SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 93757 / December 13, 2021

Admin. Proc. File No. 3-19870

In the Matter of the Application of

SHLOMO SHARBAT

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF DISCIPLINARY PROCEEDING

Individual appealed FINRA's default decision, which barred him from associating with any FINRA member firm because he failed to respond to its requests for testimony. *Held*, application for review is dismissed.

APPEARANCES:

*Zvi Gabbay*, *Hadar Israeli*, *Eran Elharar*, and *Cathy Bardenstein*, of Barnea Jaffe Lande & Co., for Shlomo Sharbat.

*Alan Lawhead*, *Megan Rauch*, and *Jennifer Brooks*, for FINRA.

Appeal filed: July 10, 2020
Last brief received: Aug. 17, 2020

Shlomo Sharbat, who was formerly associated with a FINRA member firm, seeks review of a FINRA default decision barring him from association with any FINRA member firm because he failed to respond to FINRA's requests for testimony. FINRA moves to dismiss Sharbat's application for review because he failed to exhaust his administrative remedies before FINRA and his application is untimely. Sharbat opposes FINRA's motion. For the reasons explained below, we grant FINRA's motion and dismiss Sharbat's application for review.

## I. Background

Sharbat was intermittently employed in the securities industry from August 1993 until August 2010. From February 8, 2008, until June 12, 2008, he was registered with FINRA member vFinance Investments, Inc. According to FINRA's Central Registration Depository ("CRD"), "a computerized database that contains information about most brokers, their representatives, and the firms they work for,"[1] Sharbat was "permitted to resign" from vFinance due to an "apparent violation of firm policies." Sharbat was most recently associated with another FINRA member from July 6, 2010, until August 4, 2010.

### A. FINRA's Department of Enforcement filed a complaint against Sharbat in 2012.

On July 11, 2012, FINRA's Department of Enforcement ("Enforcement") filed a complaint against Sharbat. The complaint's first cause of action alleged that Sharbat violated Regulation M and NASD Rule 2110 during vFinance's participation in an offering of securities issued by PERF Go-Green Holdings, Inc. ("PERF") in 2008.[2] The complaint's second cause of action alleged that Sharbat violated FINRA Rules 8210 and 2010 by twice failing to testify in response to requests by FINRA staff in early 2012.[3]

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[1] *Stephen Robert Williams*, Exchange Act Release No. 89238, 2020 WL 3820989, at *1 n.2 (July 7, 2020) (internal quotation marks and citation omitted).

[2] Regulation M generally prohibits a participant in a security distribution from inducing or attempting to induce the purchase of "a covered security during the applicable restricted period." 17 C.F.R. § 242.101(a).

[3] FINRA Rule 8210(a)(1) provides that FINRA staff can require any "person subject to FINRA's jurisdiction" to provide testimony regarding a FINRA investigation. Under FINRA By-Law Article V, Section 4(a)(iii), FINRA retains jurisdiction to file a complaint against an unregistered individual for two years after the termination of his or her association with a FINRA member. FINRA Rule 8210(c) provides that "[n]o member or person shall fail to provide . . . testimony . . . pursuant to this Rule." FINRA Rule 2010, which is identical to former NASD Rule 2110, provides that "[a] member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade." Violating "FINRA rules constitutes conduct inconsistent with just and equitable principles of trade and therefore also establishes a violation of FINRA Rule 2010." *David Kristian Evansen*, Exchange Act Release No. 75531, 2015 WL 4518588, at *3 n.10 (July 27, 2015).

On July 11, 2012, Enforcement served Sharbat with the complaint and a notice of complaint. Enforcement sent these documents to Sharbat via email, via certified and regular mail to his residential address listed in the CRD (the "CRD address," which was in New York), and via FedEx to his most recent known residential address in Tel Aviv, Israel (the "Tel Aviv address"). Enforcement also served these documents on Sharbat's attorney at the time.[4] The certified mailing to Sharbat's CRD address was returned unclaimed, but the regular mailing to his CRD address was not returned. The FedEx shipment was delivered to Sharbat's Tel Aviv address on July 15, 2012, and it was signed for by "Shlomo," which is Sharbat's first name.

