SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97680 / June 9, 2023

Admin. Proc. File No. 3-20210

In the Matter of the Application of

RYAN WILLIAM MUMMERT

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 prohibiting access to its arbitration forum to seek expungement of customer dispute information from the Central Registration Depository. *Held*, this proceeding is remanded to FINRA.

APPEARANCES:

Michael Bessette, *William Bean*, and *Frederick Steimling* of HLBS Law for Ryan William Mummert.

Alan Lawhead, *Jennifer Brooks*, and *Celia Passaro* for FINRA.

Appeal filed: Jan. 27, 2021
Last brief received: May 28, 2021

Ryan William Mummert, an associated person of a FINRA member firm, seeks review of a FINRA action that prohibited his access to its arbitration forum to seek expungement of customer dispute information from FINRA's Central Registration Depository ("CRD"). We remand this proceeding for further action because we are unable to determine the basis for FINRA's action and therefore cannot determine whether it complies with the requirements of Section 19(f) of the Securities Exchange Act of 1934.[1]

I. Background

A. An arbitrator issued a decision resolving a customer claim against Mummert.

Mummert has worked in the securities industry for over 25 years. As relevant here, he worked for Prudential Securities Incorporated ("Prudential") between July 1996 and August 2000. During that time, two related customers filed a complaint against Mummert and Prudential in the New York Stock Exchange ("NYSE") arbitration forum, which has since merged into the FINRA arbitration forum.[2] The customers alleged that Mummert engaged in mismanagement, failed to follow instructions, and made an unauthorized sale of Blackrock Insured Municipal 2008 Term Trust Inc. ("Blackrock") securities. Mummert contends that this arbitration was settled, whereas FINRA contends that it resulted in an award against Mummert on the merits. But the parties agree that an NYSE arbitrator issued a decision dated June 4, 1998, which states that the arbitrator "decided and determined in full and final settlement of all claims between the parties that: [Prudential and Mummert], jointly and severally, are liable to [the customers]," such that Prudential and Mummert "shall deliver" 189 shares of Blackrock and a certain "sum in cash" to the customers.[3]

As described in more detail below, this customer dispute was reported in FINRA's CRD. The CRD is a database that contains information about broker-dealers and their representatives, including customer dispute information.[4] Generally, the information in the CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration

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1 15 U.S.C. § 78s(f).

2 *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).

3 The specified "sum in cash" was ".441 times the value of one share of Blackrock on the date the 189 shares are acquired by [Prudential and Mummert] (or the date of delivery to [the customers] if the shares are delivered from inventory shares) and an additional $185 for lost earnings on the investment." The decision assessed hearing costs of $75 against the customers.

4 *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).

forms,[5] which member firms are required to file in certain circumstances.[6] The information in the CRD is used by FINRA and other regulators, as well as by firms when making personnel decisions.[7] The CRD cannot be accessed by the general public.[8] 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 FINRA member firms.[9] Because BrokerCheck's information is derived from the CRD, information that is expunged from the CRD is not accessible via BrokerCheck.[10]

Associated persons and their firms generally may use FINRA arbitration to seek to expunge customer dispute information from the CRD.[11] FINRA arbitrators must follow certain

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[5] *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.

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

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

[8] *See id.*

[9] *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).

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

[11] *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 cannot determine the basis for FINRA's denial of the use of its arbitration forum. We also 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*

procedures and apply certain standards when expunging customer dispute information.[12] 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.[13]

Here, Prudential and the NYSE reported information regarding the arbitration decision involving Mummert in FINRA's CRD. Prudential reported that the "Disposition" of the customer dispute was "Award to Customer," whereas NYSE reported that the "Resolution" was "Other," but also reported under "Disposition [D]etails" that there had been an "award against" Mummert and Prudential.

B. Mummert filed a claim to expunge information about the customer dispute from the CRD.

In April 2020, Mummert filed a statement of claim in FINRA's arbitration forum seeking to expunge the customer dispute information described above from the CRD. Mummert alleged that the underlying customer dispute resulted in a "settlement" and attached a copy of the NYSE arbitrator's decision. Mummert also alleged that the prior "case did not proceed to a hearing on the merits." Finally, he contended that the customers' allegations in the underlying customer dispute were "patently false," "clearly erroneous," and "factually impossible" and therefore should be expunged from the CRD under FINRA rules.

FINRA's Dispute Resolution Services ("DRS") initially accepted Mummert's expungement claim for arbitration. In June 2020, the named respondent in the arbitration, Prudential, filed an answer to Mummert's statement of claim and agreed to arbitration.[14] The parties selected a single arbitrator who held a prehearing conference.

In September 2020, Mummert's counsel sent a letter to the FINRA arbitrator, with copies to Prudential's counsel and the FINRA Case Administrator, explaining that Mummert and

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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.").

12 FINRA Rules 12805, 13805.

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

14 According to its answer, since the 1998 decision, Prudential was renamed Prudential Equity Group, LLC, withdrew as a FINRA member, and ceased operations. Prudential's answer noted that the underlying customer dispute "occurred over 20 years ago" and that it had "been over 12 years since [Prudential] was a member of FINRA." But Prudential's answer took "no position" as to Mummert's expungement request.

