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DBD CV-14-6016430-S — SUPERIOR COURT

WILLIAM GARBARINO — JUDICIAL DISTRICT

V. — OF DANBURY

RAYMOND JAMES FINANCIAL SERVICES, INC., ET AL. — JUNE 29, 2015

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JUDICIAL DISTRICT DANBURY
STATE OF CONNECTICUT

MEMORANDUM OF DECISION
RE: Application to Vacate Arbitration Award

I.

PROCEDURAL HISTORY & BACKGROUND

The parties in this action are the plaintiff, William Garbarino, and the defendants, Nutmeg Investment Group, Inc. (Nutmeg), Charles Meade, and Frank Gavel (collectively, the "Nutmeg defendants"), and Raymond James Financial Services, Inc. (RJFS). Defendants Meade and Gavel are registered representatives with RJFS and principals of Nutmeg.

On or about August 11, 2009, the plaintiff filed a mandatory Statement of Claim with the Financial Industry Regulatory Authority (FINRA) seeking the appointment of a FINRA arbitration panel. In its Statement of Claim, the plaintiff asserted claims against the Nutmeg defendants sounding in breach of contract, tortious interference with business relationship, and defamation. The plaintiff subsequently filed an amended Statement of Claim on or about September 13, 2010. In his amended Statement of Claim, the plaintiff added defendant RJFS as an additional respondent to the arbitration proceedings and asserted the following additional causes of action: breach of implied covenant of good faith and fair dealing, violation of the Connecticut Unfair Trade Practices Act (CUTPA), conversion, statutory theft, and violations of

the Racketeer Influenced and Corrupt Organizations Act (RICO). On September 23, 2010, defendant RJFS filed an Amended Statement of Answer. The Nutmeg defendants filed their Joint Answer and Counterclaims to the plaintiff's Amended Statement of Claim on or about September 16, 2010. The hearings before the arbitration panel were concluded on May 15, 2014,[1] at which time the plaintiff withdrew his claims for defamation and conversion against the Nutmeg defendants, and the RICO violations claims as to all defendants. The arbitration panel issued its award on November 5, 2014.

The plaintiff now moves, pursuant to an application filed on November 25, 2014, to vacate the FINRA panel's award on various grounds. The defendants in this matter filed a joint memorandum of law in opposition on January 2, 2015. On March 20, 2015, upon receipt of permission from the court to do so, the plaintiff filed a supplemental memorandum of law in support of his application. The Nutmeg defendants filed their second opposition memorandum on April 20, 2015; on that same date, defendant RJFS also filed its memorandum of law in opposition to the plaintiff's application. The matter was argued at short calendar on April 27, 2015.

II.

FACTUAL BACKGROUND

The plaintiff is a financial advisor and FINRA registered representative. (11/25/14 Plaintiff's Application, Ex. A., p. 1.) On September 27, 2005,[2] the plaintiff entered into a Financial Advisor Agreement ("FAA") with defendants Meade and RJFS. (11/25/14 Plaintiff's

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[1] The Award issued by the arbitration panel provides a list of all the dates on which hearings were held. (11/25/14 Plaintiff's Application to Vacate, Ex. C.) This list indicates that the last hearing date was held on May 15, 2013. A review of both the parties' pleadings and the Award indicates that this is a scrivener's error.

[2] It is noted that, although the body of the FAA states that the "[a]greement [was] made and entered into this 27 day of September, 2005," the "Effective" date stamped next to the parties' signature states "11/14/2005." Pursuant to the assertions stated in the plaintiff's March 20, 2015 memorandum of law in support of his application to vacate the award, it appears that the November 14, 2005 date is the date on which the FAA was signed by defendant RJFS.

Application, Ex. A., p. 1.) Also in September of 2005, the plaintiff entered into an Independent Contractor Agreement ("ICA") with the Nutmeg defendants. (1/2/15 Defendants' Joint Memorandum in Opposition, Ex. B.) Both the FAA and the ICA provided for arbitration of disputes arising under each agreement under the auspices of FINRA. (1/2/15 Defendants' Joint Opposition Memorandum, Ex. B., ¶ 7; Ex. C, ¶ 17 (b)).

During the course of their business association, disputes arose between the plaintiff and the defendants pertaining to their respective agreements. As a result of the disputes, the plaintiff resigned from his association with both Nutmeg and RJFS in April of 2009. (3/20/15 Plaintiff's Memorandum in Support, Ex. G.) In accordance with the arbitration provisions contained within both the FAA and ICA, the plaintiff subsequently filed a mandatory Statement of Claim with FINRA seeking appointment of a FINRA Arbitration Panel. The disputes between the parties were arbitrated before a three-member FINRA arbitration panel. The FINRA arbitrators heard evidence and argument in this matter over the course of seventy-six hearing sessions from January 9, 2012 through May 15, 2014. (11/25/14 Plaintiff's Application, Ex. C.) The hearings before the arbitration panel were concluded on May 15, 2014, at which time the plaintiff withdrew his claims for defamation and conversion against the Nutmeg defendants, and the RICO violations claims as to all defendants. Thereafter, the parties filed their post-hearing briefs on July 30, 2014.

