SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97248 / April 4, 2023

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, 3-19405, 3-19573, 3-19574, 3-19611, 3-20160, 3-20205, 3-20467, 3-20499, 3-20620, 3-20621

In the Matter of the

CONSOLIDATED ARBITRATION APPLICATIONS

For Review of Actions Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTIONS

Individuals appealed FINRA actions prohibiting access to its arbitration forum to seek expungement of customer dispute information regarding final adverse arbitration awards from the Central Registration Depository. *Held*, seventeen applications for review are dismissed, and six proceedings are remanded to FINRA.

APPEARANCES:

Michael Bessette, *William R. Bean*, *Frederick Steimling*, *Owen Harnett*, *Erica J. Harris*, *Michelle Atlas*, *Christopher Cummins*, *Jessica Calloway*, and *Frances Menzer* of HLBS Law and *Dochtor Kennedy* and *Harris Freedman* of AdvisorLaw, LLC for William Burk Rosenthal, Bart Steven Kaplow, Daryl Andrew Cole, Kurt Charles Jackson, Brock Evan Moseley, Ronald R. Wetzel, Peter Ashley Ramsay, Donald Anthony Wojnowski, Mark Vernon Rottler, Carl G. Gordinier, Jordan Whitney Waring, Vincent Harl Rossi, Michael Patrick Murphy, Scott Shulman, Gregory Lee Luken, Hugh Carleton Bandy, Mark Kim Gaskill, Jason Harry Kurchner, John Joseph Hanlon IV, Keys Ericson Tinney, and Richard Thomas Iannacone.[*]

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[*] Bessette and Bean are the current counsel for all of these applicants. The other attorneys have since withdrawn, but they previously entered appearances as to at least one of these applicants.

Frank Sommers of Sommers Law PC for Tim Sullivan and Frank Augustine Cuenca.

Alan Lawhead, *Jennifer Brooks*, *Megan Rauch*, *Celia Passaro*, *Ashley Martin*, *Andrew Love*, *Michael Smith*, and *Lisa Jones Toms* for FINRA.

Appeals filed: July 27, 2018 to October 7, 2021
Last brief received: November 16, 2020

This proceeding concerns currently or formerly associated persons of FINRA member firms who attempted to access FINRA's arbitration forum to seek expungement of customer dispute information concerning final adverse arbitration awards from FINRA's Central Registration Depository ("CRD"). FINRA prohibited each applicant from accessing its arbitration forum for this purpose. Each applicant now seeks review of FINRA's action.[1] We sustain seventeen of FINRA's actions, finding that FINRA acted in accordance with its rules when it denied use of its arbitration forum for collateral attacks on final adverse arbitration awards. But we remand six proceedings for further action because we cannot determine whether FINRA's actions in those proceedings were in accordance with its rule that only the Director of FINRA Dispute Resolution Services may deny use of the FINRA arbitration forum.

[1] The applicants are: Tim Sullivan (Administrative Proceeding ("AP") File No. 3-18616), William Burk Rosenthal (AP File No. 3-18617), Bart Steven Kaplow (AP File No. 3-18877), Daryl Andrew Cole (AP File No. 3-18879), Frank Augustine Cuenca (AP File No. 3-18883), Kurt Charles Jackson (AP File No. 3-18910), Brock Evan Moseley (AP File No. 3-18919), Ronald R. Wetzel (AP File No. 3-18934), Peter Ashley Ramsay (AP File No. 3-18988), Donald Anthony Wojnowski (AP File No. 3-19013), Mark Vernon Rottler (AP File No. 3-19016), Carl G. Gordinier (AP File No. 3-19017), Jordan Whitney Waring (AP File No. 3-19219), Vincent Harl Rossi (AP File No. 3-19405), Michael Patrick Murphy (AP File No. 3-19573), Scott Shulman (AP File No. 3-19574), Gregory Lee Luken (AP File No. 3-19611), Hugh Carleton Bandy (AP File No. 3-20160), Mark Kim Gaskill (AP File No. 3-20205), Jason Harry Kurchner (AP File No. 3-20467), John Joseph Hanlon IV (AP File No. 3-20499), Keys Ericson Tinney (AP File No. 3-20620), and Richard Thomas Iannacone (AP File No. 3-20621). We consolidated these applications for review and found jurisdiction to consider them under Section 19(d) of the Securities Exchange Act of 1934. *See* 15 U.S.C. § 78s(d)(2); *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 WL 4569083, at *2-3 (Aug. 6, 2020).

