

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82158 / November 27, 2017

Admin. Proc. File No. 3-18256

In the Matter of the Application of

BRUCE ZIPPER

For Review of Action Taken by

FINRA

ORDER DENYING STAY

Bruce M. Zipper has sought a stay pending his appeal of FINRA action denying him permission to continue to associate with a FINRA member firm notwithstanding his statutory disqualification. Zipper became statutorily disqualified from associating with a FINRA member firm after he entered into a Letter of Acceptance, Waiver, and Consent (“AWC”) with FINRA finding that he willfully failed to disclose certain material information on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”). Dakota Securities International, Inc., a FINRA member firm of which Zipper was chief executive officer and chief compliance officer, submitted a membership continuance application asking FINRA to permit Zipper to continue associating with it despite his statutory disqualification. FINRA denied the application on October 2, 2017.¹ Zipper appealed that decision to the Commission and, as relevant here, moved to stay the effectiveness of FINRA’s denial pending the outcome of his appeal.² Because Zipper has not met his burden of establishing that a stay is warranted, his motion is denied.

¹ See *In the Matter of the Continued Association of Bruce Zipper as a Gen. Sec. Rep. with Dakota Sec. Int’l, Inc.*, SD-2129 (Oct. 2, 2017), at http://www.finra.org/sites/default/files/NAC_SD-2129_Zipper_100217_0_0.pdf.

² Under FINRA rules and policy, Zipper was permitted to associate with Dakota until FINRA issued its decision on October 2, 2017. A stay of that decision would allow Zipper to continue to associate with Dakota. See, e.g., FINRA Rule 9524 (stating that a decision to deny continued association “shall be effective immediately”); NASD Notice to Members 00-56, *SEC Approves Changes to Rule Regarding the Code of Procedure*, 2000 WL 1375124, at *7 (Aug. 10, 2000) (stating that denials of continuance applications “are effective upon service on applicants (subject to the applicant requesting a stay of effectiveness from the SEC)”).

I. Background

A. FINRA notified Zipper that he is statutorily disqualified.

On April 22, 2016, FINRA accepted an AWC that Zipper submitted, in which he consented to a fine and three-month suspension from association.³ The AWC arose out of a FINRA examination that found Dakota had failed to ensure that Zipper and another associated person updated their Forms U4. After issuing a Cautionary Action Letter to Dakota, FINRA began investigating Zipper personally for his failure to update his Form U4. Zipper and FINRA then entered into the AWC, which provided that his “willful[] omi[ssion] to state a material fact on a Form U4 . . . makes [Zipper] subject to a statutory disqualification with respect to association with a member.” Zipper also “specifically and voluntarily” waived the right to appeal the AWC to the Commission or to a U.S. Court of Appeals, and consented to a three-month suspension from association in all capacities and a \$5,000 fine. Zipper’s AWC provided that he was prohibited from “associat[ing] with any FINRA member in any capacity . . . during the period of the . . . suspension.” Zipper’s suspension ran between May 31, 2016, and August 31, 2016.

On May 4, 2016, FINRA’s Department of Member Regulation notified Dakota that Zipper’s AWC made him statutorily disqualified under Section 3(a)(39) of the Securities Exchange Act of 1934,⁴ and that he was therefore disqualified from associating with a member firm under FINRA’s By-Laws.⁵ The notification also explained that Dakota could file an MC-400 Membership Continuance Application to seek relief from the disqualification.⁶

Dakota submitted its MC-400 Application on July 29, 2016, during Zipper’s suspension. On July 12, 2017, a FINRA Hearing Panel conducted a hearing at which Zipper and Robert

³ See generally *Bruce M. Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072, at *1-3 (Sept. 29, 2017) (describing misconduct underlying Zipper’s AWC and procedural history of the AWC’s negotiation), *motion for reconsideration pending* (filed Oct. 10, 2017).

⁴ 15 U.S.C. § 78c(a)(39)(F) (providing that a person is subject to “statutory disqualification” if he has willfully made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization).

⁵ FINRA By-Laws, Art. III, § 4 (stating that a person is subject to “disqualification” from association with a member firm if such person is subject to “statutory disqualification” as defined in Exchange Act Section 3(a)(39)).

⁶ FINRA By-Laws, Art. III, § 3(d) (providing that FINRA may grant relief from the ineligibility to associate as a result of a statutory disqualification if it determines that relief is consistent with the public interest and the protection of investors).