On November 6, 2014, the FINRA arbitration panel issued its award. In its award, the FINRA panel denied the plaintiff's claims against defendant RJFS in their entirety; the FINRA panel also denied, in their entirety, the counterclaims asserted by defendants Nutmeg and Gavel. The award further provided that the Nutmeg defendants were jointly and severally liable to the plaintiff for $60,000 in attorney's fees and $3700 in compensatory damages. In addition, the

FINRA panel found the plaintiff to be liable to defendant Meade and ordered the plaintiff to pay defendant Meade $5000 in compensatory damages and $225,000 in punitive damages in the form of attorney's fees. Lastly, the award provided for attorneys' fees to defendants RJFS and Nutmeg in the amounts of $108,943.94 and $750,000, respectively. (11/25/14 Plaintiff's Application, Ex. C.)

On November 25, 2014, the plaintiff filed the present action seeking to have this court vacate the award issued by the FINRA panel. In its application to vacate, the plaintiff argues that vacatur is proper because: (1) the award was procured by fraud, corruption, or undue means; (2) the FINRA panel committed misconduct in refusing to postpone the hearing or in refusing to hear evidence pertinent to the arbitration; (3) the FINRA panel exceeded its powers or "so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"; and (4) the award violates public policy. At oral argument before this court, counsel for the plaintiff waived plaintiff's claims that the award was procured by fraud, corruption or undue means and that the FINRA panel committed misconduct.

III.

STATEMENT OF LAW

The plaintiff moves for vacatur of the award pursuant to General Statutes § 52-418 et seq. Section 52-418 (a) (4) provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award . . . if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

Our Supreme Court has "for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense

and vexation of ordinary litigation. . . . When arbitration is created by contract, [our courts] recognize that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . Since the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . ." (Internal quotation marks omitted.) *Bridgeport* v. *Kasper Group, Inc.*, 278 Conn. 466, 473-74, 899 A.2d 523 (2006). General Statutes § 52-418 provides the grounds under which an award may be vacated and our Supreme Court has also recognized two narrow common-law bases "for vacating an award rendered pursuant to an unrestricted submission: (1) the award rules on the constitutionality of the statute; and (2) the award violates clear public policy." (Internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO,* 271 Conn. 127, 134, 855 A.2d 964 (2004).

IV.

DISCUSSION

The plaintiff, in his application, moves this court to vacate the arbitration award "in its entirety or to modify parts of the award to permit a final and definite award." In so moving, the plaintiff argues that the award issued by the FINRA panel contravenes General Statutes § 52-418. In particular, the plaintiff argues that, because none of the allegations in defendant Nutmeg's counterclaims were based on conduct that occurred prior to the expiration of both the ICA and the FAA, the FINRA panel's award of attorney's fees to defendant Nutmeg constitutes a manifest disregard of the fundamental laws of contract. In addition, as it generally pertains to

the award of attorney's fees to defendant Nutmeg, the plaintiff also argues that the plain language of both the ICA and FAA preclude the award of attorney's fees to defendant Nutmeg. The plaintiff further argues that the FINRA panel engaged in manifest disregard of the law in awarding attorney's fees to defendant RJFS because: (1) the attorney's fee provision contained within the FAA was not saved by the survival clause after the termination of the FAA; and (2) the indemnification provision of the FAA applies only to third-party claims, and thus, RJFS cannot be awarded legal fees pursuant to the indemnification provision as a party to the FAA. The plaintiff also contends that the FINRA panel's award of punitive damages for malicious defamation in favor of defendant Meade must be vacated because it constitutes manifest disregard for the law of defamation and is an unconstitutionally excessive award. Lastly,[3] the plaintiff asserts that the award must be vacated because it violates public policy in favor of protecting citizens with a duty to report wrong-doing to public agencies.

In their joint opposition memorandum dated January 2, 2015, the defendants counter that the award issued by the FINRA panel must be upheld because the award is "wholly consistent with the parties' unrestricted submission to arbitration." Specifically, the defendants contend that the arbitration submission was unrestricted and that the plain language of the submission was broad enough to grant the FINRA panel authority to adjudicate defendant Nutmeg's defamation and breach of contract counterclaims. The defendants further argue that the award conformed to the terms of both the ICA and FAA. Furthermore, the defendants assert that the plaintiff's argument that the award violates public policy is misplaced.

