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February 25, 2021

VIA ELECTRONIC MAIL

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F. St., NE - Room 10915
Washington, D.C. 20549-1090
apfilings@sec.gov

RE: In the Matter of the Application for Review of Shad Nhebi Clayton
Administrative Proceeding No. 3-20192

Dear Ms. Countryman:

Enclosed please find FINRA's Reply in Support of its Motion to Dismiss Shad Nhebi Clayton's Application for Review in the above-captioned matter.

Please contact me at (202) 728-8255 if you have any questions.

Sincerely,

/s/ Gary Dernelle

Gary Dernelle

Enclosures

cc: Shad Nhebi Clayton (via Email)

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application of

Shad Nhebi Clayton

For Review of Action Taken by

Financial Industry Regulatory Authority

File No. 3-20192

FINRA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS SHAD NHEBI CLAYTON'S APPLICATION FOR REVIEW

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February 25, 2021

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I. INTRODUCTION

On September 6, 2011, FINRA barred Shad Nhebi Clayton ("Clayton") from associating in any capacity with any FINRA member. His exclusion from the securities industry resulted inescapably by operation of FINRA Rule 9552 after he defaulted from an expedited proceeding that FINRA brought to address his failure to comply in any manner with two requests for information and documents issued under FINRA Rule 8210.

Although it is nearly a decade final, Clayton now requests that the Commission review the FINRA action that imposed the bar on him. Nevertheless, as FINRA argued in its February 1, 2021 motion to dismiss Clayton's application for review, he long ago surrendered his right to appeal that action. His application is ripe for dismissal for two, independent reasons. First, Clayton failed to exhaust the administrative remedies that FINRA provided him before he resorted to filing an appeal with the Commission, and second, his application for review is plainly time barred.

Clayton presents nothing in his opposition to FINRA's motion that alters the reality that dismissing his application for review is the correct consequence to bring his appeal to a fitting conclusion. Clayton challenges none of the relevant facts or dispositive legal points on which FINRA's motion is justifiably based. FINRA served all the written notices of its action in accordance with FINRA Rule 9552, he failed to follow FINRA procedures for challenging his suspension, and he defaulted, which resulted inevitably in his bar from the securities industry. He also clearly filed his application for review late. His assertion that he did not learn of FINRA's action until 2017, and the fact that he then waited until the twilight of 2020 to file his appeal, only serves to underscore the untimeliness of his application for review.

The arguments he marshals in support of his opposition to FINRA's motion to dismiss his application are of no moment. Although he makes several unverified claims, for example that a divorce and mental and physical duress prevented him from timely filing an appeal, these assertions do not establish extraordinary circumstances that could warrant the exercise of the Commission's discretionary authority to entertain his application for review at such a late date. Simply put, Clayton has provided no defensible grounds to excuse his failure to take steps to avoid or appeal the bar FINRA imposed on him nearly ten years ago.

For these reasons, and those set forth in FINRA's February 1, 2021 motion, the Commission should dismiss Clayton's application for review.

II. BACKGROUND

The FINRA action that Clayton belatedly appeals followed an investigation to determine whether Clayton violated securities industry rules and regulations by failing to disclose a regulatory action and tax liens or judgments on his Uniform Application for Securities Industry

Registration or Transfer ("Form U4"). RP 1-2, 81-83.[1] During that investigation, FINRA sent to Clayton's residential address as reflected in the Central Registration Depository ("CRD"®) two written requests that directed him to provide information and documents pursuant to FINRA Rule 8210. RP 1-2, 3-5, 13, 55-56.

Clayton did not respond in any manner to either of these requests. RP 3, 7, 81. Therefore, on June 2, 2011, FINRA brought an expedited proceeding under FINRA Rule 9552 to compel Clayton's response. RP 7. On that date, FINRA sent written notice to Clayton's CRD address informing him that FINRA intended to suspend him from associating in any capacity with any FINRA member on June 27, 2011, unless he took corrective action or requested a hearing. RP 7-11, 12, 13, 55-56. FINRA advised Clayton that once suspended, and absent a written request that FINRA terminate his suspension on the ground of full compliance with FINRA's two requests for information and documents, FINRA would automatically bar him from the securities industry on September 6, 2011. RP 8.

