BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

Admin. Proc. File No. 3-19594

In the Matter of the

Application of

CURTIS RICHARD EDMARK

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, Curtis Richard Edmark, sought review of FINRA's action in prohibiting Applicant's 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 on FINRA's BrokerCheck website. The Commission has requested that these questions be answered: (1) Exchange Act Section 15A(h)(2)[1] 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 Edmark a

[1] *Accord,* 15 U.S.C. § 780-3(h)(2); *also,* In re Vanderver, currently before the SEC (2020).

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 Edmark'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 Edmark? Why did FINRA not send Edmark 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?

Did FINRA issue Edmark a supporting "statement setting forth the specific grounds" for its determination as provided for by Section 15A(h)(2) of the Act?

As stated by the Section 15 of the Act, a determination by the association to 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 denial, bar, prohibition or limitation. 15 U.S.C.A. § 78o-3(h)(2). These requirements are contained within a single sentence in the Act to ensure the notification limiting the person's access to services is accompanied by the opportunity for such person to be heard regarding the ***specific grounds*** upon which the limitation was based. The very next sentence further reiterates the requirement that the association's denial, bar,

prohibition or limitation be accompanied by a statement setting forth the "***specific grounds***" upon which it was based. The Act's requirement is that the association provide specific grounds contemporaneously with denying a person's access to services. FINRA did not provide the requisite "***specific grounds***" in its October 4, 2019 letter to the Applicant in – denying forum for occurrence 1926461.

What were FINRA's grounds for determining that Edmark's claim was ineligible for arbitration, and was that prohibition of access consistent with FINRA's rules?

FINRA provided no specific grounds contemporaneously with in its letter sent to the Applicant on October 4, 2019, although it "declined to accept" the claim pursuant to Customer Code Rule 12203(a) or Industry Code Rule 13203(a). (FINRA Letter dated October 4, 2019 "October 4th letter"). Six weeks later and after the Applicant filed his petition seeking review by the Commission, FINRA sought to cure its deficiency by issuance of a statement containing the assertion that it denied forum because "regulatory actions are ineligible for expungement." (FINRA Letter dated November 25, 2019 "November 25 letter").

Under Customer Code Rule 12203(a) or Industry Code Rule 13203(a):

> 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 its representatives. Only the Director may exercise the authority under this Rule."

The "**specific grounds**" contained within the November 25, 2019 letter fail to achieve the requirements of the Act (cite) – as the Act requires that the "specific grounds" be provided contemporaneously with the denial of access to services. FINRA made no statement in its letter

setting forth with specific grounds for why it denied the Applicant, explaining 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 its representatives.

Should the Commission grant FINRA's motion to adduce its letter to Edmark? Why did FINRA not send Edmark 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?

The Commission should not grant FINRA's motion to adduce its letter to Edmark for three reasons.

First, the letter sent on November 25, 2019, restated the allegations around Occurrence Number 1926461. FINRA then brings up the separate Occurrence Number 1933543, a regulatory complaint which it then stated arose from the same circumstances giving rise to the customer complaint sought to be expunged, Occurrence Number 1926461. On the basis of the two occurrences arising from the same circumstances FINRA claims that the complaint the Applicant seeks to expunge is ineligible for expungement because "regulatory actions are ineligible for expungement." However, it stated no specific facts as to why the *customer dispute* disclosure expungement (the only expungement requested) was denied, so Applicant is forced to speculate as to FINRA's reasons.

FINRA may be implying a Federal Rules of Civil Procedure style argument. If the federal claim and the other claims arise out of a "common nucleus of operative fact," then the court may (but does not have to) exercise supplemental jurisdiction to hear the other claims as

well. *United Mine Workers v Gibbs*, 383 US 715 (1966). FINRA's reasoning in the Applicant's case is inconsistent with similar prior requests to the FINRA forum in which it differentiated between multiple occurrences having arisen out of the same facts or circumstances.[2] Moreover, FINRA's purported basis for denial of forum based upon the "two occurrences arise from the same circumstances" seeks to apply a mutation of the Gibbs Test as a way to deny the hearing of the claim. The only basis in FINRA's Rules which one can infer is that regulatory disclosures are ineligible for expungement. However, such a basis solely precludes Occurrence Number 1933543 from expungement relief. It is undisputed that the Applicant is not seeking expungement of Occurrence Number 1933543.

On the other hand, and again based on speculation, if FINRA's denial is based on some kind of claim preclusive effect arising from the State of Wisconsin Stipulation and Order ("Stipulation and Order"), that, too, is contrary to basic legal principles. For claim preclusion to apply, three elements must exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits. *Johnson v. Spencer*, 950 F.3d 680, 693 (10th Cir. 2020) (internal punctuation omitted). None of these factors apply in the case at hand, and in fact the Stipulation and Order specifically states that "the Respondent does not admit or deny the facts alleged in the attached Notice of Hearing. However, *for purposes of disposition only*, the Respondent agrees that the alleged violations may be deemed to have occurred for the purposes of determining penalty and restitution" (emphasis added). There are no prior judgments that would preclude Applicant's claim for expungement.

As for the second two elements required for claim preclusion, the Stipulation and Order is between Applicant and The Office of the Commissioner of Insurance, not Applicant and

[2] *See, e.g.* FINRA Case Nos. 18-00561 Richard Reid Frith II vs. Larson Financial Securities, LLC; 18-00939 Janet Kay Redman vs. Wells Fargo Advisors Financial Network; 18-01800 John William Corbett vs. UBS Financial Services Inc.

