

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 84324 / October 1, 2018

Admin. Proc. File No. 3-17963

In the Matter of the Application of

BRUCE M. ZIPPER

For Review of Action Taken by

FINRA

ORDER DENYING REQUEST FOR RECONSIDERATION

On September 29, 2017, we issued an opinion and order dismissing Bruce M. Zipper's application for review of FINRA action.¹ Zipper sought to challenge a Letter of Acceptance, Waiver, and Consent (the "AWC") he had entered into with FINRA in which he consented to a fine and three month suspension from association with any FINRA member. After he sought unsuccessfully before FINRA to withdraw from the AWC, he filed an application for review with the Commission. We granted FINRA's motion to dismiss Zipper's application for review because the AWC contained an appellate waiver and was therefore not appealable, Zipper did not substantiate a claim of bias, and his application was in any event untimely.

Zipper now moves for reconsideration of that decision. He contends that he was induced "to accept a flawed agreement" because FINRA told him that he could not withdraw from the agreement. The September 29 opinion addressed Zipper's argument that "he tried to withdraw from the AWC 'the very next day after it was signed,'" but noted that he appeared to raise that issue in an attempt to demonstrate that his appeal was timely. We did not address when Zipper attempted to withdraw from the AWC because that would "not change the fact that he did not file his application for review *with the Commission* within thirty days."

Zipper's reconsideration motion clarified that his argument sought relief on the ground that FINRA should have advised him of his options after he sought to withdraw from the AWC before FINRA accepted it. He does not contest our finding that the AWC contained an appellate waiver. Rather, now he contends that FINRA's failure to advise him that he could withdraw from the AWC evidences its "bias"; he also says that he misunderstood the consequences of the

¹ *Bruce M. Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072 (Sept. 29, 2017).

AWC, and signed the AWC under coercion or duress. We directed the parties to address the contentions raised in Zipper’s reconsideration motion. FINRA has submitted evidence rebutting Zipper’s claim that he attempted to withdraw from the AWC before FINRA accepted it, and has represented that had Zipper done so during that period it would have allowed him to withdraw the AWC. Zipper has not substantiated his claim that he sought withdrawal during that period. His other arguments do not furnish a basis for reconsideration. We therefore deny his motion.²

I. Background

Zipper’s AWC arose out of a FINRA examination of Dakota Securities International (“Dakota”), a FINRA member firm of which Zipper was president, CEO, and chief compliance officer. The examination found Dakota failed to implement written supervisory procedures and ensure that the Uniform Applications for Securities Industry Registration and Transfer (“Forms U4”) for Zipper and another employee were current. After FINRA issued a cautionary letter to Dakota for this misconduct, it investigated Zipper personally. FINRA and Zipper ultimately entered into an AWC in which Zipper agreed that he “willfully omitted to state a material fact on a Form U4” and that “this omission makes me 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. In the AWC, Zipper consented to a three-month suspension from association in all capacities and a fine.

Zipper executed the AWC on April 1, 2016, and FINRA’s counsel executed and accepted the AWC settlement offer consistent with FINRA’s rules on April 22, 2016.³ At some point after executing the AWC, Zipper sought to withdraw from the AWC because he claimed he was unaware of its collateral consequences. FINRA did not allow him to withdraw from the AWC.

More than a year after FINRA accepted the AWC, Zipper filed an application for review with the Commission. FINRA moved to dismiss, and we granted the motion. We held that the appellate waiver in the AWC was enforceable and therefore precluded our review of the AWC, that Zipper was not entitled to discovery because he had not substantiated a claim of bias, and that his application for review was untimely.⁴ We specifically found that “[t]he record does not support Zipper’s contention that he executed the AWC based on a misunderstanding”—the AWC “made clear that [Zipper] would be subject to a statutory disqualification.”⁵ We also rejected any

² In light of our disposition, we deny as moot Zipper’s July 2, 2018 “motion for . . . expedited decision . . . due to extraordinary circumstances.”

³ Even though FINRA drafts AWCs, FINRA’s rules treat them as being offered by the member or associated person and accepted by the applicable FINRA office. *See* FINRA Rule 9216(a)(4).

⁴ *Zipper*, 2017 WL 4335072, at *3-5.