I. Background

The consolidated applications all involve common facts. In each case, an arbitrator or arbitration panel ("arbitrator") issued a final arbitration award against the applicant in favor of one or more customers.[2] The records do not reflect that any of the applicants sought expungement relief during the underlying customer arbitration proceedings,[3] or that any of the applicants moved in court to vacate, modify, or correct the underlying adverse arbitration awards.[4]

The underlying adverse arbitration awards were reported in FINRA's CRD, which is a database that contains information about broker-dealers and their representatives, including information about customer allegations made in arbitration proceedings and any arbitration

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[2] FINRA has requested leave to file amended certified records for Murphy's and Luken's applications for review because the underlying adverse arbitration awards were omitted from the originally-filed records. FINRA also filed a supplemental record for Rosenthal's application for review to add the underlying amended adverse arbitration award. The applicants have not opposed the filing of these amended and supplemental records. The underlying adverse arbitration awards were part of "the record upon which the action complained of was taken." Rule of Practice 420(e), 17 C.F.R. § 201.420(e). Thus, we consider the amended and supplemental certified records for Murphy's, Luken's, and Rosenthal's applications for review. In addition, Rossi has filed an unopposed motion to amend an exhibit attached to the consolidated opening brief, as it inadvertently contained a different arbitration award regarding Rossi than the one he sought to expunge. We grant Rossi's unopposed motion to amend the exhibit to contain the correct award against him.

[3] Firms generally update an associated person's CRD record to reflect a customer complaint soon after it is made. Firms generally then update the person's CRD record with the status of the customer dispute as it proceeds through arbitration. FINRA rules permit an arbitrator to grant expungement of a customer's allegations from an associated person's CRD record during the customer's arbitration against the associated person. *See* FINRA Rules 2080(a), 12805.

[4] We also note that all but two of the underlying arbitration proceedings took place in the arbitration forums of FINRA, FINRA's predecessor NASD, or the New York Stock Exchange, which eventually merged with the NASD arbitration forum. *See Order Approving Proposed Rule Change to Amend the By-Laws of NASD to Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc.*, Exchange Act Release No. 56145, 72 Fed. Reg. 42,169, at 42,188-89 (Aug. 1, 2007) (describing the consolidation of the arbitration forums of NYSE and NASD, which became FINRA). Moseley's underlying arbitration proceeding was administered by the American Arbitration Association, and Gaskill's underlying arbitration proceeding was administered by the Arbitration Service of Portland.

awards resulting from those allegations.[5] Generally, the information in the CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms,[6] which member firms are required to file in certain circumstances.[7] The information in the CRD is used by FINRA and other regulators, as well as by firms when making personnel decisions.[8]

The CRD cannot be accessed by the general public.[9] However, FINRA provides a free online tool called BrokerCheck, which displays some of the CRD's information, including information about customer arbitration proceedings, regarding persons who are currently or formerly associated with FINRA member firms.[10] Because BrokerCheck's information is derived from the CRD, information that is expunged from the CRD is not accessible via BrokerCheck.[11]

Here, each applicant filed an arbitration statement of claim with FINRA's arbitration forum seeking to expunge all information from the CRD about the underlying adverse arbitration award against each particular applicant.[12] Applicants' statements of claim all asserted that the

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[5] *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).

[6] *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.

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

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

[9] *See id.*

[10] *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).

[11] *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809-10. Arbitration awards are also available on another portion of FINRA's website. *See* https://www.finra.org/arbitration-mediation/arbitration-awards. Applicants are not requesting that FINRA remove prior award information from that portion of FINRA's website.

[12] Luken's statement of claim sought expungement of information about two adverse arbitration awards, whereas every other applicant's statement of claim sought expungement of information about one adverse arbitration award. Some of the applicants' statements of claim also requested expungement of customer dispute information other than final adverse awards, but

customer allegations that resulted in the award were "patently false," as well as factually impossible or clearly erroneous.[13] Rosenthal's, Rossi's, and Gaskill's statements of claim additionally asserted that they were not involved in the customer allegations that resulted in the award.[14] In each case, FINRA issued a letter denying use of the arbitration forum for the request to expunge the final adverse arbitration award (a "denial letter"). FINRA rules 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."[15] And, as explained below, FINRA argues that the subject matter of applicants' expungement requests was inappropriate because they constituted improper collateral attacks on the final adverse arbitration awards. Applicants then sought Commission review of the denial letters.

On April 4, 2019, we consolidated twelve applications for review to consider whether the Commission had appellate jurisdiction.[16] On August 6, 2020, we found that we had jurisdiction under Exchange Act Section 19(d) because FINRA prohibited the applicants' access to a service FINRA offered.[17] We also determined that the case should continue to be consolidated and ordered the parties to submit briefs on the merits.[18] Ultimately, twenty-three applications for review have been consolidated into this proceeding.[19]

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those requests are not at issue here. Finally, Iannacone's statement of claim asserted that the underlying customer arbitration was settled, but his First Amended Application for Review reveals that this assertion was made in error and in fact the underlying customer arbitration resulted in an award against Iannacone, as in the other consolidated applications.

[13] *See* FINRA Rule 2080(b)(1)(A) and (C) (providing as grounds for expungement that "the claim, allegation or information is factually impossible or clearly erroneous" or "is false").

[14] *See* FINRA Rule 2080(b)(1)(B) (providing as grounds for expungement that "the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds").

[15] *See infra* note 25 and accompanying text.

[16] *Bart Steven Kaplow*, Exchange Act Release No. 85509, 2019 WL 1489709, at *2 (Apr. 4, 2019).

[17] Exchange Act Section 19(d)(1)-(2), 15 U.S.C. § 78s(d)(1)-(2); *Consolidated Arbitration Applications*, 2020 WL 4569083, at *1-3 (order finding jurisdiction).

