



PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION

1225 West Main Street, Suite 126 | Norman, OK 73069

Toll Free (888) 621-7484 | Fax (405) 360-2063

www.piaba.org

April 26, 2021

via email to Richard.Berry@finra.org
and regular U.S. mail

Mr. Richard W. Berry
Executive Vice President and
Director of FINRA Dispute Resolution Services
165 Broadway, Ste. 27
New York City, NY 10006

RE: FINRA Postponement of In-Person Hearings

Dear Mr. Berry:

I write on behalf of the Public Investors Advocate Bar Association ("PIABA"). Our attorney members, and the investors we represent throughout the country as claimants in Financial Industry Regulatory Authority's ("FINRA") dispute resolution forum, have a strong interest in ensuring that the mandatory arbitration process is administered fairly and expeditiously. I am writing to address our concerns relating to FINRA's decision to further extend the nationwide postponement of all in-person hearings for all 69 of FINRA's hearing locations. As I explain below, FINRA's nationwide full-stop on all in-person hearings is in direct contrast to trial courts across the country as well as two major private arbitration forums, and is having a dramatic effect on investors' pursuit of justice.

In postponing all in-person arbitration hearings around the country since March 2020 and now through July 2, 2021, we are told that FINRA is relying entirely on an outside third-party health consultant. However, neither FINRA nor its consultant have publicly identified what health thresholds must be met in order for FINRA to allow in-person hearings to proceed. The lack of transparency is concerning, particularly since the indefinite delay in FINRA in-person hearings benefits the FINRA-member brokers and brokerage firms defending the arbitration claims brought by their customers in this forum.

Investors do not have the option to take their disputes to court so they are at the mercy of FINRA to timely administer its arbitration cases. As a result, aggrieved investors over the past thirteen months have had three options: 1) wait for FINRA to lift its indefinite and repeated postponements; 2) seek voluntary agreement from all the parties and arbitrators to appear in-person; or 3) file a motion for a hearing to proceed virtually via Zoom, and hope that the motion is granted by the arbitration panel.

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Mr. Richard W. Berry

April 26, 2021

Page 2

It is unsurprising that respondent firms and brokers are happy to let the cases they are defending linger on an indefinite hold under the FINRA postponements. They have no incentive to proceed with the case if they can push off a determination indefinitely. In those cases where a respondent firm has not joined the motion for a Zoom hearing, Claimants are left to petition the arbitration panel to permit the case to proceed by Zoom. More than one-third of those requests have been denied by arbitration panels.¹ For these cases, the claimants are left with no access to justice.

Upon learning that FINRA's third party consultant concluded that not a single arbitration location in the country was "safe" to proceed with in-person evidentiary hearings, PIABA conducted an analysis of the 20 largest FINRA hearing locations (by population) to learn whether courts in those jurisdictions were holding in-person civil jury trials. The results are overwhelming - every single jurisdiction either is currently conducting in-person trials or will be doing so by July.² The links to underlying data are included in the footnote below and the data itself is attached to this letter.

Many of these courts have been safely conducting jury trials since last fall. For example, U.S. District Judge Anthony J. Battaglia in San Diego presided over four jury trials between the beginning of September and mid-October. The court worked with health experts to implement safety precautions like the digital presentations of evidence, reconfigured courtrooms, and sequestering requirements that keep jurors at the courthouse for breaks, including lunch. Each juror receives hand sanitizer, clean notebooks and pens, and clear masks that allow their facial expressions to be seen during voir dire. Witnesses also wear clear masks during testimony, Battaglia says. In Orange County, California, the state-run superior court resumed in-person trials last June and had held 100 trials by the end of October with no major problems reported.

In New Mexico, civil jury trials restarted on February 1, 2021. Criminal jury trials had been proceeding since August 2020. Of 720 jurors who reported for jury selection and responded to surveys from August to November in New Mexico, 94.9 percent responded that they felt safe throughout their jury service.

A court in Montana repurposed a middle school gym to safely assemble prospective jurors in a domestic trial. The Northern District of Texas considered holding trials outdoors under tents. These are just a few examples among many courts who have risen to meet the pandemic's challenges in order to keep justice progressing. The courts' methods might be unconventional, but judges understand that they have to get creative in order to serve their communities' needs.

