BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

Daryl Andrew Cole

File No. 3-18879

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

Alan Lawhead
Vice President and
Director – Appellate Group

Jennifer Brooks
Associate General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

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I. INTRODUCTION

This matter concerns an April 9, 2003 adverse arbitration award against Daryl Andrew Cole arising from a dispute with a customer. In an arbitration claim filed in NASD arbitration, one of Cole's customers alleged that he breached a fiduciary duty, made unsuitable recommendations, made misrepresentations, and acted negligently, among other allegations, related to the purchase of various mutual funds. (RP 165.)[1] The NASD arbitration panel determined that Cole and the firm with whom he was associated were jointly and severally liable and ordered them to pay $5,255.00 in compensatory damages to the customer. (RP 167.) There is no evidence that Cole sought to vacate, modify, or correct the award in court. Instead, 14 years later, in January 2018, Cole filed a statement of claim in FINRA's arbitration forum collaterally attacking this adverse award and seeking to expunge it from his BrokerCheck records. (RP 1, 2-6, 16.)

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1 "RP ___" refers to the page numbers in the certified record filed by FINRA on November 13, 2018.

Because expungement proceedings related to prior adverse awards arising from disputes with customers are not appropriate for arbitration, FINRA's Director of Dispute Resolution ("Director") denied Cole's attempt to seek expungement in FINRA's arbitration forum.[2] (RP 137.) In response, Cole filed an application for review with the Commission, requesting that the Commission order FINRA's Office of Dispute Resolution to permit him to arbitrate his expungement request. Cole's "appeal" suffers from a fatal flaw—the Commission lacks the statutory jurisdiction to entertain the "appeal." FINRA did not, as Cole complains, "limit[] [his] access to requesting expungement relief." (Br. at 7.) Instead, the Director exercised his discretion and acted consistently with FINRA rules. And Cole is not precluded from petitioning a court for expungement relief.

The Commission should dismiss this proceeding for lack of appellate jurisdiction. Similar to many other actions taken in FINRA arbitration, there is no FINRA action that is "subject to review" under § 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Thus, none of the four possible grounds for Commission jurisdiction set forth by Exchange Act § 19(d) applies to this case. Cole's request for expungement is nothing but a misguided attempt to collaterally attack an adverse arbitration award that he failed to vacate, modify, or correct in court. The Commission should follow its well-established precedent related to its jurisdiction and dismiss Cole's application for review.

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[2] The 2003 adverse arbitration award is disclosed in occurrence number 1079197. (RP 158-59.) The occurrence number is FINRA's internal number used in the Central Registration Depository ("CRD"®) to identify each disclosure. Occurrence numbers do not appear in the publicly-available BrokerCheck report.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant to the issue of jurisdiction are straightforward. On May 14, 2002, Stella Hartunian filed a statement of claim in NASD's arbitration forum against Cole and Royal Alliance Associates, Inc., the firm where Cole was associated at the relevant time. (RP 148-49, 165.) Hartunian asserted that Cole and Royal Alliance engaged in the following actions related to the purchase of five mutual funds: breaching a contract, breaching a fiduciary duty, acting negligently, engaging in unsuitable trading, failing to supervise, and misrepresenting information. (RP 165.) Cole and Royal Alliance denied the allegations of wrongdoing and asked that the NASD arbitration panel dismiss Hartunian's statement of claim. (RP 165-66.)

On April 9, 2003, after a full hearing on the merits in which the arbitration panel had the benefit of a full record, including pleadings, testimony, and evidence, the panel determined that Cole and Royal Alliance were liable for the misconduct. (RP 167.) The panel ordered them to pay Hartunian $5,255, jointly and severally, in compensatory damages. (RP 167.) The arbitration award contained no expungement relief. (RP 166-67.) In addition, there is no evidence that Cole sought to challenge the award in court through a motion to vacate, modify, or correct. *See Challenges to an Arbitration Award*, http://www.finra.org/arbitration-and-mediation/decision-award (last visited Jan. 25, 2019) (explaining that FINRA does not have an appeals process through which a party may challenge an adverse arbitration award and that only a court may modify, vacate, or correct an award and citing the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10). Instead, Cole waited more than 14 years and filed a statement of claim with

FINRA's Office of Dispute Resolution seeking expungement of the 2003 adverse award.[3] (RP 1-97.)

