This Expedited Order has been published by FINRA's Office of Hearing Officers and should be cited as OHO Order EXP17-01 (DFC170003).

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

REGULATORY OPERATIONS, Complainant, v. KEVIN HULL (CRD No. 2104329), Respondent.	Expedited Proceeding No. DFC170003 STAR No. 20170542379 Hearing Officer–RES

ORDER DISMISSING REQUEST FOR HEARING

On April 27, 2017, FINRA's Office of Billing Services issued a notice of intent to suspend (the "Notice of Suspension") Respondent Kevin Hull ("Hull") from associating with any FINRA member in any and all capacities under FINRA Rule 9553 for his alleged failure to pay an outstanding and past due arbitration fee in the amount of $1,049.99. The Notice of Suspension listed four separate defenses, any one of which Hull could invoke and attempt to demonstrate to prevent his suspension. Hull timely filed a request for hearing (the "Request for Hearing"). He did not dispute he had not paid the arbitration fee and did not assert any of the defenses in the Notice of Suspension. Instead, he contended he is not required to pay the arbitration fee on the ground that the arbitration dispute from which the fee arose was not arbitrable because the arbitration claimant was not a customer of his. He elaborated on this defense in a six-page, single-space response (the "Response") that he filed following an order of the Hearing Officer directing him to specify which of the four defenses in the Notice of Suspension he was relying on to support the Request for Hearing.

After reading the Request for Hearing and the Response, the Hearing Officer finds Hull did not raise a valid defense and thus is not entitled to a hearing on his failure to pay the arbitration fee. The Request for Hearing is dismissed. The Notice of Suspension is deemed to be final FINRA action. The suspension is effective immediately as of the date of this Order and will remain in effect until Hull produces sufficient documentary evidence to FINRA showing: (1) he has paid the full balance of the arbitration fee; (2) he has entered into a fully signed written installment payment plan with FINRA Finance and payments due under the plan are current; (3) he has timely filed a motion to vacate or modify any award that was issued in the arbitration proceeding through which the outstanding arbitration fee was assessed and such motion has not been denied; or (4) he has filed for bankruptcy protection and the outstanding arbitration fee has

not been deemed by a federal court to be non-dischargeable. The reasons for this Order are stated below.

I. Background

The facts on which this Order relies are taken from the Notice of Suspension, the Request for Hearing, the Response, and the opinion and order of the United States District Court in *Hull v. Bennett*,[1] a case in which Hull unsuccessfully sought to enjoin the arbitration proceeding on the ground the dispute was not arbitrable because the arbitration claimant was not his customer. Neither Hull nor the Department of Regulatory Operations has shown any dispute of fact.

On August 11, 2014, Deborah Bennett filed with FINRA Dispute Resolution an arbitration claim against Hull and three other respondents.[2] Ms. Bennett alleged that the FINRA member firm with which Hall and the other respondents were associated, Grubb & Ellis Securities, Inc. ("GES"), was the broker-dealer in her purchase of undivided tenant-in-common interests in real property that were structured as securities.[3] Ms. Bennett made claims of: (1) negligence; (2) misrepresentations and material omissions; and (3) control person liability and failure to supervise.[4] Hull and one of the other respondents requested that FINRA's Director of Arbitration exercise her discretion to deny the arbitration forum under FINRA Rule 12203, but the Director declined this request without comment.[5] Hull and the other respondent filed a complaint in District Court and, shortly after that, a motion for a preliminary injunction.[6] The purpose of this civil action was to enjoin Ms. Bennett from pursuing the arbitration.[7]

The District Court denied Hull's motion for a preliminary injunction. The District Court held that Hull and the other respondent "have not presented serious questions that make [the motion's] assertions a fair ground for litigation, nor have they demonstrated a likelihood of success on the merits of their claim."[8] More than a year after this adverse ruling, Hull and two of the respondents entered into a confidential release and settlement agreement (the "Settlement Agreement") with Deborah Bennett, in which the respondents and their insurer agreed to pay Ms.

---

[1] *Hull v. Bennett*, No. SACV 15-742-JLS (DFMx), 2015 U.S. Dist. LEXIS 184911 (C.D. Cal. Sept. 15, 2015).

