

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

In the Matter of the Application Of
Ryan William Mummert
For Review of Action Taken By
FINRA
File No. 3-20210

MR. MUMMERT’S BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

INTRODUCTION

Ryan William Mummert (“Mr. Mummert”) seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. (“FINRA”) to deny Mr. Mummert access to the FINRA Dispute Resolution arbitration forum (“FINRA’s Forum”) under FINRA Code of Arbitration Procedure for Industry Disputes (“FINRA Rules”) Rule 13203(a). Mr. Mummert, 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”)¹, challenging FINRA’s determination that Mr. Mummert’s claim is ineligible for arbitration in FINRA’s Dispute Resolution Forum (“FINRA’s Forum”).

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) as a

¹ 15 U.S.C. § 78s(d).

national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Office of Dispute Resolution, which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The Office of Dispute Resolution's authority is limited to administration of the forum, not regulatory policy decisions.

FINRA maintains an electronic database called the Central Registration Depository ("CRD") and a public reporting system known as BrokerCheck.² This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each Associated Person of a FINRA member firm. The purpose of the CRD and BrokerCheck systems are to: (1) to create a regulatory system for financial advisors to improve overall regulation of advisors, (2) to make information about financial advisors available to the public, and (3) to provide financial advisors an efficient automated filing system. FINRA requires member firms to report all customer complaints that meet specific requirements to FINRA, and publicly discloses these complaints, absent any determination of merit or factual basis. As discussed below, FINRA provides only one viable remedy for almost all Associated Persons to remove false or misreported customer complaints: expungement requests, pursuant to FINRA Rule 2080.

Mr. Mummert (CRD #2722449) is a resident of Albuquerque, New Mexico. He has been a financial services professional since 1996. Mr. Mummert is a registered representative with FINRA, and an investment advisor representative registered with the SEC. Mr. Mummert is currently registered with Morgan Stanley (CRD #149777) in Albuquerque, New Mexico.

Mr. Mummert previously worked as a registered broker with Prudential Securities Incorporated ("Prudential") from July of 1996 to August of 2000. (R. at 1).³ While registered with

² 15 U.S.C. 78o-3(i)(1).

³ "R. at ____" refers to the certified record filed on February 22, 2021.

Prudential, Mr. Mummert advised Mr. T and Ms. T⁴, a mother and son (the “Customers”), regarding investments of their joint bank account. (R. at 3-4). In 1997, Mr. T, as a joint owner of the account, advised Mr. Mummert to sell a portion of their joint stocks. (R. at 4). Ms. T later alleged that the sale was not authorized. (*Id.*). Prudential found no evidence of wrongdoing after its investigation. (*Id.*). However, on February 23, 1998, the Customers filed a complaint with the New York Stock Exchange (“NYSE”), Case No. 1998-006968, alleging “mismanagement, failure to follow [*sic*] instructions, and unauthorized sale of [certain stocks]” and claiming damages of \$5,000 against Prudential and Mr. Mummert. (*Id.*). On June 4, 1998, Prudential, Mr. Mummert, and the Customers agreed upon a settlement whereby certain shares would be returned to the Customers, along with a cash sum as interest. (R. at 5). The arbitrator memorialized this settlement into what was mis-labelled as an “award” document outlining the agreed upon terms. (*Id.*). The case never proceeded to a hearing on the merits and Mr. Mummert never had the opportunity to adequately defend against the allegations. *See*, Transcript at 20-23.⁵ Prudential returned the agreed-upon shares to the Customers and paid the total interest required per the settlement. (R. at 5). Mr. Mummert did not contribute anything to the settlement amount. (*Id.*). Even though the case was settled prior to an arbitration hearing, the occurrence was added as a disclosure to Mr. Mummert’s CRD and BrokerCheck records as an “award/judgment” (the “Disclosure”). (*Id.*). The Disclosure is readily accessible on Mr. Mummert’s BrokerCheck report, as well as a link to the settlement “award” document.

⁴ The customers’ names have been abbreviated for privacy reasons. FINRA is aware of the customers’ full names.

⁵ Mr. Mummert filed his Partially Unopposed Motion to Adduce Additional Evidence on April 4, 2021, seeking to introduce the expungement hearing transcript (“Transcript”) and the expungement hearing exhibits (“Hearing Exhibits”). The Commission has not yet ruled on Mr. Mummert’s Motion.

