COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

PETITIONS OF MICHAEL JAMES THALER and ALAN JOSEPH DOLE Petitions to Confirm Arbitration Awards and Seeking to Expunge Information from Central Registration Depository	CASE NOS. SEC-2020-00037 SEC-2020-00044

BRIEF OF AMICUS CURIAE
NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.
IN SUPPORT OF THE DIVISION OF SECURITIES AND RETAIL FRANCHISING

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INTEREST OF AMICUS CURIAE

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA's members are responsible for administering state securities laws, including by: qualifying and registering broker-dealers, investment advisers, and their agents and representatives; conducting routine and for-cause examinations and audits; and enforcing the securities laws in criminal, civil, and administrative enforcement actions. NASAA supports its members in carrying out their investor protection and regulatory duties by, for example, promulgating model rules and statutes, coordinating examination sweeps and multi-state enforcement actions, and commenting on legislative and rulemaking processes. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws.

The Central Registration Depository ("CRD") is the primary repository of the registration records of broker-dealer firms and their agents, as well as individuals registered as investment adviser representatives under the state securities laws. State securities regulators, such as the Virginia Division of Securities and Retail Franchising, and other regulators rely on these records in carrying out various statutory responsibilities. The inappropriate removal of information regarding customer complaints and allegations of misconduct from the CRD by expungement has been a matter of concern to state securities regulators for many years. NASAA and its members have had a long-standing interest in ensuring that there is no compromise to the integrity of the information housed in the CRD.[1] NASAA also has a unique expertise in the expungement process because it has been involved in developing – and reforming – the process since its inception.

ARGUMENT

The Financial Industry Regulatory Authority ("FINRA") promulgated Rule 2080 (together with former NASD Rule 2130, the "Expungement Rule")[2] in large part to preserve "the integrity of the information in the CRD, and the ability of public investors and regulators to examine the entirety of a registered person's record, with the limited exceptions as proposed." Order Granting Approval of Proposed Rule Change, SEC Rel. No. 34-48933, 68 FR 74667, 74670 (Dec. 16, 2003) ("2130 Approval Order"). However, the arbitrators' recommendations of expungement in this case are yet another example of the long-recognized flaws in the expungement process. In this case, Petitioners seek to delete valuable information from the CRD concerning significant

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[1] Over the years, NASAA has commented on numerous rule proposals regarding expungement. *See, e.g.,* Letter from Joseph Borg, NASAA President, to Barbara Sweeney, Sec'y NASD Regulation, Inc. (Dec. 31, 2001), *available at* https://www.nasaa.org/wp-content/uploads/2011/07/95-Letter.37262-47637.pdf; Letter from Deborah Bortner, NASAA CRD Steering Comm. Co- Chair, to Margaret H. McFarland, Deputy Sec'y, U.S. Sec. and Exch. Comm'n (June 4, 2003), *available at* https://www.nasaa.org/wp-content/uploads/2011/07/95-Letter.37262-47637.pdf; Letter from Karen Tyler, NASAA President, to Nancy M. Morris, Sec'y, U.S. Sec. and Exch. Comm'n (Apr. 24, 2008), *available at* https://www.nasaa.org/wp-content/uploads/2011/07/31-Release-No34-57572SR-FINRA-2008-010NASAA.pdf; Letter from Andrea Seidt, NASAA President, to Elizabeth M. Murphy, Sec'y, U.S. Sec. and Exch. Comm'n (May 14, 2014), *available at* https://www.nasaa.org/wp-content/uploads/2011/07/NASAA-Comment-Letter-Release-No-34-71959-File-No-SR-FINRA-2014-020.pdf; Letter from Christopher Gerold, NASAA President, to Vanessa Countryman, Sec'y, U.S. Sec. and Exch. Comm'n (Mar. 18, 2020), *available at* https://www.nasaa.org/wp-content/uploads/2020/03/NASAA-Comment-Letter-SR-FINRA-2020-005-Expungement.pdf; Letter from Lisa Hopkins, NASAA President, to Vanessa Countryman, Sec'y, U.S. Sec. and Exch. Comm'n (Oct. 22, 2020), *available at* https://www.nasaa.org/wp-content/uploads/2020/10/NASAA-Comment-Letter-SR-FINRA-2020-030.pdf; Letter from Lisa Hopkins, NASAA President, to Vanessa Countryman, Sec'y, U.S. Sec. and Exch. Comm'n (Jan. 18, 2021), *available at* https://www.nasaa.org/wp-content/uploads/2021/01/2021-01-18-Comment-Letter-SR-FINRA-2020-030-Amendment-No.-1.pdf; Letter from Lisa Hopkins, NASAA President, to Vanessa Countryman, Sec'y, U.S. Sec. and Exch. Comm'n (Jan. 28, 2021), *available at* https://www.nasaa.org/wp-content/uploads/2021/01/2021-01-28-Additional-Comment-Letter-SR-FINRA-2020-030-Amendment-No.-1.pdf.

