BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the

Application of

CURTIS RICHARD EDMARK

For Review of Action Taken By

FINRA

Admin. Proc. File No. 3-19594

REPLY TO FINRA'S OPPOSITION BRIEF

I. ARGUMENT

The Commission should not dismiss Applicant's application for review because the grounds in which FINRA based its decision failed to comply with its rules, as stated in Applicant's prior brief. FINRA failed to apply those rules in a manner consistent with the purposes of the Exchange Act.

A. FINRA Improperly Prohibited Applicant's Access to its Arbitration Forum

FINRA's reliance on Rule 2080 as a basis for its prohibition of Mr. Edmark's claim undermines its public attestations of being a neutral arbitration forum. At best, FINRA's denial of forum requires the Commission to read into the FINRA Arbitration Code a rule that is simply not there. At worst, FINRA's denial of forum results from a decision on the merits, without giving Mr. Edmark an opportunity to be heard.

1. *On its face, Mr. Edmark's Statement of Claim properly requests expungement of a customer dispute occurrence.*

FINRA Rule 13200 requires associated persons to arbitrate disputes that arise out of the business activities of the associated person in the FINRA forum. This includes more common claims that are decided under generally known principles of tort and contract law.[1] A claim for expungement does not have the solid legal history and foundation that tort and contract claims do, so FINRA Rule 2080 ("Rule 2080") gives guidelines as to when FINRA will waive its requirement to be named in the judicial confirmation of an award. FINRA attempts to read Rule 2080 as a restriction on the availability of the FINRA forum, but no such restrictions exist under the plain language of the rule.

Under black-letter rules of statutory interpretation, Rule 2080 must be interpreted consistent with its plain and ordinary meaning.[2] FINRA has failed to identify what language in Rule 2080 purports to limit access to the FINRA forum. Instead, they rely on the concept that Occurrence 1926461, a customer dispute disclosure, is "intrinsically linked" to Occurrence 1933543, a regulatory action.

The very fact that there are two separate occurrences and that FINRA has treated them as two separate occurrences prior to this process means that they are not "intrinsically linked." If the occurrences are "intrinsically linked," such that one is simply a continuation of the other, would the disclosures not be part of a single occurrence? But the fact is, they are not a single occurrence. They were reported as separate occurrences[3] and are published as separate occurrences. Therefore, they must be treated as separate occurrences. Even if FINRA believes

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[1] *See e.g., UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 321 (4th Cir. 2013) (Holding arbitration to be mandatory in tort and breach of contract claims brought against a broker-dealer).
[2] *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 201 L. Ed. 2d 490 (2018).
[3] See FINRA Exhibit 1

Mr. Edmark's likelihood of success is doubtful, that does not mean his claim for relief is deficient.[4] On its face, Mr. Edmark's claim for original expungement of customer dispute occurrence 1926461 is proper because it contains sufficient legal and factual allegations that, if true, could support the relief requested.[5]

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.[6] It is undisputed that the Applicant is not seeking expungement of Occurrence Number 1933543. FINRA's attempt to bar Mr. Edmark's access to the forum arises not from the proper application of a FINRA rule to bar Mr. Edmark's prima facie claim, but instead appears to arise from FINRA's review of evidence outside the four corners of the statement of claim.

FINRA further claims that denial was based on Applicant's statement of claim having omitted any reference to the Wisconsin OCI regulatory action. This is a new claim being presented by FINRA regarding this alleged deficiency and thus should not be considered by the Commission. However, if the Commission chooses to consider it, Rule 13302 only provides that the Applicant gives a statement of claim specifying the relevant facts and remedies requested.[7] Applicant stated that he contributed $5,000 dollars to the Ms. Wishau's settlement, and FINRA's argument again goes to the merits of the claim, not access to the forum.[8] If denial was based on a simple deficiency in the Statement of Claim, that could have been easily rectified with a detailed and specific denial letter from FINRA and resubmission of the Statement of Claim. FINRA's

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[4] See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)
[5] *Id.*
[6] See 18-00561 *Richard Reid Frith II vs. Larson Financial Securities, LLC*.
[7] See 13302. *Filing and Serving an Initial Statement of Claim*
[8] See Exhibit A.

argument lacks merit and does nothing to establish that the Applicant is precluded from access to the forum.

