BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, DC

In the Matter of the Application for Review of

Ryan William Mummert

File No. 3-20210

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. INTRODUCTION

In this matter, Applicant Ryan William Mummert, a FINRA associated person, seeks to collaterally attack and expunge a prior adverse arbitration award against him. In the underlying customer-initiated arbitration proceeding, an arbitrator considered the customers' allegations of misconduct on the merits and found Mummert liable to the customers for misconduct. The customer arbitration award did not grant Mummert expungement, and Mummert never moved to vacate, modify, or correct the award in court. Instead, almost 22 years after the underlying arbitration award was issued, Mummert filed a new statement of claim in FINRA's arbitration forum. Mummert claimed, without evidence, that the arbitration was settled and erroneously "mis-labeled" as an adverse award. Mummert sought to expunge the disclosure about the prior adverse award from Central Registration Depository ("CRD®") and BrokerCheck®. By seeking expungement of the adverse award, Mummert is necessarily asking a new arbitration panel to reconsider the factual and legal findings of liability made by the prior arbitrator.

Mummert's attempt to obtain expungement in FINRA's arbitration forum is a collateral attack on an adverse award arising from the customer dispute. Such a collateral attack is not

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contemplated under FINRA rules and is contrary to FINRA's Code of Arbitration Procedure. FINRA's Director of Dispute Resolution ("Director") denied Mummert's attempt to seek expungement in FINRA's arbitration forum because, when there is an adverse award, Mummert cannot demonstrate any of the narrow grounds for expungement under FINRA rules without collaterally attacking the prior arbitration award. In doing so, the Director acted pursuant to FINRA rules.

Nothing in Mummert's brief establishes that FINRA should grant him access to its arbitration forum to attempt to disturb legal and factual issues determined by the prior arbitrator and issued in a final arbitration award. There is no evidence to support Mummert's claim that the customer dispute was settled, and he concedes that he has no personal knowledge of such a settlement.

Mummert also ignores the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and the Supreme Court jurisprudence that confirms that only courts may modify, vacate, or correct an arbitration award. Instead, Mummert makes various arguments attacking the underlying adverse award and seeks to undermine the validity of the prior arbitrator's decision. His arguments are meritless, and the Commission should reject them.

The Director's decision to deny Mummert access to the arbitration forum was authorized by FINRA rules and is consistent with the Securities Exchange Act of 1934 (the "Exchange Act"), the principles of investor protection and the public interest, and the FAA. Accordingly, the Commission should dismiss Mummert's application for review.

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II. FACTUAL AND PROCEDURAL BACKGROUND

A. Ryan William Mummert

Mummert is associated with FINRA member Morgan Stanley and is registered as a general securities representative. (R. at 45-46.)[1] From July 1996 to August 2000, Mummert was associated with Prudential Securities Incorporated (now known as Prudential Equity Group, LLC) ("Prudential"). (R. at 21, 51.)

B. Mummert's Customers File an Arbitration Against Him

On February 23, 1998, Mummert's customers, DT and GT, filed an arbitration in the New York Stock Exchange's ("NYSE") arbitration forum against Mummert and Prudential seeking $5,000 in damages. (R. at 33, 62-64.) The customers alleged that Mummert mismanaged their account, failed to follow instructions, and sold an investment without authorization. (R. at 62.)

A single arbitrator considered the case as a small claim decided on the papers. (R. at 33.) On June 4, 1998, the arbitrator issued an award ordering Mummert and Prudential to return the shares sold without authorization, plus a cash award to compensate the customers for their lost interest on the investment. (Id.) Consistent with the award issued by the arbitrator, Prudential reported on Mummert's CRD record that the customers' complaint was resolved with an award to the customers valued at $3,180.59.[2] (R. at 62-63.) The NYSE also reported on Mummert's

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[1] "R. at __" refers to the certified record filed by FINRA on February 22, 2021.

[2] CRD is the central licensing and registration system used by the U.S. securities industry and its regulators. In general, the information in the CRD system is submitted by registered securities firms, brokers, and regulatory authorities in response to questions on uniform registration forms. FINRA makes specific portions of CRD publicly available through BrokerCheck.

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CRD record that the arbitration was resolved with an award in favor of the customers. (R. at 63-64.)

C. Mummert Files a Statement of Claim with FINRA Dispute Resolution Seeking Expungement

On April 21, 2020, almost 22 years after the NYSE award was issued, Mummert filed a statement of claim with FINRA Dispute Resolution Services ("DRS") seeking expungement of the customer arbitration from his CRD record. (R. at 1-7.) Due to an oversight, the expungement arbitration was initially allowed to proceed. On or around December 10, 2020, while the arbitration was pending, the Director became aware that the matter Mummert sought to expunge was an adverse arbitration award. (McNamire Declaration at 6.)[3] On December 24, 2020, DRS notified Mummert that his request for expungement was not eligible for arbitration because it involved a prior adverse arbitration award. (R. at 29.) Accordingly, the Director denied the arbitration forum for Mummert's expungement request pursuant to Industry Code Rule 13203(a), suspended the arbitration, and returned Mummert's filing fees. (R. at 29, McNamire Declaration at No. 7.)

