UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 81789 / September 29, 2017

Admin. Proc. File No. 3-17767

In the Matter of the Application of

MCBARRON CAPITAL LLC

For Review of Action Taken by

FINRA

ORDER DENYING REOPENING OF DISMISSED REVIEW PROCEEDING

On April 20, 2017, our Office of the General Counsel issued an order dismissing McBarron Capital LLC's application for review of FINRA action because McBarron failed to file an opening brief.[1] The same day, our Office of the Secretary received from McBarron a filing that appeared to indicate a desire to continue pursuing the review proceeding. We then ordered McBarron to show cause why the review proceeding should be reopened.[2] After receiving a filing that did not directly respond to the order to show cause, our Office of the General Counsel issued an order requesting additional briefing by July 24, 2017.[3] That order advised that the review proceeding would not be reopened unless McBarron explained why it did not timely file its opening brief or respond to FINRA's motion to dismiss, and why we should excuse its failure to do so. McBarron has now responded. We find that McBarron has not demonstrated good cause to reopen this review proceeding, and so deny reopening.

1 *See McBarron Capital LLC*, Exchange Act Release No. 80499, 2017 WL 1406911 (Apr. 20, 2017) (order dismissing review proceeding).

2 *See McBarron Capital LLC*, Exchange Act Release No. 80662, 2017 WL 1953455 (May 11, 2017) (order to show cause why proceeding should be reopened).

3 *See McBarron Capital LLC*, Exchange Act Release No. 81190, 2017 WL 3129144 (July 24, 2017) (order requesting additional written submission).

I. Background

On December 8, 2016, a FINRA hearing officer issued a decision pursuant to FINRA Rule 9553[4] cancelling McBarron's membership with FINRA after the firm failed to pay outstanding fees owed to FINRA.[5] The hearing officer also rejected, pursuant to FINRA Rules 9553(d)-(e) and 9559(d),[6] McBarron's request for a hearing because it was untimely and did not set forth any defense for its failure to pay. FINRA's National Adjudicatory Council did not call the decision for review, and pursuant to FINRA Rule 9553(f),[7] the hearing officer's decision became the final action of FINRA on December 29, 2016.

On January 3, 2017, McBarron filed an application for review with the Commission. Our Office of the Secretary received it on January 10, 2017. Acting pursuant to delegated authority and Rule of Practice 411,[8] our Office of the General Counsel issued an order granting the application for review on February 24, 2017.[9] That order directed McBarron to file its opening brief in support of the application for review by March 27, 2017. The order also reminded McBarron that, pursuant to Rule of Practice 180(c),[10] "failure to file a brief in support of the application may result in dismissal of this review proceeding."

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4 *See* FINRA Rule 9553(a) (providing that "[i]f a [FINRA] member . . . fails to pay any fees, dues, assessment or other charge required to be paid under the FINRA By-Laws or rules, . . . FINRA staff may issue a written notice . . . stating that the failure to comply within 21 days . . . will result in . . . cancellation of membership").

5 *McBarron Capital LLC*, FINRA Expedited Proceeding No. DFC160001, STAR No. 20160521585 (Dec. 8, 2016), *available at* https://www.finra.org/sites/default/files/OHO_McBarron_DFC160001_120816_0.pdf.

6 *See* FINRA Rule 9553(e) ("A request for a hearing shall be made before the effective date of the notice, as indicated in paragraph (d) of this Rule. A request for a hearing must set forth with specificity any and all defenses to the FINRA action."); FINRA Rule 9553(d) (providing that a "cancellation . . . shall become effective 21 days after service of the notice, unless stayed by a request for a hearing pursuant to Rule 9559"); FINRA Rule 9559(c) (explaining that, except in situations not relevant here, "a timely request for a hearing shall stay the effectiveness of a notice" of cancellation issued under Rule 9553).

7 *See* FINRA Rule 9553(f) ("If a member or person does not timely request a hearing, the . . . cancellation . . . specified in the notice shall become effective 21 days after service of the notice and the notice shall constitute final FINRA action."); *see also* FINRA Rule 9553(b) (providing that "[s]ervice is complete upon . . . mailing").

