BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.

In the Matter of the Application of

Norman Thorn Robertson

For Review of Action Taken by

FINRA

Administrative Proceeding No. 3-21982

FINRA'S BRIEF IN OPPOSITION TO THE APPLICATION FOR REVIEW AND THE MOTION TO ADDUCE ADDITIONAL EVIDENCE

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OS Received 11/04/2024

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE(S)

SUPREME COURT DECISION

FEDERAL DECISIONS

FEDERAL REGISTERS

COMMISSION DECISIONS AND RELEASES

OS Received 11/04/2024

FEDERAL RULES AND STATUTES

FEDERAL RULES AND GUIDELINES

FINRA RULES AND NOTICES

OTHER AUTHORITIES

OS Received 11/04/2024

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Norman Thorn Robertson filed an arbitration claim in FINRA's arbitration forum seeking to expunge disclosure of a regulatory action from FINRA's Central Registration Depository ("CRD"®). The Director of FINRA's Dispute Resolution Services (the "Director") properly denied Robertson access to FINRA's arbitration forum because FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information. FINRA's refusal to permit Robertson access to its arbitration forum is not reviewable under any of the four bases of Commission jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 ("Exchange Act"). Therefore, the Commission should dismiss this proceeding for lack of appellate jurisdiction.

This case presents a nearly identical fact pattern and the same legal issue as *Michael Andrew DeMaria*, Exchange Act Release No. 97511, 2023 SEC LEXIS 1271 (May 16, 2023). In *DeMaria*, the applicant sought to expunge two regulatory actions from CRD®. *Id*. at *1. The Commission found that FINRA does not provide the service of expungement of regulatory action

OS Received 11/04/2024

information through its arbitration forum. *Id*. at *2. Finding that it lacked the authority to review FINRA's action, the Commission dismissed the application for review. *Id.*

Faced with precedent that is fatal to his appeal, Robertson makes arguments that misread Commission opinions and FINRA rules in an effort to show that *DeMaria* was wrongly decided or that FINRA *should* offer the service of expunging regulatory action information through its arbitration forum. These arguments are wholly unpersuasive, and the Commission should reject them. Similarly, the Commission should reject Robertson's attempt to adduce extraneous, immaterial evidence. None of the evidence Robertson seeks to adduce changes the fact that FINRA does not offer the service Robertson seeks and therefore the Commission lacks jurisdiction to consider this appeal.

Accordingly, the Commission should dismiss Robertson's application for review.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robertson entered the securities industry in 1987, and he currently is associated with a FINRA member firm. R. at 33, 37.[1]

On August 4, 1994, after a fully litigated disciplinary hearing at which Robertson appeared with counsel, National Association of Securities Dealers ("NASD") [2] found that Robertson violated NASD rules by falsifying documents related to a customer's account. R. at 3. For this misconduct, NASD censured Robertson, suspended him from associating with any NASD member for 90 days, fined him $20,000, and ordered him to requalify by examination in any capacity in which he sought to be associated. R. at 4. Robertson did not appeal the NASD

[1] "R. at ___" refers to the page numbers in the certified record filed by FINRA on July 31, 2024.

[2] NASD is the predecessor to FINRA.

OS Received 11/04/2024

disciplinary action to the Commission. On July 7, 1999, NASD filed a Form U6 (Uniform Disciplinary Action Reporting Form) disclosing this regulatory action in CRD®.[3] R. at 47-48. His member firm also filed a Form U4 disclosing the regulatory action in CRD®.[4] R. at 46-47. The disclosure is reflected in CRD® as occurrence number 144491.[5] R. at 46-48.

Thirty years later, in June 2024, Robertson filed a statement of claim against his former firm with FINRA Dispute Resolution Services ("FINRA DRS") seeking to expunge disclosure of