D. Mummert Files an Application for Review with the Commission

On January 27, 2021, Mummert filed an application for review with the Commission, requesting that the Commission order FINRA to permit him to arbitrate his request to expunge the NYSE arbitration award. (R. at 37-39.) Despite the existence of a written award, Mummert claims in his application for review that the matter he seeks to expunge is not a prior arbitration award, but rather a customer claim that was settled. (R. at 37.)

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[3] "McNamire Declaration at __" refers to the February 18, 2021 Declaration of Laura McNamire, which is attached as Exhibit 1 to FINRA's February 23, 2021 Motion to Adduce Additional Evidence.

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III. ARGUMENT

The Director's decision to deny Mummert use of FINRA's arbitration forum was authorized by FINRA rules and based on the principle that the use of FINRA's arbitration forum to seek expungement is available only in a narrow set of circumstances. Those circumstances are not applicable here. The Director's decision also was consistent with the provisions of Section 15A(b)(6) of the Exchange Act and the principles of investor protection and the public interest, and in accordance with the FAA's mandate that exclusively vests with courts the jurisdiction to review arbitration awards.

Here, the arbitrator in the prior customer arbitration determined that Mummert was liable to his customer for misconduct. This adverse arbitration award became final and was reported in CRD. The description of the adverse arbitration award in CRD is factually accurate and provides the investing public, prospective employers, and regulators with important information about Mummert. The Director properly denied the forum because FINRA rules do not provide for the expungement of adverse awards, and those rules are consistent with FINRA's continuing obligation to protect investors by disclosing accurate information about adverse decisions in customer-initiated arbitrations.

The Director's decision also was consistent with the FAA. Allowing Mummert access to FINRA's arbitration forum to seek expungement of a prior adverse award would conflict with the FAA's requirement of limited judicial review exclusively by courts. Because the Director acted pursuant to FINRA rules, consistent with the Exchange Act, and in accordance with the FAA, the Commission should dismiss the application for review.

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A. FINRA's Action Meets the Standards of Section 19(f) of the Exchange Act

Under Section 19(f) of the Exchange Act, the Commission must dismiss Mummert's application for review if it finds that: (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 meets these standards: the Director's denial of the FINRA arbitration forum was based on the fact that Mummert seeks to expunge a prior adverse arbitration award, the Director's action was in accordance with FINRA rules, and those rules were applied in a manner consistent with the Exchange Act and investor protection. *Id.*

B. Mummert Seeks to Expunge a Prior Adverse Arbitration Award

The matter Mummert seeks to expunge is a prior adverse arbitration award. The record contains a copy of the award. (R. at 33.) The award is consistent with the format of NYSE arbitration awards issued in 1998.[4] Moreover, both the NYSE and Prudential disclosed in CRD that the matter was resolved with an award to the customers. (R. at 62-64.) Indeed, Prudential, which was a party to the arbitration and presumably understood the disposition of the matter, indicated in the comments section of the CRD disclosure that it involved a "total award equal to $3,180.59." (R. at 63.)

Notwithstanding the existence of the NYSE arbitration award, Mummert claims that the customers' complaint was not decided by an arbitrator, but rather was settled by the parties and

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[4] FINRA has moved to adduce the Declaration of David Carey, which is attached as Exhibit 2 to FINRA's February 23, 2021 Motion to Adduce Additional Evidence. Carey worked as Chief Arbitration Counsel at NYSE for almost 20 years, including the period when the prior arbitration award in this matter was issued. (Carey Declaration at Nos. 1-2.) Carey's Declaration confirms that the award issued in this matter is consistent with the form of an award issued by the NYSE and not a settlement or stipulated award. (Carey Declaration at Nos. 3-4.)

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"mis-labelled" as an award. (Mummert Br. at 3.)[5] There is no evidence, however, to support Mummert's assertion. In the facts section of his opening brief, Mummert cites to the allegations in his statement of claim, not to any evidence, and concedes the significant point that he was unable to locate the alleged settlement agreement. (Mummert Br. at 3-4.)

Mummert also relies on his testimony at the hearing held in the expungement matter prior to the denial of forum to support his assertion that he settled with the customers.[6] (Mummert Br. at 4-5.) But the hearing transcript simply does not reflect what Mummert claims it does. Mummert testified that he did not recall ever seeing a settlement agreement and, despite being a party to the customer arbitration, he testified that he did not sign a settlement agreement. (Mummert Motion at Ex. A, p. 24, 29.) Mummert testified about a meeting he "believe[s]" was a mediation, but also testified that the customers did not participate, which is inconsistent with the meeting being a mediation.[7] (Mummert Motion at Ex. A, p. 20-21.) Finally, in support of his assertion that the customers' claim was settled, Mummert testified that he did not recall participating in an arbitration hearing in the customers' case. (Mummert Motion at Ex. A, p. 23.) This, however, is entirely consistent with the arbitration award, which states that the case was decided on the papers, without a hearing. (R. at 33.)

