IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

J.P. MORGAN SECURITIES, LLC., JPMORGAN CHASE BANK, N.A., CHASE BANK USA, N.A., JPMORGAN CHASE & CO., AND ROSE COHEN,	:	
Plaintiffs,	:	
v.	:	C.A. No. 17-cv-_____
GIGI JORDAN,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Dated: February 27, 2017

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Plaintiffs J.P. Morgan Securities LLC[1] ("JPMS"), JPMorgan Chase Bank, N.A., Chase Bank USA, N.A., JPMorgan Chase & Co., and Rose H. Cohen (hereinafter "Plaintiffs"), hereby submit this Memorandum of Law in support of their Motion for a Temporary Restraining Order and Preliminary Injunction ("Motion") which requests the entry of an Order enjoining Defendant Gigi Jordan ("Jordan," or "Defendant") from pursuing FINRA arbitration Case No. 17-00001 against Plaintiffs before the Financial Industry Regulatory Authority (the "FINRA Arbitration").[2]

PRELIMINARY STATEMENT

The FINRA Arbitration at issue was brought by a convicted felon, Gigi Jordan, who purports to assert claims of fraud, conversion, and breach of duty in connection with two loans that are more than a decade old. She filed these stale claims in FINRA undoubtedly to avoid a motion to dismiss based on statutes of limitations, which would inevitably have been filed if her claims had been brought in court, but which is unavailable in the early stages of a FINRA proceeding. Nevertheless, her attempt to forum shop her claim fails, and this Court should enjoin the FINRA Arbitration from proceeding for the following three reasons:

First and foremost, Defendant seeks to arbitrate claims against Plaintiffs[3] based on an unproduced J.P. Morgan Securities LLC arbitration agreement which she alleges she did not sign. Thus, as no valid FINRA arbitration agreement exists with JPMS, Plaintiffs request both a TRO

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[1] Defendant named J.P. Morgan Securities Inc. as a respondent in a FINRA Arbitration. On September 1, 2010, J.P. Morgan Securities Inc., a Delaware corporation, was converted to J.P. Morgan Securities LLC, a Delaware limited liability company. J.P. Morgan Securities LLC is accordingly the appropriate Plaintiff herein. Defendant's SOC also purports to name as a party "JPMorgan Private Bank". No such entity exists and therefore it is not named as a plaintiff here.

[2] A copy of the Statement of Claim in the FINRA Arbitration (hereinafter, "Statement of Claim" or "SOC") is attached as Exhibit A to the accompanying Declaration of Eugene L. Small, dated February 24, 2017 ("Small Declaration").

[3] Apart from J.P. Morgan Securities LLC, the other named JPMorgan defendants are not FINRA members ("JPMorgan Private Bank" is not even a legal entity), are not subject to FINRA's jurisdiction, and will not voluntarily submit to arbitration.

and a preliminary injunction to stay the FINRA Arbitration. Second, even assuming a valid arbitration agreement exists between Jordan and JPMS, Defendant cannot arbitrate her claims regarding the loans because they do not arise in connection with the business activities of a FINRA member. According to Defendant's SOC, her claims concern two loans allegedly obtained from JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A. She does not allege that she has a FINRA arbitration agreement with either entity (neither of which is even a FINRA member). Therefore, even if Defendant had a valid arbitration agreement with JPMS, her claims regarding the loans would not be covered by that agreement because by her own admission the loans were not activities associated with the business of JPMS. Third, even if a valid arbitration agreement exists, Defendant has waived any hypothetical right to arbitrate claims against JPMS because she has been litigating claims related to the same set of facts in two related actions against Raymond Mirra ("Mirra") and his companies and agents before this Court for nearly five years. *See Hawk Mountain LLC, et. al., v. RAM Capital Group LLC, et. al.*, C.A. No. 13-02083-SLR-SRF ("RICO Action"), and *Gigi Jordan v. Raymond A. Mirra, Jr., et. al.*, C.A. No. 14-1485-SLR-SRF ("Fraud Action") (together, the "Actions").

