

**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

MR. INGLE’S REPLY BRIEF TO FINRA’S OPPOSITION BRIEF

I. INTRODUCTION

Applicant, David W. Ingle (“Mr. Ingle”) seeks Commission review of a determination by the FINRA Office of Dispute Resolution (“ODR”) to prohibit or limit Mr. Ingle’s access to the Financial Industry Regulatory Authority, Inc. (“FINRA”) arbitration forum (“FINRA Forum”), in violation of FINRA rules and Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”). 15 U.S.C. § 78s(d). FINRA has prohibited or limited Mr. Ingle’s access to a fundamentally important service that it offers – the ability to 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 challenging FINRA’s determination that Mr. Ingle’s claim is ineligible for arbitration. On August 4, 2022, Mr. Ingle submitted an Unopposed Motion to Amend

Application for Review.¹ Mr. Ingle submitted his Opening Brief in Support of the Application for Review on August 12, 2022. FINRA filed its Opposition to Mr. Ingle’s Application for Review (“FINRA’s Brief”) on August 12, 2022. Mr. Ingle now timely files this reply brief today September 26, 2022.

II. REPLY TO FINRA’S “FACTUAL BACKGROUND” SECTION IN ITS BRIEF

FINRA dedicates a significant portion of its opposition brief discussing cherry-picked portions of the underlying facts related to Mr. Ingle’s request for expungement. Resp. Br. at 3-8. Interestingly though, FINRA fails to include any reference to the witnesses’ testimony made under oath or the exhibits presented by Mr. Ingle at the expungement hearing. At this stage however, the facts to determine whether Mr. Ingle has satisfied the standard for expungement is irrelevant for purposes of this application for review by the Commission. Instead, FINRA again demonstrates in its brief the exact issue on appeal here: FINRA’s usurpation of the role of its neutral arbitrators when it reviews and interprets the facts of a claim made in its arbitration forum, then prohibits or limits access to its arbitration forum wherever it believes a claim asserted has no merit. This is a violation of its rules, the Exchange Act, and fundamental notions of due process and should not be permitted.

III. ARGUMENT

The Commission should not dismiss Mr. Ingle’s application for review. FINRA has not the standards under Section 19(f) of the Exchange Act, which requires: (1) the specific grounds upon which FINRA’s prohibition or limitation is based exist in fact; (2) that such prohibition or limitation is in accordance with FINRA rules; and (3) that those rules were applied in a manner consistent with the purposes of the Exchange Act. 15 U.S.C. § 78s(f).

¹ As of the date of this filing, the Commission has not yet ruled on Mr. Ingle’s Unopposed Motion to Amend Application for Review.

Mr. Ingle's statement of claim does not seek expungement of the AWC regulatory disclosure, nor is it a collateral attack on the AWC. Furthermore, the removal of this separate occurrence does not violate FINRA rules or the Exchange Act. FINRA has previously granted access to its forum for such hearings, therefore FINRA's decision to deny forum in this case is an inconsistent application of its rules and violation of the Exchange Act.² Additionally, by waiting until *after* the expungement hearing occurred, and allowing the case to proceed through its arbitration forum, FINRA waived its ability to deny Mr. Ingle access to its arbitration forum. FINRA has no valid justification consistent with its rules or the Exchange Act to limit or prohibit Mr. Ingle access to its arbitration forum, and thus, its decision to deny Mr. Ingle access in this case constitutes a violation of its rules and the Exchange Act.

A. Mr. Ingle Properly Pled the Standard for Expungement of Information from CRD.

Mr. Ingle does not dispute FINRA's assertions that information in the CRD is important, and that expungement is a remedy reserved to remove information with no meaningful value or under other circumstances. However, registered representatives are in fact permitted pursuant to FINRA rules to seek expungement of information in the CRD where the information is alleged to be inaccurate, misleading, false, clearly erroneous, factually impossible, defamatory in nature, or has no investor protection or regulatory value; allegations that Mr. Ingle made in his statement of claim. *See*, FINRA Rule, 2080, 8312(g); *see also*, CR³ 1-8. That determination should be made by a neutral arbitration panel, as FINRA's rules dictate, and not by FINRA's employees based on its one-sided review of the facts of the underlying claim.