Mummert effectively concedes that he has no personal knowledge that the customer case was settled. In his brief, Mummert writes that he testified at the hearing "upon information and

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[5] "Mummert Br. at __" refers to Mummert's April 14, 2021 Brief in Support of Application for Review.

[6] On April 8, 2021, Mummert filed a motion to adduce the transcript of the hearing and exhibits. "Mummert Motion at __" refers to this motion to adduce.

[7] Mummert testified that he "[did] not recall [the customers] having any involvement in the [mediation] conversation that we were having at that time." (Mummert Motion at Ex. A, p. 21.)

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belief."[8] (Mummert Br. 4-5.) By definition, a statement made upon information and belief is not based on firsthand knowledge. *See Information and Belief*, BLACK'S LAW DICTIONARY (6th ed. 1990) (defining "information and belief" as a standard legal term which is used to indicate that the allegation is not based on the firsthand knowledge of the person making it); *see also Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1189 (10th Cir. 2003) (finding that allegations were made based upon information and belief where the plaintiffs did not have personal knowledge of certain alleged conversations). Mummert's use of this qualifying phrase underscores the fact that his claim that the customers' case was settled is based on nothing more than his 20-year-old memory of a meeting at his firm's offices, which he "believes" may have been a mediation. Even if Mummert is correct that a mediation occurred, however, there is no evidence that it resulted in a settlement. To the contrary, the NYSE award, the contemporaneous disclosures made by Prudential and NYSE in CRD, and Mummert's own testimony demonstrate that the customer dispute was resolved with an arbitration award, not a settlement.

Finally, Mummert points to a notation on the customers' account statements indicating when the shares were returned to the customers pursuant to the arbitration award. (Mummert Br. at 4.) The notation states "ADJ ARBITRATION SETTLEMENT." (Mummert Motion at Ex. B, p. 35.) In his brief, Mummert underlines the word "settlement," ignores the other two words, and claims this notation supports that the matter was settled. Mummert's self-serving interpretation does not withstand scrutiny. The plain, and most sensible, reading of this notation is that the deposit was made pursuant to an adjudication, arbitration, *or* settlement. Accordingly,

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[8] Mummert uses this same qualifying language in the statement of claim he filed in the expungement proceeding and in his April 8, 2021 Motion to Adduce Additional Evidence. (R. at 5; Mummert Motion at 2, 4.)

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the account statements add nothing to support Mummert's argument that notwithstanding the existence of a written arbitration award, this case involves the settlement of a customer claim.

Mummert claims that DRS's reliance on the NYSE award in denying the arbitration forum for his expungement request constitutes improper factfinding by FINRA that should have been left to the arbitrators in the expungement arbitration. (Mummert Br. at 15.) Mummert is mistaken. The existence of a written arbitration award is not a matter reserved for a factfinder. Courts routinely take judicial notice of the existence of arbitration awards to establish the truth of the fact that there was an arbitration and award rendered. *See, e.g.*, *Oliveira v. World Fin. Grp.*, No. 11-cv-05059 NC, 2011 U.S. Dist. LEXIS 171923 at *7-8 (N.D. Cal. Dec. 15, 2011) (explaining that a FINRA arbitration award is a matter of public record and taking judicial notice of the existence of the award); *Commins v. Habberstad BMW*, No. 11-cv-2419 (JFB)(WDW), 2012 U.S. Dist. LEXIS 37878, at *13-14 (E.D.N.Y. Mar. 20, 2012) (taking judicial notice of an arbitration award and explaining that courts routinely take such notice of documents to establish the fact of the litigation and related findings); *Rowland v. Prudential Fin., Inc.*, No. CV 04-2287-PHX-EHC, 2007 U.S. Dist. LEXIS 48042, at *3 n.1 (D. Ariz. July 2, 2007) (taking judicial notice of an NASD arbitration award). Requiring parties to relitigate the fact of the existence of a written arbitration award would undermine finality and waste administrative resources.

In short, the record establishes that the matter Mummert seeks to expunge is a prior arbitration award.

C. <u>FINRA Properly Prohibited Access to Its Arbitration Forum</u>

The Director properly exercised his rule-based authority when he denied Mummert access to the arbitration forum to expunge a disclosure about a prior adverse arbitration award. Mummert's expungement claim is inappropriate for the arbitration forum because FINRA's

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narrow standards for removing customer dispute information from CRD are incompatible with expunging a prior adverse arbitration award.

1. Using FINRA's Arbitration Forum to Expunge a Prior Adverse Arbitration Award Is Not Contemplated Under FINRA Rules

An attempt to use FINRA's arbitration forum to collaterally attack a prior adverse award arising from a customer dispute is not consistent with "the purposes of FINRA and the intent of the Code" of Arbitration Procedure. *See* FINRA Rule 13203(a).

