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 REPLY TO FINRA'S RESPONSE TO THE COMMISSION'S ORDER REQUESTING ADDITIONAL BRIEFING

Applicant, Jennifer A. Johnston's ("Ms. Johnston"), sought 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 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").

After briefing the merits of Ms. Johnston's application for review, on August 9, 2023, the Commission issued an Order Requesting Additional Briefing ("Additional Briefing Order") directing Ms. Johnston to submit additional evidence regarding her involvement in the underlying

[1] 15 U.S.C. § 78s(d).

OS Received 10/30/2023

customer arbitration, specifically her involvement in the request for expungement and the arbitration hearing. Ms. Johnston submitted her Opening Brief in Response to the Commission's Request for Additional Briefing ("Johnston's Additional Brief") on September 8, 2023, along with an Unopposed Motion to Adduce Additional Evidence. On October 9, 2023, FINRA submitted its Response to the Commission's Order Requesting Additional Briefing ("FINRA's Additional Brief"). On October 18, 2023, Ms. Johnston filed an Unopposed Motion for Extension of Time to File Reply Brief, which the commission granted on October 23, 2023, extending the time for Ms. Johnston to file her reply brief to October 30, 2023. Ms. Johnston now timely submits her Reply to FINRA's Additional Brief.

Ms. Johnston requests that the Commission issue an order directing FINRA to accept her August 25, 2020 Statement of Claim in FINRA's Forum.

ARGUMENT

A. The service Ms. Johnston is requesting is not a "repeat service".

FINRA claims that it "does not offer a service through which a person who previously accessed its arbitration service and received a final award denying expungement can bring a second claim seeking expungement of the same information." Opp. at 7. This theory fails on two accounts.

First, accepting FINRA's assertion here necessarily requires a finding that Ms. Johnston is in fact requesting a "repeat service", which is not the case. As Ms. Johnston stated in her Additional Brief, she was not afforded full and fair access to FINRA's Forum for the service of expungement and did not have access to this service in the first instance. Additional Brief at 3-5. FINRA also asks this Commission to infer that it is *possible* no final hearing actually occurred.[2] Opp. at 2. Yet, the

[2] Notably, FINRA asks the Commission to make this inference without supplying any supporting evidence or affidavits from any witnesses with personal knowledge of the events.

FINRA rules in place at the time (i.e. 2010 during the underlying arbitration) – Rule 12805 – *required* that "a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement" be held for a request for expungement. Even if the Commission accepts FINRA's unsupported assertion as true – that there was no final hearing – such an assertion supports Ms. Johnston's claim that she never had an opportunity to be heard on her expungement request (a request that Ms. Johnston has affirmed she was never even aware was made on her behalf[3]). FINRA states that the Commission's findings in *Pearce*[4], *Lonske*[5], and *Davis*[6] are dispositive here. Opp. at 7. Yet in each of those cases, the applicant seeking expungement actually had a hearing on the merits of expungement, testified at the hearing, and requested expungement, all critical opportunities Ms. Johnston was never afforded.[7] Ms. Johnston acknowledges that the Commission has previously held that FINRA does not offer repeat services to expungement requests,[8] however, Ms. Johnston's "access" to FINRA's expungement service, if at all, was "illusory" at best and not consistent with

[3] *See,* Aff. at ¶16.
[4] *Kent Vincent Pearce*, Exchange Act Release No. 97451, 2023 SEC LEXIS 1087 (May 8, 2023) (hereinafter, "*Pearce*").
[5] *Jonathan William Lonske*, Exchange Act Release No. 98673, 2023 SEC LEXIS 2834 (Oct. 2, 2023) (hereinafter, "*Lonske*").
[6] *Alton Theodore Davis, Jr.*, Exchange Act Release No. 97721, 2023 SEC LEXIS 1598 (June 14, 2023) (hereinafter, "*Davis*").
[7] *See, Lonske*, at *7 (Commission stating that "Lonske was provided extensive access to FINRA's arbitration service. … Lonske challenged the merits of the customers' allegations, testified at the hearing, and requested expungement of all information regarding the arbitration from his CRD records)*; see also, Pearce,* at * 8 (Commission finding that "Pearce's access to FINRA's arbitration service during the initial customer dispute was not 'illusory' [as] … Pearce challenged the merits of the customers' allegations, testified at the hearing, and requested expungement of all information regarding the underlying arbitration from his CRD records."); *Davis,* at * 6 (Commission finding that "Davis's access to FINRA's arbitration service during the initial customer dispute was not 'illusory'. In particular, during the underlying customer arbitration, Davis challenged the merits of the customers' allegations, testified at the hearing, and requested expungement of all information regarding the arbitration from his CRD records, and then Davis
received a final, adverse award on his request.").
[8] *Pearce,* at *6 (internal citations omitted).

