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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED Plaintiff, v. **CHRISTINA BILLINGTON AS SUCCESSOR TRUSTEE FOR THE JAMES A. BILLINGTON TRUST; STEVEN MORENO; AND DONALD STRASZHEIM** Defendants.	**Case No. 2:17-cv-8150** **DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR A PRELIMINARY INJUNCTION AGAINST PROCEEDING IN FINRA ARBITRATION** Judge: Hon. George H. Wu Date: January 4, 2018 Time: 8:30 a.m. Location: Courtroom 9D

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Defendants Christina Billington as Successor Trustee for the James A. Billington Trust; Steven Moreno; and Donald Straszheim (collectively, "Defendants") by and through their undersigned counsel, hereby submit this Memorandum of Law in Opposition to Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated's ("MLPF&S") Motion for a Preliminary Injunction Against Proceeding in FINRA Arbitration and state as follows:

INTRODUCTION

In its motion Plaintiff disingenuously attempts a legal sleight of hand by asserting Defendants' dispute is with ML & Co. not MLPF&S. The truth is the exact opposite as Defendants' dispute is clearly with MLPF&S. The claims filed at FINRA also identify MLPF&S as the proper party.

In the August 2014 record $17 billion settlement the SEC, U.S. Department of Justice, U.S. Attorney's Office and the Federal Deposit Insurance Corporation (FDIC) all specifically named MLPF&S, not ML & Co., for fraudulent activities in RMBS and CDOs. MLPF&S (not ML & Co.) signed the settlement agreements with these government agencies. Additionally, independent investigations by the States of California, Delaware, Illinois, Maryland, Kentucky and New York also targeted the fraudulent activities of MLPF&S (not ML & Co.) for its RMBS and CDOs.

It was MLPF&S's fraud in RMBS and CDOs which damaged Defendants as properly alleged in their arbitration claims filed at FINRA. Defendants' Fraud, RICO and related claims are also timely as the massive fraud in RMBS and offshore CDOs was released into

the public domain for the first time in the August 2014 DOJ settlement documents. This fraud was concealed by MLPF&S. It took the full legal resources of the Federal and State government agencies to detect and uncover MLPF&S's concealed fraud. Thus, Defendants Fraud, RICO and other related claims are timely.

Regarding timeliness Plaintiff incorrectly relies on *Woori Bank v. Merrill Lynch*, 923 F. Supp. 2d 491 (S.D.N.Y. 2013), aff'd, 542 F. App'x 81 (2d Cir. 2013). In *Woori*, a Korean bank contended it learned of its cause of action after reviewing the Financial Crisis Inquiry Commission (FCIC) report in 2011. The *Woori* Court held the FCIC report merely summarized the cause of the financial crisis using previously available public information. In sharp contrast, the information released in the DOJ settlement concerning MLPF&S's fraudulent RMBS and CDOs offshore in the Cayman Islands was not previously in the public domain and had been actively concealed.

FINRA is the proper forum because Plaintiff required Defendants who were its employees to hold their compensation in the form of MER common stock and options in brokerage accounts maintained at MLPF&S. Each Defendant's brokerage account had an arbitration clause requiring all disputes to be resolved at FINRA.

With respect to FINRA as the proper forum Plaintiff erroneously relies on *Goldman Sachs & Co. v. City of Reno*, 747 F.3d 733 (2014). In *Goldman*, the parties had agreed to a forum selection clause taking the matter away from FINRA stating any dispute: "Shall be brought in the United States District Court for the District of Nevada." Of course, no such

forum selection clause exists in Defendants' arbitration agreements which require FINRA arbitration.

Plaintiff has already filed Answers and Affirmative Defenses to each Defendant's FINRA claim. Plaintiff has also ranked arbitrators. FINRA now has a panel of arbitrators selected to adjudicate the Billington claim. Arbitrator panels on the Moreno and Straszheim cases will be in place soon to adjudicate these matters as well. Discovery has also begun with specific, narrowly-tailored document requests propounded on MLPF&S designed to get to the truth of the firm's fraudulent activities cited in the August 2014 DOJ settlement. The fingerprints of MLPF&S are all over the activity that damaged Defendants.

