SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950 / November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY PROCEEDING

Reconsideration of Sanction Pursuant to Remand

Upon motion of Commission, Court of Appeals remanded Commission determination sustaining registered securities association's sanction against former associated person of member firm for Commission to consider (1) whether certain facts mitigated misconduct of former associated person and (2) whether the sanction served a remedial purpose. Held, sanction imposed by association is sustained.

APPEARANCES:

Andrew T. Solomon, of Sullivan & Worcester LLP, for Howard Brett Berger.

Marc Menchel, Alan Lawhead, and Michael J. Garawski, for NASD.

Case remanded: November 14, 2007
Last brief received: January 25, 2008

I.

This proceeding is here on our motion to the United States Court of Appeals for the Second Circuit for remand. On May 4, 2007, we issued an opinion and order sustaining NASD's 1/ findings that Howard Brett Berger, an individual who applied for registration with an NASD member firm, failed to appear and provide information at two on-the-record interviews ("OTRs"), in violation of NASD Rule 8210 and Conduct Rule 2110. 2/ We found the sanction imposed by NASD – barring Berger from associating with any NASD member in any capacity – neither excessive nor oppressive. 3/

Berger subsequently appealed our determination to the Second Circuit. On August 29, 2007, we moved the Second Circuit to remand the matter to the Commission for the sole purpose of reconsidering the sanction portion of our opinion in light of the recent ruling of the United States Court of Appeals for the District of Columbia Circuit in PAZ Sec., Inc. v. SEC. 4/ On September 13, 2007, the Second Circuit granted our motion and remanded the Berger matter to the Commission for further proceedings. 5/

1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the disciplinary action here was taken before the consolidation, we continue to use the designation NASD.

2/ Howard Brett Berger, Exchange Act Rel. No. 55706 (May 4, 2007), 90 SEC Docket 1766, remanded, Howard Brett Berger v. SEC, No. 07-2692 (2d Cir. Sept. 13, 2007) (remand order). NASD Rule 8210 requires members and associated persons to provide information if requested by NASD staff as part of an investigation, complaint, examination, or proceeding. NASD Conduct Rule 2110 requires members to adhere to "high standards of commercial honor and just and equitable principles of trade." A violation of another NASD rule, such as Rule 8210, constitutes a violation of Conduct Rule 2110. Perpetual Sec., Inc., Exchange Act Rel. No. 56613 (Oct. 4, 2007), 91 SEC Docket 2489, 2504 n.50; Stephen J. Gluckman, 54 S.E.C. 175, 185 & n.31 (1999).

3/ NASD also assessed costs.

4/ 494 F.3d 1059 (D.C. Cir. 2007) (holding that the Commission abused its discretion by failing to address certain mitigating factors raised by the petitioners and by failing to identify any remedial purpose for the sanctions it approved).

5/ Berger v. SEC, No. 07-2692 (2d Cir. Sept. 13, 2007). The Second Circuit issued its mandate on November 14, 2007, and in December 2007 the Commission requested further briefing by the parties.

II.

Neither the factual findings that establish the violations nor the findings of violations themselves are at issue on remand. With this opinion, we nonetheless expressly affirm those determinations. We summarize some of the findings here to provide the necessary background for our discussion of sanctions. Our reconsideration of the sanction portion of this case is informed by the D.C. Circuit's PAZ decision. 6/ PAZ also involved the failure to respond to NASD requests for information. In remanding PAZ to the Commission, the D.C. Circuit instructed us to reconsider, among other things, whether the sanctions were excessive or oppressive "in light of the factors raised in mitigation and to consider . . . whether the sanctions serve[d] a remedial purpose" as required by the Securities Exchange Act of 1934. 7/ In this opinion, we reconsider these factors insofar as they pertain to Berger.

Berger was registered with NASD from December 1, 1992 until April 19, 2001, when he relinquished his securities industry registration. During that period, he worked for several member firms in various capacities, including as a general securities representative and general securities principal, and also as an associate compliance director and compliance officer. In his capacity as associate compliance director and compliance officer at two member firms, Berger was responsible for, among other things, filing applications for securities industry registration. For nearly two years afterward, Berger was unregistered and not associated with any member firm while he worked at a financial software company and at Professional Traders Fund, LLC ("PTF"), a hedge fund.

Under NASD rules, securities licenses do not lapse until two years after registration has terminated. 8/ After they lapse, a person must retake the licensing examinations to become registered again. 9/ As the two-year renewal deadline for his securities licenses approached, Berger sought to renew his securities industry registration because he wanted to avoid retaking the licensing examinations and also to capture some of the commissions that his hedge fund was paying to Millennium Brokerage, LLC ("Millennium"). On April 15, 2003, four days before his securities licenses were due to expire, Berger applied for securities industry registration through

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6/ PAZ, 494 F.3d 1059.

7/ Id. at 1061.

8/ NASD asserts jurisdiction over, and has the ability to obtain information from, a person whose association with a member has been terminated or whose registration has been canceled, for two years following the date of that person's termination of registration. NASD By-Laws, Article V, Section 4.

9/ NASD Membership and Registration Rules 1021(c) and 1031(c) require any formerly registered person who has been unregistered for a period of at least two years immediately preceding the receipt by NASD of a new application for registration to pass an examination in order to renew his registration.

Millennium by submitting a Form U4. Although Berger applied for registration, his application required several amendments because the information supplied, relating primarily to Berger's disciplinary history, was incomplete. Ultimately, those deficiencies were never resolved and on August 13, 2003, Millennium terminated Berger's association without registration.

Five months later, on January 14, 2004, NASD requested Berger's appearance at an OTR scheduled for January 27, 2004 in connection with NASD's investigation of potential circumvention of day-trading rules and noncompliance with certain credit provisions by Millennium's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. An NASD staff supervisor involved in the investigation testified at Berger's disciplinary hearing that NASD staff had been inquiring into PTF's role in day-trading at Millennium in April 2003, when Berger was applying for registration. The supervisor also testified that Millennium's filing of Berger's Forms U4 coincided with the suspected activities at Millennium and that NASD staff had received information that Berger had access to a back-office system (otherwise limited to Millennium's own principals and representatives) that enabled Berger to "look at" at least 125 PTF accounts and "see the trading levels, the buying power," and "the profit and loss in the accounts." 10/ NASD's written request, which was sent by first class and certified mail, advised Berger that he was "obligated to appear at the date and time specified in [the] letter" and included an addendum warning that, if he did not appear, he might be subject to "an NASD disciplinary action, and the imposition of disciplinary sanctions, including a bar from the securities industry, suspension, censure and/or fine." Berger did not challenge NASD's jurisdiction at that time. He failed to appear, but his then-current counsel ("Initial Counsel") contacted NASD after the scheduled time for the OTR had elapsed. NASD agreed to accommodate Berger by scheduling a second OTR for a later date.

