SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 100757 / August 19, 2024

Admin. Proc. File No. 3-20120

In the Matter of the Application of

JENNIFER ANNE JOHNSTON

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Associated person of FINRA member firm filed an application for review of FINRA's denial of the use of its arbitration forum to seek expungement. *Held*, because a FINRA arbitrator previously denied the same expungement request, application for review is dismissed.

APPEARANCES:

Michael Bessette and *William Bean* of HLBS Law for Jennifer Anne Johnston.

Alan Lawhead, *Megan Rauch*, *Andrew Love*, and *Michael M. Smith* for FINRA.

Appeal filed: Oct. 8, 2020
Last brief received: Oct. 30, 2023

Jennifer Anne Johnston, an associated person of a FINRA member firm, has filed an appeal under Section 19(d) of the Securities Exchange Act of 1934[1] from FINRA's denial of use of its arbitration forum for her request to expunge information about a prior FINRA customer arbitration from her Central Registration Depository ("CRD") records. FINRA denied use of its arbitration forum because Johnston had previously requested—and was denied—expungement of the same information during the underlying customer arbitration. We dismiss Johnston's application for review because Section 19(d) does not authorize our review of FINRA's action where, as here, an applicant already accessed FINRA's arbitration service by receiving an arbitration award denying expungement.

I. Background

Johnston has worked in the securities industry since 1992. As relevant here, several customers complained that she made unsuitable investment recommendations and misrepresentations between June 2007 and December 2008, while she was associated with Banc of America Investment Services, Inc. Johnston avers in an affidavit she filed with the Commission that the customers first raised their complaint to Banc of America around April 2009, after Johnston had left Banc of America and joined another firm, but that Johnston provided statements to Banc of America to assist it with its internal investigation of the customer complaint.[2] Eventually, in December 2009, the customers filed a statement of claim against Johnston and Banc of America in FINRA's arbitration forum, seeking $25,000 for an alleged suitability violation. Johnston avers that she was first informed about the arbitration on February 23, 2010, by an attorney for Banc of America, and she provided the attorney with her notes to help him draft an answer to the statement of claim. On February 24, 2010, Johnston signed a declaration prepared by the attorney regarding her interactions with the customers, which she understood would be used to defend against the customers' claims; the attorney then filed a Statement of Answer on behalf of both Banc of America and Johnston. At some point during the proceeding, Johnston's attorney requested that the arbitrator expunge all information about the customers' allegations from Johnston's CRD records, including information about the ongoing customer arbitration and its eventual outcome.

On July 20, 2010, a FINRA arbitrator found Banc of America liable for $5,500 in compensatory damages, denied Johnston's request for expungement, and found Banc of America and Johnston jointly and severally liable for costs of $212.50 (to reimburse half of the customers' filing fee). The arbitrator also found that the customers were "among many who suffered losses in a massive market downturn," and their allegations were "not sustained by the evidence." Johnston avers that her attorney informed her of the award on July 25, 2010—and also informed her for the first time of the attorney's request for expungement on her behalf. Johnston further

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1 15 U.S.C. § 78s(d).

2 Johnston filed an unopposed motion to adduce an affidavit describing the underlying customer arbitration proceeding. We grant the motion under Rule of Practice 452 because the affidavit is material and there were reasonable grounds for Johnston's failure to adduce it previously. 17 C.F.R. § 201.452.

claims that she was not told when a hearing would be taking place, nor was she given the opportunity to testify.

The customer dispute, including the final customer arbitration award, was reported in Johnston's record in FINRA's CRD. The CRD is a database that contains information about broker-dealers and their representatives, including information about customer allegations made in arbitration proceedings and any arbitration awards resulting from those allegations.[3] Regulators and firms can access the CRD, whereas the public can access FINRA's free online tool called BrokerCheck, which displays some of the CRD's information.[4] FINRA rules generally permit associated persons and their firms to use FINRA arbitration to seek to expunge customer dispute information from the CRD.[5] FINRA arbitrators must follow certain procedures and apply certain standards when expunging customer dispute information.[6] Even when an arbitrator grants expungement relief, however, the information is not expunged from the CRD unless a court confirms the award granting expungement relief, and generally FINRA must be named as an additional party in the court confirmation action.[7]

Here, in August 2020, Johnston again sought to expunge all information regarding the 2010 customer arbitration from the CRD by filing an intra-industry statement of claim against Banc of America in FINRA's arbitration forum. Johnston asserted that the underlying customer allegations were meritless.[8]

On September 8, 2020, FINRA issued a letter denying Johnston's use of the arbitration forum, stating that "[t]he Director of FINRA Dispute Resolution Services has determined that [Johnston's request] for expungement . . . is not eligible for arbitration, because the expungement

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[3] *See, e.g.*, *Consol. Arb. Applications*, Exchange Act Release No. 97248, 2023 WL 2805323, at *2 (Apr. 4, 2023) (explaining in more detail the CRD database and the process for expungement under FINRA's rules).

