

**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 MOTION TO STRIKE DURHAM'S AFFIDAVIT

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December 10, 2024

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FINRA moves to strike Mark Kipling Durham’s “General Affidavit,” which he improperly attached to his reply brief in support of his application for review. Durham did not move to admit the affidavit as additional evidence, as required under Commission Rule of Practice 452. Nor does the affidavit—in which Durham concedes that a settlement offer he previously moved to adduce was not the final settlement he previously represented it to be and claims incredibly to recall the precise terms of a 30-year-old offer of settlement he admits he cannot locate—meet the standards for admission under Rule 452. The affidavit is not material to the issue on appeal. Thus, the Commission should strike the affidavit and all references to it in Durham’s reply brief.

I. Procedural and Factual Background

In June 2024, Durham submitted a statement of claim to FINRA’s Dispute Resolution Services (“DRS”) seeking to expunge a regulatory disclosure from his record in the Central

Registration Depository (“CRD”®) and BrokerCheck®. RP 1-16.¹ The regulatory disclosure Durham seeks to expunge concerns a regulatory action commenced against Durham in 1992 by NASD alleging that Durham violated NASD rules in connection with recommendations of a government trust (the “1992 Regulatory Action”). RP 1-16, 38-39. The disclosure reflects that Durham settled the 1992 Regulatory Action in April 1994 through an order of offer of settlement pursuant to which Durham “consented to . . . the entry of findings” and agreed to sanctions of a censure, \$5,000 fine, and five-day suspension from associating with any NASD member. RP 38-40.²

In a June 12, 2024 letter, DRS notified Durham that the DRS Director denied the arbitration forum for his expungement request pursuant to his authority under FINRA Rule 13203 because FINRA rules do not contemplate expungement of regulatory disclosures. RP 25. Durham filed an application for review of the Director’s denial with the Commission on July 12, 2024. RP 41-42.

On October 17, 2024, Durham filed with the Commission his brief in support of his application for review. Durham also filed a motion to adduce requesting admission of certain attached documents. These documents included an offer of settlement Durham purportedly

¹ “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. “FINRA’s Br. at __” refers to FINRA’s November 18, 2024 Brief in Opposition to Durham’s Application for Review and Motion to Adduce Additional Evidence. “Durham’s Reply at __” refers to Durham’s December 2, 2024 Reply to FINRA’s Brief in Opposition to the Application for Review and FINRA’s Opposition to the Motion to Adduce Additional Evidence.

² FINRA has been unable to locate the settlement document from 30 years ago. FINRA’s Br. at 3, n.3.

submitted to NASD proposing to settle the 1992 Regulatory Action for sanctions of a letter of caution and \$1,000 fine. *See* Exhibit 1 to Durham Motion.

FINRA opposed the motion to adduce the offer of settlement offered by Durham on the grounds that it is not material. FINRA Br. at 14-15. In doing so, FINRA pointed out that, among other things, “[t]here is no evidence this offer of settlement was accepted by NASD and therefore it is wholly irrelevant to this appeal.” FINRA Br. at 15. As FINRA explained, the 1992 Regulatory Action was ultimately settled when Durham consented to findings and agreed to a censure, a \$5,000 fine, and a five-business day suspension. RP 39-40. Thus, the offer of settlement offered by Durham could not have been the basis for the settlement.

On December 2, 2024, Durham filed a reply brief. In his reply, Durham concedes that the offer of settlement he moved to adduce “is not the final offer that was accepted by NASD,” and acknowledges that the final offer included a higher fine amount and a suspension. Durham Reply at 7 & n.35. Durham now claims, however, that he moved to adduce this offer of settlement “as evidence of the contents of the rest of the terms of the settlement itself.” *Id.* Durham also attached an affidavit to his reply brief. Durham Reply at 7, n.35. In the affidavit, Durham admits that “[t]he final [o]ffer of [s]ettlement is no longer available to [him].” He nonetheless represents that the missing final offer of settlement was “identical” to the offer of settlement he moves to adduce “except for the change of the fine to the amount of \$5,000 and the addition of a 5-day suspension” and that “all other terms were identical to those” in the one he moved to adduce.

