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February 22, 2021

VIA EMAIL

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RE: In the Matter of the Application for Review of Jennifer A. Johnston
Administrative Proceeding No. 3-20120

Dear Ms. Countryman:

Enclosed please find FINRA's Opposition to the Application for Review in the above-referenced matter.

Sincerely,

/s/ Michael M. Smith

Michael M. Smith

Enclosures

cc: Harris Freedman, Esq.
Erica J. Harris, Esq.

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

FINRA'S OPPOSITION TO JOHNSTON'S APPLICATION FOR REVIEW

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February 22, 2021

Table of Contents

Page

I. Introduction 1

II. Factual and Procedural Background 2

A. Johnston 2

B. Expungement of Customer Dispute Information from CRD® 2

C. Johnston's First Claim for Expungement Is Denied by the Arbitrator 3

D. FINRA Declines to Accept Johnston's Second Claim for Expungement 4

III. Argument 5

A. The Commission Should Dismiss Johnston's Application Because It Lacks Jurisdiction to Review or Set Aside the Arbitrator's Award 5

1. The Commission Lacks Jurisdiction Over Johnston's Application Under Exchange Act Section 19(d) 5

2. The FAA Provides Only Limited Judicial Review of Arbitration Awards 7

B. The Commission Should Dismiss Johnston's Application Because FINRA Properly Denied its Arbitration Forum 9

1. FINRA's Denial of the Arbitration Forum Was in Accordance with Its Rules 9

2. FINRA Applied Its Rules Consistent with the Exchange Act 15

IV. Conclusion 16

Table of Authorities

Page

Federal Decisions

Bell Aerospace Co. Div. of Textron, Inc. v. Local 516 Int'l Union,
500 F.2d 921 (2d Cir. 1974).....9

Byrd v. Am. Arbitration Ass'n, No. 2:12-cv-00638,
2013 U.S. Dist. LEXIS 43658 (S.D. Ohio Mar. 27, 2013).....12

Comedy Club, Inc. v. Improv W. Assocs.,
553 F.3d 1277 (9th Cir. 2009).....9

Corey v. N.Y. Stock Exch., 691 F.2d 1205 (6th Cir. 1982).....8, 12

Herrera v. Wyoming, 139 S. Ct. 1686 (2019).....14

Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901,
763 F.2d 34 (1st Cir. 1985).....9

In re Press Printers & Publishers, Inc., 12 F.2d 660 (3d Cir. 1926).....12

Parisi v. Netlearning, Inc., 139 F. Supp. 2d 745 (E.D. Va. 2001).....8

Prudential Sec. v. Hornsby, 865 F. Supp. 447 (N.D. Ill. 1994).....8

Puckett v. FINRA, No. CV-2012-1193,
2012 Okla. Dist. LEXIS 300 (D. Okla. Sept. 21, 2012).....5

Federal Register

Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto,
72 Fed. Reg. 4574 (Jan. 31, 2007).....10, 11

SEC Decisions and Releases

Dustin Tylor Aiguier, Exchange Act Release No. 88953,
2020 SEC LEXIS 1430 (May 26, 2020).....5, 6

Consolidated Arbitration Applications, Exchange Act Release No. 89495,
2020 SEC LEXIS 3312 (Aug. 6, 2020).....1, 6

Eric M. Diehm, 51 S.E.C. 938 (1994).....10

John Boone Kincaid III, Exchange Act Release No. 87384,
2019 SEC LEXIS 4189 (Oct. 22, 2019) 6, 7, 8, 10

Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes, Exchange Act Release No. 34-51856,
2005 SEC LEXIS 1432 (June 15, 2005).....11

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, 2008 SEC LEXIS 3162 (Oct. 30, 2008) 14

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,
2014 SEC LEXIS 2617 (July 22, 2014).....2, 15

Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure), Exchange Act Release No. 34-62476,
2010 SEC LEXIS 2246 (July 8, 2010).....13

