BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Mark Kipling Durham

For Review of Action Taken by

FINRA

File No. 3-21981

FINRA'S BRIEF IN OPPOSITION TO DURHAM'S APPLICATION FOR REVIEW AND MOTION TO ADDUCE ADDITIONAL EVIDENCE

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I. INTRODUCTION

Applicant Mark Kipling Durham requests Commission review of a determination by FINRA's Director of Dispute Resolution Services ("DRS") that his request to expunge a regulatory matter from his record in the Central Registration Depository ("CRD"®) and BrokerCheck® is ineligible for arbitration. The Commission has recently ruled on the precise issue here—whether it has jurisdiction to review this type of action by the DRS Director—and held that it does not have jurisdiction because expungement of a regulatory disclosure is not a service offered by FINRA.[1]

Not only does FINRA not offer the service Durham seeks, but FINRA's rules permit arbitration of only customer or industry disputes. Durham seeks expungement of disclosures of a

[1] *See Michael Andrew DeMaria*, Exch. Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023).

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regulatory matter initiated by FINRA's predecessor, the National Association of Securities Dealers ("NASD"), which Durham chose to settle. The jurisdictional provision providing Commission jurisdiction based on a prohibition or limitation on access to a service does not apply because FINRA does not offer the relevant service. Because expungement of a disciplinary disclosure is not a service FINRA offers, and no other statutory basis for Commission jurisdiction applies, the Commission should dismiss the application for review.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Mark Kipling Durham

Mark Kipling Durham entered the securities industry in 1988 when he associated with PaineWebber, Inc. RP 34.[2] Durham registered as a general securities representative in 1988 and as general securities principal in 1991. RP 32-33. In June 1991, Durham associated with LPL Financial LLC, his current member firm. *Id.*

B. Durham Settles a FINRA Regulatory Action

In August 1992, NASD commenced a regulatory action against Durham alleging that he violated NASD rules in connection with his recommendations of a government trust (the "1992 Regulatory Action"). RP 38-39. Specifically, NASD alleged that Durham violated NASD rules when he "induced public customers to purchase securities by means of manipulative, deceptive, or other fraudulent devices." *Id.*

In April 1994, Durham settled the 1992 Regulatory Action. RP 38-40. Pursuant to the settlement, Durham agreed to sanctions of a censure, a $5,000 fine, and a five-day suspension

[2] "RP __" refers to the page number in the certified record filed by FINRA on August 12, 2024. "Durham Br. at __" refers to Durham's October 17, 2024 brief in support of his application for review. "Durham Motion at __" refers to Durham's Motion to Adduce Additional Information.

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from associating with a member in any capacity.[3] *Id.* The settlement was reported on Durham's CRD report through a Uniform Application for Securities Industry Registration or Transfer ("Form U4") filed by his firm and a Uniform Disciplinary Action Reporting Form ("Form U6") filed by NASD.[4] *Id.* The disclosure is reflected in CRD as occurrence number 6228.[5]

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[3] Because this settlement occurred more than 30 years ago, FINRA has been unable to locate a copy of the settlement document. Thus, the description of the settlement is based on the disclosures about it in Durham's CRD record. Durham has moved to adduce an offer of settlement, which he cites as his settlement with NASD. Durham Br. at 4. *See* Exhibit 1 to Durham's Motion to Adduce. The document Durham cites, however, is an offer of settlement prepared and executed by Durham's representative at the time, and Durham provides no evidence that his offer was accepted by NASD. To the contrary, the description of the settlement in CRD demonstrates that this was not the basis of Durham's settlement with NASD. As the disclosure explains, the regulatory action was resolved by a decision and order of offer of settlement, that Durham "consented to . . . the entry of findings," and that Durham ultimately consented to a censure, $5,000 fine, and five-day suspension from associating with any NASD member—*not* the letter of caution and $1,000 fine proposed by Durham in the document he moves to adduce. RP 39-40.

