

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application for Review of

Alton Theodore Davis, Jr.

File No. 3-19588

**FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S  
REQUEST FOR ADDITIONAL BRIEFING**

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**FINRA'S BRIEF IN RESPONSE TO THE COMMISSION'S REQUEST FOR  
ADDITIONAL BRIEFING**

**I. INTRODUCTION**

Alton Theodore Davis, Jr. appeals a determination by the Director of FINRA's Office of Dispute Resolution ("Dispute Resolution") that his request to expunge information about a customer arbitration from FINRA's Central Registration Depository ("CRD<sup>®</sup>") is not eligible for arbitration. The Commission should dismiss Davis's application for review because it lacks jurisdiction to review Davis's appeal. Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act") provides, in relevant part, that the Commission may review a decision by a self-regulatory organization ("SRO") that "prohibits or limits any person in respect to access to services offered by" the SRO. 15 USC § 78s(s)(d)(1). Davis, however, has not been denied access to FINRA's arbitration forum as he alleges. To the contrary, the record unequivocally establishes that Davis requested expungement in the underlying customer arbitration and that the arbitration panel denied his request.

Davis's unsupported claim that the arbitration panel in the underlying customer arbitration did not properly consider his expungement request does not create jurisdiction for the Commission's review here. If Davis believed the underlying arbitration award lacked a proper

evidentiary basis, his exclusive remedy was to petition an appropriate court to vacate, modify, or correct the award. He did not do so. FINRA's rejection of his attempt to collaterally attack that award now 23 years later is not a denial or limitation of access to a service. Accordingly, the Commission lacks jurisdiction to review Davis's petition. The Commission should therefore follow its well-established precedent related to jurisdiction and dismiss Davis's application for review.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The Customer Arbitration**

The facts relevant to the issue of jurisdiction are straightforward. Davis has been registered with FINRA as a general securities representative since 1989. (R. at 25.)<sup>1</sup> In September 1996, Davis's customers filed a claim with the Dispute Resolution, against Davis and his member firm, Smith Barney Incorporated. (R. at 39.) The customers alleged that Davis engaged in negligent behavior, fraud and churning, and breach of fiduciary duty, and requested compensatory damages of \$25,160. (R. at 40.)

Davis and his firm filed an answer, denying the customers' allegations. Davis and his firm requested that the claims asserted against them be denied in their entirety and "that the panel sign an order expunging this case from the registration record of Davis." (R. at 41.)

Davis submitted his own submission agreement agreeing to submit the matter to arbitration in accordance with FINRA rules and agreeing to abide by and perform any award rendered. (R. at 39.) A two-day arbitration was held in May and June 1997. (*Id.*) On August 20, 1991, the arbitration panel issued an award finding in favor of the customers and against

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<sup>1</sup> "R. at \_\_\_ refers to the page in the Certified Record filed by FINRA on November 1, 2019.

Davis and his firm. (R. at 41-42.) The arbitration panel awarded the customers \$17,885.71 in compensatory damages, for which Davis and his firm were liable jointly and severally. (R. at 41.) The arbitration panel also determined that “[a]ny relief not specifically awarded is hereby denied.” (*Id.*) Thus, the arbitration panel denied Davis’s expungement request.

**B. Davis Files a Statement of Claim Seeking Expungement of the Customer Arbitration**

On September 30, 2019, more than 23 years after the arbitration award was issued, Davis filed a statement of claim with Dispute Resolution requesting expungement of the customer award from CRD and BrokerCheck. (R. at 1-5.) On October 3, 2019, FINRA informed Davis that the Director of Dispute Resolution (the “Director”) had determined that Davis’s request for expungement was “not eligible for arbitration.” (R. at 9.)

On October 18, 2019, Davis filed with the Commission an application for review of the Director’s decision. (R. at 11-5.) After initially consolidating the matter with several similar applications for review, the Commission subsequently severed Davis’s appeal from the Consolidated Arbitration Appeals because the underlying award “indicates that [Davis] requested and was denied expungement of the information regarding the underlying arbitration from his records during the underlying customer arbitration proceeding.” *In the Matter of the Consolidated Arbs. Applications*, Exchange Act Release No. 92923, 2021 SEC LEXIS 2619, at \*2 (Sept. 9, 2021). The Commission then ordered the parties to submit additional briefing on whether it has jurisdiction over Davis’s application for review.

