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August 14, 2020

BY ELECTRONIC MAIL

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Room 10915
Washington, DC 20549-1090

RE: In the Matter of the Application for Review of Shlomo Sharbat
Administrative Proceeding No. 3-19870

Dear Ms. Countryman:

For filing in the above-referenced matter, enclosed please find FINRA's Reply in Support of Its Motion to Dismiss Application for Review and to Stay Briefing Schedule. Please contact me directly should you have any questions or concerns.

Sincerely,

/s/Megan Rauch

Megan Rauch

Enclosure

cc: Hadar Israeli, Esq.
Eran Elharar, Esq.
Cathy Bardenstein, Esq.
Zvi Gabbay, Esq.

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Shlomo Sharbat

For Review of Action Taken by FINRA

File No. 3-19870

FINRA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE

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Dated: August 14, 2020

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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Shlomo Sharbat

For Review of Action Taken by FINRA

File No. 3-19870

FINRA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPLICATION FOR REVIEW AND TO STAY BRIEFING SCHEDULE

I. INTRODUCTION

The Commission should dismiss this late-filed application for review of a FINRA default disciplinary decision because Shlomo Sharbat failed to exhaust his administrative remedies and his appeal is more than seven and one-half years late. Sharbat has not shown that extraordinary circumstances exist to warrant extending the long-past appeal deadline. Dismissal on these procedural grounds is consistent with well-established precedent, and nothing in Sharbat's opposition brief demonstrates otherwise.

Notably, Sharbat does not address his admission in his application for review that he, knowing that FINRA was seeking to enter a default judgment against him, chose to allow the action to take place without responding. Nor does Sharbat address why he waited at least an additional four months to file his appeal after the entry of an administrative judgment and why the administrative judgments against individuals associated with a prior offering allegedly provided Sharbat comfort to proceed with an appeal.

Instead, Sharbat asserts that FINRA's failure to serve the default decision and notice of default decision on him by email prevented him from exhausting his administrative remedies and filing a timely appeal. It did not. In fact, FINRA served the decision in accordance with FINRA rules on both Sharbat's CRD address and Tel Aviv address, where he received actual notice of other documents, including the underlying complaint and FINRA's motion for entry of default judgment. FINRA's service of the default decision in the disciplinary proceeding against Sharbat was in accordance with FINRA rules, and Sharbat's reliance on Commission precedent in expedited proceedings is misplaced. Because Sharbat both failed to exhaust his administrative remedies and filed an untimely appeal without the requisite extraordinary circumstances to justify extending the deadline, the Commission should dismiss his application for review.

II. ARGUMENT

A. Sharbat Failed to Exhaust His Administrative Remedies.

Sharbat filed this appeal from a FINRA default decision without first appealing to the NAC, as required by FINRA rules. For that reason alone, the application for review must be dismissed. *See Edward J. Jakubik*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014, at *13 (Feb. 18, 2010) (The Commission does "not consider an application for review if the applicant failed to follow [FINRA] procedures.").

Sharbat contends that his failure to exhaust administrative remedies should be excused because he did not receive the default decision and notice of default decision. Opp. Br. at 7. FINRA, however, is not required to demonstrate actual notice of the default decision and notice of default decision. *See* FINRA Rule 9269(d). By serving the default decision and notice of default decision by mail and FedEx to Sharbat's CRD address and by FedEx to Sharbat's Tel Aviv address, FINRA provided Sharbat with constructive notice of the action in accordance with

FINRA rules. RP 146A-B*; see* FINRA Rule 9269(d) (providing that FINRA must serve a default decision on respondent by courier or other means reasonably likely to obtain prompt service when the sanction is a bar). It was reasonably likely that Sharbat would receive prompt service of the default decision and notice of default decision at the Sharbat's Tel Aviv address by FedEx because, as Sharbat acknowledges, he received actual notice of documents previously delivered by FedEx to that address.[1] RP 55-56 (¶¶9, 12, 16), 92-93, 95-96, 106-07; Opp. Br. at 3.

Contrary to Sharbat's contentions, the Hearing Officer was not required to email the default decision and notice of default decision, particularly because it is well established that Sharbat received documents at his Tel Aviv address. Sharbat's "expectation" that he would receive documents from FINRA by both FedEx and email is nothing more than an alleged preference about which he never notified the Hearing Officer during the disciplinary proceeding.[2] Opp. Br. at 4.

