SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL SCOTT DUNCAN, DWAYNE GRADY, CAROLINE GIRGIS, MARK ULICNY, ALAN McCLAIN, AMANDA PILKERTON, STANLEY DYL, KIMBERLY CHMIELEWSKI and PAUL JARVIS, Petitioners, – against – UNITED CAPITAL FINANCIAL ADVISORS, LLC, Respondent.	Index No.: IAS Part: Motion Seq. ___ **VERIFIED PETITION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION COMPELLING ARBITRATION BEFORE THE FINANCIAL INDUSTRY REGULATORY AUTHORITY AND STAYING ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION**

Petitioners Michael Scott Duncan, Dwayne Grady, Caroline Girgis, Mark Ulicny, Alan McClain, Amanda Pilkerton, Stanley Dyl, Kimberly Chmielewski and Paul Jarvis apply, pursuant to §§ 2 and 4 of the Federal Arbitration Act (9 U.S.C.) ("Act") and pursuant to Article 75 of the New York Civil Practice Law and Rules ("C.P.L.R."), for judgment:

A. compelling respondent United Capital Financial Advisors, LLC ("United Capital") to arbitrate Petitioners' claims and defenses and its claims and defenses before FINRA Dispute Resolution, Inc. ("FINRA"), a subsidiary of the self-regulatory organization Financial Industry Regulatory Authority, Inc.; and

B. preliminarily and permanently enjoining arbitration of the parties' claims and defenses before the American Arbitration Association ("AAA").

Although United Capital and Goldman Sachs & Co. LLC ("Goldman Sachs" or "Goldman") have agreements with each of the Petitioners (who were formerly employed by United

Capital and Goldman Sachs) requiring United Capital and Goldman Sachs to arbitrate before FINRA and although United Capital and Goldman Sachs initiated employment disputes in FINRA against each of the Petitioners and ***on five separate occasions acknowledged that their disputes with Petitioners were arbitrable in FINRA***, the week before Petitioners asserted counterclaims against United Capital, Goldman Sachs, and, in some cases, third-party claims against Goldman affiliate, Mercer Allied Company L.P. ("Mercer"),[1] Goldman Sachs and United Capital abruptly informed FINRA that they wanted to dismiss their claims from FINRA in order to bring them in another forum. Indeed, now United Capital seeks unilaterally to arbitrate in AAA, refusing to participate in FINRA proceedings, even though it is represented by the same counsel as Goldman and Mercer, which are participating in the FINRA proceedings.

This action arises out of Petitioners' urgent need to enforce an arbitration provision, but it is important to note by way of background that Petitioners' substantive claims against Goldman Sachs, United Capital, and Mercer arise from their *joint* employment and registration of Petitioners. In particular, they each were seasoned investment advisors, who were heads, co-heads, or senior wealth advisors, in the offices they worked at, and that left Goldman in the Fall of 2023 when Goldman announced that it was scrambling to sell United Capital—which Goldman itself had purchased only in 2019—to another financial firm. This frantic announcement, given in the context of four tumultuous years of Goldman's mismanagement of United Capital, gave rise to a miasmic cloud of uncertainty and unanswered questions that choked Petitioner's ability to advise their clients. Indeed, even before the announced sale of United Capital, Goldman's stewardship of United Capital was rife with problems, such as the failure to hire replacement staff to support

[1] Petitioners McClain, Girgis, Grady and Ulicny have claims against Goldman, United Capital, and Mercer. The other Petitioners, Duncan, Dyl, Chmielewski, and Jarvis have claims against Goldman and United Capital but not Mercer.

the Petitioners, the implementation of suitability analyses that were misaligned with Petitioners' clientele, and the improper withholding and/or changing of Petitioners' compensation. And when Goldman announced that it was selling United Capital after only four short years, the problems compounded, resulting in a well-publicized parade of advisors and their clients, including Petitioners and many of their clients, leaving Goldman to in search of stability and security. Finally, after the Petitioners left, Goldman and Mercer filed defamatory termination statements against several of the Petitioners. This, and other conduct, by Goldman, United Capital, and Mercer gave rise to claims for, among other things, breach of contract, breach of the covenant of good faith and fair dealing, intentional interference with prospective business relations, unjust enrichment, and defamation. When Goldman and United Capital sued Petitioners in FINRA for violating restrictive employment covenants by leaving Goldman and then working for a competitor, Petitioners asserted those claims—some of which are predicated on FINRA Rules—as counterclaims. When FINRA accepted United Capital's withdrawal of its claims from FINRA, Petitioners promptly re-asserted those claims in FINRA as affirmative claims. United Capital now seeks to finagle out of FINRA jurisdiction—a tribunal uniquely knowledgeable about industry practice and FINRA Rules—by asserting in AAA virtually the same claims it had previously asserted in FINRA, only this time consolidating all of the Petitioners in the same action, and excluding Goldman from its statement of claim.