The first notice of complaint was incorrectly dated, so Enforcement served Sharbat with a corrected notice of complaint and the complaint on July 13, 2012. Among other things, the corrected notice of complaint informed Sharbat that his answer was due by August 10, 2012. Enforcement sent the corrected notice of complaint to Sharbat via email, certified and regular mail to his CRD address, and FedEx to his Tel Aviv address, as well as to Sharbat's attorney. The certified mailing to Sharbat's CRD address was returned and marked refused, but the regular mailing to his CRD address was not returned. The FedEx shipment was delivered to Sharbat's Tel Aviv address on July 17, 2012, and it was again signed for by "Shlomo."

On August 2, 2012, Sharbat sent an Enforcement attorney an email requesting "an extension" of "a few months." On August 3, 2012, the Enforcement attorney informed Sharbat and his attorney via email that Enforcement was "not willing to give an open ended or months-long extension," but would instead "send out a Second Notice of Complaint on or about Aug[ust] 13[], which will allow [Sharbat] until approximately the end of August to answer."

Sharbat did not file an answer to the complaint by the due date set out in the corrected notice of complaint. On August 14, 2012, Enforcement sent Sharbat a second notice of complaint stating that if Sharbat did not file an answer by August 28, 2012, the hearing officer could deem the complaint's allegations admitted and enter a default decision against Sharbat. Enforcement sent the second notice of complaint to Sharbat via email, certified and regular mail to his CRD address, and FedEx and regular mail to his Tel Aviv address, as well as to Sharbat's attorney. The certified mailing to Sharbat's CRD address was returned unclaimed, but the regular mailing to his CRD address was not returned. The FedEx shipment to Sharbat's Tel Aviv address was delivered on August 19, 2012, and it was signed for by "Shlomo Sharbat." The regular mailing to Sharbat's Tel Aviv address was not returned. Nonetheless, Sharbat failed to file an answer by the deadline set out in the second notice of complaint.

### B. FINRA found Sharbat in default and barred him after he failed to answer the complaint.

On September 12, 2012, Enforcement filed a motion for entry of a default decision against Sharbat and a statement in support of its motion. Enforcement requested a bar for Sharbat's failure to testify and a six-month suspension and fine for his alleged violation of

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[4] This attorney did not file a notice of appearance in the FINRA disciplinary proceeding, and the record does not reflect what happened to the documents that were sent to him during the proceeding.

Regulation M. Enforcement noted that "[i]f Sharbat is barred for his failure to testify, the fine and suspension for violating Regulation M need not be imposed." Enforcement sent its motion and its statement in support to Sharbat via email, regular mail to his CRD address, and regular mail to his Tel Aviv address, as well as to Sharbat's attorney.

On September 28, 2012, the FINRA hearing officer ("Hearing Officer") directed Enforcement to supplement the record regarding Sharbat's alleged violation of Regulation M. The Hearing Officer sent this order to Sharbat via first-class mail but not via email, and the Hearing Officer did not send this order to Sharbat's attorney. It is unclear what address the Hearing Officer used for the first-class mailing. On October 12, 2012, Enforcement responded to this order by making a supplemental filing, which it sent to Sharbat via email, regular mail to his CRD address, and regular mail to his Tel Aviv address, as well to Sharbat's attorney.

On November 8, 2012, the Hearing Officer issued a default decision against Sharbat. The Hearing Officer deemed the allegations in the complaint admitted.[5] Based on the facts alleged in the complaint, the Hearing Officer found that Sharbat violated FINRA Rules 8210 and 2010 by failing to respond to FINRA staff's requests for testimony. The Hearing Officer noted that the record lacked any mitigating evidence and that FINRA's Sanction Guidelines recommend a bar for failing to respond to an information request. Thus, the Hearing Officer barred Sharbat due to his violation of FINRA Rules 8210 and 2010. The Hearing Officer dismissed the complaint's allegations that Sharbat violated Regulation M and NASD Rule 2110.

The Hearing Officer also issued a notice of default decision, which described the process for appealing to FINRA's National Adjudicatory Council ("NAC") and explained that the default decision would become FINRA's final decision unless it was appealed to the NAC or the NAC called it for review. The Hearing Officer sent the default decision and notice of default decision to Sharbat via overnight courier and first-class mail on November 8, 2020. It is unclear from the record what address the Hearing Officer used for the first-class mailing. FINRA has submitted FedEx shipment receipts showing that, on November 8, 2012, FINRA made FedEx shipments to Sharbat's CRD address and Sharbat's Tel Aviv address.[6]

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[5] *See* FINRA Rule 9269(a)(2) (providing that, when a respondent defaults, "the Hearing Officer may deem the allegations against that Respondent admitted").

