IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:19-cv-22977-MGC

JOSE S. TORRES AND
ISABEL LITOVITCH-QUINTANA,

Petitioners,

v.

MORGAN STANLEY SMITH BARNEY LLC
D/B/A MORGAN STANLEY,

Respondent.
_____________________________________/

MORGAN STANLEY SMITH BARNEY'S MOTION TO VACATE ARBITRATION AWARD AND SUPPORTING MEMORANDUM OF LAW

Respondent, Morgan Stanley Smith Barney LLC d/b/a Morgan Stanley ("MSSB"), moves to vacate the arbitration award entered in favor of Petitioners (the "Award") by an arbitration panel of the Financial Industry Regulatory Authority ("FINRA").

I. INTRODUCTION

The FINRA arbitration award – which imposes a $3 million discovery sanction that is nearly twelve times the compensatory damages award of $261,421.63, almost six times the Petitioners' claimed attorneys' fees for the entire case, and nearly $1 million more than the sanctions Petitioners requested – must be vacated under the Federal Arbitration Act, 9 U.S.C. § 10 (the "FAA"). The sanction was not coercive (the documents had been produced months earlier), the sanction was not remedial and had no bearing on Petitioners' costs or fees for the discovery issue (there was no spoliation issue and Petitioners stated in writing that the discovery issue required "several hours" of additional time at the hearing and approximately a "dozen" additional hours to address), and the sanction was undeniably punitive in violation of applicable law and beyond the authority of the arbitrators. Not only did the arbitrators exceed their authority, two of the three arbitrators failed to comply with FINRA disclosure rules, creating a presumption of evident partiality.

Two Arbitrators Failed to Make Disclosures Required by FINRA Rules

Two arbitrators failed their most fundamental obligation as arbitrators by making incomplete and inaccurate disclosures that were expressly required by FINRA Rules. The integrity of arbitration depends upon impartial arbitrators who fairly decide cases on the merits and disclose any and all prior interests, relationships, or circumstances that may create an "impression of possible bias." Commonwealth Coatings, Inc. v. Continental Cas. Co., 393 U.S. 145, 148-9 (1968). The failure to make such disclosures requires vacatur. Id.

Here, Arbitrator Jill Pilgrim (who is an attorney) failed to disclose the fact that she had been named in a foreclosure action brought by CitiMortgage, Inc., which was an affiliate of Citigroup Global Markets, Inc. ("CGMI") – a key entity in the underlying arbitration and a party to the joint venture Morgan Stanley Smith Barney LLC ("MSSB").[1] This undisclosed

[1] In 2009, Citigroup, Inc. and Morgan Stanley created a joint venture that owned Respondent, MSSB. [Ex. 1 at 1, fn. 1]. Citigroup, Inc. contributed the Smith Barney Division of CGMI to the MSSB joint venture. [Id.]. Citigroup, Inc. owned 49% of the MSSB joint venture until September 2012, when it reduced its ownership to 35% through a sale to Morgan Stanley. See Relevant Excerpt of Citigroup, Inc.'s 2013 10-K [Ex. 2 at 222]. The relevant excerpts of the

foreclosure action was filed at the same time Petitioners were allegedly losing money due to an "illegal loan" scheme by CGMI. [Tr. 45-6; 54 at Ex. 5; also Ex. 6].[2] CGMI was also the broker-dealer that acted as custodian, executed trades and was a lender for Petitioners' investment accounts when they were opened. [Ex. 8 at 61].[3] Arbitrator Pilgrim's foreclosure and subsequent loan modification with an affiliate of CGMI during the period at issue in this dispute was expressly required to be disclosed under FINRA rules (in fact, she disclosed a foreclosure action involving Wells Fargo (an unrelated party) but not the one with CitiMortgage). Her failure to disclose the action and related loan modification in an arbitration involving CGMI's lending practices creates a presumption of partiality and requires vacatur under 9 U.S.C. § 10(a)(2).

Separately, Arbitrator Ruiz (also an attorney) failed to disclose that she had brought a medical malpractice action for herself and her deceased child, and that those claims were dismissed with prejudice on appeal based solely on the Puerto Rico statute of limitations – which was the key legal defense MSSB asserted in the arbitration. Instead, Arbitrator Ruiz made an incomplete and potentially misleading disclosure referencing only a claim on behalf of another minor son that was settled with court approval. Although FINRA Rules require ongoing disclosure of non-securities related litigation (including disclosure of any details that might have relevance to the pending arbitration), Ms. Ruiz made no mention that the very same Puerto Rico statutes of limitation at issue in the arbitration had been enforced to extinguish the claims she brought for herself and a deceased son. Arbitrator Ruiz's loss was

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Form 10-Ks of parent company Citigroup, Inc. reflect that both CGMI and CitiMortgage are subsidiaries and affiliates at the time Arbitrator Pilgrim was sued by CitiMortgage. See, e.g., Ex. 3 (2012) and 4 (2013).

[2] Petitioners' loan was allegedly illegal because it violated 18 U.S.C.A. § 1344 ("Bank Fraud"). One of Petitioners' theories in arbitration was that their broker Angel Aquino had encouraged Petitioners (one of whom was a banker himself) to provide false information to CGMI on their application for a loan from CGMI. [Ex. 7 at 29]. If there was any fraud, the lender CGMI was the victim under the statute.

[3] The testimony in the arbitration reflected that Petitioners' accounts were held on the "Citigroup platform" prior to May 2012 (Tr. 1639-40), the broker was in correspondence with CGMI's trading desk liaison, Cynthia Brock (Tr. 2007), the relevant loan documents were issued by CGMI because it was the entity extending the credit (Tr. 2459). [Transcript excerpts at Ex. 9]. The arbitration also involved a wide range of other CGMI documents, including CGMI's Puerto Rico research [Ex. 10] that Arbitrator Pilgrim affirmatively ruled was relevant to this dispute over objection by Petitioners. [Tr. 1446-48 at Ex. 11].

undoubtedly tragic, but MSSB had a right to know how Arbitrator Ruiz was directly impacted by the central legal defense in the arbitration, and this failure to disclose creates an impression of bias and independently requires vacatur under 9 U.S.C. § 10(a)(2).

