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FINRA ARBITRATION AND ENFORCEMENT: A LEGAL AND PRACTICAL GUIDE

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FINRA Arbitration and Enforcement: A Legal and Practical Guide
PORTFOLIO DESCRIPTION SHEET

Securities Practice Series Portfolio No. 289, *FINRA Arbitration and Enforcement: A Legal and Practical Guide*, examines proceedings involving the Financial Industry Regulatory Authority (FINRA) in its dual capacities as a forum for dispute resolution and as a securities industry regulator. The portfolio begins with a discussion of the FINRA arbitration process for the resolution of disputes between member firms, associated persons and customers. Included is a review of the applicable arbitration codes, and an examination of prehearing matters, motion practice, hearings and awards. This portion of the portfolio concludes with a discussion of the procedures for confirming, modifying and vacating arbitration awards. The portfolio then examines enforcement actions brought by FINRA against member firms and their associated persons. This chapter reviews FINRA investigations, the disciplinary proceeding process and the procedures for appeals from or the review of decisions rendered in a FINRA disciplinary proceeding.

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FINRA Arbitration Proceedings

A. Types of FINRA Arbitrations and the Governing Codes

There are two types of arbitration proceedings held under the rules of the Financial Industry Regulatory Authority (FINRA): customer disputes and industry disputes. Customer disputes are those contested ''between investors and brokers and/or brokerage firms,''[1] and are governed by FINRA's Customer Code.[2] Industry disputes are those ''between or among industry parties only.''[3] Industry disputes often involve employment-related claims between brokers or investment advisors and the firms with which they are, or were, associated. They are governed by FINRA's Industry Code.[4]

The provisions of FINRA's Customer Code and Industry Code, and thus the rules governing arbitrations of the two different types of matters, are largely identical.

B. Arbitrability of Dispute

A threshold question to the filing of any FINRA arbitration proceeding is whether the dispute is required—or even allowed—to be arbitrated before that forum.

1. Customer disputes

Under the Customer Code, a dispute *must* be arbitrated before FINRA in accordance with the provisions of that code where the following conditions are met:

- the arbitration is either ''[r]equired by a written agreement, or . . . [r]equested by the customer;''
- the parties to the dispute are a customer[5] on one side and either a member of FINRA[6] or an associated person of a member[7] on the other side; and
- ''[t]he dispute arises in connection with the business activities of the member or the associated person.''[8]

There is one minor exception: a customer dispute that would otherwise qualify under this provision of the Customer Code need not be arbitrated if it ''involve[s] the insurance business activities of a [FINRA] member that is also an insurance company.''[9]

2. Industry disputes

Under the Industry Code, a dispute must be arbitrated before FINRA in accordance with the provisions of that code where the following conditions are met:

- the dispute ''arises out of the business activities of a member or an associated person;'' and
- the parties to the dispute are members; members and associated persons; or associated persons.[10]

There is no need for an associated person to have executed an employment agreement with an arbitration clause because, incidental to his or her employment with a FINRA member, any associated person will have executed a Form U4, pursuant to which he or she will have agreed to arbitrate any dispute

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[1] *See* FINRA, Code of Arbitration Procedure.

[2] FINRA Rules 12000–12905.

[3] *See* FINRA, Code of Arbitration Procedure.

[4] FINRA Rules 13000–13905.

[5] The Codes' definition of the term ''customer'' is vague and of limited utility. *See* FINRA Rules 12100(i), 13100(i) (''A customer shall not include a broker or dealer.''). As a result, the issue of who qualifies as a ''customer'' so as to make the dispute arbitrable is often contested. Courts have attempted to clarify the definition. *See* UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc., 660 F.3d 643, 649-50 (2d Cir. 2011) (noting that ''neither FINRA nor the courts have off[ered] [a] precise definition of 'customer,' '' but holding that ''[t]he term 'customer' includes at least a non-broker or non-dealer who purchases, or undertakes to purchase, a good or service from a FINRA member''); *see also* SunTrust Banks, Inc. v. Turnberry Cap. Mgmt. LLP, 945 F. Supp. 2d 415, 421 (S.D.N.Y. 2013) (''[C]ourts have held that the term 'customer' must have a more limited meaning than simply 'all entities other than brokers or dealers.' ''); Sinclair & Co. v. Pursuit Inv. Mgmt. LLC, 74 A.D.3d 650 (N.Y. App. Div. 2010) (''We reject the ''argu-[ment] that by negative inference [the FINRA] definition means a 'customer' is everyone who is not a broker or dealer'' . . . [and] ''qualify the word 'customer' to mean 'one involved in a business relationship with [a FINRA] member that is related directly to securities investment or brokerage services.' '') (quoting Fleet Boston Robertson Stephens Inc. v. Innovex, Inc., 264 F.3d 770, 772 (8th Cir. 2001)).

[6] A ''member'' is defined in both the Customer Code and the Industry Code as ''any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled; and any broker or dealer admitted to membership in a self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the [Customer or Industry] Code and/or to be treated as members of FINRA for purposes of the [Customer or Industry] Code, whether or not the membership has been terminated or cancelled.'' FINRA Rules 12100(o), 13100(o). The term ''member'' contemplates a firm, rather than one of its employees. *See* FINRA Dispute Resolution Glossary (defining a ''member firm'' as ''a brokerage firm that has been admitted to membership in FINRA, whether or not the membership has been terminated or cancelled,'' and providing that ''[a] brokerage firm may be a partnership, corporation or other legal entity''). An employee of a member firm may qualify as an ''associated person'' (*see* note 7), but would not himself be a member.

[7] An ''associated person'' or ''associated person of a member'' is defined in each of the Codes simply as ''a person associated with a member . . . '' FINRA Rules 12100(a), 13100(a). However, the FINRA Dispute Resolution Glossary expands on this rather circular definition, stating that an associated person is:

> any person engaged in the investment banking or securities business who is directly or indirectly controlled by a FINRA member, whether or not they are registered or exempt from registration with FINRA. An associated person includes, but is not limited to, every sole proprietor, partner, officer, director, or branch manager of any FINRA member. This individual may also be referred to as a broker.

FINRA Dispute Resolution Glossary.

[8] FINRA Rule 12200.

[9] *Id.*

[10] FINRA Rule 13200(a). For discussion of the terms ''member'' and ''associated person,'' see notes 6, 7.

qualifying for arbitration under FINRA's rules.[11] Similar to the corresponding provision in the Customer Code, the Industry Code excludes from compulsory arbitration ''disputes involving the insurance business activities of a member that is also an insurance company.''[12]

3. Elective arbitration

Even in cases where arbitration of a particular dispute before FINRA is not mandatory, the parties may elect to have their dispute heard before a FINRA arbitration panel if:

- after the dispute arises, the parties agree in writing to submit their dispute to FINRA;
- ''[t]he dispute is between a customer and a member, associated person of a member, or other related party;'' and
- ''the dispute arises in connection with the business activities of a member or an associated person.''[13]

As with compulsory customer arbitration, ''disputes involving the insurance business activities of a member that is also an insurance company'' are excluded from qualification for elective arbitration before FINRA.[14] Thus, eligibility of a dispute for elective arbitration is similar to eligibility of a dispute for mandatory arbitration, with the principal difference being that elective arbitration is available when the parties' agreement to refer the matter to FINRA arbitration was executed after, rather than before, the dispute arose.

C. Stay or Dismissal of Pending Judicial Litigation and Motions to Compel Arbitration

If a party has commenced litigation of a dispute that is subject to compulsory arbitration as a result of an arbitration clause in the parties' agreement, the defendants in that litigation may make a motion to compel arbitration. A federal court's power to grant such a motion derives from § 4 of the Federal Arbitration Act.[15] If the court determines that some of the claims before it are required to be arbitrated but some are not, the court will ''sever those claims subject to arbitration from those adjudicable only in court.''[16]

The court in which the action is pending, rather than the arbitration tribunal, will usually be the proper forum to determine the arbitrability of the claims; in federal court, absent evidence that the parties intended to submit the question of arbitrability to the arbitrator, the court decides whether a particular dispute is subject to compulsory arbitration.[17] State courts in jurisdictions such as New York enforce a similar presumption that the issue of arbitrability is one for judicial determination.[18] However, procedural questions regarding whether a dispute qualifies for arbitration under the arbitral forum's own rules are reserved to the arbitration panel.[19]

There is a split among the federal courts of appeals on whether a motion to compel arbitration must be brought in the same judicial district as the forum designated for arbitration, where the parties' arbitration agreement contains a choice of venue provision—assuming the forum selection clause is held enforceable.[20] The Sixth, Seventh, and Tenth Circuits have held that only a district court sitting in the forum designated in the

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[11] *See* FINRA Form U4, at ¶ 5 (Item 15A: Individual/Applicant's Acknowledgement and Consent) (''I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm*, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent *jurisdiction*.'') (emphasis and parentheses in original).

[12] FINRA Rule 13200(b).

[13] FINRA Rules 12201, 13201.

[14] *Id.*

[15] Under 9 U.S.C. § 4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

[16] Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 20 (2d Cir. 1995); *accord* United States ex rel. Cassaday v. KBR, Inc., 590 F. Supp. 2d 850, 863 (S.D. Tex. 2008) (same); Harris v. Iannaccone, 107 A.D.2d 429, 431 (N.Y. App. Div. 1985) (''Harris is entitled to have a judicial forum to air his charge of discrimination [but] [t]he [claim alleging] injury to Harris' business reputation is still subject to the arbitration agreement. . . . The proper course of action is to sever the two causes of action [thus allowing] the [claim for] injury to business reputation to proceed through arbitration and the discrimination cause of action to continue through the courts.'').

[17] *See, e.g.*, Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (''The question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'') (emphasis in original) (quoting AT&T Techs., Inc. v. CWA, 475 U.S. 643, 649 (1986)); *accord* Oracle Am., Inc. v. Myriad Grp., A.G., 724 F.3d 1069, 1072 (9th Cir. 2013); VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P., 717 F.3d 322, 325–26 (2d Cir. 2013).

[18] *See, e.g.*, United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City Sch. Dist. of N.Y., 1 N.Y.3d 72, 79 (2003) (''Because arbitrability is a threshold question going to the arbitrator's power to resolve the dispute, a party can seek judicial intervention to determine whether the dispute is arbitrable before consenting to arbitration.''); Cnty. of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 7 (1980) (''The parties are entitled first to a judicial determination whether there was a valid agreement to arbitrate. If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied.'').

[19] *See Howsam*, 537 U.S. 79, 85 (holding that it was for arbitrators of FINRA's predecessor organization, the National Association of Securities Dealers (NASD), to determine whether arbitration was barred due to violation of time limitation for bringing arbitration under NASD's rules). The similar FINRA rule setting time limitations for commencing arbitrations is discussed below, in 289 SPS § I-F2e, *Time limitation for commencing an arbitration*.

[20] On enforceability of forum selection clauses, *compare* , Great

forum selection clause has jurisdiction to grant a motion to compel arbitration.[21] Under this rule, if the existing litigation between the parties is pending in a different judicial district, the party seeking to compel arbitration would need to commence a new action in the proper district and then seek the order compelling arbitration in the new action. The Fifth and Ninth Circuits have reached a contrary result, concluding that a motion to compel arbitration can be made in any judicial district, regardless of any conflict with the choice of venue clause.[22] Other circuits, including the Second Circuit, have not yet addressed this issue.[23]

D. Disposition of Judicial Action: Stay, Dismissal or Parallel Proceedings

Where a motion to compel arbitration is granted in a pending judicial action and all of the claims are sent to arbitration, federal circuits differ on whether the action should be stayed or dismissed.[24] If a judicial challenge to arbitrability succeeds only with respect to some of the claims and others are deemed suitable to be brought in court, the court has a choice: it can stay the non-arbitrable claims pending arbitration;[25] it can allow claims to proceed simultaneously in arbitration and court, at its discretion;[26] or occasionally, if the non-arbitrable claims predominate, the court can stay the arbitration pending the litigation of the non-arbitrable claims.[27]

In New York state courts, the governing statute provides for a stay, rather than dismissal, of the claims found to be arbitrable when a motion to compel arbitration is granted.[28] However, if some of the claims are deemed appropriate for

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Earth Cos. v. Simons, 288 F.3d 878, 890–91 (6th Cir. 2002) (declining to enforce arbitral forum selection clause after finding that clause was fraudulently induced, but nevertheless compelling arbitration on grounds that forum selection provision was severable from remainder of arbitration clause), *with* M.A. Mortenson Co. v. Saunders Concrete Co., 676 F.3d 1153, 1158 (8th Cir. 2012) (rejecting challenge to forum selection clause under New York law and noting lack of authority for proposition that ''a forum selection clause agreed to by two sophisticated business entities could be substantively unconscionable.''); *but see* Duran v. J. Hass Grp., LLC, 531 Fed. Appx. 146, 147, (2d Cir. 2013) (holding that ''the validity of the forum selection clause [that had been challenged as unconscionable] is a procedural issue presumptively for the arbitrator to decide,'' even though this would result in the submission of the issue to an arbitrator who had been appointed in a venue chosen pursuant to an allegedly unconscionable clause).

[21] *See, e.g.*, Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007, 1018 (6th Cir. 2003) (''[T[he Federal Arbitration Act prevents federal courts from compelling arbitration outside of their own district.''); Kawasaki Heavy Indus., Ltd. v. Bombardier Recreational Prods., Inc., 660 F.3d 988, 997 (7th Cir. 2011) (''[I]f an arbitration clause contains a choice of venue provision, only a court within the same district of that venue can enter an order compelling arbitration.''); Ansari v. Qwest Commc'ns Corp., 414 F.3d 1214, 1219–20 (10th Cir. 2005) (agreeing with ''[t]h[e] majority view [that] holds that where the parties agreed to arbitrate in a particular forum only a district court in that forum has authority to compel arbitration under § 4 [of the FAA]'').

[22] *See* Dupuy-Bushing Gen. Agency, Inc. v. Ambassador Ins. Co., 524 F.2d 1275, 1278 (5th Cir. 1975) (affirming order of Mississippi district court to compel arbitration in New Jersey, and holding that ''where the party seeking to avoid arbitration brings a suit for injunctive relief in a district other than that in which arbitration is to take place under the contract, the party seeking arbitration may assert its Section 4 right to have the arbitration agreement performed in accordance with the terms of the agreement.''); Textile Unlimited, Inc. v. A..BMH and Co., 240 F.3d 781, 785 (9th Cir. 2001) (explaining in dicta that ''by its terms, § 4 [of the FAA] only confines the arbitration to the district in which the petition to compel is filed. It does not require that the petition be filed where the contract specified that arbitration should occur.'').

[23] *See* J.P. Morgan Sec., Inc. v. Louisiana Citizens Prop. Ins. Corp., 712 F. Supp. 2d 70, 81–83 (S.D.N.Y. 2010) (following rule of Sixth, Seventh and Tenth Circuits absent guidance from Second Circuit).

[24] *Compare* Lloyd v. Hovensa, LLC, 369 F.3d 263, 269–71 (3d Cir. 2004) (holding that district court erred in dismissing action rather than staying it pending arbitration), *and* Adair Bus. Sales, Inc. v. Bluebird Corp., 25 F.3d 953, 955 (10th Cir. 1994) (same), *with* Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709–10 (4th Cir. 2001) (''[D]ismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.''), Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992) (same), *and* Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (same). The Second Circuit takes what could be considered a third approach, declining to mandate either dismissal or a stay, but merely prescribing that district courts clearly state whether an action is being stayed or dismissed, since this decision determines whether an interlocutory appeal may be entertained. *See* Salim Oleochemicals, Inc. v. M/V Shropshire, 278 F.3d 90, 93 (2d Cir. 2002) (''We urge district courts in these circumstances to be as clear as possible about whether they truly intend to dismiss an action or mean to grant a stay.''); *accord* Marsh & McLennan Cos. v. GIO Ins. Ltd., No. 11 Civ. 8391 (PAC), 2013 BL 215862, at *4 (S.D.N.Y. Aug. 6, 2013) (''[T]he Second Circuit has not required district courts to stay, rather than dismiss, litigations pending arbitration, but has merely instructed district courts to state clearly whether an action was stayed or dismissed, so that appellate jurisdiction may be determined.''). However, as a practical matter, district courts sitting in the Second Circuit tend to dismiss cases in which arbitration of all the claims has been compelled. *See* Arrigo v. Blue Fish Commodities, Inc., 704 F. Supp. 2d 299, 304–05 (S.D.N.Y. 2010) (collecting cases), *aff'd*, 408 F. Appx. 480 (2d Cir. 2011).

[25] *See* note 23.

[26] *See, e.g.*, N.Y. Cross Harbor R.R. Terminal Corp. v. Consol. Rail Corp., 72 F. Supp. 2d 70, 80 (E.D.N.Y. 1998) (stating that ''the court must address whether to allow plaintiff to continue to prosecute its non-arbitrable claims or to stay the proceedings pending arbitration of the plaintiff's arbitrable claims,'' and ultimately deciding to stay the judicial proceedings); *cf.* Chelsea Family Pharmacy, PLLC v. Medco Health Solutions, Inc., 567 F.3d 1191, 1200 (10th Cir. 2009) (declining to stay action where arbitrable and non-arbitrable claim were ''distinct and unrelated'' to each other, such that ''resolution of the arbitrable claim could not ''have a preclusive effect on the nonarbitrable . . . claim'').

[27] *See, e.g.*, Bell Canada v. ITT Telecomms. Corp., 563 F. Supp. 636, 642 (S.D.N.Y. 1983) (''[T]he Court holds that only items (i) and (ii) of the Fourth Claim are arbitrable under the parties' agreement and stays arbitration of those claims pending litigation of the nonarbitrable claims asserted by Bell Canada in its complaint as well as any counterclaims ITT may assert in this forum.'').

[28] *See* N.Y. CPLR 7503(a) (''If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.''); *accord* Nachman v. Jenelo Corp., 25 A.D.3d 593, 593–94 (N.Y. App. Div. 2006) (holding that trial court ''had no authority to dismiss the complaint merely because the subject shareholders' agreement contained a mandatory arbitration clause . . .

judicial resolution, those claims will not necessarily be stayed during the pendency of the arbitration.

E. Waiver of Arbitration

A party to a valid arbitration agreement may nevertheless be held to have waived its right to arbitration of the dispute if it participates in the judicial action before asserting its right to arbitrate.[29] However, on a motion to compel arbitration, waiver will not be lightly inferred, and will only be found where the opposing party has been prejudiced by the tardiness of the movant in seeking to compel arbitration.[30]

F. Commencing an Arbitration

As in other arbitration forums, the parties who file a claim in a FINRA proceeding are called ''claimants,'' while the parties against whom claims are asserted are called ''respondents.''[31]

To initiate an arbitration proceeding before FINRA, the claimant files a written statement of claim and a signed and dated submission agreement with FINRA's Director of Dispute Resolution (Director).[32] The claimant is not generally required to serve these documents on the respondents, as FINRA's office will do so.[33]

1. Submission agreement

The submission agreement is a document by which the signatory expressly agrees to arbitrate the matter before FINRA. It is a form available for downloading from FINRA's website.[34]

2. Statement of Claim

The Statement of Claim is the claimant's initial or amended pleading filed in an arbitration.[35] It is thus akin to the complaint in a judicial action.

FINRA's rules provide scant guidance for crafting the contents of the Statement of Claim, noting merely that it should ''specify the relevant facts and remedies requested,'' and that supporting exhibits may be attached.[36] Particular causes of action are not required to be pleaded with any particular level of detail. Moreover, a motion to dismiss for legal insufficiency of the pleaded claims will rarely, if ever, be granted in a FINRA arbitration, as claims will be evaluated based on the evidence adduced at the hearings (and on legal arguments presented in connection with the hearings).[37]

Conversely, FINRA's rules make no provision for sanctioning parties or counsel for asserting frivolous claims in their pleadings (although a party opposing a claim can seek cost-shifting at the end of the proceeding if it contends that the claim was brought in bad faith).[38]

Despite the lack of a requirement to set forth claims with detail or particularity, claimant's counsel will often submit a Statement of Claim that is at least as detailed as a typical complaint filed in state or federal court. There are multiple reasons for doing this. First, the arbitration panel will typically have occasion to read the pleadings in advance of the hearings–for example, in conjunction with deciding a discovery dispute. Thus, the Statement of Claim offers an early opportunity for claimant to frame its story in a favorable manner. Attaching documents that support the claimant's case can also help in making a favorable first impression with the arbitrators who will later preside over the hearings. Additionally, the Statement of Claim is an opportunity to impress upon respondents' counsel the seriousness of the claimant's position and the strength of the claims. A robust Statement of Claim can better position the claimant for later settlement discussions or mediation – both due to what it says about the case and because it sends the message that claimant's counsel will be thorough and formidable every step of the way.

Rather, upon a proper and timely motion by the . . . defendants pursuant to CPLR 7503(a), the court could have stayed the action and directed the parties to arbitrate'').

[29] *See, e.g.*, La. Stadium & Exposition Dist. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 626 F.3d 156, 160 (2d Cir. 2010) (''[B]y filing its lawsuit and litigating it at length,'' a plaintiff that later moved to compel arbitration '' 'acted inconsistently with its contractual right to arbitration.' '') (quoting PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 109 (2d Cir. 1997)); Johnson Assocs. Corp. v. HL Operating Corp., 680 F.3d 713, 718–19 (6th Cir. 2012) (''Hartmann's actions were also completely inconsistent with any reliance on its right to arbitrate because Hartmann: failed to raise arbitration in its answer . . . ; asserted a counterclaim for breach of contract . . . ; and actively scheduled and requested discovery, including depositions, rather than moving to compel arbitration following the end of formal settlement discussions''); In re Pharmacy Benefit Managers Antitrust Litig., 700 F.3d 109, 118 (3d Cir. 2012) (finding waiver of right to arbitrate where defendant ''directly contested the merits of Plaintiffs' case through what was, in essence, two motions to dismiss''); Ryan v. Kellogg Partners Institutional Servs., 58 A.D.3d 481, 481 (N.Y. App. Div. 2013) (denying motion to compel arbitration of the dispute before FINRA, and holding that ''Defendant waived any right to arbitration by failing to raise it as a defense in its answer, asserting counterclaims, making a dispositive motion, and otherwise actively participating in this litigation for almost three years through the completion of extensive disclosure proceedings and the filing of a note of issue, all to the prejudice of plaintiff'') (citing Flores v. Lower E. Side Serv. Ctr., Inc., 4 N.Y.3d 363, 371–72 (2005)).

[30] Leadertex, Inc. v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 25 (2d Cir. 1995) (''Although litigation of substantial material issues may amount to waiver . . . delay in seeking arbitration does not create a waiver unless it prejudices the opposing party . . . .'') (citations omitted); Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc., 683 F.3d 577, 587 (4th Cir. 2012) (''[E]ven in cases where the party seeking arbitration has invoked the litigation machinery to some degree, the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*.'') (emphasis in original; citations and internal quotation marks omitted); Blimpie Int'l, Inc. v. D'Elia, 277 A.D.2d 69, 70 (N.Y. App. Div. 2000) (affirming finding of no waiver, where ''appellants failed to show any prejudice resulting from respondent's delay in seeking to enforce its right to arbitrate appellants' counterclaims'').

[31] FINRA Rules 12100(e), (v), 13100(e), (w).

[32] FINRA Rules 12302, 13302.

[33] FINRA Rules 12301, 13301.

[34] FINRA, Uniform Forms Guide, at 23.

[35] FINRA Rules 12100(w), 13100(x).

[36] FINRA Rules 12302(a), 13302(a).

[37] For a discussion of prehearing motions to dismiss directed to the merits, *see* 289 SPS § III-C, *Prehearing Motions to Dismiss*.

[38] For a discussion of requests for attorneys' fees and other cost-shifting in FINRA arbitrations, *see* 289 SPS § IV-I3, *Attorneys' fees*.

a. Nonarbitrable claims

Even where the parties' dispute properly qualifies for arbitration, whether a particular claim is subject to compulsory arbitration will depend in part on the scope of the arbitration clause in the parties' agreement.

(1) Cases involving broad arbitration clauses

Where the arbitration clause contains broad language such as ''All disputes between the parties arising out of or in connection with this agreement shall be referred to arbitration,'' it is considered a ''broad arbitration clause,'' and a claim need only ''touch on'' the agreement between the parties to be arbitrable. This is a sweeping standard.[39] Courts applying this standard to motions to compel FINRA arbitrations have held that all of the broker's claims in an industry dispute between a broker and his employer were arbitrable where the allegations ''clearly [fell] within the scope of the parties' business activities'' and where the broker did not argue that the allegations were ''excluded from the arbitration provision in [his] Form U–4.''[40] Thus, tort claims as well as contract claims are arbitrable so long as the tort claims are rooted in the contractual relationship that defined the parties' business activities.[41]

In the realm of customer disputes, claims that arose out of activity extrinsic to the particular investment account that was the subject of the parties' arbitration agreement have been held not arbitrable before FINRA's predecessor organization, the NASD.[42] Moreover, in a dispute between an investor and an investment advisor where the parties executed multiple agreements and only one of the agreements provides for arbitration, ''claims arising from a distinct contract not providing for arbitration'' have been held not arbitrable.[43]

(2) Cases involving narrow arbitration clauses

A narrow arbitration clause is one by which the parties ''have elected arbitration of narrow precisely specified issues.''[44] In a case involving such a clause, in order to be arbitrable, a claim must concern ''an issue that 'is on its face within the purview of the clause,'' and not ''a collateral issue that is somehow connected to the main agreement that contains the arbitration clause.''[45]

b. Nonarbitrability of class action claims, collective action claims and shareholder derivative actions

Regardless of the scope of the parties' governing arbitration provision, FINRA's codes of arbitration preclude the submission of class action claims (or claims related to pending class action litigation), with limited exceptions.[46] Additionally, a claim may not be arbitrated before FINRA if it is ''based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization,'' unless the claimant has agreed not to participate in the judicial class action or in any recovery that may result therefrom.[47] FINRA's rules precluding the arbitration of class actions are consistent with a general federal presumption against the arbitrability of class actions,[48] and courts have enforced contractual waivers of class arbitration—including the waiver embodied in FINRA's rules.[49]

A related category of claims that is not arbitrable under FINRA's Industry Code is collective action claims under the

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[39] *See, e.g.*, Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 846 (2d Cir. 1987) (''In determining whether a particular claim falls within the scope of the parties' arbitration agreement, we focus on the factual allegations in the complaint rather than the legal causes of action asserted . . . If the allegations underlying the claims 'touch matters' covered by the parties' sales agreements, then those claims must be arbitrated, whatever the legal labels attached to them.'') (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.13 (1985)); 3M Co. v. Amtex Sec., Inc., 542 F.3d 1193, 1199 (8th Cir. 2008); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999). New York State courts have not expressly applied this standard, but adhere to ''a similar policy . . . that where parties enter into a contract setting forth that disputes arising in connection with such agreement are to be resolved by arbitration, any controversy arising within the compass of such provision must indeed be arbitrated.'' Pers. Commc'ns Devices, LLC v. HTC Am., Inc., 40 Misc.3d 790, 796 (N.Y. Sup. Ct. 2013) (citing In re arbitration between Exercycle Corp. & Maratta, 9 N.Y.2d 329 (1961)).

[40] Hawkins v. Toussaint Cap. Partners, LLC, No. 08 Civ. 6866 (PKL), 2010 BL 118530, at *5 (S.D.N.Y. May 27, 2010); *see also* French v. Wells Fargo Advisors, LLC, No. 5:11-cv-246, 2012 BL 34576, at *5 (D. Vt. Feb. 14, 2012) (following *Hawkins*).

[41] *See* Kurschus v. PaineWebber, Inc., No. 95 Civ. 1652 (PKL) (S.D.N.Y. Feb. 1, 1996) (''The arbitration agreement contained in the U–4 Form is not limited to breach of contract claims. Arbitration agreements apply to tort claims that are 'based in substantial part on the contractual rights and responsibilities of the two parties.' '') (quoting McMahon v. RMS Elecs., Inc., 618 F. Supp. 189, 191 (S.D.N.Y. 1985)).

[42] *See* Becker v. Davis, 491 F.3d 1292, 1302 (11th Cir. 2007). While noting that ''if allegations underlying claims touch matters covered by parties' arbitration agreement, then claims must be arbitrated, whatever legal labels attached to them,'' the *Becker* court found only portions of the claims to be arbitrable because the contract containing the arbitration clause only concerned defendants' management of assets of a trust; claims regarding the disposition of plaintiff's personal funds were held non-arbitrable.

[43] Snyder v. Wells Fargo Bank, N.A., No. 11 Civ. 4496 (SAS), 2011 BL 320751, at *5 (S.D.N.Y. Dec. 19, 2011).

[44] LJL 33d St. Assocs., LLC v. Pitcairn Props., Inc., 725 F.3d 184, 192 (2d Cir. 2013).

[45] Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001); *accord* Burlington N. & Santa Fe R.R. Co. v. Public Serv. Co. of Okla., 636 F.3d 562, 569 (10th Cir. 2010); New River Mgmt. Co. v. Henry Schein, Inc., 9 F. Appx. 232, 234 (4th Cir. 2001). New York State courts apply an identical standard. *See* Zachariou v. Manios, 68 A.D.3d 539, 539 (N.Y. App. Div. 2009) (''When reviewing a narrow arbitration clause, the court must determine whether the subject of the parties' dispute is on its face within the purview of the clause or is a collateral matter connected to the main contract.'').

[46] *See* FINRA Rules 12204(a)(1), 13204(a)(1) (''Class action claims may not be arbitrated under the Code.'').

[47] *See* FINRA Rules 12204(a)(2), 13204(a)(2).

[48] Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 684 (2010) (''[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.'').

[49] *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (declining to invalidate arbitration agreement that contained waiver of class arbitration); *see also* Abed v. John Thomas Fin., Inc., 107 A.D.3d 578, 579 (N.Y. App. Div. 2013) (reversing order compel-

Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963.[50]

Shareholder derivative actions are also expressly excluded as permissible types of FINRA arbitrations under both the Customer and Industry Codes.[51]

c. Motions to enjoin arbitration

If the respondent in an arbitration proceeding does not believe that the dispute is arbitrable, its remedy is to seek a permanent injunction from a court of law, enjoining the arbitration proceeding from moving forward.[52] If such an injunction is granted, the claimant who filed the arbitration would then initiate a judicial action in an appropriate court of law.

For a federal court to have jurisdiction to entertain a motion to enjoin arbitration, there must be an independent basis for federal jurisdiction over the dispute between the parties.[53] If the requisite subject matter jurisdiction is lacking, the motion to enjoin the arbitration would need to be brought in state court.

d. Parties to name as respondents

In a customer case, in addition to naming a FINRA member firm as a respondent, claimants' counsel may assert claims against current or former associated persons of that firm who were involved in the transactions at issue. As noted above, assuming that the dispute qualifies for arbitration under the Customer Code, the associated persons are compelled to arbitrate by virtue of their having executed a U4 form that contains an arbitration provision. Conversely, a customer may compel arbitration against a FINRA member with whom the customer did not have a direct contractual relationship if it was a customer of an associated person of the FINRA member.[54]

e. Time limitation for commencing an arbitration

FINRA's arbitration codes provide a ''six-year rule'' for claims submitted to arbitration before the organization: the arbitration must be commenced no more than six years after the occurrence from which the claim arises.[55] FINRA's rules further prescribe that questions of whether a claim is time-barred shall be determined by the arbitrators and not by a court: ''The panel will resolve any questions regarding the eligibility of a claim under this rule.''[56]

The six-year rule sets a ceiling, not a floor; it does not extend applicable statutes of limitations that already apply to

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ling arbitration because ''both the Form U–4 and the employment agreement [containing an arbitration agreement] incorporate the FINRA rule prohibiting arbitration of class action claims like the ones at issue here.''); Gomez v. Brill Sec., Inc., 95 A.D.3d 32, 37 (N.Y. App. Div. 2012) (''[T]he agreement between the parties makes it exceedingly clear that arbitration shall be governed by the rules promulgated by FINRA. FINRA Rule 13204(d) prohibits arbitration of class action claims . . . Accordingly, based on the parties' own agreement, which incorporates by reference FINRA Rule 13204(d), arbitration of this class action suit is barred.''); RBC Capital Mkts. Corp. v. Thomas Weisel Partners LLC, C.A. Nos. 4709-VCN, 4760-VCN, 2010 BL 67168, at *10-11 (Del. Ch. Feb. 25, 2010) (''FINRA rules expressly prohibit the arbitration of class action claims.''); Velez v. Perrin Holden & Davenport Capital Corp., 769 F. Supp. 2d 445, 447 (S.D.N.Y. 2011) (noting in dicta, ''FINRA Rule 13204 clearly states that '[c]lass action claims may not be arbitrated' under FINRA's Code of Arbitration Procedure.''). While courts will honor agreements by the parties to authorize class arbitration, *see* Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013), FINRA Rules 12204(a) and 13204(a) prophylactically rule out any such agreement in cases to be arbitrated before FINRA.

