IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BRIAN LEGGETT and BRYSON HOLDINGS, LLC, Petitioners, vs. WELLS FARGO CLEARING SERVICES, LLC d/b/a WELLS FARGO ADVISORS, LLC and JAY WINDSOR PICKETT III, Respondents.	Civil Action File No. 2019CV328949

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION TO VACATE ARBITRATION AWARD

Petitioners, Brian Leggett ("Leggett") and Bryson Holdings, LLC ("Bryson") (hereinafter collectively the "Investors") hereby institute this special statutory proceeding pursuant to the Georgia Arbitration Code ("GAC") and the Federal Arbitration Act ("FAA") against Wells Fargo Clearing Services, LLC, d/b/a Wells Fargo Advisors, LLC ("WFA"), and Jay Windsor Pickett III ("Pickett") (hereinafter collectively "Wells Fargo"), and respectfully request that this Court vacate the August 1, 2019 Arbitration Award ("Award") issued in the arbitration styled Brian Leggett and Bryson Holdings, LLC v. Wells Fargo Clearing Services, LLC, d/b/a Wells Fargo Advisors, LLC and Jay Windsor Pickett III, FINRA Office of Dispute Resolution Case Number 17-01077 (the "Arbitration") in its entirety and order a rehearing before new arbitrators.

PRELIMINARY STATEMENT

The Award denying the Investors' claims against Wells Fargo and imposing $51,000.00 in costs and $32,200.00 in hearing session fees against the Investors must be vacated.

First, Wells Fargo rigged the arbitrator selection process in direct violation of the FINRA Code of Arbitration Procedure, denying the Investors' of their contractual right to a neutral, computer generated list of potential arbitrators.

Second, the Arbitrators are guilty of misconduct for denying the Investors' request to postpone the hearing after Wells Fargo dumped thousands of pages of relevant documents on the eve of the hearing, well beyond the timeframe required by the FINRA Code of Arbitration Procedure and scheduling orders set forth by the Arbitrators. The Arbitrators provided no reasoning for their refusal to grant the Investors' request.

Third, the Arbitrators are guilty of misconduct for denying the Investors their statutory right to present testimony from their current stockbroker and cross-examine Wells Fargo's expert witness. At the hearing, Wells Fargo introduced evidence and elicited testimony relating to the Investors' investments and investment making decisions after they moved their accounts from Wells Fargo to Schwab. The Investors requested the Arbitrators hear evidence from the Investors' new stockbroker at Schwab after the Arbitrators permitted Wells Fargo to introduce testimony and documents pertaining to those accounts, and the witness indicated he was available to testify. Despite this, the Arbitrators refused to allow this witness to testify. The Arbitrators did permit Wells Fargo, on the other hand, to present an expert witness by telephone at the last minute who was never identified as a potential witness. Were this not enough, the Arbitrators severely restricted the cross examination of the expert, thus refusing to permit counsel for the Investors to fully cross-examine this surprise witness in violation of their statutory right to present evidence.

Fourth, Wells Fargo committed fraud on the arbitration panel by procuring perjured testimony, intentionally misrepresenting the record, and hiding and refusing to turn over a key document to the Investors until after the close of evidence.

Fifth, the Arbitrators exceeded their powers and manifestly disregarded the law by (1) awarding Wells Fargo $51,000.00 in costs in violation of FINRA's Code of Arbitration Procedure; and (2) purporting to impose hearing session fees against the Investors that far exceeded the hearing session fees permitted under the FINRA Code of Arbitration Procedure.

A. FACTUAL AND PROCEDURAL BACKGROUND[1]

I. THE INVESTORS SUSTAIN MAJOR LOSSES INVESTING WITH WELLS FARGO ADVISORS

The Investors were securities customers of WFA. During 2015 and 2016, the Investors sustained losses totaling $1,178,446.78 investing in a merger arbitrage strategy (purchasing shares of companies either rumored to be acquired or that have already announced a merger) conceived and executed by their WFA broker Jacob McKelvey. McKelvey joined WFA on April 10, 2015. Between April 2015 and May 2016, McKelvey managed the Claimants' accounts under the supervision of WFA. WFA permitted the account to be over-concentrated in single stocks and industries. McKelvey encouraged this activity, telling Leggett at one point that he should be "[G]et all you can, back the truck up."[2] After suffering major losses and complaining to the firm, the Investors were provided a new broker, Pickett, who managed the accounts between April 2016 and November 2016. Pickett, under WFA's watchful eye, engaged in a risky options trading strategy that was designed to protect WFA's interests (which had extended margin loans to the Investors) rather than the Investors' interests.

[1] The second week of the arbitration hearing was transcribed by a certified court reporter. Relevant pages of the record cited herein are attached hereto as Exhibit A and cited as "Transcript, p. ___."
[2] Ex. A, Transcript, pp. 72-73.

II. WFA'S CUSTOMER AGREEMENT MANDATED ARBITRATION BEFORE THE FINANCIAL REGULATORY AUTHORITY AND INCORPORATED FINRA'S CODE OF ARBITRATION PROCEDURE INTO THE CONTRACT

FINRA, the Financial Regulatory Authority, is the principal non-governmental regulator of the securities industry, both through regulation and enforcement. It also administers the resolution of disputes with member firms (like WFA) through arbitration. WFA's customer agreement contained a binding arbitration agreement (the "Arbitration Agreement") mandating arbitration at FINRA pursuant to the FINRA Code of Arbitration Procedure:[3]

> *It is agreed that all controversies or disputes which may arise between you and WFA…shall be determined by arbitration conducted before, an arbitration panel set up by either the Financial Industry Regulatory Authority ("FINRA") in accordance with its arbitration procedures. Any of us may initiate arbitration by filing a written claim with FINRA. Any arbitration under this Agreement will be conducted pursuant to the Federal Arbitration Act and the Laws of the State of New York.*

WFA's arbitration agreement, a contract of adhesion prepared by WFA and submitted to the Investors in a form as part of the account opening process, does not contain any fee/cost shifting provision requiring the losing party to pay the attorneys' fees or costs incurred by the prevailing party.

III. THE INVESTORS INITIATE AN ARBITRATION AGAINST WELLS FARGO CONSISTENT WITH THE MANDATORY ARBITRATION AGREEMENT

The record shows that the Investors became increasingly concerned that Wells Fargo mishandled their accounts. Thereafter, the Investors initiated a FINRA arbitration by filing a Statement of Claim and Uniform Submission Agreement with the FINRA Director of Dispute Resolution on April 27, 2017 in accordance with FINRA Code of Arbitration Procedure Rule 12302 ("Filing and Serving an Initial Statement of Claim").[4] Therein, the Investors asserted a

[3] Ex. B (WFA-Leggett000013-14 ("Pre-Dispute Arbitration Agreement").
[4] Ex. C, Award, p. 1.

number of claims against WFA and Pickett including violation of the Georgia Securities Act, failure to supervise, and breach of fiduciary duty.[5]

IV. WFA AND ITS COUNSEL MANIPULATE THE FINRA NEUTRAL LIST SELECTION SYSTEM IN VIOLATION OF THE FINRA CODE OF ARBITRATION PROCEDURE

FINRA Code of Arbitration Procedure Rule 12400 ("Neutral List Selection System and Arbitrator Rosters") provides that "[t]he Neutral List Selection System is a computer system that generates, on a random basis, lists of arbitrators from FINRA's rosters of arbitrators for the selected hearing location for each proceeding. The parties *will select their panel* through a process of striking and ranking the arbitrators on lists generated by the Neutral List Selection System."

