UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 1:18-cv-20969-UU

CHRISTIAN S. GHERARDI,

Petitioner,

v.

CITIGROUP GLOBAL MARKETS, INC.,

Respondent.
_____/

OMNIBUS ORDER

THIS CAUSE is before the Court upon Petitioner's Motion to Confirm Arbitration Award (the "Motion to Confirm"), D.E. 1, and Respondent's Motion to Vacate Arbitration Award (the "Motion to Vacate"). D.E. 13.

The Court has reviewed the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons discussed below, the Motion to Vacate is GRANTED IN PART and DENIED IN PART, and the Motion to Confirm is GRANTED IN PART and DENIED IN PART.

I. Factual Background[1]

A. Christian Gherardi's Employment History

Petitioner Christian S. Gherardi ("Gherardi") is a citizen of Florida. D.E. 1 ¶ 1. Defendant Citigroup Global Markets Inc., ("Citi") is a New York Corporation and a Financial Industry Regulatory Authority ("FINRA") regulated broker-dealer. *Id.* ¶ 2. Gherardi joined Citi in 1996 and worked as a financial advisor until he was terminated on December 11, 2015. D.E. 13-1 at 9

[1] Unless otherwise indicated, the facts are taken from the exhibits and undisputed facts in the sworn affidavits of Michael Sirgado, associate general counsel of Citi, D.E. 13-2, Ira Rosenstein, Citi's counsel, D.E. 13-1, and Ethan A. Brecher, Plaintiff's counsel, D.E. 17-1.

¶ 3. At the time of his termination, Gherardi was working in Citi's Miami, Florida office where he had worked for at least fifteen years. *Id.* at 10 ¶¶ 4, 7.

When terminated, Gherardi's employment with Citi was governed by the 2015 Citi U.S. Employee Handbook (the "Handbook"). D.E. 13-1 at 139. The Handbook contained an employment arbitration policy and an "employment at-will" clause. *Id.* The employment arbitration policy required that any employment-related disputes were to be arbitrated under the auspices of FINRA. *Id.* at 22-27.[2] The arbitration policy also contained a non-retaliation provision stating that "[r]etaliation against employees who file a claim under this Policy, including claims regarding the validity of this Policy or any provision thereof, is expressly prohibited." D.E. 13-1 at 23. The "employment at-will" clause stated that Gherardi's "employment with Citi [was] at-will, which means it [could] be terminated by [Gherardi] or Citi at any time, with or without notice . . . for no reason or for any reason . . . ." *Id.* at 139. Gherardi also signed the Handbook's acknowledgement, in which he confirmed that he understood that he was an "at-will" employee. *Id.* at 141.

From approximately 2007-2009, Gherardi also worked for Smith Barney, a division and brand of Citi. D.E. 13-2 at 17-19. Gherardi's employment with Citi and Smith Barney was governed by a dual employment agreement. *Id.* The dual employment agreement also stated that Gherardi's employment relationship with Smith Barney and Citi was "at-will." *Id.* at 17. The dual employment agreement was governed by New York law. *Id.* at 18. In 2009, Smith Barney was spun-off to form a joint venture with Morgan Stanley. D.E. 13 at 5 (citing *id.*). Gherardi did not join the joint venture and remained employed by Citi until December 11, 2015. *Id.*

[2] The Handbook also states that other than the employment arbitration policy, nothing in the Handbook is a contract of employment. D.E. 13-1 at 22.

According to Gherardi, other financial advisors tried to poach his business from time to time. D.E. 13-1 at 12 ¶ 14. On April 21, 2015, he confronted one such financial advisor, Rodrigo Motta, and discussed Motta's alleged attempts to poach Gherardi's business. *Id.* On June 8, 2015, Michael Averett ("Averett"), Gherardi's supervisor, had a meeting with Gherardi, regarding his exchange with Motta. *Id.* at 13 ¶ 17. Subsequently, on June 25, 2015, Averett sent Gherardi a "Final Warning" letter. *Id.* at 44-45. The final warning letter referenced Averett's prior meeting with Gherardi and noted that further unprofessional conduct would lead to termination. *Id.* On December 8, 2015, after challenging the final warning internally, Gherardi sent an email to Citi's Human Resources Department, indicating that he was inclined to arbitrate the final warning letter. *Id.* at 15 ¶ 26. On December 11, 2015, Gherardi was terminated. D.E. 13-1 at 16 ¶ 27. In its U-5 termination notice,[3] Citi cited "Business decorum issues, non-investment related conduct" as the explanation for the termination. *Id.* ¶ 29.

B. FINRA Arbitration

1. Initiation of Arbitration

On March 15, 2016, Gherardi and his counsel, Ethan A. Brecher ("Brecher"), initiated arbitration with FINRA by filing a submission agreement ("the Submission Agreement") and a statement of claim against Citi and Averett. *Id.* at 9-21, 40. The statement of claim sought $16,500,000 in damages and asserted counts for *inter alia*, defamation based on the explanation of his termination in the U-5 form, wrongful termination based on Citi's violation of the anti-retaliation provision in the Handbook, and wrongful termination in violation of "the common law of securities arbitration, which provides that registered persons are not at-will employees."[4] *Id.* at

[3] Form U-5 is the FINRA-mandated uniform termination notice. D.E. 17-19 at 4.

[4] The statement of claim also alleged one count of tortious interference against Averett, which was subsequently denied. D.E. 13-1 at 20.

20. On June 3, 2016, Citi and Averett filed an answer to the statement of claim through their counsel, Ira G. Rosenstein ("Rosenstein"). D.E. 17-1 ¶ 7. Citi's answer alleged, among other matters, that Gherardi had been an "at-will" employee and that due to his "at-will" status he could not pursue a claim for wrongful termination. D.E. 13-1 at 34-35.

On June 2, 2016, FINRA provided the parties with a "strike and rank list" of thirty proposed arbitrators. *Id.* at 3 ¶ 5; D.E. 17-1 at 3 ¶ 9. Among the arbitrators on the list was Robert J. Bender ("Bender"). D.E. 13-1 at 3 ¶ 6. Accompanying the strike and rank list was Bender's arbitrator disclosure report, indicating his employment history, education, and conflicts. *Id.* at 56-58. In the disclosure report, Bender disclosed that he worked as "Vice-President Investments" for Smith Barney from 2000-2004. *Id.* at 58. Bender did not list Smith Barney or Citi on his list of conflicts. *Id.* at 57. On June 30, 2016, FINRA chose a three-arbitrator panel (the "Panel") to oversee the dispute, including Bender, Louis Huss ("Huss") and Jack Coe ("Coe"). *Id.* at 61.