Prudential had engaged in "good faith searches" to locate the settlement agreement that Mummert believed had resolved the customer dispute. But neither Mummert nor Prudential were able to locate the document, nor was Mummert's counsel able to locate "the original attorney on the case."[15]

C. After the hearing but before the arbitrator issued an award on Mummert's expungement claim, FINRA determined that Mummert's claim was ineligible for arbitration.

On December 10, 2020, the arbitrator held a telephonic hearing regarding Mummert's expungement request, at which only Mummert testified and submitted evidence.[16] Among other things, Mummert testified that he believed that the underlying customer dispute had been resolved through a mediation, although he did not recall the customers being involved in the mediation. He also testified that ultimately Prudential had reached a settlement with the customers by agreeing to reverse the contested trade of Blackrock securities. Mummert testified that he did not have an original or copy of the settlement agreement, as he did not believe it had been provided to him, and he did not recall whether he had signed it.

At the hearing, Mummert submitted and the arbitrator admitted as exhibits the NYSE arbitrator's decision and recreated copies of the relevant customers' account statements. One such statement reflected that the customers' account had "[r]eceived" 189 shares of Blackrock on August 27, 1998, with the notation "ADJ ARBITRATION SETTLEMENT."

On December 24, 2020, two weeks after the hearing but before the arbitrator issued an award, the FINRA Case Administrator sent a letter to Mummert, which stated in pertinent part:

> FINRA has determined that your request for expungement of [the customer dispute disclosure] in your Statement of Claim is not eligible for arbitration as it arises from a prior adverse award. Therefore, pursuant to the Industry Code Rule 13203(a), the forum is denied as to [the claim].

That same day, the Case Administrator sent the arbitrator a letter attaching this denial letter. Mummert subsequently filed this application for review of FINRA's denial with the Commission.

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[15] It is unclear whether Mummert's counsel was referring to Mummert and Prudential's attorney in the NYSE arbitration, the customers' attorney, the NYSE arbitrator, or someone else. Mummert also separately filed an affidavit of service stating that his claim had been served on one of the customers involved in the underlying dispute, but the other had passed away.

[16] Mummert filed an unopposed motion to adduce the hearing transcript and exhibits. We grant the motion under Rule of Practice 452 because the evidence is material and there were reasonable grounds for Mummert's failure to adduce it previously. 17 C.F.R. § 201.452.

II. Analysis

Section 19(d) of the Exchange Act authorizes the Commission to review actions taken by a self-regulatory organization, such as FINRA, where those actions prohibit or limit an individual's access to services offered by the SRO.[17] Exchange Act Section 19(f), in turn, sets forth the standard for our review. It provides that 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.[18] We remand this proceeding to FINRA because we are unable to determine the basis for FINRA's action and therefore cannot determine whether FINRA's action complies with these requirements.[19]

FINRA Rules 12203(a) and 13203(a) provide that the Director of DRS (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 [relevant FINRA Arbitration] Code, the subject matter of the dispute is inappropriate."[20] "Only the Director may exercise" this authority.[21]

The denial letter does not indicate whether the Director made the decision to deny Mummert access to the arbitration forum, as required by FINRA Rules 12203(a) and 13203(a).[22] As noted, the December 24, 2020 letter, issued by a FINRA case administrator, stated only that "FINRA" had determined that Mummert's claims were ineligible for arbitration. The letter did not mention the Director.

Moreover, the letter states that Mummert's expungement request is ineligible for arbitration because it relates to "a prior adverse award." But the letter does not explain why

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17 15 U.S.C. § 78s(d).

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

19 *See, e.g.*, *Consolidated Arbitration Applications*, 2023 WL 2805323, at *3-4 (remanding certain proceedings to FINRA because the relevant records did not contain a sufficient basis to determine whether FINRA's actions were in accordance with its rules).

20 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 "Director").

21 FINRA Rules 12203(a), 13203(a).

22 *See Consolidated Arbitration Applications*, 2023 WL 2805323, at *4 (remanding certain proceedings because the relevant records did not contain a sufficient basis to determine whether the Director had denied use of FINRA's arbitration forum).

FINRA concluded that the underlying customer dispute was resolved by an adverse award on the merits. Notably, although Mummert alleged that the underlying customer dispute was resolved with a settlement and introduced evidence in support of that conclusion at the hearing, the letter does not cite any evidence or other basis for reaching a different conclusion. Nor does the letter address the fact that it was sent after DRS had already accepted Mummert's claim for arbitration—indeed, after the arbitration hearing had already taken place.

