

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

Admin. Proc. File No. 3-18262

In the Matter of the Application of
RICHARD ALLEN RIEMER, JR.
For Review of Disciplinary Action Taken By
FINRA



APPLICANT'S OPENING BRIEF

Richard A. Riemer, Jr.

██████████, ██████████ ██████████

Clifton, NJ ██████████

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I.

INTRODUCTION

It is axiomatic that FINRA may sanction but not punish a wrongdoer.¹ Disciplinary sanctions should deter future misconduct and be remedial.² These principals are the foundation of FINRA's *Sanction Guidelines* and apply here. FINRA, nevertheless, circumvents these principals in cases of nondisclosure of material information on a Form U4. On the one hand, FINRA seeks a finding of willfulness, yet on the other hand pretends that the consequence of that finding – a statutory disqualification – is not punitive and falls outside the *Sanction Guidelines*.³ FINRA claims that a statutory disqualification is not a sanction and instead deems it a “collateral consequence” arising from the operation of Section 3(a)(39)(F) of the Exchange Act.⁴ FINRA's position yields absurd results, where the true sanction imposed on a respondent is inconsistent with the *Sanction Guidelines* and far eclipses the more modest sanction ostensibly requested by the Staff.

The facts of this case have never been disputed. Richard Allen Riemer, Jr. (“Riemer”) failed to timely update his Form U4 and has acknowledged his mistakes all along. Although Riemer no longer works in the securities industry, a statutory disqualification would imperil his

¹ *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013).

² See *Sanction Guidelines*, General Principals 1 and 3 (2016).

³ A person is subject to a statutory disqualification where, among other things, that person willfully has made a false or misleading statement of material fact, or has omitted to state a material fact required to be disclosed, in any application or report filed with a self-regulatory organization. 5 U.S.C. § 78c(a)(39)(F); see also Exchange Act Section 15(b)(4)(A), 5 U.S.C. § 78o(b)(4)(A). A statutory disqualification under the Exchange Act likewise disqualifies a person pursuant to FINRA's By-Laws, Article III, Section 4.

⁴ Riemer recognizes that the NAC and SEC have previously held that a statutory disqualification is an encumbrance to FINRA membership and therefore is not a sanction over which a FINRA adjudicator, including the NAC, has any discretion. See *Dep't of Enforcement v. McCune*, 2011027993301, 2015 FINRA Discip. LEXIS 22 at *24 (NAC July 27, 2015); *Michael E. McCune*, Exchange Act Release No. 77375, 2016 SEC LEXIS 1023 at *37e (Mar. 15, 2016). Riemer respectfully disagrees and reserves all arguments for further appellate consideration.

career as an insurance agent. In an effort to resolve this matter without a statutory disqualification, Riemer submitted an offer of settlement which proposed a sanction (permanent undertaking not to seek registration with a broker-dealer) that afforded maximum investor protection, exceeded the sanction range contemplated by the *Sanction Guidelines* and was far greater than the suspension supposedly sought by the Staff. The Staff's opposition to the offer of settlement made clear that punishment (in the form of a statutory disqualification) is Enforcement's true aim and Enforcement's arguments to the contrary are simply disingenuous. In so doing, FINRA has turned disciplinary hearings into an exercise in fiction. Enforcement pretends that a six-month suspension is the true "sanction," knowing full well that the punishment of a statutory disqualification will be the devastating result from the hearings. From Riemer's perspective, a statutory disqualification is an oppressive form of punishment even if FINRA chooses to call it by another name.

During the merits hearing, Hearing Officer Dixon stated that the "potential of statutory disqualification is sort of not all that relevant ..." ⁵ That statement underscores the unfairness of Riemer's disciplinary hearing. It is unfair to ask the Hearing Panel to find a willful omission (the result of which is tantamount to a bar), while the Hearing Panel simultaneously ignores the *Sanction Guidelines*, which suggests a bar only "in egregious cases" of nondisclosure. ⁶ FINRA is required to provide "a fair procedure" for the discipline of its members and associated. ⁷ FINRA falls short by imposing what amounts to a bar in cases that are not egregious simply by pretending that a statutory disqualification is not a sanction.

⁵ See Tr. 64:21-22.

⁶ *Sanction Guidelines* at 70 (2016).

⁷ 15 U.S.C. § 78o-3(b)(8).

II.

EXCEPTIONS ON APPEAL

Riemer respectfully raises the following exceptions on appeal:

A. Exceptions Concerning Statutory Disqualification

1. The Hearing Panel's Order rejecting a contested offer of settlement in which Riemer offered to permanently and irrevocably covenant not to seek registration with a member firm, the functional equivalent of a lifetime bar.⁸

2. The Hearing Panel's determination that a finding of willfulness, thus triggering statutory disqualification, is not a sanction or the functional equivalent of a sanction, and is instead a mere "collateral consequence arising from the operation of Section 3(a)(39)(F) of the Exchange Act ..."⁹

3. Hearing Officer Dixon's finding that the "potential of statutory disqualification is sort of not all that relevant ..."¹⁰

4. The Hearing Panel's finding that the "[t]he record evidence compels the Hearing Panel to find that Riemer acted willfully when he failed to disclose the two IRS liens and the bankruptcy on his Form U4 and therefore rejects his proposed sanctions as inappropriate."¹¹

⁸ See Offer of Settlement, *and* Order Rejecting Offer of Settlement, OHO Order 16-21 2013038986001 (Aug. 15, 2016).