Moreover, conducting civil jury trials require significantly more space and resources when compared to a typical FINRA arbitration hearing. Jury trials require space to conduct voir dire with numerous potential jurors, account for court personnel, public facilities and access, and much more. On the other hand, FINRA arbitrations take place in private facilities, with far fewer people and easily managed access and logistics. The bottom line is that if courts across the country can safely conduct civil jury trials, there is no question that FINRA can facilitate in-person hearings. In fact, FINRA demonstrated that it is possible to have a safe in-person hearing in January 2021, when the first in-person hearing was held successfully with the consent

¹ See FINRA Dispute Resolution Statistics, <https://www.finra.org/arbitration-mediation/dispute-resolution-statistics>.

² [New York City](#), [Los Angeles](#), [Chicago](#), [Houston](#), [Phoenix](#), [Philadelphia](#), [San Diego](#), [Dallas](#), [Jacksonville](#), [Columbus](#), [Charlotte](#), [San Francisco](#), [Indianapolis](#), [Seattle](#), [Denver](#), [Washington D.C.](#), [Detroit](#), [Oklahoma City](#), and [Portland](#).

Mr. Richard W. Berry

April 26, 2021

Page 3

of all of the parties. FINRA should now be prepared to move forward with such preparations in each of its cases, while retaining Zoom as an option if claimants do not wish to proceed in person.

FINRA is the only nationwide dispute resolution forum in the country that has refused to make plans to restart in-person hearings. The American Arbitration Association (AAA) will restart in-person hearings on May 15, 2021.³ JAMS, the largest private provider of alternative dispute resolution services worldwide, has been holding in-person arbitrations with new safety procedures in 22 out of its 24 hearing locations since June 2020.⁴ If a claimant does have a case pending in the two cities (Sacramento and Detroit) that have virtual options only, JAMS offers the option to move the case to a hearing location that offers in-person hearings.

FINRA, by contrast, has continued its blanket postponement of all in-person arbitration hearings in the country. FINRA has outwardly failed entirely to consider the differing public health statuses and guidance in any of its 69 hearing locations, and with the one high-profile exception from January, has made no efforts towards holding in-person hearings with appropriate safety measures.

Investors must be provided with a full and fair opportunity to present their cases, and a return to in-person hearings must be FINRA Dispute Resolution's highest priority. We request that FINRA publicize its health data criteria and thresholds used to decide whether to postpone hearings, weigh local circumstances, and implement reasonable safety measures⁵ for restarting in-person hearings. This information and decision-making should be made transparent to the stakeholders in the process. Of course, arbitrators and parties will be free to confer and make appropriate decisions when a high-risk individual is involved, but further blanket postponements of all in-person hearings is an overly rigid response to an evolving situation that leaves justice for aggrieved investors at a stand-still.

Additionally, we request that customers should have the right to proceed with a video conference hearing if they request one. FINRA should ensure that if a customer opts for a Zoom hearing, that option be granted. An investor's ability to pursue their remedies should not be dependent on a respondent firm consenting, or an arbitration panel agreeing, that they may proceed.

FINRA needs to address the challenges that have been tackled by courts and other arbitration forums across the country to allow the dispute resolution process to move forward in-person. It is not an easy task, but if FINRA doesn't move forward, it will ensure that investors will continue to languish without justice.

I look forward to your response and the opportunity to work with you on these important issues.

Sincerely,



David P. Meyer, President
Public Investors Advocate Bar Association

³ <https://go.adr.org/covid-19-hearing-facilities.html>.

⁴ [https://www.jamsadr.com/news/2020/coronavirus-\(covid-19\)-advisory-for-jams-visitors#updates](https://www.jamsadr.com/news/2020/coronavirus-(covid-19)-advisory-for-jams-visitors#updates).

⁵ E.g., social distancing, mask requirements, use of all-electronic exhibits, and limits on the number of individuals in a room.