Defendant's allegations against Mirra and others mirror the FINRA Arbitration claim against Plaintiffs. The SOC admits that it is based on documents obtained via subpoena from various JPMorgan entities and other parties in the Actions, several which would not be subject to FINRA jurisdiction or discovery requirements.[4] It would be manifestly unfair to permit Defendant

[4] Defendant has also sought to arbitrate claims against Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") which are simultaneously before this Court. Merrill Lynch sought relief like that which Plaintiffs seek herein. *See Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Gigi Jordan et al.* C.A. No. 1:17-00049-SLR (the "Merrill Lynch Action.") On January 25, 2017, Judge Sue L. Robinson, of this Court, entered an order temporarily restraining the FINRA arbitration against Merrill Lynch. (Merrill Lynch Action, D.I. 18).

to *take* discovery not permitted in a FINRA arbitration, and then use that information against Plaintiffs in a separate arbitration where such discovery is not permitted.

Plaintiffs further request that this Court enter a TRO and grant a preliminary injunction without the limited discovery usually afforded in these matters because Jordan's disqualification to arbitrate her claims is plain from the SOC (Exhibit A to Small Declaration). Jordan alleges that she never signed a customer agreement with JPMS and, assuming the truth of Jordan's forgery allegations, this would mean no contract was formed and no valid arbitration agreement would exist between Jordan and JPMS. Moreover, Jordan alleges that the loans at issue were made by entities that are not FINRA members and not subject to FINRA arbitration. Finally, having chosen to litigate her claims against Mirra and his associates before this Court, Defendant cannot now change course five (5) years later and arbitrate those same claims against Plaintiffs. Put simply, Defendant cannot have two-bites at the apple. Accordingly, this court should enter an order enjoining Defendant from proceeding with the FINRA Arbitration.

STATEMENT OF FACTS[5]

Background

Jordan was a successful pharmaceutical company executive and developer and owner of various highly profitable home health care ventures. Jordan and Mirra were married and later divorced, but remained close business associates. In 2004, a joint brokerage account in Jordan's and Mirra's names was opened with JPMS (the "2004 Brokerage Account"). In her FINRA SOC,

[5] These facts are based on the accompanying Small Declaration, Defendant's SOC filed in the FINRA Arbitration, pleadings and briefs filed in the Actions and the Merrill Lynch Action before this Court. This Motion relies on the pleadings and filings in the Merrill Lynch Action because Plaintiffs seek similar relief based on nearly identical allegations from the same defendant (Jordan) concerning the same parties (Mirra and his associates). A public internet page, presumably posted by Jordan, carefully details the allegations against Mirra, including those which form the basis of the FINRA Arbitration. This webpage includes documents obtained from Plaintiffs via subpoenas in the Actions. *See* https://gigijordan.files.wordpress.com/2011/06/executive-summary.pdf.

Jordan claims that Mirra fraudulently opened the 2004 Brokerage Account by forging her signature on the account documents. Jordan claims that:

> The 2004 Brokerage Account was opened utilizing account opening documents with Jordan's forged signature and without her knowledge, authorization or consent.

See SOC at pp. 12, 13, 15; Ex. 1 to the SOC.

Jordan further claims that in 2004 and 2005 Mirra and his associates, aided and abetted by Plaintiffs, obtained a 2004 Bridge Loan and 2005 Home Equity loan in Jordan's name for over $5.3 million. *See* SOC at pp. 6, 8-10, 12-15; Ex. 1 to the SOC. Jordan further alleges that proceeds from the 2004 Bridge Loan (but not the Home Equity Loan) were funneled through the 2004 Brokerage Account. Jordan claims she was unaware of any of the more than twenty-five alleged forgeries of her signature used to obtain JPMorgan[6] loans, open brokerage accounts, and pledge her property as collateral for those purportedly unauthorized loans. In 2008, Jordan and Mirra entered into a Separation and Distribution Agreement by which they distributed their vast business holdings. In 2011, in response to Jordan's inquiries into the allegedly unauthorized loans, Rose Cohen[7] allegedly advised Jordan that Mirra had assumed obligations for an outstanding loan and she no longer owed any debt obligation to JP Morgan.

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[6] Jordan's FINRA SOC repeatedly uses the defined terms "JPMorgan" and "Respondent" to collectively refer to all the named defendants without regard for their individual legal status or their individual roles. The broad use of "JPMorgan" is clearly intended to, among other things, confuse and conflate the facts to make it appear that Jordan's claims against all the named defendants fall within the purported obligation of JPMS to arbitrate Jordan's claims. Despite her attempts to obscure the issue, it is clear from the SOC that Jordan believes entities other than JPMS extended the two loans at issue. Those entities are non-FINRA members and are not obligated to arbitrate customer claims, nor can JPMS be obligated to arbitrate claims regarding loans it did not issue.