On October 9, 2018, FINRA informed Cole that the Director had determined that Cole's request for expungement of the April 9, 2003 adverse award was not eligible for arbitration.[4] (RP 137.) Under FINRA arbitration rules, 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." FINRA Rules 12203(a), 13203(a).

On October 26, 2018, Cole filed an application for review with the Commission.[5] (RP 139-41.) Cole requests that the Commission order FINRA to permit him to arbitrate his request to expunge the April 2003 adverse arbitration award against him. (RP 140.) The Commission subsequently requested that the parties address whether it has jurisdiction to consider Cole's application for review. For the reasons set forth below, it does not.

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[3] To be clear, Cole was seeking not only to expunge a customer complaint, but also the adverse award that is the subject of this appeal. (Br. at 2.)

[4] The Director permitted Cole's case to proceed in FINRA's forum with respect to one other occurrence number (1565331). (RP 137.) Notably, unlike occurrence number 1079197 at issue here, this other occurrence was not an adverse award arising from a dispute with a customer, but was related to a customer complaint that resulted in a settlement. (RP 137, 160-163.)

[5] As Cole acknowledges, there are no FINRA procedures for appealing the Director's decision barring additional arbitration in FINRA's forum related to a prior adverse arbitration award arising from a customer dispute. (Br. at 5.) As discussed in detail in Part III.A below, the FAA vests jurisdiction exclusively with the courts for limited review of prior arbitration awards.

III. ARGUMENT

The Commission should dismiss Cole's application for review because it lacks a statutory basis to exercise jurisdiction. The Commission's authority to review FINRA actions is governed by § 19(d) of the Exchange Act, which grants the Commission authority to review only four classes of actions by a self-regulatory organization ("SRO"). 15 U.S.C. § 78s(d). Specifically, § 19(d) authorizes Commission review of an SRO action only if that action: (1) imposes any final disciplinary sanction on any member (or person associated with a member) of the SRO or participant therein; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or (4) bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1), (2).

The Commission has ruled repeatedly in other cases that these four grounds are the only ones upon which a review of FINRA action can occur. *See Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 955 (2004); *see, e.g.*, *Morgan Stanley & Co.*, 53 S.E.C. 379, 382, 384 (1997) (explaining that § 19(d) authorizes Commission review when FINRA takes action impacting a member firm's access to services that are central to FINRA's functions as an SRO). The Commission cannot review FINRA determinations simply because an applicant claims "extraordinary circumstances" or "compelling reasons." *Allen Douglas*, 57 S.E.C. at 955 n.14.

With respect to arbitration cases, the Commission has never exercised appellate jurisdiction over an arbitration claim that FINRA's Dispute Resolution Director has determined is not eligible for arbitration. This is because FINRA's refusal to declare a segment of Cole's statement of claim eligible for arbitration is not subject to Commission review as one of the four statutory bases for jurisdiction. *See WD Clearing, LLC*, Investment Company Act Release No.

75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015) (stating that "there must be a statutory basis for us to exercise jurisdiction" in connection with a FINRA action). Accordingly, the Commission should dismiss Cole's appeal.

A. FINRA Did Not Prohibit or Limit Cole's Access to Services

Cole's application for review does not qualify as a prohibition or limitation of access to FINRA services. Section 19(d) of the Exchange Act authorizes the Commission to review any action by an SRO that "prohibits or limits any person in respect to access to services offered by such organization or member thereof." 15 U.S.C. § 78s(d)(1). Contrary to Cole's assertion, this provision does not authorize the Commission to review FINRA's action. (Br. at 5-7.) Cole 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]." *See Sky Capital LLC*, Exchange Act Release No. 55828, 2007 SEC LEXIS 1179, at *15 (May 30, 2007).