United Capital's purported rationale for its about-face on submitting to FINRA's jurisdiction, is that it is not a FINRA member and does not consent to "post-dispute" resolution in FINRA. That post-hoc rationale flies in the face of common sense and is utterly contradicted by United Capital's previous availment of FINRA's jurisdiction. It amounts to an assertion that United Capital unilaterally gets to choose on its whim where to arbitrate and when. United

Capital's capricious forum-shopping violates its agreements and creates the specter of ongoing, parallel actions in two forums, FINRA (involving Petitioners, Goldman Sachs, and Mercer) and AAA (involving Petitioners and United Capital) arising from the exact same contracts, conduct, and transactions.

Notably, because most of the Petitioners, as well as Mercer and Goldman Sachs, are FINRA members or associated persons and because they seek special relief including FINRA's expungement of the defamatory disclosures on their Form U5s and CRD records,[2] they ***must*** litigate ***in FINRA*** and cannot litigate in AAA. There is simply no scenario under which Petitioners could litigate their claims against Goldman Sachs and Mercer in AAA. ***FINRA is the only forum capable of arbitrating all the claims asserted by Goldman and United Capital and all of the counterclaims and third party claims asserted by Petitioners***. Thus, United Capital's shenanigans deprive Petitioners of their right to litigate all of their claims against their former employer in a single forum and thereby obtain a comprehensive arbitral resolution to each of their claims, and instead artificially fragments the actions, forcing Petitioners to expend duplicative resources by litigating the same issues and many of the same claims on two fronts with the possibility of inconsistent rulings and procedures. It is as clear as day that United Capital's AAA action is antithetical to the whole purpose of arbitration—efficiency and finality—and is not what Petitioners ever agreed to.

For these reasons as well as those set forth below and the supporting papers submitted herewith, the Court should enforce the Parties' arbitration agreements and enter judgment in

[2] Disclosures made on the Uniform Termination Notice for Securities Industry Registration (Form U5), as mandated by the Securities and Exchange Commission (SEC) and FINRA, are included in the securities professional's Central Registration Depository (CRD) Report. The CRD system is accessible to member firms and regulators, and to the general public through BrokerCheck.

Petitioners' favor compelling FINRA arbitration, enjoining the vexatious AAA arbitration and granting Petitioners such other and further relief as is just and proper.

SUMMARY OF THE PROCEEDING

Petitioners are wealth management advisers who formerly were employed by non-party The Ayco Company, L.P. ("Ayco") and respondent United Capital. During Petitioners' employment, Ayco was (and currently is) an affiliate of non-party Goldman Sachs. Goldman Sachs is both an SEC-registered investment adviser and a broker-dealer member of the Financial Industry Regulatory Authority ("FINRA"). Mercer is a broker-dealer member firm of FINRA. United Capital is an SEC-registered investment adviser but is not a member of FINRA. During Petitioners' employment, Ayco and United Capital engaged in business together as "Goldman Sachs Personal Financial Management" or "Goldman Sachs PFM."

This proceeding arises out of Petitioners' employment contracts with Ayco and United Capital. These contracts include a mandatory arbitration term, providing, in pertinent part (emphasis added), that

> "To the fullest extent permitted by law, any dispute, controversy or claim arising out of or based upon or relating in any way to this Agreement, or to Advisor's employment or other association with the firm, or the termination of Advisor's employment, will be settled by arbitration. ***Any such arbitration will be conducted in New York City before the rules then-obtaining of the Financial Industry Regulatory Authority ("FINRA")***. If the matter is not arbitrable before FINRA, it will be arbitrated before the American Arbitration Association ("AAA") in accordance with the commercial arbitration rules of the AAA."

After Petitioners resigned their employment in the fall of 2023, United Capital, along with Goldman Sachs, filed Statements of Claim with FINRA, alleging Petitioners each breached the restrictive covenants in their respective employment contracts and demanding arbitration in FINRA's forum. These claims were brought across five separate actions. With each of the five Statements of Claim, Goldman Sachs and United Capital signed and filed FINRA's standard form

of "Submission Agreement" for an industry-claimant, stating, *inter alia*, that they "hereby submit the present matter in controversy . . . to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure" and "have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules."

In the fall of 2023, FINRA accepted the filings and served the statements of claim on Petitioners. In November and December 2023, at Goldman's and United Capital's suggestion, the parties extended the deadline for Petitioners to respond to their statements of claim until January 12, 2024. On January 4, 2024—the week before Petitioners' responses were due—Goldman Sachs and United Capital abruptly decided to shop for another forum. Goldman Sachs, a member of the FINRA, withdrew from the arbitrations without prejudice. United Capital, a non-member, followed suit, notifying FINRA that it rescinded its agreement to arbitrate in FINRA and would pursue its claims it another forum. On January 12, 2024, as the statements of claim were still pending, Petitioners answered the statements of claim and asserted counterclaims. Several of the Petitioners added Mercer as a Third-Party Respondent. In response to Goldman Sachs' and United Capital's withdrawal, and over Petitioners' objection, on February 7, 2024 FINRA notified the parties that it had decided that all the arbitrations were withdrawn without prejudice" under FINRA Rule 13702(a)[3] and closed the cases.

