

.UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 89610 / August 19, 2020

Admin. Proc. File No. 3-19014

In the Matter of the Application of
DONALD ANTHONY WOJNOWSKI
For Review of Action Taken by
FINRA

ORDER REQUESTING ADDITIONAL WRITTEN SUBMISSIONS

Donald Anthony Wojnowski filed an application for review of FINRA action denying his request to use FINRA's arbitration forum to determine whether to expunge from his Central Registration Depository records information about a customer dispute. Wojnowski filed a claim against E.F. Hutton & Company, Inc., a now-terminated FINRA member firm, seeking to expunge information about a dispute brought by Wojnowski's customers, which E.F. Hutton settled. FINRA determined that the claim was ineligible for arbitration but did not explain why.

After Wojnowski appealed this action to the Commission, and after we issued an order scheduling briefs on the issue of the Commission's jurisdiction, FINRA sent Wojnowski's counsel a letter providing for the first time grounds for FINRA's conclusion that the expungement request was ineligible for arbitration. According to FINRA's letter, the named respondent cannot be served because its successor-in-interest is subject to an automatic bankruptcy stay. FINRA then moved to adduce the letter as additional evidence, and FINRA's opposition brief on the issue of jurisdiction referred to the letter as the basis for its denial of access. Wojnowski has neither opposed FINRA's motion nor objected to the absence in the record of an explained basis for FINRA's decision.

As the Commission has jurisdiction over this appeal, the parties should address the merits.¹ In addition to any other issues the parties find relevant to the Commission’s review under Section 19(f) of the Securities Exchange Act of 1934,² the Commission would benefit from additional briefing on the following issues:

- Exchange Act Section 15A(h)(2) provides that any determination to prohibit or limit a person’s access to services shall be supported by a statement setting forth the specific grounds on which the . . . prohibition or limitation is based.”³ Did FINRA issue Wojnowski a supporting “statement setting forth the specific grounds” for its determination as provided for by Section 15A(h)(2)?
- What were FINRA’s grounds for determining that Wojnowski’s claim was ineligible for arbitration, and was that prohibition of access consistent with FINRA’s rules?
- Should the Commission grant FINRA’s motion to adduce its letter to Wojnowski? Why did FINRA not send Wojnowski the letter before his appeal, and how does that bear, if at all, on whether FINRA has established reasonable grounds for its failure to adduce the letter previously?⁴ What is the relevance, if any, of case law governing judicial review of an administrative agency’s post hoc explanation concerning its reasoning at the time of its decision?⁵
- If the Commission were to deny FINRA’s motion to adduce, could the Commission discharge its review function based on the record otherwise before it, or would it instead have to remand to FINRA for issuance of a new letter to be made part of the record?⁶

¹ See *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 WL 4569083 (Aug. 6, 2020) (holding that the FINRA action Wojnowski challenges here—denying a request to use FINRA’s arbitration forum on the ground that an expungement claim is ineligible for arbitration—is a prohibition of access to SRO services for which the Commission has jurisdiction under Exchange Act Section 19(d)(2)). This order expresses no view on the merits of Wojnowski’s appeal.

² 15 U.S.C. § 78s(f).

³ 15 U.S.C. § 78o-3(h)(2).

⁴ See 17 C.F.R. § 201.452 (Commission may adduce new evidence if moving party shows, among other things, “reasonable grounds for failure to adduce such evidence previously”).

⁵ See, e.g., *Rhea Lana, Inc. v. United States*, 925 F.3d 521, 524-25 (D.C. Cir. 2019); *Olivares v. Transportation Sec. Admin.*, 819 F.3d 454, 463-64 (D.C. Cir. 2016).

⁶ See, e.g., *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 83849, 2018 WL 3869452, at *9 n.76 (Aug. 15, 2018); *Eagle Supply Grp., Inc.*, Exchange Act Release No. 39800, 1998 WL 133847, at *4 (Mar. 25, 1998).

Accordingly, it is ORDERED that Wojnowski may file a brief, not to exceed 14,000 words, addressing the issues set forth above by September 18, 2020. FINRA may file a response brief, not to exceed 14,000 words, by October 19, 2020. Wojnowski may file a reply brief, not to exceed 7,000 words, by November 2, 2020. No briefs in addition to those specified above may be filed without leave of the Commission.⁷

For the Commission, by the Office of the General Counsel, pursuant to delegated authority.

Vanessa A. Countryman
Secretary

⁷ Attention is called to Rules of Practice 150-153, 17 C.F.R. § 201.150-153, with respect to form and service, as well as the Commission's March 18, 2020 order regarding the filing and service of papers, which provides that pending further order of the Commission parties to the extent possible shall submit all filings electronically at apfilings@sec.gov. See *Pending Administrative Proceedings*, Exchange Act Release No. 88415, <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.