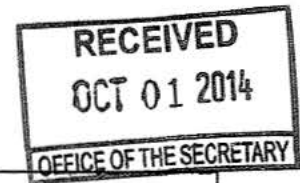


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**



In the Matter of the Application of
Gerald Joseph Lodovico
For Review of Disciplinary Action Taken by
Financial Industry Regulatory Authority
File No. 3-16131

**FINRA'S MOTION TO DISMISS LODOVICO'S APPLICATION FOR REVIEW AND
TO STAY BRIEFING SCHEDULE**

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October 1, 2014

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I. INTRODUCTION

Gerald Joseph Lodovico's application for review should be dismissed because he failed to exhaust his administrative remedies in FINRA's forum. He did not provide FINRA with the requested information, did not participate in FINRA's process, did not offer any reason why he should not be suspended, and did not later explain why he should not be barred. Lodovico cannot invoke the Commission's appellate jurisdiction when he did not make arguments in opposition to FINRA's actions before a FINRA adjudicator.

Lodovico's application for review is his first communication with FINRA regarding FINRA's investigation and expedited proceeding to bar him from associating with any FINRA member firm. Lodovico failed to respond to two FINRA requests for information concerning his outside business activities and federal and state tax liens. Notwithstanding FINRA's warning that Lodovico would be suspended and eventually barred unless he complied with the requests for information, Lodovico refused to cooperate and provide the requested information. Lodovico ignored FINRA's numerous notices and did not take any action to contest FINRA's impending

bar. Despite proper notice in accordance with FINRA rules, Lodovico failed to avail himself of the remedies available to him to contest his suspension and impending bar and, thus, failed to exhaust his administrative remedies. The Commission therefore should follow its well-established precedent in this area and dismiss Lodovico's application for review.¹

II. FACTUAL BACKGROUND

Lodovico is not currently associated with a FINRA member firm. (RP 34.)² He was last associated with Trustmont Financial Group, Inc. ("Trustmont") from March 30, 2010, to December 18, 2012. (RP 34.) The Central Registration Depository ("CRD"[®]) provides that, while associated, among other outside business activities, Lodovico worked as the Chief Executive Officer of Sinclair Hathaway Holdings, LLC ("Sinclair Hathaway"), a "private investment company which may trade options and or futures."³ (RP 39.)

¹ FINRA requests, pursuant to Commission Rule of Practice 161, that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Lodovico's appeal should be dismissed on procedural grounds before it reaches the underlying substance of this appeal.

² "RP ___" refers to the page numbers in the certified record filed by FINRA on October 1, 2014.

³ This information was provided in response to Section 13 of the Uniform Application for Securities Industry Registration or Transfer ("Form U4"), which asks, "Are you *currently* engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise?" and requests the associated person to provide details for an affirmative answer.

A. The June 11, 2013 Request for Information

On June 11, 2013, Eric J. Bickhardt, a FINRA principal examiner, sent Lodovico a letter requesting information pursuant to FINRA Rule 8210.⁴ (RP 1-4.) The letter informed Lodovico that, although he was no longer associated with a FINRA member firm, he remained subject to FINRA's jurisdiction pursuant to Article V, Section 4(c) of the FINRA By-Laws. (RP 1-2.) The letter sought financial documents concerning Sinclair Hathaway and information about three tax liens that were filed against Lodovico while he was associated with Trustmont. (RP 1.) The letter asked Lodovico to respond no later than June 24, 2013. (RP 1.) It warned Lodovico that, pursuant to Rule 8210, "[a]ny failure on [Lodovico's] part to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry." (RP 2.)

FINRA sent the letter by certified and first-class mail to Lodovico's address of record contained in CRD, [REDACTED] (RP 1, 3-4, 33.) The certified letter was returned as unclaimed. (RP 3-4.) The first-class letter was not returned. Lodovico did not respond to the Rule 8210 request.

B. The July 1, 2013 Request for Information

On July 1, 2013, FINRA examiner Bickhardt made a second written request to Lodovico pursuant to FINRA Rule 8210 for the information. (RP 5-9.) The second request asked Lodovico to answer FINRA's questions set forth in the June 11, 2013, information request and

⁴ FINRA Rule 8210 requires persons subject to FINRA's jurisdiction to provide documents and written information to FINRA with respect to any matter involved in an investigation. The rule "provides a means, in the absence of subpoena power, for the [FINRA] 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), *petition for review denied*, 347 F. App'x 692 (2d Cir. 2009). A person who fails to respond to a request issued under FINRA Rule 8210 impedes FINRA's ability to detect misconduct and protect the investing public. *Id.* at *13-14.

included a copy of that request. (RP 5-7.) The July 1 letter again warned Lodovico that his failure to respond could subject him to “sanctions, including a bar from the securities industry.” (RP 5.) Bickhardt sent the letter to Lodovico by certified and first-class mail to the CRD Address and set a response deadline of July 10, 2013. (RP 5, 8-9, 33.) The certified letter was returned as unclaimed. (RP 8-9.) The first-class letter was not returned. Again, Lodovico did not respond to the Rule 8210 request.