John G. Pearce, 52 S.E.C. 796 (1996).....8

Federal Statutes and Codes

9 U.S.C. § 12.....7

15 U.S.C. § 78o-3(i).....2

15 U.S.C. § 78s(d)(2).....5

15 U.S.C. § 78s(f) 9

FINRA Notices and Rules

FINRA Regulatory Notice 08-79, 2008 FINRA LEXIS 108 (Dec. 2008) 14

FINRA Rule 2080(b)(1).....3, 5

FINRA Rule 12805.....3

FINRA Rule 12904(b) 7, 10

FINRA Rule 13805.....3

FINRA Rule 13904(b) 7, 10

FINRA Rule 13203(a).....10

NASD Notice to Members 04-16, 2004 NASD LEXIS 18 (Mar. 2004) 3

Miscellaneous

Restatement (Second) of Judgements § 28(2)(b) (1977) 13

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

FINRA'S OPPOSITION TO JOHNSTON'S APPLICATION FOR REVIEW

I. Introduction

Jennifer Johnston improperly seeks to relitigate an arbitrator's final award denying her request to expunge adverse information from FINRA's Central Registration Depository ("CRD®"). In 2009, a customer filed an arbitration claim against Johnston and her former firm alleging suitability violations. During the arbitration, Johnston sought expungement of the customer dispute. At the end of the proceeding, the arbitrator awarded the customer $5,500 in damages and explicitly denied Johnston's request for expungement. Johnston did not move to vacate the arbitrator's award pursuant to the Federal Arbitration Act (the "FAA").[1]

Ten years later, Johnston filed a new claim with FINRA's Office of Dispute Resolution ("Dispute Resolution") seeking to expunge the same customer dispute and arbitration award from CRD®. The Director of Dispute Resolution did not accept Johnston's claim for arbitration

[1] As explained below, Johnston's case is different from several expungement-related cases pending in a consolidated matter. *See Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312 (Aug. 6, 2020). Unlike the applicants in those cases, Johnston sought expungement once and the arbitrator explicitly denied her request in the award.

because the subject matter was inappropriate, as Johnston already had litigated expungement once and lost. Johnston contends the Director lacked authority to deny her claim, and that she is entitled to plead her case to a second arbitration panel because the award from the first proceeding is tainted. Under FINRA's rules and established law, however, the arbitrator's award denying Johnston's request for expungement is final, and the Commission lacks jurisdiction to set it aside and order a new hearing. The Commission therefore should dismiss Johnston's application for review.

II. Factual and Procedural Background

A. Johnston

Johnston entered the securities industry in 1992. RP 25.[2] Between July 1999 and December 2008, Johnston was registered with Banc of America Investment Services, Inc. ("Banc of America"). RP 23. Johnston currently is registered with TD Ameritrade Investment Management, LLC, and TD Ameritrade, Inc. RP 22.

B. Expungement of Customer Dispute Information from CRD®

The Securities and Exchange Act of 1934 (the "Exchange Act") requires FINRA to collect and maintain registration information about member firms and their associated persons. 15 U.S.C. § 78o-3(i). FINRA maintains this information in CRD®. Regulators use the information in CRD® in connection with their licensing and regulatory activities, and firms use it when making hiring decisions. *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, 2014 SEC LEXIS 2617, at *3 (July 22, 2014). Additionally,

[2] "RP__" refers to the certified record file in this matter.

FINRA releases some of the information to the investing public through BrokerCheck®. *Id.* Among the information maintained in CRD® and publicly released through BrokerCheck® are customer complaints, arbitration claims, and awards that may result from those claims, collectively referred to as "customer dispute information." *Id.* at *2-3. An associated person who wishes to have customer dispute information removed from CRD® must seek expungement pursuant to FINRA Rule 2080. *Id.* at *3-4. The rule identifies three narrow circumstances that justify expungement of customer dispute information from CRD® in FINRA's arbitration forum:

- the claim, allegation or information is factually impossible or clearly erroneous;
- the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- the claim, allegation or information is false.

