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

Administrative Proceeding File No. 3-20893

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

Jennifer Brooks
Associate General Counsel

Celia L. Passaro
Associated General Counsel

Michael M. Smith
Associate General Counsel

FINRA – Office of General Counsel
1735 K Street, N.W.
Washington, D.C. 20006
202-728-8177 – Telephone
202-728-8264 – Facsimile
michael.smith@finra.org
nac.casefilings@finra.org

September 12, 2022

OS Received 09/12/2022

TABLE OF CONTENTS

OS Received 09/12/2022

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL DECISIONS

FEDERAL REGISTER

COMMISSION DECISIONS AND RELEASES

OS Received 09/12/2022

FEDERAL RULES AND STATUTES

FINRA BY-LAWS AND RULES

MISCELLANEOUS

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 Administrative Proceeding File No. 3-20893

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW

I. Introduction

David W. Ingle filed a statement of claim in FINRA's arbitration forum collaterally attacking the findings of a letter of Acceptance, Waiver and Consent (the "AWC") that he previously had submitted to FINRA. Consequently, FINRA Dispute Resolution Services ("DRS") denied the use of FINRA's arbitration forum for Ingle's statement of claim on the grounds that it was inconsistent with the AWC and therefore inappropriate for arbitration. DRS's denial of forum was proper, and the Commission should dismiss Ingle's application for review.

Ingle's statement of claim sought to expunge from FINRA's Central Registration Depository® ("CRD®") and BrokerCheck® a truthful disclosure about inaccurate, misleading, and unauthorized proof-of-funds letters he issued while registered with Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill"). Ingle admitted in a written statement to Merrill that he drafted and issued the letters, and Merrill terminated him as a result. Merrill disclosed on Ingle's Uniform Termination Notice for Securities Industry Registration ("Form U5") that it terminated Ingle

OS Received 09/12/2022

because of the proof-of-funds letters. Merrill's disclosure appears on Ingle's CRD® and BrokerCheck® records (the "Termination Disclosure").

Ingle later submitted the AWC to FINRA consenting to the entry of findings that he drafted and issued the inaccurate and misleading proof-of-funds letters without Merrill's authorization, in violation of FINRA Rule 2010. The findings in the AWC also are disclosed on Ingle's CRD® and BrokerCheck® records (the "AWC Disclosure").

Despite Ingle's submission of the AWC containing findings that he drafted and issued the inaccurate and misleading proof-of-funds letters, Ingle alleged in his statement of claim that the Termination Disclosure is defamatory and should be expunged because he did not draft or issue those letters. DRS denied forum for Ingle's statement of claim. DRS explained that the Termination Disclosure could not be expunged because it arose from the same facts and circumstances as the AWC Disclosure, which is not subject to expungement, and expungement of the Termination Disclosure would conflict with the terms of the AWC.

The Commission should dismiss Ingle's statement of claim because the grounds on which DRS denied forum exist in fact, DRS's denial of forum was in accordance with FINRA's rules, and DRS applied those rules in a manner consistent with the purposes of the Securities Exchange Act of 1934 (the "Exchange Act").

OS Received 09/12/2022

II. Factual Background

A. Ingle Submits a Letter of Acceptance, Waiver and Consent Finding that He Issued Two Inaccurate and Misleading Proof-of-Funds Letters

1. Ingle Issues the Inaccurate and Misleading Proof-of-Funds Letters

Ingle began working at Merrill in 2009 and he registered with the firm in 2013. (RP 557.)[1] In 2015, Ingle issued two proof-of-funds letters that inaccurately and misleadingly represented the value of cash and securities held at the firm and its affiliate bank by an individual, PE, and an entity, Madison Marquette. Ingle issued the letters on Merrill's letterhead but without Merrill's knowledge or authorization. (RP 102.) PE had an account at Merrill, but the account held no cash or securities. (*Id.*) Madison Marquette did not have an account at Merrill. (*Id.*)