8 17 C.F.R. § 201.411.

9 *See McBarron Capital LLC*, Exchange Act Release No. 80108, 2017 WL 733182 (Feb. 24, 2017) (order scheduling briefs).

10 17 C.F.R. § 201.180(c).

McBarron did not timely file its opening brief. On April 3, 2017, FINRA filed a motion to dismiss McBarron's application for review due to McBarron's failure to file. McBarron had five days to respond to FINRA's motion under Rule of Practice 154(b),[11] but did not do so.

For these reasons, in an order dated April 20, 2017, our Office of the General Counsel concluded that "[i]t appears that McBarron has abandoned its appeal," and ordered pursuant to delegated authority that McBarron's application for review be dismissed.[12]

The same day as that order was issued, the Office of the Secretary received a filing from McBarron that referenced "FINRA Administrative Proceeding 3-17767," an apparent reference to this proceeding. Its filing attached a copy of FINRA's motion to dismiss filed on April 3. But McBarron's filing did not otherwise address FINRA's motion. Instead, it repeated verbatim a numbered list identified as "grounds for the appeal" that it had included in its January 3 application for review. McBarron's list of issues presented on appeal was not, and did not purport to be, an opening brief or a response to FINRA's motion to dismiss.

On May 11, 2017, we issued an order to show cause why the review proceeding should be reopened.[13] The order to show cause explained that McBarron's response "must address . . . why McBarron failed to file its opening brief or an opposition to FINRA's motion to dismiss; and what good cause exists for vacating the April 20 order dismissing the review proceeding and allowing McBarron to file an untimely opening brief."[14] The order expressly provided that "[i]f McBarron seeks to reopen the review proceeding, it must file a response to this order by May 25, 2017."

Our Office of the Secretary received McBarron's two-page response on May 26, 2017. McBarron's response recounted certain events that happened before the FINRA Hearing Officer and described these as providing "[c]ause for continuance of hearing." But the response did not, and did not purport to, address the two issues identified in the order to show cause: why

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11 17 C.F.R. § 201.154(b).

12 *McBarron Capital LLC*, 2017 WL 1406911 at *1; *see* 17 C.F.R. § 200.30-14(g)(4) (delegating authority to the Commission's General Counsel to "determine whether an application for review" of SRO proceedings "has been abandoned, . . . and accordingly to issue an order dismissing the application"); 17 C.F.R. 201.431(b) (providing that a party to an action made pursuant to delegated authority may seek Commission review of that action by filing a notice of intention to petition for review within five days after service of notice of the action).

13 *See McBarron Capital LLC*, 2017 WL 1953455.

14 *Id.* at *2.

McBarron failed to file its opening brief and why the Commission should reopen this review proceeding.[15]

Acting pursuant to delegated authority,[16] our Office of the General Counsel issued an order on July 24, 2017, requesting additional briefing from McBarron.[17] The order "provide[d] McBarron one final opportunity to explain why this proceeding should be reopened" and "advised that [McBarron's] appeal will not be reopened unless it demonstrates in a supplemental brief why the Commission should excuse its untimely and incomplete filings in this appeal." The order specified that "[t]he supplemental brief must address . . . why McBarron failed to file its opening brief on or before March 27, 2017, or an opposition to FINRA's April 3, 2017 motion to dismiss; and why the Commission should excuse McBarron's failure to file, reopen this dismissed proceeding, and allow McBarron to file an untimely opening brief."[18] The order expressly provided that "[a]ny supplemental brief must be filed and served no later than July 31, 2017 . . . ."