[18] *Consolidated Arbitration Applications*, 2020 WL 4569083, at *3-4. We noted that the applicants could "implicitly rely[] on the other briefs filed in these consolidated appeals." *Id.* at *4. Thus, although Sullivan, Cuenca, Bandy, Gaskill, Kurchner, Hanlon, Tinney, and Iannacone have not filed separate merits briefs or explicitly joined other merits briefs, they have implicitly relied on the other applicants' briefs. *See id.* at *4.

[19] *See Timothy Charles Sullivan*, Exchange Act Release No. 85885, 2019 WL 2160143 (May 17, 2019) (consolidating one additional application); *William Burk Rosenthal*, Exchange Act Release No. 85886, 2019 WL 2160144 (May 17, 2019) (same); *Consolidated Arbitration*

II. Analysis

Under Exchange Act Section 19(f), we review a FINRA action prohibiting a person's access to its services to determine whether (1) the specific grounds on which FINRA based the action exist in fact; (2) the action was in accordance with FINRA's rules; and (3) FINRA's rules are, and were applied in a manner, consistent with the Exchange Act's purposes.[20]

A. The specific grounds for FINRA's actions exist in fact as to all applicants.

FINRA denied applicants the use of its arbitration forum on the ground that they sought to expunge information concerning final adverse arbitration awards. As explained below, FINRA argues that the applicants' requests constituted improper collateral attacks on final arbitration awards and therefore were inappropriate for arbitration. Applicants do not dispute that they filed claims with FINRA's arbitration forum seeking to expunge information concerning final adverse arbitration awards from the CRD. Accordingly, we find that the specific grounds on which FINRA denied access to its arbitration forum exist in fact for each of the consolidated applications, and we now turn to the merits of FINRA's denial.

Applications, Exchange Act Release No. 87615, 2019 WL 6287506 (November 25, 2019) (consolidating six additional applications); *Consolidated Arbitration Applications*, Exchange Act Release No. 88032, 2020 WL 408288 (January 24, 2020) (severing two applications); *Consolidated Arbitration Applications*, Exchange Act Release No. 89617, 2020 WL 4819305 (Aug. 19, 2020) (consolidating one additional application); *Consolidated Arbitration Applications*, Exchange Act Release No. 91305, 2021 WL 933266 (Mar. 11, 2021) (consolidating two additional applications); *Consolidated Arbitration Applications*, Exchange Act Release No. 92923, 2021 WL 4131411 (Sept. 9, 2021) (severing two applications); *Consolidated Arbitration Applications*, Exchange Act Release No. 93267, 2021 WL 4593477 (Oct. 6, 2021) (consolidating two additional applications); *Consolidated Arbitration Applications*, Exchange Act Release No. 93537, 2021 WL 5179265 (Nov. 8, 2021) (consolidating one additional application); *Consolidated Arbitration Applications*, Exchange Act Release No. 93623, 2021 WL 5415353 (Nov. 19, 2021) (same). FINRA has filed pending unopposed motions to consolidate this proceeding with three additional cases—*Alice Jean Solomon*, AP File No. 3-20631; *Neil Joseph Gagnon*, AP File No. 3-20819; and *James Thomas Young*, AP File No. 3-20905—and to postpone briefing in those cases pending resolution of this proceeding. Given our resolution of this proceeding in this opinion, we deny FINRA's motions. We will issue separate briefing schedules in each case. *See* Rule of Practice 450(a)(2)(ii), 17 C.F.R. § 201.450(a)(2)(ii) (providing that briefing schedules shall be issued within 21 days of FINRA's filing of the record index, "or such longer time as provided by the Commission").

[20] 15 U.S.C. § 78s(f). Section 19(f) also requires us to set aside FINRA's action if we find that the action imposes an undue burden on competition. *Id.* Applicants do not argue, and the record does not show, that FINRA's actions impose such a burden here.

B. FINRA denied access to its arbitration forum in accordance with its rules in seventeen proceedings, but may not have done so in six of the proceedings.

FINRA rules allow individuals to use its arbitration forum to request expungement of customer dispute information from the CRD.[21] An arbitrator may grant expungement relief by indicating in the arbitration award which of the grounds for expungement in FINRA Rule 2080 serve as the basis for its expungement order and providing a brief written explanation of the reasons for its finding that one or more of the Rule 2080 grounds for expungement applies to the facts of the case.[22] FINRA Rule 2080(b)(1) lists three bases for expungement relevant here:

(A) the claim, allegation or information is factually impossible or clearly erroneous;

(B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or

(C) the claim, allegation or information is false.[23]

Applicants all requested expungement of information related to final arbitration awards based on at least two of these grounds.[24]

However, the Director of FINRA Dispute Resolution Services ("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 [relevant FINRA Arbitration] Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or

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[21] *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. 66,086 (Nov. 6, 2008). However, even if the arbitrator issues an award "granting" expungement relief, the award must be confirmed by a court before any information is actually expunged from the CRD, and generally FINRA must be named as an additional party in the court confirmation action. *See* FINRA Rule 2080(a)-(b).

