

**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

Administrative Proceeding No. 3-20199

**FINRA'S RESPONSE TO THE APPLICANT'S INITIAL BRIEF ON
THE ISSUE OF JURISDICTION**

Alan Lawhead
Vice President and
Director – Appellate Group

Gary Dernelle
Associate General Counsel

Ashley Martin
Assistant General Counsel

FINRA
Office of General Counsel
1735 K Street, NW
Washington, D.C. 20006
(202) 728-8207
ashley.martin@finra.org

July 2, 2021

TABLE OF CONTENTS

| | <u>Page</u> |
|---|--------------------|
| I. INTRODUCTION | 1 |
| II. FACTUAL BACKGROUND..... | 3 |
| A. FINRA Entered Two Disciplinary Actions Against DeMaria and Reported Them in CRD..... | 3 |
| B. Years Later, DeMaria Sought to Expunge the Regulatory Disclosures..... | 4 |
| III. ARGUMENT..... | 6 |
| A. The Commission Should Dismiss the Application for Lack of Jurisdiction because FINRA Did Not Prohibit or Limit Access to a Service It Offers..... | 7 |
| i. The relevant service is the arbitration of requests to expunge regulatory action information..... | 8 |
| ii. FINRA does not offer arbitration for claims seeking expungement of regulatory action information | 10 |
| iii. The Commission need not consider whether the relevant service is “fundamentally important” | 14 |
| B. DeMaria’s Arguments to the Contrary Are Unpersuasive..... | 14 |
| i. DeMaria has not demonstrated that FINRA offers the service he seeks ... | 14 |
| ii. DeMaria cannot create jurisdiction with an improper collateral attack on his past disciplinary actions | 18 |
| IV. CONCLUSION..... | 20 |

TABLE OF AUTHORITIES

Page(s)

FEDERAL DECISIONS

Buscetto v. FINRA, No. 11-cv-6308 (JAP), 2012 U.S. Dist. LEXIS 65116
(D.N.J. May 9, 2012).....12, 16

Loftus v. FINRA, No. 20-cv-7290 (SHS), 2021 U.S. Dist. LEXIS 18823
(S.D.N.Y. Feb. 1, 2021)10, 12, 16

FEDERAL REGISTER

*Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to
Establish Procedures for Arbitrators to Follow When Considering Requests for
Expungement Relief*, 73 Fed. Reg. 66,086 (Nov. 6, 2008)16

*Order Approving a Proposed Rule Change Relating to Availability of Information
Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*,
74 Fed. Reg. 61,193 (Nov. 23, 2009)13

*Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited
Conditions Relating to Expungement of Customer Dispute Information*,
79 Fed. Reg. 43,809 (July 28, 2014)13, 16

FEDERAL REGULATIONS, RULES AND STATUTES

17 C.F.R. § 201.4525, 17

17 C.F.R. § 201.4605, 17

15 U.S.C. § 78o-311

15 U.S.C. § 78s 1, *passim*

COMMISSION DECISIONS AND ORDERS

Dustin Tylor Aiguier, Exchange Act Release No. 88953, 2020 SEC LEXIS 1430
(May 26, 2020).....18

Allen Douglas Secs., Inc., 57 S.E.C. 950 (2004)6, 7

Constantine Gus Cristo, Exchange Act Release No. 86018, 2019 SEC LEXIS 1284
(June 3, 2019).....7, 8, 11, 13, 14, 18

COMMISSION DECISIONS AND ORDERS – cont’d

Jonathan Edward Graham, Exchange Act Release No. 89237, 2020 SEC LEXIS 2670
(July 7, 2020)7, 11, 18

*In the Matter of the Consolidated Arbitration Applications for Review of Action
Taken by FINRA*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312
(Aug. 6, 2020) 7-8, 9, 14, 18

John Boone Kincaid III, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189
(Oct. 22, 2019)8, 9, 13, 14, 18

Matthew Brian Proman, Exchange Act Release No. 57740, 2008 SEC LEXIS 956
(April 30, 2008)19

Russell A. Simpson, 53 S.E.C. 1042 (1998)8

Gershon Tannenbaum, 50 S.E.C. 1138 (1992).....19

FINRA DECISIONS AND ORDERS

Dep’t of Enf’t v. Motherway, Expedited Proceeding No. ARB200006, 2020 FINRA Discip.
LEXIS 39 (FINRA Hearing Panel June 30, 2020)16

FINRA RULES

FINRA Rule 20104, 17, 19

FINRA Rule 20809, 15, 16, 17

FINRA Rule 208115

FINRA Rule 82103

FINRA Rule 83125, 11, 15

FINRA Rule 83134

FINRA Rule 921119

FINRA Rule 92163

FINRA Rule 922119

FINRA Rule 923119

FINRA RULES – cont’d

FINRA Rule 926819

FINRA Rule 931119

FINRA Rule 937019

FINRA Rule 95523, 4, 5, 19

FINRA Rule 1010114

FINRA Rule 1030114

FINRA Rule Series 1200012, 15

FINRA Rule 1210111, 12, 15

FINRA Rule 122009, 10, 14

FINRA Rule 122019, 10

FINRA Rule 122035

FINRA Rule 1280515

FINRA Rule Series 1300012, 15

FINRA Rule 1310111, 12, 15, 16

FINRA Rule 132009, 10, 11, 14, 16

FINRA Rule 132019, 10, 16

FINRA Rule 132029, 10, 16

FINRA Rule 132036

FINRA Rule 1380410

FINRA Rule 1380515

FINRA Rule 1390416

NASD NOTICE TO MEMBERS

NASD Notice to Members 04-16, 2004 NASD LEXIS 18 (Mar. 4, 2004)12

OTHER AUTHORITIES

FINRA, “Arbitration & Mediation,” “Learn About Arbitration,” “Arbitration Overview,”
available at: <https://www.finra.org/arbitration-mediation/arbitration-overview>.....11