[2] As used herein, "Expungement Rule" refers collectively to FINRA Rule 2080 and former NASD Rule 2130. Following the 2007 consolidation of the member firm regulatory functions of NASD and the New York Stock Exchange, NASD Rule 2130 was adopted without material change in the Consolidated FINRA Rulebook as FINRA Rule 2080. *See* Order Granting Approval of Proposed Rule Change, SEC Release No. 34-59987, 74 FR 26902 (May 27, 2009). FINRA Rules 12805 and 13805 establish procedural requirements for arbitrators applying the Expungement Rule.

allegations of account mismanagement and inappropriate investment recommendations. This information should not be deleted from the CRD because it has substantial investor protection and regulatory value, and the arbitral process did not comport with the requirements or intent of the Expungement Rule.

Information regarding customer complaints and allegations of misconduct is extremely valuable to regulators and investors alike. This information must remain available in the CRD to allow regulators to fulfill their oversight responsibilities and to enable investors to conduct appropriate due diligence when seeking financial advice. Expungement is intended to be extraordinary relief and information should not be removed from the CRD unless it is so clearly inaccurate that there is no investor protection or regulatory value to keeping it in the database. This is, and should be, a high bar to clear. But in too many cases, including this one, arbitrators recommend expungement without considering opposing views, let alone the merits of the case. Petitioners' customer dispute information should remain in the CRD because it is not clearly inaccurate, and it has ongoing investor protection and regulatory value. Further, the kind of one-sided presentation of evidence relied upon by the arbitrators here falls far short of the true intent of the Expungement Rule. The State Corporation Commission (the "Commission") should therefore deny Petitioners' request to remove valuable information from the CRD.

I. <u>Customer dispute information in the CRD must be protected to allow regulators to fulfill their regulatory oversight responsibilities and to enable investors to conduct appropriate due diligence when seeking financial advice.</u>

The CRD is the primary repository of the registration records of broker-dealer firms and their agents, as well as individuals registered as investment adviser representatives under the state securities laws. These records include extremely valuable and legally mandated information about individuals' qualifications, employment histories, customer complaints, outside business activities, certain financial matters and criminal charges, and regulatory disciplinary histories.[3] Protecting the integrity of this information is vital to investor protection. *See, e.g.*, News Release, FINRA Statement on Temporary Withdrawal of Specialized Arbitrator Roster Rule Filing (May 28, 2021) ("FINRA News Release"), *available at* https://www.finra.org/media-center/newsreleases/2021/finra-statement-temporary-withdrawal-specialized-arbitrator-roster ("Protecting the integrity of the information in the CRD system and BrokerCheck is critical to our mission of investor protection.").

