UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 74437 / March 4, 2015

Admin. Proc. File No. 3-16360

In the Matter of the Application of WILLIAM SCHOLANDER and TALMAN HARRIS for Review of Action Taken by FINRA	ORDER DENYING STAY

William Scholander and Talman Harris, formerly registered representatives with multiple FINRA member firms, appeal from a FINRA disciplinary action. FINRA found that Scholander and Harris violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010 when they sold securities of Deer Consumer Products, Inc. ("DEER") without disclosing to customers that they had a prior business and consulting relationship with DEER, which had paid them $350,000. FINRA also found that applicants had engaged in outside business activities without disclosing those activities to their member firm employer, in violation of NASD Rule 3030 and FINRA Rule 2010. FINRA barred both applicants from associating with any member firm in any capacity.[1] Applicants now move to stay imposition of the bar FINRA imposed pending their appeal. FINRA opposes this relief. For the reasons discussed below, applicants' motion is denied.

[1] For the outside business activity violations, FINRA found that it was appropriate to impose a three-month suspension and a $15,000 fine on each respondent, but FINRA declined to do so in light of the bars imposed for the fraud violations. Because those sanctions were not imposed, they are not relevant to applicants' stay motion at issue in this Order.

BACKGROUND

On January 31, 2012, FINRA's Department of Enforcement filed a complaint against Scholander and Harris, alleging, among other things, that they had sold their customers the securities of DEER, a Chinese consumer products company with stock listed on the NASDAQ stock market. FINRA charged that applicants did not disclose to the customers that they previously had a consulting agreement with DEER and had received $350,000 from DEER pursuant to that agreement. The complaint also alleged that applicants had engaged in outside business activities without disclosing those activities to their member firm employer.

A. A FINRA Hearing Panel found that Scholander and Harris received a $350,000 fee from DEER, which they used to acquire a broker-dealer.

On August 16, 2013, a FINRA Hearing Panel issued a decision finding that applicants had engaged in the charged fraud and outside business activities. The Hearing Panel barred the applicants for their fraud violations.

FINRA made the following factual findings, which applicants do not dispute. Scholander and Harris entered the securities industry in the 1990s, and they worked together as partners at branch offices of various FINRA member firms since 2002. From March and May 2009, respectively, until February 2010, Scholander and Harris were associated with Seaboard Securities, Inc. During this period, applicants decided to acquire a broker-dealer and identified a prospective firm to purchase, which was then called Brentworth and Company, Inc.

Applicants had longstanding business ties to two individuals, identified by FINRA as "Person 1" and "Person 2," who specialized in promoting the stocks of Chinese companies. In November 2009, while applicants were associated with Seaboard, one of the promoters organized a trip to China for Scholander and one of his associates. Scholander visited DEER's offices in China for approximately two hours. Before this trip, in 2008 and earlier in 2009, the promoters had promoted DEER's stock and the applicants had provided investment banking services, which are not at issue in this proceeding, to DEER regarding a private placement of the company's securities. But FINRA found that, during this trip and on conference calls with DEER, applicants provided only "very limited" services to DEER, including advice regarding the growth of DEER's business, its choice of an investment bank, and "what [DEER could] do to improve and appeal to the investors." On December 17, 2009, DEER wired a $350,000 fee for these services into a bank account that applicants had opened to assist in purchasing Brentworth. FINRA found that applicants used the $350,000 payment for various expenses connected to the purchase of their new broker-dealer, which they renamed First Merger Capital, Inc. and opened in February 2010.

Applicants then left Seaboard and became associated with First Merger. FINRA found that, from February through November 2010, Scholander and Harris sold $961,852.68 in DEER securities to thirty-two First Merger customers. Scholander and Harris acknowledge that they did not disclose to these customers the $350,000 payment or their business relationship with DEER.