Prior to the rescheduled OTR, however, Berger changed attorneys, replacing his Initial Counsel with another attorney from a different law firm ("Second Counsel"). On January 30, 2004, Second Counsel sent a letter to NASD announcing his appearance and stating that, prior to the rescheduled date, "we will determine whether the NASD has jurisdiction over Mr. Berger and will notify you of our intention as to whether or not Mr. Berger will testify on that date." On February 2, 2004, NASD sent Berger another letter by first class and certified mail, with a copy to his attorney, confirming the rescheduled date and advising Berger that "failure to appear may result in a recommendation . . . that a disciplinary action be instituted against you which may result in the imposition of sanctions such as censure, fine, suspension, or bar." On February 11, 2004, Second Counsel responded to NASD with a letter advising NASD that Berger "will not appear" for the second OTR and stating without explanation that "[t]he grounds for his decision not to appear are based on our view that the NASD does not have jurisdiction over him." Berger subsequently failed to appear at that second OTR.

10/ Although NASD counsel sought at the hearing to provide further background on the investigation, Berger's counsel objected repeatedly to the introduction of such information.

NASD By-Law Article I(dd)(1) defines a "person associated with a member" as "a natural person who is registered or has applied for registration." NASD Notice to Members 99-95 states that "any person who signs and submits a Form U4 is an associated person." 11/ When Berger, an experienced securities professional and former compliance officer, applied to renew his registration with NASD, thereby submitting himself to NASD's jurisdiction, he agreed that he understood and consented to abide by NASD's rules, including the requirement to provide information requested by NASD for its investigations. We sustained NASD's finding that Berger filled in his personal information and executed an electronic signature on an application for registration with Millennium a few days before the expiration of NASD's two-year period of retained jurisdiction over him. We agreed with NASD that it retained jurisdiction over Berger.

Having established NASD's jurisdiction, we found that Berger violated NASD Rules 8210 and 2110 when he failed to appear at the two OTRs. We noted that Berger did not respond in any manner to the first OTR request until the day of the scheduled OTR, and then only after the time for the scheduled OTR had elapsed. Even after NASD accommodated him by scheduling a second OTR after consultation with Second Counsel, Berger failed to appear.

III.

Exchange Act Section 19(e)(2) 12/ requires us to review a disciplinary sanction imposed by NASD upon a member firm or associated person "to determine whether the sanction 'imposes any burden on competition not necessary or appropriate' to further the purposes of the [Exchange] Act, or is 'excessive or oppressive.'" 13/

A. We first set forth the regulatory framework with respect to sanctions for failure to respond to an NASD request for information. 14/ The Exchange Act requires that the rules of a self-regulatory organization ("SRO") like NASD be designed for the protection of investors, 15/ and Exchange Act Section 15A requires that NASD enforce compliance by its members and their

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11/ NASD Notice to Members 99-95 (Dec. 1, 1999).

12/ 15 U.S.C. § 78s(e)(2).

13/ PAZ, 494 F.3d at 1064.

14/ See PAZ Sec. Inc., Exchange Act Rel. No. 57656 (Apr. 11, 2008), 93 SEC Docket 5122, 5123, appeal filed, No. 08-1188 (D.C. Cir. May 13, 2008).

15/ 15 U.S.C. § 78*o*-3(b)(6) (stating that an association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that its rules are designed to, among other things, protect investors and the public interest).

associated persons with the Exchange Act, the Exchange Act rules, and NASD rules. 16/ "Because of limited Commission resources, Congress has given NASD and other securities industry self-regulatory organizations significant front-line responsibility in ensuring that broker-dealers and their associated persons are complying with applicable statutes, rules, regulations, and ethical obligations." 17/

NASD lacks subpoena power, however. It must therefore "rely upon Procedural Rule 8210 in connection with its obligation to police the activities of its members and associated persons." 18/ Rule 8210 "provides a means, in the absence of subpoena power, for the NASD to obtain from its members information necessary to conduct investigations." 19/ The rule is at the heart of the self-regulatory system for the securities industry. The language of Rule 8210 – "No member or person shall fail to provide information or testimony or to permit an inspection and copying of books, records, or accounts pursuant to the Rule" 20/ – is "unequivocal" with respect to an associated person's obligation to cooperate with NASD information requests. 21/ In responding to Rule 8210 requests, therefore, "[d]elay and neglect on the part of members and their associated persons undermine the ability of the NASD to conduct investigations and thereby

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16/ 15 U.S.C. 78*o*-3; see also Report of Investigation Pursuant to Section 21(A), Exchange Act Rel. No. 51163 (Feb. 9, 2005), 84 SEC Docket 3129, 3130 ("As a registered association, the NASD has a statutory obligation to comply with the Exchange Act, and to enforce compliance by its members with the Exchange Act and its own rules."). Exchange Act Section 19(h)(1) authorizes the Commission to suspend or revoke the registration of an SRO if the Commission finds that such SRO has failed to enforce compliance with the provisions of the Exchange Act, the rules thereunder, or the rules of the SRO. 15 U.S.C. § 78s(h)(1).

17/ Charles C. Fawcett, IV, Exchange Act Rel. No. 56770 (Nov. 8, 2007), 91 SEC Docket 3147, 3157.

18/ Joseph Patrick Hannan, 53 S.E.C. 854, 858-59 (1998).

19/ Richard J. Rouse, 51 S.E.C. 581, 584 (1993). See also Elliot M. Hershberg, Exchange Act Rel. No. 53145 (Jan. 19, 2006), 87 SEC Docket 494, 498 (stating that "compliance is essential to NASD's self-regulatory function because NASD lacks subpoena power" and that "[f]ailure to comply is a serious violation justifying stringent sanctions because it subverts NASD's ability to execute its regulatory functions") (citations omitted), aff'd, 210 Fed. Appx. 125 (2d Cir. 2006).

