BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of Joseph Sylvester Sturniolo For Review of Action Taken By FINRA File No. 3-21503

MR. STURNIOLO'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

INTRODUCTION

Joseph Sylvester Sturniolo ("Mr. Sturniolo") seeks Commission review of a determination by the Director of FINRA Dispute Resolution Services ("Director") to deny Mr. Sturniolo access to the Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Rules") Rule 13203.

Mr. Sturniolo 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. On August 28, 2023, Mr. Sturniolo submitted his Brief in Support of Application for Review ("Support Brief"). On October 4, 2023, FINRA submitted its Brief in Opposition to the Application for Review ("Opposition Brief"). Mr. Sturniolo now timely submits his reply to FINRA's Opposition Brief.

[1] 15 U.S.C. § 78s(d).

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

A. FINRA improperly prohibited Mr. Sturniolo access to its arbitration forum.

1. The Director does not have unfettered authority to deny forum, and Mr. Sturniolo's claim was not inappropriate for arbitration.

Although FINRA Rule 12203(a) and 13203(a) provide the Director with discretion to deny forum for claims that, "given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate", such discretion is not unlimited and cannot be applied in the arbitrary and capricious nature that the FINRA Director did so here. Opp. at 6. While one purpose of FINRA and the Code is to enhance the effectiveness of the arbitration process and further the public interest and the protection of investors,[2] that is not the only purpose. FINRA touts that its Forum is "the largest securities dispute resolution forum in the United States," and that it provides "a fair, efficient and effective venue to handle a securities-related dispute."[3] FINRA's Forum also has a designated section for arbitration procedures for industry disputes – Section 13000 Code of Arbitration Procedure for Industry Disputes – which allows for intra-industry professionals to bring claims within the securities realm. In fact, FINRA Rule 13200 states that, "[e]xcept as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons." FINRA also has a set of rules that outline the process for which securities professionals can seek expungement within their Forum.[4] The Commission has previously found that FINRA's service of providing arbitration of

[2] *Consolidated Arbitration Applications*, Exchange Act Release No. 97248, 2023 SEC LEXIS 868, at * 20 (Apr. 4, 2023) (internal quotations omitted) (hereinafter, "Consolidated Order").
[3] *See,* https://www.finra.org/arbitration-mediation.
[4] *See,* FINRA Rule 2080 and 13805.

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expungement claims is "'fundamentally important' and central to its function as an SRO."[5] The Exchange Act also acknowledges this, where it states that the rules of the association are designed to, among other things, promote just and equitable principles of trade. 15 U.S.C. 78o-3(b)(6). Therefore, another purpose of FINRA's Forum is to allow for industry professionals the opportunity to present to an arbitration panel the basis that a disclosure should be removed from their record.

FINRA has failed to present sufficient evidence or establish how either of its denial of forum notices issued in 2020 or 2023 show that Mr. Sturniolo's claims were "inappropriate" for arbitration. As explained in the Support Brief, Mr. Sturniolo sought and was granted vacatur of the 2018 arbitration award. CR at 109-110.[6] From this point forward, pursuant to the vacatur order and applicable law[7], Mr. Sturniolo had the ability to seek expungement **in FINRA's Forum** anew.[8] FINRA's denial of forum for the 2020 Statement of Claim was therefore inconsistent with FINRA's own rules and the Exchange Act.[9] In June of 2020, when Mr. Sturniolo re-filed his Statement of Claim, FINRA issued a denial of forum notice stating that the claim was "not eligible for arbitration" and provided no further reasoning or basis for this denial. CR at 123. After the damage had already been done, FINRA now acknowledges that it had no valid basis to deny Mr.

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[5] SEC Release No. 89495 (August 6, 2020), p. 5.
[6] "CR at ___" refers to the Certified Record filed by FINRA on or about June 30, 2023 and the corresponding page number cited to.
[7] 9 U.S.C. §§ 9, 10.
[8] *See Cynthia Mary Couyoumjian,* Exchange Act Release No. 97179, 2023 WL 2596892 (Mar. 21, 2023) (hereinafter "*Couyoumjian* Order") and *Shaun Perry Nicholson,* Exchange Act Release No. 97604 (May 26, 2023) (hereinafter "*Nicholson* Order"); *see also, Lindland v. U.S. Wrestling Ass'n, Inc.*, 227 F.3d 1000, 1005 (7th Cir. 2000); *Close v. Motorists Mut. Ins. Co.*, 486 N.E.2d 1275, 1279 (Ohio App. 1985) (holding that "[t]he vacation of an arbitration award on procedural grounds leaves the parties as they were at the beginning of the process, and they are each entitled to begin anew.")
[9] *Id.*

Sturniolo access to its arbitration forum in 2020. Opp. at 2. Had FINRA not improperly denied forum in 2020, Mr. Sturniolo would have had no need to seek alternative relief in state court.

