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**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**



In the Matter of the Application of

Bruce Zipper

File No. 3-17963

**FINRA'S MOTION TO DISMISS ZIPPER'S APPLICATION FOR REVIEW AND
TO STAY BRIEFING SCHEDULE**

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TABLE OF CONTENTS

	<u>PAGE</u>
I. Introduction.....	1
II. Factual Background	2
A. The August 10, 2015 Examination Disposition Letter	2
B. Department of Enforcement’s Investigation into Zipper and the AWC	3
C. Zipper’s Attempts to Retract the AWC	4
D. FINRA’s Continued Investigation of Zipper and Dakota and Zipper’s Instant Appeal	5
III. Argument	6
A. Zipper Waived His Right to Appeal the AWC	6
B. The Commission Cannot Provide the Relief Requested.....	7
C. Zipper’s Application for Review is Untimely	8
IV. Conclusion	10

TABLE OF AUTHORITIES

	<u>Pages</u>
<u>Federal Decisions</u>	
<i>United States v. Harris</i> , 628 F.3d 1203 (9th Cir. 2011).....	7
<u>SEC Decisions and Releases</u>	
<i>Beatrice J. Feins</i> , 51 S.E.C. 918 (1993)	8
<i>Walter V. Gerasimowicz</i> , Exchange Act Release No. 72133, 2014 SEC LEXIS 1598 (May 8, 2014).....	9
<i>Gregory W. Gray</i> , Exchange Act Release No. 60361, 2009 SEC LEXIS 2554 (July 22, 2009).....	8
<i>Kalid Morgan Jones</i> , Exchange Act Release No. 80635, 2017 SEC LEXIS 1403 (May 8, 2017).....	9
<i>Robert E. Kauffman</i> , 51 S.E.C. 838 (1993)	7
<i>Aliza A. Manzella</i> , Exchange Act Release No. 77084, 2016 SEC LEXIS 464 (Feb. 8, 2016)	9
<i>Warren B. Minton, Jr.</i> , 55 S.E.C. 1170 (2002).....	9
<i>Order Approving Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change, Order Granting Accelerated Approval of Amendment No. 2 to the Proposed Rule Change, and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 3, 4, and 5 to Proposed Rule Change Regarding Membership Application Procedures, Disciplinary Proceedings, Investigations and Sanctions Procedures, and Other Conforming Changes</i> , Exchange Act Release No. 38908, 1997 SEC LEXIS 1617 (Aug. 7, 1997)	6
<i>Lance E. Van Alstyne</i> , 53 S.E.C. 1093 (1998).....	9
<u>Federal Statutes and Codes</u>	
15 U.S.C. § 78s(d).....	8, 9
15 U.S.C. § 78s(e).....	8
17 C.F.R. § 201.161	2
17 C.F.R. § 201.420	9

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I. INTRODUCTION

Bruce Zipper's application for review should be dismissed because Zipper's Letter of Acceptance, Waiver & Consent ("AWC") is not appealable, the relief sought by Zipper is not available, and notwithstanding, Zipper's application for review is untimely.

On April 22, 2016, Zipper voluntarily entered into an AWC with FINRA to settle violations related to Zipper's failures to disclose judgments on his Uniform Application for Securities Industry Registration or Transfer ("Form U4"). After entering into the AWC Zipper apparently had a change of heart. First, he argued to FINRA that he had no idea that he would be subject to statutory disqualification. This argument fails in the face of the express language of the AWC that he read and signed, which discusses Zipper's statutory disqualification, and in which Zipper waived his right to appeal the AWC to the Commission.

In the instant application for review, Zipper now claims that after he served his suspension he learned that FINRA had issued a letter of caution (on August 10, 2015) to his firm, Dakota Securities, Inc. ("Dakota" or the "Firm") for the same misconduct for which he was suspended. Zipper claims he never should have had to serve a suspension because he

believes the cautionary action applied to him personally as well the Firm. Zipper contends that FINRA is trying to cover up its mistakes and that FINRA is out to destroy Zipper and Dakota. Zipper asks the Commission to compel FINRA to produce emails and internal communications of the individuals involved in the Zipper and Dakota matters, as well as to conduct its own investigation into FINRA's conduct. These remedies are not available to Zipper. Finally, and in any event, Zipper's application for review is extremely untimely – it comes one year after he entered into the AWC.