20/ NASD Manual, Procedural Rule 8210(c).

21/ See Michael Markowski, Exchange Act Rel. No. 32562 (June 30, 1993), 54 SEC Docket 1211, 1216-17, petition for review denied, 34 F.3d 99 (2d Cir. 1994).

protect the public interest." 22/ The failure to respond impedes NASD's ability to detect misconduct that threatens investors and markets.

Vigorous enforcement of Rule 8210 helps ensure the continued strength of the self-regulatory system – and thereby enhances the integrity of the securities markets and protects investors – by preventing members and their associated persons who demonstrate their unfitness by failing to respond in any manner to Rule 8210 requests from remaining in the securities industry. 23/ Members and their associated persons who fail to respond in any manner to Rule 8210 requests present "too great a risk" to the markets and investors to be permitted to remain in the securities industry. 24/

NASD applied the NASD's Sanction Guidelines (the "Sanction Guidelines") 25/ when it determined to sanction Berger for the violation of Rule 8210 and bar him from associating with any NASD member in any capacity. Although the Commission is not bound by the Sanction Guidelines, we use them as a benchmark in conducting our review under Exchange Act Section 19(e)(2). 26/ The Sanction Guidelines state that, "[i]f the individual did not respond in any manner, a bar should be standard." 27/ Where mitigation exists, or where the individual did not respond in a timely manner, the recommended maximum sanction is a two-year suspension. 28/ The guideline for violations of Rule 8210 is one of only three out of a total of eighty sanction

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22/ Barry C. Wilson, 52 S.E.C. 1070, 1075 (1996).

23/ See Fawcett, 91 SEC Docket at 3157 (sustaining sanction of a bar for failure to comply with NASD requests for information).

24/ Id.

25/ See Fawcett, 91 SEC Docket at 3148.

26/ The Sanction Guidelines have been promulgated by NASD in an effort to achieve greater consistency, uniformity, and fairness in the sanctions that are imposed for violations. NASD Sanction Guidelines 1 (2006 ed.). Since 1993, NASD has published and distributed the Sanction Guidelines so that members, associated persons, and their counsel will have notice of the types of disciplinary sanctions that may be applicable to various violations. Id. The Sanction Guidelines are not NASD rules that are approved by the Commission, but NASD-created guidance for NASD adjudicators, which the Sanction Guidelines define as Hearing Panels and the National Adjudicatory Council. Id.

27/ NASD Sanction Guidelines (2001 ed.) at 39.

28/ Id. See also Justin F. Ficken, Exchange Act Rel. No. 54699 (Nov. 3, 2006), 89 SEC Docket 685, 696 n.38; Hershberg, 87 SEC Docket at 498.

guidelines that recommend a bar as the standard sanction. 29/ The imposition of a bar as the standard sanction for a complete failure to respond to NASD information requests "reflects the judgment that, in the absence of mitigating factors, a complete failure to cooperate with NASD requests for information or testimony is so fundamentally incompatible with NASD's self-regulatory function that the risk to the markets and investors posed by such misconduct is properly remedied by a bar." 30/ "NASD's barring of [Rule 8210 violators] is [thus] 'consistent with the Exchange Act's basic purpose of protecting public investors.'" 31/ Because we conclude that "removing those who present such a risk is necessary to further 'the Exchange Act's basic purpose of protecting public investors,' a bar in such circumstances – a complete failure to respond and no mitigation – has a remedial, and not a punitive, purpose." 32/

NASD's standard sanction of a bar protects investors not only by removing from the securities industry an individual or firm that has already shown a refusal to be investigated but also by deterring all current and future SRO members and associated persons from failing to cooperate. 33/ NASD members and associated persons who know of wrongdoing and are approached by NASD with requests for information as part of an investigation should not have an incentive to fail to cooperate. The sanction for any misconduct an NASD investigation uncovers could be less than a bar, and wrongdoers should know that cooperation is their best chance of avoiding the bar that they may receive for non-cooperation (in the absence of mitigating factors).

B. We next consider the arguments that Berger raises in support of his claim that a permanent bar is excessive or oppressive and imposes an unnecessary burden on competition. On remand, Berger argues that no sanction is appropriate because of his "objectively reasonable belief" that he was not subject to NASD's jurisdiction, that barring him from association with a broker or dealer does not serve a remedial purpose, and that his reliance on counsel is a

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29/ Fawcett, 91 SEC Docket at 3157 n.27. The other two are the sanction guidelines applicable to the conversion of customer funds and to cheating during broker-dealer qualification examinations. Id. A bar may be imposed for many other violations, such as intentional or reckless misrepresentations or omissions of material fact, where NASD deems the particular misconduct at issue to be egregious. See, e.g., NASD Sanction Guidelines at 93.

30/ Fawcett, 91 SEC Docket at 3157.

31/ Dennis A. Pearson, Jr., Exchange Act Rel. No. 54913 (Dec. 11, 2006), 89 SEC Docket 1627, 1640 (quoting Gershon Tannenbaum, 50 S.E.C. 1138, 1141 (1992)).

32/ PAZ, 93 SEC Docket at 5127-28 (internal citations omitted).

33/ See PAZ, 494 F.3d at 1066 (stating that "general deterrence" may be "considered as part of the overall remedial inquiry") (quoting McCarthy v. SEC, 406 F.3d 179, 189 (2d Cir. 2005)).

mitigating factor that warrants a lesser sanction. For the reasons discussed below, we reject these arguments.

1. Berger contends that, because he had an "objectively reasonable" belief that he was not subject to NASD's jurisdiction, he should not have been sanctioned at all. 34/ Our prior opinion in this case determined that NASD does not have a mechanism for resolving questions of jurisdiction prior to a respondent's scheduled appearance at an OTR; that NASD followed its rules in this proceeding; that its procedures accorded with the "fair procedure[s]" contemplated by Exchange Act Section 15A(b)(8); 35/ that subjecting oneself to NASD's disciplinary process, interposing one's objection, and relying on NASD's procedures is the appropriate route to challenge NASD jurisdiction; and that NASD had jurisdiction over Berger. None of these conclusions is open to challenge on remand. Berger does not explain how, in light of them, his claim that he had a "colorable basis for objecting" to NASD's requests for testimony under Rule 8210 should immunize him from sanctions for failing to comply.