FINRA Dispute Resolution Services Arbitrator’s Guide (“Arbitrator’s Guide”) *available at:*
<https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf>.....17

FINRA, “Filing & Reporting,” “Guidelines for the BrokerCheck Dispute Process,”
available at: <https://www.finra.org/filing-reporting/web-crd/guidelines-brokercheck-dispute-process>.....15

FINRA, “Registration, Exams, & CE,” “Classic CRD,” “FAQ,” “General,” *available at:*
<https://www.finra.org/registration-exams-ce/classic-crd/faq/general> 4-5

FINRA, “The Neutral Corner, Vol. 4 – 2013,” *available at:*
<https://www.finra.org/sites/default/files/Publication/p410646.pdf>11

**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

Administrative Proceeding No. 3-20199

**FINRA’S RESPONSE TO APPLICANT’S INITIAL BRIEF ON
THE ISSUE OF JURISDICTION**

I. INTRODUCTION

This matter concerns Michael Andrew DeMaria’s attempt to commence a proceeding in FINRA’s arbitration forum to expunge from FINRA’s Central Registration Depository (“CRD”[®]) and BrokerCheck[®] disclosures of two disciplinary actions against him—one of which resulted in a two-month suspension, and the other of which resulted in a 22-month suspension and a \$15,000 fine. FINRA Dispute Resolution Services denied DeMaria’s attempt to seek expungement in FINRA’s arbitration forum because FINRA does not offer arbitration for requests to expunge information concerning regulatory actions.

DeMaria subsequently filed an application for review with the Commission. After the parties filed briefs on the merits, the Commission requested additional briefing on the issue of whether it has jurisdiction to consider DeMaria’s application for review under Section 19(d) of the Securities Exchange Act of 1934 (“Exchange Act”).

The Commission does not have jurisdiction to consider DeMaria’s application for review.

Three possible bases for the Commission to have jurisdiction under Section 19(d) plainly do not apply. FINRA's determination that DeMaria's statement of claim is not eligible for arbitration did not impose a disciplinary sanction on DeMaria, deny him membership or participation, or bar him from becoming associated with a member. The only remaining statutory basis for jurisdiction—which provides for Commission review when a self-regulatory organization (“SRO”) prohibits or limits access to a service—does not apply here because FINRA does not offer the service DeMaria seeks. Because none of Section 19(d)'s four jurisdictional grounds apply to this case, the Commission should dismiss the application for lack of jurisdiction.

For purposes of its jurisdictional analysis, the Commission should continue its practice of defining the relevant service as the precise service the applicant seeks. By using a precise definition of the service sought, the Commission will ensure that its analysis accurately addresses whether the SRO offers the relevant service. Here, the precise service DeMaria seeks is arbitration for a claim seeking expungement of regulatory action information.

FINRA does not offer the relevant service. Rather, FINRA's rules permit its arbitration forum to hear only customer and industry disputes. DeMaria's arbitration claim qualifies as neither because it pertains to regulatory matters—that is, FINRA's disciplinary actions against him and its disclosures concerning those actions. Because FINRA does not offer the relevant service, the jurisdictional provision for a prohibition or limitation on access to a service does not apply. Accordingly, the Commission should dismiss the application and need not address whether the purported service DeMaria seeks is fundamentally important.

DeMaria's arguments to the contrary are unpersuasive. He fails to identify any authority demonstrating that FINRA offers arbitration for claims seeking expungement of regulatory action information. And, while DeMaria asserts that he otherwise lacks a forum to challenge the

disclosures of the disciplinary actions, this argument ignores the fact that administrative remedies were available to DeMaria during the disciplinary proceedings. He cannot now use an improper collateral attack on those proceedings to manufacture jurisdiction for an appeal to the Commission.

II. FACTUAL BACKGROUND

Because the parties recounted the factual background of this case in their initial briefs on the merits, this brief provides a summary only of the immediately relevant background.

A. FINRA Entered Two Disciplinary Actions Against DeMaria and Reported Them in CRD

On June 23, 2014, FINRA suspended DeMaria in a proceeding under FINRA Rule 9552 after he failed to respond to a FINRA Rule 8210 request for information.¹ RP² 23-24. FINRA lifted the suspension on August 27, 2014.³ RP 23. FINRA reported the suspension, as well as its subsequent decision to lift the suspension, in CRD. RP 23-25.

On June 5, 2015, DeMaria entered into a Letter of Acceptance, Waiver, and Consent (“AWC”) with FINRA’s Department of Enforcement.⁴ RP 25-26; Applicant’s Brief in Support

¹ See FINRA Rule 9552(a)-(d) (setting forth procedures for a suspension where an associated person fails to comply with a request for information, among other things).

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

³ See FINRA Rules 9552(f), (h) (providing that an associated person may file a written request for termination of a suspension).