The next day, Petitioners filed their own statements of claim, including claims against Goldman Sachs, Mercer, and United Capital with FINRA, which promptly served the statements of claim on Goldman, Mercer, and United Capital and notified them that they were by April 1, 2024, to respond to Petitioners' statements of claim. Goldman Sachs has registered as a party in the FINRA arbitration and counsel has appeared on its behalf. Petitioners look forward to

[3] FINRA Rule 13702(a) permits a party to withdraw its claims without prejudice if withdrawn prior to the filing of an answer.

Goldman Sachs' timely responses. United Capital – although jointly represented by the same counsel as Goldman Sachs – has repudiated its contractual obligation to submit its claims and defenses in the pending FINRA arbitrations. On February 28, 2024 United Capital pressed ahead with its forum-shopping strategy by filing an arbitration demand with AAA. Under the employment agreements, AAA is the proper forum *only if* the parties' claims and defenses are *not arbitrable* before FINRA. There is no genuine dispute about FINRA arbitrability. United Capital expressly acknowledged that its claims are arbitrable before FINRA by submitting the claims to FINRA. It purposely availed itself of FINRA's forum, and hauled Petitioners into that forum, by filing its Submission Agreements and statements of claim with FINRA. With each of the five Submission Agreements, United Capital expressly acknowledged that it agreed to "arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." Although it changed its mind about its strategy of seeking arbitration in FINRA's forum, its self-serving forum shopping does not diminish its earlier recognition that its claims are arbitrable before FINRA. United Capital might now prefer AAA, but it is not free to disavow its arbitration agreements, and groundlessly force Petitioners to bifurcate their claims against their employer. By their Petition *sub judice*, Petitioners seek (1) a judgment compelling specific performance of United Capital's contractual obligation to arbitrate its claims and defenses in FINRA's forum and (2) a preliminary and permanent injunction of the AAA arbitration.

While each of the Employment Agreements provide for arbitration of these disputes before FINRA, as set forth below, through its conduct before both FINRA and the AAA that can only be described as bad faith and frivolous, United Capital has completely frustrated and stymied the arbitration process. As a result of United Capital's abuse and gamesmanship of the arbitral process, the disputes initiated by United Capital and Goldman Sachs have now been pending

before FINRA (in ten separate arbitrations) since late September and a consolidated arbitration before AAA without any hope for a prompt resolution.

Absent this Court's aid, the Petitioners will be unable to prosecute their claims before FINRA, the venue agreed to by the parties to address disputes arising under the operative Employment Agreement. Further, without this Court's intervention, the Petitioners will be forced to bifurcate the dispute and prosecute this dispute in multiple actions before FINRA and AAA. Goldman Sachs, United Capital, and in some instances, Mercer, functioned as one employer during the Petitioners' employment with them, and two of those entities, Goldman and Mercer, as FINRA members must litigate in FINRA. So it is pure gamesmanship—or a divide-and-conquer strategy United Capital hatched with Goldman—to try to force Petitioners to litigate their claims against United Capital in another forum, but that gamesmanship would deprive Petitioners of effectively litigating their claims.

THE PARTIES

1. Petitioners are natural persons and citizens of states other than New York, as alleged more particularly as follows:

a. Michael Duncan is a citizen of Florida;

b. Dwayne Grady and Mark Ulicny are citizens of Maryland;

c. Caroline Girgis is a citizen of Virginia;

d. Alan McClain is a citizen of Texas;

e. Amanda Pilkerton is a citizen of Texas;

f. Kimberly Chmielewski is a citizen of North Carolina;

g. Stanley Dyl is a citizen of South Carolina

h. Paul Jarvis is a citizen of North Dakota.

2. United Capital is a Delaware limited liability company registered to do business in New York with its headquarters and principal place of business in Texas. United Capital Financial Advisors, LLC, Form ADV "*Uniform Application for Investment Adviser Registration*" ("UC's Form ADV") Item 1(F) (Nov. 7, 2023), *available at* https://reports.adviserinfo.sec.gov/reports/ADV/134600/PDF/134600.pdf, *accessed* March 26, 2024.

RELEVANT NON-PARTIES

3. Goldman Sachs is a New York limited liability company headquartered in New York. Goldman Sachs owned United Capital from between May 2019 when it purchased the company until on or about November 3, 2023, when its sale of United Capital to another financial firm closed.

4. Mercer is a Delaware limited partnership, with its main office located in New York. Mercer is an affiliate of Goldman Sachs.