In this case, Petitioners seek to delete important information from the CRD concerning significant allegations made against them of account mismanagement and inappropriate investment recommendations. The allegations include the inappropriate use of life insurance policies as a funding source for risky, speculative oil/gas and energy investments. Together, they suggest a pattern of questionable recommendations that may encourage caution from current and potential clients. The allegations, as part of the legally mandated disclosure required of all applicants and registrants, is highly relevant and valuable to securities regulators and investors, and it should remain available in the CRD.

State securities regulators rely on the information in the CRD to fulfill their important regulatory oversight and enforcement responsibilities. For example, state securities regulators routinely use this information to evaluate whether to allow or deny applications for registration, as well as whether the circumstances warrant heightened supervision or other conditions to be

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[3] *See generally*, Uniform Application for Securities Industry Registration or Transfer (Form U4), *available at* https://www.finra.org/sites/default/files/form-u4.pdf; Uniform Termination Notice for Securities Industry Registration (Form U5), *available at* https://www.finra.org/sites/default/files/form-u5.pdf; Uniform Application for Broker-Dealer Registration (Form BD), *available at* https://www.sec.gov/about/forms/formbd.pdf; Uniform Request for Broker-Dealer Withdrawal (Form BDW), *available at* https://www.sec.gov/about/forms/formbdw.pdf. *See also* Form U6, https://www.finra.org/registration-exams-ce/broker-dealers/registration-forms/form-u6 (last visited June 2, 2021) ("Regulators submit Form U6 filings to report disclosure events and disciplinary actions against individuals and organizations.").

imposed upon a person's registration.[4] Customer complaint disclosures also inform state securities regulators' other oversight functions. This information is vitally important to state securities regulators in part because there is a recognized correlation between past disclosures and future misconduct. *See, e.g.*, Mark Egan, Gregor Matvos & Amit Seru, The Market for Financial Adviser Misconduct, at 3 (concluding that "[p]ast offenders are five times more likely to engage in misconduct."), 12-15 (explaining that statistics "strongly suggest[] that misconduct does not arise due to bad luck or random complaints by dissatisfied customers"), and 52 Figure 4 (graphical depiction of the frequency and probability of misconduct) (Mar. 1, 2016), *available at* http://ssrn.com/abstract=2739170; Notice of Filing of a Proposed Rule Change, SEC Rel. No. 34-88600, 85 FR 20745, 20745-46 n.5 and accompanying text (Apr. 8, 2020).

Even when the information in the CRD is not in and of itself dispositive or conclusive as to any particular misconduct, it can serve as an important guidepost. For example, a single disclosure may indicate that there are broader issues involving particular individuals or firms that could merit closer examination, or even an investigation. Similarly, a single disclosure that appears to be isolated might quickly become one of several demonstrating a pattern of misconduct; each individual disclosure that is expunged could therefore deprive regulators of important information regarding the full scope of a pattern of misconduct. In another vein, a state securities regulator may be concerned about a certain product, asset type, or sales practice that is involved in a particular customer complaint and use that information to help focus its examination/audit program to catch and solve problems before more investors are harmed. This is precisely why

4 Some state securities regulators use the term "licensing" to refer to the same regulatory function. Although the terms are functionally interchangeable, this submission uses "registration," consistent with the Uniform Securities Acts. *See generally* Uniform Securities Act of 2002, §§ 401-412, *available at* https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=af36852d-457e-db56-3fc2-b2485cdc47e9&forceDialog=0; Uniform Securities Act of 1956, §§ 201-204, *available at* https://www.nasaa.org/wp-content/uploads/2011/08/UniformSecuritesAct1956withcomments.pdf.

individuals are required to disclose whether they have "been named as a respondent/defendant in" or "been the subject of" an investment-related arbitration or civil lawsuit, rather than whether they have been conclusively determined to have engaged in misconduct. *See, e.g.*, Form U4, *supra* note 3, at Item 14I. The information that Petitioners seek to have deleted from the CRD concerns allegations of serious misconduct and inappropriate recommendations. This information, as part of the legally mandated disclosure required of all applicants and registrants, is highly relevant to the securities regulators in any of the 31 U.S. jurisdictions in which either Thaler or Dole is currently registered,[5] as well as a state securities regulator who may need to evaluate a new application for registration from either of them.

