# APPENDICES

APPENDIX A

20-3711-cv
*Pierno v. Fidelity Brokerage Servs., LLC*

# UNITED STATES COURT OF APPEALS
# FOR THE SECOND CIRCUIT

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand twenty-one.

Present:

DEBRA ANN LIVINGSTON,
*Chief Judge,*
AMALYA L. KEARSE,
EUNICE C. LEE,
*Circuit Judges.*

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RINALDO PIERNO,

*Plaintiff-Appellant,*

v. 20-3711-cv

FIDELITY BROKERAGE SERVICES, LLC,

*Defendant-Appellee.*

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For Plaintiff-Appellant: RINALDO B. PIERNO, *pro se*, Brooklyn, NY.

For Defendant-Appellee: DAVID J. LIBOWSKY (Andrew T. Mount, *on the brief*), Bressler, Amery & Ross, P.C., New York, NY.

Appeal from the October 6 and October 22, 2020 orders of the United States District Court for the Southern District of New York (Nathan, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the orders of the district court are **AFFIRMED** and the pending motions are **DENIED**.

Rinaldo B. Pierno ("Pierno"), *pro se*, sued Fidelity Brokerage Services, LLC ("Fidelity"), challenging both the arbitration clause in Fidelity's customer agreement and its actions against his brokerage accounts. Fidelity froze Pierno's accounts after noticing a transfer of assets into Pierno's personal account from an account where he served as trustee. Pierno sought a declaratory judgment that (1) Fidelity could not interfere with his actions as trustee and (2) he was not required to arbitrate his claims. The district court determined that the arbitration clause governed and stayed the proceedings pending arbitration. *Pierno v. Fidelity Brokerage Servs., LLC*, No. 18-cv-3384, 2019 WL 233489, at *1 (S.D.N.Y. Jan. 16, 2019). After over a year in which Pierno failed to initiate arbitration proceedings but filed motions requesting a jury trial, the district court dismissed the action for failure to prosecute. Pierno appeals. He also files a motion for a writ of mandamus or a writ of prohibition, as well as a motion to supplement the record on appeal. For the reasons set forth herein, we affirm the district court's orders and deny Pierno's pending motions. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

**1. Breach of Contract Claim**

Pierno first challenges the district court's October 6, 2020 order, in which the court denied his motion for court adjudication of his breach-of-contract claim. In that order, the district court

noted that it had already ruled that Pierno's claim could proceed only in arbitration, and that Pierno could not avoid that ruling by refusing to participate in arbitration proceedings. Pierno references the October 6 order in a chronology of events in his brief, but he waives any challenge to this order by failing to raise any argument on the subject within his briefing on appeal. While we liberally construe *pro se* briefs, "reading such submissions to raise the strongest arguments they suggest," *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (internal quotation marks and citation omitted), we do not address arguments where none have been raised. *See Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) (per curiam).

Pierno *does* argue on appeal that the Federal Arbitration Act ("FAA") is unconstitutional. However, this argument does not refer to the district court's order denying a jury trial (nor to its order dismissing the case for failure to prosecute), but instead broadly asserts that the FAA unconstitutionally delegates judicial power to non–Article III tribunals and violates anti-commandeering principles. Even if we interpret Pierno's argument to challenge the orders being appealed, his claim is meritless.[1] The Supreme Court has repeatedly affirmed the FAA's constitutionality. *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (stating that the FAA "embodies Congress' intent to provide for the enforcement of arbitration agreements within the full reach of the Commerce Clause"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967) (concluding it was "clear beyond dispute" that the FAA was valid under the

[1] Pierno argues that New York law, not the FAA, controls arbitration clauses, but we do not consider this claim because it was not raised in the district court. *Harrison v. Republic of Sudan*, 838 F.3d 86, 96 (2d Cir. 2016) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (internal quotation marks and citation omitted)).

