

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 53547 / March 24, 2006

Admin. Proc. File No. 3-11786

In the Matter of the Application of

FRANK P. QUATTRONE
c/o Jerome B. Falk, Esq.
Howard, Rice, Nemerovski, Canady, Falk & Rabkin
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San Francisco, CA 94111-4024

For Review of Disciplinary Action Taken By

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY
PROCEEDINGS

Failure to Provide Requested Information

Former associated person of member firm of registered securities association asserted the privilege against self-incrimination in response to association's request for information. Held, association's finding of violation and sanctions it imposed are set aside.

APPEARANCES:

Jerome B. Falk, Jr., Kenneth G. Hausman, and Barbara A. Winters, of Howard, Rice, Nemerovski, Canady, Falk & Rabkin; John W. Kecker and Elliot R. Peters, of Kecker & Van Nest LLP; Howard E. Heiss, of O'Melveny & Myers LLP; and Jesse H. Choper, for Frank P. Quattrone.

Marc Menchel, Alan Lawhead, James S. Wrona, and Deborah F. McIlroy, for NASD.

Appeal filed: December 28, 2004
Last brief received: April 28, 2005

I.

Frank P. Quattrone, formerly a general securities representative, general securities principal, and Managing Director of the Global Technology Group at Credit Suisse First Boston LLC ("CSFB"), an NASD member firm, appeals from NASD disciplinary action. NASD found that Quattrone failed to respond to a request for on-the-record testimony in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. 1/ NASD barred Quattrone in all capacities. 2/ We base our findings on an independent review of the record.

II.

Quattrone acknowledges that he failed to respond to an NASD request for information, but contends that he had a Fifth Amendment right not to respond because NASD engaged in "state action" when it issued the request. 3/ NASD rejected this argument by granting summary disposition on the issue of liability when Quattrone raised it at the proceedings below. We find it unnecessary to decide Quattrone's argument on the merits because we have determined that NASD's actions should be set aside for other reasons which are set out below.

A. The Underlying Investigation

In 2002, the Commission, NASD, and the New York Stock Exchange (the "NYSE") commenced a joint investigation into initial public offering ("IPO") "spinning" and research analyst conflicts of interest at twelve investment firms (the "Joint Investigation"). 4/ Stephen Cutler, the Director of the Commission's Division of Enforcement at the time, testified before Congress that "of the 12 firms . . . there were four as to whom the SEC took the lead

1/ NASD Procedural Rule 8210 requires members and associated persons to provide information requested by NASD as part of an investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires that members and associated persons observe high standards of commercial honor and just and equitable principles of trade. NASD's ruling that Quattrone violated Rule 2110 accords with our policy that a violation of another NASD rule also constitutes a violation of Rule 2110. Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999).

2/ NASD also assessed costs.

3/ The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. U.S. CONST. amend. V.

4/ "Spinning" is the practice of attracting future underwriting business by allocating hot IPO shares to the personal brokerage accounts of corporate or venture-capital executives who then resell or "flip" the shares in the immediate aftermarket in order to obtain quick profits.

responsibility, four as to whom the New York Stock Exchange took the lead responsibility, and four as to whom the NASD took the lead responsibility. All of us worked together on these investigations. And although we designated one entity as the lead, it wasn't as though any of us abdicated our responsibility." 5/ CSFB was one of the subjects of the Joint Investigation, and NASD took lead responsibility as to CSFB. 6/

NASD's Department of Enforcement ("NASD Enforcement") opened one investigation into spinning practices at CSFB (the "Spinning Investigation") and a separate investigation into research analyst conflicts at CSFB (the "Research Analyst Investigation" or "Analyst Investigation") as part of the Joint Investigation. In August 2002, NASD Enforcement issued requests for Quattrone's testimony pursuant to Rule 8210 in both the Spinning and Research Analyst Investigations. Quattrone testified before NASD in the Analyst Investigation on October 1, 2002, and in the Spinning Investigation on October 3, 2002 (the "October 2002 testimony"). NASD questioned Quattrone about, among other subjects, an e-mail he sent on December 5, 2000, advising CSFB employees to follow the firm's document retention policy (the "December 5, 2000 E-mail"). 7/ Quattrone's e-mail responded to a prior e-mail encouraging compliance with the policy. NASD asked Quattrone why he sent the e-mail, why he included the prior e-mail in his own e-mail, and what he thought people would do in response to his e-mail. Quattrone never asserted the Fifth Amendment during these sessions. 8/

