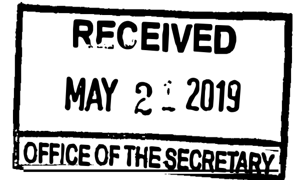

UNITED STATES OF AMERICA
before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of GREGORY ACOSTA, CRD #816526. For Review of Action Taken by FINRA,	 Admin. Proc. File No. 3-18637 REPLY BRIEF IN RESPONSE TO ORDER REQUESTING ADDITIONAL BRIEFING

REPLY

I. Mr. Acosta Lacks Any Avenue to Appeal FINRA's Determination of his Statutory Disqualification

FINRA takes great pains to detail the Membership Continuation Process, highlighting the "multiple levels of review" associated with this process. FINRA Br. at 5. This information is nothing more than a red herring, however, because, as FINRA readily admits, Mr. Acosta lacks the ability to initiate the Membership Continuation Process. Moreover, Mr. Acosta's ability to associate with a member firm depends entirely on the outcome of this process – which he cannot initiate. *See id.* at 1. FINRA does not dispute Mr. Acosta's position that he lacks an avenue to appeal his statutory disqualification.

II. FINRA's Letter to Kestra Barred Mr. Acosta and Limited his Access to Services

FINRA takes the position that "unless and until FINRA denies a member's application to associate with Acosta, FINRA has not prohibited Acosta from associating with any FINRA member, and therefore has not barred him." *Id.* at 1. This position wholly ignores the reality of the situation. FINRA prohibits Mr. Acosta from associating with any member firm without FINRA's approval. *See* FINRA Br. at 3. FINRA will not consider granting approval until a *member firm* initiates the Membership Continuation process on Mr. Acosta's behalf. *See id.* at 4. Thus, Mr. Acosta is effectively barred.

Simply put, FINRA's position is untenable. It leads to the anomalous situation in which a statutorily disqualified representative, who happens to own, or have substantial control over, a member firm, may immediately appeal his/her statutory disqualification, while a representative who lacks such control has no opportunity to appeal his/her disqualification. Mr. Acosta's position is readily distinguishable from that of the registered representatives in *Dillon*. In *Dillon*, the focus of the Commission's inquiry was on the representatives' ability to associate with *one specific firm*. *See Joseph Dillon & Company, Inc.*, Exchange Act Release No. 43523, 2000 WL 1664016, at *1 (Nov. 6, 2000). In finding that the representatives were not barred, the Commission placed great emphasis on the fact that the representatives were uninhibited in their ability to associate with other firms. *See id.* at *3 (Noting that "[w]hatever the consequences to the Firm of the exemption denial, it does not constitute a bar of Dillon's registered representatives because they will remain free to associate with other firms). In contrast, Mr. Acosta is not free to associate with *any* firm. Thus, he is effectively barred. *See Frank R. Rubba*, Exchange Act Release No. 40238, 1998 WL 404640, at *2 (finding that the NASD effectively barred a registered representative from associating with all member firms by imposing a requalification requirement).

FINRA claims that Mr. Acosta has not been barred because "FINRA has not taken final action," and "at that moment [the representative] was prohibited from associating with any FINRA member." *See* FINRA Br. at 11. With respect to the "final action" piece, this argument is disingenuous. FINRA makes clear that it will not take final action in this matter <u>unless and until</u> a member firm initiates the Membership Continuation process on Mr. Acosta's behalf. *See id.* at 5. As repeatedly emphasized herein, Mr. Acosta may not initiate this process unilaterally, nor may he compel a member firm to do so on his behalf. Thus, he is left in the same vicious cycle. Without a member firm, FINRA will n*ever* take "final action," though the effect is quite final. With respect to denial of access to services, FINRA argues that, "FINRA has done nothing to deny Acosta access to the Membership Continuation Process because *no* individual has access to that process." *See Id.* at 13. Mr. Acosta agrees. This argument aptly captures the inadequacy of Mr. Acosta's remedy through FINRA.

