BEFORE THE NATIONAL ADJUDICATORY COUNCIL

NASD

In the Matter of Department of Enforcement, Complainant, vs. Frank Peter Quattrone, Los Altos Hills, CA 94022, Respondent.	AMENDED DECISION Complaint No. CAF030008 Dated: November 22, 2004

The Hearing Panel found that respondent failed to respond to a request for on-the-record testimony. The Hearing Panel fined respondent $30,000 and suspended him in all capacities for one year, with the caveat that if he fails to comply, fully and unconditionally, with the request for testimony within one year, he will be barred. Held, findings affirmed and sanctions modified.

Appearances

For the Complainant: Rory C. Flynn, Esq., David R. Sonnenberg, Esq., Department of Enforcement, NASD, Washington, D.C.

For the Respondent: Jerome B. Falk, Jr., Esq., Kenneth G. Hausman, Esq., and Barbara A. Winters, Esq., Howard, Rice, Nemerovski, Canady, Falk & Rabkin; John W. Keker, Esq., and Elliot R. Peters, Esq., Keker & Van Nest LLP; and Howard E. Heiss, Esq., O'Melveny & Myers LLP.

DECISION

I. Introduction

NASD's Department of Enforcement ("Enforcement"), the complainant, appealed and respondent Frank Peter Quattrone ("Quattrone") cross-appealed an Office of Hearing Officers Hearing Panel decision ("Hearing Panel Decision") dated January 16, 2004. The Hearing Panel held that Quattrone violated NASD Conduct Rule 2110 and Procedural Rule 8210 by refusing to

testify at an on-the-record interview in February 2003. The Hearing Panel fined Quattrone $30,000 and suspended him for one year in all capacities, with the caveat that if he fails to comply, fully and unconditionally, with NASD's request for testimony within one year, he will be barred in all capacities.[1]

Enforcement appealed the Hearing Panel Decision as to the sanctions, which Enforcement argued should be increased to a bar in all capacities. Quattrone cross-appealed the Hearing Panel's finding that he violated NASD Conduct Rule 2110 and Procedural Rule 8210, and appealed certain procedural rulings. After thoroughly reviewing the record in this matter, we affirm the Hearing Panel's finding of violation and its procedural rulings, but increase the sanction to a bar in all capacities. We also uphold the Hearing Panel's imposition of costs for the hearing below and impose costs for this appeal proceeding.

II. Background

A. Quattrone's Employment History

Quattrone first became employed in the securities industry in June 1977 as a corporate financial analyst with Morgan Stanley & Co. in New York. Between September 1979 and June 1981, he attended Stanford University graduate school, where he earned a Masters Degree in Business Administration. Quattrone then rejoined Morgan Stanley. Over the succeeding years, Quattrone began working with technology companies, and he ultimately became the head of Morgan Stanley's technology group. Quattrone left Morgan Stanley in 1996 to form a unit known as DMG Technology Group, an investment banking business for Deutsche Bank Securities Inc.

In early 1998, Credit Suisse First Boston Corporation ("CSFB" or "the Firm") recruited Quattrone to head its Global Technology Group ("Tech Group"). Quattrone joined CSFB in July 1998 and served as the Managing Director of the Tech Group until February 3, 2003. On that date, CSFB announced in a press release ("the CSFB Press Release") that it was placing Quattrone on administrative leave "pending completion of an investigation" into whether he "was aware of pending investigations"[2] when he sent an e-mail, and permitted a subordinate to send a similar e-mail, to some CSFB employees in December 2000 regarding document retention issues.

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[1] The majority of the Hearing Panel imposed this sanction. The Hearing Officer dissented as to sanctions, stating that he would impose an immediate bar in all capacities.

[2] The "pending investigations" referenced in the CSFB Press Release related to an earlier joint investigation by NASD and the Securities and Exchange Commission of profit sharing in initial public stock offerings ("IPOs"), and not to the investigations at issue here, which did not begin until 2002.

Quattrone first registered as a general securities representative in October 1984 and as a general securities principal in August 1991. On March 4, 2003, Quattrone resigned his position with CSFB. He has not been registered with NASD or associated with an NASD member firm since March 4, 2003.

B. Procedural History

In a complaint dated March 6, 2003,[3] Enforcement charged Quattrone with violating NASD Conduct Rule 2110 and Procedural Rule 8210 by refusing to testify at an on-the-record interview in February 2003.[4] Quattrone answered the complaint and denied any wrongdoing. He asserted that he had cooperated fully with Enforcement's investigations until he was notified that he was the target of related criminal investigations by the Attorney General's Office of the State of New York ("the State Investigation") and by the United States Attorney's Office for the Southern District of New York ("the Federal Investigation"). Quattrone maintained that, once he had learned of those criminal investigations, the Fifth Amendment of the United States Constitution prevented NASD from compelling him to give testimony in any proceeding that might incriminate him in the ongoing criminal investigations. Quattrone also asserted that, by attempting to force him to waive his constitutional right against self-incrimination, NASD violated its statutory duty to provide him with a fair opportunity to defend himself. Quattrone further contended that NASD lacked a legitimate regulatory purpose when it requested his testimony in February 2003. Quattrone requested that NASD delay his on-the-record interview until the criminal investigations ended.

Enforcement advised Quattrone that the Fifth Amendment did not apply to NASD disciplinary proceedings and refused his request to postpone the interview until the criminal proceedings ended. Enforcement filed the complaint on March 6, 2003, and initiated this proceeding.

On April 17, 2003, Enforcement filed a Motion for Summary Disposition, and, on June 30, 2003, Enforcement filed a Superseding Motion for Summary Disposition ("Summary Disposition Motion").[5] On July 29, 2003, Quattrone filed his opposition to Enforcement's Motion ("Opposition to Summary Disposition Motion").

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[3] Enforcement filed an amended complaint on June 6, 2003. It charged Quattrone with the same violations, but eliminated a number of factual allegations that had been contained in the original complaint. Quattrone timely responded to the amended complaint.

[4] Enforcement also filed another complaint against Quattrone at that time, alleging violations related to supervision and the allocation of shares in IPOs.

[5] Enforcement withdrew the original Motion for Summary Disposition and accompanying papers.

On October 28, 2003, the Hearing Panel granted Enforcement's Summary Disposition Motion on the issue of liability and continued the proceeding for a hearing on the issue of sanctions only.

The hearing was held on November 11 and 12, 2003, in San Francisco, California, before a hearing panel composed of a Hearing Officer and two current members of NASD's District 1 Committee. Enforcement did not call any witnesses to testify at the hearing. Quattrone testified on his own behalf and called four additional witnesses.

The Hearing Panel found that Quattrone violated NASD Conduct Rule 2110 and Procedural Rule 8210 by failing to provide on-the-record testimony as requested by Enforcement. The Hearing Panel fined Quattrone $30,000 and suspended him for one year, with the proviso that he would be barred in all capacities if he failed to testify, fully and unconditionally, within one year of the Hearing Panel Decision.

Enforcement appealed the sanctions imposed by the Hearing Panel. Quattrone cross-appealed as to the liability finding.