[3] CRD® is a database that contains information about broker-dealers and their representatives, including information about certain regulatory actions. *See Order Approving Proposed Rule Change Relating to Release of Certain Information Regarding Disciplinary History of Members & Their Associated Persons Via Toll-Free Telephone Listing*, Exch. Act Release No. 30629, 57 Fed. Reg. 18535 n.3 (Apr. 30, 1992) (SR-NASD-91-39). Generally, the information in CRD® is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms, which member firms are required to file in certain circumstances. *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information* Exch. Act Release No. 72649, 79 Fed. Reg. 43809 (July 28, 2014) (SR-FINRA-2014-020). These forms are Form U4 (Uniform Application for Securities Industry Registration or Transfer), Form U5 (Uniform Termination Notice for Securities Industry Registration), and Form U6 (Uniform Disciplinary Action Reporting Form). *See id*. at n.6. The Commission may take official notice of the Form U4 and Form U6 at issue in CRD®. *See* Rule of Practice 323, 17 C.F.R. § 201.323 (regarding taking of official notice); *James Lee Goldberg*, Exch. Act Release No. 66549, 2012 SEC LEXIS 762, at *1 n.2 (Mar. 9, 2012) (taking official notice of information in CRD®).

[4] Robertson's member firm disclosed the regulatory action in response to Question 14E(2) and Question E(4) of the Form U4. Question 14E asks: "Has any self-regulatory organization ever: . . . (2) found you to have been involved in a violation of its rules . . . or (4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?" FINRA, *Form U4*, https://www.finra.org/sites /default/files/form-u4.pdf.

[5] The occurrence number is FINRA's internal number used in CRD® to identify each disclosure. Occurrence numbers do not appear in the publicly available BrokerCheck. *See Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. 43809 (describing BrokerCheck and its relationship to the CRD®); FINRA Rule 8312 (describing the information released on BrokerCheck).

OS Received 11/04/2024

the regulatory action information from CRD®. R. at 9-21. Robertson's statement of claim stated that he sought expungement pursuant to FINRA Rule 8312 and principles of equity. R. at 14-18.

Exercising his authority under FINRA Rule 13203, the Director declined to accept Robertson's statement of claim for arbitration. R. at 23. In a letter to Robertson, the Director stated that the matter was ineligible for expungement because "Occurrence Number 144491 involves the same conduct that is the basis of a final regulatory action." R. at 23. Accordingly, the Director explained, the subject matter of Robertson's claim was not appropriate for arbitration. R. at 23.

On June 22, 2024, Robertson filed the application for review with the Commission. R. at 25-28. On October 7, 2024, Robertson filed his opening brief. He attached to his brief several documents that are not in the record. Two days later, Robertson filed a Motion to Adduce Additional Evidence ("Motion to Adduce") asking the Commission to add to the record the documents he attached to his brief.[6]

II. ARGUMENT

The Commission should dismiss Robertson's application for review because it lacks a statutory basis to exercise jurisdiction. The Commission's authority to review a FINRA action is governed by Section 19(d) of the Exchange Act. 15 U.S.C. § 78s(d); *Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 954-55 (2004). Specifically, Section 19(d) authorizes the Commission to review a FINRA action that: (1) imposes a final disciplinary sanction on any FINRA member or any person associated with a FINRA member; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by FINRA or

[6] On October 17, 2024, the Commission granted FINRA's unopposed motion to extend the deadline to respond to the Motion to Adduce to November 4, 2024.

OS Received 11/04/2024

any FINRA member; or (4) bars any person from becoming associated with a FINRA member. 15 U.S.C. § 78s(d)(1)-(2). None of these jurisdictional bases is present here.

It is undisputed that three of the Section 19(d) jurisdictional bases do not apply to this matter: FINRA's determination that Robertson's claim is not eligible for arbitration did not impose on Robertson a final disciplinary sanction, deny him membership or participation, or bar him from becoming associated with a member.[7] The remaining jurisdictional ground—prohibiting or limiting Robertson's access to a service offered by FINRA—is equally inapplicable. Because all possible grounds for jurisdiction under Exchange Act Section 19(d) are absent, the Commission must dismiss Robertson's application for review. *See Allen Douglas Sec. Inc.*, 57 S.E.C. at 954-55.

A. The Commission Lacks Jurisdiction Because FINRA Does Not Offer the Service of Expunging Regulatory Action Information in Its Arbitration Forum

To establish jurisdiction, Robertson "must establish that FINRA offers the service that he 'faults FINRA for failing to provide.'" *DeMaria*, 2023 SEC LEXIS 1271, at *7 (quoting *Constantine Gus Cristo*, Exch. Act Release No. 86018, 2019 SEC LEXIS 1284, at *12-13 (June 3, 2019)). Robertson has not met this burden. Robertson seeks access to FINRA's arbitration forum to expunge regulatory action information. As Commission precedent firmly establishes, FINRA does not offer this service. *DeMaria*, 2023 SEC LEXIS 1271, at *2.

