

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

VASU D. ARORA,
Plaintiff,
v.
TD AMERITRADE, INC.,
Defendant.

No. CV 10-01216 CW
ORDER DENYING
PLAINTIFF'S MOTION
TO VACATE
ARBITRATION AWARD
AND GRANTING
DEFENDANT'S MOTION
TO DISMISS

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Plaintiff Vasu D. Arora has filed a complaint and a motion to vacate an arbitration award entered in favor of Defendant TD Ameritrade, Inc. Defendant opposes the motion and has filed a motion to dismiss Plaintiff's complaint. The matter was taken under submission on the papers. Having considered all of the papers filed by the parties, the Court DENIES Plaintiff's motion to vacate the arbitration award and GRANTS Defendant's motion to dismiss.

BACKGROUND

On September 20, 2006, Plaintiff opened an individual account with Defendant that allowed him to deposit cash into his account with which to buy and sell securities, including options. Daniels

1 Decl. Ex. 6, May 3, 2010.¹ On December 14, 2006, Plaintiff added
2 margin features to his account, which allowed him to use the value
3 of cash and securities in his account as collateral for a loan from
4 Defendant with which he could purchase additional securities. Id.
5 Ex. 7. The terms of Plaintiff's margin features required that he
6 hold in his account a "margin maintenance level," which is a
7 balance equal to a percentage of the amount he had been loaned.
8 The terms also alerted Plaintiff that Defendant, at any time and
9 without warning, could force the sale of securities in the account
10 to meet the required minimum balance. Id. Ex. 32 at 5, ¶ 9. The
11 terms also contained an arbitration provision, which required both
12 parties to forfeit the right to bring suit in court and agree to
13 arbitrate any dispute. Id. Ex. 5 at 13-14, ¶¶ 92-93.

14 On April 12, 2007, Defendant issued a margin call on
15 Plaintiff's account because the value of assets in his account fell
16 below the margin maintenance level. Id. Ex. 11 at 1. As a result
17 of the margin call, Plaintiff sold 5,000 shares of Dendreon Corp.
18 stock. Id. Ex. 11 at 2. On August 12, 2008, Plaintiff filed a
19 claim with the Dispute Resolution Forum of the Financial Regulatory
20 Association (FINRA), in accordance with the terms of his account.
21 Id. Ex. 15. On June 29, 2009, Plaintiff filed an amended claim.
22 Id. Ex. 2. His amended claim charged that Defendant and its CEO
23 Joe Moglia withheld and misrepresented information, failed to

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25 ¹ The Court grants Defendant's Request for Judicial Notice of
26 Exhibits 2, 4, 10-27, 30 and 31 to the Declaration of Brad S.
27 Daniels, May 3, 2001. These documents were filed in the
28 arbitration, and the Court takes judicial notice of their
existence, but not of the truth of the matters asserted therein.
Simmons v. Am. Airlines, 2002 WL 102604, *1 (N.D. Cal.)

1 provide trained or credible brokers, compelled the liquidation of
2 his portfolio, recorded phone conversations without his consent in
3 violation of California law, caused financial harm to an elder in
4 violation of California law, and violated federal securities laws
5 and regulations as well as Defendant's own policies. Daniels Decl.
6 Ex. 2 at 6-7.

7 FINRA appointed a panel of arbitrators to adjudicate
8 Plaintiff's claims. Id. Ex. 4 at 4. On December 3 and 4, 2009,
9 the panel conducted a hearing on the matter. Plaintiff testified
10 on his own behalf and did not call additional witnesses. Id. Ex.
11 27 at 1-7. Defendant moved to dismiss all of Plaintiff's claims
12 against both itself and Moglia on the grounds that they were
13 unsupported by the evidence and that the claim of illegally
14 recording phone calls was barred by the statute of limitations.
15 Id. Ex. 27 at 8-11. Plaintiff opposed the motion. Id. Ex. 27
16 at 11-19.

17 The panel granted Defendant's motion to dismiss all claims
18 against Moglia. Id. Ex. 27 at 22. The panel granted in part and
19 denied in part Defendant's motion to dismiss the claims against
20 itself, finding that the one-year statute of limitations had run on
21 the call-recording claim, but allowing Plaintiff's other claims to
22 proceed. Id. Ex. 27 at 22-23. However, the panel indicated that
23 it would reconsider its ruling on Defendant's motion to dismiss
24 Plaintiff's call-recording claim if Plaintiff could provide
25 compelling authority that the claim was not barred by the statute
26 of limitations. Id. Ex. 27 at 24-25.