[2] *Id*. at *3. Although usually decisions and orders issued from the Office of Hearing Officers do not publish the names of customers, in this instance the identity of Deborah Bennett is disclosed in the District Court's opinion and order and is a matter of public record.

[3] *Id*. at *2. GES was primarily engaged in the wholesale distribution of real estate-related securities products. *Id*. at *1.

[4] *Id*. at *3.

[5] *Id*. at *3-4. FINRA Rule 12203 provides that the Director "may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate." FINRA Rule 12203(a).

[6] *Id*. at *4.

[7] *Id*.

[8] *Id*. at *11.

Bennett $247,500 in exchange for a release of her claims.[9] In a paragraph titled "No Admission of Liability," Ms. Bennett and the trusts for which she was trustee acknowledged that Hull had no direct involvement with her account:

> Claimants acknowledge[] that Hull and Maloney were not directly involved with Claimants' account. To Claimant's knowledge, neither Deborah Bennett nor the Trusts ever opened an account with, purchased securities from, or paid any commissions or other compensation to Hull or Maloney. It is further understood that Mr. Hull and Ms. Maloney were named solely because of their relationship with their former employer, Grubb & Ellis Securities, Inc., and not because of their interaction with the Claimants.[10]

The Settlement Agreement also provided that "[t]he Parties will bear their own attorneys' fees, costs and expenses in connection with the Action and this Agreement."[11]

On April 27, 2017, FINRA's Office of Billing Services issued the Notice of Suspension, informing Hull he would be suspended for failure to pay the $1,049.99 arbitration fee.[12] The Notice of Suspension stated the suspension would continue until Hull produced documentary evidence showing he satisfied one of the defenses to suspension.[13] The Notice of Suspension also stated he could request a hearing before the FINRA Office of Hearing Officers and a timely request would stay the effective date of the suspension.[14] Hull requested a hearing and proffered the defense that the arbitration proceeding from which the arbitration fee arose was not arbitrable because Deborah Bennett was not his customer and "at no time did I sign an arbitration submission agreement or otherwise enter into a written agreement to arbitrate with this claimant."[15] He later filed the Response, reiterating that Ms. Bennett "was not my customer and it should be up to the FINRA staff to prove that fact and therefore that the matter was subject to mandatory arbitration pursuant to Rule 12200."[16] Thus, Hull's defense is essentially to attack the underlying assessment of the arbitration fee.

II. Discussion

The Request for Hearing and the Response show that Hull has not asserted a valid defense. The defense of non-arbitrability is not one of the four permitted defenses for failure to

---

[9] Settlement Agreement, Exhibit 1 to the Response, ¶¶ 1, 5.

[10] *Id.*, ¶ 2.

[11] *Id.*, ¶ 3.

[12] Notice of Suspension, at 1.

[13] *Id*. The permitted defenses are listed in Section II.A *infra*.

[14] FINRA had jurisdiction to serve the Notice of Suspension because Hull is associated with a FINRA member firm.

[15] Request for Hearing, at 1.

[16] Response, at 3.

pay an arbitration fee. For this reason alone, Hull is not entitled to a hearing. In addition, the dispute between Hull and Deborah Bennett was arbitrable because Ms. Bennett was a customer of the FINRA member firm with which Hull was associated and the dispute arose from the business activities of that firm. Hull raised the defense of non-arbitrability before FINRA's Director of Arbitration and before the District Court, and in each case that issue was decided against him. The Request for Hearing is dismissed.

A. Hull's Defense of Non-Arbitrability is Not One of the Permitted Defenses

FINRA's arbitration process and applicable rules are designed "to provide a mechanism for the speedy resolution of disputes among members, their employees, and the public."[17] But that mechanism is not free. To ensure payment of arbitration awards and arbitration fees, FINRA promulgated rules to enable expedited suspension proceedings to be brought against members, associated persons, and formerly associated persons who have allegedly failed to pay.[18] FINRA Rule 9553(a) provides:

> If a member, person associated with a member or person subject to FINRA's jurisdiction fails to pay any fees, dues, assessment or other charge required to be paid under the FINRA By-Laws or rules … FINRA staff may issue a written notice to such member or person stating that the failure to comply within 21 days of service of the notice will result in a suspension or cancellation of membership or a suspension or bar from associating with any member.