[7] Robertson does not argue that these three jurisdictional bases apply, so the Commission should not consider them here. *See DeMaria*, 2023 SEC LEXIS 1271, at *7 (declining to consider the three jurisdictional bases not argued by the applicant); *Jonathan Edward Graham*, Exch. Act Release No. 89237, 2020 SEC LEXIS 2670, at *6 n.13 (July 7, 2020) (declining to reach "alternate bases for Commission review" where the applicant did not contend that those bases applied).

OS Received 11/04/2024

Notwithstanding the Commission's controlling precedent in *DeMaria*, Robertson asserts that FINRA denied him use of a "fundamentally important service" offered by FINRA. Robertson Br.[8] at 10-11. Robertson's assertion relies on a faulty reading of a prior Commission holding in *Consolidated Arbitration Applications,* Exch. Act Release No. 89495, 2020 SEC LEXIS 3312 (Aug. 6, 2020). In that matter, the Commission found that it had jurisdiction to review FINRA's action denying applicants access to its arbitration forum to seek the expungement of prior adverse arbitration awards arising from customer disputes. *Id*. at *1, 6. As explained by the Commission in *DeMaria*, however, its broad statement in *Consolidated Arbitration Applications* that "FINRA's service of providing arbitration of expungement claims is 'fundamentally important' and central to its function as an SRO" pertains to requests to expunge customer dispute information—not regulatory action information. *DeMaria*, 2023 SEC LEXIS 1271, at *7 n. 25 (quoting *Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *4-5). And "[the Commission] specifically reserved the question of 'whether there could be other circumstances' where [the Commission] would lack authority 'to review an arbitration eligibility determination.'" *Id*. at *7 n.25 (quoting *Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *6). The Commission encountered those "other circumstances" in *DeMaria*, which undeniably establishes that "FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information." *Id*. at *2.

Robertson acknowledges that FINRA rules explicitly authorize the expungement of customer dispute information, but he argues that FINRA Rule 8312 (the BrokerCheck Disclosure

[8] References to "Robertson Br. at __" are to Robertson's opening brief dated October 7, 2024.

OS Received 11/04/2024

rule) and principles of equity provide a basis for the expungement of regulatory action information. Robertson Br. at 7-10. Robertson is mistaken. First, Robertson, like the applicant in *DeMaria*, misreads FINRA Rule 8312. Robertson Br. at 7-9. As explained by the Commission in *DeMaria*, FINRA Rule 8312 does not discuss or otherwise provide for expunging information from CRD through arbitration. *DeMaria*, 2023 SEC LEXIS 1271, at *8. Rather, the rule provides the kinds of information that FINRA, not arbitrators, may exclude from BrokerCheck, including "information that contains . . . offensive or potentially defamatory language." FINRA Rule 8312; *see also DeMaria*, 2023 SEC LEXIS 1271, at *8 (quoting FINRA Rule 8312). "And even if arbitrators [in FINRA's arbitration forum] have sometimes cited Rule 8312 in granting expungement of non-regulatory action information, an arbitrator's interpretation of Rule 8312 has no precedential effect on [the Commission's] determination of whether that rule establishes that FINRA's arbitration forum provides a means to seek expungement of regulatory action information." *DeMaria*, 2023 SEC LEXIS 1271, at *8-9.

Separately, Robertson argues that FINRA authorizes equitable expungement of regulatory action information. Robertson Br. at 7-10. Robertson relies on broad statements in FINRA guidance about how associated persons can expunge certain intra-industry dispute information through FINRA arbitration. Robertson Br. at 8. But none of the guidance Robertson cites discusses the expungement of regulatory action information. For example, Robertson points to FINRA Notice to Members 99-09, in which FINRA imposed a moratorium on the expungement of "certain information" from CRD® that was ordered by arbitrators. NASD Notice to Members 99-09, 1999 NASD LEXIS 79, at *1-2 (Feb. 1999). Specifically, the Notice stated that FINRA would expunge information from CRD® based on a directive contained in an arbitration award, rendered in a dispute between a public customer and a firm or an associated