[6] FINRA has sought leave to file an amended record that includes these FedEx shipment receipts, and Sharbat has not objected to FINRA's introduction of these receipts. We consider the receipts under Rule of Practice 452, 17 C.F.R. § 201.452 (providing that we "may allow the submission of additional evidence"). *See also* Rule of Practice 420(e), 17 C.F.R. § 201.420(e) (providing that FINRA must certify and file a "copy of the record upon which the action complained of was taken"); *Christine D. Memet*, Exchange Act Release No. 83711, 2018 WL 3584178, at *3 & n.10 (July 25, 2018) (applying Rule of Practice 452 to consider a post-bar email that FINRA filed as a "supplement to the certified record").

Sharbat did not appeal the default decision to the NAC, and the NAC did not call it for review. Accordingly, it became FINRA's final disciplinary action on December 6, 2012.[7] Sharbat has not filed a motion with FINRA to set aside the default decision.[8]

### C. Over seven years after the default decision became FINRA's final disciplinary action, Sharbat filed an application for review with the Commission.

Sharbat filed the present application for review with the Commission on July 10, 2020, over seven years after FINRA's final disciplinary action. On August 4, 2020, FINRA filed a motion to dismiss Sharbat's application for review because he failed to exhaust his administrative remedies and his application was untimely. Sharbat opposes FINRA's motion.[9]

## II. Analysis

We dismiss Sharbat's application for review because he failed to exhaust his administrative remedies before FINRA and his application is untimely.

### A. Sharbat failed to exhaust his administrative remedies.

We will not review the action of a self-regulatory organization ("SRO") like FINRA if the applicant failed to exhaust the SRO's administrative remedies.[10] Courts have upheld our administrative-exhaustion requirement because it "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."[11] The administrative-exhaustion requirement "promotes the development of a record in a forum particularly suited to create it, upon which the Commission and, subsequently,

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7 *See* FINRA Rule 9269(d) (providing that a default decision becomes FINRA's "final disciplinary action" if it is not appealed to the NAC or called for review by the NAC within 25 days of service); FINRA Rule 9134(b)(3) (providing that "[s]ervice by mail is complete upon mailing"); FINRA Rule 9138(c) (providing that three days are added to the "prescribed period for response" if "service is made by U.S. Postal Service first class, certified, or registered mail").

8 *See* FINRA Rule 9269(c) (allowing a party to file a motion to set aside a default).

9 Sharbat's opposition to FINRA's motion to dismiss erroneously cites Commission Rule of Practice 411(e). That rule applies to motions for summary affirmance of initial decisions by Commission hearing officers. *See* Rule of Practice 411(a), 411(e), 17 C.F.R. § 201.411(a), .411(e). FINRA has filed a motion to dismiss, not a motion for summary affirmance. Also, after FINRA filed its reply in support of its motion, Sharbat filed a sur-reply to which FINRA has not objected. In the exercise of our discretion, we have considered his sur-reply. *Cf.* Rule of Practice 100(c), 17 C.F.R. § 201.100(c) (providing that we may use alternative procedures).

10 *See, e.g.*, *Williams*, 2020 WL 3820989, at *4.

11 *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621 (2d Cir. 2004).

the courts can more effectively conduct their review."[12] "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."[13]

Sharbat does not contest the validity of our administrative-exhaustion requirement. He admits that he was aware of FINRA's disciplinary proceeding against him and Enforcement's motion for entry of a default decision and that he decided to default. Sharbat failed to appeal the default decision to the NAC or file a motion with FINRA to set aside the default decision.[14]

Nonetheless, Sharbat argues that he should be excused from the exhaustion requirement on the ground that he did not receive the default decision from FINRA. But a person cannot avoid the exhaustion requirement "by failing to receive or claim mail properly sent to [his] address."[15] Here, FINRA properly sent the default decision and notice of default decision to Sharbat. Under FINRA's rules, when a default decision imposes a bar, "FINRA shall serve the decision on a Respondent by courier, facsimile or other means reasonably likely to obtain prompt service."[16] Sending the default decision via FedEx to Sharbat's Tel Aviv address met this standard because FedEx is a courier and Sharbat had apparently signed for at least three FedEx shipments from Enforcement to his Tel Aviv address.