[3] The plaintiff's brief also contained arguments pertaining to his claim that the award must be vacated on the following grounds: (1) that the award was procured by corruption, fraud, or undue means; and (2) that the arbitrators are guilty of misconduct in refusing to postpone the hearing or in refusing to hear pertinent evidence. As noted in part I of this decision, counsel for plaintiff waived these claims at oral argument. Accordingly, the court will not consider the arguments pertaining to these claims.

In the Nutmeg defendants' April 20, 2015 opposition memorandum, they further assert that the plaintiff waived any objection to the FINRA panel's award of attorney's fees by his conduct at the arbitration proceedings because, throughout the proceedings, the plaintiff argued that both the ICA and FAA provided for attorney's fees. The Nutmeg defendants further argue that, even if the court finds that the plaintiff did not waive review of the award of attorney's fees, a vacatur of the attorneys' fees remains improper because the parties, in requesting attorney's fees, empowered the FINRA panel to award such fees. Similarly, in its April 20, 2015 opposition memorandum, defendant RJFS argues that the plaintiff's application must be denied because, in submitting a proposed Findings of Law to the FINRA panel stating that the FAA clearly and unambiguously allowed for attorney's fees, the plaintiff acknowledged that the FINRA panel had authority to award attorney's fees.

A. Standard of Review: Restricted-vs-Unrestricted Submission

"Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005). Thus, "[t]he significance . . . of a determination that an arbitration submission was unrestricted or restricted is not to determine what the arbitrators are obligated to do, but to determine the scope of judicial review of what they have done. Put another way, the submission tells the arbitrators what they are obligated to decide. The determination by a court of whether the submission was restricted or unrestricted tells the court what its scope of review is regarding the arbitrator's decision." (Internal quotation marks omitted.) *Bridgeport Fire Fighters Local 998* v. *Bridgeport*, 106 Conn. App. 92, 95, 940 A.2d 868 (2008). "When the submission to the

arbitrator . . . is deemed restricted . . . [the courts] engage in de novo review." (Internal quotation marks omitted.) *Office of Labor Relations* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 288 Conn. 223, 229, 951 A.2d 1249 (2008). "When the scope of the submission is unrestricted, the resulting award is not subject to de novo review even for errors of law so long as the award conforms to the submission." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 80.

In all the pleadings submitted by the respective parties both in support and in opposition to the application to vacate, all of the parties consistently stated that the submission before the FINRA panel was unrestricted. (1/2/15 Defendants' Joint Opposition Memorandum, p. 1; 3/20/2015 Plaintiff's Memorandum in Support, p.1; 4/20/15 Defendant RJFS' Memorandum of Law in Opposition, p. 5; 4/20/2015 Nutmeg Defendants' Memorandum of Law in Opposition, p. 3.) At oral argument, however, plaintiff's counsel asserted, for the first time, that pursuant to the Supreme Court's ruling in *Harty*, the submission before the FINRA panel was, in fact, restricted. Thus, to apply the appropriate standard of review in this case, the court must first determine whether the submission to the FINRA panel was restricted or unrestricted.

"In determining whether a submission is [restricted or] unrestricted, we look at the authority of the arbitrator." (Internal quotation marks omitted.) *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, 59 Conn. App. 224, 229, 755 A.2d 990 (2000). "Where the language of the arbitration clause indicates an intention on the part of the parties to include all controversies which may arise under their agreement, and where the record reveals no specific questions which the parties submitted to the arbitrator, the submission will be construed as unrestricted. . . . A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review." (Citations

omitted; internal quotation marks omitted.) *United States Fidelity & Guaranty Co.* v. *Hutchinson*, 244 Conn. 513, 519, 710 A.2d 1343 (1998); accord *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, supra, 59 Conn. App. 229.

In the present case, as previously noted, plaintiff's counsel argued at oral argument that the submission before the FINRA panel was restricted. In so arguing, plaintiff's counsel pointed to the language contained within the Submission Agreement provided to the FINRA panel. The portion of the Submission Agreement on which plaintiff's counsel relies provides, in its entirety: "The undersigned parties ('parties') hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." (1/2/15 Defendants' Joint Opposition Memorandum, Ex. D, para. 1.) At oral argument, plaintiff's counsel argued that the phrase "as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third party claims" restricted the FINRA panel's scope of review. The court disagrees.

"The arbitration clause in a contract constitutes the written submission to arbitration. . . . The process which governs the confirmation of arbitral awards is well settled by our cases. If the parties have agreed in the underlying contract that their disputes shall be resolved by arbitration, the arbitration clause in the contract is a written submission to arbitration. . . . This submission can be invoked by a demand for arbitration by one or both parties when a dispute arises. The agreement for submission constitutes the charter for the entire ensuing arbitration proceedings." (Citations omitted; internal quotation marks omitted.) *Exley* v. *Connecticut Yankee Greyhound Racing, Inc.*, supra, 59 Conn. App. 229-30. Thus, where the contractual agreement between the

parties provides for arbitration of disputes between the parties and contains no language restricting the scope of the arbitrator's authority, the submission is unrestricted.