The Arbitrators Exceeded Their Authority By Awarding Punitive and Excessive Sanctions in Violation of Applicable Law

In addition to the failed disclosures, the arbitrators exceeded their authority in violation of 9 U.S.C. § 10(a)(4) by awarding punitive sanctions that the Supreme Court has held can only be imposed after the full protection of criminal procedures. Goodyear Tire v. Haeger, 137 S. Ct. 1178, 1186 (2017). The FINRA rules that governed the underlying arbitration do not give arbitrators the authority to impose punitive criminal contempt-like sanctions, and FINRA arbitrators do not have unfettered power to impose sanctions at their whim. Although FINRA rules permit sanctions for violations of direct orders, those sanctions must be consistent with "applicable law." FINRA Rule 12511. As a matter of "applicable law," the Supreme Court holds that civil sanctions that do not (i) coerce future compliance with an order or (ii) reimburse a party, are punitive in nature and prohibited. Goodyear, 137 S. Ct. at 1186.

The discovery sanction award was purportedly based on documents produced on the morning of the third day of an arbitration hearing that took place over 19 hearing days spread out over four months. The documents were produced months before any sanctions were issued. Petitioners had every opportunity to examine each and every witness with these documents, and did use the documents with numerous witnesses as they saw fit. Despite having the documents, the arbitrators ultimately rejected most of Petitioners' claimed damages, awarding them compensatory damages of $261,420 (less than 10% of the compensatory damages Petitioners sought). [Ex. 12]. Neither Petitioners' oral arguments nor their written briefing on sanctions identified any fees or costs associated with the alleged discovery issues other than "several" additional hours of hearing time and "a dozen" hours of legal work on the issue and made no effort to support the arbitrary amount of sanctions requested. The sanctions were neither coercive nor compensatory and not permitted by FINRA and therefore the arbitrators exceeded their authority under 9 U.S.C. §10(a)(4).

The sanction award is also an end-run around statutory procedures and substantive safeguards on limiting arbitrator's ability to issue punitive damages.[4] Finally, the arbitrators also exceeded their authority by awarding an arbitrary amount of sanctions that exceeded even Petitioner's unjustified request for $2,050,000 in sanctions. See Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979) (vacating award for awarding damages that had not been sought).

While the review of arbitration awards is limited under the FAA, courts within the Eleventh Circuit and other federal circuits have not hesitated to vacate awards where arbitrators failed to make disclosures and where they exceeded their authority. While any one of these grounds supports vacatur, the combination of these grounds here compels vacatur.

II. BACKGROUND

A. MSSB's Defenses and Reliance on Puerto Rico Statute of Limitations

The underlying FINRA arbitration involved Puerto Rico residents who brought various claims against MSSB relating to alleged losses in Puerto Rico bonds and bond funds during an historic economic crisis in Puerto Rico. Although brought under a range of theories, Petitioners' claims related to the allegation that they were overconcentrated in Puerto Rico bonds and bond funds that declined in value beginning in 2013. Petitioners also alleged that MSSB (through CGMI) engaged in an "illegal loan" scheme involving a loan to Petitioners. [Tr. 45-6; 54 at Ex. 5]. The time period at issue for Petitioners' claims was August 2010 through May 2017.

MSSB filed its Answer to the Amended Claim on December 19, 2017. [Ex. 13]. Among other things, MSSB defended the claims by stating that Petitioners were Puerto Rico investors who had a long history of investing in Puerto Rico securities, which provided unique tax benefits to Puerto Rico residents. Id. MSSB asserted that Petitioners transferred a portfolio that was almost entirely invested in Puerto Rico securities to MSSB, and the allocation to Puerto Rico securities was actually reduced at MSSB. MSSB stated that the decline in value was not due to misconduct by MSSB, but rather market conditions resulting from an historic economic crisis in Puerto Rico. MSSB subsequently presented similar defenses and argument in its Prehearing Brief filed on January 4, 2019. [Ex. 1]. Both MSSB's Answer (beginning on

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[4] See, e.g., §§ 768.72 and 768.737, Fla. Stat.; see also Noble v. Corporacion Insular De Seguros, 738 F.2d 51, 54 (1st Cir. 1984) ("punitive damages do not exist in Puerto Rico.").

the very first page) and its Prehearing Brief presented defenses based on the Puerto Rico statutes of limitations, which barred all claims as untimely because they were not brought within two years of accrual. [Ex. 13 at 1 and 8-14; Ex. 1 at 13-14 and 37-41].

After the hearing, the Panel entered its Award on July 16, 2019, in which it awarded $261,420.63 in compensatory damages and prejudgment interest at 0.1% for 17 months. [Ex. 12]. The Award also expressly denied all claims for punitive damages, attorneys' fees and costs and essentially split the FINRA forum fees with $33,350 to be paid by MSSB and $32,900 paid by Petitioners. [Ex. 12]. Despite those rulings, the Panel imposed $3 million in punitive sanctions based on a discovery issue, an amount that was completely untethered to Petitioners' costs or attorneys' fees (and nearly $1 million more than Petitioners requested).

B. The Panel's Appointment and Disclosures

The FAA requires vacatur where arbitrators fail to make disclosures that would create an appearance of partiality. <u>See</u> 9 U.S.C. § 10(a)(2); <u>Commonwealth Coatings, Inc.</u>, 393 U.S. at 148-9. To avoid such partiality, FINRA has adopted specific, rigorous and ongoing disclosure requirements, which are binding on the arbitrators as part of the parties' contractual agreement to arbitrate and through their Oath of Arbitrators. [Ex. 1]. As discussed below, the FINRA rules have express provisions requiring disclosure of the specific information the arbitrators failed to disclose. Courts in the Southern District have expressly held that disclosures required by FINRA Rules are "presumptively relevant to, or illustrative of, the issue of actual or perceived bias" and vacated an award where such disclosures were not made. <u>Citigroup Global Markets, Inc. v. Berghorst</u>, 2012 WL 5989628, *3 (S.D. Fla. Jan. 20, 2012) (vacating because non-disclosure violated 9 U.S.C. §§ 10(a)(2) and 10(a)(3)).

