IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS

CIVIL COURT DEPARTMENT

MARK F. AGRE,

Plaintiff,

vs.

Case No. 17CV1974

Chapter 60; Div. 7

WELLS FARGO ADVISORS FINANCIAL NETWORK, LLC; AND FINANCIAL INDUSTRY REGULATORY AUTHORITY,

Defendants.

ORDER DENYING MOTION TO MODIFY AND CONFIRMING ARBITRATION AWARD

Defendant Wells Fargo Advisors Financial Network, LLC ("Wells Fargo"), seeks to modify an arbitration Award from a long-running arbitral proceeding in which plaintiff Mark F. Agre, a former financial advisor, established that his employer illegally extended a promissory note to repay a signing bonus that was to be repaid by a promissory note. The gist of this motion to modify is that a majority of the three-person arbitration panel ordered Wells Fargo to report as income to the Internal Revenue Service monies that defendant now says would be false, because it never did so, and this remedy or relief violates the crime exception to confirming such Awards. For reasons that are discussed below, the Court **DENIES** the motion and hereby **CONFIRMS** the Award.

The Procedural Record

Plaintiff Mark F. Agre filed this action on April 5, 2017, to confirm an arbitration Award ("Award") from a three-person panel of arbitrators[1] with the Financial Industry Regulatory Authority ("FINRA"). Exhibit A to Doc. 1. That Award was entered on March 23, 2017.

Without getting into all of the claims and counterclaims that were litigated over five sessions before the arbitrators, and because defendant does not seek to vacate the Award, the Court will confine its discussion to the single issue raised by defendant. Procedurally, because plaintiff sought to confirm the Award, Wells Fargo seeks relief by way of its response/objection to the petition to confirm, filed on June 5, 2017. Doc. 6. In that opposition/response, it raised as an issue that the Award directed Wells Fargo "to falsely report additional income to Agre for tax years 2010-2014." *Id.* at 3. Wells Fargo had filed a motion to vacate or modify the Award in the Western District of Missouri federal court but subsequently abandoned that effort when this first-filed case (requiring comity from the federal court) became evident. It then subsequently filed an amended response and counterclaim *to modify* the Award on August 18, 2017. Doc. 17. Therein, it makes clear that it does not contest the underlying merits of the Award or seek to vacate the same. *Id.* at 3, ¶ 3.

Accordingly, it seeks to modify or "correct" the Award in one discrete way.

The Scope of this Court's Review of the Award

The standards for a court considering confirmation of an arbitration Award is set out below:

[1] The presiding arbitrator dissented from the award.

> The Kansas Uniform Arbitration Act (Act), K.S.A. 5–401 *et seq.*, permits an appeal from an order confirming or vacating an arbitration Award, pursuant to K.S.A. 5–418(a). K.S.A. 5–418(b) provides: "The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action."
>
> On appeal, an appellate court's standard of review of an arbitration Award is highly deferential and the court must affirm an Award if the arbitrator acted within the scope of her or his authority. As long as errors are not in bad faith or so gross as to amount to affirmative misconduct, the appellate court is bound by an arbitrator's findings of fact and conclusions of law. *City of Coffeyville v. IBEW Local No. 1523,* 270 Kan. 322, 336, 14 P.3d 1 (2000). An arbitrator is not required to provide the reasons for his or her Award. *Griffith v. McGovern,* 36 Kan.App.2d 494, 500, 141 P.3d 516 (2006). The district court must presume an Award is valid unless one of the specific grounds in K.S.A. 5–412(a) is proven. *Alexander v. Everhart,* 27 Kan.App.2d 897, 900–01, 7 P.3d 1282, *rev. denied* 270 Kan. 897 (2000).
>
> K.S.A. 5–412(a) sets forth five limited circumstances in which an arbitration Award must be vacated:
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> "(1) The Award was procured by corruption, fraud or other undue means;
>
> "(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> "(3) The arbitrators exceeded their powers;
>
> "(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of K.S.A. 5–405, as to prejudice substantially the rights of a party; or
>
> "(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under K.S.A. 5–402 and the party did not participate in the arbitration hearing without raising the objection;
>
> "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the Award."

Moreland v. Perkins, Smart & Boyd, 44 Kan. App. 2d 628, 633–34, 240 P.3d 601, 606 (2010).

