District Court Broomfield County, Colorado Court Address: 17 Descombes Drive Broomfield, CO 80020 **Petitioner:** SEAN MICHAEL MURPHY v. **Respondent**: FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.	**COURT USE ONLY** ▲ ▲
Attorneys for Petitioner: Names: Armin Sarabi, #41332 Owen Harnett, #49899 Address: HLBS Law 9737 Wadsworth Parkway G-100 Westminster, CO 80021 Telephone: (720) 549-2880 (720) 523-8118 E-mail: armin.sarabi@hlbslaw.com owen.harnett@hlbslaw.com	Case Number: 2018CV30052 Division B Courtroom

ANSWER TO RESPONDENT'S PARTIAL OPPOSITION TO MOTION TO CONFIRM ARBITRATION AWARD

Petitioner, Sean Michael Murphy ("Murphy"), by and through his attorney, Armin Sarabi, hereby respectfully submits this Answer to Respondent's Partial Opposition to Motion to Confirm Arbitration Award ("Respondent's Motion").

I. INTRODUCTION

Petitioner, Murphy, a registered representative in the securities industry, is asking this Court to confirm the arbitration award in FINRA Case No. 17-01566, recommending the expungement of four customer complaints from Petitioner's Central Registration Depository ("CRD"). Respondent had the opportunity to review the request for expungement when initially

filed, and could have denied the request and closed the file at that time; however, Respondent allowed the request for expungement to move forward. Respondent also had the opportunity to review the final award recommending expungement and raise any concerns with the arbitration panel; however, no issues were raised and the final award letter was published to Respondent's Dispute Resolution Portal. Federal law is clear as to the limited circumstances where it is appropriate to vacate, modify or correct an arbitration award, and Respondent's argument does not meet the standards set forth in 9 U.S.C. §§9-11.

The 2017 arbitration award specifically recommends the expungement of Occurrence Number 239491 (the "Challenged Disclosure"), which stems from a customer complaint dating back to 1997. The original customer complaint associated with Occurrence Number 239491 went to arbitration where Murphy was found to be jointly liable and ordered to contribute a nominal amount. This hearing only addressed the original customer complaint, and was not an expungement proceeding pursuant to FINRA Rule 2080. Murphy did not request expungement at the time of the original customer dispute, nor any time prior to his request for expungement in FINRA Case No. 17-01566. Respondent contends that the doctrine of issue preclusion bars Murphy from requesting expungement of the allegations on his CRD; yet the issue of Murphy's request for expungement has never been reviewed by an arbitration panel. Further, Respondent's reasoning for partially contesting the Motion to Confirm Arbitration Award is inconsistent with Federal law pertaining to the confirmation, vacation, modification and correction of arbitration awards.

Murphy therefore rejects Respondent's position that the Court is estopped from confirming the arbitration award in full.

II. STATEMENT OF FACTS

In June of 2017, Murphy submitted a Statement of Claim in the FINRA arbitration forum against Eastbrook Capital Group LLC, Maxim Group LLC, and Nichols, Safina, Lerner & Co. Inc., in which he sought the expungement of four meritless customer dispute allegations publicly disclosed on his CRD record. Exhibit A, *Statement of Claim*, FINRA Case No. 17-01566, dated June 15, 2017.

Every expungement request filed with FINRA pursuant to Rule 2080 is assigned to a Senior Case Representative, who reviews the request at the time of filing to ensure eligibility. If the request for expungement is deemed ineligible for FINRA arbitration (*e.g.*, the claimant has previously requested expungement and the request was denied by an arbitration panel), the FINRA Case Representative will issue a notice to claimant and inform them of the ineligibility and provide an explanation.

Murphy's Statement of Claim was reviewed by FINRA and allowed to proceed: (i) copies of the Statement of Claim were served on all relevant parties; (ii) all relevant parties were given an opportunity to file an answer; (iii) an initial pre-hearing conference was held and an expungement hearing date was set; (iv) copies of the Statement of Claim and notice of the expungement hearing time and location were served on the underlying customers who filed the initial complaints; and (v) a recorded expungement hearing pursuant to FINRA Rule 2080 was held on February 6, 2018. FINRA had ample opportunity during this time to raise concerns about Murphy's request for expungement, yet no issues were raised.

