**BEFORE THE**

**SECURITIES AND EXCHANGE COMMISSION**

**WASHINGTON, D.C.**

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| In the Matter of the Application Of<br>Jennifer A. Johnston<br>For Review of Action Taken By<br>FINRA<br>File No. 3-20120 |

**MS. JOHNSTON'S REPLY TO FINRA'S BRIEF IN OPPOSTION TO HER APPLICATION FOR REVIEW**

This is a reply to FINRA's opposition brief to Ms. Jennifer A. Johnston's ("Ms. Johnston") Application seeking review of a determination by the Director of FINRA Dispute Resolution Services[1] ("Director"). Ms. Johnston, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[2], challenging the Director's determination that Ms. Johnston's claim is ineligible for arbitration in FINRA forum. On August 6, 2020, the Commission issued a decision that it has jurisdiction over claims like Ms. Johnston's because FINRA's action denying forum "prohibited access to a fundamentally important service that it offers." *Consolidated Arbitration Applications, Exchange Act Release No*. 89495, 2019 WL 6287506 (August 6, 2020) (the "Consolidated Matter"). Ms. Johnston seeks the Commission to remand her case back to FINRA's arbitration forum so that she may access that fundamentally important service.

[1] Formerly "Office of Dispute Resolution." ("ODR")
[2] 15 U.S.C. § 78s(d)

## INTRODUCTION

On August 25, 2020, Ms. Johnston submitted a Statement of Claim to the ODR requesting a hearing for the expungement of her CRD record as it relates to two customer dispute disclosures, Occurrence Numbers 1455733 and 1077974 (together, "the Occurrences"). On August 26, 2020, counsel for Ms. Johnston received notice (the "Notice") that the Director denied Ms. Johnston access to the FINRA forum for arbitration for expungement of Occurrence Number 1455733 (hereinafter, the "Occurrence"). The Notice stated the Occurrence was decided in a prior arbitration award and is not eligible for arbitration, citing Industry Code Rule 13203(a). However, Industry Code Rule 13203(a) does not provide for forum denial in this situation. FINRA Rule 13203(a) states 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. Only the Director may exercise the authority under this Rule.

FINRA did not state the specific grounds under FINRA Rule 13203 on which Ms. Johnston's claim was being denied, nor did it give her an opportunity to dispute the denial or provide further information for the Director. On October 8, 2020, Ms. Johnston timely filed her Application for Review of FINRA's Partial Denial of Forum. On December 23, 2020, the SEC issued its briefing schedule indicating that Ms. Johnston's brief in support of the application for review is due on January 22, 2021, FINRA's response was due on February 22, 2021, and Ms. Johnston's reply is due March 8, 2021. Ms. Johnston timely submitted her opening brief on January 22, 2021. FINRA submitted its opposition brief on February 22, 2021, and now Ms. Johnston submits her reply.

In its response, FINRA mischaracterizes both the facts of Ms. Johnston's case and what she seeks from the Commission. First, FINRA misstates the factual circumstances surrounding the previous arbitration award that it contends precludes Ms. Johnston's expungement request. Second, FINRA misconstrues Ms. Johnston's request to be allowed to present her case to a neutral arbitrator in FINRA's forum as a request for the Commission to set aside the previous arbitration award that FINRA contends precludes her request. This reply will address those mischaracterizations.

## ARGUMENT

### A. The Commission Should Remand Ms. Johnston's Case to FINRA's Forum So That She May Access the Fundamental Arbitration Service.

#### 1. The Commission Has Jurisdiction to Review Ms. Johnston's Application Under Exchange Act Section 19(d)

FINRA is incorrect in its analysis that the Commission does not have jurisdiction over this appeal. As FINRA admits, Section 19(d) of the Exchange Act authorizes the Commission to review a final action taken by an "SRO that 'prohibits or limits' 'access to services offered' by the SRO to any person." *See,* SEC Release No. 72182. FINRA's denial of Johnston's claim is a prohibition of access to FINRA's arbitration service. FINRA attempts to contort the facts and the standard by claiming that it did not deny Ms. Johnston access to its forum and that instead, "it denied her access to litigate her claim a second time." Yet, in that very argument, it admits that it did in fact deny her access to the arbitration forum. FINRA relies on two highly distinguishable cases in asserting this argument.