The Panel that rendered the award at issue included Arbitrators Pilgrim, Ruiz-Aguirre and Barr. [Ex. 12 at 7]. Arbitrator Ruiz was the only arbitrator who was on the original Panel selected for the case on October 25, 2017. The other two original arbitrators withdrew of their own accord. Arbitrator Barr was a replacement arbitrator appointed on August 6, 2018, and Arbitrator Pilgrim (the Chairperson) was a replacement arbitrator appointed on January 9, 2019, just five days before the start of the evidentiary hearing.

FINRA arbitration affords parties substantial participation in the arbitrator selection process.[5] To ensure an impartial proceeding and also aid parties in their selection process, FINRA rules have stringent disclosure requirements for arbitrators. For example, FINRA Rule 12405(a) requires arbitrators to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination in the proceeding." [Ex. 17]. That obligation is continuing in nature and requires supplemental disclosures "at any stage of the proceeding" whenever the basis for a disclosure arises:

> The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

FINRA Rule 12405(b) [Ex. 17].

FINRA repeatedly advises arbitrators that any doubt should be resolved in favor of disclosure. The importance and breadth of these disclosure requirements is described in FINRA's Arbitrator's Guide that governs its arbitrators:

> Arbitrator disclosure is the cornerstone of FINRA arbitration, and the arbitrator's duty to disclose is continuous and imperative. Disclosure includes any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision. **When making disclosures, arbitrators should consider all aspects of their professional and personal lives and disclose all ties between the arbitrator, the parties and the matter in dispute, no matter how remote they may seem. This includes, but is not limited to, lawsuits (even non-investment related lawsuits);** any publications (even if they appear only online); professional memberships; service on boards of directors; etc. If you need to think about whether a disclosure is appropriate, then it is: make the disclosure. **Failure to disclose may result in vacated awards which undermine the efficiency** and finality of our process. Failure to disclose may also result in removal from the roster.

FINRA Arbitrator's Guide at 17 (Nov. 2018) (emphasis in original) [Ex. 18].

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[5] FINRA issues a list of potential arbitrators along with detailed disclosures provided by the arbitrators. The parties are then permitted to strike or numerically rank arbitrators. FINRA Rule 12403. [Ex. 14]. FINRA then appoints the panel from the arbitrators who were not stricken based on their combined rankings. Id. Here, with regard to replacement Arbitrators Pilgrim and Barr, the parties were also given the opportunity to strike or rank them through the "short list" replacement arbitrator appointment method, in which FINRA provided the parties with a list of three potential replacement arbitrators, one strike, and the requirement to rank the other two potential arbitrators. [Exs. 15 and 16].

FINRA's disclosure requirements are not simply generic – rather, FINRA mandates every arbitrator "review carefully the pleadings" and other documents after appointment. Id. An arbitrator must then sign an "Oath of Arbitrator" with a detailed checklist of specific (though not exhaustive) questions designed to identify disclosable facts. After the panel has been selected, FINRA rules provide parties with the ability to assert for-cause challenges with the Director of Arbitration or directly request that an arbitrator recuse herself if appropriate. Gauged against these disclosure standards, Arbitrators Pilgrim and Ruiz failed to make required disclosures under FINRA rules and those failures also establish evident partiality under 9 U.S.C. § 10(a)(2). Berghorst, 2012 WL 5989628 at *3.

1. Arbitrator Pilgrim's Failure to Disclose She Was Adverse to an Affiliated Party

FINRA rules require disclosure of both banking relationships and any adverse legal action taken by a lender against an arbitrator. Arbitrators are required to disclose "Has any lender ever instituted foreclosure proceedings involving you or a property owned in whole or in part by you directly or indirectly? If yes, please provide the current status." [Ex. 19 at 5]. The Checklist requires arbitrators to: "Provide a full explanation to any question(s) to which you provided a 'yes' response." [Ex. 19 at 3]. The Checklist requires arbitrators to affirmatively look for and err on the side of making disclosures:

> When completing the Checklist, ***it is essential to make a reasonable and good faith effort to determine*** whether you have any relationships with the parties and/or attorneys in the dispute and to make any necessary disclosures. In addition to relationships, it is advisable to disclose any life experience that may raise any doubt about your ability to be impartial. ***Any doubts should be resolved in favor of making the disclosure***. [Ex. 19 at 3] (emphasis added).

On her Checklist, Arbitrator Pilgrim stated in response to the question about any adverse foreclosure actions that she already disclosed such an action on another required FINRA form, her Arbitrator Disclosure Report ("ADR"). [Ex. 20 at 4]. On her ADR, Arbitrator Pilgrim disclosed that she had been the subject of a foreclosure action, a failed short sale and an ultimate judicial sale involving Wells Fargo, but she failed to disclose that she had been sued by CitiMortgage in a foreclosure action filed in October 2013. [Ex. 21 at 4]. A copy of the Verified Complaint CitiMortgage filed against Arbitrator Pilgrim is attached as Exhibit 22, which reflects CitiMortgage sent her multiple letters stating she was in default and that foreclosure proceedings may be initiated. Those proceedings were initiated on October 9,

2013. [Ex. 22 at Schedule A]. Although it appears that Arbitrator Pilgrim was not formally served in that action, the court record reflects that she entered into a loan modification with CitiMortgage several months later on January 16, 2014 under which CitiMortgage stipulated to discontinue the foreclosure action against her [Ex. 23]. CitiMortgage is an affiliate of CGMI,[6] which was a participant in the MSSB joint venture and was the broker-dealer that held Petitioners' securities, executed their trades, and extended the loan that was a significant issue in this dispute.

In the Verified Complaint, CitiMortgage alleged that Arbitrator Pilgrim had not made payments on her mortgage for at least five months. [Ex. 22 at 4]. Despite the fact that FINRA rules expressly require disclosure of this litigation, and the fact that Arbitrator Pilgrim had disclosed the existence of the loan with CitiMortgage and a foreclosure with another bank, she failed to make any mention of the CitiMortgage foreclosure and resulting loan modification. At the beginning of the arbitration hearing Arbitrator Pilgrim affirmatively stated that she had no other disclosures to make. [Tr. 7 at Ex. 25]. Later, she made brief additional unrelated disclosures, but nothing regarding the fact that she had been sued by an affiliate of CGMI or otherwise engaged in an adversary proceeding with its affiliate. [Tr. at 2349 and 4023 at Ex. 26]. MSSB's counsel was not aware of the existence or facts regarding the CitiMortgage foreclosure and subsequent loan modification involving Arbitration Pilgrim at any point prior to the Award. [Coates Declaration at ¶ 6]. Arbitrator Pilgrim's failure to make required disclosures in violation of FINRA rules prejudiced MSSB by preventing it from making an informed decision in ranking her, from seeking a for-cause strike against her, from pursuing her recusal, from taking any other action to ensure a fair hearing, and ultimately by subjecting it to an award from an arbitrator that failed to meet the standard for impartiality.