FINRA Rule 9553(a) implements Article VI, Section 3(a) of the FINRA By-Laws, which provides for the suspension of an associated person who is in arrears in the payment of any fees, dues, assessments, or other charges:

---

[17] *Regulatory Operations v. DiPietro*, No. ARB140066, 2015 FINRA Discip. Lexis 24, at *5 (OHO June 8, 2015) (quoting *Herbert Garrett Frey*, 53 S.E.C. 146, 153 (1997); *Eric M. Diehm*, 51 S.E.C. 938, 939, (1994)); a*ccord Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4 ("NASD's arbitration process is designed to provide efficient resolution of disputes involving NASD members, their employees, and the public."), finra.org/sites/default/files/OHODecision/p038228_0_0.pdf (same); *Dep't of Enforcement v. Respondent*, (ARB040037) (Mar. 2, 2005), at 3 (same), finra.org/sites/default/files/OHODecision/p038234_0.pdf.

[18] FINRA By-Laws, Art. VI, Sec. 3(b); FINRA Rule 9550 *et seq*.; *accord Regulatory Operations v. Gimblet*, No. ARB160009, 2016 FINRA Discip. LEXIS 45, at *5 (Aug. 22, 2016); *see William J. Gallagher*, 56 S.E.C. 163, 171 (2003) ("Honoring arbitration awards is essential to the functioning of the NASD arbitration system."); *Richard R. Pendleton*, 53 S.E.C. 675, 679 (1998) ("[w]e have repeatedly stated that the NASD arbitration system provides a speedy mechanism for settling disputes, which the NASD may foster by taking prompt action against those who fail … to honor arbitration awards"); NASD Notice to Members 04-57, 2004 NASD LEXIS 90 (Aug. 2004); NASD Notice to Members 00-55, 2000 NASD LEXIS 63 (Aug. 2000). The FINRA Rules for failure to pay an arbitration fee are virtually the same as the FINRA Rules for failure to pay an arbitration award. I find the case decisions pertaining to the failure to pay an arbitration award cited in this Order highly persuasive authority. *See, e.g.*, *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *23 n.9 (NAC Oct. 2, 2013) (reliance on federal district court cases as persuasive authority).

> The [C]orporation after 15 days notice in writing, may suspend or cancel the membership of any member or the registration of any person in arrears in the payment of any fees, dues, assessments, or other charges.

The $1049.99 arbitration fee charged to Hull is part of FINRA's standard operating procedure in settled arbitrations. According to FINRA Rule 13701, "[s]ettling parties will remain responsible for fees incurred under the Code."[19] FINRA assesses the arbitration fees and costs that have accrued up to the time of settlement.[20] "If parties to a settlement fail to agree on the allocation of any outstanding fees, those fees will be divided equally among the settling parties."[21] Arbitration fees are due when assessed and become delinquent if unpaid for sixty days.[22]

FINRA Rule 9553(e) states that a person served with a notice of suspension may request a hearing under FINRA Rule 9559 and requires that the request "set forth with specificity any and all defenses to the FINRA action." Thus, in order for the instant matter to proceed on the Request for Hearing, Hull was required to provide a detailed explanation of his defenses. The following defenses are permitted in a suspension proceeding for failure to pay an arbitration fee: the respondent (1) paid the full balance of the arbitration fee; (2) entered into a fully signed written installment payment plan with FINRA Finance and payments due under the plan are current; (3) timely filed a motion to vacate or modify any award that was issued in the arbitration proceeding through which the outstanding arbitration fee was assessed and such motion has not been denied; or (4) filed for bankruptcy protection and the outstanding arbitration fee has not been deemed by a federal court to be non-dischargeable.[23] The respondent has the burden to prove the defense.[24]

---

[19] FINRA Rule 13701(b). FINRA Rule 13902 provides that, if an arbitration claim is settled or withdrawn, the parties are responsible for paying any fees or costs incurred for: hearing sessions already held; any recordings of pre-hearing conferences; the appearance of witnesses and the production of documents; postponements of hearings; and the taping or other recording of hearings.

[20] OHO Redacted Decision No. DFC020014 (Oct. 3, 2002), at 5 ("In Notice to Members 98-1, NASD explained that if a member concludes its involvement in a case through dismissal or settlement, NASD assesses the process fees that have occurred to the point of dismissal."), http://www.finra.org/sites/default/files /OHODecision/p006700_0.pdf.