OS Received 11/04/2024

person, only if the award had been confirmed by a court of competent jurisdiction. *Id.* While the Notice specifically referenced expungement of non-customer dispute information from CRD®, the Notice does not discuss the expungement of regulatory action information in particular. *See id.; DeMaria*, 2023 SEC LEXIS 1271, at *9 and 9 n.29. Similarly, in FINRA Notice to Members 99-54, FINRA stated its belief that "ordering expungement from CRD® of information that is found to be defamatory, misleading, inaccurate, or erroneous, is equitable in nature and within an arbitrator's authority." NASD Notice to Members 99-54, 1999 NASD LEXIS 30, at*4 (July 1999). Again, nothing in that Notice discussed the expungement of regulatory action information in particular, let alone authorized arbitrators to order the expungement of regulatory action information.[9] *See id.*; *DeMaria*, 2023 SEC LEXIS 1271, at *9. The Commission rejected similar arguments in *DeMaria* and should do so here, as well. *See id*. at *9 & 9 nn.29-31.

And unlike the FINRA guidance cited by Robertson, other FINRA guidance explicitly excludes regulatory action information from eligibility for expungement through arbitration. *See* FINRA, The Neutral Corner, Vol. 4 – 2013, at 7-8, https://www.finra.org/sites/default/files/Publication/p410646.pdf (identifying regulatory actions among the list of disclosure types that may not be expunged through arbitration)("[Regulatory actions] are ineligible for expungement from the CRD system through arbitration. As such, arbitration panels should deny all requests they receive for the expungement of any of these disclosure events."). Unsurprisingly, Robertson presents no evidence that FINRA allows claims to proceed to arbitration that involve

[9] Likewise, Robertson's citations to *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) and *Kelly Sutherlin Mcleod Architecture, Inc. v. Schneickert*, 194 Cal. App. 4th 519 (Cal. Ct. App. 2011) are equally unpersuasive. Those cases merely address the broad authority of arbitrators to order equitable relief, not the expungement of regulatory action information in FINRA's arbitration forum. Robertson Br. at 8.

OS Received 11/04/2024

requests to expunge regulatory action information, or that arbitrators in FINRA's arbitration forum routinely grant requests to expunge regulatory action information by citing FINRA Rule 8312.

Tacitly acknowledging the weakness of his argument that FINRA offers the service of expunging regulatory action information in its arbitration forum, Robertson argues, in the alternative, that FINRA "should offer" the service. *See* Robertson Br. at 7. In support of his argument, Robertson cites Section 15A(b)(6) of the Exchange Act, which provides that FINRA rules must "be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, . . . and in general, to protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). Robertson, however, fails to show how that provision "explicitly or even implicitly requires FINRA to offer the service of using its arbitration forum to seek expungement of regulatory action information." *DeMaria*, 2023 SEC LEXIS 1271, at *8. Regardless, the Commission lacks the authority under Section 19(d) to consider whether FINRA failed to offer a service that the Exchange Act allegedly requires FINRA to offer. *See* 15 U.S.C. § 78s(d)(1)-(2); *see also DeMaria*, 2023 SEC LEXIS 1271, at *9 n.32; *Graham*, 2020 SEC LEXIS 2670, at *7-8; *Cristo*, 2019 SEC LEXIS 1284, at *12-13.

Robertson's remaining arguments equally lack merit and do not alter the fact that the Commission lacks jurisdiction over his application for review. First, Robertson misinterprets FINRA rules to assert that he is "required" to seek the expungement of regulatory information in FINRA's arbitration forum. Robertson Br. at 7. FINRA Rule 13200 expressly limits intra-industry arbitration to disputes between or among members, members and associated persons, or associated persons. FINRA Rule 13200(a). Robertson's arbitration claim does not meet any of these criteria because it challenges FINRA's regulatory action and required disclosures thereof.

