BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application of

Mark Kipling Durham

For Review of Action Taken By

FINRA

File No. 3-21981

MR. DURHAM'S AMENDED BRIEF IN SUPPORT OF APPLICATION FOR REVIEW

INTRODUCTION

Mr. 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.

Mr. Durham asserts that expungement of this nature is a fundamentally important service provided by FINRA. He now asks that the Commission overturn FINRA's determination, and order FINRA to allow Mr. Durham access to FINRA's Forum.

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FACTUAL BACKGROUND AND PROCEDURAL HISTORY

FINRA is a not-for-profit Delaware corporation and self-regulatory organization ("SRO") registered with the U.S. Securities and Exchange Commission ("SEC" or "Commission") as a national securities association. FINRA, through its subsidiary, FINRA Regulation, Inc., has established the FINRA Dispute Resolution Services ("ODR"), which carries out the sole function of operating an arbitration and mediation forum to resolve securities industry disputes. The ODR's authority is limited to administration of the forum, not to making regulatory policy decisions.

FINRA maintains an electronic database, the CRD, and a public reporting system known as BrokerCheck[1]. This online, publicly marketed reporting system includes the wide-spread disclosure of customer complaints against each Associated Person of a FINRA Member firm, as well as termination events, regulatory disclosures, and other information. FINRA provides only one viable remedy for the removal of information from the CRD and BrokerCheck, which is expungement.[2]

The initial events that form the genesis of Mr. Durham's dispute in this case began in 1988.[3] At that time, Mr. Durham was working as a registered representative at PaineWebber Incorporated ("PaineWebber") (n/k/a "UBS Financial Services Inc").[4] Between July and November of 1988, Mr. Durham recommended investments to some of his clients in the Kemper Intermediate Government Trust ("The Kemper Trust").[5] This investment was approved and recommended by PaineWebber, the underwriter of the product.[6] Mr. Durham also performed his

[1] 15 U.S.C. 78o-3(i)(1).
[2] *See, e.g.,* FINRA Rules 2080, 13805, and 8312.
[3] CR at 5. "CR at ___" refers to the page citation in the Certified Record filed by FINRA in this matter on August 12, 2024.
[4] *Id.*
[5] CR at 7.
[6] *Id.*

own independent due diligence and discussed the nature and risks involved with each client to whom he recommended the investment, as well as providing his clients with the necessary written disclosures.[7]

In 1990, PaineWebber circulated a release expressing "new-found concern" with respect to the Kemper Trust and discussed that there was downward pressure on the value of the asset.[8] Upon discussion with his superiors, Mr. Durham advised his clients that they should move their investments from the Kemper Trust to alternative investments.[9] No clients complained at this time.[10]

In June of 1991, Mr. Durham left PaineWebber and registered with another firm.[11] A month later, Mr. Durham learned that several of his clients filed a complaint against PaineWebber alleging misrepresentation and unsuitability regarding the Kemper Trust.[12] This complaint was reported to Mr. Durham's CRD record as customer dispute disclosure Occurrence Number 6227 (the "Customer Dispute Disclosure").[13] The group of clients who filed the complaint, which collectively identified itself as former employees of the SRO Asphalt Group ("SRO Group") alleged collectively $253,988 in damages.[14] The case was ultimately settled as a business decision without admission of liability.[15] PaineWebber paid $100,000 to settle the SRO Group's claims against them, while Mr. Durham paid $22,000 to settle the claims against himself.[16]

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[7] *Id.*
[8] CR at 8.
[9] CR at 8.
[10] *Id.*
[11] CR at 9.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*

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On August 10, 1992, before resolution of the customer complaint, the NASD filed a complaint against Mr. Durham alleging "misrepresentation and unsuitability of the Kemper Intermediate Government Trust."[17] Mr. Durham denied these allegations.[18] On April 19, 1994, "without admitting the allegations contained in the Complaint", Mr. Durham entered into an Offer of Settlement with the NASD, whereby he agreed to a nominal fine of $5,000 and a period of suspension of five days.[19] Neither FINRA nor Mr. Durham have been able to locate the final Offer of Settlement that resulted in the regulatory disclosure at issue. However, Mr. Durham states in his Affidavit that Exhibit 1 to his First Motion to Adduce[20] is an Offer of Settlement that contains identical provisions to the Offer of Settlement that was accepted by the NASD, apart from the fine amount and referenced suspension referenced therein. Specifically, the final Offer of Settlement contained the language that: "at all times … Mark Durham acted in good faith and upon a reasonable belief that each member of the employee-group of customers had been clearly explained, fully advise, and truly understood" the risks of the investments; and that "inaccuracies or misunderstandings present in this case were not the result of either bad faith or scienter on the part of … Mark Durham."[21] Pursuant to the terms of the Offer of Settlement that was accepted, Mr. Durham did *not* accept or consent to any findings of fact, did *not* waive any procedural rights, and did *not* agree that this settlement would become a permanent disciplinary record or a part of any public record.[22]

