UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 83340 / May 29, 2018

Admin. Proc. File No. 3-18494

In the Matter of the Application of

WINDSOR STREET CAPITAL, L.P.

For Review of Action Taken by

FINRA

Appeal and Stay Motion Filed: May 17, 2018
Last Brief Received: May 18, 2018

ORDER DENYING STAY

Windsor Street Capital, L.P., formerly known as Meyers Associates, L.P., appeals from a FINRA decision denying the firm's application to continue its FINRA membership notwithstanding its statutory disqualification.[1] Windsor Street moves to stay the effectiveness of FINRA's decision for 45 days from the date of the decision to give it "sufficient time to wind down its activities." FINRA opposes the motion. Windsor Street's motion is denied.

I. Background

A. The Commission found that Windsor Street willfully violated the securities laws.

On July 28, 2017, the Commission entered an order (the "Order") accepting an offer of settlement from Windsor Street to resolve claims pending against it in an administrative proceeding.[2] The Order found that, between June 2013 and January 2016, Windsor Street

[1] *See Windsor Street Capital, L.P.*, SD-2172 (NAC May 14, 2018).

[2] *Windsor Street Capital, L.P.*, Exchange Act Release 81254, 2017 WL 3214439 (July 28, 2017). In addition to this proceeding, Windsor Street also has two other appeals from FINRA disciplinary actions pending before the Commission. *Meyers Associates, L.P.*, Admin. Proc. File

(*continued . . .*)

willfully violated Section 5 of the Securities Act of 1933 by facilitating the unregistered sale of hundreds of millions of penny stock shares. The Order also found that Windsor Street repeatedly and willfully violated Section 17(a) of the Securities Exchange Act of 1934 and Rule 17a-8 thereunder by failing to file suspicious activity reports with the Financial Crimes Enforcement Network, as required by the Bank Secrecy Act of 1970 and its implementing regulations.

Pursuant to the Order, Windsor Street undertook, among other things, to: (1) not accept customer deposits of stock trading at less than $5.00 ("low priced securities"); (2) within 30 days, retain an independent consultant not unacceptable to the Division of Enforcement for a two-year period to review and recommend mandatory enhancements to the firm's anti-money-laundering policies and procedures and semiannually provide the Division specified written reports; (3) remediate any deficiencies identified in the reports; and (4) certify in writing its compliance with the undertakings set forth in the Order, including by certifying within seven days that the firm had ceased accepting low priced securities.

The Commission also ordered Windsor Street to cease and desist from committing or causing any violations and any future violations of Securities Act Sections 5(a) and (c), Exchange Act Section 17(a), and Rule 17a-8 thereunder; censured Windsor Street; and required the firm to pay in installments a $200,000 civil money penalty.[3]

B. FINRA denied Windsor Street's membership continuance application.

On September 7, 2017, Windsor Street filed a membership continuance application with FINRA requesting that FINRA permit it to continue its FINRA membership notwithstanding that it was subject to a statutory disqualification as a result of the Order's finding that it had willfully violated the securities laws.[4] A firm subject to a statutory disqualification cannot remain a FINRA member firm unless it applies for, and is granted, in FINRA's discretion, relief from the disqualification.[5] On February 28, 2018, FINRA held a hearing on Windsor Street's application.

(. . . *continued*)

Nos. 3-18350, 3-18359. Last year, we dismissed Windsor Street's challenge to an earlier FINRA decision denying the firm's request for its founder to continue his association with the firm notwithstanding that he was subject to a statutory disqualification not at issue here. *Meyers Associates, L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044 (Sept. 29, 2017).

[3] Windsor Street has been the subject of at least 19 final regulatory and disciplinary actions since 2000 (not including the Order), and is subject to seven pending regulatory and disciplinary actions including the two actions that it has appealed to the Commission. *See supra* note 2.