Our Office of the Secretary received McBarron's two-page response on August 2, 2017. McBarron's response did not directly address the two issues raised in the July 24 order. It referenced the "delay in responding to FINRA's request for briefs or motions," and attributed this to "FINRA's failure to properly notify the firm of their request and/or FINRA's failure to grant McBarron's requests for an extension of time in which to reply to these requests, that would have been granted by FINRA had the firm been represented by legal counsel." McBarron's response said that "the question the SEC needs to answer for itself is not why McBarron should be granted a hearing" but rather "why FINRA continues to deny McBarron[] its right to due process by denying a hearing or offering mediation in this matter?" McBarron's response also questioned whether any decision denying reopening would give "the appearance of possible collusion" between the Commission and FINRA.

II. Analysis

Our Rule of Practice 180(c) contemplates that failure to file a brief in support of an application may result in dismissal of the review proceeding.[19] And the briefing schedule in this

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15 McBarron's response also did not adhere to Commission Rules of Practice 150 – 153. *See* 17 C.F.R. §§ 201.150-.153.

16 *See* 17 C.F.R. § 200.30-14(g)(1)(vii) (delegating authority to the Commission's General Counsel to "request additional briefs").

17 *See McBarron Capital LLC*, 2017 WL 3129144.

18 *Id.* at *1-2.

19 17 C.F.R. § 201.180(c) (providing, among other things, that the Commission may dismiss "one or more claims" by a person in a proceeding before the Commission if the person fails to make a filing required under the Rules); *see also Amendments to the Commission's Rules of Practice*, Exchange Act Release No. 78319, 81 Fed. Reg. 50212, 50219 (July 29, 2016)

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case reminded McBarron that the proceeding could be dismissed pursuant to Rule 180(c) if it failed to file its opening brief. The order dismissing McBarron's application for review was issued in accordance with Rule 180(c) after McBarron failed to file its opening brief or respond to FINRA's motion to dismiss following McBarron's failure to do so. The two orders issued on May 11 and July 24 extended opportunities for McBarron to explain why it failed to file an opening brief or respond to FINRA's motion, and why we should excuse those failures. The July 24 order specified that McBarron had the burden of "demonstrat[ing] in a supplemental brief why the Commission should excuse its untimely and incomplete filings" and reopen this proceeding, and "advised that its appeal will not be reopened unless" it carried that burden.[20] Although McBarron twice responded to those orders, neither time did it directly address those questions or carry its burden of demonstrating good cause to reopen this review proceeding.[21]

To begin with, McBarron has not clearly explained why it did not file an opening brief or respond to FINRA's motion to dismiss. According to McBarron, it was delayed in "responding to FINRA's request for briefs or motions" and attributes the delay to "FINRA's failure to properly notify [it] of [the] request and/or FINRA's failure to grant" it "an extension of time" that it says it would have received "had the firm been represented by legal counsel." But FINRA did not request that McBarron make any filings in this review proceeding, and was not responsible for granting McBarron an extension of time. Our staff issued a briefing schedule after receiving McBarron's application for review, and stated in that order that McBarron's application could be dismissed if it failed to file its brief. FINRA moved to dismiss after McBarron failed to file its brief. The record indicates that both our briefing schedule and FINRA's motion to dismiss were served on McBarron. The record also indicates that McBarron did not file a motion for an extension of time to either file its opening brief or respond to FINRA's motion. Accordingly, McBarron has not substantiated its assertions that it lacked notice about the filing deadlines for its opening brief or its response to FINRA's motion to dismiss, or that it even sought an extension of time to file let alone was denied one.

Nor has McBarron demonstrated good cause to excuse its failure to file an opening brief or respond to FINRA's motion to dismiss, reopen this proceeding, and allow it to file an untimely opening brief. McBarron had ample time to familiarize itself with our Rules of Practice, to request an extension of time from the Commission if needed, and prepare a brief consistent with our Rules. At a minimum, McBarron could have responded directly and candidly to the May 11 and July 24 orders. Even McBarron's apparent confusion about the steps required

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(explaining that substitution of "the phrase 'one or more claims' for the [previous] phrase 'the case'" was "not intended to, and do[es] not, change the substance of the Rule").

[20] *McBarron Capital LLC*, 2017 WL 3129144, at *2.

