

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHARLES SCHWAB & CO INC,

No. C-12-518 EDL

Plaintiff,

**ORDER GRANTING DEFENDANT’S  
MOTION TO DISMISS**

v.

FINANCIAL INDUSTRY REGULATORY  
AUTHORITY INC,

Defendant.

Plaintiff Charles Schwab & Co. seeks a declaratory judgment that Defendant Financial Industry Regulatory Authority (“FINRA”) may not enforce FINRA Rules regulating broker-dealers to bar a new provision in Plaintiff’s customer account agreements that waives any right to participation in class action litigation and requires individual arbitration of claims. Plaintiff contends that FINRA Rule 2268(d), properly interpreted, does not prohibit class action waivers and, in the alternative, even if intended to do so, its enforcement would impermissibly violate the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. Plaintiff seeks injunctive relief barring FINRA from further pursuing discipline proceedings against Plaintiff based on the class action waiver.

Defendant filed a motion to dismiss, arguing primarily that this Court lacks jurisdiction to hear this case. Defendant’s motion was fully briefed, and on April 3, 2012, the Court held a hearing on the motion. For the reasons stated at the hearing and in this Order, Defendant’s motion to dismiss is granted without leave to amend. The hearing on Plaintiff’s Motion for Preliminary Injunction is vacated.

**Background**

FINRA was originally incorporated in 1936 as the National Association of Securities Dealers (“NASD”). Compl. ¶ 7; Dettmer Decl. Ex. 5 at 627. In 2007, NASD merged with the regulation and enforcement functions of the New York Stock Exchange (“NYSE”) and was renamed FINRA. Compl. ¶ 7. FINRA is a private, not-for-profit Delaware corporation functioning as a self-regulatory organization (“SRO”) registered with the Securities and Exchange Commission (“SEC”) as a national securities association. Compl. ¶¶ 2, 8; 15 U.S.C. § 78o-3; Karsner v. Lothian, 532 F.3d 876, 880 (D.C. Cir. 2008) (“FINRA, as NASD's successor, is ‘the only officially registered “national securities association” under [the Exchange Act].’”) (internal citation omitted). FINRA has regulatory power, delegated from Congress through the SEC in the Securities Exchange Act of 1934 (“Exchange Act”), over broker-dealer firms registered pursuant to section 15 of the Exchange Act and their registered associated persons. Compl. ¶ 10. The Exchange Act gives FINRA the power to propose rules for the conduct and governance of its regulatory functions, and also regulates those rules. Compl. ¶ 11. As an SRO, FINRA is a key part of the interrelated and comprehensive mechanism for regulating securities markets, including market participants such as Plaintiff. See, e.g., Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc., 191 F.3d 198, 201 (2d Cir. 1999) (“As an integral part of a comprehensive system of federal regulation of the securities industry, the NASD regulates the over-the-counter securities market, which includes securities firms and registered representatives who buy and sell over-the-counter-securities.”).

In 1975, Congress amended the Exchange Act to give the SEC a much larger role than it had in the past in supervising FINRA. Compl. ¶ 15. The amendments required FINRA to file proposed rules with the SEC, which then had authority to approve or disapprove all proposed rules after publishing them for public comment, subject to certain exceptions. Compl. ¶ 15; 15 U.S.C. § 78s(b); Credit Suisse First Boston v. Grunwald, 400 F.3d 1119, 1130 (9th Cir. 2005) (“No proposed rule change shall take effect unless approved by the Commission[,] 15 U.S.C. § 78s(b)(1); moreover, the Commission must give public notice of the specific reasons for its approval.”). The SEC may also abrogate, add to and delete from the FINRA rules in any way that it deems appropriate or necessary. Compl. ¶ 15; 15 U.S.C. § 78s(c). FINRA “prescribes rules binding on member firms and

1 their registered representatives for the conduct of securities business” (Compl. ¶ 14), but members  
2 can petition the SEC for changes to FINRA’s rules. See Ass’n of Inv. Brokers v. SEC, 676 F.2d  
3 857, 864 (D.C. Cir. 1982). FINRA has the power to sanction members for noncompliance with  
4 securities laws and FINRA Rules, including imposition of fines, censure, and suspension or  
5 revocation of membership or registration. Compl. ¶ 14. Because of the SEC’s oversight, FINRA  
6 Rules approved by the SEC are expressions of federal legislative power and have the force and  
7 effect of a federal regulation. Compl. ¶ 16; see also Credit Suisse, 400 F.3d at 1132 (“In sum, we  
8 conclude that SRO rules that have been approved by the Commission pursuant to 15 U.S.C. §  
9 78s(b)(2) preempt state law when the two are in conflict, either directly or because the state law  
10 stands as an obstacle to the accomplishment of the objectives of Congress. Specifically, we hold that  
11 the NASD arbitration procedures in dispute here have preemptive force over conflicting state law.”).

12  
13 In the early 1970s, Plaintiff joined the NASD, and as part of the application for membership,  
14 Plaintiff certified its agreement to abide by the Rules of Fair Practice, now FINRA Rules. Dettmer  
15 Decl. Ex. 15 at 4, 8, 12; see Fiero v. FINRA, 600 F.3d 569, 571 (2d Cir. 2011) (“As a practical  
16 matter, all securities firms dealing with the public must be members of FINRA.”). Plaintiff has  
17 recertified its agreement to abide by those rules at least ten times since becoming a FINRA member.  
18 Id.

19 FINRA employs a five-stage disciplinary process to regulate broker-dealers. Compl. ¶ 17.  
20 First, a FINRA Hearing Panel hears a complaint. Id.; 15 U.S.C. § 78o-3(h)(1); FINRA Rule  
21 9231(b). Second, either side may appeal the Hearing Panel’s decision to the FINRA National  
22 Adjudicatory Council (“NAC”). Compl. ¶ 17; FINRA Rule 9311(a). Third, at its discretion, the  
23 FINRA Board may review the NAC’s decision. Compl. ¶ 17; FINRA Rules 9349, 9351. Fourth, a  
24 FINRA member or associated person aggrieved by a disciplinary action may apply for review by the  
25 SEC. Compl. ¶ 17; 15 U.S.C. § 78s(d); FINRA Rule 9370(a). Fifth, a FINRA member or associated  
26 person may appeal an adverse determination by the SEC to a federal circuit court of appeals.  
27 Compl. ¶ 17; 15 U.S.C. § 78y(a). Plaintiff alleges that two out of the three members of the FINRA  
28 Hearing Panel need not be attorneys, and there is no requirement that any member of the NAC or the

1 FINRA Board be attorneys. Compl. ¶ 18. Plaintiff alleges that there is nothing in the FINRA rules  
2 giving members of the Hearing Panel, NAC or FINRA Board the authority to invalidate a FINRA  
3 rule. Compl. ¶ 20. Plaintiff notes that this disciplinary process can take many years to complete.  
4 See, e.g., PAZ Sec., Inc. v. SEC, 494 F.3d 1059 (D.C. Cir. 2007) (disciplinary complaint began on  
5 August 14, 2003; appellate court ruled on July 20, 2007).