[4] *See* Exchange Act Section 3(a)(39)(F), 15 U.S.C. § 78c(a)(39)(F), incorporating by reference Section 15(b)(4)(D), 15 U.S.C. § 78o(b)(4)(D) (providing that a "person is subject to a 'statutory disqualification' with respect to membership or participation in . . . a self-regulatory organization, if such person" "has willfully violated any provision of" the securities laws); FINRA By-Laws, Art. III, § 4 (stating that a person is subject to "disqualification" if such person is subject to a "statutory disqualification" as defined in Exchange Act Section 3(a)(39)).

[5] FINRA By-Laws Article III, Section 3(a), (d).

On May 14, 2018, FINRA issued an order denying Windsor Street's application because the firm had not met its burden of demonstrating that its continued membership in FINRA is in the public interest. FINRA found that Windsor Street had failed to comply with the requirements of the Order, had failed to propose any plan of heightened supervision in connection with its application, and had failed to demonstrate that it could comply with the securities laws in the future. Accordingly, FINRA found that Windsor Street's "continued participation in the securities industry presents an unreasonable risk of harm to the markets and investors."

First, FINRA found that Windsor Street had failed to comply with the Order. FINRA found that the firm had not made all of its required payments under the Order and had offered no explanation for this failure despite documents indicating that it had sufficient funds to do so; failed to retain an independent consultant to review its anti-money-laundering procedures; and failed to certify that it no longer accepts low priced securities. FINRA was "highly troubled" by Windsor Street's noncompliance and found that its "disregard" of the Order's terms indicated that Windsor Street was not currently able to comply with securities laws and regulations.

Second, FINRA found that Windsor Street had failed to propose a meaningful plan to help ensure that it does not engage in misconduct going forward. The fifth question on the membership continuance application requires that a firm "provide a detailed statement of why the Applicant should be allowed to continue its FINRA membership, including what steps the Firm has taken, or will take, to ensure that the disqualification doesn't negatively impact upon the Firm's ability to continue its membership with FINRA." FINRA explained that a "heightened supervisory or compliance plan" "serves as a safeguard to help ensure that the disqualified firm does not repeat the misconduct underlying the disqualifying event and generally complies with securities laws and regulations going forward." FINRA found that "[o]mitting this most basic aspect of the Application indicates that the Firm does not understand or appreciate the seriousness of this process and the ramifications of its statutory disqualification."

Third, FINRA found that Windsor Street had not demonstrated that it could comply with the securities laws in the future. FINRA found that Windsor Street had "not demonstrated that it has a management team in place to help ensure better compliance." FINRA found that neither of the principal members of Windsor Street's management appeared "to be up to the task of ensuring that the Firm complies with securities laws and regulations going forward." Windsor Street's co-owner described its chief compliance officer as "buried" with work, and its acting chief executive officer appeared unfamiliar with his six direct reports and did not know about the Order until several months after it was entered. FINRA also found that Windsor Street had "not demonstrated that it has made adequate changes to its supervisory systems and controls to ensure better compliance results going forward." And FINRA found it "particularly problematic" that Windsor Street's management had failed to place certain registered individuals under heightened supervision despite allegations that the individuals had engaged in misconduct.

FINRA provided that its decision was effective immediately.[6] It also recognized that its decision likely would result in the firm's closure and loss of employment for its registered and

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[6] *See* FINRA Rule 9524(b)(3) ("A decision to deny re-entry or continued association shall be effective immediately.").

unregistered employees. But FINRA concluded that the protection of the investing public required that it deny the application notwithstanding any collateral consequences from the denial.

C. Windsor Street appealed FINRA's decision and moved to stay the decision.

On May 17, 2018, Windsor Street filed an application for review challenging FINRA's decision. In its application, Windsor Street states that it "intends to base its appeal on the ground that forcing immediate statutory disqualification of the Firm rather than permitting an orderly winding down of the Firm's affairs . . . is contrary to public policy and FINRA's ideals of consumer protection." On the same day, Windsor filed an expedited motion to stay FINRA's decision for 45 days from the date of entry.