⁹ See Hearing Panel Decision at 12, *Dep't of Enforcement v. Riemer*, 2013038986001, 2016 FINRA Discip. LEXIS 56 at *27 (FINRA OHO Nov. 4, 2016).

¹⁰ See Tr. 64:21-22.

¹¹ See Hearing Panel Decision at 12, n. 63, *Dep't of Enforcement v. Riemer*, 2013038986001, 2016 FINRA Discip. LEXIS 56 at *27 (OHO Nov. 4, 2016).

B. Exceptions Concerning Continuance

5. The Hearing Panel's Order denying a motion for continuance, thereby forcing Riemer to proceed without counsel.¹²

6.e The Hearing Panel's denial at hearing of an oral motion for continuance, thereby forcing Riemer to proceed without counsel.¹³

III.

SUMMARY OF RELEVANT UNDISPUTED FACTS

Riemer has been employed as an insurance agent with National Life of Vermont ("National Life"), an insurance company affiliate of FINRA member firm Equity Services, Inc. ("Equity Services") since 1998. On April 4, 2014, Equity Services filed a Uniform Termination Notice for Securities Industry Registration (Form U5) terminating Riemer's registration. Riemer has not been associated with another FINRA member firm since then.

Enforcement charged three instances of nondisclosure of material information. *First*, on July 2, 2002, the IRS filed and recorded a tax lien against Riemer in the amount of \$7,752.¹³ Riemer satisfied the lien on February 9, 2006, yet never disclosed the 2002 tax lien on his Form U4. *Second*, on March 7, 2005, the IRS filed and recorded a tax lien against Riemer for \$25,837. The 2005 tax lien remained unreported until June 11, 2013 and was unsatisfied during Riemer's period of registration with Equity Services. *Third*, on August 4, 2008, Riemer filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of New Jersey. The bankruptcy petition remained unreported until June 11, 2013.

¹² See Motion for Adjournment, and Order Denying Respondent's Motion to Continue Hearing, OHO Order 16-25 2013038986001 (Sept. 7, 2016).

¹³ See Tr. 9:15-16.

III.

ARGUMENT

A. A Statutory Disqualification Is a Bar for Riemer

A statutory disqualification is the functional equivalent of a bar: “the securities industry equivalent of capital punishment.”¹⁴ Like a bar, a person subject to a statutory disqualification is ineligible to associate with a member.¹⁵ Although a person subject to a statutory disqualifications could theoretically associate with a member through eligibility proceedings, practically speaking the impediments to association are insurmountable for “rank and file” insurance agents like Riemer.¹⁶ First, the disqualified person must find a member willing to sponsor his association. Second, the member must be willing to file a Membership Continuance Application, prepare for eligibility proceedings, propose a heightened plan of supervision, and submit to ongoing special examinations by FINRA to ensure compliance with the supervisory conditions.¹⁷ It would be illogical for any member to voluntarily undertake that process unless the disqualified applicant was a large producer or had other special skills. Because Riemer is neither, a statutory disqualification represents the same “death sentence” as does a bar.

B. The Sanction Guidelines Did Not Call for a Bar

The NAC designed the *Sanction Guidelines* “for use by the various bodies adjudicating decisions” and to “provide direction for Adjudicators in imposing sanctions consistently and

¹⁴ *PAZ Sec. Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007).

¹⁵ FINRA By-Laws Article III, Sec. 4.

¹⁶ See FINRA By-Laws Article III, Sec. 3(d) and FINRA Rules 9520 through 9527.

¹⁷ See “Statutory Disqualification Process for Broker-Dealers” available at <http://www.finra.org/industry/statutory-disqualification-process>. See also *Nicholas S. Savva*, Exchange Act Release No. 72485, 2014 SEC LEXIS 5100 (June 26, 2014) (summarizing the statutory disqualification review process).

fairly.”¹⁸ In cases of a late filing of a Form U4, the *Sanction Guidelines* recommend a monetary sanction of \$2,500 to \$37,000 and a suspension for 5 to 30 business days.¹⁹ Only in ‘egregious cases’ should adjudicators consider a longer suspension or a bar.²⁰ Although the Hearing Panel did not deem Riemer’s conduct to be “egregious,” they imposed a sanction that is the functional equivalent of a bar.

C. By Rejecting the Offer of Settlement, the Hearing Panel Ignored Sanction Guidelines General Principle Number One

The *Sanction Guidelines* provide general principals “applicable to all sanction determinations.”²¹ The first general principle states that “disciplinary sanctions should be designed to protect the investing public.” As set forth below, the Hearing Panel flatly disregarded the *Sanction Guidelines*’ first principal by rejecting Riemer’s offer of settlement, which included a proposed sanction with greater protections for the investing public than the sanction sought by Enforcement or the sanction ultimately imposed by the Hearing Panel.

