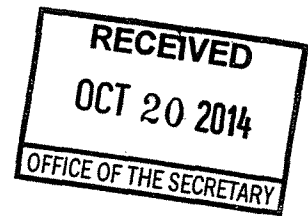


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC**



In the Matter of the Application of

Marcos A. Santana

For Review of Disciplinary Action Taken by

Financial Industry Regulatory Authority

File No. 3-16190

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

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October 20, 2014

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**FINRA'S MOTION TO DISMISS SANTANA'S APPLICATION FOR REVIEW AND
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I. INTRODUCTION

The Commission should dismiss Marcos A. Santana's application for review for his failure to exhaust the administrative remedies available to him in FINRA's forum. This case involves Santana's prolonged failure to respond to FINRA's requests for information. When FINRA learned that J.P. Morgan Securities LLC ("J.P. Morgan" or the "Firm") had fired Santana for cause, FINRA opened an investigation to determine whether he had violated FINRA rules. FINRA sent Santana three successive FINRA Rule 8210 requests for information. Santana, however, refused to provide the requested information, notwithstanding FINRA's warning that he could face disciplinary action if he refused to cooperate. FINRA then initiated an expedited proceeding against Santana, informing him that he would be suspended if he did not take corrective action before June 20, 2014. Santana again refused to cooperate and FINRA suspended him. FINRA notified Santana that he could request termination of the suspension on the ground that he complied fully with FINRA's requests. But Santana never provided the requested information and FINRA barred him.

Santana's application for review should be dismissed because he failed to follow FINRA's procedures. Santana disregarded the directives in numerous notices from FINRA and did not take corrective action by providing the requested information. Thus, he failed to exhaust his administrative remedies, and the record before the Commission contains no valid grounds for an appeal. The Commission should follow its well-established precedent in this area, find that Santana failed to avail himself of FINRA's procedures, and dismiss Santana's application for review.¹

II. FACTUAL BACKGROUND

In November 2013, J.P. Morgan fired Santana. (RP 48.)² Prior to his termination, Santana had been registered with the Firm, and its predecessor, since 2007 as an investment company products and variable contracts representative. (RP 48.) J.P. Morgan determined that Santana accessed the Firm's affiliate bank customer information without a legitimate business purpose. (RP 48.) The Firm also concluded that Santana failed to protect customer information in an alleged attempt to commit fraud. (RP 48.) After learning of Santana's termination, FINRA initiated an investigation into whether Santana violated FINRA rules. (RP 1-2.)

¹ Pursuant to Commission Rule of Practice 161, FINRA requests 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 Santana'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 20, 2014.

A. The December 23, 2013 Request for Information

On December 23, 2013, Michael Malden, a FINRA investigator, sent Santana a letter requesting information pursuant to FINRA Rule 8210.³ (RP 1-2.) The letter sought information concerning J.P. Morgan's allegations of wrongdoing that led to Santana's dismissal from the Firm, and asked Santana to provide a signed statement addressed to FINRA responding to the allegations and provide copies of correspondence and memoranda related to the matter. (RP 1.) The letter further asked whether Santana ever owned a credit card "skimming device," and if there were any complaints regarding his employment at the Firm which were open or resolved within the preceding three years of the date of his termination for cause. (RP 1.) If there were any such complaints, Santana was to provide additional documentation to FINRA. (RP 1.) The letter asked Santana to respond no later than January 6, 2014. (RP 1.) The letter warned Santana that, pursuant to Rule 8210, "[a]ny failure on [Santana's] part to satisfy these obligations could expose [him] to sanctions, including a permanent bar from the securities industry." (RP 1-2.)

FINRA sent the letter by certified and first-class mail to Santana's address of record as contained in the Central Registration Depository ("CRD"[®]), [REDACTED], New York, NY 10034 (the "CRD Address"). (RP 1, 3.) The Postal Service left a notice for Santana on December 26, 2013, to claim the certified letter. (RP 4.) The certified letter was delivered on

³ FINRA Rule 8210 requires persons subject to FINRA's jurisdiction to provide documents and written information to FINRA, upon the request of FINRA staff, with respect to any matter involved in an investigation. The rule "provides a means, in the absence of subpoena power, for [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). The Commission has made clear that 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.

January 15, 2014. (RP 3, 4.) The first-class letter was not returned. Santana did not respond to the Rule 8210 request.

B. The January 7, 2014 Request for Information

On January 7, 2014, Malden made a second written request pursuant to FINRA Rule 8210 for the information. (RP 5.) The second request asked Santana to answer FINRA's questions set forth in the December 23, 2013 information request and included a copy of that letter. (RP 5.) The January 7 letter again warned Santana that his failure to respond could subject him to disciplinary action. (RP 5.)

FINRA sent the letter to Santana by certified and first-class mail to the CRD Address and a second address, [REDACTED] (the "Lawrence Address").

