SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 86018 / June 3, 2019

Admin. Proc. File No. 3-18539

In the Matter of the Application of

CONSTANTINE GUS CRISTO

For Review of Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF FINRA ACTION

Customer of FINRA member firm appealed FINRA action. *Held*, the proceeding is dismissed because the Commission does not have jurisdiction over the appeal.

APPEARANCES:

Constantine Gus Cristo, pro se.

Alan Lawhead, *Andrew Love,* and *Megan Rauch*, for FINRA.

Appeal filed: June 8, 2018
Last brief received: October 1, 2018

In September 2017, Constantine Gus Cristo sued Charles Schwab & Co., Inc., a FINRA member firm, and certain of its affiliates (collectively, "Schwab") in federal district court. Cristo alleged that Schwab violated federal law by releasing financial records to the Internal Revenue Service ("IRS") beyond those requested in an administrative summons. The court granted Schwab's motion to compel Cristo to arbitrate his claims before FINRA.

Cristo requested that FINRA declare his claims ineligible for arbitration. But FINRA explained that its rules reserved that determination for an arbitration panel to make based on a developed record. Cristo also submitted a complaint about Schwab to FINRA's Investor

Complaint Center. The complaint restated the allegations made in Cristo's federal lawsuit. FINRA investigated Cristo's complaint and closed the matter.

Cristo then filed an application for review of FINRA's actions under Section 19(d) of the Securities Exchange Act of 1934. Because Cristo does not challenge any action that we have jurisdiction to review under Section 19(d), we dismiss his appeal for lack of jurisdiction.[1]

I. Background

A. Cristo filed a complaint alleging that Schwab violated federal law by providing financial information to the IRS beyond what it requested in an administrative summons, and the court granted Schwab's motion to compel arbitration.

Cristo asserts that he learned in June 2016 that Schwab, where he had accounts, had received an IRS administrative summons a decade earlier to produce his financial information for the 2002 tax year. According to Cristo, the IRS issued the summons because he was accused of participating in an offshore tax shelter scheme and his 2002 tax return was audited as a result. Cristo asserts that Schwab produced the requested information along with additional financial information for all other tax years between 1995 and 2006. Cristo contends that, because the IRS had not requested the additional information, Schwab violated federal law and facilitated an "IRS search for alleged hidden assets and off-shore bank accounts [that] took thirteen years and resulted in Cristo's financial insolvency." Cristo asserts that "[w]ithout the unauthorized data provided by Schwab, the IRS would have ended its review in a matter of months."

On September 12, 2017, Cristo filed a complaint against Schwab in federal district court. Cristo alleged violations of the Right to Financial Privacy Act and various provisions of Title 18 of the United States Code.[2] Schwab moved to compel arbitration before FINRA pursuant to a provision of a customer agreement with Cristo. Cristo asserts that he subsequently called FINRA staff and was told that his claims were not eligible for arbitration because they arose from events that occurred more than six years earlier. Cristo opposed Schwab's motion on the ground, among other things, that his claims could not be arbitrated under FINRA Rule 12206.[3]

On April 11, 2018, the court granted Schwab's motion to compel arbitration.[4] The court acknowledged Cristo's argument that "his claims are ineligible for arbitration because six or

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[1] We deny Cristo's motion for oral argument because we do not find that our "decisional process would be significantly aided by oral argument." Rule of Practice 451(a), 17 C.F.R. § 201.451(a).

[2] *Cristo v. The Charles Schwab Corp.*, ECF No. 1, Case No. 3:2017cv01843 (S.D. Cal. Filed Sept. 12, 2017); *see also* First Am. Compl., *Cristo v. The Charles Schwab Corp.*, ECF No. 8, Case No. 3:2017cv01843 (S.D. Cal. Filed Nov. 6, 2017) (alleging similar violations).

[3] FINRA Rule 12206(a) ("No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim.").

[4] *Cristo v. The Charles Schwab Corp.*, ECF No. 31, Case No. 3:2017cv01843 (S.D. Cal. Apr. 11, 2018).

more years have passed from the events giving rise to the claim."[5] Nonetheless, the court found that this issue was "one for the arbitrator" and that its role was "limited to determining whether an arbitration clause exists, and the scope of the arbitration provision."[6]

B. After the court compelled arbitration of Cristo's claims against Schwab, he requested that FINRA state in writing that they were not subject to arbitration and filed a complaint about Schwab with FINRA's Investor Complaint Center.