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[6] The importance disclosing potential conflicts with affiliated parties is expressly addressed in FINRA guidance provided to arbitrators. See, e.g., FINRA Publication, Neutral Corner, Volume 4 – 2011 at 13 ("Disclosure: The Cornerstone of Integrity and Fairness in Arbitration"). [Ex. 24]. On the Arbitrator Checklist required by FINRA, given to arbitrators as part of the Oath of Arbitrator, arbitrators are expressly asked "Do you, your spouse, or an immediate family member currently have a non-securities related account (e.g., checking or savings accounts or loans) with a party to this arbitration or with an entity that is affiliated with that party? For example, in recent years some banks have acquired broker-dealers and may be the parent of the broker-dealer firm that is a party in this case." [Ex. 19 at 5].

2. Arbitrator Ruiz's Failed and Misleading Disclosures Regarding Personal Litigation Dismissed Under the Puerto Rico Statute of Limitations

FINRA rules also require disclosure of litigation in which an arbitrator was a party. Specifically, on the Arbitrator Checklist, arbitrators are expressly asked "Have you ever been a party to a non-investment related lawsuit?" [Ex. 27 at 14]. The Checklist also inquires as to whether the arbitrator or her family was ever involved in "any of the same allegations or causes of action as the assigned arbitration, even if the dispute was not securities-related." [Ex. 27 at 5]. The Checklist further requires: "Provide a full explanation to any question(s) to which you provided a 'yes' response." [Ex. 27 at 2]. FINRA guidance requires disclosure of legal claims even when the subject matter is distinct and advises arbitrators that "[i]t is better to be over-inclusive and provide the parties with more information rather than too little information." [Ex. 24].[7] FINRA Training Materials expressly encourage arbitrators to disclose experience with particular issues in dispute: "The duty to disclose extends to the nature of the subject matter submitted to arbitration. Arbitrators must disclose any option, belief or position they may have regarding any substantive issue in dispute." FINRA Training, "Your Duty to Disclose," at 11 (September 2016) [Ex. 28].

On her Checklist, Arbitrator Ruiz noted that her involvement in a litigation was already disclosed on her ADR. [Ex. 27 at 14]. The ADR stated as follows:

ADDITIONAL DISCLOSURE INFORMATION

A malpractice action against the hospital where my child was born. Because my son was a minor I was the plaintiff in his name. K DP2002-0262 (801) IRLANDA RUIZ AGUIRRE VS HATO REY COMMUNITY HOSPITAL. We reached a settlement in 2013 that the Court approved. The case is inactive. My lawyer Arturo Luciano is the one who has all documentation.

[Ex. 29 at 4]. This disclosure affirmatively stated that the claim she brought was settled and the Court approved that settlement. [Id.] This disclosure was incomplete and misleading.

[7] The full question and answer on this point was as follows:
Question: I was recently appointed to a case in which the claimant alleged that the broker breached his fiduciary duty and made unsuitable investments. Ten years ago, I sued my business partner for a failed restaurant venture. The venture didn't involve securities, but it involved allegations of breach of fiduciary duty and the mismanagement of funds. Is this something I should disclose?
Answer: Yes, you should make the disclosure. Although your lawsuit did not involve securities, the allegations involved in both cases are similar enough to warrant disclosure. If you are uncertain whether you should disclose this type of information, you should contact FINRA and discuss the issue with your case administrator. It is better to be over-inclusive and provide the parties with more information rather than too little information. Neutral Corner, Volume 4 – 2011 [Ex. 24 at 13].

Subsequent to the Award, MSSB discovered a Spanish-language appellate decision dismissing claims brought by Ms. Ruiz (for herself and a deceased son) and her husband based on the Puerto Rico statute of limitations. See Ruiz Aguirre v. Hato Rey Cmty. Hosp., Inc., K DP02-0262, 2011 WL 2261479, at *1 (P.R. Cir. Mar. 31, 2011) [Ex. 30]. A certified English translation of the opinion is attached as Exhibit 31. In light of this opinion, it is clear that Ms. Ruiz failed to disclose the existence of her individual claim, her claim on behalf of her deceased child and her husband's claim and, more importantly, that all of these claims were dismissed as untimely under the applicable Puerto Rico statute of limitations on appeal after years of litigation. Arbitrator Ruiz, as an attorney, understands the difference between a settlement and a dismissal on appeal. [Ex. 29 and 31]. Her sole disclosure of a settled medical malpractice claim was a materially different disclosure than the "full explanation" of facts required by FINRA rules. She also failed to disclose the relevant facts at hearing, when she stated she had no additional disclosures despite knowing that the Puerto Rico statute of limitations represented a very significant issue in the case. [Tr. 7 at Ex. 25]. Arbitrator Ruiz's failure to disclose her direct personal experience with claims dismissed based solely on the statute of limitations was material because MSSB prominently asserted statutes of limitation (including the Puerto Rico limitations) as a complete defense to Petitioners' claims.[8]

Despite the fact that Arbitrator Ruiz had an obligation to disclose relevant facts regarding her litigation and knew that the statute of limitations was a central issue in the arbitration, she made no effort at any point during the proceeding to correct a misleading disclosure that suggested her only litigation was a representative claim that was settled without adjudication. Ms. Ruiz's failure to disclose the dismissal of her malpractice case on statute of limitations is particularly concerning – and creates an even higher impression of possible bias – considering her unique role in the arbitration process as a former Puerto Rico resident and Puerto Rico attorney. Other arbitrators at times relied on Ms. Ruiz during the final hearing to translate or interpret certain testimony of the financial advisor and Petitioners who are each Puerto Rico residents. [Tr. 684; 2078 at Ex. 34].[9]

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[8] The defense was asserted on the very first page of MSSB's Answer [Ex. 13 at 1], in its Prehearing Brief [Ex. 1 at 13-14; 37-41], in opening arguments [Tr. 77; 107-8 at Ex. 32], in its closing argument presentation [Ex. 33 at 179-183], and in its Post-Hearing Brief [Ex. 7 at 3 and 47-50].