FINRA statement that expungement would collaterally attack and undermine the regulatory action ignores the fact that, regardless of whether expungement is granted, the regulatory disclosure will remain untouched. FINRA fails to show *how* the expungement of the customer dispute occurrence will undermine the regulatory occurrence. The bottom line is that there is no reportable information contained in the customer dispute occurrence that supports or contradicts the regulatory disclosure. If one occurrence is so intrinsically linked to the other, then the two should have been merged into the single regulatory action.

2. *A reasonable arbitrator could find in favor of Mr. Edmark*

It is apparent that, at some point before the November 25, 2019 letter denying forum to Mr. Edmark, someone at FINRA reviewed evidence outside of the documents submitted in Mr. Edmark's initial application.[9] As arbitrators are required to review an applicant's BrokerCheck report to ensure no prior request for expungement of the occurrence has been denied, there is a clear inference that FINRA's review of extrinsic evidence was not to determine procedural bars, but to look at the merits of Mr. Edmark's claim. Assuming this dubious practice is allowed, or at least not prohibited, if a material question of fact exists such that a reasonable fact finder could find in favor of the applicant, FINRA should be required to allow access to its forum to decide the claim on the merits.[10]

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[9] It should be noted that, despite being a non-delegable duty, there is no evidence or supporting affidavit that the Director reviewed Mr. Edmark's application and made the decision to deny forum as required pursuant to FINRA Rules 12203 and 13203.

[10] See e.g. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In FINRA's Brief in Opposition, it relies on specific terms in the Wisconsin Stipulation and Order (the "Stipulation") to support its position.[11] Therefore, it can be undisputed that the terms of the Stipulation are material to a determination on the merits. It is also undisputed that FINRA was not a party to the regulatory action and made no investigation or independent findings of fact regarding the allegations contained in the Wisconsin Notice of Hearing. Therefore, it is improper to rely on assumptions not supported by the Stipulation. The Stipulation states that:

> "WHEREAS, the Respondent does not admit or deny the facts alleged in the attached Notice of Hearing. However, <u>for the purposes of disposition only</u>, the Respondent agrees that the alleged violations may be deemed to have occurred for the purposes of determining penalty and restitution." (emphasis added).

There is no indication that the above underlined language was not an intentional and deliberate term included by the parties to the Stipulation. FINRA's efforts to ignore the agreed upon terms of the stipulation and deem the underlying facts to be admitted outside of the purposes of disposition flies in the face of recognized contract law and undermines the decision of the parties, including the Office of the Commissioner of Insurance.[12] Moreover, even if such an interpretation was made, it would be up to the arbitrator, not FINRA, to make such a determination.[13] Based on the plain language of the stipulation, a reasonable fact finder could determine that the factual allegations in the Notice of Hearing are not binding determinations in an expungement hearing so as to make independent factual determinations regarding whether the

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[11] See *FINRA'S Brief in Opp. To App. For Review* at 3.

[12] *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001 (3d Cir. 1980) (Holding that Courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestation of their intent.)

[13] *Id.* at 1012 (Holding that interpretation of a writing is part of the duties of a fact finder).

allegations are eligible for expungement under Rule 2080. Therefore, FINRA improperly denied Mr. Edmark the opportunity to present his claim to a neutral arbitrator.

Rule 2080 contemplates that expungement relief may be based on arbitral findings beyond the circumstances listed in Rule 2080(b)(1)(A) – (C). Despite what FINRA contends, Rule 2080 places no limitation on the circumstances in which expungement of customer dispute information can be sought. Rule 2080 also does not provide the only grounds on which expungement can be recommended. In approving the language that now forms the basis of Rule 2080 (then NASD Rule 2130), the Commission stated that "the proposed rule change, as amended, is reasonably designed to accomplish these ends [i.e. "to promote just and equitable principles of trade, and, in general, to protect investors and the public interest"] by allowing fact finders and the NASD to consider all competing interests before directing or granting expungement of customer dispute information from the CRD." 68 Fed.Reg. 247 at 74671 (2003) (emphasis added). Additionally, the Commission noted that "[i]n no other instance in the NASD's Code of Arbitration Procedure are arbitrators bound by substantive restrictions on how they decide an arbitration case. Moreover…arbitrators will be aware of the standards that will be utilized with respect to the NASD's waiver of involvement, and, thus, arbitrators will indirectly consider them." *Id.*

