SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97027 / March 2, 2023

Admin. Proc. File No. 3-19771

In the Matter of the Application of

BLACKBOOK CAPITAL, INC.,
and
FRANKLIN OGELE

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Former FINRA member firm and its president applied for review of various FINRA actions. *Held*, because the challenged actions are not reviewable under Section 19(d) of the Securities Exchange Act of 1934, and because related claims of disparate treatment by FINRA staff are unsubstantiated, the proceeding is *dismissed*.

APPEARANCES:

Franklin Ogele, Esq., pro se and as counsel for BlackBook Capital, Inc.

Andrew Love for the Financial Industry Regulatory Authority, Inc.

Appeal filed: April 23, 2020
Last brief received: June 1, 2020

On April 24, 2020, BlackBook Capital, Inc., a former FINRA member firm ("BlackBook" or the "Firm"), and Franklin Ogele, its president (together "Applicants"), filed an application seeking a Commission order setting aside various actions taken by FINRA. Specifically, Applicants challenge what they describe as the "false publication" on FINRA's BrokerCheck website of information about the Firm.[1] Applicants also challenge FINRA's enforcement of filing requirements related to Financial and Operational Combined Uniform Single ("FOCUS") reports.[2] On May 15, 2020, FINRA moved to dismiss the application for review on various grounds, including that the Commission lacks the authority to review the actions Applicants challenge. We agree that Applicants have failed to establish a basis for Commission review and therefore grant FINRA's motion.

I. Background

Applicants' dispute with FINRA stems in part from a May 2014 settlement, in which the Firm agreed to a Letter of Acceptance, Waiver, and Consent (the "AWC"). FINRA regularly enters into AWCs with registered firms in order to resolve potential disciplinary matters before a complaint is filed.[3]

The AWC here concerned FINRA's allegations that the Firm: (1) charged unreasonable fees and mischaracterized those fees to its customers; (2) violated anti-money-laundering rules; and (3) failed to preserve business-related emails as required. The Firm agreed that the AWC

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[1] BrokerCheck is an online database maintained by FINRA that enables public investors to research the professional backgrounds of FINRA member firms and their associated persons. *See* http://brokercheck.finra.org.

[2] On December 23, 2019, Applicants filed suit against FINRA in federal district court making the same claims as in this appeal. *BlackBook Capital Inc., et al. v. The Financial Industry Regulatory Authority, Inc.*, No. 2:19-CV-21772-JMV-JBC (D.N.J. Dec. 23, 2019). In their application for review, Applicants state that they appealed to the Commission "to preserve their right to review . . . in the event of [an] unfavorable ruling" by the district court. On August 10, 2020, the district court granted FINRA's motion to dismiss the lawsuit without prejudice and authorized Applicants to file an amended complaint within thirty days. *See* Dkt. Nos. 20-21, *BlackBook v. FINRA*, No. 2:19-CV-21772-JMV-JBC (D.N.J. Aug. 10, 2020) (dismissing applicants' lawsuit for lack of jurisdiction). Applicants then filed an amended complaint, and FINRA again filed a motion to dismiss. On May 5, 2021, the district court granted FINRA's motion to dismiss the lawsuit and issued an order dismissing Applicants' complaint with prejudice and closing the case. *See* Dkt. Nos. 29-30, *BlackBook v. FINRA*, No. 2:19-CV-21772-JMV-JBC (D.N.J. May 5, 2021) (dismissing applicants' amended complaint because it "provided no new factual allegations" from its initial complaint).

[3] *See generally Order Approving Proposed Rule Change*, Exchange Act Release No. 38908, File No. SR-NASD-97-28, 1997 WL 441929, at *37 (Aug. 7, 1997) (describing FINRA's use of AWCs).

would be "made available through FINRA's public disclosure program" and that "FINRA may make a public announcement concerning this agreement and the subject matter thereof."[4] BlackBook also agreed to pay a fine of $50,000. Although the Firm paid most of the fine in monthly installments, it ceased making payments in February 2016, leaving a balance of $7,599.85.

On June 14, 2016, FINRA informed BlackBook that, if it failed to pay the remainder of the fine, FINRA would expel it from membership.[5] BlackBook did not pay, and FINRA expelled the Firm on June 28, 2016. FINRA subsequently updated BlackBook's entry in its Central Registration Depository ("CRD") to note that the Firm had "failed to pay fines and/or costs of $50,000" and had therefore been "expelled from FINRA membership." The CRD entry was then publicly available through BrokerCheck.

