

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**

In the Matter of the Application of

Ricky D. Mullins

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-15769

**FINRA'S MOTION TO DISMISS MULLINS' APPLICATION FOR REVIEW AND
TO STAY BRIEFING SCHEDULE**

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I. INTRODUCTION

Ricky D. Mullins' application for review should be dismissed because he failed to exhaust his administrative remedies in FINRA's forum. Mullins did not participate in FINRA's process, did not offer any reason why he should not be suspended, and did not later explain why he should not be barred. Mullins cannot invoke the Commission's appellate jurisdiction when he did not make arguments in opposition to FINRA's actions before a FINRA adjudicator.

After initially cooperating with FINRA's investigation, Mullins withdrew his cooperation and refused to appear to complete his on-the-record testimony with a FINRA examiner. Mullins unequivocally stated that he would not appear for testimony. Despite Mullins' refusal to testify, FINRA offered him several opportunities to appear for testimony. FINRA notified Mullins that he would be suspended unless he appeared. FINRA later notified Mullins that he had the opportunity to terminate the suspension if he agreed to appear and provide the requested information. Mullins ignored FINRA's numerous notices, did not take any action to contest FINRA's sanctions, and allowed the suspension and automatic bar to take effect. In short, Mullins chose to do nothing and failed to exhaust his administrative remedies. The Commission

should follow its well-established precedent in this area and dismiss Mullins' application for review.¹

II. FACTUAL BACKGROUND

A. Mullins and Guardian Direct Energy Programs

Mullins joined the securities industry in July 2004, when he joined M & W Financial, Inc., and registered with FINRA as a Direct Participation Programs Principal and Direct Participation Programs Representative. RP 165.² Mullins remained associated with M & W Financial until February 2011. RP 165.

In May 2009, Mullins established his own broker-dealer, Guardian Direct. RP 11. Mullins founded Guardian Direct to promote and sell interests in oil and gas operations. RP 11-12. Mullins served as Guardian Direct's Chief Executive Officer and Chief Compliance Officer, and registered with FINRA as the firm's Direct Participation Programs Principal, Direct Participation Programs Representative, and Operations Professional.³ RP 12, 164. Mullins associated with Guardian Direct until February 2013, when the firm filed a Form BDW (Uniform

¹ FINRA requests, pursuant to Commission Rule of Practice 161, that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. The Commission should first evaluate the dispositive argument that Mullins' appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

² "RP ____" refers to the page numbers in the certified record filed by FINRA on March 11, 2014.

³ In the "Other Business" section of Mullins' record in the Central Registration Depository ("CRD"®), he discloses that he is the "owner, president, and CEO of Guardian Ventures, Inc., a parent company, which owns Guardian Land & Commercial Real Property, Inc., a real estate investment company; Guardian Oil & Gas, Inc., an oil and gas exploration company; Guardian Distribution Company, a company that receives and distributes revenue; and Guardian Direct Energy Programs, Inc., a broker-dealer firm for direct participation programs." RP 169.

Request for Broker-Dealer Withdrawal) to cease operations and terminate its registration with FINRA. RP 13, 164.

B. FINRA Receives a Complaint and Initiates an Investigation

On October 10, 2012, FINRA received an anonymous complaint involving Mullins and Guardian Direct. RP 1. The complaint stated that Guardian Direct had promoted an offering from December 2011 through October 2012, which sold limited partnership interests in certain oil and gas operations to the investing public. RP 1. The complaint explained that the offering may be a fraudulent scheme, which was “raising money with new offerings to keep past partnerships out of default.” RP 1. The complaint also noted that the Commission had been notified and had initiated an investigation based out of its regional office in Fort Worth, Texas.⁴ RP 1.

After receipt of the complaint, FINRA initiated an investigation to determine whether Mullins’ and Guardian Direct’s promotion and sale of the limited partnership interests in the oil and gas operations had violated federal securities laws or FINRA rules. RP 97-98. As part of FINRA’s investigation, FINRA Examiner Suzanne Hall sent Mullins a request to appear for on-the-record testimony made pursuant to FINRA Rule 8210.⁵ RP 5. Mullins appeared, as

⁴ Although the record does disclose when the Commission initiated its investigation, the record supports that the Commission began examining Mullins’ and Guardian Direct’s sales of the partnership interests in 2013. RP 1, 103.

