BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

JENNIFER ANNE JOHNSTON

For Review of Action Taken by

FINRA

File No. 3-20120

MS. JOHNSTON'S OPENING BRIEF IN RESPONSE TO THE COMMISSION'S REQUEST FOR ADDITIONAL BRIEFING

INTRODUCTION

Applicant, Ms. Jennifer Anne Johnston ("Ms. Johnston") seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. ("FINRA") to deny Ms. Johnston access to its arbitration forum under FINRA Code of Arbitration Procedure for Customer Disputes Rule 12203(a) or FINRA Code of Arbitration Procedure for Industry Disputes Rule 13203(a) (collectively and/or individually, "FINRA Rules").

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")[1], challenging FINRA's determination that Ms. Johnston's claim is ineligible for arbitration in FINRA's Dispute Resolution Forum ("FINRA's Forum"). On January 22, 2021, Ms. Johnston submitted her Brief in Support of Application for Review in response to the Commission's Order

[1] 15 U.S.C. § 78s(d).

Scheduling Briefs issued on December 23, 2020. FINRA submitted a Brief in Opposition to the Application for Review on February 22, 2021. Ms. Johnston submitted her reply brief on March 8, 2021. On August 9, 2023, the Commission issued the Order Requesting Additional Briefing ("Additional Briefing Order") directing Ms. Johnston to submit additional evidence regarding her involvement in the underlying customer arbitration, specifically her involvement in the request for expungement and the arbitration hearing. Now comes Ms. Johnston to provide her response to the Commission's request.

FACTUAL BACKGROUND

Mr. Paul Mechetti and Ms. Arlene Mechetti (collectively, the "Mechettis") first became customers of Ms. Johnston in May 2005. *See,* attached Exhibit 1 at ¶ 4[2]. On December 16, 2008, Ms. Johnston's position at Banc of America Investment Services, Inc. ("BAIS") came to an end. Ex 1. at ¶ 3. At this time, Ms. Johnston ceased to provide financial services to the Mechettis. Ex. 1 at ¶ 6. On April 22, 2009, the Mechettis filed a customer complaint against Ms. Johnston with BAIS, and subsequently also submitted a Statement of Claim in FINRA's arbitration forum (the "Underlying Action"). Ex. 1 at ¶ 5[3]. Almost a year later, Ms. Johnston was contacted by Mr. Eric Glassman, counsel for BAIS, on February 23, 2010, asking for Ms. Johnston's response to the Mechetti's allegations in the Underlying Action. Ex. 1 at ¶ 7. This was the first time that Ms. Johnston learned of the Underlying Action. *Id.* Ms. Johnston signed a declaration provided by Mr. Glassman on February 24, 2010, and, on the same day, Mr. Glassman filed a Statement of Answer in the Underlying Action on behalf of BAIS and Ms. Johnston. Ex. 1 at ¶ 67.

[2] Ms. Johnston filed simultaneously with this brief an Unopposed Motion to Adduce Additional Evidence to include as part of the record the Affidavit of Jennifer Anne Johnston, labelled as Exhibit 1. The Commission has not ruled on that motion.

[3] FINRA # 09-06997 *Paul L. Mechetti et al v. Banc of America Investment Services, Inc. and Jennifer Anne Johnston*

The next time that Ms. Johnston heard anything in regard to the Underlying Action was on July 25, 2010. Ex. 1 at ¶ 11-12. On that date, Mr. Glassman sent an email to Ms. Johnston with an attached copy of the award from the Underlying Action (the "Award"). Ex. 1 at ¶ 11. Mr. Glassman explained in his email that that the Mechettis were awarded $5,500 from BAIS and not from Ms. Johnston; that the $5,500 award was due to the fact that the Mechettis referenced BAIS's prior settlement offer of that amount in their Statement of Claim; that the arbitrator found the Mechettis' claims meritless, but still gave them money; that the arbitrator did not find that Ms. Johnston engaged in any wrongdoing, and denied all of the Mechettis' claims against her; that the arbitrator held Ms. Johnston jointly liable with BAIS for half of the Mechettis' $425 filing fees, but that BAIS would be paying that fee; that the arbitrator took no further action against Ms. Johnston; that the arbitrator denied the request for expungement of the Occurrence from Ms. Johnston's registration records; and that if asked, Ms. Johnston could truthfully state that the arbitrator dismissed all claims made against me. *Id.* Prior to this point, Ms. Johnston received no notice of a hearing, no notice of her ability to appear and testify at that hearing, and no notice of the request for expungement of the Occurrence that had been made on her behalf. Ex. 1 at ¶ 9-10, 14-16. Ms. Johnston was not called as a witness during the final hearing for the Underlying Action for any purpose, and only knew that it took place after the fact when reading the results listed in the Underlying Award. *Id.*