[21] FINRA Rule 13701(b).

[22] *See* FINRA Regulatory Notice 08-45 (Aug. 2008), 2008 FINRA LEXIS 42, at *5 (arbitration fees "are considered delinquent if they are not paid within 60 days after the date of an invoice").

[23] EXP 15-01 (DFC 140002) (Mar. 18, 2015), at 3, http://www.finra.org/sites/default/files/OHO-Order-15-01-Expedited Proceeding140002_0_0_0.pdf; *accord* NASD Notice to Members 00-55, 2000 NASD LEXIS 63, at *5-6 (listing the defenses to the failure to pay an arbitration award); *Dep't of Enforcement v. Respondent*, (ARB060031) (Apr. 16, 2007), at 4-5, http://www.finra.org/sites/default/files/OHO Decision/p02822_0_0.pdf.

[24] *See* OHO Order EXP15-02 (ARB150039) (Dec. 18, 2015), at 3-4, finra.org/sites/default/filesOHO_EXP15-02_ARB150039_0.pdf; OHO Order EXP15-03 (ARB150048) (Dec. 3, 2015), at 4, finra.org/sites/default/files/OHO_EXP15-03_ARB150048_0_pdf; *accord Robert Tretiak*, 56 S.E.C. 209, 220 (2003) ("[i]t is well settled that a respondent bears the burden").

And the respondent is limited to the four permitted defenses.[25]

Directly on point is OHO Order 15-01, in which the Hearing Officer cancelled the scheduled hearing and suspended the respondent for failure to pay past due arbitration fees.[26] The respondent contended the arbitration fees were not appropriate "because Respondent was 'withdrawn from the case and the erroneous charges' would be reversed by FINRA Dispute Resolution."[27] Rejecting this defense, the hearing officer found that "[t]he defenses available under Rule 9553 are quite limited" and listed the four permitted defenses.[28] "Respondent has not set forth with specificity, nor even asserted, any of these recognized defenses to FINRA's suspension under FINRA Rule 9553."[29] For this reason, the hearing officer held that "[t]he March 31, 2015 hearing in this matter is cancelled."[30]

Like the respondent in OHO Order 15-01, Hull did not set forth with specificity, or even assert, one of the permitted defenses to FINRA's suspension. "[A] hearing request may be denied where a respondent fails to 'set forth with specificity' one of the permitted defenses to a notice of suspension."[31]

B. Hull's Defense of Non-Arbitrability is not Valid

The dispute between Hull and Deborah Bennett was arbitrable. Rule 12200 of FINRA's Code of Arbitration Procedure describes the conditions requiring parties to arbitrate a dispute:

> Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under the Code is either:
>
> (1) Required by written agreement, or

---

[25] *Regulatory Operations v. Fairbridge Capital Markets*, No. ARB160012, 2016 FINRA Discip. LEXIS 49, at *6 (OHO Aug. 5, 2016) ("a respondent in an expedited suspension proceeding under FINRA Rule 9554 may assert certain limited defenses"); *Regulatory Operations v. Dipietro*, No. ARB140066, 2015 FINRA Discip. LEXIS 24, at *6 (OHO June 8, 2015) ("a respondent may assert certain limited defenses in an expedited suspension proceeding"); OHO Order 15-01 (DFC140002) (OHO Mar. 18, 2015), at 3 ("The defenses available under Rule 9553 are quite limited."), http://www.finra.org/sites/default/files/OHO_Order-15-01_Expedited-Proceeding_0_0.pdf; *NASD Treasurer v. Fisher*, No. DCF050011 (OHO Apr. 5, 2006), at 4 (listing "[t]he limited defenses under Rule 9553"), http://www.finra.org/sites/default/files/OHODecision/p017099-0.pdf.

[26] EXP 15-01 (DFC 140002) (Mar. 18, 2015), http://www.finra.org/sites/default/files/OHO-Order-15-01-ProceedingNo.DCF140002_0_0_0.pdf.

[27] *Id*. at 2.

[28] *Id*. at 3.

[29] *Id*.

[30] *Id*. at 4.

[31] *Regulatory Operations v. Sequeira*, No. ARB160035, 2016 FINRA Discip. LEXIS 52, at *4 n.4 (Nov. 18, 2016) (quoting FINRA Rule 9554(e)).

