

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

In the Matter of the Application of
JONATHAN WILLIAM LONSKE
For Review of Action Taken by
FINRA
File No. 3-20633

MR. LONSKE’S OPENING BRIEF IN SUPPORT OF HIS APPLICATION FOR REVIEW

Applicant, Jonathan William Lonske, (“Lonske”), by and through his counsel, seeks Commission review of a determination by the Director of FINRA Office of Dispute Resolution (“Director”) to deny Mr. Lonske 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. Lonske timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”),¹ challenging the Director’s determination that Mr. Lonske’s claim is ineligible for arbitration in FINRA’s Dispute Resolution Forum (“FINRA’s Forum”).

¹ 15 U.S.C. § 78s(d).

I. FACTUAL BACKGROUND/PROCEDURAL HISTORY

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Office of Dispute Resolution, which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The Office of Dispute Resolution’s authority is limited to administration of the forum, not regulatory policy decisions.

FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system known as BrokerCheck.² BrokerCheck, the online, public reporting system, includes the wide-spread disclosure of customer complaints against each associated person of a FINRA member firm. The purpose of the CRD and BrokerCheck systems is to: (1) to create a regulatory system for financial advisors to improve overall regulation of advisors; (2) to make information about financial advisors available to the public; and (3) to provide financial advisors an efficient automated filing system. FINRA requires member firms to report all customer complaints that meet specific requirements to FINRA. FINRA will then publicly disclose these complaints, absent any determination of merit or factual basis. As discussed below, the only viable remedy FINRA provides in such a case is to remove false or misreported customer complaints pursuant to FINRA Rule 2080.

Mr. Lonske has been a financial services professional since January of 1995. He is currently an investment registered representative with Kestra Investment Services, LLC (“Kestra”) in Boston, MA. In November of 2008, Mr. Lonske began giving investment advice to

² 15 U.S.C. 78o-3(i)(1).

Mr. James R. Tye regarding the O'Brien Family's investment portfolio. In or around October 3, 2017, a customer dispute brought by Mrs. Randy O'Brien ("Mrs. O'Brien"), acting as trustee of the O'Brien Family Irrevocable Trust U/A DTD 08-15-2011, the O'Brien Family Irrevocable Life Insurance Trust Dated 10-20-2009, William Francis O'Brien individually, as trustee of the William F. O'Brien, Jr. Trust U/A/D 09-27-2005 amended 2011, Mrs. Randy O'Brien individually, as trustee of the Randy O'Brien Trust U/A/D 09-27-2005 Amended 2011, and on behalf of WR Asset Management, LLC, WR Acquisitions LP, Molly O'Brien UTMA, and Randy O'Brien as Custodian for Conor O'Brien U/MA/UTMA (collectively, "Mrs. O'Brien et al.") was reported to Mr. Lonske's CRD and BrokerCheck records. On December 8, 2015, the dispute was assigned as FINRA Arbitration Case #17-03106.

From September 23, 2019, to March 11, 2020, sixteen record hearings were held. Though Mr. Lonske testified at the hearings, he does not recall his request for expungement ever being addressed at the Hearing. *See*, Exhibit 1 at 8-9. On or about March 19, 2020, the arbitration panel in the underlying arbitration proceeding denied Mrs. O'Brien et al.'s claims in their entirety. There have never been any additional hearings to address the merits of Mr. Lonske's request for expungement. *See*, Exhibit 1 at 11.

On September 20, 2021, Mr. Lonske submitted a Statement of Claim to FINRA requesting a hearing for the expungement of his CRD record as it relates to the customer dispute disclosure occurrence number 1955134 ("the Occurrence"). On September 22, 2021, Mr. Lonske received notice that the Director of FINRA Office of Dispute Resolution ("the Director") denied him access to the FINRA forum for arbitration, claiming that the Director determined that Mr. Lonske's request for expungement of the Occurrence "is not eligible for arbitration," citing Industry Code

Rule 13203. In response, Mr. Lonske submitted his Application for Review with the Commission. Mr. Lonske now timely submits his Opening Brief in support of his Application for Review.

