

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 69405 / April 18, 2013

Admin. Proc. File No. 3-15209

In the Matter of the Application of

Gilbert Torres Martinez
4407 Wyoming Street
Dallas, TX 75211

for Review of Disciplinary Action Taken by FINRA

ORDER GRANTING
MOTION TO DISMISS
APPLICATION FOR REVIEW

I.

Gilbert Torres Martinez, formerly a registered representative associated with Wells Fargo Advisors, LLC, a FINRA member firm, seeks review of a FINRA disciplinary action.¹ FINRA barred him from associating with any FINRA member in any capacity, effective January 14, 2013, because he failed to respond to two requests for information it issued pursuant to FINRA Rule 8210.² On February 27, 2013, FINRA filed a motion to dismiss Martinez's application for review, arguing that Martinez failed to exhaust his administrative remedies.³ For the reasons set forth below, we have determined to grant FINRA's motion and dismiss the appeal.

¹ The Financial Industry Regulatory Authority, Inc. is a private, not-for-profit, self-regulatory organization registered with, and overseen by, the Securities and Exchange Commission. For a more detailed discussion of its creation in July 2007 following the consolidation of the National Association of Securities Dealers, Inc. and the member regulation, enforcement, and arbitration functions of the NYSE Regulation, Inc., see *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *1 n.2 (Nov. 9, 2012).

² Rule 8210(a)(1) states, in relevant part, that the staff has the right to "require a member, person associated with a member, or person subject to the Association's jurisdiction to provide information orally, in writing, or electronically . . . with respect to any matter involved in the investigation . . ." FINRA Rule 8210(a)(1). The rule "provides a means, in the absence of subpoena power, for the [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).

³ Martinez did not oppose that motion or respond in any other way. See 17 C.F.R. § 201.154(b) (stating that briefs in opposition to a motion shall be filed within five days after service of the motion).

II.

A. **Martinez failed to respond to two requests for information issued by FINRA pursuant to Rule 8210.**

Martinez was associated with Wells Fargo from July 3, 2007 until May 14, 2012. On June 6, 2012, Wells Fargo filed a Uniform Termination Notice for Securities Industry Registration on Form U5,⁴ disclosing that it terminated Martinez's association with the firm, effective May 14, 2012, because he had allegedly opened bank accounts without the consent of a bank customer.⁵

On July 18, 2012, FINRA sent Martinez a letter by both first-class and certified mail, pursuant to FINRA Rule 8210, to his address-of-record as contained in the Central Registration Depository, which Martinez is required to keep current.⁶ That letter asked him to provide a signed statement that addressed the allegations in the Form U5, copies of all correspondence and memoranda regarding the circumstances surrounding his termination, and information about other complaints, if any, while he was associated with Wells Fargo. The deadline for his response was August 1. Martinez failed to respond.

On August 9, FINRA sent Martinez a second Rule 8210 request to his CRD address by first-class and certified mail, asking for the same information as in its earlier letter, a copy of which it attached. The second request set a deadline of August 23 and warned Martinez that he could be subject to disciplinary action if he failed to respond.⁷

⁴ Broker-dealers, investment advisers, and issuers of securities must file a Form U5 with FINRA to terminate the registration of an individual associated with such broker-dealer, investment adviser, or issuer.

⁵ On the Form U5, Wells Fargo characterized the allegations as involving violations of "investment-related statutes, regulations, rules or industry standards of conduct." See Question 7F on Martinez's Form U5, which Martinez submitted as an attachment to his application for review.

⁶ The letter sent by certified mail was returned as "unclaimed," but there is nothing in the record to indicate that the other letter was not received. Both letters were sent to Martinez's last known residential address listed in CRD. As part of the registration process, associated persons such as Martinez are required to sign and file with FINRA a Form U4, which obligates them to keep a current address on file with FINRA at all times. *Perpetual Sec., Inc.* Exchange Act Release No. 56613, 2007 SEC LEXIS 2353, at *35 (Oct. 4, 2007); *Nazmi C. Hassanieh*, Exchange Act Release No. 35029, 52 SEC 87, 1994 SEC LEXIS 3862, at *8 (Nov. 30, 1994). A notice issued pursuant to Rule 8210 is deemed received by such person when mailed to the individual's last known CRD address. FINRA Rule 8210(d). See also NASD Notice to Members 97-31, 1997 NASD LEXIS 35, at *1-2 (May 1997) (reminding registered persons to keep a current mailing address with NASD "[f]or at least two years after an individual has been terminated by the filing of . . . [a] Form U5") (emphasis in original). In his application for review, Martinez claims, "I moved from my previous residence four months ago and my mail was not delivered to me as it should of have [sic]." Martinez does not provide evidence to support this assertion, and he acknowledges that he failed to update his CRD address until very recently.