On June 27, 2011, after Clayton did not take corrective action or request a hearing, FINRA suspended him. RP 21-22. He did not thereafter request that FINRA terminate his suspension or provide the information and documents that FINRA twice requested that he produce. RP 33, 83. Accordingly, on September 6, 2011, FINRA sent written notice to Clayton's CRD address that FINRA had barred him, effective immediately, from associating in any capacity with any FINRA member. RP 29, 33-34, 35, 55-56.

Although FINRA informed Clayton that he could appeal FINRA's action to the Commission within 30 days of his receipt of FINRA's bar notice, he did not timely do so. RP

[1] "RP __" refers to the page number in the certified record filed by FINRA on February 1, 2021.

33-34, 55-56. Clayton, claiming he did not learn until 2017 that FINRA had barred him from the securities industry, instead filed an application for review with the Commission nearly ten years after FINRA's action took effect. RP 55-63.

On February 1, 2021, FINRA moved the Commission to dismiss Clayton's application because he failed to exhaust his FINRA remedies and his appeal is untimely. On February 22, 2021, FINRA received by email Clayton's undated brief in opposition to FINRA's motion.

III. ARGUMENT

Clayton's appeal remains ripe for dismissal. The Commission should do so for two, independent reasons—Clayton failed to exhaust the administrative remedies FINRA provided him before he appealed FINRA's final action to the Commission, and his application for review, which he filed nearly ten years after the 30-day appeal period ended, is blatantly untimely. Clayton's opposition to FINRA's February 1, 2021 motion to dismiss his application for review does not raise any new fact or legal argument that supports an alternate conclusion to this proceeding.

A. Clayton Did Not Exhaust His Administrative Remedies Before FINRA

The Commission should dismiss Clayton's application for review first because he failed to exhaust his administrative remedies before FINRA. The Commission has long held that it will not consider an application for review filed by an applicant who failed to exhaust FINRA's process for contesting the FINRA action about which he complains. *Gregory S. Profeta,* Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at *5 & n.5 (May 6, 2010) (collecting cases). It remains an undisputed and dispositive fact of this case that Clayton did not follow the procedural steps recognized under FINRA Rule 9552 for challenging his suspension and

avoiding the bar FINRA imposed on him. Clayton had an opportunity to (1) take corrective action by complying with FINRA's two requests for information and documents by the suspension date indicated in the written notice FINRA sent to his CRD address on June 2, 2011; (2) request a hearing before his suspension took effect on June 27, 2011; and (3) once suspended, file a written request by September 6, 2011, that FINRA terminate his suspension on the ground that he complied fully with FINRA's two requests for information and documents. *See* RP 7-8; *see also* FINRA Rule 9552(a), (e)-(f) (2011) (detailing the steps available to members and persons associated with members to avoid suspensions and bars imposed in expedited proceedings brought under FINRA Rule 9552). Because Clayton failed to take any of these steps, he failed to exhaust his administrative remedies and lost the ability to challenge FINRA's action through this appeal. *See Patrick H. Dowd*, Exchange Act Release No. 83710, 2018 SEC LEXIS 1875, at *13 (July 25, 2018) ("His only response was to file an application for review with the Commission after he was barred.").