The arbitration provision in the FAA provides in its entirety: "In the event of a breach of this Agreement, the prevailing party in any resulting litigation or arbitration shall recover its costs incurred in enforcing its rights with respect to such breach. Such costs shall include, *without limitation*, reasonable internal and external attorney's fees and litigation expenses." (Emphasis added.) (3/20/15 Plaintiff's Memo in Support, Ex. C.) The arbitration provision in the ICA contains nearly identical language. The ICA provides: "In the event of a breach of this Agreement, the prevailing party in any resulting arbitration or mediation shall recover its costs incurred in enforcing its rights with respect to such breach. Such costs shall include, *without limitation*, reasonable attorney's fees and litigation expenses." (Emphasis added.) (3/20/15 Plaintiff's Memorandum in Support, Ex. B, Para. 7.) As is evident by the arbitration provisions in both the FAA and the ICA, neither contain any language specifically restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review. Moreover, contrary to plaintiff counsel's assertion, the relied-upon language in the Submission Agreement does not serve as a restriction to the arbitrator's authority. See *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 258 Conn. 101, 111-12, 779 A.2d 737 (2001) (noting that, where an arbitration submission directed the arbitrator to examine certain documents, but such direction was not made a condition of the submission, the Supreme Court has consistently held the submission to be unrestrictive).

Furthermore, plaintiff counsel's reliance on *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 72, in support of the argument that the submission before the FINRA panel is restricted is misplaced. In *Harty*, the defendant employer appealed the trial court's partial vacatur of the

arbitration award on the ground that the trial court improperly failed to apply the de novo standard of review to its claim that the arbitrators exceeded their authority. In concluding that the trial court erred in failing to apply the de novo standard of review, the Supreme Court[4] paid particular attention to the language of the arbitration provision contained in the employment agreement executed by the parties. The arbitration provision in *Harty* specifically provided that "it is understood and agreed that the arbitrators are *not authorized or entitled* to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages regardless of the nature or form of the claim or grievance that has been submitted to arbitration . . . ." (Emphasis added; internal quotation marks omitted.) Id., 76. Thus, the arbitration submission in *Harty* contained express language restricting the breadth of issues to be decided by the arbitrators. In contrast, in the present case, no such limitation was expressly included within the arbitration provisions contained in either the FAA or the ICA. In fact, the arbitration provisions in both agreements grant the FINRA panel authority to award attorney's fees "without limitation." This is a simple but essential distinction from the facts in *Harty.*

Accordingly, the court finds that the arbitration clauses in both the ICA and FAA constitute an unrestricted submission to arbitration. Therefore, unless otherwise noted, the award issued by the FINRA panel is not subject to de novo review.

B. Whether FINRA Panel Exceeded its Authority

"Even with an unrestricted submission, however, it is well settled that the award may be reviewed to determine if the arbitrators exceeded their authority, one of the statutory grounds under § 52-418 for vacating an award." *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 84.

[4] The defendant in *Harty* appealed from the judgment of the trial court to the Appellate Court. The Supreme Court, pursuant to its authority under General Statutes § 51-199 (c) and Practice Book § 65-1, transferred the appeal to it. *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 79.

"When addressing a claim that the arbitrators have exceeded their authority and violated § 52–418 (a) (4), the court's inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred." (Internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, 309 Conn. 767, 779, 75 A.3d 1 (2013). Thus, a court's review of a party's "claim that the arbitrators exceeded their authority in rendering their award is limited to a comparison between the submission and the award to see whether, in accordance with the powers conferred upon the arbitrators, their award conforms to the submission. . . . During this limited inquiry, the court is required to provide [e]very reasonable presumption and intendment . . . in favor of the award and of the arbitrators' acts and proceedings." (Citation omitted; internal quotation marks omitted.) Id.

The plaintiff argues that the award must be vacated because the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. In so arguing, the plaintiff asserts that, to the extent that the award of attorney's fees to defendant Nutmeg is based on the FAA, the FINRA panel's award of attorney's fees to defendant Nutmeg demonstrates a manifest disregard of the principles of contract law. The plaintiff asserts that such award was improper because defendant Nutmeg was never a party to the FAA. The plaintiff also argues that Nutmeg is not entitled to attorney's fees pursuant to the ICA as the ICA's legal fees provision is limited to claims arising out of a breach of the ICA. Plaintiff contends that in light of the fact that the ICA expired prior to the accrual of the causes of action asserted in the arbitration, the FINRA panel had no legally cognizable basis for the award of attorney's fees to defendant Nutmeg under the ICA. As it pertains to the attorney's fees awarded to defendant RJFS, the plaintiff contends that such award

constitutes a manifest disregard of the law of contracts because the cause of action asserted against RJFS did not survive the termination of the FAA.