[9] That reliance likely included her experience and knowledge of Puerto Rico law considering

MSSB's counsel was not aware of the existence of Ms. Ruiz's dismissed claims or the facts and basis for their dismissal at any point prior to the Award. [Rodriguez Declaration at ¶ 6; Coates Declaration at ¶ 7]. Arbitrator Ruiz's failure to make required disclosures in violation of FINRA rules prejudiced MSSB by preventing it from making an informed decision in ranking her, from seeking a for-cause strike against her, from pursuing her recusal, from taking any other action to ensure a fair hearing, and ultimately by subjecting it to an award from an arbitrator that failed to meet the standard for impartiality.

C. The Excessive, Unwarranted and Punitive Discovery Sanctions

The sanctions at issue related to a November 8, 2018 discovery order entered by the prior arbitration Chair. Arbitrator Pilgrim was not on the Panel at the time and did not participate in the discovery motion hearing or in the discovery order. In complying with the discovery order, the parties reached an agreement on the scope of discovery that was memorialized in an e-mail between counsel.[10] On January 14, 2019, the first day of the arbitration evidentiary hearing, Petitioners' counsel examined Mr. Aquino (the stockbroker at issue) and during that testimony, Mr. Aquino referenced a settlement agreement entered into between himself and MSSB on October 5, 2017 (three and one-half months after the termination of employment). [Coates Decl. at ¶ 8; Ex. 37 at 5, n.7].

After hearing the testimony, Petitioners sought production of the Settlement Agreement and argued it was responsive to Request No. 49. MSSB attempted to inform Arbitrator Pilgrim about the parties' discovery agreements, but she ordered that the Settlement Agreement be produced. [Tr. 180-4 at Ex. 38]. MSSB produced the Settlement Agreement ***on that same day***, January 14, 2019. [Ex. 37 at 9]. On January 15, 2019, Petitioners requested production of all emails relating to the negotiation of the Settlement Agreement, citing Req. No. 49. [Tr. 314-7 at Ex. 39]. Again, this request was much broader than the scope as narrowed by the Parties' Email Agreement. [Ex. 35 and 36]. MSSB attempted to provide her with the email chain containing the parties' Email Agreement, however, Arbitrator

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her legal background, two degrees from the University of Puerto Rico, and a past position as a professor at the American University of Puerto Rico. [Ex. 29 at 3].

[10] That agreement provided for an e-mail search over the period from "May 13, 2017 and July 13, 2017" and noted that "This search and any e-mail production will fully comply with Request No. 49" – the discovery request at issue. [Ex. 35]. Petitioners' counsel agreed with this proposal and later confirmed the agreement again in a chain of emails (collectively, the "Email Agreement"). [Ex. 36].

Pilgrim would not review the agreement and then ordered that all emails relating to the Settlement Agreement be produced by midnight that day. [Tr. 328-30 at Ex. 40]. Although the Award gives the impression that substantial time was devoted to argument on this issue, the transcript reflects that 17 pages of 318 pages that day related to the discovery issue. [Tr. 314-330 at Ex. 39-40].

Later that day, MSSB located 37 pages of emails responsive to the January 15, 2019 order (all of which were dated after July 13, 2017, the end-date of the parties' written agreement on the time frame for emails in Req. No. 49). Many of the e-mails relating to the negotiation of the Settlement Agreement appeared to squarely fall within the scope of Rule of Evidence 408 and arguably were not subject to discovery under the settlement privilege or other authority addressing discoverability in light of Rule 408.[11] To ensure that no privilege was waived, MSSB brought the documents to the hearing the following morning and at the very beginning of the hearing requested that the Panel conduct an in camera review to determine the privilege issues. [Tr. 658 at Ex. 42]. MSSB had given Petitioners notice of the request for an in-camera review before the hearing commenced that morning. [Tr. 636 at Ex. 43]. After hearing argument, Arbitrator Pilgrim refused to conduct an in camera review and ordered MSSB to produce the documents, which MSSB immediately produced to Petitioners. [Tr. 657-8 at Ex. 44].[12] Once again, although the Award suggests a long delay, only 26 pages of the 257-page transcript that day related to discussion of the discovery issue. [Tr. 635-660 at Ex. 43-44]. As Petitioners conceded in their sanctions brief, the total time to address these issues, including the Panel's deliberations, was no more than a few hours. [Ex. 45 at 10].

Petitioners did not ask for a postponement, did not seek to recall any witness (he was still on the first witness, the broker, Mr. Aquino), and did not seek any other accommodation based on the production of documents.[13] The hearing stayed on track, was not adjourned and

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[11] Chairperson Pilgrim had sustained objections based on the joint defense privilege earlier in the hearing on January 14, 2019 [Tr. 144-5 at Ex. 41], and MSSB reasonably expected that she would consider other well-founded privilege objections.

[12] Because Petitioners had already previewed that they intended to use settlement discussions to prove liability, MSSB had a well-founded basis to believe the documents would be used in violation of Rule 408. As it turned out, Petitioners used these e-mails in the very manner prohibited by Rule 408, attempting to use them to prove liability.

[13] Rather, Petitioners began using the produced documents on January 16, 2019, the very same day they received them and just the third day of the 19 day hearing. [Coates Decl. at ¶

Petitioners' counsel had a full and fair opportunity to cross-examine the broker (who was on the stand for another four days, with a weekend in between) and every other witness with the documents at issue. [Coates Decl. at ¶¶ 10 and 11].[14]

On January 23, before the Panel asked its questions of Mr. Aquino, Arbitrator Pilgrim asked Petitioners' counsel to check his notes and take his time to confirm he had asked all of the questions he wanted to ask, and he confirmed that he had. [Tr. 2281-2 at Ex. 46]. These production issues are the full extent of discovery issues detailed in the Award as the basis for a $3 million sanction. [Ex. 12].