⁵ FINRA Rule 8210 requires persons subject to FINRA’s jurisdiction to provide FINRA with information orally, in writing, or electronically with respect to any matter involved in an investigation. The rule “provides a means, in the absence of subpoena power, for the [association] to obtain from its members information necessary to conduct investigations.” *Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *13 (Nov. 14, 2008), *petition for review denied*, 347 F. App’x 692 (2d Cir. 2009), *cert. denied*, 559 U.S. 1102 (2010). A person that fails to respond to a request issued under FINRA Rule 8210 impedes FINRA’s ability to detect misconduct and protect the investing public. *Id.* at *13-14.

requested, and testified in FINRA's district office in Dallas, Texas, on May 2, 2013. RP 3-95. At the conclusion of the on-the-record testimony, Mullins and Hall agreed that Mullins would supply FINRA with additional information and documents, and that Mullins would provide additional testimony at a later date. RP 92-93.

FINRA sent Mullins several follow-up requests for information and documents, including one request that Hall sent on September 3, 2013. RP 97-98. The request, which was made pursuant to FINRA Rule 8210, asked Mullins to respond to questions concerning the securities offerings and to provide documentation of the offerings' terms, including private placement memoranda and subscription and operating agreements. RP 97-98. The last item on the information and document request stated, "It is possible that the staff will need to request your presence at a second on-the-record interview. In consideration of past scheduling difficulties, please provide possible dates and times of your availability." RP 98. The request emphasized that Mullins should respond no later than September 17, 2013. RP 98.

After obtaining a one-week extension, Mullins responded untimely to the request for information and documents on September 26, 2013. RP 99. He gave narrative responses to questions and provided supporting documents where needed. RP 99, 101-103. In response to Hall's statement about appearing again for testimony, however, Mullins offered resistance. RP 103. Mullins stated, "Odds are that I won't go on the record again until after the [Commission] is done with me. I understand that I will be subject to sanctions." RP 103.

C. The October 9, 2013 Request to Appear

On October 9, 2013, Hall sent Mullins a request to appear for on-the-record testimony. RP 105-106. The request, which was made pursuant to FINRA Rule 8210, related to FINRA's ongoing investigation of Mullins, Guardian Direct, and the firm's promotion and sale of the limited partnership interests in the oil and gas operations. RP 105-106. The request noted that

Mullins should appear in FINRA's district office in Dallas, Texas, on October 18, 2013. RP 105. The request cautioned Mullins that, "If you fail to appear and testify at the [on-the-record testimony], you may be subject to a FINRA disciplinary action and the imposition of sanctions, including a bar from the securities industry, suspension, censure and/or fine." RP 106.

Hall sent the letter by certified and first-class mail to Mullins' address of record contained in CRD, [REDACTED] (the "CRD Address"). RP 105, 161. Hall also sent the letter to a second address, [REDACTED] (the "Alternate Address"), and an email address, [REDACTED] (the "Email Address"), which Mullins had provided to her on a prior occasion. RP 105-106.

The certified mail return receipts for the CRD and Alternate Addresses contain the same illegible signature. RP 107-108. The certified mail receipt for the CRD Address, however, noted that the Alternate Address was the correct address of delivery. RP 108. The first-class mailings were not returned.

Mullins responded to the request to appear approximately one hour after he received the letter at his Email Address. RP 109. He responded succinctly, "I won't be appearing." RP 109. On the morning of October 18, 2013, the day of the scheduled testimony, Hall went on the record to document that Mullins did not appear to provide testimony, as requested in her letter of October 9, 2013. RP 111-121.

D. The October 21, 2013 Pre-Suspension Notice

Given the fact that Mullins did not appear for testimony on October 18, 2013, did not explain his failure to appear, did not contact FINRA to reschedule the testimony, or otherwise attempt to arrange for the taking of his testimony, FINRA's Department of Enforcement ("Enforcement") initiated efforts to suspend Mullins. RP 123-125. Enforcement sought to compel Mullins' appearance by instituting an expedited proceeding that could result in FINRA

suspending Mullins from associating with any FINRA firm. RP 123-125; *see* FINRA Rule 9552.⁶

