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 REPLY TO FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Ryan William Mummert ("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"), challenging a decision by the Financial Industry Regulatory Authority, Inc. ("FINRA") denying Mr. Mummert access to the FINRA arbitration forum. Mr. Mummert filed his Opening Brief in Support of Application or Review on April 14, 2021 ("Opening Brief"), FINRA filed its Brief in Opposition to the Application for Review on May 14, 2021 ("FINRA's Brief"), and Mr. Mummert hereby timely submits this Reply to FINRA's Brief ("Reply Brief").

1. <u>FINRA's actions did not meet the standards of Section 19(f) of the Exchange Act.</u>

FINRA claims that its actions met the standards under Section 19(f) of the Exchange Act, which requires: (1) the specific grounds upon which FINRA's prohibition or limitation is based exist in fact; (2) that such prohibition or limitation is in accordance with FINRA rules; and (3) that

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those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). (FINRA Br. at 6). For the reasons stated below, FINRA has not met these standards.

A. The grounds upon which FINRA's prohibition or limitation is based do not exist in fact.

To satisfy the first requirement under Section 19(f) of the Exchange Act – that the specific grounds upon which FINRA's prohibition or limitation is based exist in fact – FINRA claims that "the Director's denial of the FINRA arbitration forum was based on the fact that Mummert seeks to expunge a prior adverse award." (FINRA Br. at 6). This determination is based on its own assumptions and interpretations of issues of fact. First, as outlined in the Opening Brief, the Director's action of interpreting issues of fact is a violation of the Exchange Act itself, as the Director has no such authority to do so. Even still, FINRA acknowledges that the Director cherry-picked select facts to consider in its interpretation and willfully ignored all other facts that did not coincide with its theory.

In support of its interpretation of the of facts (which again, it has no authority to do) FINRA cites three "facts": (1) "the award is consistent with the format of NYSE arbitration awards issued in 1998", (2) "both the NYSE and Prudential disclosed in CRD that the matter was resolved was an award to the customer"; and (3) "Prudential…indicated in the comments section of the CRD disclosure that it involved a 'total award equal to $3,180.59." (FINRA Br. at 6). Based on these facts alone, without any personal knowledge, FINRA determined that the underlying arbitration resulted in an award. To FINRA's first point, FINRA cites the Declaration of David Carey, attached as Exhibit 2 to FINRA's Motion to Adduce Additional Evidence submitted on February 23, 2021 ("Carey's Declaration"). As of the date of the submission of this Reply Brief, the Commission has not yet ruled on whether to admit Carey's Declaration as evidence in these

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proceedings, and Mr. Mummert has objected to its admission in his Brief in Opposition to FINRA's Motion to Adduce Additional Evidence ("Mummert's Opposition to Evidence Brief"). Mr. Mummert renews and continues his objections to the introduction or consideration of this irrelevant evidence, as explained his Opposition to Evidence Brief. While it is true that the NYSE and Prudential later labelled the disposition an "award", Mr. Mummert contends that was in error, and presented evidence as such during both the expungement hearing and in this application for review. *See,* Submission of Expungement Hearing Exhibits attached as Exhibit B to Mr. Mummert's Partially Unopposed Motion to Adduce Additional Evidence ("Mummert's Motion to Adduce Evidence") at Mummert000050; *see also,* Hearing Transcript attached as Exhibit A to Mummert's Motion to Adduce Evidence at 20-23 ("Hearing Transcript")[1].

The real issue here is that FINRA makes clear it simply ignored any evidence contrary to its belief that this was an "award." This is the case, even though FINRA acknowledges that it was aware of this evidence prior to its factual determination that this was an award, since FINRA claims it learned this was an "award" *during* the expungement hearing (when evidence was presented contradicting the fact that it was an award). *See, id.* It is also important to note that Mr. Mummert's testimony and exhibits clarifying that this was a settlement and not an award were not disputed at point during his expungement proceeding or hearing. In other words, in reaching its factual determination that this was an "award" and not a settlement agreement, FINRA *sua sponte* considered evidence outside the scope of what was presented in the proceedings and completely disregarded the evidence that *was* presented. FINRA then has the audacity to try and mince words from Mr. Mummert's testimony in claiming that Mr. Mummert "effectively concedes that he has

[1] As of the date of the submission of this Reply Brief, the Commission has not ruled on Mummert's Motion to Adduce Evidence. Mummert also notes that although the Motion is labelled as a "partially unopposed" Motion, FINRA subsequently filed notice on April 13, 2021 that it does not oppose the entire Motion.