II. ARGUMENT

A. The Commission has jurisdiction over this appeal pursuant to the Exchange Act.

The Exchange Act authorizes the Commission to review an action taken by an SRO that “prohibits or limits any person in respect to access to services offered” by the SRO. 15 U.S.C. § 78s(d). The Commission has explained, “[a] denial of access involves a denial or limitation of ‘the applicant’s ability to utilize one of the fundamentally important services offered by the SRO.’” *Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *4 (Sept. 30, 2016). The Commission has determined that the FINRA forum for expungement is a fundamentally important service.³

A service offered by an SRO is “fundamentally important” if it is “central to the function of the SRO.” *Id.* at 5. Mr. Lonske was denied access to this fundamental service when FINRA prohibited him from using their forum for expungement. Mr. Lonske’s recollection of events is evidenced by his sworn affidavit, made upon penalty of perjury, and offered before this Commission in his corresponding Motion to Adduce.⁴ Based upon Mr. Lonske’s recollection, Mr. Lonske requested expungement in the underlying arbitration proceeding, but the arbitration panel did not consider or make any findings regarding his request.⁵

³ “[G]iven FINRA’s chosen structure and the scope of services it offers to members and third parties, we find that FINRA’s service of providing arbitration of expungement claims is “fundamentally important” and central to its function as an SRO.” See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (the “Consolidated Matter”).

⁴ Mr. Lonske requested the hearing transcript from FINRA, but FINRA has destroyed and no longer maintains that record.

⁵ “Before ruling on requests to recommend expungement of customer dispute information under Rule 2080, the panel must complete the following under Rule 12805: Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement... Indicate in the arbitration award which of the Rule 2080 grounds for expungement serves as the basis for recommending expungement and provide a brief written explanation of the

The only evidence that the Panel considered Mr. Lonske's expungement request is denial of the claim. The denial of the claim for expungement without a hearing on the merits defies FINRA's own rules. By not providing a hearing on the issue of expungement FINRA limited access to the arbitration forum.

B. There are No codified FINRA rules or Commission matters that limit Mr. Lonske from accessing the Forum.

There is no FINRA rule that limits an associated person such as Mr. Lonske from accessing FINRA's forum for a hearing on expungement more than once. FINRA claims that it is unable to provide a forum for associated persons more than once to by which they can be heard on the merits of expungement. To support its claim, FINRA relies on its Arbitration Guide.⁶

Moreover, Mr. Lonske was never given a hearing on expungement, so it cannot be argued that he has had access to the forum for expungement on a previous occasion. This contrasts with previous cases before the commission such as *Kincaid*⁷ and *Aiguier*⁸ where the applicants in those cases had clear access to the forum specifically for expungement, and hearings on the merits of expungement occurred. The arbitrator in *Kincaid* discussed, reviewed, and sought additional briefing relating to a procedural rule concerning the requested expungement relief. As noted by this Commission, "Kincaid through his counsel, actively participated in that service." *Id.* The applicant in *Kincaid* was given an opportunity to be thoroughly heard on the merits of expungement.

reasons for the panel's finding...Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief." See, FINRA Dispute Resolution Services Arbitrator's Guide, pg. 75, available at <https://www.finra.org/sites/default/files/arbitrators-refguide.pdf>; see also, FINRA 12805 available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12805>.

⁶ FINRA states in its Arbitration Guide that "[w]hen an arbitration panel has issued an award denying a broker's expungement request, the broker may not request expungement in another arbitration case." Pg. 79 of FINRA's Arbitration Guide. Notably, no FINRA rule or applicable authority is cited for this statement, as none exist.

⁷ *In the Matter of the Application of John Boone Kincaid III for Rev. of Action Taken by Finra*, Release No. 87384 (Oct. 22, 2019)

⁸ *In the Matter of the Application of Dustin Tylor Aiguier for Rev. of Action Taken by Finra*, Release No. 88953 (May 26, 2020)

In the *Aiguier* case, the claimant filed two statements of claim in September 2017 in FINRA’s arbitration forum – later consolidated into a single case – against NYLife requesting expungement of four customer dispute disclosures published on his CRD and BrokerCheck records. Similarly, to *Kincaid*, a hearing was held on the merits of Aiguier’s expungement requests. The case concluded with a written award denying expungement of the two customer complaints on July 9, 2018. FINRA then closed Aiguier’s expungement case. Both the *Kincaid* and *Aiguier* matters are factually distinguishable from Mr. Lonske’s. Unlike the above-mentioned cases, Mr. Lonske has never been provided an opportunity to be heard on the merits of expungement, nor has a panel examined relevant facts in light of FINRA’s expungement rules.⁹

As the Tenth Circuit has stated with respect to FINRA’s predecessor, the NASD, an arbitration hearing lacks fundamental fairness where a party did not have an “opportunity to be heard and to present relevant and material evidence and argument before the decision makers.” *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001). For FINRA’s claim that Mr. Lonske had access to the forum for expungement to hold water, FINRA must provide proof Mr. Lonske a meaningful opportunity to be heard and presented evidence regarding the requested relief.