Applicants challenge this BrokerCheck disclosure arising from the failure to pay the fine they agreed to in the 2014 AWC, and they also raise an unrelated challenge to what they characterize as FINRA's "discriminatory enforcement" against BlackBook of Rule 17a-5 under the Securities Exchange Act of 1934, which requires broker-dealers to file monthly and quarterly "FOCUS" reports and annual audited reports with the Commission.[6] Specifically, Applicants claim that FINRA discriminated against BlackBook by requiring it to file such reports, while allegedly not requiring a similar firm to do so. According to Applicants, FINRA's requirement that the Firm file FOCUS reports beginning in 2012 was not legally justified and "drove BlackBook out of business." Applicants also claim that they know of a firm similar to BlackBook that Applicants assert was not subject to a FOCUS filing requirement. But Applicants have neither identified the other firm nor provided any supporting evidence for their claim.

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[4] The Exchange Act requires FINRA to maintain a system for collecting and retaining registration information concerning its members and their associated persons and to make such information available to the public. 15 U.S.C. § 78o-3(i)(1). FINRA does so through its Central Registration Depository ("CRD") system, which serves as the online registration and licensing database for the securities industry. *See Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 WL 3820988, at *1 & n.4 (July 7, 2020) (citing *Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *1 & n.1 (Sept. 30, 2016)). Although investors do not have access to CRD, certain information in that system is available through BrokerCheck, a free online tool that FINRA offers to the general public. *Wanger*, 2016 WL 5571629, at *1 & n.1.

[5] *See* FINRA Rule 8320(b)(1) (providing that "FINRA may summarily suspend or expel from membership a member that fails to . . . pay promptly a fine").

[6] *See* 17 C.F.R. § 240.17a-5 (specifying periodic filing requirements applicable to registered broker-dealers); *see also Meyers Assocs., LP*, Exchange Act Release No. 86497, 2019 WL 3387091, at *10 & n.75 (July 26, 2019). FINRA Rule 4511(a) requires that members make and preserve books and records as required under Exchange Act Section 17(a) and Exchange Act Rule 17a-5.

II. FINRA's Motion to Dismiss and Applicants' Opposition

FINRA contends that we should dismiss Applicants' appeal because the Commission lacks statutory authority to review FINRA's actions under Exchange Act Section 19(d). That provision authorizes us to review the actions of self-regulatory organizations ("SROs") such as FINRA that: (1) impose any final disciplinary sanction on a member thereof or participant therein; (2) deny membership or participation to any applicant; (3) prohibit or limit any person in respect to access to services offered by that SRO or member thereof; or (4) impose any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member.[7] FINRA asserts that none of these prongs is met. FINRA further claims that Applicants' appeal is foreclosed by the AWC, in which Applicants "waived their right" to challenge the settlement.

Although they assert that we have the authority to consider their appeal under Section 19, Applicants fail to respond to FINRA's argument that the challenged actions do not implicate any of the prongs of Section 19(d) that authorize review. Indeed, Applicants appear to acknowledge that their claims "belong [in] federal court." For example, despite seeking a declaratory order that FINRA is unconstitutional, Applicants acknowledge that we lack the authority to issue such an order. Nevertheless, Applicants claim that they filed this application "to protect their right" to Commission review in the event that their lawsuit in federal court was dismissed.[8] Finally, in response to FINRA's waiver argument, Applicants contend that they are "not challenging the 2014 AWC" but rather the alleged "discriminatory regulatory action by FINRA."[9]

III. Analysis

SRO action is not reviewable simply because it has an adverse effect on an applicant.[10] Rather, where an applicant fails to establish any of the four bases for Commission review under Exchange Act Section 19(d) we must dismiss the appeal.[11] Here, dismissal is warranted.

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7 15 U.S.C. § 78s(d)(1).

8 As noted above, the district court dismissed BlackBook's lawsuit with prejudice on May 5, 2021. *See supra* note 2.

9 *See generally Bruce Zipper*, Exchange Act Release No. 81788, 2017 WL 4335072, at *3 (Sept. 29, 2017) (finding that "an appellate waiver in an otherwise valid AWC is presumptively enforceable" and that as a result applicant "waived his right to appeal"); *Sky Capital, LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *3 (May 30, 2007) (finding that disciplinary sanctions imposed in an AWC were not reviewable by the Commission because applicants "consented to those sanctions and waived their rights to appeal to the Commission").