6 Plaintiff's account agreement with its customers calls for arbitration before FINRA Dispute  
7 Resolution of any disputes arising out of the use of Plaintiff's services. Compl. ¶ 24. In October  
8 2011, Plaintiff amended its account agreement to add a class action waiver:

9 **Waiver of Class Action or Representative Action.** Neither you nor Schwab shall  
10 be entitled to arbitrate any claims as a class action or representative action, and the  
11 arbitrator(s) shall have no authority to consolidate more than one parties' claims or to  
12 proceed on a representative or class basis. You and Schwab agree that any actions  
13 between us and /or Related Third Parties shall be brought solely in our individual  
14 capacities. You and Schwab hereby waive any right to bring a class action, or any  
15 type of representative action against each other or any Related Third Parties in court.  
16 You and Schwab waive any right to participate as a class member, or in any other  
17 capacity, in any class action or representative action brought by any other person,  
18 entity or agency against Schwab or you.

15 Compl. ¶ 26 (emphasis in original). This amended agreement was delivered to nearly 7 million  
16 existing customers in September 2011 and was included in the Account Agreement for new  
17 customers opening accounts on or after October 1, 2011. Compl. ¶¶ 27-28.

18 On October 20, 2011, FINRA Enforcement Staff notified Plaintiff that it was investigating  
19 the new class action waiver. Compl. ¶ 29; Serota Decl. ¶ 4. In response, Plaintiff stated its position  
20 that FINRA Rule 2268(d) does not prohibit a class action waiver, and that if it did, it would be  
21 unenforceable under Supreme Court authority because it would violate the FAA. See AT&T  
22 Mobility v. Concepcion, 131 S. Ct. 1740 (2011); CompuCredit v. Greenwood, 132 S. Ct. 665  
23 (2012); see also Compl. ¶ 29; Serota Decl. ¶ 5. In AT&T Mobility, the Court held that the Federal  
24 Arbitration Act preempted California law striking down class arbitration waivers in consumer  
25 contracts as unconscionable as set forth in Discover Bank v. Superior Court, 36 Cal.4th 148 (2005).  
26 There, the California Supreme Court held that class waivers in consumer arbitration agreements are  
27 unconscionable if the waiver is contained in an adhesion contract, disputes between the parties are  
28 likely to involve small amounts of damages, and the party with inferior bargaining power alleges a

1 deliberate scheme to defraud. The AT&T Mobility Court reasoned: “The overarching purpose of the  
2 FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements  
3 according to their terms so as to facilitate streamlined proceedings. Requiring the availability of  
4 classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme  
5 inconsistent with the FAA.” AT&T Mobility, 131 S. Ct. at 1748. In CompuCredit v. Greenwood,  
6 132 S. Ct. 665 (2012), the Supreme Court explained that the FAA “establishes ‘a liberal federal  
7 policy favoring arbitration agreements.’ It requires courts to enforce agreements to arbitrate  
8 according to their terms. That is the case even when the claims at issue are federal statutory claims,  
9 unless the FAA's mandate has been ‘overridden by a contrary congressional command.’” 132 S.Ct.  
10 at 669. The statute at issue in that case was silent as to whether claims under the Act could proceed  
11 in an arbitrable forum, so the FAA required the arbitration agreement to be enforced according to its  
12 terms.

13 FINRA Enforcement Staff rejected Plaintiff’s arguments against disciplinary action, stating  
14 that FINRA Rule 2268(d) precludes Plaintiff from inserting a class action waiver into its pre-dispute  
15 arbitration agreement with its customers, and that the FAA does not trump the FINRA rule. Compl.  
16 ¶¶ 21, 30; see also Serota Decl. ¶ 6. On February 1, 2012, FINRA initiated disciplinary proceedings  
17 against Plaintiff for violating FINRA Rule 2268(d) by including the class action waiver in its  
18 account agreement. Dettmer Decl. Ex. 1; Serota Decl. Ex. B. The disciplinary complaint asked the  
19 Hearing Panel to declare Plaintiff in violation of FINRA Rules, to order Plaintiff to refrain from  
20 further violations of Rule 2268(d) and to impose monetary or other sanctions. Id. at 8. On the same  
21 day, Plaintiff filed this action seeking a declaration that it does not violate FINRA Rule 2268(d)(3),  
22 or alternatively that the Rule cannot be enforced to bar the class action waiver provision, which must  
23 be permitted under the FAA. Compl. ¶ 32.

24 On February 21, 2012, Plaintiff was sued in San Francisco Superior Court in a putative class  
25 action, Kamberian v. Charles Schwab & Co., No. CGC-12-518383 (Serota Decl. Ex. C), filed on  
26 behalf of all Schwab customers who spoke with one of Schwab’s employees on the telephone and  
27 had their conversations recorded, allegedly in violation of California law. Plaintiff argues that it  
28 faces the choice in the state action of either enforcing its class action waiver in its customer

1 agreement and facing further disciplinary action by FINRA, or risking waiving its right to compel  
2 individual arbitration in lieu of any class action.

### 3 **Legal Standard**

4 A motion to dismiss an action pursuant to Federal Rule of Civil Procedure 12(b)(1) raises the  
5 question of the federal court's subject matter jurisdiction over the action. When considering a Rule  
6 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to  
7 the face of the pleadings, but may review evidence, such as declarations and testimony, to resolve  
8 any factual disputes concerning the existence of jurisdiction. See McCarthy v. United States, 850  
9 F.2d 558, 560 (9th Cir.1988). The party asserting jurisdiction has the burden of proving that  
10 jurisdiction exists. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th  
11 Cir.1995); Ass'n of Am. Med. Coll. v. United States, 217 F.3d 770, 778-79 (9th Cir.2000).

### 12 **FINRA Rule at issue**

13 FINRA Rule 2268(d) states:

14 (d) No predispute arbitration agreement shall include any condition that:

- 15 (1) limits or contradicts the rules of any self-regulatory organization;  
16 (2) limits the ability of a party to file any claim in arbitration;  
17 (3) *limits the ability of a party to file any claim in court permitted to be filed in court  
under the rules of the forums in which a claim may be filed under the agreement;*  
18 (4) limits the ability of arbitrators to make any award. (emphasis added).