[7] Cohen, who joined JPMorgan in June 2005, was not employed with any of the Plaintiffs at the time the 2004 Brokerage Account was opened, at the time of the 2004 Bridge Loan, or the 2005 Home Equity Loan (dated March 2005). Cohen's only involvement with Jordan was having the misfortune of responding to Jordan's repeated, and often improper, requests for documents in 2011.

Jordan's Arrest and Conviction

On February 5, 2010, Jordan was arrested and ultimately indicted for the murder of her developmentally disabled eight-year-old son—a killing that took place when Jordan admittedly poisoned the child in a hotel suite in New York. She went to trial, was convicted of manslaughter on November 5, 2014, and was sentenced to 18 years in prison on May 28, 2015. *See People v. Jordan*, 2016 N.Y. App. Div. LEXIS 8444 (1st Dep't Dec. 22, 2016).Jordan's conviction was recently affirmed by the New York Appellate Division, First Department. *See People v. Jordan*, 2016 N.Y. App. Div. LEXIS 8444 (N.Y. App. Div. Dec. 22, 2016).

The Fraud Action

On March 9, 2012, Jordan filed a civil suit in the Southern District of New York, alleging claims of fraud, breach of contract, and breach of fiduciary duty (the "Fraud Action") against Mirra and his business partners, attorneys, accountants, trustees and advisors (the "Fraud Action defendants").[8] The case has since been removed to Delaware.

Jordan alleged that Mirra and his associates conducted a series of interrelated fraudulent schemes, including forging Jordan's signature on JPMorgan promissory notes in connection with the 2004 Bridge Loan, the 2005 Home Equity Loan, and a deed of trust for a Virginia property, as well as new account opening forms for the 2004 Brokerage Account. Mirra and his associates allegedly committed these fraudulent actions without Jordan's knowledge or consent. (Fraud Action, D.I. 1, at pp. 17-18).

In May 2012, discovery in the Fraud Action was stayed pending the outcome of the murder case against Jordan. In December 2014, following Jordan's conviction, the discovery stay was lifted. Jordan filed an amended complaint on March 9, 2015. (Fraud Action, D.I. 84).On June 5

[8] *See Gigi Jordan v. Raymond A. Mirra, Jr.*, No. 14-1485-SLR-SRF, Complaint, D.I. 1.

and 8, 2015 the Fraud Action defendants filed motions to dismiss for failure to state a claim. (Fraud Action, D.I. 108 & 113)

On June 7, 2016, Magistrate Judge Fallon filed a Report and Recommendation ("Fraud Action R&R") that denied the motions to dismiss the Fraud Action. (Fraud Action, D.I. 158). On August 31, 2016, this Court entered an order (Fraud Action, D.I. 175), accepting in part and rejecting in part Judge Fallon's Fraud Action R&R and directing further briefing on certain issues. That briefing is ongoing.

The RICO Action

On December 23, 2013, Jordan and Hawk Mountain LLC filed a separate action in this Court alleging claims under the Racketeer Influenced and Corruption Organization Act (the "RICO Action") against the same set of defendants as the Fraud Action and based on essentially the same facts as the Fraud Action.[9] Discovery in the RICO Action was also stayed pending the outcome of Jordan's criminal trial. On September 17, 2014, the RICO Action defendants filed various motions to dismiss the RICO Action. (RICO Action, D.I. 62, 63, 67).

After Jordan's conviction, on December 16, 2014, the Court lifted the stay and established a discovery schedule. (RICO Action, D.I. 87). On June 3, 2016, Magistrate Judge Fallon filed a Report and Recommendation recommending that the motions to dismiss be granted ("RICO Action R&R"; RICO Action, D.I. 457). The RICO Action R&R was adopted by this Court on August 31, 2016 (RICO Action D.I. 472), and the RICO Action was dismissed. In the interim, however, the parties engaged in nearly two years of extensive discovery, including issuing several subpoenas to various JPMorgan entities. On September 14, 2016, Jordan appealed the judgment

[9] *Hawk Mountain LLC v. RAM Capital Group LLC*, No. 13-02083-SLR-SRF, Complaint, D.I. 1.

dismissing her RICO complaint to the United States Court of Appeals for the Third Circuit, (RICO Action, D.I. 473), which remains pending.