B. On appeal, the NAC affirmed the findings of violations and the sanctions imposed.

Applicants appealed the Hearing Panel's decision to FINRA's National Adjudicatory Council. In affirming the Hearing Panel's findings, the NAC found that "Scholander and Harris were among the primary beneficiaries of the $350,000 payment [from DEER]" and that their receipt of the payment was material information they were required to disclose to their customers. The NAC cited *Kevin D. Kunz*, in which the Commission found that the existence of a consulting agreement pursuant to which a broker received payments from an issuer whose securities the broker recommended to customers "would have been material to any prospective investor" because "[w]hen a broker-dealer has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence its recommendation, it is material and should be disclosed."[2] The NAC found that applicants acted with the requisite scienter by acting "at least recklessly," stating that applicants' "ongoing business relationship with DEER gave them obvious conflicts of interest that had the potential to influence their decision of what securities to recommend to their customers." According to the NAC, the failure to disclose this information when recommending the securities was "a highly unreasonable omission that presented a danger of misleading customers."

The NAC found that several aggravating factors applied to applicants' misconduct and that there were no mitigating factors. As a result, the NAC sustained the Hearing Panel's bar of both applicants in all capacities, which it found was an appropriate sanction "to remedy [applicants'] violations, protect investors, and deter others from engaging in similar misconduct." Applicants appeal that decision and ask for a stay of the bar FINRA imposed pending their appeal.

ANALYSIS

The Commission considers the following in determining whether to grant applicants' motion for a stay: (1) the likelihood that movants will succeed on the merits of their appeal; (2) the likelihood that movants will suffer irreparable harm without a stay; (3) the likelihood that another party will suffer substantial harm as a result of a stay; and (4) a stay's impact on the public interest.[3] Applicants have the burden of establishing that a stay is warranted.[4] For the reasons discussed below, applicants have not met this burden.

---

[2] *Kevin D. Kunz*, Securities Exchange Act Release No. 45290, 55 SEC 551, 2002 WL 54819, at *6 & n.30 (Jan. 16, 2002) (citing *Michael A. Niebuhr*, Exchange Act Release No. 36620, 52 SEC 46, 1995 WL 757803, at *5 (Dec. 21, 1995)).

[3] *See, e.g.*, *Intelispan, Inc.*, Exchange Act Release No. 42738, 54 SEC 629, 2000 WL 511471, at *2 (May 1, 2000) (citing Rules of Practice, 60 Fed. Reg. 32,738, 32,772 (1995) (comment to Rule of practice 401)).

[4] *See, e.g.*, *Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000) ("The party requesting the stay has the burden of proof.").

A. Applicants have not shown a likelihood that they will succeed on the merits of their appeal.

Final resolution of applicants' appeal must await the Commission's determination on the merits. But based on the briefs the parties have filed so far, there does not appear to be a likelihood that applicants will succeed. Applicants largely repeat the arguments they made during the proceeding below, which the NAC rejected. The NAC's reasoning is supported by the record before us.

A violation of Section 10(b) of the Exchange Act and Rule 10b-5(b) thereunder requires a showing that: (1) applicants made a material misrepresentation or omission; (2) applicants acted with scienter; and (3) the conduct occurred in connection with the purchase or sale of securities.[5] Such a showing is also sufficient to establish violations of FINRA Rules 2020 and 2010.[6] For the reasons discussed below, applicants have not shown a likelihood that the Commission will reverse FINRA's finding that applicants violated these provisions.

1. Applicants admit that they did not disclose their business relationship with DEER to customers, and they have not shown that the Commission is likely to reverse FINRA's finding that this information was material.

Although applicants admit that they did not disclose the $350,000 payment or their other business dealings with DEER to customers, applicants argue that they had no duty to disclose the information and that the information was not material. Information is material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the

---

[5] *See, e.g.*, *S.W. Hatfield, CPA and Scott W. Hatfield, CPA*, Exchange Act Release No. 73763, 2014 WL 6850921, at *4 & n.14 (Dec. 5, 2014) (citing 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); *Joseph John VanCook*, Exchange Act Release No. 61039, 2009 WL 4005083, at *8 (Nov. 20, 2009) (describing requirements for liability under antifraud provisions); *SEC v. Dain Rauscher, Inc.*, 254 F.3d 852, 855-56 (9th Cir. 2001) (noting that the antifraud provisions "forbid making a material misstatement or omission" in connection with the purchase or sale of securities)).