[50] *See* FINRA Rule 13204(b). This rule was amended effective July 2012 as a reaction to court cases that had held that collective action claims were arbitrable in the absence of a prior FINRA rule on point. *See, e.g.*, Velez, 769 F. Supp. 2d 445, 448 (''In light of other district court opinions, this Court's own interpretation of FINRA rules, and the federal policy favoring arbitration as an alternative forum in which to resolve disputes, this Court finds that FLSA collective actions are within the scope of the parties' agreement to arbitrate.''); *see also* FINRA Reg. Notice 12-28 (June 2012) (''[A] district court decision compelled arbitration of [a collective action] claim in FINRA's dispute resolution forum. FINRA is, therefore, amending Rule 13204 of the Industry Code to preclude expressly collective actions from being arbitrated in its dispute resolution forum.'').

[51] FINRA Rules 12205, 13205 (The Customer Code and Industry Code both provide that ''[s]hareholder derivative actions may not be arbitrated under the Code.''); *accord* Morgan Keegan & Co. v. Garrett, 816 F. Supp. 2d 439, 442 (S.D. Tex. 2011) (noting that, under FINRA Rule 12205, FINRA arbitrators cannot hear derivative claims) (footnote omitted), *rev'd on other grounds*, 495 F. Appx. 443 (5th Cir. 2012); Butterworth v. Morgan Keegan & Co., No. 2:12-CV-00337-TMP, 2012 BL 251816, at *7 (N.D. Ala. Sept. 28, 2012) (observing ''the prohibition of FINRA Rule 12205'' against the arbitration of shareholder derivative claims, but ultimately concluding that the claimants' claims had been direct rather than derivative, and therefore were properly asserted in a FINRA arbitration).

In *Garrett*, the Fifth Circuit, while not disputing the enforceability of FINRA Rule 12205, reversed the district court's decision vacating the arbitration award on the grounds that ''it was clearly within the arbitration panel's scope of authority to decide whether, under the FINRA Rules, Appellants' claims were derivative'' and therefore barred. 495 F. Appx. 439, 445.

[52] *See* UBS Sec., LLC v. Voegeli, 405 F. Appx. 550, 552 (2d Cir. 2011) (affirming district court's grant of declaratory judgment and permanent injunction terminating FINRA arbitration proceedings, and holding that ''[b]eing forced to arbitrate a claim one did not agree to arbitrate constitutes an irreparable harm for which there is no adequate remedy at law . . . UBS is not legally obligated to arbitrate the Swiss Investors' claims, and the lack of an injunction would result in UBS effectively being required to do so'').

[53] UBS Sec., LLC v. Voegeli, 684 F. Supp. 2d 351, 353–54 (S.D.N.Y. 2010).

[54] *See, e.g.*, John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 57–60 (2d Cir. 2001) (affirming decision compelling arbitration of customer claims against FINRA member where customer had contractual relationship with member's sales representative but not with member FINRA member itself); Vestax Sec. Corp. v. McWood, 280 F.3d 1078, 1082 (6th Cir. 2002) (''[H]aving determined that the current dispute (i) is between customers and persons associated with [the FINRA member], and (ii) arises in connection with [the FINRA member's] alleged negligent supervision of its registered agents, we hold that the district court properly granted the motion to compel the arbitration of the claims against [the FINRA member].'').

[55] *See* FINRA Rules 12206(a), 13206(a) (''No claim shall be eligible for submission to arbitration under the [Customer or Industry] Code where six years have elapsed from the occurrence or event giving rise to the claim.'').

[56] FINRA Rules 12206(a), 13206(a).

statutory or common law claims in the arbitration.[57] Therefore, in order for a claim to be viable in a FINRA arbitration, that claim must independently be timely under the statute of limitations that applies to it under governing law, even if the arbitration was commenced within six years after the occurrence.

If one or more claims asserted against a respondent are time-barred under the ''six year rule,'' the respondent's remedy is to file with FINRA a written motion to dismiss such claims.[58] A motion to dismiss on the basis of the six-year rule can be granted by the arbitration panel only if preceded by a prehearing conference with the parties (either in person or telephonic); if the motion is granted the arbitrators must provide an explanation of grounds for the dismissal.[59] If a party moves for dismissal on multiple grounds including the six-year rule, the panel must first decide that portion of the motion that seeks dismissal under the six-year rule.[60] A dismissal under the six-year rule permits the claimant to refile related claims in a court of law.[61]

The initial filing of a claim in a court of law tolls FINRA's six-year limitation period as to that claim in the event that it later ends up the subject of a FINRA arbitration.[62] Moreover, the six-year rule does not apply to claims that are ''directed to arbitration by a court of competent jurisdiction upon request of a member or associated person.''[63] In other words, the rule does not apply to claims that end up in arbitration pursuant to the granting by a court of law of a motion to compel arbitration of those claims. An accompanying tolling provision prescribes that ''[i]f a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.''[64]

FINRA arbitrators have reached divergent results on the question of whether the six-year limitation in Rules 12206 and 13206 can be extended under principles of equitable tolling, where the respondents' conduct caused a delay in the claimant's discovery that it had a viable claim. Some arbitrators have at least been willing to consider the application of equitable tolling while others—relying on interpretations of judicial precedent—have held that the principle of equitable tolling applies only to statutes of limitations under state law, and not to Rules 12206 or 13206. Those FINRA awards declining to consider equitable tolling have deemed Rule 12206 to be an ''eligibility rule'' that must be strictly enforced.[65]

G. Answering the Statement of Claim

1. Necessity of timely and complete answer

Within 45 days after receiving the Statement of Claim, each respondent must serve on each other party an answer to the Statement of Claim.[66] The answer should ''specify the relevant facts and available defenses to the statement of claim.''[67] Together with the answer, each respondent must file a signed and dated submission agreement, mirroring what the claimant will have already filed to formally consent to FINRA's jurisdiction.

A party that does not answer a claim within the time period set forth in the relevant FINRA Arbitration Code and did not receive an extension of time to answer in accordance with the code[68] may, upon motion, be precluded ''from presenting facts

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[57] FINRA Rules 12206(c), 13206(c).

[58] FINRA Rules 12206(b), 13206(b).

[59] FINRA Rules 12206(b)(4)–(5); 13306(b)(4)–(5); *see, e.g.*, Burns v. Morgan Keegan & Co., Case No. 12-02955, at 3 (Sept. 17, 2013) (FINRA Award) (''[T]he [A]rbitrator granted Respondent's Motion to Dismiss without prejudice pursuant to FINRA Rule 12206 since the claim was filed more than six years after the occurrence of the event giving rise to the dispute.''); Butler v. Kennard, Case No. 12-02963, at 3 (Sept. 6, 2013) (FINRA Award) (dismissing claims because ''there are no facts showing occurrences or events giving rise to the claims . . . within six years before the filing of this claim.'').

[60] FINRA Rules 12206(b)(7), 13206(b)(7).

[61] FINRA Rules 12206(b), 13206(b) (''By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.'').

[62] FINRA Rules 12206(d), 13206(d).

[63] FINRA Rules 12206(c), 13206(c).

[64] FINRA Rules 12206(d), 13206(d).

[65] *Compare* Klopfenstein v. Deutsche Bank Sec., Inc., Case No. 12-03171, at 3 (June 3, 2013) (FINRA Award) (dismissing on basis of six year rule, but explaining: ''Claimants' delay in bringing their claims cannot reasonably be attributed to any fraud previously perpetrated upon them by Respondent. The Panel also found that the facts of this case do not support the tolling of any time limitations as a matter of equity.''), *and* Wadhwani v. Morgan Stanley & Co., Case No. 11-03699, at 3 (Apr. 4, 2012) (FINRA Award) (''[E]ven if we allow some 'tolling' from inception to discovery of [the alleged] fraud, . . . , there is still [at least] a six-year and four-month gap before they filed for arbitration.''), *with* Butler v. Kennard, Case No. 12-02963, at 3 (Sept. 6, 2013) (FINRA Award) (''With regard to equitable tolling/lulling arguments presented by Claimant, those arguments may have applicability to statute of limitations claims. . . . Without proof of Respondents' actionable conduct within the six year period, those arguments must fail in this Rule 12206 motion.''), *and* Landow v. Wachovia Sec., LLC, Case No. 10-04510, at 3 (June 28, 2011) (FINRA Award) (noting that motion to dismiss was granted under ''[t]he six year rule,'' which ''is an eligibility rule, not a statute of limitations and not subject to tolling,'' and further noting that ''[t]he six year period runs from the date of the event/events giving rise to the claims, not from the date of discovery of the alleged claims''); *see also* Trotter v. Park Ave. Sec., LLC, Case No. 09-04458, at 3 (Sept. 2, 2010) (FINRA Award) (''The claim having arisen in the state of Alabama, which is located in the Eleventh Circuit U.S. Court of Appeals, the Panel is persuaded that the law in that Circuit does not permit equitable tolling of an eligibility rule such as Rule 12206 so as to allow the time for filing of a claim to be extended. In all events, under the clearly admitted facts of this matter, there does not appear to be any factual basis to support a claim of equitable tolling.'').

Among the universe of arbitration awards searchable in FINRA's online database, we have not found any cases in which the six-year rule was actually relaxed on grounds of equitable tolling. Of course, even if counsel finds an arbitration panel receptive to an equitable tolling argument, the circumstances of the case would still need to support application of the principle.

[66] FINRA Rules 12303(a), 13303(a).

[67] *Id.*

[68] The parties may agree in writing to extend the deadline for answering a pleading so long as they notify the FINRA Director of the extension; in the absence of such an agreement a party can make a motion for an extension of time. FINRA Rules 12207(a)–(c),

or defenses'' to that claim at the hearing.[69] Presumably this rule also applies to answers to counterclaims, cross-claims and third-party claims, although it does not explicitly provide that the same consequences may be occasioned by failure to timely answer those types of pleadings.

In addition to being timely, an answer in a FINRA arbitration proceeding must be complete as defined in FINRA's rules. Specifically, ''a claim that alleges specific facts and contentions'' may not be met with a mere general denial. Rather, the specific facts and contentions in the claim must be addressed in the responsive pleading. The consequence of a general denial, or of omitting known facts or defenses from an answer, is that the panel of arbitrators may preclude the answering party ''from presenting the omitted defenses or facts at the hearing.''[70] Here again, we presume that this rule also applies to answers to counterclaims, cross-claims and third-party claims (and not just to answers to statements of claim), although the rule does not explicitly say as much.

Other than the requirement of addressing the specific facts and contentions of the statement of claim, FINRA's arbitration codes contain no particular mandates for the contents of the answer. However, in addition to responding to the allegations in the Statement of Claim, respondents' counsel may take a more pro-active approach to their answers, going beyond the minimal requirements in FINRA's codes and taking the opportunity to tell a story and place the allegations in context. Similar to the more expansive approach that claimants' counsel may take with respect to the content of the statement of claim, this technique allows respondents to frame the case favorably to them at an early point in time.

2. Counterclaims, cross-claims and third-party claims

The answer may include counterclaims (claims against the claimant) cross-claims (claims asserted against other respondents), or third-party claims (claims asserted against parties not named in the statement of claim). As with statement of claim, any counterclaims, cross-claims, or third-party claims must ''specify all relevant facts and remedies requested, and may include supporting exhibits.[71]

A party against whom a counterclaim, cross-claim, or third-party claim is asserted must serve an answer to such counterclaim or cross-claim within 20 days of receipt of the pleading that contains it.[72]

H. Amending Pleadings

A party to a FINRA arbitration may amend its pleading as of right at any time before the appointment of the panel of arbitrators.[73] After appointment of the panel, a party wishing to amend its pleading must make a motion to do so,[74] in accordance with the general procedures for making motions in FINRA arbitrations.[75] A motion to amend a pleading must include a copy of the proposed amended pleading.[76] However, FINRA's rules are otherwise silent on the showing that a party must make to prevail on a motion for leave to amend.

Amendment of a pleading to add a party is only permitted as of right before the parties are required to submit their ranked arbitrator lists to FINRA's Director.[77]

No party is required to respond to an amended pleading, but any party may elect to do so, so long as the response is filed and served within 20 days of the responding party's receipt of the amended pleading.[78]

13207(a)–(c). The panel of arbitrators or the FINRA Director also have the power to extend deadlines sua sponte. FINRA Rules 12207(b)–(c), 13207(b)–(c).

[69] FINRA Rules 12308(a), 13308(a). Even when such a sanction is applied, the defaulting party may be given an opportunity to cure its default. *See* Parineh v. Citigroup Global Mkts., Inc., Case No. 08-02259 (Feb. 10, 2012) (FINRA Award) (Panel issued order barring a respondent from presenting defenses or facts at hearing, but further ordered that the respondent ''may cure his failure to comply with the Code and be completely relieved of those sanctions by filing a response to the allegations made by Claimants [and] producing documents . . . .'').

[70] FINRA Rules 12308(b), 13308(b). This rule, too, seems to be viewed by arbitrators as discretionary. *See* UBS Fin. Servs., Inc. v. Jordan, Case No. 12-00969, at 2 (Mar. 4, 2013) (FINRA Award) (''Claimant asserted that Respondent's defenses should be barred because he filed a one-sentence general denial as his answer in violation of Rule[] . . . 13308 of the Code of Arbitration Procedure . . . . [T]he arbitrator denied Claimant's motion and determined that he would hear Respondent's verbal presentation and decide the merits.'').

[71] FINRA Rules 12304(b), 13304(b) (answering counterclaims); 12305(b), 13305(b) (answering cross-claims); 12306(b), 13306(b) (answering third-party claims).

[72] FINRA Rules 12304(a), 13304(a) (answering counterclaims); 12305(a), 13305(a) (answering cross-claims); 12306(a), 13306(a) (answering third-party claims).

[73] FINRA Rules 12309(a), 13309(a).

[74] FINRA Rules 12309(b), 13309(b).

[75] Those procedures, set forth in FINRA Rules 12503 and 13503, and are more fully discussed at 289 SPS § III.

[76] FINRA Rules 12309(b), 13309(b).

[77] *See* FINRA Rules 12309(c), 13309(c). For a discussion of the procedures surrounding the selection of the arbitrators, *see* 289 SPS § II–A, *Choosing the Arbitrators*.

[78] FINRA Rules 12309(d), 13309(d).

II.
Arbitrator Selection and Pre-Hearing Matters

A. Choosing the Arbitrators

1. Number of arbitrators

If the claimant seeks $50,000 or less in damages, FINRA will appoint a single arbitrator to preside over the matter.[1] If the damages sought are in excess of $50,000 but no more than $100,000, FINRA will appoint a single arbitrator unless the parties consent in writing to the appointment of a panel of three arbitrators.[2] If the damages sought are in excess of $100,000 or are unspecified, a panel of three arbitrators will be appointed unless the parties consent in writing to the appointment of a sole arbitrator.[3]

2. Procedure for arbitrator selection

Under FINRA's Codes, potential arbitrators are broadly divided into the classifications of ''non-public'' and ''public,'' based on whether the person has a specified level of connection to the securities industry. A ''non-public'' arbitrator is one who meets certain criteria connecting him to the industry based on past or present activities.[4] Conversely, a ''public arbitrator'' lacks such historical or current ties to the industry.[5]

Although the procedures for selecting arbitrators vary depending on the nature of the case and the number of arbitrators to be empanelled, the broad outlines of the process are similar for all cases. First, FINRA's Director of Dispute Resolution (Director) circulates to the parties a list (or multiple lists) of qualifying arbitrators along with background information, such as employment history, for each name on each list.[6] Each party may strike a certain number of arbitrators from each list and must rank the remaining arbitrators on each list in order of preference; it then must return the ranked list or lists to FINRA's Director no later than 20 days after receipt of the lists.[7] There is no requirement to serve opposing parties with copies of the ranked lists.[8] Failure to timely return the ranked lists to FINRA's Director causes a party to forfeit any input into the selection process.[9] After receiving the ranked lists from each party, the Director generates new lists that reflect combined rankings for the arbitrators that none of the parties have stricken.[10] In most situations, the highest-ranking available arbitrator on each list or lists is then selected.[11] If an arbitrator is unable or unwilling to serve, the next-highest ranking available arbitrator from the same combined list is appointed as a replacement.[12] The same replacement procedure is employed if an arbitrator becomes unable to continue serving at any time after the initial appointment.[13]

a. Procedure for selection in customer cases

In cases to be decided by a single arbitrator, unless the parties decide otherwise, that sole arbitrator will be a public arbitrator culled from a roster of chairpersons.[14] From that roster, the parties are sent a list of 10 potential arbitrators, of which each party can strike up to four.[15]

In cases that are to be decided by a panel of three arbitrators, parties receive three lists of 10 arbitrators each; those lists

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[1] FINRA Rules 12401(a), 13401(a).

[2] FINRA Rules 12401(b), 13401(b).

[3] FINRA Rules 12401(c), 13401(c).

[4] A non-public arbitrator is one who:

(1) is, or within the past five years, was:

(A) associated with, including registered through, a broker or a dealer (including a government securities broker or dealer or a municipal securities dealer);

(B) registered under the Commodity Exchange Act;

(C) a member of a commodities exchange or a registered futures association; or

(D) associated with a person or firm registered under the Commodity Exchange Act;

(2) is retired from, or spent a substantial part of a career engaging in, any of the business activities listed in [subsection] (1);

(3) is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional work, in the last two years [not including mediation services performed by as an attorney who is also a mediator], to clients who are engaged in any of the business activities listed [subsection] (1); or

(4) is an employee of a bank or other financial institution and effects transactions in securities, including government or municipal securities, and commodities futures or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

FINRA Rules 12100(p), 13100(p).

[5] A public arbitrator (1) ''is not engaged in the conduct or activities'' that qualify a person to be a non-public arbitrator; (2) was not engaged in such conduct or activities for a total of 20 years or more; (3) is not an investment adviser, or associated with, including registered through, a mutual fund or hedge fund; (4) is not an attorney, accountant, or other professional whose firm derived either 10 percent or more of its annual revenue in the past two year from any persons or entities listed in the FINRA Rules' definition of defining non-public arbitrators; (5) ''is not an attorney, accountant, or other professional whose firm derived $50,000 or more in annual revenue in the past two years from professional services rendered to any persons or entities listed in [the FINRA Rules' definition of non-public arbitrators] relating to any customer disputes concerning an investment account or transaction, including but not limited to, law firm fees, accounting firm fees, and consulting fees''; (6) ''is not employed by, and is not the spouse or an immediate family member of a person who is employed by, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business''; (7) ''is not a director or officer of, and is not the spouse or an immediate family member of a person who is a director or officer of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business''; and (8) is not married to or in the same family as a person engaged in the conduct or activities described in the FINRA Rules' definition of a non-public arbitrator. *See* FINRA Rules 12100(u), 13100(u).

[6] FINRA Rules 12402(b)–(c), 12403(a)–(b), 13403.

[7] FINRA Rules 12402(d), 12403(c), 13404.

[8] FINRA Rules 12402(d)(4), 12403(c)(4), 13404(d).

[9] FINRA Rules 12402(d)(3),12403(c)(3), 13404(d).

[10] FINRA Rules 12402(e), 12403(d), 13405.

[11] FINRA Rules 12402(f), 12403(e), 13406.

[12] FINRA Rules 12402(g), 12403(f)–(h), 13411.

[13] *Id*.

[14] FINRA Rule 12402(a).

[15] FINRA Rules 12402(b)–(d).

are respectively drawn from the roster of public arbitrators, the roster of non-public arbitrators, and the roster of FINRA chairpersons.[16] Each party may strike up to all 10 of the non-public arbitrators and up to four of the arbitrators on each of the other lists.[17] If at least one arbitrator has not been stricken by any of the parties from the list of non-public arbitrators, the highest-ranking remaining arbitrator from each of the three lists (i.e., public arbitrators, non-public arbitrators, and FINRA chairpersons) is appointed to the panel that will preside over the case.[18] On the other hand, if all 10 of the non-public arbitrators have been stricken, FINRA's Director selects an additional person from the list of public arbitrators to round out the panel in lieu of a non-public arbitrator.[19]

By exercising its prerogative to strike all 10 names from the list of non-public arbitrators, a party can insure that no non-public arbitrator will land on the panel presiding over the case.[20] Counsel for customers who are arbitrating against FINRA members or their associated persons may sometimes strike all 10 proffered non-public arbitrators on the theory that non-public arbitrators may be inclined to be more sympathetic to parties from the securities industry. However, in some circumstances, that general assumption may not apply and a customer may value the presence of a non-public arbitrator on the panel. For example, customers who believe they have strong cases on the merits may feel that an arbitrator with a background in the industry who agrees with the claimant's position may have credibility in persuading the two public arbitrators on the panel to join in finding the respondents liable.

Indeed, in practice, claimants in customer cases have not universally preferred to submit their claims to all-public panels. The current procedures for selection of the panel in customer cases reflect an amendment to Rule 12403 that applies to all customer cases filed on or after September 30, 2013.[21] Under the previous version of that rule, claimants in customer cases could elect between either an all-public panel (i.e., a panel consisting solely of public arbitrators) or a majority-public panel (i.e., a panel comprised of two public arbitrators and one non-public arbitrator), with such election to be made either in the Statement of Claim or at any time within 35 days after the service of the Statement of Claim.[22] If the claimant declined to make an election, the default panel composition would be majority-public rather than all-public.[23] In the first two years after that now-superseded version of Rule 12403 came into effect, ''customers in approximately three-quarters of eligible cases chose the all-public panel option.''[24] It follows that, in roughly one-quarter of customer cases brought while the former version or Rule 12403 was effective, the selected panel included a non-public arbitrator among its members.[25]

As a general rule, there seems to be some factual basis for claimants' counsel in customer cases to prefer an all-public panel. FINRA's study of customer cases in the first two years under the former version of Rule 12403 found that ''customers were awarded damages significantly more often when an all-public panel decided their case.''[26]

b. Procedure for selection in industry cases

(1) Cases not involving statutory employment discrimination claims

In a dispute in which there is to be a sole arbitrator, if the dispute is among members, the arbitrator will be drawn from FINRA's roster of non-public arbitrators[27] who qualify as chairpersons, unless the parties agree otherwise in writing.[28] If the dispute is between associated persons, or between or among members and associated persons, the arbitrator will be drawn from FINRA's roster of public arbitrators who qualify as chairpersons unless the parties agree otherwise in writing.

In a dispute between members that is to be heard by a panel of three arbitrators, absent a contrary agreement among the parties, all three arbitrators will be non-public, and one of them will come from the roster of non-public chairpersons.[29] The parties receive a list of 20 arbitrators from the roster of non-public arbitrators, and 10 arbitrators from the roster of non-public chairpersons.[30] Any party seeking to participate in the selection of the arbitrators can strike up to eight of the 20 names from the list of non-public arbitrators and up to four of the 10 names from the list of non-public chairpersons.[31]

If the dispute is between associated persons, or between or among members and associated persons, the panel will consist of one non-public arbitrator and two public arbitrators, one of whom qualifies as a chairperson.[32] FINRA circulates to the parties three lists: one with 10 public arbitrators; one with 10 non-public arbitrators; and one with 10 public chairpersons.[33] Each party wishing to participate in the selection of an arbitrator may strike up to four names from each list before ranking the remaining names.[34]

In either situation involving a three-person panel, FINRA's Director, after receiving the ranked lists, then generates com-

[16] FINRA Rules 12403(a)–(b).

[17] FINRA Rule 12403(c).

[18] FINRA Rules 12402(e)–(f).

[19] FINRA Rule 12403(e)(3).

[20] *See* FINRA, Arbitrator Appointment Frequently Asked Questions (FAQ) § 5. (''By striking all of the arbitrators on the non-public list, any party can ensure that the panel will have three public arbitrators. FINRA will not appoint a non-public arbitrator to the panel who has not been selected by the parties.'').

[21] *See* FINRA Reg. Notice 13-30 (Sept. 2013).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Note that during the time period covered by FINRA's study, ''[c]ustomers using the Majority-Public Panel Option did so by default 77 percent of the time, rather than by making an affirmative choice (*i.e.*, these customers did not make an election in their statement of claim or accompanying documentation, and did not respond to a request that they elect a panel-composition method).'' *Id.* (parentheses in original). Even controlling for this factor, in perhaps six or seven percent of customer cases, the customer consciously and affirmatively opted for a panel containing a non-public arbitrator.

[26] FINRA Reg. Notice 13-30.

[27] *See* 289 SPS § IIA-2, *Procedure for arbitrator selection*, for the definition of public and non-public arbitrators.

[28] FINRA Rule 13402(a)(1).

[29] *Id.*

[30] FINRA Rules 13403(a)(2), (c)(1).

[31] FINRA Rule 13404(b).

[32] FINRA Rule 13402(b).

[33] FINRA Rules 13403(b)(2), (c)(1).

[34] FINRA Rules 13404(a), (c).

bined lists and selects the highest ranking member on each list (or the two highest-ranking members for the non-public arbitrators in a case between two FINRA members), as the arbitrators.[35]

(2) Cases involving statutory employment discrimination claims

If the amount of the claim in a statutory employee discrimination dispute is $100,000 or less, the case will be heard by a single arbitrator; if the amount of the claim exceeds $100,000, a panel of three arbitrators will be appointed.[36] In cases involving a single arbitrator, that arbitrator will be a public arbitrator who meets special qualifications relevant to statutory discrimination claims but who ''may not have represented primarily the views of employers or of employees within the last five years.''[37] In cases involving three arbitrators, all three panelists will be public arbitrators; the one to be designated as chairperson must additionally meet special qualifications relevant to statutory discrimination claims, but, similar to the sole arbitrator in smaller statutory discrimination cases, ''may not have represented primarily the views of employers or of employees within the last five years.''[38]

3. Arbitrator selection in pilot program for large cases

In 2012, FINRA inaugurated a pilot program for ''large cases,'' defined as cases in which the damages sought are $10,000,000 or more.[39] Where the parties volunteer for that program in a qualifying case, they are given more autonomy in the selection of the arbitrators, as befits the complex nature typical of larger matters. For example:

- parties may agree to specific FINRA or non-FINRA arbitrators;
- parties may supply a list of arbitrators for selection;
- parties may agree to one arbitrator and request that FINRA fill any remaining positions;
- parties may request lists of arbitrators pursuant to FINRA's standard procedures; and
- parties may request lists of FINRA arbitrators whose qualifications are tailored to the parties' needs (for instance, parties may request that all arbitrators be attorneys).[40]

The ability of the parties to choose their own arbitrators enables the parties to seek out arbitrators who may be more sophisticated and will have set aside more time for the larger number of hearing dates that are required in complex cases. Regardless of whether the parties supply their own arbitrators or obtain a panel of arbitrators culled from FINRA's rosters, FINRA expects that arbitrators in the large case program will be compensated by the parties ''at a higher rate than the customary FINRA honoraria provided in the Codes of Arbitration Procedure.''[41]

B. Pre-Hearing Conferences

Once the arbitration panel (or sole arbitrator) has been appointed, the panel schedules an initial prehearing conference,[42] which is usually conducted telephonically.[43] During that initial conference, the panel sets deadlines for discovery, briefing, and motions; sets the hearing dates; and addresses any other preliminary matters that may arise.[44] The panel may also set deadlines for raising and briefing discovery disputes and for holding hearings on discovery disputes. FINRA makes available online a script that arbitrators may follow during the initial prehearing conference.[45] Also available online is a form for the scheduling order that the panel will issue after the conference.[46]

The parties may opt out of the initial prehearing conference if they jointly provide to the panel, in writing, the following information:

- a statement that the parties accept the panel that FINRA has appointed;
- whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;
- a minimum of four sets of mutually agreeable hearing dates;
- a discovery schedule;
- a list of all anticipated motions, with filing and response due dates; and
- a determination whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.[47]

Additional prehearing conferences can be scheduled if the parties jointly request them, or if FINRA's Director otherwise chooses to schedule them.[48] Among matters that can be covered at such subsequent conferences are:

- discovery disputes;
- motions;
- witness lists and subpoenas;
- stipulations of fact;
- scheduling issues;
- contested issues on which the parties will submit briefs; and

[35] FINRA Rules 13405, 13406.
[36] FINRA Rule 13802(b).
[37] FINRA Rules 13802(c)(1), (3).
[38] FINRA Rules 13802(c)(2), (3).
[39] *See* FINRA, Voluntary Program for Large Cases—FAQ. For a general discussion of the voluntary program for large cases, *see* 289 SPS § IV-F, *Pilot Program for Large Arbitration Cases*.
[40] FINRA, Voluntary Program for Large Cases—FAQ.
[41] *Id.*
[42] FINRA Rules 12500(a), 13500(a).
[43] FINRA Rules 12500(b), 13500(b).
[44] FINRA Rules 12500(c), 13500(c).
[45] *See* FINRA, Initial Pre-Hearing Conference Arbitrator's Script.
[46] *See* FINRA, Initial Pre-Hearing Conference Scheduling Order.
[47] FINRA Rules 12500(c), 13500(c).
[48] FINRA Rules 12501(a)–(b), 13501(a)–(b).