⁴ See FINRA Rule 9216 (setting forth procedures for an AWC).

of the Application for Review (“Br. Sppt. Appl.”), Attach. 2.⁵ Both DeMaria and his attorney executed the AWC, in which DeMaria consented to a finding that he failed to observe high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010. Br. Sppt. Appl., Attach. 2 at 2, 4, 5. In the AWC, DeMaria agreed to a 20-month suspension and a \$15,000 fine. RP 27; Br. Sppt. Appl., Attach. 2 at 2. He also agreed to waive certain procedural rights under FINRA’s Code of Procedure, such as the rights to have a complaint issued specifying the allegations against him, to defend against the allegations in a disciplinary hearing before a hearing panel and have a written decision issued, and to appeal any such decision to FINRA’s National Adjudicatory Council (“NAC”) and the Commission. Br. Sppt. Appl., Attach. 2 at 3. In executing the AWC, DeMaria acknowledged that it would “become part of [his] permanent disciplinary record,” and that the AWC would be “made available through FINRA’s public disclosure program in accordance with FINRA Rule 8313.” Br. Sppt. Appl., Attach. 2 at 4. FINRA reported the terms of DeMaria’s AWC in CRD. RP 25-27.

B. Years Later, DeMaria Sought to Expunge the Regulatory Disclosures

More than four years after executing the AWC, DeMaria sent a November 4, 2019 letter to FINRA’s Registration and Disclosure Department concerning the disclosures of the suspension under FINRA Rule 9552 and the AWC.⁶ Br. Sppt. Appl., Attach. 3. DeMaria’s

⁵ DeMaria filed a Brief in Support of the Application for Review on March 11, 2021. FINRA will cite to that brief as “Br. Sppt. Appl.” DeMaria filed his Brief in Support of the Commission’s Jurisdiction Over the Application on June 18, 2021. FINRA will cite to that brief as “Br. Sppt. Juris.”

⁶ FINRA’s Registration and Disclosure Department accepts correspondence related to the CRD. See FINRA, “Registration, Exams, & CE,” “Classic CRD,” “FAQ,” “General,” *available* [Footnote continued on next page]

letter stated that he “was not fully advised by counsel” concerning his decision to execute the AWC and claimed that the AWC resulted from an “abuse of authority and the enforcement process.” Br. Sppt. Appl., Attach. 3 at 1. He requested “an amicable agreement on his claims.”⁷ *Id.* After further correspondence with DeMaria’s attorney, FINRA’s Office of General Counsel sent DeMaria a February 3, 2020 letter stating that the AWC is enforceable, and that FINRA saw “no reason it should be set aside.”⁸ Br. Sppt. Appl., Attach. 4.

Ten months later, on December 8, 2020, DeMaria submitted a statement of claim to FINRA Dispute Resolution Services seeking to expunge from CRD FINRA’s disclosures about its disciplinary actions against him—that is, his suspension for failure to respond to a request for information and the AWC. RP 1-4. In his statement of claim, DeMaria contended that expungement was appropriate under FINRA Rule 8312 because both disclosures were defamatory. RP 3-4.

On December 10, 2020, FINRA Dispute Resolution Services sent written notice to DeMaria that FINRA determined that his claim was not eligible for arbitration. RP 5. As a

at: <https://www.finra.org/registration-exams-ce/classic-crd/faq/general> (last visited July 1, 2021).

⁷ Although DeMaria’s letter discussed his suspension under FINRA Rule 9552, the letter did not clearly indicate whether DeMaria sought to challenge the disclosure of that suspension. *See* Br. Sppt. Appl., Attach. 3 at 1.

⁸ In his brief addressing jurisdiction, DeMaria refers to a Petition for Expungement and Injunctive Relief he filed in the Superior Court of California in August 2020, which named FINRA as a defendant. Br. Sppt. Juris. at 3. He represents that the court dismissed this action in October 2020 after he voluntarily agreed to dismissal. *Id.* The Commission need not consider DeMaria’s statements and exhibits concerning the state action, as it is not part of the record before the Commission and DeMaria has not sought leave to adduce additional evidence. *See* Br. Sppt. Juris. at 3 & Exs. 1-2; Commission Rules of Practice 452, 460, 17 C.F.R. §§ 201.452, 201.460. More importantly, the state action is irrelevant to whether a statutory basis for jurisdiction exists under Section 19(d).

result, the letter advised, FINRA declined to accept the claim pursuant to FINRA Rules 12203(a) or Rule 13203(a). *Id.* On January 6, 2021, DeMaria filed the present application with the Commission to review FINRA's determination that his claim was not eligible for arbitration. RP 7-8.

III. ARGUMENT

The Commission should dismiss DeMaria's application for review because it lacks a statutory basis to exercise jurisdiction. The Commission's authority to review FINRA actions is governed by Section 19(d) of the Exchange Act, which grants the Commission authority to review only four classes of actions by a self-regulatory organization ("SRO"). 15 U.S.C. § 78s(d); *Allen Douglas Sec., Inc.*, 57 S.E.C. 950, 954-55 (2004). Specifically, Section 19(d) authorizes Commission review of an SRO action only if that action: (1) imposes any final disciplinary sanction on any member (or person associated with a member) of the SRO or participant therein; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by such organization or member thereof; or (4) bars any person from becoming associated with a member. 15 U.S.C. § 78s(d)(1)-(2).