2. Bender's Oath and Disclosure Checklist

On July 14, 2016, Bender submitted an "Oath of Arbitrator" and disclosure checklist. *Id.* In the oath and disclosure checklist, Bender confirmed that he was not employed by any of the parties or witnesses and that he knew of no existing or past financial, business, or professional reason that would impair him from performing his duties. D.E. 13-1 at 63-75. However, Bender disclosed that in the late 1990s, he spoke to Brecher (Gherardi's counsel) regarding a legal issue and that Brecher subsequently made a phone call on Bender's behalf, which resolved the issue. *Id.* at 75. Bender also disclosed that he spoke to Brecher again one year later regarding a separate legal issue, but that Bender was able to resolve this issue himself without any further advice from Brecher, and that he had not had any further interaction with Brecher over the last seventeen

years. *Id.* Lastly, Bender disclosed that from 2000 to 2004 he maintained a 401k with Smith Barney and that Citi was the parent company of Smith Barney. *Id.*

3. Citi's Motion to Remove Bender

On July 28, 2016, Citi moved to have Bender removed as an arbitrator. *Id.* at 77. In support, Citi alleged that Bender's prior conversations with Brecher involved an employment dispute that Bender had with Smith Barney, and that such dispute conveyed the impression of partiality as Bender would be arbitrating Gherardi's employment dispute with Citi. *Id.* Brecher responded to Citi's allegations, explaining: that the interaction occurred over seventeen years ago, that the first call Brecher allegedly made on Bender's behalf was actually made by Brecher's partner, that Brecher did nothing in his second interaction with Bender because Bender resolved the issue on his own, and that neither call had anything to do with Citi or Smith Barney because at the time of the calls, Bender worked at Olde Discount Stockbrokers. *Id.* at 84. On August 8, 2016, FINRA denied Citi's motion to remove Bender stating that the grounds did not constitute cause to sustain the challenge. *Id.* at 87.

4. Citi's Continued Attempts to Remove Bender

On August 15, 2016, during an initial pre-hearing conference with FINRA, Citi indicated that it would not accept the Panel's composition absent further disclosure from Bender regarding his alleged employment disputes with Smith Barney and Citi. *Id.* at 89. Bender declined to provide further information, but maintained that he would be impartial. D.E. 17 at 3. One day later, on August 16, 2016, Citi and Averett signed the Submission Agreement, agreeing to submit Gherardi's dispute with Citi to FINRA arbitration. D.E 17-7 at 2.

On September 6, 2016, Citi submitted a letter to FINRA, requesting that Bender voluntarily recuse himself and reiterated that his prior associations with Brecher could potentially affect the

outcome of the arbitration. D.E. 13-1 at 97-98. The letter further requested that if Bender declined to recuse himself, that he disclose certain information, including the employers with whom he had disputes, the nature of those disputes, and whether the disputes involved any sort of filings with an adjudicative body. *Id.* Bender declined to recuse himself, asserted that his impartiality was not compromised, and reiterated the facts asserted in Brecher's July 28, 2016 opposition to Citi's motion to remove Bender as an arbitrator; namely, that his interactions with Brecher had been brief and the calls had nothing to do with Smith Barney. *Id.* at 104-105. Lastly, Bender affirmed that neither interaction involved any filings with any adjudicative body, nor any settlement or confidentiality agreement, and that he received no remuneration as a result of the interactions. *Id.*

5. The Arbitration

The arbitration commenced on May 15, 2017. D.E. 17-1 at 8 ¶ 30. On the same day, Citi orally agreed to the Panel's composition, including Bender. *Id.* ¶ 31. On May 19, 2017, during Rosenstein's direct examination of a witness, Bender began to ask questions, at which point Rosenstein interjected that Bender was cross-examining Rosenstein's witness; Rosenstein complained: "I [Rosenstein] have heard that Mr. Bender is biased against our side," and "Mr. Bender is angry at me and is biased against my case." D.E. 17-12 at 31:5-6. The parties took a ten minute break and upon their return, arbitrator Huss stated "I don't think Mr. Bender was in any way . . . trying to bias your client." *Id.* at 32:9-12. The arbitration concluded on November 17, 2017. D.E. 17-1 ¶ 37. The parties filed post-hearing briefs on January 19, 2018. D.E. 17-18; D.E. 17-19.

6. The Award

The Panel issued its unanimous award on February 28, 2018. D.E. 13-1 at 143-150. The Panel stated in the award that after considering the pleadings, testimony, other evidence, and the post-hearing submissions, Gherardi was entitled to the following relief: $3,452,000 in compensatory damages expressly for wrongful termination, $150,000 for lost quarter trailers, $395,830.22 in deferred compensation, and a recommendation that the termination explanation on Gherardi's U-5 form be changed to read "terminated without cause." *Id.* at 144.

C. Documents Uncovered Post-Arbitration

After the award was issued, Michael Sigardo, Citi's general counsel, "caused [Citi] employees to retrieve and review storage files . . . relating to Smith Barney's employment of [Bender]," and uncovered the documents described below. D.E. 13-2 at 3.

1. Promissory Note & Deferred Compensation

Citi discovered two employment-related matters that Bender neglected to disclose. First, on June 30, 2000, shortly after joining Smith Barney, Bender signed a promissory note for $188,164 with Smith Barney. *Id.* at 22. Pursuant to the terms of the note, the five annual payments would be forgiven if Bender remained a Citi employee until 2005. *Id.* On August 20, 2004, after Bender left Citi, Citi sent Bender a demand letter for the balance due on the note. *Id.* at 58. According to Citi, Bender never paid the balance; however, Citi did not pursue collection. *Id.* Second, on June 29, 2000, Bender was granted an employee incentive plan award, which was scheduled to vest on June 29, 2005. *Id.* at 120-22. When Bender left Citi on April 4, 2004, he forfeited $28,761.53 of the award. *Id.*

2. Bender's Health & Employment Dispute Correspondence

Citi also uncovered correspondence between Bender, Smith Barney, and Bender's legal counsel regarding a health-related employment dispute. In September 2003, Bender's physician sent Smith Barney a letter, requesting that Smith Barney provide Bender with a "stress-free" work environment due to Bender's health issues. *Id.* at 34. On December 30, 2003, John E. MacDonald ("MacDonald") of the employment law firm Stark & Stark sent Smith Barney a letter on behalf of Bender, noting that Bender had sought reasonable accommodation for medical issues, that this had led to difficulties between him and Smith Barney, and requesting that Smith Barney speak to MacDonald regarding a potential separation agreement. *Id.* at 24.