[4] *See, e.g., id.* BrokerCheck is available at http://brokercheck.finra.org.

[5] *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 deny use of the FINRA arbitration forum in certain circumstances. *See* FINRA Rules 12203, 13203. In this case, as described more fully below, we find that Johnston already accessed FINRA's arbitration service as to her expungement claim.

[6] FINRA Rules 12805, 13805. These rules have been amended since Johnston filed her 2020 statement of claim. In our analysis below, we refer to the rules that existed before the amendments.

[7] FINRA Rule 2080(a)-(b).

[8] Invoking language from the applicable FINRA rule, Johnston's statement of claim argued that the allegations were "false, clearly erroneous, or factually impossible," and that she "was not involved in the alleged investment-related sales practice violation." *See* FINRA Rule 2080(b)(1) (providing as grounds for expungement that "the claim, allegation or information is factually impossible or clearly erroneous" or "is false," or that "the registered person was not involved in the alleged investment-related sales practice violation").

request for this disclosure was decided in a prior arbitration award," and therefore, "pursuant to the Industry Code Rule 13203(a), the forum is denied." On October 8, 2020, Johnston filed an application for review with the Commission, arguing that FINRA improperly denied use of its arbitration forum. The Commission later requested and received additional briefing from the parties concerning Johnston's involvement in the underlying customer arbitration.[9]

II. Analysis

Exchange Act Section 19(d) authorizes us to review actions taken by a self-regulatory organization ("SRO") such as FINRA only in specific circumstances.[10] One such circumstance is where an SRO "prohibits or limits any person in respect to access to services offered by [that SRO]."[11]

For the reasons articulated in detail in *Kent Vincent Pearce*,[12] we find that we lack statutory authority to consider Johnston's application for review because she already accessed the service of using FINRA's arbitration forum to seek to expunge the same customer dispute information at issue here.[13] As in *Pearce*, Johnston (through her attorney) previously requested expungement in the customer arbitration forum. Although she now requests expungement in the intra-industry arbitration forum, she does not identify any material difference between the two forums as to her expungement request.[14] In fact, FINRA's rules explicitly apply the same expungement standard to both customer and intra-industry arbitrations.[15]

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9 *Jennifer Anne Johnston*, Exchange Act Release No. 98099, 2023 WL 5126085 (Aug. 9, 2023).

10 15 U.S.C. § 78s(d)(1)-(2).

11 *Id.* The Exchange Act provides three other bases for our review of an SRO action: if the action imposes a final disciplinary sanction on a member of the SRO or an associated person; if it denies membership or participation to the applicant; or if it bars a person from becoming associated with a member. *See id*. Johnston does not argue that any of these alternate bases apply here, so we do not address them. *Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 WL 3820988, at *3 & n.13 (July 7, 2020) (not reaching "alternate bases for Commission review" where applicant did not contend that those bases applied); *cf. Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 n.18 (July 15, 2016) (stating that the Commission will not exercise its review authority "on a basis [applicants] disclaim"), *aff'd sub nom.*, *Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837 (7th Cir. 2018).

12 Exchange Act Release No. 97451, 2023 WL 3317916 (May 8, 2023).

13 *See id.* at *3-5 (dismissing application for review because applicant had already sought expungement during underlying customer arbitration).

14 *See id.* at *4.

15 *See* FINRA Rules 2080(b)(1), 12805(c), 13805(c) (2020) (providing the same grounds for expungement in customer arbitrations as in intra-industry arbitrations, including the ground that the customer's claim is "factually impossible," "clearly erroneous," or "false," or that the

Johnston attempts to distinguish her case from *Pearce* by noting that the underlying arbitration award found her liable to the customers only for costs, rather than for damages. However, as the Commission explained in *Jonathan William Lonske*, the relevant question is whether Johnston sought and received an award on her expungement claim during the underlying customer arbitration, regardless of whether the customers prevailed on their separate claims against her.[16] And here, we conclude (as we did in *Pearce*) that any practical or strategic difference between the expungement claim Johnston brought in FINRA's customer arbitration forum and the one she later brought in FINRA's intra-industry arbitration forum does not change that Johnston ultimately sought the same service offered by FINRA in both forums: an arbitration of her claim for expungement relief.[17]

