

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

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In the Matter of the Application Of  
  
MARK KIPLING DURHAM  
  
For Review of Action Taken By  
  
FINRA  
  
File No. 3-21981

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**MARK KIPLING DURHAM’S REPLY TO FINRA’S BRIEF IN OPPOSITION TO THE  
APPLICATION FOR REVIEW AND FINRA’S OPPOSITION TO THE MOTION TO  
ADDUCE ADDITIONAL EVIDENCE**

Applicant, Mark Kipling Durham (“Mr. Durham”) seeks Commission review of an action taken by the Financial Industry Regulatory Authority, Inc. (“FINRA”) whereby FINRA denied Mr. Durham access to the FINRA Dispute Resolution Arbitration Forum (“FINRA’s Forum”). After Mr. Durham filed a Statement of Claim seeking expungement of a regulatory disclosure, Occurrence Number 6228 (the “Regulatory Disclosure”) from his Central Registration Depository (“CRD”) record, FINRA issued a notice (“Denial Notice”) purportedly pursuant to FINRA Code of Arbitration for Industry Disputes (“FINRA Rules”) Rule 13203(a) stating that it denied Mr. Durham access to FINRA’s Forum on the grounds that Mr. Durham’s claim for expungement of the Regulatory Disclosure was not eligible for arbitration. On July 12, 2024, Mr. Durham submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”),<sup>1</sup> challenging FINRA’s action in

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<sup>1</sup> 15 U.S.C. § 78s(d).

prohibiting Mr. Durham's access to its forum. On October 17, 2024, Mr. Durham filed his Brief in Support of his Application for Review ("Brief in Support"). On November 18, 2024, FINRA filed its Brief in Opposition ("Opposition"). Mr. Durham now files his Reply to FINRA's Opposition to both the Brief in Support and his Motion to Adduce Additional Evidence, and he requests that the Commission remand his case back to FINRA's Forum so that he may access that fundamentally important service.<sup>2</sup>

### **REPLY TO FINRA'S "ARGUMENT"**

#### **A. The Commission Has Jurisdiction Over Mr. Durham's Appeal Because FINRA Did Prohibit or Limit Access to a Service It Offers.**

As established in his Brief in Support,<sup>3</sup> Section 19(d) of the Exchange Act dictates when the Commission has jurisdiction to review an action taken by an SRO that "prohibits or limits a person in respect to access to services offered by the SRO."<sup>4</sup> The Commission created a two-part test to determine whether they have jurisdiction under the above standard, asking "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important."<sup>5</sup> Mr. Durham has satisfied both prongs of the test, and should therefore be allowed to proceed to a hearing on the merits of his request for expungement.

FINRA's denial of forum to Mr. Durham is a "prohibition of access to a service that [FINRA] offers".<sup>6</sup> FINRA's entire jurisdictional argument in its Opposition stems from the faulty premise that FINRA does not offer the service of hearing expungement requests of regulatory

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<sup>2</sup> While FINRA combined its Opposition to the Application for Review with its Opposition to Mr. Durham's Motion to Adduce Additional Evidence ("Motion"), Mr. Durham was granted an extension to reply to FINRA's Opposition to the Motion until December 2, 2024, and will be filing that reply simultaneously herewith. Mr. Durham incorporates the facts and arguments asserted in his Reply to the Motion by referenced herein.

<sup>3</sup> Durham Br. at 6.

<sup>4</sup> 15 U.S.C. § 78s(d); see also, SEC Release No. 72182.

<sup>5</sup> See, *Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2019 WL 6287506, at 3 (August 6, 2020) (the "Consolidated Matter").