The information in the CRD also must be protected because expungement implicates state government public records and record retention obligations. State securities regulators are often legally obligated to maintain the information in the CRD as a state record. Much of the information in the CRD is filed with state securities regulators as part of the registration and qualification process, or filed by state securities regulators themselves. *See supra* note 3. The Uniform Securities Acts, which form the basis of most state securities statutes, generally provide that state securities regulators must retain all information filed as part of a registration application or as an amendment to the information filed as part of the application. *See*, Uniform Securities Act of 2002, § 606; Uniform Securities Act of 1956, § 413. In this regard, Virginia law is consistent, though not identical, with other states. *See* VA. CODE ANN. § 13.1-524; 21 VA. ADMIN. CODE §§ 5-20-40, 5-20-120, 5-80-40, 5-80-100. Thus, expungement of Petitioners' customer dispute

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5 *See* BrokerCheck by FINRA, Michael James Thaler, https://brokercheck.finra.org/individual/summary/2557899#licensesSection (last visited June 21, 2021); BrokerCheck by FINRA, Alan Joseph Dole, https://brokercheck.finra.org/individual/summary/4904989#licensesSection (last visited June 21, 2021).

information potentially implicates the public records obligations of state governments in all 31 U.S. jurisdictions in which one of them is currently registered.

State securities regulators are not the only stakeholders who rely on the data in the CRD. Information in the CRD about certain customer complaints and allegations of misconduct is also made available to the public through FINRA's "BrokerCheck" website. *See supra* note 5. FINRA and other regulators regularly encourage investors to check the backgrounds of investment professionals by, for example, conducting a search for the individual on BrokerCheck. *See, e.g.*, FINRA, Ask and Check, https://www.finra.org/investors/protect-your-money/ask-and-check (last visited June 22, 2021); NASAA, How to Check Out Your Broker or Investment Adviser, https://www.nasaa.org/2709/how-to-check-out-your-broker-or-investment-adviser/ (last visited June 22, 2021). Investors rely on this information to help them make informed decisions about whether to trust certain financial professionals with their life savings and financial futures.

In a 2015 study, FINRA determined that "the information currently available to investors through BrokerCheck, including disciplinary records, financial and other disclosures, and employment history, has significant power to predict investor harm." Hammad Qureshi & Jonathan Sokobin, *Do Investors Have Valuable Information About Brokers?*, at 17 (FINRA Office of the Chief Economist Working Paper, Aug. 2015), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652535. The fact that Petitioners have been accused of making inappropriate recommendations to their clients also would be valuable to investors who are considering doing business with Petitioners or Equity Concepts, LLC. Some investors may choose another financial professional in part because of this information; some investors may choose to do business with Petitioners or Equity Concepts, LLC despite this information. Investors are entitled to consider all relevant information before choosing a registered financial professional. The fundamental premise of CRD and BrokerCheck is that regulators and investors need and deserve the ability to consider and weigh the information for themselves.

The value of this information is not diminished by the fact that the former clients who made complaints ultimately settled with Petitioners' employers. The settlements are substantial – over $100,000 each. Despite being for less than the full amounts requested in the Statements of Claim, it is not reasonable to characterize them as mere nuisance settlements. It is also not particularly surprising that the former clients agreed to a settlement. Litigants often settle to avoid the expense and uncertainty of litigation. These considerations apply with equal – and perhaps greater – force to individual claimants facing off against financial industry firms with far greater manpower and financial resources.

Customer dispute information in the CRD must be protected to allow regulators to fulfill their regulatory oversight responsibilities and to enable investors to conduct appropriate due diligence when seeking financial advice. Courts and arbitrators must keep these important investor protection and regulatory objectives in mind when evaluating expungement requests. Expungement is inappropriate if it would impede them.

