

FINANCIAL INDUSTRY REGULATORY AUTHORITY

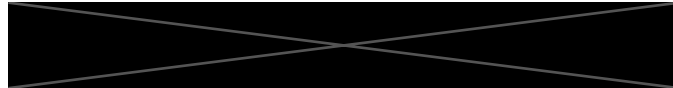
DISPUTE RESOLUTION

In the Matter of the Arbitration Between



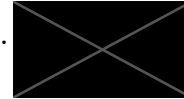
Claimant,

v.



Respondent.

FINRA Case No.



**CLAIMANT’S MOTION FOR RECONSIDERATION OF DECISION
TO PROVIDE CUSTOMER WITH AUDIO RECORDING OF FINAL HEARING**

Claimant hereby moves for FINRA to reconsider its decision to provide a copy of the audio recording of the final hearing to the underlying customer. FINRA’s response simply provided the guidance indicating that the customer may participate in the hearing. It does not indicate that the customer will be provided with anything. In fact, it is FINRA’s policy not to give customers access to the portal and FINRA does not provide the customers with copies of the hearing exhibits.

Additionally, there is a rule on point with regard to the production of audio recordings of the hearing. FINRA Rule 13606(a)(1) specifically states that “[t]he Director will provide a copy of the recording to any **party upon request.**” The customer is not a party to the matter. Nor is the customer a counsel of record for the matter.

Additionally, FINRA’s “Protecting Personal Confidential Information” website (<https://www.finra.org/arbitration-mediation/protecting-personal-confidential-information>), under Case Related Documents that Include Personal Confidential Information, it states that “FINRA does not disclose personal confidential information unless a party to whom the

information pertains authorizes FINRA to make the disclosure. FINRA may, however, disclose personal confidential information under the following circumstances: to comply with a state or federal law or regulation; to respond to a subpoena, court order, government request, or other legal process; or as otherwise permitted by law.”

Additionally, the AAA Statement of Ethical Principals (<https://www.adr.org/StatementofEthicalPrinciples>) states that “An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public.”

In fact, the U.S. Supreme Court has recognized the importance of confidentiality in arbitration proceedings as a key factor in ensuring the effectiveness of the arbitration process. For example, in the case of *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court noted that confidentiality is a "hallmark of arbitration" and that it is "essential to the private nature of the arbitration process."

There is other legal precedent regarding confidentiality in arbitration. All of which exist for the protection of the parties. Not non-party witnesses or participants. These precedents include:

- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*: In this case, the U.S. Supreme Court held that the presumption of confidentiality in arbitration is a "fundamental attribute" of the arbitration process. The Court noted that confidentiality promotes candor and

openness in the arbitration process, and helps to ensure that the parties are able to resolve their disputes without fear of damaging publicity.

- **Gulf Oil Corp. v. Bernard:** The U.S. Supreme Court in this case held that courts have the power to enforce the confidentiality of arbitration proceedings under the FAA. The Court noted that the FAA "evinces a clear federal policy favoring arbitration," and that enforcing confidentiality provisions in arbitration agreements is consistent with this policy.
- **American Arbitration Association (AAA) Commercial Arbitration Rules:** The AAA rules provide that all information relating to the arbitration proceedings, including the award, shall be kept confidential by the parties and the arbitrator(s), unless disclosure is required by law or necessary to enforce or challenge the award.
- **International Chamber of Commerce (ICC) Rules:** The ICC rules provide that the parties and the arbitrators shall maintain the confidentiality of the arbitration proceedings and all documents produced in the course of the proceedings, unless disclosure is necessary for the enforcement or challenge of the award.

Further, there is precedent regarding production of confidential information to non-party participants in the proceedings, including:

- **Schmitz v. Zilveti:** In this case, a U.S. federal court held that an arbitrator's disclosure of confidential information to third-party non-participants violated the Federal Arbitration Act and the parties' confidentiality agreement. The court ordered the arbitrator to return all confidential documents and to pay the parties' attorneys' fees and costs incurred in connection with the unauthorized disclosure.

- *Jivraj v. Hashwani*: In this case, the English Court of Appeal held that an arbitrator's disclosure of confidential information to a non-party participant was a breach of the arbitrator's duty of confidentiality. The court held that the arbitrator should not have disclosed any confidential information to the non-party, even if the non-party had signed a confidentiality agreement.
- International Centre for Settlement of Investment Disputes (ICSID) Convention and Rules: The ICSID Convention and Rules provide that arbitrators, parties, and their representatives must maintain the confidentiality of the proceedings and any information disclosed during the proceedings. The rules prohibit the disclosure of any information to non-parties without the prior written consent of the parties and the approval of the tribunal.

In every reference to arbitrations and confidentiality, there is support that the proceedings and documents remain confidential and only be provided to the parties, or for judicial proceedings. The AAA Statement of Ethical Principles even specifically states that AAA staff have an ethical obligation to keep information confidential. While the customer may participate in the final hearing, the customer is not a party to the matter. As such, the customer should not have access to confidential documents or records of the matter without consent from the parties. Accordingly, it is arguably unethical for FINRA to unilaterally determine to release the confidential recording of the proceeding to the customer.

As such, Claimant motions for FINRA to reconsider its objection and requests that the Director make a determination as to the rule.

Very truly yours,

/s/ James P Galvin
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