IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:02 CV 157

ROBERT FAZIO, et al.

Plaintiffs

v.

LEHMAN BROTHERS, INC., et al.

Defendants

MEMORANDUM IN SUPPORT OF MOTION OF ROBERT FAZIO, FAZIO INVESTMENT ONE, LIMITED and FAZIO INVESTMENT THREE, LIMITED TO VACATE THE APRIL 25, 2005 DISMISSAL ENTRY AND THE OCTOBER 20, 2004 ARBITRATION AWARD AGAINST THEM

Respectfully submitted,

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STATEMENT OF ISSUES TO BE DECIDED

I) **Where Movants could not have discovered by due diligence that for seven years the New York Stock Exchange had misclassified the Chairman of their arbitration panel as a Public Arbitrator, and such misclassification resulted in Movants' arbitration panel being composed of two Securities Industry arbitrators and one Public Arbitrator in violation of New Stock Arbitration Rule 607, and that misclassification was not revealed until over three months after the running of the ninety day statute of limitation to file a Motion to Vacate under the Federal Arbitration Act (9 U.S.C.S. §12), should this Court apply the Equitable Tolling Doctrine, and hear Movants' Motion To Vacate The October 20, 2004 Arbitration Award Against Them?**

II) **Where Movants could not have discovered by due diligence that for over a year prior to being chosen as a Public Arbitrator on their Arbitration Panel, and all during the pendency of their arbitration, attorney Michael King had intentionally concealed that he was under investigation for three bar complaints for multiple violations of the Code of Professional Responsibility, including dishonesty, theft, and misuse of clients' funds, was the subject of a formal Certified Complaint against him before the Board of Commissioner on Grievances & Discipline of the Supreme Court of Ohio which led to his recent disbarment, was in financial distress, and was simultaneously Chairman of an NASD arbitration brought by Frank Gruttadauria's Compliance Officer arising out of the same facts as Movants' arbitration, and such information was discovered five months after the running of the ninety day statute of limitation to file a Motion to Vacate under the Federal Arbitration Act (9 U.S.C.S. §12), should this Court apply the Equitable Tolling Doctrine, and hear Movants' Motion To Vacate The October 20, 2004 Arbitration Award Against Them?**

III) **Based on newly discovered evidence of the concealed misclassification of the Chairman of Movants' arbitration panel, and of the fraudulently concealed lack of character, fitness and qualification of the only Public Arbitrator, should this Court vacate its April 25, 2005, Order Of Dismissal pursuant to Federal Rule of Civil Procedure 60(B)(2), and grant Claimants' Motion To Vacate The October 20, 2004, Arbitration Award Against Them?**

IV) **Where the bias of the Arbitration Panel Chairman was concealed by his misclassification as a Public Arbitrator, and the pending disbarment, bias, lack of fitness, character and qualification of the remaining Public Arbitrator were intentionally concealed before and during the**

arbitration, should the October 20, 2004, Arbitration Award be vacated because of it was the product of fraud and undue means (9 U.S.C.S. §10(a)(1))?

V) Should the October 20, 2004, Arbitration Award be vacated due to the corruption and evident partiality of arbitrators Charles l. Marinaccio and Michael L. King (9 U.S.C.S. §10(a)(2))?

VI) Where the arbitrators failed to finish applying their rule or basis of decision to Movants' claims, should the October 20, 2004, arbitration award be vacated because the award is not final or definite (9 U.S.C.S. §10(a)(4))?

VII) Where the arbitrators awarded Movant Fazio Investment One, Limited, only $100,000.00 of its $1,411,500.00 account with Frank Gruttadauria, and awarded Movant Fazio Investment Three, Limited, none of its $6,064,972.00 account with Frank Gruttadauria, but awarded Carl Fazio, the managing partner of both accounts, the entire amount of the $1,100,000.00 account held in his own name, should the October 20, 2004 arbitration award be vacated because it is arbitrary and capricious?

VIII) Where Carl Fazio's account statements had more errors in them than his son Robert Fazio's, Carl Fazio managed more accounts with Frank Gruttadauria than Robert Fazio, and Carl Fazio was in daily contact with Frank Gruttadauria, and had more opportunity to detect fraud, yet the arbitrators awarded Carl Fazio, Sr., the entire amount of the $1,100,000.00 account held in his own name, but awarded Robert Fazio nothing, should the October 20, 2004 arbitration award be vacated because it is arbitrary and capricious as a matter of law?

IX) Where the arbitrators failed to award interest on liquidated sums of money, the arbitrators failed to fully compensate parties who, individually or through their managing partner Carl Fazio, were found to have detrimentally relied on Frank Gruttadauria, and the arbitrators failed to award money to pay the unanticipated taxes incurred by the virtual liquidation of assets triggered by their award, should the October 20, 2004 arbitration award should be vacated because it is the product of manifest disregard of the law?

X) Where the arbitration was conducted by a biased, misclassified and unqualified panel, in direct violation of the Constitution and Arbitration Rules of the New York Stock Exchange, in direct violation of the mandate

of the Securities and Exchange Act and the Securities and Exchange Commission to the New York Stock Exchange that it must promulgate and enforce rules and regulations which promote fair and equitable trade practices, and the New York Stock Exchange has failed and refused to provided Movants with new arbitration by a qualified, unbiased panel composed of two Public Arbitrators and one Securities Industry Arbitrator, should the October 20, 2004 arbitration award should be vacated because it is contrary to public policy?

SUMMARY OF THE ARGUMENT

This Motion is brought by Robert Fazio, Fazio Investment One, Ltd. ("Fazio One"), and Fazio Investment Three, Ltd. ("Fazio Three") only ("Movants"), seeking to vacate the Arbitration Award of October 20, 2004, with respect to their claims only. Carl Fazio, Sr., does not join in this Motion in his individual capacity, and Irene Dugger Fazio does not join in this Motion.

On October 20, 2004 an Arbitration Award ("the Award") was rendered in the arbitration conducted pursuant to the Special Arbitration Process ("SAP") entered into between the Fazio Claimants and Respondents Defendants S.G. Cowen Securities Corporation ("S.G. Cowen"), Lehman Brothers, Inc., J.P. Morgan Chase & Co., FSP, Inc., Financial Square Partners, L.P., and Hambrecht & Quist ("J.P. Morgan") (Exh. 1 and 2, attached). Lehman Brothers, Inc., settled during the pendency of the SAP. J.P. Morgan was not found liable. The Fazio Arbitration Panel was chaired by Washington, D.C. attorney Charles L. Marinaccio, who was joined by Texas brokerage house founder Dean Guerin, and Cleveland Attorney Michael L. King. (the "Fazio Arbitration Panel") Movants Robert Fazio and Fazio Three were awarded $0, and Movant Fazio One was awarded $100,000.00.

On February 11, 2005 S.G. Cowen filed its Motion to Dismiss With Prejudice this entire action, claiming all amounts awarded by the Fazio Arbitration Panel had been paid, Claimants' rights of appeal under the Federal Arbitration Act, 9 U.S.C.S. §1, et seq., had expired, and the Award was final. On March 25, 2005 Plaintiffs/Movants filed their Brief In Opposition. On April 25, 2005 this court journalized an Order granting S.G. Cowen's Motion to Dismiss, and dismissing all claims in this litigation.

On April 20, 2005, after the 90 day period set forth at 9 U.S.C.S. §9 for filing a Motion to Vacate the October 20, 2004 Award, Karen Kupersmith, Director of Arbitration at the New York Stock Exchange ("NYSE"), admitted in a telephone conversation with all counsel:

1) Charles L. Marinaccio, the Chairman of the Fazio Arbitration Panel, had been misclassified by the NYSE as a Non-Securities (Public) Arbitrator for the entire seven years he had been an NYSE arbitrator, and

2) the NYSE had reclassified him as a Securities Panel (Industry) Arbitrator nearly four months before, on December 29, 2004. (See Exh. 3, and Affidavits of Robert Fazio and Kevin T. Roberts).

The Fazio Arbitration Panel therefore consisted of two (2) Securities Panel (Industry) Arbitrators (Messrs. Guerin and Marinaccio) and one (1) Non-Securities Panel (Public) Arbitrator (Mr. King), in direct breach of NYSE Rule 607, which states in relevant part:

> "In all arbitration matters where the matter in controversy exceeds Twenty-Five Thousand Dollars, the Director of Arbitration **shall** appoint an arbitration panel which shall consist of no less than three (3) arbitrators, **at least a majority of whom shall not be from the securities industry**, unless the customer or non-member requests a panel consisting of a least a majority from the securities industry." (emphasis added)(Exh. 4)

On June 9, 2005 Movants learned the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ("the Board" or "the Board of Commissioners") had recommended the indefinite suspension of Fazio Arbitration Panel member Michael L. King's license to practice law. (Affidavit of Robert Fazio). Further investigation revealed Mr. King failed to disclose that, well over one year **before** being selected for the Fazio Arbitration Panel, he was the subject of three separate serious client complaints which lead to separate investigations by both the Cleveland Bar Association and Cuyahoga County Bar Association. These investigations prompted a formal complaint of misconduct against him on December 22,

2003 before the Board of Commissioners. On August 17, 2005, the Supreme Court of Ohio indefinitely suspended Mr. King's license. Cuyahoga County Bar Association v. King, 106 Ohio St. 3d 102 (2005) (Exh. 19(B).

Movants have also recently learned that throughout the pendency of the Fazio Arbitration, Mr. King: 1) did not maintain an office, 2) did not maintain a fixed address, 3) did not maintain a business telephone number, 4) failed to cooperate with the investigating Grievance Committees, 5) failed to appear for his deposition by the Cuyahoga County Bar Association the weekend before the final days of arbitration testimony, 6) signed the Fazio Arbitration Award the day after failing to appear at a two day hearing before the Board (which resulted in the recommendation that his law license be indefinitely suspended), and 7) failed to disclose he was simultaneously Chairperson of an NASD Arbitration panel in Melinda Trocano and Robert Semenak v. Lehman Brothers, Inc., a related case.[1]

This newly discovered evidence includes: 1) The NYSE not only clearly misrepresented Mr. Marinaccio as a Public ("Non-Securities Panel") Arbitrator, but then appointed him Chairman of the Fazio Arbitration Panel; 2) Mr. Marinaccio, a lawyer and former SEC Commissioner, with decades of experience in the Securities Industry, never objected to the NYSE's misrepresentation of his classification; 3) Mr. King fraudulently concealed pending misconduct charges, formal complaints, financial distress, and non-compliance with - if not contempt for - the legal proceedings against him, and 4) Mr. King's erratic and self-destructive behavior and disbarment demonstrates he lacked the fitness and character to serve on the Fazio

1 Trocano and Semenak worked at Lehman Bros. with Mr. Gruttadauria. Mr. Semenak, who was fired for failing to detect and prevent Frank Gruttadauria's years of criminal conduct, was the compliance officer at Lehman Brothers' Cleveland Branch. (Exh. 24). Mr. Semenak also testified in the Fazio matter regarding his belief in and reliance on Mr. Gruttadauria. (Hrg., Pp. 1106-1107, 1121-1123)

Arbitration Panel. This newly discovered evidence leads to the inescapable conclusion that it is no longer equitable that this Court's April 25, 2005 judgment should stay in force. This Court should apply the Equitable Tolling Doctrine, hear and grant this Motion to Vacate the October 20, 2004 Award as it affects Movants.

