

**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

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

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Dated: August 8, 2018

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**I. INTRODUCTION**

FINRA moves to dismiss William Burk Rosenthal's July 27, 2018 Application for Review because it is untimely. Rosenthal filed the 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. Even assuming, for the sake of argument, that being told that an expungement request is improper was a FINRA action that can be appealed to the Commission, Rosenthal was almost four weeks late in filing his appeal. Commission rules provide that an aggrieved person applying for review must file such an application within 30 days after receiving notice of a determination by FINRA. Rosenthal has neither timely filed his Application for Review, nor made the required showing of "extraordinary circumstances" sufficient to justify an extension of his time to file.

Consequently, the Commission should dismiss Rosenthal's Application for Review.<sup>1</sup>

## II. FACTUAL BACKGROUND

On or about February 21, 2018, Rosenthal filed a Statement of Claim with FINRA's Office of Dispute Resolution ("Dispute Resolution") against his former firm, Securities America, Inc. ("Securities America"), seeking expungement of two disclosures from his CRD record. (R. 1-18.) The first disclosure concerned a complaint letter from a customer, which Securities America denied and for which there was no further action by the customer (the "Complaint Letter"). (R. 53-59, 226-27.) The second disclosure, which is the subject of Rosenthal's Application for Review, concerned a customer arbitration in which the customers alleged breach of fiduciary duty, unsuitability, and negligence (the "Customer Arbitration"). (R. 63-66, 221-25.) The Customer Arbitration resulted in an award in favor of the customers of \$52,600 in compensatory damages, plus interest, for which Rosenthal was jointly and severally liable. (R. 221-25, 235-42.)

On March 6, 2018, Securities America filed an answer to the statement of claim requesting that it be summarily denied. (R. 179-80.) On May 31, 2018, Dispute Resolution issued a memorandum to Rosenthal advising him that his request for expungement of the Customer Arbitration was "not eligible for arbitration" because the disclosure arose "from a prior adverse Award." (R. 181.) Dispute Resolution further advised Rosenthal that his case would proceed with respect to his request to expunge the Complaint Letter. (Id.)

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<sup>1</sup> Pursuant to Commission Rule of Practice 161, FINRA requests that the Commission stay issuance of a briefing schedule in this matter while this motion is pending. *See* 17 C.F.R. § 201.161. The Commission should first evaluate the dispositive argument that Rosenthal's appeal should be dismissed on procedural grounds before it reaches the underlying substance of his appeal.

On or about June 29, 2018, Rosenthal sent a copy of his Application for Review to Dispute Resolution's Chicago office. (R. 183-87.) FINRA's Office of General Counsel ("FINRA OGC") received a copy of the Application for Review on June 18, 2018. On July 24, 2018, FINRA OGC sent a letter to Rosenthal's counsel notifying him that it appeared he had not filed his Application for Review with the Commission. (R. 195.)

On July 30, 2018, the Commission issued a letter acknowledging receipt of Rosenthal's Application for Review (the "Acknowledgement Letter"). (R. 197-99.) The Acknowledgement Letter indicated that the Commission received the Application for Review on July 27, 2018. (R. 198.)

### **III. ARGUMENT**

The Commission should dismiss Rosenthal's Application for Review because, even assuming this a decision of FINRA subject to Commission review, it is untimely and Rosenthal has made no attempt to establish "extraordinary circumstances" sufficient to justify an extension of his time to submit an application for review.

Section 19(d)(2) of the Securities Exchange Act of 1934 ("Exchange Act") provides that any person aggrieved by a self-regulatory organization's imposition of one of the four actions specified in Section 19(d)(1) may file an appeal "within thirty days" after the date the notice of the self-regulatory organization's determination was filed with the SEC and received by the aggrieved person, or "within such longer period as [the SEC] may determine." 15 U.S.C. § 78s(d)(2).<sup>2</sup>

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<sup>2</sup> FINRA did not file the May 31, 2018 memorandum from Dispute Resolution notifying Rosenthal that expungement of the Customer Arbitration was not eligible for arbitration. FINRA does not file any arbitration awards or rulings with the Commission because Section 19(d)(1)

Rosenthal's appeal is untimely and the Commission should dismiss it. Dispute Resolution issued its memorandum notifying Rosenthal that his request for expungement of the Customer Arbitration was not eligible for arbitration on May 31, 2018. (R. 181.) The Commission, however, did not receive Rosenthal's Application for Review until July 27, 2018, almost two months after Dispute Resolution issued the memorandum and almost one month after Rosenthal's time to file his application for review had passed. (R. 198.) This attempt to file a late appeal should be dismissed.