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no personal knowledge that the customer case was settled" because he used the phrase "upon information and belief"[2] and attempts to attack the evidence that Mr. Mummert presented to support his assertion that this was a settlement. (FINRA Br. at 7-8). However, the issue before the Commission is whether FINRA used appropriate conduct in prohibiting and limiting access to its forum. FINRA has acknowledged that it did not consider the evidence presented by Mr. Mummert, and *only* considered its own belief on the matter.[3]

Therefore, the specific grounds upon which FINRA's prohibition or limitation is based do not exist in fact and its actions do not meet the standards under Section 19(f) of the Exchange Act.

B. FINRA's prohibition or limitation is not in accordance with FINRA Rules.

To satisfy the second requirement under Section 19(f) of the Exchange Act – that FINRA's prohibition or limitation is in accordance with FINRA rules – FINRA claims that expungement of a prior adverse award is "inappropriate for the arbitration forum because FINRA's narrow standards for removing customer dispute information from CRD are incompatible with expunging a prior adverse award." (FINRA Br. at 10). FINRA is essentially claiming that (a) expungement could never be warranted unless FINRA Rule 2080(b)(1) is met, and (b) that if an underlying arbitration results in an award, Rule 2080(b)(1) can also never be met. Both of those premises are false.

Expungement of a customer dispute disclosure can be recommended by a FINRA arbitrator even if there are no factual findings under FINRA Rule 2080(b)(1). FINRA Rule 2080 makes clear that a factual determination under FINRA Rule 2080(b)(1)(A) – (C) means that FINRA may waive

[2] Mr. Mummert does not concede that he has no personal knowledge and testified at the expungement hearing that he did have personal knowledge of facts stated. *See,* Hearing Transcript at 20-23.
[3] FINRA talks of a "lack of personal knowledge" but fails to recognized that Mr. Mummert is the *only* person that has presented evidence that was involved with the underlying proceedings, and therefore the *only* person with personal knowledge here.

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the requirement to name it as a party in court to confirm that award. Nowhere in FINRA Rules does it state that expungement of a customer dispute disclosure can *only* be granted if there are factual findings under FINRA Rule 2080(b)(1), as FINRA seems to allege. To this very point, FINRA Rule 2080(b)(2) also contemplates an additional avenue for expungement where "(A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements." Therefore, FINRA misstates its own rules and erroneously narrows the grounds on which expungement of a customer dispute disclosure may be granted.

FINRA also claims that "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." (FINRA Br. at 11). FINRA confuses the issues here. As mentioned in Mr. Mummert's Opening Brief, in an underlying customer dispute case the issue is whether the respondent committed any wrongdoing and whether that party is liable for damages based on the elements and burdens of proof for the cause of action alleged. In an expungement hearing, the purpose is to determine whether allegations should be removed from an associated person's Registration Records. These issues are not the same, as FINRA alleges. They require different standards of proof and different considerations altogether. Therefore, FINRA's outrageous claim that a "complete reversal" of the prior award would be required here is clearly false. (FINRA Br.

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at 12).[4] An order of expungement of the *disclosure* of an adverse award does not reverse the underlying finding of liability or award for damages.[5]

Likewise, there are no FINRA rules prohibiting the arbitration of an expungement claim arising from a prior adverse award (or in this case, a settlement) of a customer dispute. FINRA's interjection of its *belief* that these types of cases are inappropriate for expungement is a determination of fact for the arbitration panel, and FINRA's conduct of usurping that fact-finding role from their neutral arbitrators violates due process and is in violation of the Exchange Act. *See,* 15 U.S.C. § 78o-3(b)(8) ("The rules of the association are [designed to]…provide a fair procedure for…the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.").