B. Clayton's Application for Review Is Inexcusably Late

Clayton's untimely appeal establishes a second basis, independent of his failure to exhaust, for the Commission to dismiss Clayton's application for review. Section 19(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act") provides that a person aggrieved by a final FINRA action must file an application for review with the Commission "within thirty days after the date such notice [of action] was . . . received by the aggrieved person, or within such longer period as [the Commission] may determine." 15 U.S.C. § 78s(d)(2). In accordance with its rules, FINRA sent written notice of Clayton's bar by FedEx and first-class mail to his CRD address on September 6, 2011. *See* RP 29, 33, 35, 55-56; *see also* FINRA Rule 9552(b) (2011) (requiring that FINRA serve notice in accordance with FINRA Rule 9134); FINRA Rule 9134 (a)-(b)

(2011) (permitting service on a natural person by personal service, mail, or courier service at the person's residential address as reflected in CRD). Consequently, Clayton received constructive notice of FINRA's final action, which started the 30-day period within which he was required to file an appeal. *See Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *16 (Feb. 8, 2016) ("FINRA's service by mail to Manzella's CRD address provided her with constructive notice of the action, which started the running of the appeal period."). It is undisputed, however, that Clayton's application for review was not filed with the Commission until December 21, 2020, almost ten years after the deadline to appeal FINRA's action had lapsed. RP 55. It is therefore unmistakably untimely and should be dismissed.

C. Clayton Fails to Raise Any Justification for the Commission to Exercise Its Discretion and Accept His Late Appeal

Clayton does not challenge any of the relevant facts or dispositive legal points on which FINRA's motion to dismiss is justifiably based. He nevertheless argues in his brief in opposition to FINRA's motion that "multiple [simultaneous] events" warrant that the Commission consider his blatantly late appeal on its merits. Although Rule 420(b) of the Commission's Rules of Practice grants the Commission discretion to hear an otherwise untimely application for review if "extraordinary circumstances" are present, this exception to enforcement of the appeal period established by Section 19(d)(2) of the Exchange Act is narrowly read and has limited application. *See* 17 C.F.R. § 201.420(b); *see also PennMont Sec.*, Exchange Act Release No. 61967, 2010 SEC LEXIS 1353, at *16 (Apr. 23, 2010) ("[T]he 'extraordinary circumstances' exception is to be narrowly construed and applied in only limited circumstances."). To establish a claim of extraordinary circumstances, Clayton must show that the reasons for his late-filed application for review were beyond his control. *See id.* at *18. He has not met this burden.

To begin, Clayton argues that he was unaware of FINRA's action barring him from the securities industry because he was unable to receive mail sent to his CRD address due to unverified claims that he was in the midst of a divorce and, for a period until December 2011, without a permanent residence. Clayton, however, as a person formerly associated with a FINRA member, had an ongoing duty to keep his CRD address current and to receive and read mail FINRA sent to him at that address.[2] *See* FINRA By-Laws, Art. V, Sec. 2(c); *see also Manzella*, 2016 SEC LEXIS 464, at *12 ("Manzella, as former employee of a FINRA member, was required to keep her Web CRD address of record current, and to receive mail there."). FINRA complied fully with its rules when it served Clayton with written notice of the expedited proceeding it brought against him under FINRA Rule 9552. Specifically, FINRA properly served the bar notice on Clayton by sending it by FedEx and first-class mail to Clayton's CRD address. *See* RP 29, 33, 35; *see also* FINRA Rule 9552(b); FINRA Rule 9134 (a)-(b). Clayton does not claim otherwise. Neither his failure to keep his CRD address current, an act solely within his control, nor his suggested inability to receive mail sent to his CRD address establish extraordinary circumstances that excuse the fact that his application for review was filed nearly ten years after FINRA's action against him took effect.[3] *See Rogelio Guevara*, Exchange Act

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[2] Clayton recognized this duty in his application for review by stating that he "take[s] full responsibility" for his failure to amend his Form U4 to update his CRD address. RP 55.