Contrary to Sharbat's claim, the record lacks any evidence that FINRA knew that Sharbat failed to sign for the default decision sent to his Tel Aviv address. Regardless, FINRA rules did not require it to confirm that Sharbat received the default decision.[17] Because FINRA properly served the default decision on Sharbat, he had constructive notice of the default decision.[18]

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12 *Id.*

13 *Id*.

14 *See* FINRA Rules 9269(c)-(d), 9311(a) (allowing appeals of default decisions to the NAC and motions to set aside defaults); *see also Edward J. Jakubik, Jr.*, Exchange Act Release No. 61541, 2010 WL 589808, at *4 (Feb. 18, 2010) (dismissing application for review for failure to exhaust administrative remedies where applicant had not moved to set aside default decision).

15 *Memet*, 2018 WL 3584178, at *4; *see also Aliza A. Manzella*, Exchange Act Release No. 77084, 2016 WL 489353, at *3 (Feb. 8, 2016) (holding that an applicant "cannot escape the consequences of her failure to comply or exhaust by refusing to accept mail").

16 FINRA Rule 9269(d).

17 *See Dennis A. Pearson, Jr.*, Exchange Act Release No. 54913, 2006 WL 3590274, at *5 & n.30 (Dec. 11, 2006) (holding that FINRA predecessor's rules on service by courier "do not require that receipt be acknowledged by the addressee").

18 *See Memet*, 2018 WL 3584178, at *4; *Manzella*, 2016 WL 489353, at *3-4 & n.20.

Sharbat also suggests that FINRA should have sent the default decision to Sharbat's email address and to his attorney at the time, as Enforcement had done when serving documents on Sharbat. But FINRA rules did not require it to use email to serve the default decision,[19] or to serve Sharbat's attorney because he failed to file a notice of appearance.[20] Sharbat has not cited any precedent or FINRA rule suggesting that the Hearing Officer was required to use these service methods simply because Enforcement had used them.[21]

As discussed above, sending the default decision to Sharbat's Tel Aviv address via FedEx was reasonable given that Sharbat had previously signed for FedEx shipments from FINRA at that address. To the extent Sharbat wanted the Hearing Officer to serve him by other means, he never informed the Hearing Officer of his preferred service methods. To the contrary, he admits that he knew Enforcement was seeking a default decision and that he chose not to respond.

Sharbat argues further that he should not be required to exhaust his administrative remedies because FINRA did not give him adequate notice that he could be barred if he defaulted. But Sharbat had adequate notice of the potential consequences of defaulting. FINRA rules provide that a bar is a possible sanction for a rule violation,[22] and FINRA's Sanction Guidelines state that "a bar should be standard" when an "individual did not respond in any manner" to an information request under FINRA Rule 8210.[23]

Indeed, Sharbat admits that he received Enforcement's statement in support of its motion for entry of a default decision, which stated that "Enforcement seeks a bar in this matter" due to Sharbat's failure to testify. We find no merit in Sharbat's argument that Enforcement's request for a bar was ambiguous because it also requested a six-month suspension and fine for the

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The record includes a pre-complaint, February 13, 2012, email in which Sharbat provided Enforcement staff with his Tel Aviv address for a FedEx shipment and stated that it "must have my phone [number]." The November 8, 2012, FedEx receipt for the shipment to the Tel Aviv address does not include Sharbat's phone number. Sharbat has not argued that his Tel Aviv address was inaccurate if it lacked a phone number, and Sharbat's response to the motion to dismiss does not provide a phone number when listing his Tel Aviv address.

19 *See* FINRA Rule 9269(d); *see also Jonathan Roth Ellis*, Exchange Act Release No. 80312, 2017 WL 1103694, at *4 & n.24 (Mar. 24, 2017) (stating, in the context of expedited proceedings under FINRA Rule 9552, that "[a]lthough FINRA may provide notice of its proceedings by email, it is not required to do so").

20 *See* FINRA Rules 9132(c), 9141(b).

21 Sharbat incorrectly claims that the default decision and notice of default decision were "[t]he only documents that were not sent to [his attorney] and Sharbat's email." The Hearing Officer used only first-class mail to serve Sharbat with the order directing Enforcement to supplement the record, and this order was not sent to his attorney.

22 *See* FINRA Rule 8310(a)(5).

