To say that we live in a litigious age is something of an understatement. That being said, as a lawyer, who the hell am I to complain about more business? Frankly, it's an ill lawsuit that blows no good for the legal profession. On Wall Street, litigation winds often take the form of typhoons and tornadoes, whose devastation last long after their winds have died down. Whether fairly named for fraud or victimized by disgruntled customers, securities industry employees find that once customer-dispute information is entered into the Central Registration Depository, its half-life challenges that of any radioactive isotope. Customers' allegations, complaints, settlements, and verdicts literally follow associated persons to the grave.

At one time, the industry had a fairly simple grievance process, which scrubbed clean a given employee's record. The problem with that approach is that a lot of recidivists got to reinvent themselves and cause ongoing damage to unsuspecting customers. After all, a dirty-record wiped clean and an unblemished record look the same if you don't know the difference. As the horror tales mounted about scamsters with sanitized histories who went on to dupe unsuspecting consumers, pressure mounted to deprive the old National Association of Securities Dealers ("NASD") and its successor the Financial Industry Regulatory Authority ("FINRA") of the right to take a squeegee to an associated person's record. As with so many reforms that occur as a "reaction" to perceived abuse, the result didn't necessarily produce a fair set of new rules and regulations. Understandably, investor advocates shed no tears for halting what they viewed as an outrageous anti-consumer abuse by NASD/FINRA. What is now on the books is far more protective of investors and far more onerous for industry participants.

How then do associated persons expunge customer information from their industry records? As you may imagine from the preface to this article, it's not a simple process -- and when a regulator does not provide for a simple solution, that also means that the remedy can prove expensive and time-consuming. Welcome to the world of seeking a FINRA expungement.

FINRA Rule 2080

The steps necessary to expunge customer-dispute-information from the Central Registration Depository ("CRD") are set out in FINRA Rule 2080. *Below find verbatim extracts from Rule 2080 with my comments indented:*

FINRA Rule 2080: *Obtaining an Order of Expungement of Customer Dispute Information from the Central Registration Depository (CRD) System*

> **Bill Singer's Comment:** Carefully note that *FINRA Rule 2080* applies only to the expungement of a customer dispute and does not pertain to intra-industry

matters. Given that the goal of the Rule 2080 expungement is to remove information from CRD, let's start with an understanding of what CRD is, as set forth on FINRA's website:

> **Central Registration Depository (Web CRD)**
>
> FINRA operates Web CRD®, the central licensing and registration system for the U.S. securities industry and its regulators. The system contains the registration records of more than 3,815 registered broker-dealers, and the qualification, employment and disclosure histories of more than 635,365 active registered individuals.
>
> Web CRD also facilitates the processing and payment of registration-related fees such as form filings, fingerprint submissions, qualification exams and continuing education sessions. Web CRD is a secure system for entitled users only. Firms must complete FINRA's entitlement process noted below to request access to use Web CRD.

It is important to distinguish between seeking the expungement of information arising from a dispute between a FINRA member firm and an associated person, and the expungement of customer-complaint information arising from a dispute between a customer and a member firm and/or associated person. As to the ambit of FINRA Rule 2080, consider this commentary in " NASD Regulation Seeks Comment On Issues Relating To Arbitration-Ordered Expungements Of Information From The Central Registration Depository; Comment Period Expires July 30, 1999." ("NASD NTM 99-54") [Ed: boldface in original]:

> In addition, NASD Regulation is continuing to expunge information from the CRD system based on expungement directives in arbitration awards rendered in disputes between firms and current or former associated persons, where arbitrators have awarded such relief based on the defamatory nature of the information in the CRD system. To qualify for this exception from having an award confirmed in court, the dispute must be **between a firm and a current or former associated person and arbitrators must clearly state in the "Award" section of the award that they are ordering expungement relief based on the defamatory nature of the information in the CRD system.**. (Arbitrators, however, are not required to state explicitly in the award that they have found that all of the elements required to satisfy a claim in defamation under governing law have been met.)

Page 352 of NASD NTM 99-54

> I cannot stress enough that Rule 2080 does **NOT** apply to intra-industry disputes between firms and associated persons provided that no customer party is involved. As such, we are eliminating from the purview of Rule 2080 matters that typically arise in conjunction with *purely* workplace disputes such as lack of lack of production, attendance, insubordination, promissory notes, wrongful termination, etc. In such intra-industry disputes, FINRA may expunge defamatory information without a court order.

(a) Members or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief.

