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October 26, 2020

VIA EMAIL

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
apfilings@sec.gov

RE: In the Matter of the Consolidated Arbitration Applications, Administrative Proceeding Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919, 3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574, 3-19588, 3-19611

Dear Ms. Countryman:

Enclosed please find FINRA's Opposition to Applicants' Brief on the Merits in the above-referenced matter. Please contact me at (202) 728-8863 or megan.rauch@finra.org if you have any questions.

Sincerely,

/s/ *Megan Rauch*
Megan Rauch

Enclosures

cc: Owen Harnett (by email)
Erica Harris (by email)
Frank Sommers (by email)

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the

Consolidated Arbitration Applications

File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919, 3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574, 3-19588, 3-19611

For Review of Action Taken by
Financial Industry Regulatory Authority

FINRA'S OPPOSITION TO APPLICANTS' BRIEF ON THE MERITS

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October 26, 2020

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BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
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File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919, 3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574, 3-19588, 3-19611

For Review of Action Taken by
Financial Industry Regulatory Authority

FINRA'S OPPOSITION TO APPLICANTS' BRIEF ON THE MERITS

I. INTRODUCTION

Each of the above-captioned matters concerns an Applicant, who is a FINRA associated person, seeking to collaterally attack and expunge a prior adverse arbitration award against the Applicant in a customer dispute. In the underlying customer-initiated arbitration proceedings, an arbitration panel considered the customers' allegations of misconduct on the merits and found the Applicant liable to the customer for misconduct. The corresponding awards did not grant expungement to the Applicants, and the Applicants never moved to vacate, modify, or correct the awards in court. Rather each Applicant—acting as an arbitration claimant—filed a new statement of claim in FINRA's arbitration forum seeking to expunge disclosures about the prior adverse award from Central Registration Depository ("CRD®") and BrokerCheck®. By seeking expungement of the adverse awards, Applicants are necessarily asking a new arbitration panel to reconsider the factual and legal findings of liability made by the prior arbitration panel.

The Applicants' attempt to obtain expungement in FINRA's arbitration forum is a collateral attack on the adverse awards arising from the customer disputes. Such a collateral attack is not contemplated under FINRA rules and is contrary to FINRA's Code of Arbitration Procedure. FINRA's Director of Dispute Resolution ("Director") denied the Applicants' attempt to seek expungement in FINRA's arbitration forum because, where there is an adverse award, the Applicants cannot demonstrate any of the narrow grounds for expungement under FINRA rules without collaterally attacking the prior arbitration awards. In doing so, the Director acted pursuant to FINRA rules.

Nothing in the Applicants' brief establishes that FINRA should grant the Applicants access to its arbitration forum to attempt to disturb legal and factual issues actually litigated and determined by prior arbitration panels and issued in final arbitration awards in customer disputes. The Applicants fail to even acknowledge the meaningful investor protection and regulatory value of the publication of adverse decisions in customer-initiated arbitrations, like the adverse awards against the Applicants. The Applicants also ignore the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and the Supreme Court jurisprudence that confirms that only courts may modify, vacate, or correct an arbitration award. Instead, the Applicants make various arguments attacking the underlying adverse awards and seek to undermine the validity of the prior arbitration panels' decisions. The arguments are meritless, and the Commission should reject them.

The Director's decision to deny the Applicants access to the arbitration forum was authorized by FINRA rules and is consistent with the Securities Exchange Act of 1934 (the "Exchange Act"), the principles of investor protection and the public interest, and the FAA. Accordingly, the Commission should dismiss the Applicants' applications for review.

II. FACTUAL AND PROCEDURAL BACKGROUND

The underlying facts of the Consolidated Arbitration Applications are similar. In each matter, a customer or customers filed a statement of claim in an arbitration forum against an Applicant.[1] The customers alleged that the Applicant engaged in a variety of misconduct related to the securities industry, including failing to disclose, providing false and misleading information, engaging in unsuitable trading, acting negligently, failing to supervise, misrepresenting and omitting material information, engaging in fraud, violating FINRA and NASD rules, violating Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and breaching fiduciary duties. Exhibit A, Column 5.

An arbitrator or arbitration panel considered each of the customer statements of claim against the Applicants on the merits.[2] In each, an arbitrator or arbitration panel determined that

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[1] Consolidated Arbitration Applications – Statement of Facts Summary Exhibit (hereinafter "Summary Exhibit"), attached hereto as Exhibit A. The Summary Exhibit contains the facts relevant to the 19 Consolidated Arbitration Applications and citations to the applicable record. "RP (Applicant) __" refers to the page numbers in the certified record filed by FINRA in that Applicant's application for review. In 18 of the Consolidated Arbitration Applications, the customers filed their underlying statement of claim against the Applicants in FINRA's or its predecessor's arbitration forum. There were two separate customer-initiated arbitrations against Applicant Luken, resulting in two adverse arbitration awards, both of which Luken sought to expunge. RP (Luken) 55-58, 62-64. In the arbitration initiated against Applicant Moseley, the customers filed their statement of claim in the American Arbitration Association forum. The statement of claim alleged that Moseley engaged in misconduct, including misrepresentation and failure to conduct due diligence with respect to a private promissory note obligation, and that Moseley had no reasonable basis for recommending the note. RP (Moseley) 161. Whereas the arbitration panel found that Moseley did not engage "in any act or omission that violated any Securities Law," the panel found Moseley liable for other claims and ordered him to pay the customers $640,000. *See* Applicants Opening Joint Brief ("Br.") Ex. 4 at 3-4.

[2] A single arbitrator considered the customer statements of claim against Gordinier, Murphy, Wojnowski, and Moseley. RP (Gordinier) 41-42; RP (Murphy) 103-04; RP (Wojnowski) 56-59; and (Moseley) 160-61. An arbitration panel considered the customer

[Footnote cont'd on next page]

the Applicant was liable to the customer for misconduct following a hearing with the benefit of a full record, including the pleadings, evidence, witness testimony, and the parties' arguments (or in consideration of the same issues on the record and as set forth in the parties' written submissions).[3] The arbitration awards did not grant expungement relief. Exhibit A, Column 6. Nor is there any evidence that any Applicant sought to challenge the adverse award in court through a motion to vacate, modify, or correct. Instead, the Applicants did nothing for considerable time—ranging from two to 28 years—and then filed statements of claim with FINRA's Office of Dispute Resolution seeking to expunge disclosures about these adverse awards.[4] Exhibit A, Column 8.

Within weeks of receiving the Applicants' statements of claim, FINRA sent written notice to each Applicant that the Director had determined that the Applicant's request for expungement of the adverse customer award was not eligible for arbitration. Exhibit A, Column 10. Under FINRA's Code of Arbitration Procedure, the Director "may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and

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[cont'd]

statements of claim in the other 15 Consolidated Arbitration Applications, including the two separate customer statements of claim against Luken. Exhibit A, Column 6.

[3] In 17 of the Consolidated Arbitration Applications, a single arbitrator or an arbitration panel conducted a hearing and decided in favor of the customers in full and final resolution of the issues. Exhibit A, Column 6. In two of the Consolidated Arbitration Applications, a single arbitrator decided in full and final resolution of the issues on the record without a hearing. RP (Gordinier) 41-42; RP (Murphy) 103-04. For readability purposes, we use the term "arbitration panel" or "panel" hereinafter to refer to both a single arbitrator or arbitration panel in the underlying arbitration proceedings in the 19 Consolidated Arbitration Applications.