The Award against Movants should be vacated on the following grounds: 1) it was the product of fraud and undue means, namely, the concealment of the bias and lack of qualification of two of three arbitrators by the NYSE and by the Arbitrators themselves; 2) the corruption and evident partiality of the arbitrators; 3) the Award was not final or definite; 4) the Award was arbitrary and capricious; 5) the Award was the product of manifest disregard of the law; and, 6) continued enforcement of the Award is against public policy.

STATEMENT OF FACTS

A key inducement for the Movants' agreement to enter into the SAP was the condition, set forth at Section 3(d) of the SAP, that the entire arbitration hearing would be concluded within 180 days. (Exh. 2) (Affidavit of Robert Fazio). A further inducement for the Movants' agreement to submit their claims to the SAP was S.G. Cowen's willingness to admit its liability for Frank Gruttadauria's conduct during the years S.G. Cowen and Cowen & Company employed him. (Exh. 2, § 10). (Affidavits of Carl Fazio, Sr., (attached) and Robert Fazio, at ¶18).

Per its terms, the SAP was to be conducted under the NYSE Arbitration Rules ("the Rules" or "Rule")(Exh. 2, § 2). The Fazio Arbitration Panel was selected through the traditional method set forth in NYSE Arbitration Rule 607(3). (Exh.4) The NYSE Arbitration selected three arbitrators, two of whom the Rules require to be "Non-Securities" or "Public" Arbitrators. The

NYSE has complete control over the application process to become a NYSE arbitrator. It controls the qualifications for and the selection of arbitrators for its panels, and the classification of arbitrators as either "Securities" or "Non-Securities" arbitrators. (Exhs. 5, 6).

A. The NYSE Application, Qualification and Screening Process

Any person who seeks to be appointed to the NYSE's panel of arbitrators must complete the Arbitrator/Mediator Profile Form. (Exh. 6). Each nominee must be endorsed by his community, field, or profession, whose recommendation letters must include an attestation as to the nomimee's character and fitness. (Ibid).

Per the NYSE Guidelines for the Arbitrator/Mediator Profile Form, the Profile provides the exchange with the background information necessary to qualify arbitrators for service, and to classify them as either "Public" or "Securities" arbitrators. In addition, the profile "enables the parties to make an informed decision as to whether to exercise their challenges." (Exh. 6). The profile "serves as the initial disclosure of potential conflicts which you may have with the parties or counsel or witnesses on a particular case." (Ibid, emphasis added) The guidelines require a complete response to each question on the application: "be candid and err on the side of disclosure." (Ibid).

Question No. 1 on the Profile Form seeks to solicit information to ensure arbitrators are properly classified as "securities" or "public" arbitrators. "**Public arbitrators must be free, both in fact and appearance of close ties with the securities industries**." (Exh. 5, Question 1)

Question No. 4 on the Arbitration/Mediation Profile contains numerous subparts requiring applicants to disclose complaints, investigations, convictions, penalties, adverse findings, etc., by regulatory bodies. (Exh. 6) Question No. 4(e) inquires whether:

"[Any] state regulatory agency… ever:

(1) found you to have made a false statement or omission or have been dishonest, unfair or unethical?

***

(5) denied, suspended or revoked your registration or license… or disciplined you by restricting your activities?

(6) revoked or suspended your license as an attorney, accountant, or federal contractor?

Question No. 4(f) inquires in relevant part:

"Has any self-regulatory organization or commodities exchange:

(1) found you to have made a false statement or omission?

(2) found you to have been involved in a violation of its rules?

***

(4) Disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?

Question 4(h) inquires, in relevant parts:

"Have you been the subject of any… consumer-initiated complaint or proceeding that:

(1) Alleged compensatory damages of $10,000.00 or more, fraud, or wrongful taking of property?

(2) Was settled or decided against you for $5,000.00 or more, or found fraud with the wrongful taking of property?

Questions 4(i) is especially relevant here:

"(i) Are you now the subject of any complaint, investigation, or

proceeding that could result in a 'yes' to answer to parts (a)-(h) of this item?" (emphasis added)

B. The NYSE Arbitrator's Continuing Duty to Disclose

Every applicant to become an NYSE arbitrator does, by signing the application, swear or affirm that the information they disclose is "true and complete to the best of their knowledge." They further acknowledge they are "responsible for advising the NYSE of any changes to the above information," and "the NYSE reserves the right to reconsider the eligibility or employment of arbitrators at any time, and to remove arbitrators as it in its sole judgment deems appropriate." (Exh. 6)

Per Rule 610(a), "each arbitrator shall be required to disclose to the Director of Arbitration any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." This obligation is a continuing duty that "requires a person who accepts an appointment as an arbitrator to disclose, at any stage of the arbitration, any such interest, relationships or circumstances that arise or are recalled or discovered."

Per 610(d) The Director of Arbitration may remove an arbitrator prior to the commencement of the first hearing session based on information disclosed if the information is disclosed. If the arbitrator is not removed after such disclosure, the Director of Arbitration must disclose that fact as well.

C. Classification of Arbitrators

In addition to mandating that at least two of the panel members be from outside the securities industry, NYSE Rule 607 also provides guidance for the classification of arbitrators:

"(2) an arbitrator will be deemed as being from the securities industry if he or she:

i. is a person associated with a member, dealer, government securities broker, government securities dealer, municipal securities dealer or registered investment advisor, or

ii. has been associated with any of the above within the past five (5) years, or

iii. is retired from or spent a substantial part of his or her business career in any of the above or

iv. is an attorney… who devoted twenty (20) percent or more of his or her professional work effort to security industry clients within the last two(2) years.

Rule 607(b) invests the Director of Arbitration with unfettered discretion to select panel members:

(b) Composition of panels:

The individuals who shall serve on a particular arbitration panel shall be determined by the Director of Arbitration. The Director of Arbitration may name the chairman of each panel.

As Amended May 27, 2003, the NYSE's Guidelines for Classification of arbitrators include the following:

"In order to insure continued investor confidence in the arbitration process, the New York Stock Exchange has adopted the following policies with regard to the classification of securities industry and public arbitrators…:

1. Individuals who have close securities industry ties such as attorneys, … who routinely represent industry firms or individuals, **will either be reclassified as industry arbitrators or not be used**.

2. Individuals who have spent a substantial part of their business careers in the securities industry **shall always be classified as industry arbitrators.**

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"THESE GUIDELINES WILL BE USED BY THE NEW YORK STOCK EXCHANGE IN APPLYING RULE 607." (Exh. 5)

Though the NYSE enacted this reclassification protocol in May, 2003, they did not reclassify Charles L. Marinaccio until December 29, 2004 – over two months after the Fazio award.

D. Selection of the Fazio Arbitration Panel

On February 25, 2004, 104 days after the Fazios agreed to the SAP (which was to be concluded in 180 days), David L. Carey, Chief Arbitration Counsel of the NYSE Arbitration Department, selected three arbitration panel members: Michael L. King, Charles L. Marinaccio, and Edward Bradley. (Exh. 8). Mr. Marinaccio was designated as a member of the Non-Securities (Public) panel, as was Mr. King. Mr. Bradley was the only one classified as a Securities Panel Arbitrator. A "Redacted Neutral Profile" was provided for all three Arbitrators (Exhs. 9, 10, 13).

Mr. King's profile was last updated on October 21, 2003. With respect to Discipline problems, his answer was "None." (Exh. 9)

Mr. Marinaccio's profile states he has been a Director of Ameritrade from 1997 to the present, and an Industry Director of the Securities Investor Protection Corporation (SIPC), from 1996 to the present. Mr. Marinaccio's profile also contains his statement "I have had 33 years of high level experience dealing with financial industry and securities matters before administrative agencies, Congress and the Courts." As of February 25, 2004 Mr. Marinaccio's profile had last been updated on December 19, 2002. Mr. Marinaccio and Mr. Carey had conversations about his qualifications and potential bias prior to Carey's selection of Marinaccio. In a February 23, 2004 e-mail to David L. Carey, Mr. Marinaccio revealed that, during the nine years he was a partner at the Washington law firm of Kelley, Dry & Warren, he performed billable work for Defendant Societe Generale (parent of S.G. Cowen), and was a lobbyist for

Defendant/Respondent J.P. Morgan "for a number of years commencing about 1990." (Exh. 11). Prior to his selection he owned (but sold) substantial stock of J.P. Morgan. (Exh. 12).

At no time did Mr. Marinaccio object to his classification as a Non-Securities Public Arbitrator or attempt to change that classification. At no time did Mr. Carey of the NYSE, or anyone else from the NYSE, re-classify or object to the classification of Mr. Marinaccio prior to the issuance of the Award in this matter. And, at no time did Movants knowingly choose to have an arbitration panel consisting of two members of the securities industries and only one non-securities member. (Affidavits of Robert Fazio and Carl Fazio, Sr., ¶19).

On March 8, 2004 Respondent Lehman Brothers, Inc., exercised its peremptory challenge to remove arbitrator Edward S. Bradley. (Exh. 14) The NYSE replaced Mr. Bradley with John H. Finn III as the new Securities Panel Arbitrator, and the Fazios exercised their peremptory challenge of Mr. Finn. (Exh. 15) The NYSE in turn replaced him with Dean Guerin, a businessman from Dallas, Texas. (Exhs. 16, 17).

In a March 19th teleconference between and among counsel for the parties, David L. Carey announced that the NYSE had selected Mr. Marinaccio Chairman of the Fazio Arbitration Panel.

E. Fazio Abitration and Award

On April 15th, 153 days after the Fazios agreed to participate in the SAP (to be completed in 180 days), the Fazio Arbitration Panel held a conference in New York City. Two telephone "hearings" were held April 29th and May 11th. On May 4th and May 8th, the Fazio Arbitration Panel members held "teleconferences without the parties." (Exh. 1).

On May 17th, 185 days after the Fazios agreed to participate in the SAP, yet another entire day was devoted to motion practice. (Transcript of Fazio Arbitration Hearing - hereinafter

"Hrg., pp. __")[2] On May 19th -21st, there was opening statements and testimony. On June 17th there was another "hearing" but no transcript of any testimony. On June 18th, 21st, and 22nd there was witness testimony. On July 15th and August 30th the Fazio Arbitration Panel held telephone conferences without the parties. (Exh. 1)

On Tuesday, September 21st and the following two days, the final witnesses testified. On September 23rd, the Fazios submitted to the Fazio Arbitration Panel $1,307,027.06 in legal fees and expenses from Kohrman, Jackson & Krantz, $54,611.23 legal fees from Walter & Haverfield, and $370,420.00 for the fees and expenses of their expert Howard Wershbale. (Hrg, pp.2529 - 2531). On September 24th final arguments were made and the hearing concluded. The total transcript is 2,725 pages long.

On September 29th the Fazio Arbitration Panel held a teleconference without the parties. On October 8, 2004 post-hearing briefs were submitted. On Wednesday, October 20, 2004, the Arbitration Award was executed and distributed to the parties. (Exh. 1).