27 On December 4, 2009, Plaintiff submitted CashCall, Inc. v.
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1 Superior Court, 159 Cal. App. 4th 273 (2008), and Bunnell v.
2 Department of Corrections, 64 Cal. App. 4th 1360 (1998), and argued
3 that these cases established that his claims were not time-barred.
4 Daniels Decl. Exs. 28, 29; Pl.'s Am. Mem. P. & A. Supp. Mot. Vacate
5 at 3. After considering this authority, the panel affirmed its
6 earlier decision to dismiss the call-recording claim. Daniels
7 Decl. Ex. 27 at 49.

8 Before issuing its order on the other claims, the panel asked
9 both parties if they were satisfied that they had had the
10 opportunity to present all evidence. Id. Ex. 27 at 70. Both
11 parties responded affirmatively. Id. Ex. 27 at 70. On December
12 22, 2009, the panel issued an award denying all of Plaintiff's
13 claims for relief. Id. Ex. 4 at 2. Plaintiff now challenges the
14 validity of the panel's decision.

15 LEGAL STANDARD

16 The Federal Arbitration Act (FAA) supplies mechanisms for
17 enforcing arbitration awards: a judicial decree confirming an
18 award, an order vacating it, or an order modifying or correcting
19 it. 9 U.S.C. §§ 9-11. These three provisions, §§ 9-11,
20 substantiate a national policy favoring arbitration subject to
21 limited review in order to preserve arbitration's essential
22 function of resolving disputes effectively and efficiently. Hall
23 St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 588 (2008).

24 "Any other reading opens the door to legal and evidentiary appeals
25 that can 'rende[r] informal arbitration merely a prelude to a more
26 cumbersome and time-consuming judicial review process,' and bring
27 arbitration theory to grief in post-arbitration process." Hall

1 St., 552 U.S. at 588 (quoting Kyocera Corp. v. Prudential-Bache
2 Trade Services, Inc., 341 F.3d 987, 998 (9th Cir. 2003)).

3 Title 9 U.S.C. § 10 provides the exclusive grounds for
4 vacating an arbitration award. Hall St., 552 U.S. at 584; U.S.
5 Life Ins. Co. v. Superior Nat'l Ins. Co., 591 F.3d 1167, 1173 (9th
6 Cir. 2010). Section 10 provides that:

7 (a) In any of the following cases the United States court in
8 and for the district wherein the award was made may make an
9 order vacating the award upon the application of any party to
10 the arbitration-

11 (1) where the award was procured by corruption, fraud, or
12 undue means;

13 (2) where there was evident partiality or corruption in
14 the arbitrators, or either of them;

15 (3) where the arbitrators were guilty of misconduct in
16 refusing to postpone the hearing, upon sufficient cause
17 shown, or in refusing to hear evidence pertinent and
18 material to the controversy; or of any other misbehavior
19 by which the rights of any party have been prejudiced; or

20 (4) where the arbitrators exceeded their powers, or so
21 imperfectly executed them that a mutual, final, and
22 definite award upon the subject matter submitted was not
23 made.

24 9 U.S.C. § 10. The grounds afforded by section 10 create an
25 extremely limited review authority that is designed to preserve due
26 process but not to permit unnecessary public intrusion into private
27 arbitration procedures. Kyocera Corp., 341 F.3d at 998. Neither
28 erroneous legal conclusions nor unsubstantiated factual findings
justify federal court review of an arbitration award under the
statute. Id. at 994.

In order to provide relatively expeditious and inexpensive
dispute resolution, arbitration is not governed by the federal
courts' strict procedural and evidentiary requirements. Mitsubishi

1 Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628
2 (1985); Kyocera Corp., 341 F.3d at 998. Rather, the court's
3 responsibility is to ensure that the FAA's due process protections
4 were afforded. U.S. Life Ins. Co., 591 F.3d at 1173. Arbitrators
5 enjoy wide discretion to require the exchange of evidence, and to
6 admit or exclude evidence, how and when they see fit. Id. at 1175.
7 Arbitrators are merely required to give each of the parties to the
8 dispute an "adequate opportunity to present its evidence and
9 arguments." Id. (quoting Sunshine Moving Co. v. United
10 Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987)).

