

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
November 13, 2015

SECURITIES EXCHANGE ACT OF 1934
Release No. 76440 / November 13, 2015

Admin. Proc. File No. 3-16933

In the Matter of the Application of
DAWSON JAMES SECURITIES, INC.
For Review of Action Taken by
FINRA

ORDER DENYING STAY

Bret M. Shapiro became statutorily disqualified after entering into a settlement with FINRA for alleged violations stemming from his willful failure to disclose certain federal tax liens on his Uniform Application for Securities Industry Registration or Transfer (“Form U4”). Shapiro’s employer, Dawson James Securities, Inc. (“DJSI”), a FINRA member firm, submitted an application asking FINRA to permit Shapiro to continue associating with the firm. FINRA denied the application on September 29, 2015.¹ DJSI has appealed that decision to the Commission and—at issue here—moved to stay the effectiveness of FINRA’s denial pending the outcome of the appeal.² Because DJSI has not met its burden of establishing that a stay is warranted, the motion is denied.

¹ *In the Matter of the Continued Ass’n of Bret M. Shapiro as a Gen. Sec. Rep. with Dawson James Sec., Inc.*, SD-1812 (Feb. 19, 2014), available at http://www.finra.org/sites/default/files/SD-2029-Shapiro_0_0.pdf.

² Under FINRA rules and policy, Shapiro was permitted to associate with DJSI until FINRA issued its decision. A stay of that decision would allow Shapiro to continue to associate with DJSI. *See, e.g.*, FINRA Rule 9524 (stating that a decision to deny continued association “shall be effective immediately”); FINRA Notice 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

On October 29, 2013, Shapiro settled charges of alleged willful violations of FINRA rules stemming from Shapiro's failure to disclose on his Form U4 five outstanding federal tax liens totaling approximately \$631,180. As part of the settlement, Shapiro consented to the imposition of a three-month suspension from association with any FINRA member firm and a \$5,000 fine. Shapiro served his suspension and paid the fine in full. But the finding of willful violations in the settlement subjects Shapiro to statutory disqualification under Exchange Act Section 3(a)(39),³ and, as a result, to disqualification from association with a member firm under FINRA's By-Laws.⁴

On February 27, 2014, DJSI submitted an MC-400 Membership Continuation Application asking FINRA to permit Shapiro to continue to associate with the firm as a general securities representative and general securities principal despite his statutory disqualification. Shapiro continued to work for DJSI while the firm's application was pending.

After a hearing, FINRA's National Adjudicatory Council denied DJSI's application. The NAC concluded that DJSI had not met its burden of establishing that it was in the public interest to permit Shapiro to continue to associate with the firm and found that Shapiro's association with the firm would create an unreasonable risk of harm to the market or investors. The NAC found that Shapiro not only failed to disclose the five tax liens that were the subject of his settlement, but that he also failed to disclose four additional judgments and liens on his Form U4, which "demonstrate[d] a pattern by Shapiro of disregarding his disclosure obligations under FINRA's rules." The NAC further found that DJSI's disciplinary and regulatory history, along with concerns about the proposed supervisor's ability to effectively supervise Shapiro, weighed "heavily" against approving the continuance application. The NAC considered DJSI's post-hearing revisions to its supervisory plan, but found that the changes "would not cure Shapiro's repeated failures to comply with FINRA's disclosure rules and our other concerns." Because the NAC decision was not called for review by the FINRA Board of Governors, it became the final decision of FINRA.

II. Analysis

The Commission considers the following factors in determining whether to grant a stay: (i) whether there is a strong likelihood that the moving party will succeed on the merits of its appeal; (ii) whether the moving party will suffer irreparable harm without a stay; (iii) whether any person will suffer substantial harm as a result of a stay; and (iv) whether a stay is likely to

³ 15 U.S.C. § 78c(a)(39) (defining "statutory disqualification" to include any person who has been found to have willfully made a false or misleading statement of material fact, or omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization).

⁴ 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)).

serve the public interest.⁵ The moving party has the burden of establishing that a stay is warranted.⁶ DJSI has failed to discharge this burden.

A. DJSI has not demonstrated a strong likelihood of success on the merits of its appeal.

Our analysis of the likelihood of DJSI's success on the merits of its appeal is preliminary.⁷ But at this stage of the proceedings, DJSI has not demonstrated a strong likelihood that its appeal will succeed on the merits. In support of its appeal, DJSI argues that (i) FINRA's denial of its application was punitive instead of remedial; (ii) FINRA erred in considering additional conduct that was not the subject of Shapiro's settlement; and (iii) FINRA erred in its consideration of DJSI's supervisory plan.

