BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of

SHAUN PERRY NICHOLSON

For Review of Action Taken By

FINRA

File No. 3-20529

MR. NICHOLSON'S REPLY BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

INTRODUCTION

Applicant, Shaun Perry Nicholson ("Mr. Nicholson") seeks Commission review of a determination by the FINRA Office of Dispute Resolution ("ODR") to deny Mr. Nicholson access to the Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Rules") Rules 12203(a) or 13203(a). Mr. Nicholson, by and through counsel, timely submitted his Application for Review to the Commission, under Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[1], challenging the Director's determination that Mr. Nicholson's claim is ineligible for arbitration in FINRA's Dispute Resolution Forum ("FINRA's Forum"). On November 4, 2021, Mr. Nicholson submitted his Brief in Support of Application for Review. On December 6, 2021, FINRA submitted a Brief in Opposition to the Application for Review ("FINRA Brief"). Mr.

[1] 15 U.S.C. § 78s(d).

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Nicholson now timely submits his Reply Brief in Support of the Application for Review for consideration by the Commission.

MR. NICHOLSON'S REPLY TO FINRA'S ASSERTIONS IN ITS INTRODUCTION SECTION

FINRA misleadingly mischaracterizes the basis for Mr. Nicholson's application to the Commission. FINRA claims that "[t]his case involves Shaun Perry Nicholson's attempt to relitigate an arbitration claim that he previously lost on the merits in FINRA's arbitration forum" and that "Nicholson did not accept the arbitrator's decision." FINRA Brief, at 1. FINRA is correct in its assertion that Mr. Nicholson did not accept the arbitrator's arbitrary and improper decision, but FINRA omits the fact that a District Court entered an order that the arbitrator exceeded his powers and manifestly disregarded the law in ordering vacatur. CR at 9-10[2]. With a valid vacatur order in hand, Mr. Nicholson then sought to commence a subsequent proceeding in FINRA's arbitration forum, as he had every right to do.

MR. NICHOLSON'S REPLY TO FINRA'S ASSERTIONS IN ITS "FACTUAL BACKGROUND" SECTION

A. FINRA's attempt to relitigate the vacatur order is without merit, irrelevant to this appeal, and not subject to review by the Commission.

FINRA's attempt to relitigate the vacatur order and sidetrack the issue in this appeal is unavailing and should be disregarded, as it is not subject to the Commission's review. Mr. Nicholson had a right to seek vacatur of the arbitration award. FINRA arbitrations, including requests for expungement, are conducted pursuant to the FINRA Code of Arbitration Procedure. The FINRA Code of Arbitration Procedure is a written agreement subject to the Federal

[2] "CR at ___" refers to the page Certified Record filed by FINRA in this case on September 14, 2021 and the corresponding page number.

Arbitration Act ("FAA"). *See, Washington Square Sec., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004). Section 9 of the FAA allows parties to an arbitration to seek vacatur of an arbitration award. 9 U.S.C. § 10. There is no exception that states or implies that arbitrations for expungement are exempt from vacatur. Therefore, Mr. Nicholson had the right to seek vacatur of the underlying arbitration award to which he was a party.

Notably, FINRA has not cited any authority – nor can it – that establishes Mr. Nicholson was required to name FINRA as a party to the Petition to Vacate, as FINRA was not a party to the arbitration. In an expungement request case within FINRA's Forum, FINRA is the neutral forum and not a party to the case. Mr. Nicholson has referenced numerous cases where FINRA was *not* named as a party to a vacatur proceeding and the successful party that obtained the order of vacatur was permitted to refile in FINRA without obstruction by FINRA. *See*, Exhibits 1, 2, 3, and 4 attached to Mr. Nicholson's Brief in Support of Application for Review ("Opening Brief"). Specifically, and most applicable here, is the case cited in the Opening Brief (also attached to Mr. Nicholson Brief as Exhibit 1) – *Ling Yung Wu v. J.P. Morgan, LLC*, FINRA Case No. 18-02825 – where an identical scenario to this case occurred: a claimant requested expungement in FINRA's Forum, the arbitration panel denied the request for expungement, the claimant filed a petition to vacate the award and did not name FINRA or the underlying customers, there was no opposition filed by the named respondents, and the judge issued an order vacating the arbitration award. Yet in that case, when the claimant refiled his request for expungement in FINRA's Forum, as he was permitted to do after obtaining a vacatur order (and as Mr. Nicholson attempted to do here), FINRA permitted that claimant access to its Forum.