On October 21, 2013, Steve Graham, Senior Regional Counsel in FINRA's office in Dallas, Texas, sent Mullins a letter (the "Pre-Suspension Notice"). RP 123-125. The Pre-Suspension Notice warned Mullins that FINRA planned to suspend him on November 14, 2013 because he failed to appear for on-the-record testimony. RP 123. The Pre-Suspension Notice also stated that Mullins could avoid imposition of the suspension if he took corrective action by complying with the FINRA Rule 8210 request before November 14, 2013. RP 123. Finally, the Pre-Suspension Notice explained that Mullins had the opportunity to request a hearing to contest the imposition of the suspension, and to seek termination of the suspension if he complied fully with the original request to appear. RP 124. The Pre-Suspension Notice also stressed that if Mullins failed to request termination of the suspension within three months, he would be in default, and barred, on January 24, 2014. RP 124.

FINRA sent the Pre-Suspension Notice to Mullins' CRD and Alternate Addresses by Federal Express Overnight Delivery and first-class mail. RP 123. FINRA also sent the Pre-Suspension Notice to the Email Address. RP 123. The Federal Express Overnight Delivery to the CRD Address was returned to FINRA. RP 128. The Federal Express Overnight Delivery to the Alternate Address was delivered on October 22, 2013. RP 127. The first-class mailings

⁶ FINRA Rule 9552(a) states that, "If a member, person associated with a member or person subject to FINRA's jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, . . . , FINRA staff may provide written notice to such member or person specifying the nature of the failure and stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member."

were not returned. Mullins did not respond to the Pre-Suspension Notice or otherwise contact FINRA to schedule or appear for his on-the-record testimony.

E. The November 14, 2013 Suspension Notice

Because Mullins failed to take any action in response to the Pre-Suspension Notice, on November 14, 2013, Sandra Harris, Senior Director of Policy and Expedited Proceedings, sent Mullins a letter (the “Suspension Notice”). RP 133-134. The Suspension Notice notified Mullins that he was suspended, effective immediately, from association with any FINRA firm in any capacity. RP 133. The Suspension Notice advised Mullins that he could file a written request to terminate the suspension based on full compliance with FINRA’s request to appear for on-the-record testimony. RP 133. The Suspension Notice also reiterated the warning that Mullins’ failure to seek relief from the suspension by January 24, 2014 would result in an automatic bar pursuant to FINRA Rule 9552. RP 133; *see also* FINRA Rule 9552(h).⁷

Prior to mailing the Suspension Notice, FINRA staff searched a comprehensive public records database in LexisNexis.⁸ RP 129-132. FINRA sent the Suspension Notice by Federal Express Overnight Delivery and first-class mail to the CRD and Alternate Addresses. RP 133. FINRA also sent the Suspension Notice to the Email Address. RP 133. The Federal Express Overnight Delivery to the CRD Address was returned to FINRA. RP 137-141. The Federal

⁷ Rule 9552(h) states, “A member or person who is suspended under this Rule and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred.”

⁸ The public records database provided that Mullins’ CRD and Alternate Addresses overlapped. RP 129. The database listed the CRD Address as Mullins’ address from July 2005 to present, and the Alternate Address as his address from July 2013 to present. RP 129. As of February 26, 2014, Mullins’ records in CRD continue to identify the CRD Address as his residential address of record. RP 161.

Express Overnight Delivery to the Alternate Address was delivered on November 18, 2013. RP 135-136. The first-class mailings were not returned.

Mullins responded to the Suspension Notice approximately one hour after he received a copy of the letter at his Email Address. RP 143. He stated, “Can you please stop sending mail to the [CRD Address]? I haven’t lived there in months. The [Alternate Address] is accurate.” RP 143.

F. The January 24, 2014 Bar Notice

In the three months following the Pre-Suspension Notice, Mullins did not challenge his suspension, or otherwise attempt to comply with the request to appear. Accordingly, on January 24, 2014, Sandra Harris notified Mullins that he was in default, and barred, effective immediately (the “Bar Notice”). RP 149-150.

Before sending the Bar Notice, FINRA staff searched a comprehensive public records database in LexisNexis.⁹ RP 145-147. FINRA sent the Bar Notice to Mullins’ CRD, Alternate, and Email Addresses. RP 149. FINRA sent the Bar Notice to the CRD and Alternate Addresses by Federal Express Overnight Delivery and first-class mail. RP 149. The Federal Express Overnight Delivery to the CRD Address was returned to FINRA. RP 153-155. The Federal Express Overnight Delivery to the Alternate Address was delivered on January 27, 2014. RP 151-152. The first-class mailings were not returned.