<sup>6</sup> *Id.*

disclosures.<sup>7</sup> FINRA’s assertion here is based on its claims that (1) the Commission in *DeMaria*<sup>8</sup> has determined that FINRA does not offer this service, (2) that FINRA rules do not allow for expungement of regulatory disclosures because there is no explicit rule that outlines the procedure for such a request,<sup>9</sup> (3) that the FINRA rules do not require an action for regulatory expungement to be brought in FINRA’s arbitration forum,<sup>10</sup> and (4) that the Commission should not consider Mr. Durham’s arguments on the merits of his claim for expungement as the Commission does not have jurisdiction to hear this matter.<sup>11</sup>

FINRA rules do allow for expungement of regulatory disclosures. FINRA claims that it is insignificant that there is no explicit prohibition of expungement of regulatory disclosures under FINRA’s Rules. To the contrary, as stated in his Brief in Support, this distinction is of great significance.<sup>12</sup> While there is no explicit allowance of termination disclosures contemplated under FINRA’s Rules, FINRA nevertheless agrees that such expungement requests are allowed to proceed through their arbitration forum.<sup>13</sup> Mr. Durham’s Motion to Adduce Additional Evidence directly supports this as well, where it cites to countless instances where expungements, both of termination and criminal disclosures, have been allowed to move forward or have been otherwise approved by FINRA without any explicit allowance under the FINRA Rules.<sup>14</sup> These actions *do* suggest that FINRA does (or at least should) offer “a similar service to request expungement of regulatory information through its arbitration forum,”<sup>15</sup>. Interestingly, FINRA fails to provide any

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<sup>7</sup> FINRA Opp. at 4-14.

<sup>8</sup> *Id.* at 5-6, citing *Michael Andrew DeMaria*, Exchange Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023) (hereinafter, “*DeMaria*”).

<sup>9</sup> *Id.* at 7-11.

<sup>10</sup> FINRA Opp. at 9.

<sup>11</sup> FINRA Opp. at 10-14.

<sup>12</sup> Durham Br. at 8-9.

<sup>13</sup> FINRA Opp. at 10.

<sup>14</sup> Durham Br. at 8-9.

<sup>15</sup> FINRA Opp. at 11.

support under its rules or the Exchange Act to reconcile its inconsistent claim that expungement of termination or other types of disclosures is allowed even though there is no FINRA rule excluding it, but that in the same light, a claim for expungement of a regulatory disclosure is *not* allowed even though there is no rule prohibiting it.

FINRA's next argument – that FINRA rules do not require an action for regulatory expungement to be brought in FINRA's arbitration forum – is flawed.<sup>16</sup> FINRA's argument here is premised on the fact that Mr. Durham's statement of claim made no allegations of wrongdoing against his former firm, the named respondent, and therefore, it is not “an intra-industry dispute within the scope of FINRA Rule 13200.”<sup>17</sup> FINRA's claim here is again inconsistent with how it regularly functions its arbitration forum. For example, FINRA routinely allows expungements of customer dispute or termination disclosures where the firm (or former firm) is named as a respondent in the expungement action and no allegations of wrongdoing are made against the named respondent.<sup>18</sup> FINRA fails to reconcile this glaring inconsistency. FINRA clearly offers this service of expungement requests: an advisor naming the firm or former firm as a respondent, even where no allegations of wrongdoing against the respondent are made and expungement is the sole claim. As such, Mr. Durham has shown that FINRA's forum denial was a “prohibition of access to a service that [FINRA] offers” and, therefore, satisfies the first prong of the test.<sup>19</sup>

The second prong of the jurisdictional test concerns whether the prohibition by the SRO was of a service that was “fundamentally important.”<sup>20</sup> The Commission previously determined

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<sup>16</sup> FINRA Opp. at 10.

<sup>17</sup> *Id.* at 10.

<sup>18</sup> See FINRA Case Nos. 23-00104, 23-01328, 23-01329, 23-01432, 23-02291, 23-03290, 23-03594, 24-00039, and 24-00115 (FINRA cases of termination disclosure expungement that were allowed to proceed with no allegations of wrongdoing against the firm); see also FINRA Case Nos. 24-02277, 24-02283, 24-02285, and 24-02441 (FINRA cases of customer dispute disclosure expungement that were allowed to proceed with no allegations of wrongdoing against the firm).

<sup>19</sup> Consolidated Matter at 3.