OS Received 10/30/2023

FINRA Rules or the Exchange Act. Expungement necessarily requires a weighing of the equities to determine whether it is warranted, a determination which Ms. Johnston never received. *See, Lickiss v. FINRA*, 146 Cal. Rptr. 3d 173, 179 (Cal. Ct. App. 2012) (It is a "basic principle of equity jurisprudence that "courts cannot properly exercise equitable powers without considering the equities on both sides of a dispute" and "should weigh the competing equities bearing on the issue at hand and then grant or deny relief based on the overall balance of these equities.").

Even if the Commission determines that Ms. Johnston's 2010 "access" to FINRA's expungement service was not "illusory", and that her 2020 request for access is now a "repeat service", as FINRA alleges, FINRA has failed to establish how its rules allow it to prohibit Ms. Johnston access to such repeat services. Nowhere in FINRA's rules (then in existence at the time Ms. Johnston's 2020 statement of claim was filed and FINRA denied her access to its Forum) does it state that a person may only request expungement of a customer dispute disclosure once. In fact, Indiana allows for expungement claims to be refiled after the elapse of three years from the date on which the previous expungement was denied. [9] Expungement relief is "inherently remedial and, as such, should be liberally construed to advance the remedy for which they were enacted."[10]

B. Ms. Johnston did not previously access FINRA's expungement arbitration service.

As noted above, Ms. Johnston did not meaningfully access FINRA's expungement arbitration service in the underlying arbitration because she did not actively participate in the proceeding and any access was "illusory" at best. Contrary to FINRA's assertions, Ms. Johnson is not withholding information or failing to address issues raised by the Commission. Opp. at 9-10. Ms. Johnston admitted that she first received notice of the underlying customer arbitration

[9] *Ball v. State*, 165 N.E.3d 130, 134 (Ind. Ct. App. 2021).
[10] *Id.*

proceeding on February 23, 2010, when Mr. Glassman contacted her. Aff. at ¶ 7. Ms. Johnston also does not dispute that Mr. Glassman represented her (and BAIS, her former firm). Aff. at ¶ 9. What Ms. Johnston disputes here, is that she did not have a meaningful access to FINRA's expungement service.[11]

FINRA's reliance on *Kincaid*[12] is also distinguishable here. In *Kincaid,* the Commission found that the applicant had access to FINRA's arbitration service where he, "through his counsel, actively participated in that service by taking part in the arbitrator's selection, filing stipulations before the arbitrator, and attending the telephonic prehearing conference" and that he had the opportunity "to submit a brief explaining why the expungement request should not be dismissed as untimely." *Kincaid,* at *5. Again, Ms. Johnston was not afforded the ability to "actively participate" in the expungement service. Unlike the applicant in *Kincaid*, Ms. Johnston's participation was limited to only providing notes and a declaration regarding her relationship with the Mechettis.[13] Ms. Johnston did not participate in any portion of the proceedings of the arbitration itself, be that the arbitrator selection, the filing of any pleadings, motions, or other documents, was not made aware a request for expungement was made on her behalf[14], and was not provided the opportunity to submit a brief regarding expungement or testify at any hearing.[15]

[11] *See,* Additional Brief at 3-5; *see also,* Ms. Johnston's Brief in Support of Her Application for Review, at 6-8; Ms. Johnston's Reply to FINRA's Brief In Opposition to Her Application for Review, at 4-5.
[12] *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189 (Oct. 22, 2019) (hereinafter, "*Kincaid*").
[13] Aff. at ¶¶ 8, 10.
[14] Aff. at ¶ 9.
[15] Aff. at ¶¶ 14-15.