⁷ Again, there is no evidence in the record that the letter FINRA sent by first-class mail was returned. The tracking information for the letter sent by certified mail does not indicate whether it was received.

Although Martinez did not respond in writing to the second letter, he spoke by telephone on August 15 with the FINRA investigator who sent the two earlier Rule 8210 requests. The investigator described Martinez as "hostile and uncooperative" during that call; he was "offended that FINRA was asking him about his employment, and asked [the investigator] if [he] knew who [he] was dealing with."⁸ The investigator informed Martinez that, if he did not respond to FINRA's Rule 8210 request, FINRA would pursue a disciplinary action against him, after which Martinez immediately hung up the phone.

B. FINRA sanctioned Martinez.

On October 11, 2012, FINRA notified Martinez in writing, pursuant to FINRA Rule 9552(a),⁹ that it intended to suspend him from associating with any member firm in any capacity on November 5, 2012 unless he took corrective action before that date by complying with its Rule 8210 requests. That notice also advised Martinez that he could request a hearing under Rule 9552(e), which, if made timely, would stay the effective date of the suspension.¹⁰ The notice further warned Martinez that, if the suspension was imposed, FINRA would automatically bar him from associating with any member firm in any capacity on January 14, 2013 unless he requested termination of the suspension based on full compliance.¹¹ Martinez failed to take any action to comply with the outstanding requests or request a hearing.

On November 5, 2012, FINRA sent Martinez a letter informing him that, as of that date, he was suspended from associating with any FINRA member in any capacity pursuant to Rule 9552(d). That letter reminded Martinez that an automatic bar would be imposed on January 14, 2013 if he did not fully comply with the notice of suspension, which required him to fully

⁸ Decl. of Michael D. Malden in Support of FINRA's Mot. to Dismiss Martinez's Application for Review and to Stay Briefing Schedule at 2.

⁹ FINRA Rule 9552(a) states that if an associated person fails to provide the staff with requested information pursuant to FINRA rules, the association may provide written notice "specifying the nature of the failure and stating that a failure to take corrective action within 21 days after service of the notice will result in [a] suspension."

¹⁰ Rule 9559(c) provides that, "[u]nless the Chief Hearing Officer or the Hearing Officer assigned to the matter orders otherwise for good cause shown, a timely request for a hearing shall stay the effectiveness of a notice issued under Rule 9551 through 9556."

¹¹ Rule 9552(f) permits a suspended individual to file a written request for termination of the suspension on the ground of full compliance with the notice of suspension. Rule 9552(h) provides that a suspended person who fails to request termination of the suspension within three months of issuance of the original notice of suspension will be barred automatically.

FINRA served the October 11, 2012 written notice on Martinez by overnight courier service and first-class mail at the same CRD address it used earlier in sending the Rule 8210 requests—shortly after which Martinez contacted the FINRA investigator by telephone. Rule 9552(b) provides for service of a notice of suspension in accordance with FINRA Rule 9134, which permits service by both mail and courier service at an individual's residential CRD address. FINRA Rule 9134(a) – (b)(1). Service by mail is complete upon mailing while service by courier service is complete upon delivery. FINRA Rule 9134(b)(3). Again, there is no evidence that the letter sent by first-class mail was returned. The tracking information for the overnight courier service does not indicate whether the pre-suspension notice was received.

respond to FINRA's two earlier Rule 8210 information requests and file a request to terminate his suspension.¹²

Martinez took no action to end his suspension by supplying the information requested by FINRA, and the automatic bar from associating with any member firm in any capacity took effect on January 14, 2013. On that date, FINRA sent Martinez a letter notifying him that he was barred and could appeal its decision by filing an application for review with the Commission.¹³

On February 11, 2013, after receiving a telephone call from Martinez, FINRA e-mailed copies of the October 11, 2011 pre-suspension notice, the November 5, 2012 notice of suspension, and the January 14, 2013 bar notice to Martinez. FINRA also sent hard copies of these letters via USPS Express Mail to a new address Martinez provided over the telephone.¹⁴

III.

