

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of
ALTON THEODORE DAVIS, JR.
For Review of Action Taken by
FINRA
File No. 3-19588

**MR. DAVIS'S OPENING BRIEF IN SUPPORT OF THE
COMMISSION'S JURISDICTION OVER HIS APPLICATION FOR REVIEW**

INTRODUCTION

This matter concerns the Securities and Exchange Commission's (the "Commission") Order Requesting Additional Briefing issued on September 13, 2021. Applicant, Alton Theodore Davis, Jr., ("Mr. Davis") sought review of FINRA's Dispute Resolution Arbitration Forum in seeking expungement of a customer dispute disclosure published on his Central Registration Depository ("CRD") and BrokerCheck Record. Mr. Davis stated that FINRA's action was reviewable under Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act")¹ and denial of his claim was inconsistent with the Exchange Act and FINRA rules, and he should therefore be permitted to submit his claim in FINRA's arbitration forum.

¹15 U.S.C. § 78s(d).

Initially, the Commission consolidated Mr. Davis' application into the Consolidated Arbitration Applications matter. After the briefing, the Commission determined that they had jurisdiction to review the Applications in the Consolidated Matter according to the Exchange Act Section 19(d)(2) as “FINRA’s action prohibited access to a fundamentally important service that it offers.” After briefing was completed in the Consolidated Matter the Commission issued an order severing Mr. Davis Application on September 9, 2021.

The Commission’s Order Requesting Additional Briefing (“Briefing Order”) requests that the parties address whether they have jurisdiction over Mr. Davis’s Application for Review. In the Briefing Order, the Commission indicated that the parties should discuss the following points:

1. During the underlying customer arbitration proceeding, did Davis seek expungement of the information about the underlying arbitration from his Central Registration Depository record, and did the arbitration panel deny that request?
2. How does the underlying customer arbitration panel’s apparent denial of Davis’s request for expungement bear on whether Davis accessed FINRA’s arbitration service, or was prohibited or limited in his access to that service? What is the relevance, if any, of *Dustin Tylor Aiguier* and *John Boone Kincaid III*?
3. For the purposes of Exchange Act Section 19(d)(1), is arbitrating an expungement claim during a customer arbitration a “service” and, if so, is it different from the “service” of arbitrating an expungement claim during an intra-industry arbitration? Or is the relevant “service” the same, regardless of whether an expungement claim is made in a customer arbitration or an intra-industry arbitration? In answering these questions, the parties should address the similarities and differences between seeking expungement in customer

arbitration and intra-industry arbitration and should consider citing particular FINRA arbitration rules and practices.

For the reasons set forth below, in light of the above considerations, the Commission should find that it *does* have jurisdiction to review the instant dispute concerning FINRA’s denial or limitation of Mr. Davis’s access to important services.

BACKGROUND

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Dispute Resolution Services (“ODR”), which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The ODR’s authority is limited to the administration of the forum, not to making regulatory policy decisions.

FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system is known as BrokerCheck.² This online, publicly marketed reporting system includes the widespread publication of certain disclosure events against each associated person of a FINRA member firm. See, FINRA Rule 8312. FINRA requires member firms to report all disclosure events that meet specific requirements to FINRA, including final regulatory actions, and publicly discloses these events absent any determination of merit or factual basis. See, FINRA Rule 4530. FINRA provides only one viable remedy for the removal of event disclosure information from the CRD and BrokerCheck, which is expungement according to FINRA’s arbitration forum.

² 15 U.S.C. 78o-3(i)(1).

Mr. Davis (CRD #1769626), a resident of Hinsdale, Illinois, has been a financial services professional since November of 1987 and is currently a financial advisor with Morgan Stanley in Chicago, Illinois. On October 3, 2019, counsel for Mr. Davis received notice that the Director of FINRA Office of Dispute Resolution (“the Director”) denied FINRA forum for arbitration for expungement of the Occurrence. This notice provided no basis and merely cited Industry Code Rule 13203(a).

In response Mr. Davis submitted an Application for Review with the Commission. FINRA moved to consolidate Mr. Davis' Application with other Applications for Review before the Commission and moved to stay further briefing. So that the Commission may first resolve the “common issue” whether it has jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 to review FINRA’s determination that a claim for expungement of a prior adverse arbitration award is not eligible for arbitration. The Commission granted the consolidation and found in favor of briefs submitted by Counsel that the Commission has jurisdiction. After further briefing that followed, the Commission has severed Mr. Davis Application from the *Consolidated Arbitration Applications Matter* and is now requesting an additional briefing on jurisdiction.

