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**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 1st day of October, two thousand nine.

PRESENT:

JON O. NEWMAN,
BARRINGTON D. PARKER,
DEBRA ANN LIVINGSTON,
Circuit Judges.

HOWARD BRETT BERGER,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

**SUMMARY ORDER
No. 09-0062-ag**

1 FOR PETITIONER: Andrew Todd Solomon, Sullivan & Worcester, LLP, New York, NY.

2

3 FOR RESPONDENT: Luis de la Torre, Senior Litigation Counsel (David M. Becker,
4 General Counsel, Mark D. Cahn, Deputy General Counsel, and Jacob
5 H. Stillman, Solicitor, *on the brief*), Washington, D.C.

6 UPON DUE CONSIDERATION of this petition for review of a decision of the Securities
7 and Exchange Commission (“SEC”), it is hereby ORDERED, ADJUDGED, AND DECREED that
8 the petition for review is DENIED.

9

10 Petitioner Howard Brett Berger seeks review of two orders of the SEC, the first sustaining
11 disciplinary action against him by the National Association of Securities Dealers (“NASD”)¹, and
12 the second affirming that sanction after our remand for reconsideration. We assume the parties’
13 familiarity with the underlying facts, the procedural history of the case, and the issues raised on
14 appeal.

15 Berger first contends that the SEC’s finding that Berger was subject to NASD’s retention
16 jurisdiction was not based on substantial evidence. In applying the substantial evidence standard of
17 review, we uphold the SEC’s findings of fact where they are supported by “such relevant evidence
18 as a reasonable mind might accept as adequate to support a conclusion.” *Consol. Edison Co. of*
19 *N.Y. v. NLRB*, 305 U.S. 197, 217 (1938). We review the SEC’s legal conclusions for arbitrariness,
20 capriciousness, and abuse of discretion. *Markowski v. SEC*, 34 F.3d 99, 104 (2d Cir. 1994).

21 NASD has jurisdiction over its members and associated persons, the latter being defined as
22 “natural person[s] who . . . [have] applied for registration under the Rules of Association,” NASD
23 By-Laws, art. I, § dd(1), and it retains such jurisdiction for two years after the effective date of the
24 individual’s termination of association, *id.* at art. V, § 4, *available at*

¹NASD was consolidated with other regulatory bodies in 2007 to become the Financial Industry Regulatory Authority (“FINRA”).

1 www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p009798.pdf. NASD
2 jurisdiction has been held to extend to those applicants who have applied for membership but who
3 have not been approved, including those who have signed and submitted a Form U4. *See, e.g.,*
4 *Dep't of Enforcement, Complainant v. Respondent*, Complaint No. C10010146, 2003 NASD
5 Discip. LEXIS 1, at *9 n.4 (N.A.C. Jan. 3, 2003). We conclude that the finding that Berger signed
6 and submitted a Form U4 within the two years prior to the first on-the-record interview (“OTR”) at
7 which he was asked to appear was grounded in the record and was supported by substantial
8 evidence. The initial Form U4 bore Berger’s name on the “signature of applicant” line and was
9 twice amended over the month after its submission on April 15, 2003. In addition, the information
10 that was supplied in connection with those amendments in all likelihood could only have been
11 provided by Berger, and Berger had strong incentives to seek registration in April 2003.

12 Berger next contends that the SEC abused its discretion in sustaining a sanction against him
13 that permanently barred him from associating with any NASD member firm. Under the
14 Administrative Procedure Act (“APA”), we review the SEC’s sanction determinations for whether
15 they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5
16 U.S.C. § 706(2)(A). We overturn such sanctions only if they are unwarranted in law or without
17 justification in fact. *McCarthy v. SEC*, 406 F.3d 179, 188 (2d Cir. 2005). We have discretion to
18 reduce or eliminate a sanction if it is “excessive or does not serve its intended purposes.” *Id.*

19 We find the SEC’s sanction to be warranted in law and adequately justified in its decisions,
20 and note that the SEC was not required to impose the least onerous sanction available to it, so long
21 as the sanction it chose was remedial and not excessive or oppressive. *See PAZ Sec., Inc. v. SEC*
22 (*PAZ II*), 566 F.3d 1172, 1174-76 (D.C. Cir. 2009). In light of Berger’s past disciplinary history

1 with NASD; the circumstances of his failure to appear at the two OTRs; the importance of the
2 Millennium investigation to NASD, which Berger’s conduct at least somewhat impeded; and the
3 seriousness of Rule 8210 violations in general, we conclude that the SEC was within its discretion
4 in sustaining the agency’s permanent bar against Berger.

5 Finally, Berger argues that NASD’s procedures fail to meet the fairness requirement of the
6 Securities Exchange Act of 1934 (“SEA”), *see* 15 U.S.C. § 78o-3, because they do not allow an
7 associated person to challenge NASD’s jurisdiction over him or her prior to an OTR. In essence,
8 Berger contends that NASD should adopt what he alleges to be the New York Stock Exchange’s
9 practice of imposing conditional bars on persons who violate its rules. We have held, however, that
10 NASD is not a state actor subject to due process requirements, *D’Alessio v. SEC*, 380 F.3d 112, 120
11 n.12 (2d Cir. 2004), and to the extent that NASD provides those persons who refuse to appear at an
12 OTR a full, albeit delayed, opportunity to litigate the jurisdictional issue after disciplinary
13 proceedings have begun, *see Bob Jones Univ. v. Simon*, 416 U.S. 725, 746-47 (1974), we are
14 satisfied that its procedures comply with the SEA’s fairness requirement.

15 We have reviewed Berger’s remaining contentions and conclude that they are without merit.
16 For the foregoing reasons, Berger’s petition for review is DENIED.

17
18 FOR THE COURT:
19 Catherine O’Hagan Wolfe, Clerk

20
21 By:_____