

**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 OPPOSITION TO FINRA’S MOTION TO STRIKE

Applicant, Mark Kipling Durham (“Mr. Durham”), hereby opposes FINRA’s Motion to Strike Durham’s Affidavit (“Motion to Strike”) filed on December 10, 2024, and respectfully requests that the Commission deny FINRA’s Motion to Strike.

I. 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

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.*

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 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

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.

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>.

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

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”). On November 18, 2024, FINRA filed their Brief in Opposition to Durham’s Application for Review and Motion to Adduce Additional Evidence (“Motion to Adduce”). On December 2, Mr. Durham filed his combined Reply to FINRA’s Brief in Opposition to Durham’s Application for Review and his Motion to Adduce. In that Reply brief, Mr. Durham attached and referenced the Affidavit. Mr. Durham now seeks to adduce the Affidavit to include in the record.

II. ARGUMENT

Pursuant to SEC Rule of Practice 452, “[a] party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Commission.”¹² As of the date of this filing, the Commission has not yet rendered a decision on Mr. Durham’s application for review, but a Motion to Adduce Additional Evidence has been filed alongside this opposition. As such, the Motion to Adduce is timely pursuant to the SEC Rules of Practice, and any arguments by FINRA regarding a lack of Motion to Adduce should be ignored. As to the standards to allow the admittance of additional evidence under Rule 452, Mr. Durham points to the arguments raised in his Second Motion to Adduce Additional Evidence, filed simultaneously with this opposition.

⁹ CR at 3-23.

¹⁰ CR at 25.

¹¹ *Id.*

¹² 17 C.F.R. 201.452.

FINRA points out that there are inconsistencies with statements from Mr. Durham regarding the final accepted Offer of Settlement that led to his \$5,000 fine and 5-day suspension. Mr. Durham will be filing a Motion to Amend his Brief in Support and first Motion to Adduce Additional Evidence to correct these mistaken inconsistencies, as he does not dispute that the final accepted settlement agreement did not include a \$1,000 fine and a Letter of Caution. That was what was proposed in the Offer of Settlement that Mr. Durham included as Exhibit 1 to his first Motion to Adduce.

To address FINRA's final point, Mr. Durham takes issue with its incredulity towards his memory of the terms of the agreement, without any supporting evidence to the contrary.¹³ Mr. Durham has had this disclosure on his record for over 30 years, that is true. However, with an otherwise spotless record as a financial advisor, it is perfectly reasonable that such a blemish on his BrokerCheck and CRD, and the circumstances that surround it, would stand out starkly in his mind and memory. To that end, Mr. Durham argues that it is not strange whatsoever, contrary to FINRA's claims, that he would hold such good and accurate memory of such an important event in his professional career, thereby giving credence to the statements made in his Affidavit. Additionally, Mr. Durham's Affidavit is sworn under oath.

Given all the foregoing and the simultaneously filed Second Motion to Adduce Additional Evidence, the Affidavit should not be stricken from the record and FINRA's Motion to Strike should be denied.

Dated: December 16, 2024

Respectfully submitted,

/s/ Peter Lindholm
Peter Lindholm

¹³ FINRA Mot. to Strike at 5.

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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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