UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 91045 / February 2, 2021

Admin. Proc. File No. 3-20209

In the Matter of the Application of

ROBBI J. JONES and KIPLING JONES & CO., LTD.,

For Review of Disciplinary Action Taken by

FINRA

Appeal filed: January 19, 2021
Motion for stay filed: January 19, 2021
Last brief received: February 1, 2021

ORDER DENYING MOTION FOR A STAY

Robbi J. Jones and Kipling Jones & Company, Ltd. ("KJC" and, collectively, "Applicants"), appeal from FINRA disciplinary action finding that Jones caused KJC to willfully create and maintain inaccurate books and records and to file materially inaccurate reports. FINRA also found that Jones provided inaccurate and misleading information to FINRA staff and refused to respond to questions during on-the-record testimony. FINRA imposed two independent bars against Jones for those violations. Applicants now move to stay imposition of the bars pending our consideration of their appeal. FINRA opposes the motion. Because Applicants have not met their burden for granting a stay, the motion is denied.[1]

[1] FINRA also fined KJC $38,000. Although Applicants' motion focuses on the bars, they also ask that we stay both "the bars and sanctions imposed." Because FINRA Rule 9370 provides that "[t]he filing with the SEC of an application for review by the SEC shall stay the effectiveness of any sanction, other than a bar or an expulsion, imposed in a decision constituting a final disciplinary action of FINRA," we deny as moot Applicants' request for a stay of any sanction other than the two bars imposed on Jones. *See, e.g.*, *Thaddeus J. North*, Exchange Act Release No. 80490, 2017 WL 1397541, at *1 (Apr. 19, 2017) (denying as moot motion to stay FINRA's imposition of a fine, suspension, and costs pending appeal).

I. Background

In April 2017, FINRA's Department of Enforcement filed a four-cause complaint against Applicants. The first cause of action alleged that Jones had caused KJC to willfully violate Section 17(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 17a-3 and 17a-5, and that Jones and KJC had violated FINRA Rules 4511 and 2010. Specifically, the complaint alleged that Jones had caused KJC's books and records to be inaccurate because Jones did not record the cancelation of a certificate of deposit, but instead allowed it to be shown as a KJC asset. The complaint further alleged that Jones filed, or caused to be filed, materially inaccurate Financial and Operational Combined Uniform Single Reports Part IIA ("FOCUS reports") that inflated KJC's reported net capital by improperly treating the CD as an allowable asset.

The second cause of action alleged that Jones violated FINRA Rule 2010 because she provided false and misleading information to FINRA staff about the CD and about an investigation by the City of Houston (a municipal securities client of KJC) into the use of a city credit card. The third and fourth causes alleged that Jones violated FINRA Rules 8210 and 2010 because she provided false and misleading information about the CD and the Houston investigation to FINRA staff in response to FINRA Rule 8210 requests and refused to answer questions at her on-the-record testimony ("OTR") that related to the Houston investigation.

After a five-day hearing, a FINRA hearing panel found KJC liable under the first cause and Jones liable under all four causes. For the books-and-records violations, the hearing panel fined KJC $38,000, suspended Jones from associating with any FINRA member firm in any capacity for two years, barred her from associating with any FINRA member firm in any supervisory or principal capacity, and fined her $35,000. For Jones's violations related to providing false and misleading information, the hearing panel suspended Jones from associating with any FINRA member firm in any capacity for two years and fined her $35,000. The hearing panel ordered that Jones's two suspensions run consecutively.

Applicants appealed to FINRA's National Adjudicatory Council (the "NAC"). In doing so, Applicants conceded liability and focused their appeal on only the imposition of sanctions. The NAC nevertheless conducted an independent review of the record and affirmed the hearing panel's liability findings. The NAC relied, in part, on the hearing panel's finding that Jones was not a credible witness, noting that the hearing panel "gave little weight to Jones's testimony" and had held that "Jones's demeanor at the hearing and the record as a whole caused the Panel to view Jones as not being a credible witness." The NAC affirmed the fine imposed on the firm, but determined that Jones's violations warranted more serious sanctions than a suspension because Jones's misconduct was egregious and "rendered her unfit to remain in the securities industry." The NAC therefore imposed a bar in all capacities for her books-and-records violations and a separate bar in all capacities for her violations related to providing false and

misleading information to FINRA and refusing to respond to FINRA staff's questions. Applicants now seek a stay of those bars.[2]