F. The NYSE Discloses its Misclassification of Charles L. Marinaccio

Unexpectedly, Karen Kupersmith, the Director of Arbitration at the NYSE, arranged an April 20, 2005 telephone conference call to all counsel representing the parties to the arbitration. Robert Fazio also participated. During that call, Director Kupersmith revealed the following information: 1) in the fall of 2004, the NYSE conducted a review of its classification of attorneys on its panels; 2) As a result of that review, Charles L. Marinaccio was reclassified from a Public Arbitrator to a Industry Arbitrator; 3) The NYSE had misclassified Mr. Marinaccio as a

2 A disc containing the entire transcript is being separately filed manually, in searchable E-Transcript format, for the Court's convenience.

member of the Non-Securities Panel since 1998; 4) The NYSE knew that, when Mr. Marinaccio first became an NYSE arbitrator in 1998, he had been a member of the Board of Directors of Ameritrade since 1997, and an Industry Director at the Securities and Investor Protection Corporation since 1996. (Affidavits of Robert Fazio and Kevin T. Roberts)

G. The Purposeful Concealment and Recent Disclosure of Michael King's Professional Misconduct and Disbarment, and Lack of Fitness and Qualification to Serve on the Fazio Abitration Panel

On or about June 9, 2005 the Fazios learned that The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio had recommended that Michael L. King be indefinitely suspended from the practice of law. (Affidavits of Kevin T. Roberts, Esq. and Robert Fazio). Further investigation revealed that this recommendation and vote occurred on December 20, 2004 and was the result of investigations commenced in early 2003, in response to complaints by clients who claimed Mr. King had unlawfully taken their money.

On June 10, 2005 Movants received the file in GEN-2004-2141 from the Supreme Court of Ohio. (Exh. 19A) On June 14, 2005 Movants received the Complaint and Certificate in Case No. 03-116, filed December 22, 2003 before the Board of Commissioners (Exh. 18A), and the Amended Complaint and Certificate in the same case filed April 6, 2004 (Exh. 18B)[3]. (Ibid.). These files, and further investigation, revealed the following specific facts:

Foreclosure

The public records of Cuyahoga County show that in the Fall of 2002, Aames Funding Corporation obtained a judgment against Michael L. King and his wife. Their home was ordered

3 Exhibits 18A and 18B, the original and Amended Complaint and Certificate, share a common set of Exhibits. These shared Exhibits are filed in this Court with Exhibit 18B, and, where necessary, identified by referring first to Exhibit 18A or 18B, then, separated by a hyphen, the shared exhibit, e.g. 18A-1, 18B-2.

sold at foreclosure and Aames Funding was the successful bidder at an auction on the King home located at 3801 Bendemeer, Cleveland Heights, Ohio, the address Mr. King kept on file with the Supreme Court of Ohio and the local bar associations. (Exh. 20).

The Alma L. Overton Complaint

On February 27, 2003 an attorney for the Estate of Alma L. Overton filed a complaint against Mr. King before the Certified Grievance Committee of the Cleveland Bar Association for paying himself $5,000.00 in fees from the Estate for work which was never itemized and/or approved by the Probate Court, or approved by the client. And, his check for court costs was dishonored. (Exhs. 18B-10, 18B-11, Exh. 19, pp. 9-11) Mr. King failed to respond to the Probate Court's telephone calls informing him the check had been dishonored, and did not respond to two requests that he return the sum of $5,200.00 to the Estate. (Ibid.) He finally returned the money on May 14, 2003. (Exhs. 18B-12, 18B-13). On August 27, 2003 the Certified Grievance Committee of the Cleveland Bar Association found probable cause to believe that Mr. King violated the Code of Professional Responsibility in the Alma Overton matter, and requested the appointment of a Trial Committee for proceedings against Mr. King before the Board of Commissions of the Supreme Court of Ohio. (Exh. 18B-14).

Lack of Address, Office, or Phone Number

On August 18, 2003 an investigator reported to the Grievance Committee of the Cleveland Bar Association that: Mr. King had not been seen at his former office address for four (4) months, and "just disappeared" leaving no forwarding phone number or address; mail that had been received was returned to the post office; persons at his law office did not know if he still practiced law, or where. (Exh. 18B-18) The investigator also found Mr. King was no longer at his residence address at 3801 Bendemeer, Cleveland Heights, Ohio (his address of record with

the Cleveland Bar Association), and no neighbor there had any knowledge of his whereabouts. Mail received at the Bendemeer address had been returned to the Post Office. His former office indicated to the investigator that Mr. King's mail was being forwarded to P. O. Box 221312 in Beachwood, Ohio. The P. O. Box, set up by Mr. King, was in the name of an apparently fictional business known as Premier Supply. (Ibid.). Certified Mail service of the Cleveland Bar Association's August 27, 2003 letter to Mr. King was returned unclaimed from P. O. Box 221312. (Exhs. 18B-15, 16, 17).

The Gail Robertson Complaint

Sometime prior to March 11, 2003, client Gail D. Robertson complained that Mr. King received five (5) payments from January through April of 2000, totaling $800.00 to file a bankruptcy petition for her, but never filed such petition. After the Cleveland Bar Association began investigating the matter, Mr. King refunded his client the $800.00. (Exh. 18B, Count VI, Exh. 19A, p. 11)

The Thomas Hartley Complaint

On or about September 1, 2000 Michael L. King undertook the representation of Thomas D. Hartley to initiate a discrimination claim, and received from him on that date $1,500.00. (Exh. 18B, pp. 1-4, Exh. 19, p. 5, para. 2) Hartley understood that King was representing him on a contingent fee arrangement, though Hartley was not provided a written fee agreement. The $1,500.00 was deposited into a non-IOLTA account. Mr. King gave no accounting of the funds to Hartley. Mr. King filed Mr. Hartley's claim for employment discrimination but without the client's consent, also filed a Notice of Dismissal without prejudice after Mr. Hartley's deposition revealed that he had previously brought his claims before the Ohio Civil Rights Commission. (Ibid.) Approximately one month after he filed the Notice of Dismissal, Mr. King informed the

client by letter that he had "pulled back out the Complaint briefly," and was exploring other action and other potential defendants. (Exh. 18B-3) Mr. King did not respond to the client's attempts to speak to him by telephone after the deposition, and eventually referred the matter to another unidentified lawyer. (Exh. 18A, ¶15).

In response to Thomas Hartley's grievance, the Certified Grievance Committee of the Cuyahoga County Bar Association sent a letter on March 10, 2003. (Exh. 18B - 6). On June 9, 2003 the investigating attorney re-sent the March 10, 2003 letter, noting Mr. King had not responded to numerous telephone calls seeking documentation in response to the grievance, and that he made no response to the March 10th letter. (Exh. 18B - 6). In undated letters containing no phone number or law office address, Mr. King responded to the Hartley complaint. (Exhs. 18B – 4 and 18B - 5).

In one of his letters, likely written in the summer of 2003, Mr. King states "currently, I am involved in a non-law business venture". (Exh. 18B – 4, para. 9).

December 22, 2003: Original Complaint of Misconduct

On December 22, 2003 the Cuyahoga County Bar Association filed its formal complaint against Michael L. King before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, for misconduct arising out of the Thomas Hartley complaint. The Complaint alleged Breach of Client's Confidence, Failure to Preserve Identity of Funds of a Client, Failure to Return Client Funds, Failure to Maintain Complete Records of Client's Funds, and Failure to Cooperate in Investigation of Misconduct. (Exh. 18A)

April 6, 2004: Amended Complaint Before the Board of Commissioners

On April 6, 2004 the Complaint against Mr. King before the Board of Commissioners was amended to include claims of misconduct arising out of the Gale Robertson and Alma

Overton complaints. Specifically, the following additional accounts were included: Failure to Deposit Client Funds in an IOLTA Account, Neglect of a Legal Matter, Failure to Cooperate, Failure to Deposit Client Funds in an IOLTA Account, Conduct Adversely Reflecting on Fitness to Practice Law, and Failure to Cooperate. (Exh.18B).

December 28, 2004: The Board Recommended Indefinite Suspension

On December 28, 2004 the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio filed its recommendation that Michael L. King be indefinitely suspended from the practice of law. (Exh. 19). The history of events leading up to that recommendation reveals Arbitrator King's continued pattern of concealment, evasion and contempt for legal proceedings. On January 23, 2004 Mr. King answered the original Complaint by the Cuyahoga County Bar Association, Pro Se. Thereafter, he retained counsel. A hearing on the complaint was set for July 19, 2004 in Columbus, Ohio. On July 2, just two weeks before the hearing, Mr. King's attorney withdrew as counsel, claiming a conflict of interest. Mr. King requested a continuance. The hearing was rescheduled to Monday, October 18, 2004 in Cleveland, Ohio. (Ibid.)

On Thursday, September 16, 2004 the Grievance Committee of the Cuyahoga County Bar was scheduled to take Mr. King's deposition. Mr. King did not appear for deposition. (Id.) On October 18, 2004 a panel selected by the Board of Grievances commenced a scheduled two-day, full hearing on the numerous claims, counts and complaints against Mr. King. Mr. King did not appear, nor did any attorney on his behalf. (Id.)

August 15, 2005: Michael L. King Is Indefinitely Suspended From The Practice Of Law

On August 17, 2005 the Supreme Court of Ohio indefinitely suspended Michael L. King from the practice of law (Exh. 19B)

The Fraudulent September 21, 2003 NYSE Update

When Mr. King updated his NYSE Arbitrator Profile on September 21, 2003, he falsely stated that he had no discipline problems. (Exh. 9) However, Mr. King was under a continuing duty to update his Arbitrator Profile, and should have disclosed to the NYSE, and all parties to the Fazio Arbitration, that he was actively under investigation from state regulatory bodies (the Cleveland Bar Association, the Cuyahoga County Bar Association and the Board of Commissioners of the Supreme Court of Ohio) for charges of taking money, fraud, dishonesty, ethics violations, etc., which could have led to the denial, suspension or revocation of his license (see Exh. 6, Question 4).

Continued Fraudulent Concealment

After the formal Complaint & Certificate against him was filed on December 22, 2003 before the Board of Commissioners, Mr. King did not disclose his discipline problems to the NYSE. Even after the Complaint & Certificate was amended April 6, 2004 to include charges arising out of complaints by two more clients, he still concealed any problems. Had Mr. King complied with his mandatory duty to disclose anytime before May 19, 2004, it would have resulted in his removal prior to the commencement of any testimony. Instead, Mr. King participated in conferences, heard testimony, and rendered decisions from March through mid-September without mentioning a word about his disciplinary problems. On September 15, 2004, the day before the Cuyahoga County Bar Association was to take his deposition, for use at the October 18 – 19, 2004 Hearing before the panel assembled by the Board of Commissioners, and nearly seven months after he was selected for the Fazio Arbitration Panel, Michael King wrote an e-mail to David Carey at the Arbitration Department of the NYSE:

"Dave – Here it is.

'I am the subject of a professional grievance, the genesis of which is I did not appropriately handle various closed files. I deny any wrongdoing, and affirmatively state that my ability to fairly and effectively continue in this arbitration is unaffected.'"
(Exh. 22).

The next day, September 16, 2004, David Carey, in turn, forwarded Mr. King's e-mail message to counsel for the parties to the Fazio Arbitration. (Ibid).