III. Factual History

A. The Underlying Investigations

In 2002, Enforcement commenced two investigations that centered on CSFB's Tech Group's practices and policies. The first investigation ("the Spinning Investigation") focused on a practice known as "spinning," which is when a firm allocates shares in IPOs to the personal brokerage accounts of corporate or venture-capital executives. The firm then sells these shares for the executives, or "spins" them, for quick profits to the executives, which the firm hopes will attract future underwriting business from the executives' companies. The second investigation focused on conflicts of interest between research analysts and investment bankers that resulted in pressures on analysts to compromise their independence and objectivity ("the Analyst Investigation"). In addition, Enforcement sought to examine the Tech Group’s organizational structure and the adequacy of its supervisory systems and practices.

In connection with these two investigations, Enforcement questioned a number of CSFB employees, including Quattrone. Quattrone gave on-the-record testimony on October 1 and 3, 2002, and cooperated fully and timely with all of Enforcement's requests for information in 2002.

By letter dated January 16, 2003 ("the Wells Letter"),[6] Enforcement advised Quattrone that it had made a preliminary determination to recommend a disciplinary proceeding against

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[6] A "Wells" letter refers to a letter sent by Enforcement staff notifying a respondent "that a recommendation of formal disciplinary charges is being considered" and usually provides the respondent with an opportunity to "submit a written statement explaining why such charges

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him for alleged violations of certain NASD rules. Enforcement informed Quattrone that he could submit a response ("the Wells Submission") to the Wells Letter no later than February 6, 2003.[7] The Wells Letter did not specify Enforcement's contemplated charges against Quattrone; however, Quattrone's Wells Submission addressed both spinning and supervisory issues.

On February 3, 2003, prior to Quattrone's initial Wells Submission, the CSFB Press Release was issued under the headline, "CSFB Places Frank Quattrone on Administrative Leave Pending Completion of Investigation." CSFB announced that it took this action:

> based on new information learned on Friday, January 31 … [that] raised questions about [Quattrone's] response to an inquiry last week by the Firm about whether he was aware of pending investigations in 2000 when he sent an e-mail to employees regarding document retention issues … [and] about whether [he] acted appropriately in December 2000 when he sent that e-mail and permitted a subordinate to send a similar e-mail to employees.

The CSFB Press Release further stated that CSFB had "notified the appropriate government and regulatory authorities about the new information."

The CSFB Press Release triggered immediate governmental and regulatory action. Quattrone's attorneys testified that on the morning of February 3, 2003, they received a telephone call from a representative for the State Investigation, and in the afternoon on that date they received another call from an Assistant United States Attorney regarding the Federal Investigation. Each official notified Quattrone's counsel that his office was opening a criminal investigation into purported improper document destruction at CSFB. The Assistant United States Attorney further stated that he would be issuing a grand jury subpoena for Quattrone's testimony on February 12, 2003. Also in the afternoon of February 3, 2003, Enforcement sent Quattrone's attorneys a letter via facsimile, which requested, pursuant to Procedural Rule 8210, that Quattrone appear on February 12, 2003, for an on-the-record interview (the "Rule 8210 Request").

B. The Rule 8210 Request

The Rule 8210 Request stated that Enforcement required "further testimony" from Quattrone in an on-the-record interview in connection with "the above referenced matter," which

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should not be brought." NASD Notice to Members 97-55, 1997 NASD LEXIS 77, at *13 (Aug. 1997).

[7] Enforcement granted Quattrone's request for an extension until February 13, 2003, to make his initial Wells Submission. Quattrone filed a supplement to the Wells Submission on February 26, 2003.

listed the NASD file number for the Analyst Investigation (EAF 020016). Enforcement contends, however, that the real subject matter for the Rule 8210 Request was the document destruction issue raised in the CSFB Press Release, and that it used the Analyst Investigation file number on the Rule 8210 Request solely as a "matter of expediency." Enforcement never opened a separate investigation file for the document destruction issue.[8]

One of Quattrone's attorneys, Howard E. Heiss ("Heiss"), telephoned Nicole Bocra ("Bocra"), a former investigator with Enforcement, on February 5, 2003, to request a continuance for the on-the-record testimony because of scheduling difficulties, including the upcoming deadline for the Wells Submission. Bocra agreed to extend the date to February 28, 2003. Heiss also asked Bocra what the subject matter of the testimony would be, and she said that the questions would relate to the recent press reports regarding possible document destruction at CSFB and the circumstances surrounding CSFB's decision to place Quattrone on administrative leave.

During this period, Quattrone also was seriously ill. From December 2002 to April 2003, he suffered from mycoplasma pneumoniae, a form of bacterial pneumonia that his doctor stated was often much more severe than viral pneumonia.[9] Between February 11 and 21, 2003, despite intensive medication, Quattrone's condition worsened. On February 21, 2003, Quattrone's doctor advised that traveling to Washington, D.C., and being subjected to continuous questioning, could lead to Quattrone suffering permanent lung damage.

On February 24, 2003, Heiss telephoned Barry Goldsmith ("Goldsmith"), Executive Vice President, Enforcement, to request a further extension of Quattrone's on-the-record interview due to the pendency of the dual State and Federal Investigations. Goldsmith said that an adjournment was unlikely, but he told Heiss that he would consult with other members of his staff. Heiss also stated that it was unfair for NASD to require Quattrone to give testimony on the exact same issues that were the subject of the State and Federal Investigations. Goldsmith disagreed, stating that other people have been in the same or similar circumstances. For example, Goldsmith referred to four individuals at CSFB against whom NASD had imposed sanctions for failing to give testimony when requested, despite their arguments that they should not have been required to testify to NASD at the same time that they were the subjects of related criminal investigations. Goldsmith said "he didn't think there was any basis for distinguishing Mr. Quattrone or making an exception for Mr. Quattrone." Heiss also advised Goldsmith of Quattrone's pulmonary condition, which would restrict his travel. Goldsmith said Enforcement would be sensitive to those concerns and, if necessary, Quattrone's testimony could be taken in San Francisco.

On February 25, 2003, Enforcement declared that it would not adjourn Quattrone's on-the-record interview, but it would agree to take his testimony in San Francisco rather than Washington, D.C. On February 26, 2003, Heiss sent a letter to Goldsmith, stating that Quattrone

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[8] The Spinning Investigation had been assigned file number EAF 020043.

[9] Quattrone placed a declaration from his treating pulmonologist into the record.

declined to testify before NASD in any location, due to the pending State and Federal Investigations. Quattrone's attorneys advised him not to testify in order to preserve his Fifth Amendment right against compelled testimony.[10] They further advised Quattrone that Enforcement likely would bring a case against him if he declined to testify. Quattrone acknowledged that he understood that Enforcement took the position that his obligation to testify was unconditional.

On February 27, 2003, Enforcement wrote to Heiss that it intended to recommend that a disciplinary action be authorized against Quattrone "based on his refusal to appear for testimony on February 28, 2003, and by conditioning this refusal on the completion of the pending criminal investigations." Enforcement stated that it could not agree to the further adjournment Quattrone requested because: (1) it was of the "utmost importance" to take Quattrone's testimony "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"; (2) time was of the essence as the investigation could involve others, and NASD would eventually lose jurisdiction over those individuals who have left the industry; and (3) Enforcement had already been flexible in rescheduling Quattrone's testimony. Enforcement asserted that it would not be in the public interest for it to permit an open-ended extension to Quattrone that was contingent on the completion of two separate criminal investigations.

