

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF MARKET
REGULATION,

Complainant,

v.

ALEX LUBETSKY
(CRD No. 5869838),

Respondent.

Expedited Proceeding
No. FPI140011

STAR No. 20110297130-02

Hearing Officer-DRS

HEARING PANEL DECISION

March 12, 2015

Respondent is suspended from associating with any FINRA member firm in any capacity for refusing to provide testimony at an on-the-record interview pursuant to FINRA Rule 8210. The suspension will automatically convert to a bar if, within three months after the date of this decision, he fails to fully comply with the request for testimony. Respondent is also ordered to pay hearing costs.

Appearances

For the Department of Market Regulation, Complainant, Laurie Doherty, Esq., and Justin Chretien, Esq., Rockville, Maryland.

For Alex Lubetsky, Respondent, Kerry Brainard Verdi, Esq., Martin & Gitner LLC, Washington, DC.

DECISION

I. Introduction

During an investigation into possible market manipulation occurring in an account at Lek Securities Corporation ("Lek"), the Department of Market Regulation sought the on-the-record testimony ("OTR") of Alex Lubetsky, formerly an associated person at Lek. At his OTR, Lubetsky invoked the Fifth Amendment to the U.S. Constitution and refused to answer questions. Because FINRA is not a governmental entity, an associated person may not ordinarily refuse to answer questions on that basis. Lubetsky, however, claimed that Market Regulation had requested his testimony at the behest of the U.S. Securities and Exchange Commission ("SEC")

and that the two regulators were engaging in joint action in connection with their respective investigations of Lek. As a result, according to Lubetsky, FINRA's request constituted state action, thereby entitling him to assert the Fifth Amendment as a basis for not answering questions.

Market Regulation disputed Lubetsky's state action accusation and sent him a Notice of Suspension from associating with any FINRA member firm based on his refusal to answer questions. Lubetsky requested a hearing, which stayed his suspension. In his hearing request, Lubetsky re-asserted his state action defense. On January 8, 2015, a telephonic hearing was held before a Hearing Panel¹ during which the parties introduced exhibits but called no witnesses to testify. The primary issue before the Panel with respect to liability is whether Lubetsky established his state action defense. The Panel concludes that Lubetsky failed to do so; finds that he violated FINRA Rule 8210 by refusing to testify; and imposes the sanctions set forth herein.

II. Findings of Fact

A. Alex Lubetsky

Alex Lubetsky entered the securities industry in December 2010 as a general securities representative at Lek, where he was registered until August 2014.² He is not currently registered with a FINRA member firm.³ Before joining Lek, from June 2007 to May 2010, Lubetsky was employed by an entity named Avalon Fund in Kiev, Russia.⁴

B. Lubetsky Invokes the Fifth Amendment at His OTR and Refuses to Answer All But a Few Preliminary Questions

In October 2011, Market Regulation began investigating potentially manipulative trading activity occurring from an account at Lek.⁵ According to Market Regulation, during the investigation, it learned that the subject activity originated from an account named Avalon FA LTD.⁶ In June 2014, in connection with its investigation and pursuant to Rule 8210, Market Regulation issued a written request for Lubetsky to appear for an OTR.⁷ The Rule 8210 request scheduled Lubetsky's testimony for July 8, 2014.⁸ Attached to the request was an Addendum

¹ The hearing panel consisted of a Hearing Officer, David R. Sonnenberg, and a current member of the District 10 Committee and a current member of the District 11 Committee.

² CX-2, at 6.

³ CX-2, at 3.

⁴ CX-2, at 6.

⁵ CX-4, at ¶ 3. Market Regulation represents that it is conducting the investigation on behalf of FINRA and various FINRA client exchanges. CX-4, at ¶ 4.

⁶ CX-4, at ¶ 3.

⁷ JX-3; *see also* CX-4, at ¶ 7.