In their joint memorandum in opposition, the defendants collectively counter that the award conforms to the broad authority conferred on the FINRA panel by the parties' unrestricted submission. The defendants contend that "the plain language of the submission is broad enough to include" an award as to the defendants' respective affirmative defenses and counterclaims. Furthermore, in its April 20, 2015 opposition papers, defendant RJFS argues that, because the submission agreement provided for consideration of all matters raised, the FINRA panel acted within its authority when it awarded defendant RJFS attorney's fees. In so arguing, defendant RJFS notes that, in his arguments before the FINRA panel, the plaintiff relied upon the FAA for the breach of contract claim asserted against RJFS.[5] Similarly, in their April 20, 2015, opposition memorandum, the Nutmeg defendants assert that the plaintiff has waived judicial review of the claim that the FINRA panel exceeded its authority as it relates to the award of attorney's fees because, throughout the arbitration proceedings, the plaintiff argued that both the ICA and the FAA provided for attorney's fees; thus, the FINRA panel was authorized to award such fees pursuant to the parties' requests and agreement. The Nutmeg defendants further argue that, even if the FINRA panel erred in awarding the attorney's fees pursuant to the ICA and FAA, it was authorized to award such fees under the FINRA guidelines.

"[A] claim that the arbitrators have exceeded their powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn.

[5] At oral arguments, plaintiff's counsel conceded that, if this court were to find that the award of attorney's fees to the defendants was invalid due to the expiration of the ICA, then the award of attorney's fees to the plaintiff pursuant to the ICA is also invalid.

85. Under the manifest disregard standard, "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover . . . the arbitrator [must have appreciated] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it. . . . [In addition], [t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable." (Internal quotation marks omitted.) *Garrity* v. *McCaskey*, 223 Conn. 1, 9, 612 A.2d 742 (1992). "[A] necessary predicate to a claim that the arbitrators manifestly disregarded the law is that the arbitrators generally were vested with the authority to decide the issue or to grant the relief, but ignored clearly applicable law in making that determination." *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 88. Thus, in order to prevail under the manifest disregard of the law standard, the party challenging the arbitrator's award "must demonstrate that the award reflects an egregious or patently irrational rejection of clearly controlling legal principles." *Garrity* v. *McCaskey*, supra, 223 Conn. 11.

In analyzing the plaintiff's arguments, the court is mindful of the particularly narrow scope of review for an arbitrator's alleged manifest disregard. As outlined by our Supreme Court in *Garrity*, this ground for vacatur should be reserved for circumstances where the arbitrator has displayed an "extraordinary lack of fidelity to established legal principles." *Garrity* v. *McCaskey*, supra, 223 Conn. 10. This court is not "at liberty to set aside an arbitration panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it." (Internal quotation marks omitted.) Id., 9. Vacatur under the manifest disregard standard is appropriate only in circumstances where the arbitrator's infidelity to established legal principles is such that the arbitrator "had reached his decision by consulting a ouija board" or where his

decision "discloses an infidelity to the obligation imposed upon the arbitrators." (Internal quotation marks omitted.) Id., 8.

The plaintiff argues that the FINRA panel ignored the governing rules of contract law in awarding attorney's fees to defendants Nutmeg and RJFS pursuant to the ICA and FAA. It must be noted, however, that "[a]rbitration awards . . . are not to be invalidated merely because they rest on an allegedly erroneous interpretation or application of the relevant . . . agreement. . . . Rather, in determining whether the arbitration award draws its essence from the . . . agreement, the reviewing court is limited to considering whether the . . . agreement, rather than some outside source, is the foundation on which the arbitral decision rests. . . . If that criterion is satisfied . . . then [the court] cannot conclude that the arbitrator exceeded his authority or imperfectly executed his duty. . . . Ultimately, [n]either a misapplication of principles of contractual interpretation nor an erroneous interpretation of the agreement in question constitutes grounds for vacatur. . . . It is not [the court's] role to determine whether the arbitrator's interpretation of the . . . agreement was correct." (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, supra, 309 Conn. 780.

In his application for vacatur, the plaintiff relies heavily on the assertion that the FINRA panel acted in manifest disregard of the laws of contract in asserting that vacatur is proper. It is, however, well established that a court may not vacate an arbitration award simply because of an error or misunderstanding with respect to the law. See *Adviser Dealer Services, Inc.* v. *Icon Advisers, Inc*, 557 Fed. Appx. 714, 718 (10th Cir. 2014) ("[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of contract, the courts have no business overruling him because their interpretation of contract is different from his") (Internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-325* v.