JURISDICTION AND VENUE

5. United Capital is a large investment adviser, registered with the Securities and Exchange Commission and the New York State Department of Law. At all times material to this proceeding, United Capital continuously and systematically engaged in the business of offering to perform, and performing, investment advisory, securities brokerage and insurance brokerage services in New York to residents of New York and other states. In the conduct of this business, it maintains offices in Bethpage and Buffalo, New York, and public telephone numbers for the offices where it employs individuals who regularly perform investment advisory functions, securities broker-dealer activities and insurance broker activities. It regularly keeps and maintains books and records in Bethpage and Buffalo and contracts with a third-party recordkeeper to store

its records in New York City. *See* UC's Form ADV, Section 1.F "Other Offices"; Section 1.L "Location of Books and Records," Item 2 "SEC Registration / Reporting."[4]

6. Section 6, entitled "Dispute Resolution," of United Capital's employment agreement with each of the Petitioners is the virtually same. Section 6.1, entitled "Arbitration," provides in pertinent part that

> "To the fullest extent permitted by law, any dispute, controversy or claim arising out of or based upon or relating in any way to this Agreement, or to Advisor's employment or other association with the firm, or the termination of Advisor's employment, will be settled by arbitration. *Any such arbitration will be conducted in New York City before the rules then-obtaining of [FINRA]*. If the matter is not arbitrable before FINRA, it will be arbitrated before the [AAA] in accordance with the commercial arbitration rules of the AAA."

Amended and Restated Head of Office Agreement, § 6.1 (emphasis added); Wealth Advisor Agreement, § 6.1 (emphasis added).

7. Each agreement provides that

> "Except as noted in Section 6.6 below, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York, without regard to choice of law rules."

8. Section 6.6 of each agreement provides in pertinent part that "the Federal Arbitration Act governs interpretation and enforcement of all arbitration provisions under this Agreement, and all arbitration proceedings thereunder."

9. The Court has general jurisdiction over the person of United Capital. C.P.L.R. § 301 (2024).

10. The Court has specific jurisdiction over the person of United Capital. C.P.L.R. § 302(a)(1) (2024).

[4] *See also*, https://unitedcapitalwealth.com/location/bethpage/; https://unitedcapitalwealth.com/location/ buffalo/, last accessed Mar. 9, 2023.

11. United Capital has further consented to the jurisdiction of this Court by consenting to arbitration before FINRA in New York, New York, by initiating arbitration against Petitioners in FINRA in New York, New York, and by initiating arbitration against Petitioners in AAA in New York, New York. *See, e.g.*, *Zurich Ins. Co. v. R. Elec.*, A.D.3d 338, 339 (1st Dep't 2004); *Merrill Lynch Pierce, Fenner & Smith Inc. v. Lecopulos*, 553 F.2d 842, 844 (2d Cir. 1977); *accord Doctor's Assocs. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996) ("A party who agrees to arbitrate in a particular jurisdiction consents not only to personal jurisdiction but also to venue of the courts within that jurisdiction.").

12. Venue is proper in this Court in the County of New York. C.P.L.R. § 7502(a)(i) (2024).

FACTUAL BACKGROUND

A. United Capital's Agreements With Petitioners Included Arbitration Provisions

13. United Capital's agreements with Petitioners Michael Duncan, Caroline Girgis, Dwayne Grady, Alan McClain, Stanley Dy and Paul Jarvis are known as the Amended and Restated Head of Office Agreements. The agreements with Petitioners Mark Ulicny and Kimberly Chmielewski are known as the Wealth Advisor Agreements. The Amended and Restated Head of Office Agreements and Wealth Advisor Agreements are referred to hereinafter collectively as the "Agreements."

14. Section 6 of the Agreements sets forth the parties' pre-dispute agreement to arbitrate (the "Pre-Dispute Arbitration Agreements"). Section 6.1 (emphasis added) provides as follows:

B. The Parties Agreed That FINRA Was The Mandatory Arbitration Forum

15. By § 6.1, the parties agreed that if the dispute is arbitrable before FINRA, then FINRA is the mandatory forum.

16. By § 6.1, the parties agreed that if dispute is not arbitrable before FINRA, then AAA is the mandatory forum.

17. In late September and early October 2023, United Capital commenced five FINRA arbitration proceedings against Petitioners (the "Original FINRA Arbitrations") by filing its Statements of Claim with FINRA. FINRA assigned docket numbers to the proceedings as follows:

a. United Capital's arbitration demand against Michael Duncan was docketed as FINRA Dispute Resolution No. 23-03081;

b. United Capital's arbitration demand against Dwayne Grady, Caroline Girgis and Mark Ulicny was docketed as FINRA Dispute Resolution No. 23-02691;

c. United Capital's arbitration demand against Alan McClain was docketed as FINRA Dispute Resolution No. 23-02676;

d. United Capital's arbitration demand against Stanley Dyl and Kimberly Chmielewski was docketed as FINRA Dispute Resolution No. 23-02690;

e. United Capital's arbitration demand against Paul Jarvis was docketed as FINRA Dispute Resolution No. 23-03057.