> **Bill Singer's Comment:** One of the most misunderstood policies on Wall Street is that the route to obtaining an expungement of CRD information is available via two paths. Among the most pervasive of all industry myths is that a CRD expungement may only be "recommended" by a FINRA Arbitration Panel and, thereafter, confirmed by a court. In reality, those seeking expungements are not limited to the relief afforded solely through arbitration but may directly apply for a court order.

(b) Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived pursuant to subparagraph (1) or (2) below.

> **Bill Singer's Comment:** If you opt for the *Court-Order*-route or you have obtained an arbitration award containing expungement relief (frankly, the Rule should more accurately denote this as a *recommendation* of expungement from an Arbitration Panel), you are required to name FINRA as an additional party in your petition to a court and you must further serve FINRA in its role as a party.
>
> (1) Upon request, FINRA may waive the obligation to name FINRA as a party if FINRA determines that the expungement relief is based on affirmative judicial or arbitral findings that:
>
> > **Bill Singer's Comment:** Notwithstanding that Rule 2080 mandates naming FINRA as a party, a waiver process exists by which the self-

regulatory organization may relieve you of the need to *name-and-serve* it provided that there are judicial/arbitral "findings," which are further detailed

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

Bill Singer's Comment: A waiver of *name/service* may be predicated upon a finding that:

(A) the cited customer claim/allegation/information is factually impossible or clearly erroneous. If you are proceeding with your expungement case *pro se* (without a lawyer), make sure that you specifically seek a favorable ruling in which the magic words "factually impossible or clearly erroneous" are set forth.

Examples of what might be considered "factually impossible or clearly erroneous" would be if you were named as employed by member firm X in 2015 but had either never been employed by that firm or had resigned in 2011.

(B) the petitioning registered person was not involved in the specified allegations of investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds. If you are proceeding with your expungement case *pro se,* make sure that you specifically seek a favorable ruling in which you are pointedly exonerated via the specific conduct set forth in the Rule.

(C) you may need to research the elements of what constitutes forgery, theft, or conversion and argue that although you did, in fact, commit the alleged acts A, B, and C, that they do not rise to the level of the crime or tort indicated. For example, you may have "signed" a customer's signature but did so with her authorization because her hand was broken at the time. Such conduct could still be a violation of your firm's written supervisory policies but would not necessarily constitute a "forgery," which usually occurs without the prior knowledge and consent of the individual whose signature

> is in dispute. Similarly, you may need to prove that a client gave you a gift of cash that was never intended as a loan and, consequently, you did not convert his money. Again, accepting such a gift could be a violation of industry rules and policies but might not satisfy the legal definition of conversion.

(2) If the expungement relief is based on judicial or arbitral findings other than those described above, FINRA, in its sole discretion and under extraordinary circumstances, also may waive the obligation to name FINRA as a party if it determines that:

> (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.

> **Bill Singer's Comment:** Nothing like a rule that says you may obtain relief subject to a regulator's "sole discretion" and based upon what that regulator deems to be "extraordinary circumstances." Tough to imagine a more loaded set of dice. If FINRA denies your request for the waiver, it's going to be tough to appeal because Rule 2080 pretty much permits FINRA to dismiss any appeal with the rationale that its ruling is as it is "because we say so."
>
> Regardless of the naked discretion arrogated by the self-regulator, FINRA may grant you a waiver of the *name/service* requirement if your relief is deemed "meritorious" and would not materially and negatively impact investor protection, the integrity of CRD, or contravene regulatory requirements.

(c) For purposes of this Rule, the terms "sales practice violation," "investment-related," and "involved" shall have the meanings set forth in the Uniform Application for Securities Industry Registration or Transfer ("Form U4") in effect at the time of issuance of the subject expungement order.

> **Bill Singer's Comment**: Would it not have been a preferred rule-making approach to offer the definition of those three key concepts in the body of Rule 2080? Does it truly make any sense to now send readers on a scavenger hunt?

One of the most glaring problems with Rule 2080(c) is its false premise that the *Form U4* provides the referenced definitions. If you examine a copy of a *U4* and you will see that few, if any, italicized or other important terms are defined "in" the Form. Additionally, the "General Instructions" portion of the *Form U4* do not offer any of the definition of the three terms.
There is this oddball page of information floating around in cyberspace. If you locate it, you will see that it is housed on FINRA's website and offers explanations of terms in the Forms U4, U5, BD, BDW, and BR. What you could do, is find this online FINRA page. This document is something *separate and apart* from the various forms and is certainly not providing "definitions" that are physically "in" the various Forms. By way of guidance, this is what is currently provided under "Form U4 Explanation of Terms":

> **Sales Practice Violations:** Shall include any conduct directed at or involving a customer which would constitute a violation of: any rules for which a person could be disciplined by any self-regulatory organization; any provision of the Securities Exchange Act of 1934; or any state statute prohibiting fraudulent conduct in connection with the offer,
>
> **Investment-Related:** Pertains to securities, commodities, banking, insurance, or real estate (including, but not limited to, acting as or being associated with a broker-dealer, issuer, investment company, investment adviser, futures sponsor, bank, or savings association).
>
> **Involved:** Means doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.