On January 5, 2004, Joe Anderson ("Anderson"), Bender's supervisor, sent Bender a "goal attainment letter." *Id.* at 27. The letter referenced prior discussions regarding Bender's unacceptable job performance, set forth goals that Bender was to achieve in order to maintain his employment at Citi, and noted that failure to meet the goals could result in termination. *Id.* at 27. On February 11, 2004, Bender sent an email to Smith Barney's Human Resources representative, Maribeth Robinson ("Robinson"), stating that he felt that Anderson was trying to force him out due to his health problems. *Id.* at 29. In the same email, Bender argued that his ill health would prevent him from meeting the goals in the goal attainment letter and he requested that he be permitted to retire early. *Id.* at 29. Robinson responded that she was unable to grant exceptions to the retirement policy. *Id.* The same day, Bender sent another email to Robinson, further explaining his ill health and requesting that she honor an offer allegedly made by Anderson to forgive the remainder of the promissory note. *Id.* at 32. On February 26, 2018, Robinson responded that although Smith Barney was committed to providing reasonable accommodation if necessary, it expected Bender to perform to the standards outlined in the goal attainment letter

and clarified that Human Resources had never agreed to the offer allegedly made by Anderson to forgive the promissory note and it would not be honored. *Id.* at 34. Subsequently, Bender was informed that he would be terminated effective April 4, 2004. *Id.* at 38.

On March 11, 2004, MacDonald sent Smith Barney a letter, requesting that Smith Barney discuss some legal issues Bender had with Smith Barney prior to Bender's termination. *Id.* at 38. On March 31, 2004, MacDonald sent Smith Barney another letter, enclosing a draft state-court complaint alleging claims against Citi by Bender. *Id.* at 47-53. The draft complaint alleged counts under New Jersey's age and health-disability discrimination statutes and intentional infliction of emotional distress. *Id.* The draft complaint was never filed with any court. D.E. 13 at 10.

3. Class Action Litigation

Lastly, Citi discovered that Bender was a settlement class member in a 2007 class action against Citi by former financial advisors, alleging unpaid overtime under the Fair Labor Standards Act (the "FLSA"). *Id.* at 60-117. Bender was not a named plaintiff. *Id.* However, Michael Sirgado's rebuttal declaration states that Bender "cash[ed] a check in excess of $6,000 that he received from the settlement administrator [in the FLSA class action]." D.E. 22-2 ¶ 5.

II. Procedural Background

On March 14, 2018, Gherardi filed his Motion to Confirm. D.E. 1. On March 29, 2018 Citi filed its response in opposition to Gherardi's Motion to Confirm, D.E. 12, and the next day filed its Motion to Vacate, D.E. 13, which is substantively identical to its response in opposition. D.E. 13 at 1 n.1. In its response to Citi's Motion to Vacate, Gherardi requests a hearing on the Motion to Vacate. D.E. 17. However, a hearing is unnecessary.

III. Legal Standard

Under the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 1 *et seq*., the Court must confirm an arbitrator's award unless the award is vacated or modified pursuant to section 10 or 11. 9 U.S.C. § 9; *Careminders Home Care, Inc. v. Kianka*, 666 Fed.Appx. 832, 834 (11th Cir. 2016) (explaining that the FAA "imposes a heavy presumption in favor of confirming arbitration awards and accordingly a court's confirmation of an arbitration award is usually routine or summary.") (citation omitted). Section 10 of the FAA permits a court to vacate an award where, *inter alia*, "there was evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2), and "where the arbitrators exceeded their powers . . . ." 9 U.S.C. § 10(a)(4).

IV. Analysis

Citi argues that the award should be vacated under § 10(a)(2) because Bender did not disclose his prior disputes with Citi and those disputes would lead a reasonable person to question Bender's impartiality as an arbitrator. D.E. 13. Citi also argues that the award should be vacated under § 10(a)(4) because the Panel exceeded its powers by rendering an award for wrongful termination when Gherardi's employment was terminable "at-will." D.E. 12. The Court will first determine whether the award should be vacated under § 10(a)(2) before turning to whether the Panel exceeded its powers under § 10(a)(4).[5]

I. The Award Should Not Be Vacated Under § 10(a)(2)

Section 10(a)(2) of the FAA permits the Court to vacate an arbitral award where there is "evident partiality" among the arbitrators. 9 U.S.C. § 10(a)(2). "The burden of proving facts which would establish a reasonable impression of partiality rests squarely on the party challenging the award." *Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197, 1201 (11th Cir.

[5] Gherardi also argues that Citi waived its right to bring an evident partiality claim. However, because the Court finds that Bender's nondisclosures do not create a reasonable impression of partiality, the Court does not address whether Citi waived its right to bring an evident partiality claim.

1982). In the Eleventh Circuit "an arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Tr. v. ADM Inv'r Servs., Inc*., 146 F.3d 1309, 1312 (11th Cir. 1998). Because there is a strong presumption in favor of upholding arbitral awards under the FAA, the possibility of bias must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Middlesex*, 675 F.2d at 1202 (citation omitted). "Accordingly, the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Lifecare Int'l, Inc. v. CD Med., Inc*., 68 F.3d 429, 433 (11th Cir. 1995), opinion modified and supplemented, 85 F.3d 519 (11th Cir. 1996). "The evident partiality question necessarily entails a fact intensive inquiry. This is one area of the law which is highly dependent on the unique factual settings of each particular case . . . ." *Id.*

A. Citi's Evidence Does Not Present Information that Would Lead a Reasonable Person to Believe that a Potential Conflict Existed

Citi argues that Bender failed to disclose: (1) that like Gherardi, he had a prior employment dispute with Smith Barney in 2004; (2) that his counsel sent Smith Barney a draft complaint alleging employment discrimination; (3) that Smith Barney rejected Bender's attempt to negotiate an early retirement; (4) that like Gherardi, he forfeited deferred compensation because he separated from Smith Barney prior to the vesting date of the award; (5) that he defaulted on a promissory note with Smith Barney on which he owed in excess of $37,000; and (6) that he was a settlement class member in a FLSA lawsuit brought by Citi and Smith Barney financial advisors against Citi. D.E. 13. Citi argues that these facts would lead a reasonable person to believe that Bender would be biased against Citi in rendering the award, requiring the Court to vacate the award under § 10(a)(2). Gherardi does not argue that Bender actually

disclosed these facts, rather he argues that "the mere appearance of bias or partiality is not enough to set aside an arbitration award" and that these undisclosed facts are too remote, uncertain, and speculative to lead a reasonable person to believe that a potential conflict existed between Bender and Citi at the arbitration. D.E. 17 at 15 (quoting *Lifecare Int'l, Inc.*, 68 F.3d at 433). For the reasons discussed below, the Court agrees with Gherardi.

