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8  
9 DISTRICT COURT  
10  
11 CLARK COUNTY, NEVADA

12 MITCHELL DEAN HORST, an  
13 individual,

CASE NO.: A-18-777960-C  
DEPT NO.: X

14 Plaintiff,

15 vs.

16 FINANCIAL INDUSTRY  
17 REGULATORY AUTHORITY, INC.,

18 Defendant.

19  
20 **NOTICE OF ENTRY OF ORDER**  
**DENYING MOTION TO VACATE ARBITRATION AWARD**

21 Please take notice that an Order Denying Motion to Vacate Arbitration Award was entered  
22 in the above-captioned matter on October 25, 2018, a copy of which is attached hereto.

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27 ///

1 DATED this 29th day of October, 2018

2 BROWNSTEIN HYATT FARBER  
3 SCHRECK, LLP

4  
5 By: 

6 Patrick J. Reilly  
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8 Las Vegas, NV 89106-4614

9 *Attorneys for Financial Industry  
10 Regulatory Authority, Inc.*

11 **CERTIFICATE OF SERVICE**

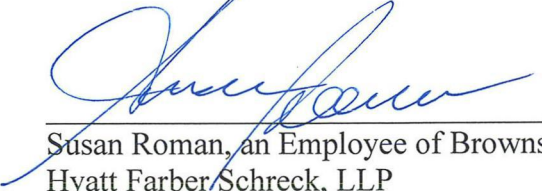
12 I hereby certify that on the 29<sup>th</sup> day of October, 2018, a true and correct copy of the  
13 foregoing **NOTICE OF ENTRY OF ORDER DENYING MOTION TO VACATE  
14 ARBITRATION AWARD** was served by the following method(s):

15 Electronic: by submitting electronically for filing and/or service with the Eighth Judicial  
16 District Court's Odyssey eFileNV Electronic Filing system and serving all parties with an  
17 email address on record, as indicated below, pursuant to Administrative Order 14-2 and  
18 Rule 9 of the N.E.F.C.R. That date and time of the electronic proof of service in place of  
19 the date and place of deposit in the U.S. Mail.

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1 **ORDER**  
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7 AUTHORITY, INC.

8 **DISTRICT COURT**  
9 **CLARK COUNTY, NEVADA**

11 MITCHELL DEAN HORST, an  
12 individual,  
13 Plaintiff,  
14 v.  
15 FINANCIAL INDUSTRY  
REGULATORY AUTHORITY, INC.,  
16 Defendant.  
17

Case No.: A-18-777960-C  
Dept. No.: X

**ORDER DENYING MOTION TO VACATE  
ARBITRATION AWARD**

18  
19 On September 25, 2018, this Court heard oral argument on a Motion to Vacate Arbitration  
20 Award (the “Motion”) filed by Plaintiff Mitchell Dean Horst (“Mr. Horst”) in the above-entitled  
21 matter. Steven H. Burke, Esq. appeared on behalf of Mr. Horst. Patrick J. Reilly, Esq. appeared  
22 on behalf of Defendant Financial Industry Regulatory Authority, Inc. (“FINRA”). Stacey M.  
23 Garrett, Esq. appeared on behalf of Wells Fargo Advisors Financial Network, LLC (“Wells  
24 Fargo”), which did not oppose the Motion.

25 **I.**  
26 **FINDINGS OF FACT**

27 **A. Nature Of The FINRA Dispute Resolution Arbitration Forum**

28 This is an action to vacate or modify an arbitration award issued in a FINRA arbitration

1 between Mr. Horst and Wells Fargo. FINRA operated the arbitration forum and administered the  
2 underlying arbitration titled Mitchell Dean Horst v. Wells Fargo Advisors Financial Network,  
3 LLC, FINRA Arbitration No. 17-02535.<sup>1</sup>

4 FINRA is a not-for-profit corporation organized under Delaware law and is a self-  
5 regulatory organization (“SRO”) registered with the Securities and Exchange Commission  
6 (“SEC”) as a national securities association pursuant to the Maloney Act of 1938, (15 U.S.C. §  
7 78o-3, et seq.), amending the Securities Exchange Act of 1934 (“Exchange Act”) (15 U.S.C. §  
8 78a, et seq.). FINRA has existed since 1935, and is the nation’s only registered securities  
9 association as well as the nation’s largest SRO: As an SRO, FINRA is a part of the Exchange  
10 Act’s highly interrelated and comprehensive mechanism for regulating the securities markets.

11 FINRA also operates the largest dispute resolution forum in the securities industry to  
12 assist in the resolution of monetary and business disputes. These arbitrations are conducted  
13 pursuant to FINRA’s Code of Arbitration Procedure. The SEC must approve all FINRA rules,  
14 policies, practices, and interpretations before they are implemented, including the Code of  
15 Arbitration Procedure. 15 U.S.C. § 78s(b); Shearson/American Express v. McMahon, 482 U.S.  
16 220, 233-234, 107 S. Ct. 2332 (1987). Arbitrators in the FINRA Dispute Resolution forum are  
17 independent contractors, not FINRA employees. It appears that Mr. Horst has named FINRA in  
18 its capacity as an arbitration forum, not in its capacity as a regulator of the securities industry and  
19 its participants.