FINRA Rule 2080(b)(1). FINRA's Code of Arbitration Procedure requires arbitrators to make an affirmative finding that one of the standards in FINRA Rule 2080 has been proven before recommending expungement. *See* FINRA Rules 12805, 13805. The standards imposed by FINRA Rule 2080 are intended to promote the common interest of public investors, broker-dealers and their associated persons, and regulators in "a CRD system that contains accurate and meaningful information" and maintains the "integrity of the arbitration process." NASD Notice to Members 04-16, 2004 NASD LEXIS 18 (Mar. 2004).

C. Johnston's First Claim for Expungement Is Denied by the Arbitrator

In December 2009, a customer filed an arbitration claim against Johnston and Banc of America. RP 29. The customer alleged "unsuitable investment recommendations and misrepresentations," and sought $25,000 in damages. *Id.* There is no evidence that Johnston did not receive notice of the customer's claims against her, or that she did not have an opportunity to

be heard during the proceeding. To the contrary, Johnston states she was represented by counsel in the arbitration. Johnston Br. at 6. During the proceeding, Johnston's attorney, apparently, requested expungement of the customer's claims against her. *See id.*[3] In July 2010, the arbitrator entered an award ordering Banc of America to pay the customer $5,500 and explicitly denying Johnston's expungement request. RP 29-30. In the award, the arbitrator wrote: "Respondent Jennifer Anne Johnston's request for expungement is denied." RP 29. There is no evidence that Johnston was not timely notified of the arbitrator's award.[4] There is no evidence that Johnston moved to vacate, modify, or correct the award in court pursuant to the FAA.

D. FINRA Declines to Accept Johnston's Second Claim for Expungement

Ten years later, in August 2020, Johnston filed a statement of claim with Dispute Resolution seeking expungement of the same customer dispute and the resulting award. RP 2.[5] In September 2020, the Director determined that Johnston's claim for expungement was not eligible for arbitration because "the expungement request for this disclosure was decided in a prior arbitration award." RP 5.[6] The Director made his determination pursuant to FINRA Rule

[3] Johnston states in her brief that she personally did not request expungement but does not identify who did. Johnston Br. at 6.

[4] The award states it was served on July 22, 2010. RP 30.

[5] Johnston inaccurately alleged in her statement of claim that the customer's claim was settled in July 2010. *See* RP 3.

[6] Johnston also sought expungement of a different customer complaint unrelated to the arbitrator's award. *See* RP 2. The Director accepted that claim for arbitration. RP 5.

13203(a), which authorizes him to deny access to FINRA's forum if the subject matter of a claim is inappropriate for arbitration. RP 5.[7] Johnston filed an application for review. RP 11-13.

III. Argument

A. The Commission Should Dismiss Johnston's Application Because It Lacks Jurisdiction to Review or Set Aside the Arbitrator's Award

1. The Commission Lacks Jurisdiction Over Johnston's Application Under Exchange Act Section 19(d)

Exchange Act Section 19(d)(2) authorizes the Commission to review FINRA's actions only in specific circumstances, including, as relevant here, any action that "prohibits or limits any person in respect to access to services offered by" FINRA. 15 U.S.C. § 78s(d)(2).[8] Johnston contends her appeal fits within this provision because, she argues, FINRA denied her access to its arbitration service by not accepting her expungement claim. But FINRA did not deny Johnston access to its arbitration service to litigate her expungement claim—it denied her access to litigate her claim a second time. *See Dustin Tylor Aiguier*, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *6-7 (May 26, 2020) (stating that FINRA's refusal to reopen the applicant's arbitration was not a denial of access because it did "not change the fact that [the applicant] accessed the arbitration service."). FINRA's denial of Johnston's claim seeking to relitigate expungement does not constitute a denial or limitation of access to FINRA's arbitration service. *See id.* at *7. ("Congress has not authorized us to reopen an arbitration proceeding that

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[7] The Director's determination to deny FINRA's arbitration forum does not preclude Johnston from seeking expungement in a court of competent jurisdiction. *See* FINRA Rule 2080; *see also, e.g.*, *Puckett v. FINRA*, No. CV-2012-1193, 2012 Okla. Dist. LEXIS 300 (D. Okla. Sept. 21, 2012) (granting plaintiff's request for expungement). However, Johnston will have to overcome the finality of the arbitrator's award.

