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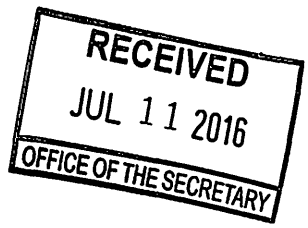

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Kenny Akindemowo

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17076

FINRA'S BRIEF IN OPPOSITION TO REQUEST FOR STAY

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July 11, 2016

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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Kenny Akindemowo

For Review of Disciplinary Action Taken by

FINRA

File No. 3-17076

FINRA'S BRIEF IN OPPOSITION TO REQUEST FOR STAY

I. INTRODUCTION

Applicant Kenny Akindemowo has moved to stay the bars imposed in a December 29, 2015 decision of FINRA's National Adjudicatory Council ("NAC").[1] In that decision, the NAC found that Akindemowo induced two investors' purchases in a securities offering by deceptive means, converted the investors' funds, and engaged in private securities transactions and outside business activities without providing the necessary written notice to his employer broker-dealer. (RP 961-72.) The NAC, finding numerous aggravating factors that elevated this case to an egregious one, sanctioned Akindemowo by imposing independent bars for his fraud and conversion, which was consistent with FINRA's Sanction Guidelines ("Guidelines"). (RP 972-74.)

[1] FINRA filed a certified copy of the record in this case with the Commission on February 12, 2016. "RP" refers to the page numbers in the certified record. A copy of the NAC's decision is included in the certified record at RP 955-75.

FINRA opposes Akindemowo's request to stay the effectiveness of the bars. Akindemowo preyed on two women who trusted him as a securities professional to invest their funds. Rather than investing the funds as promised, Akindemowo deposited the money into his bank account and spent the money on his personal expenses. Akindemowo engaged in fraud and conversion, two of the most serious forms of misconduct committed by a representative in the securities industry.

Akindemowo fails to meets the high burden that is necessary to stay the effectiveness of the sanctions imposed upon him. Indeed, Akindemowo puts forth no meritorious argument in support of his request for a stay. Accordingly, there is no likelihood that Akindemowo will prevail on the merits of his appeal, and he has failed to satisfy the high burden necessary to stay the effectiveness of the bars. The Commission therefore should deny the request for a stay.

II. FACTUAL BACKGROUND[2]

A. Akindemowo's Background

Akindemowo was an insurance agent with The Prudential Insurance Company of America ("Prudential") beginning in June 2010 and was registered with Prudential's affiliated broker-dealer, Pruco Securities, LLC ("Pruco"). (RP 538, 565, 589-92, 956.) In September 2011, Akindemowo resigned from Pruco while the firm was investigating him for the misconduct at issue in this case. (RP 343-44, 538, 589-92, 956.) Akindemowo has not been associated with a FINRA member firm since September 2011. (RP 538, 956; Akindemowo's Br. on the merits at faxed page 2.)

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[2] FINRA sets forth here an abbreviated version of the facts. A complete recitation of the facts is contained in FINRA's brief on the merits filed with the Commission on May 17, 2016.

B. Akindemowo Solicited the Investments of Two Individuals and Used Their Funds for His Own Purposes

The bars of Akindemowo stem from Akindemowo's conduct surrounding his recommendations of securities issued by Apex Venture Capital Group ("Apex"). Apex would pool investor funds and loan these funds to distressed businesses in need of cash. (RP 465-66, 478-79, 821, 956.) Apex purportedly then would pay the investors a lower interest rate than it charged the borrowers, keeping the difference as a profit. (RP 459, 478-79, 956.)

Akindemowo solicited investments from two investors, Angela Garcia and Rosemary Baufield, who gave Akindemowo a total of $15,000 to invest in Apex. (RP 293-94, 405-06, 621, 641, 956-60.) To Garcia, Akindemowo described Apex as a venture capital group that pooled investors' money and loaned the funds to banks and other businesses. (RP 286, 309, 478, 957.) Akindemowo told Garcia that her investment would generate six percent interest and that quarterly she could withdraw her money without penalty or add to her investment. (RP 286, 292-93, 957.) Akindemowo directed Garcia to invest in Apex through his company, Goshen Wealth Management Group ("Goshen"). (RP 286, 957.)

On December 6, 2010, Garcia invested $10,000 with Akindemowo in order to invest in Apex. (RP 293-94, 301-02, 621, 957.) At Akindemowo's instruction, Garcia made the check payable to Goshen. (RP 294, 621, 957.) Although Akindemowo told Garcia her money would be invested in Apex, it never was. (RP 957.) Akindemowo instead deposited Garcia's money into his Goshen bank account, which he used as a personal account, and, unbeknownst to Garcia, used her funds for his own purposes. (RP 302, 455, 480, 649-50, 957.)

To Baufield, Akindemowo suggested an investment in a business that pooled investors' money to loan to others who were trying to start businesses such as franchises. (RP 400-01, 959.) This investment was Apex. (RP 471, 959 & n.4.) He told Baufield that her money would

be pooled with that of other investors and that she would earn a nine percent guaranteed return. (RP 401, 403, 959.)

On March 28, 2011, Baufield invested $5,000 with Akindemowo to be directed into the Apex investment pool through Goshen. (RP 405-06, 641, 959.) Like he did with Garcia's money, Akindemowo deposited Baufield's funds into his Goshen account and used the money to pay his personal expenses, including paying fees related to his home mortgage, dining out, and shopping for himself. (RP 493, 642, 661, 959.)

Garcia and Baufield consistently testified that their funds were not intended to be a loan or to be used to pay Akindemowo's expenses, such as his mortgage, but were to be invested in the Apex loan pool that Akindemowo described to them. (RP 405-06, 418, 419, 422, 423, 962-63.) Akindemowo never repaid Garcia or Baufield. (RP 299, 342, 415-16, 435, 589-90, 958, 960.) After being stonewalled by Akindemowo regarding the status of their funds, both investors complained to Pruco. (RP 299-300, 418, 633-39, 673-76, 958, 960.) Pruco repaid Garcia and Baufield in full with interest. (RP 299-300, 418, 633-39, 673-76, 958, 960.)

III. ARGUMENT

Akindemowo fails to demonstrate that the Commission should stay the bars pending resolution of this appeal. He has failed to demonstrate a likelihood of success on the merits, and he is, moreover, unable to demonstrate that he will suffer irreparable harm without a stay or that granting the stay will serve the public interest. Indeed, the public interest strongly favors precluding Akindemowo from participating in the securities industry. The Commission should keep the bars in place to protect investors.

