

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 56100 / July 19, 2007

Admin. Proc. File No. 3-12461

In the Matter of the Application of

GREGG HEINZE
c/o Paul R. Grand, 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 national securities exchange asserted the privilege against self-incrimination in response to association's request for testimony. Held, the proceeding is remanded for further consideration.

APPEARANCES:

Paul R. Grand and Andrew J. Schell, of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., for Gregg Heinze.

Susan Light, Virginia J. Harnsich, Allen D. Boyer, and Kwame Anthony for the New York Stock Exchange, Inc.

Appeal filed: October 23, 2006
Last brief received: January 30, 2007

I.

Gregg Heinze, a former specialist with New York Stock Exchange, Inc. ("NYSE" or the "Exchange") member firm Bear Wagner Specialists LLC ("Bear Wagner"), 1/ appeals from NYSE disciplinary action. The Exchange found that Heinze failed to comply with requests by the NYSE that Heinze provide testimony in connection with an NYSE investigation concerning matters that occurred while he was a specialist at Bear Wagner, in violation of NYSE Rule 476, and that Heinze was, therefore, subject to discipline pursuant to NYSE Rules 476(a) and 477. 2/ The NYSE censured Heinze 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 Exchange 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 November 2, 2004, our Division of Enforcement (the "Division") issued a subpoena to Heinze, requesting information and testimony in connection with the Division's investigation of NYSE specialists. 3/ Shortly thereafter, on November 19, 2004, the NYSE Division of Enforcement ("NYSE Enforcement") requested documents from Heinze as part of its investigation of "allegations of improper trading by specialists on the Floor of the Exchange that resulted in violations of Exchange Rules and Federal Securities Laws." In a letter dated December 3, 2004, Heinze responded to NYSE Enforcement's document request, stating, "As we discussed during our telephone conference earlier this week, Gregg Heinze does not have any documents responsive to your November 19, 2004 letter."

1/ Heinze voluntarily resigned from Bear Wagner on December 23, 2004.

2/ 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 a censure and bar, by the Exchange. 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.

3/ The subpoena is not in the record. However, the record does include the cover letter, dated November 2, 2004, accompanying the subpoena, sent by a Division attorney to Heinze's counsel. The subject line of the letter is "*In the Matter of Certain Specialist Trading - New York Stock Exchange.*" The letter does not otherwise detail the scope of the Division's investigation.

On January 12, 2005, Heinze responded to the Division's subpoena by a written, sworn declaration, in which he asserted the Fifth Amendment privilege against self-incrimination as to all questions posed by the Division. ^{4/} Also on January 12, 2005, NYSE Enforcement requested that Heinze appear on February 3, 2005, for testimony in connection with NYSE Enforcement's investigation of "allegations that during [Heinze's] employment as a registered specialist with Bear Wagner Specialists LLC, he may have violated Exchange rules and federal securities laws in connection with his trading of Exchange listed securities." Subsequently, Heinze informed the NYSE that he would not appear for testimony as requested. ^{5/}

On February 28, 2005, as a result of Heinze's failure to comply with the Exchange's request for testimony, NYSE Enforcement charged that Heinze "violated Exchange Rule 476 in that he failed to comply with requests by the Exchange that he provide testimony concerning matters which occurred prior to the termination of his employment with a member organization, and he is, therefore, subject to discipline pursuant to Exchange Rule 476(a) and 477." The parties submitted briefs and, before the NYSE Hearing Panel, NYSE Enforcement requested summary judgment on the question of whether Heinze had committed the violations the Exchange charged. The Hearing Panel granted NYSE Enforcement's request for summary judgment and found Heinze guilty of violating NYSE Rule 476 and then heard arguments regarding sanctions. The NYSE Hearing Panel later issued its decision censuring and barring Heinze. ^{6/}

^{4/} 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. The record indicates that the declaration, dated January 7, 2005, was hand-delivered to the Commission staff on January 12, 2005.

^{5/} The way in which Heinze informed the NYSE that he would not testify as requested and the substance of what he told the Exchange are unclear. However, in Heinze's April 15, 2005, response to the NYSE's charge memorandum, Heinze's counsel stated, "We received the Exchange's request calling for Mr. Heinze's testimony only after the commencement of both an investigation by the United States Attorney's Office and an investigation by the Securities and Exchange Commission At the time we received the Exchange's request for our client's testimony, we had already received a subpoena from the S.E.C. and had explained to the S.E.C. that, because of the pendency of the criminal investigation and of the S.E.C.'s refusal to identify the transactions they were accusing our client of having engaged in, we had advised Mr. Heinze to rely on his constitutional right not to be a witness against himself."

