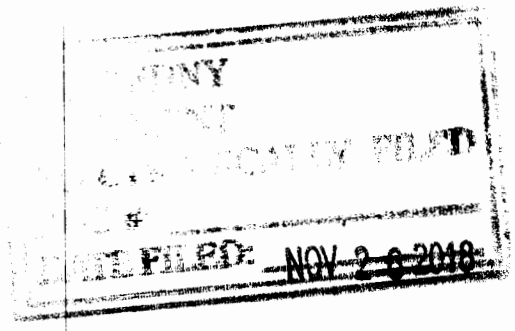

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HEATH JUSTIN HARRIS,

Petitioner,

-against-

WELLS FARGO CLEARING SERVICES, LLC,

Respondent.

MEMORANDUM DECISION AND ORDER

18 Civ. 4625 (GBD)

GEORGE B. DANIELS, United States District Judge:

Petitioner Heath Justin Harris petitions to vacate an Award entered against him in a FINRA arbitration brought by Respondent Wells Fargo Clearing Services, LLC ("Wells Fargo"). (ECF No. 5.) Wells Fargo cross-petitions to confirm the Award. (ECF No. 20.) Harris's petition is DENIED. Wells Fargo's cross-petition is GRANTED.

I. FACTUAL BACKGROUND

On July 31, 2015, and October 1, 2016, the parties executed two promissory notes (the "Notes").[1] (Pet., ECF No. 5, ¶ 11; *id.* Exs. A & B, ECF Nos. 5-2 & 5-3.) The Notes state that an "Event of Default" will occur if Harris's "employment with [Wells Fargo] ends for any reason or for no reason." (Pet., Ex. A § 1.) Each Note further states that an "Event of Default" permits Wells Fargo to, "at its option, declare the entire unpaid principal balance of this Note immediately due and payable." (*Id.* § 2.) Each of the Notes also contains an arbitration provision, which states that the parties "agree that any actions or claims instituted as a result of . . . any controversy arising

[1] The Notes are between Harris and "Wells Fargo Advisors, LLC, its affiliates, successors, and assigns." (*See* Pet., Ex. A at 1.) Because the substantive provisions of the Notes are identical, only the July 31, 2015 Note is cited hereafter. "Wells Fargo Advisors" is a business name used by Wells Fargo Clearing Services, LLC. (Cross-Pet., ECF No. 20, ¶ 5.)

out of, or in connection with, the validity, enforcement, or construction of this Note . . . shall be resolved by arbitration under the then-current Rules of the Financial Industry Regulatory Authority ('FINRA') . . . ."[2] (*Id.* § 7.)

On July 21, 2017, Harris terminated his employment with Wells Fargo and joined Citigroup Global Markets, Inc. ("Citigroup"). (Cross-Pet. ¶ 11; *see also* Omnibus Mem. of Law in Supp. of Cross-Pet. ("Wells Fargo Reply"), Ex. C ("Pet. Resp. to Discovery Reqs."), ECF No. 28-3, at 20 (response to request for admission).) In August 2017, Harris provided Wells Fargo with his new business address. (Cross-Pet. ¶ 13; *see also* Pet. Resp. to Discovery Reqs., at 20–21.)

On August 18, 2017, Wells Fargo sent a letter to Harris at the business address that Harris had provided. (Cross-Pet. ¶ 14.) The letter requested that Harris pay the balance due on the note "within ten (10) business days" and stated that "if this matter is not resolved within the time frame specified above, Wells Fargo will initiate proceedings against you in order to secure payment." (Aff. of Carolyn LaMar dated Oct. 29, 2018 ("LaMar Aff."), Ex. 3 ("Demand Letter"), ECF No. 28-2, at 16.[3]) Harris admits that he received the August 18, 2017 letter. (Pet. Resp. to Discovery Reqs. at 17–18.) However, Harris asserts that he did not receive the letter until May 1, 2018.[4] (Pet.'s Reply to Def.'s Opp'n, ECF No. 29, at 4–5.)