20 **B. The Underlying Arbitration**

21 On September 25, 2017, Mr. Horst filed a Statement of Claim in the FINRA arbitration  
22 forum against Wells Fargo, his former firm. Complaint, ¶ 23. Mr. Horst also submitted a  
23 Uniform Submission Agreement agreeing to be bound by FINRA By-Laws, Rules and Code of  
24 Arbitration Procedure. Opposition, Exhibit A. In his Statement of Claim, Mr. Horst sought to  
25 expunge a customer complaint related to Auction Rate Securities made by his customers in  
26

27 <sup>1</sup> FINRA was not a party to the underlying arbitration and has no arbitration agreement with  
28 either party to the underlying arbitration. As the neutral arbitration forum, FINRA does not take a  
position at this time on the substantive issue of Mr. Horst’s underlying claim for expungement.

1 September of 2008 — a complaint that is now almost 10 years old. *See* Statement of Claim, ¶ 22  
2 (attached as Exhibit 1 to Exhibit 1 of the Complaint). On November 17, 2017, Wells Fargo  
3 submitted its Statement of Answer indicating it did not object to Mr. Horst’s efforts to obtain  
4 expungement. Complaint, ¶ 24.

5 The Initial Pre-Hearing Conference (“IPHC”) occurred on January 8, 2018, and the  
6 Arbitrator raised the FINRA Rule 13206 eligibility issue at that IPHC. Complaint, at ¶¶ 25-26.  
7 FINRA’s Code of Arbitration Procedure provides that “No claim shall be eligible for submission  
8 to arbitration under the Code where six years have elapsed from the occurrence or event giving  
9 rise to the claim.” FINRA Rule 13206; see also Complaint, ¶ 20. FINRA Rule 13206(a) also  
10 provides that “[t]he panel will resolve any questions regarding the eligibility of a claim under this  
11 rule.” In his January 8, 2018 IPHC Scheduling Order, the Arbitrator ordered Mr. Horst’s counsel  
12 to provide a memorandum of points and authorities on the Arbitrator’s authority to decide the  
13 merits of the claim if the claim did not meet the eligibility threshold of FINRA Rule 13206.  
14 Complaint, ¶ 26. On March 23, 2018, Mr. Horst’s counsel submitted that memorandum.  
15 Complaint, ¶ 27.

16 On April 13, 2018, the arbitration hearing on expungement occurred. Complaint, ¶ 29. At  
17 the conclusion of that hearing, the Arbitrator asked for oral arguments regarding the eligibility of  
18 the claim under FINRA Rule 13206. Complaint, ¶ 30.

19 FINRA served the Award on April 19, 2017 on all parties. Motion, Exhibit 5. The Award  
20 denied the claim for expungement because the claim did not meet the eligibility period listed in  
21 FINRA Rule 13206. *Id.*; see also Complaint, ¶ 33.

## 22 II.

### 23 CONCLUSIONS OF LAW

#### 24 A. Standard of Review

25 An arbitration award shall be confirmed, unless modified or corrected pursuant to NRS  
26 38.237 or NRS 38.242, or is vacated pursuant to NRS 38.241.<sup>2</sup> NRS 38.239. NRS 38.241

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28 <sup>2</sup> Mr. Horst does not seek to modify or correct the award under NRS 38.237 or NRS 38.242. As a  
result, Mr. Horst’s Motion is subject to NRS 38.241 only.

1 provides in pertinent part as follows:

2 NRS 38.241 Vacating award.

3 1. Upon motion to the court by a party to an arbitral proceeding, the court  
4 shall vacate an award made in the arbitral proceeding if . . .

5 (c) An arbitrator refused to postpone the hearing upon showing of  
6 sufficient cause for postponement, refused to consider evidence  
7 material to the controversy, or otherwise conducted the hearing  
8 contrary to NRS 38.231, so as to prejudice substantially the rights  
9 of a party to the arbitral proceeding;

10 (d) An arbitrator exceeded his or her powers....

11 NRS 38.241(1). Nevada recognizes statutory grounds for vacating an arbitration award under  
12 NRS 38.241(1), as well as two common law grounds: “(1) whether the award is arbitrary,  
13 capricious, or unsupported by the agreement; and (2) whether the arbitrator manifestly  
14 disregarded the law.” Clark County Educ. Ass ‘n v. Clark County Sch. Dist., 122 Nev. 337, 341,  
15 131 P.3d 5, 8 (2006).

16 Courts are extremely limited in their discretion to overturn or set aside an arbitration  
17 award. “The party seeking to attack the validity of an arbitration award has the burden of proving  
18 by clear and convincing evidence the statutory or common law ground relied upon for  
19 challenging the award.” Health Plan of Nevada, Inc. v. Rainbow Med., LLC, 120 Nev. 689, 695,  
20 100 P.3d 172, 176 (2004); accord, Sylver, 129 Nev. at —, 300 P.3d at 721. This Court defines  
21 clear and convincing evidence as satisfactory proof that is:

22 so strong and cogent as to satisfy the mind and conscience  
23 of a common man, and so to convince him that he would  
24 venture to act upon that conviction in matters of the highest  
25 concern and importance to his own interest. It need not  
26 possess such a degree of force as to be irresistible, but there  
27 must be evidence of tangible facts from which a legitimate  
28 inference . . . may be drawn.

