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BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C.

In the Matter of the Application

of William Burk Rosenthal

For Review of Action Taken By

FINRA

File No. 3-18617

APPLICANT'S RESPONSE TO FINRA'S MOTION TO DISMISS THE APPLICATION FOR REVIEW AND TO STAY THE BRIEFING SCHEDULE

I. INTROUDUCTION

On Wednesday, August 8, 2018, FINRA's Office of the General Counsel submitted a Motion to Dismiss the Application for Review and to Stay the Briefing Schedule via certified, overnight mail. Counsel for the Applicant, William Burk Rosenthal ("Rosenthal"), received a copy of this Motion on Monday, August 20, 2018. FINRA states that Rosenthal's Application for Review should be dismissed because "it is untimely." Specifically, FINRA asserts that Rosenthal filed his Application for Review "almost two months after he was notified that his request for expungement of a customer arbitration from his record in the Central Registration Depository ("CRD®") was not eligible for arbitration." FINRA also asserts that Rosenthal has not "made the required showing of 'extraordinary circumstances' sufficient to justify an extension of his time to file." However, Rosenthal did in fact file his Application for Review within the 30-day time-frame allotted, and thus had no need to show

"extraordinary circumstances" sufficient to justify an extension of his time to file, as he had no need to seek such an extension. Consequently, the Commission should deny FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule.

II. FACTUAL BACKGROUND

On February 21, 2018, Rosenthal filed a Statement of Claim with FINRA's Office of Dispute Resolution ("Dispute Resolution"), naming his former firm, Securities America, Inc. ("Securities America") as Respondent, seeking expungement of two disclosures from his CRD Record and BrokerCheck. *See Exhibit 1*. On March 6, 2018, Securities America filed its Statement of Answer. *See Exhibit 2*.

On May 31, 2018, Dispute Resolution issued a notice to Rosenthal stating that his request for expungement for one of the disclosures "which arises from a prior adverse Award" was "not eligible for arbitration." *See Exhibit 3*. Rosenthal was advised that forum would be granted for the other disclosure.

On June 29, 2018, Rosenthal sent an original, plus 3 copies, of his Application for Review to Dispute Resolution's Chicago office via certified, overnight mail. *See Exhibit 4*. On that same day, Rosenthal sent an original, plus 3 copies, of his Application for Review to the Commission via certified, overnight mail. *See Exhibit 4*. According to FINRA's Motion to Dismiss, the Office of General Counsel somehow received a copy of the Application for Review on June 18, 2018.

On July 23, 2018 counsel for Rosenthal received notice from the Commission that they had received the Application for Review from FINRA. Counsel for Rosenthal explained that it had served both FINRA and the Commission contemporaneously, as required by Commission Rule of Practice 420. 17 C.F.R. § 201.420(b). It was conveyed to counsel for

Rosenthal via telephone that the copies sent to the Commission must have been sent to a different address than what is used for service of process and that the Application for Review may be in the wrong location within the office. The Commission requested a copy be faxed to one of two fax numbers. After several failed attempts to fax the requested copies, counsel for Rosenthal mailed another copy via certified, priority mail. *See Exhibit 5*. Counsel for Rosenthal sent the Application for Review to the same address as it had used previously after confirming that it was, in fact, the proper address. For reasons unknown, only the second attempt to mail the Application for Review to the Commission was successful despite the use of certified mail on both attempts.

On July 30, 2018, the Commission issued a letter acknowledging that it had received Rosenthal's Application for Review on July 27, 2018. However, the Commission made no mention that the filing was untimely.

III. ARGUMENT

The Commission should deny FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule because FINRA's assertion of and argument that the Application is untimely is both false and brought in bad faith. Further, the argument that Rosenthal "has made no attempt to establish 'extraordinary circumstances' sufficient to justify an extension of his time to submit an application for review" is an irrelevant argument. Rosenthal did not seek an extension of his time to file as he filed his Application for Review within 30 days of receiving notice from Dispute Resolution that his request for expungement for one disclosure was not eligible for arbitration. As such, he made no argument to establish "extraordinary circumstances."

According to Comment (b) of Commission Rule of Practice 420, "a method of service that provides proof of delivery is not mandatory," but the applicant for review bears the burden of proving that a filing was made in a timely manner when such a fact comes into question. While there is no identifiable reason as to why the Commission did not receive the Application for Review when it was first sent via certified, overnight mail on June 29, 2018, Rosenthal has met his burden of proof in establishing that his Application for Review was filed within the 30-day time limit pursuant to Commission Rules of Practice 420 and 151. 17 C.F.R. §§ 202.420; 202.151. *See Exhibits 4, 5.*

In the event that the Commission did make a determination that Rosenthal's Application for Review was untimely because it was not received by the Commission within the 30-day time limit, Rosenthal would then vehemently argue that he has experienced "extraordinary circumstances" which warrant an extension; as he made a best faith effort to file his Application for Review within the 30-day time limit by sending the required original plus 3 copies and Certificates of Service to both FINRA and the Commission via certified, overnight mail on June 29, 2018, one day before his deadline. It is unknown why the Application was received by FINRA, but not the Commission.