On June 20, 2017, FINRA provided the parties with its list of proposed arbitrators generated by the Neutral List Selection System and requested the parties submit their ranking lists by July 10, 2017, which was extended by agreement of counsel to July 14, 2017.[6]

Rather than ranking and striking pursuant to the Code, on July 10, 2017, counsel for WFA submitted a letter to FINRA insisting that one of the proposed arbitrators on the list of potential arbitrators be removed from the computer generated list on the ground that he harbored personal bias against Wells Fargo's lead counsel, Terry Weiss. The alleged bias resulted from a previous case (outside) counsel Weiss had worked on (and lost) for another FINRA member firm in which Weiss filed an unsuccessful motion to vacate alleging arbitrator misconduct.[7]

The Investors objected to Wells Fargo's impoper attempt to manipulate the computer generated list in order to effectively gain an "extra strike" on July 11, 2017.[8] Therein, Investors

[5] *Id.*, p. 1-2.
[6] Ex D.
[7] Ex. E, July 10, 2017 Letter from Terry Weiss to FINRA.
[8] Ex. F, July 11, 2017 Letter from Craig Kuglar to FINRA.

insisted that FINRA follow the procedure set forth in the Code which the parties had contractually agreed to follow:

> *Respondents do not provide any evidence whatsoever that this potential arbitrator is biased against or conflicted with any of the Respondents. The sole basis of the request is that years ago, Respondents' counsel, on behalf of another client, sought to have an arbitration award vacated on the ground that the arbitrator was biased.*
>
> *What Respondents fail to state, however, is that in that case a federal judge denied the motion to vacate, specifically rejecting the argument that the arbitrator exhibited evident partiality or misbehaved. See October 25, 2012 Order Denying Motion to Vacate attached hereto as Exhibit A.*
>
> *To the contrary, the Order sets forth numerous instances, based on its review of the audio recording of the hearing, in which Respondents' counsel "raised his voice and sounded agitated." Order, p. 9. The Order also notes that even after he demanded they recuse themselves, Respondents' counsel "responded that he did not doubt the neutrality of the panel." Later, he threatened to file a complaint with FINRA and continued to complain about the actions of the panel. Id. at 10.*
>
> *There is no absolutely nothing that has been provided to FINRA that suggests that this potential arbitrator has any bias or prejudice against this client or their chosen counsel. To the contrary, a federal judge has held that this arbitrator was not biased or prejudiced. The fact that Respondents' counsel made this potential arbitrator the bad guy to try to get an arbitration award vacated against Merrill Lynch cannot mean that he is stricken from the rolls in every case in which a Respondent chooses to hire Mr. Weiss. Indeed, I submit that if I were permitted to strike every arbitrator on the Atlanta roll simply because I didn't think they liked me or an old client of mine, the list would be slim pickings.*
>
> *As a final matter, the fact that Respondents' counsel has been successful in removing this potential arbitrator from the pool in a previous case is of no moment. First, I cannot know whether the opposing party opposed this request. In any event, that case involved the same FINRA member firm that was the subject of the motion to vacate. That is not the case here.*
>
> *For all of the foregoing reasons, Claimant respectfully requests that the Respondents' request be denied.*

On July 13, 2017, counsel for Wells Fargo sent another letter to FINRA.[9] Therein, counsel for Wells Fargo for the first time disclosed a secret agreement between FINRA and counsel for Wells Fargo pertaining to the pool of arbitrators available to his clients in all of his cases:

> *It was made clear to me verbally that none of the Postell arbitrators would have the opportunity to serve on any one of my cases given the horrific circumstances surrounding the underlying case, the SEC investigation, the publicity and the aftermath. It was a most unusual set of circumstances.*

In response to this revelation, the Investors sent a follow up letter to FINRA.[10] Therein, the Investors again objected to FINRA providing Wells Fargo's counsel with an "edited" list of computer generated arbitrators and requested FINRA disclose whether in fact WFA and its counsel have their own subset of the "neutral" arbitrator list:

> *Mr. Weiss' statement that he has an unwritten agreement with FINRA preventing the Postell arbitrators from serving as arbitrators in any case in which he appears as counsel is extremely troubling. Setting aside the fact that a federal judge carefully examined the record in response to his client's motion to vacate found no grounds for vacatur, secret agreements between FINRA and counsel for its member firms culling arbitrators from arbitrator rolls calls into question the fairness of the entire FINRA process.*
>
> *Mr. Weiss' statement raises several questions that must be answered. Were the other Postell arbitrators striken from the list provided to me in this case? Does Mr. Weiss have secret agreements with FINRA concerning other arbitrators from other cases? It is essential that I receive a response to these inquiries so as to protect my clients' interests.*

FINRA never provided any response to these inquiries. Instead, the Director of Dispute Resolution simply notified the parties that he had struck the potential arbitrator from the list and supplied the parties with a new, more edited, computer generated list:[11]

[9] Ex. G, July 13, 2017 Letter from Terry Weiss to FINRA.
[10] Ex. H, July 13, 2017 Letter from Craig Kuglar to FINRA.
[11] Ex. I, July 17, 2017 Email.

Dear Parties:

The Director has reviewed all documents in connection with Respondents' request to remove arbitrator Fred Pinckney from the pool of potential arbitrators in this matter.

The request to remove arbitrator Pinckney is hereby granted.

With regards,
Dan

Thereafter, a Panel of three arbitrators were selected from this edited list of arbitrators.

V. AFTER MANIPULATING THE LIST AND CHOOSING ARBITRATORS, WELLS FARGO THEN SUCCEEDS IN GETTING FINRA TO STRIKE ONE OF THE ARBITRATORS SELECTED BY THE PARTIES FOR ALLEGED BIAS THAT WELLS FARGO WAS WELL AWARE PRIOR TO SELECTION

The Panel of three arbitrators ultimately selected by the parties from Wells Fargo's "edited list" included Ken Canfield, an experienced Atlanta litigator whose law firm explicitly states, on its website, that it and its lawyers represent plaintiffs in cases against financial institutions. Wells Fargo did not use their strikes to strike Canfield, and he was thus selected by the parties as one of the three arbitrators. However, on August 25, 2017, Wells Fargo moved FINRA to strike Canfield for cause, claiming they had only recently become aware that other lawyers in Canfield's firm were representing a plaintiff in a suit against Wells Fargo.[12] The Investors again objected to Wells Fargo's continued manipulation of the FINRA arbitrator selection process:[13]

> Ronald Reagan's famous "there you go again" phrase comes to mind in responding to Wells Fargo's latest effort to stack this Arbitration Panel with arbitrators they perceive to be friendly to them and their counsel. Having already gained an extra strike by getting Arbitrator Fred Pinckney ("Arbitrator Pinckney") removed from the list altogether, Respondents chose not to use it on Arbitrator Canfield, a well known and respected Atlanta trial lawyer who has spent his entire career suing banks and other financial institutions on behalf of individuals.

[12] Ex. J, August 25, 2017 Letter from Terry Weiss to FINRA.
[13] Ex. K, August 30, 2017 Letter from Craig Kuglar to FINRA.

The Investors provided FINRA with settled law holding that arbitrator bias does not exist simply because an arbitrator's law firm had either represented or brought a claim against a party to the arbitration:[14]

> No actual conflict exists here. Respondents admit that the facts of the *Hubbard* Lawsuit have no overlap with the facts presented in this case. Indeed, the *Hubbard* Lawsuit arises out of life insurance policies whereas this arbitration pertains to securities. The fact that Arbitrator Canfield's law firm represents a client against Respondent Wells Fargo Advisors, LLC does not in and of itself create an actual conflict. Courts have long rejected attempts to vacate an arbitration award on the ground that an arbitrator's law firm had either represented or brought a claim against a party to the arbitration. *See, e.g., Standard Tankers (Bahamas) Co., Ltd. v. Motor Tank Vessell, AKTI*, 438 F. Supp. 153 (E.D.N.C. 1977) (fact that arbitrator's law firm had represented clients in actions against Exxon and its related companies did not constitute evident partiality).

On September 1, 2017, the Director of FINRA Dispute Resolution yet again ceded to Wells Fargo's demands and struck the arbitrator from the case:[15]

> Please be advised that the request to remove Kenneth Steven Canfield is hereby granted.
>
> Once a replacement arbitrator is appointed, this office will notify you of the replacement Arbitrator and provide you with his/her Arbitrator Disclosure Report, unless all parties agree to proceed with two arbitrators.
>
> If you have any questions, please do not hesitate to contact me at 561-447-4931 or by email at Daniel.Zailskas@FINRA.org.