II. Analysis

A stay pending appeal is an "'extraordinary remedy,'" and the moving party bears the burden of establishing that relief is warranted.[3] We emphasize that our conclusions with respect to a motion for a stay "are not final."[4] We base the conclusions that we reach in considering a motion for a stay "only on a review of the record and arguments currently before us."[5]

In deciding whether to grant a stay under Rule of Practice 401,[6] we consider whether the moving party has established that (i) there is a strong likelihood that it will eventually succeed on the merits of the appeal; (ii) it 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.[7] "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."[8] "The first two factors are the most critical, but a stay decision rests on the balancing of all four factors."[9]

To obtain a stay under this framework, a movant need not necessarily establish that it is likely to succeed on the merits of its appeal, but it must at least show "that the other factors

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[2] Because FINRA found KJC's violation to be willful, it found that the firm was also subject to a statutory disqualification. We do not consider that finding here because Applicants request only a stay of sanctions, and a statutory disqualification is not a sanction. *See, e.g.*, *Michael Earl McCune*, Exchange Act Release No. 77375, 2016 WL 1039460, at *9 (Mar. 15, 2016) (explaining that "FINRA does not subject a person to statutory disqualification as a penalty or remedial sanction"), *petition denied*, 672 F. App'x 865 (10th Cir. 2016); *Anthony A. Grey*, Exchange Act Release No. 75839, 2015 WL 5172955, at *11 n.60 (Sept. 3, 2015) (stating that a "statutory disqualification is not a FINRA-imposed penalty or remedial sanction").

[3] *Bloomberg L.P.*, Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 432–34 (2009)); *accord Alpine Sec. Corp.*, Exchange Act Release No. 87599, 2019 WL 6251313, at *5 & n.51 (Nov. 22, 2019); *Mark E. Laccetti*, Exchange Act Release No. 79138, 2016 WL 6137057, at *2 & n.10 (Oct. 21, 2016).

[4] *Bloomberg L.P.*, 2018 WL 3640780, at *7.

[5] *Id*.

[6] 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).

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

[8] *Bloomberg*, 2018 WL 3640780, at *7.

[9] *Id.*

weigh heavily in its favor" and that it has "raised a 'serious legal question' on the merits."[10] "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.'"[11] "Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 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."[12] Applicants have not met that standard.

A. Applicants fail to raise serious questions on the merits.

Because Applicants seek a stay before full development of the record, our analysis is based on the arguments and evidence before us. We emphasize that "[f]inal resolution must await the Commission's determination of the merits of [Applicants'] appeal."[13] Applicants argue in their motion that they "raise meaningful and substantive challenges to the proceedings" by cross-referencing their application for review. But given the nature of an application for review, it only alleges that certain findings were in error without citing to the record or any supporting

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[10] *Zipper*, 2017 WL 5712555, at *6 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392–93 (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").

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

[12] *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)).

[13] *Se. Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *2 (June 12, 2019) (quoting *Harry W. Hunt*, Exchange Act Release No. 68755, 2013 WL 325333, at *4 (Jan. 29, 2013)); *see also Alpine*, 2019 WL 6251313, at *6 ("Because [the movant] seeks relief in a stay motion before full development of the record, our analysis is based on the arguments and evidence before us, and we emphasize that [f]inal resolution must await the Commission's determination of the merits of [the movant's] appeal." (internal quotation marks omitted)).

authority.[14] Such generalized claims of error are insufficient to establish that a stay is warranted.[15]