Ingle issued the first proof-of-funds letter in June 2015 for Madison Marquette. Around this time, Ingle was speaking with PE's nephew, DE, about Madison Marquette's potential purchase of land in New York City. (RP 89.) On June 19, 2015, Ingle emailed DE and asked him to "send me the verbiage you need . . . . I will get the letter out today." (RP 82.) DE emailed the text of the letter he wanted Ingle to provide. (RP 84.) Ingle copied the text into an email message and sent it back to DE from his Merrill email account. (RP 84-85.) DE then asked Ingle to copy and paste the text onto Merrill letterhead and send it back to him as an attachment. (RP 84.) Ingle complied with DE's request. (RP 87.) The letter Ingle issued on Merrill letterhead stated that "Madison Marquette and their [sic] affiliated limited partners have the financial capacity to consummate" a $278 million all-cash transaction with no financing. (*Id.*) In fact, Madison Marquette held no cash or securities at Merrill. (RP 102.)

[1] "RP__" refers to the page number in the certified record.

OS Received 09/12/2022

Ingle issued the second proof-of-funds letter in November 2015 for PE. On November 13, 2015, DE (PE's nephew) emailed to Ingle the text he wanted Ingle to include in the second letter. (RP 71). Among other things, DE asked Ingle to write that PE had "in excess of $56 million in cash at Merrill Lynch/Bank of America." (*Id.*) Ingle copied the text onto paper and emailed it back to DE as an attachment. (RP 73-74.) In his email attaching the letter, Ingle wrote, "Here you go. Hope this helps." (*Id.*) In the letter, Ingle wrote that "[PE] and entities owned by him have in excess of $60 million in cash at Merrill Lynch/Bank of America." (*Id.*) DE responded by asking Ingle to change the letter to state that PE had in excess of $57 million with the firm and its bank affiliate rather than $60 million. (RP 76.) Ingle made the change and emailed DE the revised letter on Merrill letterhead. (RP 76-77.) In the revised letter, Ingle stated that PE "has the financial capacity to consummate" a $57 million transaction on an all-cash basis, and that "[PE] and entities owned by him have in excess of $57 million in cash at Merrill Lynch/Bank of America." (RP 77.) Contrary to Ingle's representation, although PE had an account at Merrill, the account was not funded, and neither he nor the entities he owned had in excess of $57 million with Merrill or Bank of America. (RP 102, 286.)

2. Merrill Learns About the Inaccurate and Misleading Proof-of-Funds Letters and Opens an Investigation

In December 2015, Merrill received an email from a third party asking for verification of the November 2015 proof-of-funds letter for PE. (RP 3, 36, 79-80.) Merrill opened an investigation in January 2016. (RP 37.) Merrill soon discovered that, in addition to the November 2015 proof-of-funds letter, Ingle also had issued the June 2015 letter for Madison Marquette. (RP 37-38.)

OS Received 09/12/2022

3. Ingle Admits Issuing the Inaccurate and Misleading Proof-of-Funds Letters

In February 2016, Ingle admitted that he issued the two inaccurate and misleading proof-of-funds letters. (*See* RP 89-90.) In a written statement, regarding the June 2015 letter, Ingle wrote that, "prior to writing a letter for the purchase of New York City land," he was "in conversation with [b]oth [DE] and [DE's partner] . . . about their partnership to purchase land and roll into a possible construction loan" for a new hotel. (RP 89.) Ingle wrote that he was "asked on a phone call and later in an email to provide them with a letter stating they would purchase the land for $278mm cash and had the means to do so." (*Id.*) He admitted that, although he "felt confident [Madison Marquette] had the cash to do this," he "never saw any statement or proof showing any dollar amount." (*Id.*) Ingle further admitted that he "really should have known better." (*Id.*)

Regarding the November 2015 letter, Ingle wrote that, "[a]fter speaking with [PE] and [DE]. . . . [T]hey asked me for a letter for $60mm later changed to $57mm[.]" Ingle explained that "when [he] was asked[] to provide a letter for a real estate project they were thinking of getting into, even though [he] had not seen any statements, [he] did have or thought [he] had reason to believe the cash would be there within a few days to a week." (RP 90.)

