UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93652 / November 23, 2021

Admin. Proc. File No. 3-20646

In the Matter of the Application of

THOMAS LEE JOHNSON

For Review of Disciplinary Action Taken by

FINRA

Appeal filed: November 2, 2021
Motion for stay filed: November 2, 2021
Last brief received: November 12, 2021

ORDER DENYING MOTION FOR A STAY

Thomas Lee Johnson appeals from FINRA disciplinary action finding that he violated FINRA Rule 2010 by converting $1,059,544.98 from his former employer, RBC Capital Markets, LLC ("RBC"). For his misconduct, FINRA barred Johnson from associating with any member firm in any capacity. Johnson now moves to stay imposition of the bar pending consideration of his appeal. FINRA opposes the motion. Because Johnson has not met his burden for granting a stay, the motion is denied.[1]

[1] FINRA also ordered Johnson to pay $3,068.30 in hearing costs and $1,710.30 in appeal costs. Although Johnson's motion focuses on the bar, he also asks that we stay "the bar and sanctions imposed." But costs are not sanctions. *See Sharemaster v. SEC*, 847 F.3d 1059, 1070 (9th Cir. 2017) (distinguishing between "the sunk transactional costs of pursuing an administrative appeal" and a fine); *see also Sharemaster*, Exchange Act Release No. 83138, 2018 WL 2017542, at *6 (Apr. 3, 2018) (distinguishing between "administrative fees assessed in connection with hearings before" FINRA, which are not final disciplinary sanctions, and a fine). In any case, FINRA informed Johnson in its letter enclosing its decision that orders to pay costs would be stayed in the event that Johnson appealed its decision to the Commission. As a result, to the extent Johnson seeks a stay of the order that he pay costs, that request is moot. *See, e.g.*, *Keith D. Geary*, Exchange Act Release No. 78833, 2016 WL 4761752 (Sept. 13, 2016) (denying

I. Background

In January 2019, FINRA's Department of Enforcement filed a complaint against Johnson, alleging that he violated FINRA Rule 2010 by converting $1,059.544.98 from RBC when he transferred the funds from his RBC account to his outside bank account.[2] According to the complaint, RBC mistakenly deposited $1,059.55.98 into Johnson's RBC account when it should have deposited only $951.01. The complaint alleged that, despite knowing the $1,059,544.98 had been deposited in error, Johnson transferred the funds out of RBC.

In August 2019, following a two-day hearing, a FINRA hearing panel found that, as alleged, Johnson converted $1,059,544.98 from RBC in violation of FINRA Rule 2010. For this misconduct, FINRA barred Johnson from associating with any member firm.

Johnson appealed to FINRA's National Adjudicatory Council (the "NAC"). After conducting an independent review of the record, the NAC affirmed the hearing panel's findings of violation and the sanction imposed. The NAC agreed with the hearing panel that "Johnson knew he had no right to the money[,] [y]et he treated the money as if he did and admitted that he would have kept it had RBC not caught the error." The NAC concluded that Johnson's actions "fully" satisfied the elements of conversion, and that a bar was the "only appropriate" remedial sanction. Johnson now seeks a stay of the bar pending his appeal to the Commission.

II. Analysis

A stay pending appeal is an "'extraordinary remedy,'" and the movant bears the burden of establishing that relief is warranted.[3] We emphasize that our conclusions with respect to a stay motion "are not final," and that "'[f]inal resolution must await the Commission's determination of the merits of [an applicant's] appeal.'"[4] We base the conclusions we reach in considering a stay motion "only on a review of the record and arguments currently before us."[5]

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as moot an applicant's request that the Commission stay an order to pay costs pending the appeal).

[2] FINRA further alleged that Johnson violated FINRA Rules 8210 and 2010 by providing false and misleading statements to FINRA staff but that allegation was later dismissed.

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

[5] *Id.*

In determining whether to grant a stay under Rule of Practice 401,[6] 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] "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, but it 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."[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] Johnson has not met his burden.

A. Johnson has not raised a serious question on the merits.

In his motion for a stay, Johnson argues that he "raises meaningful and substantive challenges to the proceeding and to the appropriateness of the sanctions imposed." But Johnson provides no elaboration or support other than a cross-reference to his application for review. And Johnson's application for review effectively consists of five single-sentence assertions that

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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.*

10 *Zipper*, 2017 WL 5712555, at *6 (quoting *Sherley v. Sebelius*, 644 F.3d 388, 398 (D.C. Cir. 2011)).

11 *Id.* (quoting *In re Revel AC, Inc.*, 802 F.3d 558, 570 (3d Cir. 2015) (alterations in original)).

12 *Id.* (quoting *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (emphasis in original)).

