

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

In the Matter of the Application of

Michele Gray

File No. 3-20651

**FINRA'S MOTION TO DISMISS THE PETITION FOR REVIEW
AND STAY ISSUANCE OF A BRIEFING SCHEDULE**

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November 30, 2021

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Applicant Michele Gray, the claimant in a customer arbitration brought in FINRA’s arbitration forum, appeals to the Commission an arbitration award in which her claims against a FINRA member firm were dismissed. It is well settled, however, that the Commission does not have jurisdiction to review an arbitration award. Instead, the Federal Arbitration Act (“FAA”) provides that Gray’s exclusive remedy for challenging the award is to petition to vacate it in an appropriate court. Accordingly, the Commission should dismiss Gray’s application for review.¹

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Gray was a customer of Fidelity Brokerage Services LLC (“Fidelity”), a FINRA member firm. On or about October 4, 2020, Gray filed a statement of claim with FINRA Dispute

¹ Pursuant to Commission Rule of Practice 161, FINRA also requests that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Gray’s petition should be dismissed on jurisdictional grounds before it reaches the underlying substance of this appeal.

Resolution Services (“DRS”) against Fidelity. (R. at 5.)² Gray’s statement of claim alleged that Fidelity improperly and negligently closed her accounts and asserted causes of action for breach of fiduciary duty, breach of contract, negligence, and intentional infliction of emotional distress. Gray requested reinstatement of her accounts or, in the alternative, \$500,000 in compensatory damages and \$1 million in punitive damages. (R. at 5-6.) Fidelity filed an answer, denying the allegations and requesting dismissal of Gray’s claims. (*Id.*)

In October 2021, a three-person arbitration panel held a hearing. (R. at 7-8.) On October 21, 2021, the arbitration panel issued its award dismissing Gray’s claims (the “Award”). (R. at 5-8.) DRS sent Gray a cover memorandum along with the Award explaining that “all awards rendered are final and are not subject to review or appeal.” (R. at 2.) The memorandum also informed Gray that “[a]ny party wishing to challenge the award must make a motion to vacate the award in a federal or state court of appropriate jurisdiction pursuant to the Federal Arbitration Act, 9 U.S.C. § 10, or applicable state statute.” (*Id.*)

Rather than making a motion to vacate the Award in court, Gray instead filed this application for review with the Commission. (R. at 15-16.) In her notice of appeal, Gray cites the arbitration panel’s “disregard” of “discovery documents” and the nature of her claims and request for relief.³

² “R. at ___” refers to the page number in the certified record filed by FINRA on November 24, 2021.

³ In support of her application for review, Gray cites FINRA Rule 9620 and Section 4221.9 of Title 29 of the Code of Federal Regulations. Neither of these provisions applies here, however. FINRA Rule 9620 applies to decisions by FINRA when FINRA members request certain exemptive relief. Section 4221.9 applies to reconsideration of arbitration awards issued in disputes arising under certain sections of the Employee Retirement Income Security Act of 1974. Neither provision applies to awards issued in FINRA’s arbitration forum, and neither confer jurisdiction on the Commission to hear an appeal of a FINRA arbitration award.

III. ARGUMENT

Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) defines the Commission’s jurisdiction to review FINRA actions. *See* 15 U.S.C. § 78s(d); *see also* *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3699, at *10 (Sept. 9, 2015) (explaining that there must be a statutory basis for the Commission’s jurisdiction). Under Section 19(d)(2), the Commission may review a FINRA action that (1) imposes any final disciplinary sanction on any FINRA member or person associated with a member, (2) denies membership or participation to any applicant, (3) prohibits or limits any person in respect to services offered by the SRO, or (4) bars any person from being associated with a member. 15 U.S.C. § 78s(d)(1); *see also* *Joseph Dillon & Co.*, 54 S.E.C. 960, 962-63 (Nov. 6, 2000) (finding the Commission lacked jurisdiction over the appeal of an NASD action where the action did not fall within any of the four jurisdictional bases of Section 19(d)).

Gray’s application for review of an arbitration award does not fall within any of these jurisdictional bases. The Award was the result of an arbitration adjudicating a dispute between a FINRA member firm and customer and did not result in the disciplinary sanction of a member, the denial of membership to an applicant, a bar from association with a member, or any prohibition of limitation of service. Indeed, as the Commission previously has noted, an arbitration award is not an action taken by FINRA at all. *See* *Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 SEC LEXIS 3588, at *12 n.14 (Nov. 15, 2013) (observing that an arbitration award issued in the New York Stock Exchange’s (“NYSE”) arbitration forum was not action taken by the NYSE).

It is well settled that the Commission does not have jurisdiction over appeals of arbitration awards and that challenges to an arbitration award must be brought by filing a petition

in a court to vacate the award.⁴ *See, e.g., Sequeira v. SEC*, 816 F. App'x, 703, 707 (3d Cir. June 11, 2020) (noting that the Commission lacks jurisdiction over any challenge to an arbitration award, which must instead be brought in a court of competent jurisdiction). As the Commission itself has observed, "Congress has not authorized [the Commission] to reopen an arbitration proceeding that has resulted in an award." *Dustin Tylor Aiguier*, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *7 (May 26, 2020). Instead, the "exclusive remedy for challenging . . . an arbitration award rendered by a FINRA arbitrator is to move to vacate, modify, or correct the award in court." *Id.* (internal quotation marks omitted); *see also John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *8-9 (Oct. 22, 2019) (explaining that "as courts have long explained, Kincaid's recourse for challenging an allegedly erroneous arbitration award would be by seeking to vacate, modify, or correct the award in court through the Federal Arbitration Act").

When the Award was issued, FINRA notified Gray that it was not subject to review or appeal. (R. at 2.) FINRA's notice explained that Gray's remedy for challenging the award was to file a motion to vacate in an appropriate court. (*Id.*) Gray ignored these instructions, however, and instead filed this application for review with the Commission. The Commission lacks jurisdiction to review Gray's application and, accordingly, should dismiss it.

⁴ Rule 12904(b) of FINRA's Code of Arbitration Procedure for Customer Disputes provides that "all awards rendered under the Code are final and are not subject to review or appeal." FAA Section 10 provides that when a party can establish one of the enumerated bases, "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration." 9 U.S.C. § 10. Additionally, New York law (where Gray resides) also provides that a party may challenge an arbitration award by filing an application to vacate it. *See* N.Y. C.P.L.R. § 7511 (Consol. 2021) (providing that a party may make an application to vacate an arbitration award and that the award will be vacated if the applicant can establish one of the enumerated bases for doing so).

IV. CONCLUSION

The Commission lacks jurisdiction to hear this matter. Appeals of arbitration awards do not fall within the jurisdictional bases for Commission review set forth in Exchange Act Section 19(d). Gray's exclusive remedy for challenging an arbitration award is to file a petition to vacate the award in an appropriate court. Accordingly, the Commission should dismiss Gray's application for review.

Respectfully submitted,

/s/Celia Passaro

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November 30, 2021

CERTIFICATE OF COMPLIANCE

I, Celia Passaro, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/ Celia Passaro

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CERTIFICATE OF SERVICE

I, Celia Passaro, certify that on this 30th day of November 2021, I caused a copy of the foregoing FINRA's Motion to Dismiss the Petition for Review and Stay Issuance of a Briefing Schedule, in the matter of the Application of Michele Gray, Administrative Proceeding File No. 3-20651, to be filed through the SEC's eFAP system.

and served by electronic mail on:

Michele Gray



Respectfully submitted,

/s/ Celia Passaro

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