

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

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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

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**APPLICANTS' REPLY TO FINRA'S OPPOSITION BRIEF**

**I. INTRODUCTION**

FINRA's Opposition ("Response") to Applicants' Brief on the Merits ("Brief") is based primarily on a mischaracterization of the relief ultimately sought by each of the Applicants. FINRA contends that the Applicants are "seeking to collaterally attack and expunge a prior adverse arbitration award." (FINRA's Response, pg. 1). However, Applicants are not seeking to vacate, modify, or correct the underlying arbitration award, nor are they seeking to expunge the award itself. Rather, Applicants are seeking an opportunity for a neutral arbitrator to evaluate whether to expunge the Central Registration Depository ("CRD") and BrokerCheck disclosures that contain the allegations from the underlying complaint. FINRA maintains a public online database of all awards rendered in its forum that is separate from the CRD and BrokerCheck databases<sup>1</sup>, and

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<sup>1</sup> To access the database, see: <https://www.finra.org/arbitration-mediation/arbitration-awards>.

Applicants do not seek to overturn any award or have the awards removed from that database. In support of its Response, FINRA also misconstrues its own rules, particularly FINRA Rule 2080. The Applicants<sup>2</sup> submit this Reply to address these mischaracterizations and to reply generally to FINRA's summary responses.

## II. REPLY TO FINRA'S ARGUMENT

FINRA's averment that the Director of Dispute Resolution's ("Director") decision to deny the Applicants access to FINRA's arbitration forum was "based on the principle that the use of FINRA's arbitration forum to seek expungement is available only in a narrow set of circumstances" fails to cite any supporting rule or case-law. (FINRA's Response, pg. 6). FINRA Rule 2080 ("Rule 2080") does not limit access to FINRA's arbitration forum. Rule 2080, which governs the expungement of customer dispute information, places no limitation on the circumstances in which an associated person can *seek* expungement of customer dispute information. Rather, it provides the factual findings that are required for FINRA to agree to waive an associated person's obligation to name FINRA in the subsequent state court action to confirm an arbitration award that recommends expungement. The availability of the forum is a separate and distinct issue from whether there are adequate grounds for expungement. By denying forum on these claims, FINRA makes a sham of its role as a neutral forum and allows its Director and likely its case managers to make a determination on the merits of the Petitioners claims.

In its Response, FINRA misconstrues the language of Rule 2080 as to say that expungement can *only* be recommended if the information sought to be expunged is factually impossible, clearly erroneous, false, or if the representative demonstrates that he was not involved

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<sup>2</sup> Applicants Sullivan and Cuenca are no longer represented by the undersigned counsel and this Reply.

in the alleged sales-practice violation. (FINRA’s Response, pg. 7). However, the language of Rule 2080 on its face clearly debunks FINRA’s mischaracterization of it. Rule 2080 provides that associated persons seeking to expunge information from the CRD system “must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.” FINRA Rule 2080(a). Rule 2080 further provides that, when petitioning a court for expungement or seeking judicial confirmation of an arbitration award containing expungement relief, the associated person must name FINRA “unless this requirement is waived.” FINRA Rule 2080(b). Rule 2080 states, upon request, FINRA may waive the obligation to name FINRA as a party if it determines that relief is based on an affirmative finding that the information being expunged is factually impossible, clearly erroneous, false, or that the associated person was not involved in the alleged sales-practice violation. FINRA Rule 2080(b)(1)(A)-(C). Critically here though, Rule 2080 also states:

**If the expungement relief is based on judicial or arbitral findings other than those described above**, FINRA in its sole discretion and under extraordinary circumstances, also may waive the obligation to name FINRA as a party if it determines that:

- (A) the expungement relief and accompanying findings on which it is based are meritorious; and
- (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.

Rule 2080(b)(2) (emphasis added). Clearly, Rule 2080 contemplates that expungement relief may be based on arbitral findings beyond the circumstances listed in Rule 2080(b)(1)(A) – (C).

Despite what FINRA contends, Rule 2080 places no limitation on the circumstances in which expungement of customer dispute information can be sought. Rule 2080 also does not provide the only grounds on which expungement can be recommended. In approving the language that now forms the basis of Rule 2080 (then NASD Rule 2130), the Commission stated that “the

proposed rule change, as amended, is reasonably designed to accomplish these ends [i.e. “to promote just and equitable principles of trade, and, in general, to protect investors and the public interest”] by allowing fact finders and the NASD to consider all competing interests before directing or granting expungement of customer dispute information from the CRD.” 68 Fed.Reg. 247 at 74671 (2003) (emphasis added). Additionally, the Commission noted that “[i]n no other instance in the NASD’s Code of Arbitration Procedure are arbitrators bound by substantive restrictions on how they decide an arbitration case. Moreover...arbitrators will be aware of the standards that will be utilized with respect to the NASD’s waiver of involvement, and, thus, arbitrators will indirectly consider them.” *Id.* There is no FINRA rule that prohibits expungement requests if there is an arbitration award tied to the allegations sought to be expunged.