None of Section 19(d)'s four jurisdictional grounds are present here. It is undisputed that FINRA's determination that DeMaria's claim is not eligible for arbitration did not impose a disciplinary sanction on DeMaria, deny him membership or participation, or bar him from associating with a member. Moreover, the eligibility determination did not prohibit or limit DeMaria in accessing a service offered by FINRA. Here, the relevant service is the precise service DeMaria requested: arbitration for a claim seeking expungement of regulatory action information. FINRA does not offer such a service and, as a result, the jurisdictional provision

for a prohibition or limitation on access to a service does not apply. *See Jonathan Edward Graham*, Exchange Act Release No. 89237, 2020 SEC LEXIS 2670, at *7-8 (July 7, 2020); *Constantine Gus Cristo*, Exchange Act Release No. 86018, 2019 SEC LEXIS 1284, at *12-13 (June 3, 2019). Because none of the four possible statutory bases for jurisdiction apply in this case, the Commission must dismiss the application. *Allen Douglas Sec.*, 57 S.E.C. at 954-55.

DeMaria's assertions that FINRA's arbitration forum may consider his expungement claim are unsupported and incorrect, as FINRA's rules authorize the forum to hear only customer and industry disputes. DeMaria's claim qualifies as neither because it pertains to a regulatory action. And, while FINRA's arbitration forum has considered expungement claims in limited circumstances, those circumstances do not apply here. Indeed, FINRA's arbitration forum not only lacks authorization to consider requests for expungement of regulatory action information, but doing so would violate FINRA's statutory obligation to maintain and report such information.

In essence, DeMaria seeks to collaterally challenge FINRA's disciplinary actions by framing the challenge as an expungement claim. The Commission should follow its precedent addressing jurisdiction, as well as improper collateral attacks, and reject DeMaria's attempt to reframe his improper collateral challenge as a viable arbitration claim.

A. The Commission Should Dismiss the Application for Lack of Jurisdiction because FINRA Did Not Prohibit or Limit Access to a Service It Offers

When evaluating whether it has jurisdiction to review an SRO's purported prohibition or limitation on access to a service, the Commission considers whether the SRO offers the relevant service and, if so, whether the service is fundamentally important. *In the Matter of the Consolidated Arbitration Applications for Review of Action Taken by FINRA* (hereinafter "*Consolidated Arbitration Applications*"), Exchange Act Release No. 89495, 2020 SEC LEXIS

3312, at *3 (Aug. 6, 2020). Where the SRO does not offer the relevant service, dismissal is required and the Commission need not consider whether the relevant service is fundamentally important. *John Boone Kincaid III*, Exchange Act Release No. 87384, 2019 SEC LEXIS 4189, at *9-10 & n.13 (Oct. 22, 2019). As discussed below, FINRA does not offer the relevant service—that is, arbitration for requests seeking to expunge regulatory action information. Accordingly, the Commission should dismiss the application and need not consider whether such a service would be fundamentally important.

i. The relevant service is the arbitration of requests to expunge regulatory action information

For purposes of Section 19(d), the Commission should define the relevant service as the service DeMaria requested in his statement of claim—that is, access to FINRA’s arbitration forum for consideration of his claim seeking to expunge regulatory action information. RP 1-4. When deciding whether it has jurisdiction to review an SRO’s purported prohibition or limitation on access to a service, the Commission has considered the precise nature of the service sought by the applicant. *See, e.g., Cristo*, 2019 SEC LEXIS 1284 at *12-13 (considering whether confirmation in writing that claims are ineligible for arbitration is a service that FINRA offers, as this was “precisely the service [the respondent] fault[ed] FINRA for failing to provide”); *Russell A. Simpson*, 53 S.E.C. 1042, 1047 (1998) (considering whether “permitting any person to file a complaint against an NASD member or associated person and conducting any resulting proceeding” is a “service offered” for purposes of Section 19(d)). For example, where an applicant faulted FINRA for failing to review an arbitrator’s award for compliance with its rules

prior to issuance, the Commission defined the relevant service in precisely that manner.⁹

Kincaid, 2019 SEC LEXIS 4189, at *9.

Here, the Commission should continue its practice of defining the relevant service based on the precise nature of the service sought by the applicant.¹⁰ As noted above, the Commission's jurisdictional analysis requires consideration of whether FINRA offers the relevant service. *See Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *3. That analysis would lack rigor if the Commission broadly defined the relevant service, as an analysis based on an imprecise definition (such as "arbitration" or "arbitration of expungement claims") would say nothing about whether FINRA actually offers the service DeMaria seeks. Indeed, while FINRA has rules addressing arbitration and expungement, those rules provide for arbitration or expungement only in certain circumstances. *See* FINRA Rules 12200, 12201, 13200, 13201(a), 13202 (providing for arbitration of certain customer and industry disputes); FINRA Rule 2080 (providing a mechanism to expunge, under narrow circumstances, customer dispute information from CRD). Accordingly, to ensure an accurate jurisdictional analysis, the Commission should define the relevant service based on the precise service sought by DeMaria—arbitration for a claim seeking expungement of regulatory action information.

⁹ Moreover, in the arbitration context, the Commission has indicated that its jurisdictional analysis may depend on the specific circumstances of the arbitration claim at issue. *See Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *6. As discussed here, the Commission's definition of the relevant service should match the precise nature of DeMaria's arbitration claim because this approach ensures an accurate jurisdictional analysis.