18. United Capital's Statements of Claim in the Original FINRA Arbitrations asserted claims arising out of or based upon or relating to the Agreements.

19. Concurrently with filing its Statements of Claim, United Capital filed FINRA's standard form of "Submission Agreement" for an industry-claimant in each of the Original FINRA Arbitrations. Pursuant to FINRA Rule 13100(ee), a Submission Agreement "is a document that

parties sign at the outset of an arbitration in which they agree to submit to arbitration under the Code [of Arbitration Procedure for Industry Disputes]."

20. United Capital's Submission Agreements stated, among other things, that it "hereby submit[s] the present matter in controversy . . . to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure" and had "read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules."

21. The language of FINRA's form of Submission Agreement "constitutes a clear and unqualified agreement to arbitrate." *Safra Sec., LLC v. Gonzalez*, 764 F. App'x 125, 126 (2d Cir. Apr. 23, 2019) (unreported).

22. Pursuant to Rule 13301, FINRA notified the Petitioners that they were "required by FINRA rules to arbitrate this dispute."

23. After the deadlines for responding to United Capital's Statements of Claim were extended by the parties' consent pursuant to FINRA Rule 13207(a), on January 12, 2024 each of the Petitioners filed their Statement of Answer and Counterclaim, asserting counterclaims against United Capital.

24. Concurrently with filing their Statements of Answer and Counterclaim, Petitioners filed FINRA's standard form of Submission Agreement for an industry-respondent, stating, among other things, that they "hereby submit the present matter in controversy . . . to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure" and have "read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules."

25. The claims that United Capital asserted in its Statements of Claim when it commenced the Original FINRA Arbitrations and filed the Submission Agreements are arbitrable before FINRA.

26. By filing the statements of claim and Submission Agreements, United Capital clearly and without qualification manifested its assent to arbitration of its claims before FINRA and submitted to FINRA's jurisdiction.

27. By filing statements of claim in the Original FINRA Arbitrations asserting venue in New York City and then administering arbitrations in New York City, United Capital clearly and without qualification manifested its assent to conduct these arbitrations in New York and pursuant to New York law.

28. With respect to the February 28, 2024 AAA Arbitration, United Capital filed its "Demand for Arbitration" with the American Arbitration Association – International Centre for Dispute Resolution (AAA-IDRC). The AAA-IRDC is headquartered in AAA-ICDR New York City at 120 Broadway, Floor 21, New York, NY 10271. In its AAA Demand for Arbitration, United Capital requested that the arbitration be conducted in New York City (indicating that New York City is the "local provision included in the contract").

29. FINRA accepted, and exercised, jurisdiction over United Capital and the subject matter of its Statements of Claim.

30. Petitioners accepted FINRA's jurisdiction over them, the subject matter of United Capital's Statements of Claim, their defenses and their counterclaims against United Capital.

31. FINRA is the mandatory forum for arbitration of United Capital's claims and Petitioners' counterclaims.

32. Pursuant to the plain language of the Pre-Dispute Arbitration Agreement, if United Capital means to pursue the claims it stated in its Statements of Claim, it must do so by arbitration before FINRA.

C. United Capital Breached The Arbitration Agreement

33. FINRA Rule 13702(a) provides that "[b]efore a claim has been answered by a party, the claimant may withdraw the claim against that party without or without prejudice."

34. In November and December 2023, at United Capital's and Goldman's suggestion, the parties agreed to extend Petitioners' deadline to respond to Goldman's and United Capital's statements of claim until January 12, 2024, presumably to get past the holidays.

35. On January 4, 2024, before Petitioners had answered those statements of claim, United Capital filed a notice in each of the Original FINRA Arbitrations announcing to FINRA that it no longer agreed to arbitrate its claims against Petitioners in FINRA's forum and, instead, would pursue its claims in another forum.

36. On January 12, 2024, Petitioners filed their answers and counterclaims against Goldman and United Capital in the Original FINRA Arbitrations. Several Petitioners also asserted third-party claims against Mercer. These claims arose out of the same nucleus of facts as Goldman's and United Capital's claims, including claims by Petitioners directed to the unenforceability of their restrictive covenants and related employment claims. Because Goldman and Mercer had made false and defamatory statements on the Uniform Termination Notice for Securities Industry Registration of Form U5 concerning the nature and bases for certain Petitioners' resignations, several Petitioners also asserted third party claims against Goldman and Mercer on that basis. In sum, Petitioners variously asserted claims against their former employer

for breach of contract, breach of the covenant of good faith and fair dealing, intentional interference with prospective business relations, unjust enrichment, and defamation.