4. Merrill Terminates Ingle and Discloses that He Issued the Inaccurate and Misleading Proof-of-Funds Letters

Merrill terminated Ingle in February 2016 and filed a Form U5 in March 2016 containing the Termination Disclosure. (RP 93, 98.) Specifically, in response to question number three on the Form U5, titled "reason for termination" and "termination explanation," Merrill stated that Ingle was "discharged" due to "[c]onduct including providing an inaccurate proof-of-funds letter

OS Received 09/12/2022

on behalf of a client."[2] (*Id.*) The Termination Disclosure appears on Ingle's CRD® record and his BrokerCheck® report. (*See* RP 279, 558.)

5. Ingle Submits the AWC Consenting to the Entry of Findings that He Issued the Inaccurate and Misleading Proof-of-Funds Letters

In March 2018, Ingle submitted the AWC in which he consented to the entry of findings that he issued the inaccurate and misleading proof-of-funds letters in violation of FINRA Rule 2010. (*See* RP 101-04.) Specifically, the AWC finds:

> In June 2015 . . . Ingle drafted and issued a proof of funds letter on Merrill Lynch letterhead stating that a business [Madison Marquette] linked to a prospective client [DE] had the financial capacity to consummate a $278 million real estate purchase with no financing.
>
> . . . [T]he letter was misleading because the prospective client held no funds or securities at Merrill Lynch at the time Ingle drafted the letter.
>
> In November 2015, Ingle drafted another proof of funds letter on firm letterhead stating that a firm client [PE] had in excess of $57 million in cash at Merrill Lynch or its affiliate bank.
>
> . . . [T]his letter was misleading because the client did not actually have the cash or securities at Merrill Lynch or its affiliate bank at the time Ingle drafted the letter.

(RP 102.) As a sanction for this misconduct, Ingle agreed to an 18-month suspension and a $10,000 fine. (*Id.*) Ingle and his attorney signed the AWC. (RP 104.)

The AWC Disclosure accurately describes the AWC's findings. It states that Ingle "consented . . . to the entry of findings that he created and distributed two proof of funds letters that contained misleading statements. . . . Contrary to the firm's policies, Ingle did not submit

[2] On the Form U5, Merrill also checked the boxes for questions 7(F)(1) and (2), indicating that Ingle was discharged after allegations accusing him of "violating investment-related statutes, regulations, rules or industry standards of conduct," and "fraud or the wrongful taking of property[.]" (RP 96-97.)

OS Received 09/12/2022

either letter for review prior to sending." (RP 561.) The AWC Disclosure appears on Ingle's CRD® record and his BrokerCheck® report. (RP 274, 560-61.)

B. Ingle Seeks Expungement of Merrill's Disclosure that He Was Terminated for Issuing the Inaccurate and Misleading Proof-of-Funds Letters

In February 2021, Ingle filed with DRS a statement of claim against Merrill seeking expungement of the Termination Disclosure on grounds that it is defamatory. (*See* RP 1-8.) In his statement of claim, Ingle made several statements that were contrary to the findings in the AWC. Specifically, Ingle alleged that he did not write the November 2015 proof-of-funds letter for PE. (RP 3.) Instead, Ingle alleged that PE's nephew, DE, "created [the] fraudulent proof-of-funds letter," and that Ingle "was not involved with the creation of the [l]etter, which was based on previous proof-of-funds letters that [Ingle] had created." (*Id.*) Ingle alleged that he "did not take any steps to intentionally provide an inaccurate proof-of-funds letter on behalf of a client," and "had no involvement with the creation of the [l]etter." (RP 4-5.) Ingle also alleged that, contrary to the findings in the AWC, both proof-of-funds letters "were issued with [Merrill's] knowledge and authorization." (RP 5.) Last, although the AWC contained a finding that Ingle violated FINRA Rule 2010, Ingle alleged that he "never acted unethically or illegally in his business or interactions." (RP 7.) Ingle asserted that the Termination Disclosure was "defamatory in nature," that it could "mislead the public," and that it should be expunged. (RP 5-6.) Specifically, Ingle requested that the "reason for termination" be changed from "discharged" to "voluntary," that the answers to questions 7F(1) and 7F(2) be changed from "yes" to "no," and that the "termination disclosure reporting pages" be deleted.[3] (RP 7.)