ARGUMENT

1. Ms. Johnston was not afforded full and fair access to FINRA's arbitration service for expungement.

Ms. Johnston was not provided a full and fair opportunity to address her request for expungement of the Occurrence. Although BAIS – the firm that Ms. Johnston was no longer registered with and who clearly had no reason advocate on her behalf – apparently sought

expungement on behalf of Ms. Johnston during the Underlying Action, Ms. Johnston was not aware of the request for expungement prior to the issuance of the Award, she was not called as a witness to provide any testimony, and she was not informed of the date or given an opportunity to advocate on her behalf at the final hearing. Ex. 1 at ¶ 6, 12-16. As the Tenth Circuit has articulated of FINRA's predecessor, the NASD, an arbitration hearing lacks fundamental fairness where a party did not have an "opportunity to be heard and to present relevant and material evidence and argument before the decision makers." *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001).

Claim and issue preclusion both require a full and fair opportunity to litigate the issue or claim, and a judgment on the merits of that issue or claim.[4] In the Underlying Action, Ms. Johnston was afforded neither. The Fourth Circuit has held that one must "receive reasonable notice of the claim" and must have an "opportunity to be heard" in order to properly satisfy the full-and-fair-opportunity standard. *Holland v. Kohn*, 12 Fed.Appx. 160, 166 (4th Cir. 2001). Ms. Johnston was never called to testify regarding the issue of expungement (or any other issue), nor was she informed of the date of the hearing or her ability to appear if she wished. Ex. 1 at ¶ 14-15. Federal courts have also held that a full and fair opportunity to litigate "means there is 'no reason to doubt the quality, **extensiveness**, or fairness of procedures followed in prior litigation.'" *Wanjiku v. Johnson County*, 173 F.Supp.3d 1217, 1226 (D. Kan. 2016) (quoting *Zhu v. St. Francis Health Ctr.*, 413 F.Supp.2d 1232, 1240 (D. Kan. 2006)) (emphasis added). In the present case, Ms. Johnston was left in the dark when it came to the issue of the expungement request until after it was already too late. Ex. 1 at ¶ 9-16. She had no opportunity to litigate the issue of expungement in the Underlying Action. The Supreme Court has held that a "fundamental requirement of due

[4] *Zazzali v. Hirschler Fleischer, P.C.*, 482 B.R. 495, 508 (D. Del. 2012); *Johnson v. Watkins*, 101 F.3d 792, 794 (2d Cir. 1996); *Cruz v. Root*, 932 F.Supp. 66, 68 (W.D.N.Y. 1996); *Curry v. City of Syracuse*, 316 F.3d 324, 332 (2nd Cir. 2003).

process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Ms. Johnston never received any notice of the hearing in the Underlying Action, and, critically, no notice of her opportunity to present evidence and testimony on the topic of expungement. Ex. 1 at ¶ 15-16. To that end, Ms. Johnston must not be barred from bringing her claim for expungement of the Occurrence through FINRA's Forum, as she has not had a full and fair opportunity to litigate it.

2. The Commission's previous decisions in *Pearce* and *Davis* do not impact this case.

The Commission recently issued a decision in *Pearce*[5] and found that, under the facts of that case, Pearce was attempting to access FINRA's arbitration services "again" and under the same grounds that he previously accessed its services, and therefore, the Commission did not have authority to review FINRA's failure to offer this repeat service. *Pearce,* 2023 WL 3317916 at *5-6. However, the facts of this case are not analogous to the facts of the *Pearce* case. First, Pearce not only had the opportunity to be heard on his expungement request at the underlying arbitration proceeding, but he also appeared and testified at that hearing. *Pearce,* 2023 WL 3317916 at *2. Here, Ms. Johnston was not provided with the opportunity to be heard and did not appear or provide testimony at the final hearing. Ex. 1 at ¶ 12, 14-16. Ms. Johnston was not even aware that an expungement request was made on her behalf, nor was she informed of the hearing or her ability to testify at that hearing. *Id.* Additionally, Pearce was registered with the broker-dealer that retained the counsel that represented both Pearce and the broker-dealer (Merrill Lynch) in the