Additionally, in Mr. Nicholson's case, FINRA was not directly affected by the underlying arbitration, the award, or Mr. Nicholson's Petition to Vacate because FINRA merely served as the

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neutral arbitration forum for the proceedings. FINRA cannot play both sides by alleging that it is, on the one hand, the *neutral* arbitration forum where claimants are given a full and fair opportunity to seek expungement, and then, on the other hand, a *party* that has an interest in opposing claimants vacatur requests as it sees fit. FINRA has no regulatory duty or authority to intervene in every case across the country where a party seeks vacatur of an award issued in its Forum, nor do they. Pursuant to its own rules (FINRA Rule 2080), parties are only required to name FINRA with respect to an expungement award where they are seeking *confirmation* of the award. *See,* FINRA Rule 2080. FINRA Rule 2080 makes no mention that FINRA shall or even *should* be named when seeking vacatur.

Likewise, the underlying customers were not parties to Mr. Nicholson's expungement request in FINRA's Forum, and were provided notice of that expungement hearing as a courtesy. Again, FINRA has cited no authority (because it does not exist) that establishes a party seeking vacatur of an expungement award must notify the underlying customers of the request for vacatur.

FINRA also implies in its Brief that the vacatur order was improper based upon FINRA's *belief* that it lacked grounds and because there was no opposition from UBS. *See,* FINRA Brief, at 7. These implications are irrelevant here and should be disregarded. The Petition to Vacate was already considered and ruled upon. CR at 9-10. Regardless of whether FINRA believes the vacatur order had merit, the vacatur order stands and is not subject to review and/or overruling by the Commission. *See also,* Exhibit 1 attached to the Opening Brief (judge granting motion to vacate *Wu* FINRA arbitration award with no opposition from respondent J.P. Morgan Securities, i.e. FINRA was not named as a party and that after Wu received the vacatur order without naming FINRA, he was able to refile his expungement request in FINRA's Forum and was granted access by FINRA).

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FINRA's attempt to intervene post-judgment in Mr. Nicholson's vacatur petition is a thinly veiled back-door attempt to use the court to seek enforcement. Such an action is outside the scope of its statutory powers. In *Fiero v. Fin. Indus. Regul. Auth., Inc.*, 660 F.3d 569, 574 (2d Cir. 2011), the 2nd Circuit held that FINRA could not bring a judicial action to enforce the collection of fines without express statutory authority. Even if FINRA was given notice of Mr. Nicholson's petition to vacate prior to the issuance of the order, FINRA has not identified any statutory authority that would allow it to seek judicial enforcement of the underlying arbitration award. There must be some balance imposed on FINRA. If it's role in expungement claims is truly to provide a neutral arbitration forum, then it cannot suddenly change hats and use its regulatory power to try and use the courts to enforce the decisions that arise from that forum. Parties such as Mr. Nicholson have explicit statutory authority to use the court system to seek vacatur of an award under the FAA. FINRA does not.

FINRA's implications that it was required to be named as a party to the vacatur proceeding, that the underlying customers were required to be notified, and that the vacatur order is somehow invalid should be disregarded. These assertions are not at issue here and not subject to review by the Commission.

B. FINRA abused its authority by denying Mr. Nicholson access to FINRA's Forum after the legal and proper vacatur of the award.

FINRA argues in its Brief that Mr. Nicholson was denied access to its arbitration forum "[b]ecause Nicholson previously had accessed the forum and fully litigated expungement of the same customer complaints on the merits." FINRA Brief, at 8. This argument would suggest that FINRA consistently denies forum to any and all statement of claims resubmitted after vacatur of an arbitration award. Of course, this is not the case, as referenced above. FINRA routinely allows

claimants to resubmit claims to FINRA's Forum after courts of have vacated their arbitration awards. This process is contemplated and memorialized in the in 9 U.S.C. § 10, the statutory frameworks of most (if not all) states, and in FINRA's own rules and guidance.[3] Thus, FINRA has not consistently applied the non-sensical standard it appears to have alleged in its Brief: that all arbitration awards issued after hearings in FINRA's Forum are final decisions that are not subject to vacatur. Such a standard is clearly inconsistent with the law, as stated above.

Nonetheless, even if FINRA has suddenly decided that this will be their new standard for denying access to FINRA's Forum in the future, its own rules do not allow for the denial of forum on those grounds. Pursuant to FINRA Rule 13203(a) (the rule FINRA cited as its basis for denying Mr. Nicholson access to its Forum), FINRA may only deny forum in limited circumstances: (a) if the subject matter of the dispute is inappropriate, or (b) if accepting the matter would pose a risk to the health of safety of arbitrators, staff, or parties or their representatives. FINRA Rule 13203(a). Neither of these grounds apply in Mr. Nicholson's case. Clearly, the subject matter is not inappropriate for FINRA's Forum as it pertains to the expungement of disclosures from the regulatory databases that FINRA owns, maintains, and operates, and FINRA offers expungement through its Forum. There is also no evidence that accepting the matter would have placed the participants in any risk of danger to their health of safety.