The Commission has held that "extraordinary circumstances" may arise when "the failure to timely file was beyond the control of the applicant." *PennMont*, 2010 WL 1638720, at *4. The failure of Rosenthal's best faith efforts to serve both FINRA and the Commission via certified, overnight mail is an extraordinary circumstance beyond his control. Rosenthal must not be held responsible for whatever extraordinary circumstances caused a well-established and usually extremely reliable process of service to fail.

The power and authority granted to the Commission is plenary. FINRA's motion to dismiss as untimely is a misguided attempt to persuade the Commission to overlook the principles of justice in their entirety. As outlined herein, the sole basis of FINRA's motion is not only littered with assumptions, but unequivocally excepted pursuant to *PennMont*.

IV. CONCLUSION

Rosenthal filed his Application for Review within the 30-day time limit that is established by Commission Rule of Practice 420. While that fact has come into question, Rosenthal has met his burden of proof with receipts of certified, overnight mail sent to both FINRA and the Commission, dated June 29, 2018. Because Rosenthal did not file untimely, there is no requirement for him to show "extraordinary circumstances" that warrant an extension. However, should the Commission determine the showing of such a requirement, Rosenthal has met that burden as well. Consequently, the Commission should deny FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule.

Respectfully submitted,

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Date: August 23, 2018

Exhibit 1 – William Burk Rosenthal, Statement of Claim and Exhibits, dated February 21, 2018.

Exhibit 2 – SAI Answer to Statement of Claim, dated March 6, 2018.

Exhibit 3 – FINRA Notice titled 'Forum Was Denied Without Prejudice,' dated May 31, 2018.

Exhibit 4 – Copy of Receipts for Certified, Overnight Mail, dated June 29, 2018.

Exhibit 5 – Copy of Receipt of Certified, Priority Mail, dated July 27, 2018.

EXHIBIT 1

FINANCIAL INDUSTRY REGULATION AUTHORITY DISPUTE RESOLUTION	
In the Matter of the Arbitration Between: Claimant: William Burk Rosenthal v. Respondent: Securities America, Inc.	**CASE NO. _____**
STATEMENT OF CLAIM	

As his Statement of Claim, Mr. William B. Rosenthal (the "Claimant"), by the undersigned attorney, hereby requests arbitration with a telephonic expungement hearing before FINRA Dispute Resolution against Securities America, Inc. (the "Respondent") pursuant to customer dispute occurrence numbers: 1224432 and 1457912 (together, the "Occurrences").

THE PARTIES

1. The Claimant, William Rosenthal (CRD #2030765), is a resident of Fort Worth, Texas. The Claimant has worked in securities since March of 1990 and is currently registered with LPL Financial LLC in Fort Worth, Texas. (*see*, Exhibit 1)

2. The Respondent, Securities America, Inc. (CRD #10205), is a securities broker-dealer and FINRA member firm with its corporate headquarters in La Vista, Nebraska. Between October of 1995 and December of 2007, the Respondent employed the Claimant as a registered representative in Fort Worth, Texas. (*see*, Exhibit 1)

3. On September 25, 2003, Mr. Michael Cooney ("Michael") and Mrs. Amy Cooney ("Amy") (together, the "Cooneys") attended a retirement workshop for Verizon employees, at which Mr. Brian Armstrong ("Armstrong") was one of two presenters.

4. At that time, Armstrong was a representative with the Claimant's business, Rosenthal Retirement Planning ("RRP"), which operated under the Respondent's broker-dealer umbrella. The Claimant was the office of supervisory jurisdiction ("OSJ") principal for Armstrong. (*see*, Exhibit 1)

5. Notably, the Claimant never met with the Cooneys at any point during their relationship with Armstrong and the Respondent. (*see*, Exhibit 2) For business processing purposes at RRP, the Claimant was listed as the agent of record on all accounts that were serviced by all affiliated representatives. Each advisor, such as Armstrong, had a group of clients which that advisor serviced as the primary advisor and contact person, and for which the Claimant served as supervisory manager. (*see*, Exhibit 2)

6. In late 2003, over the course of several meetings with the Cooneys, Armstrong discussed the Cooneys' retirement objectives, income needs, investment time horizon, previous investment experience, and overall investment goals. Armstrong discussed in detail with the Cooneys the advantages and disadvantages of using mutual funds or variable annuities as an IRA rollover account for Michael's pension and 401(k) rollovers from Verizon. Said discussions included white board presentations with numbered lists of key points and drawings for illustration purposes. The Cooneys were encouraged to ask questions in order to assist them in making well-informed decisions. Armstrong made it clear to the Cooneys that the decisions of whether to invest and in what to invest were ultimately theirs and theirs alone and that he would not be making decisions on their behalf.