[4] FINRA has since changed the name of the Office of Dispute Resolution to FINRA Dispute Resolution Services.

the intent of the Code, the subject matter of the dispute is inappropriate." FINRA Rules 12203(a), 13203(a).

In 12 of the Consolidated Arbitration Applications, the letter explicitly stated the "Director . . . determined that your request for expungement . . . is not eligible for arbitration, as it arises from a prior adverse award" pursuant to FINRA Rule 12203(a) or FINRA Rule 13203(a). Exhibit A, Column 9 (Sullivan, Rosenthal, Kaplow, Cole, Cuenca, Jackson, Wetzel, Ramsay, Gordinier, Rossi, Shulman, and Luken). In two of the Consolidated Arbitration Applications, the letter stated the "Director . . . determined that your request for expungement is not eligible for arbitration" pursuant to FINRA Rule 12203(a) or FINRA Rule 13203(a) but did not mention "a prior adverse award." Exhibit A, Column 9 (Pearce, Davis). In three of the Consolidated Arbitration Applications, the letter stated that "FINRA" had determined that the statement of claim was "not eligible for arbitration" pursuant to FINRA Rule 12203(a) or FINRA Rule 13203(a). Exhibit A, Column 9 (Moseley, Wojnowski, Murphy). In one application, the letter said FINRA denied the forum because "[t]his matter is ineligible for expungement as an Award was rendered . . . and Claimant was held jointly and severally liable for damages to the customer." RP (Rottler) 161. Finally, in the last appeal, the FINRA letter was executed by the Director and informed the Applicant that his request for expungement was "inappropriate for arbitration" under FINRA Rule 13203(a) because the arbitrators made a finding of liability as to the Applicant. RP (Waring) 57-60.

After receiving the Director's decision, each Applicant filed an application for review with the Commission. Exhibit A, Column 10. The Commission subsequently consolidated these applications for review for the purpose of deciding whether it had jurisdiction to consider them

under Section 19(d) of the Exchange Act. Having concluded that it has jurisdiction, the Commission ordered the parties to submit additional briefing on the merits.[5]

III. ARGUMENT

The Director's decision to deny the Applicants use of FINRA's arbitration forum was authorized by FINRA rules and based on the principle that the use of FINRA's arbitration forum to seek expungement is available only in a narrow set of circumstances. Those circumstances are not applicable here. The Director's decision also was consistent with the provisions of Section 15A(b)(6) of the Exchange Act and the principles of investor protection and the public interest, and in accordance with the FAA's mandate that exclusively vests with courts the jurisdiction to review arbitration awards.

In each of the Consolidated Arbitration Applications, the arbitration panel in the prior arbitration proceeding determined that the Applicant was liable to his customer for misconduct. These adverse arbitration awards became final and were reported in CRD.[6] The description of the adverse arbitration awards in CRD is factually accurate and provides the investing public,

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[5] Applicants Sullivan and Cuenca did not file an opening brief on the merits. On March 31, 2020, prior counsel for Applicants Sullivan and Cuenca (who continue to represent the other 17 Applicants and filed a timely opening brief on the merits on their behalf) filed a Notice of Withdrawal of Counsel with the Commission and directed that future correspondence should be directed to a different attorney and law firm.

The Commission consolidated Luken (3-19311) two weeks after concluding that it had jurisdiction and ordering further briefing. Counsel for Luken filed a separate brief on the merits on Applicant Luken's behalf, but made the same arguments as those in the brief on the merits for the other 16 Applicants. FINRA's brief is in opposition to all 19 Consolidated Arbitration Applications.

[6] CRD is the central licensing and registration system used by the U.S. securities industry and its regulators. In general, the information in the CRD system is submitted by registered securities firms, brokers, and regulatory authorities in response to questions on uniform registration forms. FINRA makes specific CRD publicly available through BrokerCheck.

prospective employers, and regulators with important information about the Applicants. The Director properly denied the forum because FINRA rules do not provide for the expungement of adverse awards, and those rules are consistent with FINRA's continuing obligation to protect investors by disclosing accurate information about adverse decisions in customer-initiated arbitrations.

The Director's decision also was consistent with the FAA. Allowing Claimants access to FINRA's arbitration forum to seek expungement of prior adverse awards would conflict with the FAA's requirement of limited judicial review exclusively by courts. Because the Director acted pursuant to FINRA rules, consistent with the Exchange Act, and in accordance with the FAA, the Commission should dismiss the Consolidated Arbitration Applications.

A. FINRA's Summary Responses to Issues Raised by the Commission

To aid in its review of the Consolidated Arbitration Applications, the Commission requested further analysis of four issues. We briefly address these issues.

Q: What was the Director's basis for the prohibitions of access and was that basis consistent with FINRA's rules?

A: The Director, exercising his authority under FINRA Rules 12203 and 13203, denied the Applicants use of FINRA's arbitration forum because the Applicants' claims for expungement are beyond the arbitration forum's mandate under FINRA rules. FINRA Rule 2080 provides for the expungement of customer dispute information if the information is factually impossible, clearly erroneous, or false or where a representative demonstrates he was not involved in the alleged investment-related sales practice violation. The Director's denial of access to the arbitration forum when a prior adverse award was issued in the underlying arbitration proceeding is consistent with FINRA rules because a liability finding by the prior arbitration panel precludes a subsequent arbitrator from making one of the required findings under FINRA Rule 2080. *Infra* at 14-16.

Q: Did all of applicants' denied requests to arbitrate their expungement claims involve prior adverse arbitration awards? Were the prior adverse arbitration awards all related to underlying customer disputes?

A: Yes, in each of the Consolidated Arbitration Applications, the Applicant requested to expunge disclosures about a prior adverse arbitration award related to an underlying customer dispute. Exhibit A, Columns 4, 6, 10.

Q: What rule governs whether an arbitrator could grant applicants' requested relief of expungement of information related to customer disputes? Would applying that rule require the arbitrator to revisit legal or factual issues actually litigated and determined in a final arbitration award issued in the prior arbitration proceeding? If expungement relief is conditioned on the arbitrator revisiting those issues, would that be relevant to whether the Director's prohibition of access was consistent with FINRA's rules?

A: FINRA Rules 2080, 12805, and 13805 govern whether an arbitrator can grant the Applicants' requests for expungement. These rules provide that an arbitrator may recommend expungement of customer dispute information only in narrow circumstances after making an affirmative finding that one of the standards in FINRA Rule 2080 has been proven. Making a finding under FINRA Rule 2080—i.e., that the claim, allegation, or information is factually impossible, clearly erroneous, or false or that the registered person was not involved in the alleged investment-related sales practice violation—would directly conflict with the prior arbitration panel's finding in the final arbitration award that the Applicant was liable to his customer for the alleged misconduct.

Were the Director to permit the use of FINRA's arbitration forum in these instances, the expungement arbitrator necessarily would be required, to satisfy FINRA Rule 2080, to revisit legal and factual issues actually litigated and determined in the prior arbitration proceeding. Because such collateral attacks on final arbitration awards would undermine the integrity of FINRA's arbitration forum, this threat was highly relevant to the Director's determination that the Applicants' efforts to use the arbitration forum were inappropriate. *Infra* at 9-16.