FINRA argues further that the Director’s decision to deny the Applicants access to the arbitration forum was consistent with FINRA’s obligation to disclose accurate information about the adverse decisions in customer-initiated arbitrations and with the Federal Arbitration Act (“FAA”) because “allowing [Applicants] access to FINRA’s arbitration forum to seek expungement of prior adverse awards would conflict with the FAA’s requirements of limited judicial review exclusively by courts.” (FINRA’ Response, pg. 7). This argument rests on erroneous assumptions regarding the relief sought by the Applicants. It is true that the FAA provides for limited judicial review of arbitration awards and provides narrow grounds for modification, correction, or vacatur of arbitration awards subject to the FAA. 9 U.S.C. § 1. However, the Applicants are not seeking modification, correction, or vacatur of the underlying awards. Rather, they are seeking expungement of the CRD and BrokerCheck disclosures that publish the summarized allegations from the underlying arbitration complaint. The relief the Applicants’ seek, if granted, will not result in modification, correction, or vacatur of any of the

underlying arbitration awards. Moreover, an arbitrator's recommendation to expunge an occurrence from the CRD and BrokerCheck systems would not result in expungement of the award itself from FINRA's online award database.

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

The Commission asked FINRA for analysis on four issues. The Applicants briefly reply to each of FINRA's responses.

**SEC Q1:** What was the Director's basis for the prohibitions of access and was that basis consistent with FINRA's rules?

FINRA's basis for the prohibitions of access to the arbitration forum was not consistent with its rules. As previously stated in Applicants' Brief, FINRA's action is inconsistent with the purpose and intent of FINRA Rules 12203 and 13203. The purpose of providing the FINRA Director with the authority under Rule 12203 and 13203 was to "give the Director the flexibility needed in *emergency* situations" and to "address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations." 72 Fed. Reg. 20 at 4580-4601 (2007) (emphasis added). "[T]his authority, *which cannot be delegated* by the Director...should be limited by application in *only a very narrow range of unusual circumstances*." (emphasis added). *Id.* at 4602. The Director exceeded its authority under this Rule, both through delegating its authority to FINRA case representatives, and through improperly exercising authority in situations not contemplated by the Commission in its approval of the Rule.

It is also notable that FINRA's response brief does not include any supporting affidavits to counter the undeniable implication that, despite the non-delegable authority of FINRA Rules 12203 and 13203, the forum denials at issue in this consolidated briefing resulted from an unwritten blanket rule applied by case representatives. There can be no dispute that claims for

expungement are within the mandate of the FINRA arbitration forum. By limiting 12203 and 13203 to Director determination only, it is clear that denial of forum based on these rules requires a case-by-case review. FINRA makes no effort to show the Director conducted a review in any case other than Waring. By allowing persons other than the Director to apply the authority of Rules 12203 and 13203, FINRA bypassed its rulemaking requirements.

FINRA has, pursuant to its rulemaking procedures, adopted Rules and issued guidance on expungement procedure.<sup>3</sup> None of the adopted rules and guidance state that an application for expungement is barred if it relates to a resolved customer dispute arbitration. In fact, the Expungement Guidance states that a broker may not file a request for expungement of customer dispute information arising from an underlying customer arbitration *until the underlying customer arbitration is concluded*.<sup>4</sup> (emphasis added). In every case currently before the Commission, the customer arbitration is concluded. As stated above, FINRA has misconstrued the language of Rule 2080 to fit its argument, but the language of the Rule on its face establishes that expungement can be granted on grounds other than those specified by FINRA. Therefore, the Director improperly exercised authority by unilaterally determining that the Applicants could not satisfy the standards for expungement; a determination that should be made by the factfinder.

**SEC Q2:** 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?

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<sup>3</sup> FINRA Rules 2080, 2081, and 13805; FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance ("Expungement Guidance") (Updated September 2017) <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>; FINRA's Dispute Resolution Services Arbitrator's Guide ("Arbitrator's Guide"); <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

<sup>4</sup> <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance> at § 8.

As mentioned in Applicants' Brief, sixteen of the expungement requests involve requests for expungement of disclosures that relate to customer disputes that resulted in an arbitration award in the FINRA forum. Those awards can all be accessed on FINRA's online arbitration award database. The remaining Applicant, Brock Moseley, requested expungement of a disclosure that relates to a customer claim that was arbitrated in the AAA forum. None of the Applicants' sought to expunge the prior adverse award.

