BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application for Review of

Donald Anthony Wojnowski

File No. 3-19014

FINRA'S RESPONSE ADDRESSING THE ISSUE OF THE COMMISSION's JURISDICTION

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

Associated persons of FINRA member firms may seek to have information that describes a customer dispute expunged from the Central Registration Depository ("CRD") system by filing an arbitration claim and having a court confirm the arbitration award, or filing in court and obtaining a court order. Here, Donald Anthony Wojnowski filed an arbitration claim, seeking to expunge customer dispute information and named E.F. Hutton and Company Inc. as the respondent. For reasons relating to E.F. Hutton's status, FINRA decided that the claim was not eligible for arbitration and did not accept it.

The Commission should dismiss Wojnowski's application for review 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.

I. PROCEDURAL AND FACTUAL BACKGROUND

On January 23, 2019, Wojnowski filed with Dispute Resolution a statement of claim in which he requested that an arbitrator order expungement of the CRD description of the customers' complaint, which is contained in CRD occurrence No. 151029.[1] (RP 1-3.)[2] In the statement of claim, Wojnowski alleges that the CRD information is factually impossible or clearly erroneous. (RP 2, ¶ 7.) Wojnowski's statement of claim names E.F. Hutton and Company Inc. ("E.F. Hutton") as the respondent.

On April 8, 2019, David L. Carey, an Associate Director of Dispute Resolution, sent counsel for Wojnowski a letter that explained Dispute Resolution's reason for being unable to accept Wojnowski's statement of claim (cited hereinafter as the "Carey letter"). On April 10, 2019, FINRA filed a motion to adduce additional evidence to include a copy of this letter as part of the record. (Motion to Adduce Additional Evidence, filed April 10, 2019).

Although not reflected in CRD, FINRA accepts—for purposes of this discussion of jurisdiction—that Wojnowski worked for E.F. Hutton from June 1983 to June 1987. (RP 1.) The CRD occurrence Wojnowski seeks to expunge has information from a Form U5 filed by E.F. Hutton (RP 38-40) and a Form U4 filed by Empire Financial Group, Inc. (RP 37-38.) The E.F. Hutton filing describes the customers as alleging that Wojnowski was the broker for the customers' account and that all options and some stock trades were not authorized. (RP 38-40.) The E.F. Hutton filing states that Wojnowski claimed the transactions were authorized. (RP 40.)

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[1] The occurrence number is FINRA's internal number used in CRD to identify each disclosure.

[2] "RP ___" refers to the page numbers in the certified record filed by FINRA on December 20, 2018.

The E.F. Hutton filing also states that E.F. Hutton settled the claim for $31,396.45 on July 7, 1988, and Wojnowski did not contribute to the settlement. (RP 39-40.)

The Empire Financial Group filing states that the "customer alleged that he knew about the transactions he profited from and the customer alleged he did not know about the transactions he did not profit from at E.F. Hutton." (RP 37.)

E.F. Hutton went out of business, terminated its FINRA registration, and merged with Lehman Brothers in 1989. (Carey letter.) Lehman Brothers filed for bankruptcy protection in September 2008[3] and all claims against Lehman Brothers are stayed while its bankruptcy case is pending. (Carey letter.) Currently, CRD has no listing for E.F. Hutton, and a similarly sounding entity, EF Hutton Investments, LLC, is an investment adviser firm, not a broker-dealer. (Carey letter.)

On January 29, 2019, Dispute Resolution notified counsel for Wojnowski that his client's claims were not being accepted by Dispute Resolution and refunded the filing fees. (RP 7.) As noted above, on April 8, 2019, Dispute Resolution gave a more detailed explanation for why Wojnowski's claim was inappropriate for the Dispute Resolution forum.

II. ARGUMENT

The Commission should dismiss Wojnowski'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).

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[3] *See* Andrew Sorkin, New York Times (Sept. 14, 2008), available at www.nytimes.com/2008/09/15/business/15lehman.html (last visited 6/3/2019).

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.*, *Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 SEC LEXIS 1284, at *17 (June 3, 2019) (finding no jurisdiction would be created under Section 19(d) even "if the Commission instituted rulemaking proceedings under Section 19(c)"). 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 Dispute Resolution has determined is not eligible for arbitration. Accordingly, the Commission should dismiss Wojnowski's appeal.

