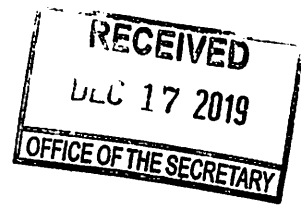


**HARD COPY**  
BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC



In the Matter of the Application of

Gregory Lee Luken

File No. 3-19611

**FINRA'S MOTION TO CONSOLIDATE AND POSTPONE FURTHER BRIFING**

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December 17, 2019

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application of

Gregory Lee Luken

File No. 3-19611

**FINRA'S MOTION TO CONSOLIDATE AND POSTPONE FURTHER BRIFING**

On April 4, 2019, and again on November 25, 2019, the Commission consolidated and postponed further briefing in a series of separate appeals (the "Arbitration Expungement Appeals") that all raised the same threshold issue: Does the Commission possess jurisdiction to order FINRA's Office of Dispute Resolution to allow a claimant to arbitrate a request to expunge a previous, adverse arbitration award? The Commission consolidated 20 proceedings that raised this issue and stayed briefing in 19, pending a decision on the Commission's jurisdiction based on the briefs filed in *Bart Steven Kaplow*, Administrative Proceeding No. 3-18877. *See Order Consolidating Proceedings*, Exchange Act Release 87615, 2019 SEC LEXIS 4752 (Nov. 25, 2019) (courtesy copy attached hereto as Exhibit A). Luken's application for review raises the identical jurisdictional issue. Accordingly, the Commission should consolidate this matter with the Arbitration Expungement Appeals and postpone any further briefing until the Commission issues a decision in *Kaplow*.

We briefly review the relevant facts. On November 4, 2019, Luken filed a statement of claim with FINRA's Office of Dispute Resolution ("Dispute Resolution"), requesting expungement of two customer disputes from his record in FINRA's Central Registration

Depository (“CRD®”).<sup>1</sup> (R. at 1-10.) On November 7, 2019, FINRA notified Luken that the matters were not appropriate for arbitration because they arose from prior adverse awards.<sup>2</sup> (R. at 13.) On December 3, 2019, Luken filed this application for review with the Commission, seeking review of Dispute Resolution’s decision that the matter, which arose from an adverse arbitration award, is not appropriate for an expungement arbitration. (R. at 15-19.)

Commission Rule of Practice 201(a) provides that the Commission may consolidate “proceedings involving a common question of law or fact . . . for hearing of any or all matters at issue in such proceedings.” 17 C.F.R. § 201.201(a). This appeal shares the same common fact pattern and question of law in the Arbitration Expungement Appeals. Like the applicants in those cases, Luken filed an arbitration for expungement of customer disputes in which there had been an adverse arbitration award. After FINRA notified him that adverse arbitration awards are inappropriate for an expungement arbitration, he sought Commission review of Dispute Resolution’s decision. Like the applicants in the Arbitration Expungement Appeals, Luken is also represented by counsel associated with the law firm HLSB Law.

Luken’s application for review raises the same threshold question of the Commission’s jurisdiction, which was fully briefed in *Kaplow* and, accordingly, it is appropriate to consolidate

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<sup>1</sup> “R. at \_\_\_” refers to the page number in the certified record filed contemporaneously on December 17, 2019.

<sup>2</sup> The prior adverse awards are reflected as occurrence number 374784 and 374792. R. at 37, 41. The occurrence number is FINRA’s internal number used in CRD to identify each disclosure. Occurrence numbers do not appear in the publicly-available BrokerCheck report. For occurrence number 374784, the customer was awarded \$55,056, of which Luken was liable and ordered to pay the customer \$27,528. R. at 38. For occurrence number 374792, the customer was awarded \$51,825, of which Luken was liable and ordered to pay the customer \$25,912.50. R. at 41.

Luken's appeal with the Expungement Arbitration Appeals for purposes of resolving the jurisdictional issue.

Commission Rule of Practice 161(a) authorizes the Commission to order postponement for "good cause shown." 17 C.F.R. § 201.161(a). Rule of Practice 161(b) sets forth the factors the Commission must consider in determining whether to grant a postponement, including: (1) the length of the proceeding to date; (2) the number of previous postponements granted; (3) the stage of the proceedings at the time of the request for postponement; and (4) any other such matters as justice may require. 17 C.F.R. § 201.161(b). These factors favor postponement here.