⁵ *Id.* at *3.

suggestion that he executed the AWC under duress; the text of the agreement provided that Zipper had “read and underst[oo]d” its provisions, could “ask questions about it,” had “agreed to its provisions voluntarily,” and had been induced to sign only by “the terms set forth herein and the prospect of avoiding the issuance of a Complaint.”⁶

Zipper filed a motion for reconsideration contending that he was induced “to accept a flawed agreement” because FINRA told him that he could not withdraw from the agreement shortly after he signed it. Our prior opinion addressed this argument in the context of Zipper’s apparent attempt to demonstrate that his appeal was timely. We found that Zipper’s purported attempt to withdraw from the AWC did “not change the fact that he did not file his application for review *with the Commission* within thirty days.”⁷ Zipper’s motion clarifies that he seeks relief on the ground that he wanted to withdraw from the AWC after he signed it but before FINRA accepted it, and that FINRA failed to advise him of his options after he sought to do so. He also appears to challenge our finding that his appeal of the AWC was untimely (in addition to being waived) by noting that his uncontested May 5, 2016 request to withdraw from the AWC was made within thirty days after receiving notice that FINRA accepted the AWC.

Rule of Practice 470(b) provides that “[n]o response to a motion for reconsideration shall be filed unless requested by the Commission.”⁸ On January 11, 2018, FINRA was directed to file a response to Zipper’s reconsideration motion, and Zipper was directed to file a reply.⁹ The briefing order identified five issues that the parties should address, including:

- whether Zipper attempted to withdraw his executed AWC between when he executed it on April 1, 2016, and when FINRA accepted it on April 22, 2016;
- FINRA staff’s response, if any, to any such attempt to withdraw the executed AWC;
- whether FINRA Rule 9216 prohibits the withdrawal by a member or associated person of an executed AWC—and thus makes both the offer and FINRA’s power of

⁶ *Id.* Zipper’s application for review also sought discovery in support of his assertion that FINRA was covering up attempts to “destroy[.]” him. We construed this contention as an allegation of bias and denied the request for discovery because “Zipper ha[d] failed to substantiate any claim of bias.” We also rejected Zipper’s request that we initiate investigative proceedings against FINRA with respect to this alleged bias, “insofar as [that request could] not be adjudicated in [an] appeal” by a private litigant; nonetheless, we referred Zipper’s request “to the appropriate staff for such action as may be appropriate.” *Id.* at *4 & n.15.

⁷ *Id.* at *4.

⁸ 17 C.F.R. § 201.470(b).

⁹ *See Bruce Zipper*, Exchange Act Release No. 82486, 2018 WL 360192 (Jan. 11, 2018) (order requesting additional written submissions).

acceptance irrevocable—during the period between submission by the member or associated person of the executed AWC and acceptance by FINRA; or whether, in light of the Commission’s decision in *David L. Turnipseed*,¹⁰ withdrawal of an executed AWC, communicated to FINRA during such period, revokes FINRA’s power to accept the AWC and thus renders any subsequent acceptance invalid;

- whether Zipper’s attempt to withdraw from the AWC and FINRA’s response, if they occurred, present extraordinary circumstances warranting the Commission’s discretionary consideration of his untimely application for review; and
- whether the Commission should grant Zipper’s motion for reconsideration.

II. Analysis

Commission Rule of Practice 470 governs motions for reconsideration.¹¹

Reconsideration is “an extraordinary remedy ‘designed to correct manifest errors of law or fact, or to permit the presentation of newly discovered evidence’”; motions may not simply “reiterate arguments previously made.”¹² Zipper’s motion does not meet the standard for reconsideration.

A. Zipper’s attempt to withdraw from the AWC.

Zipper’s motion for reconsideration clarifies that he attributes FINRA’s alleged bias to its failure to advise him of his “options” after he signed the AWC. He contends that he wanted to withdraw from the AWC “the next day after it was signed,” which was before FINRA accepted it, and that FINRA should have advised him of the “option” to withdraw or to appeal at that time. Both parties submitted filings addressing Zipper’s claim in response to our briefing order. FINRA submitted evidence that Zipper first sought to withdraw on May 5, 2016, nearly two weeks after FINRA accepted the AWC, in a series of emails with the FINRA attorney with whom he negotiated the AWC. Zipper asserts that he attempted to withdraw from the AWC

¹⁰ Exchange Act Release No. 24173, 1987 WL 757592, at *1-2 (Mar. 4, 1987) (setting aside NASD’s findings of violations and imposition of sanctions following an offer of settlement where NASD did not allow respondent to withdraw settlement offer after he submitted it but before NASD accepted it); *see also id.* at *1 n.1 (exercising the Commission’s discretion to entertain the appeal even though it was filed twenty days late); *id.* at *2 & n. 6 (declining to consider whether NASD could implement a policy of refusing to allow a respondent to withdraw a settlement offer prior to acceptance “without amending the NASD’s Code of Procedure pursuant to Section 19(b)” of the Securities Exchange Act of 1934).

