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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of

Bart Steven Kaplow

For Review of Action Taken By

FINRA

File No. 3-18877

MR. KAPLOW'S RESPONSE TO FINRA'S RESPONSE TO APPLICANT'S INITIAL BRIEF ON THE ISSUE OF JURISDICTION

FINRA gets one thing correct in their brief—"the Commission ... requested that the parties address whether it has jurisdiction to consider Kaplow's application for review." FINRA failed to acknowledge that the Commission's order confined briefs to the Commission's jurisdiction pursuant to Section 19(d)(2), however, and could not refrain from interspersing their Brief on the Commission's Jurisdiction with attacks on the merits of Kaplow's appeal and his underlying claim submitted in FINRA's arbitration forum, almost forgetting to address the issue of the Commission's jurisdiction over the appeal at all. Now, for fear that the point of this particular briefing schedule will be lost within FINRA's tangential topics and rambling arguments, Kaplow must waste even more of the Commission's time and resources to dispel FINRA's lateral attacks to demonstrate, at a minimum, that Kaplow's request for expungement relief is not a request to vacate an arbitration award, and his request for expungement has merit.

1. The Director has *qualified* discretion under Rule 13203, which was inappropriately used, and Kaplow should be permitted to offer his request for arbitral determination on the merits.

FINRA contends throughout its brief that the Director acted consistently with FINRA Rules and Kaplow's request was "not appropriate for arbitration[.]" Notwithstanding the completely inappropriate nature of FINRA's repetitive arguments on the merits throughout their brief, Kaplow now must address these arguments to show that this request is not moot. [1]

FINRA misconstrues Kaplow's argument that the Director's action was a final action by FINRA, which Kaplow raised to satisfy one element of the Commission's jurisdiction over this request for review. In doing so, they attempt to diminish Kaplow's argument as a blatant omission of text from Rule 13203. To clarify Kaplow's point, the Commission's approval of rule changes granting the Director discretion to act under Rule 13203 without NAMC or its Executive Committee's approval, highlights the finality of the Director's denial of forum. Consequently, there is no FINRA body which approves, or reviews challenges to, the Director's determinations under Rule 13203, thus making the Director's action denying forum a final action by FINRA. This makes Kaplow's request ripe for Commission review, as FINRA has no adjudicatory body which is authorized to review and overrule the Director's decisions under this Rule.

[1] A FINRA arbitration award contains no explained decision or findings of fact. In many instances, as is with Kaplow's case, the Claimant in the underlying arbitration provided multiple theories of relief, some aimed at Kaplow and others at the firm. Yet, there is no explanation of which the panel ruled on or how they determined their allocation of liability. Did the panel find that Kaplow committed a sales practice violation of securities regulations or laws? Or, was the firm found liable for a failure in oversight or violation of securities laws, and Kaplow was held joint and severally liable as the principal owner of the company? Another possibility is that the decision to award a small amount of damages was a decision by the panel to allocate losses to the party most capable to incur them, because the fault lied with neither. Any of these latter scenarios would explain the panel's award against Kaplow and his firm jointly and severally, but would also justify another panel's recommendation that the information should be expunged from the CRD repository pursuant to FINRA Rules. Instead of allowing Kaplow the opportunity to request that a neutral arbitration panel make such a determination, FINRA, however, apparently elects to expense their own ideas of justice through the use of RULE 13203 under Director discretion.

FINRA uses this misinterpretation of Kaplow's argument to claim that Kaplow "misreads the rule text and conveniently ignores the disjunctive 'or' in the plain language[.]" Kaplow does not claim that the remaining language of the Rule does not exist, nor that the Director is only permitted to deny forum when health and safety concerns arise. However, in response to FINRA's argument regarding the merits, the Commission's clarification that "[Rule] 13203 is intended to give the Director the flexibility needed in emergency situations[,]" implies that the Commission's approval of this Rule was premised on the Director's discretion under this rule being limited in its use. Furthermore, the plain text of the Rule includes the qualifying language, "given the purposes of FINRA and the intent of the Code," which also limits the scope of the Director's discretion denying forum under instances where the claim is inappropriate. Thus, the Rule's plain text and the Commission's approval of Rule 13203 both support that the Director's discretion is limited, and not plenary.