Applicants also argue, without further detail, that the sanctions are excessive because there was no evidence of investor harm and Jones has no prior disciplinary record. But neither the absence of customer harm nor the absence of prior disciplinary history are mitigating factors.[16] Applicants claim further that Jones's "testimony evidenced that she would properly maintain the required net capital" and that, "[a]s a matter of principle, she has every incentive to operate KJC in good faith, to observe high standards of commercial honor, and to practice just and equitable principles of trade." But Applicants provide no record citation to Jones's testimony in their stay motion. Nor do they address FINRA's finding that Jones was not a credible witness. Applicants' unsupported assurances thus do not establish either a likelihood of success on the merits or, at a minimum, serious legal questions going to the merits.[17]

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[14] *Compare* Rule of Practice 401(a); 17 C.F.R. § 201.401(a) (requiring that all motions "be supported by affidavits or other sworn statements or copies thereof" and that "[p]ortions of the record relevant to the relief sought, if available to the movant, shall be filed with the motion") *with* Rule of Practice 420(b); 17 C.F.R. § 201.420(b) (stating that applications for review "shall identify the determination complained of and set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons thereof").

[15] *See, e.g.*, *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1248, 1250 (S.D.N.Y. 1992) ("Significantly, defendant does not provide supporting legal argument or case law and instead relies solely on its bald assertion that it has 'clearly "raised serious legal questions."' Thus, although defendant has provided a list of issues it wishes to raise before the Court of Appeals, it has not made the required 'strong showing that [it] is likely to succeed on the merits.'") (alteration in original) (citation omitted).

[16] *See, e.g.*, *KCD Fin. Inc.*, Exchange Act Release No. 80340, 2017 WL 1163328, at *12 (Mar. 29, 2017) (citing *Howard Braff*, Exchange Act Release No. 66467, 2012 WL 601003, at *7 (Feb. 24, 2012) (observing that the "absence of monetary gain or customer harm is not mitigating")); *CMG Inst'l Trading, LLC*, Exchange Act Release No. 59325, 2009 WL 223617, at *9 (Jan. 30, 2009) (rejecting applicants' argument that the absence of customer harm or fraud in connection with their Rule 8210 violation was mitigating) (citing *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 WL 1697153, at *5 (Apr. 11, 2008), *petition denied*, 566 F.3d 1172 (D.C. Cir. 2009)); *Allen Holeman*, Exchange Act Release No. 86523, 2019 WL 3530381, at *14 (July 31, 2019) (observing that the Commission has "repeatedly" held that a lack of prior disciplinary history is not mitigating), *petition denied*, __ F. App'x __ (D.C. Cir. Jan. 5, 2021); *see also PAZ Secs., Inc. v. SEC*, 566 F.3d 1172, 1175 (D.C. Cir. 2009) (sustaining the Commission's determination that "the lack of direct harm or benefit does not mitigate a complete failure to respond in violation of Procedural Rule 8210"); *Rooms v. SEC*, 444 F.3d 1208, 1214 (10th Cir. 2006) ("Lack of a disciplinary history is not a mitigating factor.").

[17] Applicants raise a variety of claims, and attempt to introduce evidence for the first time, in their reply brief. Applicants provide no explanation for why they could not have done this

B. Applicants have not established that they will suffer 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].'"[18] Here, Applicants claim that they "will suffer tremendous and irreparable harm should the bars be enforced pending Commission review."

Applicants provide no support for that assertion. Courts and the Commission have recognized that monetary loss that "threatens the very existence of the movant's business" may constitute irreparable harm.[19] But a movant must "substantiate the claim that irreparable injury