[4] CRD is a database that contains information about broker-dealers and their representatives, including information about certain regulatory actions. *See Order Approving Proposed Rule Change Relating to Release of Certain Information Regarding Disciplinary History of Members & Their Associated Persons Via Toll-Free Telephone Listing*, Exchange Act Release No. 30629, 57 Fed. Reg. 18535 n.3 (Apr. 30, 1992) (SR-NASD-91-39). Generally, the information in CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms, which member firms are required to file in certain circumstances. *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, Exchange Act Release No. 72649, 79 Fed. Reg. 43809 (July 28, 2014) (SR-FINRA-2014-020). The Commission may take official notice of the Form U4 and Form U6 at issue in CRD. *See* Rule of Practice 323, 17 C.F.R. § 201.323 (regarding taking of official notice); *James Lee Goldberg*, Exchange Act Release No. 66549, 2012 SEC LEXIS 762, at *3 n.2 (Mar. 9, 2012) (taking official notice of information in CRD).

[5] The occurrence number is FINRA's internal number used in CRD to identify each disclosure. Occurrence numbers do not appear in the publicly available BrokerCheck. *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. 43809 (describing BrokerCheck and its relationship to the CRD®); FINRA Rule 8312 (describing the information released on BrokerCheck).

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C. The DRS Director Denies Durham Access to FINRA's Arbitration Forum

Thirty years later, in June 2024, Durham submitted a statement of claim and submission agreement with DRS seeking to commence an arbitration. RP 1-16. Durham's statement of claim names NASD as the respondent and requests expungement of information concerning the 1992 Regulatory Action from his CRD and BrokerCheck. *Id.*

Exercising his authority under FINRA Rule 13203, the DRS Director declined to accept Durham's statement of claim for arbitration.[6] In a June 12, 2024 letter, DRS notified Durham that the Director denied him the arbitration forum for his expungement request because "FINRA rules do not contemplate expungement of this type of disclosure; and as a result, this matter is ineligible for expungement." RP 25. DRS's denial letter was signed by the DRS Director. *Id.* On July 12, 2024, Durham filed this application for review with the Commission.[7] RP 41-42.

IV. ARGUMENT

The Commission should dismiss Durham's application for review because it lacks a statutory basis to exercise jurisdiction. The Commission's authority to review a FINRA action is governed by Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act"). 15 U.S.C. § 78s(d); *Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 954-55 (2004). Specifically, Section 19(d) authorizes the Commission to review a FINRA action that: (1) imposes a final disciplinary sanction on any FINRA member or any person associated with a FINRA member; (2) denies

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[6] FINRA Rule 13203(a) provides, in part, that the "Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate."

[7] On October 17, 2024, Durham filed with the Commission his Brief in Support of the Application for Review but did not serve a copy on FINRA. Days later, FINRA obtained a copy of the brief from the Commission's website. After contacting Durham's counsel, FINRA received a copy of Durham's Motion to Adduce and the attached exbibits on October 28, 2024.

membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by FINRA or any FINRA member; or (4) bars any person from becoming associated with a FINRA member. 15 U.S.C. § 78s(d)(1)-(2). None of these jurisdictional bases is present here.

It is undisputed that three of the Section 19(d) jurisdictional bases do not apply to this matter. FINRA's determination that Durham's claim is not eligible for arbitration did not impose on Durham a final disciplinary sanction, deny him membership or participation, or bar him from becoming associated with a member. As discussed below, the remaining jurisdictional ground—prohibiting or limiting Durham's access to a service FINRA offers—is equally inapplicable. Because all possible grounds for jurisdiction under Exchange Act Section 19(d) are absent, the Commission should dismiss Durham's application for review. *See Allen Douglas Sec. Inc.*, 57 S.E.C. at 954-55.

A. The Commission Should Dismiss the Application for Lack of Jurisdiction Because FINRA Did Not Prohibit or Limit Access to a Service It Offers

To establish jurisdiction under Section 19(d)(1), Durham "must establish that FINRA offers the service that he 'faults FINRA for failing to provide.'" *DeMaria*, 2023 SEC LEXIS 1271, at *7 (quoting *Constantine Gus Cristo*, Exch. Act Release No. 86018, 2019 SEC LEXIS 1284, at *12-13 (June 3, 2019)). Durham has not met this burden. Durham seeks access to FINRA's arbitration forum to expunge disclosures about NASD's 1992 Regulatory Action against him and his settlement of those claims. As the Commission held in *DeMaria*, FINRA does not offer this service. *DeMaria*, 2023 SEC LEXIS 1271, at *2.