- any other matter that will simplify or expedite the arbitration.[49]

C. Discovery

1. Party discovery: Mandatory document production (customer cases only)

In customer cases, but not in industry cases, parties are required to make a production of certain categories of documents defined by FINRA, within 60 days after the date on which the answer to the Statement of Claim is due.[50] FINRA maintains separate lists of ''Documents the Firm/Associated Persons Shall Produce in All Customer Cases'' and ''Documents the Customer Parties Shall Produce in All Customer Cases.''[51] Among the categories of documents that firms and associated persons are mandated to produce are ''documents concerning the customer parties' risk tolerance''; ''correspondence sent to the customer parties or received by the firm/associated persons relating to the claims, accounts, transactions, or products or types of products at issue''; ''sections of the firm's manuals and . . . updates thereto relating to the claims alleged in the Statement of Claim''; and ''investigations, charges, or findings by any regulator (state, federal or self-regulatory organization) and the firm/associated persons' responses to such investigations, charges, or findings for the associated persons' alleged improper behavior similar to that alleged in the Statement of Claim.''[52]

Among the categories of documents that customers are mandated to produce are certain sections of ''federal income tax returns the customer parties filed'' on behalf of themselves or on behalf of businesses that they own; ''[f]inancial statements, including statements within a loan application, or similar statements of the customer parties' assets, liabilities, and/or net worth''; ''account statements for each non-party securities firm where the custom parties have maintained an account'' during a certain time period; ''correspondence the customer parties (or any person acting on behalf of the customer parties) sent or received relating to the accounts or transactions at issue''; and ''complaints/Statements of Claim and answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer parties have been a party, and all final decisions or awards or non-confidential settlements entered in these matters through the date the Statement of Claim was filed.''[53]

With respect to each category of documents that the appropriate list calls for a party to produce, that party has a choice of (1) producing the documents; (2) ''[i]dentify[ing] and explain[ing] the reason that specific documents . . . cannot be produced within the required time, and stat[ing] when the documents will be produced''; or (3) objecting to the production.[54] A party's response to its applicable list for mandatory document production must be made in good faith, meaning that the party ''must use its best efforts to produce all documents required or agreed to be produced,'' and that ''[i]f a document cannot be produced in the required time, [the] party must establish a reasonable timeframe to produce the document.''[55] Additionally, a party who asserts that there are no documents in its possession, custody or control that are responsive to a request on its mandatory list must:

- state in writing that the party conducted a good faith search for the requested documents;
- describe the extent of the search; and
- state that, based on the search, there are no requested documents in the party's possession, custody, or control.[56]

Objections to producing documents identified on the mandatory disclosure lists must be in writing, served simultaneously and in the same manner on all parties, and must specify the list items the party is objecting to providing and the reasons for the objection.[57] The objecting party must produce all documents that it has not objected to producing.[58] Objections not served within the required time for responding to the document list are waived, ''unless the panel determines that the party had substantial justification for failing to make the objection within the required time.''[59] In ruling on objections, the panel ''may consider the relevance'' of the particular list items ''and the relevant costs and burdens to parties to produce this information.''[60]

2. Party discovery: Document requests, responses, and objections

A party that wishes to obtain additional documents beyond those produced to it as mandatory disclosures may serve a request for production of documents on any other party.[61]

Within 60 days of receiving a document request, a party has a choice of producing requested documents; ''[i]dentify[ing] and explain[ing] the reason that specific requested documents . . . cannot be produced within the required time, and stat[ing] when the documents will be produced;'' or objecting to the request.[62] All responses to a document request must be made in good faith, defined to mean that the party ''must use its best efforts to produce all documents or information required or agreed to be produced,'' and that ''[i]f a document or information cannot be produced in the required time, a party must establish a reasonable timeframe to produce the document or information.''[63] In addition, where a party asserts that documents that it was requested to produce are not in its possession, custody or control, the arbitrators ''in appropriate cases'' have the discretion to order the responding party to supply a written

[49] FINRA Rules 12501(b), 13501(b).
[50] FINRA Rule 12506(b).
[51] *See* FINRA, Discovery Guide (Discovery Guide).
[52] *Id.* at List 1 (list items 1(b), 2, 11, 16) (parentheses in original).
[53] *Id.* at List 2 (list items 1, 2, 4, 9, 11(a)).
[54] FINRA Rule 12506(b)(1).
[55] FINRA Rule 12506(b)(2).
[56] Discovery Guide at 3.
[57] FINRA Rule 12508(a).
[58] *Id.*
[59] FINRA Rule 12508(b).
[60] FINRA Rule 12508(c).
[61] FINRA Rules 12507(a)(1), 13506(a).
[62] FINRA Rules 12507(b)(1), 13507(a).
[63] FINRA Rules 12507(b)(2), 13507(b).

affirmation regarding the search that it made for responsive documents.[64]

Objections to document requests must be in writing, served simultaneously and in the same manner on all parties; and must specify the requested documents the party is objecting to providing and the reasons for the objection.[65] The objecting party must produce all documents that it has not objected to producing.[66] Objections not served within the required time for responding to the document request are waived, ''unless the panel determines that the party had substantial justification for failing to make the objection within the required time.''[67] In ruling on objections, the panel ''may consider the relevance'' of the requested documents ''and the relevant costs and burdens to parties to produce this information.''[68]

3. Party discovery: Requests for information

''Standard interrogatories are generally not permitted'' in FINRA arbitrations,[69] although the parties may agree to permit the service and use of interrogatories in their proceeding.[70] Parties may, however, serve ''requests for information.'' This is a narrow device, as the information that may be sought through it is generally confined to ''identification of individuals, entities, and time periods related to the dispute.''[71] Additionally, requests for information ''should be reasonable in number and not require narrative answers or fact finding.''[72]

Within 60 days after receiving a request for information, a party has a choice of producing the requested information; ''[i]dentify[ing] and explain[ing] the reason that specific requested . . . information cannot be produced within the required time, and stat[ing] when the [information] will be produced;'' or objecting to the request.[73] All responses to a request for information must be made in good faith.[74]

The procedure for objecting to a request for information is similar to the procedure for objecting to a document request. Objections must be in writing, served simultaneously and in the same manner on all parties, and must specify the requested information the party objects to providing and the reason for the objection.[75] The objecting party must produce all information that it has not objected to producing.[76] Objections not served within the 60-day time period for responding to the request for information are waived, ''unless the panel determines that the party had substantial justification for failing to make the objection within the required time.''[77] In ruling on objections, the panel ''may consider the relevance'' of the requested information ''and the relevant costs and burdens to parties to produce this information.''[78]

4. Subpoenas and other requests for discovery from nonparties

Any subpoenas in a FINRA arbitration must be issued by the arbitrators rather than counsel for the parties; the arbitrators are authorized to issue subpoenas for production of documents as well as for appearances of witnesses at hearings.[79]

The Codes provide that, if FINRA members or employees or associated persons of FINRA members are seeking documents or hearing testimony from non-parties who are FINRA members or employees or associated persons of FINRA members, the issuance of a subpoena is the correct procedure only if ''circumstances dictate the need for a subpoena.''[80] Absent such circumstances, in lieu of a subpoena, the party seeking the documents or hearing testimony should make a motion for an order directing ''the appearance of [the designated] persons or the production of documents from such persons or non-party FINRA members.''[81]

Where the particular non-party is appropriately the subject of the subpoena, the application to the arbitrators must be made by written motion, which must include a draft subpoena.[82] A party receiving such a motion can file objections in writing, within 10 days of its service, to ''the scope or propriety of the subpoena.''[83] ''[T]he arbitrator responsible for deciding discovery-related motions'' decides the application for the subpoena, taking the objections into account.[84]

If the application is granted and the subpoena issued and served on the non-party, the non-party can, within 10 days, object in writing to ''the scope or propriety of the subpoena.''[85] The party that applied for the subpoena can respond in writing to the objections within 10 days after receiving the objections.[86] The arbitrator who issued the subpoena then rules on the objections.[87]

If a party receives documents from a non-party pursuant to a subpoena, it must notify all other parties within five days after receiving the documents.[88] Any other party may then request copies of the documents; the requested documents must then be

[64] FINRA Discovery Guide at 3.

[65] FINRA Rules 12508(a), 13508(a).

[66] *Id.*

[67] FINRA Rules 12508(b), 13508(b).

[68] FINRA Rules 12508(c), 13508(c).

[69] FINRA Rules 12507(a), 13506(a).

[70] *See* FINRA, Rules Frequently Asked Questions (FAQ) § 4 (''[I]nterrogatories are generally not permitted (*absent agreement of the parties*) in FINRA arbitration disputes.'') (emphasis added). In our experience, parties rarely, if ever, agree to the use of interrogatories in FINRA arbitrations.

[71] FINRA Rules 12507(a), 13506(a).

[72] *Id.*

[73] FINRA Rules 12507(b)(1), 13507(a).

[74] FINRA Rules 12507(b)(2), 13507(b); For a discussion of the definition of ''good faith'' in this context, *see* 289 SPS § II-C2, *Party discovery: Document requests, responses, and objections*.

[75] FINRA Rules 12508(a), 13508(a).

[76] *Id.*

[77] FINRA Rules 12508(b), 13508(b).

[78] FINRA Rules 12508(c), 13508(c).

[79] FINRA Rules 12512(a)(1), 13512(a)(1).

[80] FINRA Rules 12512(a)(2), 13512(a)(2).

[81] *Id*. The application for the order is made pursuant to Rules 12513 and 13513, respectively, in customer cases and industry cases.

[82] FINRA Rules 12512(b), 13512(b).

[83] FINRA Rules 12512(c), 13512(c).

[84] *Id.*

[85] FINRA Rules 12512(e), 13512(e).

[86] *Id.*

[87] *Id*.

[88] FINRA Rules 12512(f), 13512(f).

provided to the requesting party within 10 days after receiving the request.[89]

5. Enforcement of subpoenas

If a non-party refuses to comply with a subpoena, FINRA lacks jurisdiction over the non-party to compel compliance or to penalize it for non-compliance unless the non-party is a FINRA member or an employee or associated person of a member. Otherwise, a party seeking to enforce a subpoena issued in a FINRA arbitration must resort to the courts. Whether the party can successfully compel compliance depends not only on the merits of the application, but also on the court from which such relief is sought.

The Federal Arbitration Act (FAA) does not provide an express basis for the enforcement of prehearing subpoenas duces tecum.[90] Consequently, in cases where the FAA applies, federal courts have reached differing conclusions as to whether federal district courts have the authority to compel a non-party to produce documents in prehearing discovery in an arbitration pursuant to a subpoena[91] On the other hand, federal courts have universally held that the FAA's unambiguous language gives courts the power to compel a non-party to appear to testify at an arbitration hearing or to bring documents to the hearing.[92]

A party may be more likely to obtain judicial enforcement of a subpoena in state courts, where arbitration statutes more liberal than the FAA may apply. For example, under New York State's arbitration code, a party can successfully enforce a subpoena for prehearing discovery, at least if it can show the documents sought to be relevant, as the statute is broader than the FAA in authorizing such subpoenas.[93]

The preceding should not be taken to suggest that a party can seek application of a state arbitration statute rather than the FAA without a legitimate basis for state arbitration law to apply. In general, the FAA will control if the transaction with respect to which the parties executed the arbitration agreement involved interstate or international commerce.[94] Moreover, where the FAA applies, it will ''prevail over any inconsistent state arbitration statute.''[95]

In sum, unless a party is before a court that would grant a motion to compel a subpoena issued in an arbitration, obtaining documents pursuant to a prehearing subpoena duces tecum from non-parties who are not bound contractually by the arbi-

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[89] *Id.*

[90] *See* 9 U.S.C. § 7 (providing that ''[t]he arbitrators selected . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case,'' but making no provision for the arbitrators to summon a non-party to produce documents in any context other than an appearance before the arbitrators as a witness).

[91] *Compare* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212, 218 (2d Cir. 2008) (reversing order compelling non-party to comply with prehearing subpoena duces tecum on grounds that ''section 7 [of the FAA] does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding''), *and* Hay Grp., Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 411 (3d Cir. 2004) (''[W]e hold that the FAA did not authorize the [arbitration] panel to issue a pre-hearing discovery subpoena''), *and* Kennedy v. Am. Exp. Travel Related Servs. Co., 646 F. Supp. 2d 1342, 1344 (S.D. Fla. 2009) (''[A]n arbitrator is not statutorily authorized under the FAA to issue [subpoenas] for prehearing . . . document discovery from non-parties. To be clear, an arbitrator may do so at a hearing, but he may not order such production before the hearing.'') (citation omitted), *with* In re Sec. Life Ins. Co. of Am., 228 F.3d 865, 870–71 (8th Cir. 2000) (''[I]mplicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing''), *and* Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV (New World Commc'ns of Detroit, Inc.), 164 F.3d 1004, 1009 (6th Cir. 1999) (''[T]he FAA's provision authorizing an arbitrator to compel the production of documents from third parties for purposes of an arbitration hearing has been held to implicitly include the authority to compel the production of documents for inspection by a party prior to the hearing.'').

The Fourth Circuit has reached a middle ground, declining to set forth a per se rule as to the enforceability of prehearing arbitration subpoenas but holding that ''a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship.'' COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269, 278 (4th Cir. 1999).

Note that, while some of the cases holding the subpoenas unenforceable speak in terms of the arbitrator lacking the power to issue the subpoenas in the first place, FINRA's Codes clearly vest FINRA arbitrators with the power to issue subpoenas to produce documents prior to the hearing. *See* FINRA Rules 12512(a)(1), 13512(a)(1).

[92] *See, e.g.*, Stolt-Nielsen SA v. Celanese AG, 430 F.3d 567, 577–78 (2d Cir. 2007) (''Any rule there may be against compelling non-parties to participate in discovery cannot apply to situations, as presented here, in which the non-party is 'summon[ed] in writing . . . to attend before [the arbitrators] or any of them as a witness and . . . to bring with him . . . [documents] which may be deemed material as evidence in the case.' '') (quoting 9 U.S.C. § 7) (brackets in original); Lloyd v. Hovensa, LLC., 369 F.3d 263, 270 (3d Cir. 2004) (holding that under the FAA, ''parties may ask the court to compel the attendance of witnesses [at hearings], or to punish the witnesses for contempt''); Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC, 804 F. Supp. 2d 808, 811 (N.D. Ill. 2011) (holding that ''[u]nder FAA section 7, a federal court's authority to enforce an arbitrator's subpoena [that directs the witness to produce evidence and give testimony at the arbitration hearing] is coextensive with the court's authority to enforce one of its own subpoenas''); Empire Fin. Grp., Inc. v. Penson Fin. Servs., Inc., No. 3:09-CV-02155, 2010 BL 46299, at *2 (N.D. Tex. Mar. 3, 2010) (''Section 7 of the FAA specifically grants district courts the authority to 'compel the attendance of [witnesses] before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.' '') (quoting 9 U.S.C. § 7) (brackets in original).

[93] *See, e.g.*, Reuters Ltd. v. Dow Jones Telerate, Inc., 231 A.D.2d 337, 341 (N.Y. App. Div. 1997) (reversing order requiring production of subpoenaed documents after finding that the documents sought were not relevant, but holding, ''there is no question that arbitrators, who are entrusted with deciding an increasing number of disputes in our society, are among those who are statutorily authorized to issue subpoenas, [including subpoenas] duces tecum'') (citing N.Y. C.P.L.R. 7505).

[94] *See, e.g.*, PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir. 1996) (''Any arbitration agreement affecting interstate commerce, . . . is subject to the [Federal Arbitration] Act.'').

[95] In re Arbitration Between Integrity Ins. Co. & Am. Centennial Ins. Co., 885 F. Supp. 69, 71 n.3 (S.D.N.Y. 1995), *overruled on other grounds by* Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 216–17 (2d Cir. 2008).

tration agreement or by subscription to FINRA's rules may depend on the voluntary cooperation of the subpoenaed party.

6. Depositions

''Depositions are strongly discouraged'' in FINRA arbitrations.[96] A party that seeks leave to take a deposition must make a motion.[97] The panel of arbitrators has discretion to grant such a motion only in limited circumstances: ''To preserve the testimony of ill or dying witnesses''; ''[t]o accommodate essential witnesses who are unable or unwilling to travel long distances for a hearing and may not otherwise be required to participate in the hearing''; ''[t]o expedite large or complex cases''; or ''[i]f . . . extraordinary circumstances exist.''[98] In a case involving claims of statutory employment discrimination, a deposition may also be permitted ''if necessary and consistent with the expedited nature of arbitration.''[99]

Absent an order from the arbitrators, the parties are permitted to agree amongst themselves to take depositions.[100] In our experience, however, parties rarely enter into such agreements, as depositions add expense and delay that undermine some of the principal advantages of arbitration over litigation.

7. Expert discovery

The Codes do not generally provide for expert discovery. There is no provision mandating the exchange of expert reports; and as stated above, depositions of any witnesses—let alone depositions of expert witnesses—are generally disallowed.[101] The sole mandatory prehearing discovery regarding experts is that shortly before the hearing, the parties exchange (i) lists of all witnesses that each party intends to call at the hearing, including expert witnesses; and (ii) documents on which each party plans to rely at the hearing that it has not already produced, including exhibits that the parties plan to introduce through their experts during their testimony.[102] However, through document requests served during the normal discovery period,[103] a party can also seek from opposing parties the curriculum vitae and transcripts of prior testimony for any experts on which the opposing parties plan to rely at the hearing. These documents may enable a party to begin preparing for the cross-examination of opposing expert witnesses well in advance of the hearing.

8. Motions to compel discovery

A party may make a motion to the panel to direct another party to comply with its mandatory document production obligations or with a document request or request for information that the moving party has served.[104] A motion to compel may also challenge objections that a party has made to producing documents or information.[105] Copies of the discovery request or mandatory document production list at issue must be attached to the motion, and the moving party must describe the efforts that it made to resolve the discovery dispute prior to filing the motion.[106]

In cases that are to be heard by a panel of three arbitrators, a motion to compel discovery will often be heard and decided by the chair of the panel, rather than by the entire panel.[107]

9. Discovery sanctions

The arbitration panel may assess sanctions on a party for failing to comply with the discovery provisions of the Customer Code or Industry Code, unless the panel finds ''substantial justification'' for such non-compliance.[108] Sanctions may also be imposed for ''frivolously objecting'' to production of documents or information.[109] Specific sanctions available as penalties for discovery violations include, without limitation, monetary penalties; preclusion of a party from presenting evidence; drawing an adverse inference against a party; assessing postponement or forum fees; and assessing attorneys' fees, costs and expenses.[110]

If a party intentionally and materially fails to comply with a previously issued discovery order by the panel of arbitrators, and ''if prior warnings or sanctions have proven ineffective,'' the panel has the discretion to dismiss a claim, defense, or proceeding of that party with prejudice.[111]

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[96] FINRA Rules 12510, 13510.

[97] *Id.*

[98] FINRA Rules 12510, 13510.

[99] FINRA Rule 13510.

[100] *See* FINRA, Rules Frequently Asked Questions (FAQ) § 4 (''Depositions . . . are generally not permitted (*absent agreement of the parties*) in FINRA arbitration disputes.'') (emphasis added).

[101] *See* 289 SPS § II-C6, *Depositions*.

[102] FINRA Rules 12514, 13514; For the provisions governing prehearing exchange of exhibits and witness lists, *see* Rules 13514(b)–(c) .

[103] *See* 289 SPS § II-C2, *Party discovery: Document requests, responses, and objections*.

[104] FINRA Rules 12509(a), 13509(a). For a general description of the procedures for making motions in FINRA arbitrations, *see* 289 SPS § III, *Motion Practice*.

[105] FINRA Rules 12509(a), 13509(a).

[106] FINRA Rules 12509(b), 13509(b).

[107] FINRA Rules 12503(d)(3), 13503(d)(3) (''Discovery-related motions are decided by one arbitrator, generally the chairperson. The arbitrator may refer such motions to the full panel either at his or her own initiative, or at the request of a party. The arbitrator must refer motions relating to privilege to the full panel at the request of a party.'').

[108] FINRA Rules 12511(a), 13511(a).

[109] *Id.*

[110] FINRA Rules 12212(a), 13212(a).

[111] FINRA Rules 12511(b), 12212(c), 13511(b), 13212(c).

III.
Motion Practice

A. Motion Procedure in General

All pre-hearing motions must be in writing;[1] however, a written submission is ''not required to be in any particular form, and may take the form of a letter, legal motion, or any other form that the panel decides is acceptable.''[2] Under FINRA rules, motions must generally be served at least 20 days prior to the onset of the hearings, absent special dispensation from the panel.[3] In many arbitrations, however, the scheduling order issued pursuant to the pre-hearing conference may set a different deadline.[4] Prior to making a motion, ''a party must make an effort to resolve the matter that is the subject of the motion with the other parties,'' and the motion papers must describe such efforts as were made towards resolution.[5]

A motion must be responded to within 10 days after its receipt, absent agreement of the parties, or permission from the panel or from FINRA's director of Dispute Resolution, to extend that deadline.[6] The moving party may then serve reply papers in further support of the motion within five days after receiving the opposition papers, although here again that time frame may be extended pursuant to agreement of the parties or permission from the panel or from the director.[7]

B. Motions to Consolidate or Sever Claims

1. Motions to consolidate

One or more parties may join together, in the same arbitration, claims that ''contain common questions of law and fact,'' where either ''[t]he claims assert any right to relief jointly and severally'' or ''[t]he claims arise out of the same transaction or occurrence, or series of transactions or occurrences.''[8] Similarly, one or more parties may join multiple respondents in the same arbitration where ''the claims contain . . . questions of law or fact common to all respondents'' and where either ''[t]he claims are asserted against the respondents jointly and severally'' or ''[t]he claims arise out of the same transaction or occurrence, or series of transactions or occurrences.''[9]

If claims or respondents were not joined in the initial pleading and a party wishes them to be joined, that party may file a motion for consolidation with FINRA's staff prior to appointment of the panel of arbitrators.[10] Following appointment of the panel, a party can make a motion to the panel to reconsider a decision by the staff to consolidate claims.[11]

FINRA's rules on consolidation of claims are subject to the FINRA Customer and Industry Codes' prohibitions on class action arbitrations.[12]

2. Motions to sever

After the service of responsive pleadings, a party may make a motion to sever into separate arbitrations claims that were joined together. The motion can seek to sever claims made by multiple claimants or claims made against multiple respondents.[13] If the panel has not yet been appointed, the motion is submitted to FINRA's director of Dispute Resolution; otherwise, the motion is made to the panel.[14] If the director grants such a motion for severance, ''[a] party whose claims were separated by the Director'' may make a motion to the panel, ''in the lowest numbered case,'' to reconsider the decision granting severance.[15]

C. Pre-Hearing Motions to Dismiss

''Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.''[16] The only acceptable grounds for granting such a motion on the merits are that ''(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or (B) the moving party was not associated with the account(s), security(ies), or conduct at issue.''[17] Absent those exclusive grounds, the codes make no provision for dismissal of a claim for legal insufficiency. Additionally, although FINRA rules do not specifically state that counterclaims, cross-claims, or third-party claims can similarly be dismissed, the rule should apply to them as well.

Any motions to dismiss prior to the conclusion of the case-in-chief must be in writing and filed subsequent to the filing of the answer but at least 60 days prior to the initial scheduled hearing date, unless an agreement of the parties or order of the panel permits the motion to be filed at a later

[1] FINRA Rules 12503(a)(1), 13503(a)(1).

[2] FINRA Rules 12503(a)(2), 13503(a)(2).

[3] FINRA Rules 12503(a)(3), 13503(a)(3).

[4] *See* FINRA, Initial Pre-Hearing Conference—Scheduling Order; *see also* 289 SPS § II-B, *Pre-Hearing Conferences* (discussing the initial pre-hearing conference).

[5] FINRA Rules 12503(a)(1), 13503(a)(1).

[6] FINRA Rules 12503(b), 13503(b). The initial pre-hearing conference scheduling order may set a different deadline for responses to motions.

[7] FINRA Rules 12503(c), 13503(c). A different deadline for reply papers on motions may also be set in the initial pre-hearing conference scheduling order.

[8] FINRA Rules 12312(a), 13312(a).

[9] FINRA Rules 12313(a), 13313(a).

[10] FINRA Rules 12314, 13314 (''Before ranked arbitrator lists are due to the Director [during the arbitrator selection process] . . . , the Director may combine separate but related claims into one arbitration.''); *see also* FINRA DISPUTE RESOLUTION, ARBITRATOR'S GUIDE 40 (2014) (''Before the panel's appointment, staff may consider a party's motion to consolidate claims.''). Neither the Customer Code, the Industry Code, nor the Arbitrator's Guide explicitly authorizes a party to make a motion for consolidation subsequent to the appointment of the panel.

[11] FINRA Rules 12314, 13314 (''After its appointment, the panel may reconsider the decision to consolidate the claims based on a party's motion.''); *see also* FINRA DISPUTE RESOLUTION, ARBITRATOR'S GUIDE 40 (''After its appointment, the panel may reconsider the decision to consolidate the claims based on a party's motion.'').

[12] *See generally* FINRA Rules 12204, 13204.

[13] FINRA Rules 12312(b), 12313(b), 13312(b), 13313(b).

[14] *Id.*

[15] *Id.*

[16] FINRA Rules 12504(a)(1), 13504(a)(1).

[17] FINRA Rules 12504(a)(6), 13504(a)(6).

time.[18] The non-moving parties have 45 days to respond to a motion to dismiss, although this deadline also is subject to modification by agreement of the parties or permission of the panel.[19] The moving party may file reply papers within five days after receiving opposition papers.[20]

The panel will hold a pre-hearing conference to discuss the motion, either in person or telephonically, unless the parties waive such a conference; the holding or waiver of such a conference is a prerequisite to the granting of a motion to dismiss.[21] If a conference is held, it is recorded.[22]

A motion to dismiss that is made prior to the conclusion of the case-in-chief may be granted only by unanimous decision of the panel, and such decision must be in writing.[23] If the motion is denied, that denial precludes the moving party from refiling the motion, absent special permission by order of the panel.[24] Denial of the motion also requires the panel to assess to the moving party ''forum fees associated with hearings on the motion.''[25] If the panel finds that the motion was frivolous, it is also required to award reasonable costs and attorneys' fees to any party that opposed the motion.[26] Sanctions are also available, although not mandatory, if the panel finds that the motion was made in bad faith.[27]

D. Provisional Remedies in Aid of Arbitration

No provision of either the Customer Code or the Industry Code authorizes FINRA arbitrators to issue provisional remedies of any kind. Any such preliminary relief must therefore be sought from a court of law.[28]

In federal courts, provisional remedies in aid of arbitration are governed by the common law;[29] in New York state courts, they are governed by a specific provision in that state's code of civil procedure, which states:

> The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.[30]

1. Preliminary injunctions

a. Basic standard

Some courts have implicitly held that the same test applicable to motions for injunctions in pending judicial actions should apply to such motions in aid of arbitration.[31] The test that some federal appellate courts, including the Second Circuit, employ when determining applications for injunctions requires the moving party to demonstrate that it will suffer irreparable harm absent the injunction and ''either (1) a likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.''[32] Courts in other circuits apply slight variations of this test.[33]

In New York state courts, to obtain an injunction in aid of an arbitration, the movant must demonstrate both ''the traditional factors for injunctive relief'' and ''that the arbitration award could be rendered ineffectual'' absent the requested injunction.[34] The ''traditional factors'' that must be shown for entitlement to a preliminary injunction in New York State are similar to the factors that federal courts require: ''a probability of success, danger of irreparable injury in the absence of an

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[18] FINRA Rules 12504(a), 13504(a).

[19] FINRA Rules 12504(a)(3), 13504(a)(3).

[20] *Id*.

[21] FINRA Rules 12504(a)(5), 13504(a)(5).

[22] FINRA Rules 12504(a)(5), 12606, 13504(a)(5), 13606.

[23] FINRA Rules 12504(a)(7), 13504(a)(7).

[24] FINRA Rules 12504(a)(8), 13504(a)(8).

[25] FINRA Rules 12504(a)(9), 13504(a)(9).

[26] FINRA Rules 12504(a)(10), 13504(a)(10).

[27] FINRA Rules 12504(a)(11), 12212, 13504(a)(11), 13212.

[28] *See* FINRA Rule 13804(a)(1) (''In industry or clearing disputes required to be submitted to arbitration under the Code, parties may seek a temporary injunctive order *from a court of competent jurisdiction*.'') (emphasis added).

[29] Both the Federal Arbitration Act and the Federal Rules of Civil Procedure are silent as to provisional remedies in aid of arbitration.

[30] N.Y. C.P.L.R. 7502(c).

[31] *See, e.g.*, M.B. Int'l W.W.L. v. PMI Am., Inc., No. 1:12-CV-04945, 2012 BL 197938, at *10 (S.D.N.Y. Aug. 6, 2012); Pruco Sec. Corp. v. Montgomery, 264 F. Supp. 2d 862 (D.N.D. 2003); Rosetto v. Pabst Brewing Co., 71 F. Supp. 2d 913, 918–19 (E.D. Wis. 1999), *rev'd on other grounds*, 217 F.3d 539 (7th Cir. 2000).

[32] Christian Louboutin S.A. v. Yves St. Laurent Am. Holding, Inc., 696 F.3d 206, 215 (2d Cir. 2012); *see also* Wiener v. Cnty. of San Diego, 23 F.3d 263, 268 (9th Cir. 1994) (same). This standard has some fluidity. For example, courts in the Second Circuit may sometimes require a movant to demonstrate a balance of hardships in its favor even if the movant has shown a likelihood of success on the merits. *See, e.g.*, Salinger v. Colting, 607 F.3d 68, 79–80 (2d Cir. 2010). The court may further seek to ''ensure that the public interest would not be disserved by the issuance of a preliminary injunction.'' *M.B. Int'l W.W.L.*, 2012 BL 197938, at *10 (citations and internal quotation omitted).

[33] For example, in the D.C. Circuit, the movant must show ''(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction.'' Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 297 (D.C. Cir. 2006). In the Seventh Circuit, the movant must show ''1) a reasonable likelihood of success on the merits of the underlying claim; 2) no adequate remedy at law; and 3) irreparable harm if the injunction is not granted.'' Lucini Italia Co. v. Grappolini, 288 F.3d 1035, 1038 (7th Cir. 2002). Further, courts in the Seventh Circuit will also ''weigh the potential harms'' and ''consider the public interest.''

[34] Interoil LNG Holdings, Inc. v. Merrill Lynch PNG LNG Corp., 60 A.D.3d 403, 404 (N.Y. App. Div. 2009); *see generally* N.Y. C.P.L.R. § 6301.

injunction, and a balance of the equities in . . . favor'' of the moving party.[35]

b. FINRA requirements regarding injunctions in industry cases

A party that applies to a court for a preliminary injunction in aid of ''an industry or clearing dispute required to be submitted to arbitration under the [Industry] Code'' is required to file and serve, simultaneous with the filing of the judicial application, ''a statement of claim requesting permanent injunctive and all other relief with respect to the same dispute in the manner specified under the [Industry] Code.''[36] That statement of claim must be served on all other parties.[37]

If the court issues ''a temporary injunctive order,'' then within 15 days after issuance of that order, FINRA will convene hearings on the request for permanent injunctive relief;[38] at those hearings, the panel will apply the law ''of the state where the events upon which the request is based occurred, or as specified in an enforceable choice of law agreement between the parties.''[39] The hearings are held before a panel of three arbitrators.[40] In addition to having the power to grant a permanent injunction, the panel ''may prohibit the parties from seeking an extension of any court-issued temporary injunctive order remaining in effect, or, if appropriate, order the parties jointly to move to modify or dissolve any such order.''[41]

After the conclusion of the hearings regarding the possible issuance of permanent injunctive relief, the same panel may schedule subsequent hearings on damages or other relief.[42] The record in any such subsequent hearings includes, but is not confined to, the record from the hearings on the request for a permanent injunction.[43]

c. Injunctions in FINRA customer cases

FINRA's Customer Code is devoid of any corresponding provisions regarding obligations that arise, or events that are triggered, upon a party's judicial application for an injunction, perhaps reflecting that the types of claims that may require a preliminary injunction to preserve the status quo would be expected to be relatively rare in customer cases.

2. Temporary restraining orders

In addition to a preliminary injunction in aid of arbitration, a court can also enter a temporary restraining order (TRO) in aid of arbitration, which has the effect of enjoining the challenged conduct pending the hearing on the preliminary injunction. Both federal and state courts have issued such TROs.[44]

3. Orders of attachment

An order of attachment is a prejudgment seizure of property belonging to the debtor to be applied towards satisfaction of a judgment in the event that the party seeking the attachment ultimately prevails and obtains an award of monetary damages.[45] FINRA rules do not provide for seeking such orders from the arbitrators. Applications in federal court for orders of attachment are governed by the state law provisions of the state in which the federal district court sits.[46] This principle applies equally when the attachment is sought in aid of an arbitration.[47]

In New York state court, an order directing attachment of the assets of a party to an arbitration prior to entry of an award in the arbitration may initially be obtained upon an ex parte application without notice to the opposing party.[48] But for that initial order to continue in force, the party that procured the attachment must make a motion on notice to confirm the order of attachment within five days after levying on the monies.[49]

To obtain any order of attachment, as well as to obtain confirmation of an order of attachment that was procured ex parte, the movant must show ''that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment . . . exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff.''[50] A showing that ''an arbitration award may be rendered ineffectual in the absence of an order of attachment'' qualifies as sufficient grounds for attachment where the attachment is sought in aid of arbitration.[51]

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[35] Aetna Ins. Co. v. Capasso, 552 N.E.2d 166, 167 (1990).

[36] FINRA Rule 13804(a)(2). The rule does not specify the procedure to follow if the party seeking a preliminary injunction has already filed a Statement of Claim with FINRA that seeks an award of damages. Presumably, in that situation, the party should seek to amend its existing Statement of Claim in accordance with FINRA Rules. *See* 289 SPS § I-G, *Amending Pleadings* (discussing amendment requirements and procedures under FINRA Rules 12309, 13309, 12504, and 13504).

[37] *Id.*

[38] FINRA Rule 13804(b)(1).

[39] FINRA Rule 13804(b)(4).

[40] FINRA Rule 13804(b)(2). The mechanism for selection of the panel is set forth in FINRA Rule 13804(b)(3).

[41] FINRA Rule 13804(b)(5).

[42] FINRA Rule 13804(c)(1).