(RP 5, 6, 8.) The letter set a response deadline of January 21, 2014. (RP 5.) The certified mailing to the CRD Address was delivered on January 15, 2014. (RP 7.) The certified mailing to the Lawrence Address was unclaimed. (RP 9, 10.) The Postal Service did not return the first-class mailings to FINRA. Santana did not respond to FINRA's January 7, 2014 letter.

C. The January 22, 2014 Request for Information

On January 22, 2014, FINRA investigator Malden made a third written request pursuant to Rule 8210 for the information. (RP 11.) The third request asked Santana to answer FINRA's questions as set forth in the December 23, 2013 information request and included a copy of that letter, as well as the January 7, 2014 letter. (RP 11.) The January 22 request letter again warned Santana that his failure to respond could subject him to disciplinary action. (RP 11.)

FINRA sent the letter to Santana by certified and first-class mail to the CRD Address and the Lawrence Address. (RP 11, 12, 15.) The letter set a response deadline of February 5, 2014. (RP 11.) The certified mailings were unclaimed. (RP 14, 17.) The Postal Service did not return

either of the first-class mailings to FINRA. Santana did not respond to FINRA's January 22, 2014 letter.

Given Santana's silence, FINRA's Department of Enforcement ("Enforcement") initiated efforts to suspend Santana.

D. The May 27, 2014 Pre-Suspension Notice

After Santana failed to respond to the three requests for information, Enforcement sought to suspend Santana from associating with any FINRA member firm pursuant to FINRA Rule 9552.⁴ (RP 19-20.) On May 27, 2014, Sandra J. Harris, FINRA's Senior Director of Policy and Expedited Proceedings, warned Santana in a letter (the "Pre-Suspension Notice") that FINRA planned to suspend him on June 20, 2014, for his failure to respond to the requests for information.⁵ (RP 19-20.)

The Pre-Suspension Notice stated that Santana could avoid imposition of the suspension if he took corrective action by complying with the information requests before the suspension date of June 20, 2014. (RP 19.) The Pre-Suspension Notice further explained that Santana had the opportunity to request a hearing before the suspension date of June 20, to contest the

⁴ 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.

⁵ The Pre-Suspension Notice also included copies of the December 23, 2013, January 7, 2014, and January 22, 2014 requests for information. (RP 19-20.)

imposition of the suspension, and to seek termination of the suspension if he complied fully with the original requests.⁶ (RP 19.) The Pre-Suspension Notice stressed not only that Santana 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 September 2, 2014. (RP 20); *see also* FINRA Rule 9552(h).⁷

FINRA sent the Pre-Suspension Notice to the CRD Address by FedEx Overnight Delivery and first-class mail.⁸ (RP 19, 21.) A shipment detail for the FedEx mailing shows that the package was delivered on May 28, 2014. (RP 22.) The first-class mailing was not returned. Santana did not respond to the Pre-Suspension Notice, nor did he answer FINRA's outstanding requests for information.

E. The June 20, 2014 Suspension Notice

Because Santana failed to take any action in response to the Pre-Suspension Notice, on June 20, 2014, Harris notified Santana in a letter (the "Suspension Notice") that he was suspended, effective immediately, from association with any FINRA member firm in any capacity. (RP 25-26.) The Suspension Notice advised Santana that he could file a written request to terminate the suspension based on fully providing the information and documents that FINRA requested in the December 23, 2013, January 7, 2014, and January 22, 2014 FINRA Rule

⁶ The Pre-Suspension Notice provided Santana with the address of FINRA's Office of Hearing Officers where he should direct a request for a hearing. (RP 19.)

⁷ 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."

⁸ A public records database in LexisNexis showed that Santana's current mailing address was the CRD Address at the time Harris sent the Pre-Suspension Notice to him. (RP 23.)

8210 requests. The Suspension Notice reiterated the warning that Santana's failure to seek relief from the suspension by September 2, 2014, would result in a default and an automatic bar pursuant to FINRA Rule 9552. (RP 25.)

FINRA sent the Suspension Notice by FedEx Overnight Delivery and first-class mail to the CRD Address.⁹ (RP 25, 27, 28.) The FedEx shipment detail for the mailing indicates that it was delivered on June 23, 2014. (RP 28.) The first-class mailing was not returned. Santana did not respond to the Suspension Notice.

F. The September 2, 2014 Bar Notice

In the three months following the Pre-Suspension Notice, Santana did not provide FINRA with the requested information or challenge his suspension. Accordingly, on September 2, 2014, Harris notified Santana that, effective immediately, he was in default and barred (the "Bar Notice"). (RP 31-32.)