Q: Was the Director's prohibition of access consistent with the provisions of Section 15A(b)(6) of the Exchange Act requiring, among other things, that the rules of a registered securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest?

A: The Director's decision to deny Applicants access to FINRA's arbitration forum was consistent with Exchange Act Section 15A(b)(6). FINRA Rule 2080, governing the scope of expungements in FINRA's arbitration forum, was approved by the Commission as consistent with Section 15A(b)(6). Further, FINRA is obligated to provide the investing public, prospective employers, and regulators with accurate and meaningful information about registered persons in CRD. The Director's use of his authority under FINRA Rules 12203 and 13203 precludes the use of FINRA's forum to seek removal of factual information that is important to the investing public, prospective employers, and regulators. *Infra* at 18-20.

B. FINRA's Actions Meet the Standards of Section 19(f) of the Exchange Act

Under Section 19(f) of the Exchange Act, the Commission must dismiss the Consolidated Arbitration Applications if it finds that: (1) the specific grounds on which FINRA based its action exist in fact; (2) FINRA's denial of the arbitration forum was in accordance with its rules; and (3) those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). FINRA's action meets these standards: the Director's denial of the FINRA arbitration forum was based on the fact that each of the Applicants seeks to expunge a prior adverse arbitration award, the Director's action was in accordance with FINRA rules, and those rules were applied in a manner consistent with the Exchange Act and investor protection. *See* 15 U.S.C. § 78s(f).

C. FINRA Properly Prohibited the Applicants Access to Its Arbitration Forum

The Director properly exercised his rule-based authority when he denied the Applicants access to the arbitration forum to expunge disclosures about prior adverse arbitration awards. The Applicants' expungement claims are inappropriate for the arbitration forum because FINRA's narrow standards for removing customer dispute information from CRD are incompatible with expunging prior adverse arbitration awards.

1. Using FINRA's Arbitration Forum to Expunge a Prior Adverse Arbitration Award Is Not Contemplated Under FINRA Rules

An attempt to use FINRA's arbitration forum to collaterally attack a prior adverse award arising from a customer dispute is not consistent with "the purposes of FINRA and the intent of the Code" of Arbitration Procedure. *See* FINRA Rules 12203(a), 13203(a).

While FINRA rules contemplate the use of FINRA's arbitration forum to expunge customer dispute information in certain narrow circumstances, the rules do not contemplate the expungement of adverse arbitration awards arising from customer disputes. FINRA Rule 2080

governs the expungement of customer dispute information from CRD. The Rule identifies three narrow circumstances that serve as an appropriate basis for the expungement of customer dispute information from CRD in FINRA's arbitration forum:

- the claim, allegation or information is factually impossible or clearly erroneous;
- the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- the claim, allegation or information is false.

FINRA Rule 2080(b)(1). The standards imposed by FINRA Rule 2080 are intended to promote the common interest of public investors, broker-dealers and their associated persons, and regulators in "a CRD system that contains accurate and meaningful information" and maintains the "integrity of the arbitration process." *NASD Notice to Members 04-16*, 2004 NASD LEXIS 18 (Mar. 2004).

FINRA's Code of Arbitration Procedure requires arbitrators to make an affirmative finding that one of the standards in FINRA Rule 2080 has been proven before recommending expungement of customer dispute information.[7] *See* FINRA Rules 12805, 13805. In order to grant an expungement request, the arbitration panel must hold a recorded hearing regarding the appropriateness of the expungement of customer dispute information and "provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case." FINRA Rules 12805, 13805. "The procedures add…safeguards

[7] Although FINRA Rules 12805 and 13805 state that the arbitration panel may "grant" expungement of customer dispute information under FINRA Rule 2080, a person seeking expungement must also obtain a court order confirming an arbitration award for FINRA to expunge the customer dispute information from CRD system. *See* FINRA Rule 2080.

designed to ensure that the extraordinary relief of expungement is granted only under appropriate circumstances." *FINRA Regulatory Notice 08-79*, 2008 FINRA LEXIS 76, at *2 (Dec. 2008).

Thus, the intent of FINRA rules and FINRA's Code of Arbitration Procedure is to allow associated persons to expunge customer dispute information only in narrow circumstances—i.e., when the claim, allegation, or information is factually impossible, clearly erroneous, or false, or the registered person was not involved in the alleged investment-related sales practice violation. *See* FINRA Rules 2080, 12805, 13805. FINRA rules were not intended to allow associated persons a second chance at arbitrating the same issues under the guise of an expungement request, where a prior arbitration panel rendered a decision on the merits in favor of a customer in a customer-initiated arbitration. In fact, FINRA arbitration training reinforces this point. It instructs arbitrators that "if the arbitrators found that the broker was liable . . . and awarded the claimant monetary damages, expungement would not be appropriate. These findings would not satisfy any of the three grounds under Rule 2080." *FINRA Office of Dispute Resolution Expungement Training*, https://www.finra.org/sites/default/files/FINRA-Expungement-Training.pdf, at *12 (last visited Oct. 20, 2020).[8]

The Applicants are unable to show any of the narrow grounds for expungement under FINRA Rule 2080 without collaterally attacking the prior adverse arbitration award. First, to

[8] FINRA recently proposed a rule change to amend the Code of Arbitration Procedure to modify the process for expungement of customer dispute information as a result of concerns raised by stakeholders in the forum about expungement hearings by arbitration panels that had not heard the merits of that case. *See Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests*, 85 Fed. Reg. 62,142 (Oct. 1, 2020) (hereinafter "*Special Arbitrator Roster Proposed Rule Change*"). The proposal notes that expungement requests may be complex, particularly requests where the customers do not participate in the expungement hearing. The proposed rule change seeks to impose additional safeguards for the process of expungement of customer dispute information.

prove that the adverse arbitration award was factually impossible or clearly erroneous would essentially require a rehearing of the evidence from the prior arbitration proceeding and a complete reversal by the second arbitration panel of the prior adverse arbitration award. Second, to prove that the registered person was not involved in the investment-related sales practice (or similar) violation would require the second panel to overturn the prior arbitration panel's factual findings and assessment of liability. In finding the Applicants liable, the prior arbitration panels necessarily found that the Applicants were involved in the alleged misconduct, and in ordering the Applicants to pay an award, the panels assigned responsibility for damages to the Applicants. Third, to prove that the adverse arbitration award was false would require a frontal assault on the prior adverse award. In other words, the expungement of prior adverse awards is not contemplated by FINRA rules because it would invalidate factual and legal issues actually litigated and decided in a final arbitration award by the prior arbitration panel. Even if the specific issue of expungement was not litigated during the prior arbitration proceeding, the arbitration panel's determination of liability in that proceeding necessarily precludes expungement relief of adverse awards under FINRA Rule 2080 because none of the standards set forth in that rule can be satisfied.

To be sure, the Applicants' brief launches collateral attacks on the legal and factual findings underlying the prior adverse awards. For example, the Applicants argue that "an award in the complaining customer's favor when based on a low standard of proof should not preclude an expungement award based on a higher standard." Br. at 11. The Applicants are confusing differing burdens of proof while attempting to collaterally attack the adverse arbitration awards. The prior arbitration panels found the Applicants liable for misconduct in the underlying arbitration proceeding. And, logically, an expungement arbitrator cannot find that the underlying

information was factually impossible, clearly erroneous, or false, or that the registered person was not involved in the alleged investment-related sales practice violation, without undermining the liability findings of the prior arbitration panel.[9] To argue to a second arbitration panel that the prior panel's findings should be expunged because the presentation to the second panel is more persuasive is merely a rationalization of a collateral attack. Br. at 11-13. To wit, the expungement of an adverse award would directly contradict the prior arbitration panel's final award and findings that the Applicant was liable for the misconduct.[10]

Although FINRA rules allow an associated person to seek expungement of customer dispute information in narrow circumstances, those circumstances do not and cannot exist when the expungement sought relates to a prior adverse award—like those that are the subject of the Applicants' claims—in which the associated person was found liable to the customer.[11]

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[9] The Commission has previously recognized impermissible collateral attacks on underlying arbitration awards in other FINRA actions. *See, e.g.*, *Michael Albert Dipietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *13 (Mar. 17, 2016) (holding that the applicant cannot collaterally attack the underlying arbitration award in a FINRA expedited proceeding); *Richard J. Lanigan*, 52 S.E.C. 375, 377 n.9 (1995) ("An applicant, however, may not collaterally attack an arbitration award in a disciplinary proceeding for failing to pay the award.").

[10] "As courts have long held, parties cannot re-frame their argument to make an otherwise impermissible collateral attack on an arbitration award." *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *18 (Oct. 22, 2019) (collecting cases).

[11] The Applicants assert that "[i]t is in the best interest of the investing public to separate hearings on customer complaints for damages and advisor requests for expungement." Br. at 12. These proceedings historically often have been separated when a registered person is found not liable and later seeks expungement, but a claimant is not permitted to expunge a prior adverse arbitration award. Under the *Special Arbitrator Roster Proposed Rule Change*, FINRA has proposed that an associated person, who is named in a customer-initiated arbitration (as the Applicants were), must request expungement of the customer dispute information arising from the customer's statement of claim during that arbitration or forfeit the ability to request expungement of that same disclosure. This requirement, however, would only apply if the rule

[Footnote cont'd on next page]

2. The Director's Denial of the Arbitration Forum Is Consistent with FINRA Rules

FINRA Rules 12203(a) and 13203(a) establish a gatekeeper role for the Director by authorizing him to exclude inappropriate arbitration claims from the FINRA arbitration forum. The rules are identical and provide:

> (a) The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives.

FINRA Rules 12203(a),13203(a).

In its approval order for FINRA Rules 12203 and 13203, the Commission underscored that the rules empowered the Director to act to preserve the arbitration forum for claims that are consistent with the purpose of the forum. Specifically, the Commission noted that Rules 12203 and 13203 would "facilitate excluding cases from the [FINRA] arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum." *Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto*, 72 Fed. Reg. 4574, 4062 (Jan. 31, 2007) (hereinafter "*Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration*

[cont'd]

proposal is approved by the Commission and regardless would not apply to the Applicants in these Consolidated Arbitration Applications.

Rules"). At the time of these statements, the Commission was approving the *expansion* of the Director's discretionary authority under FINRA Rules 12203 and 13203.

In each of the Consolidated Arbitration Applications, the Director properly exercised his authority under FINRA Rules 12203 and 13203 to deny use of the arbitration forum because the Applicants' claims for expungement were inappropriate and beyond the arbitration forum's mandate. FINRA Rule 2080 identifies specific, narrow grounds upon which expungement is permitted—i.e., that the complaint is factually impossible, clearly erroneous, false or that that the registered person was not involved in the alleged investment-related sales practice violation. Because a finding by an arbitrator in the expungement proceeding would directly conflict with the prior arbitration panel's liability finding, the relief sought by Applicants is not contemplated by FINRA's Code of Arbitration Procedure.[12] *See* FINRA Rules 2080, 12805(c), 13805(c). The expungement of adverse customer awards would invalidate factual and legal issues actually litigated and determined in final arbitration awards, a result that contravenes FINRA rules, the finality of arbitration awards, and public policy.[13]

The Director also properly acted as a gatekeeper under FINRA Rules 12203 and 13203 to prevent the wasteful re-litigation of the same issues in the arbitration forum. The point of

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[12] By contrast, a claimant seeking to expunge a customer complaint or other customer dispute information that was not previously adjudicated by an arbitrator could potentially demonstrate the narrow grounds for expungement under FINRA Rule 2080. Therefore, that claimant would not be denied access to FINRA's arbitration forum to seek expungement.

[13] The Applicants assert that "[n]one of the adopted rules and guidance state that an application will be barred if it relates to a resolved customer arbitration." Br. at 5. But FINRA rules need not explicitly provide what types of customer disputes cannot be expunged. Rather, FINRA Rule 2080 provides the narrow circumstances contemplated by FINRA rules related to the expungement of customer dispute information in FINRA's forum. A plain reading of FINRA Rule 2080 is that some categories of customer dispute information will not meet the strict standards contained in the rule.

Applicants' arbitration claims seeking expungement is to eliminate the reporting of the adverse awards in CRD because they allegedly committed no wrong—the precise issue that was litigated in the prior arbitration proceedings in which every Applicant was able to participate and was found liable. Thus, the Director's denial of the arbitration forum to the Applicants supports the finality of arbitration awards and prevents an unnecessary waste of administrative resources.

3. FINRA's Letters Accurately Informed the Applicants of the Director's Decisions

FINRA informed each of the Applicants about the Director's decision to deny access to FINRA's arbitration forum in a letter from FINRA's Office of Dispute Resolution setting forth the specific grounds on which the prohibition was based. *See* 15 U.S.C. § 78o-3(h)(2).[14] The Applicants nevertheless make various claims that the letters communicating the Director's decision were inadequate and did not comply with FINRA rules. Br. at 3-5. These arguments are without merit. In all but one of the Consolidated Arbitration Applications, the FINRA letter denying the arbitration forum explicitly references FINRA Rule 12203(a) or 13203(a). Exhibit A, Column 6. Applicants note that FINRA's letter to Applicant Rottler does not cite FINRA Rule 12203 or 13203. But as the Applicants concede, it is evident that FINRA Rules 12203 and 13203 were the basis of the denial of forum in that matter as well. Br. at 4.

The failure of the letters communicating the Director's denial of access to the forum to quote back the specific language of FINRA Rules 12203 and 13203—i.e., that the "subject matter" of the request for expungement was "inappropriate" "given the purposes of FINRA"—is

[14] Section 15A(h)(2) provides that national securities associations are required to keep a record and to provide notice, an opportunity to be heard, and a "statement setting forth the specific grounds" on which its denial is based. 15 U.S.C. § 78o-3(h)(2). FINRA met these requirements in the Consolidated Arbitration Actions.

not fatal. The Applicants' rigid expectations are neither reasonable nor required under FINRA rules or the Exchange Act. Moreover, the Applicants readily admit that they were aware that the Director denied the forum because of the subject matter of the requests—i.e., the expungement of prior adverse arbitration awards—which the Director deemed inappropriate. Br. at 4-5.