On April 21, 2020, Mr. Mummert filed a Statement of Claim with FINRA seeking expungement of the Disclosure, pursuant to FINRA Rule 2080 (FINRA Case Number 20-01275). (R. at 1-7). The Statement of Claim referenced the language of the arbitrator’s “award” and attached the document to the filing. (R. at 5). On April 22, 2020, FINRA accepted forum and served the named respondent – Prudential – with the Statement of Claim and service documents. On August 11, 2020, an Initial Pre-Hearing Conference (“IPHC”) was held where the Chairperson inquired about the “award” and whether Mr. Mummert would be able to submit the settlement agreement. On September 24, 2020, in response to the Chairperson’s inquiry at the IPHC, and in response to the IPHC Order issued by the Chairperson, Mr. Mummert submitted a letter to the Chairperson indicating that after good faith efforts, all attempts to locate the settlement agreement had been unsuccessful. (R. at 25). On September 30, 2020, Mr. Mummert submitted to the FINRA DR Portal an updated BrokerCheck report, which references the “award/judgment” at issue and provides a link to the “award.” On December 8, 2020, Mr. Mummert submitted to the FINRA DR Portal the Hearing Exhibits, which again included the “award” at issue attached as “Exhibit 1”. FINRA forwarded the Hearing Exhibits to the Chairperson in advance of the hearing.

Finally, on December 10, 2020, the expungement case proceeded to a hearing on the merits. During the expungement hearing, Mr. Mummert’s counsel introduced the Hearing Exhibits that were previously sent to FINRA, including Exhibit 1 – the “award” at issue – into evidence. *See*, Transcript at 26. Additionally, one of the Hearing Exhibits submitted contained “Exhibit 18,” which is an account statement showing the transaction from Prudential returning the shares in dispute, that references the transaction as a “ADJ ARBITRATION SETTLEMENT” payment at the bottom of the page. *See*, Hearing Exhibits at Mummert000050. Mr. Mummert also testified at

the expungement hearing that, upon information and belief, the case was settled after mediation and that there was no arbitration proceeding. *See*, Transcript at 20-23.

On December 24, 2020, two weeks after the conclusion of the case and while the arbitration panel was deliberating on the ruling, counsel for Mr. Mummert received notice (“Denial Notice”) that FINRA usurped the fact-finding role from the arbitration panel, interpreted the facts of the underlying case, and denied Mr. Mummert access to FINRA’s Forum. (R. at 32). The only basis for this determination by FINRA was stated in the Denial Notice, which states that “FINRA has determined that your request for expungement...is not eligible for arbitration as it arises from a prior adverse award.” (*id.*). FINRA cited Rule 13203(a) as its authority for its newly seized fact-finding role and in its determination to deny forum.⁶ The Denial Notice was issued by Michelle Vickerman, a “Case Administrator” from FINRA.

On January 27, 2021, Mr. Mummert filed an application for review with the Commission, requesting that FINRA be ordered to allow Mr. Mummert access to its forum to arbitrate his expungement request. (R. at 37-41). FINRA filed a Motion to Adduce Additional Evidence on February 23, 2021, seeking to introduce two declarations into the record. Mr. Mummert filed a Brief in Opposition to FINRA’s Motion to Adduce Additional Evidence on March 1, 2021. As of the date of this filing, the Commission has not yet ruled on FINRA’s Motion.

On April 4, 2021, Mr. Mummert filed his Partially Unopposed Motion to Adduce Additional Evidence, seeking to introduce the Transcript and the Hearing Exhibits. The Commission has not yet ruled on Mr. Mummert’s Motion.

⁶ FINRA’s Industry Code Rule 13203(a) states: “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.”

On March 15, 2021, the Commission issued its briefing schedule indicating that Mr. Mummert's brief in support of the application for review is due on April 14, 2021, the brief in opposition is due on May 14, 2021, and any reply brief is due May 28, 2021. Mr. Mummert hereby timely submits this Brief in support of the application for review.

JURISDICTION

The Commission has jurisdiction to hear this Application for Review pursuant to Section 19(d) of the Securities Exchange Act of 1934.⁷ In this case, FINRA's determination that Mr. Mummert's claim is not eligible for arbitration deprived him of the ability to participate in that service with respect to that claim, which effects a prohibition of access to the arbitration forum. *See, Consolidated Applications*, at 4.

ARGUMENT

FINRA has prohibited or limited Mr. Mummert's access to a fundamentally important service that it offers – the ability to contest and seek expungement of customer dispute disclosures published on his CRD and BrokerCheck records – and in doing so, has exceeded its authority under the Exchange Act, its own rules, and has violated fundamental notions of due process. FINRA's violative conduct here consists of: (A) its determination that Mr. Mummert's expungement claim is “not eligible” for FINRA arbitration pursuant to FINRA Rule 13203(a); and (B) by violating its covenant to host a “neutral forum” for industry disputes and usurping the fact-finding role of the arbitration panel in determining that Mr. Mummert's Disclosure involved a “prior adverse award”.