Further, FINRA's Case Representatives have the opportunity to review the arbitration award letter, and raise issues with the arbitration; however, FINRA's Case Representatives raised no issues, published the final award letter and formally closed the case.

Murphy sought expungement of four customer dispute allegations pursuant to FINRA Rule 2080, which was formally codified in April of 2004 and amended in August 2009. FINRA Rule 2080, nor any other Rule found in the entire body of FINRA's Code of Arbitration Procedure, explicitly bars a request for expungement where an arbitration award was issued in the underlying customer complaint.

On December 05, 2017, FINRA issued Regulatory Notice 17-42 and requested public comment on a number of proposed rule changes pertaining to the expungement process. The proposed also fail to explicitly bar a request for expungement where an arbitration award was issued in the underlying customer complaint. Exhibit B, *Regulatory Notice*, FINRA Notice No. 17-42, dated December 05, 2017.

The 2017 award found that all four disclosures on Murphy's CRD should be expunged. Exhibit C, *Executed Award Letter*, FINRA Case No. 17-01566, dated February 08, 2018. at 3-4.

Murphy filed a Motion to Confirm Arbitration Award on or about February 20, 2018, and Respondent's Motion was filed on April 16, 2018.

III. ARGUMENT

A. The Reviewing Court Must Grant an Application to Confirm an Arbitration Award Unless a Party Timely Moves to Vacate, Modify, or Change an Arbitration Award

State and Federal public policy strongly encourages the resolution of disputes through arbitration. *See, United Paperworkers Int'l Union v. Misco,* 484 U.S. 29, 37–38, 108 S.Ct. 364,

98 L.Ed.2d 286 (1987). *See also, Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928, 930 (Colo. 1990). To facilitate confidence in the finality of arbitration awards and to discourage piecemeal litigation, the Arbitration Act, 9 U.S.C. §1, *et seq.*, provides the statutory basis for a district court's review of an arbitrational award. Sections 10 & 11 of that act restrain a court's power to modify an arbitration award. When wishing to modify an arbitration award, a party must not only show that the award failed to draw its essence from the bargaining agreement, but must also meet the statutory requirement of 9 U.S.C. § 11. Pursuant to 9 U.S.C. § 11, courts may modify an arbitration award only:

> (1) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any personal thing or property referred to in the award.
>
> (2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (3) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Courts may vacate, modify or correct an arbitration award only "for the reasons enumerated in the Federal Arbitration Act, 9 U.S.C. § 10 & 11, or for 'a handful of judicially created reasons.'" *Burlington N. & Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 567 (10th Cir.2010). These judicially created reasons "include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing." *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir.2001). In reviewing a party's motion to vacate, modify or correct the court should "give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law." *Hollern v. Wachovia Securities, Inc.* 458 F.3d 1169, 1172. This narrow standard "has been interpreted to

mean that 'as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.'" *Int'l Bhd. of Elec. Workers, Local Union No. 611, AFL–CIO v. Pub. Serv. Co. of N.M.*, 980 F.2d 616, 618 (10th Cir.1992). "Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances." *Burlington*, 636 F.3d at 567.

In the present case, Respondent has not explicitly asked the Court to vacate, modify, or correct the 2017 award, and to the extent that this Court accepts Respondent's Motion as a request to vacate, modify or correct the arbitration award, Respondent has failed to satisfy any of the requirements set forth in 9 U.S.C. § 10 & 11. Therefore, confirmation of the arbitration award is appropriate both as a matter of law and public policy.

B. The Doctrine of Issue Preclusion Does not apply, and the Court is Not Estopped from Confirming the 2017 Award in Full

Respondent argues that the doctrine of issue preclusion bars Murphy from relitigating the adverse determination made against him in the 1997 award. Respondent contends that the 2017 award should only be partially confirmed by the Court because of issue preclusion. As discussed *infra*, the doctrine of issue preclusion does not satisfy the elements required under 9 U.S.C. § 10 & 11 to vacate, modify, or correct an award.