^{6/} Under the Hearing Panel decision, Heinze received a thirty-day period to testify before his bar would become permanent. Heinze continued to decline to testify during this thirty-day period.

On March 24, 2006, subsequent to Heinze's hearing, we issued our opinion in Frank P. Quattrone, in which we observed that a self-regulatory organization ("SRO"), such as the Exchange, although generally not a "state actor," can become subject to the Fifth Amendment under certain circumstances when, through its significant involvement with a government investigation, it can be deemed to have engaged in "state action." ^{7/} Following our decision in Quattrone, Heinze requested that the NYSE Hearing Panel set aside its decision and re-open the record to permit Heinze to introduce evidence to support his claim that "the Exchange and the S.E.C., by their own admission, conducted a joint investigation into the conduct of various specialist firms and individual specialists such as Mr. Heinze." Among other things, Heinze noted that there was significant regulatory interest in the trading activities of NYSE specialists at Bear Wagner and other firms during this time period. ^{8/} The NYSE Hearing Panel, however, denied Heinze's request to re-open the hearing, finding that the "information submitted on behalf of Mr. Heinze does not rise to the level of specific facts required to re-open the record. They constitute mere conclusory allegations or speculation insufficient to re-open this matter."

On July 3, 2006, Heinze requested review of the Hearing Panel decision by the NYSE Board of Directors. The NYSE Board set oral argument for Heinze's appeal on October 3, 2006. By letter dated September 29, 2006, however, Heinze informed NYSE Enforcement that he was then willing to testify in connection with the Exchange's underlying investigation and requested

^{7/} Securities Exchange Act Rel. No. 53,547, 87 SEC Docket 2155 (Mar. 24, 2006). Before the NYSE Hearing Panel, NYSE Enforcement had cited NASD's decision barring Quattrone (before the Commission set it aside) to support its argument that "the Fifth Amendment did not apply in the disciplinary proceeding."

^{8/} On April 12, 2005, a press release was issued announcing the settlement of a Commission enforcement action against the Exchange, "finding that the NYSE, over the course of nearly four years, failed to police specialists, who engaged in widespread and unlawful proprietary trading on the floor of the NYSE." On April 12, 2005, the Commission instituted proceedings against several NYSE specialists, including two Bear Wagner specialists, but not Heinze, charging the specialists with violations of the antifraud provisions of the securities laws by inter-positioning orders in their firms' proprietary accounts between customer orders and by trading ahead of customer orders using their firms' proprietary accounts. Also on April 12, 2005, the Exchange announced the issuance of charges resulting from its investigation of other NYSE specialists, including two Bear Wagner specialists, but not including Heinze. On April 15, 2005, the United States Attorney for the Southern District of New York brought criminal charges relating to improper trading in proprietary accounts against fifteen NYSE specialists, including two Bear Wagner specialists, but not Heinze.

that, accordingly, oral argument before the NYSE Board be postponed. ^{9/} On October 2, 2006, the NYSE denied Heinze's request that the oral argument be postponed. ^{10/} On October 4, 2006, following oral argument, the NYSE Board issued a one-sentence decision affirming the decision of the NYSE Hearing Panel in all respects. This appeal followed.

III.

Heinze acknowledges that he failed to appear for testimony, as found by the Exchange. Such a failure establishes a prima facie violation of NYSE Rules 476 and 477. ^{11/} Heinze argues, however, that he could not be forced to testify before the NYSE because he was entitled to invoke the Fifth Amendment's right against self-incrimination. Heinze argues that the right against self-incrimination applied to the NYSE because of evidence that "show[ed]," according to Heinze, "that NYSE Enforcement had been working jointly with the SEC when it sought Mr. Heinze's testimony and thus had engaged in state action." On appeal, Heinze requests that his case be remanded to the NYSE "for further fact-finding on the issue of whether NYSE Enforcement engaged in state action in its investigation of Mr. Heinze." ^{12/}

^{9/} Heinze's counsel stated, "I am writing to inform you that recent developments in the specialists investigation – including two acquittals and a declination of prosecution – have led me to re-assess my previous advice to Gregg Heinze that he not testify before the Exchange. Based on my re-assessment, Mr. Heinze has decided that he may now follow through on his long-standing desire to provide the Exchange with testimony."

^{10/} Despite Heinze's offer to testify, which remains outstanding, Heinze has never provided testimony to NYSE Enforcement.

^{11/} 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. Justin F. Ficken, Exchange Act Rel. No. 54,699, 89 SEC Docket 685, 690-91 (Nov. 3, 2006) ("The failure to respond to NASD's requests for testimony demonstrates a prima facie violation of [analogous NASD Rule].").