---

[2] Wells Fargo is a FINRA member and Harris is an "associated person." (Mem. in Supp. of Pet. ("Mem."), ECF No. 4, ¶ 14; Cross-Pet. ¶ 4.) The petition describes Harris as an "affiliated person," (*see* Pet. ¶ 5), but this appears to be a typographical error. (*See id.* ¶ 24 (referring to FINRA rules governing "service of an associate [sic] person").

[3] Each of the affidavits filed in this action includes multiple exhibits as part of the same document. The cited page numbers refer to the pages of the entire document, rather than the pages of the individual exhibits.

[4] The interrogatory response that Harris cites does not appear to support his assertion. The interrogatory asks "the date when [Harris] first became aware of the Arbitration," not when Harris first became aware of the underlying claim. (*See* Pet. Resp. to Discovery Reqs. at 5.) Harris's response to Wells Fargo's request for an admission that he received the August 18, 2017 letter does not state when the letter was received. (*Id.* at 17–18.)

Wells Fargo asserts that on October 4, 2017, when it did not receive a response to the August 18, 2017 letter, it sent a second demand letter to Harris's business address that included a draft Statement of Claim.[5] (Cross-Pet. ¶ 14; *see also* LaMar Aff., Ex, 5, at 21.)

In November 2017, Wells Fargo filed a FINRA Statement of Claim against Harris alleging that he had failed to pay the balance due under the Notes. (Pet. ¶ 9; *id.*, Ex. D, ECF No. 1-4 ("Award").[6]) Wells Fargo mailed a copy of the Statement of Claim to Harris at his business address. (Pet. ¶ 13; *see also* Aff. of Stephen Burns dated Oct. 29, 2018 ("Burns Aff."), Ex. 1, ECF No. 28-4, at 6–12.)

FINRA mailed a Claim Notification Letter, dated November 27, 2017, and a copy of the Statement of Claim to Harris at his recorded residential address. (Pet. ¶ 16; *see also* Burns Aff., Ex. 5 ("Claim Notification Letter"), at 59–66.) At the time the Statement of Claim was filed, Harris was no longer residing at that residential address. (Pet. ¶ 14.) However, Harris does not dispute that the residential address to which FINRA mailed the Claim Notification Letter was the most recent residential address in FINRA's Central Registration Depository ("CRD") system and listed on Harris's FINRA Form U4.[7] (*See id.* ¶ 36 (acknowledging that an update to his CRD

---

[5] It is unclear whether Harris received the October 4, 2017 demand letter. In response to one of Wells Fargo's interrogatories, Harris asserted that he received the October 4, 2017 demand letter on May 1, 2018, when he asked Citigroup's branch manager to review its old records. (Pet.'s Resp. to Discovery Reqs. at 5–6.) However, at oral argument, Harris's counsel stated that he did not "claim [Harris] didn't get that second demand letter in or about the time that [Wells Fargo] sent it." (Transcript of Oral Argument dated Nov. 15, 2018 ("Oral Arg. Tr.") at 37:12–14.)

[6] The petition alleges that the Statement of Claim was filed "on or about November 6, 2017." (Pet. ¶ 9.) However, the Award states that the Statement of Claim was filed on November 3, 2017. (Award at 1.)

[7] The "Form U4 Uniform Application for Securities Industry Regulation or Transfer ('Form U4')" must be completed "[i]n order to register" with FINRA as an associated person. *Ironson v. Ameriprise Fin. Servs., Inc.*, No. 11 Civ. 899 (JBA), 2012 WL 3940141, at *2 (D. Conn. Sept. 10, 2012); *see also* FINRA Bylaws art. V, § 2(a) ("Application by any person for registration with [FINRA] . . . shall be made . . . on the form to be prescribed by [FINRA] . . . .").

"never occurred"); *see also* Claim Notification Letter; Burns Aff., Ex. 4 ("Pet.'s Form U4"), ECF No. 28-4, at 40–57 (Petitioner's FINRA Form U4 dated November 28, 2018).)