[6] FINRA Rule 2020 prohibits members and their associated persons from effecting transactions, or inducing the purchase or sale of a security, by means of any manipulative, deceptive, or fraudulent device. FINRA Rule 2010 requires members and their associated persons to observe "high standards of commercial honor and just and equitable principles of trade," and the Commission has held that a violation of the Exchange Act or any FINRA rule constitutes a violation of Rule 2010. *See, e.g.*, *E. Magnus Oppenheim & Co.*, Exchange Act Release No. 51479, 2005 WL 770880, at *2 (Apr. 6, 2005) (finding that violation of Exchange Act or other FINRA Rules constitutes a violation of Rule 2010's predecessor, NASD Rule 2110).

reasonable investor as having significantly altered the 'total mix' of information made available."[7]

Applicants claim that they had no obligation to disclose the $350,000 fee because it was "compensation" and that FINRA had specifically found that there was no evidence "that the advisory fees [for which the DEER payment was made] were related in any way to sales of DEER stock." Applicants state that "[t]here is no general fiduciary duty in an ordinary broker/customer relationship" and that there was nothing special about the relationship between applicants and their customers (such as customers having entrusted funds to applicants) that created a "duty to disclose the DEER payment as compensation to their customers."

FINRA opposes applicants' position regarding their duty to disclose the information to their customers. FINRA cites authority holding that, "[w]hen recommending securities to a prospective investor, a securities professional must not only avoid affirmative misstatements but also must disclose 'material adverse facts,' including any self-interest that could influence the salesman's recommendation."[8] FINRA contends that "numerous circumstances gave rise to applicants' conflicts of interest," thus requiring applicants to disclose the information to their customers. The circumstances FINRA cites include: (1) applicants' use of the $350,000 fee to fund the opening of First Merger; (2) the NAC's finding that "it is reasonable to infer that DEER did not make the $350,000 payment for no reason at all, and that the limited 'advisory services' that Scholander and Harris provided were not the only services that DEER expected for its money"; (3) applicants' business relationship with DEER, dating back to their prior investment banking relationship; and (4) DEER's longstanding relationship with the stock promoters who introduced applicants to DEER and advised applicants regarding their purchase of the firm that became First Merger.

FINRA also opposes applicants' reliance on authority stating that "a registered representative is under no inherent duty to reveal his compensation" and "must reveal the compensation only if he has a 'fiduciary duty' to the customer." In support of this argument, applicants cite *U.S. v. Skelly*, in which the court held that broker respondents had not violated Section 10(b) and Rule 10b-5 by failing to disclose commissions they received from their employer for recommending a particular investment.[9] But FINRA argues that *Skelly* is inapposite because, unlike in that case, applicants here received the compensation at issue from the issuer of the securities they recommended, rather than from their member firm employer.

---

7 *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

8 *Richard H. Morrow*, Exchange Act Release No. 40392, 1998 WL 556560, at *6 & n.16 (Sept, 2, 1998) (citing *Gilbert A. Zwetsch*, Exchange Act Release No. 30092, 50 SEC 816, 1991 WL 288614, at *2 (Dec. 18, 1991)).

9 *U.S. v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006).

FINRA states that, while reasonable customers would expect that their broker is receiving a commission for the securities they sell, they would not expect the broker to have received a $350,000 fee "from the issuer of the securities [the broker] recommends, [to have] a close and ongoing business relationship with the issuer, or [to have] longstanding and lucrative ties to the issuer's promoters."

FINRA further disputes applicants' characterization of the undisclosed information as not being related to "the narrow task of consummating the transaction" at issue, *i.e.*, the purchase of the DEER securities by applicants' customers.[10] FINRA responds that the information "*did* concern the specific securities transactions at issue because it was information that would have been important to reasonable investors when engaging in the narrow task of deciding to invest in DEER securities." FINRA further contends that, in any event, applicants' argument that their duty to disclose material information is so limited "is incorrect." In support, FINRA cites the Commission's decision in *Kunz*, where the applicants had sold private placement interests without disclosing in the offering documents that Kunz had a consulting relationship with the issuer, pursuant to which he had received consulting fees, and that the issuer had financed Kunz's firm. The Commission found that such relationships "would have been material to any prospective investor" and "should be disclosed."[11]