From the foregoing, it is clear that K.S.A. 5-412(a)(3) is the basis for the current motion.[2]

In essence, a court's review of an arbitration Award is very narrow, even if the arbitrator makes

[2] At oral argument, although the Court questioned why this matter was not controlled by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*., the parties agreed that the law on this topic would be the same under either the state or federal act. The grounds for vacatur and modification under that act are outlined in §§ 10 and 11, respectively. Accordingly, the Court finds decisions under the FAA to be persuasive in this instance.

an erroneous ruling, finding or conclusion of law. An "error of law renders the law void only when it would require the parties to commit a crime or otherwise violate a positive mandate of the law." 44 Kan. App. 2d at 634-35 (*citing Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683, 689, 751 P.2d 122 (1988)). The crime exception never has been the basis for upsetting any arbitration Award but it is the narrow issue defendant raises.

The Pertinent History Underlying the Arbitration Award

The arbitration Award that plaintiff seeks to confirm is attached to the Verified Petition, Doc. 1, Exhibit A. For purposes of this order, because Wells Fargo concedes confirmation of every other aspect of the Award, the Court will focus on some pertinent background from the the panel majority opinion. The dissent only briefly addresses the issue here.

Mr. Agre was a financial consultant for Wells Fargo (and its predecessor company, Wachovia). Wells Fargo initially filed the arbitration case on May 8, 2015 with regard to a complaint that plaintiff owed it money under a promissory note. Mr. Agre counterclaimed on June 22, 2015. He also amended his counterclaim because a former customer made a complaint against him which he sought to expunge. The arbitration panel unanimously recommended expungement of that complaint on March 23, 2017; FINRA is a party to this action only to effect that portion of the Award. ¶¶ 5-13. Wells Fargo essentially admits this aspect of the Award. Doc. 6, ¶¶ 5-13.

The Verified Petition primarily seeks confirmation of the Award, but primarily references the need to expunge a record with FINRA. But the Award's Case Summary illustrates the more significant issue now before the Court. Wells Fargo initiated the claims process by contending that Mr. Agre owed it money under a promissory note that he initially signed on August 4, 2006. At oral argument, the parties characterized this "loan" as an obligation to payback, over time, an

upfront signing bonus of $415,000. The Award itself explains this arrangement as "[s]ubstance over form" and an industry practice that exchanged upfront bonuses for promissory notes that allowed the company to recoup its payment from its financial advisors ("FAs") over a sufficient period of time. Thereby, the note obligated the FA to continue working for the company, receiving commensurate monthly payment bonuses to pay the note. Leaving the company before the end of the stipulated 88-month term triggered an acceleration of the "loan." Until this, Wells Fargo booked monthly payment bonuses as income on its books but never paid the same to the FA. It merely applied them to the loan. Award Page 4 of 9.

Under the original promissory note, Wells Fargo paid monthly $5,720.73 to Mr. Agre that it then used to reduce the "loan." That changed, at some point, so that both the loan payment and the payment bonuses were reduced to $2,992.37, but the consequence of this reduction, which the panel said only benefitted Wachovia/Wells Fargo, but to extend the working commitment of the FA. Exhibit A at Award Page 4 of 9.

The panel observed that Agre continued to work for defendant by another four years before he decided to quit. Wells Fargo justified the extension because its "FAs generally were 'choking on taxes' or that he [Agre] had any other reason to want to amend the Promissory Note." The panel majority determined, however, that the amendment was "significantly unbalanced…and, most importantly, places [Agre] in a worse position than under the Promissory Note." *Id.* It rejected *any* benefit to the FA either in terms of the interest rate or the deferral of taxes as "insignificant" when compared with Agre's "loan" risk and further control by Wells Fargo over him.

Ultimately, the panel concluded that Mr. Agre fulfilled his obligation "under the Promissory Note. That is, he worked for Wachovia (the predecessor company) and then Claimant

for more than the 'eighty-eight (88) months' set forth in the Promissory Note." Award Page 4 of 9. The panel's remedy, beyond discharging any obligation owed to Wells Fargo (on the amended promissory note) was to find, effectively that Mr. Agre's service to the company had effected payment of the original note. Thereby, the Award ordered Wells Fargo to "revise its records for Respondent's income for the years 2010-14 based on the Promissory Note. In other words, *as if the Amendment never occurred*. Claimant is ordered to report these changes to the IRS." *Id.* (emphasis added). The foregoing appears under paragraph 1 of the Award, the finding in response to defendant's original claim. Other than expungement, all other damage claims and counterclaims of the parties were denied. Award Page 5 of 9.