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earlier. We therefore do not entertain these arguments or evidence at this time. *See, e.g.*, *Wright v. United Parcel Serv., Inc. (Ohio)*, No. 20-30249, 2021 WL 235632, at *4 n.5 (5th Cir. Jan. 22, 2021) (finding substantive arguments against the imposition of sanctions raised for the first time in a reply brief to be waived where the opening brief "merely call[ed] [sanctions] 'unfair, excessive, harsh and unwarranted'"); *Conway v. United States*, 647 F.3d 228, 237 n.8 (5th Cir. 2011) (finding that "[a]rguments raised for the first time in a reply brief are forfeited"); *Bd. of Regents v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996) (explaining that, "[t]o prevent this sort of sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived"); *Waid v. Mission Coal Co., LLC*, No. 2:19-CV-00647-KOB, 2020 WL 705066, at *4 (N.D. Ala. Feb. 12, 2020) (holding that petitioner waived argument that it raised the first time in reply brief regarding a motion for a stay pending appeal); *Newspaper, Newsprint, Magazine & Film Delivery Drivers, Helpers, & Handlers, Int'l Bhd. of Teamsters, Local Union No. 211 v. PG Publ'g Co.*, No. 2:19-CV-1472-NR, 2019 WL 9101872, at *6 n.2 (W.D. Pa. Dec. 27, 2019) (considering arguments and authorities to be waived where they were raised for the first time in petitioner's reply in support of its motion for a stay pending appeal and observing that petitioner did not explain why these arguments and authorities could not have been raised earlier); *Colon v. City of New York*, No. 11-CV-0173 (MKB), 2014 WL 1338730, at *9 (E.D.N.Y. Apr. 2, 2014) (observing that "[t]he Second Circuit has clearly stated that arguments raised for the first time in reply papers or thereafter are properly ignored") (collecting cases).

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

[19] *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (citing *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 n.2); *see also Zipper*, 2017 WL 5712555, at *4 n.26 (stating that "the Commission has said that 'the destruction of a business could provide a sufficient basis to support' a finding of irreparable harm") (quoting *Atlantis Internet Grp. Corp.*, Exchange Act Release No. 70620, 2013 WL 5519826, at *5 n.14 (Oct. 7, 2013)); *Scattered Corp.*, File No. 3-9212, 1997 SEC LEXIS 2748, at *15 n.15 (Apr. 28, 1997) (stating that "[i]n rare circumstances, . . . the destruction of a business, absent a stay, is more than just 'mere' economic injury and rises to the level of irreparable injury"); *Bunker Ramo*, Exchange Act Release No. 14606, 1978 WL 197047, at *4 (Mar. 24, 1978) (finding a substantial likelihood of irreparable harm based in part on the determination that "petitioners could be forced out of [a particular] line of business" in the absence of relief).

is 'likely' to occur."[20] Applicants argue only that "Ms. Jones' livelihood is KJC" and that "KJC is Ms. Jones, as Ms. Jones is KJC's President, Chief Executive Officer, Chief Compliance Officer and Financial and Operations Principal." This recitation of Jones's titles does not explain how she or KJC is likely to suffer irreparable harm without a stay. For example, Applicants have submitted no information about KJC's expenses, level of profitability, or exhaustion of available resources that would allow us to assess the degree of harm by not staying the bars.[21] Applicants add only that "the loss of business (both current and future) alone is tremendous and the bell once rung cannot be unrung." But the Commission has held "that 'suffer[ing] financial detriment does not rise to the level of irreparable injury warranting a stay."[22] "[T]he loss of employment income does not necessarily establish irreparable harm—even when the loss is unrecoverable."[23] Without submitting evidence about an inability to meet financial obligations or continue in business because of the bars, we cannot find that Applicants have established they will suffer irreparable harm.[24] In any case, even were we to find irreparable harm, Applicants' failure to raise a serious legal question on the merits or establish that the other factors favor them means they have not met their burden in seeking a stay.[25]

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[20] *Wis. Gas Co.*, 758 F.2d at 674 (quoting *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 n.3).

[21] *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 under the penalty of perjury demonstrating the likely harm to his businesses and its customers if the bar FINRA imposed was not stayed pending appeal).

[22] *Se. Invs., N.C.*, 2019 WL 2448245, at *5 (citation omitted); *see also id.* ("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.").

[23] *Id.* (quoting *Colley v. James*, 254 F. Supp. 3d 45, 69 (D.D.C. 2017)).

[24] *See id*. at 4 (finding that Black's claim "that barring him 'will severely hamper [his firm's] ability to function" was "unspecific, speculative, and unsupported," that "a claim that the bar will 'severely hamper' operations is also not the same as a claim that the business will be destroyed," and that as a result "Black' claim about the effect that his bar will have on SEI does not establish irreparable harm"); *cf. Zipper*, 2017 WL 5712555, at *4 (finding a possibility of irreparable harm where FINRA denied firm's CEO relief from a statutory disqualification and CEO "objected that he cannot quickly find registered principals and representatives to replace him at [the firm]" and argued that FINRA would "shut down" the firm if he could not do so").