On April 12, 2018, Cristo wrote to FINRA requesting "a letter of ineligibility" stating that Cristo's claims against Schwab could not be arbitrated under Rule 12206 because the "action giving rise to the claim[s] occurred in 2006." On April 19, 2018, the Director of FINRA Dispute Resolution responded to Cristo's letter. The Director stated that FINRA did "not have any independent authority to invalidate a court order," that he declined to "opine on" the application of Rule 12206 to Cristo's claims, and that "questions of arbitrability under FINRA's six-year eligibility rule should be decided by FINRA arbitrators."[7] On April 30, 2018, Cristo renewed his request for a letter of ineligibility. Cristo never submitted his claims to arbitration.

On June 19, 2018, after Schwab received copies of Cristo's April 30 request, it sent Cristo a letter stating that his claims could be arbitrated before FINRA. Schwab explained that FINRA Rule 12206(c) provides that "the six-year time limit on the submission of claims [shall not] apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a [FINRA] member or associated person." Schwab argued that, because its motion to compel arbitration had been granted, the six-year eligibility rule did not apply to Cristo's claims.

On April 13, 2018, the day after his first request for a letter of ineligibility, Cristo also submitted a two-page letter to FINRA's Investor Complaint Center. In this letter, Cristo accused Schwab of violating the Right to Financial Privacy Act and other United States laws by providing unrequested financial information to the IRS in 2006 in response to its administrative summons. The letter also referred to Cristo's lawsuit against Schwab, the court's order compelling arbitration, and Cristo's April 12 letter to FINRA. On May 8, 2018, a FINRA investigator advised Cristo that FINRA had completed its review of his complaint and closed its investigation of the matter. The investigator stated that FINRA had analyzed "the information [Cristo] provided and additional details [it] collected during the examination process," and explained further that "if new information develops, FINRA may re-open its investigation."

C. Cristo submitted an application for review to the Commission.

On June 8, 2018, Cristo filed an application with the Commission seeking review of FINRA's decision to close its investigation "without any interview or contact with Cristo." Cristo requested that we reverse that decision and declare his claims ineligible for arbitration.

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5 *Id.* at 5 n.2.

6 *Id.* at 5.

7 *See* FINRA Rule 12206(a) ("The panel will resolve any questions regarding the eligibility of a claim under this rule.").

On June 12, 2018, the Commission's Office of the Secretary acknowledged receipt of Cristo's application and determined to accept it for filing. But the Office of the Secretary cautioned Cristo that this did not "constitute a Commission determination as to the proper statutory basis for your application, or a prejudgment on the part of the Commission of any issues that may be raised by the parties pertaining to the Commission's jurisdiction to consider this matter or the scope of the relevant statutory provisions." On July 17, 2018, the parties were ordered to submit briefs limited to the issue of the Commission's jurisdiction.[8]

II. Analysis

Cristo filed his application for review pursuant to Exchange Act Section 19 and Commission Rule of Practice 420. Exchange Act Section 19(d) authorizes the Commission to review certain actions taken by self-regulatory organizations ("SROs"); Rule 420 authorizes a person aggrieved by the actions specified in Section 19(d) to file an application for review with the Commission.[9] Because Cristo's application for review does not challenge an action specified in Section 19(d), we lack jurisdiction to consider it and dismiss Cristo's application for review.[10]

A. FINRA did not take any action reviewable under Section 19(d).

Exchange Act Section 19(d) provides that we may review SRO action that: (1) imposes any final disciplinary sanction on a member thereof or participant therein; (2) denies membership or participation to any applicant; (3) prohibits or limits any person in respect to access to services offered by that SRO or member thereof; or (4) imposes any final disciplinary sanction on any person associated with a member or bars any person from becoming associated with a member. FINRA did not take any action against Cristo reviewable under Section 19(d).

1. FINRA did not prohibit or limit Cristo's access to any service.

Cristo argues that we have jurisdiction over his application because FINRA prohibited or limited his access to its services in three ways. We disagree.

First, Cristo argues that FINRA "refused to provide a service" when it closed its investigation into his complaint without interviewing him. "To determine whether FINRA's actions prohibited or limited access to services under the meaning of Section 19(d), we consider whether FINRA has 'denied or limited the applicant's ability to utilize one of the fundamentally important services offered by the SRO,' and whether the 'services at issue were not merely

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[8] *Constantine Gus Cristo*, Exchange Act Release No. 83658, 2018 WL 3454926, at *1 (July 17, 2018).

