IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO.: 17-023398-CA-01

FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.,

Petitioner,

vs.

PATRICK JAMES DWYER,

Respondent.
_____/

PATRICK JAMES DWYER,

Counter Petitioner,

vs.

MERRILL LYNCH, PIERCE FENNER & SMITH, INCORPORATED,

Third Party Respondent,

FINANCIAL REGULATORY AUTHORITY INC.,

Third Party Respondent.
_____/

FINRA'S OPPOSITION TO RESPONDENT'S
PETITION TO CONFIRM ARBITRATION AWARD

Introduction

Petitioner Financial Industry Regulatory Authority, Inc. ("FINRA") hereby files this Response to Respondent's Petition to Confirm Arbitration Award ("Petition to Confirm"). Respondent's Petition to Confirm fails because a California court already denied expungement of all seven of the customer complaints at issue in this arbitration award. *John Doe v. FINRA*, Case No. BC516756 (the "State Court Action"). Specifically, the *Doe* Court, after conducting a trial on the merits, opined "This is not a close case. The equities weigh heavily against expungement of Plaintiff Dwyer's record." State Court Action Op. at 28, attached as Ex. A to FINRA's Motion to Vacate. The Respondent did not appeal the court's ruling.

Having failed to get the relief Respondent sought in a California court – a court he chose despite the fact that he neither lives nor works in California -- he then initiated an arbitration proceeding seeking expungement of the same seven customer complaints solely against his employer Merrill Lynch, which did not oppose expungement. Neither Respondent nor Merrill Lynch disclosed the existence of the *Doe* court's 28-page opinion denying expungement of the identical customer complaints (dating from 2001-2009) to the arbitration panel. Instead, when the arbitration panel inquired about the timing of his expungement claim, despite having litigated the issue extensively for over two years in the State Court Action, Respondent misled the panel testifying that he simply "didn't know we could file for expungement [earlier] – you would be surprised how clueless we are."

Respondent now attempts to tax the resources of yet another judicial forum, this Court, in his pursuit of relief to which he is not entitled. The Court should not allow Respondent to have the proverbial second bite at the apple given the preclusive effect of the State Court Action and

FINRA's rule that a broker may sue *or* arbitrate the issue of expungement – but cannot do both. Respondent's Petition to Confirm has no merit and should be denied.

Background

A. FINRA's Legal Status and Function in Relation to Expungement

FINRA is a private, not-for-profit Delaware corporation and self-regulatory organization ("SRO") registered with the Securities Exchange Commission ("SEC") as a national securities association pursuant to the Maloney Act of 1938, 15 U.S.C. §78o-3, *et seq*., amending the Exchange Act. FINRA is the nation's only registered securities association as well as the nation's largest SRO. As an SRO, FINRA is part of the Exchange Act's comprehensive plan for regulating the securities markets. *See* 15 U.S.C. §§78q, 78s; *see also PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009), *cert. denied*, 130 S. Ct. 1698 (2010); *Desiderio v. NASD*, 191 F.3d 198, 201 (2d Cir. 1999), *cert. denied*, 531 U.S. 1069 (2001). The Exchange Act provides for extensive SEC oversight of SROs such as FINRA. *See* 15 U.S.C. §78s; *First Jersey Sec. Inc. v. Bergen*, 605 F.2d 690, 693 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074, 100 S. Ct. 1020 (1980); *PennMont Sec.*, *supra*, 586 F.3d at 246. Under the Act, the SEC must approve all FINRA rules, policies, practices, and interpretations before they are implemented, including the FINRA rules at issue in this matter. *See* 15 U.S.C. §78s(b).

FINRA's Office of Dispute Resolution is part of FINRA Regulation, Inc., which is a wholly owned subsidiary of FINRA. The Office of Dispute Resolution's sole function is to operate an arbitration/mediation forum to resolve securities industry disputes. Its authority and jurisdiction are limited to administering arbitrations/mediations, and it has no authority to

make or waive the making of regulatory decisions that are made by FINRA in its regulatory capacity.

