BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application Of

JENNIFER A. JOHNSTON

For Review of Action Taken By

FINRA

File No. 3-20120

MS. JOHNSTON'S BRIEF IN SUPPORT OF HER APPLICATION FOR REVIEW

Ms. Jennifer A. Johnston ("Ms. Johnston") seeks Commission review of a determination by the Director of FINRA Dispute Resolution Services[1] ("Director") to deny Ms. Johnston access to the Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Rules") Rule 13203(a). Ms. Johnston, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")[2], challenging the Director's determination that Ms. Johnston's claim is ineligible for arbitration in FINRA forum. On August 6, 2020, the Commission issued a decision that it has jurisdiction over claims like Ms. Johnston's because FINRA's action denying forum "prohibited access to a fundamentally important service that it offers." *Consolidated Arbitration Applications, Exchange Act Release No*. 89495, 2019 WL 6287506 (August 6, 2020) (the "Consolidated Matter"). Ms.

[1] Formerly "Office of Dispute Resolution."
[2] 15 U.S.C. § 78s(d)

Johnston seeks the Commission to remand her case back to FINRA's arbitration forum so that she may access that fundamentally important service.

INTRODUCTION

FINRA is a not-for-profit Delaware corporation and self-regulatory organization ("SRO") registered with the U.S. Securities Exchange Commission ("SEC") as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Dispute Resolution Services ("ODR"), which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The ODR's authority is limited to administration of the forum, not to making regulatory policy decisions. *See generally*, FINRA Dispute Resolution Services Party's Reference Guide.

FINRA maintains an electronic database called the Central Registration Depository ("CRD") and a public reporting system known as BrokerCheck.[3] This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each Associated Person of a FINRA Member firm. *See*, FINRA Rule 8312. FINRA requires member firms to report all customer complaints that meet specific requirements to FINRA, and publicly discloses these complaints, absent any determination of merit or factual basis. *See*, FINRA Rule 4530. FINRA provides only one viable remedy for the removal of customer dispute information from the CRD and BrokerCheck, which is expungement pursuant to FINRA Rule 2080.

On August 25, 2020, Ms. Johnston, a resident of Corte Madera, CA, submitted a Statement of Claim to the ODR requesting a hearing for the expungement of her CRD record as it relates to two customer dispute disclosures, Occurrence Numbers 1455733 and 1077974 (together, "the Occurrences"). On August 26, 2020, counsel for Ms. Johnston received notice (the "Notice") that

[3] 15 U.S.C. 78o-3(i)(1)

the Director denied Ms. Johnston access to the FINRA forum for arbitration for expungement of Occurrence Number 1455733 (hereinafter, the "Occurrence"). The Notice stated the Occurrence was decided in a prior arbitration award and is not eligible for arbitration, citing Industry Code Rule 13203(a). However, Industry Code Rule 13203(a) does not provide for forum denial in this situation. FINRA Rule 13203(a) states that:

> The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director may exercise the authority under this Rule.

On October 8, 2020, Ms. Johnston timely filed her Application for Review of FINRA's Partial Denial of Forum. On December 23, 2020, the SEC issued its briefing schedule indicating that Ms. Johnston's brief in support of the application for review is due on January 22, 2021, FINRA's response is due on February 4, 2019, and Ms. Johnston's response is due February 22, 2021. Ms. Johnston hereby timely submits her brief in support of her application.

ARGUMENT

I. The Commission has jurisdiction over this appeal.

The Commission has jurisdiction over this appeal and should proceed to the merits of Ms. Johnston's appeal. Section 19(d) of the Exchange Act requires the Commission to review a final action taken by an "SRO that 'prohibits or limits' 'access to services offered' by the SRO to any person." *See,* SEC Release No. 72182. The Commission has already determined in the Consolidated Matter that Exchange Act Section 19(d)(2) authorizes review of an SRO's action if that action "prohibits or limits any person in respect to access to services offered by [the SRO]." In determining whether the Commission has jurisdiction under the above standard, it has analyzed whether the SRO prohibited or limited access to a service that the SRO offers and whether that

service is fundamentally important. The Commission has already determined FINRA's arbitration forum is a fundamentally important service and that forum denial limits or restricts access to that service. Ms. Johnston's appeal clearly fits under this standard.