OS Received 11/04/2024

Although Robertson named his former firm as the respondent in his statement of claim, doing so did not transform his claim into an intra-industry dispute within the scope of FINRA Rule 13200. Indeed, Robertson's statement of claim does not challenge any action taken by his former firm or any other FINRA member. R. at 9. Rather, Robertson's claim challenges the disclosure of FINRA's disciplinary action against him. R. at 9. FINRA Rule 13200 therefore has no application to this case.[10]

Next, Robertson asserts it is significant that FINRA rules do not explicitly prohibit the expungement of regulatory action information. Robertson Br. at 9. It is not. The issue is whether FINRA offers the service of using its arbitration forum to request expungement of regulatory action information. As precedent establishes, FINRA does not offer this service. *See DeMaria*, 2023 SEC LEXIS 1271, at *2. Robertson contends that it is noteworthy that FINRA does not have rules that relate to expungement of termination disclosures but "FINRA has long-recognized and allowed expungement requests for such disclosures time and time again." Robertson Br. at 9. It is not. Unlike Robertson's statement of claim, arbitration claims seeking the expungement of termination disclosures are permitted in certain instances and subject to the FINRA Rule 13000 series. And to state the obvious, the fact that FINRA permits some arbitration claimants to use FINRA's arbitration forum to request expungement of termination

[10] Even if Robertson's statement of claim challenging the disclosure of the regulatory action by his former firm in Robertson's Form U4 qualifies as an intra-industry dispute, which it does not, the Director acted in accordance with FINRA Rule 13203 when he denied Robertson use of FINRA's arbitration forum. FINRA does not offer the service of expunging regulatory information, so the Director properly determined the claim was inappropriate given the purposes of FINRA and the intent of the Code. *See* FINRA Rule 13203; *see also* FINRA Rule 13200(a) (indicating that Rule 13200 applies "[e]xcept as otherwise provided in the Code").

OS Received 11/04/2024

disclosures does not demonstrate that FINRA offers a similar service to request expungement of regulatory information through its arbitration forum.

Robertson raises various arguments on the underlying merits of why the regulatory action information should be expunged or why FINRA's action should otherwise be set aside. Robertson Br. at 12-13. For example, Robertson argues that FINRA did not act in accordance with its rules when the Director denied Robertson access to FINRA's arbitration forum because the Director is authorized to deny the forum only in "emergency situations" and that the Director overstepped his authority when he determined that the subject matter was inappropriate for FINRA's arbitration forum. Robertson Br. at 12-13. Robertson argues that the regulatory action information should be expunged because the customer complaint that purportedly led to the regulatory action at issue was expunged in FINRA's arbitration forum by a "neutral arbitrator." Robertson Br. at 9. The Commission, however, should not consider these arguments because it lacks authority to review this action. *See DeMaria*, 2023 SEC LEXIS 1271, at *10-11 (declining to consider the applicant's arguments on the underlying merits of why regulatory information should be expunged or why FINRA's action should otherwise be set aside under Section 19(f)); *Dustin Tylor Aiguier*, Exc. Act Release No. 88953, 2020 SEC LEXIS 1430, at *7 (May 26, 2020) (explaining that "arguments regarding the merits do not create jurisdiction under Section 19(d)(2)"); *John Boone Kincaid III*, Exch. Act Release No. 87384, 2019 SEC LEXIS 4189, at *14 (Oct. 22, 2019) (explaining that an application for "review must first satisfy the jurisdictional requirements of Section 19(d) before the Commission can review the action under Section 19(f)").[11]

[11] In any case, Robertson's arguments ignore Commission precedent. *See, e.g., Consolidated Arbitration* Applications, Exch. Act Release No. 97248, 2023 SEC LEXIS 868, at

[Footnote continued on next page]

Furthermore, Robertson had the opportunity to appeal that regulatory action to the Commission, and he failed to do so. He cannot now use an improper collateral attack on a final NASD disciplinary proceeding to manufacture jurisdiction for an appeal to the Commission. *See DeMaria*, 2023 SEC LEXIS 1271, at *10-11 (declining to consider whether the underlying regulatory actions were themselves flawed as the applicant failed to file applications for review of FINRA's actions with the Commission). That Robertson now lacks any avenue to obtain expungement relief does not provide the Commission grounds under Section 19(d) to review FINRA's action denying him use of FINRA's arbitration forum. *See id*. at *10 n.34 ("And while DeMaria suggests that he now lacks any avenue for obtaining expungement relief, even if true, that does not provide grounds for us to review under Exchange Act Section 19(d).")[12].

