No. A22A1149

In the
Court of Appeals of Georgia

WELLS FARGO CLEARING SERVICES, LLC d/b/a WELLS FARGO ADVISORS, LLC and JAY WINDSOR PICKETT, III,

Appellants,

v.

BRIAN LEGGETT and BRYSON HOLDINGS, LLC,

Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF FULTON COUNTY
CIVIL CASE NO. 2019-CV-328949

BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION IN SUPPORT OF APPELLEES

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IDENTITY OF AMICUS CURIAE AND ITS INTERESTS IN THE CASE

Pursuant to Rule 26, the Public Investors Advocate Bar Association ("PIABA") submits this Brief as an amicus in support of the Appellees.

PIABA is an international organization of attorneys who advocate on behalf of savers, investors, and retirees in disputes with their financial professionals. PIABA works to protect public investors from abuses in the arbitration process and to create a level playing field for public investors in securities and commodities arbitration. PIABA has appeared as an amicus curiae before the United States Supreme Court, Federal Circuit Courts of Appeal, and state supreme courts throughout the nation in cases involving issues important to public investors.

PIABA supports affirming the trial court's *vacatur* order of the arbitration award in this case with respect to Enumeration of Error 1, concerning whether the panel selection process violated 9 U.S.C. § 10(a)(4). PIABA asserts that the trial court correctly found that a secret agreement regarding arbitrator selection between counsel for Appellants and the arbitration administrator, the Financial Industry Regulatory Authority[1] ("FINRA"), violated the parties' bargained for rights to a neutral, randomly selected, computer-generated list of arbitrators, and to have an equal opportunity to strike and rank arbitrators, pursuant to the FINRA Code of

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[1] FINRA is a self-regulatory organization that is owned and operated by its members, who are securities broker-dealers.

Arbitration Procedure (the "Code").[2] Consequently, the arbitration award was properly vacated pursuant to 9 U.S.C. § 10(a)(4) because the arbitrators were not selected in accordance with the parties' agreement.

Upholding the trial court's order is imperative for protecting the interests of the investing public. Most disputes involving individual investors are heard in FINRA arbitration, the dispute resolution forum that the securities industry universally requires in pre-dispute arbitration agreements to be used by public investors in the event of a dispute between the investor and an industry member. When investors agree to FINRA arbitration, they are bargaining for a fair, equitable, and efficient process, governed by the detailed procedures in the Code, to hear and resolve any disputes that might arise with their financial professionals. Denial of a fair process puts the life savings and retirement savings of working families and the elderly at risk, and subjects them to abuse by unscrupulous financial advisors without any meaningful form of redress. PIABA attorneys are therefore deeply concerned and involved in ensuring fairness and impartiality in the FINRA arbitration process.

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[2] The relevant sections of the Code governing the process by which arbitrators are appointed in a FINRA arbitration and the procedures on party objections to proposed arbitrators are important in this Court's evaluation of this case. The entire Code is available on the FINRA website at https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-12000. The particular Rules at issue in this case are Rules 12400, 12403, and 12407.

Notably, there has been Congressional interest in the issue on which PIABA submits this Brief. On February 9, 2022, Senator Elizabeth Warren and Representative Katie Porter wrote to FINRA regarding the important issues raised by the trial court's order.[3] FINRA responded by letter of February 21, 2022.[4]

DISCUSSION

Vacatur Is Warranted Because the Arbitrators Were Not Appointed in Accordance With the Parties' Arbitration Agreement

An arbitration award may be vacated under the Federal Arbitration Act ("FAA") in cases where the arbitrators have exceeded their powers. 9 U.S.C. § 10(a)(4); Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir. 1991). Section 5 of the FAA, 9 U.S.C. § 5, provides that, where a method for appointing arbitrators is set forth in the parties' contract, that process shall be followed. Consequently, courts nationwide have consistently held that arbitration awards made by arbitrators who were not appointed in accordance with the methodology set forth in the parties' arbitration agreement must be vacated because such arbitrators have necessarily exceeded their powers. Soaring Wind Energy, LLC v. Catic USA, Inc.,