The only authority Berger cites for his arguments is Fiero v. SEC 36/, an unpublished opinion, which the court of appeals stated was "a summary order, which cannot be cited, let alone relied upon." 37/ Moreover, Fiero is distinguishable from the facts at issue here.

Respondent Fiero received and ultimately refused to comply with a request from an individual identified as NASD's Deputy Director of Market Surveillance (the "Deputy Director") that Fiero appear for testimony pursuant to the version of Rule 8210 then in effect. 38/ The court of appeals reversed and vacated the Commission's order affirming NASD's sanctions against Fiero. 39/ The court determined that NASD's Market Surveillance Committee ("Committee") did not have the authority to request the investigative testimony and that a reasonable person would have thought that the Deputy Director was acting on behalf of that Committee when requesting that Fiero testify. However, the court in Fiero distinguished the facts before it from a case in which "testimony or information is sought from witnesses by those NASD committees

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34/ We address here Berger's argument that the existence of a jurisdictional defense precludes sanctions altogether. Berger also argues that his jurisdictional defense is a mitigating factor in the sanctions analysis, which we take up in addressing his advice-of-counsel claim.

35/ 15 U.S.C. § 78*o*-3(b)(8).

36/ No. 98-4103, 1999 WL 33952140 (2d Cir. Jan. 20, 1999) (unpublished opinion) (reversing and vacating John J. Fiero, 53 S.E.C. 434 (1998)).

37/ Fiero v. SEC, No. 98-4103, slip op. at 2 (2d Cir. Mar. 26, 1999) (denying rehearing).

38/ Fiero, 1999 WL 33952140, at *1.

39/ Id. at *4.

with appropriate authority," stating that under those circumstances "witnesses are not permitted to place conditions on their testimony." 40/

That is precisely the case here. For the reasons stated in our prior opinion, we found that NASD staff were authorized to seek Berger's appearance pursuant to Rule 8210. We previously found, as had NASD, that Berger played an "active role in completing" the initial Form U4, which was filed four days before his securities licenses were due to expire, and the first and second amended Forms U4, filed over the next month. The record showed that during the period from late March 2003 to mid-May 2003, Berger initiated the registration process; filled out and forwarded to Millennium a template of personal information in a back-and-forth process with its chief compliance officer (the individual responsible for filing Forms U4 at the firm); signed the Form U4 electronically by typing in his own name; and supplied detailed Form U4 information that was previously unavailable in the Central Registration Depository ("CRD") in response to deficiency notices from NASD. These findings concerning Berger's actions undermine his claim that he reasonably believed that he had not applied for registration. While Berger testified that he had "no recollection of receiving or signing" the Form U4, he does not claim that, at the time he received and refused to comply with NASD's requests for testimony, he made any attempt to refresh his recollection by contacting Millennium or to obtain copies of any documents. For these reasons, we reject Berger's claim of an "objectively reasonable" belief.

2. Berger contends that a permanent bar is punitive rather than remedial because NASD has made no determination of his overall fitness or the likelihood that he will commit future misconduct. Rather, according to Berger, NASD's basis for barring him was "really general deterrence; punish Berger to ensure that the next person complies."

As we have explained above, the risks presented by persons who, in the absence of mitigating factors, completely fail to respond to Rule 8210 requests are appropriately remedied by a bar. Berger provides no explanation for his failure to comply with NASD's first request for information, other than his first counsel's comments in oral argument before the NAC indicating that Berger left the matter entirely to his attorney, who "failed to get back to the NASD in time." Berger's only stated reason for not complying with the second request was a jurisdictional defense that, as discussed, is belied by what the evidence shows about his own actions with respect to the Forms U4. Berger provided no information in response to either request and did not offer to provide any such information until nearly sixteen months after the first request, after a disciplinary proceeding had been brought, a hearing held, and a bar imposed. Even then Berger offered to comply only on the condition that NASD eliminate the sanction against him. As discussed below, Berger has failed to show that the circumstances of this case mitigate his violation.

In addition, Berger has a prior disciplinary history. NASD considered the serious nature of Berger's previous misconduct, which included flipping, supervision, and registration

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40/ Id. at *3.

violations that carried substantial sanctions. That his settlements with NASD, involving significant, multiple acts of past misconduct, "occurred nearly ten years ago" and did not "involve[] violations of Rule 8210 or a failure to cooperate with an investigation," as he argues, does not mean that they have no bearing on his present fitness to remain in the securities industry. Viewing the circumstances of Berger's failure to respond to its information requests in light of his previous violations, NASD determined that Berger's misconduct posed a serious risk to investors.

To minimize his failure to comply in any manner with the Rule 8210 requests and its implications for his present fitness, Berger argues that NASD is acting as if he were "accused of serious wrongdoing, threatening to commit future misconduct, and abjectly refusing to testify without cause in order to avoid punishment." Berger contends that none of this is true, that in general terms he has simply tried to preserve his "privacy" and "time," and, therefore, that a bar is not warranted. He further asserts that not all Rule 8210 violations are the same and that, while "[s]ome may be accused of underlying wrongdoing," he was not.

However, "a request for information is no less serious because NASD issues the request in an effort to prevent or uncover misconduct rather than to unearth the details of misconduct of which it is already aware." 41/ To allow Berger to justify his refusal to testify by using an after-the-fact assessment of the results of NASD's investigation would shift the focus from NASD's perspective at the time it seeks the information and disregard intervening events. It would also ignore the fact that refusal to cooperate with an investigation can prevent NASD from determining and establishing whether wrongdoing occurred, undermining NASD's ability to protect the investing public. 42/ Berger's violative conduct does not cease to be serious because it was allegedly motivated by a desire to avoid the loss of privacy and time that is inherent in compliance with any information request.

