

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

In the Matter of the Application of

Nancy Kimball Mellon,

For Review of

FINRA Disciplinary Action

File No. 3-21267

**FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND STAY THE
ISSUANCE OF THE BRIEFING SCHEDULE**

Alan Lawhead
Vice President and
Director – Appellate Group

Andrew Love
Associate General Counsel

Colleen Durbin
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
202-728-8816 – Telephone
202-728-8264 – Facsimile

January 6, 2023

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I. INTRODUCTION

FINRA moves to dismiss Nancy Kimball Mellon’s application for review because it is untimely.¹ Mellon filed her application for review more than two months after FINRA’s National Adjudicatory Council (“NAC”) found that she converted \$4,300 from her employer firm, Wells Fargo Clearing Services, LLC (“Wells Fargo”), by submitting false expense reports (which also caused the firm to maintain inaccurate books and records) and that Mellon provided false and misleading information to FINRA. The Securities Exchange Act of 1934 (“Exchange Act”) and Commission rules provide that an aggrieved person applying for review must file such an application within 30 days after receiving notice of a determination by FINRA. Mellon has

¹ Pursuant to Commission Rule of Practice 161, FINRA respectfully requests that the Commission stay the issuance of the briefing schedule while this dispositive motion remains pending.

neither timely filed her application for review, nor made the required showing of “extraordinary circumstances” sufficient to justify an extension of her time to file. Consequently, the Commission should dismiss Mellon’s appeal.

I. FACTUAL BACKGROUND

On November 9, 2018, FINRA’s Department of Enforcement filed a four-cause complaint against Mellon. RP 5-16.² Cause one alleged that Mellon converted \$4,300 from Wells Fargo, in violation of FINRA Rule 2010. Cause two alleged that Mellon also violated FINRA Rule 2010 by submitting false expense reports to Wells Fargo. Cause three alleged that by submitting false expense reports, Mellon caused Wells Fargo to maintain inaccurate books and records, in violation of FINRA Rules 4511 and 2010. Finally, cause four alleged that Mellon violated FINRA Rules 8210 and 2010 by providing false and misleading information to FINRA during its investigation. Mellon filed an answer denying the charges and requested a hearing. RP 39.

After a two-day hearing, a FINRA Hearing Panel concluded that Mellon committed each of the violations alleged and barred her from associating with any member firm in any capacity. RP 1415-1443. Mellon appealed to the NAC. RP 1447-48. On October 18, 2022, the NAC issued its decision affirming the Hearing Panel’s findings of liability and also affirmed the three separate bars the Hearing Panel imposed on Mellon for her misconduct. RP 1556-73. In the cover letter sent to Mellon accompanying the NAC’s decision, FINRA informed Mellon that if she wished to appeal the decision, she must file with the SEC within 30 days and provided instructions to her on how to do so. RP 1553-55.

² “RP” refers to the record page number in the certified record filed with the Commission on January 4, 2023.

Upon receipt of the NAC’s decision, on October 18, 2022, Mellon emailed FINRA counsel to inform them that she intended to appeal. RP 1575, 1599. Mellon also attached a previously filed hardship waiver request form and various tax documents to the email. RP 1599; 1602-1941. The following day, on October 19, 2022, Mellon emailed FINRA counsel again attaching various documents related to a BrokerCheck dispute and a request to update her residential address. RP 1943-2006. Counsel for FINRA responded to Mellon that if she believed that the information attached to her emails was pertinent to her appeal, she should file it with the Commission. RP 2007.

More than one month later, on November 24, 2022, after her 30-day appeal window had closed, Mellon again emailed FINRA counsel, this time asking that the information regarding her bar be “removed from [her] reporting” since she had appealed. RP 2011. The next day, FINRA counsel responded to Mellon that FINRA had not received any notice of appeal from Mellon, nor had it received notice from the Commission acknowledging her appeal. FINRA counsel also directed Mellon to contact the Commission if she had any questions about her appeal. *Id.* Mellon responded to FINRA counsel asking where she should send her appeal. RP 2095. Counsel for FINRA replied that the cover letter accompanying the NAC’s decision explained how to appeal the NAC decision to the Commission. FINRA counsel again provided that cover letter as an attachment to the email. *Id.*

On December 29, 2022, Mellon filed her application for review with the Commission. RP 2177.

II. ARGUMENT

The Commission should dismiss Mellon’s application for review because it is untimely, and Mellon has made no attempt to establish the “extraordinary circumstances” sufficient to

justify an extension of her time to submit an application for review.

Exchange Act Section 19(d)(2) provides that any person aggrieved by a self-regulatory organization's imposition of one of the four actions specified in Section 19(d)(1) may file an appeal "within thirty days" after the date the notice of the self-regulatory organization's determination was filed with the SEC and received by the aggrieved person, or "within such longer period as [the SEC] may determine." 15 U.S.C. § 78s(d)(2); *see also* Commission Rule of Practice 420(b) (same).