Luken's appeal was filed less than two weeks ago and there have been no previous postponements. Moreover, consolidating this appeal with the Arbitration Expungement Appeals to resolve the jurisdictional question would promote administrative efficiency and avoid the need for the parties to file briefs which repeat the same arguments made in *Kaplow*.<sup>3</sup>

The jurisdictional issue has been fully briefed in *Kaplow* and, accordingly, consolidation for purposes of resolving this issue and postponing further briefing serves the interests of speed and efficiency. Accordingly, the Commission should grant FINRA's motion.

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<sup>3</sup> The Commission allowed the other applicants in the Expungement Arbitration Appeals to file a supplemental brief (not to exceed 2,000 words) to raise legal arguments relevant to jurisdiction not already addressed in the briefs in *Kaplow* and the other consolidated appeals. See *Order Consolidating Proceedings and Postponing Further Briefing*, 2019 SEC LEXIS 731, at \*9. The Commission should follow a similar procedure here.

Respectfully submitted,



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December 17, 2019

# Exhibit A

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 87615 / November 25, 2019

Admin. Proc. File Nos. 3-18616, 3-18617, 3-18877, 3-18879, 3-18883, 3-18894, 3-18910,  
3-18919, 3-18934, 3-18988, 3-19013, 3-19016, 3-19017, 3-19019, 3-19219, 3-19228, 3-19405,  
3-19573, 3-19574, 3-19588

In the Matter of the  
Consolidated Arbitration Applications  
For Review of Action Taken by FINRA

ORDER CONSOLIDATING APPEALS

Jordan Whitney Waring, Kent Vincent Pearce, Vincent H. Rossi, Michael Patrick Murphy, Scott Shulman, and Alton Theodore Davis, Jr. (collectively, the “Applicants”), all associated persons of FINRA member firms, separately filed claims in FINRA’s arbitration forum seeking to expunge from FINRA’s public records information regarding prior arbitration awards entered in favor of their customers. After FINRA denied their expungement requests as ineligible for arbitration, Applicants sought Commission review of FINRA’s action. We previously consolidated several applications for review (the “Consolidated Arbitration Applications”) presenting similar fact patterns for the purpose of deciding whether the Commission has jurisdiction to consider them under Section 19(d) of the Securities Exchange Act of 1934 (the “*Kaplow* Order”).<sup>1</sup> In the *Kaplow* Order, we consolidated twelve proceedings raising the same jurisdictional issue for purposes of a decision on the Commission’s jurisdiction based on the briefs filed to that point, and all applicants were provided an opportunity to file a supplemental brief.<sup>2</sup>

<sup>1</sup> *Bart Steven Kaplow*, Exchange Act Release No. 18877, 2019 WL 1489709, at \*2 (Apr. 4, 2019); *see also* 15 U.S.C. § 78s(d)(2). We declined to consolidate at that time two similar proceedings in which FINRA’s motions to dismiss for untimeliness were then pending. *Kaplow*, 2019 WL 1489709, at \*1-2 nn. 3 & 6. On May 17, 2019, we denied those motions and consolidated those appeals with the appeals that had previously been consolidated. *See Timothy Charles Sullivan*, Exchange Act Release No. 85885, 2019 WL 2160143 (May 17, 2019); *William Burk Rosenthal*, Exchange Act Release No. 85886, 2019 WL 2160144 (May 17, 2019). Exhibit A identifies all proceedings making up the Consolidated Arbitration Applications as of the date of this order, including those consolidated here.

<sup>2</sup> *Kaplow*, 2019 WL 1489709, at \* 2 n.6.

FINRA now moves to consolidate Applicants' appeals with the Consolidated Arbitration Applications, and to postpone further briefing. Pearce does not object to consolidating his case on the issue of jurisdiction or postponing further briefing, and the other Applicants have not responded. Under the circumstances, it appears appropriate to grant FINRA's motion.

