

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”).¹ 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.²

¹ *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.

² *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."³ 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."⁴ 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.⁵ 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

³ 17 C.F.R. § 201.201(a).

⁴ 17 C.F.R. § 201.161(a).

⁵ See generally *Kaplow*, 2019 WL 1489709.

otherwise addressed.”⁶ 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.”⁷

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

⁶ *Id.* at *3.

⁷ *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