[5] *Kent Vincent Pearce*, Exchange Act Release No. 97451, 2023 WL 3317916 (May 8, 2023).

underlying customer complaint. *Pearce,* 2023 WL 3317916 at *2. Here, the counsel that "represented" Ms. Johnston was retained by Ms. Johnston's *former* broker-dealer where Ms. Johnston was no longer registered. Ex. 1 at ¶ 6. Ms. Johnston's only involvement before the Award was issued was to provide BAIS her statement of facts nearly a year after the Mechettis filed their complaint. Ex. 1 at ¶ 5, 7, 9-10. Third, the arbitration panel in *Pearce* specifically found that Pearce was jointly and severally liable with the firm for compensatory damages for $50,000. *Pearce,* 2023 WL 3317916 at *2. However, in this case, Ms. Johnston was specifically *not* found liable for any compensatory damages; only BAIS was found liable for $5,500. *See,* CR[6] at 29; *see also,* Ex. 1 at ¶ 11. Although the panel did find Ms. Johnston jointly and severally liable for half of the Mechettis' filing fee, in the amount of $212.50, that does not change the analysis here. CR at 29. BAIS paid the entire fee, and Ms. Johnston was informed by BAIS's counsel that the arbitrator did not find that she engaged in any wrongdoing, and denied all of the Mechettis' claims against her. Ex. 1 at ¶ 11. Fourth, the Commission found that Pearce was attempting to access FINRA's Forum for a second time based solely on the issue of the underlying arbitration award having no merit.[7] Here, however, Ms. Johnston alleged in her Statement of Claim that she is entitled to expungement based not only on the merits, but also under equitable principles. *See,* CR at 3-4[8]. Based on these facts, Ms. Johnston did not have the opportunity to be heard in the underlying arbitration, as Pearce did in his case.

[6] "CR at ___" refers to the Certified Record filed by FINRA in this matter on or about October 22, 2020, and the page citation.
[7] *Pearce,* 2023 WL 3317916 at *5.
[8] Ms. Johnston alleged in her Statement of Claim that "the public disclosure of the patently false allegations herein does not offer and public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing [her] CRD record and will not provide valuable information for knowledgeable decision making." Additionally, in addition to seeking expungement under FINRA Rule 2080, Ms. Johnston also requested "any and all other relief that the Arbitrator deems just and equitable".

The facts of *Davis*[9] are likewise distinguishable from the facts of this case. Unlike Ms. Johnston, Davis participated in the underlying arbitration proceeding and was provided an opportunity to be heard[10], Davis was found jointly and severally liable with the other respondent firm for compensatory damages[11], Davis was registered with the broker-dealer respondent firm (Smith Barney) at the time he was represented by the firm's counsel[12], and Davis' expungement request in the action that FINRA denied him access to its forum was based solely on the merits of the underlying arbitration proceeding, and not based on principles of equity or other claims.[13] Therefore, the finding in *Davis* that Davis previously accessed FINRA's service and that the Commission did not have authority to review FINRA's failure to offer this repeat services is not applicable to the facts of this case.

CONCLUSION

Ms. Johnston was never afforded a full and fair opportunity to be heard on her expungement claim. Ms. Johnston was wholly unaware of the fact that a request for expungement had been made on her behalf prior to discovering that the very same request had already been denied in a proceeding that she was not informed was occurring. The facts of *Pearce* and *Davis* are distinguishable here, and do not impact this case. Given the foregoing, the Commission should remand Ms. Johnston's claim to the FINRA arbitration forum for review of the expungement claim in front of an arbitration panel.

Dated: September 8, 2023

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[9] *Alton Theodore Davis, Jr.*, Exchange Act Release No. 97721, 2023 WL 4026783 (June 14, 2023).
[10] *Davis,* 2023 WL 4026783, at *2.
[11] *Id.*
[12] Although this fact is not apparent from the Commission's decision in *Davis,* a quick search on the publicly-accessible database BrokerCheck confirms this fact. *See,* https://brokercheck.finra.org/individual/summary/1769626.
[13] *Davis,* 2023 WL 4026783, at *4, 6.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donna Montemayor, certify that on September 8, 2023, caused a copy of the foregoing Unopposed Motion to Adduce Additional Evidence in the matter of the Application for Review of Jennifer Anne Johnston Administrative Proceeding File No. 3-20120 to be filed through the SEC's eFAP system and served by electronic mail on:

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

/s/ ***Donna Montemayor***

Donna Montemayor
[redacted]