

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

In the Matter of the Application of

KENT VINCENT PEARCE

For Review of Action Taken by

FINRA

File No. 3-19228

**MR. PEARCE’S OPENING BRIEF IN SUPPORT OF THE
COMMISSION’S JURISDICTION OVER HIS APPLICATION FOR REVIEW**

INTRODUCTION

This matter concerns the Securities and Exchange Commission’s (the “Commission”) Order Requesting Additional Briefing issued on September 13, 2021. Applicant, Kent Pearce, (“Mr. Pearce”) sought review of FINRA’s action in prohibiting his access to the use of FINRA’s Dispute Resolution Arbitration Forum (“FINRA’s Arbitration Forum”) to seek expungement of a customer dispute disclosure published on his Central Registration Depository (“CRD”) and BrokerCheck records. Mr. Pearce stated that FINRA’s action was reviewable by the Commission under Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹ and FINRA’s denial of access to its Forum was inconsistent with the Exchange Act and FINRA rules, and he should therefore be permitted to submit his claim in FINRA’s Arbitration Forum.

¹15 U.S.C. § 78s(d).

Initially, the Commission consolidated Mr. Pearce's application into the Consolidated Arbitration Applications matter. After briefing, the Commission determined that it has jurisdiction to review Mr. Pearce's Application for Review as "FINRA's action prohibited access to a fundamentally important service that it offers." *See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (hereinafter, "Consolidated Matter")*.

On September 9, 2021, the Commission issued its Order Requesting Additional Briefing ("Briefing Order") requesting briefing on whether it has jurisdiction over Mr. Pearce's Application for Review. In considering this question, the Commission specifically asked in the Briefing Order:

1. During the underlying customer arbitration proceeding, did Pearce seek expungement of the information about the underlying arbitration from his Central Registration Depository record, and did the arbitration panel deny that request?
2. How does the underlying customer arbitration panel's apparent denial of Pearce's request for expungement bear on whether Pearce accessed FINRA's arbitration service, or was prohibited or limited in his access to that service? What is the relevance, if any, of *Dustin Tylor Aiguier* and *John Boone Kincaid III*?
3. For the purposes of Exchange Act Section 19(d)(1), is arbitrating an expungement claim during a customer arbitration a "service" and, if so, is it different from the "service" of arbitrating an expungement claim during an intra-industry arbitration? Or is the relevant "service" the same, regardless of whether an expungement claim is made in a customer arbitration or an intra-industry arbitration? In answering these questions, the parties should address the similarities and differences between seeking expungement in customer

arbitration and intra-industry arbitration and should consider citing particular FINRA arbitration rules and practices.

See, Briefing Order at 1.

On September 28, 2021, Mr. Pearce requested an extension to submit his opening brief addressing the issues raised in the Briefing Order. The Commission granted this extension and set the new briefing schedule as follows: Mr. Pearce's brief in support of the application for review is due on November 3, 2021, FINRA's response shall be filed by November 17, 2021, and Mr. Pearce may file a reply by December 1, 2021. Mr. Pearce hereby timely submits his brief in support of the Commission's jurisdiction over his application for review.

FACTS

On December 10, 2002, the Dubicki Living Trust, Margaret Dubicki, and Edward P. Dubicki (collectively, "Underlying Claimants") filed a Statement of Claim with the NASD (NASD Case # 02-07575) alleging various causes of action against Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") and Mr. Pearce (collectively, "Underlying Respondents"). CR² at 7. On February 26, 2003, Underlying Respondents filed a Statement of Answer. CR at 11. Included within the Statement of Answer was a one sentence request for expungement of the information about the underlying arbitration from Mr. Pearce's CRD and BrokerCheck records imbedded in the "WHEREFORE" Section. CR at 22-23.

From February 17, 2004 to February 19, 2004, a recorded hearing ("Underlying Hearing") was conducted to address the underlying claims. CR at 77. Mr. Pearce testified at the Underlying

² "CR at ____" refers to the Certified Record filed by FINRA on July 10, 2019 and the corresponding cited page number of that record.

Hearing. *See*, attached **Exhibit 1**.³ However, Mr. Pearce does not recall his request for expungement nor the standard for expungement being addressed at the Underlying Hearing. *See*, Exhibit 1.

On February 25, 2004, the underlying arbitration panel issued an award (“Award”) finding that (1) the Underlying Respondents were jointly and severally liable to the Underlying Claimants for compensatory damages in the amount of \$50,000; (2) that the both parties would bear their respective costs, except fees that are further allocated in the Award; and (3) “[a]ny and all relief not specifically addressed herein, including punitive damages, is denied in its entirety.” CR at 75-81. Mr. Pearce was not required by Merrill Lynch to contribute to the Award amount. *See*, Exhibit 1. No additional hearings have ever been held to address Mr. Pearce’s request for expungement. *See*, Exhibit 1.

ARGUMENT

I. Mr. Pearce Was Not Afforded Full and Fair Access to FINRA’s Arbitration Service

Mr. Pearce’s recollection of events is evidenced by his sworn affidavit, made upon penalty of perjury, and offered before this Commission in his corresponding Motion to Adduce.⁴ Based upon said recollection, while Mr. Pearce did request expungement in the underlying arbitration proceeding, the arbitration panel did not consider or make any findings regarding expungement. Expungement was not discussed by counsel. In short, the claim was never meaningfully addressed. Such a denial despite total lack of consideration constitutes limiting access to the arbitration forum. Additionally, Mr. Pearce was not represented by independent counsel at the arbitration hearing, and no

³ Mr. Pearce filed an Unopposed Motion to Adduce Additional Evidence on November 1, 2021 seeking to introduce the Affidavit labelled as Exhibit 1 into the record of this case. As of the date of the filing of this Brief, the Commission has not yet granted Mr. Pearce’s Unopposed Motion to Adduce Additional Evidence.

⁴ Mr. Pearce requested the hearing transcript from FINRA, but FINRA has destroyed and no longer maintains that record.

counsel pressed his individual claim for expungement. Mr. Pearce has never been provided an opportunity to be heard on the issue of expungement, nor has a panel examined relevant facts in light of FINRA's expungement rules.⁵ As the Tenth Circuit has articulated of FINRA's predecessor, the NASD, an arbitration hearing lacks fundamental fairness where a party did not have an "opportunity to be heard and to present relevant and material evidence and argument before the decision makers." *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001). For FINRA's claim that Mr. Pearce had access to the forum for expungement to hold any water, FINRA would have had to provide Mr. Pearce a meaningful review of the requested relief.⁶

II. This Commission Has Jurisdiction to Review FINRA's Action Denying Mr. Pearce Meaningful Access to Its Arbitration Forum

Section 19(d) of the Exchange Act at 15 U.S.C. § 78s(d) provides this Commission with the authority to review any SRO decision that "prohibits or limits any person in respect to access to services offered by such organization."⁷ This section "provides for SEC review of disciplinary and regulatory actions by self-regulating organizations" *MFS Securities Corp. v. New York Stock Exchange, Inc.*, 277 F.3d 613, 619 (2nd Cir. 2002) (emphasis added, and noting that formal disciplinary proceedings are not required for an exercise of SEC review jurisdiction and that appeal from a regulatory decision does not prevent SEC review). Mr. Pearce's access to FINRA's arbitration services was prevented or limited by FINRA's failure to engage in the arbitral process regarding his claim for expungement relief. Whether the underlying customer arbitration panel's apparent denial of Mr. Pearce's request for expungement would satisfy this requirement if the

⁵ See, e.g., FINRA Rules 2080 and 13805; see also, <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

⁶ See also, FINRA Rule 12805 available in its entirety at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12805> and requiring an arbitration panel reviewing a request to expunge customer dispute information to "Hold a recorded hearing session regarding the appropriateness of expungement" even where the customer did not otherwise request a hearing on the merits of the dispute.

⁷ See, *In the Matter of the Application of Orbixa Techs., Inc. for Rev. of Action Taken by New York Stock Exch., LLC*, Release No. 70893 (Nov. 15, 2013).

underlying customer arbitration forum had addressed the issue of expungement is unclear. However, though Mr. Pearce requested such relief prior to the hearing, the hearing that ensued exclusively reviewed a customer dispute – a fundamentally different question – and did not meaningfully address expungement. No hearing on the issue of expungement in accordance with FINRA’s Rules ever took place.⁸ The award here at issue reflects merely that “any relief not specifically awarded is hereby denied,” using catchall verbiage that sidesteps any substantive determination regarding the requested expungement relief, and indicating there was no review of expungement on its merits. Because Mr. Pearce has not been heard on the issue of expungement, the underlying customer arbitration has no bearing on Mr. Pearce’s ability to seek expungement in a subsequent occasion.

A. *Kincaid and Aiguier Are Factually Distinguishable and Inapposite*

Here, despite procedural FINRA rules designed to afford meaningful review of an expungement request, relief was simply denied out of hand without discussion, in a proceeding focused on another issue entirely.⁹ In *Kincaid*, by contrast, the arbitrator discussed, reviewed, and sought additional briefing relating to a procedural rule concerning the requested expungement relief. As noted by this Commission, “Kincaid through his counsel, actively participated in that service”.¹⁰ Kincaid received a meaningful opportunity to present argument solely on the issue of expungement and his case was ultimately dismissed from arbitration due to a procedural defect in

⁸ *Id.*

⁹ “Before ruling on requests to recommend expungement of customer dispute information under Rule 2080, the panel must complete the following under Rule 12805: Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement...Indicate in the arbitration award which of the Rule 2080 grounds for expungement serves as the basis for recommending expungement and provide a brief written explanation of the reasons for the panel’s finding...Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.” See, *FINRA Dispute Resolution Services Arbitrator’s Guide*, pg. 75, available at <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>; see also, FINRA 12805 available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12805>.