Applicants do not directly address whether their receipt of $350,000 from DEER, shortly before selling significant amounts of the security to brokerage customers, created a material conflict of interest. Instead, they characterize *Kunz* and other authority discussing the obligation of registered representatives to disclose conflicts of interest as requiring the disclosure of only "excessive charges to the customers or additional funds to the registered representative that were tied to the particular transaction at issue." But FINRA responds by pointing out that, in many other cases, brokers have been held liable for failing to disclose conflicts of interest that did not relate to commissions or payments specifically related to a given transaction (such as where the broker was a market maker in a given security or had an investment banking relationship with the issuer).[12]

---

[10] In support of this argument, applicants cite *Press v. Chem. Inv. Servs. Corp*., 166 F.3d 529, 536 (2d Cir. 1999). But *Press* concerned whether a broker-dealer is required to disclose a markup in the context of an arm's length transaction. The court found that the broker-dealer had no duty to disclose the markup because it was not excessive, and disclosure was not otherwise required as a result of the particular broker-dealer duty at issue in that case, which related to the "narrow task of consummating the transaction." *Id.*

[11] *Kunz*, 2002 WL 54819, at *6.

[12] *See, e.g., Chasins v. Smith Barney & Co.*, 438 F.2d 1167, 1171-72 (2d Cir. 1970) (holding that broker's failure to disclose its role as a market maker of a given security was material because investors "must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest"); *Richmark*

On balance, we find that applicants have not shown that they are likely to succeed in their arguments that they had no obligation to disclose the $350,000 fee or that this information was not material.

2. Applicants do not dispute that their failures to disclose were "in connection with" the purchase or sale of securities.

Applicants do not dispute that their failure to disclose their consulting fees and other relationships were "in connection with" the purchase or sale of securities, as required under Exchange Act Section 10(b). The Commission has "consistently adopted a broad reading of the 'in connection with' requirement,"[13] and it appears that this prong of the Section 10(b) analysis is satisfied here.

3. Applicants have not shown that the Commission is likely to reverse the NAC's finding that they acted with scienter.

As discussed above, to sustain a finding that an applicant violated Exchange Act Section 10(b), the Commission must find that the applicant acted with scienter. Scienter includes recklessness, defined as conduct that is "an extreme departure from the standards of ordinary care … to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[14]

Applicants claim that they did not act with scienter because their failures to disclose fall into what they describe as a "grey area" of the law and thus it was not an "extreme departure" for them to fail to disclose the information. In support of this argument, applicants claim that "no one at First Merger or acting on behalf of First Merger who was aware of the fee—which included a securities lawyer and the Chief Compliance Officer at the firm who held a Series 24 license and was also the supervisor of the trades—thought that it needed to be disclosed."

FINRA asserts that applicants did, in fact, act recklessly. FINRA points out that applicants were aware of the $350,000 payment and their business dealings with DEER and, as a result, "must have known that these conflicts had the potential to influence their decision of what securities to recommend to clients" and that "failing to disclose these conflicts of interest

---

(. . . footnote continued)

Capital Corp., Exchange Act Release No. 48758, 2003 WL 22570712, at *6 (Nov. 7, 2003) (finding that, where applicant had an investment banking relationship with issuer, applicants were "obligated to disclose their financial incentive in recommending [the issuer's securities] so that investors could make an informed judgment").

13 *S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002).

14 *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977); *Hollinger v. Titan Corp.*, 914 F.2d 1564, 1569-70 (9th Cir. 1990).

presented the danger of misleading customers that applicants had no conflicts of interest when selling DEER securities." FINRA notes that applicants cite no evidence to support their claim that no First Merger official requested that they disclose the information.

Applicants have not shown that they are likely to succeed in their argument that the evidence does not support a finding that they acted with scienter.

4. Applicants have not shown a likelihood that the Commission will determine that the bars FINRA imposed are excessive or oppressive.

Applicants contend that a stay is warranted because a bar is an excessive sanction for their misconduct. Reiterating their claim that their violations fall into a "grey area" regarding the obligation to disclose the information, applicants argue that their conduct is not egregious and thus a bar is unwarranted. As discussed above, applicants have not shown a likelihood of success with respect to their claim that they were not obligated to disclose the information regarding their relationship with DEER.