> (2) Requested by the customer;
>
> - The dispute is between a customer and a member or associated person of a member; and
>
> - The dispute arises in connection with the business activities of the member or the associated person …

GES was a member of FINRA, and Hull was an associated person.[32] The critical question is whether Deborah Bennett was a customer. In *Goldman, Sachs & Co. v. City of Reno*, the United States Court of Appeals for the Ninth Circuit defined a customer under FINRA Rule 12200: a "'customer' is a non-broker and non-dealer who purchases commodities or services from a FINRA member in the course of the member's FINRA-regulated business activities, i.e., the member's investment banking and securities business activities."[33] Ms. Bennett was a customer because she was a non-broker and non-dealer who purchased commodities or services from GES in the course of the firm's investment banking and securities business activities. That is, Ms. Bennett purchased undivided tenant-in-common interests in real property that were structured as securities.[34]

Hull argues that the definition of customer is limited to a direct relationship between the purchaser and the individual associated person—*i.e.*, that Ms. Bennett must have directly purchased commodities or services from Hull personally to qualify as *his* customer under Rule 12200. Yet "customer" is not so narrowly confined. *City of Reno* did not limit "customer" to a person who purchased commodities or services directly from a particular arbitration respondent associated with a FINRA member. Hull fails to cite any decision that has adopted his position.

Next, applying the three elements of FINRA Rule 12200: first, arbitration was requested by customer Bennett. Second, the dispute was between customer Bennett and a FINRA member (GES) and persons associated with it. Third, the dispute arose in connection with the business activities of GES. Although Hull might not have directly supervised the GES associated persons who directly interacted with Ms. Bennett, direct supervision and direct interaction are not

---

[32] *Hull*, 2015 U.S. Dist. LEXIS 184911, at *9.

[33] *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 741 (9th Cir. 2014). Or, as articulated in *Citigroup Global Markets Inc. v. Abbar*, 761 F.3d 268 (2d Cir. 2014), a case on which Hull relies, "a 'customer' under FINRA Rule 12200 is one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member or (2) has an account with a FINRA member." *Id*. at 275; *accord Deutsche Bank Securities Inc. v. Roskos*, 2016 U.S. Dist. LEXIS 102682, at *14-15 (S.D.N.Y. Aug. 4, 2016) (same); *see Fleet Boston Robertson Stephens, Inc. v. Innovex, Inc.*, 264 F.3d 770, 772 (8th Cir. 2001) (the definition of customer "refers to one involved in a business relationship with a [FINRA] member that is related directly to investment or brokerage services"); *Herbert J. Sims & Co. v. Roven*, 548 F. Supp. 2d 759, 764 (N.D. Cal. 2008) ("If an investor invests directly with a member firm, then the investor is likely a customer of that firm."). Ms. Bennett was a customer under these definitions as well.

[34] *Hull*, 2015 U.S. Dist. LEXIS 184911, at *2.

required by Rule 12200.[35] The Rule requires only that the dispute arose from a FINRA member's or associated person's business activities. Hence, the Rule governed the dispute between Hull and Ms. Bennett and obligated them to arbitrate.

The Settlement Agreement does not change the result. The paragraph titled "No Admission of Liability" asserted, among other things, that "[t]o Claimants' knowledge, neither Deborah Bennett nor the Trusts ever opened an account with, purchased securities from, or paid any commission or other compensation to Hull or Maloney."[36] In short, Ms. Bennett admits she was not Hull's customer. But, as already stated, arbitrability does not depend on whether the arbitration claimant is the respondent's direct customer. All that is required is that the claimant was the customer of the FINRA member firm or an associated person of the firm, and that the dispute arose from the business activities of the firm or the associated person. Here, Ms. Bennett was a customer of GES, the dispute was between Ms. Bennett and GES and persons associated with it, and the dispute arose from GES's business activities.