Upon receipt of Heiss's February 26, 2003 letter, Enforcement canceled Quattrone's on-the-record interview.[11] After Enforcement filed the complaint against Quattrone on March 6, 2003, Heiss sent a letter dated March 11, 2003, to Enforcement, stating that he was "hopeful that [Quattrone] will be in a position to testify soon." Heiss suggested that, in the meantime, Quattrone's attorneys provide information by other means, such as a "factual proffer [to Enforcement] relating to the subjects of the investigation following specific interrogatories fashioned by [Enforcement]." By letter dated March 12, 2003, Enforcement advised Quattrone that the offer of a factual proffer was inadequate.

On May 12, 2003, a federal indictment was filed in the Federal Investigation that charged Quattrone with three counts of obstructing investigations and destroying evidence. A jury trial on these charges was held between September 29 and October 24, 2003. Quattrone testified at the trial. The jury was unable to reach a verdict, and the judge declared a mistrial on October 24, 2003. The Federal Investigation was retried between April 13 and May 3, 2004, during which Quattrone again testified on his own behalf. On May 3, 2004, the jury found Quattrone guilty of all three counts contained in the indictment. On September 7, 2004, the judge sentenced

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[10] Quattrone's attorneys further advised him that, if he testified, Enforcement might share that testimony with the criminal prosecutors.

[11] Quattrone was willing to appear at the scheduled on-the-record interview and assert his Fifth Amendment privilege. Enforcement had requested, however, that Quattrone's attorneys advise Enforcement if Quattrone was going to decline to testify so that it could save the expenses of staff travel to San Francisco.

Quattrone to serve 18 months in prison and pay a $90,000 fine. Following the jury conviction, Enforcement renewed its request for Quattrone to provide on-the-record testimony to NASD. Ultimately, Enforcement and Quattrone's attorneys agreed that Quattrone would appear for testimony on July 13, 2004, in San Francisco, California. Quattrone appeared on that date, as agreed, and he testified in response to questions from Enforcement for two days, July 13 and 14, 2004. At the conclusion of the second day of testimony on July 14, 2004, Enforcement requested that Quattrone return, at a mutually agreeable time, to testify for several more hours. Quattrone agreed to Enforcement's request, and he concluded his testimony on October 7, 2004.

IV. Discussion

A. The Hearing Panel Was Correct in Making Its Summary Disposition Finding that Quattrone Failed to Respond to Enforcement's Request for On-the-Record Testimony.

Pursuant to Procedural Rule 9264(e), a hearing panel may grant a motion for summary disposition "if there is no genuine issue with regard to any material fact and the [p]arty that files the motion is entitled to summary disposition as a matter of law." Enforcement was the party that requested summary disposition; therefore it bore the burden of demonstrating the absence of a genuine issue of material fact. The burden then shifted to the nonmoving party, Quattrone, to demonstrate specific facts that would create a triable issue. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (moving party bears the burden of demonstrating the absence of a genuine issue of material fact); Matsushita Elec. Indus. Corp. v. Zenith Radio Co., 475 U.S. 574, 586-87 (1986) (opposing party must come forward with specific facts showing a genuine issue in dispute).[12]

The core facts here are not in dispute. Quattrone admits that he received Enforcement's requests for on-the-record testimony and that he refused to comply because he was the subject of the State and Federal Investigations on related criminal charges. Quattrone contends, however, that the Hearing Panel erred in granting summary disposition as to liability because: (1) the undisputed facts compel a ruling that Enforcement issued the Rule 8210 Request in a joint investigation with the SEC, which made Enforcement's conduct "state action" under the "joint action test," subject to the Fifth Amendment; (2) his factual showing entitled him at least to an evidentiary hearing on this issue, during which he could have elicited testimony to show further how the SEC's "deep involvement" with Enforcement's conduct rendered that conduct state action; and (3) even if Enforcement's conduct was not subject to constitutional restrictions, NASD nonetheless violated its statutory duty under Section 15A of the Securities Exchange Act of 1934 ("the Exchange Act") to conform its activities to fundamental standards of due process,

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[12] The Celotex and Matsushita cases involve Federal Rule of Civil Procedure 56, after which NASD patterned Procedural Rule 9264. In cases involving motions for summary disposition, we look to federal law for guidance. See, e.g., Dep't of Enforcement v. U.S. Rica Fin., Inc., Complaint No. C01000003, 2003 NASD Discip. LEXIS 24, at *12 & n.3 (NAC Sept. 9, 2003).

and to "provide a fair procedure" and "an opportunity to defend" oneself. We will address each of these arguments in turn.

(1) Enforcement Did Not Engage in State Action.

(a) Enforcement's Rule 8210 Request Was Not Issued in Connection with a Joint Investigation with the SEC.

The constitutional right at issue in this matter is Quattrone's Fifth Amendment privilege against self-incrimination. The Fifth Amendment restricts only governmental conduct. The courts have consistently rejected the theory that NASD is generally a state actor based on its regulatory responsibilities, its cooperation with the SEC or criminal authorities, or any other basis. D. L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 132 F. Supp. 2d 248, 251-53 (S.D.N.Y. 2001), aff'd, 279 F.3d 155, 162 (2d Cir. 2002), cert. denied, 537 U.S. 1028 (2002); Marchiano v. NASD, 134 F. Supp. 2d 90, 95 (D.D.C. 2001). A respondent may properly invoke a Fifth Amendment privilege only if NASD has engaged in a specific action that may be found to be "fairly attributable" to the government. D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d at 161 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982)); Corrigan v. Buckley, 271 U.S. 323, 330 (1926); see also Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

In order to prove state action, a respondent must show that the state was responsible for the specific conduct about which he complains. One way for Quattrone to make this showing would have been to demonstrate that NASD's request for his testimony was made solely at the behest of the SEC. There is no evidence, however, that Enforcement's Rule 8210 Request was coerced, directed, or encouraged by the SEC or any other government actor. To the contrary, the record shows that Enforcement issued the Rule 8210 Request under NASD authority and for NASD's own regulatory purposes.[13] Enforcement issued the Rule 8210 Request primarily to examine Quattrone regarding the content of the CSFB Press Release.[14] The obstruction of

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[13] The fact that the Rule 8210 Request bore the investigative number of the Analyst Investigation, which Quattrone alleges to have been a uniquely joint investigation by the SEC and NASD, does not change our analysis. The evidence shows that Enforcement, which was conducting two separate investigations of Quattrone at that time, simply used an existing investigative number as a matter of expediency. The use of that number did not convert the Rule 8210 Request into a part of the Analyst Investigation case. Moreover, the Analyst Investigation was not a joint investigation for state action purposes. The record shows that NASD, the NYSE, and the SEC divided the responsibility for investigating the same subject matter at 12 firms by assigning each regulator primary responsibility for four firms. There is no evidence that the SEC deputized NASD to complete an SEC investigation, or that the SEC directed NASD's investigative efforts into CSFB's activities.