Harris asserts that before the Statement of Claim was filed, he "advised [his] employer at the time . . . to update . . . [his] Form U4 to reflect [his] new address" and that his employer "was directed to change [his] address through the FINRA Central Registration Depository ('CRD') system." (Affidavit of Heath Justin Harris dated May 23, 2018 ('Harris Aff."), ECF No. 4-4, ¶¶ 15–16.) As support for this assertion, Harris cites an email dated July 26, 2017, which states, "Below you will find the requested information."[8] (*Id.* (citation omitted); July 26, 2017 Email.) The email lists five items. (July 26, 2017 Email.) The fifth item states, "(5) Information Requested" and contains a list of five sub-items, one of which is an address different from the residential address to which the Statement of Claim was mailed by FINRA. (*Id.*) The email does not request that Harris's address be updated and does not mention Harris's Form U4 or FINRA's CRD system.

Harris did not respond to the Statement of Claim or participate in the arbitration. (Pet. ¶¶ 16–17.) On April 23, 2018, an Award was entered against Harris in the amount of $362,641.73 plus interest. (*Id.* ¶ 33; *see also* Award.) The Award stated that "the Arbitrator determined that [Harris] was served with the Statement of Claim, an Overdue Notice and Notification of Arbitrator by regular mail, and is therefore bound by the Arbitrator's ruling and determination." (Award at 2.) Harris asserts that he did not receive a copy of the Award but subsequently discovered the Award online. (Pet. ¶¶ 18–19.)

[8] It is unclear what information was requested, as the email that Harris was responding to is not part of the exhibit to his petition. (*See* Harris Aff., Ex. C ("July 26, 2017 Email"), at 15.)

Harris petitions to vacate the Award on the grounds that the Arbitrator "exceeded [her] authority due to FINRA's numerous failures to serve process properly pursuant to FINRA § 12301(a) [sic]" and because "such a failure was a manifest disregard of the law."[9] (Mem. ¶ 64.)

II. LEGAL STANDARDS

Under the Federal Arbitration Act ("FAA"):

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected, as prescribed in Sections 10 and 11 of this title.

9 U.S.C. § 9. "To ensure that 'the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation' are met, arbitration awards are subject to 'very limited review.'" *NYKCool A.B. v. Pac. Fruit, Inc.*, 507 F. App'x 83, 85 (2d Cir. 2013). "[A]s a general matter, a court is required to enforce the arbitration award as long as there is a 'barely colorable justification for the outcome reached.'" *Leeward Constr. Co., Ltd. v. Am. Univ. of Antigua-Coll. of Med.*, 826 F.3d 634, 638 (2d Cir. 2016) (quoting *Banco Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 260 (2d Cir. 2003)).

"The party challenging the award bears the heavy burden of showing that the award falls within a very narrow set of circumstances delineated by statute and case law that warrant vacatur." *Id.* As relevant here, § 10(a)(4) of the FAA provides that a district court "may make an order vacating the award . . . where the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). "The focus of [the court's] inquiry in challenges . . . under [§] 10(a)(4) is whether the arbitrators had the

[9] Petitioner uses the pronoun "his," (Mem. ¶ 64), but the arbitrator who signed the Award is female. (*See* Award at 3.)

power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, *not whether the arbitrators correctly decided that issue*." *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 122 (2d Cir. 2011) (citation and internal quotation marks omitted).

"In addition, as 'judicial gloss on the[] specific grounds for vacatur of arbitration awards'" enumerated in the FAA, a "court may set aside an arbitration award if it was rendered in 'manifest disregard of the law.'" *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 451 (2d Cir. 2011) (quoting *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 340 (2d Cir. 2010)). "A court may vacate an arbitral award on this ground only if the court 'finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case.'" *Zurich*, 811 F.3d at 588 (quoting *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004)).