[43] *Id.*

[44] *See, e.g.*, Banus v. Citigroup Global Mkts., Inc., No. 1:09-CV-07128, 2010 BL 90646, at *8 (S.D.N.Y. Apr. 23, 2010) (''temporary restraining orders . . . may be, and frequently are, granted in aid of arbitration claims where necessary to avoid irreparable injury'') (footnote omitted), *aff'd*, 422 F. Appx. 53 (2d Cir. 2011); *Pruco Sec. Corp.*, 264 F. Supp. 2d 862. *See also In re* Arbitration of Int'l Legal Consulting Ltd. v. Malibu Oil & Gas Ltd., 950 N.Y.S.2d 723 (N.Y. Sup. Ct. 2012) (noting that in a prior decision in the case, the court granted a TRO in aid of arbitration).

[45] Hotel 71 Mezz Lender LLC v. Falor, 926 N.E.2d 1202, 1207 (2010).

[46] *See* FED. R. CIV. P. 64(a) (''At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment.''); FED. R. CIV. P. 64(b) (''The remedies available under this rule include . . . attachment'').

[47] *See, e.g.*, Mishcon de Reya N.Y. LLP v. Grail Semiconductor, Inc., No. 1:11-CV-04971, 2012 BL 306114, at *3 (S.D.N.Y. Dec. 28, 2011).

[48] N.Y. C.P.L.R. 6211(a).

[49] N.Y. C.P.L.R. 6211(b).

[50] N.Y. C.P.L.R. 6212(a); *accord Hotel 71 Mezz Lender*, 926 N.E.2d at 1206 n.5.

[51] Drexel Burnham Lambert Inc. v. Ruebsamen, 139 A.D.2d 323, 328 (N.Y. App. Div. 1988) (holding that ''respondents' possible or likely transfer of assets from New York to West Germany, along with petitioner's inability to enforce the arbitration award in West Germany should it ultimately prevail in its claim against respondents, is certainly sufficient to support an order of attachment'').

E. Mediation and Stay of Arbitration

During the pendency of the arbitration, the parties have the option of proceeding to nonbinding mediation, which is governed by FINRA's Code of Mediation Procedure.[52] Such mediation ''is voluntary, and requires the written agreement of all parties.''[53] A party may not be ''compelled to participate in a mediation or to settle a matter by FINRA, or by any mediator appointed to mediate a matter pursuant to the Code [of Mediation Procedure].''[54]

1. Submission to mediation and selection of a mediator

To submit to mediation under the auspices of FINRA, the parties provide executed Submission Agreements to FINRA's director of Dispute Resolution.[55] The parties can then choose a mediator from a list supplied by FINRA.[56] Alternatively, FINRA can approve a mediator that the parties select on their own, with the mediation then conducted under FINRA's auspices.[57] Parties are also free to pursue mediation outside of FINRA's mediation program, such as through mediators affiliated with such organizations as Judicial Arbitration and Mediation Services, Inc. (JAMS) and similar organizations.[58]

2. Stay of arbitration pending mediation

''Unless the parties agree otherwise, the submission of a matter for mediation will not stay or otherwise delay the arbitration of a matter pending at FINRA.''[59] However, if the parties agree to a stay pending mediation, ''the arbitration will be stayed, notwithstanding any provision to the contrary in th[e] Code [of Mediation Procedure] or any other rule.''[60]

If a stay of arbitration to permit the parties to mediate necessitates the postponement of scheduled hearings in the matter, no postponement fees will be assessed if the mediation is conducted through FINRA.[61] This waiver of postponement fees should apply regardless of whether the mediator was drawn from FINRA's list, so long as the mediator was approved by the director of Dispute Resolution.[62] If, however, the mediation is conducted outside of FINRA, postponement fees may be assessed.

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[52] FINRA Rules 14100 et seq.
[53] FINRA Rule 14104(a).
[54] *Id.*
[55] FINRA Rule 14104(c).
[56] FINRA Rule 14107(a)(1).
[57] FINRA Rule 14107(a)(2).
[58] JAMS is a private alternative dispute resolution entity made up of a panel of retired judges and attorneys. JAMS specializes in mediating and arbitrating complex, multi-party, business and commercial cases.
[59] FINRA Rule 14105(a).
[60] *Id.*
[61] FINRA Rule 14105(b).
[62] *See* FINRA Rule 14107(a)(2).

IV.
Hearings and Awards

A. Pre-Hearing Exchange of Documents, Witness Lists and Explained Decision Requests

1. Documents and witness lists

At least 20 days before the start of hearings, the parties are required to exchange ''copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced,''[1] and ''the names and business affiliations of all witnesses they intend to present at the hearing.''[2] Copies of the witness lists, but not of the documents exchanged under this rule, also are filed with the director of FINRA Dispute Resolution.[3]

With respect to the exchange of documents, it is common at this juncture for parties to produce documents that they intend to introduce at the hearings through their expert witnesses. Such documents often will not have been produced previously during the arbitration because they may not fall into the classifications of documents that will have been required to be produced pursuant to FINRA's mandatory disclosure lists,[4] and they may not necessarily have been produced in response to party document requests. Indeed, in the case of demonstrative exhibits and the like that are prepared specifically for use at the hearings, such documents may not even have been in existence at the times when documents were previously exchanged in the case.

Parties are precluded from presenting at the hearings any documents, materials, or witnesses that they have not identified at least 20 days prior to the hearings, ''unless the panel determines that good cause exists for the failure to produce the document or identify the witness.''[5] ''Good cause'' in this context ''includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing.''[6] However, ''[d]ocuments and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.''[7]

2. Explained decision requests

If the parties desire the arbitration award rendered in the case to include an explained decision from the arbitrators, they must jointly request an explained decision at least 20 days prior to the commencement of the hearings.[8] Absent such a timely request, the arbitrators' award is not required to provide reasons for the outcome reflected in the award.[9]

B. Hearing Location

1. Customer cases

For hearings that are to be held in the U.S., the director of Dispute Resolution determines the location from among 69 potential hearing locations that FINRA maintains.[10] The chosen location will usually be the one that was ''closest to the customer's residence at the time of the events giving rise to the dispute, unless [that] location is in a different state from the customer's residence, in which case the customer may request a hearing location in the customer's state of residence at the time of the events giving rise to the dispute.''[11]

2. Industry cases

As in customer cases, for industry cases that are to be heard in the U.S., the director initially selects the hearing location.[12] If one of the parties is an associated person, the hearing location will usually be the one ''closest to where the associated person was employed at the time of the events giving rise to the dispute.'' If that location is in a different state from that site of employment, however, the associated person may request a hearing location in the state in which he or she resided at the time of the events from which the dispute arises.[13] If multiple parties are associated persons, the director will assess various factors to determine the hearing location, including any guidance from the parties' written arbitration agreement; which party initiated the transaction or business at issue; and where essential witnesses and documents are located.[14]

3. Rules common to all cases

After the director initially chooses the hearing location, the parties may agree to a different location before the director circulates the list of potential arbitrators.[15] Any party may make a motion to change the hearing location.[16]

Upon agreement of all parties as well as the director, the hearing may be held in a foreign country and conducted by

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[1] FINRA Rules 12514(a), 13514(a).

[2] FINRA Rules 12514(b), 13514(b).

[3] *Compare* FINRA Rules 12514(a) *and* 13514(a) *with* FINRA Rules 12514(b) *and* 13514(b).

[4] *See* 289 SPS § II-C1, *Party discovery: mandatory document production (customer cases only)*.

[5] FINRA Rules 12514(c), 13514(c).

[6] *Id*.

[7] *Id*.

[8] FINRA Rules 12514(d), 12904(g)(3), 13514(d), 13904(g)(3).

[9] *See* 289 SPS § IV-H, *Arbitration Award*.

[10] *See* FINRA Rule 12213(a)(1); *see also* FINRA, *Dispute Resolution Regional Offices and Hearing Locations*, FINRA.ORG. In addition to its locations within the 50 states of the United States, FINRA also maintains hearing locations in San Juan, Puerto Rico and London, United Kingdom.

[11] FINRA Rule 12213(a)(1).

[12] FINRA Rule 13213(a)(1).

[13] Id.

[14] *Id.*

[15] FINRA Rules 12213(a)(2), 13213(a)(2). For a discussion of the arbitrator selection process, *See* 289 SPS § II-A2, *Procedure for arbitrator selection*.

[16] FINRA Rules 12213(c)–(d), 13213(c)–(d). FINRA's rules do not set forth any criteria for the arbitrators to consider on a motion to change the hearing location. Thus, it is to be expected that the determinations of such motions will be case-specific.

foreign arbitrators, where the arbitrators meet FINRA's requirements for background qualifications and training.[17]

4. Postponement of hearings

Hearings may be postponed upon agreement of the parties.[18] Postponement of a hearing may also be granted by the director ''in extraordinary circumstances'' or by the arbitration panel, either ''in its own discretion'' or upon motion of a party.[19] A motion to postpone a hearing that is made within 10 days prior to the start of the hearing may only be granted upon a determination of ''good cause.''[20]

If a postponement is granted pursuant to consent of the parties or as a result of a party request, postponement fees may be assessed unless the postponement is for the purpose of enabling the parties to participate in a mediation under FINRA's auspices; the arbitration panel opts to waive fees ''in its own discretion;'' or the director finds ''extraordinary circumstances.''[21]

If all parties either jointly request or agree to at least two postponements of the hearings, the panel has the discretion to dismiss the arbitration proceeding without prejudice.[22]

C. Hearing and Submission of Evidence

1. Who is entitled to attend hearings

The parties ''and their representatives'' have an absolute right to attend the hearings.[23] Expert witnesses are also entitled to attend all hearings, ''[a]bsent persuasive reasons to the contrary.''[24]

Counsel for a non-party witness may attend a hearing for the duration of a client's testimony so long as

- the attorney is ''in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States,'' and
- state law does not prohibit the representation.[25]

Absent permission from the panel for a more expansive role, the authorized participation at the hearing by counsel for the non-party witness is confined to ''the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination.''[26]

The attendance at the hearings of any person not described above is at the discretion of the panel of arbitrators.[27]

2. Failure of a party to appear

''If a party fails to appear at a hearing after having been notified of the time, date and place of the hearing, the panel may determine that the hearing may go forward, and may render an award as though all parties had been present.''[28]

3. Presentation of evidence

The admission of evidence at the hearings is at the discretion of the panel, which is not bound by state or federal rules of evidence.[29]

''Production of documents in discovery does not create a presumption that the documents are admissible at the hearing.''[30] Parties may object to the introduction of any documents as evidence at the hearing.[31]

Just as in a judicial proceeding, witnesses must testify under oath or affirmation.[32]

Also as in a judicial proceeding, the claimant generally presents its case first and the respondent follows with its defense.[33] However, ''[t]he panel has the discretion to vary the order in which the hearing is conducted, provided that each party is given a fair opportunity to present its case.''[34] As a general rule, panelists try to accommodate individual witnesses' schedules, and the arbitrators will often permit witnesses to be taken ''out of turn.''

The arbitration panel decides when to close the record. While that generally occurs at the end of the last hearing session, the panel may request or agree to accept additional submissions from any party subsequent to the final hearing.[35] In cases in which no hearing is held,[36] the record is presumed closed when the director sends the parties' pleadings to the panel, unless the panel requests or agrees to accept additional submissions from any party.[37]

The panel may reopen the record either sua sponte or upon motion of any party at any time before the rendering of the arbitration award, unless the reopening of the record is prohibited by applicable law.[38]

D. Pre-Award Termination of an Arbitration

If all of the parties to an arbitration or claim jointly request dismissal of that arbitration or claim before an award has been issued (as may occur, for example, if the parties reach a settlement after the hearings have concluded but before the issuance of an award), the panel is required to honor that request.[39] The panel may also dismiss a claim:

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[17] FINRA Rules 12213(b)(1), 13213(b)(1).
[18] FINRA Rules 12601(a)(1), 13601(a)(1).
[19] FINRA Rules 12601(a)(2), 13601(a)(2).
[20] *Id.*
[21] FINRA Rules 12601(b), 13601(b).
[22] FINRA Rules 12601(c), 13601(c).
[23] FINRA Rules 12602(a), 13602(a).
[24] *Id.*
[25] FINRA Rules 12602(b), 13602(b).
[26] *Id.*
[27] FINRA Rules 12602(c), 13602(c).
[28] FINRA Rules 12603, 13603.
[29] FINRA Rules 12604(a), 13604(a).
[30] FINRA Rules 12604(b), 13604(b).
[31] *Id.*
[32] FINRA Rules 12605, 13605.
[33] FINRA Rules 12607, 13607.
[34] *Id.*
[35] FINRA Rules 12608(a), (c), 13608(a), (c).
[36] The two types of FINRA arbitration proceedings in which no hearing is held are simplified arbitration proceedings, *see* 289 SPS § IV-E, *Simplified Arbitration*, and default proceedings, *see* 289 SPS § IV-G, *Default Proceedings*.
[37] FINRA Rules 12608(b), 13608(b).
[38] FINRA Rules 12609, 13609.
[39] FINRA Rules 12700, 13700.

- pursuant to motion of a party upon a finding that the claim is barred under FINRA's six-year eligibility rule;[40]
- on its own initiative, with prejudice, as a sanction against a claimant;[41] or
- on its own initiative, without prejudice, if the parties jointly agree to or request more than two postponements of the hearings.[42]

E. Simplified Arbitration

Certain simplified procedures apply when the amount at stake in a FINRA arbitration is $50,000 or less.[43] A sole arbitrator oversees the proceeding;[44] in customer cases it is a public arbitrator selected from FINRA's roster of chairpersons (unless the parties agree otherwise),[45] while in industry cases it is simply a person selected from FINRA's roster of chairpersons (again, unless the parties agree otherwise).[46]

In a simplified arbitration, no hearings or prehearing conferences will be held unless the customer (in a customer case) or claimant (in an industry case) requests a hearing.[47] In cases without hearings, the arbitrator's award will be based on ''the pleadings and other materials submitted by the parties.''[48] If, however, the customer or claimant requests a hearing, the usual provisions of FINRA's codes regarding hearings and pre-hearing conferences will apply.[49]

Discovery in simplified arbitrations is limited. Parties may serve requests for documents or information on other parties within 30 days after the date that the last answer in the case is due,[50] and responses or objections to such discovery requests must be served on all other parties in the case and filed with the director of Dispute Resolution within 10 days after receipt of the request.[51] No other discovery is permitted.

F. Pilot Program for Large Arbitration Cases

As described earlier, since 2012 FINRA has operated a pilot program for ''large cases,'' defined as cases in which the damages sought are $10,000,000 or more.[52] Participation in that program is voluntary. Parties that opt to participate in the ''large cases'' program receive greater autonomy in the selection of the arbitrators–for example, by being permitted to provide their own arbitrators who are not on FINRA's rosters.[53] Participating parties also enjoy extensive freedom to chart their own course in discovery: ''The parties can agree to use interrogatories, depositions, requests for admissions, or any other discovery method''[54] despite the otherwise limited availability of such discovery methods under FINRA's codes of arbitration procedure. Additionally, the parties can agree to the appointment of a special arbitrator in the case whose sole responsibility is ''to decide discovery issues.''[55]

For the hearings themselves, the parties can choose an alternative location that offers amenities such as larger conference rooms or WiFi capability that are unavailable at FINRA's conventional hearing venues.[56] The parties bear the rental costs for any such alternative hearing location.[57]

G. Default Proceedings

Where a respondent fails to file an answer to a claim within the time for which the codes provide,[58] a default proceeding is available if the respondent is:

- a FINRA member whose membership has been terminated, suspended, canceled or revoked, or which has been expelled from FINRA or is ''otherwise defunct;'' or
- an associated person whose registration has been terminated, revoked, or suspended.[59]

To initiate default proceedings, the claimant simply advises the director of Dispute Resolution in writing that it is doing so while copying all other parties on the notification.[60] The director, if it is determined that the requirements for default

[40] FINRA Rules 12206, 13206. For a discussion of motions made under those rules, *see* 289 SPS § I-F2e, *Time limitation for commencing an arbitration*.

[41] FINRA Rules 12212, 13212. Sanctions may be assessed against a party ''for failure to comply with any provision in the [Customer or Industry] Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel.'' FINRA Rules 12212(a), 13212(a). A claim, defense, or arbitration may be dismissed with prejudice ''as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.'' FINRA Rules 12212(c), 13212(c).

[42] FINRA Rules 12601(c), 13601(c). *See* 239 SPS § IV-B4, *Postponement of Hearings*.

[43] FINRA Rules 12800(a), 13800(a).

[44] FINRA Rules 12800(b), 13800(b).

[45] FINRA Rule 12800(b). A public arbitrator is one whose professional experience or other background connects him to the securities industry. *See* FINRA Rule 12100(u) defining ''public arbitrator''); 289 SPS § II-A2, *Procedure for arbitrator selection* (discussing definition of ''public arbitrator'').

[46] FINRA Rule 13800(b).

[47] FINRA Rules 12800(c), 13800(c).

[48] FINRA Rules 12800(c), 13800(c). See 289 SPS § IV-H, *Arbitration Award*, for a discussion of the arbitration award in cases with hearings.

[49] FINRA Rules 12800(c), 13800(c).

[50] FINRA Rules 12800(d), 13800(d). For a discussion of the deadlines for serving answers, *see* 289 SPS § I-G1, *Necessity of timely and complete answer*.

[51] FINRA Rules 12800(d), 13800(d).

[52] *See* FINRA, Voluntary Program for Large Cases–FAQ; *see also* 289 SPS § II-A3, *Arbitrator selection in pilot program for large cases*.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See* 289 SPS § I-G1, *Necessity of timely and complete answer*.

[59] FINRA Rules 12801, 13801. *See* 289 SPS § I-B, *Arbitrability of Dispute* (discussing ''associated person''); FINRA Rules 12100(a) & 13100(a) (defining term ''associated person''). FINRA's codes do not explain when a FINRA member should be considered ''otherwise defunct.''

[60] FINRA Rules 12801(b)(1), 13801(b)(1). If there is more than one claimant, all claimants must agree in writing to initiate default proceedings.

proceedings have been met,[61] then appoints a sole arbitrator who considers ''the statement of claim and other documents presented by the claimant,''[62] but does not hold any hearings.[63] The arbitrator may request additional information from the claimant.[64]

In a default proceeding, the claimant is not entitled to an award in its favor merely because the opposing party has failed to appear. The claimant ''must present a sufficient basis to support the making of an award.''[65] The arbitrator is not authorized to award relief that was not requested in the statement of claim or to award damages beyond those that were demanded in the statement of claim.[66] Any award rendered against the defaulting party has no effect on non-defaulting parties.[67]

A respondent against whom default proceedings have been commenced can cure the default by filing an answer prior to the issuance of an award in the default proceedings. If the respondent does so, the default proceedings are terminated, and the claim against that respondent then proceeds under the ordinary rules for FINRA arbitrations.[68]

Although FINRA's rules do not state whether default proceedings are available when the party in default is a respondent to a counterclaim, cross-claim or third-party claim, it seems reasonable to assume that default proceedings should be available as to those types of claims.

H. Arbitration Award

1. Contents of awards

Awards in FINRA arbitration proceedings must be in writing and signed by a majority of the arbitrators on the panel.[69] In a case decided by a panel of arbitrators rather than a sole arbitrator, unanimity is not required.[70] Once an award is rendered, there is no provision under FINRA's rules for review of it or appeal from it,[71] although it is subject to judicial review.[72]

Among the information that the award is required to set forth is the following:

- the names of the parties and their representatives;
- an acknowledgment that the arbitrators have read the pleadings and other party submissions;
- a summary of the issues;
- the damages and other relief requested; and the damages and other relief awarded;
- a statement of any other issues resolved; and
- the allocation of forum fees or any other fees that the panel decides to apportion.[73]

2. Explained decisions

An ''explained decision,'' which the arbitrators are required to issue if the parties have timely requested it,[74] is an award that ''stat[es] the general reason(s) for the arbitrators' decision.''[75] An explained decision is ''fact-based,''[76] and ''[i]nclusion of legal authorities and damage calculations is not required'' in such an award. It is written by the chairperson of the panel issuing the decision.[77] Explained decisions are not available in simplified cases or default proceedings.[78]

While the texts of FINRA's rules concerning explained decisions do not expressly authorize such a decision as to less than all of the claims in a particular arbitration,[79] FINRA's regulatory notice that announced the adoption of those rules states that the parties may choose to request an explained decision only as to certain claims.[80]

If the parties have not requested an explained decision, the award ''may,'' but is not required to, ''contain a rationale underlying the award.''[81]

3. Attorneys' fees

A party may be entitled to attorneys' fees in one of three situations:

- the parties' contract contains a clause providing for them;
- the fees are permitted pursuant to a statute under which a claim is brought; or
- all of the parties to the arbitration request, or agree to, the awarding of attorneys' fees.[82]

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[61] FINRA Rules 12801(b)(2), 13801(b)(2).

[62] FINRA Rules 12801(b)(2), 13801(b)(2).

[63] FINRA Rules 12801(c), 13801(c).

[64] *Id.*

[65] FINRA Rules 12801(e)(1), 13801(e)(1).

[66] *Id.*

[67] FINRA Rules 12801(e)(2), 13801(e)(2).

[68] FINRA Rules 12801(f), 13801(f).

[69] FINRA Rules 12904(a), 13904(a).

[70] *Id.*; *see also* FINRA, Decision and Awards (''In a three-arbitrator panel, an award is based on the vote of a majority of the arbitrators; a unanimous decision is not required.'').

[71] *See* FINRA Rules 12904(b), 13904(b) (both providing that ''[u]nless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal'').

[72] *See* 289 SPS § V-B (discussing judicial motions to confirm or vacate arbitration awards).

[73] FINRA Rules 12904(e), 13904(e).

[74] *See* 289 SPS § IV-A2, *Explained decision requests*; *see also* FINRA Rules 12514(d), 13514(d) (request for ''explained decision'' must be made jointly by the parties at least 20 days before the start of the hearings).

[75] FINRA Rules 12904(g)(2), 13904(g)(2).

[76] *Id.*

[77] FINRA Rules 12904(g)(4), 13904(g)(4).

[78] FINRA Rules 12904(g)(6), 13904(g)(6). *See* 289 SPS §§ IV-E, *Simplified Arbitration*, and IV-G, *Default Proceedings*, respectively for discussions of simplified arbitrations and default proceedings.

[79] FINRA Rules 12514(d), 13514(d), 12904(g), 13904(g).

[80] *See* FINRA Notice 09-16 (Mar. 2009) (''Normally, the arbitrators will be resolving the entire matter; thus, the explained decision will address all the claims asserted by the parties. However, the parties may request that an explained decision address only certain claims.'').

[81] FINRA Rules 12904(f), 13904(f); *see also* FINRA, DISPUTE RESOLUTION ARBITRATOR'S GUIDE 61 (''Absent a joint request from the parties for an explained decision, arbitrators may still include a written decision to be published within the body of the award if they believe that an explanation for the award would benefit the parties.'').

[82] FINRA, DISPUTE RESOLUTION ARBITRATOR'S GUIDE.

Arbitrators are expected to take applicable law into account in determining a request for attorneys' fees;[83] however, FINRA advises its arbitrators that they ''*must* award reasonable attorneys' fees to claimants who prevail under certain statutes, including Title VII actions for discrimination based on race, color, religion, sex or national origin.''[84] FINRA arbitrators are further advised that, if they harbor doubts regarding their authority to award attorneys' fees in a particular arbitration, ''they should request the parties to brief the issue.''[85]

If the arbitrators conclude that a party is entitled to recover its attorneys' fees, the party ''must prove the amount to the satisfaction of the panel.''[86] If the award grants attorneys' fees, ''[t]he authority for granting attorneys' fees must be included in the award.''[87]

4. Other requirements regarding awards

All FINRA arbitration awards are publicly available.[88] Any party against whom a monetary award is rendered must pay the amount of the award within 30 days after receipt of the award, ''unless a motion to vacate has been filed with a court of competent jurisdiction.''[89] Interest on monetary awards is assessed ''at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).''[90] That interest is measured from the date of the award, in the event that:

- the award is not paid within 30 days of receipt;
- the award is the subject of a judicial motion to vacate that is ultimately denied; or
- the panel specifies in the award that the interest is to run from the date of the award.[91]

Fees and assessments in an arbitration award that the arbitrators impose pursuant to FINRA's Codes of Arbitration Procedure, as opposed to monies assessed as damages on the claims themselves, must be paid immediately upon receipt of the award.[92]

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[83] *See* FINRA, FILING A CLAIM FREQUENTLY ASKED QUESTIONS (FAQ) § 14 (''Arbitrators may consider awarding attorneys' fees, but the procedure and law varies from state to state.'').

[84] FINRA, DISPUTE RESOLUTION ARBITRATOR'S GUIDE (emphasis added).

[85] *Id.*; *see also* FILING A CLAIM FREQUENTLY ASKED QUESTIONS (FAQ) § 14 (''It is appropriate for the arbitrators to request the parties to brief this issue.'').

[86] FINRA, DISPUTE RESOLUTION ARBITRATOR'S GUIDE.

[87] *Id.*

[88] FINRA Rules 12904(h), 13904(h).

[89] FINRA Rules 12904(j), 13904(j).

[90] *Id.*

[91] FINRA Rules 12904(j), 13904(j). For a discussion of judicial motions to vacate arbitration awards, *see* 289 SPS § V-C, *Motions to Vacate, Modify or Correct an Award*.

[92] FINRA Rules 12904(i), 13904(i).

V.
Judicial Motions to Confirm, Vacate or Modify the Award

A. Introduction

An arbitration award is not self-enforcing. To be converted to an enforceable judgment, the decision of the arbitration panel must be confirmed by a court of law.[1]

In cases governed by the Federal Arbitration Act (FAA), a court is required to grant a timely motion to confirm an arbitration award, unless the court grants a motion to vacate or modify the award.[2] The same rule applies in cases governed by New York law.[3]

B. Motions to Confirm an Award

In cases where the FAA applies,[4] § 9 of the FAA provides that a motion to confirm an arbitration award may be brought ''within one year after the award is made.[5] For the motion to confirm to properly be brought in federal rather than state court, there must be an independent basis for federal subject matter jurisdiction.[6] Any party to the arbitration may bring a motion to confirm the award.[7] The motion may be brought in a court specified in the parties' arbitration agreement; if the parties' agreement did not specify a court, the motion may be brought in the federal district court in the district in which the award was made, assuming that federal subject matter jurisdiction exists.[8] Absent an adequate basis for federal jurisdiction, an application to review an arbitration award under the FAA must be brought in state court.[9]

Some federal courts have held that the one-year time period for a motion to confirm is permissive rather than mandatory, meaning that such a motion may be made even after a longer duration has elapsed.[10] Others, including the Second Circuit, have held that § 9 establishes a mandatory statute of limitations for the filing of a motion to confirm.[11] Courts that regard the one-year time limitation as mandatory, rather than

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[1] *See, e.g.*, D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006) (''Because arbitration awards are not self-enforcing they must be given force and effect by being converted to judicial orders by courts; these orders can confirm and/or vacate the award, either in whole or in part.'') (citation, internal quotation marks and brackets omitted).

[2] *See* 9 U.S.C. § 9 (upon timely motion for confirmation, ''the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title''); *accord* Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 587 (2008) (concluding that § 9 ''unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions [warranting vacatur] applies.''); D.H. Blair & Co., 462 F.3d at 110 (''Normally, confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected.'') (citations and internal quotation omitted).

[3] *See* N.Y. C.P.L.R. 7510 (''The court *shall* confirm an award upon application of a party made within one year after its delivery to him, *unless* the award is vacated or modified . . . .'') (emphasis added).

[4] 9 U.S.C. § 1 et seq. *See* 289 SPS § II-C5, *Enforcement of subpoenas* (discussing the circumstances under which federal, rather than state, arbitration law applies).

[5] 9 U.S.C. § 9. The time when ''the award is made'' for purposes of triggering the running of the time period under this provision is the date when the award is signed. *See* Photopaint Techs., LLC v. Smartlens Corp., 207 F. Supp. 2d 193, 204 (S.D.N.Y. 2002) (rejecting the contention that an arbitration award was made at the time of delivery to the parties), *rev'd on other grounds*, 335 F.3d 152 (2d Cir. 2003).

[6] *See, e.g.*, Carter v. Health Net of Cal., Inc., 374 F.3d 830, 833 (9th Cir. 2004) (''It is well-established that even when a petition is brought under the Federal Arbitration Act (FAA), a petitioner seeking to confirm or vacate an arbitration award in federal court must establish an independent basis for federal jurisdiction.'') (parentheses in original) (citing Southland Corp. v. Keating, 465 U.S. 1, 15 n.9 (1984)). Perpetual Sec., Inc. v. Tang, 290 F.3d 132 (2d Cir. 2002). In *Perpetual Securities*, the Second Circuit explained that:

> Although the district court was correct in determining that it lacked jurisdiction over Perpetual's claim to vacate the arbitration award, it erred in determining that section 9 of the FAA conferred jurisdiction to the district court to *confirm* an arbitration award . . . [T]he FAA creates a substantive body of law but does not, by itself, confer federal question subject matter jurisdiction to the district courts.

290 F.3d at 140 (emphasis in original). As with other federal actions or proceedings, the requisite subject matter jurisdiction must arise either from diversity of citizenship of the parties or from the presentation of a federal question. *See* 28 U.S.C. §§ 1331, 1332. Where the movant seeks to seeks to rely on federal question jurisdiction, the court looks to ''the substantive claims raised in the . . . petition to confirm [or vacate] the award.'' *Carter*, 374 F.3d at 834. However, where the grounds for confirmation or vacatur do not themselves implicate a federal question, ''the presence of federal questions in an underlying arbitration is insufficient to provide an independent basis for federal question jurisdiction to review an arbitration award under the FAA.'' *Id*.

[7] 9 U.S.C. § 9.

[8] *Id*.

[9] *See Carter*, 374 F.3d at 839 (holding that district court lacked subject matter jurisdiction over motion to vacate, and ''remand[ing] the case in order for the district court to remand to state court'').

[10] *See, e.g.*, Wachovia Sec., Inc. v. Gangale, 125 F. Appx. 671, 676 (6th Cir. 2005) (stating, in dicta, that ''[t]he District Court correctly noted that the limitation on the time for seeking confirmation in the statute is permissive, not mandatory''); Val-U Constr. Co. of S.D. v. Rosebud Sioux Tribe, 146 F.3d 573, 581 (8th Cir. 1998) (''We hold that § 9 is a permissive statute and does not require that a party file for confirmation within one year.''); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993) (''§ 9 [of the FAA] must be interpreted as its plain language indicates, as a permissive provision which does not bar the confirmation of an award beyond a one-year period''); Kolowski v. Blatt, Hasenmiller, Leibsker & Moore, LLC, 07-C V-4964, 2008 BL 66562, at *3 (N.D. Ill. Mar. 20, 2008) (''The purpose and structures of the FAA better support that the one-year period stated in § 9 is permissive, not mandatory.'').

[11] *See, e.g.*, Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003) (''We . . . hold that section 9 of the FAA imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA.''); FIA Card Servs., N.A. v. Gachiengu, 571 F. Supp. 2d 799, 804 (S.D. Tex. 2008) (''This court joins those concluding that the one-year period in section 9 of the FAA is mandatory.''); *In re* Consol. Rail Corp., 867 F. Supp. 25, 32 (D.D.C. 1994) (finding that ''the plain reading of § 9 indicates that if a party does not bring an action to confirm its arbitration award within one year after the award is made, the party will be time-barred from

permissive, will deny a motion for confirmation that is brought more than one year subsequent to the date of the arbitration award.[12] Most federal circuits have not yet addressed this issue.

