

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 62055 / May 6, 2010

Admin. Proc. File No. 3-13810

In the Matter of the Application of

GREGORY S. PROFETA

25215 North Carmel Hills Drive
Carmel, CA 93923

For Review of Disciplinary Action Taken by the
Financial Industry Regulatory Authority, Inc.

ORDER GRANTING
MOTION TO DISMISS
APPLICATION FOR
REVIEW

I.

On March 8, 2010, Gregory S. Profeta ("Applicant") filed an application for review of disciplinary action taken by the Financial Industry Regulatory Authority, Inc. ("FINRA") on February 8, 2010 barring Applicant from associating with any FINRA member in any capacity. On March 22, 2010, FINRA filed a "Motion to Dismiss Profeta's Application for Review and to Stay Briefing Schedule" in which FINRA asked us to, among other things, dismiss Applicant's appeal because Applicant failed to avail himself of FINRA's procedures to contest the bar.¹ Applicant did not file a response to FINRA's motion.

For the reasons set forth below, we have determined to grant FINRA's motion to dismiss Applicant's application.

¹ FINRA also asked us to extend the briefing schedule in this matter until we ruled on FINRA's motion to dismiss, which we did on March 26, 2010. *Gregory S. Profeta*, Admin. Proc. File No. 3-13810, Order (Mar. 26, 2010).

II.

On October 28, 2008, M.L. Stern & Co., LLC ("M.L. Stern"), a former FINRA member firm, filed a Uniform Application for Securities Industry Registration (the "Form U4") with FINRA on behalf of Applicant, and the Form U4 was amended on December 23, 2008.² The Form U4 asked Applicant to, among other things, disclose whether Applicant had been charged with a misdemeanor involving the wrongful taking of property or a felony. Applicant did not disclose anything on the Form U4 in response to these questions.

FINRA conducted a background search on Applicant and discovered three criminal matters that Applicant may have been required to disclose on the Form U4. On April 16, 2009, FINRA sent Applicant a letter (the "First Letter") pursuant to FINRA Rule 8210³ requesting certain information regarding these criminal matters, including related charging documents, documents evidencing sentencing or disposition, and why such matters were not disclosed by Applicant on the Form U4. The First Letter asked for Applicant's response by April 30, 2009. FINRA sent the First Letter to Applicant's address of record in the Central Registration Depository (the "CRD"). Applicant does not contest receipt of the First Letter and did not respond to it.

On May 1, 2009, FINRA sent Applicant a second letter (the "Second Letter") pursuant to FINRA Rule 8210 requesting the same information that it had requested in the First Letter. The Second Letter asked for Applicant's response by May 14, 2009, and was also sent to Applicant's CRD address. The Second Letter was returned to FINRA marked "unclaimed" on May 19, 2009.

FINRA sent Applicant a third letter on August 5, 2009 (the "Third Letter") notifying Applicant that, pursuant to FINRA Rule 9552(a),⁴ he would be suspended on August 31, 2009 if he did not provide FINRA with the information requested in the First and Second Letters. The Third Letter further notified Applicant of his right to request a hearing in connection with this matter prior to August 31, 2009 pursuant to FINRA Rule 9552(e). Applicant does not contest receipt of the Third Letter and did not respond to it.

² The record does not indicate what changes were made in the amended Form U4. M.L. Stern terminated Applicant on January 14, 2009 for failure to pass the General Securities Representative Examination.

³ FINRA Rule 8210 requires individuals associated with a FINRA member firm to provide information upon request with respect to any matter involved in an investigation.

⁴ FINRA Rule 9552(a) permits FINRA to suspend the association of an individual with a FINRA member firm upon twenty-one days' notice if such individual does not provide FINRA with information requested pursuant to FINRA's rules.

On August 31, 2009, FINRA sent Applicant a fourth letter (the "Fourth Letter") notifying him of his suspension effective that date and notifying him that he would be barred from associating with a FINRA member in any capacity on February 8, 2010 pursuant to FINRA Rule 9552(h) if he did not provide FINRA with the requested information and request termination of his suspension pursuant to FINRA Rule 9552(f). FINRA sent the Fourth Letter to Applicant's CRD address and to five other addresses associated with Applicant that FINRA had obtained through a search of public records. Applicant does not contest receipt of the Fourth Letter and did not respond to it.

On February 8, 2010, FINRA sent Applicant a fifth letter (the "Fifth Letter") notifying him that he was barred from associating with a FINRA member firm in any capacity effective that date. The Fifth Letter also notified Applicant of his right to appeal the disciplinary sanction to the Commission within thirty days. Applicant timely filed this application for review.

III.

We have previously 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.⁵ We have also previously stated 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."⁶

Here, FINRA's actions were in accordance with its rules and the purposes of the Exchange Act. FINRA's rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action. Pursuant to these rules, FINRA informed Applicant in its various letters to him that he would be suspended and automatically barred if he failed to respond to FINRA's inquiry or request a hearing to contest his impending sanction. Applicant chose not to avail himself of these procedures. He failed to respond to FINRA's requests for information or request a hearing to contest his impending sanction. As a result, Applicant's bar was imposed automatically in accordance with FINRA's rules.

Applicant does not dispute the basis for FINRA's action – that he had notice of FINRA's requests and failed to respond to FINRA's letters or request a hearing to contest his impending

⁵ See, e.g., *Jeffrey A. King*, Securities Exchange Act Rel. No. 52571 (Oct. 7, 2005), 86 SEC Docket 1439 (dismissing application for review for failure by applicant to pursue NASD administrative procedures under predecessor to FINRA Rule 9552); *Lee Gura*, 57 S.E.C. 972 (2004) (same); *Gary A. Fox*, 55 S.E.C. 1147 (2002) (same); see also *Edward J. Jakubik, Jr.*, Exchange Act Rel. No. 61541 (Feb. 18, 2010), __ SEC Docket __, __ .

⁶ *Royal Sec. Corp.*, 36 S.E.C. 275, 277 (1955), cited with approval in *David I. Cassuto*, 56 S.E.C. 565, 571 (2003) and *Fox*, 55 S.E.C. at 1149-50.

sanction. Instead, Applicant argues that, with respect to one of the criminal matters discovered by FINRA, "I was not charged with anything" and "my lawyer . . . said that I do not have to answer yes to the question as I was not sentenced and in fact the records, because I was under 18 years old, were expunged from my records." Regarding the other two criminal matters discovered by FINRA, Applicant argues that "I did not state anything about these incidents because they are not accurate. I have no recollection of any conviction of [the matters identified by FINRA]. In fact it is insulting to me that somehow these accusations about me are being stated. This is in fact part of the reason that I have waited to respond. When I first saw this it really offended me and I did not want to even dignify the letter with a response."

Applicant's reasons for not responding to FINRA's letters do not mitigate his failure to comply with FINRA's procedures. Applicant chose not to respond to FINRA's letters to raise these issues or request a hearing to challenge his impending sanction, and therefore cannot complain at this stage about the consequence of his choice.⁷

Accordingly, it is ORDERED that FINRA's motion to dismiss the application for review filed by Gregory Profeta be, and it hereby is, GRANTED.

By the Commission.

Elizabeth M. Murphy
Secretary

⁷ We have considered all of the parties' contentions. We have rejected or sustained them to the extent they are inconsistent or in accord with the views expressed herein.