[22] FINRA Rules 12805(c), 13805(c).

[23] FINRA Rule 2080(b)(1).

[24] *See supra* notes 13-14 and accompanying text.

safety of arbitrators, staff, or parties or their representatives."[25] Only the Director may exercise this authority.[26] In each case, FINRA issued a letter denying access to its arbitration forum.

1. We remand six proceedings because the record does not establish that FINRA acted in accordance with FINRA Rules 12203(a) and 13203(a).

FINRA Rules 12203(a) and 13203(a) specify that only the Director may exercise the authority to deny access to the arbitration forum. As a result, the threshold issue is whether the Director made that determination in these cases. In six cases—Moseley, Wojnowski, Rottler, Murphy, Bandy, and Gaskill—FINRA staff members sent letters that denied use of the arbitration forum and stated that "FINRA" made the decision, without referring to the Director or otherwise specifying who within FINRA made the decision. FINRA argues that, because five of the six letters stated that the forum was being denied "pursuant to" FINRA Rule 13203(a) and, in some cases, Rule 12203(a), the Director must have made the decision.[27]

FINRA has not provided any record evidence that demonstrates that the Director himself made the decision to deny use of the arbitration forum in these six cases. In contrast to the letters in the other seventeen cases, these letters did not mention the Director. As a result, we lack a sufficient basis to determine in these six proceedings whether FINRA complied with its rule that only the Director may exercise the authority under FINRA Rules 12203(a) and 13203(a) to deny access to the arbitration forum. Therefore, we remand the six proceedings to FINRA for further action that is appropriate and consistent with this opinion.[28]

2. We find in seventeen proceedings that FINRA acted in accordance with its rules.

In the other seventeen proceedings, the record shows that FINRA complied with the requirement that only the Director can exercise the authority to deny access to the arbitration forum. In Waring's case, the Director personally signed the denial letter. In the sixteen other

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[25] 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"). FINRA Dispute Resolution Services used to be called the FINRA Office of Dispute Resolution. *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).

[26] FINRA Rules 12203(a), 13203(a).

[27] The letter to Rottler did not cite either rule.

[28] *See, e.g.*, *First Potomac Inv. Serv., Inc.*, Exchange Act Release No. 30282, 1992 WL 15628, at *2 & n.4 (Jan. 23, 1992) (remanding NASD's refusal to lift a condition on applicant's membership so that NASD could address an argument that NASD had failed to address because otherwise the Commission was not "able to exercise properly [its] review function").

cases—those of Sullivan, Rosenthal, Kaplow, Cole, Cuenca, Jackson, Wetzel, Ramsay, Gordinier, Rossi, Shulman, Luken, Kurchner, Hanlon, Tinney, and Iannacone—FINRA staff members sent denial letters stating that the Director had denied the use of the forum or found the claims ineligible for arbitration. The letters referencing the Director's decision, which were written by other staff members on behalf of FINRA, are sufficient to establish that the Director made the decision to deny access to the arbitration forum. Writing and sending the letter was a purely ministerial or administrative task that implemented the Director's decision.[29]

Turning to the merits of the Director's decision to deny access to the arbitration forum, as pertinent here, FINRA Rules 12203(a) and 13203(a) allow the Director to deny "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."[30] FINRA's relevant arbitration codes, in turn, provide that, "[u]nless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal."[31] The seventeen remaining applications for review all involve underlying arbitration awards in the FINRA arbitration forum or predecessor arbitration forums.[32] The Director could properly conclude that a collateral attack on such an arbitration award would both undermine its finality and improperly subject it to review.[33]

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[29] *Cf., e.g.*, *United States v. Stark*, 418 F.2d 901, 901-02 (9th Cir. 1969) (in banc) (holding that clerk could issue order because "the action of the clerk in issuing the order is merely ministerial implementation" and the decision-maker made "the critical exercise of administrative judgment"); *Perpetual Sec., Inc.*, Exchange Act Release No. 56613, 2007 WL 2892696, at *6 n.21 (Oct. 4, 2007) (explaining that, where the Secretary of the adjudicative body signed a decision on behalf of the adjudicative body, the decision was issued by the adjudicative body because the Secretary's "role is purely administrative").

[30] FINRA Rules 12203(a) and 13203(a) also provide that the Director may deny access to the arbitration forum if "accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives." But the parties agree that access was not denied in these cases due to a risk to health or safety.

[31] FINRA Rules 12904(b), 13904(b); *see also* FINRA Rule 10330(b) (providing the same for arbitration cases filed before April 16, 2007).

[32] *See supra* note 4. Because we are remanding to FINRA the proceedings of Gaskill and Moseley, the two cases where the underlying arbitrations occurred in other, non-FINRA forums, we reserve the question of whether the same analysis would apply in those cases. On remand, the Director should consider that question in the first instance.

[33] *See, e.g.*, *Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994) (suggesting that collateral attacks undermine principles of "finality and consistency"); Black's Law Dictionary (11th ed. 2019) (defining "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective").