⁷ *See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (“Consolidated Applications”)* (Commission finds jurisdiction to hear claims where FINRA prohibited applicants' access to its arbitration forum to seek expungement because “FINRA's service of providing arbitration of expungement claims is ‘fundamentally important’ and central to its function as an SRO.”).

A. FINRA’s determination that Mr. Mummert’s expungement request is “not eligible” for FINRA arbitration is inconsistent with FINRA rules, fundamental notions of due process, and the Exchange Act.

FINRA made a determination that Mr. Mummert’s claim is “not eligible” for FINRA arbitration pursuant to FINRA Rule 13203(a) and prohibited or limited Mr. Mummert access to its Forum *two weeks* after a full expungement arbitration had already occurred. FINRA’s only alleged justification for this determination was its factual finding that the Disclosure resulted from a prior adverse award. FINRA’s action here is an inconsistent, arbitrary, and an inappropriate application of its rules, is in excess of its authority under the Exchange Act, and contrary to notions of due process.

1. FINRA’s determination that Mr. Mummert’s claim is “not eligible” for FINRA arbitration violates its own rules and the Exchange Act.

FINRA offers the service to registered representatives the ability to seek expungement of customer dispute disclosures published on the CRD in its Forum. In fact, FINRA’s Rules allow (and, in some cases, *require*) registered representatives to seek expungement through FINRA’s Forum.⁸ Therefore, the default is that Mr. Mummert is permitted to seek expungement in FINRA’s Forum.

Only in limited circumstances is the Director of FINRA permitted to decline the use of the FINRA arbitration forum. Those limited circumstances exist only if “the [FINRA] 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.” FINRA Rule 13203(a).

⁸ See, FINRA Rule 2080; FINRA Rule 13200(a); <https://www.finra.org/registration-exams-ce/classic-crd/faq/finra-rule-2080-frequently-asked-questions>.

Where FINRA makes a determination that a claim is not eligible for FINRA arbitration pursuant to Rule 13203, such a determination must be made by the Director of FINRA. *See*, FINRA Rule 13203(a) (“*The Director* may decline to permit the use of the FINRA arbitration forum if *the Director* determines....”; and “Only the Director may exercise the authority under this Rule.”); *see also*, 72 Fed. Reg. 20 at 4580, 4602 (2007) (“[T]his authority, *which cannot be delegated* by the Director...”) (emphasis added)). As a preliminary matter, it is important to note that the Denial Notice in this case was issued by a FINRA “Case Administrator,” and not by the Director. (R. at 32). In fact, the Denial Notice does not mention the Director as having made any decision at all, nor is there any evidence in the record before the Commission that the determination in this case was made by the Director. Therefore, the Denial Notice does not comply with Rule 13203.

Even if the Director of FINRA did make the determination that Mr. Mummert’s claim is ineligible for FINRA arbitration here, the determination was still an abuse of FINRA’s authority under Rule 13203. FINRA Rule 13203 clearly outlines the parameters where the Director may decline to permit the use of the FINRA Forum: only where “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.” The purpose of providing the FINRA Director with authority under Rule 13203 was to “give the Director the flexibility needed in *emergency* situations” and to “address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations.” 72 Fed. Reg. 20 at 4580-4601 (2007) (emphasis added). This authority was meant to be limited in application “in only a very narrow range of unusual circumstances.” *Id.*

FINRA has not met its burden of showing that the determination in this case meets the requirements under FINRA Rule 13203, nor can it. There is absolutely no evidence in the record that Mr. Mummert's expungement request "would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives." FINRA Rule 13203. Likewise, there is no evidence that Mr. Mummert's expungement request is "inappropriate" for FINRA arbitration. Nowhere in FINRA's rules does it indicate that a claim for expungement is ineligible when the underlying allegation resulted in a prior award.

