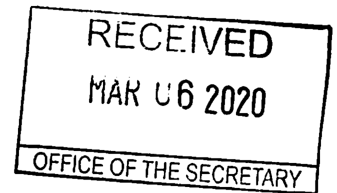

BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

Thomas Christophe Prentice

File No. 3-18894

FINRA'S RESPONSE TO APPLICANT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Thomas Christophe Prentice is seeking Commission review of FINRA's denial of his arbitration claim to expunge from his BrokerCheck records an 1996 adverse arbitration award against him arising from a dispute with a customer. (RP 1-6, 11.) After the parties submitted initial briefs concerning whether the Commission had jurisdiction to consider the application, the Commission requested supplemental briefing. For the reasons stated herein, FINRA submits that the arbitrator did, in fact, consider on the merits and deny Prentice's request for expungement of the adverse arbitration award despite FINRA's determination that the claim was ineligible for arbitration. Accordingly, pursuant to the Commission's decision in *John Boone Kincaid*, FINRA did not limit Prentice's access to its arbitration forum. The Commission should not exercise jurisdiction and accept this appeal because to do so would be entirely incompatible with the Federal Arbitration Act ("FAA") (9 U.S.C. § 10). Therefore, the Commission should follow its well-established precedent related to its jurisdiction and dismiss Prentice's application for review.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 22, 1996, a public arbitrator in NASD's arbitration forum determined that Prentice and his firm were liable to a customer for alleged misconduct (the "1996 Customer Arbitration Award") (RP 162.) The arbitrator ordered them to pay the customer $6,032.90, jointly and severally, in compensatory damages. (RP 162.) The award contained no expungement relief. (RP 162.) Prentice never sought to challenge the award in court through a motion to vacate, modify, or correct. Instead, Prentice waited more than 20 years and filed a statement of claim with FINRA's Office of Dispute Resolution seeking expungement of the 1996 Customer Arbitration Award. (RP 1-42.)

On October 9, 2018, FINRA informed Prentice that FINRA's Dispute Resolution Director (the "Director") had determined that Prentice's request for expungement of the 1996 Customer Arbitration Award (occurrence number 170892) was not eligible for arbitration. (RP 127.) The Director permitted Prentice's case to proceed in FINRA's arbitration forum with respect to the other claim in his statement of claim (occurrence number 1454693). (RP 127.)

On October 15, 2018, despite having received the Director's determination, Prentice requested that the assigned arbitrator (the "Arbitrator") nonetheless consider his request for expungement of the 1996 Customer Arbitration Award. At the expungement hearing for occurrence number 1454693, Prentice also requested the same. In his written arbitration award, the Arbitrator granted Prentice's expungement request for occurrence 1454693 on the merits. The Arbitrator also, based on Prentice's requests and despite the Director's ineligibility determination, considered at the same hearing Prentice's request for expungement of the 1996 Customer Arbitration Award and denied the claim on the merits, as further explained herein.

III. ARGUMENT

The Commission should dismiss Prentice's application for review because it lacks a statutory basis to exercise jurisdiction. Prentice's application for review does not qualify as a prohibition or limitation of access to FINRA services because FINRA did not limit Prentice's access to its arbitration service. Indeed, the Arbitrator reviewed Prentice's expungement request in FINRA's arbitration forum to determine the appropriateness of expungement and denied the request. Relying on the Commission's decision in *Kincaid*, the Commission should dismiss Prentice's application for review because the Arbitrator's decision to deny expungement of the 1996 Customer Arbitration Award was not a denial of FINRA's arbitration forum, and it does not fall within any of the four categories of actions subject to Commission review under § 19(d) of the Exchange Act.