<sup>20</sup> *Id.*

that FINRA’s arbitration forum is a fundamentally important service.<sup>21</sup> In arguing against this, FINRA continues to rely on the fact that, in the *Consolidated Matter*, the Commission did not explicitly mention regulatory disclosure expungement. However, it is again flawed in that explicit allowance for other types of disclosures are already allowed without issue. It is an arbitrary and capricious distinction between the allowed termination disclosures and the disallowed regulatory disclosures. FINRA claims that the removal of regulatory disclosures from the CRD and BrokerCheck is “antithetical to the principle of investor protection.”<sup>22</sup> Yet, the underlying factual scenario that led to the regulatory disclosure he now seeks to expunge has already been found to be “false” by a FINRA arbitrator in FINRA’s arbitration forum.<sup>23</sup> It is antithetical to the principle of investor protection to require the continued publication of information that has been found after an evidentiary hearing to be impossible or clearly erroneous facts. The Commission has previously held that FINRA’s corporate charter states that one of its functions is to “promote self-discipline among members, and to investigate and adjust grievances between the public and members and between members.”<sup>24</sup> The Commission has also previously held that, under the FINRA Rules, arbitration in FINRA’s forum is required for disputes arising “out of the business activities of a member or associated person and is between or among members, members and associated persons, or associated persons.”<sup>25</sup> Given these previous rulings by the Commission, and FINRA’s own rules, it is clear that expungement actions that request to remove information from the CRD and BrokerCheck that are inaccurate, misleading, false, erroneous, factually impossible, defamatory in nature, or that provides no investor protection or regulatory value must be allowed to move

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<sup>21</sup> *Id.* at 5-6.

<sup>22</sup> FINRA Opp. at 13.

<sup>23</sup> Durham’s Motion to Adduce Additional Evidence, Exhibit 4 at 14.

<sup>24</sup> Consolidated Matter at 5.

<sup>25</sup> *Id.* at 6, n. 17; FINRA Rule 13200.

forward.<sup>26</sup> Therefore, hearing disputes regarding the removal of information that has already been determined to be erroneous and factually impossible *must* be a “fundamentally important service” if it was included in its core corporate charter. As such, it is clear that the second prong of the jurisdiction test created by the Commission is satisfied.

With both prongs of the two-part test being satisfied, the Commission has jurisdiction over Mr. Durham’s Application for Review. Furthermore, since FINRA failed to address the merits of Mr. Durham’s Application for Review beyond its claim of lack of jurisdiction, all such arguments raised by Mr. Durham regarding the merits and not objected to by FINRA should thus be deemed conceded by FINRA.

**B. The Additional Evidence is Material and FINRA Has Waived Any Other Challenge Against Its Admission Under the Commission’s Rules of Practice.**

The standard for admission of the Additional Evidence is outlined in Rule 452 of the Commission’s Rules of Practice, and states that: (1) there must have been reasonable grounds to not adduce such evidence previously; and (2) that such additional evidence is material.<sup>27</sup> FINRA conceded, or at least failed to raise any issue with and waives the right to dispute, that Mr. Durham has satisfied the first prong of this standard.<sup>28</sup> Therefore, the first prong is satisfied.

As to the second prong – materiality – FINRA has failed to refute Mr. Durham’s explanation as to why the Additional Evidence is material. FINRA’s sole argument here is that “[n]one of the [Additional] [E]vidence sheds any light on whether FINRA offers the service of expunging regulatory information through its arbitration forum” and “whether the Commission

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<sup>26</sup> See FINRA Rule 2080; FINRA Rule 8312(g).

<sup>27</sup> 17 CFR § 201.452.

<sup>28</sup> FINRA Opp. at 14-16.

has jurisdiction to consider this matter”.<sup>29</sup> This argument has no merit. First, Mr. Durham outlined the materiality in his Brief in Support and Motion and showed how the Additional Evidence shows that FINRA *does* offer the service of regulatory expungement.<sup>30</sup> FINRA argues in its Opposition that, because there is no explicit FINRA rule outlining the process for regulatory disclosure expungement, then it must be not permitted under its rules or the Exchange Act.<sup>31</sup> The Additional Evidence tends to refute FINRA’s logical fallacy here and shows that FINRA does allow for expungement requests even where no explicit rule outlines the process for relief.<sup>32</sup> Exhibits 5 and 6 are material evidence of these scenarios where, absent explicit allowance under any FINRA Rules, expungement of disclosures beyond customer dispute information is offered as a service by FINRA.<sup>33</sup>