[8] Johnston cites no other jurisdictional basis in support of her application, and none is apparent. *See* Johnston Br. at 3-4.

has resulted in an award and grant a new trial."). The Commission therefore lacks jurisdiction over Johnston's application.

Johnston erroneously relies on the Commission's order in *Consolidated Arbitration Applications* to argue that the Commission has jurisdiction over her appeal. *See Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312. In that order, Johnston contends, the Commission decided "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.'" Johnston Br. at 1. In addition to ignoring the Commission's holding in *Aiguier*, which is squarely on point, Johnston ignores the obvious distinction between the consolidated cases and hers: unlike Johnston, the applicants in the consolidated cases never had an expungement request denied in an arbitrator's final award. *See Consolidated Arbitration Applications*, 2020 SEC LEXIS, 3312, at *1 ("[A]n arbitration panel previously issued an arbitration award against [each] applicant in a customer dispute. The underlying awards contained no expungement relief as to the applicants[.]"). By contrast, Johnston previously sought expungement relief, and her request was explicitly denied in the arbitrator's award. Johnston's attempt to relitigate expungement is therefore readily distinguishable from the consolidated cases.

That FINRA did not allow Johnston to relitigate her expungement claim does not change the fact that FINRA previously allowed her to access its arbitration service and litigate the exact same claim. *See Aiguier*, 2020 SEC LEXIS 1430, at *7 ("His claim that FINRA should have reopened the hearing is a merits question about whether FINRA properly implemented that service in a manner consistent with its rules, and arguments regarding the merits do not create jurisdiction under Section 19(d)(2)."); *John Boone Kincaid III*, Exchange Act Release No.

87384, 2019 SEC LEXIS 4189, at *14 (Oct. 22, 2019) (stating that Exchange Act Section 19(f) allows the Commission "to review whether in taking certain actions FINRA acted in accordance with its rule[s] . . . . But a petition for review must first satisfy the jurisdictional requirements in Section 19(d) before the Commission can review the action under Section 19(f)."). FINRA did not deny Johnston's access to its arbitration service to litigate her expungement claim, and the Commission therefore lacks jurisdiction to consider Johnston's application.

2. The FAA Provides Only Limited Judicial Review of Arbitration Awards

The arbitrator's award denying Johnston's expungement claim is a final FINRA arbitration award. Under FINRA's Code of Arbitration, all awards are "final and are not subject to review or appeal *unless the applicable law directs* otherwise." FINRA Rules 12904(b), 13904(b) (emphasis added).[9] The "applicable law," the Commission has explained, is the FAA. *Kincaid*, 2019 SEC LEXIS 4189, at *10. Under the FAA, once the arbitrator issued the award denying Johnston's claim for expungement, Johnston had only "one path for relief": a motion to vacate, modify, or correct the award in court. *Id.* at *10. Johnston did not challenge the award in court and the limitations period for doing so has long since expired. *See* 9 U.S.C. § 12 (stating that a motion to vacate, modify, or correct an award must be served within three months of the award).

Johnston seeks to avoid the FAA's time bar, and its high standard for vacatur, by demanding, essentially, that the Commission set aside the arbitrator's final award and give her

[9] The award confirms that it represents the arbitrator's "full and final resolution of the issues submitted for determination[.]" RP 29.

another chance.[10] Johnston argues that she is entitled to relitigate expungement because, during the first proceeding, "[n]o 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.'" Johnston Br. at 6. Johnston maintains that "[i]t is clear from the award and the underlying facts of the case that the arbitrator did not actually examine or consider the expungement request," and therefore her expungement request "has not actually been litigated." *Id.* at 6-7.

