BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

Admin. Proc. File No. 3-19014

In the Matter of the

Application of

DONALD ANTHONY WOJNOWSKI

For Review of Action Taken By

FINRA

REPLY BRIEF TO SCHEDULING ORDER

I. INTRODUCTION

This matter concerns the Securities and Exchange Commission's (the "Commission") order scheduling briefs on August 19, 2020. The applicant, Mr. Donald Anthony Wojnowski ("Mr. Wojnowski"), sought review of FINRA's action in prohibiting his access to the use of FINRA's Dispute Resolution Arbitration Forum in seeking expungement of customer dispute disclosures published within FINRA's Central Registration Depository ("CRD") and thereby continuously republished to the public via FINRA's BrokerCheck website. The Commission determined that it has jurisdiction over Mr. Wojnowski's appeal and has requested a briefing on the merits of his appeal.

II. PROCEDURAL HISTORY AND BACKGROUND

FINRA is a not-for-profit corporation and self-regulatory organization ("SRO") registered with the Commission 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 CRD and a public reporting system known as BrokerCheck.[1] This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each associated person of a FINRA member firm. The purpose of the CRD and BrokerCheck systems are to: (1) to create a regulatory system for financial advisors to improve overall regulation of advisors, (2) to make information about financial advisors available to the public, and (3) to provide financial advisors an efficient automated filing system. 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. To maintain the integrity and accuracy of the information published on the CRD and BrokerCheck systems, FINRA and the Commission established a *right* for advisors to seek expungement of customer dispute disclosures contained on those systems pursuant to FINRA Rule 2080.

On January 23, 2019, Mr. Wojnowski filed a claim for expungement of one customer complaint disclosure from his records in FINRA's arbitration forum against his former broker-dealer, E.F. Hutton & Company, Inc. ("E.F. Hutton). On January 29, 2019, FINRA denied him

[1] 15 U.S.C. 78o-3(i)(1).

access to its arbitration forum and closed his case without prejudice. On February 22, 2019, Mr. Wojnowski submitted an application for review to the Commission requesting that he be permitted to bring his case in the forum that he is both entitled to and bound to by the FINRA Industry Code Rules. Whether the customer dispute disclosure is eligible for expungement should be subsequently determined by a panel that is assigned in arbitration, in accordance with FINRA Industry Code Rules 2080 and 13805.

On April 5, 2019, the Commission requested briefs limited only to the issue of jurisdiction. On April 8, 2019, FINRA sent Mr. Wojnowski an unsolicited "explanation of forum denial." On April 10, 2019 FINRA moved to adduce additional evidence in the form of the "explanation of forum denial" sent two days prior. On May 6, 2019, Mr. Wojnowski submitted his brief on the issue of the Commission's jurisdiction. On June 5, 2019, FINRA submitted its brief on the issue of jurisdiction and made reference to the "explanation of forum denial" letter.

On August 6, 2020, the Commission issued a decision finding that it has jurisdiction over Mr. Wojnowski's appeal. The Commission further found that FINRA's forum for equitable remedy is fundamentally important and central to its functions as an SRO. On August 19, 2020, the Commission issued an order seeking further briefing on the merits of Mr. Wojnowski's appeal and certain enumerated questions. This brief addresses those issues.

III. LEGAL ANALYSIS

The Commission requested that the following questions be answered: (1) Exchange Act Section 15A(h)(2) provides that any determination to prohibit or limit a person's access to services shall be supported by a statement setting forth the specific grounds on which the . . . prohibition or limitation is based." Did FINRA issue Wojnowski a supporting "statement setting forth the specific grounds" for its determination as provided for by Section 15A(h)(2) of the Exchange Act

of 1934 (hereafter, "the Act")?; (2) What were FINRA's grounds for determining that Wojnowski's claim was ineligible for arbitration, and was that prohibition of access consistent with FINRA's rules?; (3) Should the Commission grant FINRA's motion to adduce its letter to Wojnowski? Why did FINRA not send Wojnowski the letter before his appeal, and how does that bear, if at all, on whether FINRA has established reasonable grounds for its failure to adduce the letter previously? What is the relevance, if any, of case law governing judicial review of an administrative agency's post hoc explanation concerning its reasoning at the time of its decision?; (4) If the Commission were to deny FINRA's motion to adduce, could the Commission discharge its review function based on the record otherwise before it, or would it instead have to remand to FINRA for issuance of a new letter to be made part of the record?

(1) FINRA did not issue Mr. Wojnowski a supporting "statement setting forth the specific grounds" for its determination as provided for by Section 15A(h)(2) of the Act?

As stated in Section 15A(h)(2) of the Exchange Act, a determination by the association to prohibit or limit a person with respect to access to services offered by the association or a member thereof requires that the association "notify such person" and "give him an opportunity to be heard" regarding the "specific grounds" upon which the association based the prohibition or limitation. 15 U.S.C.A. § 78o-3. The association's prohibition or limitation shall also be accompanied by a statement setting forth the specific grounds upon which it was based.