Notwithstanding the Commission's holding in *DeMaria*, Durham asserts that FINRA denied him use of a "fundamentally important service" offered by FINRA. Durham Br. at 10-11. Durham's argument, however, relies on a faulty reading of a prior Commission decision in

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Consolidated Arbitration Applications, Exch. Act Release No. 89495, 2020 SEC LEXIS 3312 (Aug. 6, 2020). In that matter, the Commission found that it had jurisdiction to review FINRA's action denying applicants access to its arbitration forum to seek the expungement of prior adverse arbitration awards arising from customer disputes. *Id*. at *1, 6. As explained by the Commission in *DeMaria*, however, the Commission's broad statement in *Consolidated Arbitration Applications* that "FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO" referenced requests to expunge customer dispute information—not regulatory action information. *DeMaria*, 2023 SEC LEXIS 1271, at *7 n. 25 (quoting *Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *4). Indeed, in *Consolidated Arbitration Applications*, "[the Commission] specifically reserved the question of 'whether there could be other circumstances' where [the Commission] would lack authority 'to review an arbitration eligibility determination.'" *Id*. at *7 n.25 (quoting *Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *6). The Commission encountered these "other circumstances" in *DeMaria*, in which the Commission directly addressed the issue of its jurisdiction in the context of a request to expunge regulatory action disclosures and held that "FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information." *Id*. at *2.

Durham's effort to distinguish *DeMaria* from this case is unpersuasive. Durham argues that because he did not settle the 1992 Regulatory Action through a Letter of Acceptance, Waiver and Consent ("AWC") pursuant to which an applicant consents to findings and waives certain rights, the *DeMaria* holding does not apply here. Durham Br. at 10-11. But Durham makes no cogent argument about why the Commission's jurisdiction should turn on how a regulatory action was resolved. In *DeMaria*, the Commission held that FINRA does not offer

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the service of expunging through arbitration regulatory action information. The fact that a regulatory action may have been resolved through litigation, an AWC, a decision and order of offer of settlement, or other process has no bearing on this holding.[8]

Durham acknowledges that FINRA rules explicitly authorize the expungement of customer dispute information only, but he argues that FINRA Rule 8312 and principles of equity provide a basis for the expungement of regulatory action information. Durham Br. at 8-10. Durham's arguments are baseless. First, Durham, like the applicant in *DeMaria*, misreads FINRA Rule 8312. Durham Br. at 8-9. As explained by the Commission in *DeMaria*, FINRA Rule 8312 does not discuss or otherwise provide for expunging information from CRD through arbitration. *DeMaria*, 2023 SEC LEXIS 1271, at *8. Rather, the rule sets forth the kinds of information that *FINRA*, not arbitrators, may exclude from BrokerCheck, including "information that contains . . . offensive or potentially defamatory language." *See* FINRA Rule 8312; *see also DeMaria*, 2023 SEC LEXIS 1271, at *8 (quoting FINRA Rule 8312). "And even if arbitrators [in FINRA's arbitration forum] have sometimes cited Rule 8312 in granting expungement of non-regulatory action information, an arbitrator's interpretation of Rule 8312 has no precedential effect on [the Commission's] determination of whether that rule establishes that FINRA's arbitration forum provides a means to seek expungement of regulatory action information." *DeMaria*, 2023 SEC LEXIS 1271, at *8-9. Thus, as the Commission held, FINRA Rule 8312 is not a means to seek expungement in the arbitration forum.

[8] Durham also again mischaracterizes the sanction to which he agreed in connection with the 1992 Regulatory Action, claiming, without support, that it consisted of a letter of caution and "nominal fine" of $1,000. Durham Br. at 4. The CRD disclosure states, however, that Durham agreed to a censure, $5,000 fine, and five-day suspension to settle the 1992 Regulatory Action. RP 39-40.