FINRA rules likewise do not require that the Director himself communicate his decision to deny the forum. Br. 4-5. By referencing FINRA Rule 12203(a) or 13203(a), it is axiomatic that the Director exercised his authority under the rules, regardless of whether he personally signed the letter communicating his decision or the letter explicitly referenced that "the Director," as opposed to "FINRA," made the decision. In sum, FINRA's letters effectively communicated the Director's decision.

The Applicants also contend that FINRA engaged in unilateral, "unwritten" rulemaking when the Director denied access to the arbitration forum. Br. at 5. This argument is a red herring. First, the Director's decision to deny the Applicants access to the arbitration forum did not create a new rule; the Director was acting pursuant to his authority under FINRA Rules 12203 and 13203. Second, these rules by their terms are flexible. The Director is authorized to deny the arbitration forum when "the subject matter of the dispute is inappropriate." FINRA Rules 12203(a) and 13203(a). Rather than providing a list of each subject matter that is inappropriate, the rule allows the Director to address new or novel arbitration claims that are inappropriate.[15] Indeed, the Commission considered the advantages of having the Director act as

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[15] The Applicants further contend that FINRA rules permit the Director to deny the forum only in emergencies and "to address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations." Br. at 5. In making this argument, the Applicants quote a comment letter submitted during the rule approval process, not the Commission. *See Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules*, 72 Fed. Reg. 4574. Applicants also misread the rule text itself

[Footnote cont'd on next page]

a gatekeeper to the forum and concluded that FINRA Rules 12203 and 13203 "allow[ed] [the forum] to focus on the cases that are appropriately in the forum" which "in turn, should promote the efficacy and efficiency of the arbitration." *Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules*, 72 Fed. Reg. at 4602.

4. The Director's Denial of the Arbitration Forum Is Consistent with the Exchange Act and the Public Interest

Not only was the Director's denial of the arbitration forum pursuant to FINRA rules, it was also consistent with the Exchange Act and FINRA's obligation to provide the investing public, prospective employers, and regulators with accurate and meaningful information.

First, the Director's use of his authority under FINRA Rules 12203 and 13203 to deny the Applicants access to the forum was consistent with the provisions of Section 15A(b)(6) of the Exchange Act because the Applicants' attempt to use FINRA's arbitration forum to collaterally attack an adverse customer arbitration award is not consistent with FINRA's mission or the intent of FINRA rules. *See* 15 U.S.C. 78o-3(b)(6); *see Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules*, 72 Fed. Reg. at 4601 (finding that FINRA Rules 12203 and 13203 were consistent with the Exchange Act, which requires that FINRA rules be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.").

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and conveniently ignore the disjunctive "or" in the plain language of the rule, which permits denial of the forum in circumstances like this one. Here, the Director relied on the inappropriate nature of the arbitration claims; the Director was not relying on the health-and-safety powers contained in the rule.

The Director's decision to deny the Applicants access to the forum also was consistent with the principles of investor protection and the public interest. Investors, broker-dealers and their associated persons, and regulators "share a common interest in a CRD system that contains accurate and meaningful information." *NASD Notice to Members 04-16*, 2004 NASD LEXIS at *6. Information expunged from CRD "is no longer available to regulators, broker-dealers, or the investing public," and "regulators and the investing public are disadvantaged when factual information is removed from the CRD." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, 79 Fed. Reg. 43,809, 43,813 (July 28, 2014). The expungement of a prior adverse award violates public policy because it would permanently remove valuable and factually accurate information from the Applicants' securities record and thus disadvantage investors, prospective employers, and regulators. *See id*.

In fact, as part of its statutory mandate under the Exchange Act, FINRA is required to collect and maintain registration information about member firms and associated persons. *See* 15 U.S.C. § 78o-3(i)(1)(A). FINRA maintains the registration information in CRD and provides a subset of that information to the public through BrokerCheck. FINRA makes available to the public certain registration information, including information about adverse arbitration awards arising from disputes with customers, because such information is important to investor protection and to the regulation of the securities industry. 15 U.S.C. § 78o-3(i)(1)(B).

The Commission has found that "[h]aving complete and accurate information in CRD is important to regulators, the industry, and the public." *Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Adoption of FINRA Rule 3110(e) (Responsibility of Member To Investigate Applicants for Registration) in*

the Consolidated FINRA Rulebook, 80 Fed. Reg. 546, 547 (Jan. 6, 2015). Accordingly, the Commission has determined that expungement of information from CRD "is an extraordinary remedy that is permitted only in the appropriate narrow circumstances contemplated by FINRA rules." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, 79 Fed. Reg. at 43,812-13.

The Commission has recognized the importance of publication of adverse decisions in customer-initiated arbitrations when it approved a FINRA rule change that *requires* FINRA to make information related to arbitration awards against representatives in customer-initiated arbitrations permanently available to the public. *Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, 75 Fed. Reg. 41,254, 41,254-55 (July 15, 2010). The Commission explained, "if registered persons are aware that their CRD information will be available for a longer period of time, it should provide an additional incentive to act consistent with industry best practices," and confirmed that this information has meaningful investor protection and regulatory value. *Id.* at 41,257. Notably, the Applicants conveniently ignore the meaningful investor protection and regulatory value of the publication of adverse decisions, despite the Commission's explicit statements.

Accordingly, the Director's action denying the Applicants access to the arbitration forum was consistent with the Exchange Act and FINRA's purposes to provide the investing public, prospective employers, and regulators with complete information about prior adverse arbitration awards.[16]

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[16] In addition, any expungement proceeding now to re-litigate the issue of liability against the Applicants is likely untenable due to the passage of time since the prior arbitration

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5. The Applicants' Remaining Arguments Lack Merit

The Applicants contend that the arbitration forum has shortcomings and that FINRA violated constitutional protections. These arguments have no merit.

The Applicants contend that the failure of FINRA's Code of Arbitration Procedure to "specify a standard of proof" in the arbitration forum justifies the Applicants getting a chance to re-arbitrate the same issues in an expungement proceeding. Br. at 11. It does not. The arbitration panel, having considered the pleadings, record, and the parties' arguments, found that each Applicant was liable for the alleged misconduct and determined the relief to which the complaining customer was entitled.[17] *See* FINRA Rules 12608, 12904. This finding of liability is not diminished because the Applicant was found jointly and severally liable with another respondent. Br. 10-11. FINRA's Code of Arbitration Procedure specifically contemplates multiple respondents if the claims contain any questions of law or fact common to all respondents and the claims are asserted against the respondents "jointly and severally" or the claims arise out of the same transaction or occurrence. *See* FINRA Rule 12313. For each Applicant here, the issue of liability was litigated and determined by the arbitration panel in the prior arbitration proceeding. In each instance, the prior arbitration panel, having considered the

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proceeding. The majority, if not all, of the evidence related to the prior adverse award likely would be unavailable. In 15 of the Consolidated Arbitration Applications, the prior arbitration proceedings and awards are more than 15 years old. The remaining awards, save one, are six years old or older. Exhibit A, Column 6.

[17] In a three-arbitrator panel, an award is based on the vote of a majority of the arbitrators. *See* FINRA Rule 12410.

issue of liability and the claims on the merits, determined that the Applicant was *independently* liable for the misconduct.[18] Exhibit A, Columns 6, 7.