II. **Petitioners' customer dispute information should remain in the CRD because it is not clearly inaccurate, and it has ongoing investor protection and regulatory value.**

Expungement of information from the CRD has long been understood to be extraordinary relief that should only be granted in very limited circumstances. *See, e.g.*, Notice of Filing of Proposed Rule Change, SEC Rel. No. 34-47435, 68 FR 11435, 11437 (Mar. 4, 2003) ("2130 Proposal Notice"). However, for many years, NASAA, state securities regulators, and investor advocates have raised serious concerns about the frequency and the legal and factual basis of expungements. *See id.* (describing concern "that courts granting expungement relief under the existing rules and procedures may not fully consider all of the competing interests," including the interests of investors and regulators in the availability of complete and meaningful information in the CRD); NASAA comment letters, *supra* note 1; NASD Notice to Members 99-09 (Feb. 1999), *available at* https://www.finra.org/sites/default/files/NoticeDocument/p004582.pdf. The Expungement Rule was designed and implemented in response to these recognized flaws in the system to ensure that valuable information is not deleted from the CRD.

a. The person seeking expungement must show that the information sought to be expunged is clearly inaccurate and has no ongoing investor protection or regulatory value.

Information should be expunged only where it is clearly inaccurate and its continued inclusion in the CRD holds no investor protection or regulatory value. 2130 Approval Order, 68 FR at 74672 (explaining that information should remain in the CRD unless it has "no regulatory value"); *Reinking v. Fin. Indus. Regul. Auth.*, No. A-11-CA-813-SS, 2011 WL 13113323, at *4 (W.D. Tex. Dec. 1, 2011) (following SEC's articulation of the standard); *see also* FINRA Dispute Resolution Servs., Notice to Arbitrators and Parties on Expanded Expungement Guidance (Sept. 2017) ("Dispute Resolution Guidance"), https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance; Expungement of Customer Dispute Information, https://www.finra.org/rules-guidance/key-topics/expungement (last visited June 22, 2021) (expungement intended "to remove clearly inaccurate [] information"). In this case, the arbitrators recommended expungement because, according to the arbitrators, "the claim, allegation, or information is false." Petition of Michael James Thaler and Alan Joseph Dole to Confirm Arbitration Award, Case No. SEC-2020-00037, Exh. A at 3 (July 30, 2020); Petition of Michael James Thaler and Alan Joseph Dole to Confirm Arbitration Award, Case No. SEC-2020-

00044, Exh. A at 3 (Sept. 10, 2020); *see* FINRA Rule 2080(b)(1)(C). This is, and should be, a high bar to clear.

A person seeking expungement needs to come forward with affirmative proof that the claim, allegation, or information is objectively false, not simply that the claimant was unsuccessful or failed to prove their claims. *See, cf., Reinking*, 2011 WL 13113323, at **4-6 (concluding that "no rational trier of fact could find any regulatory value to including [information about the] dispute on the CRD" based on "a review of [the claimants'] own deposition testimony," which "conclusively demonstrate[d] [the claim] was frivolous"). For example, a claim, allegation, or information is not false because it is unproven, or because the claim is dismissed, or even because the respondent prevails on the claim after a full hearing. *See* 2130 Approval Order, 68 FR at 74669, 74672 (rejecting the argument that "[t]he current system of disclosing unproven allegations is inequitable"); *id.* at 74670 ("dismissal of a claim alone would not be a sufficient basis for ordering expungement"); *Sawyer v. Horwitz & Assocs., Inc.*, No. 11-CV-1604-LAB-JMA, 2012 WL 296996, at *2 (S.D. Cal. Jan. 31, 2012) (explaining that "it is completely logical to find that a party has not technically violated the law but nonetheless conducted itself in such a manner that the public would be well-served to know").

b. <u>The process underlying the arbitrators' expungement recommendations was deeply flawed and contravenes the intent of the Expungement Rule</u>.