FINRA sent the Bar Notice by certified and first-class mail to the Lawrence Address and Santana's CRD Address.¹⁰ (RP 31, 33, 34, 36.) The certified mail shipment detail for the mailing to the CRD Address indicates that the letter was unclaimed. (RP 35.) The first-class letter to the CRD Address, however, was not returned. Both mailings to the Lawrence Address were unclaimed and returned to FINRA. (RP 38, 39.)

⁹ Prior to mailing the Suspension Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Santana's current mailing address, which FINRA staff determined was the CRD Address. (RP 23.)

¹⁰ Prior to mailing the Bar Notice, FINRA staff searched a comprehensive public records database in LexisNexis to determine Santana's current mailing address, which FINRA staff determined was the Lawrence Address. (RP 29.)

On October 6, 2014, approximately four weeks after FINRA mailed the Bar Notice, Santana submitted an application for review of this matter to the Commission. (RP 41-43.)

III. ARGUMENT

The Commission should dismiss Santana's application for review because he 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, Santana ignored numerous letters and notices from FINRA, failed to follow FINRA procedures to challenge his suspension, and defaulted. Santana took no action until he was barred, and the action that he did take was deficient under FINRA rules. Santana failed to exhaust his administrative remedies. The Commission therefore should dismiss this appeal.

A. Santana Failed to Exhaust His Administrative Remedies

The Commission is precluded from considering Santana's application for review because he failed to follow FINRA procedures, and consequently, failed to exhaust his administrative remedies. As the Commission 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." *Ricky D. Mullins*, Exchange Act Release No. 71926, 2014 SEC LEXIS 1268, at *10 (Apr. 10, 2014). The precedent in this area is well-settled. *See, e.g., id.* at *13-14 (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 an aggrieved party, Santana was required to exhaust his administrative remedies before resorting to an appeal. See *Profeta*, 2010 SEC LEXIS 1563, at *5 (explaining that the Commission “will not consider an application for review if the applicant failed to exhaust FINRA’s procedures for contesting the sanction at issue”). Those who fail to exercise their rights to administrative review cannot claim that they have exhausted their administrative remedies. *Royal Sec. Corp.*, 36 S.E.C. 275, 277 n.3 (1955). 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 the 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 concluded that the doctrine of exhaustion of administrative remedies applies in NASD disciplinary actions).

Santana failed repeatedly to comply with FINRA procedures to prevent or challenge his suspension. Santana chose not to respond to three FINRA Rule 8210 requests, in which he was informed that a failure to respond could result in a disciplinary action and serious sanctions, including a bar. (RP 1-2, 5, 11.) After issuance of the Pre-Suspension Notice, Santana 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 not be imposed. (RP 19-20.) But Santana did not take corrective action or request a hearing.

Likewise, after issuance of the Suspension Notice, Santana had the opportunity to move for reinstatement on the ground that he had complied with the Pre-Suspension Notice. (RP 25-

26.) Similar to his decision not to respond to FINRA's three requests for information or the Pre-Suspension Notice, Santana did nothing. Accordingly, pursuant to FINRA Rule 9552(h), Santana was barred. (RP 31-32.)

In his application for review, Santana now claims that he "sent the documents by mail" to FINRA in August, while conceding that "said letter" was never received by FINRA. (RP 41.) Santana now belatedly attempts to provide some of the information requested in the Rule 8210 requests that he previously ignored. He attached to his application for review a letter dated September 2, 2014, purportedly explaining the circumstances surrounding his termination from J.P. Morgan's affiliate bank. (RP 42.) Santana's attempt is not only untimely, it is substantially incomplete. While Santana explains how J.P. Morgan learned of the facts that led to his termination, he never provides what FINRA requested. He does not address the Firm's allegations that he accessed bank customer information without a legitimate business purpose and failed to protect customer information in an attempt to commit fraud. He does not respond to FINRA staff's question about whether he ever owned a credit card skimming device. (RP 1, 5, 11.) Santana also never provided copies of all correspondence and memoranda referring or relating to his termination from J.P. Morgan's affiliate bank. (RP 1, 5, 11.) Finally, Santana never answers whether there were complaints regarding his employment at J.P. Morgan which were open or resolved within three years of his termination for cause. (RP 1, 5, 11.) And, if there were, Santana never provides the relevant documentation. (RP 1, 5, 11.)

Regardless, Santana's incomplete 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 Santana's underlying misconduct—his failure to respond to the Rule 8210 requests—but rather, whether Santana

failed to follow FINRA procedures to challenge his suspension, and consequently, forfeited his ability to challenge FINRA's actions before the Commission. Here, the record is undisputed that Santana did not follow the required procedural steps as a condition of applying for review and, thus, failed to exhaust his administrative remedies. Santana 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, 11, 19-20, 25-26.) He took none of these steps. Santana instead 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 25-26, 31-32.)

