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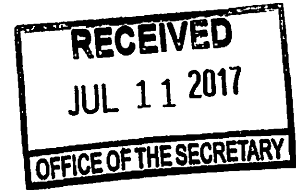

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Michael R. Turner

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority (formerly NASD)

File No. 3-17995

FINRA'S REPLY TO TURNER'S OPPOSITION TO FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND TO STAY THE BRIEFING SCHEDULE

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July 10, 2017

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As FINRA argued in its motion to dismiss, Turner's appeal should be dismissed as untimely. Turner's appeal is 11 years late, and there are no extraordinary circumstances that warrant accepting his late appeal. FINRA acted consistent with its rules by sending Turner the NASD Rule 8210 requests and the notices in the NASD Rule 9552 proceeding to Turner's Central Registration Depository ("CRD®") address and another residential address of Turner's of which FINRA became aware. If Turner did not receive the notices that FINRA sent to his CRD address, that was because he did not comply with his independent obligation to update his CRD address when he moved from that address. Moreover, Turner was aware of the bar at least by October 2009—and was also aware that appeals from such bars were to be directed to the SEC—yet he *still* chose not to appeal to the SEC for another eight years.

In his opposition, Turner argues that a "combination" of factors amounts to extraordinary circumstances for accepting his late appeal, including an alleged failure by FINRA to follow its rules governing service, his assertion that he "did not receive FINRA's communications," and

his purported "diligence in seeking reinstatement." Opp. 12.[1] None of these circumstances have merit. As explained below, Turner has failed to identify anything extraordinary that would warrant allowing this 11-year late appeal to proceed, and requiring strict compliance with the appeal filing deadline is consistent with the need for finality in administrative proceedings. The SEC should dismiss Turner's Application for Review.

I. FINRA Complied with Its Rules Governing Service and Notice.

Turner primarily argues that an extraordinary circumstance for accepting his late appeal is that FINRA "failed to comply with its own Rules regarding procedure of service." Opp. 8, 12. That argument lacks merit, and Turner misreads FINRA rules. As explained below, FINRA complied with its rules for serving the NASD Rule 8210 requests and the notices in the NASD Rule 9552 proceeding.

A. FINRA Provided Notice of the NASD Rule 8210 Requests in Compliance with NASD Rule 8210(d).

NASD Rule 8210(d) governed how FINRA was to provide Turner with notice of the four NASD Rule 8210 requests directed to Turner. In his opposition, Turner selectively excerpts

[1] References to "Opp. ____" are to Turner's Opposition to FINRA's Motion to Dismiss Turner's Application for Review and to Stay the Briefing Schedule. References to "RP ____" are to the certified record of this proceeding. This reply also uses the same defined terms as FINRA used in its motion to dismiss (e.g., "First Request," "Second Request," "Third Request," "Fourth Request," "Notice of Intent to Suspend," "Notice of Suspension," "Bar Letter," "Dody Drive Address," and "Bankston Drive Address").

from the relevant rule text, and then misquotes the excerpt.[2] Opp. 8. NASD Rule 8210(d) actually provided as follows (emphasis added):

> A notice under this Rule shall be deemed received by the member or person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the [CRD]. If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the [CRD] is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:
>
> (1) the last known business address of the member *or* the last known residential address of the person as reflected in the [CRD]; *and*
>
> (2) any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

FINRA complied with NASD Rule 8210(d) in sending the four requests for information. When FINRA sent the First Request and the Second Request to Turner on March 24 and April 15, 2005, respectively, FINRA sent them to Turner at the Dody Drive Address. (RP 1, 25.) FINRA was required to do so by NASD Rule 8210(d), because the Dody Drive Address was Turner's residential address in the Central Registration Depository ("CRD®"). (RP 219, 221, 225.) There is no evidence that FINRA had actual knowledge when it sent the first two requests that Turner's CRD address was out of date or inaccurate.