In a letter received by our Office of the Secretary on February 13, 2013,¹⁵ Martinez stated that he "seek[s] to appeal the suspension from Association with any FINRA member dated November 5, 2012 and Bar from Association with any FINRA member (Rule 9552) dated January 14, 2013."¹⁶ Martinez asserts in this letter that, among other things, "no violations of the federal securities laws or FINRA, NASD, NYSE, or MSRB rules have occurred" and that there were no "misappropriate Bank customer funds in connection with [his] termination."¹⁷ As noted, FINRA asks that we dismiss Martinez's application because, in challenging FINRA's action, he "failed to avail himself of FINRA's procedures."¹⁸ According to FINRA, "Martinez ignored

¹² Rule 9552 does not explicitly require FINRA to send a letter confirming the effectiveness of a suspension after it sends a notice of suspension. The letter dated November 5, 2012 nonetheless is consistent with the notice of suspension sent on October 11, 2012 and complies with the service requirements applicable to a notice of suspension. *See supra* note 11.

FINRA served the letter on Martinez at the same CRD address by overnight courier service and by first-class mail. The courier returned the notice to FINRA on November 13, 2012. There is no evidence that the letter sent by first-class mail was returned.

¹³ FINRA sent that letter to Martinez by overnight courier service and by first-class mail to his CRD address. The courier returned the notice to FINRA on January 22, 2013. Once again, there is no evidence that the letter sent by first-class mail was returned. FINRA also sent this notice to an address it identified in a public records database as Martinez's second most recent address, after the CRD address. FINRA sent the notice to this second address via USPS Express Mail and first-class mail. There is no evidence that either copy of the letter sent to the second address was returned.

¹⁴ FINRA did not elaborate on what Martinez said during the call, other than that he provided the new mailing address.

¹⁵ The letter is dated January 12, 2013, despite its explicit reference to FINRA correspondence dated January 14, 2013.

¹⁶ Martinez's Application for Review at 1.

¹⁷ *Id.*

¹⁸ FINRA's Mot. to Dismiss Martinez's Application for Review and to Stay Briefing Schedule at 1.

FINRA's numerous notices, and he did not take any action required by FINRA's rules to contest his impending bar."¹⁹ We agree that Martinez's failure to exhaust his appeal rights before FINRA precludes our consideration of his appeal.

We have emphasized that "[i]t 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 review."²⁰ On this basis, we 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."²¹ As the Second Circuit has reasoned:

Were SRO members, or former SRO members, free to bring their SRO-related grievances before the SEC without first exhausting SRO remedies, the self-regulatory function of SROs could be compromised. Moreover, like other administrative exhaustion requirements, the SEC's promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently, the courts can more effectively conduct their review. It also provides SROs with the opportunity to correct their own errors prior to review by the Commission. The SEC's exhaustion requirement thus promotes the efficient resolution of disciplinary disputes between SROs and their members and is in harmony with Congress's delegation of authority to SROs to settle, in the first instance, disputes relating to their operations.²²

The July 18 and August 9, 2012 Rule 8210 requests, which sought specific information related to Martinez's termination by Wells Fargo, warned Martinez that "failure to comply . . . may subject you to disciplinary action." The October 11, 2012 notice of suspension stated that FINRA intended to suspend Martinez on November 5, 2012 unless he took corrective action by complying with the Rule 8210 requests. The notice also stated that, alternatively, he could request a hearing under Rule 9552(e), which would have stayed the effectiveness of the suspension under Rule 9559(c). But Martinez did not take corrective action or request a hearing.

¹⁹ *Id.*

²⁰ *MFS Secs. Corp.*, Exchange Act Release No. 47626, 2003 SEC LEXIS 789, at *22 & n.29 (Apr. 3, 2003) (citing *Royal Secs. Corp.*, Exchange Act Release No. 5171, 36 SEC 275, 1955 SEC LEXIS 94, at *5 (May 20, 1955)), *aff'd*, 380 F.3d 611 (2d Cir. 2004).