[3] These reasons also do not, as Clayton avers in his opposition to FINRA's motion to dismiss, render invalid FINRA's argument that his appeal should be dismissed because he failed to exhaust his administrative remedies. *See Manzella*, 2016 SEC LEXIS 464, at *12 ("Manzella's assertion that she did not 'physically take receipt' of the July 2014 letter or the prior requests for information does not excuse her failure to exhaust."); *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 4624, at *13 n.12 (Apr. 10, 2014) ("Even if Mullins had argued that he did not receive certain FINRA correspondence because he no longer received correspondence at the CRD address . . . that argument would have no merit."); *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *10 (Jan. 24, 2014)

[Footnote continued on next page]

Release No. 78134, 2016 SEC LEXIS 2233, at *8 (June 22, 2016) ("But because Guevara failed to keep his CRD address current as FINRA's by-laws require, his belated collection of FINRA's bar notice does not excuse his failure to timely file his application."); *see also Manzella*, 2016 SEC LEXIS 464, at *15 (finding applicant's appeal untimely when FINRA properly served her with notice sent to her CRD address and thus provided her with constructive notice of FINRA's action).

Next, Clayton claims that a "period of mental and physical duress" prevented him from timely appealing FINRA's final action. The Commission, however, has found that such unsubstantiated personal problems do not constitute extraordinary circumstances that excuse a late-filed appeal.[4] *See Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 SEC LEXIS 3749, at *13 (Dec. 1, 2017) ("Nothing Kolquist submitted suggests that his health issue prevented him from filing an application for review in the thirty days after receiving the Bar Notice, or in the nearly eleven months after that deadline lapsed."). Clayton's assertion that he was not of "sound mind" frankly does not justify his untimely application for review.

[cont'd]

(rejecting as an excuse for a failure to exhaust administrative remedies applicant's claim that "he did not receive the FINRA correspondence in a timely manner because he was unable to receive mail per the policy of the residence at which he was residing temporarily"); *Gilbert Torres Martinez*, Exchange Act Release No, 69405, 2013 SEC LEXIS 1147, at *15 (Apr. 18, 2013) ("[W]e have repeatedly held that not doing so is no defense to a failure to respond.").

[4] Nor do they validate Clayton's failure to exhaust the administrative remedies provided under FINRA Rule 9552. *See Curtis Steven Culver*, Exchange Act Release No. 75774, 2015 SEC LEXIS 3541, at *11 (Aug. 27, 2015) ("Without medical records or other proof that medical or personal problems prevented Culver from responding to the Rule 8210 requests, there is no basis for excusing his failure to exhaust available administrative remedies."); *Lee Gura*, 57 S.E.C. 972, 976 (2004) ("Gura has not provided any evidence substantiating his claims of depression so severe that he could not respond in any manner to NASD's multiple requests for information.").

Finally, Clayton argues that he did not learn of the fact that FINRA had barred him until 2017, at which point he, or his firm, allegedly spoke with FINRA staff but was told that he could not appeal FINRA's action. These second or third-hand, undocumented assertions, which Clayton submits without detail or attribution, are not under Rule 420(e) of the Commission's Rules of Practice part of the record of FINRA's action, and he has not moved to adduce additional evidence to support them as required under the Commission Rule of Practice 452. *See* 17 C.F.R. § 201.420(e) (requiring FINRA to certify and file with the Commission one copy of the "record upon which the action complained of was taken"); 17 C.F.R. § 201.452 ("A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission."). The Commission should therefore disregard them. *See David Richard Kerr III*, Exchange Act Release No. 79744, 2017 SEC LEXIS 76, at *2 n.4 (Jan. 5, 2017).

Clayton has not established that any information FINRA staff allegedly provided to him or his firm since 2017 is material to the issues FINRA raised in its motion to dismiss. *See* 17 C.F.R. § 201.452 ("Such motion shall show with particularity that such additional evidence is material . . . ."). Indeed, any statements by FINRA, coming many years after the final action that resulted in Clayton being barred, could not possibly explain away Clayton's failure to exhaust his administrative remedies and timely file an application for review in 2011. Nor would they shift to FINRA Clayton's responsibility to understand the consequences of his bar or the means by which he might pursue a return to the securities industry, either by appealing FINRA's action to the Commission or pursuing, with a FINRA member's sponsorship, an application with FINRA to permit his association with a member despite the existence of a statutory