First, FINRA relies on *Dustin Tylor Aiguier,* Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *6-7 (May 26, 2020) for its argument. It points out that the Commission held in that case that "FINRA's refusal to reopen the applicant's arbitration was not a denial of access

because it did 'not change the fact that [the applicant] accessed the arbitration service.'" FINRA Br. At 5. However, Ms. Johnston is not seeking to *relitigate* a previous expungement request. Instead, Ms. Johnston is asking for a chance to meaningfully litigate her expungement request in the first place, unlike the previous arbitration where the request was made without her involvement, without her presence at a hearing, and without meaningful consideration of the issue. This distinguishes Ms. Johnston's case from *Aiguier*. In that case, the applicant previously had an opportunity be heard on his expungement claim. The claim was fully litigated and denied and the applicant improperly sought to have the Commission step in to reopen or set aside that award. In the present case, Ms. Johnston's broker-dealer's attorney made the expungement request on her behalf without her involvement as if it were an afterthought. There was no meaningful consideration given to the request – no testimony or evidence on the request was provided. The only claims meaningfully considered were the customer's. FINRA's recent denial prevents an actual hearing on the expungement claim from occurring at all. This decision limited Ms. Johnston's access to the arbitration service forum specifically regarding for her claim for expungement. Ms. Johnston does not seek to relitigate the customer's claims.

Furthermore, Ms. Johnston is not seeking the Commission to reopen the underlying arbitration or to set that award aside. Rather, Ms. Johnston seeks the Commission to remand her case back to FINRA's forum so that she can proceed in a separate arbitration solely on the claim for expungement. If expungement is granted by the arbitration panel, it will not set aside or reopen the underlying award. Rather, it will simply remove references to the allegations and award from Ms. Johnston's CRD and BrokerCheck records. The award itself will still be accessible on FINRA's online database.

FINRA also relies on *John Boone Kincaid III*, Exchange Act Release No. 7 87384, 2019 SEC LEXIS 4189, at *14 (Oct. 22, 2019), where the Commission decided it did not have jurisdiction over the application. In that case, FINRA accepted Kincaid's expungement claim, but the arbitrator issued an award denying the claim without conducting a hearing. *Id*. at *3. Kincaid sought review of FINRA's action in closing the case when a hearing had not been held, claiming that it was inconsistent with FINRA's rules. *Id*. However, the Commission decided that it did not have jurisdiction because FINRA had not limited his access to the arbitration forum. *Id*. at *4. The Commission stated that "FINRA accepted Kincaid's statement of claim and allowed him to access its arbitration forum." *Id*. at *5. The present case is clearly distinguishable. FINRA did not accept Ms. Johnston's statement of claim and did not allow her access to its arbitration forum on her expungement claim. Again, without sufficient knowledge of the underlying facts, FINRA claims that Ms. Johnston was previously given access to its forum on this claim, but as explained above that is inaccurate.

As previously asserted, if FINRA had not abused its discretion in denying Ms. Johnston access to its forum, a neutral arbitrator could have viewed all of the underlying facts and made an independent decision on whether Ms. Johnston's claim had been previously litigated. Instead, the Director unilaterally made a decision inconsistent with the intent and purpose of FINRA Rule 13203 and did so without sufficient knowledge as to the underlying facts of Ms. Johnston's case.

**2. Ms. Johnston Does Not Seek Modification, Correction, or Vacatur of an Arbitration Award**

FINRA's next argument is that the FAA provides one path for relief for Ms. Johnston: a motion to vacate, modify or correct the previous arbitration award. It is true that the FAA provides for limited judicial review of arbitration awards and provides narrow grounds for modification, correction, or vacatur of arbitration awards subject to the FAA. 9 U.S.C. § 1. However, Ms.

Johnston is not seeking modification, correction, or vacatur of the underlying award. Rather, Ms. Johnston is seeking expungement of the CRD and BrokerCheck disclosure that publish the summarized allegations from the underlying arbitration complaint. The relief Ms. Johnston seeks, if granted, will not result in modification, correction, or vacatur of the underlying arbitration award. Nor would an arbitrator's recommendation to expunge an occurrence from the CRD and BrokerCheck systems result in expungement of the underlying award itself.

FINRA points to the *Kincaid* case, stating that under the FAA, once the arbitrator issued the award denying expungement there was only one path of relief left: modification, correction, or vacatur of the award. The current matter is distinguishable from *Kincaid*. In that case, Kincaid was allowed access to the arbitration forum on an expungement claim he filed as an individual, while represented by independent counsel. Expungement was the only issue in the case and was not a request made as an afterthought, and ultimately, his case was denied under a procedural time-limit rule: an issue which he failed to fully brief before his case was closed. Importantly, FINRA's assertion that a motion to vacate the award was Kincaid's "exclusive remedy" is disingenuous, as FINRA has since stipulated to the expungement of the disclosure at issue in Kincaid's case following Kincaid's filing of a state court complaint for equitable relief. *See, John Kincaid v. Financial Industry Regulatory Authority, Inc.*, No. 2020CV30068 (Broomfield County District Court March 31, 2020). As stated above, representation for Ms. Johnston was an attorney for the broker-dealer whom she no longer worked for. Ms. Johnston was not present at the hearing nor aware of the expungement request. The expungement claim was offered by the attorney as an afterthought and there was no testimony or evidence presented on the expungement request. All of these facts distinguish Ms. Johnston's case from Kincaid's. In the end, despite actually having been given access to FINRA's arbitration forum and having his case dismissed by the Commission,

Kincaid was ultimately successful in having his record expunged through FINRA's agreement to remove the record.

