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

Administrative Proceeding No. 3-20633

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

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The Commission should dismiss Jonathan William Lonske's application for review because he does not identify any FINRA action subject to review under Section 19(d) of the Securities and Exchange Act of 1934 (the "Exchange Act"). Contrary to Lonske's assertions, FINRA did not deny Lonske access to its arbitration service to seek expungement of a customer complaint from his Central Registration Depository® ("CRD®") record. Lonske fully litigated his expungement claim to a final award in FINRA's arbitration forum. FINRA did, however, refuse to reopen that award and allow Lonske to litigate his expungement claim a second time. The Commission has held that FINRA's refusal to reopen an award and allow relitigation of the same claim does not constitute a denial of access to FINRA's arbitration service.

Lonske fully litigated his expungement claim in an arbitration proceeding initiated by his customers, Randy O'Brien and her family. In 2017, the O'Briens filed a statement of claim against Lonske and his firm, Morgan Stanley, alleging misconduct in the handling of their investments. In their answer, Lonske and Morgan Stanley denied liability and

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requested expungement of the O'Brien's complaint from Lonske's CRD® record. After an evidentiary hearing, during which Lonske was represented by counsel and testified, the arbitration panel issued an award denying the O'Brien's claims while also denying Lonske's request for expungement.

In 2021, Lonske sought to litigate his expungement claim a second time by filing a new statement of claim with FINRA's Dispute Resolution Services ("DR"). The Director of DR determined that Lonske's claim was not appropriate for arbitration because Lonske had litigated the same claim to an award. Lonske filed an application for review, and argues that the Director's determination denied him access to FINRA's arbitration service.

The Commission should dismiss Lonske's application for review because the Director's determination did not deny Lonske access to any service offered by FINRA. Lonske accessed FINRA's arbitration service during the O'Brien's arbitration proceeding, which led to an award denying his claim. Under FINRA's rules, that award is final and not reviewable, and FINRA has no procedures for reopening it. For that reason, the Director's refusal to reopen the award and allow Lonske to seek a new award did not constitute a denial of access to any service offered by FINRA. There is thus no FINRA action subject to review under Section 19(d), and the Commission therefore should dismiss Lonske's application.

I. Factual Background

A. Expungement of Customer Dispute Information from CRD®

The Exchange Act requires FINRA to collect and maintain registration information about member firms and their associated persons. 15 U.S.C. § 78o-3(i). FINRA maintains this information in CRD®. Regulators use the information in CRD® in connection with their licensing and regulatory activities, and firms use it when making hiring decisions. *See Order*

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Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information, 79 Fed. Reg. 43809 (July 28, 2014). Additionally, FINRA releases some of the information to the investing public through BrokerCheck®. *Id.* Among the information maintained in CRD® and publicly released through BrokerCheck® are customer complaints, arbitration claims, and awards that may result from those claims, collectively, "customer dispute information." *Id*.

The Commission has recognized that "[t]he completeness of information in the CRD, including accurate customer dispute information, is critical for the protection of investors and effective regulatory oversight," and that when factual information is expunged from CRD®, "both regulators and the investing public are disadvantaged[.]" *Id.* at 43812-813. The Commission has therefore encouraged FINRA "to assure that expungement in fact is treated as an extraordinary remedy that is permitted only where the information to be expunged has no meaningful investor protection or regulatory value." *Id.* at 43813.

An associated person who wishes to have customer dispute information removed from CRD® must seek expungement pursuant to FINRA Rule 2080. *Id.* at *43810. The rule identifies three narrow circumstances that justify 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). 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 expungement. *See* FINRA Rules 12805, 13805. 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).

B. After a Hearing on the Merits, a FINRA Arbitration Panel Denies Lonske's Request to Expunge the O'Brien's Complaint

Lonske entered the securities industry in 1995. RP 159. Between June 2009 and November 2020, Lonske was registered with Morgan Stanley. RP 157. In October 2017, Lonske's customers, Randy O'Brien and her family, filed a customer complaint against Lonske alleging, among other things, "unsuitability with respect to investments[.]" RP 131-32, 183.[1] The O'Brien's complaint was recorded on Lonske's CRD® record as Occurrence No. 1955134. RP 182. In December 2017, the O'Brien's complaint evolved into an arbitration when they filed a statement of claim with DR. RP 1-48; 184. In January 2018, Randy O'Brien's brother, James R. Tye, also filed a statement of claim with DR against Lonske and Morgan Stanley. RP 129, 132.