B. FINRA May Only Deny Forum for Certain Claims, Under Limited Circumstances.

² *See, e.g., Eschleman v. Wells Fargo Clearing Services, LLC*, FINRA Dispute Resolutions Services, Case Number 20-02613 (Claimant was awarded expungement of a termination disclosure published on his CRD record even though facts giving rise to the termination disclosure were also the subject of an AWC with FINRA).

³ "CR ___" refers to the page number in the certified record.

Although FINRA is permitted under Rule 12203(a) and 13203(a) to deny access to its arbitration forum *in limited circumstances*, Mr. Ingle's claim was not one of them. FINRA's only argument as to why it denied him access to its forum (after they already granted him access) is that his claim for expungement of the termination disclosure Mr. Ingle shares similar facts to that of an AWC, and is thus, inappropriate. Notably, FINRA cites to no authority that permits the Director to deny forum on these grounds. Clearly, the subject matter is appropriate for FINRA's Forum as it pertains to the expungement of a disclosure from its regulatory databases that FINRA owns, maintains, and operates. This service offered by FINRA has been determined by the Commission to be a "fundamentally important" service. *See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 (August 6, 2020)* ("Consolidated Matter"). Instead, FINRA wishes that the Commission grant it *carte blanche* authority to make its own independent determination on the merits of an expungement request, without the need for a hearing or due process, and unilaterally rule that expungement is not warranted whenever it believes. Such authority is not permitted under the Exchange Act or under FINRA rules.

C. Mr. Ingle's Expungement Claim Is not a Collateral Attack on the AWC.

Mr. Ingle is not seeking expungement of the AWC disclosure, and his expungement claim is not a collateral attack on the AWC or the AWC regulatory disclosure. Again, Mr. Ingle's claim for expungement is of a separate and distinct occurrence from the AWC and regulatory disclosure. It is undisputed that the termination disclosure that Mr. Ingle seeks expungement of and the AWC regulatory disclosure (that Mr. Ingle does *not* seek expungement of) were reported on separate dates, by separate entities, involving separate reporting forms, were assigned separate occurrence numbers, contain separate and distinct language, and each occurrence has its own distinct disclosure on Mr. Ingle's CRD and BrokerCheck reports. *See, Resp. Br. at 14; see also, CR 96-97,*

116-121. Moreover, an attack on the AWC would require Mr. Ingle to pursue a vacatur, reversal, or otherwise destruction of the effect of the AWC.⁴ Seeking expungement of a separate occurrence is not a collateral attack because expungement of the termination disclosure would have no effect on the existence of the AWC, the prior sanctions imposed, or on the regulatory disclosure of the AWC.

An AWC is a settlement agreement whereby a party agrees, *without admitting to the findings or to liability*, that they are willing to forgo an evidentiary hearing on the merits in order to accept the terms of the settlement agreement. In this case, Mr. Ingle did just that – he agreed to settle a matter *with FINRA* in exchange for not having to further litigate the issue. Specifically, pursuant to the terms of the AWC, Mr. Ingle agreed to the following: “I hereby accept and consent, *without admitting* or denying the findings, and *solely for the purposes of this proceeding* and any other proceeding brought by or on behalf of FINRA, or to which FINRA is a party...to the entry of the following findings by FINRA:”. CR 101 (emphasis added). Therefore, although Mr. Ingle consented to the findings in the AWC, he did not admit to them, and his consent was solely for the purposes of that proceeding. *Id.* If FINRA is given unfettered discretion to usurp the role of its arbitrators and prohibit or limit its members and associated persons from accessing its arbitration forum based solely on its own interpretation of the facts, then seeking expungement of any customer dispute or termination disclosure that involves a settlement would be in jeopardy, as well as any claim that FINRA deems lacking in merit.

