

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

**ALAA ELHAMRAWY,**

**v.**

**USAA INVESTMENT MANAGEMENT  
COMPANY et al.**

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**Civil Action No. 13-CV-11133-DJC**

**DEFENDANT’S MOTION FOR LEAVE TO FILE A REPLY TO PLAINTIFF’S OPPOSITION  
TO DEFENDANT’S MOTION TO DISMISS**

Pursuant to Local Rule 7.1(b)(3), USAA Investment Management Company (“USAA”) hereby moves for leave to file a Reply Brief to Plaintiff, Alaa Elhamrawy’s, Opposition to Defendant’s Motion to Dismiss. In support of this Motion, USAA states that the Reply is brief addresses discrete legal and factual inaccuracies contained in Plaintiff’s Opposition, addresses new exhibits Plaintiff filed as attachments to his Opposition and will materially assist the Court in clarifying and disposing of the issues raised in Defendant’s Motion.

Counsel for Defendant attempted to confer with all parties via e-mail on September 4, 2013, pursuant to Local Rule 7.1(a)(2), regarding this Motion. Co-Defendant’s counsel assented to this Motion. Plaintiff failed to respond to counsel’s e-mail.

WHEREFORE, Defendant respectfully requests that the Court grant its Motion for Leave to File the attached Reply.

UNITED STATES DISTRICT COURT  
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USAA’S REPLY IN SUPPORT OF MOTION TO DISMISS

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Although previously strong, the evidence submitted by Alaa Elhamrawy (“Mr. Elhamrawy”) makes the grounds for dismissal even more compelling.

The audiotape demonstrates that Mr. Elhamrawy rested prior to any party filing a motion to dismiss, that Mr. Elhamrawy told the Arbitrators he needed a recess in order to make copies of exhibits, that no *ex parte* communication took place during the recess, and that the Arbitrators never denied Mr. Elhamrawy the opportunity to call witnesses prior to resting.

The audiotape further demonstrates that the only time the Arbitrators did not bend over backwards for Mr. Elhamrawy was when he attempted to re-open his case to call USAA IMCO’s lawyer as a surprise witness. The Arbitrators rightly denied the request to re-open: Mr. Elhamrawy had rested, had failed to designate USAA IMCO’s lawyer as a witness, had stated he had no witnesses, and USAA IMCO’s counsel had no personal knowledge.

The audiotape also demonstrates Mr. Elhamrawy paid for the securities at issue with a bad check, and he could not wire money to cover the bad check because his funds were frozen in Egypt. The Panel rightly dismissed the claims, and the Court should uphold the decision.

## ANALYSIS

### I. MR. ELHAMRAWY RESTED BEFORE ANY PARTY MOVED TO DISMISS.

The record indicates Mr. Elhamrawy rested prior to any party moving to dismiss. *See MZ000026 at 00:50-00:59.*

In fact, Mr. Elhamrawy rested once he finished his direct testimony in his case-in-chief – before any party had opportunity to cross-examine. *Id.* The Chair of the Panel specifically warned Mr. Elhamrawy there would be cross examination, regardless of whether he rested, and Mr. Elhamrawy agreed this was proper. *Id. at 1:08-1:21.* The Chair also warned Mr. Elhamrawy that if he rested, his case was considered “closed, that’s it, completed” and there would be no right to reopen. *Id. at 1:22-1:28.*

Mr. Elhamrawy responded he wanted to rest, subject to reopening. *Id. at 2:20-2:28.* The Chair refused, stating Mr. Elhamrawy could not “rest for now” – he could either rest or not rest. *Id. at 2:28-2:42.* Mr. Elhamrawy then stated **he rested**. *Id. at 2:28-2:42.* After Mr. Elhamrawy rested, OptionsXpress immediately moved to dismiss, waiving its right of cross examination. *Id. at 2:56 – 3:10.* Since the Claimant had rested, the motion to dismiss was ripe. *FINRA Rule 12211.* The Arbitrators granted the motion. *MZ000028 at 00:10 – 00:38.* For its part, USAA IMCO decided that it would move to dismiss after it engaged in cross examination – which is precisely what the Chair said it might do. *MZ000027 at 1:08-1:21.*

Mr. Elhamrawy has falsely claimed the Arbitrators considered a motion to dismiss prior to the close of his case, but this is simply false. *MZ000027 at 2:56 – 3:10.* There has been no unripe motion to dismiss, and no grounds exist to set aside the Arbitration. 9 U.S.C. § 10(a); *see generally McCarthy v. Citigroup Global Mkts. Inc.*, 463 F.3d 87, 91 (1st Cir.2006) (giving standards for overturning arbitration decision).

