

**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 REPLY BRIEF IN SUPPORT OF HIS APPLICATION FOR REVIEW

Applicant, Jonathan William Lonske, (“Mr. Lonske”), 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, by and through counsel, timely submitted his 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 claim is ineligible for arbitration in FINRA’s Dispute Resolution Forum (“FINRA’s Forum”). On December 20, 2021, Mr. Lonske submitted his Brief in Support of Application for Review. On February 9, 2022, FINRA submitted a Brief in Opposition to the Application for Review (“FINRA

¹ 15 U.S.C. § 78s(d).

Brief”). Mr. Lonske now timely submits his Reply Brief in Support of the Application for Review for consideration by the Commission.

**MR. LONSKE’S REPLY TO FINRA’S ARGUMENT THAT THE DIRECTOR’S
DETERMINATION DID NOT PROHIBIT OR LIMIT ACCESS TO ANY SERVICE**

FINRA OFFERS

FINRA states that "Lonske accessed FINRA's arbitration service during the O'Brien's arbitration proceeding...". FINRA Brief at 8. The proceeding that FINRA refers to is a customer dispute hearing titled "O'Briens et al. v. Lonske". Mr. Lonske participated in that customer dispute arbitration proceeding as a defendant. His participation was limited to defending himself against the O'Brien’s claims.

FINRA repeatedly conflates Mr. Lonske's participation as a defendant in customer dispute arbitration with Mr. Lonske's participation as a plaintiff in an expungement hearing to argue that he had access to arbitration. This is an oversimplification that ignores reality. Mr. Lonske has not participated as a plaintiff in an arbitration hearing on expungement. He has said that he did not have a "meaningful opportunity to be heard and present evidence." If he was a plaintiff in an expungement hearing, that would not have happened. Mr. Lonske has sworn in an affidavit that he "does not recall the request for expungement ever being addressed by anyone" or "the standard for expungement being addressed." Because he participated in the customer dispute arbitration as a defendant, Mr. Lonske had little to no control over what issues were raised.

FINRA makes a shallow argument that *Aiguier* and *Kincaid* are applicable in this matter. They cut and paste a few sentences from each case to show how the present case is similar, completely ignoring that when taken as a whole, those cases are largely different and inapplicable to this one. For example, with respect to *Kincaid*, FINRA quotes “the arbitrator

issued the award before a hearing on the merits.” FINRA Brief at page 8. Bringing up this reference is clearly meant to legitimize their denial of an expungement hearing for Mr. Lonske. However, they conveniently omit the context that clearly shows why that occurred, which demonstrates why that case is irrelevant to this one: prior to award, Kincaid was allowed access to an arbitration forum for the sole purpose of expungement, even though that broke FINRA Rule 13206(a) which states “[n]o claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.” In *Kincaid*, ten years had elapsed since the occurrences he sought to expunge, but Kincaid was given access to the arbitration forum anyway.² Then he missed a reasonable filing deadline. *Id.* at *3. After missing the deadline, the arbitrator issued the award without a hearing on the merits of his expungement. *Id.* .

The quote from *Kincaid* FINRA uses as support does not apply to Mr. Lonske’s case because Kincaid’s actions prior to the award merited the consequences, specifically denial of expungement without a hearing. No such context exists here.

Aiguier is also dissimilar to Mr. Lonske’s case because Aiguier was given a hearing solely on expungement, was denied in his award, and later, Aiguier asked for another shot at the expungement case because he had new evidence.³ Here, Mr. Lonske was not given a hearing solely on expungement. Mr. Lonske is seeking the opportunity to participate in an expungement hearing so he can present his case for the first time.

FINRA argues, "the record shows that the arbitration panel in the O'Briens proceeding conducted sixteen sessions." and therefore Mr. Lonske had "ample opportunity to present evidence and argument" FINRA Brief at 10. FINRA concludes, that because Mr. Lonske failed

² *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *3 (Oct. 22, 2019)

³ *Dustin Tylor Aiguier*, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430 (May 26, 2020)

to use that opportunity, he therefore was not deprived of the opportunity to present evidence and argument specific to an expungement request. FINRA Brief at 10. FINRA, without foundation, assumes that sixteen sessions equate to ample opportunity for Mr. Lonske to be heard. They assert their opinion based on an arbitrary number and on the assumption that those sixteen sessions were not entirely focused on the O'Brien's testimony and Mr. Lonske's defenses to the same.

