

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82486 / January 11, 2018

Admin. Proc. File No. 3-17963

In the Matter of the Application of

BRUCE M. ZIPPER

For Review of Action Taken by

FINRA

ORDER REQUESTING ADDITIONAL WRITTEN SUBMISSIONS

On September 29, 2017, the Commission issued an opinion and order dismissing Bruce M. Zipper’s application for review of FINRA action.¹ Zipper sought to challenge a Letter of Acceptance, Waiver, and Consent (the “AWC”) he had entered into with FINRA in which he consented to a fine and three month suspension from association with any FINRA member. The Commission granted FINRA’s motion to dismiss Zipper’s application for review because the AWC contained an appellate waiver and was therefore not appealable, Zipper was not entitled to the other relief he sought, and his application was in any event untimely.

Zipper has moved for reconsideration of that decision. In that motion, he contends that he was induced “to accept a flawed agreement” because FINRA told him that he could not withdraw from the agreement the day after he signed it. The September 29 opinion addressed Zipper’s argument that “he tried to withdraw from the AWC ‘the very next day after it was signed,’” but he appeared to raise that issue in an attempt to demonstrate that his appeal was timely. The Commission stated that Zipper’s purported attempt to withdraw from the AWC the day after he signed it did “not change the fact that he did not file his application for review *with the Commission* within thirty days.” Now, Zipper clarifies that he seeks relief on the ground that FINRA should have advised him of his options after he sought to withdraw from the AWC.

FINRA Rule 9216 provides that staff “may prepare and request that the . . . associated person execute a letter accepting a finding of violation, consenting to the imposition of sanctions, and agreeing to waive” certain rights—including “any right of appeal to . . . the SEC” and the

¹ See *Bruce M. Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072 (Sept. 29, 2017).

right “to otherwise challenge the validity of the letter”—“if the letter is accepted.”² The Rule provides that once the “associated person executes” the AWC, “it shall be submitted” to FINRA “for acceptance or rejection.”³ Furthermore, “[i]f the letter is accepted by the National Adjudicatory Council, the Review Subcommittee, or the Office of Disciplinary Affairs, it shall be deemed final and shall constitute the complaint, answer, and decision in the matter.”⁴ Rule 9216 does not address the “withdrawal” of an executed AWC before FINRA accepts it or whether a purported withdrawal has the effect of revoking FINRA’s power to accept the AWC.

Zipper appears to have executed his AWC on April 1, 2016, and FINRA appears to have executed it and thus accepted it on April 22, 2016. In its reply brief in support of its motion to dismiss, FINRA stated that the “first documentary evidence” in the record of Zipper’s attempt to withdraw from the AWC was a May 5, 2016 email. It did not address directly Zipper’s claim that he sought to withdraw the day after he signed the AWC. Rather, it said that whether “Zipper attempted to void his AWC a day after its execution or on May 5, 2016 is irrelevant” to the timeliness of his application for review. As a result, FINRA has not responded previously to Zipper’s claim that he sought to withdraw from the AWC the day after he signed it and that FINRA did not properly advise him of his options at that time.

Rule of Practice 470(b) provides that “[n]o response to a motion for reconsideration shall be filed unless requested by the Commission.”⁵ Accordingly, IT IS ORDERED that FINRA shall file a response to Zipper’s motion for reconsideration. FINRA should address:

- whether Zipper attempted to withdraw his executed AWC between when he executed it on April 1, 2016, and when FINRA accepted it on April 22, 2016;
- FINRA staff’s response, if any, to any such attempt to withdraw the executed AWC;
- whether FINRA Rule 9216 prohibits the withdrawal by a member or associated person of an executed AWC—and thus makes both the offer and FINRA’s power of acceptance irrevocable—during the period between submission by the member or associated person of the executed AWC and acceptance by FINRA; or whether, in light of the Commission’s decision in *David L. Turnipseed*,⁶ withdrawal of an

² FINRA Rule 9216(a)(1).

³ FINRA Rule 9216(a)(3).

⁴ FINRA Rule 9216(a)(4).

⁵ 17 C.F.R. § 201.470(b).

⁶ Exchange Act Release No. 24173, 48 S.E.C. 689, 1987 WL 757592, at *1-2 (Mar. 4, 1987) (setting aside NASD’s findings of violations and imposition of sanctions following an offer of settlement where NASD did not allow respondent to withdraw settlement offer after he submitted it but before NASD accepted it); *see also id.* at *1 n.1 (exercising the Commission’s discretion to entertain the appeal even though it was filed twenty days late); *id.* at *2 & n. 6

executed AWC, communicated to FINRA during such period, revokes FINRA's power to accept the AWC and thus renders any subsequent acceptance invalid;

- whether Zipper's attempt to withdraw from the AWC and FINRA's response, if they occurred, present extraordinary circumstances warranting the Commission's discretionary consideration of his untimely application for review; and
- whether the Commission should grant Zipper's motion for reconsideration.

FINRA shall file a brief limited to these specified issues, not to exceed 7,000 words, by January 25, 2018. Zipper shall file a reply, not to exceed 7,000 words, by February 8, 2018.⁷ Any evidentiary materials, such as supporting affidavits or declarations, shall be attached to the briefs, which must contain specific citations to the evidence relied upon. No briefs in addition to those specified in this order may be filed without leave of the Commission.

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

Brent J. Fields
Secretary

(...continued)

(declining to consider whether NASD could implement a policy of refusing to allow a respondent to withdraw a settlement offer prior to acceptance "without amending the NASD's Code of Procedure pursuant to Section 19(b)" of the Securities Exchange Act of 1934).

⁷ The briefs shall conform to Rules of Practice 150–153, with respect to service, filing, and form, Rule of Practice 154(c), with respect to length limitations, and Rule of Practice 450(b), with respect to content limitations. 17 C.F.R. §§ 201.150–.153, .154(c), .450(b). Requests for extensions of time to file briefs will be disfavored.