In cases where New York law applies, article 75 of that state's Civil Practice Law and Rules (C.P.L.R.) provides that a motion to confirm an arbitration award must be made within one year ''after its delivery'' to the moving party.[13] This time limitation has been held to be mandatory rather than permissive.[14]

C. Motions to Vacate, Modify or Correct an Award

Under § 12 of the FAA, a motion to vacate, modify, or correct an award must be made within three months after the date of filing or delivery of the award.[15] This limitation is strictly enforced.[16] Moreover, if a party has waived its right to move to vacate an award by failing to make such a motion within three months, it may not then seek vacatur under the guise of an opposition to its opponent's subsequent motion to confirm the award.[17] As with a motion to confirm, a motion to vacate may only be brought in a federal court if there is an independent basis for federal jurisdiction.[18]

In cases where the FAA applies, the fact that the time period for moving to confirm an award is significantly longer than the time period for moving to vacate or modify it (one year versus three months, even in courts that hold the time period for moving to confirm to be mandatory) has an important implication for the winning party in the arbitration. Unless that party has an urgent need for a judgment (e.g., to seek expungement,[19] or to begin judgment enforcement proceedings in an attempt to collect money awarded to it), it should consider holding off on moving to confirm until after the expiration of the three-month period for its opposing party or parties to move to vacate, modify, or correct the award. Assuming that the motion to confirm is timely made after the three months have expired, the waiver of grounds to vacate the award should minimize the time and expense of the confirmation proceeding.

New York law is similar to the FAA with respect to the time within which a party may challenge an arbitration award; under the C.P.L.R., a motion to vacate or modify an award must be brought within 90 days (compared to three months under the FAA) after the delivery of the award to the party seeking to vacate or modify it.[20] However, New York law differs from the FAA in one critical respect: a request to vacate or modify an award may be interposed as a defense to a motion to confirm, even where a motion to vacate or modify the award would have been untimely on its own.[21]

1. Grounds for vacatur of arbitration awards

FINRA rules make no provision for review of or appeal from an arbitration award and, in fact, affirmatively preclude the ability to do so within FINRA itself.[22] Thus, the only way that a losing party in a FINRA arbitration can have the award

availing itself of the summary confirmation process provided by § 9'').

[12] *See, e.g.*, Faust v. Fox, No. 05-CV-03962, 2005 BL 24338 (S.D.N.Y. Aug. 3, 2005) (dismissing as untimely a petition to confirm an arbitration award that was filed one year and 21 days after entry of the award despite petitioner's couching of application as motion to ''enter judgment'' rather than motion for confirmation).

[13] N.Y. C.P.L.R. 7510; *accord* Nahum v. Mansour, 970 N.Y.S.2d 570 (N.Y. App. Div. 2013).

[14] *See Nahum*, 970 N.Y.S.2d at 571–72 (finding that ''the proceeding to confirm the arbitration award was untimely since it was commenced more than one year after the petitioners had been notified of the award'') (footnotes omitted).

[15] *See* 9 U.S.C. § 12 (''Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.''); *accord* Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155, 1158 (10th Cir. 2007) (''A party to an arbitration award who fails to comply with the statutory precondition of timely service of notice [of a motion to vacate, modify, or correct the award] forfeits the right to judicial review of the award.'') (citation and internal quotation omitted); Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 151 (''[T]his language in § 12 [of the FAA] is mandatory, and thus, modification motions made beyond three months after the award are time barred.'').

[16] *See, e.g.*, Glaser v. Legg, 928 F. Supp. 2d 236, 238–39 (D.D.C. 2013) (denying as untimely a petition to vacate a FINRA arbitration award where the petition was served more than five months after the filing of the award); *see also* Kruse v. Sands Bros. & Co., 226 F. Supp. 2d 484, 487 (S.D.N.Y. 2002) (holding that, by having failed to make a proper motion to vacate within three months after the date of the award, respondents ''lost the opportunity to make such a Motion.'').

[17] *See, e.g.*, Florasynth, Inc. v. Pickholz, 750 F.2d 171, 175 (2d Cir. 1984) (holding that under § 12 of FAA, ''a party may not raise a motion to vacate, modify, or correct an arbitration award after the three month period has run, even when raised as a defense to a motion to confirm.''); Operating Engineers Local 841 v. Murphy Co., 82 F.3d 185, 188 (7th Cir. 1996) (same); Sheet Metal Workers Local 150 v. Air Sys. Eng'g, Inc., 831 F.2d 1509, 1510 (9th Cir. 1987) (''[A]n unsuccessful party at arbitration who did not move to vacate the award within the prescribed time may not subsequently raise, as affirmative defenses in a suit to enforce the award, contentions that it could have raised in a timely petition to vacate the award.'') (brackets in original).

[18] *See* 289 SPS § V-B, *Motions to Confirm the Award*; Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 25 (2d Cir. 2000) (finding that ''federal question jurisdiction does not arise simply because a petitioner brings a claim [to vacate] under § 10 of the FAA; there must be an independent basis of jurisdiction before district courts may entertain petitions to vacate'') (citation and internal quotation omitted). As with a motion to confirm, in determining whether that basis is supplied by the raising of a federal question, the court looks to ''the ground for the petitioner's challenge to the award'' and not to ''the underlying claim'' that was asserted in the arbitration. *Id.* at 26 (citation and internal quotation omitted).

[19] *See* 289 SPS § V-D, *Expungement of Information from the Record of a FINRA Member or Associated Person* (discussing expungement).

[20] N.Y. C.P.L.R. 7511(a); *accord* Rosa v. City Univ. of N.Y., 789 N.Y.S.2d 4, 5 (N.Y. App. Div. 2004) (holding that ''the proceeding [to vacate an arbitration award], which was brought more than 90 days after receipt of the award, must be dismissed as untimely'').

[21] *See, e.g.*, Pine St. Assocs., LP v. Southridge Partners, LP, 965 N.Y.S.2d 15, 18–19 (N.Y. App. Div. 2013) (explaining that ''a party may oppose an arbitral award either by motion pursuant to CPLR 7511(a) to vacate or modify the award within 90 days after delivery of the award or by objecting to the award in opposition to an application to confirm the award notwithstanding the expiration of the 90-day period'') (citation omitted).

[22] *See* FINRA Rules 12904(b), 13904(b) (''Unless the applicable law directs otherwise, all awards rendered under the [Customer or Industry] Code[s] are final and are not subject to review or appeal'').

overturned is to make a judicial motion to vacate it.[23] Section 10 of the FAA enumerates the following circumstances under which an award may be vacated:

- where the award was procured by corruption, fraud, or undue means;
- where there was evident partiality or corruption in the arbitrators;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[24]

The statutory grounds under which a party may seek to vacate an arbitration award under New York state law are similar to the grounds under the FAA. Article 75 of New York's C.P.L.R. provides the following grounds for vacatur:

- corruption, fraud or misconduct in procuring the award;
- partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- an arbitrator, agency or person making the award exceeding power or so imperfectly executing it that a final and definite award upon the subject matter submitted was not made; or
- failure to follow the procedure of Article 75, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.[25]

As one of the principal differences, the FAA, but not the CPLR, expressly provides for vacatur where the arbitrators committed misconduct such as failing to postpone the hearing or failing to ''hear evidence pertinent and material to the controversy.''[26] Moreover, New York law, but not the FAA, provides for vacatur where the arbitration ''fail[ed] to follow the procedure of this article.''[27]

New York law further allows a non-party who did not receive notice of and did not participate in the arbitration to seek to vacate the award, where it can meet one of the following requirements:

- the rights of that non-party were prejudiced by one of the grounds upon which a party to the arbitration could seek to have an award vacated;
- a valid agreement to arbitrate was not made;
- the agreement to arbitrate had not been complied with; or
- the arbitrated claim was barred by limitation under subdivision (b) of CPLR § 7502.[28]

Apart from the exception of a judge-made doctrine called ''manifest disregard of the law,'' which some courts accept as an additional basis for vacating arbitration awards,[29] courts have held that the respective grounds set forth in the FAA and the C.P.L.R. describe the mandatory contours of judicial review of arbitration awards in cases where those statutes apply, even if the parties have agreed by contract to a more rigorous or more lenient review by a court.[30]

Vacatur is designed to be difficult to obtain—regardless of which law applies and regardless of the specific provision urged as the basis for reversing an award in a given case—in light of the broad public policy in favor of arbitration. While courts are thus loath to interfere with arbitral decisions,[31] the applicable arbitration statutes do provide grounds for vacatur.

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[23] *See* FINRA Dispute Resolution, *Awards Frequently Asked Questions (FAQ)*, FINRA.ORG (answering Question 1: ''Arbitration is final and binding, subject to review by a court only on a very limited basis. However, a party may file a motion to vacate the arbitration award in a federal or state court of competent jurisdiction pursuant to the Federal Arbitration Act or applicable state statute.'').

[24] 9 U.S.C. § 10(a).

[25] N.Y. C.P.L.R. § 7511(b)(1); *accord* N.Y. City Transit Auth. v. Transport Workers Local 100, 845 N.E.2d 1243, 1245 (N.Y. 2005) (''Courts may vacate an arbitrator's award only on the grounds stated in CPLR 7511(b).'').

[26] 9 U.S.C. § 10. However, notwithstanding the lack of such an express provision, New York courts applying article 75 of the CPLR will still vacate an arbitral award where there is a showing of certain types of misconduct by the arbitrator. *See* 289 SPS § V-C1, *Grounds for vacatur of arbitration awards.*

[27] N.Y. C.P.L.R. 7511(b)(1)(iv).

[28] N.Y. C.P.L.R. 7511(b)(2). There is no corresponding provision under the FAA. *See* 9 U.S.C. § 10.

[29] *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953); *see also* 289 SPS § V-C1h, *Non-explicit basis for vacatur: Manifest disregard of the law (FAA and New York).*

[30] *See Hall St. Assocs.*, 552 U.S. 576, 586 (holding that ''the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration''); *In re* Wal-Mart Wage and Hour Employment Practices Litig., 737 F.3d 1262, 1267 (9th Cir. 2013) (''Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.''); *In re* Arbitration of Cnty. of Chemung v. Civil Serv. Emps. Ass'n, 716 N.Y.S.2d 734, 736 (N.Y. App. Div. 2000) (''To the extent that this [contractual] provision can be construed as broadening the scope of judicial review under CPLR article 75, it is of no effect.'').

[31] *See* Rich v. Spartis, 516 F.3d 75, 81 (2d Cir. 2008) (noting ''the general rule that '[a]rbitration awards are subject to very limited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation' '') (quoting Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)); Goldfinger v. Lisker, 500 N.E.2d 857, 859 (N.Y. 1986). The *Goldfinger* court noted that:

> Courts are reluctant to disturb the decisions of arbitrators lest the value of this method of resolving controversies be undermined. Precisely because arbitration awards are subject to such judicial deference, it is imperative that the

a. Awards procured through a party's misconduct (FAA and New York CPLR)

Under the FAA, the provision for vacatur where the prevailing party procured the award through ''corruption, fraud, or undue means''[32] sets a high bar for the required showing; parties are often required to establish the misconduct as well as its effect on the proceedings by clear and convincing evidence or a similar burden of proof.[33] Moreover, courts construing this provision have held that vacatur of an award based on a party's misconduct is appropriate only where two conditions, beyond a mere showing of the misconduct, are met :

- the misconduct was material to the outcome; and
- the party that is now challenging the misconduct lacked the opportunity to timely raise the issue with the arbitrator.[34]

Under New York law, the standard for vacatur based on a party's ''corruption, fraud or misconduct''[35] is that the challenging party must show by clear and convincing evidence that the award was obtained as a result of the alleged misconduct.[36] Moreover, even where the complaining party exercised due diligence in raising allegations of misconduct with the arbitrator, a New York court may be reluctant to second guess the arbitrator's decision as to the alleged misconduct.

b. Evident partiality or corruption in the arbitrators (FAA and New York CPLR)

Under FAA § 10(a)(2), arbitration awards can be vacated based upon ''evident partiality or corruption'' on the part of arbitrators.[37] Courts have held that awards can be vacated based on a showing of actual bias based on the arbitrator's dealings with one of the parties or evidence that the arbitrator failed to disclose facts suggesting such bias.[38] The motion to vacate may succeed if the movant shows facts from which it could be concluded that the arbitrator was biased or partial, even in the absence of a showing of actual bias.[39]

Moreover, parties must make a clear showing of the facts that are alleged to establish bias.[40] The standard for vacatur of an award based on ''evident partiality'' has been held satisfied

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integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded.

Id. (internal citations omitted).

[32] 9 U.S.C. § 10(a)(1).

[33] *See, e.g.*, Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irreovcable Trust, 729 F.3d 99, 104 (2d Cir. 2013) (explaining that an award may be vacated for party misconduct where it is ''abundantly clear'' that the award was obtained by improper means); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992) (''We have held that, in order to justify vacating an award because of fraud, the party seeking vacation must show that the fraud was . . . established by clear and convincing evidence.'') (citation and internal quotation omitted); Morgan Keegan & Co. v. Garrett, 495 F. Appx. 443, 447 (5th Cir. 2012) (requiring clear and convincing evidence of fraud); ARMA, S.R.O. v. BAE Sys. Overseas, Inc., 961 F. Supp. 2d 245, 254 (D.D.C. 2013) (''[T]he party seeking vacatur must demonstrate by clear and convincing evidence that its opponent actually engaged in fraudulent conduct or used undue means during the course of the arbitration.'').

[34] *See, e.g.*, Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 878 F. Supp. 2d 459, 464 (S.D.N.Y. 2012) (party seeing to vacate award based on its adversary's fraudulent conduct must show that ''(1) [its] adversary engaged in fraudulent activity; (2) the petitioner could not, in the exercise of due diligence, have discovered the alleged fraud prior to the award; and (3) the alleged fraud materially related to an issue in the arbitration'') (brackets in original) (citation and internal quotation omitted), *aff'd*, 729 F.3d 99 (2d Cir. 2013); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992) (requiring party seeking to vacate an award based on fraud committed by opposing party to show that the fraud was ''(1) not discoverable upon the exercise of due diligence prior to the arbitration [and] (2) materially related to an issue in the arbitration . . . .''); Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (holding that, to vacate an award based on fraud such as perjury, ''the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration [and] . . . the fraud [must have] materially related to an issue in the arbitration.'') (citations omitted).

[35] N.Y. C.P.L.R. § 7511(b)(1)(i).

[36] *See* Motors Ins. Corp. v. Lewis, 634 N.Y.S.2d 189, 190 (N.Y. App. Div. 1995) (finding that vacatur not warranted because ''[t]he appellant has not demonstrated by clear and convincing evidence that the respondent procured his award of uninsured motorist benefits through fraud.''). In *Motors Ins. Corp.*, a New York appellate court also noted that ''[t]he arbitrator was fully aware of the appellant's contentions with respect to the respondent's alleged fraud, but nevertheless concluded that the respondent was entitled to an award.'' *Id*.

[37] 9 U.S.C. § 10(a)(2).

[38] Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., 668 F.3d 60, 72 (2d Cir. 2012) (''Among the circumstances under which the evident-partiality standard is likely to be met are those in which an arbitrator fails to disclose a relationship or interest that is strongly suggestive of bias in favor of one of the parties.''); Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 645–46 (9th Cir. 2010) (''To show 'evident partiality' in an arbitrator, Lloyd's either must establish specific facts indicating actual bias toward or against a party or show that Whitehead failed to disclose to the parties information that creates a reasonable impression of bias.'') (citation and internal quotation omitted).

[39] *See* Scandinavian Reinsurance Co., 668 F.3d at 64 (''Evident partiality may be found . . . where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'') (citation and internal quotation omitted); Woods v. Saturn Distrib. Corp., 78 F.3d 424, 427 (9th Cir. 1996) (''In nondisclosure cases, vacatur is appropriate where the arbitrator's failure to disclose information gives the impression of bias in favor of one party.''). Some federal courts have developed specific multifactor tests to evaluate motions brought under the ''evident partiality'' prong of FAA § 10. *See, e.g.*, Three S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 530 (4th Cir. 2007) (''To determine if a party has established such partiality, a court should assess four factors: (1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (2) the directness of the relationship between the arbitrator and the party he is alleged to favor; (3) the connection of that relationship to the arbitrator; and (4) the proximity in time between the relationship and the arbitration proceeding.'').

[40] *See, e.g.*, Kolel Beth Yechiel Mechil of Tartikov, 729 F.3d at 104 (requiring that evidence of the arbitrator's evident partiality or corruption be ''abundantly clear''); Azroui v. E*Trade Sec., LLC, 499 F. Appx. 606, 607 (7th Cir. 2013) (noting '' 'difficult' burden of showing direct bias'') citation and internal quotation marks omitted); *see also*

where, for example, one of the arbitrators failed to disclose to the parties that there was a commercial relationship between a division of the arbitrator's company and the parent company of one of the parties to the arbitration—at least where the parties' arbitration agreement provided that ''[n]o person shall *serve* as an arbitrator who has or has had a financial or personal interest in the outcome of the arbitration . . . .''[41] Further, ''when an arbitrator knows of a potential conflict, a failure to investigate or disclose an intention not to investigate is indicative of evident partiality'' that could lead to vacatur of an award.[42]

Parties must generally first raise any suspicions of partiality or bias with the arbitrators during the pendency of the arbitration proceeding (assuming they have the opportunity to do so), or the issue may be deemed waived during a subsequent judicial motion to vacate. Federal courts have reached differing conclusions, however, on whether such a waiver is appropriately found in situations in which a party only had constructive, as opposed to actual, knowledge of the arbitrator's partiality or bias prior to the entry of the award.[43]

The standard under New York law for vacatur based on ''partiality of an arbitrator''[44] is more easily satisfied than the standard that courts have adopted under the FAA: ''appearance of impropriety'' by the arbitrator has been held to be a sufficient basis to vacate an award under New York law regardless of the actual effect of the conduct that created the appearance of impropriety.[45]

c. Misconduct or misbehavior on the part of arbitrators (explicitly under FAA and implicitly under New York CPLR)

Section 10(a)(3) of the FAA allows for vacatur where arbitrators are guilty of misconduct in refusing to postpone a hearing or hear evidence or where arbitrators otherwise are guilty of misbehavior prejudicing the rights of any party.[46] The mere refusal of an arbitrator to postpone a hearing or to hear a particular evidentiary submission does not necessarily rise to a level justifying vacatur; an arbitrator's refusal to do one of those things only warrants vacatur where such refusal violated ''fundamental fairness.''[47]

FAA § 10(a)(3) also contains a catch-all component allowing for vacatur where ''the arbitrators were guilty of . . . any other misbehavior by which the rights of any party have been prejudiced.''[48] However, it is extremely difficult for parties to establish that any specific acts or omissions by the arbitrators other than the statutorily enumerated examples of failure to postpone hearings or to hear evidence rise to a sufficient level to vacate the award.[49]

Article 75 of New York's CPLR does not contain a specific provision allowing for vacatur in the case of an arbitrator's misconduct.[50] However, New York courts have interpreted C.P.L.R. 7511(b)(1)—which provides for vacatur where there was ''corruption, fraud or misconduct in procuring the

Lagstein, 607 F.3d at 645–46 (holding that, ''to show 'evident partiality' in an arbitrator, [the movant] either must establish specific facts indicating actual bias toward or against a party or show that [the arbitrator] failed to disclose to the parties information that creates '[a] reasonable impression of bias' '').

[41] Applied Indus. Materials Corp. v. Ovalar Makine Ticaret ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007).

[42] *Id.* at 138.

[43] *Compare* Fid. Fed. Bank, FSB v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004) (''Holding that the waiver doctrine applies where a party to an arbitration has constructive knowledge of a potential conflict but fails to timely object is the better approach in light of our policy favoring the finality of arbitration awards.''), *with* Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1359 (6th Cir. 1989) (''The successful party in the grievance may not rely on the failure to object for bias, however, unless all the facts now argued as to the alleged bias were known . . . at the time the joint committee heard their grievances.'') (ellipsis in original) (internal quotation omitted) (quoting Early v. E. Transfer, 699 F.2d 552, 558 (1st Cir. 1983)).

[44] N.Y. C.P.L.R. 7511(b)(ii).

[45] *See* United House of Prayer for All People of Church on the Rock of Apostolic Faith v. L.M.A. Int'l, Ltd., 107 F. Supp. 2d 227, 230 (S.D.N.Y. 2000) (observing that ''courts often hold that the 'appearance of impropriety' may not be sufficient to vacate an award under the FAA, while under CPLR 7511(b), as construed by the New York courts, the appearance of impropriety may be a sufficient or critical factor in vacating arbitration awards'').

[46] 9 U.S.C. § 10(a)(3).

[47] *See* Alexander Julian, Inc. v. Mimco, Inc., 29 F. Appx. 700, 703 (2d Cir. 2002) (''In evaluating an arbitrator's decision to deny a postponement, courts consider whether there existed a reasonable basis for the arbitrator's decision and whether the denial created a 'fundamentally unfair' proceeding.'') (internal quotation omitted) (quoting Bisnoff v. King, 154 F. Supp. 2d 630, 637 (S.D.N.Y. 2001)); Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (''Courts have interpreted section 10(a)(3) to mean that except where fundamental fairness is violated, arbitration determinations will not be opened up to evidentiary review. In making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts.'') (citation and internal quotation omitted); Howard Univ. v. Metro. Campus Police Officer's Union, 512 F.3d 716, 721 (D.C. Cir. 2008) (finding that, ''in making evidentiary determinations, an arbitrator need not follow all the niceties observed by the federal courts. The arbitrator need only grant the parties a fundamentally fair hearing'') (citation and internal quotation omitted); Hamel-Schwulst v. Cnty. Place Mortg., Ltd., 406 F. Appx. 906, 914 (5th Cir. 2010) (''When a party requests that an arbitration award be vacated pursuant to § 10(a)(3), the party must establish, at base, th[at] she suffered from serious prejudice as a result of the arbitrator's alleged misconduct.''); Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997) (''When the exclusion of relevant evidence actually deprived a party of a fair hearing . . . it is appropriate to vacate an arbitral award.'').

[48] 9 U.S.C. § 10(a)(3).

[49] *See, e.g.*, Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264–66 (7th Cir. 1992) (finding that arbitrator's referring witness to a particular section of an agreement during cross-examination did not constitute actionable ''misconduct'' under § 10(a)(3), particularly where parties had agreed in advance that arbitrator could ask questions to witnesses); On Time Staffing, LLC v. Nat'l Union Fire Ins. Co. of Pitt., PA, 784 F. Supp. 2d 450, 455 (S.D.N.Y. 2011) (rejecting the contention of one of the parties that ''that the Panel committed 'misconduct' under FAA § 10(a)(3) by ordering the posting of pre-hearing security without first conducting a full evidentiary hearing.''); Lunsford v. RBC Rain Dauscher, Inc., 590 F. Supp. 2d 1153, 1156–57 (D. Minn. 2008) (Neither the arbitrators' refusal to permit plaintiffs to cross-examine defendants in person at the hearing, nor their refusal to issue a subpoena to obtain recordings of certain conversations, could be held to ''amount[] to bad faith or affirmative misconduct'' that would warrant vacatur).

[50] *See generally* N.Y. C.P.L.R. 7511(b).

award''—as allowing for vacatur in certain instances of arbitrator misconduct. For example, New York courts have been willing to vacate awards when the arbitrator's refusal to postpone the hearing or admit relevant evidence had a sufficiently prejudicial effect.[51] Additionally, some instances of arbitrator misconduct may fall under the rubric of a C.P.L.R. provision providing for vacatur where the arbitrator failed to follow C.P.L.R.-mandated procedures in conducting the arbitration.[52]

It may prove difficult for a party to a FINRA arbitration to prove that an arbitrator wrongfully refused to hear evidence regardless of whether a reviewing court is bound by the FAA or by the C.P.L.R. (or by the arbitration law of another jurisdiction). FINRA arbitration awards are generally not required to disclose what evidence the arbitrator chose to consider or exclude or to disclose any other factors that went into the decision.[53]

In some cases, the transcript of the hearing will reveal and memorialize the arbitrators' decisions regarding requests to admit certain evidence.[54] Sometimes, however, the arbitrators will decline to resolve an evidentiary dispute by commenting that they will ''take this document for what it's worth.'' In such an instance, the extent to which the evidence was actually considered may never be known.

d. Where the arbitrator exceeded or imperfectly executed his powers (FAA and New York CPLR)

Section 10(a)(4) of the FAA authorizes vacatur ''where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.''[55] It is the only FAA provision that permits a court to address the merits of the determinations made by the arbitrators, rather than the conduct of the parties, the conduct or associations of the arbitrators or the procedures used in the arbitration.

Likewise, C.P.L.R. 7511(b)(1)(iii), which authorizes vacatur where ''an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made,''[56] is the only provision of article 75 of the C.P.L.R. that permits a court to vacate an award based on the merits of the determinations made by the arbitrators.

(1) Arbitrators exceeding their powers

A party seeking to set aside on award on the basis that the arbitrator's powers were exceeded or imperfectly executed ''bears a heavy burden'' to convince the court to override the substantive judgment of the arbitrator.[57] ''Only if the arbitrator acts outside the scope of his contractually delegated authority . . . may a court overturn his determination.''[58]

The Supreme Court has explained that ''an arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement.''[59]

New York courts have held that an arbitrator may be deemed to have exceeded his power only ''where his 'award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power.' ''[60]

(2) Arbitrators imperfectly executing their powers

Under the FAA, an award can be vacated when an arbitrator has ''so imperfectly executed [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made'' because the award does not finally determine liability and damages on the parties' claims.[61]

Under New York's C.P.L.R., if an arbitrator has ''so imperfectly executed [his powers] that a final and definite award upon the subject matter submitted was not made,'' the arbitrator

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[51] *In re* Bevona v. Sup. Maint. Co., 611 N.Y.S.2d 193, 195 (N.Y. App. Div. 1994) (''where refusal to grant adjournment forecloses the presentation of evidence and results in the effective exclusion of an entire issue, such ruling constitutes 'misconduct' within the meaning of CPLR 7511(b)(1)(i)'') (citations omitted); Bernstein v. Mitgang, 661 N.Y.S.2d 253, 254 (N.Y. App. Div. 1997) (''An arbitrator's award may be vacated for prejudicial misconduct by the arbitrator . . . and one form of misconduct is the refusal to hear pertinent and material evidence'') (citations omitted) (citing Prof'l Staff Congress/City Univ. of N.Y. v. Bd. of Higher Ed. of City of N.Y., 347 N.E.2d 918 (1976)).

[52] *See* 289 SPS § V-C1g, *Failure to follow statutory arbitration procedures (New York CPLR only)*.

[53] *See* 289 SPS § IV-A2, *Explained decision requests* (discussing the requirement that the parties jointly request an ''explained decision'').

[54] FINRA rules require that every FINRA hearing be recorded or stenographically transcribed. FINRA Rules 12606, 13606.

[55] 9 U.S.C. § 10(a)(4).

[56] N.Y. C.P.L.R. 7511(b)(1)(iii).

[57] Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013).

[58] *Id.* at 2068 (citation and internal quotation omitted).

[59] Jock v. Sterling Jewelers Inc., 646 F.3d 113, 122 (2d Cir. 2011). The *Jock* court distinguished two situations—one where the arbitrators reach an issue that the operative agreement does not permit to be arbitrated and one where the arbitrators incorrectly decided an issue validly before them. Only in the former situation may a court vacate the award on the theory that the arbitrators exceeded their power. *Id.* at 123. *See also* Timegate Studios, Inc. v. Southpeak Interactive, LLC, 713 F.3d 797, 802–03 (5th Cir. 2013) (''We will sustain an arbitration award as long as the arbitrator's decision 'draws its essence' from the contract—even if we disagree with the arbitrator's interpretation of the contract . . . [A]n arbitrator has not exceeded his powers unless he has utterly contorted the evident purpose and intent of the parties—the 'essence' of the contract.'').

[60] In re Arbitration of Kowaleski v. N.Y. Dep't of Corr. Servs., 942 N.E.2d 291, 294 (2010) (quoting N.Y. City Transit Auth. v. Transport Workers Local 100, 845 N.E.2d 1243, 1245 (N.Y. 2005)).

[61] *See generally* Esso Exploration & Prod. Chad, Inc. v. Taylor Int'l Servs., Inc., 293 F. Appx. 34, 35 (2d Cir. 2008) (holding that ''the arbitration award was 'final and definite' '' and that ''[t]he arbitrator decided both liability and damages on the claims presented'') (citation omitted).

fails to dispose of the controversy and thus leaves open the possibility of further litigation to resolve the controversy.[62]

e. Violation of public policy

Federal courts have been willing to vacate arbitration awards where the underlying agreement between the parties is deemed to violate a ''public policy.'' The court will then decline to uphold the award in order to avoid enforcing the agreement.[63] The public policy being upheld ''must be 'explicit,' 'well defined,' and 'dominant.' ''[64]

New York courts have likewise accepted violation of public policy as grounds to vacate an arbitration award.[65] To warrant vacatur under this ''extremely narrow'' doctrine, either ''the particular matters to be decided by arbitration'' must be absolutely prohibited by law, or the arbitration award itself must be found to violate ''a well-defined constitutional, statutory or common law'' of the state of New York.[66]

f. Irrationality of awards

Some federal courts have held that an arbitration award can be vacated if the award is ''completely irrational.''[67] Not all courts have accepted this gloss on § 10(a)(4) of the FAA.[68] In federal jurisdictions where the doctrine of irrationality is available, successfully raising it often requires a showing that the award fail to draw its essence from the parties' agreement.[69] Other courts hold that an award may be vacated on the grounds of ''complete irrationality'' where the award ''is so completely irrational that it lacks support altogether.''[70]

New York courts will only set aside an award as ''irrational'' where the court finds either that there was ''no proof whatever to justify the award''[71] or that the arbitrator's construction of the parties' agreement had the effect of writing ''a new contract for the parties.''[72]

g. Failure to follow statutory arbitration procedures (New York CPLR only)

Article 75 of New York's C.P.L.R. sets forth certain procedures that must be followed in arbitrations governed by New York arbitration law, such as that ''[t]he parties are entitled to be heard, to present evidence and to cross-examine witnesses,''[73] and that ''party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place.''[74] An arbitrator's failure to abide by such statutory obligations may give rise to a motion to vacate his award where a party was prejudiced;[75] however, the moving party may be held to have waived any objection to procedural irregularities in the arbitra-

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[62] *See* Sands Bros. & Co. v. Generex Pharm., Ltd., 720 N.Y.S.2d 450, 451 (N.Y. App. Div. 2001) (''An arbitration award that fails to settle the dispute, relegating the parties to new controversies or future litigations in order to ascertain their rights, is deemed to be so imperfectly executed as not to constitute a final and definite award upon the subject matter submitted.'') (citations and internal quotation omitted).

[63] *See* W.R. Grace & Co. v. Rubber, Cork, Linoleum & Plastic Workers Local 759, 461 U.S. 757, 766 (1983) (holding that ''[i]f the contract as interpreted by [the arbitrator] violates some explicit public policy,'' a court is ''obliged to refrain from enforcing it'' by confirming an award rendered in an arbitration that was held pursuant to that agreement); *accord* Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 452 (2d Cir. 2011); Boehringer Ingelheim Vetmedica, Inc. v. Food & Comm. Workers Local Two, 739 F.3d 1136, 1141–42 (8th Cir. 2014) (same); Titan Tire Corp. of Freeport, Inc. v. United Steelworkers, 734 F.3d 708, 716 (7th Cir. 2011) (same). In *Titan Tire Corp.*, the Seventh Circuit ordered the vacatur of an arbitration award on the grounds that the award's directive that a corporation pay the salaries of a president and benefit representative of a union that represented the corporation's workers violated the Labor Management Relations Act even though the payments were authorized by labor agreements between the company and the union. 734 F.3d at 712.

[64] E. Associated Coal Corp. v. Mine Workers Dist. 17, 531 U.S. 57, 62 (2000) (quoting W.R. Grace & Co., 461 U.S. at 766); *Schwartz*, 665 F.3d at 452.

[65] *See* United Fed'n of Teachers Local 2 v. Bd. of Educ. of City of N.Y., 801 N.E.2d 827, 832–33 (2003).

[66] *Id.* at 833.

[67] *See, e.g.*, Bosack v. Soward, 586 F.3d 1096, 1106 (9th Cir. 2009) (''An award may be vacated if it is 'completely irrational.' '') (quoting Comedy Club Inc. v. Improv W. Assocs., 553 F.3d 1277, 1288 (9th Cir. 2009)); Hoffman v. Cargill Inc., 236 F.3d 458, 461 (8th Cir. 2001) (explaining that an award can be set aside ''where it is completely irrational'') (citation and internal quotation omitted).