Mellon's appeal is untimely, and the Commission should dismiss it. Despite receiving a copy of the NAC's decision and an accompanying cover letter explaining the 30-day appeal period and the Commission's electronic filing requirement on the date the decision was issued, Mellon waited until the end of December—72 days after she received notice of the NAC's decision and 42 days after her appeal period expired to file her appeal with the Commission. In addition, on two occasions – October 19 and November 25, FINRA counsel encouraged Mellon to reach out the Commission to seek assistance with her appeal.

Commission Rule of Practice 420 is the "exclusive remedy" for seeking an extension of the 30-day appeal period. 17 C.F.R. § 201.420(b). That rule provides that the Commission "will not extend this 30-day period, absent a showing of extraordinary circumstances." *Id.*; *see also*, *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at *7 & n.9 (May 20, 2008). Mellon's application for review, however, provides absolutely no explanation for her lateness, much less a showing of "extraordinary circumstances."

The Commission has stated that the "extraordinary circumstances" exception to the 30-day filing rule should be "narrowly construed and applied only in limited circumstances" because "strict compliance with filing deadlines facilitates finality and encourages parties to act

timely in seeking relief.” See *Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014, at *20-21 (June 17, 2010), *aff’d*, 447 F. App’x 984 (11th Cir. Dec. 5, 2011). The Commission has explained that a showing of extraordinary circumstances may be made where “an applicant’s failure timely to file was beyond the control of the applicant.” *Id.* at *21.

However, “[e]ven ‘when circumstances beyond the applicant’s control give rise to the delay’ in appealing, the applicant must ‘demonstrate that he or she promptly arranged for the filing of the appeal as soon as reasonably practicable.’” *Shlomo Sharbat*, Exchange Act Release No. 93757, 2021 SEC LEXIS 3647, at *12 (Dec. 13, 2021); *Michael Ross Turner*, Exchange Act Release No. 81693, 2017 SEC LEXIS 2974, at *8 (Sept. 22, 2017).

Mellon has provided no excuse for the lateness of her appeal, let alone a showing of extraordinary circumstances. In fact, Mellon’s communications with FINRA belie any argument that she was either unable or incapable of filing her appeal. The Commission has routinely rejected applications for review where the applicants did not act promptly to pursue their appeals. See, e.g., *McBarron Capital LLC*, Exchange Act Release No. 81785, 2017 SEC LEXIS 3112, at *5-7 (Sept. 29, 2017) (dismissing an application for review as untimely where it was filed almost one month late and the applicant provided to explanation for its lateness); *Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 SEC LEXIS 1403, at *18-20 (May 9, 2017) (dismissing an untimely application for review where applicant never sought an extension of the time to file and provided no explanation for his late filing); *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at *8 (June 22, 2016) (dismissing an untimely application for review where applicant claimed not to have received timely notice from FINRA because he failed to update his CRD address); *Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at *17 (Feb. 8, 2016) (dismissing an untimely application for

review where applicant never sought an extension). As the Commission has observed, “unmet deadlines may cut off substantive rights to review, but this is their function.” *Id.* (quoting *Walter V. Gerasimowicz*, Exchange Act Release No. 72133, 2014 SEC LEXIS 1598, at *9 (May 8, 2014) (citation omitted)).

Accordingly, the Commission should dismiss Mellon’s appeal because it is untimely.

III. CONCLUSION

Mellon failed timely to file her appeal with the Commission and gives no explanation that would excuse her lateness. Consequently, the Commission should dismiss Mellon’s application for review and stay the issuance of the briefing schedule.

Respectfully submitted,

/s/ Colleen Durbin

Colleen Durbin
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8816

CERTIFICATE OF COMPLIANCE

I, Colleen Durbin, certify that:

- (1) FINRA's Motion to Dismiss the Application for Review and to Stay the Issuance of a Briefing Schedule complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information; and
- (2) FINRA's Motion to Dismiss the Application for Review and to Stay the Issuance of a Briefing Schedule complies with the 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 1,439 words.

/s/ Colleen Durbin _____

Colleen Durbin
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
colleen.durbin@finra.org
nac.casefilings@finra.org
(202)728-8816

Dated: January 6, 2023

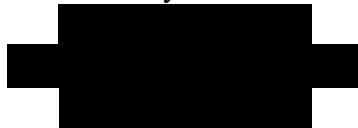
CERTIFICATE OF SERVICE

I, Colleen Durbin, certify that on this 6th day of January 2023, I caused a copy of the foregoing Motion to Dismiss the Application for Review and to Stay the Issuance of a Briefing Schedule to be filed through the SEC's electronic filing system, effecting service on:

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

I further certify that, on this date, I also caused a copy of the Motion to Dismiss the Application for Review and to Stay the Issuance of a Briefing Schedule to be served by electronic mail on:

Nancy Mellon



/s/ Colleen Durbin _____

Colleen Durbin
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, DC 20006
colleen.durbin@finra.org
nac.casefilings@finra.org
(202)728-8816