On April 27, 2005, FINRA received the unclaimed certified mailing of the First Request, which contained a sticker indicating that the Bankston Drive Address was a "New Address." (RP 23-24.) That was the first time at which FINRA became aware that the Dody Drive Address

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2 Turner also cites the wrong rule. He cites "FINRA Rule 8210(d)," which was not effective until December 15, 2008. Opp. 8; *FINRA Regulatory Notice 08-57*, 2008 FINRA LEXIS 50, at *1, 16 (Oct. 2008).

may no longer be an accurate address for Turner and that the Bankston Drive Address may be a more current address. Thus, when FINRA sent the Third Request and Fourth Request to Turner on May 3 and June 3, 2005, FINRA sent those requests to both the Dody Drive Address and the Bankston Drive Address. (RP 53, 97.) Sending the requests to these two addresses—the CRD address and "any other more current address known to the . . . FINRA staff"—was in compliance with NASD Rule 8210(d)(1) and (2).[3]

Turner argues that "it can be inferred FINRA had knowledge Turner was not at the Bankston [Drive] Address as of July 28, 2005, when it received the [T]hird [R]equest letters unclaimed." Opp. 10. No such inference can be drawn. There was nothing on the returned certified mailing of the Third Request sent to the Bankston Drive Address indicating that the Bankston Drive Address was incorrect or out of date, and there is no evidence that the first-class mailing sent to the Bankston Drive Address was ever returned. (RP 94-95.) The same is true for the certified and first-class mailings of the Fourth Request sent to the Bankston Drive Address. (RP 127.) Thus, from FINRA's perspective in July 2005, a possible explanation for why the certified mailings of the Third and Fourth Requests sent to the Bankston Drive Address were returned was that Turner lived at the Bankston Drive Address, but was refusing to retrieve the certified mailings. Indeed, Turner implied in an October 27, 2009 email that he wrote to Mariann Miller ("Miller") that he lived at the Bankston Drive Address when FINRA sent Turner

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[3] Relying on his misreading of Rule 8210(d), Turner argues that FINRA was required to send the NASD Rule 8210 requests to Duerr Financial Corporation. Opp. 8, 11. He is mistaken. When FINRA had actual knowledge that Turner's CRD address was not accurate, NASD Rule 8210(d)(1) required FINRA to send a copy of the request to "the last known business address of the member *or* the last known residential address of the person as reflected in the Central Registration Depository." (Emphasis added.) Thus, Rule 8210(d)(1) set forth two alternatives for service, and FINRA complied by sending a copy of the Third Request and Fourth Request to the CRD address (i.e., the Dody Drive Address).

the Third and Fourth Requests to that address.[4] (RP 166.) For all of the above reasons, FINRA properly served the NASD Rule 8210 notices.

B. FINRA Served the Notices in the NASD Rule 9552 Proceeding in Compliance with Its Rules.

FINRA also complied with its rules when serving Turner with the notices in the NASD Rule 9552 proceeding. NASD Rule 9552(b) required that FINRA serve Turner with a notice of an intent to suspend "in accordance with [NASD] Rule 9134." NASD Rule 9134(b)(1) provided, in relevant part, as follows:

> Papers served on a natural person may be served at the natural person's residential address, as reflected in [CRD], if applicable. When a Party or other person responsible for serving such person has actual knowledge that the natural person's [CRD] address is out of date, duplicate copies shall be served on the natural person at the natural person's last known residential address and the business address in the [CRD] of the entity with which the natural person is employed or affiliated . . . .

FINRA complied with NASD Rule 9134(b)(1) by sending the Notice of Intent to Suspend, the Notice of Suspension, and the Bar Letter to Turner's CRD address (i.e., the Dody Drive Address) and a duplicate copy to Turner's "last known residential address" (i.e., the Bankston Drive Address).

Turner contends that he did not reside at the Dody Drive Address or the Bankston Drive Address when FINRA sent the notices in the NASD Rule 9552 proceeding to those addresses. Opp. 5, 6. Even if that is true, that does not mean that FINRA did not comply with its service rules. Although FINRA was aware that the Dody Drive Address may have been out of date

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4 Likewise, in the declaration that Turner has filed in support of his opposition, he makes no assertion that he did not live at the Bankston Drive Address when FINRA mailed the Third and Fourth Requests to that address. *See generally* Declaration of Michael R. Turner.

when it began sending notices in the NASD Rule 9552 proceeding, sending the notices to the Dody Drive Address and duplicates to the "last known residential address" satisfied the requirements of NASD Rule 9134(b)(1). Moreover, there is no evidence that FINRA was aware that Turner's "last known residential address" was something other than the Bankston Drive Address. In this regard, two certified mailings of the NASD Rule 8210 requests were returned with a notation that the Bankston Drive Address was a "new address," there is no evidence that any first-class mailings sent to the Bankston Drive Address were returned, and there is no evidence that the overnight delivery service provider that FINRA used to send notices in the NASD Rule 9552 proceeding provided FINRA with any information that the Bankston Drive Address was out of date. Moreover, Turner points to nothing that shows that FINRA was aware of any other residential address to use than the Dody Drive Address and Bankston Drive Address.[5]

Contrary to Turner's argument, the SEC's order in *Kevin E. Murphy*, Exchange Act Release No. 79016, 2016 SEC LEXIS 3772 (Sept. 30, 2016), provides no support for his argument that FINRA did not comply with its service rules. Opp. 8-10. In *Murphy*, FINRA sent two Rule 8210 requests to Murphy, by both certified and first-class mail, at his CRD residential address and a second address also noted in the system. *Murphy*, 2016 SEC LEXIS 3772, at *2.