There is a two-part analysis under Section 19(d) for determining whether the Commission has jurisdiction over Ms. Johnston's appeal. The first is whether the action being appealed is a "final action" by the SRO. Here, as in the Consolidated Matter, the Director's denial of forum was a final action by FINRA. FINRA offers no internal appeal process for a determination by the Director and did not offer Ms. Johnston any other remedy or course of action. The second part of the analysis is whether the final action "prohibited or limited" the applicant's access to a service offered by FINRA. Here, as in the Consolidated Matter, FINRA limited Ms. Johnston's access to its service of arbitration. As stated above, the Commission has already determined that FINRA's arbitration system is a fundamental service it provides. Therefore, the Commission's jurisdiction over Ms. Johnston's appeal is clear.

II. FINRA's forum denial was inconsistent with its rules.

According to the Notice, the Director made a determination under FINRA Rule 13203 that Ms. Johnston's claim is ineligible for FINRA arbitration. Prior to the Commission's approval of rule changes in 2007, NASD Rule 10301(b) permitted the Director to deny arbitration forum "only upon approval of the NAMC or its Executive Committee."[4] The Commission, in approving rule changes that resulted in FINRA Rule 13203, stated that the Director's authority could not be delegated and emphasized that its approval was "intended to give the Director the flexibility needed in *emergency* situations" and that "in emergency situations, it is reasonable for the Director

[4] National Arbitration and Mediation Committee (NAMC)

to have the authority and flexibility to act quickly to protect the health and safety of users and administrators of the forum."[5]

FINRA's denial of Ms. Johnston's access to the arbitration forum was inconsistent with its rules and its authority under the Exchange Act in more than one way. First, although the Notice references the Director, it was issued by a Senior Case Specialist, Cheryl Abuan. This is clearly inconsistent with the Commission's requirement that the Director's authority under Rule 13203 not be delegated. Second, FINRA provided absolutely no rationale for how denial was necessary to protect the health or safety of users and administrators of the forum, nor how Ms. Johnston's request somehow presented an emergency situation that required the Director's intervention. The Notice did not explain how, under Rule 13203, Ms. Johnston's claim was "ineligible" for arbitration, nor did the Notice make reference to any section of the Code that rendered Ms. Johnston's claim "inappropriate."

Assuming the Director's determination was that Ms. Johnston's claim was "inappropriate" for arbitration, the Director clearly overstepped its authority under Rule 13203 which is intended to be used in extreme, emergency situations. Furthermore, whether the previous award referenced in the Notice was preclusive to Ms. Johnston's relief is a determination that should be made by the fact finder and not by the neutral forum to which her expungement request was submitted. By way of analogy, when an issue is precluded by *res judicata*, the court clerk who accepts the filing does not preemptively decline to accept the filing. Whether an issue or claim is precluded is a determination made by the judge. Without further inquiry into the underlying facts of the matter,

[5] SEC Release No. 34-55158, at 108. It is important to note that the text "or the President of NASD Dispute Resolution" was originally included in the SEC's approval language, however, was omitted as the President of NASD Dispute Resolution is no longer included in FINRA Rule 13203.

there was no reasonable way for the Director to determine that Ms. Johnston's claim was "ineligible for arbitration." Because Ms. Johnston's claim clearly did not present a threat to the health or safety of the arbitration forum, there was no basis for the Director to exercise its discretion under Rule 13203.

FINRA did not provide Ms. Johnston with any opportunity to present her argument that, despite the fact that another award denied a request for expungement of this occurrence, Ms. Johnston did not submit this prior request, did not attend a hearing, and did not have her own counsel. Importantly, FINRA provided zero rationale as to what part of the Code made the "subject matter" of Ms. Johnston's claim "inappropriate." The subject matter of Ms. Johnston's claim was purely expungement – a subject matter that is directly contemplated and authorized by the Code. Therefore, the Director abused its discretion in determining that Ms. Johnston's request was "ineligible."