The NASD reported to Mr. Durham's CRD the Regulatory Disclosure, which alleges: "Violations of Article III, Sections 1, 18, and 27 of the Rules of Fair Practice in that Respondent

[17] CR at 9. "CR at ___" refers to the page citation in the Certified Record filed in this matter on August 12, 2024.
[18] *Id.*
[19] *Id.*
[20] This Offer of Settlement refers to the one Mr. Durham sought to adduce as Exhibit 1 in his Motion to Adduce Additional Evidence filed on October 23, 2024.
[21] See Exhibit 1.
[22] These provisions are typical of AWCs that result in regulatory disclosures, that are not present in this case.

Durham induced public customers to purchase securities by means of manipulative, deceptive, or other fraudulent decides."[23] The Regulatory Disclosure was also reported to Mr. Durham's publicly-available BrokerCheck record.[24] Listed in the CRD record, but notably absent from the BrokerCheck record, is the finding that there was no willful violation or failure to supervise.[25] Further, while the CRD and BrokerCheck records specify that a 5-day suspension was part of his sanctions, the NASD settlement agreement makes no mention of any suspension whatsoever.

On April 26, 2023, Mr. Durham filed a Statement of Claim in FINRA's Forum[26] seeking expungement of the Customer Dispute Disclosure. On December 13, 2023, after a hearing on the merits, a FINRA arbitrator issued an award recommending expungement of the Customer Dispute Disclosure.[27] The expungement award was granted pursuant to FINRA Rule 13805 after the arbitrator made affirmative findings of fact that "the claim, allegation, or information [contained within the Customer Dispute Disclosure] was false."[28]The arbitrator found that:

> [Mr. Durham] met with the customers and reviewed the investors' profiles, investment objectives, provided investment materials, obtained signed disclosure documents, discussed liquidity needs, investment horizons, and the risk tolerance of individual investors, [Mr. Durham's] exhibits demonstrate the due diligence of [Mr. Durham]… as to the SRO customers in Occurrence Number 6227, and the recommendations met the suitability requirements per [Mr. Durham]'s testimony… The investments met the

[23] CR at 9.
[24] *Id.*
[25] BrokerCheck by FINRA, *Mark Kipling Durham* (October 17, 2024), https://brokercheck.finra.org/individual/summary/1142920.
[26] This matter was assigned FINRA Case No. 23-01128.
[27] CR at 21
[28] *Id.*

> suitability requirements and [Mr. Durham] wisely counseled the SRO customers to sell declining asset investments when the market conditions began to deteriorate.[29]

Ultimately, the disclosure reporting pages accompanying the Customer Dispute Disclosure were ordered to be deleted.[30] This arbitration panel was the only entity to have heard evidence, testimony, and documentary evidence regarding these allegations.

Mr. Durham subsequently filed for confirmation of the Award and named FINRA as a party to that confirmation proceeding.[31] On March 28, 2024, the District Court for Broomfield County, Colorado issued an order confirming the Award and entered an order ("Expungement Order") of expungement from the CRD of the Customer Dispute Disclosure.[32] FINRA honored the Award and the Expungement Order, and has since expunged the Customer Dispute Disclosure from Mr. Durham's CRD.[33]

On June 10, 2024, Mr. Durham filed a claim in FINRA's Forum seeking expungement of the Regulatory Disclosure[34] pursuant to FINRA rules and separately pursuant to principles of equity.[35] On June 12, 2024, Mr. Durham received the Denial Notice from FINRA.[36] On July 11, 2024, Mr. Durham filed a timely application for review before the Commission challenging FINRA's decision to deny Forum. On September 3, 2024, the Commission issued its Order Scheduling Briefs. After an Unopposed Motion for Extension of Time, the Commission issued a new Order Scheduling Briefs on October 3, 2024, stating that Mr. Durham's Brief in Support is

[29] *Id.*
[30] *Id.*
[31] See attached **Exhibit 2**.
[32] See attached **Exhibit 3**.
[33] See attached **Exhibit 4**.
[34] This matter was assigned FINRA Case No. 24-01276.
[35] CR at 3.
[36] CR at 25.

due October 17, 2024, FINRA's Brief in Opposition is due on November 18, 2024, and Mr. Durham's Reply is due on December 2, 2024. Mr. Durham now timely submits his Brief in Support of Application for Review.