B. The CRD System and BrokerCheck

FINRA is required by the Exchange Act to maintain information about member firms, their registered representatives and associated persons and does so on a computer database called the Central Registration Depository ("CRD"). *See* 15 U.S.C. §78o-3(i)(1)(A); *see also In re Olick*, 2000 U.S. Dist. LEXIS 4275, at *14 (E.D. Pa. Apr. 4, 2000). CRD was developed by FINRA and the securities commissions of the 50 states and contains registration information as well as regulatory and enforcement actions taken against securities industry personnel. CRD is operated by FINRA for the benefit of FINRA, the SEC, other SROs, securities firms, and the fifty states, including Florida's Office of Financial Regulation, pursuant to an agreement with the North American Securities Administrators Association, an organization of the state securities commissions.[1]

The CRD database allows prospective employers to obtain a wide range of information necessary in considering whether to hire a broker. It also provides securities regulators with a critical regulatory tool in overseeing the activities of brokers, and in detecting potential regulatory problems before they evolve into significant investor losses.

The Exchange Act also mandates that portions of a representative's CRD record be available to members of the public without subpoena through a toll-free telephone number and through the FINRA BrokerCheck program, which is available on the internet at www.finra.org. *See* 15 U.S.C. §78o-3(i)(1)(B) ("A registered securities association shall . . .

[1] We note that in the prior State Court Action the State of California enforced its interest in the proceedings when it successfully intervened to oppose the Respondent on the merits. November 20, 2014 Order Granting State of California's Motion to Intervene [D.E. 94].

establish and maintain a toll-free telephone listing, and a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding . . . registration information on its members and their associated persons"). BrokerCheck allows the public to obtain information about a broker or firm with whom they do business or contemplate doing business. "Registration Information" that must be published in BrokerCheck is defined in the Exchange Act to include "disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law, or exchange or association rule, and the source and status of such information." 15 U.S.C. §78o-3(i)(5). The dissemination and accessibility of registration information to the public – which includes customer complaints – is important because it helps public investors make informed decisions about brokers to whom they may decide to entrust their life savings.

Argument

A. RESPONDENT CHOSE THE JUDICIAL PATH TO PURSUE EXPUNGEMENT AND MUST ABIDE BY THE CALIFORNIA COURT'S DECISION.

FINRA Rule 2080 clearly states two options from which brokers may choose to pursue expungement: court or arbitration. Rule 2080(a) states that "[m]embers or associated persons seeking to expunge information from the [CRD] system arising from disputes with customers must obtain an order from a court of competent jurisdiction directing such expungement ***or*** confirming an arbitration award containing expungement relief (emphasis added)." "[T]he word 'or' is generally construed in the disjunctive when used in a statute or rule." *Sparkman v. McClure*, 498 So. 2d 892, 895 (Fla. 1986) (citation omitted). "The use of this particular disjunctive word in a statute or rule normally indicates that alternatives were intended." *Id.*

(citations omitted). Put another way, Florida Supreme Court precedent dictates that one may employ one option *or* the other, but not both.

Respondent cites no support for his construction of the word "or" as it is used in Rule 2080(a). Petition to Confirm at 4-5. Respondent argues nonsensically that a broker can employ these alternatives successively, again and again, until he or she gets the expungement relief desired, if ever. That is not the law.

Respondent's reliance on the difference between the September 2015 and September 2017 versions of FINRA's Notice to Arbitrators and Parties on Expanded Expungement Guidance is unavailing. *See* Petition to Confirm at 17-19. There was no change in policy as asserted by Respondent. Rather, the earlier version simply stated that successive arbitrations of the same expungement request were not allowed and did not address the situation where a court decision denying expungement was followed by an arbitration. The later version addressed this situation, stating that an arbitration succeeding a court case was not allowed. But the rule the notices relate to, Rule 2080, requiring disjunctively that the broker choose one venue or the other, had been in place long before either of these notices were issued.

Simply put, under FINRA's expungement rule, the choice of forum is a disjunctive one. *See* FINRA Rule 2080(a). Either the broker chooses a judicial forum or an arbitral one.

B. UNDER BOTH FLORIDA AND CALIFORNIA LAW, RES JUDICATA AND COLLATERAL ESTOPPEL PRINCIPLES BAR CONFIRMATION OF THE ARBITRATION AWARD AND REQUIRE THAT THE AWARD BE VACATED.

Although FINRA has cited California law requiring that the decision in the State Court Action be enforced against Respondent via res judicata and collateral estoppel principles, see Petition to Vacate ¶¶ 10-11, application of the Florida law cited by Respondent, see Petition to Confirm at 19-23, yields the same result. Both Respondent and FINRA were parties to the State

Court Action, and by operation of FINRA Rule 2080(b), FINRA is a mandatory party to this action, Respondent's Petition to Confirm the arbitration award, as well. Respondent's many attempts to distinguish between the two actions, which **both** (1) request expungement of the same seven customer complaints **and** (2) involve FINRA and Respondent as parties, fall short.

1. THE CLAIMS AT ISSUE IN THE TWO CASES ARE IDENTICAL.

In an effort to fabricate a difference in the subject matter of the two proceedings, Respondent labeled his arbitration an "expungement only" case to try to distinguish it from the State Court Action. *See* Petition to Confirm at 5. However, both were "expungement only" proceedings, meaning that expungement was not requested as part of an underlying litigation or arbitration with a customer, but rather that expungement was the primary relief sought in both forums.

2. THE PARTIES IN BOTH CASES ARE THE SAME.

Respondent argues that FINRA cannot move to vacate the arbitration award and is not a party in this action because *he* chose not to name it. *See* Petition to Confirm at 8-11. This argument has no merit. Rule 2080(b) **makes** FINRA a party to Respondent's confirmation action[2] and requires that it be served with all documents: "Members or associated persons petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief **must name FINRA as an additional party** and serve FINRA with all appropriate documents unless this requirement is waived pursuant to

[2] Respondent's reliance on a motion filed by FINRA in the case of *Vega Asset Recovery LLC v. Newedge USA, LLC*, Case No. 17-01332 (N.D. Ill. 2017), for the proposition that FINRA has admitted it is never a proper party to a motion to vacate an arbitration award is beyond misplaced. *See* Petition to Confirm at 13-15. That case did not involve expungement and FINRA's sole involvement was as an arbitration forum, not as a regulator. There is no valid, relevant admission here. For the same reason, Respondent's argument that FINRA is judicially estopped given this "admission," *see* Petition to Confirm at 24-26, has no merit.

subparagraph (1) or (2) below" (emphasis added). FINRA denied Respondent's waiver request. Because Respondent cannot get expungement relief without naming FINRA in this case, FINRA is a party in this case.

The arbitration panel also notified Respondent in language contained in the Award that he must obtain judicial confirmation of the Award before FINRA would expunge his record, including naming FINRA as a party and serving FINRA with all appropriate documents.[3] It is clear that Respondent read but misconstrued this directive because he relies on it for his argument that FINRA allegedly admitted that it cannot vacate the award.[4] Respondent misunderstands that the act of moving to vacate the award, which Section 628.13, Florida Statutes, explicitly empowers FINRA to do, is not the same as actually vacating the award, which the same section empowers only courts to do.

Despite the explicit language contained in Rule 2080(b) and in the Award itself, Respondent again violated Rule 2080 and the process by improperly captioning FINRA "Amicus Curiae," rather than naming it as a required party. Respondent therefore directly misled this Court when he stated that "[a]ll the requirements of Rule 2080 in this case were also met." Petition to Confirm at 32.

In contending that FINRA is not a "party" here, Respondent completely misses the point of why (absent an explicit waiver by FINRA) Rule 2080(b) requires parties to name FINRA as a party to all court actions seeking to confirm arbitration awards that contain expungement relief. Typically, the customer who has made the complaint against the broker is a party to an arbitration wherein the broker asks the panel to order expungement as part of the award pursuant to FINRA Rule 12805. In a less typical case, the employing firm is a party to an arbitration with

[3] *See* Petition to Vacate, Ex. D at 3.
[4] *See* Petition to Confirm at 12-13.

the broker seeking to clear customer complaints pursuant to FINRA Rule 13805. In either case, FINRA would not be a party to the arbitration in its regulatory capacity. But FINRA must *always* be a party to a judicial proceeding to confirm the arbitration award by operation of Rule 2080(b), unless it waives that requirement. FINRA denied Respondent's waiver request, so he knew that in order to confirm this fraudulently obtained arbitration award he would have to name FINRA as a party to this case.