11 The burden of establishing grounds for vacating an arbitration
12 award is on the party seeking it. U.S. Life Ins. Co., 591 F.3d at
13 1173.

14 DISCUSSION

15 I. Plaintiff's Motion to Vacate Arbitration Award

16 Plaintiff bases his motion to vacate the arbitration award on
17 four grounds: (1) that the panel improperly refused to hear
18 evidence of the applicable statute of limitations on the call-
19 recording claim; (2) that the panel improperly refused to hear
20 evidence of misconduct by Defendant in opening a margin account for
21 Plaintiff; (3) that by improperly refusing to hear this evidence
22 the panel imperfectly executed its powers so that an award was not
23 made; and (4) that the panel engaged in improper ex parte contact
24 with Defendant during the hearing.

25 A. Statute of Limitations on Call-Recording

26 Plaintiff claims that the panel improperly refused to hear
27 evidence of the applicable statute of limitations on his claim that
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1 Defendant illegally recorded his phone conversations without his
2 consent. Plaintiff contends that the two-year statute of
3 limitations in the federal Electronic Communications Privacy Act
4 preempts the one-year California state statute of limitations, and
5 that the panel refused to consider this despite the case law
6 Plaintiff submitted in support of his position. Plaintiff argues
7 that, in doing so, the panel refused to hear evidence that was
8 pertinent and material to the controversy, which is grounds to
9 vacate the arbitration award under 9 U.S.C. § 10(a)(3).

10 Plaintiff's grievance seems to revolve around the panel's
11 claimed refusal to consider the cases he cited and then rule in his
12 favor, rather than around any failure to consider any evidence he
13 offered. That the panel ultimately found Plaintiff's arguments
14 unpersuasive does not support the inference that it refused to hear
15 pertinent or material evidence in support of his claims. The panel
16 considered Plaintiff's claims of illegal phone recording under
17 California Penal Code sections 632, 637 and 637.5 and in light of
18 the authority Plaintiff submitted to the panel. Nevertheless, the
19 panel found that the statute of limitations had run and granted
20 Defendant's motion to dismiss the call-recording claim. Before
21 concluding the hearing, the panel asked each party if it were
22 satisfied with the opportunity it had to present evidence. Each
23 replied affirmatively. The record indicates that the panel did not
24 refuse to hear Plaintiff's evidence on the issue of recording his
25 phone calls; rather, the panel gave Plaintiff ample opportunity to
26 present such evidence. Plaintiff's claim that the arbitration
27 award should be vacated because the panel refused to hear evidence

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1 pertinent and material to the controversy is unsubstantiated and
2 therefore denied.

3 B. Plaintiff's Margin Account

4 Plaintiff alleges that the panel refused to consider evidence
5 that Defendant extended margin privileges to Plaintiff after he
6 expressly declined them, causing him to suffer financial loss.
7 However, Plaintiff fails to specify the evidence that he sought to
8 admit and that was allegedly denied.

9 Nothing in the record indicates that the panel did not
10 consider Plaintiff's evidence or his testimony. Plaintiff
11 submitted to the panel his emails and letters to Defendant
12 outlining his complaints about his account. Daniels Decl. Exs. 10-
13 13. Plaintiff testified at the hearing that he opened a margin
14 account. Id. Ex. 27 at 4. A copy of the terms of the margin
15 account, signed by Plaintiff, was admitted into evidence. Id. Ex.
16 7. Plaintiff also testified that he was not aware of the terms of
17 his margin account and that he did not discuss the terms until
18 after the liquidation of his account. Id. Ex. 27 at 3-4.
19 Nevertheless, the panel found against him and Plaintiff fails to
20 articulate a viable claim under 9 U.S.C. § 10(a)(3) on this issue.

21 C. Imperfect Execution of Award

22 Plaintiff contends that, by refusing to consider evidence
23 pertinent to the statute of limitations on the call-recording issue
24 and to the margin account issue, the panel so imperfectly executed
25 its powers that a definite award was not made on the matters
26 submitted. Plaintiff also argues that, before the panel denied all
27 of his claims, it partially granted and partially denied his

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1 claims. Plaintiff asserts that granting and then denying his
2 claims constituted a manifest disregard of the law, which resulted
3 in the award not being a mutual, final or definite award.

