UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86097 / June 12, 2019

Admin. Proc. File No. 3-19185

In the Matter of the Application of

SOUTHEAST INVESTMENTS, N.C., INC.

and

FRANK HARMON BLACK

For Review of Disciplinary Action Taken by

FINRA

Appeal and stay motion filed: May 29, 2019
Last brief received: June 3, 2019

ORDER DENYING STAY

Frank Harmon Black appeals from a FINRA decision barring him from associating with any FINRA member firm and moves to stay the bar pending our consideration of his appeal. FINRA opposes the motion. For the reasons discussed below, Black's motion is denied.

I. Background

In a September 2015 complaint against Black and Southeast Investments, N.C., Inc. ("SEI"), the FINRA member firm Black founded, FINRA alleged in relevant part that Black lied to FINRA staff during testimony and fabricated documents to support his lies. FINRA alleged that Black, as result, violated FINRA Rules 8210, 4511, and 2010. Rule 8210 requires that member firms and those associated with them comply with FINRA information requests made in connection with an investigation or examination. Providing false or misleading information to

the staff in response to an information request violates Rule 8210.[1] Any violation of Rule 8210 also violates Rule 2010, which requires a member to observe high standards of commercial honor and just and equitable principles of trade.[2] FINRA Rule 4511 provides that members shall make and preserve books and records and "require[s] that the records be accurate . . . ."[3]

A hearing was held to present evidence regarding these allegations. An extended hearing panel ("Hearing Panel") found that Black lied and provided fabricated documents to FINRA staff in violation of Rules 8210, 4511, and 2010.[4] The Hearing Panel found that four former registered representatives of SEI ("Testifying Representatives") testified credibly at the hearing that Black did not inspect their SEI offices, and that Black lacked credibility in testifying to the contrary. For these violations, the Hearing Panel barred Black from associating with any FINRA member firm in any capacity. On May 23, 2019, FINRA's National Adjudicatory Council ("NAC") affirmed the findings of violation and the bar from associating with a FINRA member firm. It found that Black engaged in a pattern of misconduct—by providing fabricated documents and false testimony to FINRA—in an attempt to mislead or deceive FINRA into believing he had conducted office inspections when he had not. The NAC also found that Black and SEI failed to present substantial evidence to set aside the Hearing Panel's credibility determinations.

On May 28, 2019, Black and SEI appealed the NAC's decision to the Commission. Black also moved to stay the bar imposed on him.[5]

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1 *See Geoffrey Ortiz*, Exchange Act Release No. 58416, 2008 WL 3891311, at *7 (Aug. 22, 2008).

2 *See Rani T. Jarkas*, Exchange Release No. 77503, 2016 WL 1272876, at *8 (Apr. 1, 2016).

3 *Eric J. Brown*, Securities Act Release No. 9299, 2012 WL 625874, at *11 (Feb. 27, 2012) (internal quotation marks and citation omitted), *aff'd sub nom. Collins v. SEC*, 736 F.3d 521 (D.C. Cir. 2013).

4 FINRA Rule 9231(a) provides for the appointment of "a Hearing Panel or an Extended Hearing Panel to conduct the disciplinary proceeding and issue a decision." FINRA Rule 9231(a). A matter "shall be designated an Extended Hearing, and . . . shall be considered by an Extended Hearing Panel," upon "consideration of the complexity of the issues involved, the probable length of the hearing, or other factors." FINRA Rule 9231(c).

5 *See* FINRA Rule 9370(a) (stating that an appeal to the Commission does not automatically stay the effectiveness of a bar).

II. Analysis

A stay pending appeal is an "'extraordinary remedy.'"[6] In deciding whether to grant a stay under Rule of Practice 401,[7] the Commission determines whether the moving party has established that a stay is warranted.[8] The Commission considers whether: (i) there is a strong likelihood that the moving party will eventually succeed on the merits of the appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) another party will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.[9] "The appropriateness of a stay turns on a weighing of the strengths of these four factors; not all four factors must favor a stay for a stay to be granted."[10] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[11]

Under this approach, in order to obtain a stay a movant need not necessarily establish that it is likely to succeed on the merits of its appeal but must at least show "that the other factors weigh heavily in its favor" and that it has "raised a 'serious legal question' on the merits."[12] "In other words, 'even if a movant demonstrates irreparable harm that decidedly outweighs any potential harm to the [stay opponent] if a stay is granted, [it] is still required to show, at a minimum, serious questions going to the merits.'"[13] "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that

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6 *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 432-434 (2009)).

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 *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *3 (Nov. 27, 2017).

9 *Id.*

10 *Bloomberg*, 2018 WL 3640780, at *7.

11 *Id.*

12 *Zipper*, 2017 WL 5712555, at *6 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392-393 (D.C. Cir. 2011)); *see also Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (stating that the "necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors" and that a "court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits").