¹⁰ In this case, DeMaria's statement of claim identified the actual service he seeks. *See* RP 1 (requesting arbitration for a claim seeking expungement of two regulatory disclosures). If a statement of claim were to inaccurately identify the actual nature of the service sought, however, then the Commission should not base its jurisdictional analysis on the statement of claim's mischaracterization of the service.

In the statement of claim he submitted to FINRA, DeMaria asked for arbitration for his request to expunge regulatory action disclosures from CRD. RP 1-4. He now defines the relevant service in a different way, as access to FINRA’s “arbitration forum to seek equitable relief.” Br. Sppt. Juris. at 4. DeMaria fails to explain why the Commission should define the relevant service in this manner. *See* Br. Sppt. Juris. at 4-7. Moreover, DeMaria’s proposed definition illustrates the problems that would arise if the Commission were to base its jurisdictional analysis (which it should not) on an imprecise definition of the relevant service. While FINRA’s arbitrators may award some forms of equitable relief, they may do so only in cases that are properly in the forum.¹¹ Thus, absent a definition of the relevant service that refers to the specific nature of the arbitration claim, it would be impossible to discern whether the forum actually offers the service DeMaria requests. *See* FINRA Rules 12200, 12201, 13200, 13201(a), 13202 (providing for the arbitration of certain customer and industry disputes). The Commission should reject DeMaria’s proposed definition of the relevant service because it omits critical details of the service sought and invites an inaccurate jurisdictional analysis.

ii. FINRA does not offer arbitration for claims seeking expungement of regulatory action information

FINRA’s dispute resolution forum “exists to facilitate the resolution of private securities disputes, not FINRA disciplinary actions.” *Loftus v. FINRA*, No. 20-CV-7290 (SHS), 2021 U.S. Dist. LEXIS 18823, *9 (S.D.N.Y. Feb. 1, 2021). FINRA’s Codes of Arbitration Procedure, which are codified in the 12000 and 13000 series of FINRA rules, provide for the resolution of certain

¹¹ For example, FINRA Rule 13804 provides that an arbitration panel may order permanent injunctive relief (an equitable remedy). This rule, however, does not apply to disputes that are not subject to arbitration under FINRA’s Code of Arbitration Procedure for Industry Disputes (“Industry Code”). *See* FINRA Rules 13804(a)(1)-(2) (stating that the rule applies to industry disputes “required to be submitted to arbitration under the Code”).

customer and industry disputes. *See* FINRA Rules 12200, 12201 (providing for arbitration of certain customer disputes); FINRA Rules 13200, 13201(a), 13202 (providing for arbitration of certain industry disputes).¹² FINRA’s Codes of Arbitration Procedure do not authorize the forum to consider other matters, including claims related to the expungement of regulatory actions.¹³ *See* FINRA Rules 12101(a), 13101(a) (providing that FINRA’s Codes of Arbitration Procedure apply only to disputes eligible for arbitration under FINRA’s rules).¹⁴ Because DeMaria’s claim concerns the expungement of a regulatory action—and FINRA’s arbitration forum is not authorized to consider such claims—the Commission should dismiss the application for lack of jurisdiction.¹⁵ *See Graham*, 2020 SEC LEXIS 2670, at *7-8; *Cristo*, 2019 SEC LEXIS 1284, at *12-13.

¹² *See also* FINRA, “Arbitration & Mediation,” “Learn About Arbitration,” “Arbitration Overview,” *available at*: <https://www.finra.org/arbitration-mediation/arbitration-overview> (listing the types of disputes that are eligible for arbitration or subject to mandatory arbitration) (last visited July 1, 2021).

¹³ FINRA disciplinary actions are administered pursuant to the FINRA Code of Disciplinary Procedure, which is codified in the 9000 Rule Series. 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.

¹⁴ *See also* “The Neutral Corner, Vol. 4 – 2013,” at 7-8, *available at*: <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) (last visited July 1, 2021).

¹⁵ While DeMaria named his former firm as the respondent in his statement of claim, that did not transform his claim into an intra-industry dispute. *See* FINRA Rule 13200 (providing that a dispute must be arbitrated under the Industry Code if, among other things, it is between or among members, members and associated persons, or associated persons). DeMaria’s statement of claim did not challenge any action taken or disclosure made by a FINRA member. *See* RP 1-4. Rather, DeMaria’s dispute is related to regulatory actions taken by FINRA and its disclosure of information concerning those actions. RP 1-4, 22-27.

Indeed, absent a rule authorizing arbitration for claims seeking expungement of regulatory action information (or at least, for the arbitration of claims related to regulatory actions), FINRA cannot offer the service DeMaria seeks. As discussed above, FINRA’s rules authorize its arbitration forum to hear certain customer and industry disputes—not disputes related to regulatory actions. Moreover, FINRA is required to maintain and report information concerning regulatory and disciplinary actions against its members and associated persons. 15 U.S.C. § 78o-3(i); *see also* FINRA Rule 8312(b)(2)(A), (c)(1)(A); *Buscetto v. FINRA*, No. 11-cv-6308 (JAP), 2012 U.S. Dist. LEXIS 65116, at *8 (D.N.J. May 9, 2012) (observing that “FINRA has a duty under the Exchange Act to report ‘registration information’ about current and former securities representatives, which includes information relating to [an associated person’s] disciplinary record”). If FINRA were to offer its arbitration service to expunge such information, it would potentially violate its duties under the Exchange Act. *See Buscetto*, 2012 U.S. Dist. LEXIS 65116, at *8; *Loftus*, 2021 U.S. Dist. LEXIS 18823, at *11.