Commerce Clause).[2]

**2. Dismissal for Failure to Prosecute**

Pierno also challenges the district court's October 22, 2020 order dismissing his action for failure to prosecute, arguing that Fidelity was required to initiate the arbitration proceedings. We review a dismissal for failure to prosecute for abuse of discretion. *See Lewis v. Rawson*, 564 F.3d 569, 575 (2d Cir. 2009). In doing so, we are "mindful that [such a] dismissal . . . is a harsh remedy" that should not be utilized frequently. *Id.* at 575–76 (internal quotation marks and citation omitted). When reviewing a dismissal for failure to prosecute, we consider five factors:

> (1) the plaintiff's failure to prosecute caused a delay of significant duration; (2) plaintiff was given notice that further delay would result in dismissal; (3) defendant was likely to be prejudiced by further delay; (4) the need to alleviate court calendar congestion was carefully balanced against plaintiff's right to an opportunity for a day in court; and (5) the trial court adequately assessed the efficacy of lesser sanctions.

*United States ex rel. Drake v. Norden Sys., Inc.*, 375 F.3d 248, 254 (2d Cir. 2004).

The district court's dismissal for failure to prosecute was not an abuse of discretion. Pierno failed to initiate arbitration proceedings for over a year and a half, a delay substantially longer than other delays that we have determined to be sufficient to support a dismissal for failure to prosecute. *See, e.g., Ruzsa v. Rubenstein & Sendy Att'ys at L.*, 520 F.3d 176, 177 (2d Cir. 2008) (per curiam) (characterizing a delay of nearly eight months as a "delay of significant duration" (citing *Drake*, 375 F.3d at 254)); *Lyell Theatre Corp. v. Loews Corp.*, 682 F.2d 37, 42–43 (2d Cir.

[2] Pierno argues that the district court improperly delegated the question of arbitrability to the magistrate judge. But this issue was not delegated to the magistrate judge for a decision, but rather, was referred to the magistrate judge with a request for a report and recommendation. *See* Dkt. 17. Thereafter, the matter was decided by the district judge.

1982) (noting that delays that are "merely a matter of months" may support dismissal); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 666–68 (2d Cir. 1980) (concluding that a six-month delay sufficed for dismissal).

Pierno admitted to the district court that his delay was intentional, stating, "I have refused to participate in FINRA arbitration," Dkt. 42, and that he would continue to refuse to initiate arbitration, even though the court had provided notice that the action could be dismissed if no arbitration proceedings began. Pierno appears to have believed that it was Fidelity's responsibility to initiate arbitration, and argues that Fidelity never notified him of an arbitration forum. However, under the parties' customer agreement, it was Pierno's responsibility to initiate arbitration proceedings, as he was the party with a grievance. Pierno conceded that Fidelity informed him of this responsibility. Regardless, he asserts that under 9 U.S.C. § 3, the party seeking a stay of the district court proceedings to pursue arbitration is responsible for initiating arbitration proceedings. However, under Section 3, a district court *may* lift a stay if the party who originally sought it defaults on its obligations in arbitration. Here, Fidelity was not in default, as it was not required to initiate arbitration proceedings. Pierno was required to initiate proceedings, and was thus responsible for the delay.[3]

[3] Pierno also argues that the customer agreement required Fidelity to designate an arbitration forum if the customer does "not notify [Fidelity] in writing . . . within five days" of their forum choice. Appellant's Br. at 8 (quoting Fidelity's customer service agreement). This argument is also meritless. The portion of the agreement cited by Pierno applies only after a customer initiates arbitration proceedings and only if the customer's chosen forum fails to follow appropriate guidelines. If so, the agreement requires the customer to designate a different arbitration forum; if the customer does not do so within five days, Fidelity has the authority to notify the customer which one it has chosen. The agreement also states that a customer can designate a forum *if* they receive "a written demand for arbitration" from the company, but it does not mandate that Fidelity commence arbitration if a customer initiated a dispute. Appellant's App'x at 13.

