SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 96769 / January 30, 2023

Admin. Proc. File No. 3-18894

In the Matter of the Application of

THOMAS CHRISTOPHE PRENTICE

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Associated person of FINRA member firm filed an application for review of a FINRA determination that his expungement claim was ineligible for arbitration. *Held*, because arbitrator eventually denied the expungement claim, application for review is dismissed.

APPEARANCES:

Michael Bessette, *William Bean*, *Frederick Steimling*, *Erica Harris*, *Owen Harnett*, *Michelle Atlas*, and *Armin Sarabi* of HLBS Law for Thomas Christophe Prentice.

Alan Lawhead, *Jennifer Brooks*, and *Megan Rauch* for FINRA.

Appeal filed: November 14, 2018
Last brief received: March 24, 2020

Thomas Christophe Prentice, an associated person of a FINRA member firm, appeals FINRA's determination that a claim to expunge information about a prior adverse arbitration award from his Central Registration Depository ("CRD") records was ineligible for arbitration under FINRA's rules. During the arbitration of a separate claim to expunge information about a customer complaint from his CRD, Prentice asked the arbitrator to also decide the claim that FINRA had said was ineligible for arbitration. The arbitrator granted the expungement claim as to the customer complaint, and then considered but denied the expungement claim as to the prior adverse arbitration award.[1] Prentice then filed an application for review under Section 19(d) of the Securities Exchange Act of 1934,[2] challenging FINRA's determination that the latter expungement claim was ineligible for arbitration and requesting that we order FINRA to allow arbitration of that claim. We dismiss Prentice's application for review because Section 19(d) does not authorize our review of FINRA's action where, as here, an applicant already accessed FINRA's arbitration service by receiving an arbitration award on the merits.

I. Background

Prentice has worked in the securities industry for more than 40 years. As relevant here, he worked for Merrill Lynch, Pierce, Fenner & Smith Inc. ("Merrill Lynch") between April 1980 and January 2016. During that time, two customers made complaints about Prentice's investment recommendations. The first customer filed a statement of claim against Prentice and Merrill Lynch in the arbitration forum of FINRA's predecessor, NASD, alleging that Prentice made misrepresentations, failed to disclose material information, failed to follow investment goals, and failed to follow the pricing strategy the customer was promised. In July 1996, an arbitrator determined that Prentice and Merrill Lynch were liable and ordered Prentice and Merrill Lynch to pay the customer $6,032.90, jointly and severally. The second customer complained to Merrill Lynch in April 2009 that Prentice engaged in "misrepresentation and unsuitable investment recommendations." Merrill Lynch investigated the complaint and, in February 2010, took no action because it found the claim to be meritless.

The prior adverse arbitration award and the customer complaint were reported in FINRA's CRD. The CRD is a computerized database that contains information about broker-dealers and their representatives, including information about customer arbitration awards and other customer disputes.[3] Generally, the information in the CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms,[4] which

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1 *Prentice v. Merrill Lynch Pierce Fenner & Smith Inc.*, Docket No. 18-00464, 2018 WL 5994182, at *2–3 (FINRA Arbitration Nov. 5, 2018).

2 15 U.S.C. § 78s(d).

3 *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, Exchange Act Release No. 72649, 79 Fed. Reg. 43,809, 43,809 (July 28, 2014).

4 *Id.* These forms are Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form). *Id.* at 43,809 & n.6.

member firms are required to file in certain circumstances.[5] The information in the CRD is used by FINRA and other regulators, as well as by firms when making personnel decisions.[6] The CRD cannot be accessed by the general public.[7] However, FINRA provides a free online tool, called BrokerCheck, which displays some of the CRD's information, including information about prior customer arbitrations and other customer disputes, regarding persons who are currently or formerly associated with FINRA member firms.[8] Because BrokerCheck's information is derived from the CRD, information that is expunged from the CRD is not accessible via BrokerCheck.[9]

Associated persons and their firms generally may use FINRA arbitration to seek to expunge customer dispute information from the CRD.[10] FINRA arbitrators must follow certain procedures and apply certain standards when expunging customer dispute information.[11] Even when an arbitrator recommends expungement relief, however, the information is not expunged from the CRD unless a court confirms the award, and generally FINRA must be named as an additional party in the court confirmation action.[12]

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5 *See, e.g.*, FINRA By-Laws Art. V, Sec. 2; FINRA Rule 1013(a)(2).

6 *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809.

7 *See id.*

8 *See, e.g.*, *id.* at 43,809-10 (describing BrokerCheck and its relationship to the CRD); FINRA Rule 8312 (describing the information released on BrokerCheck). BrokerCheck is available at http://brokercheck.finra.org. In addition to displaying information about persons who are currently or formerly associated with FINRA member firms, BrokerCheck also allows people to research investment adviser firms and their representatives. *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514, at *1 n.2 (Oct. 22, 2019).

9 *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809-10.