Therefore, FINRA's prohibition or limitation was not in accordance with FINRA rules and its actions do not meet the standards under Section 19(f) of the Exchange Act.

C. FINRA did not apply its rules in a manner consistent with the purposes of the Exchange Act.

To satisfy the third requirement under Section 19(f) of the Exchange Act – that FINRA applied its rules in a manner consistent with the purposes of the Exchange Act – FINRA claims it

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[4] An expungement request does not request that the awarded damages be reversed, just as a request to expunge a criminal record does not demand that the sentence be undone or the conviction be reversed. It is a request to remove the publicly-disclosed publication of that information.

[5] Case in point, Mr. Mummert referenced in his Opening Brief FINRA Case No. 17-01566, *Sean Michael Murphy v. Eastbrook Capital, LLC, et al* attached as Exhibit 1 in the Opening Brief. In the *Murphy* case, after that claimant obtained an award recommending expungement of the disclosure of a prior adverse award from his Registration Records and the expungement award was confirmed in court, the disclosure was removed from the CRD/BrokerCheck, but the award is still in FINRA's Arbitration Award Database and there was no order to reverse or overturn the award. *See,* https://brokercheck.finra.org/individual/summary/2630916#disclosuresSection (Murphy's BrokerCheck record has no reference to the prior adverse award); *see also,* *https://www.finra.org/arbitration-mediation/arbitration-awards-online?aao_radios=all&field_case_id_text=&search=17-01566&field_forum_tax=All&field_special_case_type_tax=All&field_core_official_dt%5Bmin%5D=&field_core_official_dt%5Bmax%5D=* (FINRA's Award Database showing the Award that was expunged from the CRD/BrokerCheck). Mr. Mummert sought identical relief in his Statement of Claim as the claimant in the *Murphy* case did.

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was permitted to decline Mr. Mummert access to its forum because "Mummert's attempt…to collaterally attack an adverse customer arbitration award is not consistent with FINRA's mission or the intent of the FINRA rules" and it is not "consistent with principles of investor protection and the public interest." (FINRA Br. at 17-18). Again, however, FINRA's entire argument rests on its erroneous assumptions that the Director (a) has the authority to decide issues of material fact instead of allowing its neutral arbitration panels to serve that function, and (b) has the authority to make factual determinations on the merits of particular claims whenever it suits them. The issue though is whether FINRA's action of prohibiting or limiting Mr. Mummert's access to its arbitration forum was consistent with the Exchange Act, and that answer is no.

Consistent with the purpose of 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. This forum is touted by FINRA as being a "neutral" arbitration forum where its staff members will not unduly interfere. Yet, apparently that is not the case here. FINRA is saying here that it has the authority to step in to a case where it *believes* that the claimant cannot meet its burden of proof based on its own interpretation of the evidence, and can unilaterally strip a claimant of the ability to seek the requested relief altogether. If FINRA is permitted to engage in such blatant interference in its "neutral" arbitration forum, why even have an arbitration panel at all? This conduct is not consistent with the purpose of the Exchange Act. *See,* 15 U.S.C. § 78o-3(b)(8) ("The rules of the association are [designed to]…provide a fair procedure for…the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.").

FINRA also claims that it was "correct" in denying Mr. Mummert access to its forum because he should have challenged the adverse award by filing a motion with an appropriate court

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to vacate, modify, or correct the award. (FINRA Br. at 21). But again, Mr. Mummert is not seeking to *overturn* or "collaterally attack" the "award" as FINRA constantly and erroneously claims. He is seeking to expunge the publication of that disclosure on his Registration Records, as he is entitled to do under FINRA Rules and the Exchange Act. FINRA's entire line of argument here is completely irrelevant and once again is an attempt to confuse the issues in this application for review. Additionally, this argument again presupposes that the final disposition was in fact an arbitration award, which Mr. Mummert contends it was not.

