

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

In the Matter of the Application Of

Michael Andrew DeMaria

For Review of Action Taken By

FINRA

File No. 3-20199

**MR. DEMARIA'S REPLY BRIEF TO FINRA'S RESPONSE ON THE ISSUE OF
JURISDICTION**

I. INTRODUCTION

Applicant, Michael Andrew DeMaria (“Mr. DeMaria”) seeks Commission review of a determination by Financial Industry Regulatory Authority, Inc. (“FINRA”) to deny Mr. DeMaria access to its arbitration forum in violation of Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”) ¹ and in violation of its own rules. Mr. DeMaria sought to expunge two regulatory disclosures reported on the Central Registration Depository (“CRD”) and publicly-available BrokerCheck websites owned and operated by FINRA, but was denied access to its arbitration forum by FINRA. Mr. DeMaria then filed his application for review with the Commission.

After the parties briefed the merits, the Commission requested additional briefing on the issue of whether it has jurisdiction to consider Mr. DeMaria’s application for review under the

¹15 U.S.C. § 78s(d).

Exchange Act. Mr. DeMaria timely filed his Opening Brief in Support of the Commission's Jurisdiction Over His Application for Review ("Opening Brief") on June 18, 2021, FINRA filed its Response to Applicant's Initial Brief on the Issue of Jurisdiction ("FINRA's Response") on July 2, 2021, and now Mr. DeMaria files this reply brief ("Reply").

II. MR. DEMARIA'S REPLY TO FINRA'S "FACTUAL BACKGROUND"

SECTION IN ITS RESPONSE

In its Response, FINRA states that, in Mr. DeMaria's Statement of Claim filed on December 8, 2020 in FINRA's Dispute Resolution Services forum seeking expungement of the disclosures, Mr. DeMaria "contended that expungement was appropriate under FINRA Rule 8312 because both disclosures were defamatory." FINRA's Response at 5 (emphasis added). This is a mischaracterization of the facts. Mr. DeMaria contended that expungement was appropriate under FINRA Rule 8312 because both disclosures were defamatory *in nature*, or "potentially defamatory". RP² 3-4. Further, Mr. DeMaria also contended in his Statement of Claim that the disclosures were appropriate for expungement because they "do not offer any public protection and have no regulatory value" and that "[i]f not expunged, the [disclosures] will mislead any person viewing [Mr. DeMaria's] CRD and BrokerCheck records and will not provide valuable information for knowledgeable decision making." RP 3-4. Nowhere in Mr. DeMaria's Statement of Claim is the tort of defamation alleged, as FINRA contends in its Response.

III. MR. DEMARIA'S REPLY TO FINRA'S "ARGUMENT" SECTION IN ITS RESPONSE

- A. The Commission has jurisdiction to consider Mr. DeMaria's application for review because FINRA prohibited or limited access to a fundamentally important service it offers.**

² "RP ____" refers to the page numbers in the certified record filed by FINRA on January 19, 2021.

a. **FINRA offers the fundamentally important service which Mr. DeMaria sought to gain access to.**

FINRA asks the Commission to define the relevant service that it prohibited or limited Mr. DeMaria access to here as the service of arbitration for the expungement of regulatory action disclosures from the CRD. FINRA's Response at 9-10. Mr. DeMaria proposed that the Commission define the relevant service as the service of offering an arbitration forum to seek expungement of disclosure events published on the CRD and BrokerCheck systems. Opening Brief at 4. Regardless of which definition of the relevant service is selected, the analysis here does not change: the Commission has jurisdiction under the Exchange Act to hear Mr. DeMaria's Application for Review.

FINRA contends that because there is no specific FINRA rule explicitly stating that members or associated persons may seek expungement of regulatory disclosure events from the CRD under the 12000 and 13000 series of FINRA Rules, such claims must not be allowed in its forum. FINRA's Response at 10-12. Yet FINRA 2080, which contemplates expungement of customer dispute disclosures, is a FINRA rule not under the 12000 or 13000 series of FINRA Rules. Likewise, FINRA routinely allows associated persons and members to seek expungement of event disclosures in its arbitration forum where an arbitration panel finds the event disclosure contains "potentially defamatory" language, pursuant to FINRA Rule 8312 (even though there is no specific FINRA rule explicitly outlining the procedure for such requests). FINRA completely fails to reconcile its own rule that explicitly states that FINRA offers to its members and associated persons its dispute resolution arbitration forum "for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any FINRA member, or arising out of the employment or termination of employment of associated person(s) with any member...." *See*, FINRA Rule 10101 (emphasis added); *see also*, FINRA Rule 10301.

Nevertheless, although Mr. DeMaria's claim was not required to be made pursuant to the 12000 or 13000 series of FINRA Rules, as FINRA contends, Mr. DeMaria's claim was in fact an industry dispute. Northwestern Mutual Investment Services, LLC, a FINRA-member firm, was named as the Respondent in Mr. DeMaria's Statement of Claim. Mr. DeMaria's claim for expungement was also directly tied to a customer dispute where he was previously found not liable by an arbitration panel. Mr. DeMaria then invoked FINRA Rule 8312 and the arbitration panel's equitable power, which allows for the expungement of potentially defamatory and inaccurate information from BrokerCheck. According to Notice to Members 99-54, FINRA will remove information from BrokerCheck without a court directive if an arbitrator in its forum makes a finding that the information is "potentially defamatory." In his statement of claim, Mr. DeMaria alleged sufficient facts to establish that the disclosures he sought expungement of are potentially defamatory. There is no FINRA rule that prevents Mr. DeMaria from seeking expungement relief in FINRA's arbitration forum. To the contrary, there are FINRA rules that authorize such claims. *See*, FINRA Rules 10101, 8312.

