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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of

Frank Augustine Cuenca

For Review of Action Taken By

FINRA

File No. 3-18883

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

This matter concerns FINRA's attempt to influence their own "neutral" arbitration proceedings by unilaterally, and without authority, denying Mr. Cuenca's ability to seek a right he is entitled to pursue through FINRA's own rules: expungement. See FINRA Rule 2080(b)(1). FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction ("FINRA's Response") attempts to misdirect the purpose of the current briefing schedule, which is to address whether the Commission has *jurisdiction* to hear this request for review, and instead uses its Response as an attempt to attack the merits of Mr. Cuenca's requested relief. Mr. Cuenca hereby submits this Reply brief to address FINRA's Response regarding its *jurisdictional* arguments only, but also to clarify some of FINRA's numerous falsities.

The Commission has jurisdiction to review the determination by the Director of FINRA to deny Mr. Cuenca access to FINRA's arbitration forum. FINRA admits that the "Commission's authority to review FINRA actions is governed by § 19(d) of the Exchange Act" and that there are "four classes of actions by a self-regulatory organization ("SRO") that the Commission can

review. See FINRA's Response, pg. 5; see also 15 U.S.C. § 78s(d); SEC Rule 420. The only applicable class at issue here is where an SRO "prohibits or limits any person in respect to access to services offered by such organization or member thereof." *Id.*

FINRA claims that the Director of FINRA's Office of Dispute Resolution's determination to prohibit and/or limit Mr. Cuenca's access to its forum "does not qualify as a prohibition or limitation of access to FINRA services...[because Mr.] Cuenca 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 FINRA's Response, pg. 6 (internal quotations and citations omitted). FINRA points to several instances where the Commission has held that the services were central to its operation as an SRO—terminating a member's market maker status; denying a member's request to improve communications with a trading floor; delisting the securities of an issuer—then contends that, because FINRA did not deny access to similar FINRA services, it did not deny Mr. Cuenca access to a fundamentally important service central to its function. See FINRA's Response, pg. 7. FINRA's argument however, relies on a logical fallacy—denying the antecedent— which stems from an if/then premise where the antecedent is made not true, then it is presumed that the consequent is also not true (i.e. if A, then B; not A; therefore, not B). That is to say: apples are fruits; this orange is not an apple; therefore, this orange is not a fruit.

The service that FINRA denied Mr. Cuenca access to in this case however, is a fundamentally important service central to its function. FINRA describes on its website that:

> 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[.][1]

Here, FINRA clearly states that resolving securities disputes, including the industry dispute Mr. Cuenca filed, is one of the five activities FINRA performs in order to accomplish their mission. It defies common sense for FINRA to then contend that FINRA arbitration is not fundamentally important or central to their function, especially since they handle nearly 100 percent of securities-related arbitrations. FINRA also proudly touts that it "provides the first line of oversight for broker-dealers and the first line of defense for investors ... [and] regulates both the firms and professionals selling securities[.]"[2] Part of the regulation, oversight, and defense provided by FINRA is the CRD repository and operation of the BrokerCheck website. FINRA claims that it had 629,847 registered representatives as of 2018[3] and requires that BrokerCheck be a readily apparently reference and hyperlink on the firm's initial website or any other web page that includes a professional profile of one or more registered persons who conduct business with retail investors.[4] With the pervasiveness of the BrokerCheck website, and the information contained therein, and because FINRA requires disclosure of most customer disputes regardless of their merit, an expungement process was specifically set up to ensure the integrity of the system and to allow the hundreds of thousands of representatives to remove claims that are factually impossible, clearly erroneous, false, or where they were not involved with the allegations made. See FINRA Rule 2080. FINRA's Rule 2080 specifically allows *arbitrators* to determine whether expungement is appropriate after

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[1] http://www.finra.org/about/what-we-do, emphasis added.
[2] http://www.finra.org/industry/oversight
[3] http://www.finra.org/newsroom/statistics
[4] FINRA Regulatory Notice 15-50 (June 6, 2016); FINRA Rule 2210.

a hearing on the merits. 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.

FINRA also seemingly attempts to claim that because the "Commission has never exercised appellate jurisdiction over an arbitration claim that FINRA's Dispute Resolution Director has determined is not eligible for arbitration," therefore, the Commission does not have jurisdiction. See FINRA's Response, pg. 5. However, FINRA fails to cite a single case where the Commission *denied* jurisdiction in a similar circumstance. Just because the Commission has not yet heard such a case does not mean that it is statutorily barred from hearing such a case.