23 FINRA Sanction Guidelines 33 (2011); *accord* FINRA Sanction Guidelines 33 (Oct. 2021), https://www.finra.org/sites/default/files/Sanctions_Guidelines.pdf.

alleged Regulation M violation. Enforcement made clear that it was seeking separate sanctions for the failure to testify and Regulation M violations, stating that "[i]f Sharbat is barred for his failure to testify, the fine and suspension for violating Regulation M need not be imposed."

Accordingly, we dismiss Sharbat's application for review because he failed to exhaust his administrative remedies before FINRA by failing to file an answer to the complaint, appeal the default decision to the NAC, or file a motion with FINRA to set aside the default decision.[24]

**B. Sharbat's application for review is untimely.**

We dismiss Sharbat's application for review for the independent reason that it is untimely. Sharbat received at least constructive notice of the Hearing Officer's default decision, which became FINRA's final disciplinary action on December 6, 2012. We take official notice that FINRA filed notice of the action with the Commission on December 12, 2012.[25] Thus, Sharbat's application for review was due in January 2013.[26] Sharbat did not file his application for review until July 10, 2020.

We "will not extend [the] 30-day period" for filing an application for review, "absent a showing of extraordinary circumstances."[27] "Even '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.'"[28]

Sharbat argues that he did not receive the default decision from FINRA and that this constitutes an extraordinary circumstance justifying his untimely appeal. As explained above, FINRA properly served the default decision on Sharbat, so he had constructive notice of the default decision. He has not shown that his failure to receive the default decision was due to a circumstance beyond his control, given that he was aware of the disciplinary proceeding and

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[24] *Cf. Lewis v. Potter*, No. 6:9-570-HFF-WMC, 2009 WL 4823893, at *4-5 (D.S.C. Dec. 14, 2009) (dismissing complaint for plaintiff's failure to exhaust administrative remedies where he failed to timely file internal agency appeal, despite his argument that he never received notice of the action to be appealed because it was sent to the wrong address, where notice was sent to plaintiff's address of record and he knew of his obligation to notify agency if he changed addresses).

[25] *See* Rule of Practice 323, 17 C.F.R. § 201.323 (providing that we may take official notice of certain facts).

[26] *See* 15 U.S.C. § 78s(d)(1)-(2); Rule of Practice 420(b), 17 C.F.R. § 201.420(b); *see also Williams*, 2020 WL 3820989, at *5 (providing that "'constructive notice'" of a FINRA action can "'start[] the running of the appeal period'" (quoting *Manzella*, 2016 WL 489353, at *4)).

[27] Rule of Practice 420(b), 17 C.F.R. § 201.420(b).

[28] *Michael Ross Turner*, Exchange Act Release No. 81693, 2017 WL 4222468, at *4 (Sept. 22, 2017) (quoting *PennMont Secs.*, Exchange Act Release No. 61967, 2010 WL 1638720, at *4 (Apr. 23, 2010)).

chose not to participate in it by either filing an answer or responding to the motion for default. Sharbat also has not shown that he filed his appeal promptly after he learned of the default decision, as he has failed to allege when he learned of the default decision.[29]

Sharbat next claims that he received death threats that constitute "exceptional circumstances that would justify his failure to appeal within the 30 days allotted." According to Sharbat, "[a]t the same time" that FINRA requested his testimony in 2012, he received "threats against his life from [two individuals] and several others who were involved in the distribution of [PERF], should he cooperate with FINRA's investigation, causing him to flee to Israel." Sharbat argues that he has the "sense of security" to appeal now since he "[r]ecently . . . learned that both [of the individuals] were brought to trial by the SEC and final judgments were obtained against them on November 21, 2019, and March 16, 2020, respectively."

Sharbat offers few details about the alleged threats.[30] But even assuming that he received them, he has not explained why, once the alleged threats dissipated, he did not first file a motion with FINRA to set aside the default. Further, Sharbat has failed to show that he appealed as promptly as reasonably practicable, even given the alleged threats. Sharbat suggests that he became less concerned after the entry of judgments against the two named individuals he asserts were threatening him. He claims that these judgments were entered on November 21, 2019, and March 16, 2020. However, we take official notice that, while one of the relevant judgments was indeed announced by a litigation release on November 21, 2019,[31] the other relevant judgment was announced by an earlier litigation release on July 12, 2019,[32] rather than on March 16, 2020,

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[29] *See Turner*, 2017 WL 4222468, at *4 ("Although we have previously remanded FINRA action where an applicant lacked actual notice of FINRA's decision due to possible defects in how FINRA served its notices, we have not done so where the applicant failed to appeal promptly after receiving actual notice." (footnote omitted)).