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3 https://www.warren.senate.gov/imo/media/doc/2022.02.09%20Letter%20to%20FINRA%20on%20Wells%20Fargo%20Scandal%20(1).pdf

4 https://www.warren.senate.gov/imo/media/doc/FINRA%20Response%20to%20Warren-Porter%20(2.21.22).pdf

946 F.3d 742, 755 (5th Cir. 2020); Poolre Ins. Corp. v. Organizational Strategies, Inc., 783 F.3d 256, 263 (5th Cir. 2015); Hugs & Kisses, Inc. v. Aguirre, 220 F.3d 890, 893 (8th Cir. 2000); Cargill Rice, Inc. v. Empresa Nicarajuense Dealimentos Basicos, 25 F.3d 223, 225-226 (4th Cir. 1994); Szuts, *supra,* 931 F.2d at 831-832; Avis Rent A Car System, Inc. v. Garage Employees Union Local 272, 791 F.2d 22, 25 (2d Cir. 1986)). This is because the arbitration selection process, including the methodology of appointments and the sources of lists of potential panelists, are all material terms of the parties' agreement. Poolre, *supra,* 783 F.3d at 263; Cargill, *supra,* 25 F.3d at 226.

For example, in Szuts, *supra,* the Eleventh Circuit reversed the trial court's confirmation of an arbitration award, finding that "[b]ecause the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their authority under the arbitration agreement." Szuts, *supra,* 931 F.2d at 831-832. Thus, an order issued by a panel of only two arbitrators was vacated.

Similarly, in Cargill, *supra,* the Fourth Circuit vacated an arbitration award because the arbitrators were not mutually selected by the parties, as provided for in the arbitration agreement. That court expressly stated, "[a]rbitration awards made by arbitrators not appointed under the method provided in the parties' contract *must be vacated*." Cargill, *supra,* 25 F.3d at 225-226 (emphasis added).

The Fifth Circuit reached the same conclusion in affirming the trial court's decision to vacate an arbitration award because the arbitrator had not been appointed by the Anguilla B.W.I. Director of Insurance, as specified in the parties' agreement. Poolre, *supra,* 783 F.3d at 263-264, citing 3 Thomas H. Oehmke & Joan M. Brovins, *Commercial Arbitration* § 61:6 (2014) for the proposition that "The arbitral selection process is a material contract term, including methodology of appointment, source of the list of potential panelists, ... and more."

The award in this case was properly vacated because the arbitrators here were not selected in accordance with FINRA's rules and its neutral list selection process, the methodology provided for in the parties' agreement.

Since the Supreme Court's 1987 decision in Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987), the overwhelming majority of disputes between individual investors and securities firms and advisors have been resolved by compulsory arbitration.[5] It is nearly impossible for an ordinary public investor to open or maintain an account at a brokerage firm without agreeing to arbitrate

[5] See Jill Gross & Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, J. Disp. Resol. 349, 350-51 (2008) ("arbitration in forums sponsored by the securities industry has been the primary mechanism for the resolution of disputes …").

disputes with the brokerage firm and its professionals.[6] The vast majority of those arbitrations are administered by FINRA.

Congress and the SEC have entrusted much of the regulation of the securities industry to FINRA. Webb v. Frawley, 858 F.3d 459, 460 (7th Cir. 2017) ("FINRA is … authorized by Congress to protect America's investors …"). With FINRA arbitration all but eliminating court as the forum in which an individual investor can assert rights against investment industry firms and professionals, the process of FINRA arbitration must remain fair—both in actual practice and public perception. Arbitrator selection is at the heart of the FINRA assuring a fair and impartial arbitration process because of the enormous power afforded to arbitrators to resolve disputes.[7]

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6 See, letter from Robert W. Cook, President and Chief Executive Officer, FINRA, dated February 21, 2022, to Sen. Elizabeth Warren and Rep. Katie Porter, at p. 1 ("broker-dealers and investment advisers often require their customers to enter into agreements to arbitrate disputes…"); see also Gross & Black, *supra*, J. Disp. Resol. at 352, n.14 ("[t]o open an account with virtually any broker-dealer, investors must sign an agreement that contains a clause requiring … arbitration").