The jurisdictional question is also not the only issue raised in Mr. Durham’s Application for Review or Brief in Support, thus, evidence material to the merits of his arguments beyond jurisdiction should be admitted for purposes of the Motion at issue here. Exhibit 1 shows Mr. Durham’s original Offer of Settlement that his attorney shared with NASD. While this is not the final offer that was accepted by NASD, as pointed out by FINRA in their Opposition,<sup>34</sup> Mr. Durham sought to provide is as evidence of the contents of the rest of the terms of the settlement itself.<sup>35</sup> Exhibits 2-4 provide material procedural history involved in this case whereby Mr.

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<sup>29</sup> *Id.* at 14-15.

<sup>30</sup> Durham Br. at 4-11; Mot. at 4-5.

<sup>31</sup> FINRA Opp. at 10.

<sup>32</sup> See Exhibits 5-6 (FINRA allowing for expungements of termination disclosures and criminal disclosures absent any FINRA rule explicitly permitting such relief).

<sup>33</sup> Mot. at 4-5.

<sup>34</sup> FINRA Opp. at 3, n\* 3.

<sup>35</sup> Included with this filing, Mr. Durham has attached a General Affidavit wherein he states that the contents of the final Offer of Settlement that the NASD did accept was identical to the one found in Exhibit 1 with the exception of the fine amount being adjusted from \$1,000 to \$5,000 and the addition of a 5-day suspension.

Durham was permitted by FINRA to expunge the exact factual circumstances that are related to the regulatory disclosure he now seeks to expunge.<sup>36</sup>

Regardless, not only does the Additional Evidence provide support to the merits of his Application for Review and Brief in Support,<sup>37</sup> it also provides material support to Mr. Durham's argument regarding the Commission's jurisdiction to hear the application for review. Mr. Durham raised in his Brief in Support and Motion the argument that FINRA offers the service of expungement of regulatory disclosures based under general principles of equity available in its arbitration forum, and not solely pursuant to FINRA rules. The Additional Evidence is directly relevant and material to that issue.

The Additional Evidence also provides material support to Mr. Durham's argument that the Exchange Act allows for this type of relief. The Exchange Act requires that FINRA rules "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."<sup>38</sup> FINRA's action in prohibiting Mr. Durham from seeking expungement of the regulatory disclosure – after a neutral arbitration panel made findings that "the claim, allegation, or information is false,"<sup>39</sup> about the underlying customer dispute information that forms the basis of the regulatory disclosure – is inconsistent with the Exchange Act and its purpose.

Mr. Durham has met his burden for the Commission to grant his Motion here and should allow him to adduce the Additional Evidence, as there were reasonable grounds to not adduce such

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<sup>36</sup> Mot. at 4.

<sup>37</sup> FINRA concedes this point in its Opposition, and thus recognizes its materiality beyond the jurisdictional argument. Opp. at 15.

<sup>38</sup> 15 U.S.C. § 78o-3(b)(6).

<sup>39</sup> Exhibit 2 at 3; Exhibit 4 at 13.



evidence previously and such additional evidence is material. Therefore, the Commission should grant Mr. Durham's Motion to Adduce.

### **CONCLUSION**

The Commission is authorized to review an action of FINRA where FINRA prohibits or limits a person's access to services offered by it and where that service is fundamentally important, which is the case here. FINRA's reliance on the fact that there is no explicit allowance of regulatory disclosure expungement is misplaced, and inconsistent with its rules, prior conduct, and the Exchange Act. Mr. Durham is an associated person pursuant to FINRA's Rules. FINRA overstepped its discretionary power and wrongfully denied Mr. Durham access to a fundamentally important service it offers in its arbitration forum. In denying forum, FINRA rejects its own decisions when arbitration awards adjacent have found that the underlying related facts are false or clearly erroneous. Further, absent FINRA arbitration, FINRA's arguments would leave parties without recourse when there is an erroneous in-house decision. Mr. Durham respectfully requests that his Motion be granted and that his case be remanded to FINRA with an order that FINRA allow him access to its forum on his claim for expungement.

Dated: December 2, 2024

Respectfully submitted,

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