

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89495 / August 6, 2020

Admin. Proc. File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18910, 3-18919,
3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19219, 3-19228, 3-19405, 3-19573, 3-19574,
3-19588

In the Matter of the
Consolidated Arbitration Applications
for Review of Action Taken by FINRA

ORDER FINDING JURISDICTION

The applicants in this consolidated review proceeding challenge FINRA’s action denying them access to FINRA’s arbitration forum to seek expungement of prior adverse arbitration awards arising from customer disputes. We previously consolidated these applications for review (the “Consolidated Arbitration Applications”) for the purpose of deciding whether we have jurisdiction to consider them under Section 19(d) of the Securities Exchange Act of 1934.¹ Turning to that question here, we find that we have jurisdiction to review these applications because FINRA’s action prohibited access to a fundamentally important service that it offers.

¹ See 15 U.S.C. § 78s(d)(2); *Bart Steven Kaplow*, Exchange Act Release No. 85509, 2019 WL 1489709, at *2 (Apr. 4, 2019); *Timothy Charles Sullivan*, Exchange Act Release No. 85885, 2019 WL 2160143 (May 17, 2019); *William Burk Rosenthal*, Exchange Act Release No. 85886, 2019 WL 2160144 (May 17, 2019); *Consolidated Arbitration Applications*, Exchange Act Release No. 87615, 2019 WL 6287506 (Nov. 25, 2019). Exhibit A identifies all proceedings making up the Consolidated Arbitration Applications as of the date of this order.

I. Background

The Consolidated Arbitration Applications all involve common facts relevant to whether the Commission has jurisdiction to review the applications. Each applicant is an associated person of a FINRA member firm, and an arbitration panel previously issued an arbitration award against the applicant in a customer dispute.² The underlying awards contained no expungement relief as to the applicants, and the applicants never moved in court to vacate the awards.

These awards were reported in FINRA's Central Registration Depository ("CRD") and BrokerCheck.³ FINRA's rules permit representatives to seek expungement in its arbitration forum of certain information reported in CRD and BrokerCheck. Those rules also set forth the procedures arbitrators must follow before issuing an award granting expungement relief.⁴ Under FINRA's rules, the Director of FINRA's Office of Dispute Resolution ("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 In each case, the Director determined that each request to expunge the prior adverse arbitration award arising from customer disputes was not eligible for arbitration under FINRA's rules. Each applicant then sought Commission review of those determinations.

² FINRA administered all the prior arbitrations, except one administered by the American Arbitration Association.

³ BrokerCheck is a free online tool that enables public investors to research the professional backgrounds of current and former FINRA-registered broker-dealers and their representatives, as well as investment adviser firms and their representatives. *See* <http://brokercheck.finra.org>. The information contained in BrokerCheck about broker-dealers and their representatives is derived from FINRA's CRD system, the securities industry's online registration and licensing database. Although public investors do not have access to CRD, certain information in that system is available through BrokerCheck.

⁴ *See, e.g.,* FINRA Rules 2080, 12805, 13805; *Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief*, Exchange Act Release No. 58886, 73 Fed. Reg. 66086, 2008 WL 4808789 (Nov. 6, 2008).

⁵ FINRA Rules 12203(a), 13203(a).

On April 4, 2019, we issued an order consolidating twelve of these applications for review “limited to the question of the Commission’s appellate jurisdiction.”⁶ We observed that applicants in these proceedings were all represented by counsel affiliated with the same law firm and had filed briefs that were materially identical. We therefore postponed further briefing and determined to resolve the jurisdictional question based on the briefs filed up to that point. In that and subsequent orders, we allowed the parties an opportunity to file supplemental briefs limited to legal arguments relevant to jurisdiction not otherwise addressed in the briefs already filed.

II. Jurisdiction

Exchange Act Section 19(d)(2) authorizes us to review a self-regulatory organization (“SRO”) action if that action “prohibits or limits any person in respect to access to services offered by [the SRO].”⁷ In determining whether we have jurisdiction under that standard, we ask whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important.⁸ Here, applicants’ appeals fit within that standard.