Unlike in this case, when the Commission has found a denial of access to services, "an SRO had denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO." *Morgan Stanley*, 53 S.E.C. at 385. "The services at issue were not merely important to the applicant but were *central* to the function of the SRO." *Id.* (emphasis added). For example, in *William J. Higgins*, 48 S.E.C. 713, 718-19 (1987), the Commission held that an exchange's denial of a member's request to install direct telephone link-ups between the trading floor and non-member customers prohibited or limited access to the principal service offered by an exchange: the operation of a trading floor.[6] And in *Tower*

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[6] *Cf. Interactive Brokers, LLC*, 53 S.E.C. 466, 469-70 (1998) (restrictions on use of hand-helds in trading groups limited access to SRO's "essential" service of providing a market for

[Footnote cont'd on next page]

Trading, L.P., 56 S.E.C. 270, 280-82 (2003), the Commission held that an exchange's termination of a member's "designated primary market-maker" status denied access to a guaranteed entitlement to participate in certain options transactions, a "substantial benefit" that the exchange provided only to designated primary market-makers.[7] Other activities that the Commission has treated as among an SRO's central "services" include the listing of securities[8] and the provision of market quotation data.[9]

1. The Denial of Forum Is Not Central to FINRA's Operation as an SRO

Here, FINRA did not deny to Cole any services that are central to FINRA's operation as an SRO. FINRA did not terminate a member's market maker status; it did not deny a member's request to improve communications with a trading floor; it did not delist the securities of an issuer; and it did not deny Cole access to any similar FINRA services. *See Allen Douglas*, 57 S.E.C. at 960-62. The Director's denial of forum has no bearing on Cole's membership in FINRA, which continues unchanged regardless of whether the arbitration forum is granted. *See Joseph Dillon & Co.*, 54 S.E.C. 960, 965 (2000).

[cont'd]

securities trading); *MFS Sec. Corp.*, 56 S.E.C. 380, 388 n.15 (2003) (termination of "member" status by exchange constituted denial of access to services).

[7] *Cf. Scattered Corp.*, 52 S.E.C. 812 (1996) (reviewing an exchange's refusal to process request for registration as a market-maker in certain issues).

[8] *Biorelease Corp.*, 52 S.E.C. 219 (1995) (reviewing decision to delist issuers of securities from exchange's quotation system); *see also Creative Med. Dev., Inc.*, 52 S.E.C. 968 (1996) (involving a delisting of an issuer's securities).

[9] *Bloomberg, L.P.*, Exchange Act Release No. 49076, 2004 SEC LEXIS 79 (Jan. 14, 2004) (reviewing SRO's restrictions on vendors' use of market quotation data).

Moreover, even if some aspect of FINRA's evaluation of arbitration claims was a "fundamentally important service," which *it is not*, FINRA did provide the service of reviewing a statement of claim to determine the appropriateness of an arbitration forum. In doing so, the Director correctly decided that part of Cole's statement of claim should not proceed. Nevertheless, FINRA permitted Cole to proceed in arbitration with respect to one of the occurrences that he identified in the same statement of claim. (RP 1, 6-15, 137.) Cole just dislikes that the Director found inappropriate his attempt to expunge one occurrence, which was an adverse arbitration award. *See* FINRA Rules 12203(a), 13203(a).

Cole contends that FINRA rules permit the Director to exercise discretion to deny the forum only in emergencies. (Br. at 5.) Cole, however, misreads the rule text and conveniently ignores the disjunctive "or" in the plain language of the rule, which permits denial of the forum in circumstances like this one. The rules expressly provide 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." FINRA Rules 12203(a), 13203(a) (emphasis added). When the Commission approved Rules 12203 and 13203, it stated "that the proposed rules should facilitate excluding cases from the NASD arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum. This, in turn, should promote the efficacy and efficiency of the arbitration forum in processing its claims." *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; Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Industry Disputes, 72 Fed. Reg. 4574, 4602 (Jan. 24, 2007).

