

NO. A09-2216

State of Minnesota
In Court of Appeals

TRANSAMERICA FINANCIAL ADVISORS, INC.,
a Delaware corporation,

Appellant,

vs.

CRYSTAL D. KILCHER, DANIEL J. KILCHER,
ANTHONY C. MUELLENBERG AND
TROY D. MUELLENBERG,

Respondents.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE CASE

Appellant Transamerica Financial Advisors, Inc. (“Appellant”) is a financial services provider. Its agent, Helen Dale (“Dale”), provided financial planning, financial advice, and financial products for Respondents Crystal D. Kilcher, Daniel J. Kilcher, Anthony C. Muellenberg, and Anthony C. Muellenberg, and as Trustee of the Troy D. Muellenberg 2007 Revocable Trust (collectively, “Respondents”). Respondents, who were very young and who had little understanding of financial products, trusted Dale and considered her a friend and concerned advisor. But Respondents later discovered that in fact, the financial products that Dale had induced them to buy were completely unsuitable for Respondents – but very high-commission, netting Dale hundreds of thousands of dollars. Furthermore, Dale had churned (at the least) Daniel Kilcher’s account, buying and selling mutual funds every month – resulting in huge early-sale penalties for Dan, and similarly huge monthly commissions for Dale.

Respondents appropriately brought a Financial Industry Regulation Association (“FINRA”) arbitration action against Appellant and Dale in January 2008. Appellant and Dale both moved to dismiss various claims. In particular, Dale moved to dismiss all of Respondents’ claims that attached to actions over six years old, pursuant to a FINRA rule limiting FINRA’s jurisdiction to claims less than six years old. That rule further states that, if the rule is invoked to dismiss

some claims, Respondents may withdraw their remaining claims to district court. Respondents accordingly moved to do this and the arbitrators permitted it. Neither Dale nor Appellant protested the withdrawal to FINRA – but later, Appellant moved in the court proceeding to compel further arbitration. The district court, concluding that the FINRA arbitration had been appropriately withdrawn following the FINRA rules and that Appellant had not objected to the withdrawal in the FINRA action, and denied Appellant’s motion. This appeal followed.

STATEMENT OF THE FACTS¹

At this time, this case has dragged on for over two years purely because Appellant and Dale have raised obstruction after obstruction, delaying any resolution, refusing to comply with any discovery in any forum (including arbitration) and spinning the case out in an attempt to avoid what they know is serious liability. This brief will provide a short procedural history.

Background

Dale is a financial advisor, working as an agent (“Registered Representative”) of Appellant since 1995. (Amended Complaint at ¶12, 65-67.) In this position, Dale acted as a financial advisor for Respondents, who were young,

¹ In this brief, Respondents use the abbreviation “R.App.” for citation to Respondent’s Appendix, “App.” for citation to Appellants’ Appendix, and “Ct. Order” for citation to the district court’s October 16, 2009 Order and Memorandum (included in Appellants’ Addendum). Citations to the motion hearing transcript are abbreviated as Motion Tr. [page number].

unsophisticated laypersons, for several years. (*Id.* at ¶10-13.) She proposed investment options to Respondents, and earned commissions for making their investments for them. (*Id.* at ¶13-31.) During that time, Dale persuaded and tricked Respondents into pursuing investment options that greatly benefited Dale to the detriment of Respondents. (*Id.*) For instance, Dale misled Respondents into purchasing insurance products obviously unsuitable for their situations, including enormous insurance policies and front-end loaded mutual funds carrying very high commissions for Dale. (*Id.*) Dale also concealed costs associated with these products, and “churned” at least one of Respondents’ accounts (unnecessarily buying and selling Respondents’ investments), causing Respondents to incur numerous commission fees each month. (*Id.*)

Arbitration clauses

Because Dale was working on behalf of Appellant, Respondents had to sign “New Account” Agreements (the “Agreements”) with Appellant that contained an arbitration clause. (App. 34-41.) The Agreements state that claims must be arbitrated, but only pursuant to certain arbitration rules:

The undersigned agree(s) that any controversy between us arising out or relating to my (our) account, transactions with or for me(us) or this agreement or the breach thereof shall be settled by arbitration in accordance with the rules, then established, of the National Association of Securities Dealers, Inc.

