

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 97721 / June 14, 2023

Admin. Proc. File No. 3-19588

In the Matter of the Application of
ALTON THEODORE DAVIS, JR.
For Review of Action Taken by
FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION – REVIEW OF FINRA ACTION

Associated person of FINRA member firm filed an application for review of a FINRA determination that his expungement claim was ineligible for arbitration. *Held*, because arbitrator previously denied the same expungement claim, application for review is dismissed.

APPEARANCES:

Michael Bessette, William Bean, Frederick Steimling, Owen Harnett, and Jessica Calloway of HLBS Law for Alton Theodore Davis, Jr.

Alan Lawhead, Megan Rauch, Jennifer Brooks, and Celia Passaro for FINRA.

Appeal filed: October 23, 2019
Last brief received: December 1, 2021

Alton Theodore Davis, Jr., an associated person of a FINRA member firm, appeals FINRA's determination that a claim to expunge information about a prior adverse customer arbitration award from his Central Registration Depository ("CRD") records was ineligible for arbitration under FINRA's rules. During the underlying customer arbitration that concluded in 1997, Davis opposed the customer's claims on the merits and requested expungement of information about that arbitration from his CRD records, but the arbitration panel denied this request. In 2019, Davis again sought arbitration of his request to expunge all information about the underlying customer arbitration from his CRD records based on the alleged lack of merit of the customers' allegations. FINRA denied that request, finding it ineligible for arbitration.

Davis filed an application for review under Section 19(d) of the Securities Exchange Act of 1934,¹ challenging FINRA's determination. We dismiss Davis's application for review because Section 19(d) does not authorize our review of FINRA's action where, as here, an applicant already accessed FINRA's arbitration service by receiving an arbitration award on the merits.

I. Background

Davis has worked in the securities industry since 1989. As relevant here, in 1994, while Davis was associated with Smith Barney Inc., two customers complained that Davis had engaged in "misrepresentation (fraud) and excessive trading." Eventually, the customers filed a statement of claim against Davis and Smith Barney in the arbitration forum of FINRA's predecessor, NASD, alleging, among other things, negligence, fraud and churning, and breach of fiduciary duty. According to the eventual arbitration award, Davis and Smith Barney, through their counsel, denied the customers' allegations insofar as they alleged wrongdoing, asserted various unspecified affirmative defenses, and requested that the arbitration panel deny the customers' claims in their entirety and expunge the case from Davis's registration record. Davis avers that he participated in the underlying customer arbitration proceeding, denying the merits of the customers' allegations and being present at and testifying at the hearing.² Davis also claims that Smith Barney requested expungement on his behalf in its statement of answer in the underlying customer arbitration, but he does not recall his expungement request being addressed at the hearing. Finally, Davis contends that he was represented by Smith Barney's counsel, not "an independent counsel of [his] choosing," during the proceeding.

In August 1997, the customer arbitration panel determined that Davis and Smith Barney were jointly and severally liable and ordered them to pay the customers compensatory damages of \$17,885.71. The arbitration panel also noted that Davis and Smith Barney had requested "that the panel sign an order expunging this case from the registration record of Davis." And the panel's decision provided that "[a]ny relief not specifically awarded is hereby denied."

¹ 15 U.S.C. § 78s(d).

² Davis has filed an unopposed motion to adduce an affidavit describing the underlying customer arbitration proceeding. We grant the motion under Rule of Practice 452 because the affidavit is material and there were reasonable grounds for Davis's failure to adduce it previously. 17 C.F.R. § 201.452.

The final adverse arbitration award was reported in FINRA's CRD. The CRD is a computerized database that contains information about broker-dealers and their representatives, including information about customer allegations made in arbitration proceedings and any arbitration awards resulting from those allegations.³ Generally, the information in the CRD is provided by FINRA member firms, associated persons, and regulatory authorities on the uniform registration forms,⁴ which member firms are required to file in certain circumstances.⁵ The information in the CRD is used by FINRA and other regulators, as well as by firms when making personnel decisions.⁶

The CRD cannot be accessed by the general public.⁷ However, FINRA provides a free online tool called BrokerCheck, which displays some of the CRD's information, including information about prior customer arbitrations, regarding persons who are currently or formerly associated with FINRA member firms.⁸ Because BrokerCheck's information is derived from the CRD, information that is expunged from the CRD is not accessible via BrokerCheck.⁹

Associated persons and their firms generally may use FINRA arbitration to seek to expunge customer dispute information from the CRD.¹⁰ FINRA arbitrators must follow certain

³ See *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information*, Exchange Act Release No. 72649, 79 Fed. Reg. 43,809, 43,809 (July 28, 2014).