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Durham also argues, without a citation to any binding authority, that FINRA authorizes equitable expungement of regulatory action information. Durham Br. at 8-9. Instead of citing a FINRA rule or Commission precedent, Durham relies on broad statements in general FINRA guidance discussing how associated persons can expunge certain intra-industry dispute information through FINRA arbitration. Durham Br. at 9-10. None of the guidance Durham cites discusses the expungement of regulatory action information.

For example, Durham points to FINRA Notice to Members 99-09, pursuant to which FINRA imposed a moratorium on the expungement of "certain information" from CRD that is ordered by arbitrators. NASD Notice to Members 99-09, 1999 NASD LEXIS 79, at *1-2 (Feb. 1999). Specifically, the Notice states that FINRA would expunge information from CRD based on a directive contained in an arbitration award, rendered in a dispute between a public customer and a firm or an associated person, only if the award had been confirmed by a court of competent jurisdiction. *Id.* While the Notice references expungement of non-customer dispute information from CRD, the Notice does not explicitly discuss the expungement of regulatory action information. *See id.; DeMaria*, 2023 SEC LEXIS 1271, at *9 & *9 n.29. Similarly, in FINRA Notice to Members 99-54, FINRA states its belief that "ordering expungement from CRD of information that is found to be defamatory, misleading, inaccurate, or erroneous, is equitable in nature and within an arbitrator's authority." NASD Notice to Members 99-54, 1999 NASD LEXIS 30, at *13 (July 1999). However, nothing in that Notice discusses the expungement of regulatory action information, let alone authorizes arbitrators to order the expungement of regulatory action information.[9] *See id.*; *DeMaria*, 2023 SEC LEXIS 1271, at *9. The

[9] Durham's citations to *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) and *Kelly Sutherlin Mcleod Architecture, Inc. v. Schneickert*, 194 Cal. App. 4th 519 (Cal. Ct. App. 2011)

[Footnote continued on next page]

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Commission rejected these arguments in *DeMaria* and should do so here. *See DeMaria*, 2023 SEC LEXIS 1271, at *9 & *9nn.29-31.

Moreover, Durham conveniently ignores other FINRA guidance that explicitly states that regulatory action information is not eligible for expungement through arbitration. *See* FINRA, The Neutral Corner, Vol. 4 – 2013, at 7-8, https://www.finra.org/sites/default/files/Publication/p410646.pdf (identifying regulatory actions among the list of disclosure types that may not be expunged through arbitration and stating that "[regulatory actions] are ineligible for expungement from the CRD system through arbitration" and that "arbitration panels should deny all requests they receive for the expungement of any of these disclosure events.").

Tacitly acknowledging the weakness of his argument that FINRA offers the service of expunging regulatory action information in its arbitration forum, Durham also argues that FINRA "should offer" this service. *See* Durham Br. at 8. To support this argument, Durham cites Exchange Act Section 15A(b)(6), which provides that FINRA rules must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and in general, to protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6); Durham Br. at 10. As the Commission held in *DeMaria*, however, Durham fails to present any argument that this general provision "explicitly or even implicitly requires FINRA to offer the service of using its arbitration forum to seek expungement of regulatory action information." *DeMaria*, 2023 SEC LEXIS 1271, at *9. Moreover, the Commission lacks authority under Exchange Act Section 19(d) to consider whether FINRA failed to offer a service that the Exchange Act allegedly requires FINRA to offer. *See* 15 U.S.C. § 78s(d)(1)-(2); *see also*

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are equally unpersuasive. Those cases merely address the broad authority of arbitrators to order equitable relief, not the expungement of regulatory action information in FINRA's arbitration forum. Durham Br. at 9.

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DeMaria, 2023 SEC LEXIS 1271, at *9 n.32; *Johnathan Edward Graham*, Exch. Act Release No. 89237, 2020 SEC LEXIS 2670, at *7-8 (July 7, 2020); *Cristo*, 2019 SEC LEXIS 1284, at *12-13.