The Commission therefore should dismiss his application for review.¹

II. FACTUAL BACKGROUND

A. The August 10, 2015 Examination Disposition Letter

On August 10, 2015, FINRA's Department of Member Regulation ("Member Regulation"), sent its Examination Disposition Letter ("Disposition Letter") relating to its Financial/ Operational and Sales Practice examination of Dakota to Zipper. (RP 1-8.)² Zipper is the Chief Executive Officer of Dakota. The Disposition Letter noted that Member Regulation had elected to refer three exceptions from its examination to FINRA's Department of Enforcement ("Enforcement") for further review and disposition. Member Regulation found that the Firm was not in compliance with FINRA Rule 3310 (Anti-Money Laundering Compliance Program) (RP 5-6.); the Firm was not in compliance with FINRA Rule 4511 (General

¹ FINRA requests, pursuant to Commission Rule of Practice 161, that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Zipper's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

² "RP ___" refers to the page numbers in the certified record filed by FINRA on May 17, 2017.

Requirements) and Securities Exchange Act of 1934 240.17a-3 (Records to be Made by Certain Exchange Members, Brokers & Dealers) (RP 6-7.); and the Firm was not in compliance with NASD Rule 3010 (Supervision) (RP 7.)

The Disposition Letter also stated that Member Regulation was taking only cautionary action against the Firm for its non-compliance with FINRA By-Laws Article V, Section 2 (Application for Registration) and NASD Rule 3010 (Supervision) (RP 6.) Member Regulation concluded that the Firm failed to implement written supervisory procedures to ensure that registered persons kept their Form U4's current. Specifically, Member Regulation found that the Firm failed to disclose unsatisfied judgments and liens against Zipper and another Dakota employee. (Id.)

B. Department of Enforcement's Investigation into Zipper and the AWC

Over the next several months, Enforcement issued a series of FINRA Rule 8210 requests to both Zipper (individually, as a registered representative), and to Dakota. (RP 9-22.) During Enforcement's investigation, it became clear that Zipper had failed to timely amend his Form U4 to disclose several judgments, including a judgment in favor of Shochet Holding Company, when remained undisclosed as of March 15, 2016. (RP 23-28.) In light of these failures to timely disclose, Zipper agreed to enter into an AWC with Enforcement. Zipper negotiated the AWC with Kevin Rosen, Senior Regional Counsel in FINRA's Department of Enforcement. (RP 29-30.) On April 22, 2016, FINRA sent Zipper the executed AWC. (RP 41-48.) In the AWC, Zipper admitted the he failed to timely amend his Form U4 to disclose three judgments. (RP 44.) Zipper consented to a three-month suspension in all capacities and a \$5,000 fine. When he signed the AWC, Zipper "specifically and voluntarily" waived the right to appeal the

AWC to the Commission, or beyond to a U.S. Court of Appeal. (RP 45.) Furthermore, Zipper explicitly agreed to the finding that:

I willfully omitted to state a material fact on a Form U4, and that under Section 3(a)(39)(F) of the Securities Exchange Act of 1934 and Article III, Section 4 of FINRA's By-Laws, this omission makes me subject to a statutory disqualification with respect to association with a member. (RP 45.)

On April 26, 2016, Zipper sent an email to Christopher Dragos, in FINRA's Office of Registration and Disclosure asking for a delay of the commencement of his suspension. Zipper maintained that because of the Firm's small size he needed to find personnel to fill his positions while he sat out. The following day, Dragos responded to Zipper, granting him a delay of his suspension. (RP 53.)

C. Zipper's Attempts to Retract the AWC

On May 5, 2016, Zipper reached out to Rosen by email. (RP 56-57.) Zipper states in his email that he would have never agreed to the AWC had he known that he would be subject to statutory disqualification. (Id.) Rosen responded to Zipper that same day, pointing him to the language contained in the AWC that expressly states that Zipper is subject to statutory disqualification. (RP 56.) Rosen further states that Zipper "was informed during the settlement negotiations that [he] would be subject to statutory disqualification based upon the willfulness of [his] misconduct." (Id.)

In response, Zipper contends that he was "not aware of the sanctions that would be added to the agreed upon deal we made." (RP 55.) Zipper states that he is "going to withdraw [] agreeing with the AWC due to not being informed of the harsh consequences." (Id.) Rosen again responded, reiterating that Zipper was made aware of the statutory disqualification issue and informing Zipper that the AWC was final and not subject to withdrawal. (Id.)