C. The May 14, 2014 Pre-Suspension Notice

Given Lodovico’s silence, FINRA’s Department of Enforcement (“Enforcement”) initiated efforts to suspend Lodovico. Enforcement sought to compel a response from Lodovico by bringing an expedited proceeding that could result in FINRA suspending him from associating with any FINRA member firm. (RP 11-12); *see* FINRA Rule 9552.⁵ On May 14, 2014, Sandra Harris, FINRA’s Senior Director of Policy and Expedited Proceedings, warned Lodovico in a letter (the “Pre-Suspension Notice”) that FINRA planned to suspend him on June 9, 2014, for his failure to respond to the prior FINRA Rule 8210 requests for information. (RP 11-18.)

⁵ FINRA Rule 9552(a) states that

[i]f a member, person associated with a member or person subject to FINRA’s jurisdiction fails to provide any information, report, material, data, or testimony requested or required to be filed pursuant to the FINRA By-Laws or FINRA rules, or fails to keep its membership application or supporting documents current, FINRA staff may provide written notice to such member or person specifying the nature of the failure and 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.

The Pre-Suspension Notice stated that Lodovico could avoid imposition of the suspension if he took corrective action by complying with the Rule 8210 requests for information by June 9, 2014. (RP 11.) The Pre-Suspension Notice further explained that Lodovico had the opportunity to request a hearing to contest the imposition of the suspension, and to seek termination of the suspension if he complied fully with the outstanding Rule 8210 requests. (RP 11-12.) The Pre-Suspension Notice stressed not only that Lodovico could seek reinstatement during his suspension, but also that if he failed to request termination of the suspension within three months, he would be in default, and barred, on August 18, 2014. (RP 12); *see also* FINRA Rule 9552(h).⁶

FINRA sent the Pre-Suspension Notice to the CRD Address by FedEx Overnight Delivery and first-class mail. (RP 11, 16-18, 33.) Neither mailing was returned. The FedEx shipment detail for the mailing indicates that it was delivered on May 15, 2014. (RP 17-18.) Lodovico did not respond to the Pre-Suspension Notice or answer FINRA's outstanding Rule 8210 requests.

D. The June 9, 2014 Suspension Notice

Because Lodovico failed to take any action in response to the Pre-Suspension Notice, on June 9, 2014, Harris notified Lodovico in a letter (the "Suspension Notice") that he was suspended, effective immediately, from association with any FINRA member firm in any capacity. (RP 21-24.) The Suspension Notice advised Lodovico that he could file a written request to terminate the suspension based on fully providing the information and documents

⁶ FINRA Rule 9552(h) states, "a member or person who is suspended under this Rule 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 requested in the June 11 and July 1 FINRA Rule 8210 requests, and reiterated the warning that Lodovico's failure to seek relief from the suspension by August 18, 2014, would result in a default and an automatic bar pursuant to FINRA Rule 9552. (RP 21.)

FINRA sent the Suspension Notice by FedEx Overnight Delivery and first-class mail to the CRD Address.⁷ (RP 21, 23-24, 33.) Neither mailing was returned. The FedEx shipment detail for the mailing indicates that it was delivered on June 10, 2014. (RP 24.) Lodovico did not respond to the Suspension Notice.

E. The August 18, 2014 Bar Notice

In the three months following the Pre-Suspension Notice, Lodovico did not communicate with FINRA or challenge his suspension. Accordingly, on August 18, 2014, Harris notified Lodovico that, effective immediately, he was in default and barred (the "Bar Notice"). (RP 27-30.)

FINRA sent the Bar Notice by certified and first-class mail to the CRD Address.⁸ (RP 27, 29-30.) The certified mail shipment detail for the mailing indicates that the letter was unclaimed. (RP 30.) The first-class letter was not returned.

On September 16, 2014, approximately four weeks after FINRA mailed the Bar Notice, Lodovico submitted an application for review of this matter to the Commission. (RP 31-32.)

