

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

In the Matter of the Application of

David W. Ingle

For Review of Action Taken By

FINRA

File No. 3- 20893

**DAVID INGLE'S OPENING BRIEF IN SUPPORT
OF APPLICATION FOR REVIEW**

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I. INTRODUCTION

Applicant, David W. Ingle (“Mr. Ingle”) seeks Commission review of a determination by the FINRA Office of Dispute Resolution (“ODR”) to deny Mr. Ingle’s access to the Financial Industry Regulatory Authority, Inc. (“FINRA”) arbitration forum (“FINRA Forum”) after FINRA had already accepted forum and allowed Mr. Ingle to proceed to and conclude a hearing on the merits. FINRA has prohibited or limited Mr. Ingle’s access to a fundamentally important service that it offers – the ability to contest and seek expungement of a termination disclosure published on his CRD and BrokerCheck records – and in doing so, has exceeded its authority under the Exchange Act, its own rules, and has violated fundamental notions of due process.

On June 8, 2022, Mr. Ingle, by and through counsel, timely submitted his Application for Review to the Commission, under Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”),¹ challenging FINRA’s determination that Mr. Ingle’s claim is ineligible for

¹ 15 U.S.C. § 78s(d).

arbitration. On August 4, 2022, Mr. Ingle submitted an Unopposed Motion to Amend Application for Review. Mr. Ingle now respectfully submits his Opening Brief in Support of Application for Review.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

FINRA is a not-for-profit Delaware corporation and self-regulatory organization (“SRO”) registered with the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Office of Dispute Resolution (“ODR”). FINRA ODR’s sole function is to operate a neutral arbitration and mediation forum to resolve securities industry disputes. FINRA ODR’s authority is limited to the administration of the forum, and it is not permitted to engage in deciding the outcome of an award judgment.²

FINRA maintains an electronic database called the Central Registration Depository (“CRD”) and a public reporting system known as BrokerCheck.³ This online, publicly marketed reporting system includes the widespread publication of numerous disclosure events against each Associated Person of a FINRA member firm. The purposes of the CRD and BrokerCheck systems are (1) to create a regulatory system to improve the overall regulation of advisors, (2) to make information about financial advisors available to the public, and (3) to provide financial advisors with an efficient automated filing system.

Mr. Ingle is currently a resident of Chandler, Arizona, and has been a financial services professional since 1997. (R. at 2)⁴. Mr. Ingle is currently Managing Director and Chief Compliance Officer at Synergistic Wealth Management LLC in Chandler, Arizona. *Id.* From February of 2009

² See, FINRA Arbitration Overview, at <https://www.finra.org/arbitration-mediation/overview>. (“FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.”).

³ 15 U.S.C. 78o-3(i)(1).

⁴ “R. at ___” refers to the certified record filed by FINRA on June 17, 2022.

to February of 2016, Mr. Ingle was a FINRA registered representative with Merrill Lynch, Pierce, Fenner & Smith Incorporated (“Merrill Lynch”) in Mesa Arizona. (R. at 2). Mr. Ingle’s registration with Merrill Lynch was terminated on February 4, 2016 due to his alleged mishandling of proof-of-funds letters. (R. at 3).

On March 2, 2016, Merrill Lynch filed with FINRA a Form U5 termination entry, corresponding with occurrence number 1869090 (the “Occurrence”), which was published by FINRA to Mr. Ingle’s CRD and BrokerCheck records. The Occurrence states that Mr. Ingle was “discharged” on February 4, 2016, because of alleged “Conduct including providing an inaccurate proof of funds letter on behalf of a client.”

On February 8, 2021, Mr. Ingle filed his Statement of Claim with FINRA ODR seeking expungement of the Occurrence from his CRD and BrokerCheck records pursuant to FINRA Rules. (R. at 1-8). The Statement of Claim was filed against Merrill Lynch as the respondent. *Id.*