(*Id.*) Subsequently, the National Association of Securities Dealers (“NASD”) and the member regulation, enforcement and arbitration functions of the New York Stock Exchange merged and created a new organization, FINRA. FINRA handles the NASD arbitration and promulgates the rules.

There is no dispute that any arbitration under the Agreements is controlled by the FINRA rules, and that if the FINRA rules do not require arbitration, the Agreements do not require arbitration. Appellant itself has argued that the insurance claims at issue in this case need not be arbitrated because FINRA does not require insurance claims to be arbitrated. (App. 26, FINRA Rule 12200.) Dale does not even argue that the claims against her need be arbitrated further; she has admitted that they were properly removed from arbitration to district court and is not party to this appeal. (Motion Tr., p.16.)

Arbitration action, Defendants’ motions to dismiss claims to district court

Respondents became aware of Dale’s machinations in May 2007. (Amended Complaint, ¶ 32.) In December 2007, Respondents brought their fraud claims as an arbitration action against Dale and Appellant, as required by the arbitration agreement. (*See* Complaints.) Respondents’ claims consisted of both securities-based claims (fraud, breach of fiduciary duty, and related claims based on Respondents’ purchase and sale of securities) and insurance-based claims (fraud, breach of fiduciary duty, and related claims based on Respondents’

purchasing of insurance). (*see* Complaints, Amended Complaint.)

But in March 2008, Defendants moved to dismiss various of Respondents' claims from arbitration as follows:

- Both Defendants moved to dismiss Plaintiff's insurance-based claims from the arbitration, arguing that these claims had to be brought in court because the FINRA rules excluded insurance claims from arbitration. (R. App. 9-10, App 26.)
- Both Defendants moved to dismiss some of Respondents' securities claims on the ground that they fell outside the two-year and five-year statutes of limitations. (*Id.*)
- Furthermore, Dale moved to dismiss some of Respondents' claims on the basis that they were more than six years old. (*Id.*) FINRA limits its jurisdiction to consideration of claims six years old or less under Rule 12206(a). (R.App. 35.) Dale's motion stated in relevant part:

Pursuant to the six (6) year eligibility rule set forth in Rule 12206 of the NASD Code of Arbitration Procedure, any claims arising from purported losses from investments, transactions, or representations made prior to December 11, 2001 are clearly ineligible for arbitration. * * * it cannot be disputed that Claimant opened her account with Helen and Transamerica in August 1999, more than eight (8) years prior to the filing of the Statement of Claim. With respect to this account, any claims arising from purported losses from investments, transactions or representations occurring prior to December 11, 2001 are time-barred by Rule 12206 and are clearly ineligible for submission to arbitration.

(R.App. 11.)

Respondents commence Hennepin District Court action

Respondents learned that Appellant and Dale were objecting to arbitrating the insurance and other claims and insisting on litigating in court in March 2008, when they received Appellant's motion to dismiss claims. Accordingly, Respondents served (but did not yet file) complaints in Hennepin County District Court, referencing the FINRA action and noting that the complaint was being served to toll the statute of limitations. (*See Complaints.*) Respondents voluntarily gave Appellant and Dale extensions of time to answer and stayed the case pending the arbitration.²

Arbitration panel decision on motions to dismiss claims

The arbitrators issued an Order dated July 23, 2008, responding to Dale and Appellant's motions to dismiss. (App. 29-30) This Order concluded that:

- The statute of repose bars any securities law based claims over five years old.
- That the two year statute of limitations argued by the Appellant and Dale did not apply.
- That the Defendants were not required to arbitrate the insurance claims in the FINRA arbitration.

² (*See Complaints served March 2008, responding Motions not served until September 2008.*)

- That any of Respondents' claims that were older than six years were dismissed from the arbitration without prejudice under Rule 12206(a), for Respondents to pursue in district court if they chose.

(App. 29-30.)