[14] Subsequently, Enforcement decided that it also wished to question Quattrone about certain representations made in the Wells Submission. By the time Enforcement informed

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justice issues raised in the CSFB Press Release were unrelated to any issue being investigated by either NASD or the SEC at the time. The record further shows that although Enforcement knew about Quattrone's December 2000 e-mail when it questioned him in October 2002, Enforcement was unaware at that time that Quattrone may have sent the e-mail with knowledge of a pending federal grand jury subpoena.[15] NASD therefore had ample reason independently to issue the Rule 8210 Request, which was not duplicative of previous Rule 8210 requests for Quattrone to testify in other investigations.

(b) Under the Joint Action Test, the Coordinated Inquiry by NASD with the SEC in the Analyst Investigation Did Not Constitute State Action by NASD.

Even if the Rule 8210 Request had been connected to the Analyst Investigation or a "joint investigation" with the SEC, which we find it was not, we are not compelled to find that Enforcement engaged in state action here.[16] The determination as to whether particular conduct by a private entity constitutes state action is made on a case-by-case basis. Jackson , 419 U.S. at 349. The Supreme Court has developed a number of tests to identify state action,[17] but the common purpose of the tests "is to determine whether an action 'can fairly be attributed to the State.'" Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass'n, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)).

Under the joint action test, state action may be found if a private party is a "willful participant in joint action with the State or its agents." Brentwood, 531 U.S. at 296 (quoting Lugar, 457 U.S. at 941). No specific case defines joint action between the government and a self-regulatory organization ("SRO") for the purpose of determining whether the SRO engaged in state action. Under existing case law, however, more is needed to impose constitutional requirements on a private entity than a coordinated inquiry into a securities industry problem.

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Quattrone about this intent, however, Quattrone's attorneys had already informed Enforcement that Quattrone might not testify due to his intention to assert his Fifth Amendment privilege.

[15] CSFB previously withheld this information on the basis of attorney-client privilege.

[16] As further evidence that the Analyst Investigation was a unique joint investigation, Quattrone states that NASD, the SEC, and the NYSE developed a special joint letterhead for case correspondence, representatives from the SEC attended a Wells Letter conference with Quattrone's counsel and NASD staff, and an SEC representative corresponded with Quattrone two days after the Rule 8210 Request to state that any resolution of the investigation would have to involve the SEC. For the reasons set forth above, we find that Quattrone's evidence does not prove that Enforcement engaged in state action by coordinating its investigation with the SEC.

[17] The tests are: (1) the "joint action" test; (2) the "public function" test; (3) the "symbiotic relationship" test; (4) the "nexus" test; and (5) the "entwinement" test.

See D.L. Cromwell Invs., Inc., 279 F.3d at 162-163 (finding no state action by Enforcement in pursuing "similar evidentiary trails" as federal criminal authorities in investigation of improper trading).

The coordinated regulatory roles of NASD and the SEC reflect congressional intent "to establish a 'cooperative regulation' where [securities] associations would regulate themselves under the supervision of the SEC." Lang v. French, 154 F.3d 217, 221 (5th Cir. 1998) (quoting S. Rep. No. 75-1455, at 3-4; H.R. Rep. No. 75-2307, at 4-5). For years, Congress and the SEC have encouraged regulators to coordinate investigations among themselves. Memorandum of Understanding Among the Securities and Exchange Commission, American Stock Exchange, Chicago Board Options Exchange, National Association of Securities Dealers, New York Stock Exchange, and the North American Securities Administrators Association Concerning Consultation and Coordination With Respect to the Regulatory Examination of Broker-Dealers (Nov. 28, 1995), http://www.sec.gov/info/smallbus/mouex.txt. By leveraging resources, regulators benefit the public through concerted and continuous efforts to coordinate examinations, and benefit themselves and securities firms by avoiding regulatory duplication.

The Supreme Court has held that to demonstrate state action, it is not sufficient to demonstrate that the government is aware of the private party's initiatives, but merely approves of or acquiesces in them. Blum v. Yaretsky, 457 U.S. at 1004-05; Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999). Rather, courts look to whether state officials and private parties acted in concert to effect a particular deprivation of constitutional rights. Hoai v. Vo, 935 F.2d 308, 313 (D.C. Cir. 1991) (finding state action present when there was "overt and significant state participation" in depriving the plaintiff of constitutional rights); see also Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988) ("In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action."); Fonda v. Gray, 707 F.2d 435, 437 (9th Cir. 1983) ("A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one's constitutional rights.").

Quattrone made no showing here that the SEC was involved with NASD in an action to deprive him of his Fifth Amendment privilege.[18] See Gallagher v. Neil Young Freedom Concert, 49 F.3d 1442, 1445 (10th Cir. 1995) (rejecting claim that university state actor shared with private security service in the common goal of performing pat-down searches of concert patrons, stating that "state and private entities must share a specific goal to violate the [individual's] constitutional rights by engaging in a particular course of action"). Rather, the record shows that Enforcement made the decision to issue the Rule 8210 Request in response to the CSFB Press

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[18] See, e.g., Cunningham v. Seattle Ctr. for Mental Health, Inc., 924 F.2d 106, 107 (7th Cir. 1991) ("A requirement of the joint action charge . . . is that both public and private actors share a common, unconstitutional goal."); Collins v. Womancare, 878 F.2d 1145, 1154 (9th Cir. 1989) (state action found when state and private officials engaged in a "substantial degree of cooperative action" to deprive the plaintiff of constitutional rights).

Release that announced the Firm's concern that Quattrone may have sent an e-mail in December 2000 that impeded an official investigation. Accordingly, we find that there is no evidence in this record to support a finding of state action under the joint action test.

(c) Under Other Tests Formulated by the Supreme Court, NASD Did Not Engage in State Action.

The Supreme Court has set forth several tests in addition to the joint action test to determine whether a private entity has engaged in state action.[19] For the following reasons, we find that, under any of these other tests, NASD did not engage in state action in its investigative treatment of Quattrone.

(i) NASD Did Not Engage in State Action Under the Public Function Test.

The public function test requires a private entity to perform a function that is exclusively reserved to the state, and not a function that is only occasionally performed by the government. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978) ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"). Only a certain few state functions have been determined to be exclusive to the state: "the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park." Perkins v. Londonderry Basketball Club, 196 F.3d 13, 19 (1st Cir. 1999) (quoting United Auto Workers v. Gaston Festivals, Inc., 43 F.3d 902, 907 (4th Cir. 1995)).

NASD's function as a regulator of the securities industry does not fall within any of those categories. NASD is incorporated as a private corporation, it does not receive state or federal funding, and its Board of Governors is not composed of government officials or appointed by a government official or agency. D.L. Cromwell Invs., Inc., 279 F.3d at 162. Moreover, NASD's role as an SRO is not a traditional or exclusive function of the government, and the SEC's oversight of NASD does not convert its actions into state actions. San Francisco Arts & Ath. v. United States Olympic Comm., 483 U.S. 522, 544 (1987) ("Even extensive regulation by the government does not transform the actions of the regulated entity into those of the government.").[20]

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[19] Quattrone did not specifically argue that any of these other tests were applicable to this case. Nonetheless, we discuss them in brief to conclude our analysis of state action, and to support our conclusion that NASD did not engage in state action in requesting testimony from Quattrone, and in refusing to accept his claim of Fifth Amendment privilege.

