BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of NORMAN THORN ROBERTSON For Review of Action Taken By FINRA File No. 3-21982

NORMAN THORN ROBERTSON'S REPLY TO FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Applicant, Norman Thorn Robertson ("Mr. Robertson"), seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. ("FINRA") to deny Mr. Robertson access to its arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes Rule 13203(a) or the Customer Code Rule 12203(a) (collectively, "FINRA Rules"). On July 22, 2024, Mr. Robertson 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 FINRA's action in prohibiting Mr. Robertson's access to its forum. Mr. Roberston requests that the Commission remand his case back to FINRA's arbitration forum so that he may access that fundamentally important service. On October 7, 2024, Mr. Robertson filed his Brief in Support of his Application for Review. On November 4, 2024, FINRA filed its Brief in Opposition. Mr. Roberston now files

[1] 15 U.S.C. § 78s(d).

OS Received 11/18/2024

his Reply to FINRA's Opposition and requests that the Commission remand his case back to FINRA's arbitration forum so that he may access that fundamentally important service. [2]

REPLY TO FINRA'S "ARGUMENT"

A. The Commission Has Jurisdiction Over Mr. Robertson's Appeal.

As established in his Brief in Support,[3] Section 19(d) of the Exchange Act dictates when the Commission has jurisdiction to review an action taken by an SRO that "prohibits or limits a person in respect to access to services offered by the SRO."[4] The Commission created a two-part test to determine whether they have jurisdiction under the above standard, asking "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important."[5] Mr. Robertson has satisfied both prongs of the test, and should therefore be allowed to proceed to a hearing on the merits of his request for expungement.

FINRA's denial of forum to Mr. Robertson is a "prohibition of access to a service that [FINRA] offers," pursuant to prior Commission rulings.[6] FINRA's entire jurisdictional argument in its Opposition stems from the faulty premise that FINRA does not offer the service of hearing expungement requests of regulatory disclosures.[7] FINRA's assertion here is based on its claims that (1) the Commission in *DeMaria*[8] has determined that FINRA does not offer this service, (2) that FINRA rules do not allow for expungement of regulatory disclosures because there is no

[2] While FINRA combined its Opposition to the Application for Review with its Opposition to Mr. Robertson's Motion to Adduce Additional Evidence ("Motion"), Mr. Robertson already replied to FINRA's Opposition to the Motion on November 7th, 2024, and incorporates the facts and arguments asserted therein by referenced here.
[3] Robertson Br. at 6.
[4] 15 U.S.C. § 78s(d); see also, SEC Release No. 72182.
[5] *See, Consolidated Arbitration Applications,* Exchange Act Release No. 89495, 2019 WL 6287506, at 3 (August 6, 2020) (the "Consolidated Matter").
[6] *Id.*
[7] FINRA Opp. at 5-14.
[8] *Id.* at 5-6, citing *Michael Andrew DeMaria*, Exchange Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023) (hereinafter, "*DeMaria*").

explicit rule that outlines the procedure for such a request,[9] (3) that the FINRA rules do not require an action for regulatory expungement to be brought in FINRA's arbitration forum,[10] and (4) that the Commission should not consider Mr. Robertson's arguments on the merits of his claim for expungement as the Commission does not have jurisdiction to hear this matter.[11]

While the Commission in *DeMaria* previously determined that FINRA does not offer the service of regulatory disclosure expungement, the Commission could not have accounted at the time for the *Jarkesy* decision. Specifically, when there are allegations of fraud, the 7th amendment is triggered and the right to a jury trial is enshrined.[12] *Jarkesy* limits precedent setting within administrative decisions.[13] Mr. Robertson asserts here that this case is distinguishable from *DeMaria* in that the Commission in *DeMaria* did not consider additional facts, case law, and arguments present in this case, as addressed below.

FINRA rules do allow for expungement of regulatory disclosures. FINRA claims that it is insignificant that there is no explicit prohibition of expungement of regulatory disclosures under FINRA's Rules. To the contrary, as stated in his Brief in Support, this distinction is of great significance.[14] While there is no explicit allowance of termination disclosures contemplated under FINRA's Rules, FINRA nevertheless agrees that such expungement requests are allowed to proceed through their arbitration forum.[15] Mr. Robertson's Motion to Adduce Additional Evidence directly supports this as well, where it cites to countless instances where expungements, both of termination and criminal disclosures, have been allowed to move forward or have been otherwise

[9] *Id.* at 6-7.
[10] FINRA Opp. at 9.
[11] FINRA Opp. at 10-13.
[12] *SEC v. Jarkesy*, 144 S. Ct. 2145-2050 (2024)
[13] *Id.* at 2148.
[14] Robertson Br. at 7-9.
[15] FINRA Opp. at 10.

approved by FINRA without any explicit allowance under the FINRA Rules.[16] These actions *do* suggest that FINRA does (or at least should) "offer a similar service to request expungement of regulatory information through its arbitration forum,"[17]. Interestingly, FINRA fails to provide any support under its rules or the Exchange Act to reconcile its inconsistent claim that expungement of termination or other types of disclosures is allowed even though there is no FINRA rule excluding it, but that in the same light, a claim for expungement of a regulatory disclosure is *not* allowed even though there is no rule prohibiting it.