7. On October 6, 2003, Armstrong met with the Cooneys and discussed various investment alternatives, including WM Group mutual funds and a MetLife Investors Series L variable annuity (the "MetLife Annuity"). (*see*, Exhibits 1, 2) Notably, the mutual funds discussed at said meeting were not presented as having higher fees than the MetLife Annuity. Armstrong and the Cooneys also discussed a Series C version of a similar MetLife annuity, including the fact that the Series C version had no surrender charges or timeframe that the Cooneys would be required to stay in the product, while the ongoing fees for the Series C version were higher than those for the MetLife Annuity. (*see*, Exhibit 2) Armstrong and the Cooneys also discussed at that time that the MetLife Annuity had a three-year contingent deferred sales charge schedule, or surrender schedule, though the ongoing fees for the MetLife Annuity were lower than those for the Series C version. Additionally, the MetLife Annuity offered an enhanced dollar cost averaging program that was not available in the Series C version. (*see*, Exhibit 2)

8. Due to his preference for the lower fees and the enhanced dollar cost averaging program, Michael selected the MetLife Annuity. (*see*, Exhibit 2) Michael also stated to Armstrong that Amy may be interested in transferring her existing IRA to a MetLife Annuity, as well.

9. Armstrong made extensive disclosures to the Cooneys regarding the MetLife Annuity. He described to them all details of the MetLife Annuity, including all costs, fees, risks, terms, advantages, and disadvantages of the product. (*see*, Exhibit 1) Additionally, the Cooneys received a prospectus for the MetLife Annuity, as well as each of the Prospectus Statement disclosure documents associated with the product, which the Cooneys signed. (*see*, Exhibit 2) All costs associated with the MetLife Annuity were outlined in the prospectus. (*see*, Exhibit 2)

10. Armstrong and the written materials for the MetLife Annuity specifically explained that the MetLife Annuity had a three-year surrender schedule which applied regardless of any optional benefit riders that the Cooneys may select. In other words, their MetLife Annuity contract

was subject to said surrender schedule whether or not the Cooneys selected the GMIB rider. (*see*, Exhibit 2) Armstrong and the written materials for the MetLife Annuity explained that the MetLife Annuity's surrender schedule would directly affect the current market surrender value of the Cooneys' MetLife Annuity contracts as long as said schedule was in effect. The prospectus for the MetLife Annuity included details regarding this. (*see*, Exhibit 2)

11. The Cooneys selected the Guaranteed Minimum Income Benefit ("GMIB") optional rider that was offered as an option with the purchase of the MetLife Annuity. Armstrong reviewed the features of the MetLife Annuity and the GMIB optional rider with the Cooneys on multiple occasions prior to their purchase of the MetLife Annuity. (*see*, Exhibit 2) Additionally, because the GMIB rider was a relatively new feature available in the investment industry, extra caution was used when presenting said feature to the Cooneys. (*see*, Exhibit 2)

12. As was routine with every client prior to signing such a contract, the Prospectus Statement disclosures were read aloud to the Cooneys. In signing the Prospectus Statement disclosures for the MetLife Annuity, the Cooneys attested to their understanding that: (a) the GMIB was available at an additional cost; (b) although the GMIB was based on six percent compound growth annually, it did not provide a cash or account value guarantee, nor is it a guarantee of any investment option; (c) the GMIB did provide an income base which was available for conversion to a lifetime income stream through annuitization at any time after the ten-year anniversary; and (d) the Cooneys had read and understood the aforementioned information. (*see*, Exhibit 2)

13. Additionally, the Prospectus Statement included an attestation by the Cooneys that they had been advised that withdrawals in excess of any free withdrawal amount may be subject to a charge on a declining basis annually and that said charge would be a percentage reduced to

zero over three years and would apply to any units redeemed within three years of purchase. (*see*, Exhibit 2)

14. On November 11, 2003, Michael signed the Prospectus Statement disclosure document associated with his MetLife Annuity. (*see*, Exhibits 1, 2)

15. In December of 2003, Michael rolled over [redacted] from his 401(k) into a MetLife Annuity for himself. (*see*, Exhibits 1, 3)

16. On December 8, 2003, Amy signed the Prospectus Statement disclosure document associated with her MetLife Annuity. (*see*, Exhibits 1, 2)

17. In January of 2004, Amy rolled over her IRA, worth [redacted] into a MetLife Annuity for herself. (*see*, Exhibits 1, 3)

18. Subsequently, Michael spoke with an "individual that [he] located on the internet who also sells MetLife VA products" who claimed that the Cooneys' MetLife Annuity contracts were very good but not "anywhere close" to the representations that Armstrong had made for the MetLife Annuity. (*see*, Exhibit 3)

19. On September 7, 2004, the Cooneys alleged "misrepresentation" of their MetLife Variable Annuity contracts purchased in December of 2003 and January of 2004. The Cooneys sought compensatory damages in the amount of $75,984. (*see*, Exhibit 1)

20. In their complaint letter, the Cooneys claimed that Armstrong represented that their investment would always be guaranteed to the higher of their initial investment or fair market value and that it would grow at a rate of six percent per year. (*see*, Exhibit 2) They further indicated that it was their understanding that the surrender value of their portfolio would never go below $901,000 after year three, including 5.55% income annually. (*see*, Exhibits 2, 3)

21. On November 2, 2004, the Respondent denied the claim, concluding that there had been no wrongdoing regarding the presentation and sale of the MetLife Annuity. (*see*, Exhibits 1,

2) The Respondent concluded that it appeared that the MetLife Annuity contracts were consistent with the Cooneys' stated investment objectives, and that none of the documentation supported the Cooneys' statements regarding their MetLife Annuity Contracts. (*see*, Exhibit 2)