13 *Zipper*, 2017 WL 5712555, at *6 (cleaned up) (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015)).

the 'balance of hardships tips *decidedly* in its favor,' its overall burden is no lighter than the one it bears under the 'likelihood of success' standard."[14]

We deny Black's motion to stay the bar pending his appeal. Black has not shown a likelihood of success or a serious legal question regarding his challenge to the underlying violations. Although Black potentially has raised a serious legal question about the propriety of the bar FINRA imposed, the other factors weigh heavily against a stay.

A. Likelihood of Success

The Commission reviews a FINRA disciplinary action to determine whether the respondents engaged in the conduct that FINRA found, whether such conduct violates the rules FINRA specified, and whether FINRA's rules are, and were applied in a manner, consistent with the purposes of the Securities Exchange Act of 1934.[15] The Commission reviews the sanctions FINRA imposed to determine whether they are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[16] We apply a preponderance of the evidence standard.[17] Our current analysis of the merits of Black's appeal is necessarily preliminary, and "[f]inal resolution must await the Commission's determination of the merits of [the] appeal."[18] Black argues that he is likely to succeed in having the bar set aside both because the NAC erred in its finding of violations and because FINRA's bar is impermissibly punitive.

1. Black has not shown either a likelihood of success on the merits or a substantial legal question with respect to his challenge to the violations.

Black argues that the Commission is likely to reverse the Hearing Panel's credibility determinations and conclude that the Testifying Representatives lied at the hearing by denying that Black traveled to each Testifying Representative to inspect his SEI office. We defer to a FINRA hearing panel's credibility determinations absent substantial evidence to the contrary.[19]

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[14] *Id.* (cleaned up) (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original) (internal quotation marks and citation omitted)).

[15] 15 U.S.C. § 78s(e)(1).

[16] 15 U.S.C. § 78s(e)(2).

[17] *See Richard G. Cody*, Exchange Act Release No. 64565, 2011 WL 2098202, at *9 & n.7 (May 27, 2011), *aff'd*, 639 F.3d 251 (1st Cir. 2012).

[18] *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013).

[19] *See Lek Sec. Corp.*, Exchange Act Release No. 82981, 2018 WL 1602630, at *9 n.22 (Apr. 2, 2018) (citing *John Edward Mullins*, Exchange Act Release No. 66373, 2012 WL 423413, at *13 (Feb. 10, 2012)); *see also United States v. Layton*, 564 F.3d 330, 334 (4th Cir.

(continued . . .)

Based on our review of the parties' briefs and the NAC's decision, it appears that to this point Black and SEI have not offered substantial, reliable evidence to justify overturning the Hearing Panel's credibility determination. Thus, Black has not shown that he is likely to succeed on the merits.

Black also argues that he is likely to succeed on appeal because of the unfairness of the disciplinary proceeding and the investigation that led to it. First, Black alleges unfairness in FINRA's delayed production of summaries of conversations between FINRA's staff and the Testifying Representatives. According to Black, these summaries contained significant exculpatory and impeachment evidence that would have casted doubt on the Testifying Representatives' credibility at the hearing. But the NAC considered these arguments and determined that the summaries did "not contain exculpatory material," and Black does not explain what information in the summaries was exculpatory. The NAC also concluded that the summaries had no material impact on the Hearing Panel's credibility determinations. Indeed, the NAC determined that the summaries confirmed the Testifying Representatives' testimony on the "main issue"—that Black did not conduct inspections of their offices. And as the NAC noted further, the Hearing Panel went so far as to confirm its credibility determinations after it became aware of the summaries following the hearing. Black also alleges that notes of the conversations that predated the summaries—and were lost and never produced—would have changed the Hearing Panel's conclusions on the Testifying Representatives' credibility. In confirming its credibility determinations after reviewing the summaries of the notes, however, the Hearing Panel stated that the Testifying Representatives' testimony that Black did not conduct inspections of their offices was consistent not only with the summaries but also with what the Testifying Representatives submitted in writing in response to Rule 8210 requests for information from FINRA. At this stage of the proceeding, Black has not shown that the failure to produce the notes that were the subject of the summaries was not harmless error.[20]

Second, Black alleges that FINRA's investigation was unfair and unreliable because FINRA spoke to only biased, former representatives of SEI, and not current representatives, in assessing whether Black in fact completed inspections. But the NAC considered Black's argument that the Testifying Representatives were biased when it evaluated their credibility.

(. . . continued)

2009) ("The district court's credibility determinations receive 'great deference'" (quoting *United States v. Feurtado*, 191 F.3d 420, 424 n.2 (4th Cir. 1999)).

[20] *See* FINRA Rule 9253 ("In the event that a statement required to be made available for inspection and copying by a Respondent is not provided by the Department of Enforcement, there shall be no rehearing of a proceeding already heard, or issuance of an amended decision in a proceeding already decided, unless the Respondent establishes that the failure to provide the statement was not harmless error.").