However, even if this Court finds that the doctrine of issue preclusion provides grounds to vacate, modify, or correct an award as a matter of public policy, the elements of issue preclusion have not been satisfied. Issue preclusion bars relitigating of an issue only if:

(1) the issue precluded is identical to an issue actually determined in the prior proceeding;

(2) the party against whom estoppel is asserted has been a party to or is in privity with a party in the prior proceeding;

(3) there is a final judgment on the merits in the prior proceeding; and

(4) the party against whom the doctrine is asserted has had a full and fair opportunity to litigate the issue in the prior proceeding.

Barnett v. Elite Properties of America, Inc. 252 P.3d 14 (Colo. App. 2010).

In order for the doctrine of issue preclusion to trigger, all of these elements outlined above must be satisfied. *Id.* Respondent's contention that the doctrine of issue preclusion applies fails because the issue litigated in the 1997 arbitration hearing was entirely different from the issue litigated in the 2017 arbitration hearing. Respondent has failed to show that the issues determined in the prior proceedings were identical to the issues addressed in the 2017 expungement hearing. Respondent asserts that a finding of liability by the former arbitration panel is sufficient proof that the issues litigated in the 2017 hearing are identical to the issues in the former arbitration. Such is simply not the case. Additionally, the customer in the underlying dispute "later wrote a letter stating that there might have been some miscommunication on his part as to the price for which the subject security was sold." Exhibit D, Award, *Joe Williams v. Nichols, Safina, Lerner & Co., and Sean Murphy*, NASD Arbitration No. 97-03915, dated March 4, 1998 at 4 ¶1.

Accordingly, issue preclusion does not bar the Court from confirming the 2017 arbitration award in its entirety.

C. The 2017 Arbitration Award is Not an Impermissible Collateral Attack on the Previous Award

Respondent argues that Murphy's request for expungement of the Challenged Disclosure seeks to collaterally attack the adverse arbitration award in the 1997 arbitration because Murphy

failed to timely challenge the March 4, 1997 award under either Colorado law or the Federal Arbitration Act. This argument fails because Murphy's request for an expungement hearing in 2017 is entirely separate from the liability hearing held in 1997. FINRA does not have a rule that required Murphy to request expungement prior to or during the 1997 arbitration. In addition, Murphy was able to present new evidence at the 2017 expungement hearing in the form of a letter from the underlying customer that was written two months after the 1997 arbitration was closed. The investor at the heart of the Challenged Disclosure submitted a letter on May 6, 1998, stating that although he and Murphy had a dispute regarding a trade in the investor's account, Murphy "handle[d] the situation to the best of his ability and in a timely fashion" Exhibit E, *Letter*, Joe Williams, dated May 6, 1998. The arbitrator in the 2017 award relied on this new evidence in his decision. Therefore, Murphy did not have a chance to fully present his case in the 1997 arbitration. Further, Respondent was fully aware of the 1997 arbitration at the time that Murphy participated in the 2017 arbitration. However, Respondent made no attempt to challenge the expungement hearing until after the 2017 award was granted. Therefore, Respondent's challenge of the 2017 award is moot.

Accordingly, the 2017 arbitration award is not an Impermissible Collateral Attack on the 1997 arbitration.

IV. CONCLUSION

WHEREFORE, Petitioner, Murphy, supports confirmation of the 2017 arbitration award issued in Sean Michael Murphy v. Eastbrook Capital Group LLC, Maxim Group LLC, and Nichols, Safina, Lerner & Co., Inc., FINRA Arbitration No. 17-01566, to the extent that the award recommends the expungement of all four customer disputes on Murphy's CRD record.

Date: April 23, 2018

/s/ Armin Sarabi
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CERTIFICATE OF SERVICE

I certify that on April 23, 2018, a true and correct copy of the foregoing was filed electronically with the Clerk of Court via the Colorado Courts E-Filing System, which will send notification of such filing via email to the following:

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