⁷ Prior to mailing the Suspension Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Lodovico's current mailing address, which FINRA staff determined was the CRD address. (RP 19-20.)

⁸ Prior to mailing the Bar Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Lodovico's current mailing address, which FINRA staff determined was the CRD address. (RP 25.)

III. ARGUMENT

The Commission should dismiss Lodovico's application for review because Lodovico failed to exhaust his administrative remedies by providing the requested information or requesting a hearing. Despite receiving notice of these proceedings in accordance with FINRA rules, Lodovico ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge his suspension, and defaulted. Indeed, Lodovico does not dispute the basis for FINRA's action—that he had notice of the Rule 8210 requests and failed to respond or request a hearing to contest his impending suspension. Lodovico thus failed to exhaust his administrative remedies, and the Commission should dismiss this appeal.

A. Lodovico Failed to Exhaust His Administrative Remedies

The Commission is precluded from considering Lodovico's application for review because he failed to follow FINRA procedures to challenge his suspension and, thus, failed to exhaust his administrative remedies. The precedent in this area is well settled. *See, e.g., Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *13-14 (Apr. 10, 2014) (dismissing applicant's appeal for failure to exhaust administrative remedies when FINRA barred applicant under Rule 9552 for failing to respond to Rule 8210 requests); *Mark Steven Steckler*, Exchange Act Release No. 71391, 2014 SEC LEXIS 283, at *9-13 (Jan. 24, 2014) (same); *Gilbert Torres Martinez*, Exchange Act Release No. 69405, 2013 SEC LEXIS 1147, at *11-15 (Apr. 18, 2013) (same); *Norman Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at *6, 11 (Sept. 16, 2011) (same); *Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at *5, 8 (May 6, 2010) (same). As the Commission most recently emphasized, “[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 the review.” *Mullins*, 2014 SEC LEXIS 1268, at *10 (citing *Royal Sec. Corp.*, 36 S.E.C. 275 (1955)).

An aggrieved party—such as Lodovico—is required to exhaust his administrative remedies before resorting to an appeal, and those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *See Royal Sec. Corp.*, 36 S.E.C. at 277 n.3. This doctrine applies with equal force to FINRA proceedings. *See Lang v. French*, 154 F.3d 217, 220 (5th Cir. 1998) (holding that “[NASD] disciplinary orders are reviewable by the [Commission] after administrative remedies within NASD are exhausted”); *Swirsky v. NASD*, 124 F.3d 59, 62 (1st Cir. 1997) (noting that the court “agree[s] with other circuits that have considered the question” and concluding that the doctrine of exhaustion of administrative remedies applies in NASD disciplinary actions).

Lodovico failed repeatedly to pursue his administrative remedies to prevent or challenge his suspension. Lodovico chose not to respond to two FINRA Rule 8210 requests, in which he was informed that a failure to respond could result in serious sanctions, including a bar. (RP 2, 5.) After issuance of the Pre-Suspension Notice, Lodovico had the opportunity to take corrective action by complying with the Rule 8210 requests or, alternatively, to request a hearing and set forth the reasons why he believed his suspension should be set aside. (RP 11-12.) But Lodovico did not take corrective action or request a hearing. After issuance of the Suspension Notice, Lodovico had the opportunity to move for reinstatement. (RP 21.) Again, Lodovico did nothing. Accordingly, pursuant to FINRA Rule 9552(h), Lodovico was barred. (RP 27-28.)

In his application for review, Lodovico, while conceding that “[he] failed to respond to FINRA in a timely manner,” attempts to provide some of the information requested in the Rule 8210 requests. (RP 32.) Lodovico’s attempt is not only untimely, it is substantially incomplete:

among other things, he never provided Sinclair Hathaway's general ledger or similar records, did not identify Sinclair Hathaway's money market and checking accounts and provide monthly statements, did not provide any information regarding the federal tax lien, and provided insufficient information about the state tax liens. (RP 1, 6, 32.) Regardless, Lodovico's inadequate and untimely attempt at compliance with the Rule 8210 requests for information is irrelevant for purposes of the Commission's consideration of his application for review. The issue before the Commission is not Lodovico's underlying misconduct—i.e., his failure to respond to the Rule 8210 requests. Instead, the issue before the Commission is whether Lodovico failed to follow FINRA procedures to challenge his suspension, and consequently, forfeited his ability to challenge FINRA's actions before the Commission.