Durham's remaining arguments similarly lack merit and do not alter the fact that the Commission lacks jurisdiction over his application for review. First, Durham misinterprets FINRA rules to assert that he is required to seek the expungement of regulatory information in FINRA's arbitration forum. Durham Br. at 8. FINRA Rule 13200 expressly limits intra-industry arbitration to disputes between or among members, members and associated persons, or associated persons. FINRA Rule 13200(a). Durham's statement of claim here is not an intra-industry dispute. Durham's claim does not challenge any action taken by his former firm or any other FINRA member. RP 3. Rather, Durham's claim names *NASD* and seeks expungement of NASD's 1992 Regulatory Action and the required disclosures related to that action. FINRA Rule 13200 therefore does not apply to this case.

Next, Durham claims it is significant that FINRA rules do not explicitly prohibit the expungement of regulatory action information. Durham Br. at 10. It is not. The issue here is whether FINRA offers the service of using its arbitration forum to request expungement of regulatory action information. The Commission held that FINRA does not offer this service. *See DeMaria*, 2023 SEC LEXIS 1271, at *2.

Durham also claims that "FINRA has long-recognized [sic] and allowed expungement requests for such disclosures time and time again." Durham Br. at 9-10. Durham is incorrect. In certain instances, FINRA accepts for arbitration claims seeking the expungement of termination disclosures. These claims are brought against the FINRA member that made the termination disclosure—not FINRA. To state the obvious, the fact that FINRA permits some arbitration

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claimants to use FINRA's arbitration forum to request expungement of termination disclosures does not demonstrate that FINRA offers a similar service to request expungement of regulatory information through its arbitration forum.

Durham raises various arguments about why FINRA's action denying use of its arbitration forum should be set aside. Durham Br. at 12-14. For example, Durham argues that FINRA did not act in accordance with its rules when the Director denied him access to FINRA's arbitration forum because the Director is authorized to deny the forum only in "emergency situations," and the Director overstepped his authority when he determined that the subject matter was inappropriate for FINRA's arbitration forum. Durham Br. at 12-13. Durham also suggests that the 1992 Regulatory Action information should be expunged because the customer complaint that purportedly led to the regulatory action was expunged in FINRA's arbitration forum.

The Commission should not consider Durham's arguments on the merits because it lacks authority to review FINRA's action. *See DeMaria*, 2023 SEC LEXIS 1271, at *10-11 (declining to consider the applicant's arguments on the underlying merits of why regulatory information should be expunged or why FINRA's action should otherwise be set aside under Section 19(f)); *Dustin Tylor Aiguier*, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430, at *7 (May 26, 2020) (explaining that "arguments regarding the merits do not create jurisdiction under Section 19(d)(2)"); *John Boone Kincaid III*, Exch. Act Release No. 87384, 2019 SEC LEXIS 4189, at *14 (Oct. 22, 2019) (explaining that an application for "review must first satisfy the jurisdictional requirements of Section 19(d) before the Commission can review the action under Section 19(f)").

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In any event, Durham's merits arguments are baseless. The Commission has held that "emergency or unusual circumstances" are not required for the Director to deny access to FINRA's arbitration forum. *See, e.g., Consolidated Arbitration* Applications, Exch. Act Release No. 97248, 2023 SEC LEXIS 868, at *17 (Apr. 4, 2023) ("Nothing . . . suggests that emergency or unusual circumstances are required when denying access based on a determination that the subject matter is inappropriate for arbitration, the basis on which the Director denied access to applicants.").[10] And the expungement of the underlying customer complaint does not mean that NASD's regulatory action was flawed or that the 1992 Regulatory Action disclosure should be expunged. FINRA's regulatory actions are separate from FINRA's role as an arbitration forum provider for securities-related disputes between brokers, their firms, and customers. *See* FINRA Rule 9000 Series (governing FINRA's disciplinary proceedings), FINRA Rules 12200, 12201 (providing for arbitration of certain customer disputes); FINRA Rules 13200, 13201(a), 13202 (providing for arbitration of certain industry disputes); *see also Loftus v. FINRA*, No. 20-CV-7290 (SHS), 2021 U.S. Dist. LEXIS 18823, at *9 (S.D.N.Y. Feb. 1, 2021) ("[FINRA's dispute resolution forum] exists to facilitate the resolution of private securities disputes, not FINRA disciplinary actions."). In Durham's case, a single arbitrator ordered expungement of the customer dispute information in an arbitration at which Durham was the only witness, the respondent (Durham's firm) did not oppose the expungement request, and none of the customers from 30 years ago testified. *See In the Matter of the Arbitration Between: Mark Kipling Durham*