Nor does it diminish the seriousness of Berger's failure to provide information that he may have been, in his words, "merely a witness" in an investigation that he assumes was not "impacted" by his refusal to testify. 43/ Berger may not second guess NASD's information requests. 44/ Moreover, the requests for testimony concerned information essential to NASD's investor-protection efforts. Given his access to Millennium's back-office systems, Berger was

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41/ PAZ, 93 SEC Docket at 5131.

42/ See id. at 5131-32.

43/ See supra note 10.

44/ Morton Bruce Erenstein, Exchange Act Rel. No. 56768 (Nov. 8, 2007), 91 SEC Docket 3114, 3120 (stating that a "member or associated person may not 'second guess[]' an NASD information request . . . ."), petition denied, No. 07-15736, 2008 WL 4216552 (11th Cir. Sept. 16, 2008).

well-situated to provide potentially valuable information, and his assumptions about the investigation are unwarranted and unsupported. 45/

As discussed, an NASD staff supervisor testified at the hearing that, while conducting a routine examination of Millennium, NASD staff detected the potential circumvention of day-trading rules and noncompliance with margin regulations by the firm's day-trading clients, with the possible involvement and awareness of Millennium principals and personnel. Exchange Act Section 7 incorporates rules (specifically, Regulation T) of the Board of Governors of the Federal Reserve governing margin requirements and prescribes lending limits for the initial extension of credit on securities "[f]or the purpose of preventing the excessive use of credit for the purchase or carrying of securities." 46/ The Commission has "note[d] the importance of the extension of credit rules promulgated under Exchange Act Section 7," which "protect public customers from the potential consequences of over-leveraging their securities purchases, and preserve the public interest by maintaining the financial integrity of broker-dealers." 47/ In 2001, in approving proposed NASD rule changes that specifically addressed risks associated with day-trading, and that included a per-account minimum-equity requirement, the Commission explained that "[g]iven the potential for significant losses to those persons who engage in day-trading activities, legislators and regulators have scrutinized the practice and have taken steps to protect investors and limit financial risks to investors, broker-dealers, and securities markets." 48/ The Commission found that the proposed rules "are designed to reduce excessive and unnecessary risk of financial loss to market participants" and thereby increase "overall market integrity." 49/

Berger also argues that a permanent bar is punitive because it virtually assures that an individual threatened with a permanent bar for initially not responding will never comply with an NASD information request. According to Berger, a conditional bar – a bar that would remain in place only so long as he refused to comply with Rule 8210 – would be remedial because it could coerce compliance with Rule 8210 and therefore would result in less harm to the investigation. Berger's argument, however, omits the fact that NASD's rules do not provide for a conditional bar. Nor is there any statutory requirement that NASD provide for conditional bars. In rejecting a similar argument that a bar was inappropriate where a respondent offered to comply with a Rule 8210 request after having refused to do so for fourteen months, we stated that "NASD should not have to bring a disciplinary proceeding in order to obtain compliance with its rules

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45/ See, e.g., supra text accompanying note 10.

46/ 15 U.S.C. § 78g(a).

47/ See John Thomas Gabriel, 51 S.E.C. 1285, 1293 (1994).

48/ Order Approving Proposed Rule Changes Relating to Margin Requirements for Day Trading, 66 Fed. Reg. 13608, 13611, 13616 (Feb. 27, 2001).

49/ Id. at 13617.

governing investigations." 50/ In addition, timely compliance is essential to the prompt discovery and remediation of wrongdoing. We agree with NASD that a conditional bar could result in a delay in compliance with NASD's information request as an individual calculates whether refusing to comply would be more advantageous than providing the requested information and when compliance would best suit his or her own interests, with no assurance that the information would ever be provided, much less while it was still useful.

Moreover, this case illustrates the deficiencies of a conditional bar as a sanction for failure to comply with Rule 8210. Millennium terminated or withdrew its registration on March 16, 2005, was expelled from NASD membership on July 12, 2005 for non-payment of fines, and accepted on July 28, 2005 a $125,000 fine and censure for "various compliance violations." 51/ These events took place fourteen months or more after Berger was first asked to testify. Although Berger suggests that they show that the relevant NASD investigation was not affected by his failure to cooperate, there is no indication that these events relate to the relevant NASD investigation (the subject matter appears unrelated). To the contrary, NASD argues, "Berger's failure to testify impeded NASD's investigation by depriving NASD of the ability to ask for facts and explanations regarding day-trading and Regulation T issues concerning Millennium and the PTF account" and that "[l]argely as result of Berger's refusal to testify," NASD was not "able to determine whether Millennium engaged in any violative activity with respect to the PTF accounts." Berger argues that his conduct was not serious because NASD could have "resumed its investigation" after he "offered to testify" in a June 7, 2005 affidavit as "part of his appeal" of the Hearing Panel's March 23, 2005 decision. However, the events here demonstrate NASD's need for prompt cooperation and why a respondent may not substitute his judgment for NASD's with respect to its priorities, resource allocation, and manner of conducting an investigation.

The cases Berger cites to support a conditional bar are inapposite. None involves a complete failure to respond to an NASD information request. Several involve a failure to comply with a court order where a conditional sanction carried the potential to remedy the harm. 52/ Moreover, the cases cited by Berger involve coercion by conditional sanction through

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50/ Hershberg, 87 SEC Docket at 498.

51/ Berger attaches to the appendix to his opening brief information relating to Millennium's recent disciplinary history and its 2005 expulsion from NASD membership. Rule 323 of our Rules of Practice, 17 C.F.R. § 201.323, permits us to take official notice of any "material fact" and, accordingly, we take official notice of the Millennium information.

52/ See, e.g., Hicks ex rel. Feiock v. Feiock, 485 U.S. 624 (1988) (remanding proceeding to determine, among other things, whether parent, who had been held in contempt for failure to comply with a child-support order, would purge the contempt judgment by paying his arrearage); Smith v. Sullivan, 611 F.2d 1050 (5th Cir. 1980) (reversing contempt judgments against sheriff and other public officials for failure to comply with a district

(continued...)

the use of subpoena power, judicial enforcement of subpoena power, and judicial contempt powers. 53/ These are powerful tools to obtain the sought-after information, but NASD does not have such powers. The question here is whether a bar is necessary or appropriate to safeguard NASD's ability to investigate questionable activity. We believe it is and reject Berger's argument that NASD's sanction of a permanent, as opposed to conditional, bar is punitive and excessive.