Thereafter, FINRA provided the parties with a "short list" of potential arbitrators to replace Arbitrator Canfield. This resulted in the appointment of Arbitrator Charles White, a non-lawyer who works in the real estate and construction industries:[16]

> This letter is to inform you that Kenneth Steven Canfield has been removed from the arbitration panel in the above-referenced case. The replacement arbitrator is Charles White. Attached for your review is Arbitrator White's Disclosure Report.

[14] *Id.*
[15] Ex. L, September 1, 2017 Order.
[16] Ex. M, October 9, 2017 Order.

VI. THE FINRA CODE OF ARBITRATION PROCEDURE REQUIRED WELLS FARGO INCLUDE ANY COUNTERCLAIMS AGAINST THE INVESTORS IN ITS ANSWER AND PAY A COUNTERCLAIM FILING FEE

Next, on August 25, 2017, Wells Fargo filed its Answer.[17] FINRA Code of Arbitration Procedure Rule 12303, expressly incorporated into the Arbitration Agreement, required Wells Fargo file a written Answer to the Statement of Claim and assert any counterclaims against the Investors therein:

> 12303. Answering the Statement of Claim
>
> (a) Respondent(s) must serve each other party with the following documents within 45 days of receipt of the statement of claim:
>
> (1) Signed and dated Submission Agreement; and
>
> (2) An answer specifying the relevant facts and available defenses to the statement of claim.
>
> The respondent may include any additional documents supporting the answer to the statement of claim. Parties that fail to answer in the time provided may be subject to default proceedings under Rule 12801.
>
> (b) **The answer to the statement of claim may include any counterclaims against the claimant**, cross claims against other respondents, or third party claims, specifying all relevant facts and remedies requested, **as well as any additional documents supporting such claim**. If the answer contains a third party claim, the respondent must serve the third party with the answer containing the third party claim and all documents previously served by any party, or sent to the parties by the Director, by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile, and must file proof of service with the Director through the Party Portal except as provided in Rule 12300(a)(2). The respondent must file the third party claim with the Director through the Party Portal except as provided in Rule 12300(a)(2).
>
> * * *
>
> (d) **If the answer to the statement of claim contains any counterclaims, cross claims or third party claims, the respondent must pay all required filing fees.**[1]

[17] Ex. C, p. 1.

Wells Fargo denied all liability to the Investors. Nowhere in their Answer, however, did Wells Fargo assert any counterclaim against the Investors. Nor did Wells Fargo pay, or FINRA staff direct Wells Fargo to pay, any counterclaim filing fees, because no counterclaim was asserted. The Award does not reflect the filing of any counterclaim or motion to amend the answer to file a counterclaim.[18] Wells Fargo did not request attorneys' fees or costs in the Answer, period. Their summary paragraph requested only that the claims be denied at that the Investors "be assessed all forum fees"[19]:

true. Respondents request that this Claim be dismissed, expungement granted as to the marks imposed now on McKelvey and Pickett's registrations, and Claimants be assessed all forum fees.

Respectfully submitted this 25th day of August, 2017.

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VII. THE ARBITRATORS DENY THE INVESTORS' REQUEST FOR CONTINUANCE AFTER WELLS FARGO PRODUCES THOUSANDS OF PAGES OF DOCUMENTS ON THE EVE OF THE SCHEDULED HEARING

The arbitration hearing was subsequently scheduled for September 24, 2018. On September 10, 2018, two weeks before the first scheduled hearing date, the Investors rmoved to adjourn the arbitration. In doing so, the Investors noted that Wells Fargo had just produced 1,882 pages of documents on September 6, 2018, in violation of the FINRA Code of Arbitration Procedure discovery rules:[20]

[18] *Id.*, p. 1.
[19] Ex. N, Answer, p. 29.
[20] Ex O, Motion to Adjourn.

> It is with great reluctance that Claimants request a short adjournment of the hearing, preferably during November or December 2018, and that the Panel allot seven rather than five hearing days to the hearing. As the Panel is aware, the parties have continued to engage in document exchanges even through today, and counsel for both parties are still digesting literally thousands of pages of key documents such as text messages between Mr. Leggett and his Wells Fargo advisors that were only produced by Wells Fargo last week.

Counsel for the Investors made it clear that additional time was necessary to ensure a fair hearing and reminded the Panel that they had not made any prior requests to continue the hearing:[21]

> Claimants have not previously requested an adjournment and only made the decision to file this motion when it became absolutely clear that additional time is needed to ensure a fair hearing. If the hearing proceeds as scheduled, Claimants will not have been given a fair opportunity to prepare. Counsel should be in final preparation mode working with witnesses, preparing opening statements and the like. Instead, we are still obtaining, reviewing and digesting key relevant documents that should have been produced long ago. For the foregoing reasons, Claimants request the Panel grant the motion to adjourn the hearing.

On September 17, 2018, the Arbitrators denied the Investors' request without providing any explanation or reasoning:[22]

> Dear Parties:
>
> The Panel has indicated that the Motion to Adjourn is **DENIED**. I'll post this Order to the Portal as well.
>
> Thanks,
> Dan

[21] *Id.*, p. 5.
[22] Ex. P, Order.

VIII. THE ARBITRATION HEARING IS INTERRUPTED MID-CROSS EXAMINATION DUE TO A MEDICAL EMERGENCY

The arbitration hearing was commenced in Atlanta on September 24-27, 2018.[23] In the middle of the cross-examination of WFA's broker, Jacob McKelvey, counsel for Wells Fargo left the hearing with an undisclosed medical emergency. Thereafter, the hearing was delayed indefinitely. The hearing re-commenced nine months later on June 24, 2019 and concluded on June 28, 2019.[24] The entirety of the hearing was recorded by the Arbitrators on audio tapes pursuant to FINRA Rules. The Investors hired a certified court reporter to transcribe the hearing when it resumed in June.

IX. THE ARBITRATORS DENY THE INVESTORS' REQUEST TO CALL A THIRD PARTY WITNESS TO REBUT EVIDENCE INTRODUCED AND ELICITED BY WELLS FARGO AT THE HEARING

On June 27, 2019, counsel for the Investors' requested to call a Schwab representative as a rebuttal witness after the introduction of evidence the day before by Wells Fargo during their examination of Investors' expert witness. Wells Fargo objected. Investors' counsel pointed out that the documents introduced during this testimony were requested and obtained during the adjournment, not before the pre-hearing exchange as required by FINRA rules.[25] The Panel then ruled that the desire to rebut the "characterization of the information and the trade confirmation" could be accomplished "by Claimant, by counsel, during the argument. The trade confirms are in the record, and we would invite you to address that. We don't feel as if anything would be added by the Schwab representative, and that's our ruling."[26]

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[23] Ex. C, p. 6.
[24] *Id.*, p. 6.
[25] Ex. A, Transcript, pp. 801-817.
[26] Ex. A, Transcript. pp. 928-929.