Lefkowitz, Dakota's acting chief compliance officer during Zipper's suspension, testified.⁷ After the hearing, the Hearing Panel submitted its written recommendation on Zipper's application to FINRA's Statutory Disqualification Committee, which in turn presented a written recommendation to FINRA's National Adjudicatory Council (the "NAC").

B. FINRA denied Dakota's membership continuance application.

On October 2, 2017, the NAC issued a written decision denying Dakota's application.⁸ The NAC concluded that "Zipper's continued association with [Dakota] is not in the public interest and would create an unreasonable risk of harm to the market or investors." It cited three reasons. First, the NAC found that "Zipper engaged in serious misconduct after entry of the . . . AWC by improperly associating with [Dakota] during his three-month suspension" by communicating with Dakota customers about their portfolios and recommending securities to them. The NAC found that Lefkowitz "shared Zipper's view of what was permissible during his suspension despite the clear language" of the AWC, and permitted Zipper to associate with Dakota during his suspension.⁹ The NAC found further that Zipper's serious misconduct during his suspension showed that Zipper "is currently unable to demonstrate that he can comply with FINRA's rules and regulations."

Second, the NAC found that Zipper's proposed supervisors lacked the necessary experience and independence. As to their lack of experience, the NAC found that one of the proposed supervisors had "minimal (if any) direct supervisory experience during her career," and another proposed supervisor had "no direct supervisory experience." Even though Dakota had an "obligation to marshal its witnesses and evidence . . . to satisfy its burden that approving the Application is in the public interest," as the NAC explained, Dakota failed to introduce the testimony of those two proposed supervisors. Meanwhile, Lefkowitz, Dakota's proposed chief executive officer, "ha[d] only been registered as a general securities principal for approximately one year, . . . ha[d] limited supervisory experience," and "during his brief time as a supervisor, . . . permitted Zipper to violate the terms of his suspension, which resulted in Lefkowitz's [own] five-month suspension." Indeed, Lefkowitz was unable "to serve as Zipper's supervisor during

⁷ The Hearing Panel initially denied Zipper's request to hold the hearing by teleconference or hold it in Florida. Zipper then filed an application for review of that denial, but we granted his request to withdraw the application after FINRA agreed to hold the hearing in Florida. *See Bruce M. Zipper*, Exchange Act Release No. 80599, 2017 WL 1735952 (May 4, 2017).

⁸ After the hearing, but before the NAC issued its decision, we dismissed Zipper's separate application for review seeking to challenge his AWC. *See Zipper*, 2017 WL 4335072, at *3-5 (granting motion to dismiss Zipper's application for review of the AWC because it was not timely filed, because his AWC contained a valid and enforceable appellate waiver, and because Zipper otherwise requested relief that was not available to him).

⁹ Lefkowitz subsequently entered into his own AWC—in which he agreed to a \$5,000 fine and a five-month principal suspension—as a result of this conduct.

his [own] suspension.” In addition, the NAC found “that the Firm has not demonstrated that Zipper’s proposed supervisors possess the necessary independence to supervise Zipper” due to Zipper’s close relationship with Lefkowitz; his history as Dakota’s owner and as a supervisor for each of the proposed supervisors before he became disqualified; and his authority as Dakota’s owner to fire any of the proposed supervisors, including Lefkowitz.

Finally, the NAC rejected Dakota’s proposed heightened supervisory plan. The NAC observed that it “falls short of what is required to ensure that a statutorily disqualified individual be subject to stringent supervision,” such as details explaining how and where Zipper—who previously had worked from home—would be supervised. The NAC identified other “provisions . . . lack[ing] sufficient detail,” such as a plan to “review Zipper’s incoming and outgoing emails” that the NAC found “particularly troubling given that Zipper’s intervening misconduct involved communicating with his customers via email while he was suspended.”

C. Zipper appealed to the Commission and sought a stay.

On October 18, 2017, Zipper filed an application for review with the Commission of FINRA’s denial of Dakota’s membership continuance application.¹⁰ He filed a motion with the Commission to stay FINRA’s denial of his application on October 31. On November 3, he sent another document detailing, as an additional basis for his requested stay, FINRA’s request that Dakota “present a plan” about how it would continue to operate if Zipper were not allowed to associate with it. Zipper served the October 31 and November 3 papers on FINRA on November 8. We have considered these filings, as well as FINRA’s opposition and Zipper’s reply.