On January 16, 2003, NASD Enforcement outlined the charges it intended to recommend against Quattrone stemming from the spinning and research analyst conflict allegations in a meeting with Quattrone's counsel and representatives from the Commission and the NYSE. Quattrone's counsel received a letter from NASD Enforcement later that same day advising Quattrone that it had made a preliminary determination to recommend disciplinary action against him with respect to the potential violations discussed at the meeting earlier in the day (the "Wells Notice"). NASD Enforcement provided Quattrone with an opportunity to make a Wells Submission in response to the Wells Notice. Quattrone filed a submission (the "Wells

5/ The Impact of the Global Settlement: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 108th Cong. 49 (2003) (testimony of Stephen Cutler).

6/ On April 29, 2002, the Commission, the NYSE, and NASD sent CSFB a joint request for documents as part of what they characterized as their "joint inquiry."

7/ Quattrone's e-mail stated: "having been a witness in a securities litigation case in south texas (miniscribe) i strongly advise you to follow these procedures."

8/ The transcript of the October 2002 testimony, which is included in the record, consists of 450 pages.

Submission") refuting the spinning and research analyst conflict charges and denying any wrongdoing. ^{9/}

The Rule 8210 Request

On February 3, 2003, CSFB issued a press release (the "CSFB Press Release") announcing that it had placed Quattrone on administrative leave "based on new information" about whether Quattrone "was aware of pending investigations in 2000 when he sent an e-mail to employees regarding document retention issues" and whether Quattrone "acted appropriately in December 2000 when he sent that e-mail and permitted a subordinate to send a similar e-mail to employees." ^{10/} The e-mail referenced in the CSFB Press Release is the December 5, 2000 E-mail. Quattrone's attorney received telephone calls later that morning from both the Attorney General's Office of the State of New York and the United States Attorney's Office for the Southern District of New York, notifying him that both offices had opened criminal investigations into possible improper document destruction at CSFB.

NASD Enforcement issued a written request later that same day, February 3, 2003, for Quattrone to appear for an on-the-record interview pursuant to Procedural Rule 8210 (the "Rule 8210 Request"). The same NASD investigator who issued one of the Rule 8210 requests in August 2002 sent this Rule 8210 request. The request bore the file number of the Research Analyst Investigation.

The Rule 8210 Request stated that "NASD Department of Enforcement is conducting an investigation in the above referenced matter to determine whether NASD rules or federal securities laws were violated. In connection with this inquiry, we are requiring further testimony of Frank Quattrone in an on-the-record interview." The Rule 8210 Request did not mention document destruction allegations. NASD Enforcement scheduled Quattrone's testimony for February 12, 2003, but agreed to extend the date to February 28, 2003, at Quattrone's request.

^{9/} Quattrone filed his Wells Submission on February 13, 2003, and supplemented this submission on February 26, 2003. Quattrone provided copies of both submissions to the Commission and the NYSE as well as NASD, and Quattrone's counsel addressed issues raised by these submissions in a meeting attended by Commission staff as well as representatives from both self-regulatory organizations.

^{10/} The "pending investigations" referenced in the press release concerned an unrelated, earlier joint investigation of CSFB by NASD and the Commission in 2000 of profit sharing in initial public offerings. Certain customers received hot IPO shares and funneled a portion of the profits that they made by flipping the shares back to CSFB in the form of excessive brokerage commissions in unrelated securities trades. On January 22, 2002, CSFB settled charges related to this earlier investigation by paying a monetary sanction of \$50 million to NASD and \$50 million to the Commission.

The Commission's Letter to Quattrone

On February 5, 2003, Commission staff sent Quattrone's counsel a letter emphasizing the joint nature of NASD's investigation of Quattrone (the "February 5, 2003 Letter"). The February 5, 2003 Letter stated that "NASD's investigation of Mr. Quattrone is being conducted pursuant to the joint investigations of certain analysts' conflicts of interest and spinning undertaken by the Commission staff, the NASD, and the New York Stock Exchange," that "[c]onsequently, any resolution of the matter will need to involve all three regulators," and that "if no settlement is reached, the three regulators would confer to determine how they will proceed against [Quattrone]." The letter stated further that Quattrone would be given an opportunity to respond to any additional charges not raised in the January 16, 2003 Wells Notice. The letter also reiterated, as discussed earlier in a telephone conversation, that Quattrone's counsel confirmed that he would send a copy of Quattrone's Wells Submission to the Commission and the NYSE as well as NASD. The February 5, 2003 Letter did not reference the Rule 8210 Request.