A. Akindemowo Bears the Burden to Prove that the Commission Should Issue a Stay

"[T]he imposition of a stay is an extraordinary and drastic remedy," and the applicant has the burden of establishing that a stay is appropriate. *William Timpinaro*, Exchange Act Release No. 29927, 1991 SEC LEXIS 2544, at *6 (Nov. 12, 1991); *see William Scholander*, Exchange Act Release No. 74437, 2015 SEC LEXIS 841, at *6 (Mar. 4, 2015). Akindemowo has not met that burden.

To obtain a stay, Akindemowo must show (1) a strong likelihood that he will prevail on the merits; (2) that, without a stay, he will suffer irreparable harm; (3) there would not be substantial harm to other parties if a stay were granted; and (4) that the issuance of a stay would be likely to serve the public interest. *See The Dratel Group, Inc.*, Exchange Act Release No. 72293, 2014 SEC LEXIS 1875, at *7-8 & n.6 (June 2, 2014). Under this standard, the Commission must deny Akindemowo's motion to stay.

B. Akindemowo Has No Likelihood of Success on the Merits

Akindemowo has not demonstrated that he is likely to succeed on the merits of his appeal. In fact, Akindemowo makes no cognizable argument in his motion for a stay that addresses this required element that the Commission considers when determining whether to grant a stay. Akindemowo therefore fails to meet his heavy burden.

In its decision, the NAC found by a preponderance of the evidence that Akindemowo induced Garcia's and Baufield's investments in securities by fraudulent means and converted their funds. (RP 961-69.) In exchange for their funds, Akindemowo promised these women investment returns of six to nine percent. (RP 957, 959.) Rather than investing the funds as promised, Akindemowo deposited the money into his bank account and spent the money on his personal expenses, including his mortgage and purchases at retail stores and restaurants. (RP

957, 959.) When the women pressed Akindemowo for documentation of their investments, he evaded them. (RP 957-85, 959.) When the women became suspicious and requested remittance of their funds, Akindemowo dodged their requests and placated them with excuses and never repaid them. (RP 957-60.) The women, frustrated with Akindemowo's evasiveness, complained to Pruco, his employer broker-dealer. (RP 958-60.) When confronted by Pruco, and later FINRA, Akindemowo provided shifting explanations, downplayed the allegations as baseless complaints of former girlfriends, and otherwise contended that the funds that he received were actually loans from these women. (RP 957, 958, 959 n.6, 960, 963, 974.) Based on this, the NAC found that Akindemowo violated FINRA Rules 2020 and 2010. (RP 961-69.)

The NAC's findings are supported by Akindemowo's extensive testimony along with the testimony of Garcia, Baufield, and Akindemowo's supervisors from Pruco and Prudential. In addition, Akindemowo admitted most of the facts necessary to establish that he converted Garcia's funds. (RP 961-62.) Akindemowo also never provided a credible account of what occurred once his misconduct was discovered. (RP 764, 958.) Instead, Akindemowo provided a false account of the facts to Pruco, FINRA staff, and the Hearing Panel and blamed Garcia and Baufield for this disciplinary action against him. (RP 958-60, 974.) While any final determination awaits the Commission's consideration of the merits of the issues on review, the specific grounds upon which the NAC based its decision to bar Akindemowo exist in fact.

Akindemowo is also unlikely to overturn the bars, which are within the range of sanctions recommended in FINRA's Guidelines and not excessive or oppressive. The NAC, finding numerous aggravating factors that elevated this case to an egregious one, sanctioned Akindemowo by imposing independent bars for his fraud and conversion. (RP 972-74 (the relevant Guidelines are attached as Exhibit 1).) The record fully supports this conclusion. The

NAC properly concluded that Akindemowo's egregious misconduct made him a danger to the investing public and that barring Akindemowo in all capacities was the only effective remedy. (RP 973-74.) Akindemowo is not likely to have the sanctions overturned on appeal, and the Commission should reject Akindemowo's request to stay the bars pending its full review of this matter.

C. Akindemowo Has Not Demonstrated that a Denial of the Stay Will Impose Irreparable Harm

To make the required showing of irreparable injury, Akindemowo must show that complying with the NAC's order will impose injury that is "irreparable as well as certain and great." *Whitehall Wellington Invs., Inc.*, Exchange Act Release No. 43051, 2000 SEC LEXIS 1481, at *5 (July 18, 2000). "The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time, and energy . . . are not enough." *Timpinaro*, 1991 SEC LEXIS 2544, at *8; *see Meyers Assocs., L.P.*, Exchange Act Release No. 77994, 2016 SEC LEXIS 1999, at *15-16 & n.16 (June 3, 2016). Indeed, Akindemowo has offered no evidence or credible argument to support a finding that he would be irreparably injured unless the bars are stayed during the pendency of his appeal.

Akindemowo argues that without a stay, he will have difficulty providing for his family, who he contends has suffered "untold hardship" since FINRA barred him. (Motion at 1.) Akindemowo's vague claims of hardship are unsupported and do not establish irreparable injury. Moreover, any possibility that Akindemowo may suffer some financial detriment during an appeal does not rise to the level of an irreparable injury and provides no basis for relief. *See Associated Sec. Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1960); *Scholander*, 2015 SEC LEXIS 841, at *23 (rejecting arguments that absent a stay, irreparable harm would result to applicants (such as financial and reputational harm) and their parents, for whom applicants are

the sole providers); *see also N. Woodward Fin. Corp.*, Exchange Act Release No. 72828, 2014 SEC LEXIS 2894, at *14 (Aug. 12, 2014) ("The Commission has held repeatedly that the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." (internal quotation marks omitted)); *The Dratel Group*, 2014 SEC LEXIS 1875, at *17 (denying stay and finding that bar from business that provided only source of income does not rise to level of irreparable harm).

Akindemowo contends that he provided "an excellent service and advice to each of [his] clients." (Motion at 1.) Akindemowo has not demonstrated that a denial of his stay request will substantially harm anyone else, including his former customers' loss of Akindemowo's securities-related services. (Motion at 1.) The Commission previously has rejected a customer's loss of a broker's services as sufficient harm to warrant a stay. *See Harry W. Hunt*, Exchange Act Release No. 68755, 2013 SEC LEXIS 297, at *17-18 (Jan. 29, 2013). Akindemowo's customers, moreover, will likely be better protected if he cannot participate in the securities industry during this appeal.