[9] Exchange Act Section 19(d), 15 U.S.C. § 78s(d); Rule of Practice 420(a), 17 C.F.R. § 210.420(a); *see also Lawrence Gage*, Exchange Act Release No. 54600, 2006 WL 2987058, at *3 (Oct. 13, 2006) ("The grounds for Commission jurisdiction enumerated in Rule 420(a) are the same as those described in Section 19(d)(1) of the Exchange Act.").

[10] *Matthew Brian Proman*, Exchange Act Release No. 57740, 2008 WL 1902072, at *1 (Apr. 30, 2008) ("If we find that we do not have jurisdiction, we must dismiss the proceeding.").

important to the applicant but were central to the function of the SRO.'"[11] We have held that "permitting any person to file a complaint against [a FINRA] member or associated person and conducting any resulting proceeding" is not "offering a 'service' for purposes of Section 19(d)."[12] In any case, FINRA accepted, investigated, and responded to Cristo's complaint. Thus, even assuming that permitting individuals to file a complaint and get a response constitutes a service under Section 19(d), FINRA did not prohibit or limit Cristo's access to that service.[13]

Second, Cristo argues that FINRA denied him access to services because it would not confirm in writing that his claims against Schwab were ineligible for arbitration under FINRA Rule 12206 before he filed an arbitration proceeding. But Cristo has not identified any service FINRA offers that he was denied.[14] Cristo has not established that FINRA offers a service whereby it provides a definitive determination of whether a claim is subject to arbitration before an arbitration is commenced. Although this is precisely the "service" Cristo faults FINRA for failing to provide, he has not shown that FINRA provides it or that its rules require it to do so. Cristo faults FINRA for failing to provide access to a service it does not offer.

Third, Cristo contends that he notified FINRA of prohibitions or limitations of access in his April 2018 letters. But these letters seek FINRA action; they do not identify any FINRA action prohibiting or limiting Cristo's access to services. Accordingly, Cristo fails to establish jurisdiction over his application based on a prohibition or limitation of access to services.

We note that Cristo has chosen not to avail himself of the procedure FINRA offers. Specifically, FINRA Rule 12206(a) provides that, after an arbitration is commenced, an

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[11] *WD Clearing, LLC*, Exchange Act Release No. 75868, 2015 WL 5245244, at *5 n.28 (Sept. 9, 2015) (quoting *Sky Capital LLC*, Exchange Act Release No. 55828, 2007 WL 1559228, at *4 (May 30, 2007)).

[12] *Russell A. Simpson*, Exchange Act Release No. 40690, 1998 WL 801399, at *3 (Nov. 19, 1998) (declining to find jurisdiction over handling of complaint); *see also Sky Capital*, 2007 WL 1559228, at *3 (finding that applicant did not establish jurisdiction by claiming it was denied access to NASD's internal complaint process because it failed to show that the relevant NASD office provided a fundamentally important service central to the function of NASD).

[13] *Simpson*, 1998 WL 801399, at *3 (concluding that, "[e]ven if the NASD were deemed to be offering a service under Section 19(d)" by handling public complaints, "it did not limit or prohibit Simpson's access to that service," where it investigated and considered the complaint); *Sky Capital*, 2007 WL 1559228, at *3 (finding no jurisdiction where applicant "had access to the Ombudsman's Office and voiced its complaints about [NASD] staff's actions").

[14] *WD Clearing*, 2015 WL 5245244, at *5 n.28 (finding no jurisdiction as a result); *see also Eric David Wanger*, Exchange Act Release No. 79008, 2016 WL 5571629, at *4 (Sept. 30, 2016) (finding that applicant failed to establish the existence of jurisdiction where he "d[id] not identify any services to which he ha[d] been denied access by virtue of" the challenged action); Exchange Act Section 19(d)(1), 15 U.S.C. § 78s(d)(1) (referring to action that "prohibits or limits any person in respect to access to services *offered* by [the SRO] or member thereof") (emphasis added).

arbitration "panel will resolve any questions regarding the eligibility of a claim under this rule." As stated in his reply brief, however, "Cristo now refuses to file an arbitration claim."

2. The other bases for jurisdiction enumerated in Section 19(d) do not apply.

Cristo does not contend that any of the other bases for jurisdiction in Section 19(d) apply to his application, and we find that none of them does. First, FINRA did not impose a final disciplinary sanction on Cristo. A final disciplinary sanction follows a "determination of wrongdoing."[15] FINRA did not determine that Cristo engaged in wrongdoing. Second, FINRA did not deny membership or participation to Cristo. This occurs when an SRO denies applications for membership or imposes restrictions on business activities as a condition of membership.[16] Cristo did not file, and FINRA did not deny, any such application. Third, FINRA did not bar Cristo from becoming associated with a member firm. Cristo was not associated with, and did not seek association with, any FINRA member firm.