Neither Arbitrator King nor Mr. Carey disclosed the iceberg of underlying facts lying below Mr. King's knowingly false statement about a single "professional grievance," namely, the nature of the Complaints against him, that he had been under investigation for nineteen months, that Mr. King's deposition was scheduled to be taken the very day Mr. Carey transmitted Mr. King's e-mail, and that a panel had been assembled by the Board of Commissioners for a hearing on October 18–19, to decide whether Mr. King was fit to practice law in Ohio.

Mr. King's September 15, 2004, misstatement that he was the subject of a single "grievance" was forwarded to counsel for the parties just three business days before the final three days of testimony before the Fazio Arbitration Panel (September 21-23, 2004)(Hrg., pp.1605-2586), which were followed by final argument the next day (Hrg., pp.2592) By the time Mr. King mentioned his "grievance," the arbitration was in its midnight hour. The following had already occurred since the panel was assembled in March:

(1) the arbitrators had met by telephone conference four times;

(2) there had been a discovery hearing in April;

(3) seven of the ten full days of testimony, including opening statements, the testimony of Carl Fazio, Sr., Robert Fazio, Irene Fazio, Claimants' Expert Professor Tom Hazen of the University of North Carolina, and testimony

from other witnesses, some by affidavit and some by deposition (including Robert Semenak, the co-claimant in Melinda Trocano and Robert Semenak v. Lehman Brothers, Inc., the NASD arbitration chaired by Mr. King)[4] that they, too, had relied on Frank Gruttadauria;

(4) the panel heard over 1,600 pages of testimony and argument. (Hrg., pp.13-1604)

Per NYSE Rule 610, in the event that an Arbitrator becomes disqualified after the commencement of a hearing, the claimants have the choice of proceeding without that Arbitrator, or selecting a new Arbitrator to join the panel. Therefore, even if, on September 15, 2004, Mr. King had fully disclosed the truth of his personal and professional situation which would have immediately disqualified him, Movants would have been faced with two equally unacceptable choices: (1) continue the arbitration before two Securities Industry Arbitrators (Marinaccio and Guerin), or (2) further postpone the Arbitration testimony to select a new panel member. As of September 21, 2004 the hearing was resuming 313 days after Movants entered the SAP, or 133 days after the testimony was to be completed. It was too late to spend weeks selecting an entirely new Arbitration Panel member, who would have to review 1,600 pages of transcripts, hundreds of pages of expert reports, affidavits, and exhibits, and an enormous and complicated pleading file, to become effectively capable of sitting on the Fazio Arbitration Panel.

Nothing in Mr. King's benign September 15th e-mail concerning his "grievance" gave Movants' prior counsel, or counsel for any party, concern, and the hearing went ahead as

4 Mr. Semenak testified June 21, 2004 (Hrg., pp. 1105-1171), though he was originally appeared to testify in May. In May, when Mr. Semenak appeared but did not testify, Mr. King had a perfect opportunity to reveal that he was the Chairperson of the NASD Arbitration Panel which was scheduled to hear Mr. Semenak's claims against Lehman Brothers, Inc. (on October 7 and 8th, 2004). Instead, he said nothing. (Exh. 24)

scheduled on September 21st. (Exh. 23). None of the Claimants personally, including Movants here, received any notice of Mr. King's "disclosure" of the "grievance" against him. (Affidavits of Robert Fazio, and Carl Fazio, Sr., ¶10).

The inherent bias of persons who have been, or are, associated with the securities industry, is implicit in the mandate of NYSE Rule 607 that every arbitration panel shall consist of two Non-Securities industry members, and one Securities industry member. The tendency of securities industry panel members to vote in favor of the industry is well-documented. (Exhs. 25A, 25B, 25C, 26A, 26B) The misclassification of arbitrators as "public" when in fact they have long standing past and present ties and connections to the securities industry, is a matter of public controversy, and Congressional Investigation. (Ibid). The NASD has been pressured to remove all securities industry panel members altogether. (Ibid.) The NYSE and NASD, under pressure from investors, various state regulators, and the SEC, are both revising their classification requirements to make it much more difficult for persons with former industry ties and connections to be classified as a Public Arbitrator. (Exhs. 25A, 25B and 25C) But for Movants, these reforms are too little, too late.

There can be no doubt that had Michael L. King properly and timely disclosed the true nature and extent of his clients' complaints, the multiple investigations of his conduct, and the formal complaint against him before the Supreme Court of Ohio, he would never have been selected by the NYSE for potential membership on the Fazio Arbitration Panel or by the Fazio Claimants. (Affidavits of Robert Fazio and Carl Fazio, Sr., ¶12).

Movants were entitled to an arbitrator of the fitness and character required by the NYSE, one willing to abide by his ethical and contractual obligations of full disclosure of all relevant facts upon which they would make their decision to select him for their Panel.

Regrettably, and for whatever reasons, Mr. King was in obvious financial difficulty, took money from his clients, was untruthful with his clients, was not truthful or forthcoming with the Cleveland and Cuyahoga County Bar Associations' Grievance Committees, and has throughout these past two years, been virtually contemptuous of the legal process and his ethical and legal obligations.

As if these points needed any further demonstration, while Mr. King was a member of the Fazio Panel, he was simultaneously Presiding Chairperson of an NASD Arbitration Panel, in the matter of Melinda Trocano and Robert Semenak vs. Lehman Brothers, Inc., Cuyahoga County Case Number Case No. 02-07826, being heard in Cleveland, Ohio. The hearing was conducted on October 7th and 8th, 2004, just after the Fazio hearings ended September 24th. (Exh. 23) (n.b. October 8th 2004, was the date on which the Post-Hearing Briefs were filed in the Fazio Arbitration. (Exh. 1)). Mr. Semenak was the Compliance Officer at the Lehman Brothers, Inc. Cleveland Office who was terminated for failing to supervise Frank Gruttadauria. Mr. King never disclosed to the parties to the Fazio arbitration that he was simultaneously the Chairperson of this closely related arbitration. This is true even though the pre- hearing conferences in the Trocano/Semenak arbitration began July 14th, 2003 - over nine (9) months prior to Mr. King's selection for the Fazio Arbitration Panel. (Exh. 24). The Forum Fees of the Arbitrators in the Trocano/Semenak Panel were $9,600. Of this, 37.2%, or $3,576.47 would go to Mr. King. He was earning $475 per two-session day as Chairperson, while the other two arbitrators earned $400 per two session day. (Exhs. 24, 27).

Finally, it should be plainly stated that after having lost his home, with no office, fixed address or phone number, having taken various clients' funds, having seen his attorney in the bar investigations withdraw, Mr. King was in a state of dire financial and psychological

distress before, during, and after he served on the Fazio Arbitration Panel, as demonstrated by his failure to appear for his deposition on September 16, or the October 18th hearing, when his livelihood was at stake. Even as of last week, August 17, 2005, Mr. King's whereabouts were "unknown" to the Supreme Court of Ohio. Cuyahoga County Bar v. King, 106 Ohio St. 3d (Exh. 19B).

Clearly, Mr. King deliberately chose not to disclose information which would have prevented him from being selected for the Fazio Arbitration Panel and being paid $400 a day for the many days the Fazio Arbitration was sure to take, or which would have jeopardized his $475/day to chair the Trocano/Semenak arbitration. (Exhs. 24, 27, 28) He devoted more time to the Fazio and Semenak arbitrations than to defending his license before the Supreme Court of Ohio.

At the very least, the Fazios were entitled to an arbitrator whose mind could fully focus and concentrate on the difficult and complicated matters at issue in the Fazio case. Instead, they had an arbitrator whose concentration was diverted by depositions, hearings, and trials where he had to defend claims that he had stolen from his clients, mishandled funds, violated numerous Disciplinary Rules, and was unfit to continue to practice law. The fact that Mr. King never appeared to contest these charges, but spent September and October serving on the Fazio and Trocano/Semenak panels reveal a man who has simply given up on his profession, to become a securities arbitration panelist.

Evidence suggests Arbitration Panel members who vote in favor of the securities industry, are repeatedly chosen to be members of future panels. (Exh. 25A, p. 2, para. 3; Exh. 26A, p. 4, paras. 1-2) Mr. King has continuously voted in favor of the securities industry:

1) In the NASD arbitration between Cosmol Bordonaro, et al. vs. Merrill Lynch, Pierce, Fenner & Smith, Inc., et al., Case No. 01-02610, heard in Cleveland, Ohio, Mr. King voted with the Panel to deny all claimants' claims in their entirety. (Exh. 29).

2) In the Trocano/Semenak Arbitration, Mr. Semenak sought over $350,000, but was awarded only his unused vacation pay in the amount of $6,538, and the value of previously issued restricted stock units in the amount of $12,840. Ms. Trocano sought approximately $200,000 in damages, but was only awarded the value of her unused vacation pay in the amount of $4,331. (Exh. 24)

3) the Fazio claimants sought over $22.5 million dollars in damages, but were awarded $1.5 million, plus attorneys' fees and expenses none of which the Fazios ever received themselves. Movant Robert Fazio was awarded $0; movant Fazio Investment Limited Three was awarded $0; Irene Fazio, as Tenant-in Common with Fazio Investment One-Limited was awarded $0; and Fazio Investment One-Limited was awarded $100,000 on a claim of over $2.8 million. [5]

The recently discovered inherent bias, partiality and lack of qualifications of the arbitrators explains the illogical, inconsistent, and unjust Arbitration Award itself.

A. Carl Fazio's Award, and Fazio One and Fazio Three

Carl Fazio, Sr., was awarded $1,100,000.00 (Exh. 1) for the account held in his own name, but awarded $0 for the limited partnerships he managed with Mr. Gruttadauria.

Commencing in the mid-1990's, for estate planning purposes, Carl Fazio, Sr. formed two family limited partnerships: Fazio Investment One Ltd., ("Fazio One") and Fazio Investment Three, Ltd. ("Fazio Three")(Hrg., pp. 370-373, 1677-1700) The formation, and "seeding" of Fazio One began with $500,000 worth of Carl Fazio's stock. The gifting of limited partnerships in Fazio One began in 1997. By the end of 2000 all the family limited partnership shares in Fazio One were gifted to Carl Fazio's three sons, their wives, and their children. (Ibid.) Carl Fazio, Sr. was not a limited or general partner. The General Partner of Fazio One is Fazio Asset

[5]These are the results of arbitration awards in which Mr. King was a panel member, which are publicly available. Neither the NYSD or NYSE maintains the capacity to search its data base of arbitration awards by panel member.

Management ("FAM"), a corporation owned and operated by Carl Fazio, Sr., and his sons Robert Fazio, and Carl Fazio, Jr. Fazio Asset Management owns .001 % percent of the overall interest in Fazio One. Throughout the years when Frank Gruttadauria was the broker for the Fazio family and its Limited Partnerships, Carl Fazio, Sr. was the President of FAM, and the active manager of Fazio One and Fazio Three. (Hrg., pp. 372, 558, 1686)

At about the same time Carl Fazio, Sr., created and seeded Fazio One, Fazio One and Irene Dugger Fazio opened an account with Frank Gruttadauria as Tenants-In-Common. Irene Dugger Fazio contributed $500,000 cash to the account, and Fazio One contributed securities. (Hrg., pp. 362, 370-72) The two holders had equal shares. The last statement in the Tenants-In-Common account prior to Mr. Gruttadauria's disappearance was $2,823,058.07. (Hrg., pp. 1815-1817)

By the late 1990's, Fazio Investment Three had been formed. During this period, Carl Fazio, Sr., as President of FAM, was the active manager and representative of Fazio Three. (Hrg., pp. 374-378) By continuous interaction with and reliance on Frank Gruttadauria, Carl Fazio, Sr., was not only acting on his own behalf, but also as President of FAM, the General Partner of Fazio One and Fazio Three. As President of FAM, he was the representative of the entire family's interest in Fazio One and Fazio Three. One bond safekeeping account was the only account held in his name. The balance of the last statement for that bond safekeeping account prior to Mr. Gruttadauria's disappearance was $1,100,738.00.