In February 2018, Morgan Stanley's attorney, on behalf of the firm and Lonske, filed one answer to both the O'Brien's and Tye's statements of claim. RP 49-54, 110.[2] In the answer, Lonske and Morgan Stanley denied liability, sought expungement from Lonske's CRD® record

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[1] The O'Briens became Lonske's customers while Lonske was registered with Citigroup Global Markets Inc. *See* RP 132. When Lonske moved to Morgan Stanley in November 2009, the O'Briens apparently moved their accounts to Morgan Stanley. *See* RP 132.

[2] In their answer, Lonske and Morgan Stanley asked the arbitration panel in the O'Brien's case to combine their claims with Tye's. *See* RP 52-53. The record does not show how the panel ruled on that request. Tye's claims did not result in a final arbitration award because Morgan Stanley settled with Tye. *See* RP 132.

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of the O'Brien's and Tye's customer complaints, and asked the arbitrator to award Lonske and Morgan Stanley their costs. RP 52.

The O'Brien's case proceeded to arbitration, during which Lonske and Morgan Stanley were represented by counsel. *See* RP 110. Sixteen hearing sessions were held in September 2019 and March 2020. RP 113. Lonske was present at the hearings and testified. Affidavit of Jonathan William Lonske ¶ 8 (attached as Exhibit A to Lonske's Brief).

In March 2020, the arbitration panel issued an award denying the O'Brien's claims while also denying Lonske's request for expungement of the O'Brien's complaint. RP 109-14. In the award, the panel acknowledged that Lonske and Morgan Stanley had requested "expungement of Respondent Lonske's CRD records[.]" RP 111. The panel, however, wrote that "[a]fter considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted" that Lonske's "request for expungement of his CRD records is denied." RP 111.

C. The Director Determines That Lonske's Statement of Claim for Expungement of the O'Brien's Complaint Is Ineligible for Arbitration

In September 2021, Lonske filed a statement of claim with DR seeking expungement of six customer complaints from his CRD® record, including the O'Brien's complaint. RP 115-35. Lonske alleged that the O'Brien's allegations against him were "clearly erroneous and false," and therefore met "the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(c) standard for expungement." RP 133.

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Soon after, DR notified Lonske that the Director had denied FINRA's forum for Lonske's expungement claim. RP 137.[3] DR explained that the Director had exercised his authority under FINRA Rules 12203 and 13203 to deny forum because a FINRA "arbitration panel . . . previously rendered an award denying expungement" of the O'Brien's complaint, and therefore "the subject matter of this dispute is inappropriate" for FINRA's forum. RP 139.[4] Lonske filed an application seeking review by the Commission of the Director's determination. RP 141-44.

II. Argument

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

The Commission should dismiss Lonske's application for review because the Director's determination is not a FINRA action subject to review under Exchange Act Section 19(d)(2). "Action by a self-regulatory organization . . . such as FINRA is not reviewable merely because it adversely affects the applicant." *Dustin Tylor Aiguier*, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *4 (May 26, 2020). Exchange Act Section 19(d)(2) authorizes the Commission to review FINRA's actions "only in specific circumstances," including, as relevant here, any action that prohibits or limits any person in respect to access to services offered by FINRA. *Id.* at *5; 15 U.S.C. § 78s(d)(2).[5]

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[3] DR accepted for arbitration Lonske's other five claims for expungement, including his claim for expungement of Tye's complaint. *See* RP 137. None of those complaints led to an arbitration award denying expungement. *See* RP 115-35.

[4] FINRA Rules 12203(a) and 13203(a) provide that 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[.]"

[5] Lonske identifies no other bases of jurisdiction under Section 19(d).