To begin with, we find that FINRA prohibited applicants’ access to its arbitration forum with respect to their claims for expungement of prior adverse arbitration awards. FINRA Rules 12203 and 13203 permit the Director to “decline to permit use of the FINRA arbitration forum”

⁶ *Kaplow*, 2019 WL 1489709, at *2. We declined to consolidate at that time two similar proceedings in which FINRA’s motions to dismiss for untimeliness were then pending. *Kaplow*, 2019 WL 1489709, at *1-2 nn. 3 & 6. On May 17, 2019, we denied those motions and consolidated those appeals with the appeals that had previously been consolidated. *Sullivan*, 2019 WL 2160143; *Rosenthal*, 2019 WL 2160144. On November 25, 2019, we consolidated six additional appeals. *Consolidated Arbitration Applications*, 2019 WL 6287506. And on January 24, 2020, we severed two cases that had previously been consolidated. *See Consolidated Arbitration Applications*, Exchange Act Release No. 88032, 2020 WL 408288 (Jan. 24, 2020).

⁷ The Exchange Act provides three other jurisdictional bases for Commission review of an SRO action: if the action imposes a final disciplinary sanction on a member of the SRO or an associated person; if it denies membership or participation to the applicant; or if it bars a person from becoming associated with a member. *See* 15 U.S.C. § 78s(d). We do not consider FINRA’s arguments that these alternate bases do not apply here because the applicants expressly deny that any of them do. *See Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 n.18 (July 15, 2016) (“We will not exercise jurisdiction on a basis [applicants] disclaim.”), *aff’d sub nom.*, *Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837 (7th Cir. 2018); *accord Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (“Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.”).

⁸ *See, e.g., Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *4 (Sept. 30, 2016) (explaining that a prohibition or limitation of access “involves a denial or limitation of ‘the applicant’s ability to utilize one of the fundamentally important services offered by the SRO’”).

upon making certain findings.⁹ Because the Director’s decision that a claim is not eligible for arbitration deprives the applicants of the ability to participate in that service with respect to that claim, it effects a prohibition of access to the arbitration forum.¹⁰

FINRA argues that it processed applicants’ claims for arbitration and did not prohibit their access to an “evaluation” of those claims’ eligibility. But FINRA’s “evaluation” that applicants could not access its arbitration service does not mean that applicants accessed that service. Instead, FINRA’s “evaluation” is the means by which it prohibited applicants’ access to arbitration.¹¹

Our finding of a prohibition of access does not end the inquiry. Section 19(d) confers jurisdiction only to prohibitions or limitations of access to services that involve “the applicant’s

⁹ FINRA Rules 12203(a), 13203(a).

¹⁰ See *Order Approving Proposed Rule Change*, Exchange Act Release No. 55158, 2007 WL 966961, at *11, *59 (Jan. 24, 2007) (comparing identical Rules 12203 and 13203 of the Customer and Industry Codes, stating that under Rule 12203 and thus also 13203 “the authority to deny the forum could not be delegated by the Director,” and noting that the title of the rule was changed to “Denial of NASD Forum,” making clear that the action is in fact to deny the forum) (emphasis added); see also *Positron Corp.*, Exchange Act Release No. 74216, 2015 WL 470454, at *1, 2, 5 & n.29 (Feb. 5, 2015) (finding jurisdiction to review FINRA’s denial of company’s request that FINRA process and announce company’s reverse stock split and change of corporate domicile, which FINRA denied pursuant to its authority under FINRA Rule 6490 to deny an issuer’s request that FINRA process and announce certain company actions, because Exchange Act Section 19(d) authorizes “Commission review of SRO action that prohibits or limits ‘any person with respect to access to services offered by the [SRO]’”); cf. *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514 (Oct. 22, 2019) (concluding that FINRA action giving effect to arbitrator’s award finding a claim to be ineligible was not a “denial of access” to arbitration, and thus there was no jurisdiction under Section 19(d), where FINRA “accepted [the applicant’s] statement of claim and allowed him to access its arbitration forum,” the applicant “actively participated in that service,” and the applicant received a ruling from the arbitrator denying the requested relief).