Carl Fazio, Sr., also represented his wife's interest in the Fazio One/Irene Dugger Fazio Tenants-In-Common account. (Hrg., pp. 370-371) Altogether, Carl Fazio, Sr. was responsible for accounts with ending balances of over $9.8 million. He paid over $50,000 to the attorneys who created and implemented his estate plan. Along with other Claimants, he had paid and/or

incurred:

1) attorneys fees and expenses of Kohrman, Jackson & Krantz totaling $1,059,434.14, and $203,245.21, respectively;

2) expert fees of Howard Wershbale & Company totaling $366,589.00; and

3) litigation-related fees of Walter Haverfield of $54,611.23. (Hrg., pp. 2529-30)

He also paid Federal, State and local income taxes on gains from phantom sales of phantom equities. His estate plan, shown to be based on non-existent securities, failed. And any recovery he received in arbitration would be taxed as a single realization event, a liquidation. (Hrg., pp. 1801-1802, 1806-1807).

Yet the Fazio Arbitration Panel only awarded Carl Fazio, Sr. $1,100,000.00, the amount of the last balance in the only account held in his individual name, the bond safekeeping account. (Exh. 1) In order to award Carl Fazio, Sr. money, the Panel correctly concluded Carl Fazio, Sr. reasonably relied on Frank Gruttadauria and could not have discovered his fraud and criminal conduct. But, to repeat, Carl Fazio, Sr., was interacting with Mr. Gruttadauria on his own account, but also as the head manager of Fazio One and Fazio Three, whose Limited Partners (all his children, their spouses and his grandchildren) relied on Carl Fazio, Sr. for investment management. If, as the Fazio Arbitration Panel correctly concluded, the General Partner and Manager of Fazio One and Fazio Three reasonably relied on Gruttadauria, then the partnerships did, too. 17 O.R.C. § 1782.24(A), 17 O.R.C. § 1775.08, In re: Needleman, 204 B.R. 524, 527 (S. Dist. Ohio 1997). Since Carl Fazio, Sr. could not have been partially reliant on Frank Gruttadauria, any more than a woman can be partially pregnant, the Fazio Arbitration Panel should have awarded each limited partnership full damages. Instead they awarded Fazio One $100,000 and Fazio Three $0. The ending balance of Fazio One's half share of the Tenants-In-

Common account it held with Irene Dugger Fazio was $1,411,500.00 (exclusive of any accrued interest, etc.). The ending balance of the Fazio Three account was $6,064,972.00 (exclusive of any interest or other costs, etc.). The total value of these two funds for which Carl Fazio, Sr. was a manager is $7,476, 472.00. The amount the Fazio Arbitration Panel awarded was about 1/75th of that amount, which correlates to no amount testified to by any witness. These limited partnerships could not have been 1/75 reliant on Frank Gruttadauria, when their Managing Agent and General Partner was held to be 100% reliant on him.

B. Irene Dugger Fazio's Award

Irene Dugger Fazio was awarded $300,000. (Exh. 1) Therefore, the Fazio Arbitration Panel concluded she had reasonably relied on Frank Gruttadauria. However, like all the other amounts awarded by the Fazio Arbitration Panel, her award did not correlate to any number testified to by any expert or other witness. She had two accounts. She was the half owner of the Irene Dugger Fazio/Fazio Investment One Ltd. Tenants-in-Common account. The ending balance of her half share was $1,411,500.00. She also had IRA accounts. The total balance of the last IRA statements was $259,237. (Hrg., pp. 1803, 1811-1812) The Fazio Arbitration Panel's award to Irene Dugger Fazio for her IRA accounts was $41,000 **more than** the full value of her IRA and personal accounts. Awarding Irene Dugger Fazio $300,000 on her individual accounts is inconsistent with the Panel's own rulings. The Arbitration Panel expressly denied any award for interest on any award, or any amount for taxes, and attorneys' fees and experts' expenses were separately awarded. (Exh. 1) More importantly, she is the only claimant awarded the full amount she asked for on any account. Yet, the same panel awarded her $0 on her largest account, the one she funded with $500,000 in cash: the account she held as Tenants-In-Common with Fazio One.

Like Carl Fazio, Sr., Irene Fazio either did or did not reasonably rely on Gruttadauria for all her accounts. Therefore, if the Fazio Arbitration Panel awarded all she asked for on one account, and then some, it should have awarded her all she asked for on all three of her accounts, including her Tenants-In-Common account with Fazio One. And, since she and Fazio One received the same account statements from Gruttadauria for their Tenants-In-Common accounts, both should have been awarded the full amount of their claims. Yet, the Panel only awarded Fazio One $100,000 on that common account.

C) Denial of Any Award to Robert Fazio

Robert Fazio relied on Frank Gruttadauria to the same degree as his father. They shared the same office, had the same accountant, and saw each other daily. They both spoke with Frank Gruttadauria, golfed with him, had dinner with him. (Hrg., pp. 316-322, 347, 477-479, 947-949, 1192, 1206-1210) They both knew Gruttadauria since he was a young man. Gruttadauria told them both they were doing well and should withdraw money from their accounts, and when they did, Gruttadauria always made sure they got their money. The Fazio Arbitration Panel heard from witnesses in the brokerage houses, the most prominent Cleveland banks, and the highest social and business circles in Cleveland, and even Gruttadauria's own compliance officer, Mr. Semenak, all of whom testified they relied completely and absolutely on Frank Gruttadauria, and never suspected any wrongdoing. (Hrg., pp. 1121-1123, 1394-1418, 1472-1487, 1607-1621, 1832-1944)

Carl Fazio, Sr. began investing with Frank Gruttadauria in 1987. Mr. Gruttadauria was "like a son" to Carl Fazio, Sr. (Hrg., pp. 316-322, 947-949) For several years, Robert Fazio saw, and discussed with his father, the results that Frank Gruttadauria was producing for Carl Fazio, Sr. (Hrg., pp. 1198-1199) These results, in the forms of oral and

written statements, were intentionally falsified by Frank Gruttadauria to induce other investors to become clients and customers of Frank Gruttadauria. In 1990, after several years of being induced by these fraudulent statements, Robert Fazio began investing with Frank Gruttadauria. (Hrg., p. 1203) Over the years, Robert Fazio invested more funds with Frank Gruttadauria. (Hrg., 1198-1206) At his request, Gruttadauria maintained a basic bond portfolio for him and an initially small equities folder. On Gruttadauria's recommendation, Robert Fazio primarily invested in only three non-bond equities: 1) a First Executive Bank "Sinking Fund," which produced extraordinary results, 2) Sun Microsystems, and 3) Cisco. Sun and Cisco were some of the highest returning stocks in the technology boom of the late 1990s, producing net returns averaging high double, and even triple digit percent yearly growth. (Hrg., pp. 1199, 1225-1226)

In contrast to his father, Robert Fazio was a very conservative investor, preferring "safety in money," made very few active trades. (Hrg., 1195-1196) He tracked the gains of the two or three stocks in his equity portfolio by checking the values of his positions in the newspaper and through the internet. In further reliance on Frank Gruttadauria, he also opened accounts for his children. (Hrg., p. 1217)

Robert Fazio was a victim of Frank Gruttadauria. He lost his own $2,374,517.85 account with Gruttadauria. (Hrg., pp. 1284-1285) And, Robert Fazio was and is a Limited Partner of Fazio One. His 7.87% ownership interest of the $1,411,652.90 final Fazio One statement balance was worth $111,097.08.

Robert Fazio's limited partnership interest in Fazio One was determined to be virtually worthless. The Arbitration Award of $100,000.00 to Fazio One on an account valued at $1,416,152.90 was equivalent to paying seven (7) cents on the dollar (i.e., even with this award, he lost over $100,000.00 in Fazio One). His wife and children lost over $400,000.00 as well, a

family loss of over one-half million dollars, over three and one-half years ago. On top of these direct losses were loss of interest, overpayment of taxes on phantom gains, costs of borrowing money to pay ongoing expenses, attorneys fees, and other damages.

Yet, Robert Fazio received no award at all for the loss of his $2,374,000.00 account, or his $100,000.00 plus share of Fazio One, or any of his other damages. The Fazio Arbitration Panel provided no explanation whatsoever for this complete miscarriage of justice, and none can be gleaned from the Fazio Arbitration Panel's illogical, arbitrary and capricious decision.

D) The Fazio Arbitration Panel Did Not Award Any Interest.

At the time of the decision, it had been almost three years since Frank Gruttadauria revealed his thievery and fraud. Under the law of Ohio, as almost anywhere, interest is due on awards of liquidated sums of money. Ohio Revised Code §1343.03; Society Corp. v. American Casualty Co., 1993 U.S. Dist. LEXIS 20173 (N. Dist. 1993).

E) Improper Behavior By the Arbitrators

In the last few days of the Hearing, both the Chairman Mr. Marinaccio and Mr. Guerin (the only properly disclosed "Securities Industry" Panel Member) brought cameras to the Hearing, and took pictures of the defense lawyers. They did not take pictures of any of the Fazios' lawyers. The arbitrators also slept through substantial parts of the testimony. (Affidavits of Robert Fazio and Carl Fazio, Sr., ¶¶ 16, 17).

LAW AND ARGUMENT

I) UNDER THE EQUITABLE TOLLING DOCTRINE, THIS COURT SHOULD HEAR MOVANTS' MOTION TO VACATE THE OCTOBER 20, 2004, ARBITRATION AWARD.

The facts in this case warrant application of the Equitable Tolling Doctrine to allow Movants to seek vacatur of the Award, notwithstanding the three-month period by which a Motion to Vacate an award under 9 U.S.C.S. § 12 has already passed. The Sixth Circuit Court of Appeals has held that a trial court may examine the facts of a particular case, and conclude that the Doctrine of Equitable Tolling may toll the three-month limitation period set forth at 9 U.S.C.S. §12:

> "The Supreme Court has long held that the **doctrine of equitable tolling** is read into every federal statute of limitations."

Merrill Lynch v. Berry 92 Fed. Appx. 243, 248 (6th Cir. 2004), U.S. Appellate LEXIS 3890,(copy attached) citing, Holmberg v. Armbrecht, 327 U.S. 392, 397, 90 L. Ed. 743, 66 S. Ct. 582, 585 (1946); Honda v. Clark, 386 U.S. 484, 501, 18 L. Ed. 2d 244, 87 S. Ct. 1188, 1197 (1967); Zipes v. Trans World Airlines. Inc., 455 U.S. 385, 394, 71 L. Ed. 2d 234, 102 S. Ct. 1127(1982).; Hallstrom v. Tillamook County, 493 U.S. 20, 27, 107 L. Ed. 2d 237, 110 S. Ct. 304, 309 (1989): and Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95-96, 111 S. Ct. 453, 457, 112 L. Ed. 2d 435 (1990).