X. THE ARBITRATORS PERMIT WELLS FARGO TO CALL AN UNDISCLOSED EXPERT WITNESS AND SEVERELY RESTRICT THE INVESTORS ABILITY TO CROSS EXAMINE THE WITNESS

On June 28, 2019, during Wells Fargo's examination of their expert witness, Steve Scales, an entirely new set of documents was introduced. Investors' counsel objected to the addition of hundreds of pages to Wells Fargo's expert report. After an explanation by Wells Fargo that it was simply a "compilation of all of the information that is contained in the Bates report," Investors' pointed out that it should have "been represented as such" and that it "would have been nice to have gotten this before the middle of the cross-examination of their expert."[27]

After being given a short recess to review the documents, Investors' counsel continued their objection stating that they had "no way of knowing or the time to figure out whether this is presented in an accurate or fair fashion."[28] The Chairman of the Panel decided to allow the document to come into evidence, but to allow Investors' counsel to call Peter Klouda, expert for Wells Fargo, to examine him about the document.[29]

Investors' counsel called Peter Klouda the same day. Investors' were, however, severely prejudiced by the extreme limitations placed upon them in their questioning and the fact that the witness did not prepare the document. Mr. Weiss stated that Klouda was only "prepared to testify about the solicited versus unsolicited trades."[30] In attempting to clarify where the information from these documents came from, Klouda could not answer the questions to which Wells Fargo said, "[H]e's only got this. Now he's got this. This is what you wanted, this is what you're going

[27] Ex. A, Transcript, pp. 1194-1195.
[28] *Id*., Transcript, pp. 1196-1197.
[29] *Id*., Transcript, pp. 1202-1210.
[30] *Id*., Transcript, p. 1431.

to ask from. He's not prepared for anything else."[31] Investors' again objected to the evidence being admitted which the Panel chose to ignore.[32]

XI. WELLS FARGO'S COUNSEL AND ITS WITNESSES COMMIT FRAUD ON THE PANEL BY INTENTIONALLY MISSTATING FACTS AND TESTIMONY

Jacob McKelvey, Investors' first broker, began his testimony during the initial hearing week in September of 2018.[33] During his testimony, he was asked questions about text messaging at WFA:

Q: Now those text messages never went through compliance at Wells Fargo, did they?
A: Correct.
Q: You know that's a no-no?
A: I do.
Q: It's a violation of the Written Supervisory Procedures, right?
A: Right.
Q: It's a violation of SEC recording keeping rules?
A: Right.
Q: You know it's a bad thing, right?
A: Right.
Q: And you did it anyway?
A: Correct.[34]

When his testimony resumed on June 24, 2019, McKelvey's story had changed significantly and when questioned on it, Wells Fargo's counsel intentionally mislead the Panel:

Q. (By Mr. Kuglar) Mr. McKelvee, earlier you
11 testified with respect to text messages that you
12 didn't believe that the text messages between you and
13 Mr. Leggett were violations of FINRA rules, correct?
14 A. Correct.
15 Q. And the last time we were here in
16 September, you did admit that they were violations of
17 FINRA rules, didn't you?
18 A. I don't remember that. I don't recall

[31] *Id*., Transcript, p. 1440.
[32] *Id.*
[33] The first week of hearing in this matter, September 24-27, 2018, was not transcribed by a court reporter. FINRA does audio recordings of hearings. These recordings will be provided to the Court along with a courtesy copy of this Petition. Relevant portions of the recordings cited herein will be cited as "Hearing Recording, 9/___/2018, (recording #) _____, (time) ____."
[34] Hearing Recording, 9/26/2018, 1024, 50:27.

that. No.
Q. Do you remember being asked whether they were a violation of FINRA rules?
A. I don't.
Q. In September, I asked you if these text messages were a violation of FINRA rules, and you said yes, that you agreed they were.
A. I don't remember that.
Q. Did you do any homework or study during this adjournment with respect to policy and procedures pertaining to text messages?
A. No.
Q. Sorry?
A. No.
Q. Did you read anything?
A. No.
Q. Did you ask anybody for clarification?
A. No.
Q. And now, this time around, you believe and you have an understanding that text messages with your securities customers can be -- are not a violation and with -- where you're not talking about specific transactions. That's what you testified earlier, right?
A. I don't believe that's a violation.
Q. So unless the client is saying, buy gold today, that's what you mean by a specific transaction, right?
MR. WEISS: That wasn't his testimony.
THE WITNESS: Well, first of all, I would never take an over via text.
MR. WEISS: Well, his testimony before was if you're not doing business.
THE WITNESS: Right. Yeah. That's exactly what I said. If you're not conducting business, i.e., taking an order.
Q. (By Mr. Kuglar) Okay. Where did you hear that term, not conducting business? Because you certainly didn't use that last time.
A. I don't remember what I used last time.
MR. WEISS: Do you have a transcript or something? Wait a minute. You're saying what he said last time. I don't recall that either. It's a difference of a fact.

MR. KUGLAR: We do, actually. I have our notes, and I recall it.
MR. WEISS: Okay. I don't recall it.[35]

Mr. McKelvey's changes did not end there. During his first bit of testimony, he stated the following regarding his understanding of how solicited versus unsolicited trades are entered at WFA:

Q: When you go in to this system the default, the default is solicited, isn't it?
A: Uh, I don't believe that's correct. I think there's a drop-down box.
Q: Ah. So, you click on the box
A: Correct.
Q: And then S or, or I'm sorry Y or no.
A: Well.
Q: And you specifically have to hover your mouse over Y or no, right? 'Cause it says solicited and drops down.
A: It's a box. I'm not sure if the box says unsolicited or solicited or Y or no, yes or no.[36]

And again, upon continuation of McKelvey's examination, his testimony changes significantly.

Q. Okay. So you don't recall seeing that trade blotter where it was marked solicited for that big Allergan trade?
A. The -- I recall you showing me a document that said that. Yes, sure.
Q. And your position was that that was a mistake and, like everything else, that was in truth unsolicited?
A. Yes, because the default for our system is solicited unless you change it to unsolicited. So yes.[37]

Wells Fargo's counsel also intentionally mislead the Panel regarding the dates of trades multiple times. During questioning of McKelvey on June 27, 2019, Wells Fargo's counsel testifies that the Bates report is "based on settlement dates, not trade date, so it wouldn't be the same as the

[35] Ex. A, Transcript, pp. 208-210.
[36] Hearing Recording, 9/26/2018, 1024, 49:16.
[37] Ex. A, Transcript, p. 26.

date of the other thing."[38] And again during the same witness he tells everyone, "[J]ust to make sure everybody clear, that's three days late, because it's settlement date."[39] And when Panelist Schweber asked to clarify, Weiss does so: "[R]ight. Three days' difference on the stock."[40] But when Investors' counsel brought this up later with Wells Fargo's expert witness, Steve Scales, Weiss backpedaled quickly. He said then, "[I]f you've got a questions about a specific situation you're going to have the guy who did it in whatever, and you just ask him if you want."[41]

XII. WELLS FARGO HIDES A KEY DOCUMENT AND REFUSES TO PROVIDE IT TO THE INVESTORS UNTIL AFTER THE CLOSE OF EVIDENCE

On June 25, 2019, during the second day of the second week of the hearing, Investors' counsel asked for WFA's internal rule regarding texting after Pickett testified as to what the rules says.[42] Wells Fargo's counsel objeced to this request on the grounds that it was not specifically asked for during the discovery process.[43] The chair ordered that Wells Fargo produce the document.[44] Two days later, this document had still not been produced as ordered. Investors' counsel is forced to bring this issue up again in the hearing saying that Investors have "been told for two days that we can't get the rule, so I would appreciate the rule."[45] Wells Fargo's counsel responds that they are "getting it Bates-stamped."[46] The next day, which was also the last day of the hearing, Investors' counsel asks yet again for the rule to be produced to be able to use it as part of their closing statement.[47] The rule is still not produced. Closing arguments come and go. Only

[38] Ex. A, Transcript, p. 1099.
[39] *Id.*, p. 1105.
[40] *Id.*, pp. 1105-1106.
[41] *Id.*, pp. 1392-1393.
[42] *Id.*, p. 371.
[43] *Id.*
[44] *Id.*, p. 372.
[45] *Id.*, p. 821.
[46] *Id.*
[47] *Id.*, p. 1446.

then, and again upon demand from Investors' counsel, Wells Fargo finally produces this two pages when it can no longer be used for examination of witness or the closing argument.[48]

XIII. THE PANEL DENIED WELLS FARGO'S BELATED ATTEMPT TO AMEND ITS ANSWER AT THE CONCLUSION OF THE HEARING SO AS TO SEEK ATTORNEYS' FEES AND COSTS