As part of Riemer’s offer of settlement, he proposed to execute an undertaking in which he irrevocably and permanently covenanted to refrain from seeking to register with a member firm. Riemer’s proposed sanction served the interests of all concerned. From the perspective of Enforcement, the proposed sanction was far greater than the sanction requested by Enforcement. From the perspective of the Hearing Panel, the proposed sanction permitted the Hearing Panel to faithfully discharge its duties while promoting judicial economy. And from the perspective of Riemer, the proposed sanction was remedial and would prevent the recurrence of misconduct,

¹⁸ *Sanction Guidelines* at 1 (2016).

¹⁹ *Id.* at 69.

²⁰ *Id.* at 70.

²¹ *Id.* at 2.

yet enabled him to remain employed and provide for his family. Therefore, the proposed sanction honored the *Sanction Guidelines* because it was remedial without being oppressive or excessive.

Enforcement contested the offer of settlement by characterizing it as an “attempted end-run around FINRA’s disciplinary authority” and arguing that the “proposed sanction disregards the Guidelines and is inconsistent with the seriousness of Respondent’s conduct.”²² Enforcement concluded with an odd argument that the Reimer’s “misconduct merits a substantial sanction including, at least, a suspension.”²³ Enforcement would thus have the NAC believe that a mere suspension is somehow more “substantial” than a lifetime ban.

Ultimately, the Hearing Panel rejected the offer of settlement for two reasons.²⁴ First, the Hearing Panel concluded that the “Guidelines contain no provision that permits FINRA to accept as a sanction Respondent’s promise to never again register with a member firm.”²⁵ While technically true, the Hearing Panel nevertheless overlooked the flexibility afforded by the *Sanction Guidelines* “to design sanctions other than those specified in these guidelines.”^{26e} Second, the Hearing Panel rejected the offer by finding that the issue of willfulness cannot “be adjudicated on the papers.”²⁷

The Hearing Panel’s rationale for rejecting the offer of settlement cannot stand. First, the sanction proposed by Reimer provided greater protection for the investing public than the

²² Opposition to Offer of Settlement at 6.

²³ Id.

²⁴ See Order Rejecting Offer of Settlement, OHO Order 16-21 2013038986001 (Aug. 15, 2016).

²⁵ Id.

²⁶ *Sanction Guidelines* at 3 (2016).

²⁷ Order Rejecting Offer of Settlement, OHO Order 16-21 2013038986001 (Aug. 15, 2016).

sanction crafted by the Hearing Panel. Second, it is fundamentally unfair for a Hearing Panel to force a plenary hearing on the issue of willfulness, while pretending that the consequences flowing from the hearing's outcome are "not all that relevant ..."²⁸ In so doing, FINRA's disciplinary hearings become procedurally unfair in violation of the Exchange Act framework.^{29e}

D.e The Finding of Willfulness Triggered an Excessive and Oppressive Punishment

In it undisputed that a statutory disqualification will cause irreparable harm for Riemer. Although Riemer no longer works in a registered capacity, he will lose his job with National Life because the firm will not employ an agent subject to a statutory disqualification.³⁰ Given the extraordinary impediments associated with FINRA's eligibility proceeding, it is fair to conclude that a statutory disqualification will end Riemer's career as an insurance agent. Consequences of that nature represent an excessive and oppressive form of punishment.

E.e The Hearing Panel Abused its Discretion in Denying a Continuance

Riemer filed an application for a continuance in advance of the hearing and renewed the application at the hearing.³¹ The motion was necessary to enable Riemer to obtain funds fore representation at the hearing. The Hearing Panel denied the application even though the action was less than six-month's old, no prior continuance request was made, and there was no potential harm to the investing public in granting the modest continuance sought by Riemer. Forcing Riemer to proceed without counsel was an abuse of the Hearing Panel's discretion and rendered the hearing unfair.

²⁸ See Tr. 64:21-22.

²⁹ 15 U.S.C. § 78o-3(b)(8).

³⁰ See Offer of Settlement (Teese Affidavit). See also Tr. 35, 39. At the hearing, Equity Services' chief compliance officer confirmed that a statutory disqualification would have "serious ramification" for Riemer's employment with National Life. Tr. 63, 65.

³¹ See Motion for Adjournment; Order Denying Respondent's Motion to Continue Hearing, OHO Order 16-25 2013038986001 (Sept. 7, 2016), ; and Tr. 9:15-16.

IV.

CONCLUSION

For the reasons above, Riemer respectfully requests that the SEC vacate the NAC's Decision as needed and accept Riemer's offer of settlement, and for such other and further relief that is just and proper.

Dated: December 27, 2017

Respectfully submitted,



RICHARD A. RIEMER, JR.

Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing Opening Brief to be sent by overnight mail this 27th day of December, 2017, to:

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