⁸ JX-3; *see also* CX-4, at ¶ 7.

informing Lubetsky that: (1) he was “obligated, under FINRA rules, to answer all questions asked by FINRA staff;” (2) FINRA “is not a governmental agency, and thus, does not recognize the Fifth Amendment privilege against self-incrimination in any of its proceedings, including an OTR;” (3) should he “refuse to answer any questions based on an assertion of the privilege, [he] may be subject to a FINRA disciplinary action and the imposition of sanctions, including a bar from the securities industry, suspension, censure, and/or fine;” and (4) “FINRA is subject to oversight by the SEC and routinely provides the SEC with access to its files.”⁹

Through counsel, Lubetsky informed Market Regulation that he was unavailable on July 8 and requested a continuance.¹⁰ To accommodate Lubetsky, Market Regulation twice rescheduled his testimony until September 9, 2014.¹¹ While rescheduling his testimony, Lubetsky’s counsel notified Market Regulation that Lubetsky intended to assert his Fifth Amendment rights “in response to the OTR.”¹² This notification prompted Market Regulation to direct Lubetsky’s counsel to the above-referenced language in the Addendum, and warned that if Lubetsky invoked the Fifth Amendment and refused to answer questions, he may be subject to disciplinary action.¹³

On September 9, 2014, Lubetsky, represented by counsel, appeared for his OTR. At the beginning of the OTR, Market Regulation informed him that he was appearing pursuant to Rule 8210 and that, among other things, if he refused to answer any questions truthfully and completely, or failed to provide any information, he could be subject to disciplinary action including a suspension or bar from the securities industry. Lubetsky acknowledged that he understood this,¹⁴ and also answered several preliminary questions.¹⁵

But when asked if he was known by any other names, Lubetsky invoked the Fifth Amendment and refused to answer further questions.¹⁶ Justifying this refusal, Lubetsky explained that he had been “informed that there is ample evidence to determine that there is a coordination between the SEC and the [sic] FINRA and their investigation of Lek Securities.” Lubetsky claimed that “[t]his coordination combined with the addendum to the 8210 request demonstrates that indicates [sic] -- that in this case the 8210 request is a state action, thereby allowing the assertion of the Fifth Amendment right to any questions.”¹⁷ He stated further that he

⁹ JX-3, at 3.

¹⁰ JX-4.

¹¹ JX-6; JX-7; JX-8; JX-9; *see also* CX-4, at ¶¶ 8–13.

¹² JX-7, at 2.

¹³ JX-9, at 2.

¹⁴ JX-10, at 5–6.

¹⁵ Lubetsky answered that he was represented by counsel (JX-10, at 5) and that he had no condition that impacted his ability to respond to the staff’s questions (JX-10, at 8).

¹⁶ JX-10, at 8–11.

¹⁷ JX-10, at 9.

had “decided to follow my counsel’s instruction and decline to testify based on my Fifth Amendment Constitutional right.”¹⁸ Finally, Lubetsky informed the staff that he declined to answer any questions on this basis until such time as all of his activities “are fairly aired and when I get the opportunity to explain my actions in a setting that will not compromise my ability to defend myself in any legal proceedings arising out of my activities.”¹⁹

In response, Market Regulation told Lubetsky that his Fifth Amendment claim was meritless; that FINRA was not a governmental agency and did not recognize the Fifth Amendment; and that if he refused to answer questions by asserting this privilege, he may be subject to disciplinary action, including a bar.²⁰ Additionally, Market Regulation denied that it was coordinating its investigation with the SEC, and represented that its inquiry was independent of, and separate from, any existing governmental inquiry relating to his conduct.²¹ Market Regulation then asked Lubetsky a few additional questions, including where he worked before joining Lek, but Lubetsky declined to answer these questions, relying on the Fifth Amendment.²² Market Regulation again reminded Lubetsky that his refusal to answer questions could lead to disciplinary action, including a bar.²³ Lubetsky reaffirmed his decision not to answer any more questions,²⁴ and Market Regulation terminated the OTR.²⁵

C. FINRA Issues a Notice of Suspension to Lubetsky

Based on Lubetsky’s refusal to testify, on November 7, 2014, FINRA issued a Notice of Suspension pursuant to FINRA Rule 9552(e) (“Notice”).²⁶ The Notice informed Lubetsky that he would be suspended from associating with any FINRA member firm in any capacity on December 1, 2014, unless, before then, he requested a hearing. The Notice also advised him that if he failed to comply with the Rule 8210 request before February 10, 2015, he would automatically be barred from association with any FINRA member in any capacity.

Lubetsky timely requested a hearing on November 21, 2014, thereby staying his suspension. In his hearing request, Lubetsky asserts that he has evidence demonstrating that FINRA and the SEC coordinated their respective Lek investigations. According to the hearing request, this coordination included FINRA and the SEC: (1) interviewing or deposing virtually the same witnesses from Lek; (2) seeking virtually the same documents from Lek and its

¹⁸ JX-10, at 9.

