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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 BRIEF ON COMMISSION'S JURISDICTION OVER THIS APPEAL**

Mr. Bart Steven Kaplow seeks Commission review of a determination by the Director of FINRA Office of Dispute Resolution ("Director") to deny Mr. Kaplow access to the Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Code") Rule 13203(a). Mr. Kaplow, through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"),<sup>1</sup> challenging the Director's determination that Mr. Kaplow's claim is not eligible for arbitration in FINRA forum. The Commission has jurisdiction over the Director's determination and should hear Mr. Kaplow's appeal because the Director's determination is a final action by FINRA which prohibits or limits Mr. Kaplow's access to services offered by FINRA, and such prohibition is an aggrieving decision by the Director.

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<sup>1</sup> 15 U.S.C. § 78s(d)

## I. FACTUAL BACKGROUND

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission (“Commission” or “SEC”) as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Office of Dispute Resolution, which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The Office of Dispute Resolution’s authority is limited to administration of the forum, not regulatory policy decisions.

FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system known as BrokerCheck.<sup>2</sup> This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each associated person of a FINRA member firm. FINRA requires member firms to report all customer complaints that meet specific requirements to FINRA, and publicly discloses these complaints, absent any determination of merit or factual basis. As discussed below, FINRA provides only one viable remedy for almost all associated persons to remove false or misreported customer complaints: expungement requests, pursuant to Rule 2080 of the Code.

On January 8, 2018, Mr. Kaplow, through counsel, filed a Statement of Claim and Submission Agreement to FINRA arbitration requesting expungement of customer complaints from his CRD record. Counsel for Mr. Kaplow received notice, dated September 21, 2018, that his request for expungement of occurrence number 1145308, “which arises from a prior adverse Award, is not eligible for arbitration.” The notice indicates that the Director made this determination pursuant to Industry Code Rule 13203(a), which states:

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<sup>2</sup> 15 U.S.C. 78o-3(i)(1)

“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. Only the Director may exercise the authority under this Rule.”

## I. ARGUMENT

The Commission has jurisdiction over this appeal and should permit the merits of Mr. Kaplow’s appeal to be heard. Section 19(d) of the Securities Exchange Act of 1934 requires the Commission to review a final action taken by a “SRO that ‘prohibits or limits’ ‘access to services offered’ by the SRO to any person.”<sup>3</sup>

### **A. The Director’s determination that Mr. Kaplow’s claim is ineligible for arbitration is a final action by FINRA.**

The Director made a determination under Rule 13203 that Mr. Kaplow’s claim is not eligible for FINRA arbitration. Whether this determination was an appropriate use of the Director’s discretion is not proper for this particular brief limited to the Commission’s jurisdiction. What is at issue, however, is whether a determination by the Director under Rule 13203 lacks a provision permitting a petition for review by or appeal to an authority within FINRA, so as to render a Director’s determination denying FINRA forum a final action. The Commission approved Rule 13203 granting the Director sole discretion to make determinations under Rule 13203 barred from delegation, and there is no commission or appeal procedure within FINRA’s By-Laws or the Code permitting appeal of determinations under Rule 13203. It is for these reasons that the Director’s determination that a claim is ineligible for FINRA arbitration is a final action by FINRA.

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<sup>3</sup> SEC Release No. 72182, at 1. (footnote 1)

Prior to the Commission's approval of rule changes in 2007, NASD Rule 10301(b) permitted the Director to deny arbitration forum "only upon approval of the NAMC or its Executive Committee."<sup>4</sup> The Commission, in approving rule changes that resulted in current Rule 13203, emphasized that "this authority may be exercised only by the Director [...] and cannot be delegated[.]"<sup>5</sup> The Director's discretionary authority, absent any permissible delegation, implies that the discretion evades review by another FINRA body, because no person other than the Director is authorized to make a determination under Rule 13203.

Furthermore, the Commission stated that its approval was "intended to give the Director the flexibility needed in *emergency* situations" and that "in emergency situations, it is reasonable for the Director to have the authority and flexibility to act quickly to protect the health and safety of users and administrators of the forum."<sup>6</sup> Finally, the Code is absent of any Rule that provides an avenue to request reconsideration or challenge the Director's determination under Rule 13203.