Thus, we agree that FINRA acted in accordance with its rules when denying the applicants access to the arbitration forum because the applicants' expungement requests constituted collateral attacks on final adverse FINRA arbitration awards, which the Director could properly conclude were not consistent with the intent of the FINRA Arbitration Codes. Applicants do not argue that the data reported about the award in the CRD was false or clearly erroneous—such as the date, outcome, or description of the award. Nor do they argue that the award reported in the CRD had actually been issued against a different person. These would be permissible uses of the arbitration forum. Rather, applicants' statements of claim all sought to expunge information about final arbitration awards by alleging that the underlying customer allegations that led to those awards were "patently false" and factually impossible or clearly erroneous under FINRA Rule 2080(b)(1)(A) and (C). Rosenthal's and Rossi's statements of claim additionally alleged that the underlying award should be expunged under FINRA Rule 2080(b)(1)(B) because the applicant was not involved in the alleged conduct. As applicants' arguments on appeal highlight, these are all collateral attacks on the merits of the underlying awards.

For example, applicants suggest on appeal that the arbitrators may have applied a low burden of proof in favor of the customers; the customers or the applicants' firms may have been comparatively more at fault than the applicants; and conflicts of interest existed because the applicants generally shared legal representation with their firms during the underlying arbitration proceedings. These arguments all contend that the underlying arbitration proceedings were flawed, which the Director could properly conclude would, contrary to FINRA's rules, undermine the finality of the prior awards.[34] That is, the Director acted within his discretion when he concluded that the proper forum for arbitrating the merits of the underlying customer allegations was during each underlying customer arbitration, not during a subsequent arbitration.

Applicants nevertheless argue that these challenges are not collateral attacks because they seek to expunge the underlying adverse awards rather than vacate, modify, or correct them. But by attacking the merits of the underlying customer allegations, the applicants are necessarily attacking the merits of the awards that were made based on those allegations. The Director could reasonably conclude that such independent actions that attack the merits of prior, final awards amount to impermissible collateral attacks on those prior awards and undermine their finality.[35] And applicants "may not transform what would ordinarily constitute an impermissible collateral attack [on an arbitration award] into a proper independent direct action by . . . altering the relief

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[34] *See, e.g.*, *Corey v. N.Y. Stock Exchange*, 691 F.2d 1205, 1211-12 (6th Cir. 1982) (finding that allegations of "acts compromis[ing] the arbitration award" were "no more, in substance, than an impermissible collateral attack on the award itself").

[35] *See, e.g.*, *United States v. Crowell*, 374 F.3d 790, 792-94 (9th Cir. 2004) (holding that seeking expungement of a prior conviction by attacking its merits amounts to a collateral attack on the conviction); *Alexander v. Am. Arbitration Ass'n*, No. C 01-1461 PJH, 2001 WL 868823, at *4 (N.D. Cal. July 27, 2001) (precluding collateral attack on arbitration award because the complaint's allegations would "adversely affect the outcome of the arbitration").

sought."[36] For example, we have held that a request to re-arbitrate claims amounts to a collateral attack on a prior arbitration award even if an applicant does not explicitly request that the prior award be vacated, modified, or corrected.[37] Courts have similarly held that seeking expungement of a prior conviction can amount to a collateral attack on the conviction even if the relief would not overturn the conviction itself.[38] Accordingly, we find that FINRA acted in accordance with its rules when the Director determined that collateral attacks on prior final FINRA arbitration awards were inappropriate for arbitration.[39]

3. The applicants forfeited and failed to exhaust any argument that they could have sought expungement under grounds other than those found in FINRA Rule 2080(b)(1).

The applicants argue for the first time in their reply brief that FINRA Rule 2080(b)(1) does not provide the only grounds for an arbitrator to grant expungement, citing the Commission's statement when approving now-Rule 2080 that fact finders may "consider all competing interests before directing or granting expungement of customer dispute information

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[36] *Corey*, 691 F.2d at 1213; *accord Kincaid*, 2019 WL 5445514, at *3.

[37] *See Kincaid*, 2019 WL 5445514, at *3.

[38] *See Crowell*, 374 F.3d at 792-94; *Tarlton v. Saxbe*, 507 F.2d 1116, 1128 n.34 (D.C. Cir. 1974) ("[T]he expungement of arrest or conviction records is a form of collateral attack . . . .").

[39] Some denial letters failed to specify that access was being denied because the applicant sought expungement of information regarding a prior adverse arbitration award, and only a few of the letters explicitly state that this subject matter was inappropriate. We do not address in this opinion whether the Director was required to state the reason for denying applicants' claims. Although some applicants raised this point in their applications for review, they failed to raise it in their briefs. Instead, the applicants' briefs do not dispute that FINRA denied use of the arbitration forum because the subject matter was inappropriate given that each applicant sought expungement of information regarding an underlying adverse arbitration award. And the applicants' briefs do not argue that they lacked sufficient notice of this justification. We therefore find that the applicants have forfeited any argument that the denial letters failed to provide sufficient notice of FINRA's reasoning. *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule of Practice] 450(b) may, at the discretion of the Commission, be deemed to have been waived by the applicant."); Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (stating that, in briefs, "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly" and "[e]xceptions shall be supported by citation to the relevant portions of the record . . . and by concise argument"); *Canady v. SEC*, 230 F.3d 362, 362-63 (D.C. Cir. 2000) (upholding Commission determination that a party waived a defense by failing to timely raise it).