The Hearing Officer likewise is not required to "make another attempt of service" on Sharbat because he did not confirm his receipt of the default decision and notice of default decision with his signature via FedEx. Opp. Br. at 4. Defaulting respondents are respondents who have elected not to participate in FINRA disciplinary proceedings and thus, arguably, would be the least likely to respond. The notion that FINRA should be required to demonstrate actual

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[1] The proper standard under FINRA Rule 9629 is a method "reasonably likely to obtain prompt service," not "due notice." Opp. Br. at 8, 11.

[2] Contrary to Sharbat's assertions, there is no evidence in the record that the Hearing Officer knew when issuing the default decision that Sharbat "had come to rely on" receiving documents by email. Sharbat received documents at his Tel Aviv address and never notified the Office of Hearing Officers about an alleged preference for email. Considering that Sharbat had received actual notice at his Tel Aviv address, service via FedEx at the same address, in fact, was "reasonably calculated to give Sharbat proper notice of either the sanctions imposed on him, or the time limits in which to challenge those sanctions." Opp. Br. at 8.

notice of a default decision or otherwise make numerous attempts at service on defaulting respondents is not required by FINRA rules. Rather, FINRA is required only to serve a default decision on a respondent by means reasonably likely to obtain prompt service when the sanction is a bar, which is precisely what the Hearing Officer did in this case. *See* Rule 9269(d). Here, Sharbat undeniably had actual notice of the complaint and motion for entry of default judgment. RP 55-56 (¶¶9, 12, 16), 92-93, 95-96, 106-07; Opp. Br. at 3. *Cf. Paz Sec.*, *Inc.*, 58 S.E.C. 859, 869-70 (2005) (refusing to set aside default judgment when applicant had actual notice of the complaint), *remanded for redetermination of sanctions*, 494 F.3d 1059 (D.C. Cir. 2007). Moreover, the Hearing Officer's service of the default decision and notice of default decision at Sharbat's Tel Aviv address was reasonably likely to result in prompt service; thus, the Hearing Officer followed FINRA rules.[3]

Despite receiving, at the very least, constructive notice of the default decision and having actual notice of the complaint against him and Enforcement's motion for entry of default judgment, Sharbat admittedly chose to default by "allow[ing] the action to take place without responding."[4] RP 147. This notice is not somehow negated by Sharbat's or his attorney's

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[3] Sharbat takes issue with FINRA's citation to *Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875 (July 25, 2018). Here, FINRA brought a disciplinary proceeding against Sharbat and sought a default after his failure to answer. *Dowd*, on the other hand, was an appeal of an expedited proceeding in which Dowd conceded that FINRA provided him with a bar notice. 2018 SEC LEXIS 1875, at *8-9. FINRA cited the *Dowd* case for the general propositions that the Commission will not consider an application for review if the applicant failed to follow FINRA procedures, and that the Commission has dismissed untimely applications for review. *See* Opening Br. at 8, 13. Nothing in Sharbat's brief undermines this well-established precedent for which FINRA cited *Dowd*.

[4] Sharbat cannot now try to bypass the NAC's review process based on a change of heart about his litigation strategy under which he chose not to participate in the disciplinary proceeding against him. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *60 (Jan. 30, 2009) ("Public policy considerations favor the expeditious disposition of

[Footnote continued on next page.]

purported misunderstanding about the potential repercussions as a result of Sharbat's choice to default. While Sharbat admits he received Enforcement's motion for entry of default judgment, he asserts that his misunderstanding about the potential sanctions means that he "never received real notice of what he was facing" and is "prejudicial error." Opp. Br. at 4, 7. The argument is a red herring and should be disregarded.[5]

The language in Enforcement's motion for entry of default judgment is plain and unambiguous on its face. *See also* FINRA's Opening Br. at 12. Enforcement's request that "the Hearing Office enter a Default Order barring [Sharbat] for violating FINRA Rules 8210 and 2010, and suspending him for six months and fining him $25,000 for violating Regulation M and NASD" is conjunctive, not disjunctive. RP 50. Sharbat's contention that these sanctions are "options" that cannot coexist is addressed by a footnote immediately following the allegedly problematic sentence and conveniently ignored by Sharbat. Opp. Br. at 3. The footnote provides: "If Sharbat is barred for his failure to testify, the fine and suspension for violating Regulation M need not be imposed." RP 50. Enforcement undoubtedly was seeking to bar Sharbat in the underlying proceeding and asked that the Hearing Officer not impose the six-

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[cont'd]

litigation, and a respondent cannot be permitted to gamble on one course of action and, upon an unfavorable decision, to try another course of action.") (internal quotations omitted), *aff'd*, 416 F. App'x 142 (3d Cir. 2010); *see also Kirlin Sec., Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *62 (Dec. 10, 2009) ("[W]e have held that an applicant's unsuccessful litigation strategy 'does not warrant reopening the record.'") (quoting *Russo Sec.*, Inc., 55 S.E.C. 58, 78 (2001)).