D. The Panel Directs Only Limited Post-Hearing Briefing on Sanctions

At the conclusion of the hearing, the Panel permitted the Parties to submit (i) post-hearing briefs on the merits of 50 pages or less [Tr. 5781-2 at Ex. 47], and (ii) post-hearing briefs on the issue of sanctions of 10 pages or less. [Ex. 48]. MSSB supported its brief on sanctions with an affidavit and attached the emails reflecting the Parties' agreement on the scope of the email search to satisfy the prior order, and Petitioners' agreement to extend the date for compliance with the discovery order. [Ex. 37]. Petitioners did not submit any affidavit with their sanctions briefing. [Ex. 45]. Petitioners sought sanctions of $2,050,000, or $50,000 per day from December 10, 2018 (the date for compliance with the discovery order ignoring the agreed extension) to January 20, 2019 (the date the last of the responsive documents were produced). [Ex. 45 at 10]. Incredibly, the requested sanctions included days when Petitioners' counsel had indisputably agreed to an extension to comply with the order, which MSSB pointed out in its Brief. [Ex. 37 at 8 n.10]. The Panel did not conduct an evidentiary hearing

9]. Over the course of the hearing, Petitioners had every opportunity to use the documents as they saw fit, and examined multiple witnesses with the documents. MSSB also continued to conduct its search and on Sunday, January 20, 2019, produced a limited set of additional documents. Petitioners made only passing reference to a few of these documents at the hearing and the documents are not referenced in the Award as a basis for sanctions. [Ex. 12].

[14] Unrelated to the document issues, Petitioners requested and MSSB agreed that due to a scheduling conflict Petitioners' expert would be taken out of turn during the first week of the arbitration hearing. After the documents at issue were produced on the morning of Wednesday, January 16, 2019, Petitioners' counsel examined Mr. Aquino for the rest of the day (including questions based on the documents). Mr. Aquino was then excused and Petitioners' expert testified on Thursday and Friday. Mr. Aquino's testimony resumed after the weekend on Monday through Wednesday of the following week. [Id.].

on the sanctions, had not previously entered coercive sanctions and otherwise gave no notice that it was contemplating a sanction remotely in the magnitude of $3 million.

MEMORANDUM OF LAW

I. THE ARBITRATION AWARD MUST BE VACATED BECAUSE THE ARBITRATORS EXHIBITED EVIDENT PARTIALITY BY FAILING TO MAKE REQUIRED DISCLOSURES

The FAA specifically authorizes a court to vacate an arbitration award where the arbitrators have exhibited evident partiality by failing to make required disclosures. 9 U.S.C. § 10(a)(2) (vacatur appropriate "where there was evident partiality or corruption in the arbitrators"). The FAA's rigorous disclosure requirements arise from the Supreme Court's seminal decision of Commonwealth Coatings:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but ***we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges***, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that ***arbitrators disclose to the parties any dealings that might create an impression of possible bias.***

393 U.S. at 148-9 (emphasis added).

Following the Supreme Court's Commonwealth Coatings standard, the Eleventh Circuit has held that the duty of full disclosure is affirmatively owed by the arbitrator, and cannot be shifted to the parties to the arbitration:

> We also find that waiver or estoppel would be inappropriate in view of the code of strict morality and fairness which shapes the arbitrator's affirmative duty of disclosure. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. at 148, 89 S.Ct. at 339. By positing that appellants have the duty to inquire into the background of the arbitrator, appellant attempts to shift to the parties to the arbitration the burden of determining and disclosing bias or the reasonable appearance thereof. Neither federal nor Florida law supports such a result. As the district court aptly stated, "for the arbitration process to work successfully, the onus must be placed on the arbitrator to reveal potential bias."

Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197, 1204 (11th Cir. 1982). The FINRA rules requiring full and ongoing disclosure by arbitrators implement this directive. Actual bias is not required. See Commonwealth Coatings, 393 U.S. at 150 (arbitrators "not only must be unbiased but also must avoid even the appearance of bias"); Berghorst, 2012 WL 5989628 at *3 ("To satisfy the 'evident partiality' standard, a party challenging an arbitration award ***need not show actual bias*** on the part of an arbitrator.").

Applying this standard, the Eleventh Circuit has held that vacatur is appropriate if "***the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.***" University Commons–Urbana, Ltd. v. Universal Constructors Inc., 304 F.3d 1331, 1339 (11th Cir. 2002); Middlesex, 675 F.2d at 1201 ("The Commonwealth Coatings holding has been interpreted as somewhat analogous to a *per se* rule or a rebuttable presumption requiring the award to be set aside once it is established that the arbitrator actually knew of, yet failed to disclose potentially prejudicial facts which could impair his judgment.").

Additionally, incomplete or misleading disclosures are insufficient. "[T]he irreducible minimum requirement of Commonwealth Coatings is full disclosure." Continental Ins. Co. v. Williams, 1986 WL 20915, *5 (S.D. Fla. Sept. 17, 1986) (vacating an award because an arbitrator's disclosure that he had known a party's counsel "for a while" was "decidedly unilluminating of relationships between the parties"). Williams also held that the party seeking vacatur need not prove they would have challenged the arbitrator had there been disclosure – the mere failure to disclose requires vacatur. Id. ("Had such [required] disclosures been made, Continental's counsel may well have considered [the arbitrator] highly impartial and have chosen to proceed with the hearing. Continental, however, was not given the opportunity to make such an election.").

In Berghorst, the court applied Commonwealth Coatings and Eleventh Circuit standards to vacate an arbitration award where an arbitrator failed to make disclosures required by FINRA rules. 2012 WL 5989628 at *3. Specifically, an arbitrator failed to disclose that (i) he had been involved in an adverse proceeding involving another brokerage firm, and (ii) he had been involved in a foreclosure action. Id. The court held that the arbitrator's adverse action involving an ***unrelated*** broker-dealer was sufficient to create an appearance of bias against the respondent broker-dealer. Id. Looking to the FINRA rules, the court held that even though the arbitrator's disputes were not with any party to the arbitration, the non-disclosure "was a violation of his continuing disclosure duty under FINRA rules" and "create[d] an impression of possible bias." Id. at *3-4. The court vacated the award. Id. at 5. Berghorst also held that the failed disclosure violated 9 U.S.C. § 10(a)(3) ("misbehavior by which the rights of [a] party have been prejudiced"), which provides an additional ground to vacate the Award. Id. Many other courts vacated arbitration awards where the arbitrators failed to make required disclosures, including disclosures required by FINRA rules.[15]

Here, both Arbitrator Ruiz and Arbitrator Pilgrim failed to make disclosures required by FINRA rules, and the disclosures they did make were misleading. The fact that the disclosures were required by FINRA rules creates a presumption of materiality under the very rules under which the parties agreed to arbitrate. Berghorst, 2012 WL 5989628, at *3. As a result, MSSB was deprived of essential facts when choosing whether to rank or strike these arbitrators, as well as during the hearing when it may have had a for cause challenge if either arbitrator had made ongoing disclosures. In each case, the undisclosed facts were sufficient to create an appearance of partiality and warrant vacatur under 9 U.S.C. § 10(a)(2).