The district court's order also satisfies the fourth and fifth factors informing our review of a dismissal for failure to prosecute. It was reasonable for the district court to believe it needed to "alleviate . . . congestion" by dismissing the case; after the court asked for a joint status report on the arbitration, Pierno filed two motions and a letter in which he requested a jury trial, despite the court's prior order staying proceedings until arbitration concluded. This is especially true because Pierno *could* have secured his "day in court" if he had initiated arbitration proceedings. *See Steele v. L.F. Rothschild & Co.*, 864 F.2d 1, 3 (2d Cir. 1988) (holding that a "party who has been compelled to arbitrate will have her chance to argue that the arbitral forum was the incorrect one when the arbitral award is before the district court in an action for enforcement"). Further, although the district court did not reference the possibility of lesser sanctions in its order, it had provided notice to Pierno that the case could be dismissed if he did not proceed with his claim in arbitration. *See Pierno v. Fidelity Brokerage Servs., LLC*, No. 18-cv-3384, 2020 WL 6390514, at *1 (S.D.N.Y. Oct. 6, 2020). Given Pierno's refusal to begin arbitration—which he stated to the district court multiple times—it is not clear what "efficacy" lesser sanctions would have had. Finally, although the merits of Fidelity's argument would likely not be prejudiced by further delay, it was reasonable for the district court to decide that the other factors sufficiently outweighed the third factor regarding prejudice to the defendant. *Drake*, 375 F.3d at 254 (stating that "[n]o one factor is dispositive" in reviewing a dismissal for failure to prosecute).

**3. Pierno's Motions on Appeal**

Pierno's motion for a writ of mandamus granting a jury trial or a writ of prohibition is meritless. A writ of mandamus exists only for cases with "exceptional circumstances or . . . extraordinary significance." *In re United States*, 680 F.2d 9, 12 (2d Cir. 1982). While

"[m]ere error . . . does not suffice to support issuance of the writ," *Orange Cnty. Water Dist. v. Unocal Corp.*, 584 F.3d 43, 48 (2d Cir. 2009) (per curiam) (internal quotation marks and citation omitted), a writ of mandamus may be appropriate where there is "usurpation of power, clear abuse of discretion [or] the presence of an issue of first impression," *In re United States*, 680 F.2d at 12 (internal quotation marks and citation omitted). In *Steele*, we noted that, concerning arbitration clauses, a district court should consider "whether the parties agreed to arbitrate, the scope of the arbitration agreement, and whether Congress intended [the] . . . claims to be nonarbitrable." 864 F.2d at 4 (discussing the applicability of a writ of mandamus for an arbitration-clause dispute). The magistrate judge's report and recommendation discussed each of these factors, and the district court's order adopted its analysis in full. *Pierno v. Fidelity Brokerage Servs., LLC*, No. 18-cv-3384, 2018 WL 5619980, at *3 (S.D.N.Y. July 13, 2018), *report and recommendation adopted*, 2019 WL 233489 (S.D.N.Y. Jan. 16, 2019). No "exceptional circumstances" are present here. *In re United States*, 680 F.2d at 12. Concerning the writ of prohibition, it is available as a "means of confining the inferior court to a lawful exercise of its prescribed jurisdiction," *Ex parte Republic of Peru*, 318 U.S. 578, 583 (1943), but only in "exceptional cases," *id.* at 585. This claim fails because Pierno does not raise objections to the district court's jurisdiction.[4]

* * *

[4] We also deny Pierno's motion to supplement the record on appeal and his related request for this Court to take judicial notice of the exhibits contained within said motion. Under Federal Rule of Appellate Procedure 10(e)(2), a party may supplement the record on appeal if material evidence was omitted "by error or accident." But Rule 10(e)(2) is "not a device for presenting evidence to this Court that was not before the trial judge." *Natofsky v. City of New York*, 921 F.3d 337, 344 (2d Cir. 2019) (internal quotation marks and citation omitted). Pierno does not address why the

We have considered all of Plaintiff-Appellant Pierno's arguments and find them to be without merit. Accordingly, we **AFFIRM** the October 6 and October 22, 2020 orders of the district court and **DENY** Pierno's pending motions on appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


materials were not submitted to the district court, but merely argues that this "supplementation to the Appeal record is a vital extension of [the] argument in [the] previous briefs." Plaintiff-Appellant's Motion to Supplement Record on Appeal at 3. This argument is insufficient to support a Rule 10(e)(2) motion to supplement the record.

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE
## SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 4th day of February, two thousand twenty-two.

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Rinaldo Pierno,

Plaintiff - Appellant,

v.