1. The Director's Determination Did Not Prohibit or Limit Lonske's Access to any Service FINRA Offers

The Commission has held that when a person accesses FINRA's arbitration service and litigates an expungement claim to an award, as Lonske did here, FINRA's refusal to reopen that award and allow further litigation of the same claim does not constitute a denial of access to any service offered by FINRA. *See Aiguier*, 2020 SEC LEXIS 1430, at *5 (stating that "denying [] an attempt to obtain a new hearing after an arbitration award does not constitute a limitation of access to FINRA's arbitration service under Section 19(d)(2)"); *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189 (Oct. 22, 2019). In *Aiguier*, for example, an arbitrator issued an award denying Aiguier's claims for expungement of two customer complaints. *Aiguier*, 2020 SEC LEXIS 1430, at *3. Aiguier later obtained several documents that he considered probative of his expungement claim. *Id*. Aiguier asked FINRA to reopen his arbitration so he could use the new evidence to obtain a new hearing and award. *Id.* at *3-4. FINRA refused Aiguier's request because the Director determined that it did not comply with FINRA Rule 13905, which governs the submission of documents in closed cases. *Id.* at *4.

On appeal, the Commission held that it lacked jurisdiction under Section 19(d)(2) because the Director's determination did not prohibit or limit Aiguier's access to any service offered by FINRA. The Commission noted that Aiguier did, in fact, access FINRA's arbitration service by litigating his expungement claims to an award. *Id.* at *5-6 ("Aiguier's objection to the evidentiary basis for the award and the process by which the arbitrator reached a decision does not change the fact that he accessed FINRA's arbitration service."). Under FINRA's rules, that award was final and not reviewable, and FINRA has no procedures for reopening it. *Id.* at *6-7; FINRA Rules 12904(b), 13904(b) ("Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal."). As a result, when

the Director refused to reopen the award so Aiguier could seek a new hearing, the Director was not limiting or denying Aiguier access to any service offered by FINRA. *Id*.[6]

The same reasoning applies here. Lonske accessed FINRA's arbitration service during the O'Brien's arbitration proceeding and litigated his expungement claim to an award. RP 109-14. When Lonske filed his statement of claim seeking to relitigate his expungement claim and obtain a new award, the Director did not accept it because a FINRA arbitration panel previously had denied the same claim. RP 137, 139. As in *Aiguier*, the Director's decision not to accept Lonske's statement of claim was not a denial of access to any service FINRA offers. Like the award in Aiguier's arbitration, the award in the O'Brien's arbitration is final and not reviewable, and FINRA has no procedures for reopening it. Thus, the Director's determination not to accept Lonske's statement of claim did not prohibit or limit Lonske's access to any service FINRA offers.

Lonske tries to avoid the effect of the Commission's holdings in *Aiguier* and *Kincaid* by claiming that, unlike Aiguier and Kincaid, he never accessed FINRA's arbitration service. According to Lonske, he "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." Lonske Brief at 5. Lonske maintains that his case "contrasts with" *Kincaid* and *Aiguier* because "the applicants in

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[6] The Commission reached the same conclusion in *Kincaid*. In that case, an arbitrator issued an award denying Kincaid's expungement claims. *Kincaid*, 2019 SEC LEXIS 4189, at *5. Because the arbitrator issued the award before a hearing on the merits, Kincaid believed the arbitrator did not follow FINRA's rules. *Id.* at *9. Kincaid asked FINRA to reopen the award so he could obtain a new hearing. *Id.* FINRA denied Kincaid's request. *Id.* On appeal, the Commission held that it lacked jurisdiction to review FINRA's action. The Commission reasoned that Kincaid accessed FINRA's arbitration service and litigated his expungement claim to an award. *Id*. The Commission found that, because FINRA did not offer any service through which it reviewed arbitration awards for compliance with FINRA's rules, it did not deny Kincaid access to any service when it refused his request to reopen the arbitrator's award. *Id.* at *9-10.

those cases had clear access to the forum specifically for expungement, and hearings on the merits of expungement occurred." Lonske Brief at 5.[7]