III. Ms. Johnston's claim is not barred by issue or claim preclusion.

FINRA Rule 13805 explicitly requires a recorded hearing on expungement requests. Not only was Ms. Johnston represented by the same attorney as her previous broker-dealer firm, whom she was no longer employed with, during the underlying arbitration, she was not aware of an expungement request, and she was not present at any recorded arbitration hearing – not on the customer's claims, nor on the expungement request. No evidence was presented to support an expungement claim and the arbitrator offered zero rationale for denying the expungement claim, despite explicitly stating in the same award that the investor's allegations were "not sustained by the evidence." It is clear from the award and the underlying facts of the case that the arbitrator did not actually examine or consider the expungement request. Issue preclusion does not apply when

an issue has not actually been litigated.[6] Again, Ms. Johnston's claim requires an examination and analysis of the underlying facts of her case and the previous arbitration award and not an arbitrary application of FINRA Rule 13203, which was not even intended to give the Director discretion to deny forum in cases like Ms. Johnston's.

Even if the previous expungement request made *on behalf of* Ms. Johnston had been actually litigated, which it was not, Ms. Johnston's claim should still not be barred by issue preclusion. Even when the elements of issue preclusion are met, "an exception may be warranted if there has been an intervening change in the applicable legal context."[7] This exception recognizing that applying issue preclusion in changed circumstances may not "advance the equitable administration of the law."[8] Since the award at issue in Ms. Johnston's case, there have been several changes to FINRA's rules that warrant an exception to issue preclusion.

The award at issue was rendered in 2009. In 2009, a customer complaint would be archived after two years. In November 2010, the Commission authorized a change in FINRA Rule 8312 that made all customer complaints permanently available for registered representatives. See, FINRA Notice to Members 10-34. This rule change also expanded the post-registration disclosure period from two years to ten years; meaning, were Ms. Johnston to retire from the financial industry, this complaint would now remain on BrokerCheck for ten years rather than two. Furthermore, in 2016, FINRA made it requirement for all registered representatives to publish an easily accessibly link to their BrokerCheck profiles on any professional websites. *See*, FINRA Rule 2210. Both of these changes substantially affect the impact this disclosure has on Ms. Johnston's personal and professional reputation. At the time the decision to deny expungement

[6] *First Mortg. Corp. v. United States*, 961 F.3d 1331, 1338 (Fed. Cir. 2020).
[7] *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697, 203 L. Ed. 2d 846 (2019)
[8] *Id*. (quoting *Bobby v. Bies*, 556 U.S. 825, 834, 129 S. Ct. 2145, 173 L. Ed. 2d 1173 (2009).)

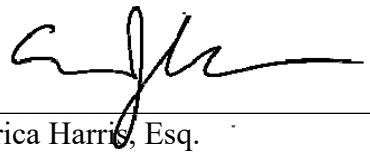
was made, the arbitrator could not possibly have considered the potential dangers to Ms. Johnston's career because at that time, the arbitrator knew the disclosure would eventually be archived, and the internet, and specifically the internet facing BrokerCheck, was not nearly as pervasive as it is now. To advance the equitable administration of law, Ms. Johnston should be allowed to bring her expungement request again, regardless of whether it was actually litigated before.

CONCLUSION

The Commission is required to review an action of a SRO if the action is final, prohibits or limits a person's access to services offered to any person by the SRO, and application by an aggrieved party is timely filed. The Commission irrefutably has jurisdiction over Ms. Johnston's appeal. Furthermore, FINRA overstepped its authority in denying Ms. Johnston access to its forum. Ms. Johnston's case should be remanded back to FINRA's arbitration forum so that a fact finder can make a determination of whether she is eligible for expungement of the Occurrence.

Dated: January 22, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James Bellamy certify that on this 22nd day of January 2021, I caused a copy of Applicant's Brief in Support of her Application for Review above, to be served by email on:

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[X] (BY EMAIL) I caused the documents to be sent to the persons at the e-mail address listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] (STATE) I certify (or declare) under penalty of perjury under the laws of the State of Colorado that the foregoing is true and correct.

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