[21] *Cf.* Rule of Practice 155(b), 17 C.F.R. § 201.155(b) (stating, in the context of a motion to set aside a default, that the motion must, among other things, "specify the nature of the proposed defense," and that the Commission may set aside the default "for good cause shown").

to pursue its appeal does not justify its persistent failure to respond substantively to our orders. As we have said, "[w]e expect all parties, including those appearing *pro se*, … to familiarize themselves with the Rules of Practice and to comply with procedural requirements."[22]

Moreover, McBarron has shown throughout this proceeding a pattern of making incomplete and untimely filings.[23] The hearing officer rejected McBarron's first request for a hearing because it did not fully set forth its defenses as required by FINRA's Rules, and ordered McBarron "to file a hearing request conforming to Rules 9553(e) and 9559 no later than 5:00 p.m. on December 5, 2016." McBarron requested a 30-day extension at 2:59 pm on December 5; the hearing officer denied the request at 5:11 pm that afternoon, and extended until midnight the time for filing the hearing request. After McBarron sent an email the next day at 11:51 am denying liability and setting forth an affirmative defense, the hearing officer rejected it as untimely and as setting forth an impermissible defense. Meanwhile, in this review proceeding before the Commission, McBarron never filed an opening brief and failed to respond to FINRA's motion to dismiss. It also failed to directly address either of the orders providing it an opportunity to explain its failures to do so. McBarron's repeated failure to comply with these deadlines and orders borders on contumacy.

McBarron contends that "FINRA has"—we interpret this to mean we have—elevated "form over substance" by not treating its filings as substitutes for a "formal" brief. According to McBarron, the requirement to file a formal opening brief is "superfluous" because it already submitted "several good faith filings"—including an application for review—that "transparen[tly]" explain the basis for its appeal.[24] But the only timely filing McBarron submitted before we dismissed the proceeding was its application for review. Not only do our Rules of Practice contemplate that an application for review and an opening brief are separate filings with separate substantive requirements,[25] but the application also did not, and did not

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22 *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 WL 4727517, at *10 (Sept. 9, 2016) (internal quotation marks and alteration omitted).

23 We take official notice that FINRA separately expelled McBarron from membership on February 21, 2017, under its Rule 9552, for failing to respond to its requests for information under its Rule 8210. *See* Rule of Practice 323, 17 C.F.R. § 201.323 (authorizing us to take official notice of "any matter in the public official records of the Commission"). McBarron filed a separate application for review of that action, and FINRA filed a motion to dismiss the review proceeding on the ground that McBarron's application for review was filed untimely. That application for review, and FINRA's motion in that proceeding, are not at issue here.

24 McBarron's filing refers to FINRA's receipt of these filings, but in context we understand it to be referring to the Commission.

25 *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) (providing that an application for review must "set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons therefore," and that those alleged errors may "be deemed to have been waived" if not "supported" in a separate "opening brief").

purport to, satisfy the requirements for a brief in our Rules.[26] Indeed, in the February 24 order scheduling briefs, we informed McBarron of the need to file a brief in support of its application for review, and warned McBarron that failure to do so could result in the dismissal of its appeal. Yet McBarron made no timely filing in response to that order. FINRA's motion to dismiss also did not elicit a timely response. The filings McBarron made after its application for review were either untimely or made in response to our orders to show cause why the proceeding should be reopened. McBarron cannot establish good cause for reopening the proceeding by claiming that its application for review, together with its remaining filings, satisfy the requirement that it file a brief in support of its application—without explaining why it did not file a brief timely and why that failure should be excused. It has failed to provide this explanation.

McBarron has also failed to establish meritorious grounds for reversing FINRA's action.[27] FINRA's cancelled McBarron's membership after the firm failed to pay outstanding fees owed to FINRA, and rejected McBarron's request for a hearing because it was filed untimely and asserted an impermissible defense. Although McBarron's application for review and filings in response to our order to show cause list numerous issues with FINRA's action, none explains why FINRA's cancellation of its membership or denial of its hearing request was improper.