Johnston's argument is precisely the type of collateral attack the FAA prohibits. "[A]s courts have long explained, the exclusive remedy for challenging acts that taint an arbitration award rendered by a FINRA arbitrator is to move to vacate, modify, or correct the award in court under the [FAA]." *Kincaid*, 2019 SEC LEXIS 4189, at *10.[11] The arbitrator's award explicitly states that "Respondent Jennifer Anne Johnston's request for expungement is denied." If Johnston's expungement request was not fully and fairly litigated the first time, as she now contends, she should have challenged the award in court under the FAA. *See, e.g., John G.*

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[10] That Johnston makes her argument under the guise of a new statement of claim does not change the nature of the ultimate relief she seeks—the impermissible vacatur of the prior award. *See Parisi v. Netlearning, Inc.*, 139 F. Supp. 2d 745, 750 (E.D. Va. 2001) ("Aggrieved parties may not circumvent the FAA by packaging a motion to vacate as a fresh complaint.").

[11] *See also, e.g., Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1212-13 (6th Cir. 1982) ("Once an arbitrator has rendered a decision the award is binding on the parties unless they challenge the underlying contract to arbitrate pursuant to section 2 [of the FAA] or avail themselves of the review provisions of sections 10 and 11. . . . The three month notice requirement in section 12 for an appeal of the award on section 10 or 11 grounds is meaningless if a party to the arbitration proceedings may bring an independent direct action asserting such claims outside of the statutory time period provided for in section 12."); *Prudential Sec. v. Hornsby*, 865 F. Supp. 447, 451 (N.D. Ill. 1994) (enjoining the defendant from pursuing a second NASD arbitration claim alleging misconduct in the first proceeding because "the policies behind section 10 [of the FAA] would be eviscerated if it were only an optional way to modify an arbitration award[.] [A]n attempt to modify an award by a route or mechanism other than section 10 must be enjoined.").

Pearce, 52 S.E.C. 796, 798 (1996) ("[Respondent] attacks the fairness of the underlying arbitration proceeding between the [customers] and him. However, an applicant may not collaterally attack an arbitration award in a disciplinary proceeding for failure to pay that award.").[12] Just as respondents may not collaterally attack a final arbitration award during a disciplinary appeal to the Commission, Johnston cannot do so now in an application to the Commission or in a second FINRA arbitration proceeding.

B. The Commission Should Dismiss Johnston's Application Because FINRA Properly Denied its Arbitration Forum

If the Commission determines it has jurisdiction, it should nonetheless dismiss Johnston's application because the Director properly denied Johnston access to FINRA's arbitration forum to relitigate expungement. Under Section 19(f) of the Exchange Act, the Commission must dismiss Johnston's application if it finds (1) the specific grounds on which FINRA based its action exist in fact; (2) FINRA's denial of the arbitration forum was in accordance with its rules; and (3) those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f). FINRA's action here meets these standards.

1. FINRA's Denial of the Arbitration Forum Was in Accordance with Its Rules

FINRA rules authorize the Director to deny the arbitration forum to inappropriate claims, and Johnston's expungement claim is inappropriate. FINRA Rule 13203(a) establishes a

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[12] *See also, e.g., Hoteles Condado Beach, La Concha & Convention Ctr. v. Union de Tronquistas Local 901*, 763 F.2d 34, 40 (1st Cir. 1985) (stating that a court may vacate an arbitrator's award under the FAA "if the arbitrator's refusal to hear pertinent and material evidence prejudice[d] the rights of the parties to the arbitration proceedings"); *Bell Aerospace Co. Div. of Textron, Inc. v. Int'l Union, United Auto., etc.*, 500 F.2d 921, 923 (2d Cir. 1974) (stating that, under the FAA, "courts will not enforce an award that is incomplete, ambiguous, or contradictory"); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009), *aff'd*, 558 U.S. 824 (2009) (stating that a court may vacate an award under the FAA "if it is completely irrational or constitutes manifest disregard of the law").