disqualification.[5] *Cf. John G. Harmann*, 51 S.E.C. 687, 693-94 (1993) ("Once individuals are involved in a disciplinary proceeding and have actual notice . . . , it is incumbent upon them to inform themselves of the potential outcomes of that review."). At a minimum, Clayton admits that he had actual notice of his bar from at least 2017, and he did not promptly appeal as soon as reasonably practical thereafter. His failure to do so shows that no extraordinary circumstances justify excusing his failure to file an appeal until late 2020. *See Michael Ross Turner*, Exchange Act Release No. 81693, 2017 SEC LEXIS 2974, at *13 (Sept. 22, 2017) ("Turner's repeated failure to promptly appeal after receiving actual notice of his bar establishes that no extraordinary circumstances justify excusing his failure to file an appeal within thirty days of his receipt of the Bar Notice."); *see also Caryl Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at *11 (Sept. 19, 2014) ("Her professed ignorance of the bar's consequences and alleged reliance on advice from a FINRA examiner . . . do not constitute extraordinary circumstances that would excuse her late filing.").

Although Clayton asserts in his brief in opposition to FINRA's motion that dismissal of his appeal would "constitute a grave injustice," the exhaustion of remedies doctrine and the requirement that an applicant timely file an application for review are important preconditions for Commission review of any final FINRA action. *See, e.g.*, *Dowd*, 2018 SEC LEXIS 1875, at *11 ("The exhaustion requirement promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to

[5] Clayton, who was barred by FINRA, is subject to a statutory disqualification under Section 3(a)(39)(A) of the Exchange Act. *See* 15 U.S.C. § 78c(a)(39)(A). A statutorily disqualified person is not eligible to associate with a FINRA member without the consent of FINRA. Any FINRA member wishing to associate with a statutorily disqualified person must apply to FINRA for permission to continue operating notwithstanding such association. FINRA By-Laws, Art. III, Sec. 3(b), (d).

SROs to settle, in the first instance, disputes relating to their operations."); *id.* at *25 ("As we have observed, strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief."). Clayton provides no reason to deviate from these rules here. His failure to exhaust the administrative remedies FNRA provided him and the untimeliness of his appeal clearly warrant that the Commission dismiss his application for review.[6]

IV. CONCLUSION

The Commission should dismiss Clayton's application for review. Clayton failed to exhaust FINRA's procedures for contesting its action against him, and he therefore failed to exhaust his administrative remedies. His application is also untimely. Clayton's failure to pursue an appeal to the Commission within the 30-day appeal period is not disputed, and he has not shown that any extraordinary circumstances exist to effectively extend the deadline for him to file an application for review of FINRA's action by nearly ten years.

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[6] Any other arguments that Clayton raises in his opposition regarding the merits of the bar FINRA imposed on him—for example, that he was not terminated for misconduct, that he did not engage in any unethical misconduct, or that he has paid the debt that resulted in the suspension of his insurance license—are obviously irrelevant to FINRA's pending dispositive motion, and the Commission should disregard them. *See Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 SEC LEXIS 1403, at *17 (May 9, 2017) ("Jones cannot argue about the merits of the bar since he did not timely raise the issue in the first instance to FINRA through its administrative process by, for example, requesting a hearing in response to the Pre-Suspension Notice."); *Profeta*, 2010 SEC LEXIS 1563, at *7 ("Applicant's reasons for not responding to FINRA's letters do not mitigate his failure to comply with FINRA's procedures.").

Respectfully submitted,

/s/ Gary Dernelle

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February 25, 2021

CERTIFICATE OF SERVICE

I, Gary Dernelle, certify that on this 25th day of February 2021, I caused FINRA's Reply in Support of its Motion to Dismiss Shad Nhebi Clayton's Application for Review, Administrative Proceeding No. 3-20192, to be served by electronic service on:

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

Shad Nhebi Clayton
[redacted]
West Des Moines, IA [redacted]

Respectfully submitted,

/s/ Gary Dernelle

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