from the CRD."[40] But generally we will not consider arguments raised for the first time in a reply brief, and applicants provide no basis for deviating from that general rule here.[41]

Applicants also failed to raise this argument in their statements of claim before FINRA. Applicants instead sought expungement based only on the grounds in Rule 2080(b)(1). FINRA thus had no opportunity to decide, in the first instance, whether to permit the use of its arbitration forum as to expungement claims brought on any other grounds. And we will not review a FINRA action if the applicant failed to exhaust FINRA's administrative remedies.[42]

4. Emergency or unusual circumstances need not exist for the Director to deny use of the FINRA arbitration forum.

Applicants suggest that the Director can deny use of the arbitration forum only if emergency or unusual circumstances exist, but we disagree. As discussed above, the Director can deny use of the forum under FINRA's rules if "the Director determines [1] that, given the purposes of FINRA and the intent of the [relevant FINRA Arbitration] Code, the subject matter of the dispute is inappropriate, *or* [2] that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives."[43] The parties agree that the second ground is inapplicable here. Instead, applicants cite the Commission order approving these rules to argue that emergency or unusual circumstances must exist for either ground.[44] In fact, however, when discussing the first ground for denying use of the forum, the order states:

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[40] *Order Relating to Proposed NASD Rule 2130 Concerning the Expungement of Customer Dispute Information from the Central Registration Depository System*, Exchange Act Release No. 48933, 68 Fed. Reg. 74,667, 74,671 (Dec. 24, 2003). The applicants have not addressed whether this statement by the Commission still applies given the subsequent enactment of FINRA Rules 12805 and 13805, which as discussed above impose specific requirements for granting expungement requests in FINRA arbitrations.

[41] *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) ("[E]xcept as otherwise determined by the Commission in its discretion, any argument raised for the first time in a reply brief shall be deemed to have been waived.").

[42] *See, e.g.*, *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 621-22 (2d Cir. 2004) (explaining that the Commission's administrative exhaustion requirement "promotes the efficient resolution of . . . disputes" between FINRA and its members and "is in harmony with Congress's delegation of authority to [self-regulatory organizations] to settle, in the first instance, disputes relating to their operations"); *Stephen Robert Williams*, Exchange Act Release No. 89238, 2020 WL 3820989, at *4 (July 7, 2020) (describing our exhaustion requirement).

[43] FINRA Rules 12203(a), 13203(a) (emphasis added).

[44] *See Order Approving Proposed Rule Change to Amend NASD Arbitration Rules for Customer Disputes and NASD Arbitration Rules for Industry Disputes*, Exchange Act Release No. 55158, 72 Fed. Reg. 4574, 4601-02 (Jan. 31, 2007) (approving rules that are now FINRA Rules 12203(a) and 13203(a)).

> The Commission believes that the proposed rules should facilitate excluding cases from the [FINRA predecessor] arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum. This, in turn, should promote the efficacy and efficiency of the arbitration forum in processing its claims.[45]

The order then discusses the second ground for denying access to the forum by observing that, "in emergency situations, it is reasonable for the Director to have the authority and flexibility to act quickly to protect the health and safety of users and administrators of the forum."[46] The order further explains that this emergency authority "should be limited by application in only a very narrow range of unusual circumstances."[47] Applicants conflate the order's discussion of the two grounds for denying use of the forum to suggest that even under the first ground the arbitration forum can only be denied in emergency or unusual circumstances.

As indicated above, when read in context, the discussion about emergency or unusual circumstances concerns only the second, health-and-safety ground for denying use of the forum. Nothing in the order's discussion (or FINRA's rules themselves) suggests that emergency or unusual circumstances are required when denying access based on a determination that the subject matter is inappropriate for arbitration, the basis on which the Director denied access to applicants. And there is no logical reason that the subject matter of a dispute would be inappropriate for arbitration only in emergency or unusual circumstances.[48]

5. The existing FINRA rules and guidance allowed the Director to deny use of the FINRA arbitration forum here.

The applicants argue that, because FINRA's rules do not explicitly prohibit expungement claims that relate to prior customer dispute arbitrations, the Director's brief and uniform denials of their arbitration claims suggest FINRA has adopted a new "unwritten blanket rule" that required Commission approval. But a rule need not explicitly address each of its intended applications, particularly when it deliberately states a broad principle.[49] And FINRA Rules 12203(a) and 13203(a) deliberately state the broad principle that the Director can determine that a subject matter is inappropriate for arbitration, given the purposes of FINRA and the intent of its

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45 *See id.* at 4602.

46 *Id.*

47 *Id.*

48 *Cf., e.g.*, *infra* note 53-54 and accompanying text (noting the Director's determination, in a situation that involved neither emergency nor unusual circumstances, that it would be inappropriate to provide access to the forum for a new arbitration case seeking to expunge an underlying customer arbitration before that underlying arbitration had concluded).