Moreover, Akindemowo is not currently associated with a broker-dealer and has not been registered in the securities industry since September 2011 when he resigned from Pruco while under investigation for the misconduct at issue in this case. (RP 538, 956 & n.1; Akindemowo's Br. on the merits at faxed page 2.) It is therefore likely that his customers' accounts are already being handled by another registered representative. Even assuming Akindemowo currently desired to associate with a FINRA member-broker dealer, and was unable to do so as result of the bars imposed by the NAC's decision, such "financial detriment" would not raise to the level

of irreparable injury.[3] *See Scott Epstein*, Administrative Proceeding File No. 3-12933, Order Denying Stay, slip op. at 4 (Mar. 20, 2008) ("[I]t does not appear that Epstein, who apparently has not been employed in the securities industry for several years, will suffer irreparable harm without a stay.") (attached as Exhibit 2).

In addition, Akindemowo's delay in filing a motion for stay further weighs against a finding of irreparable harm. *See Nicholas S. Savva*, Administrative Proceeding File No. 3-15017, Order Denying Stay, slip op. at 6 (Oct. 31, 2012) (attached as Exhibit 3). Akindemowo did not file his motion for stay until six months after FINRA issued its decision and five months after filing his application for review with the Commission. (RP 952-75, 977.)

Akindemowo has failed to show any irreparable harm.

D. Denial of the Stay Will Avoid Potential Harm to Others and Will Serve the Public Interest

Whatever slight injury Akindemowo may have asserted is eclipsed by the remaining factors that strongly weigh in favor of denying his stay request. *See Stratton Oakmont, Inc.*, 52 S.E.C. 1150, 1152-53 (1996). The violations here were extremely serious, and Akindemowo's misconduct goes to the very heart of FINRA's investor protection mission.

Akindemowo's fraud and conversion occurred over the course of several months and involved several separate, wrongful and intentional acts. (RP 956-60, 973); *see FINRA Sanction Guidelines* 6-7 (2013) (Principal Considerations in Determining Sanctions, Nos. 8, 13)

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[3] Akindemowo requests that the Commission reinstate his license during the pendency of this appeal. (Motion at 1.) Because Akindemowo has not been registered with a FINRA member firm for more than two years, he would be required to take and pass a qualification examination prior to associating with a member. *See* NASD Rule 1031(c) (requiring that a representative "whose most recent registration as a representative . . . has been terminated for a period of two (2) or more years immediately preceding the date of receipt by the Association of a new application shall be required to pass" the appropriate qualification examination).

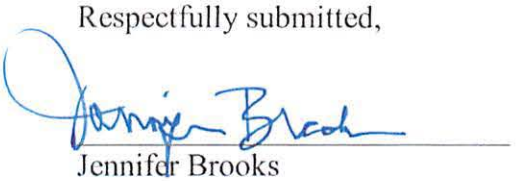
[hereinafter "*Guidelines*"]. Akindemowo's misconduct also was accompanied by unmistakable efforts to conceal his actions and efforts intended to discourage Garcia and Baufield from complaining to Pruco. (RP 973); *Guidelines*, at 6 (Principal Considerations in Determining Sanctions, No. 10). Akindemowo's failure to acknowledge his misconduct poses a serious risk to the investing public that he will, if given the opportunity to participate in the securities industry, engage in similar misconduct in the future. (RP 974); *Guidelines*, at 6-7 (Principal Considerations in Determining Sanctions, Nos. 2, 12); *see Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *64 (Nov. 9, 2012) (finding that applicant's "persistent attempts to deflect blame onto others . . . suggests that he is likely to engage in similar misconduct in the future").

Akindemowo's contention that he has no other disciplinary history or customer complaints implies that a stay imposes no risk to the investing public. (Motion at 1.) But the investing public would be in grave danger in light of the egregiousness of Akindemowo's misconduct and his troubling disregard for fundamental principles of the securities industry. Indeed, the Commission previously has rejected an applicant's assertion that a lack of customer complaints meant that the public interest was served by his presence in the securities industry notwithstanding his repeated disregard for regulatory requirements. *Hans N. Beerbaum*, Administrative Proceeding File No. 3-12316, Order Denying Stay, slip op. at 3 (June 8, 2006) (attached as Exhibit 4). In balancing the possibility of injury to Akindemowo against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to Akindemowo. *See John Montelbano*, Exchange Act Release No. 45107, 2001 SEC LEXIS 2490, at *12-13 (Nov. 27, 2001). In light of the seriousness of Akindemowo's actions, the Commission will further the public interest by denying the stay request.

IV. CONCLUSION

For the reasons discussed above, the Commission should deny Akindemowo's stay request.

Respectfully submitted,



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July 11, 2016

CERTIFICATE OF SERVICE

I, Jennifer Brooks, certify that on this 11th day of July 2016, I caused a copy of the foregoing Brief of FINRA in Opposition to Request for Stay, In the Matter of the Application of Kenny Akindemowo, Administrative Proceeding File No. 3-17076 to be served by messenger on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

and via FedEx on:

Kenny Akindemowo
[redacted]
Hopkins, MN [redacted]

Service was made on the Commission by messenger and on the applicant by overnight delivery service due to the distance between FINRA's offices and the applicant.

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CERTIFICATE OF COMPLIANCE

I, Jennifer Brooks, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 7,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 3,007 words.

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Exhibit 1

Conversion or Improper Use of Funds or Securities

FINRA Rules 2010 and 2150[1], and NASD Rule 2330 and IM-2330

Principal Considerations in Determining Sanctions	Monetary Sanction	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Conversion*[2] (No fine recommended, since a bar is standard.) *Improper Use* Fine of $2,500 to $50,000.	*Conversion* Bar the respondent regardless of amount converted. *Improper Use* Consider a bar. Where the improper use resulted from the respondent's misunderstanding of his or her customer's intended use of the funds or securities, or other mitigation exists, consider suspending the respondent in any or all capacities for a period of six months to two years and thereafter until the respondent pays restitution.

1 This guideline also is appropriate for violations of MSRB Rule G-25.

2 Conversion generally is an intentional and unauthorized taking of and/or exercise of ownership over property by one who neither owns the property nor is entitled to possess it.

Misrepresentations or Material Omissions of Fact

FINRA Rules 2010 and 2020[1]

Principal Considerations in Determining Sanctions	Monetary Sanction[2]	Suspension, Bar or Other Sanctions
See Principal Considerations in Introductory Section	*Negligent Misconduct* Fine of $2,500 to $50,000. *Intentional or Reckless Misconduct* Fine of $10,000 to $100,000.	*Negligent Misconduct* Suspend individual in any or all capacities and/or suspend firm with respect to any or all activities or functions for up to 30 business days. *Intentional or Reckless Misconduct* Suspend individual in any or all capacities and/or suspend firm with respect to any or all activities or functions for a period of 10 business days to two years. In egregious cases, consider barring the individual and/or expelling the firm.

1 This guideline also is appropriate for violations of MSRB Rule G-17.

2 In cases involving misrepresentations and/or omissions as to two or more customers, the Adjudicator may impose a set fine amount per investor rather than in the aggregate. As set forth in General Principle No. 6, Adjudicators may also order disgorgement.