### III. ARGUMENT

The Commission lacks jurisdiction to review Davis's application for review and should, accordingly, dismiss it. Exchange Act Section 19(d) defines the Commission's jurisdiction to review FINRA's action and provides, in relevant part, that the Commission may review a FINRA action that prohibits or limits any person in respect to services offered by FINRA. 15 U.S.C. § 78s(d)(1); *see Joseph Dillon & Co.*, 54 S.E.C. 960, 962 (2000). The Commission lacks jurisdiction here because Davis was not denied access to a service provided by FINRA. To the contrary, Davis requested expungement in the underlying customer arbitration, and the arbitration panel denied his request. The Director of Dispute Resolution subsequently denied Davis's attempt to re-access FINRA's arbitration forum, but that denial does not constitute a limitation of access to FINRA's arbitration forum.

#### A. FINRA's Summary Responses to Issues Raised by the Commission

To aid in its review of Davis's application for review, the Commission requested further analysis of three issues. We briefly address these issues.

*Q: 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?*

A: Yes, the customer award states that Davis requested expungement of information about the underlying customer arbitration from CRD and that the arbitration panel denied this request. Davis also admits on appeal that he sought expungement in the underlying customer arbitration proceeding. *Infra* at Part III.B.

*Q: 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?*

A: Davis was allowed full access to FINRA's arbitration forum for his expungement request in the underlying customer arbitration. The customer award reflects that the arbitration panel accepted Davis's request for expungement and a hearing was held. The Commission's holdings in *Dustin Tylor Aiguier* and *John Boone Kincaid III* are both



applicable here. Like the applicants in those cases, Davis accessed FINRA’s arbitration forum for his expungement request and, when his request was denied, asked for a second hearing on his expungement claim. The Commission held that when, like here, an expungement request was previously submitted to arbitration and denied, it does not have jurisdiction to hear an appeal of FINRA’s denial of a request to reopen or relitigate the expungement request. Like *Aiguier* and *Kincaid*, granting Davis’s requested relief would require the Commission to set aside the underlying customer arbitration award and result in an otherwise impermissible collateral attack on an arbitration award. *Infra* at Part III.B.1.

*Q: 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 than 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.*

*A: The Commission has previously found that arbitrating an expungement claim is a “service” offered by FINRA. The service is the same whether the expungement claim is made in a customer arbitration or in an intra-industry arbitration. In both customer and industry arbitrations, parties are entitled to discovery, a hearing, and to be represented by counsel. Moreover, under the current rules, the standards for recommending expungement set forth in FINRA Rule 2080 apply in both customer and industry arbitrations, and in both cases the arbitrators are required to explain the basis for recommending expungement. Arbitrators, however, are not required to explain their reasons in the case of a denial of expungement. *Infra* at Part III.B.2.*

**B. The Commission Lacks Jurisdiction over Davis’s Appeal Because He Previously Accessed FINRA Arbitration for His Expungement Claim**

An action by an SRO such as FINRA is not reviewable merely because it adversely affects an applicant. *See Joseph Dillon & Co.*, 54 S.E.C. at 964. Rather, there must be a statutory basis for the Commission’s review. *See WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 SEC LEXIS 3699, at \*10 (Sept. 9, 2015). Section 19(d)(2) authorizes the Commission to review FINRA actions only in specific circumstances, including, as relevant here, if that action “prohibits or limits any person in respect to access to services offered by [the

SRO].”<sup>2</sup> Davis argues that the Commission has jurisdiction because he was denied access to FINRA’s arbitration service for his expungement claim. The record flatly contradicts this claim. The customer award states that Davis requested expungement in the underlying customer arbitration and that, other than an award of compensatory damages to the customer, all other relief requested was denied. (R. at 41.) Accordingly, Davis’s request for expungement was considered by an arbitration panel, and he was not denied access to arbitration for that claim.