Fidelity Brokerage Services, LLC,

Defendant - Appellee.

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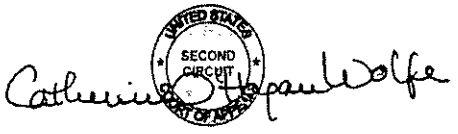
**ORDER**

Docket No: 20-3711

Appellant Rinaldo Pierno, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



## APPENDIX C

# UNITED STATES COURT OF APPEALS
# FOR THE
# SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of March, two thousand twenty-two.

Before: Debra Ann Livingston,
*Chief Judge*,
Amalya L. Kearse,
Eunice C. Lee,
*Circuit Judges.*

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Rinaldo Pierno,

Plaintiff - Appellant,

v.

Fidelity Brokerage Services, LLC,

Defendant - Appellee.

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**ORDER**

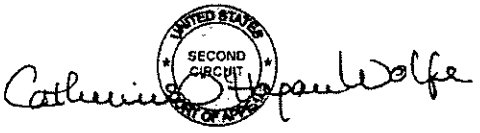
Docket No. 20-3711

Appellant, pro se, moves to publish the Court's Summary Order as an Opinion.

IT IS HEREBY ORDERED that the motion is DENIED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX D

# UNITED STATES COURT OF APPEALS

# FOR THE SECOND CIRCUIT

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Rinaldo B. Pierno

*Plaintiff-Appellant*

Case No. 20-3711-cv

-v-

Fidelity Brokerage Services L.L.C.

*Defendant-Appellee*

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**PLAINTIFF'S/APPELLANT'S MOTION TO CONVERT SUMMARY ORDER INTO A PUBLISHED OPINION OF CITABLE PRECEDENT[1]**

Pursuant to Federal Rule of Appellate Procedure 27 and Second Circuit Rule 27.1, and the authorities cited below, Plaintiff/Appellant Rinaldo B. Pierno, *pro se*, moves to convert the unpublished, of "no precendential value" Summary Order of December 16, 2021 (attached as Exhibit A) into a published opinion of *citable precedent*. Counsel for Appellee Fidelity Brokerage Services LLC have been informed of this motion and

1 Citable precedent defined as: Cases may be cited, but the weight given to the case is left open to the court.

Appellant has no knowledge as to their position concerning Appellant's motion regarding publication and conversion.

## I. BASIS FOR REQUESTING PUBLICATION AND CONVERSION

On June 26, 2007, the Second Circuit adopted and put into effect Local Rule 32.1 and Rule 32.1.1, *Dispositions by Summary Order*. The Court noted: "Rulings by Summary Order have no precendential effect."; "Accordingly, in those cases in which a decision is unanimous and each judge of the panel believes no jurisdictional purpose would be served by an opinion (i.e., a ruling having precendential effect), the ruling may be by summary order instead of by opinion." In recent years the Second Circuit has disposed of 60-70% of appeals by summary orders.

Courts have granted motions, however, to convert an unpublished opinion into binding precedent (see for example, *SEC v. Monterosso*, F 56 F3d 1326, 1329 (11th Cir, 2014) (granting SEC's motion to publish a previously unpublished opinion); 5th Cir. R. 47.5.2; 7th Cir. Rule 32.1(c)(allowing "any person" to make the motion); 9th Cir. R.36-4.

The Appellant respectfully disagrees with this honorable Court that the Appellant's case as presented in both the District and Appellate Courts "no jurisdictional purpose would be served," and has "no precedential value" because as noted in Appellant's petition for *Rehearing En Banc (denied*, Docket number 129) issues

regarding the U.S. Constitution were presented with attached persuasive authorities which upheld Appellant's contentions regarding Appellant's Seventh Amendment right to *trial by jury*, the *Tenth Amendment*, the "*separation of powers*" under the theory of federalism.[2]

Appellant maintains, and many critics would agree, that summary orders are inappropriate when issues of Constitutional dimension are placed before the Appellate Courts. In those cases involving the U.S. Constitution, a reasoned published opinion of citable precedent ought to be required at a minimum, in the interests of justice, public interest, and a litigant's right to due process.