> "This court has recognized that the three months limitation period in 9 U.S.C. §12 is a statute of limitations."

See Occidental Chemical Corp. v. Int'l Chemical Workers Union, 853 F.2d 1310, 1313 (6th Cir. 1988) and Smart v. Ellis Trucking Co., Inc., 580 F.2d 215, 219 (6th Cir. 1978).

Though equitable tolling is most often based on adverse-party fraud, adverse-party fraud is not the only possible equitable reason to toll a limitation period:

> "We generally consider several non-exclusive factors to decide whether to toll: 1) the movant's lack of actual or constructive notice of the filing requirement; 2) the movant's diligence in pursuing his rights; 3) an absence of prejudice to the non-movant: and 4) the movant's reasonableness in remaining ignorant of the filing requirement. All factors need not be present, but the third factor alone cannot justify tolling." Merrill v. Berry, supra, at 246 (citing Vroman v. Brigano, 346 F.3d 598, 601 (6th Cir. 2003)).

Fraud by an arbitrator is grounds for vacatur. (Ibid.).

Here, Movants have been diligent in pursing their rights based on newly discovered evidence. The misclassification of Charles L. Marinaccio was revealed to them for the first time on April 20, 2005. And, Movants had no cause to suspect Mr. King, much less investigate the record and circumstances leading up to the indefinite suspension of his license to practice law, until that recommendation was first revealed to them June 9, 2005.

The NYSE does not make public the information upon which it bases its classification of any given arbitrator. (Exh. 32, p. 2) The NYSE does not publicize its lists of Non-Securities or Securities Panel arbitrators. Its classification of any given arbitrator is unknown to anyone until and unless they are a party to an arbitration in which the "Redacted Neutral Profile" of any given arbitrator is sent to the parties. Therefore, it was not possible for Movants to know that the NYSE had misclassified Mr. Marinaccio as a Non-Securities Arbitrator since his application to become an arbitrator was accepted by the NYSE back in 1998. Nor could Movants have discovered that in the fall of 2004 (even as Mr. Marinaccio was deciding Movants' fate), the NYSE was internally re-examining its prior classification of arbitrators. In short, Movants could not have discovered prior to April 20, 2005, by any manner or type of due diligence, that the NYSE had reclassified Mr. Marinaccio as a Securities Panel Arbitrator.

The NYSE never explained why it delayed the disclosure of its reclassification of Mr. Marinaccio until April 20, 2005, nearly three months **after** the otherwise applicable three month period for filing a Motion to Vacate had expired in January, 2005.

Similarly, Michael L. King's numerous intentional breaches of his positive duty to disclose the complaints against him, the pending investigations into his professional conduct, his chairmanship of a related arbitration, his financial distress, his lack of commitment to the law, and all the other facts and circumstances which disqualified him from serving on the Fazio arbitration panel, thwarted timely discovery of those facts. Movants were entitled to rely on Mr. King's continued silence from February 2003 onward, when he had a duty to speak, and his statement that, with respect to discipline problems, there were "none."

And, Mr. King's September 15th statement that he had merely been "the subject of professional grievances" arising out of certain "closed matters" would not and did not provide any counsel with cause to commence any investigation into Mr. King's background. No counsel representing any parties to the Fazio arbitration commenced such an investigation after Mr. King's September 15, 2004 statement. (Exh. 24) The timing and phrasing of Mr. King's September 15th Statement were calculated to prevent investigation by counsel for the parties. As importantly, Movants personally were unaware of Mr. King's statement that "professional grievances" had been filed against him, or David Carey's September 16th e-mail transmitting Mr. King's September 15th statement (Affidavits of Robert Fazio and Carl Fazio, Sr., ¶10, Affidavit of Irene Fazio, ¶ 5).

The timing of Mr. King's disclosure put all the parties in the position of having, at most, two business days (Friday, September 17, and Monday, September 20, 2004), to investigate Mr. King, and to decide whether to object to his continued presence on the Fazio Arbitration Panel.

On Monday, all the Fazio Arbitration Panel members and counsel were flying in from Texas, Washington, D.C., and New York to commence the final days of the Hearing. And, per NYSE Rule 607, if Mr. King were determined to be unqualified to further serve on the panel, the Fazios would have had to choose between continuing with a panel consisting of only two industry insiders or to postpone the conclusion of the arbitration for another three weeks to a month or longer in order for the NYSE to select a new public arbitrator, send that arbitrator's profile to the parties, and bring that panel member up to speed on the issues of the case.

In any event, even had Movants' prior counsel immediately investigated his entire disciplinary file commencing September 16, 2004, and objected to Mr. King's continued service on the panel, the award here would have been just as invalid: the two remaining panel members were both from the NYSE's Securities Panel, i.e. insiders.

The Court is required to consider the potential prejudice to the non-moving parties. The non-movants can hardly claim prejudice by the vacatur of an arbitration award in their favor which newly discovered evidence reveals was (as discussed in detail in Sections III-VIII, infra) procured by fraud, corruption, and undue means, where the arbitrators were evidentially partial, where the result was in manifest disregard of the law, arbitrary and capricious, and in violation of public policy.

Of the four factors to be considered by the court in applying the Equitable Tolling Doctrine, the only pivotal factor under these circumstances is whether Movants exercised due diligence in discovering the evidence now before the Court. Here, the evidence of the NYSE's seven year misclassification of Charles Marinaccio was concealed from the world, and even his proper reclassification was concealed by the NYSE until three months after the deadline to file a Motion To Vacate under 9 U.S.C.S. §12. And, Michael King intentionally and fraudulently

concealed absolutely critical evidence of his unfitness for over 20 months. The prejudice to Movants here is absolute; this is now their only appeal, recourse, or remedy, for the unconscionable deprivation of their legal rights which occurred at their arbitration.

This Court should apply the Equitable Tolling Doctrine, and grant Movant's Motion to Vacate the October 20, 2004 arbitration award.

II) BASED ON NEWLY DISCOVERED EVIDENCE, THIS COURT SHOULD VACATE ITS APRIL 25, 2005, ORDER OF DISMISSAL AND GRANT CLAIMANTS' MOTION TO VACATE THE OCTOBER 20, 2004, ARBITRATION AWARD.

The standard for granting a Motion For Relief From Judgment under Fed. R. 60(B)(2) is well-settled:

> "Pursuant to FED. R. Civ. P. 60(b)(2), a court may relieve a party from a final judgment if there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). FED. R. CIV. P. 60(b)(2). To be considered newly discovered evidence under Rule 60(b)(2), the evidence must have been in existence, or pertain to facts that existed, at the time of trial." Williams v. United Dairy Farmers, 188 F.R.D. 266, 272, 1999 U.S. Dist. LEXIS 14520 (S.Dist. Ohio 1999)(internal quotation marks omitted), citing Davis v. Jellico Community Hosp., Inc., 912 F.2d 129, 135 (6th Cir. 1990).

In order to prevail on a Rule 60(b)(2) motion the movant must demonstrate:

> "(1) that it exercised due diligence in obtaining the information and (2) [that] the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment." Williams v. United Dairy Farmers, 188 F.R.D. at 272, citing Good v. Ohio Edison Co., 149 F.3d 413 (6th Cir. 1998), Id. at 423 (quoting New Hampshire Ins. Co. v. Martech U.S.A., Inc., 993 F.2d 1195, 1200-01 (5th Cir. 1993)).

For the reasons set forth in Section I, supra, which are hereby reincorporated in their entirety by reference, Movants' newly discovered evidence would not have been discovered by due diligence.

Movants' evidence is material evidence of the fundamental bias and corruption of the arbitrators and the arbitration forum, and not merely impeaching or cumulative of the evidence presented at trial, from which it is completely divorced.

Finally, the newly discovered evidence demonstrates a new trial would have produced a different result. Two of the three arbitrators were from the securities industry. The third was unable to concentrate, unfit to serve, and dishonest with his clients, the Cleveland and Cuyahoga Bar Associations, the Supreme Court of Ohio, the NYSE, and all the parties to the Fazio Arbitration.

The inherent pro-industry bias of Securities Panel members is the fundamental premise of NYSE Arbitration Rule 607's mandate that every arbitration panel shall have only one Securities Panel Arbitrator, and two Non-Securities Panel Arbitrators. If having two (or more) Securities Panel members on a panel would not influence the outcome, there would be no need for the rule. Examining Mr. Marinaccio's conduct more carefully reveals a deep rooted bias on his part; this former SEC Commissioner and high-caliber securities lawyer with over 33 years experience, who was classified by the NASD and the SIPC as industry insider, simply had to be aware the NYSE had misclassified him, the entire time he was misclassified, yet he said nothing, a wolf in sheep's clothing. Assuming even that the NYSE never told him his classification, (e.g., he was never provided a copy of his profile, on which his classification was written), in the course of meeting with other panel members during arbitrations, and in discussions with counsel, etc., he surely realized that he was not the only industry insider on any given panel. Here, for example,

he certainly learned from Mr. Guerin that Mr. Guerin had formed and run a brokerage for decades, hardly making him a Public arbitrator. (See Exh. 17). Prior to his selection, he had private conversations with David L. Carey, the NYSE attorney who selected him. At the very least, they discussed potential conflicts of interest Marinaccio had as a result of representing and lobbying for two of the Defendants in the case. (Exhs. 11, 12) Only a hearing where Mr. Marinaccio and Mr. Carey testify will reveal whether in fact, as is likely, they discussed Marinaccio's classification.

Mr. King was clearly unqualified to serve on the panel, and he obtained his membership on the panel by continuous fraud and concealment and deliberate misrepresentation of his qualifications and fitness. His vote should be voided.

This Court should not enforce an arbitration award based on two votes by industry insiders, where one of those votes was the result of deliberate and concealed, or at best, grossly negligent misclassification, and rendered by a panel composed in direct breach of NYSE Rule 607. The newly discovered evidence does not merely affect the outcome of the arbitration award, it voids it altogether. All the requirements of Rule 60(B)(2) have been met. It is no longer equitable that this Court's April 25, 2005 dismissal entry should continue to be enforceable and it should be vacated, along with the October 20, 2004 Arbitration Award.

III) THE OCTOBER 20, 2004, ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT WAS THE PRODUCT OF FRAUD AND UNDUE MEANS (9 U.S.C.S. §10(a)(1))

The October 20, 2004 Arbitration Award was procured by fraud and undue means. Although "fraud" and "undue means" are not defined in §10(a) of the Federal Arbitration Act, courts interpret them together. In the Matter of the Arbitration Between Trans Chem. Ltd. &

China Nat'l Mach. Import & Exp. Corp., 978 F. Supp. 266, 303 (S.D.Tex. 1997). Undue influence of an arbitrator and undisclosed bias of an arbitrator constitute fraud for purposes of §10(a). Id. at 304 citing (Indocomex Fibres Pte., Ltd. v. Cotton Co. Int'l, Inc., 916 F. Supp. 721, 728 (W.D. Tenn. 1996)). Similarly "undue means" connotes behavior that is "immoral if not illegal" or otherwise in bad faith. Id. (citing A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1403-04). Chairman Marinaccio's classification, that is, his bias, was not disclosed by him or by the NYSE. And, Mr. King's intentional concealment of the multitude of facts disqualifying him demonstrates his need for appointments by the NYSE, i.e., his susceptibility to bias in favor of the industry providing him paychecks in both NYSE and NASD Arbitrations.