[3] Merrill's "yes" responses to questions 7(F)(1) and 7(F)(2) on Ingle's Form U5 indicate that Ingle was discharged after allegations accusing him of "violating investment-related statutes, regulations, rules or industry standards of conduct," and "fraud or the wrongful taking of property[.]" (RP 96-97.)

OS Received 09/12/2022

Notably, Ingle did not mention the AWC nor the AWC Disclosure in his statement of claim. (*See* RP 1-8.) DRS accepted Ingle's statement of claim shortly after he filed it. (*See* RP 21.)

Merrill opposed Ingle's expungement request. (*See* RP 29.) In its answer, Merrill disputed Ingle's allegations that he was not involved in writing the proof-of-funds letters and denied that the Termination Disclosure was defamatory. (*See* RP 41-43.)

The arbitrator scheduled a hearing on Ingle's expungement claim for April 2022. (*See* RP 142-43, 145.) On the day of the scheduled hearing, Ingle requested an emergency postponement. (RP 493.) Ingle and Merrill agreed to reschedule the hearing for May 2, 2022, and the hearing was held on that date. (RP 499, 539.)

C. DRS Denies Forum for Ingle's Expungement Claim

On May 10, 2022, before the arbitrator issued a decision, DRS notified Ingle that it had denied forum for his expungement claim due to the AWC. (RP 537.) In a letter to Ingle, DRS stated that it had reviewed Ingle's CRD® record and determined that the Termination Disclosure was not eligible for expungement. (*Id.*) DRS explained that the Termination Disclosure could not be expunged because it arose "from the same facts and circumstances" as the AWC Disclosure, and "[r]egulatory actions [i.e., the AWC Disclosure] are ineligible for expungement." (*Id.*) DRS further stated that "expungement in this matter would conflict with the terms" of the AWC. (RP 541.)

OS Received 09/12/2022

III. Procedural History

Ingle filed an application for review on June 8, 2022 (RP 541-43), and a motion to amend his application for review on August 4, 2022, seeking the Commission's review of DRS's decision to deny forum for his expungement claim.[4]

IV. Argument

The Commission should dismiss Ingle's application for review because the grounds on which DRS based its decision exist in fact, DRS's decision was in accordance with FINRA's rules, and DRS applied those rules in a manner consistent with the purposes of the Exchange Act. *See* 15 U.S.C. § 78s(f). As explained below, FINRA's rules authorize DRS to deny forum for any statement of claim whose subject matter is inappropriate for arbitration. Ingle's statement of claim is inappropriate for arbitration because it is an improper collateral attack on the AWC's findings and could result in an arbitration award that is inconsistent with those findings. DRS therefore acted appropriately by denying forum for Ingle's expungement claim.

A. Expungement of Information from CRD® Is an Extraordinary Remedy Reserved for Information with No Meaningful Value

The Exchange Act requires FINRA to collect and maintain registration information about member firms and their associated persons. *See* 15 U.S.C. § 78o-3(i). FINRA maintains this information—which includes disciplinary actions and regulatory, judicial, and arbitration proceedings—in CRD®. *See* 15 U.S.C. § 78o-3(i)(5). Regulators use the information in CRD® in connection with their licensing and regulatory activities, and firms use it when making hiring decisions. *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081,*

[4] As of the date of this filing, the Commission had not granted Ingle's motion to amend his application for review.