Westbrook, supra, 309 Conn. 780. Furthermore, even assuming that the FINRA panel erred in awarding attorneys' fees pursuant to the principles of contract law, this court is not at liberty to overturn the award of attorney's fees. See *Garrity* v. *McCaskey*, supra, 223 Conn. 11-12 (finding that "[e]ven if the arbitrators were to have misapplied the law . . . such a misconstruction of the law would not demonstrate the arbitrators' egregious or patently irrational rejection of clearly controlling legal principles"); *AFSCME, Council 15, Local 1159* v. *Bridgeport*, 21 Conn. App. 28, 31, 571 A.2d 127 (1990) (noting that the trial court properly determined that "even if the arbitrators committed errors of law, such errors are not reviewable.")

Moreover, even if this court were to find that neither the ICA nor the FAA allowed for the award of attorney's fees to the defendants, the FINRA panel had authority to award such fees pursuant to the FINRA guidelines. The parties' Submission Agreement provides that they submit "to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure"; thus, the parties agreed to be bound by any award entered pursuant to the FINRA guidelines. (1/02/15 Defendants' Joint Memorandum in Opposition, Ex. D.) The Tenth Circuit's decision in *Adviser Dealer Services, Inc.* v. *Icon Advisers, Inc*, supra, 557 Fed. Appx. 714, relied upon by the Nutmeg defendants, is instructive on this point. In *Adviser Dealer Services, Inc.*, the FINRA panel awarded attorney's fees "pursuant to the terms of the Retirement Agreement at issue . . . ." (Internal quotation marks omitted.) Id., 717. The plaintiff then sought vacatur of the panel's award on the ground that it was never a party to the Retirement Agreement and could not, therefore, be made to pay attorney's fees based on an agreement to which it was never a party. Id. In reversing the district court's vacatur of the award, the Tenth Circuit held that such award of attorney's fees was proper because "FINRA guidelines expressly allow a panel to award attorney's fees when all of the parties *request or agree* to such fees." (Emphasis altered;

internal quotation marks omitted.) Id., 718. In so ruling, the Tenth Circuit noted that where the parties' Submission Agreement incorporates by reference their statement of claim and answer, both of which contain requests for attorney's fees, the "parties expressly empower the arbitrators to award attorney's fees." (Internal quotation marks omitted.) Id. The Tenth Circuit further stated that "an erroneous reference to the Retirement Agreement as a basis for its award [is] merely an error of fact, which does not justify overturning the panel's award of attorney's fees." Id., 718-19.

Similar to the argument made by the plaintiffs in *Adviser Dealer Services, Inc.*, the plaintiff in the present case argues that, assuming that the panel's award of attorney's fees to defendant Nutmeg was made pursuant to the FAA, such award is improper because defendant Nutmeg was never a party to the FAA. As previously noted, however, this does not provide sufficient grounds for vacatur of the FINRA panel's award, especially in light of the fact that the parties' expressly agreed to be bound by the FINRA guidelines. Furthermore, all the parties in the present case expressly requested an award of attorney's fees in their respective Statements of Claim. (3/20/15 Plaintiff's Memorandum in Support, Ex. F, p. 20; 4/20/15 Defendant RJFS' Opposition Memorandum, Ex. B, p. 4; 4/20/15 Nutmeg Defendants' Opposition Memorandum, Appendix at A320.) Lastly, it must be noted that, although the FINRA panel's award provides that such fees were awarded "pursuant to the terms of the parties' agreement," this fact does not, by itself, justify vacatur of the panel's award of attorney's fees. Accordingly, the court concludes that the plaintiff has failed to demonstrate that the FINRA panel exceeded its authority in awarding attorney's fees.

C. Public Policy Argument

The plaintiff next contends that the arbitration award should be vacated because the award violates public policy. In his March 20, 2015 memorandum of law, the plaintiff asserts that the FINRA panel's award of attorney's fees to defendant Meade violates the "strong public policy in favor of protecting citizens with a duty to report wrong-doing to public agencies . . . ."

Our Supreme Court first recognized the public policy exception to the general rule of deference to an arbitration award made pursuant to an unrestricted submission in *Board of Trustees* v. *Federation of Technical College Teachers*, 179 Conn. 184, 195, 425 A.2d 1247 (1979. "The public policy exception applies only when the award is clearly illegal or violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them." (Citation omitted; internal quotation marks omitted.) *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 271 Conn. 135. "[W]hen a challenge to a voluntary arbitration award rendered pursuant to an unrestricted submission raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review." (Internal quotation marks omitted.) Id.

"When a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [the parties' agreements] is limited to situations where the [award] . . . would violate some explicit public

policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." (Citation omitted; internal quotation marks omitted.) Id., 135-36. "The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated." (Internal quotation marks omitted.) Id., 136.