And the fact that FINRA investigators did not talk to other representatives from other offices who would have stated that Black inspected their offices is not material to whether Black lied about inspecting the offices of the Testifying Representatives.[21] Thus, Black has failed to establish that he is likely to succeed in establishing that the disciplinary proceeding based on his production of fabricated documents and provision of false testimony to FINRA was unfair.

2. Black raises a serious legal question with respect to the bar.

Black asserts that the NAC's imposition of a bar was "draconian and failed to serve a remedial purpose." But the NAC determined that the bar was "appropriate to remedy Black's and SEI's failures to provide truthful responses in response to FINRA requests for information and testimony" in light of "the seriousness of a failure to provide truthful responses to FINRA requests." Black does not explain why barring a person who fails to respond truthfully to FINRA requests for information from associating with a FINRA member firm is not remedial.

Black states further that recent court decisions "have clouded the issue of whether a permanent bar can even be considered remedial or if it is instead 'excessive or oppressive.'" In *Saad v. SEC*, the D.C. Circuit raised the question of whether the Supreme Court's decision in *Kokesh v. SEC*[22] impacted the permissibility of a FINRA-imposed bar and remanded to the Commission to consider that question.[23] Black offers no argument as to why the answer to that question should be that *Kokesh* renders FINRA bars impermissible. As a result, he has not established a likelihood of success on that issue. Nonetheless, in light of the D.C. Circuit's decision in *Saad* to remand the issue to the Commission we find it to be a serious legal question.

Having determined that Black raises a serious legal question, we inquire whether the balance of the hardships tips decidedly in his favor. We find that it does not.

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[21] *Cf. Schellenbach v. SEC*, 989 F.2d 907, 912 (7th Cir. 1993) (observing that FINRA disciplinary proceedings are given "wide latitude . . . unless there is a showing of selective enforcement or an attempt to discriminate by arbitrary classification"); *Blair Alexander West*, Exchange Act Release No. 74030, 2015 WL 137266, at *10 n.28 (Jan. 9, 2015) (rejecting claim that FINRA investigation was unfair or improper and finding no evidence of unfair treatment on independent review), *petition denied*, 641 F. App'x 27 (2d Cir. 2016).

[22] *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).

[23] *Saad v. SEC*, 873 F.3d 297, 304 (D.C. Cir. 2017); *see also id.* at 304-07 (Kavanaugh, J., concurring) (applying the reasoning of *Kokesh*, which deemed disgorgement in a Commission action to be punitive for purposes of a statute of limitations, to a FINRA-imposed bar).

B. Irreparable Harm

To establish irreparable harm, a movant "must show an injury that is 'both certain and great' and 'actual and not theoretical'" and "'that the alleged harm will directly result from the action which the movant seeks to [stay].'"[24] Black claims that barring him "will severely hamper SEI's ability to function." Although the Commission has held that "the destruction of a business, absent a stay, . . . rises to the level of irreparable injury,"[25] Black's claim is unspecific, speculative, and unsupported; a claim that the bar will "severely hamper" operations is also not the same as a claim that the business will be destroyed.[26] Black's claim that his bar will impact SEI is also undermined by his statement that he is no longer SEI's owner. We find that Black's claim about the effect that his bar will have on SEI does not establish irreparable harm.

Black argues further that he will suffer irreparable harm because even if he prevails in his appeal "his career will have been destroyed with little prospect for starting anew." But Black does not explain why he would be unable to resume his career if we set aside the bar at the conclusion of his appeal. At that point, he would no longer be barred from associating with a FINRA member. He could once again associate with any FINRA member including SEI. As a result, Black's claim that absent a stay he would suffer irreparable harm because he would "lose the benefit of a possible reduction of his permanent bar" is without merit.[27]

Black also states that he has worked "in the securities industry since 1971," has "limited work experience in other fields," and absent a stay "will have difficulty finding work" and will be unable "to support himself financially." But the Commission has held that "suffer[ing] financial detriment does not rise to the level of irreparable injury warranting issuance of a

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[24] *Zipper*, 2017 WL 5712555, at *4.

[25] *Scattered Corp.*, 52 S.E.C. 1314, 1997 SEC LEXIS 2748, at *15 (Apr. 28, 1997); *accord Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013); *see also Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 (concluding that destruction of a business constituted "irreparable injury").

[26] *Cf. Scottsdale Cap. Advisors Corp.*, Exchange Act Release No. 83783, 2018 WL 3738189, at *3 (Aug. 6, 2018) (finding irreparable harm where applicant supported his claim "with a declaration from the manager of the holding companies for SCA and Alpine, who declares under the penalty of perjury that if 'SCA and Alpine lose access to funds associated with [applicant], SCA and Alpine will likely be forced to cut staff and will likely become insolvent").