10 *Joseph Dillon & Co., Inc.*, Exchange Act Release No. 43523, 2000 WL 1664016, at *3 (Nov. 6, 2000).

11 *Sky Capital*, 2007 WL 1559228, at *3 & n.11; *see also Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *1 (Apr. 30, 2008) (explaining that

A. FINRA's BrokerCheck disclosure is not reviewable under Section 19(d).

Once FINRA expelled BlackBook from its membership, FINRA disclosed that expulsion on BrokerCheck. While that disclosure was a predictable consequence of FINRA's action, it did not itself constitute an independent sanction on either BlackBook or Ogele.[12] Indeed, when it published the expulsion, FINRA "did not invoke its disciplinary procedures," did not determine that BlackBook had engaged in wrongdoing or otherwise violated a statute or rule, and "did not impose a final disciplinary sanction" on it.[13] Nor did the disclosure bar Ogele from becoming associated with a member firm. The disclosure is therefore not reviewable as a disciplinary sanction under Section 19(d).

FINRA's BrokerCheck disclosure is also not reviewable as a denial of access or service FINRA provides. Our authority to review SRO action that denies membership or participation to an applicant extends to "SRO decisions actually denying applications for membership or imposing restrictions on business activities as a condition of membership."[14] Applicants do not identify, nor are we aware of, any such services to which FINRA denied them access by virtue of

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dismissal is appropriate where none of the bases for review under Section 19(d) have been established)); *Allen Douglas Secs., Inc.*, Exchange Act Release No. 50513, 2004 WL 2297414, at *2 & n.14 (Oct. 12, 2004) (same).

[12] *Wanger*, 2016 WL 5571629, at *3. Applicants state in their application for review that "[t]he expulsion of BlackBook for failure to pay $50,000 in fines is an abuse of power and/or discretion." FINRA responds that, notwithstanding this statement in the application for review, Applicants "focus exclusively on the way FINRA disclosed the expulsion [on BrokerCheck], and not the expulsion itself." We agree that Applicants appear to challenge only the disclosure of the expulsion on BrokerCheck and not the expulsion itself and therefore evaluate the reviewability of their appeal on that basis. *See Merrimac Corp. Sec.*, Exchange Act Release No. 86404, 2019 WL 3216542, at *25 n.158 (July 17, 2019) ("As the D.C. Circuit has explained, '[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.' The 'Commission need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner.'") (internal citations omitted); *Bennett Grp. Fin. Servs.*, Exchange Act Release No. 10331, 2017 WL 1176053, at *2 (Mar. 30, 2017) ("We have held previously that we are not 'obliged to independently sift through the record to identify and develop arguments that a party fails to advance with clarity.'") (citation omitted).

[13] *Wanger*, 2016 WL 5571629, at *3 & n.33 (finding that disclosing applicant's disciplinary history on BrokerCheck did not constitute imposing a final disciplinary sanction reviewable under Exchange Act Section 19(d)); *see also Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 WL 2338414, at *6 (June 3, 2019) (explaining that a final disciplinary sanction "follows a determination of wrongdoing") (quoting *Morgan Stanley & Co.*, Exchange Act Release No. 39459, 1997 WL 802072, at *2 (Dec. 17, 1997)).

[14] *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244, at *4 (Sept. 9, 2015).

FINRA's BrokerCheck disclosure. Nor does the record in any way indicate that FINRA's BrokerCheck disclosure denied or conditioned BlackBook's membership or participation in FINRA.

B. Applicants have not substantiated their claim that FINRA enforced its rules disparately.

Applicants additionally assert that FINRA engaged in "biased and discriminatory enforcement of Rule 17a-5" by allegedly requiring BlackBook to file FOCUS reports but not requiring the same of other "other similarly-situated [*i.e.*, non-clearing] broker-dealers." Applicants further claim that FINRA made it difficult for them to learn of the allegedly discriminatory application of FOCUS Report filing requirements by "insisting" to Applicants that it required all similar firms to comply with the requirement. Finally, Applicants allege that FINRA's actions caused them to suffer a "constructive expulsion" from FINRA membership.