¹¹ 17 C.F.R. § 201.470.

¹² *Eric J. Brown*, Exchange Act Release No. 66752, 2012 WL 1143573, at *1 (Apr. 5, 2012) (quoting *Perpetual Sec., Inc.*, Exchange Act Release No. 56962, 2007 WL 4372765, at *1 (Dec. 13, 2017)), *aff’d sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

before then but submits no evidence that would support that assertion. We find that Zipper did not attempt to withdraw the AWC until *after* FINRA accepted it.¹³

1. Zipper attempted to withdraw from the AWC on May 5, 2016.

Zipper negotiated the AWC with Kevin Rosen, then Senior Regional Counsel for FINRA’s Department of Enforcement.¹⁴ On March 30, 2016, Rosen sent Zipper an unexecuted AWC that would resolve his Form U4 violations and asked him to return it the next day. Zipper asked if it was possible to allow him to serve a suspension in a principal capacity only rather than in all capacities. Rosen responded that Enforcement would not settle for a suspension in a limited capacity. Zipper executed the AWC and returned it to Rosen on April 1, 2016. That same day, Rosen sent a memorandum to FINRA’s Office of Disciplinary Affairs (“ODA”) requesting approval of Zipper’s AWC. Rosen received approval from ODA, and on April 22 he signed the AWC and emailed it to Zipper.

On April 26, 2016, Zipper emailed Christopher Dragos in FINRA’s Office of Registration and Disclosure to ask that his suspension be delayed.¹⁵ Zipper maintained that because of his firm’s small size he needed to find personnel to fill his positions while he was suspended. On April 27, 2016, Dragos granted Zipper a delay of his suspension.

¹³ We grant FINRA’s motion to adduce as additional evidence declarations of the percipient fact witnesses and internal FINRA emails attached to those declarations. *See* Rule of Practice 452, 17 C.F.R. § 201.452. These documents are material because they constitute evidence that Zipper did not seek to withdraw his AWC until May 5, 2016. FINRA has reasonable grounds for introducing these documents now in light of the January 11 order directing that supporting evidence “shall be attached to the briefs.” *Zipper*, 2018 WL 360192, at *2.

We likewise grant Zipper’s motion to adduce as additional evidence telephone call logs showing calls between him and FINRA between April 1 and May 5, 2016. The phone calls are material to Zipper’s claim that he communicated with individuals at FINRA during this time. Zipper has reasonable grounds for introducing these logs in response to the briefing order.

¹⁴ Zipper and Rosen also negotiated a separate AWC not at issue here. That AWC involved Dakota’s and Zipper’s failures to preserve and maintain all business-related electronic communications, and failures to establish, maintain, and enforce an adequate supervisory system to ensure that business-related electronic communications were subject to retention and supervision. *See Dakota Securities Int’l and Bruce M. Zipper*, AWC No. 2013035303301 (Apr. 20, 2016), http://www.finra.org/sites/default/files/fda_documents/2013035303301_FDA_RB7X2764.pdf. This other AWC also imposed a statutory disqualification. Zipper signed that AWC on April 20, 2016, and FINRA accepted it on April 22—the same day Rosen signed the AWC at issue here. Zipper does not claim that he ever sought to withdraw from this other AWC.

¹⁵ *See* FINRA Rule 9216(a)(1) (providing that unless an AWC “states otherwise, the effective date of any sanction(s) imposed will be a date to be determined by FINRA staff”).

The record shows that the first time Zipper sought to withdraw was when he exchanged a series of emails with Rosen on May 5, 2016, nearly two weeks after Rosen signed the AWC. In none of those emails did Zipper reference a prior attempt to withdraw from the AWC or a prior communication with FINRA that included such a request. Rather, the May 5 emails appear to initiate an attempt to withdraw. In those emails, Zipper claimed that he was not aware that the AWC subjected him to a statutory disqualification. According to Zipper, he did not know that Dakota was thus required to submit an MC-400 membership continuance application for permission to continue to associate with him. Zipper said that he intended to “withdraw . . . due to not being informed of the harsh consequences.” Rosen responded by directing Zipper’s attention to the language in the AWC pertaining to his statutory disqualification, and informed Zipper that “[t]he AWC is final and not subject to your withdrawal.”