22. The Cooneys' claim of "misrepresentation" is clearly erroneous, factually impossible, and false and, therefore, meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement. (*see*, Exhibit 1)

a. The allegation is false, because Armstrong extensively discussed all details of the MetLife Annuity with the Cooneys over the course of several meetings. Armstrong utilized a white board in his presentations, encouraged the Cooneys to ask questions, and provided the Cooneys with all written materials pertaining to their MetLife Annuity contracts.

b. The allegation is factually impossible, because the Cooneys signed attestations to their acknowledgment and understanding of all details of their MetLife Annuity contracts, including all details of the contracts' surrender schedules, fees, costs, terms, and the GMIB rider.

c. The allegation, as reported to the Claimant's Central Registration Depository ("CRD") record and BrokerCheck, is factually impossible, because the Claimant made no representations whatsoever to the Cooneys. In fact, the Claimant never met or spoke with the Cooneys. As the Claimant made no representations, and never spoke to the Cooneys regarding their MetLife Annuity contracts or any other subject, it would be impossible for the Claimant to make misrepresentations to the Cooneys regarding their MetLife Annuity contracts.

d. The allegation is clearly erroneous, because it was based not on any misrepresentation on the part of Armstrong. Rather, it was based on the Cooneys' misunderstanding of the details of their contracts after speaking with a third party. Any misunderstanding of an oral representation on the part of Armstrong would be clarified by the written documents that the Cooneys received and of which they attested their understanding.

23. The Claimant was not involved in the alleged investment-related sales practice violation and, therefore, is entitled to relief pursuant to FINRA Rule 2080(b)(1)(B). The Claimant was not the person who made the representations to the Cooneys and, therefore, could not possibly have made any misrepresentations to the Cooneys. The Claimant never met with the Cooneys and never had any conversations whatsoever with them regarding their MetLife Annuity or any other investment.

24. Since the Claimant made no representations to the Cooneys regarding their MetLife Annuity contracts and, therefore, made no misrepresentations to the Cooneys regarding their MetLife Annuity contracts, the public disclosure of the patently false allegations herein does not offer any public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing the Claimant's CRD record and will not provide valuable information for knowledgeable decision making.

Occurrence Number 1457912

25. On June 28, 1999, Mr. Clyde C. Byram ("Clyde") and Mrs. Meleena K. Byram ("Meleena") (together, the "Byrams") attended a retirement seminar conducted by the Claimant for Southwestern Bell Company ("SBC") employees. The Byrams subsequently called in to the Respondent and became clients of another advisor at the Respondent, Ms. Julie Rosenthal ("Julie"), who is the Claimant's ex-wife.

26. Initially, Julie met with the Byrams at the Dallas, Texas branch of RRP.

27. In 1999, as part of a larger employee buyout, SBC offered the Byrams a lump sum buyout or a pension benefit in lieu of continuing employment and future pension rights. The combined buyout for the Byrams was over [redacted], and the Byrams also had accumulated retirement savings in their 401(k) plans of approximately [redacted], as well. (*see*, Exhibit 4)

28. On March 30, 2000, the Byrams met with Julie. At that time, they informed Julie that they intended to leave SBC together in June of 2001 and to move back to St. Louis to be closer to their family. While they preferred not to work at all, the Byrams informed Julie that they may do odd jobs that did not require a permanent commitment. (*see*, Exhibit 5)

29. Julie and the Byrams weighed the pros and cons of the Byrams' options for retirement. The Byrams' primary desire was to maximize their income from their current retirement assets and to be able to replace their current income as much as possible. (*see*, Exhibit 5)

30. Julie prepared income projection worksheets for the Byrams based on hypothetical annual withdrawal rates between six percent and eight percent. Julie repeatedly advised the Byrams, both orally and in writing, that there was no guarantee that their investments would produce sufficient returns to cover the specific withdrawal rates used in the hypotheticals and that the very real possibility existed that, due to poor market performance, the Byrams' withdrawals could exceed the return on their investments. (*see*, Exhibit 5)

31. In 2000, the Byrams both made independent decisions to accept the early retirement offers from SBC. (*see*, Exhibit 5) Both of the Byrams chose the near-maximum allowed withdrawal rate of 7.5% per IRS Section 72(t) regulations. (*see*, Exhibit 5)

32. At the time of their retirement, Clyde was 54 years old, and Meleena was 44 years old. The Byrams had been managers at SBC and were retired. They were experienced investors

prior to bringing their accounts to the Respondent, and they were familiar with the risks associated with investing. Through several interviews, an investor profile questionnaire, and risk tolerance assessments, Julie and the Byrams ascertained the Byrams' investment objective to be growth and income with a moderate risk tolerance. Their investment time horizon was long-term, and their liquidity needs were solely for income purposes. The Byrams currently held mutual funds in their accounts.

33. Based on the Byrams' investor profile and stated objectives, Julie and the Byrams discussed various investments. Julie provided the Byrams with prospectus for each investment that they discussed. (*see*, Exhibit 5)

34. In November of 2000, Clyde related to Julie that he had studied the prospectus provided. (*see*, Exhibit 5)

35. From 2000 to 2002, the stock market experienced a downturn during which $5 trillion in market value was lost. The initial crash within this time period was caused by the dotcom bubble bursting, before conditions were exacerbated by the financial uncertainty following the September 11, 2001 terrorist attack. The markets did not recover to their March 2000 NASDAQ high for more than 15 years following the dotcom crash.