The Commission’s decisions in *Dustin Tylor Aiguier* and *John Boone Kincaid III* are instructive here. In *Aiguier*, the applicant filed a statement of claim with FINRA Dispute Resolution requesting expungement of two customer complaints. Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at \*2-3 (May 26, 2020). An arbitration hearing was held, and the arbitrator denied Aiguier’s request for expungement. *Id.* at \*3. Approximately one year later, Aiguier asked Dispute Resolution to reopen the expungement arbitration, claiming that he had discovered new evidence that he considered exculpatory. *Id.* at \*3-4. FINRA denied Aiguier’s request, explaining that his request did not comply with the Code of Arbitration rule that allows for submissions after an arbitration case is closed in only very limited circumstances. *Id.* at \*4. Aiguier filed an appeal of FINRA’s decision with the Commission. *Id.* The Commission found that it did not have jurisdiction over Aiguier’s application for review because “denying such an attempt to obtain a new hearing after an arbitration award does not constitute a

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<sup>2</sup> Section 19(d) defines the Commission’s jurisdiction to review FINRA’s action. *See* 15 U.S.C. § 78s(d). Under Section 19(d)(2), the Commission may review a FINRA action that (1) imposes any final disciplinary sanction on any member or person associated with a member; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to services offered by the SRO; or (4) bars any person from being associated with a member. 15 U.S.C. § 78s(d)(1); *see Joseph Dillon & Co.*, 54 S.E.C. at 962 (finding the Commission lacked jurisdiction over the appeal of an NASD action when the action did not fall within any of the four jurisdictional bases of Section 19(d)). It is undisputed that the other bases for the Commission’s jurisdiction are inapplicable here.

limitation of access to FINRA’s arbitration service under Section 19(d)(2).” *Id.* at \*5. The Commission noted that FINRA accepted Aiguier’s statement of claim requesting expungement, allowed him access to the arbitration forum, and Aiguier participated in the arbitration. *Id.* at \*5-6.

Likewise in *Kincaid*, the Commission again found that it lacked jurisdiction to hear an appeal when the applicant previously had access to FINRA’s arbitration forum for his expungement claim. Kincaid filed a statement of claim with FINRA’s arbitration forum requesting expungement of two customer complaints. Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at \*3 (Oct. 22, 2019). The arbitrator issued a written award denying Kincaid’s request for expungement. *Id.* at \*4. Kincaid then filed an application for review with the Commission, claiming that FINRA had limited his access to its arbitration forum by giving effect to an award he claimed violated FINRA rules. *Id.* at \*7. The Commission held that it did not have jurisdiction to review Kincaid’s petition because “Kincaid [had] not identified any way in which FINRA limited his access to its arbitration service, nor . . . provided any other basis for [its] jurisdiction to review FINRA’s actions.” *Id.* The Commission further explained that “[a]lthough the arbitrator’s ruling was adverse to Kincaid, FINRA did not limit Kincaid’s access to its arbitration forum but rather provided Kincaid with access to that service.” *Id.* at \*9.

The Commission’s holdings in *Aiguier* and *Kincaid* are squarely on point here.<sup>3</sup> Like the applicants in those cases, Davis requested expungement of all information related to the

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<sup>3</sup> Davis’s efforts to distinguish *Aiguier* and *Kincaid* are unpersuasive. Davis argues that *Aiguier* and *Kincaid* are distinguishable because in those cases, expungement was specifically addressed in the prior awards. (Davis’s Opening Brief in Support of the Commission’s Jurisdiction Over His Application for Review, filed on November 2, 2021, at 7-8 [hereinafter “Davis Br. at \_\_\_”]). But the same is true in this case. The customer award explicitly states that

[Footnote continued on next page]

underlying customer arbitration. (R. at 41; Opening Br. at 5). A two-day arbitration hearing was held, in which Davis participated. (R. at 39.) There is no evidence, and Davis does not claim, that his participation in the hearing was in any way limited. To the contrary, Davis acknowledges in an affidavit attached to his brief that he was present at the arbitration hearing and that he testified. (Davis Br. at Ex. 1 ¶8.) The customer award reflects that Davis denied the customers' allegations and requested expungement of the matter from CRD. (R. at 40-41.) The arbitration panel, however, denied Davis's expungement request and found him liable for compensatory damages to his customers. (R. at 39-42.) In short, FINRA did not deny Davis access to the arbitration forum and, accordingly, there is no basis for the Commission's jurisdiction to hear this appeal.

