

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**



In the Matter of the Application Of
Donald Anthony Wojnowski
For Review of Action Taken By
FINRA
File No. 3-19014

**MR. WOJNOWSKI'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. Wojnowski'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. Wojnowski's requested relief. Mr. Wojnowski 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. Wojnowski 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, pages 3-4; see also 15 U.S.C. § 78s(d); SEC Rule 420. The only applicable class at issue here is whether FINRA, 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. Wojnowski's access to its forum "does not qualify as a prohibition or limitation of access to FINRA services...[because Mr.] Wojnowski 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. 4 (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. Wojnowski access to a fundamentally important service central to its function. See FINRA's Response, pg. 5. 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. Wojnowski 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. Wojnowski filed, is one of the five explicitly enumerated 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 its 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 2018³ and requires that BrokerCheck be a readily apparent 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, the expungement process was specifically enacted 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 the representative was not involved with the allegations made. See FINRA Rule 2080. FINRA’s Rule 2080 specifically

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.

allows *arbitrators* to determine whether expungement is appropriate after 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," it necessarily follows that the Commission does not have jurisdiction in such context. See FINRA's Response, pg. 4. 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. Wojnowski's access to seek arbitration *was* a fundamentally important service, "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. See FINRA's Response, pg. 6. FINRA's claim that Mr. Wojnowski's request for expungement would be one-sided, as the respondent has been out of business for more than twenty years, defies logic. FINRA requires all associated persons seeking expungement to notify the underlying customer(s) of the associated person's request for expungement. Further, the underlying customer(s) have a right to appear at the final expungement hearing, provide testimony, put forth evidence, and they can ultimately oppose the associated person's request for expungement. Therefore, it is entirely possible in Mr. Wojnowski's case that the underlying customer *could* oppose Mr. Wojnowski's request for expungement. If that were to occur, then Mr. Wojnowski's

claim would not be one-sided, as the assigned arbitrator would have to make a credibility determination between Mr. Wojnowski and the underlying customer.

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

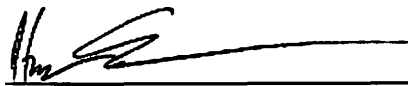
FINRA uses this misinterpretation of Mr. Wojnowski's argument to claim that Mr. Wojnowski "misreads the rule text and conveniently ignores the disjunctive 'or' in the plain language[.]" See FINRA's Response, pg. 6. Mr. Wojnowski does not claim that the remaining language of the Rule does not exist, nor 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 strictly 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.

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

Dated: June 19, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Olivia Peterson, on June 19, 2019, served the original and three copies of Mr. Wojnowski's Reply to FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction on:

Vanessa A. Countryman
Acting Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549-1090
Fax: 202-772-9324

[X] (BY FAX) I caused the documents to be sent to the persons at the fax number 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] (BY MAIL) I caused the documents to be sent by US Certified Mail to the persons listed above. I did not receive notice or indication from the US Postal Service that the delivery would be 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.

On this date, I also caused the original and three copies of Mr. Wojnowski's Reply to FINRA's Response to Applicant's Initial Brief on the Issue of Jurisdiction on:

Alan Lawhead
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FINRA
1735 K Street, NW
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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] (BY MAIL) I caused the documents to be sent by US Certified Mail to the persons listed above. I did not receive notice or indication from the US Postal Service that the delivery would be 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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