FINRA failed to comply with the Act's requirement that it accompany its limitation or prohibition with a "statement setting forth the *specific grounds* upon which…the prohibition or limitation is based." 15 U.S.C.A. § 78o-3 (emphasis added). When FINRA denied Mr. Wojnowski's access to FINRA's Forum on January 29, 2019, the only grounds FINRA cited were that: "FINRA has determined that the claims you have alleged in your statement of claim are not

eligible for arbitration. Therefore, pursuant to the Customer Code Rule 12203(a) or Industry Code Rule 13203(a), we decline to accept your claim." Industry Code 13203(a) simply provides FINRA's Director of Dispute Resolution with the authority to deny access to the FINRA arbitration forum in certain circumstances. However, this forum denial letter did not provide the specific grounds on which the forum denial was made. Therefore, FINRA failed to comply with the Act's requirements.

FINRA then attempted to cure its failure to comply with the Act by providing a letter of explanation dated April 8, 2019 – *three months* after it denied Mr. Wojnowski access to its forum, two months after this application for review had already been filed with the Commission, and three days after the Commission issued a briefing scheduling order. FINRA then filed a Motion to Adduce Additional Evidence on April 10, 2019, attaching the April 8, 2019 letter, claiming that it was material to the issue of the Commission's jurisdiction, and that there was reasonable grounds for failure to adduce such evidence previously because it "did not exist at the time FINRA filed the certified record in this appeal." Whether the letter was material to the issue of the Commission's jurisdiction is now of no consequence as the Commission has already determined that it does have jurisdiction over this appeal. However, creating an explanation letter *after* an application for review is filed and attempting to offer it as probative with the excuse that it "did not exist at the time" flies in the face of FINRA's obligations to provide Mr. Wojnowski with specific grounds for denial contemporaneously with the denial and does not absolve FINRA of its failure to do so.

(2) FINRA had no grounds to determine that Mr. Wojnowski's claim was ineligible for arbitration and its prohibition of access is inconsistent with FINRA rules.

FINRA had no grounds to deny Mr. Wojnowski's right to the use of FINRA's arbitration forum for expungement. In FINRA's initial denial letter dated January 29, 2019, although they

failed to supply any reasoning, it is reasonable to conclude that their citation of Customer Code Rule 12203(a) or Industry Code Rule 13203(a) (hereinafter, "Rule 13203(a)")[2] was the basis for its denial. 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.

As a preliminary matter, it is important to note that this denial letter was issued by "Elise Guerrero" a FINRA "Senior Case Specialist", indicating that this was not a determination made by the Director of FINRA, as required by Rule 13203(a). In this letter, FINRA provided no explanation in this letter setting forth specific grounds for its forum denial under this Rule. It did not explain why the subject matter was inappropriate, or how it would pose a risk to the health or safety of the arbitrators, staff, or parties or their representatives. FINRA did not otherwise explain why the claims were "not eligible" for arbitration, which is not outlined as a valid basis to deny forum pursuant to Rule 13203(a). FINRA's action was inconsistent with the purpose and intent of Rule 13203.[3]

Rules 12203 and 13203 are the only FINRA rules that govern prohibition of access to the arbitration forum. Those rules provide only two grounds on which the Director may deny forum: when the subject matter is inappropriate for arbitration or when the case would pose a risk to health or safety. FINRA Rules 2080 and 13805 dictate that claims for expungement of customer dispute information are eligible for arbitration in FINRA's forum and are, therefore, appropriate subject

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[2] The language of the rules is identical, and since Mr. Wojnowski's Statement of Claim involved an action by an Association Person against a former Member Firm, this action is classified as an "industry dispute."

[3] The purpose of providing the FINRA Director with this authority under Rule 13203 was to "give the Director the flexibility needed in *emergency* situations" and to "address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations." 72 Fed. Reg. 20 at 4580-4601 (2007) (emphasis added). "[T]his authority, *which cannot be delegated* by the Director…should be limited by application in *only a very narrow range of unusual circumstances.*" (emphasis added). *Id.* at 4602.

matter. Regardless of any later alleged procedural issues with Mr. Wojnowski's claim, there is no argument that the *subject matter* of his claim (expungement of a settled customer complaint) was appropriate for arbitration under FINRA's rules. Further, there is no basis for an argument that Mr. Wojnowski's claims posed any risk to the health or safety of any arbitrator, staff, party, or party representative. Therefore, denial of forum was not consistent with FINRA's rules.

As stated above, FINRA then altered its reasoning in its untimely issuance of a statement more than three months after-the-fact in an attempt cure to its deficiency. Although the language of the Act does not specify a timeframe for when FINRA must submit a "statement setting forth the specific grounds," when reviewing the provision as a whole, it is clear that the statement must be provided *contemporaneously* with its determination to prohibit or limit a person's access to services since the provision also requires an opportunity to be heard on FINRA's determination. Providing a statement more than three months after-the-fact and never providing Mr. Wojnowski with an opportunity to be heard violated his rights and FINRA's obligations under the Act.