Principal Considerations in Determining Sanctions

The following list of factors should be considered in conjunction with the imposition of sanctions with respect to all violations. Individual guidelines may list additional violation-specific factors.

Although many of the general and violation-specific considerations, when they apply in the case at hand, have the potential to be either aggravating or mitigating, some considerations have the potential to be only aggravating or only mitigating. For instance, the presence of certain factors may be aggravating, but their absence does not draw an inference of mitigation.[1] The relevancy and characterization of a factor depends on the facts and circumstances of a case and the type of violation. This list is illustrative, not exhaustive; as appropriate, Adjudicators should consider case-specific factors in addition to those listed here and in the individual guidelines.

1. The respondent's relevant disciplinary history (see General Principle No. 2).
2. Whether an individual or member firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator.
3. Whether an individual or member firm respondent voluntarily employed subsequent corrective measures, prior to detection or intervention by the firm (in the case of an individual) or by a regulator, to revise general and/or specific procedures to avoid recurrence of misconduct.
4. Whether the respondent voluntarily and reasonably attempted, prior to detection and intervention, to pay restitution or otherwise remedy the misconduct.
5. Whether, at the time of the violation, the respondent member firm had developed reasonable supervisory, operational and/or technical procedures or controls that were properly implemented.
6. Whether, at the time of the violation, the respondent member firm had developed adequate training and educational initiatives.
7. Whether the respondent demonstrated reasonable reliance on competent legal or accounting advice.
8. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
9. Whether the respondent engaged in the misconduct over an extended period of time.
10. Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a customer, regulatory authorities or, in the case of an individual respondent, the member firm with which he or she is/was associated.
11. With respect to other parties, including the investing public, the member firm with which an individual respondent is associated, and/or other market participants, (a) whether the respondent's misconduct resulted directly or indirectly in injury to such other parties, and (b) the nature and extent of the injury.

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1 *See, e.g., Rooms v. SEC*, 444 F.3d 1208, 1214-15 (10th Cir. 2006) (explaining that while the existence of a disciplinary history is an aggravating factor when determining the appropriate sanction, its absence is not mitigating).

12. Whether the respondent provided substantial assistance to FINRA in its examination and/or investigation of the underlying misconduct, or whether the respondent attempted to delay FINRA's investigation, to conceal information from FINRA, or to provide inaccurate or misleading testimony or documentary information to FINRA.

13. Whether the respondent's misconduct was the result of an intentional act, recklessness or negligence.

14. Whether the member firm with which an individual respondent is/was associated disciplined the respondent for the same misconduct at issue prior to regulatory detection. Adjudicators may also consider whether another regulator sanctioned a respondent for the same misconduct at issue and whether that sanction provided substantial remediation.

15. Whether the respondent engaged in the misconduct at issue notwithstanding prior warnings from FINRA, another regulator or a supervisor (in the case of an individual respondent) that the conduct violated FINRA rules or applicable securities laws or regulations.

16. Whether the respondent member firm can demonstrate that the misconduct at issue was aberrant or not otherwise reflective of the firm's historical compliance record.

17. Whether the respondent's misconduct resulted in the potential for the respondent's monetary or other gain.

18. The number, size and character of the transactions at issue.

19. The level of sophistication of the injured or affected customer.

Exhibit 2

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12933

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
March 20, 2008

In the Matter of the Application of

SCOTT EPSTEIN
c/o
George L. Mahr, II
Mahr and Mahr, LLC
80 Main Street
P.O. Box 534
Madison, NJ 07940

For Review of Disciplinary Action by

FINRA

ORDER
DENYING
STAY OF BAR

Scott Epstein, a former registered representative with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), a member of the Financial Industry Regulatory Authority ("FINRA"), 1/ has appealed from FINRA disciplinary action. In a December 20, 2007 decision, FINRA found that Epstein made unsuitable mutual fund switch recommendations to customers in violation of NASD Rules 2310, 2110, and IM-2310-2. 2/ For these violations, FINRA barred

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1/ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 91 SEC Docket 517. Because the final disciplinary action on appeal here was taken after the consolidation, references to FINRA herein shall include references to NASD.

2/ NASD Rule 2310 requires that, in recommending the purchase, sale, or exchange of any security to a customer, a member must have reasonable grounds for believing that the recommendation is suitable for that customer based on the facts, if any, disclosed by the

(continued...)

Epstein from acting in any capacity with any member firm. 3/ On February 27, 2008, more than two months after the FINRA decision, Epstein filed a motion with the Commission seeking a stay of the bar imposed by FINRA, pending his appeal to the Commission. 4/ For the reasons discussed below, it does not appear appropriate to grant Epstein's stay request. 5/

I.

FINRA found that Epstein engaged in a pattern of recommending mutual fund switch transactions to twelve Merrill Lynch Financial Advisory Center ("FAC") customers from October 2001 to February 2002, and that those transactions were unsuitable. FINRA found that "the preponderance of the evidence in this case indicates the existence of a pattern of switches from one fund to another that were recommended by Epstein to the [FAC] customers with whom he dealt" and that "Epstein failed to introduce any evidence showing that he had any reasonable grounds to believe that his recommendations to switch from one fund to another were suitable." FINRA concluded that "the preponderance of the evidence establishes that Epstein routinely recommended switch transactions that caused customers to incur sales charges, triggered new and lengthy [contingent deferred sales charge] holding periods, and burdened customers with higher fund expenses."

2/ (...continued)
customer as to his other securities holdings and the customer's financial situation and needs. NASD Rule IM-2310-2 imposes on members and registered representatives an "implicit" obligation of "fair dealing" in relationships with customers. NASD Rule 2110 requires the observance of "high standards of commercial honor and just and equitable principles of trade." A violation of the NASD suitability rule is also a violation of NASD Rule 2110. See, e.g., Wendell D. Belden, 56 S.E.C. 496, 505 (2003).

3/ FINRA also assessed costs.

4/ Epstein's stay motion contains additional requests for relief. Epstein also seeks orders directing FINRA to (1) produce a copy of the FINRA subcommittee's decision detailing findings of fact and conclusions of law, (2) produce the names of FINRA members who participated in rendering the final decision, (3) produce various documents and recordings relating to FINRA matters or to Merrill Lynch, and (4) issue subpoenas compelling testimony from various Merrill Lynch customers and FINRA executives. Epstein's additional requests will be addressed at a later date.