7 Investors often doubt the fairness of securities arbitration. In their 2008 study, Professors Gross and Black found that "63% of customers did not believe that, overall, the process [of securities arbitration] was fair." Gross & Black, *supra*, J. Disp. Resol. at 350-51. FINRA itself recognizes the importance of the public perception of fairness in FINRA arbitration of investor disputes. FINRA proposed current FINRA Rule 12403 regarding arbitrator selection partly in response to concerns about "a perception that FINRA Dispute Resolution's forum was not fair to customers." Securities and Exchange Commission Release No. 34-70442, p. 3, September 18, 2013.

Here, the parties agreed that "all disputes or controversies" between them "shall be determined by arbitration conducted before, and only before, an arbitration panel set up by either [sic] the Financial Industry Regulatory Authority ("FINRA") in accordance with its arbitration procedures." (V2-104, ¶ 5). Those arbitration procedures are set forth in the Code, and Rule 12400 of the Code provides that FINRA's computer system shall generate, on a random basis, lists of arbitrators from FINRA's rosters for the selected hearing location for each proceeding. The parties will then select their panel through a process of striking and ranking the arbitrators who appear on those lists. (Rules 12400, 12403).

Despite the Code provisions setting forth exactly how arbitrator candidates will be identified and presented to the litigants, FINRA failed to abide by those Code provisions in two meaningful regards.

First, the trial court found that the foregoing process was not followed in this case insofar as counsel for Appellants disclosed, soon after FINRA provided the parties with its list of proposed arbitrators, that he had a verbal agreement with FINRA that at least three arbitrators he did not like would not "have the opportunity to serve on any one of my cases." (V2-156-57). The trial court found that this agreement had not been previously disclosed to the Appellees or their counsel. (V5-1233). It only came to light because one of those arbitrators accidentally appeared on the neutral computer-generated list. (Id. at 1254).

The second manner in which FINRA's selection of arbitrator candidates ran afoul of its Code provisions was revealed by way of its February 21, 2022 letter to Senator Warren and Representative Porter, in which FINRA indicated that its staff has virtually unfettered discretion to remove arbitrators from the computer-generated lists for perceived bias without notifying the parties.[8] While FINRA's stated purpose of allowing staff to review the computer-generated neutral list for conflicts that would not be identified by the computer program itself is a noble one, *nothing* in the Code provides for FINRA to so act. Nor would participants in FINRA's arbitration program have any reason to understand or know that FINRA would so act. Nor would FINRA's participants have any understanding of what standards FINRA uses to gauge conflicts sufficient to warrant the removal and replacement of arbitrator candidates before the list is distributed to the parties.

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[8] FINRA also acknowledged, in its letter to Senator Warren and Representative Porter, that it removed an additional two arbitrators from the computer-generated lists in the Leggett case, solely because they happened to hold deposit accounts with Wells Fargo Bank. (FINRA Ltr. to Warren and Porter, p. 6). This previously undisclosed arbitrator "cleansing" process has the effect of potentially excluding dozens, if not hundreds, of neutral and qualified arbitrators in cases involving large financial institutions such as Appellant Wells Fargo because most people do their banking and obtain their mortgage loans and credit cards through just a few financial institutions. There is no reason to believe that an arbitrator is necessarily going to be biased for or against a broker-dealer solely because they have a bank account, home mortgage, or credit card with an affiliated entity. In that regard, PIABA respectfully submits that it should be up to the parties and their counsel, and not FINRA, to decide if having a bank account or home mortgage with an affiliated entity is grounds for disqualifying an arbitrator.