We need not address whether a "constructive expulsion" may provide a basis for our review under Exchange Act Section 19(d) because Applicants have not substantiated their claim of disparate treatment resulting in their allegedly constructive expulsion from FINRA membership.[15] Applicants have introduced no evidence to support their claim of disparate treatment. As noted above, Applicants have not identified the FINRA member firm they claim was not required to file FOCUS reports. They state only that Ogele discovered the disparate treatment when he was representing another client, a "FINRA member firm similar to BlackBook . . . that was not required to file monthly FOCUS Reports." Applicants also claim that FINRA staff engaged in additional "discriminatory enforcement" with respect to another FINRA member with which Ogele was associated, but they again fail to substantiate this claim. Nor have Applicants introduced any evidence to support their assertion that FINRA engaged in "active concealment of the facts of the disparate practice." Although Ogele submitted an affidavit, the affidavit merely repeated the concealment claim and provided the name of a FINRA staffer who was purportedly responsible for the concealment.

In lieu of submitting evidence, Applicants assert that they "intend to fully develop through discovery the factual basis of FINRA's historical regulatory bias in favor of big firms and powerful individuals" and that such discovery will reveal FINRA's discriminatory regulatory practices. But we have previously rejected a nearly identical request for discovery

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15 *Cf. Gregory Acosta*, Exchange Act Release No. 89121, 2020 WL 3428890, at *4 & n.15 (June 22, 2020) (stating that "SRO action having the effect of 'barring' an individual from association with the SRO's members—whether the individual is formally barred or not—is reviewable under Section 19(d)") (citing *Lawrence Gage*, Exchange Act Release No. 54600, 2006 WL 2987058, at *5 (Oct. 13, 2006)); *MFS Sec. Corp. v. New York Stock Exchange, Inc.*, 277 F.3d 613, 620 (2d Cir. 2002) (finding that "NYSE's revocation of MFS's membership and its actions to cut off phone service manifestly limited MFS's access to services" and therefore "SEC review was available to MFS" under Section 19(d)(2)).

related to unsubstantiated allegations that FINRA had acted in a biased manner and had covered up its allegedly improper actions.[16] As we have observed, an applicant is "not entitled to go on a fishing expedition in the hope that something might turn up to aid his defense."[17]

Applicants also assert that FINRA's enforcement of a monthly FOCUS filing requirement was contrary to Exchange Act Rule 17a-5(a)(2)(iii) because BlackBook "never held nor cleared customer accounts and had no prior history of Net Capital Rule violation[s]." Contrary to their claim, a firm's non-clearing status does not provide an exemption from such filing requirements.[18] Nor does, as they suggest without citing authority, the absence of a history of net capital violations.[19]

C. Applicants' other arguments do not establish a basis for Commission review.

In their reply brief, Applicants seek to amend their application to couch their claim regarding the BrokerCheck disclosure as a "libel claim" and their claim regarding discriminatory enforcement of Rule 17a-5 as a claim of "negligent supervision" or "breach of implied contract and bad faith." But, as we have held, questions of state law such as whether FINRA libeled an

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[16] *See Zipper*, 2017 WL 4335072, at *4 & n.12 (citing *Asensio & Co., Inc.*, Exchange Act Release No. 68505, 2012 WL 6642666, at *15 & n.85 (Dec. 20, 2012)).

[17] *John Montelbano*, Exchange Act Release No. 47227, 2003 WL 147562, at *12 (Jan. 22, 2003).

[18] *See supra* note 6. It is well established that a broker-dealer's non-clearing status in no way excuses a failure to comply with FOCUS filing requirements. *See, e.g., E. Magnus Oppenheim & Co., Inc.*, Exchange Act Release No. 51479, 2005 WL 770880, at *2, 5 (Apr. 6, 2005) (holding that Rule 17a-5(a)(2)(iii) requires firms which "neither carry nor clear transactions, nor carry customer accounts," to file FOCUS Reports and rejecting argument that FOCUS reports filed by such firms have "no meaningful impact . . . and influence on the integrity of the market and health of the industry.").