Applicants argue that "a fact-finder could reasonably conclude that a fact-finder found some credible evidence that the customer was harmed, but not enough to meet a preponderance of evidence standard" because "there are no findings of fact to explain any of the awards." Br. at 12. This argument has no basis in fact or the law and should be rejected. The arbitration panel was not required to make an explicit "factual finding of actual specific wrongdoing."[19] Br. at 9. *See also* FINRA Rule 12904 (stating that awards "may contain a rationale"). And the failure to do so does not negate the arbitration panel's liability finding against the Applicant nor transform it into "boilerplate" language "included for the sole purpose of collection of damages." Br. at 10. The arbitration panel likewise was not required to apportion liability in a manner other than "joint and several." Br. at 8-9. And the fact that the Applicants were jointly represented by counsel with another party does not mean that they should be permitted to re-litigate the liability findings in the underlying adverse awards in an expungement arbitration.

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[18] The Applicants argue that an arbitration panel's decision to award damages in any amount less than the original amount the customer sought in the underlying statement of claim somehow minimizes the Applicants' liability. Br. at 11. The Commission should reject this non sequitur. None of the arbitration awards in the Consolidated Arbitration Applications assess comparative liability. In each case, the arbitration panel concluded that the Applicant was independently liable for the misconduct and, afterwards, determined the appropriate damages to be assessed against the Applicant. Exhibit A, Columns 6, 7. The assessed damages do not minimize the arbitration panel's finding of liability against the Applicant.

[19] To the extent that the Applicants had any concerns about the findings of the prior arbitration panels, the Applicants should have challenged those findings by filing in the appropriate court a timely motion to vacate, modify, or correct the award. There is no evidence that any Applicant sought to challenge his underlying award in court.

Finally, the Applicants assert that, even if FINRA had the authority under its rules to deny access to the arbitration forum to those seeking to expunge adverse awards, the "de facto nature of it violates fundamental due process standards." Br. at 5. Applicants fail to explain how their right to a fair process has been violated. Moreover, it is well established that constitutional protections are inapplicable to FINRA proceedings. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (noting that the Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violation of constitutional rights by the government, not private actors); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011) ("FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings.").

D. The FAA Establishes the Limited Review of Arbitration Awards Exclusively with Courts

The Director's decision was also correct because allowing Applicants to seek expungement in FINRA's arbitration forum conflicts with the requirements of the FAA. The Applicants' avenue for challenging their adverse awards was to file a timely motion with an appropriate court to vacate, modify, or correct the award—an avenue the Applicants did not pursue. *See, e.g.*, FAA, 9 U.S.C. § 12 (requiring any motion to vacate, modify, or correct an arbitration award be made with a court within three months of the award being issued); *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) (relying on the FAA as the limiting grounds on which a court can set aside an arbitral award, and stating that "we do not allow the disappointed party to bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators' decision"); *see also Challenges to an Arbitration Award,* http://www.finra.org/arbitration-and-mediation/decision-award (last visited Oct. 20, 2020) (explaining that FINRA does not have an appeals process through which a party may challenge

an adverse arbitration award and that—pursuant to the FAA—only a court may modify, vacate, or correct an award).

The Applicants' attempt to secure a second arbitration panel to negate the liability findings underpinning the prior adverse arbitration awards therefore conflicts with the FAA.[20] The arbitration awards against the Applicants are final and binding. When describing specifically its role in the arbitration process, the Commission has stated that it "cannot overturn or change an arbitrator's decision. In addition, arbitration decisions are not subject to appeal," and a party may only challenge an award by filing a motion to vacate. *See Arbitration, Challenging a Decision, SEC Role*, https://www.sec.gov/fast-answers/answers-arbappealhtm.html (last visited Oct. 20, 2020).

As the Supreme Court has explained, the FAA mandates that only courts review arbitration awards and places strict limits on that judicial review. Notably, the Applicants cite no provision or authority within either the FAA or the Exchange Act that permits a second arbitration panel to review the factual and legal findings in the prior adverse award or to correct an arbitration award arising from a dispute with customers. Applicants cite no such authority because there is none. "The [FAA] . . . supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 582-84 (2008) (citing 9 U.S.C. §§ 9-11). The Court held in *Hall Street* that parties to an arbitration agreement cannot contract for any review

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[20] For example, the Applicants contend that Applicant Gordinier "was not informed of, nor did he participate in, the underlying arbitration." Br. at 10. The Commission should reject the Applicants' unsupported attack on the arbitration award against Gordinier. Gordinier was named in the underlying arbitration proceeding and can only challenge a final arbitration award by filing a timely motion to vacate, modify, or correct the award. *See, e.g.*, FAA, 9 U.S.C. § 12.

other than the narrow judicial review set out by the FAA in 9 U.S.C. Sections 10 and 11. *Id.* at 590.

The Court determined that "the [FAA's] three provisions, §§ 9-11, [were] substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. This narrow scope of review is what gives rise to the greater efficiency of arbitration. "Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in postarbitration process." *Id.* (internal quotation marks and citations omitted). In no circumstances does the FAA permit a collateral attack on a final arbitration award, years later, such as the expungement relief sought by the Applicants.

As "*Hall Street Associates* makes clear[,] de novo review is entirely incompatible with the expedited process envisioned in the FAA." *Citizen Potawatomi Nation v. OK*, 881 F.3d 1226, 1237 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 375 (Oct. 15, 2018). Mere dissatisfaction with an award is not a good enough reason for a losing party such as the Applicants to obtain expanded review not contemplated by the FAA. "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993). Therefore, allowing the Applicants access to FINRA's arbitration forum to essentially re-litigate whether the prior adverse award was correct would be "entirely incompatible" with the FAA. *See Citizen Potawatomi*, 881 F.3d at 1237.

IV. CONCLUSION

The Director's decision to deny the Applicants access to FINRA's arbitration forum to seek expungement of prior adverse arbitration awards arising from customer disputes is based on facts that exist, is in accordance with FINRA rules, and is consistent with the purposes of the Exchange Act. Accordingly, the Commission should dismiss the Applicants' applications for review.