5/ Although Epstein requested expedited consideration of his stay motion, such consideration is unavailable to him. Rule of Practice 401(d)(3), 17 C.F.R. § 201.401(d)(3), requires that a request for expedited consideration be filed "within 10 days of the effectiveness of the action, or where the action complained of, will, by its terms, take effect within five days of the filing of the motion for stay . . . ."

In barring Epstein, FINRA found that Epstein's misconduct was "egregious" in that he "abused the trust of the customers with whom he dealt . . . ." FINRA also found "disquieting" Epstein's "failure to accept responsibility for his own actions" and the Hearing Panel's determination that "Epstein was not forthright in testimony given by him to FINRA staff during the investigation of this matter." In addition, FINRA found that "Epstein's demonstrated insouciance and indifference towards his responsibilities under NASD rules poses a serious risk to the investing public." Rejecting Epstein's claims of mitigation, FINRA concluded that a bar was necessary "to prevent Epstein from inflicting the same harm upon customers in the future that he inflicted upon his customers in this case."

II.

The Commission generally has considered the following factors in determining whether to grant a stay: (1) the likelihood that the moving party will eventually succeed on the merits of its appeal; (2) the likelihood that the moving party will suffer irreparable harm without a stay; (3) the likelihood that another party will suffer substantial harm as a result of a stay; and (4) a stay's impact on the public interest. 6/ The burden of establishing the appropriateness of a stay is on the moving party, Epstein. 7/

In support of his stay request, Epstein introduces an affidavit from his counsel (the "Affidavit") challenging the fairness of the bar, alleging conflicts of interest among FINRA, its offices, and Merrill Lynch, and assigning error to the FINRA Hearing Officer, the Hearing Panel, a FINRA subcommittee, and FINRA's National Adjudicatory Council (the "NAC"). The Affidavit asserts that the bar is "unfair" because, "upon information and belief," Epstein was the only one among "numerous other" Merrill Lynch representatives employed at the FAC who violated FINRA suitability rules. The Affidavit also alleges that Epstein's bar "is a result of the conflicts of interest that exist among FINRA, the NASD, the [NASD Department of Enforcement], the Office of the Hearing Officers, the Office of Regulatory Policy and Oversight, the NAC and Merrill Lynch." The Affidavit cites Epstein's application for review, stating that Epstein seeks a stay until he is "afforded the opportunity to present the exculpatory and mitigating evidence he was prevented from presenting to the [H]earing [P]anel." The Affidavit further faults the "organizational structure of FINRA" for being "permeated with conflicts of interests . . . ." The Affidavit assigns error to the Hearing Officer, the Hearing Panel, the FINRA subcommittee, and the NAC for, among other things, restricting evidence, making erroneous discovery rulings, accelerating the disciplinary proceedings, permitting introduction of certain

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6/ See, e.g., Intelispan, Inc., 54 S.E.C. 629, 631 (2000); Stratton Oakmont, Inc., 52 S.E.C. 1150, 1152 & n.4 (1996) (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985)).

7/ See, e.g. Millenia Hope, Inc., Exchange Act Rel. No. 42739 (May 1, 2000), 72 SEC Docket 965, 966.

evidence, failing to subpoena certain witnesses, including customers and FINRA and Merrill Lynch executives, and exhibiting bias.

FINRA opposes Epstein's motion for a stay. FINRA asserts that it is unlikely that Epstein's appeal will prevail on the merits given the "considerable evidence" of his violations. FINRA argues that the "specific grounds on which the NAC based its decision to bar Epstein exist in fact." FINRA disputes "that a bar in this case would cause [Epstein] any injury that can be characterized as irreparable." In this regard, FINRA contends that, "[e]ven assuming Epstein currently desired to associate with a FINRA member-broker dealer, and was unable to do so as a result of the bar," the potential financial impact "would not [rise] to the level of irreparable injury." FINRA states further that the "violations here were extensive [and] extremely serious." FINRA observes that, "[i]n light of [its] duty to protect the investing public and ensure the integrity of the market, the NAC found that it must act decisively in cases, like this one, in which the evidence proves that Epstein lacks an understanding of his duties as a registered person to ensure that he recommends suitable transactions." FINRA argues that the public interest would be furthered "by allowing the bar to remain in place until [the Commission] can undertake a full review of this case."

Based on the parties' filings, it appears that Epstein has not satisfied the burden required to establish the appropriateness of a stay of the bar against him. Although any formal resolution must await the Commission's determination on the merits of Epstein's appeal, it is not clear at this stage that Epstein will prevail on the merits. Moreover, it does not appear that Epstein, who apparently has not been employed in the securities industry for several years, will suffer irreparable harm without a stay. 8/ It should be noted, in this connection, that Epstein did not file his stay request until more than two months after the bar issued.

FINRA found that Epstein's violations were egregious. Granting a stay pending resolution of Epstein's appeal would allow Epstein to reenter the industry and expose customers to the risk of further violations. Any detriment that Epstein may incur from the denial of his stay

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8/ We have held repeatedly that "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." Richard L. Sacks, Exchange Act Rel. No. 57028 (Dec. 21, 2007), __ SEC Docket __.

request is outweighed by the danger that he would pose to the investing public. 9/ Under the circumstances and based on the parties' filings, therefore, the granting of Epstein's stay request is not warranted.

Accordingly, IT IS ORDERED that the request of Scott Epstein for a stay of the bar imposed against him by FINRA, in its decision dated December 20, 2007, pending the Commission's consideration of Epstein's appeal be, and it hereby is, denied.

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

Nancy M. Morris
Secretary

9/ See John Montelbano, Exchange Act Rel. No. 45107 (Nov. 27, 2001), 76 SEC Docket 1023, 1029 (denying stay in part because detriment was "outweighed by the necessity of protecting the public interest").

Exhibit 3

ADMINISTRATIVE PROCEEDING
FILE NO. 3-15017

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
October 31, 2012

In the Matter of the Application of

NICHOLAS S. SAVVA and HUNTER SCOTT FINANCIAL, LLC
c/o Michael Schwartzberg, Esq.
Winget, Spadafora & Schwartzberg, LLP
45 Broadway, 19th Floor
New York, NY 10006

For Review of Action Taken by

FINRA

ORDER DENYING STAY

Hunter Scott Financial, LLC, a FINRA member firm, and Nicholas S. Savva, formerly associated with Hunter Scott, appeal from a FINRA decision denying Hunter Scott's application for Savva to continue to associate with the firm as a general securities representative. Applicants move to stay the effectiveness of FINRA's decision, which FINRA opposes. For the reasons stated below, the motion is denied.

I.

In July 2002, Congress passed the Sarbanes-Oxley Act, which amended the definition of "statutory disqualification" in the Securities Exchange Act of 1934.[1] Among other changes, the Sarbanes-Oxley Act expanded the definition of statutorily disqualifying events to include when an individual is "subject to any final order of a State securities commission (or any agency or officer performing like functions)" that either (i) "[b]ars such person from association with an entity regulated by such commission . . . or from engaging in the business of securities . . .