## II. THE ARBITRATORS DID NOT IMPROPERLY ORDER COPIES.

The record indicates Mr. Elhamrawy said he was going to offer exhibits, but told the Arbitrators he had failed to make copies. The Arbitrators graciously gave him time to make copies of any exhibits he was going to submit. Mr. Elhamrawy has no basis to complain about being given the opportunity to make copies.

At the hearing, Mr. Elhamrawy first attempted to read documents aloud, rather than offering the documents as exhibits. *MZ000012 at 1:50-2:33*. The Chair asked Mr. Elhamrawy if he intended to submit any exhibits. *Id. at 2:30-2:33*. Mr. Elhamrawy indicated that he did intend to submit exhibits. *Id. at 2:34-2:52*.

The Chair then pointed out that, if Mr. Elhamrawy intended to offer exhibits, he needed to provide copies to the arbitrators and to the opposing parties, so that everyone could understand what he was talking about. *Id. at 2:54 – 3:18*. Mr. Elhamrawy said that the Panel could have his own copies, but that he did not have copies for everyone. *Id. at 3:18-3:40*. The Chair offered Mr. Elhamrawy a recess so that Mr. Elhamrawy could make copies of the exhibits he wanted to submit. *Id. at 4:18 – 4:24*. Mr. Elhamrawy then indicated that **he** wanted to make copies so that he would be able to submit exhibits. *Id. at 4:23 - 4:26*. The Chair then gave Mr. Elhamrawy a recess so that he could make copies. *MZ00013 at 00:46 – 1:00*.

The Chair did not order Mr. Elhamrawy to make copies of anything – but the Chair said that if Mr. Elhamrawy was going to submit exhibits, he needed to present copies to all parties. *Id.* It is not the Arbitrators' fault that Mr. Elhamrawy was unprepared at the start of the hearing. There is no basis to reverse the Arbitration decision because Mr. Elhamrawy failed to make sufficient copies at the outset. *See* 9 U.S.C. § 10(a); *McCarthy*, 463 F.3d at 91.

### **III. THERE WAS NO *EX PARTE* COMMUNICATION**

The audiotape demonstrates there was never an *ex parte* communication between USAA IMCO and the Panel during the recess when Mr. Elhamrawy went to make copies.

According to the tape of the hearing, when Mr. Elhamrawy indicated he was going to make his copies, counsel for USAA IMCO asked if the Arbitrators would like everyone else to leave the hearing room. *MZ000014 at 00:18-00:22*. The Chair responds and orders everyone to exit. *Id.* The order to evacuate the room comes **before** the sound of the door opening to the hearing room – meaning that Mr. Elhamrawy and each Respondent was present when the Chair made its order. *Id.* There simply is no evidence of any *ex parte* communication whatsoever. *Id.* There is no basis to overturn the Panel’s decision on grounds of an improper *ex parte* communication, since there is no evidence that such communication occurred or influenced the proceedings. *Schwartz v. Merrill Lynch & Co.*, 2010 WL 517585 (S.D.N.Y. 2010); *Spector v. Torenberg*, 852 F.Supp. 201, 209 (S.D.N.Y.1994); *Springfield Terminal Ry. Co. v. United Transp. Union*, 767 F.Supp. 333, 347-50 (D.Me. 1991).

### **IV. THERE WAS NO DENIAL OF CROSS-EXAMINATION.**

Mr. Elhamrawy chose to rest, prior to USAA IMCO having the opportunity to take cross examination. *MZ000026 at 2:28-2:42*. The Chair had warned Mr. Elhamrawy that even if he rested, USAA IMCO would be permitted to cross-examine – a process which Mr. Elhamrawy agreed was fair. *Id. at 1:08-1:21*. Pursuant to the Chair’s rulings USAA IMCO cross-examined Mr. Elhamrawy. *MV000028 at 2:36 et seq.* Towards the end of that cross-examination, Mr. Elhamrawy – who had already rested – stated that he wanted to call counsel for USAA IMCO to testify. *MZ000044 at 2:48-2:52*.

There were multiple problems with Mr. Elhamrawy's request to call USAA IMCO's lawyer as a witness. First – Mr. Elhamrawy had **already rested** and therefore could not call any witnesses in his case-in-chief. *MZ000026. at 2:28-2:42*. Second, Mr. Elhamrawy had failed to designate USAA IMCO's lawyer as a witness, and therefore, USAA IMCO's lawyer could not be called to testify. *FINRA Rule 12514*. Third, when USAA IMCO raised the lack of witness designations, Mr. Elhamrawy told the Panel that he had **"no witnesses."** *MZ00007 at 3:10 – 3:40*. Finally, it would have been improper to ask counsel for USAA IMCO any questions directly – he would have had no personal knowledge of any events relating to the claim, and his opinions would have been protected work product.