[5] Sharbat's observations concerning attorney Irv Einhorn also do not provide him with the relief he is seeking. Opp. Br. at 3. While the default decision and notice of default were not sent to Einhorn, Einhorn never filed a notice of appearance under FINRA Rule 9141, nor made any other filings on Sharbat's behalf reflecting that Einhorn officially represented Sharbat before FINRA in these proceedings. *See* FINRA Rules 9134, 9141. The Hearing Officer served the default decision and notice of default decision on Sharbat at his Tel Aviv address in conformity with FINRA rules.

month suspension and fine *if* Sharbat was barred. While the Commission must construe Sharbat's assertions in his application for review in his favor, Sharbat's story about any ambiguity in the motion's text is unfounded and his purported reliance on his counsel's interpretation defies credibility. Regardless, any interpretation about Enforcement's requested sanction is irrelevant because it is within the Hearing Officer's discretion, not Enforcement's, to determine the appropriate sanction.[6] *See* FINRA Rules 9268(b)(6), 9269.

Sharbat misinterprets the holding in *Destina Mantar*, Exchange Act Release No. 79851, 2017 SEC LEXIS 194 (Jan. 19, 2017). Opp. Br. at 8. As explained in FINRA's opening brief, *Mantar* is an expedited proceeding initiated pursuant to FINRA Rule 9552, in which the Commission permitted a late appeal. *See* Opening Br. at 14 n.8. The Commission stated: "[W]e have not held in the *context of expedited proceedings* that mailing documents to an individual's CRD address is always sufficient to support a dismissal for failing to exhaust administrative remedies." *Mantar*, 2017 SEC LEXIS 194, at *9 (emphasis added). The Commission continued, "expedited proceedings and disciplinary proceedings are 'two [separate] avenues' for addressing Rule 8210 violations." *Id.* at *11. "In cases challenging a bar imposed *in expedited proceedings* where there is reason to believe the applicant did not have actual notice of FINRA"s

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[6] Besides, Sharbat offers no support for his claim that he reasonably relied on such advice, other than his self-serving statements now made by different counsel who was not representing him at the time. *See Paz*, 58 S.E.C. at 869-70 (refusing to set aside default judgment based on applicant's assertions of negligent assistance of counsel when there was no evidence that the applicant took any actions to consult with his counsel); *see also Howard Brett Berger*, Exchange Act Release No. 58950, 2008 SEC LEXIS 3141, at *40 (Nov. 14, 2008) ("We believe that the respondent asserting such reliance must provide sufficient evidence . . . that the respondent made full disclosure to counsel, appropriately sought to obtain relevant legal advice, obtained it, and then reasonably relied on the advice."), *aff'd*, 347 F. App'x 692 (D.C. Cir. Oct. 1, 2009), *cert. denied*, 559 U.S. 1102 (2010).

information requests or notices, we have regularly remanded the matter back to FINRA."[7] *Id.* (emphasis added). Here, FINRA brought a disciplinary proceeding against Sharbat by filing a complaint and sought a default after his failure to answer that complaint—about which Sharbat was well aware. RP 55-56 (¶¶9, 12, 16), 92-93, 95-96, 106-07; Opp. Br. at 3. Thus, the same policy considerations with respect to expedited proceedings, or the requirement that FINRA demonstrate actual notice in certain instances to secure a dismissal, are not applicable here.[8]

In sum, FINRA properly served Sharbat with the default decision and notice of default decision in accordance with its rules. Despite receiving actual notice of the complaint, knowing that FINRA was seeking a default judgment against him, and receiving constructive notice of the default decision and notice of default decision, Sharbat nonetheless chose to take no action and default. Sharbat then failed to appeal to the NAC to set aside that default. Sharbat therefore failed to exhaust his administrative remedies, and the Commission should dismiss this appeal.