19 The “rules of the forums” referenced in Rule 2268(d)(3) are contained in the FINRA Code of  
20 Arbitration Procedure for Customer Disputes. Rule 12204(d) of that Code states that:

21 (d) A member or associated person may not enforce any arbitration agreement against  
22 a member of a certified or putative class action with respect to any claim that is the  
23 subject of the certified or putative class action until:

- 24 • The class certification is denied;
  - 25 • The class is decertified;
  - 26 • The member of the certified or putative class is excluded from the class by the  
27 court; or
  - 28 • The member of the certified or putative class elects not to participate in the class or  
withdraws from the class according to conditions set by the court, if any.
- This paragraph does not otherwise affect the enforceability of any rights under this  
Code or any other agreement.

26 In the late 1980s, the SEC approved NASD Rule 3110, the predecessor to FINRA Rule  
27 2268(d), to prevent pre-dispute arbitration agreements from “curtailing any rights that a party may  
28 otherwise have had in a judicial forum.” Dettmer Decl. Ex. 7 at 21,154. NASD Rule 3110 was

1 proposed in response to the SEC's suggestion that SROs review "issues raised by the current use of  
2 mandatory predispute arbitration agreements by their member firms." Id. at 21,145; 21,154 n.56;  
3 Dettmer Decl. Ex. 12. One of the SEC's suggestions was that SROs should "consider procedures  
4 that would permit investors access to the courts in appropriate cases . . . . For example, cases  
5 involving . . . class actions . . . may be more appropriately resolved through the courts." Dettmer  
6 Decl. Ex. 13 at 487; see also id. Ex. 7 at 21,153; 21,154. In particular, Rule 3110(f)(4) was aimed at  
7 assuring customers in arbitration the same remedies they could obtain in court, such as punitive  
8 damages. See 54 Fed. Reg. 21,144 (SEC Release No. 34-26805) (May 10, 1989). In 1988, when the  
9 NASD presented Rule 3110 to the membership for comment, Plaintiff expressed its overall approval  
10 of the new rules. Dettmer Decl. Ex. 16.

11 In October 1998, the NASD proposed replacing NASD 3110 with the current language of  
12 FINRA Rule 2268, in order to "clarify the prohibition against provisions that limit [investors'] rights  
13 or remedies." Dettmer Decl. Ex. 8 at \*2, \*5-6 (explaining that under the prior version of the rule, "a  
14 customer who agreed to arbitrate disputes under New York law could inadvertently forfeit" rights,  
15 such as "the ability to obtain punitive damages, that might have been available in court."); see also  
16 Dettmer Decl. Ex. 9 at \*4; 64 Fed. Reg. 66,681 (Amendments to Rule 3110(f) Governing Predispute  
17 Arbitration Agreements with Customers) (Nov. 29, 1999).

18 The NASD proposed the basic language of rule 12204(d) on June 17, 1992. Dettmer Decl.  
19 Ex. 10 at 30,519. As part of the same proposal, the NASD proposed amendments to the Rules of  
20 Fair Practice requiring members to make certain disclosures in pre-dispute arbitration agreements  
21 with their customers, which is now codified as rule 2268(f). Id. In approving these rules in October  
22 1992, the SEC agreed with NASD's position that "the judicial system has already developed the  
23 procedures to manage class action claims. Entertaining such claims through arbitration at the NASD  
24 would be difficult, duplicative and wasteful." Dettmer Decl. Ex. 11 at 52,661 (agreeing with  
25 NASD's position that "in all cases, class actions are better handled by the courts and that investors  
26 should have access to the courts to resolve class actions efficiently.").

## 27 Discussion

### 28 1. Plaintiff's failure to exhaust administrative remedies bars this action

1 It is undisputed that Plaintiff has not exhausted the FINRA administrative process. As noted,  
2 FINRA disciplinary actions proceed through a number of levels that culminate in administrative  
3 review by the SEC and then in judicial review by the federal court of appeals. Congress believed  
4 that this process would achieve several benefits, including “the expertise and intimate familiarity  
5 with complex securities operations which members of the industry can bring to bear on regulatory  
6 problems, and the informality and flexibility of self-regulatory procedures.” S. Doc. No. 93-13, 93rd  
7 Cong., 1st Sess. 149 (1973); see also Swirsky v. Nat’l Ass’n of Sec. Dealers, 124 F.3d 59, 62 (1997)  
8 (quoting S. Doc. No. 93-13, 93rd Cong., 1st Sess. 149 (1973)).

9 Defendant argues that Plaintiff’s failure to exhaust deprives the Court of jurisdiction. See  
10 First Jersey, 605 F.2d at 700 (“We conclude therefore that First Jersey’s failure to exhaust its  
11 administrative remedies rendered the district court without jurisdiction to entertain the suit. The  
12 proper response by the district court would have been to grant NASD’s motion for dismissal. If and  
13 when sanctions are imposed on First Jersey, the company would have full and ample opportunity to  
14 present its due process and statutory claims to the court of appeals.”). Plaintiff, however, argues that  
15 exhaustion under the Exchange Act is not jurisdictional, and that Plaintiff need not exhaust because  
16 it comes within the exceptions to exhaustion. For the reasons set forth below, the Court concludes  
17 that the failure to exhaust administrative remedies is jurisdictional, but even if it is only an element  
18 of a claim, Plaintiff has failed to show that it meets the requirements for an exception to the  
19 requirement of administrative exhaustion.

20 Jurisdictional exhaustion is:

21 rooted, not in prudential principles, but in Congress’ power to control the jurisdiction  
22 of the federal courts. Whether a statute requires exhaustion is purely a question of  
23 statutory interpretation. If the statute does mandate exhaustion, a court cannot excuse  
24 it. . . . In order to mandate exhaustion, a statute must contain ‘[s]weeping and direct’  
25 statutory language indicating that there is no federal jurisdiction prior to exhaustion,  
or the exhaustion requirement is treated as an element of the underlying claim. We  
presume exhaustion is non-jurisdictional unless ‘Congress states in clear, unequivocal  
terms that the judiciary is barred from hearing an action until the administrative  
agency has come to a decision.’