These findings should not be made based solely on evidence and argument from the person seeking expungement, but that appears to have happened in this matter.

Before recommending expungement, arbitrators must first "consider *all competing interests*," including the interest of regulators and investors in keeping the information in the CRD. 2130 Proposal Notice, 68 FR at 11437 (emphasis added). *See also* Notice of Filing of a Proposed Rule Change, SEC Rel. No. 34-90000, at 7 (Sept. 25, 2020), *available at* https://www.sec.gov/rules/sro/finra/2020/34-90000.pdf (explaining that panels considering expungement requests should "hear[] the full merits of that case . . ."). Arbitrators considering an expungement request need to "ensure that they have *all* of the information necessary to make an informed and appropriate recommendation on expungement [and they] *should request* any documentary or other evidence they believe is relevant to the expungement request, *particularly in cases that settle before an evidentiary hearing* or in cases where only the requesting party participates in the expungement hearing." Dispute Resolution Guidance, *supra* page 9 (emphases added).[6] This was not the case with the customer dispute information that Petitioners seek to have deleted from the CRD.

There is no indication in the record that the arbitrators in either of the arbitrations at issue sought out or considered any evidence other than the evidence that Petitioners chose to give them. In fact, there was no advocate during the expungement hearing to ensure that the arbitrators heard any position other than Petitioners'. As a result, the arbitrators could not have considered any of the competing interests in the information that Petitioners seek to have deleted from the CRD. Such a showing could not reasonably justify a finding that the claims at issue were clearly inaccurate, false, or that there is no investor protection or regulatory value in keeping the information available to investors and regulators through the CRD. To the contrary, the substantial settlements involved in this case indicate that the respondents perceived some potential liability risk in proceeding with a full evidentiary hearing, and further demonstrate that the allegations are not clearly inaccurate, but reside in a grey area requiring more factual development.

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[6] In far too many cases, arbitrators fail to consider all of the relevant evidence and competing interests before recommending expungement, thereby eroding the intended extraordinary nature of the remedy. *See, e.g.*, PIABA 2021 Study at 6, 17 (finding that arbitrators grant 90% of expungement requests as a result of one-sided presentations about the merits of customer complaints).

It is especially important that arbitrators seek out opposing views and avoid one-sided presentations in cases like this one for three reasons. First, questions as to the suitability of investment recommendations are complex, fact-intensive, and ill-suited to one-sided evaluation. The suitability inquiry requires a factfinder to go beyond boilerplate account forms and inherently poor proxies for investment sophistication (such as income, general business experience, and the number of years the client has held investment accounts). *See, e.g.*, FINRA Rule 2111 ("A customer's investment profile includes, *but is not limited to*, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and *any other information the customer may disclose* to the member or associated person in connection with such recommendation.") (emphases added). The factfinder must also consider matters such as the context in which certain recommendations were made, how the recommendations were formulated, and how *the client* understood the recommendations. *Cf. Royal All. Assocs., Inc. v. Liebhaber*, 2 Cal. App. 5th 1092, 1100, 206 Cal. Rptr. 3d 805, 810 (2016) (post-settlement expungement hearing deemed unfair when arbitrators heard and relied upon statements by the person seeking expungement, but denied claimant's attorney the chance to ask her questions about matters such as "how she came to meet [the claimant], what advice she gave [the claimant], questions about the suitability of the investments, whether she considered certain factors about these investments she was recommending, how much time she spent giving [the claimant] the advice she gave [the claimant] and what she told [the claimant] about whether [the claimant] should take this early retirement at age 47"). The line between an aggressive recommendation and an imprudent one is often thin, but it exists and it can easily be crossed. This is why a factfinder cannot credibly find that specific recommendations were suitable (a prerequisite to the conclusion that the claim, allegation, or information is clearly inaccurate and false) by considering only the broker's side of the story.

