

**BEFORE THE
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C.**

In the Matter of the Application of

David E. Jennings

For Review of Action Taken by FINRA

File No. 3-21073

FINRA’S MOTION TO CONSOLIDATE AND POSTPONE BRIFING

I. INTRODUCTION

On September 8, 2022, David E. Jennings filed with the Commission an application for review. Jennings appeals a determination by the Director of FINRA Dispute Resolution Services (“DRS”) that Jennings’s request to expunge a customer arbitration award from FINRA’s Central Registration Depository (“CRD®”) is not eligible for arbitration. Jennings’s appeal presents the same fact pattern, and raises the same legal issues, as numerous appeals previously consolidated by the Commission that have been fully briefed. Consequently, FINRA requests that the Commission consolidate Jennings’s appeal with those appeals and postpone briefing in this appeal pending resolution of the consolidated appeals.

II. BACKGROUND

A. David E. Jennings

Jennings entered the securities industry in 1997. R. at 83.¹ He is currently registered with a FINRA member. R. at 81-82.

B. Procedural Background

In January 2003, Jennings's customer filed an arbitration statement of claim with NASD Dispute Resolution (now DRS) against Jennings and his former firm. R. at 1, 96. The customer alleged that Jennings committed, among other things, fraud, misrepresentations, and breach of fiduciary duty. R. at 2, 96.

A three-day arbitration hearing was held in November 2004. R. at 2, 4. Following the hearing, the arbitration panel issued an award (the "Customer Award") finding Jennings and his former firm jointly and severally liable and awarding the customer \$94,000 in compensatory damages. R. at 3.

On December 8, 2021, Jennings filed a statement of claim with DRS. R. at 9. Jennings sought expungement of the Customer Award from CRD. R. at 17. FINRA initially accepted Jennings's statement of claim and appointed an arbitrator to preside over the matter. R. at 19-26, 43. On the day of the scheduled hearing and prior to its commencement, FINRA administratively postponed the hearing. R. at 69.

On August 10, 2022, the Director of DRS notified Jennings that, in FINRA's initial review of his statement of claim, "[FINRA] overlooked that an arbitrator found [Jennings] jointly and severally liable to a customer" in the underlying Customer Award. R. at 71. The Director

¹ "R. at ___" refers to the page number in the certified record in this matter filed on September 22, 2022.

further notified Jennings that his request to expunge the Customer Award “is ineligible for expungement from CRD because an adverse award against [Jennings] was rendered . . . , and [Jennings] was held liable for damages to the customer.” R. at 71. The notice explained that the Commission “has approved three narrowly crafted grounds in FINRA Rule 2080(b)(1) for recommending expungement in FINRA’s arbitration forum” and that “[a] liability finding by a prior arbitrator or arbitration panel precludes a subsequent arbitrator from making one of the required findings” under the rule. R. at 71. The notice further explained: “Therefore, pursuant to FINRA Rules 12202 or 13203, the Director [of DRS] denies the use of the forum for the expungement request . . . because the subject matter of this dispute is inappropriate.” R. at 71.

On September 8, 2022, Jennings filed an application for review with the Commission. R. at 73.

C. The Consolidated Arbitration Appeals

The Commission previously consolidated numerous applications for review (the “Consolidated Arbitration Appeals”) presenting the same fact pattern and legal issues as presented by Jennings in this appeal. *See Consolidated Arbitration Applications*, Exchange Act Release No. 89495, 2020 SEC LEXIS 3312 (Aug. 6, 2020).² The parties in the Consolidated Arbitration Appeals have fully briefed the merits of those appeals.

III. ARGUMENT

Jennings’s appeal presents the same fact pattern, and raises the same legal issues, as the Consolidated Arbitration Appeals. The parties have already fully briefed the issues in the

² The Commission initially consolidated the Consolidated Arbitration Appeals to determine whether it had jurisdiction to review them. After determining that it had jurisdiction, the Commission found that the proceeding should continue to be consolidated for purposes of briefing the merits.

Consolidated Arbitration Appeals. Accordingly, for the reasons set forth herein, the Commission should consolidate this matter with the Consolidated Arbitration Appeals and postpone briefing.

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 questions of law as presented in the Consolidated Arbitration Appeals. Like the applicants in those cases, Jennings filed a statement of claim seeking expungement of a customer dispute in which there had been an adverse arbitration award and he was held liable for damages to the customer. After FINRA notified him that adverse arbitration awards are inappropriate for an expungement arbitration, he sought Commission review of that decision. Further, like the vast majority of the applicants in the Consolidated Arbitration Appeals, Jennings is represented by counsel associated with the law firm HLBS Law. *See R.* at 16.

While DRS initially accepted Jennings’s statement of claim after it “overlooked” that an arbitrator found Jennings liable for damages to a customer in the underlying Customer Award, the Director corrected this error by notifying Jennings that adverse arbitration awards are ineligible for expungement in FINRA’s arbitration forum and denying the use of FINRA’s arbitration forum. FINRA’s corrective actions do not distinguish this matter from the other Consolidated Arbitration Appeals because Jennings’s appeal, like the Consolidated Arbitration Appeals, concerns FINRA’s ultimate denial of the arbitration forum because the subject matter is inappropriate for the forum under FINRA rules. *R.* at 74.

Jennings’s counsel has indicated that Jennings opposes consolidation of his appeal with the Consolidated Arbitration Appeals and postponing briefing in this matter. His opposition, however, is misplaced because this matter involves the same question of law and a nearly

identical fact pattern. Moreover, although Jennings mentions in his Notice of Appeal the time and expense spent preparing for an expungement hearing that ultimately did not occur, Jennings does not request damages. Rather, Jennings, just like the other applicants in the Consolidated Arbitration Applications, requests that the Commission order that his claim for expungement of an adverse arbitration award proceed to FINRA's arbitration forum. Considering the requested remedies are the same, Jennings's claim that his matter is distinguishable falls flat.

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.

Jennings's appeal was filed less than three weeks ago and there have been no previous postponements. Moreover, consolidating this appeal with the Consolidated Arbitration Appeals would promote administrative efficiency and avoid the need for the parties to file briefs which repeat the same arguments. Accordingly, the Commission should grant FINRA's motion to consolidate Jennings's appeal with the Consolidated Arbitration Appeals and postpone briefing.

Respectfully submitted,

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September 26, 2022

CERTIFICATE OF COMPLIANCE

I, Megan Rauch, certify that this motion complies with the Commission's Rules of Practice by filing a motion that omits or redacts any sensitive personal information described in Rule of Practice 151(e).

/s/Megan Rauch

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CERTIFICATE OF SERVICE

I, Megan Rauch, certify that on this 26th day of September 2022, I caused a copy of the foregoing FINRA's Motion to Consolidate and Postpone Briefing, In the Matter of the Application of David E. Jennings, Administrative Proceeding File No. 3-21073, to be filed through the SEC's eFAP system on:

Vanessa Countryman, Secretary
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