Respondent's argument that FINRA cannot be a party because it is involved here only as the arbitrator and not as the regulator with the authority to expunge a broker's record is factually inaccurate. *See* Petition to Confirm at 30-31. The quoted language of the Rule 2080 FAQ states this: "the Rule gives FINRA and the States the opportunity to participate in the court confirmation process and make courts fully aware of investor protection and regulatory concerns relating to inappropriate expungements" and "FINRA will generally participate in the court confirmation proceeding and generally oppose confirmation of the expungement directive . . ." *Id.* at 31. FINRA brings its motion to vacate, and opposes the motion to confirm, solely in its capacity as Respondent's regulator and as the securities regulator responsible for maintaining the integrity and accuracy of the CRD database.

3. FINRA IS THE REAL PARTY IN INTEREST.

FINRA is the real party in interest in the expungement process due to its ownership and control over the CRD and its mandate to maintain accurate information about registered securities and brokers for protection of investors. FINRA has a legally protected interest in the records that Respondent wants expunged and is the only entity that can actually expunge the records. As such, FINRA is an indispensable party to any effort to effectuate the relief sought. Indeed, Respondent cannot get the award confirmed without first naming FINRA so that FINRA

has the opportunity to dispute the requested relief if such a position is required. Therefore, FINRA has an enforceable right to petition to vacate the award. *See* Fla. Stat. § 682.13; *Ass'n of Contracting Plumbers of City of New York, Inc. v. Local Union No. 2 United Ass'n of Journeymen*, 841 F.2d 461, 466-67 (2d Cir. 1988).

While Respondent tenders various arguments regarding FINRA's standing in these proceedings, he fails to address a fundamental concept of juridical power. Dwyer asks this Court to enter final judgment "ordering FINRA to expunge the complaints set forth in Dwyer v. Merrill Lynch . . ." Petition to Confirm at 33. Respondent is therefore asking this Court to rule that FINRA is not a proper party and then, to render an order directed to FINRA. Such relief offends basic due process.

> "[N]o court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree. If it assumes to do so, the decree is pro tanto brutum fulmen [to that extent an empty threat], and the persons enjoined are free to ignore it. It is not vested with sovereign powers to declare conduct unlawful; its jurisdiction is limited to those over whom it gets personal service . . . ."

Humphery v. Deutsche Bank Nat'l Trust Co., 113 So. 3d 1019, 1020 (Fla. 2d DCA 2013), *quoting Alemite Mfg. Corp v. Staff,* 42 F. 2d 832, 832-33 (2d Cir. 1930); *Blue Dolphin Fiberglass Pools, Inc. v. Swim Industries Corp.*, 597 So. 2d 808, 809 (Fla. 2d DCA 1992).

4. FINRA DOES NOT HAVE AN AGREEMENT TO ARBITRATE WITH BROKERS.

The Court should be aware that FINRA has no agreement to arbitrate with brokers or member firms, and accordingly, FINRA is *never* named as a party to an arbitration of the kind brought by Respondent. So, to the extent that Respondent sought to create some benefit from his choice of his employer Merrill Lynch as arbitration partner, there is none. When he suggests that the arbitration was allowed because FINRA Rule 13805 in conjunction with Rule 2080 allows

the broker to arbitrate with his employer, it is clear that just because such an arbitration is theoretically allowed does not mean that a broker can file and lose a court case, and then later arbitrate the exact same issue, regardless of the parties.[5] *See* discussion *supra* at Section A and FINRA Rule 2080(a).

In sum, Respondent's arguments in rebuttal to FINRA's request that the doctrines of res judicata and collateral estoppel be applied are all based on Respondent's filing of essentially a sham arbitration proceeding against a non-adverse, non-interested party with which he did not have an actual controversy (Merrill Lynch) in an effort to both get a decision more to his liking and undermine the preclusive effect of the California court's decision. This Court should deny Respondent's obvious subversion of the judicial system and the finality of fully litigated judgments.