OS Received 10/30/2023

As stated in Ms. Johnston's Additional Brief, Ms. Johnston did not have a full and fair opportunity to be heard. In *Holland v. Kohn*[16], plaintiffs sued their former attorneys for causing the dismissal of a tort case. A motion to compel was filed against plaintiffs and their former attorney, and served on plaintiff's former attorneys only. *Id.* at 162. The plaintiffs claimed that they did not receive notice of the motion to compel while the former attorneys still represented them. *Id.* The former attorneys subsequently sought to withdraw as counsel for the plaintiffs. *Id.* A hearing was then conducted where the plaintiffs were present and testified. *Id.* At that hearing, the former attorney's motion to withdraw was addressed, but the plaintiffs were not provided an opportunity to address the issue on their discovery violations raised in the motion to compel. *Id.* at 163. The case was then dismissed, due in part to plaintiff's failure to comply with discovery obligations. *Id.* at 164. The plaintiffs filed a suit against the former attorneys, which was dismissed on collateral estoppel grounds, because the first court had "held a hearing on that very issue and made findings of fact, one of which was that discovery had not been provided and it was the fault of the plaintiffs. *Id.* at 165. On appeal, the Fourth Circuit found that the plaintiffs did not receive an opportunity to be heard, due in part to the fact that they never received notice of the motion to compel or an opportunity to be heard on that motion. *Id.* at 166-167. In noting that a "full and fair formulation generally means that a person cannot be bound by a judgment unless he has had reasonable notice of the claim against him and opportunity to be heard in opposition to that claim,"[17] the Fourth Circuit found that plaintiffs were not allowed the ability to object to the former attorneys testimony, were not offered the opportunity to question the former attorneys, and the state court ruled on the motion to compel

[16] *Holland v. Kohn*, 12 Fed. Appx. 160 (4th Cir. 2001). This case was cited in Ms. Johnston's Additional Brief, at 4.

[17] *Id.* (internal quotations and citations omitted).

without seeking argument on that motion from plaintiffs. *Id.* The situation here is analogous. Even if Mr. Glassman requested expungement at some point during the proceeding, Ms. Johnston was never afforded the opportunity to testify at all, question witnesses, or provide any argument on her expungement claim.

C. Ms. Johnston is not asking FINRA to review or set aside the underlying arbitration award.

FINRA is attempting to raise additional arguments in its Section C that are beyond the scope of what the Commission requested in its Additional Briefing Order, and Ms. Johnston respectfully requests that its arguments here be disregarded and deemed waived. Opp. at 11-12. FINRA had the chance to brief these issues, and cannot raise new issues outside of the scope of the Commission's Additional Briefing Order. Nevertheless, Ms. Johnston will address FINRA's new meritless assertions in the event the Commission considers them.

In Section C of FINRA's Additional Brief, FINRA makes three assertions: (1) that Ms. Johnston's exclusive remedy was to seek vacatur of the underlying award, (2) that Ms. Johnston's 2020 claim for expungement is seeking to review or set aside the underlying award, and (3) that Ms. Johnston's claim that she is seeking expungement under equitable principles is waived as it was not raised in her prior briefs. Opp. at 11-12. None of these assertions have merit. In Ms. Johnston's Brief in Support of Her Application for Review ("Opening Brief"), Ms. Johnston pointed to numerous changes in FINRA's rules over the years that made customer dispute disclosures more accessible to the public that were not considered by the original arbitration panel, and that Ms. Johnston was seeking to "advance the equitable administration of law" in seeking expungement now. Opening Brief, at 7-8. Additionally, Ms. Johnston indicated that "she should be allowed to bring her expungement request again, regardless of whether it was actually litigated before." *Id.,* at 8. Therefore, Ms. Johnston's equitable argument *was* previously raised, and should not be deemed

OS Received 10/30/2023

waived. Additionally, Ms. Johnston already addressed FINRA's claim regarding vacatur as her supposed sole avenue in the Reply to FINRA's Brief in Opposition to Her Application for Review ("Reply Brief"), pointing out that vacatur is *not* the only available remedy, and that seeking expungement now is not the same as a request for vacatur of the award. Opening Brief, at 5-8.