FINRA erred in finding him liable for conversion and barring him. As we have held, "such generalized claims of error are insufficient to establish that a stay is warranted."[13]

For example, Johnson does not support his assertion that FINRA's findings of violation were unsupported by the evidence. As a result, Johnson has not established a serious legal question or a substantial likelihood of success with respect to the findings of violation.[14]

Johnson next argues, with respect to the bar, that there was no evidence of investor harm and that he has no prior disciplinary record. "But neither the absence of customer harm nor the absence of [a] prior disciplinary history are mitigating factors."[15] Johnson also argues that "he has every incentive to observe high standards of commercial honor, and to practice just and equitable principles of trade during the pendency of the proceedings and at all times in the future." But Johnson's "unsupported assurances . . . do not establish either a likelihood of success on the merits or, at a minimum, serious legal questions going to the merits."[16]

Johnson argues further that FINRA's bar is "punitive" because "this matter does not concern any customer harm," he "is well aware of and compliant with his regulatory obligations," and "there is no threat of future violation." But FINRA's Sanction Guidelines provide that "a bar is standard" for conversion "regardless of [the] amount converted."[17] "This approach reflects the judgment that, absent mitigating factors, conversion 'poses so substantial a risk to investors and/or the markets as to render the violator unfit for employment in the securities industry.'"[18] "Indeed, conversion is antithetical to the basic requirement that customers and firms must be able to trust securities professionals with their money, and one who

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[13] *Robbi J. Jones*, Exchange Act Release No. 91045, 2021 WL 396767, at *3 (Feb. 2, 2021) (finding that applicants failed to raise a serious question on the merits necessary to obtain a stay where they argued in their stay motion only that they raised "'meaningful and substantive challenges to the proceedings' by cross-referencing their application for review").

[14] In his reply brief, Johnson raises a number of new claims regarding the likelihood of success on the merits, including that there was no evidence that the funds RBC erroneously placed in his account "belonged to RBC," and that, therefore, he could not have converted them. Johnson provides no authority to support his argument. Moreover, he provides no explanation for why he could not have raised this and the reply's other claims earlier. We therefore do not entertain the new claims at this time. *See, e.g., Jones*, 2021 WL 396767, at *3 n.17 (collecting cases and finding waiver where stay movant raised new arguments and evidence in reply brief).

[15] *Jones*, 2021 WL 396767, at *3.

[16] *Id.*

[17] FINRA Sanction Guidelines, at 36 (Mar. 2019).

[18] *Stephen Grivas*, Exchange Act Release No. 77470, 2016 WL 1238263, at *7 (Mar. 29, 2016) (quoting *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 WL 3306105, at *5 n.27 (Nov. 8, 2007)).

intentionally misappropriates funds entrusted to him demonstrates a lack of fitness to be in the securities industry."[19] Here, the NAC found no mitigating factors that weighed in favor of a lighter sanction based on its finding that Johnson engaged in conversion. Indeed, the NAC found the presence of several aggravating factors that supported a bar, including that the amount of money converted was substantial and that Johnson's misconduct was intentional.

"In sum," the NAC stated, "Johnson's willingness to disregard his ethical obligations in order to pursue pecuniary self-interest reflects dishonesty incompatible with the integrity required by high standards of commercial honor and just and equitable principles of trade." We have found bars to be remedial and not punitive where allowing the respondent to remain in the securities industry would pose an unacceptable risk to the public.[20] As a result, at this point, Johnson has not established either a likelihood of success on the merits or a substantial legal question with respect to his claim that the bar is "punitive" and thus excessive or oppressive.

B. Johnson has not shown that he will suffer irreparable harm without a stay.

To establish irreparable harm, Johnson "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].'"[21] Johnson argues that he will suffer irreparable harm because "he will have to vacate [his] role" as Chief Compliance Officer of Royal Capital Wealth Management, LLC ("RCWM"), a firm he owns and operates with his brother.[22] But we have stated that "suffer[ing] financial detriment does not rise to the level of irreparable injury warranting issuance of a stay."[23] We have also stated that the "'loss of employment income does

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19 *Id.* (footnote omitted).

20 *See, e.g.*, *Trevor Michael Saliba*, Exchange Act Release No. 91527, 2021 WL 1336324, at *23 (Apr. 2, 2021).

21 *Zipper*, 2017 WL 5712555, at *4 (alteration in original) (quoting *Wis. Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam)).

22 In his reply brief, Johnson characterizes the irreparable harm as the fact that as a result of the bar he is unable to enter securities transactions on behalf of RCWM's clients. As discussed above, we consider this claim waived since it was raised for the first time in the reply brief. *See supra* note 14. In any case, the assertion that Johnson's clients could be harmed because he is unable to enter securities transactions on their behalf is insufficient to demonstrate irreparable harm. Johnson acknowledges that since the bar his brother has been serving RCWM's clients in his place. *See generally Dratel Grp.*, Exchange Act Release No. 72293, 2014 WL 2448896, at *5 (June 2, 2014) (holding that applicant's "vague reference to his customers' lost access to applicants' services is not enough to demonstrate irreparable harm).