As stated in Mr. Edmark's September 18, 2020 brief, Occurrence 1926461 is not subject to mandatory reporting on the Form U4. The settlement that arose from the customer dispute disclosed in Occurrence 1926461 was settled for less than the threshold amount required for reporting under Section 14I Questions (1) and (2). A reasonable arbitrator, upon review of the relevant evidence, could conclude that expungement is proper because a disclosure that is not

otherwise reportable holds no regulatory value. This is a determination that is within the purview of an arbitrator determining the merits of a claim for expungement.[14]

A determination by the Commission that FINRA has the ability to deny forum based on the merits of a claim undermines the neutrality of the FINRA arbitration forum. Not only was Mr. Edmark not allowed a chance to be heard before FINRA made its determination on the merits, but there are significant and material questions of fact that should only be determined after a full recitation of the evidence – not on a superficial reading of extrinsic evidence. Therefore, FINRA's denial of forum was improper because it denied Mr. Edmark his right to be heard in front of a neutral fact finder.

B. FINRA's Letters did not accurately inform the Applicant of the Director's Decision

FINRA admits that the letter from November 25, 2019 did not exist at the time FINRA filed the certified record, which shows that the letter's creation was prompted by the Applicant appealing its decision. FINRA has done this now in multiple cases, first sending out a letter that clearly fall short of the standard required by Section 15A(h)(2) of the Exchange Act, then later after an Applicant files an application for review with the Commission, FINRA seeks to cure that deficiency, effectively making an end run around the Section 15 of the Exchange Act.

Bolden v. Blue Cross holds that <u>it is the general rule</u> that an agency may not rely on *post hoc* reasoning, divulged for the first time in litigation, as the basis of its decision.[15] Further the court states the reason why it allowed the record in the *Bolden* case is because "Decisional

[14] Rule 2080 also includes provisions allowing an arbitrator to award expungement if "the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements."

[15] See *Bolden v. Blue Cross & Blue Shield Ass'n,* 669 F. Supp. 1096, 1101 (D.D.C. 1986), aff'd sub nom. *Appeal of Bolden*, 848 F.2d 201 (D.C. Cir. 1988).

Memorandum merely illuminates reasons obscured but implicit in the administrative record." *Id.* This statement can not be applied to FINRA's first letter to Applicant denying forum as there is not even a hint in FINRA Rules 12203 and 13203 that forum may be denied if an occurrence that is the subject of a claim for expungement is related to a subsequent occurrence.

FINRA further cites *Rhea Lana, Inc.*, case, in which the later-created document was accepted by the court. Even in this case the Court restates that "Ordinarily, [we] review an agency action based solely on the record compiled by the agency when issuing its decision, not on some new record made initially in the reviewing court."[16] The rule generally prohibits "ex post supplementation of the record by either side."[17] Courts have stated that they "can permit consideration of post hoc materials when they "illuminate[ ] the reasons that are [already] implicit in the internal materials."[18] Once again FINRA's claim that one occurrence that is a regulatory disclosure can be used to deny forum to another occurrence that is not a regulatory disclosure is not implicit in FINRA's rules or materials.

FINRA further claims that its failure to state with specificity its reasoning for denying the Applicant forum was not the result of negligence, but a reasonable belief that its denial of arbitration forum would not be subject to Commission review. The standard set forth in 15A(h)(2) does not only apply when a FINRA decision is up for review. FINRA effectively admits here that it was aware its reasoning in the first letter was not in compliance. FINRA has a duty to keep in compliance with the Exchange Act regardless of whether or not the Commission

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[16] See *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524 (D.C. Cir. 2019), see also Camp v. Pitts, 411 U.S. 138, 142, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (per curiam); see also *SEC v. Chenery Corp*., 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943).
[17] See also *Walter O. Boswell Mem'l Hospital v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984).
[18] *Olivares v. Transportation Sec. Admin.*, 819 F.3d 454, 464 (D.C. Cir. 2016);. See also *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524 (D.C. Cir. 2019).

grants review of FINRA's decisions. FINRA has an obligation to remain in compliance with the Exchange Act regardless of whether or not FINRA believes its service to be essential.