The standard of proof in an underlying arbitration is also not the same as in an expungement hearing, and therefore, the fact that a registered representative has a "prior adverse award" does not equate to the inability to plead a valid basis for expungement. Arbitrators may issue awards or judgments against registered representatives and in favor of investors for a number of reasons. Neither FINRA nor the Exchange Act specify a standard of proof that must be met in the arbitration of claims in FINRA's Forum. Nor does FINRA mandate to its arbitrators that a complaining customer must meet a burden of proof before an award may be made. This lack of specificity gives the arbitrator discretion to accept a lower burden of proof such that, even if the comparative fault of the customer is greater than the fault attributed to the respondents, the arbitrator may still issue an award in favor of the customer. To say it another way, as long as there is some credible evidence supporting an award to the complaining customer, even if that evidence does not meet a preponderance of the evidence standards, an arbitrator's award to a customer will likely be upheld. *See, Jeffrey M. Brown Assocs., Inc. v. Allstar Drywall & Acoustics, Inc.*, 195 F. Supp. 2d 681, 684 (E.D. Pa. 2002) (Holding that "district courts have very little authority to upset arbitrators' awards and an award will be properly vacated only if there is absolutely no support at all in the record justifying the arbitrator's determinations.").

An award in the complaining customer's favor when based on a low standard of proof should not preclude the registered representative's ability to seek expungement based on a higher standard. For example, the "award" in this case shows that the customer requested \$5,000 in compensatory damages, yet the final outcome was that the respondents delivered to the Customers the shares that were allegedly sold without their authorization. No compensatory or punitive damages were "awarded" here, and no factual findings to explain the "award" were made. (R. at 5). The arbitrator also assessed all forum fees against the Customers. There is a clear argument that the arbitrator did not find evidence of any actual wrongdoing on the part of Mr. Mummert. Based on FINRA and the SEC's mandate to ensure investor protection, the existing "award" does not conflict with the standard for expungement under FINRA Rule 2080.

Section 15A(b)(6) of the Exchange Act does not abrogate the investor's right to challenge the veracity of customer allegations or their regulatory value. It is in the best interest of the investing public to separate hearings on customer complaints for damages, and advisor requests for expungement. It allows the arbitrator to give the full benefit of the evidence to the customer when determining what, if any, monetary award the customer may be entitled to, yet reserves judgment on whether the advisor can meet the higher standard required to justify expungement of the disclosure. It also safeguards the integrity and efficiency of the customer arbitration by ensuring the full focus of the presentation is on the merits of the customer's claims, and not on any potential allocation of wrongdoing. An underlying arbitration award is unquestionably evidence that could be considered when determining whether expungement is appropriate, the same way a settlement agreement is evidence considered by the arbitrator. However, the question before the Commission is whether advisors should be necessarily be *precluded* from seeking expungement in the FINRA Forum. The mere existence of potentially adverse evidence should not be an absolute

bar to the advisor's right to an expungement hearing, and doing so is in violation of FINRA's Rules and the Exchange Act.

As an arbitration forum, FINRA has a duty to preserve the integrity of the judicial process. FINRA Rules are silent as to whether a claim that is tied to a prior award or settlement is eligible for expungement. Interpreting the FINRA Rules is a question of contract, and those questions are under the exclusive domain of the arbitrator. *See, e.g. Livingston v. John Wiley & Sons, Inc.*, 313 F.2d 52, 59 (2d Cir. 1963), aff'd, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964). FINRA's act of usurping the fact-finding role of the arbitrator undermines decades of law as well as notions of fundamental fairness.

Additionally, Mr. Mummert is aware of *at least* one other registered representative that has been allowed to seek expungement of a customer dispute disclosure in FINRA's Forum where the underlying claim resulted in a prior adverse award, and suspects that there are countless others. *See, e.g., Sean Michael Murphy v. Eastbrook Capital Group, LLC, et al*, FINRA Case No. 17-01566 (February 9, 2018), attached as **Opening Brief Exhibit 1** (Arbitration panel recommending expungement of a customer dispute disclosure where the underlying complaint resulted in a prior adverse award (the prior adverse award is attached as **Opening Brief Exhibit 2**)). Therefore, FINRA's denial of forum in this case is an inconsistent and arbitrary application of Rule 13203.

2. FINRA's determination that Mr. Mummert's claim is "not eligible" for FINRA arbitration violates fundamental notions of due process.