¹⁹ JX-10, at 10.

²⁰ JX-10, at 11–12.

²¹ JX-10, at 11, 15.

²² JX-10, at 16.

²³ JX-10, at 17.

²⁴ JX-10, at 18.

²⁵ JX-10, at 18–19.

²⁶ CX-5; CX-1 (copies of certified mail receipt and Federal Express receipt evidencing service of the Notice).

associated persons; and (3) contacting Lubetsky's counsel, within days of each other, to request Lubetsky's testimony. Lubetsky also references the language in the Addendum, noted above, that FINRA routinely provides the SEC with access to its files. He further asserts that the SEC/FINRA coordination transformed FINRA's Rule 8210 request for his testimony into state action. Accordingly, Lubetsky contends that he properly asserted the Fifth Amendment in response to FINRA's questions at his OTR.²⁷

D. Lubetsky's State Action Defense

The totality of Lubetsky's state action evidence consisted of the following exhibits:

(1) a June 4, 2014 email from Lubetsky's counsel informing Market Regulation's attorney that she represented both Lubetsky and SP, purportedly the administrative assistant to another Lek employee,²⁸ and further advising that she understood Market Regulation was seeking to speak with both Lubetsky and SP;²⁹

(2) a June 6, 2014 email from Market Regulation to counsel for Lubetsky and SP purportedly including FINRA requests for their on-the-record testimony;³⁰

(3) two SEC subpoenas issued on June 13, 2014, seeking testimony and documents from Lubetsky³¹ and SP;³² and

(4) a letter dated August 6, 2014, from Lubetsky's counsel to Market Regulation asserting that: (a) "the SEC is conducting a concurrent investigation of Lek;" (b) "there is ample evidence in this matter to demonstrate that there is coordination between the SEC and FINRA;" (c) "throughout these investigations both FINRA and the SEC have interviewed or deposed almost the same individuals from Lek" and "have sought almost identical documents from Lek and from associated persons from Lek;" (d) the SEC and FINRA contacted her "within days of each other to discuss scheduling of a deposition and OTR respectively" for Lubetsky; and (e)

²⁷ After Lubetsky requested a hearing, he sought discovery from Market Regulation. Lubetsky served Market Regulation with a "First Set" of interrogatories and document requests to obtain evidence to support his Fifth Amendment defense. Market Regulation opposed these discovery requests. The Hearing Officer denied the requests because, among other grounds, Lubetsky had not made a sufficient threshold showing that Market Regulation had engaged in state action. *See Order Denying Respondent's Requests for Discovery* (Dec. 29, 2014).

²⁸ Respondent's Post-Hearing Brief, at 2.

²⁹ JX-1.

³⁰ JX-2. In Respondent's Post-Hearing Brief, at 2; JX-2 is identified as evidencing FINRA requests for Lubetsky and SP's OTRs. This exhibit, however, references, but does not identify or contain, an attachment.

³¹ RX-1.

³² RX-2.

that the Addendum stated that “FINRA is subject to oversight by the SEC and routinely provides the SEC with access to its files.”³³

To rebut Lubetsky’s state action defense, Market Regulation submitted a declaration, under penalty of perjury, from Susan Tibbs, a Vice President in the Quality of Markets Section of Market Regulation and manager of the Market Manipulations Group (“MMG”) within Quality of Markets.³⁴ The declaration states, in pertinent part, that “MMG’s decision to request Lubetsky’s testimony was based solely on the time and completion of investigatory steps in our investigation of the suspicious trading activity entering the market through Lek.”³⁵ Further, Tibbs declares that “[a]t no time did SEC staff request, encourage, suggest, intimate, or otherwise influence or coerce, MMG staff in its decision to request the testimony of Lubetsky.”³⁶

Lubetsky provided no evidence countering Tibb’s sworn declaration or causing the Hearing Panel to reject the statements contained in it. Accordingly, the Hearing Panel finds that Lubetsky failed to demonstrate that FINRA and the SEC coordinated their respective investigations, conducted them jointly, or that the SEC requested, encouraged, suggested, intimated, or otherwise influenced, or coerced FINRA into issuing a Rule 8210 request seeking Lubetsky’s investigative testimony. At best, the record shows investigative overlap by two regulators, nothing more.