[1] 15 U.S.C. § 78c(a)(39).

activities" or (ii) "[c]onstitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct."[2]

On August 3, 2004, Savva consented to the entry of an order against him by Vermont's Department of Banking, Insurance, Securities, and Health Care Administration. The order censured Savva, ordered that he permanently cease and desist from violating Vermont law, fined him $25,000, and prohibited Savva from seeking registration in Vermont as a broker-dealer or investment adviser representative without prior written consent from the state. The factual basis underlying the consent order, which Savva neither admitted nor denied, was that between August 2002 and November 2003 Savva engaged in unauthorized transactions in customer accounts, made unsuitable recommendations to customers, and used "boiler room" or high-pressure sales tactics.

In June 2009, FINRA notified Hunter Scott that Savva, who had been associated with Hunter Scott since January 2004, was subject to statutory disqualification as a registered representative because of the Vermont order. Although disputing that the Vermont order constituted a disqualifying event, Hunter Scott filed a Membership Continuance Application seeking approval of Savva to continue to associate with the firm notwithstanding his disqualification.

The issue was set for a hearing before a subcommittee of FINRA's Statutory Disqualification Committee. Following a hearing on November 17, 2011, and briefing by the parties, the subcommittee submitted its written recommendation to the Statutory Disqualification Committee, which subsequently presented a written recommendation to FINRA's National Adjudicatory Council.[3] On August 10, 2012, the NAC issued a decision denying the request for Savva's continued association with Hunter Scott. The NAC found that Savva is statutorily disqualified because of the Vermont order and that FINRA did not unfairly and retroactively apply the definition of statutory disqualification to Savva. The NAC further found that Savva's continued association with Hunter Scott was not in the public interest and would create an unreasonable risk of harm to investors and the market given the serious nature of the statutorily disqualifying event, numerous customer complaints and regulatory actions, and the inadequacy of the firm's supervisory plan.

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2 *Id.* §§ 78c(a)(39)(F), 78o(b)(4)(H).

3 *See* FINRA Rule 9524(a)(10).

On September 10, 2012, applicants filed an application for review with the Commission and on October 9, 2012, filed a motion to stay the NAC decision pending the Commission's review.[4]

II.

The Commission generally considers the following factors in determining whether to grant a stay:

> (1) whether there is a strong likelihood that the Applicants will succeed on the merits of their appeal; (2) whether the Applicants will suffer irreparable injury without a stay; (3) whether there will be substantial harm to the public if the stay were granted; and (4) whether the stay will serve the public interest.[5]

The moving party has the burden of establishing that a stay is warranted.[6]

A. Applicants argue that they have a strong likelihood of succeeding on the merits of their appeal because FINRA made both procedural and substantive errors in reaching its decision. Specifically, applicants contend that FINRA failed to give them proper notice of the basis for Savva's disqualification because FINRA's Department of Member Regulation initially argued that the Vermont order was disqualifying based on it being a final order barring Savva and not for the reason ultimately adopted by the NAC—that the Vermont order was based on laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct. Applicants further argue that FINRA imposed the statutory disqualification retroactively because FINRA procedural rules related to the statutory disqualification definition in the Sarbanes-Oxley Act were not put in place until 2009—years after Savva's conduct resulting in the Vermont order. Applicants also argue that, because it was entered by consent, the Vermont order does not qualify as a "final order" for the purpose of statutory disqualification. Applicants also fault FINRA for allowing a transcript of prior sworn testimony by Savva to be introduced into evidence after the hearing.

On the substance of Hunter Scott's Membership Continuance Application, applicants argue that the firm has demonstrated that it can properly supervise Savva, and that in reaching the opposite conclusion, FIRNA relied on stale events. Applicants contend that FINRA failed to

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[4] "The filing of an application for review by the SEC shall not stay the effectiveness of final FINRA action, unless the SEC otherwise orders." FINRA Rule 9559(s).

[5] *John Montelbano*, Exchange Act Release No. 45107, 2001 WL 1511604, at *3 (Nov. 27, 2001).

[6] *E.g., Millenia Hope, Inc.*, Exchange Act Release No. 42739, 2000 WL 511439, at *1 (May 1, 2000).

give proper consideration to a revised supervision plan submitted in advance of the final ruling, and they argue that Savva has not had a single customer complaint in the last four years.

Applicants submit that without a stay Savva "will effectively be barred from the securities industry" and that the "loss of his securities business clientele represents irreparable harm."[7] Additionally, applicants contend that "Hunter Scott will be irreparably harmed as it will be denied the services of one of its most experienced and profitable registered representatives" and will likely "lose customers to other securities firms."[8]

Applicants argue Savva's lack of recent customer complaints demonstrates "that his continued association with the firm will not create substantial harm to the public," and, in fact, a "stay will serve the public interest, as Mr. Savva will be permitted to return to his role as the registered representative for his long-standing customers at Hunter Scott."[9] In support of their stay application, applicants have submitted several largely identical affidavits from Savva's customers stating their desire to retain Savva as their broker notwithstanding their knowledge of the Vermont order and Savva's history of customer complaints.

FINRA opposes applicants' motion by arguing that they have not shown a strong likelihood of succeed on the merits. FINRA argues that applicants' procedural arguments fail to demonstrate that they are likely to succeed on appeal. First, FINRA opposes applicants' contention that they were not given proper notice of the basis for Savva's statutory disqualification, arguing that from the beginning applicants knew that the Vermont order was the basis for the disqualification. Moreover, FINRA argues, the issue whether the Vermont order was one barring Savva or one based on fraudulent, manipulative, or deceptive conduct was raised by FINRA more than four months before the hearing and applicants were given ample opportunity to brief and argue the issue before FINRA reached its decision. Second, FINRA argues that it did not apply the statutory disqualification retroactively because the Sarbanes-Oxley Act—which created the applicable statutory disqualification—became effective before the conduct resulting in the Vermont order, and its entry. Moreover, FINRA's rules and by-laws amended in 2007 and 2009 concerned only procedural matters and, therefore, were not impermissibly retroactive. Third, FINRA argues that there was nothing improper in the NAC admitting the prior testimony transcript into evidence "for the purpose of considering Savva's differing explanations of the events surrounding the Vermont Order," particularly because applicants were given an opportunity to address the admission of the transcript.[10] Fourth, FINRA argues that applicants' contention that the Vermont order is not a "final order" because it is a

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7 Applicant's Mot. for Stay at 13.