Furthermore, if the Commission were to require FINRA to grant DeMaria’s request for access to its arbitration forum, FINRA would have no rules or standards to apply in the resulting arbitration. *See* 15 U.S.C. § 78s(f) (providing that, where the Commission determines that an agency’s prohibition or limitation on access to a service should be set aside, the remedy is to grant the applicant “access to services offered”). FINRA’s Arbitration Codes include rules and procedures for, *inter alia*, party submissions and responses, discovery, hearings, evidence, and awards. *See generally* FINRA Rules Series 12000, 13000. But these rules would not apply to DeMaria’s claim because it is not a customer or industry dispute. *See* FINRA Rules 12101, 13101 (explaining that the Arbitration Codes apply only to eligible customer and industry disputes). FINRA has no such rules or procedures to apply to an arbitration claim seeking

expungement of regulatory action information, and the lack of such procedures could be particularly problematic in this context because there is a strong public interest in preventing the removal of accurate and meaningful information from BrokerCheck. *See NASD Notice to Members 04-16*, 2004 NASD LEXIS 18, at *5-6 (Mar. 4, 2004) (noting the “common interest in a CRD system that contains accurate and meaningful information”); *see also Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081, Prohibited Conditions Relating to Expungement of Customer Dispute Information* (hereinafter “*Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*”), 79 Fed. Reg. 43,809, at 43,810 (July 28, 2014) (“The completeness of information in the CRD . . . is critical for the protection of investors and effective regulatory oversight.”).¹⁶

In sum, FINRA does not offer arbitration for claims seeking expungement of regulatory action information. Because FINRA does not offer the service DeMaria seeks, the Commission should dismiss his application for review for lack of jurisdiction. *See Cristo*, 2019 SEC LEXIS 1284, at *12-14 (dismissing the application for review where the applicant could not establish that FINRA prohibited or limited his access to a service it offers); *Kincaid*, 2019 SEC LEXIS 4189, at *9-10, 20 (same).

¹⁶ *See also Order Approving a Proposed Rule Change Relating to Availability of Information Pursuant to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)*, 74 Fed. Reg. 61193, at 61196 (Nov. 23, 2009) (explaining that FINRA would expand access to regulatory action information concerning formerly associated persons because 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”).

iii. The Commission need not consider whether the relevant service is “fundamentally important”

As explained above, the Commission has jurisdiction to review a purported denial of access to a service under Exchange Act Section 19(d) only where “the SRO prohibited or limited access to a service that the SRO offers *and* [] that service is fundamentally important.” *Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *3 (emphasis added). Where the SRO does not offer the relevant service, dismissal is required and the Commission need not consider whether the relevant service is fundamentally important. *Kincaid*, 2019 SEC LEXIS 4189, at *9-10 & n.13; *Cristo*, 2019 SEC LEXIS 1284, at *12-14 (dismissing the application for review where the applicant could not establish that FINRA prohibited or limited his access to a service it offers). Because FINRA does not offer the relevant service in this case, the Commission need not address fundamental importance.

B. DeMaria’s Arguments to the Contrary Are Unpersuasive

i. DeMaria has not demonstrated that FINRA offers the service he seeks

Citing to FINRA rules, DeMaria contends that arbitration is available for his claim because the forum hears “any” claims arising out of the business of a FINRA member or the employment or termination of persons associated with a member.¹⁷ Br. Sppt. Juris. at 4 (citing FINRA Rules 10101, 10301, 12200 and 13200). Even if this were true, DeMaria fails to explain why this would mean that his claim—which challenges a regulator’s disclosure of its disciplinary actions against him—is eligible for arbitration. *See* Br. Sppt. Juris. at 4-5; RP 1-4. Moreover, DeMaria ignores that the rules he cites expressly limit arbitration to disputes between or among:

¹⁷ FINRA Rules 10101 and 10301 apply only to arbitration cases filed before April 16, 2007. FINRA Rule 10301 (noting the effective date).

members; associated persons; members and associated persons; members or associated persons and public customers; or members and certain registered clearing agencies. FINRA Rules 10101, 10301(a), 12200, 13200. DeMaria's arbitration claim does not meet any of these criteria because it challenges FINRA's regulatory actions and disclosures. *See* RP 1-4.

Next, DeMaria contends that FINRA's arbitration forum considers expungement requests for virtually any published event disclosure that is alleged to be inaccurate, false, or defamatory.¹⁸ Br. Sppt. Juris. at 5-7. He is incorrect. FINRA's rules do not provide that "expungement claims" are a category of dispute eligible for arbitration—rather, as discussed above, only eligible customer and industry disputes are eligible to be heard in the forum. *See* FINRA Rules 12101(a), 13101(a) (providing that FINRA's Arbitration Codes apply only to eligible customer and industry disputes). When a customer or industry dispute is properly in the forum, the panel may address expungement in connection with that dispute—but only in limited circumstances. Indeed, FINRA's rules directly addressing expungement (namely, FINRA Rules 2080, 12805, and 13805) apply solely to requests to expunge customer dispute information, and they provide a mechanism for expunging such information only when narrow criteria are met.