At the conclusion of the evidentiary hearing, Wells Fargo moved to amend its Answer so as to make a claim for attorneys' fees and costs. The Award reflects that "during the evidentiary hearing, Respondents made an ore tenus motion to amend their Statement of Answer to include a counterclaim for the sole purpose of requesting attorneys' fees and costs. The Panel denied the motion as untimely."[49]

XIV. WELLS FARGO NEVER PROVIDED CLAIMANTS WITH ANY EVIDENCE OF FEES/COSTS IN ADVANCE OF THE HEARING AS REQUIRED BY THE FINRA CODE OF ARBITRATION PROCEDURE

FINRA Code of Arbitration Procedure Rule 12514, expressly incorporated into the Arbitration Agreement, required WFA to exchange all documents they intended to use and identify all witnesses they intended to call at the hearing and precluded the use of any documents or witnesses not identified:

> 12514. Prehearing Exchange of Documents and Witness Lists, and Explained Decision Requests
>
> (a) Documents and Other Materials
>
> At least 20 days before the first scheduled hearing date, all parties must provide all other parties with copies of all documents and other materials in their possession or control that they intend to use at the hearing that have not already been produced. The parties should not file the documents with the Director or the arbitrators before the hearing.
>
> (b) Witness Lists
>
> At least 20 days before the first scheduled hearing date, all parties must provide each other party with the names and business affiliations of all witnesses

[48] *Id.*, p. 1531.
[49] Ex. C, p. 3.

> they intend to present at the hearing. All parties must file their witness lists with the Director.
>
> (c) Exclusion of Documents or Witnesses
>
> Parties may not present any documents or other materials not produced and or any witnesses not identified in accordance with this rule at the hearing, unless the panel determines that good cause exists for the failure to produce the document or identify the witness. Good cause includes the need to use documents or call witnesses for rebuttal or impeachment purposes based on developments during the hearing. Documents and lists of witnesses in defense of a claim are not considered rebuttal or impeachment information and, therefore, must be exchanged by the parties.[50]

The Investors listed their counsel, Craig H. Kuglar, Esq., as a witness with respect to their request for attorneys' fees and costs and identified records relating to fees and expenses as documents they intended to present at the hearing.[51] Wells Fargo, on the other hand, did not list any witness with respect to any counterclaim or claim for fees and expenses, and did not provide the Investors with any proof of their costs or expenses at any time including during the hearing.[52]

XV. NO EVIDENCE OF COSTS IS INTRODUCED BY WELLS FARGO DURING THE ARBITRATION

During the examination of Ken McAfee, WFA's regional brokerage manager in Atlanta, Wells Fargo's counsel began a line of questioning about legal fees and costs that resulted from this arbitration to which Investors' counsel objected on the grounds that Wells Fargo had no counterclaim pending nor had they submitted fees or expenses.[53] The arbitrators immediately said they would allow the questioning.[54] Investors' counsel objected again because they had no way to cross-examine the witness about this.[55] The arbitrators not only allowed the witness to answer questions about whether they had paid legal fees and expenses, but they allowed Wells Fargo's

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[50] Ex. Q.
[51] Ex. R, Twenty Day Letter.
[52] Ex. S, Twenty Day Letter.
[53] Ex. A, Transcript, p. 846.
[54] *Id.*
[55] *Id.*, Transcript, pp. 846-847.

counsel read off numbers from a document that no one had seen nor had, and which Wells Fargo's counsel said, "[W]e are not submitting this into evidence. . . She can read whatever she wants and ask him a question."[56] The questions asked were as follows:

Q. Are the fees in excess of $433,770?
A. Yes.
Q. Are the costs in excess of $15,000 and $34,296?
A. Yes.
Q. Have your FINRA costs been more than $2000?[57]

This was the entirety of the testimony and evidence of costs for Wells Fargo in this case. There was never any mention of expert witness fees. When the Award was issued, however, the Panel said that Wells Fargo's counsel "questioned one of Respondents' witnesses regarding some of the costs incurred in this matter, including expert witness fees. The witness provided specific numbers in this regard. The Panel deemed this line of questioning to be Respondents' request for costs, which the Panel notes does not require an amendment to the pleadings in order to be considered."[58] Not only were these not specific numbers, these numbers were never proven or entered into evidence.

XVI. THE ARBITRATION AWARD

The Arbitrators served their Award on August 1, 2019. The Arbitrators denied all of the Investors' claims in their entirety.[59] The Arbitrators awarded Wells Fargo $51,000.00 against Leggett, "representing costs incurred by Respondents in connection with this matter."[60] The

[56] *Id.*, Transcript, p. 848.
[57] *Id.*
[58] Ex. C, p. 3.
[59] *Id.*, p. 4.
[60] *Id.*, p. 4.

Arbitrators likewise assessed $400.00 in discovery-related motion fees and $32,200.00 in hearing session fees against Leggett.[61]

XVII. THE ARBITRATORS DENY THE INVESTORS' MOTION TO CORRECT THE AWARD TO MAKE THE IMPOSITION OF SESSION FEES CONSISTENT WITH THE FINRA CODE OF ARBITRATION PROCEDURE

Pursuant to the FINRA Code, the Investors filed a motion to correct the arbitration award, noting that the Arbitrators miscalculated the hearing session fees they purported to impose against Leggett under the calculations mandated by the FINRA Code of Arbitration Procedure.[62] The Arbitrator Chairperson inexplicably denied the motion which requested the session fees be reduced from $32,200.00 to $17,250.00 consistent with a table of session fees set forth under the FINRA Code of Arbitration Procedure. In denying this request, the Arbitrator provided no explanation, but did provide an exclamation:[63]

> Re: *Claimant's Motion to Correct Arbitration Award.* Dated August 9, 2019
>
> Denied!
>
> Robert Lestina, Chair
> August 23, 2019

[61] *Id.*, p. 6.
[62] Ex. T, August 9, 2019 Motion.
[63] Ex. U, August 23, 2019 Email.

B. ARGUMENT

I. LEGAL STANDARD APPLICABLE TO VACATION OF ARBITRATION AWARDS

i. Overstepping Authority/Exceeding Their Powers

The Federal Arbitration Act ("FAA") permits vacation if the court finds "[an] overstepping by the arbitrators of their authority."[64] In vacating an arbitration award in a recent case, the Supreme Court explained that "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers" "when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice."[65]

ii. Refusal to Postpone the Hearing

An arbitration award likewise cannot stand where the arbitrators were "guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown."[66] "The statute limits the court's review to a determination as to whether the arbitrators were guilty of misconduct in refusing a postponement. As such, it follows that arbitrators are to be accorded a degree of discretion in exercising their judgment with respect to a requested postponement. Therefore, *assuming there exists a reasonable basis for the arbitrators' considered decision* not to grant a postponement, the Court will be reluctant to interfere with the award on these grounds."[67]

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[64] "The FAA applies in state and federal courts to all contracts containing an arbitration clause that involves or affects interstate commerce." *Am. Gen. Fin. Servs. v. Jape*, 291 Ga. 637, 638 (2012) (citing *Perry v. Thomas,* 482 U.S. 483, 489 (1987)).

[65] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010).

[66] 9 U.S.C. § 10(a)(3).

