

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85509 / April 4, 2019

Admin. Proc. File Nos. 3-18877, 3-18879, 3-18883, 3-18894, 3-18910, 3-18919, 3-18934,
3-18988, 3-19013, 3-19016, 3-19017, and 3-19019

In the Matter of the Applications of

BART STEVEN KAPLOW,
DARYL ANDREW COLE,
FRANK CUENCA,
THOMAS PRENTICE,
KURT JACKSON,
BROCK MOSELY,
RONALD R. WETZEL,
PETER A. RAMSAY,
DONALD ANTHONY WOJNOWSKI,
MARK VERNON ROTTLER,
CARL G. GORDINIER, and
TIMOTHY ARTHUR VANDERVER III

For Review of Action Taken by
FINRA

ORDER CONSOLIDATING PROCEEDINGS AND POSTPONING FURTHER BRIEFING

On January 31, 2019, FINRA filed a motion to stay proceedings in several applications for review of FINRA action. These applications challenge FINRA action declining to permit associated persons of member firms to use FINRA's arbitration forum to seek expungement of prior adverse arbitration awards arising from customer disputes. We consolidate the twelve proceedings listed in the caption above for purposes of a decision on the Commission's jurisdiction based on the briefs filed in *Bart Steven Kaplow* and pursuant to this order.

Background

Each proceeding appears to involve the same common jurisdictional facts.¹ The applicant is an associated person of a FINRA member firm. A FINRA arbitration panel previously issued an adverse arbitration award against the applicant in a customer dispute. The applicant never moved in court to vacate the award. Instead, the applicant filed with FINRA's

¹ All applicants are represented by counsel affiliated with the law firm HLBS Law.

Office of Dispute Resolution a statement of claim seeking to have FINRA expunge the award from its publicly accessible BrokerCheck records. The Director of FINRA’s Office of Dispute Resolution determined that requests to expunge prior adverse arbitration awards arising from customer disputes are not eligible for arbitration under FINRA’s rules.² The applicant then filed an application for review of FINRA’s action challenging the Director’s determination.

We issued orders scheduling briefs in several of these proceedings directing the parties to brief whether the Commission has jurisdiction under Section 19(d) of the Securities Exchange Act of 1934 to consider the application for review.³ Briefing in *Kaplow* is complete.⁴ Opening and response briefs have been filed in some proceedings, and the Commission has not issued orders scheduling briefs in still other proceedings. Several of the briefs filed so far have been materially identical to those in *Kaplow*.

FINRA moves, “[i]n light of the common issues raised” in these proceedings, for an order expediting consideration of the threshold jurisdictional question in *Kaplow* and staying proceedings in the other appeals.⁵ According to FINRA, it “will present the same core argument on jurisdiction” in each case. *Kaplow* “takes no position on FINRA’s” motion. The other applicants have filed materially identical oppositions to FINRA’s motion. These applicants assert that staying their cases would impose “continuing harm” on the applicant’s “reputation and livelihood” because it would “extend[] the time” for a decision on the merits—and thus the time the adverse arbitration award is reported on their BrokerCheck records.

Analysis

We construe FINRA’s request to resolve the “common issue” in these cases by issuing a decision in the *Kaplow* appeal as a request to consolidate these cases for purposes of the jurisdictional question. We have determined to consolidate the proceedings identified in the

² Under FINRA’s rules, the Director “may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate.” FINRA Rules 12203(a), 13203(a).

³ See *Thomas Christopher Prentice*, Exchange Act Release No. 84886, 2018 WL 6696597 (Dec. 20, 2018) (order scheduling briefs); *Frank Augustine Cuenca*, Exchange Act Release No. 84792, 2018 WL 6499913 (Dec. 11, 2018) (order scheduling briefs); *Daryl Andrew Cole*, Exchange Act Release No. 84722, 2018 WL 6333612 (Dec. 4, 2018) (order scheduling briefs). Pending before the Commission are FINRA’s motions to dismiss for untimeliness in *William Rosenthal*, Admin. Proc. File No. 3-18617, and *Tim Sullivan*, Admin. Proc. File No. 3-18616.

⁴ See <https://www.sec.gov/litigation/apdocuments/ap-3-18877.xml>.

⁵ On March 14, 2019, FINRA filed a second motion requesting the same relief as to applications filed after its first motion. In one of those cases, FINRA withdrew the motion and we later granted the applicant’s request to dismiss the appeal as moot. See *Stephen M. Seewer*, Exchange Act Release No. 85471, 2019 WL 1424368 (March 29, 2019).

caption above limited to the question of the Commission’s appellate jurisdiction.⁶ Commission Rule of Practice 201(a) provides that we may consolidate “proceedings involving a common question of law or fact . . . for hearing of any or all the matters at issue in such proceedings.”⁷ These proceedings all 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. These proceedings also share a common fact pattern relevant to the FINRA action at issue. We conclude it is appropriate to consolidate these proceedings limited to the jurisdictional question.