First, we reject DJSI's argument that FINRA "failed to consider and properly apply well-settled precedent that requires sanctions to be remedial and not punitive." Specifically, DJSI contends that FINRA's denial of its application constituted a "death sentence for Mr. Shapiro's securities career" and was thus "completely devoid of any sense of proportionality." But this argument is misplaced because FINRA's denial of the application was not a sanction. At the time of DJSI's application, Shapiro already had been disqualified from association under FINRA's By-Laws. DJSI's application sought "relief from [this] previously existing disqualification"⁸ and FINRA was required to determine whether it was in the public interest to

⁵ *Harry W. Hunt*, Securities Exchange Act Release No. 68755, 2013 WL 325333, at *3 (Jan. 29, 2013) (citing *Intelispan, Inc.*, Exchange Act Release No. 42738, 2000 WL 511471, at *2 (May 1, 2000)); see also *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985); Rules of Practice, Exchange Act Release No. 35833, 60 Fed. Reg. 32,738, 32,772 (June 23, 1995) (prior comment to Rule of Practice 401).

⁶ *Hunt*, 2013 WL 325333, at *3 (citing *Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000)).

⁷ See *id.* at *4 (noting that "[f]inal resolution must await the Commission's determination of the merits of [movant's] appeal").

⁸ *Dennis Milewitz*, Exchange Act Release No. 40254, 1998 WL 409449, at *4 (July 23, 1998); see also *Eric J. Weiss*, Exchange Act Release No. 69177, 2013 WL 1122496, at *10 (Mar. 19, 2013) (observing that, despite denial of continuance application, Weiss "remain[ed] free to restart the association process with a different firm at any time"); *Halpert & Co., Inc.*, Exchange Act Release No. 28615, 1990 WL 322213, at *2 (Nov. 14, 1990) (stating that the denial of an application is a denial only of the "request *at this time* for relief from [the associated person's] previously incurred disqualification" (emphasis added)).

grant that relief.⁹ Thus, FINRA's consideration of an application is neither a penalty nor a remedial sanction for misconduct.¹⁰

Second, DJSI has not demonstrated that FINRA erred when it considered Shapiro's failure to disclose four additional judgments and liens. DJSI errs in arguing that Commission precedent bars FINRA from considering this conduct because it occurred before Shapiro entered into the settlement that led to his statutory disqualification. The Commission has stated that FINRA may not deny relief "based solely on the underlying misconduct that led to the statutory disqualification" and completed sanction,¹¹ but the Commission has not stated that, in assessing an application for relief from a statutory disqualification, FINRA is foreclosed from considering past misconduct *other than* the misconduct that was the predicate for the disqualification. Indeed, the Commission has explained that FINRA may consider "new information" that demonstrates a "significant pattern" of misconduct.¹² DJSI has not contested FINRA's finding that Shapiro's additional judgments and liens were not known to FINRA at the time it entered into the 2013 settlement, and, at this point in the proceedings, DJSI has not shown a likelihood of succeeding on the merits of its claim that FINRA erred in considering this new information.

Third, DJSI has not supported its claims that FINRA failed to adequately consider DJSI's post-hearing submissions, in which DJSI proposed changes to its supervisory plan, and that FINRA erroneously concluded that Shapiro's proposed supervisor would be "stretched too thin."¹³ DJSI, as the applicant, has the burden of showing that, "despite the disqualification, it is

⁹ See *Weiss*, 2013 WL 1122496, at *6.

¹⁰ See *id.* at *10 (holding that FINRA's denial of a continuation application was neither a penalty nor a remedial sanction); *accord Milewitz*, 1998 WL 409449, at *4 (holding that "NASD's consideration of the applicant's disciplinary history prior to the statutory disqualification, including misconduct for which sanctions were imposed previously, does not amount to a further penalty for that prior misconduct"); *Halpert & Co.*, 1990 WL 322213, at *2 (holding that NASD's denial of membership was not "imposing a penalty on applicants in this matter or even a remedial sanction").

¹¹ *Harry M. Richardson*, Exchange Act Release No. 51236, 2005 WL 424920, at *3 (Feb. 22, 2005); see also *Leslie A. Arouh*, Exchange Act Release No. 62898, 2010 WL 3554584, at *12 (Sept. 13, 2010) ("[W]here a statutorily disqualified person has applied for permission to associate after a sanction of specified duration has run its course, we have held that it would be inconsistent with the remedial purposes of the Exchange Act and unfair to deny the application solely on the basis of the misconduct that led to the original sanction." (citing *Paul Edward Van Dusen*, Exchange Act Release No. 18284, 1981 WL 315505, at *3 (Nov. 24, 1981))).

¹² *Arthur H. Ross*, Exchange Act Release No. 30956, 1992 WL 188932, at *2 & n.10 (July 27, 1992).

¹³ See *supra* note 6 and accompanying text (observing that the moving party has the burden of establishing that a stay is warranted).

in the public interest to permit the requested employment.”¹⁴ DJSI’s unsupported assertions are inadequate for us to conclude that DJSI will be likely to show that denying the requested relief was not justified by FINRA’s concerns about DJSI’s disciplinary and regulatory history, proposed supervisory plan, and, ultimately, DJSI’s ability to supervise Shapiro adequately.