[cont'd

*17 (Apr. 4, 2023) ("Nothing . . . suggest[s] that emergency or unusual circumstances are required when denying access based on a determination that the subject matter is inappropriate for arbitration, the basis on which the Director denied access to applicants."); *James Thomas Young*, Exch. Act Release No. 101273, 2024 SEC LEXIS 2656, at *7-8 (Oct. 8, 2024) (dismissing applicant's contention that interpreting FINRA rules is within "the exclusive domain of the arbitrator" because "FINRA Rules 12203(a) and 13203(a) provide the Director with authority to determine whether the subject matter of a dispute is inappropriate for arbitration given the intent of the FINRA Arbitration Codes, which necessarily requires the Director to interpret the FINRA Arbitration Codes.").

[12] Of course, the expungement of any underlying customer complaint does not mean that NASD's disciplinary action was flawed or that the regulatory action disclosure should be expunged. FINRA's disciplinary proceedings are separate from FINRA's role as an arbitration forum provider for securities-related disputes between brokers, their firms, and customers. *See* FINRA Rule 9000 Series (governing FINRA's disciplinary proceedings), FINRA Rules 12200, 12201 (providing for arbitration of certain customer disputes); FINRA Rules 13200, 13201(a), 13202 (providing for arbitration of certain industry disputes); *see also Loftus v. FINRA,* No. 20-CV-7290 (SHS), 2021 U.S. Dist. LEXIS 18823, at *9 (S.D.N.Y. Feb. 1, 2021) ("[FINRA's dispute resolution forum] exists to facilitate the resolution of private securities disputes, not FINRA disciplinary actions.").

OS Received 11/04/2024

Robertson's contention that his expungement request is "not an attack" on the NASD's final disciplinary action rings hollow. Robertson Br. at 10. Regardless, removal of regulatory action information from CRD® is antithetical to the principle of investor protection. Information expunged from CRD® "is no longer available to regulators, broker-dealers, or the investing public," and "regulators and the investing public are disadvantaged when factual information is removed from CRD." *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. 43809, 43813. As the Commission explained when approving FINRA's rule change to make information available through BrokerCheck about formerly associated persons who were the subject of a final regulatory action, such information is reliable and "relevant to investors and members of the public who wish to educate themselves with respect to the professional history of a formerly associated person." *Order Approving a Proposed Rule Change Relating to Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, 74 Fed. Reg. 61193, 61196 (Nov. 23, 2009).

Finally, Robertson argues that the Director's decision denied him due process under the Fourteenth Amendment. Robertson Br. at 10, 14. Because FINRA is not a part of the government or otherwise a state actor, the requirements of constitutional due process do not apply. *See, e.g., Epstein v. SEC*, 416 F. App'x 142, 148 (3d Cir. 2010) ("Epstein cannot bring a constitutional due process claim against the [FINRA], because '[FINRA] is a private actor, not a state actor.'"); *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 206 (2d Cir. 1999) (finding that "[FINRA] is a private actor, not a state actor").

In sum, FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information. *See DeMaria*, 2023 SEC LEXIS 1271, at *2. Because FINRA does not offer the service Robertson seeks, the Commission lacks jurisdiction

OS Received 11/04/2024

over Robertson's application for review and should dismiss it. *See id*. at *11 (dismissing the application for review where the applicant could not establish that FINRA prohibited or limited his access to a service it offers); *Cristo*, 2019 SEC LEXIS 1284, at *12-14 (same); *Kincaid*, 2019 SEC LEXIS 4189, at *9-10, 20 (same).[13]

B. The Commission Should Deny Robertson's Motion to Adduce Additional Evidence

The Commission should deny Robertson's motion to adduce extraneous, immaterial evidence into the record. Robertson seeks to adduce six exhibits. The first four exhibits concern Robertson's successful claim seeking to expunge a customer complaint from his CRD® record in FINRA's arbitration forum. The fifth exhibit comprises several arbitration awards that order expungement of termination disclosures from a claimant's CRD® record in certain instances on grounds that the disclosures were defamatory in nature. The sixth exhibit comprises two letters relating to a court's order to expunge certain criminal information from CRD® because the information was the result of a clerical error. Rule 452 of the Commission's Rules of Practice states that the "Commission may accept or hear additional evidence . . . as appropriate." 17 C.F.R. § 201.452. Under Rule 452, Robertson must establish "that there were reasonable grounds for [his] failure to adduce such evidence previously" *and* "show with particularity that such additional evidence is material." *Id*. Robertson fails to carry his burden under the rule.