II. Analysis

In deciding whether to grant a stay under Rule of Practice 401,¹¹ the Commission determines whether the moving party has established that a stay is warranted.¹² The Commission has customarily stayed suspensions or fines pending appeal, but has only stayed sanctions such as permanent bars or expulsions “in extraordinary circumstances.”¹³ The factors the Commission considers on a motion for a stay are whether: (i) there is a strong likelihood that the

¹⁰ Zipper is entitled to appeal the denial of Dakota’s application. *See Nicholas S. Saava*, Exchange Act Release No. 72485, 2014 WL 2887272, at *1 n.5 (June 26, 2014) (stating that an associated person may appeal a FINRA decision denying a firm’s membership continuance application to the Commission).

¹¹ 17 C.F.R. § 201.401.

¹² *Ahmed Gadelkareem*, Exchange Act Release No. 80586, 2017 WL 1735943, at *1 (Apr. 28, 2017).

¹³ *Scattered Corp.*, 52 S.E.C. 1314, 1320 n.15, 1997 SEC LEXIS 2748, at *15 n.15 (Apr. 28, 1997).

moving party will succeed on the merits of its appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) any person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.¹⁴

A. Likelihood of success.

The Commission reviews FINRA’s denial of an MC-400 application under Exchange Act Section 19(f). That section directs the Commission to dismiss the appeal if it finds: (i) that the specific grounds on which FINRA based its action exist in fact; (ii) that the action was in accordance with FINRA’s rules; and (iii) that the relevant rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.¹⁵ Our analysis of the merits of Zipper’s appeal is necessarily preliminary, and “[f]inal resolution must await the Commission’s determination of the merits of [his] appeal.”¹⁶

Zipper’s stay motion fails to address the Exchange Act Section 19(f) standard. Despite making multiple filings in support of his stay motion, Zipper identifies no reason why he is likely to succeed in challenging the NAC’s determinations that he violated the terms of his suspension, that his proposed supervisors lacked the necessary experience and independence, and that the proposed heightened supervisory plan was inadequate.¹⁷ Accordingly, we find for purposes of this motion that Zipper has not even raised a substantial question on the merits, let alone shown a strong likelihood of success.¹⁸

¹⁴ *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016) (order denying stay).

¹⁵ 15 U.S.C. § 78s(f) (providing that the Commission “shall dismiss the proceeding” if these criteria are met, unless it finds that such denial “imposes any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act); *see Saava*, 2014 WL 2887272, at *6 (“Section 19(f) of the Exchange Act establishes the criteria that govern our review of FINRA’s denial of [applicant’s] MC-400 Application.”).

¹⁶ *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013).

¹⁷ *See Richard Allen Riemer, Jr.*, Exchange Act Release No. 82014, 2017 WL 5067462, at *2-3 (Nov. 3, 2017) (order denying stay) (finding a “complete failure to attempt to establish a likelihood of success on the merits” where the movant did “not even assert that his appeal is likely to succeed,” “attempt to rebut FINRA’s findings or further develop his arguments,” or “explain why they now are likely to succeed” despite having been rejected by FINRA).

¹⁸ Nothing in this order should be construed as a decision on the merits of any argument Zipper may raise in his appeal. *See* note 16 above.

B. Irreparable harm.

To establish irreparable harm, Zipper must show an injury that is “both certain and great” and “actual and not theoretical.”¹⁹ A stay “will not be granted [based on] something merely feared as liable to occur at some indefinite time,”²⁰ and a “movant must show that the alleged harm will directly result from the action which the movant seeks to [stay].”²¹ Moreover, “[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough to constitute irreparable harm.”²²

Zipper contends that, absent a stay, Dakota will be forced to cease operations. He argues that FINRA has asked Dakota to “present a plan” demonstrating its “ability to stay in business” without him being associated, and that FINRA “will shut down Dakota Securities or put it out of business” if the plan is not acceptable or not timely. Zipper has objected that he cannot quickly find registered principals and representatives to replace him at Dakota to FINRA’s satisfaction if he cannot “help the company” in that process while remaining disqualified.