Also READ: "FINRA Rule 2080 Frequently Asked Questions" (Finra.org)

For an excellent primer on how FINRA arbitrators are trained to handle expungement requests, ***read***: "Expungement Training" (*Finra Office of Dispute Resolution Expungement Training*, October 2016 version).

FINRA Rule 2081

Now that you have a better understanding to the *Rule 2080* CRD expungement process, be careful that you don't get too creative about taking short-cuts. The very next rule in FINRA's rulebook is

FINRA Rule 2081: *Prohibited Conditions Relating to Expungement of Customer Dispute*

No member or associated person shall condition or seek to condition settlement of a dispute with a customer on, or to otherwise compensate the customer for, the customer's agreement to consent to, or not to oppose, the member's or associated person's request to expunge such customer dispute information from the CRD system

> **Bill Singer's Comment:** A "NO" means "NO" rule. A rare but commendable example of a concise and lucid FINRA Rule. You cannot negotiate a customer's consent or non-opposition to a future expungement request as a condition for settling a customer dispute.

As to the ambit of FINRA Rule 2081, consider "Customer Dispute Information / SEC Approves FINRA Rule 2081 Regarding Prohibited Conditions Relating to Expungement of Customer Dispute Information / Effective Date: July 30, 2014 " FINRA Regulatory Notice 14-31 / July 2014).

Also read the "Letter Responding to PIABA study from former FINRA Chief Executive Officer and Chairman Richard G. Ketchum to Senators Jack Reed and Charles E. Grassley"(Ketchum/FINRA response to PIABA Letter dated December 16, 2013, January 6, 2014)

READ the BrokeAndBroker.com Blog Expungement Archive

If you opt to pursue an expungement of customer-dispute information from the Central Registration Depository ("CRD"), you have two pathways:

1. seeking an expungement recommendation from a FINRA arbitration panel; or
2. directly petitioning the courts.

Let's consider the steps you would take upon those separate avenues of relief.

The FINRA Arbitration Route

As is often the penchant of many a bureaucracy, FINRA has drafted two virtually identical rules entitled "Expungement of Customer Dispute Information Under Rule 2080":

FINRA Code of Arbitration Procedure of Customer Disputes Rule 12805: *Expungement of Customer Dispute Information Under Rule 2080*

In order to grant expungement of customer dispute information under Rule 2080, the panel must:

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 12800 even if a customer did not request a hearing on the merits.

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.

(c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

FINRA Code of Arbitration Procedure for Industry Disputes Rule 13805: *Expungement of Customer Dispute Information Under Rule 2080*

In order to grant expungement of customer dispute information under Rule 2080, the panel must:

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 13800 even if a claimant did not request a hearing on the merits.

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.

(c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

Note that Rules 12805 and 13805 both apply ONLY to customer-dispute-information and are not pertinent to solely intra-industry disputes.

> **Bill Singer's Comment:** I disagree with the assertion in Rules 12805 and 13805 that a FINRA Arbitration Panel will "***grant*** expungement of customer dispute information under Rule 2080."
>
> According to Rule 2080(a):
>
> > [P]ersons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction . . . confirming an arbitration award containing expungement relief.
>
> According to Rule 2080(b):
>
> > [P]ersons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived . . .
>
> There is no self-executing *grant of expungement* emanating from any FINRA Arbitration Panel. The Rule 2080 expungement scheme requires that any expungement relief awarded by a Panel must be confirmed by a court and your petition for confirmation must name FINRA as a party. Adding FINRA as a party provides the self-regulatory organization with standing in court to challenge an expungement award made by its own forum. That may strike you as silliness bordering on absurdity. Why would FINRA ever seek to vacate an expungement recommendation from its own arbitration panels? Laugh all you want but consider this recent court case in which a petition to confirm a FINRA Arbitration Panel expungement was rejected by the court, and both the public customer and FINRA (which was named as a post-Arbitration party) petitioned for the vacatur:
>
> Royal Alliance Associates, Inc., *Plaintiff / Appellant*, v. Sandra L. Liebhaber et al., *Defendants / Respondents* (*Opinion*, Court of Appeal of the State of California, Second Appellate District; B264619 / August 30, 2016) (the "Liebhaber CtApp Opinion"):