Quattrone Declines to Testify

On February 26, 2003, Quattrone's attorney, after requesting unsuccessfully that Quattrone's testimony be postponed until resolution of the pending criminal investigations, informed NASD in writing that Quattrone declined to testify due to those investigations. ^{11/} The next day, NASD Enforcement wrote Quattrone's counsel that "[t]aking Mr. Quattrone's testimony at this time on matters directly relating to representations he makes in his Wells submissions of February 13 and 26, 2003, as well as with respect to crucial issues regarding document destruction and possible obstruction of justice, is of the utmost importance." ^{12/} The February 27, 2003 letter informed Quattrone's counsel that Quattrone's decision not to testify was "contrary

^{11/} NASD Enforcement cancelled Quattrone's on-the-record interview after receiving Quattrone's letter. Quattrone was willing to appear at the scheduled on-the-record interview and assert his Fifth Amendment privilege. NASD Enforcement, however, had requested that Quattrone's attorneys advise it if Quattrone was going to decline to testify so that it could save traveling expenses.

^{12/} NASD asserts in its brief that it first informed Quattrone of its intention to question him about his Wells Submission in the February 27, 2003 letter. Quattrone, however, responds in his reply brief that NASD informed Quattrone's counsel of this intention in a telephone conversation on February 25, 2003, the day before Quattrone informed NASD that he would not testify. Quattrone's counsel filed a declaration accompanying Quattrone's opposition to NASD's motion for summary disposition that supports this assertion. The parties agree that NASD Enforcement also advised Quattrone's counsel in a telephone conversation on February 5, 2003, that it wanted to question Quattrone about "what had been reported in the press regarding the e-mails" and about "the circumstances surrounding him being placed on administrative leave."

to his obligations under NASD Rules 8210 and 2110" and that it "intended to recommend enforcement action" against Quattrone "based on his refusal to appear for testimony" and "conditioning this refusal on the completion of the pending criminal investigations."

On March 6, 2003, NASD Enforcement filed a complaint charging Quattrone with violating NASD Procedural Rule 8210 and Conduct Rule 2110 by refusing to testify (the "Rule 8210 Proceeding"). ^{13/} On March 11, 2003, Quattrone's counsel wrote NASD Enforcement to explore whether Quattrone could provide NASD Enforcement with the information it sought without testifying pursuant to the Rule 8210 Request. Quattrone's counsel suggested, for example, that counsel could make a factual proffer to NASD Enforcement relating to the subjects of the investigation in response to specific interrogatories fashioned by NASD Enforcement. The next day, NASD Enforcement rejected this proposal by reiterating the need to question Quattrone about document destruction and the representations in his Wells Submissions and stating that Quattrone's suggested proffer was an inadequate substitute. ^{14/} On April 17, 2003, NASD Enforcement moved for summary disposition in the Rule 8210 Proceeding.

B. The Rule 8210 Proceeding

On June 30, 2003, NASD Enforcement filed a superseding motion for summary disposition. NASD Enforcement rejected Quattrone's Fifth Amendment defense on the ground that the privilege against self-incrimination did not apply to questioning in proceedings by self-regulatory organizations. On July 29, 2003, Quattrone filed an opposition to summary disposition, arguing, among other things, that the privilege against self-incrimination applied to the Rule 8210 Request because the Commission and NASD conducted the investigation of Quattrone jointly. Quattrone highlighted specifically the February 5, 2003 Letter sent by Commission staff emphasizing the joint nature of NASD's investigation. On October 28, 2003, an NASD Hearing Panel granted summary disposition on the issue of liability, thus precluding Quattrone from presenting evidence on this issue at a hearing. ^{15/}

^{13/} The same day, NASD Enforcement filed a separate complaint charging Quattrone with spinning in violation of NASD Conduct Rules 3060 and 2110 and supervisory failures in violation of Rules 3010 and 2110. NASD stated in a press release that its complaint "grew out of the coordinated research analyst investigation led by the SEC and conducted by NASD in conjunction with the NYSE and other regulators." NASD stayed that proceeding on August 25, 2004, pending the resolution of related criminal charges.