3. Berger next contends that, even if his conduct warranted a sanction, his reliance on counsel was a mitigating factor that should trigger a lesser sanction than a bar. Citing the "principal considerations" enumerated in the introductory section of the Sanction Guidelines, Berger identifies as a mitigating factor "[w]hether the respondent demonstrated reasonable reliance on competent legal or accounting advice." 54/ He also notes that the Sanction Guidelines provide that a respondent's intent, recklessness, or negligence with respect to the violation is to be considered. Berger argues that his reliance on Second Counsel's advice "negates any finding that he acted willfully in violating NASD rules."

Berger cites to a three-page affidavit that he created and submitted to NASD on June 7, 2005 – following the ruling by the Hearing Panel, but prior to the hearing of his appeal before NASD's National Adjudicatory Council (the "NAC"). 55/ The affidavit states that the advice that Second Counsel provided to Berger "[c]an be summarized" in the following terms: (1) "you do not have to appear for the OTR because you are not subject to the NASD's jurisdiction;" (2) "if you appear for the OTR, you will waive your jurisdictional defenses;" and (3) "if the NASD (incorrectly) determines that you are subject to their jurisdiction, the sanction will be conditional and you will be given an opportunity to testify to avoid the sanction."

The affidavit also states that "[a]fter receiving [Second Counsel's] initial advice," Berger "questioned [Second Counsel] several times about the consequences of not appearing. Each time, he firmly reiterated his advice, assuring [Berger] that [Berger] was not subject to the

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52/ (...continued)
court order limiting the inmate population of a county jail, where lifting of contempt sanctions was conditioned on inmate population not exceeding a certain number during specified dates).

53/ In Penfield Co. of Cal. v. SEC, 330 U.S. 585, 593-95 (1947), for example, the court held that a contempt judgment that does not include relief of a coercive nature is punitive. However, that case involved Commission subpoena authority, which can be judicially enforced. NASD has no such authority.

54/ NASD Sanction Guidelines at 9.

55/ Following the Hearing Panel decision but before the NAC hearing, Initial Counsel resumed his representation of Berger.

NASD's jurisdiction, but even if [he] were, this [was] the appropriate way to challenge jurisdiction." The affidavit adds that Second Counsel "[n]ever" advised Berger that "[Berger] could receive a permanent sanction as a result of [his] nonappearance," and moreover, had counsel advised him otherwise, Berger "would have appeared." The affidavit states further that Berger "hired an expert attorney [Second Counsel] who told [him] that [Berger] was not subject to the NASD's jurisdiction and that [his] nonappearance was not only legitimate but the only means for asserting [his] jurisdictional rights." The affidavit asserts that, "[b]ecause [Berger] acted reasonably in light of the advice [he] received and in good faith, [he] believe[s] the severe sanction imposed on him was unjustified." Berger argues that he is entitled to "mitigation credit" reducing his bar to a two-year suspension based on his reliance on Second Counsel's advice.

As we noted in our prior opinion, Berger does not claim that he failed to appear at the first OTR on the advice of counsel. Berger seeks to rely on advice of counsel with respect to the second OTR.

In our prior opinion, we recognized that a valid claim of reliance upon counsel may have a mitigating effect on sanctions. To constitute mitigation, however, the claim must have sufficient content and sufficient supporting evidence. Both are lacking in this case. Indeed, the evidence that establishes that NASD had jurisdiction over Berger is flatly inconsistent with Berger's account of his actions with regard to the Forms U4 and undercuts his assertions of reasonable, good-faith reliance on counsel.

As a legal matter, Berger, citing SEC v. Howard, argues that he need not "hit each of the 'elements'" that courts and the Commission commonly consider in deciding whether to credit an advice-of-counsel claim. 56/ Those elements are that the person made complete disclosure to counsel, sought advice on the legality of the intended conduct, received advice that the intended conduct was legal, and relied in good faith on counsel's advice. 57/

Contrary to Berger's contention, Howard does not excuse a less than "complete" advice-of-counsel claim in this case. The Howard court considered evidence of advice of counsel in making a determination about an essential element of liability that the plaintiff must prove: whether there was substantial evidence that Howard acted with the state of mind (scienter) necessary to violate the applicable substantive law. As we have held previously, scienter is not

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56/ 376 F.3d 1136, 1147 (D.C. Cir. 2004).

57/ Markowski v. SEC, 34 F.3d 99, 105 (2d Cir. 1994); C.E. Carlson v. SEC, 859 F.2d 1429, 1436 (10th Cir. 1988); SEC v. Goldfield Deep Mines Co. of Nevada, 758 F.2d 459, 467 (9th Cir. 1985); SEC v. Savoy Indus., Inc., 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981). See also Joseph J. Vastano, Jr., 57 S.E.C. 803, 813 n.22 (2004); Anthony H. Barkate, 57 S.E.C. 488, 497 n.19 (2004); Toni Valentino, 57 S.E.C. 330, 338-39 & n.11 (2004).

an element of a Rule 8210 violation. 58/ An advice-of-counsel claim is not relevant to liability in this case, but instead, only potentially as to sanctions. The Howard court did not address when a claim of reliance on advice of counsel will qualify as mitigation of an established violation for purposes of determining what remedial sanction is in the public interest.

The Commission reviews the sanctions against Berger with "due regard for the public interest and the protection of investors," which is at issue even if a respondent did not act with scienter. 59/ Reasonable reliance on competent legal advice is simply one factor to be considered in the overall sanctions analysis and can be evidence of a less culpable mental state that justifies a reduced sanction. 60/ However, when a respondent is found to have committed violations, he should not too easily avoid a sanction that is necessary for the protection of the investing public. We believe that the respondent asserting such reliance must provide sufficient evidence to the body making the sanction determination that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice. Courts consider it important that "the advice of counsel [the client] received was based on a full and complete disclosure." 61/ Further, it "isn't possible to make out" an advice-of-

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58/ Rouse, 51 S.E.C. 581 (1993) (rejecting the view that we must find scienter to find a violation of the predecessor of Rule 8210). Cf. Joseph G. Chiulli, 54 S.E.C. 515, 522 (2000) (finding no scienter requirement for Rule 3110).