**SEC Q3:** 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?

As stated above, FINRA Rules 2080, 2081 and 13805 pertain to expungement of customer dispute information in the FINRA arbitration forum. FINRA repeatedly mischaracterizes Rule 2080 as to say an arbitrator may only recommend expungement in the "narrow circumstances" provided in the Rule. FINRA repeatedly ignores the clear language of the Rule that provides that expungement may be recommended on other grounds. While many arbitrators recommend expungement pursuant citing the factual findings outlined in Rule 2080, an arbitrator has the authority to grant expungement relief in alignment with its interpretation of the FINRA Arbitration Code or on equitable grounds. *See*, FINRA Rule 13413; *see also*, NASD Notice to Members 99-54. FINRA is clearly misconstruing Rule 2080 to fit its argument that expungement of information related to an adverse arbitration award would necessarily require an arbitrator to revisit legal and factual determinations that were previously litigated.

In addition to misconstruing its rules, FINRA continues to conflate a request for expungement of the *disclosure related to* an adverse arbitration award with modification,

correction, or vacatur of the award itself. A recommendation for expungement of a CRD disclosure does not require the vacatur or modification of a prior award, nor does it require that the expungement arbitration panel determine that the arbitration panel involved in the underlying customer arbitration failed in any way. It is also worth noting that not a single award that found the Applicants' liable made any factual or legal finding regarding what the Applicants were liable for, or why, and each award simply stated that each of the Applicants were jointly and severally liable *with the broker-dealer* for a certain amount of damages, all of which were *less than* the original amount requested by the underlying customers. In fact, in one award, the arbitration panel determined that no securities violations had occurred, yet still awarded the customer damages. *See*, Exhibit 1. FINRA acknowledges that prior arbitration awards are not binding on later arbitration panels. *See*, Arbitrator's Guide, pg. 35. Therefore, an arbitration panel could determine that, although a prior arbitration panel awarded damages to the customer, expungement is still appropriate without undermining the prior award. If recommended on any grounds other than those enumerated in FINRA Rule 2080, FINRA can raise its opposition to the expungement request during the judicial confirmation proceeding, as contemplated by the Rule.

FINRA's assertion that allowing the Applicants an opportunity to seek expungement would necessarily require the expungement arbitrator to revisit legal and factual issues actually litigated and determined in the prior arbitration proceeding is completely false. First, an arbitrator's determination that a customer dispute disclosure should be expunged does not involve the same factual or legal determinations that a customer's claim for damages would entail. They involve separate legal standards, involve different procedural requirements, have starkly different burdens of proof, and involve separate factual findings. Secondly, in each of the underlying arbitration proceedings at issue here, the expungement determination was never actually litigated. That means



evidence was never presented as to the standard for expungement, counsel never had the opportunity to present opening or closing remarks regarding expungement, the arbitrators never considered and made no factual and legal findings regarding expungement, and the Applicants never had the opportunity to be heard regarding the merits of their request, as is required pursuant to FINRA rules, the Exchange Act, and fundamental principles of due process.

The Director should not be permitted to unilaterally deny access to the arbitration forum and prevent the Applicants from exercising their rights based on a rigid opinion that there can be absolutely no circumstance under which an expungement can be awarded. Permitting this would provide far too much discretion to the Director and completely undermines the purpose of providing a neutral arbitration forum. The ultimate determination of whether expungement is appropriate should be determined by a neutral factfinder. The Director's improper use of discretion is akin to a court clerk dismissing a case before it even gets before a judge because it does not think the judge should rule favorably for the plaintiff. If FINRA would like to prohibit the types of requests filed by the Applicants, it should be required to go through the rulemaking process proscribed by the Commission.

**SEC Q4:** 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?

As stated in the Applicants' Brief and above, the prohibition was not in accordance with Section 15A(b)(6) of the Exchange Act. The Act states that the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to

remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. 15 U.S.C. 78o-3(b)(6). FINRA's summary dismissal of expungement claims without the involvement of a neutral arbitrator creates a discriminatory system that harms financial advisors and broker-dealers and results in inaccurate information being published to investors.