8 *Id.*

9 *Id.* at 14.

10 Br. of FINRA in Opp. to Mot. for Stay at 19.

consent order should be rejected because it was raised for the first time on appeal and because it "defies logic."[11] The Vermont order, FINRA contends, is final because it "resolved and concluded all matters concerning that particular misconduct in Vermont."[12]

FINRA further contends that it properly denied applicants' application on the merits. FINRA argues that it considered all the evidence presented and denied the application based on a finding that "Savva's continued association with Hunter Scott was not consistent with the public interest and the protection of investors."[13] FINRA argues that it properly considered the nature and seriousness of the disqualifying event as well as Savva's history in the industry—which includes three customer complaints and a FINRA Cautionary Action "in the past five years alone."[14] In addition, FINRA argues that it properly considered and rejected Hunter Scott's proposed plan of supervision—including the revised plan, which substituted the firm's compliance officer as Savva's proposed supervisor. FINRA submits that it properly concluded that Hunter Scott "did not demonstrate that it could properly supervise Savva, regardless of who serves as Savva's primary supervisor."[15]

FINRA further argues that "[t]he fact that Savva or [Hunter Scott] may suffer some financial detriment if the NAC's action is not stayed does not rise to the level of irreparable injury."[16] Finally, FINRA contends that "[i]n balancing the potential injury to applicant against the possibility of harm to the public, the necessity of protecting the public far outweighs any potential injury to applicants."[17]

B. Final resolution must await the Commission's determination on the merits of applicants' appeal. However, based on the briefs the parties have filed so far, there does not appear to be a strong likelihood that applicants will succeed on appeal. Applicants appear to have been given sufficient notice of and opportunity to address the basis of Savva's disqualification. And applicants' argument that FINRA retroactively applied the statutory disqualification does not appear likely to succeed because the statutory basis for the Savva's disqualification was in place before the conduct resulting in the Vermont order, even if FINRA's procedural rules related to statutory disqualification were not fully in place until after the Vermont order. Furthermore, applicants' argument that the Vermont order is not a final order because it was entered by consent

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11 *Id.* at 21.

12 *Id.*

13 *Id.* at 14.

14 *Id.* at 15.

15 *Id.* at 16 (internal quotation marks omitted).

16 *Id.* at 22.

17 *Id.*

does not appear likely to succeed. As FINRA points out, the Vermont order brought to conclusion particular allegations about Savva's misconduct, and applicants have failed to come forward with persuasive reasons why such an order should be excluded from the definition of a final order. Applicants also have not shown a strong likelihood that FINRA's admission of the transcript of Savva's prior testimony provides a basis for applicants to prevail on appeal. In addition, applicants have not shown a strong likelihood of success on their argument that FINRA failed properly to consider all the evidence in rejecting the application for Savva's continued association with Hunter Scott.

Nor have applicants established that, absent a stay, they will suffer irreparable harm. As the Commission has repeatedly stated, "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay."[18] FINRA correctly states that "[t]he alleged harm to applicants is indistinguishable from the harm to every person who is subject to a statutory disqualification and faced with loss of employment and every member firm that employs a highly profitable person subject to statutory disqualification."[19] Also weighing against a finding of irreparable harm is the fact that applicants did not file their motion for stay until two months after FINRA issued its decision and one month after filing their application for review.

Moreover, it appears that any harm to applicants is outweighed by the potential harm to the investing public from Savva's continued participation in the industry. FINRA has shown a history of misconduct by Savva with respect to his sales practices. Although applicants have submitted substantially identical affidavits of some of Savva's customers to support the showing that a stay would be in the public interest, in assessing the public interest "we look beyond the interests of particular investors . . . to the protection of investors generally."[20]

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[18] *See Robert J. Prager*, Exchange Act Release No. 50634, 2004 WL 2480717, at *1 (Nov. 4, 2004); *see also William Timpinaro*, Exchange Act Release No. 29927, 1991 WL 288326, at *3 (Nov. 12, 1991) ("'Mere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay, are not enough.'" (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958))).

[19] Br. of FINRA in Opp. to Mot. for Stay at 22.

[20] *Jeffrey L. Gibson*, Exchange Act Release No. 57266, 2008 WL 294717, at *4 (Feb. 4, 2008); *see also Christopher A. Lowry*, Investment Advisers Act Release No 2052, 55 SEC 1133, 2002 WL 1997959, at *6 (Aug 30, 2002) (stating that the public interest extends beyond the interests of a particular group of investors to the interest of the public-at-large), *aff'd*, 340 F.3d 501 (8th Cir. 2003).

Accordingly, IT IS ORDERED that, pending Commission review of their appeal, the motion by Nicholas S. Savva and Hunter Scott Financial, LLC to stay the effect of FINRA's decision be denied.

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

Elizabeth M. Murphy
Secretary

Exhibit 4

ADMINISTRATIVE PROCEEDING
FILE NO. 3-12316

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
June 8, 2006

In the Matter of the Application of HANS N. BEERBAUM and BEERBAUM & BEERBAUM FINANCIAL AND INSURANCE SERVICES, INC. 5881 Roblar Rd. Petaluma, California 94952 For Review of Disciplinary Action Taken by NASD	ORDER DENYING STAY

I.

Hans N. Beerbaum, who during the relevant period was a general securities representative with Beerbaum & Beerbaum Financial and Insurance Services, Inc. (the "Firm"), an NASD member, appeals from NASD disciplinary action barring him from association with any member. NASD found that Beerbaum and the Firm violated NASD Membership and Registration Rule 1021 ("NASD Rule 1021") 1/ and NASD Conduct Rule 2110 ("NASD Rule 2110") 2/ when Beerbaum, from July 5, 2002 through June 3, 2004, acted as a general securities principal for the Firm without being registered as such. 3/ In connection with that appeal, Beerbaum requests that his bar be stayed. NASD opposes this request. 4/

1/ NASD Membership and Registration Rule 1021 requires, among other things, that "[a]ll persons engaged . . . in the . . . securities business of a member who are to function as principals shall be registered as such with NASD . . . ." NASD Manual at 3131 (2003).

2/ NASD Conduct Rule 2110 requires NASD members to observe high standards of commercial honor and just and equitable principles of trade. NASD Manual at 4111.

3/ In addition to the bar imposed on Beerbaum, NASD also fined the Firm $15,000. Under NASD Procedural Rule 9370, the Firm is not required to pay the fine pending the outcome of the Commission's review.

4/ Beerbaum filed a response to NASD's opposition. However, Rule 401(d) of the

(continued...)

II.