One such critic of non-precedential rulings is Judge Richard S. Arnold, of the Eighth Circuit. In 2000 Judge Arnold authored an opinion in *Anastasoff v. United States.*[3] *Anastasoff* held that the Eighth Circuit rule declaring unpublished opinions as not precedent was unconstitutional under Article III "because it purports to confer on the federal courts a power that goes beyond the judicial." Citing *Marbury v. Madison*, the court determined that every judicial decision is, or should be, "a declaration and interpretation of a general principle or rule of law." According to the *Anastasoff* panel,

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2 Jean R. Stearnlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial* (2001). Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress* (2006).

3 *Anastasoff v. United States*, 235 F.3rd 1054 (8th Cir. 2000) (*en banc*)

this "declaration of law" *must* be applied in all subsequent cases to parties who are similarly situated. Those principles of precedent, it continued, were "well-established and well-regarded at the time this nation was founded." Determining that our legal system was based on a requirement of precedent, it concluded that "insofar as the [Eighth Circuit rule regarding unpublished opinions] would allow us to avoid the precedential effect of our prior decisions," it is unconstitutional.

*Anastasoff* countered the contention that courts do not have enough time to treat every decision as precedent by responding, "[if]this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only". Most importantly, *Anastasoff* stated that the rule at issue expanded the power beyond what Article III gave to the courts by giving them the power "to choose for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not." The court felt that those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday.[4]

4 Shenoa l.Panye, *THE ETHICAL CONUNDRUMS OF UNPUBLISHED OPINIONS (2008) (available online)*

Specifically, a decision with presidential effect, warranting publication, generally does one or more of the following:[5]

a) establishes a new rule of law;

b) alters, modifies, clarifies or explains an existing rule of law;

c) contains a reasoned criticism or questioning of existing law;

d) resolves or identifies an apparent conflict of authority, either within the circuit or between the circuit and another, or create a conflict between the circuit and another;

e) draws attention to a rule of law that appears to have been generally overlooked;

f) applies an existing rule of law in a novel factual context, differing materially from those in previously published opinions of the court applying the rule;

g) contributes significantly to the legal literature by reviewing the legislative, judicial, administrative or electoral history of an existing rule of law;

h) interprets a rule of state law in a way conflicting with state or federal precedent interpreting the state rule;

i) is a case of first impression in the court with regard to the substantial issue it resolves;

j) concerns an issue of substantial or continuing public interest or importance; or

k) will otherwise serve as a significant guide to the bench, bar or future litigants.

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5 Melissa H. Weresh, *The Unpublished, Non- Precedential Decision: An Uncomfortable Legality?*, Journal of Appellate Practice and Process (2001) (*available online*)

The Appellant's briefs, particularly the Appellant's *Petition for Rehearing En Banc* (docket number 129) specifically met (c) (d) (e) (g) (h) (j) and perhaps several more of the above guidelines which would justify an opinion and citable precedent.

The confusion that has resulted in allowing a place for non-precedential decisions in appellate courts appears to vindicate Judge Arnold's *Aastasoff* contentions, as has been pointed out, and further noted in Ahmed Bahgat's survey of the Sixth Circuit rulings regarding the use of tasers in law enforcement.[6]

Even Supreme Court Justice Thomas seems frustrated by the confusion created by non-precedential decisions, in his dissent criticizing denial of *certiorari* in *Plumley v. Austin*, 574 U.S. 1127 (2015). Justice Thomas, in dissent wrote "By any standard – and certainly by the Fourth Circuit's own – this decision should have been published. The Fourth Circuit's Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it "established... "a rule of law within that circuit," "involved a legal issue of continuing public interest," and "created a conflict with a decision in another circuit." Rules 36 (a) (i), (ii), (v) (2015). It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit."

