NO. _____

IN THE

Supreme Court of the United States

BRIAN K. WELLS,
PETITIONER,

V.

MERRILL LYNCH PIERCE FENNER & SMITH INC.,
MERRILL CLEARING CORPORATION, AND
BOFA SECURITIES, INC.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Petitioner

April 16, 2026

QUESTION PRESENTED

The Federal Arbitration Act ("FAA") is a procedural statute used to enforce arbitration terms in contracts. The FAA is inapplicable without an arbitration term. If a contract mandates arbitration, the FAA provides a procedural mechanism for compelling arbitration. The FAA honors contractual rights, including waiver. Waiver is the relinquishment of a known right where a party to a contract explicitly repudiates its rights under the contract or acts in a manner inconsistent with an intention of exercising them. *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022) ("courts are not to create arbitration-specific procedural rules"). In the opinion below, the First Circuit invented an arbitration-specific procedural rule: a party cannot waive service nor waive any objections to service after the three-month period in Section 12 expires. The First Circuit applied this novel rule to nullify Defendants' written waiver of service to grant their motion to dismiss for insufficient service. It sided with the minority in a circuit split who strictly construe Section 12 to prohibit waivers and prevent extensions to the three-month period to serve notice. The majority recognizes the FAA's procedural and contractual underpinnings and are more flexible with this deadline being extended or waived.

The Question Presented is: Does invalidating an explicit waiver to waive service because the waiving party executed it after the three-month period set forth in Section 12 passed violate this Court's instruction that lower courts must "place arbitration agreements on an equal footing with other contracts?" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

PARTIES TO THE PROCEEDINGS

The following respondents were defendants-appellees in the First Circuit: Merrill, Lynch, Pierce, Fenner & Smith, Inc. (BAC), BofA Securities, Inc. (BAC), and Merrill Professional Clearing Corporation (BAC) (collectively, "ML" or "Defendants").

The petitioner is Brian Wells who was the plaintiff-appellant in the First Circuit.

RELATED PROCEEDINGS

Wells v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., BofA Securities, Inc., and Merrill Lynch Professional Clearing Corporation, Case No. No. 25-1584 (1st Cir. January 16, 2025)

Wells v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., BofA Securities, Inc., and Merrill Lynch Professional Clearing Corporation, Case No. 24-cv-100-LM-TSM (D.N.H. May 13, 2024)

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PETITION FOR A WRIT OF CERTIORARI

Brian Wells respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the court of appeals is unpublished that is reprinted in the Appendix to the Petition at A2-A4. The relevant district court's order denying a Motion to Reconsider is unpublished and reprinted at A5. The district court's order adopting a report and recommendation is reprinted at A6. The report and recommendation is reprinted at A7-A21.

JURISDICTION

The court of appeals entered judgment on January 16, 2026. A2. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 12 of the Federal Arbitration Act provides in relevant part: Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. 9 U.S.C. § 12.

STATEMENT OF THE CASE

In November of 2021, Wells retained ML as an investment advisor. A7. To do so, he had to open a Cash Management Account ("CMA") and agree to an arbitration clause. *Id.* A few months later, in March of 2022, ML sold Wells option contracts that it failed to honor when exercised. *Id.* When he raised this issue, ML froze his accounts. *Id.*

ML's failure to honor these options caused millions of dollars in damages. A8. In June of 2023, Wells filed an arbitration claim with the Financial Industry Regulatory Authority ("FINRA") where the parties agreed to arbitrate pursuant to its rules. A7.

The arbitration was a sham. On the day before the hearing, an inadvertent recording captured the arbitrators privately discussing their decision to rule against Wells. They did more than that. They sanctioned him $100,000.00 for unspecific acts.[1] A8.

Pursuant to FINRA Rule 12904, the Director mailed the decision and "posted" it on FINRA's website. A9. ("It is undisputed that FINRA ***posted*** the Award on its website on December 28, 2023").[2]

A "notice of motion to vacate the award" under Section 12 thus had to be served on "the adverse party or their attorney" on or before April 1, 2024. *See* 9 U.S.C. § 12; FED. R. CIV. P. R. 5.

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[1] This dispute has not been resolved on the merits because the lower courts dismissed it for insufficient service. A2, A9. *Parrish v. United States*, 605 U.S. 376, 388 (2025) ("the spirit of the Federal Rules" is that "decisions on the merits [should not] be avoided on the basis of ... mere technicalities.").

[2] Under Rule 6, three days are added to act on the decision.

To give notice per Section 12, Wells emailed ML's arbitration counsel "notice of a motion to vacate." A9. But after receiving notice of this motion, ML's attorney refused to accept the motion itself. A10.

The next day, on April 28, 2024, Wells mailed the motion to ML's arbitration counsel. A8. Under Rule 5, service is complete upon mailing. *See* FED. R. CIV. P. R. 5. *Morgan, Inc.*, 596 U.S. at 419 (recognizing that motions under the FAA must "apply the usual federal procedural rules, including any rules relating to a motion's timeliness."). *Id.* [3]

On June 17, 2024, ML executed a written waiver and "waive[d] any objections" of service for more time to respond to verified motion. A25-A33. On August 6, 2024, ML objected to service. A12.

The lower court essentially created a new procedural rule that nullified ML's waiver of service required under Section 12 because ML's waiver was executed after the three-month period in Section 12. The lower court also imposed a rule that a motion to vacate arbitration was governed by Rule 4 (summons) not Rule 5 (motions). [4] A15.

The First Circuit affirmed, adding that ML's waiver was ineffective because it was executed after the Section 12 deadline: "[ML's] waiver of service -- several months after the § 12 deadline for service had expired -- did not waive their right to challenge the timeliness of service via Rule 12(b)(5)." A2.

The First Circuit is wrong.

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[3] ML's response to this motion was due on April 22, 2024.

[4] But an insufficient act requires an act.

Parties may waive Rule 12(b) defenses (except for lack subject matter jurisdiction). Indeed, a defense for insufficient service under Rule 12(b)(5) is very waivable. In fact, Rule 12 states that such defense are waived if it is not timely asserted. *See* FED. R. CIV. P. R. 12(h); *Foster v. Turley*, 808 F.2d 38, 41 (10th Cir. 1986) (holding that defendant – via conduct – waived an objection to untimely service under Section 12).