Centaurus Financial, Inc, the named respondent in Applicant's statement of claim for expungement of occurrence 1926461. Further, there is no evidence, nor does FINRA allege, and the cause of action that gave rise to the Stipulation and Order was a claim for expungement. Therefore, neither the identity of the parties or privies in the two suits, nor the identity of the cause of action support claim preclusion.

The second reason the Commission should deny FINRA's motion to adduce is that the Applicant can only assume that FINRA's November 25th letter was created solely based upon his appeal to address FINRA's omission in the October 4th letter. That is, the Applicant was forced to file a legal claim in order to get FINRA to adhere to the requirements of the Act. The November 25, 2019 letter is inconsistent with FINRA's rules. The Applicant requested the expungement of occurrence 1926461, this occurrence is a customer dispute (not a regulatory action), and thus, is eligible for expungement under FINRA Rule 2080. FINRA seeks to extend its authority to allow it to deny forum based upon factors which do not apply to a customer dispute disclosure. Applicant has been unable to identify the authority under which FINRA is allowed to restrict access to its forum based on its unilateral determination of a legal issue.

As a Self-Regulatory Organization, FINRA is required to follow the appropriate procedure and process if it seeks a rule or rule change authorizing the denial of forum on the basis that two occurrences may share a common nucleus of operative fact. The Applicant has been unable to identify any evidence demonstrating or suggesting that FINRA has obtained approval to use the occurrence not addressed by an Applicant to deny forum for another occurrence when they arise out of the same events. This is effectively an end run around the process of expungement and therefore inconsistent with FINRA's existing rules.

Finally, FINRA states as its grounds that it did not send this letter before the Applicant filed his appeal, "because it did not exist at the time FINRA filed the certified record in this appeal." See attached Motion to Adduce Additional Evidence. FINRA also states that this letter is material to decide whether or not the Office of Dispute Resolution's actions in denying forum qualify for an appeal. If this letter was material evidence, it would have been issued and would be dated prior to the appeal. It is not credible that FINRA's reason for forum denial is based on evidence created after that denial was issued. It is essentially stating that FINRA denied forum, but needed extra time to formulate a reason for that denial. FINRA's own negligence in failing to issue the letter before the appeal is not good cause to allow its admission into evidence.

A simple but fundamental rule of administrative law is that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69, 83 S. Ct. 239, 246, 9 L. Ed. 2d 207 (1962) (internal punctuation omitted). The courts may not accept *post hoc* rationalizations for agency action. *Id.* at 169. FINRA's request to adduce its Letter from November 25, 2019 is seeking both to undermine the expungement process established by its own rules, and to undermine the gravity of its responsibilities under 15 U.S.C.A. § 78o-3.

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?

Yes, the Commission could deny FINRA's motion to adduce and still discharge its review function based on the record. FINRA's original October 4th letter denying forum was

perfunctory at best. The November 25th letter attempted to provide some additional explanation, but denial was still premised on FINRA's discretion to deny. In addition, neither letter offered the Applicant a hearing and an opportunity to be heard on the denial. This is important because, had this requirement been met, the Applicant could have pointed out that the settlement FINRA supports it use of discretion with is *not reportable under FINRA Rules*.

On the Form U4, Section 14I addresses customer complaints. Question 14I(1) is as follows:

(1) Have you ever been named as a respondent/defendant in an investment-related, consumer-initiated arbitration or civil litigation which alleged that you were involved in one or more sales practice violations and which:

(a) is still pending, or;

(b) resulted in an arbitration award or civil judgment against you, regardless of amount, or;

(c) was settled, prior to 05/18/2009, for an amount of $10,000 or more, or;

(d) was settled, on or after 05/18/2009, for an amount of $15,000 or more?

Section 14I Question (2) is as follows:

(2) Have you ever been the subject of an investment-related, consumer-initiated (written or oral) complaint, which alleged that you were involved in one or more sales practice violations, and which:

(a) was settled, prior to 05/18/2009, for an amount of $10,000 or more, or;

(b) was settled, on or after 05/18/2009, for an amount of $15,000 or more?

The settlement in question was executed in 2005 for restitution to the customer in the amount of $5,000. This is lower than the threshold amount required for disclosure in either

question 14I(1) or 14I(2). The November 25th letter did not cite any additional rules under which FINRA was denying discretion – it only identified "The regulatory complaint and resulting restitution" as the basis for denial. Thus, it can be inferred that denial was still based on FINRA's discretion under Customer Code Rule 12203(a) or Industry Code Rule 13203(a). Because the customer disclosure is a non-reportable disclosure, there is no other Rule that would authorize FINRA to deny forum.

The question before the Commission is whether FINRA has the authority to unilaterally deny forum for expungement of a customer dispute without adequate explanation, and without an opportunity to respond. The answer to this question does not depend on FINRA's attempts to justify what was originally an arbitrary decision. The Applicant was forced to file suit before FINRA was willing to fulfill its obligations. Allowing FINRA to benefit from its own negligence is contrary to basic principles of justice, and is not material to the determination of the overall question.

Conclusion

The Applicant has a right to pursue expungement in the FINRA forum in front of a neutral arbitrator. Although the arbitration panel could, presumably, use a related regulatory disclosure as evidence to consider in whether or not to grant expungement, FINRAs denial of forum based only on the existence of a regulatory disclosure amounts to a unilateral determination on the merits without the due process protections mandated by 15 U.S.C.A. § 78o-3. For the reasons stated above, the Applicant respectfully request that the Commission remand his claim for expungement to the FINRA arbitration forum for a hearing on the merits.

Dated: September 18, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James Bellamy, on September 18, 2020, served the foregoing Notice of Substitution of Counsel 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.

/s/James Bellamy
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