Commission Rule of Practice 201(a) provides that we may order consolidation of proceedings "involving a common question of law or fact."<sup>3</sup> In the *Kaplow Order*, we concluded based on the record then before us that the Consolidated Arbitration Applications all appeared to involve a common question of law: whether Exchange Act Section 19(d) authorizes the Commission to review the FINRA Dispute Resolution Director's determination that an expungement claim is not eligible for arbitration under FINRA's rules. We also concluded that the Consolidated Arbitration Applications shared a common fact pattern regarding the FINRA action at issue. It appears that the Waring, Pearce, Rossi, Murphy, Shulman, and Davis applications for review involve these same common questions of law and fact, and that the ultimate disposition of the jurisdictional question in the Consolidated Arbitration Applications will not be unduly delayed by consolidating these more recent applications with the other proceedings.

FINRA also asks that the Commission postpone further briefing pending a decision on the Commission's jurisdiction based on the briefs filed thus far in the Consolidated Arbitration Applications. Rule of Practice 161(a) authorizes the Commission to order postponement for "good cause shown."<sup>4</sup> FINRA contends that good cause exists here because consolidation and postponement would promote administrative efficiency and avoid the need for the parties to file briefs that repeat the same arguments already made in these consolidated proceedings.

Although Pearce does not object to consolidation or postponement, he states that his counsel "does not represent" the applicant in *Kaplow*, and that he reserves "the right to further address any issues of jurisdiction" and to "participate" in any proceeding "that is related in any way to, or has any effect upon," his application for review. The consolidation of Pearce's application for review with the Consolidated Arbitration Applications does not limit those rights. Nor has Pearce identified how postponement of further briefing in his case would prejudice him.

In any event, the *Kaplow Order* did not say that the Commission would decide the jurisdictional issue based on the briefs in *Kaplow* alone or that other applicants would be denied participation.<sup>5</sup> Rather, we set forth a procedure for the parties to review the briefs filed to that point in all of the consolidated cases, and invited supplemental briefs on arguments "not

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<sup>3</sup> 17 C.F.R. § 201.201(a).

<sup>4</sup> 17 C.F.R. § 201.161(a).

<sup>5</sup> See generally *Kaplow*, 2019 WL 1489709.



otherwise addressed.”<sup>6</sup> This procedure reflected that some “counsel do not represent other applicants,” and that the filing of materially identical briefs by “the same law firm” was not likely to “aid the Commission’s decisional processes.”<sup>7</sup>

FINRA asks us to “follow a similar procedure here”—a request the Applicants have not addressed. We agree with that approach, and reiterate that the Commission will decide the issue of its jurisdiction based on all submissions filed in the Consolidated Arbitration Applications. Accordingly, we direct the Applicants’ attention to the *Kaplow* Order regarding procedures for filing supplemental briefs. The Applicants may move for leave to file such a brief under Rule of Practice 154 by December 16, 2019, appending their proposed brief to the motion, or may instead rely on the briefs filed thus far in the consolidated proceeding.

Accordingly, it is ORDERED that FINRA’s motion to consolidate and postpone issuance of the briefing order is granted; and it is further

ORDERED that Waring’s, Pearce’s, Rossi’s, Murphy’s, Shulman’s, and Davis’s applications for review be consolidated with the other proceedings previously consolidated together with *Bart Steven Kaplow*, Administrative Proceeding File No. 3-18877, under the new caption *Consolidated Arbitration Applications*, for a hearing on the jurisdictional question and that supplemental briefing (if any) on the jurisdictional question proceed as set forth above.

For the Commission, by the Office of the General Counsel and its Secretary, pursuant to delegated authority.

Vanessa A. Countryman  
Secretary

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<sup>6</sup> *Id.* at \*3.

<sup>7</sup> *Id.* at \*2.

Exhibit A

<u>Applicant</u>	<u>Administrative Proceeding File Number</u>
Tim Sullivan	3-18616
William Burk Rosenthal	3-18617
Bart Steven Kaplow	3-18877
Daryl Andrew Cole	3-18879
Frank Augustine Cuenca	3-18883
Thomas Christopher Prentice	3-18894
Curt Charles Jackson	3-18910
Brock Mosely	3-18919
Ronald R. Wetzel	3-18934
Peter Ashley Ramsay	3-18988
Donald Anthony Wojnowski	3-19013
Mark Vernon Rottler	3-19016
Carl G. Gordinier	3-19017
Timothy Arthur Vanderver, III	3-19019
Jordan Whitney Waring	3-19219
Kent Pearce	3-19228
Vincent Harl Rossi	3-19405
Michael Patrick Murphy	3-19573
Scott Shulman	3-19574
Alton Theodore Davis, Jr.	3-19588