⁴A “collateral attack” on a judgment is an effort to obtain another and independent judgment which will destroy the effect of the former judgment. *Duncan v. Progressive Preferred Ins. Co. ex rel. Est. of Pop*, 228 Ariz. 3, 261 P.3d 778 (Ct. App. 2011).

D. FINRA improperly Denied Forum to Mr. Ingle's Claim.

FINRA claims that seeking expungement of a termination disclosure that addresses facts similar to that of an AWC "is not consistent with the purpose of the forum or the Code of Arbitration Procedure" because "there is no dispute to be resolved. Resp. Br. at 14-15. However, again, a finding by FINRA that Mr. Ingle drafted and issued inaccurate and misleading proof-of-funds letters does not negate the fact that Mr. Ingle is still entitled to seek expungement of a separate occurrence stating that he was terminated from a broker-dealer firm. Contrary to FINRA's assertion, there is a dispute here: whether the termination disclosure should be permanently present on Mr. Ingle's CRD and BrokerCheck records. Seeking resolution of that dispute *is* consistent with FINRA's forum and the Code of Arbitration Procedure, because these types of claims are specifically permitted. *See*, FINRA Rules 2080 and 8312(g); *see also*, *Consolidated Matter*.

Furthermore, even if FINRA did have the ability to deny forum under these circumstances, it waived that ability after it already granted Mr. Ingle access to its forum. FINRA's claim that it was not aware of the AWC, an agreement it entered into, and which is publicly displayed on Mr. Ingle's CRD and BrokerCheck, defies credulity. Resp. Br. at 16. Mr. Ingle fully complied with FINRA Rule 13302(a)(2) when he submitted his statement of claim⁵ and was not required to disclose the existence of the AWC in his statement of claim. Nevertheless, FINRA was clearly on notice of its existence, since FINRA was a party to the agreement. The existence of the AWC and its link to the disclosure Mr. Ingle sought expungement of were also disclosed in the statement of answer and attached as an exhibit that was filed with FINRA months before its denial of forum notice. CR 31; 100-105. Mr. Ingle's BrokerCheck report was also filed with FINRA. CR 106-122.

⁵ *See*, FINRA Rule 13302: To initiate an arbitration, a claimant must file the following with the Director:

- (1) Signed and dated Submission Agreement; and
- (2) A statement of claim specifying the relevant facts and remedies requested.

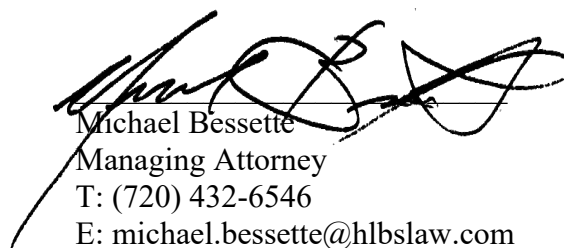
CONCLUSION

FINRA acted improperly in denying the forum for Ingle's statement of claim after already granting access and allowing a hearing on the merits. Mr. Ingle's statement of claim does not collaterally attack the AWC nor does it seek expungement of the AWC regulatory disclosure. FINRA violated the Exchange Act, its own rules, and fundamental notions of due process when it denied Mr. Ingle's request for expungement through its forum.

For these reasons, Mr. Ingle submits this Reply Brief requesting that he be permitted to have his expungement request in FINRA Case Number 21-00345 resubmitted to the arbitration panel 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: September 26, 2022

Respectfully submitted,



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

CERTIFICATE OF SERVICE

I, Michael Bessette, certify that on September 26, 2022, I caused a copy of the foregoing Reply 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:

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

Michael M. Smith
Associate General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
michael.smith@finra.org
nac.casefilings@finra.org

Jennifer Brooks
Associate General Counsel
jennifer.brooks@finra.org

Celia Passaro
Associate General Counsel
Ersilia.Passaro@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

[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.



Michael Bessette

Managing Attorney

T: (720) 432-6546

E: michael.bessette@hlbslaw.com

HLBS Law

9737 Wadsworth Pkwy, Ste. G-100

Westminster, CO 80021