[30] We reject Sharbat's argument that he should be allowed to proceed to briefing on the merits so that he can present evidence about the threats. Sharbat, who has the assistance of counsel, could have moved to submit evidence regarding the threats in response to FINRA's motion to dismiss. *See* Rule of Practice 452, 17 C.F.R. § 201.452 (providing that parties can move to submit additional evidence to the Commission). Indeed, the Commission has considered evidence submitted at this stage when adjudicating FINRA motions to dismiss. *See, e.g.*, *Brendan D. Feitelberg*, Exchange Act Release No. 89365, 2020 WL 4196029, at *4-6 (July 21, 2020) (considering applicant's affidavit under Rule 452 when adjudicating motion to dismiss).

We also reject Sharbat's argument that he could not thoroughly describe the threats because of the length limitation for applications for review. Sharbat could have described the threats in more detail in his response to the motion to dismiss, but he failed to do so.

[31] Litigation Release No. 24672, 2019 WL 6251308 (Nov. 21, 2019).

[32] Litigation Release No. 24529, 2019 WL 3074083 (July 12, 2019); *see also* Rule of Practice 323, 17 C.F.R. § 201.323 (providing that we may take official notice of certain facts).

as Sharbat claims.[33] Sharbat has not explained why he waited until July 10, 2020, over seven months after the later litigation release, to file his appeal.

Even if we accept Sharbat's assertion that the later judgment was entered on March 16, 2020, he still did not file his application for review until almost four months later. In his sur-reply brief, Sharbat claims for the first time that the coronavirus pandemic delayed his appeal. According to Sharbat, he hired counsel "[a]s soon as he was able" in late May 2020, and the application for review was filed "[l]ittle more than one month after [the counsel was] retained."

Sharbat has waived this argument by raising it for the first time in his sur-reply brief.[34] In any event, Sharbat has not described how his ability to retain counsel was delayed by the pandemic. Thus, Sharbat has not shown that he appealed as soon as reasonably practicable after the perceived threat was removed.[35]

Accordingly, we dismiss Sharbat's application for review because it is untimely.

**C. Sharbat's remaining arguments are unavailing.**

Sharbat argues that this case is similar to *Destina Mantar*.[36] In *Mantar*, we remanded the proceeding to FINRA. Sharbat argues we should do the same here.

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33 March 16, 2020 is the date of another litigation release announcing an unrelated case development. Litigation Release No. 24771, 2020 WL 1313516 (Mar. 16, 2020).

34 *See Bruce Zipper*, Exchange Act Release No. 84334, 2018 WL 4727001, at *7 (Oct. 1, 2018) (holding, in the context of briefing on the merits, that "generally 'any argument raised for the first time in a reply brief shall be deemed to have been waived'" (quoting Rule of Practice 450(b), 17 C.F.R. § 201.450(b))); *see also Potomac Cap. Markets, LLC*, Exchange Act Release No. 91172, 2021 WL 666510, at *4 n.30 (Feb. 19, 2021) (citing *Zipper*, 2018 WL 4727001, at *7) (applying this principle in the context of briefing on a stay motion).

35 *See Kenneth Joseph Kolquist*, Exchange Act Release No. 82202, 2017 WL 5969252, at *4 (Dec. 1, 2017) (holding that applicant had not shown that he filed his untimely appeal as soon as reasonably practicable, given a delay of less than three months); *cf. Feitelberg*, 2020 WL 4196029, at *5 (holding that applicant's serious illness constituted extraordinary circumstances that justified an untimely appeal where applicant appealed as soon as reasonably practicable).

36 Exchange Act Release No. 79851, 2017 WL 221653 (Jan. 19, 2017).

*Mantar* is distinguishable for at least four reasons. First, in *Mantar*, FINRA had barred the applicant using an expedited proceeding.[37] Here, FINRA brought a disciplinary proceeding against Sharbat, which provided him with additional procedural protections.[38] Second, even though Sharbat claims he did not receive the default decision, he knew about the proceeding. By contrast, the applicant in *Mantar* may not have known about the proceeding against her.[39] Third, we remanded the case in *Mantar* in part because FINRA had not explained why the bar was still appropriate, even though the applicant had responded to FINRA's information requests two weeks after the bar's effective date.[40] Here, Sharbat does not dispute that he failed to respond to FINRA's testimony requests. Fourth, in *Mantar*, the application for review was timely,[41] whereas Sharbat's application is over seven years overdue. Thus, *Mantar* is inapposite.[42]