Respondents permitted to remove their claims to court

Under the FINRA rules, which undisputedly governed the arbitration under the arbitration agreement, when a defendant makes a motion pursuant to the six (6) year eligibility rule set forth in Rule 12206 of the FINRA rules, as Dale did, and the FINRA panel grants the motion as to some of the claims in the arbitration, the non-moving party (Respondents) has the option, under Code § 12206(b), of removing *all* their related claims to court:

12206. Time Limits

(a) Time Limitation on Submission of Claims

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(R.App. 35.) The purpose of this rule is to prevent duplicative litigation where

some claims would be arbitrated and others litigated.

Because the FINRA panel had granted Dale's motion to dismiss claims pursuant to Rule 12206(b), Respondents had the option of withdrawing all their claims from arbitration and pursuing them instead in district court. Respondents accordingly moved to withdraw their claims from arbitration to district court. (Ct. Order 4, App. 67.) The FINRA arbitrators permitted this. (Ct. Order 4; Motion Tr. p.27-28.) **Neither Appellant nor Dale objected in the FINRA arbitration to the dismissal to district court.** (Ct. Order 4, 6.)

Case proceeding in Hennepin County District Court

Appellant and Dale served motions in lieu of answers in response to the Complaint in the Hennepin County Court action, which were heard on July 23, 2009:

- Appellant filed a motion to stay the case and compel arbitration. (App. 17-24)
- Dale filed a motion to dismiss and a motion to change venue to Scott County. (Dale's Motions to Dismiss and Change Venue, Motion Tr. 14.)

During the hearing, Appellant conceded that they could have agreed to have the insurance claims resolved in the arbitration, which would have resolved all issues in just one action. (Motion Tr. 11-12.) In other words, **but for Appellant's insistence on a court action, Respondents would not have had to bring any court**

actions, and the entire matter could have been resolved in arbitration. While Appellant now attempts to cast itself as a champion of arbitration, it is the very party that pulled claims *out* of arbitration in the first place.

Hennepin County District Court's Order

The Hennepin County District Court issued an order on October 16, 2009, concluding in relevant part that Respondents had appropriately withdrawn their claims from arbitration to district court under FINRA rules and need not proceed with any further arbitration. As the district court explained:

It is undisputed that the account agreements Respondents executed contained a valid arbitration agreement. Moreover, Respondents' disputes fall within the very broad scope of the arbitration agreement in that they arose out of or relate to their accounts with Appellant. * * * Thus, it was proper for the Plaintiff Children to submit to the FINRA arbitration.

However, the Plaintiff Children can only be forced to arbitrate to the extent that they have agreed to do so through their agreement. *See Layne-Minnesota Co. v. Regents of the University of Minn.*, 123 N.W.2d 371, 375 (Minn. 1963) (stating that contracting parties "retain control over the arbitration process by the language of their agreements.") *** The arbitration agreement at issue provides that claims must be arbitrated under the FINRA rules, which state that **if a party moves to dismiss under the Eligibility Rule, the "non-moving party may withdraw any remaining claims" and "pursue all of the claims in court."** § 12206(b). Appellant argues that it did not move to dismiss under the Eligibility Rule, thus it is entitled to a second arbitration of the same claims. Nevertheless, the cited language is not modified by "against the moving party" or similar language of limitation. **While the Rule provides that only the moving party (Dale) must agree to the removal, the Court notes that Appellant did not object.** As a result, the arbitration panel's ruling applied to all of the Plaintiff Children's six-year-old claims

regardless of whether those claims were against Dale or Appellant, whose interests are significantly intertwined.

(Ct. Order 5-6.) The court then, noting that Respondents' federal claims could be brought only in federal court, *sua sponte* dismissed all Respondents' claims without prejudice so that Respondents could bring them together all in federal court.³ (Ct. Order 6, 10.)

Instead, on December 10, 2009, Respondents chose to bring their case again in state court (Scott County), simply omitting their federal claims. Appellant simultaneously appealed the decision denying Appellant's motion to compel arbitration of the securities claims (but not the insurance claims) and stay the district court proceedings regarding the insurance claims.