B. Cristo's other arguments lack merit.

Cristo contends that jurisdiction exists over his application for several other reasons, but none has merit. First, Cristo contends that we have jurisdiction because the Commission could file a civil suit against Schwab, institute administrative proceedings against Schwab, or exercise discretionary review of his allegations against Schwab. Were we to institute a civil action or an administrative proceeding against Schwab, the result would be a new court or administrative proceeding to which Cristo was not a party. This would not confer jurisdiction over Cristo's claims in this matter.[17] As for our ability to exercise discretionary review, Cristo cites Section 4A of the Exchange Act. Section 4A provides that "the Commission shall retain a discretionary right to review the action of any . . . division of the Commission, individual Commissioner,

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[15] *Morgan Stanley & Co.*, Exchange Act Release No. 39459, 1997 WL 802072, at *2 (Dec. 17, 1997).

[16] *WD Clearing*, 2015 WL 5245244, at *4 (citing *Morgan Stanley*, 1997 WL 802072, at *3).

[17] *See Simpson*, 1998 WL 801399, at *4 n.12 ("Simpson also urges us to institute proceedings against the NASD and/or NASDR based on what he terms their failure to enforce the NASD's rules. Our decision whether to institute such proceedings is a separate matter from our disposition of this review proceeding [for lack of jurisdiction]."); *Sky Capital*, 2007 WL 1559228, at *4 n.26 ("Our decision whether to undertake [investigation of the NASD at applicant's request] is separate from our disposition of this proceeding."); *cf. Citadel Sec. LLC*, Exchange Act Release No. 78340, 2016 WL 3853760, at *4 (July 15, 2016) (finding that the Commission's discretionary authority to bring an administrative enforcement action against a self-regulatory organization under Exchange Act Section 19(h)(1), even if exercised, would not confer jurisdiction over third-party petition for administrative remedy), *aff'd sub nom.*, *Chicago Bd. Options Exchange v. SEC*, 889 F.3d 837 (7th Cir. 2018).

administrative law judge, employee, or employee board" to which it has delegated its functions.[18] FINRA is not any of the persons or entities listed in Section 4A.

Second, Cristo argues that "looming questions" relevant to FINRA Rule 12206(c) "demand review by the Commission." He contends that Rule 12206(c) is "fatally biased" toward FINRA members because it allows them to move to compel arbitration of claims that do not comply with the six-year eligibility provision in Rule 12206(a) notwithstanding that claimants could not institute arbitration on those claims themselves. Cristo asserts that the Commission should address his concerns by exercising its power under Exchange Act Section 19(c) to amend FINRA's rules.[19] But the Commission approved the provision about which Cristo complains.[20] In any case, even if the Commission instituted rulemaking proceedings under Section 19(c), that would not create jurisdiction under Section 19(d) over Cristo's application for review.[21]

Third, Cristo argues that the doctrine of judicial estoppel "demands intervention and review by the Commission" because FINRA purportedly changed its position regarding the scope of its investigation and the eligibility of his claims for arbitration. Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.[22] An alleged inconsistency in FINRA's positions does not create jurisdiction over Cristo's application under Section 19(d).[23]

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[18] Exchange Act Section 4A(b), 15 U.S.C. § 78d-1(b).

[19] 15 U.S.C. § 78s(c) (generally providing that the "Commission, by rule, may abrogate, add to, and delete from . . . the rules of a self-regulatory organization . . . as the Commission deems necessary or appropriate . . . in furtherance of the purposes of" the Exchange Act).

[20] *See* Exchange Act Release No. 50714 (Nov. 22, 2004), 69 Fed. Reg. 69,971, 69,973 (Dec. 1, 2004) (approving provision now contained in Rule 12206(c) as "consistent with the [Exchange] Act" and stating that it "limits the potential litigation strategies that could impede the resolution of disputes and would address the concern that industry parties could force claimants to litigate in two forums," i.e., court and arbitration); *see also* Exchange Act Release No. 55703 (May 3, 2007), 72 Fed. Reg. 26,664, 26,665-66 (May 10, 2007) (notice that provision was reinserted after it was inadvertently omitted from revised arbitration code).

[21] *See generally* 15 U.S.C. § 78s(c)(1)-(4) (specifying the procedure triggered when Commission conducts rulemaking under Exchange Act Section 19(c)).

