

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85886 / May 17, 2019

Admin. Proc. File No. 3-18617

In the Matter of the Application of

WILLIAM BURK ROSENTHAL

For Review of Action Taken by

FINRA

ORDER DENYING MOTION TO DISMISS AND CONSOLIDATING APPEAL

FINRA moves to dismiss an application for review filed by William Burk Rosenthal. Rosenthal appeals FINRA's determination to deny his request to use FINRA's arbitration forum to seek expungement of prior adverse arbitration awards arising from customer disputes. Our Rules of Practice provide that an applicant must file an application for review within 30 days after the notice of the determination is received by the aggrieved person applying for review.¹ FINRA claims that the application was filed late, noting that FINRA notified Rosenthal of the denial on May 31, 2018 and that our Secretary's letter acknowledging the appeal stated that the application was received on July 27, 2018. Consequently, according to FINRA, Rosenthal filed his application "almost one month after Rosenthal's time to file his application . . . had passed."

In his opposition to FINRA's motion, Rosenthal does not dispute that he received notice from FINRA on May 31, 2018, but asserts that he sent his application to FINRA and the Commission on June 29, 2018, "via certified, overnight mail," within the 30-day period. As support, Rosenthal provided a receipt and USPS tracking information that confirm his assertion about the mailing date of his application. Moreover, our records indicate that the application was delivered to Commission headquarters within two business days after mailing but was then misdirected to a Commission office other than the Secretary. The July 27, 2018 receipt date referenced in the Secretary's acknowledgement letter relates to a follow-up copy of the application that Rosenthal filed after Rosenthal was informed by FINRA that his original application had not been received. FINRA has not filed a reply to Rosenthal's opposition. Under the circumstances, it is appropriate to deny FINRA's motion.

¹ See Rule of Practice 420(b), 17 C.F.R. § 420(b).

FINRA has separately moved to consolidate this case along with several others, and stay further briefing, so that the Commission may first resolve the “common issue[]” whether it has jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 to review FINRA’s determination that a claim for expungement of a prior adverse arbitration award is not eligible for arbitration. FINRA’s motion to consolidate was granted with respect to several cases in a April 4, 2019 order (the “*Kaplow* Order”), but this case was not consolidated at that time since FINRA’s motion to dismiss was pending before the Commission.² In the *Kaplow* Order, twelve proceedings raising the same jurisdictional issue were consolidated for purposes of a decision on the Commission’s jurisdiction based on the briefs filed in one case—*Bart Steven Kaplow*—and applicants in the other cases were provided an opportunity to file a supplemental brief.³

In light of our determination to deny the motion to dismiss in this case, we now grant FINRA’s motion to consolidate this case with the other cases that have been consolidated for purposes of resolving the jurisdictional issue and to postpone further briefing in this case for the reasons discussed in the *Kaplow* Order. Rosenthal opposed FINRA’s motion on the ground that it would delay a decision on the merits, but we disagree for the reasons set forth in the *Kaplow* Order. We direct Rosenthal’s attention to the procedures set forth in the *Kaplow* Order with respect to supplemental briefs on the issue of the Commission’s jurisdiction. If Rosenthal wishes to file a supplemental brief on the issue of the Commission’s jurisdiction, he may move for leave to do so under Rule of Practice 154 by June 7, 2019.

Accordingly, it is ORDERED that FINRA’s motion to dismiss William Burk Rosenthal’s application for review as untimely is denied; and it is further

ORDERED that this proceeding be consolidated with the proceedings identified in our April 4, 2019 order in *Bart Steven Kaplow et al.* for a hearing on the jurisdictional question and that briefing on the jurisdictional question proceed as set forth above.

By the Commission.

Vanessa A. Countryman
Acting Secretary

² *Bart Steven Kaplow*, Exchange Act Release No. 85509, 2019 WL 1489709, at *2 n.6 (April 4, 2019).

³ *Id.* at *2-3.