36. As the markets declined, the Byrams accounts were not keeping up with their withdrawals, and they became increasingly nervous about the markets. The Byrams wanted to find a way to help to protect their future income, either by allocating to a more conservative allocation or by moving to an account that provided some type of protection of future income. (*see*, Exhibit 5)

37. After much discussion over several months, it was decided that the Byrams' pension lump sums would be invested in a well-diversified portfolio of investments, utilizing mutual funds and variable annuities. (*see*, Exhibit 5)

38. Among the other investment alternatives presented to the Byrams, Julie presented an AIG SunAmerica Polaris II variable annuity (the "Polaris Annuity") to the Byrams. (*see*, Exhibit 1)

39. Julie made extensive disclosures to the Byrams regarding the Polaris Annuity, including all costs, fees, risks, terms, advantages, and disadvantages of the Polaris Annuity. (*see*, Exhibit 1)

40. The Byrams signed prospectus statements attesting to their acknowledgment and understanding of all details of the Polaris Annuity, including that there was no guarantee that their investment objectives could be met and that the value of their investments could increase or decrease based upon investment results. (*see*, Exhibits 1, 5) As was common practice at RRP, Julie read the prospectus statements aloud to the Byrams and confirmed that the Byrams were advised of both the advantages and disadvantages of mutual funds and variable annuities and that they were advised that the tax-deferred benefits of variable annuities offered no additional benefit when used in an IRA account. (*see*, Exhibit 5)

41. Julie and the Byrams met and/or communicated frequently regarding the status of the Byrams' accounts, as well as the Byrams' financial situation. (*see*, Exhibit 5)

42. On January 30, 2001, Clyde purchased a Polaris Annuity with his IRA.

43. On February 15, 2001, Clyde purchased a MassMutual Life Panorama Passage variable annuity (the "PP Annuity") with his IRA.

44. On March 9, 2001, Meleena purchased a PP Annuity with her IRA.

45. On March 12, 2001, Meleena purchased a Polaris Annuity with her IRA.

46. Meanwhile, the Byrams' withdrawals continued to increase as a percentage of their account balances. Upon being advised by Julie to reduce their withdrawals, the Byrams chose not to do so. They were satisfied with their investment portfolio, and they were not concerned, because

they still anticipated supplementing their retirement income with money earned from various business endeavors, and they planned to continue saving by reinvesting their excess monthly income. (*see*, Exhibit 5)

47. Near the end of 2002, Julie met with the Byrams to discuss the fact that, due to market conditions, the Byrams' withdrawal rates were in danger of reducing the principal corpus of their retirement funds. At that time, it was expressly discussed whether to reduce the percentage of withdrawals in order to alleviate the erosion of the Byrams' retirement funds. However, the Byrams refused at that time to reduce their withdrawals. (*see*, Exhibit 5)

48. In or around late 2002, the Byrams moved from Texas to Missouri. All subsequent meetings with the Byrams were conducted via telephone.

49. In 2003, the Byrams designed and built a custom home.

50. The Byrams subsequently determined that they liked the idea of using the Guaranteed Minimum Income Benefit with the MetLife Series L variable annuity (the "MSL Annuity") to protect their future income.

51. On July 18, 2003, Meleena purchased the MSL Annuity with her IRA.

52. On July 31, 2003, Clyde purchased the MSL Annuity with his IRA.

53. Together, the Byrams' Polaris, PP, and MSL Annuities initially constituted approximately 50% of the Byrams' portfolio with the Respondent. All of the annuities held by the Byrams paid low, up-front commissions of between one and two percent with trail commissions of approximately one percent.

54. Subsequently, Clyde independently decided that he preferred to own a Skandia annuity in place of his mutual funds, and the Byrams ultimately liquidated their brokerage accounts and mutual funds so that they were 100% invested in annuities. This was done predominantly at the Byrams' request.

55. On December 21, 2004, the Byrams officially began working with the Claimant after Julie ceased meeting with clients.

56. The Claimant and the Byrams spoke several times per year regarding the Byrams' accounts.

57. In January of 2005, after years of being advised to do so by the Claimant and Julie, Meleena elected to reduce her annual withdrawal rates. (*see*, Exhibit 5)

58. In April of 2006, Clyde agreed to reduce his annual withdrawal rates. (*see*, Exhibit 5)

59. In 2008 and 2009, the markets suffered a highly documented and unprecedented market collapse and subsequent financial crisis. The global financial crisis of 2008 is considered by many economists to be the worst financial crisis since the Great Depression of the 1930s. It began in 2007 with a crisis in the subprime mortgage market in the United States and developed into a full-blown international banking crisis with the federal takeover of Fannie Mae and Freddie Mac and the collapse of a number of major investment banks, including the bankruptcy of Lehman Brothers on September 15, 2008. The crisis was followed by a global economic downturn known as the "Great Recession."

60. Despite the aforementioned financial crisis, the Byrams' annuities performed reasonably well. However, due to the Byrams' withdrawals and their refusal to reduce their withdrawals for several years, the Byrams were disappointed with the performance of their annuities.