1. Bender's Employment Dispute

In support of its argument, Citi points to the correspondence between Bender and Smith Barney and argues that this correspondence shows that Bender had been deeply unhappy at Smith Barney. D.E. 13. Specifically, Citi points to the January 2004 goal attainment letter and the subsequent correspondence between Bender and Robinson, Smith Barney's human resources representative. D.E. 13-2 at 27-46. In that correspondence, Bender stated that he would not be able to meet Smith Barney's goals because of his medical issues, that his supervisor was "forcing him out," and he also requested that Smith Barney permit him to retire early, but Smith Barney declined his request. D.E. 13. Citi also points to the correspondence between Bender's employment counsel and Smith Barney, in which his counsel attached a proposed civil complaint alleging employment discrimination. *Id.* Citi argues that Bender's claims in the draft complaint are "strikingly similar" to Gherardi's claims in the arbitration. *Id.* Lastly, Citi points to the fact that Bender defaulted on his promissory note with Citi, that Citi rejected his proposal to forgive the remaining balance, and that Citi sought to collect on the note. *Id.*

Gherardi argues that because Bender's employment dispute with Smith Barney occurred in 2004, twelve years before Bender was appointed to the Panel, and fourteen years before the Panel rendered the award, it is too remote to lead a reasonable person to believe that Bender was biased against Citi in the arbitration. D.E. 17. Gherardi notes that courts commonly vacate

awards for "evident partiality" in circumstances when arbitrators fail to disclose a concurrent dispute with a party, not disputes that are over a decade old. *Id*. In *Citigroup Glob. Markets, Inc. v. Berghorst*, No. 11-80250-CIV, 2012 WL 5989628 (S.D. Fla. Jan. 20, 2012), the court vacated an award for evident partiality of an arbitrator because the arbitrator was "currently embroiled in battles" with one of the parties, the dispute was a "fresh wound" and was therefore not remote, uncertain or speculative. *Id.*; *see also Middlesex,* 675 F.2d 1204 (vacating an award for evident partiality of an arbitrator where the arbitrator failed to disclose concurrent litigation between himself and the parties); *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc*., 304 F.3d 1331, 1343 (11th Cir. 2002) ("[i]nteractions between an arbitrator and a party's counsel, especially those concurrent with the arbitration, can pose a potential conflict . . . .") (emphasis added); *Merit Ins. Co. v. Leatherby Ins. Co*., 714 F.2d 673, 680 (7th Cir. 1983) (reversing vacatur of arbitration award for evident partiality where arbitrator had been a party's employee fourteen years earlier and the arbitrator had no financial stake in the outcome of the arbitration).

The Court agrees with Gherardi. To be sure, the correspondence indicates that Bender felt that he was being unfairly forced out and that he was unhappy with the way Smith Barney handled his termination in 2004. However, this correspondence is fourteen years old, and Citi fails to explain exactly how Bender's 2004 dispute with Citi would lead a reasonable person to believe that a potential conflict existed between Bender and Citi in the 2017-2018 arbitration. Instead, Citi seems to argue that the evidence speaks for itself. This is insufficient to show "evident partiality." *Lifecare Int'l, Inc.*, 68 F.3d at 433 ("[T]he mere appearance of bias or partiality is not enough to set aside an arbitration award."). Moreover, other than showing that he could have opted-in as a member of a settlement class in a lawsuit against Citi in 2007, there is no evidence of Bender having any interaction with Smith Barney or Citi over the last fourteen

years. Lastly, Gherardi rightly notes that by 2013, Smith Barney was no longer part of Citi and the supervisor with whom Bender had issues has not been employed by Citi since 2009. D.E. 17 at 16; D.E. 17-1 ¶ 43; *Leatherby*, 714 F.2d at 680 ("Time cools emotions, whether of gratitude or resentment.").

Gherardi also argues that Bender's issues with Smith Barney are not similar to Gherardi's issues with Citi and therefore are too uncertain to lead a reasonable person to believe that Bender would not be impartial. D.E. 17 at 16. The Court agrees with Gherardi; other than the fact that they were both financial advisors terminated after performance warnings, their situations are not analogous. Bender's issues with Smith Barney revolved around its alleged failure to accommodate his illness. Indeed, the proposed civil complaint that Bender's counsel sent to Smith Barney contained three counts of statutory discrimination and retaliation claims under New Jersey's anti-discrimination laws and one count for intentional infliction of emotional distress based on Bender's medical issues and age. D.E. 13-2 at 47-52. In contrast, Gherardi's statement of claim alleges wrongful termination, defamation, and tortious interference arising out of a dispute with a coworker and that Citi terminated him because it was concerned he would leave with a $250,000,000 book of business. D.E. 13-1 at 18 ¶¶ 16, 39.

Lastly, Gherardi argues that Bender's default on the promissory note would not lead a reasonable person to believe that a potential conflict existed between Bender and Citi in the arbitration because although Smith Barney sent Bender a collection notice on August 20, 2004, Smith Barney took no further steps to enforce the note. D.E. 17 at 16. In addition, Gherardi notes that Citi could no longer collect on the note as of 2010 because the promissory note was governed by New York law and was thus subject to a six-year statute of limitations for breach of contract. D.E. 13-2 at 22. Therefore, Gherardi argues that Bender actually benefited from his

default on the promissory note and would have no motivation, based on the note, to be biased against Citi. The Court agrees with Gherardi. While it is unlikely that Bender was aware of New York's statute of limitations on his promissory note, the default occurred fourteen years ago, Citi did not take further action to collect on the note, and Bender kept the money.

Accordingly, the Court finds that the circumstances surrounding Bender's disputes with Smith Barney and Bender's default on the promissory note are too remote, uncertain, and speculative to lead a reasonable person to believe that Bender held such a grudge against Smith Barney that fourteen years later his decision to render an award in favor of Gherardi would be motivated by bias against Citi.

2. FLSA Class Action

Citi also argues that a reasonable person would question Bender's impartiality because Bender was a settlement class member in a 2007 FLSA unpaid overtime class action against Citi. D.E. 13. Gherardi responds that Citi has not explained whether Bender was an opt-in or opt-out class member. D.E. 17 at 17. Although not entirely clear, the Court construes Gherardi's argument to be that it is possible that Bender did not actively participate in the lawsuit and was unaware of the lawsuit until he received the settlement. The Court agrees with Gherardi that Bender's involvement in the class action as evidence of potential bias is too speculative. Even if Bender knew of the lawsuit, the class action concluded in 2007 and Citi has not explained how or why Bender would still harbor animosity nine years later in 2016, when he was appointed to the Panel. D.E. 22-2 ¶ 5. Also, Gherardi did not allege any unpaid overtime claims under the FLSA in his arbitration.

3. Deferred Compensation

Citi also argues that the award must be vacated because both Bender and Gherardi forfeited deferred compensation after leaving Citi and that would lead a reasonable person to believe that Bender could not be impartial in the arbitration.[6] D.E. 13. Specifically, Citi argues that Bender forfeited $28,761.53 in deferred compensation by leaving Smith Barney prior to its vesting date and that Gherardi raised a claim for lost deferred compensation in the arbitration. *Id.* at 13. Gherardi argues that the situations are not similar because Bender never asserted a claim for deferred compensation. The Court agrees with Gherardi. Despite Citi's assertion to the contrary, there is no evidence that Bender raised any issue regarding the forfeiture of his deferred compensation when he was terminated in 2004.

4. Violation of FINRA Rules and Conduct at the Arbitration

In further support of its argument that the award must be vacated for evident partiality, Citi argues that Bender's nondisclosures violate FINRA's arbitration rules. Specifically, Citi argues that Bender was obligated to disclose his history with Smith Barney under FINRA Rule 13408(a), which requires that arbitrators: "must disclose . . . any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding . . . ." Citi also points to FINRA's Arbitrator's Guide, which provides that "[i]f you need to think about whether disclosure is appropriate, then it is: Make the Disclosure." FINRA Arbitrator's Guide pp. 17-18. Citi argues that Bender violated these rules by not disclosing his history with Citi in his Oath, D.E. 13-2 at 63, in his disclosure checklist, *id.* at 67-68, and by refusing to voluntarily recuse himself, D.E. 13-1 at 105. Citi "submits that these multiple

[6] As explained *infra*, the Court does not accept the conclusion that Gherardi "forfeited" his deferred compensation.

disclosure failures – individually and collectively – plainly justify vacatur . . . ."[7] D.E. 13 at 16. Citi also argues that Bender interfered in the direct questioning of a witness at the arbitration. *Id.*

These arguments are unavailing. First, as Gherardi notes, it is unclear that Bender was required to disclose his history with Citi or that he made any material misstatements in his disclosures as it is possible that he believed his history with Citi was not a "circumstance . . . which might preclude [Bender] from rendering an objective and impartial determination in the proceeding." D.E. 17 at 18. Moreover, the Court has already determined that the circumstances of Bender's employment dispute, default, and class action settlement with Citi are too remote and uncertain to lead a reasonable person to believe that a potential conflict existed between Bender and Citi in the arbitration. Therefore, Bender's nondisclosure of these facts does not provide any additional evidence of partiality; violations of the FINRA Rules do not constitute an independent ground for vacatur. *See, e.g., Lifecare*, 68 F.3d at 435 ("[W]e simply cannot conclude that [the] Arbitrator['s] . . . conduct, although in violation of Canon II of the American Arbitration Association's Code of Ethics, rises to the level of creating a reasonable impression of bias or partiality."); *see also Fed. Vending, Inc. v. Steak & Ale of Fla., Inc.*, 71 F. Supp. 2d 1245, 1249 (S.D. Fla. 1999) (holding that although arbitrator should have disclosed his prior arbitration with a party under rule of full disclosure, the award was not to be vacated for evident partiality).

Last, Despite Citi's assertions to the contrary, there is no substantial evidence of partiality at the hearing itself. Citi argues that Bender "interfered" with Rosenstein's direct examination of

[7] Citi also argues that these nondisclosures rise to the level of actual bias. But, Citi has provided no credible evidence that Bender's nondisclosure was motivated by actual bias; it is equally likely that he thought a fourteen-year old dispute with a subsidiary of one of the parties was irrelevant and would not affect his ability to render an impartial award.

a witness.[8] D.E. 13 at 16. However, the alleged interference does not demonstrate evident partiality. The transcript indicates that Bender asked a clarifying question and, after the Panel took a break, arbitrator Huss explicitly stated that he did not "[t]hink Mr. Bender was in any way . . . trying to bias your client," D.E. 17-12 at 32:9-12, and that the Panel had been permitting the arbitrators to ask clarifying questions during direct examination. *Id.* at 34-35. The transcript is consistent with arbitrator Huss' conclusions.

5. Conclusion

"The burden of proof for vacating an arbitration award based upon alleged bias is a heavy one." *Austin S. I, Ltd. v. Barton-Malow Co.*, 799 F. Supp. 1135, 1142 (M.D. Fla. 1992) (citation omitted). The partiality must be "direct, definite and capable of demonstration, rather than remote, uncertain and speculative." *Gianelli*, 146 F.3d at 1312. Citi has not met this burden because the alleged partiality that can be inferred from Citi's evidence, both individually and collectively, is too remote, speculative, and uncertain to lead a reasonable person to conclude that a potential conflict existed between Bender and Citi at the arbitration. *Leatherby*, 714 F.2d at 683 (explaining that vacating an award in the absence of evidence of actual or probable partiality "[w]ould open a new and, we fear, an interminable chapter in the efforts of people who have chosen arbitration and been disappointed in their choice to get the courts—to which they could have turned in the first instance for resolution of their disputes—to undo the results of their preferred method of dispute resolution."). Thus, the Court finds that the award should not be vacated under § 10(a)(2) for evident partiality.

[8] Citi also argues that because the award was rendered "contrary to law" it is also evidence of partiality. While the Court explains *infra* that she agrees that the arbitrators exceeded their powers in rendering the award, nothing in the record connects the award with any partiality on Bender's part.

II. The Panel Exceeded its Powers under § 10(a)(4)

Citi argues that the Panel's award is predicated on a finding of wrongful termination and that the Panel exceeded its powers under § 10(a)(4) by granting Gherardi's claim for wrongful termination, in direct contradiction of the employment arbitration policy's "at-will" language. D.E. 13 at 17-18. In the Eleventh Circuit, determining whether an arbitrator has exceeded his powers under § 10(a)(4) is guided by two principles. First, the Court "must defer entirely to the arbitrator's interpretation of the underlying contract no matter how wrong [the Court] think[s] that interpretation is." *Wiregrass Metal Trades Council AFL-CIO v. Shaw Envtl. & Infrastructure, Inc*., 837 F.3d 1083, 1087 (11th Cir. 2016). "[T]he sole question . . . is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013). Second, "[a]n arbitrator may not ignore the plain language of the contract . . . That means an arbitrator may not issue an award that contradicts the express language of the agreement . . . It also means that an arbitrator may not modify clear and unambiguous contract terms." *Wiregrass Metal Trades Council AFL-CIO*, 837 F.3d at 1088 (internal quotation marks and quotations omitted) (emphasis added). "Applying these two principles, an arbitrator acts within his authority when he even arguably interprets a contract, and he exceeds his authority when he modifies the contract's clear and unambiguous terms." *Original Appalachian Artworks, Inc. v. JAKKS Pac., Inc*., 718 F. App'x 776, 784 (11th Cir. 2017) (citation omitted).

The Court is well aware that federal policy strongly favors arbitration, that arbitrators generally are due deference in their interpretation of agreements and that vacatur on this ground is exceedingly rare. Accordingly, the Court has considered the parties' arguments thoroughly and with caution.

1. The Award

"In many cases, courts determine whether an arbitrator engaged in interpretation, as opposed to modification, by looking at the arbitrator's reasoning." *Wiregrass Metal Trades Council AFL-CIO*, 837 F.3d at 1090. Here, the award provides essentially no reasoning for why it granted Gherardi's claim for wrongful termination:

> CASE SUMMARY
>
> In the Statement of Claim, Claimant asserted the following causes of action: defamation on his Central Registration Depository ("CRD") Form U5; tortious interference with prospective economic relations; wrongful termination and/or breach of contract and/or promissory estoppel; violation of the common law of securities arbitration; and tortious interference with contractual relations. The causes of action relate to Claimant's termination of employment with Respondent Citi . . .
>
> AWARD
>
> After considering the pleadings, the testimony and evidence presented at the recorded in-person hearing and the post-hearing submissions, the Panel has unanimously decided in full and final resolution of the issues submitted for determination as follows:
>
> 1. Claimant's claims are denied in their entirety as to Respondent Michael R. Averett.
>
> 2. Respondent Citi is liable for and shall pay to Claimant the sum of $3,452,000 in compensatory damages under the claim of wrongful termination.
>
> 3. Respondent Citi is liable for and shall pay to Claimant the sum of $150,000 for lost quarter trailers.
>
> 4. Respondent Citi is liable for and shall pay to Claimant the sum of $395,830.22 for deferred compensation . . . .

D.E. 13-1 at 143-44 (emphasis added).

Citi argues that by granting Gherardi's claim for wrongful termination, the Panel modified the plain "at-will" language in the employment arbitration policy, in excess of their authority under § 10(a)(2). In contrast, Gherardi reiterates arguments made in his statement of claim and post-hearing briefing, which suggested methods by which the Panel could have "arguably

interpreted" the employment arbitration policy to reconcile the award for wrongful termination with the "at-will" language in the employment arbitration policy. For the reasons discussed below, the Court agrees with Citi.

5. The "At-Will" Language in the Dual Employment Agreement, Employee Handbook, and Arbitration Policy is Unambiguous on its Face

"To determine whether the arbitrator engaged in interpretation, as opposed to modification, we begin by looking at the relevant language in the [contract] and asking, as a threshold matter, whether that language is open to interpretation." *Wiregrass Metal Trades Council AFL-CIO*, 837 F.3d at 1088. Contract language is susceptible to interpretation "when it is sufficiently ambiguous on its face . . . or [w]hen there are two plausible interpretations of an agreement." *Id.* (alteration in original) (internal quotations and citations omitted).

Citi argues that Gherardi's employment was governed by three documents: the dual employment agreement, the Handbook and the employment arbitration policy contained in the Handbook (collectively, the "Employment Documents"). D.E. 13-1 at 139; D.E. 13 at 18; D.E. 13-2 at 17. Citi argues that these three documents unambiguously stated that Gherardi's employment was "at-will" and subject to termination with or without cause at any time, and were therefore not open to interpretation. *See e.g.*, D.E. 13-2 at 17-18 ("your employment relationship is 'at-will' and this agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York . . . ."); D.E. 17-3 at 9 ("Your employment with Citi is at-will, which means it can be terminated by you or Citi at any time, with or without notice . . . for no reason or for any reason not otherwise prohibited by law."). Moreover, Citi notes that Gherardi signed the Handbook's acknowledgement, which emphasizes:

> WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY, I UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK, NOR THE HANDBOOK ITSELF, IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN

> ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT MY EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. I UNDERSTAND THAT MY EMPLOYMENT WITH CITI IS AT-WILL, WHICH MEANS IT CAN BE TERMINATED BY ME OR CITI AT ANYTIME, WITH OR WITHOUT NOTICE FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.

D.E. 13-1 at 141 (emphasis in original).

Citi further asserts that under the dual employment agreement, Gherardi's employment was governed by New York law and there is no cause of action for wrongful termination of an "at-will" employee under New York law. *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983) ("New York does not recognize common law claims for wrongful termination.").[9] Thus, Citi concludes that the Employment Documents unambiguously state that Gherardi could be terminated "at-will" and the Panel exceeded its authority in granting an award for wrongful termination because under applicable law, there is no cause of action for wrongful termination of an "at-will" employee.

Gherardi raises two principle arguments in response. First, Gherardi argues that the employment arbitration policy is ambiguous and was therefore open to interpretation by the Panel. D.E. 17 at 18-19. Specifically, Gherardi argues that the anti-retaliation provision contained within the employment arbitration policy can be read to provide an exception to the "at-will" language, permitting a cause of action for wrongful termination. *Id.* at 18. Second,

[9] The Court agrees with Citi that the Employment Documents unambiguously state that Gherardi was terminable "at-will." However, the Court notes that Gherardi ceased to be employed by Smith Barney in 2009, and thus it is unclear whether the dual employment agreement still governed his employment with Citi when he was terminated in 2015. Nevertheless, Citi also points out that at the time of his termination, Gherardi had been employed in Florida for over fifteen years and under Florida law there is also no cause of action for wrongful termination of an at-will employee. *See Walton v. Health Care Dist. of Palm Beach Cty.*, 862 So.2d 852, 855 (Fla. Dist. Ct. App. 2003). ("[A]n 'at will' employee . . . can be terminated for any or no reason and, thus, as a matter of law c[an] not state a cause of action for wrongful termination."). In their post-hearing briefings, the parties repeatedly reference and apply Florida law. D.E. 17-18; D.E. 17-19. Moreover, in their memoranda in this Court, neither party seriously disputes that either New York or Florida law applies to the Employment Documents. As there is no cause of action for wrongful termination of an "at-will" employee under either Florida or New York law and there is nothing in the record to indicate that the Panel applied a different law, the Court's conclusion is unchanged by the application of Florida or New York law.

Gherardi argues that even if the Employment Documents unambiguously stated that Gherardi's employment was terminable at will, the Employment Documents could be interpreted to contain implied terms negating his at-will employment status.

a. The Effect of the Anti-Retaliation Provision

The anti-retaliation provision states: "Retaliation against employees who file a claim under this Policy, including claims regarding the validity of this Policy or any provision thereof, is expressly prohibited." D.E. 13-2 at 11. Gherardi's statement of claim alleged that Citi wrongfully terminated him, in violation of the anti-retaliation provision of the employment arbitration policy, after he indicated to Citi that he was inclined to dispute his 2015 final warning. D.E. 13-1 at 14-16. Additionally, Gherardi argued in his post-hearing briefing that he was terminated in violation of the anti-retaliation provision in the Handbook. D.E. 17-18 at 18. The award states that the Panel read the pleadings and the post-hearing briefings before rendering their award. D.E. 13-1 at 144. Thus, Gherardi concludes that in rendering an award for wrongful termination, the Panel agreed with his interpretation of the anti-retaliation provision and "arguably interpreted" the employment arbitration policy to permit a claim for wrongful termination, which was within their authority under § 10(a)(4). D.E. 17 at 19.