Prohibited Conditions Relating to Expungement of Customer Dispute Information, 79 Fed. Reg. 43,809 (July 28, 2014). Additionally, FINRA releases much of the information in CRD® to the investing public through BrokerCheck®. *Id.* Regulatory and disciplinary actions are among the information maintained in CRD and publicly released through BrokerCheck®. *Id.*

The Commission has recognized that "[t]he completeness of information in the CRD . . . is critical for the protection of investors and effective regulatory oversight," and that when factual information is expunged from CRD®, "both regulators and the investing public are disadvantaged[.]" *Id.* at 43,812-813. Accordingly, the Commission has encouraged FINRA "to assure that expungement in fact is treated as an extraordinary remedy that is permitted only where the information to be expunged has no meaningful investor protection or regulatory value." *Id.* at 43,813.

B. DRS May Deny Forum for Inappropriate Arbitration Claims

DRS may decline to accept for arbitration any statement of claim whose subject matter is not appropriate for FINRA's forum. FINRA Rules 12203(a) and 13203(a) provide the Director of DRS with discretion to deny the forum for any claim that involves "inappropriate" subject matter given "the purposes of FINRA and the intent of the Code [of Arbitration Procedure]."[5] As the Commission stated in its order approving the rules, FINRA Rules 12203(a) and 13203(a) empower the Director to preserve the arbitration forum for claims that are consistent with its purpose. Specifically, the Commission noted that these rules "facilitate excluding cases from the [FINRA] arbitration forum that are beyond its mandate, allowing it to focus on cases that are appropriately in the forum." *Order Approving Proposed Rule Change and Amendments 1, 2, 3,*

[5] FINRA Rule 12203(a) applies to arbitrations involving customer disputes and FINRA Rule 13203(a) applies to arbitrations involving industry disputes.

and 4 to Amend NASD Arbitration Rules for Customer Disputes and Notice of Filing and Order Granting Accelerated Approval of Amendments 5, 6, and 7 Thereto, 72 Fed. Reg. 4574, 4602 (Jan. 31, 2007).

C. Ingle's Expungement Claim Is an Improper Collateral Attack on the AWC

1. Ingle Is Bound by the AWC

Ingle is bound by the AWC's findings. An AWC is a letter that a FINRA member or associated person executes to resolve alleged violations of FINRA rules prior to the issuance of a disciplinary complaint. See *Order Approving Proposed Rule Change Regarding Membership Application Procedures, Disciplinary Proceedings, Investigations and Sanctions Procedures*, Exchange Act Release No. 38908, 1997 SEC LEXIS 1617, at *99 (Aug. 7, 1997). It is a voluntary, negotiated resolution of a disputed matter. *See Notice of Filing of a Proposed Rule Change to Propose Changes in Membership Application Procedures, Disciplinary Proceedings, and Other Proceedings*, Exchange Act Release No. 38545, 1997 SEC LEXIS 959, at *24 (Apr. 24, 1997). It constitutes, upon FINRA's acceptance, "the complaint, answer, and decision in the matter." FINRA Rule 9216(a)(4).

By submitting the AWC, Ingle declined the opportunity to challenge the allegations against him regarding the proof-of-funds letters. Instead, to obtain the certainty of a result and avoid the cost and uncertainty of litigation, Ingle knowingly and voluntarily submitted the AWC and waived his right to contest the allegations against him in a FINRA disciplinary hearing. *See Richard D. Feldmann*, Exchange Act Release No. 77803, 2016 SEC LEXIS 1734, at *8 (May 10, 2016) ("[I]n all settlements, a party—by forgoing a trial on the merits—relinquishes any possibility of a more favorable outcome. However, settling parties achieve the certainty of avoiding a potentially worse outcome, while avoiding the time and expense of additional litigation."). Ingle, who was represented by counsel, "specifically and knowingly" waived his

OS Received 09/12/2022

right to have a complaint issued specifying the allegations against him, to answer that complaint in writing, and to appear before FINRA adjudicators to confront the allegations in a disciplinary hearing. (RP 103.) The AWC Disclosure accurately describes the AWC's findings and the sanctions imposed on Ingle.