¹⁰ *In the Matter of the Application of John Boone Kincaid III for Rev. of Action Taken by Finra*, Release No. 87384 (Oct. 22, 2019).

addition to Kincaid's own failure to file appropriate timely briefing, not at issue here. While this Commission has held previously that it lacks the jurisdiction to set aside the award of a FINRA arbitration panel where that panel was specifically convened to review a request for expungement relief and the applicant failed to advance his own case by meaningfully participating, that recitation is fundamentally factually distinguishable from the instant matter. Moreover, Kincaid argued before this Commission that he was denied access to FINRA's review of arbitral decisions to ensure compliance with FINRA rules – a service that FINRA does not offer. Here, Mr. Pearce submits that FINRA's actions denied him a fundamental opportunity to be heard and to receive a determination on the merits of his expungement claim despite properly availing himself of FINRA arbitration. This is the precise service offered by FINRA's ODR, and one to which Mr. Pearce was entitled, but prohibited or limited access to by FINRA.

Similarly, in *Aiguier*, the claimant filed two statements of claim in September of 2017 in FINRA's arbitration forum – later consolidated into a single case – against NYLife requesting expungement of four customer dispute disclosures published on his CRD and BrokerCheck records.¹¹ After holding a hearing specifically on the merits of *Aiguier*'s expungement requests, the arbitrator issued a written award denying expungement of the two customer complaints on July 9, 2018. FINRA then closed *Aiguier*'s expungement case. These matters are so factually distinguishable from the instant situation that their reasoning does not preclude jurisdiction here.

III. Meaningful Arbitration of Expungement Claims is an Important Service to Which Mr. Pearce's Access Was Limited

Insofar as is relevant here, the Exchange Act limits this Commissions' jurisdiction to review actions by SROs in prohibiting or limiting any persons' access to *service*. 15 U.S.C. § 78s(d). The

¹¹ *In the Matter of the Application of Dustin Tylor Aiguier for Rev. of Action Taken by Finra*, Release No. 88953 (May 26, 2020)

Act does not further define the term “services”. *Sharemaster v. U.S. Securities & Exchange Commission*, 847 F.3d 1059, 1068 (9th Cir. 2017). This Commission has held that arbitration of expungement claims is a “fundamentally important” service that is “central to its function as an SRO.”¹² While the services of providing a hearing specifically on the issue of expungement in an intra-industry dispute and addressing the issue during a customer dispute hearing differ extensively, this distinction is not jurisdictionally relevant where, as here, FINRA has limited or prohibited access to either by any definition. In either case, the “service” that FINRA provides, in order to meet its corporate purpose, cannot be the mere formal appearance of review of a claim for expungement devoid of any substantive consideration whatsoever, but must comprehend minimum standards in accordance with FINRA’s rules and what FINRA holds out to citizens like Mr. Pearce as its purpose. Were it otherwise, an SRO would need only provide illusory access to services to evade all review by this Commission.

Additionally, however, this Commission has explicitly held that it has jurisdiction to review situations in which FINRA has denied an applicant “access to review of *prior* adverse arbitration awards arising from customer disputes.”¹³ A contemporaneous denial of expungement relief does not afford Mr. Pearce access to the FINRA service of reviewing the totality of an adverse customer dispute arbitration award, potentially with a new arbitrator or panel of arbitrators, in order to measure the facts giving rise to the award against the standards set forth in FINRA’s expungement rules. These two proceedings are materially distinct.

Whether the Commission chooses to consider these two proceedings the same “service” or different “services”, however, the result is the same: Mr. Pearce should have been (but was not)

¹² *In the Matter of the Application of Michael Andrew Demaria for Review of Action Taken By FINRA*, Release No. 91969 (May 21, 2021) (Observing that FINRA’s arbitration forum and operation of the CRD are held out by FINRA as means of serving its corporate charter purpose).