> Appellant Royal Alliance Associates, Inc., a securities brokerage firm, petitioned to confirm an arbitration award recommending expungement of an allegation of misconduct from the record of one of its employees, Kathleen J. Tarr. The individual who made the allegation of misconduct, Sandra Liebhaber, petitioned to vacate the same arbitration award. Liebhaber argued that the arbitrators violated the rules applicable to the arbitration and refused to hear evidence she sought to introduce and cross-examination she sought to elicit. The Financial Industry Regulatory Authority, Inc. (FINRA), under whose auspices and rules the arbitration at issue was performed, also petitioned to vacate the award on similar grounds.
>
> The trial court denied Royal Alliance's petition to confirm the award and granted Liebhaber's and FINRA's petitions to vacate, ruling that the arbitrators exceeded their powers and that Liebhaber's rights were substantially prejudiced by the arbitrators' misconduct and refusal to hear material evidence. Royal Alliance appealed, and we affirm . . .

At Page 2 of the Liebhaber CtApp Opinion

At page 7 of the *Liebhaber CtApp Opinion*, the FINRA arbitration panel is described as having "issued an award ***recommending*** expungement on September 10, 2014 . . ." [Ed: Emphasis added]. As such, the Court is not entertaining an appeal of a panel's "grant" of expungement but has recognized that what is before it is a recommendation.

Also consider that FINRA's role in Liebhaber was not passive but, to the contrary, that of a party actively opposing the petition:

> FINRA also opposed Royal Alliance's petition and sought to vacate the arbitration award. FINRA took "no position on the merits of the underlying case," but "oppose[d] expungement of the arbitration from FINRA's regulatory database because the arbitrators failed to follow FINRA rules governing such expungements," specifically Rules 2080 and 12805. FINRA argued that the expungement hearing "was fatally defective because Tarr, the broker seeking expungement, was permitted to testify unsworn without cross examination, while her customer Liebhaber, who opposed expungement, was denied the right even to speak, with or without cross examination. As a result, the award's findings were not properly made

> under FINRA Rule 2080 (which governs arbitrator-ordered expungements)." FINRA further contended that the arbitrators exceeded their powers by violating applicable FINRA rules, and substantially prejudiced Liebhaber by disallowing her testimony.

Pages 10 - 11 of the Liebhaber CtApp Opinion

Also READ: "California Court Of Appeal Says FINRA Expungement Hearing Unfair" (*BrokeAndBroker.com Blog*, September 1, 2016)

Notwithstanding my above disagreement with the accuracy of the rules' characterization of a FINRA Arbitration Panel's expungement ruling, in order for the Panel to grant / recommend expungement, the following preconditions must be satisfied:

Mandatory Hearing Session

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule [12800 or 13800] even if a customer did not request a hearing on the merits.

> **Bill Singer's Comment:** You don't get to mail-in a request for an expungement. FINRA requires that a hearing session be conducted during which the appropriateness of your request must be considered. You may be able to save on some fees and costs by requesting that the hearing be conducted via telephone rather than requiring you to travel for an in-person session. The hearing is not optional, however, must occur even if not requested by a customer.

Settlement Review

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.

> **Bill Singer's Comment:** Carefully note that the Rule does not predicate the panel's review of settlement documents on a settlement involving the **individual** seeking an expungement but states that the review is required when the underlying **case** settles. Why is that an important distinction? Consider the circumstances where a public customer sued Member Firm X, Registered Representative A, and You for $3 million; but the customer ultimately settled all claims for $3 million with only Firm X. Registered Rep A didn't settle. You didn't settle. On the other hand, the "case" settled regardless of the participation of two of the three respondents. You might have decided from day one to fully contest

the customer's allegations and made it clear that you would not participate in any settlement negotiations and would never contribute to any cash settlement. When you learned that the client entered into a full and final settlement of all claims and that only Firm X was on the hook, you felt vindicated. Guess what: If you pursue your expungement relief, the FINRA Arbitration Panel is still required to review all settlement documents. Also, carefully consider this commentary from "FINRA Rule 2080 Frequently Asked Questions" (FINRA.org):

> **15. How does a respondent request expungement if the parties settle the arbitration?**
>
> In the event of settlement, the parties could jointly request a stipulated award from an arbitration panel that would include a request that the panel make affirmative findings and order expungement based on one or more of the standards in Rule 2080. The arbitrators would be required to follow the procedures set forth in Arbitration Code Rule 12805 or 13805 in considering any such request for expungement. The arbitrators would then determine whether expungement should be granted based on one or more of the three standards set forth in Rule 2080. **Note:** Parties who plan to seek expungement relief notwithstanding a settlement should immediately advise the FINRA arbitration staff member assigned to the case that they plan to do so, so that the case is not closed before the expungement request is considered. As discussed in response to Question No. 17, the Arbitration Code contains strict time deadlines and other conditions for reopening closed cases. See Arbitration Code Rules 12905 and 13905.