6 Ahmed Bahgat, *The Shockingly Common Use of Non-Precedential Opinions in Sixth Circuit Taser Litigation(2019) available online*

"The Fourth Circuit decision warrants review. It orders the District Court to grant the extraordinary writ of habeas corpus corpus on a questionable basis. It announces a rule that is at odds with the decisions of this Court and Courts of Appeals. And, it does so in an unpublished opinion that preserves its ability to change course in the future. For these reasons, we should have granted the petition for a *writ of certiorari.*"[7]

Another criticism of non-precedential decisions is that it undermines the Appellate process. A litigant is denied the possibility of effective review by a higher court when the resolution of his or her case is termed "no precedential effect" and goes unpublished. If an opinion has been designated as having no precedential value, the Supreme Court is less likely to grant review of an issue that arguably has no impact on future litigants.[8]

"Publication is a signal to litigants and observers that the court has nothing to hide, that the quality of its work in a case is open for public inspection." Moreover, "written opinions encourage judges to produce well – reasoned, well – written decisions because they subject judges' conclusions to public scrutiny. This leads to better more consistent opinions because it holds judges

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7 Justice Thomas in dissent, *Plumley v. Austin*, 574 U.S. 1127 (2015)

8 Milissa H. Weresh, *op. cit.* p. 182

accountable to the public which they serve.[9]

## II. CONCLUSION

Although the Appellant is aware that the Court's Summary Order is not favorable to Appellant's case, nevertheless, Appellant as counsel, is of firm belief that due to the Constitutional nature and content of the issues contained in Appellant's lawsuit, and for the benefit of public interest, and particularly to negate concerns over due process, and for all the reasons cited above:

WHEREFORE, Appellant respectfully requests that the Court grant this motion, to convert to citable precedent this Court's Summary Order of December 16th, 2021 and allow publication for reasons cited above.

Dated: February 8, 2022
Brooklyn, New York

Respectfully Submitted,

By /s/ Rinaldo B. Pierno

Rinaldo B. Pierno
Brooklyn Heights, N.Y.

(Cell) 917-915-1717
*therbeedragons@gmail.com*

9 Milissa H. Weresh, *op.cit.* p.182

*Copy to:* Andrew T. Mount
David J. Libowsky
Attorneys for Defendant
via CM/ECF

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this February 8, 2022, I served a copy of the foregoing document via this Court's CM/ECF System to the following:

Andrew T. Mount
David J. Libowsky

Bressler Amery & Ross
325 Columbia Turn.
Suite 301
Florham Park, NJ
Tel: 973-514-1200

*Attorneys for Defendant*

/s/Rinaldo B. Pierno, *pro se*

**APPENDIX E**



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Rinaldo Pierno,

Plaintiff,

–v–

Fidelity Brokerage Services, LLC,

Defendant.

18-cv-3384 (AJN)

ORDER

ALISON J. NATHAN, District Judge:

On January 16, 2019, the Court granted the Defendant's motion to compel arbitration and stayed this action pending the outcome of that arbitration. Dkt. No. 34. The Plaintiff has informed the Court that no arbitration proceedings have commenced because he refused to participate in arbitration, and that he continues to refuse to participate in any arbitration. *See* Dkt. Nos. 36, 42.

Considering the factors set out in *LeSane v. Hall's Sec. Analyst, Inc.*, 239 F.3d 206 (2d Cir. 2001), the Court finds that dismissal for failure to prosecute under Federal Rule of Civil Procedure 41(b) is appropriate. Well over a year has passed since the Court ordered arbitration, and, in the face of an order warning that the action may be dismissed for failure to prosecute, the Plaintiff continues to maintain that he has no intention of ever arbitrating his claims. The Court therefore dismisses the action. *See, e.g.*, *Dhaliwal v. Mallinckrodt PLC*, No. 18-cv-3146 (VSB), 2020 WL 5236942, at *2 (S.D.N.Y. Sept. 2, 2020) (dismissing for failure to prosecute where plaintiff did not initiate arbitration following order compelling arbitration); *Shetiwy v. Midland Credit Mgmt.*, No. 12-cv-7068 (RJS), 2016 WL 4030488, at *2 (S.D.N.Y. July 25, 2016) (same), *aff'd*, 706 F. App'x 30 (2d Cir. 2017). The Clerk of Court is respectfully directed to close the

case.

The Clerk of Court is respectfully directed to mail a copy of this Order to the Plaintiff and note the mailing on the public docket.

SO ORDERED.

Dated: October 22, 2020
New York, New York

ALISON J. NATHAN
United States District Judge