On February 10, 2021, FINRA granted Mr. Ingle access to its forum and accepted the Statement of Claim. (R. at 9-17). FINRA then served the named respondent – Merrill Lynch – with the Statement of Claim and service documents. *Id.* On April 1, 2021, FINRA notified Mr. Ingle and Merrill Lynch (together, the “Parties”) that they may engage in the arbitration panel selection process. (R. 21-25). On April 8, 2021, FINRA notified the Parties that “[a]wards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. **FINRA makes available an arbitration forum** – pursuant to rules approved by the SEC – but has no part in deciding the award.” (R. at 27) (emphasis added). On April 8, 2021, Merrill Lynch filed their Answer and Affirmative Defenses to Statement of Claim, along with multiple exhibits. (R. 29-122). On April 22, 2021, FINRA appointed the arbitration panel and scheduled an Initial Prehearing Conference (“IPHC”) for the matter. (R. 123-128). On May 27, 2021, FINRA issued a

notice to the Parties regarding the scheduling of the final evidentiary hearing. (R. at 145-151). Prior to the evidentiary hearing, the Parties engaged in discovery, and numerous other motions, requests, exhibit lists, witness lists, and other prehearing submissions were filed with FINRA by the Parties, the arbitration panel issued several orders accordingly, and FINRA issued notices and acknowledgements of these prehearing submissions and orders. (*See, generally*, R. 131-561). Mr. Ingle's claims proceeded to a final evidentiary hearing on the merits on May 2, 2022, where evidence was presented by both Parties. Upon conclusion of the hearing, the record was closed and submitted to the arbitration panel for a ruling.

Then on May 10, 2022, eight days *after the conclusion of the case* and all evidence had been presented regarding Mr. Ingle's expungement claim, FINRA submitted a notice (the "Notice") to the Parties that FINRA decided to deny Mr. Ingle access to its arbitration forum on his expungement request. (R. at 537-538). The Notice states that it denied Mr. Ingle access based on an Acceptance Waiver and Consent ("AWC") that Mr. Ingle entered into with FINRA on April 10, 2018, more than four years earlier. *Id.* FINRA claimed in the Notice that, "[i]n the AWC, Mr. Ingle agreed that *the AWC* would become part of his permanent disciplinary record and that he would not take any action denying, directly or indirectly, any findings in this AWC or create the impression that AWC is without factual basis." (emphasis added and internal quotations omitted.). *Id.* The Notice further states that the "Occurrence Number 1869090 and Section 3 of David Ingle's Form U5 are ineligible for expungement from CRD in FINRA's arbitration forum because they arise from the same facts and circumstance related to a regulatory action disclosure (Occurrence #1974680)." *Id.*

On June 8, 2022, Mr. Ingle timely filed his Application for Review of FINRA's denial of the forum. (R. at 541-544). On July 13, 2022, the Commission issued its briefing schedule

indicating that Mr. Ingle’s brief in support of the application for review is due on August 12, 2022, the brief in opposition is due on September 12, 2022, and any reply brief is due September 26, 2022. Mr. Ingle hereby timely submits his brief in support of the Application for Review.

III. JURISDICTION

The Commission has jurisdiction to hear this Application for Review under Section 19(d) of the Securities Exchange Act of 1934.⁵ In this case, FINRA’s determination that Mr. Ingle’s claim is not eligible for arbitration deprived him of the ability to participate in that service with respect to that claim, which effects a prohibition or limitation of access to the arbitration forum. *See, id.*

IV. LEGAL ANALYSIS

1. The claim Mr. Ingle submitted through FINRA’s arbitration forum is eligible for expungement and separate and distinct from the other occurrence.

FINRA denied Mr. Ingle access to its arbitration forum (after FINRA already granted him access to it) to seek expungement of the Occurrence because Mr. Ingle has a *separate and distinct* regulatory disclosure that he was not seeking expungement of. Generally, the very terms of an AWC, an individual waives the right to further access administrative remedies or later contest the validity of the AWC. FINRA fails to grasp that no two cases are the same. In stating that Mr. Ingle is not able to seek expungement of the Occurrence because of the existence of a FINRA AWC. FINRA cited no rules or laws in support of its decision to deny forum on this basis. Mr. Ingle posits this is because there is no FINRA rule barring the hearing on or expungement of disclosure

⁵ *See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020) (Commission finds jurisdiction to hear claims when FINRA prohibited applicants’ access to its arbitration forum to seek expungement because “FINRA’s service of providing arbitration of expungement claims is ‘fundamentally important’ and central to its function as an SRO.”)*