MLPF&S admits in its motion that "FINRA Rule 12200 defines the scope of arbitrable disputes." FINRA has already determined that Plaintiff is "required by FINRA rules to arbitrate" each Defendant's claims. Moreover, each Defendant's FINRA case is proceeding quickly, efficiently and cost-effectively. Despite all of this Plaintiff now improperly seeks the extraordinary relief of requesting that this Court halt each Defendant's arbitration which was required by contract in Defendants' customer agreements.

Finally, Plaintiff has withheld from this Court the existence of yet another binding arbitration agreement requiring Defendants' claims be resolved at FINRA. Each Defendant was an employee of and associated person for MLPF&S. Pursuant to that employment relationship MLPF&S required Defendants to sign a Form U4 which contained a pre-dispute arbitration agreement requiring any dispute be resolved at FINRA. MLPF&S's fraudulent

business activities as a FINRA member severely damaged Defendants' employee compensation. The Form U4 requires arbitration and FINRA routinely adjudicates such matters.

Since there are multiple, valid and binding arbitration agreements Plaintiff's frivolous motion should be denied.

BACKGROUND

Each Defendant was both a MLPF&S employee and a registered FINRA Associated Person. MLPF&S is a Member firm of FINRA. Upon entering an employment relationship with Defendants, MLPF&S was required to submit a Uniform Application for Securities Industry Registration or Transfer ("Form U4") for each individual. Though MLPF&S has thus far refused to provide copies of Defendants' Forms U4, attached as **Exhibit 1** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas is the Form U4 of John Thompson who is one of the 19 Defendants referenced by Plaintiff in its Complaint and Motion for Preliminary Injunction. Section 15A, Paragraph 5 contains an arbitration clause, which requires an employee 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 [FINRA] . . . ."

Throughout the entirety of the decades that Defendants were employed by MLPF&S, part of their compensation came in the form of shares or stock options issued by MLPF&S's affiliate, Merrill Lynch & Co. ("ML & Co."). This portion of Defendants' compensation was

deposited into MLPF&S brokerage accounts that MLPF&S required all employees to open and maintain during their period of employment. At the time MLPF&S opened Defendants' accounts, MLPF&S required Defendants to sign a customer agreement. Although MLPF&S has thus far also declined to provide copies of Defendants' customer agreements, such agreements contain provisions similar to the following:

> "This agreement contains a predispute arbitration clause. By signing this arbitration agreement the parties agree as follows: All parties to this Agreement are giving up the right to sue each other in court…
> Any arbitration pursuant to this provision shall be conducted only before the Financial Industry Regulatory Authority, Inc. (FINRA) or an arbitration facility provided by any other exchange of which Merrill Lynch is a member, and in accordance with the respective arbitration rules then in effect in FINRA or such other exchange."
>
> **See Exhibit 2** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas.

Notably, MLPF&S has never denied that Defendants were customers of MLPF&S, that such customer agreements exist, or that they contain arbitration provisions.

As described at length in Defendants' FINRA statements of claim for arbitration, attached as **Exhibits 3, 4,** and **5** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas, on August 21, 2014, MLPF&S and its parent company Bank of America entered into a record $17 billion settlement with the United States Department of Justice to resolve fraud charges. This is the largest settlement in American history. As part of this settlement MLPF&S and Bank of America admitted flagrant misconduct and wrongdoing in connection with their fraudulent activities in mortgage-backed securities. In documents

filed with the Securities and Exchange Commission and U.S. Department of Justice, MLPF&S and Bank of America both signed admissions of wrongdoing. The comprehensive Department of Justice settlement materials revealed massive fraud and presented data not previously available to the public or ever disclosed by MLPF&S or Bank of America. MLPF&S's fraudulent conduct played a major role in severely damaging the U.S. economy and causing the public to lose many billions of dollars. This fraud ultimately destroyed ML & Co.'s share value.

The significant depreciation in ML & Co. share value caused by MLPF&S's concealed fraud resulted in dramatic losses in Defendants' brokerage accounts held by MLPF&S. The losses to Defendant Billington's account exceed $100 million on his ML & Co. shares and stock options. Defendants Straszheim and Moreno's accounts likewise suffered losses of multiple millions of dollars as a result of MLPF&S's fraud. Defendants have presented and claimed damages related to the loss of stock value in arbitration as but one of several measures of damages that will be presented at final hearing for the arbitration panel's consideration based upon Fraud, RICO and related claims.