2. Mr. Sturniolo's 2023 arbitration claim was not a collateral attack on a state court judgment, and was likewise, not "inappropriate" for arbitration.

FINRA claims, for the first time in this appeal, that Mr. Sturniolo's 2023 arbitration claim was "an impermissible collateral attack on a state court judgment denying expungement of the same customer dispute information." Opp. at 7. Notably, FINRA makes no reference to this in the 2023 denial notice, and thus, this argument should be disregarded and deemed waived. *See,* CR at 1537.

Nevertheless, Mr. Sturniolo's 2023 request for arbitration is not a collateral attack on the state court judgment. A collateral attack is an attack on a judgment in a proceeding other than a direct appeal.[10] Contrary to FINRA's assertion, Mr. Sturniolo is not asking the Commission to set aside the Colorado's court's order on summary judgment. The Colorado summary judgment order determined that neither Mr. Sturniolo *nor any other person* has the ability to seek expungement *in Colorado courts*, because it is not a recognized cause of action in that jurisdiction. CR at 1502. But expungement *is* a recognized cause of action in FINRA arbitration.[11] In each of the cases FINRA cites in support of its assertion, none of them involve the issue presented here. *See,* Opp. at 8, FN 6.

FINRA claims that Mr. Sturniolo had the option of choosing FINRA arbitration or state court, and since he chose state court, he "must abide by the consequences of that choice." Opp. at 10. However, the critical procedural component that FINRA omits to address in this analysis is that Mr. Sturniolo properly tried to seek expungement through FINRA's arbitration, and FINRA

[10] *Wall v. Kholi*, 562 U.S. 545,552 (2011)); *see also* Black's Law Dictionary 298 (9th ed. 2009).
[11] *See,* FINRA Rule 2080 and 13805.

improperly denied him access to that forum. Mr. Sturniolo is not challenging the validity of the Colorado court's decision that the state of Colorado does not have a cause of action for expungement, he is seeking to arbitrate his claim in FINRA's forum – the forum he has and had a right to seek expungement in.

FINRA claims that the "Director's denial was based only on the existence of the state court judgment denying expungement of the same customer dispute information" and that "the existence of the underlying Vacatur of the Prior Arbitration Award is irrelevant to the Director's 2023 denial of access to FINRA's arbitration services". Opp. at 10. However, the Director's 2023 denial notice states nothing of the sort. CR at 1537. The 2023 denial notice specifically references the vacate order, and does not specify the reasoning that forum was denied. Instead, it simply recites the procedural history of the case and includes an ambiguous assertion at the end that "the subject matter of the dispute is inappropriate." *Id.* FINRA cannot now, on appeal, make additional assertions and justifications that were not specified in the denial notice in an attempt to fit its newly concocted arguments here. Regardless, contrary to FINRA's assertion, the existence of the vacate order *is* most certainly relevant to this analysis, as discussed in the Support Brief and throughout this reply.

3. Mr. Sturniolo's 2023 arbitration claim was appropriate and should not have been denied forum.

In this section in FINRA's Opposition Brief, FINRA is seemingly attempting to relitigate the issue that was already decided in the *Couyoumjian* and *Nicholson* matters, and its argument here should be disregarded due to those findings.

FINRA also claims that it is "contrary to the principles of finality and efficiency to allow Sturniolo to file another arbitration claim seeking the same relief." Opp. at 11. FINRA is essentially stating that, although it violated its own rules and the Exchange Act in denying Mr. Sturniolo

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access to its forum in 2020, they should not be held accountable where Mr. Sturniolo was forced to seek alternative relief elsewhere and was denied access to another forum, i.e. state court. This does not comport with notions of due process and fair procedures. Mr. Sturniolo has yet to be provided with access to any forum, due solely to FINRA's repeated violations of its rules and the Exchange Act and its continued obstruction.