49 *ABN AMRO Clearing Chicago LLC*, Exchange Act Release No. 83849, 2018 WL 3869452, at *4 (Aug. 15, 2018).

arbitration codes. Those rules permit the Director to determine that a particular type of claim was inappropriate for arbitration and deny the use of the forum on a case-by-case basis. Here, the Director found that the subject matter raised in each applicant's statement of claim was inappropriate for arbitration. The Director's denial of the forum in each case demonstrates consistency in FINRA's decision-making— not the adoption of a new rule.[50]

For similar reasons, we reject applicants' argument that FINRA should have issued new guidance before denying the use of the forum. A FINRA interpretation of a rule is not considered a proposed rule change if "it is reasonably and fairly implied by an existing rule."[51] FINRA Rules 12203(a) and 13203(a) reasonably and fairly imply that the Director could deny the use of the forum as to requests to expunge final adverse arbitration awards. Accordingly, FINRA did not need to issue new guidance saying so.[52]

We also reject the applicants' argument that FINRA's actions conflict with its existing guidance that "[a] broker may not file a [new case with a] request for expungement of customer dispute information arising from an underlying customer arbitration until the underlying customer arbitration has concluded."[53] FINRA's guidance explains that the Director had determined it would be inappropriate to allow use of the forum as to an expungement request filed before the conclusion of the underlying customer arbitration because disallowing the filing of a separate expungement-only proceeding while the underlying arbitration customer arbitration is pending "prevent[s] inconsistent results, ensure[s] that the forum operates efficiently, and

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[50] Some of the applicants argue in their applications for review, but not in their briefs, that their counsel has represented individuals who were allowed to proceed to FINRA arbitration on requests to expunge underlying adverse arbitration awards, including at least one individual who was granted expungement. But applicants have forfeited this argument by failing to brief it. *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief that complies with [Rule 450(b)] may . . . be deemed to have been waived by the applicant."); Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that, in briefs, "[e]ach exception to the findings or conclusions being reviewed shall be stated succinctly" and "[e]xceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument").

[51] Exchange Act Rule 19b-4(a)(6), (c)(1), 17 C.F.R. § 240.19b-4(a)(6), (c)(1).

[52] *See SIG Specialists, Inc.*, Exchange Act Release No. 51867, 2005 WL 1421103, at *5 (June 17, 2005) (holding that applicants had "fair notice" of obligations in part because an existing rule "reasonably and fairly implied" their existence); *see also* Exchange Act Rule 19b-4(c)(1), 17 C.F.R. § 240.19b-4(c)(1); *ABN AMRO*, 2018 WL 3869452, at *4.

[53] *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA, https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance (last updated September 2017). However, an associated person may request expungement during the underlying customer arbitration itself, as opposed to filing a new case with a request for expungement. *See id.*; *see also supra* note 3.

protect[s] the accuracy of information contained in CRD and disseminated through Brokercheck [sic]."[54] Contrary to Applicants' suggestion, this language does not require the Director to allow arbitration of every new expungement request once the underlying arbitration has concluded or indicate that the Director could not, as in these cases, determine that the subject matter of other expungement requests might also be inappropriate for arbitration.

C. FINRA's rules are, and were applied, consistent with the Exchange Act's purposes.

In the seventeen cases we are not remanding, FINRA Rules 12203(a) and 13203(a) are, and were applied, consistent with the Exchange Act's purposes. The Exchange Act requires that FINRA's rules be designed "to protect investors and the public interest."[55] The order approving the predecessors to FINRA Rules 12203(a) and 13203(a) explained that giving FINRA the power to deny access to its arbitration forum under certain circumstances would "allow[] it to focus on the cases that are appropriately in the forum," which "in turn, should promote the efficacy and efficiency of the arbitration forum in processing its claims."[56] And "enhanc[ing] the effectiveness of the arbitration process . . . furthers the public interest and the protection of investors."[57] The Director's application of those rules in the seventeen remaining cases was consistent with these purposes because denying access to the FINRA arbitration forum for cases that are not appropriately in the forum enhances the effectiveness of the forum.

III. Due Process

Although applicants' opening briefs state that "the constitutionality of FINRA's publication of customer disputes and other disclosures is not an issue before the Commission," applicants nevertheless suggest that FINRA violated their constitutional due process rights by denying them a forum for seeking expungement of information about their underlying arbitration awards from the CRD. Because FINRA is not part of the government or otherwise a state actor, the requirements of constitutional due process do not apply.[58] However, the Exchange Act

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54 *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, *supra* note 53.

55 Exchange Act Section 15A(b)(6), 15 U.S.C. § 78*o*-3(b)(6).

56 *Order Approving Proposed Rule Change to Amend NASD Arbitration Rules for Customer Disputes and NASD Arbitration Rules for Industry Disputes*, 72 Fed. Reg. at 4602; *see also supra* notes 44-47 and accompanying text (describing this order in more detail).

57 *Perpetual Sec., Inc.*, Exchange Act Release No. 48433, 2003 WL 22056640, at *3 (Sept. 3, 2003).