Lodovico, who contends that he "voluntarily relinquish[ed] [his] licenses . . . for life" in October 2013, asserts he failed to respond to FINRA because he assumed he did not need to do so. (RP 32.) The Pre-Suspension and Suspension Notices, however, unequivocally told Lodovico that his failure to comply with the Rule 8210 requests or otherwise respond would result in a bar from associating with any FINRA member. (RP 11-12, 21.) Lodovico should have considered the implications of a bar rather than choosing to ignore the Rule 8210 requests and FINRA's repeated notices.

Here, the record is undisputed that Lodovico did not follow the required procedural steps as a condition of applying for review and, thus, failed to exhaust his administrative remedies. Lodovico could have previously provided the information at issue, requested a hearing, or contested the suspension during the three-month suspension period. (RP 1-2, 5-7, 11-12, 21-22.) He took none of these steps. Instead, Lodovico filed this appeal more than three months after he received the Suspension Notice and four weeks after FINRA notified him that, consistent with

the explicit language of FINRA Rule 9552 (as well as the Pre-Suspension, Suspension, and Bar Notices), his suspension had converted to a bar. (RP 21-22, 27-28, 32.)

By repeatedly failing to respond to the FINRA Rule 8210 requests for information and disregarding the directions set forth in the Pre-Suspension and Suspension Notices, Lodovico is precluded from challenging FINRA's action before the Commission. *See, e.g., Mullins*, 2014 SEC LEXIS 1268, at *13-14 (relying on "well-established precedent" when dismissing application for review in a FINRA Rule 9552 proceeding where applicant failed to request a hearing or take corrective action in FINRA's forum); *Steckler*, 2014 SEC LEXIS 283, at *8 (same); *Martinez*, 2013 SEC LEXIS 1147, at *15 (same); *Chen*, 2011 SEC LEXIS 3224, at *10 (finding that applicant's conduct "amounted to a complete failure to respond and [FINRA] acted consistently with the purposes of the Exchange Act in imposing the bar"); *Profeta*, 2010 SEC LEXIS 1563, at *6 (finding in a Rule 9552 proceeding that "FINRA's actions were in accordance with its rules and the purposes of the Exchange Act [when] rules set forth the procedures for suspending and ultimately barring individuals who fail to supply requested information or take corrective action").

B. FINRA Provided Lodovico with Proper Notice of These Proceedings

The record shows that FINRA properly served Lodovico with the FINRA Rule 8210 requests, Pre-Suspension Notice, Suspension Notice, and Bar Notice. (RP 1-4, 5-9, 11-18, 21-24, 27-30, 33.) Furthermore, Lodovico does not deny receiving the Rule 8210 requests or any of the FINRA notices. (RP 32.)

Lodovico is deemed to have received all FINRA correspondence sent to the "last known residential address," as reflected in FINRA records. *See* FINRA Rule 8210(d) (providing that any request for information "shall be deemed received" when it is transmitted to the "last known

residential address of the person as reflected in the Central Registration Depository”). Similarly, FINRA Rule 9134(b)(1) provides that, “Papers served on a natural person may be served at the natural person’s residential address, as reflected in the [CRD], if applicable.”

It is undisputed that FINRA sent all correspondence to the CRD Address.⁹ (RP 1-4, 5-9, 11-18, 21-24, 27-30, 33.) Therefore, the record demonstrates that FINRA complied with the applicable rules and properly served Lodovico by sending all correspondence to the CRD Address. *See, e.g., Steckler*, 2014 SEC LEXIS 283, at *10-11 (finding that the 8210 requests were deemed to have been received by applicant, regardless of whether he had actual receipt, when FINRA properly served him at his CRD address); *Martinez*, 2013 SEC LEXIS 1147, at *4 n.6 (stating that a “notice issued pursuant to Rule 8210 is deemed received by such person when mailed to the individual’s last known CRD address”).

* * * * *

In sum, the Commission should follow established precedent and dismiss Lodovico’s application for review because he failed to exhaust the FINRA administrative remedies that were available to him.


IV. CONCLUSION

Lodovico failed to respond to FINRA Rule 8210 requests for information, and consistent with FINRA rules, was suspended. Lodovico then ignored numerous FINRA notices and failed to avail himself of FINRA administrative procedures to terminate the suspension. As a result, Lodovico defaulted, and was barred. At each step, Lodovico received notice of these

⁹ As of the filing of this brief, CRD still reflects that Lodovico’s current address is the CRD Address, to which all correspondence was mailed in this matter. (RP 33.) Moreover, Lodovico provides the CRD Address as his address of record in his application for review. (RP 32.)

proceedings, but chose to do nothing. Lodovico failed to exhaust his administrative remedies. Accordingly, the Commission should dismiss Lodovico's application for review.

Respectfully submitted,

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