FINRA's additional contention that FINRA's arbitration service does not offer equitable expungement is also false and notably unsupported by any authority. Opp. at 12. FINRA rules allow for expungement of customer dispute disclosures in more than three instances outlined in FINRA Rule 2080. FINRA Rule 2080(b)(1) outlines three instances where FINRA will waive its requirement to be named in a court proceeding confirming an arbitration award. Nowhere in this rule does it state that a factual finding under FINRA Rule 2080(b)(1)(A) – (C) is *required* for expungement, nor does it state that these are the *only* three instances expungement may be granted. Instead, the rule clearly states the opposite: that there are other instances where expungement may be appropriate, e.g. when "(A) the expungement relief and accompanying findings on which it is based are meritorious; and (B) the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements." *See,* FINRA Rule 2080(b)(2). Additionally, as referenced above, FINRA grants access to the FINRA Forum for claims seeking justice under general principles of equity. FINRA's own guide for arbitrators – The Arbitrator's Manual – states the following in a quote from Aristotle:

> Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.

Additionally, Ms. Fienberg, formerly the president of NASD Dispute Resolution, was a featured speaker and panelist at the North American Securities Administrators Association ("NASAA")

presentation entitled "NASAA Listens Forum," held at the National Press Club in Washington DC on July 20, 2004. She stated:

> In arbitration, in SRO NASD arbitration, unlike in court, you get an equitable result. You do not have to have a claim that is cognizable under state or federal law. It can be cognizable under NASD rules. So for example, there's only one cause of action under the federal securities laws, that's l0(B), it's very limited, has a short statute of limitations. The rules that are applied by arbitrators looking for equitable relief are much broader than if they had to strictly follow the law.

(emphasis added). Therefore, it is clear that FINRA offers an arbitration service of providing equitable relief.

D. Ms. Johnston is entitled to relief.

As FINRA points out in FINRA's Additional Brief, a fundamentally fair arbitration hearing requires "notice, opportunity to be heard and to present relevant and material evidence and argument before the decision makers, and that the decision-makers are not infected with bias." *Legacy Trading Co. v. Hoffman*, 363 Fed. App'x 633, 636 (10th Cir. 2010). FINRA first claims that Ms. Johnson has not shown that she did not receive notice because no hearing was held. Opp. at 13. As mentioned above, the Commission should not speculate, as FINRA is requesting the Commission to do here, and conclude that no hearing was held without evidence in the record to establish this. Additionally, FINRA falsely claims that no hearing was required under FINRA Rules, citing *Gilotti*[18] in support of its contention. Opp. at 13-14. However, the *Gilotti* decision – an opinion issued by a trial court and not binding authority here – cited to numerous other cases that have determined otherwise: that a hearing *is* required on expungement,[19] which FINRA conveniently fails to ignore. As the *Gilotti*

[18] *Mut. Sec., Inc. v. Gilotti*, CV 21-5031, 2023 WL 1453140, at *4-5 (E.D. Pa. Feb. 1, 2023).
[19] See, e.g. *Williams v. Tucker*, 801 S.E. 273, 402-03 (W. Va. 2017) ("the Tuckers are assumed to have been advised of the implications of the expungement proceedings, i.e., that their claims would be substantively reviewed by a panel of FINRA arbitrators and affirmative findings of fact made in order to determine whether the circumstances met one of the grounds for expungement," implying that Rule 12805 applies to all expungement proceedings); *Aiguier v. FINRA*, 2017 WL 1311986, at

court pointed out, "[t]here is logical support for this position [that a hearing is required] – the second sentence of Rule 12805(a) states that the recorded hearing requirement 'will apply to cases ... even if a customer did not request a hearing on the merits.'"[20] "This suggests that when expungement is raised, the Panel should take it upon itself to hold a hearing."[21] Finally, the court in *Gilotti* concluded that it would not vacate an arbitration award where there was no *additional* hearing on expungement; but there was still a hearing to address the merits of the case.[22] As Ms. Johnston has shown that she was denied notice of the hearing, her circumstances can be differentiated from those found in *Gilotti*.