ARGUMENT

I. STANDARD OF REVIEW.

In general, this Court reviews a district court's decision to deny a motion to compel arbitration *de novo*. *Cnty. Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 632 (Minn.App.2005). However, when "the district court's decision is based on principles of equitable estoppel," the decision is reviewed for an abuse of discretion. *ev3 Inc. v. Collins*, No. A08-1120, 2009 WL 2432348, *2

³ In April 2009, Respondents' mother, Kimberly McKinley, served a separate Complaint against Defendants, which was then consolidated with the Respondents' action. Ms. McKinley's case was divided from the Respondents' case by the district court's October 16, 2009 order, and is still in the Hennepin County District Court, not having been arbitrated yet.

(Minn.App. April 21, 2009); *Am. Bankers Ins. Group, Inc. v. Long*, 453 F.3d 623, 629 (4th Cir.2006); *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 528 (5th Cir.2000) (using an abuse-of-discretion standard to review the district court's application of equitable estoppel to decide whether to compel arbitration).

II. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE PARTIES' ARBITRATION AGREEMENT DOES NOT REQUIRE FURTHER ARBITRATION OF THIS CLAIM.

A. Respondents, like Appellant, are only bound to arbitrate to the extent that the arbitration agreement requires it.

“When considering a motion to compel arbitration, the court's inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement.” *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn.App. 1993). The courts “manifest a ‘liberal federal policy favoring arbitration agreements’”; however, absent some ambiguity in the agreement, it is the language of the contract that defines the scope of disputes subject to arbitration. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). “[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties.” *Id.*

In particular, as the district court pointed out, parties cannot be forced to submit to arbitration that is not required by the terms of their arbitration agreements. *Waffle House, Inc.*, 534 U.S. at 293 (noting that the “[FAA] does not require parties to arbitrate when they have not agreed to do so”); *Layne-Minnesota*

Co. v. Regents of University of Minn., 123 N.W.2d 371, 375 (Minn. 1963) (noting that parties can limit, through their agreements, which controversies must be arbitrated, and that “contracting parties, desiring to avail themselves of the benefits of arbitration, retain control over the arbitration process by the language of their agreements.”); *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 352 (Minn. 2003).

In this case, the agreement specifically says that claims must be arbitrated only pursuant to certain arbitration rules:

The undersigned agree(s) that any controversy between us arising out or relating to my (our) account, transactions with or for me(us) or this agreement or the breach thereof shall be settled by arbitration in accordance with the rules, then established, of the National Association of Securities Dealers, Inc.

(See Ct. Order 35, 41.) As this language shows, Respondents (and Appellants) only agreed to arbitrate claims under the NASD (now FINRA) rules. Appellant itself admits that FINRA rules do not require arbitration of all of Respondents’ claims. (Motion Tr. 10-12.) For instance, when Respondents were attempting to bring all their claims in arbitration, Appellant personally argued – successfully – to the arbitrators that Respondents’ insurance claims should be dismissed from arbitration and addressed in court, despite the fact that they obviously arise out of

the representation agreement, solely because the FINRA rules did not require (though they do not forbid) arbitration of the insurance claims.⁴ (*Id.*, p.10-12, 26.)

As the FINRA rules explicitly permit Respondents to withdraw their claims from arbitration and proceed in Court because some of Respondents claims were dismissed under Code § 12206 (see below), Respondents cannot be required to arbitrate any longer. *See Layne-Minnesota Co.*, 123 N.W.2d at 375.

B. As the district court concluded, Respondents appropriately removed their claims from arbitration to district court under FINRA arbitration rule § 12206(b).

1. Respondents were permitted to remove all their claims to district court under § 12206(b) when the arbitrators granted dismissal of some of Respondents' claims under § 12206(a).

As the district court concluded, under the FINRA rules, Respondents were permitted to withdraw their claims to district court and not required to arbitrate further. (Ct. Order 5-6.) This is because one of the grounds for dismissal Dale raised in her Arbitration Answer was Code § 12206(a), which provides:

(a) Time Limitation on Submission of Claims

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

⁴ Appellant admitted at the hearing for the motion to compel that the insurance claims could have been kept in arbitration – FINRA rules did not forbid arbitration of the insurance claims if Appellant and Dale had permitted it. (Motion Tr. 12, FINRA rule 12200.)