MR. NICHOLSON'S REPLY TO FINRA'S ASSERTIONS IN ITS "ARGUMENT" SECTION

A. The Commission Has Jurisdiction to Review the Director's Determination

[3] *See*, https://www finra.org/arbitration-mediation/decision-award (FINRA acknowledges on their own website under the section labelled "Challenges to an Arbitration Award", that "under federal and state laws, there are limited grounds on which a court may hear a party's appeal on an award. Specifically the law permits a district court to vacate or overturn an arbitration award if it finds that:...the arbitrators exceeded their powers...[or a] Manifest Disregard of the Law", both grounds which were cited in Mr. Nicholson's Petition to Vacate).

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The Commission has jurisdiction over this appeal pursuant to Section 19(d)(2) of the Exchange Act, which authorizes the Commission to review an action taken by an "SRO that 'prohibits or limits' 'access to services offered' by the SRO to any person." 15 U.S.C. § 78s(d); *see also*, SEC Release No. 72182. In determining whether the Commission has jurisdiction under this standard, the Commission asks "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important." *See*, *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (the "Consolidated Matter").

As to the first prong, the Commission has already determined that "[b]ecause the Director's decision that a claim is not eligible for arbitration deprives the applicants of the ability to participate in that service with respect to that claim, it effects a prohibition of access to the arbitration forum." *See*, Consolidated Matter, at 4. Here, FINRA did just that – determined that Mr. Nicholson's claim was not eligible for arbitration, which therefore deprived Mr. Nicholson of the ability to participate in a service that FINRA offers with respect to his claim for expungement. This is a prohibition or limitation of access to the arbitration forum that satisfies the first prong of the jurisdictional test.

The second prong is also satisfied here – that the service FINRA denied Mr. Nicholson access to is "fundamentally important service" offered by FINRA. *See*, Consolidated Matter, at 4-5. Again, the Commission has also already determined that FINRA's Forum is a fundamentally important service it offers. *See*, *id*., at 5-6. ("we find that FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO."). Therefore, the Commission has jurisdiction over Mr. Nicholson's appeal here.

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FINRA claims that the Commission does not have jurisdiction here because it did not deny Mr. Nicholson access to its Forum, since it allowed Mr. Nicholson to "fully litigate" his claims in its forum initially and the case resulted in a "final written award". *See*, FINRA's Brief, at 8. Except that the case did not result in a final written award, since that award was vacated. Again, FINRA is essentially claiming that it has the authority to select any case where the award was vacated and chose, at a whim, which ones it will allow access to its Forum and which ones it will not. The Exchange Act does not provide this plenary authority to FINRA, as discussed above. Even if FINRA did have the authority to discriminate against claimants without rhyme or reason, which it does not, that still not does not change the fact that FINRA's determination that Mr. Nicholson's claims are "not eligible for arbitration" is in fact a prohibition or limitation of his access to its forum and thus subject review by the Commission. *See*, Consolidated Matter, at 4-5.

FINRA cites the Commission's decision in *Aiguier* in support for its argument on this point, stating that the Commission in that case dismissed the application for review for lack of jurisdiction because "arguments regarding the merits do not create jurisdiction under Section 19(d)(2)." FINRA Brief, at 8, citing Exchange Act Release No. 88953, 2020 SEC LEXIS 1430 (May 26, 2020). However, the *Aiguier* decision is highly distinguishable from Mr. Nicholson's Application for Review and not relevant here. In *Aiguier*, Mr. Aiguier sought expungement of four customer dispute disclosures in FINRA's Forum, and after a hearing, received an award recommending expungement of two and denying expungement of the other two. *Aiguier*, at *2. Mr. Aiguier then confirmed that arbitration award in court – i.e. Mr. Aiguier never sought vacatur of that arbitration award. Id., at *3-4. After the case was closed and the award confirmed, Mr. Aiguier discovered potential exculpatory evidence and filed a motion to reopen the original FINRA proceeding in order to introduce new evidence to the original arbitration panel. *Id*. FINRA refused to submit Mr.