Parties may also still waive contract rights. arbitration does not change anything. *Morgan, Inc.*, 596 U.S. at 419 (recognizing that motions under the FAA must "apply the usual federal procedural rules, including any rules relating to a motion's timeliness.").

REASONS FOR GRANTING THE PETITION

I. THIS CASE IS A WONDERFUL VEHICLE FOR CLARYIFYING THE REQUIREMENTS FOR SERVICE UNDER SECTION 12 OF THE FAA TO RESOLVE VARIOUS CONFLICTING INTERPRETATIONS AMONG THE CIRCUITS

In 2011, a certiorari petition sought guidance on service under Section 12 of the FAA because "the lower courts are in disarray." *Argentine Rep. v. Nat'l Grid, PLC*, *Cert* Petition, 2011 WL 3706743, at *10 (2011) ("***the lower courts are in disarray*** concerning the extent to which the Federal Rules govern the timing and manner of service in actions brought under the Federal Arbitration Act.") (emphasis added). Fifteen years later, the situation remains confusing while the volume of arbitrations has skyrocketed. *Id.*

The circuit courts continue to analyze and interpret Section 12 to construct how it interplays with the Federal Rules of Civil Procedure. But their work appears to only be increasing the number of conflicts. The circuits have split on so many issues with respect to Section 12 that they are now stuck in a tangled weave. *Id.*

For example, a split exists in regard to whether Section 12's time limit is jurisdictional or procedural. *Compare Dalla-Longa v. Magnetar Cap. LLC*, 33 F.4th 693, 697 (2d Cir. 2022); *Florasynth v. Pickholz*, 750 F.2d 171, 175 (2d Cir. 1984) (holding that there are no common-law exceptions to § 12); *Cigna Ins. Co. v. Huddleston*, 986 F.2d 1418 (5th Cir. 1993); *Webster v. A.T. Kearney, Inc.*, 507 F.3d 568, 570 (7th Cir. 2007); *Virgin Islands Hous. Fin. Auth. v. Fed. Emergency Mgmt. Agency*, 151 F.4th 409, 415 (D.C. Cir. 2025).

A split also exists on when the service period begins because the circuits have differing interpretations of the trigger: when the order is "filed and delivered" term means. *See Webster*, 507 F.3d at 573 (identifying potential conflict due to the "filed or delivered" text in Section 12). In *Sargent v. Paine Webber, Jackson & Curtis, Inc.*, a district court elaborated on the ambiguity of "filed or delivered":

> The very language of 9 U.S.C. § 12 is ambiguous—the date that the award is "filed or delivered" can lead to different results as is evident from the case law. Some courts have interpreted the phrase to mean the date designated on the face of the award. (*Witt v. Reinholdt & Gardner*, 587 F.2d 383, 384 (8th

> Cir.1978); *Colavito v. Hockmeyer Equipment Corp.*, 605 F.Supp. 1482, 1487 (S.D.N.Y.1985)). Other courts look to the date the award was filed or entered, referring to the date the award was actually docketed as contrasted to the date on the face of the award. (*Foster v. Turley*, 808 F.2d 38, 41 (10th Cir.1986); (*Tokura Construction Co., Ltd. v. Corporacion Raymond, S.A.*, 533 F. Supp. 1274 (S.D.Tex. 1982). However, several courts ***9** have held that an application to vacate must be made within three months of receipt of the decision. (*Dinger v. Anchor Motor Freight*, Inc., 501 F. Supp. 64 (S.D.N.Y.1980) ("An application to vacate or modify an arbitral award must be made within three months of receipt of the decision under federal law." *Id.* at 68 (*citing* 9 U.S.C. § 12) (emphasis added). Because the plaintiff challenged the arbitrator's award more than eleven months after receiving the decision, the court held that his claim was time-barred.) If "delivery" of the award is deemed to be receipt of the award, as declared in *Dinger*, the motion to vacate was timely filed ... .

687 F. Supp. 7, 8–9 (D.D.C. 1988).

Finally, the circuit courts are also split on whether the manner of service under Section 12 is governed by Rule 4 (summons and complaint) or Rule 5 (motion). The Second Circuit, Third Circuit, and

Eleventh Circuit rely on the statute's plain text to conclude that a summons is unnecessary because Section 12 only requires "notice of a motion" and thus Rule 5 controls. *See O'Neal Constructors, LLC v. DRT Am., LLC*, 991 F.3d 1376, 1379 (11th Cir. 2021); *Commodities & Mins. Enter. Ltd. v. CVG Ferrominera Orinoco, C.A.*, 49 F.4th 802, 814 (2d Cir. 2022);; *Teamsters Local 177 v. United Parcel Serv.*, 966 F.3d 245, 252, 254 (3d Cir. 2020). In contrast, the First Circuit has required a Rule 4 summons. *See Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 25 (1st Cir. 2005), *abrogated on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)

Put simply, the circuit courts have diverged to such a degree on when and how service must be made under Section 12 that it will continue to be a confusing mess without guidance.

II. INTERPRETING SECTION 12

Few courts have interpreted the language of Section 12 in a manner that gives all words therein meaning. These interpretations do not give meaning to the "notice of" term of "notice of a motion" meaningless, especially in contrast to other parts of the statute that only use "motion" alone. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) *quoting Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). §

If a person must "file and serve" a motion on the adverse party, then there is no reason to serve a "notice of a motion. The "notice of" language becomes meaningless. 9 U.S.C. 12. If the motion itself had to be

served, the "notice of" would have been omitted. *Keene*,[5] 508 U.S. at 208.

Similarly, if Section 12 requires a motion to be "filed and served" under Rule 4 of the Federal Rules of Civil Procedure, that would render the "or ***[their] attorney***" language in the FAA meaningless. Compare Fed. R. Civ. P. 4 (only allowing service on a "party") *with* 9 U.S.C. § 12 (allowing service of a notice on "the adverse party or [their] attorney."). Section 12 thus only requires "***notice of a motion***" to be served. U.S.C. § 12. That notice is akin to a notice of appeal.