MSSB had every right to rely on the accuracy of Arbitrators Pilgrim and Ruiz's disclosures. Importantly, the Eleventh Circuit holds that it is not the parties' duty to uncover any undisclosed or inaccurate disclosures made by the arbitrators:

> To hold, in the circumstances of this case, that the insurers waived their right to contest the alleged impartiality of the neutral arbitrator because the insurers did not discover evidence of partiality prior to arbitration would put a premium on concealment. Waiver applies only where a party has acted with full knowledge of the facts.

Middlesex Mut. Ins. Co., 675 F.2d at 1204 (citations omitted); see also Berghorst, 2012 WL 5989628, at *4 (finding that even if an arbitrator's "cryptic disclosure" were sufficient to put a party on notice of a potential conflict, no cause existed for the party to inquire further). Following Commonwealth Coatings, the courts have not hesitated to vacate awards when

[15] See, e.g., Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 160 (8th Cir. 1995) (vacating award under Section 10(a)(2) were arbitrator violated NASD disclosure rules, noting that outcome was "especially fair because it realizes the terms of the parties' arbitration agreement in this case"); New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007) (vacating award for failure to disclose arbitrator's employment with company that was negotiating with a party); Crow Constr Co. v. Jeffrey M. Brown Assoc., Inc., 264 F.Supp.2d 217 (E.D. Pa. 2003) (vacating award for failure to disclose that one arbitrator had served as a mediator for a party, another arbitrator had arbitrated another dispute for a party, and two arbitrators had served on an unrelated panel together); see also Builders First Source-South Texas, L.P v. Ortiz, 515 S.W.3d 451 (Tex. Ct. App. 2017) (vacating award including sanctions based on arbitrator's failure to disclose two prior matters in which a parties' counsel had appeared); Hagman v. Citigroup Global Markets, Inc., 2011 WL 975535 (Cal. Super. Feb. 9, 2011) (vacating FINRA award for failure to disclose involvement in lawsuit against a business partner in a real estate investment).

the disclosures were inadequate. This is precisely such a case and the Award in its entirety must be vacated.

II. THE ARBITRATORS EXCEEDED THEIR AUTHORITY BY AWARDING SANCTIONS THAT WERE PUNITIVE IN NATURE IN VIOLATION OF APPLICABLE PROCEDURAL AND SUBSTANTIVE LAW

The Supreme Court has unequivocally stated that sanctions that do not reimburse a party for the specific misconduct at issue are punitive and cannot be awarded without the full protection of criminal procedures (including proof "beyond a reasonable doubt"). See, e.g., Goodyear, 137 S. Ct. at 1186; Mine Workers v. Bagwell, 512 U.S. 821, 826-830 (1994). As such, no private arbitrator could impose the untethered, clearly punitive and excessive sanctions at issue in the Award. There is nothing in the FINRA rules or the parties' agreements that would grant the arbitrators criminal authority over any of the parties.

The FAA authorizes a court to vacate an arbitration award where the arbitrators "exceeded their powers." 9 U.S.C. § 10(a)(4). Public policy requires vacatur of awards when an arbitrator exceeds his authority because, at its core, arbitration is a creature of contract. United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960). Therefore, the reach of the arbitrator's authority is expressly limited by the scope of the relevant contract. Id.

Moreover, the specific FINRA Rules relating to sanctions in customer cases only authorize sanctions to the extent they are not prohibited by applicable law. See FINRA Rules 12212 and 12511 [Ex. 49 and 50]. "Applicable law" in the form of Supreme Court authority clearly prohibit the punitive sanctions here. FINRA also cautions that sanctions are for "egregious situations" and states arbitrators should consider them "as a last resort to address non-compliance by a party, and exercise this authority judiciously. . . ." *Neutral Corner*, "Sanctions and the NASD Arbitration Process" at 4-5 (Oct. 2004) [Ex. 51].[16] The FINRA Guidance on sanctions generally referenced flat-fee sanctions in amounts such as $2,750 or $10,000. [Ex. 52 at 27-28].[17]

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[16] Before a Panel strikes a claim or defense (which would have been less extreme than the sanctions awarded here, which were more than both the compensatory damage award and even the claimed damages), FINRA Rules require that lesser sanctions or warnings prove unsuccessful in motivating compliance with an order (which did not occur here).

[17] Even in regulatory enforcement matters brought by FINRA, the maximum recommended fine for a failure to produce documents published by FINRA is $77,000. [Ex. 53 at 32-33].

The sanctions here was not "judicious." They were extreme and punitive and sought to punish MSSB for, among other things, an eight and one-half hour delay in producing documents (from midnight to early the next morning) to allow it the opportunity to seek consideration of a well-founded privilege and clearly subject to Rule 408. Petitioners had the documents early in the hearing to use with all witnesses, MSSB produced the documents pursuant to Arbitrator Pilgrim's order without the need for any sanctions, the hearing was not delayed more than several hours as a result of the discovery issues, and there was no articulable or quantifiable prejudice to Petitioners ever addressed or presented at the hearing. At most, Petitioners' brief on sanctions stated that the discovery disputes at issue caused the parties and Panel "to spend several additional and unnecessary hours to fight over the discovery withheld" and Petitioners' counsel had "expended over a dozen additional hours to address MS'S [sic] discovery violations, including the preparation of this brief." [Ex. 45 at 10]. Petitioners' counsel represented that the highest hourly rate on Petitioners' legal team was $550. [Coates Decl. at ¶ 12]. Accordingly, based on Petitioners' own submissions, the maximum compensatory sanction should have been $10,000 or less.

