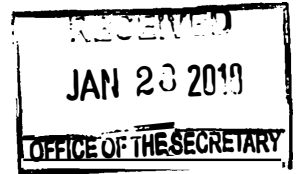


**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**



In the Matter of the Application Of

Daryl Cole

For Review of Action Taken By

FINRA

File No. 3-18879

MR. COLE'S BRIEF ON COMMISSION'S JURISDICTION OVER THIS APPEAL

Daryl Cole seeks Commission review of a determination by the Director of FINRA Office of Dispute Resolution ("Director") to deny Mr. Cole access to the Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Rules") Rule 13203(a). Mr. Cole, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")¹, challenging the Director's determination that Mr. Cole's claim is ineligible for arbitration in FINRA forum. The Commission has jurisdiction over the Director's determination and should hear Mr. Cole's appeal because the Director's determination is a final action by FINRA which prohibits or limits Mr. Cole's access to services offered by FINRA, and such prohibition is an aggrieving decision by the Director.

¹ 15 U.S.C. § 78s(d)

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the Securities Exchange Commission (“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.

2. FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system known as BrokerCheck.² 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.

3. On January 29, 2018, Mr. Cole, by and through counsel, filed a Statement of Claim and Submission Agreement to FINRA arbitration (case number 18-00325) against Royal Alliance Associates, Inc. (“Respondent”) requesting expungement of two customer complaints from his CRD record: (1) Occurrence No. 1079197 with Mr. and Mrs. Hartunians as the underlying customers (the “Hartunians” Occurrence); and (2) Occurrence No. 1565331 with Mr. and Mrs. Sotelo as the underlying customers (the “Sotelo” Occurrence).

² 15 U.S.C. 78o-3(i)(1)

4. On March 20, 2018, Respondent filed a Submission Agreement to FINRA arbitration and its Statement of Answer, indicating that it does not oppose Mr. Cole's request for expungement of either occurrence.

5. On July 5, 2018, an Initial Pre-Hearing Conference ("IPHC") was held where Chairperson Jasper was accepted as the sole panel member, a final hearing date was set for January 23, 2019, and any additional outstanding issues were resolved by the panel.

6. Over three months after the IPHC, on October 9, 2018, Counsel for Mr. Cole received a Partial Denial of Forum notice that his request for expungement of the Hartunian Occurrence, according to the Director, "is not eligible for arbitration, as it arises from a prior adverse award. Therefore, pursuant to ... [FINRA] Rule 13203(a), the forum is denied as to [the Hartunian] occurrence number 1079197." See attached **Exhibit A**.

7. FINRA Rule 13203(a) states that:

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.

FINRA Rule 13203(a).

8. On October 26, 2018, Mr. Cole timely filed his Application for Review of FINRA's Partial Denial of Forum.

9. On December 4, 2018, the SEC sent its briefing schedule indicating that Mr. Cole's brief on jurisdiction is due on January 3, 2019, FINRA's response is due on February 4, 2019, and Mr. Cole's response is due February 19, 2019.

10. Mr. Cole hereby timely submits his brief.

ARGUMENT

11. The Commission has jurisdiction over this appeal and should permit the merits of Mr. Cole's appeal to be heard. Section 19(d) of the Exchange Act requires the Commission to review a final action taken by an "SRO that 'prohibits or limits' 'access to services offered' by the SRO to any person." (See SEC Release No. 72182).

A. The Director's determination that Mr. Cole claim is "ineligible for arbitration" is a final action by FINRA.

12. The Director made a determination, *sua sponte*, under FINRA Rule 13203 that Mr. Cole's claim is ineligible 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 FINRA 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 FINRA Rule 13203 granting the Director sole discretion to make determinations under that rule barred from delegation, and there is no commission or appeal procedure within FINRA's By-Laws or the Code permitting appeal of determinations under that rule. It is for these reasons that the Director's determination that a claim is ineligible for FINRA arbitration is a final action by FINRA.

13. 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."³ The Commission, in approving rule changes that resulted in current Rule

³ National Arbitration and Mediation Committee (NAMC)

13203, emphasized that “this authority may be exercised only by the Director [...] and cannot be delegated[.]”⁴ 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 FINRA Rule 13203.