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[5] Turner incorrectly argues that FINRA was also required to send the notices in the NASD Rule 9552 proceeding to Duerr Financial Corporation. Opp. 11. However, NASD Rule 9134(b)(1) required FINRA, when it had actual knowledge that a CRD residential address is out of date, to send duplicate copies of notices to "the business address in [CRD] of the entity with which the natural person *is* employed or affiliated." (Emphasis added.) At the time FINRA sent the notices in the NASD Rule 9552 proceeding in September 2005, October 2005, and April 2006, Turner was no longer employed or affiliated with Duerr Financial Corporation. RP 253 (Form U5 terminating Turner's registration in January 2005).

All of the mailings were returned to FINRA.[6] *Id.* at *3. Subsequently, FINRA sent a Rule 9552 Presuspension Notice to Murphy at his CRD address, via certified and first-class mail, and these mailings were returned as "not deliverable as addressed" and "unable to forward." *Id.* at *6. FINRA also sent Murphy a Suspension Notice in the Rule 9552 proceeding to his CRD address, but did so after obtaining results from a LEXIS Public Records Database search that listed a "former address . . . that was not previously listed" in a prior LEXIS search. *Id.* at *6-8. FINRA moved to dismiss Murphy's appeal on the grounds that he failed to exhaust his administrative remedies, but the SEC remanded the proceeding to FINRA. *Id.* at *9-15. The SEC stated, "[t]hat the requests for information sent to Murphy's CRD address were returned to FINRA suggests that FINRA had actual knowledge that Murphy's CRD address was out of date." *Id.* at *11-12. The SEC also found that the circumstances "raised questions about whether [FINRA] was aware that its information requests and notices were not reaching the respondent" and "what [FINRA] did to satisfy its obligation" to send the Presuspension Notice to the "last known residential address." *Id.* at *13.

The present case against Turner involves starkly different circumstances that those in *Murphy*. Unlike the returned mailings in *Murphy*, none of the returned mailings sent to Turner at the Bankston Drive Address contained any USPS markings indicating that the Bankston Drive Address was an out-of-date or undeliverable address. There also is no evidence that FINRA had any other information that the Bankston Drive Address was out of date (e.g., LEXIS search

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6 The mailings to the CRD address were returned with the notations, "not deliverable as addressed" and "unable to forward." *Id.* at *3. The mailings to the second address were returned with the notation "unable to forward," and the first-class mailings sent to the second address were returned with a handwritten notation stating "Return to Sender! Not at this address." *Id.* at *3.

results showing other addresses, CRD records showing a second residential address). Moreover, there is no evidence that all of the mail sent to the Bankston Drive address was returned.[7] And notably, *Murphy* did not involve a late appeal. *Id.* at *8. This case, by contrast, involves Turner's untimely appeal filed years after he admittedly had actual notice of the bar.[8]

FINRA properly served Turner with the NASD Rule 8210 requests for information and the notices in the NASD Rule 9552 proceeding. The SEC should reject Turner's argument that FINRA failed to follow its rules for service.

II. The Other Factors to Which Turner Points Are Not Extraordinary Circumstances for Filing His Appeal 11 Years Late.

In addition to his flawed argument that FINRA failed to abide by its service rules, Turner argues that several other circumstances, in combination, are extraordinary and warrant accepting his 11-year late appeal. Turner's arguments fail.

Turner argues that he "did not receive FINRA's communications" and that "[s]everal years passed before Turner became aware of FINRA's bar." Opp. 11, 12. Even assuming arguendo that is true,[9] Turner now admits he was aware of the bar as early as 2009. Opp. 6. The

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[7] Specifically, there is no evidence that any of the first-class mailings or overnight delivery packages sent to the Bankston Drive Address were returned.