On May 18, 2018, FINRA opposed Windsor Street's stay motion on the ground that it had failed to meet the high bar for receiving a stay. With respect to Windsor Street's argument that a stay is necessary to permit an orderly winding down of the firm's affairs, FINRA questions why that process has not yet been completed given that the firm's statement that it has been "making preparations for the smooth wind down of the Firm's operations" since the Order. FINRA also states that the firm previously has reversed course after stating an intention to close.

II. Analysis

In deciding whether to grant a stay under Rule of Practice 401,[7] the Commission considers: (i) the likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) whether the moving party will suffer irreparable harm without a stay; (iii) whether another party will suffer substantial harm as a result of a stay; and (iv) the public interest.[8] Because the first two factors are the most critical, an applicant's failure to demonstrate any likelihood of success or irreparable harm ordinarily will be dispositive.[9] "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."[10] And even under the view that a stay may be granted absent a showing of a strong likelihood of success, the movant must at least show that it has "raised a 'serious legal question' on the merits."[11] The movant would also have to show "that the other factors weigh heavily in its favor."[12]

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7 17 C.F.R. § 201.401; *see also* Exchange Act Section 19(d)(2), 15 U.S.C. § 78s(d)(2) (authorizing Commission to stay challenged self-regulatory organization action).

8 *Ahmed Gadelkareem*, Exchange Act Release No. 80586, 2017 WL 1735943, at *1 (Apr. 28, 2017) (citing *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *2 (Apr. 4, 2014)).

9 *Id.*

10 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *5 (Nov. 27. 2017).

11 *Id.* at *6 (citation omitted).

12 *Id.*

The moving party has the burden of establishing that a stay is warranted.[13] Windsor Street has failed to meet its burden. None of the four factors supports a stay.

A. Windsor Street fails to demonstrate a likelihood of success on the merits.

Our analysis of the merits of Windsor Street's appeal is necessarily preliminary, and "'[f]inal resolution must await the Commission's determination of the merits of [the firm's] appeal.'"[14] Nonetheless, at this stage Windsor Street has not met its burden of demonstrating that it has a strong likelihood of success on the merits. Indeed, Windsor Street "concedes that there is not a particularly strong likelihood that it will succeed on the merits of its appeal." Windsor Street does not otherwise address the merits of FINRA's decision. Accordingly, Windsor Street also fails to show that there is a serious legal question on the merits.

B. Windsor Street fails to establish that it will suffer irreparable harm without a stay.

Windsor Street asserts that various factors will cause it irreparable harm if a stay is not granted. To establish irreparable harm, Windsor Street must show an injury that is "both certain and great" and "actual and not theoretical."[15] A stay "will not be granted [based on] something merely feared as liable to occur at some indefinite time,"[16] and a "movant must show that the alleged harm will directly result from the action which the movant seeks to [stay]."[17] 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.[18] Windsor Street makes no attempt to explain why any of its claimed harms are irreparable under this standard.

Instead, Windsor Street argues that in the absence of a stay it will suffer irreparable harm because it will not be able to "smoothly transition its customer accounts to another firm or close them entirely." But Windsor Street fails to demonstrate how its alleged inability to do this in the absence of a stay would harm it. Nor does it establish that it would be unable to do this in the absence of a stay or that the granting of a stay would ensure that it could do this. In its motion, Windsor Street represents that it has been "making preparations for the smooth wind down of the Firm's operations" since the Commission issued the Order in 2017; at the February 2018 hearing, Windsor Street characterized its own recent operations as "difficult and chaotic." Thus, the firm has not established either that it is unable to conduct a smooth transfer of accounts absent a stay or that it is able to conduct a smooth transfer of accounts if a stay is granted.

Windsor Street also claims that it will be irreparably injured in the absence of a stay because it will not be able to "withdraw all outstanding appeals and settle all pending regulatory

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13 *Gadelkareem*, 2017 WL 1735943, at *1.

14 *Zipper*, 2017 WL 5712555, at *3 (citation omitted).

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

16 *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)).

17 *Id*.