The FINRA Arbitration against Merrill Lynch

On or about October 31, 2016, Jordan, Hawk Mountain LLC and a third claimant filed a SOC against Merrill Lynch with FINRA. The SOC contains allegations which are virtually identical to those in the Actions. On January 13, 2017, Merrill Lynch moved to enjoin the FINRA arbitration.*Merrill Lynch, Pierce, Fenner & Smith Inc. v. Gigi Jordan et al.*, No. 17-00049-SLR, D.I. 1 (hereinafter, the "Merrill Lynch Action."). On January 25, Judge Sue Robinson entered an order granting a TRO and setting a briefing schedule. (Merrill Lynch Action, D.I. 18.) Oral argument on the preliminary injunction in the Merrill Lynch Action was held on February 23, 2017.

The FINRA Arbitration against Plaintiffs

On December 29, 2016, five years after filing the Actions, and over three months after the RICO Action was dismissed, Jordan filed her SOC against Plaintiffs with FINRA. The allegations in the SOC are virtually identical to those in the Actions. Additionally, the SOC explicitly refers to documents produced by various JPMorgan entities and other individuals in the Actions to support claims against Plaintiffs.

Basis for the FINRA Arbitration

Per her SOC in the FINRA Arbitration, Defendant explains the basis for Plaintiffs' obligation to arbitrate disputes with Defendant as follows:

> J.P. Morgan Securities, Inc. is required to submit to FINRA arbitration because of "[a]n arbitration provision appearing in the account application for the 2004 Brokerage Account [that] binds J.P. Morgan Securities, Inc. ***and related entities*** to 'arbitrate any controversies' arising in relation to the agreement between Jordan as account holder and J.P. Morgan Securities."

SOC, at p. 7 (emphasis added). Defendant's FINRA Arbitration SOC does not attach the purported arbitration provision she relies upon. Moreover, Defendant alleges that her signature on the documents used to open the 2004 Brokerage Account is a forgery.

Notwithstanding her claim that "related entities" other than JPMS are subject to FINRA arbitration, Defendant's SOC provides no basis for the remaining respondents' alleged obligation to submit to FINRA's arbitral forum.

ARGUMENT

Defendant should be temporarily restrained and enjoined from pursuing the FINRA Arbitration pending this Court's final determination that (i) no arbitration agreement exists between the parties, (ii) Jordan's claims are not subject to FINRA's arbitral forum; (iii) even if an agreement to arbitrate exists, Defendant waived her right to arbitration. As a threshold matter, whether the parties agreed to arbitrate is an issue for the Court to determine. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (whether the parties have agreed to submit a particular dispute to arbitration is "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.") (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). The Third Circuit has held that "a district court has the authority to grant injunctive relief in an arbitrable dispute, if the traditional prerequisites for such relief are satisfied." *Ortho Pharm. Corp. v. Amgen, Inc.*, 882 F.2d 806, 812 (3d Cir. 1989); *see, e.g., Painewebber Inc. v. Hofmann*, 984 F.2d 1372, 1383 (3d Cir. 1993) (holding that Plaintiff is entitled to stay and enjoin the arbitration of fraud claims brought by customer).

To obtain a temporary restraining order or preliminary injunctive relief, Plaintiffs must demonstrate four elements: (1) a likelihood of success on the merits; (2) irreparable injury if relief is not granted; (3) no greater harm to the nonmoving party from the relief sought; and (4) that the

public interest favors such relief. *Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt. LLC*, 793 F.3d 313, 318-19 (3d Cir. 2015); Reedy v. Borough of Collingswood, 204 F. App'x 110, 113–14 (3d Cir. 2006) (citing *Morton v. Beyer*, 822 F.2d 364, 367 (3d Cir. 1987)).

Plaintiffs are likely to succeed on the merits of their claim for three reasons. First, no valid arbitration agreement exists between the parties because Defendant's FINRA Arbitration SOC explicitly alleges that the 2004 Brokerage Account forms which purportedly contain the arbitration agreement were executed with Defendant's forged signature and were entered without her knowledge or consent. As discussed below, if the agreement is void, then the agreement to arbitrate must also be void. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000).