Written Explanation by Arbitrators

(c) Indicate in the arbitration award which of the Rule 2080 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2080 grounds for expungement applies to the facts of the case.

> **Bill Singer's Comment:** Rule 2080 sets forth specific grounds on which a Panel may find an expungement is appropriate. ***READ Bill Singer's in-depth analysis of FINRA Rule 2080***. Make sure that your *Statement of Claim* for expungement relief specifies which of those grounds (or all of those grounds) that your request is based on. In arguing your case, provide the arbitrators with citations to the section(s) of Rule 2080 that you believe support your

> expungement. Keep in mind that many FINRA Expungement *Decisions* are written in a manner that often "tracks" the arguments and proof presented by the Claimant, and, as such, the more detail you provide in your written submissions, the easier it may be for the arbitrators to cut-and-paste your positions into their final *Decision*. On the other hand, don't submit "War and Peace" because Rule 2080(c) specifically requires a "brief written explanation" of the arbitrators' rationale.

FINRA Cash Register

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

> **Bill Singer's Comment:** *Ka-ching*!

The Court Route: *Lickiss*

For reasons that I've never quite understood, many industry participants only seem aware of the option to seek an expungement through a FINRA arbitration and, thereafter, a court confirmation of the panel's recommendation. Another viable option is to seek an expungement directly from the courts. An advantage of going the court-direct route is that you would not be subject to the potentially limiting bases for expungement set forth in FINRA Rule 2080.

If you opt to file your petition for expungement directly with a court rather than seek that relief through a FINRA Arbitration proceeding, be aware that FINRA is not always a compliant party and may raise objections. Consider the seminal case of Edwin E. Lickiss, *Plaintiff/Appellant*, v. Financial Industry Regulatory Authority, *Defendant/Respondent* (*Opinion*, Court of Appeal of the State of California, 1st Appellate District, A134179 / August 23, 2012) (the "Lickiss CtApp Opinion"):

> The FINRA BrokerCheck report on Lickiss shows 17 past customer complaints, as well as a regulatory action, filed between 1991 through 1996. According to a summary of the arbitration claims and regulatory action Lickiss provided with his moving papers, the sale of stock in Commonwealth Equity Trust (CET) was specifically named in disclosures of 13 of the 17 customer complaints. Lickiss has declared that aside from the CET customer complaints, the only other blemish on his CRD report concerned one client settlement he made after the client sustained a loss on a promissory note sold to the client by Lickiss's partner. He agreed to reimburse the client for his loss under pressure—the client was

> believed to be on his deathbed. However, Lickiss did not contact his broker-dealer first, a violation of FINRA rules. The client later complained to FINRA.
>
> In his moving declaration, Lickiss stated that he began selling CET stock to clients in 1987 and continued selling through the early part of 1991, during which time CET exhibited strong financial performance, under the prudent management of Jeff Berger, Sr. 5 Lickiss stopped selling CET stock because he became concerned about its rising level of debt, which coincided with Berger, Sr.'s death, at which time the son, Berger, Jr., took over. Berger Jr.'s company, B&B Property Investment (B&B), extracted $7.2 million in prepaid commissions from CET around 1990. This drained liquidity from CET and weakened its financial position as California entered a recession and experienced a declining commercial real estate market. CET's share price plummeted, its stock became illiquid and the company declared bankruptcy in 1993. Meanwhile, lawsuits against B&B were settled for approximately $1 million, and Berger, Jr. was ousted from the company.
>
> Many of Lickiss's clients who invested in CET filed claims against him, their essence being —that the investments were unsuitable for the clients and [Lickiss] failed to disclose the risks of the stock to them.
>
> According to Lickiss, in at least 12 of the 17 arbitration claims, clients were represented by Richard Sacks, a nonattorney who ran an "investor recovery" service in the Bay Area in the mid-1990's. Prior to this career, Sacks was the subject of over $479,000 in securities regulatory fines and was eventually barred from the industry. Sacks's operating method was to affirmatively contact investors and incite them to sue Lickiss.
>
> The issues surrounding Lickiss's sale of CET stock occurred more than 20 years ago, and the one regulatory matter against him resolved 15 years ago in 1997. Since then, his record has been clear, yet Lickiss attested that he suffers professional and financial hardship relating to the prior sale of CET stock because current and potential clients increasingly use the Internet to obtain his BrokerCheck history.