[67] *Fairchild & Co. v. Richmond, F. & P. R. Co.*, 516 F. Supp. 1305, 1313–14 (D.D.C. 1981) (emphasis added). *See, e.g., Coastal Gen. Const. Servs., Inc. v. Virgin Islands Hous. Auth.*, 238 F. Supp. 2d 707, 710 (D.V.I. 2002), *aff'd sub nom. Coastal Gen. Const. Servs. Corp. v. Virgin Islands Hous. Auth.*, 98 F. App'x 156 (3d Cir. 2004) ("the arbitrator's refusal to give VIHA time

iii. Refusal to Hear Relevant Evidence

The FAA permits vacation "where the arbitrators were guilty of misconduct…in refusing to hear evidence pertinent and material to the controversy…"[68] This does not mean that every failure to receive relevant evidence constitutes misconduct which will require vacation of an arbitration award. A court "may vacate an arbitrator's award under 9 U.S.C. § 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing. Further, an arbitration award must not be set aside for the arbitrator's refusal to hear evidence that is cumulative or irrelevant."[69] The facts of the *Robbins* case are illustrative. There, the Eleventh Circuit held that the arbitrator did not engage in misconduct in refusing to hear testimony where the party requesting the testimony had previously represented that the testimony "was 'unimportant' to their case and that if given would only provide cumulative evidence."[70]

Courts do not hesitate to vacate an arbitration award, however, where arbitrators refuse to hear testimony that is relevant and non-cumulative. In *Gulf Coast Industrial Workers Union v. Exxon Co., USA*,[71] a dispute under a collective bargaining agreement pertaining to whether Exxon had just cause to terminate a union employee for refusing to consent to a drug test, the Fifth Circuit affirmed the vacation of an arbitration award. In doing so, the Fifth Circuit explained that while "judicial review of an arbitration award is extraordinarily narrow," a case involving a refusal to

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to investigate the amended claim presented by Coastal less than twenty-fours before the hearing amounts to misconduct as it clearly affected VIHA's right to a fair hearing.").

[68] 9 U.S.C. § 10(a)(3).

[69] *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992).

[70] *Id*.

[71] 70 F.3d 847, 848 (5th Cir. 1995).

hear evidence "fits squarely into one of those grounds."[72] It went on to hold that the arbitrator's refusal to accept the evidence constituted misconduct warranting vacation of the award.

iv. Award Procured by Corruption, Fraud or Undue Influence

The FAA also permits an award to be vacated "where the award was procured by corruption, fraud or undue influence."[73] In *Bonar v. Dean Witter Reynolds, Inc.* [74], the Eleventh Circuit Court of Appeals found that perjury constitutes fraud within the meaning of section 10(a) of the Federal Arbitration Act and established a three part test to determine whether an arbitration award should be vacated for fraud. First, the moving party must establish fraud by clear and convincing evidence. Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. Third, the fraud must have materially related to the arbitration.[75]

v. Manifest Disregard of the Law

The FAA does not list "manifest disregard of the law" as a statutory basis for vacation. Nonetheless, federal courts have long recognized it as a basis for vacation.[76] In 2008, the Supreme Court held that parties are not permitted to add additional grounds for vacation under the FAA in their contract of arbitration.[77] In doing so the Supreme Court questioned whether manifest disregard of the law was "a 'judicially created' ground for vacation or whether it 'may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators

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[72] *Id*. at 850.
[73] 9 U.S.C. § 10(a)(1).
[74] 835 F.2d 1378, 1383 (11th Cir.1988).
[75] *See also O'Rear v. Am. Family Life Assur. Co. of Columbus*, 817 F. Supp. 113, 115 (M.D. Fla. 1993).
[76] *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("The origins of modern manifest disregard as an independent basis for reviewing American arbitration decisions likely lie in dicta from the Supreme Court's decision in *Wilko v. Swan,* 346 U.S. 427 (1953).").
[77] *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) ("*Hall Street Associates*").

were 'guilty of misconduct' or 'exceeded their powers.'"[78] This dicta led some Circuit Courts to declare manifest disregard of the law dead as a ground for vacation.[79] However, in a subsequent decision involving a review of an arbitration award, the Supreme Court specifically explained:

> We do not decide whether "'manifest disregard'" survives our decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 585, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo,* that such a standard applies, we find it satisfied for the reasons that follow.[80]

Circuit Court decisions subsequent to the later *Stolt-Nielsen* decision have thus held that manifest disregard of the law remains a valid ground for vacation under the FAA.[81] The parties agree that the Arbitration Agreement expressly incorporated New York law.[82] The Second Circuit has held that "manifest disregard remains a valid ground for vacating arbitration awards" in the wake of *Hall Street Associates*.[83] The Second Circuit has further confirmed that in examining whether arbitrators manifestly disregarded the law, "the court must consider, first, whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit, and clearly applicable, and, second, whether the arbitrator knew about the existence of a clearly governing legal principle but decided to ignore it or pay no attention to it."[84]

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[78] *Id*. at 585.
[79] *See, e.g. Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street."*).
[80] *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 (2010).
[81] The Eleventh Circuit's decision in *Frazier*, although handed down several days after *Stolt-Neilsen*, did not cite, reference or mention the *Stolt-Nielsen* Supreme Court decision or its clarifying footnote.
[82] Ex. B.
[83] *T. Co. Metals, LLC v. Dempsey Pipe & Supply, Inc*., 592 F.3d 329, 339 (2d Cir. 2010). *See also Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011).
[84] *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011).

II. WELLS FARGO'S REFUSAL TO UTILIZE THE FINRA NEUTRAL COMPUTER GENERATED ARBITRATOR LIST REQUIRES THE AWARD BE VACATED

The facts set forth in Section A(IV-V), *supra*, demonstrates that Wells Fargo violated FINRA Rule 12400 by refusing to utilize the FINRA neutral computer generated arbitrator list. "It is well-established that courts may set aside awards when the arbitrator exceeds his contractual mandate by acting contrary to express contractual provisions."[85] In *PoolRe*, the First Circuit Court of Appeals recently affirmed a District Court's vacation of an arbitration award. There, the relevant arbitration agreement required the disputes be submitted to "ICC arbitration before an arbitrator selected by the Anguilla, B.W.I. Director of Insurance."[86] An arbitrator was appointed in a manner contrary to this agreement and the arbitrator conducted the arbitration pursuant to the Rules of the American Arbitration Association. In affirming the district court's vacation, the First Circuit confirmed that by "act[ing] contrary to the express arbitrator- and forum-selection clauses in the arbitration agreements to which PoolRe was a party, we affirm the district court's holding that [the arbitrator] exceeded his authority under 9 U.S.C. § 10(a)(4)."[87]

Federal courts routinely vacate arbitration awards where the arbitrators failed to follow the procedures set forth in the arbitration agreement. In *Smith v. Transport Workers Union of Am.*,[88] the Fifth Circuit affirmed the vacatur of an arbitration award holding that an arbitration panel lacked the power to modify its award one month after issuing the initial decision. There, the arbitration agreement among the parties forbade the correction by the arbitrators more than three

[85] *PoolRe Ins. Co. v. Organizational Strategies, Inc.*, 783 F.3d 256, 262 (1st Cir. 2015) (citing *Beiard Indus. Inc. v. Local 2297, Int'l Union*, 404 F.3d 942, 946 (5th Cir. 2005)).
[86] *Id*. at 263.
[87] *Id*. at 265.
[88] 374 F.2d 372 (5th Cir. 2004).

days after the award.[89] The Fifth Circuit concluded that a correction by the arbitrators thirty days after the award "was beyond the reach of the arbitrators' power."[90]

Here, Wells Fargo rigged the arbitrator selection process in direct violation of the FINRA Code of Arbitration Procedure, denying the Investors' of their contractual right to a neutral, computer generated list of potential arbitrators. To date, neither Wells Fargo, FINRA, or its chosen counsel have rebutted the assertion that certain potential arbitrators are precluded by FINRA from serving on any cases in which its counsel in involved. Permitting a lawyer to secretly "red-line" the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum.

Wells Fargo's insistence on removing the potential arbitrator for bias, rather than using a strike, illustrates the importance on each and every strike. Permitting unfavored arbitrators to be stricken from cases in which a specific attorney is involved (no matter the firm) gives the member firm a distinct advantage over the Claimants. Wells Fargo's manipulation of the Neutral List Selection System is a violation of Rule 12400 and a breach of Wells Fargo's contractual arbitration clause.