C. Vacatur is not a remedy available to Mr. Lonske

Mr. Lonske was not able to seek vacatur as a remedy to the denial of his expungement claim. The arbitration panel, while denying expungement without hearing, also denied Mrs. O’Brien et al.’s claims against Mr. Lonske. It would not be in Mr. Lonske’s best interest to vacate an award that went in his favor with respect to the underlying customer complaints, and this remains true despite the fact Mr. Lonske was not heard on the merits of his expungement claim. The vacatur of an arbitration award is meant to leave the parties as they were at the beginning of

⁹See, e.g., FINRA Rules 2080 and 13805; see also, <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

the process before the award. See, *Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1005 (7th Cir. 2000). Moreover, the courts have long established specific grounds for overturning, an arbitration award, “[a] successful challenge to an arbitration award, apart from section 10, depends upon the challenger's ability to show that the award is (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact.” See, *McCarthy v. Citigroup Glob. Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); See also *Mountain Valley Prop., Inc. v. Applied Risk Servs., Inc.*, 863 F.3d 90, 95 (1st Cir. 2017).

In sum, the claim against Mr. Lonske was denied. While FINRA has continually indicated in multiple matters now that it believes the proper procedure for expungement is vacatur, that is simply not a viable option for those in Mr. Lonske’s position. FINRA specifically created their expungement rules to address matters like Mr. Lonske where the claims were clearly erroneous and therefore dismissed.

D. There are distinct differences between customer arbitration and arbitration for expungement.

Given that the Customer Hearing denied Mr. Lonske's claim for expungement, while at the same time denying the customer claims brought against him, it is clear that the panel was not governed by the same standard of an expungement hearing. If the Panel followed the same standard of expungement hearing, then contradictory decisions of the panel would not have occurred. Because a customer arbitration hearing has different standards from a hearing focused on expungement, it is more likely for completely contradictory opinions such as the one in the arbitration award to arise.

The differences are quite clear between a customer arbitration hearing and expungement. FINRA itself maintains that Rules 2080, 2081, and 12805 “do not apply to intra-industry disputes” and do not require an arbitrator reviewing a request for expungement relief in an intra-industry dispute to “address the standards set forth in Rule 2080 or the procedural requirements under Rule 12805.” Moreover, customers are not required to be present at an expungement hearing, and FINRA arbitrators will not hold nonparticipation of the customer as a factor bearing in favor of expungement. In a customer dispute hearing, the focus is on ensuring the correction of any alleged harm to the investor – not apportioning the relative rights and responsibilities between the financial advisor and the member firm.

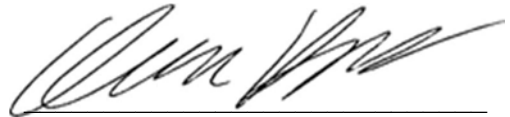
Because of these differences, it strains credulity to argue that Mr. Lonske was given a fair hearing on the issue of expungement. Mr. Lonske requested relief, the hearing that ensued exclusively reviewed a customer dispute – a fundamentally different question – and did not meaningfully address expungement. No hearing on the issue of expungement in accordance with FINRA’s Rules ever took place. The award in question denies expungement without a hearing even though a substantive determination regarding the requested expungement was needed, particularly since the Panel also decided that Claimants’ claims were denied in their entirety. Because Mr. Lonske has not been heard on the merits of expungement, the underlying customer arbitration has no bearing on Mr. Lonske’s ability to seek expungement in a subsequent occasion.

CONCLUSION

Mr. Lonske sought expungement of a disclosure in FINRA's arbitration forum pursuant to FINRA Rules, yet FINRA unilaterally decided to deny Mr. Lonske access to its arbitration forum – a service that it purports to offer to other associated persons – in violation of the Exchange Act. This service that FINRA offers (and even requires) of associated persons, like Mr. Lonske, is a fundamentally important service to the function of FINRA. Therefore, the Commission has jurisdiction over Mr. Lonske's application for review.