[10] *See also James Thomas Young*, Exch. Act Release No. 101273, 2024 SEC LEXIS 2656, at *7-8 (Oct. 8, 2024) (dismissing applicant's contention that interpreting FINRA rules is within "the exclusive domain of the arbitrator" because "FINRA Rules 12203(a) and 13203(a) provide the Director with authority to determine whether the subject matter of a dispute is inappropriate for arbitration given the intent of the FINRA Arbitration Codes, which necessarily requires the Director to interpret the FINRA Arbitration Codes.").

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v. Kidder, Peabody & Co., 2023 FINRA ARB. LEXIS 888 (Dec. 13, 2023). The outcome of the customer dispute expungement request does not mean that NASD's regulatory action, which Durham settled by agreeing to the entry of findings and sanctions, should be expunged.

Moreover, Durham waived his right to litigate the merits of NASD's 1992 Regulatory Action and to appeal any adverse findings to the Commission. Instead of litigating the charges against him, Durham chose to settle the action and consent to the entry of findings and sanctions. He cannot undo that decision 30 years later. The fact that Durham now lacks any avenue to obtain expungement relief does not provide the Commission with jurisdiction under Exchange Act Section 19(d). *See DeMaria*, 2023 SEC LEXIS 1271 at*10 ("And while DeMaria suggests that he now lacks any avenue for obtaining expungement relief, even if true, that does not provide grounds for us to review under Exchange Act Section 19(d).").

Removal of regulatory action information from CRD is antithetical to the principle of investor protection. Information expunged from CRD "is no longer available to regulators, broker-dealers, or the investing public," and "regulators and the investing public are disadvantaged when factual information is removed from the CRD." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. 43809, 43813. Such information is reliable and "relevant to investors and members of the public who wish to educate themselves with respect to the professional history of a formerly associated person." *Order Approving a Proposed Rule Change Relating to Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, Exchange Act Release No. 61002, 74 Fed. Reg. 61193, 61196 (Nov. 23, 2009) (SR-FINRA-2009-050). Allowing expungement of regulatory information would undermine these important investor protection goals.

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Finally, Durham argues that the Director's decision denied him due process under the Fourteenth Amendment. Durham Br. at 13-14. Because FINRA is not a part of the government or otherwise a state actor, however, the requirements of constitutional due process do not apply. *See, e.g.*, *Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the [FINRA], because '[FINRA] is a private actor, not a state actor.'"); *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999) (finding that "[FINRA] is a private actor, not a state actor").

FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information. *See DeMaria*, 2023 SEC LEXIS 1271, at *2. Because FINRA does not offer the service Durham seeks, the Commission lacks jurisdiction over Durham's application for review and should dismiss it. *See id*. at *11 (dismissing the application for review where the applicant could not establish that FINRA prohibited or limited his access to a service it offers); *Cristo*, 2019 SEC LEXIS 1284, at *12-14 (same); *Kincaid III*, 2019 SEC LEXIS 4189, at *9-10, 20 (same).[11]

B. The Commission Should Deny Durham's Motion to Adduce Additional Evidence

The Commission should deny Durham's motion to adduce extraneous, immaterial evidence into the record. Commission Rule of Practice 452 states that the "Commission may accept or hear additional evidence . . . as appropriate." 17 C.F.R. § 201.452. Under Rule 452, Durham must establish "that there were reasonable grounds for [his] failure to adduce such

[11] Because FINRA does not offer the service of expunging regulatory action information through arbitration, the Commission need not consider whether that service is fundamentally important. *See DeMaria*, 2023 SEC LEXIS 1271, at *10-11; *Cristo*, 2019 SEC LEXIS 1284, at *12-14; *Kincaid III*, 2019 SEC LEXIS 4189, at *9-10 & n.13.