In an attempt to support its decision to deny Mummert access to the arbitration forum, FINRA filed a motion with the Commission to adduce as additional evidence two declarations. The first is by a Regional Director in DRS, stating that DRS learned during Mummert's arbitration hearing that the underlying customer dispute had ended with an award rather than a settlement, which had not been "readily apparent to DRS" before the hearing began. The second declaration is by a retired Associate Director of DRS who previously worked for the NYSE arbitration forum as a Chief Arbitration Counsel, stating that NYSE arbitration decisions "would explicitly state that the dispute was resolved by settlement" if applicable—which the decision involving Mummert did not—and that "[t]he language 'in full and final settlement of all claims' was embedded in the standard award form used by the NYSE in 1998."[23]

Even if we admitted these declarations—and Mummert opposes FINRA's motion to adduce them—they still do not adequately explain the basis for FINRA's decision.[24] Among other things, they do not explain why FINRA found unpersuasive Mummert's allegations and evidence that the underlying customer dispute was resolved with a settlement. Nor do the declarations explain how FINRA's denial of access to the arbitration forum comported with FINRA Rules 12203(a) and 13203(a), given that FINRA had previously allowed access to the forum and allowed the arbitration hearing to take place. In addition, as explained above, FINRA's decision to deny use of the forum had to be made by the Director himself.[25] We therefore remand this proceeding for the Director to explain in the first instance whether he believes it is appropriate to deny Mummert use of the FINRA arbitration forum.

Although the current record does not provide a sufficient basis to review FINRA's action, we reject Mummert's argument that the Director cannot engage in fact-finding when determining

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[23] The second declaration also attaches several examples of NYSE awards that include the phrase "full and final settlement," but no examples of NYSE decisions that state that the dispute was resolved by settlement.

[24] Thus, we do not address whether FINRA's motion to adduce meets the standard set forth for motions to adduce additional evidence in Rule of Practice 452. *See* 17 C.F.R. § 201.452 (providing that a party that files a motion for leave to adduce additional evidence "shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously").

[25] *See supra* notes 20-21.

whether to deny use of the FINRA arbitration forum.[26] FINRA Rules 12203(a) and 13203(a) specify that the Director may deny use of the 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." In order to determine whether a subject matter is inappropriate for arbitration, the Director must necessarily engage in limited fact-finding to determine the scope of "the subject matter of the dispute," at least when a factual question arises regarding that subject matter.[27] And nothing in the Exchange Act requires FINRA to accept as true all evidence and allegations presented by a party that seeks access to its services.[28]

Nor, as Mummert argues, is this conclusion that FINRA can engage in limited fact-finding inconsistent with the FINRA article "What to Expect: FINRA's Dispute Resolution Process," which describes FINRA's dispute resolution process as a neutral forum in which staff cannot dismiss arbitration claims that are allegedly frivolous,[29] or with the FINRA Arbitrator's Guide, which states that only arbitrators may decide cases and that staff members are not advocates.[30] FINRA Rules 12203(a) and 13203(a) explicitly authorize the Director to decide whether a dispute's subject matter is inappropriate for FINRA arbitration. And determining the subject matter of an arbitration case (and whether that subject matter is inappropriate for arbitration) is distinct from deciding a case is frivolous, deciding its merits, or acting as an advocate.[31]

Mummert also argues that the Director could, and did, waive the ability to deny use of the arbitration forum by failing to do so until after the arbitration hearing. On remand, Mummert

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[26] Mummert also argues that, even if the underlying customer dispute resulted in a final adverse arbitration award, the denial of Mummert's access to the arbitration forum violated the Exchange Act, FINRA rules, and Mummert's due process rights. But we rejected these same arguments in the *Consolidated Arbitration Applications*, 2023 WL 2805323, at *4-8, and do so again here for the same reasons.

[27] By way of analogy, a federal district court that encounters a question about its subject-matter jurisdiction generally "may inquire by affidavits or otherwise, into the facts as they exist." *Land v. Dollar*, 330 U.S. 731, 735 & n.4 (1947).

[28] *Cf.* Exchange Act Section 15A(h)(2), 15 U.S.C. § 78*o*-3(h)(2) (requiring FINRA to provide an "opportunity to be heard" and to "keep a record" when prohibiting or limiting access to its services, but not providing that FINRA must accept all allegations and evidence as true).

[29] *See What to Expect: FINRA's Dispute Resolution Process* 1-2 (2012), https://www.finra.org/sites/default/files/Education/p117487_0_0.pdf.

[30] *See* FINRA, *Arbitrator's Guide* 11 (Apr. 2023 ed.), https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

[31] By way of analogy, for example, federal courts regularly engage in threshold determinations (such as whether a court has subject-matter jurisdiction) without opining on the merits. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-95 (1998) (differentiating between merits questions and subject-matter jurisdiction questions).

may present this and any other argument so that the Director can address it in the first instance.[32] An appropriate order will issue.[33]

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

Vanessa A. Countryman
Secretary

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[32] In light of our remand of this case, we express no opinion on the underlying merits of FINRA's decision to deny access to its arbitration forum or any remaining issue raised by the parties.

[33] 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. 97680 / June 9, 2023

Admin. Proc. File No. 3-20210

In the Matter of the Application of

RYAN WILLIAM MUMMERT

For Review of Action Taken by

FINRA

ORDER REMANDING PROCEEDING TO REGISTERED SECURITIES ASSOCIATION

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

ORDERED that this proceeding is remanded to FINRA for any appropriate action consistent with such opinion.

By the Commission.

Vanessa A. Countryman
Secretary