26 Avocados Plus Inc. v. Veneman, 370 F.3d 1243, 1247-48 (D.C. Cir. 2004) (internal citations  
27 omitted). In the specific context of FINRA disciplinary procedures, courts have held without  
28 exception that the comprehensive review process renders exhaustion jurisdictional. See First Jersey,

1 605 F.2d at 700; see also PennMount Sec. v. Frucher, 586 F.3d 242, 246 (3d Cir. 2009) (stating that  
2 “Typically, when a litigant refuses to exhaust the available administrative remedies provided by the  
3 Exchange Act, a district court may not exercise jurisdiction over the case,” and noting that there are  
4 two exceptions: “either of which would compel a court to hear an unexhausted case: ‘1) when the  
5 administrative procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when  
6 there is a clear and unambiguous statutory or constitutional violation.’”) (internal citation omitted);  
7 Merrill Lynch, Pierce, Fenner & Smith v. NASD, 616 F.2d 1363, 1368-71 (5th Cir. 1980) (“To  
8 fulfill these goals, self-regulatory disciplinary hearings should be handled expeditiously, without  
9 being disrupted by challenges to procedural rulings which do not pertain to the merits of the case.  
10 The doctrine of exhaustion of administrative remedies should therefore apply to the disciplinary  
11 proceedings of the NASD.”); Alton v. NASD, 1994 WL 443460, at \*2-3 (N.D. Cal. July 26, 1994)  
12 (granting motion to dismiss based on lack of subject matter jurisdiction where the plaintiff failed to  
13 exhaust the NASD disciplinary proceedings and did not qualify for an exception to the exhaustion of  
14 administrative remedies requirement).

15 The First Jersey court explained that the “comprehensiveness of the review procedure  
16 suggests that the doctrine of exhaustion of remedies should be applied to prevent circumvention of  
17 the established procedures.” First Jersey, 605 F.2d at 695; see also Swirsky, 124 F.3d at 61-62 (“We  
18 agree with other circuits that have considered the question that the ‘comprehensiveness of the review  
19 procedure suggests that the doctrine of exhaustion of administrative remedies should be applied to  
20 prevent circumvention of established procedures.’”); Cleantech Innovations, Inc. v. NASDAQ Stock  
21 Mkt, LLC, 2012 WL 345902, at \*1-2 (S.D. N.Y. Jan. 31, 2012) (dismissing a case due to lack of  
22 jurisdiction where the focus of the amended complaint was the defendant’s alleged unconstitutional  
23 conduct in delisting plaintiff’s stock based on racial animus, stating that: “the Exchange Act sets  
24 forth a specific and comprehensive scheme for reviewing disciplinary actions taken by  
25 self-regulatory organizations (“SRO”) like NASDAQ, including review by the SEC (15 U.S.C. §  
26 78s(d)) and the United States Courts of Appeals (id. § 78y(a)(1)). This Court has repeatedly found  
27 that scheme to be the “exclusive route” for obtaining review of SRO disciplinary actions, such as  
28 delistings. . . . Most importantly . . . should plaintiff disagree with the SEC’s ultimate assignment, it

1 can appeal it to the Court of Appeals . . .”).

2 The conclusion that exhaustion of FINRA procedures is a jurisdictional requirement is  
3 consistent with the Supreme Court’s analysis in Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207  
4 (1994) of whether the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801,  
5 et seq. (“Mine Act”), precluded district court jurisdiction prior to exhaustion of administrative  
6 remedies. The Mine Act required the Secretary of Labor or his representative to conduct periodic,  
7 unannounced health and safety inspections of mines. See 30 U.S.C. § 813. Section § 813(f)  
8 provides:

9 [A] representative of the operator and a representative authorized by his miners shall  
10 be given an opportunity to accompany the Secretary or his authorized representative  
11 during the physical inspection of any coal or other mine ... for the purpose of aiding  
such inspection and to participate in pre-or post-inspection conferences held at the  
mine.

12 Regulations promulgated under Section 813 defined a miners' representative as “[a]ny person or  
13 organization which represents two or more miners at a coal or other mine for the purposes of the  
14 Act.” 30 CFR § 40.1(b)(1) (1993). The regulations required mine operators to post the information  
15 regarding representatives at the mine. Id.

16 Employees of Thunder Basin Coal Company, which operated a nonunion coal mine, selected  
17 two employees of the United Mine Workers of America, who were not employees of the mine, to  
18 serve as their miners' representatives pursuant to § 813(f). Thunder Basin, 510 U.S. at 204. Rather  
19 than post the information regarding the representatives, Thunder Basin complained to the Mine  
20 Safety and Health Administration (“MSHA”) that the designation compromised its rights under the  
21 National Labor Relations Act (“NLRA”). Id. at 204. MSHA instructed Thunder Basin to post the  
22 miners' representative designations. Id. Thunder Basin sued in district court for pre-enforcement  
23 injunctive relief, arguing that “the designation of nonemployee [union] ‘representatives’ violated the  
24 principles of collective-bargaining representation under the NLRA as well as the company's NLRA  
25 rights to exclude union organizers from its property.” Id. Thunder Basin also argued that:  
26 “requiring it to challenge the MSHA's interpretation of 30 U.S.C. § 813(f) and 30 CFR pt. 40  
27 through the statutory-review process would violate the Due Process Clause of the Fifth Amendment,  
28 since the company would be forced to choose between violating the Act and incurring possible

1 escalating daily penalties, or, on the other hand, complying with the designations and suffering  
2 irreparable harm.” Id.

3 The Supreme Court held that the Mine Act precluded district court jurisdiction prior to  
4 exhaustion of administrative remedies:

5 In cases involving delayed judicial review of final agency actions, we shall find that  
6 Congress has allocated initial review to an administrative body where such intent is  
7 “fairly discernible in the statutory scheme.” Whether a statute is intended to preclude  
8 initial judicial review is determined from the statute's language, structure, and  
9 purpose, its legislative history, Block, 467 U.S., at 345, 104 S.Ct. at 2453, and  
10 whether the claims can be afforded meaningful review.

11 Applying this analysis to the review scheme before us, we conclude that the Mine Act  
12 precludes district court jurisdiction over the pre-enforcement challenge made here.  
13 The Act establishes a detailed structure for reviewing violations of “any mandatory  
14 health or safety standard, rule, order, or regulation promulgated” under the Act. §  
15 814(a). A mine operator has 30 days to challenge before the Commission any citation  
16 issued under the Act, after which time an uncontested order becomes “final” and “not  
17 subject to review by any court or agency.” §§ 815(a) and (d). Timely challenges are  
18 heard before an administrative law judge (ALJ), § 823(d)(1), with possible  
19 Commission review. Only the Commission has authority actually to impose civil  
20 penalties proposed by the Secretary, § 820(i), and the Commission reviews all  
21 proposed civil penalties de novo according to six criteria. The Commission may grant  
22 temporary relief pending review of most orders, § 815(b)(2), and must expedite  
23 review where necessary, § 815(d).

24 *Mine operators may challenge adverse Commission decisions in the appropriate  
25 court of appeals, § 816(a)(1), whose jurisdiction “shall be exclusive and its judgment  
26 and decree shall be final” except for possible Supreme Court review, ibid. The court  
27 of appeals must uphold findings of the Commission that are substantially supported  
28 by the record, ibid., but may grant temporary relief pending final determination of  
most proceedings, § 816(a)(2).*

19 Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994) (emphasis added).