gatekeeper role for the Director by empowering him to deny "the use of the FINRA arbitration forum if [he] determines that . . . the subject matter of the dispute is inappropriate[.]" As the Commission stated in approving Rule 13203(a), the rule enables the Director to "exclud[e] cases from the arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum." *See Order Approving Proposed Rule Change and Amendments 1, 2, 3, and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto*, 72 Fed. Reg. 4574, 4602 (Jan. 31, 2007) [hereinafter *Approval Order*].

The Director correctly determined that Johnston's claim for expungement is not appropriate for arbitration because a FINRA arbitrator cannot adjudicate a claim that already has been adjudicated in an earlier FINRA arbitration proceeding. Under FINRA's Code of Arbitration, all awards are "final and are not subject to review or appeal unless the applicable law directs otherwise." FINRA Rules 12904(b), 13904(b); *cf. Eric M. Diehm*, 51 S.E.C. 938, 940 (1994) ("Section 41(b) of the Code of Arbitration Procedure, however, makes clear that the NASD does not have the power to review its own arbitration awards.") (discussing the predecessor to Rule 13203(a)). As discussed above, the "applicable law" is the FAA, and under the FAA, Johnston's only path for review of the arbitrator's award was a motion to vacate, modify, or correct the award in court. *Kincaid*, 2019 SEC LEXIS 4189, at *10.

Johnston erroneously argues that the Director lacked authority under Rule 13203(a) to deny her expungement claim because, she contends, the Director can exercise his authority under the rule only in "extreme, emergency situations," such as when denying forum is necessary to protect the health and safety of its users or administrators. Johnston Br. at 5. Johnston's argument is refuted by the plain text of the rule, which states that the Director may deny the

forum if he determines "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." (emphasis added) The Commission has recognized the Director's authority under the rule to deny forum to claims that are "beyond its mandate," regardless of whether there exists an "extreme, emergency" situation. *See Approval Order*, 72 Fed. Reg. at 4602.

Johnston's argument also is refuted by the rule's administrative history. Before Rule 13203(a) was enacted, the Director had authority, under NASD Rule 10301(b), to deny the arbitration forum when a "dispute, claim, or controversy [wa]s not a proper subject matter for arbitration." FINRA proposed Rule 13203(a) for the express purpose of *broadening* the Director's authority to cover situations in which, although a dispute involved a proper subject matter, denial of the forum was necessary for other reasons, including the health and safety of the participants. *See Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto to Amend NASD Arbitration Rules for Customer Disputes*, Exchange Act Release No. 34-51856, 2005 SEC LEXIS 1432, at *10 (June 15, 2005) ("Occasionally, situations arise in which the Director believes that it is in the best interest of the forum to deny use of the forum for reasons other than subject matter. For example, . . . when NASD has reason to believe that a party would present a security risk to the forum or to other parties."). In approving the broadening of the Director's authority to cover emergencies, the Commission remarked 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," and that this new authority "should be limited by application in only a very narrow range of circumstances." Contrary to Johnston's assertion, the Commission did not state, or even suggest, that the Director could exercise his authority under Rule 13203(a) *only* in emergency situations.