In re Discipline of Drakulich, 111 Nev. 1556, 1566, 908 P.2d 709, 715 (1995) (citing Gruber v.  
Baker, 20 Nev. 453, 477, 23 P. 858, 865 (1890)).

1 **B. The Arbitrator Properly Applied FINRA Rule 13206**

2 FINRA Rule 13206(a) titled “Time Limitation on Submission of Claims” states: “No  
3 claim shall be eligible for submission to arbitration under the Code where six years have elapsed  
4 from the occurrence or event giving rise to the claim.” FINRA Rule 13206; see also Complaint, ¶  
5 20. FINRA Rule 13206(a) also provides that “[t]he panel will resolve any questions regarding the  
6 eligibility of a claim under this rule.” FINRA Rule 13413 titled “Jurisdiction of Panel and  
7 Authority to Interpret the Code” states: “The panel has the authority to interpret and determine the  
8 applicability of all provisions under the Code. Such interpretations are final and binding upon the  
9 parties.” See also Howsam v. Dean Witter Reynolds, 537 U.S. 79, 85-86 (2002) (finding that an  
10 arbitrator properly decides issues of eligibility, because arbitrators are “comparatively more  
11 expert about the meaning of their own rule, are comparatively better able to interpret and to apply  
12 it”, and recognizing that arbitrators are “empowered to interpret and determine the applicability of  
13 all provisions under this Code”). Notably, the Nevada Supreme Court has specifically agreed with  
14 Howsam as to its application of FINRA’s (formerly the NASD’s) eligibility rule:

15 That Howsam presumed the arbitrator would decide the  
16 NASD time-limit bar makes sense: The NASD arbitrator  
17 was “comparatively better able to interpret and to apply” the  
18 NASD’s procedural rule, so the parties would have expected  
that issue to go to the arbitrator as the decision-maker with  
the better comparative expertise.

19 Principal Investments, Inc. v. Harrison, 132 Nev. Adv. Op. 2, 366 P.3d 688 (Nev. 2016), quoting  
20 Howsam, 537 U. S . at 85.

21 The Rule on claim eligibility speaks for itself, as does the Rule on the Arbitrator’s ability  
22 to apply all the Rules in FINRA’s Code of Arbitration Procedure. In order to be eligible for  
23 resolution by a FINRA arbitration panel, a claim must be less than six years old. Here, the  
24 customer complaint was made in 2008—well past the six-year eligibility threshold. Contrary to  
25 Mr. Horst’s arguments,<sup>3</sup> FINRA Rule 13206’s eligibility requirements is jurisdictional—it may

26 \_\_\_\_\_  
27 <sup>3</sup> Mr. Horst contends that even if the Arbitrator had the authority to decide the eligibility issue, he  
28 failed to follow the procedural requirements of FINRA Rule 13206(b). See Complaint, ¶¶ 44-47.  
However, the procedural requirements for deciding a motion to dismiss brought by a party under  
Rule 13206(b) were not triggered, because no party brought such a motion.

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be raised *sua sponte* by an arbitrator and not only when a party to the arbitration raises it in a motion. Complaint, ¶¶ 37-43. To the contrary, both FINRA Rule 13206 and FINRA Rule 13413 are jurisdictional in nature, and make clear that the Arbitrator had authority and was well within that authority to determine the eligibility of the claim before him.

This Court also rejects Mr. Horst’s arguments that the arbitrator did not give him an opportunity to be heard regarding eligibility. The Complaint specifies that the Arbitrator raised the eligibility issue at the IPHC in January 2018, and asked Mr. Horst to provide a memorandum of law on the eligibility issue in his January 8, 2018 IPHC Scheduling Order. Complaint, ¶¶ 25-26. Pursuant to this IPHC Scheduling Order, Mr. Horst submitted the required memorandum. Complaint, ¶ 27. The Arbitrator then gave counsel for Mr. Horst an opportunity to present oral argument on the issue at the April 13, 2018 hearing. Complaint, ¶ 30. As such, Mr. Horst had several opportunities to address this issue. That the Arbitrator determined the claim did not meet the eligibility issue does not form a basis, under Nevada or Federal law, to vacate the Award.

Accordingly, this Court DENIES Mr. Horst’s Motion.

IT IS SO ORDERED.

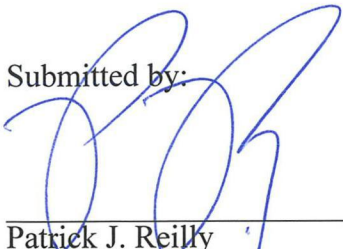
DATED this 25 day of October, 2018.

  
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DISTRICT COURT JUDGE  
SW



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Submitted by:




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