III. FINRA was Incorrect in its Determination that Mr. Acosta is Subject to Statutory Disqualification

FINRA contends that the California Department of Insurance ("the Department") incorporated the allegations from its Accusation into the Stipulated Order by the Department ("the Order"). This is incorrect. The Department's Order explicitly references California Insurance Code Section 1668.1 ("Section 1668.1"), while conspicuously omitting any reference to any other statute referenced in the Accusation. If, as FINRA contends, the Order incorporates all of the allegations in the Accusation, this begs the question – why does the Order expressly reference, some, but not all of the allegations therein? Further, the only specific injunctive or prospective conditions in the Department's Order prohibit Mr. Acosta from becoming the beneficiary of any type of insurance for any client, and from entering into any loans with any insurance client-- the same conduct prohibited by Section 1668.1. In contrast, the order in *Melton* included prospective conditions specifically prohibiting fraudulent conduct. *See In re* Marshall E. Melton, Exchange Act Release No. 2151, 2003 WL 21729839, at *1 (Jul. 25, 2003) (representative was "permanently enjoined from violating antifraud provisions of the securities laws"). In *Melton*, the Commission noted, "we may properly take into account the allegations underlying the *injunction to which Respondents consented*." *Id.* at *3 (emphasis added). Mr. Acosta only consented to injunctions relating to violations of Section 1668.1. Thus, the allegations in the Accusation, to the extent they are relevant at all (which Mr. Acosta does not concede), are only relevant insofar as they relate to violations of this specific section.

FINRA attempts to avoid this hurdle by arguing that Mr. Acosta agrees (in paragraph five of the Stipulation and Waiver) to comply with the California Insurance Code, which, "by definition includes Section 1668(i)." *See* FINRA Br. at 20. This argument is specious and illogical. In the same paragraph, Mr. Acosta also agrees, "to obey all other laws of the state of California, the United States of America, and every state and foreign government or regulatory authority having jurisdiction over Respondents." Accordingly, per FINRA's interpretation, the Order may be based on violations of *any* of these laws.

On its face, the Order does not reference any statute for which Mr. Acosta may be subject to statutory disqualification. Extrinsic evidence of intent may only be considered when an Order's terms are ambiguous. *See In re* Meyer's Associates, L.P., Exchange Act Release No. 81778, 2017 WL 4335044 at *6 (Sep. 29, 2017). Here, the Order, by its terms, unambiguously references only Section 1668.1 – a non-fraud provision. Thus, the Department's initial allegations are irrelevant to the Order's interpretation. Even assuming, arguendo, that the terms of the Order are ambiguous, extrinsic evidence (including the Accusation itself) suggests that the Parties did not intend to include any fraud provision in the Order. The Accusation acknowledged that Mr. Fawcett was 87 years old and "his memory was not very good." Accusation of the Insurance Commissioner of the State of California ("the Accusation") at 3. Moreover, Mr. Fawcett's CPA, attorney, and daughter submitted declarations indicating that Mr. Fawcett was aware of, and consented to, the loan and policy at issue. *See* Declaration of Gregory Acosta ("Acosta Decl.") at ¶ 14-15; *see also* Acosta Decl. Exhibits B, C & D. Under these circumstances, it defies common sense to conclude that Mr. Acosta consented to an order based on allegations of fraud.

Mr. Acosta's situation differs importantly from that of the representative in *Savva.* In *Savva*, the Commission expressly found that the order at issue was "based on violations of Vermont regulations prohibiting fraudulent, manipulative, or deceptive conduct." *See In re* Nicholas S. Savva, Exchange Act Release No. 72485, 2014 WL 2887272, at *9 (Jun. 26, 2014) (The representative's fraudulent conduct included, among other things, engaging in unauthorized transactions in customer accounts and using "boiler room" tactics to sell securities). Moreover, the representative did not dispute the fact that the order was based on fraudulent conduct. [1] *See id.* at *1. In contrast, the Order in this case was not based on fraudulent, manipulative, or deceptive conduct. Thus, there is no basis for Mr. Acosta's statutory disqualification.

[1] Similarly, the registered representative in *Melton* consented to an order permanently enjoining him from violating the antifraud provisions of the securities laws. *See In re* Marshall E. Melton, Exchange Act Release No. 2151, 2003 WL 21729839, at *1 (Jul. 25, 2003); In *Rowe*, the consent order at issue barred the registered representative from engaging in the securities business in New Hampshire. *See In re* Nicholas Rowe, Exchange Act Release No. 746, 2015 WL 847167, at *1 (Feb. 27, 2015).

FINRA attributes great importance to the language in the second paragraph of the Stipulation and Waiver, stating, "if proven to be true and correct, the facts alleged in [the] Accusation are grounds for discipline...pursuant to the provisions...referred to in [the] Accusation." This boilerplate language does not alter the fact that the Order solely references Section 1668.1, and enjoins Mr. Acosta from violating this statute only. These facts clearly demonstrate that alleged violations of Section 1668.1 constitute the sole basis upon which the Order was entered. Moreover, for the reasons detailed herein, the Accusation is not relevant to interpretation of the Order.

Conclusion

The Commission has jurisdiction over this matter because, through its letter to Kestra, FINRA barred Mr. Acosta and prohibited his access to services. If the SEC believes FINRA's decision is not reviewable here, Mr. Acosta requests that it make clear expeditiously that it will not be reviewing this matter.

DATED: May 17, 2019

D'AMURA & ZAIDMAN, PLLC

By: Richard A. D'Amura

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