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evidence previously" *and* "show with particularity that such additional evidence is material." *Id*. Durham has not met this burden.

Durham has not established that the evidence he seeks to introduce is material to the issue on appeal—i.e., whether FINRA offers the service of expunging regulatory action information through its arbitration forum. The first exhibit appears to be an offer of settlement by Durham to settle NASD's claims. There is no evidence this offer of settlement was accepted by NASD and therefore it is wholly irrelevant to this appeal.[12] Exhibits two, three and four concern Durham's successful claim to expunge customer dispute information from his CRD record in FINRA's arbitration forum. There is no dispute that FINRA's rules allow expungement of this type of information from CRD through its arbitration forum and that Durham did so for this customer dispute information. The fifth and sixth exhibits contain examples of expungements of termination disclosures and a criminal disclosure through the arbitration forum.[13] None of these exhibits, however, are relevant to or contradict the Commission's previous holding that FINRA does not offer the service of using its arbitration forum to expunge regulatory action information.

Durham offers these documents for the purpose of arguing on the merits that FINRA should offer the service of expunging regulatory action information and that the NASD's 1992

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[12] As discussed in Footnote 3 above (*see supra* p. 3), the document Durham requests to adduce does not appear to be the basis of the disclosed settlement of the 1992 Regulatory Action. The CRD disclosure states that Durham ultimately consented to a censure, $5,000 fine, and five-day suspension from associating with any NASD member; not the letter of caution and $1,000 fine proposed by Durham in the document he provides. RP 39-40.

[13] The current Forms U4, U5, and U6 contain separate sections for Criminal Disclosure. *See* FINRA, *Form U4*, https://www.finra.org/sites/default/files/form-u4.pdf; FINRA, *Form U5*, https://www.finra. org/sites/default/files/form-u5.pdf; FINRA, *Form U6*, https://www.finra.org/sites/default/files/AppSupportDoc/p116975.pdf. Thus, a criminal action disclosure is not the same thing as a regulatory action disclosure with respect to the Form U4 or Form U6.

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Regulatory Action information should be expunged. Durham Motion at 3-4. But for the reasons explained herein, Durham's arguments as to the merits cannot be considered by the Commission because it lacks jurisdiction under Exchange Act Section 19(d). *See* 15 U.S.C. § 78s(d)(1)-(2); *see also DeMaria*, 2023 SEC LEXIS 1271, at *10-11; *Aiguier*, 2020 SEC LEXIS 1430, at *7; *Kincaid III*, 2019 SEC LEXIS 4189, at *4.

Because Durham's proposed exhibits are not material to the issue on appeal—i.e., whether the Commission has jurisdiction to consider this matter—Durham has not met his burden under Commission Rule of Practice 452. Accordingly, the Commission should deny the Motion to Adduce.

V. CONCLUSION

The Commission should dismiss Durham's appeal on the grounds that it lacks jurisdiction to hear it. FINRA did not prohibit or limit Durham from accessing a service it offers because, as the Commission previously held, FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information. Accordingly, the Commission lacks jurisdiction under Exchange Act Section 19(d). The Commission should also deny Durham's Motion to Adduce because the documents Durham has offered are not relevant or material to the issue of jurisdiction.

Respectfully submitted,

[redacted]

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CERTIFICATE OF COMPLIANCE

I, Celia Passaro, 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).

I, Celia L. Passaro, further certify that this brief complies with the length limitation set forth in Commission Rule of Practice 450(c). I have relied on the word count feature of Microsoft Word in verifying that this brief contains 4,879 words, exclusive of the pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions, or rules and exhibits.

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CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 18th day of November 2024, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review, in the matter of the Application for Review of Mark Kipling Durham, Administrative Proceeding File No. 3-21981, to be filed through the SEC's eFAP system.

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