^{12/} Alternatively, Heinze asks that we order the NYSE to terminate Heinze's permanent bar within thirty days. Heinze argues, "In our opening brief, we asked for an order that the permanent bar on Mr. Heinze's membership be lifted once he testifies. However, out of a concern that such an order may result in a de facto permanent bar simply because NYSE Enforcement never asks for Mr. Heinze's testimony, we ask for an order lifting the bar within 30 days of the issuance of the Commission's order. This will provide NYSE Enforcement with ample time to take Mr. Heinze's testimony, but will ensure that the bar is lifted even if NYSE Enforcement chooses not to take the testimony."

Heinze supports his claim of state action by pointing to comments he claims were made by NYSE Enforcement staff during their investigation of him. According to Heinze, during a conversation regarding "what misconduct [Heinze] had engaged in," Heinze's lawyer "was told by a [NYSE] staff attorney that the Stock Exchange was, the words were, conducting a joint investigation with the SEC and that the SEC was taking the lead on certain aspects. And if it weren't a joint investigation, he could tell me more about what the accusations were against my client." Heinze claims that this alleged statement by an NYSE attorney "impl[ies] that the SEC was forcing NYSE Enforcement to restrict the flow of information."

Heinze also asserts that, on January 12, 2005, the same day that Heinze asserted his Fifth Amendment privilege in connection with the Commission investigation, "In a telephone conversation with [Heinze's counsel], one or more NYSE attorneys revealed that he/they knew Heinze had informed the SEC he would assert his privilege and decline to testify." According to Heinze, his decision to assert his Fifth Amendment privilege before the Commission was "information that [NYSE Enforcement] could only have learned from the SEC." Heinze argues, "The fact that NYSE Enforcement, upon learning this information, immediately requested Mr. Heinze's testimony indicates that the request was the result of joint planning with the SEC, or caused by coercion, or at the very least, strong encouragement, from the SEC." In addition to these assertions, Heinze cites a March 30, 2004, Commission press release announcing the settlement of enforcement actions against five NYSE specialist firms, including Bear Wagner, for violations involving "executing orders for their dealer accounts ahead of executable public customer or 'agency' orders," which described the action as the product of a "joint investigation" and stated, "The NYSE and SEC will continue to coordinate in the investigation of individual responsibility for the violative conduct that is the subject of the enforcement actions announced today." ^{13/}

The Exchange contends that the evidence Heinze presented is insufficient to establish state action. At most, the NYSE asserts, the evidence suggests regulatory coordination between Commission staff and NYSE Enforcement which, according to the Exchange, "clearly does not establish state action." In particular, the NYSE disputes the veracity of Heinze's claim that an NYSE attorney told Heinze's counsel that the NYSE had been instructed by the Commission not to provide Heinze with additional information about the NYSE investigation, arguing that, "if it were true, Heinze's counsel clearly would have raised the issue at his hearing in July 2005, which he did not." The NYSE also characterizes as "merely erroneous speculation" Heinze's claim that the NYSE's knowledge of Heinze's assertion of the Fifth Amendment before the Commission shows significant cooperation and "strong encouragement" between the Commission and the NYSE.

^{13/} Although, as noted above, the record contains limited information about the Division's underlying investigation of Heinze, the investigation of Heinze appears to be related to the same subject matter as the enforcement actions discussed in the March 30, 2004, press release.

IV.

In three recent opinions, we have addressed the question of whether an SRO, although not generally a state actor subject to the Fifth Amendment, can, under certain circumstances, engage in "state action" such that it becomes subject to the right against self-incrimination. In Quattrone, we set aside on procedural grounds NASD action barring an associated person who had refused to testify in an NASD investigation because he was then subject to criminal prosecution. ^{14/} We observed in Quattrone that "[a]pplicable law indicates that cooperation between the Commission and NASD will rarely render NASD a state actor, and the mere fact of such collaboration is generally insufficient, standing alone, to demonstrate state action." ^{15/} However, we also noted there that precedent indicates that a private entity such as an SRO may, under certain circumstances, engage in state action, observing 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. ^{16/} We also noted in Quattrone that 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." ^{17/}

^{14/} 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.

^{15/} 87 SEC Docket at 2165 (citing Scher v. NASD, 386 F. Supp. 2d 402, 408 (S.D.N.Y. 2005)). 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." 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)).

^{16/} 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)).

^{17/} Id. (citing Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n, 531 U.S. 288, 296 (2001)).