Assuming, for the sake of argument, that FINRA had the authority deny Mr. Mummert access to its Forum here under FINRA Rules and the Exchange Act, the *de facto* nature of the denial violates fundamental due process standards. In 1971, the U.S. Supreme Court heard a case involving a Wisconsin statute that allowed "designated persons" to post notices forbidding the sale

or gift of liquor to persons who, because of excessive drinking, failed to provide for his or her family or threatened the peace of the community.⁹ In deeming the statute unconstitutional, the Court stated that:

It would be naive not to recognize that such ‘posting’ or characterization of an individual will expose him to public embarrassment and ridicule, and it is our opinion that procedural due process requires that before one acting pursuant to State statute can make such a quasi-judicial determination, the individual involved must be given notice of the intent to post and an opportunity to present his side of the matter.¹⁰

Since 1971, federal courts have upheld that “where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”¹¹ In 1994, the 2nd Circuit Court of Appeals held that New York State’s maintenance of a Central Register that identifies individuals accused of child abuse or neglect, and its communication of the names of those on the list to potential employers implicated a protectible liberty interest under the Fourteenth Amendment.¹²

While the constitutionality of FINRA’s publication of customer disputes and other disclosures is not an issue before the Commission, having publicly-available disclosures that broadcast allegations of securities practice violations is equated to being a con artist, an unscrupulous financial professional, or a disreputable person. Mr. Mummert’s Disclosure calls into question his good name, reputation, honor, and integrity. Further, FINRA Rule 3110 requires member firms to review and consider an investment advisor’s CRD when making hiring, retention, and advancement decisions. The Disclosure here has a tangible effect on Mr. Mummert’s pursuit of his chosen profession. Mr. Mummert has the right to an evidentiary hearing to determine

⁹ *Wisconsin v. Constantineau*, 400 U.S. 433, 434 (U.S. 1971).

¹⁰ *Id.* at 436.

¹¹ *See, e.g., Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

¹² *Valmonte v. Bane*, 18 F.3d 992, 994 (2d Cir. 1994).

whether his disclosures should be expunged¹³; a right that Mr. Mummert was in the process of exercising when FINRA decided to summarily deny his access to FINRA's Forum two weeks after the conclusion of a full hearing on the merits and prior to the issuance of the award.

In accordance with FINRA Rule 2080, it is FINRA's responsibility to ensure the accuracy of the information published in its databases. FINRA purports to provide a neutral arbitration forum whereby FINRA-registered financial advisors, like Mr. Mummert, can dispute a CRD and/or BrokerCheck disclosure's accuracy. Arbitration is favored by public policy in federal courts, as well as state courts, as an efficient alternative to litigation. *See, AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). It is Mr. Mummert's right, as a FINRA-registered broker, to have access to FINRA's fundamentally important arbitration service to dispute inaccurate information published to FINRA's public databases.

3. FINRA waived its ability to "deny forum" in this case.

Even if FINRA initially had the authority to deny Mr. Mummert access to its Forum in this case – which it did not – FINRA subsequently waived its ability to do so after it *accepted* forum. This is not a case where, shortly after a claimant files a claim, FINRA issues a forum denial notice. This case had been *concluded* by the time FINRA made its determination that it would deny Mr. Mummert access to its Forum. FINRA had ample opportunity to issue its Denial Notice, and failed to do so.

A waiver occurs when one in possession of any right, whether conferred by law or by contract, and with full information of the material facts, does or forbears the doing of some things inconsistent with the existence of the right or his intention to rely upon it; thereupon

¹³ *See*, FINRA Rules 13805 and 2080.

he is said to have waived it, and he is precluded from claiming anything by reason of it afterward.

United States v. Turley, 878 F.3d 953, 959 (10th Cir. 2017).

In the case at hand, FINRA expressly accepted Mr. Mummert's claim into its Forum, with full information of the material facts available to it. It allowed a full and complete hearing on the claims to occur. Both of these are acts inconsistent with FINRA's intention to rely on its "right" – which again, it does not have (addressed above) – to dismiss Mr. Mummert's claim under Rule 13203. Therefore, FINRA is estopped from using Rule 13203 as a basis for refusing Mr. Mummert access to its Forum.

FINRA's attempted claim that it was unaware of the prior "award" or that it did not become aware of the prior "award" until during the expungement hearing is also not credible and not relevant. *See*, FINRA's Motion to Adduce Additional Evidence. The underlying "award" was referenced in the Statement of Claim and attached as Exhibit 1; FINRA served the documents, including the "award," on respondent Prudential; FINRA coordinated the IPHC where the "award" and "settlement" was discussed; FINRA was provided with Mr. Mummert's BrokerCheck report in advance of the hearing, which references the "award" and provides a hyperlink to the "award" document itself; Mr. Mummert also submitted to FINRA his Hearing Exhibits 1-19 and FINRA forwarded the Exhibits to the Chairperson in advance of the hearing; a readily apparent link to the "award" is listed on Mr. Mummert's publicly-available BrokerCheck page – a database created, operated, and maintained by FINRA; and the "award" is also published on FINRA's Arbitration Award Database. Over the span of eight months while this case was proceeding through FINRA's Forum, FINRA was aware of the "award" and ratified its acceptance of forum at every step of the way. Even if FINRA did first learn of the underlying "award" during the expungement hearing,

nearly eight months after the claim was filed, it still then allowed the expungement hearing to continue to conclusion, and then waited an additional two (2) weeks to deny forum. Mr. Mummert has exerted significant time and expense in preparing for and presenting his expungement request. FINRA cannot now claim, after all this, that Mr. Mummert's claim was "ineligible" or "inappropriate" for arbitration.