Pages 4 – 5 of the Lickiss CtApp Opinion

It's Old, It's Only One Security, And It Was Out of My Control

In seeking expungement of the CET-related complaints from CRD, Lickiss filed his expungment action directly with Superior Court. As set forth in *FINRA Rule 2080*:

> (b) Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents unless this requirement is waived pursuant to subparagraph (1) or (2) below.
>
> (1) Upon request, FINRA may waive the obligation to name FINRA as a party if FINRA determines that the expungement relief is based on affirmative judicial or arbitral findings that:
>
> (A) the claim, allegation or information is factually impossible or clearly erroneous;
>
> (B) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
>
> (C) the claim, allegation or information is false.

As set forth in the *Lickiss CtApp Opinion*, his arguments did not track the guidelines promulgated under *FINRA Rule 2080*. He did not assert that the customers' claims were erroneous or that he was not involved in the matter cited in the rule or that the underlying cliams were false. Pointedly, that court characterized Lickiss' arguments as:

> (1) the material requested to be expunged occurred anciently, i.e., 20 or more years ago, (2) Petitioner's regulatory record has long since been and remained clean, and (3) the material sought to be expunged was overwhelming[ly] caused by the failure of a single investment security which Petitioner brokered for nothing more than ordinary commissions and over which Petitioner had no control or influence" . . .

Pages 5 – 6 of the Lickiss CtApp Opinion

Remand

In response to Lickiss' filing for expungement relief in California state court, FINRA removed the action to federal court, where that court remanded the case back to California Superior Court. The remanding federal court perceived a lack of subject

matter jurisdiction after concluding that the federal securities laws did not provide a standard as to when expungement would be either appropriate or required, and, further, that *FINRA Rule 2080* only addressed expungment *procedures*.

On remand in Superior Court, FINRA argued that Rule 2080(b)(1) required that Lickiss needed to prove that the claims for which he sought expungement were factually impossible or clearly erroneous, which was not the basis for his state claims. Lickiss countered that Rule 2080 was merely a procedural option by which certain petitioners could avoid having to serve FINRA with notice of their expungement action.

Oh-So Tentative

The Superior Court "tentatively' ruled in favor of Lickiss but upon FINRA's protest, the lower court set aside its first ruling and found that Lickiss had not plead any basis for expungement under *FINRA Rule 2080*. Lickiss appealed to the Court of Appeal, which reversed the Superior Court's *Order* and remanded for further proceedings consistent with its *Opinion:*

> [T]his is not, as FINRA contends, merely a request for a remedy. Rule 2080(a) essentially recognizes the right of members and associated persons to seek expungement of information from the CRD system by obtaining an order from a court of competent jurisdiction directing such expungement. Lickiss's petition and declaration reference rule 2080(a) and the facts upon which the equitable remedy of expungement was sought. Lickiss proceeded to state court, took a detour in federal court, and then returned to state court in pursuit of the right to seek expungement. Exercising that right under a rule that provides no substantive criteria for delivering the remedy of expungement, Lickiss called upon the court's inherent equitable powers to weigh the equities favoring expungement against the detriment to the public should expungement be granted. . .

Pages 10 – 11 of the Lickiss CtApp Opinion

No Unequitable End Run

In offering its rationale, the Court of Appeal essentially pulled a bit of pre-emption and staked out its right to fully consider the equities of a petition for expungement, and to do so unfettered by the a mere procedural rule of a self-regulatory organization:

> [I]f, as FINRA suggests, the court believed that equity permitted it to rely exclusively on rule 2080(b)(1) to resolve the demurrer, the court erred. The

> choice of a very narrow, rigid legal rule to assess the legal sufficiency of Lickiss's petition—a choice that closed off all avenues to the court's conscience in formulating a decree and disregarded basic principles of equity—was nothing short of an end run around equity. This is particularly so given that on its face rule 2080(b)(1) is a procedural rule that does not provide any substantive criteria as to when expungement would be appropriate. The SEC itself argued against applying the rule 2080 standards directly to NASD members, acknowledging that federal and state courts are better suited to make the right decision. (68 Fed.Reg., supra, 74667-01, 74671.) Further, if the court determined it could rule on the demurrer without addressing Lickiss's equitable claim it also erred because Lickiss has stated a valid cause of action.