20 The Exchange Act’s administrative review process is very similar to the administrative  
21 process at issue in Thunder Basin. Like the Mine Act, the Exchange Act allocates initial review to  
22 an administrative body, establishes a detailed structure for review that leads to review by an  
23 independent commission, and ultimately provides for judicial review by the court of appeals. In  
24 particular, under the administrative procedure in the Exchange Act:

25 *(1) A person aggrieved by a final order of the Commission entered pursuant to this  
26 chapter may obtain review of the order in the United States Court of Appeals for the  
27 circuit in which he resides or has his principal place of business, or for the District of  
28 Columbia Circuit, by filing in such court, within sixty days after the entry of the  
order, a written petition requesting that the order be modified or set aside in whole or  
in part.*

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1           (3) *On the filing of the petition, the court has jurisdiction, which becomes exclusive*  
 2           *on the filing of the record, to affirm or modify and enforce or to set aside the order in*  
 3           *whole or in part.*

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4           See 15 U.S.C. § 78y (emphasis added); see also S.E.C. v. Jett, 514 F.Supp.2d 532 (S.D.N.Y. 2007)  
 5           (Court of Appeals has exclusive jurisdiction to review the merits of an order of the SEC); Maschler  
 6           v. Nat'l Ass'n of Sec. Dealers, Inc., 827 F.Supp. 131 (E.D.N.Y. 1993) (Securities Exchange Act  
 7           restricted judicial review of final disciplinary orders of Securities and Exchange Commission  
 8           exclusively to Courts of Appeals). Moreover, similar to the posture of this case, in Thunder Basin,  
 9           the party seeking to avoid administrative exhaustion raised the argument that enforcement of a  
 10           regulation issued under one statute conflicted with and was trumped by its rights under a separate  
 11           statute. Nonetheless, the Supreme Court held that the failure to exhaust deprived the district court of  
 12           jurisdiction.

13           Plaintiff argues that McBride Cotton & Cattle Co. v. Veneman, 290 F.3d 973 (9th Cir. 2002)  
 14           supports its position that exhaustion is not a jurisdictional requirement here. McBride Cotton  
 15           addressed the exhaustion requirement under the Federal Crop Insurance Reform and Department of  
 16           Agriculture Reorganization Act of 1994:

17           Notwithstanding any other provision of law, a person shall exhaust all administrative  
 18           appeal procedures established by the Secretary [of Agriculture] or required by law  
 19           before the person may bring an action in a court of competent jurisdiction against-  
 20           (1) the Secretary;  
 21           (2) the Department; or  
 22           (3) an agency, office, officer, or employee of the Department.

23           7 U.S.C. § 6912(e). The court concluded that this provision was not jurisdictional.

24           Unlike the Exchange Act at issue here, the statute in McBride did not provide for exclusive  
 25           jurisdiction in the Court of Appeals at the conclusion of the administrative process. The McBride  
 26           court reasoned:

27           Comparing the exhaustion requirement in this case with other exhaustion  
 28           requirements we have considered, we hold that 7 U.S.C. § 6912(e) does not limit the  
 29           district court's subject matter jurisdiction over the plaintiffs' claims. Nothing in §  
 30           6912(e) mentions, defines, or limits federal jurisdiction. Instead, § 6912(e)'s  
 31           requirement that “a person shall exhaust all administrative appeal procedures  
 32           established by the Secretary or required by law before the person may bring an action  
 33           in a court of competent jurisdiction ...” is similar to the language which, in Anderson  
 34           and Rumbles, we held was merely a codification of the exhaustion requirement.

1 Arguing for a contrary result, the Secretary relies upon the Second Circuit's decision  
2 in Bastek v. Federal Crop Insurance Corporation, 145 F.3d 90 (2d Cir.1998), holding  
3 that the statutory exhaustion requirement of 7 U.S.C. § 6912(e) may not be waived by  
4 the court. The court in Bastek based its analysis upon a determination that the  
5 exhaustion requirement of § 6912(e) was a statutory requirement, as opposed to one  
6 which had been “judicially-developed.” Id. at 94-95. We recognized in Anderson,  
7 Rumbles, and similar cases, however, that not all statutory exhaustion requirements  
8 are created equal. Only statutory exhaustion requirements containing “sweeping and  
9 direct” language deprive a federal court of jurisdiction. Anderson, 230 F.3d at 1162;  
10 Rumbles, 182 F.3d at 1067. Section 6912(e) contains no such language.

11 McBride, 290 F.3d at 980. By contrast, the Exchange Act provides for judicial review of a final  
12 SEC order in the Court of Appeals, which has exclusive jurisdiction on the filing of the record. 15  
13 U.S.C. § 78y. This provision vesting exclusive jurisdiction in the Court of Appeals upon conclusion  
14 of the administrative process goes beyond a mere statutory “codification of the exhaustion  
15 requirement.”

16 Plaintiff correctly points out that the Supreme Court has recently cautioned courts to be more  
17 careful to distinguish between true jurisdictional conditions and non-jurisdictional limitations on  
18 bringing claims. See Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237, 1243 (2010). The Court  
19 stated:

20 While perhaps clear in theory, the distinction between jurisdictional conditions and  
21 claim-processing rules can be confusing in practice. Courts—including this  
22 Court—have sometimes mischaracterized claim-processing rules or elements of a  
23 cause of action as jurisdictional limitations, particularly when that characterization  
24 was not central to the case, and thus did not require close analysis. See Arbaugh,  
25 supra, at 511–512, 126 S.Ct. 1235 (citing examples); Steel Co., 523 U.S., at 91, 118  
26 S.Ct. 1003 (same). Our recent cases evince a marked desire to curtail such “drive-by  
27 jurisdictional rulings,” ibid., which too easily can miss the “critical difference[s]”  
28 between true jurisdictional conditions and nonjurisdictional limitations on causes of  
action, Kontrick, supra, at 456, 124 S.Ct. 906; see also Arbaugh, 546 U.S., at 511,  
126 S.Ct. 1235.

In light of the important distinctions between jurisdictional prescriptions and  
claim-processing rules, see, e.g., id., at 514, 126 S.Ct. 1235, we have encouraged  
federal courts and litigants to “facilitat[e]” clarity by using the term “jurisdictional”  
only when it is apposite, Kontrick, supra, at 455, 124 S.Ct. 906. In Arbaugh, we  
described the general approach to distinguish “jurisdictional” conditions from  
claim-processing requirements or elements of a claim:

“If the Legislature clearly states that a threshold limitation on a statute's scope shall  
count as jurisdictional, then courts and litigants will be duly instructed and will not be  
left to wrestle with the issue. But when Congress does not rank a statutory limitation  
on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in  
character.” 546 U.S., at 515–516, 126 S.Ct. 1235 (citation and footnote omitted).