Commission Rule of Practice 420 is the "exclusive remedy" for seeking an extension of the 30-day appeal period. 17 C.F.R. § 201.420(b). That rule provides that the Commission "will not extend this 30-day period, absent a showing of extraordinary circumstances." *Id.*; *see also*, *Robert M. Ryerson*, Exchange Act Release No. 57839, 2008 SEC LEXIS 1153, at \*7 & n.9 (May 20, 2008). The Application for Review, however, provides absolutely no explanation for its lateness, much less a showing of "extraordinary circumstances."

The Commission has stated that the "extraordinary circumstances" exception to the 30-day filing rule should be "narrowly construed and applied only in limited circumstances" because "strict compliance with filing deadlines facilitates finality and encourages parties to act timely in seeking relief." *See Manuel P. Asensio*, Exchange Act Release No. 62315, 2010 SEC LEXIS 2014, at \*20-21 (June 17, 2010), *aff'd* 447 F. App'x 984 (11th Cir. Dec. 5, 2011). The Commission has explained that a showing of extraordinary circumstances may be made where "an applicant's failure timely to file was beyond the control of the applicant." *Id.* at \*21. The Commission, however, has routinely rejected applications for review where the applicants did

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does not include rulings made in FINRA's arbitration forum. 15 U.S.C. § 78s(d)(1). Accordingly, FINRA reserves the right to argue in another filing with the Commission that Rosenthal does not meet the statutory grounds for the Commission to entertain his appeal.

not act promptly to pursue their appeals. *See, e.g., McBarron Capital, LLC*, Exchange Act Release No. 81785, 2017 SEC LEXIS 3112, at \*5-7 (Sept. 29, 2017) (dismissing an application for review as untimely where it was filed almost one month late and the applicant provided to explanation for its lateness); *Kalid Morgan Jones*, Exchange Act Release No. 80635, 2017 SEC LEXIS 1403, at \*18-20 (May 9, 2017) (dismissing an untimely application for review where applicant never sought an extension of the time to file and provided no explanation for his late filing); *Rogelio Guevara*, Exchange Act Release No. 78134, 2016 SEC LEXIS 2233, at \*8 (June 22, 2016) (dismissing an untimely application for review where applicant claimed not to have received timely notice from FINRA because he failed to update his CRD address); *Aliza Manzella*, Exchange Act Release No. 77084, 2016 SEC LEXIS 464, at \*17 (Feb. 8, 2016) (dismissing an untimely application for review where applicant never sought an extension).

Even assuming this matter is subject to review by the Commission, Rosenthal's application for review was late and fails to provide any explanation why the Commission should accept his late filing. Accordingly, the Commission should dismiss Rosenthal's appeal because it is untimely.

**IV. CONCLUSION**

Rosenthal failed timely to file his appeal with the Commission and gives no explanation that would excuse his lateness. Consequently, the Commission should dismiss Rosenthal's Application for Review.

Respectfully submitted,



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August 8, 2018

**CERTIFICATE OF SERVICE**

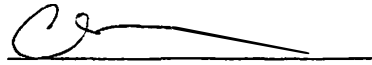
I, Celia L. Passaro, certify that on this 8th day of August 2018, I caused the original and three copies of FINRA's Motion to Dismiss the Application for Review and to Stay the Briefing Schedule in the matter of Application for Review of William Burk Rosenthal, Administrative Proceeding File No. 3-18617, to be served by messenger on:

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

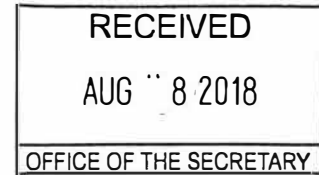
and a copy to be served via FedEx on:

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

Service was made on the Commission by messenger and on the applicant by overnight delivery service due to the distance between FINRA's offices and the applicant.

  
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August 8 2018

**VIA MESSENGER**

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

**RE: Administrative Proceeding No. 3-18617**  
**William Burk Rosenthal**

Dear Mr. Fields:

Enclosed please find the original and three copies of FINRA's Motion to Dismiss the Application for Review and to Stay Briefing Schedule in the above-captioned matter.

Also enclosed please find supplemental documents to the certified record, three copies of the revised index to the certified record, and a CD containing an electronic copy of the revised index.

Please contact me at (202) 728-8985 if you have any questions.

Very truly yours,



Celia L. Passaro

Enclosures

cc: Owen Hamett (Revised Index and Motion to Dismiss)  
AdvisorLaw, LLC  
3400 Industrial Lane, Unit 10A  
Broomfield, CO 80020

Karen Tantay