Second, Plaintiffs are not required to arbitrate Defendant's claims. Although the SOC alleges that JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A. issued the loans in question, neither they, nor JPMorgan Chase & Co., are FINRA member firms, nor are they subject to its jurisdiction. As to Plaintiffs JPMS and Cohen, while they are FINRA members and associated persons, respectively, they are not subject to FINRA's arbitral forum because Jordan's claims do not arise out of business activities of JPMS or Cohen. FINRA Rule 12200 requires that FINRA arbitration claims must "arise[] in connection with the business activities of the member or the associated person[...]." The SOC contains no allegation that JPMS or Cohen was involved in issuing or servicing the loans in question. Accordingly, they cannot be forced to arbitrate regarding the loans.

Third, even if an agreement to arbitrate exists, Defendant waived any alleged right to arbitration because she chose to litigate claims against Mirra and his associates for five (5) years before seeking to arbitrate the same claims against Plaintiffs. Defendant has benefited from

extensive discovery which would not have been available to her in arbitration. Such untimeliness and prejudice weighs in favor of finding Defendant waived her right to arbitrate these claims.

The remaining factors of irreparable injury, no harm to the non-moving party, and consideration of the public interest all weigh in favor of an injunction. Absent an injunction against arbitration, Plaintiffs will be irreparably harmed because they will be forced to arbitrate claims for which they did not consent to arbitration. They will further be deprived of the opportunity to file a motion to dismiss based on the statute of limitations as such motions are not permitted under FINRA rules.

Additionally, during litigation, Defendant used the robust discovery available under the Federal Rules of Civil Procedure to obtain extensive deposition testimony and document production to which she would not have been entitled to in arbitration. This discovery is protected by the Protective Order in the actions before this Court and its use in the FINRA Arbitration may be a violation of that Order. Injunctive relief also serves the greater public interest of preservation of resources, prevention of waste in the judicial system, and avoiding potentially inconsistent results.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs are likely to succeed on the merits because Defendant has no agreement to arbitrate with Plaintiffs. However, even assuming an arbitration agreement does exist, Defendant's claims are not arbitrable under FINRA rules. The rule governing arbitrability of customer disputes by FINRA members is FINRA Rule 12200, which provides in pertinent part that "[p]arties must arbitrate a dispute under the [FINRA] Code [of Arbitration Procedure]" only if the following conditions are met. First, arbitration under the FINRA Code must be either "(1) [r]equired by a written agreement, or (2) [r]equested by the customer"; second, the dispute must be "between a customer and a member or associated person of a member"; and third, the dispute must "arise[ ]

in connection with the business activities of the member or the associated person . . . ." Finally, even if all the above conditions were met, Defendant has waived her right to arbitrate.

A. NO VALID AGREEMENT TO ARBITRATE EXISTS

Per the allegations in Defendant's FINRA Arbitration SOC, the 2004 Brokerage Account – which purportedly contains the only arbitration provision at issue – was entered without her knowledge and consent. Thus, by her own allegations Defendant has not entered a valid agreement to arbitrate disputes with JPMS. For this reason alone, this Court should enjoin the FINRA Arbitration because it is premised on an arbitration agreement that was never validly formed.

"[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 943, 985 (1995). The *Granite Rock* Court further held that "[t]o satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." 561 U.S. at 297 (internal citations omitted). It well settled "the thrust of the federal law is that arbitration is strictly a matter of contract."*Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 472 (1989). Accordingly, arbitration "is a way to resolve those disputes--but only those disputes--that the parties have agreed to submit to arbitration."*Granite Rock Co.*, 561 U.S. at 297 (citing *First Options of Chicago, Inc.*, 514 U.S. at 943). When interpreting arbitration agreements, courts "should apply ordinary state-law principles that govern the formation of contracts."*First Options of Chicago, Inc.*, 514 U.S. at 944.