III. THE AWARD IS CONFIRMED

The arbitration clause in the Notes provided for "arbitration under the then-current rules of [FINRA]." (Pet., Ex. A, § 7.) Harris is an "associated person" within the meaning of FINRA Rules. (Mem. ¶ 14.) FINRA Rule 13301(a) provides:

> The Director will serve the Claim Notification Letter on an associated person directly at the person's residential address or usual place of abode. If service cannot be completed at the person's residential address or usual place of abode, the Director will serve the Claim Notification Letter on the associated person at the person's business address.

Article V, § 2(c) of FINRA's Bylaws provides that the Form U4, through which an associated person provides FINRA with his residential and business address, "shall be kept current at all times by supplementary amendments . . . . filed with [FINRA] not later than 30 days after learning of the facts or circumstances giving rise to the amendment." FINRA Bylaws, art. V, § 2(c). FINRA has stated that "[t]he duty to maintain an accurate Form U4 lies primarily with an associated person

who is in the best position to provide information about the questions presented in the form." *In re N. Woodward Fin. Corp.*, Exchange Act Release No. 74913, 111 SEC Docket 2348, 2015 WL 2151765, at *9 (May 8, 2015).

Harris argues that "the [A]ward should be vacated as the arbiter [sic] exceeded [her] authority due to FINRA's numerous failures to serve process pursuant to FINRA § 12301(a) [sic]." (Mem. ¶ 64.) Harris also argues that the Award was entered in "manifest disregard of law." (*Id.*) However, Harris does not deny that FINRA sent the Claim Notification Letter and related materials to the residential address listed on his Form U4.[10] (*See* Pet. ¶ 64; Pet.'s Form U4.) Courts in this district and elsewhere have found that a Claim Notification Letter is "properly served when . . . mailed . . . to the residence [the associated person] provided on his U4 form."[11] *Marsillo v. Geniton*, No. 03 Civ. 2117 (TPG), 2004 WL 1207925, at *6 (S.D.N.Y. June 1, 2004); *see also Longview Fin. Grp. Inc. v. Branyan*, No. 13 Civ. 2412 (PHX) (GMS), 2015 WL 251492, at *1 (D. Ariz. Jan. 20, 2015) (confirming award where a Statement of Claim was "sent by certified mail to the address listed on [the associated person's] Form U-4" and the associated person "provided no evidence, apart from her bare allegations . . . , that service was not effected"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Blackburn*, Index No. 653273/2011, 2013 N.Y. Misc. LEXIS 6741, at *7, *12 (N.Y. Sup. Ct. N.Y. Cnty. July 15, 2013) (confirming award when "FINRA served [the associated] person with the [a]ward by mailing a copy to the . . . address" listed on his Form U4).

---

[10] At oral argument, Harris asserted that the Claim Notification Letter should have been sent by certified mail, rather than regular mail. However, Rule 13301 does not require the Claim Notification Letter to be served on the respondent by any particular method. *See* FINRA Rule 13301(a). FINRA Rule 13300(d), which governs service of documents "produced during discovery," provides that "[a]vailable methods for such documents are first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile." FINRA Rule 13300(d)(2).

[11] Although the quoted case involves FINRA's predecessor, the National Association of Securities Dealers ("NASD"), the FINRA and NASD Rules for service of process on an associated person are identical. (*Compare* FINRA Rule 13301(a), *with* NASD Rule 13301(a).)

Any failure to receive the Claim Notification Letter is attributable to Harris's failure to fulfill his obligation to maintain an accurate Form U4, not to FINRA's failure to comply with its rules. Harris asserts that "notifying his employer of his address triggered his employer's duty to update Harris's [Form] U4." (Reply at 3.) In support of this argument, Harris notes that the SEC has recognized that "a member, which is required to file the Form U4, also is subject to th[e] duty" to ensure that the form is accurate. (*Id.* at 2 (quoting *N. Woodward Fin. Corp.*, 2015 WL 2151765, at *9).) However, FINRA has explained that informing a member of information that would require an update to an associated person's Form U4 "d[oes] not satisfy [the associated person's] *personal* obligation to make sure his Form U4 [i]s up to date." Hearing Panel Decision, *Dep't of Enforcement v. Langweiler*, FINRA Disciplinary Proceeding No. 201102954201, 2017 WL 1547253, at *11 (Mar. 17, 2017) (emphasis added).