[22] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

[23] After briefing closed, Cristo filed a motion seeking to supplement the record to include evidence of what he contends is "FINRA's past practice of uniformly applying FINRA Rule 12206(a)" to deny any arbitration claim based on events that occurred more than six years before the Statement of Claim was filed. Rule of Practice 452 requires that, among other things, a moving party must "show with particularity that such additional evidence is material." 17 C.F.R. § 201.452. Cristo argues that we should admit the evidence he offers because it is relevant to our oversight of FINRA. We disagree. Cristo has not shown that the additional evidence he submitted bears on the existence of jurisdiction under Section 19(d). For the same reason, we

(*continued* …)

Fourth, Cristo argues that we should exercise jurisdiction over his claims because Schwab committed "constitutional violations" that he asserts cannot be resolved by FINRA arbitrators. Cristo also contends that FINRA arbitrators are Officers of the United States who have not been appointed consistent with the United States Constitution.[24] And he raises various other attacks on the suitability of arbitration for his claims against Schwab. These are arguments regarding the merits of Cristo's contention that he should not have to arbitrate his claims against Schwab before FINRA; these arguments do not create jurisdiction for us under Exchange Act Section 19(d) to entertain Cristo's application for review of the actions FINRA took.[25]

Fifth, Cristo suggests that the remedies he seeks—e.g., reversal of FINRA's closure of its investigation and a declaration that his claims cannot be arbitrated—create jurisdiction under Section 19(d). But Cristo must first establish that we have jurisdiction over his application for review before we could afford him any relief. Because relief, if appropriate, comes at the end of the process, a request for certain relief does not create jurisdiction.[26]

Finally, Cristo argues that "[j]urisdiction is proper" because the Office of the Secretary accepted his application for review for filing. But as explained above, the acceptance letter cautioned that it did not constitute a determination of jurisdiction.[27] We have now reviewed Cristo's arguments and determined that we lack jurisdiction over his application. In any case, we would lack jurisdiction even had the Office of the Secretary not included the cautionary language

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(… *continued*)
deny Cristo's additional request to admit unidentified evidence that Schwab "violated Cristo's constitutional rights and his protections under the RFPA, prior to January 10, 2007."

[24] *Cf. Lucia v. SEC*, 585 U.S. ___, 138 S. Ct. 2044, 2049 (2018) (holding that Commission administrative law judges qualify as "Officers of the United States" under Appointments Clause of Article II of the United States Constitution). Cristo acknowledges that FINRA is a "non-governmental organization" but does not address the impact of this status on his argument.

[25] *See Orbixa Techs., Inc.*, Exchange Act Release No. 70893, 2013 WL 6044106, at *5 n.20 (Nov. 15, 2013) (recognizing that, because the Commission lacked jurisdiction under Section 19(d), it lacked the ability to review applicant's contention that SRO violated Exchange Act rules); *see also Simpson*, 1998 WL 801399, at *4 n.13 ("Because we lack review jurisdiction, we do not consider the merits of Simpson's allegations of rule violations.").

[26] *Cf. Davis v. Passman*, 442 U.S. 228, 239 (1979) ("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470 (5th Cir. 1985) ("The district court has no power to grant an interlocutory or final injunction against a party over whom it has not acquired valid jurisdiction.").

[27] *See supra* Section I.C; *see also WD Clearing*, 2015 WL 5245244, at *3 & n.14 (dismissing for lack of jurisdiction where "[n]otwithstanding this cautionary language, WD Clearing incorrectly claims in its brief before us that we 'agreed to consider the Petition'").

in its letter accepting Cristo's filing. The filing and docketing of an appeal does not establish jurisdiction to hear the appeal.[28] Cristo cites no case to the contrary, and we are aware of none.

An appropriate order will issue.

By the Commission (Chairman CLAYTON and Commissioners JACKSON, PEIRCE, and ROISMAN).

Vanessa A. Countryman
Acting Secretary

[28] *See, e.g.*, *Sluka v. Estate of Herink*, No. 94-4999, 1996 WL 612459, at *1 (E.D.N.Y. Aug. 13, 1996) ("The docketing of a complaint or other court document . . . is essentially a ministerial action, that may occur regardless of whether the court has jurisdiction over the action.").

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86018 / June 3, 2019

Admin. Proc. File No. 3-18539

In the Matter of the Application of

CONSTANTINE GUS CRISTO

For Review of Action Taken by

FINRA

ORDER DISMISSING PROCEEDING

On the basis of the Commission's opinion issued this day, it is

ORDERED that the application for review filed by Constantine Gus Cristo is dismissed.

By the Commission.

Vanessa A. Countryman
Acting Secretary