According to Defendant's own allegation in the SOC, she did not sign an account agreement for the 2004 Brokerage Agreement, and therefore could not have agreed to submit disputes related to the 2004 Brokerage Account to arbitration. Indeed, Defendant alleges that the "2004 Brokerage Account was opened utilizing account opening documents with Jordan's forged

signature and without her knowledge, authorization or consent." (FINRA Arbitration SOC, at p. 13.) There is no basis for arbitrating disputes with JPMS based on an allegedly forged agreement which would be invalid *ab initio*. *See Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3d Cir. 2000) (holding that if the agreement is void, then so the agreement to arbitration must also be void). The *Sandvik* court further held that courts will not refer a "matter to arbitrators without a definitive conclusion on the issue whether an agreement to arbitrate actually existed."*Id.* at 111. District courts in this circuit have further refused to compel arbitration in cases of void contracts because "a declaration that a contract is void nullifies all aspects of the agreement, including an embedded arbitration clause, giving neither party the power to ratify or disaffirm its provisions. *Bertram v. Beneficial Consumer Disc. Co.*, 286 F. Supp. 2d 453, 458 (M.D. Pa. 2003) (further holding that "[v]oid contracts generally arise in cases of forgery of a party's name or unauthorized execution of an agreement on behalf of another party") (citing *Restatement of Contracts (2d)* § 7 & cmt. a (1981)). Thus, any arbitration agreement that Defendant claims she never signed would be void.

B. FINRA JURISDICTION DOES NOT EXTEND TO DEFENDANT'S CLAIMS

Although JPMS is a FINRA Member and Cohen is an associated person, FINRA Rule 12200 requires members and associated persons to arbitrate claims brought by customers.[10] The SOC named JPMorgan Chase Bank, Chase Bank USA, N.A. and JPMorgan Chase & Co. as respondents. None of those entities are FINRA members, nor are they required to submit to FINRA's jurisdiction. *See* FINRA Rule 12200. *See also* FINRA Rule 0140 (FINRA rules apply to members) and FINRA Rule 12101 (FINRA's Code applies to disputes between customers and member). JPMorgan Chase Bank, N.A., Chase Bank USA, N.A. and JPMorgan Chase & Co. are

[10] As detailed below, Jordan was not JPMS' "customer."

not FINRA members and did not agree to arbitrate disputes with Jordan, so an injunction is appropriate.

As mentioned above, JPMS is a FINRA member and Cohen is an associated person who are generally subject to FINRA's rules and arbitral forum. However, FINRA Rule 12200 requires that FINRA arbitration claims must "arise[] in connection with the business activities of the member or the associated person[...]." The two loans that form the basis for Jordan's SOC are the 2004 Bridge Loan and the 2005 Home Equity Loan. Per the SOC, these loans were not issued by JPMS and there is no allegation that Cohen had any involvement with them (Cohen was not even employed by any JPMorgan entity at the time the loans were issued). Indeed, Jordan's SOC conceded that JPMS and Cohen were not involved with the at issue loans because "JPMorgan Chase Bank extended the 2004 Bridge Loan to Mirra and JPMorgan Chase Bank, N.A. "consummated the transactions, executing the agreements in relation to the 2005 Home Equity Line of Credit." SOC at p. 7. Accordingly, Jordan's arbitration claims against JPMS and Cohen do not arise "in connection with the business activities of the member or the associated person" and are therefore not arbitrable against either JPMS or Cohen.

Regarding Cohen, Jordan's SOC alleges that Cohen tried to prevent Jordan's discovery of Plaintiffs' ongoing complicity in fraudulent activity related to millions of dollars in unauthorized loans extended to Mirra in Jordan's name without her knowledge, authorization or consent. SOC, p. 6. However, Cohen was not employed by any Plaintiff at the time the loans were issued. Moreover, Jordan admits that Wesley Brooks, another JPMorgan banker, "handled the Mirra loan inquiries and loan initiation process for Respondent." SOC, p. 8, FN12. Thus, the required nexus between Jordan's claims and Cohen is completely lacking. Likewise, there can be no arbitration of Jordan's claims against Cohen regarding two loans allegedly issued by non-FINRA members

JPMorgan Chase Bank and Chase Bank USA, N.A. *See Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.* 264 F.3d 770, 771 (8th Cir. 2001) (holding that "'customer' under the [FINRA] Code refers to one involved in a business relationship with a [FINRA] member that is related directly to investment or brokerage services.") Because Jordan's claims do not arise in connection with the brokerage services of JPMS, the claims are not subject to arbitration.

C. DEFENDANT WAIVED HER RIGHT TO ARBITRATE

Even if the parties entered into a valid agreement to arbitrate their disputes, Defendant has waived any right to arbitrate because she filed substantially similar claims in federal court in the Actions described above, then waited nearly five (5) years to commence an arbitration against Plaintiffs on the same claims, all while taking advantage of the extensive discovery available in federal court, but not available in FINRA.