While FINRA rules contemplate the use of FINRA's arbitration forum to expunge customer dispute information in certain narrow circumstances, the rules do not contemplate the expungement of adverse arbitration awards arising from customer disputes. FINRA Rule 2080 governs the expungement of customer dispute information from CRD. The rule identifies three narrow circumstances that serve as an appropriate basis for the expungement of customer dispute information from CRD in FINRA's arbitration forum:

- the claim, allegation or information is factually impossible or clearly erroneous;
- the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or
- the claim, allegation, or information is false.

FINRA Rule 2080(b)(1). The standards imposed by FINRA Rule 2080 are intended to promote the common interest of public investors, broker-dealers and their associated persons, and regulators in "a CRD system that contains accurate and meaningful information" and maintains the "integrity of the arbitration process." *NASD Notice to Members 04-16*, 2004 NASD LEXIS 18 (Mar. 2004).

FINRA's Code of Arbitration Procedure requires arbitrators to make an affirmative finding that one of the standards in FINRA Rule 2080 has been proven before recommending

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expungement of customer dispute information.[9] *See* FINRA Rules 12805, 13805. In order to grant an expungement request, the arbitration panel must hold a recorded hearing regarding the appropriateness of the expungement of customer dispute information and "provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case." *Id.* "The procedures add . . . safeguards designed to ensure that the extraordinary relief of expungement is granted only under appropriate circumstances." *FINRA Regulatory Notice 08-79*, 2008 FINRA LEXIS 108, at *4 (Dec. 2008).

Thus, the intent of FINRA rules and FINRA's Code of Arbitration Procedure is to allow associated persons to expunge customer dispute information only in narrow circumstances—i.e., when the claim, allegation, or information is factually impossible, clearly erroneous, or false, or the registered person was not involved in the alleged investment-related sales practice violation. *See* FINRA Rules 2080, 12805, 13805. FINRA rules were not intended to allow associated persons a second chance at arbitrating the same issues under the guise of an expungement request, when a prior arbitration panel rendered a decision on the merits in favor of a customer in a customer-initiated arbitration.[10]

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[9] Although FINRA Rules 12805 and 13805 state that the arbitration panel may "grant" expungement of customer dispute information under FINRA Rule 2080, a person seeking expungement must also obtain a court order confirming an arbitration award for FINRA to expunge the customer dispute information from CRD system. *See* FINRA Rule 2080.

[10] FINRA recently proposed a rule change to amend the Code of Arbitration Procedure to modify the process for expungement of customer dispute information as a result of concerns raised by stakeholders in the forum about expungement hearings by arbitration panels that had not heard the merits of that case. *See Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests*, 85 Fed. Reg. 62,142 (Oct. 1, 2020) (hereinafter "*Special Arbitrator Roster Proposed Rule Change*"). The proposal notes that expungement requests may be complex, particularly those when the customers do not participate

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Mummert is unable to show any of the narrow grounds for expungement under FINRA Rule 2080 without collaterally attacking the prior adverse arbitration award. First, to prove that the adverse arbitration award was factually impossible or clearly erroneous would essentially require a rehearing of the evidence from the prior arbitration proceeding and a complete reversal by the second arbitration panel of the prior adverse arbitration award. Second, to prove that the registered person was not involved in the investment-related sales practice (or similar) violation would require the second panel to overturn the prior arbitration panel's factual findings and assessment of liability. In finding Mummert liable, the prior arbitrator necessarily found that Mummert was involved in the alleged misconduct, and in ordering Mummert and Prudential to pay an award, the arbitrator assigned responsibility for damages to Mummert. Third, to prove that the adverse arbitration award was false would require a frontal assault on the prior adverse award. In other words, the expungement of prior adverse awards is not contemplated by FINRA rules because it would invalidate factual and legal issues litigated and decided in a final arbitration award by the prior arbitration panel. Even if the specific issue of expungement was not litigated during the prior arbitration proceeding, the arbitration panel's determination of liability in that proceeding necessarily precludes expungement relief of adverse awards under FINRA Rule 2080 because none of the standards set forth in that rule can be satisfied.

To be sure, Mummert's brief launches collateral attacks on the legal and factual findings underlying the prior adverse award. For example, Mummert argues that "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." (Mummert

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in the expungement hearing. *See id.* The proposed rule change seeks to impose additional safeguards for the process of expungement of customer dispute information. *See id.*

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Br. at 10.) Mummert confuses differing burdens of proof while attempting to collaterally attack the adverse arbitration award. The prior arbitrator found Mummert liable for misconduct in the underlying arbitration proceeding. And, logically, an expungement arbitrator cannot find that the underlying information was factually impossible, clearly erroneous, or false, or that the registered person was not involved in the alleged investment-related sales practice violation, without undermining the liability findings of the prior arbitrator.[11] To argue to a second arbitration panel that the prior arbitrator's findings should be expunged because the presentation to the second panel is more persuasive is merely a rationalization of a collateral attack. (*See* Mummert Br. at 9-11.) To wit, the expungement of an adverse award would directly contradict the prior arbitrator's final award and findings that Mummert was liable for the misconduct.[12]

