

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97604 / May 26, 2023

Admin. Proc. File No. 3-20529

In the Matter of the Application of

SHAUN PERRY NICHOLSON

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Associated person of FINRA member firm appealed FINRA action denying access to its arbitration forum. Associated person sought to arbitrate claim for expungement of customer dispute information from the Central Registration Depository after a court vacated a prior arbitration award denying expungement relief for that same information. *Held*, FINRA’s action is set aside, and FINRA is directed to grant associated person access to its arbitration forum.

APPEARANCES:

Michael Bessette, William Bean, and Frederick Steimling of HLBS Law for Shaun Perry Nicholson.

Alan Lawhead, Megan Rauch, and Michael M. Smith for FINRA.

Appeal filed: Sept. 3, 2021
Last brief received: Dec. 17, 2021

Shaun Perry Nicholson, an associated person of a FINRA member firm, seeks review of a FINRA action that denied his access to its arbitration forum. Previously, Nicholson requested to expunge information about four customer disputes from FINRA's Central Registration Depository ("CRD"). A FINRA arbitration award denied two of those expungement requests and granted the other two. A court subsequently vacated the award as to the two denied expungement claims and confirmed the award as to the two granted claims. Nicholson again sought arbitration of the two previously-denied expungement claims in FINRA's arbitration forum, and FINRA found these claims ineligible for arbitration. We now set aside FINRA's action as inconsistent with its rules and direct FINRA to grant Nicholson access to its arbitration forum.

I. Background

Nicholson has worked in the securities industry since 1992. As relevant here, he has been the subject of four customer disputes that have been reported in FINRA's CRD. The CRD is a computerized database that contains information about broker-dealers and their representatives, including customer dispute information.¹ Generally, the information in the CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms,² which member firms are required to file in certain circumstances.³ The information in the CRD is used by FINRA and other regulators, as well as by firms when making personnel decisions.⁴

The CRD cannot be accessed by the general public.⁵ However, FINRA provides a free online tool called BrokerCheck, which displays some of the CRD's information, including customer dispute information, regarding persons who are currently or formerly associated with

¹ 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).

² *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.

³ See, e.g., FINRA By-Laws Art. V, Sec. 2; FINRA Rule 1013(a)(2).

⁴ *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809.

⁵ See *id.*

FINRA member firms.⁶ Because BrokerCheck’s information is derived from the CRD, information that is expunged from the CRD is not accessible via BrokerCheck.⁷

Associated persons and their firms generally may use FINRA arbitration to seek to expunge customer dispute information from the CRD.⁸ FINRA arbitrators must follow certain procedures and apply certain standards when expunging customer dispute information.⁹ 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.¹⁰

⁶ 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).

⁷ See *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809-10.

⁸ 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”); *Consolidated Arbitration Applications*, Exchange Act Release No. 97248, 2023 WL 2805323, at *4-5 (Apr. 4, 2023) (upholding FINRA’s application of Rules 12203(a) and 13203(a) to deny use of the arbitration forum for particular expungement claims). In this particular case, as described more fully below, we find that denying use of the forum was inconsistent with FINRA’s rules. We note that we recently approved a proposal by FINRA to amend Rules 12203(a), 13203(a), and various rules related to the expungement of customer dispute information from the CRD. *Order Granting Accelerated Approval of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information*, Exchange Act Release No. 97294, 88 Fed. Reg. 24,282, 24,283-95 (Apr. 19, 2023). But we do not consider the amended rules, which are not yet in effect. *Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information*, Exchange Act Release No. 95455, 87 Fed. Reg. 50,170, 50,188 (Aug. 15, 2022) (“If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice following Commission approval.”).

⁹ FINRA Rules 12805, 13805.

¹⁰ FINRA Rule 2080(a)-(b).

Here, in late 2017, Nicholson filed an arbitration statement of claim in FINRA’s arbitration forum seeking to expunge from the CRD information about four separate customer disputes.¹¹ On July 31, 2018, a FINRA arbitrator granted two and considered, but denied, two of Nicholson’s expungement claims. Nicholson subsequently filed a petition in Colorado state court to confirm that award as to the two granted expungement claims, and the court confirmed the award. Nicholson then moved separately for the Colorado state court to vacate the portion of that same award that had denied his other two expungement claims. In his motion to vacate, Nicholson argued that the arbitrator had “exceeded his powers and manifestly disregarded the law,” in part because “all of the evidence presented by the parties” allegedly supported Nicholson’s expungement claims. The court granted Nicholson’s request to vacate the relevant portion of the award without explanation on February 24, 2020.¹²

On August 13, 2021, Nicholson again filed with the FINRA arbitration forum the same two expungement claims that had previously been denied. On August 17, 2021, FINRA issued a letter to Nicholson stating that the matters were “ineligible for expungement” because a FINRA arbitrator had “previously rendered an award denying expungement,” and “[t]herefore, pursuant to FINRA Rules 12203 or 13203, the Director denies the use of the forum for the expungement requests . . . because the subject matter of this dispute is inappropriate.” On September 3, 2021, Nicholson filed an application for review of this denial letter with the Commission.