In evaluating whether a party has waived its right to arbitration, the Third Circuit considers the timeliness, or lack thereof, of the demand for arbitration. "[W]aiver will normally be found only where the demand for arbitration came long after the suit commenced and when both parties ha[ve] engaged in extensive discovery." *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231–32 (3d Cir. 2008). The Third Circuit has further stated that waiver of the right to arbitrate is based on the principle that "a party may not use arbitration to manipulate the legal process and in that process waste scarce judicial resources." *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 453–54 (3d Cir. 2011); *see also Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 776 (D.C. Cir. 1987) ("To give Edwards a second bite at the very questions presented to the court for disposition squarely confronts the policy that arbitration may not be used as a strategy to manipulate the legal process.").

The existence of a waiver is apparent here, where Defendant waited over a decade to commence the FINRA Arbitration concerning alleged fraudulent conduct that, per Defendant's

own allegations in this Court and in the FINRA Arbitration, took place in 2004 and 2005.Jordan asserts in the FINRA Arbitration that she began to unravel Plaintiffs' alleged wrongdoing in 2011 when she corresponded with Rose Cohen. Even assuming, arguendo, that is true,[11] Jordan delayed another five (5) years—until 2016—before commencing arbitration against Plaintiffs, although she sued Mirra in 2012.

If Plaintiffs are required to arbitrate, they will be prejudiced in defending the FINRA Arbitration by the extensive discovery obtained from various JPMorgan entities and other parties that would not have been required to produce discovery in FINRA and depositions of key witnesses such as Mirra and his associates, who Jordan claims forged her signature on the 2004 Brokerage Account and subsequent loan documents. The prejudice that results from the sort of extensive discovery that Defendant has already enjoyed weighs heavily in favor of a finding that she has waived any right to arbitrate the claims.

In *Nino v. Jewelry Exch., Inc.* the Third Circuit found that the parties' significant discovery efforts during a fifteen-month period "weigh[ed] firmly in favor of a finding of waiver." 609 F.3d at 213. During that time, the parties conferred and prepared a proposed case management order, propounded interrogatories, served and supplemented disclosures, exchanged requests for document production, and attended the depositions of four witnesses. *Id.*

Other courts have found waiver in similar circumstances. *See, e.g., St. Mary's Med. Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co.*, 969 F.2d 585, 591 (7th Cir. 1992) ("By delaying its demand for arbitration, *Disco* was able to obtain discovery it would not necessarily have been

[11] Magistrate Judge Fallon concluded that Jordan was on notice of her claims by no later than March 2008 when Jordan and Mirra (and their respectively owned entities) signed the Separation and Distribution Agreement. (RICO Action R&R, D.I. 457 at 16). Judge Robinson affirmed Magistrate Judge Fallon's RICO Action R&R and dismissed the RICO action. (RICO Action dismissal order, D.I. 472).

entitled to in an arbitration proceeding."); *Com–Tech Assocs. v. Computer Assocs. Int'l, Inc.*, 938 F.2d 1574, 1576–78 (2d Cir. 1991) (finding waiver where defendant seeking to arbitrate actively had participated in discovery and filed dispositive motions over the course of 18 months); *S & H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990) (finding waiver where defendant delayed eight months, engaging in merits and non-merits motion practice and took several depositions in the interim.).

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY

Defendant's demand for arbitration has come only after years of extensive discovery in litigation from numerous parties that would not be required to produce discovery in FINRA. As such, Plaintiffs have been deprived of their right to object to the production of certain documents. Moreover, Defendant's SOC is based, in part, on depositions of Mirra and his associates. Plaintiffs were unable to participate in these depositions. Defendant, moreover, enjoyed access to extensive discovery of documents in JPMorgan's possession because of issuing numerous subpoenas – including to JPMorgan entities that are not FINRA members – which she may not have been able to access as part of the FINRA discovery process. Defendant's unfair advantage was compounded when she took 23 depositions although she would not have been entitled to any depositions in the FINRA Arbitration.Clearly, Plaintiffs would be prejudiced if Defendant were permitted to use this material to pursue the FINRA Arbitration.