[25] *See Se. Invs., N.C.*, 2019 WL 2448245, at *5 (stating that to the extent applicant's assertions would establish irreparable harm they were "outweighed by other factors"); *Zipper*, 2017 WL 5712555, at *5 (finding that, "[u]ltimately, we need not decide whether Zipper has satisfied his burden of establishing an irreparable injury because any harm to Zipper is

C. The risk of harm to others and the public interest weigh against staying the bars.

The risk of harm to others and the public interest also weigh against a stay. Applicants characterize Jones's violations as mere "technical errors," but FINRA found knowing and serious violations that represented a risk to investors and the market. Among other things, FINRA found that Jones deliberately and repeatedly falsified the firm's financial records; repeatedly filed FOCUS reports that materially overstated KJC's net capital; and deliberately inflated KJC's reported net capital to enhance her prospects of obtaining new business. FINRA concluded that Jones then attempted to conceal the firm's recordkeeping and reporting violations from FINRA during KJC's exam and Jones's OTR. Such a pattern of deceit poses a risk to investors and the public, and at this point Applicants have not shown that the findings FINRA made that establish that Jones engaged in this conduct were made erroneously.[26]

Indeed, the Commission has repeatedly emphasized the seriousness of such violations. A Rule 8210 violation is serious because it "subverts [FINRA's] ability to execute its regulatory responsibilities."[27] The Commission has thus held that "individuals who violated Rule 8210 'present too great a risk to the markets and investors to be permitted to remain in the securities industry.'"[28] The Commission has similarly explained the seriousness of recordkeeping violations, as "the recordkeeping requirements are fundamental to the regulation of the securities

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outweighed by the other factors"); *see also, e.g.*, *Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) (denying stay pending appeal because claimed irreparable injury of "exclu[sion] from the securities business," while "[s]erious," was "not of controlling importance" and was outweighed by the need to protect investors).

[26] *Se. Invs., N.C.*, 2019 WL 2448245, at *5 ("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); *cf. 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").

[27] *Joseph Ricupero*, Exchange Act Release No. 62891, 2010 WL 3523186, at *6 (Sept. 10, 2010); *see also Charles C. Fawcett*, Exchange Act Release No. 56770, 2007 WL 3306105, at *6 (Nov. 8, 2007) (stating that as FINRA lacks subpoena power Rule 8210 is "vitally important").

[28] *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 WL 503416, at *5 (Feb. 11, 2013) (citing *PAZ Sec.*, 2008 WL 1697153, at *4); *see also Se. Invs., N.C.*, 2019 WL 2448245, at *5 (June 12, 2019) (denying motion for a stay by noting, in part, that a propensity for dishonesty poses a risk to investors and the public); *N. Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 WL 3937496, at *4 (Aug. 12, 2014) (finding that the public interest supported denying stay of a bar for failing to comply with Rule 8210 request, which subverted FINRA's "ability to execute its regulatory responsibilities" (citations omitted)).

industry, serving as the 'keystone of our surveillance of brokers and dealers.'"[29] We thus conclude that, at this stage of the proceedings, the risk of harm to others and the public interest weigh against a stay of Jones's bars during Applicants' appeal.

* * *

Applicants have failed to satisfy their burden of establishing that a stay is warranted. They have not shown at this time that their appeal presents a serious legal question on the merits; that they would suffer irreparable harm absent a stay; or that the risk of harm to others or the public interest militates in favor of a stay. Accordingly, IT IS ORDERED that Applicants' motion for a stay pending Commission review of their appeal of the sanctions FINRA imposed is denied.

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

Vanessa A. Countryman
Secretary

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[29] *Mitchell H. Fillet*, Exchange Act Release No. 75054, 2015 WL 3397780, at *10 (May 27, 2015) (quoting *vFinance Invest. Inc*., Exchange Act Release 62448, 2010 WL 2674858, at *8 (July 2, 2010)).