

**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' REPLY BRIEF IN SUPPORT OF THE
COMMISSION'S JURISDICTION OVER HIS APPLICATION FOR REVIEW**

INTRODUCTION

Applicant, Mr. Alton Theodore Davis, Jr. (“Mr. Davis”) seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. (“FINRA”) to deny Mr. Davis access to its arbitration forum under FINRA Code of Arbitration Procedure for Customer Disputes Rule 12203(a) or FINRA Code of Arbitration Procedure for Industry Disputes Rule 13203(a) (collectively and/or individually, “FINRA Rules”).

Mr. Davis, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹, challenging FINRA’s determination that Mr. Davis’ claim is ineligible for arbitration in FINRA’s Dispute Resolution Forum (“FINRA’s Forum”). On November 2, 2021, Mr. Davis submitted his Brief in Support of Application for Review (“Davis’ Brief”) in response to the

¹ 15 U.S.C. § 78s(d).

Commission's Order Requesting Additional Briefing issued on September 13, 2021 ("Additional Briefing Order"). On November 17, 2021, FINRA submitted a Brief in Opposition to the Application for Review ("FINRA's Brief"). Mr. Davis now timely submits his Reply Brief in Support of the Application for Review for consideration by the Commission.

ARGUMENT

MR. DAVIS' REPLY TO FINRA'S ASSERTIONS IN ITS INTRODUCTION AND FACTUAL AND PROCEDURAL BACKGROUND SECTIONS

FINRA mischaracterizes Mr. Davis' expungement request in his Statement of Claim (R. at 1-9²) as an attempt to "collaterally attack" the award from the underlying customer arbitration proceeding. *FINRA's Brief* at 1-2. However, Mr. Davis' expungement request in his Statement of Claim does not seek to *overturn* the underlying arbitration award and makes no claim to do so. Instead, Mr. Davis sought removal of the derogatory information that *FINRA* published, and continues to publish, on his BrokerCheck and CRD records. FINRA's continual attempts to unduly narrow the focus of the issues on this appeal by claiming that Mr. Davis' "exclusive remedy was to petition an appropriate court to vacate, modify, or correct the award" should be disregarded. *FINRA's Brief* at 1-2. The issue is not whether Mr. Davis previously had a right to vacate, modify, or correct the award, but whether FINRA should be permitted to now prohibit or limit Mr. Davis access to its Forum for a claim of expungement. Even if expungement had been properly addressed in the underlying customer arbitration (which Mr. Davis contends is not the case), there is no codified rule that prevents Mr. Davis from requesting expungement a second time. FINRA's only authority in support of its contention is a citation to the FINRA arbitration *guide*, which is not

² "R. at ___" refers to the page in the Certified Record filed by FINRA on July 10, 2019.

binding authority.³ Accordingly, the Commission has jurisdiction to review Mr. Davis' Application for Review.

MR. DAVIS' REPLY TO FINRA'S ASSERTIONS IN ITS ARGUMENT SECTION

A. Mr. Davis was not afforded full and fair access to FINRA's arbitration service for expungement.

FINRA claims that "the record flatly contradicts" Mr. Davis' claim that he was denied access to FINRA's arbitration service for his expungement claim because of the one sentence request for expungement imbedded in the Statement of Answer⁴ and because the underlying arbitration award states that "[a]ny and all relief not specifically addressed herein, including punitive damages, is denied in its entirety".⁵ *See, FINRA's Brief* at 6. Notably however, FINRA fails to address Mr. Davis' assertion that he was not afforded an adequate opportunity to be heard on his request for expungement. It is clear, based on the findings in the underlying award, that the underlying arbitration panel addressed the customer's claims for damages, but it did not meaningfully address Mr. Davis' request for expungement. FINRA seemingly implies (without any supporting evidence) that Mr. Davis' recollection of the events is not credible, merely because they happened years ago. *See, FINRA's Brief* at 8. However, Mr. Davis swore under oath that the contents of his Affidavit were "complete and accurate to the best of [his] knowledge" and submitted evidence that his request for expungement was not addressed at the underlying arbitration hearing. *See, Affidavit*. On the contrary, FINRA has failed to proffer any evidence refuting Mr. Davis' testimony other than its speculation and implications, all of which should be disregarded here.