[20] We also reject Quattrone's argument that the threshold for finding state action by NASD should be lower because it operates in a highly regulated industry. Quattrone has no precedent for this position. Instead, his arguments attempt to compare NASD to a "heavily regulated utility with at least something of a governmentally protected monopoly." Jackson, 419 U.S. at 351. Yet we note that even in cases involving utilities, the Supreme Court did not lower the threshold

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Accordingly, we find that NASD did not engage in state action under the public function test.

(ii) NASD Did Not Engage in State Action Under the Symbiotic Relationship Test.

The Supreme Court also has stated that state action may be found if the government "has so far insinuated itself into a position of interdependence" with a private party that "it must be recognized as a joint participant in the challenged activity." Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961); see also Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972) (referring to the "symbiotic relationship between lessor and lessee that was present in Burton").

The symbiotic relationship test focuses "on the nature of the overall relationship between the State and the private entity." An inquiry must be made into the independence of the private entity in conducting its daily affairs, and whether the private entity shared in profits resulting from the State's violative conduct. Perkins, 196 F.3d at 21; Gallagher, 49 F.3d at 1452.

Here, there is no question that NASD is independent from the SEC in conducting its daily affairs. See D.L. Cromwell Invs., Inc., 279 F.3d at 162; Desiderio, 191 F.3d at 206. Moreover, no profits are in question. NASD is a not-for-profit corporation, and NASD is not funded by the government. See Griffith v. Bell-Whitley Comty. Action Agency, 614 F.2d 1102, 1108 (6th Cir. 1980) (finding no symbiotic relationship even though private agency received much of its operating funds from the federal government and its organization was "dictated by federal regulations"). Although NASD is subject to oversight by the SEC, NASD's conduct cannot be deemed fairly attributable to the government because of such regulation. San Francisco Arts & Ath., 483 U.S. at 543-44 (stating that state action may not be found simply because of the private entity's creation, funding, licensing, or regulation by the government). We therefore conclude that NASD did not engage in state action here under the symbiotic relationship test.

(iii) NASD Did Not Engage in State Action Under the Nexus Test.

The Supreme Court's nexus test requires a respondent to show "a sufficiently close nexus" between the government and the conduct in question in order that the conduct "may be fairly treated as that of the State itself." Jackson, 419 U.S. at 351. A private entity may be found to have engaged in state action only if "the State is responsible for the specific conduct" at issue, such as where the government "has exercised coercive power or has provided such

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[cont'd]

for finding state action, and did not make findings that such utilities engaged in state action. See Jackson, 419 U.S. at 350 (1974); see also Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 843 (9th Cir. 1999).

significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Blum, 457 U.S. at 1004. Thus, the issue to be determined is the "connection between the State and the challenged conduct, not the broader relationship between the State and the private entity." Perkins, 196 F.3d at 13-14; 20 (finding no evidence that the town participated in the decision-making process that led to the exclusion of a girl from a basketball tournament); Gilmore v. Salt Lake Cmty. Action Program, 710 F.2d 632 (10th Cir. 1983) (finding no evidence that a state official participated in a decision to terminate the plaintiff or that a state policy led to such a decision).

Quattrone argues that sufficient nexus exists in this case because NASD, the SEC, and the NYSE engaged in a coordinated investigation of industry-wide conflicts of interest in the Analyst Investigation. As we previously noted, however, joint activity by itself does not demonstrate the existence of state action, and there is no evidence of SEC involvement in NASD's decision to request further testimony from Quattrone after the CSFB Press Release. Quattrone has failed to demonstrate that the SEC was responsible for the specific conduct at issue in this case – Enforcement's determination to request further testimony from Quattrone in February 2003. Accordingly, we find that NASD did not engage in state action under the nexus test.

(iv) NASD Did Not Engage in State Action Under the Entwinement Test.

The Supreme Court enunciated its latest test for state action determination, the entwinement test, in Brentwood , 531 U.S. at 296 (a private entity may be considered a state actor when it is "entwined with governmental policies or when government is entwined in its management or control"). The Court ruled that state action analysis must consider whether "the relevant facts show pervasive entwinement to the point of largely overlapping identity." Id. at 303;[21] see also Tomaiolo v. Mallinoff, 281 F.3d 1, 9 (1st Cir. 2002) (rejecting entwinement theory because there was no evidence "that the government [was] the real actor behind a private façade, joining in a charade designed to evade constitutional prohibitions."); Marr v. Schofield, 307 F. Supp. 2d 130, 134 (D. Me. 2004) ("The 'nexus' and 'entwinement' tests require a court to 'focus specifically on the state's involvement in the challenged conduct at issue.'").

In Brentwood, the Supreme Court found state action by a private high school athletic association based on the specific facts of that case: 84 percent of the association's membership was composed of public high schools located in one state, the association's revenue flowed mainly from public high schools, and certain members of the State Board of Education were non-voting members of the association's committees. None of those facts are present here. NASD is composed entirely of private securities firms located throughout the United States. NASD does

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[21] Quattrone initially argued that Brentwood had changed state action law and that NASD should be considered a state actor because it is entwined with the SEC. At oral argument, however, Quattrone's attorneys stated that they wished to focus on the alleged joint investigation here by NASD and the SEC.

not receive federal or state funding, and government officials do not appoint NASD Board members or serve on NASD's Board or committees. These facts demonstrate that NASD is not a state actor due to substantial entwinement with the federal government.

* * * * * * * * *

We therefore conclude that, under any of the Supreme Court's tests for state action determination, NASD did not engage in state action in its investigation of Quattrone because its actions were not "fairly attributable" to the SEC.

2) Quattrone is not Entitled to an Evidentiary Hearing on the Issue of State Action.

As we previously stated, the Hearing Panel was correct to grant Enforcement's Summary Disposition Motion "if there [was] no genuine issue with regard to any material fact and the [p]arty that file[d] the motion [was] entitled to summary disposition as a matter of law." NASD Procedural Rule 9264(e). Enforcement met its burden of demonstrating that no genuine issue of material fact existed in this matter. We conclude that Quattrone did not establish to the contrary.

Quattrone conceded that he had received Enforcement's requests for on-the-record testimony and that he refused to provide such testimony. Thus, 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 constituted state action subject to the Fifth Amendment. We find that, even after giving Quattrone all reasonable inferences, Quattrone did not make the requisite showing for an evidentiary hearing.[22] See United States v. Szur, 1998 U.S. Dist. LEXIS 3519, at *44-45 (S.D.N.Y. 1998) (quoting United States v. Gel Spice Co., 601 F. Supp. 1214, 1218 (E.D.N.Y. 1985) ("[A]n evidentiary hearing is not required without a meaningful factual showing of an improper purpose by the agency.")).