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Aiguier's motion to the arbitration panel pursuant to FINRA Rule 13905, which provides "limited circumstances" under which parties may "submit documents to arbitrator(s) in cases that have been closed." *Id*. Mr. Aiguier sought Commission review of FINRA's refusal to submit a motion to the original arbitration panel after the award was confirmed. *Id*. The Commission found that case to be merits-based and determined it lacked the jurisdiction to review FINRA's decision. *Id*. at *4-5. Critically, the Commission stated that granting Mr. Aiguier's requested relief "would require us to set aside the award." *Id*., at *5. On the contrary, Mr. Nicholson's award has already been set aside (in part). Mr. Nicholson is also not asserting that the Commission has the jurisdiction to decide issues of merit related to his underlying case. Rather, Mr. Nicholson has asserted that the Commission has the jurisdiction to review whether FINRA's seemingly arbitrary decision to deny him access to FINRA's Forum was permitted under FINRA Rules 12203(a) or 13203(a), as FINRA claims.

Similarly, FINRA's citation of *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189 (Oct. 22, 2019) is not persuasive or applicable to this case. *See,* FINRA Brief, at 10. In *Kincaid,* the applicant sought Commission review of an *arbitrator's* decision to deny his claim based on the application of FINRA Rule 13206 after FINRA accepted the claims allowed Kincaid access to its arbitration forum. *Id.* at 4-5. Kincaid's application for review therefore did not involve a decision by *FINRA* that limited or prohibited his access to a fundamentally important services FINRA offers, since "FINRA accepted Kincaid's statement of claim and allowed him access to its arbitration forum." *Id.* at 5. That is not what happened here. It is FINRA that denied Mr. Nicholson access to its forum. CR at 21. (FINRA states in its letter that "FINRA denies the forum" and "the Director denies the use of the forum".).

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The issue presented in the case however is analogous to the issue in the Consolidated Matters. In the Consolidated Matters, FINRA issued a notice of denial of forum notice to each of the applicants based on FINRA Rules 12203(a) or 13203(a) because FINRA believed that the applicants' claims were "ineligible" for arbitration. *See,* Consolidated Matter, at 4-5. In that situation, the Commission found it had jurisdiction to review FINRA's actions because FINRA denied the applicants access to a fundamentally important service that it offers – arbitration for expungement cases. *Id.* That scenario is identical to the facts of this case. Thus, the Commission has jurisdiction to determine whether the prohibition and/or limitation of Mr. Nicholson's access to FINRA's Forum was improper.

B. FINRA's attempts to justify its abuse of authority under the Exchange Act is without merit.

FINRA next argues that its decision to deny Mr. Nicholson access to FINRA's Forum was based on investor protection concerns. *See,* FINRA Brief, at 10. Specifically, FINRA feigns concern that "investor protection would be profoundly undermined if a party who lost an expungement request on the merits could keep relitigating the request in FINRA's arbitration forum until he obtained the desired outcome." *Id.* This argument is without merit. The federal and state laws have provided mechanisms for judicial review and vacatur of arbitration awards, since FINRA does not have its own review process for improper arbitration awards. The federal and state governments, and FINRA, for that matter, never intended for arbitration awards to be final, binding judgments not subject to any form of oversight, review, and/or scrutiny. Mr. Nicholson is not relitigating the same issues until he obtains his desired outcome, as FINRA alleges. Instead, he has engaged in the proper legal processes for invalidating an arbitration award that the court has deemed to be erroneous. FINRA cannot host an arbitration forum purported to be in

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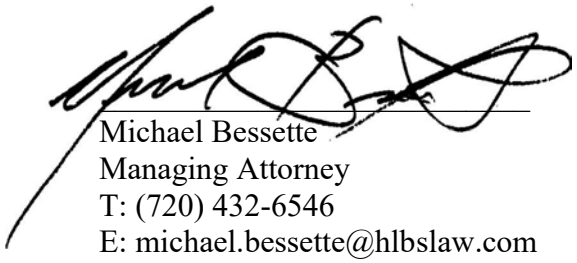
compliance with the FAA and then argue that claimants have no right to pursue the avenues made available by the FAA to vacate improper arbitration awards.

CONCLUSION

The Commission has jurisdiction to review FINRA's decision to deny Mr. Nicholson access to its arbitration forum, and FINRA abused its authority in doing so. Therefore, Mr. Nicholson respectfully requests an order allowing Mr. Nicholson to bring his expungement claim through FINRA's arbitration forum.

Dated: December 17, 2021

Respectfully submitted,



Michael Bessette
Managing 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, certify that on December 17, 2021, I caused a copy of the foregoing Reply Brief in Support of the Application for Review the matter of the Application for Review of Shaun Perry Nicholson., Administrative Proceeding File No. 3-20529 to be filed through the SEC's eFAP system and served by electronic mail on:

The Office of the Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, D.C. 20549-1090

Michael M. Smith
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
michael.smith@finra.org

Megan Rauch
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
megan.rauch@finra.org

Alan Lawhead
Vice President and Director – Appellate Group
Office of General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
alan.lawhead@finra.org

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

[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