III. THIS CASE IS IMPORTANT BECAUSE THERE IS A SUBSTANTIAL PUBLIC INTEREST IN GUARDING AGAINST ARBITRATION ABUSES THAT MIGHT FLOURISH UNDER MURKEY RULES

There are almost a billion arbitration clauses now in effect in the United States. The benefits of honest arbitration are immense. But due to its informality, private nature, and the lack of formal

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[5] The "notice" language here serves purposes that are consistent with the FAA. First, a "notice of a motion" (akin to a "notice of appeal" under the Federal Rules) is simpler way to indicate a challenge to an arbitration award compared to preparing and filing a motion itself. Second, a "notice of motion" would also serve to protect the parties' privacy interests – an oft-recognized reason to submit to arbitration – as they would have an opportunity to negotiate a resolution before filing papers publicly. Finally, a "notice of a motion" necessarily reduces the judiciary's burden because the notice itself would cause some parties to settle before filing the motion in federal courts. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983) (recognizing FAA's purpose to "move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible").

oversight, arbitration forums provide a ripe setting for corporations and charlatans to defraud people.

Murky rules provide an opportunity to these charlatans because they help them muddy the water. They also deter people from seeking relief because people (and lawyers) recognize that it is more difficult to recover in a judicial setting where words can mean anything, the written law is random, and the application becomes far too unpredictable.

IV. THE FIRST CIRCUIT IS WRONG TO DISMISS A CASE AGAINST A BIG BANK FOR INSUFFICIENT SERVICE AFTER THEY EXPRESSLY WAIVED SERVICE

Dismissing an action for lack of service a few months after a sophisticated party waived service is "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." U.S. Supreme Court Rule 10(a). This ruling is illogical.

Nonsensical rulings sow distrust in judiciary.

The First is wrong. It must corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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United States Court of Appeals
For the First Circuit

No. 25-1584

BRIAN K. WELLS,
Plaintiff - Appellant,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; BOFA SECURITIES, INC.; MERRILL LYNCH PROFESSIONAL CLEARING CORP.,
Defendants - Appellees.

Before Gelpí, Montecalvo, and Rikelman,
Circuit Judges.

JUDGMENT

Entered: January 16, 2026

Plaintiff-Appellant Brian K. Wells appeals the district court's order granting the Defendants' Motion to Dismiss his Motion to Vacate Arbitration Award ("Motion to Vacate") for failure to timely serve notice in accordance with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 12. Wells also appeals the district court's denial of his subsequent motion to enlarge the time to effect service. After careful consideration, we affirm.

Dismissals for insufficient service of process under Rule 12(b)(5) are typically reviewed for abuse of discretion. See Calderon Serra v. Banco Santander Puerto Rico, 747 F.3d 1, 7 (1st Cir. 2014) (citing Crispin-Taveras v. Municipality of Carolina, 647 F.3d 1, 6 (1st Cir. 2011)). However, when an appeal is premised on questions of law, as it is here, the ruling engenders de novo review. See Comfort v. Lynn School

Committee, 560 F.3d 22, 25 (1st Cir. 2009); Fradella v. Petricca, 183 F.3d 17, 19 n.2 (1st Cir. 1999) (statutory interpretation of FAA reviewed de novo); Marcus v. Am. Contract Bridge League, 80 F.4th 33, 43 (1st Cir. 2023) (de novo review applied to interpretation of Federal Rules of Civil Procedure).

Essentially for the reasons set forth in the magistrate judge's February 21, 2025, report and recommendation as adopted by the district court on March 12, 2025, we affirm the district court's judgment. We add only that Defendants' waiver of service -- several months after the § 12 deadline for service had expired -- did not waive their right to challenge the timeliness of service via Rule 12(b)(5). See 5B Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 1353 (4th ed. 2025) ("A Rule 12(b)(5) motion is the proper vehicle for challenging . . . the timeliness of delivery of the summons and complaint."). The only defenses eliminated by a waiver of service "are those involving the sufficiency of the summons or the sufficiency of the method by which it is served." Fed. R. Civ. P. 4, Advisory Committee Notes, 1993 Amendments, Subdivision d, paragraph 1. A defendant who waives service may still assert all "other defenses that may be available." Id.

Accordingly, a defense of untimely service under the FAA is not waived or precluded by a defendant's waiver of service after the deadline has already expired. Because Wells did not serve appropriate notice of his Motion to Vacate within the three-month period set forth in § 12, we affirm the district court's grant of Defendants' Motion to Dismiss. See Fed. R. Civ. P. R. 6, Advisory Committee Notes, 2016 Amendments (service by electronic means, or consent thereto, does not count as "other

means" consented to under Rule 5(b)(2)(F) and does not add three days to time to act for purposes of Rule 6(d)).[6]

Finally, we review the district court's decision denying Wells' motion for an extension of time to perfect service for abuse of discretion. See Benjamin v. Grosnick, 999 F.2d 590, 591 (1st Cir. 1993). Assuming arguendo that the good cause and excusable neglect provisions of Rule 4(m) and 6(b) apply in the context of § 12 motions to vacate, cf. Fradella, 183 F.3d at 21 (declining to decide whether § 12 deadline may be equitably tolled), Wells failed to establish he is entitled to an extension. See 4B Wright & Miller, Fed. Prac. & Proc. Civ. § 1137 (4th ed. 2025) (good cause considerations); Tubens v. Doe, 976 F.3d 101, 104-105 (1st Cir. 2020) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)) (explicating excusable neglect factors). Discerning no abuse of discretion, we affirm the district court's denial of Wells' motion for an extension of time to effect service.

For the foregoing reasons, the district court's judgment is affirmed. See 1st Cir. R. 27.0(c).

By the Court:
Anastasia Dubrovsky, Clerk

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6 In his reply brief, Wells now challenges the admissibility of tracking information from the U.S. Postal Service webpage. However, he did not raise this argument in the district court or in his opening brief. It is therefore waived. Carrozza v. CVS Pharmacy, Inc., 992 F.3d 44, 59 (1st Cir. 2021) ("[A]ppellants cannot raise an argument on appeal that was not 'squarely and timely raised in the trial court.'" (citation omitted)); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000) ("We have held, with a regularity bordering on the monotonous, that issues advanced for the first time in an appellant's reply brief are deemed waived.").

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Brian K. Wells

v. Case No. 24-cv-100-LM-TSM

Merrill Lynch, Pierce,
Fenner & Smith, Inc., et al.

ORDER

Plaintiff Brian Wells moves to enlarge time to serve process (doc. no. 21) and—in the event that motion is granted—to reconsider the order dismissing the action (doc. no. 22) on that basis. The court denies both motions.