18 *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

matters." But Windsor Street does not establish that it must be a FINRA member to do this. Windsor Street's ability to settle all outstanding matters if a stay is granted is also speculative.

Lastly, Windsor Street asserts that it will suffer irreparable harm in the absence of a stay because it will not be able to "properly terminate its clearing agreement and make all necessary arrangements with its escrow agent." Windsor Street does not explain what these tasks entail, why it cannot complete these tasks without a stay, or why it must be a FINRA member to complete these tasks. These vague assertions accordingly do not establish irreparable injury.[19]

C. A stay would endanger investors and is not in the public interest.

The remaining factors do not weigh in favor of a stay. Windsor Street asserts that "no person will suffer substantial harm as a result of [a] stay" because it "will not be commencing any new business lines; hiring or registering any new representatives; opening any new branch locations; making any changes to its current ownership structure; or engaging in a bulk transfer of its customer accounts during the 45-day period." Windsor Street also argues that "a stay is likely to serve the public interest, in particular, the interests of the Firm's existing public customers because the stay will allow the Firm to transition those accounts to a new firm or close them without harm to the customers." Windsor Street asserts that "[w]ithout the stay, customers will experience issues and delays in receiving their funds and securities currently held with Windsor and its clearing firm." Contrary to the firm's arguments, the record shows that granting a stay would harm investors and denying a stay would not harm Windsor Street's customers.

Windsor Street's representations that it will not expand its business or take certain other actions in the next 45 days do not eliminate the risks associated with its continued operations because the securities industry is "rife with opportunities for abuse and overreaching."[20] In the Order, FINRA found that Windsor Street "failed to show that it is capable of complying with securities rules and regulations going forward" and that "it is not in the public interest, and would create an unreasonable risk of harm to the market or investors, for [the firm] to continue its FINRA membership." Because Windsor Street offers "no basis to doubt" these findings, "any relief staying FINRA's denial of the [membership continuance] application while the Commission considers [its] appeal could endanger investors."[21] Such a stay would allow Windsor Street to continue in FINRA membership "'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.'"[22] Indeed,

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19 *See, e.g.*, *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 213 (D.D.C. 2012) (finding movant's "claimed economic injuries . . . too vague and speculative to support a finding of irreparable harm" necessary to stay a DEA order where movant stated "that rerouting drug shipments from facilities outside of Florida would 'require substantial effort and resources'").

20 *Michael B. Scheft*, Exchange Act Release No. 24417, 1987 WL 757513, at *2 (May 1, 1987).

21 *Zipper*, 2017 WL 5712555, at *5.

22 *Id.* (quoting *Richard Allen Riemer, Jr.*, Exchange Act Release No. 82014, 2017 WL 5067462, at *3 (Nov. 3, 2017)).

Windsor Street itself represents that its recent operations have been "difficult and chaotic." These considerations weigh heavily against Windsor Street's motion.[23]

Windsor Street also fails to show that its customers will be injured without a stay. According to Windsor Street, it "believes" and "has been advised" that its clearing firm has "no retail capabilities to handle customer orders or other requests from customers with regard to their brokerage accounts." But FINRA's opposition includes a declaration stating that, based on a conversation with a representative at Windsor Street's clearing firm, a Windsor Street customer could contact the clearing firm to request the receipt of cash, to sell securities positions and receive the proceeds, and to cover short positions. The declaration also states that a Windsor Street customer could complete an account transfer within three to seven days. Windsor Street offers no contrary evidence, and it does not specify how long an account transfer would take if it continued operations. Accordingly, Windsor Street has not shown that its customers would be harmed in the absence of a stay or that the public interest favors granting relief.[24]

Finally, Windsor Street argues that a stay is necessary because a 45-day "wind down period" will allow the firm's nine salaried employees "to seek other employment either within or outside the securities industry." But Windsor Street does not explain why its employees could not do this in the absence of the stay. To the extent Windsor Street argues that the 45-day wind down period is necessary because otherwise its employees would "lose their income" and have "their health benefits" interrupted while seeking employment, it does not explain why the 45-day

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[23] *See, e.g.*, *Gadelkareem*, 2017 WL 1735943, at *1 (finding, given FINRA's determination that movant "poses a danger to the industry and the investing public," that "allowing him to associate with a FINRA member firm during the pendency of his appeal raises a substantial risk of harm to the public" and "would not serve the public interest") (citations omitted).