The Commission asked three questions in its supplemental order: (1) Did Prentice ask the arbitrator to consider and rule on his claim to expunge the prior adverse arbitration award despite FINRA's determination that the claim was ineligible for arbitration?; (2) In denying the claim as lacking "compelling justification" did the arbitrator deny expungement relief as to that claim on the merits, or instead decline to consider the claim?; and (3) How does the arbitrator's decision bear on whether Prentice accessed the arbitration service, or was prohibited or limited in his access to that service? What is the relevance of the Commission's decision in *John Boone Kincaid*? We address each of the Commission's questions in turn.

1. *Did Prentice ask the arbitrator to consider and rule on his claim to expunge the prior adverse arbitration award despite FINRA's determination that the claim was ineligible for arbitration?*

The parties agree that Prentice requested that the Arbitrator consider and rule on his claim to expunge the prior adverse award. Although FINRA maintains that this request was an

attempted end run around the Director's ruling that the claim was not eligible for arbitration, the Arbitrator acknowledged Prentice's request to expunge the 1996 Customer Arbitration Award. As proffered by Prentice on appeal, Prentice made the request on October 15, 2019—six days after receiving the Director's determination that the award was ineligible for arbitration. (Prentice supplemental brief dated February 13, 2020 (hereinafter "Prentice Supp. Br.) at 2.) At the expungement hearing, Prentice again requested expungement of the 1996 Customer Arbitration Award, as noted by the Arbitrator in his written award. (RP. 131.)

2. *In denying the claim as lacking "compelling justification" did the arbitrator deny expungement relief as to that claim on the merits, or instead decline to consider the claim?*

The Arbitrator denied expungement relief as to that claim on the merits. The Arbitrator, began by noting that he had "consider[ed] the pleadings, the testimony and evidence presented at the hearing," which included Prentice's request for expungement of the 1996 Customer Arbitration Award, and had "decided in full and final resolution of the issues submitted for determination." (RP 131.) With respect to Prentice's request, the Arbitrator continued:

> If recommending expungement in light of [the Director's] determination were ever appropriate, it would require a compelling justification. Even absent such a determination, second-guessing an arbitrator who heard or read all of the evidence would itself require a compelling justification. No such compelling justification exists here.

(RP. 131.) Specifically, the Arbitrator details that compelling justification would be required in order (i) to recommend expungement of the 1996 Customer Arbitration Award in spite of the Director's determination *or* (ii) to second-guess an arbitrator who heard or read all of the evidence. And the Arbitrator, having received Prentice's request to review his claim despite the Director's determination and having "consider[ed] the pleadings, testimony and evidence

presented at the hearing," found "[n]o such compelling justification exists here" to recommend expungement and accordingly denied expungement relief. (RP. 131.)

That both the consideration of Prentice's request for the expungement of the 1996 Customer Arbitration Award and the recommendation of expungement of occurrence 1454693 are both enumerated points under the award discussion's introductory text (detailing that the Arbitrator's full and final resolution of the issues) further supports that the entire award discussion was on the merits. (RP 131.) Indeed, it is a more harmonious reading of the Arbitrator's award as a whole.

On appeal, Prentice confuses the language of the Arbitrator's arbitration award with the Director's October 9, 2018 determination. FINRA, through the Director, did not deny Prentice's claim as "lacking compelling justification." (Prentice Supp. Br. at 2.) Rather, the Director determined that Prentice's request was "not eligible for arbitration as it arises from a prior adverse award." (RP. 127) On the other hand, the Arbitrator, having considered the record, found "no compelling justification" to recommend expungement and therefore denied Prentice's request for expungement. (RP. 131.) Although the Director initially determined that the expungement request was ineligible for arbitration, the Arbitrator nonetheless reviewed the pleadings, testimony, and evidence presented at the hearing; considered the claim on the merits; and denied expungement relief.

