

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 85238 / March 1, 2019

Admin. Proc. File No. 3-18382

In the Matter of the Application of
DAKOTA SECURITIES INTERNATIONAL, INC.
For Review of Action Taken By
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF FINRA ACTION

FINRA member firm appealed from FINRA action ordering it to pay fees or be suspended from membership. Firm paid the fees and was not suspended. *Held*, the proceeding is dismissed because the Commission does not have jurisdiction over the appeal.

APPEARANCES:

Gary Cuccia, Dakota Securities International, Inc., for Dakota Securities International, Inc.

Alan Lawhead, Michael Garawski, and Celia L. Passaro, for FINRA.

Appeal filed: February 23, 2018
Last brief received: May 8, 2018

Dakota Securities International, Inc., a registered broker-dealer and FINRA member firm, seeks review from a FINRA decision in an expedited proceeding resulting from Dakota's failure to pay fees assessed in connection with an arbitration. FINRA ordered that, effective 14 days after issuance of the decision, it would suspend Dakota's membership until the outstanding fees were paid. Dakota paid the arbitration fees within 14 days and FINRA did not impose the suspension. FINRA has moved to dismiss Dakota's appeal on the ground that we lack jurisdiction to consider it. We grant the motion and dismiss the appeal.

I. Background

A. The Arbitration

On September 23, 2015, Dakota was named a respondent in a FINRA consumer arbitration claim.¹ On November 13, 2015, Dakota executed a FINRA Arbitration Submission Agreement (by and through its president and owner Bruce Zipper) in which it agreed to submit the claims "to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedures." FINRA assessed several fees against Dakota in connection with the arbitration, including a \$2,475 "member surcharge fee" and a \$5,075 "member process fee."²

On January 28, 2016, the chairperson of the arbitration panel executed an order for the production of documents requested by the claimants. The arbitrators also convened three prehearing sessions with the parties. On October 21, 2016, the claimants notified FINRA Dispute Resolution that they had settled the arbitration with Dakota.

On May 5, 2017, the arbitration panel issued an arbitration award setting forth the assessment of arbitration fees against Dakota.³ The arbitration award confirmed the member surcharge and member process fees that FINRA had previously invoiced to Dakota, assessed a discovery fee of \$200 against Dakota for the order of production, and assessed fees of \$3,900 against Dakota for the three prehearing conferences.⁴ The award explained that "[a]ll balances [were] payable to FINRA Office of Dispute Resolution and [were] due upon receipt."

¹ *Paul Beattie v. Dakota Sec. Int'l, Inc.*, FINRA Dispute Resolution Arbitration Case No. 15-02495.

² See FINRA Rule 12901 (authorizing a member surcharge fee in arbitration proceedings and setting the amount of the fee); FINRA Rule 12903 (authorizing a member process fee in arbitration proceedings and setting the amount of the fee).

³ The May 5, 2017 arbitration order also directed a second respondent, with whom the claimants had not settled, to pay compensatory damages and fees.

⁴ See FINRA Rule 12902 (authorizing hearing session fees and setting the amount of those fees and authorizing the assessment of other costs and expenses incurred by the parties).

B. The FINRA Proceeding

Dakota requested that FINRA waive the fees assessed against it on the ground that it was unable to pay. On June 22, 2017, FINRA denied Dakota's hardship waiver request but offered the firm a 12-month payment plan with \$970.83 monthly installments as an accommodation. Dakota rejected the plan.

Under FINRA rules, member firms must timely pay all fees, dues, or assessments resulting from arbitrations.⁵ "If a member . . . fails to pay any fees, due, or assessment or other charge required to be paid under the FINRA By-Laws or rules, . . . FINRA staff may issue a written notice to such member . . . stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership."⁶

On October 16, 2017, FINRA issued Dakota a notice pursuant to FINRA Rule 9553 that it would be suspended, effective November 6, 2017, for failure to pay \$11,650 in fees assessed in the arbitration. The suspension notice explained that the suspension would be stayed if Dakota requested a hearing under FINRA 9559, which Dakota timely did on October 17, 2017.