B. DJSI has not demonstrated that it will suffer irreparable harm without a stay, or that a stay is likely to serve the public interest.

DJSI has also failed to make a sufficient showing on the remaining stay factors. DJSI asserts that both it and Shapiro will suffer irreparable harm because, without a stay, they “are at risk of losing [their] client base and, consequently, substantial revenue, to competing firms and brokers.” These losses, DJSI claims, “would be irreparable in the sense that there will be no recourse for Mr. Shapiro or the Firm to recapture the revenues and clients lost as a result of the NAC’s misguided decision.” But as the Commission and courts have held, “[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.¹⁵

Moreover, DJSI has not shown that a stay is likely to serve the public interest. To the contrary, granting a stay has the potential to harm the investing public. The Commission has emphasized that “[a] representative’s truthfulness in answering the financial disclosure questions on the Form U4 is a particularly critical measure of fitness for the industry because a commitment to accurate, complete, and non-misleading financial disclosure is central to any securities professional’s responsibilities.”¹⁶ FINRA concluded that Shapiro’s pattern of failing to disclose matters on his Form U4 “demonstrate[s] that he is currently unable to show that he can comply with FINRA’s rules and regulations,” which “would create an unreasonable risk of harm to the market or investors[] for Shapiro to continue to associate with [DJSI].”¹⁷ That FINRA

¹⁴ *Timothy H. Emerson, Jr.*, Exchange Act Release No. 60328, 2009 WL 2138439, at *4 (July 17, 2009).

¹⁵ *William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) (quoting *Va. Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also *Michael A. Rooms*, Admin. Proc. File No. 3-11621, 2004 SEC LEXIS 3158, at *5 (Nov. 14, 2004) (holding that applicant’s claims “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”); *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004) (holding that “the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay”).

¹⁶ *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 WL 5462896, at *9 (Nov. 9, 2012) (stating that “an inability or unwillingness to honestly answer straightforward questions on a written, certified registration form casts doubt on the individual’s commitment to truthfulness and accuracy in other situations requiring financial disclosure to regulators and investors”).

¹⁷ *Cf. Emerson*, 2009 WL 2138439, at *5 (affirming FINRA’s denial of membership continuation application where a statutorily disqualified person’s failure to ensure that his

allowed Shapiro to continue working while DJSI's continuation application was pending before the NAC (a practice that is consistent with FINRA's policy)¹⁸ does not negate the specific risk of harm that FINRA concluded would exist if Shapiro were to continue his association with the firm.¹⁹

Nor has DJSI otherwise established that it would be in the public interest to grant a stay. DJSI claims that Shapiro's customers will be harmed if Shapiro is no longer able to provide them with financial advice. And DJSI adds that Shapiro "does not have a single customer complaint during his entire association with DJSI." But these claims do not tip the public interest factors in favor of granting a stay.²⁰ Any claimed harm to Shapiro's customers is outweighed by FINRA's concerns about Shapiro's ability to comply with the securities laws and the threat he poses to investors.²¹ We therefore find that DJSI has not met its burden of showing that a stay is in the public interest.

(. . . continued)

Form U4 was accurate "raise[d] questions about his ability to maintain his obligations under the securities laws").

¹⁸ See *supra* note 2.

¹⁹ Cf. *Mitchell T. Toland*, Exchange Act Release No. 71875, 2014 WL 1338145, at *3 (Apr. 4, 2014) (denying motion for a stay where applicant argued that FINRA allegedly failed to schedule a timely hearing and therefore "could not have believed that his continued association with the firm presented an imminent risk of unreasonable harm to investors").

²⁰ Cf. *N. Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 WL 3937496, at *4 n.15 (Aug. 12, 2014) (finding that applicants' argument about not having any customer complaints did not support issuing a stay); *The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 WL 2448896, at *5 (June 2, 2014) (finding that applicant's vague references to his customers' losing access to his services did not provide sufficient basis for granting a stay); *Hans N. Beerbaum*, Exchange Act Release No. 55731, 2007 WL 1376365, at *5 (May 9, 2007) (rejecting applicant's assertion that a lack of customer complaints meant that the public interest was served by his presence in the industry notwithstanding his violation of applicable rules, "which are intended to protect investors, [and] are rendered meaningless if aspects of them are, as here, disregarded"); *Rooney, Pace Inc.*, Exchange Act Release No. 23763, 1986 WL 626057, at *5 (Oct. 31, 1986) (finding suspension to be in the public interest despite mitigation claim that suspension would "depriv[e] registrant of the services of its key executive officer"). Moreover, the NAC found that Shapiro had multiple customer complaints before his association with DJSI.

²¹ See *supra* notes 17–19 and accompanying text.

Accordingly, IT IS ORDERED that the motion by Dawson James Securities, Inc., 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