59/ 15 U.S.C. 78(e)(2); see PAZ, 494 F.3d at 1065.

60/ See, e.g., Goldfield, 758 F.2d at 467; SEC v. Steadman, 967 F.2d 636, 648 (D.C. Cir. 1992) (where evidence of attorney's advice "in a formal, unqualified opinion letter" that was also received and not questioned by the clients' "disinterested independent auditor, a partner at one of the country's largest accounting firms who had substantial expertise in [the relevant area of] accounting and auditing," coupled with "no suggestion" that the clients "did not act in good faith," established "[g]ood faith reliance on counsel," considering it as "a factor in determining the propriety of injunctive relief"); Savoy, 665 F.2d at 1315 n.28 (even when the four factors are established, reliance on advice of counsel "is only one factor to be considered in determining the propriety of injunctive relief"); SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1101-02 (2d Cir. 1972) (advice of counsel "may be a factor to consider in deciding whether to grant injunctive relief" where the defendant "relie[s] in good faith on counsel's advice" and "counsel's interpretation of the law" is "'neither frivolous nor wholly unreasonable'"). Berger cites no case rejecting these principles.

61/ SEC v. Merchant Capital, 483 F.3d 747, 772 (11th Cir. 2007); accord Dolphin & Bradbury, Inc. v. SEC, 512 F.3d 634, 642 (D.C. Cir. 2008) (that respondent "failed to disclose the [pertinent] information to [his counsel], who lacked independent knowledge of this information," "substantially undercuts his [reliance on counsel] argument"; "'Reliance on advice of counsel will not be available to the defendant if he failed to

(continued...)

counsel claim "without producing the actual advice from an actual lawyer." 62/ The Seventh Circuit rejected a defendant's argument that "reliance on advice of counsel exculpates his conduct" because the defendant "offered nothing more than his say-so." 63/ The court noted that "[h]e did not produce any letter from a securities lawyer giving advice that reflected knowledge of all material facts; he did not produce any opinion letter, period. Nor did [he] offer the live testimony of any securities lawyer." 64/

Berger's advice-of-counsel claim is deficient in both of these respects. During the period from NASD's first request for Berger's testimony on January 14, 2004 to the Hearing Panel's decision on March 23, 2005, Berger and Second Counsel made only the barest of references to advice of counsel. These references occurred in letters to NASD, in arguments advanced during a pre-hearing conference and the NASD hearing and in briefs, and in one short exchange between Second Counsel and Berger at the December 2004 hearing. 65/ None of these references contains information about what advice Second Counsel offered or what he had been told in rendering this advice. 66/

61/ (...continued)
disclose all relevant facts to the attorney.'") (citation omitted); Howard, 376 F.3d at 1148 (in crediting reliance-on-counsel argument, stating that outside counsel "oversaw the closing of the first offering at its law offices, that it drafted the documents for the second offering," and that inside and outside counsel "approv[ed] of" transactions challenged in the case).

62/ SEC v. McNamee, 481 F.3d 451, 456 (7th Cir. 2007).

63/ Id. at 455-56.

64/ Id. at 456; accord Eugene T. Ichinose, Jr., 47 S.E.C. 393, 395 (1980) (finding that respondent could not rely on advice of counsel where record did not "show with any specificity what advice [respondent] may have received from" counsel).

65/ At the December 2004 hearing, Second Counsel asked Berger: "[W]as it on advice of counsel that you didn't come in?" Berger replied, "For the on-the-record interview, yes." That exchange, prompted by a Hearing Panel member's question, was abruptly curtailed by Second Counsel's assertion of attorney-client privilege. However, the attorney-client privilege "cannot at once be used as a shield and a sword[,]" and the privilege "may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications." United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (citations omitted), cert. denied, 502 U.S. 813 (1991).

66/ In his affidavit, Berger appears to criticize the quality of Second Counsel's advice, noting that Second Counsel "did not advise me of the consequences of asserting [attorney-client] privilege with respect to my 'advice of counsel' defense, or even that the decision

(continued...)

Not until June 7, 2005, during his appeal to the NAC, did Berger seek to introduce evidence of any details of his communications with Second Counsel, in the form of his affidavit drafted under the renewed representation of his Initial Counsel. Because Berger had given no substantive testimony on the advice-of-counsel claim, he deprived the Hearing Panel and the NAC of a proper airing of the claim, including cross-examination, and of the opportunity to assess his credibility. Berger also presented no evidence to corroborate the assertions in his affidavit, such as an affidavit or testimony from Second Counsel. 67/

Berger's affidavit contains no description of what disclosure he made to Second Counsel and whether Berger provided him with all relevant facts, nor has Berger cited anything else in the record that does. 68/ This is particularly meaningful in light of what the record shows Berger would have known, but did not include in his testimony at the hearing, about the Forms U4 and, at a minimum, his claimed uncertainty about his own actions with regard to the Forms, which would have been important for counsel to know in assessing jurisdiction. Due to the lack of evidence about what Berger told his counsel, the record does not show that Berger relied reasonably and in good faith on advice that NASD did not have jurisdiction over him and that even if NASD did have jurisdiction, the sanction would be conditional and Berger would be given an opportunity to testify to avoid the sanction.

Record support is also lacking for Berger's assertions about the legal advice he received. By its own terms, Berger's affidavit purports only to "summarize[]" Second Counsel's advice. Second Counsel's February 11, 2004 letter to NASD merely stated that "NASD does not have jurisdiction over [Berger]" and that Berger was unwilling to testify until "it is determined that NASD does have jurisdiction." That Second Counsel raised certain arguments during the litigation of the proceeding, cited by Berger in his reply brief on remand, is not sufficient to

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66/ (...continued)
whether or not to waive it was mine." However, Berger "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . ." Link v. Wabash, R.R., 370 U.S. 626, 633-634 (1962).

67/ Berger asserts that nothing precluded NASD from obtaining testimony or an affidavit from Second Counsel. NASD does not have subpoena power and could not have compelled Berger's attorney to testify. In addition, it is Berger's obligation to marshal all evidence in his defense. See Robert Thomas Clawson, 56 S.E.C. 584, 595 & n.25 (2003), petition denied, 2005 WL 2174637 (9th Cir. 2005) (unpublished opinion).