^{14/} On October 24, 2003, Quattrone's counsel again offered to meet with NASD Enforcement to discuss Quattrone's requested testimony. No evidence indicates that NASD Enforcement responded to this offer.

^{15/} The Hearing Panel's subsequent written order rejected Quattrone's arguments that recent legal developments invalidated authorities holding that the Fifth Amendment did not

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The Hearing Panel continued the proceeding for a hearing on the issue of sanctions. The hearing took place on November 11-12, 2003. On January 16, 2004, the panel issued its decision imposing on Quattrone a one-year suspension and \$30,000 fine. The Hearing Panel found substantial mitigating factors that indicated a bar was not warranted. ^{16/} The panel stated that NASD Enforcement's failure to pursue Quattrone's offers to provide information without testifying "raise[d] unanswered questions about whether [it] had singled out Quattrone for harsher treatment due to his prominence." The panel stated further that "Quattrone's unique status caused [NASD Enforcement] to exhibit less flexibility in his case than it did with [four] others at CSFB who likewise asserted the Fifth Amendment and declined to testify while they were the subjects of criminal investigations." According to the Hearing Panel, "this disparate treatment undermine[d] [NASD Enforcement's] arguments that a bar must be imposed[.]" The Hearing Panel found that these considerations "constitute[d] substantial mitigation" and accordingly declined to impose a bar, but it included in its decision a proviso that Quattrone would be barred in all capacities if he failed to testify within one year of the decision.

Quattrone complied with the Hearing Panel's condition by testifying before NASD on July 13-14, 2004. He had offered to testify immediately following his criminal trial, ^{17/} but

^{15/} (...continued)
apply to NASD. In a footnote, the panel stated that, "[c]ontrary to Quattrone's argument, the fact that NASD in some cases cooperates with governmental agencies in conducting investigations is of no consequence." The panel's decision did not address Quattrone's argument that NASD cooperated with the government in its investigation of him.

^{16/} The Hearing Officer dissented as to sanctions, finding insufficient mitigation to warrant a sanction of less than an immediate bar.

^{17/} On May 12, 2003, the United States Attorney for the Southern District of New York filed an indictment charging Quattrone with three counts of obstructing investigations and destroying evidence. A jury trial on these charges occurred between September 29 and October 24, 2003. The jury failed to reach a verdict, and the judge declared a mistrial. The government retried Quattrone on the criminal charges between April 13 and May 3, 2004. The jury convicted Quattrone of all three counts contained in the indictment, and the court sentenced him to eighteen months in prison and imposed a \$90,000 fine.

We note that NASD's rules permit it to bar a person from associating with a member when that person has been convicted of any felony in the preceding ten years. Stephen L. Keidaish, 54 S.E.C. 983, 986 (2000); NASD By-Laws Article III, Sections 3(b), 4(g)(2) (stating that no person shall become or continue to be associated with a member "if such person is or becomes subject to a disqualification" and defining disqualification to include a felony conviction in the last ten years). On August 4, 2004, NASD filed a complaint against Quattrone seeking a lifetime bar based on his conviction. On

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NASD did not schedule his testimony until July 2004. NASD questioned Quattrone for approximately one full day about his Wells Submission and for approximately one full day about issues related to the December 5, 2000 E-mail. At the conclusion of testimony on July 14, 2004, NASD stated that it had additional questions for Quattrone, and the parties scheduled further testimony for October 7, 2004. Quattrone completed his testimony on that date, and NASD acknowledged that Quattrone had satisfied his obligations regarding the Rule 8210 Request.

On November 22, 2004, NASD's National Adjudicatory Council (the "NAC") increased Quattrone's sanction to a bar in all capacities because it "agree[d] with the Hearing Officer's dissent" which, according to the NAC, "found that Quattrone's misconduct in refusing to testify was egregious, requiring a bar in all capacities." ^{18/} The NAC considered the summary disposition on the issue of liability appropriate because "the only possible triable issue of material fact would have arisen from Quattrone's argument that Enforcement's involvement in an alleged joint investigation with the SEC" rendered the Fifth Amendment applicable to the Rule 8210 Request, but, "even after giving Quattrone all reasonable inferences, Quattrone did not make the requisite showing for an evidentiary hearing."

III.