simply because it may share facts and circumstances with another disclosure.⁶ Neither occurrence has been joined together into a single claim under FINRA Rule 12312, nor did Mr. Ingle seek expungement of the AWC disclosure. A review and expungement of the Occurrence does not automatically mean that Mr. Ingle is denying, directly or indirectly, any findings that are the subject of AWC disclosure. *Eschelman v. Wells Fargo Clearing Services, LLC*, FINRA Dispute Resolutions Services, Case Number 20-02613 (*Claimant was awarded expungement of occurrence of an employment separation following allegations reported to the CRD. The fact that Claimant had signed an AWC that arose from related, though distinct, facts and circumstances from the occurrence that was ultimately expunged*).⁷The AWC referenced by FINRA in its denial of the forum letter ought to be viewed as a separate occurrence from the Occurrence addressed in Mr. Ingle's arbitration proceeding. FINRA itself recognized that these were separate and distinct occurrences when it initially allowed Mr. Ingle access to the forum. For FINRA to deny access to its forum after the conclusion of the final evidentiary hearing constitutes a violation of the Exchange Act. Moreover, it shows a lack of fundamental fairness towards Mr. Ingle, who, as an associated person, is entitled to due process by FINRA before it makes a decision effecting his fundamental rights. The arbitration panel should have been permitted to issue an award after Mr. Ingle's hearing.

2. FINRA's denial of Mr. Ingle's request to be heard in the FINRA Forum is not consistent with FINRA rules, the law, or fundamental notions of due process.

FINRA offers to its members and associated persons its dispute resolution arbitration forum "for the arbitration of any dispute, claim, or controversy arising out of or in connection

⁶ Mr. Ingle does not concede FINRA's assertion that the facts related to the expungement of the Occurrence "arise out of" the AWC.

⁷ Mr. Ingle, by and through counsel, intends to file a Motion to Adduce Additional Evidence to introduce the Award and Statement of Claim from *Eschelman* following the filing of this Opening Brief.

with the business of any FINRA member or arising out of the employment or termination of employment of associated person(s) with any member....” *See*, FINRA Rule 10101; *see also*, FINRA Rule 10301. FINRA requires the submission of claims and controversies arising out of or in connection with the business of any FINRA member or the employment of associated persons with any member through its arbitration forum. *See*, FINRA Rules IM-10100, IM-13000, 13200, and 12200.

The aforementioned FINRA rules make clear that FINRA’s arbitration forum allows, and in some cases even requires, the submission of claims arising in connection with the employment or termination of associated persons. The FINRA Dispute Resolution Task Force has even stated that its dispute-resolution service is “for all practical purposes, the sole arbitration forum in the United States for resolving disputes between broker-dealers, associated persons, and customers,” and that as of 2015, FINRA “handle[d] more than 99 percent of the securities-related arbitrations and mediations in the [United States]”.⁸

FINRA is generally required to report a variety of disclosure events to the CRD system and release that information on its BrokerCheck website, including final regulatory actions. In light of this requirement, and in acknowledging that the information published on these systems may be inaccurate, misleading, false, erroneous, factually impossible, defamatory in nature, or may provide no investor protection or regulatory value, FINRA offers the service to its associated persons and members the ability to seek expungement of this information from these systems. *See*, FINRA Rule, 2080, 8312(g).

⁸ FINRA Dispute Resolution Brochure, About FINRA Dispute Resolution
https://www.finra.org/sites/default/files/14_0289%201_DR%20Promo%20Brochure.pdf

3. Regulatory Disclosures can be reviewed and expunged in a FINRA Arbitration Forum.

FINRA's rules allow for expungement claims of other disclosure events or information other than customer dispute disclosures. *See*, FINRA Dispute Resolution Services Arbitrator's Guide ("FINRA's Guide") at 73-78. FINRA's Guide states that "[s]ecurities firms and regulatory authorities may report a variety of disclosure events to the CRD system, including civil judicial actions, criminal matters, customer disputes...employment terminations, internal reviews...investigations, financial matters, and regulatory actions." FINRA's Guide at 73.

FINRA's Guide also states that "[b]rokers who seek to expunge disclosure events from their CRD records generally look to remove a customer dispute, employment termination or internal review." *Id.* The fact that disclosure "events" is pluralized (i.e., not restricted to customer dispute disclosures only) and that FINRA states brokers "generally" seek expungement of a customer dispute or employment termination, or internal review disclosures denotes that there is a wide range of disclosure events that brokers may seek expungement of, such as employment separation after allegations and regulatory actions. Similarly, FINRA's Guide addresses the fact that where expungement requests do not involve customer dispute information, "arbitrators may recommend expungement of this information from CRD without addressing the standards set forth in Rule 2080 or the procedural requirements under Rule 12805." FINRA's Guide at 78-79.