In arguing that the Director's decision to deny forum under FINRA Rule 13203 was in accordance with the Act, FINRA argues that the Director's decision precludes the use of FINRA's forum to seek removal of factual information that is important to the investing public. However, Rule 13203 was not designed to give the Director authority to unilaterally decide that disclosures relating to adverse awards contain "factual information that is important to the investing public," nor does the Rule provide for denial of access on those grounds. The current rules and guidance related to expungement were designed for a neutral arbitrator to make determinations on the appropriateness of an expungement request. Those rules and guidance also provide an additional safeguard for the investing public, which is the requirement that FINRA be named in the court confirmation process, and the requirement to notify the underlying customer of the expungement request and provide them an opportunity to present their position on the request. *See*, Expungement Guidance. Moreover, as previously stated, expungement would not result in the removal of the award itself from the public arbitration award database.

Federal courts have long upheld that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to

be heard are essential.”<sup>5</sup> This is exactly what is envisioned by FINRA Rule 2080 – an opportunity to be heard by a neutral arbitration panel regarding whether information should be removed from the CRD. The Applicants’ disclosures call into question Applicants’ good name, reputation, honor, and integrity. FINRA Rule 3110(e) requires member firms to review and consider an investment advisor’s CRD when making hiring, retention, and advancement decisions. The disclosures have a tangible effect on the advisor’s pursuit of their chosen profession and on their professional and personal reputation. It is also important to note that disclosure on an advisor’s CRD and BrokerCheck profiles is a burden that is almost always borne *only* by the advisor. It is not joint and several and it is logical that expungement relief exists outside of any joint and several finding. Therefore, it is essential that the Applicants have the right to an evidentiary hearing to determine whether their disclosures should be expunged, regardless of the fact that they were required to pay damages to a customer.

**B. FINRA’s Actions did not Meet the Standards of Section 19(f) of the Exchange Act**

Under Section 19(f) of the Exchange Act, the Commission dismissal of the Consolidated Arbitration Applications requires 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 actions do not meet these standards. As stated above, the Director’s denial of the FINRA arbitration forum was based on unilateral and inaccurate application of the expungement rules and the conflation of expungement with vacatur, modification, and correction. The Director’s denial was not based in its authority under FINRA Rule 13203. The Director’s

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<sup>5</sup> See, e.g. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L. Ed. 2d 548 (1972).

actions were not consistent with its own rules, nor the Exchange Act. Allowing the Director to make the ultimate decision of whether expungement is appropriate in a situation where no FINRA rule directly prohibits expungement completely undermines the neutral arbitration forum that the Commission has determined is a fundamental service and results in unfair discrimination against brokers and broker-dealers.

### **III. CONCLUSION**

FINRA's Response rests on its conflation of expungement of a CRD and BrokerCheck disclosure with the modification or vacatur of the underlying arbitration award and a mischaracterization of its rules. The fact remains that there is no rule that bars the Applicants from filing an expungement request. Furthermore, an arbitrator's recommendation for expungement of the CRD or BrokerCheck disclosure would not result in modification or vacatur of the underlying awards. The vagueness of the issued awards as to which, if any, of the claims raised by the underlying customer formed the basis for the damages awarded leaves open the question of whether the underlying disclosure has any investor protection or regulatory value. The underlying award is evidence to be considered by the arbitrator, but should not be an absolute bar to a hearing on the merits of expungement.

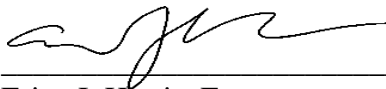
Despite the fact that, even if expungement were recommended FINRA would be given an opportunity to oppose confirmation of the award and the fact that the underlying award would remain publicly available on FINRA's online award database, FINRA has justified the Director's decision to deny forum under the guise of being in line with "investor protection." However, regardless of whether the Director's decision was made with investor protection in mind, the Director exceeded his authority under the Exchange Act and did not act consistently with FINRA's rules. FINRA's rules contemplate that neutral arbitrators are the decision-makers for expungement

requests. Further, Rule 13203 was approved by the Commission with the understanding that it would be used in narrow, emergency situations.

The Commission has determined that FINRA’s service of providing arbitration of expungement claims is “fundamentally important” and central to FINRA’s function as an SRO. Under 15 U.S.C. § 78s(d)(2), Congress delegated authority to the Commission to ensure that an essential service is not improperly denied to a claimant. FINRA has exceeded its authority and improperly denied the Applicants access to a fundamental service. The Applicants respectfully request that they be given access to that fundamental service.

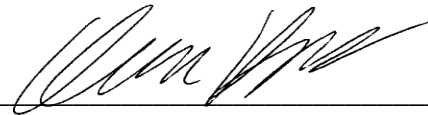
Dated: November 16, 2020

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, James Bellamy, on November 16, 2020, served the foregoing Opening Joint Brief of the above listed Applicants on:

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**[X] (BY EMAIL)** I caused the documents to be sent to the persons at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

**[X] (STATE)** I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

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