4 The record of the arbitration hearing does not support
5 Plaintiff's claim that the panel refused to hear his evidence or
6 that the panel reversed its decision on Plaintiff's claims. The
7 transcript of the hearing shows that the panel granted in part and
8 denied in part Defendant's motion to dismiss the claims against it.
9 Daniels Decl. Ex. 27 at 22. The record also shows that the panel
10 accepted Plaintiff's additional authority on the call-recording
11 issue, which it deemed a motion to reconsider. The panel informed
12 Plaintiff it would advise him if the cases persuaded it to change
13 its opinion. The panel ultimately denied Plaintiff's motion. Id.
14 Ex. 27 at 48-49.

15 Section 10(a)(4) allows a court to vacate an arbitration
16 decision if the "arbitrators exceeded their powers." 9 U.S.C.
17 § 10(a)(4). "[A]rbitrators exceed their powers . . . not when
18 they merely interpret or apply the governing law incorrectly, but
19 when the award is completely irrational, or exhibits a manifest
20 disregard of law.'" Schoendube Corp. v. Lucent Techs., Inc., 442
21 F.3d 727, 731 (9th Cir. 2006); (quoting Kyocera Corp., 341 F.3d at
22 997). "'Manifest disregard of the law' means something more than
23 just an error in the law or a failure on the part of the
24 arbitrators to understand or apply the law. It must be clear from
25 the record that the arbitrators recognized the applicable law and
26 then ignored it." Michigan Mut. Ins. Co. v. Unigard Sec. Ins. Co.,
27 44 F.3d 826, 832 (9th Cir. 1995) (internal citation omitted).

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1 The panel provided the due process afforded in 9 U.S.C. § 10
2 and allowed the parties to introduce evidence and plead their
3 cases. The resulting award denying Plaintiff's claims is not
4 completely irrational nor does it exhibit a manifest disregard of
5 law. The panel gave Plaintiff the opportunity to present his case
6 and reviewed the authority he submitted. There is no indication
7 that the panel consciously disregarded applicable law. Therefore,
8 Plaintiff's claim that the award was imperfectly executed fails.

9 D. Ex Parte Contact, Evident Partiality and Actual Bias

10 Plaintiff claims ex parte contact, evident partiality and
11 actual bias on the part of the panel in violation of 9 U.S.C.
12 § 10(a)(2). The evidence he offers on this issue is in his
13 declaration in support of his motion to vacate, where he alleges,

14 On or about Dec. 3-4, 2009, I observed numerous conversations
15 between Defendants, non-attorney employees and company
16 attorneys for TD Ameritrade, Opposing Counsels and members of
17 the Panel during the day and in the evening. Numerous
18 pleasantries, jovial, and subjects of a personal nature such
19 as interpersonal relations (marriage and divorce and other
20 family issues) conversations were exchanged but no such
21 conversations were held with Plaintiff/Claimant. At no time
22 was I made aware of the content of any of these conversations.
23 On the evening of Dec. 3, 2009, defense counsel Rosenbaum
24 stated to me: "I like the Arbitrators" and also "I am pleased
25 with the way the proceedings have gone so far."

26 Arora Decl. in Supp. of Pl.'s Reply to Def.'s Mot. to Vacate ¶ 7.

27 Two attorneys represented Defendant during the arbitration
28 hearing, Brad S. Daniels and Lois O. Rosenbaum. Daniels Decl. Ex.
4 at 1. Mr. Daniels has stated that the only conversations between
defense counsel and panel members that occurred off the record were
during breaks in proceedings, in the presence of Plaintiff, and
consisted of small talk about the weather and San Francisco

1 restaurants. Daniels Decl. ¶ 40. Ms. Rosenbaum's declaration
2 corroborates this. Rosenbaum Decl. ¶ 4.

3 Title 9 U.S.C. section 10(a)(2) provides grounds to vacate an
4 arbitration award "where there was evident partiality or corruption
5 in the arbitrators." The Ninth Circuit has concluded that the
6 legal standard for evident partiality is whether there are "facts
7 showing a 'reasonable impression of partiality.'" New Regency
8 Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1106 (9th
9 Cir. 2007) (quoting Schmitz v. Zilveti, 20 F.3d 1043, 1047 (9th
10 Cir. 1994) (holding that evident partiality existed where an
11 arbitrator's firm had represented the parent company of a party
12 nearly twenty times over thirty-five years, even though the
13 arbitrator was not aware of the relationship)). Most of the cases
14 in which the evident partiality of arbitrators is addressed involve
15 allegations of a conflict of interest that existed prior to
16 arbitration or an arbitrator's failure to disclose a business or
17 personal relationship that could render her impartiality suspect.
18 Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095, United
19 Food and Commercial Workers Union, 834 F.2d 751, 756 (9th Cir.
20 1987).