In sum, FINRA argues that Mr. Lonske was not deprived of his opportunity. However, when held up against Mr. Lonske's affidavit in which he swears that he was deprived of the opportunity to discuss expungement, FINRA's assumption is completely discredited.

MR LONSKE'S REPLY TO FINRA'S ASSERTION THAT LONSKE'S RELUCTANCE TO SEEK VACATUR OF THE AWARD DOES NOT CREATE JURISDICTION

It would not be in Mr. Lonske's best interest to vacate the award through a state court proceeding, which leaves expungement through FINRA's Forum as the only available remedy. Because Mr. Lonske never had a hearing on the issue of expungement, FINRA's denial of a hearing constitutes a prohibition or limitation by FINRA on access to a service FINRA offers, and thus creates jurisdiction for the Commission under Section 19(d).

MR. LONSKE'S REPLY TO FINRA'S ARGUMENT THAT THE STANDARDS ARE THE SAME NO MATTER WHO INITIATES THE PROCEEDING

FINRA states, the "standards for expungement are the same no matter who initiates the arbitration proceeding." FINRA Brief at 11. However, this is false.

FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance ("FINRA Guidance") states that "[a]rbitrators should ensure that they have all of the information necessary to make an informed and appropriate recommendation on expungement. Thus,

arbitrators should request any documentary or other evidence they believe is relevant to the expungement request, particularly in cases that settle before an evidentiary hearing or in cases where only the requesting party participates in the expungement hearing.”⁴

In expungement-only cases, the customer is allowed, but not required, to participate in the hearing. According to FINRA Guidance, if a customer chooses not to participate in the hearing, arbitrators are advised that it is then particularly important that they request additional documents and evidence related to the request. This demonstrates that straight-in expungement requests made by brokers have different standards of evaluation. FINRA acknowledged this: when brokers file straight-in expungement requests, “[t]hese requests typically do not involve the customer that had the dispute, and can occur years after the dispute was arbitrated or reported to the CRD system, resulting in the panel receiving information only from the broker requesting expungement.”⁵

FINRA's argument that the "arbitration panel's award denying the O'Briens and Lonske's claims was not inconsistent" because the adjudicator finds that "neither party has satisfied its burden of proof" is illogical. FINRA Brief at 13. FINRA states, "[b]y 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." FINRA Brief at 14.

⁴ FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance, available at <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

⁵ FINRA's Expungement of Customer Dispute Information at <https://www.finra.org/rules-guidance/key-topics/expungement>.

FINRA's reasoning contradicts its own guidance. Mr. Lonske qualifies for expungement if the panel finds that the claim, allegation, or information is factually impossible or clearly erroneous by great preponderance of the evidence presented.⁶

FINRA's example of written explanations of awards ordering expungement under this standard state that a registered representative in Mr. Lonske's position is entitled to expungement where the arbitrator finds claimant's version of the events not credible and where the arbitrator finds claimant's allegations and version of events are not supported by the evidence, and therefore, factually impossible. *Id.* If the panel under the underlying customer dispute arbitration found that the O'Brien's version of events were not credible and denied their award, then it naturally follows that the version of the events appearing on Mr. Lonske's FINRA registration records are factually impossible. *Id.*

CONCLUSION

Mr. Lonske sought expungement of a disclosure in FINRA's arbitration forum pursuant to FINRA Rules, yet FINRA denied Mr. Lonske access to its arbitration forum in violation of the Exchange Act. FINRA's defense of this action is illogical and inconsistent with their own guidance. Mr. Lonske did not have a hearing on expungement. This is a service that FINRA offers to its Associated Persons, like Mr. Lonske. It is a fundamentally important service to the function of FINRA. Therefore, the Commission has jurisdiction over Mr. Lonske's application for review.

⁶ FINRA's Examples of Expungement Orders at <https://www.finra.org/arbitration-mediation/examples-expungement-orders>.

Dated: February 22, 2022

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Owen Harnett", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Owen Harnett, certify that on February 22, 2022, I caused a copy of the foregoing Reply 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:

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[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.

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