

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92521 / July 29, 2021

Admin. Proc. File No. 3-20276

In the Matter of the Application of

MICHAEL CLARK

For Review of Action Taken by

FINRA

Appeal filed: April 26, 2021
Motion for stay filed: April 26, 2021
Last brief received: June 17, 2021

ORDER DENYING STAY

Michael Clark, a registered representative of FINRA member firm Ameriprise Financial Services, LLC, appeals from and moves to stay FINRA's determination that he is subject to a statutory disqualification under Section 3(a)(39) of the Securities Exchange Act of 1934.¹ FINRA filed an opposition to the motion, and Clark filed a reply. Because Clark has not met his burden of showing that a stay is warranted, the motion is denied.

I. Background

Clark previously held insurance licenses issued by New York and California. In November or December 2019, Clark and the New York State Department of Financial Services (the "New York Department") entered into a Stipulation Surrendering License (the "New York Stipulation"). Clark waived his right to a hearing and admitted that "he demonstrated untrustworthiness and/or incompetence within the meaning of [New York statute] in that he failed to respond to [three New York] Department letters . . . regarding an affirmative answer on his license renewal application, and thereby hampered and impeded the [New York]

¹ 15 U.S.C. § 78c(a)(39).

Department's investigation." As part of the New York Stipulation, Clark surrendered "any and all licenses issued to him by the [New York] Department," with "such surrender . . . having the same force and effect as if said licenses had been revoked or denied after a hearing."

According to Clark's application for review and his accompanying stay motion, he "consented to surrender his [New York] license . . . , based on his decision not to respond to an inquiry related to tax liens," because "[a]t the time, [he] no longer needed his insurance license in New York." Clark's Central Registration Depository record, which is contained in the record, reflects multiple outstanding tax liens against Clark.

In January 2021, the Insurance Commissioner of the State of California (the "California Commissioner") issued an Order of Summary Revocation against Clark (the "California Order"). The California Order noted that the New York Stipulation had revoked Clark's New York insurance license, and that he had failed to report, or respond to an inquiry about, the New York Stipulation. Based on these facts, the California Commissioner revoked Clark's California insurance "license and licensing rights."²

FINRA states that Clark failed to report either the New York Stipulation or the California Order to FINRA until mid-March 2021. Clark neither contests this assertion nor explains his delay in reporting the New York Stipulation and California Order. On March 29, 2021, FINRA sent Ameriprise a notice (the "Notice") that, because of the New York Stipulation and California Order, Clark is subject to a statutory disqualification under Exchange Act Section 3(a)(39).

The Notice informed Ameriprise that, by April 15, 2021, it had to either "initiate the Membership Continuance process" or terminate its association with Clark. On Ameriprise's request, FINRA extended this deadline to May 6, 2021. Clark now represents that Ameriprise "has indicated it will not" file a membership continuance application on his behalf.

On April 26, 2021, Clark filed the instant application for review of the Notice. Clark also moved to stay the statutory disqualification determination pending the Commission's review. The parties subsequently stipulated to a stay of the Notice until Clark's stay motion is resolved.

On June 17, 2021, after the stay motion was fully briefed, Clark submitted a supplemental filing stating that he had successfully reapplied for a New York insurance license. He represented that he also had reapplied for a California insurance license, but that reapplication was still pending. His supplemental filing also stated that he could request an update on his California reapplication's status on July 5, 2021. However, Clark has not filed any additional supplemental filings with the Commission regarding the status of his reapplication, and the California Department of Insurance "Check a License" website suggests that Clark's

² The revocation was effective 30 days from the date of the California order.

reapplication was denied on June 30, 2021.³ Nonetheless, for the purposes of this order, we assume that Clark’s California reapplication is still pending.

II. Analysis

We recently denied a very similar stay motion in *Paul H. Giles*, where the applicant requested a stay pending his appeal of FINRA’s determination that he is statutorily disqualified due to an order revoking his California insurance license.⁴ As explained in further detail in *Giles*, the party requesting a stay has the burden of establishing that the “extraordinary remedy” of a stay is warranted.⁵ In adjudicating a stay motion, we base our conclusions only on the record and arguments that are currently before us.⁶

When determining whether to grant a stay, we consider whether: (i) there is a strong likelihood that the movant will eventually succeed on the merits of the appeal; (ii) the movant will suffer irreparable harm without a stay; (iii) no other person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.⁷ If a movant raises a serious legal question on the merits, but fails to make a strong showing of a likelihood of success on the merits, we may grant a stay only if the balance of hardships tips decidedly in the movant’s favor.⁸ As explained below, Clark has not met his burden under this standard.

A. Clark has raised a serious legal question on the merits, but he has not made a strong showing of a likelihood of success on the merits of his appeal.