FINRA also acknowledges that it "will expunge the referenced information if the award is confirmed by a court of competent jurisdiction" and that "[i]f the arbitrators recommend expungement of non-customer dispute information and also determine that the information is defamatory in nature, FINRA will expunge the information without a court order." *Id*; *see also*, NASD Notice to Members 99-09 ("Reg. Notice 99-09") (FINRA acknowledging that it "will

continue to expunge information from the CRD system based on expungement directives contained in arbitration awards...where arbitrators have awarded such relief based on the defamatory nature of the information” and that FINRA, in “recognizing arbitrators’ broad authority to grant equitable relief and a party’s ability to have an award confirmed in court, also had honored such expungement directives provided they were contained in an arbitrator’s award.”

FINRA offers its members and associated persons the ability to utilize its arbitration forum for a variety of claims, including expungement of the Occurrence (or the AWC disclosure, which was not sought for expungement in this case).

4. FINRA waived its ability to “deny forum” in this case.

Even if FINRA initially had the authority to deny Mr. Ingle access to its forum in this case – which it did not – FINRA subsequently waived its ability to do so after it *accepted* forum. This is not the case where, shortly after a claimant files a claim, FINRA issues a forum denial notice. This case had been *concluded* by the time FINRA made its determination that it would deny Mr. Ingle access to its forum. FINRA had ample opportunity to issues its denial notice prior to the conclusion of Mr. Ingle’s arbitration hearing but failed to do so.

A waiver occurs when one in possession of any right, whether conferred by law or by contract, and with full information of the material facts, does or forbears the doing of some things inconsistent with the existence of the right or his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. See *United States v. Turley*, 878 F.3d. 953, 959 (10th Cir. 2017).

In the case at hand, FINRA expressly accepted Mr. Ingle's claim into its arbitration forum, with full information of the material facts available to it. It allowed a full and complete hearing on the claims to occur. Both of these are acts inconsistent with FINRA's intention to rely on its purported right to dismiss Mr. Ingle's claim under Rule 13203. Therefore, FINRA is estopped from using Rule 13203 as a basis for refusing Mr. Ingle access to its forum.

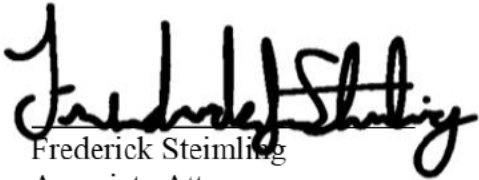
CONCLUSION

FINRA violated the Exchange Act, its own rules, and fundamental notices of due process when it denied Mr. Ingle's request for expungement through its forum. The Occurrence is separate and distinct from the AWC disclosure. The Commission must review the action of an SRO where the SRO issues an action that is final; prohibits or limits a person's access to services offered to any person by the SRO; and where an application by an aggrieved party is timely filed. Mr. Ingle was at all relevant times a FINRA Associated Person, who is not only to be provided access to the service of the FINRA arbitration forum but as a procedural matter, is required to file all claims within the forum pursuant to FINRA Rule 13200. FINRA's action in denying Mr. Ingle access to FINRA Forum is a final action by FINRA which prohibits Mr. Ingle's access to the service of FINRA arbitration, and limits Mr. Ingle's access to request and obtain the relief he seeks. Furthermore, Mr. Ingle's Application for Review was timely filed with the Commission within 30 days of receiving the Notice from FINRA.

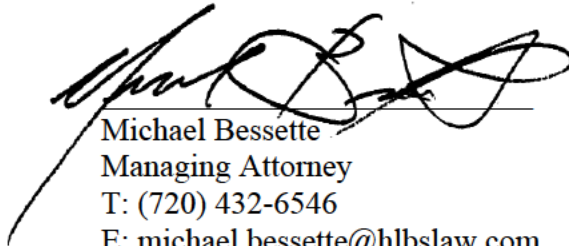
For these reasons, Mr. Ingle submits this Opening Brief to the Commission requesting that he be permitted to have his expungement request in FINRA Case Number 21-00345 be resubmitted to the arbitration panel (which has already heard all of the evidence), and to allow the arbitration panel to issue a ruling. In the alternative, Mr. Ingle requests such other relief that is appropriate and ordered by the Commission.

Date: August 12, 2022

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Frederick Steimling, certify that on August 12, 2022, I caused a copy of the foregoing Opening Brief in Support of the Application for Review in the matter of the Application for Review of David W. Ingle., Administrative Proceeding File No. 3-20893 to be filed through the SEC's eFAP system and served by electronic mail on:

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

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