Procedural Rule 9264(e) requires the party opposing the summary disposition to present, by affidavit prior to the hearing, facts essential to justify the opposition to the motion. Quattrone supplied his facts as required, and the Hearing Panel found them to be insufficient to justify his opposition to Enforcement's Summary Disposition Motion. We agree that there was no reason for the Hearing Panel to conduct an evidentiary hearing in order to explore this issue further. The NAC reached a similar conclusion in Dep't of Enforcement v. Respondent Firm, Complaint No. CAF000013, 2003 NASD Discip. LEXIS 40, at *34-35 (NAC Nov. 14, 2003); where we stated:

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[22] Quattrone argues that the Hearing Panel erred in granting summary disposition on the issue of liability because the state action analysis required a "fact bound inquiry." We find no such error. Although an issue may require an adjudicator to analyze numerous facts, if no material facts are in dispute, summary disposition is appropriate.

> Nor do we find that [respondents] should have been allowed, based on the minimal information that they provided regarding the [NASD] attorney, to have gone on a "fishing expedition" in an effort to produce evidence that the attorney, in requesting their appearances, was acting on behalf of any entity other than NASD… As a self-regulatory organization, NASD has an independent obligation to investigate possible rule violations, and respondents have offered no evidence that NASD was acting on anything other than its own investigation . . . . We find that that the Hearing Panel properly granted Enforcement summary disposition on this issue.

See also Moore v. City of Paducah, 890 F.2d 831, 835 (6th Cir. 1989) (affirming summary judgment due to insufficient evidence of joint action between state and private entity); Marr, 307 F. Supp. 2d at 135 (affirming summary judgment in absence of factual assertions by plaintiff that would permit the court to find that defendant was a state actor).[23]

B. NASD Conducted the Proceedings Against Quattrone Fairly and the Proceedings Comported With the Requirements of the Securities Exchange Act of 1934.

Quattrone argues that Enforcement's attempt to compel his testimony in this case breached NASD's statutory duties under Section 15A of the Securities Exchange Act of 1934 ("the Exchange Act"). Quattrone contends that the Fifth Amendment right against compelled testimony is a fundamental standard of due process that is applicable to NASD through the Exchange Act. We find that there is no support for Quattrone's attempt to hold NASD to constitutional standards through Section 15A of the Exchange Act. NASD is not a state actor, but a private corporation. As such, constitutional and common law due process requirements do not apply to NASD proceedings. See, e.g., Datek Sec. v. NASD, 875 F. Supp. 230, 234 (S.D.N.Y. 1995) (dismissing Fifth Amendment claim regarding a disciplinary proceeding because NASD is not a state actor); see also D.L. Cromwell Invs. Inc. , 279 F.3d at 162; First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 698-99 (3d Cir. 1979).

Section 15A(b)(8) of the Exchange Act requires that SRO rules "provide a fair procedure for the disciplining of members and persons associated with members." Section 15A(h)(1) of the Exchange Act requires that NASD proceedings be fair. The Commission's interpretations of the

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[23] Having affirmed the Hearing Panel's granting of summary disposition on the liability issue, we also affirm the Hearing Panel's decision to deny Quattrone's proffer at the hearing of further evidence of the alleged "joint conduct" by the SEC and NASD. The hearing was limited to sanctions; therefore evidence on the liability issue that had already been decided was not relevant.

Exchange Act's fairness language have focused on whether the SRO followed its internal procedures and whether those procedures were fair.[24]

We find that NASD satisfied its statutory obligation and provided Quattrone with the procedural safeguards required by Section 15A of the Exchange Act. Enforcement made written requests for Quattrone's on-the-record testimony pursuant to Procedural Rule 8210. Pursuant to Quattrone's request, the testimony was rescheduled and relocated. Enforcement's written requests for testimony stated that if Quattrone failed to comply, NASD could take disciplinary action against him that could result in sanctions, including a suspension or a bar from the securities industry. Quattrone was represented by counsel at all times, and he made a fully informed choice to refuse to provide testimony to NASD due to the pending State and Federal Investigations. See, e.g., Sundra Escott-Russell, Exchange Act Rel. No. 43363, 2000 SEC LEXIS 2053, at *13 (Sept. 27, 2000) (finding requirements of Section 15A(h)(1) met when NASD brought specific charges, the respondent had notice of such charges, the respondent had an opportunity to defend against such charges, and NASD kept a record of the proceedings); Dan Adlai Druz, 52 S.E.C. 416, 429 (1995) (rejecting claim that the NYSE denied a respondent a fair opportunity to respond to the charges against him due to a pending criminal matter).

NASD's Code of Procedure was approved by the Commission, which properly determined that it was fair and furthered the public interest. See Exchange Act Rel. No. 38908 (Aug. 7, 1997). Further, courts have repeatedly upheld NASD's Code of Procedure as affording appropriate due process. See Austin Municipal Sec., Inc. v. NASD, 757 F.2d 676, 689 (5th Cir. 1985) ("[T]he statutory framework of the NASD disciplinary process contains sufficient safeguards to control unconstitutional conduct."); First Jersey Sec., Inc. 605 F.2d at 699 (rejecting claim that NASD process for self-regulation is an unconstitutional violation of due process).

Quattrone's argument that the Exchange Act itself requires protection against self-incrimination as a matter of fundamental fairness implicitly assumes that NASD is a state actor. Since NASD is not a state actor, it does not owe any constitutional protections to members and associated persons under its jurisdiction. It is because of that fact that Congress mandated in Section 15A(a)(8) of the Exchange Act a fair procedure for disciplining members and associated persons. Absent such a provision in the Exchange Act, due process considerations under the Fifth Amendment, being inapplicable, could not otherwise compel such protections. However, we must read Section 15A as being purposely limited in what it requires. In promulgating a standard of fairness that is analogous to due process insofar as it applies to the disciplining of members and associated persons, Section 15A cannot be read to implicitly encompass and require any particular constitutional rights that are enumerated in the Fifth Amendment. Accordingly, we reject Quattrone's argument that the Exchange Act requires NASD to allow respondents to refuse to testify based on their Fifth Amendment privilege.

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[24] See Scattered Corp., 53 S.E.C. 948, 958 (1998) (noting that past cases involving "fairness" analyses "have focussed on the fairness of the SRO's internal procedures, including organization structure as it affects the fairness and impartiality of the course of the proceeding").

V. Sanctions

NASD Procedural Rule 8210 authorizes NASD to require persons associated with an NASD member, such as Quattrone, to "provide information orally [or] in writing . . . and to testify at a location to be specified by Association staff, under oath or affirmation . . . with respect to any matter" involving an NASD investigation. Procedural Rule 8210 further states that "no . . . person shall fail to provide information . . . pursuant to this Rule."

When Quattrone registered with NASD, he agreed to abide by its rules, which are "unequivocal with respect to the obligation to cooperate with the NASD." Michael J. Markowski, 51 S.E.C. 553, 557 (1993), aff'd, 34 F.3d 99 (2d Cir. 1994). Quattrone, however, chose to disregard his obligation and instead refused to provide testimony. As we have previously stated, "[a] refusal to comply with an NASD request for information is tantamount to a complete failure to respond." Dep't of Enforcement v. Steinhart, Complaint No. FPI020002, 2003 NASD Discip. LEXIS 23 (NAC Aug. 11, 2003). We therefore conclude that it is appropriate to impose a bar in all capacities on Quattrone for his refusal to testify.