¹³ *Id.*

afforded full access to a meaningful review of his expungement request and an opportunity to seek that relief. Certainly, there is some distinction between FINRA’s treatment of these proceedings. The facts, circumstances, parties, and standards of review are all different as between the two. FINRA maintains that Rules 2080, 2081, and 12805 “do not apply to intra-industry disputes” and does not require an arbitrator reviewing a request for expungement relief in an intra-industry dispute to “address the standards set forth in Rule 2080 or the procedural requirements under Rule 12805.”¹⁴ Customers are not even required to be present at an expungement hearing, and FINRA arbitrators will not hold nonparticipation of the customer as a factor bearing in favor of expungement because the moving party has the burden of demonstrating entitlement.¹⁵ In a customer dispute hearing, the focus is on ensuring the correction of any alleged harm to the investor – not in apportioning the relative rights and responsibilities as between the financial advisor and the member firm. Bolstering this important distinction is the common practice of joint representation by one legal representative of the respondent parties in a customer dispute arbitration by counsel whose function was to defend the parties against the customer dispute allegations, and not to represent their individual interests, especially where these may have been adverse. That is exactly what happened here: Mr. Pearce and the firm respondent were jointly represented by counsel, giving rise to a potential conflict of interest incapacitating counsel from pressing Mr. Pearce’s individual entitlement to expungement.

In sum, the service of arbitrating a claim for expungement in a separate, intra-industry proceeding is distinct from the service provided incidental to a customer dispute proceeding. But expungement of information in an intra-industry dispute is a related and equally-fundamental service that FINRA explicitly holds out to the public as available and in line with its proffered

¹⁴ See, *FINRA Dispute Resolution Services Arbitrator’s Guide, Supra*, at p. 78.

¹⁵ *Id.* at 76.

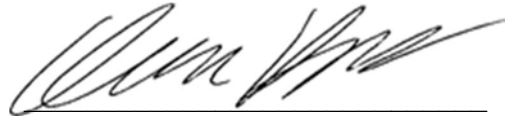
corporate mission. In any case, Mr. Pearce was limited or prohibited from access to a fundamentally important service, however defined.

Dated: November 2, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James Bellamy, certify that on November 2, 2021, I caused a copy of the foregoing Opening Brief with Attached Exhibit 1 Affidavit in the matter of the Application for Review of Kent Vincent Pearce, Administrative Proceeding File No. 3-19228 to be filed through the SEC's eFAP system and served by electronic mail on:

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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.

/s/James Bellamy
James Bellamy
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Westminster, CO 80021


EXHIBIT 1

AFFIDAVIT OF KENT PEARCE

I, Kent Vincent Pearce, do hereby swear that the information contained herein is complete and accurate to the best of my knowledge. I do depose and say:

1. My name is Kent Vincent Pearce and I reside at [REDACTED] Hunt Valley, MD
2. I am a registered representative and investment adviser representative registered with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") in Towson, MD.
3. On or about December 10, 2002, the Dubicki Living Trust, Margaret Dubicki, and Edward P. Dubicki ("Underlying Claimants") submitted a Statement of Claim filed in the case captioned NASD # 02-07575, *Dubicki Living Trust, Margaret Dubicki, and Edward P. Dubicki v. Merrill Lynch, Pierce, Fenner & Smith, Inc. and Kent V. Pearce* ("Underlying Action").
4. Throughout the Underlying Action, I was represented by Merrill Lynch's counsel and not represented by an independent counsel of my choosing.
5. I denied the merits of the allegations made by the Underlying Claimants in the Underlying Action then and still do to this day.
6. Merrill Lynch submitted on my behalf in its Statement of Answer a request for expungement of references to the Underlying Action from my Central Registration Depository ("CRD") record.
7. On or about February 17, 2004 to February 19, 2004, an arbitration hearing was conducted ("Hearing") to address the Underlying Claimants' causing of action.
8. I was present and testified at the Hearing.
9. At the Hearing, I do not recall my request for expungement of the Underlying Action ever being addressed by anyone nor do I recall the standard for expungement being addressed.
10. On or about February 25, 2004, the arbitration panel in the Underlying Action issued an award ("Award") finding me and Merrill Lynch jointly and severally liable for \$50,000 in compensatory damages. The Underlying Claimants were requesting over \$260,000 in compensatory damages.
11. I was not required by Merrill Lynch to contribute to the Award amount.
12. No additional hearing to address my request for expungement was ever held.

I, Kent Vincent Pearce, hereby declare the above affidavit was written and signed absent duress, and in good faith.


Kent Vincent Pearce

10-27-21
Date

STATE OF MARYLAND, COUNTY OF BALTIMORE

On this 27th day of October, 2021, before me, Kent Pearce, personally appeared (or satisfactorily proven) to be the person whose name is subscribed in the within Affidavit, and, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit and that the matters stated herein are true to the best of his/her information, knowledge, and belief.

In witness whereof I hereunto set my hand and official seal.

KEBRON HABTEHAYMER
Notary Public

NOTARY - PUBLIC
Title

My commission expires 07.25.2021

Kebron