(R. App. 35.) The arbitrators granted the motion to dismiss some of Respondents' claims on this jurisdictional ground. The dismissal of a party's claims under Code § 12206(a) specifically allows the claimant to withdraw all their remaining claims and litigate them in Court:

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(R. App. 35.) Respondents therefore accordingly moved their case into this Court. Neither Dale *nor Appellant* protested the removal of the claims to the arbitrators or otherwise in the arbitration. The district court concluded that, under this rule and given Appellant's failure to object to the removal of the claims to district court, Respondents were under no obligation to arbitrate further:

However, the Plaintiff Children can only be forced to arbitrate to the extent that they have agreed to do so through their agreement. *See Layne-Minnesota Co. v. Regents of the University of Minn.*, 123 N.W.2d 371, 375 (Minn. 1963) (stating that contracting parties "retain control over the arbitration process by the language of their agreements.") *** The arbitration agreement at issue provides that claims must be arbitrated under the FINRA rules, which state that if a party moves to dismiss under the Eligibility Rule, the "non-moving party may withdraw any remaining claims" and "pursue all of the claims in court." § 12206(b). Appellant argues that it did not move to dismiss under the Eligibility Rule, thus it is entitled to a

second arbitration of the same claims. Nevertheless, the cited language is not modified by “against the moving party” or similar language of limitation. While the Rule provides that only the moving party (Dale) must agree to the removal, the Court notes that Appellant did not object. As a result, the arbitration panel’s ruling applied to all of the Plaintiff Children’s six-year-old claims regardless of whether those claims were against Dale or Appellant, whose interests are significantly intertwined.

As the district court pointed out, § 12206(b) does not limit the non-moving party to withdrawing only those claims that it has against the moving party. Instead, the moving party may “withdraw *any* remaining related claims.” (emphasis added.) Respondents appropriately did so.

2. Appellant waived its right to object to the removal of claims under § 12206(b).

Appellant argues that as it was Dale, not Appellant, who moved to dismiss the claims pursuant to § 12206(a) (“TFA never moved to dismiss under the FINRA eligibility rule”). (App. Brief p.13.) Appellant was therefore not the “moving party,” – but Appellant interestingly does not explain what exactly the result of this fact should be under the rule. (*Id.*)

This is because the rule merely says that the “moving party agrees” to a withdrawal of the remaining “related claims” to district court. Consequently, as the district court pointed out, the fact that Dale and not Appellant was not the “moving party” under 12206(a) simply means that at best, Appellant could have protested the withdrawal of Respondents’ claims against Appellant pursuant to

Rule 12206(b). (Ct. Order 6.) Appellant undisputedly failed to so object within the arbitration. (*Id.*) As a result, Appellant failed to exercise any rights it had under §12206(b) to object to Respondents' withdrawal of the securities claims against Appellant to district court.

Respondents therefore respectfully request that, pursuant to Code § 12206(b), this Court affirm the district court's decision to deny Appellant's motion to stay and compel arbitration.

3. The district court's application of the plain language of the FINRA rule is in keeping with the intention of the FINRA rule.

While the district court's decision was correct under the plain language of rule 12206, it is worth noting that it was also in keeping with the purpose of that rule. The reason for the provision of § 12206(b) is obvious: if a claimant's claims are to be entirely cut up by the arbitrary jurisdictional time limit, the claimant should have the option of withdrawing its case to a forum where *all* its related claims can be heard together. Otherwise, the claimant would be simultaneously required to arbitrate and prohibited from arbitrating some of the very same issues (e.g. separate but related fraud counts from prior to and after the six-year jurisdictional time limit). The claimant would be forced, in essence, to litigate all its claims twice.

That is in fact what Appellant's apparent goal is here - Appellant is asking for Respondents to have to go through both an arbitration and a litigation, and

while waiting on the arbitration of a few of the more minor counts, not to be able to proceed with Respondents' main case (the breach of fiduciary duty, fraud, misrepresentation, and unsuitability claims against both Defendants based on the insurance products and, as against Dale, the securities claims as well). Appellant's proposition would require two similar fraud and breach of fiduciary duty cases, and an appalling waste of resources – with no appropriate benefit to anyone. The result would be a doubling of costs, and no relief for Appellants for a far, far longer time period. This is the exact opposite of what arbitration is supposed to accomplish. And it is exactly what Rule 12206(b) seeks to avoid.