Defendants have each filed individual FINRA statements of claim for FINRA arbitration. As discussed at length below, FINRA is the appropriate and required forum to decide these disputes and the FINRA arbitration actions are proceeding.

Moreover, FINRA Regulatory Notice 16-25 issued in July 2016 warns member firms including MLPF&S that attempts to circumvent predispute arbitration agreements with

customers or associated persons would violate FINRA rules and result in disciplinary action. See **Exhibit 6** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas. Indeed, FINRA's Department of Enforcement is already reviewing MLPF&S's deliberate court tactics to avoid arbitration in this case as Defendants are both customers and associated persons.

Despite having already responded to Defendants' claims in FINRA arbitration, as it was required to by multiple arbitration agreements, MLPF&S filed a frivolous Complaint in this Court and has now filed an equally frivolous Motion for a Preliminary Injunction Against Proceeding in FINRA Arbitration. Defendants have already filed a Motion to Dismiss or, in the Alternative, Stay Proceedings and Compel Arbitration, and Defendants now ask the Court to deny Plaintiff's baseless request for injunctive relief.

ARGUMENT

"[I]njunctive relief [is] as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L.Ed.2d 249 (2008). For a court to grant preliminary injunction, the plaintiff must establish (1) likelihood of success on the merits, (2) likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that public interest favors injunction. *Id.* at 20.

As Plaintiff notes in its Motion, the Ninth Circuit has articulated a second standard for preliminary injunctions. This test uses the same four factors as the *Winter* test, but allows the plaintiff to receive a preliminary injunction in situations where there are serious questions as

to the plaintiff's likelihood of success on the merits so long as the "balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir.2011). Under this test, the plaintiff must also demonstrate a likelihood of irreparable harm and that public interest favors the injunction, as is required under the *Winter* test. *Id.* at 1135.

As will be demonstrated herein, Plaintiff fails to satisfy either of these standards, because Defendants' claims are subject to valid arbitration provisions.

A. Plaintiff Will Not Succeed on the Merits

Contrary to what Plaintiff's arguments would lead one to believe, Plaintiff is only required to show a likelihood of success on the merits as to a single issue—whether Defendants' claims must be arbitrated. While Defendants do not dispute that it is for the Court to determine arbitrability of these claims, that determination does not depend on many of the factors that Plaintiff hinges its arguments on, like the proper party to those claims or whether the claims are timely. *Tuminello v. Richards*, No. C11-5928BHS, 2012 WL 750305, at *3 (W.D. Wash. Mar. 8, 2012), *aff'd*, 504 F. App'x 557 (9th Cir. 2013) ("Here, Richards has asserted claims in his personal capacity against UBSFS and Tuminello, and there is no dispute that the Master Account Agreement between UBSFS and Richards contains a valid arbitration clause. **Accordingly, the Court's inquiry starts and ends with its determination that there exists a valid and enforceable arbitration agreement between the parties named in the SOC, and the Court need not address the secondary question**

of who is the "real party in interest" in the context of the SOC. The Court must defer that fact-finding function to the arbitrator.")

When assessing arbitrability, the Court must merely decide: "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (citation and internal quotation marks omitted). Because there are multiple valid arbitration agreements covering Defendants' claims, those claims are subject to FINRA arbitration and Plaintiff's Motion must be denied.

1. There are multiple valid agreements to arbitrate.

As explained above, at the time each Defendant became employed by MLPF&S, they were required to sign a Form U4 before they were permitted to provide services for MLPF&S. *See Valentine Capital Asset Mgmt., Inc. v. Agahi*, 174 Cal. App. 4th 606, 613, 94 Cal. Rptr. 3d 526, 532 (2009). "The Form U4 is a contract between the regulatory organization (here FINRA) and the individual registrant." *Id.* Courts have generally held arbitration is mandated by the Form U4 and FINRA rules. *Mullins v. U.S. Bancorp Invt., Inc.* 1:15-CV-00126-GNS, 2016 U.S. Dist. LEXIS 47488 (W.D. Ky. April 8, 2016); *Hawkins v. Questar Capital Corp*. No. 5:12-CV-000376, WL 5596897, at *2 (E.D. ky. Oct. 11, 2013).