Finally, FINRA argues that its conduct of usurping the fact-finding role and prohibiting Mr. Mummert access to its forum was consistent with principles of investor protection and public interest. (FINRA Br. at 18). Mr. Mummert does not dispute the fact that having complete and accurate information in the CRD is important to regulators, the industry, and the public. The issue however is that Mr. Mummert has alleged (and has presented evidence at the expungement hearing) that the information published on his Registration Records is *not* complete and accurate information. (R. at 5-6); Hearing Transcript at 26-27 (Mr. Mummert testifying under oath that the allegations against him by the underlying customers are false, clearly erroneous, and factually impossible, based on the evidence presented.). The public is not served by the publication of false, clearly erroneous, or factually impossible information. Yet instead of allowing its trained arbitrators to apply the FINRA rules and determine the issues of material fact, FINRA instead has usurped that role and *sua sponte* determined that Mr. Mummert's allegations and evidence have no merit.[6]

2. <u>FINRA and/or its Director waived its authority to deny forum to Mr. Mummert.</u>

[6] And again, FINRA has made this fact determination based solely on the "evidence" it deems credible (which was not even presented during the course of the expungement proceeding), and apparently has completely ignored all evidence Mr. Mummert has presented to support his claims. Notably as well, Mr. Mummert served the underling customer with notice of the expungement request and their right to participate in the proceedings, and they did not oppose or participate. (R. at 27).

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FINRA argues that allowing a waiver of the Director's ability to deny forum "would restrict the Director's ability to promote the efficacy and efficiency of the arbitration forum…." (FINRA Br. at 24). Yet FINRA fails to explain how it was effective and efficient here to wait until *two weeks after* the case concluded before deciding to deny forum. FINRA relies on the date the Director became aware of the purported adverse award (which again, as explained in Mr. Mummert's Opposition to Evidence Brief and his Opening Brief is irrelevant for purposes of this application for review), but interestingly fails to provide an affidavit or any evidence from the Director about when he actually became aware. In fact, it is the antithesis of effectiveness and efficiency to have denied forum *after accepting forum* and allowing the parties to conduct an arbitration to conclusion during an *eight months period* and expend substantial costs and time doing so. Nevertheless, as pointed out in Mr. Mummert's Opening Brief, the evidence is very clear that FINRA was in fact aware that an "award" was at issue here.[7]

CONCLUSION

For the reasons stated above and as presented in Mr. Mummert's Opening Brief, FINRA improperly limited or prohibited Mr. Mummert access to a fundamentally important service it offers in violation of its own rules and the Exchange Act. FINRA's conduct here is even more egregious considering it accepted forum and allowed Mr. Mummert to engage in a full arbitration

[7] Mr. Mummert stated in his Opening Brief (page 14) and provided evidence of the fact the underlying "award" was referenced in his Statement of Claim and attached as an exhibit; that FINRA served the documents, including the "award," on respondent at the onset of the case; that FINRA coordinated the IPHC where the "award" was discussed; that 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; that Mr. Mummert also submitted to FINRA his Hearing Exhibits 1-19 and FINRA forwarded the Exhibits to the Chairperson in advance of the hearing; that 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 that the "award" is also published on FINRA's Arbitration Award Database.

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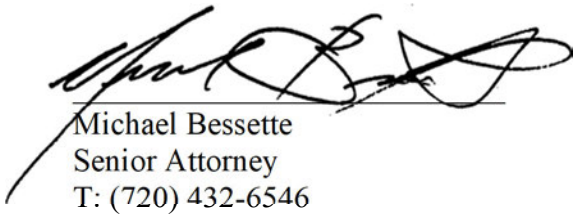
hearing before prohibiting or limiting him access. FINRA's actions were not based in fact, not consistent with its rules, and not consistent with the purpose of the Exchange Act. Therefore, Mr. Mummert respectfully requests an order requiring Mr. Mummert's expungement claim be submitted back to the arbitration panel in FINRA's forum to issue an award on the record that has already been presented to the arbitration panel.

Dated: May 28, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James Bellamy, certify that on this 28th day of May 2021, I caused a copy of Mr. Mummert's Brief in Reply to FINRA's Brief in Opposition to the Application for Review, in the matter of the Application for Review of Ryan William Mummert, Administrative Proceeding File No. 3-20210, to be filed through the SEC's eFAP system and served by electronic mail on:

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