⁴ *Id.* 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). *Id.* at 43,809 & n.6.

⁵ See, e.g., FINRA By-Laws Art. V, Sec. 2; FINRA Rule 1013(a)(2).

⁶ *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809.

⁷ See *id.*

⁸ See, e.g., *id.* at 43,809-10 (describing BrokerCheck and its relationship to the CRD); FINRA Rule 8312 (describing the information released on BrokerCheck). BrokerCheck is available at <http://brokercheck.finra.org>. In addition to displaying information about persons who are currently or formerly associated with FINRA member firms, BrokerCheck also allows people to research investment adviser firms and their representatives. *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 WL 5445514, at *1 n.2 (Oct. 22, 2019).

⁹ See *Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. at 43,809-10.

¹⁰ See FINRA Rule 2080. FINRA arbitration may not always be available, however, because FINRA rules also provide that the Director of FINRA Dispute Resolution Services "may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the [relevant FINRA Arbitration] Code, the subject matter of the dispute is inappropriate." FINRA Rules 12203(a), 13203(a); see also FINRA Rules 12100(h), 13100(h) (defining the applicable FINRA Arbitration "Code"); FINRA Rules

procedures and apply certain standards when expunging customer dispute information.¹¹ Even when an arbitrator recommends expungement relief, however, the information is not expunged from the CRD unless a court confirms the award, and generally FINRA must be named as an additional party in the court confirmation action.¹²

Here, in September 2019, Davis again sought to expunge all information regarding the August 1997 customer arbitration from the CRD by filing an intra-industry statement of claim in FINRA’s arbitration forum against Smith Barney’s successor. As he had during the customer-dispute arbitration, Davis asserted that the underlying customer allegations were meritless.¹³

On October 3, 2019, FINRA sent Davis a letter informing him that the Director of the Office of Dispute Resolution¹⁴ had determined that his request for expungement of the prior arbitration award was “not eligible for arbitration” and FINRA “decline[d] to accept [Davis’s] claim” under FINRA Rule 13203(a).

12100(m), 13100(m) (defining the FINRA “Director”); *Consolidated Arbitration Applications*, Exchange Act Release No. 97248, 2023 WL 2805323, at *4-5 (Apr. 4, 2023) (upholding FINRA’s application of Rules 12203(a) and 13203(a) to deny use of the arbitration forum for particular expungement claims). In this case, as described more fully below, we find that Davis already accessed FINRA’s arbitration service as to his expungement claim. We also note that we recently approved a proposal by FINRA to amend Rules 12203(a), 13203(a), and various rules related to the expungement of customer dispute information from the CRD. *Order Granting Accelerated Approval of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information*, Exchange Act Release No. 97294, 88 Fed. Reg. 24,282, 24,283-95 (Apr. 19, 2023). But we do not consider the amended rules, which are not yet in effect. *Notice of Filing of a Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information*, Exchange Act Release No. 95455, 87 Fed. Reg. 50,170, 50,188 (Aug. 15, 2022) (“If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice following Commission approval.”).

¹¹ FINRA Rules 12805, 13805.

¹² FINRA Rule 2080(a)-(b).

¹³ Specifically, Davis’s statement of claim argued that the allegations were “patently false” and factually impossible or clearly erroneous. See FINRA Rule 2080(b)(1)(A), (C) (providing as grounds for expungement that “the claim, allegation or information is factually impossible or clearly erroneous” or “is false”).

¹⁴ FINRA’s Office of Dispute Resolution has since been renamed FINRA Dispute Resolution Services. See *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Reflect Name Changes to Two FINRA Departments*, Exchange Act Release No. 90344, 85 Fed. Reg. 71,695, 71,695 (Nov. 10, 2020).

On October 23, 2019, Davis filed an application for review with the Commission, arguing that FINRA’s eligibility determination was improper. We directed the parties to address whether we have authority to review Davis’s application under Exchange Act Section 19(d).¹⁵

II. Analysis

Exchange Act Section 19(d) authorizes us to review actions taken by a self-regulatory organization (“SRO”) such as FINRA only in specific circumstances.¹⁶ One such circumstance is where an SRO “prohibits or limits any person in respect to access to services offered by [that SRO].”¹⁷

For the reasons articulated in detail in *Kent Vincent Pearce*,¹⁸ we find that we lack authority to consider Davis’s application for review. In particular, we find that Davis already accessed the service of using FINRA’s arbitration forum to seek to expunge the same customer dispute information at issue here, on the same ground that the customer allegations lacked merit.¹⁹ Even though Davis previously requested expungement in the customer arbitration