II. Analysis

FINRA rules expressly authorize associated persons to request expungement of customer dispute information from the CRD by seeking a final arbitration award from a FINRA arbitrator or arbitration panel.¹³ Section 19(d) of the Securities Exchange Act of 1934 authorizes the Commission to review actions taken by a self-regulatory organization (“SRO”), such as FINRA, where those actions prohibit or limit an individual’s access to services offered by the SRO.¹⁴ We consider under Section 19(d) claims that FINRA has prohibited or limited access to its arbitration

¹¹ Nicholson also requested expungement of information about a fifth customer dispute, but ultimately he withdrew this request.

¹² We take official notice of Nicholson’s motion to confirm the arbitration award, his motion to vacate the arbitration award, in part, and the court’s subsequent order vacating the arbitration award, which FINRA attached to its brief in opposition to Nicholson’s application for review. *See* Rule of Practice 323, 17 C.F.R. § 201.323 (“Official notice may be taken of any material fact which might be judicially noticed by a district court of the United States . . .”).

¹³ *See* FINRA Rules 12904, 13904 (providing rules regarding arbitration awards); *see also Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 WL 4569083, at *2 (Aug. 6, 2020) (finding that “FINRA’s service of providing arbitration of expungement claims is ‘fundamentally important’ and central to its function as an SRO”).

¹⁴ 15 U.S.C. § 78s(d)(1)-(2).

forum for associated persons seeking expungement of customer dispute information.¹⁵ And under Exchange Act Section 19(f), we review a FINRA action prohibiting or limiting a person's access to its services to determine if (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.¹⁶

Based on our recent opinion in *Cynthia Mary Couyoumjian*,¹⁷ we find that we have authority to consider Nicholson's application for review, set aside FINRA's action, and direct FINRA to grant Nicholson access to its arbitration forum. In *Couyoumjian*, FINRA denied the applicant's use of its arbitration forum to seek expungement where the applicant had previously sought expungement in that forum, received an award on her expungement claims, and then obtained an order from state court vacating the award.¹⁸ We found that we had authority to review FINRA's action because FINRA had prohibited or limited the applicant's access to its arbitration forum by preventing her from seeking a new, valid award as to her expungement claims.¹⁹ And we found that FINRA had not acted in accordance with its rules when it denied use of its arbitration forum by treating a vacated FINRA arbitration award as still final and binding.²⁰

This case is not materially distinguishable from *Couyoumjian*. Although, unlike in *Couyoumjian*, the state court vacated only part of the arbitration award, the court vacated the part that had denied two of Nicholson's claims for expungement, which means there is no longer a final award as to those claims. FINRA has thus prohibited or limited Nicholson's access to its arbitration forum by preventing him from seeking a new, valid award as to those two expungement claims.²¹ To the extent that FINRA suggests that the state court acted improperly by vacating only a portion of the prior arbitration award, we lack authority to review or set aside the state court's order.²² And we find, as we did in *Couyoumjian*, that FINRA's denial of the use

¹⁵ *Consolidated Arbitration Applications*, 2020 WL 4569083, at *1-3; *see also* 15 U.S.C. § 78s(d)(1)-(2).

¹⁶ 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.* Nicholson does not argue, and the record does not show, that FINRA's action imposes such a burden here.

¹⁷ Exchange Act Release No. 97179, 2023 WL 2596892 (Mar. 21, 2023).

¹⁸ *Id.* at *2.

¹⁹ *Id.* at *3.

²⁰ *Id.* at *3-4.

²¹ *See id.* at *3.

²² *See id.*

of its arbitration forum was not in accordance with its rules, as FINRA provides no basis for treating the vacated portion of Nicholson's arbitration award as if it were final and binding.²³

Accordingly, we set aside FINRA's action and direct FINRA to grant Nicholson access to its arbitration forum. In doing so, we express no opinion on the underlying merits of Nicholson's requests for expungement. An appropriate order will issue.²⁴

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

Vanessa A. Countryman
Secretary

²³ See *id.* at *3-4.

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
Release No. 97604 / May 26, 2023

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In the Matter of the Application of
SHAUN PERRY NICHOLSON
For Review of Action Taken by
FINRA

ORDER SETTING ASIDE ACTION OF REGISTERED SECURITIES ASSOCIATION

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

ORDERED that the action taken by FINRA denying Shaun Perry Nicholson's request for access to its arbitration forum be, and hereby is, set aside, and it is further

ORDERED that FINRA grant Shaun Perry Nicholson access to its arbitration forum.

By the Commission.

Vanessa A. Countryman
Secretary