By signing the Form U4, Defendants agreed 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 [FINRA] . . . ." FINRA Rules 13200 and 12200 require arbitration of all disputes between FINRA members and associated persons "if the dispute arises out of the[ir] business activities." FINRA Rule 13200. Plaintiff is a FINRA member and Defendants are associated persons. So long as Defendants' claims arose out of Plaintiff's business activities, then the dispute must be arbitrated. MLPF&S engaged in the fraudulent RMBS and CDOs as part of its FINRA business activities. ML & Co. could not and did not as it was merely a holding company. MLPF&S was also specifically named for its RMBS and CDO activity by the State and Federal regulators and agencies involved in the 2014 DOJ settlement. MLPF&S's fraud damaged Defendants.

Additionally, the customer agreements for Defendants' brokerage accounts with MLPF&S require FINRA arbitration pursuant to FINRA rules. As a FINRA member, MLPF&S is bound by the rules of FINRA, which further prove that arbitration is required in this case. Specifically, FINRA Rule 12200 states:

> Parties must arbitrate a dispute under the [FINRA Code of Arbitration] if:
>
> Arbitration is either:
>
> (1) Required by a written agreement, or
>
> (2) Requested by the customer;
>
> The dispute is between a customer and a member or associated person of a member; and
>
> The dispute arises in connection with the business activities of the member or the associated person . . . .

FINRA Rule 12200. Not only is there a written customer agreement requiring arbitration

of this dispute, arbitration is specifically being requested by the customers—Defendants. Additionally, FINRA has determined these cases "are required to be arbitrated. See FINRA service letters attached as **Exhibits 7, 8 and 9** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas. Moreover, this Court has previously held that Rule 12200 itself may serve as a written arbitration agreement. *Hull v. Bennett*, No. SACV15742JLSDFMX, 2015 WL 11438547, at *3 (C.D. Cal. Sept. 15, 2015) ("Accordingly, a court applies 'the federal policy favoring arbitration' when interpreting this provision, 'generously construe[ing] [the parties' intentions] as to issues of arbitrability' and '[resolving] any ambiguities as to the scope of the arbitration clause' in favor of arbitration. Thus, the issue before the Court is whether the scope of the agreement includes the dispute at hand.") (internal citations omitted).

Accordingly, because valid arbitration agreements exist and Plaintiff does not challenge the validity of these agreements, nor are there grounds to challenge their validity, this factor is undisputedly satisfied.

2. The arbitration agreements encompass Defendants' claims.

Either from an employment or customer perspective, both arbitration provisions require FINRA arbitration of Defendants' claims, because the losses suffered from the fraud relating to ML & Co. stock was a direct result of MLPF&S's business activities.

Plaintiff's decision to compensate its employees using ML & Co. stock and options, which were compromised and depreciated due to Plaintiff's fraud, can only be considered a "business activity" of MLPF&S. Importantly, courts routinely interpret the Form U4

arbitration provision broadly and sufficient to mandate arbitration in all types of disputes between a Member Firm employer and an Associated Person employed by that Member. *Hightower v. JPMorgan Chase Bank, N.A.*, No. CV111802PSGPLAX, 2014 WL 12558114, at *10 (C.D. Cal. Jan. 28, 2014) ("[E]ven under the arbitration described in Form U4, employment-related disputes with [the Firm] are subject to arbitration."); *Feller v. Wells Fargo Advisors, LLC*, No. 6:11-CV-345-ORL-28, 2011 WL 3331265, at *3 (M.D. Fla. Aug. 3, 2011) ("[The] clause is broad and encompasses the claims Plaintiff seeks to bring in this lawsuit."). In *Hawkins*, the Court stated: "other district courts within the Sixth Circuit have uniformly deemed employment-related claims…between brokerage firms and their agents as disputes arising out of the business activities of FINRA members." *Hawkins v. Questar Capital Corp*. No. 5:12-CV-000376, WL 5596897, at *12-13 (E.D. ky. Oct. 11, 2013). In the instant case the dispute between employer and employee regarding damage to their compensation is clearly a business activity of a FINRA member. FINRA panels routinely adjudicate such disputes. See FINRA Awards in which the Panel considered, heard and decided employee compensation disputes **Exhibits 10** and **11** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas.