Mullins submitted a timely application for review of this matter to the Commission on February 19, 2014. RP 157-159.

⁹ The public records database conducted prior to the mailing of the Bar Notice identified the Alternate Address as Mullins’ “current” address, and noted that the CRD Address was his address from July 2005 through December 2013. RP 16.

III. ARGUMENT

The Commission should dismiss Mullins' application for review because Mullins failed to exhaust his administrative remedies. Despite receiving notice of these proceedings in accordance with FINRA's rules, Mullins ignored FINRA's notices, failed to follow FINRA's procedures to challenge his suspension, and consequently, was automatically barred.

A. Mullins Failed to Exhaust His Administrative Remedies

The Commission is precluded from considering Mullins' application for review because he failed to follow FINRA's procedures to challenge his suspension, and consequently, failed to exhaust his administrative remedies. The precedent in this area is well-settled. *See Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *1 (Jan. 24, 2014) (dismissing an application for review when the applicant received FINRA's information request, but failed to avail himself of FINRA's procedures by responding to the Pre-Suspension, Suspension, and Bar Notices); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at *11-15 (Apr. 18, 2013) (same); *Norman S. Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at *6, 11 (Sept. 16, 2011) (dismissing applicant's appeal for failure to exhaust administrative remedies when FINRA barred applicant under Rule 9552 for failing to respond to FINRA Rule 8210 information requests); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at *5, 8 (May 6, 2010) (same).

An aggrieved party, such as Mullins, is required to exhaust his administrative remedies before resorting to an appeal, and those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *Royal Secs. Corp.*, 36 S.E.C. 275, 277 n.3 (1955). This doctrine applies with equal force to FINRA proceedings. *See Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that "[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within the NASD are

exhausted”); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (noting that the court “agree[s] with other circuits that have considered the question,” and concluding that the doctrine of exhaustion of administrative remedies applies in NASD disciplinary actions).

In this case, when confronted with mounting regulatory inquiries into his and Guardian Direct’s investment activities, Mullins unilaterally decided not to pursue his administrative remedies before FINRA to prevent, or otherwise challenge his suspension or bar. In the first instance, Mullins chose not to appear for his on-the-record testimony, despite FINRA’s clear warning that his failure to appear may result in serious sanctions, including a bar. RP 105-106. Mullins acknowledged that his failure to appear could subject him to sanctions, but asserted, “I won’t be appearing.” RP 103, 109.

Second, after issuance of the Pre-Suspension Notice, Mullins had the opportunity to take corrective action by complying with the FINRA Rule 8210 request or, alternatively, to request a hearing and set forth the reasons why he believed his suspension should be set aside. RP 123-125. Mullins, however, did not take corrective action or request a hearing.

Finally, after issuance of the Suspension Notice, Mullins had the opportunity to move for reinstatement. RP 133-134. Once again, Mullins did not avail himself of FINRA’s procedures. Instead, he responded to the Suspension Notice with the following instruction, “[P]lease stop sending mail to the [CRD Address] . . . I haven’t lived there in months. The [Alternate Address] is accurate.” In lieu of moving for reinstatement, Mullins made no objection and allowed the bar to take effect. RP 149-150; *see also* FINRA Rule 9552(h).

By failing to take action in response to the Pre-Suspension and Suspension Notices, Mullins forfeited his ability to challenge FINRA’s actions before the Commission. *See Steckler*, 2014 SEC LEXIS 283, at *8 (dismissing application for review and stating, “[W]e repeatedly have held that ‘we will not consider an application for review if the applicant failed to exhaust

FINRA's procedures for contesting the sanction at issue.'"); *Martinez*, 2013 SEC LEXIS 1147, at *15 (relying on "well-established precedent" and dismissing application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action by complying with Rule 8210 requests); *Profeta*, 2010 SEC LEXIS 1563, at *6 (finding in a FINRA Rule 9552 proceeding that "FINRA's actions were in accordance with its rules and the purposes of the Exchange Act" [when] "rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action").