Section 19(f) of the Securities Exchange Act of 1934 provides the standards for our review. ^{19/} We must dismiss Quattrone's appeal if we find that the specific grounds on which NASD based its action exist in fact, that NASD's determination to bar Quattrone is in accordance with its rules, that NASD applied its rules in a manner consistent with the purposes of the Exchange Act, and that NASD's action does not impose an undue burden on competition. We must set aside NASD's action if we do "not make any such finding." We have determined to set aside NASD's action based on our determination that NASD's grant of summary disposition on the issue of liability against Quattrone was inappropriate and the action was not in accordance with NASD's rules. ^{20/}

^{17/} (...continued)

August 25, 2004, NASD stayed that proceeding pending resolution of Quattrone's appeal. On March 20, 2006, the Second Circuit Court of Appeals overturned Quattrone's conviction.

^{18/} The Hearing Officer did not state in his dissent that he considered Quattrone's misconduct egregious. The dissent states simply that "Quattrone failed to demonstrate sufficient mitigation to warrant a sanction of less than an immediate bar."

^{19/} 15 U.S.C. § 78s(f).

^{20/} Accordingly, we need not decide the merits of either Quattrone's contention that NASD disciplinary proceedings always constitute state action rendering NASD subject to the

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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." 21/ Quattrone argued before NASD, as here, that the Rule 8210 Request constituted "state action" giving him a right not to respond under the Fifth Amendment's privilege against self-incrimination because NASD issued the request as part of a joint investigation with the Commission. 22/ According to Quattrone, the extensive participation of the Commission, a state actor, in the investigation pursued jointly by the Commission and NASD rendered the Rule 8210 Request state action. 23/ NASD acknowledged that Quattrone's claim presented a "possible triable issue of material fact," but it justified summary disposition on this issue against Quattrone because, "even after giving Quattrone all reasonable inferences,

20/ (...continued)

Fifth Amendment or his claim that Exchange Act Section 15A applies to NASD the privilege against self-incrimination. We note that our cases as well as federal court opinions hold consistently that NASD disciplinary proceedings are not state action. See, e.g., D.L. Cromwell Invs., Inc., v. NASD Regulation, Inc., 279 F.3d 155 (2d Cir. 2002) (holding explicitly that NASD did not engage in state action by issuing a Rule 8210 request even though the respondent faced a parallel criminal investigation); E. Magnus Oppenheim & Co., Exchange Act Rel. No. 51479 (April 6, 2005), __ SEC Docket __, __ n.15 (stating that constitutional protections do not apply in NASD disciplinary proceedings). We note further that we have held previously that Exchange Act Section 15A(b)(8) simply requires that self-regulatory organizations provide "fair procedures" for disciplining members. Robert Fitzpatrick, Exchange Act Rel. No. 44956 (Oct. 19, 2001), 76 SEC Docket 252, 258, petition denied, 63 Fed. Appx. 20 (2d Cir. 2003) (unpublished).

21/ NASD Procedural Rule 9264(e).

22/ 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. 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)). A violation of the Fifth Amendment, therefore, requires "state action" on the part of the actor alleged to have denied an individual his constitutional rights. Id. 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." Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295 (2001).

23/ Under the "joint action" test developed by the federal courts, private entities engage in state action when they are willful participants in joint action with state officials. Mathis v. PG&E, 75 F.3d 498, 503 (9th Cir. 1996).

Quattrone did not make the requisite showing for an evidentiary hearing." 24/ Given the particular set of facts raised by Quattrone, we find that NASD was not entitled to conclude that he had not raised a genuine issue of material fact. 25/

As discussed, Quattrone noted that the Commission, the NYSE, and NASD launched a joint inquiry into spinning and research analyst conflict allegations at twelve investment firms, that they decided that NASD would lead the investigation of Quattrone's firm, and that NASD investigated Quattrone as part of this inquiry. Commission staff also sent Quattrone a letter two days after NASD sent Quattrone the Rule 8210 Request emphasizing the joint nature of NASD's investigation, stating that any settlement of that investigation would have to involve the Commission and NYSE, and declaring that the Commission, NYSE, and NASD would confer to determine how to proceed if no settlement was reached. Quattrone, therefore, did not rely on mere conclusory allegations or speculation but instead offered specific facts to support his contention that NASD engaged in state action as a joint actor with the Commission. 26/ Separately, these facts would not necessarily have raised a genuine issue of material fact. However, taking them together and giving Quattrone all reasonable inferences, we cannot say that Quattrone failed to earn the right to present evidence regarding whether NASD's role in the

24/ All reasonable inferences must be drawn in favor of the party opposing summary judgment. *See, e.g., Harris v. Coweta County, Ga.*, ___ F.3d ___, ___ (11th Cir. Dec. 23, 2005); *see also 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).