3. *How does the arbitrator's decision bear on whether Prentice accessed the arbitration service, or was prohibited or limited in his access to that service? What is the relevance of the Commission's decision in* <u>*John Boone Kincaid*</u>*?*

By requesting that the Arbitrator rule on his claim seeking to expunge the 1996 Customer Arbitration Award and having had the Arbitrator deny expungement relief as to his claim on the merits, Prentice accessed the arbitration service. The fact that he received a negative result does

not mean that he was denied access to the arbitration service.[1] Similar to *Kincaid,* "[a]lthough the arbitrator's ruling was adverse to [Prentice], FINRA did not limit [Prentice's] access to its arbitration forum but rather provided [Prentice] with access to that service." *John Boone Kincaid*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *9 (Oct. 22, 2019). Indeed, Prentice does not identify any concrete way in which FINRA limited his access to its arbitration service with respect to this claim and instead generally refers to the Director's determination. The Arbitrator, however, did not follow the Director's determination and instead considered Prentice's claim on the merits. In doing so, Prentice accessed the arbitration service.

On appeal, Prentice argues that Kincaid's failure to file a requested brief in the arbitration forum resulted in the arbitrator's adverse award and then asserts "[i]n our current case there was no opportunity given due to the Director's intervention which prevented the case from being decided on the merits." (Prentice Supp. Br. at 3.) Prentice is incorrect. While it is true that the Arbitrator did not request briefing, the Arbitrator ruled on Prentice's request for expungement on the merits after considering the pleadings, testimony, and evidence presented at the hearing. (RP 131.) The Arbitrator, who under the rules is permitted to request or agree to accept additional submissions from the parties, was within his discretion to decide the matter without supplemental briefing. *See* FINRA Rule 13608. Indeed, "FINRA's rules vest arbitrators with the sole authority to interpret and apply FINRA's arbitration rules—specifying that '[s]uch interpretations are final and binding,' and that an arbitrator's award is 'not subject to review or

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[1] To be sure, FINRA maintains that an arbitrator's evaluation of claims is not "fundamentally important service," such to convey Commission jurisdiction, but regardless Prentice was not denied access to the arbitration service. Even if an arbitrator did not evaluate an expungement claim based on the Director's determination, the Commission nonetheless would not have jurisdiction over an application for review of that action for the reasons set forth in FINRA's brief on the issue of jurisdiction in the consolidated applications for review. *See Bart Steven Kaplow*, Exchange Act Release No. 85509, 2019 SEC LEXIS 731 (Apr. 4, 2019).

appeal' by FINRA." *Kincaid*, 2019 SEC LEXIS 4189, at *10 (quoting FINRA Rules 13413 and 13904(b)).

The proper forum for Prentice to challenge, modify, or correct the award denying expungement was in court through a motion to vacate. *See Challenges to an Arbitration Award*, http://www.finra.org/arbitration-and-mediation/decision-award (last visited March 3, 2020) (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 FAA, 9 U.S.C. § 10). Prentice argues that his ability to seek relief under the FAA does not preclude the Commission from exercising "responsibility" over his claim. (Prentice Supp. Br. at 3.) Prentice is incorrect. FINRA Rule 13904(b) provides that arbitration awards are not reviewable unless the applicable law directs otherwise. As the Commission explained in *Kincaid* "[t]he applicable law provided Kincaid with one path for relief: as courts have long explained, '*the exclusive remedy* for challenging acts that taint an arbitration award' rendered by a FINRA arbitrator is to move to vacate, modify, or correct the award in court under the [FAA]." *Kincaid*, 2019 SEC LEXIS 4189, at *10 (quoting *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 908 (6th Cir. 2000) (emphasis added)). Rather than pursuing this remedy, Prentice now seeks to circumvent the FAA and have the Commission review the Arbitrator's decision despite the Commission's lack of jurisdiction to do so. Prentice's attempts to set aside the Arbitrator's decision in order to re-arbitrate his expungement request is an impermissible attack on the arbitration award and incompatible with the FAA.

IV. CONCLUSION

The Commission should dismiss Prentice's appeal for lack of jurisdiction. The Arbitrator's decision to deny expungement of the 1996 Customer Arbitration Award 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 Prentice's complaints.

Respectfully submitted,

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