Although FINRA rules allow an associated person to seek expungement of customer dispute information in narrow circumstances, those circumstances do not and cannot exist when the expungement sought relates to a prior adverse award—like that which is the subject of the Mummert's claim—in which the associated person was found liable to the customer.[13]

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[11] The Commission has previously recognized impermissible collateral attacks on underlying arbitration awards in other FINRA actions. *See, e.g.*, *Michael Albert DiPietro*, Exchange Act Release No. 77398, 2016 SEC LEXIS 1036, at *13 (Mar. 17, 2016) (holding that the applicant cannot collaterally attack the underlying arbitration award in a FINRA expedited proceeding); *Richard J. Lanigan*, 52 S.E.C. 375, 377 n.9 (1995) ("An applicant, however, may not collaterally attack an arbitration award in a disciplinary proceeding for failing to pay the award.").

[12] "As courts have long held, parties cannot re-frame their argument to make an otherwise impermissible collateral attack on an arbitration award." *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *18 (Oct. 22, 2019) (collecting cases).

[13] Mummert asserts that "[i]t is in the best interest of the investing public to separate hearings on customer complaints for damages and advisor requests for expungement." (Mummert Br. at 10.) These proceedings historically often have been separated when a registered person is found not liable and later seeks expungement, but a claimant is not permitted

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2. The Director's Denial of the Arbitration Forum Is Consistent with FINRA Rules

FINRA Rule 13203(a) establishes a gatekeeper role for the Director by authorizing him to exclude inappropriate arbitration claims from the FINRA arbitration forum. Rule 13202(a) provides:

> (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 their representatives.

In its approval order for FINRA Rule 13203, the Commission underscored that the rule empowered the Director to act to preserve the arbitration forum for claims that are consistent with the purpose of the forum. Specifically, the Commission noted that Rule 13203 would "facilitate excluding cases from the [FINRA] arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum." *Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto*, 72 Fed. Reg. 4574, 4602 (Jan. 31, 2007) (hereinafter "*Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration*

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to expunge a prior adverse arbitration award. Under the *Special Arbitrator Roster Proposed Rule Change*, FINRA has proposed that an associated person, who is named in a customer-initiated arbitration (as Mummert was), must request expungement of the customer dispute information arising from the customer's statement of claim during that arbitration or forfeit the ability to request expungement of that same disclosure. This requirement, however, would only apply if the rule proposal is approved by the Commission and would not apply to Mummert.

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Rules”). At the time of these statements, the Commission was approving the *expansion* of the Director’s discretionary authority under FINRA Rule 13203.

The Director properly exercised his authority under FINRA Rule 13203 to deny use of the arbitration forum because Mummert’s claim for expungement was inappropriate and beyond the arbitration forum’s mandate. FINRA Rule 2080 identifies specific, narrow grounds upon which expungement is permitted—i.e., that the complaint is factually impossible, clearly erroneous, false or that that the registered person was not involved in the alleged investment-related sales practice violation. Because a finding by an arbitration panel in the expungement proceeding would directly conflict with the prior arbitrator’s liability finding, the relief sought by Mummert is not contemplated by FINRA’s Code of Arbitration Procedure.[14] *See* FINRA Rules 2080, 12805(c), 13805(c). The expungement of adverse customer awards would invalidate factual and legal issues litigated and determined in final arbitration awards, a result that contravenes FINRA rules, the finality of arbitration awards, and public policy.[15]

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[14] By contrast, a claimant seeking to expunge a customer complaint or other customer dispute information that was not previously adjudicated by an arbitrator could potentially demonstrate the narrow grounds for expungement under FINRA Rule 2080. Therefore, that claimant would not be denied access to FINRA’s arbitration forum to seek expungement. *See, e.g.*, *John Boone Kincaid III*, 2019 SEC LEXIS 4189 (seeking review of an expungement arbitration in which the associated person sought expungement of two customer complaints which did not involve arbitration awards.)

[15] Mummert asserts that “FINRA [r]ules are silent as to whether a claim that is tied to a prior award or settlement is eligible for expungement.” (Mummert Br. at 11.) But FINRA rules need not explicitly provide what types of customer disputes cannot be expunged. Rather, FINRA Rule 2080 provides the narrow circumstances contemplated by FINRA rules related to the expungement of customer dispute information in FINRA’s forum. A plain reading of FINRA Rule 2080 is that some categories of customer dispute information will not meet the strict standards contained in the rule.

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The Director also properly acted as a gatekeeper under FINRA Rule 13203 to prevent the wasteful re-litigation of the same issues in the arbitration forum. The point of Mummert's arbitration claim seeking expungement is to eliminate the reporting of an adverse award in CRD because he allegedly committed no wrong—the precise issue that was litigated in the prior arbitration proceeding in which Mummert participated and was found liable. Thus, the Director's denial of the arbitration forum to Mummert supports the finality of arbitration awards and prevents an unnecessary waste of administrative resources.