37. Over Petitioners' objection, on February 7, 2024 FINRA notified the parties that it had decided under Rule 13702 that the Original FINRA Arbitrations were withdrawn without prejudice.

38. The next day, February 8, Petitioners commenced five new FINRA arbitration proceedings by restating their counterclaims and third-party claims as direct claims. FINRA docketed the new cases (collectively, the "Pending FINRA Arbitrations") as follows:

a. *Michael Duncan v. Goldman Sachs & Co. LLC and United Capital Financial Advisers, LLC*, FINRA Dispute Resolution No. 24-00299;

b. *Caroline Marie Girgis, Dwayne Laverne Grady and Mark Joseph Ulicny vs. Goldman Sachs & Co. LLC, United Capital Financial Advisers, LLC and Mercer Allied Company*, FINRA Dispute Resolution No. 24-00301;

c. *Alan Thomas Mcclain vs. Goldman Sachs & Co. LLC, United Capital Financial Advisers, LLC and Mercer Allied Company*, FINRA Dispute Resolution No. 24-00303;

d. *Stanley Dyl and Kimberly Chmielewski vs. Goldman Sachs & Co. LLC and United Capital Financial Advisers, LLC*, FINRA Dispute Resolution No. 24-00300; and

e. *Paul Jarvis vs. Goldman Sachs & Co. LLC and United Capital Financial Advisers, LLC*, FINRA Dispute Resolution No. 24-00302.

39. FINRA accepted Petitioners' Statements of Claim and began administering the Pending FINRA Arbitrations.

40. Pursuant to Rule 13301, by letters dated February 9, 2024 FINRA notified United Capital that it was "required by FINRA rules to arbitrate this dispute" and "required, on or before

April 1, 2024, to file with FINRA . . . a signed and dated Submission Agreement . . . and answer" to Petitioners' statements of claim.

41. As of today, United Capital's answers to Petitioners' Statements of Claim in the Pending FINRA Arbitrations are not yet due.

42. By letters dated February 28, 2024, United Capital notified FINRA that it "object[ed] to . . . being named as a respondent" in the new cases. It asserted a unilateral right to avoid FINRA's forum by refusing to comply with FINRA's requirement that it confirm its submission to FINRA's jurisdiction.

43. That same day (February 28), United Capital purportedly commenced an arbitration proceeding with AAA under its Commercial Rules (the "AAA Arbitration") by filing a Statement of Claim asserting the same claims against all the Petitioners that it had previously submitted in the Original FINRA Arbitrations.

44. On March 5, 2024, counsel for United Capital emailed counsel for Petitioners a "courtesy copy" of United Capital's AAA Statement of Claim and wrote that the same would be served via FedEx.

45. On March 20, 2024, AAA sent Petitioners' notice that it had accepted United Capital's Statement of Claim and that Petitioners' response was due on April 4, 2024.

46. The power of courts to issue an injunction in aid of arbitration is well recognized both under the FAA and C.P.L.R. 7502(c). Under the FAA, the "Second Circuit has repeatedly held that courts retain the power, and the responsibility, to consider applications for preliminary injunctions while a dispute is being arbitrated." *Gen. Mills, Inc. v. Champion Petfoods USA, Inc*., No. 20-CV-181, 2020 WL 915824, at *3 (S.D.N.Y. Feb. 26, 2020). The Second Circuit has repeatedly held that courts retain the power, and the responsibility, to consider applications for

preliminary injunctions while a dispute is being arbitrated. *Id.* ("Where the parties have agreed to arbitrate a dispute, a district court has jurisdiction to issue a preliminary injunction to preserve the status quo pending arbitration. The standard for such an injunction is the same as for preliminary injunctions generally." (citing *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 894–95 (2d Cir. 2015))); *see also Nicosia v. Amazon.com, Inc*., 834 F.3d 220, 238 (2d Cir. 2016) ("Generally, courts should consider the merits of a requested preliminary injunction even where the validity of the underlying claims will be determined in arbitration.").

47. This court has jurisdiction to issue a temporary restraining order/preliminary injunction to preserve the status quo pending arbitration. *Id*. Pursuant to C.P.L.R. § 6301, a court may issue a preliminary injunction, as in this case, where the Respondent's actions threaten the Petitioners' rights related to the arbitration, potentially nullifying the arbitrations' outcomes, or when the Petitioners seek to prevent the Respondent from engaging in conduct that would harm them with respect to the arbitrations. Additionally, a temporary restraining order can be issued to prevent immediate and irreparable harm to the petitioner until a hearing on the preliminary injunction can be held.

48. By withdrawing without prejudice from the Original FINRA Arbitrations, by objecting to the Pending FINRA Arbitrations and by filing its claims in the AAA Arbitration, United Capital disavowed its obligation under Section 6.1 of the Pre-Dispute Arbitration Agreements and its Submission Agreement to arbitrate the claims before FINRA.