III. Conclusions of Law

A. Lubetsky Failed to Show that FINRA Engaged in State Action

Under the Fifth Amendment, “no person shall be compelled in any criminal case to be a witness against himself.”³⁷ This right against self-incrimination does not apply to self-regulatory organizations such as FINRA, which are not considered state actors.³⁸ Therefore, generally, a registered person cannot refuse to provide information to FINRA by asserting the Fifth Amendment.³⁹ Nevertheless, FINRA can be subject to the Fifth Amendment if it engages in state action by becoming significantly involved with a government investigation.⁴⁰ Significant involvement constituting state action occurs only when the nexus between the government and

³³ JX-7.

³⁴ CX-4.

³⁵ CX-4, at 4.

³⁶ CX-4, at 4.

³⁷ *Dep’t of Enforcement v. Legacy Trading Co., LLC*, No. 2005000879302, 2009 FINRA Discip. LEXIS 12, at *42 n.97 (NAC Oct. 8, 2010).

³⁸ *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *41 (citing *Warren E. Turk*, Exchange Act Release No. 55942, 2007 SEC LEXIS 1355, at *7–8 (June 22, 2007)).

³⁹ *Id.*

⁴⁰ *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *41 (citing *Gregg Heinze*, Exchange Act Release No. 56100, 2007 SEC LEXIS 1580, at *6 (July 19, 2007)).

the challenged action by a private party is so close “that the seemingly private behavior may be fairly treated as that of the State itself.”⁴¹ In determining whether such a close nexus exists, the relevant factors include whether: (1) “the challenged activity results from the State’s exercise of coercive power;” (2) “the State provides significant encouragement, either overt or covert;” or (3) “a private actor operates as a willful participant in joint activity with the State or its agents.”⁴²

Lubetsky bears a heavy burden in demonstrating joint activities sufficient to render FINRA a state actor.⁴³ In order to meet that burden, Lubetsky must demonstrate a nexus between the SEC and FINRA’s requests for testimony triggering his invocation of the Fifth Amendment.⁴⁴ In this case, Lubetsky failed to carry his burden.

Lubetsky averred that the SEC and FINRA had coordinated their respective Lek investigations, but provided no proof that this occurred. He showed merely that during contemporaneous FINRA and SEC investigations, the two regulators sought information, close in time, from the same two persons, i.e., Lubetsky and SP, and that Lubetsky was advised in the Rule 8210 request that FINRA routinely shares information with other regulators. This evidence is insufficient to establish state action. Cooperation and information sharing between the SEC and FINRA “will rarely render [FINRA] as state actor, and the mere fact of such cooperation is generally insufficient, standing alone, to demonstrate state action.”⁴⁵ Further, the temporal proximity of the FINRA and the SEC testimony requests⁴⁶ and information sharing⁴⁷ do not, by themselves, constitute joint activity sufficient to render FINRA a state actor.⁴⁸ Nor is there any

⁴¹ *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *41 (quoting *Brentwood Acad. v. Tennessee Secondary Sch. Ath. Ass’n*, 531 U.S. 288, 295 (2001) (internal quotation marks omitted)).

⁴² *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *42 (quoting *Tennessee Secondary Sch. Ath. Ass’n*, 531 U.S. 296 (internal quotation marks omitted)); *Sassano*, 2008 SEC LEXIS 2947, at *16–17 (Sept. 24, 2008) (“Some courts have described this last fact pattern as the ‘joint action’ test, and have focused on inquiries such as whether ‘the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity’ or whether ‘the particular actions challenged are inextricably intertwined with those of the government.’”).

⁴³ *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *43 (citing *Heinze*, 2007 SEC LEXIS 1580, at *19).

⁴⁴ *Sassano*, 2008 SEC LEXIS 2947, at *18.

⁴⁵ *Ficken*, Exchange Act Release No. 54699, 2006 SEC LEXIS 2547, at *24 (Nov. 3, 2006); *Sassano*, 2008 SEC LEXIS 2947, at *19.

⁴⁶ *Sassano*, 2008 SEC LEXIS 2947, at *23 (quoting *Turk*, Exchange Act Release No. 559422007, SEC LEXIS 1355, at *16) (June 22, 2007) (“evidence that SEC Enforcement and NYSE Enforcement requested an individual’s testimony ‘within one month of each other’ and ‘brought charges in connection with their respective investigations on the same day’ were insufficient to establish state action.”).