21 "'Evident partiality' is distinct from actual bias." New
22 Regency, 501 F.3d at 1105. A "'reasonable impression' of
23 partiality is not equivalent to, nor does it imply, a finding of
24 actual bias." Schmitz, 20 F.3d at 1047. In cases alleging actual
25 bias, "the integrity of the arbitrators' decision is directly at
26 issue." Id. "Therefore, the party alleging evident partiality [in
27 actual bias cases] 'must establish specific facts which indicate
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1 improper motives.'" Woods v. Saturn Distrib. Corp., 78 F.3d 424,
2 427 (9th Cir. 1996) (quoting Sheet Metal Workers Int'l Ass'n, Local
3 420 v. Kinney Air Conditioning Co., 756 F.2d 742, 745 (9th Cir.
4 1985)). Such facts include, for example, that specific arbitrators
5 would be more likely than others to decide in favor of one party,
6 or that they would benefit from deciding in favor of that party.
7 Woods, 78 F.3d at 429.

8 Plaintiff does not allege evident partiality of the
9 arbitrators based on a conflict of interest or prior relationships.
10 Rather, Plaintiff alleges evident partiality based on the
11 communications between Defendant's representatives and the panel
12 members. Plaintiff inconsistently declares both that personal
13 matters were discussed among the arbitrators and Defendant's
14 representatives and that he was not aware at any time of the
15 content of the conversations. Either way, this evidence merely
16 points to non-case-related small talk among Defendant's
17 representatives and the panel during breaks from the proceedings
18 and at the end of the day. Declarations submitted by defense
19 counsel confirm this. This is insufficient to amount to evident
20 partiality. Nor does Plaintiff's evidence support an inference of
21 actual bias or improper motive on the part of the arbitrators. He
22 does not assert any specific facts which indicate that panel
23 members had any interest in the outcome of the arbitration. The
24 exchange of pleasantries does not support an allegation of evident
25 partiality or of actual bias against Plaintiff.

1 II. Plaintiff's Complaint

2 The proper procedure for a party seeking to vacate an
3 arbitration award is to file an application to vacate in the
4 district court. 9 U.S.C. § 6 ("an application to the court [under
5 9 U.S.C.] shall be made and heard in the manner provided by law for
6 the making and hearing of motions"); O.R. Sec. Inc. v. Professional
7 Planning Assocs. Inc., 857 F.2d 742, 746 (11th Cir. 2008); see also
8 Sheet Metal Workers' Int'l. Ass'n, Local No. 252 v. Standard Sheet
9 Metal, Inc., 699 F.2d 481, 482-83 (9th Cir. 1983) (noting that,
10 ordinarily, a party opposing an arbitration award must move to
11 vacate the award or be barred from further legal action). If a
12 party to an arbitration award were to challenge the award in the
13 form of a complaint, the proceeding to vacate the arbitration award
14 could develop into full scale litigation. O.R. Sec., 857 F.2d at
15 745. This result is contrary to the goals of arbitration, which is
16 "an encouraged method of dispute resolution" because it provides
17 for "quick and final resolution" of disputes. U.S. Life Ins. Co.,
18 591 F.3d at 1172; Sheet Metal Workers, 699 F.2d at 482.

19 Plaintiff filed a complaint in this case on the same day that
20 he filed his motion to vacate. The Court deems Plaintiff's
21 complaint to be an application to vacate the award. In addition,
22 however, Plaintiff includes claims identical to those he alleged in
23 his arbitration hearing. These claims are barred by res judicata.

24 Plaintiff contends that he raises new claims in his complaint
25 that were not decided in the arbitration hearing, but res judicata
26 bars these claims as well. The Ninth Circuit has held, "'An
27 arbitration decision can have res judicata or collateral estoppel

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1 effect.'" C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100
2 (9th Cir. 1987) (quoting Greenblatt v. Drexel Burnham Lambert,
3 Inc., 763 F.2d 1352, 1360 (9th Cir. 1985)).