Citi responds that the plain language of the Employment Documents forecloses Gherardi's argument. For example, on the page before the anti-retaliation provision, the employment arbitration policy clearly states:

> This Policy doesn't constitute, nor should it be construed to constitute, a waiver by Citi of its rights under the 'employment-at-will' doctrine nor does it afford an employee or former employee any rights or remedies not otherwise available under applicable law.
>
> D.E. 17-3 at 10.[10]

[10] Additionally, the acknowledgement Gherardi signed when he received the handbook stated: "[w]ith the exception of the Employment Arbitration Policy, I understand that nothing contained in this Handbook, nor the Handbook

Contract language is susceptible to interpretation "when it is sufficiently ambiguous on its face . . . or [w]hen there are two plausible interpretations of an agreement." *Wiregrass Metal Trades Council AFL-CIO*, 837 F.3d at 1088 (alteration in original) (internal quotations and citations omitted). There are not two plausible interpretations of the employment arbitration policy and it is therefore not susceptible to interpretation. The employment arbitration policy unambiguously and repeatedly emphasizes that Gherardi can be terminated "at-will" and that nothing in the employment arbitration policy waives that right or affords Gherardi a cause of action for wrongful termination. *See, e.g.*, D.E. 17-3 at 10-11. Therefore, Gherardi's argument that the anti-retaliation provision can be read as an exception to the "at-will" language is unavailing. To be sure, the Court must defer to the Panel's interpretation of the employment arbitration policy, but deference is not warranted where the Panel's interpretation directly contradicts the plain language of the employment arbitration policy. To the extent the Panel relied on this argument in granting Gherardi's claim for wrongful termination they exceeded their authority under § 10(a)(4).

b. The Panel Was not Empowered to Imply Contradictory Terms Into the Employment Documents

Gherardi argues alternatively that even if the Employment Documents unambiguously state that Gherardi's employment was terminable "at-will," the Employment Documents nonetheless are susceptible to interpretation because the Employment Documents could contain implied terms negating his "at-will" status. *Wiregrass Metal Trades Council AFL-CIO*, 837 F.3d at 1088 ("[E]ven if we were to conclude that [a contract] is not ambiguous on its face, we would not be

---

itself is considered a contract of employment." D.E. 13-1 at 141. However, the next line emphasizes that there is no exception to the employment at-will policy in the Handbook: "In addition, nothing in this Handbook [including the employment arbitration policy] constitutes a guarantee that my employment will continue for any specified period of time." *Id.* (emphasis added).

required to overturn [an arbitration] award . . . That is true because collective-bargaining agreements may include implied, as well as express, terms, and an arbitrator is empowered to discover [those] implied terms . . . .") (internal citations, internal quotations and quotation marks omitted) (alteration in original); *Int'l Bhd. of Elec. Workers, Local Union No. 199 v. United Tel. Co. of Fla*., 738 F.2d 1564, 1568 (11th Cir. 1984) (explaining that even if an arbitrator's award contradicts the plain language of an agreement, where the award "draws its essence" from the agreement it will not be vacated).

Gherardi argues that his statement of claim asserted wrongful termination in violation of the common law of securities arbitration, which provides that in employment agreements subject to mandatory arbitration clauses, such as Citi's employment arbitration policy, there is an implied "for-cause" termination requirement. D.E. 17 at 19-20. In support of his argument, Gherardi cites *PaineWebber v. Argon*, 49 F.3d 347, 352 (8th Cir. 1995) and *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 313 (7th Cir. 1981). In *PaineWebber*, the Eighth Circuit Court of Appeals held that submitting an employment dispute to arbitration "[n]ecessarily alters the employment relationship from at-will to something else—some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship." *PaineWebber*, 49 F.3d at 352. Similarly, in *Shearson*, the Seventh Circuit Court of Appeals held that "[i]t has been held repeatedly that an agreement to arbitrate disputes about employee discharges implies a requirement that discharges be only for 'just cause.'" *Shearson*, 653 F.2d at 312. Gherardi also cites *Countrywide Sec. Corp. v. Varga*, 2009 WL 10674333 (C.D. Cal. Aug. 19, 2009), in which the court relied on *PaineWebber* to find that the arbitrator did not exceed his power in permitting a claim for wrongful discharge of an employee under California law, even though his employment contract expressly stated he was employed "at-will." D.E. 17

(citing *id.*). As noted *supra*, Gherardi raised these arguments in his post-hearing briefing, D.E. 17-18 at 47-48, thus, Gherardi concludes that the Panel agreed with his interpretation of *PaineWebber* and "arguably interpreted" the employment arbitration policy as containing an implied "for-cause" term.

In response, Citi argues that the Panel did not have authority to imply a "for-cause" term into the Employment Documents because the cases Gherardi cites are contrary to Supreme Court precedent. D.E. 17-19 at 23. Specifically, Citi cites *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (U.S. 1991) for the proposition that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* (quotation omitted). Citi also cites *Scherk v. Alberto-Culver Co*., 417 U.S. 506, 519 (1974), to argue that an agreement to arbitrate "[i]s, in effect, [merely] a specialized kind of forum selection clause." *Id.* In addition, Citi asserts that *PaineWebber* and *Shearson* were distinguished and rejected by *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 195 (4th Cir. 2010) and *Crawford v. Benzie-Leelanau Dist. Health Dep't Bd. Of Health*, 636 Fed. Appx. 261, 270 n.8 (6th Cir. 2016). In *Raymond James*, the Fourth Circuit Court of Appeals distinguished *PaineWebber* and *Shearson* because those cases involved the interpretation of collective bargaining agreements and in such circumstances the arbitrator is charged with determining "whether a discharged employee should be reinstated." *Raymond James*, 596 F.3d at 194. The Fourth Circuit also noted that in neither *PaineWebber* nor *Shearson* "[w]as the court faced with an express agreement providing for termination at will. Accordingly, whether or not we believe those cases announced a rule of general application, we decline to follow them . . . ." *Id.* In *Crawford*, the Sixth Circuit Court of Appeals expressly rejected the holding of *PaineWebber* that where an employer agrees to arbitrate employment

disputes some just-cause standard is implied, asserting that Michigan had not adopted this approach. *Crawford*, 636 F. App'x at 270 n.8.

The precedent Gherardi cites, permitting arbitrators to imply seemingly contradictory terms into unambiguous contracts, addressed the interpretation of collective bargaining agreements in the arbitration context. *See, e.g., Shearson*, 653 F.2d 310, 313. As the Supreme Court has made clear, unlike a private contract, a collective bargaining agreement:

> [I]s more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960); *Loveless v. E. Air Lines, Inc*., 681 F.2d 1272, 1280 (11th Cir. 1982) (explaining that when interpreting collective bargaining agreements "absent some express restriction upon the arbitrator's authority, the arbitrator is not limited to the bare words of the agreement and common law rules for the interpretation of private contracts.") (emphasis added). The same considerations do not apply here in the case of private employment agreements between a financial advisor and a financial institution. This Court finds the Fourth Circuit's reasoning in *Raymond James* persuasive; where arbitrators imply a termination "for-cause" provision into a private employment agreement that expressly provides for termination "at-will," the arbitrators do more than commit a permissible error of law, they exceed their authority by ignoring the agreement's plain language. *Raymond James*, 596 F.3d at 194.

