

**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 SECOND 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 Mr. Durham’s Affidavit (“Affidavit” attached as **Exhibit 7**) to provide additional explanation and context to the Offer of Settlement that Mr. Durham sought to adduce in his first Motion to Adduce Additional Evidence (“First Motion to Adduce”). The Commission should permit the introduction of the Affidavit to the record of this case because it is material and there were reasonable grounds for failing to adduce this evidence previously.

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 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. Mr. Durham’s Affidavit supports this evidence.

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

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.

⁵ See Exhibit 1 to First Motion to Adduce.

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

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. On December 2, 2024, 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.

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

⁶ CR at 9.

⁷ *Id.*

⁸ CR at 39.

⁹ CR at 3-23.

¹⁰ CR at 25.

¹¹ *Id.*

adduce such evidence previously.¹² The Affidavit is material and there are reasonable grounds for not adducing the evidence previously. Thus, it should be admitted into evidence.

The Affidavit is material because it provides the factual circumstances and language surrounding the Offer of Settlement that was reported as the regulatory disclosure that Mr. Durham now seeks to expunge. The Offer of Settlement produced as Exhibit 1 to Mr. Durham's First Motion to Adduce includes language that was virtually identical to the ultimately accepted Offer of Settlement, with the exception of the fine changing from \$1,000 to \$5,000 and the addition of a five-day suspension. The Affidavit is material in that it provides clarity and further explains why the Offer of Settlement produced as Exhibit 1 is relevant to Mr. Durham's efforts to seek expungement of the regulatory disclosure.

There were reasonable grounds not to adduce the Affidavit previously because it did not exist. The Affidavit was only created and executed after Mr. Durham realized additional context needed to be included surrounding the Offer of Settlement that was sought to be adduced in his First Motion to Adduce. Because of the forgoing, it is clear that there were reasonable grounds not to adduce the Affidavit previously.

In conclusion, the Affidavit is material and there were reasonable grounds for not previously introducing the evidence. Therefore, the Commission should grant Mr. Durham's present motion.

Dated: December 16, 2024

Respectfully submitted,

/s/ Peter Lindholm
Peter Lindholm
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Of Counsel

¹² 17 CFR § 201.452.

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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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