B. FINRA assumed a "fact-finding" role in violation of the Exchange Act.

FINRA also exceeded its authority under the Exchange Act, its own rules, and notions of due process, in its action of assuming a fact-finding role to interpret the evidence in the record. FINRA made an independent determination after the expungement hearing concluded that Mr. Mummert's customer dispute resulted in an "award/judgment." This determination by FINRA was made *after* evidence was presented that resolution of the case in fact did *not* result in an award/judgment, but was in fact a settlement. *See*, Transcript at 20-23; *see also*, Hearing Exhibits at Mummert000050. Additionally, prior to and during the expungement hearing, no party to the case, nor any witnesses, disputed the fact that the customer dispute resulted in a settlement and not an award/judgment. Nevertheless, FINRA stepped in after the hearing was concluded and all evidence presented, and made a finding of fact that the underlying case resulted in an award/judgment. FINRA does not have the authority to do this under the Exchange Act or its own rules. *See, e.g.* 15 U.S.C. § 78s(g)(1). In FINRA's "What to Expect Series," it published an article, *FINRA's Dispute Resolution Process* ("FINRA Article"), claiming that its Dispute Resolution forum is a neutral forum. *See*, FINRA Article at 1¹⁴. It also claims that its [s]taff members...are not involved in rendering judgments, and are separate from FINRA's Examination and Enforcement departments." *See, id.* FINRA explains that once it receives the Statement of Claim,

¹⁴ Full article can be seen at: https://www.finra.org/sites/default/files/Education/p117487_0_0.pdf. Last visited April 12, 2021.

“it analyzes the claim, looking for things like...the nature of the dispute.” *Id.* at 2. FINRA specifically points out that “Firms often ask if FINRA staff can dismiss frivolous claims” and in response states that “[b]ecause FINRA staff serves as the impartial provider of the arbitration forum, staff members have no authority to evaluate the strengths and weaknesses of claims or defenses. That job is reserved for the arbitrators.” *Id.* FINRA has also specifically acknowledged that its “Staff members are not advocates, nor do they conduct legal research or provide legal advice” and that “Only the arbitrators may decide a case.”¹⁵ Despite all this, FINRA overstepped its authority under the Exchange Act, its own rules, and disregarded due process in its unilateral decision to determine that the case resulted in an award/judgment.

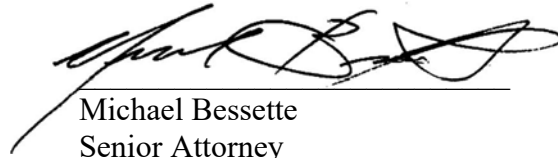
CONCLUSION

The Commission is required to review an action of an SRO if the action prohibits or limits a person’s access to services that involve the applicant’s ability to utilize a fundamentally important service offered by the SRO. Mr. Mummert is an Associated Person who was denied access to FINRA’s Forum to seek expungement, a fundamentally important service offered by FINRA. FINRA’s determination that Mr. Mummert’s expungement request is “not eligible” for FINRA arbitration is inconsistent with FINRA rules, fundamental notions of due process, and the Exchange Act. FINRA also assumed a “fact-finding” role in violation of the Exchange Act. Therefore, Mr. Mummert respectfully requests an order requiring Mr. Mummert’s expungement claim be submitted back to the arbitration panel in FINRA’s Forum to issue an award on the record that has already been presented to the arbitration panel.

¹⁵ <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

Dated: April 14, 2021

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Bessette", is written over a horizontal line. The signature is fluid and cursive.

Michael Bessette
Senior Attorney
T: (720) 432-6546
E: michael.bessette@hlbslaw.com

HLBS Law
9737 Wadsworth Pkwy, Ste. G-100
Westminster, CO 80021

CERTIFICATE OF SERVICE

I, James Bellamy, on April 14, 2021, caused a copy of Mr. Mummert's Brief in Support of his Application for Review, to be served by email on:

Vanessa A. Countryman, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090
apfilings@sec.gov

Celia L. Passaro
Assistant General Counsel
FINRA
1735 K Street, N.W.
Washington, D.C. 20006
ersilia.passaro@finra.org

General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
Email: nac.casefilings@finra.org

Alan Lawhead
alan.lawhead@finra.org
Office of General Counsel FINRA
1735 K Street, NW Washington, D.C. 20006

[X] (BY EMAIL) I caused the documents to be sent to the persons at the e-mail addresses 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
9737 Wadsworth Pkwy Suite G-100
Westminster, CO 80021

EXHIBIT 1

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimant
Sean Michael Murphy

Case Number: 17-01566

vs.