D. FINRA's Continued Investigation of Zipper and Dakota and Zipper's Instant Appeal

On November 17, 2016 Enforcement requested that Zipper appear for an on-the-record interview ("OTR"). (RP 65.) The subject matter of the investigation involved the exceptions listed in the August 10, 2015 Disposition Letter. (RP 61.) Zipper emailed Angela Brunelle and Dawn Calonge, FINRA employees in its Boca Raton office, to express his concerns about the newest investigation. Zipper maintained that:

I made a deal with FINRA enforcement and Kevin Rosen who made out an AWC to settle the issues confronting Bruce Zipper and Dakota Securities relating to the exam. [Enforcement] informed me that I was under a misimpression and this issue is still being looked at for enforcement and possible fines and suspensions for both me and Dakota. (RP 59.)

Zipper also asks Brunelle to "furnish the author of the letter August 10, 2015 [Disposition Letter]." (Id.)

On January 27, 2017, Zipper wrote a letter to Yvette Panetta, the author of the Disposition Letter, seeking clarification regarding the scope of the cautionary action for exception 2. (RP 79-80.) On February 10, 2017, Ms. Panetta responded:

Exception #2 as detailed in the Examination Report of June 29, 2015 was resolved with a cautionary action as explained in the disposition letter dated August 10, 2015. The Examination Report was specific to the examination of Dakota Securities. Please note that the language in the disposition letter informed the recipient that the matters related to this Exception need not be included in the Central Registration Depository nor must they be reported on the Form BD or Form U4. (RP 81.)

Panetta goes on to explain to Zipper that the AWC involving Zipper's Form U4 violations resolved a separate matter from those discussed in the Disposition Letter. She explained that Zipper was "subsequently noticed on October 6, 2015, to appear for testimony under oath for Examination #20150465121. It was related to this examination that [Zipper] ultimately entered into the Acceptance, Waiver, and Consent dated April 22, 2016." (Id.) Panetta's letter

explained, yet again, that the Disposition Letter dealt with the *Firm*'s alleged misconduct, while the AWC concerning Zipper's U4 violations dealt with Zipper's *individual* misconduct.

On April 16, 2017, Zipper sent a letter to the Commission (treated as the instant Application for Review). (RP 89-92.) In his application, Zipper argues that he never would have agreed to FINRA's harsh settlement terms (in the AWC) had he known that Dakota (and, according to Zipper, him personally) were only subject to a letter of caution related to the failure to disclose violations as outlined in the Disposition Letter. Zipper alleges that FINRA is engaged in a cover up and is "hell bent on destroying both me and my firm." (Id.) Zipper asks the Commission to investigate FINRA, to compel FINRA's Boca Raton office to provide Zipper with internal emails and other communications, and ostensibly to nullify the AWC.

III. ARGUMENT

The Commission should dismiss Zipper's application for review because Zipper's AWC is not appealable, the relief sought in the application is not available, and because Zipper's appeal is time-barred.

A. Zipper Waived His Right to Appeal the AWC

Although not expressly stated, we read Zipper's application as asking for some sort of relief from the AWC. To the extent Zipper is asking the Commission to review the AWC, however, the Commission is precluded from doing so because the AWC is not appealable. Zipper "specifically and voluntarily" waived his right to appeal to the Commission when he signed the AWC. In general, a "respondent may not appeal any final action contained in an AWC . . . that has been accepted by [FINRA]." *Order Approving Proposed Rule Change and Amendment No. 1 to the Proposed Rule Change, Order Granting Accelerated Approval of Amendment No. 2 to the Proposed Rule Change, and Notice of Filing and Order Granting*

Accelerated Approval of Amendment Nos. 3, 4, and 5 to Proposed Rule Change Regarding Membership Application Procedures, Disciplinary Proceedings, Investigations and Sanctions Procedures, and Other Conforming Changes, Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at *139 n.198 (Aug. 7, 1997).

The record shows that Zipper “specifically and voluntarily” waived his right to appeal the AWC to the Commission. The fact that FINRA had previously issued a cautionary action to Dakota regarding the *Firm’s failure to supervise* Zipper and another Dakota employee’s Form U4 filings is irrelevant to the AWC. Zipper was individually responsible for updating his Form U4, which he failed to do in a timely manner. *See Robert E. Kauffman*, 51 S.E.C. 838, 840 (1993) (“Every person submitting registration documents has the obligation to ensure that the information printed therein is true and accurate.”), *aff’d*, 40 F.3d 1240 (3d Cir. 1994). Furthermore, Zipper’s argument that the cautionary action included him personally is utterly incorrect and contradicted by the record. Because the AWC is valid and Zipper is bound by its terms, the Commission should dismiss the appeal. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (“Where an appeal raises issues encompassed by a valid, enforceable appellate waiver, the appeal generally must be dismissed.”).