¹¹ Cf. *Scattered Corp.*, Exchange Act Release No. 37249, 1996 WL 284622, at *2 (May 29, 1996) (finding that the Chicago Stock Exchange’s “determination not to process Scattered’s application for registration as a market maker limit[ed] the firm’s access to the CHX’s services”).

ability to utilize one of the fundamentally important services offered by the SRO.”¹² Where we have previously exercised jurisdiction on this basis, “[t]he services at issue were not merely important to the applicant but central to the function of the SRO.”¹³

Here, given FINRA’s chosen structure and the scope of services it offers to members and third parties, we find that FINRA’s service of providing arbitration of expungement claims is “fundamentally important” and central to its function as an SRO. FINRA’s corporate charter states that one of its functions is “[t]o promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members.”¹⁴ To that end, FINRA has delegated certain “responsibilities and *functions* as a registered securities association” to its subsidiary FINRA Regulation, including “conduct[ing] arbitrations, mediations, and other dispute resolution programs” and “operat[ing] the [CRD],”¹⁵ in which information about those arbitrations is disclosed. In holding itself out to the public, FINRA

¹² *Morgan Stanley & Co.*, Exchange Act Release No. 39459, 1997 WL 802072, at *3 (Dec. 17, 1997). FINRA argues that the standard for our jurisdiction here is whether the challenged SRO action prohibits or limits the applicant’s “activities as an associated person of a FINRA member.” While SROs may impose a final disciplinary sanction on persons associated with its members by, among other things, limiting such persons’ activities, *see* 15 U.S.C. §§ 78o-3(b)(7); *see also supra* note 7 (discussing the Commission’s jurisdiction over SRO action that imposes a final disciplinary sanction), no one contends that FINRA’s Rule 13203 determinations are limitations on applicants’ activities or are otherwise final disciplinary sanctions. The issue here is whether FINRA has prohibited access to its services.

¹³ *Morgan Stanley & Co.*, 1997 WL 802072, at *3.

¹⁴ Restated Certificate of Incorporation of Financial Industry Regulatory Authority, Inc. § 3(4) (July 2, 2010), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4589.

¹⁵ *Plan of Allocation and Delegation of Functions by FINRA to FINRA Regulation, Inc.* § II.A.1.i., n. (amended effective Dec. 20, 2015), <https://www.finra.org/rules-guidance/rulebooks/corporate-organization/ii-finra-regulation-inc> (“Delegation Plan”) (emphasis added); *see also Notice of Filing of Proposed Rule Change to Amend the By-Laws of NASD Dispute Resolution*, Exchange Act Release No. 61575, 2010 WL 675923, at *2 (Feb. 23, 2010) (explaining that “FINRA’s dispute resolution subsidiary conducts arbitration . . . programs and interprets rules and regulations pertaining to its dispute resolution programs”), *approved by* Exchange Act Release No. 62156, 2010 WL 2111277 (May 24, 2010); *see also Order Approving a Proposed Rule Change to Merge FINRA Dispute Resolution, Inc. Into and With FINRA Regulation, Inc.*, Exchange Act Release No. 76670, 2015 WL 9182782 (Dec. 16, 2015).

emphasizes the importance of its arbitration forum to its relationship with its member firms.¹⁶ And FINRA's rules require member firms and associated persons to arbitrate certain disputes.¹⁷

FINRA argues that we have not previously found its arbitration forum for expungement claims to be “fundamentally important” or “central” to its function. We routinely consider our jurisdiction over novel challenges to SRO actions that we have not previously considered.¹⁸ Novelty is no obstacle to our review if the challenged SRO action falls within Exchange Act Section 19(d). FINRA further argues that it has not prohibited applicants' access to any services similar to the handful of services that we have previously found to meet the “fundamentally important” standard.¹⁹ But FINRA does not explain why its arbitration forum should not be considered fundamentally important and central to its function. Nor does it explain why the