The required nexus between the fraud and undue means and the panel's decision is easily demonstrated here. Forsythe Int'l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022 (5th Cir. 1990). As discussed above at Section II, Chairman Marinaccio's proper classification as a Securities Panel member is probative, if not conclusive, of his bias. Mr. Marinaccio failed to disclose what he must have known for the entire seven years he was classified as a Non-Securities Panel Arbitrator: namely, that he had absolutely no business being classified as a Public Arbitrator when he was on the Board of Directors of Ameritrade, an Industry Director at SIPC, and an industry arbitrator with the NASD. This concealment, or at best, lack of candor, calls Mr. Marinaccio's motives and bias into question. As for Mr. King's vote, his very membership on the panel was a result of fraud and undue means, and like Mr. Marinaccio's, void *ab initio*. Mr. King's lies and concealments are indicative of a desperate need to maintain employment with the NYSE and NASD.

A party alleging an arbitration award was procured through fraud and undue means must demonstrate the improper behavior was not discoverable by due diligence before or during the

Arbitration Hearing. Movants reincorporate as if fully rewritten here, their argument and discussion on this point in Sections I and II above.

The newly discovered evidence here demonstrates the Arbitration Award was procured by fraud and undue means.

The October 20, 2004 Arbitration Award should be vacated.

IV) THE OCTOBER 20, 2004, AWARD SHOULD BE VACATED DUE TO THE CORRUPTION AND EVIDENT PARTIALITY OF ARBITRATORS CHARLES L. MARINACCIO AND MICHAEL L. KING (9 U.S.C.S. §10(a)(2))

The October 20, 2004 Arbitration Award should also be vacated, under §10(a)(2) of the Federal Arbitration Act, due to the evident partiality and corruption of the Fazio Arbitrators.

In Commonwealth Coatings Corp. vs. Continental Casualty Company, 393 U.S. 145 (1968), the United Supreme Court had occasion to define evident partiality and its effect. In Commonwealth, a single arbitrator had failed to disclose that he served as a consultant for a principal of the party that prevailed in the arbitration, and had received approximately $12,000.00 in fees over a 4 or 5 year period. Even though the arbitrator's services for the prevailing party were "sporadic", and there had been no dealings between them for almost a year, the Supreme Court held the arbitrator's failure to make this disclosure warranted setting aside the award for evident partiality. Id. at 147-150.6 It was not necessary to establish the actual bias of the arbitrator in order to set aside the award. Id. at 147-148.

In Crow Construction Co. v. Jeffrey M. Brown Assoc. Inc., 264 F.Supp. 2d 217, 220-225 (PA Dist. 2003), the plaintiff unknowingly entered an arbitration where, as here, two of the three

6 The Court in Crow Construction Co. v. Jeffrey M. Brown Accos. Inc., 264 F.Supp 2d 217, 221-222 (PA Dist. 2003) also provides an in-depth analysis as to why Commonwealth is mistakenly titled as a plurality opinion.

arbitrators on its panel failed to disclose pertinent information. The Crow Construction Court adopted the Commonwealth 'appearance of bias' standard over the 'actual bias' standard articulated in Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds, 748 F.2d 79 (2d. Cir. 1984). In addition to finding that the Morelite Court wrongly concludes that Commonwealth was a plurality opinion, the Crow Construction Court found that Morelite and its progeny (including Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989)) do not address situations where there is: 1) a neutral arbitration panel chosen directly or indirectly both parties, 2) undisclosed information by the arbitrators, and 3) bias or fraud in the arbitration selection process (as opposed to the arbitration process itself). Crow Construction at 221, 223.

> "Regardless of whether a court considers the actual bias standard to be legitimate (this Court does not), such a standard does not apply in cases, such as this one, where (1) the parties have some influence in selecting their arbitrators and (2) an arbitrator failed to disclose information which may create a reasonable impression of the arbitrator's partiality." Id. at 222.

The Court states that when "when an arbitrator is selected by the parties after having failed to disclose a fact which may create the appearance of bias, the selection process is prone to failure." Id. at 223. One of the Crow arbitrators had ties to the Defendant's business. Like Mr. King, the other arbitrator failed to disclose that she was simultaneously sitting on a second panel, related to the Plaintiff's case. The Court was concerned about the arbitrator's non-disclosure because 1) the proceedings took place at the same time, and the arbitrator would inevitably hear information disclosed in one proceeding and inadvertently apply it to the other, and 2) the Plaintiff's would be unable to rebut or respond to any information gleamed from the other arbitration. Id. at 224, 225. As the Court stated:

> "Disclosure is mandated to enable parties to proceedings, such as this one, to avoid such

> a scenario. Crow should have been notified of the potential conflict in order to have a chance to respond accordingly, or, at the very least, seek an alternate arbitrator. [The arbitrator's] failure to make the necessary disclosure gives rise to an obvious appearance of bias." Id.

Further, the Court found that the timing of the arbitrations' overlap was particularly damaging because it occurred at the end of Plaintiff's arbitration, "a crucial time in which the arbitrators were presumably making their determinations as to liability and damages." Id. at 225.

The Court found that the failure of two arbitrators to disclose personal connections to the case and parties undermined the arbitration process. Id. The Court held ultimately:

> "The repeated failed disclosures in the arbitration process here resulted in a selection process whereby the Petitioner was not afforded a fair opportunity to make informed choices with regard to the arbitrators proposed by the AAA. Such a failure lies in direct contradiction with the spirit of Commonwealth Coatings and intent behind both the Court's opinion and Justice White's concurrence in that matter. Finally, such a failure ultimately fails the arbitration process as a whole."
> Id. at 226.

Here, Michael L. King failed to disclose that he was chairperson in the Trocano/Semenak arbitration, in which evidence of Frank Gruttadauria's conduct in the same time-period would be heard, and unrebuttable conclusions drawn. In fact, the Trocano/Semenak hearing was held October 7th and 8th, 2004 – just two weeks after the testimony in the Fazio Arbitration ended. Therefore, as in Crow, the Mr. King would be deliberating in the Fazio Arbitration while hearing testimony in Trocano/Semenak. On the same day, October 8th 2004, the Fazio parties filed their Post-Hearing briefs. (Exhs. 1, 24). [7]

Mr. King's willingness to falsely represent that he had no discipline problems, to conceal he was Chairperson of an ongoing, related arbitration against Lehman Bros., Inc., and to remain silent while the parties spent millions of dollars in fees and expenses presenting and defending

7 And, Mr. King was scheduled to appear to defend his law license before the Board on October 18th. (Exh. 19)

against claims of over $22 million, when he knew he had no business being on the panel, and was surely distracted by his personal and professional dilemmas, reveals corruption on his part and evident partiality to the securities industry. The NYSE and NASD, and their members, including the Respondents, were clients willing to employ him at $400 and $475 per day, respectively.

Mr. Marinaccio's failure to disclose his own misclassification, even after being appointed chairman, indicates bias on his part. And, as discussed infra at Sections I - III above, Chairman Marinaccio's evident partiality was revealed on April 20, 2005 when the NYSE admitted they had misclassified him for over seven years. The evident bias by a member of the NYSE's Securities Panel is intrinsic to NYSE Rule 607, by which the NYSE mandates that every panel shall have two Non-Industry members and one Industry member. Here, Mr. Marinaccio's ties with the securities industry include his membership on the Board of Directors of Ameritrade, serving as an Industry Director at the SIPC, providing legal services for Societe Generale, and lobbying for JP Morgan, both of whom are Defendants in this action. (See Exhs. 11,12). Even the Director of Arbitration at the NYSE admitted her Department had misclassified him for 7 years.

Under the precedent of Commonwealth Coatings and its progeny, including Crow Construction, this Court should vacate the October 20, 2004 arbitration award.

****

The arguments and proofs in the following Sections demonstrate that in addition to being void on account of newly discovered evidence of fraud, fraudulent concealment, misclassification, a lack of qualification, etc., the award from this arbitration panel consisting of two Securities Panel members, and one unqualified and industry-biased "Public" arbitrator, was

not final or definitive, was arbitrary and capricious, was in manifest disregard of the law, and was the product of violations of public policy.

V) THE OCTOBER 20, 2004, ARBITRATION AWARD SHOULD BE VACATED BECAUSE THE AWARD IS NOT FINAL OR DEFINITE (9 U.S.C.S. §10(a)(4)).

A District Court may set aside an arbitration award that is not final or definite. 9 U.S.C.S. §10(a)(4). Where an award clearly employs a method or formula of decision that leads to continuing dispute as to its application, such award may be vacated. Lummus Global Amazonas, S.A., v. Aguatyia Energy del Peru, S.R. Ltda., 256 F. Supp. 2d 594, 641-643 (March 26, 2002). Here, the panel awarded Carl Fazio, Sr., $1,100,000.00, an amount which correlated exactly to the amount of the last balance in the Carl Fazio bond safekeeping account. The panel therefore concluded Carl Fazio, Sr., justifiably relied on Frank Gruttadauria, and was owed the balance of that account. Yet, the panel awarded Fazio Three, the family limited partnership managed by Carl Fazio, Sr., absolutely nothing. And, though Carl Fazio, Sr. managed the entire the Fazio One/Irene Dugger Fazio Tenants-in-Common account, which had a final balance of $2,813,058.00, they awarded it only $100,000, and to Fazio One only. Indisputably, the panel simply never finished applying the decision it had reached with respect to Carl Fazio, Sr., and his award was never made definite and final with respect to Fazio Three, Fazio One and Irene Dugger Fazio's Tenants-In-Common account.

Similarly, Irene Dugger Fazio was found to have reasonably relied on Frank Gruttadauria, and was awarded $300,000.00 on her IRA accounts, but none of the over $1.4 million in her Tenants-In-Common account. This failure to render a final and definite award is grounds for vacatur under 9 U.S.C.S. §10(a)(4).

VI) THE OCTOBER 20, 2004, ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT IS ARBITRARY AND CAPRICIOUS

In addition to the express grounds for vacatur set forth at 9 U.S.C.S. §10(a), the Federal Courts of Appeal have long recognized that where the basis for an award cannot be inferred from the facts of the case, the award is arbitrary and capricious and may be vacated. Lummus Global, supra, 256 F. Supp. 2d at 605; Ainsworth v. Skurnick, 960 F. 2d 939, 941, (11th Cir. 1992), *cert. denied,* 507 U.S. 915 (1993); Manville Forest Prod.Corp. v. United Paperworkers Int'l. Union, 831 F.2d 72, 74 (5th Cir. 1987).

Here, there is absolutely no basis for the panel's decision to award Carl Fazio, Sr., the full amount of the bond safekeeping account in his name ($1,100,000.00), yet award only $100,000.00 of the $7,771,292.15 in the statements for the Fazio Three and the Fazio One/Irene Dugger Fazio accounts, which he managed. The panel obviously concluded he reasonably relied on Frank Gruttadauria in his individual capacity, and was entitled to damages. Thus, all the entities he managed were entitled to damages as well, and the facts demonstrate no basis not to award Fazio One or Fazio Three their full measure of damages. Not to do so was simply arbitrary and capricious and grounds for vacatur.