Doc. no. 21 re-raises the same arguments made and considered twice-over. First in Magistrate Judge Saint-Marc's well-reasoned Report and Recommendation (doc. no. 17), and then by the undersigned in an order approving the Report and Recommendation (doc. no. 19) after considering Wells' objection thereto (doc. no. 18). As such, doc. no. 21 is denied. Because Wells concedes that doc. no. 22 depends on the resolution of doc. no. 21, it is denied as well.

For these reasons, doc. nos. 21 and 22 are denied.

SO ORDERED.

[image of signature omitted]
s/ Landya B. McCafferty
Landya B. McCafferty
Chief Judge

Date: May 13, 2025

cc. Brian K. Wells, pro se
Counsel of Record

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Brian K. Wells

v. Case No. 24-cv-100-LM-TSM

Merrill Lynch, Pierce,
Fenner & Smith, Inc., et al.

ORDER

After due consideration of the objection filed, I herewith approve the Report and Recommendation of Magistrate Judge Talesha L. Saint-Marc dated February 21, 2025. For the reasons explained therein, the defendants' motions to dismiss (Doc. No. 7 and 13) are granted. The defendants' motion to strike (Doc. No. 13) is denied as moot.

The clerk shall enter judgment and close this case.

SO ORDERED.

[image of signature omitted]
s/ Landya B. McCafferty
Landya B. McCafferty
Chief Judge

Date: March 12, 2025
cc. Brian K. Wells, pro se
Counsel of Record

NITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

BRIAN K. WELLS

v. Case No. 24-cv-100-LM-TSM

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., BOFA SECURITIES, INC., AND MERRILL LYNCH PROFESSIONAL CLEARING CORP

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS

Self-represented claimant/plaintiff, Brian K. Wells ("Wells"), initiated this action on April 1, 2024, by filing a Motion to Vacate Arbitration Award (Doc. No. 1),[1] wherein he requested that the court vacate an arbitration award denying his claims against respondents/defendants, Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), BOFA Securities, Inc. ("BOFA Securities") and Merrill Lynch Professional Clearing Corp. ("MLPCC"),[1] and ordering Wells to pay a sanction to Merrill Lynch. The matter is before the court on defendants' Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) (Doc. Nos. 7 and 13). Defendants contend that this action must be dismissed as untimely because Wells failed to file and serve his motion to vacate within three months after the arbitration award was filed or delivered, as required by § 12 of the Federal

[1] At some point prior to December 2023, defendant MLPCC merged into and with BOFA Securities. Doc. No. 13-2, pg. 2. Consequently, MLPCC no longer exists as a separate entity. Id.

Arbitration Act ("FAA"). Id. Wells objects (Doc. Nos. 14 and 16) and maintains that his motion to vacate complied with the requirements of § 12, and that defendants forfeited their right to contest the sufficiency of service by waiving service of process. For all the reasons detailed below, this court concludes that Wells' motion to vacate the arbitration award was untimely under the FAA. Therefore, it recommends that the district judge grant defendants' motions to dismiss.

BACKGROUND[2]

The Parties

Wells is an attorney who has been licensed to practice law since 2007. Doc. No. 13-1, pg. 3. He owns his own law firm and serves as an adjunct professor at the University of New Hampshire School of Law. Id. Defendants are affiliated companies that were incorporated in Delaware and maintained their principal places of business in New York at all times relevant to this action. Doc. No. 13-2, pg. 2; see also Doc. No. 3 at ¶¶ 11-13.

The Underlying Arbitration

In November 2021, Wells opened a Cash Management Account ("CMA Account") with Merrill Lynch so he could begin using the company's brokerage and investment advisory services. Doc. No. 3 at ¶ 19. The CMA Account contained an arbitration clause that called for the submission of disputes to

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[2] The relevant facts are derived from: 1- Wells' pleadings (Doc. Nos. 1 and 3); 2- documents submitted by defendants in connection with their motions to dismiss (Doc. Nos. 7-1 through 7-9 and Doc. Nos. 13-1 through 13-3); and, 3- documents submitted by Wells in connection with his objection (Doc. Nos. 14-1 through 14-5).

arbitration before the Financial Industry Regulatory Authority ("FINRA"). Id. It also called for arbitrations to be governed by FINRA's rules. Id.

The arbitration giving rise to this action occurred as a result of a dispute relating to Wells' purchase of option contracts from defendants in early 2022. See id. at ¶¶ 28-31. Wells claims that he sustained losses due to defendants' refusal to honor the option contracts and their subsequent decision to freeze his Merrill Lynch account in retaliation for his complaints about their conduct. See id. at ¶¶ 22-31. In late June 2022, Wells initiated arbitration against defendants by filing a Statement of Claim with FINRA. Id. at ¶ 28; Doc. No. 3-2. In his Statement of Claim, Wells alleged that defendants breached their contractual obligations to him and violated their fiduciary duties by failing to honor his option contracts and freezing his Merrill Lynch account without returning his funds. Doc. No. 3-2, pg. 1. On September 8, 2022, Wells filed an Amended Statement of Claim containing numerous causes of action against defendants and seeking millions of dollars in damages based on defendants' alleged conduct with respect to the option contracts. Doc. No. 3-1, pg. 2-3.

Wells' claims against defendants proceeded before a panel of arbitrators ("Panel"). See id. at pg. 3. On May 1, 2023, the Panel dismissed BOFA Securities and MLPCC from the arbitration after finding no evidence that those entities were associated with Wells' accounts or the alleged conduct at issue. Id. at pg. 4. The arbitration process continued with respect to Wells' claims against Merrill Lynch. Id.

The Panel held evidentiary hearings on the matter from December 5, 2023 through December 8, 2023. Id. It also considered a motion for sanctions that Merrill Lynch filed against Wells based on his conduct during the arbitration process. Id. In an order dated December 17, 2023, the Panel granted the motion for sanctions, citing Wells' "continued discovery and motion practice abuses throughout the pre-hearing and hearing process." Id. Shortly thereafter, on December 28, 2023, the Panel issued an arbitration award ("Award") in which it denied Wells' claims against Merrill Lynch in their entirety, ordered Wells to pay Merrill Lynch $100,000.00 "as a sanction pursuant to Rule 12212(a) of the [Code of Arbitration Procedure,]" and denied all remaining claims for relief. Id. at pg. 5. It is undisputed that FINRA posted the Award on its website on December 28, 2023. Doc. No. 3, ¶ 51; Doc. No. 14-1, ¶ 5; Doc. No. 7, pg. 4. Accordingly, the parties received notice of the Award on that date.

The Instant Litigation

On March 27, 2024, ninety days after the Award was posted, Wells sent an email to defendants' arbitration counsel in which he informed them that he would be "filing a petition to challenge the [A]ward in the FINRA arbitration this week" and asked them whether defendants agreed to waive service of process. Doc. No. 14-1, pg. 2; Doc. 14-4, pg. 3. One day later, on March 28, 2024, one of defendants' attorneys, Ronald D. Smith, Esq., responded to Wells' email. Doc. No. 14-4, pg. 2. In his response, Attorney Smith informed Wells that "[a]s a Texas licensed attorney, I am not authorized to accept service." Id. Wells then replied in relevant part:

> I am serving you. Under the FAA, "service shall be made upon the adverse party or his attorney" – you are that attorney. You have authority to accept service of the motion for yourself.
>
> * * *
>
> Please let me know before 3:00 p.m. EST. If I do not hear from you, I will assume that you will not accept service. In that case, I will serve the motion on you via mail.

Id. at pgs. 1-2. Attorney Smith did not respond by Wells' 3:00 p.m. deadline. See id. Instead, on April 3, 2024, Attorney Smith replied, "I am not accepting service of your new lawsuit. I do not have authority to do so. This is a new lawsuit for which I am not counsel of record." Id. at pg. 1.

On April 2, 2024, Attorney Smith received a package from the United States Postal Service ("USPS") containing Wells' Motion to Vacate, but the document contained no case number, file stamp, or any other indication that it had been filed with a court. Doc. No. 13-1, ¶ 10. Tracking information from the USPS website showed that Wells created a shipping label for the package on March 28, 2024, but the package was not received by USPS until March 30, 2024. Id.; see also id. at pgs. 196-207.

Wells initiated this action on April 1, 2024, by filing a Motion to Vacate Arbitration Award along with a Memorandum in Support of Motion to Vacate Arbitration Award ("Motion to Vacate"). Doc. No. 1. Shortly thereafter, the court informed Wells that his Memorandum should be filed as a pleading. Doc. No. 14-1, ¶ 15. Accordingly, on April 23, 2024, Wells filed

a Verified Amended Complaint for Motion to Vacate Arbitration Award ("Verified Motion to Vacate"), which became the operative complaint in the case. Id. at ¶ 16; Doc. No. 3. On May 6, 2024, Wells requested and obtained a summons for each defendant from the court. See Doc. Nos. 5 and 6. On June 17, 2024, defendants returned completed Waiver of Service of Summons forms to Wells by email. Doc. No. 7-9; Doc. No. 11.

On August 6, 2024, defendants moved to dismiss Wells' Verified Motion to Vacate pursuant to Federal Rule of Civil Procedure 12(b)(5). Doc. No. 7. In their motion, defendants argued that Wells failed to timely and properly file and serve them with the Verified Motion to Vacate under §12 of the FAA. Id. at pg. 6-7. Wells did not object to defendants' motion. Instead, he filed a Verified First Amended Complaint for Motion to Vacate Arbitration Award ("First Amended Motion to Vacate"), which purportedly contains new facts that Wells discovered after he filed his original pleading. Doc. No. 12.

On September 10, 2024, defendants filed an "Objection and Response to Plaintiff's Verified First Amended Complaint for Motion to Vacate Arbitration Award, and, In the Alternative, 12(B)(5) Motion to Dismiss" ("second motion to dismiss"). Doc. No. 13. Defendants object to and move to strike plaintiff's First Amended Motion to Vacate on the grounds that Wells did not comply with Federal Rule of Civil Procedure 15(a)(2) and because the proposed amendment is futile. Id. Alternatively, defendants move to dismiss the First Amended Motion to Vacate for the reasons raised in their first motion to dismiss. Id. Wells objects to defendants' second motion to dismiss, and in a footnote, requests that the court

grant him retroactive leave to file his First Amended Motion to Vacate. Doc. No. 14, n. 8.

DISCUSSION

I. Motion to Dismiss

A. Standard of Review

Defendants move, pursuant to Federal Rule of Civil Procedure 12(b)(5), to dismiss both the Verified First Motion to Vacate and the Amended Motion to Vacate. Doc. No 7 and 13. Defendants argue that Wells failed to comply with § 12 of the FAA because he failed to properly file and serve defendants with a copy of his Motion to Vacate within three months. "A Rule 12(b)(5) motion is the proper vehicle for challenging the mode of delivery, the lack of delivery, or the timeliness of delivery of the summons and complaint." 5B Arthur R. Miller, *et al.* Federal Practice and Procedure: Civil § 1353 (4th ed.); see Doyle v. YMCA of New Hampshire, 560 F. Supp. 3d 499, 502 (D.N.H. 2021) (citation omitted) ("A defendant may . . . challenge the manner in which process was served under Rule 12(b)(5)."). "When a defendant seasonably challenges the adequacy of service, the plaintiff has the burden of showing that service was proper." Vázquez-Robles v. CommoLoCo, Inc., 757 F.3d 1, 4 (1st Cir. 2014).

B. The Statutory Framework – 9 U.S.C. § 12

"The FAA embodies a national policy favoring arbitration; contains a narrow set of statutory grounds to vacate, modify, or correct an award; and supplies enforcement mechanisms for these types of actions." Popular Sec., Inc. v. Colon, 59 F. Supp. 3d 316, 318 (D.P.R. 2014) (citing Hall Street Associates v. Mattel, 552 U.S. 576, 581–582 (2008)).

To this end, § 12 of the FAA provides, in pertinent part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 12. "A party who seeks judicial review of an arbitration award must comply with the notice requirements of section 12; otherwise he forfeits his right to judicial review." Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461, 463 (D.P.R. 1991) (citing Corey v. New York Stock Exchange, 691 F.2d 1205, 1212 (6th Cir. 1982)). The parties agree that the Panel issued its final decision on December 28, 2023, and thus, Wells' deadline to serve "notice" of his motion was Thursday, March 28, 2024.[3] They dispute,

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3 Although the plain language of § 12 provides that "notice . . . must be served . . . within three months," the First Circuit referred to it as three months and 90-days. 9 U.S.C. § 12 (emphasis added). Compare Prudential-Bache Securites, Inc. v. Tanner, 72 F.3d 234, 239 (1st Cir. 1995) (noting "the text of Section 12 is unambiguous, clearly setting out a 90-day time limit[.]"), with Ribadeneira v. New Balane Athletics, Inc., 65

however, whether Wells timely and properly served notice of his motion.

Defendants contend that Wells fumbled the deadline, and therefore, his Motion to Vacate (including the amended pleadings) should be dismissed. First, defendants argue that § 12 required Wells to serve them notice of a filed motion to vacate before March 28, 2024, which he did not. See Doc. No. 13, pgs. 12-13. Second, defendants contend that Wells did not properly serve them pursuant to § 12. Id. at pgs. 13-16. The court addresses each argument in turn.

C. Timeliness of Motion to Vacate

The parties dispute what constitutes notice under § 12. Defendants contend that "Wells had to serve Defendants with a filed Motion to Vacate by March 28, 2024." Doc. No. 13, p. 13 (emphasis in original). Wells disagrees and argues that § 12 "only requires '***notice of a motion***.'" Doc. No. 16, pg. 2 (emphasis in original). He further argues that his March 27, 2024 email to defendants' arbitration counsel, informing them of his intent to file a petition to challenge the Award, was sufficient to satisfy the notice requirement. See id., pg. 3.

Although the First Circuit has not directly addressed this issue, its decisions regarding timeliness under § 12 suggest that the motion to vacate must be filed and served within three months

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F.4th 1, 14-15 (1st Cir. 2023) (concluding that an amended motion to vacate was timely filed within the "FAA's three-month deadline."). Here, ninety days after December 28, 2023, is March 27, 2024. However, three months after December 28, 2023, is March 28, 2024. The parties agree that March 28, 2024 is the appropriate deadline for purposes of this motion, which the court concludes is consistent with the plain language of § 12.

to be considered timely. See Ribadeneira v. New Balance Athletics, Inc., 65 F.4th at 15 (finding appellee's motion to vacate timely because it was filed before the expiration of the three-month period); Seacoast Motors of Salisbury, Inc. v. DaimlerChrysler Motors Corp., 271 F.3d 6, 8 (1st Cir. 2001) (If the claim were brought under the FAA, it would be "time-barred, because it failed to serve notice of the action . . . within three months of the filing of the award (its service came six days late)"); Fradella v. Petricca, 183 F.3d 17, 18, 20-21 (1st Cir. 1999) (finding the motion to vacate was untimely where it was filed seven days late); Prudential-Bache Sec., Inc., 72 F.3d at 238 (referencing the date the petition to vacate was filed in evaluating the timeliness of the petition). Other courts in this circuit also look to the date the motion to vacate was filed to determine whether the motion is timely under § 12. See Popular Sec., Inc., 59 F. Supp. 3d at 318 (finding defendants' attempt to vacate the arbitration untimely where they failed "to file a notice of motion to vacate or modify the award."); Domnarski v. UBS Financial Serv. Inc., 919 F. Supp. 2d 183, 187 (D. Mass 2013) (concluding motion to vacate was filed three days late and therefore, time-barred).

The court finds, therefore, that Wells had to serve defendants with a filed motion to vacate by March 28, 2024. He did not. Indeed, he could not because his initial Motion to Vacate (Doc. No. 1) was filed in this court on April 1, 2024, after the limitations period already expired. Accordingly, Wells' Motion is untimely, and his challenge to the arbitration award should be dismissed.

Even if § 12 did not require Wells to file and serve defendants before the deadline, as this court

concludes, but rather simply required that he provide an unfiled pleading to defendants before the deadline, Wells was still too late. See Shellito v. Travelers Companies, Inc., 567 F. Supp. 3d 538, 539 (E.D. Pa. 2021) (finding that the "plain language of [§ 12] requires 'service' rather than filing within the three-month period."). Defendants received their first copy of the unfiled Motion on April 2, 2024, after the three-month period expired. Doc. No. 13-1, ¶ 10.

Nevertheless, Wells argues that his March 27, 2024 email to defendants' arbitration counsel constituted sufficient notice under § 12 because § 12 requires only "notice." He contends that "[s]uch 'notice of a motion' is akin to a 'notice of appeal' required to initiate an appeal under the Federal Rules of Appellate Procedure." Doc. No. 14, pg. 6 (citing Fed. R. App. P. 4). Accordingly, he maintains that his email, which informed arbitration counsel, "I am filing a petition to challenge the award in the FINRA arbitration this week," Doc. No. 14-4, pg. 3, gave "unambiguous" notice that the award would be challenged. Doc. 14, pg. 2.

Unsurprisingly, Wells provides no legal support for the proposition that the notice required by § 12 is satisfied by a party providing notice that they *intend* to file *something* at *some point*. If that were sufficient, the three-month deadline would be meaningless. Further, such an interpretation would frustrate one of the overarching goals of the FAA, timely resolution of disputes, because a party could send an abstract "notice" that it planned to file a motion, but not actually file the motion until months or even years later. See Fradella, 183 F.3d at 19 ("The primary purpose served by the arbitration process is expeditious dispute resolution."). Finally, for the

reasons set forth below, Wells failed to serve his email in accordance with the requirements of § 12. In short, Wells' argument lacks merit.

D. Service of the Notice Was Improper Under § 12 of the FAA

Even if Wells' email to defendants that he planned to file a motion to vacate was sufficient "notice" under § 12, which it was not, dismissal is nevertheless appropriate because Wells did not timely serve the "notice" pursuant to § 12 of the FAA. See 9 U.S.C. § 12 (emphasis added) (requiring that "[n]otice of a motion to vacate, modify, or correct an award must be *served* . . . within three months . . . ."); see also Glaser v. Legg, 928 F. Supp. 2d 236, 239 (D.D.C. 2013) (emphasis in original) ("[T]he plain text of the statute requires *service* of notice of a motion to vacate rather than mere filing within the three month time limit[.]"); Seacoast Motors of Salisbury, Inc., 271 F.3d at 8 (noting service must occur within the three-month timeframe).

Section 12 specifies the manner by which service must be made:

> If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 12.