⁴⁷ *Legacy Trading Co., LLC*, 2009 FINRA Discip. LEXIS 12, at *43–44.

⁴⁸ See *SEC v. McGinn*, 2011 U.S. Dist. LEXIS 54416, at *13 (E.D.N.Y. Jan. 5, 2011) (“Speculation based on no more than the temporal nexus of certain events, the apparent ebbs and flows of an investigation, or the sharing of information and evidence will not suffice [to establish state action] absent evidence of direct SEC involvement in the FINRA investigation, such as the presence of SEC personnel at [the OTR taken by FINRA], requests to FINRA to obtain certain evidence, or evidence of jointly undertaken activities.”).

other evidence in the record suggesting that FINRA engaged in state action, or even that FINRA or the SEC had any involvement in each other's investigation.

In short, the timing of the FINRA and SEC actions in connection with their investigations is insufficient to prove a “causal connection between the requests for testimony’ in the separate investigations” or that that the SEC guided FINRA’s investigation.⁴⁹ Finally, the timing of the testimony requests does not show that the SEC “ha[d] so far insinuated itself into a position of interdependence with [Market Regulation] that it must be recognized as a joint participant” in connection with the testimony requests or “that the requests for testimony are ‘inextricably intertwined’ with investigations by the government.”⁵⁰ Consequently, the Hearing Panel rejects Lubetsky’s Fifth Amendment defense.

B. Lubetsky Violated Rule 8210 by Refusing to Provide Information at his OTR

FINRA Rule 8210 requires FINRA members and persons associated with a member to “provide information orally [or] in writing . . . with respect to any matter involved in [a FINRA] investigation.” This requirement is “unequivocal” and “unqualified.”⁵¹ Failing to provide information impedes FINRA’s ability to carry out its self-regulatory functions and is a serious violation.⁵² More specifically, it “frustrates [FINRA’s] ability to detect misconduct, and such inability in turn threatens investors and markets.”⁵³

Market Regulation sent Lubetsky a Rule 8210 request, and the attached Addendum apprised him of the consequences for asserting the Fifth Amendment and refusing to answer questions. At his OTR, Lubetsky acknowledged that he understood that he was appearing pursuant to a Rule 8210 request⁵⁴ and that he could be subject to a disciplinary action leading to a bar if he failed to answer any question. Notwithstanding these warnings, without justification, Lubetsky invoked the Fifth Amendment and refused to answer all but a few questions. The staff warned him that he could not refuse to answer questions on that basis. But he refused to answer further questions, and made it clear that he would continue to do so. By virtue of this conduct, Lubetsky violated Rule 8210.

⁴⁹ *Sassano*, 2008 SEC LEXIS 2947, at *24.

⁵⁰ *Sassano*, 2008 SEC LEXIS 2947, at *25.

⁵¹ *Dep’t of Enforcement v. North Woodward Financial*, No. 2010021303301, 2014 FINRA Discip. LEXIS 32, at *19 (NAC July 21, 2014) (citing *Dep’t of Enforcement v. Asensio Brokerage Servs., Inc.*, No. CAF030067, 2006 NASD Discip. LEXIS 20, at *44 (NAC July 28, 2006), *aff’d*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014 (June 17, 2010)); Rule 8210(c).

⁵² *North Woodward Financial*, 2014 FINRA Discip. LEXIS 32, at *19 (citing *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *13 (Apr. 11, 2008), *aff’d*, 566 F.3d 1172 (D.C. Cir. 2009)); *Elliot M. Hershberg*, 58 S.E.C. 1184, 1190, *aff’d*, 210 F. App’x 125 (2d Cir. 2006).

⁵³ *North Woodward Financial*, 2014 FINRA Discip. LEXIS 32, at *19 (citing *PAZ Sec., Inc.*, 2008 SEC LEXIS 820, at *13).

⁵⁴ JX-10, at 8.

IV. Sanctions

Rule 9552(n)(1) governs sanctions in this expedited proceeding and provides that the Hearing Panel “may approve, modify or withdraw any and all sanctions, requirements, restrictions or limitations imposed by the notice and . . . may also impose any other fitting sanction.” This proceeding arose from a Notice which imposed sanctions on Lubetsky. Those sanctions were stayed because Lubetsky requested a hearing so he could assert a state action defense, which the Panel has rejected. Given this rejection, the Hearing Panel concludes that the sanctions imposed by the Notice should now take effect, with the suspension and automatic bar dates extended, accordingly, as a result of the stay.