[19] To the extent Applicants' appeal pertains to their obligation to comply with FOCUS report filing requirements generally applicable to all FINRA member firms, such a challenge does not provide a basis for our review. We have held that "an action by a self-regulatory organization that merely subjects a member to a rule of general applicability" is not subject to Commission review under Exchange Act Section 19(d). *Gage*, 2006 WL 2987058, at *5 (holding that SRO membership is "conditioned on the member's compliance with the [SRO's] rules"); *see also Alpine Secs. Corp.*, Exchange Act Release No. 96293, 2022 WL 16839451, at *3 (Nov. 9, 2022) (denying applicant's stay motion in part because it had not established that there was a "serious legal question" as to whether it could challenge, pursuant to Section 19(d), "generally applicable rules" governing a clearing agency's margin requirements) (citing *NASDAQ Stock Mkt. v. SEC*, 961 F.3d 421, 428-29 (D.C. Cir. 2020)).

applicant by allegedly "knowingly and falsely publishing [a] falsehood . . . are outside the scope of [a Commission] proceeding."[20]

Applicants also claim here, as they did in their federal lawsuit, that FINRA is "unconstitutional" because "the [FINRA] Board, as currently structured and in the implementation of responsibilities in pursuant of Section 15A of the Act, violates the separation of powers." But we have held that an applicant's efforts to present a claim against FINRA as a constitutional violation do not create authority "for us under Exchange Act Section 19(d) to entertain [an] application for review of the actions FINRA took" but rather are arguments that may be raised on the merits in defense of a FINRA enforcement action.[21]

Applicants further seek relief that is beyond our authority to grant. They seek "an order and judgment enjoining the [FINRA] Board and its members from carrying out any powers as delegated to them under Section 15A or Section 19 of the Exchange Act or by FINRA Rules." But they cite no authority, and we are aware of none, that would authorize the Commission to order such relief in a proceeding under Exchange Act Section 19(d). Applicants also request that we order FINRA to pay Ogele actual and punitive damages "in an amount to be determined at

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[20] *Keith Patrick Sequeira*, Exchange Act Release No. 85231, 2019 WL 995508, at *8 (Mar. 1, 2019), *aff'd*, 816 Fed.Appx. 703 (3d Cir. 2020).

[21] *Cristo*, 2019 WL 2338414, at *6.

trial for the loss of BlackBook" as well as an award of Ogele's costs and expenses in bringing this action. But we lack the authority to award damages or attorneys' fees.[22]

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For the reasons discussed above, we dismiss the application for review.[23]

An appropriate order will issue.[24]

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

Vanessa A. Countryman
Secretary

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[22] *See* Exchange Act Section 19)(e) & (f), 15 U.S.C. § 78s(e) & (f) (describing the relief that we may provide in our review of FINRA proceedings); *see also, e.g.*, *Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 (July 15, 2016) ("We do not have authority to award damages under Section 19(f)."), *aff'd*, 889 F.3d 837 (7th Cir. 2018); *John Joseph Plunkett*, Exchange Act Release No. 73124, 2014 WL 4593195, at *7 (Sept. 16, 2014) (finding that awarding damages to applicant is "beyond the scope of our authority" under Exchange Act Section 19(e)); *Sky Capital*, 2007 WL 1559228, at *3 & n.11 (finding no authority to award damages under Exchange Act Sections 19(e) and (f)); *William J. Higgins*, Exchange Act Release No. 24429, 1987 WL 757509, at *14 (May 6, 1987) (concluding that the Commission has "no authority to award attorneys' fees" under Exchange Act Section 19).

[23] In light of our determination to dismiss the appeal, we deny as moot FINRA's motion to stay the briefing schedule. We also deny as moot Applicants' request that we "stay action on this matter until [the district court] rules on the Original Complaint," since the district court has already issued a final Opinion and Order. *See supra* note 2. Finally, we deny Applicants' request to file a sur-reply brief in connection with FINRA's motion to dismiss because our rules do "not contemplate the filing of a sur-reply and we have determined that the filing of [an] additional brief is unnecessary." *Scott Epstein*, Exchange Act Release No. 59328, 2009 WL 223611, at *1 & n.1 (Jan. 30, 2009); *see also* Rule of Practice 154(b), 17 C.F.R. §201.154(b) (governing motions and providing only for briefs in opposition and reply briefs and not sur-reply briefs).

[24] 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
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In the Matter of the Application of

BLACKBOOK CAPITAL, INC.,
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FRANKLIN OGELE

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 FINRA's motion to dismiss the application for review filed by BlackBook Capital, Inc., and Franklin Ogele is granted and the application for review is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary