UNITED STATES OF AMERICA
before the
SECURITIES EXCHANGE COMMISSION

In the Matter of the Application of

MICHAEL CLARK, CRD# 2580455

For a Motion to Stay Sanctions
Imposed by FINRA

REPLY IN SUPPORT OF PETITONER'S MOTION TO STAY STATUTORY DISQUALIFICATION

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INTRODUCTION

FINRA's decision to statutorily disqualify Mr. Clark is based on a Stipulation Surrendering License filed by the New York State Department of Financial Services (the "New York Stipulation"), whereby Mr. Clark voluntarily surrendered his insurance license in New York, and an Order of Summary Revocation filed by the California Department of Insurance (the "California Default Order") that revoked Mr. Clark's insurance license in California for not responding to the state regarding tax liens and the New York Stipulation. However, Mr. Clark recently reapplied for an insurance license in New York and his application was approved. Therefore, the only remaining basis for FINRA's statutory disqualification decision is the California Default Order.

Mr. Clark is currently in the process of a reapplying for his California insurance license. At a minimum, a stay should be entered until California makes a decision on Mr. Clark's application.

FINRA's opposition brief incorrectly characterizes this matter as a settled question of law by citing previous Commission decisions regarding statutory disqualifications. However, the precedent FINRA relies on is either not applicable or actually supports Mr. Clark's contention that his statutory disqualification should be set aside.

A stay should be entered to allow Mr. Clark to continue working in the industry while the Commission considers the unique legal issue on appeal. As explained in the Motion to Stay and discussed further herein, Mr. Clark satisfies all the factors necessary for the Commission to enter a stay.

ARGUMENT

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I. The standard for considering a request to stay

The Commission may grant a stay if it finds that "justice so requires." *Electronic Transaction Clearing, Inc.*, Exchange Rel. No. 73698, 2014 WL 6680112 (Nov. 26, 2014). FINRA correctly identified the four factors to consider in determining whether to grant a stay: (1) a strong likelihood that the movant will prevail on the merits; (2) whether the movant will suffer irreparable harm without a stay; (3) whether there would be substantial harm to other parties if a stay were granted; and (4) whether the issuance of a stay would serve the public interest. *Scottsdale Cap. Advisors Corp.*, Exchange Release Act No. 83783 (Aug. 6, 2018) (Order Granting Stay). However, the four factors are "not accorded equal weight" and "a stay may be granted where there is a high probability of irreparable harm, but a lower probability of success on the merits, **or vice versa**." *Michael Earl McCune*, Exchange Act Release No. 77921, 2016 WL 2997935 (May 25, 2016) (Order Granting Stay) (emphasis added). Accordingly, the Commission only needs to conclude that Mr. Clark has a high probability of success on one of the four factors.

As set forth in Mr. Clark's Motion to Stay and discussed herein, the Commission should stay FINRA's statutory disqualification because Mr. Clark has a high likelihood of success on multiple factors relevant to determining whether to grant a stay.

II. Mr. Clark has a strong likelihood of success on the merits.

Mr. Clark has a strong likelihood of success in setting aside his statutory disqualification because the Exchange Act, prior Commission decisions, and FINRA's own action all indicate that an insurance license revocation is not the equivalent of a bar.

A. FINRA acknowledges and *Acosta* demonstrates that not all license revocations are bars.

Before initiating the instant appeal, Mr. Clark's employing broker dealer Ameriprise Financial Services, LLC and undersigned counsel met with FINRA staff on April 6, 2021, to discuss FINRA's decision to statutorily disqualify Mr. Clark. FINRA staff advised during the

meeting that it does not consider all insurance license revocations to be "bars" and that its determination is based on factors that FINRA staff considers internally but has never disclosed to brokers like Mr. Clark. For example, FINRA staff explained that insurance license revocations based on a failure to pay required fees are not bars from FINRA's perspective and that brokers whose licenses are revoked for this reason would not be subject to statutory disqualification. FINRA explained that revocations based on more egregious conduct *could* be considered bars if in the independent judgment of FINRA staff such a determination was warranted.

FINRA cannot have it both ways. FINRA cannot ignore the distinction it has drawn internally and applied in practice that some revocations are bars but not others, while simultaneously arguing in this case that *any* revocation preventing a broker from engaging in insurance transactions is a bar that must result in a statutory disqualification. FINRA's contradictory positions regarding whether revocations are bars should be evidence enough that Mr. Clark has a high probability of success on the merits of his appeal.

The Commission's decision in *Acosta* further supports Mr. Clark's position. FINRA correctly explains in its brief that the primary issue in *Acosta* was whether a California insurance license revocation found that the applicant violated a statute prohibiting fraudulent, manipulative, or deceptive ("FMD") conduct. *Gregory Acosta*, Exchange Act Release No. 89121, 2020 SEC LEXIS 3470 (June 22, 2020). *Acosta* determined that the California insurance license revocation did not contain such a finding so the applicant was not statutorily disqualified under Exchange Act Section 15(b)(4)(H)(ii). *Id*. However, if all insurance license revocations were actually bars, then the applicant in *Acosta* would still have been statutorily disqualified under Exchange Act Section 15(b)(4)(H)(i). The revocation in *Acosta* would have been sufficient grounds for statutory disqualification regardless of whether the revocation found the applicant violated a statute

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prohibiting FMD conduct. Clearly FINRA and the Commission did not take the position in *Acosta* that all revocations are bars and the same should be true with respect to Mr. Clark. Moreover, the Commission in *Acosta* held that FINRA is bound by the plain language of an insurance commission's order in determining whether a statutory disqualification exists. It is undisputed that the Default Order only uses the term "revocation," not "bar."

B. The reasoning in *Meyers* does not apply to Mr. Clark.

Orders revoking insurance licenses do not have the same practical effect as a bar if the applicant is now able to reapply for licensure. FINRA argues that *Meyers* rejected an argument that is "identical to Clark's argument here – that the state order at issue was not a bar because it did not contain the term 'bar.'" (FINRA Opposition, p. 8) (citing *Meyers Assocs., L.P.*, Exchange Act Release No. 81778 (Sept. 29, 2017)). However, setting aside the fact that *Meyers* involved a securities license rather than an insurance license, FINRA ignores a critical fact present in *Meyers* that is absent with respect to Mr. Clark. The appellant in *Meyers* was attempting to overturn the statutory disqualification decision during a three-year period where the applicant was ineligible to reapply for his license. "Without admitting or denying those charges, applicants consented to a final order that required Meyers to withdraw his registration as an agent of the firm **and not reapply for registration for three years**." *Id*. (emphasis added).

Relying on *Meyers*, FINRA argues that all license revocations have the same "practical effect as a bar regardless of the nomenclature used in the order." (FINRA Opposition, p. 12). However, at best, the revocation in *Meyers* had the practical effect of a bar because the appellant was still unable to reapply for his license while challenging the statutory disqualification. The *Saava* decision cited by FINRA recognizes the importance of considering whether sanctions exist beyond just a revocation. *Nicolas S. Saava*, Exchange Act Release No. 72485, 2014 SEC LEXIS

5100 (June 26, 2014) (holding that persons may be subject to disqualification "where the sanctions involved licensing or registration revocation or suspension…**and the sanctions were still in effect**") (emphasis added).

The New York Stipulation obviously does not bar Mr. Clark from maintaining an insurance license in New York because Mr. Clark reapplied for and received a New York insurance license on May 6, 2021. The fact that he received a new license should be sufficient evidence to show that the New York Stipulation was not a bar. Similarly, Mr. Clark is able to reapply for a California insurance license and could have reapplied immediately after entry of the California Default Order.[1] Accordingly, the New York Stipulation and the California Default Order did not have the practical effect of barring Mr. Clark from engaging in the insurance business in either state and Mr. Clark will likely success on the merits of his appeal.

C. The Exchange Act's fairness requirement supports setting aside Mr. Clark's statutory disqualification.

"[A] fundamental principle governing all SRO disciplinary proceedings is fairness." *Jeffrey Ainley Hayden*, Exchange Release Act No. 42772, 2000 WL 649146 (May 11, 2000). Fairness principles support setting aside Mr. Clark's statutory disqualification because Mr. Clark has regained his insurance license in New York and is currently in the process of applying for a new California insurance license. If Mr. Clark's forthcoming application for an insurance license in California is accepted, the statutory disqualification notice will be moot, and FINRA's argument that Mr. Clark is currently barred from the insurance industry will be defeated even under FINRA's flawed and inconsistent argument that a revocation is equivalent to a bar. Fairness principles dictate that, at a minimum, Mr. Clark's statutory disqualification should be stayed until the

[1] Mr. Clark is currently in the process of reapplying for an insurance license in California. The process has been complicated and delayed by the COVID-19 pandemic.