On September 29, 2021, Mr. Davis requested an extension on the order for additional briefing. The Commission granted this extension and sent its new briefing schedule indicating that Mr. Davis' brief in support of the application for review is due on November 3, 2021. FINRA’s response shall be filed by November 17, 2021, and Davis may file a reply by December 1, 2021. Mr. Davis hereby timely submits his brief in support of the application for review.

ARGUMENT

I. Mr. Davis Was Not Afforded Full and Fair Access to FINRA's Arbitration Service

Mr. Davis's recollection of events is evidenced by his sworn affidavit, made upon penalty of perjury, and offered before this Commission in his corresponding Motion to Adduce.³ Based upon said recollection, while Mr. Davis did request expungement in the underlying arbitration proceeding, the arbitration panel did not consider or make any findings regarding expungement. Expungement was not discussed by counsel. In short, the claim was never meaningfully addressed. Such a denial despite total lack of consideration constitutes limiting access to the arbitration forum. Additionally, Mr. Davis was not represented by independent counsel at the arbitration hearing, and no counsel pressed his individual claim for expungement. Mr. Davis has never been provided an opportunity to be heard on the issue of expungement, nor has a panel examined relevant facts in light of FINRA's expungement rules.⁴ As the Tenth Circuit has articulated of FINRA's predecessor, the NASD, an arbitration hearing lacks fundamental fairness where a party did not have an "opportunity to be heard and to present relevant and material evidence and argument before the decision makers." *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001). For FINRA's claim that Mr. Davis had access to the forum for expungement to hold any water, FINRA would have had to provide Mr. Davis a meaningful review of the requested relief.⁵

³ Mr. Davis requested the hearing transcript from FINRA, but FINRA has destroyed and no longer maintains that record.

⁴ See, e.g., FINRA Rules 2080 and 13805; see also, <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>

⁵ See also, FINRA Rule 12805 available in its entirety at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/12805> and requiring an arbitration panel reviewing a request to expunge customer dispute information to "Hold a recorded hearing session *regarding the appropriateness of expungement*" even where the customer did not otherwise request a hearing on the merits of the dispute.

II. This Commission Has Jurisdiction to Review FINRA’s Action Denying Mr. Davis Meaningful Access to Its Arbitration Forum

Section 19(d) of the Exchange Act at 15 U.S.C. § 78s(d) provides this Commission with the authority to review any SRO decision that “prohibits or limits any person in respect to access to services offered by such organization.”⁶ This section “provides for SEC review of disciplinary and regulatory actions by self-regulating organizations. ... “. *MFS Securities Corp. v. New York Stock Exchange, Inc.*, 277 F.3d 613, 619 (2nd Cir. 2002) (emphasis added, and noting that formal disciplinary proceedings are not required for an exercise of SEC review jurisdiction and that appeal from a regulatory decision does not prevent SEC review). Mr. Davis’s access to FINRA’s arbitration services was prevented or limited by FINRA’s failure to engage in the arbitral process regarding his claim for expungement relief. Whether the underlying customer arbitration panel’s apparent denial of Mr. Davis’ request for expungement would satisfy this requirement if the underlying customer arbitration forum had addressed the issue of expungement is unclear. However, though Mr. Davis requested such relief prior to the hearing, the hearing that ensued exclusively reviewed a customer dispute – a fundamentally different question – and did not meaningfully address expungement. No hearing on the issue of expungement in accordance with FINRA’s Rules ever took place.⁷ The award here at issue reflects merely that “any relief not specifically awarded is hereby denied,” using catchall verbiage that sidesteps any substantive determination regarding the requested expungement relief, and indicating there was no review of expungement on its merits. Because Mr. Davis has not been heard on the issue of expungement, the underlying customer arbitration has no bearing on Mr. Davis’s ability to seek expungement in a subsequent occasion.

⁶ See, *In the Matter of the Application of Orbixa Techs., Inc. for Rev. of Action Taken by New York Stock Exch., LLC*, Release No. 70893 (Nov. 15, 2013)

⁷ *Id.*

A. *Kincaid and Aiguier Are Factually Distinguishable and Inapposite*

In *Kincaid*, by contrast, the arbitrator discussed, reviewed, and sought additional briefing relating to a procedural rule concerning the requested expungement relief. As noted by this Commission, “Kincaid through his counsel, actively participated in that service”.⁸ *Kincaid* received a meaningful opportunity to present argument solely on the issue of expungement and his case was ultimately dismissed from arbitration due to a procedural defect in addition to Kincaid’s own failure to file appropriate timely briefing, not at issue here. While this Commission has held previously that it lacks the jurisdiction to set aside the award of a FINRA arbitration panel where that panel was specifically convened to review a request for expungement relief and the applicant failed to advance his own case by meaningfully participating, that recitation is fundamentally factually distinguishable from the instant matter.