4 Res judicata applies when "the earlier suit . . . (1) involved
5 the same 'claim' or cause of action as the later suit, (2) reached
6 a final judgment on the merits, and (3) involved identical parties
7 or privies." Mpoyo v. Litton Electro-Optical Systems, 430 F.3d
8 985, 987 (9th Cir. 2005) (quoting Sidhu v. Flecto Co., 279 F.3d
9 896, 900 (9th Cir. 2002)). Four criteria are used to determine
10 whether a suit involve the same claim or cause of action:

11 (1) whether the two suits arise out of the same transactional
12 nucleus of facts; (2) whether rights or interests established in
13 the prior judgment would be destroyed or impaired by prosecution of
14 the second action; (3) whether the two suits involve infringement
15 of the same right; and (4) whether substantially the same evidence
16 is presented in the two actions. Mpoyo, 430 F.3d at 987. Newly
17 articulated claims based on the same nucleus of facts may still be
18 subject to a res judicata finding if the claims could have been
19 brought in the earlier action. Tahoe Sierra Preservation Council,
20 Inc. v. Tahoe Regional Planning Agency, 322 F.3d 1064, 1078 (9th
21 Cir. 2003). "Res judicata bars relitigation of all grounds of
22 recovery that were asserted, or could have been asserted, in a
23 previous action between the parties, where the previous action was
24 resolved on the merits. It is immaterial whether the claims
25 asserted subsequent to the judgment were actually pursued in the
26 action that led to the judgment; rather, the relevant inquiry is
27 whether they could have been brought." Id. (quoting United States

1 ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 909 (9th Cir.
2 1998)).

3 In his complaint in this Court, Plaintiff alleges that
4 Defendant (1) recorded his calls in violation of California and
5 federal law; (2) fraudulently induced him to open a margin account;
6 (3) owed a fiduciary duty to him to advise him properly as to the
7 risks of a margin account, and breached that duty by allowing its
8 employees to place trades on that account without informing him of
9 the patent risks and by not responding to his calls, emails and
10 letters; (4) violated California law by appropriating property of a
11 senior citizen when it converted his cash account to a margin
12 account; (5) committed deceptive business practices on a senior
13 citizen in violation of California law; (6) intentionally and
14 negligently misrepresented the risks of his margin account; (7)
15 breached its contract with him regarding his account; and (8)
16 violated federal securities law.

17 Plaintiff's complaint reiterates the claims submitted to the
18 FINRA Dispute Resolution Forum. The allegations arise out of the
19 same transactional nucleus of fact, namely, the dispute over
20 Dendreon Corp. stock, Defendant's treatment of Plaintiff and his
21 account, and the call recordings. Plaintiff alleges the same types
22 of claims: violation of his right to privacy, breach of Defendant's
23 fiduciary duty and taking advantage of a senior citizen. Plaintiff
24 contends that his claims of elder abuse in his complaint are new
25 and that he plans to submit additional evidence. However, the
26 panel heard his claims of elder abuse during the arbitration
27 hearing. Daniels Decl. Ex. 4 at 1-2. Res judicata, moreover, bars
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1 all claims arising out of the same nucleus of facts that could have
2 been raised in the initial proceeding. Tahoe Sierra, 322 F.3d at
3 1078. Allowing Plaintiff's complaint to succeed would undercut the
4 judgment of the arbitration panel.

5 As to the other two elements of res judicata, Plaintiff and
6 Defendant are the parties to both proceedings, and the FINRA panel
7 reached a final judgment on the merits on each of Plaintiff's
8 claims. Daniels Decl. Ex. 4 at 1. Res judicata therefore applies
9 to Plaintiff's complaint in this Court. Because Plaintiff's motion
10 to vacate the arbitration award is denied, and the remaining claims
11 in Plaintiff's complaint are barred by res judicata, the Court
12 grants Defendant's motion to dismiss Plaintiff's complaint.

13 CONCLUSION

14 For the reasons stated above, Plaintiff's motion to vacate the
15 arbitration award is DENIED. Docket No. 12. Defendant's motion to
16 dismiss Plaintiff's complaint is GRANTED. Docket No. 34. The
17 Court grants Plaintiff's motion for expedited proceedings for
18 senior or seriously ill patients. Docket No. 3. The Clerk shall
19 enter judgment accordingly and close the file. Defendant may
20 recover costs from Plaintiff.

21 IT IS SO ORDERED.

22 Dated: 07/26/10

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24 _____
25 CLAUDIA WILKEN
26 United States District Judge
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