Although our analysis on the merits is necessarily preliminary,⁹ we find that, as in *Giles*, Clark has raised a serious legal question on the merits regarding whether the California Order “bars” him “from engaging in the business of . . . insurance” under Exchange Act Section 15(b)(4)(H)(i), and therefore amounts to a statutory disqualification under Exchange Act Section 3(a)(39)(F).¹⁰ In particular, like the applicant in *Giles*, Clark’s case is distinguishable from the

³ This website is available at <https://cdicloud.insurance.ca.gov/cal>.

⁴ See Exchange Act Release No. 92177, 2021 WL 2419849 (June 14, 2021).

⁵ *Id.* at *2 (quoting *Nken v. Holder*, 556 U.S. 418, 432-34 (2009)).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ See *id.*

¹⁰ *Id.* at *2-4; see also 15 U.S.C. §§ 78c(a)(39)(F), 78o(b)(4)(H)(i). Because, as noted above, Clark represents that his reapplication for a New York insurance license has been approved, we limit our inquiry to the effect of the remaining California Order.

situation in the Commission’s decision in *Meyers Associates*.¹¹ In *Meyers Associates*, the Commission deemed a similar state order to be in effect a bar that subjected the applicant to a statutory disqualification, notwithstanding that the order, like the order at issue here, did not use the term “bar.”¹² The Commission held in *Meyers Associates* that a state order requiring the applicant to withdraw his broker-dealer registration as an agent in the state, and not reapply for registration for three years, “constituted a bar from engaging in the business of securities within the meaning of Section 15(b)(4)(H)(i).”¹³ But the Commission expressly declined to determine whether the applicant would still be subject to a bar beyond the three-year period in which he was prohibited from reapplying for registration.¹⁴ Clark’s case is distinguishable from *Meyers Associates* because he appears to be eligible to reapply for his California insurance license.¹⁵

Nevertheless, for the reasons provided in *Giles*, Clark has not shown a strong likelihood of success on the merits because, unless and until he successfully reapplies for his California insurance license, the California Order appears to operate as a bar on his ability to engage in the business of insurance in California.¹⁶ Consequently, our consideration of Clark’s stay request

¹¹ See *Giles*, 2021 WL 2419849, at *4.

¹² *Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044, at *4-5 (Sept. 29, 2017).

¹³ *Id.*

¹⁴ *Id.* at *6 n.44.

¹⁵ See *Giles*, 2021 WL 2419849, at *4 & n.22 (citing authority that an individual can reapply for a California insurance license at any time after revocation, although the reapplication can be summarily denied for a five-year period). However, Clark’s case is also distinguishable from *Giles* because the California Commissioner apparently is still entitled to summarily deny any reapplication. See *id.*

¹⁶ See *id.* at *4. As in *Giles*, Clark also alleges that he is in the process of reapplying for his California insurance license. See *id.* at *4 n.24. But, as in *Giles*, Clark does not offer a likely timeline for the California Commissioner’s decision on his reapplication. Although Clark’s most recent supplemental filing asserts that, he could inquire about the status of his California reapplication around July 5, 2021, he has not made any supplemental filings since that date regarding the status of his reapplication and, as noted above, the California Department of Insurance website suggests that his reapplication was denied. See *supra* text accompanying note 3. Clark’s supplemental filing also asserts that the California Commissioner is likely to grant his reapplication because the California Order was based on the New York Stipulation. But the fact that he has regained his New York insurance license does not negate the New York Stipulation, nor its adverse findings, and Clark has produced no evidence that the New York Stipulation has been vacated. And, aside from the New York proceedings, the California Order seemingly was at least partly based on Clark’s failure to report or respond to a separate inquiry from California authorities regarding the New York Stipulation. Thus, at this point, we have no basis for

depends on whether the balance of the hardships tips decidedly in Clark's favor.¹⁷ As discussed below, we find that it does not.

B. Clark has not demonstrated irreparable harm.

As to irreparable harm, Clark raises most of the same arguments that were raised in *Giles*, and we reject them for the reasons we provided there.¹⁸ For example, as in *Giles*, Clark fails to show that the existence of a business entity such as Ameriprise would be threatened absent a stay. Indeed, he makes only speculative claims about potential harm to his business.¹⁹ And Clark has not shown that he would have to leave the industry, let alone suffer financial injuries rising to the level of irreparable harm, absent a stay.²⁰

Thus, as in *Giles*, Clark has not carried his burden of demonstrating irreparable harm absent a stay.²¹ But, even assuming that Clark has shown some amount of irreparable harm, he has not demonstrated such a high degree of irreparable harm that the balance of the hardships tips decidedly in his favor, particularly given that the third and fourth factors weigh against a stay.²²

concluding that it is likely that California will grant his application, or when it might do so. Given this uncertainty, as in *Giles*, Clark has not explained how Commission rules and relevant precedent would support issuing a stay pending California's decision on his reapplication (even assuming that his reapplication is indeed still pending). *See Giles*, 2021 WL 2419849, at *4 n.24. Clark may seek relief from FINRA or may file a motion for appropriate relief in this appeal if his reapplication is successful. *See id.*

¹⁷ *Giles*, 2021 WL 2419849, at *4.