The AWC Disclosure cannot be expunged. The Exchange Act requires FINRA to maintain and report information about regulatory and disciplinary actions taken against its members and their associated persons. 15 U.S.C § 78o-3(i). FINRA's Codes of Arbitration Procedure, which are codified in the 12000 and 13000 series of FINRA rules, provide only for the resolution of certain customer and industry disputes. *See* FINRA Rules 12200, 12201 (providing for arbitration of certain customer disputes); FINRA Rules 13200, 13201(a), 13202 (providing for arbitration of certain industry disputes). FINRA's Codes of Arbitration Procedure do not authorize the forum to consider other matters, including claims related to the expungement of regulatory actions. *See* FINRA Rules 12101(a), 13101(a) (providing that FINRA's Codes of Arbitration Procedure apply only to disputes eligible for arbitration under FINRA's rules).

2. Ingle's Expungement Claim Collaterally Attacks the AWC and AWC Disclosure

Ingle's expungement claim is an improper collateral attack on the AWC and the AWC Disclosure. *See Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (finding, during a review of a denial of a membership continuance application, that "[i]t is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made

against him").[6] In the AWC, Ingle consented to the entry of findings that he drafted both proof-of-funds letters and did so without Merrill's authorization. (RP 102.) Specifically, the AWC states that, in June 2015, Ingle "drafted and issued" an inaccurate and misleading proof-of-funds letter for Madison Marquette, and that in November 2015, he "drafted and issued" an inaccurate and misleading proof of funds letter for PE. (RP 102.) The AWC further states that, "[c]ontrary to [Merrill's] policies, Ingle did not submit either letter for review prior to sending." (RP 102.) The AWC finds that, by virtue of this conduct, Ingle violated FINRA Rule 2010. (RP 102.)

Ingle's expungement claim attacks the AWC's findings and the accurate description of those findings in the AWC Disclosure. In his statement of claim, contrary to the AWC's findings, Ingle alleges that he "was not involved with the creation" of the November 2015 proof-of-funds letter for PE," that he "did not provide the [l]etter," that he "had no involvement with the creation of the [l]etter," and that he "cannot and should not be penalized for the fraudulent actions of another, over which he had no control." (RP 3-5.) Ingle further alleges that the Termination Disclosure is defamatory because Ingle "did not provide an inaccurate proof-of-funds letter on behalf of a client," and that the Termination Disclosure tends to mislead because "it implies that [Ingle] committed acts of dishonesty or insubordination that rose to the level of being terminable offenses." (RP 6.) Ingle's denial of any responsibility for the November 2015

[6] *See also David C. Ho*, Exchange Act Release No. 54481, 2006 SEC LEXIS 2100, at *24 (Sept. 22, 2006) ("We have consistently rejected attempts by respondents to avail themselves of an appeal to the Commission in one proceeding to attack collaterally a prior administrative decision by a self-regulatory organization in another proceeding."); *Bruce Zipper*, Exchange Act Release No. 84334, 2018 SEC LEXIS 2709, at *29 (Oct. 1, 2018) ("Zipper's arguments are an impermissible collateral attack on the AWC.").

proof-of-funds letter forms the entire basis of his expungement claim. Ingle's expungement claim therefore is an improper collateral attack on the AWC and the AWC Disclosure.[7]