Regardless of the timing, the after-the-fact explanation was nonetheless inconsistent with FINRA's rules. The rules invoked by FINRA to deny forum provide that the Director may deny access to the forum for inappropriate subject matter or claims which pose a health or safety risk. FINRA failed to establish in its April 8, 2019 letter that the *subject matter* of Mr. Wojnowski's claim was inappropriate, nor that it posed a health or safety risk. Additionally, it appears that the determination was made by a Senior Case Specialist and not the Director, which is also inconsistent with FINRA's rules. FINRA's failures to comply with the Act and failures to act consistently with its own rules forced Mr. Wojnowski to seek recourse through this appeal to the Commission.

(3) The Commission should not grant FINRA's motion to adduce additional evidence to Mr. Wojnowski.

The Commission should not grant FINRA's motion to adduce its letter to Mr. Wojnowski. First, FINRA's Motion to Adduce Additional Evidence stated only that the letter was material to the issue of the Commission's jurisdiction over this appeal. That issue is now moot as the Commission has already made a determination that it does have jurisdiction. Therefore, according to FINRA's Motion, there is no reason to adduce this letter.

If FINRA intended for the letter to also be offered as evidence on the merits of Mr. Wojnowski's appeal, the grounds provided for its failure to adduce the letter previously are circular and nonsensical. FINRA states that it did not adduce the letter previously because the letter did not exist. However, these are not sufficient grounds in this case because the reason the letter did not exist is because FINRA did not fulfill its obligations under the Act to provide the explanation contemporaneously with its denial of forum and did not provide Mr. Wojnowski with an opportunity to be heard. FINRA created the letter after this appeal was filed. The letter did not exist prior to Mr. Wojnowski's appeal, however, FINRA appears to offer the letter as proof that it did provide an explanation of the specific grounds. By stating that the letter from April 8, 2019 did not exist at the time FINRA filed the certified record, FINRA admits that the letter's creation was prompted by Mr. Wojnowski's application for review of FINRA's decision to deny him access to its arbitration forum. It can reasonable be inferred that FINRA's April 8, 2019 letter was only produced by FINRA when it realized that its first letter provided on January 29, 2019 was insufficient. The attempt to introduce this "evidence" made after-the-fact is a manipulation of this appeal.

Courts have similarly held that post hoc rationalizations for agency action should not be accepted. In *Burlington Truck Lines v. United States*, the Court held that post hoc rationalizations

for agency action may not be accepted, and that "an agency's discretionary order will be upheld, if at all, *on the same basis articulated in the order by the agency itself*." (Emphasis added). *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962). See also, *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995. In this case, the "order" itself was the January 29, 2019 letter to Mr. Wojnowski. FINRA's order must be upheld, if at all, on the grounds enumerated in that letter.

(4) The Commission can and should discharge its review function based on the record before it.

Mr. Wojnowski's appeal turns on the question of whether FINRA's unilateral decision to deny him access to its fundamental service of arbitration was consistent with FINRA's rules and authority under the Act. Upon the record before it, the Commission should determine that it was not.

The record before the Commission indicates clearly that FINRA did not provide Mr. Wojnowski with the specific grounds on which its decision to deny forum in a timely fashion and did not allow Mr. Wojnowski an opportunity to be heard on those grounds prior to closing his case and refunding his filing fees. FINRA waited until after Mr. Wojnowski filed his application for review with the Commission and waited until after the Commission issued its briefing scheduling order to create and provide an explanation to Mr. Wojnowski. Even if this letter would have provided Mr. Wojnowski with an opportunity to be heard on the grounds provided, the opportunity came too late, as Mr. Wojnowski had already called upon the Commission to review FINRA's action.

Further, the record clearly indicates that FINRA's decision to deny Mr. Wojnowski access to its forum was inconsistent with FINRA's rules and exceeded its authority under the Act. First, the decision appears to have been made by a Senior Case Specialist, and not the Director of Dispute

Resolution. Moreover, Mr. Wojnowski's claim for expungement of a settled customer complaint is not inappropriate subject matter under FINRA's Code, nor did it pose a health or safety risk to any arbitrator, staff, party, or party representative – these are the only two grounds for forum denial present in FINRA's rules. FINRA gains its authority from the Act. Its rules are reviewed and approved by the Commission. Therefore, denying access to the arbitration forum on any grounds other than those enumerated in its rules that have been approved by the Commission was in excess of its authority under the Act. The record clearly indicates that it was.

FINRA failed to fulfill its obligations under the Section 15A(h)(2) of the Act and exercised discretion inconsistent with its rules, and thus inconsistent with its authority under the Act. Allowing FINRA the opportunity to fulfill its obligations after it forced Mr. Wojnowski to incur significant expenses and spend significant time appealing its actions to the Commission is contrary to basic principles of justice. FINRA should not receive this benefit, and the Commission should discharge its review function based on the record before it, and determine that Mr. Wojnowski is entitled to access to the FINRA arbitration forum.

Dated: September 18, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James Bellamy, on September 18, 2020, served the foregoing Reply Brief to Scheduling Order of the above listed Applicants on:

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[X] (BY EMAIL) I caused the documents to be sent to the persons at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[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.

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