In dramatically reducing an attorney's fee discovery sanction to just those particular fees that were made necessary by the specific discovery misconduct at issue, the Supreme Court in Goodyear recently explained that civil sanctions cannot be punitive:

> This Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature. See Mine Workers v. Bagwell, 512 U.S. 821, 826-830, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (distinguishing compensatory from punitive sanctions and specifying the procedures needed to impose each kind). In other words, the fee award may go no further than to redress the wronged party "for losses sustained"; it may not impose an additional amount as punishment for the sanctioned party's misbehavior. Id., at 829, 114 S.Ct. 2552 (quoting United States v. Mine Workers, 330 U.S. 258, 304, 67 S.Ct. 677, 91 L.Ed. 884 (1947)). To level that kind of separate penalty, a court would need to provide procedural guarantees applicable in criminal cases, such as a "beyond a reasonable doubt" standard of proof. See id., at 826, 832-834, 838-839, 114 S.Ct. 2552. When (as in this case) those criminal-type protections are missing, a court's shifting of fees is limited to reimbursing the victim.[18]

[18] Later in the Goodyear decision, the Court noted that Bagwell also permitted civil "coercive" sanctions, designed to force a party comply with a court order, but that kind of sanction was not at issue in Goodyear or in the Award at issue in this case. Id. Indeed, as recounted in the Award, the documents were produced early in the arbitration hearing and the Panel did not need to resort to imposing sanctions to coerce compliance. [Ex. 12].

Goodyear, 137 S. Ct. at 1186. The Supreme Court further ruled:

> That means, pretty much by definition, that the court can shift only those attorney's fees incurred because of the misconduct at issue. Compensation for a wrong, after all, tracks the loss resulting from that wrong. So as we have previously noted, a sanction counts as compensatory only if it is "calibrate[d] to [the] damages caused by" the bad-faith acts on which it is based. Id., at 834, 114 S.Ct. 2552. A fee award is so calibrated if it covers the legal bills that the litigation abuse occasioned. But if an award extends further than that—to fees that would have been incurred without the misconduct—then it crosses the boundary from compensation to punishment. Id. at 1186.

The Middle District applied this rule to not only reduce an attorney's fee sanction, but to completely strike a "civil contempt penalty" for discovery misconduct. In Environmental Manufacturing v. Peach State Labs, the court explained the limitation on civil sanctions:

> A contempt fine accordingly is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained." "Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge...." For example, a "per diem fine imposed for each day a contemnor fails to comply with an affirmative court order" is civil because "once the jural command is obeyed, the future, indefinite, daily fines are purged." On the other hand, "a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance."

274 F. Supp. 3d 1298, 1330-1 (M.D. Fla. 2017) (citing Mine Workers v. Bagwell, 512 U.S. 821 (1994)). The court struck the entire $200,000 penalty as an improper punitive sanction.[19] Here, the $3 million sanction made months after the production at issue and also after the hearing had concluded, was clearly punitive in nature and must be vacated.

Nor can sanctions be used as a subterfuge to award punitive damages. First, the Award expressly considered and denied Petitioners' punitive damage claim. [Ex. 12]. Second, Florida law expressly limits an arbitrator's ability to impose punitive relief on a party. Section 768.737 prohibits an arbitrator from making any award of punitive damages without including express factual findings of how the arbitrator satisfied the standards of Section 768.72 in rendering the award.[20] There is no basis for the Award to avoid these requirements

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[19] Even when arbitrators have entered coercive sanction awards, courts have vacated the sanctions when the source of the power to sanction was unclear and the amount of the sanctions were arbitrary. See Certain Underwriters at Lloyd's v. Argonaut Ins. Co., 264 F. Supp. 2d. 926 (N.D. Cal. 2003).

[20] See § 768.737, Fla. Stat. That section makes clear that the statutory limitations on punitive damages apply in arbitration. Id. Accordingly, the Award could not have awarded the

simply by labelling this relief as "sanctions" rather than "punitive damages" in a clear end-run around the limitations on the ability of an arbitrator to punish a party in arbitration.

Additionally, the Award exceeded the arbitrators' authority because it awarded an arbitrary amount of sanctions well beyond the amount actually sought by Petitioners. The record shows that Petitioners requested $2,050,000 in sanctions, but the Award increased that amount by nearly 50% without justification. Courts have vacated awards when the relief awarded was in excess of what was sought. See Totem, 607 F.2d 649 (vacating an arbitration award under 9 U.S.C. § 10(a)(4) because the arbitrators exceeded their powers by entering an award that significantly exceeded claimed damages – "although arbitrators enjoy a broad grant of authority to fashion remedies [under the AAA Rules] the arbitrators are restricted to those issues submitted."). Id. The former Fifth Circuit explained: "It is anomalous for the arbitration panel to award an unrequested item of damages three times larger than any item claimed by North American and then to hear the panel action supported with an argument that the awarded item was naturally intertwined within the scope of the arbitration." Id.

The Panel held no evidentiary hearing on the sanctions, limited the briefing to 10 pages (while allowing 50 pages on the merits) and gave no indication that it considered the sanctions issue as the primary disputed issue (and certainly not to the extent that it would later comprise 92% of the award). To the extent that the Court does not vacate the Award in its entirety due to evident partiality, the Award's $3 million punitive sanctions must be vacated because the arbitrators exceeded their authority and the sanctions award must be reduced to only the additional fees that are attributable to the alleged misconduct, which Petitioners' own brief on sanctions reflected was no more than "several" hours in arbitration hearing time and approximately "a dozen hours" in drafting additional submissions such as that brief. [Ex. 45 at 10]. Based on Petitioner's counsel's stated maximum hourly rate of $550, that amount should be no more than $10,000.

CONCLUSION

For these reasons, the Court must vacate the arbitration award in whole or in part.

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sanctions as punitive damages because it failed to make the findings required under Section 768.72, and the amount of sanctions would have been excessive under Section 768.73 (generally limiting punitive damages to three times the amount of compensatory damages, or in this case a maximum of $784,261.89). Puerto Rico law does not even provide for punitive damages. Noble, 738 F.2d at 54 ("punitive damages do not exist in Puerto Rico.").

Dated: August 9, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Tracy L. Gerber