission's press release, announcing the institution of proceedings against twenty NYSE specialists including Turk, states, in relevant part, "The staff acknowledges the assistance of the U.S. Attorney's office, the FBI, and the NYSE Division of Enforcement." The NYSE press release states, in relevant part, "NYSE Regulation worked cooperatively in this matter with the U.S. Department of Justice and the U.S. Securities and Exchange Commission. The Exchange acknowledges their substantial support and assistance." In its press release announcing the indictments of fifteen NYSE specialists (as noted, not including Turk), the United States Attorney's office thanked the NYSE, "which has been cooperating with the Government in its continuing investigation." Turk included these press releases as exhibits to his reply brief to us. NYSE Enforcement has submitted no objection to the inclusion of the press releases in the record, nor has NYSE Enforcement sought to question the authenticity of the press releases Turk has adduced. We have therefore determined to include the press releases in our consideration of Turk's appeal.

24/ Ficken, 89 SEC Docket at 695.

cooperation is generally insufficient, standing alone, to demonstrate state action. 25/ We also note 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 . . . ." 26/

Nevertheless, while the evidence Turk identifies is insufficient to establish state action, he should have a further opportunity to develop and present his state action claim. Because the evidence presented to date might be the product of more than cooperation, and because Turk's NYSE evidentiary hearing occurred before the issuance of our decisions in Quattrone and Ficken, 27/ we believe it is appropriate to provide Turk an opportunity to develop a full evidentiary record on the state action question.

On remand, Turk may seek discovery in connection with his efforts to prove that the NYSE engaged in state action. As we noted in Ficken, a party must be afforded "a full opportunity to conduct discovery" to obtain the "affirmative evidence" that is "essential to his opposition" to summary judgment, 28/ but 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." 29/ Not every defense of state action deserves discovery and a hearing. A respondent must provide a reasonable and credible basis to conclude that the SRO's relationship with the government in the case suggests such a "close nexus between the State and

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25/ Quattrone, 87 SEC Docket at 2165. 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 testimony, 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").

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

27/ We wish to observe that, as noted, the burden of establishing state action is on the applicant and that, normally, an applicant's failure to introduce sufficient evidence on this point will justify the dismissal of his appeal if a claim of state action represents his sole defense. We nevertheless have determined to remand here because of the unusual posture of this appeal. Moreover, we expect that, in the future, parties will seek to introduce any evidence related to the state action issue during the initial evidentiary hearing, so that the record is fully developed in the first instance when the case is before the SRO.

28/ Ficken, 89 SEC Docket at 695 n. 35 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 250 n.5 & 256-257 (1986)).

29/ Id. at 695 n. 36 (citing 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).

the challenged action" that the seemingly private behavior "may be fairly treated as that of the State itself." 30/

Turk will be required on remand to state "the precise manner in which [the facts he does possess] support[] his claims," to explain "why he needs 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. 31/ Turk must be able to satisfy these standards to obtain discovery in opposition to a properly supported motion for summary judgment. To the extent that Turk meets this burden, the NYSE will be expected to give due consideration to any requests Turk makes for additional discovery. 32/ We do not intend to suggest any view on the outcome of this remand.

An appropriate order will issue. 33/

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

Nancy M. Morris
Secretary

30/ See supra note 15.

31/ Ficken, 89 SEC Docket at 695-96 n. 37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-1443 (5th Cir. 1993)).

32/ See Ficken, 89 SEC Docket at 696.

33/ 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
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ORDER REMANDING DISCIPLINARY PROCEEDING TO NATIONAL SECURITIES EXCHANGE

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

ORDERED that this disciplinary proceeding with respect to Warren E. Turk be, and it hereby is, remanded to the New York Stock Exchange, Inc. for further consideration.

By the Commission.

Nancy M. Morris
Secretary