Johnston additionally argues that her earlier expungement claim should not preclude her from bringing a second one because she was unaware of her attorney's initial expungement request on her behalf at the time it was made. But Johnston does not dispute that her attorney represented her. And she is thus bound by his actions.[18] Rather, Johnston argues that she should not be bound by her attorney's decision to make an expungement claim on her behalf, citing *Holland v. Kohn* for the proposition that the actual parties, rather than just their attorneys, must receive notice and an opportunity to be heard regarding a motion.[19] *Holland* is inapposite, however, because the attorneys at issue in that proceeding explicitly declined to provide representation to the relevant parties regarding the motion at issue.[20] Here, there is no allegation that Johnston's attorney in the underlying customer arbitration ceased representing her regarding

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associated person "was not involved in the alleged investment-related sales practice violation"). Notably, Johnston based her new expungement claim on Rule 2080(b)(1) only. *See supra* note 8 and accompanying text; *infra* notes 26-27 and accompanying text.

16 *See Jonathan William Lonske*, Exchange Act Release No. 98673, 2023 WL 6389868, at *3-4 (Oct. 2, 2023) (holding that associated person already accessed FINRA's relevant service where the underlying customer arbitration award denied expungement, even though the award also denied the customers' claims).

17 *See Pearce* 2023 WL 3317916, at *4.

18 *See, e.g.*, *Link v. Wabash R. Co.*, 370 U.S. 626, 633-34 (1962) (noting that, in "our system of representative litigation," "each party is deemed bound by the acts of his lawyer-agent"); *Jason A. Craig*, Exchange Act Release No. 59137, 2008 WL 5328784, at *6 (Dec. 22, 2008) (holding that an associated person "must accept the consequences of the actions of the agent whom he freely selected."). Although Johnston also faults her attorney for jointly representing both her and her former firm, she has not argued that FINRA prevented her from retaining her own attorney during the customer arbitration. *See Pearce*, 2023 WL 3317916, at *4 n.27 (noting that "nothing in FINRA's rules prevented Pearce from retaining his own attorney during the underlying customer arbitration").

19 12 Fed. App'x 160, 166-67 (4th Cir. 2001) (per curiam) (unpublished).

20 *Id.* (finding that notice to attorneys of motion to compel could not be imputed to their clients because the attorneys had already "moved to withdraw and explicitly responded to the motion only on their own behalf," and the attorneys "admitted . . . that they did not intend to represent [the clients] on that motion").

her expungement request. To the contrary, Johnston's attorney promptly advised her of the denial of the expungement request after the award was issued. Johnston also admits that she aided her attorney in preparing a defense to the customers' claims. Johnston further admits that she knew by July 25, 2010, that the expungement request had been raised and denied, yet she did not object to the allegedly unauthorized expungement request by, for example, seeking to file additional documents with the arbitrator under FINRA Rule 12905, or filing a petition to vacate, modify, or correct the award in court.[21]

As in *Pearce*, we also reject Johnston's argument that her access to FINRA's arbitration service during the underlying customer arbitration was so illusory that she did not obtain access to the service. Instead, we find that she *did* receive access to the service during the underlying customer arbitration because, as explained above, Johnston was represented by an attorney, helped prepare and then signed a declaration for use by the defense, and—through her attorney—filed an answer to the customers' claims and requested expungement of all information regarding the arbitration from her CRD records. She also received a final, adverse award on her expungement request.[22] Johnston thus already accessed FINRA's relevant arbitration service for expungement, regardless of whether she had an opportunity to provide testimony or participate in an evidentiary hearing regarding her expungement request or the customers' claims.[23] Although Johnston now also claims that the prior arbitration lacked fairness, and the arbitrator failed to follow FINRA's rules, Johnston cannot establish our authority to review FINRA's current action by making this kind of collateral attack on her 2010 final arbitration award.[24]

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[21] *See Pearce* 2023 WL 3317916, at *4 (noting that Pearce could have filed a petition in court to vacate, modify, or correct the underlying customer arbitration award that denied expungement).

[22] *Cf. Pearce*, 2023 WL 3317916, at *4 (finding that Pearce's access to arbitration forum was not illusory where he "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," and "then received a final, adverse award on his request").

[23] *Cf. id.* at *1, *4 (finding that Pearce already accessed relevant arbitration expungement service even though he did not "recall his expungement request being addressed at the hearing"); *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514, at *3 (Oct. 22, 2019) (finding that "FINRA did not limit Kincaid's access to its arbitration forum but rather provided Kincaid with access to that service," despite lack of evidentiary hearing, because Kincaid, through his counsel, participated in the arbitrator's selection, filed stipulations, attended a telephonic prehearing conference, and was provided an opportunity to submit a brief explaining why his claim should not be dismissed as untimely). We note that Johnston has not argued that FINRA prevented her from attending or receiving an evidentiary hearing on her expungement request.