Even if Robertson established reasonable grounds for failing to adduce this evidence previously, he has not established that this evidence is material to the relevant issue on appeal. None of the evidence sheds any light on whether FINRA offers the service of expunging

[13] Because FINRA does not offer the service of expunging regulatory action information through arbitration, the Commission need not consider whether that service is fundamentally important. *See DeMaria*, 2023 SEC LEXIS 1271, at *10-11; *Cristo*, 2019 SEC LEXIS 1284, at *12-14; *Kincaid*, 2019 SEC LEXIS 4189, at *9-10 & n.13.

OS Received 11/04/2024

regulatory information through its arbitration forum. The first four exhibits show that FINRA offers a service to expunge customer dispute information through its arbitration forum. The fifth exhibit shows that FINRA offers a service to expunge termination disclosures through its arbitration forum. The sixth exhibit shows an instance in which FINRA expunged criminal disclosure information in response to a court order.[14] None of these six exhibits shows that FINRA offers the service of using its arbitration forum to expunge regulatory action information.

Rather, Robertson offers the evidence for the purpose of arguing on the merits why information about NASD's final disciplinary action against him should be expunged or to support his contention that FINRA should offer the service of expunging regulatory information. Robertson Motion at 3-4.[15] But for the reasons explained herein, arguments as to the underlying merits of why the regulatory information should be expunged, why FINRA's action should be set aside under Section 19(f), or why FINRA should offer the service of expunging regulatory information cannot be considered by the Commission because of its lack of jurisdiction. *See* 15 U.S.C. § 78s(d)(1)-(2); *see also DeMaria*, 2023 SEC LEXIS 1271, at *10-11; *Aiguier*, 2020 SEC LEXIS 1430, at *7; *Kincaid*, 2019 SEC LEXIS 4189, at *4. Accordingly, the evidence is not material to the relevant issue on appeal—i.e., whether the Commission has jurisdiction to consider this matter.

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[14] The Forms U4, U5, and U6 contain separate sections for Criminal Disclosure Reporting Pages and Regulatory Action Disclosure Reporting Pages. *See* FINRA, *Form U4*, https://www.finra.org/sites/default/files/form-u4.pdf; FINRA, *Form U5*, https://www.finra.org/sites/default/files/form-u5.pdf; FINRA, *Form U6*, https://www.finra.org/sites/default/files/AppSupportDoc/p116975.pdf. In this matter, Robertson's former form and NASD disclosed the regulatory action information in the in the Regulatory Action Disclosure Reporting Pages of the Form U4 and Form U6, respectively. Thus, a criminal action disclosure is not the same thing as a regulatory action disclosure with respect to the Form U4 or Form U6.

[15] References to "Robertson Mot. at __" are to Robertson's Motion to Adduce dated October 9, 2024.

OS Received 11/04/2024

Robertson has failed to sustain his burden to show that his proffered evidence is material. Therefore, the Commission should deny the Motion to Adduce.

III. CONCLUSION

The Commission should dismiss Robertson's appeal for lack of jurisdiction. As Commission precedent establishes, FINRA did not prohibit or limit Robertson in accessing a service it offers because FINRA does not offer the service of using its arbitration forum to request expungement of regulatory action information. Accordingly, the Commission lacks jurisdiction to address Robertson's complaints. The Commission should also deny Robertson's Motion to Adduce because the evidence is immaterial to the issue of jurisdiction.

Respectfully submitted,

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November 4, 2024

OS Received 11/04/2024

CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 4th day of November 2024, I caused a copy of the foregoing FINRA's Brief in Opposition to the Application for Review and the Motion to Adduce Additional Evidence, Administrative Proceeding File No. 3-21982, to be filed through the SEC's eFAP system on:

The Office of the Secretary
Securities and Exchange Commission
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CERTIFICATE OF COMPLIANCE

I, Megan Rauch, certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

I, Megan Rauch, further certify that this brief complies with the Commission's Rules of Practice by filing a brief in opposition not to exceed 14,000 words. I have relied on the word count feature of Microsoft Word in verifying that this brief contains 3,683 words.

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