1 Reed Elsevier, 130 S. Ct. at 1243-44. In Reed Elsevier, the Supreme Court determined that a  
2 provision in the Copyright Act, 17 U.S.C. § 411(a), requiring registration before bringing suit, with  
3 certain enumerated exceptions, was not jurisdictional, but instead “impose[d] a precondition to filing  
4 a claim that is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision,  
5 and admits of congressionally authorized exceptions.” Id. at 1247. The Reed Elsevier Court did not  
6 consider a detailed regulatory scheme like FINRA’s disciplinary process culminating in an  
7 administrative review by a federal commission, the SEC, and ultimately vesting exclusive  
8 jurisdiction in the Court of Appeals to review the SEC’s decision, which is more akin to the  
9 regulatory scheme held to be jurisdictional in Thunder Basin. While it is true that numerous judicial  
10 decisions holding that the Exchange Act’s process is jurisdictional were decided prior to Reed  
11 Elsevier, their reasoning appears to this Court to remain sound.

12 Moreover, even assuming that the label “jurisdictional” has been bestowed incorrectly, the  
13 same considerations set forth in First Jersey and similar decisions support requiring exhaustion here  
14 as a prudential matter. Thus, assuming that exhaustion under the Exchange Act is only a claim  
15 processing requirement, Plaintiff does not satisfy any of the exceptions to exhaustion recognized by  
16 the courts. In McCarthy v. Madigan, 503 U.S. 140, 146 (1992) (superseded by statutes on other  
17 grounds as stated in Booth v. Churner, 532 U.S. 731, 740 (2001)), the Supreme Court explained: “In  
18 determining whether exhaustion is required, federal courts must balance the interest of the individual  
19 in retaining prompt access to a federal judicial forum against countervailing institutional interests  
20 favoring exhaustion.” McCarthy, 503 U.S. at 146. The Court acknowledged three exceptions under  
21 this balancing principle:

22 This Court's precedents have recognized at least three broad sets of circumstances in  
23 which the interests of the individual weigh heavily against requiring administrative  
24 exhaustion. First, requiring resort to the administrative remedy may occasion undue  
prejudice to subsequent assertion of a court action. Such prejudice may result, for  
example, from an unreasonable or indefinite timeframe for administrative action.

25 Second, an administrative remedy may be inadequate “because of some doubt as to  
26 whether the agency was empowered to grant effective relief.” Gibson v. Berryhill,  
27 411 U.S., at 575, n. 14, 93 S.Ct., at 1696, n. 14. For example, an agency, as a  
preliminary matter, may be unable to consider whether to grant relief because it lacks  
28 institutional competence to resolve the particular type of issue presented, such as the  
constitutionality of a statute.

Third, an administrative remedy may be inadequate where the administrative body is

1 shown to be biased or has otherwise predetermined the issue before it.

2 Id. at 146-48; see also, e.g., First Jersey, 605 F.2d at 696 (“In this Circuit, we have recognized two  
3 situations in which the exhaustion requirement will not be adhered to: 1) when the administrative  
4 procedure is clearly shown to be inadequate to prevent irreparable injury; or 2) when there is a clear  
5 and unambiguous statutory or constitutional violation.”).

6 Plaintiff argues that it need not exhaust administrative remedies for all three reasons set forth  
7 in McCarthy. First, Plaintiff argues that requiring exhaustion in this case would irreparably harm  
8 Plaintiff because the FINRA disciplinary process could take up to four or more years, during which  
9 Plaintiff risks waiving its right to compel arbitration in one or more class action suits, citing  
10 Alascom, Inc. v. ITT North Elec. Co., 727 F.2d 1419, 1422 (9th Cir. 1984) (when a court grants a  
11 stay of arbitration, forcing the party to “undergo the expense and delay of a trial before being able to  
12 appeal, the advantages of arbitration-speed and economy-are lost forever. We find this consequence  
13 ‘serious, perhaps, irreparable’ and ‘effectually challenged’ only by immediate appeal.”); Olde  
14 Discount Corp. v. Tupman, 805 F. Supp. 1130, 1141 (D. Del. 1992) (“Likewise, the Court concludes  
15 that the loss of its federal substantive right to arbitrate, should injunctive relief be denied, constitutes  
16 irreparable harm clearly distinguishable from purely economic losses.”). However, this case does  
17 not concern a stay on arbitration or an injunction against an administrative rescission action on  
18 behalf of investors, but instead the possibility that FINRA will impose discipline on Plaintiff, which  
19 would ultimately be subject to judicial review.

20 Further, delay is not a basis to exempt a party from the requirement to exhaust administrative  
21 remedies unless it is combined with a showing that the remedies available are palpably inadequate,  
22 resulting in serious injustice. See Maxon Marine, 39 F.3d at 147 (“But delay is not a valid ground  
23 for bypassing the procedures established by Congress for obtaining judicial review of agency action,  
24 procedures that include a mandatory resort to such administrative remedies as remain open to the  
25 aggrieved party, unless those remedies are palpably inadequate, which Maxon has not shown,  
26 resulting in serious injustice, which Maxon also has not shown.”); Myers v. Bethlehem Shipbuilding  
27 Corp., 303 U.S. 41, 51 (1938) (“Obviously, the rules requiring exhaustion of the administrative  
28 remedy cannot be circumvented by asserting that the charge on which the complaint rests is

1 groundless and that the mere holding of the prescribed administrative hearing would result in  
2 irreparable damage.”); Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974) (“Exhaustion is  
3 required in part because of the possibility that administrative review might obviate the need for  
4 judicial review. That the administrative process might not have this effect is not usually a reason for  
5 bypassing it.”).