Respectfully submitted,

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October 26, 2020

CONSOLIDATED ARBITRATION APPLICATIONS - STATEMENT OF FACTS SUMMARY EXHIBIT

Applicant	Admin. Proc. File No.	Occurrence Number / Date Customer Filed Claim in Arbitration Forum	Customer Names	Allegations / Alleged Compensatory Damages	Award date	Award Amount	Date Expungement Claim Filed	Date Director Denied Forum	Date Applicant Filed Application
Timothy C. Sullivan Award 02-04811	3-18616	1067267 – 8/14/2002 (RP (Sullivan) 1, 143)	William and Antoinette Harris (RP (Sullivan) 6, 44, 45, 116, 118, 143)	Unsuitability, negligence, unauthorized trading, breach of fiduciary duty, misrepresentation, non-disclosure / $151,958 (RP (Sullivan) 116-118, 143)	8/1/2003 (RP (Sullivan) 117, 143-48)	$23,927.60 (RP (Sullivan) 117, 144)	4/6/2018 (RP (Sullivan) 1-9)	5/31/2018 (RP (Sullivan) 81)	6/29/2018 (RP (Sullivan) 85-87)
William B. Rosenthal Award 09-01724	3-18617	1457912 – 3/25/2009 (RP (Rosenthal) 1, 229, 237)	Clyde & Meleena Byram (RP (Rosenthal) 7, 44, 46-47, 221, 229, 237)	Breach of fiduciary duty, failure to protect against risk by diversification, negligence, failure to supervise, unsuitability and negligence / $500,000 (RP (Rosenthal) 44, 46-47, 221, 229-30 237-38)	5/24/2010 (Rosenthal RP 229-36) Amended Award Date 6/17/2010 (RP (Rosenthal) 237-44)	$52,600 (RP (Rosenthal) 222, 231, 239)	2/21/2018 (RP (Rosenthal) 1-17)	5/31/2018 (RP (Rosenthal) 181)	6/29/2018 (RP (Rosenthal) 185-87)
Bart Steven Kaplow Award 02-00490	3-18877	1145306 – 1/25/2002 (RP (Kaplow) 1, 96, 139)	E. Marshall Goldberg and E. Marshall Goldberg, M D., P.C. (RP (Kaplow) 96-97, 137)	Failing to disclose, providing false and misleading information, engaging in unsuitable trading, acting negligently, failing to supervise, misrepresenting and omitting material information, engaging in fraud, violating NASD rules, violating § 10(b) of the Exchange Act and Rule 10b-5 thereunder, violating the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and breaching a fiduciary duty / $750,000 (RP (Kaplow) 137-38)	9/16/2003 (RP (Kaplow) 97, 137-43)	$62,000 (RP (Kaplow) 97, 138)	1/8/2018 (RP (Kaplow) 1-11)	9/21/2018 (RP (Kaplow) 71)	10/25/2018 (RP (Kaplow) 73-76)
Daryl Andrew Cole Award for 02-02923	3-18879	1079197 – 5/14/2002 (RP (Cole) 1, 158-60, 165)	Stella Hartunian (RP (Cole) 2, 42, 158, 165)	Unsuitable recommendations in Sept. 2000 for mutual fund portfolio, breach of contract, breach of fiduciary duty, negligence, misrepresentation, failure to supervise / $66,242 (RP (Cole) 158-59, 165)	4/9/2003 (RP (Cole) 160, 165-70)	$5,255 (RP (Cole) 159, 167)	12/26/2018 (RP (Cole) 1-17)	10/9/2018 (RP (Cole) 137)	10/26/2018 (RP (Cole) 139-42)
Frank A. Cuenca Award for 02-04811	3-18883	1100681 – 8/14/2002 (RP (Cuenca) 1, 90, 101)	William and Antoinette Harris (RP (Cuenca) 5, 35, 90, 101)	Unsuitability, negligence, unauthorized trading, breach of fiduciary duty, misrepresentation, non-disclosure / $151,959 (RP (Cuenca) 35, 90-92, 101)	8/1/2003 (RP (Cuenca) 35-36, 90-92, 101-06)	$23,927.60 (RP (Cuenca) 35-36, 90-92, 102)	3/23/2018 (RP (Cuenca) 1-8)	10/9/2018 (RP (Cuenca) 59)	10/29/2018 (RP (Cuenca) 61-63)
Kurt C. Jackson Award for 03-01513	3-18910	1135499 – 3/3/2003 (RP (Jackson) 1, 188, 193)	David & Gavin Dirusso (RP (Jackson) 4, 31, 188-90, 193)	Negligence, breach of contract, breach of fiduciary duty, respondeat superior, failure to supervise and suitability / $490,000 and $42,000 (RP (Jackson) 34, 188-90, 193-94)	10/21/2004 (RP (Jackson) 34, 188-90, 193-97)	$48,430 (RP (Jackson) 188-90, 194)	3/28/2018 (RP (Jackson) 1-8)	11/8/2018 (RP (Jackson) 153)	11/12/2018 (RP (Jackson) 155-59)
Brock E. Moseley AAA Arb Award for Case # 01-17-0000-2401	3-18919	1934123 – 2/8/2017 (RP (Moseley) 1, 161)	Shareef Abdou, as Trustee of the Shareef Abdou Family Trust (RP (Moseley) 2, 160)	Misrepresentation and failure to conduct due diligence with respect to a private promissory note obligation, no reasonable basis for recommending the investment in the private note in January 2015 / $640,000 + interest (RP (Moseley) 22, 161)	6/13/2018 (RP (Moseley) 94-97, 160-161)	$640,000 (RP (Moseley) 97, 161)	10/31/2018 (RP (Moseley) 1-11)	11/6/2018 (RP (Moseley) 139)	12/3/2018 (RP (Moseley) 143-145)
Ronald R. Wetzel Award for 07-00977	3-18934	1347459 – 3/22/2007 (RP (Wetzel) 1, 90, 99)	James C. Martin (RP (Wetzel) 7, 90, 99)	Unsuitability, Violation of Section 10(b) of the 1934 Securities Exchange Act and Rule 10b-5, Breach of Contract, Breach of Fiduciary Duty, Violation of PA Securities Law, Negligence, Violation of PA Unfair Trade Law / $70,000 (RP (Wetzel) 90, 99)	3/17/2009 (RP (Wetzel) 91, 99-104)	$1.00 (RP (Wetzel) 91, 100)	9/17/2018 (RP (Wetzel) 1-11)	11/13/2018 Forum denied (RP (Wetzel) 63)	12/11/2018 (RP (Wetzel) 65-67)
Peter A. Ramsay Award for 03-03696	3-18988	1145316 – 5/20/2003 (RP (Ramsay) 1, 55)	Richard & Mary Mack (RP (Ramsay) 52-53, 55)	Suitability, fraud, misrepresentation, breach of contract, negligence, violation of NASD Conduct Rules, negligent supervision, and breach of fiduciary duty / $110,800 (RP (Ramsay) 52-53, 55-56)	6/30/2004 (RP (Ramsay) 52-53, 55-61)	$24,000 (RP (Ramsay) 53, 56)	12/20/2018 (RP (Ramsay) 1-3)	1/7/2019 (RP (Ramsay) 33)	2/1/2019 (RP (Ramsay) 35-39)