Directly on point is *In re Lehman Brothers Securities and ERISA Litigation*,[37] in which Richard S. Fuld, Jr., the former Chief Executive Officer of Lehman Brothers, Inc., was compelled to arbitrate a customer's claims because Fuld was associated with a FINRA member firm and the claims arose in connection with the firm's business activities. The Second Circuit found that six of the arbitration claims employed:

> a control person or supervisory liability theory based on [Fuld's] role as chief executive officer of LBI. All therefore arose 'in connection with [LBI's] business activities.' In consequence, these six of the [customer's] seven claims against Fuld … appear to be subject to the arbitration agreement.[38]

[35] In *John Hancock Life Insurance Co. v. Wilson*, 254 F.3d 48 (2d Cir. 2001), the Second Circuit found a dispute arbitrable—and the FINRA member firm an appropriate arbitration respondent—even though the claimant was not a customer of the firm, but only a customer of persons associated with the firm, who were acting without the firm's authority or knowledge. Rejecting cases proffered by the firm in an effort to avoid arbitration, the Second Circuit held that "[t]o the extent any of these cases *require* indicia of a direct customer relationship between the member and the customer, we reject them as contrary to the plain language of Rule 10301." *Id*. at 60 (emphasis original). NASD Rule 10301 was the predecessor to FINRA Rule 12200.

[36] Settlement Agreement, Exhibit 1 to the Response, ¶ 2.

[37] 706 F. Supp. 2d 552 (S.D.N.Y. 2010).

[38] *Id*. at 560.

Like the claims against Lehman Brothers CEO Fuld, the claims against Hull were subject to arbitration because Deborah Bennett was a customer and the claims arose from GES's business activities.[39]

C. Hull's Defense of Non-Arbitrability Has Already Been Decided Against Him

Hull already exercised his right to litigate the arbitrability of his dispute with Deborah Bennett and lost. At the beginning of the arbitration, Hull requested FINRA's Director of Arbitration to exercise her discretion to deny the arbitration forum under FINRA Rule 12202, but the Director declined without comment.[40] Hull next filed a complaint in District Court and moved for preliminary injunctive relief to prevent Ms. Bennett from pursuing the arbitration.[41] The District Court denied the motion, holding that Hull and the other moving respondent "have not presented serious questions that make [the motion's] assertions a fair ground for litigation, nor have they demonstrated a likelihood of success on the merits of their claim."[42] In its opinion and order, the District Court decided the issue Hull seeks to raise here.[43] The docket sheet in *Hull v. Bennett* shows that Hull did not pursue the case to a final conclusion, but instead voluntarily dismissed it without prejudice.[44] He never renewed it.

In the Settlement Agreement, entered into more than a year after the voluntary dismissal, Hull had a chance to avoid paying the arbitration fee. The parties to the Settlement Agreement could have allocated all or a part of the arbitration fee to Deborah Bennett—or, alternatively, the respondents could have sought a reduction in the $247,500 settlement amount to reflect the

---

[39] Hull complains that he was unfairly forced into the arbitration forum against his will. In reality, he voluntarily agreed to arbitrate any dispute that fell within the terms of FINRA Rule 12200. In *City of Reno*, the Ninth Circuit noted that "FINRA Rule 12200 constitutes 'an agreement in writing' under the [Federal Arbitration Act], and, assuming [the arbitration claimant] is a customer, it is entitled to invoke FINRA Rule 12200 as an intended third-party beneficiary." 747 F.3d 733 at 739 n.1. By becoming associated with a FINRA member firm, Hull agreed to be bound by FINRA's Rules, including Rule 12200. *Ameriprise Advisor Services, Inc. v. Sala*, Case No. 10-00469, 2010 FINRA Arb. LEXIS 952, at * 2 (Sept. 1, 2010) ("[a]s Respondent was formerly registered with FINRA as an associated person of a member-firm, Respondent was and is bound by the rules of FINRA, including FINRA's Code" of Arbitration Procedure); *Dep't of Enforcement v. Houston*, No. 2006005318801, 2008 FINRA Discip. LEXIS 60, at *19 (Dec. 17, 2008) ("[w]hen Respondent elected to become associated with a FINRA member, he agreed to be bound by FINRA's rules").

[40] *Hull*, 2015 U.S. Dist. LEXIS 184911, at *3-4. The request to the Director of Arbitration was the only time Hull sought a determination of arbitrability from FINRA while the arbitration was pending. *See* Response, at 2 ("The arbitrators were never asked and never ruled on the question whether the claimant was my customer.")

[41] *Hull*, 2015 U.S. Dist. LEXIS 184911, at *4.

[42] *Id*. at *11.

[43] *Id*. at *8-12.

