

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 82633 / February 5, 2018

Admin. Proc. File No. 3-18256

In the Matter of the Application of

BRUCE ZIPPER

For Review of Action Taken by

FINRA

ORDER DENYING SECOND MOTION FOR STAY

Bruce M. Zipper has again asked for a stay pending his appeal of FINRA action denying him permission to continue to associate with a FINRA member firm despite his statutory disqualification. We denied Zipper's first request for a stay in November 2017 because he had not established that a stay was warranted.¹ Zipper contends that a stay is now warranted because the Commission directed FINRA to respond to Zipper's motion for reconsideration of the Commission's opinion rejecting his appeal of the sanction that subjected him to the statutory disqualification.² But that order does not establish that a stay is warranted in this case; it identified issues raised by Zipper's reconsideration motion, directed the parties to address those issues in briefs that would not otherwise be authorized by the Commission's rules, and invited the submission of supporting evidence.³ Because Zipper still has not established that a stay is warranted, we deny his second motion for a stay.

¹ See *Bruce Zipper*, Exchange Act Release No. 82158, 2017 WL 5712555, at *1 (Nov. 27, 2017).

² See *Bruce M. Zipper*, Exchange Act Release No. 82486, 2018 WL 360192 (Jan. 11, 2018) (order requesting additional written submissions); see generally *Bruce Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072 (Sept. 29, 2017) (opinion dismissing appeal), *motion for reconsideration pending* (filed Oct. 10, 2017).

³ See *infra* note 11.

I. Background

Zipper's application for review in this proceeding challenges FINRA's action denying Dakota Securities International, Inc., a FINRA member firm of which Zipper was chief executive officer and chief compliance officer, permission for Zipper to continue his association with Dakota despite his statutory disqualification. The statutory disqualification stems from a Letter of Acceptance, Waiver, and Consent (the "AWC") that Zipper entered into with FINRA.⁴ Zipper appears to have executed the AWC on April 1, 2016, and FINRA appears to have executed it and thus accepted it on April 22, 2016. In the AWC, Zipper consented to a fine and three-month suspension from association with a FINRA member firm. The AWC also stated that Zipper would be "subject to a statutory disqualification with respect to association with a member."

Zipper filed a separate application for review with the Commission seeking to challenge the AWC. FINRA moved to dismiss on the ground that the application was untimely. On September 29, 2017, the Commission issued an opinion and order granting FINRA's motion to dismiss 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 untimely.⁵

While Zipper served his suspension, Dakota submitted an MC-400 membership continuance application asking FINRA for permission for Zipper to continue his association with Dakota despite his statutory disqualification. FINRA's National Adjudicatory Council denied the application on October 2, 2017.⁶ On October 18, 2017, Zipper filed the application for review in this proceeding challenging that denial.

Zipper filed his first request to stay FINRA's denial on October 31. On November 3, he sent another document detailing, as an additional basis for a stay, FINRA's request that Dakota "present a plan" about how it would continue to operate if Zipper were not allowed to associate with it. Zipper served the October 31 and November 3 papers on FINRA on November 8.

We denied Zipper's first request for a stay because he had not established under the traditional four-factor test that a stay was warranted.⁷ As to the first factor—likelihood of success on the merits—we found that Zipper had not raised a substantial question on the merits let alone shown a strong likelihood of success. Zipper "identifie[d] no reason why he is likely to

⁴ See *Zipper*, 2017 WL 4335072, at *1-2; see also *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 WL 2887272, at *2 (June 26, 2014) (describing statutory disqualifications and FINRA's eligibility proceedings).

⁵ See generally *Zipper*, 2017 WL 4335072, at *3-5.

⁶ See *In the Matter of the Continued Association of Bruce Zipper as a Gen. Sec. Rep. with Dakota Sec. Int'l, Inc.*, SD-2129 (Oct. 2, 2017), at http://www.finra.org/sites/default/files/NAC_SD-2129_Zipper_100217_0_0.pdf.

⁷ See *Zipper*, 2017 WL 5712555, at *3-6; see also *infra* text accompanying note 13.

succeed in challenging [FINRA’s] determinations” underlying its denial.⁸ As to the second factor—irreparable injury—we assessed Zipper’s “claims that his firm will be forced to cease operations absent a stay.” We considered Zipper’s claims to be “somewhat vague” but not “entirely speculative” and ultimately did not “decide whether Zipper ha[d] satisfied his burden of establishing an irreparable injury because any harm to Zipper [was] outweighed by the other factors.”⁹ Indeed, the third and fourth factors—risk of harm to others and the public interest—“tip[ped] decidedly against granting a stay.” Zipper offered no reason to doubt FINRA’s findings that he engaged in serious misconduct while suspended; that his “proposed supervisors and proposed heightened supervisory plan were both inadequate”; and that his “continued association . . . would create an unreasonable risk of harm to the market or investors.”¹⁰

Zipper also moved for reconsideration of the Commission’s September 29 opinion dismissing his application for review of his AWC. In that opinion, the Commission addressed Zipper’s argument that he sought to withdraw from the AWC “the very next day after it was signed” in the context of whether the appeal was timely. Zipper’s reconsideration motion clarified that he sought relief on the ground that FINRA should have advised him of his options after he sought to withdraw from the AWC. Because the Commission’s rules do not authorize a response to a reconsideration motion “unless requested by the Commission,” we issued a briefing order on January 11, 2018, directing FINRA to file a response to the motion for reconsideration and inviting Zipper to file a reply.¹¹ The order directed the parties to address five issues related to Zipper’s claim that he tried to withdraw his AWC before FINRA accepted it.