Pages 10 of the Lickiss CtApp Opinion

The Court Route: *Godfrey*

Since *Lickiss,* FINRA has had a tough time prevailing upon the courts when it comes to imposing its Rule 2080 guidelines upon Plaintiffs seeking a court-ordered expungement. About four years after *Lickiss,* FINRA suffered yet another defeat, this time in the United States District Court for the Central District of California ("CDCA") In Philip Godfrey, *Plaintiff*, v. Financial Industry Regulatory Authority, *Defendant* (*Order*, United States District Court for the Central District of California, 16-CV-2776, August 9, 2016), we are informed of this background:

> In 1988, Godfrey purchased securities for members of his family. Id. ¶ 12. Later that year, Godfrey's then-wife claimed that Godfrey had improperly converted the funds for his own use and benefit. Id. ¶ 13. NASD filed a complaint against Godfrey on the basis of the allegations made by Godfrey's then spouse. Id. ¶ 16. Although Godfrey alleges that he did nothing wrong, he entered into a settlement with NASD. Id. ¶¶ 14–18. Godfrey's complaint and settlement information is currently included in FINRA's Central Registration Depository ("CRD"), and is available to the public through FINRA's "BrokerCheck" feature. Id. ¶¶ 10–11, 16–18. Godfrey alleges that his record is otherwise clean. Id. ¶ 18.
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> On March 25, 2016, Godfrey filed an action for expungement and declaratory relief in the Superior Court for the County of Los Angeles. Dkt. #1-1. FINRA timely removed to this Court. Dkt. #1. On May 23, 2016, Godfrey filed the present motion to remand.

Page 1 of the Godfrey CDCA Order

No Federal Subject-Matter Jurisdiction

In addressing Godfrey's motion and considering, among other things FINRA's removal to federal court based upon its assertion that federal law preempted state court action, CDCA considered the following post-Lickiss history:

> At least four courts have addressed remand in similar FINRA-expungement actions, and all have found that remand was proper. In In re Lickiss, the plaintiff sought expungement of "references to certain customer claims and settlements" under California law. No. C-11-1986 EMC, 2011 WL 2471022, at *1 (N.D. Cal. June 22, 2011). FINRA moved to remand, arguing that federal courts had exclusive jurisdiction under 15 U.S.C. § 78aa. Id. at *2. Section 78aa states that the "district courts . . . shall have exclusive jurisdiction of . . . all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder." 15 U.S.C. § 78aa(a). The Lickiss court explained that although FINRA has a duty to collect and retain registration information, it has no corresponding duty to expunge. Id. at *3. The Court also noted that FINRA Rule 2080, which states in relevant part that "[m]embers or associated persons seeking to expunge information from the CRD system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement or confirming an arbitration award containing expungement relief," "sets forth procedures, not a substantive duty," and seems to contemplate an action in state court due to the use of the phrase "court of competent jurisdiction." Id. at *4. The Court thus found that there was no exclusive jurisdiction for expungement actions under state law, and remanded the case for lack of subject matter jurisdiction. Id.
>
> The plaintiff in Spalding v. Financial Industry Regulatory Authority, Inc. sought expungement of customer-dispute information under Georgia law. No. 1:12-CV-1181-RWS, 2013 WL 1129396, at *1–2 (N.D. Ga. Mar. 19, 2013). FINRA offered two theories of federal jurisdiction this time -- that federal courts had exclusive jurisdiction under § 78aa because expungement implicated a duty, and that the suit would require the state court to interpret federal law (which was identified as Rule 2080). Id. at *2–3. Citing Lickiss, the Spalding court found that there was no exclusive jurisdiction because there was no duty to expunge under the Exchange Act or Rule 2080. Id. at *3–5. The court also rejected FINRA's argument that substantial federal issues were implicated because expungement would require "a reading and interpretation of Rule 2080" and involved a

"comprehensive federal regulatory scheme in which FINRA plays an integral role in enforcing the 1934 Act and regulating participants in the securities industry." Id. at *5. The court explained that nothing in the expungement action would require interpretation of Rule 2080, and that the existence of a compressive federal regulatory scheme was insufficient on its own to establish federal jurisdiction. Id. at *5–6. The Court thus remanded the case for lack of subject matter jurisdiction. Id. at *6.