C. RESPONDENT WAIVED HIS RIGHT TO ARBITRATE.

Respondent admits in his Petition to Confirm that he first selected the judicial option for expungement, tried his case and lost. "Dwyer first sought expungement in a California state court action by solely naming FINRA as the Respondent, asking the court to exercise its equitable powers to expunge the seven customer complaints filed against him. Doe v FINRA, Superior Court of the State of California for the County of Los Angeles Case No. BC516756. The court in the California Case declined relief." Petition to Confirm at 5.

[5] Even if this Court finds that FINRA's status as initially not a party to the underlying arbitration proceeding to be relevant to the collateral estoppel analysis, in some factual situations Florida law does not require complete identity of parties. *See Red Carpet Corp. v. Roberts*, 443 So. 2d 377, 380 (Fla. 1st DCA 1983) (identity of the parties extended to include a person who is technically not a party when that person had an interest in the litigation); *see also Zeidwig v. Ward*, 548 So. 2d 209 (Fla. 1989) (collateral estoppel applies where the party seeks to use the prior decision defensively, as FINRA seeks to do here).

Respondent thus waived any right to arbitrate his claim[6] when he previously litigated the same claim in the California court, failed to preserve any right to arbitrate, and failed to appeal the state court decision. Waiver is defined as "the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right." *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136, 1138 (Fla. 1st DCA 1999). If a party participates in a lawsuit or takes action inconsistent with his right to arbitrate and does not safeguard that right, a court can find that a party waived his right to arbitrate his claim. *See Grigsby & Assocs., Inc. v. M Sec. Inv.*, 664 F.3d 1350, 1353 (11th Cir. 2011); *see also Raymond James Fin. Servs., Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005) (recognizing that a party's right to arbitrate "may be waived by actually participating in a lawsuit or taking action inconsistent with that right"; holding that "an arbitration right must be safeguarded by a party who seeks to rely upon that right and the party must not act inconsistently"); *Fritz v. Fritz*, 219 So. 3d 234, 238-39 (Fla. 3rd DCA 2017) (finding that the party "waived his right to invoke arbitration because he spent three years litigating the same matter in [court] and therefore, he has clearly 'acted inconsistently with the right to arbitrate and [is] now forum shopping'" (citation omitted); *Miller Brewing Co. v. Fort Worth Dist. Co.*, 781 F.2d 494, 496-498 (5th Cir. 1986) (court held that the plaintiff, having pursued unsuccessful legal remedies for three and a half years before turning to arbitration, waived its right to arbitration).

What Respondent has engaged in here is impermissible forum shopping, which is disallowed when parties try to use the judicial system ***and*** arbitration to decide the same matter.

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[6] Respondent argues that FINRA's waiver argument requires identity of parties. *See* Petition to Confirm at 23-24. But Rule 2080 forces the broker to choose one of two forums, and thus waiver occurs when there is identity of subject matter, the seven customer complaints that Respondent wanted expunged, and does not require identity of parties. In any event, Rule 2080(b) makes FINRA a required party to Respondent's confirmation action. *See* discussion *supra* in Section B.2.

See Fritz v. Fritz, 219 So. 3d at 239; *Cassedy v. Hofmann*, 153 So. 3d 938, 942 (Fla. 1st DCA 2014) (finding that "by litigating the underlying dispute for four years, Appellees acted inconsistently with the right to arbitrate and are now forum shopping"). That the arbitration was conducted in FINRA's separate dispute resolution forum does nothing to legitimize the fraudulently obtained arbitration award in light of the prior California case.

Because Respondent did not disclose the State Court Action to the arbitration panel, the question of whether the arbitration proceeding could be held despite the prior court action was not before the arbitration panel nor could the panel have decided it. *See Cassedy*, 153 So. 3d at 942 (holding "a claim of waiver of the right to arbitrate based on prior litigation conduct is presumptively one for the court"). Citing federal cases with approval, the *Cassedy* court quoted *Grigsby*: "'[I]t is presumptively for the courts to adjudicate disputes about whether a party, by earlier litigating in court, has waived the right to arbitrate. This presumption leaves the waiver issue to the decisionmaker with the greater expertise in recognizing and controlling abusive forum-shopping." *Id.* at 941. Only this Court can find that the clear and unambiguous language of Rule 2080 did not authorize Respondent's subsequent arbitration proceeding, which he waived the right to pursue. Thus, the award issued by the panel was null and void and cannot be confirmed pursuant to Section 628.12, as set forth in FINRA's Petition to Vacate ¶ 12.