¹⁸ In connection with this argument, DeMaria cites to FINRA Rule 8312(g). Br. Sppt. Juris. at 5. In relevant part, this rule reserves discretion to FINRA to exclude defamatory language from BrokerCheck. *See* FINRA Rule 8312(g)(1). It does not refer to arbitration, nor does it fall within FINRA's Arbitration Codes. *See* FINRA Rule 8312; FINRA Rule Series 12000, 13000. Rather than referencing arbitration, FINRA Rule 8312 expressly contemplates that individuals may dispute the accuracy of information disclosed in BrokerCheck pursuant to an administrative process that takes place outside of the arbitration forum. FINRA Rule 8312(e); *see also* FINRA, "Filing & Reporting," "Guidelines for the BrokerCheck Dispute Process," *available at*: <https://www.finra.org/filing-reporting/web-crd/guidelines-brokercheck-dispute-process> (describing the BrokerCheck dispute process) (last visited July 1, 2021). Even under that process, however, an individual may not "collateral[ly] attack [] or otherwise challenge[] the allegations underlying . . . a regulatory action." FINRA Rule 8312, Supp. Material .02(d). For all of these reasons, FINRA Rule 8312 should not be interpreted to create access to FINRA's arbitration forum for DeMaria's expungement claim.

These are the only rules addressing expungement in FINRA’s arbitration forum, and they do not apply where, as here, a party seeks expungement of regulatory action information. *See Loftus*, 2021 U.S. Dist. LEXIS 18823, at *11 (“[FINRA] Rule 2080 only allows the expungement, under narrow circumstances, of customer-initiated complaints, not FINRA-initiated enforcement actions”); *Buscetto*, 2012 U.S. Dist. LEXIS 65116, *9 (explaining that FINRA Rule 2080 “is not and never has been applied to expunge final FINRA disciplinary actions and records”).¹⁹

Moreover, while FINRA’s arbitration forum has considered the expungement of information related to industry disputes, that does not mean that the forum can hear claims for expungement of regulatory action information.²⁰ As discussed above, FINRA’s Industry Code provides that the forum may hear and enter awards in certain industry disputes. *See* FINRA Rules 13200, 13201(a), 13202, 13904 (providing for the arbitration of, and entry of awards in, certain industry disputes). Any expungement awards entered in such cases necessarily were entered pursuant to the authority provided by those rules. *See* FINRA Rule 13101(a) (providing that intra-industry arbitration claims are governed by the Industry Code). In contrast, there are

¹⁹ *See also Order Approving a Proposed Rule Change to Adopt FINRA Rule 2081*, 79 Fed. Reg. 43,809, at 43,810 (stating that “[b]rokers who wish to have *customer dispute information* removed from the CRD” may seek expungement under FINRA Rule 2080) (emphasis added).

²⁰ *See Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure to Establish Procedures for Arbitrators to Follow When Considering Requests for Expungement Relief*, 73 Fed. Reg. 66086, at 66087 (Nov. 6, 2008) (explaining that the proposed rule change “would not affect FINRA’s current practice of permitting expungement . . . of information from the CRD *as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms* based on the defamatory nature of the information ordered expunged”) (emphasis added); *see also, e.g., Dep’t of Enf’t v. Motherway*, Expedited Proceeding No. ARB200006, 2020 FINRA Discip. LEXIS 39, at *2 n.4 (FINRA Hearing Panel June 30, 2020) (explaining that the arbitration panel recommended the expungement of certain information disclosed by the respondent’s firm on a Form U5 in the context of an industry dispute between the respondent and the firm).

no rules permitting FINRA's arbitration forum to hear and enter awards in disputes related to regulatory actions. Accordingly, the fact that FINRA arbitrators have ordered the expungement of information related to some intra-industry disputes does not demonstrate that FINRA offers the service DeMaria seeks.

In addition, DeMaria's citations to excerpts from a FINRA Arbitrator's Guide do not demonstrate that FINRA offers arbitration for claims seeking expungement of regulatory action information.²¹ *See* Br. Sppt. Juris. at 5-6. In particular, DeMaria contends that language found on pages 73-79 of the guide demonstrates that FINRA permits the expungement of a variety of disclosure events, including final regulatory actions. To the contrary, this portion of the Arbitration Guide confirms that FINRA's arbitration forum has considered expungement claims in the following limited circumstances: (1) requests for expungement of customer dispute information under FINRA Rule 2080 (Arbitrator's Guide at 73-78); and (2) expungement requests made in connection with intra-industry disputes (Arbitrator's Guide at 78-79). Nothing in the Arbitrator's Guide suggests that FINRA offers arbitration for claims that do not concern customer or industry disputes, nor does it suggest that the forum will consider claims for expungement of regulatory action information. *See generally* Arbitrator's Guide at 9-87.