Similarly, there is no basis from which to infer a basis for the panel's decision to award Carl Fazio $1,100,000.00, yet not award Robert Fazio any damages at all. The facts demonstrate:

1) Carl Fazio's accounts had as many, if not more, errors in them as Robert's (Hrg., pp. 541-635, 797-920,1518-1598, 2329-2333);

2) Robert and Carl shared the same broker, worked together in the same office, and knew and relied on Gruttadauria to the exact same extent. Carl Fazio had a much higher risk portfolio, and was a much more active trader than Robert, sometimes

calling Gruttadauria 3-4 times a day (Hrg., pp. 316-322, 347, 477-479, 947-949, 1192, 1206, 1210); if anything, Carl Fazio had many times the opportunities to discover Frank Gruttadauria and his statements were fraudulent than did Robert;

3) In proportion to his initial investment, Carl Fazio withdrew money from his account at a much higher rate than Robert. (Hrg., pp. 2409-2412) Therefore, the basis for denying Robert damages, while awarding them to his father, cannot be that he withdrew too much relative to his investments. [8]

The Fazio Arbitration Panel's decision with respect to all Movants was arbitrary and capricious, and should be vacated.

VII) THE OCTOBER 20, 2004 ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT IS THE PRODUCT OF MANIFEST DISREGARD OF THE LAW.

In First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), the United States Supreme Court recognized that an arbitration award which reflects manifest disregard of settled law is not binding upon the parties. Based on First Options, the Second Circuit has articulated a two step test which must be met before an arbitration award may be vacated for manifest disregard of the law:

a. the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and
b. the law ignored by the arbitrators was well-defined, explicit, and clearly applicable to the case.

See Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 202 (2d Cir. 1998) (citing DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied,* 522 U.S. 1049 (1998)), *cert. denied*, 526 U.S. 1034 (1999); *see also*, Merrill Lynch, Pierce, Fenner & Smith, Inc. v.

8 On August 3, 2005, in a recent related NASD arbitration against S.G. Cowen, Lehman Bros, et al., the panel awarded Gruttadauria customers Alan and JudithYale $484, 847.17 (the amount of the their account when Gruttaduaria began defrauding them), plus interest at 5% from January 1, 1992 to April 30, 2005 (13 years and 4 months), even though the Yales withdrew over $19 million dollars from accounts with Gruttadauria in which they had invested - at most - $1.2 million. (Exh. 34) Robert Fazio actually invested over $716, 250.00. (Hrg. 2436). Compounded at 5% annually, a similar award would yield Robert Fazio approximately $1,377,000.00.

Jaros, 70 F.3d 418, 421 (6th Cir. 1995) (discussing "manifest disregard of the law"); Advest, Inc. v. McCarthy, 914 F.2d 6, 8-9 (1st Cir. 1990) (discussing "manifest disregard of the law").

Here, the arbitrators, two of whom were practicing lawyers with combined experience of over 50 years at the bar, ignored at the least the following well-defined, explicit legal principles clearly applicable to this case:

1) interest is to be awarded on liquidated sums of damages. Ohio Revised Code §1343.03(A); Society Corp. v. American Casualty Co., 1993 U.S. Dist. LEXIS 20173 (N. Dist. 1993). The arbitrators expressly declined to award interest, evidencing their recognition that interest was to be awarded. (See Exh. 1);

2) the purpose of compensatory damages is to make the plaintiff/claimant whole. In addition to denying interest, the arbitrators refused to award any amount for the taxes to be paid on any award, notwithstanding any award is an unrequested liquidation of the entire amount of their investment account, a realization event under the tax code (Exh.1; Hrg., at pp. 1801-1802). And, as discussed above, even successful claimants Fazio One and Irene Dugger Fazio were not made whole;

3) Persons who reasonably rely to their detriment upon knowingly false statements are entitled to compensation. Gaines v. Preterm-Cleveland, Inc., 33 Ohio St. 3d 54, 56 (1987). The Fazio Arbitration Panel found the managing agent and General Partner of Fazio Three, Carl Fazio, Sr., reasonably relied to his detriment upon the knowingly false statements of Frank Gruttadauria, yet they awarded Fazio Three absolutely nothing. And, they awarded Robert Fazio, who had less contact with Frank Gruttadauria, and more accurate statements than Carl Fazio, Sr., absolutely nothing.

VIII) THE OCTOBER 20, 2004 ARBITRATION AWARD SHOULD BE VACATED BECAUSE IT IS CONTRARY TO PUBLIC POLICY

The Supreme Court has long refused to enforce contracts or enforce arbitration awards, which violate law, or a well-defined, explicit, and dominant public policy. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 32 (1987), (citing W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983)). See also, United Food & Commercial Workers'

Union AFL-CIO, Local 540 v. Pilgrim's Pride Corp., 193 F.3d 328, 332, (5th Cir. 1999) (a court will not enforce an arbitration award that clearly violates a "well-defined and dominant" public policy).

> "The general pro-arbitration policy relies on the assumption that the forum is fair, and therefore cannot justify special deference to arbitration outcomes in the face of a colorable claim that the forum was unfair in a particular case."
>
> Merrill Lynch v. Berry 92 Fed. Appx. at 246, referencing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. at 38.

According to The Securities Exchange Act of 1934, 15 U.S.C. §78(f)(b) (the "Act") in order for a National Exchange to register with the S.E.C. it must be organized and have the ability to enforce compliance by its members (and persons associated with its members) with the provisions of the Act, the rules and regulations of the Act, and *the rules of the exchange*. 15 U.S.C. §78(f)(b)(1) (emphasis added). 15 U.S.C. §78(f)(b)(5) states, in pertinent part, that, in order for an exchange to be registered,

> "The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, **and, in general, to protect investors and the public interest"** (emphasis added).

The Securities Act of 1934 clearly states the public policy underlying the NYSE's right to exist and perform its functions as a self-regulating organization. The NYSE must abide by its own arbitration rules and procedures, which it has not done here.

In Shearson v. McMahon, 482 U.S. 220 (1987) the Supreme Court expressed its belief that arbitration panels are capable of understanding and handling factual and legal complexities,

the arbitration procedure itself does not restrict an injured parties' substantive rights, and it is assumed that arbitrators will follow that law and comply with statutes. Shearson v. McMahon at 232. The Court sanctions the SEC's ability to oversee and regulate the arbitration process by citing the SEC's ability to oversee and change a self-regulating organization ("SRO")'s rules. Shearson v. McMahon at 234. The Court's faith that the SEC will approve of fair and equitable rules would be pointless if the Court did not intend that the SEC/SRO rules would be adhered to by both SROs and their arbitrators. The Supreme Court stated: "We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain **competent, conscientious, and impartial** arbitrators." Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985). By authorizing the vacation of any award procured by fraud or undue means, Congress manifests its intent that arbitration remain impartial. Commonwealth at 147. The Supreme Court has held that the appearance of bias in arbitrators, as it is with juries and judges, is absolutely unacceptable. Id. at 148. This is particularly true when there is even "the slightest pecuniary interest" on behalf of the arbitrator. Commonwealth at 148 citing Tumey v. Ohio, 273 U.S. 510 (1927). The public policy is clear. The Supreme Court expects competent, conscientious and impartial arbitrators. The NYSE and arbitrators Marinaccio and King acted in direct opposition to articulated and defined public policy.

The Award here was the result of numerous violations of a well-defined and dominant public policy. The NYSE is a self-regulating organization, whose arbitration agreements are enforceable against an investor's common law and statutory right to a judicial remedy. Its willingness to promulgate and enforce rules and regulations promote fair trade and equitable practices is a condition precedent to its existence. The preamble of the NYSE Constitution states

that the NYSE rules "are designed to prevent fraudulent and/or manipulative acts and practices" and "promote just and equitable principles of trade." (Exh. 33)

Though petitioned, the NYSE has flatly refused to enforce and/or remedy violations of its own rules, regulations and practices relating to the Fazio arbitration (Exhs. 30-32):

First, the NYSE provided an arbitrator - Michael King, who was not of the fitness and character required of an NYSE arbitrator. The NYSE failed to investigate his background when updating his profile in September 2003. It failed yet again to investigate his background in September 2004 when Mr. King and David Carey of the NYSE Arbitration Department had communications leading up to Mr. King's false disclosure that he was merely "the subject of a professional grievance" relating to "closed files." Mr. Carey's transmittal of King's completely benign description of the status of his professional situation was a violation of the NYSE's duty to engage in fair trade and equitable practices.

Second, the NYSE egregiously misclassified Charles Marinaccio for some seven years (1998 to 2004). It never reviewed his credentials while steadily appointing him as an arbitrator on panels (Exh. 10), or as the Chairman of the Fazio Arbitration Panel. They properly classified him on December 29, 2004, seventy (70) days after the Fazio award, but did not reveal their mistake until April 20, 2005, ninety two (92) days after the ninety (90) day deadline for appealing arbitration awards had passed. At best, concealment of this mistake is egregiously unfair and inequitable. At worst, it is deliberate fraud. In either event, enforcing an award rendered by two Securities Panel arbitrators (one of whom was the Chairman) would violate not only NYSE Arbitration Rule 607 (which mandates there be two non-Securities Panel members) but the well-established policy of a fair and equitable arbitration.

Enforcement of this arbitration award, which recently discovered evidence demonstrates was the result of a panel selected:

1) **without** critical information about the unfitness and/or bias of Mr. King and Mr. Marinaccio, fraudulently concealed by them and the NYSE; and

2) **without** knowledge that the Chairman selected by the NYSE was misclassified as a Public arbitrator, and was, in fact, an industry insider; and

3) **in violation** of the "two public arbitrator" mandate of NYSE Rule 607

is against well-defined, explicit, and dominant public policy. The award should be vacated for that reason alone.

CONCLUSION

The Fazios believed Frank Gruttadauria was an honest broker, when, in fact, he was a fraud, liar, thief, and criminal. They believed the NYSE was a fair forum. They believed Charles Marinaccio and Michael King were fair, honest lawyers serving as Public Arbitrators. All this, too, proved to be a lie and a fraud. The Fazios' Arbitration Panel consisted of an insider who slept too much, a Chairman who was disguised as a Public Arbitrator, and a sole Public Arbitrator whose fraudulent concealment, dishonest acts, and personal and financial distress, rendered him unfit to serve and highly likely to vote for the industry that was gainfully employing him in this and the Trocano/Semenak arbitration.

This Court's April 25, 2005 Order dismissing this action should be vacated. The Arbitration Award of October 20, 2004 should be vacated. This matter should be reinstated against all Defendants with whom Movants Robert Fazio, Fazio Investment One, Ltd., and Fazio Investment Three, Ltd. have not settled for proceedings under the Second Amended Complaint

of Plaintiffs. Movants seek an evidentiary hearing on all matters raised by this Motion.

Respectfully submitted,

s/Kevin T. Roberts
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2005, a copy of the foregoing Motion of Robert Fazio, Fazio Investment One Limited, and Fazio Investment Three Limited to Vacate the April 25, 2005 Dismissal Entry and Vacate the October 20, 2004 Arbitration Award Against Them was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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