B. The Commission Cannot Provide the Relief Requested

In addition to the inferred requested relief from the AWC, Zipper also asks the Commission for “discovery from the Boca Office of FINRA showing e-mails and communications between these people,” and for a Commission “investigation as to what is going on there [FINRA].” (RP 92.) The Commission, however, is not empowered to provide this relief, and Zipper’s request should be denied, and the appeal dismissed.

Section 19(e) of the Securities Exchange Act of 1934 (“Exchange Act”) describes what the Commission may do in response to a final disciplinary sanction imposed by FINRA.³ 15 U.S.C. § 78s(e)(1)(B). Section 19(e)(1)(B) of Exchange Act provides that if a self-regulatory organization (“SRO”) such as FINRA did not act appropriately, the Commission “shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.” Section 19(e) does not contemplate a remedy other than affirmation, dismissal, setting aside, or remand. *See Beatrice J. Feins*, 51 S.E.C. 918, 922 n.14 (1993) (declining to reach state law or claims for monetary damages because “[w]e are not authorized under statute to award damages”); *see also Gregory W. Gray*, Exchange Act Release No. 60361, 2009 SEC LEXIS 2554, at *39 n.41 (July 22, 2009) (noting that the Exchange Act does not authorize the Commission to increase SRO disciplinary sanctions). The Exchange Act does not authorize the Commission to compel FINRA to respond to Zipper’s discovery requests nor does it permit Zipper to direct the Commission to investigate at his direction. Accordingly, Zipper’s request for relief should be denied.

C. Zipper’s Application for Review is Untimely

Notwithstanding the above arguments in favor of dismissal, Zipper’s untimely filing of his application for review provides an independent basis for dismissing his appeal. Zipper’s AWC was executed on April 22, 2016 and he first sought to withdraw the AWC in early May 2016. Zipper’s application for review is dated April 16, 2017. Zipper waited nearly one year to

³ FINRA is not conceding that the Commission has jurisdiction under Section 19(d) of the Exchange Act to hear Zipper’s appeal of his AWC. *See* 15 U.S.C. § 78s(d). However, for purposes of addressing Zipper’s requested forms of relief and the timeliness of his appeal, we assume *arguendo* that jurisdiction exists.

file the instant appeal. Section 19(d)(2) of the Exchange Act provides that appeals from actions of SROs must be filed by the aggrieved person “within thirty days after the date such notice was . . . received by [the] aggrieved person, or within such longer period as [the Commission] may determine.” 15 U.S.C. § 78s(d)(2). Rule of Practice 420(b) provides that the Commission “will not extend this 30-day period, absent a showing of extraordinary circumstances.” 17 C.F.R. § 201.420(b). Zipper never sought an extension of the filing deadline and has failed to identify any reason to allow the untimely filing of his application for review or to excuse his year-long delay. The Commission has noted that “‘strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.’ Unmet deadlines may cut off substantive rights to review, but this is their function.” *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *17 (Feb. 8, 2016) (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 SEC LEXIS 1598, at *9 (May 8, 2014) (citation omitted)).

The Commission has declined to review late applications for review that were similarly untimely. See *Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 SEC LEXIS 1403 (May 8, 2017) (finding that a three-month delay in filing the application for review rendered it untimely and justified dismissal); *Manzella*, 2016 SEC LEXIS 464, at *17 (dismissing an application for review where it was submitted nine months late); *Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1178-79 (2002) (refusing to accept an application for review filed 2.5 years after final NASD action); *Lance E. Van Alstyne*, 53 S.E.C. 1093, 1099 (1998) (refusing to accept an application for review filed five months after notice of NASD decision). Accordingly, the Commission should dismiss Zipper’s appeal because it is untimely.

IV. CONCLUSION

Zipper voluntarily entered into an AWC with FINRA to settle claims related to his personal failures to disclose three judgments in a timely manner. Zipper also “specifically and voluntarily” waived his right to appeal the AWC to the Commission. In addition, the relief sought by Zipper is not available under the Exchange Act, and his application for review is extremely untimely. The Commission should therefore dismiss Zipper’s appeal.

Respectfully submitted,

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