A hearing was held on November 28, 2017. On February 6, 2018, the hearing officer issued a decision finding that Dakota had failed to pay the arbitration fees and had failed to demonstrate a bona fide inability to pay. The hearing officer ordered that Dakota's membership be suspended on February 20, 2018, 14 days after issuance of the decision, unless Dakota paid the outstanding \$11,650 in arbitration fees.⁷ On February 12, 2018, Dakota paid the outstanding arbitration fees in full. FINRA never imposed the suspension.

C. The Appeal

On February 23, 2018, Dakota filed an application with the Commission for review of FINRA's February 6, 2018 order. On April 2, 2018, we issued an order scheduling briefing in the matter. On April 4, 2018, FINRA filed a "Motion to Dismiss the Application for Review and Stay the Briefing Schedule." In its motion, FINRA argued that "[b]ecause the suspension was never effective, Dakota is not subject to a final disciplinary decision by FINRA and, accordingly,

⁵ See FINRA Rule 12904(i) ("Fees and assessments imposed by the arbitrators under the Code shall be paid immediately upon the receipt of the award by the parties."); FINRA By-Laws Art. IV, Sec. 1(a)(2) ("(a) Application for membership in [FINRA] . . . shall contain: . . . (2) an agreement to pay such dues, assessments, and other charges in the manner and amount as from time to time shall be fixed pursuant to [FINRA By-Laws and rules].").

⁶ FINRA Rule 9553.

⁷ The hearing officer also ordered Dakota to pay \$2,462.09 in fees and costs related to the November 28, 2017 hearing. It is unclear from the record whether Dakota paid the \$2,462.09 in these fees and costs. Dakota does not argue that the Commission has jurisdiction over its appeal based on the assessment of these fees and costs.

the Commission does not have jurisdiction over this appeal under Section 19(d) of the Securities Exchange Act of 1934.” FINRA also requested that we stay the briefing schedule while the motion to dismiss was pending. On May 1, 2018, we granted FINRA’s request and extended the schedule for briefing on the merits pending our ruling on FINRA’s motion to dismiss.⁸

II. Analysis

Exchange Act Section 19(d)(2) authorizes Commission review of FINRA action that “imposes any final disciplinary sanction” on a FINRA member.⁹ We have held previously that a member would be subject to a “final disciplinary sanction” if it failed to pay an arbitration award and was suspended for that failure.¹⁰ Here, however, no suspension was ever imposed.

“We construe Section 19(d) as requiring a ‘live’ sanction—that is, a sanction that exists at the time of review for us to potentially affirm, modify, or set aside.”¹¹ In *Sharemaster v. SEC*, the Ninth Circuit held that “the Commission’s interpretation of Section 19(d)(2) as only permitting review of ‘live’ disciplinary sanctions is permissible.”¹² The court recognized that “if a self-regulatory organization (“SRO”) “such as FINRA imposed a disciplinary sanction but then fully retracted the sanction by, for example, setting aside a suspension and returning any fine levied, it would make little sense for the Commission to proceed with review.”¹³

Here, there is no live sanction for us to review because FINRA did not impose the suspension after Dakota paid the arbitration fees and it did not impose any fines on Dakota. We have held previously that a suspension that is not imposed after an arbitration award is paid may not serve as the basis for our jurisdiction. In *Wedbush Morgan Securities, Inc.*,¹⁴ NASD ordered that a firm pay an arbitration award by a certain date or be suspended. The firm paid the award

⁸ *Dakota Sec. Int’l, Inc.*, Exchange Act Release No. 83139, 2018 WL 2017543, at *2 (May 1, 2018).

⁹ 15 U.S.C. § 78s(d)(2). Exchange Act Section 19(d)(2) also authorizes Commission review of FINRA action that denies membership or participation to an applicant; prohibits or limits any person with respect to access to services offered by FINRA or a FINRA member; or bars any person from becoming associated with a FINRA member. *See id.* Neither party argues, nor do we find, that any of these other three bases for jurisdiction exist here.

¹⁰ *Wedbush Morgan Sec., Inc.*, Exchange Act Rel. No. 57138, 2008 WL 123907, at *3 (Jan. 14, 2008).

