

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 57740 / April 30, 2008

Admin. Proc. File No. 3-12729

In the Matter of the Application of

MATTHEW BRIAN PROMAN

c/o Randy Scott Zelin
Randy Scott Zelin, P.C.
675 Old Country Road
Westbury, New York 11590

For Review of Action Taken by

NASD

ORDER DISMISSING
APPLICATION FOR
REVIEW

I.

On July 20, 2007, NASD denied a request by Matthew Brian Proman for relief from sanctions imposed on him pursuant to a February 26, 1998 Decision and Order of Acceptance of Offer of Settlement ("Settlement Agreement"). On August 20, 2007, Proman appealed the denial of his request to the Commission. On September 12, 2007, Financial Industry Regulatory Authority ("FINRA") moved on NASD's behalf to dismiss Proman's application for review on the grounds that the Commission lacks jurisdiction over the matter. ^{1/} For the reasons discussed below, we find that we lack jurisdiction over Proman's appeal and consequently dismiss his application for review.

^{1/} On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of NASD and the member regulation, enforcement and arbitration functions of the New York Stock Exchange. See Securities Exchange Act Rel. No. 56146 (July 26, 2007), 72 Fed. Reg. 42,190 (Aug. 1, 2007) (SR-NASD-2007-053). Because the action here was taken before that date, we continue to use the designation NASD.

NASD filed a complaint against Proman in July 1997 alleging that Proman arranged to have an imposter take the Series 7 Qualification Exam on his behalf in March 1995 and that Proman failed to respond to NASD requests for information related to the investigation of that allegation. ^{2/} In December 1997, Proman submitted, through counsel, an Offer of Settlement to NASD to resolve the charges against him. The Offer of Settlement stated that it was submitted voluntarily and waived Proman's right to appeal any written decision by NASD. On February 26, 1998, NASD entered a Decision and Order based on the Offer of Settlement barring Proman, censuring him, and fining him \$50,000.

Nine years later, on May 25, 2007, Proman filed a request with NASD seeking to vacate the bar imposed as part of the 1998 settlement which had, he claimed, a continuing adverse effect on him. ^{3/} In the request, Proman stated that he did not contest the validity of the settlement nor did he have any intention to associate with an NASD member firm or to otherwise re-enter the securities industry. On July 20, 2007, NASD denied Proman's request. This appeal followed on August 20, 2007.

II.

Our authority to review an action of a self-regulatory organization ("SRO"), including NASD, is governed by Section 19(d) of the Securities Exchange Act of 1934. Section 19(d) authorizes Commission review of an SRO action that (1) imposes a final disciplinary sanction on any member or person associated with a member; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or a member of the organization; or (4) bars any person from becoming associated with a member. ^{4/} If we find that we do not have jurisdiction, we must dismiss the proceeding. ^{5/} We conclude that we do not have jurisdiction to consider Proman's application for review.

^{2/} The parties agree as to the facts.

^{3/} Proman states that the record of the bar is accessible to anyone who researches his background. He asserts that the existence of the bar impedes his current business activities although those activities are unrelated to the securities industry.

^{4/} 15 U.S.C. § 78s(d).

^{5/} Sky Capital LLC, Exchange Act Rel. No. 55828 (May 30, 2007), 90 SEC Docket 2201, 2205.

In Larry Saylor, we found that we lacked jurisdiction over Saylor's request that we review NASD's refusal to vacate a thirty-two year old principal bar. 6/ We found that the NASD's action in refusing to vacate Saylor's bar was not disciplinary. We explained that "a 'disciplinary action' is 'an action that responds to an alleged violation of an SRO rule or Commission statute or rule, or an action in which a punishment or sanction is sought or intended.'" 7/ We concluded that NASD's action denying Saylor's motion was "collateral to the underlying disciplinary action in which Saylor has already been sanctioned." 8/

As in Saylor, NASD did not invoke its disciplinary procedures, did not determine that Proman had violated a statute or rule, and did not impose a final disciplinary sanction on him. These actions occurred in the 1998 NASD decision, to which Proman consented. Here, like Saylor, Proman's request to vacate the bar is collateral to the underlying disciplinary action.

We further found in Saylor that, because NASD's action merely denied Saylor collateral relief from his principal bar, NASD's denial of Saylor's request did not constitute a denial of membership or participation. 9/ We believe the same result pertains to Proman. NASD's action in rejecting Proman's request did not deny or condition Proman's membership or participation in NASD, nor did it bar him from becoming associated with an NASD member, membership or

6/ Larry A. Saylor, Exchange Act Rel. No. 51949 (June 30, 2005), 85 SEC Docket 3118.

