

**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 MOTION TO ADDUCE ADDITIONAL EVIDENCE

I. INTRODUCTION

Applicant, Mark Kipling Durham (“Mr. Durham”), respectfully moves the Commission for leave to adduce additional evidence pursuant to SEC Rule of Practice 452. Through his Application for Review, Mr. Durham seeks for the Commission to review FINRA’s decision to deny Mr. Durham access to its arbitration forum to seek expungement of a regulatory disclosure. Mr. Durham now requests to introduce as additional evidence in this case the Offer of Settlement with NASD (the “Offer of Settlement” attached as **Exhibit 1**), Mr. Durham’s Petition to Confirm the FINRA Arbitration Petition to Confirm for the related customer dispute arbitration (the “Petition to Confirm” attached as **Exhibit 2**), the court order granting expungement of the customer dispute disclosure (the “Court Order” attached as **Exhibit 3**), the letter from the Credentialing, Registration, Education, and Disclosure (“CRED”) department confirming that they had completed the expungement of the customer dispute disclosure (the “CRED Letter” attached as **Exhibit 4**), a collection of example FINRA arbitration awards showing U5 expungements (the

“U5 Petitions to Confirm” attached as **Exhibit 5**), and an instance of FINRA approving a criminal expungement from their CRD system (the “Criminal Expungement” attached as **Exhibit 6**) (collectively, the “Additional Evidence”) to complete the factual and procedural record related to his Application for Review, as well as to supplement his arguments in his Brief. The Commission should permit the introduction of the Additional Evidence to the record of this case because it is highly material and there were reasonable grounds for failing to adduce this evidence previously. Mr. Durham’ counsel has conferred with FINRA’s counsel, and FINRA has stated that it opposes this motion.

II. FACTUAL BACKGROUND

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.”¹ Mr. Durham denied these allegations.² 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.³ 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 Adduce⁴ 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

¹ CR at 9. “CR at ____” refers to the page citation in the Certified Record filed in this matter on August 12, 2024.

² *Id.*

³ *Id.*

⁴ 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.

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.”⁵ 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.

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 Durham induced public customers to purchase securities by means of manipulative, deceptive, or other fraudulent decides.”⁶ The Regulatory Disclosure was also reported to Mr. Durham’s publicly-available BrokerCheck record.⁷ Listed in the CRD record, but notably absent from the BrokerCheck record, is the statement that there was no willful violation or failure to supervise.⁸

On June 10, 2024, Mr. Durham submitted a Statement of Claim to the FINRA Office of Dispute Resolution requesting expungement of the regulatory disclosure (“the Occurrence”) from his CRD record⁹. On June 12, 2024, Mr. Durham received notice (the “Forum Denial Notice”) from the Director of FINRA (“Director”) that FINRA denied Mr. Durham access to its forum.¹⁰ The Forum Denial Notice stated that the denial was based on Rule 13203 as “FINRA rules do not contemplate this type of disclosure.”¹¹

⁵ See Exhibit 1.

⁶ CR at 9.

⁷ *Id.*

⁸ BrokerCheck by FINRA, *Mark Kipling Durham* (October 17, 2024), <https://brokercheck.finra.org/individual/summary/1142920>.

⁹ This matter was assigned FINRA Case No. 24-01429.

¹⁰ CR at 25.

¹¹ *Id.*

On August 12, 2024, FINRA filed the Certified Record in this matter. On October 17, 2024, Mr. Durham filed his Brief in Support of Application for Review (“Brief in Support”). As part of his argument in the Brief in Support, Mr. Durham cited the underlying procedural history of this case, to FINRA’s expungement process in general, and to the fact that FINRA allows expungements in matters beyond customer dispute disclosures. Mr. Durham now seeks to adduce additional evidence to include in the record evidence of these issues that are critical to his argument.

III. ARGUMENT

Pursuant to SEC Rule of Practice 452, the Commission may grant this Motion if Mr. Durham shows that the evidence is material and there were reasonable grounds for failure to adduce such evidence previously.¹² The Additional Evidence is material and there are reasonable grounds for not adducing the evidence previously. Thus, it should be admitted into evidence.

The Offer of Settlement (**Exhibit 1**) 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. The Petition to Confirm (**Exhibit 2**) is evidence that FINRA was named as a party to the expungement action of the customer dispute disclosure involving the same facts and circumstances related to the regulatory disclosure. The Offer of Settlement and Petition to Confirm together are material because they show that, when the exact same factual scenario was concerned, FINRA allowed in its arbitration forum the expungement of a disclosure regarding the very same conduct.

The Court Order (**Exhibit 3**) and CRED Letter (**Exhibit 4**) are material to show that the expungement in the customer dispute matter was finalized and ultimately fully approved and

¹² 17 CFR § 201.452.

executed by FINRA themselves, and to provide an understanding of the factual and procedural history that lead to both the customer dispute disclosure and the related regulatory disclosure expungement request at issue here. The U5 Petitions to Confirm (**Exhibit 5**) and the Criminal Expungement (**Exhibit 6**) are material to established evidence that FINRA offers the service of providing expungements beyond customer dispute information even though there is no explicit FINRA rule outlining expungement.

There were reasonable grounds not to adduce the Additional Evidence previously because this is the first opportunity where it was relevant to do so, and because the Additional Evidence was not included in the initial Certified Record as prepared by FINRA. Mr. Durham has no control over what FINRA does or does not choose to include in the Certified Record when they submit it.

In conclusion, the Additional Evidence is material and there were reasonable grounds for not previously introducing the evidence. Mr. Durham filed this Motion to Adduce promptly. Therefore, the Commission should grant Mr. Durham's Motion.

Dated: December 16, 2024

Respectfully submitted,

/s/ Peter Lindholm

Peter Lindholm

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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.

/s/ Peter Lindholm
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