Now, defendant contends it would commit a false reporting (a crime) to alter its records to show that the original note had been paid off by income it never paid Mr. Agre.

Review of the presiding arbitrator's dissent, provides further insight into the arbitral litigation. The dissent notes that the loan balance under the presumed valid amendment that extended the employment obligation had been reduced to $131,119.84 when Mr. Agre quit his employment. Award Page 8 of 9. The dissent observed about the original transaction:

> The business deal here was a loan of $415,870.00 in August of 2006, when Respondent joined Claimant's predecessor, Wachovia. (It should be noted that Respondent could have accepted bonus payments as earned instead of receiving an upfront bonus-related loan). The loan was to pay, in advance, a bonus to be earned over the ensuing eighty-eight (88) months. The loan was to be repaid on a fixed schedule out of income earned by Respondent as an employee, ***and those payments were to be reimbursed to Respondent under a bonus plan***. However, if the bonus payments were no longer being earned (and quitting would end bonus payments), the loan was to be repaid anyway. For several years all went well, thus reducing the loan balance to $131,119.84 when Respondent quit his employment by Claimant. The Loan Payment Authorization Agreement signed in 2006, provided that, in the event of employment termination for any reason, '…I agree that I will immediately pay you the remaining balance owed.' Thus, when the majority of the Panel ruled that when Respondent remained employed for over eight[sic]-eight (88) months, he 'fulfilled his obligation', that ignores the actual transaction and substitutes a nonexistent business understanding.

> The documents referred to above were amended in 2010 to reduce the payments, reduce the interest rate, and reduce the bonus payments. Such Amendment did not cancel the obligation to repay.

Award at Page 8 of 9 (emphasis added).

The dissent, while noting it would uphold the promissory note amendment and find that the transaction was valid, also questioned whether the ordered relief was proper.

> The majority of the Panel comments on tax treatment. While I believe that is outside of our authority, I would note that if Claimant has to recast previous bonus payments at a higher amount, Respondent needs to file amended returns showing higher income for those years.

Award at Page 9 of 9. Thus, even the dissent recognize that defendant could "recast" its prior payments or book them differently to effect the bonuses it should have paid.[3]

From the foregoing, it is clear that both the majority and the dissent realized, factually and legally, the same transaction. They disagreed, however, on the result and the appropriate relief although the dissent does not argue harshly about forcing defendant to commit a false reporting or crime. For some reason, although it strenuously objects to the remedy, defendant never sought a rehearing on this issue before the panel.

CONCLUSIONS OF LAW

It is clear that unless defendant fits within the narrow "criminal" exception, the Award must be confirmed in all respects. It attempts to submit evidence to this Court that either was or was not submitted to the arbitrators. In its brief, Doc. 22, Wells Fargo reflects some of the litigiousness that prevailed below. In a pertinent footnote discussing the impact of the Award's

[3] The Court has no comment on whether the additional bonuses paid should be recast, as the dissent suggests, in a way that takes them into account for the appropriate tax years when Mr. Agre should have been receiving the higher bonus amounts to justify paying off the loan. Effectively, he received lesser amounts for an extended period of time. But what Wells Fargo *should not do* is characterize this as a cancelled debt. It was not.

obvious nullification of the amendment to the promissory note, and the impact on Mr. Agre of the relief ordered, it complains:

> But if Wells Fargo is now compelled to falsely report to the IRS that it paid to and received from Agre the larger monthly amounts between 2010 and 2014 [since the Panel concluded he had fulfilled the original note's terms], ***Agre essentially escapes tax-free***. All of those tax years except for the first few months of 2014 are now closed and ***Agre cannot be compelled to pay those taxes***. Thus, what is really happening here is Agre seeks to force Wells Fargo to lie to the IRS so he can escape tax liability.

Doc. 22 at 7, n. 5 (emphasis added). It appears to the Court that defendant complains too much about Mr. Agre "escaping" tax treatment that may or may not occur, not whether it will be guilty of falsely reporting income it had failed to pay and book.

The panel majority, however, sought to impute income that paid off the original promissory note because Mr. Agre had fulfilled the service obligation that should have resulted in monthly bonus compensation to pay off the debt. But Wells Fargo reveals its motive here, which is less about reporting false income, and more about seeking to impute a "cancelled debt" that would force Mr. Agre to pay taxes on the same. But the Award itself rejected the existence of such a debt. Thus, defendant's position is precisely contrary to the Award. \

It is apparent the arbitrators sought to avoid any real monetary recovery for damages by either party. It rejected Wells Fargo's principal claim of a debt and it rejected Mr. Agre's claim for monetary damages, except in the limited remedy of ensuring that no debt was owed. Implicit in the Award, however, is that Mr. Agre should have been paid under a bonus plan to ensure he would not have to pay any debt at the end of the original duration for service.

Accordingly, if Wells Fargo failed to make those appropriate bonus payments under the original note, then the panel's conclusion and remedy that Mr. Agre should have received bonus

payments over the duration of the original note to effect cancellation of the debt is consistent with its remedy. Importantly, while defendant may disagree with its application of the law, the Award is consistent with the issues disputed below and does not fit within the category of something neither party litigated.

The Motion to "Modify or Correct"

In spite of having lost that issue before the panel, Wells Fargo now proceeds with a two-pronged attack and justification for its motion to modify. It first seeks to describe the panel's order to report or restate the income that should have been paid to Mr. Agre as promoting a crime because it asks defendant to falsely portray its records. It then seeks to justify reporting to the IRS a cancelled debt obligation. It is this latter suggestion that would be false because no reading of the majority's decision supports such an analysis. In essence, this is the dissent's view.

To reach the conclusion that reporting anything other than what Wells Fargo actually reported in error, it attaches an affidavit and new evidence that is not referenced in the Award, even if it might have been considered below. It is obvious from further review of the Award that bad blood existed between the parties. Indeed, Mr. Agre alleged a constructive discharge. It is further obvious from the tone of the briefing here that some of that animosity lingers:

> The Award, the merits of which are not now disputed, results in ***imputed income*** to Agre ***in the amount of the cancelled debt*** under the Amended Note. ***The appropriate way to report this to the IRS is for Wells Fargo to file an IRS Form 1099 showing the cancelled balance due as imputed income to Agre*** for the tax year in which the Award was issued, not to "restate" the prior, timely, and accurate reporting for 2010-2014 to now inaccurately report greater income to Agre and payments on the original Note than were actually received and paid during those earlier years.

Doc. 22 at 9-10 (emphasis added).

Whether There Are Grounds to Vacate or Modify

On the Public Policy Exception

The Court starts from the premise that it must confirm an arbitration award unless there is proof of the specific grounds to vacate outlined in K.S.A. 5-412(a). *Moreland*, 44 Kan. App. 2d at 633. Even if a court of law or equity would not order such relief is not a basis for vacating an award or refusing to confirm the same. *Neighbors Construction Co. v. Woodland Park at Soldier Creek, LLC*, 48 Kan. App. 2d 33, 43, 284 P.3d 1057 (2012).

The party seeking to vacate or modify an arbitration Award has the burden to set it aside. *Griffith v. McGovern,* 36 Kan. App. 2d 494, 500, 141 P.3d 516 (2006). This, coupled with the highly limited review of the Award itself, *Moreland*, 44 Kan. App. 2d at 636, places a very high burden on Wells Fargo on its motion. Defendant theoretically can seek to employ a non-specific ground for refusing to enforce an award known as the public policy exception. *See United Paperworkers Intern. Union v. Misco, Inc.*, 484 U.S. 29 (1987) (affirming award that reinstated worker in possession of marijuana, despite employer's public policy argument).[4]

This is an uphill battle after *Misco*, in which an employee who got caught with marijuana in his car in the employer's parking lot, was deemed insufficient to justify his discharge under a collective bargaining agreement. The Court found the public policy ground for failing to enforce an award "is a more specific application of the more general doctrine, rooted in common law, that a court may refuse to enforce contracts that violate law or public policy." 484 U.S. at 42 (citations omitted). It derives from the "basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act." *Id.*

[4] This exception has been employed since *Misco*, a labor case, in the commercial setting.

In upholding the arbitrator, the Court said it could not engage in contrary fact-finding:

> In any event, it was inappropriate for the Court of Appeals itself to draw the necessary inference. To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration Award.