Because the district court's conclusion was correct under both the plain language and the purpose of FINRA rule 12206(b), Respondents respectfully request that this Court uphold the district court's decision to deny Appellant's motion to compel arbitration of Respondents' securities-based claims against Appellant.

4. The FINRA panel permitted the withdrawal of the claims pursuant to § 12206, and their interpretation of their own rules is binding.

Additionally, as noted by the district court, the FINRA panel permitted Respondents to withdraw their claims pursuant to Rule 12206. (Ct. Order 4.) In doing so, FINRA impliedly determined that Respondents had correctly interpreted Rule 12206. This is especially true because FINRA limits the circumstances in

which the FINRA panel can dismiss claims. Claims may only be dismissed from FINRA arbitration if under 12206(b), as a sanction, as a result of two postponements, or where all parties consent. FINRA R. 12700. The FINRA panel could not have dismissed the case simply on Respondents' request.

Minnesota case law give arbitrators broad authority in applying and interpreting their own rules. *Morris v. Matheson*, 1999 WL 451703, 2 (Minn.App. 1999), *Haekenkamp v. Allstate Ins. Co.*, 265 N.W.2d 821, 824 (Minn.1978) (arbitrator is permitted to interpret rules under which his decision is made and a court of law should not interfere with such an interpretation absent evidence that arbitrator clearly exceeded his authority).

As FINRA has already made the determination that dismissal to district court was appropriate, this Court should accord deference to that decision. The FINRA panel did not clearly exceed its authority – rather, it correctly applied its own rule. For this additional reason, Respondents respectfully request that this Court uphold the decision of the district court.

C. **Even if removal was inappropriate under Rule § 12206(b), Appellant waived its right to object by its failure to object in the arbitration forum.**

Even if Respondents' withdrawal of their securities-based claims against Appellant from arbitration was inappropriate under Rule § 12206(b), Appellant's objection to Respondents' withdrawal is barred by Appellant's failure to raise that

objection in arbitration. “The parties to an arbitration may waive procedural defects by failing to bring such issues to the arbitrator’s attention in time to cure the defects.” *Campbell v. American Family Life Assur. Co. of Columbus, Inc.*, 613 F.Supp.2d 1114, 1119 (D.Minn. 2009) (concluding that plaintiffs waived any objections to the use of summary judgment in an arbitration action by failing to raise those objections in the arbitration); *Goff v. Dakota, Minnesota & Eastern R.R. Corp.* 276 F.3d 992, 998 (8th Cir. 2002); *Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312, 1317 (Alaska 1997) (objection party failed to make in arbitration was waived). Objections not brought before the arbitrators are waived because “orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.” *Brotherhood of Locomotive Engineers Intern. Union v. Union Pacific R. Co.*, 134 F.3d 1325, 1331 (8th Cir. 1998).

As the district court found, when Respondents notified Appellant, Dale, and the FINRA panel that Respondents were seeking to withdraw their claims from arbitration pursuant to FINRA rule 12206(b), Appellant raised no objection at all in the arbitration forum. (Ct. Order 6.) Under Minnesota and federal law, Appellant’s failure to object in arbitration has waived Appellant’s right to object at all. For this additional reason, Respondents respectfully request that this Court

affirm the district court's decision to deny Appellant's motion to stay and compel arbitration.

D. Dale did not waive Appellant's right to arbitrate; Appellant did.

Appellant argues that "the district court's ruling is predicated on the notion that Helen Dale... can waive Appellant's federally protected right to arbitrate. Respondents cited no arbitration provision or case law to support this assertion." (App. Brief p.7, *see also* p.14.)