Mullins could have: (1) appeared to provide on-the-record testimony, (2) requested a hearing, or (3) contested the suspension during the three-month suspension period. RP 123-125. He took none of these steps.¹⁰ Instead, Mullins filed this appeal three months after he received the Suspension Notice, and nearly one month after FINRA notified him that, consistent with the explicit language of FINRA Rule 9552 (as well as the Pre-Suspension, Suspension, and Bar Notices), his suspension had converted to a bar. RP 133-134, 149-150. "It is clearly proper to require that a statutory right to review be exercised in an orderly fashion, and to specify procedural steps which must be observed as a condition to securing the review." *Gary A. Fox*, 55 S.E.C. 1147, 1150 (2002) (internal citation omitted). It is undisputed that Mullins did not follow

¹⁰ Mullins states that he requested a postponement of the on-the-record testimony until after the Commission completed its investigation of him and Guardian Direct. RP 157. But Mullins made no such request in writing. After receiving the request to appear, Mullins communicated with FINRA on two occasions. RP 109, 143. Mullins contacted FINRA on October 9, 2013, immediately after receiving the request, to inform the FINRA examiner that, "I won't be appearing." RP 109. The email made no request for a postponement. Mullins also emailed FINRA immediately after receipt of the Suspension Notice, on November 14, 2013, to ask that FINRA refrain from sending him correspondence at his CRD Address. RP 143. Mullins did not request a postponement, or otherwise contact FINRA to reschedule the on-the-record testimony scheduled for October 18, 2013.

the required procedural steps as a condition of applying for the Commission's review.

Accordingly, the Commission should dismiss this appeal.

B. FINRA Provided Mullins with Proper Notice of These Proceedings

FINRA properly served Mullins with the request to appear, the Pre-Suspension Notice, the Suspension Notice, and the Bar Notice. RP 105-108, 123-128, 133-141, 149-155. And Mullins cannot claim otherwise. Mullins acknowledged actual receipt of the request to appear by contacting Hall, the FINRA examiner, to state that he would not appear, and also indicated that he received the Suspension Notice when he requested that Graham and Harris, the FINRA attorneys handling the case, stop sending correspondence to the CRD Address. RP 109, 143. Mullins also received the Bar Notice, as evidenced by the fact that he attached the letter to his application for review before the Commission. RP 157-159.

Mullins also was deemed to have received all FINRA correspondence sent to the "last known residential address," as reflected in FINRA records. *See* FINRA Rule 8210(d) (providing that any request for information "shall be deemed received" when it is transmitted to the "last known residential address as reflected in the Central Registration Depository"). Similarly, FINRA Rule 9134(b)(1) provides that, "Papers served on a natural person may be served at the natural person's residential address, as reflected in the Central Registration Depository, if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's Central Registration Depository address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address"

The record demonstrates that FINRA complied with these rules and sent all correspondence to the CRD Address, in addition to the Alternate and Email Addresses, which

Mullins himself had provided to the FINRA examiner on an earlier occasion. RP 105-108, 123-128, 133-141, 149-155.

To the extent that Mullins would argue on the merits that he did not receive certain FINRA correspondence because he no longer received correspondence at the CRD Address, this argument is unavailing. It is well settled that all registered representatives are required to sign and file a Form U4, “which obligates them to keep a current address on file with the NASD at all times.” *Nazmi C. Hassanieh*, 52 S.E.C. 87, 90 (1994). Because registered persons are subject to FINRA jurisdiction for at least two years after leaving the securities industry, they are obliged to keep their addresses current with FINRA, even after they leave the industry. *See Warren B. Minton, Jr.*, 55 S.E.C. 1170, 1178 (2002). Thus, any failure by Mullins to keep his address current does not excuse his failure to exhaust his administrative remedies. *See, e.g., Martinez*, 2013 SEC LEXIS 1147, at *15 (dismissing application for review and rejecting applicant’s argument that his failure to challenge FINRA’s disciplinary sanction through FINRA appeal procedures was excused because FINRA used an old mailing address).

* * *


The Commission should follow established precedent and dismiss Mullins’ application for review because he failed to exhaust the FINRA administrative remedies that were available to him.

IV. CONCLUSION

Mullins failed to appear to provide FINRA with his on-the-record testimony, and consequently, was suspended. Instead of availing himself of FINRA’s administrative procedures to terminate the suspension, Mullins made no effort to give on-the-record testimony or challenge the suspension. As a result, Mullins’ suspension continued and eventually he was barred, in

accordance with FINRA's procedures. The Commission should dismiss Mullins' application for review.

Respectfully submitted,

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