484 U.S. at 44–45.

There Is No Specific Ground Cited to Modify or Correct

Modification or correction of an award is outlined in K.S.A. 5-413(a) which contains only three grounds. The first is an evident miscalculation of figures or description of any person, thing or property referenced in the award. K.S.A. 5-413(a)(1). That is inapplicable here. The second is that the arbitrators "have awarded upon a matter not submitted to them." K.S.A. 5-413(a)(2). This also does not apply as the remedy here is related to the subject matter heard. Finally, the last is that the award "is imperfect in a matter of form not affecting the merits of the controversy." K.S.A. 5-413(a)(3). This also does not apply as the Award remedy stems directly from the merits of the controversy.

The difficulty here is that K.S.A. 5-412 addresses the grounds for *vacating* an Award in its entirety and subsection (3) seems to address whether arbitrators exceeded their powers. This is an all-or-nothing proposition. But Wells Fargo sidesteps this provision to tweak the Award's remedy by seeking to "modify or correct" the same. Nowhere in its motion or its initial brief does Wells Fargo cite any specific provision to modify or correct the award under K.S.A. 5-413(a). Docs. 21, 22. The Court is left to guess until its reply brief references K.S.A. 5-413(a)(2), that allows modification if the award decided "upon matters not submitted to [the arbitrators] and the award

may be corrected without affecting the merits of the decision upon the issues submitted." Doc. 25 at 5. That is not this case.

Plaintiff's opposing brief does little to illuminate the matter from the crime exception. It initially cites K.S.A. 5-412, Doc. 24 at 10, presumably because it thought Wells Fargo's non-specific invocation of grounds to modify was proceeding on this ground. Primarily, however, it sought to rebut defendant's arguments about harm to Mr. Agre should the Court favor Wells Fargo's argument about committing a crime (but reporting a cancelled debt). To make matters more confusing, the operative pleading filed by Wells Fargo, denominated as *Amended Response and Counterclaim of Wells Fargo Clearing Services, LLC D/B/A Wells Fargo Advisors to Verified Petition to Confirm Arbitration Award*, Doc. 17, cites the "imperfect in a matter of form ***not affecting the merits of the controversy***" provision. *Id.* at 8, ¶ 29. It now has abandoned that basis for its motion because it clearly would affect the merits of the controversy. The remedy is wrapped up in the controversy.

The Invocation of the Public Policy Exception

If none of the KUAA provisions apply, then the only basis for not enforcing the remedy must be the public policy exception of which the "crime" exception is one species. Other grounds for failing to enforce an award, however, also common law based and not enumerated under the Act. The "manifest disregard" for the law exception precludes enforcing an award that demonstrates the arbitrators deliberately refused to apply the law, as opposed to mistakenly applied the same. *Neighbors Construction Co., Inc. v. Woodland Park at Soldier Creek,* LLC, 48 Kan. App. 2d 33, 43, 284 P.3d 1057 (2012). The public policy exception is recognized under the same umbrella of exceptions, which also includes being denied a fair hearing. *Id.* at 50 (*citing Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001)). No Kansas case has ever vacated an Award

for manifest disregard for the law. *Id.* at 50-51. The found no such case invoking the public policy exception, much less the crime exception.

The public policy exception for modifying an award stems from the likelihood that some ordered relief would offend public policy when one party is required to take action that directly conflicts with the public policy. *Revere Cooper and Brass, Inc. v. Overseas Private Inv. Corp.*, 628 F.2d 81, 83 (D.C. Cir.), *cert. denied*, 446 U.S. 983 (1980).

Assuming Wells Fargo properly invokes the public policy exception here, it is doubtful that the Award can be corrected or modified in the manner it suggests without vacating the entire award because the ordered relief is a result of the determination by the panel to provide relief but not specific damages to Mr. Agre. Doc. 1, Exhibit A at Pages 1-2 of 9. As the arbitral respondent, Mr. Agre raised issues regarding wrongful termination or constructive discharge, breach of the employment relationship *and compensation agreements*, restitution and unjust enrichment. Other issues included the handling of a customer complaint.

The relief requested, as summarized in the Award, addressed and rejected Mr. Agre's claim for $131,119.84 in damages (the same amount defendant wants to impute as a cancelled "debt"). Wells Fargo requested its own damages that assumed this same debt. Exhibit A at Page 2 of 9. The Award mentions that "there was no new bonus money" with the amended promissory note, or nothing of value to justify the amended note and the Panel treated it "as if the Amendment never occurred." Page 4 of 9. The dissenting arbitrator observed that by working 88 months, or for some specified duration, the FA repaid the upfront bonus money on the promissory note "on a fixed schedule *out of income earned* by [Mr. Agre] as an employee, *and those payments were to be reimbursed to [Mr. Agre] under a bonus plan*." Page 8 of 9 (emphasis added). In other words,

part of the dispute involved income bonus payments that Wells Fargo should have paid, which is consistent with plaintiff's asserted theory of a breach of compensation agreements.

Under any scenario, working for the specified duration *earned* bonus payments. The Award determined Mr. Agre had earned the same, but such payments were not booked as such by Wells Fargo. Defendant now complains that either its failure to make sufficient bonus payments or underpaying Mr. Agre such payments now forces it to commit a crime because it will have to effectively recharacterize its FA transaction to reflect the Award's findings. In reality, it is complaining that the consequence of its "amendment" of the promissory note is that it was not enforced, much less believed and that Mr. Agre will be getting away with something. In other words, it refuses to acknowledge the result of the Award.

To convince the Court about its self-inflicted dilemma, Wells Fargo provides the Declaration of Carolyn Lamar, which, in turn, attaches purported business records and a partial accounting of the employment relationship, and an "analysis" of its self-serving accounting under the promissory note. *See* Exhibits A, B and C to Doc. 22. Likewise, Mr. Agre commits the same error in attempting to improperly inject evidence, contending he did not receive 1099s for the bonus payments booked as W-2 income. Doc. 24 at Ex. 3, ¶¶ 3, 4.

The Court is mindful of its limited function. It may not hear the case *de novo* or even consider evidence submitted to the arbitrators. *Evans Electrical Constr. Co. v. University of Kansas Med. Center*, 230 Kan. 298, 307, 634 P.2d 1079 (1981); *Nowicki v. Project Paint Research Labs*, 40 Kan. App. 2d 733,737, 195 P.3d 273 (2008). It cannot reconsider the merits of the award. *Foley v. Grindsted Products, Inc.*, 233 Kan. 339, 348, 662 P.2d 1254 (1983). Likewise, if it cannot consider evidence before the arbitrators, it certainly cannot consider new evidence (or evidence that is not explicitly mentioned in the Award itself). This would invite a *de novo* review.

The narrow review of the merits also applies to the remedy ordered. *Teamsters Local No. 115 v. DeSoto, Inc.*, 725 F.2d 931, 937 (3rd Cir. 1984). Typically, if an arbitral remedy is futile, that decision should have been a question for the arbitrators. Only open issues *not* addressed by the Award are subject to remand. *Id.* at 940. An arbitrator's discretion to determine the extent of remedies is as great as his or her discretion to determine the initial issues that prompt the same. *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal. 4th 362, 374, 885 P.2d 994, 1001 (1994).

The KUAA does allow for a change of an award by the arbitrators, upon application by a party "or, if an application to the court is pending under K.S.A. 5-411, 5-412 or 5-413." But the resubmission to the arbitrators under such conditions as the court may order assumes "the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) [evident miscalculation or mistake in description, etc.] and (3) [imperfect in a matter of form not affecting the merits] of subsection (a) of K.S.A. 5-413, or for the purpose of clarifying the Award." K.S.A. 5-409.

As stated before, that exception for resubmission does not exist and neither party has requested the same. Additionally, it is evident from the Award and the dissenting arbitrator's opinion that the remedy stemmed directly from the issues raised below. It was integral to the panel's determination. Thus, it was a miscalculation nor or a mistake stemming from the contracts or disputes at issue. Nor was it an imperfect determination, the correction of which *could not affect* the merits of the controversy. Here, it *was* the controversy.

With the foregoing in mind, the *only* basis for consideration by this Court is whether the remedy ordered violates public policy. A court may decline to enforce an award that violates public policy under the Uniform Arbitration Act. *State v. Henderson*, 277 Neb. 240, 249-50, 762

N.W.2d 1, 8-9 (2009) (*citing Misco* and public policy exception to vacate Award that ordered reinstatement of trooper who was an avowed member of the Ku Klux Klan).

Principally, Wells Fargo's argument goes, employers must report and withhold taxes on only those wages that are paid. 26 U.S.C. 3402. A W-2 must be provided that contains an employee's wages and tax information. 26 U.S.C. 6501(a). Finally, an employer is required to furnish such W-2 information and one "who willfully furnishes a false or fraudulent statement…shall, for each such offense, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 years, or both." 26 U.S.C. 7204. Section 7206(1), defendant complains, makes it a felony to report something on a return that is false.[5] It argues that forcing it to report income that it "knows [was] not, in fact, actually paid would place Wells Fargo in violation of sections 7204 and/or 7206(1) of the Internal Revenue Code." Doc. 22 at 8-9.