Wells acknowledges that defendants are Delaware corporations with their principal place of business in New York. See Doc. No. 3, ¶¶ 11-13. Thus, pursuant to § 12, defendants should have been served by a marshal before the three-month deadline. They were not. Instead, on March 27, 2024, Wells emailed defendants' arbitration counsel and notified them that he planned to challenge the arbitration award but did not include the proposed pleading. See Doc. No. 14-4, pg. 4, And on March 30, 2024, after the three-month deadline expired, Wells mailed arbitration counsel an unfiled Motion to Vacate, which counsel received on April 2, 2024. See Doc. No. 13-1, ¶ 10. Neither of these "service" attempts complied with the plain language of § 12. 9 U.S.C. § 12; see Shaut v. Hatch, No. 1:18 CV 420, 2018 WL 3559081, at *2 (N.D. Ohio July 24, 2018) ("The wording of § 12 is clear. Service by marshal is required if the adverse party is a nonresident."); Logan & Kanawha Coal Co., LLC v. Detherage Coal Sales, LLC, 789 F. Supp. 2d 716, 718-719 (S.D.W. Va. 2011) (collecting cases that construe the FAA's service requirement under similar verbiage in 9 U.S.C. § 9 strictly).

Although § 12's language is clear, some courts interpret the phrase, "in like manner as other process of the court," to permit service of process under Federal Rule of Civil Procedure 4 when the adverse party is a non-resident. See Hancor, Inc. v. R & R Eng'g Prods., Inc., 381 F. Supp. 2d 12, 15 (D.P.R. 2005) (citing *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure,* 96 F.R.D. 81, 94 (1983)). However, even under this standard, Wells' service was insufficient

under §12 because he did not serve defendants before the March 28, 2024 deadline.

Federal Rule of Civil Procedure 4(b) provides, "On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant." Further, Rule 4(c) states, "A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service." Wells filed his Motion to Vacate on April 1, 2024, after the expiration of the limitations period, and he did not request summonses until May 6, 2024.

Nevertheless, Wells argues that dismissal is not warranted for two reasons. First, he contends that defendants waived service of process in June 2024, and therefore, cannot now seek dismissal for insufficient service of process. Doc. No. 14, pg. 1. Second, Wells argues that his March 27th email was sufficient service because defendants consented to electronic service during the arbitration proceedings. Doc. No. 14, pgs. 5-6; Doc. No. 16, pgs. 3-4. Both arguments fail.

Wells' first argument – that defendants waived their ability to challenge the sufficiency of service because they waived service of the summons in June 2024 – misapprehends defendants' argument. Defendants do not challenge "the sufficiency of the actual service of process or the method of process," but rather "object to the timing" of service – specifically, that it occurred after the March 28th deadline. Doc. No.

15, pg. 4. Wells' untimely service of his § 12 "notice" is not cured simply because defendants waived service of the summons.

Next, Wells argues that his March 27, 2024 email to defendant's arbitration counsel constituted sufficient and timely service under § 12. Doc. No. 14, pg. 6; Doc. No. 16, pgs. 3-4. He contends that the parties "consented to electronic service by submitting to FINRA rules," and that "[s]uch service complies with Rule 5 that governs the service of notices, including 'notice of a motion' under Section 12 of the FAA." Doc. No. 14, pg. 6 (citing Fed. R. Civ. P. 5(b)(2)(E)). First, Federal Rule of Civil Procedure 5 applies where the adverse party is a "resident of the district within which the award was made." 9 U.S.C. § 12; see Dalla-Longa v. Magnetar Capital LLC, 33 F.4th 693, 696 (2d Cir. 2022) (noting that Rule 5 applies where the "adverse party" is a "resident" of the district within which the award is made); O'Neal Constructors, LLC v. DRT America, LLC, 991 F.3d 1376, 1379 (11th Cir. 2021) (same). Defendants are "nonresidents,"[4] and thus, Rule 5 does not apply here.

Further, Rule 5 permits service "by other electronic means that the person consented to in writing . . ." Fed. R. Civ. P. 5(b)(2)(E). Courts consistently reject the argument that a parties' agreement to accept papers by email in an arbitration proceeding carries over to service of papers in an action to vacate the arbitration award. See Dalla-

[4] Wells does not address defendants' residency in his objections. In his Declaration, however, Wells states that Merrill Lynch and BOFA Securities "are registered as foreign corporations in New Hampshire." Doc. No. 14-1, ¶ 11. Thus, he appears to concede that defendants are nonresidents for purpose of service of process.

Longa, 33 F.4th at 696 (2d Cir. 2022) ("But even assuming the parties did agree to email service in the arbitration, that agreement did not constitute [defendant's] written consent to service of papers by email in a subsequent lawsuit brought in federal court to vacate the arbitration award."); Kaplan v. Merrill Lynch Lynch, Pierce, Fenner & Smith Inc., 2022 WL 2110391, * 3 (S.D.N.Y. Jun. 10, 2022) (relying on Dalla-Longa to conclude that consent to email service in the "FINRA arbitration does not mean that [the party] consented to email service of a subsequent petition brought in federal court."). The same is true here. Defendants' consent to email service in the FINRA arbitration did not extend to service of Wells' Motion to Vacate in federal court. Wells understood this, otherwise he would not have needed to ask arbitration counsel to accept service. Similarly, he would not have needed to advised arbitration counsel, "If I do not hear from you, I will assume that you will not accept service," and "I will serve the motion on you via mail." Doc. No. 14-4, pgs. 1-2. But if Wells had doubts about whether defendants consented to email service, arbitration counsel's response that he was not authorized to accept service certainly made things clear. Accordingly, Wells' March 27, 2024 email did not constitute sufficient service under § 12 of the FAA, and therefore, dismissal is warranted.

II. Defendants' Motion to Strike the Verified First Amended Complaint

"It is common ground that leave to amend should be 'freely give[n]' in circumstances in which 'justice so requires.'" Calderón-Serra v. Wilmington Trust Co., 715 F.3d 14, 19 (1st Cir. 2013) (brackets in original) (quoting Fed. R. Civ. P. 15(a)(2)). However, "[t]he rule 'does not mean . . . that a trial court must

mindlessly grant every request for leave to amend.'" Id. (quoting Aponte–Torres v. Univ. of P.R., 445 F.3d 50, 58 (1st Cir. 2006)). The court has discretion to deny a motion to amend if, "as a matter of law," the proposed "amendment would be futile." Demars v. Gen. Dynamics Corp., 779 F.2d 95, 99 (1st Cir. 1985).

Because this court recommends that the district judge dismiss Wells' litigation as untimely, defendants' motion to strike the Verified First Amended Complaint is moot and need not be decided. However, in the event the district judge declines to adopt the recommendation that the case be dismissed, it should grant defendants' motion to strike.

Federal Rule of Civil Procedure 15 permits a party to "amend its pleading once as a matter of course no later than . . . 21 days after serving it," 15(a)(1)(A), or "with the opposing party's written consent or the court's leave." 15(a)(2). Wells filed the First Amended Motion to Vacate after the 21 days permitted by Rule 15(a)(1)(A). Additionally, he did not obtain defendants' written consent, nor did he seek the court's leave. See Fed. R. Civ. P. 15(a)(2). Wells offers no justification for his non-compliance with Rule 15(a), and he does not raise any persuasive arguments that justify granting him leave to amend. Under these circumstances, the district judge should grant defendants' motion to strike, if the district judge does not adopt the recommendation to dismiss the litigation in its entirety.

CONCLUSION

For all the reasons detailed herein, this court recommends that the district judge grant defendants' Motions to Dismiss (Doc. No. 7 and 13). Further, if the district judge adopts the recommendation to dismiss the litigation, the district judge should deny

defendants' Motion to Strike (Doc. No. 13) as moot. However, if the district judge declines to adopt this court's recommendation, for the reasons stated herein, the district judge should grant defendants' Motion to Strike. Any objections to this Report and Recommendation must be filed within fourteen (14) days of receipt of this notice. The fourteen-day period may be extended upon motion. Failure to file any objection within the specified time waives the right to appeal the district court's Order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016). Only those issues raised in the objection(s) to this Report and Recommendation "are subject to review in the district court" and any issues "not preserved by such objection are precluded on appeal." Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (quoting Keating v. Sec'y of Health & Hum. Servs., 848 F.2d 271, 275 (1st Cir. 1988)).

SO ORDERED.

[image of signature omitted]
s/ Talesha L. Saint-Marc
Talesha L. Saint-Marc
United States Magistrate Judge

Date: May 13, 2025

cc. Brian K. Wells, pro se
Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Wells	}	
Plaintiff	}	
v.	}	Civil Action No.
Merrill Lynch Pierce	}	24-cv-100-LM-TSM
Fenner & Smith	}	
Defendant		

WAIVER OF THE SERVICE OF SUMMONS

To: Brian Wells

(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 06/07/2024, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 06/10/2024

s/ Thomas J. Pappas
Signature of the attorney
or unrepresented party

BOFA Securities, Inc.
(Name of party waiving service of summons)

Thomas J. Pappas, Esq.
Primmer Piper
Eggleston & Cramer PC,
900 Elm St., 19th Floor,
Manchester, NH 03101
Address
tpappas@primmer.com
E-mail Address
(603) 626-3300
Telephone Number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Wells	}	
Plaintiff	}	
v.	}	Civil Action No.
Merrill Lynch Pierce	}	24-cv-100-LM-TSM
Fenner & Smith	}	
Defendant		

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I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 06/07/2024, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 06/10/2024

s/ Thomas J. Pappas
Signature of the attorney or unrepresented party

Merrill Lynch Pierce Fenner & Smith, Inc.
(Name of party waiving service of summons)

Thomas J. Pappas, Esq.
Primmer Piper Eggleston & Cramer PC,
900 Elm St., 19th Floor,
Manchester, NH 03101
Address
tpappas@primmer.com
E-mail Address
(603) 626-3300
Telephone Number

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Wells	}	
Plaintiff	}	
v.	}	Civil Action No.
Merrill Lynch Pierce	}	24-cv-100-LM-TSM
Fenner & Smith	}	
Defendant		

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(Name of the plaintiff's attorney or unrepresented plaintiff)

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I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 06/07/2024, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: 06/10/2024

s/ Thomas J. Pappas
Signature of the attorney
or unrepresented party

Merrill Lynch
Professional
Clearing Corporation
(Name of party waiving service of summons)

Thomas J. Pappas, Esq.
Primmer Piper
Eggleston & Cramer PC,
900 Elm St., 19th Floor,
Manchester, NH 03101
Address
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Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and

objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

NO. _____

IN THE

Supreme Court of the United States

BRIAN K. WELLS,
PETITIONER

V.

MERRILL LYNCH PIERCE FENNER & SMITH INC.,
MERRILL CLEARING CORPORATION, AND
BOFA SECURITIES, INC.,
RESPONDENTS.

Certificate of Service

I, Brian Wells, *pro se,* certify that on this 16th day day April, I will serve a copy electronically serve and will cause three copies of my Petition for a Writ Certiorari to be mailed on the following counsel:

Robert Kendall, III
Primmer Piper Eggleston & Cramer PC
900 Elm St, 19th Floor
PO Box 3600
Manchester, NH 03101
rkendall@primmer.com

Thomas J. Pappas
Primmer Piper Eggleston & Cramer PC
900 Elm St, 19th Floor
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Manchester, NH 03101
tpappas@primmer.com

/s/ Brian K. Wells
Brian K. Wells, *pro se*
144 Willis Road
Gardner, MA
617.842.6161

Petitioner

April 16, 2026

NO. _____

IN THE

Supreme Court of the United States

BRIAN K. WELLS,
PETITIONER

V.

MERRILL LYNCH PIERCE FENNER & SMITH INC.,
MERRILL CLEARING CORPORATION, AND
BOFA SECURITIES, INC.,
RESPONDENTS.

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I, Brian Wells, acting *pro se*, (Massachusetts Bar No. 670462), certify the petition for a writ of certiorari contains 10,013 words, excluding parts that are exempted by Supreme Court Rule 33.1(d)

/s/ Brian K. Wells
Brian K. Wells, *pro se*
144 Willis Road
Gardner, MA
617.842.6161

Petitioner

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MERRILL CLEARING CORPORATION, AND
BOFA SECURITIES, INC.,
RESPONDENTS.

Certificate of Service

I, Brian Wells, *pro se,* certify that on this 15th day of June, I will electronically serve a copy of my motion to enlarge on the following counsel:

Robert Kendall, III
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/s/ Brian K. Wells
Brian K. Wells, *pro se*
144 Willis Road
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617.842.6161

Petitioner

June 15, 2026