JURISDICTION

The Commission has jurisdiction to hear this Application for Review pursuant to Section 19(d)(2) of the Securities Exchange Act of 1934[37] ("The Exchange Act"). The Exchange Act authorizes the Commission to review an action taken by an SRO, such as FINRA, that "prohibits or limits any person in respect to access to services offered" by the SRO. 15 U.S.C. § 78s(d). In determining whether the Commission has jurisdiction under the above standard, the Commission asks "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important." See, Consolidated Arbitration Applications, Exchange Act Release No. 89495, 2019 WL 6287506 at 3 (August 6, 2020) (the "Consolidated Matter").

ARGUMENT

I. The Commission Has Jurisdiction Over Mr. Durham's Appeal.

The Commission has jurisdiction over this appeal and should proceed to the merits of Mr. Durham's application. Section 19(d) of the Exchange Act authorizes the Commission to review an action taken by an "SRO that "prohibits or limits any person in respect to access to services offered" by the SRO.[38] In determining whether the Commission has jurisdiction under the above standard, the Commission asks "whether the SRO prohibited or limited access to a service that the SRO offers and whether that service is fundamentally important."[39]

[37] 15 U.S.C. § 78s(d).
[38] *Id.*; see also, SEC Release No. 72182.
[39] See *Consolidated Matter,* at 3.

As to the first prong, the Commission has already determined that "[b]ecause the Director's decision that a claim is not eligible for arbitration deprives the applicants of the ability to participate in that service with respect to that claim, it effects a prohibition of access to the arbitration forum."[40] Here, the Director did just that – determined that Mr. Durham's claim is not eligible for arbitration, which therefore deprived Mr. Durham of the ability to participate in a service that FINRA offers with respect to his claim for expungement.[41] This is a prohibition of access to the arbitration forum that satisfies the first prong of the jurisdictional test.

FINRA offers the service of expungement of regulatory disclosures. FINRA states that "a dispute must be arbitrated under the [FINRA] Code if the dispute arises out of the business activities of a member or an associated person and is between or among Members; Members and Associated Persons; or Associated Persons."[42] Mr. Durham is an Associated Person and the dispute at issue here arises "out of the business activities of a member of an associated person."[43] Therefore, Mr. Durham is not only permitted to seek relief in FINRA's Forum, but FINRA's rules require it. The FINRA Dispute Resolution Task Force has also stated that FINRA's arbitration forum is "for all practical purposes, the sole arbitration forum in the United States for resolving disputes between broker-dealers, associated persons, and customers," and that, as of 2015, FINRA "handle[d] more than 99 percent of the securities-related arbitrations and mediations in the [United States]."[44]

FINRA offers the service of (or in the alternative should offer) regulatory disclosure expungement under both FINRA rules and under theories of equitable relief, and expungement is

[40] *Id.* at 4.
[41] CR at 25.
[42] FINRA Rule 13200(a) (emphasis added).
[43] FINRA Rule 13200(a).
[44] See, FINRA Dispute Resolution Task Force, Final Report and Recommendations of the FINRA Dispute Resolution Task Force 1 (Dec. 16, 2015), http://www.finra.org/sites/default/files/Final-DR-task-force-report.pdf (emphasis added).

not limited to customer dispute disclosures. Pursuant to FINRA Rule 8312(g), "FINRA shall not release…information that contains…offensive or potentially defamatory language or information that raises…privacy concerns not outweighed by investor protection concerns."[45] FINRA has also acknowledged that it will "expunge information from the CRD system based on expungement directives contained in arbitration awards rendered in disputes between firms and current or former associated persons, where arbitrators have awarded such relief based on the defamatory nature of the information."[46] Notably, FINRA's directive in Reg. Notice 99-09 specifically references expungement of information from the CRD that does not involve customer dispute disclosures, so long as the information is "defamatory in nature." Additionally, FINRA Notice to Members 99-54 ("Notice 99-54") states that "ordering expungement of information from the CRD system that is found to be defamatory, misleading, inaccurate, or erroneous, is equitable in nature."[47] Additionally, "[i]t is widely accepted that arbitrators should have the authority to award equitable relief."[48] "Arbitrators…may base their decision upon broad principles of justice and equity....[and] make their award *ex aequo et bono* [according to what is just and good]."[49] FINRA has also recognized this authority: FINRA "arbitrators [have] broad authority to grant equitable relief".[50]