[68] *See* Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC, 497 F.3d 133, 139 (2d Cir. 2007) (declining to recognize irrationality as a valid basis for vacatur because such a basis does not appear in the text of the FAA).

[69] *See Bosack*, 586 F.3d at 1106 (''Under the 'completely irrational' doctrine, the question is whether the award is 'irrational' with respect to the contract, not whether the panel's findings of fact are correct or internally consistent.''). Under this formulation, an award draws its essence from the parties' agreement, and is *not* ''completely irrational,'' where ''the award is derived from the agreement, viewed in light of the agreement's language and context, as well as other indications of the parties' intentions.'' McGrann v. First Albany Corp., 424 F.3d 743, 749 (8th Cir. 2005).

[70] Neuronetics, Inc. v. Fuzzi, No. 13-01506, 2014 BL 20006 (3d Cir. Jan. 24, 2014); *see also* Advest, Inc. v. McCarthy, 914 F.2d 6, 8–9 (1st Cir. 1990) (explaining that an award may be vacated where the movant shows that ''the award is (1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact . . . [but] as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision.'') (citations and internal quotation omitted); PMA Cap. Ins. Co. v. Platinum Underwiters Bermuda, Ltd., 659 F. Supp. 2d 631, 639 (E.D. Pa. 2009) (vacating award and explaining, ''the Arbitrators simply took [a] Provision out of the contract,'' which, in the court's view ''is 'completely irrational,' the Panel's broad discretion notwithstanding'').

[71] *In re* Arbitration of Local 342 v. Town of Huntington, 860 N.Y.S.2d 607, 608 (N.Y. App. Div. 2008) (citation and internal quotation omitted).

[72] Transparent Value, LLC v. Johnson, 941 N.Y.S.2d 96, 98 (N.Y. App. Div. 2012) (internal quotation and citation omitted).

[73] N.Y. C.P.L.R. 7506(c).

[74] N.Y. C.P.L.R. 7506(d).

[75] *See* N.Y. C.P.L.R. 7511(b)(1)(iv) (grounds for vacatur include ''failure to follow the procedure of this article''); *accord* Siegel v. Landy, 944 N.Y.S.2d 581, 584 (N.Y. App. Div. 2012) (reversing confirmation of arbitration award where arbitrator dismissed plaintiff's claims on statute of limitations grounds without holding hearing on that issue; court held that arbitrator violated ''the procedures set forth

tion if it ''continued with the arbitration with notice of the defect and without objection.''[76]

No corresponding provision in the FAA allows for a motion to vacate where the arbitrator failed to follow required procedures.[77] However, as a practical matter, the failure of the arbitrators to follow statutorily mandated procedures may give rise to a motion to vacate on the grounds that the arbitrators were guilty of ''misbehavior by which the rights of any party have been prejudiced.''[78]

h. Non-explicit basis for vacatur: Manifest disregard of the law (FAA and New York)

In 2008, the U.S. Supreme Court held that the grounds enumerated in the FAA ''provide exclusive regimes for the review [of arbitration awards] provided by the statute . . . .''[79] That holding called into question previous federal court jurisprudence, dating back to a 1953 Supreme Court decision, that had long held that arbitral awards could be vacated where the arbitrators had acted in manifest disregard of the law—a ground for vacatur that does not appear in the text of the FAA.[80]

Following the Supreme Court's holding that the FAA provides the exclusive grounds for review of arbitration awards, the Second, Fourth, Sixth and Ninth Circuits have concluded that manifest disregard is an appropriate basis for vacatur; those courts have found the doctrine to be a valid judicial gloss on the factors expressly enumerated in § 10 of the FAA.[81] On the other hand, the Fifth, Seventh, Eighth and Eleventh Circuits have concluded that manifest disregard of the law no longer remains a valid basis for vacating an arbitration award.[82]

In a statement that it later characterized as ''dicta,'' the First Circuit observed that the doctrine is no longer good law.[83] The Third, Tenth and D.C. Circuits have thus far declined to address the issue by explaining that, even if the doctrine survived, it did not apply to the facts of the cases in which it was asserted.[84] The Federal Circuit has yet to weigh in on the issue. Thus, there is now a split among federal circuits on the viability of the ''manifest disregard'' doctrine.[85]

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in CPLR article 75'' and thereby deprived plaintiff of ''her right to notice, the opportunity to be heard, and the opportunity to present evidence'') (citation omitted).

[76] N.Y. C.P.L.R. 7511(b)(1)(iv); *accord* Peckerman v. D & D Assocs., 567 N.Y.S.2d 416 (N.Y. App. Div. 1991). The *Peckerman* court found that:

> [R]espondent has not preserved any claim with respect to the alleged misconduct of the arbitrators. At no time did it ever protest the panel's decision to accept written submissions in place of further hearings. On the contrary, respondent merely filed its papers and continued with the arbitration. Thus, it has waived any purported defects.

567 N.Y.S.2d at 420.

[77] *See* 9 U.S.C. § 10.

[78] 9 U.S.C. § 10(a)(3); *see* 289 SPS § V-C1c, *Misconduct or misbehavior on the part of arbitrators (explicitly under FAA and implicitly under New York CPLR).*

[79] Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 590 (2008).

[80] *See* Wilko v. Swan, 346 U.S. 427, 436–37 (1953) (finding that ''the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation'') (emphasis added); *see also id.* at 440 (Frankfurter, J., dissenting) (''Arbitrators may not disregard the law . . . On this we are all agreed.'').

[81] *See, e.g.*, Wachovia Sec., LLC v. Brand, 671 F.3d 472, 482–83 (4th Cir. 2012) (concluding that manifest disregard exists either as an independent basis for review or as a judicial gloss); T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 340 (2d Cir. 2010) (concluding that manifest disregard is a judicial gloss on the vacatur standards enumerated in 9 U.S.C.A. § 10); Johnson v. Wells Fargo Home Mortg., Inc., 635 F.3d 401, 414 (9th Cir. 2011) (''Although the words 'manifest disregard for law' do not appear in the FAA, they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA § 10(a)(4).''); Coffee Beanery, Ltd. v. WW, LLC, 300 F. Appx. 415, 419 (6th Cir. 2008) (''In light of the Supreme Court's hesitation to reject the 'manifest disregard' doctrine in all circumstances, we believe it would be imprudent to cease employing such a universally recognized principle. Accordingly, this Court will follow its well-established precedent here and continue to employ the 'manifest disregard' standard.'').

[82] *See, e.g.*, Citigroup Global Mkts., Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) (''In the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.''); S. Commc'ns Servs., Inc. v. Thomas, 720 F.3d 1352, 1358 (11th Cir. 2013) (''[I]n light of the [Supreme] Court's decision in Hall Street, . . . the judicially-created bases for vacatur that we had formerly recognized, such as where an arbitrator behaves in manifest disregard of the law, are no longer valid.'') (citation and internal quotation omitted); Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc., 660 F.3d 281, 285 (7th Cir. 2011) (holding that manifest disregard does not survive *Hall Street* except to the extent an award purports to bind third parties who did not agree to arbitration or to compel illegal or impossible acts); Med. Shoppe Int'l, Inc. v. Turner Invs., Inc., 614 F.3d 485, 489 (8th Cir. 2010) (''Appellants' claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10 and are therefore not cognizable.'').

[83] Bangor Gas Co., LLC v. H.Q. Energy Servs. (U.S.) Inc., 695 F.3d 181, 187 (1st Cir. 2012) (''[*Hall Street*] has caused a circuit split, with this court saying (albeit in dicta) that manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act'') (internal quotation omitted) (quoting Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008)).

[84] *See, e.g.*, Bellantuono v. ICAP Sec. USA, LLC, No. 12-04253, 2014 BL 25907, at *4–5 (3d Cir. Jan. 30, 2014) (noting the circuit split but then stating that ''[b]ecause we find that the District Court was correct in concluding that the Panel did not act in manifest disregard of the law, we need not'' rule on the issue); Affinity Fin. Corp. v. AARP Fin., Inc., 468 F. Appx. 4, 5 (D.C. Cir. 2012) (holding that even if it retains validity, the manifest disregard standard would not apply); Abbott v. Law Office of Patrick J. Mulligan, 440 F. Appx. 612, 620 (10th Cir. 2011) (''[I]n the absence of firm guidance from the Supreme Court, we decline to decide whether the manifest disregard standard should be entirely jettisoned. And it is not necessary to do so because this case does not present exceedingly narrow circumstances supporting a vacatur based on manifest disregard of the law.'') (citations omitted).

[85] The Supreme Court itself has recently noted the dispute over whether manifest disregard remains viable but declined to resolve the issue. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 672 n.3 (2010) (''We do not decide whether 'manifest disregard' survives our decision in *Hall St. Assocs., LLC v. Mattel, Inc.* as an independent ground for review or as a judicial gloss on the enumerated

In federal jurisdictions where the doctrine of manifest disregard has been preserved, the movant must meet variations of the following test to show that the arbitrator consciously disregarded operative law:

- the allegedly disregarded law was ''clear, and in fact explicitly applicable to the matter before the arbitrators'';
- the law ''was in fact improperly applied, leading to an erroneous outcome''; and
- the arbitrators actually knew of the existence of the particular law and its applicability to the case.[86]

An award will not be vacated due to the arbitrator's manifest disregard of the law merely because the arbitrator made an error of law.[87] Additionally, the legal principle that was allegedly disregarded ''must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.''[88] Moreover, courts will confirm an award, and will not vacate it on the grounds of manifest disregard, where ''a justifiable ground for the decision can be inferred from the facts of the case.''[89] Nevertheless, notwithstanding the rigorous nature of the test for ''manifest disregard of the law,'' litigants are sometimes able to meet that test.[90]

New York state courts applying the C.P.L.R. have recognized the availability of ''manifest disregard of the law'' as grounds for vacatur of arbitration awards in their state,[91] although it is not expressly enumerated in article 75 of the C.P.L.R. as one of the grounds for vacatur.[92] Similar to the standard that federal courts apply, New York courts have held that vacatur for manifest disregard of the law is only appropriate where ''the arbitrators ignored law which is well defined, explicit, and clearly applicable to the case.''[93]

In courts that recognize the doctrine of manifest disregard, as a practical matter, awards in FINRA arbitrations may prove especially difficult to vacate under that doctrine. FINRA does instruct its arbitrators not to ''manifestly disregard the law'' and warns that they risk the vacatur of their award by a court of law if they disregard clear legal principles that are presented to them and apply to the case.[94] Nevertheless, the lack of explanations of the reasons for the decision in many FINRA awards,[95] which courts have considered an acceptable practice in arbitration awards,[96] often makes it difficult for losing parties

grounds for vacatur set forth at 9 U.S.C. § 10.'') (citation omitted).

[86] *T.Co Metals*, 592 F.3d at 339. *See also* Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (''[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.''); Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009) (''[F]or an arbitrator's award to be in manifest disregard of the law, '[i]t must be clear from the record that the arbitrator[ ] recognized the applicable law and then ignored it.'') (citation and internal quotation omitted); Regnery Publ'g, Inc. v. Miniter, 368 F. Appx. 148, 149 (D.C. Cir. 2010) (unpublished opinion) (holding that even if manifest disregard could be a viable basis for vacatur, appellant had not shown manifest disregard since it had not demonstrated that ''(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case'') (citation and internal quotation omitted).

[87] *See* Goldman Sachs Execution & Clearing, LP v. Official Unsecured Creditors' Comm. of Bayou Grp., LLC, 491 F. Appx. 201, 203–04 (2d Cir. 2012) (''We cannot vacate an arbitral award merely because [we are] convinced that the arbitration panel made the wrong call on the law.'') (citation and internal quotation omitted).

[88] *Bobker*, 808 F.2d at 933; *see also* M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 851 (6th Cir. 1996); CF Global Trading, LLC v. Wassenaar, No. 1:13-CV-00766, 2013 BL 278041, at *4–5 (S.D.N.Y. Oct. 8, 2013); Order, LaTour v. Citigroup Global Mkts., Inc., No. 3:11-CV-01167 (S.D. Cal. Mar. 16, 2012), *aff'd*, 544 F. Appx. 748 (9th Cir. 2013).

[89] Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 390 (2d Cir. 2003) (holding that, ''where an arbitral award contains more than one plausible reading, manifest disregard cannot be found if at least one of the readings yields a legally correct justification for the outcome'').

[90] *See, e.g.*, Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998) (''In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both.''); Coffee Beanery, Ltd. v. WW, LLC, 300 F. Appx. 415, 420–21 (6th Cir. 2008) (directing vacatur of arbitration award, where arbitrator's conclusion that party had not been required to disclose felony conviction in offering prospectus ''fl[ew] in the face of clearly established legal precedent'' and where court found that ''the Arbitrator expressly chose not to follow [the] clearly established law regarding the disclosure of [the] prior felony''); *see also* Porzig v. Dresdner, Kleinwort, Benson, N. Am., LLC, 497 F.3d 133, 143 (2d Cir. 2007) (finding that arbitration panel acted in manifest disregard of the law in its determination of attorneys' fee application, in light of ''the lack of any transparent fee calculation analysis by the Panel, which handicaps [the court's] ability to review the reasonableness of the . . . Award, the numerous incorrect representations regarding the applicable law made by the Defendants to the Panel, the fact that the Panel had been found to have issued [a previous award in the case] in manifest disregard of the law, and the fact that the Panel issued a portion of the present award without authority'') (citation omitted). In *Porzig*, the Second Circuit also found that the arbitration panel had exceeded its authority by ordering plaintiff's counsel to return a contingency fee that counsel had retained from monies awarded to the plaintiff, where plaintiff's counsel had not been a party to the arbitration. 497 F.3d at 140–41.

[91] *See, e.g.*, Cohen v. Ark Asset Holdings, Inc., 755 N.Y.S.2d 37 (N.Y. App. Div. 2003) (tersely holding that trial court opinion affirming award properly determined that ''the arbitrator's award was not . . . in manifest disregard of the law''); *but see* Genger v. Genger, 929 N.Y.S.2d 232, 235 n.2 (N.Y. App. Div. 2011) (''An arbitral award cannot be attacked on the ground that an arbitrator refused to consider, or failed to appreciate, particular evidence or arguments.'').

[92] *See* N.Y. C.P.L.R. 7511(b).

[93] Natixis N. Am., LLC v. Payner, 954 N.Y.S.2d 878 (App. Div. 1st Dept. 2012) (internal quotation omitted).

[94] *See* FINRA DISPUTE RESOLUTION, ARBITRATOR'S GUIDE 59 (2014) (''[I]t is important that arbitrators not manifestly disregard the law. By doing so, your award may be vacated. In other words, if the parties have provided the panel with the law, the law is clear, and it applies to the facts of the case, the arbitrators should not disregard it.'').

[95] *See* 289 SPS § IV-H2, *Explained decisions*.

[96] *See* Folkway Music Publishers, Inc. v. Weiss, 989 F.2d 108, 112 (2d Cir. 1993) (''[A] lack of accompanying justification for the award

to point to evidence that the arbitrator consciously disregarded controlling law.[97]

Instead, where arbitrators do not explain their decision—and consistent with the general rule in cases where the ''manifest disregard'' doctrine is raised—the award will be confirmed so long as ''a justifiable ground for the decision can be inferred from the facts of the case.''[98] Even ''explained decisions'' in FINRA arbitrations are not required to set forth any of the legal authorities on which the arbitrators may have relied;[99] absent disclosure of those legal authorities in the written award, it will often prove challenging in practice to show that the arbitrators chose to ignore controlling legal principles or that no justifiable ground for the decision may be inferred.

will not render the award . . . in manifest disregard of the law. Arbitrators need not give reasons for their determinations.'') (citing Wilko v. Swan, 346 U.S. 427, 436 (1953)); *but see* W. Emp'rs Ins. Co. v. Jefferies & Co., 958 F.2d 258, 262 (9th Cir. 1992) (holding that, where parties' agreement provided for arbitration in which award would set forth findings of fact and conclusions of law, NASD arbitrators exceeded their authority by issuing award that did not include findings of fact or conclusions of law).

[97] *See* Murray v. Citigroup Global Mkts., Inc., 511 F. Appx. 453, 455 (6th Cir. 2013) (finding that ''the absence of a reasoned award makes it all but impossible to determine whether the [FINRA] arbitration panel acted in manifest disregard of the law''); Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (''As arbitrators need not explain their award and did not do so here, it is no wonder that appellant is hard pressed to satisfy the exacting criteria for invocation of the [manifest disregard] doctrine.'') (citation omitted); Ohlfs v. Charles Schwab & Co., No. 1:08-CV-00710, 2012 BL 16637, at *8 (D. Colo. Jan. 24, 2012) (''In the absence of an explanation for the Award, Plaintiff cannot demonstrate that the [FINRA arbitration] panel manifestly disregarded the law . . . based on the fact that it found for Defendant on his claims.''); *see also* Global Reins. Corp. of Am. v. Argonaut Ins. Co., 634 F. Supp. 2d 342, 349 (S.D.N.Y. 2009) (''Where the arbitrators have failed to document the reasoning behind their decision—a perfectly acceptable practice in arbitration—courts must consider the facts and the law to determine whether the allegedly disregarded law was clearly applicable and ignored.'') (citations and internal quotations omitted); *In re* Arbitration of Solow Bldg. Co., LLC v. Morgan Guar. Trust Co. of N.Y., 776 N.Y.S.2d 547, 548 (N.Y. App. Div. 2004) (''[B]ecause arbitrators are not required to give reasons for their decision, an award cannot be attacked on the basis of a dissenting arbitrator's affidavit or other evidence that the panel refused to consider or failed to appreciate particular evidence or arguments.''); *but see Porzig*, 497 F.3d at 141–42 (''[W]hen the circumstances that exist in this case are present—namely, where a court has already taken the rare and extreme step of vacating the original award for being issued in manifest disregard of law, where the Panel on remand has acted plainly outside its authority with respect to one facet of the award, and where we do not have the benefit of being able to examine the Panel's analytical methodology on the very issue that required the original vacatur and remand-we may consider that absence of explanation when deciding whether the Panel has acted in manifest disregard of the law.'') (footnote omitted); *Halligan*, 148 F.3d at 204 (''At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account.'').

[98] Data & Dev., Inc. v. InfoKall, Inc., 513 F. Appx. 117, 117 (2d Cir. 2013) (citation and internal quotation omitted); *accord* Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 354–55 (D.C. Cir. 2006).

[99] FINRA Rules 12904(g)(2), 13904(g)(2).

2. Grounds for modification of arbitration awards

An arbitration award is subject to judicial modification to correct mathematical errors, clerical errors, and the like; those types of minor errors may be rectified without casting aside the entire award. However, only mistakes or irregularities that do not go to the merits of the award may be modified by a court of law. Section 11 of the FAA supplies the following grounds for modification or correction (as opposed to vacatur) of an award:

- where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
- where the arbitrators have awarded upon a matter not submitted to them, unless it does not affect the merits of the decision upon the matter submitted; or
- where the award is imperfect in matter of form not affecting the merits of the controversy.[100]

Where one or more of the criteria for modification or correction are determined to apply, the FAA authorizes the entry of a judicial order to ''modify and correct the award, so as to effect the intent thereof and promote justice between the parties.''[101]

New York's provisions for modification of an award are virtually identical to those of the FAA. Modification (the C.P.L.R. does not use the additional term ''correction'') is available where:

- there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award;
- the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
- the award is imperfect in a matter of form, not affecting the merits of the controversy.[102]

[100] 9 U.S.C. § 11; *accord* Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 708 (2d Cir. 1985) (modification of award only available if case falls within one of grounds of § 11 of FAA); Atl. Aviation, Inc. v. EBM Grp., Inc., 11 F.3d 1276, 1284 (5th Cir. 1994) (''[T]he failure of the panel to award the balance remaining under the contract to Atlantic was in essence a clerical error which may be corrected without disturbing the merits of the arbitrators' decision . . . Correcting the award to reflect th[e] [panel's] intention neither changes the panel's findings that Atlantic breached its duty timely to deliver the aircraft to EBM nor affects the panel's award of $16,664 to EBM.''); Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F. Supp. 2d 10, 15 (D. Mass. 2002) (''Nationwide has convincingly argued that the inclusion of the $855,898 figure in the final award as the recognized principal amount of the Owens–Illinois claim was a simple mistake. The award should be corrected to substitute the agreed principal amount of the Owens–Illinois award, $630,000.'').

[101] 9 U.S.C. § 11.

[102] N.Y. C.P.L.R. 7511(c); *accord* Daly v. Lehman Bros., Inc., 675 N.Y.S.2d 535, 535 (N.Y. App. Div. 1998) (''[T]here [does not] exist any basis to modify the award pursuant to CPLR 7511(c)(1). The claimed error affecting the award is not computational in nature and,

D. Expungement of Information from the Record of a FINRA Member or Associated Person

1. Background: The CRD

FINRA operates the Central Registration Depository (CRD), describing it as ''the central licensing and registration system for the U.S. securities industry and its regulators.''[103] Housed within the CRD are ''the registration records of more than 6,800 registered broker-dealers and the qualification, employment, and disclosure histories of more than 660,000 active registered individuals.''[104]

In the event of a customer dispute involving a FINRA member or associated person,[105] an entry regarding the customer's complaint is made in the CRD file for that member or associated person. Even when an associated person is not named as a respondent in a customer arbitration, a notation regarding the customer complaint may be made in the CRD file for that associated person where, for example, the customer's statement of claim alleges misconduct by the associated person.[106]

A member or associated person who seeks the removal from its CRD entry of ''information arising from disputes with customers''[107] must apply to either a court or an arbitration panel for an order directing expungement of the information in question.[108]

2. Grounds for expungement

FINRA regards expungement as ''an extraordinary remedy that should be granted only under appropriate circumstances.''[109] It is viewed as extraordinary in part because it is an irrevocable step: ''[o]nce information is expunged from the CRD system, it is permanently deleted and thus no longer available to the investing public, regulators or prospective broker-dealer employers.''[110] Thus, FINRA arbitrators are instructed that ''[i]nformation should be expunged only when it has no meaningful investor protection or regulatory value.''[111]

Expungement is available if at least one of the following conditions is met:

- the claim, allegation or information is factually impossible or clearly erroneous;
- the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds; or
- the claim, allegation or information is false.[112]

3. Procedure for seeking expungement

a. Raising an expungement request in arbitration

For expungement requests that are raised initially during an arbitration proceeding (as opposed to those brought up in the first instance in a judicial application), FINRA's rules do not specify the point in time at which the request should first be articulated. The rules do not specifically require that a request for expungement be included in the member's or associated person's responsive pleading. The relevant provisions in the Customer and Industry Codes provide in broad terms that ''[t]he answer to the statement of claim may include any counterclaims against the claimant, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, as well as any additional documents supporting such claim,''[113] but do not specifically mention expungement requests.

FINRA's website does recommend that a request for expungement be initially made in the pleading that the requesting party files in the arbitration:

accordingly is not error of the sort remediable under the authority of that statute.''); Taunus Corp. v. Allianz Ins. Co., No. 2003-602519 (N.Y. Super. Ct. June 29, 2006) (''Modification pursuant to CPLR 7511(c)(1) is available only where a mathematical error in the computation of damages is evident from the face of the award, and not where the party is challenging the [arbitrator's] exercise of judgment or the basis of an award.'').

[103] *See Central Registration Depository (CRD)*, FINRA.ORG. FINRA maintains the CRD pursuant to Exchange Act § 15A(i)(1)(A), which requires registered securities associations such as FINRA to ''establish and maintain a system for collecting and retaining registration information.'' 15 U.S.C. § 78o-3(i)(1)(A). *See also* 15 U.S.C. § 78o-3(i)(5) (defining ''registration information'' as ''the information reported in connection with the registration or licensing of brokers and dealers and their associated persons, including 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.''). *See generally* Bridge v. E*TRADE Sec. LLC, No. 3:11-CV-02521, 2012 BL 200433, at *1 (N.D. Cal. Aug. 7, 2012) (''Under the Securities Exchange Act, one of FINRA's duties is to establish and maintain a system for collecting and retaining registration information about registered representatives. . . .'') (citation and internal quotation omitted).

[104] *Central Registration Depository (CRD)*, FINRA.ORG.

[105] *See* 289 SPS § I-B1, *Customer disputes* (discussing the definition of ''associated person'').

[106] *See, e.g.*, Lawrence J. Davis Revocable Trust v. Wells Fargo Invs., LLC, FINRA Arb. No. 09-04863, at 3 (June 20, 2012) (addressing request for expungement of references to the arbitration from the CRD records of two individuals who were not parties to the arbitration but were mentioned in the customer's Statement of Claim).

[107] For purposes of expungement applications, '' 'customer dispute information' includes customer complaints, arbitration claims, and court filings made by customers, and the arbitration awards or court judgments that may result from those claims or filings.'' FINRA, *Expungement*,Notice to Members 04-16, at 213 (Mar. 2004). Customer dispute information generally contains allegations that a member or one or more of its associated persons ''has violated securities laws, rules, or regulations.'' *Id.*

[108] FINRA Rule 2080(a). However, ''FINRA may execute, without a court order, arbitration awards rendered in disputes between firms and associated persons that contain directives to expunge information other than customer dispute information, provided that the arbitration panel states that expungement relief is being granted because of the defamatory nature of the information.'' *FINRA Rule 2080 (Formerly NASD Rule 2130) Frequently Asked Questions*, FINRA.ORG (answering Question 1).

[109] *Notice to Arbitrators and Parties on Expanded Expungement Guidance*, FINRA.ORG.

[110] *Id.*

[111] *Id.*

[112] FINRA Rule 2080(b)(1); *see also Expanded Expungement Guidance*, FINRA.ORG.

[113] *See* FINRA Rules 12303(b), 13303(b). *See generally* 289 SPS § I-G, *Answering the Statement of Claim*.

> [A] party seeking expungement in an arbitration proceeding should request expungement, *preferably* in his or her answer, counterclaim or statement of claim. The arbitrators will decide whether to grant a request for expungement on the basis of one or more of the . . . standards specified in Rule 2080.[114]

This explanation, however, suggests that raising the request in the party's pleading is preferred but not imperative, and the failure to do so may not necessarily foreclose that party from successfully raising the issue of expungement at a later point in the proceeding—or even after the conclusion of the arbitration in a plenary judicial action.[115]

Accordingly, while it may be the better practice for expungement to be among the items of relief specified in the member's or associated person's responsive pleading, the issue may be raised later on.

b. Arbitral hearings and awards regarding requests for expungement

Where expungement is sought, the panel of arbitrators must hold a recorded hearing to discuss the expungement request (although that hearing may be held either in person or telephonically).[116] Where the expungement is requested pursuant to a settlement among the parties rather than an award finding in favor of the associated person, the Panel is required to ''review settlement documents and consider the amount of payments made to any party and any other terms and conditions'' of the settlement.[117]

An award granting expungement must set forth the grounds that serve as the basis for the expungement, and must further ''provide a brief written explanation of the reason(s)'' for the determination that one or more of those grounds for expungement is satisfied under the facts of the case.[118] For information to actually be expunged from the CRD system, an award granting expungement must be confirmed by a court of competent jurisdiction.[119]

Although, as stated above, FINRA regards expungement as an ''extraordinary'' remedy,[120] arbitrators appear to grant it in a majority of cases in which it is sought. A study released in October 2013 by a self-described public interest bar group examined FINRA arbitration awards issued between May 18, 2009, and December 31, 2011, that addressed expungement requests. The study found that expungement was granted in 96.9 percent of cases where there was a stipulated settlement between the parties disposing of the claims, and in 64 percent of cases where a decision on the merits was issued in the respondent's favor.[121] Moreover, expungement was granted in 23 percent of cases where a decision on the merits was issued in the claimant's favor.[122]

c. Judicial proceedings regarding expungement requests

When a party makes a motion for judicial confirmation of an award of expungement or applies to a court for an order for expungement, FINRA must be named as an additional party to the application unless FINRA waives its right to be so named.[123] The requirement to name FINRA as an additional party may be waived in two types of circumstances.

First, the requirement can be waived upon request of the party seeking the judicial expungement order where there have been ''affirmative judicial or arbitral findings'' that the claim, allegation or information that was the basis for the CRD entry is factually impossible, clearly erroneous, or false, or that the applicant for expungement ''was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation or conversion of funds.''[124] In other words, the party can request FINRA to waive the requirement where an arbitrator or court has already found that one of the enumerated grounds for granting of expungement is met.

Second, FINRA may, ''in its sole discretion and under extraordinary circumstances,'' waive the requirement that it be named as an additional party. It may do so if it finds both that ''the expungement relief and accompanying findings on which it is based are meritorious'' and that ''the expungement would have no material adverse effect on investor protection, the integrity of the CRD system or regulatory requirements.''[125]

When a party asks FINRA to waive the requirement to name it as an additional party in judicial proceedings regarding expungement, ''FINRA staff will provide to the States where the individual is, or is seeking to be, registered a copy of the waiver request and any accompanying documents.''[126] Authorities in those states may seek to intervene in the judicial proceedings to oppose the expungement request.[127]

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[114] *FINRA Rule 2080 FAQ*, FINRA.ORG. (emphasis added) (answering Question 4).

[115] An earlier notice issued by the National Association of Securities Dealers (NASD) regarding NASD Rule 2130 (the predecessor to FINRA rule 2080) explains that a ''respondent seeking expungement relief in an arbitration would ask for expungement in his or her prayer for relief,'' although the text of NASD Rule 2130 did not actually require respondents to do so. *See* NASD, *Expungement*, Notice to Members 04-16 (Mar. 2004). In any event, the ambiguous language in the more recent FINRA FAQ reflects FINRA's most current pronouncement on the issue.

[116] FINRA Rules 12805(a), 13805(a).

[117] FINRA Rules 12805(b), 13805(b).

[118] FINRA Rules 12805(c), 13805(c).

[119] FINRA Rule 2080(a).

[120] *See Expanded Expungement Guidance*, FINRA.ORG.

[121] *See* Susan Antilla, *Black Marks Routinely Expunged From Brokers' Records, Report Finds*, N.Y. TIMES, Oct. 16, 2013; PUB. INVESTORS ARBITRATION BAR ASS'N (PIABA), STUDY: STOCKBROKER ARBITRATION SLATES WIPED CLEAN 9 OUT OF 10 TIMES WHEN ''EXPUNGEMENT'' SOUGHT IN SETTLED CASES 21 (2013). The accuracy of these statistics (and thus the statistics themselves) may need to be taken with a grain of salt, as PIABA is an advocacy group for customer claimants. Furthermore, each arbitration panel will deal with expungement on the case before it, as it applies to the criteria pertaining to the person at issue.

[122] PIABA STUDY, at 21.

[123] FINRA Rule 2080(b).

[124] FINRA Rule 2080(b)(1).

[125] FINRA Rule 2080(b)(2).

[126] *FINRA Rule 2080 FAQ*, FINRA.ORG (answering Question 7).

[127] *Id. See, e.g.*, Karsner v. Lothian, 532 F.3d 876, 885–87 (D.C. Cir. 2008) (reversing district court's denial of motion by Maryland Commissioner of Securities to intervene in proceeding for confirmation of arbitration award that contained expungement relief).

