

**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 OPPOSITION BRIEF

This brief by Mr. Michael Andrew DeMaria (“Mr. DeMaria”), is in reply to FINRA’s opposition brief filed on April 12, 2021. Mr. DeMaria seeks Commission review of a determination by the Director of FINRA Office of Dispute Resolution (“Director”) to deny Mr. DeMaria access to the FINRA arbitration forum, under FINRA Code of Arbitration Procedure for Industry Disputes (“FINRA Rules”) Rule 13203(a).

Mr. DeMaria, by and through counsel, timely submitted an Application for Review to the Commission, pursuant to Section 19(d) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹, challenging the Director’s determination that Mr. DeMaria’s claim is ineligible for arbitration in FINRA forum. On March 11, 2021, Mr. DeMaria submitted his brief (“Opening Brief”) in support of his Application for Review. On April 12, 2021 FINRA submitted their Brief in Opposition (“Response”). Mr. DeMaria now timely submits his Reply Brief in Support of the Application for Review for Consideration by the Commission.

¹ 15 U.S.C. § 78s(d).

INTRODUCTION

In its Response, FINRA incorrectly states that only customer complaints may be expunged from the CRD and BrokerCheck in its forum, in accordance with FINRA Rule 2080. Response Brief (“Resp. Br.”) at 8. Not only is this assertion untrue, but it also fails to acknowledge that Mr. DeMaria did not invoke Rule 2080 in his arbitration claim. FINRA also misstates that the three grounds enumerated in Rule 2080 are the only grounds upon which expungement can be recommended. *Id.* at 3. Further, FINRA states that the disclosures Mr. DeMaria seeks expungement of are not eligible for expungement and thus not eligible for arbitration, but fails to cite a single rule to support this argument. Lastly, FINRA fails to provide any support for its blanket assertion that FINRA Rule 13203 permits the Director of Dispute Resolution to deny access to its forum in a case like Mr. DeMaria’s.

The Commission should not dismiss Mr. DeMaria’s application for review because the grounds on which FINRA based its decision were inconsistent with its own rules and Securities Exchange Act of 1934 (the “Exchange Act”).

ARGUMENT

A. FINRA Improperly Prohibited Mr. DeMaria Access to Its Arbitration Forum

i. FINRA Rules Do Not Only Permit Expungement of Customer Dispute Information

FINRA Rules 2080, 2081 and 13805 pertain to expungement of customer dispute information in the FINRA arbitration forum. FINRA asserts in its Response that only customer dispute information may be expunged from the CRD and BrokerCheck. Resp. Br. at 8. This assertion is demonstrably false. FINRA ignores entirely the multitude of other disclosures that are expunged and/or modified regularly from the CRD and BrokerCheck, including employment termination information, criminal disclosures, and financial disclosures. Expungements of these

kinds of records have been accomplished in accordance with FINRA Notice to Members 99-54², FINRA Rule 8312³, BrokerCheck Dispute Forms⁴, petitions to FINRA’s Credentialing, Registration and Disclosure Department (“CRED”), and petitions to state courts. In his statement of claim, Mr. DeMaria invoked FINRA Rule 8312(g), which calls for the expungement of potentially defamatory 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 seeks expungement of are potentially defamatory. Despite this, FINRA refused to allow his case to proceed in its forum for a neutral arbitrator to decide.

FINRA repeatedly mischaracterizes Rule 2080 to say an arbitrator may only recommend expungement in the “narrow circumstances” provided in the Rule. Resp. Br. at 3, 8, 10. However, FINRA Rule 2080 actually pertains to judicial confirmation of arbitration awards. It states plainly that a representative must obtain a court order directing FINRA to expunge the information and must name FINRA as a party to its motion to confirm the arbitration award. The Rule then goes on to state that FINRA may waive the obligation to name it in the motion if expungement is recommended on the specific grounds enumerated. FINRA repeatedly ignores the clear language of the Rule that provides that expungement may be recommended on other grounds. While many arbitrators recommend expungement pursuant to the grounds outlined in Rule 2080, an arbitrator has the authority to grant expungement relief in alignment with its

² <https://www.finra.org/sites/default/files/NoticeDocument/p004219.pdf>

³ <https://www.finra.org/rules-guidance/rulebooks/finra-rules/8312>

⁴ https://www.finra.org/sites/default/files/BrokerCheck_Dispute_Form.pdf

interpretation of the FINRA Arbitration Code or on equitable grounds. *See*, Rule 2080(b)(2); *see also*, FINRA Rule 13413.