When viewing Defendants in their capacity as customers of MLPF&S, Defendants' claims likewise arose out of MLPF&S's business activities. MLPF&S conspired with ML & Co. to offer ML & Co. stocks and options to MLPF&S customers while failing to warn the customers of any risks associated with the stocks or take any other precautionary

measures with regard to the customers' accounts.[1] Notably, it was the business activity of MLPF&S through the creation of the fraudulent financial products as described in the FINRA Statement of Claims that give rise to the fraud, RICO, and related claims. Furthermore, any argument that MLPF&S is absolved of any obligation to arbitration because of ML & Co.'s wrongdoing is unavailing and improper at this stage, as it relates to liability, not arbitrability. As explained by the Northern District of California:

> To the extent that WPS rests its argument on the assertion that its relationship with [the employee] was "independent" of [the employee]'s activities in connection with investment in Ray Pacific, and that WPS was "unaware" of [the employee]'s conduct in connection with that fund, the argument lacks merit. While such a distinction may bear on WPS's ultimate liability, it has no significance to the question of whether arbitration is required here. Under the FINRA Rules, there is no exemption from the obligation to arbitrate claims based upon an assertion that the activities of the associated person were unknown to the firm or were outside the normal scope of the relationship.

White Pac. Sec., Inc. v. Mattinen, No. 12 CV 151 YGR, 2012 WL 952232, at *5 (N.D. Cal. Mar. 19, 2012). Similarly, MLPF&S cannot escape its responsibility to arbitrate by simply pointing fingers at its co-conspirator, ML & Co.

B. MLPF&S Will Not Suffer Irreparable Harm If Required to Comply with Its Obligation to Arbitrate.

Plaintiff will not suffer irreparable harm if it is required to arbitrate Defendants' claims. First, the costs associated with funding arbitration are economic and quantifiable, and therefore do not qualify as "irreparable." Second, because Plaintiff knowingly and

[1] If this Court finds that Defendants are customers of MLPF&S and that Defendants' claims are within the scope of the provision requiring arbitration, the Court can and should deny Plaintiff's Motion for failure to show a likelihood of success on the merits, without needlessly addressing any other factors. *See Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013) ("[W]hen we agree with the district court that a plaintiff has failed to show the likelihood of success on the merits, we 'need not consider the remaining three [*Winter* elements].'").

willingly agreed to arbitrate these disputes with Defendants, Plaintiff cannot claim that it will be harmed if required to arbitrate. Moreover, Plaintiff continues to misrepresent its ability to be dismissed from FINRA arbitration prior to a final hearing. In fact, the FINRA Rules provide several opportunities for Plaintiff to seek and obtain dismissal in the early stages of arbitration.[2]

When a party has agreed to arbitrate claims, enforcement of that agreement to arbitrate does not qualify as irreparable harm.

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[2] Notably, the District of Delaware recently decided a very similar motion brought by MLPF&S and reached an identical conclusion on all three of these points:

> I reject the arbitration defendants' first argument for three reasons. First, the expense of arbitration is insufficient to constitute irreparable harm. *522 W. 38th St. N.Y. LLC v. New York Hotel & Motel Trade Council, AFL-CIO*, 517 F. Supp. 2d 687, 688 (S.D.N.Y. 2007) ("Moreover, with arbitration already ongoing, the main injury petitioner points to is economic in nature, i.e., the costs and disruptive effects of arbitration, which can be addressed through non-injunctive relief."); *see Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").
>
> Second, Merrill Lynch and JPMS are FINRA members and included arbitration in contracts they drafted. Their preferred vehicle for resolving disputes with customers is through arbitration. Thus, they cannot reasonably complain that the procedures of the FINRA arbitration irreparably harm them.
>
> Third, FINRA has a rule that allows timeliness concerns to be heard at an early stage of the proceeding. FINRA Rule 12206 allows a motion to dismiss if "six years have elapsed from the occurrence or event giving rise to the claim." Merrill Lynch complains that, if dismissal were granted under this rule, Jordan could refile in court. If Jordan were to file time-barred claims, however, the appropriate remedy would be a motion to dismiss, not anticipatory injunctive relief.
>
> Thus, the arbitration defendants have failed to show they will suffer irreparable harm from being forced to arbitrate the dispute with Jordan.