An attempt to use FINRA's arbitration forum to collaterally attack an adverse award arising from a customer dispute is not consistent with "the purposes of FINRA or the intent of the Code" of Arbitration. *See* FINRA Rules 12203(a), 13203(a). 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. 15 U.S.C. § 78o-3(i)(1)(A). FINRA also is required to make the registration information in CRD, including information about adverse arbitration awards arising from disputes with customers, available to the public 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 specifically 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 (Dec. 30, 2014). 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. 43809, 43812-13 (July 22, 2014).

Those appropriate and narrow circumstances do not include permitting additional arbitration to challenge an adverse award arising from a customer dispute. *See* FINRA Rule 2080. Indeed, the Commission recognized the importance of adverse decisions in customer-

initiated arbitrations, such as the adverse award against Cole in this case, when it approved a change to FINRA rules 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. 41254, 41254-55 (July 8, 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 41257. Thus, the Director's decision to exclude the portion of Cole's claim that sought to expunge information about an adverse award was entirely consistent not only with FINRA rules, but with the mandate contained within the FAA that only courts review arbitration awards.

2. FINRA Rules and the FAA Vest Jurisdiction with the Courts to Review Challenges to Adverse Awards Arising from Disputes with Customers

FINRA Rule 2080 directs that associated persons such as Cole who are seeking to expunge information from CRD arising from disputes with customers "must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief." In 2003, following a full hearing on the merits in which the arbitration panel had the benefit of a full record, including pleadings, testimony, and evidence, the panel determined that Cole and Royal Alliance were jointly and severally liable for the misconduct alleged in that arbitration proceeding. (RP 167.) Cole could only challenge that finding by filing a timely motion to vacate, modify, or correct the award—an avenue he 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"). Instead, 14 years later, Cole filed a statement of claim seeking to erase the liability finding from his record. Such a result is not contemplated by FINRA rules; thus, the dispute is not appropriate for resolution in FINRA's arbitration forum.[10]

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 Jan. 25, 2019). Not surprisingly, Cole ignores entirely the FAA and the Supreme Court's jurisprudence that vests jurisdiction related to contesting arbitration awards squarely with the courts. (Br. at 5.)

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[10] Cole contends that he may only seek expungement through arbitration pursuant to a FINRA arbitration rule, Rule 13200. (Br. at 6.) Cole is incorrect and misunderstands the context of FINRA rules. Rule 13200 provides,

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:
>
> - Members;
> - Members and Associated Persons; or
> - Associated Persons.

In his statement of claim, Cole is seeking to expunge an adverse award resulting from a dispute with a customer, Hartunian, not a dispute between him and a member or another associated person irrespective of how he captioned his claim. (RP 1, 2-6, 16.) Thus, FINRA Rule 2080—a conduct rule—governs. And consistent with that rule, Cole is not precluded from seeking a court order directing expungement.

As the Supreme Court has explained, the FAA mandates that only courts review arbitration awards and then places strict limits on that judicial review. Notably, Cole cites no provision within either the FAA or the Exchange Act that provides for Commission review of arbitration awards arising from disputes with customers because he cannot. "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 Street 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 other than the narrow judicial review set out by the FAA in 9 U.S.C. §§ 10 and 11. *Id.* at 590. "Under the terms of § 9 [of the FAA], a *court* 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one." *Id.* at 582 (emphasis added). 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). Cole's attempt to insert the Commission into an appellate-review role is directly in conflict with the FAA.

In favor of Commission jurisdiction, Cole argues that "court is not a viable option" because it is "more complicated, expensive, and time-consuming." (Br. at 6.) FINRA Rule 2080, however, specifically provides an avenue to expungement through the courts. And, "SRO

action is not reviewable [by the Commission] merely because it adversely affects the applicant." *Dillon*, 54 S.E.C. at 964.