What Mr. Elhamrawy wanted was the opportunity to re-open his case in chief, and then to call USAA IMCO's lawyer as a witness, so that USAA IMCO's lawyer could be cross-examined. *MZ000045-MZ000046 00:01 – 00:49*. The Arbitrators would not let him do so. *Id.* The Arbitrators had the power to refuse to allow Mr. Elhamrawy to re-open his case and the power to refuse to allow Mr. Elhamrawy to call undisclosed witnesses – particularly one who had no personal knowledge relevant to the dispute. *FINRA Rule 12514 and Rule 12607*. The fact that Mr. Elhamrawy was not allowed to call counsel for USAA IMCO after Mr. Elhamrawy had rested, when counsel for USAA IMCO was an undisclosed witness, and when counsel for USAA IMCO had no personal knowledge of the facts of this case, is not a grounds to set aside the Arbitration decision. *See* 9 U.S.C. § 10(a).

**V. THE PANEL PROPERLY DISMISSED.**

There is no merit to Mr. Elhamrawy's contention that the Arbitrators failed to consider his claim that USAA IMCO denied him the right to "cover" his bad check with a "ten minute"

wire. In fact, the Panel considered Mr. Elhamrawy's argument, and found that it lacked all substance whatsoever, because all of his assets were frozen in Egypt.

According to Mr. Elhamrawy, he told USAA IMCO on March 29, 2011 that he was going to wire money to USAA IMCO to cover his bad check. *MZ000038 at 3:20 – 3:48*. He claims that USAA IMCO was unsatisfied by his promise of a “ten minute” wire transfer, which was supposed to come from his “overseas” family account. *MZ000039 at 00:14 – 00:22*. However, Mr. Elhamrawy never sent this wire, because his family account in Egypt was frozen. *Id. at 00:55 – 1:12*. Accordingly, there was no “ten minute” wire that Mr. Elhamrawy could send on March 29 or March 30, 2011 to cover the bad check. *Id.*

One of the Arbitrators specifically asked Mr. Elhamrawy how he could have obtained a wire to cover the funds if all his money was frozen in Egypt. *MZ000050 at 4:10 – 4:12*. Mr. Elhamrawy responded that he could have evaded the freeze on assets in Egypt by engaging in a set of informal transactions through a network of Egyptian nationals both in Egypt and in the United States. *Id. at 4:24 – 4:50*. Mr. Elhamrawy was specifically asked why he believed that this transaction could have been accomplished in “ten minutes” *MZ000051 at 00:05 – 00:10*. He never answered that question. *Id. at 00:11 – 00:53*.

There was never a delivery of money to USAA IMCO to cover the bad check. *MV000044 at 00:08 – 01:53*. The Purchase Confirmation on the options stated Mr. Elhamrawy had to remit funds on or before the settlement date. *See Ex. 7, Purchase Confirmation*. When the promised wire did not come in by March 30, 2011, USAA IMCO cancelled the transaction. *Ex. 10, Cancellation Notice – March 29 Options*. In short, the evidence demonstrated Mr. Elhamrawy gave USAA IMCO a bad check, never wired money, and never paid for the securities he ordered, resulting in USAA IMCO cancelling the order. *MZ000048 at 1:46 – 4:59*.

On this record, the Arbitrators granted USAA IMCO's motion to dismiss. *MZ000052 at 00:20 – 01:21*. The Arbitrators specifically noted that “there was a bounced check from [Mr. Elhamrawy] for the securities purchased, therefore there were no funds from Claimant to cover his transactions.” *Ex. 14, Award*. Since USAA IMCO prevailed on its motion to dismiss, there was no reason for the Panel to use Mr. Elhamrawy's damage model. *Id.* There is no basis to overturn the decision of the Panel. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir.1990). The Court accordingly should dismiss this case, and affirm the decision of the Panel.

## **VI. PRAYER**

The Court should grant the Motion to Dismiss and confirm the award issued by the Arbitrators pursuant to the Federal Arbitration Act.

Respectfully submitted,

By:

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Dated: September 5, 2013

Counsel for Defendant, USAA IMCO



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing USAA's Motion for Leave to File a Reply Brief and Reply in Support of Motion to Dismiss was filed electronically with the United States District Court for the District of Massachusetts, with notice of case activity to be generated and sent electronically by the Clerk of the Court with ECF notice being sent to all counsel of record and a copy mailed on this 5th day of September, 2013, addressed to those who do not receive notice from the Clerk of the Court:

Alaa Elhamrawy, Pro Se Party  
180 Newbury St., Apt. 1101  
Danvers, MA 01923

/s/ Alice M. Forbes  
Alice M. Forbes