

United States District Court
Southern District of New York

E-FILED DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>12/1/10</u>

IN RE PROSHARES TRUST SECURITIES
LITIGATION

09 Civ. 6935 (JGK)
10 Civ. 3042 (JGK)

STEVEN AND SHERRI SCHNALL,

Plaintiffs,

MEMORANDUM OPINION AND
ORDER

- against -

PROSHARES TRUST,

Defendant.

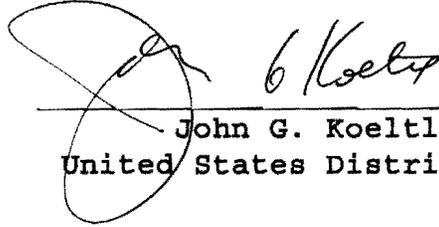
JOHN G. KOELTL, District Judge:

Defendant ProShares Trust's motion to quash a third-party document subpoena served on ProShares Trust by plaintiffs Steven and Scherri Schnall, as issued by an arbitrator for the Financial Industry Regulatory Authority ("FINRA"), is hereby **granted**. The FAA "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 215 (2d Cir. 2008) (quoting Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004) (Alito, J.)). FINRA's internal rules cannot expand this power against parties who have not consented to the FINRA arbitration proceeding at issue.

Because the subpoena was plainly inappropriate under the holding of Life Receivables Trust, there is no need to consider the parties' other arguments.¹

SO ORDERED.

Dated: New York, New York
November 30, 2010



John G. Koeltl
United States District Judge

¹ ProShares Trust is not a party in the Schnalls' pending FINRA arbitration. The Schnalls and ProShares Trust are parties to a litigation that is pending before this Court in which discovery is currently stayed under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1(b)(1), while the Court decides a motion to dismiss. See Schnall v. ProShares Trust, Nos. 10 Civ. 3042, 09 Civ. 6935, 2010 WL 1962940, at *2 (S.D.N.Y. May 17, 2010). None of the parties disputes this Court's power to decide a motion to quash the FINRA subpoena.