61. In December of 2008, six years after their first discussion of reducing their rate of withdrawals, the Byrams transferred their business to another investment advisor. The Claimant spoke with Clyde, who was displeased with the level of attention that their portfolio received due

to its decline in value. Clyde stated that the Byrams simply wanted to use a local advisor, and the conversation ended on friendly terms. (*see*, Exhibit 5)

62. On April 28, 2009, the Byrams filed for FINRA arbitration, alleging a "breach of fiduciary duty, unsuitability, and negligence" and seeking compensatory damages in the amount of $500,000. (*see*, Exhibit 1)

63. In their Statement of Claim, the Byrams alleged that the Claimant and Julie had recommended the Byrams' early retirement and had claimed that the Byrams' investments could replace their income from employment for the rest of the Byrams' lives and that the Claimant and Julie specifically promised the Byrams returns of eight percent to ten percent from their investments. The Byrams claimed that it was the Claimant and Julie, not the Byrams, who placed the Byrams entire account into annuities and that the Claimant and Julie did so in order to maximize their own commissions. Additionally, the Byrams claimed that they were never advised to reduce their withdrawals and that they were consistently reassured that their withdrawals could be supported by their investments. (*see*, Exhibit 4)

64. The Claimant denies all of the Byrams' allegations. (*see*, Exhibit 1)

65. On May 24, 2010, the Byrams were awarded $52,600, a fraction of the amount sought. The Claimant contributed $5,000 to the award amount. There were no findings of fault on the part of the Claimant during the Byrams' arbitration. (*see*, Exhibit 1)

66. The Byrams' claim of "breach of fiduciary duty, unsuitability, and negligence" is clearly erroneous, factually impossible, and false and, therefore, meets both the FINRA Rule 2080(b)(1)(A) standard and the Rule 2080(b)(1)(C) standard for expungement. (*see*, Exhibit 1)

a. The allegation of a breach of fiduciary duty is clearly erroneous, factually impossible, and false. At the time when the complaint was filed, fiduciary duties owed by financial advisors to clients like the Byrams had not been clearly

defined or codified and, as such, neither Julie nor the Claimant owed any specific fiduciary duty to the Byrams. Notwithstanding the fact that no fiduciary duty was owed, the Claimant and Julie did, at all times, act within the Byrams' best interests and risk tolerance in furtherance of the Byrams' investment objectives. Furthermore, the Claimant's first meeting with the Byrams occurred subsequent to the Byrams purchasing the annuities at issue in this dispute.

b. The allegation of unsuitability is false, because, pursuant to FINRA Rule 2111, the Claimant and Julie had a reasonable basis to believe that the annuities recommended by Julie were suitable for the Byrams based on the reasonable diligence of the Respondent, Julie, and the Byrams themselves to ascertain the Byrams' investor profile. The Byrams made an independent decision to retire at a relatively young age, and their objective was to ensure that they would have income throughout their retirement. While Julie recommended a diversified portfolio that included annuities and mutual funds, the Byrams agreed and then subsequently elected to liquidate their brokerage accounts and mutual funds and to invest 100% of their portfolio in annuities, thereby reducing the diversification of their portfolio that had been recommended by Julie. In doing so, the Byrams affirmatively indicated that they were exercising independent judgment in evaluating Julie's recommendations, and Julie and the Claimant thereby had a reasonable basis to believe that the Byrams were capable of evaluating investment risks independently, both in general and with regard to the annuities at issue in this dispute.

c. The allegation of unsuitability is factually impossible, because, by signing the documents necessary to purchase the annuities at issue in this dispute, the Byrams explicitly attested to the annuities' suitability.

d. The allegation of unsuitability is clearly erroneous, because the suitability of an investment is determined at the time when the investment is made. Profitability is not a required component of suitability, and a subsequent diminution in value alone says nothing about the suitability of an investment at the time it was made. A future event, such as the Byrams' rate of withdrawals or the financial crises in the markets during the time while the Byrams held their accounts with the Respondent, cannot and does not retroactively render the annuities at issue in this dispute unsuitable at the time when the investments were made.

e. The allegation of negligence is clearly erroneous, factually impossible, and false. In general, the elements of a negligence claim are: (i) duty, (ii) breach of that duty by allowing conduct to fall below the applicable standard of care, (iii) actual and proximate causation, and (iv) compensable injury caused. The Byrams have failed to produce any evidence in support of the aforementioned criteria. Specifically, the Byrams have failed to identify any duty that was allegedly breached or how said alleged breach was caused by allowing conduct to fall below the applicable standard of care. The Claimant's and Julie's recommendations were based upon the information known to them at the time when the recommendations were made. All recommendations were suitable and appropriate for the Byrams based upon their goals, objectives, and risk tolerance. Investing, by its very nature, involves risk, which the Byrams understood, and which the Byrams willingly took. Ultimately, all financial

decisions were made by the Byrams themselves. Furthermore, the financial crises described herein, in combination with the Byrams' rate of withdrawals was the actual and proximate cause of the Byrams' dissatisfaction with the performance of their accounts.