[44] The docket sheet is a public document and is available under the case name and docket number *Hull v. Bennett*, Case No. SACV 15-742-JLS (DFMx) (C.D. Cal.).

arbitration fee.[45] Instead, Hull and the other parties agreed that they "will bear their own attorneys' fees, costs and expenses in connection with the Action and this Agreement."[46]

It is now too late for Hull to challenge the arbitrability of the dispute and FINRA's assessment of the arbitration fee.[47] The District Court had the jurisdiction to decide this issue. In *City of Reno*, the Ninth Circuit held that "whether the court or the arbitrator decides arbitrability is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise."[48] "[T]here is a presumption that courts will decide which issues are arbitrable …"[49] Here, there is no clear and unmistakable evidence Hull or Ms. Bennett intended for a body other than the District Court to decide arbitrability.[50] On the contrary, Hull correctly elected to invoke the jurisdiction of the District Court by filing *Hull v. Bennett*. The District Court rendered a decision Hull did not like. He cannot seek a different result in an expedited proceeding for his failure to pay a $1,049.99 arbitration fee.

III. Conclusion

The Hearing Officer finds, and the parties do not dispute, that Hull did not pay the arbitration fee. For the reasons stated, the Hearing Officer does not find it necessary or appropriate to hold a hearing, and the Request for Hearing is dismissed. In particular, Hull did not assert one of the permitted defenses to the Notice of Suspension. The defense he did raise—that the underlying arbitration dispute was not arbitrable—is invalid because the dispute was between a customer and the FINRA member firm with which Hull was associated, and the dispute arose from the firm's business activities. Hull had a full opportunity to raise his defense before FINRA's Director of Arbitration and the District Court, and they rejected it.

Under Article VI, Section 3(a) of FINRA's By-Laws and FINRA Rule 9559(n), Hull is suspended from associating with any member firm in any capacity, effective immediately. This proceeding is dismissed under FINRA Rule 9559(m), and the Notice of Suspension is deemed to

---

[45] The FINRA Code of Arbitration Procedure contemplates that the parties to an arbitration may allocate the fees and costs of the arbitration among themselves. *See* FINRA Rules 13701(b) ("[i]f parties to a settlement fail to agree on the allocation of any outstanding fees …"); 13902(d) ("[i]f a case is settled or withdrawn and the parties' agreement fails to allocate … fees and costs …").

[46] Settlement Agreement, Exhibit 1 to the Response, ¶ 3.

[47] *Regulatory Operations v. Fairbridge Capital Markets*, 2016 FINRA Discip. LEXIS 49, at *7 ("Fairbridge had the opportunity to present its payment defense in the underlying arbitration, which it elected not to do").

[48] *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d at 738-39 (emphasis removed) (quoting *Oracle American, Inc. v. Myriad Group A.G.*, 724 F.3d 1069, 1072 (9th Cir. 2013)).

[49] *Oracle American, Inc. v. Myriad Group A.G.*, 724 F.3d at 1072; *accord In re Lehman Brothers Securities and ERISA Litigation*, 706 F. Supp. 2d 522 at 558 ("[a]ssuming the existence of an agreement to arbitrate, the question whether a particular dispute is to be resolved by litigation or arbitration also is for the court").

[50] As the District Court found, "[t]here is no 'clear and unmistakable' evidence the parties intended for FINRA to determine this issue. The Court therefore finds it has jurisdiction to determine the issue of arbitrability of this case." *Hull*, 2015 U.S. Dist. LEXIS 184911, at *6.

be final FINRA action. The suspension shall continue until Hull produces sufficient documentary evidence to FINRA showing: (1) he has paid the full balance of the arbitration fee; (2) he has entered into a fully signed written installment payment plan with FINRA Finance and payments due under the plan are current; (3) he has timely filed a motion to vacate or modify any award that was issued in the arbitration proceeding through which the outstanding arbitration fee was assessed and such motion has not been denied; or (4) he has filed for bankruptcy protection and the outstanding arbitration fee has not been deemed by a federal court to be non-dischargeable.

SO ORDERED.

Richard E. Simpson
Hearing Officer

June 12, 2017

Copies to:
Kevin Hull (via electronic and first-class mail)
Ann-Marie Mason, Esq. (via electronic and first-class mail)
Meredith MacVicar, Esq. (via electronic mail)
William Otto, Esq. (via electronic mail)