7/ Id. at 3121, citing Lance E. Van Alstyne, 53 S.E.C. 1093, 1098 (1998). See also Sky Capital, 90 SEC Docket at 2206 (quoting Russell A. Simpson, 53 S.E.C. 1042, 1046 (1998)).

8/ Saylor, 85 SEC Docket at 3121.

9/ Id. at 3122.

association that, in any event, Proman did not request and does not want. 10/ The NASD decision here only refused to remove the bar imposed in the earlier decision. 11/

We also conclude that Proman has not been denied access to services. A denial of access involves a denial or limitation of "the applicant's ability to utilize one of the fundamentally important services offered by the SRO." 12/ Such services must be "central to the function of the SRO," such as access to an exchange trading floor or registration as a market maker. 13/ Proman identifies no such services to which he has been denied access by virtue of NASD's refusal to vacate its earlier imposed sanctions.

Proman notes that we have vacated bars in the past and argues that, as a result, we have the power to vacate an NASD bar. However, the cases cited by Proman involved relief from bars

10/ Proman suggests that, if he sought to become associated with a member firm, he could obtain vacatur of his bar. While Article III, Section 3(d) of the By-Laws permits a member to apply to associate a disqualified person, that provision only provides for association notwithstanding a disqualification, such as a bar. It does not lift the bar. Moreover, to obtain such relief, among other things, the member must demonstrate that neither it nor the designated supervisor has a disciplinary history, the nature and scope of the disqualified person's association, and the type of supervision the member will provide the disqualified person. See, e.g., Citadel Sec. Corp., Exchange Act Rel. No. 49666 (May 7, 2004), 82 SEC Docket 3249 (denying firm's application to associate statutorily disqualified person).

11/ The Commission has consistently held that refusing collateral relief does not constitute an action by NASD over which the Commission has jurisdiction. Saylor, 85 SEC Docket at 3122 (in denying collateral motion "NASD did not . . . impose a final disciplinary sanction"); Warren B. Minton, Jr., 55 S.E.C. 1170, 1176 (2002) ("When [NASD] denied [a] motion to set aside the default, the NASD merely rejected [a] collateral attack" and did not impose disciplinary sanctions); Van Alstyne, 53 S.E.C. at 1097 ("We lack authority under Section 19(d) to review [NASD's denial of motion to set aside default] because the . . . order does not fall within the actions enumerated under Section 19(d)(1)").

12/ Morgan Stanley & Co., Inc., 53 S.E.C. 379, 385 (1997).

13/ Id. See, e.g., Scattered Corp., 52 S.E.C. 812, 813 (1996) (finding denial of access for exchange's refusal to process firm's request to register as market maker); William T. Higgins, 48 S.E.C. 713, 718 (1987) (exchange denied member's request to install telephone connection on exchange floor to non-member customers).

imposed in Commission-instituted administrative proceedings, not SRO proceedings. 14/ Consequently, Exchange Act Section 19(d) and its limitations on our jurisdiction over actions taken by SROs such as NASD did not apply. 15/

Proman requests removal of the bar against him because it disadvantages him in his non-securities business. As we have stated previously, "SRO action 'is not reviewable merely because it adversely affects the applicant.'" 16/ For the reasons indicated above, we conclude that we do not have jurisdiction to consider his appeal.

Accordingly, IT IS ORDERED that the Motion of the Financial Industry Regulatory Authority, Inc. to Dismiss Application for Review be, and it hereby is, granted.

By the Commission.

Nancy M. Morris
Secretary

14/ Salim B. Lewis, Exchange Act Rel. No. 54054 (June 28, 2006), 88 SEC Docket 1103 (granting petition to vacate bar order imposed in settlement of Commission administrative proceeding in light of Presidential pardon and judicial vacatur of injunction underlying bar); Edward I. Frankel, Exchange Act Rel. No. 49002 (Dec. 29, 2003), 81 SEC Docket 3778 (granting petition to vacate bar imposed in Commission administrative proceeding); Ciro Cozzolino, Exchange Act Rel. No. 49001 (Dec. 29, 2003), 81 SEC Docket 3769 (same); Stephen S. Wien, Exchange Act Rel. No. 49000 (Dec. 29, 2003), 81 SEC Docket 3758 (same).

15/ Proman asks that we direct NASD, now FINRA, to establish prospectively a formal procedure allowing barred individuals to request that NASD vacate the sanctions against them. Exchange Act Section 19(d) does not provide for such relief.

16/ Sky Capital, 90 SEC Docket at 2206 (quoting Joseph Dillon & Co., 54 S.E.C. 960, 964 (2000)).