City	Population	Civil In Person Jury Trials Resumed?	Date Resumed	Link
New York, New York	8,336,817	Yes	10/26/2020	https://www.nycourts.gov/covid-archive.shtml
Los Angeles, California	3,979,576	No	Soon	https://www.firstlegal.com/lasc-presiding-judge-eric-c-taylor-announces-new-civil-jury-trial-ramp-up-plan-to-preserve-jurors-promote-social-distancing/
Chicago, Illinois	2,693,976	Yes	5/3/2021	"The Cook County Circuit Court cleared the way for jury trials to resume as early as May 3, ending a 13-month stoppage caused by the COVID-19 pandemic. In an updated administrative order issued Tuesday, Chief Circuit Judge Timothy C. Evans set the target date as May 3 for civil cases." http://www.illinoiscourts.gov/administrative/covid-19.asp , https://www.chicagolawbulletin.com/cook-order-allows-for-jury-trials-in-may-20210324
Houston, Texas	2,320,268	Yes	3/5/21	TX Supreme Court lifted restrictions on in-person proceedings "A district court, statutory or constitutional county court, statutory probate court, justice court, or municipal court may conduct in-person proceedings, including both jury and nonjury proceedings" https://www.txcourts.gov/media/1451833/219026.pdf , https://www.txcourts.gov/court-coronavirus-information/court-guidance/
Phoenix, Arizona	1,680,992	Yes	3/1/21	https://superiorcourt.maricopa.gov/communications-office/covid-19-judicial-branch-operations-and-updates/ "empanelment of juries for civil trials in the Superior Court is suspended through February 28, 2021" http://www.superiorcourt.maricopa.gov/SuperiorCourt/AdministrativeOrders/AdminOrders/AO%202020-170.pdf
Philadelphia, Pennsylvania	1,584,064	Yes	3/8/21	https://www.philadelphiabar.org/WebObjects/PBA.woa/Contents/WebServerResources/CMSResources/FJD-TrialDivision-Civil-ProtocolsandGuidelinesforConductingIn-PersonCivilJuryTrialsMarch_2_2021.pdf , https://wssl.com/philadelphia-county-court-of-common-pleas-resumes-civil-jury-trials/
San Diego, California	1,423,851	Yes	2/21	http://www.sdcourt.ca.gov/pls/portal/docs/PAGE/SDCOURT/GENERALINFORMATION/COVID-19INFO/2021-01-27%20SDSC%20TO%20RESUME%20JURY%20TRIALS%20-%20FINAL.PDF "Jury trials were again suspended in December and January; however, the Court now aims to resume jury trials in February 2021." http://www.sdcourt.ca.gov/portal/page?_pageid=55,2053814&_dad=portal&_schema=PORTAL
Dallas, Texas	1,343,573	Yes	3/5/21	See Houston
Jacksonville, Florida	911,507	Yes	10/5/20	https://www2.duvalclerk.com/about/office-status/ "Beginning with the October 5, 2020 report date, in-person jury service has resumed at the Duval County Courthouse."
Columbus, Ohio	898,553	Yes	4/5/21	https://www.supremecourt.ohio.gov/coronavirus/courts/Franklin/CPGeneral_030221.pdf "Beginning April 5, 2021, all jury trials (civil and criminal), conducted by Judges, Magistrates, and Visiting Judges, will resume. Additionally, jurors will be summonsed en masse." https://www.supremecourt.ohio.gov/coronavirus/courts/default.aspx

Charlotte, North Carolina	885,708	Yes	3/22/21	https://www.nccourts.gov/covid-19 "Effective January 14, 2021, Chief Justice Paul Newby authorized jury trials to resume statewide in district and superior court." https://www.nccourts.gov/assets/inline-files/Mecklenburg-Court-Operations-Chart-effective-03152021.pdf?pnrq8gOwLm3v0FQbP0.yGyz.UmNk.4c Mecklenburg County, which encompasses Charlotte, restarted Jury trials 3/22/21
San Francisco, California	881,549	Yes	2/16/21	https://www.cand.uscourts.gov/jury/ https://www.sfsuperiorcourt.org/general-info/Information-Regarding-Coronavirus-And-Court-Operations
Indianapolis, Indiana	876,384	Yes	3/1/21	https://www.in.gov/courts/files/order-other-2020-20S-CB-123p.pdf
Seattle, Washington	753,675	Yes	7/6/20	http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Jury%20Resumption%20Order%20061820.pdf
Denver, Colorado	727,211	Yes	7/20/20	https://www.courts.state.co.us/userfiles/file/Court_Probation/02nd_Judicial_District/Denver_District_Court/Second%20Judicial%20District%20Jury%20Call%20and%20Trial%20Procedures%20Plan%20and%20CJO%2020-08.pdf
Washington D.C.	705,749	Yes	5/1/21	https://www.dccourts.gov/coronavirus#:~:text=The%20DC%20Superior%20Court%20will,of%20their%20jury%20service%20date.
Detroit, Michigan	670,031	Yes	3/15/21	https://www.detroitnews.com/story/news/local/wayne-county/2020/12/16/wayne-county-circuit-court-resume-jury-trials-march/3921262001/
Oklahoma City, Oklahoma	655,057	Yes	4/13/21	https://www.okwd.uscourts.gov/event/criminal-civil-jury-trials-commence-11/
Portland, Oregon	654,741	Yes	3/1/21	https://www.courts.oregon.gov/courts/Documents/CJO%2020-047_Amended.pdf