49. In repudiation of its agreement to arbitrate the dispute before FINRA, United Capital now cynically asserts that the dispute is not arbitrable before FINRA (on the basis that it does not agree to arbitrate).

50. Section 6.2, of the Agreements provides in pertinent part that

> "It is further explicitly agreed that, notwithstanding any applicable forum rules to the contrary, to the extent there is a question of enforceability of this Agreement ***arising from a challenge to the arbitrator's jurisdiction or to the arbitrability of a claim, such question shall be decided by a court and not an arbitrator***."

51. This matter involves United Capital's challenge to FINRA jurisdiction and to the arbitrability of the dispute before FINRA and the Petitioners' challenge to AAA jurisdiction (based on the pendency of the FINRA Arbitrations and the lack of jurisdictional predicate) and demand for performance of the Agreements.

52. Accordingly, judicial intervention is now warranted.

53. The purpose of this Petition is to prevent the irreparable harm that will result if Petitioners are forced to arbitrate in a venue to which Petitioners did not agree. In particular, Petitioners will suffer immediate and irreparable harm absent the requested injunctive relief. The Petitioners, having initiated the dispute resolution process under the jurisdiction of FINRA, now confront the untenable prospect of litigating arbitrations bifurcated across two forums, necessitating litigating virtually identical claims—stemming from the same agreements, disputes and transactions—before the AAA (against United Capital) and in FINRA (against FINRA members). The Pending FINRA Arbitrations assert claims against United Capital, and its former affiliates, Goldman Sachs, and, in certain instances, Mercer. All Petitioners (except Mr. Jarvis) hold the status of "associated persons" under FINRA, whereas Goldman Sachs and Mercer are "member firms" and are subject to FINRA's mandatory arbitration rules (Rule 13200). As such, the Petitioners are mandated by regulation to resolve their grievances against Goldman Sachs and Mercer in FINRA. Petitioners' are mandated by contract to resolve all Employment Agreement disputes against United Capital in FINRA.

54. The Petitioners would suffer irreparable harm if forced to participate in the AAA Arbitration while actively participating in the Pending FINRA Arbitrations involving

substantially the same dispute. Such bifurcation introduces a significant risk of inconsistent, conflicting, and contradictory results arising from parallel arbitrations adjudicating the same agreements, disputes, and transactions. The very essence of arbitration—efficiency and finality—is compromised, as the parties could receive divergent decisions on identical issues. Furthermore, this fragmentation exacerbates the logistical and financial burdens on the Petitioners, significantly increasing litigation costs if forced to navigate two distinct sets of procedural rules, overlapping discovery processes, and the requirement to prepare for and attend multiple hearings.

55. Moreover, the separation of potential tortfeasors across different arbitration forums hampers the comprehensive resolution of disputes and could lead to partial remedies that fail to fully address the harm caused to the Advisors. This not only affects the efficiency of the process but also compromises the equity of the outcomes, as the adjudication of related claims in separate forums may prevent a holistic examination of the facts and interconnected liabilities. Thus, the bifurcation of arbitrations, against the backdrop of a clear contractual agreement for FINRA arbitration, exposes the Petitioners to a labyrinth of procedural and substantive complexities, underlining the irreparable harm requiring injunctive relief to maintain the integrity of the arbitration process as originally agreed upon by the parties.

CLAIMS FOR RELIEF

First Claim
[FAA – Specific Performance of Respondent's Obligation to Submit to FINRA Arbitration]

56. Petitioners reallege every allegation made in the preceding paragraphs as though fully set forth herein.

57. The Agreements govern United Capital's employment of Petitioners to provide investment advisory, financial planning, consulting, investing and other services involving commerce within the meaning of § 1 of the Federal Arbitration Act.

58. Under the Federal Arbitration Act, the Pre-Dispute Arbitration Agreements are valid, irrevocable and enforceable. 9 U.S.C. § 2.

59. The subject matter of the Pending FINRA Arbitrations and the AAA Arbitration encompass a "dispute, controversy or claim arising out of or based upon or relating in any way to this Agreement, or to Advisor's employment or other association with the firm, or the termination of Advisor's employment."

60. The disputes, controversies and claims at issue in the Pending FINRA Arbitrations and the AAA Arbitration are arbitrable before FINRA.

61. United Capital breached the Pre-Dispute Arbitration Agreements by commencing the AAA Arbitration and seeking dismissal of the Pending FINRA Arbitrations.

62. If the making of an agreement for arbitration or a party's failure to comply with the agreement is not in issue, a court "shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

63. Section 4 of the Federal Arbitration Act authorizes the Court to compel specific performance of United Capital's obligation to submit its claims and defenses for arbitration in FINRA's forum. *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co*., 613 F.2d 468, 472 (2d Cir. 1980) ("Applying the federal policy of the Arbitration Act, a federal court is entitled to adjudicate 'issues relating to the making and performance of the agreement to arbitrate,' and it is empowered to grant specific performance of the agreement to arbitrate." (internal citation omitted)); *see also*

Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010) (explaining that the FAA requires courts to enforce arbitration agreements "according to their terms").