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

Wojnowski's application for review does not qualify as a prohibition or limitation of access to FINRA services. Contrary to Wojnowski's assertion, this provision does not authorize the Commission to review FINRA's action. (Br. at 3-4.) Wojnowski has not met the high bar of showing that the denial of an arbitration forum for 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.[4] And in *Tower 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.[5] Other activities that the Commission has treated as among an SRO's central "services" include the listing of securities[6] and the provision of market quotation data.[7]

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[4] *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 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).

[5] *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).

[6] *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).

[7] *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).

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

Here, FINRA did not deny to Wojnowski 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 him access to any similar FINRA services. *See Allen Douglas*, 57 S.E.C. at 960-62. Just as FINRA's allowing a customer to file a complaint against a FINRA member, but closing that investigation, is not offering a service for purposes of Section 19(d), so too is Dispute Resolution's refusal to allow Wojnowski to arbitrate against E.F. Hutton not the prohibition of a fundamentally important service that FINRA offers. *See Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 SEC LEXIS 1284, at *10-11 (June 3, 2019). Dispute Resolution's denial of forum has no bearing on Wojnowski'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).

Moreover, even if FINRA's dispute resolution process was a "fundamentally important service," which *it is not*, FINRA should not be compelled to allow an arbitration claim for expungement of customer dispute information when the proceeding will be one-sided because the respondent has been out of business for more than twenty years.

Wojnowski contends that FINRA rules permit the Director to exercise discretion to deny the forum only in emergencies. (Br. at 4.) Wojnowski, 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).

Wojnowski's arbitration claim against E.F. Hutton that sought to expunge information is not appropriate in the dispute resolution forum. *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 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).

FINRA's decision to deny the forum to Wojnowski was appropriate and should not be subject to the Commission's appellate review.

C. FINRA Did Not Deny Wojnowski Membership or Participation or Impose a Disciplinary Sanction or Bar

Although Wojnowski does not contend that the Commission has jurisdiction under another prong of Section 19(d), we address the remaining subsections of Section 19(d) for completeness. Section 19(d) of the Exchange Act also provides the Commission with jurisdiction to review a 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 Wojnowski 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, LLC*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015). As the record reflects, Dispute Resolution's action had no impact on Wojnowski's membership in FINRA. In fact, Wojnowski is currently associated with FINRA member Paulson Investment Company LLC, as a general securities representative and general securities principal, among other registrations. (RP 17, 18.)

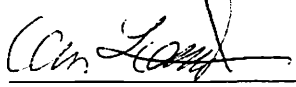
FINRA also did not take any action against Wojnowski that qualifies as a final disciplinary sanction or a bar. The Commission has "interpreted the term 'disciplinary' to refer to action responding to an alleged violation of an [SRO] rule or Commission statute or rule, or action 'in which a punishment 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 Wojnowski violated a FINRA rule or Commission statute or rule, and FINRA did not impose any sanction on him. Given this standard, FINRA's refusal to permit Wojnowski to arbitrate was not "disciplinary," and this provision does not provide a basis to review Wojnowski'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 Wojnowski from becoming associated with a FINRA member. Indeed, as highlighted above, Wojnowski is currently associated with a FINRA member. (RP 17, 25.) And FINRA has taken no action against Wojnowski 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.").

III. CONCLUSION

The Commission should dismiss Wojnowski'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 Wojnowski's complaints.

Respectfully submitted,



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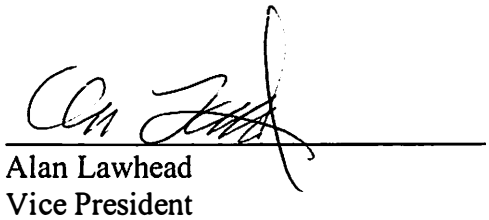
CERTIFICATE OF COMPLIANCE

I, Alan Lawhead, certify that this brief complies with the length limitation set forth in SEC Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 2,584 words.



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CERTIFICATE OF SERVICE

I, Alan Lawhead, certify that on this 5th day of June 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 Donald Anthony Wojnowski, Administrative Proceeding No. 3-19014, to be served by messenger on:

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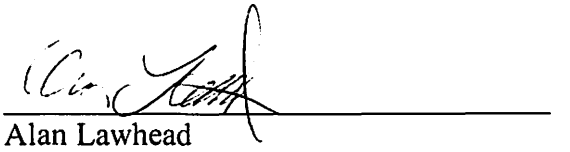

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