C. The Commission has Sufficient Record to Discharge its Review Function Without Granting FINRA's Motion to Adduce

FINRA has failed to stay in compliance with its own rules or Section 15 of the Exchange Act. Its first letter to the applicant was clearly insufficient and its second letter, a clear attempt to cure the deficiency in its first letter, did not act as a further illustration of the actual contents of the original letter. FINRA's November 25, 2019 letter does not cure FINRA's deficiency in denying Mr. Edmark a fundamental service without an opportunity to be heard as required by 15 U.S.C. § 78o-3(h)(2). There is not rule that requires denial of an expungement hearing on this occurrence simply because it arises out of the same facts as a separate occurrence with a Regulatory Disclosure. If FINRA wants to create such a rule, it has the authority to do so as an SRO.

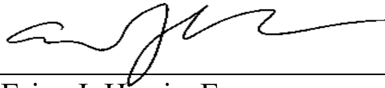
II. CONCLUSION

FINRA did not properly exercise its discretion by denying FINRA's arbitration forum to the Applicant. FINRA's decision was not consistent with FINRA's rules, and the Applicant was not given notice of the specific reasons for the underlying denial of forum as required by the Exchange Act.

Accordingly, the Commission should grant the Applicant's application for review.

Dated: November 23, 2020

Respectfully submitted,



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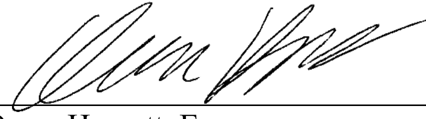

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CERTIFICATE OF SERVICE

I, James Bellamy, on November 23, 2020, served the foregoing Reply Brief to FINRA's Opposition Brief of the above listed Applicant 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

James Bellamy
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EXHIBIT A

<table>
<tr><td>FINANCIAL INDUSTRY REGULATORY AUTHORITY DISPUTE RESOLUTION</td><td rowspan="2">FINRA ARB. NO. ____________</td></tr>
<tr><td>In the Matter of the Arbitration Between:

Claimant:

Curtis Richard Edmark

v.

Respondent:

Centaurus Financial, Inc.</td></tr>
<tr><td colspan="2">STATEMENT OF CLAIM</td></tr>
</table>

As his Statement of Claim, Mr. Curtis R. Edmark ("Claimant"), by the undersigned attorney, hereby requests arbitration with a telephonic expungement hearing before FINRA Dispute Resolution against Centaurus Financial, Inc. ("Respondent"), seeking expungement of customer dispute occurrence number 1926461 (the "Underlying Occurrence") from Claimant's Central Registration Depository ("CRD") and BrokerCheck records, pursuant to FINRA Rule 2080.

THE PARTIES

1. Claimant, Curtis Edmark (CRD #1596961), is a resident of Kenosha, Wisconsin. Claimant has been a financial services professional since December of 1986 and is currently a registered representative with Respondent in Greenfield, Wisconsin.

2. Respondent, Centaurus Financial, Inc. (CRD #30833), is a securities broker-dealer, investment adviser firm, and FINRA member firm with its corporate headquarters in Anaheim, California. Since December of 2017, Claimant has been registered with Respondent.

FACTUAL BACKGROUND

3. In March of 2003, Mr. Arkley E. Wishau ("Customer") and Mrs. Betty L. Wishau ("Mrs. Wishau") (together, the "Wishaus") became clients of Claimant after they attended a dinner seminar that was hosted by Respondent.

4. Customer was 78 years of age, and Mrs. Wishau was 72 years of age. The Wishaus were retired. Customer was an experienced investor. [REDACTED] Based on conversations with Claimant, as well as personal and financial information forms completed by Customer, Claimant ascertained Customer's investment objective to be preservation of principal with a secondary investment objective of income. The Wishaus had a conservative risk tolerance and minimal liquidity needs. Customer's investment time horizon was long-term.

5. Over the course of at least three conversations, based on Customer's investor profile and investment objective of preservation of principal, Claimant recommended the Transamerica Corporation ("Transamerica") SelectMark Special Edition Plus 4 Annuity (the "Wishau Annuity"), which was a fixed annuity with a guarantee of principal, as well as a death benefit. Claimant explained that the Wishau Annuity utilized a total return strategy, investing in 50% investment-grade bonds and 50% in investment-grade convertible bonds. Although Transamerica charged three percent of the earnings in the account, Customer would earn no less than three percent compounded. Claimant explained to Customer in detail the terms, risks, fees, features, and benefits of the Wishau Annuity, including its death benefit options and its settlement options. Customer received and reviewed the offering materials associated with the Wishau Annuity, which further explained the terms, risks, fees, features, and benefits of the Wishau Annuity.