III. THE ARBITRATORS VIOLATED 9 U.S.C. § 10(a)(3) IN DENYING THE INVESTORS' REQUEST TO POSTPONE THE HEARING

The facts set forth in Section A(VII), *supra*, demonstrates that the Arbitators violated 9 U.S.C. § 10(a)(3) when they denied the Investors' request to postpone the hearing after Wells Fargo dumped thousands of pages of relevant documents on the eve of the hearing, well beyond the timeframe required by the FINRA Code of Arbitration Procedure and scheduling orders set forth by the Arbitrators. As noted above, Courts are reluctant to second guess arbitrators

[89] *Id*. at 375.
[90] *Id*.

"assuming there exists a reasonable basis for the arbitrators' considered decision not to grant a postponement." Here, however, the arbitrators provided no reasoning or support for their unilateral decision to deny the Investors' reasonably request for a short delay – a delay necessitated not by the Investors' failure to prepare but rather due to Wells Fargo's late production of documents outside the time periods set forth by the Code of Arbitration Procedure.

IV. THE ARBITRATORS VIOLATED 9 U.S.C. § 10(a)(3) BY REFUSING TO HEAR RELEVANT, NON-CUMULATIVE TESTIMONY FROM A THIRD PARTY WITNESS AND UNFAIRLY LIMITING THE CROSS EXAMINATION OF A WFA EXPERT WITNESS

The facts set forth in Section A(IX-X), *supra*, demonstrate that the Arbitrators violated 9 U.S.C. § 10(a)(3) by refusing to hear relevant, non-cumulative testimony proferred by the Investors. The FAA permits vacation "where the arbitrators were guilty of misconduct…in refusing to hear evidence pertinent and material to the controversy…"[91] This does not mean that every failure to receive relevant evidence constitutes misconduct which will require vacation of an arbitration award. A court "may vacate an arbitrator's award under 9 U.S.C. § 10(a)(3) only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties and denies them a fair hearing. Further, an arbitration award must not be set aside for the arbitrator's refusal to hear evidence that is cumulative or irrelevant."[92] The facts of the *Robbins* case are illustrative. There, the Eleventh Circuit held that the arbitrator did not engage in misconduct in refusing to hear testimony where the party requesting the testimony had previously represented that the testimony "was 'unimportant' to their case and that if given would only provide cumulative evidence."[93]

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[91] *Id*.
[92] *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992).
[93] *Id*.

Courts do not hesitate to vacate an arbitration award, however, where arbitrators refuse to hear testimony that is relevant and non-cumulative. In *Gulf Coast Industrial Workers Union v. Exxon Co., USA*,[94] a dispute under a collective bargaining agreement pertaining to whether Exxon had just cause to terminate a union employee for refusing to consent to a drug test, the Fifth Circuit affirmed the vacation of an arbitration award. In doing so, the Fifth Circuit explained that while "judicial review of an arbitration award is extraordinarily narrow," a case involving a refusal to hear evidence "fits squarely into one of those grounds."[95] It went on to hold that the arbitrator's refusal to accept the evidence constituted misconduct warranting vacation of the award.

The Second Circuit's decision vacating an arbitration award in *Tempo Shain Corp. v. Bertek, Inc.*,[96] is directly on point with this case. There, Bertek asserted a counterclaim for fraudulent inducement pertaining to various statements allegedly made to its former President whom it intended to call at the hearing.[97] The former President was unavailable to testify at the hearing due to his wife's illness.[98] The arbitrators refused to postpone the hearing holding that the evidence would be cumulative of other evidence already presented at the hearing and later issued an award against Bertek. In reversing the district court's denial of Bertek's motion to vacate, the Second Circuit explained:

> We find that there was no reasonable basis for the arbitration panel to determine that Pollock's omitted testimony would be cumulative with regard to the fraudulent inducement claims. Said differently, the panel excluded evidence plainly "pertinent and material to the controversy," 9 U.S.C. § 10(a)(3). The panel did not indicate in what respects Pollock's testimony would be cumulative, but stated that there were "a number of letters in the file" and that Pollock was "speaking through the letters [he wrote], and the reports he[ ] received."

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[94] 70 F.3d 847, 848 (5th Cir. 1995).
[95] *Id*. at 850.
[96] 120 F.3d 16, 20 (2d Cir. 1997).
[97] *Id*. at 17.
[98] *Id*. at 17-18.

* * *

> While the letters and reports might have been sufficient to represent what Pollock would have testified to in rebuttal of Neptune's breach of contract claims, which we do not decide, there is nothing to suggest that Pollock's intended testimony concerning appellees' fraudulent inducement claim and Bertek's counterclaim for fraudulent inducement was addressed by the documents admitted into evidence.
>
> * * *
>
> Because Bertek's alleged misrepresentations were not documented, appellees' unsupported oral testimony concerning such representations was unrebutted because Pollock, who allegedly made the representations on Bertek's behalf, was not allowed to testify, and he is the only person who could have done so.[99]

Here, as in *Bertek*, the Arbitrators refused to hear testimony from not one but two separate witnesses each of whom had relevant, non-cumulative evidence relating to the two main claims asserted by the Investors, including:

At the hearing, Wells Fargo introduced evidence and elicited testimony relating to the Investors' investments and investment making decisions after they moved their accounts from Wells Fargo to Schwab. The Investors initially objected to any testimony or witnesses being introduced on these grounds. The Investors requested the Arbitrators hear evidence from the Investors' new stockbroker after the Arbitrators permitted Wells Fargo to introduce testimony and documents pertaining to those accounts, and he indicated he was available to testify. The Arbitrators refused to allow this witness to testify. Earlier in the hearing, one of the Arbitrators disclosed that he had a close personal relationship with this third-party witness. Their decision to deny the Investors' their right to present this extremely relevant "standby" testimony was clearly driven by their fear that the appearance of the witness would require the Arbitrator to recuse himself at the end of an already much delayed arbitration. The Arbitrators did permit Wells Fargo,

[99] *Id*. at 20.

on the other hand, to present an expert witness by telephone at the last minute who was never identified as a potential witness. Were this not enough, the Arbitrators severely restricted the cross-examination of the expert, thus refusing to permit counsel for the Investors to fully cross-examine this surprise witness in violation of their statutory right to present evidence.

V. THE AWARD WAS PROCURED BY FRAUD IN VIOLATION OF 9 U.S.C. § 10(a)(1)

The factual background set forth in Section A(XI-XII), *supra*, demonstrate that Wells Fargo committed fraud on the arbitration panel by procuring perjured testimony, intentionally misrepresenting the record, and hiding and refusing to turn over a key document to the Investors until after the close of evidence.

The transcripts attached hereto satisfy the Investors' burden of proving the fraud on the panel by clear and convincing evidence. The audio tapes, which were not available to the Investors until after the close of the hearing, confirm that Wells Fargo's key witness used the "break in the action" caused by the medical emergency to bamboozle the Arbitrators and offer perjured testimony in direct contravention of the earlier testimony wherein Wells Fargo's broker admitted he broke the law and Wells Fargo's policies. And, although counsel noted that the testimony had changed, counsel for Wells Fargo vehemently disagreed and went on the record stating the opposite. The relevance of this testimony cannot be understated. The Arbitrators specifically held that "the Panel finds that neither Respondent Pickett nor Non-Party Mckelvey engaged in any wrongful conduct." The Arbitrators were clearly misled by McKelvey's second round of testimony (after the medical break) and the affirmation of Wells Fargo's counsel, who falsely mischaracterized his prior testimony, in which he, without hesitiation or equivocation, admitted:

Q: Now those text messages never went through compliance at Wells Fargo, did they?
A: Correct.
Q: You know that's a no-no?

A: I do.
Q: It's a violation of the Written Supervisory Procedures, right?
A: Right.
Q: It's a violation of SEC recording keeping rules?
A: Right.
Q: You know it's a bad thing, right?
A: Right.
Q: And you did it anyway?
A: Correct.[100]

The presentation of perjured testimony along with counsel's mischaracterization of the previous testimony, which he knew was not yet transcribed, resulted in a fraud on the Arbitrators that had an obvious impact on their final Award.