Applicant	Admin. Proc. File No.	Occurrence Number / Date Customer Filed Claim in Arbitration Forum	Customer Names	Allegations / Alleged Compensatory Damages	Award date	Award Amount	Date Expungement Claim Filed	Date Director Denied Forum	Date Applicant Filed Application
Donald A. Wojnowski Award for 09-02695	3-19013	1477090 -- 5/6/2009 (RP (Wojnowski) 1, 15, 56-59)	Trini & Betty Thomas (RP (Wojnowski) 2, 15, 56-59)	Misrepresentation, violation of Fla. Stat. § 517, breach of fiduciary duty, failure to supervise / $100,000 (RP (Wojnowski) 16, 56-59)	3/19/2010 (RP (Wojnowski) 15-21, 56-59)	$140,000 (RP (Wojnowski) 17-18, 56-59)	1/24/2019 (RP (Wojnowski) 1-3)	1/25/2019 (RP (Wojnowski) 7)	2/22/2019 (RP (Wojnowski) 9-11)
Mark V. Rottler Award for 13-01838	3-19016	1664981 -- 6/17/2013 (RP (Rottler) 1, 58, 113)	Robert Kenneke (RP (Rottler) 5, 58-65, 106-07, 113)	Common law fraud, suitability, failure to supervise, negligence, breach of fiduciary duty, violations of the Illinois Consumer Fraud and Deceptive Practices Act and violations of the Illinois Securities Law of 1953 / $388,097 (RP (Rottler) 58-59, 106-07, 113-20)	11/12/2014 (RP (Rottler) 62, 113-20)	$100,000 (RP (Rottler) 60, 107, 115)	12/20/2018 (RP (Rottler) 1-10)	2/8/2019 Forum partially denied (RP (Rottler) 73)	2/25/2019 (RP (Rottler) 75-78)
Carl G. Gordinier Award for 95-01790	3-19017	135779 -- 4/11/1995 (RP (Gordinier) 1, 41)	Paul J. Fike (RP (Gordinier) 1, 33-36, 41)	Suitability and misrepresentation / $9,000 (RP (Gordinier) 33-36, 41-42)	10/30/1995 (RP (Gordinier) 33-36, 41-42)	$4,200 (RP (Gordinier) 33-36, 41-42)	2/1/2019 (RP (Gordinier) 1-3)	2/15/2019 (RP (Gordinier) 5)	2/27/2019 (RP (Gordinier) 7-10)
Jordan W. Waring NYSE Award Docket 1996-005660	3-19219	158307 -- 3/11/96 (RP (Waring) 1, 16, 57-60)	DC Masonry, Inc. (RP (Waring) 16, 57-60)	Wire fraud, negligent handling of its account, churning, unsuitability, misrepresentation breach of contract and violations of Federal Securities Laws / $171,155 (RP (Waring) 1, 57-60)	4/18/1997 (RP (Waring) 16, 57-60)	$60,000 (RP (Waring) 16, 57-60)	5/16/2019 (RP (Waring) 1-14)	6/3/2019 (RP (Waring) 15)	6/26/2019 (RP (Waring) 23-25)
Kent Vincent Pearce Award for 02-07575	3-19228	1111750 --12/10/2002 (RP (Pearce) 1, 75, 103-05)	Edward P. & Margaret M. Dubicki (RP (Pearce) 2, 75, 103-05)	Unsuitability, breach of fiduciary duty, breach of contract, fraud / $260,179 (RP (Pearce) 75-76, 103-05)	2/25/2004 (RP (Pearce) 75-81, 103-05)	$50,000 (RP (Pearce) 76, 103-05)	6/26/2019 (RP (Pearce) 1-9)	6/27/2019 (RP (Pearce) 83)	6/28/2019 (RP (Pearce) 85-86)
Vicent H. Rossi Award for 89-01813	3-19405	7885 -- 6/15/1989 (RP (Rossi) 1, 11)	Michael & Anita Fountain, *et al.* (RP (Rossi) 2, 11, 36-37)	Consumer fraud, breach of contract, restitution, breach of fiduciary duty, unsuitability, breach of trust, breach of agency, constructive fraud, fraud, intentional misrepresentation, negligent misrepresentation, conversion, negligence and violations of NASD and NYSE rules / $147,292.74 + interest (RP (Rossi) 11-15, 36-37)	4/22/1991 (RP (Rossi) 11-15, 36-37)	$9,199.60 (RP (Rossi) 11-15, 36-37)	7/29/2019 (RP (Rossi) 1-7)	7/31/2019 (RP (Rossi) 9)	8/28/2019 (RP (Rossi) 17-19)
Michael P. Murphy Award for 05-03091	3-19573	1263532 -- 6/14/2005 (RP (Murphy) 9, 64-66, 103)	Sandra Shepis (RP (Murphy) 10, 64-66, 103)	Unauthorized trades / $25,000 (RP (Murphy) 64-66, 103)	11/3/2005 (RP (Murphy) 64-66, 103-104)	$13,750 (RP (Murphy) 64-66, 103)	8/22/2019 (RP (Murphy) 9-23 Amended Statement of Claim)	9/25/2019 Forum denied (RP (Murphy) 25)	10/1/2019 (RP (Murphy) 27-29)
Scott Shulman Award for 94-05445	3-19574	4789 -- 12/21/1994 (RP (Shulman) 1, 25, 56-59)	John Sanders, individually and as Trustee of the Sarah Hooks Sanders Family Trust (RP (Shulman) 2, 25, 57-59)	Breach of fiduciary duty, negligence, unsuitability, misrepresentation with fradulent intent, excessive trading and failure to adequately supervise Shulman in the management of claimant's accounts, churning / $1M (RP (Shulman) 26-27, 56-59)	3/19/1996 (RP (Shulman) 25-31, 56-59)	$310,000 (RP (Shulman) 28, 56-59)	9/9/2019 (RP (Shulman) 1-21)	9/25/2019 Forum denied (RP (Shulman) 23)	10/2/2019 (RP (Shulman) 33-35)
Alton Theodore Davis, Jr. Award for 96-04385	3-19588	190544 -- 9/24/1996 (RP (Davis) 1, 33-35, 39-42)	John & Vera Veres (RP (Davis) 2, 33-35, 39)	Negligence, misrepresentation (fraud), churning, and excessive trading / $23,921 (RP (Davis) 33-36, 39-41)	8/20/1997 (RP (Davis) 33-36, 39-42)	$17,885.71 (RP (Davis) 33-36, 41)	9/30/2019 (RP (Davis) 1-5)	10/3/2019 (RP (Davis) 9)	10/18/2019 (RP (Davis) 11-13)
Gregory Lee Luken Award for 99-01818	3-19611	374784 -- 4/16/1999 (RP (Luken) 1, 37-40, 51)	John E. & Sherrie S. Rieber (RP (Luken) 2, 37-38, 40, 51)	Unsuitability, misrepresentation, unauthorized trades, excessive trading / $121,330.00 (RP (Luken) 37-40, 51-52)	8/8/2000 (RP (Luken) 37-40, 51-58)	$55,056 (RP (Luken) 37-40, 53)	11/4/2019 (RP (Luken) 1-9)	11/7/2019 (RP (Luken) 13)	12/3/2019 (RP (Luken) 15-17)
Gregory Lee Luken Award for 99-05360	3-19611	374792 -- 11/29/1999 (RP (Luken) 1, 59)	Billy West (RP (Luken) 5, 43, 59)	Common law fraud, negligent misrepresentation, common law breach of fiduciary duty, common law gross negligence / $500,000 (RP (Luken) 41-44, 59-60)	3/13/2001 (RP (Luken) 41-44, 59-64)	$51,825 (RP (Luken) 40-44, 60)	11/4/2019 (RP (Luken) 1-9)	11/7/2019 (RP (Luken) 13)	12/3/2019 (RP (Luken) 15-17)

CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 26th day of October 2020, I caused a copy of FINRA's Opposition to Applicants' Brief on the Merits, in the matter of Application for Review of Consolidated Arbitration Applications, Administrative Proceeding File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919, 3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574, 3-19588, and 3-19611 to be served by via email on:

Vanessa Countryman, Secretary
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Due to office closures related to COVID-19, the parties were served via electronic mail.

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