Moreover, absent injunctive relief, Plaintiffs would suffer additional prejudice because Defendant now seeks to arbitrate to deprive Plaintiffs of their ability to raise, in a timely and effective manner, their threshold defense that all the claims are barred by the applicable statutes of limitations for fraud, conversion and breach of fiduciary duty. Even accepting Defendant's claim that she did not discover the alleged fraud until 2011, the fraud claim against Plaintiffs are still untimely. Under New York law, either the six-year statute of limitation on the fraud claim began

to run by no later than 2005 (the date of the last transaction), and expired by 2011 or, under New York's two-year discovery rule, began to run in 2011 (when Defendant claims she began to suspect fraud) and expired in 2013. *See* CPLR § 213(8). In either case, the statute of limitations on Defendant's fraud claim against Plaintiffs had long expired when she filed the SOC in the FINRA Arbitration.

Defendant's conversion and breach of fiduciary duty claims are similarly untimely. The relevant statutes of limitation in New York for those claims are three years and began to run from the date of the alleged conversion, the last of which allegedly occurred in 2005, per the SOC, or the date of the relevant breach, which defendants assert continued through 2011. Thus, those claims became untimely as of 2015, at the latest. *See* CPLR § 214(3) and § 213(8).

Even though Jordan's arbitration claims are plainly barred by statutes of limitations, there is no procedural mechanism in a FINRA arbitration to obtain dismissal of time-barred claims at the pleading stage. Accordingly, Plaintiffs will be required to file a detailed Answer to the SOC, engage in all pre-hearing procedures including arbitrator selection and discovery, and prepare for a full evidentiary hearing. Plaintiffs will thus be forced to litigate entire case before it can obtain a ruling that Defendant's claims are barred by the statute of limitations. On the other hand, Defendant will suffer no irreparable harm if an injunction is issued. She will still be able to file her claims in an appropriate judicial forum where the merits of each side's positions and defenses can be assessed in a timely and efficient fashion. Moreover, the fact that three of the entities named in the SOC – including the two that allegedly issued the loans in question – are not even FINRA members and will not consent to arbitrate claims regarding the loans makes clear that Defendant will not be harmed if an injunction against the FINRA Arbitration is issued.

III. THE PUBLIC INTEREST FAVORS AN INJUNCTION BECAUSE ARBITRATION OF DEFENDANT'S CLAIMS AFTER YEARS OF LITIGATION OF THE SAME CLAIMS IN THIS COURT IS INEFFICIENT AND WASTEFUL

It is in the public interest to preserve judicial resources. As mentioned *supra*, the Third Circuit has stated that arbitration is based on the principle that "a party may not use arbitration to manipulate the legal process and in that process waste scarce judicial resources." *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 453–54 (3d Cir. 2011); *see also Nat'l Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 776 (D.C. Cir. 1987) ("To give Edwards a second bite at the very questions presented to the court for disposition squarely confronts the policy that arbitration may not be used as a strategy to manipulate the legal process."). "[A]rbitration is meant to streamline the proceedings, lower costs, and conserve private and judicial resources, and it furthers none of those purposes when a party actively litigates a case for an extended period only to belatedly assert that the dispute should have been arbitrated, not litigated, in the first place." *Nino v. Jewelry Exch., Inc.*, 609 F.3d 191, 209 (3d Cir. 2010).

IV. TO PRESERVE THE STATUS QUO PENDING A DECISION ON THE PRELIMINARY INJUNCTION MOTION, THE COURT SHOULD ISSUE A BRIEF TEMPORARY RESTRAINING ORDER

Plaintiffs currently faces several deadlines in the FINRA Arbitration, including a March 2, 2017 deadline to file their Answer. As with any FINRA arbitration, that Answer is not a mere formulaic response to the claimant's allegations but a narrative explanation of the respondent's factual and legal positions, and requires considerable time and expense to put together. Further, the parties must begin the time-consuming process of arbitrator selection. Neither activity will be necessary if the Court enjoins the FINRA Arbitration. Hence, to avoid unnecessary expense, the Court should preserve the *status quo* by issuing a brief temporary stay of the FINRA Arbitration while it considers Plaintiffs' injunction motion.

CONCLUSION

For the reasons stated above, this Court should grant Plaintiffs' motion for a temporary restraining order and a preliminary injunction, thereby enjoining Defendant from pursuing arbitration proceedings against Plaintiffs.

Dated: February 27, 2017

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