¹¹ *Sharemaster*, Exchange Act Release No. 83138, 2018 WL 2017542, at *3 (Apr. 30, 2018).

¹² 847 F.3d 1059, 1068 (9th Cir. 2017).

¹³ *Id.*

¹⁴ Exchange Act Rel. No. 57138, 2008 WL 123907 (Jan. 14, 2008).

by the specified date and the suspension never took effect.¹⁵ We dismissed Wedbush’s subsequent appeal of the decision ordering that it pay the arbitration award for lack of jurisdiction.¹⁶ Like in *Wedbush*, FINRA ordered Dakota to pay arbitration fees by a certain date or be suspended. Dakota paid the arbitration fees before the deadline for doing so and the suspension never took effect. Thus, there is no “live” disciplinary sanction for us to review.¹⁷

Dakota does not argue that the suspension provides a basis for us to exercise jurisdiction; rather, it states that it is “asking the Commission to review the FINRA fees that were assessed . . . for \$11,650 dollars [sic] for an arbitration case.” But the fees and costs assessed against Dakota in connection with the arbitration proceeding are not reviewable under Exchange Act Section 19(d). We have held previously that the Exchange Act does not provide for our jurisdiction based solely on administrative fees and costs assessed against an applicant in connection with a FINRA arbitration proceeding or other hearing before an SRO.¹⁸

¹⁵ *Id.* at 3.

¹⁶ *Id.*

¹⁷ We note that Dakota could have appealed to the Commission and sought a stay of the suspension pending our resolution of the matter. *See* Rule of Practice 401(d)(1), 17 C.F.R. § 201.401(d)(1) (“A motion for a stay of an action by a self-regulatory organization for which the Commission is the appropriate regulatory agency, for which action review may be sought pursuant to Rule 420, may be made by any person aggrieved thereby at the time an application for review is filed in accordance with Rule 420 or thereafter.”); *see also Sharemaster*, Exchange Act Release No. 70290, 2013 WL 4647204, at *3 (Aug. 29, 2013) (“Sharemaster could have, but did not, seek a stay of the suspension pending our resolution of this matter”). A party requesting a stay has the burden of establishing that a stay is warranted. *Windsor St. Capital, L.P.*, Exchange Act Release No. 83340, 2018 WL 2426502, at *3 (May 29, 2018).

¹⁸ *See, e.g., Marshall Fin., Inc.*, Exchange Act Release No. 50343, 2004 WL 2026518, at *1, 3 n.21 (Sept. 10, 2004) (finding that administrative fees and costs associated with an arbitration proceeding before an SRO were not subject to Commission review under Exchange Act Section 19); *Wedbush*, 2008 WL 123907, at *3 (finding that Commission lacked jurisdiction to review, among other things, costs imposed in an arbitration where a suspension for failing to pay the arbitration award never took effect because the firm paid the arbitration award by the deadline for doing so); *see also Sharemaster*, 847 F.3d at 1070 (distinguishing between a fine, which would constitute a final disciplinary sanction, and “the sunk transactional costs of pursuing an administrative appeal”); *Sharemaster*, 2018 WL 2017542, at *6 (distinguishing between “administrative fees assessed in connection with hearings before an SRO,” which are not final disciplinary sanctions reviewable under Exchange Act Section 19, and “a fine directed at the underlying conduct,” which is a final disciplinary sanction). *Compare* FINRA Rule 8310 (Sanctions for Violations of Rules) *with* Rule 8330 (Costs and Proceedings). *See generally* Article IV, Section 1(a)(2) of FINRA’s By-Laws (providing that FINRA members agree to pay all dues, fees, and other charges assessed according to FINRA’s rules); FINRA Rules 12901-12903 (authorizing the fees that were assessed on Dakota as part of the arbitration).

An appropriate order will issue.

By the Commission (Chairman CLAYTON and Commissioners JACKSON, PEIRCE and ROISMAN).

Brent J. Fields
Secretary

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

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ORDER DISMISSING PROCEEDINGS

On the basis of the Commission's opinion issued this day, it is
ORDERED that FINRA's motion to dismiss the proceeding is granted.
By the Commission.

Brent J. Fields
Secretary