The same is true for the key document intentionally withheld from the Investors until after the close of the evidence. During the hearing, a number of Wells Fargo witnesses testified about and characterized in their own words a key internal WFA Rule pertaining to the use of text messages. For instance, their broker's testimony after the medical break changed, and his new story was that texting with the Investors was permitted so long as "you're not conducting business."[101] As noted in Section A(XII), *supra*, Wells Fargo stonewalled producing this document to the Investors until after the conclusion of the hearing. That document in fact states that "the Firm prohibits Associates from sending or responding to business communications by text message."[102] The refusal to hand over this document, like the perjured testimony, amounted to a fraud on the Panel and the Award must therefore be vacated.

[100] Hearing Recording, 9/26/2018, 1024, 50:27.
[101] Ex. A, Transcript, pp. 208-210.
[102] Ex. V.

VI. THE ARBITRATORS VIOLATED 9 U.S.C. § 10(a)(3) AND MANIFESTLY DISREGARDED THE LAW WITH RESPECT THE AWARD OF COSTS AND SESSION FEES

The Arbitrators exceeded their powers and manifestly disregarded the law by (1) awarding Wells Fargo $51,000.00 in costs in violation of the arbitral forum's Code of Arbitration Procedure; and (2) purporting to impose hearing session fees against the Investors that far exceeded the hearing session fees permitted under the FINRA Code of Arbitration Procedure. The Arbitrators ignored the contractual framework the parties had agreed to and imposed liability beyond that which was permitted or contemplated, thus dispensing their own brand of industrial justice in violation of law.

The FINRA Code of Arbitration Procedure, incorporated by the parties therein, does not contain any provision specifically granting Arbitrators authority to shift the expenses of litigation. To the contrary, FINRA Code of Arbitration Procedure Rule 12902(c) provides "In its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses." This is in contrast to the rules of some other arbitral forums whose rules expressly grant arbitrators the power to shift attorneys' fees against a losing party. For instance, in *Landmark Ventures, Inc. v. Insightec, Ltd.*,[103] the court held that an arbitrator "had clear authority to award attorneys' fees and costs" where "Article 37 of the ICC Rules authorizes the Arbitrator to award costs, including attorneys' fees."

The recent decision in *Ameriprise Fin'l Serv's, Inc. v. Brady*[104] is instructive. There, the court held that FINRA arbitrators exceeded their authority, in violation of 9 U.S.C. § 10(a)(3), by

[103] 63 F. Supp. 3d 343 (S.D.N.Y. 2014).
[104] 2018 WL 4344993, No. 18-10337 (D. Mass. Sept. 11, 2018).

awarding attorneys' fees against a losing party. The agreement there, as in this case, did not provide for a fee shift in the event the prevailing party lost.[105]

The arbitration agreement provided for the application of New York law. As in Georgia, "It is well settled in New York that a prevailing party may not recover attorneys' fees from the losing party except where authorized by statute, agreement or court rule." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 3 N.Y.3d 592, 597, 822 N.E.2d 777, 779–80 (2004). In this case, Wells Fargo did not provide the Arbitrators with any statute, agreement, or court rule supporting their claim for attorneys' fees. The Arbitrators' Award does not provide any such support. Rather, it simply states "Claimant Legget is responsible for and shall pay to Respondents the sume of $51,000.00, representing costs incurred by Respondents in connection with this matter."[106]

Even if the Arbitrators had the authority to assess fees and/or costs against Leggett, which they did not, here there was no valid evidence to support this make believe number. "Attorney's fees should not be awarded without conducting a hearing or requiring proof by affidavit substantiating the attorney's fees requested." *Moses v. Moses*, 231 A.D.2d 850, 850, 647 N.Y.S.2d 318, 319 (1996). During the examination of Ken McAfee, WFA's regional brokerage manager in Atlanta, Wells Fargo's counsel began a line of questioning about legal fees and costs that resulted from this arbitration to which Investors' counsel objected on the grounds that Wells Fargo had no counterclaim pending nor had they submitted fees or expenses.[107] The arbitrators immediately said they would allow the questioning.[108] Investors' counsel objected again because they had no way to cross-examine the witness about this.[109] The arbitrators not only allowed the witness to

[105] *Id*. at *8.
[106] Ex. C, Award, p. 4.
[107] Ex. A, Transcript, p. 846.
[108] *Id.*
[109] *Id.*, Transcript, pp. 846-847.

answer questions about whether they had paid legal fees and expenses, but to read off numbers from a document that no one had seen nor had, and which Wells Fargo's counsel said, "[W]e are not submitting this into evidence. . . She can read whatever she wants and ask him a question."[110] The questions asked were as follows:

Q. Are the fees in excess of $433,770?
A. Yes.
Q. Are the costs in excess of $15,000 and $34,296?
A. Yes.
Q. Have your FINRA costs been more than $2000?[111]

This was the entirety of the testimony and evidence of costs for Wells Fargo in this case. There was never any mention of expert witness fees. When the Award was issued, however, the Panel said that Wells Fargo's counsel "questioned one of Respondents' witnesses regarding some of the costs incurred in this matter, including expert witness fees. The witness provided specific numbers in this regard. The Panel deemed this line of questioning to be Respondents' request for costs, which the Panel notes does not require an amendment to the pleadings in order to be considered."[112] Not only were these not specific numbers, these numbers were never proven or entered into evidence.

The arbitrariness of the Award did not stop there. As noted above, the Arbitrators also imposed "session fees" (the fees paid to the Arbitrators) against the Investors that were inconsistent with the FINRA Code of Arbitration Procedure, which sets forth a chart of fees. Pursuant to the FINRA Code, the Investors filed a motion to correct the arbitration award, noting that the Arbitrators miscalculated the hearing session fees they purported to impose against Leggett under

[110] *Id.*, Transcript, p. 848.
[111] *Id.*
[112] Ex. C, p. 3.

the calculations mandated by the FINRA Code of Arbitration Procedure.[113] The Arbitrator Chairperson inexplicably denied the motion which requested the session fees be reduced from $32,200.00 to $17,250.00 consistent with a table of session fees set forth under the FINRA Code of Arbitration Procedure. In denying this request, the Arbitrator provided no explanation, but did provide an exclamation:[114]

> Re: *Claimant's Motion to Correct Arbitration Award.* Dated August 9, 2019
>
> Denied!
>
> Robert Lestina, Chair
> August 23, 2019

VII. THE ARBITRATION AWARD SHOULD BE VACATED IN ITS ENTIRETY

In reviewing an arbitration award, a court "can confirm and/or vacate the award, either in whole or in part."[115] Here, the entire proceeding was stained with fraud and unfairness beginning with arbitrator selection and running all the way through the Award which imposed costs and fees on the Investors not contemplated by the arbitration agreement of the rules of the arbitral forum. At a minimum, the Award should be vacated as to the imposition of costs and hearing session fees against the Investors. However, the Investors respectfully submit that the proper result is for the Award to be vacated in its entirety.

CONCLUSION

Judicial review of arbitration awards, while limited in nature, ensures that the arbitration process is fundamentally fair to all parties involved. As demonstrated above, in this case (1) Wells

[113] Ex. T, August 9, 2019 Motion.
[114] Ex. U, August 23, 2019 Email.
[115] *D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006).

Fargo rigged the arbitrator selection process; (2) the Arbitrators refused to postpone the hearing after discovery procedure violations by Wells Fargo on the eve of the hearing; (3) the Arbitrators denied the Investors their statutory right to present testimony from relevant witnesses; (4) Wells Fargo procured perjured testimony, intentionally misrepresented the record and refused to turn over a key document until after the close of evidence; and (5) the Arbitrators improperly and without legal justification imposed costs and fees on the Investors in violation of the contractual framework that bound the parties. The Award must therefore be vacated and remanded for a new hearing in front of new arbitrators.

Respectfully submitted this 30th day of October, 2019.

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