Lonske's effort to distinguish his case from *Aiguier* and *Kincaid* fails because the record contains abundant evidence that Lonske accessed FINRA's arbitration service during the O'Brien's arbitration proceeding. The Commission has held that a person accesses FINRA's arbitration service if he participates in the arbitration proceeding. *See Aiguier*, 2020 SEC LEXIS 1430, at *5 (stating that Aiguier accessed FINRA's arbitration service because he participated in the arbitration by propounding discovery requests, filing motions, attending the hearing, and obtaining an award); *Kincaid*, 2019 SEC LEXIS 4189, at *9 (stating that Kincaid accessed FINRA's arbitration service because he participated in the arbitration by taking part in the arbitrator's selection, filing stipulations, and attending a telephonic prehearing conference). The record repeatedly shows that Lonske participated in the O'Brien's arbitration proceeding by filing an answer (RP 49-54), requesting expungement of the O'Brien's customer complaint from his CRD® record (RP 52), moving to consolidate the O'Brien's claims with Tye's claims (RP 52-53), moving to postpone the hearing (RP 112), attending the hearing (Lonske Affidavit ¶ 8), testifying at the hearing (Lonske Affidavit ¶ 8), and obtaining an award (RP 109-14). Lonske's participation in the O'Brien's arbitration proceeding was extensive, and his assertion that he never accessed FINRA's arbitration service is unfounded.

Lonske also argues that he did not access FINRA's arbitration service during the O'Brien's arbitration because, despite his participation in that proceeding, he claims he did not

[7] Kincaid did not, in fact, have a hearing on the merits of his expungement claim. The arbitrator issued an award denying Kincaid's claim before the scheduled hearing. *Kincaid*, 2019 SEC LEXIS 4189, at *9 ("The arbitrator then issued an award denying the request for expungement and closing the proceeding before the scheduled hearing.").

have a "meaningful opportunity to be heard and present[] evidence" in support of his expungement claim. Lonske Brief at 6. Again, the record disproves Lonske's assertion. In his affidavit, Lonske states vaguely that he does not "recall the request for expungement . . . ever being addressed by anyone," and that he does not "recall the standard for expungement being addressed." Lonske Affidavit ¶ 9. As the party seeking expungement, however, Lonske should have raised those issues. There is no evidence that Lonske was prevented in any way from doing so. To the contrary, the record shows that the arbitration panel in the O'Brien's proceeding conducted sixteen hearing sessions. RP 113. Lonske attended the hearings, was represented by counsel, and testified. Lonske Affidavit ¶ 8; RP 110. In sum, Lonske had ample opportunity to present evidence and argument in support of his expungement claim. His post-award assertion that he failed to use that opportunity does not mean he was deprived of it.[8]

2. Lonske's Reluctance to Seek Vacatur of the Award Denying His Expungement Claim Does Not Create Jurisdiction

Lonske argues he is entitled to a new hearing on his expungement claim in FINRA's arbitration forum because judicial vacatur of the arbitration panel's award denying expungement "is not a remedy available to" him. Lonske Brief at 6. According to Lonske, seeking vacatur of an "award that went in his favor with respect to the underlying customer complaints" is not in his "best interest." *Id.*[9]

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[8] *See, e.g., Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001) ("[O]ne who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard."); *Canfield Aviation, Inc. v. Nat'l Transp. Safety Bd.*, 854 F.2d 745, 750 (5th Cir. 1988) ("Canfield cannot now claim . . . that it was denied the opportunity to be heard on this issue simply because it failed to take advantage of that opportunity.").

[9] Lonske asserts that FINRA "specifically created their expungement rules to address matters like Mr. Lonske [sic] where the claims were clearly erroneous and therefore dismissed." Lonske cites no authority to support the proposition that an arbitration panel must find a

[Footnote continued on next page]

Lonske's reluctance to seek vacatur of the arbitration panel's award does not give the Commission jurisdiction over his appeal under Section 19(d). To establish jurisdiction, Lonske must show that FINRA prohibited or limited his access to a service FINRA offers. *See, e.g.*, *Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 SEC LEXIS 1284 (June 3, 2019) (finding that the Commission lacked jurisdiction under Section 19(d) to review the appeal because the applicant failed to show that FINRA limited or prohibited access to any service it offered). Lonske's reluctance to seek judicial review does not constitute a prohibition or limitation by FINRA on access to any service FINRA offers, and thus does not create jurisdiction for the Commission under Section 19(d).