The Supreme Court has made the FAA the nationwide standard governing virtually all forms of commercial arbitration. Its jurisprudence makes plain that federal law preempts state law that is inconsistent with or "undermine[s] the goals and policies of the FAA." *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 478 (1989). The FAA therefore establishes the limited review of arbitration decisions exclusively in the federal or state courts. *See Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997); *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (extending the FAA and the federal substantive law on arbitrability to state courts)[11]; *see, e.g.*, New York Code of Practice Law and Rules § 7511 (setting forth the limited grounds for a New York state court to vacate or modify an arbitration award, which is consistent with the standards in the FAA). "Because of the courts' limited ability to review arbitration awards, their powers of review have been described as 'among the narrowest known to the law.'" *Denver & Rio Grande W. R.R.*, 119 F.3d at 849 (quoting *ARW Expl. Corp. v. Aguirre*, 45 F.3d 1455, 1462 (10th Cir. 1995)). In no circumstances does the FAA authorize federal agency review of arbitration decisions, such as that requested by Cole from the Commission.

Rather, federal policy favors the preservation of the integrity of the arbitration process, which includes only the limited review by courts as contemplated in §§9-11 of the FAA. *See*

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[11] In *Hall Street*, the Court explained that the FAA is "not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable." 552 U.S. at 590. Nonetheless, it is well established that the FAA's reach is expansive, applying to all contracts involving interstate commerce, and that state courts are bound to enforce the FAA's substantive provisions under the Supremacy Clause. *See Southland*, 465 U.S. at 16.

AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); *Hall Street*, 552 U.S. at 588. This policy is motivated by the desire to maintain an alternative adjudicative procedure with increased efficiency, less complexity, shorter proceedings, and reduced costs compared to the traditional litigation process. *See AT&T Mobility*, 563 U.S. at 344-45. If a party to an arbitration were free to invoke a federal agency's appellate review, the advantage of a speedy resolution of disputes by private arbitration mechanisms would certainly disappear. As "*Hall Street Associates* makes clear[,] de novo review is entirely incompatible with the expedited process envisioned in the FAA." *Citizen Potawatomi Nat'l v. OK*, 881 F.3d 1226, 1237 (10th Cir. 2018), *cert. denied*, 2018 U.S. LEXIS 6254 (Oct. 15, 2018). Mere dissatisfaction with an award is not a good enough reason for a losing party such as Cole 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 Cole to essentially re-arbitrate the April 2003 award would be "entirely incompatible" not only with FINRA rules but also with the FAA.[12] *See Citizen Potawatomi*, 881 F.3d at 1237.

FINRA acted consistent with its mandate by refusing to allow Cole to challenge an adverse award in a FINRA forum, and took no action to prohibit or limit Cole's activities as an associated person of a FINRA member. *See Allen Douglas*, 57 S.E.C. at 960-61 (explaining that Commission lacked jurisdiction to review NASD's disapproval of member firm's subordinated loan agreement); *Dillon*, 54 S.E.C. at 965 (finding that NASD's denial of rule exemption and

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[12] In addition, given the passage of time of more than 14 years since the underlying adverse arbitration award was issued, the evidence related to the award would likely be unavailable.

requiring firm to tape record telephone conversations with customers was not a denial of access to services). The Director's determination is not reviewable under this prong of § 19(d).

B. FINRA Did Not Deny Cole Membership or Participation or Impose a Disciplinary Sanction or Bar

Section 19(d) of the Exchange Act also provides the Commission with jurisdiction to review FINRA action that (1) qualifies as a denial of membership or participation; (2) imposes any final disciplinary sanction on any member of the SRO; or (3) bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1). These three bases for appellate review are also inapplicable to this proceeding.

FINRA did not take any action against Cole that qualifies as a denial of membership or participation under § 19(d). This basis for review is directed at SRO decisions that actually deny applications for membership or impose restrictions on business activities as a condition of membership. *See WD Clearing*, 2015 SEC LEXIS 3699, at *10. As the record reflects, the Director's action had no impact on Cole's membership in FINRA. In fact, Cole is currently associated with Royal Alliance, a FINRA member, as a general securities representative and principal, municipal fund securities principal, and an investment company and variable contracts products limited representative. (RP 146.) Therefore, FINRA's refusal to permit Cole to collaterally attack an adverse arbitration award arising from a customer dispute in a subsequent arbitration in FINRA's arbitration forum did not deny, alter, or otherwise affect Cole's membership or participation in FINRA. *See Eric David Wanger*, Exchange Act Release No. 79008, 2016 SEC LEXIS 3770, at *14-15 (Sept. 30, 2016).