"To determine whether an arbitration award must be vacated for violating public policy, [Connecticut courts] employ a two-pronged analysis. . . . First, [the court] must determine whether the award implicates any explicit, well-defined, and dominant public policy. . . . To identify the existence of a public policy, [courts] look to statutes, regulations, administrative decisions, and case law. . . . Second, if the decision of the arbitrator does implicate a clearly defined public policy, [the court must] then determine whether the [award] . . . violates that policy." (Citations omitted.) *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 316 Conn. 618, 630-31 (2015).

In the present case, with regard to the first prong of the analysis, the court's first task is to determine whether there is a clear, well-defined public policy in favor of protecting citizens participating in judicial and quasi-judicial proceedings. Our Supreme Court has found a clear, well-defined public policy protecting those who provide information in connection with such proceedings. In *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 79 A.3d 60 (2013), the Supreme Court stated: "[t]he purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial

proceedings." (Internal quotation marks omitted.) Id., 627. "The effect of an absolute privilege in a defamation action is that damages cannot be recovered for a defamatory statement even if it is published falsely and maliciously." (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, 78 Conn. App. 549, 553, 827 A.2d 793 (2003), aff'd, 271 Conn. 78, 856 A.2d 372 (2004). Accordingly, this court finds that there is a clear, well-defined public policy protecting those who testify in quasi-judicial proceedings.

Having established the existence of an explicit public policy protecting statements made in quasi-judicial proceedings, the court must now determine whether, under the circumstances of the present case, the FINRA panel's award of attorney's fees to defendant Meade violates that public policy. The plaintiff argues that the award of attorney's fees to defendant Meade violates public policy because "there can be no doubt that the Connecticut Department of Insurance (Department of Insurance) and the Internal Revenue Service (IRS) are administrative agencies exercising quasi-judicial fact-finding functions." In determining whether the FINRA panel's award constitutes a violation of the public policy of encouraging participation and candor in quasi-judicial proceedings, the court must examine whether: (1) the Department of Insurance and the IRS are, in fact, administrative agencies exercising quasi-judicial fact-finding functions; and (2) letters sent to such administrative agencies are absolutely privileged.

In regard to the issue of whether the IRS is an administrative agency exercising quasi-judicial fact-finding functions, this court finds in the affirmative. See, e.g., *Hinds County* v. *Wachovia Bank*, 700 F. Supp. 2d 378, 403 (S.D.N.Y. 2010) (discussing reach of the quasi-judicial authority bestowed on the IRS); *Johnson* v. *U.S.*, 680 F. Supp. 508, 515-16 (E.D.N.Y 1987) (discussing Ninth Circuit's analysis of quasi-judicial immunity afforded to IRS officials).

In regard to the issue of whether the Department of Insurance is an administrative agency exercising quasi-judicial fact-finding functions, the court also finds that the Department of Insurance is, in fact, a quasi-judicial body. In *American Casualty Co.* v. *Fyler*, 60 Conn. 448, 22 A. 494 (1891), our Supreme Court held that "the authority given to the [Insurance Commissioner] is administrative, or quasi-judicial, rather than ministerial." Id., 461. Although the Supreme Court's decision in *Fyler* was based on the General Statutes provisions in effect more than a century ago, this holding remains valid. In *Mercer* v. *Blanchette*, 133 Conn. App. 84, 33 A.3d 889 (2012), the Appellate Court stated: "The judicial proceeding to which [absolute] immunity attaches has not been defined very exactly. . . . It extends . . . to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) Id., 90. In determining whether an entity is quasi-judicial in nature, Connecticut courts consider "whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties." (Internal quotation marks omitted.) Id., 91.

An analysis of the factors outlined in *Mercer* leads this court to conclude that the Department of Insurances continues to be a quasi-judicial body well after the Supreme Court issued its decision in *Fyler*. The Department of Insurance is authorized, through the Insurance Commissioner, to exercise judgment and discretion pursuant to General Statutes § 38a- 14 (b). see also General Statutes §§ 38a-27 (a) (1); 38a-27 (b). It also has the authority to conduct hearings and issue binding orders. See General Statutes §§ 38a-16; 38a-19; and 38a-14 (f) (1). In

addition, the Insurance Commissioner has the authority to issue subpoenas for the attendance of any witnesses or the production of any documents deemed relevant to the investigation. See General Statutes § 38a-14 (f) (1). Accordingly, this court finds that the Department of Insurance is a quasi-judicial body.