By absolving the Director of the approval requirement of either of these committees, prohibiting delegation of the authority under Rule 13203, reserving use of discretion to emergency situations, and not providing any avenue within FINRA for a denied party to challenge the Director's decision, FINRA and the Commission intended the Director's Rule 13203 determinations to be final actions by FINRA. Therefore, the only appropriate administrative procedure of review is an appeal to the Commission under Section 19(d).

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<sup>4</sup> National Arbitration and Mediation Committee (NAMC)

<sup>5</sup> SEC Release No. 34-55158, at 108. It is important to note that the text "or the President of NASD Dispute Resolution" was originally included in the SEC's approval language, however, was omitted as the President of NASD Dispute Resolution is no longer included in Rule 13203.

<sup>6</sup> *Id.* (emphasis added)

**B. FINRA prohibited or limited Mr. Kaplow's access to the services offered by FINRA.**

The Director's determination that Mr. Kaplow's claim is not eligible for FINRA arbitration denies Mr. Kaplow access to the arbitration forum: a service FINRA offers to members and associated persons for the resolution of disputes. An associated person is permitted by the Code to pursue a request for expungement "from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief," under Rule 2080(a). While this rule appears to permit a party to pursue an order from a court of competent jurisdiction directing expungement, each member or associated person, notwithstanding, is required to submit any claim for any industry dispute, including requests for expungement, to FINRA arbitration pursuant to Rule 13200, and any failure to do so is deemed conduct inconsistent with just and equitable principle of trade and a violation of Rule 2010.<sup>7</sup> Furthermore, FINRA will almost certainly request dismissal of any claim for relief sought within the courts for failure to exhaust all administrative remedies.

Pursuing a claim for expungement of a customer dispute in court is not a viable option for many associated persons aggrieved by false or misreported information publicly disseminated through BrokerCheck. Even if arbitration in FINRA forum for these matters was not required of associated persons, like Mr. Kaplow, pursuing a claim in court is significantly more expensive; in many instances, preventing aggrieved parties from seeking any request for relief, if not available through arbitration. Moreover, the process in court is far more complicated, expensive, and time-consuming, and FINRA is the most appropriate forum to hear a claim for expungement as FINRA is the body that has developed and codified the standards and requirements for expungement.

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<sup>7</sup> See Rule IM-13000 of the Code of Arbitration Procedure for Industry Disputes

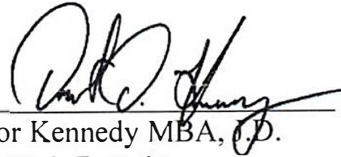
The Director's determination that Mr. Kaplow's claim is not eligible for FINRA arbitration not only prohibits Mr. Kaplow's access to a fundamentally important FINRA service available to all associated persons and members of FINRA, it effectively denies or at a minimum irrefutably limits access to requesting expungement relief altogether.

## II. CONCLUSION

The Commission is required to review an action of a SRO if the action is final, prohibits or limits a person's access to services offered to any person by the SRO, and application by an aggrieved party is timely filed. Mr. Kaplow is an Associated Person, who is not only provided access to the service of FINRA arbitration forum, but is required to file all claims within the forum pursuant to Rule 13200 and Rule 2010 of the Code. The Director's decision to deny FINRA arbitration forum to Mr. Kaplow's claim is a final action by FINRA, which prohibits Mr. Kaplow's access to the service of FINRA arbitration, limits his access to request any relief at all, and his application for review was filed with the Commission within 30 days of receiving notice from FINRA that the Director made the determination to deny Mr. Kaplow forum for his claim. Therefore, the Commission has jurisdiction pursuant to Section 19(d) of the Exchange Act and should permit Mr. Kaplow's application for review proceed to a review of the merits.

Dated: December 31, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul C. Kennedy", written over a horizontal line.

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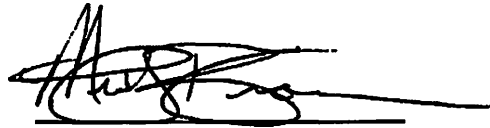
**CERTIFICATE OF SERVICE**

I, Misty Brown, certify that on this 31<sup>st</sup> day of December 2018, I caused the original and three copies of this Application for Review of Bart Steven Kaplow, to be served via Certified Mail on:

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