Under the circumstances, we find that McBarron has not demonstrated good cause to reopen this proceeding. Federal agencies may dismiss an administrative appeal for failure to file an opening brief.[28] And "courts have consistently ruled that administrative agencies should not be required to reopen their final orders except in the most extraordinary circumstances."[29] This

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[26] Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (stating that "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly" and "supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including such statutes, decisions and other authorities as may be relevant").

[27] *Cf.* Rule of Practice 155(b), 17 C.F.R. § 201.155(b) (noting that the Commission "may for good cause shown set aside a default" and that a motion to set aside a default must specify "the reasons for the failure to appear or defend" and "the nature of the proposed defense").

[28] *See, e.g., Consol. Coal Co. v. Gooding*, 703 F.2d 230, 232-33 (6th Cir. 1983) (holding that a federal agency did not abuse its discretion in dismissing an administrative appeal for "fail[ure] to file a required brief or to respond to [an administrative] show cause order," because the board's power to deem an appeal abandoned was "similar in all significant respects" to a court's "'inherent power' to dismiss cases *sua sponte* for lack of prosecution"); *see also, e.g., Durham v. Dep't of Labor*, 515 F. App'x 382, 383 (6th Cir. Feb. 13, 2013) (finding that an agency did not abuse its discretion in dismissing an administrative appeal for "failure to comply with both the briefing order and the show cause order").

[29] *Blackfeet Tribe v. U.S. Dep't of Labor*, 808 F.2d 1355, 1358 (9th Cir. 1987) (holding that agency's adoption of an "exceptional circumstances" standard for relief from ten-day deadline for filing an administrative appeal was not arbitrary and capricious because "administrative filing

(*continued…*)

is consistent with the more general practice under which a federal court of appeals may dismiss an appeal where an appellant fails to file timely an opening brief.[30]

We recognize the effect that not reopening the proceeding has on McBarron's appeal, but we cannot ensure that parties will adhere to our rules and that we will be able to manage our docket efficiently without requiring that filings be made timely and that good cause be shown for excusing untimely filings. As the Supreme Court has observed, "[p]roper exhaustion" of administrative remedies—as a precursor to judicial review—"demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."[31] And as we have explained in the analogous context of untimely appeals, "'strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief.' Unmet deadlines may cut off substantive rights to review, but this is their function."[32]

(*…continued*)
periods serve the legitimate interests of administrative efficiency and finality") (internal quotation marks omitted); *cf.* Rule of Practice 155, 17 C.F.R. § 201.155(b) (adopting a "good cause" standard for deciding a motion to set aside a default).

30 *See, e.g., Gilroy v. Erie Lackawanna Railroad Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970) (granting motion to dismiss appeal for failure to prosecute, and noting that "[u]nless [an] application for extended time is made so that it may be considered before the allotted time has expired, it is evidence of a lack of good faith and, failing extraordinary circumstances, it constitutes neglect which will not be excused."); *Barber v. American Sec. Bank*, 841 F.2d 1159, 1161 (D.C. Cir. 1988) (dismissing an appeal based on "counsel's failure to file a brief on time, his failure to file a motion for an extension ten days prior to the date his brief was due, his failure to seek leave to file his time enlargement motion late, and the clearly inadequate grounds he eventually offered for the late filings") (citing *Gilroy*, 421 F.2d at 1323); *cf. Community Coalition for Media Change v. FCC*, 646 F.2d 613, 616 (D.C. Cir. 1980) ("disapprov[ing] the lack of diligence with which [the appellant] pursued its petition and appeal," which "reflects a cavalier attitude . . . that impedes the just, speedy, and inexpensive disposition of judicial business," and adopting the *Gilroy* standard for "untimely filings").

31 *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006) (explaining that "[a]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice*").

32 *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *4 (Feb. 8, 2016) (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 WL 1826641, at *2 (May 8, 2014) (citation omitted)).

Accordingly, it is ORDERED that the request of McBarron Capital LLC, upon our order to show cause, to reopen these proceedings be, and it hereby is, denied.

By the Commission.

Brent J. Fields
Secretary