[24] *See Pearce* 2023 WL 3317916, at *4; *cf. Kincaid*, 2019 WL 5445514, at *5 (rejecting Kincaid's attempt to establish that we may exercise review by re-framing his arguments in terms of FINRA's failure to "enforce its rules" by observing that, "[a]s courts have long held, parties cannot re-frame their argument to make an otherwise impermissible collateral attack on an arbitration award").

Johnston also argues that she is entitled to bring a second expungement claim because there is no explicit FINRA rule prohibiting an associated person from bringing successive expungement claims. But Johnston bears the burden of establishing that FINRA offers the service of bringing successive expungement claims.[25] She cannot satisfy this burden simply by pointing out that FINRA lacks an explicit rule *prohibiting* successive expungement claims. And she offers no other evidence that FINRA does offer such a service.

Johnston further argues that the FINRA rules that existed at the time she filed her second statement of claim permitted her to seek expungement a second time on equitable, rather than merits-based, grounds. But Johnston's second statement of claim did not seek expungement based on equitable grounds. Instead, Johnston's second statement of claim requested expungement based *only* on the alleged lack of merit of the underlying customer allegations. For example, the statement of claim alleged that disclosure of the customer dispute information "does not offer any public protection and has no regulatory value" *because* that information was "patently false."[26] Although the statement of claim also included a catchall request for any other "just and equitable" relief, this was insufficient to notify FINRA that Johnston was asserting broader equitable grounds for her expungement request because Johnston's statement of claim explicitly and repeatedly challenged the merits of the underlying customer allegations, without pleading any specific facts relating to broader equitable issues. For example, Johnston argues for the first time in her briefs to us that expungement is warranted because the consequences of disclosures on the CRD are allegedly greater now than they were in 2010, as CRD disclosures are now retained on BrokerCheck for longer and brokers now must provide links to their BrokerCheck profiles on their websites. But Johnston failed to raise these arguments or any facts supporting them in her second statement of claim. Because Johnston failed to exhaust such equity-based grounds for her expungement request before FINRA, we do not consider them.[27]

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[25] *See Michael Andrew DeMaria*, Exchange Act Release No. 97511, 2023 WL 3529972, at *3 (May 16, 2023) (holding that "the party asserting our authority to review this action . . . must establish that FINRA offers the service that [she] 'faults FINRA for failing to provide'" (quoting *Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 WL 2338414, at *4 (June 3, 2019)).

[26] *See Gaskill v. SEC*, No. 23-1139, 2024 WL 2734998, at *3 (D.C. Cir. May 28, 2024) (per curiam) (unpublished) (noting that "in their requests for expungement, the petitioners claimed that *because* the allegations in the prior arbitrations were false, it was not in the public interest for FINRA to continue publicizing the results of those arbitrations," and therefore "[e]ven if recast as 'equitable' claims, these are still collateral attacks on the arbitral awards").

[27] *See, e.g.*, *Pearce*, 2023 WL 3317916, at *5 (not considering whether Pearce could have brought expungement request based on equitable grounds because he had not raised that claim to FINRA); *Consol. Arb. Applications*, 2023 WL 2805323, at *5-6 (not considering whether applicants could have brought expungement claims asserting grounds other than FINRA Rule 2080(b)(1), as their statements of claim did not assert other grounds), *pet. for review dismissed in part, denied in part sub nom.*, *Gaskill*, 2024 WL 2734998.

Finally, because we lack authority to review FINRA's action, we do not consider Johnston's merits arguments that FINRA's denial letter failed to comply with FINRA rules.[28]

Accordingly, we dismiss the application for review. An appropriate order will issue.[29]

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

Vanessa A. Countryman
Secretary

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[28] *See Pearce*, 2023 WL 3317916, at *5 n.35 ("Because we lack authority to review FINRA's action, we do not consider Pearce's merits arguments regarding whether FINRA's denial letter complied with FINRA rules.").

[29] 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. 100757 / August 19, 2024

Admin. Proc. File No. 3-20120

In the Matter of the Application of

JENNIFER ANNE JOHNSTON

For Review of Action Taken by

FINRA

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY REGISTERED SECURITIES ASSOCIATION

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

ORDERED that this application for review filed by Jennifer Anne Johnston is dismissed.

By the Commission.

Vanessa A. Countryman
Secretary