In this section of its argument, FINRA continues to misconstrue Ms. Johnston's request. Ms. Johnston does not seek a reversal of the arbitration award, but an actual hearing on the expungement claim. A hearing on expungement of allegations contained in a complaint against a broker does not result in reversal an arbitration award, even if expungement is recommended. For Ms. Johnston's expungement claim to be precluded by this underlying award, the issue must have been fully litigated. *See, Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 172 (D.C. Cir. 1981); *see also, Walker v. FedEx Office & Print Servs., Inc.*, 123 A.3d 160, 162 (D.C. 2015) (collateral estoppel can be overcome with a showing of a "manifest error" in the underlying award). In this instance, the expungement claim was neither examined nor meaningfully considered. FINRA's assertion that for Ms. Johnston to have an opportunity to seek expungement would necessarily require the expungement arbitrator to revisit legal and factual issues litigated and determined in the prior arbitration proceeding is also false. Here, FINRA conflates an underlying arbitration hearing with an expungement hearing. FINRA also continues to conflate a request for expungement of the disclosure related to an adverse arbitration award with modification, correction, or vacatur of the award itself. A recommendation for expungement of a CRD disclosure does not require the vacatur or modification of a prior award. Furthermore, an arbitrator may recommend expungement under any grounds set forth in FINRA Rule 2080, or on any other grounds it deems appropriate. FINRA is then given an opportunity to contest the recommendation for expungement when the broker moves to confirm the award. *See*, FINRA Rule 2080. Rather than operate in accordance with its Rules and wait for its opportunity to contest the award (if

expungement had been granted), the Director denied Ms. Johnston the opportunity to be heard on her claim at all and circumvented the safeguards put in place by FINRA Rule 2080.

FINRA itself admits in its own Discovery Guide on pg. 35, that prior arbitration awards are not binding on later arbitration panels. See *FINRA Arbitrator's Guide*, pg. 35. Therefore, an arbitration panel could determine that, although a prior arbitration panel awarded damages to the customer or denied expungement, expungement is still appropriate. Such a determination would require the arbitration panel, who is given plenary power under FINRA's Code, to review the totality of the underlying circumstances and make an independent decision that the previous award does not preclude Ms. Johnston's requested relief. By abusing its discretion, the Director prevented that independent factual and legal review from taking place.

### B. The Commission Should Not Dismiss Johnston's Application Because FINRA Did Not Properly Deny its Arbitration Forum.

The Commission irrefutably has jurisdiction over Ms. Johnston's claim. There is no denying that Ms. Johnston was prohibited from accessing FINRA's fundamental service of arbitration. As stated previously, the Commission has already held that these facts result in the Commission's jurisdiction over an application for review. Under Section 19(f) of the Exchange Act, the Commission must dismiss Johnston's application if it finds (1) the specific grounds on which FINRA based its action exist in fact; (2) FINRA's denial of the arbitration forum was in accordance with its rules; and (3) those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). FINRA's action here does not meet these standards.

#### 1. FINRA's Denial of the Arbitration Forum Was Not in Accordance with Its Rules or the Exchange Act.

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. FINRA states that the Director correctly determined that Johnston's claim for expungement is not appropriate for arbitration because a FINRA arbitrator cannot adjudicate a claim that already has been adjudicated in an earlier FINRA arbitration proceeding. As stated above, Ms. Johnston's claim was not fully adjudicated in the previous arbitration. Furthermore, as stated previously, denial in this type of situation is not contemplated by Rule 13203. The Director was not in the position to examine the underlying facts of Ms. Johnston's claim and instead unilaterally decided to deny her access to FINRA's arbitration forum in a manner inconsistent with its Rules and the intent of the Exchange Act, which contemplated this discretion be exercised only in cases of emergency.

As stated by 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*"

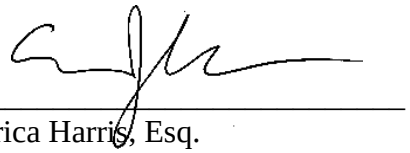
in its Forum Denial Letter, nor did it give Ms. Johnston an opportunity to share the facts of her case or request that the Director reconsider its decision.

## CONCLUSION

The Commission irrefutably has jurisdiction over Ms. Johnston's appeal. Furthermore, FINRA overstepped its authority in denying Ms. Johnston access to its forum. Ms. Johnston's case should be remanded back to FINRA's arbitration forum so that a fact finder can make a determination of whether she is eligible for expungement of the Occurrence.

Dated: March 8, 2021

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I, James Bellamy certify that on this 8th day of March 2021, I caused a copy of Applicant's Brief in Support of her Application for Review above, to be served by email 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.

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