25/ NASD concedes that "one way for Quattrone to [establish state action] would have been to demonstrate that NASD's request for his testimony was made solely at the behest of the SEC." NASD asserts correctly that no evidence existed that the Commission coerced, directed, or encouraged NASD to issue the Rule 8210 Request, 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. *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 defining government compulsion test as considering whether the coercive influence or significant encouragement of the state effectively converts the private action into state action).

26/ *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (noting that, under the Federal Rules of Civil Procedure, a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings but must set forth specific facts showing that there is a genuine issue for trial). Quattrone could only have opposed NASD's motion for summary disposition successfully by presenting such hard evidence. *See D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998) (stating that party opposing summary judgment "may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence").

Joint Investigation rendered the Rule 8210 Request state action. 27/ Accordingly, NASD granted summary disposition on this issue improperly and therefore did not act in accordance with its rules.

We do not reach the merits of the issue of whether the Rule 8210 Request constituted state action because we hold only that Quattrone should have been allowed to present evidence to support his claim that the requisite degree of coordination between NASD and the Commission existed here. Applicable 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. 28/ However, Quattrone proffered enough evidence concerning the Joint Investigation to earn an evidentiary hearing. Therefore, although we consider the burden of demonstrating joint activities sufficient to render NASD a state actor to be high, NASD should not have summarily dismissed the claim that, on the facts of this case, the Rule 8210 Request constituted state action.

Quattrone raises certain additional arguments. He highlights the Hearing Panel's findings that NASD Enforcement treated him unfairly due to his notoriety and that it unreasonably failed to pursue his offers to cooperate in any way that would not prejudice his defense of the criminal

27/ NASD maintains that whether NASD engaged in state action in the Joint Investigation is irrelevant because NASD issued the Rule 8210 Request as part of a separate and unrelated investigation. Quattrone, however, introduced facts indicating that the request was part of the Joint Investigation or, at the least, that he could have believed reasonably that this was the case.

28/ See, e.g., 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 on-the-record interview before NASD, 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"). But see Cromwell, 279 F.3d at 163 (stating that NASD's Criminal Prosecution Assistant Unit "was in fact working with the government, and when it does it may well be a state actor").

charges. 29/ In light of our finding that NASD improperly granted summary disposition, we do not address these contentions. 30/

 In conclusion, we have determined, based on the particular circumstances presented, that Quattrone raised a genuine issue of material fact regarding whether NASD's role in the Joint Investigation rendered the Rule 8210 Request state action, that consequently NASD improperly granted summary disposition on this issue, and that therefore NASD did not act in accordance with its rules. 31/ Accordingly, we have determined to set aside the NASD action.

An appropriate order will issue. 32/

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

Nancy M. Morris
Secretary

29/ As Quattrone notes, the panel found that there were "unanswered questions about whether [NASD Enforcement] singled [Quattrone] out for harsher treatment due to his prominence" and that Quattrone's "unique status" caused NASD staff to exhibit less flexibility in his case than with four other CSFB employees who similarly asserted the Fifth Amendment and declined to testify while they were the subjects of criminal investigations.

30/ Quattrone has now fully complied with the Rule 8210 Request. We note that Quattrone has not been registered with NASD or associated with an NASD member firm since March 4, 2003.

31/ We grant Quattrone's three Requests for Official Notice and we accept his two Supplemental Briefs and two Notices of New Case Authority. We also accept NASD's responses to the Third Request for Official Notice, the Second Supplemental Brief, and the Notices of New Case Authority, as well as NASD's Surreply Brief and Quattrone's Response. We deny NASD's motion to strike Quattrone's Reply Brief. In light of the disposition of the case, Quattrone's petition for review of the order denying oral argument issued by delegated authority is moot.

32/ 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

NASD

ORDER SETTING ASIDE DISCIPLINARY ACTION OF REGISTERED SECURITIES
ASSOCIATION

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

ORDERED that the disciplinary action taken by NASD against Frank P. Quattrone be,
and it hereby is, set aside.

By the Commission.

Nancy M. Morris
Secretary