Applicants also assert that FINRA failed to consider certain factors they claim are mitigating. Specifically, applicants argue that: (1) they lack prior disciplinary history; (2) the violations stem from a single incident (the $350,000 DEER payment); (3) according to applicants, they did not conceal the DEER payment from anyone; (4) no customers were harmed by their failure to disclose the information; (5) their conduct was not reckless; and (6) they had not ignored warnings from FINRA or another regulator that they were obligated to disclose the information. Applicants additionally claim that FINRA imposed considerably lesser sanctions in *Kunz* for relatively similar violations and in its settlement agreement with First Merger's Chief Compliance Officer.

FINRA disputes applicants' claim that certain factors are mitigating. FINRA notes that, as the Commission has held consistently, a lack of disciplinary history is not mitigating for sanctions purposes.[15] FINRA next disputes applicants' claim that the violations stem from a "single incident," noting that applicants engaged in a large number of separate transactions over a nine-month period and that, in addition to the $350,000 fee, they "also failed to disclose the conflicts of interest that derived from the applicants' ongoing business relationship with DEER, which arose from their longstanding and lucrative relationship with . . . the promoters of DEER securities." FINRA also contends that applicants' claim that they did not seek to conceal the fee

---

[15] *See, e.g.*, *John B. Busacca III*, Exchange Act Release No. 63312, 2010 WL 5092726, at *16 & n.77 (Nov. 12, 2010) (citing *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006); and *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 WL 3313843, at *6 (Nov. 8, 2006) ("[L]ack of disciplinary history is not mitigating for purposes of sanctions because an associated person should not be rewarded for acting in accordance with his duties as a securities professional.")).

from anyone is without merit. FINRA points out that applicants did not disclose the information to the customers and alleges that they provided inaccurate and misleading information to FINRA investigators. FINRA also rejects applicants' argument that the alleged lack of customer harm is mitigating. Even if applicants' assertion is correct, such a finding would not be mitigating.[16]

FINRA also opposes applicants' attempts to compare the sanctions FINRA imposed to sanctions imposed in other cases. The Commission has consistently held that "the appropriateness of the sanctions imposed depends on the facts and circumstances of the particular case and cannot be determined precisely by comparison with action taken in other cases."[17] Likewise, applicants' reliance on the sanctions imposed in the settled proceeding against First Merger's compliance officer is misplaced. The Commission has observed repeatedly that "comparisons to sanctions in settled cases are inappropriate" in determining the appropriate sanction for a given violation because pragmatic considerations justify the acceptance of lower sanctions in negotiating a settlement "such as the avoidance of time-and-manpower-consuming adversary proceedings."[18] Further, "[l]itigated cases typically present a fuller, more developed record of facts and circumstances for purposes of assessing appropriate sanctions than do settled matters."[19]

---

[16] *Edward S. Brokaw*, Exchange Act Release No. 70883, 2013 WL 6044123, at *18 & n.137 (Nov. 15, 2013) ("[T]he absence of . . . customer harm is not mitigating, as our public analysis focus[es] . . . on the welfare of investors generally.") (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 & n.25 (Feb. 24, 2012) (internal quotations omitted); *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *5 (Apr. 11, 2008) (holding that applicants' failures to comply with NASD rules "are not mitigated because those failures did not, in themselves, produce a monetary benefit to Applicants or result in injury to the investing public"), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009); *Coastline Fin., Inc.*, Exchange Act Release No. 41989, 54 SEC 388, 1999 WL 798874, at *5 (Oct. 7, 1999) (rejecting absence of customer harm as a mitigating factor for sanctions)).

[17] *Dennis S. Kaminski*, Exchange Act Release No. 65347, 2011 WL 4336702, at *13 (Sept. 16, 2011). *See also Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 187 (1973) (holding that "[t]he employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases"); *Geiger v. SEC*, 363 F.3d 481, 488 (D.C. Cir. 2004) (holding that, because the "Commission is not obligated to make its sanctions uniform," court would not compare sanction imposed in case to those imposed in previous case).

[18] *Kent M. Houston*, Exchange Act Release No. 71589, 2014 WL 651953, at *7 (Feb, 20, 2014).

[19] *Id.*

In addition, FINRA cites three aggravating factors in support of the NAC's finding that applicants' misconduct was egregious and warranted a bar. Specifically, FINRA notes that applicants: (1) sold nearly $1 million in DEER securities to thirty-five customers over a nine-month period; (2) engaged in misconduct that provided them with a monetary gain; and (3) provided inaccurate or misleading testimony to FINRA investigators during on-the-record interviews regarding the timing of the visit to DEER's facilities in China and their financial contributions toward the purchase of the firm that became First Merger.