Similarly, Johnston contends that whether the arbitrator's prior award precludes the relief she now seeks "is a determination that should be made by the fact finder and not by the neutral forum to which her expungement request was submitted." Johnston Br. at 5. As an example, Johnston argues that "when an issue is precluded by res judicata, the court clerk who accepts the filings does not preemptively decline to accept the filing." *Id.* Johnston's analogy is inapt. In most judicial systems, the clerk's position is ministerial; the clerk has no authority to determine whether the subject matter of a dispute is not proper for litigation.[13] By contrast, FINRA's rules establish the Director as the gatekeeper for FINRA's arbitration forum, and explicitly empower him to deny access to the forum when the subject matter of the dispute is inappropriate for FINRA's arbitration forum, as it is here.[14]

Last, Johnston argues that she should be allowed to relitigate her expungement claim because, she contends, there has been an "intervening change in the applicable legal context" since her first claim was denied, and relitigation is necessary to "advance the equitable administration of the law." Johnston Br. at 7. Johnston asserts that, after the arbitrator denied

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[13] *See, e.g.*, *In re Press Printers & Publishers, Inc.*, 12 F.2d 660, 662 (3d Cir. 1926) ("It is settled that a clerk of court is a ministerial officer and cannot exercise judicial functions.").

[14] The Director's denial of Johnston's claim for arbitration is compelled by FINRA rules and the FAA, and is not dependent on the judicial doctrine of res judicata. Courts routinely enjoin judicial and arbitral proceedings that amount to collateral attacks on arbitration awards without addressing the elements of res judicata. *See, e.g., Byrd v. Am. Arbitration Ass'n*, No. 2:12-cv-00638, 2013 U.S. Dist. LEXIS 43658, at *13 (S.D. Ohio Mar. 27, 2013) (finding that plaintiff's claims against the American Arbitration Association alleging that a prior arbitration proceeding was fundamentally flawed "constitute[d] a collateral attack against the award even though [plaintiff] is currently suing a different defendant than his original adversary in the arbitration proceeding. [Plaintiff's] complaint has 'no purpose other than to challenge the very wrongs affecting the award for which review is provided under section 10 of the Arbitration Act.'"); *Corey*, 691 F.2d at 1213 ("Very simply, [Plaintiff] did not avail himself of the review provisions of section 10 of the [Federal] Arbitration Act and may not transform what would ordinarily constitute an impermissible collateral attack into a proper independent direct action by changing defendants and altering the relief sought.").

her request for expungement of the disclosure, changes were made to two FINRA rules governing disclosure of information, Rules 8312 and 2210, and that these changes increased the impact of negative disclosures in CRD® and BrokerCheck®. Johnston Br. at 7. The rule changes, for the purpose of investor protection, increased the length of time disclosures would be published in BrokerCheck® and required firms to include a link to BrokerCheck® on their websites. Johnston states the arbitrator "could not possibly have considered the potential dangers to [Johnston's] career" that would result from denying her expungement request because BrokerCheck® was "not nearly as pervasive at it is now." Johnston Br. at 8-9. Johnston argues she should be allowed to relitigate her expungement claim so another arbitration panel can consider her claim in light of these changes. Johnston Br. at 8.[15]

The doctrine Johnston cites is not applicable to her case. The doctrine holds that when an issue is decided in a proceeding based on controlling legal principles at the time, and those legal principles later change, a party should not be precluded from relitigating the issue in a subsequent proceeding. *See* Restatement (Second) of Judgements § 28(2)(b) (1977) (stating that relitigation of an issue is not precluded when the "issue is one of law," and "a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.").

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[15] Johnston's argument is based largely on the erroneous premise that the Commission did not approve the change to Rule 8312 until after the arbitrator issued the award. Johnston states the arbitrator issued the award in 2009, and that the Commission authorized the change to Rule 8312 in November 2010. Johnston Br. at 7. In fact, the Commission approved the changes to Rule 8312 on July 8, 2010, and the arbitrator did not issue the award until 12 days later, on July 20, 2010. *See Order Approving a Proposed Rule Change to Amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, Exchange Act Release No. 34-62476, 2010 SEC LEXIS 2246 (July 8, 2010); RP 30. Thus, the rule change was not, in fact, an intervening change in the applicable legal context.