67. The Claimant was not involved in the alleged investment-related sales practice violations and, therefore, is entitled to relief pursuant to FINRA Rule 2080(b)(1)(B). The Claimant was not involved in the recommendation or sale of any of the annuities at issue in this dispute. The final annuity at issue in this dispute was purchased in 2003. The Claimant did not begin working with the Byrams or their account until 2004. Furthermore, the Claimant consistently recommended that the Byrams reduce their rate of withdrawals, a recommendation which the Byrams chose not to heed for several years.

68. Since the Claimant breached no fiduciary duty, was not negligent, and was not involved in the recommendation or sale of the annuities at issue in this dispute, the public disclosure of the patently false allegations herein does not offer any public protection and has no regulatory value. If not expunged, this customer dispute will mislead any person viewing the Claimant's CRD record and will not provide valuable information for knowledgeable decision making.

RELIEF REQUESTED

69. The Claimant requests expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(A) as the claim, allegation, or information is factually impossible or clearly erroneous.

70. The Claimant requests expungement of occurrence number 1457912 from his CRD record pursuant to FINRA Rule 2080(b)(1)(B) as the Claimant was not involved in the alleged

investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.

71. The Claimant requests expungement of the Occurrences from his CRD record pursuant to FINRA Rule 2080(b)(1)(C) as the claim, allegation, or information is false.

72. The Claimant requests an award of compensatory damages in the amount of $1.00 from the Respondent.

73. The Claimant requests any and all other relief that the Arbitrator deems just and equitable.

Respectfully submitted,

Dochtor Kennedy MBA, J.D.
President, Managing Attorney
T: (720) 282-5154
E: Doc@advisorlawyer.com

AdvisorLaw, LLC
3400 Industrial Lane, Unit 10A
Broomfield, CO 80020

Date: February 21, 2018

Exhibit 1 – William Burk Rosenthal BrokerCheck Report and CRD Individual Snapshot Report, dated February 21, 2018

Exhibit 2 – Securities America, Inc. response letter to Michael & Amy Cooney, dated November 2, 2004

Exhibit 3 – Michael Cooney and Amy Cooney letter of complaint to Securities America, Inc., dated August 31, 2004

Exhibit 4 – Statement of Claim before the Financial Industry Regulatory Authority in the Matter of the Arbitration between Clyde C. Byram and Meleena K. Byram v. William B. Rosenthal and Julie Rosenthal d/b/a Rosenthal Retirement Planning, L.P., not dated

Exhibit 5 – Respondents' Answer to Statement of Claim & Affirmative Defenses in the Matter of the Arbitration between Clyde C. Byram and Meleena K. Byram vs. William B. Rosenthal and Julie Rosenthal, d/b/a Rosenthal Retirement Planning, LP, dated June 30, 2009

EXHIBIT 2

March 6, 2018

Via FINRA DR Portal

FINRA
Office of Dispute Resolution
Midwest Regional Office
Sarah Farrukh
Case Administrator
55 West Monroe Street
Suite 2600
Chicago, IL 60603-5104

Re: FINRA Arbitration No. 18-00723
William Burk Rosenthal v. Securities America, Inc.

Dear Ms. Farrukh,

Please allow this letter to serve as Respondent Securities America, Inc.'s ("SAI") Answer to the Statement of Claim filed by William Burk Rosenthal ("Rosenthal") which seeks the expungement of two customer complaints from his Central Registration Depository ("CRD") records:

1.i Occurrence Number 1224432i
2.i Occurrence Number 1457912i

SAI notes at the outset that the Statement of Claim makes no claim against SAI nor does it allege any wrongdoing of any kind on the part of SAI. Claimant has named SAI solely as a nominal Respondent, consistent with FINRA rules governing expungement actions.

SAI takes this opportunity to correct the record in the Statement of Claim. Rosenthal alleges that, "Respondent employed the Claimant as a registered representative in Fort Worth, Texas" (Statement of Claim Paragraph 2). At all times during Rosenthal's affiliation with SAI, Rosenthal acted as an independent contractor and not an employee.

SAI does not oppose the present action for expungement of the above-referenced complaints from Rosenthal's CRD, as detailed in paragraph numbers 22, 66, 69, 70 and 71. SAI reserves the right to revisit its position with respect to non-opposition based upon further discovery. However, SAI does not anticipate any such change in its position. SAI further reserves its right as a named party to appear at any scheduled hearing in this matter.

Rosenthal requests an award of damages in the amount of $1.00 from SAI and requests any and all other relief that the Arbitrator deems just and equitable. However, Rosenthal makes no claim against SAI, alleges no wrongdoing on the part of SAI, and only names SAI as a nominal Respondent consistent with FINRA rules governing expungement actions. Accordingly,

Rosenthal is not entitled to relief from SAI whatsoever, and his request for an award of damages from SAI should be summarily denied.

If you have any questions or require any additional information, you may contact me via phone at (800) 747-6111 ext. 6208 or via email at tschubauer@saionline.com.

Sincerely,

Tyler Schubauer
In-House Counsel
Securities America, Inc.

Christina Heller
First Vice President & Senior Counsel
Securities America, Inc.

EXHIBIT 3

FINRA
Financial Industry Regulatory Authority

TO: Dochtor Kennedy, Esq.

CC: Tyler Schubauer, Esq.