Respondents
Eastbrook Capital Group LLC
Maxim Group LLC
Nichols, Safina, Lerner & Co. Inc.

Hearing Site: New York, New York

Nature of the Dispute: Associated Person vs. Members

REPRESENTATION OF PARTIES

For Claimant Sean Michael Murphy: Dochter Kennedy, AdvisorLaw LLC, Broomfield, Colorado.

For Respondent Eastbrook Capital Group LLC: Edward Samson, Eastbrook Capital Group LLC, East Brunswick, New Jersey.

For Respondent Maxim Group LLC: Ian H. Hummel, Esq., Maxim Group LLC, New York, New York.

For Respondent Nichols, Safina, Lerner & Co. Inc.: Chee Eng, Nichols, Safina, Lerner & Co. Inc., New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: June 15, 2017.

Amended Statement of Claim filed on or about: June 16, 2017.

Sean Michael Murphy signed the Submission Agreement: June 15, 2017.

Statement of Answer filed by Maxim Group LLC on or about: August 7, 2017.

Maxim Group LLC signed the Submission Agreement: September 19, 2017.

Eastbrook Capital Group LLC did not file an Answer or sign the Submission Agreement.
Nichols, Safina, Lerner & Co. Inc. did not file an Answer or sign the Submission Agreement.

CASE SUMMARY

Claimant asserted the following cause of action: expungement.

RELIEF REQUESTED

In the Statement of Claim and Amended Statement of Claim, Claimant requested:

1. expungement of the occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(A), as the claims, allegations, or information is factually impossible or clearly erroneous;
2. expungement of the occurrences from his CRD record pursuant to FINRA 2080(b)(1)(C), as the claims, allegations, or information is false;
3. an award of damages in the amount of \$1.00 from Respondents; and
4. any and all other relief that the Arbitrator deems just and equitable.

In the Statement of Answer Respondent Maxim Group LLC did not oppose Claimant's request for expungement, but opposed Claimant's request for compensatory damages.

At the hearing, Claimant withdrew his request for \$1.00 in compensatory damages.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges that they have each read the pleadings and other materials filed by the parties.

Respondents Eastbrook Capital Group LLC and Nichols, Safina, Lerner & Co., Inc. did not file with FINRA Office of Dispute Resolution Statement of Answers or properly executed Submission Agreements but are required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code") and are bound by the determination of the Arbitrator on all issues submitted.

Respondents Eastbrook Capital Group LLC and Nichols, Safina, Lerner & Co., Inc. did not appear at the evidentiary hearing. Upon review of the file, the Arbitrator determined that Respondents Eastbrook Capital Group LLC and Nichols, Safina, Lerner & Co., Inc. have been properly served with the Statement of Claim and received due notice of the hearing, and that arbitration of the matter would proceed without said Respondents present, in accordance with the Code.

On or about January 2, 2018, Claimant notified the customers related to occurrence numbers 1399143, 239491, 1289679 and 1176513 of the expungement request and of their right to participate and testify at the expungement hearing and he provided the customers with a copy of the Statement of Claim.

The Arbitrator conducted a recorded telephonic expungement hearing on February 6, 2018 so the parties could present oral argument and evidence on Claimant's request for expungement.

Respondents Eastbrook Capital Group LLC and Nichols, Safina, Lerner & Co., Inc., and the customers did not participate in the expungement hearing and did not contest the request for expungement.

The Arbitrator reviewed the BrokerCheck® Report for Sean Michael Murphy. The Arbitrator did not review the settlement documents related to occurrence numbers 239491 and 1289679 because they could not be located. However, Sean Murphy testified that he contributed to both settlements and that the settlements were not conditioned on the customers not opposing the request for expungement. The Arbitrator considered the amount of payments made to the customers, and noted that the evidence and testimony of Claimant was credible and supported expungement, as outlined in the award section below.

In recommending expungement the Arbitrator relied upon the following documentary or other evidence: Claimant's Statement of Claim, Respondent Maxim Group LLC's Statement of Answer, Sean Michael Murphy's BrokerCheck® Report, and the testimony and evidence presented at the expungement hearing.