Later that afternoon, Zipper spoke with Rosen and Dawn Calonge, the Surveillance Director of FINRA’s Department of Member Regulation. Zipper reiterated his desire to withdraw from the AWC. Calonge and Rosen told Zipper that the AWC was final and that he could seek relief through the membership continuance application process.¹⁶

The next day, Zipper left a voicemail for Rosen’s supervisor, Enforcement Regional Chief Counsel David Klafter. Klafter then spoke with Zipper and again explained that he could not withdraw from the AWC. He sent Rosen an email memorializing that conversation.

The record shows that Zipper first attempted to withdraw from the AWC on May 5, 2016. There is no evidence establishing that Zipper attempted to withdraw before his May 5, 2016 email to Rosen. Rosen and Calonge state that they do not recall Zipper requesting to withdraw before that email. Klafter states that he has no recollection of communicating with Zipper before receiving the May 6 voicemail. Contemporaneous emails do not reference any earlier request by Zipper to withdraw the AWC. And Rosen declares that he would have allowed Zipper to withdraw had he done so before April 22, 2016, when FINRA accepted the AWC.

2. No evidence shows that Zipper attempted to withdraw before May 5, 2016.

Zipper has not shown that he sought to withdraw from the AWC before his May 5 email to Rosen, let alone before FINRA accepted the AWC. Zipper has not submitted a sworn statement supporting his claim that he attempted to withdraw before May 5. While Zipper’s telephone call logs indicate that he communicated with FINRA between April 1 and May 5, those logs do not indicate what was said on those calls. Accordingly, they are consistent with

¹⁶ See generally *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *2 (June 26, 2014) (describing statutory disqualifications and FINRA’s eligibility proceedings). FINRA later denied the MC-400 application that Dakota filed seeking permission for Zipper to continue to associate with it. Zipper has filed an application for review challenging that denial. See *Bruce Zipper*, Admin. Proc. File No. 3-18256 (filed Oct. 18, 2017). Nothing in this order should be construed as a decision on the merits of any argument raised in that appeal.

Rosen's and Calonge's statements that they did not recall Zipper requesting to withdraw during that period and with the emails they produced where Zipper attempted to withdraw on May 5 and did not reference an attempt to withdraw prior to that date. Other than the telephone call logs, Zipper all but concedes he lacks evidence supporting his claim.¹⁷

FINRA maintains that Zipper did not attempt to withdraw before it accepted the AWC on April 22, and submits a declaration from Rosen saying he would have allowed withdrawal had Zipper done so. Zipper challenges the credibility of this assertion. He points to FINRA's

repeated statements that an AWC cannot be withdrawn or appealed once FINRA accepts it, and suggests that this is evidence that no one at FINRA would have permitted him to withdraw before FINRA accepted the AWC. But FINRA's positions are consistent. Zipper could have withdrawn his offer before FINRA accepted it.¹⁸ After FINRA accepted the offer, however, Zipper was bound to his side of the bargain—including the provision that he could not appeal the AWC to the Commission.¹⁹ Zipper implies that FINRA should have advised him of a right to withdraw before April 22, but identifies no basis for imposing such a duty on FINRA. Indeed, FINRA would have had no reason to advise Zipper of a right to withdraw before April 22 unless he had attempted to do so by that date. No evidence impeaches the credibility of Rosen's declarations that Zipper did not do so and would have been allowed to withdraw if he had.

¹⁷ Zipper seeks discovery "to prove the [request] . . . occurred in April of 2016." We deny his motion that we order FINRA to produce certain "phone records and e-mails" from April and May 2016. FINRA has already adduced responsive documents from May 2016. *See supra* note 13. As for documents from April 2016, Zipper has not provided any competent evidence, such as a sworn statement, substantiating his claim that he sought withdrawal during that month. To the contrary, the two attorneys still employed by FINRA declared that none of their records memorialized an attempt by Zipper to withdraw before May 5, 2016. Under the circumstances, Zipper's various submissions afford no basis for ordering discovery.

¹⁸ *See* Restatement (Second) of the Law of Contracts § 42 ("An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract."); *supra* note 3 (explaining that FINRA's rules treat AWCs as having been offered by the associated person and accepted by FINRA); *see also Turnipseed*, 1987 WL 757592, at *2 (setting aside disciplinary action where NASD did not allow respondent to withdraw settlement offer after he submitted it but before NASD accepted it).

¹⁹ *See* Restatement (Second) of the Law of Contracts § 42 cmt. c ("Once the offeree has exercised his power to create a contract by accepting the offer, a purported revocation is ineffective . . .").

3. FINRA had no obligation to advise Zipper that he could appeal to the Commission after he sought to withdraw from the AWC.