VI.
FINRA Investigations and Enforcement Actions

A. Investigations

1. Requests for discovery from members or associated persons

When FINRA conducts investigations into possible misconduct by firms or associated persons, one way that it gathers information is by requesting documents and testimony from them. Failure of a person over whom FINRA has jurisdiction to comply with such a request ''may result in a fine, suspension or bar from the industry.''[1] FINRA may also issue investigatory discovery requests to persons over whom it lacks jurisdiction, such as customers, although as FINRA acknowledges, the compliance of those persons is voluntary.[2]

a. Requests for books and records

An Adjudicator[3] or a FINRA staff member may require a FINRA member, a person associated with a member, or any other person subject to FINRA's jurisdiction to provide for inspection and copying ''the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding that is in such member's or person's possession, custody or control.''[4]

b. Requests for testimony or written information

An Adjudicator or FINRA staff member may require a FINRA member, a ''person associated with a member,'' or ''any other person subject to FINRA's jurisdiction'' to ''provide information orally, in writing, or electronically,'' as well as to testify in person ''with respect to any matter involved in the investigation, complaint, examination, or proceeding.''[5] Personal testimony may be required to be given under oath or affirmation.[6]

Persons who are served with notice to provide testimony are advised of their right to:

- have an attorney present for the questioning;
- review a copy of their transcript; and
- make a written request for a copy of their transcript.[7]

Transcript requests will be honored unless FINRA's staff has good cause to withhold it.[8]

2. Sufficiency of evidence review and cautionary actions

Upon completing an investigation, FINRA staff conducts a sufficiency of evidence review, in which it analyzes the evidence and applicable law and makes a preliminary determination of whether or not a violation appears to have occurred.[9] If it appears from that review that rules have been violated, FINRA determines whether official disciplinary action is merited. If the violation is deemed minor and there is no customer harm or detrimental market impact, FINRA may resolve the matter through an informal disciplinary action, an example of which is the issuance of a Cautionary Action.[10]

Cautionary Actions, although they may be taken into account in future disciplinary proceedings, do not themselves constitute formal discipline and are not reported in FINRA's Central Registration Depository (CRD) with respect to the member or associated person.[11] This is an important distinction because the CRD is, in effect, a broker's ''permanent record'' and follows the broker's entire career.[12] Thus, FINRA's decision to issue a Cautionary Action rather than commence a formal disciplinary action, in addition to sparing the respondent form the expenses and stresses of litigation, can make a significant difference for the broker's career.

3. Wells submissions

If FINRA contemplates bringing formal disciplinary charges against an entity or individual as a result of its investigation, its staff will typically contact that respondent or its counsel to advise of its intention.[13] During this initial communication, which FINRA staff refer to as a ''Wells Call,''[14] the respondent is advised of the potential charges and the principal supporting evidence.[15] The respondent is given the opportunity to submit a Wells Submission, to address the relevant facts and law and to explain why formal charges against the respondent would not be appropriate.[16] FINRA follows up the Wells Call with a confirmatory letter known as a Wells Notice.[17] Associated persons are required to disclose the receipt of a Wells Notice on their U4 forms,[18] and certain FINRA member firms,

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[1] FINRA, Reg. Notice 09-17, Investigations and Formal Disciplinary Actions, at 2 (Mar. 2009).

[2] *Id*.

[3] FINRA defines an ''Adjudicator'' as a body, board, committee, group, or natural person that presides over a proceeding and renders a decision or a recommended or proposed decision that is acted upon by an Adjudicator or a natural person who serves on such a body, board, committee, or group. FINRA Rule 9120(a).

[4] FINRA Rule 8210(a)(2).

[5] FINRA Rule 8210(a)(1).

[6] *Id*.

[7] FINRA Reg. Notice 09-17, at 3.

[8] *Id*.

[9] *Id*.

[10] *Id*.

[11] *Id*.

[12] Respondents who have customer complaints against them reported in the Central Registration Depository (CRD) may seek expungement from the CRD record of information regarding those complaints. *See* 289 SPS § V-D, *Expungement of Information from the Record of a FINRA Member or Associated Person*. However, FINRA's rules make no provision for expungement from the CRD of information regarding a disciplinary proceeding against a member or associated person.

[13] FINRA Reg. Notice 09-17, at 3–4.

[14] *Id*. at 3. ''Wells Call'' and related terms date back to 1972 and arose from a committee appointed by the chairman of the SEC and led by former Sen. John Wells. The committee, charged with reviewing and evaluating the SEC's enforcement policies and practices, recommended that the Commission should provide notice to prospective respondents of charges that the SEC staff was considering. This notice has subsequently been referred to be securities regulators as a Wells Notice, and this terminology and device are used by FINRA in its disciplinary process.

[15] *Id.* at 3.

[16] *Id*.

[17] *Id*.

[18] Form U4 is the uniform application for securities industry regis-

such as publicly traded companies, may also be required to disclose receipt of the notice.[19]

Respondents or their counsel who are invited to make a Wells Submission should consider that, while such submissions may offer a valuable opportunity to articulate respondents' positions, the submissions are not often successful in persuading FINRA to refrain from commencing disciplinary proceedings. Conversely, the contents of Wells Submissions may have a damaging impact against the respondent in subsequent proceedings. For example, statements in Wells Submissions may be used as admissions by the respondent or to impeach a respondent who later provides allegedly inconsistent testimony.

The Wells process is employed by FINRA on a discretionary basis; in cases of sufficient urgency, such as when customer funds are at risk, FINRA may move forward immediately with a formal disciplinary proceeding without affording the respondent an opportunity to dissuade it.[20] In cases where there is a Wells Submission, after receiving the submission, FINRA staff may request additional information from the respondent or may gather additional information on its own.[21] FINRA staff review the submission and determine whether to move forward with formal disciplinary action; FINRA may also decide to pursue settlement discussions if the respondent has initiated such a dialogue.[22] According to FINRA, most cases settle prior to litigation.[23] The mechanism to effectuate a settlement is the issuance of a document called a Letter of Acceptance Waiver and Consent.[24]

If the matter is closed without formal disciplinary action against a respondent who received a Wells Notice, FINRA sends a closing letter to that respondent.[25] If FINRA does decide to pursue charges against the respondent, the next step is to commence a disciplinary proceeding.

4. Risks in cases with parallel proceedings

Concurrently with a FINRA investigation, a respondent may be under investigation by governmental entities such as the SEC. The respondent may also face investigation by the Justice Department and thus be exposed to the threat of criminal prosecution. Additionally, private parties may commence litigation or arbitration against the respondent based on the conduct at issue.

Where parallel regulatory, criminal, or civil proceedings are occurring, respondents and their counsel should consider carefully the effect that admissions or production of evidence in the FINRA investigation may have on such parallel proceedings. For example, documents produced to FINRA pursuant to a request for information may be subject to subpoena by private litigants or may be shared with governmental entities as well as other self-regulatory organizations.[26] Wells submissions may also be discoverable.[27] Admissions to FINRA may in a particular case tend to incriminate the respondent, but a respondent has no Fifth Amendment right to avoid cooperation with FINRA, as FINRA is a private self-regulatory organization rather than an arm of the government.[28] Conversely, failure to respond to provide documents or testimony requested in a FINRA investigation, even when the Fifth Amendment is invoked, may expose the respondent to severe sanctions such as loss of securities license.

B. Disciplinary Proceedings

1. Contents of a FINRA complaint

A FINRA disciplinary hearing is commenced via the filing and service of a written complaint against the respondent.[29] The complaint is issued by either FINRA's Department of Enforcement (DOE) or its Department of Market Regulation

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tration used by broker-dealers to register associated persons with self-regulatory organizations (SROs) and jurisdictions. *See* FINRA, FORM U4: UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER (May 2009).

[19] FINRA Reg. Notice 09-17, at 3.

[20] *Id.*

[21] *Id.* at 4.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Under FINRA rules:

> FINRA staff may enter into an agreement with a domestic federal agency, or subdivision thereof, or foreign regulator to share any information in FINRA's possession for any regulatory purpose set forth in such agreement, provided that the agreement must require the other regulator, in accordance with the terms of the agreement, to treat any shared information confidentially and to assert such confidentiality and other applicable privileges in response to any requests for such information from third parties.

FINRA Rule 8210(b).

[27] *See In re* Initial Pub. Offering (IPO) Sec. Litig., No. 1:21-MC-00092 (S.D.N.Y. Jan. 12, 2004) (finding that defendant underwriters' Wells Submissions to the SEC were relevant and therefore discoverable in private civil action); Prymak v. Contemporary Fin. Solutions, Inc., No. 1:07-CV-00103, 2008 BL 83155, at *3 (D. Colo. Apr. 9, 2008) (granting plaintiffs' motion in private action to compel defendants to produce Wells Submissions they had made to FINRA's predecessor, NASD); *see also In re* Steinhardt Partners, LP, 9 F.3d 230 (2d Cir. 2003) (holding that petitioner's submission of Wells memorandum to SEC waived work product protection as to contents of memorandum and thus memorandum was discoverable in private litigation).

[28] *See, e.g.*, D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc., 279 F.3d 155, 161–62 (2d Cir. 2002) (acknowledging that testimony in a proceeding before FINRA's predecessor, NASD, may entail exposure to criminal liability, but holding that respondent had no Fifth Amendment right to avoid complying with NASD's requests for information because the NASD itself is not a government functionary and the Fifth Amendment restricts only governmental conduct); McGinn, Smith & Co., Inc. v. Fin. Indus. Regulatory Auth., 786 F. Supp. 2d 139, 147 (D.D.C. 2011) (noting that courts have repeatedly held that FINRA is a private entity and not a government functionary and that FINRA therefore has no obligation to honor a party's constitutional rights); *see also* Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1200–01 (9th Cir. 1998) (concluding that NASD rules do not constitute state action for Fifth Amendment due process purposes), *overruled on other grounds*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003).

[29] FINRA Rule 9211(b).

(DMR)[30] and must ''specify in reasonable detail the conduct alleged to constitute the violative activity and the rule, regulation, or statutory provision the Respondent is alleged to be violating or to have violated.''[31] In complaints that set forth multiple causes of action, each cause of action is required to be stated separately.[32]

2. Amendment of the complaint

The DOE or DMR may amend its complaint once as of right before the respondent has answered.[33] Thereafter, the DOE or DMR may make a motion to the Hearing Officer for leave to amend;[34] the Hearing Officer may grant such a motion, ''including amendments so as to make the complaint conform to the evidence presented,'' after taking into account whether the movant has shown good cause for the amendment and whether any respondent would be unfairly prejudiced if the amendment were allowed.[35] As in judicial proceedings, amendments to complaints in FINRA disciplinary proceedings are to be ''freely granted when justice so requires.''[36]

3. Assignment of Hearing Officer and appointment of panelists

As soon as practicable after the DOE or DMR files its complaint, the Chief Hearing Officer assigns a Hearing Officer to preside over the case[37] and also appoints panelists to a Hearing Panel or Extended Hearing Panel for the case.[38]

A Hearing Panel, which is charged with conducting the disciplinary proceeding and issuing a decision, generally consists of a Hearing Officer and two panelists.[39] The Hearing Officer is a FINRA employee, but is independent from the DOE (or other FINRA department initiating the proceeding) and is not responsible for investigating possible misconduct or instituting disciplinary actions.[40] The two panelists who serve alongside the Hearing Officer are ''representatives of the securities industry who are associated with, or retired from association with, a FINRA member firm.''[41] The Hearing Officer leads the panel.[42]

The Chief Hearing Officer may determine—based on the complexity of the issues involved, the probable length of the hearing, or other factors—that the case should be deemed an ''extended hearing.''[43] In that case, just as with a regular Hearing Panel, the Chief Hearing Officer appoints a Hearing Officer and two panelists to the Extended Hearing Panel, and the Hearing Officer leads the Extended Hearing Panel.[44] The prehearing and hearing procedures are the same regardless of whether a Hearing Panel or Extended Hearing Panel is appointed.[45]

Respondents have no input into the appointment of the Hearing Officer or other panelists.[46] This is in contrast to FINRA arbitration proceedings, where the parties are given substantial input into the appointment of arbitrators.[47] However, respondents may move to disqualify a particular Hearing Officer[48] or Hearing Panelist where a reasonable, good faith belief that a conflict of interest or bias exists or circumstances otherwise exist where the Hearing Officer's or Panelist's fairness might reasonably be questioned.[49]

4. Answering FINRA's complaint

a. Time to answer

A respondent is required to serve an answer to the complaint on all other parties to the proceeding within 25 days after receiving a service of complaint.[50]

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[30] FINRA Rule 9212(a)(1).

[31] *Id.*

[32] *Id.*

[33] FINRA Rule 9212(b).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] FINRA Rule 9213(a).

[38] FINRA Rule 9213(b).

[39] FINRA Rule 9231(a).

[40] *See* FINRA, GUIDE: DISCIPLINARY HEARING PROCEDURES 2.

[41] *See FINRA Disciplinary Proceedings—Answers to Frequently Asked Questions*, FINRA.ORG; *see also* FINRA Rule 9231 (setting forth criteria for appointment of panelists).

[42] FINRA Rule 9231(a).

[43] FINRA Rule 9231(c).

[44] *Id.*

[45] *See* 289 SPS §§ VI-B8—VI-B19. An SEC notice regarding the original introduction by FINRA's predecessor, the NASD, of extended hearing panels seemingly reflects that the original purpose of extended hearing panels was to draw on a larger pool of panelists befitting the more complex status of qualifying matters. In particular, it was intended that retired persons, who presumably would have more available time, would be eligible for service on extended hearing panels but not on regular hearing panels. *See* Notice of Filing of a Proposed Rule Change by NASD, 62 Fed. Reg. 25,226, 25,250 (May 8, 1997), SEC Release No. 34-38545, at 47 (Apr. 24, 1997) (explaining that, in the rule as envisioned, by designating a proceeding as an Extended Hearing, the Chief Hearing Officer will have a larger pool of persons from which to appoint panelists and may consider appointing persons who have greater time to donate to the disciplinary process, i.e., persons who have retired recently from employment in the securities industry). Under current FINRA rules, however, retired persons are eligible for service on both hearing panels and extended hearing panels. *Compare* FINRA Rule 9231(b) (hearing panels), *with* FINRA Rule 9231(c) (extended hearing panels). The only discernible difference between the rules regarding appointment to the two types of panels is that the chief Hearing Officer is authorized to provide greater honoraria to panelists who serve on extended hearing panels. *See* FINRA Rule 9231(c) (providing that the Chief Hearing Officer has discretion to compensate any or all panelists of an Extended Hearing Panel at the rate then in effect for arbitrators appointed under the Arbitration Code for Customer Disputes); *see also* FINRA Rule 12000 et seq. (Customer Code). While there may be a resultant difference in the types of persons who serve on the two types of panels, whether a particular respondent's case is assigned to a regular hearing panel or an extended hearing panel would seem to make little difference to the respondent's approach to the litigation of the matter.

[46] *See generally* FINRA Rule 9231 (making no provision for such input).

[47] *See* 289 SPS § II, *Arbitrator Selection and Pre-Hearing Matters*.

[48] Hearing Officers and Extended Hearing Officers will be referred to collectively as ''Hearing Officers.'' Similarly, Hearing Panels and Extended Hearing Panels will be referred to collectively as ''Hearing Panels.''

[49] FINRA Rules 9233(b), 9234(b).

[50] FINRA Rule 9215(a).

b. Contents of answer

For each allegation in the complaint, an answer is required to ''specifically admit, deny, or state that the Respondent does not have and is unable to obtain sufficient information to admit or deny'' that allegation.[51] A respondent is permitted to deny an allegation in part, in which case the portion of the allegation that is admitted must be specified.[52] A statement that the respondent lacks sufficient information to admit or deny an allegation is deemed a denial of the allegation.[53] An allegation that is not denied in whole or in part is deemed to be admitted.[54]

Any affirmative defense that the respondent wishes to assert is required to be raised in the answer.[55] Common examples of affirmative defenses include collateral estoppel, discharge in bankruptcy, payment or release, res judicata, and statute of frauds.

c. Motion for a more definite statement

Together with its answer, a respondent may file a ''motion for a more definite statement of specified matters of fact or law to be considered or determined.''[56] Beyond the general rules that govern motions in FINRA disciplinary proceedings,[57] the only requirement for such motion is that it must set forth reasons ''why each such matter of fact or law should be required to be made more definite.''[58]

d. Amendment of answer

A respondent can amend its answer only by making a successful motion to do so; in deciding the motion, the Hearing Officer considers ''good cause shown by the Respondent and any unfair prejudice which may result to any other Party . . . .''[59]

e. Responding to an amended complaint

A respondent that has already filed an answer is required to serve an amended answer within 14 days after service of the amended complaint unless the Hearing Officer prescribes a different time period.[60] If the respondent has not yet served an answer, the answer to an amended complaint must be served by the later of the original time period within service of the answer, or 14 days after service of the amended complaint.[61]

5. Default proceedings

If a respondent fails to answer a complaint or make any other filing or request related to the complaint within the required time, the Office of Hearing Officers, the DOE or DMR will serve a second notice on the respondent demanding service of an answer within 14 days.[62] The second notice warns that if a respondent fails to answer after those 14 days have elapsed, the Hearing Officer's may treat the complaint's allegations against the defaulting respondent as admitted and may commence default proceedings.[63]

If the respondent fails to answer the complaint within 14 days after service of a second notice on him, the Hearing Officer may issue a default decision against him.[64] The required contents of a default decision are the same as the contents of a decision issued at the end of a fully litigated disciplinary proceeding.[65] A respondent against whom a default decision is rendered may file a motion to set aside the default, which should be granted upon a showing of good cause.[66] The respondent may also appeal a default decision pursuant to the rules governing appeals from decisions in disciplinary proceedings.[67]

6. Withdrawal of FINRA's complaint

The DOE or DMR may withdraw its complaint if it obtains leave of the Hearing Officer to do so.[68] If the withdrawal occurs before the earlier of a decision on a motion for summary disposition[69] or the beginning of the hearing, the withdrawal is deemed to be without prejudice and the DOE or DMR may later refile a complaint based on allegations concerning the same facts and circumstances.[70] If the withdrawal occurs subsequent to either of those two events, the Panel determines whether the withdrawal shall be deemed to be with or without prejudice to a later refiling.[71]

7. Request for hearing

Together with the filing of its answer, a respondent may request a hearing and suggest a location for that hearing.[72] A respondent's request for a hearing that is filed with an answer must be granted;[73] conversely, a respondent who fails to request a hearing when answering waives the right to one.[74] However, the Hearing Officer or Hearing Panel may set a matter for a hearing even where the respondent has waived the right to one.[75]

In a multi-respondent proceeding where only some of the respondents have waived their entitlement to a hearing and others have exercised that right, the Hearing Officer or Hearing

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[51] FINRA Rule 9215(b).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] FINRA Rule 9215(c).
[57] FINRA Rule 9146; *see* 289 SPS § VI-B14, *General motion procedures* (discussing rules that govern motions in FINRA disciplinary proceedings).
[58] FINRA Rule 9215(c)
[59] FINRA Rule 9215(d).
[60] *Id.*
[61] FINRA Rule 9215(e).
[62] FINRA Rule 9215(f).
[63] *Id.*
[64] FINRA Rule 9269(a).
[65] FINRA Rules 9269(b), 9268(b); *see* 289 SPS § VI-B19b, *Decision* (discussing the contents of such default decisions).
[66] FINRA Rule 9269(c)
[67] FINRA Rule 9269(d). *See* 289 SPS § VI-C, *Appeal from or Review of a Decision in a Disciplinary Proceedings* (discussing the appeals process).
[68] FINRA Rule 9212(c).
[69] *See* 289 SPS § VI-B15, *Motions for summary disposition*.
[70] FINRA Rule 9212(c).
[71] *Id.*
[72] FINRA Rules 9221(a)(1)–(2).
[73] FINRA Rule 9221(a).
[74] *Id.*
[75] FINRA Rules 9221(b)–(c).

Panel may nevertheless direct a hearing as to all respondents.[76] In the alternative, the Hearing Officer or Hearing Panel may order a hearing only as to the respondents who timely and properly requested a hearing while deciding the allegations against the other respondents based upon the materials in the record.[77]

8. Pre-hearing conference and submission

a. Pre-hearing conference

The Hearing Officer may either sua sponte or upon request of a party order counsel or any party to meet for a pre-hearing conference, either in person or with one or more parties participating from remote locations.[78] Such a conference is to be held within 21 days after filing of an answer or, where a respondent has defaulted in answering, within 21 days after the time to answer pursuant to a notice of default has expired.[79] The purposes of a pre-hearing conference may include expediting the disposition of the proceeding or establishing efficient procedures for the management of the proceeding.[80]

Among the subjects that may be raised and discussed at a pre-hearing conference are:

- simplification and clarification of the issues;
- exchange of witness and exhibit lists and copies of exhibits;
- stipulations, admissions of fact, and stipulations concerning the contents, authenticity, or admissibility into evidence of documents;
- matters of which official notice may be taken;
- the schedule for exchanging pre-hearing motions or briefs, if any;
- the method of service and filing of papers by the parties;
- determination of hearing dates;
- amendments to the complaint or answers thereto;
- production of documents;
- designation and indexing of relevant portions of transcripts from investigative testimony or other proceedings and the inclusion of an index for such testimony; and
- such other matters as may aid in the orderly and expeditious disposition of the proceeding.[81]

If a party fails to appear at a duly noticed pre-hearing conference, the Hearing Officer has the discretion to enter a default decision against that party.[82]

During or subsequent to the conference, the Hearing Officer is required to enter a written order that sets forth any agreements reached and any procedural determinations made at the conference.[83]

b. Pre-hearing submission

Prior to a hearing, the Hearing Officer may order a party to provide to the other parties, or to the Hearing Officer or the Hearing Panel, some or all of the following items:

- an outline or narrative summary of the party's case or defense;
- the legal theories upon which the party plans to rely;
- a list and copies of the documents that the party plans to introduce at the hearing;
- a list of the witnesses that the party plans to call to testify on its behalf, including their names, occupations and addresses, and a brief summary of their expected testimony; and
- for any expert witnesses that the party plans to call to testify, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given expert testimony, a list of the expert's publications, and copies of those publications that are not readily available to the other parties and the Panel.[84]

9. Discovery

a. Mandatory disclosure by DOE and DMR

The DOE and the DMR are generally required to make available to respondents, for inspection and copying, any documents prepared or obtained by Interested FINRA staff in connection with the investigation that led to the institution of the disciplinary proceedings.[85] This document production is mandatory and is not dependent upon an affirmative request by the respondent.[86] The categories of documents to which respondent are entitled include, without limitation:

- requests for information that FINRA issues in connection with the investigation.;[87]
- any written requests issued to any persons not employed by FINRA to provide documents or to appear for an interview;

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[76] *Id.*

[77] *Id.*

[78] FINRA Rule 9241(b).

[79] *See* 289 SPS § VI-B5, *Default proceedings* (discussing notices of default); FINRA Rule 9241(d).

[80] FINRA Rule 9241(a).

[81] FINRA Rule 9241(c).

[82] FINRA Rule 9241(f). *See* 289 SPS § VI-B5 (discussing default decisions in FINRA disciplinary proceedings).

[83] FINRA Rule 9241(e).

[84] FINRA Rule 9242(a).

[85] FINRA Rule 9251(a)(1). "Interested FINRA Staff" may include the head of enforcement or an employee who reports to the head of enforcement; the head of the DMR or an employee who reports to the head of the DMR; a FINRA employee who had direct involvement in the authorization of the complaint in the disciplinary proceeding; a FINRA employee who had involvement in an examination, investigation, prosecution, or litigation related to the disciplinary proceeding; or a district director or department head who supervises a FINRA employee who had involvement in an examination, investigation, prosecution, or litigation related to the disciplinary proceeding. FINRA Rule 9120(t)(1).

[86] *See id.*

[87] *See* 289 SPS § VI-A1, *Requests for discovery from members or associated persons* (discussing requests for information in FINRA investigations).

- any documents that FINRA received pursuant to such written requests;
- transcripts and exhibits thereto; and
- all other documents obtained by persons who are not FINRA employees.[88]

The DOE or DMR may withhold documents from this production:

- on grounds of privilege or attorney work-product protection;
- if a document is an examination or inspection report, an internal memorandum, or other note or writing prepared by a FINRA employee that will not be offered in evidence;
- if the document would reveal an examination, investigatory or enforcement technique or guideline of FINRA or any other regulatory organization;
- if the document would reveal the identity of a source that furnished information or was furnished information on a confidential basis regarding any type of civil or criminal enforcement action;
- if the document would reveal any type of civil or criminal enforcement action under consideration or initiated by FINRA or any other regulatory organization, or
- if disclosure of the document is prohibited by federal law.[89]

In addition, the Hearing Officer may permit the DOE or DMR to withhold a particular document or category of documents on the grounds that the documents are not relevant to the proceeding or for good cause shown.[90]

FINRA is under a continuing obligation to supplement these mandatory disclosures. Thus, when documents that are material and relevant to the disciplinary proceeding are produced to interested FINRA staff pursuant to an investigatory request for information after the initial production of mandatory disclosures to a respondent, FINRA must make those newly acquired documents available to the respondent within 14 days after their receipt and no later than 10 days prior to the start of the hearing.[91]

b. Requests for FINRA to issue requests for information

A respondent can request in writing that FINRA issue a request to a third party to produce documents at the hearing or provide testimony at the hearing.[92] The respondent's request must be served at least 21 days prior to the start of the hearing and must:

- specifically describe the documents, the category or type of documents, or the testimony sought;
- state why the documents, the category or type of documents, or the testimony are material;
- describe the requesting party's previous efforts to obtain the documents, the category or type of documents, or the testimony through other means; and
- state whether the custodian of each document, or the custodian of the category or type of documents, or each proposed witness is subject to FINRA's jurisdiction.[93]

The respondent's request may be granted upon showing that the information sought is relevant, material, and non-cumulative; a previous attempt has been made in good faith to obtain the documents and testimony but has been unsuccessful; and each of the persons from whom the documents and testimony are sought is subject to FINRA's jurisdiction.[94] The Hearing Officer may deny the request if it is found to be unreasonable, oppressive, excessive in scope, or unduly burdensome.[95] The Hearing Officer also takes into consideration whether the other parties are willing to stipulate to the facts that would be shown by the documents or testimony that the requesting party seeks to compel.[96]

If the Hearing Officer grants the request, an order is issued requiring the third party to produce documents at least 10 days in advance of the hearing (unless the order is issued 10 or fewer days prior to the hearing, in which case the third party is required to produce the documents immediately) or requiring the third party to appear at the hearing and provide testimony.[97] In lieu of granting the request in full or denying it, the Hearing Officer may also issue the request for information in a limited or modified form.[98]

c. Exchange of witness statements

A respondent in a disciplinary proceeding may make a motion to compel the DOE or DMR to make available for inspection and copying a contemporaneous recording or transcription of any oral statement of any person called as a witness, which statement pertains, or is expected to pertain, to the direct testimony.[99]

A respondent may also make a motion to compel the DOE or DMR to produce statements made by an interested FINRA staff member during a routine examination or inspection about the substance of oral statements made by a non-FINRA person when the following two conditions are met:

- the DOE or DMR calls either the interested FINRA staff member or the non-FINRA person as a witness; and
- the portion of the statement of which the respondent seeks to compel production relates directly to the testimony of such witness.[100]

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[88] FINRA Rule 9251(a)(1).
[89] FINRA Rule 9251(b).
[90] FINRA Rule 9251(b)(1)(D).
[91] FINRA Rule 9151(a)(2). *See* FINRA Rule 9120(t)(1) (defining ''Interested FINRA Staff''); note 85 *above*.
[92] FINRA Rule 9252(a).
[93] *Id.*
[94] FINRA Rule 9252(b).
[95] *Id.*
[96] FINRA Rule 9252(c).
[97] *Id.*
[98] FINRA Rule 9252(b).
[99] FINRA Rule 9253(a)(1).
[100] FINRA Rule 9253(a)(2). *See* FINRA Rule 9120(t)(1) (defining

d. Motions for a protective order

A party or other person whose documents are subject to production or introduction into evidence in a FINRA proceeding, or a witness who is to testify at a hearing, may file a motion for a protective order.[101] Such motion may seek to limit disclosure or to preclude disclosure of documents or testimony containing confidential information to other parties, witnesses or persons.[102] However, a protective order may not prohibit disclosure of documents or testimony to the DOE, the DMR, or other FINRA staff.[103] A protective order also may not prohibit FINRA staff from performing their regulatory and self-regulatory responsibilities and functions, including the transmittal without restriction to the recipient of the documents or testimony at issue to any regulatory authorities or other self-regulatory organizations.[104]

The granting of a protective order requires a determination that disclosure of the particular documents or testimony ''would have a demonstrated adverse business effect on the movant or would involve an unreasonable breach of the movant's personal privacy.''[105]

10. Rule regarding former FINRA officers serving as expert witnesses

''No former officer of FINRA shall, within a period of one year immediately after termination of employment with FINRA, provide expert testimony on behalf of any other person'' in a FINRA disciplinary proceeding.[106] This rule does not preclude former officers from testifying as witnesses on behalf of FINRA in such a proceeding.[107]

11. Sanctions for contemptuous conduct or failure to disclose

a. Sanctions in general

A party or its attorney or representative who violates an order of a Hearing Officer or member of a Hearing Panel or who otherwise engages in ''contemptuous conduct'' is subject to sanctions.[108] The available sanctions include:

- an order providing that the matters on which the order is made or any other designated facts shall be taken to be established for the purposes of the disciplinary proceeding in accordance with the claim of the party obtaining the order;
- an order providing that the disobedient party may not support or oppose designated claims or defenses or may not introduce designated matters in evidence;
- an order providing that pleadings or a specified part of the pleading shall be stricken, or an order providing that the proceeding shall be stayed until the party subject to the order obeys it;
- in lieu of any of the foregoing orders or in addition thereto, an order providing that contemptuous conduct includes the failure to obey any order; and
- an order as provided in the first three subparagraphs above, where a party has failed to comply with an order to produce a person for examination, unless the party failing to comply shows that such party is unable to produce such person for examination.[109]

b. Preclusion of evidence and other sanctions for failure to disclose

When a party fails to disclose information as required pursuant to FINRA rules or an order of the Hearing Officer or panel (without substantial justification), the party is precluded from using as evidence the witness or information that was not disclosed—whether at a hearing, in a motion, in any other papers filed in the proceeding, or in oral argument.[110]

A party that fails to make required disclosures is also subject to some of the same sanctions as a party that engages in contemptuous conduct. Available penalties for failure to disclose include orders:

- taking certain facts to be established against the position of the disobedient party;
- precluding the disobedient party from supporting or opposing particular claims or defenses or from introducing particular matters into evidence; and
- striking all or a portion of the disobedient party's pleading.[111]

c. Orders of exclusion of attorneys or representatives

An attorney or representative of a party who engages in contemptuous conduct is also subject to exclusion from further participation in the proceeding.[112] The excluded person may file a motion with the National Adjudicatory Council (NAC)[113] to vacate the order of exclusion.[114] Such a motion is decided by the NAC on an expedited basis without oral argument, and the making of such a motion stays the disciplinary proceeding until seven days after service of the order deciding it.[115]

''Interested FINRA Staff''); note 85 *above*.

[101] FINRA Rule 9146(k)(1).

[102] *Id.*

[103] *Id.*

[104] FINRA Rule 9146(k)(2).

[105] FINRA Rule 9146(k)(1).

[106] FINRA Rule 9242(b).

[107] *Id.*

[108] FINRA Rule 9280(a)(1). FINRA's rules do not specify what might constitute such ''contemptuous conduct.''

[109] FINRA Rule 9280(b)(1).

[110] FINRA Rule 9280(b)(2). However, the party may not be precluded from using the evidence if the failure to disclose is found to be harmless. *Id.*

[111] *Id.*

[112] FINRA Rule 9280(a)(2).

[113] The NAC is the national committee that reviews initial decisions rendered in FINRA disciplinary and membership proceedings. *See National Adjudicatory Council (NAC)*, FINRA.ORG.

[114] FINRA Rule 9280(c).

[115] *Id.*

12. Temporary cease and desist proceedings

a. Which matters qualify; initiation of the proceeding

The DOE or DMR may bring a temporary cease and desist proceeding with respect to conduct that violates § 10(b) of the Securities Exchange Act of 1934,[116] certain regulations promulgated thereunder, or certain FINRA rules.[117] The proceeding is initiated by service on the member or associated person of a notice stating—

> the rule or statutory provision that the Respondent is alleged to have violated and that the Department of Enforcement or the Department of Market Regulation is seeking to have the Respondent ordered to cease violating. The notice also shall state whether the Department of Enforcement or the Department of Market Regulation is requesting the Respondent to be required to take action or to refrain from taking action.[118]

A declaration of facts specifying the alleged acts or omissions, and a proposed order, must accompany the notice.[119] Additionally, if the DOE or DMR has not already filed a complaint against the respondent relating to the subject matter of the temporary cease and desist proceeding, it must serve and file such a complaint together with the notice by which it commences the cease and desist proceeding.[120]

b. Hearing

As soon as practicable after filing the notice of the temporary cease and desist proceeding, the Chief Hearing Officer assigns a Hearing Officer and two panelists to preside over the proceeding.