6. On February 28, 2003, Customer purchased the Wishau Annuity for $105,634.18. The Wishau Annuity represented less than 20% of the Wishaus' portfolio with Respondent (the

“Wishau Portfolio”). In connection with the Wishau Annuity, Customer completed and signed disclosure documents, wherein he affirmed his understanding of the terms, risks, fees, features, and benefits of the Wishau Annuity. Customer received copies of the signed documents, as well a copy of the offering materials and the policy itself.

7. Mrs. Wishau also purchased the Wishau Annuity for herself for $50,000.

8. Between February of 2003 and February of 2005, Claimant spoke with the Wishaus every three months regarding the performance of the Wishau Portfolio. At no time did Claimant execute any trades on the Wishaus’ behalf without first obtaining their authorization.

9. On November 23, 2004, Customer passed away. At the time of Customer’s death, the Wishau Annuity had increased in value, earning approximately six percent compounded interest. Customer had not expressed any dissatisfaction with Claimant’s handling of the Wishau Portfolio, and Customer had not spoken with Claimant about lodging a formal complaint.

10. When Customer passed away, Mrs. Wishau began to work with a competing financial advisor, Mr. Randall Otto (“Mr. Otto”), who advised her to liquidate the Wishau Annuity and to transfer the proceeds away from Respondent. Claimant explained to Mrs. Wishau that she could not liquidate the Wishau Annuity without a surrender penalty.

11. Ultimately, Mrs. Wishau opted to surrender the contract of the Wishau Annuity.

12. Mrs. Wishau did not speak with Claimant about lodging a formal complaint.

13. On February 1, 2005, Mrs. Wishau, as Arkley E. Wishau (Deceased), alleged that Claimant “did not disclose all features of a fixed annuity contract.” Mrs. Wishau sought compensatory damages in the amount of $10,000.

14. On January 12, 2009, as a business decision, Respondent settled with Mrs. Wishau in the amount of $5,000, a fraction of the amount sought and a nominal amount in light of the potential cost of arbitration or litigation. Claimant contributed $5,000 to the settlement.

15. Mrs. Wishau's claim that Claimant "did not disclose all [of the] features of a fixed annuity contract" is clearly erroneous, factually impossible, and false and, therefore, meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement.

a. The allegation of misrepresentation is false, because Claimant explained all details of the Wishau Annuity to Customer. Claimant explained to Customer in detail the terms, risks, fees, features, and benefits of the Wishau Annuity, including its death benefit options and its settlement options, prior to purchase. Additionally, Claimant provided Customer with all written materials pertaining to the investment. Customer received and reviewed the offering materials associated with the Wishau Annuity, which further explained the terms, risks, fees, features, and benefits of the Wishau Annuity. Customer acknowledged his understanding of said details and authorized the investment. Following Customer's death, Claimant explained to Mrs. Wishau all options available to her in regard to the Wishau Annuity, as well.

b. The allegation of misrepresentation is factually impossible, because, in authorizing the investment, Customer attested to his understanding of all details of the investment.

c. The allegation of misrepresentation is clearly erroneous, because this dispute did not arise out of any alleged misrepresentation on the part of Claimant. Rather, this dispute appears to have arisen as a result of Mr. Otto persuading Mrs. Wishau to liquidate the Wishau Annuity, as well as Mrs. Wishau's dissatisfaction with the fact that, upon Customer's death, she could not immediately surrender the Wishau Annuity without penalty, a fact which was explained to the Wishaus prior to the purchase of the Wishau Annuity.

16. Because Claimant fully and accurately represented the Wishau Annuity and performed his duties as a representative in a thorough, ethical, and professional manner, the public disclosure of the patently false allegations herein does not offer any public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing Claimant's CRD record and will not provide valuable information for knowledgeable decision making.

RELIEF REQUESTED

17. Claimant requests expungement of the Underlying Occurrence from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claim, allegation, or information is factually impossible or clearly erroneous.

18. Claimant requests expungement of the Underlying Occurrence from his CRD record pursuant to FINRA Rule 2080(b)(1)(C), as the claim, allegation, or information is false.

19. Claimant requests an award of compensatory damages in the amount of $1.00 from Respondent.

20. Claimant requests any and all other relief that the Arbitrator deems just and equitable.

Respectfully submitted,

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Date: September 17, 2019