

**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 MOTION TO AMEND HIS BRIEF IN SUPPORT AND FIRST
MOTION TO ADDUCE ADDITIONAL EVIDENCE**

I. INTRODUCTION

Applicant, Mark Kipling Durham (“Mr. Durham”), respectfully moves the Commission for leave to amend and correct his Brief in Support of his Application for Review and his first Motion to Adduce Additional Evidence. 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. After receipt and review of FINRA’s Motion to Strike and a subsequent review of his Brief in Support and first Motion to Adduce, Mr. Durham has become aware that he made factually incorrect statements in both and seeks to correct the record. Mr. Durham maintains that these corrections do not materially alter his arguments thus far in this matter but does wish to ensure that the record is true and accurate and request leave to make the changes to both documents.

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^{3,4} 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 Adduce⁵ 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.”⁶ 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.

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 The underline portion of this sentence is the correction and amendment that Mr. Durham seeks to make in both his Brief in Support and his first Motion to Adduce.

⁴ CR at 9.

⁵ 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.

⁶ See Exhibit 1.

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.”⁷ The Regulatory Disclosure was also reported to Mr. Durham’s publicly-available BrokerCheck record.⁸ 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.⁹

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 record¹⁰. 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.¹¹ The Forum Denial Notice stated that the denial was based on Rule 13203 as “FINRA rules do not contemplate this type of disclosure.”¹²

III. ARGUMENT

In his Brief in Support and his first Motion to Adduce, Mr. Durham claims that the NASD accepted an Offer of Settlement that stated, in part, he would be fined \$1,000 and issued a Letter of Caution.¹³ These reflected the terms that were stated in the Offer of Settlement that Mr. Durham submitted as Exhibit 1 to his first Motion to Adduce.¹⁴ While true of that Offer of Settlement, NASD did not accept that offer and instead adjusted, and ultimately accepted, an offer identical to that one other than the increase of the settlement and the replacement of the Letter of Caution with

⁷ CR at 9.

⁸ *Id.*

⁹ BrokerCheck by FINRA, *Mark Kipling Durham* (October 17, 2024), <https://brokercheck.finra.org/individual/summary/1142920>.

¹⁰ CR at 3-23.

¹¹ CR at 25.

¹² *Id.*

¹³ Durham Brief in Support at 4; Durham’s first Motion to Adduce at 2.

¹⁴ Durham’s Motion to Adduce, Ex. 1.

a five-day suspension. The only corrections made to both documents referenced above are ones where the incorrect fine amount was referenced or the Letter of Caution was referenced instead of the five-day suspension. The remainder of both documents, including their arguments, remain the same.

In conclusion, Mr. Durham requests leave to amend his Brief in Support of his Application for Review and his first Motion to Adduce Additional Evidence in order to correct factual inaccuracies.

Dated: December 16, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter Lindholm, certify that on December 16, 2024, I caused a copy of the foregoing Motion to Amend the Brief in Support and first 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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