FINRA responds that this is an “alleged negative economic or financial consequence[.]” that “do[es] not constitute irreparable harm.” It supports this assertion by citing the statement in *Meyers Associates, L.P.*, that “[t]he Commission has generally refused to grant stays based on applicants’ claims that FINRA’s decision will negatively affect, or even close, a business.”²³ But in neither *Meyers* nor the cases it cites did the Commission say that the imminent destruction of a business did not constitute irreparable harm. Rather, the Commission denied a stay because the potential effect on the business either was too speculative,²⁴ or was outweighed by other

¹⁹ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

²⁰ *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)); *cf. Winter*, 555 U.S. at 22 (holding that a mere “possibility” of irreparable harm is insufficient to warrant a preliminary injunction, given the “extraordinary” nature of injunctive relief).

²¹ *Wisconsin Gas*, 758 F.2d at 674.

²² *Dawson James Sec., Inc.*, Exchange Act Release No. 76440, 2015 WL 7074282, at *3 (Nov. 13, 2015) (internal quotation marks omitted).

²³ Exchange Act Release No. 77994, 2016 WL 3124674, at *4 (June 3, 2016).

²⁴ *See William Scholander*, Exchange Act Release No. 74437, 2015 WL 904234, at *7 (Mar. 4, 2015).

countervailing factors.²⁵ Indeed, the Commission has said that “the destruction of a business could provide a sufficient basis to support” a finding of irreparable harm.²⁶

Although Zipper’s claims that his firm will be forced to cease operations absent a stay are somewhat vague, they do not appear entirely speculative. In its opposition, FINRA does not dispute that it has given Zipper and Dakota “a deadline to submit a plan to stay in business in Zipper’s absence.” Nor does it disclaim an intention, as Zipper asserts, to “shut down” Dakota or put it “out of business” if it fails to do so. Ultimately, we need not decide whether Zipper has satisfied his burden of establishing an irreparable injury because any harm to Zipper is outweighed by the other factors.

C. The risk of harm to others and the public interest.

The other equitable considerations tip decidedly against granting a stay. FINRA found that Zipper engaged in “serious misconduct” by associating with Dakota and engaging in the “core functions of a registered representative” while suspended. FINRA also found that Zipper’s proposed supervisors and proposed heightened supervisory plan were both inadequate. After making these findings, FINRA concluded that “Zipper’s continued association . . . would create an unreasonable risk of harm to the market or investors.” Here, Zipper has offered no basis to doubt these findings, or the NAC’s finding that he is currently unable to comply with securities

²⁵ See *Meyers*, 2016 WL 3124674, at *4 (finding harm to the firm “outweighed by the risk of allowing Meyers’s continued participation in the securities industry”); *Al Rizek*, Exchange Act Release No. 41972, 1999 WL 955890, at *2 (Oct. 1, 1999) (similar); *Stratton Oakmont, Inc.*, Exchange Act Release No. 38026, 1996 WL 707982, at *2-3 (Dec. 6, 1996) (similar).

²⁶ *Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013) (order denying stay); see also *Scattered Corp.*, 1997 SEC LEXIS 2748, at *15 n.15 (noting that “[i]n rare circumstances, . . . the destruction of a business, absent a stay, is more than just ‘mere’ economic injury and rises to the level of irreparable injury,” and granting stay based on the weight of the factors, including the movant’s “credible . . . contention that an immediate expulsion” from stock exchange membership “might destroy its business” as well as movant’s having “presented a substantial case” on the merits) (citing *Bunker Ramo and GTE Info. Sys., Inc.*, Exchange Act Release No. 14606, 1978 SEC LEXIS 1932, at *12 (Mar. 24, 1978) and *Wash. Metro. Area Transit Comm’n v Holiday Tours, Inc.*, 559 F.3d 2d 841, 843 (D.C. Cir. 1977)); cf., e.g., *Wisconsin Gas*, 758 F.2d at 674 (holding that “monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business”).

rules and regulations.²⁷ Accordingly, we find that any relief staying FINRA’s denial of the MC-400 application while the Commission considers Zipper’s appeal could endanger investors.²⁸ It would allow Zipper to continue to associate with Dakota “without the protections provided by FINRA’s membership continuance application process, which considers the public interest when weighing whether to allow a proposed association that is otherwise prohibited.”²⁹ The public interest and the risk of harm to others therefore do not support Zipper’s motion.