[24] *See No. Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 WL 3937496, at *4 (Aug. 12, 2014) (finding that customers of firm expelled from FINRA membership "should be able to obtain [certain] information directly from the clearing firm," and concluding that "on balance, depriving their customers of applicants' brokerage-related services during the appeal does not support the issuance of a stay"); *Stratton Oakmont, Inc.*, Exchange Act Release No. 38026, 1996 WL 707982, at *2 (Dec. 6, 1996) (denying a stay pending appeal of a FINRA decision expelling a firm from membership in light of the "risks of further violations with respect to the Firm's customers and prospective customers" and the fact that the firm's "clearing broker can liquidate or transfer [firm] customer positions"); *see generally Meyers Associates, L.P.*, Exchange Act Release No. 77994, 2016 WL 3124674, at *4 (June 3, 2016) (concluding that "[t]he alleged harm to Applicants' customers and employees is outweighed by the risk of allowing Meyers's continued participation in the securities industry"); *Dawson James Secs.*, Exchange Act Release No. 76440, 2015 WL 7074282, at *4 (Nov. 13, 2015) ("Any claimed harm to [statutorily disqualified individual's] customers is outweighed by FINRA's concerns about [individual's] ability to comply with the securities laws and the threat he poses to investors."); *cf. Kabani & Co., Inc.*, Exchange Act Release No. 80403, 2017 WL 1295034 (Apr. 7, 2017) (concluding that "[a]ny detriment to [movants'] clients from the need to engage new auditors is outweighed by the substantial risk to movants'clients, and others, if the revocation of [firm's] registration and the bars from association imposed against movants are stayed").

period is necessary in light of its representation that it has been "making preparations for the smooth wind down of the Firm's operations" since the Commission issued the Order in 2017.

In any case, we disagree that denying a stay would "caus[e] catastrophic harm to these people in the absence of any risk to the public." As discussed above, granting a stay would put investors and the public at risk given FINRA's conclusion that Windsor Street "failed to show that it is capable of complying with securities rules and regulations going forward" and that it "would create an unreasonable risk of harm to the market or investors[] for [the firm] to continue its FINRA membership." Indeed, Windsor Street appears unable to comply with orders entered after it has been found to have violated the securities laws. Its failure to comply with all of the required undertakings in the Order is undisputed. We find any harm to Windsor Street's employees outweighed by the danger that the firm's continued membership in FINRA represents.[25]

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Windsor Street fails to raise a serious question on the merits let alone establish a likelihood of success in its appeal. Nor does it show that it will suffer irreparable harm absent a stay. And even if we considered some of its alleged injuries to constitute irreparable harm, it does not demonstrate that the balance of the equities weigh decidedly in its favor. Indeed, consideration of the public interest militates strongly in favor of denying a stay. Under these circumstances, a stay is not warranted.[26] Accordingly, IT IS ORDERED that the motion by Windsor Street Capital, L.P., to stay the effect of FINRA's decision is denied.

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

Brent J. Fields
Secretary

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[25] *See Meyers Associates*, 2016 WL 3124674, at *4 (finding that the "alleged harm to Applicants' customers and employees is outweighed by the risk of allowing Meyers's continued participation in the securities industry" where Applicants' "extensive regulatory and disciplinary history . . . strongly suggests that any future in the securities industry will result in further non-compliance").

[26] *See Zipper*, 2017 WL 5712555, at *6 (finding that applicant did not meet his burden of establishing that a stay was warranted where he "failed to show that his appeal raises a substantial question on the merits, let alone that he is likely to succeed," and where "the public interest and risk of harm to others decidedly outweigh any irreparable harm to [his firm]").