[8] Turner also cites the SEC's opinion in *Destina Mantar,* but that case is also inapposite. Opp. 10. *Mantar* involved whether the applicant exhausted administrative remedies, not an untimely appeal. *Mantar*, Exchange Act Release No. 79851, 2017 SEC LEXIS 194 (Jan. 19, 2017).

[9] Turner asserts that he "did not receive FINRA's letters" and that FINRA "essentially admits the same by acknowledging its letters were returned unclaimed." Opp. 11. FINRA makes no such admission. Although several certified mailings were returned to FINRA, there is no evidence that any of the first-class mailings or overnight delivery packages were returned. And as explained above, there is no evidence foreclosing the likelihood that the reason why Turner did not receive the certified mailings of the Third and Fourth Requests is that he chose not to receive them.

fact that Turner chose to wait another eight years to file this SEC appeal is not an extraordinary circumstance.

Turner also argues that "[o]nce [he] became aware of the bar, he diligently sought reinstatement" (Opp. 11), but the circumstances he describes show no such diligence and lack an evidentiary foundation. For example, Turner argues that "[i]n 2009 Turner contacted FINRA directly and was provided with minimal information about how to proceed" and that he "belie[ved] based on his communications with Ms. [Mariann] Miller [that] no action was necessary at the time." Opp. 6, 11. Turner's purported belief was unreasonable given the information that Miller provided. In 2009, Miller provided Turner with a copy of the Bar Letter, which expressly instructed Turner that appeals from actions in NASD Rule 9552 proceedings are to be directed to the SEC. (RP 157-160.) Turner acknowledged receiving this information. (RP 166.) That Turner chose to ignore the clear information Miller provided to him and wait another eight years before filing this appeal is not an extraordinary circumstance warranting an extension of the appellate deadline.[10]

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[10] Turner's other arguments about his efforts to seek "reinstatement" are similarly unpersuasive. He asserts that "[i]n 2011, he sought reinstatement himself, but FINRA denied his efforts." Opp. 11. The record, however, contains no evidence of any effort by Turner to seek "reinstatement," let alone evidence that FINRA "denied" any such effort.

Turner also asserts that in 2011, he "sought representation to address the issue, but his counsel did not inform him of the option to file an appeal to the SEC" and that, in 2015, he "again sought advice and counsel." Opp. 11. But Turner offers no relevant details about his interactions with lawyers—such as their identities, what information or documents Turner disclosed to his counsel (if any), or what specific advice Turner received in response—or any evidence from his unnamed lawyers about the actual advice they specifically provided. *See Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *40-41 (Nov. 14, 2008) (describing requirements for a reliance-on-counsel argument), *aff'd*, 347 F. App'x 692 (2d Cir. 2009). Moreover, as FINRA explained in its motion to dismiss, Turner's interactions with counsel in 2011 and 2015 have no bearing on why Turner chose not to file an appeal with the SEC in 2009. Turner's attorney's purported failure to advise him of the appellate

[Footnote cont'd on next page]

Whatever steps Turner purportedly took to pursue "reinstatement"—such as his claim that he sought firms to sponsor him[11]—they did not include the appropriate recourse of attempting to file an appeal with the SEC. The fact that Turner may have pursued other avenues to re-entering the industry was his choice, not a circumstance beyond his control that prevented him from also filing an appeal with the SEC. *See Pennmont Sec.*, Exchange Act Release No. 61697, 2010 SEC LEXIS 1353, at *18 (Apr. 23, 2010) ("[A]n extraordinary circumstance under Rule of Practice 420(b) may be shown where the reason for the failure timely to file was beyond the control of the applicant that causes the delay."), *aff'd*, 414 F. App'x 465 (3d Cir. 2011).[12]

Turner asserts that he "was under the impression" that Union Safe Deposit Bank or Bank of the West (which employed him beginning in mid-2004) "informed FINRA of his changes in employment and address." Opp. 4. But as FINRA argued in its motion to dismiss, there is no evidence that any such impression of Turner's was a reasonable one and, in any event, it was Turner's independent responsibility to keep current address information on file with CRD, not

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[cont'd]

process does not justify extending the deadline to file an appeal, and any appeal filed after Turner's consultations with counsel would still have been untimely. *See* Motion to Dismiss at 17-18 (citing *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 SEC LEXIS 1598, at *4-5, 9 (May 8, 2014)).

11 *See* Declaration of Michael R. Turner, at 6 (¶25).