For example, in *Herrera v. Wyoming*, the case Johnston cites in her brief, the issue was whether the Crowe Tribe's hunting rights under an 1868 treaty expired when Wyoming became a state. *See* 139 S. Ct. 1686 (2019). The lower court held that the tribe was precluded from relitigating the issue because a 1995 federal appellate court decision already had decided it. The Supreme Court disagreed. It held that issue preclusion did not apply because there had been an intervening change in the applicable legal context. The Court noted that, in adjudicating the issue in 1995, the federal appellate court relied on a Supreme Court decision from 1896. However, the Court explained, during the period between the federal appellate court's decision in 1995 and the lower court's decision in *Herrera*, the Court had decided a case that called into question its own 1896 decision on which the federal appellate court had relied. Because "a repudiated decision does not retain preclusive force," the Court held that it would be inequitable to preclude the tribe from relitigating the issue of the treaty's expiration. *Id.*

Johnston's case is inapposite. Johnston seeks to relitigate her expungement claim in a legal context that is virtually identical to the one she faced the first time; the standard to obtain an expungement award is the same, as is the qualitative effect of an award denying expungement (publication of adverse information).[16] The only thing that has changed is the length of time disclosures are published in BrokerCheck® and the requirement for firms to include a link to

[16] The current expungement process, including the standard for expungement, has been in place since January 2009. *See 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, 2008 SEC LEXIS 3162 (Oct. 30, 2008); FINRA Regulatory Notice 08-79, 2008 FINRA LEXIS 108 (Dec. 2008). The arbitration claim at issue was filed in December 2009. RP 29.

BrokerCheck® on their websites. That is not an intervening change in the applicable law, nor does it make it inequitable to preclude Johnston from relitigating her expungement claim.[17]

2. FINRA Applied Its Rules Consistent with the Exchange Act

The Director acted consistently with the purpose of the Exchange Act—and the protection of investors—by denying Johnston's claim for expungement. The Commission has recognized that "[t]he completeness of information in the CRD, including accurate customer dispute information, is critical for the protection of investors and effective regulatory oversight," and that when factual information is expunged from CRD®, "both regulators and the investing public are disadvantaged[.]" *Proposed Rule Change to Adopt FINRA Rule 2081,* 2014 SEC LEXIS 2617, at *23-24. Accordingly, the Commission has encouraged FINRA "to assure that expungement in fact is treated as an extraordinary remedy that is permitted only where the information to be expunged has no meaningful investor protection or regulatory value." *Id.*

In this case, an arbitrator previously decided that Johnston was not entitled to expungement of the customer's claims against her under any of the grounds set forth in Rule 2080. It would be wholly *inconsistent* with FINRA's rules and the Exchange Act's purpose of investor protection for the Director to allow Johnston to relitigate expungement in a new proceeding today, more than ten years after the underlying dispute was decided with an award explicitly denying that relief. The Director's decision to decline Johnston's claim for arbitration in FINRA's forum was consistent with FINRA rules and the Exchange Act.

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[17] Johnston also argues that FINRA's denial of its arbitration forum was improper because the letter denying her forum was issued by a case specialist, not the Director. Johnston Br. at 5. FINRA rules, however, do not require the Director to sign each letter that communicates his determination to deny the arbitration forum. Moreover, the letter states on its face that the Director made the determination. *See* RP 5.

IV. Conclusion

The Commission should dismiss Johnston's application because it lacks jurisdiction to review or set aside the arbitrator's award denying Johnston's first claim for expungement. Alternatively, the Commission should dismiss Johnston's application because the Director's decision not to accept her claim for arbitration was consistent with FINRA rules, which provide that an arbitrator's award is final and cannot be reviewed except by a court of competent jurisdiction pursuant to the FAA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 22nd day of February 2021, I caused FINRA's Opposition to the Application for Review in the matter of *Application for Review of Jennifer A. Johnston*, Administrative Proceeding No. 3-20120, to be served by electronic service on:

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