3. FINRA's Notice Accurately Informed Mummert of the Director's Decision

FINRA informed Mummert about the Director's decision to deny access to FINRA's arbitration forum in a notice from DRS setting forth the specific grounds on which the prohibition was based. (R. at 32.) *See* 15 U.S.C. § 78o-3(h)(2).[16] Mummert nevertheless claims that the notice communicating the Director's decision was inadequate and did not comply with FINRA rules. (Mummert Br. at 8.) This argument is without merit. The notice explicitly references FINRA Rule 13203(a) as the basis for the denial of forum. (R. at 32.)

FINRA rules do not require that the Director himself communicate his decision to deny the forum. (Mummert Br. at 8.) By referencing FINRA Rule 13203(a), it is axiomatic that the Director exercised his authority under the rules, regardless of whether he personally signed the notice communicating his decision or the notice explicitly referenced that "the Director," as

[16] Section 15A(h)(2) provides that national securities associations are required to keep a record and to provide notice, an opportunity to be heard, and a "statement setting forth the specific grounds" on which its denial is based. 15 U.S.C. § 78o-3(h)(2). FINRA met these requirements in this case.

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opposed to "FINRA," made the decision. In sum, FINRA's notice effectively communicated the Director's decision.

Mummert further contends that FINRA rules permit the Director to deny the forum only in emergencies and "to address circumstances that may require immediate resolution, such as security concerns and other unusual but serious situations." (Mummert Br. at 8.) In making this argument, Mummert quotes a comment letter submitted during the rule approval process, not the Commission. *See Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules*, 72 Fed. Reg. 4574. Mummert also misreads the rule text itself and conveniently ignores the disjunctive "or" in the plain language of the rule, which permits denial of the forum in circumstances like this one. Here, the Director relied on the inappropriate nature of the arbitration claims; the Director was not relying on the health-and-safety powers contained in the rule.

4. The Director's Denial of the Arbitration Forum Is Consistent with the Exchange Act and the Public Interest

Not only was the Director's denial of the arbitration forum pursuant to FINRA rules, it was also consistent with the Exchange Act and FINRA's obligation to provide the investing public, prospective employers, and regulators with accurate and meaningful information.

First, the Director's use of his authority under FINRA Rule 13203 to deny Mummert access to the forum was consistent with the provisions of Section 15A(b)(6) of the Exchange Act because Mummert's attempt to use FINRA's arbitration forum to collaterally attack an adverse customer arbitration award is not consistent with FINRA's mission or the intent of FINRA rules. *See* 15 U.S.C. § 78o-3(b)(6); *see Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules*, 72 Fed. Reg. at 4601 (finding that FINRA Rule 13203 is consistent with the Exchange Act, which requires that FINRA rules be "designed to

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prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest").

The Director's decision to deny Mummert access to the forum also was consistent with the principles of investor protection and the public interest. Investors, broker-dealers and their associated persons, and regulators "share a common interest in a CRD system that contains accurate and meaningful information." 2004 NASD LEXIS at *6. Information expunged from CRD "is no longer available to regulators, broker-dealers, or the investing public," and "regulators and the investing public are disadvantaged when factual information is removed from the CRD." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, 79 Fed. Reg. 43,809, 43,813 (July 28, 2014). The expungement of a prior adverse award violates public policy because it would permanently remove valuable and factually accurate information from an associated person's securities record and thus disadvantage investors, prospective employers, and regulators. *See id.*

In fact, as part of its statutory mandate under the Exchange Act, FINRA is required to collect and maintain registration information about member firms and associated persons. *See* 15 U.S.C. § 78o-3(i)(1)(A). FINRA maintains the registration information in CRD and provides a subset of that information to the public through BrokerCheck. FINRA makes available to the public certain registration information, including information about adverse arbitration awards arising from disputes with customers, because such information is important to investor protection and to the regulation of the securities industry. 15 U.S.C. § 78o-3(i)(1)(B).

The Commission has found that "[h]aving complete and accurate information in CRD is important to regulators, the industry, and the public." *Order Granting Accelerated Approval of a*

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Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the Adoption of FINRA Rule 3110(e) (Responsibility of Member To Investigate Applicants for Registration) in the Consolidated FINRA Rulebook, 80 Fed. Reg. 546, 547 (Jan. 6, 2015). Accordingly, the Commission has determined that expungement of information from CRD "is an extraordinary remedy that is permitted only in the appropriate narrow circumstances contemplated by FINRA rules." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, 79 Fed. Reg. at 43,812-13.

The Commission has recognized the importance of publication of adverse decisions in customer-initiated arbitrations when it approved a FINRA rule change that *requires* FINRA to make information related to arbitration awards against representatives in customer-initiated arbitrations permanently available to the public. *Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, 75 Fed. Reg. 41,254, 41,254-55 (July 15, 2010). The Commission explained, "if registered persons are aware that their CRD information will be available for a longer period of time, it should provide an additional incentive to act consistent with industry best practices," and confirmed that this information has meaningful investor protection and regulatory value. *Id.* at 41,257.