Moreover, Kincaid argued before this Commission that he was denied access to FINRA’s review of arbitral decisions to ensure compliance with FINRA rules – a service that FINRA does not offer. Here, Mr. Davis submits that FINRA’s actions denied him a fundamental opportunity to be heard and to receive a determination on the merits of his expungement claim despite properly availing himself of FINRA arbitration. This is the precise service offered by FINRA’s ODR, and one to which Mr. Davis was entitled.

Similarly, in *Aiguier* the claimant filed two statements of claim in September of 2017 in FINRA’s arbitration forum – later consolidated into a single case – against NYLife requesting expungement of four customer dispute disclosures published on his CRD and BrokerCheck records.⁹ After holding a hearing specifically on the merits of Aiguier’s expungement requests,

⁸ *In the Matter of the Application of John Boone Kincaid III for Rev. of Action Taken by Finra*, Release No. 87384 (Oct. 22, 2019)

⁹ *In the Matter of the Application of Dustin Tylor Aiguier for Rev. of Action Taken by Finra*, Release No. 88953 (May 26, 2020)

the arbitrator issued a written award denying expungement of the two customer complaints on July 9, 2018. FINRA then closed Aiguier's expungement case. These matters are so factually distinguishable from the instant situation that their reasoning does not preclude jurisdiction here.

III. Meaningful Arbitration of Expungement Claims is an Important Service to Which Mr. Davis's Access Was Limited

Insofar as is relevant here, the Exchange Act limits this Commission's jurisdiction to review actions by SRO's in prohibiting or limiting any persons' access to *service*. 15 U.S.C. § 78s(d). The Act does not further define the term "services". *Sharemaster v. U.S. Securities & Exchange Commission*, 847 F.3d 1059, 1068 (9th Cir. 2017). This Commission has held that arbitration of expungement claims is a "fundamentally important" service that is "central to its function as an SRO."¹⁰ While the services of providing a hearing specifically on the issue of expungement in an intra-industry dispute and addressing the issue during a customer dispute hearing differ extensively, this distinction is not jurisdictionally relevant where, as here, FINRA has limited or prohibited access to either by any definition. In either case, the "service" that FINRA provides, in order to meet its corporate purpose, cannot be the mere formal appearance of review of a claim for expungement devoid of any substantive consideration whatsoever, but must comprehend minimum standards in accordance with FINRA's rules and what FINRA holds out to citizens like Mr. Davis as its purpose. Were it otherwise, an SRO would need only provide illusory access to services to evade all review by this Commission.

Additionally, however, this Commission has explicitly held that it has jurisdiction to review situations in which FINRA has denied an applicant "access to review of *prior* adverse

¹⁰ *In the Matter of the Application of Michael Andrew Demaria for Review of Action Taken By FINRA*, Release No. 91969 (May 21, 2021) (Observing that FINRA's arbitration forum and operation of the CRD are held out by FINRA as means of serving its corporate charter purpose).

arbitration awards arising from customer disputes.” A contemporaneous denial of expungement relief does not afford Mr. Davis access to the FINRA service of reviewing the totality of an adverse customer dispute arbitration award, potentially with a new arbitrator or panel of arbitrators, in order to measure the facts giving rise to the award against the standards set forth in FINRA’s expungement rules. These two proceedings are materially distinct. In an underlying customer dispute case, the issue under consideration is whether the respondent committed any wrongdoing and whether that party is liable for damages based on the elements and burdens of proof for the cause of action alleged. In an expungement hearing, the purpose is to determine whether allegations should be removed from an associated person’s Registration Records. These issues require different standards of proof and different considerations altogether, and entitlement to expungement can only be fully evaluated considering the entirety of the customer dispute arbitration process.

Whether the Commission chooses to consider these two proceedings the same “service” or different “services”, however, the result is the same: Mr. Davis should have been (but was not) afforded full access to a meaningful review of his expungement request and an opportunity to seek that relief. Certainly, there is some distinction between FINRA’s treatment of these remedies. The facts, circumstances, parties, and standards of review are all different as between the two. FINRA maintains that Rules 2080, 2081, and 12805 “do not apply to intra-industry disputes” and does not require an arbitrator reviewing a request for expungement relief in an intra-industry dispute to “address the standards set forth in Rule 2080 or the procedural requirements under Rule 12805.”¹¹ Customers are not even required to be present at an expungement hearing, and FINRA arbitrators will not hold nonparticipation of the customer as a factor bearing in favor of expungement because

¹¹ See, *FINRA Dispute Resolution Services Arbitrator’s Guide, Supra*, at p. 78.

the moving party has the burden of demonstrating entitlement.¹² In a customer dispute hearing, the focus of the hearing is on ensuring the correction of any alleged harm to the investor – not in apportioning the relative rights and responsibilities as between the financial advisor and the member firm. Bolstering this important distinction is the common practice of joint representation by one legal representative of the respondent parties in a customer dispute arbitration by counsel whose function was to defend the parties against the customer dispute allegations, and not to represent their individual interests, especially where these may have been adverse. That is exactly what happened here: Mr. Davis and the firm Respondent were jointly represented by counsel, giving rise to a potential conflict of interest incapacitating counsel from pressing Mr. Davis’s individual entitlement to expungement.