**1. Davis's Arguments That His Access to FINRA's Arbitration Service for His Expungement Request Was Limited in the Underlying Customer Arbitration Have No Merit**

Davis's primary argument is that his expungement request was "never meaningfully addressed" in the underlying customer arbitration. (Davis Br. at 5.) In support of this claim, Davis cites his more than 25-year-old recollection that his expungement claim was not addressed during the arbitration hearing. (Davis Br. at 5, Ex. 1 ¶9.) Davis also claims that he was represented at the arbitration hearing by his firm's counsel and not counsel of "my choosing." (Davis Br. at 10, Ex. 1 ¶4.) Even if these facts were true, however, Davis has not identified any way *FINRA* denied or limited his access to the arbitration forum in the underlying customer arbitration. Davis's answer denying the allegations of the statement of claim and requesting expungement was accepted. Davis signed a submission agreement for arbitration, and an

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Davis requested expungement and that all relief other than an award of compensatory damages to the customers was denied.

arbitration hearing was held. Davis was present and participated in the hearing. He testified and was represented by counsel throughout the proceeding.<sup>4</sup> There is no evidence, or claim by Davis, that FINRA limited his presentation at the arbitration hearing.

Davis also claims, without evidence, and in the face of the plain language of the customer award, that the arbitration panel did not review his request for expungement on the merits. (Davis Br. at 6.) In support of this contention, Davis points to the lack of specific findings with respect to expungement in the customer award, asserting that the award's finding that "any relief not specifically awarded is hereby denied" sidesteps the issue of expungement. Davis Br. at 6. Davis's argument is illogical and without merit. Moreover, under the applicable rules in effect at the time of the underlying customer arbitration, the arbitration panel was not required to make specific findings concerning expungement. *See* Code of Arbitration Procedure Rule 10330(e) (setting forth the requirements for arbitration awards).

In any event, if Davis believed there was insufficient evidentiary basis for the arbitration panel's denial of his request for expungement in the underlying customer arbitration, his exclusive remedy was to file a petition in an appropriate court to vacate, modify, or correct the customer award. As the Commission had previously explained, "Congress has not authorized [the Commission] to reopen an arbitration proceeding that has resulted in an award and grant a new trial;" rather, the "exclusive remedy for challenging acts that taint an arbitration award rendered by a FINRA arbitrator is to move to vacate, modify, or correct the award in court."

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<sup>4</sup> Davis's suggestion that his attorney did not adequately represent him because he also represented Davis's firm is a baseless attack on the professionalism of that attorney. (Davis Br. at 10.) Regardless, Davis's decision to be represented by the same attorney as his firm in the underlying customer arbitration has no relevance to the issue of whether FINRA denied or limited his access to the forum for his expungement claim, and any dissatisfaction he may now have with the attorney does not result in the Commission having jurisdiction to hear this appeal.

*Aiguier*, 2020 SEC LEXIS 1430, at \*7; *see also Kincaid*, 2019 SEC LEXIS 4189, at \*8-9 (explaining that “as courts have long explained, Kincaid's recourse for challenging an allegedly erroneous arbitration award would be by seeking to vacate, modify, or correct the award in court through the Federal Arbitration Act”). Moreover, as the Commission explained in *Aiguier*, an “objection to the evidentiary basis for the award and the process by which the arbitrator reached a decision does not change the fact that [an applicant] accessed FINRA’s arbitration service. 2020 SEC LEXIS 1430, at \*5-6.

## **2. The Request for an Expungement Is the Same Whether It Is Made in a Customer Arbitration or Intra-Industry Arbitration**

The Commission has found that “FINRA’s service of providing arbitration of expungement claims is ‘fundamentally important’ and central to its function as an SRO.” *Consolidated Arb. Applications*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312, \*4 (Aug. 6, 2020). That service is the same whether the expungement request is made in a customer arbitration or in an intra-industry arbitration.

The current FINRA rules contain the Customer Code and a separate Code of Arbitration Procedure for Industry Disputes (the “Industry Code”). The Customer Code applies to “any dispute between a customer and a [FINRA] member or associated person of a member that is submitted for arbitration.” Customer Code Rule 12101(a). The Industry Code applies to matters submitted for arbitration between members, members and associated persons, and associated persons. *See* Industry Code Rule 13101(a). A request for expungement may be brought as a counterclaim in a customer case or in an intra-industry arbitration. *See* Customer Code Rules 12303,12805; Industry Code Rule 13805.