We further construe FINRA’s request that we stay the appeals other than *Kaplow* as a request to postpone further briefing in those cases pursuant to Commission Rule of Practice 161, which authorizes us to order postponements for “good cause shown.”⁸ Under Rule 161(b), the factors the Commission must consider in determining whether to grant a postponement as relevant here are: (i) the length of the proceeding to date, (ii) the number of postponements, adjournments, or extensions already granted, (iii) the stage of the proceedings at the time of the request, and (iv) any other such matters as justice may require.⁹ Each factor favors FINRA here.

The Commission received FINRA’s motion on January 31, 2019, before briefing orders issued in several of the appeals at issue. No previous extensions or postponements have been granted. Consolidating the cases to resolve the jurisdictional question and postponing further briefing would promote administrative efficiency. Postponing further briefing would obviate the need for the parties to file briefs repeating the same arguments on the jurisdictional question.

We disagree with the Applicants that by consolidating the appeals for purposes of briefing and deciding the jurisdictional issue a decision on the merits will be delayed. FINRA is not requesting that we postpone a decision on the merits. Instead, FINRA requests that we postpone jurisdictional briefing in the cases other than *Kaplow* to save the parties the time and expense of filing parallel, materially identical jurisdictional briefs in each case. Applicants do

⁶ FINRA has not moved to consolidate and stay briefing in *Kevin Clayton Cox*, Admin. Proc. File No. 3-18980, or in a second review proceeding brought by one of the applicants listed in the caption above, *Donald Anthony Wojnowski*, Admin. Proc. File No. 3-19014. We therefore decline to consolidate those cases at this time and will issue separate briefing orders.

We do not decide FINRA’s motion with respect to *Rosenthal* and *Sullivan* at this time since FINRA’s motions to dismiss those appeals on timeliness grounds are pending before the Commission.

⁷ Rule of Practice 201(a), 17 C.F.R. § 201.201(a).

⁸ Rule of Practice 161(a), 17 C.F.R. § 201.161(a).

⁹ Rule of Practice 161(b), 17 C.F.R. § 201.161(b).

not explain how requiring jurisdictional briefs to be filed individually in each of the cases would expedite a decision on jurisdiction, let alone decisions on the merits.¹⁰

In any case, no applicant has argued that the *Kaplow* briefs inadequately address the jurisdictional question or that the applicant would be prejudiced if he could not supplement those briefs. Although several applicants have noted that their counsel do not represent other applicants, we note that all counsel are directly or indirectly affiliated with the same law firm,¹¹ and the briefs that have been filed so far by counsel in the cases being consolidated have been materially identical. Based on our review of these briefs, it does not appear that jurisdictional briefing in each case would aid the Commission's decisional processes. Accordingly, we find it in the interests of justice to order consolidated briefing.

If after reviewing the *Kaplow* briefs,¹² and the other briefs filed thus far in the appeals being consolidated,¹³ any applicant wishes to file a supplemental brief, such applicant may move no later than April 25, 2019, under Rule of Practice 154 for leave to do so. Applicants shall attach the proposed supplemental brief to the motion. Supplemental briefs shall not exceed 2,000 words, and shall be limited to legal arguments relevant to jurisdiction not otherwise addressed in the applicants' briefs filed in *Kaplow* and the other appeals being consolidated.¹⁴ Applicants may assume the Commission is familiar with all briefs filed in *Kaplow* and in the other appeals being consolidated, including the supplemental briefs. It is not necessary to file a protective supplemental brief to join or preserve legal arguments addressed in those briefs or to be deemed to have exhausted administrative remedies before the Commission. The parties' obligations to file briefs addressing the jurisdictional issue will be satisfied by either relying on the other briefs filed in these consolidated appeals or by submitting any supplemental brief.

Accordingly, it is ORDERED that the proceedings identified in the caption above be consolidated for hearing of the jurisdictional question; and it is further

¹⁰ FINRA requests "expedited consideration" of the jurisdictional question. The Rules of Practice do not provide for expedited consideration of a specific question in an appeal from SRO action. *See, e.g.*, Rule of Practice 400(b), 17 C.F.R. § 201.400(b) (petition for "interlocutory review of a hearing officer's ruling"); Rule of Practice 401(d)(3) 17 C.F.R. § 201.401(d)(3) (motion to stay SRO actions that have "already taken effect" or "will, by [their] terms, take effect within five days"); Rule of Practice 401(e)(3) (motions to lift stay of Public Company Accounting Oversight Board action); Rule of Practice 411(e), 17 C.F.R. § 201.411(e) (request for Commission to determine whether to order on its own initiative review of hearing officer's decision); Rule of Practice 500, 17 C.F.R. § 201.500 (temporary orders and suspensions).

¹¹ *See supra* note 1.

¹² *See* <https://www.sec.gov/litigation/apdocuments/ap-3-18877.xml>.

¹³ *See* <https://www.sec.gov/litigation/apdocuments/ap-open-filenos-asc.xml>

¹⁴ Rule of Practice 154, 17 C.F.R. § 201.154.

ORDERED that briefing on the jurisdictional question in these consolidated proceedings 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
Acting Secretary