6 Second, Plaintiff contends that it cannot obtain effective relief at the administrative level  
7 because FINRA hearing officers and panels lack experience and competence to decide whether the  
8 FAA’s mandate prevails over the Exchange Act and SRO rules. Cf. Mathews v. Diaz, 426 U.S. 67,  
9 76 (1976) (noting that where plaintiffs challenged the constitutionality of a portion of the Social  
10 Security Act, the Secretary of Health, Education and Welfare lacked competence to decide that  
11 issue). However, much of Plaintiff’s complaint alleges that FINRA Rule 2268(d), properly  
12 understood, does not prohibit Plaintiff’s class action waiver (Compl. ¶ 32), and that FINRA is  
13 misinterpreting its own Rules in pursuing disciplinary action against Plaintiff (Compl. ¶¶ 34-38).  
14 These issues are squarely within the expertise of FINRA, as well as the SEC. For example, the  
15 Exchange Act instructs the SEC in reviewing final disciplinary actions to determine whether the  
16 rules were applied in a manner “consistent with the purposes of” the Act, which are fundamentally  
17 to ensure the maintenance of fair and honest markets. See 15 U.S.C. § 78s(e); 15 U.S.C. § 78b;  
18 Krull v. SEC, 248 F.3d 907 (9th Cir. 2001) (“Congress granted the Commission broad supervisory  
19 responsibility over self-regulatory organizations such as NASD and requires the Commission to  
20 approve all rules, policies, practices, and interpretations prior to implementation. Because of the  
21 Commission’s expertise in the securities industry, we owe deference to its construction of NASD’s  
22 Rules of Fair Practice.”) (internal citation omitted); Shenandoah v. US Dep’t of Interior, 159 F.3d  
23 708, 713 (2d Cir. 1998) (“Exhaustion may also ‘[moot] a judicial controversy.... And even where a  
24 controversy survives administrative review, exhaustion of the administrative procedure may produce  
25 a useful record for subsequent judicial consideration, especially in a complex or technical factual  
26 context’ or where as here the underlying issues are particularly within the agency’s expertise.”)  
27 (internal citation omitted).

28 Moreover, the remedies available in the administrative process (or indeed on review by the

1 court of appeals) are not palpably inadequate. To the contrary, Defendant stated unequivocally at  
 2 the hearing that the disciplinary process is capable of concluding with a determination that the  
 3 FINRA Rule at issue is invalid in light of the FAA.<sup>1</sup> See, e.g., First Jersey, 605 F.2d at 696  
 4 (“Ultimate review by the court of appeals ensures that constitutional or statutory errors will not go  
 5 unremedied.”); Cleantech, 2012 WL 345902, at \*2 (“The Court agrees with defendants that there is  
 6 no reason to believe that the SEC lacks similar expertise to review the constitutionality of the SRO  
 7 actions here. . . . Most importantly—as recognized by this Court in Altman—should plaintiff  
 8 disagree with the SEC's ultimate assessment, it can appeal it to the Court of Appeals, where ‘any  
 9 constitutional challenge raised in [the] administrative proceedings will be meaningfully  
 10 addressed.’”) (internal citation omitted).

11 As stated above, in Thunder Basin, which like this case addressed a regulation issued under  
 12 one statute that allegedly conflicted with a different statute, the Supreme Court made no exception  
 13 for exhaustion even though the plaintiff there brought a constitutional claim as well as a statutory  
 14 one, in view of the availability of review by an independent commission (like the SEC here) and by  
 15 the Court of Appeals. See Thunder Basin, 510 U.S. at 215 (“As for petitioner's constitutional claim,  
 16 we agree that ‘[a]djudication of the constitutionality of congressional enactments has generally been  
 17 thought beyond the jurisdiction of administrative agencies.’ This rule is not mandatory, however,  
 18 and is perhaps of less consequence where, as here, the reviewing body is not the agency itself but an  
 19 independent commission established exclusively to adjudicate Mine Act disputes. The Commission  
 20 has addressed constitutional questions in previous enforcement proceedings. Even if this were not  
 21 the case, however, petitioner's statutory and constitutional claims here can be meaningfully  
 22 addressed in the Court of Appeals.”) (internal citations omitted). Here, Plaintiff makes no  
 23 constitutional claim and its statutory claim depends in large part on an area of FINRA’s and the

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24  
 25 <sup>1</sup> Indeed, Plaintiff could also petition the SEC to change the FINRA Rule at issue in light  
 26 of the recent Supreme Court decisions construing the FAA, which the SEC has the power to do. See  
 27 Credit Suisse First Boston v. Grunwald, 400 F.3d 1119, 1130 (9th Cir. 2005) (“Moreover, the 1975  
 28 Amendments gave the Commission the power to abrogate, add to, and delete from the rules of any SRO  
 ‘as the Commission deems necessary or appropriate to insure the fair administration of the self  
 regulatory organization....’ Unlike the restrictions in the original statute, this new authority is not limited  
 to specific subject matter areas. The Commission's expanded authority includes, for example, ‘the power  
 to mandate the adoption of any rules [the Commission] deems necessary to ensure that arbitration  
 procedures adequately protect statutory rights.’”) (internal citations omitted).

1 SEC's expertise. Again, the reasoning of Thunder Basin is highly instructive:

2 Petitioner pressed two primary claims below: that the UMWA designation under §  
 3 813(f) violates the principles of collective bargaining under the NLRA and  
 4 petitioner's right "to exclude nonemployee union organizers from [its] property,"  
 5 Lechmere, Inc. v. NLRB, 502 U.S. 527, 532, 112 S.Ct. 841, 845, 117 L.Ed.2d 79  
 6 (1992), and that adjudication of petitioner's claims through the statutory-review  
 7 provisions will violate due process by depriving petitioner of meaningful review.  
 8 Petitioner's statutory claims at root require interpretation of the parties' rights and  
 9 duties under § 813(f) and 30 CFR pt. 40, and as such arise under the Mine Act and  
 10 fall squarely within the Commission's expertise. The Commission, which was  
 11 established as an independent-review body to "develop a uniform and comprehensive  
 12 interpretation" of the Mine Act, Hearing on the Nomination of Members of the  
 13 Federal Mine Safety and Health Review Commission before the Senate Committee  
 14 on Human Resources, 95th Cong., 2d Sess., 1 (1978), has extensive experience  
 15 interpreting the walk-around rights and recently addressed the precise NLRA claims  
 16 presented here. Although the Commission has no particular expertise in construing  
 17 statutes other than the Mine Act, we conclude that exclusive review before the  
 18 Commission is appropriate since "agency expertise [could] be brought to bear on" the  
 19 statutory questions presented here. Whitney Nat. Bank, 379 U.S., at 420, 85 S.Ct., at  
 20 557.

21 Thunder Basin, 510 U.S. at 213-15. As in Thunder Basin, here the interpretation of FINRA Rule  
 22 2268(d) and the Exchange Act is squarely within the expertise of FINRA and the SEC, and the SEC  
 23 is capable of addressing the statutory issue of the interplay between the Exchange Act and the FAA.  
 24 Moreover, the court of appeals has the final word and can correct any error.