In imposing these sanctions, the Hearing Panel took into account the nature of this proceeding as well as the specific sanction provision that applies to it. Proceedings under Rule 9552 are primarily focused on obtaining compliance with information requests (and on keeping reported information current) and imposing a suspension and then a bar for continued non-compliance, while providing a respondent several opportunities to avoid sanctions through full compliance. Even if an associated person has failed to provide information requested under Rule 8210, Rule 9552 essentially creates a 21-day window in which to take corrective action before the violator will be suspended.⁵⁵ Additionally, after a suspension has been imposed, the associated person may request termination of the suspension on the ground of full compliance.⁵⁶ The suspension automatically converts to a bar, however, if the associated person fails to request termination of the suspension within three months of issuance of the original notice of suspension.⁵⁷ The sanctions imposed by the Hearing Panel in this case are consistent with this general framework.

The Panel does not find any basis for imposing different sanctions. The parties each made sanctions recommendations based upon the Sanction Guidelines for violations of Rule 8210.⁵⁸ Market Regulation seeks a permanent bar, arguing that this is the standard sanction under the guidelines and that there is no mitigation warranting a lesser sanction. Lubetsky, on the other hand, recommends a two year suspension (if his defense is rejected), claiming, among other things, that his reliance on advice of counsel to assert the Fifth Amendment is mitigative. But these arguments miss the mark, as they ignore the specific purposes of a Rule 9552 proceeding. Additionally, they fail to address the sanctions’ scheme contained in Rule 9552(n)(1). Specifically, they do not explain whether (or why) the sanctions imposed by the Notice should be approved, modified, or withdrawn. Nor do they explain why the Panel should impose “any other

⁵⁵ Rules 9552(a) and (d).

⁵⁶ Rule 9552(f).

⁵⁷ Rule 9552(h).

⁵⁸ *Sanction Guidelines* at 33.

fitting sanction” rather than the sanctions contained in the Notice. Consequently, the Hearing Panel did not find the parties’ sanction arguments persuasive.⁵⁹

V. Order

Respondent Alex Lubetsky is suspended from associating with any FINRA member firm in any capacity for refusing to provide testimony at an on-the-record interview pursuant to FINRA Rule 8210. The suspension shall take effect as of the date of this decision, and the suspension shall automatically convert to a bar if Lubetsky does not comply fully with the Rule 8210 request within three months after the date of this decision. Respondent is also ordered to pay the costs of the hearing in the amount of \$1,796.68, which includes a \$750 administrative fee and the cost of the hearing transcript, which shall be due and payable when Lubetsky applies to re-enter the securities industry.⁶⁰


David R. Sonnenberg
Hearing Officer
For the Hearing Panel

Copies to: Kerry Brainard Verdi, Esq. (via electronic mail and first-class mail)
Alex Lubetsky (via overnight mail and first-class mail)
Laurie Doherty, Esq. (via electronic and first-class mail)
Justin Chretien, Esq. (via electronic mail)

⁵⁹ The Panel rejected Lubetsky’s reliance on advice of counsel argument for an additional reason. Even assuming that reliance on advice of counsel can mitigate sanctions in an expedited proceeding, it is not mitigative in this case. As the National Adjudicatory Council has made clear, reliance on advice of counsel can be considered mitigating if the respondent sought the advice “for the purpose of ensuring that one has not violated applicable securities laws and rules.” *Dep’t of Enforcement v. Quattrone*, No. CAF030008, 2004 NASD Discip. LEXIS 17, at *52–53 (NAC Nov. 22, 2004), *rev’d on other grounds*, *Frank P. Quattrone*, Exchange Act Release No. 53547, 2006 SEC LEXIS 703 (Mar. 24, 2006). However, advice that “is premised on a strategy for a respondent to avoid full compliance with applicable regulatory requirements for any reason” is not mitigative. *Id.* The advice Lubetsky received related to a strategy to avoid full compliance with his Rule 8210 obligations. Accordingly, Lubetsky’s reliance on this advice does not mitigate his sanctions.

⁶⁰ Rule 9559(n)(3) permits the Hearing Panel to impose costs. The Hearing Panel considered and rejected without discussion all other arguments by the parties.