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[37] *Id.* at *3-4. Under FINRA Rule 9552, FINRA can bring expedited proceedings against an individual who fails to respond to an information request. *See id.* at *4 (noting that "expedited proceedings and disciplinary proceedings are 'two [separate] avenues' for addressing" failures to respond to information requests (alteration in original) (quoting *Christopher A. Parris*, Exchange Act Release No. 78669, 2016 WL 4446331, at *2 (Aug. 24, 2016))). FINRA initiates expedited proceedings by sending an individual a notice "stating that the failure to take corrective action within 21 days after service of the notice will result in suspension of membership or of association of the person with any member." FINRA Rule 9552(a). "A member or person who is suspended under [FINRA Rule 9552] and fails to request termination of the suspension within three months of issuance of the original notice of suspension will automatically be expelled or barred." FINRA Rule 9552(h).

[38] *See Mantar*, 2017 WL 221653, at *3 ("Disciplinary actions begin with the filing of a complaint authorized by FINRA's Office of Disciplinary Affairs, are assigned to a Hearing Officer and Hearing Panel as soon as practicable, and, among other things, authorize a respondent found to be in default to move the Hearing Officer to set aside the default for good cause.").

[39] *See id.* at *4.

[40] *See id.* at *4-5.

[41] *Id.* at *5.

[42] We recently remanded the proceeding to FINRA in *Feitelberg*, 2020 WL 4196029. As in *Mantar* and in contrast to this case, *Feitelberg* involved an expedited rather than a disciplinary proceeding, the applicant may not have known about the proceedings against him, and FINRA did not explain why a bar was still appropriate, even though the applicant had responded to FINRA's information requests after the bar's effective date. *See Feitelberg*, 2020 WL 4196029, at *7. Although the application for review was not timely filed in *Feitelberg*, we found that "extraordinary circumstances" (namely, "a serious illness") "justif[ied] our consideration of [the applicant's] untimely appeal." *Id.* at *5.

Sharbat also suggests that he defaulted based on his prior attorney's advice. But he has not adequately developed any argument that his prior attorney's advice should excuse his failure to exhaust his administrative remedies before FINRA or his failure to timely appeal to us.[43]

Finally, Sharbat argues that FINRA should not have imposed a bar against him and that FINRA's actions violated his due process rights. We do not reach these arguments because Sharbat failed to exhaust his administrative remedies before FINRA and his appeal is untimely.[44] Even if we reached Sharbat's due process argument, however, we note that the Exchange Act requires FINRA to provide "fair procedure[s]."[45] As described above, FINRA provided fair procedures here in defaulting Sharbat and imposing the bar.

Accordingly, we grant FINRA's motion to dismiss.

An appropriate order will issue.[46]

By the Commission (Chair GENSLER and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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[43] *Cf. Turner*, 2017 WL 4222468, at *4 n.13 (finding that applicant failed to demonstrate that his attorney's advice constituted extraordinary circumstances where applicant "did not introduce meaningful evidence about his prior counsel's representation and therefore did not meet his burden of substantiating a claim of attorney misconduct").

[44] *See, e.g.*, *Williams*, 2020 WL 3820989, at *5 ("[The applicant] cannot argue about the merits of the bar since he did not timely raise these issues in the first instance to FINRA through its administrative process."); *Newport Coast Secs., Inc.* Exchange Act Release No. 88548, 2020 WL 1659292, at *19 (Apr. 3, 2020) (finding that bias due process claim was forfeited because applicant failed to raise bias claim to FINRA); *Jakubik*, 2010 WL 589808, at *2 n.14 (declining to address applicant's arguments about the appropriateness of a bar because he "failed to exhaust his administrative remedies and . . . his appeal is untimely").

[45] Exchange Act Section 15A(b)(8), 15 U.S.C. § 78o-3(b)(8).

[46] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 93757 / December 13, 2021

Admin. Proc. File No. 3-19870

In the Matter of the Application of

SHLOMO SHARBAT

For Review of Disciplinary Action Taken by

FINRA

ORDER DISMISSING APPEAL OF DISCIPLINARY ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that the appeal filed by Shlomo Sharbat be, and it hereby is, dismissed.

By the Commission.

Vanessa A. Countryman
Secretary