The Arbitrator noted that Sean Michael Murphy did not previously file a claim requesting expungement of the same disclosures in the CRD.

AWARD

After considering the pleadings, the testimony and evidence presented at the recorded telephonic expungement hearing, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. The Arbitrator recommends the expungement of all references to occurrence numbers 1399143, 239491, 1289679 and 1176513 from registration records maintained by the Central Registration Depository ("CRD"), for Sean Michael Murphy (CRD# 2630916), with the understanding that, pursuant to Notice to Members 04-16, Sean Michael Murphy must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to Rule 13805 of the Code, the Arbitrator has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Arbitrator has made the above Rule 2080 finding based on the following reasons:

Occurrence number 1399143: This complaint for unauthorized trading was examined by the Claimant's employer, and the complaint was found to be false. In addition, the customer wrote an e-mail requesting that the complaint be withdrawn.

Occurrence number 239491: The complaint in this matter was for selling a stock at an unauthorized price. While Claimant settled the customer's claim for \$3,900.00 because the brokerage firm that employed Claimant had gone bankrupt, the

customer later wrote a letter stating that there might have been some miscommunication on his part as to the price for which the subject security was sold. Claimant said no price was ever required by the customer and was sold at market.

Occurrence number 1289679: This complaint for breach of fiduciary duty in the amount of \$250,000 simply should not have been brought as a matter of law, since there were no laws or regulations in place at the time of the alleged breach which would have allowed for such a claim to go forward. Additionally the complaint against Claimant was brought some five years after he left Eastbrook, his former employer, which is a terminated member of FINRA. The Claimant testified that a lawyer's retainer to contest this claim would have been \$20,000, and because of that he settled with the customer for \$9,999. Because the complaint was not based on valid law, I find it false; because the Claimant's settlement was such a small portion of the damages claimed, I find it inconsequential. Claimant's record should be expunged.

Occurrence number 1176513: The complaint alleged unauthorized transactions. The customer was recorded on tape approving the purchase of the subject security in contradiction to his complaint. He never pursued the complaint in any form.

2. Any and all claims for relief not specifically addressed herein, are denied.

FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee	= \$ 50.00
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**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the event(s) giving rise to the dispute. Accordingly, as parties, Respondents Eastbrook Capital Group LLC, Maxim Group LLC, and Nichols, Safina, Lerner & Co., Inc. are each assessed the following:

Member Surcharge	= \$ 150.00
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ARBITRATOR

Richard W. Cutler

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Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Arbitrator's Signature



Richard W. Cutler
Sole Public Arbitrator



Signature Date

February 9, 2018

Date of Service (For FINRA Office of Dispute Resolution office use only)

EXHIBIT 2

N.A.S.D. REGULATION AWARD
NATIONAL ASSOCIATION OF SECURITIES DEALERS REGULATION, INC.

CASE: 97-03915

Joe Williams, claimant vs. Nichols, Safina, Lerner & Co. Inc., and Sean Murphy, respondents.

ATTORNEYS:

Claimant appeared Pro Se, Martinez, GA.

For Respondents appeared Evan L. Gordon, Esq., New York, NY.

DATE FILED: August 7, 1997

CASE SUMMARY: Claimant alleged that respondents failed to execute his sell order in a timely manner.

Claim Data

Claim: \$3,900.00
Punitive: \$.00
Atty Fees: \$.00
Filing Fees: \$.00

Award Data

Award: \$3,900.00
Punitive: \$.00
Atty Fees: \$.00
Filing Fees: \$125.00

AWARD: The undersigned arbitrator has decided and determined in full and final resolution of the issues submitted for determination as follows: 1) Respondent Sean Murphy is liable and shall pay to the claimant \$3,900.00. 2) All other relief requests are denied. 3) The \$125.00 filing fee previously deposited with National Association of Securities Dealers Regulation, Inc. by the claimant, shall be retained by NASD Regulation, Inc. 4) Respondent Sean Murphy is liable and shall pay claimant \$125.00 as reimbursement of the filing fee.

OTHER ISSUES: Prior to the decision on the merits, the claims against respondent Nichols, Safina, Lerner & Co. Inc. were stayed due to respondent's Chapter 7 Bankruptcy Voluntary Petition.

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Award #97-03915

AFFIRMATION

I, Joel S. Arogeti, do hereby affirm, upon my oath as arbitrator, that I am the individual described herein who executed this instrument, which is my oath and award.



Joel S. Arogeti

March 4, 1998
Date of award