A hearing must be held within 15 days after service of the notice initiating the temporary cease and desist proceeding unless the Hearing Officer adjourns it to a later time with the consent of the parties and for good cause shown.[121]

Witnesses at the hearing who are subject to FINRA's jurisdiction are required to testify under oath or affirmation.[122] No corresponding requirement applies to witnesses who are outside FINRA's jurisdiction.[123] The hearing is stenographically transcribed by a court reporter.[124]

If a respondent in a temporary cease and desist proceeding fails to appear at a hearing, the allegations in the initiatory notice and accompanying declaration of facts may be deemed admitted.[125] Additionally, the Hearing Panel may then issue a temporary cease and desist order against that respondent without any further proceedings.[126]

At any time, the Hearing Panel may direct any party to supply additional information, which must be provided to all parties at least one day before the Hearing Panel issues its decision.[127]

c. Temporary cease and desist orders

The Hearing Panel must issue its decision in writing within 10 days after its receipt of the hearing transcript unless the Hearing Officer extends that time with the consent of the parties and for good cause shown.[128] If the Hearing Panel issues a temporary cease and desist order, the order must:

- be confined to directing the respondent ''to cease and desist from violating a specific rule or statutory provision, and, where applicable, to ordering a Respondent to cease and desist from dissipating or converting assets or causing other harm to investors;''
- describe ''the alleged violation and the significant dissipation or conversion of assets or other significant harm to investors that is likely to result without the issuance of an order;'' and
- set forth ''in reasonable detail'' any and all actions that the respondent is ordered to take or desist from taking.[129]

A temporary cease and desist order remains in effect until a final decision is issued in the parallel FINRA disciplinary proceeding.[130]

d. Penalties for violation of temporary cease and desist orders

Violation of a temporary cease and desist order may result in the suspension or cancellation of the respondent's membership in or association with FINRA.[131]

e. Reviews of and appeals from temporary cease and desist orders

(1) Applications to hearing panel

At any time after the issuance of a temporary cease and desist order, the respondent may make an application to the Hearing Panel to modify, set aside, suspend, or limit the order.[132] The Hearing Panel must issue its decision on the application within 10 days after its receipt of the request unless that time period is extended with consent of the parties and for good cause shown.[133] The pendency of such an application does not stay the validity of the cease and desist order.[134] FINRA's rules do not prescribe any specific standard by which the Hearing

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[116] 15 U.S.C. § 78j(b).

[117] *See* FINRA Rule 9810(a). The rules and regulations whose violation may subject the violator to proceedings for a temporary cease and desist order are Exchange Act § 10(b); Exchange Act Rules 10b-5 and 15g-1 through 15g-9; and FINRA Rules 2010, 2020 and 2330. *See* 15 U.S.C. § 78j(b); 17 C.F.R. §§ 240.10b-5, 240.15g-1 et seq.

[118] FINRA Rule 9810(b).

[119] *Id.*

[120] FINRA Rule 9810(c).

[121] FINRA Rule 9830(a).

[122] FINRA Rule 9830(d).

[123] *See id.*

[124] FINRA Rule 9830(f).

[125] FINRA Rule 9830(h).

[126] *Id.*

[127] FINRA Rule 9830(e).

[128] FINRA Rule 9840(a).

[129] FINRA Rule 9840(b).

[130] FINRA Rule 9840(c).

[131] FINRA Rule 9860.

[132] FINRA Rule 9850.

[133] *Id.*

[134] *Id.*

Panel is required to determine an application to modify, set aside, suspend, or limit the order; nor do the rules limit the number of applications that a respondent may make for reconsideration or modification of such an order.[135]

(2) Appeals to the SEC

FINRA considers a temporary cease and desist order to be a final and immediately effective disciplinary sanction, and such an order is therefore immediately appealable to the SEC.[136] The filing of an appeal to the SEC does not stay the effectiveness of the order unless the SEC orders a stay.[137]

13. Settlement offers by respondents

A respondent may make a written settlement offer at any time after being notified of the inception of a disciplinary proceeding.[138] Such an offer is required to include the following information:

- the investigative or other origin of the disciplinary action;
- the specific statutory or rule provisions that the respondent allegedly violated;
- the acts or practices the member or associated person allegedly engaged in or omitted;
- the respondent's consent to findings of fact and violations consistent with the conduct and violations that have been alleged;
- a proposed sanction to be imposed that is consistent with FINRA's sanction guidelines or, if the proposed sanction is inconsistent with FINRA's guidelines, a detailed statement supporting the proposed sanction; and
- either the effective date of any sanctions to be imposed, or a statement that the effective date of the sanctions is to be determined by FINRA staff.[139]

The settlement offer may not be made frivolously, and its proposed sanctions must be consistent ''with the seriousness of the violations to be found.''[140]

If the hearing on the merits has not yet commenced, the making of such a settlement offer does not stay the proceeding unless the Hearing Officer so directs.[141] If the hearing on the merits has begun, the making of such settlement offer does not stay the proceeding unless the Hearing Panel so directs.[142]

14. General motion procedures

Motions in disciplinary proceedings may generally be made either orally in writing,[143] although a motion for summary disposition must be in writing.[144] An Adjudicator[145] may also require a particular motion to be made in written form, taking into account whether the hearing or conference at which the motion is made is being recorded and whether opposing parties will have sufficient notice of and opportunity to respond to the motion.[146]

When a motion is made in writing, the opposing party is given 14 days to respond; failure to respond within that timeframe may be taken as a waiver by the opposing party of any objections to the granting of the motion.[147] When a motion is made orally, the opposing party will often be given the opportunity for an immediate response, but the Adjudicators have the discretion to grant additional time for the response.[148]

There is no general right to reply papers on a motion, but an Adjudicator may grant the moving party leave to serve a reply.[149] Any reply papers that are allowed must be served within five days after service of the opposition papers on the motion, or (in the event that leave to reply was granted subsequent to service of the opposition papers) within five days after service of the order granting leave to reply.[150]

Absent leave to file longer papers, submissions in support of or in opposition to a motion are limited to 10 double-spaced pages including double-spaced footnotes but exclusive of tables.[151]

An Adjudicator has the discretion to hold oral argument on a motion either in person or telephonically.[152] FINRA's rules do not prescribe a particular procedure for requesting such oral argument.

The filing of a motion does not stay proceedings unless an Adjudicator specifically orders a stay.[153]

15. Motions for summary disposition

a. Filing requirements and timing

After a respondent has answered the complaint and mandatory disclosures have been made to the respondent, but prior to the start of the hearing, any party may move for summary disposition of some or all of the causes of action in the complaint or of a respondent's defenses.[154] Such a motion along with supporting papers must be filed at least 21 days prior to the

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[135] *See id.*

[136] FINRA Rule 9870; *see also* Exchange Act § 19(d)(2), 15 U.S.C. § 78s(d)(2) (providing for review of disciplinary sanctions that self-regulatory organizations such as FINRA impose on their members or participants).

[137] FINRA Rule 9870.

[138] FINRA Rule 9270(a).

[139] FINRA Rule 9270(c).

[140] FINRA Rule 9270(b).

[141] FINRA Rule 9270(a).

[142] *Id.*

[143] FINRA Rule 9146(a).

[144] FINRA Rule 9264(a). *See* 289 SPS § VI-B15, *Motions for summary disposition*.

[145] *See* FINRA Rule 9120(a) (defining ''Adjudicator'' as a body, board, committee, group, or natural person that presides over a proceeding and renders a decision, or who renders a recommended or proposed decision that is acted upon by another Adjudicator).

[146] FINRA Rule 9146(b).

[147] FINRA Rule 9146(d).

[148] *Id.*

[149] FINRA Rule 9146(h).

[150] *Id.*

[151] FINRA Rule 9146(i).

[152] FINRA Rule 9146(e).

[153] FINRA Rule 9146(g).

[154] FINRA Rule 9264(a).

scheduled start of the hearing or by such earlier date as the Hearing Officer directs.[155] Opposing papers must be filed at least seven days prior to the scheduled start of the hearing.[156] FINRA's rules make no provision for reply papers on a motion for summary disposition although they do not expressly preclude the Hearing Officer from agreeing to permit them.[157]

Once the hearing has commenced, a party may only move for summary disposition if leave is granted by the Hearing Officer.[158]

A motion for summary disposition is required to include the following papers:

- a statement of undisputed facts;
- a supporting memorandum of points and authorities; and
- affidavits or declarations setting forth facts that would be admissible at the hearing and showing affirmatively that the affiant is competent to attest to the matters stated therein.[159]

Memoranda of points and authorities in support of or in opposition to a motion for summary disposition are limited to 35 pages.[160]

b. Decisions on motions for summary disposition

A motion for summary judgment can only be granted by the full Hearing Panel, except that the Hearing Officer is empowered to grant such a motion if the basis for granting it concerns the issue of FINRA's jurisdiction over the respondent.[161] The Hearing Officer is also permitted to promptly deny or defer decisions on a motion for summary disposition without input from the full Panel.[162] A decision by the Hearing Panel on a motion for summary disposition requires a majority vote of Panel members.[163]

The granting of a motion for summary disposition requires a finding that ''there is no genuine issue with regard to any material fact and the party that files the motion is entitled to summary disposition as a matter of law.''[164] In making that determination, the facts alleged in the pleadings of the party opposing the motion are deemed to be true except to the extent modified or contradicted by stipulations or where there are admissions by the opposing party, unchallenged affidavits or declarations, or facts of which the Panel has taken official notice.[165] The Panel may deny or defer decision on the motion if it finds that the opposing party is unable prior to the hearing to present in an affidavit facts essential to justify that party's opposition to the motion.[166]

c. Partial disposition of the motion

If the Hearing Panel finds that summary disposition of the entire case is not warranted and a hearing will remain necessary, it determines ''what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.''[167] The Hearing Panel then issues an order identifying the facts that appear without substantial controversy; at the hearing, those facts are deemed established.[168]

16. Expedited disciplinary proceedings

In cases where there is a temporary cease and desist order in place, or where there is a parallel temporary cease and desist proceeding based on the subject matter, hearings are to be held and decisions rendered at the earliest possible time.[169] An expedited hearing schedule is to be set at a pre-hearing conference.[170]

17. Rules of evidence and the taking of official notice by the panel

The formal rules of evidence that govern judicial actions do not apply in FINRA disciplinary proceedings.[171] The persons presiding over the hearing are empowered to take ''official notice of such matters as might be judicially noticed by a court, or of other matters within the specialized knowledge of FINRA as an expert body.''[172] Before taking official notice of a matter, the presiding persons are required to provide the parties with the opportunity to oppose or comment on such taking of official notice.[173]

18. Pre-hearing exchange of documents and information

At least 10 days prior to the hearing, the parties are required to exchange copies of the documentary evidence that they intend to present at the hearing and the names of the witnesses that they intend to call.[174] Copies of such documents and information must generally be provided to the Hearing Officer as well as to all other parties, but the Hearing Officer may direct the parties not to provide these materials.[175] If a party seeks to introduce evidence at the hearing that was not included in the pre-hearing exchange, the party must apply to the Hearing Officer, who may permit the introduction of the proffered evidence upon good cause shown and upon a finding

[155] *Id.*
[156] *Id.*
[157] *See* FINRA Rule 9264; *but see* FINRA Rule 9146(h) (providing, for motions generally, that an Adjudicator may grant a movant leave to file reply papers on its motion).
[158] FINRA Rule 9264(b).
[159] FINRA Rule 9264(d).
[160] *Id.*
[161] FINRA Rule 9264(e).
[162] *Id.*
[163] FINRA Rule 9146(j)(1).
[164] FINRA Rule 9264(e).
[165] *Id. See* 289 SPS § VI-B17, *Rules of evidence and the taking of official notice by the panel* (discussing the procedure by which the Panel may take official notice of facts).
[166] FINRA Rule 9264(e).
[167] FINRA Rule 9264(c).
[168] *Id.*
[169] FINRA Rule 9290. *See* 289 SPS § VI-B12, *Temporary cease and desist proceedings* (discussing temporary cease and desist proceedings and related orders).
[170] *Id.*
[171] FINRA Rule 9145(a).
[172] FINRA Rule 9145(b).
[173] *Id.*
[174] FINRA Rule 9261(a).
[175] *Id.*

that the evidence may be relevant and necessary for a complete record.[176]

19. Hearing and decision

a. Hearing

A party has a right to appear at the hearing either in person or through legal counsel or a representative.[177]

Documentary evidence that the parties exchange prior to the hearing[178] does not necessarily become part of the record of the proceeding unless the Hearing Officer or Panel decide to make it such.[179]

Persons who are subject to FINRA's jurisdiction are required to testify under oath or affirmation.[180] As in the investigation that precedes the disciplinary proceeding, respondents have no Fifth Amendment right to decline to give testimony at the hearing.[181] Although FINRA's rules do not expressly state that an adverse inference will be drawn against a respondent who chooses not to testify, invocation of the Fifth Amendment right against self-incrimination may as a practical matter result in a decision that imposes such sanctions as the loss of the respondent's securities license.[182] Thus, just as in the initial investigation, counsel representing a respondent against whom a parallel criminal investigation or prosecution is proceeding should consider carefully the costs and benefits of invoking the Fifth Amendment privilege.[183]

There is no requirement for persons who are outside FINRA's jurisdiction to give their testimony under oath or affirmation.

The hearing is stenographically transcribed.[184] During the hearing, the Hearing Officer is required to receive relevant evidence but has the discretion to exclude evidence that is ''irrelevant, immaterial, unduly repetitious, or unduly prejudicial.''[185] A party wishing to object to the introduction of evidence must do so on the record, succinctly explaining the grounds relied upon.[186] Excluded evidence is attached to the record as a supplemental document.[187]

Upon the conclusion of the hearing, the Hearing Officer has the discretion to direct the parties to file proposed findings of facts and conclusions of law or post-hearing briefs.[188] Absent permission from the Hearing Officer for more lengthy submissions, post-hearing submissions are limited to 25 pages exclusive of tables.[189] Proposed findings of fact and factual statements in post-hearing briefs must be supported by specific references to the record.[190]

b. Decision

Within 60 days subsequent to the final day allowed for filing proposed findings of fact, conclusions of law, and post-hearing briefs, or by such other date set at the discretion of the Chief Hearing Officer, the Hearing Officer is required to prepare a written decision reflecting the majority vote of the Hearing Panel.[191]

Among the required contents of the decision are the following:

- the investigative or other origin of the disciplinary proceeding, if not otherwise contained in the record;
- the specific statutes or rules that the respondent allegedly violated;
- the findings of fact with respect to any act or practice that the respondent allegedly committed or omitted;
- the conclusions of the Panel regarding whether the respondent violated any provision alleged in the complaint;
- a statement of the Panel supporting the disposition of the principal issues raised in the proceeding; and
- an enumeration of any sanctions imposed, the reasons for such sanctions, and the date upon which such sanctions are to become effective.[192]

Unless the decision provides otherwise, a sanction other than a bar or an expulsion becomes effective on a date to be determined by FINRA, and a sanction of a bar or an expulsion becomes effective immediately upon the decision becoming the final disciplinary action of FINRA for purposes of Exchange Act Rule 19d-1(c)(1).[193]

20. Available sanctions; Summary action for failure to pay fines

The panel's imposition of sanctions in a FINRA disciplinary proceeding is guided by several overarching principles:

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[176] FINRA Rule 9261(c).

[177] FINRA Rule 9261(b).

[178] *See* 289 SPS § VI-B18, *Pre-hearing exchange of documents and information*.

[179] FINRA Rule 9261(a).

[180] FINRA Rule 9262.

[181] *See* note 28, *above*.

[182] *See* 289 SPS § VI-B20, *Available sanctions; Summary action for failure to pay fines* (discussing sanctions that the Hearing Panel may impose if it finds against the respondent).

[183] In addition, a respondent may be unlikely to procure a stay of a FINRA disciplinary proceeding pending the resolution of parallel criminal or regulatory enforcement proceedings. *See* McGinn, Smith & Co. v. Fin. Indus. Regulatory Auth., 786 F. Supp. 2d 139, 146 (D.D.C. 2011) (holding that district court lacked jurisdiction to stay FINRA disciplinary action pending resolution of parallel civil enforcement action by SEC in federal court, because federal appellate courts have exclusive jurisdiction over appeals from FINRA disciplinary proceedings, and any application for such a stay therefore must be brought in form of application to a court of appeals for a writ of mandamus). No reported decisions from any of the federal appellate courts have addressed an application for such a stay.

[184] FINRA Rule 9265(a).

[185] FINRA Rule 9263(a).

[186] *Id.*

[187] *Id.*

[188] FINRA Rule 9266(a).

[189] FINRA Rule 9266(d).

[190] FINRA Rule 9266(b).

[191] FINRA Rule 9268(a).

[192] FINRA Rule 9268(b).

[193] *See* FINRA Rule 9268(f); 17 C.F.R. § 240.19d-1(c)(1). A decision becomes a final disciplinary action when the appeals and reviews within FINRA have been exhausted. *See* 289 SPS § VI-C, *Appeal from or Review of a Decision in a Disciplinary Proceeding*.

- Disciplinary sanctions are remedial in nature and should be designed to deter future misconduct and to improve overall business standards in the securities industry.
- Sanctions should be more severe for recidivists.
- Sanctions should be tailored to the particular misconduct at issue.
- Where the subject of the proceedings has been determined to have committed multiple violations, it may be appropriate to batch or aggregate the violations together to determine the sanctions.
- The remedies of restitution and/or rescission should be ordered to the extent appropriate. The respondent's ''ill-gotten gain'' should be taken into account when devising the remedy.
- Where appropriate, the respondent should be required to requalify by examination for employment in the securities industry.
- Adjudicators are required to consider a respondent's bona fide inability to pay when imposing a fine or ordering restitution.[194]

In addition to those general principles, FINRA has provided a list of 19 factors that should be considered in all sanction determinations. Among these factors are:

- the respondent's prior disciplinary history;
- whether the respondent accepted responsibility for, acknowledged the conduct, or took corrective measures prior to the detection of the conduct;
- whether the respondent reasonably relied on competent legal or accounting advice;
- whether the respondent sought to conceal the misconduct;
- whether, if the respondent is a member firm, it had developed reasonable supervisory, operational or technical procedures or controls that were properly implemented as of the time of the violation; and
- whether the conduct was intentional as opposed to reckless or negligent.[195]

Moreover, FINRA has issued detailed guidelines to be considered for specific types of misconduct, including appropriate ranges of monetary penalties for specific violations of statutes or rules.[196]

FINRA may, pursuant to a disciplinary proceeding:

- censure a member or person associated with a member;
- impose a fine upon a member or person associated with a member;
- suspend the membership of a member or suspend the registration of a person associated with a member for a definite period or a period contingent on the performance of a particular act;
- expel a member, cancel the membership of a member, or revoke or cancel the registration of a person associated with a member;
- suspend or bar a member or person associated with a member from association with all members;
- impose a temporary or permanent cease and desist order against a member or a person associated with a member; or
- impose any other fitting sanction.[197]

C. Appeal from or Review of a Decision in a Disciplinary Proceeding

1. Internal review: The National Adjudicatory Council

a. Notice of appeal or cross-appeal

Any party may appeal the decision in a disciplinary proceeding to the NAC.[198] Notice of any such appeal must be filed within 25 days after service of the decision.[199] An appeal to the NAC operates to automatically stay the decision pending the appeal, except that an appeal does not stay the implementation of a cease and desist order.[200]

A notice of appeal to the NAC must be in writing and must contain the following information:

- the name of the disciplinary proceeding;
- the disciplinary proceeding docket number;
- the name of the party on whose behalf the appeal is made;
- a statement on whether oral argument before the NAC is requested; and
- a brief statement of the findings, conclusions, or sanctions as to which exceptions are taken.[201]

A party served with a notice of appeal may serve a notice of cross-appeal within five days after service of the notice of appeal.[202]

The NAC has the discretion to deem waived any issue that a party does not raise in its notice of appeal or notice of cross-appeal.[203]

A party may withdraw its notice of appeal or cross-appeal by serving a written notice of withdrawal.[204]

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[194] FINRA, SANCTION GUIDELINES 2–5 (2013).
[195] *See id.* at 6–7 (listing all 19 factors).
[196] *See generally* FINRA, SANCTION GUIDELINES.
[197] FINRA Rule 8310(a).
[198] FINRA Rule 9311(a). An appeal may be filed by a respondent, the DOE, or the DMR. *Id.*
[199] *Id.*
[200] FINRA Rule 9311(b).
[201] FINRA Rule 9311(c).
[202] FINRA Rule 9311(d).
[203] FINRA Rule 9311(e).
[204] FINRA Rule 9311(f).

b. Sua sponte review by the NAC

Even where no party files a notice of appeal, the NAC may elect to undertake a review of a decision issued in a FINRA disciplinary proceeding.[205] The NAC's general counsel may initiate a review of a default decision issued in a FINRA disciplinary proceeding.[206] In either case, a written notice of review will be served on each party to the proceeding.[207]

The NAC may also initiate a review of a disciplinary proceeding decision that was initially appealed by one or more parties but as to which all pending appeals were withdrawn before the NAC reached a decision on the merits of the appeal.[208]

c. Oral argument

A party that desires oral argument on an appeal or review before the NAC must request it in writing, either in its notice of appeal or cross-appeal or in a filing, within 15 days after service of a notice of review by the NAC.[209] Absent such a request, the NAC may choose either to hold oral argument or to decide the matter solely based on the record.[210]

If oral argument is held, each party's presentation at the argument is limited to 30 minutes unless the NAC grants a longer time allotment for good cause shown.[211]

Oral argument on an appeal or review before the NAC is stenographically transcribed by a court reporter.[212]

d. Filing of briefs

Parties are permitted to file briefs in connection with appeals and other reviews before the NAC.[213] Briefs must be confined to the particular matters at issue and are expected to cite to relevant portions of the record.[214]

Reply briefs are permitted but are limited to matters in reply.[215]

A party's initial brief is limited to 25 double-spaced pages exclusive of tables; a reply brief is limited to 12 double-spaced pages exclusive of tables.[216]

Moving briefs are due on dates established by the NAC and, unless the NAC provides otherwise, they will be required to be filed at least 21 days after the date of the scheduling order in the appeal.[217] Answering briefs are due 21 days after submission of moving briefs. Reply briefs are due 10 days after submission of answering briefs.[218]

[205] FINRA Rule 9312(a)(1).
[206] FINRA Rule 9312(a)(2).
[207] FINRA Rule 9312(c).
[208] FINRA Rule 9312(d).
[209] FINRA Rule 9341(a).
[210] FINRA Rule 9341(b).
[211] FINRA Rule 9341(e).
[212] FINRA Rule 9341(f)(1).
[213] FINRA Rule 9347(a).
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] FINRA Rule 9347(b).
[218] *Id.*

e. NAC's decision

In an appeal or review from a decision in an FINRA disciplinary proceeding, the NAC issues a written proposed decision that is required to contain the following elements:

- the investigative or other origin of the disciplinary proceeding, if not otherwise contained in the record;
- the specific statutory or rule provisions that each respondent allegedly violated;
- the findings of fact with respect to any act or practice that each respondent allegedly committed or omitted;
- conclusions as to whether each respondent violated any provision alleged in the complaint;
- a statement supporting the disposition reached regarding the principal issues raised in the proceeding; and
- descriptions of any sanctions imposed, the reasons therefor, and the dates upon which such sanctions are to become effective.[219]

The NAC submits its proposed written decision to the FINRA board.[220] The board then decides whether to undertake a review; a decision to review may be initiated by a governor of FINRA's board.[221] If FINRA's board does not opt to review the NAC's proposed decision, the decision becomes final and is served on the parties and on each member of FINRA with which each respondent is associated.[222] At this point the decision constitutes the final disciplinary action of FINRA against the respondent, so that the respondent is permitted to apply to the SEC for review of the decision.[223]

2. Discretionary review of an NAC decision by FINRA board

If a governor from FINRA's board calls for review of a proposed decision of the NAC, the board considers the case no later than the board's next meeting.[224] The board may direct the parties to file briefs in connection with its review, although it will not request briefing from any respondent who did not appeal or cross-appeal the original disciplinary decision or from any respondent to whom the issues on the review are inapplicable.[225]

Pursuant to its review, FINRA's board may affirm, modify, or reverse the NAC's proposed written decision and may also affirm, modify, reverse, increase or reduce any sanction, or may impose any other sanction that it deems fitting.[226] Alternatively, the FINRA board may remand the disciplinary proceeding with

[219] FINRA Rule 9349(b).
[220] FINRA Rule 9349(c).
[221] FINRA Rule 9351(a).
[222] FINRA Rule 9349(c).
[223] *See* 289 SPS § VI-C3, *Application for SEC review* (discussing applications to the SEC for review of FINRA disciplinary decisions).
[224] FINRA Rule 9351(c).
[225] *Id.*
[226] FINRA Rule 9351(d).

instructions.[227] Unless the board remands the proceeding, its decision constitutes the final disciplinary action of FINRA and may thereby be appealed to the SEC.[228]

3. Application for SEC review

A respondent who wishes to challenge a final disciplinary action by FINRA can petition the SEC to review the case.[229] FINRA promptly notifies the SEC of its disciplinary decision,[230] and the respondent must then file its application with the SEC within 30 days after FINRA's notice of the determination is filed with the SEC and received by the aggrieved person applying for review.[231]

The application must ''identify the determination complained of and set forth in summary form a brief statement of the alleged errors in the determination and supporting reasons therefor,'' but is limited to two pages.[232] FINRA, rather than the applicant, files and certifies the record of the proceeding that is being appealed.[233] If the applicant is to be represented by legal counsel, that attorney must file a notice of appearance.[234] At any time before the SEC issues its decision, the SEC is permitted to raise or consider any matter that it deems material, regardless of whether the parties have raised that issue.[235] The SEC may provide the parties with notice of and the opportunity to submit supplemental briefing on issues that the parties have not already briefed if the SEC believes that such briefing would significantly aid the decisional process.[236]

The pendency of the SEC review stays the effectiveness of any FINRA-imposed sanction except for a bar or expulsion of the respondent.[237] Upon review, the SEC may overturn or modify the sanction only if it finds that the sanction imposes an unnecessary or inappropriate burden on competition or is excessive or oppressive.[238]

4. Judicial review of disciplinary proceedings

Before seeking judicial review, a respondent must exhaust its administrative remedies by appealing to the NAC and then the SEC.[239] Following review by the SEC, a sanctioned party can seek judicial review by a federal court of appeals.[240] The review may be sought in the U.S. Court of Appeals for the circuit in which the respondent resides or has a principal place of business, or for the District of Columbia Circuit,[241] and the petition for review must be filed with the court within 60 days after entry of the SEC's order.[242]

Pursuant to the filing of such a petition, the federal circuit court will review the SEC's order rather than the initial decision by FINRA imposing sanctions.[243] The court will review the SEC's decision to sustain the sanctions imposed by a self-regulatory organization such as FINRA for abuse of discretion; under this standard, a court will overturn such a decision only if it is unwarranted in law or without justification in fact.[244] The federal court will also sustain the SEC's findings of fact so long as they are supported by substantial evidence[245] and will only set aside the SEC's conclusions of law when it finds them to be arbitrary and capricious.[246]

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[227] *Id.*

[228] FINRA Rule 9351(e).

[229] *See* FINRA Rule 9370(a) (providing that a respondent aggrieved by final disciplinary action may apply for review by the SEC pursuant to Exchange Act § 19(d)(2)); 15 U.S.C. § 78s(d)(2) (providing for review by SEC of disciplinary sanctions that self-regulatory organizations such as FINRA impose on their members or participants).

[230] *See* 15 U.S.C. § 78s(d)(1); 17 C.F.R. § 240.19d-1(c).

[231] 17 C.F.R. § 201.420(b). The SEC may also initiate review of a FINRA disciplinary decision sua sponte within 40 days after it receives FINRA's notice of the decision. 17 C.F.R. § 201.421(a).

[232] 17 C.F.R. § 201.420(c).

[233] 17 C.F.R. § 201.420(e).

[234] 17 C.F.R. §§ 201.420(c), 201.102.

[235] 17 C.F.R. § 201.421(b).

[236] *Id.*

[237] FINRA Rule 9370(a).

[238] 15 U.S.C. § 78s(e)(2).

[239] *See* Charles Schwab & Co. v. Fin. Indus. Regulatory Auth., Inc., 861 F. Supp. 2d 1063, 1069, 1079 (N.D. Cal. 2012) (noting that ''FINRA disciplinary actions proceed through a number of levels that culminate in administrative review by the SEC and then in judicial review by the federal court of appeals'' and holding that ''exhaustion of FINRA's administrative remedies in this disciplinary case is jurisdictional''); *see also* First Jersey Sec., Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979); McGinn, Smith & Co. v. Fin. Indus. Regulatory Auth., 786 F. Supp. 2d 139, 146 (D.D.C. 2011) (explaining that the district courts lack jurisdiction over complaints seeking to enjoin NASD disciplinary proceedings and that Congress has vested the Courts of Appeals with exclusive jurisdiction to review final NASD disciplinary rulings after they are reviewed by the SEC); *but see* Bruan, Gordon & Co. v. Hellmers, 502 F. Supp. 897 (S.D.N.Y. 1980). The *Bruan* court observed that—

> it is well-established that the doctrine of exhaustion of administrative remedies applies with equal force to the disciplinary proceedings of NASD. . . . However, . . . extraordinary circumstances may compel a court to hear a case. . . . For example, a narrow exception to the exhaustion doctrine exists in situations where plaintiffs allege that an agency is acting plainly beyond its jurisdiction.

Id. at 902 (citations and internal quotations omitted).

[240] 15 U.S.C. § 78y.

[241] *Id.*

[242] *Id.*

[243] Cody v. SEC, 693 F.3d 251, 257 (1st Cir. 2012).

[244] Kleinser v. SEC, 539 F. Appx. 7, 9 (2d Cir. 2013) (quoting McCarthy v. SEC, 406 F.3d 179, 188 (2d Cir. 2005)); *see also* Saad v. SEC, 718 F.3d 904, 910 (D.C. Cir. 2013) (holding that the court reviews the SEC's conclusions regarding sanctions imposed by FINRA to determine whether those conclusions are arbitrary, capricious, or an abuse of discretion and will reverse only if the remedy chosen is unwarranted in law or is without justification in fact.); Krull v. SEC, 248 F.3d 907, 912 (9th Cir. 2001) (finding that the SEC's imposition of sanctions is reviewed for abuse of discretion in the context of imposition of sanctions typically involves either a sanction palpably disproportionate to the violation or a failure to support the sanction chosen with a meaningful statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record); *McCarthy*, 406 F.3d at 188; Epstein v. SEC, 416 F. Appx. 142, 147 (3d Cir. 2010).

[245] *Kleinser*, 539 F. Appx. at 9; *see also Cody*, 693 F.3d at 257; Erenstein v. SEC, 316 F. Appx. 865, 869 (11th Cir. 2008) (same).

[246] *Kleinser*, 539 F. Appx. at 9 (explaining the arbitrary and capricious standard, in which ''a reviewing court shall hold unlawful and

While a respondent has the right to judicial review under appropriate circumstances, the Second Circuit held in 2011 that FINRA lacks the corresponding authority to commence a judicial action to collect disciplinary fines that it has imposed.[247] No other reported decision of which we are aware has yet addressed this issue.

set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'') (internal quotation omitted) (quoting 5 U.S.C. § 706(2)(A)); *see also Cody*, 693 F.3d at 257 (explaining that the SEC's orders and conclusions must not be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law) (quoting 5 U.S.C. § 706(2)(A)); *cf. Erenstein*, 316 F. Appx. at 869 (''We conduct a *de novo* review of the SEC's legal conclusions.'') (emphasis in original).

[247] Fiero v. Fin. Indus. Regulatory Auth., Inc., 660 F.3d 569 (2d Cir. 2011) (reversing dismissal of complaint that sought a declaratory judgment that, among other things, FINRA lacks the authority to bring court actions to collect disciplinary fines it has imposed).