Accordingly, the Director's action denying Mummert access to the arbitration forum was consistent with the Exchange Act and FINRA's purposes to provide the investing public, prospective employers, and regulators with complete information about prior adverse arbitration awards.[17]

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[17] In addition, any expungement proceeding now to re-litigate the issue of liability against Mummert is likely untenable due to the passage of time since the prior arbitration proceeding.

[Footnote cont'd on next page]

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5. Mummert's Due Process and Other Arguments About the Arbitration Forum Lack Merit

Mummert contends that the arbitration forum has shortcomings and that FINRA violated constitutional protections. These arguments have no merit.

Mummert argues that the failure of FINRA's Code of Arbitration Procedure to "specify a standard of proof" in the arbitration forum justifies getting a chance to re-arbitrate the same issues in an expungement proceeding. (Mummert Br. at 9-10.) It does not. The arbitrator, having considered the record, found that Mummert was liable for the alleged misconduct and determined the relief to which the complaining customers were entitled.[18] *See* FINRA Rules 12608, 12904.

Mummert argues that "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." (Mummert Br. at 9.) This argument has no basis in fact or the law and should be rejected. The arbitration panel was not required to make an explicit "factual finding to explain" the award."[19] (Mummert Br. at 10.); *see also* FINRA Rule 12904 (stating that awards "may contain a rationale"). And the failure to do so

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The majority, if not all, of the evidence related to the prior adverse award likely would be unavailable. The prior arbitration proceeding is almost than 22 years old.

[18] Mummert argues that the arbitrator's decision to award damages to the customers less that the amount claimed in the underlying statement of claim and the fact that no punitive damages were awarded somehow minimizes Mummert's liability. (Mummert Br. at 10.) The Commission should reject this non sequitur. The assessed damages do not minimize the arbitration panel's finding of liability against Mummert.

[19] To the extent that Mummert had any concerns about the findings of arbitrator in the customer arbitration, he should have challenged those findings by filing in the appropriate court a timely motion to vacate, modify, or correct the award. There is no evidence that Mummert sought to challenge the underlying customer award in court.

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does not negate the arbitrator's liability finding against Mummert nor indicates, as Mummert claims, that the arbitrator "did not find evidence of any actual wrongdoing on [his] part." (Mummert Br. at 10.)

Finally, Mummert asserts that, even if FINRA had the authority under its rules to deny access to the arbitration forum to those seeking to expunge adverse awards, the "de facto nature of the denial violates fundamental due process standards." (Mummert Br. at 11.) Mummert fails to explain how his right to a fair process was violated. Moreover, it is well established that constitutional protections are inapplicable to FINRA proceedings. *See, e.g.*, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982) (noting that the Fifth and Fourteenth Amendments to the United States Constitution protect individuals only against violation of constitutional rights by the government, not private actors); *Richard A. Neaton*, Exchange Act Release No. 65598, 2011 SEC LEXIS 3719, at *34 (Oct. 20, 2011) ("FINRA is not a state actor and thus, traditional Constitutional due process requirements do not apply to its disciplinary proceedings.").

D. The FAA Establishes the Limited Review of Arbitration Awards Exclusively with Courts

The Director's decision also was correct because allowing Mummert to seek expungement in FINRA's arbitration forum conflicts with the requirements of the FAA. Mummert's avenue for challenging an adverse award was to file a timely motion with an appropriate court to vacate, modify, or correct the award—an avenue he did not pursue. *See, e.g.*, 9 U.S.C. § 12 (requiring any motion to vacate, modify, or correct an arbitration award be made with a court within three months of the award being issued); *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) (relying on the FAA as the limiting grounds on which a court can set aside an arbitral award, and stating that "we do not allow the disappointed party to

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bring his dispute into court by the back door, arguing that he is entitled to appellate review of the arbitrators' decision"); *see also Challenges to an Arbitration Award*, http://www.finra.org/arbitration-and-mediation/decision-award (last visited May 13, 2021) (explaining that FINRA does not have an appeals process through which a party may challenge an adverse arbitration award and that—pursuant to the FAA—only a court may modify, vacate, or correct an award).

Mummert's attempt to secure a second arbitration panel to negate the liability findings underpinning the prior adverse arbitration award therefore conflicts with the FAA. The arbitration award is final and binding. When describing specifically its role in the arbitration process, the Commission has stated that it "cannot overturn or change an arbitrator's decision. In addition, arbitration decisions are not subject to appeal," and a party may only challenge an award by filing a motion to vacate. *See Arbitration, Challenging a Decision, SEC Role*, https://www.sec.gov/fast-answers/answers-arbappealhtm.html (last visited May 13, 2021).

As the Supreme Court has explained, the FAA mandates that only courts review arbitration awards and places strict limits on that judicial review. Notably, Mummert cites no provision or authority within either the FAA or the Exchange Act that permits a second arbitration panel to review the factual and legal findings in the prior adverse award or to correct an arbitration award arising from a dispute with customers. Mummert cites no such authority because there is none. "The [FAA] . . . supplies mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it." *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 582-84 (2008) (citing 9 U.S.C. §§ 9-11). The Court held in *Hall Street* that parties to an arbitration agreement cannot contract for any review

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other than the narrow judicial review set out by the FAA in 9 U.S.C. Sections 10 and 11. *Id.* at 590.