Finally, DeMaria's citation to a pleading FINRA filed in his state court proceeding does not demonstrate that FINRA's arbitration forum hears claims seeking to expunge regulatory action information. Br. Sppt. Juris. at 9. Again, DeMaria has not sought leave to adduce pleadings from that action into the record before the Commission. *See* Commission Rules of Practice 452, 460, 17 C.F.R. §§ 201.452, 201.460. Even if the Commission were to consider the

²¹ In particular, DeMaria appears to cite to the February 2021 Edition of the *FINRA Dispute Resolution Services Arbitrator's Guide* ("Arbitrator's Guide") available at: <https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf> (last visited July 1, 2021).

pleading DeMaria cites, it correctly points out that he failed to exhaust—and in fact, voluntarily chose to forego—any potential challenges to the FINRA Rule 2010 violation described in the AWC. Br. Sppt. Juris., Ex. 1 at 14-17. Consistent with the discussion below (*see infra* at 18-19), the pleading explains that a collateral attack on the AWC is improper. Br. Sppt. Juris., Ex. 1 at 14-17.

ii. DeMaria cannot create jurisdiction with an improper collateral attack on his past disciplinary actions

DeMaria also contends that access to FINRA’s arbitration forum to hear his claim is fundamentally important because there is no alternate forum to hear his claim that the regulatory disclosures he seeks to expunge are defamatory. Br. Sppt. Juris. at 8-9; RP 3. This argument is flawed, as it conflates the issue of fundamental importance with the distinct issue of whether FINRA offers the service DeMaria seeks in the first place. *See Consolidated Arbitration Applications*, 2020 SEC LEXIS 3312, at *3-4 (noting that the issue of whether an SRO offers a service is distinct from the issue of fundamental importance); *Kincaid*, 2019 SEC LEXIS 4189, at *9 n.13 (same). Because FINRA does not offer the service DeMaria seeks, the Commission lacks jurisdiction under Section 19(d) regardless of whether the purported service could be considered fundamentally important. *See Kincaid*, 2019 SEC LEXIS 4189, at *9-10 & n.13; *Cristo*, 2019 SEC LEXIS 1284, at *12-14.

Because a statutory basis for jurisdiction is not present in this case, the Commission must dismiss DeMaria’s application notwithstanding his assertions about the lack of an alternate forum or the purported merits of his expungement claim. *Graham*, 2020 SEC LEXIS 2670, at *10 (explaining that an SRO’s action is not reviewable merely because it adversely affects the applicant, even if there is no alternate forum to challenge the action); *Dustin Tylor Aiguier*, Exchange 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)”). In any event, DeMaria’s arguments in this regard ignore the fact that he had opportunities to challenge FINRA’s actions in the disciplinary actions he seeks to expunge. With respect to his suspension for failing to provide information, DeMaria could—and did—garner the lifting of the suspension. *See* RP 25; FINRA Rule 9552(f), (h) (setting forth procedures to request the lifting of a suspension imposed under the rule). With respect to the FINRA Rule 2010 violation described in the AWC, DeMaria could have availed himself of a number of opportunities to contest FINRA’s findings of a violation, including to have a complaint issued specifying the allegations against him, defend against those allegations in a disciplinary hearing and have a written decision issued, and to appeal any such decision to the NAC and the Commission. *See* FINRA Rules 9211, 9221, 9231, 9268, 9311, 9370. He voluntarily chose to forego these options when he signed the AWC. Br. Sppt. Appl., Attach. 2 at 3. In doing so, he expressly acknowledged that FINRA would disclose information about the AWC to the public. Br. Sppt. Appl., Attach. 2 at 4. Having chosen to forego the available procedural protections, DeMaria cannot now use an improper collateral attack on the AWC to create a FINRA service where none exists. *See Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 SEC LEXIS 956, at *5-9 (April 30, 2008) (finding that the Commission lacked jurisdiction to review FINRA’s denial of the applicant’s request to vacate a bar imposed in a past settlement, as the request was collateral to a final disciplinary action); *see also Gershon Tannenbaum*, 50 S.E.C. 1138, 1140 (1992) (“It is always true in a case of this sort that a respondent cannot mount a collateral attack on findings that have previously been made against him.”).

IV. CONCLUSION

The Commission lacks jurisdiction over the application. FINRA did not prohibit or limit DeMaria in accessing a service it offers when it denied his request for access to the arbitration forum, as FINRA does not offer arbitration for claims seeking to expunge regulatory action information. Accordingly, the Commission should dismiss DeMaria's application and reject his attempt to manufacture jurisdiction with an impermissible collateral attack on the disciplinary actions he seeks to expunge.

Respectfully submitted,

/s/ Ashley Martin

Ashley Martin

Gary Dernelle

Alan Lawhead

FINRA

1735 K Street, NW

Washington, DC 20006

(202) 728-8207

July 2, 2021

CERTIFICATE OF COMPLIANCE

I, Ashley Martin, 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, Ashley Martin, 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 5,918 words.

/s/ Ashley Martin

Ashley Martin

Assistant General Counsel

FINRA

1735 K Street, NW

Washington, DC 20006

(202) 728-8207

ashley.martin@finra.org

CERTIFICATE OF SERVICE

I, Ashley Martin, certify that on this 2nd day of July 2021, I caused a copy of the foregoing FINRA's Response To The Applicant's Initial Brief On The Issue of Jurisdiction, Administrative Proceeding File No. 3-20199, to be filed through the SEC's eFAP system and served by electronic mail on:

Vanessa Countryman, Secretary
apfilings@sec.gov

and served by electronic mail on:

Owen Harnett
Managing Attorney
HLBS Law
legal.harnett@hlbslaw.com
owen.harnett@hlbslaw.com

Michael Bessette
Senior Attorney
HLBS Law
legal.bessette@hlbslaw.com
michael.bessette@hlbslaw.com

/s/ Ashley Martin
Ashley Martin
Assistant General Counsel
FINRA
1735 K Street, NW
Washington, DC 20006
ashley.martin@finra.org