Both the Customer Code and Industry Code contain comparable procedural rules. In both, the parties are entitled to legal representation and a hearing. *See* Customer Code Rules

12208,12805; Industry Code Rules 13208, 13805. In both, the parties may request discovery. See Customer Code Rules 12506, 12507; Industry Code Rule 13506. Moreover, under both the Customer Code and Industry Code, the standards for expungement set forth in FINRA Rule 2080 apply,<sup>5</sup> and when an award includes an order of expungement, the award must indicate which of the grounds for expungement set out in Rule 2080 serves as the basis of the order. See Customer Code Rule 12805; Industry Code Rule 13805.

Davis's expungement claim in the underlying customer arbitration was heard prior to the effectiveness of Rule 2080<sup>6</sup>, and prior to the adoption of the Customer Code and Industry Code.<sup>7</sup> Under the prior Code of Arbitration Procedure ("Code"), the rules provided similar protections,

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<sup>5</sup> In his brief, Davis erroneously states that Rule 2080 does not apply to industry disputes and he misquotes the FINRA Dispute Resolution Service Arbitrator's Guide (the "Arbitrator's Guide"). (Davis Br. at 9.) Contrary to Davis's claim, the Arbitrator's Guide states, that "Rules 2080, 2081 and 12805 do not apply to intra-industry disputes, *unless the information to be expunged involves [a] customer dispute.*" Arbitrator's Guide at p. 78, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>. (Emphasis added.)

<sup>6</sup> FINRA Rule 2080 provides that a request for expungement relief must be based on findings that (1) the claim, allegation or information in the matter sought to be expunged is factually impossible or clearly erroneous; (2) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (3) the claim, allegation or information in the matter sought to be expunged is false.

<sup>7</sup> The statement of claim in the underlying customer arbitration was filed in September 1996, the hearing was held in May and June 1997, and the customer award was issued on August 20, 1997. (R. at 39-42.) FINRA Rule 2080 was effective as of April 12, 2004, after the customer award was issued. See *NASD Notice to Members 04-16*, 2004 NASD LEXIS 18 (Mar. 4, 2004). Moreover, Customer Code Rule 12805, which sets forth requirements when an arbitration panel grants an expungement claim in a customer arbitration, was not yet adopted, and applies to claims that were filed on or after April 16, 2007, long after issuance of the customer award. See Customer Code Rule 12000, Part 1. Rule 12805 provides that in order to grant expungement, an arbitration panel must hold a hearing and "[i]ndicate 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."

including the right to be represented by counsel, discovery, and the right to a hearing. *See* Code Rules 10213, 10303, 10316, 10317, and 10321. The Code did not, however, require that an award explain the basis for the arbitration panel's decision, including with respect to recommending expungement.<sup>8</sup> *See* Code Rule 10330(e).

In short, the service accessed when an expungement request is made is the same in all material respects whether it is made in a customer or intra-industry arbitration.

#### **IV. Conclusion**

Davis had not established any of the statutory bases for the Commission's jurisdiction. The record shows that Davis's access to FINRA's arbitration forum for his expungement claim was not denied or limited. To the contrary, his claim was submitted to the arbitration panel in the underlying customer arbitration and the arbitration panel denied it. Accordingly, the Commission lacks jurisdiction to review Davis's application for review and should dismiss it.

Respectfully submitted,

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<sup>8</sup> Neither the current rules, nor the rules under the Code, require the arbitration panel to explain their reasons in the case of a *denial* of expungement.



**CERTIFICATE OF COMPLIANCE**

I, Megan Rauch, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

*/s/ Megan Rauch*

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**CERTIFICATE OF SERVICE**

I, Megan Rauch, certify that on this 17th day of November 2021, I caused a copy of the foregoing FINRA's Brief in Response to the Commission's Request for Additional Briefing, In the Matter of the Application of Alton Theodore Davis, Jr., Administrative Proceeding File No. 3-19588, to be filed through the SEC's eFAP system on:

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