¹⁸ *See id.* at *4-6.

¹⁹ *See id.* at *4. In his reply brief, Clark briefly suggests that, absent a stay, he or his group at Ameriprise may permanently lose customers, which he alleges constitutes irreparable harm. This argument is waived because he raised it for the first time in his reply brief. *See, e.g., id.* at *7 (finding waiver where argument was raised in first time in reply). Regardless, we need not determine whether permanently losing brokerage customers constitutes irreparable harm. Clark's claim is speculative, as Clark alleges only that "clients *may* leave the group" (emphasis added), and he has not produced any evidence to support this allegation. *See, e.g., id.* at *4 (recognizing that movant must show an injury that is certain and actual to establish irreparable harm). In addition, Clark fails to allege or prove that any clients who may be lost are irreplaceable.

²⁰ *See id.* at *5 & nn. 34-35.

²¹ *See id.* at *4-6.

²² *See, e.g., id.* at *6 & n.39.

C. The risk of harm to others and the public interest weigh against a stay.

We view the third and fourth factors—the risk of harm to others from a stay and the public interest—as supporting the denial of a stay. As in *Giles*, at least on the record and arguments before us, Clark seemingly fails to appreciate that his conduct suggests a concerning disregard for regulatory oversight.²³ In entering into the New York Stipulation, Clark admitted that he “demonstrated untrustworthiness and/or incompetence” within the meaning of a New York statute by failing to respond to three inquiries regarding tax liens from the New York Department.²⁴ And the California Order states that Clark failed to report or respond to an inquiry regarding the New York Stipulation.

Clark explains that he no longer needed his New York insurance license, but his regulatory obligations did not end simply because he no longer needed his license. Clark also failed to timely report the New York Stipulation that was entered in November or December 2019, and the California Order that was entered in January 2021, to FINRA until mid-March 2021.²⁵ As noted above, he offers no explanation for his delay in reporting these orders.

In addition, given that Clark has not shown a likelihood of success on the merits, he may well be subject to a statutory disqualification.²⁶ If Clark is subject to a statutory disqualification, a stay would allow Clark to continue to associate with Ameriprise “without the protections provided by FINRA’s membership continuance application process, which considers the public interest when weighing whether to allow a proposed association that is otherwise prohibited.”²⁷ As a result, we believe that staying FINRA’s statutory disqualification finding here while the Commission considers Clark’s appeal of that finding would pose a risk to endanger investors.²⁸

²³ See *id.* at *6.

²⁴ Although, as noted above, Clark represents that his reapplication for a New York insurance license has been granted, Clark does not claim that the New York Stipulation has been vacated.

²⁵ See *id.* at *6 & n.41 (explaining that FINRA rules require associated persons to report license revocations within at most 30 days of learning of the reportable event).

²⁶ See *id.* at *7.

²⁷ *Id.* (quoting *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *5 (Nov. 27, 2017)).

²⁸ *Richard Allen Riemer*, Exchange Act Release No. 82014, 2017 WL 5067462, at *3 (Nov. 3, 2017).

Finally, as in *Giles*, Clark waived his fairness argument by raising it for the first time in his reply brief, and regardless he has not established that he is entitled to a stay on this basis.²⁹ And we reject Clark's argument that a stay would be in the public interest because FINRA granted Ameriprise's request for a temporary extension of the Notice's deadline.³⁰ FINRA's agreement to a temporary extension—to briefly preserve the *status quo ante* pending the Commission's consideration of Clark's stay request—does not mean that a longer stay pending appeal would be in the public interest now that the merits of that request have been considered.³¹

* * *

Clark has not satisfied his burden of establishing that a stay is warranted. Although he has shown that his appeal raises a serious legal question, he has not established a likelihood of success on the merits or that the balance of hardships tip decidedly in his favor. Accordingly, it is ORDERED that Clark's motion for a stay is denied.

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

Vanessa A. Countryman
Secretary

²⁹ *Giles*, 2021 WL 2419849, at *7 (stating that Giles failed to establish that, because he is reapplying for his insurance license, fairness requires us to stay FINRA's action pending his appeal).

³⁰ *Id.*

³¹ *See id.*