For similar reasons, we reject Zipper’s contention that FINRA should have advised him of his option to appeal even assuming “[f]or the sake of argument” that he first requested to withdraw from the AWC on May 5. FINRA had no obligation to advise him then of an “option” to withdraw or appeal. Instead, FINRA told him accurately that he could not withdraw from the AWC unilaterally after he signed it and FINRA accepted it and that his remaining options were to perform his obligations under “the agreement or be immediately suspended.”

Zipper’s reconsideration motion specifically “ask[s] . . . the Commission” whether he had “the right within thirty days of acceptance by [FINRA of] an AWC to file an appeal?” He did not. Even assuming that an AWC is a final disciplinary sanction that may be appealed under Exchange Act Section 19(d),²⁰ Zipper was prohibited from appealing this AWC. As our prior opinion explained, Zipper “specifically and voluntarily” agreed to waive his right to appeal the AWC to the Commission or to a U.S. Court of Appeals in the AWC itself.²¹ Our opinion found that this appellate waiver was “binding,” “valid[,] and enforceable.”²² Zipper provides no reason why FINRA should have told him he could withdraw a binding agreement, or that he could file an appeal even though he had agreed he was giving up his right to do so.

Zipper also appears to challenge our finding that his appeal of the AWC was untimely (in addition to being waived) by noting that his May 5, 2016 request to withdraw from the AWC was made within thirty days of receiving notice that FINRA accepted the AWC. But when he made that request to FINRA has nothing to do with whether he filed an application for review with the Commission within thirty days of receiving notice of FINRA’s final disciplinary action.²³ Although we do not believe the 30-day appeal period applies to an AWC containing a waiver of the right to appeal, Zipper’s attempt to appeal would be untimely under that standard: he filed his appeal “nearly one year” after receiving notice that FINRA accepted the AWC.²⁴

²⁰ See *Zipper*, 2017 WL 4335072, at *3 n.11 (assuming without deciding that we have jurisdiction under Exchange Act Section 19(d) to review Zipper’s appeal of his AWC).

²¹ See *id.* at *3 (explaining that “a respondent may not ‘appeal’ any final action contained in an AWC . . . that has been accepted by [FINRA]”) (quoting *Order Approving Proposed Rule Change*, File No. SR_NASD-97-28, Exchange Act Release No. 38908, 1997 WL 441929, at *38 n.198 (Aug. 7, 1997)).

²² *Id.*

²³ See 15 U.S.C. § 78s(d)(2).

²⁴ *Zipper*, 2017 WL 4335072, at *4.

B. Zipper’s purported misunderstanding about the AWC’s consequences.

Zipper claims that he should have been allowed to withdraw from the AWC because he accepted it based on a misunderstanding about Dakota’s obligation to file an MC-400 membership continuance application. But Zipper made this argument previously, and we addressed it in our opinion. We held that “[t]he record does not support Zipper’s contention that he executed the AWC based on a misunderstanding.”²⁵ Zipper does not explain why we should reconsider this finding. This claim therefore does not furnish grounds for reconsideration.²⁶

C. Zipper’s purported acceptance under coercion or duress.

Finally, Zipper contends that he accepted the AWC under coercion or duress because after he did so FINRA required him to choose between adhering to the AWC’s terms or losing the benefit of a delayed start date for his suspension and “fac[ing] immediate suspension.”²⁷ But in our opinion we found that the AWC was binding on Zipper because it provided that he had “read and underst[oo]d” its provisions and had entered into it “voluntarily.”²⁸ FINRA’s refusal to allow Zipper to unilaterally terminate the agreement, once both parties had entered into it, does not alter the fact that he entered into it voluntarily.²⁹

Accordingly, IT IS ORDERED that the motion for reconsideration is denied.

By the Commission.

Brent J. Fields
Secretary

²⁵ *Id.* at *3.

²⁶ *See Brown*, 2012 WL 1143573, at *2 (concluding that a “repackaged argument[]” that we previously rejected “provide[s] no basis for reconsideration”).

²⁷ FINRA has discretion to decide when some suspensions begin, and Dragos had granted Zipper a brief extension of the suspension’s start date. *See supra* text accompanying note 15.

²⁸ *Zipper*, 2017 WL 4335072, at *3.

²⁹ *See generally Asberry v. U.S. Postal Serv.*, 692 F.2d 1378, 1381 (Fed. Cir. 1982) (“In order to successfully defend on the ground of force or duress, it must be shown that the party benefited thereby constrained or forced the action of the injured party Nor would duress be implied if the present settlement had been the result of a hard bargain.”) (quotation marks and citations omitted).