12 Turner also relies upon his lack of a disciplinary history. Opp. 12. But just as the lack of a disciplinary history is not a mitigating factor for purposes of sanctions in disciplinary proceedings, it should not be an extraordinary circumstance that warrants accepting an 11-year late appeal. An associated person "should not be rewarded for acting in accordance with his duties as a securities professional." *PAZ Sec., Inc.*, Exchange Act Release No. 57656, 2008 SEC LEXIS 820, at *26-27 (Apr. 11, 2008) (citing *Philippe N. Keyes*, Exchange Act Release No. 54723, 2006 SEC LEXIS 2631, at *23 (Nov. 8, 2006)), *aff'd*, 566 F.3d 1172 (D.C. Cir. 2009).

the responsibility of his broker-dealer employers or non-broker-dealer employers. *See* Motion to Dismiss at 14-16.

Turner fails to identify any extraordinary circumstances that would warrant permitting this late appeal to proceed. The SEC should dismiss Turner's appeal because it is 11 years late.

III. SEC Rule of Practice 100(c) Is Not Applicable to Appeals of SRO Actions.

Turner finally argues that the SEC should waive, pursuant to SEC Rule of Practice 100(c), the 30-day appeal period set forth in SEC Rule of Practice 420(b). Opp. 12-13. Turner again ignores the plain text of a rule. In appeals from SRO actions like this one, Rule 420(b) is "the exclusive remedy for seeking an extension of the 30-day period." The narrow limitation to a timely appeal provided by Rule 420(b) intends and, in fact, brings finality to the administrative process and reflects a deliberate choice to impose finality on SRO action. Therefore, Rule 100(c) is not an authority for extending Rule 420(b)'s appeal deadline.

In any event, extending the 30-day appeal deadline—where there are no extraordinary circumstances involved with Turner's 11-year delay—would not serve the interests of justice. *See* SEC Rule of Practice 100(c).[13] Turner did not appeal the 2006 bar until 2017, despite being on notice of the bar at least by 2009, and despite having received in 2009 a copy of the Bar Notice and an email from Miller that informed Turner that an appeal should be directed to the SEC. Allowing this late appeal to proceed would do nothing more than reward Turner's extreme lack of diligence in pursuing appellate recourse. *Cf. Gerasimowicz*, 2014 SEC LEXIS 1598, at

[13] Rule 100(c) provides that the SEC "upon its determination that to do so would serve the interests of justice and not result in prejudice to the parties to the proceeding, may by order direct, in a particular proceeding, that an alternative procedure shall apply or that compliance with an otherwise applicable rule is unnecessary."

*8-9 (rejecting request pursuant to Rule 100(c) to permit a six-month-late appeal, when applicant "took no action to challenge the sanctions and effectively ignored the proceeding following issuance of the Initial Decision, until efforts were instituted to enforce the decision in district court"); *Jacob Keith Cooper*, Exchange Act Release No. 77068, 2016 SEC LEXIS 486, at *12-14 (Feb. 5, 2016) (rejecting request pursuant to Rule 100(c) to permit a two-month late appeal, when applicant failed to diligently pursue his appeal and was not prevented from timely filing by some extraordinary circumstance). Moreover, to allow such a late appeal would be run directly counter to the "need for finality in administrative proceedings." *Gerasimowicz*, 2014 SEC LEXIS 1598, at *9 (stating that "[u]nmet deadlines may cut off substantive rights to review, but this is their function").

IV. CONCLUSION

Turner's appeal is 11 years late, and there are no extraordinary circumstances for accepting his late appeal. The SEC should dismiss Turner's Application for Review as untimely.

Respectfully submitted,

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July 10, 2017

CERTIFICATE OF COMPLIANCE

I, Michael Garawski, certify that the foregoing FINRA's Reply to Turner's Opposition to FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of Application for Review of Michael R. Turner (File No. 3-17995), complies with the length limitation set forth in SEC Rule of Practice 154(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 3,811 words.

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Dated: July 10, 2017

CERTIFICATE OF SERVICE

I, Michael Garawski, certify that on this 10th day of July 2017, I caused a copy of FINRA's Reply to Turner's Opposition to FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule, in the matter of Application for Review of Michael R. Turner, Administrative Proceeding No. 3-17995, to be served by messenger on:

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and via overnight FedEx on:

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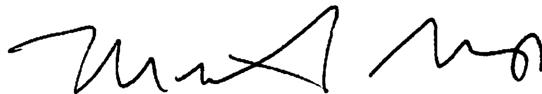
Service was made on the Commission by messenger on the Applicant's counsel by overnight FedEx due to the distance between the office of FINRA and Applicant's counsel.



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