Dated: December 20, 2021

Respectfully submitted,



Owen Harnett,
Managing Attorney
T: (720) 515-9069
E: owen.harnett@hlbslaw.com
HLBS Law
9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021

CERTIFICATE OF SERVICE

I, James Bellamy, certify that on December 20, 2021, I caused a copy of the foregoing Opening Brief in Support of the Application for Review in the matter of Jonathan William Lonske Administrative Proceeding File No. 3-20633 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
(202) 728-8177
michael.smith@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
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

EXHIBIT 1

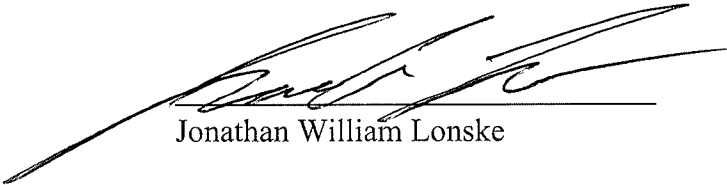
AFFIDAVIT OF JONATHAN WILLIAM LONSKKE

I, Jonathan William Lonske, do hereby swear that the information contained herein is complete and accurate to the best of my knowledge. I do depose and say:

1. My name is Jonathan William Lonske and I reside in Boston, MA.
2. I am a registered representative and investment adviser representative registered with Kestra Investment Services, LLC (“Kestra”) in Boston, MA.
3. On or about November 17, 2017, Seth E. Ellis as Trustee of the O’Brien Family Irrevocable Trust U/A DTD 8-15-2011, the O’Brien Family Irrevocable Life Insurance Trust Dated 10-20-2009. William Francis O’Brien, individually and as a TTEE for William F. O’Brien, Jr. Trust U/A/D 09-27-2005 amended 2011, Mrs. Randy O’Brien, individually and as TTEE Randy O’Brien Trust U/A/D 09-27-2005 Amended 2011, WR Asset Management, LLC, WR Acquisitions LP; Molly O’Brien UTMA, Randy O’Brien as Custodian for Conor O’Brien U/MA/UTMA (“Underlying Claimants”) submitted a Statement of Claim filed in the case captioned FINRA # 17-03106, *The O’Brien Family Irrevocable Trust U/A DTD 8-15-11 The O’Brien Family Irrevocable Life Insurance Trust Dated 10-20-09 Randy and William Francis O’Brien JT. TEN. (JOINT/ROS) Mrs. Randy O’Brien, Individually William F. O’Brien, Jr. Trust U/A/D 09-27-2005 Amended 2011 Randy O’Brien Trust U/A/D 09-27-2005 Amended 2011 WR Asset Management, LLC Seth E. Ellis The O’Brien Family Irrevocable Trust WR Acquisitions LP WR Asset Management, LLC Seth E. Ellis Esq. The O’Brien Family Irrevocable Trust MSB FBO WR Acquisitions, L.P. - WR Asset Management, LLC William Francis O’Brien, Jr. Mr. William Francis O’Brien, Jr., Individually Randy O’Brien as the owner of her Traditional IRA William F. O’Brien, Jr. as the owner of his ROTH IRA Randy O’Brien as the owner of her ROTH IRA 529 Plan FBO Molly O’Brien UTMA 529 Plan FBO Conor O’Brien UTMA vs. Morgan Stanley, Jonathan William Lonske* (“Underlying Action”).
4. Throughout the Underlying Action, I was represented by counsel of fellow Respondent, Morgan Stanley, and not represented by an independent counsel of my choosing.
5. I denied the merits of the allegations made by the Underlying Claimants in the Underlying Action then and still do to this day.
6. Morgan Stanley submitted on my behalf in its Statement of Answer a request for expungement of references to the Underlying Action from my Central Registration Depository (“CRD”) record.
7. On or about September 23, 2019, to March 11, 2020, arbitration hearings were conducted (“Hearings”) to address the Underlying Claimants’ cause of action.
8. I was present and testified at the Hearings.
9. At the Hearings, I do not recall the request for expungement of the Underlying Action ever being addressed by anyone nor do I recall the standard for expungement being addressed.

10. On or about March 19, 2020, the arbitration panel in the Underlying Action denied Claimants' claim in their entirety.
11. No additional hearing to address my request for expungement was ever held.

I, Jonathan William Lonske, hereby declare the above affidavit was written and signed absent duress, and in good faith.

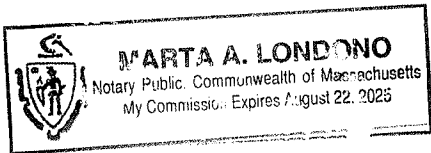

Jonathan William Lonske

12/3/2021
Date

COMMONWEALTH OF MASSACHUSETTS, COUNTY OF SUFFOLK

On this 3 day of ~~November~~ ^{12th} December 2021, before me, Jonathan Lonske personally appeared (or satisfactorily proven) to be the person whose name is subscribed in the within Affidavit, and, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit and that the matters stated herein are true to the best of his/her information, knowledge, and belief.

In witness whereof, I hereunto set my hand and official seal.



Marta Londono
Notary Public
Notary

Title

My commission expires Aug 22/2025