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Blackburn*, upon which Harris relies, a New York state court confirmed an arbitration award on similar facts. (*See* Mem. ¶¶ 41, 55–58 (citing *Blackburn*, 2013 N.Y. Misc. LEXIS 6741, at *14, *17).) In that case, the named respondent claimed that his former employer was "aware that he was no longer residing at the . . . address" listed on his Form U4 because his resignation letter requested that a Form U5 be sent to a new address. *Id.* at *13. However, the court noted that the employer was not on notice that Blackburn's address had changed, because the letter did not "identif[y] this address as Blackburn's residence, . . . and d[id] not indicate that it should be used for any purpose other than forwarding a U5 Form." *Id.* at *15. The court rejected Blackburn's "assert[ion] that the duty to update[] his address lay with [the former employer] and not with himself," finding that it "ignores the clear mandate found in Article [V], Section 2(c)" of the FINRA Bylaws. *Id.* at *14. The court explained that Blackburn "does not dispute that he provided [his] address to FINRA in the first instance or

that he failed to update it as required under the FINRA By-laws. As such, Blackburn clearly was at fault for not informing FINRA of his change of address." *Id.* at *15.

Harris asserts that his case is distinguishable from *Blackburn* because "he took the steps required to update his CRD." (Mem. ¶ 59.) However, the email that Harris sent to his employer does not "indicate that [the address] should be used for any" particular purpose, and does not mention the CRD system or Harris's Form U4. *Blackburn*, 2013 N.Y. Misc. LEXIS 6741, at *13. Here, as in *Blackburn*, Harris's "assert[ion] that the duty to update[] his address lay with [his employer]" is without merit. *Id.* at *14.

Because the court in *Blackburn* found that the petition was not timely filed, it did not address whether the arbitrator had exceeded his powers. *See id.* at *16–17. However, in *Staples v. Morgan Smith Barney*, a Montana district court explained that "[a]s a registered associate of a FINRA member, it was [the associated person's] responsibility to maintain proper addresses for all FINRA communications" and "[t]he arbitrator's finding that service was properly made and [the associated person] should therefore be bound by the arbitrator's ruling and determination [wa]s not in excess of the arbitrator's powers" or in manifest disregard of the law. No. 13 Civ. 13 (CCL), 2013 WL 5786593, at *6 (D. Mont. Oct. 28, 2013).

In *Staples*, a Statement of Claim was sent to the "residential address listed for [the associated person] in the FINRA CRD" and, when that mailing was returned as undeliverable, by "mailing it to [the associated person's] office address." 2013 WL 5786593, at *1. Harris argues that here, as in *Staples*, the Statement of Claim should have been sent to his business address.[12]

[12] Additionally, Harris contends that *Staples* does not control because it "uses as its measuring stick to determine if service was completed properly, FINRA's Arbitration Code §[§] 13300(d) and (e)." (Reply at 4.) Harris is incorrect. *Staples* cites FINRA Rules 13300(d) and (e) in discussing the *channels* through which process may be served (*i.e.*, by "first class mail or overnight mail" or "email"). *Staples*, 2013 WL 5786593, at *7. However, in discussing the *addresses* at which process may be served, *Staples* cites Rule

(*See* Pet. ¶¶ 25–27.) However, FINRA Rule 13301(a) only requires service at a business address "[i]f service cannot be completed at the person's residential address." Harris asserts that "FINRA must have received returned mail" sent to his residential address of record.[13] (Mem. ¶ 54.) However, Harris does not plead any facts to support this assertion. Wells Fargo asserts that in response to a subpoena, FINRA did not produce "any documents or information showing that mail sent to Harris's residential address of record was returned to FINRA."[14] (Burns Aff. ¶ 7); *cf. Hansalik v. Wells Fargo Advisors, LLC*, No. B232151, 2012 WL 1423014, at *1 (Cal. Ct. App. Apr. 25, 2012) (affirming vacatur of award where, "[d]espite the knowledge that [an associated person] had moved out of the United States, FINRA persisted in mailing various arbitration notices to [the associated person's] former residential address in California" and "the Post Office returned the mail to FINRA as undelivered").