D. THE ARBITRATION PANEL WAS BOUND BY THE CALIFORNIA COURT'S DECISION.

As FINRA stated in the Petition to Vacate, "Dwyer fraudulently concealed and failed to disclose the State Court Action and its result to the Arbitration Panel." FINRA's Petition to Vacate Arbitration Award ¶ 9. While the Panel could not decide against Respondent based on his waiver of the right to arbitrate, a decision for a court alone, see *supra* at Section C, but for Respondent's fraud the Panel could and should have considered the fact of the California court

ruling in deciding whether or not to issue the award. In the Petition to Vacate, FINRA stated that Section 628.13(1)(a) requires the award be vacated on this ground:

> Dwyer's extreme lack of candor to the Arbitration Panel was material because the Arbitration Claim was barred by the doctrines of res judicata and collateral estoppel. Courts look to the law of the state where the prior ruling was entered to determine res judicata and collateral estoppel issues. Under California law, re-litigation of issues argued and decided in a previous case is prohibited. *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 824-25 (Cal. July 13, 2015). The prior judgment conclusively resolves an issue litigated and determined in the first action. *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342 (Cal. 2010). "The bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost. The point is that, once an issue has been finally decided against such a party, that party should not be allowed to relitigate the same issue in a new lawsuit." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th at 827. Collateral estoppel can be asserted only against a party to the first lawsuit, or one in privity with a party, and can be invoked by one not a party to the first proceeding. *Bernhard v. Bank of Am. Nat'l Tr. & Sav. Asso.*, 19 Cal. 2d 807, 812, 122 P.2d 892 (Cal. 1942); *DKN Holdings LLC v. Faerber*, 61 Cal. 4th at 827.

Petition to Vacate ¶ 10; *see also id.* ¶ 11.

Furthermore, Respondent's choice of Merrill Lynch as his new "adversary" in the arbitration, without notification to FINRA, constituted a further fraudulent manipulation of the process. Naming Merrill Lynch in the arbitration simply served to hide from FINRA that Respondent was taking a second bite at the apple. Respondent likely hoped that FINRA would not notice that he was proceeding by arbitration, which also would have been harder to track

given the substitution of parties.[7] Respondent seems to have failed to recognize that eventually FINRA would become a party by operation of FINRA Rule 2080(b).

Respondent does not disagree that Section 628.13 provides statutory reasons not to confirm and to vacate the award and that fraud is one of them. See Petition to Confirm at 7 & 15. To say that "FINRA has no basis to oppose confirmation of the arbitration award," Petition to Confirm at 32, is just patently incorrect. Respondent's fraud in procuring the arbitration award is not allowed by Rule 2080 and the arbitration may have had a different outcome had the California court's decision been revealed to the panel.

Because the Court cannot confirm the arbitration award until it determines the merits of FINRA's Petition to Vacate, see *Glen Johnson, Inc. v. Ruzicka*, 517 So. 2d 762, 763 (Fla. 2d DCA 1987), and because the Petition to Confirm has no merit, the Petition to Confirm must be denied, or at least stayed pending resolution of FINRA's Petition to Vacate.

[7] Respondent argues that because FINRA's dispute resolution forum did not disallow the arbitration under FINRA Rule 13203, FINRA waived its right to object to it. *See* Petition to Confirm at 28. On its face, this arbitration filing appeared appropriate under FINRA Rule 13200. FINRA Rule 13203 allows the Director of the Office of Dispute Resolution non-delegable discretion to decline arbitrations when he learns that the subject matter is inappropriate or that the safety of the arbitrators or the parties is somehow compromised. At no time is the Director empowered to waive the rights of FINRA the regulator. Moreover, even if the Director could waive the regulator's rights, the Respondent fraudulently concealed the fact of the prior California trial from him and his office, thus making a knowing waiver impossible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of January 2018, a true and correct copy of the foregoing was filed by the Florida Courts E-Filing Portal, which will serve all counsel of record electronically.

/s/ *David S. Mandel*