²¹ *E.g.*, *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 where FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 information requests); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at *5, 8 (May 6, 2010) (same); *Jeffrey A. King*, Exchange Act Release No. 52571, 2005 SEC LEXIS 2516, at *8-10 (Oct. 7, 2005) (same); *David I. Cassuto*, Exchange Act Release No. 48087, 2003 SEC LEXIS 1496, at *10-14 (June 25, 2003) (same); *Gary A. Fox*, Exchange Act Release No. 46511, 2002 SEC LEXIS 2381, at *3-6 (Sep. 18, 2002) (same); *see also MFS Secs. Corp.*, 2003 SEC LEXIS 789, at *21-26 (refusing to consider applicant's denial of access to services claim because applicant failed to exhaust New York Stock Exchange's procedures).

²² *MFS Secs. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004).

The October 11 and November 5 notices further informed Martinez that, after the suspension took effect, he could request its termination based on full compliance. As noted, he never did so.

Martinez does not dispute that he failed to respond to FINRA's informational requests or otherwise cooperate with FINRA's investigation. Nor does he claim that he tried to challenge the resulting disciplinary sanction through FINRA's appeal procedures. Rather, he blames his failure on what he claims was FINRA's use of an old mailing address which, he suggests, resulted in his not receiving the informational requests and related correspondence.²³ As Martinez seems to concede, however, it was his responsibility to update his CRD address, as expressly required by FINRA rules,²⁴ and we have repeatedly held that not doing so is no defense to a failure to respond.²⁵ Moreover, Martinez does not dispute that, whatever the address used by FINRA, he received sufficient notice of the FINRA staff's inquiries to prompt him to contact the staff by telephone, during which conversation his obligation to cooperate was orally reiterated, as were the implications of not cooperating. Under these circumstances, and given the well-established precedent discussed above, we see no basis for denying FINRA's motion to dismiss.²⁶

²³ He also states that he "look[s] after an aging father and . . . go[es] out of town constantly," which presumably are additional reasons for his failure to respond. Martinez's Application for Review at 1. Such circumstances, if true, do not excuse his failure to cooperate.

²⁴ See *supra* note 6.

²⁵ See, e.g., *Edward J. Jakubik*, Exchange Act Release No. 61541, 2010 SEC LEXIS 1014 at *16 (Feb. 18, 2010) (finding that applicant was deemed to have received the association's default decision that was properly served at his CRD address); *Robert J. Langley*, Exchange Act Release No. 50917, 57 SEC 1125, 2004 SEC LEXIS 3048 at *9 (Dec. 22, 2004) ("Rule 8210(d) does not require NASD to take any affirmative action to track down a registered representative who has failed to provide NASD with a current address"); *Warren B. Minton Jr.*, Exchange Act Release No. 46709, 55 SEC 1170, 2002 SEC LEXIS 2712 at *13 (Oct. 23, 2002) (holding that registered representatives have a "continuing duty" to notify NASD of address changes) (citing cases); *Ashton Noshir Gowadia*, Exchange Act Release No. 40410, 53 SEC 786, 1998 SEC LEXIS 1887 at *11 (Sept. 8, 1998) (finding that registered representative's assumption that member firm had updated his CRD address does not mitigate representative's failure to do so); *Nazmi C. Hassanieh*, Exchange Act Release No. 35029, 52 SEC 87, 1994 SEC LEXIS 3862 at *9 (Nov. 30, 1994) (noting that the obligation to keep CRD address current is crucial to NASD's investigative efforts because, otherwise, investigations "could easily be avoided by an individual's moving without leaving a forwarding address").

²⁶ To date, Martinez has not complied with the two Rule 8210 requests. Though he states that he attached "copies of the documents and information you previously requested" to his application [Martinez's Application for Review at 1], all he attached were the Form U5 termination notice by Wells Fargo and the January 14, 2013 bar notice and November 5, 2012 suspension notice that FINRA sent him. These documents are not responsive to the informational request at issue in this matter, and in no way alter our conclusion to dismiss Martinez's appeal.

* * *

Accordingly, IT IS ORDERED that FINRA's motion to dismiss the application for review filed by Gilbert Torres Martinez is GRANTED.

By the Commission.

Elizabeth M. Murphy
Secretary