¹⁶ FINRA, *2017 Annual Report 37* (June 27, 2018), https://www.finra.org/sites/default/files/2017_AFR.pdf (explaining that FINRA “provide[s] arbitration and mediation services to assist in the resolution of monetary and business disputes between and among investors, broker-dealers and individual brokers”); *see also* FINRA, *Five Steps to Protecting Market Integrity* (accessed August 3, 2020), <https://www.finra.org/about/what-we-do/five-steps-protecting-market-integrity> (listing five activities that FINRA performs, including “administer[ing] the largest forum specifically designed to resolve securities-related disputes between and among investors, securities firms, and individual brokers”); FINRA Dispute Resolution Task Force, *Final Report and Recommendations of the FINRA Dispute Resolution Task Force 1* (Dec. 16, 2015), <http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf> (explaining that its dispute-resolution service is “for all practical purposes, the sole arbitration forum in the United States for resolving disputes between broker-dealers, associated persons, and customers,” and that as of 2015, FINRA “handle[d] more than 99 percent of the securities-related arbitrations and mediations in the [United States]”).

¹⁷ *See* FINRA Rule 12200 (requiring arbitration of disputes between customers and member firms or associated persons if dispute arises in connection with the business activities of the member or associated person and customer requests arbitration); FINRA Rule 13200 (requiring arbitration if dispute arises out of the business activities of a member or associated person and is between or among members, members and associated persons, or associated persons).

¹⁸ *See, e.g., Allen Douglas Sec., Inc.*, Exchange Act Release No. 50513, 2004 WL 2297414, at *2 (Oct. 12, 2004) (considering jurisdiction over type of NASD action not previously appealed and comparing to prior rulings on other types of SRO actions); *William J. Higgins*, Exchange Act Release No. 24429, 1987 WL 757509, at *5 (May 6, 1987) (exercising jurisdiction to review SRO's denial of request to install telephone linkup though we had not previously done so).

¹⁹ *See, e.g., Scattered Corp.*, 1996 WL 284622, at *2 (finding that exchange's determination not to process firm's application for registration as a market maker limited access); *Higgins*, 1987 WL 757509, at *5 (finding that exchange's denial of a member's request to install telephone linkup on the trading floor to permit direct communication between the floor and non-member customers was a denial of access).

services previously found to be fundamentally important should be so considered but its arbitration forum should not be.

For these reasons, we find that we have jurisdiction to review the Consolidated Arbitration Applications. In doing so, we do not express any views about the underlying merits of the applications for review in this proceeding, including whether FINRA properly prohibited applicants' access to its arbitration forum, or about whether there could be other circumstances under which we would not have jurisdiction to review an arbitration eligibility determination.

III. Merits Briefing

Having determined that we have jurisdiction to review FINRA's prohibition of access here, we find that this proceeding should continue to be consolidated.²⁰ Commission Rule of Practice 201(a) provides that we may consolidate "proceedings involving a common question of law or fact . . . for hearing of any or all the matters at issue in such proceedings."²¹ Although each application at issue in the Consolidated Arbitration Applications involves case-specific facts regarding the underlying customer disputes, the applications share common facts relevant to our analysis of whether FINRA's prohibition of access to its services was improper.²² Each case involves a determination that the customer dispute information sought to be expunged related to a prior adverse arbitration award. Each case involves the question of whether the Director determined that the expungement requests were ineligible because they involved prior adverse arbitration awards and whether the requests in fact sought expungement of such awards. And each case involves common questions of law, such as whether the Director's eligibility determination was consistent with FINRA's rules and whether those rules are, and were applied in a manner, consistent with the Exchange Act's purposes. The applicants are also all represented by counsel associated with the same law firm, and jurisdictional briefs have been materially identical thus far. Considerations of adjudicatory economy thus weigh in favor of consolidating this proceeding for the purposes of briefing and deciding the merits of applicants' claims.

²⁰ Cf. *Kaplow*, 2019 WL 1489709, at *2 (consolidation "limited to . . . jurisdiction").

²¹ Rule of Practice 201(a), 17 C.F.R. § 201.201(a).

²² See Exchange Act Section 19(f), 15 U.S.C. § 78s(f) (directing us to dismiss an application for review of an SRO's prohibition or limitation of access if (1) the grounds for the SRO's action exist in fact; (2) that action was in accordance with the SRO's rules; and (3) those rules are, and were applied in a manner, consistent with the Exchange Act's purposes); see also *Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *2 n.10 (Nov. 15, 2013) ("When an applicant . . . makes a threshold showing of jurisdiction by . . . establishing a prohibition or limitation of [access to] services under Section 19(d)(1), we apply the statutory standard of review set forth in Section 19(f)."). See generally *Sequiera*, 2017 WL 4335070, at *3-4 (discussing Section 19(f) standards of review).