58 *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999); *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010); *accord William H. Murphy*, Exchange Act Release No. 90759, 2020 WL 7496228, at *17 (Dec. 21, 2020); *Meyers Assocs., L.P.*, Exchange Act Release No. 81778, 2017 WL 4335044, at *7 n.37 (Sept. 29, 2017).

requires FINRA to provide "fair procedure[s]."[59] Here, applicants have not been denied fair procedures or, even were it held to apply to FINRA, due process. They not only had the opportunity to contest the customer allegations during the underlying arbitration proceedings,[60] they also could have sought expungement during those proceedings.[61] None sought expungement during their underlying arbitration proceedings. In addition, the applicants could have sought in court to vacate, modify, or correct the underlying adverse arbitration awards,[62] but they again failed to do so.

Gordinier suggests that he was further deprived of due process because he allegedly lacked notice of the underlying arbitration proceeding, and thus was denied the opportunity to contest the customer allegations or seek expungement. But Gordinier's statement of claim before FINRA failed to allege that he lacked notice of the underlying arbitration proceeding, so FINRA did not have an opportunity to decide whether to allow such an allegation to proceed to

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[59] Exchange Act Section 15A(b)(8), 15 U.S.C. § 78*o*-3(b)(8).

[60] *Cf. Conn. Dep't of Public Safety v. Doe*, 538 U.S. 1, 7 (2003) (holding that no additional process was required to register an individual as a sex offender where registration "turn[ed] on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest"); *Mitchell M. Maynard*, Investment Advisers Act Release No. 2875, 2009 WL 1362796, at *8 (May 15, 2009) (finding no due process violation in follow-on proceeding based on state regulator's order in part because petitioners could confront the charges in the proceeding before the state regulator).

[61] *See supra* note 3; *cf. Capric v. Ashcroft*, 355 F.3d 1075, 1088–89 (7th Cir. 2004) (holding, in the context of a deportation hearing, that "due process requires a meaningful *opportunity* to present a claim, but imposes no obligation to ensure that the [individual] actually makes a meaningful presentation" (emphasis in original)).

[62] *See Kincaid*, 2019 WL 5445514, at *3 (noting that an individual may seek "to vacate, modify, or correct" an allegedly erroneous FINRA arbitration award "in court through the Federal Arbitration Act").

arbitration. Thus, we will not consider this allegation because it was not exhausted before FINRA.[63]

* * *

Accordingly, we dismiss seventeen applications for review. We remand six proceedings to FINRA for any action deemed appropriate and consistent with this opinion.

An appropriate order will issue.[64]

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

Vanessa A. Countryman
Secretary

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[63] *See MFS Sec.*, 380 F.3d at 621-22 (affirming the Commission's application of "an exhaustion requirement in its review of disciplinary actions by [self-regulatory organizations]"); *Williams*, 2020 WL 3820989, at *4 (observing that the Commission has repeatedly held that it will not consider applications for review of FINRA action where applicants failed to exhaust administrative remedies). In any case, we note that Gordinier has not submitted any evidence that he lacked notice of the underlying arbitration, and the underlying award states that Gordinier and his member firm presented arguments "through their in-house representative."

[64] 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. 97248 / April 4, 2023

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, 3-19405, 3-19573, 3-19574, 3-19611, 3-20160, 3-20205, 3-20467, 3-20499, 3-20620, 3-20621

In the Matter of the Application of

CONSOLIDATED ARBITRATION APPLICATIONS

For Review of Actions Taken by

FINRA

ORDER DISMISSING SEVENTEEN APPEALS OF ACTIONS TAKEN BY REGISTERED SECURITIES ASSOCIATION AND REMANDING SIX PROCEEDINGS TO REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the appeals filed by Tim Sullivan (AP File No. 3-18616), William Burk Rosenthal (AP File No. 3-18617), Bart Steven Kaplow (AP File No. 3-18877), Daryl Andrew Cole (AP File No. 3-18879), Frank Augustine Cuenca (AP File No. 3-18883), Kurt Charles Jackson (AP File No. 3-18910), Ronald R. Wetzel (AP File No. 3-18934), Peter Ashley Ramsay (AP File No. 3-18988), Carl G. Gordinier (AP File No. 3-19017), Jordan Whitney Waring (AP File No. 3-19219), Vincent Harl Rossi (AP File No. 3-19405), Scott Shulman (AP File No. 3-19574), Gregory Lee Luken (AP File No. 3-19611), Jason Harry Kurchner (AP File No. 3-20467), John Joseph Hanlon IV (AP File No. 3-20499), Keys Ericson Tinney (AP File No. 3-20620), and Richard Thomas Iannacone (AP File No. 3-20621) be, and hereby are, dismissed; and

ORDERED that the proceedings regarding Brock Evan Moseley (AP File No. 3-18919), Donald Anthony Wojnowski (AP File No. 3-19013), Mark Vernon Rottler (AP File No. 3-19016), Michael Patrick Murphy (AP File No. 3-19573), Hugh Carleton Bandy (AP File No. 3-

20160), and Mark Kim Gaskill (AP File No. 3-20205) are remanded to FINRA for any appropriate action consistent with such opinion.

By the Commission.

Vanessa A. Countryman
Secretary