FINRA's next argument that FINRA rules do not require an action for regulatory expungement to be brought in FINRA's arbitration forum are without merits[18]. FINRA's argument here is premised on the fact that Mr. Robertson's statement of claim made no allegations of wrongdoing against his former firm, the named respondent, and therefore, it does not "transform his claim into an intra-industry dispute within the scope of FINRA Rule 13200."[19] FINRA's claim here is again inconsistent with how it regularly functions its arbitration forum. For example, FINRA routinely allows expungements of customer dispute or termination disclosures where the firm (or former firm) is named as a respondent in the expungement action and no allegations of wrongdoing are made against the named respondent.[20] FINRA fails to reconcile this glaring inconsistency. FINRA clearly offers this service of expungement requests, naming the firm or former firm as a respondent, even where no allegations of wrongdoing against the respondent are made and expungement is the sole claim. As such, Mr. Robertson has shown that FINRA's forum

[16] Robertson Br. at 8-9.
[17] FINRA Opp. at 10-11.
[18] FINRA Opp. at 9.
[19] *Id.* at 9-10.
[20] *See* FINRA Case Nos. 23-00104, 23-01328, 23-01329, 23-01432, 23-02291, 23-03290, 23-03594, 24-00039, and 24-00115 (FINRA cases of termination disclosure expungement that were allowed to proceed with no allegations of wrongdoing against the firm); *see also* FINRA Case Nos. 24-02277, 24-02283, 24-02285, and 24-02441 (FINRA cases of customer dispute disclosure expungement that were allowed to proceed with no allegations of wrongdoing against the firm).

OS Received 11/18/2024

denial was a "prohibition of access to a service that [FINRA] offers" and, therefore, satisfies the first prong of the test.[21]

The second prong of the jurisdictional test concerns whether the prohibition by the SRO was of a service that was "fundamentally important."[22] The Commission previously determined that FINRA's arbitration forum is a fundamentally important service.[23] In arguing against this, FINRA continues to rely on the fact that, in the *Consolidated Matter*, the Commission did not explicitly mention regulatory disclosure expungement. However, it is again flawed in that explicit allowance for other types of disclosures are already allowed without issue. It is an arbitrary and capricious distinction between the allowed termination disclosures and the disallowed regulatory disclosures. FINRA claims that the removal of regulatory disclosures from the CRD and BrokerCheck is "antithetical to the principle of investor protection."[24] Yet, the underlying factual scenario that led to the regulatory disclosure he now seeks to expunge have already been considered to be "factually impossible or clearly erroneous" by a neutral arbitrator in FINRA's arbitration forum.[25] Mr. Robertson argues that it could not be more antithetical to the principle of investor protection than to continue to publish information that has been found after an evidentiary hearing to be impossible or clearly erroneous facts. The Commission has previously held that FINRA's corporate charter states that one of its functions is to "promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members."[26] The Commission has also previously held that, under the FINRA Rules, arbitration in FINRA's forum is required for disputes arising "out of the business activities of a member or

[21] Consolidated Matter at 3.
[22] *Id.*
[23] *Id.* at 5-6.
[24] FINRA Opp. at 13.
[25] Robertson Br. at 11; *see also* Robertson's Motion to Adduce Additional Evidence, Exhibit 2 at 3.
[26] Consolidated Matter at 5.

OS Received 11/18/2024

associated person and is between or among members, members and associated persons, or associated persons."[27] Given these previous rulings by the Commission, it is clear that expungement actions that request to remove information from the CRD and BrokerCheck that are inaccurate, misleading, false, **erroneous, factually impossible**, defamatory in nature, or that provides no investor protection or regulatory value must be allowed to move forward.[28] Therefore, hearing disputes regarding the removal of information that has already been determined to be erroneous and factually impossible ***must*** be a "fundamentally important service" if it was included in its core corporate charter. As such, it is clear that the second prong of the jurisdiction test created by the Commission is satisfied.

With both prongs of the two-part test being satisfied, the Commission has jurisdiction over Mr. Robertson's Application for Review. Furthermore, since FINRA failed to address the merits of Mr. Robertson's Application for Review beyond its claim of lack of jurisdiction, all such arguments raised by Mr. Robertson regarding the merits and not objected to by FINRA should thus be deemed conceded by FINRA.

CONCLUSION

The Commission is authorized to review an action of FINRA where FINRA prohibits or limits a person's access to services offered by it and where that service is fundamentally important, which is the case here. FINRA's reliance on the fact that there is no explicit allowance of regulatory disclosure expungement is misplaced, and inconsistent with its rules, prior conduct, and the Exchange Act. Mr. Robertson is an associated person pursuant to FINRA's Rules. FINRA overstepped its discretionary power and wrongfully denied Mr. Robertson access to a fundamentally important service it offers in its arbitration forum. In denying forum, FINRA rejects

[27] *Id.* at 6, n. 17; FINRA Rule 13200.
[28] *See* FINRA Rule 2080; FINRA Rule 8312(g).

OS Received 11/18/2024

it's own decisions when arbitration awards adjacent have found that the underlying related facts are false or clearly erroneous. Further, absent FINRA arbitration, FINRA's arguments would leave parties without recourse when there is an erroneous in-house decision. Mr. Robertson respectfully requests that his case be remanded to FINRA with an order that FINRA allow him access to its forum on his claim for expungement.

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Respectfully submitted,

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OS Received 11/18/2024

CERTIFICATE OF SERVICE

I, Austin Davis, certify that on November 18, 2024, I caused a copy of the foregoing Reply to FINRA's Brief in Opposition of the above listed Applicant, in the matter of the Application for Review of Norman Thorn Robertson, Administrative Proceeding File No. 3-21982, 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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