Ms. Johnston has also shown that she was denied an opportunity to present relevant evidence. In fact, Ms. Johnston had *no* opportunity at all to present relevant evidence.[23] FINRA claims that arbitrators are not required to hold a hearing, so long as the proceeding is otherwise fundamentally fair. Opp. at 16. Ms. Johnston has established that her expungement arbitration was not fundamentally fair. Ms. Johnston was "represented" by an attorney that represented her former firm that terminated her employment, and Ms. Johnston had no involvement with the arbitration proceeding other than to provide her notes and a statement of the facts before the answer was filed.[24] Ms. Johnston had no idea a request for expungement was made, was not provided an opportunity to

*3 (Mass. Sup. Ct. Mar. 10, 2017) (presenting Rule 12805 as the rule "which set[s] out the manner in which an arbitration panel is to address matters of expungement that are brought before it"); *In re Johnson (Summit Equities, Inc.*, 864 N.Y.S.2d 873, 898-99 (N.Y. Sup. Ct. 2008) (suggesting that the purpose of Rule 12805 was to "ensure that arbitrators 'perform the critical fact-finding necessary' so that expungement relief was granted only in appropriate cases"); *Sage, Rutty & Co., Inc. v. Salzberg*, 2007 N.Y. Slip Op. 31406, at *4-5 (N.Y. Sup Ct. 2007) (applying Rule 12805's predecessor, Rule 2130, and finding that "the arbitrators' decision on expungement [was] irrational because it was made without any evidentiary support" when the arbitrators had not held any hearing, no written settlement agreement was drafted, and no other documents were submitted.).

[20] *Gilotti*, CV 21-5031, 2023 WL 1453140, at *4.

[21] *Id.*

[22] *Id.*

[23] Aff. at ¶¶ 10, 14-16.

[24] Aff. at ¶¶ 6-16.

OS Received 10/30/2023

address expungement, was not made aware of any hearing, and was ultimately found not liable by the arbitrator.[25]

E. Ms. Johnston's case is materially distinct from *Kent Vincent Pearce* and *Theodore Alton Davis, Jr.*

Each of the issues raised by FINRA in this section were addressed above and in Ms. Johnston's Additional Brief.

CONCLUSION

Ms. Johnston has established the Commission's jurisdiction over this appeal because she has shown that FINRA prohibited or limited her access to a service it offers. Therefore, the Commission should issue an order directing FINRA to accept her August 25, 2020 Statement of Claim in FINRA's Forum.

Dated: October 30, 2023

Respectfully submitted,

HLBS LAW, LLC

[redacted]

By: _____

Michael Bessette
390 Interlocken Crescent, Suite 350
Broomfield, Colorado 80021
Telephone: (720) 432-6546
Email: michael.bessette@hlbslaw.com

Counsel for Applicant, Jennifer Johnston

[25] *Id.*

CERTIFICATE OF SERVICE

I, Donna Montemayor, hereby certify that on this 30th day of October 2023, a true and correct copy of the foregoing ***Applicant's Reply to FINRA's Response to the Commission's Order Requesting Additional Briefing*** has been filed through the SEC's eFAP system and served by electronic mail as follows:

The Office of the Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, D.C. 20549-1090

Alan Lawhead
Vice President and Director – Appellate Group
Office of General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
Email: alan.lawhead@finra.org

General Counsel
FINRA Office of General Counsel
1735 K Street, NW
Washington, DC 20006
Email: nac.casefilings@finra.org

Mr. Michael M. Smith
Associate General Counsel
FINRA Office of General Counsel
1735 K Street, NW
Washington, DC 20006
Email: michael.smith@finra.org

Ms. Megan Rauch
FINRA Office of General Counsel
1735 K Street NW
Washington, DC 20006
Email: megan.rauch@finra.org

Ms. Michelle Parker
FINRA Office of General Counsel
1735 K Street NW
Washington, DC 20006
Email: michelle.parker@finra.org

/s/ ***Donna Montemayor***
Donna Montemayor