Although the Commission has previously held that FINRA does not offer the service of expungement of regulatory disclosures, this decision was flawed and should be overturned, and in the alternative, is not applicable to this case.[51] In *DeMaria*, the Commission stated that,

[45] FINRA Rule 8312(g).
[46] NASD Notice to Members 99-09 ("Notice 99-09").
[47] NASD Notice to Members 99-54 ("Reg. Notice 99-54").
[48] *Id.*; *citing Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).
[49] *Kelly Sutherlin McLeod Architecture, Inc. v. Schneickert*, 194 Cal. App. 4th 519 (Cal. Ct. App. 2011).
[50] Notice 99-09.
[51] Opinion of the Commission, In the Matter of Michael Andrew DeMaria, Release No. 97511, at *5-6 (May 16, 2023) ("DeMaria Opinion").

because FINRA's rules do not contain an explicit procedure for expunging regulatory disclosures, like it does for customer dispute disclosures under FINRA Rule 2080, it must not offer the service.[52] However, as explained above, FINRA's rules do not contain an explicit subsection of expungement for other types of disclosures on the CRD – like U5 termination disclosures – but FINRA has long-recognized and allowed expungement requests for such disclosures time and time again.[53] Significantly here, there is nothing in FINRA's rules that prohibit an applicant to seek expungement of a regulatory disclosure. Neither FINRA, nor the Commission in *DeMaria*, provide any reasoning why the expungement of a regulatory disclosure is any different from seeking expungement of a customer dispute disclosure, or a termination disclosure, or a criminal disclosure,[54] or any other type of information for which FINRA has already offered the service of expungement. The purpose of expungement is to allow an individual to remove information disclosed on a public database based on principals of equity, and that is exactly what Mr. Durham is doing here. The ability to seek removal of this information is consistent with the provisions of Section 15A(b)(6) of the Exchange Act, which requires, among other things, 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."[55]

This case is also highly distinguishable from *DeMaria.* In *DeMaria,* the regulatory disclosure at issue involved a Letter of Acceptance, Waiver, and Consent ("AWC"), pursuant to FINRA Rule 9216, whereby Mr. DeMaria "consented to FINRA's entry of findings … [and] waived certain procedural and appellate rights by entering into the AWC, and he agreed that he

[52] *Id.* at 6.
[53] *See generally*, **Exhibit 5**.
[54] *See* **Exhibit 6.**
[55] 15 U.S.C. § 78f(b)(5).

understood that, if the AWC was accepted, it would become part of his permanent disciplinary record."[56] Mr. DeMaria "also agreed that ... he could not 'take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis."[57] In this case, none of these facts are present: Mr. Durham did not consent to the NASD's entry of findings, he did not waive any procedural or appellate rights by entering into the agreement, he did not agree that it would be made a part of a permanent record, and he did not agree that he could not take any action or make or permit to be made any public statement denying any finding in the agreement or create the impression that the agreement is without factual basis. Finally, Mr. Durham agreed to a brief suspension and a "nominal fine" (i.e. not a "sanction"), unlike DeMaria, who consented to "findings" that he violated FINRA rules and a "sanction" as a result.[58] Therefore, the Commission's Opinion in *DeMaria* is not applicable to this case.

The second jurisdictional prong is also satisfied here – that the service FINRA denied Mr. Durham access to is a "fundamentally important service" offered by FINRA.[59] Again, the Commission has already determined that FINRA's arbitration forum is a fundamentally important service it offers.[60] ("we find that FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO.") Therefore, the Commission has jurisdiction over Mr. Durham's appeal.

[56] *DeMaria* at 2.
[57] *Id.* at 2-3.
[58] *Id.* at 2.
[59] See *Consolidated Matter* at 4-5.
[60] *Id.* at 5-6.