Second, although the Expungement Rule assumes that states will be heard "if they have concerns regarding whether investor protection or regulatory issues have been fairly considered" by the arbitrators, 2130 Approval Order, 68 FR at 74671, state securities regulators do not have a meaningful ability to intervene in arbitrations to oppose expungement requests. FINRA provides notice of expungement requests to state securities regulators through NASAA, but only when expungement relief is sought, either directly or through confirmation of an arbitral award, in court. In the vast majority of cases, this occurs after the arbitrators have already made findings and recommendations regarding expungement, such as in this matter. Further, the notice often fails to provide sufficient information on which to meaningfully assess the expungement request in the limited time available for the affected states to determine whether to oppose expungement. Investigation of every customer complaint that underlies an expungement request, particularly in the time permitted to make a determination, would impose a tremendous burden on state securities regulators. Consequently, state securities regulators are rarely heard on expungement requests before arbitrators.

Third, claimants "have little incentive to participate in an expungement hearing once their case has settled," and they typically do not.[7] SEC Rel. No. 34-90000, at 27-28; David P. Meyer, *et al.*, The PIABA Foundation, *2021 Updated Study on FINRA Expungements: A Seriously Flawed Process That Should be Fixed Now to Protect the Integrity of the Public Record*, 6 (May 18, 2021)

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[7] In fact, NASAA has raised this issue repeatedly in public comments on expungement-related proposals. *See, e.g.*, Letter from Lisa Hopkins (Oct. 22, 2020), *supra* note 1; Letter from William Beatty, NASAA President, to Barbara Black, FINRA Dispute Resolution Taskforce, Re: NASAA Comments on Expungement of Matters from the Central Registration Depository (Aug. 31, 2015), available at http://nasaa.cdn.s3.amazonaws.com/wp-content/uploads/2011/07/NASAA-Expungement-Letterenclosure.pdf, at 4-5; Letter from Deborah Bortner (June 4, 2003), *supra* note 1.

("PIABA 2021 Study"), *available at* https://piaba.org/piaba-newsroom/report-2021-updated-study-finra-expungements-may-18-2021 (finding "that the process is not designed for customers to meaningfully participate and oppose expungement requests without an attorney willing to handle the case pro bono"). It is rational and reasonable for a claimant to decide that they no longer want to spend their mental, emotional, and financial resources in litigation. However, it is unreasonable to put the onus on the claimant to defend the broad public interest in keeping relevant information available in the CRD.

Before depriving the public of information by deleting it from the CRD, arbitrators must consider the full merits of the case, including *all* relevant evidence and competing interests. The record does not indicate that the arbitrators did so here and therefore does not support their findings that "the claim, allegation, or information is false." In sum, the arbitrators failed to act fully as factfinders in the expungement hearing by relying on Petitioners' one-sided presentations of evidence. The process did not comport with the requirements or intent of the Expungement Rule, and the Commission should not deprive regulators and investors of the right and ability to consider and weigh for themselves the customer dispute information in Petitioners' respective CRD records.

CONCLUSION

Petitioners seek to delete valuable information from the CRD concerning significant allegations of account mismanagement and inappropriate investment recommendations. This information should not be deleted from the CRD because it has substantial investor protection and regulatory value, and the arbitral process did not comport with the requirements or intent of the Expungement Rule. Regulators rely on this information to fulfill their important regulatory oversight and investor protection obligations. Investors rely on this information to make informed decisions when searching for financial advice. For these and other reasons, information should not be removed from the CRD unless it is so clearly inaccurate that there is no investor protection or regulatory value to keeping it in the database. In this case, the record indicates that the arbitrators recommended expungement without considering opposing views or evidence, let alone the merits of the case. This kind of one-sided presentation of evidence falls far short of the true intent of the Expungement Rule. The Commission should deny Petitioners' request to delete this valuable information from the CRD.

Respectfully Submitted

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