Ingle suggests that the Termination Disclosure and the AWC Disclosure do not arise from the same facts and circumstances because they appear under different occurrence numbers in CRD®. (*See* Ingle Brief at 5-6.) Ingle is incorrect. Occurrence numbers are assigned to each event that is reportable in CRD® and have no correlation to the underlying subject matter.[8] The Termination Disclosure and the AWC Disclosure appear under different occurrence numbers in CRD® because each is a separately reportable event. Merrill's termination of Ingle was one reportable event, and FINRA's acceptance of the AWC was another. *See* FINRA By-Laws Art. V, Section 3; FINRA Rule 4530. While these events were separately reportable, they both arise from the same facts and circumstances—Ingle's drafting and issuance of the inaccurate proof-of-funds letters—as DRS stated in its letter denying FINRA's forum.

C. DRS Properly Denied Forum Because Ingle's Collateral Attack on the AWC Because It Is Inappropriate for Arbitration

DRS properly denied forum for Ingle's expungement claim because the claim is inappropriate for arbitration. The subject matter of the claim, i.e., a collateral attack on the AWC, is not consistent with the purpose of the forum or the Code of Arbitration Procedure. *See*

---

[7] Ingle argues in his brief that he is not mounting a collateral attack against the AWC because his request for expungement "does not automatically mean that [he] is denying, directly or indirectly, any findings that are the subject of the AWC [D]isclosure." (Ingle Brief at 6.) The allegations in Ingle's statement of claim belie this assertion. The entire basis of Ingle's expungement claim is that he did not draft or issue any inaccurate proof-of-funds letters while registered with Merrill—the precise misconduct that underlies the AWC's findings.

[8] *See Web CRD® and IARD™ Training* at 2, available at https://www.finra.org/sites/default/files/AppSupportDoc/p124434.pdf (defining an "occurrence" as a "disclosure event that is reported" electronically to CRD® and explaining that each occurrence contains details regarding a specific disclosure event).

OS Received 09/12/2022

FINRA Rules 12203(a) and 13203(a) (stating that DRS may deny forum to any statement of claim that involves "inappropriate" subject matter given "the purposes of FINRA and the intent of the Code [of Arbitration Procedure]."). As the Commission has recognized, the purpose of the forum is to "provide speedy dispute resolution for members, their employees, and the public." *Eric M. Diehm*, 51 S.E.C. 938, 939 (1994). In this case, there is no dispute to be resolved in the forum. Ingle consented to the AWC's findings that he drafted and issued the inaccurate and misleading proof-of-funds letters. Ingle is bound by those findings. *Cf. Int'l Union of Operating Eng'rs, Local No. 714 v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676 (5th Cir. 1981) ("The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined."). Ingle's collateral attack on the AWC's findings is not consistent with the purpose of the forum or the Code of Arbitration Procedure.

DRS's decision to deny the arbitration forum for Ingle's expungement claim was necessary to ensure that an arbitrator did not make findings inconsistent with the AWC. Had DRS not denied forum, an arbitrator could have issued an award finding that Ingle did not draft and issue the inaccurate and misleading proof-of-funds letters, notwithstanding the AWC's findings to contrary. Such an award could have been used to mislead investors, regulators, and FINRA members into believing that Ingle did not engage in the misconduct found in the AWC. The only way for DRS to ensure that this did not happen was to deny forum for Ingle's expungement claim.[9] *Cf. Missud v. City & Cty. of S.F.*, No. 15-cv-05596-JCS, 2017 U.S. Dist. LEXIS 40799, at *36 n.13 (N.D. Cal. Mar. 21, 2017) (stating that "[f]actors that may be

[9] As the Commission has recognized, arbitration awards are final and not reviewable by FINRA. *See John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4263, at *10 (Oct. 22, 2019) (noting that "FINRA has only a ministerial role in preparing and serving the awards that arbitrators render," and that an "arbitrator's award is not subject to review or appeal by FINRA.").