10 *See* FINRA Rule 2080. FINRA arbitration may not always be available, however, because FINRA rules also provide that the Director of FINRA Dispute Resolution Services "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 [relevant FINRA Arbitration] Code, the subject matter of the dispute is inappropriate." FINRA Rules 12203(a), 13203(a); *see also* FINRA Rules 12100(h), 13100(h) (defining the applicable FINRA Arbitration "Code"); FINRA Rules 12100(m), 13100(m) (defining the FINRA "Director"). In this case, because – as described more fully below – the arbitrator reached and rejected Prentice's request to expunge the prior customer claim on the merits, we need not determine when, if ever, the Director may appropriately invoke these rules to deny the use of FINRA arbitration for claims to expunge customer dispute information.

11 FINRA Rules 12805, 13805.

12 FINRA Rule 2080(a)-(b).

Here, in February 2018, Prentice filed a statement of claim in FINRA's arbitration forum requesting expungement of the prior adverse arbitration award and customer complaint from the CRD. FINRA's Office of Dispute Resolution[13] initially accepted the claims for arbitration. Prentice filed an amended statement of claim in August 2018. In October 2018, shortly before the scheduled arbitration hearing, FINRA sent Prentice a letter informing him that the Director of the Office of Dispute Resolution ("Director") had determined that his request for expungement of the prior arbitration award was ineligible for arbitration because it arose from a prior adverse arbitration award.[14] But FINRA allowed Prentice's claim to expunge the customer complaint to proceed at the scheduled arbitration hearing. Prentice asked the arbitrator to also consider whether to expunge the information about the prior adverse award despite the Director's decision that the expungement claim was ineligible for arbitration.

The arbitrator issued a written award on November 2, 2018. The award granted expungement relief as to the customer complaint but denied expungement relief as to the prior adverse award. The arbitrator explained that, if granting expungement "were ever appropriate" as to that prior award given the Director's determination that it was ineligible for arbitration, such expungement "would require a compelling justification." But the arbitrator then proceeded to consider and reject Prentice's request on the merits, finding that "[e]ven absent" the Director's determination that the claim was ineligible for arbitration, "second-guessing an arbitrator who heard or read all of the evidence" during the underlying customer arbitration and found against Prentice "would itself require a compelling justification." The arbitrator concluded that "[n]o such compelling justification exists here."

On November 14, 2018, Prentice filed an application for review with the Commission arguing that FINRA's eligibility determination was improper and asking that he "be permitted to bring his case to FINRA arbitration." We directed the parties to address whether we have authority to review Prentice's application under Exchange Act Section 19(d).[15]

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[13] FINRA's Office of Dispute Resolution has been renamed FINRA Dispute Resolution Services. *See Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Reflect Name Changes to Two FINRA Departments*, Exchange Act Release No. 90344, 85 Fed. Reg. 71,695, 71,695 (Nov. 10, 2020).

[14] *See* FINRA Rules 12203(a), 13203(a) (providing that the 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 [respective FINRA Arbitration] Code, the subject matter of the dispute is inappropriate").

[15] We initially consolidated Prentice's application with others that appeared to raise similar reviewability issues and requested briefs on reviewability. *Bart Steven Kaplow*, Exchange Act Release No. 85509, 2019 WL 1489709, at *2 (Apr. 4, 2019). We later severed Prentice's application from the other consolidated cases because, unlike those cases, "the record indicates that Prentice may have accessed the arbitration forum." *Consolidated Arbitration Applications*, Exchange Act Release No. 88032, 2020 WL 408288, at *1 (Jan. 24, 2020). We then requested additional briefs regarding, among other things, whether the arbitrator had decided the

II. Analysis

Exchange Act Section 19(d) authorizes us to review actions taken by a self-regulatory organization ("SRO") such as FINRA only in specific circumstances.[16] One such circumstance is where an SRO "prohibits or limits any person in respect to access to services offered by [that SRO]."[17] Prentice contends that his appeal fits within Section 19(d) because FINRA prohibited or limited his access to one of its services—arbitration—by determining that his claim to expunge the prior adverse award was ineligible to be arbitrated. According to Prentice, this determination "caus[ed] the Arbitrator to choose not to decide the claim on the merits." But the arbitrator *did* decide Prentice's claim on the merits, considering whether Prentice's expungement request should be granted, and ultimately concluding that it should not. We therefore find that FINRA's action did not prohibit or limit Prentice with respect to access to the arbitration service, and therefore we lack authority to review this action.

As noted above, the arbitrator considered *both* FINRA's determination that expunging the prior adverse award was ineligible for arbitration *and*, at Prentice's request, the claim for expungement on the merits. And the arbitrator specifically found that even if FINRA had not found Prentice's expungement claim regarding the prior adverse award ineligible for arbitration, it would still require "a compelling justification" to second-guess the prior arbitrator and find expungement warranted. But, after assessing the record and Prentice's arguments, the arbitrator found "[n]o such compelling justification." Accordingly, the arbitrator denied Prentice's expungement claim on the merits of that request.[18] As a result, Prentice has already obtained the relief that he seeks: to "be permitted to bring his case to FINRA arbitration." Moreover, as

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expungement request on the merits. *Thomas Christophe Prentice*, Exchange Act Release No. 88038, 2020 WL 408289 (Jan. 24, 2020).