This proceeding follows a similar NASD proceeding in 2002, in which Beerbaum and the Firm were found to have violated NASD Rules 1021 and 2110 when Beerbaum acted as a principal for the Firm from March 4, 1996 through January 23, 1998 when he was registered only with another firm. 5/ In that earlier proceeding, NASD required Beerbaum to requalify as a principal within 90 days after the decision became final with the proviso that, if Beerbaum was unable to requalify during the 90-day period, he would be suspended as a principal until he requalified. Although Beerbaum took the principal examination three times in an effort to requalify, he failed to do so until June 2004, when he passed the examination. Notwithstanding his inability to requalify, which resulted in his suspension from July 2002 through June 2004, Beerbaum engaged in, and the Firm permitted him to engage in, activity that required Beerbaum to be registered as a principal.

NASD found that Beerbaum, while suspended as a principal, acted as a principal in that he, among other things, signed annual audit reports as the Firm's president, was designated as the principal submitting seven of the Firm's FOCUS reports, identified himself as the Firm's chief executive officer, executive representative, chief financial officer, contact for compliance issues, and supervisor in charge of training registered representatives, signed the Firm's anti-money laundering program compliance and supervisory procedures, supervised a general securities representative and principal of the Firm, and received override commissions from that person's transactions. In determining to bar Beerbaum, NASD found that he intentionally and knowingly violated NASD rules by ignoring the earlier NASD decision, thereby demonstrating a lack of appreciation for the importance of NASD's registration requirements.

III.

Beerbaum makes several claims in support of a stay. He asserts that NASD erred in that it "ignored mitigation which was the entire defense and was referred to regularly in the defense presentation." According to Beerbaum, in engaging in the actions at issue, he "chose to meet

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4/ (...continued)
Commission's Rules of Practice, under which a stay of an action by a self-regulatory organization is considered, does not contemplate such a filing.

5/ NASD found that Beerbaum, during the relevant period, acted as a principal in that he supervised another registered representative of the Firm, acted as the Firm's president, and filed Financial and Operational Combined Uniform Single ("FOCUS") reports and an amendment to the Uniform Application for Broker-Dealer Registration ("Form BD") on behalf of the Firm.

compliance deadlines on a timely basis since he was the only one who knew how to do it." 6/ He also asserts that the proceeding involves no allegations of "financial harm to clients" and that, therefore, staying the bar "will not pose a risk to the investing public." He further claims that, without a stay, the bar will "impose financial consequences of not just the $15,000 in fines that NASD seeks, but hundreds of thousands of dollars in personal financial losses and tax and other exposure." Moreover, he claims that the bar would prevent him from preparing the Firm's FOCUS and other required reports (or training anyone else to do so), forcing the Firm out of regulatory compliance. 7/

In determining whether to grant a stay, the Commission generally considers (1) whether there is a strong likelihood that the applicant will succeed on the merits of the appeal; (2) whether the applicant will suffer irreparable injury without a stay; (3) whether there will be substantial harm to the public if the stay were granted; and (4) whether a stay will serve the public interest. 8/ The applicant has the burden of demonstrating that a stay is warranted. 9/

In opposing the stay, NASD asserts that Beerbaum has not demonstrated a likelihood of success on the merits, noting that Beerbaum has never disputed the facts supporting NASD's findings of violation. NASD also notes that the sanctions are within the range recommended in NASD's Sanction Guidelines. NASD further asserts that Beerbaum's claim of severe financial harm is unsupported, noting that Beerbaum "fails to articulate why Beerbaum Financial and another principal at the Firm would be unable to pay requisite broker-dealer expenses in Beerbaum's absence" or to file the reports necessary to remain in compliance. 10/ In addition, NASD argues that allowing Beerbaum to remain in the industry during the pendency of his appeal would be "perilous to maintaining the integrity of NASD's membership and to the investing public." NASD asserts that Beerbaum's claim that no investors were harmed is "illogical considering the egregiousness of his misconduct and his repeated disregard for regulatory requirements."

A consideration of the relevant factors does not support Beerbaum's request. While any final determination must await the Commission's consideration of the merits of this proceeding, it does not appear that, at this stage, Beerbaum has demonstrated a strong likelihood that he will

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6/ Beerbaum seems to concede that, in "choosing" to comply with reporting requirements, he and the Firm were violating NASD registration requirements.

7/ Beerbaum also claims, without elaboration, that "[a] bar prevents any action, including filing this appeal, which we intend to file."

8/ E.g., Stratton Oakmont, Inc., 52. S.E.C. 1150 (1996) (citing Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985)).

9/ Id. at 978.

10/ NASD asserts that nothing supports Beerbaum's claim that the bar would prevent Beerbaum from pursuing his appeal.

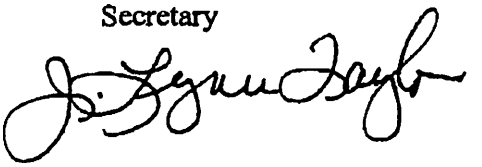
prevail on appeal. Nor does it appear that Beerbaum's vague and unsupported claim of financial harm justifies a stay. 11/

Granting a stay could result in substantial harm to the public and would not serve the public interest. In determining to impose a bar on Beerbaum, NASD found that his "extensive responsibilities for the Firm while he was suspended as a principal to be a significant aggravating factor" that evidenced egregious misconduct. NASD found as another aggravating factor that Beerbaum and the Firm "ignored the [earlier NASD] decision that found [them] in violation of the same NASD rules at issue in the present case." NASD further found that Beerbaum and the Firm engaged in several activities identical to those that the earlier NASD decision found violative, and thus demonstrated intentional and knowing violations of NASD's rules. NASD also found that Beerbaum's comments, "throughout the course of these proceedings," that the principal examination was "'a waste of everyone's time,' a 'farce,' and 'irrelevant' to the Firm's business" indicated his failure to "appreciate the importance of NASD's registration requirements, which, in turn, reflects on his ability to remain in the securities industry and supports barring him." Under the circumstances, it does not appear that a stay of Beerbaum's bar is warranted.

Accordingly, IT IS ORDERED that the request of Hans N. Beerbaum, for a stay of NASD's action against him be, and it hereby is, denied.

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

Nancy M. Morris
Secretary



By: J. Lynn Taylor
Assistant Secretary

11/ As the Commission has repeatedly held, "the fact that an applicant may suffer financial detriment does not rise to the level of irreparable injury warranting issuance of a stay." Robert J. Prager, Securities Exchange Act Rel. No. 50634 (Nov. 4, 2004), 84 SEC Docket 171. See also Joseph A. Geraci, II, Admin. Proc. File No. 3-11772 at p.3 (Dec. 22, 2004) (denying stay of personal bar despite applicant's claim of being the family's sole source of income and suffering personal adverse financial effects).