3. The Standards for Expungement Are the Same No Matter Who Initiates the Arbitration Proceeding

Lonske argues he is entitled to a new hearing on expungement in FINRA's arbitration forum because, he claims, the arbitration panel in a customer-initiated proceeding is "not governed by the same standard" that applies in an expungement proceeding initiated by an associated person, known as a "straight-in" expungement request. Lonske Brief at 7.[10]

[Cont'd]

customer's claim clearly erroneous before dismissing it. Indeed, "[i]n the typical customer arbitration, it is the customer who has the burden of proof, by a preponderance of evidence, that the broker's misconduct gave rise to the damages suffered." 2 Securities Arbitration Procedure Manual § 13-23 (2021).

[10] *See* FINRA Regulatory Notice 20-25, 2020 FINRA LEXIS 26 (July 20, 2020) (explaining that an associated person may request expungement "as part of the customer arbitration" or by "fil[ing] an expungement request in a separate arbitration (straight-in request)").

Lonske is incorrect. Lonske relies on what appears to be selectively quoted text from FINRA's Dispute Resolution Services' Arbitrator's Guide.[11] Lonske states that FINRA Rules 2080, 2081, and 12805 "'do not apply to intra-industry disputes,'" and therefore, he argues, an arbitrator in a straight-in expungement proceeding would "not have to 'address the standards set forth in Rule 2080 or the procedural requirements under Rule 12805.'" Lonske Brief at 8. The full sentences from which Lonske appears to have pulled his quotations contradict his assertion, and make clear that FINRA Rules 2080, 2081, and 12805/13805 apply in any proceeding in which an associated person seeks expungement of customer dispute information, no matter who initiated it.[12] The relevant sentences from the Arbitrator's Guide read:

> Rules 2080, 2081 and 12805 do not apply to intra-industry disputes, *unless the information to be expunged involves customer dispute information*. For example, a broker might request expungement of the reason for termination (e.g., failure to meet production standards) reported on his or her CRD record by a former employer. *Since this request does not involve customer dispute information*, arbitrators may recommend expungement of this information from CRD without addressing the standards set forth in Rule 2080 or the procedural requirements under Rule 12805.

Arbitrator's Guide (Feb. 2021), at 78-79 (emphasis added).

Additionally, the text of Rules 2080, 2081, and 12805/13805 make clear that the rules apply in any proceeding in which an associated person seeks expungement of customer dispute information. FINRA Rule 2080 is titled "Obtaining an Order of Expungement of Customer

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[11] Lonske does not cite the source for the quotes in his brief, so the Commission should give limited weight to these quotes as persuasive. We note, however, that the quoted material tracks text found in the Arbitrator's Guide. The Arbitrator's Guide is publicly available at https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

[12] FINRA has separate subsets of rules for customer and industry disputes. FINRA Rule 12805 applies to customer disputes. FINRA Rule 13805, which is identical to FINRA Rule 12805, applies to industry disputes. Both rules are titled "Expungement of Customer Dispute Information under Rule 2080."

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Dispute Information from the Central Registration Depository (CRD) System." FINRA Rule 2081 is titled "Prohibited Conditions Relating to Expungement of Customer Dispute." And FINRA Rule 12805/13805 is titled "Expungement of Customer Dispute Information under Rule 2080." Lonske's suggestion that a different standard for expungement applies in straight-in expungement proceedings is incorrect.

Lonske also suggests that the arbitration panel's "contradictory" award in the O'Brien's proceeding shows that the arbitration panel was focused solely on the O'Brien's claims, and made "no substantive determination requiring the requested expungement[.]" Lonske Brief at 8. Once again, Lonske is incorrect. The arbitration panel made a substantive determination that Lonske was not entitled to expungement. In its award, the panel acknowledged Lonske's request for expungement, and "[a]fter considering the pleadings, the testimony and evidence presented at the hearing," it denied his request. RP 111. The part of the award denying expungement is no less substantive than the part denying the O'Brien's claims.