FINRA also did not take any action against Cole that qualifies as a final disciplinary sanction or a bar. The Commission has "interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an [SRO] rule or Commission statute or rule, or action 'in

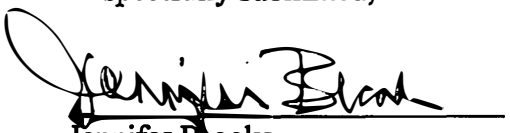
which a punishment or sanction is sought or intended.'" *Tower Trading*, 56 S.E.C. at 277-78 (quoting *Pac. Stock Exch. Options Floor Post X-17*, 51 S.E.C. 261, 266 (1992)). FINRA does not allege that Cole violated a FINRA rule or Commission statute or rule, and FINRA did not impose any sanction upon Cole. Given this standard, FINRA's refusal to permit arbitration related to expungement of an adverse award was not "disciplinary," and this provision does not provide a basis to review Cole's appeal. Nor did FINRA employ its disciplinary procedures or make any "determination of wrongdoing," a prerequisite to the imposition of a punishment or sanction. *See Allen Douglas*, 57 S.E.C. at 955-56; *Morgan Stanley*, 53 S.E.C. at 383. Accordingly, FINRA's denial of its arbitration forum does not qualify as a "disciplinary action" subject to Commission review.

Finally, FINRA's action did not bar Cole from becoming associated with a FINRA member. Indeed, as highlighted above, Cole is currently associated in several capacities with a FINRA member. (RP 146.) And FINRA has taken no action against Cole that limits or prevents his ability to continue to do so. *See WD Clearing*, 2015 SEC LEXIS 3699, at *19 ("FINRA did not bar WD Clearing or its representatives from associating with . . . any other FINRA-member firm, let alone all FINRA-member firms, as would be required for us to assume jurisdiction on this ground.").

IV. CONCLUSION

The Commission should dismiss Cole's appeal for lack of jurisdiction. The denial of FINRA's forum for arbitration does not fall within any of the four categories of actions subject to Commission review under § 19(d) of the Exchange Act. Accordingly, the Commission lacks jurisdiction to address Cole's complaints.

Respectfully submitted,



Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

February 4, 2019

CERTIFICATE OF SERVICE

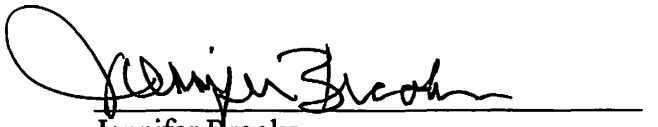
I, Jennifer Brooks, certify that on this 4th day of February 2019, I caused a copy of FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction, in the matter of Application for Review of Daryl Andrew Cole, Administrative Proceeding No. 3-18879, to be served by messenger on:

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

and via FedEx overnight and first-class mail on:

Michael Bessette
HLBS Law, LLC
9737 Wadsworth Parkway, G-100
Westminster, CO 80021

Different methods of service were used because courier service could not be provided to the applicant's counsel.



Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
(202) 728-8083

FINRA

Financial Industry Regulatory Authority

Jennifer Brooks
Associate General Counsel

Direct: (202) 728-8083
Fax: (202) 728-8264

February 4, 2019

BY MESSENGER

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

RE: In the Matter of the Application for Review of Daryl Andrew Cole
Administrative Proceeding No. 3-18879

Dear Mr. Fields:

Enclosed please find the original and three (3) copies of FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction in the above-captioned matter.

Please contact me at (202) 728-8083 if you have any questions.

Very truly yours,

Jennifer Brooks

Enclosures

cc: Michael Bessette (via FedEx Overnight and first-class mail)
HLBS Law, LLC
9737 Wadsworth Parkway, G-100
Westminster, CO 80021