In Justin F. Ficken, where NASD had also barred an associated person who had refused to testify in an NASD investigation because he was the subject of both a Commission investigation and a criminal investigation of the same subject matter, we determined to remand the case to NASD for further development of the record because, among other things, the applicant had been limited in his ability to introduce evidence on the question of whether NASD had engaged in state action. ^{18/} In remanding Ficken, we noted that the case had been considered by NASD prior to the issuance of our decision in Quattrone. As part of our discussion of the relevant legal precedent, we observed in Ficken that the Supreme Court has identified certain facts "that can bear on the fairness of such an attribution [that a private entity engaged in state action]," 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.'" ^{19/}

More recently, in Warren E. Turk, ^{20/} the applicant, like Heinze the subject of Commission and, potentially, criminal investigations, had been barred based on his failure to testify before the NYSE. Like Heinze, Turk sought unsuccessfully to develop a record before the Exchange regarding possible state action by the NYSE Enforcement staff. As in Ficken, we determined to remand the proceeding. We found that the evidence Turk had presented in support of his state action claim did not meet the burden of "demonstrating joint activities sufficient to render an SRO a state actor." ^{21/} "Nevertheless," we held there that, "while the evidence Turk

^{18/} Exchange Act Rel. No. 54,699 (Nov. 3, 2006), 89 SEC Docket 695, 696.

^{19/} 89 SEC Docket at 692 (citing Brentwood, 531 U.S. at 296). 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." See, e.g., Kirtley v. Rainey, 326 F.3d 1088, 1093, 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 private action into a government action").

^{20/} Exchange Act Rel. No. 55,942, __ SEC Docket __ (June 22, 2007).

^{21/} __ SEC Docket at __.

identifies is insufficient to establish state action, he should have a further opportunity to develop and present his state action claim." 22/

We have similarly determined here that Heinze should have a further opportunity to develop and present his state action claim. The evidence Heinze has presented raises questions about whether the Exchange's coordination with Commission staff made the Exchange a state actor in its investigation of Heinze. The assertions made by Heinze -- (1) that his counsel was told by an NYSE attorney that the Division had instructed the NYSE to limit the amount of information about his investigation that the Exchange provided to Heinze and (2) that NYSE attorneys told Heinze's counsel that they were aware of Heinze's assertion of his Fifth Amendment privilege before the Commission on the same day he so informed the Commission -- appear to warrant further development of the record in order to assess their credibility. If Heinze's assertions were found to be credible, they would suggest the possibility that the Division exercised significant control and influence over the NYSE's investigation of Heinze, which would be relevant to a state action inquiry. 23/

Although, as noted in Turk, 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/ we believe that Heinze has identified specific evidence that warrants a further opportunity to develop and present his state action claim. Under the circumstances and because the NYSE considered Heinze's case without the full benefit of all of our recent decisions on this issue, 25/

22/ Id. In Turk, we found that, on the record that had been developed, we were not able to make each of the findings required by Section 19(e) of the Securities Exchange Act of 1934 to sustain disciplinary action by an SRO. See Exchange Act Section 19(e)(1), 15 U.S.C. § 78s(e)(1). We also are unable to make such findings here, as discussed below.

23/ See, e.g., Brentwood, 531 U.S. at 295-96 (citing, among the factors that contribute to a determination of when a private actor engages in state action, whether a challenged activity "results from the State's exercise of its 'coercive power'" and whether "the State provides 'significant encouragement, either overt or covert'").

24/ See Turk, ___ SEC Docket at ___ (citing Ficken, 89 SEC Docket at 695).

25/ As noted in Turk, 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.

we believe it is appropriate to remand this proceeding for full consideration of this evidence. 26/ We do not intend to suggest any view on the outcome of this remand.

An appropriate order will issue. 27/

By the Commission (Commissioners ATKINS, CAMPOS, NAZARETH, and CASEY);
Chairman COX not participating.

Nancy M. Morris
Secretary

26/ On remand, the Exchange should carefully consider whether Heinze should be given a new hearing to present additional evidence regarding his state action claim. It appears, as indicated, that such a hearing will be necessary, at a minimum, to assess the credibility of Heinze's assertions about what his lawyers were told regarding the level of coordination between the NYSE Enforcement and Division staff in their investigations of Heinze. Nevertheless, in seeking such a hearing, Heinze will be required to state "the precise manner in which [the facts he does possess] support[] his claims," explain "why he needs additional discovery," "state with some precision the materials he hope[s] to obtain with further discovery," and explain "exactly how" the further information would support his claims. See Ficken, 89 SEC Docket at 695-96 n.37 (citing Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442-1443 (5th Cir. 1993)). To the extent that Heinze meets this burden, the NYSE will be expected to give due consideration to any requests Heinze makes for additional discovery. See id., 89 SEC Docket at 696.

27/ 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

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For Review of Disciplinary Action Taken by the
the New York Stock Exchange, Inc.

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 Gregg Heinze be, and it hereby is, remanded to the New York Stock Exchange, Inc. for further consideration.

By the Commission.

Nancy M. Morris
Secretary