25 Plaintiff argues that the SEC does not have any advantage in expertise over federal courts in  
 26 deciding "standard questions of administrative law" where such questions do not involve "fact-  
 27 bound inquiries" or "technical considerations of [agency] policy." Free Enterprise Fund v. Public  
 28 Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010). Plaintiff also relies on Gupta v. SEC,  
 796 F. Supp. 2d 503 (S.D. N.Y. 2011), in which the district court found that claims as to the  
 constitutional violations that the plaintiff would "suffer from the allegedly improper retroactive  
 application of the Dodd-Frank Act are not peculiarly within the SEC's competence or expertise.  
 Indeed, questions of statutory retroactivity are far more commonly reviewed by district courts than  
 by the SEC, and 'administrative expertise [is] not implicated where a constitutional violation is  
 alleged, because such allegations are particularly suited to the expertise of the judiciary, . . .'"  
Gupta, 796 F. Supp. 2d at 512. However, unlike Gupta, Plaintiff here does not bring any  
 constitutional claims, and a major focus of its complaint is that the class action waiver does not  
 violate any FINRA Rule, which is not a mere standard question of administrative law but instead

1 implicates the expertise of FINRA and the SEC regarding resolution of customer disputes with the  
2 broker-dealers that FINRA regulates. Last but not least, review by a federal court of appeals  
3 provides the ultimate safeguard for addressing Plaintiff’s concerns. See Thunder Basin, 510 U.S. at  
4 215.

5 Moreover, in Gupta, the plaintiff brought both a constitutional claim and a statutory one. He  
6 alleged that the SEC unconstitutionally singled him out for unfair treatment in violation of the Equal  
7 Protection clause because, of the twenty-nine people implicated in the insider trading scheme at  
8 issue in that case, only Gupta was the subject of an SEC disciplinary proceeding, while the rest were  
9 sued in district court. The Gupta plaintiff also alleged that the SEC improperly sought retroactive  
10 penalties under the Dodd-Frank Act, thereby depriving the plaintiff of the procedural safeguards  
11 available in federal court. The Gupta court determined that the plaintiff’s constitutional equal  
12 protection claim -- *but not* his claim based on the retroactive application of the Dodd–Frank Act --  
13 was appropriate for judicial review because the claim satisfied the requirements of the Free  
14 Enterprise test. See Free Enterprise, 130 S. Ct. at 3150 (“But we presume that Congress does not  
15 intend to limit jurisdiction if ‘a finding of preclusion could foreclose all meaningful judicial review’;  
16 if the suit is ‘wholly collateral to a statute’s review provisions;’ and if the claims are ‘outside the  
17 agency’s expertise.’”) (internal citation omitted). Here, however, Plaintiff’s statutory claim  
18 concerning the interplay of the FAA and FINRA Rules is more akin to the statutory claim in Gupta,  
19 which the court held was subject to administrative exhaustion.

20 Third, Plaintiff argues that the FINRA disciplinary procedures do not offer a meaningful path  
21 to review because Plaintiff would have to “bet the farm” by violating the statute before testing its  
22 validity. See Free Enterprise, 130 S. Ct. at 3151 (“Alternatively, the Government advises petitioners  
23 to raise their claims by appealing a Board sanction. But the investigation of Beckstead and Watts  
24 produced no sanction, and an uncomplimentary inspection report is not subject to judicial review. So  
25 the Government proposes that Beckstead and Watts incur a sanction (such as a sizable fine) by  
26 ignoring Board requests for documents and testimony. If the Commission then affirms, the firm will  
27 win access to a court of appeals—and severe punishment should its challenge fail. We normally do  
28 not require plaintiffs to ‘bet the farm ... by taking the violative action’ before ‘testing the validity of

1 the law,' and we do not consider this a 'meaningful' avenue of relief.") (internal citation omitted).  
2 Plaintiff argues that because of the pending putative class action in state court, it must choose  
3 whether to "bet the farm" by enforcing its class action waiver and facing further discipline, or risk  
4 losing the right to individual arbitration with putative class members.

5       However, in Free Enterprise, unlike here, the plaintiff challenged the very existence of the  
6 administrative agency, a collateral issue to any discipline, and one which rendered meaningful  
7 review in the administrative process a practical impossibility. See Free Enterprise, 130 S. Ct. at  
8 3150 ("But petitioners object to the Board's existence, not to any of its auditing standards.  
9 Petitioners' general challenge to the Board is "collateral" to any Commission orders or rules from  
10 which review might be sought."). Here, Plaintiff's claims are not collateral to the disciplinary  
11 process or to FINRA's Rules. See McBride, 290 F.3d at 980 ("A claim is collateral if it is not  
12 'bound up with the merits so closely that [the court's] decision would constitute "interference with  
13 agency process."') (internal citation omitted). To the contrary, Plaintiff seeks to enjoin the  
14 disciplinary process and obtain a contrary interpretation or invalidation of the FINRA Rule on which  
15 the disciplinary action is based – issues central to the merits. Further, in Free Enterprise, it was  
16 undisputed that the challenger had not yet violated any rules, and thus faced the choice of having to  
17 incur a sanction to proceed with its challenge. By contrast, Plaintiff has allegedly already violated a  
18 rule by inserting the class action waiver into its account agreement. Regardless of where this  
19 dispute is heard, Plaintiff may face sanctions for that violation unless it succeeds in changing the  
20 interpretation of or invalidating FINRA Rule 2268(d).

21       Plaintiff maintains nonetheless that this action is collateral because it attacks FINRA's and  
22 the SEC's authority to bar class action waivers, and may succeed regardless of whether Plaintiff  
23 violated the FINRA rules. As noted above, Plaintiff argues that the FAA as interpreted in AT&T  
24 Mobility v. Concepcion, 131 S. Ct. 1740 (2011) and CompuCredit v. Greenwood, 132 S. Ct. 665  
25 (2012) prevails over any inconsistent statute or regulation absent a clear statutory command to the  
26 contrary, which it contends is lacking in the Exchange Act. These cases, however, do not address  
27 whether exhaustion of the administrative process set forth in the FINRA Rules is jurisdictional or  
28 whether Plaintiff has shown that it is exempt from the administrative exhaustion requirement.

1 Moreover, here, Plaintiff's claims, far from being merely peripheral to the disciplinary action,  
2 challenge the interpretation of the FINRA Rule whose alleged violation is its very basis. Thus, the  
3 Court concludes that exhaustion of FINRA's administrative remedies in this disciplinary case is  
4 jurisdictional, but even if not, Plaintiff has not shown that it is entitled to an exception from the  
5 general exhaustion requirement.

6 **Conclusion**

7 Accordingly, Defendant's motion to dismiss is granted without leave to amend.

8 **IT IS SO ORDERED.**

9  
10 Dated: May 11, 2012



11 ELIZABETH D. LAPORTE  
12 United States Magistrate Judge  
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United States District Court  
For the Northern District of California