B. Sharbat's Application for Review Is Untimely.

Even if Sharbat had exhausted his administrative remedies, the Commission should nonetheless dismiss this appeal on the separate ground that it is untimely. It is undisputed that Sharbat filed his appeal more than seven and one-half years late after FINRA properly served the

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[7] The Commission's recent decision in *Brendan D. Feitelberg* further elucidates the Commission's position with respect to expedited proceedings when there is reason to believe that the applicant did not have actual notice of FINRA's information or notices. Exchange Act Release No. 89365, 2020 SEC LEXIS 2746, at *14-15 (July 21, 2020). The proceeding against Sharbat was disciplinary in nature and not expedited under Rule 9552.

[8] In addition, unlike both Mantar and Feitelberg who acted promptly and provided FINRA with the requested information from the underlying requests before filing their appeals with the Commission, Sharbat waited more than seven and one-half years (and even at least four months after the entry of the administrative actions against Del Presto and Honing) to file this appeal and has never offered to provide FINRA with the requested testimony. *See Feitelberg*, 2020 SEC LEXIS 2746, at *14; *Mantar*, 2017 SEC LEXIS 194, at *13.

default decision and notice of default decision at Sharbat's Tel Aviv address on November 8, 2012. RP 129, 140, 146A-B; *see* FINRA Rule 9269. His application is therefore untimely.

In addition, Sharbat has failed to demonstrate that the circumstances surrounding his untimely application were beyond his control and that he promptly arranged for filing of the appeal as soon as reasonably practicable thereafter. *See PennMont Sec.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at *18-19 (Apr. 23, 2010). Sharbat does not address the *PennMont* standard or even cite the case, the controlling precedent interpreting exceptional circumstances that justify the failure to timely appeal under Commission Rule of Practice 420(b). Nor can he because the record undercuts any argument that extraordinary circumstances exist.

First, the failure to file timely was within Sharbat's control. Sharbat choose, based on purported advice of counsel, to allow the default proceeding to proceed against him and the resulting sanction to be imposed. RP 147-48. As Sharbat acknowledged in his application for review, "[b]ased upon his understanding that this suspension was only for a short time, and in light of the threats he received, [Sharbat] thought the safer course was neither testify nor appeal." RP 147. For the reasons previously stated, Sharbat's misimpression about Enforcement's suggested sanction is neither reasonable nor relevant.

Second, even if the Commission were to accept Sharbat's tale of purported threats against him constituted an extraordinary circumstance, Sharbat did not promptly arrange for the filing of his appeal as soon as reasonably practicably thereafter. Sharbat, who moved to Israel in 2012 allegedly because of threats by Samuel DelPresto and Barry Honing, nevertheless waited seven and one-half years to file this application for review. He attempts to justify the long passage of time by noting that the Commission recently entered final administrative judgments against DelPresto and Honing in November 2019 and March 2020, respectively. Sharbat does not

explain why these administrative judgments would provide him with a "sense of security required to dare seek reversal of FINRA's judgment and penalties assessed against him." RP 148.

Even if these administrative actions did, in fact, comfort Sharbat, he still did not act promptly. After the final judgments against DelPresto and Honing, Sharbat waited an additional seven months and nearly four months, respectively, before filing this application for review. Sharbat does not address this additional delay in seeking the Commission's review. As a result, *PennMont*'s standard has not been met in this case. Sharbat therefore failed to demonstrate that extraordinary circumstances exist that justify his untimely application. *See Stephen Robert Williams*, Exchange Act Release No. 89238, 2020 SEC LEXIS 2045, at *11-13 (July 7, 2020) (dismissing applicant's application for review because application was untimely when it was sent "more than eight months after the deadline lapsed" and applicant failed to demonstrate any extraordinary circumstances justifying his untimely application); *Dowd*, 2018 SEC LEXIS 1875, at *9 (dismissing applicant's application for review because application was untimely when it was sent "about six months after the deadline lapsed" and applicant failed to demonstrate any extraordinary circumstances justifying his untimely application).