64. Petitioners are entitled to an order under § 4 of the Federal Arbitration Act compelling specific performance of United Capital's promise under the Pre-Dispute Arbitration Agreements to submit its claims and defenses to FINRA for arbitration.

Second Claim
[New York Law – Specific Performance of Respondent's Obligation to Submit to FINRA Arbitration]

65. In the alternative, Petitioners reallege every allegation made in the preceding paragraphs as though fully set forth herein.

66. Under New York law, "[a] written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award." C.P.L.R. § 7501 (2024).

67. Under New York law, a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, a New York court "shall direct the parties to arbitrate." C.P.L.R. § 7503(a) (2024).

68. Under § 7503(a), Petitioners have "the right to compel specific performance of the promise to arbitrate matters within the scope of the agreement. *Lummus Co. v. Commonwealth Oil Refining Co.*, 195 F.Supp. 47, 53 (S.D.N.Y. 1961) (decided under prior law).

69. In the alternative, Petitioners are entitled to an order under § 7503(a) compelling specific performance of United Capital's promise under the Pre-Dispute Arbitration Agreements to submit its claims and defenses to FINRA for arbitration.

Third Claim
(FAA - Injunctive Relief Against the AAA Arbitration)

70. Petitioners reallege every allegation made in the preceding paragraphs as though fully set forth herein.

71. AAA served Petitioners with United Capital's Statement of Claim, which is duplicative of, and inextricably intertwined with the claims and defenses at issue in the Pending FINRA Arbitrations.

72. Petitioners are likely to succeed on the merits of their claim because the plain language of the Arbitration Agreements requires arbitration of the claims at issue in FINRA, not AAA, which is confirmed by, among other things, United Capital's and Goldman's initiating their own actions against Petitioners in FINRA and signing five Submission Agreements acknowledging FINRA's jurisdiction.

73. Petitioners will be irreparably harmed by having to arbitrate the same claims and defenses concurrently in both the Pending FINRA Arbitrations and the AAA Arbitration.

74. A court is authorized to grant injunctive relief pending arbitration. *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 910 F.2d 1049, 1052 (2d Cir. 1990).

75. The Court should preliminarily enjoin the AAA Arbitration pending a final judgment under the Federal Arbitration Act disposing of this proceeding.

76. The Court should permanently enjoin the AAA Arbitration as relief ancillary to its final judgment under the Federal Arbitration Act compelling specific performance of United Capital's promise to submit its claims and defenses to FINRA for arbitration in its forum.

Fourth Claim
(New York Law - Injunctive Relief Against the AAA Arbitration)

77. Petitioners reallege every allegation made in the preceding paragraphs as though fully set forth herein.

78. A court is authorized to grant injunctive relief pending arbitration pursuant to C.P.L.R. §§ 7502(c) and 6301.

79. The Court should preliminarily enjoin the AAA Arbitration pending a final judgment under New York's Arbitration Law disposing of this proceeding.

80. The Court should permanently enjoin the AAA Arbitration as relief ancillary to its final judgment under C.L.P.R. § 7503(a) compelling specific performance of United Capital's promise to submit its claims and defenses to FINRA for arbitration in its forum.

RELIEF REQUESTED

The Court should enter a final judgment in Petitioners' favor and against United Capital:

A. compelling United Capital to submit its dispute with Petitioners under the Agreements with FINRA for arbitration pursuant to FINRA's Code of Arbitration Procedure for Industry Disputes;

B. preliminarily and permanently enjoining United Capital against submitting its dispute with Petitioners under the Agreements with any forum other than FINRA and against maintaining and prosecuting the AAA Arbitration;

C. Awarding Petitioners their attorneys' fees and costs; and

D. awarding Petitioners such other relief as the Court deems just and proper.

Dated: March 26, 2024.

Respectfully submitted,

Dated: New York, New York
March 26, 2024

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

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Attorneys for Petitioners

VERIFICATION

STATE OF NEW YORK)
: SS:
COUNTY OF NEW YORK)

JENNIFER J. BARRETT, an attorney duly admitted to practice in the courts of the State of New York, hereby deposes and says:

1. I am a partner at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, counsel for Petitioners in the within proceeding.

2. I have read the foregoing Petition and, to my knowledge, its contents are true, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

3. The reason why the verification is not made by Petitioners is that there are two or more parties united in interest and pleading together and none of them acquainted with the facts is within New York County.

JENNIFER J. BARRETT

Sworn to before me this
26 day March, 2024

Notary Public

CAROLANN SCOTT
Notary Public – State of New York
No. 01SC6330055
Qualified in Rockland County
My Commission Expires 5/15/2024