Appellant misstates the case in two ways: first, the district court did not find that *Dale* waived Appellant's rights, but rather that *Appellant* waived its *own* rights by failing to object in the arbitration to Respondents' request to dismiss their claims to district court. As the court stated, "under the FINRA rules, * * * if a party moves to dismiss under the Eligibility Rule, the non-moving party may withdraw any remaining claims" and "pursue all of the claims in court." § 12206(b). * * * While the Rule provides that only the moving party (*Dale*) *must* agree to the removal, the Court notes that **Appellant did not object.**" (Ct. Order 6.) As discussed above, *Appellant's* failure to object to the motion to withdraw the claims in the FINRA action waived Appellant's right to object. The FINRA panel's action in permitting the removal of the claims to district court is therefore binding.

Second, as discussed above, Appellant's "right" to arbitrate – like that of Respondents – only extends to what is granted by the parties' arbitration agreement. *See Layne-Minnesota Co.*, 123 N.W.2d at 375. For instance, Appellant itself argued to the arbitrators and the district court that Respondents' insurance claims cannot be arbitrated, despite the fact that they obviously arise out of the representation agreement, solely because the FINRA rules do not require arbitration of insurance claims. Despite Appellant's current high-flown language about the parties' "federally-protected right" to arbitrate, when Appellant judged it expedient to split Respondents' claims and force the insurance claims out of arbitration, it did not hesitate to do so, arguing then that the arbitration agreement – the FINRA rules – did not allow arbitration of those claims.⁵ (Motion Tr. p.10-12.)

Respondents, like Appellants, are only required by the arbitration agreement to arbitrate under the FINRA rules. The FINRA rules permitted Appellants to withdraw their claims. As the FINRA rules governed the boundaries of the arbitration agreement, if those rules permit Respondents to cease arbitrating, Appellant has no further "right" to arbitration. Furthermore, even if Dale and not Appellant had waived Appellant's "right" to arbitrate, if that is permitted by the

⁵ Appellant admitted at the motion hearing that if it had consented to arbitration of those claims, the FINRA panel would have arbitrated them. (Motion Tr. p.12.)

FINRA rules, it is permitted by the parties' arbitration agreement, and Appellant has no "right" to force Respondents to arbitrate further.

III. EVEN IF THE DISTRICT COURT ERRED IN REFUSING TO COMPEL ARBITRATION, THE COURT LITIGATION OF THE INSURANCE CLAIMS SHOULD NOT BE STAYED PENDING ARBITRATION OF THE SECURITIES CLAIMS.

Appellant argues that this Court should, after compelling arbitration of Appellant's securities-based claims, stay the remaining nonarbitrable claims (Respondents' claims against Appellant and Dale based on insurance Dale fraudulently induced Respondents to purchase, and claims against Dale based on securities she convinced Respondents to purchase and sell.)

Under the FAA, where a case involves some arbitrable and some nonarbitrable claims, the district court has discretion regarding whether to stay the nonarbitrable claims pending arbitration of the remaining claims. The courts have noted that a stay of nonarbitrable claims is appropriate where the arbitrable claims predominate, or where the outcome of the nonarbitrable claims will depend upon the arbitrator's decision. *Simitar Entertainment, Inc. v. Silva Entertainment, Inc.* 44 F.Supp.2d 986, 997 (D.Minn. 1999); *ABC Bus Leasing, Inc. v. Traveling in Style (TIS) Inc.*, 2007 WL 2768292, 12 (D.Minn. 2007). The courts have refused to stay the nonarbitrable claims where, *e.g.*:

- Proceeding with the nonarbitrable claims without a stay is “the best way to ensure resolution of all of the claims in the shortest timeframe” *Sybaritic, Inc. v. Neoqi, Ltd*, 2004 WL 2066853, 4 (D.Minn. 2004);
- Where the claims “can proceed independently,” *id.*;
- Or where “[a] decision to stay the action would simply prolong the proceedings.” *ev3 Inc. v. Collins*, 2009 WL 2432348, *8.