FINRA then states that even if its denial of Mr. Cuenca's access to seek arbitration *was* a fundamentally important service, "FINRA did provide the service of reviewing a statement of claim to determine the *appropriateness* of an arbitration forum...[and that Mr.] Cuenca just *dislikes* that the Director found inappropriate his attempt to expunge one occurrence." See FINRA's Response, pg. 8 (emphasis added). First of all, Mr. Cuenca is not arguing that he merely "dislikes" the Director's decision to prohibit his access to a fundamentally important service. Mr. Cuenca is stating that FINRA went beyond its statutory authority (as a neutral arbitration forum) and made a biased decision, without any authority, to deny a fundamentally important service to Mr. Cuenca simply because its *Director* apparently disliked Mr. Cuenca's request. Secondly, the remainder of FINRA's claim has absolutely no merit and defies logic. The fact that the Director allowed one claim to proceed does not change the fact that the Director still denied Mr. Cuenca's access to a fundamentally important service as to his other claim, and had no authority to do so.

FINRA also misconstrues Mr. Cuenca's argument that the Director's action was a final action by FINRA, which Mr. Cuenca raised to satisfy one element of the Commission's jurisdiction over this request for review. In doing so, FINRA attempts to diminish Mr. Cuenca's argument as a blatant omission of text from Rule 13203. To clarify Mr. Cuenca'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 Mr. Cuenca'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.

FINRA uses this misinterpretation of Mr. Cuenca's argument to claim that Mr. Cuenca "misreads the rule text and conveniently ignores the disjunctive 'or' in the plain language[.]" See FINRA's Response, pg. 8. Mr. Cuenca 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.

FINRA also misconstrues Mr. Cuenca's claim requesting expungement relief as a collateral attack on and attempt to vacate an arbitration award.[5] This could not be any more of a distorted representation of Mr. Cuenca'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 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, Mr. Cuenca is not seeking to vacate the award or modify any finding of the panel who presided over the underlying case. FINRA uses this misconception to postulate their contention that that the Federal Arbitration Act ("FAA") applies to Mr. Cuenca'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 Mr. Cuenca from seeking expungement through arbitration, is (a) false, because § 10 of the FAA does not prohibit parties from pursuing other avenues of vacatur,[6] and (b) irrelevant, because Mr. Cuenca is not attempting to vacate the award. Although FINRA claims that seeking expungement of an adverse award if "is not contemplated by FINRA rules," there is not a single rule promulgated by FINRA

[5] A collateral attack on a prior adverse award would, nevertheless, be an arbitrary effort on Mr. Cuenca'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 Mr. Cuenca's 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.

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

that states a person cannot seek expungement of a customer dispute disclosure that previously resulted in an award.[7]

The Commission has jurisdiction to review the determination by the Director of FINRA to deny Mr. Cuenca access to FINRA's arbitration forum, as this action prohibits or limits Mr. Cuenca's access to services offered by FINRA. § 19(d) of the Exchange Act.

Dated: February 22, 2019

Respectfully submitted,

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[7] The FINRA arbitration award at issue here contains no explained decision or findings of fact. In many instances, as is with Mr. Cuenca's case, the Claimant in the underlying arbitration provided multiple theories of relief, some aimed at Mr. Cuenca, but others were aimed at the firm and another broker, Timothy Sullivan. Yet, there is no explanation of which the panel ruled on or how they determined their allocation of liability. Did the panel find that Mr. Cuenca committed a sales practice violation of securities regulations or laws, or was it Mr. Sullivan? Or, was the firm found liable for a failure in oversight or violation of securities laws, and Mr. Cuenca was held joint and severally liable as the principal owner of the company? Notably, the Claimant sought over $151,000, and the panel only awarded them $23,927.60. Therefore, 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 Mr. Cuenca, Mr. Sullivan and their 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, especially after Mr. Cuenca has had this disclosure on his record for years. Instead of allowing Mr. Cuenca 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, and claims that this case is "inappropriate" for arbitration merely because there was an award for a nominal amount of damages.

CERTIFICATE OF SERVICE

I, Misty Brown, certify that on this 22nd day of February 2019, I caused the original and three copies of this Mr. Cuenca's Reply to FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction to be served on:

Brent J. Fields, Secretary
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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.

and

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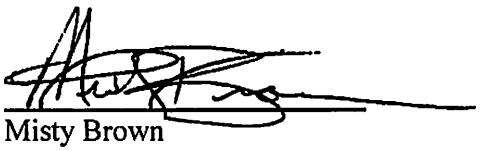

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