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

not necessarily establish irreparable harm—even when the loss is unrecoverable.'"[24] Johnson "has not shown that, absent a stay, he would be unable to obtain another job or be in financial distress."[25] "Indeed, he has put on no evidence of his likely financial situation absent a stay."[26] Thus, Johnson's bare assertion that he "will have to vacate [his] role" at Royal Capital Wealth Management absent a stay is not enough to constitute irreparable harm.[27]

Johnson also claims that "[b]arring [him] for several months or years pending review to then impose a suspension shorter in time would cause [him] irreparable harm which cannot be recovered or remedied." But other than asserting that absent a stay he would have to vacate his role at RCWM, which as we have explained does not constitute irreparable harm, Johnson does not explain why the length of the Commission's review would itself cause him irreparable harm absent a stay. Such unspecific claims of irreparable harm are insufficient to warrant a stay.[28]

In any case, Johnson's failure to raise a serious legal question on the merits or establish that the other factors favor him means that he has not met his burden in seeking a stay.[29]

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[24] *Se. Invs., N.C., Inc.*, Exchange Act Release No. 86097, 2019 WL 2448245, at *5 (June 12, 2019) (quoting *Colley v. James*, 254 F. Supp. 3d 45, 69 (D.D.C. 2017)).

[25] *Paul H. Giles*, Exchange Act Release No. 92177, 2021 WL 2419849, at *5 (June 14, 2021).

[26] *Id.*

[27] *See Se. Invs., N.C., Inc.*, 2019 WL 2448245, at *5 (finding that movant's "bare assertion that he would have difficulty finding work absent a stay does not rise to the level of irreparable harm"); *see also Colley*, 254 F. Supp. 3d at 70 (finding no irreparable harm from unrecoverable loss of employment income where plaintiffs "appear able to seek other employment").

[28] *Giles*, 2021 WL 2419849, at *4 (finding that movant's "unspecific, speculative, and unsupported" claim of harm to his business was insufficient to establish irreparable harm"); *Jones*, 2021 WL 396767, at *3 (finding applicants' claim "that they 'will suffer tremendous and irreparable harm should the bars be enforced pending Commission review" to be unsupported).

[29] *See, e.g., Se. Invs., N.C., Inc.*, 2019 WL 2448245, at *5 (stating that to the extent movant's assertions would establish irreparable harm they were "outweighed by the other factors"); *Zipper*, 2017 WL 5712555, at *5 (stating that "we need not decide whether Zipper has satisfied his burden of establishing an irreparable injury because any harm to Zipper is outweighed by the other factors"), *see also, e.g., Associated Secs. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960) (denying stay pending appeal because claim that exclusion from the securities business constituted irreparable injury was outweighed by the need to protect investors).

C. Johnson has not shown that no other person will suffer substantial harm as a result of a stay or that a stay is likely to serve the public interest.

The risk of harm to others and the public interest weigh against a stay. As discussed above, FINRA found that Johnson converted funds in violation of FINRA Rule 2010. Johnson has not demonstrated a likelihood that he will overturn FINRA's findings of violation. Although Johnson argues that the "absence of harm to the Commission, FINRA, or investor[s] weighs in favor of a stay," we do not agree. We have rejected the view that a bar is not in the public interest where the victim is the respondent's employer rather than investors.[30] Instead, the fact that the record suggests that Johnson converted funds from his employer indicates that he poses a risk to investors.[31] For these reasons, the record presently before us suggests that the "potential harm of allowing [Johnson] to continue participating in the industry pending his appeal outweighs the potential harm of not staying the bar."[32]

* * *

Accordingly, IT IS ORDERED that Johnson's motion for a stay pending Commission review of his 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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30 *See Thomas C. Gonnella*, Exchange Act Release No. 78532, 2016 WL 4233837, at *13 n.60 (Aug 10, 2016), *petition denied*, 954 F.3d 536 (2d Cir. 2020).

31 *See supra* notes 18-19 and accompanying text (explaining why conversion poses a risk to investors); *see also, e.g.*, *Mayer A. Amsel*, Exchange Act Release No. 37092, 1996 WL 169430, at *5 (Apr. 10, 1996) (stating that respondent's "misconduct was no less serious because the firm was his victim rather than investors"); *Richard Dale Grafman*, Exchange Act Release No. 21648, 1985 WL 548687, at *2 n.2 (Jan. 14, 1985) ("[W]e do not agree with [respondent] that his misconduct was somehow less serious because it did not involve public customers. The fact that he defrauded a brokerage firm instead is hardly a factor in his favor.")

32 *Hunt*, 2013 WL 325333, at *5; *see also, e.g.*, *Gregory Evan Goldstein*, Exchange Act Release No. 68904, 2013 WL 503416, at *5 (Feb. 11, 2013) (highlighting the "risk of harm that allowing Goldstein to continue participating in the industry pending his appeal would pose").