FINRA claims that, if it "were to offer its arbitration service to expunge such information, it would potentially violate its duties under the Exchange Act" because it has a duty to report such information. FINRA's Response at 12. FINRA's claim is without merit and devoid of any authority in support of it. Mr. DeMaria does not dispute that FINRA is generally required to report regulatory disclosures, just as it is required to report customer dispute disclosures, employment termination events, and other disclosures as well. Yet when sufficient evidence has been presented to show that customer dispute disclosures, termination disclosures, or other disclosures (such as regulatory disclosures) should be expunged, FINRA complies with those recommendations and expunges the disclosures with no issues. Likewise, in this case, if Mr. DeMaria can present sufficient evidence that his disclosures should be expunged, FINRA's compliance with an expungement

recommendation in such a circumstance would not violate the Exchange Act. To the contrary, FINRA would be (and is here) in violation of the Exchange Act if FINRA did *not* allow, under *any* circumstances, the expungement of certain event disclosures, such as regulatory disclosures. It is a “basic principle of equity jurisprudence” that parties be able to seek equitable relief with a “weigh[ing] of the competing equities bearing on the issue at hand and then grant or deny relief based on the overall balance of these equities.” See *Lickiss v. Fin. Indus. Reg. Auth.*, 146 Cal. Rptr. 3d 173, 179 (Cal. App. 1st Dist. 2012). The Exchange Act states that the rules of and SRO, like FINRA, are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. 15 U.S.C. 78o-3(b)(6).

FINRA further claims that if, “the Commission were to require FINRA to grant [Mr.] DeMaria’s request for access to its arbitration forum, FINRA would have no rules or standards to apply in the resulting arbitration. FINRA’s Response at 12. Again, FINRA’s argument is misplaced and ignores the fact that it has been offering this service to members and associated persons for ages: expungement of event disclosures. For example, FINRA offers the service to its members and associated persons the ability to seek expungement of termination disclosures. This is true even though there is no specific FINRA Rule outlining the standards to apply. In such cases, FINRA arbitration panels are given the authority to use their discretion in hearing requests for equitable remedies to determine whether expungement is appropriate under FINRA Rules (such

as FINRA Rule 8312), FINRA's Guidance³, and principles of equity.⁴ FINRA's attempt at simplifying the inquiry here in claiming that since there is no FINRA Rule specifically discussing this type of claim there must be no ability to seek said claim, is unfounded and does not now mean that the service no longer exists.

FINRA's summary dismissal of expungement claims without the involvement of a neutral arbitrator creates a discriminatory system that harms financial advisors and broker-dealers and results in inaccurate information being published to investors and the public at large. The Exchange Act does not bar Mr. DeMaria from seeking expungement here, nor does FINRA have any rules barring the equitable remedy of expungement that Mr. DeMaria seeks. Congress under Section 19(d)(2) gave the authority to the Commission to ensure that SROs, such as FINRA, do not unduly prohibit or limit access to fundamentally important services to its members and associated persons, as FINRA did here to Mr. DeMaria.

FINRA chose not to address in its Response whether the service at issue here is a fundamentally important service. *See*, FINRA Response at 14. Therefore, if the Commission finds that FINRA *does* offer the relevant service at issue here, FINRA's conscious choice not to address Mr. DeMaria's assertion that the relevant service offered here is "fundamentally important" is conceded and is not in dispute. *See*, Opening Brief at 7-9 (Mr. DeMaria addressing that the relevant service at issue here is fundamentally important.).

b. Mr. DeMaria's action is not an improper collateral attack

³ *See*, <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.

⁴ "Equity aims to do right and accomplish justice.... Equity or chancery law has its origins in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice in the affairs of men.... These [equitable] powers are broad enough to address novel conditions and meet the requirements of every case. In other words, equity recognizes that we live in a changing world and equitable remedies are flexible, capable of expanding to meet the increasing complexities of these changing times. *Lickiss*, 208 Cal. App. 4th at 1133. (internal citations and quotations omitted).

FINRA's claim that Mr. DeMaria's action is a collateral attack on his past disciplinary actions is also without merit. Mr. DeMaria is not seeking to reverse the sanctions imposed, but solely to remove the *publication* of the disclosure on his CRD and BrokerCheck reports. Similarly, just as an associated person who agrees to settle a customer dispute, thereby waiving their right to defend against those allegations, is offered the service by FINRA to seek expungement of the publication of that disclosure without being accused of "collaterally attacking" the settlement agreement, here, Mr. DeMaria is seeking expungement of the publication of the disclosures at issue, and not attempting to disrupt the settlement agreement made with FINRA.

CONCLUSION

The Commission has jurisdiction over Mr. DeMaria's application for review. FINRA prohibited or limited Mr. DeMaria's access to a service it offers, as FINRA offers the service of arbitration for claims seeking expungement of disclosure events published on the CRD and/or BrokerCheck databases. This service offered by FINRA is a fundamentally important service critical to its function. The Commission should remand DeMaria's application to FINRA's arbitration forum for further hearing on his claim for expungement and request for equitable relief.

Dated: July 16, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James Bellamy, certify that on this 16th day of July 2021, I caused a copy of the foregoing Reply Brief to FINRA's Opposition Brief of the above listed Applicant, in the matter of the Application for Review of Michael Andrew DeMaria, Administrative Proceeding File No. 3-20199, 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/James Bellamy

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