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, Santana 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”). Santana should have considered the implications of a bar rather than choosing to ignore the Rule 8210 requests and FINRA’s repeated notices.

B. FINRA Provided Santana with Proper Notice of These Proceedings

The record shows that FINRA properly served Santana with the FINRA Rule 8210 requests. Pre-Suspension Notice, Suspension Notice, and Bar Notice. (RP 1-4, 5-7, 11-13, 19-22, 25-28, 31-35.) Santana 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), which governs service of notices of suspension in FINRA Rule 9552 proceedings, provides that, “[p]apers 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 Santana’s CRD Address.¹¹ (RP 1-4, 5-7, 11-13, 19-22, 25-28, 31-35.) Therefore, the record demonstrates that FINRA complied with the applicable rules and properly served Santana by sending all correspondence to the CRD Address.¹² *See, e.g., Steckler*, 2014 SEC LEXIS 283, at *10-11 (finding that the 8210 requests

¹¹ As of the filing of this motion, CRD still reflects that Santana’s current address is the CRD Address, to which all correspondence was mailed in this matter. (RP 45.) Moreover, Santana provides the CRD Address as his address of record in his application for review and on the September 2, 2014 letter that he attached to that application. (RP 41, 42.)

¹² FINRA also sent the January 7, and January 22, 2014 Rule 8210 requests and the Bar Notice to the Lawrence Address. (RP 5, 8-9, 11, 15-16, 31, 36-37.) In the instances when FINRA served Santana only at the CRD Address, it acted in compliance with FINRA rules. *See* FINRA Rule 9134(b).

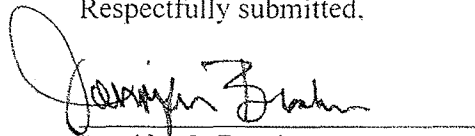
were deemed to have been received by applicant, regardless of whether he had actual receipt, when FINRA properly served him at his CRD address); *Martinez*, 2013 SEC LEXIS 1147, at *4 n.6 (stating that a “notice issued pursuant to Rule 8210 is deemed received by such person when mailed to the individual’s last known CRD address”). Moreover, Santana effectively concedes in his application for review that he had actual notice of the Pre-Suspension Notice when he states that he attempted to send documents to Harris, the author of the Pre-Suspension Notice, on August 15, 2014. (RP 41.)

The Commission should follow established precedent and reject Santana’s appeal because he failed to exhaust the FINRA administrative remedies that were available to him.

IV. CONCLUSION

Santana repeatedly failed to respond to FINRA’s requests for information, and consequently, was suspended. He then disregarded the directives set forth in FINRA’s notices and failed to follow FINRA’s administrative procedures to terminate the suspension. As a result, Santana was barred in accordance with FINRA’s administrative procedures. Santana failed to exhaust his administrative remedies. Accordingly, the Commission should dismiss Santana’s application for review.

Respectfully submitted,



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October 20, 2014

CERTIFICATE OF SERVICE

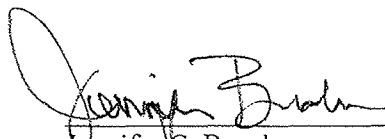
I, Jennifer C. Brooks, certify that on this 20th day of October 2014, I caused a copy of FINRA's Motion to Dismiss Santana's Application for Review and to Stay Briefing Schedule, in the matter of Application for Review of Marcos A. Santana, Administrative Proceeding No. 3-16190, to be served by messenger and fax on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549-1090
Fax: (202) 772-9324

and via FedEx and certified mail on:

Marcos A. Santana
[REDACTED]
[REDACTED]

Service was made on the Commission by messenger and fax and on the Applicant by FedEx and certified mail due to the distance between the office of FINRA and the Applicant.



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OFFICE OF THE SECRETARY

October 20, 2014

VIA MESSENGER AND FACSIMILE

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Fax: (202) 772-9324

RE: In the Matter of the Application for Review of Marcos A. Santana
Administrative Proceeding No. 3-16190

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Motion to Dismiss Santana's Application for Review and to Stay Briefing Schedule in the above-captioned matter.

Please contact me at (202) 728-8083 if you have any questions.

Very truly yours,

Jennifer C. Brooks

Enclosures

cc: Marcos A. Santana (via FedEx and certified mail)

[Redacted]



Financial Industry Regulatory Authority

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OCT 20 2014
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FACSIMILE

TO	Brent J. Fields, Secretary	FROM	Jennifer Brooks
COMPANY	SEC	FAX	202-728-8264
FAX	202-772-9324	TEL	202-728-8083
TEL			
DATE	October 20, 2014		
NUMBER OF PAGES INCLUDING COVER	19		

This fax transmittal is strictly confidential and is intended solely for the person or organization to whom it is addressed.

RE: In the Matter of the Application for Review of Marcos A. Santana Administrative Proceeding No. 3-16190