The NASD Sanction Guidelines ("Guidelines") for "Failure To Respond Or Failure To Respond Truthfully, Completely, Or Timely To Requests Made Pursuant To NASD Procedural Rule 8210" state that a bar should be imposed if an individual did not respond in any manner.[25] Despite the clear wording of the Guideline, however, the Hearing Panel majority imposed a more lenient sanction on Quattrone – a one-year suspension (which would convert into a bar if he failed to testify satisfactorily within one year) and a $30,000 fine. The Hearing Officer, in a dissenting opinion, disagreed with the sanctions imposed by the majority. The Hearing Officer found that Quattrone's misconduct in refusing to testify was egregious, requiring a bar in all capacities. We agree with the Hearing Officer's dissent. We find Quattrone's misconduct to be egregious. Indeed, the type of misconduct at issue here threatens the self-regulatory process. Because NASD does not possess subpoena power, it must rely upon Rule 8210 to gather information for its investigations. As the Commission has emphasized, NASD would not be able to carry out its self-regulatory functions without respondents' compliance with Conduct Rule 2110 and Procedural Rule 8210:

> Because NASD does not have subpoena power, compliance with its rules requiring cooperation in investigations is essential to enable NASD to carry out its self-regulatory functions. NASD should not have to bring disciplinary proceedings, as it was required to do here, in order to obtain compliance with its rules governing its investigations. The standard sanction of a bar is warranted.

Toni Valentino, Exchange Act Rel. No. 49255, 2004 SEC LEXIS 330, at *15-16 (Feb. 13, 2004).

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[25] See NASD Sanction Guidelines (2001 ed.) at 39.

The Guidelines recognize the importance of Rules 2110 and 8210 to NASD's regulatory process by treating a failure to respond as an egregious violation. The Guidelines provide that, absent mitigating factors, "a bar should be standard." Here, we find that Quattrone's conduct was egregious, and we do not find any facts in mitigation. The Guidelines list two principal considerations for such violations: (1) the nature of the information requested; and (2) whether the requested information has been provided. If the information was provided, the Guidelines state that the adjudicator should consider the number of requests made, the time the respondent took to respond, and the degree of regulatory pressure required to obtain a response. We find that these considerations support the imposition of a bar on Quattrone.

Enforcement's Rule 8210 Request was material to NASD's investigation of the issue raised by the CSFB Press Release--whether Quattrone had known about an impending investigation at the time he forwarded the December 2000 e-mail to his colleagues, advising them to follow the Firm's document retention policy. There is no question that such questions regarding obstruction of justice are at the heart of NASD's regulatory role in preventing securities fraud and protecting investors. See, e.g., United States v. O'Hagan, 521 U.S. 642, 658 (1997) (stating that in passing the Exchange Act, one of Congress's animating objectives was "to insure honest securities markets and thereby promote investor confidence" after the market crash of 1929); see also Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 315 (1985) (stating that the "primary objective of the federal securities laws" is investor protection through promotion of a "high standard of business ethics" in "every facet of the securities industry"). Enforcement sought to verify the questions raised by the CSFB Press Release by having Quattrone testify. Thus, Quattrone's testimony was crucial to NASD's investigation.

The record shows that Quattrone did not begin his testimony in response to Enforcement's February 3, 2003 Rule 8210 Request until July 13, 2004, and he did not complete this testimony until October 7, 2004. Thus, Enforcement was forced to wait 17 months from its initial Rule 8210 Request on February 3, 2003 for Quattrone to begin his testimony. Quattrone's refusal to testify therefore impeded an NASD investigation and "undermined[d] the NASD's ability to carry out its regulatory mandate." Michael David Borth, 51 S.E.C. 178, 180 (1992). Quattrone is not entitled to a lesser sanction because he was willing to appear for NASD testimony only when the timing was right for him, depending on the circumstances surrounding the Federal and State Investigations. Steinhart, 2003 NASD Discip. LEXIS 23, at *13 (stating that "NASD . . . should not have to bring disciplinary proceedings to obtain responses to its requests for information."); Accord Dep't of Enforcement v. Laucius, Complaint No. C9A030017, 2003 NASD Discip. LEXIS 45, at *14 (OHO Oct. 1, 2003).

We also find that the Hearing Panel erred in finding mitigating factors present in this case. The Hearing Panel stated that Enforcement had engaged in "disparate treatment" of Quattrone, and it compared his situation to four other individuals from CSFB, who also had been subject to NASD investigations. All four of those individuals delayed giving requested testimony to NASD – three eventually testified, and one never testified. All four, however, settled their actions with NASD and received a $30,000 fine and a one-year suspension.

First, it is well recognized that "appropriate sanctions depend on the particular facts and circumstances of each case, and cannot be determined by comparison with the action taken in other cases." John Montelbano, Exchange Act Rel. No. 47227, 2003 SEC LEXIS 153, at *50 (Jan. 22, 2003); see also John M. W. Crute, 53 S.E.C. 870 (1998), aff'd mem., Crute v. SEC, 208 F.3d 1006 (5th Cir. 2000). Further, all four of the other CSFB individuals settled their cases with Enforcement, and, as the Commission has frequently noted, "pragmatic considerations justify the acceptance of lesser sanctions in negotiating a settlement." Steven D. Goodman, 54 S.E.C. 1203, 1212 (2001). NASD's Sanction Guidelines also state that "settled cases generally result in lower sanctions than fully litigated cases to provide incentives to settle." NASD Guidelines (2001 ed.) at 1.[26] Accordingly, we find that the Hearing Panel incorrectly compared Quattrone's situation to other matters, including settled actions, when it imposed on him the exact same sanctions that the four settling CSFB respondents had received.

We also note that the Hearing Panel reached its conclusion as to Enforcement's alleged disparate treatment of Quattrone without having sufficient evidence in the record regarding the facts of the four settled cases. The Hearing Officer granted Enforcement's pre-hearing motion to exclude Quattrone's proffer of evidence on the manner in which Enforcement allegedly treated him with "animus" and accorded other respondents preferential treatment. The Hearing Officer issued an order on this motion, stating that "the dispositions of the cases against these individuals are irrelevant."[27] The Hearing Panel therefore had no evidence before it from which to conclude that Quattrone's case was at all comparable to the four settled cases.

We also find that it was error for the Hearing Panel to find mitigating, or give even "limited consideration," as it termed it, to Quattrone's contention that he relied on his counsel's advice in refusing to give testimony to Enforcement. The Guidelines list as a Principal Consideration whether the respondent demonstrated reasonable reliance on competent legal advice. See Guidelines (2001 ed.) at 9 (Principal Consideration No. 7). The reasonable reliance on counsel standard in the Principal Consideration contemplates reliance on counsel for the purpose of ensuring that one has not violated applicable securities laws and rules. The Principal Consideration does not contemplate reliance on the advice of counsel that is premised on a strategy for a respondent to avoid full compliance with applicable regulatory requirements for any reason, including the desire to avoid greater liability or jeopardy. The record here clearly shows that Quattrone and his lawyers were aware that NASD would consider Quattrone's failure

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[26] This policy also reflects NASD's recognition of the "pragmatic considerations," as stated by the SEC, that may lead to a settlement, such as the "avoidance of time-and-manpower-consuming adversary proceedings." Richard J. Puccio, 52 S.E.C. 1041, 1045 (1996) (quoting David A. Gingras, 50 S.E.C. 1286, 1294 (1992), and the cases there cited).