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Jordan, No. 17-CV-199 (RGA), 2017 WL 1536396, at *8 (D. Del. Apr. 27, 2017) (internal citation omitted).

> Plaintiffs argue that without a preliminary injunction, they will be forced to expend time and resources defending an invalid arbitration. And while courts generally have found that arbitrating claims in the absence of an agreement to arbitrate sufficiently demonstrates irreparable harm, here, Plaintiffs clearly agreed to arbitrate certain disputes as associated persons under FINRA. Moreover, it appears that the claims fall within the scope of FINRA Rule 12200. Plaintiffs have therefore failed to demonstrate irreparable harm, and their requests do not warrant equitable relief at this time.

Hull v. Bennett, No. SACV15742JLSDFMX, 2015 WL 11438547, at *4 (C.D. Cal. Sept. 15, 2015) (internal citations omitted). As this Court has previously held, equitable relief is not warranted for a party that has previously agreed to arbitrate the claims at issue, as is the case here. Additionally, the fact that Plaintiff argues in favor of a more costly and time consuming forum, federal court, rather than the more efficient and cost-effective FINRA arbitration, weighs heavily against a finding of irreparable harm. *See Tuminello v. Richards*, No. C11-5928BHS, 2012 WL 750305, at *4 n.4 (W.D. Wash. Mar. 8, 2012), aff'd, 504 F. App'x 557 (9th Cir. 2013) (holding that "[t]he economics cut against a finding of irreparable harm" when Plaintiffs based in Seattle, Washington sought to "litigate the claims referenced in the [FINRA statement of claim] in Switzerland rather than locally in a presumably less expensive FINRA arbitration").

Furthermore, if there is any merit to Plaintiff's arguments that it is an improper party or that the claims are untimely, Plaintiff will have every opportunity to raise those issues on a motion to dismiss in the proper forum: FINRA arbitration. Despite Plaintiff's claims, FINRA Rules 12504 and 13504, attached as **Exhibit 12 and 13** to the Supporting Declaration of Defendants' Attorney Paul W. Thomas, specifically allow for early

dismissal based on a small number of grounds, two of which expressly apply to Plaintiff's arguments. For example, under Rule 12504(a)(6)(B), a party may move for dismissal if "the moving party was not associated with the account(s), security(ies), or conduct at issue." As expressly noted in FINRA Notice 09-07, Rule 12504(a) motions are those that are "filed before a hearing on the merits (i.e., prehearing motions), or motions filed during the hearing on the merits but before a party has concluded its case-in-chief." Additionally, under Rule 12206, a party may move to dismiss based on eligibility, if claims are not within FINRA's 6-year eligibility rule. See FINRA Rule 12206. Like Rule 12504(a) motions, Rule 12206 eligibility motions are also permitted—and, in fact, required—to be filed prior to the hearing on the merits. *See* FINRA Notice 09-07 ("Under the eligibility rule, a party may file a motion to dismiss on eligibility grounds at any stage of the proceeding, except that a party may not file this motion any later than 90 days before the scheduled hearing on the merits[.] . . . The 30-day timeframe to respond to eligibility motions will expedite the process, so that the time between filing a claim and resolution of the dispute is shortened."). Under either Rule 12504(a) or 12206, Plaintiff may properly seek dismissal of any claims in arbitration to which it believes it is not the proper party or that the claim is not timely. This Court is limited to determining the issue of arbitrability and issues relating to the proper party or the timeliness are not relevant to arbitrability and may be addressed in the early stages of FINRA arbitration.

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C. The Balance of Equities Tips Sharply in Defendants' Favor—Not Plaintiff's.

In determining the balance of hardships to either party, the court must "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 571 F.3d 960, 988 (9th Cir.2009). As established below, the equities do not tip in Plaintiff's favor in the slightest, and in fact tip sharply in favor of Defendants, thus Plaintiff cannot satisfy either standard for injunctive relief.