Plaintiff, in response, attacks the assumption that defendant may report a cancelled debt under the nullified amended promissory note and decries the effect of this as requiring him to submit a Form U4 to disclose whether he had suffered a "compromise with a creditor" over the past ten years. Doc. 24 at 5. He then minimally addresses defendant's "false" reporting argument by noting that the tax code addresses *earned* wages, not reported wages, and that compensation should be viewed broadly. *Id.* at 13 n.6 (*citing Social Security Board v. Nierotko*, 327 U.S. 358 (1946)).

Wachovia's payment of bonuses and use of promissory notes is noted in *Wells Fargo Advisors, LLC v. Watts*, 540 Fed. App. 229 (4th Cir. 2013). There, the court reversed the district court's vacation of an attorney fees award that sustained the bonus agreement/promissory note

[5] The Court must observe, at this point, that if Wells Fargo had little or no justification for its failure to pay Mr. Agre his appropriate bonus payment, then it significantly underreported the same which also is false.

arrangement that it said reflected "standard agreements in the industry that courts uphold." *Id.* at 231. There, the court rejected the public policy exception for *not* awarding attorney fees. *Id.*

This, on the other hand, requires Wells Fargo *to report* what it failed to pay for an arrangement, in essence, that recognized compensation for services rendered in the form of periodic bonus payments. This ordered remedy was in lieu of the damages Mr. Agre sought but is a valuable result nonetheless. Complying with this ordered remedy is neither a wilful or false reporting of income. In *Bachmann v. Commissioner*, 97 T.C.M. 1278, 2009 WL 614791 (T.C. March 11, 2009), the petitioner, like plaintiff, worked in the financial services industry for Salomon Smith Barney and obtained an arbitration award against his employer. He sought to avoid reporting compensation under the award as reportable as income. His employer paid the award and issued a 1099-MISC. Bachmann did not report that money as income. *Id.* at *3.

In determining that Bachmann owed income tax, the court focused on the fact that "all income from whatever source derived" is included in gross income. *Id.* at *5 (*citing Commissioner v. Schleier*, 515 U.S. 323, 328 (1995). When an amount is received by a taxpayer as a result of a legal dispute, the tax treatment of the payment is determined by asking "in lieu of what were the damages awarded?" *Id.* (*citing Raytheon Prod. Corp. v. Commissioner*, 144 F.2d 110, 113 (1st Cir. 1944), affirmed 1. T.C. 952 (1943)). Ruling against the taxpayer, the court concluded that at least part of the award was for his services which are subject to taxation. *Id.* at *6.

The Award here found that Mr. Agre should have received sufficiently monthly reductions in his promissory note obligation in lieu of him receiving such income directly as payment for services rendered. Thus, the *services* rendered justified the the ordered compensation and it is reportable one way or the other regardless of whether the IRS treats the transaction as no longer assessable. That is between Mr. Agre and the IRS. The arbitrators were within their purview by

ordering Wells Fargo to treat this transaction as payment for services rendered as opposed to cancellation of a debt. *See Fresh Eggs Mgr., L.L.C. v. Ohio Fresh Eggs*, 2013 WL 4033778 *7 (Ohio Ct. App., Aug. 8, 2013) (affirming arbitral award despite argument that arbitrators failed to consider a debt write-off as opposed to an equity conversion).

In conclusion, the Court finds that the arbitral remedy and Award that requires Wells Fargo to report income related to Mr. Agre's services during the relevant tax years with defendant does not violate public policy or justify modifying the Award. Rather, it is within arbitral authority to order such a remedy. Accordingly, the Court confirms the arbitration Award in all respects.

IT IS SO ORDERED.

2/22/18
Date

/s/ David W. Hauber
DISTRICT COURT JUDGE, Div. 7

NOTICE OF ELECTRONIC SERVICE

Pursuant to KSA 60-258, as amended, copies of the above and foregoing ruling of the court have been delivered by the Justice Information Management System (JIMS) automatic notification electronically generated upon filing of the same by the Clerk of the District Court to the e-mail addresses provided by counsel of record in this case. Counsel for the parties so served shall determine whether all parties have received appropriate notice, complete service on all parties who have not yet been served, and file a certificate of service for any additional service made.

/s/ DWH