FINRA goes on to argue that they are required to retain and report information concerning regulatory and disciplinary actions against its members and associated persons. Resp. Br. at 9. However, FINRA fails to acknowledge that it also has the authority to expunge information from those records and does not cite a single rule that *prohibits* the removal of information. The Act also states that the rules of the association are designed 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'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.

ii. Mr. DeMaria's Arbitration Claim is Not Inconsistent with the Forum's Purpose

FINRA makes a blanket assertion in its Response that Mr. DeMaria's claim was ineligible for arbitration because it was inconsistent with the Code. Resp. Br. at 9. However, it makes only a circular citation to FINRA Rules 12203/13203 and a citation to Rule 2080. *Id.* As stated above, FINRA Rule 2080 pertains only to expungement of customer dispute information, however, neither Rule 2080, nor Rule 13203 state that Mr. DeMaria's claim is ineligible for arbitration. In fact, FINRA does not cite to a single provision of its Code that prohibits claims like Mr. DeMaria's.

FINRA asserts that the Director properly exercised his authority under Rule 13203 because the subject matter of Mr. DeMaria's arbitration request is inappropriate in its forum because it is "patently ineligible for expungement under FINRA Rule 2080." *Id.* at 10. This is again a complete mischaracterization of the language of Rule 2080. Rule 2080 pertains to expungement of customer dispute information, but it does not address the eligibility of expungement of other material. Furthermore, Mr. DeMaria did not seek expungement of these disclosures under Rule 2080.

Lastly, FINRA states that the Director's denial "served the public's interest." *Id.* However, FINRA Rule 13203 does not give the Director authority to deny access to its arbitration forum on these grounds. FINRA focuses on the perceived "accuracy" and "meaningful[ness]" of the information Mr. DeMaria seeks expungement of. However, if FINRA's neutral arbitrators are not properly trained to assess that criteria, which is their sole purpose, then there is a bigger overarching issue at play. Nonetheless, FINRA cites to no authority that permits the Director to deny forum in on these grounds.

B. FINRA Acted Inconsistently with the Exchange Act

FINRA addresses Mr. DeMaria's assertion that he did not receive an adequate opportunity to be heard on the forum denial by stating that his statement of claim was his opportunity to be heard. *Id.* at 12. FINRA asserts that "the very purpose" of his statement of claim is to explain why expungement should be permitted in FINRA's forum. *Id.* at 13. Again, FINRA cites no rule that requires a claimant to address questions of eligibility in their statement of claim. Mr. DeMaria's statement of claim was limited to just that: his claim. He pleaded what the relief was that he sought and the facts to support that request. Mr. DeMaria was not blessed with foresight as to the denial and his claim made no mention of it. FINRA cites no authority supporting this nonsensical argument.

FINRA addresses Mr. DeMaria's assertion that he was not provided with the "specific grounds" for the forum denial by stating that the letter cited Rule 13203. *Id.* However, again, FINRA cites no relevant authority that addresses the sufficiency of this notice. The Exchange Act requires that the notice provide the *specific* grounds on which denial is based. The notice may have asserted that the Director unilaterally determined Mr. DeMaria's claims were ineligible for arbitration, but it did not state *why* his claims were ineligible or provide any Code provision that rendered his claim "inappropriate" for the forum.

FINRA's remaining arguments go to the merits of Mr. DeMaria's expungement request itself and not to the merits of the present appeal and are thus irrelevant. Nonetheless, this is not a collateral attack on the previous decision made by FINRA. Mr. DeMaria does not seek to reverse or set aside the AWC. Mr. DeMaria acknowledges what the AWC says. However, given the unique circumstances surrounding his case, he simply seeks removal of the *reference* to the Occurrences from his CRD and BrokerCheck records. The facts of his case, if reviewed by an independent arbitrator, could warrant such a result. The normal safeguards afforded to FINRA and its AWCs are not appropriate in a situation where it has completely abused its authority. Mr. DeMaria does not seek action against FINRA, but rather an opportunity to have a neutral arbitrator determine whether the Occurrences should remain a matter of public record. Mr. DeMaria has no other adequate remedy available to him. Instead, FINRA has usurped the fact-finding role in its "neutral" arbitration forum in dismissing Mr. DeMaria's claims based on its perceived belief that it has no merit, in violation of its authority under the Exchange Act.

The AWC should have never been issued by FINRA in the first place. FINRA issued an AWC where there was no wrongdoing found on the part of an arbitration panel. FINRA Rule 9216 states that, if the Department of Enforcement has reason to believe a violation has occurred and

the member or associated person does not dispute the violation, the Department of Enforcement may prepare and request that the member or associated person execute a letter accepting a finding of violation. In this case, there was no reason to believe any such violation occurred. By the time an AWC was even presented to Mr. DeMaria's counsel, there was already a determination made that the customer's claims lacked merit.

CONCLUSION

The Commission is authorized to review an action of an SRO where the SRO prohibits or limits a person's access to services offered by the SRO and where that service is fundamentally important, which is the case here. Furthermore, FINRA overstepped its authority in denying Mr. DeMaria's access to its forum. Mr. DeMaria respectfully requests that his case be remanded to FINRA with an order that FINRA allow him access to its forum on his claim for expungement.

Dated: April 26, 2021

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, James Bellamy certify that on this 26th day of April 2021, I caused a copy of Applicant's Reply Brief to FINRA's Opposition Brief above, to be served by email on:

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[X] (BY EMAIL) I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[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.

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