[27] Quattrone appealed this order, arguing that it was incorrect to prevent the Hearing Panel from being able to consider evidence concerning the other four settled CSFB actions. We reject this argument and affirm the Hearing Officer's order, for the reasons discussed herein regarding the irrelevance of other cases, particularly settled cases, in determining sanctions for a litigated case.

to testify as a violation of NASD rules. The Rule 8210 Request stated that a failure to comply could lead to disciplinary action, including a suspension or a bar from the industry. Quattrone understood that his lawyers were advising him to assert his Fifth Amendment privilege and refuse to testify for NASD because he should be concerned, first and foremost, with the potential dangers that the Federal and State Investigations posed to him. Quattrone made an informed choice to follow his lawyers' strategy to concentrate primarily on the criminal charges against him, even in the face of a potential NASD disciplinary action. Accordingly, the Hearing Panel erred in considering Quattrone's reliance on counsel as a mitigating factor in assessing sanctions.

We also conclude that the Hearing Panel improperly considered Quattrone's lack of a disciplinary history to be mitigating. In general, NASD does not consider a lack of disciplinary history to be mitigating. See Dep't of Enforcement v. Balbirer, Complaint No. C07980011, 1999 NASD Discip. LEXIS 29, at *10 (NAC Oct. 18, 1999) ("We are not compelled to reward a respondent because he has acted in the manner in which he agreed (and was required) to act when entering this industry as a registered person. We therefore do not find that the absence of a disciplinary history should mitigate the seriousness of the misconduct or the severity of the sanctions imposed."); see also U.S. Rica Financial, Inc., 2003 NASD Discip. LEXIS 24, at *44-45. We find that, under the facts of this case and considering the seriousness of the misconduct, Quattrone's lack of disciplinary history is not mitigating.

We also reject Quattrone's contention that we should uphold the Hearing Panel majority's finding that his offers of "cooperation" with NASD's investigations were mitigating, and that Enforcement was "unreasonably rigid" in failing to pursue them. The record shows that Quattrone's attorneys suggested a factual proffer to Enforcement only after the complaint in this action was filed in March 2003.[28] As we have previously noted, NASD should not have to file a disciplinary action in order to obtain responses to requests for information. Steinhart, 2003 NASD Discip. LEXIS 23 at *13; see also Brian L. Gibbons, 52 S.E.C. 791, 794 n.10 (1996) ("Gibbons' offers to confess after his actions were discovered do not mitigate his offense."). Further, Quattrone's attorneys suggested that they could make a factual proffer to Enforcement "relating to the subjects of the investigation following specific interrogatories fashioned by [Enforcement]." Written answers from Quattrone's attorneys were not an acceptable alternative to Enforcement's request for in-person, sworn, on-the-record testimony from Quattrone on his own thoughts and actions. We conclude that Quattrone should not be given a reduced sanction based on Enforcement's rejection of his offers to supply information by any means other than the on-the-record testimony requested by Enforcement. Case law solidly supports the principle that a person subject to a Rule 8210 request cannot impose conditions on his or her compliance, or make his or her own determination as to when or in what manner he or she will comply. See,

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[28] We also reject as mitigating the argument that Quattrone had previously cooperated with Enforcement's requests for information and had testified on October 1 and 3, 2002 in connection with a different investigation. Quattrone's prior compliance does not mitigate his refusal to testify in this case. Cf. Robert Fitzpatrick, Exchange Act Rel. No. 44956, 2001 SEC LEXIS 2185, at *24-25 (Oct. 19, 2001) ("[P]rompt compliance with some requests for information does not excuse dilatory compliance with other requests.").

e.g., Dist. Bus. Conduct Comm. No. 3 v. Prendergast, Complaint No. C3A960033, 1999 NASD Discip. LEXIS 19, at *64 (NAC July 8, 1999) ("[A] respondent cannot, consistent with the NASD's rules, refuse to provide requested information simply because he or she has determined that it might be detrimental to his or her own interests to cooperate with an NASD investigation."); Hannan, 53 S.E.C. 854 (1998).

We further find that Enforcement did not act unreasonably in its handling of the Rule 8210 Request. Enforcement accommodated Quattrone's requests for a continuance and for a change of location to San Francisco.[29] It was not unreasonable for Enforcement to deny Quattrone's request for an open-ended delay of his NASD testimony until the conclusion of the Federal and State Investigations.

In view of the serious nature of Quattrone's misconduct and the lack of mitigating facts, we conclude that a bar is necessary in this case to protect the integrity of NASD's investigative responsibilities and its role as an SRO, serving the public interest. As a private entity without subpoena power, NASD must rely on Rule 8210 to compel industry members to provide requested information about potential violations of the federal securities laws and NASD rules. Quattrone failed to meet his obligation to cooperate with Enforcement in its investigation, and therefore a bar is appropriately remedial.

VI. Conclusion

We uphold the Hearing Panel's finding of violation of Conduct Rule 2110 and Procedural Rule 8210. A preponderance of the evidence proves that Quattrone refused to testify in compliance with Enforcement's Rule 8210 Request. We overrule the sanctions imposed by the Hearing Panel majority. We find that Quattrone's misconduct was egregious. Accordingly, we order that Quattrone be barred in all capacities. The bar will become effective upon issuance of this decision. In light of our imposition of the bar, we eliminate the fine and suspension imposed

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[29] In finding mitigating circumstances, the Hearing Panel relied on Dep't of Enforcement v. Levitov, Complaint No. CAF980025, 1999 NASD Discip. LEXIS 30 (NAC Nov. 1, 1999). Levitov is distinguishable from Quattrone's situation, however, in that there the NAC found that staff had "acted rigidly" in denying respondents' initial request for continuance in a matter that already had been ongoing for two years. Here, Enforcement consented to a continuance and a relocation in a new matter that began as a direct result of the CSFB Press Release, which had been issued on the same date as the Rule 8210 Request. Moreover, in Levitov, the NAC cautioned that its conclusions should not be applied generally to cases involving a violation of Procedural Rule 8210, and emphasized the "unique circumstances" that led to its decision not to bar the respondent: "[W]e are not departing from our previous holdings that NASD Regulation has no obligation to postpone investigations because of actions taken by other regulators or criminal authorities." Id. at *21, 23; see also Dep't of Enforcement v. Kaagan, Complaint No. C02030026, 2003 NASD Discip. LEXIS 56, at *14 (OHO Dec. 4, 2003).

by the Hearing Panel. Finally, we uphold the Hearing Panel's imposition of hearing costs of $2,831.52, and impose $1,479.14 in appeal costs. [30]

On Behalf of the National Adjudicatory Council,

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Barbara Z. Sweeney, Senior Vice President and Corporate Secretary

[30] We have considered and reject without discussion all other arguments advanced by Quattrone and Enforcement.