From: Sarah Farrukh
Case Administrator

Subject: FINRA Office of Dispute Resolution Arbitration Number 18-00723
William Burk Rosenthal vs. Securities America, Inc.

Date: May 31, 2018

The Director of FINRA Office of Dispute Resolution determined that your request for expungement of occurrence number 1457912 in your Statement of Claim, which arises from a prior adverse Award, is not eligible for arbitration. Therefore, pursuant to the Customer Code Rule 12203(a) or Industry Code Rule 13203(a), the forum as to occurrence number 1457912 is denied. The case will proceed in this forum as to occurrence number 1224432.

If you have any questions, please do not hesitate to contact me at 312-899-4449 or by email at Sarah.Farrukh@finra.org.

SFH:sfh:LC53W
idr: 07/08/2016

RECIPIENTS:
Dochtor Kennedy, Esq., AdvisorLaw, LLC, 3400 Industrial Lane, Unit 10A, Broomfield, CO 80020
On Behalf Of: William Burk Rosenthal

CC:
Tyler Schubauer, Esq., Securities America, Inc., 12325 Port Grace Blvd., Lavista, NE 68128
On Behalf Of: Securities America, Inc.

EXHIBIT 4

Tim Sullivan
William Rosenthal
FINRA / SEC

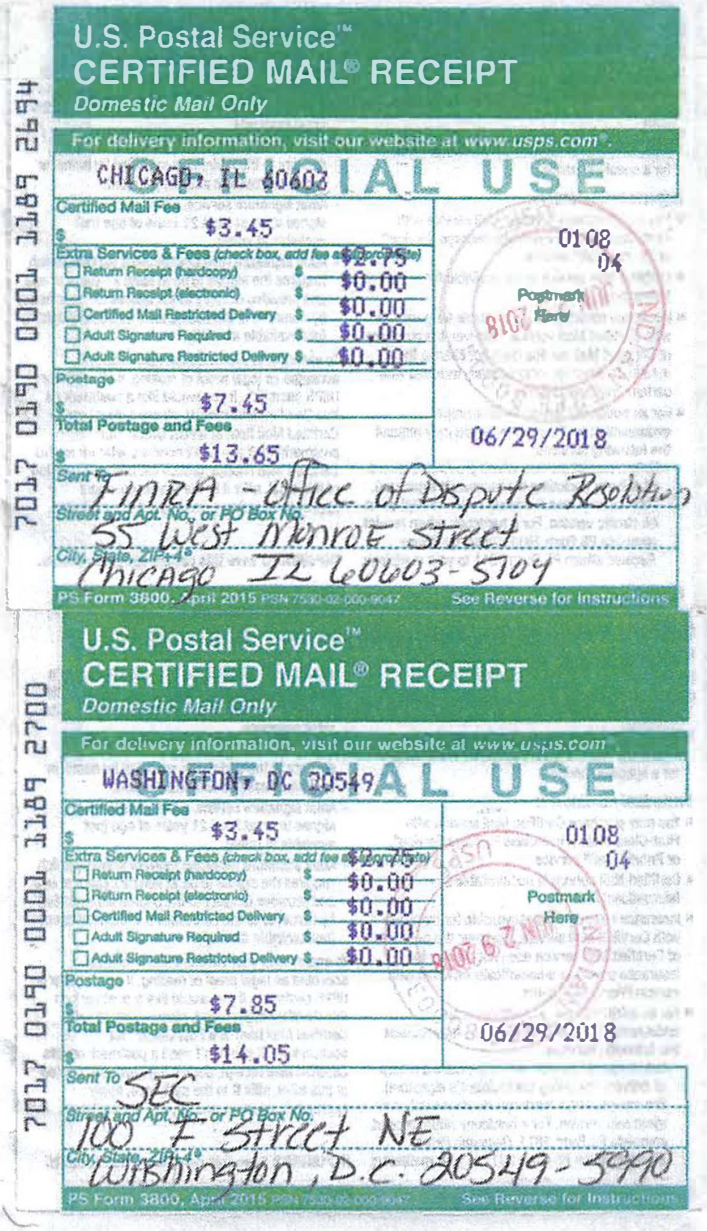

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EXHIBIT 5

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Sales Receipt

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Qty: 1 @ $6.70 $6.70

Total Paid: $6.70

Merchant Location: 4404502365228
9
Card Number: XXXXXXXXXXXX3840
Reference ID: 020813488002
Card Type: Visa
Approval Code: 837894

CERTIFICATE OF SERVICE

I, Owen Harnett, certify that on this 27th day of August 2018, I caused the original and three copies of Applicant's Response to FINRA's Motion to Dismiss and to Stay the Briefing Schedule in the matter of Application for Review of William Burk Rosenthal, Administrative Proceeding File No. 3-18617, to be served via Certified Mail on:

Brent J. Fields, Secretary
Securities and Exchange Commission
100 F St., NE
Room 10915
Washington, DC 20549-1090

and

Celia L Passaro
Assistant General Counsel
FINRA
1735 K Street, NW
Washington, DC 2006

Owen Harnett, Esq.
Attorney
AdvisorLaw LLC
3400 Industrial Lane, Unit 10A
Broomfield, CO 80020