³ FINRA states in its Arbitration Guide that "[w]hen an arbitration panel has issued an award denying a broker's expungement request, the broker may not request expungement in another arbitration case." Pg. 79 of FINRA's Arbitration Guide. Notably, no FINRA rule or applicable authority is cited for this statement, as none exist.

⁴ *See, R.* at 22-23.

⁵ *See, R.* at 75- 81.

The evidence shows that Mr. Davis has not 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.⁶ Pointing to lack of Rules 12805 and 2080 at the time of the underlying customer dispute does not remove FINRA's responsibility to provide a fair forum to address the issue of expungement now. 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). Therefore, FINRA exceeded its authority and prohibited or limited Mr. Davis' access to a fundamental service in violation of the Exchange Act.

B. The Commission's holding in the *Dustin Tylor Aiguier* and *John Boone Kincaid* matters are not applicable here.

FINRA claims that the holdings in *Aiguier* and *Kincaid* are applicable here because, "[l]ike the applicants in those cases, Davis requested expungement of all information related to the Underlying Customer Arbitration." *FINRA's Brief* at 7-8. However, FINRA evidently skipped over the fact that Mr. Davis attested, under oath, that he did *not* have a meaningful opportunity to be heard on his request for expungement, as the applicants in *Aiguier* and *Kincaid* had. *See*, Affidavit. The arbitrator in *Kincaid* discussed, reviewed, and sought additional briefing relating to a procedural rule concerning the requested expungement relief. As noted by the Commission, "Kincaid through his counsel, actively participated in that service."⁷ Kincaid was given an opportunity to be heard on the matter of expungement. Similarly, in *Aiguier*, the claimant was permitted the opportunity to be heard during a full expungement hearing on the merits of his

⁶ *See, e.g.*, FINRA Rules 2080 and 13805; *see also*, <https://www.finra.org/arbitration-mediation/notice-arbitrators-and-parties-expanded-expungement-guidance>.

⁷ *See, In the Matter of the Application of John Boone Kincaid III for Rev. of Action Taken by Finra*, Release No. 87384 (Oct. 22, 2019).

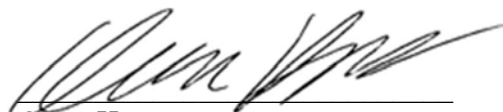
expungement requests, but the Commission determined there was no jurisdiction to hear his application for review because FINRA denied Aiguier “an attempt to obtain a new hearing *on expungement*,” a hearing that Mr. Davis has never had.⁸

CONCLUSION

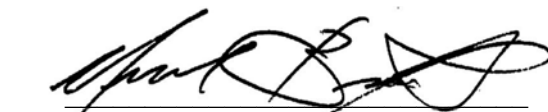
Mr. Davis has a clear statutory basis under the Exchange Act for the Commission’s review of his application, as FINRA limited or prohibited his access to its forum for the fundamental service of expungement arbitration. Mr. Davis was never afforded a full and fair opportunity to be heard on his expungement claim and FINRA limited or prohibited his ability to do so. Even if Mr. Davis *did* have an opportunity to be heard on his expungement claim, there is no FINRA rule that prohibits him from seeking expungement at a later date, under equitable grounds. The Commission should therefore remand Mr. Davis’ claim to the FINRA Forum for review of the expungement claim in front of an arbitration panel.

Dated: December 1, 2021

Respectfully submitted,



Owen Harnett,
Managing Attorney
T: (720) 515-9069
E: owen.harnett@hlbslaw.com
HLBS Law
9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021



Michael Bessette,
Managing Attorney
T: (720) 432-6546
E: michael.bessette@hlbslaw.com
HLBS Law
9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021

⁸ See, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *2-3 (May 26, 2020) (emphasis added).

CERTIFICATE OF SERVICE

I, James Bellamy, certify that on December 1st, 2021, I caused a copy of the foregoing Reply Brief 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:

The Office of the Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, D.C. 20549-1090

Celia Passaro
Associate General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
Celia.Passaro@finra.org

Megan Rauch
Associate General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
megan.rauch@finra.org

Alan Lawhead
Vice President and Director – Appellate
Group
Office of General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
alan.lawhead@finra.org

General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
Email: nac.casefilings@finra.org

Jennifer Brooks
Associate General Counsel
FINRA
1735 K Street, NW
Washington, D.C. 20006
jennifer.brooks@finra.org

[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