Although the parties' jurisdictional briefs include some argument on the merits of applicants' challenges to the Director's determination that their requests for expungement are not eligible for arbitration in FINRA's forum, we believe that additional briefing would "significantly aid [our] decisional process."²³ In addition to any other matters the parties find relevant, the Commission may benefit from further analysis of the following issues:

- What was the Director's basis for the prohibitions of access and was that basis consistent with FINRA's rules?
- Did all of applicants' denied requests to arbitrate their expungement claims involve prior adverse arbitration awards? Were the prior adverse arbitration awards all related to underlying customer disputes?
- What rule governs whether an arbitrator could grant applicants' requested relief of expungement of information related to customer disputes? Would applying that rule require the arbitrator to revisit legal or factual issues actually litigated and determined in a final arbitration award issued in the prior arbitration proceeding? If expungement relief is conditioned on the arbitrator revisiting those issues, would that be relevant to whether the Director's prohibition of access was consistent with FINRA's rules?
- Was the Director's prohibition of access consistent with the provisions of Section 15A(b)(6) of the Exchange Act requiring, among other things, that the rules of a registered securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest?²⁴

As the unnecessary duplication of identical arguments in multiple briefs is unlikely to promote adjudicatory efficiency, we encourage the parties to consider filing joint or consolidated briefs. Applicants may assume that the Commission will be familiar with all briefs filed in this consolidated proceeding. It is therefore unnecessary for applicants to file a protective brief to join or preserve legal arguments addressed in other briefs or to be deemed to have exhausted administrative remedies before the Commission on these issues. Applicants' obligations to file briefs addressing the merits issues identified above will be satisfied by (1) filing joint briefs or

²³ 17 C.F.R. § 201.421(b).

²⁴ 15 U.S.C. § 78o-3(b)(6); *see also Order Approving Proposed Rule Change*, 2007 WL 966961, at *58-59 (finding that Rules 12203 and 13203 were consistent with the Exchange Act's purposes of "protect[ing] investors and the public interest" when approving them and explaining that the rules "should facilitate excluding cases from the [FINRA] arbitration forum that are beyond its mandate").

affirmatively joining briefs or (2) implicitly relying on the other briefs filed in these consolidated appeals.

Accordingly, it is ORDERED that applicants shall file their opening brief or briefs by September 4, 2020, that FINRA shall file its opposition brief or briefs by October 5, 2020, and that applicants may file their reply brief or briefs by October 19, 2020.²⁵

By the Commission.

Vanessa A. Countryman
Secretary

²⁵ As provided by Rule 450(a), no briefs in addition to those specified in this order may be filed without leave of the Commission. Attention is called to Rule of Practice 450(b) and (c), 17 C.F.R. § 201.450(b) & (c), with respect to content and length limitations, and Rules of Practice 150–153, 17 C.F.R. § 201.150–153, with respect to form and service, and the Commission’s March 18, 2020 order providing further instructions regarding the filing and service of papers in appeals of action taken by FINRA. *See In re: Pending Administrative Proceedings*, Exchange Act Release No. 88415, <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

Exhibit A

Effective as of this order, the Consolidated Arbitration Applications are:

<u>Applicant</u>	<u>Administrative Proceeding File Number</u>
Tim Sullivan	3-18616
William Burk Rosenthal	3-18617
Bart Steven Kaplow	3-18877
Daryl Andrew Cole	3-18879
Frank Augustine Cuenca	3-18883
Curt Charles Jackson	3-18910
Brock Mosely	3-18919
Ronald R. Wetzel	3-18934
Peter Ashley Ramsay	3-18988
Donald Anthony Wojnowski	3-19013
Mark Vernon Rottler	3-19016
Carl G. Gordinier	3-19017
Jordan Whitney Waring	3-19219
Kent Pearce	3-19228
Vincent Harl Rossi	3-19405
Michael Patrick Murphy	3-19573
Scott Shulman	3-19574
Alton Theodore Davis, Jr.	3-19588