Additionally, FINRA's assertion that its 2020 denial of forum notice was a "final action" that subjects Mr. Sturniolo to res judicata is also unfounded. Opp. at 10-13. As FINRA acknowledges, the 2020 denial letter indicated that FINRA "decline[d] to accept [Mr. Sturniolo's] claim" and closed the case "without prejudice." CR at 123. There is no additional substantive language. FINRA now attempts to add language and weight to this notice, claiming the "without prejudice" language apparently meant Mr. Sturniolo could *only* file his action elsewhere. Opp. at 11, FN 9. But there is nothing to indicate that Mr. Sturniolo was not permitted to file his action again in FINRA, nor did the 2020 denial notice state that. In fact, the 2020 denial notice was completely devoid of any basis for FINRA's reason as to why his case was not accepted. What is undisputed though, is that FINRA specifically stated that it declined to accept the claim "without prejudice." Mr. Sturniolo's could have, but was not *required* to seek review of the 2020 denial notice to the Commission, and FINRA has not pointed to any law that would establish such a requirement. Therefore, FINRA's reliance on the *SEC v. Milan*[12] is not applicable here, as Mr. Sturniolo was not required to appeal the 2020 FINRA denial notice and it had no preclusive effect on his ability to refile a request for expungement. Opp. at 12.

B. FINRA failed to apply its rules consistent with the Exchange Act.

[12] *SEC v. Milan Cap. Group, Inc.*, No. 00-CV-108, 2014 U.S. Dist. LEXIS 85532, at *8-11 (S.D.N.Y. June 23, 2014).

FINRA claims that it properly applied FINRA Rule 13203(a) to deny Mr. Sturniolo access to its arbitration forum in 2023 because his 2023 arbitration claim was a "collateral attack" on the state court summary judgment order. Opp. at 13. This issue was addressed above. However, FINRA also seemingly argues a general catch-all approach in saying that it would be wholly unfair to allow Sturniolo to "relitigate expungement in a new proceeding today" due to the procedural history. Opp. at 14. FINRA wants the Commission to completely overlook its prior violation of its own rules and the Exchange Act in denying Mr. Sturniolo access to its forum in 2020 without any basis under its rules or the Exchange Act to do so.

C. FINRA should not be permitted to benefit from its transgressions.

FINRA should not be permitted to admit that it violated its rules and the Exchange Act in denying Mr. Sturniolo access to its arbitration forum in 2020 to which he was absolutely entitled, force him to seek relief in an alternative forum with continued obstruction, and then benefit from its delay tactics in passing a new rule that effects his ability to seek expungement if the claim had been filed today. Mr. Sturniolo should be entitled to the applicable rules in effect before FINRA engaged in its improper conduct.[13]

CONCLUSION

Mr. Sturniolo's actions do not constitute a collateral attack on any underlying action or previous ruling. Mr. Sturniolo is simply trying to follow the proper course of action by seeking and being granted vacatur of an invalid arbitration award, and then continuing to seek a new

[13] *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815, 65 S. Ct. 993, 998, 89 L. Ed. 1381 (1945) (court applying the "unclean-hands doctrine", stating that "he who comes into equity must come with clean hands" and that courts should withhold assistance to prevent "a wrongdoer from enjoying the fruits of his transgression") (internal quotations and citations omitted).

opportunity to be heard on the merits of his case. FINRA's continued obstruction is not consistent with their Rules or the Exchange Act, and Mr. Sturniolo is requesting an order allowing him to bring his expungement claim through FINRA's forum with the FINRA rules that were applicable at the time he filed his Statement of Claim.

Dated: October 18, 2023

Respectfully submitted,

HLBS LAW, LLC

By: [redacted]

Michael Bessette
390 Interlocken Crescent, Suite 350
Broomfield, Colorado 80021
Telephone: (720) 432-6546
Email: michael.bessette@hlbslaw.com

Attorney for Joseph Sturniolo

CERTIFICATE OF SERVICE

I, Donna Montemayor, hereby certify that on this 18th day of October 2023, a true and correct copy of the foregoing ***Reply To FINRA's Brief In Opposition to the Application For Review*** has been filed through the SEC's eFAP system and served by electronic mail as follows:

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

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

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

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

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

Ms. Ashley Martin
Associate General Counsel
FINRA Office of General Counsel
1735 K Street NW
Washington, DC 20006
Email: ashley.martin@finra.org

/s/ ***Donna Montemayor***
Donna Montemayor