68/ See, e.g., Hal S. Herman, 55 SEC 395, 403 (2001) (finding no reliance on advice of counsel where respondent could not establish that he made full disclosure to counsel).

establish that counsel advised Berger at the time NASD requested his testimony that failing to appear was legal or that Berger's reliance on such advice was reasonable. 69/

We note that the record with respect to Second Counsel's advice contrasts with the evidence in Morton Bruce Erenstein. 70/ In Erenstein, we sustained NASD's imposition of a one-year suspension instead of a bar and noted that NASD "appropriately considered," in mitigation of Erenstein's Rule 8210 violation, his attorney's apparently "good faith interposition of his objections . . . ." The record demonstrated that Erenstein appeared at an OTR and testified until his counsel objected to NASD's requests for information about Erenstein's tax returns. Counsel subsequently sent a letter and other communications to NASD detailing the basis for his objection. 71/ Here, by contrast, Berger did not rely on counsel's advice in failing to appear at the first OTR and refused to appear at the second OTR. Neither he nor his counsel attempted to explain to NASD at the time of the scheduled testimony the basis for Berger's claim that NASD lacked jurisdiction. Instead, Second Counsel's letter responding to NASD's letter scheduling the second OTR stated merely that "we will determine whether the NASD has jurisdiction over Mr. Berger" and "will notify you of our intention as to whether or not Mr. Berger will testify on that date." Second Counsel's subsequent letter advising NASD that Berger would not appear provided no basis for his jurisdictional objection, referring only to "our view that the NASD does not have jurisdiction" and declining to address the matter further until "the NASD determines to bring an 8210 proceeding."

Berger appears to concede that an advice-of-counsel claim is not mitigating if it is premised on a strategy to avoid full compliance with applicable regulatory requirements. 72/

69/ Even examining Second Counsel's statements during the proceeding does not help Berger. Statements that lack of jurisdiction "was not a frivolous defense," that it "has substance," and that "[w]e have a lawfully legitimate right to challenge NASD's jurisdiction" show nothing more than that Second Counsel argued that Berger had a colorable jurisdictional argument, not necessarily one that was likely to prevail. We can find no statement anywhere in the record by Second Counsel that if NASD proves jurisdiction, "the sanction will be conditional and [Berger] will be given an opportunity to testify to avoid the sanction."

70/ Erenstein, 91 SEC Docket at 3114.

71/ Id. at 3124. Erenstein eventually produced the withheld information eight months after it was first requested, after receiving a Wells notice informing him that NASD staff intended to recommend institution of disciplinary proceedings.

72/ See Valentino, 57 S.E.C. at 338 (stating that "[w]e have repeatedly held that reliance on counsel does not excuse an associated persons's obligation to supply information or testimony or otherwise cooperate with NASD investigations," nor "should it mitigate the

(continued...)

Berger seems to suggest that even if the record gave rise to such a concern, which the Hearing Panel expressed here, he could dismiss that concern from consideration by asserting in his affidavit that he did not seek "to thwart the NASD's investigation or to foster strategic advantage." We understand the basis of the Hearing Panel's concern. Berger has stated that he did not want to spend the time required to provide the requested information. However, given the lack of evidence that Berger relied on the advice of counsel, we do not need to reach the issue of whether Berger sought to thwart NASD. On the record before us, we have no basis to determine whether Berger's reliance on advice-of-counsel claim is valid. Thus, we cannot accept Berger's advice-of-counsel claim as mitigating.

Based on the rationale behind the recommendation of a bar as the standard sanction for a complete failure to respond to an NASD request for information, and given the absence of any mitigating factors in this case, we find that the bar against Berger is neither excessive nor oppressive.

Berger argues for the first time in his reply brief that barring him from association with any broker or dealer would impose an undue burden on competition. He asserts that the "stigma" of a bar would impede his ability to engage in lawful economic activity, particularly in the securities industry. This is not the type of competitive concern that Exchange Act Section 19 meant to be considered. 73/ Otherwise, NASD could never impose a bar on an individual or firm because the bar would always have the same effect that Berger describes. Even lesser sanctions could have the same such effect and therefore would be forbidden in Berger's view. We do not

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72/ (...continued)
sanctions imposed" under circumstances in which the respondent, "in determining whether to testify," was "weighing a concern regarding her continued ability to work in the securities industry if she failed to testify against a concern about the potential consequences to her husband if she pro[f]fered testimony" and "engaged in dilatory tactics to evade questioning by NASD"). Cf. Steadman, 967 F.2d at 642 (in considering whether defendants raising an advice-of-counsel claim "acted in bad faith," noting lack of "any motive" or "anything, to gain.").

73/ The requirement that sanctions imposed by an SRO not impose an unnecessary or inappropriate burden on competition was added to Section 19 of the Exchange Act by the Securities Reform Act of 1975 (the "SRA"), Pub. L. No. 94-29, 89 Stat. 97 (codified as amended in scattered sections of 15 U.S.C.), a legislative effort to enhance competition among securities exchanges and markets. The SRA's intent, and consequently, that of Exchange Act Section 19, is to "break down the unnecessary regulatory restrictions which . . . restrain competition among markets and market makers . . . ." S. Rep. No. 94-75, at 12-13 (1975). The SRA does not address the economic impact on former securities professionals barred from further participation in the industry.

believe that Exchange Act Section 19 embraces consideration of the reasons advanced by Berger for competitive harm.

Accordingly, we find that the bar against Berger does not impose any burden on competition and is neither excessive nor oppressive, because, as set forth above, the bar serves a remedial rather than a punitive purpose and Berger has not identified any factors that mitigate his violations.

An appropriate order will issue. 74/

By the Commission (Chairman COX and Commissioners CASEY, AGUILAR, and PAREDES; Commissioner WALTER not participating).

Florence E. Harmon
Acting Secretary

74/ 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

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 58950 / November 14, 2008

Admin. Proc. File No. 3-12393r

In the Matter of the Application of

HOWARD BRETT BERGER

c/o Andrew T. Solomon, Esq.
Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, New York 10104

For Review of Disciplinary Action Taken by

NASD

ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY 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 Howard Brett Berger, and NASD's assessment of costs, be, and they hereby are, sustained.

By the Commission.

Florence E. Harmon
Acting Secretary