In assessing the potential damage to each party, courts consider a wide range of factors. The fact that claims will be arbitrated rather than litigated is not "damage." *See Abraham v. Simpson*, No. 11-CV-0637-RBJ-MJW, 2011 WL 5925522, at *6 (D. Colo. Nov. 28, 2011). In fact, when a party has experience in FINRA, due to an extensive background in the financial industry, a court may consider that as weighing against a finding of damage. *Id.* ("A person with [plaintiff's] background and the experience in the industry has presumably had considerable experience with FINRA and its predecessor, the NASD. . . . He has provided nothing to indicate that he cannot and will not get a full and fair hearing with the FINRA panel."). MLPF&S, of course, has considerable and extensive experience navigating FINRA arbitrations and will suffer no harm by being required to arbitrate Defendants' claims, as it would ordinarily do under these circumstances. Furthermore, while MLPF&S has the experience and resources required to continue litigating in this federal court action, individual Defendants do not have those same benefits and thus will suffer significant damage if they are improperly required to

litigate their claims rather than have them assessed in the simpler and more cost-effective forum of FINRA arbitration.

Courts also consider factors including the age of the parties and the status of the pending arbitrations when deciding whether enjoining arbitration may damage either party. In *Abraham*, the District of Colorado discussed these factors, which are applicable in the instant case:

> Mr. Simpson is 84 years old. Mrs. Simpson is 89 years old. This case was filed in March 2011. Due to no fault of either party, it has not progressed rapidly. However, an arbitration is set and ready to go tomorrow. . . .
>
> Given the Simpsons' age [and] the delay inherent in starting over in court, . . . the Court finds that the balance of the equities does not favor a preliminary injunction.

Abraham v. Simpson, No. 11-CV-0637-RBJ-MJW, 2011 WL 5925522, at *6 (D. Colo. Nov. 28, 2011); *see also UBS Fin. Servs., Inc. v. W. Virginia Univ. Hosps., Inc.*, 760 F. Supp. 2d 373, 379 (S.D.N.Y.), *aff'd in part, vacated in part*, 660 F.3d 643 (2d Cir. 2011) ("[T]he Court finds that further delay of these proceedings would frustrate Defendants' right to a speedy arbitration of their claims. This hardship is not outweighed by any potential hardship to UBS. Therefore, the Court holds that UBS has not satisfied its burden as to this prong."). Defendants in this case will be damaged by any additional delay in the pending arbitrations, as they are only advancing in age (Defendant Billington is deceased). Additionally, the arbitrations are well underway and offer the most expedient way to resolve these claims.

D. Entry of an Injunction Is Not in the Public Interest.

The public interest favors compelling arbitration of Defendants' claims, pursuant to the public policies underlying injunctive relief and arbitration agreements, in addition to general contract principles.

As the Supreme Court stated in *Winter*, "courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376–77. There is a strong federal policy favoring arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

Furthermore, public policy favors giving effect to the parties' intent. *See, e.g., Local Union 2426 v. United Mine Workers*, 864 F.Supp. 545, 554 (S.D.W.Va.1994) (holding that public policy favors enforcing the parties' intent with respect to arbitration). "This issue is, therefore, resolved by looking to whether the parties agreed to arbitrate." *UBS Fin. Servs. Inc. v. Carilion Clinic*, 880 F. Supp. 2d 724, 734 (E.D. Va. 2012), *aff'd*, 706 F.3d 319 (4th Cir. 2013). "Having concluded that [Plaintiffs] agreed to arbitrate disputes with their customers, and that [Defendant] qualifies as a customer, public policy favors giving effect to the parties' intent by allowing arbitration to proceed." *Id.*

As previously noted, injunctive relief is an extraordinary remedy that "should not be

granted unless the movant, by a clear showing, carries the burden of persuasion." *Towery v. Brewer*, 672 F.3d 650, 657 (9th Cir. 2012). Plaintiff has failed to satisfy its burden and thus this Motion should be denied.

It is clear from the multiple arbitration provisions between Plaintiff and Defendants that the parties intended to arbitrate any disputes. As was already established herein, the arbitration provisions are valid and encompass Defendants' claims and therefore the public policy in favor of arbitration requires that the provisions be enforced. Requiring that Plaintiff adheres to its commitment to arbitrate these disputes not only serves the public interest favoring arbitration, but also generally furthers the public interest in requiring parties to follow through with their contractual obligations.

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CONCLUSION

For all of the above reasons Plaintiff's Motion should be denied.

Dated: December 14, 2017
Respectfully Submitted,

By: /s/ Paul W. Thomas

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