2. Kaplow's request for expungement is not an attempt to vacate the arbitration award issued in 2003.

FINRA misconstrues Kaplow's claim requesting expungement relief as a collateral attack on and attempt to vacate an arbitration award.[2] This could not be any more of a distorted representation of Kaplow's request. Expungement is *not* the vacatur of an arbitration award. Expungement is a proceeding requesting that a record be sealed, making the record unavailable through the correlating repository. Vacatur of an arbitration award is a request for a state or federal court to make a determination and enter an order that the award was issued in such a

[2] A collateral attack on a prior adverse award would, nevertheless, be an arbitrary effort on Kaplow's part as the judgment has already been satisfied in full. Regardless of whether the arbitration panel recommended expungement of the information relating to the customer complaint and arbitration filed by former customers or denied the request for relief—had the Director not denied Kaplow access to the service—the prior award would remain and the panel's ruling would have no prejudicial effect on the customers' rights pursuant to the award.

manner that it has no colorful basis for enforcement. The former is a petition to curtail the ongoing dissemination of harmful information; while the latter seeks to overturn the arbitrator's ruling and, thereby, avoid the allocation of liability determined by the arbitrator. To be clear, Kaplow is not seeking to vacate the award or modify any finding of the Arbiter who presided over the underlying case. FINRA uses this misconception to postulate their contention that that the Federal Arbitration Act applies to Kaplow's expungement request and, therefore, the FAA's supremacy vests jurisdiction in the federal courts for collaterally attacking an arbitration award. FINRA's contention that the FAA's supremacy prohibits Kaplow from seeking expungement through arbitration, is (a) false, because § 10 of the FAA does not prohibit parties from pursuing other avenues of vacatur,[3] and (b) irrelevant, because Kaplow is not attempting to vacate the award.

2. Kaplow raised only FINRA's prohibition or limitation of access to services offered by FINRA under § 19(d)(2) as statutory grounds granting the Commission jurisdiction to review FINRA's action.

Kaplow never contended that the Commission's jurisdiction to review Kaplow's appeal arises under any rule of law, statute, or SEC precedent or authority, other than FINRA's prohibition or limitation of access to services offer by FINRA, pursuant to § 19(d)(1)(2) of the SEA of 1934. In fact, Kaplow specifically raised only one of the four grounds for review enumerated in § 19(d)(1)(2) as his basis that the commission has the statutory authority to review FINRA's action as an SRO. FINRA in turn offered substantial support expanding on the other three statutory grounds of § 19(d)(2), and demonstrated why they do not apply to Kaplow's

[3] *See Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008)

request, even though these were never raised by Kaplow.[4] Because Kaplow never raised these and does not contend that they apply, he will not address them in this response.

To quash the risk of following FINRA's lead and allowing this briefing schedule to depart from the Commission's Order into further irrelevant discussion, Kaplow will refrain from further response to FINRA's inappropriate commentary and focus on the only point FINRA raised that is worth the Commission's time: Whether FINRA prohibited or limited Kaplow's access to services.

3. FINRA prohibited, or at a minimum limited, Kaplow's access to services.

The Director of FINRA's Office of Dispute Resolution's determination to deny Kaplow forum, however, did prohibit Kaplow's access to services. FINRA argues that the denial of forum is not reviewable by the commission, because "Kaplow has not met the high bar of showing that the denial of an arbitration forum for a segment of his claim provides a fundamentally important service that is central to the function of FINRA," citing *Sky Capital LLC*. FINRA, however, proceeds to commit a common fallacious argument—denying the antecedent—in its justification that FINRA arbitration forum is not a fundamentally important service that is central to FINRA's function. This logical fallacy stems from an if/then premise where the argument presumes the inverse must also be true. If A, then B; If not A, then not B. That is to say, apples are fruits and anything not an apple is therefore not a fruit. FINRA, points to several instances in the past where the Commission has held that the services were central to its operation as an SRO (apples): terminating a member's market maker status; denying a

