

**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 REPLY TO FINRA’S OPPOSITION TO DURHAM’S SECOND
MOTION TO ADDUCE ADDITIONAL EVIDENCE AND MOTION TO AMEND**

I. INTRODUCTION

Applicant, Mark Kipling Durham (“Mr. Durham”), respectfully requests the Commission grant his Second Motion to Adduce Additional Evidence and his Motion to Amend.

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 record¹. 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.² The Forum Denial Notice stated that the denial was based on Rule 13203 as “FINRA rules do not contemplate this type of disclosure.”³

On October 17, 2024, Mr. Durham filed his Brief in Support of his Application for Review of FINRA’s forum denial. Mr. Durham also filed his first Motion to Adduce Additional Evidence

¹ CR at 3-23.

² CR at 25.

³ *Id.*

shortly thereafter. On November 18, 2024, FINRA filed their Brief in Opposition to Mr. Durham's Application for Review and his first Motion to Adduce. On December 2, 2024, Mr. Durham filed his Reply to FINRA's Brief in Opposition and included the General Affidavit as part of his response. On December 10, 2024, FINRA filed their Motion to Strike Mr. Durham's General Affidavit. On December 16, 2024, Mr. Durham filed a Motion to Amend his Brief in Support and first Motion to Adduce, seeking to correct previous misstatements made that were corrected by the General Affidavit. On the same day, Mr. Durham also filed his Opposition to FINRA's Motion to Strike and his Second Motion to Adduce Additional Evidence, seeking to include the General Affidavit into the record. On December 23, 2024, FINRA filed their Opposition to Mr. Durham's Second Motion to Adduce and his Motion to Amend, and their Reply in support of their Motion to Strike. Now Mr. Durham respectfully submit his Reply to FINRA's Opposition to his Second Motion to Adduce and his Motion to Amend.

II. ARGUMENT

In its Opposition, FINRA condemns Mr. Durham's prior inconsistencies, using them as a basis for *why* he should not be able to seek to amend them.⁴ Mr. Durham admits that his prior statements⁵ in his Brief in Support regarding the Offer of Settlement (the document that ultimately led to the Occurrence being reported on his record that he now seeks to expunge) were inaccurate, which is the exact reason he filed his Motion to Amend to remedy that issue. The fact that those inaccuracies exist cannot be a basis to prevent the ability to correct them, as if that were the case, then a Motion to Amend would not serve much purpose. FINRA argues that Mr. Durham's previous inaccurate statements "highlight the unreliability of his statements in the affidavit," to

⁴ FINRA's Opposition to Durham's Second Motion to Adduce and Durham's Motion to Amend his Brief in Support and First Motion to Adduce at 5.

⁵ Durham's Brief in Support of his Application for Review at 4, (claiming that the offer of settlement that NASD ultimately accepted included only a nominal fine of \$1,000 and a Letter of Caution).

say that it should be ignored.⁶ Instead, it offers greater credibility to Mr. Durham's claims that he now acknowledges and seeks to correct his previously inaccurate statements. It would not be good public policy to prohibit a party from attempting to correct prior inaccurate statements once discovered, as Mr. Durham is seeking to do in this instance.

Further, FINRA claims that Mr. Durham's General Affidavit "contradicts documentary evidence,"⁷ in that it claims that he did not consent to any findings contrary to the regulator statement on the disclosure itself that mentions the "entry of findings." However, FINRA ignores the fact that Mr. Durham has challenged this disclosure for, among other things, its inaccurate language. As he stated in his Motion, Mr. Durham's General Affidavit is being proffered to show that the final settlement was identical to the one that was submitted with his prior filings (other than the addition of a 5-day suspension and increase to the fine amount), and that the remaining terms of Offer of Settlement produced show that the statement in the disclosure regarding the "entry of findings," is incorrect. Mr. Durham also reminds the Commission of his previous argument regarding the weight it should grant his memory of the details of this incident despite the time that has elapsed since it occurred. As he argued in his Opposition to FINRA's Motion to Strike, the fact that this disclosure is alone in his long career would make it stick out in his mind and make the particular circumstances stand clear in his memory.⁸ As such, the General Affidavit should be given full weight and credence when considering Mr. Durham's Second Motion to Adduce.

In conclusion, as stated in the Motion, Mr. Durham seeks to correct the record and ensure that his prior inaccurate statements are corrected. Mr. Durham also has shown that the General

⁶ *Id.*

⁷ *Id.* at 6.

⁸ Durham's Opposition to FINRA's Motion to Strike at 4.

Affidavit is material and that there was reason not to adduce it previously, and has shown that it should be given reasonable weight in the Commission's decision regarding his Application for Review. Therefore, the Commission should grant Mr. Durham's Motion to Amend and his Second Motion to Adduce.

Dated: January 3, 2025

Respectfully submitted,

/s/ Peter Lindholm

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CERTIFICATE OF SERVICE

I, Peter Lindholm, certify that on January 3, 2025, I caused a copy of the foregoing Reply to FINRA's Opposition to Durham's Second Motion to Adduce Additional Evidence and Motion to Amend 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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