[27] *Cf. Colley v. James*, 254 F. Supp. 3d 45, 69 (D.D.C. 2017) (finding that "loss of the teaching certifications is not an irreparable injury" because plaintiffs did not show they would be unable to "regain employment with the school district upon reinstatement of their certifications").

stay."[28] Indeed, "the loss of employment income does not necessarily establish irreparable harm—even when the loss is unrecoverable."[29] Black's bare assertion that he would have difficulty finding work absent a stay does not rise to the level of irreparable harm.[30] In any case, to the extent it could be considered irreparable harm, we find it outweighed by the other factors.

C. The Risk of Harm to Others and the Public Interest

We view the third and fourth factors—the public interest and the risk of harm to others from a stay—as strongly supporting the denial of a stay. A Rule 8210 violation is "serious" as it "subverts [FINRA's] ability to execute its regulatory responsibilities."[31] "As a result, individuals who violated Rule 8210 'present too great a risk to the markets and investors to be permitted to remain in the securities industry."[32] This is especially so where, as here, the basis for the Rule 8210 violation is lying in testimony and fabricating documents. These dishonest acts, which at this point Black has not shown a likelihood will be disproven during this proceeding, caution against allowing continued association with a FINRA member during Black's appeal.[33]

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[28] *Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004).

[29] *Colley*, 254 F. Supp. 3d at 69.

[30] *Id.* at 70 (finding no irreparable harm from unrecoverable loss of employment income where plaintiffs "appear able to seek other employment") (citing *Davis v. Billington*, 76 F. Supp. 3d 59, 65 (D.D.C. 2014) (finding plaintiff's inability to recover back pay from his former employer at his primary job did not constitute irreparable harm for preliminary injunction purposes where plaintiff still received a military pension as well as income from a second job")); *see also Monica J. Linden*, Securities Act Release No. 9808, 2015 WL 3747254, at *9 (June 16, 2015) (denying stay request against the backdrop of "inherently speculative" financial harm); *The Dratel Grp.*, Exchange Act Release No. 72293, 2014 WL 2448896, at *5 (June 2, 2014) (finding applicant's claim that absent a stay he would "be barred from a business he has been a part of for over thirty-seven years and [that is] his only source of income," without further explanation or support, did not establish that applicant would suffer irreparable harm).

[31] *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 WL 3523186, at *6 (Sept. 10, 2010).

[32] *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 WL 503416, at *5 (Feb. 11, 2013).

[33] *See id.* (highlighting the "risk of harm that allowing Goldstein to continue participating in the industry pending his appeal would pose" in light of his "noncompliance with Rule 8210" and denying a stay because "the potential harm of allowing Goldstein to continue participating in the industry pending his appeal outweighs the potential harm of not staying the bar").

Black states that there is "no risk" of harm to other parties if his bar is stayed because FINRA's complaint against him lacks an allegation of harm to a customer or other party. He adds that his "continued involvement in the industry will directly benefit SEI, its employees and customers." For the reasons discussed above, we disagree that Black's continued participation in the industry does not pose a substantial risk to others. A propensity for dishonesty poses a risk to investors and the public.[34] As for any benefit to SEI, its employees, and its customers from a stay, any such benefit does not mean that the public interest as a whole supports a stay.

Black also argues that a stay serves "the public interest because [he] will be allowed to continue reporting illegal investment schemes," as he claims to have done "on numerous occasions" with great consequence. This argument lacks merit. Black does not describe how the NAC's decision prevents him from speaking to regulators and law enforcement entities about illegal investment schemes or criminal conduct; nor does he describe why he would be unable to expose fraudulent investment schemes if not employed by a FINRA member firm. Not all who have knowledge of and report on wrongdoing in the securities industry are employees of broker-dealers or other financial firms. And even if it were true that Black could only engage in whistleblowing activities if employed in the industry, the potential harm of staying the bar greatly outweighs any interest in preserving his claimed whistleblowing activities.

* * *

Black has not satisfied his burden of establishing that a stay is warranted. He has failed to show that the balance of the relevant factors support a stay. Although he has raised a serious legal question with regard to the bar in light of the D.C. Circuit's remand in *Saad*, the public interest and risk of harm to others outweighs any harm that Black claims he will suffer absent a stay.

Accordingly, IT IS ORDERED that the motion by Frank Harmon Black to stay the bar FINRA imposed is denied.

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

Vanessa A. Countryman
Acting Secretary

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[34] *Bruce Paul*, Exchange Act Release No. 21789, 1985 WL 548579, at *2 (Feb. 26, 1985) (stating that the respondent's "clear demonstration of his propensity for dishonesty" made "the bar imposed by the law judge . . . fully warranted in the public interest" because "the investing public must be protected against any recurrence of Paul's dishonest actions").