Doe, like Lickiss, addressed the expungement of customer-dispute information under California law. 2013 WL 6092790, at *1. FINRA again argued that federal courts have exclusive jurisdiction over expungement of customer-dispute information, and that the case involved substantial issues of federal law. Id. at *2–3. Citing Lickiss, the Doe court held that there was no duty to expunge that would trigger exclusive jurisdiction. Id. Citing Spalding, the court also held that there was no substantial issue of federal law implicated because the plaintiff "d[id] not claim that FINRA failed to fulfill any particular duty or that FINRA's rules are facially invalid," and "no determination [would need to] be made by the [state court] as to whether FINRA was required to remove the disclosures under the circumstances in determining whether expungement is appropriate in this case." Id. at *3. The court therefore remanded the case. Id. at *4.

The most recent case cited by the parties, Flowers v. Financial Industry Regulatory Authority, Inc., addressed expungement under California law for regulatory information. No. 15CV2390 DMS (JMA), 2015 WL 9487450, at *1 (S.D. Cal. Dec. 24, 2015). FINRA again moved to remand on the ground that federal courts had exclusive jurisdiction and that substantial issues of federal law were implicated. Id. at *1–3. FINRA attempted to distinguish the expungement at issue in Flowers from the expungements in Lickiss, Spalding, and Doe, arguing that those plaintiffs sought to remove customer-dispute information, while the Flowers plaintiff sought to expunge final regulatory information. Id. at *1–2. The court was unpersuaded. Citing Lickiss, Spalding, and Doe, the court found that there was no duty implicated that would lead to exclusive jurisdiction. Id. at *1–2. The court explained that Lickiss and Doe did not "rel[y] on the type of information at issue in reaching the conclusion that federal question jurisdiction was lacking," so their reasoning applied equally to the Flowers plaintiff's request. Id. at *2. The court also found there were no substantial issues of federal law implicated for the reasons set forth in Spalding and Doe. Id. at *3. The Court

> noted that FINRA had offered a third theory, complete preemption, but declined to address it because the theory was not included in the notice of removal. Id. at *3 n.2. The court therefore remanded the case for lack of subject matter jurisdiction. Id. at *3.

Pages 3 -5 of the Godfrey CDCA Order

In granting Godfrey's motion to remand back to state court, CDCA agreed with the Flowers court's analysis of Lickiss, Spalding, and Doe and declined to find a substantial federal issue:

> Although the Court notes that FINRA is now 0 for 5 (counting Lickiss, Spalding, Doe, Flowers, and this case), and FINRA's counsel is now 0 for 4 (as lead counsel here was also the lead counsel in Lickiss, Doe, and Flowers), the Court will not award attorney's fees. FINRA had at least one new legal theory in this case (complete preemption), and argued that the only other court to address final regulatory actions (Flowers) erred. The Court disagrees with FINRA's arguments, but does not find them objectively unreasonable.

Pages 12 - 13 of the Godfrey CDCA Order

FINRA Will Recommend

Notwithstanding that FINRA is 0 for 5 on its efforts to force the federal courts to abide by the proscriptions of Rule 2080, FINRA does not go down without a fight, as is evident by this posting on its website:

> **6. Do the standards described above apply to court proceedings in addition to arbitrations?**
>
> Yes. Although courts are not obligated to adhere to the standards enunciated in Rule 2080, FINRA will use the Rule 2080 standards in determining whether to oppose the expungement request and will recommend that the court use the standards when considering the request for expungement.

FINRA Rule 2080 Frequently Asked Questions

In my opinion, FINRA's self-serving questions and responses in #6 above do not fully or fairly present the current judicial trend. It's not that the "courts are not obligated to adhere" to Rule 2080's "standards;" to the contrary, those courts confronted with a

direct petition for expungement have specifically said that they would merely use the Rule as guidance, at best, and, at worst, do not feel any obligation whatsoever to be bound by a mere procedural rule of a self-regulatory organization. To that extent, courts seem disposed to decline to follow any *dictates* of Rule 2080, regardless of whether FINRA is determined to oppose expungement relief. Although it is a fair proposition that courts may take into consideration Rule 2080 when grappling with the equities of granting an expungement, those same courts are likely to jealously protect and preserve their unfettered mandate to adjudicate cases as they see the dictates of equity require.

FINRA's Question #6 and its response comes off as a peevish effort given the regulator's 0-for-5 record in arguing for federal court jurisdiction. In the face of so many adverse rulings, it's a bit unsettling for a regulator to threaten that it "will use the Rule 2080 standards in determining whether to oppose the expungement request and will recommend that the court use the standards when considering the request for expungement." The answer to Question #6 should be revised to more accurately reflect the current jurisprudence. FINRA's response to its question should include specific reference to the contrary judicial interpretations of its position and should include citations to the five cases enunciating the adverse rulings.