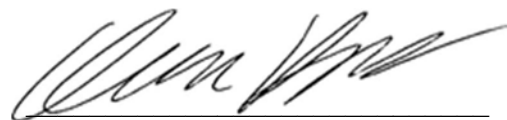
In sum, the service of arbitrating a claim for expungement in a separate, intra-industry proceeding is distinct from the service provided incidental to a customer dispute proceeding. But expungement of information in an intra-industry dispute is a related and equally fundamental service that FINRA explicitly holds out to the public as available and in line its proffered corporate mission. In any case, Mr. Davis was limited or prohibited from access to a fundamentally important service, however defined.

Dated: November 2, 2021

Respectfully submitted,



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¹² *Id.* at 76.

CERTIFICATE OF SERVICE

I, James Bellamy, certify that on November 2, 2021, I caused a copy of the foregoing Opening Brief with attached Exhibit 1 Affidavit in the matter of the Application for Review of Alton Theodore Davis, Jr., Administrative Proceeding File No. 3-19588 to be filed through the SEC's eFAP system and served by electronic mail on:

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

/s/James Bellamy
James Bellamy
9737 Wadsworth Pkwy Suite G-100
Westminster, CO 80021

EXHIBIT 1

AFFIDAVIT OF ALTON DAVIS

I, Alton Theodore Davis Jr., do hereby swear that the information contained herein is complete and accurate to the best of my knowledge. I do depose and say:

1. My name is Alton Theodore Davis Jr. and I reside at [REDACTED] Naples, FL
2. I am a registered financial advisor registered with Morgan Stanley in Naples, Florida.
3. On or about September 24, 1996, Mr. John Veres ("Mr. Veres") and Mrs. Vera Veres ("Mrs. Veres") ("Underlying Claimants") submitted a Statement of Claim filed in the case captioned NASD # 96-04385, *In the Matter of the Arbitration Between John Veres and Vera Veres v. Smith Barney Incorporated and Alton T. Davis* ("Underlying Action").
4. Throughout the Underlying Action, I was represented by Smith Barney Incorporated ("Smith Barney") counsel and not represented by an independent counsel of my choosing.
5. I denied the merits of the allegations made by the Underlying Claimants in the Underlying Action then and still do to this day.
6. Smith Barney submitted on my behalf in its Statement of Answer a request for expungement of references to the Underlying Action from my Central Registration Depository ("CRD") record.
7. On or about May 30, 1997 to June 10, 1997, an arbitration hearing was conducted ("Hearing") to address the Underlying Claimants' causing of action.
8. I was present and testified at the Hearing.
9. At the Hearing, I do not recall my request for expungement of the Underlying Action ever being addressed by anyone nor do I recall the standard for expungement being addressed.
10. On or about August 19, 1997, the arbitration panel in the Underling Action issued an award ("Award") finding me and Smith Barney jointly and severally liable for compensatory damages in the sum of \$17,885.71. The Underlying Claimants were requesting compensatory damages in the amount of \$25,160.
11. No additional hearing to address my request for expungement was ever held.

I, Alton Theodore Davis, Jr., hereby declare the above affidavit was written and signed absent duress, and in good faith.



Alton Theodore Davis, Jr.

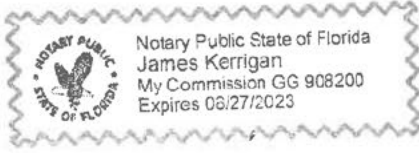
10/29/21

Date

STATE OF FLORIDA, COUNTY OF COLLIER

On this 29 day of October, 2021, before me, ALTON DAVIS, personally appeared (or satisfactorily proven) to be the person whose name is subscribed in the within Affidavit, and, being first duly sworn on oath according to law, deposes and says that he/she has read the foregoing Affidavit and that the matters stated herein are true to the best of his/her information, knowledge, and belief.

In witness whereof I hereunto set my hand and official seal.





Notary Public

NOTARY

Title

My commission expires 8/27/2023