Harris also argues that the Award should be vacated "[u]nder the principle[s] of fairness and due process," because he did not receive notice of the proceedings against him.[15] (Mem. ¶¶ 16,

---

13301(a), which Harris concedes is applicable here. *Id.* at *1. Although the petition refers to "FINRA § 12301," the text that it quotes is from FINRA Rule § 13301(a). (Pet. ¶ 24; *see also* Mem. ¶ 15 (same).)

[13] At oral argument, Harris asserted that FINRA also should have been aware that he did not receive the Claim Notification Letter because he did not log in to FINRA's Dispute Resolution Portal. (Oral Arg. Tr. at 7:24–8:14.) This assertion is meritless. The mere fact that Harris did not access the portal would not have provided FINRA with a basis to conclude that service was not validly effected, because FINRA would have no way of knowing whether Harris's failure to log in to the portal was attributable to a failure to receive the Claim Notification Letter or a deliberate decision not to respond.

[14] The subpoena requested, among other things, "[a]ll documents related to service of the Statement of Claim by FINRA on, or notice of any kind sent from FINRA to, Heath Justin Harris," including "notifications related to the return of such mail." (Subpoena, ECF No. 23-1, at 4 ¶ 1.)

[15] Harris's assertion that he "had no notice of the arbitration proceedings," (Mem. ¶ 16), appears to be a reference to formal notice by service of process, rather than actual notice. At oral argument, Harris's counsel conceded that Harris did not "claim that he did not get that filed [S]tatement of [C]laim that was mailed by Wells Fargo," nor did Harris "claim that he didn't get that [Statement of Claim] in . . . or around November 3." (Oral Arg. Tr. at 37:18–23.) Harris's counsel also acknowledged that Harris was "not claiming he wasn't aware" of the arbitration proceeding at issue. (*Id.* at 18:10–11; *see also id.* at 19:6–11 (same).)

62.) However, "[d]ue process does not require perfect or actual notice." *Yukos Capital S.A.R.L. v. OAO Samaraneftegaz*, 963 F. Supp. 2d 289, 296 & n.7 (S.D.N.Y. 2013) (citing *Mullane v. Centr. Hanover Bank & Trust Co.*, 339 U.S. 306, 314–15 (1950)), *aff'd sub nom. Yukos Capital S.A.R.L. v. Samaraneftegaz*, 592 F. App'x 8 (2d Cir. 2014). It requires "only 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Yukos*, 592 F. App'x at 11 (quoting *Jones v. Flowers*, 547 U.S. 220, 226 (2006)).

At least one New York state court has found that "notices sent to [an associated person] at the . . . address that she provided to FINRA for service of process . . . were reasonabl[y] calculated to apprise the respondent of the pendency of the arbitration . . . ." *New Brunswick Theological Seminary v. Van Dyke*, Index No 600869/2018, 2018 WL 3940118, at *4 (N.Y. Sup. Ct. Suffolk Cnty. 2018) (citing *Beckman v. Greentree Sec., Inc.*, 663 N.E.2d 886 (N.Y. 1996) (finding "mailed service upon [an NASD member] of [an] arbitration claim was a means reasonably calculated to provide notice" to an associated person)).

Here, because mailing the Claim Notification Letter to the residential address in FINRA's records was a means "reasonably calculated . . . to apprise [Harris] of the pendency of" the arbitration, confirmation of the Award will not violate due process. *Yukos Capital*, 592 F. App'x at 11.

IV. CONCLUSION

Harris's petition to vacate the Award, (ECF No. 5), is DENIED. Wells Fargo's cross-petition to confirm the Award, (ECF No. 20), is GRANTED.

Dated: November 26, 2018
New York, New York

SO ORDERED.

GEORGE B. DANIELS
United States District Judge