Contrary to Sharbat's arguments, Sharbat was given the opportunity to establish that extraordinary circumstances exist that justify his untimely appeal. Opp. Br. at 6, 10. *Cf. Brendan D. Feitelberg*, Exchange Act Release No. 89365, 2020 SEC LEXIS 2746, at *11-12 (July 21, 2020) (permitting a five-month late appeal when applicant provided a sworn affidavit in which he averred that he was suffering from a serious illness that prevent him from timely appealing his bar imposed in an expedited proceeding and applicant acted promptly as soon as reasonably practicable after he recovered and learned of the bar). Sharbat's failure to establish

extraordinary circumstances in either his application for review or his opposition brief does not warrant allowing this appeal to proceed, so he may have another opportunity to try to do so now.

The Commission should also reject Sharbat's misguided reliance on the case of *John M.E. Saad* and his assertion that the underlying bar warrants Commission review.[9] *See* Opp. Br. at 6, 9-10. By disputing the appropriateness of the sanction for his misconduct, Sharbat is making a merits argument which the Commission should not reach.[10] *See Larry A. Saylor*, Exchange Act Release No. 51949, 2005 SEC LEXIS 1536, at *13-14 (June 30, 2005) (rejecting arguments that purported "substantial harm" caused by a principal bar amounted to extraordinary circumstances to permit a decades-late appeal). The notion that the mere existence of a bar imposed in a default decision permits a years-late appeal would transform the "extraordinary circumstances" standard from a narrow exception into an easily-met exception that would open the floodgates of late appeals from barred respondents who previously opted not to pursue all their appellate options. *See Jakubik*, 2010 SEC LEXIS 1014, at *10 n.14 (declining to consider applicant's arguments that the bar imposed by FINRA was excessive and exceeded the sanctions

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[9] FINRA barred Saad for misappropriating firms funds following disciplinary proceedings, including a hearing before a hearing panel and an appeal to the NAC. *See John M.E. Saad*, Exchange Act Release No. 86751, 2019 SEC LEXIS 2216, at *1 (Aug. 23, 2019), *appeal docketed*, No. 19-1214 (D.C. Cir. Oct. 17, 2019). After the D.C. Circuit remanded the matter to the Commission to address whether the Supreme Court's decision in *Kokesh v. SEC* was relevant to FINRA's bar of Saad, the Commission held that *Kokesh* does not apply to FINRA-imposed bars and affirmed on the bar of Saad. *Saad*, 2019 SEC LEXIS 2216, at *2, 43-46. *Saad*'s holding is not relevant to Sharbat's attempt to appeal a bar imposed more than seven years ago after he chose then not to participate in the disciplinary proceedings against him.

[10] Sharbat makes another merits argument when he asserts that the threats against him justified his failure to cooperate with FINRA's investigation. Opp. Br. at 9. This argument is a defense to the underlying default decision and Sharbat's failure to provide testimony to FINRA. The Commission should likewise not reach this issue. *See Jakubik*, 2010 SEC LEXIS 1014, at *16-17 (rejecting applicant's challenges to the decision in the underlying proceeding when dismissing the application for review for failure to exhaust administrative remedies).

sought by Enforcement in light of finding that applicant failed to exhaust his administrative remedies and that his appeal was untimely).

While Sharbat cites *Saad* as "recent developments in case law," he fails to address controlling and on-point precedent cited by FINRA in its brief. Among other oversights, Sharbat does not distinguish *Edward J. Jakubik*. Like Sharbat, the underlying proceeding at issue in *Jakubik* was a disciplinary proceeding that resulted in a default judgment. 2010 SEC LEXIS 1014, at *13. The Commission dismissed Jakubik's application for review of a default decision barring the applicant based on his failure to exhaust administrative remedies and untimeliness. *Id.* at *15-17. The Commission should follow its established precedent and dismiss Sharbat's application for review because it is untimely and Sharbat failed demonstrate that extraordinary circumstances exist to justify permitting the appeal. *See id.* (refusing to accept an application for review filed five years after the final NASD action).

IV. CONCLUSION

Sharbat's application for review should be dismissed because he chose not to exhaust FINRA's administrative remedies available to him. In addition, Sharbat's appeal is untimely. While the Commission resolves the preliminary issues raised by this motion, it should stay the briefing schedule.

Respectfully submitted,

/s/Megan Rauch

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Dated: August 14, 2020

CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 14th day of August 2020, I caused a copy of FINRA's Reply in Support of Its Motion to Dismiss Application for Review and to Stay Briefing Schedule in the matter of *Application for Review of Shlomo Sharbat*, Administrative Proceeding No. 3-19870 to be served via email on:

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Due to office closures related to COVID-19, the parties agreed to accept service from each other via electronic mail.

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