Moreover, the arbitration panel's award denying the O'Brien's and Lonske's claims was not inconsistent. A finding is not inconsistent just because an adjudicator decides that neither party has satisfied its burden of proof.[13] Here, the O'Briens had the burden of proving that Lonske engaged in the misconduct alleged, and Lonske had the burden of proving he was entitled to expungement by showing that the O'Brien's allegations were "factually impossible or

[13] *See, e.g.*, *Arrow Mach. Co. v. Array Connector Corp.*, 2010-L-115, 968 N.E.2d 515, 524 (Ohio Ct. App. Dec. 19, 2011) ("The jury's verdicts reflect the logical conclusion that neither party satisfied its burden of proving, 'by the greater weight of the evidence,' that the other party was in breach."); *Safeco Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 1992 Wisc. App. LEXIS 380 at *4 (Apr. 22, 1992) ("When neither party meets its burden of proof, the proper disposition of a case is dismissal.") (finding that, in case in which both parties alleged that the other party caused an automobile accident by running a red light, neither party established that fact, and thus neither party met its burden of proof).

clearly erroneous" or false. *See* FINRA Rule 2080(b)(1).[14] The arbitration panel's finding that the O'Briens failed to meet their burden of proof on their claims is not the same as an affirmative finding that the O'Brien's allegations against Lonske were "factually impossible or clearly erroneous" or false.[15] By denying the O'Brien's claims, the arbitration panel found that the O'Briens failed to prove that Lonske engaged in the misconduct alleged; it did not find that Lonske did not engage in the misconduct alleged. Similarly, by denying Lonske's expungement claim, the arbitration panel found that Lonske failed to prove that the O'Brien's allegations were "factually impossible or clearly erroneous" or false; it did not find that the allegations were true.

The arbitration panel's substantive finding that Lonske failed to prove that he was entitled to expungement is not inconsistent with its substantive finding that Lonske was not liable on the O'Brien's claims.

B. The Director Properly Exercised His Authority by Not Accepting Lonske's Statement of Claim

In 2021, the Director properly exercised his authority under FINRA Rule 13203 by not accepting Lonske's statement of claim. Relitigating expungement claims in FINRA's arbitration forum is not consistent with "the purposes of FINRA and the intent of the Code" of Arbitration Procedure. *See* FINRA Rule 13203(a). Permitting Lonske to access FINRA's arbitration forum

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[14] The second basis for expungement, that the registered person was not involved in the alleged investment-related sales practice violation, could not apply here because Lonske concedes that the O'Briens were his customers and that he provided the advice at issue. *See* RP 50-52.

[15] *Cf. Ashe v. State*, 726 A.2d 786, 791 (Md. 1999) ("The failure of all twelve jurors to find that malice existed which resulted in a hung jury did not constitute an affirmative finding that malice did not exist. . . . Reduced to its simplest terms, the mere doubt or inability to agree as to the establishment of element 'A' is not proof of the absence of 'A.'"); *Grenwelge v. Shamrock Reconstructors, Inc.*, 705 S.W.2d 693, 694 (Tex. 1986) ("The jury's failure to find that [counterclaim-defendant] breached the contract merely means that the [counterclaim-plaintiffs] failed to carry their burden of proving the fact. It does not mean the reverse, that [counterclaim-defendant] substantially performed the contract.").

and relitigate expungement until he gets the outcome he wants would subvert the integrity of CRD® and flout the most basic principles of investor protection. Indeed, 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 outcome he desired. The Director has authority under 13203 to prevent such abuse and maintain the integrity of the expungement process, and he properly exercised that authority in this case.

III. Conclusion

Lonske accessed FINRA's arbitration service, he participated in a hearing on the merits regarding his customer's claim and his expungement request, and received an award denying his expungement request. FINRA's refusal to allow Lonske to access its arbitration forum to litigate the same expungement request a second time does not create jurisdiction for the Commission under Exchange Act Section 19(d). For these reasons, the Commission should dismiss Lonske's application for review for lack of jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that this brief complies with the Commission's Rules of Practice by omitting or redacting any sensitive or personal information described in Rule of Practice 151(e).

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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 9th day of February, 2022, I caused *FINRA's Brief in Opposition to the Application for Review* in the Matter of the Application of Jonathan William Lonske, Administrative Proceeding No. 3-20633, to be filed with and served through the SEC's eFAP system on:

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