¹⁵ We initially consolidated Davis’s application with others that appeared to raise similar reviewability issues. *See Consolidated Arbitration Applications*, Exchange Act Release No. 87615, 2019 WL 6287506 (Nov. 25, 2019). We later severed *Davis* from the other consolidated cases because, unlike in those cases, the record indicated that Davis “may not have been denied access to the arbitration forum for [his] request[] to expunge the prior adverse arbitration award[.]” *Consolidated Arbitration Applications*, Exchange Act Release No. 92923, 2021 WL 4131411 (Sept. 9, 2021). We then requested additional briefs regarding, among other things, whether the underlying customer arbitration panel had denied Davis’s request to expunge information regarding the customers’ allegations from the CRD. *Alton Theodore Davis, Jr.*, Exchange Act Release No. 92968, 2021 WL 4170498 (Sept. 13, 2021).

¹⁶ 15 U.S.C. § 78s(d)(1)-(2).

¹⁷ *Id.* The Exchange Act provides three other bases for our review of an SRO action: if the action imposes a final disciplinary sanction on a member of the SRO or an associated person; if it denies membership or participation to the applicant; or if it bars a person from becoming associated with a member. *See id.* Davis does not argue that any of these alternate bases apply here, so we do not address them. *Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 WL 3820988, at *3 & n.13 (July 7, 2020) (not reaching “alternate bases for Commission review” where applicant did not contend that those bases applied); *cf. Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *3 n.18 (July 15, 2016) (“We will not exercise jurisdiction on a basis [applicants] disclaim.”), *aff’d sub nom., Chicago Bd. Options Exch. v. SEC*, 889 F.3d 837 (7th Cir. 2018); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.6 (1986) (“Jurisdiction may not be sustained on a theory that the plaintiff has not advanced.”).

¹⁸ Exchange Act Release No. 97451, 2023 WL 3317916 (May 8, 2023).

¹⁹ *See id.* at *3 (dismissing application for review because applicant had already sought expungement during underlying customer arbitration). Although Davis and Smith Barney’s statement of answer in the underlying customer arbitration is not in the record, Davis’s affidavit

forum, whereas now he is requesting expungement in the intra-industry arbitration forum, Davis has not identified any material difference between the two forums as to his expungement request.²⁰ And, just as in *Pearce*, Davis's access to FINRA's arbitration service during the initial customer dispute was not "illusory."²¹ In particular, during the underlying customer arbitration, Davis challenged the merits of the customers' allegations, testified at the hearing, and requested expungement of all information regarding the arbitration from his CRD records, and then Davis received a final, adverse award on his request.²² We also note that Davis could have sought to vacate, modify, or correct the 1997 arbitration award in court,²³ but he did not do so. Finally, as in *Pearce*, Davis failed to exhaust any claim before FINRA that he sought to use FINRA arbitration to request expungement on equitable grounds.²⁴

Accordingly, we dismiss the application for review.²⁵ An appropriate order will issue.²⁶

By the Commission (Chair GENSLER and Commissioners PEIRCE, CRENSHAW, UYEDA and LIZÁRRAGA).

Vanessa A. Countryman
Secretary

and the eventual customer arbitration award show that the Davis and Smith Barney's only substantive claim was that the customer's allegations were meritless, and therefore expungement was warranted.

²⁰ *See id.* at *4.

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See id.* at *5.

²⁵ Because we lack authority to review FINRA's action, we do not consider Davis's merits arguments regarding whether FINRA's denial letter complied with FINRA rules. *Id.* at *5 n.35. Davis's application for review also suggests that we should direct FINRA to delete the references to the underlying customer dispute from the CRD, but Davis forfeited this argument by failing to brief it. *See* Rule of Practice 420(c), 17 C.F.R. § 201.420(c) ("Any exception to a determination not supported in an opening brief . . . may, at the discretion of the Commission, be deemed to have been waived by the applicant."). In any event, we lack authority to review FINRA's decision not to remove information from the CRD. *Graham*, 2020 WL 3820988, at *3-4.

²⁶ We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97721 / June 14, 2023

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ALTON THEODORE DAVIS, JR.
For Review of Action Taken by
FINRA

ORDER DISMISSING APPLICATION FOR REVIEW OF ACTION TAKEN BY
REGISTERED SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it is

ORDERED that this application for review filed by Alton Theodore Davis, Jr., is
dismissed.

By the Commission.

Vanessa A. Countryman
Secretary