OS Received 09/12/2022

considered to determine whether the assertion of defensive collateral estoppel is equitable include . . . the potential for inconsistent outcomes"). DRS's exercise of its authority to deny forum was necessary, appropriate, and authorized under FINRA Rule 13203(a).

Ingle contends that FINRA waived its ability to deny forum once DRS accepted his statement of claim. (Ingle Brief at 9.) However, DRS's initial acceptance of Ingle's statement of claim did not preclude DRS from subsequently taking corrective action to deny forum once it became aware of the AWC. *See Melvin Y. Zucker*, 46 S.E.C. 731, 733 (1976) ("A regulatory authority's failure to take early action neither operates as an estoppel against later action nor cures a violation.").

Even if DRS were subject to the doctrine of waiver, no waiver occurred here because Ingle failed to disclose "full information," i.e., the AWC, in his statement of claim. As Ingle states in his brief, a person cannot be charged with a waiver unless he or she has "full information of the material facts" at the time of the alleged waiver. (Ingle Brief at 9.) DRS was not immediately aware of the AWC because Ingle did not disclose it in his statement of claim, even though he was required to do so. FINRA Rule 13302(a)(a) provides that an arbitration claimant must file a statement of claim "specifying the relevant facts and remedies requested." A reasonable arbitrator would consider it relevant to Ingle's expungement claim that Ingle already had consented to the entry of findings that he drafted and issued the two inaccurate and misleading proof-of-funds letters in violation of FINRA Rule 2010, and that he consented to a $10,000 fine and 18-month suspension for this misconduct. Nevertheless, Ingle failed to disclose the AWC and its findings in his statement of claim. Ingle attempts to blame DRS for failing to take notice sooner of an AWC that he tried to conceal. The Commission consistently has rejected respondents' efforts to shift responsibility for their failures to FINRA, and the

OS Received 09/12/2022

Commission should do the same here. *Cf. Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 SEC LEXIS 558, at *22 (Feb. 13, 2015) ("The responsibility for complying with regulatory requirements cannot be shifted to regulatory authorities.")

V. Conclusion

DRS acted properly in denying forum for Ingle's statement of claim. FINRA rules authorize DRS to deny forum for any statement of claim that is inappropriate given the purposes of FINRA and the intent of the Code of Arbitration Procedure. Ingle's statement of claim is inappropriate for the forum because it collaterally attacks the AWC and could result in an award that is inconsistent with the AWC's findings. Such an award could mislead the public, regulators, and FINRA members about Ingle's involvement in drafting and issuing the inaccurate and misleading proof-of-funds letters. Accordingly, DRS's denial of forum was appropriate, and the Commission should dismiss Ingle's application for review.

Respectfully submitted,

/s/ Michael M. Smith

Michael M. Smith
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, D.C. 20006
202-728-8177 – Telephone
michael.smith@finra.org
nac.caseflings@finra.org

Dated: September 12, 2022

CERTIFICATE OF COMPLIANCE

I, Michael M. Smith, certify that this brief complies with SEC Rule of Practice 151(e) because it omits or redacts any sensitive personal information.

Respectfully submitted,

/s/ Michael M. Smith

Michael M. Smith
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, D.C. 20006
202-728-8177 – Telephone
michael.smith@finra.org
nac.caseflings@finra.org

CERTIFICATE OF SERVICE

I, Michael M. Smith, certify that on this 12th day of September, 2022, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, in the matter of the *Application 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:

Frederick Steimling, Esq.
Michael Bessette, Esq.
HLBS Law
9737 Wadsworth Parkway, Suite G-100
Westminster, CO 80021
frederick.steimling@hlbslaw.com
michael.bessette@hlbslaw.com

Respectfully submitted,

/s/ Michael M. Smith

Michael M. Smith
Associate General Counsel
FINRA – Office of General Counsel
1735 K Street, NW
Washington, D.C. 20006
202-728-8177 – Telephone
michael.smith@finra.org
nac.caseflings@finra.org