* * *

In weighing the four factors, the Supreme Court has held that the first two factors are the most critical.³⁰ Indeed, recent decisions from the courts of appeals suggest that the failure to show a strong likelihood of success or irreparable harm eliminates the need to balance the other factors. For example, the D.C. Circuit has recognized that the factors governing motions for stays “also apply to motions for preliminary injunctions,”³¹ and has read Supreme Court precedent as suggesting that “a movant cannot obtain a preliminary injunction without showing *both* a likelihood of success *and* a likelihood of irreparable harm.”³² Other circuits agree.³³

²⁷ In addition, while Zipper argues that he did not engage in misconduct during his suspension because he received verbal assurances from the FINRA attorney who negotiated the AWC that he could continue to communicate with Dakota clients notwithstanding his suspension, the NAC specifically found his testimony not credible and rejected this argument. He offers no reason to doubt FINRA’s finding, beyond his bare assertion to the contrary.

²⁸ See *Bernard D. Gorniak*, Exchange Act Release No. 35996, 1995 WL 442063, at *2 (July 20, 1995) (noting that the securities business “presents a great many opportunities for abuse and overreaching, and depends very heavily on the integrity of its participants”).

²⁹ *Riemer*, 2017 WL 5067462, at *3.

³⁰ *Nken v. Holder*, 556 U.S. 418, 434 (2009).

³¹ *Wash. Metro. Area Transit Comm’n*, 559 F.2d at 842 n.1.

³² *Sherley v. Sebelius*, 644 F.3d 388, 392-393 (D.C. Cir. 2011) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (citing *Winter*, 555 U.S. 7; *Nken*, 556 U.S. 418; and *Munaf v. Geren*, 128 S. Ct. 2207 (2008)) (emphasis in *Davis*)); see also *Davis*, 571 F.3d at 1296 (Kavanaugh, J., concurring) (stating that Supreme Court precedent “means that a strong showing of irreparable harm . . . cannot make up for a failure to demonstrate a likelihood of success on the merits”).

³³ See, e.g., *Real Truth about Obama, Inc. v. FEC*, 575 F.3d 342, 346-347 (4th Cir. 2009) (“[A]ll four requirements must be satisfied.”), *vacated on other grounds*, 130 S. Ct. 2371 (2010); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (“[E]ven if Plaintiffs establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper.”).

Even under the view that a stay may be granted absent a showing of strong likelihood of success, courts agree that the movant must show not only that the other factors weigh heavily in its favor but also that it has at least “raised a ‘serious legal question’ on the merits.”³⁴ In other words, “even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [stay opponent] if a stay is granted, [it] is still required to show, at a minimum, ‘serious questions going to the merits.’”³⁵ “Because the moving party must not only show that there are ‘serious questions’ going to the merits, but must additionally establish that ‘the balance of hardships tips *decidedly* in its favor, its overall burden is no lighter than the one it bears under the ‘likelihood of success’ standard.”³⁶ Our prior orders granting stays based on the balance of the four factors are consistent with this line of cases.³⁷

Zipper has not satisfied his burden here. As discussed above, he has failed to show that his appeal raises a substantial question on the merits, let alone that he is likely to succeed. And the public interest and risk of harm to others decidedly outweigh any irreparable harm to Dakota.³⁸

Accordingly, IT IS ORDERED that Bruce Zipper’s motion to stay the sanctions FINRA imposed pending Commission review of his appeal be, and hereby is, denied.

³⁴ *Sherley*, 644 F.3d at 398 (quoting *Wash. Metro. Area Transit Comm’n*, 559 F.3d 2d at 843-44); see also, e.g., *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (explaining that even where the movant does not demonstrate a likelihood of success on the merits on appeal, a motion for a stay may also be “granted upon a lesser showing of a ‘substantial case on the merits’ when ‘the balance of the equities [identified in factors 2, 3, and 4] weighs heavily in favor of granting the stay’”) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981) (per curiam)) (brackets in original).

³⁵ *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (alterations in original).

³⁶ *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal citations omitted).

³⁷ See, e.g., *Scattered Corp.*, 1997 SEC LEXIS 2748, at *11-12 (granting a stay even though it was “unclear . . . due to the complexity” of the case “whether applicants [had] met their burden of showing there is a strong likelihood” of success, because “the applicants have shown this to be a substantial case on the merits and . . . the other three factors” favor granting a stay).

³⁸ Cf. *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) (denying stay pending appeal because the claimed irreparable injury of “exclu[sion] from the securities business,” while “[s]erious,” was “not controlling” and was outweighed by the need to protect investors).

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

Brent J. Fields
Secretary