The Court determined that "the [FAA's] three provisions, §§ 9-11, [were] substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. This narrow scope of review is what gives rise to the greater efficiency of arbitration. "Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in postarbitration process." *Id.* (internal quotation marks and citations omitted). In no circumstances does the FAA permit a collateral attack on a final arbitration award, 22 years later, such as the expungement relief sought by Mummert.

As "*Hall Street Associates* makes clear[,] de novo review is entirely incompatible with the expedited process envisioned in the FAA." *Citizen Potawatomi Nation v. OK*, 881 F.3d 1226, 1237 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 375 (Oct. 15, 2018). Mere dissatisfaction with an award is not a good enough reason for a losing party such as Mummert to obtain expanded review not contemplated by the FAA. "Arbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party." *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993). Therefore, allowing Mummert access to FINRA's arbitration forum to essentially re-litigate whether the prior adverse award was correct would be "entirely incompatible" with the FAA. *See Citizen Potawatomi*, 881 F.3d at 1237.

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E. The Director Did Not Waive His Authority to Deny the Arbitration Forum

Mummert argues that even if FINRA had the authority to deny the arbitration forum for his expungement request, FINRA waived its ability to deny forum when it accepted the arbitration and allowed it to proceed partially through the arbitration process. (Mummert Br. at 13-15.) Mummert's argument has no merit. The passage of time and initiation of proceedings do not transform a matter that is inappropriate for arbitration into one that is appropriate. All the reasons supporting the Director's denial of the arbitration forum still apply. The case Mummert cites to support his argument is inapplicable and concerns the waiver of a purchase option under a lease agreement, not the denial of the arbitration forum under Rule 13201(a). *See United States v. Turley*, 878 F.3d 953, 959 (10th Cir. Dec. 28, 2017) (citing *Whitemore v. Zolbe*, 1065 OK 97, 403 P.2d 445, 448 (1965) (concerning a waiver of a right to bring a tort action)). The waiver of a claim or defense by a party in litigation is distinct from the exercise of the Director's rule-based authority to deny the forum when the subject matter of an arbitration is inappropriate. Indeed, allowing such a waiver would restrict the Director's ability to promote the efficacy and efficiency of the arbitration forum by excluding cases beyond and in contravention of FINRA's mandate. Here, the Director appropriately halted the arbitration and denied the forum when he learned that Mummert's expungement request involved a prior adverse arbitration award.

Mummert also cites a case in which he claims the expungement of a prior arbitration award was allowed and argues that FINRA's denial of the forum in his case was thus arbitrary.[20]

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[20] Mummert also asserts without any evidence that he "suspects that there are countless" other such cases. (Mummert Br. at 11.) The Commission should reject Mummert's unsupported speculation. To the contrary, there are numerous cases pending before the Commission in which FINRA has consistently denied forum because the claimant requested expungement of a prior arbitration award. *See In the Matter of the Consolidated Arbitration Applications*, File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919, 3-18934, 3-18988, 3-19013, 3-

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(Mummert Br. at 11.) Assuming that the expungement award that Mummert attached to his brief as Exhibit 1 relates to the customer award attached as Exhibit 2,[21] a close examination of the expungement award indicates that, like here, the expungement claimant also alleged in the face of a written award that the customer dispute had been settled. (Mummert Br. at Ex. 1, p. 3.) The expungement award states that the "Arbitrator did not review the settlement documents related to [the customer dispute] because they could not be located." (*Id.*) The fact that DRS may have missed that this expungement arbitration also involved a prior adverse arbitration award does not negate the appropriateness of the Director's denial of forum in Mummert's case. Contrary to Mummert's claims, it is DRS's practice to attempt to identify claims seeking to expunge prior adverse arbitrations awards when a statement of claim is filed and consistently denies those claims pursuant to Rule 13203(a). (*See* McNamire Declaration at Nos. 2-3.)

IV. CONCLUSION

The Director's decision to deny Mummert access to FINRA's arbitration forum to seek expungement of a prior adverse arbitration award arising from a customer dispute is based on facts that exist, is in accordance with FINRA rules, and is consistent with the purposes of the

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19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574, 3-19588, 3-19611, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312 (Aug. 6, 2020).

[21] This relationship is not obvious from the awards, but we note that Mummert's counsel's firm also represented the claimant in the cited expungement arbitration. (Mummert Br. at Ex. 1, p. 1.)

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Exchange Act. Accordingly, the Commission should dismiss the Mummert's application for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Celia Passaro, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 7,628 words.

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CERTIFICATE OF SERVICE

I, Celia Passaro, certify that on this 14th day of May 2021, I caused FINRA's Brief in Opposition to the Application for Review in the matter of the Application for Review of Ryan William Mummert, Administrative Proceeding No. 3-20210, to be filed through the SEC's eFAP system and served by electronic mail on::

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