[4] Kaplow acknowledges that FINRA may have raised these arguments against other statutory ground granting the Commission jurisdiction to dissuade the Commission's potential to review FINRA's action on their own motion. Because Kaplow did not raise these provisions to justify the Commission's jurisdiction for review, however, Kaplow defers to the Commission's discretion regarding these statutory grounds for review of FINRA's action, should the Commission elect to pursue review on their own motion.

member's request to improve communications with a trading floor; delisting the securities of an issuer. Then FINRA proceeds to contend that, because FINRA did not deny access to any similar FINRA service, it did not deny Kaplow access to a fundamentally important service central to its function (not a fruit). Because FINRA neither establishes through a logical argument that FINRA arbitration does not constitute a fundamentally important service central to its function as an SRO, nor presents any argument or relevant authority that it is not, Kaplow establishes his burden by demonstrating any rational basis or argument the FINRA arbitration is a fundamentally important service central to FINRA's function.

The services at issue, access to FINRA's arbitration forum by an associated person, is not merely fundamentally important but is central to FINRA's function as an SRO. As FINRA describes on their website:

> "To accomplish our dual mission of investor protection and market integrity, FINRA performs the following activities every day:
>
> ...
>
> 5. Resolve securities disputes
>
> ... we administer the largest forum specifically designed to resolve securities-related disputes between and among investors, securities firms and individual brokers
>
> Our dispute resolution forum is the largest in the country for the securities industry, handling nearly 100 percent of securities-related arbitration"[5]

Here, FINRA states that resolving securities disputes, including the industry dispute Kaplow filed, is one of the five activities FINRA performs in order to accomplish their mission. It is absent any rational basis for FINRA to contend that FINRA arbitration is not fundamentally important or central to their function. Furthermore, "FINRA provides the first line of oversight for broker-

[5] http://www.finra.org/about/what-we-do

dealers and the first line of defense for investors ... [and] ... regulates both the firms and professionals selling securities[.]"[6] Part of the regulation, oversight, and defense provided by FINRA is the CRD repository and operation of the BrokerCheck website. Therefore, a request for expungement of information from the repository surely resides within FINRA's oversight of the securities industry and is a fundamental aspect of their mandate and central to their function.

Dated: February 13, 2019

Respectfully submitted,

Dochtor Kennedy MBA, J.D.
President & Founder
T: (720) 282-5154
E: legal@advisorlawyer.com

AdvisorLaw, LLC
9737 Wadsworth Pkwy, Ste. 205
Westminster, CO 80021

[6] http://www.finra.org/industry/oversight

CERTIFICATE OF SERVICE

I, Olivia Peterson, on February 13, 2019, served the original and three copies of Mr. Kaplow's Reply to FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090
Fax: 202-772-9324

[X] (BY FAX) I caused the documents to be sent to the persons at the fax number 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] (BY MAIL) I caused the documents to be sent by US Certified Mail to the persons listed above. I did not receive notice or indication from the US Postal Service that the delivery would be 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.

On this date, I also caused the original and three copies of this Brief on Commission's Jurisdiction of Bart Steven Kaplow on:

Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
Email: nac.casefilings@finra.org

[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.

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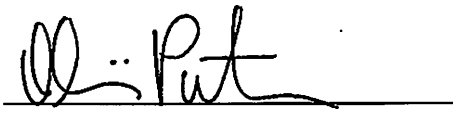
[X] (STATE) I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.



Olivia Peterson
Scheduling Coordinator
AdvisorLaw, LLC
9737 Wadsworth Parkway, Suite 205
Westminster, CO 80021