II. Argument

Under Rule 452, the Commission may permit a party to introduce new evidence if the moving party shows with particularity that the evidence is material and that there were reasonable grounds for his failure to adduce such evidence previously. *Jack H. Stein*, 56 S.E.C. 108, 119 (2003); 17 C.F.R. 201.452. Durham did not file a motion to adduce the affidavit. He has not satisfied the requirements of Rule 452 because Durham's affidavit is not material to the issue on appeal—whether the Commission has jurisdiction to review a denial of arbitration for a request to expunge a regulatory disclosure.

Durham's appeal concerns whether the Commission has jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 (the "Exchange Act") to review the Director's denial of the arbitration forum for Durham's request to expunge a regulatory disclosure. As FINRA explained in its opposition brief, the Commission lacks jurisdiction to review the Director's denial because, as the Commission itself previously held, expungement of regulatory disclosures is not a service FINRA offers. *See Michael Andrew DeMaria*, Exch. Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023). Accordingly, FINRA did not prohibit or limit Durham's access to a service it offers and there are no bases for Commission jurisdiction under Exchange Act Section 19(d). *See* FINRA Br. at 4-9.

The affidavit does not contain any evidence material to the issue of jurisdiction. Durham offers it to support his new claim that the terms of the missing final settlement were, except for the amount of the fine and the suspension, identical to the offer of settlement he moved to adduce. But even if true, the terms of Durham's settlement with NASD, including whether he waived his rights to challenge NASD's allegations of misconduct, are not relevant to whether expungement of regulatory disclosures is a service FINRA offers.

Durham appears to offer the affidavit for the purpose of correcting his prior incorrect claim that the offer of settlement he previously moved to adduce was his final settlement with NASD, while still seeking to rely on that document to make claims about the other terms of his final settlement with NASD. Durham's opening brief and motion to adduce represent, incorrectly, that the offer of settlement he moved to adduce was his final settlement with NASD. For example, in his opening brief Durham complains that the CRD disclosure references a 5-day suspension, while the offer of settlement he moved to adduce "makes no mention of any suspension whatsoever." Durham BR. at 5. Additionally, in his motion Durham incorrectly asserts that the offer of settlement he seeks to adduce "is material because it provides the factual circumstances surrounding the settlement and what was reported as the regulatory disclosure that Mr. Durham now seeks to expunge." Durham's Motion to Adduce at 4. Indeed, it was not until after FINRA filed its opposition to Durham's motion to adduce that he acknowledged the offer of settlement "is not the final offer that was accepted by NASD." Durham Reply at 7.

Even if the Commission were to accept Durham's affidavit, it should give it no weight because Durham's statements in it are incredible. Durham claims in the affidavit to recall the precise terms of a 30-year-old settlement with NASD, and he asserts that, except for the fine and the suspension, the other terms of the settlement were "identical" to the offer of settlement he moved to adduce. Durham's claim is implausible because, when he moved to adduce the offer of settlement, he claimed that this document was his final settlement with NASD—a fact he now admits in his affidavit was not correct. Durham's claim that he knows the terms of a document he previously did not even acknowledge existed is not credible.

III. Conclusion

Durham's affidavit is not material to the issue on appeal. Because Durham did not move to adduce Durham's affidavit or otherwise demonstrate that he meets the standards to adduce additional evidence under Rule 452, the Commission should strike the affidavit and all references to it in Durham's reply brief.

Respectfully submitted,


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December 10, 2024

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).




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CERTIFICATE OF SERVICE

I, Celia L. Passaro, certify that on this 10th day of December 2024, I caused a copy of the foregoing FINRA's Motion to Strike Durham's Affidavit, 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.

And served by electronic mail on:

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