For all of the foregoing reasons, applicants have not met their burden of showing that there is a likelihood that they will succeed on the merits of their appeal.

B. Applicants have not shown a likelihood that they will suffer irreparable harm or another party will suffer substantial harm.

Applicants state that without a stay, irreparable harm will result to applicants, to the employees of Radnor Research & Trading Company, LLC, a broker-dealer with which applicants were associated until recently, and to applicants' parents, "who suffer from debilitating diseases and for whom [applicants] are the sole providers." Citing an affidavit from the CEO of Radnor Research, applicants claim that it is "highly likely" that their branch office will have to close if a stay is not granted. According to applicants, such a closure "will likely lead to [the Radnor Research employees'] unemployment, resulting in significant and irreparable harm to them and their families due to their loss of livelihood." Applicants further claim that, absent a stay, they will suffer reputational harm.

In response to applicants' irreparable harm arguments, FINRA notes that the Commission has held repeatedly that "'the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay.'"[20] FINRA further states that applicants have introduced no evidence regarding Radnor Research's financial condition to support the claims in the CEO's affidavit that, absent a stay, it is "highly likely" that applicants' branch office would close. FINRA further notes that, in any event, the Commission has refused generally to grant stays based on applicants' claims that sanctions will negatively affect a business.[21] FINRA also opposes applicants' claim that the reputational harm they will suffer in

---

[20] *Mitchell T. Toland*, Exchange Act Rel. No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014) (quoting *Robert J. Prager*, Exchange Act Rel. No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004)); *see also Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) (stating that the "necessity of protection to the public far outweighs any personal detriment").

[21] *See, e.g.*, *Al Rizek*, Exchange Act Release No. 41972, 1999 WL 955890, at *2 (Oct. 1, 1999) (finding that, despite applicant's claim that, in the absence of stay, he would be forced to close his securities firm, applicant had engaged in egregious conduct and "[a]ny harm that he may suffer from the denial of his stay request is outweighed by the danger he poses to customers and potential customers" but granting limited 60-day stay to allow applicant "to avail himself of his appellate rights" by "apply[ing] for a stay from a court of appeals"). The court of appeals

the absence of a stay constitutes irreparable harm. The Commission has held that similar claims do not present the necessary showing of irreparable harm.[22]

On balance, we find that applicants have failed to make the necessary showing of a likelihood of irreparable harm to warrant a stay.

C. Denying applicants' motion will serve the public interest.

As explained above, FINRA found that the applicants engaged in fraud, and applicants have not demonstrated a likelihood that they will overturn that finding on appeal. Nor have applicants demonstrated a likelihood that they or another party will suffer irreparable harm without a stay. We therefore find that the public interest favors denial of their motion.[23]

Accordingly, IT IS ORDERED that, pending Commission review of their appeal, applicants' motion to stay the sanctions FINRA imposed is denied.

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Brent J. Fields
Secretary

(. . . footnote continued)

denied Rizek's stay request, finding that he "failed to satisfy this Court that he is likely to succeed on the merits, since he has failed to show an absence of substantial evidence to support the Commission's decision." *Rizek v. SEC*, No. 99-2114 (1st Cir. Oct. 29, 1999).

[22] *Michael A. Rooms*, Admin. Proc. File No. 3-11621, 2004 SEC LEXIS 3158, at *5 (Nov. 17, 2004) (denying stay by concluding that applicant's argument that "the bar imposed on him ha[d] resulted in severe financial loss and damages to his reputation . . . d[id] not rise to the level of irreparable injury").

[23] *Cf. Hans N. Beerbaum*, Exchange Act Rel. No. 55731, 2007 WL 1376365, at *5 (May 9, 2007) (rejecting applicant's argument that "allowing [him] to remain in the industry would serve the interest of investors"); *Barr Fin. Group, Inc.*, Investment Adviser Act Rel. No. 2179, 56 SEC 1243, 2003 WL 22258489, at *7 (Oct. 2, 2003) (finding a bar "amply warranted" where, "[a]lthough there is no evidence that any customer lost money as a result of respondents' violations, their actions clearly posed a threat to the investing public").