Here, as in the above cases, a stay would be only a pointless delay. This is because these non-arbitrable claims all must and will be heard in district court; it is simply a question of whether it happens now or two years from now (when evidence will inevitably have grown more stale). As noted above, Appellant and Dale argued to the FINRA panel that the insurance claims could not be considered in arbitration and must be brought in court. (R. App. 9-10, Motion Tr. 10-12, Ct. Order 4.) Respondents are therefore pursuing the claims in court.⁶ Consequently, if this Court concludes that the securities claims must be arbitrated, this case will necessarily be split: the securities claims against Appellant will be heard in arbitration, while the insurance claims against Appellant and Dale and the

⁶ Appellant appears to argue that it will not have to litigate the insurance claims because, it claims, it is not liable for the insurance sold by its representative, Dale. But Respondents have argued that Appellant *is* liable, under both financial advisor fiduciary duty law and common law agency principles. Appellant cannot simply disclaim liability and leave the district court case; these are issues to be resolved after discovery.

securities claims against Dale will be heard in court. Consequently, there is no point in delaying the case.

Appellant argues that nevertheless, should arbitration be compelled, this Court should also stay litigation of the remaining claims because “as the district court noted, the predominant claims against [Appellant] are clearly the securities transactions[.]” Appellant is mistaken on two grounds. First, the district court never determined or remarked on whether the Respondents’ securities claims predominated, because it never reached the issue of a stay, having denied the motion to compel arbitration. (Ct. Order 4-6.) While the district court made findings regarding Kimberly McKinley’s claims, those claims are entirely different from the Respondents’ claims, and are not at issue on appeal. While Ms. McKinley was also defrauded, she purchased different types and amounts of life insurance, and different types and amounts of securities, than Respondents did.

Second, Appellant raises no evidence whatsoever that the securities claims predominate, and in fact, they do not. While little evidence of these amounts is in the record at this time (mainly because Appellant and Dale have refused to fully submit to discovery in *any* forum, including refusing to disclose the amounts Dale was paid in commissions), there is certainly no evidence whatsoever to support Appellant’s argument that the securities claims predominate. Furthermore, it is literally impossible for the securities claims against Appellant to predominate over

the insurance claims of Appellant *plus* the insurance *and* securities claims against Dale, all of which would remain in court.

Therefore, should this Court conclude that the securities claims must be arbitrated and that there is insufficient evidence in the record to determine whether the insurance claims predominate, Respondents respectfully request that this Court either simply deny the stay or remand to the district court (the case has now been brought in Scott County District Court) for that court to consider whether the insurance claims should be stayed pending conclusion of the securities claims.

CONCLUSION

The District Court did not err in denying Appellant's motion to compel further arbitration of Respondents securities-based claims against Appellant and stay proceedings of the remaining claims (Respondents' insurance-based claims against Appellant and Respondents' insurance- and securities-based claims against Dale). Because the arbitrators had dismissed some of the claims in the arbitration pursuant to FINRA rule 12206(a), Rule 12206(b) permitted Respondents to withdraw all "related claims" from the arbitration to have them all heard together in district court. To the extent that Rule 12206(b) allowed Appellant to object to this withdrawal, Appellant failed to so object. Appellant's failure to object to the withdrawal of Respondents' claims in the arbitration (or, indeed, for a year after the arbitration ended) also waived any objection Appellant might have had to the

actual propriety of the withdrawal. Furthermore, the FINRA court, in permitting withdrawal, implicitly decided that withdrawal was appropriate under Rule 12206(b), and their interpretation of their own rule should be respected.

Finally, even if this Court decides to overturn the district court and order Respondents to go back to arbitration on Respondents' securities-based claims against Appellant, a stay of the remaining claims should not be ordered, as (1) the district court did not issue any findings regarding whether the securities claims against Appellants predominate over the remaining claims and (2) it is not justified because the insurance claims against Appellant, in particular coupled with the securities and insurance claims against Dale, do in fact predominate over the securities claims against Appellant. For the foregoing reasons, Respondents respectfully request that this Court affirm the October 16, 2009 Order of the District Court.

Dated: March 24, 2010

Respectfully Submitted,



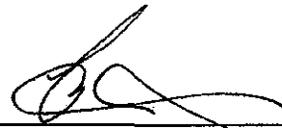
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The brief was prepared using Microsoft Word 2003, utilizes 14 point type, a Times New Roman font and contains 6,005 words.

Dated: March 24, 2010

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