6. Gherardi's Remaining Arguments

Gherardi also raises two other methods by which the Panel could have "arguably interpreted" the employment arbitration policy to reconcile the award for wrongful termination with the termination "at-will" language in the employment arbitration policy. D.E. 17. Both of

these arguments were also discussed in the parties' pleadings and post-hearing briefs. First, Gherardi argues that by signing the FINRA Submission Agreement the parties supplanted the Employment Documents and agreed to arbitrate all of Gherardi's claims with FINRA, including wrongful termination. D.E. 17 at 20. Therefore, Gherardi argues the Panel acted "within the four corners" of the Submission Agreement in rendering its award for wrongful termination. D.E. 17 at 20. In support, Gherardi cites *Dean Witter Reynolds, Inc. v. Fleury*, 138 F.3d 1339, 1342-43 (11th Cir. 1998), in which the court found that the parties had modified their earlier arbitration agreements by signing a submission agreement. *Id.* at 1342. However, the Court reads *Dean Witter* as holding that parties may amend their choice of arbitral forum in an arbitration agreement by subsequently executing a submission agreement. *Id.* As Citi rightly notes, even if the Submission Agreement modified the Employment Documents to permit arbitration under FINRA rules, the Submission Agreement did not modify the Employment Documents to create a cause of action for wrongful termination where one did not previously exist, nor did it permit the Panel to ignore the plain "at-will" language of the Employment Documents. *E.E.O.C. v. Waffle House, Inc*., 534 U.S. 279, 289 (2002) ("Absent some ambiguity in the agreement, however, it is the language of the contract that defines the scope of disputes subject to arbitration."); *Cf. Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (quotation omitted).

Gherardi also argues that Citi did not treat him as an "at will" employee and therefore the panel did not exceed its authority in interpreting the parties' employment relationship as requiring "just-cause" to terminate Gherardi. D.E. 17 at 20. In support, Gherardi points to testimony from Averett, in which he stated that it was "unusual and maybe unprecedented that

people at [at Citi] are fired with no cause." D.E. 17-12 at 94:16-17. Citi responds that Averett also stated "[m]y understanding is that I don't need cause." *Id.* at 96. More importantly, as Citi rightly points out, Gherardi provides no authority for the proposition that if Citi did not treat Gherardi as an "at-will" employee, then he could only be terminated for "just-cause." Accordingly, this argument is also unavailing.

7. Remaining Interpretations

The Court has determined that the Employment Documents unambiguously provided for termination "at-will" and that Gherardi's proposed methods of reconciling the award for wrongful termination with the unambiguous "at-will" language in the Employment Documents fail. The remaining question is whether there are any other methods by which the award for wrongful termination can be upheld notwithstanding the Employment Documents' plain "at-will" language. As discussed *supra*, other than stating that the Panel read the pleadings and post-hearing briefs, the award provides essentially no reasoning for why it granted Gherardi's claim for wrongful termination. D.E. 13-1 at 144. "If it is not apparent from the arbitrator's stated reasoning whether he permissibly interpreted a contract or impermissibly modified it, and one can plausibly read the award either way, we must resolve the ambiguity by finding that the award is an interpretation of the contract and enforcing it." *Original Appalachian Artworks, Inc.*, 718 F. App'x at 784 (citation omitted) (emphasis added). Other than Gherardi's arguments, there is nothing in the record to support a view that the Panel permissibly interpreted the Employment Documents. Thus, the award cannot be read either way; the only interpretation of the award open to the Court is that the Panel rendered an award for wrongful termination in direct contradiction of the plain termination "at-will" language in the Employment Documents and thereby exceeded

its powers. Accordingly, and despite the fact that vacatur on this basis is exceedingly rare, the award, to the extent predicated on wrongful termination, will be vacated.

8. Remainder of the Award

Citi asserts that "[h]ere, the Panel specifically indicated in the Award itself that the Award was predicated solely on a finding that CGMI 'wrongfully terminated' Mr. Gherardi." D.E. 13 at 18. But Citi misstates the Panel's findings. What the award actually states is "[t]he causes of action relate to Claimant's termination of employment with Respondent Citi," and that the causes of action include wrongful termination, tortious interference, breach of contract, violation of the common law of securities arbitration, and promissory estoppel. D.E. 13-1 at 143. Further, only the award of $3,452,000 in compensatory damages expressly refers to wrongful termination. *Id.* at 144-145.

The moving party "[b]ears the heavy burden of demonstrating that vacatur is appropriate . . . by proving the existence of one or more of four statutorily enumerated causes for reversal set forth in 9 U.S.C. § 10(a)(1)-(4)." *Wiand v. Schneiderman*, 778 F.3d 917, 925 (11th Cir. 2015). Citi met this burden as to the award of "compensatory damages" in the amount of $3,452,000 by demonstrating that in granting Gherardi's claim for wrongful termination, the Panel directly contradicted the plain language of the Employment Documents, in excess of its power under § 10(a)(4). However, Citi has not met this burden as to the balance of the award. Citi simply does not connect the Panel's award of compensatory damages based on wrongful termination with the award for lost quarter trailers, deferred compensation, fees, and modification of the termination explanation in the form U-5. *See* D.E. 13. Moreover, Citi has provided no reason for the Court to conclude that the Panel did not "arguably interpret" the deferred compensation plan and whatever agreements there may be governing Gherardi's lost quarter trailers when it concluded

that, apart from the wrongful termination damages, Gherardi was entitled to compensation for these items. *Oxford*, 569 U.S. at 564 ("[T]he sole question . . . is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong."). Accordingly, the Court finds that Citi has not met its burden of demonstrating that the Panel exceeded its authority in awarding Gherardi deferred compensation, compensation for lost quarter trailers, fees, and modification of the termination explanation on his form U-5. Consequently, the Court will enter judgment separately in favor of Gherardi on those portions of the award.

V. Conclusion

For the above reasons, Citi's Motion to Vacate Arbitration Award, D.E. 13, is GRANTED in part and DENIED in part, and Gherardi's Petition to Confirm Arbitration Award and for Entry of Final Judgment, D.E. 1, is GRANTED IN PART and DENIED IN PART. Only the following portion of the Panel's Award, D.E. 1-1 is VACATED:

> Respondent Citi is liable for and shall pay to Claimant the sum of $3,452,000 in compensatory damages under the claim of wrongful termination.

It is further ORDERED AND ADJUDGED that Plaintiff's Motion to Confirm Arbitration Award, D.E. 1, is GRANTED IN PART and DENIED IN PART. The Court will separately enter final judgment. It is further

ORDERED AND ADJUDGED that the Clerk of Court SHALL administratively close this case. All future hearings are CANCELLED and all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this _26th_ day of July, 2018.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record