Rather, FINRA states that its staff can remove an arbitrator for "other reasons affecting the arbitrator's ability to serve."[9] That standard is so broad that it could encompass virtually anything, including the removal of the three arbitrators who had previously ruled against Appellants from cases involving Appellants' counsel. Indeed, the wide discretion which FINRA gives to its case administrators and other staff members to surreptitiously remove arbitrators from the computer-generated lists is precisely what allowed for the verbal agreement with Appellants' counsel that is at issue in this case.

The parties agreed to arbitration in accordance with the Code. This was done with the reasonable expectation that FINRA would follow its own rules as set forth in the Code. But FINRA failed to follow its rules in this case because: (a) as the trial court found, FINRA agreed to always remove three arbitrators of Appellants' counsel's choosing from the computer-generated lists; and (b) it actually removed one of those three arbitrators from the computer-generated lists. There is no rule in the Code which authorized FINRA to enter into an agreement with any counsel to always remove arbitrators who had previously ruled against him, or to remove one of those arbitrators in this case. Consequently, Appellees did not receive what they bargained for when they agreed to arbitrate their dispute in accordance with the Code.

[9] FINRA Ltr. to Warren and Porter, p. 3.

There should be no question that, as a matter of fundamental fairness, the procedural rights of each of the parties in a FINRA arbitration conducted under the Code must be equal. If the selection process in a FINRA arbitration is conducted with one side's lawyer having the private assurance before the parties receive the lists under Rule 12403(b) that arbitrators who have ruled against that lawyer in the past cannot serve on the panel in a current case, the procedural rights of the parties in the arbitration are not equal. What is presented as a forum in which the parties have a fair opportunity to have their dispute adjudicated by an impartial arbitration panel has been improperly skewed.

Nothing in the Code provides or implies that a FINRA member firm or its counsel can insist upon assurance that certain arbitrators will never be candidates for selection in arbitrations involving that firm's counsel. Nonetheless, in this case, Appellant Wells Fargo, by selecting this particular counsel, had that very assurance. That is a plain violation of FINRA Rule 12403.

It is indisputable that an attorney could not be allowed to have a secret agreement with the clerk of court, and unknown to opposing parties, that certain judges would not be assigned to his or her case. Can a trial lawyer have standing assurance from the clerk of court that the lawyer's cases will not be assigned to any judge who has ruled against the lawyer in an earlier case? Can a medical malpractice lawyer regularly representing plaintiffs have assurance that people who work in the

insurance industry will never be placed in the jury venire for cases to be tried by that lawyer? The answer to these questions is "no." The same logic must apply in arbitrator selection in FINRA arbitration.

The arbitrators in this case were not appointed in accordance with FINRA Rule 12403, which is uniformly applicable to all FINRA arbitrations involving customer disputes. Appellants had an inappropriate advantage entering into the arbitrator selection process, knowing that three arbitrators who had previously given a favorable award to a customer would never be appointed as arbitrators in this case.

CONCLUSION

The process for the appointment of arbitrators was contrary to the FINRA Code of Arbitration Procedure, which the parties agreed would govern. As a result, the arbitrators exceeded their powers and the arbitration award was properly vacated under 9 U.S.C. § 10(a)(4). PIABA, as amicus, respectfully asks this Court to affirm the trial court's order.

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Respectfully submitted, this the 31st day of May, 2022.

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CERTIFICATIONS

(a) I, the undersigned attorney of record in the above-styled case, certify that the Brief filed herein complies with Rule 2.

(b) I, the undersigned attorney of record in the above-styled case, certify that the Brief filed herein complies with Rule 24.

(c) This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

This is to certify that I have this 31st day of May, 2022, caused a copy of the foregoing **Brief of Amicus Curiae Public Investors Advocate Bar Association in Support of Appellees** to be served on all counsel of record by the Court's eFAST system and by mailing same in the United States mail, postage prepaid and properly addressed as follows:

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