II. FINRA's Forum Denial Was Inconsistent with Its Rules and the Exchange Act.

According to the Forum Denial Notice, FINRA made a determination under FINRA Rules 13203 that Mr. Durham's claim is ineligible for FINRA arbitration.[61] Prior to the Commission's approval of rule changes in 2007, NASD Rule 10301(b) permitted the Director to deny arbitration forum "only upon approval of the NAMC or its Executive Committee."[62] The Commission, in approving rule changes that resulted in FINRA Rule 13203, stated that the Director's authority could not be delegated and emphasized that its approval "should facilitate excluding cases from the NASD arbitration forum that are beyond its mandate, allowing it to focus on the cases that are appropriately in the forum … [which] should promote the efficacy and efficiency of the arbitration forum in processing its claims."[63] This rule was "intended to give the Director the flexibility needed in emergency situations" and that "in emergency situations, it is reasonable for the Director to have the authority and flexibility to act quickly to protect the health and safety of users and administrators of the forum."[64] Significantly, the Commission noted that the Director's use of this rule "should be limited by application in only a very narrow range of unusual circumstances."[65]

FINRA's denial of Mr. Durham's access to the arbitration forum is inconsistent with its rules and its authority under the Exchange Act in that FINRA provided no rationale for why Mr. Durham's claim was "ineligible" for arbitration consistent with its rules or the Exchange Act and provided no clarification as to what constitutes the definition of that term. FINRA clearly overstepped its authority under FINRA Rules 12203(a) and 13203(a), which are intended to be used in extreme, emergency situations, and "limited by application in only a very narrow range of

[61] CR at 25.
[62] National Arbitration and Mediation Committee (NAMC).
[63] SEC Release No. 34-55158, at 108.
[64] *Id.*
[65] *Id.*

unusual circumstances."[66] FINRA also provided zero rationale as to what part of its rules made the subject matter of Mr. Durham's claim "ineligible" or "inappropriate" for arbitration. The subject matter of Mr. Durham's claim was expungement – a subject matter that is directly contemplated and authorized by its rules and guidance, and pursuant to the Exchange Act.

Expanding the Director's authority under FINRA Rule 13203 to permit this type of discretion completely undermines the purpose of providing a neutral arbitration forum for industry professionals. The ultimate determination of whether expungement is appropriate must be determined by a neutral factfinder – not by FINRA's Director. By way of analogy, when res judicata is an issue in a case, the court clerk who accepts the filing cannot preemptively decline to accept the filing. Whether an issue or claim is precluded is a determination made by the judge after an inquiry into the facts and circumstances is made. Here, FINRA has essentially determined that its Director has the authority to discriminate against brokers whenever the Director believes at the time a case is filed that their claims would not be consistent with investor protection or public interest. Such a rule is not consistent with FINRA Rules or the Exchange Act.

Additionally, permitting the Director such discretion effectively permits the Director to establish an unwritten blanket rule, without further inquiry, which bypasses the rulemaking procedures adopted by FINRA. FINRA Rule 0110 requires public notice and SEC approval for any new rules or rule changes,[67] none of which occurred before the Director created this new rule of denying access to any petitioner seeking expungement of a regulatory disclosure.

FINRA also denied Mr. Durham the opportunity to contest this determination or denied him an opportunity to be heard. The Exchange Act requires FINRA to "provide a fair procedure for … the prohibition or limitation by the association of any person with respect to access to

[66] *Id.*
[67] FINRA Rule 0110.

services offered by the association or a member thereof."[68] The Fourteenth Amendment to the U.S. Constitution also establishes a right to due process, which requires, at a minimum: (a) notice; (b) an opportunity to be heard; and (c) an impartial tribunal.[69] Federal courts have also long upheld that "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[70] Here, FINRA has denied Mr. Durham an opportunity to be heard and due process in seeking to clear his reputation, in violation of its own rules, the Exchange Act, the U.S. Constitution, and general principles of due process.

CONCLUSION

The Commission is authorized to review an action of an SRO where the SRO prohibits or limits a person's access to services offered by the SRO and where that service is fundamentally important, which is the case here. Furthermore, FINRA overstepped its authority in denying Mr. Durham's access to its Forum. Mr. Durham respectfully requests 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 16, 2024

Respectfully submitted,

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[68] Exchange Act § 15A(b)(8), 15 U.S.C. § 78o-3(b)(8).
[69] U.S. Const. amend. XIV; *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950).
[70] *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).

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CERTIFICATE OF SERVICE

I, Peter Lindholm, certify that on December 16, 2024, I caused a copy of the foregoing Second Motion to Adduce Additional Evidence of the above listed Applicant, 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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[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.

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