Zipper filed his second request to stay FINRA’s denial of the membership continuance application on January 25, 2018. According to Zipper, the order requesting that FINRA respond to the motion for reconsideration supports granting him a stay. FINRA opposes the request.

II. Analysis

We apply the same test to Zipper’s second request for a stay as to his first.¹² This test asks whether: (i) there is a strong likelihood that the moving party will succeed on the merits of

⁸ *Zipper*, 2017 WL 5712555, at *3-4.

⁹ *Id.* at *4-5.

¹⁰ *Id.* at *5.

¹¹ 17 C.F.R. § 470(b); *Zipper*, 2018 WL 360192, at *1-2.

¹² *See supra* text accompanying notes 7-10. Because we are denying Zipper’s motion, we need not address FINRA’s contention that Commission Rule of Practice 401(d)(1) forbids a second or successive motion for a stay.

its appeal; (ii) the moving party will suffer irreparable harm without a stay; (iii) any person will suffer substantial harm as a result of a stay; and (iv) a stay is likely to serve the public interest.¹³

Zipper argues mainly that there is a “good likelihood” that he will succeed on the merits because the briefing order shows that his AWC will be “found to be invalid” and the denial of his membership continuance application “will have to be rolled back.” But this misunderstands the briefing order’s purpose. The briefing order did not, as Zipper appears to contend, make findings that Zipper attempted to withdraw his AWC before FINRA accepted it; that his withdrawal “revoke[d] FINRA’s power to accept the AWC”; or that his attempt “present[s] extraordinary circumstances warranting the Commission’s consideration of his untimely application for review.” Rather, the briefing order’s purpose was to authorize the filing of briefs not otherwise permitted under the Rules of Practice and to identify issues that the parties should address specifically.¹⁴ The order also required that the parties attach “[a]ny evidentiary materials” to their briefs.¹⁵ FINRA has filed an opposition brief in response to the order, along with evidentiary materials—including declarations signed under penalty of perjury—purporting to rebut Zipper’s claim that he attempted to withdraw from the AWC before FINRA accepted it. Neither Zipper’s reply brief in response to the order nor his stay motion is supported by any evidence substantiating his claim of attempted withdrawal.¹⁶

Indeed, Zipper’s second stay motion also fails to address the Exchange Act Section 19(f) standard under which the Commission reviews FINRA’s denial of an MC-400 application.¹⁷ And because he introduces no evidence in support of his motion, he again identifies no reason why he is likely to succeed in challenging FINRA’s determinations that he violated the terms of his suspension, that his proposed supervisors lacked the necessary experience and independence, and that the proposed heightened supervisory plan was inadequate.¹⁸ Accordingly, we find that Zipper has not raised a substantial question on the merits of his challenge to FINRA’s denial of his MC-400 application, let alone a strong likelihood of success on the merits.

Zipper also has not demonstrated irreparable harm. To establish irreparable harm, Zipper must show an injury that is “both certain and great” and “actual and not theoretical.”¹⁹ We

¹³ *Kenny A. Akindemowo*, Exchange Act Release No. 78352, 2016 WL 3877888, at *2 (July 18, 2016) (order denying stay).

¹⁴ *See supra* note 11.

¹⁵ *Zipper*, 2018 WL 360192, at *2.

¹⁶ Nothing in this order should be construed as a decision on the merits of any argument raised in Zipper’s motion for reconsideration.

¹⁷ 15 U.S.C. § 78s(f); *see also Zipper*, 2017 WL 5712555, at *3-4.

¹⁸ *See Richard Allen Riemer, Jr.*, Exchange Act Release No. 82014, 2017 WL 5067462, at *2-3 (Nov. 3, 2017) (order denying stay).

¹⁹ *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

previously characterized as not “entirely speculative” Zipper’s claim that FINRA threatened to “shut down Dakota Securities or put it out of business” if he could not “present a plan” demonstrating its ‘ability to stay in business’ without him being associated”—including by finding registered principals or representatives to replace him.²⁰ But in a subsequent filing, Zipper stated that Dakota hired a “new CEO and compliance officer.” And according to Zipper, FINRA staff “feel confident” this individual is running Dakota Securities “properly.” Zipper’s second stay motion does not address the possibility that FINRA might require Dakota to shut down, so these developments have apparently mooted any concern about that injury. Zipper has identified no other injury that meets the standard for irreparable harm. As a result, we find that Zipper has not demonstrated irreparable harm.

Zipper has not attempted to address the remaining factors—the risk of harm to others or the public interest. We found previously that these factors “tip decidedly against granting a stay” because permitting Zipper to associate with his firm pending this appeal, “without the protections provided by FINRA’s membership continuation application process,” would put the investing public at risk.²¹ Nothing in Zipper’s second stay motion supports a contrary conclusion now. Indeed, based on the record before us, we find that Zipper’s continued association would continue to create an unreasonable risk of harm to the market and investors. We therefore find that the public interest favors denying his motion.

For these reasons, Zipper has failed to satisfy his burden of establishing that a stay is warranted, and we deny the motion.

Accordingly, IT IS ORDERED that Bruce Zipper’s second motion to stay the denial of the membership continuance application pending Commission review of his appeal is denied.

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

Brent J. Fields
Secretary

²⁰ *Zipper*, 2017 WL 5712555, at *4-5.

²¹ *Id.* at *5.