California Department of Insurance makes a decision regarding Mr. Clark's forthcoming application.

III. Mr. Clark would be irreparably harmed if a stay is not granted and others would be substantially harmed.

"[T]he destruction of a business, absent a stay, is more than just a 'mere' economic injury, and rises to the level of irreparable injury." *Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783 (Aug. 6 2018) (internal citations omitted). Similar to the appellant in *Scottsdale*, a statutory disqualification would force Mr. Clark would to divest all control of his relationships with his clients and would prevent Mr. Clark's continued involvement in the securities business. If Mr. Clark must relinquish all control of his primary business upon statutory disqualification, there will be "no practical way to undo those consequences should [he] ultimately prevail on appeal." *Id*. If Mr. Clark is no longer able to service clients in his group or play a role in their financial planning, the clients may leave the group. The Commission has found that a likelihood to permanently lose customers will show irreparable harm. *Bloomberg L.P.*, Exchange Act Release No. 83755 (July 31, 2018). Contrary to FINRA's assertion, Mr. Clark is not alleging irreparable harm based purely on financial income or employment. As a 62-year-old financial professional with over 25 years in the business, he is interested in protecting his clients and his business relationships.

Mr. Clark cannot be required to seek another member firm to sponsor a membership continuance application as a means to avoid the irreparable harm he will suffer as a result of FINRA's statutory disqualification. Freedom to associate with a member firm and file a membership continuance application is not the same as challenging a statutory disqualification. *See Gregory Acosta*, Exchange Act Release No. 89121, 2020 SEC LEXIS 3470 (June 22, 2020).

Mr. Clark did not file the instant appeal to continue membership with a member firm, he filed it because he has been inappropriately subject to a statutory disqualification that should be set aside. Even if Mr. Clark could find another member firm willing to sponsor a membership application, he cannot be required to do so. The solution to avoiding the harm of the statutory disqualification is to stay the action pending Mr. Clark's appeal, not force him to try and find employment with another member firm willing to sponsor a membership continuance application.

Finally, the impact of the COVID-19 pandemic should be considered in evaluating the harm to Mr. Clark and others. FINRA argues that granting a stay based on the pandemic would "elevate any purported harm incurred by an applicant seeking a stay since March 2020 to the level of 'irreparable,' which is untenable." (Opposition to Stay, p. 15). Yet Mr. Clark is not contending that the pandemic alone dictates that a stay is required, merely that it should be considered. Courts and professions across the country have made decisions based on the hardships inevitably caused by the pandemic. FINRA even pointed to such hardships in its request for an extension of the briefing deadlines in this matter.

A stay should be granted to avoid irreparable harm to Mr. Clark and substantial harm to others such as Mr. Clark's clients and his business group.

IV. A stay will serve the public interest.

Mr. Clark does not present any harm to the public and should be allowed to continue offering his financial advisory services to the public while this appeal is pending. The Commission generally looks for substantive securities law violations or serious violations of FINRA's rules which would pose a risk to investors when considering whether a stay would go against the public interest. *See, e.g.*, *Ahmed Gadelkareem*, Exchange Act Release No. 80586, 2017 WL 1735943 (May 3, 2017); *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888 (July

18, 2016); *William Scholander*, Exchange Act Release No. 74437, 2015 WL 904234 (Mar. 4, 2015). Mr. Clark never committed the types of substantive or serious violations that would harm the public. His mistake was not responding to questions regarding tax liens. The public was unequivocally not harmed by Mr. Clark's action.

CONCLUSION

For the foregoing reasons, Mr. Clark respectfully requests that the Commission grant the Motion to Stay pending a full review of the substantial legal issues present.

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May 11, 2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the following via the email and the SEC portal this 11th day of May 2021:

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