14. 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.”⁵ Finally, the FINRA Rules are absent of any rule that provides an avenue to request reconsideration or challenge the Director’s determination under FINRA Rule 13203.

15. By absolving the Director of the approval requirement of either of these committees, prohibiting delegation of the authority under FINRA 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 FINRA 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) of the Exchange Act.

B. FINRA prohibited or limited Mr. Cole access to the services offered by FINRA.

16. The Director’s determination that Mr. Cole’s claim is ineligible for FINRA arbitration denies Mr. Cole access to the arbitration forum: a service FINRA offers to members

⁴ 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 FINRA Rule 13203.

⁵ *Id.* (emphasis added)

and associated persons for the resolution of disputes. An associated person is permitted by FINRA Rules to pursue a request for expungement “from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief,” under FINRA 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 FINRA Rule 13200, and any failure to do so is deemed conduct inconsistent with just and equitable principle of trade and a violation of FINRA Rule 2010.⁶ Furthermore, FINRA will almost certainly request dismissal of any claim for relief sought within the courts for failure to exhaust all administrative remedies.

17. 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. Cole, pursuing a claim in court is significantly more expensive and, in many instances, prevents 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.

18. The Director’s determination that Mr. Cole’s claim is ineligible for FINRA arbitration not only prohibits Mr. Cole’s access to a fundamentally important FINRA service

⁶ See Rule IM-13000 of the Code of Arbitration Procedure for Industry Disputes

available to all associated persons and members of FINRA, it effectively denies or at a minimum irrefutably limits access to requesting expungement relief altogether.

CONCLUSION

19. 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. Cole 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 FINRA Rules 13200 and 2010. The Director's decision to deny FINRA arbitration forum to Mr. Cole's claim is a final action by FINRA, which prohibits Mr. Cole'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. Cole forum for his claim. Therefore, the Commission has jurisdiction pursuant to Section 19(d) of the Exchange Act and should permit Mr. Cole's application for review proceed to a review of the merits.

Dated: January 2, 2019

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Bessette", written over a horizontal line.

Michael Bessette, Esq.
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EXHIBIT A



TO: Michael Bessette
Bradley A. Fishman, Esq.

From: Michelle Vickerman
Case Administrator

Subject: FINRA Office of Dispute Resolution Arbitration Number 18-00325
Daryl Andrew Cole vs. Royal Alliance Associates, Inc.

Date: October 9, 2018

The Director of FINRA Office of Dispute Resolution has determined that your request for expungement of occurrence number 1079197 in your Statement of Claim is not eligible for arbitration, as it arises from a prior adverse award. Therefore, pursuant to the Industry Code Rule 13203(a), the forum is denied as to occurrence number 1079197. The case will proceed in this forum as to occurrence number 1565331.

If you have any questions, please do not hesitate to contact me at 213-229-2371 or by email at Michelle.Vickerman@finra.org.

MVV:mvv:LC53W
idr: 07/08/2016

RECIPIENTS:

Michael Bessette, AdvisorLaw, LLC, 3400 Industrial Lane, Unit 10A, Broomfield, CO 80020
On Behalf Of: Daryl Andrew Cole

Bradley A. Fishman, Esq., Royal Alliance, 10 Exchange Place, Suite 1410, Jersey City, NJ
07302
On Behalf Of: Royal Alliance Associates, Inc.

CERTIFICATE OF SERVICE

I, Misty Brown, certify that on this 2th day of January 2019, I caused the original and three copies of this Application for Review of Daryl Cole, to be served via Certified Mail on:

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

and

General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006

A handwritten signature in black ink, appearing to read 'Misty Brown', written over a horizontal line.

Misty Brown
HLBS Law
9737 Wadsworth Parkway, Suite 205
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January 3, 2019

In the Matter of the Application of Daryl Cole File No. 3-18879

Mr. Fields,

Please accept this copy of Mr. Cole's Brief on Commission's Jurisdiction as the final and complete version. The previous copy submitted, January 2, 2019, was missing the attachment of Exhibit A.

Please feel free to contact me directly via email at legal.bessette@hlbslaw.com or via telephone at (720) 432-6546. Documents may be mailed to me at:

9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021

Respectfully,

Michael Bessette
Attorney
HLBS Law

Enclosures