Having determined that these agencies are quasi-judicial bodies, the court must now determine whether the statements contained in the letters are absolutely privileged, especially in light of the fact that they were written by the plaintiff prior to any quasi-judicial proceedings before either the Department of Insurance or the IRS. In *Kelley* v. *Bonney*, 221 Conn. 549, 606 A.2d 693 (1992), our Supreme Court examined the issue of whether a letter containing an allegedly defamatory statement is privileged where that letter was not part of a proceeding, but rather, a request for an investigation. Id., 554-55. The *Kelley* court ultimately concluded that, because "any statements made as a requisite step in [quasi-judicial] proceedings [are] absolutely privileged," the statements made by the persons requesting an investigation were privileged. Id., 571. Thus, insofar as the plaintiff's letter to the Department of Insurance is a "Request for Market Conduct Investigation," as stated in its subject line; (3/20/15 Plaintiff's Memorandum in Support, Ex. J); the court finds that the statements contained therein are absolutely privileged. The court finds, however, that the statements contained in the plaintiff's letter to the IRS are not privileged because the letter was not a request for an investigation nor was it, in any manner, a preliminary step to a proceeding before the IRS. (3/20/15 Plaintiff's Memorandum in Support, Ex. J). Accordingly, the public policy exception does not apply to the defamatory statements contained in the plaintiff's letter to the IRS.

Notwithstanding the foregoing, the court finds that vacatur of the FINRA panel's award of attorney's fees to defendant Meade is improper under the public policy exception because

defendant Meade's defamation counterclaims are also based on statements made before third parties not afforded absolute privilege in a defamation action. Although the plaintiff's arguments for vacatur to this court on public policy grounds focus entirely on defendant Meade's defamation counterclaims as they pertain to the letters written to the IRS and the Department of Insurance, defendant Meade's defamation counterclaims are not, in fact, based solely on those letters. In the counterclaims submitted to the FINRA panel, defendant Meade alleges that the plaintiff made "false representations of fact to third persons, including, but not limited to, individuals in RJFS management, individuals at RJFS's errors and omissions insurance carrier, the Connecticut Department of Insurance, and upon information and belief, [the plaintiff's] customers." (4/20/15 Nutmeg Defendants' Opposition Memorandum, Appendix at A320, para. 4.) Thus, defendant Meade's defamation counterclaims before the FINRA panel were also based on statements made to private individuals and such statements are not protected by the absolute privilege immunity.

The plaintiff does not assert, nor does the court find, any clearly established public policy against which to measure the propriety of the FINRA panel's award of attorney's fees as to the defamatory statements not made before the quasi-judicial bodies. Furthermore, because the submission before the FINRA panel was unrestricted, this court "may not review the arbitrator's report for errors of fact to determine what evidence [it] did or did not rely on" in issuing attorney's fees to defendant Meade. *Hartford* v. *International Assn. of Firefighters, Local 760*, 49 Conn. App. 805, 815, 717 A.2d 258 (1998); see also *In re Lehman Brothers Securities & ERISA Litigation*, 706 F. Supp. 2d 552, 561 n.69 (S.D.N.Y. 2010) (noting that the "FINRA arbitrators here are not required to justify their decisions"). The FINRA panel, therefore, had a reasonable basis not contrary to a well-defined public policy for its award of attorney's fees to

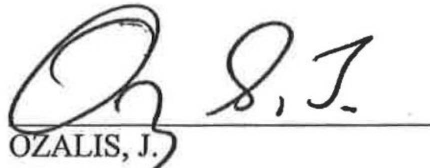
defendant Meade. See *Lykins* v. *Citicorp Credit Services, Inc.*, United States District Court, Docket No. 1:13-MC-11 (SSB), (S.D. Ohio May 13, 2013) (noting that in order to vacate an arbitrator's award under 9 U.S.C.§ 10, which contains language nearly identical to § 52-418, "the plaintiff must demonstrate by clear and convincing evidence that the arbitrator had no reasonable basis for his decision."); *Questar Capital Corp.* v. *Gorter*, 909 F. Supp. 2d 789, 822 (W.D. Kentucky 2012) (noting that, although the plaintiff seeks to have the court eliminate "every plausible line of reasoning that would support the award" issued by the FINRA panel, the court has no such authority.); *Mason Tenders Dist. Council of Greater New York & Long Island* v. *Circle Interior Demolition, Inc.*, United States District Court, Docket No. 07-CV-11227 (RMB) (THK) (S.D.N.Y. December 22, 2009) (noting that the trial court properly issued its ruling after finding that "there was a reasonable basis for the arbitrator's determination that Defendant is . . . liable for . . . attorney's fees.") (Internal quotation marks omitted.) As the court must make every reasonable presumption in favor of the arbitration award; *Bridgeport* v. *Kasper Group, Inc.*, supra, 278 Conn. 473-74, the court finds vacatur under the public policy exception improper.

V.

CONCLUSION

For the foregoing reasons, the plaintiff's Application to Vacate arbitration award is denied in its entirety.

BY THE COURT,



OZALIS, J.