16 15 U.S.C. § 78s(d)(1)–(2).

17 *Id.* The Exchange Act provides three other bases for our 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 id*. Prentice denies that any of these alternate bases apply here, so we do not address them. *Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 WL 3820988, at *3 & n.13 (July 7, 2020) (not reaching "alternate bases for Commission review" where applicant did contend that those bases applied); *cf. 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); *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.").

18 *Cf. Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 550 F.3d 27, 30–31 (D.C. Cir. 2008) (rejecting argument that arbitration award addressed only one issue and not another issue that the arbitrator's analysis framed as an "alternative" issue, because the text of the award addressed and decided both "conceptually distinct issues" (cleaned up)).

noted, the arbitrator considered and issued a decision on the merits of his expungement request. That the arbitrator ruled against Prentice does not mean he was denied access to arbitration.[19]

Although he acknowledges that an arbitrator's determination on the merits of a claim is "final and binding,"[20] Prentice asks that we issue an order enabling him to arbitrate his expungement claim again. But this relief would require us to overturn the arbitration award denying his claim, which we lack authority to do under Section 19(d).[21]

Moreover, Prentice acknowledges that he has "another available path" for relief—moving to vacate, modify, or correct the award in court under the Federal Arbitration Act ("FAA").[22] Prentice argues that the possibility of relief under the FAA from an adverse arbitration award "does not relieve the Commission of its oversight responsibility." But, as noted, Congress has not authorized us to review FINRA's arbitration awards and FAA review remains Prentice's only potential path for relief.

Prentice's citation to *John Boone Kincaid* does not establish that we may exercise review here.[23] Kincaid argued that FINRA had limited his access to its arbitration service by giving effect to an arbitration award that Kincaid claimed violated FINRA rules. We disagreed, holding that FINRA had not limited Kincaid's access to services, because Kincaid had fully participated in an arbitration culminating in an adverse award. Prentice argues that *Kincaid* is distinguishable because Prentice was not given the same opportunity to participate in arbitration as Kincaid. In support, Prentice notes that Kincaid was given a chance to file a supplemental brief, but, in

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19 *See Kincaid*, 2019 WL 5445514, at *3 ("Although the arbitrator's ruling was adverse to Kincaid, FINRA did not limit Kincaid's access to its arbitration forum but rather provided Kincaid with access to that service."); *see also Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007) (holding that an SRO action "is not reviewable merely because it adversely affects the applicant").

20 *See* FINRA Rule 13413; *see also Kincaid*, 2019 WL 5445514, at *3 n.16 ("Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal." (quoting FINRA Rule 13904(b))); *Eric M. Diehm*, Exchange Act Release No. 33478, 1994 WL 17049, at *2 (Jan. 14, 1994) (stating that NASD, FINRA's predecessor, "d[id] not have the power to review its own arbitration awards"); *cf. John G. Pearce*, Exchange Act Release No. 37217, 1996 WL 254675, at *2 (May 14, 1996) (rejecting applicant's attack on "the fairness of the underlying arbitration proceeding" because permitting "a party dissatisfied with an arbitral award to attack it collaterally for legal flaws" "would subvert the salutary objective that the NASD's arbitration resolution seeks to promote" (cleaned up)).

21 *Kincaid*, 2019 WL 5445514, at *3, 5 (finding that Section 19(d) does not provide us with the authority to overturn an arbitration award and that an applicant'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").

22 *See id.* at *3.

23 *See id.* at *2-3.

Prentice's case, FINRA "intervene[ed]" by determining that his expungement claim was ineligible for arbitration "before the arbitrator could determine on the merits if relief was warranted."

To the contrary, however, Prentice's participation in arbitration was at least as active as Kincaid's. While the arbitrator considering Prentice's claim may not have requested a supplemental filing (which, as Prentice notes, Kincaid never actually filed), Prentice fully participated in the arbitration proceeding. He filed both an initial statement of claim and an amended statement of claim months later. Then, after FINRA issued its letter finding Prentice's expungement request ineligible for arbitration, Prentice still asked the arbitrator to consider this expungement request, and the arbitrator did so, ultimately denying his claim on the merits. Therefore, like Kincaid, Prentice was not denied access to FINRA's arbitration forum. And, as in *Kincaid*, because we lack authority to review FINRA's action under Section 19(d), we therefore also do not address Prentice's merits arguments that FINRA's eligibility determination was inconsistent with the Exchange Act and with FINRA's rules.[24]

We therefore dismiss the application for review. An appropriate order will issue.[25]

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

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[24] *See Kincaid*, 2019 WL 5445514, at *5 (explaining that a petition for review must "first satisfy" the requirements in Section 19(d) "before the Commission can review the action under Section 19(f)" (citing 15 U.S.C. § 78s(d), (f))).

[25] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96769 / January 30, 2023

Admin. Proc. File No. 3-18894

In the Matter of the Application of

THOMAS CHRISTOPHE PRENTICE

For Review of Action Taken by

FINRA

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that this application for review filed by Thomas Christophe Prentice is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary