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APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 20-3059

[Filed: May 9, 2022]

CHRISTOPHER N. CAPUTO,)
)
Appellant)
)
v.)
)
WELLS FARGO ADVISORS, LLC)
)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:19-cv-17204)
Honorable Freda L. Wolfson, Chief District Judge

Argued: November 17, 2021

Before: CHAGARES, *Chief Judge*, BIBAS and FUENTES, *Circuit Judges*

(Opinion filed: May 9, 2022)

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OPINION*

FUENTES, *Circuit Judge.*

Petitioner-Appellant Christopher N. Caputo appeals the District Court's order denying his motion to vacate an arbitration award issued in favor of Respondent-Appellee Wells Fargo Advisors, LLC ("Wells Fargo") and granting Wells Fargo's cross-motion to confirm the award. Caputo argues that the award should be vacated because it violates public policy and is in manifest disregard of law. He also argues that it should be vacated because the arbitration panel exceeded its

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* This disposition is not an opinion of the full Court and under I.O.P. 5.7 does not constitute binding precedent.

authority and excluded certain evidence. For the following reasons, we will affirm the District Court's order.

I.

Wells Fargo hired Caputo as a financial advisor in February 2011. Under the terms of his employment offer, Caputo became eligible for certain bonuses and awards upon meeting particular performance-based benchmarks. Specifically, Caputo qualified to receive a Transitional Bonus of $1,202,294, paid in monthly installments of $12,833 from 2011 to 2021. He also qualified to receive three separate Production Bonuses of $240,459, as well as a Best Practice Award of $240,459, which were to be paid in monthly installments over approximately ten years.

Caputo could choose to get cash for his bonuses and awards upfront in the form of a loan. So from 2011 to 2014, Wells Fargo and Caputo executed five Promissory Notes, each for a principal sum of each bonus and award amount—one for $1,202,294 and four for $240,459—totaling over two million dollars. In other words, rather than waiting to receive the bonuses and awards in monthly installments over ten years, Caputo elected to receive them in an upfront lump sum.

Each of the Promissory Notes set forth a schedule of debt obligations under which Caputo was "unconditionally" obligated to pay Wells Fargo back in full.[1] Critically, Caputo's decision to execute the Promissory Notes did not alter Wells Fargo's payment

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[1] *See, e.g.*, App. 199.

of the bonuses or awards. Rather, while Wells Fargo employed Caputo, it still paid him his bonuses and awards in monthly installments, which in turn offset Caputo's debt obligations under the Promissory Notes. Most importantly, under the Promissory Notes, if Caputo were ever terminated, Wells Fargo was entitled to "declare the entire unpaid principal balance of [each] Note immediately due and payable."[2]

Wells Fargo terminated Caputo's employment in December 2014 after conducting an internal investigation and determining that he had engaged in inappropriate practices. Wells Fargo found that Caputo had traded certain clients' long-term investments for other long-term investments to the clients' detriment, resulting in multiple violations of company policy. At the time of his termination, Caputo had repaid Wells Fargo around $300,000 through his monthly bonus and award installments. Wells Fargo sent Caputo a notice of demand for the outstanding amount due under the Promissory Notes (about $1.7 million) and advised Caputo that it had placed an administrative hold on his Wells Fargo brokerage accounts. When Caputo failed to pay, Wells Fargo commenced a Financial Industry Regulatory Authority ("FINRA") arbitration, asserting claims for breach of contract against Caputo. Caputo asserted multiple counterclaims, including for breach of contract, unconscionability based on fraudulent inducement, unjust enrichment, breach of implied duty of good faith and fair dealing, defamation, fraudulent inducement to accept employment, expungement, and breach of New Jersey employment law.

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[2] *See, e.g.*, *id.*

In July 2019, after multiple days of hearings, the FINRA arbitration panel issued an award in favor of Wells Fargo, concluding that Caputo was liable to Wells Fargo for the entire balance owed under the Promissory Notes. The arbitration panel also denied Caputo's counterclaims in their entirety. Caputo then moved to vacate the arbitration award in the U.S. District Court for the District of New Jersey. Wells Fargo opposed the motion and filed a cross-motion to confirm the award. In May 2020**,** the District Court denied Caputo's motion and granted Wells Fargo's. Caputo then filed a motion for reconsideration, which the District Court denied in September 2020. Caputo filed a timely notice of appeal.[3]

[3] Caputo simultaneously moved for a stay of the District Court's judgment before the District Court, which the District Court denied. He then filed the same motion before this Court, which we also denied on October 29, 2020. That same day, Caputo filed for Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of New Jersey ("Bankruptcy Court"). The Bankruptcy Court ultimately discharged Caputo's debts, including the approximately $1.7 million he owed to Wells Fargo under the District Court judgment, and ordered the bankruptcy case closed.

II.[4]

The District Court had jurisdiction under 9 U.S.C. §§ 9 and 10 and 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291 and 9 U.S.C. § 16(a).[5] "When reviewing a district court's denial of a motion to vacate an arbitration award, we review its legal conclusions de novo and its factual findings for clear error."[6] "[T]he correlative grant of a motion to confirm" an arbitration award is also reviewed de novo.[7] Given the "strong federal policy in favor of commercial arbitration, we

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[4] Wells Fargo asserts that the instant appeal is moot given that Caputo's debt to Wells Fargo pursuant to the District Court's judgment was discharged in bankruptcy. We disagree. Assuming that Caputo could prevail in this appeal, we could fashion "meaningful relief." *See In re Surrick*, 338 F.3d 224, 230 (3d Cir. 2003) (internal quotation marks omitted). A reversal of the District Court's decision and (eventual) vacatur of the arbitration award could result in Caputo receiving the money from his Wells Fargo brokerage accounts, which were placed on administrative hold after Caputo failed to pay Wells Fargo the amount he owed under the Promissory Notes. Thus, Caputo's appeal is not moot.

[5] *Hamilton Park Health Care Ctr. Ltd. v. 1199 SEIU United Healthcare Workers E.*, 817 F.3d 857, 861 (3d Cir. 2016).

[6] *Whitehead v. Pullman Grp., LLC*, 811 F.3d 116, 119 n.23 (3d Cir. 2016) (citing *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3d Cir. 2012), *aff'd*, 569 U.S. 564 (2013)).

[7] *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 941, 949 (1995).

begin with the presumption that the award is enforceable."[8]

Under the Federal Arbitration Act ("FAA"), four narrow grounds exist for vacating an arbitration award.[9] Even so, "a reviewing court will decline to sustain an award 'only in the rarest case.'"[10] Caputo challenges the award on two vacatur grounds not enumerated in the FAA: (1) that the arbitration award violated public policy, and (2) that the award was in manifest disregard of law.[11] He also challenges the award on two of the four grounds enumerated in the FAA: (1) that the arbitration panel exceeded its authority under § 10(a)(4), and (2) that the panel

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[8] *Sutter*, 675 F.3d at 219 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

[9] 9 U.S.C. § 10(a).

[10] *Newark Morning Ledger Co. v. Newark Typographical Union Loc. 103*, 797 F.2d 162, 165 (3d Cir. 1986) (internal citation omitted).

[11] As the District Court correctly noted, we have recognized these grounds as additional bases for vacatur. *See, e.g.*, *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003) (manifest disregard); *Serv. Emps. Int'l Union Loc. 36 v. City Cleaning Co.*, 982 F.2d 89, 92 (3d Cir. 1992) (public policy). That said, we have not yet weighed in on whether these grounds for vacatur survive the Supreme Court's decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). Like the District Court, we will presume, for the purposes of this appeal, that these grounds "continue to exist as a basis for vacatur after *Hall Street*." App. 10.

excluded pertinent and material evidence under § 10(a)(3).[12] We address each vacatur ground in turn.[13]

III.

A.

First, Caputo argues that the arbitration award should be vacated for violating dominant public policy because (1) it enforced contract provisions prohibited by state labor statutes and designed to evade taxes; and (2) Caputo was discharged without just cause. We disagree.

An arbitration award may be vacated when enforcing it violates explicit public policy.[14] However, "the public policy must be well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[15] We must use "common sense" to determine "whether a public policy exists[,] . . . keeping in mind that a formulation of public policy based only on general considerations of supposed public

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[12] *See* 9 U.S.C. § 10(a)(3)–(4).

[13] We will address Caputo's arguments regarding manifest disregard of law and § 10(a)(4) together, as the basis for both is that the arbitration panel ignored state labor laws.

[14] *W.R. Grace & Co. v. Loc. Union 759*, 461 U.S. 757, 766 (1983); *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 42–43 (1987).

[15] *United Transp. Union Loc. 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 381 (3d Cir. 1995) (internal citation and quotation marks omitted).

interests is not the sort that permits [us] to set aside an arbitration award."[16] We have characterized this exception as "slim."[17] Indeed, it "is available only when the arbitration decision and award create an *explicit* conflict with an *explicit* public policy."[18]

Caputo asserts that enforcing the contractual provisions at issue would violate state labor laws, and that "[a]n express statutory override of particular types of contractual provisions . . . is by definition an expression of dominant public policy."[19] And, he adds, the Promissory Notes run afoul of "law[s] condemning tax evasion," so they are unenforceable for that reason too.[20] The case law that Caputo cites in support of these propositions is inapposite.[21] In fact, these arguments improperly conflate the manifest disregard and public

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[16] *Id.* at 381–82 (internal citation and quotation marks omitted).

[17] *Id.* at 382 (internal citation and quotation marks omitted).

[18] *Id.* (emphasis added) (internal citation and quotation marks omitted).

[19] Caputo Opening Br. at 14.

[20] *Id.* at 26.

[21] Along with the case law cited in his briefing, Caputo submitted several Rule 28(j) letters containing mostly out-of-circuit case law purporting to support his public policy arguments. Rule 28(j) Letter (filed March 13, 2022); Rule 28(j) Letter (filed Dec. 1, 2021). These cases are distinguishable and do not persuade us that the arbitration award issued in favor of Wells Fargo (or the contract provisions at issue in *this* case) violates public policy.

policy doctrines.[22] Even if these laws articulated some public policy, it would not be "well defined [or] dominant."[23] Caputo identifies no other explicit *public policy* that the arbitration award violates.

Caputo also argues that the arbitration award is contrary to public policy because he was terminated without cause. Yet besides "general considerations of supposed public interests," Caputo does not explain how being fired without cause violates public policy. And it is hard to see how that could be true here, given that Caputo's employment was at-will.

B.

Second, Caputo argues that the arbitration award should be vacated for being in manifest disregard of law for ignoring state labor statutes. This argument also fails. "The manifest disregard standard requires more than legal error."[24] "Rather, the arbitrators' decision must fly in the face of clearly established legal precedent, such as where an arbitrator appreciates the existence of a clearly governing legal principle but

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[22] *Cf. Seneca Nation of Indians v. New York*, 988 F.3d 618, 628 (2d Cir. 2021) (stating in dicta that "a court could certainly vacate an arbitration award that interpreted an agreement to require something expressly prohibited by law or statute, insofar as that would show that the arbitrators willfully flouted the governing law by refusing to apply it" or, in other words, manifestly disregarded the law (internal citation and quotation marks omitted)).

[23] *United Transp. Union Loc. 1589*, 51 F.3d at 381.

[24] *Whitehead*, 811 F.3d at 121.

decides to ignore or pay no attention to it."[25] It is an "extremely deferential" standard.[26]

Caputo also argues that the award should be vacated for exceeding the arbitrator's authority under § 10(a)(4) on the same basis. Caputo asserts that Wells Fargo invited the arbitration panel to disregard the law and that they did so, as evidenced by the panel restricting Caputo's cross-examination of certain witnesses and granting an arbitration award in favor of Wells Fargo. As the District Court recognized, "[u]nder § 10(a)(4) of the FAA, a court cannot examine the merits of an arbitrator's decision, correct factual or legal errors, or overrule an award based on a mere disagreement with the arbitrator's interpretation of a contract."[27] Simply put, "we must enforce an arbitration award if it is based on an arguable interpretation of" the contract.[28] The terms of an award may not be revised "unless they are completely irrational."[29] As we have explained, "[s]o deferential is the 'irrationality' standard under the FAA that we 'may not overrule an arbitrator simply because [we] disagree . . . . [T]here

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[25] *Id.* (internal citations and quotation marks omitted).

[26] *Id.* (internal citation and quotation marks omitted).

[27] App. 15 (internal citations omitted).

[28] *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1291 (3d Cir. 1996).

[29] *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Acct.*, 618 F.3d 277, 295 (3d Cir. 2010) (internal citation and quotation marks omitted).

must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of an award.'"[30]

Even if the FINRA arbitration panel got it wrong, it is hard to see how this would be more than legal error, as required to vacate an arbitration award under the manifest disregard doctrine. Further, despite Caputo's assertions to the contrary, there is no evidence in the record that Wells Fargo urged the FINRA arbitration panel to disregard the law. The arbitrators' decisions to cut off the cross-examination of certain witnesses and rule in favor of Wells Fargo do not support the inference that the FINRA arbitration panel disregarded the law such that they exceeded their authority. Unlike the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, which Caputo cites in support of his arguments, the FINRA arbitration panel did not impose its own "policy choice" in making its decision.[31] Instead, the arbitral panel "rationally derived" the arbitration award in favor of Wells Fargo "from the agreement between the parties."[32]

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[30] *Id.* at 295–96 (quoting *United Transp. Union Loc. 1589*, 51 F.3d at 379); *see also Sutter*, 675 F.3d at 220 ("In other words, the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur." (citation omitted)).

[31] 559 U.S. 662, 677 (2010).

[32] *Ario*, 618 F.3d at 295.

C.

Lastly, Caputo asserts that the arbitration award should be vacated because the arbitrators excluded evidence showing that Wells Fargo discharged him without just cause. We are not persuaded. The FAA permits district courts to vacate arbitration awards "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy."[33] But we have cautioned that § 10(a)(3) "cannot be read . . . to intend that every failure to receive relevant evidence constitutes misconduct which will require the [vacatur] of an arbitrator's award."[34] Vacatur under § 10(a)(3) is "warranted only where the arbitrator's refusal to hear proffered testimony so affects the rights of a party that it may be said that he was deprived of a fair hearing."[35] Like the manifest disregard of law standard, this is an "extremely deferential standard" and typically results in confirmation of an arbitration award.[36]

We are not convinced that the arbitrators' decision to exclude evidence of Caputo's discharge deprived him of a fair hearing. Given that Caputo was an at-will

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[33] 9 U.S.C. § 10(a)(3).

[34] *Century Indem. Co. v. Certain Underwriters at Lloyd's, London, Subscribing to Retrocessional Agreement Nos. 950548, 950549 & 950646*, 584 F.3d 513, 557 (3d Cir. 2009) (internal citation and quotation marks omitted).

[35] *Id.* (internal citations and quotation marks omitted).

[36] *Id.* (internal citation and quotation marks omitted).

employee who signed Promissory Notes promising that he would pay Wells Fargo back in full, we are skeptical that excluding the evidence at issue resulted in an unfair hearing.

IV.

For these reasons, we will affirm the District Court's order denying Caputo's motion to vacate the arbitration award and granting Wells Fargo's motion to confirm the arbitration award.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 19-17204 (FLW)

[Filed: May 29, 2020]

CHRISTOPHER N. CAPUTO,)
)
Petitioner,)
v.)
)
WELLS FARGO ADVISORS, LLC,)
)
Respondent.)
)

OPINION

WOLFSON, Chief Judge:

Petitioner Christopher Caputo ("Petitioner") initiated this action against Wells Fargo Advisors, LLC ("Wells Fargo Advisors") to vacate an arbitration award ("Award") that a panel of FINRA arbitrators entered against him in a prior proceeding. Pending before the Court are the following: (1) Petitioner's Motion to vacate the Award; and (2) Wells Fargo Advisor's Cross-Motion to confirm the Award. For the reasons

expressed herein, the Court confirms the Award and denies Petitioner's Motion.

I. BACKGROUND AND PROCEDURAL HISTORY

Wells Fargo Advisors is a broker-dealer that is registered with the U.S. Securities and Exchange Commission, and a member of the Financial Industry Regulatory Authority ("FINRA"). On February 17, 2011, Wells Fargo Advisors hired Petitioner on an at-will basis, as a registered financial advisor at its branch office in Spring Lakes, New Jersey. Prior to his employment at Wells Fargo Advisors, Petitioner worked as a financial advisor at UBS Wealth Management.

Pursuant to his contract, Wells Fargo Advisors agreed to provide Petitioner with a "Transitional Bonus" of $1,202,294.00, paid in installments of $12,883.50 once a month from 2011 to 2021. In addition, sometime during his tenure at Wells Fargo Advisors, Petitioner qualified to receive four separate "Production Bonuses" of $240,459.00, because his "total gross production" exceeded specific benchmarks set forth in his contract. Like the transitional bonus, the production bonuses were paid in installments, once a month over the course of a specified period.

Petitioner elected to execute five separate loan agreements (the "Notes") that allowed him to receive each bonus upfront, in a lump sum amount. Under their terms, Petitioner agreed to reimburse Wells Fargo Advisors for the Notes, which each set forth a schedule of debt obligations; the debt obligations were

matched each month by the transitional and production bonus installments that Petitioner received. The Notes also contained acceleration provisions triggered upon an event of default, including termination. In such instances, Wells Fargo Advisors was entitled under the Notes to "declare the entire principal balance of [each] Note immediately due and payable."

During Petitioner's tenure at the firm, Wells Fargo Advisors conducted an internal investigation into Petitioner's business practices, which resulted in his discharge on December 2014. Thereafter, on August 4, 2015, Wells Fargo Advisors commenced an arbitration proceeding against Petitioner with FINRA, in order to recoup the outstanding principal owed on the Notes, along with interest, costs, and fees. Petitioner counter-claimed against Wells Fargo Advisors, alleging numerous causes of action, including: breach of contract, unconscionability based on fraudulent inducement, unjust enrichment, breach of the implied duty of good faith and fair dealing, defamation, fraudulent inducement to accept employment, expungement, and employment law breach.

In resolving the parties' dispute, a FINRA arbitration panel of three members (the "Panel") held over 22 separate hearings that spanned from December 10, 2018 to June 21, 2019, during the course of which more than 13 witnesses testified. On July 26, 2019, following the conclusion of the hearings, the Panel issued a final award (the "Award"). In the Award,[1] the

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[1] Although the Award does not set forth the Panel's reasoning, it is-well established that

Panel found that Petitioner was liable to Wells Fargo Advisors in the amount of $1,663,529.71 in compensatory damages. The Panel also considered and rejected all of Petitioner's counterclaims against Wells Fargo Advisors. To date, Petitioner has not satisfied his obligations under the Award.

On August 26, 2019, Petitioner filed the instant action to vacate the Award. On October 23, 2019, Petitioner filed a brief in support of his Motion to vacate the Award, wherein he argues, among other things, that the Award is in conflict with certain fundamental pubic policies in connection with the forfeiture of an employee's promised and earned remuneration. On December 2, 2019, Wells Fargo Advisors opposed Petitioner's Motion to vacate, and cross-moved to confirm the Award.

II. STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") establishes a "strong presumption" in favor of enforcing arbitration awards. *See Brentwood Med. Assocs. v. UMW*, 396 F.3d 237, 241 (3d Cir. 2005) ("There is a strong presumption under the [FAA] in favor of enforcing arbitration awards . . . ."). As such, a reviewing court must take a limited approach and vacate an arbitration award "in the rarest case[s]." *Newark Morning Ledger Co. v. Newark Typographical Union*, 797 F.2d 162, 165 (3d Cir. 1986). "[M]indful of the strong federal policy in favor of commercial arbitration, [the Court] begin[s] with the presumption that the award is enforceable." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 251 (3d Cir. 2013); *see Rite Aid of N.J., Inc. v. UFCW, Local 1360*, 501 Fed. Appx. 189, 192 (3d Cir. 2012) ("We

presume that any arbitration award is valid unless the party seeking to vacate the award "affirmatively show[s]" that it is invalid on one of the grounds listed in the Federal Arbitration Act.") (citations omitted) (alteration in original).

Section 10 of the FAA, however, provides four explicit grounds under which a district court can vacate an arbitration award, including: "(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct . . . or of any other misbehavior by which the rights to any party have been prejudiced; or (4) where the arbitrators exceeded their powers . . . . " 9 U.S.C.A. § 10(a)(1)-(4). "The party seeking to overturn an award bears a heavy burden, as these are 'exceedingly narrow circumstances,' and courts accord arbitration decisions exceptional deference." *Handley v. Chase Bank USA NA*, 387 Fed. Appx. 166, 168 (3d Cir. 2010) (citation omitted); *see Giant Eagle, Inc. v. United Food & Commerical Workers Union Local 23*, 547 Fed. Appx. 106 (3d Cir. 2013) ("[O]ur review of an arbitration award is quite narrow and we must give substantial deference to the arbitrator's award.") (citation omitted).

On this Motion, Petitioner raises two challenges to the Award: (1) it conflicts with certain public policies; and (2) it was rendered in manifest disregard of the law. Although these grounds are not explicitly set forth in the FAA, the Third Circuit has previously recognized them as additional bases for vacatur. *See Black Box Corp. v. Markham*, 127 Fed. Appx. 22, 25 (3d Cir.

2005); *Service Employees Int'l Union Local 36 v. City Cleaning Co.*, 982 F.2d 89, 92 (3d Cir. 1992). However, importantly, the Supreme Court has since cast doubt on whether a petitioner can continue to dispute an arbitration award, on such non-statutory grounds. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court found that parties cannot contract to "expand" or supplement the basis upon which to "review" an arbitration award under the FAA. *Id.* at 583. In so holding, the Supreme Court reasoned that §§ 10 and 11 of the FAA "provide the [statute's] *exclusive grounds* for expedited vacatur and modification." *Id.* at 583 (emphasis added).

A split among the Circuit Courts of Appeals has emerged in the wake of the *Hall Street* decision. In particular, as to the manifest disregard doctrine, the Second, Fourth, and Ninth Circuits have found that it continues to exist as a "judicial gloss" under § 10(a)(4), because arbitrators who render a decision in violation therewith have "exceeded their powers" under that provision of FAA.[2] On the other hand, the Fifth, Eighth, and Eleventh Circuits have concluded that, in

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[2] *See Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012) ("[W]e find that manifest disregard continues to exist as either an independent ground for review or as a judicial gloss [on the statutory grounds for vacatur]."); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009) ("We have already determined that the manifest disregard ground for vacatur is shorthand for . . . § 10(a)(4)."); *Stolt-Nielsen SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 95 (2d Cir. 2008) (discussing manifest disregard standard "as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA"), *overruled on other grounds*, 559 U.S. 662 (2010).

the aftermath of *Hall Street*, the manifest disregard standard no longer survives because it is not enumerated in the FAA.[3] Based on these same reasons, the Circuit Courts of Appeals have, too, disagreed on whether the public policy exception continues to serve as cognizable means for challenging an arbitration award. *Compare, e.g.*, *Titan Tire Corp. of Freeport v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 717 (7th Cir. 2013) ("*Hall Street* Court did not overrule [the] public policy exception to the general prohibition on overturning arbitrator awards."), *with Frazier*, 604 F.3d at 1324 (holding that the Supreme Court barred all extra-statutory grounds for vacatur after the decision in *Hall Street*).

Despite various opportunities, the Third Circuit has declined to weigh in on whether these common law and judicially-created exceptions are still available, in light of the Supreme Court's decision in *Hall Street*. *See CD&L Realty LLC v. Owens Ill., Inc.*, 535 Fed. Appx.

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[3] *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of *Hall Street*."); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009) ("*Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating [arbitration] awards."); *Medicine Shoppe Int'l, Inc. v. Turner*, 614 F.3d 485, 489 (8th Cir. 2010) ("Appellants' claims, including the claim that the arbitrator disregarded the law, are not included among those specifically enumerated in § 10 and are therefore not cognizable.").

201, 205 (3d Cir. 2013) ("We assume, without deciding, that the 'violation of public policy' and the 'manifest disregard of law' grounds for vacatur survive [*Hall Street*]."); *see also Rite Aid N.J., Inc. v. United Food Commer. Workers Union, Local 1360*, 449 Fed. Appx. 126, 129 (3d Cir. 2011) ("Assuming, post-*Hall Street*, that an '[a]rbitration award . . . can be vacated when such awards violate public policy,' or exhibit 'manifest disregard for the law,' . . . .") (citation omitted). As such, in the absence of more specific guidance from the Third Circuit, I will presume, for the purposes of this Motion, that these extra-FAA mechanisms continue to exist as a basis for vacatur after *Hall Street*, particularly since neither basis entitles Petitioner to vacate the Award. *See Santomeno v. United States Mineral Prods. Co.*, No. 12-3782, 2013 U.S. Dist. LEXIS 2441, at *23 n.7 (D.N.J. 2013) (assuming that the common law grounds for review of an arbitration award are still viable after *Hall Street*).

As to public policy violations, the Third Circuit has explained that this exception "'does not . . . sanction a broad judicial power to set aside arbitration awards as against public policy.'" *Service Employees Int'l Union Local 36,* 982 F.2d at 92 (quoting *United States v. Misco*, 484 U.S. 29, 43 (1987)). Rather, according to the Third Circuit, the exception is "limited." *Id*; *see United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 382 (3d Cir. 1995) ("In *Service Employees*, we explained that 'the public policy exception' to the enforcement of arbitration awards is slim indeed.") (quotation marks and citations omitted). In that regard, the Third Circuit has instructed that the exception applies only when "the arbitration decision

and award create an explicit conflict with an explicit public policy" that is both "well defined and dominant and [can be] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id.* (quoting *W.R. Grace Company v. International Rubber Workers Union*, 461 U.S. 757, 766 (1983)); *see also First Nat'l Supermarkets v. Retail, Wholesale & Chain Store Food Emples. Union Local 338*, 118 F.3d 892, 897 (2nd Cir. 1997). ("Courts may invoke public policy to vacate an arbitral award "only in those rare cases.").

Likewise, the manifest disregard of the law doctrine is "used 'only [in] those exceedingly rare circumstances where some egregious impropriety on the party of the arbitrators is apparent, but where none of the provisions of the [FAA] apply." *Black Box Corp*, 127 Fed. Appx. at 25 (explaining that, in order to vacate an arbitration award, it must "evidence[] [a] manifest disregard of the law rather than an erroneous interpretation"); *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863, 870 (D.N.J. 1994) ("The 'manifest disregard' doctrine may provide a basis for vacating an award in some circumstances, but its scope is exceedingly narrow[.]"); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) ("[T]he reach of the manifest disregard doctrine is severely limited.") (quotations and citation omitted). As such, a court reviewing an arbitration award for manifest disregard of the law "should not vacate an award unless it finds 'both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit and clearly

applicable to the case.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Millar*, 274 F. Supp. 2d. 701, 706 (W.D. Pa. 2003) (citations omitted); *New York Tel. Co. v. Communs. Workers Local 1100*, 256 F.3d 89, 91 (2d Cir. 2001).

For the reasons explained *infra*, I find that Petitioner has failed to demonstrate that the dispute, here, concerns a "well defined and dominant" public policy which requires vacatur, or that the Panel rendered an Award in manifest disregard of the law. I turn to Petitioner's public policy arguments.

III. DISCUSSION

A. Public Policy

First, Petitioner argues that he "earned" five bonuses during his tenure as a financial advisor, based on his "generation of gross commissions" and "exceeding" certain "contractual benchmarks." Petitioner's Opposition Brief ("Petr.'s Opp."), at 8. Petitioner contends that Wells Fargo Advisors paid each of these bonuses in the form of a separate, lump sum "forgivable" loan. *Id.* at 9. Under the terms of his contract, Petitioner maintains that he received bonus installments that offset his obligations under the loans each month, contingent upon his continued tenure with Wells Fargo Advisors. *Id.* However, in the event of his resignation or discharge from Wells Fargo Advisors, Petitioner argues that an unenforceable contractual forfeiture provision stated that he would "forfeit . . . unpaid installments . . . due under [h]is [b]onus[es]." *Id.* At that same time, according to Petitioner, the outstanding balance under all of his loans "become due

in full out of pocket." *Id.* Citing various labor laws, Petitioner argues that the contract's forfeiture provision, in essence, deprived him of "wages" that he "earned," based on his performance at Wells Fargo Advisors. Moreover, according to Petitioner, Wells Fargo Advisors prevented him from working off his loan "obligation[s]," because he was discharged without cause.

I find that Petitioner's contentions do not raise any cognizable public policy concerns. For example, while not exclusive to such circumstances, federal courts will typically vacate arbitration awards on public policy grounds, "where the safety of the general public [is] implicated." *Exxon Shipping Co. v. Exxon Seamen's Union*, 788 F. Supp. 829, 840 (D.N.J. 1992); *see, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 666-68 (11th Cir. 1988) (vacating an arbitration award that reinstated a pilot who flew while intoxicated, because he "endangered the lives of his passengers and crew."); *Iowa Elec. Light & Power Co. v. Local Union, 204 of Int'l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427-30 (8th Cir. 1987) (overruling an award that reinstated an employee who violated a "public safety regulation at a nuclear power plant[.]"); *United States Postal Serv. v. American Postal Workers Union*, 736 F.2d 822, 826 (1st Cir. 1984) (overturning an award reinstating a postal worker who was discharged for "embezzling" government funds, as his actions "violated" "the public['s] trust."); *Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122, 124-25 (5th Cir. 1983) (vacating an award that reinstated a driver who "course[d] the highways in a massive tractor-trailer

rig," because he was "caught drinking liquor on duty[.]"); *Amalgamated Meat Cutters & Butcher Workmen v. Jones Dairy Farm*, 680 F.2d 1142, 1144 (7th Cir. 1982) (holding that a company policy which prevented workers who "processed meat products" from "contacting inspectors" jeopardized "the heath and welfare of consumers[.]").

Unlike the cited cases above, the instant dispute does not implicate notions of public policy or public harm. Petitioner cites to New Jersey and Missouri wage labor statutes, both of which, he submits, are applicable here, and argues that the forfeiture provision in his contract deprives him of owed "sales commissions." However, Petitioner has not shown that his "transitional" and "production" *bonuses* constitute, as he claims, compensable "sales commissions" rather than, for example, supplemental or incentive based forms of income that fall outside of the purview of New Jersey[4] and Missouri[5] labor laws. Nor has Petitioner

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[4] The New Jersey Wage And Hour Law excludes "supplementary incentives and bonuses which are calculated independently of regular wages . . . ." *See* N.J.S.A. 34:11-4.2; *see also Gaytan v. G&G Landscaping Constr., Inc.*, 145 F. Supp. 3d 320, (D.N.J. 2014) ("Defendant is correct that the NJWPL does not apply to . . . bonuses."); *Sluka v. Landau Uniforms, Inc.*, 383 F. Supp. 2d 649, 656 (D.N.J. 2005) (holding that the NJWHL does not apply to "incentive based" compensation and that "[s]upplementary incentives are the types of incentives that, by definition, are not included under the" statute); *Dubler v. Hangsterfer's Labs.*, No. 09-5144, 2012 U.S. Dist. LEXIS 28386, *18 (D.N.J. Mar. 5, 2012) (finding that the plaintiff's "year-end bonus payment [does] not fall within the WPL's definition of wages."); *Bintliff-Ritchie v. Am. Reinsurance Co.*, No. 05-3802, 2007 U.S. Dist. LEXIS 10469, at *14 (D.N.J. February 15, 2007) (holding that a "bonus" which the

argued that Wells Fargo Advisors did not compensate him with the portion of his bonuses that accrued before he was terminated—which the arbitration Award did not require him to repay. Rather, to support his wage claims, Petitioner relies on distinguishable case law and authorities which do not involve bargained for provisions requiring employees to remain with a firm, for a specific duration before a bonus vests or accrues, such as the one he contests here. Moreover, based upon this Court's own research, no New Jersey or Missouri court has addressed the issue whether such a provision, in a contract that two knowing parties executed, constitutes a violation of public policy. Thus, in the absence of applicable law, Petitioner has not shown that the disputed provision in his contract conflicts with "well defined and dominant" public policies under New Jersey and Missouri labor statutes.[6]

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plaintiff earned under an "Incentive Compensation Plan" did not constitute "wages").

[5] In arguing that the disputed compensation, here, constitutes wages under Missouri wage labor law, Petitioner cites to a single unpublished case, *Gustafson v. SAP Am. Inc.*, No. 14-1497, 2015 U.S. Dist. LEXIS 43999 (E.D. Mo. Apr. 3, 2015). However, Petitioner's reliance on that decision is misplaced, as the issue, there, did not concern whether bonuses which were paid in connection with an incentive based compensation structure constituted wages under Missouri labor law.

[6] Even if, for argument sake, Petitioner can show a bona fide violation of the New Jersey and Missouri labor statutes, *i.e.*, that his bonus installments were wages, this violation, in of itself, does not somehow transform this matter into a public concern,

Rather, Petitioner's disputes describe nothing more than a knowing and willing private contractual relationship between himself and Wells Fargo Advisors. Thus, because the parties' dispute, here, is contractual in nature, Petitioner cannot seek to vacate the Award unless he demonstrates that the "arbitrators exceeded their powers" under § 10(a)(4) of the FAA, based on their decision to enforce the Notes as independent and valid loan agreements. 9 U.S.C.A. § 10(a)(4).

Under § 10(a)(4) of the FAA, a court cannot examine the merits of an arbitrator's decision, correct factual or legal errors, or overrule an award based on a mere disagreement with the arbitrator's interpretation of a contract. *W.R. Grace & Company*, 461 U.S. at 764; *Dauphin Precision Tool*, 338 Fed. App'x 219, 222 (3d Cir. 2009). Rather, the court "must enforce an arbitration award if it is based on an arguable interpretation of" a contract. *Dauphin Precision Tool*, 338 Fed. App'x, at 222 (quoting *Exxon Shipping Co. v. Exxon Seaman's Union*, 73 F.3d 1287, 1291 (3d Cir. 1996)). A court should not vacate an arbitration award unless it "cannot 'be rationally derived from the agreement between the parties or from the parties' submissions to the arbitrators" or when the terms of the arbitration award itself "are completely irrational." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schwarzwaelder*, 496 Fed. Appx. 227, 232 (3d Cir. 2012) (quoting *Ario v. Underwriting Members of*

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particularly since Petitioner has not persuasively argued that the public at large is harmed by Wells Fargo Advisor's alleged violations of these statutes.

Syndicate 53 at Lloyds, 618 F.3d 277, 295 (3d Cir. 2010)).

The Third Circuit has explained that "[t]his is a 'singularly undemanding' standard." *Id.* at 232. Although a court "will not 'rubber stamp' the interpretations and decisions of arbitrators," arbitration awards are entitled to "a strong presumption of correctness." *Id.* (quoting *Matteson v. Ryder Sys. Inc.*, 99 F.3d 108, 113 (3d Cir. 1996)); *see Major League Umpires Ass'n v. Am. League of Prof'l Baseball Clubs*, 357 F.3d 272, 280 (3d Cir. 2004). "The parties to an arbitration agreement have bargained for their dispute to be resolved by the arbitrators rather than by the courts." *Id.* (citing *Major League Umpires Ass'n* , 357 F.3d at 280). "The role of the courts is to ask only 'whether the parties . . . got what they bargained for, namely an arbitrator who would first provide an interpretation of the contract that was rationally based on the language of the agreement, and second would produce a rational award.'" *Id.* (quoting *Brentwood Med. Assocs.*, 396 F.3d at 242.); *Brentwood Med. Assocs.*, 396 F.3d at 241 ("An award draws its essence from a[n] . . . agreement if its interpretation can in any rational way be derived from the agreement[.]").

Here, it is undisputed that Petitioner was eligible to receive five separate bonuses during his tenure at Wells Fargo Advisors, including one "transitional" and four "production" bonuses. Pursuant to the terms of his employment contract, the bonuses were structured such that Petitioner would acquire them over time, paid once a month in separate installments during the

course of a specified period.[7] However, because Petitioner elected to receive the future bonus installments upfront in an immediate lump sum, he executed five separate Notes in amounts equaling each of his bonuses. Notwithstanding the five separate Notes that the parties executed, Wells Fargo Advisors continued to provide Petitioner with transitional and production bonus installments each month, which "offset" Petitioner's monthly debt obligations under the Notes.

Petitioner argues that the Notes do not constitute bona fide loan agreements. Citing out-of-district bankruptcy court cases,[8] Petitioner contends that "[e]ach note should . . . be considered together with the bonus agreement on which the note is predicated." Petr.'s Opp., at 17. Construing these documents in tandem, according to Petitioner, "the supposed loans were not intended . . . to be repaid, but instead . . . forgiven over the course of the 'borrowers' continued employment." Petr.'s Opp., at 18. In support, Petitioner emphasizes that his bonus installments were paid each

[7] Petitioner does not dispute that he agreed to be compensated in a similar manner at his previous firm, or that this particular compensation structure is common within the securities industry.

[8] The out-of-district bankruptcy court cases that Petitioner relies upon were not decided under the deferential standard of review that the arbitrators are accorded with on this Motion. *See In re Killian,* 422 B.R. 903 (Bankr. N.D. Ill. 2009); *see also Frymire v. PaineWebber, Inc.*, 107 B.R. 506 (Bankr. E.D. Pa. 1989). Moreover, *In re Killian* did not address the issue of loan forgiveness, but instead whether loaned monies constitute income for tax purposes. In addition to these reasons, Petitioner's reliance on these bankruptcy cases is misplaced as further explained *infra*.

month, in amounts that matched the obligations which came due under the Notes. Petr.'s Opp., at 9. The "economic effect" of these transactions, Petitioner avers, equates to a "periodic and scheduled forgiveness of [his] outstanding debt." Petr.'s Opp., at 17. Thus, Petitioner contends that the Panel erred in enforcing the Notes and entering an Award against him.

Here, Petitioner fails to present a valid ground for vacatur under the FAA. At best, Petitioner's arguments establish an alternate interpretation of the Notes as a forgivable loan.[9] However, in order to vacate the Award, Petitioner must establish that the Award is "irrational"—a demanding burden that he has not satisfied. Indeed, the language in the parties' agreements provides a reasonable basis for the Panel to conclude that the Notes are valid and enforceable loans. *See Ario*, 618 F.3d at 295-96 (A must cannot "overrule an arbitrator simply because [it] disagree[s] . . . . [T]here must be absolutely no support at all in the record justifying the arbitrator's determinations for a court to deny enforcement of an award.") (citing *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995)); *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230, 235 (4th Cir. 2006) ("[A]n arbitration award does not fail to draw its essence from

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[9] If the Court accepts Petitioner's contention that the Note is forgivable, he would recover a windfall that he would not have otherwise received under the terms of his contract. Indeed, the Notes allowed Petitioner to obtain future bonus installments upfront, in a lump sum amount that would not have accrued, unless Petitioner remained with Wells Fargo Advisors for a specified period of time.

the agreement merely because a court concludes that an arbitrator has misread the contract.").

First, the parties' agreements, including the Notes and Petitioner's employment contract, do not contain provisions describing the loans as a forgivable loan transaction. Rather, each Note includes an identical paragraph setting forth Petitioner's rights and obligations thereunder: "[Petitioner,] as the undersigned maker of this Note, unconditionally promise[s] to pay to the order of Wells Fargo Advisors, LLC ('WFA'), its affiliates, successors and assigns . . . the principal of . . . . ; [t]he undersigned shall have the right to prepay this Note in full or in part at any time without penalty or amounts so prepaid." Certification of Megan M. Christensen, ¶ 6, Ex. B. The Notes also state that, "upon the occurrence of an event of default," Wells Fargo Advisors reserves the right to "declare the entire unpaid principal balance of [the] Note immediately due and payable[.]" *Id.* In addition, Petitioner's employment contract does not reference the Notes whosoever. Nor does it require the transitional and production bonus installments, which Petitioner received once a month, to be paid towards his debt obligations under the loan agreements.

As such, I conclude that the Panel's decision to enforce each Note as a legitimate loan instrument finds support in the record. *See Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 496 Fed. Appx., at 231 (rejecting the plaintiff's loan forgiveness defense, even though "there [was] a basis . . . to construe the parties' agreements as intending to effect a single transaction akin to a forgivable loan," where, among other things, the

parties' agreements did not describe a note "as a form of loan forgiveness" and the plaintiff's employment contract did not require her to use "monthly [bonus] compensation . . . for debt repayment."). I proceed to address Petitioner's arguments in connection with the manifest error doctrine.

B. Manifest Error of Law

Petitioner argues that the Panel rendered a decision in manifest disregard of the law. In support, Petitioner contends that, during the arbitration proceedings, Wells Fargo Advisors encouraged the Panel to resolve the parties' dispute based on "industry practice," instead of the applicable law. Petr.'s Opp., at 33. During the hearings, Petitioner also maintains that Wells Fargo Advisors "emphasized that it could discharge [Petitioner] at will," and claimed that a reviewing court was "not entitled to . . . substitute its judgment for that of the arbitral panel, no matter how wrong it may believe the panel's decision to be." *Id.* Citing *Montes v. Shearson Lehman Bros.,* 128 F.3d 1456, 1464 (11th Cir. 1997), Petitioner contends that the representations that Wells Fargo Advisors advanced during the proceedings, in conjunction with the Award which it received, "raise[] an inference that the law was ignored." I disagree.

Here, Petitioner's reliance on *Montes* to establish that the Panel acted in manifest disregard of the law is misplaced. In that case, the Eleventh Circuit found that an arbitration panel violated the manifest disregard doctrine, where the evidence revealed that counsel "flagrantly and blatantly urged" them to ignore

governing authorities. Indeed, in his closing arguments, counsel stated:

> You have to decide whether you're going to follow the statutes that have been presented to you, or whether you will do or want to do or should do what is right and just and equitable in this case. I know it's hard to have to say this and it's probably even harder to hear it but in this case this law is not right. Know that there is a difference between law and equity and I think, in my opinion, that difference is crystallized in this case. The law says one thing. What equity demands and requires and is saying is another. What is right and fair and proper in this? You know as arbitrators you have the ability, you're not strictly bound by case law and precedent. You have the ability to do what is right, what is fair and what is proper, and that's what Shearson is asking you to do.

Id. at 1459. The Eleventh Circuit explained that, although the "arbitrators expressly took note of [counsel's] plea in their award when summarizing the parties' arguments[,] . . . nothing in the award or elsewhere in the record . . . indicates that the[] [arbitration panel] did not heed this plea." *Id*. at 1461. As such, according to the Eleventh Circuit, there were no grounds to "refute[] the inference that the law was ignored" under the particular circumstances of that case. *Id*. at 1461, n.8.

The *Montes* decision stands in stark contrast to the factual circumstances of this case. Indeed, such blatant representations are not contained in the record, and

the Panel was neither encouraged nor directed to disregard the law in resolving the parties' dispute during the prior proceedings. In addition, and more importantly, because support for the Award can be derived from the terms and provisions of the Notes and Petitioner's contract of employment, the Court cannot infer that the Panel's decision to enforce the loan agreements represents a manifest disregard of the law. *See Black Box Corp.*, 127 Fed. App'x, at 25 (explaining that the manifest disregard doctrine is to be used in "rare circumstances where some egregious impropriety on the part of the arbitrators is apparent[.]"). Thus, this ground fails to provide a basis for vacating the Award.

C. Excluded Evidence

Finally, Petitioner contends that the Panel excluded certain evidence during the hearings which would have established that he was discharged from Wells Fargo Advisors without cause. Petr.'s Opp., at 35. To the extent that Petitioner raises this challenge under §§ 10(a)(3) or (a)(4) of the FAA, which requires vacatur when a litigant "has been prejudiced" or where the "arbitrators [have] exceeded their powers," his arguments fail. 9 U.S.C.A. § 10(a)(1),(4). Indeed, while "[a]rbitrators have substantial discretion to admit or exclude evidence[,]" *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust*, 729 F.3d 99, 107 (2nd Cir. 2013), no prejudice can result from the Panel's exclusion of evidence that related to the circumstances of his discharge, because Petitioner's letter offer stated that he was hired on an at-will basis: "[y]our employment with Wells Fargo has no specified

term or length. Both you and Wells Fargo have the right to terminate your employment at any time, with or without advance notice and with or without cause. This is called employment at will." *See* Letter Offer. Thus, these grounds fail to provide a basis for vacatur.

IV. CONCLUSION

Based on the foregoing, Petitioner's Motion to vacate the Award is **DENIED**. Consequently, because Petitioner has failed to provide a basis for vacatur under the provisions of the FAA or the manifest error doctrine, Wells Fargo Advisor's Cross-Motion to confirm the Award is **GRANTED**.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 19-17204 (FLW)

[Filed: May 29, 2020]

CHRISTOPHER N. CAPUTO,

Petitioner,

v.

WELLS FARGO ADVISORS, LLC,

Respondent.

ORDER

THIS MATTER having been opened to the Court by Mark A. Kriegel, Esq., counsel for Petitioner Christopher N. Caputo ("Petitioner"), on a Motion to vacate an arbitration award ("Award") that a panel of FINRA arbitrators entered against Petitioner in a prior proceeding; it appearing that Wells Fargo Advisors, LLC ("Wells Fargo Advisors"), through its counsel, Megan M. Christensen, Esq., opposes the Motion and cross-moves to confirm the Award; it appearing that the Court having considered the parties' submissions in connection with the Motion pursuant to Fed. R. Civ. P.

78, for the reasons set forth in the Opinion filed on this date, and for good cause shown;

IT IS on this 29th day of May, 2020,

ORDERED that Petitioner's Motion to vacate the Award is **DENIED**; and it is further

ORDERED that Wells Fargo Advisor's Cross-Motion to confirm the Award is **GRANTED**.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 19-17204 (FLW)

[Filed: September 11, 2020]

CHRISTOPHER N. CAPUTO,
Petitioner,
v.
WELLS FARGO ADVISORS, LLC,
Respondent.

OPINION

WOLFSON, Chief Judge:

Petitioner Christopher Caputo ("Petitioner") initiated this action against Wells Fargo Advisors, LLC ("WFA") to vacate an arbitration award ("Award") that a panel of FINRA arbitrators entered against him in a prior proceeding. Presently before the Court is a Motion by Petitioner seeking reconsideration of the Court's May 29, 2020 Opinion and Order, wherein the Court denied his motion to vacate on public policy grounds and confirmed the Award. For the reasons

expressed herein, the Court finds that Petitioner has failed to meet his burden of demonstrating that reconsideration of the prior decision is warranted, and thus, the Motion is **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

Because the factual background of this matter is set forth in the Court's May 29, 2020 Opinion, I will only recount the necessary facts for the resolution of this Motion. On February 17, 2011, WFA hired Petitioner on an at-will basis, as a registered financial advisor at its branch office in Spring Lakes, New Jersey. Pursuant to his contract, WFA agreed to provide Petitioner with a "Transitional Bonus" of $1,202,294.00. The Transitional Bonus was to be paid in installments of $12,883.50 once a month from 2011 to 2021. In addition, at separate times during his tenure at WFA, Petitioner qualified to receive four separate "Production Bonuses" of $240,459.00, because his "total gross production" exceeded specific benchmarks set forth in his contract. Like the Transitional Bonus, the Production Bonuses were paid in once-a-month installments over a specified period.

Petitioner elected to execute five separate loan agreements (the "Notes") that allowed him to receive each bonus upfront, in a lump sum amount. The terms of the Notes, among other things, required Petitioner to reimburse WFA in accordance with a schedule of debt obligations; the debt obligations were "offset" each month with the transitional and production bonus installments that Petitioner received. Moreover, each of the Notes contained an acceleration provision that

was triggered upon Petitioner's termination from WFA. In such instances, WFA was entitled to "declare the entire principal balance of [each] Note immediately due and payable."

In December 2014, after conducting an internal investigation into his business practices, WFA discharged Petitioner. Thereafter, on August 4, 2015, WFA commenced a FINRA arbitration proceeding against Petitioner to recoup the outstanding principal owed on the Notes, along with interest, costs, and fees. In resolving the parties' dispute, a FINRA arbitration panel of three members (the "Panel") held over 22 separate days of hearings from December 10, 2018 to June 21, 2019. Following the conclusion of the hearings on July 26, 2019, the Panel issued a final award, finding that Petitioner was liable to WFA in the amount of $1,663,529.71 in damages.

On August 26, 2019, Petitioner filed the instant action to vacate the Award. On October 23, 2019, Petitioner submitted a brief in support of his Motion to vacate the Award, wherein he argued that the Award is in conflict with certain fundamental pubic policies relating to earned wages. On December 2, 2019, WFA opposed Petitioner's Motion to vacate, and cross-moved to confirm the Award. On May 29, 2020, this Court entered an Opinion and Order that denied Petitioner's motion and granted WFA's cross-motion to confirm the Award. In the instant matter, Petitioner moves for reconsideration on the basis that the Court should have vacated the Award, because the Award is in conflict with certain public policies against the forfeiture of earned wages.

II. DISCUSSION

A. Standard of Review

Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1 govern motions for reconsideration. In particular, pursuant to Local Civil Rule 7.1(i), a litigant moving for reconsideration must "set[ ] forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked[.]" L. Civ. R. 7.1(i). Motions for reconsideration are considered "extremely limited procedural vehicle[s]." *Resorts Int'l v. Greate Bay Hotel & Casino*, 830 F. Supp. 826, 831 (D.N.J. 1992). Indeed, requests for reconsideration "are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (citing *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)); *see also N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

A "judgment may be altered or amended [only] if the party seeking reconsideration shows at least one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Blystone*, 664 F.3d at 415 (quotations omitted). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and 'recapitulation of the cases and arguments considered by the court before rendering its original

decision fails to carry the moving party's burden.'" *G-69 v. Degnan*, 748 F. Supp. 274, 275 (D.N.J. 1990) (citation omitted). In other words, "a motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple." *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 533 (D.N.J. 1998) (citation omitted). Rather, a difference of opinion with the court's decision should be dealt with through the appellate process. *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.*, 680 F. Supp. 159, 162 (D.N.J. 1998).

B. Analysis

The Court previously determined that the Award did not violate "well defined and dominant" public policies against the forfeiture of earned wages, pursuant to New Jersey and Missouri labor laws. Therefore, the arbitration decision was confirmed under a deferential standard of review. *See Caputo v. Wells Fargo Advisors, LLC,* No. 19-17204, 2020 U.S. Dist. LEXIS 93856, at *18 (D.N.J. May 29, 2020). Petitioner challenges the Court's findings and argues that his bonuses do, in fact, fall within the scope of state wage labor statutes as covered "sales commissions." Petitioner's Motion, at 1. For this reason, Petitioner contends that the Award deprived him of earned wages, and the Court erred in failing to vacate the arbitrator's decision under a *de novo* standard of review.

As I explained in the prior opinion, courts are not accorded with a "broad judicial power to set aside arbitration awards as against public policy.'" *Service Employees Int'l Union Local 36 v. City Cleaning Co.*, 982 F.2d 89, 92 (3d Cir. 1992) (citation omitted).

Rather, according to the Third Circuit, this exception is "limited." *Id*; *see United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 382 (3d Cir. 1995) ("[W]e [have] explained that 'the public policy exception' to the enforcement of arbitration awards is slim indeed."). In that regard, the Third Circuit has instructed that the exception applies when "the arbitration decision and award create an explicit conflict with an explicit public policy" that is both "well defined and dominant . . . ." *Id.* (quoting *W.R. Grace Company v. International Rubber Workers Union*, 461 U.S. 757, 766 (1983)).

Petitioner contends that the New Jersey Wage and Hour Law ("NJWL"), which he attempts to invoke here, supports a strong public policy of protecting earned compensation. Under the statute, "wages" are defined to include "direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." N.J.S.A. 34:11-4.1. According to Petitioner, the following cases lend credence to his argument that incentive-based compensation plans, like his, meet the NJWL's definition of wages: *Feldman v. U.S. Sprint Com. Co.*, 714 F. Supp. 727 (D.N.J. 1999); *Mulford v. Computer Leasing, Inc.*, 334 N.J. Super. 385 (Law Div. 1999); *Martelet v. AVAX Techs., Inc.*, No. 09-2925, 2012 U.S. Dist. LEXIS 63277 (E.D. Pa. May 2, 2012).

At the outset, I note that Petitioner referenced these same decisions in his original moving brief. In fact, in

the prior opinion, I reviewed and distinguished them before finding that Petitioner's bonuses are excluded forms of supplemental income under the NJWHL. In lieu of citing to "an intervening change in the controlling law" on the instant Motion, Petitioner urges the Court to "reconsider[]" cases that were rejected in the prior opinion. However, the Court, in refusing to vacate the Award, found those same decisions unpersuasive, and Petitioner's disagreement with that outcome does not constitute a valid ground for reconsideration. Indeed, it is axiomatic that a litigant cannot file a reconsideration motion to "ask the Court to rethink what is had already thought through—rightly or wrongly." *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co.*, 744 F. Supp. 1311, 1314 (D.N.J. 1990). Therefore, although the instant motion can be denied on this basis, alone, I will again explain why Petitioner's reliance on the aforementioned cases is misplaced.

In *Feldman*, the plaintiff sold telecommunications products and he received from the defendant a commission on each sale. *Feldman*, 714 F. Supp. at 728. The earned commission was not disbursed until four months after a sale, because certain "difficulties with its billing" processes prevented the defendant from calculating the amount due on an earlier date. *Id.* at 728. Following the execution of various sales orders, but before the expiration of the four-month period, the plaintiff resigned from his sales position and filed suit to recover unpaid commissions. In ruling in the plaintiff's favor, the court explained that a contrary finding would permit the defendant "to benefit unjustly

from its inability to generate timely invoices." *Id*. at 729.

In *Mulford*, the plaintiff worked as a salesman who was paid a commission on the completed sales and leases of computer equipment. *See Mulford*, 334 N.J. Super. at 389. After the plaintiff became dissatisfied with a drop in his rate, the defendant agreed to provide him with $455,000 in commissions, which represented 20% of the cash profit that he had generated in computer sales and leases. *Id*. at 389-90. Despite their arrangement, the plaintiff was terminated without receiving the agreed-upon sum, and he, in turn, sued the defendant to recover outstanding commissions due. *Id*. at 392. The court ruled in the plaintiff's favor and explained that his discharge "cannot alone . . . effect his right to [the] commissions [which he had] earned." *Id*.

In *Martelet*, the defendant hired the plaintiff to serve as its CEO, and his contract included a provision reading: "[f]or the first year of the [e]mployment [p]eriod, [plaintiff] shall receive a minimum bonus of 30% of the [e]mployee's base salary." *Martelet*, 2012 U.S. Dist. LEXIS 63277, at *2-3. Despite working for the required timeframe, the plaintiff was terminated from his position without receiving a bonus. *Id*. at *7-10. He then sued the defendant. The Defendant took the position that the bonus was not guaranteed under the contract. *Id*. at *21. However, the court disagreed, and found that the contract's language could be construed to entitle the plaintiff to a "guaranteed bonus," and that, in such an instance, the bonus would

meet the definition of a wage.[1] *Id.* at *24 (citation omitted).

Here, unlike the cases cited above, where the plaintiffs' interests in the unpaid commissions had accrued, Petitioner received the vested portions of his transition and production bonuses from WFA. As I explained in the prior opinion, Petitioner was not eligible to receive a bonus award, without having first satisfied two contractual conditions. In particular, under the terms of his contract, Petitioner had to exceed certain performance-based benchmarks. In addition, and in contrast to the cases that he relies upon in seeking reconsideration, Petitioner was required to retain his position at WFA for a particular period of time (the "Bonus Period") for his bonus to vest in full. The second condition is set forth in § 5(b) of the agreement and reads:

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[1] I note that the incentive based compensation plans in the above cases are distinguishable from the one here. For instance, in *Mulford* and *Feldman*, the plaintiffs received a specific commission rate on each individual sale that was completed, while Petitioner's bonus plan, here, is not expressed as a percentage of sales. Rather, a plain reading of Petitioner's contract reveals the he was entitled to receive a lump sum bonus upon exceeding certain sales quotas set forth in his contract. Indeed, § 4(d) provides as follows: "[i]f your total gross production equals or exceeds $865,652.00 . . . you will be eligible to receive a [Production Bonus Award] of $240,459.00." Agreement, § 4(d). Thus, while the plaintiffs in *Mulford* and *Feldman* were entitled to a certain percentage of generated sales under their incentive plans, Petitioner received nothing unless he met specified contractual benchmarks. Moreover, the *Mulford* court was tasked with determining whether a "guaranteed" bonus, not a performance-based award, like the one here, could fall within the scope of the NJWL.

> Your receipt of continued payments on your Bonuses is conditioned upon your continued active employment with [WFA] and holding the functional title of Financial Advisor (or the equivalent). In the event your employment terminates for any reason . . . or if you no longer hold the functional title of Financial Advisor (or the equivalent), then you will no longer be eligible to receive any further payments on any Bonuses and you will forfeit any unpaid installments or other amounts due under the Bonuses.

Agreement, § 5(b).

The five bonuses that Petitioner qualified for were structured so that he would receive them on a periodic basis. Indeed, the bonuses were paid in separate installments on a once-a-month basis over the course of a specific timeframe, and the continued receipt of those installments was subject to § 5(b) of Petitioner's contract.[2] However, as explained above, Petitioner chose to execute five loan agreements (the "Notes") that equaled each of his incentive-based bonus awards. Therefore, in practical effect, the Notes served as "compensation advances" which allowed Petitioner to obtain future installments—to which he was otherwise not entitled—in the form of an upfront immediate lump sum.[3] *See Wells Fargo Advisors, LLC v. Watts*, 858 F.

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[2] To be clear, Petitioner's transition and production bonuses were both subject to § 5(b) of his contract.

[3] For background purposes, I note that WFA continued to remit transitional and production bonus installments to Petitioner each

Supp. 2d 591, 602 (W.D.N.C., 2012) (citing *Banus v. Citigroup Global Mkts., Inc.*, No. 09-7128, 2010 U.S. Dist. LEXIS 40072, at *7 (S.D.N.Y. Apr. 23, 2010)). The arbitration award that was entered against Petitioner did nothing more than require him to return the unvested portion of his bonuses that he would not have otherwise acquired but for the execution of the Notes. Thus, the Award neither deprives nor requires Petitioner to forfeit earned wages, and its enforcement does not violate public policies under state labor laws, as I held in the prior opinion.[4]

Moreover, Petitioner's position that § 5(b) operates as an illegal forfeiture under the NJWL has no merit. Indeed, courts in this district have enforced bargained for provisions that require workers to remain with a firm for a specific duration before a bonus accrues. For instance, in *Bintliff-Ritchie v. Am. Reinsurance Co.*, No. 05-3802, 2007 U.S. Dist. LEXIS 10469 (D.N.J. Feb. 15, 2007), the plaintiff participated in an incentive-based

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month, in amounts that offset the obligations coming due under his Notes. Upon his termination, WFA ceased remitting the bonus installments to Petitioner.

[4] Petitioner contends that the Award violates Missouri wage labor laws which, like the NJWL, protects earned wages, and he cites to the same lone unpublished decision that he relied upon in his original moving brief, *Gustafson v. SAP Am. Inc.*, No. 14-1497, 2015 U.S. Dist. LEXIS 43999 (E.D. Mo. Apr. 3, 2015). However, as I explained in the previous opinion, Petitioner's reliance on *Gustafson* is misplaced; the issue, there, did not concern whether bonus awards paid in connection with an incentive based compensation plan constitute earned wages under Missouri labor law. Petitioner references no additional Missouri cases in seeking reconsideration.

plan that included a bargained for retention provision. *Id.* at *13-14. Although the plaintiff had been approved to receive a $112,000 performance-based bonus, she was terminated from her job before the contractual date on which it was paid. *Id.* at *14. In finding that the bonus did not constitute an earned wage under the NJWPL, the court explained that the plaintiff's interest in the award had not "vested," and thus, she could not recover the funds under the statute.[5] *Id.* at *14-15; *see also Schweikert v. Baxter Healthcare Corp.*, No. 12-5876, 2015 U.S. Dist. LEXIS 98627, at *29 (D.N.J. July 29, 2015) (finding that the plaintiff was not entitled to receive a retention bonus, because he failed to retain his position with the defendant throughout the entire duration of the applicable period).

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[5] Petitioner avers that he was discharged without cause, and WFA prevented him from retaining his job through the Bonus Period so that he could earn additional bonus installments. To the extent that Petitioner maintains that WFA's bad faith conduct prevented him from fulfilling his contractual duties, this position does not implicate notions of public policy. Rather, such arguments are rooted in traditional principles of contract law, which are insufficient to disregard the deferential standard of review that is accorded to an arbitrator's decision. Nevertheless, I note that, based on the Award entered in favor of WFA, the Court can infer that the Panel, which conducted more than 22 separate hearings from December 10, 2018 to June 21, 2019, concluded that WFA did not act in bad faith in terminating Petitioner. While their decision could have provided more detail in this regard, it is-well established that "[an arbitration] award may be made without explanation of [its] reasons . . . . " *Wilko v. Swan*, 346 U.S. 427, 436 (1953); *Newark Morning Ledger Co. v. Newark Typographical Union Local 103*, 797 F.2d 162, 168 (3d Cir. 1986) ("Arbitrators have no obligation to the court to give their reasons for an award.") (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)).

Because Petitioner, on reconsideration, fails to demonstrate that the Award conflicts with "well defined and dominant" public policies under state wage labor statutes, the Panel's decision is entitled to "a strong presumption of correctness." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Schwarzwaelder*, 496 Fed. Appx. 227, 232 (3d Cir. 2012). Under this standard, "[t]he role of the courts is to ask only whether the parties . . . got what they bargained for, namely an arbitrator who would first provide an interpretation of the contract that was rationally based on the language of the agreement, and second would produce a rational award." *Id.* For the reasons explained in the previous opinion, which the Court need not reiterate here, the Panel's decision to enforce each of the Notes against Petitioner as a legitimate loan instrument finds sufficient support in the record. Indeed, in seeking reconsideration, Petitioner does not contend that the Award is based on a "completely" unreasonable or irrational interpretation of the Notes, and therefore, the Panel's decision in favor of WFA remains undisturbed. *Id.* (internal citation omitted).

I note that other district courts have confirmed arbitration decisions to enforce executed notes, like the ones here, between a financial advisor and an employer as bona fide loan instruments. For instance, in rejecting a litigant's request to vacate an arbitration award, the Southern District Court of New York, in *Banus v. Citigroup Global Mkts., Inc.*, No. 09-7128, 2010 U.S. Dist. LEXIS 40072, *7, (S.D.N.Y. April 23, 2010), provided the following succinct explanation:

> To begin with, plaintiffs signed the Notes, received the substantial loan proceeds (interest free it should be noted), and had the ability to use those proceeds for any purpose they chose, not least of them being the investment of the loan proceeds to generate interest income or capital gains. There was no lack of consideration or mutuality . . . . In this case, the loan proceeds were paid to the plaintiffs at the start of their employment and were to be repaid out of their annual compensation during the continuation of that employment. There is nothing inequitable about accelerating any unpaid balance where a broker left [a firm] before fully repaying the loan.

Id. at *34; *see also Wells Fargo Advisors, LLC v. Watts*, 858 F. Supp. 2d 591, 602 (W.D.N.C. March 9, 2012) (enforcing a loan agreement between a financial broker and WFA, and explaining that "[t]he . . . note in this case was simply not in violation of any public policy, or otherwise illegal, such that the arbitrator's award could be vacated."). Therefore, Petitioner has failed to provide sufficient grounds to vacate the Award, nor has he satisfied any of the basis for granting a motion for reconsideration. Accordingly, Petitioner's Motion for reconsideration is denied.

III. CONCLUSION

For the reasons set forth above, Petitioner's Motion for reconsideration is **DENIED**.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 19-17204 (FLW)

[Filed: September 11, 2020]

CHRISTOPHER N. CAPUTO,

Petitioner,

v.

WELLS FARGO ADVISORS, LLC,

Respondent.

ORDER

THIS MATTER having been opened to the Court by Mark A. Kriegel, Esq., counsel for Petitioner Christopher N. Caputo ("Petitioner"), on a Motion for reconsideration of the Court's May 29, 2020 Opinion and Order; it appearing that Wells Fargo Advisors, LLC, through its counsel, Megan M. Christensen, Esq., opposes the Motion; it appearing that the Court having considered the parties' submissions in connection with the Motion pursuant to Fed. R. Civ. P. 78, for the reasons set forth in the Opinion filed on this date, and for good cause shown;

IT IS on this 11th day of September, 2020,

ORDERED that Petitioner's Motion for reconsideration is **DENIED**.

/s/ Freda L. Wolfson
Freda L. Wolfson
U.S. Chief District Judge

APPENDIX F

Award
FINRA Office of Dispute Resolution

<u>Case Number</u>: 15-02044

[Filed: July 26, 2019]

In the Matter of the Arbitration Between:

<u>Claimant</u>
Wells Fargo Advisors, LLC

vs.

<u>Respondent</u>
Christopher N. Caputo

<u>Hearing Site</u>: Newark, New Jersey

Nature of the Dispute: Member vs. Associated Person

<u>REPRESENTATION OF PARTIES</u>

For Claimant Wells Fargo Advisors, LLC: Megan M. Christensen, Esq. and Jonathan Scoble, Esq, Stevens & Lee, Lawrenceville, New Jersey.

For Respondent Christopher N. Caputo: Timothy W. Bergin, Esq., Potomac Law Group, PLLC, Washington, District of Columbia.

CASE INFORMATION

Statement of Claim filed on or about: August 4, 2015.
Answer to Counterclaim filed on or about: November 19, 2015.
Wells Fargo Advisors, LLC signed the Submission Agreement: August 4, 2015.

Statement of Answer and Counterclaim filed by Respondent on or about: October 16, 2015.
Christopher N. Caputo signed the Submission Agreement: October 13, 2015.

CASE SUMMARY

Claimant asserted the following causes of action: breach of contract- non-payment of amounts due under promissory notes.

Unless specifically admitted in the Statement of Answer and Counterclaim, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses. In his Counterclaim, Respondent asserted the following causes of action: breach of contract, unconscionability based on fraudulent inducement, unjust enrichment, breach of implied duty of good faith and fair dealing, defamation, fraudulent inducement to accept employment, expungement and New Jersey employment law breach.

Unless specifically admitted in the Answer to Counterclaim, Claimant denied the allegations made in the Counterclaim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested compensatory damages of $1,663,529.71 plus interest, attorneys' fees, costs, and such other legal or equitable relief as the arbitration Panel deems appropriate, including but not limited to the right of set-off.

In the Statement of Answer and Counterclaim, Respondent requested compensatory damages not less than $1,000,000.00, dismissal with prejudice all of Claimant's claims, costs, attorneys' fees, expungement of the false and defamatory Form U5 from his CRD record, such other and further relief, including punitive damages, as the Panel deems appropriate, personal and reputational damages in the amount of $5,000,000.00 and an award that clarifies that any setoff damages, including punitive damages, awarded to Respondent can be netted or subtracted against Claimant's claims, and not require a separate payment.

In the Answer to Counterclaim, Claimant requested an award dismissing Respondent's Counterclaim, denying Respondent's requested relief, and awarding attorneys' fees, costs and all other relief that the Panel deems necessary and appropriate.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

The parties present at the hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent is liable for and shall pay to Claimant the sum of $1,663,529.71 in compensatory damages.

2. Respondent is liable for and shall pay to Claimant interest on the above-stated sum at the rate of 2.57% per annum from the date of the award to date full payment is made.

3. Respondent's Counterclaim is denied.

4. Respondent's request for expungement of his CRD records is denied.

5. Any and all claims for relief not specifically addressed herein, including punitive damages and attorneys' fees, are denied.

FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee =$ 3,400.00
Counterclaim Filing Fee =$ 2,250.00

**The filing fee is made up of* a *non-refundable and* a *refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated person at the time of the event giving rise to the dispute. Accordingly, as a party, Claimant Wells Fargo Advisors, LLC is assessed the following:

Member Surcharge	=$ 3,025.00
Member Process Fee	=$ 6,800.00

Postponement Fees

Postponements granted during these proceedings for which fees were assessed or waived:

January 17-20, & 27, 2017, postponement by Parties.
=$ 1,500.00

Total Postponement Fees =$ 1,500.00

The Panel has assessed $750.00 of the adjournment fees to Claimant.
The Panel has assessed $750.00 of the adjournment fees to Respondent.

Discovery-Related Motion Fee

Fees apply for each decision rendered on a discovery-related motion.

One (1) decision on a discovery-related motion on the papers with one (1) arbitrator @ $200.00/decision
=$ 200.00

Claimant submitted one discovery-related motion

Total Discovery-Related Motion Fees =$ 200.00

The Panel has assessed $160.00 of the discovery-related motion fees to Claimant.
The Panel has assessed $ 40.00 of the discovery-related motion fees Respondent.

Hearing Session Fees and Assessments
The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Three (3) pre-hearing sessions with the Panel @ $1,500.00/session =$ 4,500.00
Pre-hearing conferences:

January 27, 2016	1 session
January 23, 2018	1 session
December 3, 2018	1 session

Twenty-two (22) hearing sessions @ $1,500.00/session =$33,000.00
Hearing Dates:

December 10, 2018	2 sessions
December 11, 2018	2 sessions
December 12, 2018	2 sessions
December 13, 2018	2 sessions
December 14, 2018	2 sessions
April 9, 2019	2 sessions
April 11, 2019	2 sessions
April 12, 2019	2 sessions

June 11, 2019	2 sessions
June 20, 2019	2 sessions
June 21, 2019	2 sessions

Total Hearing Session Fees =$37,500.00

The Panel has assessed $18,300.00 of the hearing session fees to Claimant.
The Panel has assessed $19,200.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

ARBITRATION PANEL

Paul Allan Massaro	-	Public Arbitrator, Presiding Chairperson
Jay Alan Kranis	-	Public Arbitrator
Ronald J. Colombo	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

/s/ Paul A. Massaro
Paul Allan Massaro
Public Arbitrator, Presiding Chairperson

July 25, 2018
Signature Date

____________________ _______________
Jay Alan Kranis Signature Date
Public Arbitrator

____________________ _______________
Ronald J. Colombo Signature Date
Non-Public Arbitrator

July 26, 2019
Date of Service (For FINRA Office of Dispute Resolution office use only)

ARBITRATION PANEL

Paul Allan Massaro	-	Public Arbitrator, Presiding Chairperson
Jay Alan Kranis	-	Public Arbitrator
Ronald J. Colombo	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

____
Paul Allan Massaro
Public Arbitrator, Presiding Chairperson

____
Signature Date

/s/ Jay A. Kranis 7/25/18
Jay Alan Kranis Signature Date
Public Arbitrator

____________________ _______________

Ronald J. Colombo Signature Date
Non-Public Arbitrator

July 26, 2019
Date of Service (For FINRA Office of Dispute Resolution office use only)

ARBITRATION PANEL

Paul Allan Massaro	-	Public Arbitrator, Presiding Chairperson
Jay Alan Kranis	-	Public Arbitrator
Ronald J. Colombo	-	Non-Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

____

Paul Allan Massaro
Public Arbitrator, Presiding Chairperson

____

Signature Date

____________________ _______________

Jay Alan Kranis Signature Date
Public Arbitrator

/s/ Ronald J. Colombo 7/25/2019
Ronald J. Colombo Signature Date
Non-Public Arbitrator

July 26, 2019
Date of Service (For FINRA Office of Dispute Resolution office use only)

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-3059

(D NJ No. 3-19-cv-17204)

[Filed: June 17, 2022]

CHRISTOPHER N. CAPUTO, Appellant)
)
)
v.)
)
WELLS FARGO ADVISORS, LLC)
)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, AMBRO, JORDAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FUENTES* , Circuit Judges

The petition for rehearing filed by appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fuentes's vote is limited to panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Julio M. Fuentes
Circuit Judge

Dated: June 17, 2022
Lmr/cc: All Counsel of Record

APPENDIX H

* * * *

Excerpted Testimony of Wells Fargo Witness ANTHONY CITRO (from recording no. 7, December 10, 2018)

MS. CHRISTENSEN: [*3:56*] Thank you very much for flying in and being here to testify in person. Would you mind, I don't believe that the Chairperson had asked you about your title?

MR. CITRO: I work for Wells Fargo Advisors. My title is Market Growth and Development Manager. I'm a 19-year veteran of the company and I currently reside in Charlotte, North Carolina.

CHAIR MASSARO: Market growth and --?

MR. CITRO: -- development manager.

CHAIR MASSARO: Thank you.

MS. CHRISTENSEN: And Mr. Citro, what is the market growth development manager? What are the responsibilities of that job?

MR. CITRO: Sure. Currently I work on compensation strategies and business development work for Wells Fargo Advisors.

MS. CHRISTENSEN: Is it fair to say then, to simplify it, that you help develop compensation packages for financial advisors for Wells Fargo?

MR. CITRO: Yes, ma'am. Previous to this role, I worked in finance and was responsible for developing offer summaries and promissory notes for newly hired advisors as well as for production-based bonuses that were earned.

* * * *

[p. 5]

MS. CHRISTENSEN: [*6:17*] Okay. Mr. Citro, I'm going to ask that – and there were several questions for Mr. Mairs earlier about the bonus structure. So I'm going to ask that you walk the Panel through the different bonuses that are offered and incentivized by Wells Fargo to recruit financial advisors. The first is, if you look on paragraph 1 there [CA3.App.377], the transitional bonus. Can you tell us what a transitional bonus is and how it's generally structured?

MR. CITRO: Sure. The transitional bonus is the initial bonus that an advisor would get for agreeing to come. The firm typically certifies what's called a trailing 12 months of revenue and in some cases, as was prescribed here, in assets under management. Generally, they offer percent of trailing 12, which is very common in the industry, in the form of a transition bonus, and it's outlined here that that bonus is paid in equal installments over 112 months. It states the beginning date, the end date, as well as an additional interest rate that's added.

* * * *

MS. CHRISTENSEN: [*13:27*] Mr. Caputo has also alleged that this transition payment is akin to a signing bonus. Is this accurate?

MR. CITRO: No. Typically a signing bonus would be paid in a lump sum and taxed at the time of payment. Signing bonuses may or may not have repayment terms associated with them, but for – signing bonuses are typically not of this size either, if they're paid in a lump sum and taxed at the time of payment.

MS. CHRISTENSEN: And why is that?

MR. CITRO: It's two things. One, the employee has a benefit where they get to stretch the taxation so this cash bonus being paid in monthly installments stretches out the taxable income over a period of 10 years, little under 10 years. And the firm also doesn't have to recognize the full expense paid out on their initial that way outlay.

MS. CHRISTENSEN: Okay. And is it – would it be typical for any at-will employee to be given a signing bonus?

MR. CITRO: No. The only time they're typically given is if they're less than 20 – if it's $59,600 or something like that, they would be given in a lump sum.

MS. CHRISTENSEN: Okay. And is this designed to ensure that financial advisors don't just take a check and run off to the next firm?

MR. CITRO: Yeah. I mean at the end of the day, we are a company that's owned by shareholders and it will be bad for us to lay out cash and have somebody to be able to take that cash and then move firm-to-firm and collect other checks, not to mention the client experience that would be there.

MS. CHRISTENSEN: Okay. And that's perhaps why it's designed to be paid on a monthly basis, is that correct?

MR. CITRO: That's correct.

MS. CHRISTENSEN: Okay. Are these types of transition packages common in the industry?

MR. CITRO: It's very common in the industry. ...

* * * *

[from recording no. 8, December 10, 2018]

MS. CHRISTENSEN: [*1:21*] So if you could describe for the Panel what a production bonus is and more specifically, how it is different than a transition bonus?

MR. CITRO: Sure. So production-based bonuses, and they're labeled in here as production bonuses and best practice awards, are essentially another set of bonus installments that can be earned if at a particular point in time certain thresholds and requirements are met. They're typically done based on a scale, on the pre-hire trailing 12, so just as the initial amount was set, the production-based bonuses will say, if you meet x of your pre-hire trailing 12 on this date, you can then earn another subsequent installment period of bonuses. And they usually go out sometimes up to four years. And then they can also have additional requirements attached to them, such as best practice components, which are usually planning type engagement things.

MS. CHRISTENSEN: Okay. Is there a difference between a, just a production bonus and a best practice bonus?

MR. CITRO: They can be different. In this, in these particular offers they are tied together. They'll say you have to meet both a production basis and have a certain number, in these cases, there are key households with a plan of record.

MS. CHRISTENSEN: Okay. Is it fair to say that these production bonuses call for a goal and quality checks in any given, like, snapshot of a time period?

MR. CITRO: Yes, so they'll have a timeframe outlined of when you need to meet these parameters, and if those parameters are met, it will pay the according bonus installments that are outlined. The paragraphs do stipulate there's a maximum that an FA can be paid between the upfront and the performance bonuses, and that's to maintain profitability for the firm.

MS. CHRISTENSEN: And Mr. Citro, does it have the same sort of condition that the FA has to remain employed with Wells Fargo?

MR. CITRO: Yes, ma'am. They say that there, the performance bonuses are outlined in paragraph four [CA3.App.378-379], the paragraph that we referred to earlier where the additional terms and conditions are applicable to all bonuses, so that includes both the transition and the performance, sorry, production-based bonuses.

MS. CHRISTENSEN: Thank you. So like the transitional bonus, was the goal to incentivize a financial advisor not only to meet certain production levels but also to stay with Wells Fargo over a period of time?

MR. CITRO: Correct. That's correct. They were production-based and there's also this client wrapper in here, that there's an expectation that a certain number of key households have a plan of record, so stay with Wells Fargo, take care of your clients, and meet your production goal.

MS. CHRISTENSEN: And if these bonus monies were paid in one lump sum, would you not have the same concern that you spoke of earlier which is, financial advisor taking the check and jumping ship?

MR. CITRO: Yes, ma'am.

MS. CHRISTENSEN: Okay. And are production bonuses unique to Wells Fargo?

MR. CITRO: No, they are not. Typically, in those results we would get back, we get total package deals. We do a lot of attrition analysis when financial advisors leave Wells Fargo, even trying to find out where they went, what they got. So it will usually get reported back that they got some sort of package, and a total percent of the deal, so much upfront and so much available on the back end.

* * * *

MS. CHRISTENSEN: [*6:03*] 59 is the next one, you're correct.

CHAIR MASSARO: Do you have more tabs in this case?

MS. CHRISTENSEN: Yes, we do. Mr. Citro, you've never seen this document [CA3.App.301-306], have you?

MR. CITRO: No, ma'am.

MS. CHRISTENSEN: Okay. So if you wouldn't mind just taking a moment to review it and then I'll ask you some questions.

[Silence]

MS. CHRISTENSEN: Have you had enough time to review this document?

MR. CITRO: Briefly, yes.

MS. CHRISTENSEN: Okay. Thank you. I understand it's new to you. What is your understanding of what this document is?

MR. CITRO: It appears to be an offer from UBS dated January 5th, 2006 to Chris Caputo, and it has a very similar layout to the offer that we reviewed before, with terms and conditions of an upfront, what is referred to in here as an employee forgivable loan.

MS. CHRISTENSEN: Okay. And if I can draw your attention also to paragraphs 6 and 7.

MR. CITRO: Yes. These are production-based bonuses where there was an opportunity to earn additional loans after it looks like 14 months of employment and 26 months of employment, subject to some production thresholds and things like that.

MS. CHRISTENSEN: And it has the same sort of – what do you call them? Quality check, the ROA at 1.5%?

MR. CITRO: That is correct.

MS. CHRISTENSEN: And it's similar to what we saw with the production bonuses that Wells Fargo offered, correct?

MR. CITRO: Yeah, with the only exception is these are specified as forgivable loans.

MS. CHRISTENSEN: Yeah, we'll get to that in one second. But the production, it also has that in order to receive this production bonus you would have at least 75% of your original trailing 12?

MR. CITRO: Correct, yes.

MS. CHRISTENSEN: That would be what would be the equivalent to the benchmark that Wells Fargo sets out in its production bonuses?

MR. CITRO: Yes, ma'am.

MS. CHRISTENSEN: Okay. And the same for paragraph 7, is that an additional production bonus that was offered by UBS?

MR. CITRO: Yeah. This one is 10% of gross commissions produced during months 15 through 26, provided production is at least 85% of the trailing 12.

MS. CHRISTENSEN: Okay. And that's equivalent, again, to the production bonuses that were offered by Wells Fargo, or similar I should say. Equivalent, similar, correct?

MR. CITRO: Yes, ma'am.

MS. CHRISTENSEN: And do these production bonuses that were provided to Mr. Caputo by UBS require that they be paid over time?

MR. CITRO: They do not because they structured as forgivable loans.

MS. CHRISTENSEN: So what is the difference there between what Wells Fargo does and what UBS did?

MR. CITRO: So, in the – there's a paragraph in here that talks about an employee forgivable loan agreement and it says, it's a cash loan in the amount of $812,819 and "shall be forgivable over six years." We don't have a copy of the loan agreement, but typically when they're offered, you have a loan disclosure statement that says, we will impute to your income, in this case, it will be over six years, if it's done monthly it would be 1/72nd every month in your pay check, and that's one payment that you do not have to repay should you depart prior to the end of the six-year period. So instead of it being paid as a cash bonus, it's imputed income and taxed, it's taxed that way.

MS. CHRISTENSEN: So, Mr. Citro, just for clarity here, for those firms that offer it as a forgivable loan, do they require that the money be paid back if the employee leaves the employment of that firm?

MR. CITRO: Yes, they do require repayment of the, an amortized balance.

MS. CHRISTENSEN: Okay. We also do have the note, so I would like to introduce that as well as tab 60 [CA3.App.307-312].

[Silence]

MS. CHRISTENSEN: Have you had an opportunity to briefly, or as much as you possibly could in that time period, to review this document?

MR. CITRO: Yes, ma'am.

MS. CHRISTENSEN: Okay. And can you state for the record what this document represents?

MR. CITRO: This appears to be one of the performance bonus or production bonus promissory notes that was issued on April the 7th, 2008. It's in the amount of $72,605. It stipulates that Chris Caputo would receive that $72,605 and he must repay it by April the 7th, 2012 in full. Then there are provisions in here that basically say, on an annual basis as long as he's employed, they will forgive one of the payments. Looks like one fourth.

MS. CHRISTENSEN: Okay. If I could ask you, Mr. Citro, if you could read the last line of that first page into the record, starting with "If employees..."

MR. CITRO: Sure. It's under the paragraph entitled forgiveness of principal amount. "If employee's employment with UBS Financial Services or UBS shall terminate, whether voluntarily or involuntarily, other than by reason of disability, as hereinafter defined, or death, no part of the unpaid principal amount shall be forgiven."

MS. CHRISTENSEN: And then continue with the acceleration part.

MR. CITRO: Acceleration. "This note shall immediately become due and payable without

presentment, demand, protest, notice of default or any other notice of any kind, which the employee hereby expressly waives, in the event that the employee's employment with UBS Financial Services or UBS is terminated, either voluntarily or involuntarily by the employee, UBS Financial Services or UBS for any reason whatsoever other than disability or death."

MS. CHRISTENSEN: Thank you. And as you've been reading these UBS documents, do they stand out to you to be unique to the industry?

MR. CITRO: They don't stand out as unique because they have similar terms of what we've reviewed in the previous documents from Wells Fargo.

MS. CHRISTENSEN: Is it fair to say, then, that each of these bonuses from both Wells Fargo and from UBS are structured in a way to incentivize both production levels as well as retention with Wells Fargo?

MR. CITRO: Yes, ma'am.

MS. CHRISTENSEN: Now Mr. Citro, does Wells Fargo pay the monthly installments, the bonus monies to the financial advisors even when they elect to take a promissory note?

MR. CITRO: Yes, ma'am.

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[p. 15]

MR. CITRO: So in – both when an FA offer is extended or in those performance-based, sorry, production-based opportunities, the bonuses are

outlined in the offer summary [CA3.App.377-382]. Wells Fargo does offer the option for an FA to borrow the proceeds upfront. It is a loan document that stands alone by itself and it basically has similar conditions that say, you receive an allotment of money. You don't even have to borrow the full amount. So, if I was offered a million dollars to come over to the firm today, I don't have to borrow a million dollars. I could borrow a half a million. But Wells Fargo would still pay me the equivalent of the million in installments.

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[p. 16]

MS. CHRISTENSEN: [*20:56*] Okay. Mr. Citro, are the disbursed proceeds in the form of promissory note considered wages? In other words, if the financial advisor chose to enter into a loan agreement with Wells Fargo and was given a certain amount in check form, would that be taxable income?

MR. CITRO: No, ma'am. Promissory note is issued in after-tax dollars, which is why it's being repaid in after tax dollars on the pay stub.

MS. CHRISTENSEN: So it's not considered compensation at all?

MR. CITRO: That's correct.

MS. CHRISTENSEN: And the financial advisor does not pay taxes on the loan?

MR. CITRO: No, ma'am.

MS. CHRISTENSEN: The financial advisor does pay taxes on the monthly bonus payments?

MR. CITRO: Yes, ma'am.

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MS. CHRISTENSEN: Mr. Citro, would you agree with me that it can't be wages unless it's taxed?

MR. CITRO: That's correct.

* * * *

[p. 18]

MS. CHRISTENSEN: Okay. Thank you. And I just have a few questions left. Under the offer, what would happen to the monthly bonus payments if the FA's employment with Wells Fargo ended?

MR. CITRO: If the employment status of the financial advisor would end for any reason other than death or disability, the payments would stop.

MS. CHRISTENSEN: And under the hypothetical that the financial advisor elects to enter into a promissory note agreement, what happens if the financial advisor's employment with Wells Fargo ends?

MR. CITRO: The note should contain a paragraph that states, if you no longer hold the title of financial advisor or are no longer employed, the note balance is due and callable.

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APPENDIX I

FINANCIAL INDUSTRY REGULATORY AUTHORITY
DISPUTE RESOLUTION

FINRA Dispute Resolution
Arbitration No. 15-02044

[Dated: June 28, 2019]

In the Matter of Arbitration between:

WELLS FARGO ADVISORS, LLC,

Claimant and Counter-
Claim Respondent,

v.

CHRISTOPHER CAPUTO,

Respondent and
Counter-Claimant

RESPONSE ON BEHALF OF CHRISTOPHER CAPUTO TO WELLS FARGO'S POST-HEARING SUBMISSION

June 28, 2019

Overview

In its post-hearing submission, Wells Fargo asks the Panel to require Christopher Caputo to pay Wells Fargo at least $434,010 in attorney fees and costs, on top of more than $2,084,550 supposedly due under five promissory notes (including penalty interest). Wells Fargo should not be awarded any attorney fees or costs because for the reasons set forth below, it is not entitled to recover under the notes.

Moreover, Mr. Caputo is entitled to an award of damages that more than offsets the amounts claimed by Wells Fargo in this case.[1] Mr. Caputo's counter-claims fall into two broad categories: **(1)** damages for breach of his employment contract (Caputo Ex. 41), insofar as Wells Fargo has refused to pay Mr. Caputo **(a)** the full production bonuses that he was promised and *fully earned* (by meeting annual production benchmarks), and funds of Mr. Caputo held in his frozen Wells Fargo accounts, and **(b)** the full transitional bonus (and other deferred compensation) promised to induce him to leave UBS and join Wells Fargo;[2] and **(2)** damages for defamatory statements

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[1] Mr. Caputo incorporates by reference herein **(1)** his Pre-Hearing Memorandum (submitted October 29, 2018) ("Pre-Hg. Mem."), **(2)** his Reply to Wells Fargo's Pre-Hearing Letter (submitted November 6, 2018), and **(3)** his Restatement of Claimed Damages, and Proofs as to Claimed Attorney Fees and Costs (submitted November 20, 2018) (Caputo Ex. 40). Any exhibit cited herein (or otherwise admitted into evidence) will be provided upon request.

[2] *See* Mr. Caputo's Restatement of Claimed Damages, and Proofs as to Claimed Attorney Fees and Costs, pp. pp. 1-2. Compensatory damages claimed by Mr. Caputo for Wells Fargo's breach of

made by Wells Fargo about Mr. Caputo to FINRA and to his prospective employers, past and prospective clients, and the public at large.[3]

Wells Fargo has argued that the promissory notes at issue should be viewed not as forgivable loans (forgiven to the extent that corresponding retention bonuses are earned over time, or to the extent the broker is prevented from doing so by a discharge at will), but rather in isolation from the bonus that gave rise to the note. This approach is neither fair nor

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contract exceed $1,948,530. Mr. Caputo also seeks additional recovery of $3,295,928 under an applicable Missouri statute requiring employers who fail to pay earned commissions to pay punitive damages "as if the sales representative were still earning commissions calculated on an annualized pro rata basis from the date of termination to the date of payment." Id., p. 4.

[3] *See id.,* pp. 2-5. Compensatory damages claimed by Mr. Caputo for Wells Fargo's defamatory statements amount to approximately $2,569,191, consisting of the following components: (1) attorney fees and costs incurred in complying with information requests by FINRA's enforcement department; (2) net commissions lost and costs incurred while seeking to renew registrations with state securities regulators that were called into question due to Wells Fargo's defamatory Form U-5; (3) the present value of net commissions Mr. Caputo would likely have received from the 27 clients he lost due to Wells Fargo's defamatory statements; (4) the present value of net commissions Mr. Caputo would likely have received from new clients but for Wells Fargo's defamatory statements; (5) the value of an incentive compensation package that Mr. Caputo would likely have received from a new employer, after leaving Wells Fargo, but for its defamatory statements; and (6) compensation for humiliation and mental suffering caused by Wells Fargo's defamatory statements. Mr. Caputo also seeks punitive damages for Wells Fargo's defamatory statements.

realistic (as Wells Fargo's own witnesses recognized),[4] and is contrary to controlling case law.[5] Moreover, it is pointless because even if Wells Fargo were otherwise entitled recovery on the notes standing alone, Mr. Caputo would clearly be entitled to an offsetting recovery on the corresponding bonus awards,[6] as shown below.

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[4] *See* "Case Law and Testimony Referenced in Closing Argument" on behalf of Mr. Caputo (hereinafter, "Closing References"), pp. 23-28 (hand-numbered). Mr. Citro testified that the "*forgivable* loans"/ production bonuses that Mr. Caputo received from UBS were "equivalent" to those he received from Wells Fargo — each month UBS or Wells Fargo would credit him with bonus income that offset a corresponding portion of the loan. *Id.* p. 23. Mr. Citro showed that each monthly bonus credit from Wells Fargo fully offset the corresponding monthly loan payment otherwise due. *Id.* at pp. 26-27. Additional money was deducted from Mr. Caputo's paycheck only to the extent Wells Fargo also paid his income taxes on the bonus installments. *Id.* p. 28.

[5] *See* Pre-Hg. Mem., p. 14, ¶1 & note 37. In the words of a federal court addressing loans by Wells Fargo to brokers just like those at issue here: "the economic effect is exactly the same as periodic and scheduled forgiveness of the outstanding 'debt'." *Id.* In the case cited by Wells Fargo in this regard, *Merrill Lynch v. Schwartzwaelder,* 496 Fed. Appx. 227 (3d Cir. 2012), the court "acknowledge[d] that there is a basis in the record to construe the parties' agreements as intending to effect a *single transaction akin to a forgivable loan*" but did not decide the issue, deferring instead to the finding of an arbitral panel that a departed broker had executed a release extinguishing her claim to bonus compensation that would otherwise offset a corresponding promissory note. *Id.* at 232-33. All emphasis in quotations herein is by the undersigned.

[6] *See* Caputo's Restatement of Claimed Damages, and Proofs as to Claimed Attorney Fees and Costs, pp. 1-2.

Legal Framework for Contract Claims in This Case

Four of the promissory notes at issue were for upfront payment of compensation that Mr. Caputo had already fully earned at the time, as reflected by the four Production Bonuses (Caputo Ex. 42) awarded to him by Wells Fargo *prior* to the corresponding notes. These bonuses were payable in monthly installments over roughly ten years (so structured to discourage Mr. Caputo from resigning within that period) that more than offset the monthly installments due under the corresponding notes, as Wells Fargo witness Citro confirmed (*see* note 4, *supra*). Likewise, as Wells Fargo witness John Mairs acknowledged (in reference to Caputo Ex. 41, pp. 703-704), monthly installments due under the other (first) note were more than fully offset by monthly installment payments of the transitional bonus awarded to Mr. Caputo to induce him to leave UBS and join Wells Fargo.

Thus, having awarded the bonuses, Wells Fargo had no expectation that any of corresponding notes would be repaid out of pocket — as opposed to cancelled out by bonuses earned by or promised to Mr. Caputo — so long as he remained employed by Wells Fargo during the 10-year payment period.[7] The employment contract

[7] For this reason, a federal court has held, in accord with uniform case law, that loans by Wells Fargo to brokers just like those at issue here are not bona fide loans, but rather simply payment of bonuses (subject to a condition of continued employment during the 'loan' term). *See* Pre-Hg. Mem., pp. 14-15 (¶2) & note 38. Thus, the only lawful function of the notes was as a contractual claw-back provision to the extent (if any) that a bonus was not fully

(Caputo Ex. 41) provided in that regard that if he resigned — or was discharged by Wells Fargo for any reason or no reason at all (at will) — he would "forfeit any unpaid installments ... due under the Bonuses" (¶5.b) if such forfeiture was "allowed by applicable law" (¶4.g). For two broad reasons, no such forfeiture is allowed by applicable law in this case.

First, it is fundamental public policy, under statutes and case law of both Missouri (by which the employment contract is expressly governed) and New Jersey as well as virtually every other state, that while an employee may be discharged at will, the employee may not be deprived of compensation promised and *earned* for services rendered, *irrespective* of whether the employee was discharged without good cause (or resigned), and *any contractual provision to the contrary is void and unenforceable.*[8] As a matter of law, 48.5344% of Wells Fargo's aggregate claim (*i.e.,* all claims relating to the four production bonuses) should

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earned at the time Mr. Caputo's employment by Wells Fargo ended.

[8] *See* Pre-Hg. Mem. pp. 15-18 (¶¶3-5); Reply to Wells Fargo's Pre-Hg. Letter, pp. 3-4. Under choice of law rules, New Jersey law applies to the extent it provides greater protection of employees than Missouri law, and vice versa (and the relevant case law of other states is applicable if not inconsistent with Missouri or New Jersey law). *See* Pre-Hg. Mem. p. 14 note 36. It is immaterial that Mr. Caputo did not invoke such law instead of paying off UBS production-bonus notes with funds provided by Wells Fargo for that purpose (i.e., from the transitional bonus it awarded him).

be rejected on this ground.[9] In its Post-Hearing Brief (p. 5), Wells Fargo accordingly states that it "does *not* seek to recoup compensation ... *earned* by Mr. Caputo during his employment" at Wells Fargo.

Second, it is likewise fundamental public policy, under long-established case law of Missouri and New Jersey as well as other states, that contractual provisions for forfeiture of compensation promised in recruiting an employee are unconscionable and unenforceable to the extent the forfeiture results from discharging the employee *at will* — as opposed to resignation by the employee, or breach of the employment contract by the employee so serious as to preclude continued employment.[10]

This body of law is not necessarily contrary to the industry practices that Wells Fargo invokes — it simply precludes forfeiture of bonuses promised and

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[9] As of December 10, 2018, Wells Fargo claimed $1,072,826.38 on the transitional-bonus note (WF Ex. 1.B), $227,799.46 on the first production-bonus note (WF Ex. 2.B), $248,937.35 on the second production-bonus note (WF Ex. 3.B), $249,928.47 on the third production-bonus note (WF Ex. 4.B), and $285,058.27 on the fourth production-bonus note (WF Ex. 5.B), for a total of $2,084,549.93 (before post-12-10-2018 interest, attorney fees and costs). $1,072,826.38 + $2,084,549.93 x 100 = 51.4656%

[10] *See* Pre-Hg. Mem., pp. 18-20 (¶¶6-7) & note 54 in particular; *id.* p. 2 note 4; Reply to Wells Fargo's Pre-Hg. Letter, pp. 7-10; Closing References, pp. 1-19 (copies of the *Frymire* and *Agron* cases). *See also Wells Fargo Advisors v. Shaffer,* 2011 WL 2669479, at *1, 4 (N.D. Cal.) (confirming arbitral award "ruling ... unconscionable" and unenforceable Wells Fargo's contract provisions for calling forgivable loans due upon discharge of broker "'for any reason whatsoever'").

fully earned, and also requires payment of retention bonuses promised to employees who are later discharged at will, and thus deprived of an opportunity to fully earn the retention bonus that induced the employment. To the extent any bonus is paid upfront subject to a promissory note, and is not fully earned when the employee resigns (as in the cases cited in Wells Fargo's Post-Hearing Brief), the note is enforceable, as Mr. Caputo has always recognized in this case (*see* note 7, *supra*). If a production bonus already fully earned is subject to a promissory note, however, the note is merely a mechanism for forfeiture of earned compensation, and is thus void and unenforceable by statute and otherwise.

As summarized by the federal court in the *Frymire* case (Closing References, p. 14) in rejecting PaineWebber's claim based on a forgivable loan to a securities broker, discharged at will, that was tied to a transitional retention bonus, it is not sufficient even if the employer may have some grounds for discharging the broker. Only if the broker had engaged in conduct "so egregious as to have compelled his discharge" — precluding "other active steps" by PaineWebber "to preserve its relationship with the [broker]" — could it be said that the broker was more responsible than the employer (despite PaineWebber's "great degree of control over the [broker's] employment status") for the broker's failure to satisfy the condition (continued employment during the 'loan' term) for extinguishing the 'debt' that neither had intended at the outset to be repaid.

Similarly, in the *Agron* case (Closing References, pp. 16-19), the federal court of appeals confirmed an arbitral decision rejecting a similar forfeiture claim by PaineWebber, even though the broker was discharged for violating a rule of the NASD (FINRA's predecessor), because the NASD had found that only a "letter of caution" was warranted in view of "mitigation in the client's consent" (*id.* p. 17). The court *rejected* PaineWebber's position (echoed by Wells Fargo in this case) that the discharge was required because PaineWebber would otherwise itself "risk discipline by the NASD" (*id.* p. 18) for having failed to supervise its broker adequately.[11]

It is indisputable that — as Wells Fargo informed FINRA in response to its direct questions — Mr. Caputo was discharged because of the number of transactions by his clients surrendering variable

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[11] Wells Fargo misses the point in attempting to distinguish *Argron* in its Post-Hearing Brief. First, irrespective of contract language, *public policy* precludes enforcement of *any* promissory note or other contractual provision that would deprive an employee of a promised retention bonus due to a discharge at will (*see* Pre-Hg. Mem., p. 19 & note 54). Second, that principle applies even if the employer had *some* cause to discharge the employee, as in *Agron,* unless the employee's conduct was "so egregious as to have compelled his discharge" and precluded any discipline short of discharge. *Frymire, supra.* Further, Wells Fargo is wrong in suggesting that under *Agron,* courts necessarily defer to arbitrators. Rather, *Agron* recognized that courts "review ... [arbitral] conclusions *de novo* to determine if they violate *public policy*." 49 F.3d at 350.

annuities and investing the proceeds in mutual funds.[12] As detailed below, however, the record in this case does not support any finding that Mr. Caputo violated any established rule or policy of Wells Fargo in that regard.

Rather, he was *admittedly* discharged only because — *despite* his repeated assurances that he would adhere fully to any Wells Fargo rule or policy of which he was given fair notice — his past transactions were perceived by Wells Fargo compliance personnel as presenting a risk that FINRA could impose sanctions on Wells Fargo itself for having failed to monitor such transactions adequately, and for permitting and approving such transactions. *See, e.g.,* Closing References, pp. 32-34 (testimony of Shea Hicks);[13] and

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[12] *E.g.,* Caputo Ex. 19 (Jan. 29, 2015 letter from Stuart Sakosits to FINRA) (hand-numbered pp. 223-224) ("... Mr. Caputo's clients were liquidating annuities in order to generate cash to invest in A share mutual funds. ... [T]here appeared to be many instances in which the mutual funds did not produce the level of income produced by the formerly held annuities. ... *For this reason, the firm made the decision to discharge Mr. Caputo* and that action was carried out on December 17, 2014"); Caputo Ex. 22 (January 8, 2016 letter from Shea Hicks to FINRA) (hand-numbered pp. 231-265) (presenting 46 such transactions by Mr. Caputo's clients "which *directly led to his termination*"). In other words, there is no evidence that Mr. Caputo was discharged in December 2014 due to alerts by monitors *in 2013* calling for an explanation of whether additional breakpoint discounts could have been obtained by purchasing more mutual fund A-shares (or more within the same mutual fund family), or why some mutual fund A-shares were sold within five years.

[13] Wells Fargo's legal and compliance departments "push[ed] for immediate termination" of Mr. Caputo (even prior to the Capital Forensics report) because the "volume of transactions" presented

recall the emphatic testimony of Otha Jones in this regard. In other words, Mr. Caputo was discharged essentially as a "sacrificial lamb" to mitigate Wells Fargo's own supposed potential exposure to FINRA sanctions.[14] Indeed, Wells Fargo emphasizes in its Post-Hearing Brief (pp. 7-8) that Mr. Caputo was discharged "at-will" — for "business reasons".

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a "regulatory risk" to Wells Fargo itself "given a lot of pronouncements that FINRA had issued to the industry about concerns in switches and making sure that movement from long term products to other long term products was in the client's best interest." *Id.,* pp. 32-33. *See, e.g., In re Great American Advisors, Inc.,* Letter of Acceptance, Waiver and Consent, approved by FINRA on May 22, 2014; *In re Wachovia Securities, L.L.C., n/k/a Wells Fargo Advisors, L.L.C.,* Letter of Acceptance, Waiver and Consent, approved by FINRA on August 28, 2009; *In re Wells Fargo Investments, L.L.C.,* Letter of Acceptance, Waiver and Consent, approved by FINRA on July 23, 2009 — all provided to the Panel on June 21, 2019.

[14] *See also* Closing References, pp. 43-44, 57 (testimony by Matthew Hulbert that Wells Fargo had no monitoring system for exchanging variable annuities for mutual funds) (discharge recommendation presented on Sept 8, 2014 conference call "was *not* that there was a *suitability* issue" but instead was "based on sheer numbers, they felt that there was a clear pattern" of annuity redemptions); Caputo Ex. 30, at 524 (weekly report by Greg Thies for period ending August 15, 2014, noting concerns by Surveillance regarding "potential gaps around the liquidation of annuities"); Caputo Ex. 24, p. 304 (October 5, 2016 email to Shea Hicks from Kamran Fotouhi) ("we did not identify any Wells Fargo centric records pertaining to annuity liquidations"). Wells Fargo's abortive plan to compensate Mr. Caputo's clients (never implemented) was likewise apparently designed to mitigate its supposed potential exposure to FINRA sanctions, as were its "soft" calls to clients (designed to avoid generating any client complaint).

By no means, therefore, does the discharge of Mr. Caputo meet the standards applied in the analogous *Frymire* and *Agron* cases for requiring Mr. Caputo to forfeit compensation promised by Wells Fargo in recruiting him, and awarded to him in the form of a transitional bonus payable over time (offsetting the corresponding promissory note) so long as he remained employed by Wells Fargo. Rather, Wells Fargo prevented him from meeting that condition by discharging him at will — *not* for any "conduct so egregious as to have compelled his discharge" despite his assurances that he would comply with any Wells Fargo policy of which he had fair notice.[15] Had it chosen, Wells Fargo could have instead maintained heightened supervision of Mr. Caputo (requiring advance supervisory approval of transactions in question) and/or issued a formal "memorandum of education" or "memorandum of warning" in accord with its Team Member Handbook (Caputo Hx. 38, p. 669). *See* Closing References, pp. 59-60 (testimony of Matthew Hulbert).

Further Evidence Supporting Mr. Caputo's Contract Claims

Mr. Caputo had no fair notice of any Wells Fargo policy that supposedly prohibited him from permitting

[15] *See, e.g.,* Caputo Ex. 10 (Interview Notes), hand-numbered p. 183 ("I understand the firm doesn't want me to liquidate annuities for profit. I have to be more diligent going forward"); Caputo Ex. 12, p. 209 (post-interview email from Caputo to supervisors) ("I have decided to change some of my business practices going forward" including to "stress the need to hold existing annuity contracts ... for the very long term").

his clients to surrender variable annuities for the purpose of investing the proceeds in mutual funds, not only because his supervisor, Mr. Sakosits, permitted and approved such transactions,[16] but also because there *admittedly* was *no* such policy. *See, e.g.,* Closing References, p. 29 (testimony of Shea Hicks) (no rule or policy against liquidating annuities to take a profit), pp. 45-52, 55 (testimony of Matthew Hulbert) (approving four such transactions in April 2014) ("no Wells Fargo policies ... that would prohibit any such exchanges") ("no policy that variable annuities should not be surrendered in order to capture a profit or an investment gain"); and recall the similar testimony of Wells Fargo witnesses Carroll, Sakosits, and Biggs.

Then why was Mr. Caputo investigated so aggressively by surveillance and compliance officers beginning in late March 2014? Because incredibly, as Mr. Hulbert explained (*see* Closing References, pp. 40-44), they *misread* a mid-2013 audit report (Caputo Ex. 26, p. 426) as supposedly "citing" Mr. Caputo for "this exact activity" (permitting his clients to surrender variable annuities for the purpose of investing the proceeds in mutual funds), and thus recklessly considered him to be a recidivist violator of a Wells Fargo policy made known to him in mid-2013. *Id.* p. 424. *See also* Caputo Ex. 10 (Interview Notes), p. 183 (same error made by compliance interrogators).

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[16] *See, e.g.,* Caputo Ex. 26, p. 438-442 (supervision note of client call by Mr. Sakosits, approved by Mr. Hulbert, regarding surrender of Hartford variable annuity on behalf of Lydia Ledeen); Caputo Ex. 27, pp. 444-467 (surrender request forms signed by Mr. Sakosits on behalf of several clients).

In fact, the *precise opposite* was true, as Mr. Hulbert (who participated in the audit) confirmed: **(1)** the audit *exonerated* Mr. Caputo because the transaction in question — surrender of a Hartford variable annuity on behalf of Lydia Ledeen, and reinvesting the proceeds in mutual funds — was wholly transparent (Hartford sent the surrender proceeds check directly to Wells Fargo with an explanation of the transaction, *id.* p. 443), unlike a similar transaction executed by another broker (whose client deposited the surrender proceeds with Wells Fargo by *personal* check);[17] **(2)** the transaction for Lydia Ledeen was *approved* both by Mr. Caputo's supervisor, Mr. Sakosits, after calling the client (*id.* p. 438) *and* by Mr. Hulbert (after reviewing Mr. Sakosits' supervision note and questioning it in an extended email exchange, *id.* pp. 439-442); and **(3)** the approval was communicated by Mr. Sakosits (and Mr. Ledeen, on behalf of his wife) to Mr. Caputo, who never received any notice of any concern regarding such transactions until he was notified of the investigation in early April 2014. *See* Closing References, p. 60 (testimony of Mr. Hulbert).

Throughout the investigation, Mr. Caputo communicated to his supervisors and compliance officers that if such transactions were now deemed *ipso facto* contrary to Wells Fargo policy (as was asserted by

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[17] *See also* Closing References, pp. 61-62 (testimony of Mr. Hulbert) (variable annuity surrender requests for annuities held in IRA accounts are submitted for processing to Wells Fargo's affiliate, First Clearing, as the custodial owner of the annuities) (variable annuity surrender proceeds are now mostly transmitted by insurers to Wells Fargo by wire, for the convenience of all concerned).

compliance interrogator Rebecca Rogers,[18] but later denied by other Wells Fargo witnesses), he would discourage them, and would comply with whatever policy Wells Fargo laid down, provided only that he was given fair notice of it.[19] These efforts by Mr. Caputo to resolve any issues going forward fell on deaf ears, however, and were instead unfairly used to taint Mr. Caputo in widely circulated progress reports regarding the investigation,[20] culminating in the final version of the Matter Summary sent to FINRA[21] — which deleted all recognition (in prior drafts of the "Compliance Findings") of the mitigating factor that all

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[18] See Caputo Ex. 10 (Interview Notes), p. 180 ("Rebecca Rogers advised that liquidating annuities for a profit should not be a sgrategy").

[19] *See* note 15, *supra*.

[20] *See, e.g.,* Caputo Ex. 30, p. 515 (Caputo supposedly "acknowledged that he did not fully understand the income riders on the annuity contracts. Additionally, he indicated that he did not perform proper due diligence when making recommendations to several clients. He understands now that it is not a proper business practice to liquidate annuities to take a profit"), p. 320 ("pattern with this FA ... possible exposure to the firm"), p. 327 ("The FA was cited in the 2013 audit for liquidating an outside annuity with a surrender charge and rider fee and investing the proceeds in a mutual fund A share. ... Since then, the FA has been circumventing that action plan by having the clients wire the funds directly into the accounts").

[21] Caputo Ex. 9, p. 148 ("Introduction"), pp. 166-167 ("Compliance Findings"): "The FA acknowledged that he did not fully understand the income riders on annuity contracts. Additionally, he indicated that he did not perform proper due diligence when making recommendations to several clients."

clients contacted by Wells Fargo were fully informed (of benefits forgone as well as surrender fees and commissions) and supportive of the transactions in question.[22]

By mid-August 2014, as Wells Fargo compliance officers became aware of more such transactions (which had never been concealed, but rather were reported contemporaneously to Wells Fargo's affiliate First Clearing), the Wells Fargo compliance department recommended that Mr. Caputo be discharged without further investigation (by Capital Forensics) — because of their perception (as shown above) that Wells Fargo could itself be exposed to FINRA sanctions for having permitted and approved such transactions, and otherwise for lack of an adequate monitoring system. Accordingly, neither the Matter Summary nor any of Wells Fargo's related communications to FINRA acknowledged that four such transactions were expressly approved by Mr. Hulbert even during the investigation of Mr. Caputo. *See* Closing References, pp. 45-50 (testimony of Mr. Hulbert).

Wells Fargo discharged Mr. Caputo "at will" (as it concedes in its Post-Hearing Brief) — to protect itself from perceived exposure to potential FINRA sanctions — not because of any "conduct so egregious as to have compelled his discharge" (*Frymire, supra*). FINRA's Department of Enforcement has not asserted that Mr.

[22] *See* Caputo Ex. 29, p. 509 (draft "**Mitigating Factors:** Clients were contacted and outlined that they were aware of the benefits that they were forfeiting, associated fees and commissions and wanted to move forward with liquidating the annuities").

Caputo violated any FINRA rule, or given any notice that it may do so, despite interrogating Mr. Caputo for two full days in 2016,[23] based on all the documents and analysis provided to it by Wells Fargo as well as FINRA's interviews with the clients in at least 27 of the 46 variable annuity surrender transactions reported to it by Wells Fargo. FINRA's suitability rules focus on purchasing variable annuities, or exchanging one variable annuity for another, and are not violated simply by a "pattern" of such exchanges.[24]

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[23] FINRA's Department of Enforcement is not required to give notice that its investigation of Mr. Caputo has been concluded.

[24] *See FINRA Dept. of Enforcement v. Pierce,* 2013 WL 5503319 (National Adjudicatory Council, Oct. 1, 2013) (provided to the Panel on June 21, 2019), at *23-24 (rejecting claims that broker's recommendations to seven clients to surrender variable annuities and use the proceeds to purchase other variable annuities were unsuitable, despite surrender charges and adverse tax consequences, absent evidence — including customer testimony and contracts — at least that the exchanges caused net harm to customers); *id.* at *6 note 14, at *21 note 53 (irrelevant that broker reportedly admitted to supervisor that he should have done more due diligence, or that the broker admittedly did not fully understand the tax implications at issue); *FINRA Dept. of Enforcement v. SWS Financial Services, Inc.,* 2015 WL 5782976 (Extended Hearing Panel, Aug. 13, 2015) (provided to the arbitral Panel on June 21, 2019), at *1-2, 15-17 (rejecting claims that broker-dealer lacked reasonable basis to approve 12 variable annuity surrenders, solicited by two brokers for purposes of reinvesting the proceeds in other variable annuities, despite surrender fees, higher annual fees, and reduced market value of substituted investments, ruling that a suitability determination requires a reasonable balancing of *all* relevant factors pertaining to *particular* transactions) (recognizing that "in many cases, ... customers, not unreasonably, are reluctant to turn over ownership of their VA [variable annuity] investments to the insurance

The Record Provides No Basis for Fairly Determining That Wells Fargo's Suitability Guideline Was Violated.

Likewise, Wells Fargo's discharge of Mr. Caputo was not based on a determination that Mr. Caputo violated its applicable suitability guideline (Caputo Ex. 37, pp. 625, 663). That guideline required that Mr. Caputo have a "reasonable basis to believe" that any "recommendation" he made to exchange a variable annuity for mutual funds would ultimately benefit the client, in light of the comparative benefits *and* costs of the new *and* existing investments, as well as the financial circumstances, goals, and risk tolerance of the client. For the following reasons, the discharge could not have been based on a reasonable determination that Mr. Caputo violated this guideline.

- Compliance consultant Rebecca Rogers had never before investigated any exchange of variable annuities for *mutual funds*. Her experience was limited to exchanges of one variable annuity for another variable annuity, or to purchases of variable annuities. *See* Closing References, p. 38.

- In weighing the comparative benefits of mutual funds, Ms. Rogers considered only projected short-term dividends, and *ignored a key component of annual income from mutual funds* — distribution of realized capital gains (from the

companies — *i.e.,* they do not want to annuitize them" and thus may choose instead to surrender them) (rejecting inquiry into circumstances under which annuities were originally purchased).

periodic sale of mutual fund assets), by check if the investor so elects.[25] Ms. Rogers also failed to consider *un*realized capital gains of mutual funds, projected by investors (from past performance) seeking long-term growth in the value of their mutual fund shares.[26]

- On the other side of the ledger, Ms. Rogers *ignored all annual costs of variable annuities,* in the form of various annual fees (insurance premiums), despite her recognition that such fees *offset by at least half* any guaranteed payments under variable annuity riders. See Closing References, p. 39.

- Ms. Rogers also relied on postulated payments under variable annuity riders that could not occur for many years, if ever — because the client was well below the age (at least 59.5) at which payments could begin under a guaranteed lifetime withdrawal benefit (GLWB) rider, or because the client had a guaranteed minimum income benefit (GMIB) rider with at least a 10-

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[25] *See* SEC.gov/Mutual Funds and Exchange-Traded Funds (ETFs) – A Guide for Investors, at p. 10 (copy distributed to the Panel on June 21, 2019, at hand-numbered p. 944). No witness disputed that capital gain distributions by mutual funds constitute current "income" — as confirmed by witnesses Carroll and Sakosits, as well as witnesses Olsen and Gauvreau.

[26] *See id.* According to Wells Fargo's Matter Summary (Caputo Ex. 9, hand-numbered p. 165), for only half the transactions in question did Mr. Caputo indicate a client focus on increasing income.

year waiting period for any guaranteed payment, available only through annuitization.[27]

- Any variable annuity surrender fee, or mutual fund sales charge, is more than fully offset by any net gain from the transactions. While a surrender fee would reduce the amount of surrender proceeds received, and a sales charge would further reduce the number of mutual fund shares that could be purchased with the surrender proceeds, the client is still better off so long as annual returns on the mutual funds exceed any annual 'returns' from the surrendered annuity.[28]

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[27] Thus, in the Exhibits to her Interview Notes (Caputo Ex. 11, hand-numbered pp. 198-200), Ms. Rogers postulates that Stephanie Hyacinth, "[a]ge 52" when she surrendered her GLWB rider from PacLife, could have received payments thereunder "*if* client began taking income *at age 59$^{1/2}$*". In the case of Robert Ledeen, who had no lifetime payment rider under his AXA annuity according to Ms. Rogers, she postulates as annual 'income' the "10% free withdrawal from annuity" (*id.* pp. 191-192) — which would simply amount to gradual surrender of the annuity.

[28] Moreover, as explained by expert witness John Olsen, guaranteed lifetime payments under variable annuity riders generally are simply a return of the annuity owner's own money (a return *of* investment, rather than a return *on* investment), unless and until the owner exceeds actuarial life expectancy. Mr. Olsen also confirmed that Wells Fargo and Capital Forensics double counted surrender fees and sales charges because, as explained above, they are already factored into the 'income' comparison between surrendered variable annuities and the mutual funds purchased with surrender proceeds.

As acknowledged by Shea Hicks (Closing References, p. 37), the report issued by Capital Forensics in December 2014 followed as a template the same fundamentally-flawed framework of analysis applied by Rebecca Rogers — **(1)** ignoring annual capital gain distributions by mutual funds (as well as their long-term growth in value), **(2)** ignoring all annual fees of variable annuities, which offset most of any guaranteed payments under the annuity riders, and **(3)** postulating payments under variable annuity riders that could not occur for many years, if ever. Mr. Fotouhi of Capital Forensics acknowledged these flaws in his testimony. *See, e.g.,* Closing References, pp. 63-77.

For example, Mr. Fotouhi confirmed in his sworn testimony that under GMIB riders, **(a)** guaranteed lifetime payments are available only through annuitization, **(b)** which is available only after a waiting period of at least 10 years, but **(c)** is generally avoided annuity owners (who generally prefer to retain control over their assets).[29] *See id.* pp. 63-64, 66, 72, 77. Yet in its December 2014 report, Capital Forensics had postulated income "based on withdrawals from the GMIB and *not* through annuitization" — and "assumed the maximum withdrawal amount per year which

[29] John Olsen testified to the same phenomenon, referred to in the industry as the "annuitization puzzle." *See also FINRA Dept. of Enforcement v. SWS Financial Services, Inc., supra* note 24 ("in many cases, ... customers, not unreasonably, are reluctant to turn over ownership of their VA [variable annuity] investments to the insurance companies — *i.e.,* they do not want to annuitize them").

would not reduce the Income Benefit Base."[30] Mr. Fotouhi conceded in his testimony, however, that the latter assumption was contradicted by the AXA prospectus (Caputo Ex. 57, p. 983: "withdrawals will reduce each ... [GMIB] benefit base on a dollar-for-dollar basis" at least). *See id.,* pp. 67-71, 77. Mr. Fotouhi nonetheless told the Panel that contrary to the statements in its report, Capital Forensics had always assumed that guaranteed payments under GMIB riders were available only through annuitization, several years in the future, which was not expected to actually occur. *See id.* pp. 66-72, 77.

For all these reasons, the record in this case provides no sound basis on which the Panel could fairly determine that Mr. Caputo violated Wells Fargo's suitability guideline in respect of any of the transactions at issue. The truncated quantitative presentations by Rebecca Rogers and Capital Forensics fall far short of the cost/benefit comparison required by that rule because those presentations **(1)** ignore all the annual costs of the variable annuities, **(2)** ignore key benefits of the mutual funds, including capital gain "income" distributed annually, and **(3)** postulate benefits of variable annuities that were not available for many years, if then. Further, there is no basis for any finding that any of the transactions in question were inconsistent with client goals, financial

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[30] Caputo Ex. 12 (summary report), note **. Capital Forensics repeated those statements in its full December 2014 report, for each variable annuity surrender transaction addressed that involved a GMIB rider. Caputo Ex. 25, pp. 362, 366, 382, 386, 393, 396.

circumstances, or risk tolerance because all of the clients that Wells Fargo chose to contact were admittedly fully informed regarding comparative costs and benefits and sought to proceed or were fully satisfied with the transactions.[31]

Further, with all respect, the proper role of the Panel in these circumstances is not to speculate whether any of the transactions in question might have unsuitable under Wells Fargo's guidelines. Rather, under the *Frymire* and *Agron* cases, as well as kindred applicable case law, the proper role of the Panel in this

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[31] The transactions were not even subject to Wells Fargo's suitability guideline unless they were solicited (recommended) by Mr. Caputo rather than directed by the client. Absent any standard written definition, the concept of solicitation is subject to interpretation. Mr. Caputo's understanding that a transaction is unsolicited if it was conceived and initially raised by the client rather than the broker has support from Wells Fargo's in-house counsel, and witnesses Olsen and Gauvreau, as well as case law. *See* Closing References, p. 35 (testimony of Shea Hicks); *In re McGee,* 2017 WL 1132115, at *6 (S.E.C. March 27, 2017) (also available at FINRA.org, S.E.C. Release No. 80314, p. 7) (securities transaction is unsolicited if it was initially the client's idea, rather than the broker's); *Schmid v. Langenberg,* 526 S.W.2d 940, 944-945 (Mo. App. 1975) (similar). In any event, a solicited transaction can of course be suitable. Moreover, Mr. Caputo's characterization of most of the transactions at issue as unsolicited is evidence at least that he was *not* "pushing" such transactions on clients simply to generate commissions, and without any reasonable expectation that the client would ultimately benefit. Any speculation to the contrary is belied by the evidence that of the total variable annuities held by Mr. Caputo's clients at Wells Fargo (which constituted only about 20% of the assets under his management), at least 75% were *not* surrendered (and clients who did surrender annuities often retained annuities as well). *See* Caputo Ex. 64.

case is to determine whether the record shows that Mr. Caputo was "guilty of any conduct so egregious as to have compelled his discharge." Closing References, p. 14.[32]

If not, the discharge should be deemed "at will" and Wells Fargo "should gracefully accept the fact that severance of this relationship" — "which would allow [Mr. Caputo] ... to 'work off' his obligation to [Wells Fargo]" — "should logically constitute a waiver of its right to reimbursement of the [transitional advance compensation award], which it never could have anticipated to have recovered from the outset of the parties' relationship in any event" *Id*.[33]

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[32] This standard is an objective one. In both *Frymire* and *Agron,* the employer had some plausible grounds for discharging the broker, but the courts found such grounds to be inadequate. The Panel thus should not defer to any sincere but unwarranted reliance by any particular Wells Fargo decision-maker on the glib but fundamentally flawed analysis of Rebecca Rogers and Capital Forensics. In this regard, the knowledge and doubts of all agents of Wells Fargo should be imputed to Wells Fargo, no less than for Mr. Caputo's defamation claims against Wells Fargo, addressed *infra*.

[33] In this regard, *Frymire* is consistent with the *Killian* case (quoted in Pre-Hg. Mem., pp. 14-15, ¶2), which held in accord with uniform case law that a promissory note underlying a transitional bonus awarded by *Wells Fargo* does not reflect bona fide debt (only a contractual claw-back provision, *e.g.,* if the broker resigns before fully earning the bonus) because the parties expect the 'loan' to be satisfied by future service, rather than repayment of the bonus. *Frymire* recognizes that such 'loan' is not necessarily unenforceable as a claw-back provision (*e.g.,* if the broker gives the employer no choice but to discharge the broker before the bonus is fully earned), but also recognizes that the 'loan' is not enforceable if the

As shown at the outset, Wells Fargo should not in any event be permitted to recover any portion of the four production bonuses that were fully earned by Mr. Caputo. Thus, Wells Fargo's promissory note claims should at least be reduced by $821,482, and its claim for attorney fees should be reduced proportionately, by 48.5344%%. Further, any remaining portion of such claims should be more than offset by damages incurred by Mr. Caputo as a result of Wells Fargo's defamation of him.

Legal Framework for Mr. Caputo's Defamation Claims

Under applicable Missouri law, Mr. Caputo's defamation claims against Wells Fargo are governed in part by a statute, designed by the NASD, holding broker-dealers like Wells Fargo liable for compensatory damages (for "humiliation and mental suffering" as well as pecuniary losses), under a negligence standard, for defaming brokers in misleading communications required by FINRA (including forms U-5, among other things). *See* Pre-Hg. Mem., p. 20 (¶8) & note 57. The same standard applies to the broker-dealer's communications to clients of a discharged broker. *Id.*

Further, punitive damages are warranted, under a recklessness standard, for an employer's defamatory statement about a current or former employee despite the employer's serious doubt whether the statement is true and not misleading. *Id.* p. 21. This standard is met (by clear and convincing evidence) where such doubt is

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employer, by discharging the broker at will, prevents the broker from "working off" the loan as the parties intended.

inferable from objective evidence such as inconsistent statements by the employer, or the employer's omission of known mitigating factors or countervailing information.[34] *Id.* Moreover, for purposes of compensatory or punitive damages, the knowledge and statements of employees or other agents (*e.g.,* Capital Forensics) acting on behalf of the employer are imputed to the employer itself, rendering it fully liable based on their defamatory statements or their serious doubt regarding any such statement. *Id.* pp. 21-22.

Evidence Supporting Mr. Caputo's Defamation Claims

Under these standards, and the analogous case law addressed below, compensatory and punitive damages should be awarded to Mr. Caputo for Wells Fargo's defamatory statements about him to FINRA (apart from this arbitration), and to his clients, prospective employers, and the public, including (among other things) the following statements:

- At FINRA's request (Caputo Ex. 20, p. 226), Wells Fargo submitted to FINRA in February 2015 its Matter Summary (Caputo Ex. 9), which
  - broadly stated that clients were not better off as a result of the transactions in question (*id.,* pp. 148, 167), according to analysis by Rebecca Rogers and Capital Forensics —

[34] Thus, a "defamatory *assessment* of facts can be actionable even if the facts [or some of the relevant facts] ... are accurately presented." *Nazeri v. Missouri Valley College,* 860 S.W.2d 303, 314 note 6 (Mo. 1993) (quoting U.S. Supreme Court).

thereby implicating Mr. Caputo in a supposed potential violation of Wells Fargo's suitability guideline, despite Wells Fargo's actual and imputed knowledge of the gross omissions and other fundamental flaws in such analysis, and thus its serious doubts as to the validity of such analysis;

- was edited to delete from its "Compliance Findings" a prior recognition of "Mitigating Factors" that "Clients were contacted and outlined that they were aware of the benefits that they were forfeiting, associated fees and commissions and *wanted to move forward with liquidating the annuities*" (Caputo Ex. 29, pp. 509, 513) — thereby obscuring the facts that clients did not concur with the analysis of Rebecca Rogers and Capital Forensics, and that Wells Fargo had pre-approved four of the transactions at issue even during its investigation of such transactions (a fact that might increase its supposed exposure to potential FINRA sanctions, and reduce the exposure of Mr. Caputo);

- was further edited to delete from its "Compliance Findings" that Mr. Caputo "understands now that it is not a prudent business practice to liquidate annuities to take a profit" (*id.*) — thereby obscuring the facts that Mr. Caputo had no prior notice of any such policy, yet had agreed to comply with it, irrespective of client directives, even

though the supposed policy was inconsistent with Wells Fargo's suitability guideline (balancing comparative costs and benefits);

  - asserted erroneously that "the 2013 audit ... specifically cited Chris Caputo and this exact activity as a finding" (Caputo Ex. 9, p. 149), as though he were a recidivist violator of a Wells Fargo policy of which he had prior notice;

  - stated at the beginning and conclusion of the Matter Summary that Mr. Caputo "acknowledged that he did not fully understand the income riders on annuity contracts" and "indicated that he did not perform proper due diligence when making recommendations to clients" (id., pp. 148, 166-167) — although his underlying statements reflect only his assurance that he would more "diligent" in resisting client requests to surrender variable annuities, as well as his understanding in 2009 (when client Hyacinth purchased her PacLife annuity) that a 47-year-old unemployed client with a GLWB rider also needed a GMIB rider (cancelable) in case she needed withdrawals prior to age 59.5.

- At FINRA's request (Caputo Ex. 20, p. 226), Wells Fargo submitted to FINRA by February 6, 2015 a letter from Mr. Caputo's immediate supervisor, Stuart Sakosits (Caputo Ex. 19), which

- ○ broadly stated that according to analysis by Rebecca Rogers and Capital Forensics, the transactions in question "did not appear to be in the best interests of the customers" and that "[f]or this reason, the firm made the decision to discharge Mr. Caputo" (*id.,* p. 224) — thereby implicating Mr. Caputo in a supposed violation of Wells Fargo's suitability guideline, despite Wells Fargo's actual and imputed knowledge of the gross omissions and other fundamental flaws in such analysis, and thus its serious doubts as to the validity of such analysis;

- ○ Mr. Sakosits added that Wells Fargo "plans to put an action plan in place to address these issues with the firm's customers" (*id.)* — thereby suggesting that customers had been harmed, and that Wells Fargo would compensate them (to mitigate its supposed exposure to potential sanctions by FINRA for permitting and approving the transactions in question), although Wells Fargo never compensated any such customer.

- Wells Fargo submitted to FINRA on January 8, 2016 a letter from its in-house counsel Shea Hicks (Caputo Ex. 22, pp. 231-265) in response to FINRA's request for information regarding transactions on behalf of Mr. Caputo's clients "which directly led to his termination" by Wells Fargo (*id.,* p. 231).

  - ○ The information provided by Mr. Hicks was based on the above-referenced analysis by

Rebecca Rogers and Capital Forensics, implicating Mr. Caputo in a supposed violation of Wells Fargo's suitability guideline, despite Wells Fargo's actual and imputed knowledge of the gross omissions and other fundamental flaws in such analysis, and thus its serious doubts as to the validity of such analysis;

- Mr. Hicks did not disclose to FINRA that four of the transactions he addressed in the letter (including two in which the customer supposedly suffered a loss) had been expressly pre-approved by a Wells Fargo supervisor (Mr. Hulbert) even during Wells Fargo's investigation of such transactions (and that others were approved by supervisors prior thereto), thus shielding Wells Fargo from potential exposure to FINRA sanctions, and increasing unfairly the exposure of Mr. Caputo;

- Among the 46 transactions addressed in the letter as having "directly led to ... termination" of Mr. Caputo, half did not apparently result in any loss even under the fundamentally flawed analysis of Rebecca Rogers and Capital Forensics, and many were clearly beneficial to the client — indicating that Mr. Caputo was discharged under an informal Wells Fargo policy (not contained in its Associates Guide, and at odds with its suitability guideline) that as asserted by Rebecca Rogers, it supposedly is

virtually never appropriate to surrender a variable annuity to capture an investment gain or invest directly inn [sic] the market (to avoid the heavy burden of annual variable annuity fees, *i.e.,* insurance premiums) — again shielding Wells Fargo from potential exposure to FINRA sanctions, and increasing unfairly the potential exposure of Mr. Caputo.

- As required by FINRA, Wells Fargo submitted to FINRA on January 6, 2015 a Form U-5 stating that Mr. Caputo was discharged by Wells Fargo after an internal review of alleged violations of regulations, rules, or industry standards of conduct resulted in "concerns regarding [his] ... recommendations for customers to change from one long term product to another." Caputo Ex. 18, parts 3, 7B, and 7F.[35] As shown above, Wells Fargo subsequently clarified for FINRA that its concerns leading to its discharge of Mr. Caputo were focused on the analysis by Rebecca Rogers and Capital Forensics of variable annuity surrender transactions by Mr. Caputo's clients, despite Wells Fargo's actual and imputed knowledge of the gross omissions and other fundamental flaws in such analysis, and thus its serious doubts as to the validity of such analysis.

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[35] Forms U-5 become public documents (summarized on Broker Check), and under FINRA Rule 3110(e), a job applicant's Form U-5 must be reviewed by prospective employers in the industry.

- Shortly after the discharge of Mr. Caputo, Wells Fargo brokers called his clients, seeking to persuade them to disassociate from Mr. Caputo by falsely telling them that he had been discharged for "illegal misconduct" (Caputo Ex. 44, p. 712) or otherwise disparaging him unfairly. Two cease-and-desist letters from Mr. Caputo's attorneys at the time (Caputo Ex. 46-47) were ignored by Wells Fargo. While most of Mr. Caputo's clients followed him from Wells Fargo to his current firm, 27 clients did not (*see* Caputo Ex. 48) — a loss of nearly $12 million in assets under his management.

In essence, the investigation of variable annuity surrender transactions on behalf of Mr. Caputo's clients, for purposes of investing the proceeds in mutual funds directly, began with a reckless misreading by Wells Fargo, in late March 2014, of a mid-2013 audit report as supposedly "citing" Mr. Caputo for evading surveillance of such transactions (a number of which were "discovered" in late March 2014), and violating a supposed informal policy prohibiting virtually any such transactions — when in fact Mr. Caputo's audited transaction was fully transparent, and was reviewed and approved by his three immediate supervisors (as Mr. Hulbert acknowledged). In these upside-down circumstances, however, Rebecca Rogers (who admittedly had scant expertise with mutual funds) was determined to bring Mr. Caputo down, by reporting unfairly and recklessly that he lacked diligence and competence generally, and that the transactions in question were somehow both illicit and unsuitable. Contrary to Wells Fargo's

suitability guideline, her suitability analysis (essentially replicated by Capital Forensics, and expanded to additional transactions) ignored key costs and benefits, and assumed current 'guaranteed' payments that were only available (if at all) years later. The ultimate driver of the discharge of Mr. Caputo was Wells Fargo's misplaced concern with its own potential exposure to FINRA sanctions for having permitted and approved the transactions in question, and for not having an adequate system to monitor such transactions.

Analogous Case Law Supports Mr. Caputo's Defamation Claims

In analogous circumstances, brokers have been awarded compensatory and punitive damages for defamatory statements by broker-dealers such as Wells Fargo. *See, e.g., Galarneau v. Merrill Lynch,* 504 F.3d 189, 200-04 (1st Cir. 2007) (affirming award of $775,000 to broker defamed by Form U-5 asserting inappropriate short-term trading in long-term bonds that was periodically *approved* by supervisors and client, thus establishing broker-dealer's *awareness, or reckless disregard,* that such trading was *not* contrary to any clear policy of the firm -- notwithstanding consultant's report commissioned by the firm to impugn such trading); *Merrill Lynch v. Savino,* 2007 U.S. Dist Lexis 23126, at *20-21, *43-44 (S.D.N.Y.) (applying New Jersey law) (confirming arbitral award of $12.5 million for reckless defamation of brokers, based on Form U-5 assertions that brokers' short-term trading violated firm's policy, as well as related oral statements) (panel could find that brokers lacked fair notice of firm's

supposed policy, absent any "specific Merrill Lynch directives" violated by the brokers, and given "no clear law governing" such trading, and fact that "*supervisors ... never rejected or reversed a single trade*"); *Dickinson v. Merrill Lynch,* 431 F. Supp. 2d 247, 253-54, 263 (D. Conn. 2006) (broker-dealer's recklessness in issuing defamatory Form U-5 supported by inference that compliance officer who investigated employee and reported grounds for discharge did so unfairly, with reckless disregard for truth) (because compliance officer acted as its agent, her recklessness was imputed to broker-dealer as matter of law); *DeVries v. McNeil Consumer Prod. Co.,* 250 N.J. Super. 159, 167-69 & note 3 (App. Div. 1991) (upholding defamation claim against employer for asserting employee was discharged for violating company policy, despite *pre-approval* of the conduct by manager -- constituting *clear and convincing* evidence that the assertion was *reckless*); *Clinch v. Heartland Health,* 187 S.W.3d 10, 17-18 (Mo. App. 1987) (assertion that employee's performance was "cause for concern" constituted defamatory "half-truth"). *See also Harburjack v. Prudential-Bache Securities,* 759 F. Supp. 293, 301-02 (W.D.N.C. 1991) (upholding broker's slander claim for post-discharge statements to clients by former colleague which, according to two affidavits, created a false "impression" that he was discharged for illegal activity, and were imputable to employer as designed to obtain business for it); *Sawtelle v. Wadell & Reed,* 2002 N.Y. Misc. LEXIS 2020 (confirming arbitral award for broker exceeding $26 million, including punitive damages, based on employer's post-discharge disparagement of broker to clients), *remanded to panel for redetermination of punitive damages, and otherwise*

aff'd, 754 N.Y.S.2d 264, 267-68 (App. Div. 2003) (punitive damages warranted for "campaign of deception giving the impression that Sawtelle had mishandled his clients' investments, [and] was untrustworthy"). *See generally* Pre-Hg. Mem., pp. 20-22.

Mr. Caputo claims compensatory damages exceeding $2.5 million for Wells Fargo's defamation of him, as well as punitive damages. That amount is itemized in Mr. Caputo's Restatement of Claimed Damages, and Proofs as to Claimed Attorney Fees and Costs (at pp. 2-4), submitted pursuant to pre-hearing Order on November 20, 2018, with a supporting sworn Declaration by Mr. Caputo, also entered into evidence as Caputo Ex. 40, and supported by Caputo Ex. 50-51.

Expungement of Wells Fargo's Form U-5 for Mr. Caputo

Mr. Caputo also seeks expungement of defamatory Form U-5 statements that Wells Fargo submitted to FINRA regarding its discharge of Mr. Caputo (Caputo Ex. 18). Mr. Caputo requests that the Panel expunge the continuing defamatory effect of the Form U-5 by mandating that the following be substituted in part 3 of the Form: *A FINRA arbitral Panel has found insufficient evidence that the discharge was warranted under the circumstances presented.*

Mr. Caputo's Claim for Attorney Fees and Costs

Mr. Caputo seeks an award of all attorney fees and costs he incurred in this case on grounds set forth in his Restatement of Claimed Damages, and Proofs as to

Claimed Attorney Fees and Costs, p. 5 & note 14 (submitted November 20, 2018, pursuant to pre-hearing Order). As stated therein (p. 6), Mr. Caputo respectfully submits that a comprehensive statement and documentation of such attorney fees and costs should be required and timely provided as necessary only if and when the Panel determines, after resolving the merits of this case, that an award of such attorney fees and costs is warranted in this case, in an amount to be determined. Alternatively, Mr. Caputo respectfully submits that the Panel should follow the precedent of awarding attorney fees and costs in an amount to be determined by a court of competent jurisdiction, in connection with judicial proceedings for confirmation of the arbitral award as a whole.[36]

Conclusion

For all the foregoing reasons, Wells Fargo should not be awarded any recovery in this case, and is not entitled to any award of attorney fees or costs. Mr. Caputo should be awarded recovery and expungement as requested above, and in his Restatement of Claimed Damages, and Proofs as to Claimed Attorney Fees and Costs.

Respectfully submitted,

/s/ Timothy W. Bergin

Timothy W. Bergin
Potomac Law Group, PLLC

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[36] *See, e.g., Abern Financial v. IMS Securities,* 2009 U.S. Dist. LEXIS 131138, at *3-4 (S.D. Fla.).

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Dated: June 28, 2019

APPENDIX J

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June 25, 2019

BY DR PORTAL

Ms. Lakisha Finkelstein
FINRA Dispute Resolution
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Re: Wells Fargo Advisors, LLC v. Christopher N. Caputo
FINRA Dispute Resolution Arbitration No. 15-02044
Claimant's Post-Hearing Brief

Dear Ms. Finkelstein:

This office represents Wells Fargo Advisors, LLC (hereinafter, "Claimant" or "Wells Fargo Advisors") in the above-captioned matter. Pursuant to the Panel's December 3, 2018 Order, please accept this Letter as Claimant's Post-Hearing Brief in response to

Respondent Christopher Caputo's October 29, 2018 Pre-Hearing Memorandum ("Caputo Memorandum"). Please forward this Letter to the Panel for its consideration.

Wells Fargo Advisors seeks the repayment of loaned monies, plus interest, attorneys' fees, and costs, that are duly owed to Wells Fargo Advisors by Respondent Christopher Caputo (hereinafter, "Respondent" or "Mr. Caputo") pursuant to five (5) separate promissory notes ("Promissory Notes") entered into by Mr. Caputo from 2011 to 2014. Pursuant to the terms of the Promissory Notes, Mr. Caputo received loans from Wells Fargo Advisors in excess of $2 million and unconditionally promised to repay them. On the date of his separation from Wells Fargo Advisors, Mr. Caputo owed an outstanding total balance of $1,663,529.71. Despite his clear obligations to repay the unpaid balances under his loan agreements, Mr. Caputo now feigns ignorance to his promises to repay the loaned monies and attacks the validity of the Promissory Notes.[1] Promissory notes conditioned upon continued employment are not unique in the financial industry.[2] Indeed, such promissory

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[1] During his employment with Wells Fargo Advisors, Mr. Caputo was aware of his contractual obligation to repay the loaned monies under the five Promissory Notes, reaffirming that obligation each time he took out an additional loan and signed a new note. Wells Fargo Advisors notes that Mr. Caputo raised no questions as to the legality or validity of the five Promissory Notes when he first responded to the Statement of Claim in this matter.

[2] *See e.g. Marano v. Fulton Bank, N.A.,* No. 812 MDA 2016, 2017 WL 1242793 (Pa. Super. Ct. Apr. 4, 2017) (granting summary judgment in favor of Fulton Bank on its counterclaims for breach

notes have been regularly enforced by FINRA arbitration panels. By refusing to repay the sums due and refuting the validity of his loan agreements with Wells Fargo Advisors, Mr. Caputo seeks to single-handedly put an end to an industry practice that has been well accepted and implemented by FINRA regulated financial institutions and their employees.

Throughout his pre-hearing submissions and the course of this arbitration, Mr. Caputo has attempted to convolute the issues from various angles, including attacks on the terms of his employment and the mischaracterization of loaned monies as earned compensation. Wells Fargo Advisors respectfully reminds the Panel that the nature of this case is strictly contractual: (1) Mr. Caputo had contractual obligations to repay loaned monies he received; and (2) Mr. Caputo was terminated from Wells Fargo Advisors pursuant to an at-will employee relationship.

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of promissory notes and unjust enrichment against former advisors because, *inter alia,* the "clear and unambiguous language of promissory notes and bonus letters set forth that Fulton agreed to pay amounts required to be repaid by the [advisors] while they remained employed by Fulton and that upon termination from Fulton, the [advisors] agreed to repay all unpaid amounts under the notes."); *Lewis v. UBS Financial Service, Inc.,* 818 F.Supp.2d 1161 (N.D. Cal. 2011) (interpreting an arbitration provision found in promissory notes entered into by UBS and its former advisor.); *Merrill Lynch Int'l Fin., Inc. v. Donaldson,* 27 Misc. 3d 391, 396, 895 N.Y.S.2d 698, 703 (Sup. Ct. 2010); *see also* Claimant Wells Fargo Advisors' Pre-Hearing Letter, at pp. 3-4.

ARGUMENT

I. Each Promissory Note is an enforceable contract separate from any pre-existing compensation owed to Mr. Caputo during his employment.

A. Each Promissory Note is a bona fide loan instrument separate from any bonus compensation under the terms of Mr. Caputo's employment.

Mr. Caputo asserts that Promissory Notes are not based on bona fide loans, "as Courts Have Invariably Held," by relying upon case law that has neither precedential control in this jurisdiction nor applicable control over the facts of this case. *See* Caputo Memorandum, p. 14. For example, Mr. Caputo relies upon several cases that examine loaned monies for the purpose of determining whether or not such monies should be considered income for taxation and/or bankruptcy purposes.[3] In such analyses, "[t]he key question is thus whether [an employee's] obligation to repay the bonus was unconditional at the time he received it." *Winter v. Comm'r,* 100 T.C.M. (CCH) 604,

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[3] *See e.g. In re Killian,* 422 B.R. 903 (Bankr. N.D. Ill. 2009) (where the Bankruptcy Court considered a loan agreement not to specifically negate the debtor-employee's contractual obligations to repay the loaned amounts, but to determine whether or not the loaned monies constituted income for tax purposes); *see also e.g. Winter v. IRS,* 2010 WL 5476765 (Tax Ct.); Brooks v. IRS, 2012 WL 246459 (Tax Ct.); *Vancouver Clinic, Inc. v. United States*, 2013 WL 1431656 (W.D. Wash. 2013).

2010 WL 5476765 (Tax Ct. 2010).[4] In *Winter,* the Tax Court found that the loaned monies the employee received should be considered income, because the employee would "have to repay [his loan] if and only if he quit or was fired for cause within five years." *Winter,* 2010 WL 5476765, at *9. While this holding only applies to the classification of loaned monies for taxation purposes, even under this same analysis, the Promissory Notes in question here are explicitly clear that Mr. Caputo's obligation to repay the loaned monies was ***unconditional*** at the time he accepted each loan. Therefore, even in an attempt to apply the legal conclusions of the case law cited by Mr. Caputo, the facts at hand do not support Mr. Caputo's attempts to mischaracterize the loaned monies as earned income.

Mr. Caputo attempts to distort this unconditional obligation to repay the loaned monies by conflating the Promissory Notes with his bonus compensation. However, the Third Circuit Appellate Court has provided clear guidance in finding that a promissory note, such as the Notes at issue, and an employee's compensation, as found in an employment agreement, should be viewed as ***separate transactions.*** In *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Schwarzwaelder,* 496 Fed.Appx. 227 (3d Cir. 2012), a Merrill Lynch advisor received monthly bonus compensation payments of $16,687.15 over the course of four years. *Id.* at 229. In a separate promissory note, Merrill Lynch loaned the advisor $850,000, which she agreed to repay with interest in monthly installments

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[4] As relied upon by Mr. Caputo in Caputo Memorandum, p. 15, at n. 38.

of $16,687.15 during the same four year pay-out period for her bonus compensation. The advisor departed Merrill Lynch with an outstanding balance due under her promissory note. In response to Merrill Lynch's claim for repayment, the advisor argued that the bonus compensation payments were intended as a form of loan forgiveness for the promissory note. Like, Mr. Caputo here, the advisor asserted this loan forgiveness as a defense to Merrill Lynch's claim for repayment, arguing that her bonus compensation and promissory notes must be read as one transaction. *Id.* at 232. Upon appeal for the confirmation of the arbitration award[5], the Third Circuit Appellate Court rejected the lower District Court's finding[6] that the promissory note and the employment agreement must be read together. *Id.* at 230-232. Although the court did recognize that the two instruments (loan repayments and bonus payments) were seemingly drafted to fit together, the court ultimately affirmed the arbitrators' reading of the promissory note and the bonus compensation as separate transactions and confirmed the arbitration award granting repayment on the promissory note, in favor of Merrill Lynch. *Id.* at 233 -234.

Among other factors, the Third Circuit Appellate Court reasoned that neither the promissory note nor

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[5] The FINRA Arbitration Panel entered an award in favor of Merrill Lynch, finding that the advisor must repay the unpaid balance on the promissory note. *Merrill Lynch,* 496 Fed.Appx at 230.

[6] In confirmation proceedings, the lower court denied confirmation of the FINRA Arbitration Award that granted Merrill Lynch repayment from the advisor under her promissory note. *Id.* at 231.

the advisor's employment agreement described the parties' arrangement as a form of loan forgiveness:

> "Under the terms of the promissory note, Schwarzwaelder agreed to repay the loan 'unconditionally' – i.e., without regard to any offsetting payment of transition compensation... the employment agreement makes no mention of the promissory note and does not require that the monthly transition compensation be used for debt repayment."
>
> [*Id.* at 233.]

Here, the facts are no different. Mr. Caputo entered into five separate Promissory Notes under which he "as the undersigned maker of this Note, *unconditionally promise[d]* to pay" Wells Fargo Advisors the principal sum of the note, without regard to any offsetting payment of bonus compensation payment. In fact, the Promissory Notes further provided that Mr. Caputo "shall have the right to prepay this Note in full or in part at any time without penalty on any amounts so prepaid." Following the Third Circuit's guidance in this jurisdiction and a plain reading of the express terms of the Promissory Notes, it is clear that the Promissory Notes are bona fide standalone loan agreements, separate from any other compensation owed to Mr. Caputo during his employment with Wells Fargo Advisors.

B. Pursuant to the express contractual agreements contained in Mr. Caputo's five Promissory Notes, Mr. Caputo accepted the upfront lump sums as loaned monies, not earned compensation or wages.

The Promissory Notes at issue here speak for themselves: Mr. Caputo received loaned monies which he agreed to repay unconditionally. By mischaracterizing the loaned monies as earned compensation, Respondent attempts to create an implied-in-fact contract for the loaned monies as wages. Respondent attempts over and over again to convolute the nature of the simple transaction that took place, distorting the well-understood intents of the contracting parties who knowingly entered into a debtor-creditor relationship. Controlling courts in this jurisdiction have clearly held that "[t]here cannot be an implied-in-fact contract if there is an express contract that covers the same subject matter... In other words, express contract and implied-in-fact contract theories are mutually exclusive." *Baer v. Chase,* 392 F.3d 609, 616-17 (3d Cir. 2004) (citing *In re Penn Cent. Transp. Co.*, 831 F.2d 1221, 1229-30 (3d Cir. 1987)); *see also Klebe v. United States,* 263 U.S. 188, 191-92, 44 S.Ct. 58, 58-59, 68 L.Ed. 244 (1923). Mr. Caputo signed an express contract, not once, not twice, but a total of **five** times, to receive lump sum payments of loaned monies. Where the express contract covers terms and conditions of the monies received and due for repayment by Mr. Caputo, any attempts to assert an implied-in-fact contract for compensation holds no merit.

Perhaps the validity of the Promissory Notes as true loans becomes most evident when we examine the context in which Mr. Caputo accepted the Promissory Notes: Mr. Caputo was never obligated to enter into the Promissory Notes in order to receive compensation. The Promissory Notes were offered to Mr. Caputo as separate loan instruments – which he was free to reject – not earned compensation. Had Mr. Caputo rejected the lump sum loans under the Promissory Notes, he would have received his bonus compensation as scheduled per pay period, without any deductions for repayment towards the loans.

II. Mr. Caputo knowingly and willingly accepted over $1.6 million as loaned sums pursuant to clear contractual terms, which conditioned his receipt of the loaned monies upon his continued employment with Wells Fargo Advisors.

Mr. Caputo's arguments attacking the enforceability of the "forfeiture provision"[7] in the Promissory Notes hinge entirely upon his continued mischaracterization of the loan agreements as earned compensation. To be clear, Wells Fargo does not seek to recoup

[7] Wells Fargo Advisors notes that the use of the phrase "forfeiture provision" to describe the retention requirement in the Promissory Notes is, again, Mr. Caputo's mischaracterization of the facts at hand. *See* Caputo Memorandum, pp. 15 – 17. Where the loaned monies were not earned, no compensation existed to be "forfeited." Here, the retention requirement served as a condition to the loan agreement. This condition required immediate ***repayment***, not forfeiture, of the loaned monies, in the event of Mr. Caputo's failure to meet the terms of the Promissory Notes.

compensation or wages earned by Mr. Caputo during his employment. As is clear in the preceding discussion herein, the loaned monies Mr. Caputo received were, in fact, separate from any bonus compensation he was entitled to. Indeed, had he not entered into the Promissory Notes, Mr. Caputo would have continued to receive bonus compensation payments per applicable pay period. Mr. Caputo's characterization of any bonus compensation as a "forgivable loan" is erroneous. It follows that Mr. Caputo's arguments that forfeiture of earned compensation is unlawful are not applicable here.

Notwithstanding the above factual distinction, Mr. Caputo's arguments attacking the enforceability of the retention condition to the Promissory Note hold no legal merit. Notably, Mr. Caputo reviewed, accepted, and re-accepted his contractual obligations under the Promissory Notes in **five separate** instances. Mr. Caputo now alleges that the "forfeiture provisions"[8] requiring repayment of loaned sums upon termination of employment are unenforceable. Despite Mr. Caputo's assertion that "[t]he law is firmly established" that any such provision is unenforceable, retention instruments are not uncommon across industries nor uncommonly upheld by the courts. Indeed, Mr. Caputo's characterization of the Promissory Notes' retention requirement as a "penalty clause" or "liquidated damages" is misplaced. In *Killian, supra,* at 911, the court reasoned that the retention requirement in question was more like liquidated damages for breach of the employment contract rather than a debt or loan

[8] *See* footnote 8.

obligation because the "debtor's 'primary obligation was to work,' and the 'obligation to repay the remaining amount was secondary.'" Here, in the very first sentence of the agreements themselves, the Promissory Notes clearly designate the debtor's primary obligation as the obligation to repay. Where Mr. Caputo's retention of employment was a condition to receiving the loaned sums and not a primary obligation under the Promissory Notes, the retention requirement cannot be considered a penalty or liquidated damages provision.

Additionally, while Mr. Caputo's arguments seek to put an end to the prevalent use of retention bonuses by employers looking to protect their business interests, the Third Circuit Court has upheld the use of similar compensation instruments conditioned upon retention of employment by the employee. In *France v. Syngenta Crop Protection Inc.*, 80 Fed.Appx. 238 (3d Cir. 2003), an employee sought payment of a retention bonus that was subject to a written agreement. To be eligible for the lump sum retention component, the employee was required to retain employment with the company. The Third Circuit Court affirmed the lower court's conclusion that the bonus plan specifically stated that "a plan participant who resigns, is terminated, or transfers has exited the plan," rendering the employee no longer eligible to receive the retention bonus after the termination of his employment. *Id.* at 240.

While Mr. Caputo's Promissory Notes were not specifically intended as bonus compensation or as agreements incentivized solely for the retention of the employee, the Promissory Notes here operated as a

similar contractual agreement for which an employee agreed to retain employment as a condition of the receiving a lump sum of loaned monies. Mr. Caputo's arguments denying the enforcement of such a contractual provision have no factual or legal foundation.

Furthermore, because the Promissory Notes clearly and expressly define the monies received by Mr. Caputo as loaned sums due for unconditional repayment, Mr. Caputo's reliance upon case law applying the Implied Covenant of Good Faith and Fair Dealing to forfeitures of earned compensation is not applicable. Certainly, Mr. Caputo's long career history as a financial advisor and prior dealings with almost identical promissory notes from former and subsequent employers suggests that Mr. Caputo was fully aware of his contractual duties under such loan agreements.

III. Mr. Caputo was lawfully terminated under his at-will employment relationship with Wells Fargo Advisors, creating no legal consequence upon his obligations to repay the loaned monies.

Mr. Caputo also presents an additional narrative which he believes excuses him from his contractual obligations to repay the Promissory Notes. Specifically, Mr. Caputo suggests that Wells Fargo Advisors is not entitled to repayment of the promissory notes because it did not have "good cause" to terminate Mr. Caputo. Caputo Memorandum, p. 19. However, under New Jersey law, "good cause" is not required to terminate Mr. Caputo, an at-will employee. Mr. Caputo relies

upon case law[9] that offers neither factual comparison nor legal application to the case at hand.

It is clear that Mr. Caputo was an at-will employee that could be terminated at any time for any reason. Under New Jersey law, the relationship between an employer and its employees is presumed to be for an indefinite period and terminable at the will of either party, unless an agreement exists that provides otherwise. *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597, 603 (D.N.J. 2003); *Wade v. Kessler Inst.,* 798 A.2d 1251, 1258 (N.J 2002). Furthermore, under the employment-at-will doctrine, an employer may terminate an employee for good reason, bad reason, or no reason at all. *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257, 1260 (N.J. 1985); *Wade*, 798 A.2d at 1258. There are exceptions, however, to the at-will doctrine. *Witkowski v. Thomas J. Lipton, Inc.*, 136 N.J. 385, 398, 643 A.2d 546, 553 (N.J. 1994). An employer's grounds for termination cannot be contrary to public policy or based on impermissible factors such as race, religion, sex, national origin, or age. *Witkowski*, 136

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[9] *See e.g. Russell v. Princeton Labs.*, 50 N.J. 30, 37-39 (1976), as cited in Caputo Memorandum, p. 19, at n. 54. In *Russell,* the court considered whether an employee was entitled to payment of deferred compensation (not loaned monies) from an employees' profit-sharing trust, upon termination of employment. The court noted that the profit-sharing trust was clearly intended as a form of deferred compensation, not a "mere gratuity." *Id.* at 35. Here, the Promissory Notes are separate instruments, independent of any earned compensation. The repayment of the balances due under the loans cannot be considered a forfeiture of any deferred compensation where no deferred compensation exists.

N.J. 398; *Wade*, 798 A.2d at 1258; *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980).

The law in Missouri is no different in that no "good cause" is required for the termination of an at-will employee.[10] "The at-will employment doctrine is well-established Missouri law" and is "[r]ooted in freedom of contract and private property principles, designed to yield efficiencies across a broad range of industries." *Margiotta v. Christian Hosp. Ne. Nw.*, 315 S.W.3d 342, 345-346 (Mo. 2010) (internal citations omitted). "Absent an employment contract with a 'definite statement of duration... an employment at will is created... An employer may terminate an at-will

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[10] The PainWebber, Inc. v. Agron (8th Cir.) case does not stand for the overly broad proposition that termination must be for good cause in order to repay an employee's promissory note. As subsequent courts have noted, PaineWebber's holding is extremely narrow and fact specific. *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 195 (4th Cir. 2010); *see also e.g. Crawford v. Benzie-Leelanau Dist. Health Dep't Bd. of Health*, 636 F. App'x 261, 270 n.8 (6th Cir. 2016). In PainWebber, the employee's promissory note was specifically included in his compensation package. More importantly, the note itself expressly provided that "the note... could be called due if, at any time prior to its total forgiveness, Agron ***was terminated for cause***." (at 352) Here, Mr. Caputo's Promissory Notes, which were not a part of his earned compensation, expressly contain the very opposite language. Mr. Caputo's Promissory Notes undeniably provide for immediate repayment of the balances due upon termination of employment "for any reason or no reason." Moreover, the PaineWebber court made it clear that, under the applicable standard of review, it was "not entitled to merely substitute [its] judgment for that of the arbitration panel, no matter how wrong [it] may believe the panel's decision to be." (at 350)

employee 'for any reason or for no reason.'" *Id.* (internal citations omitted).

Here, as outlined in his employment agreement and the offer summary, Mr. Caputo was an at-will employee with Wells Fargo Advisors. *See* Mr. Caputo's Employment Agreement and Offer Summary, attached hereto as "Exhibit B." The terms of Mr. Caputo's relationship with Wells Fargo Advisors clearly stated that he could be terminated at any time for any reason. Notwithstanding Wells Fargo Advisors' justifiable business reasons for terminating Mr. Caputo, Mr. Caputo's claim that Wells Fargo Advisors needed (and consequently lacked) "good cause" to terminate him fails under the express terms of his employment agreement and the laws of New Jersey and Missouri.

IV. Mr. Caputo's defamation claim is without factual merit because the statements made on Mr. Caputo's Form U-5 are true and are subject to an absolute privilege.

The elements of a defamation claim by a private individual are: (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury. *Abulkhair v. Engelhart,* No. A-5532-07T2, 2009 WL 857413, at *2 (N.J. Super. Ct. App. Div. Apr. 2, 2009). Mr. Caputo's defamation claim fails because the statements on the Form U-5 were truthful disclosures contained in confidential communications. Accordingly, Mr. Caputo's defamation claim is without any factual or legal merit.

V. CONCLUSION

What began as a simple collection matter in 2015 has been conflated with various arguments and excuses offered by Respondent over the course of this arbitration. However, the analysis of the disputes at issue is clear: Mr. Caputo's obligations to Wells Fargo Advisors are governed by the contractual terms of his Promissory Notes and the terms of his at-will employment. Mr. Caputo's opportunistic arguments, now after having entered the same loan agreement at least five times over the course of his employment, have no merit. Furthermore, Mr. Caputo's defamation claims are without factual support and, therefore, without any legal basis.

Wells Fargo Advisors respectfully requests that the Panel enter judgment in its favor for $1,663,529.71, representing the outstanding balance owed to Wells Fargo Advisors under Mr. Caputo's five Promissory Notes that he unconditionally promised to repay, in addition to applicable interest, attorneys' fees, and costs.

Very truly yours,

STEVENS & LEE

<u>/s/ Megan M. Christensen</u>

Megan M. Christensen

Enclosures
cc: Timothy Bergin, Esq. (via DR Portal)

APPENDIX K

STATUTORY PROVISIONS INVOLVED

9 U.S.C.A. § 10

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

V.A.M.S. 290.080

290.080. Employees paid semimonthly, exception — statement of deductions — violation, misdemeanor

All corporations doing business in this state, and all persons operating railroads or railroad shops in this state, shall pay the wages and salaries of their employees as often as semimonthly, within sixteen days of the close of each payroll period; provided, however, that executive, administrative and professional employees, and sales people and other employees compensated in whole or in part on a commission basis, at the option of such employers, may be paid their salaries or commissions monthly. Such corporations and persons either as a part of the check, draft or other voucher paying the wages or separately, shall furnish the employee at least once a month a statement showing the total amount of deductions for the period. Any corporation or person violating this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than fifty dollars, nor more than five hundred dollars, for each offense.

V.A.M.S. 290.110

290.110. Payment due discharged employee — exceptions — penalty for delay

Whenever any person, firm or corporation doing business in this state shall discharge, with or without cause, or refuse to further employ any servant or employee thereof, the unpaid wages of the servant or employee then earned at the contract rate, without

abatement or deduction, shall be and become due and payable on the day of the discharge or refusal to longer employ and the servant or employee may request in writing of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station or office where a regular agent is kept; and if the money or a valid check therefor, does not reach the station or office within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of the servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid; provided, such wages shall not continue more than sixty days. This section shall not apply in the case of an employee whose remuneration for work is based primarily on commissions and whose duties include collection of accounts, care of a stock or merchandise and similar activities and where an audit is necessary or customary in order to determine the net amount due.

V.A.M.S. 407.911

407.911. Definitions

As used in sections 407.911 to 407.915, the following terms mean:

(1) "**Commission**", compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of orders or sales, or as a specified amount per order or per sale;

(2) "**Principal**", a person, firm, corporation, partnership or other business entity, whether or not it

has a permanent or fixed place of business in this state, and who:

(a) Manufactures, produces, imports, provides, or distributes a product or service for sale;

(b) Contracts with a sales representative to solicit orders for the product or service; and

(c) Compensates the sales representative, in whole or in part, by commission;

(3) "**Sales representative**", a person, firm, corporation, partnership, or other business entity who contracts with a principal to solicit orders and who is compensated, in whole or in part, by commission, but shall not include a person, firm, corporation, partnership, or other business entity who places orders or purchases for its own account for resale.

V.A.M.S. 407.912

407.912. Commission to become due, when — termination of employment, all commissions due, when

1. When a commission becomes due shall be determined in the following manner:

(1) The written terms of the contract between the principal and sales representative shall control;

(2) If there is no written contract, or if the terms of the written contract do not provide when the commission becomes due, or the terms are ambiguous or unclear, the commission shall be paid when the product or

service is delivered and accepted by the purchaser or the principal receives satisfaction in full;

(3) If neither subdivision (1) nor (2) of this subsection can be used to clearly ascertain when the commission becomes due, then the commission shall be due on the date the principal accepts the order and receives satisfaction in full, unless the custom and usage prevalent in this state for the parties' particular industry is different, in which event such custom and usage shall prevail.

2. Nothing in sections 407.911 to 407.915 shall be construed to impair a sales representative from collecting commissions on products or services ordered prior to the termination of the contract between the principal and the sales representative but delivered and accepted by the purchaser after such termination.

3. When the contract between a sales representative and a principal is terminated, all commissions then due shall be paid within thirty days of such termination. Any and all commissions which become due after the date of such termination shall be paid within thirty days of becoming due.

V.A.M.S. 407.913

407.913. Failure to pay sales representative commission, liability in civil action for actual damages — additional damages allowed — attorney fees and costs.

Any principal who fails to timely pay the sales representative commissions earned by such sales representative shall be liable to the sales

representative in a civil action for the actual damages sustained by the sales representative and an additional amount as if the sales representative were still earning commissions calculated on an annualized pro rata basis from the date of termination to the date of payment. In addition the court may award reasonable attorney's fees and costs to the prevailing party.

V.A.M.S. 407.915

407.915. Civil action for all claims against principal may be joined — express or contract waivers of commission laws, invalid

1. Nothing in sections 407.911 to 407.915 shall invalidate or restrict any other or additional right or remedy available to a sales representative from seeking to recover in one action on all claims against a principal.

2. A provision in any contract between a sales representative and a principal purporting to waive any provision of sections 407.911 to 407.915, whether by expressed waiver or by a contract subject to the laws of another state, shall be void.

N.J.S.A. 34.11-4.1

34:11-4.1. Definitions

As used in this act:

a. "Employer" means any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person in this State.

For the purposes of this act the officers of a corporation and any agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation.

b. “Employee” means any person suffered or permitted to work by an employer, except that independent contractors and subcontractors shall not be considered employees.

c. “Wages” means the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto.

d. “Commissioner” means the Commissioner of Labor.

N.J.S.A. 34:11-4.2

34:11-4.2. Time and mode of payment; paydays

Except as otherwise provided by law, every employer shall pay the full amount of wages due to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks on banks where suitable arrangements are made for the cashing of such checks by employees without difficulty and for the full amount for which they are drawn. An employer may establish regular paydays less frequently than semimonthly for bona fide executive, supervisory and other special classifications of employees provided that the employee shall be paid in

full at least once each calendar month on a regularly established schedule.

If a regular payday falls on a nonwork day, that is, a day on which the workplace of an employee is not open for business, payment shall be made on the immediately preceding work day, except where it is otherwise provided for in a collective bargaining agreement.

The end of the pay period for which payment is made on a regular payday shall be not more than 10 working days before such regular payday, provided that if the regular payday falls on a nonwork day payment shall be made on the preceding work day.

N.J.S.A. 34:11-4.3

34:11-4.3. Termination or suspension of employment

Whenever an employer discharges an employee, or when the work of an employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, or whenever an employee quits, resigns, or leaves employment for any reason, the employer shall pay the employee all wages due not later than the regular payday for the pay period during which the employee's termination, suspension or cessation of employment (whether temporary or permanent) took place, as established in accordance with section 2 of this act; or in the case of employees compensated in part or in full by an incentive system, a reasonable approximation of all wages due, until the exact amounts due can be computed; provided, however, that when any employee is suspended as a

result of a labor dispute and such labor dispute involves those employees who make up payrolls, the employer may have an additional 10 days in which to pay such wages. Such payment may be made either through the regular pay channels or by mail if requested by the employee.

N.J.S.A. 34:11-4.4

34:11-4.4. Withholding from wages

No employer may withhold or divert any portion of an employee's wages unless:

a. The employer is required or empowered to do so by New Jersey or United States law; or

b. The amounts withheld or diverted are for:

(1) Contributions authorized either in writing by employees, or under a collective bargaining agreement, to employee welfare, insurance, hospitalization, medical or surgical or both, pension, retirement, and profit-sharing plans, and to plans establishing individual retirement annuities on a group or individual basis, as defined by section 408 (b) of the federal Internal Revenue Code of 1986 (26 U.S.C.s.408(b)), or individual retirement accounts at any State or federally chartered bank, savings bank, or savings and loan association, as defined by section 408 (a) of the federal Internal Revenue Code of 1986 (26 U.S.C.s.408(a)), for the employee, his spouse or both.

(2) Contributions authorized either in writing by employees, or under a collective bargaining agreement,

for payment into company-operated thrift plans; or security option or security purchase plans to buy securities of the employing corporation, an affiliated corporation, or other corporations at market price or less, provided such securities are listed on a stock exchange or are marketable over the counter.

(3) Payments authorized by employees for payment into employee personal savings accounts, such as payments to a credit union, savings fund society, savings and loan or building and loan association; and payments to banks for Christmas, vacation, or other savings funds; provided all such deductions are approved by the employer.

(4) Payments for company products purchased in accordance with a periodic payment schedule contained in the original purchase agreement; payments for employer loans to employees, in accordance with a periodic payment schedule contained in the original loan agreement; payments for safety equipment; payments for the purchase of United States Government bonds; payments to correct payroll errors; and payments of costs and related fees for the replacement of employee identification, which is used to allow employees access to sterile or secured areas of airports, in accordance with a fee schedule described in any airline media plan approved by the federal Transportation Security Administration; provided all such deductions are approved by the employer.

(5) Contributions authorized by employees for organized and generally recognized charities; provided the deductions for such contributions are approved by the employer.

(6) Payments authorized by employees or their collective bargaining agents for the rental of work clothing or uniforms or for the laundering or dry cleaning of work clothing or uniforms; provided the deductions for such payments are approved by the employer.

(7) Labor organization dues and initiation fees, and such other labor organization charges permitted by law.

(8) Contributions authorized in writing by employees, pursuant to a collective bargaining agreement, to a political committee, continuing political committee, or both, as defined in section 3 of P.L.1973, c. 83 (C.19:44A-3), established by the employees' labor union for the purpose of making contributions to aid or promote the nomination, election or defeat of any candidate for a public office of the State or of a county, municipality or school district or the passage or defeat of any public question, subject to the conditions specified in section 2 of P.L.1991, c. 190 (C.34:11-4.4a).

(9) Contributions authorized in writing by employees to any political committee or continuing political committee, other than a committee provided for in paragraph (8) of this subsection, for the purpose of making contributions to aid or promote the nomination, election or defeat of any candidate for a public office of the State or of a county, municipality or school district or the passage or defeat of any public question, subject to the conditions specified in section 2 of P.L.1991, c. 190 (C.34:11-4.4a); in making a payroll deduction pursuant to this paragraph the administrative

expenses incurred by the employer shall be borne by such committee, at the option of the employer.

(10) Payments authorized by employees for employer-sponsored programs for the purchase of insurance or annuities on a group or individual basis, if otherwise permitted by law.

(11) Such other contributions, deductions and payments as the Commissioner of Labor and Workforce Development may authorize by regulation as proper and in conformity with the intent and purpose of this act, if such deductions are approved by the employer.

N.J.S.A. 34:11-4.7

34:11-4.7. Agreements by employer with employee

It shall be unlawful for any employer to enter into or make any agreement with any employee for the payment of wages of any such employee otherwise than as provided in this act, except to pay wages at shorter intervals than as herein provided, or to pay wages in advance. Every agreement made in violation of this section shall be deemed to be null and void, and the penalties in this act provided may be enforced notwithstanding such agreement; and each and every employee with whom any agreement in violation of this section shall be made by any such employer, or the agent or agents thereof, shall have a right of civil action against any such employer for the full amount of his wages in any court of competent jurisdiction in this State.

N.J.S.A. 34:11-4.10

34:11-4.10. Violations

a. Any employer who knowingly fails to pay the full amount of wages to an employee agreed to or required by, or in the manner required by, the provisions of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), or who knowingly violates any other provision of P.L. 1965, c. 173 (C.34:11-4.1 et seq.), or who takes a retaliatory action against an employee by discharging or in any other manner discriminating against the employee because the employee has made a complaint to that employee's employer, to the commissioner, or to that employee's authorized representative, that the employer has not paid the employee the full amount of wages agreed upon or required by, and in the manner required by, the provisions of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), or because the employee has caused to be instituted or is about to cause to be instituted any proceeding under or related to that article or those acts, or because that employee has testified or is about to testify in any proceeding under or relating to that article or those acts, or because the employee has informed any employee of the employer about rights under State laws regarding wages and hours worked, shall be guilty of a disorderly persons offense and, upon conviction for a first violation, shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than 10 nor more than 90 days or by both the fine and

imprisonment and, upon conviction for a second or subsequent violation, be punished by a fine of not less than $1,000 nor more than $2,000 or by imprisonment for not less than 10 nor more than 100 days or by both the fine and imprisonment. Each week, in any day of which any violation of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.) continues shall constitute a separate and distinct offense. In the case of a discharge or other discriminatory action against the employee which is in violation of this subsection, the employer shall also be required to offer reinstatement in employment to the discharged employee and to correct the discriminatory action, and also to pay to the employee, in full, all wages lost as a result of that discharge or discriminatory action, plus liquidated damages equal to not more than 200 percent of the wages due, under penalty of contempt proceedings. Taking an adverse action against an employee within ninety days of the employee filing a complaint with the commissioner or a claim or action being brought by or on behalf of the employee in a court of competent jurisdiction for a violation of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.) shall be considered presumptive evidence that the employer's action was knowingly taken in retaliation against the employee. An employee complaint or other communication need not make explicit reference to any section or provision of any State law regarding wages and hours worked to trigger the protections of this section.

b. As an alternative to or in addition to any other sanctions provided by law for violations of P.L.1965, c. 173 (C.34:11-4.1 et seq.), when the Commissioner of Labor and Workforce Development finds that an employer has violated that act, or taken any retaliatory action against the employee in violation of subsection a. of this section, the commissioner is authorized to assess and collect administrative penalties, up to a maximum of $250 for a first violation and up to a maximum of $500 for each subsequent violation, specified in a schedule of penalties to be promulgated as a rule or regulation by the commissioner in accordance with the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.). When determining the amount of the penalty imposed because of a violation, the commissioner shall consider factors which include the history of previous violations by the employer, the seriousness of the violation, the good faith of the employer and the size of the employer's business. No administrative penalty shall be levied pursuant to this section unless the Commissioner of Labor and Workforce Development provides the alleged violator with notification of the violation and of the amount of the penalty by certified mail and an opportunity to request a hearing before the commissioner or his designee within 15 days following the receipt of the notice. If a hearing is requested, the commissioner shall issue a final order upon such hearing and a finding that a violation has occurred. If no hearing is requested, the notice shall become a final order upon expiration of the 15-day period. Payment of the penalty is due when a final order is issued or when the notice becomes a final order. Any penalty imposed pursuant to this section may be recovered with costs in

a summary proceeding commenced by the commissioner pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c. 274 (C.2A:58-10 et seq.). Any sum collected as a fine or penalty pursuant to this section shall be applied toward enforcement and administration costs of the Division of Workplace Standards in the Department of Labor and Workforce Development.

c. If any employer fails to pay the full amount of wages to an employee agreed to or required by, or in the manner required by, the provisions of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), the employee may recover in a civil action the full amount of any wages due, or any wages lost because of any retaliatory action taken in violation of subsection a. of this section, plus an amount of liquidated damages equal to not more than 200 percent of the wages lost or of the wages due, together with costs and reasonable attorney's fees as are allowed by the court, except that if there is an agreement of the employee to accept payment of the unpaid wages supervised by the commissioner pursuant to section 9 of P.L.1965, c. 173 (C.34:11-4.9) or R.S.34:11-58, the liquidated damages shall be equal to not more than 200 percent of wages that were due prior to the supervised payment. The payment of liquidated damages shall not be required for a first violation by an employer if the employer shows to the satisfaction of the court that the act or omission constituting the violation was an inadvertent error made in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation, and the employer

acknowledges that the employer violated the law and pays the amount owed within 30 days of notice of the violation. In a case of retaliation against an employee in violation of the provisions of subsection a. of this section, the employer shall also be required to offer reinstatement in employment to the discharged employee and take other actions as needed to correct the retaliatory action. For purposes of this subsection, an employer taking an adverse action against an employee within ninety days of the employee filing a complaint with the commissioner, or a claim or action being brought by or on behalf of the employee in a court of competent jurisdiction, for a violation of provisions of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.) shall raise a presumption that the employer's action was taken in retaliation against the employee, which presumption may be rebutted only by clear and convincing evidence that the action was taken for other, permissible, reasons. Any agreement by the employee to work for, or accept, wages paid which are less than the amount agreed to or required by law, or paid in a manner other than that required by article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), shall be no defense to the action. The employee shall be entitled to maintain the action for and on behalf of other similarly situated employees, or designate an agent or representative to maintain the action for and on behalf of all similarly situated employees. The employee may bring the action for all appropriate relief, including reinstatement, the payment of damages and the recovery of lost wages or unpaid wages pursuant to this section in the Superior

Court. Upon the request of any employee not paid the full wages agreed upon or required by law and in the manner required by the provisions of article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), the commissioner may take an assignment of the wage claim in trust for the assigning employee and may bring any legal action necessary to collect the claim, and the employer shall be required to pay to the employee the unpaid wages and liquidated damages equal to not more than 200 percent of the amount of the unpaid wages and pay to the commissioner the costs and reasonable attorney's fees as determined by the court. The payment of liquidated damages shall not be required for a first violation by an employer if the employer shows to the satisfaction of the court that the act or omission constituting the violation was an inadvertent error made in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation, and the employer acknowledges that the employer violated the law and pays the amount owed within 30 days of notice of the violation.

N.J.S.A. 34:11-56a1

34:11-56a1. Definitions

As used in this act:

* * * *

(d) "Wages" means any moneys due an employee from an employer for services rendered or made available by the employee to the employer as a result of their employment relationship including commissions, bonus

and piecework compensation and including the fair value of any food or lodgings supplied by an employer to an employee, and, until December 31, 2018, "wages" includes any gratuities received by an employee for services rendered for an employer or a customer of an employer. The commissioner may, by regulation, establish the average value of gratuities received by an employee in any occupation and the fair value of food and lodging provided to employees in any occupation, which average values shall be acceptable for the purposes of determining compliance with this act in the absence of evidence of the actual value of such items.

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N.J.S.A. 34:11-57

34:11-57. Definitions

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As used in this article:

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"State wage and hour laws" means article 1 of chapter 11 of Title 34 of the Revised Statutes and all acts supplementing that article (R.S.34:11-2 et al.), P.L.1966, c. 113 and all acts supplementing that act (C.34:11-56a et al.), P.L.2005, c. 379 (C.34:11-56.58 et seq.), and article 3 of chapter 11 of Title 34 of the Revised Statutes (R.S.34:11-57 et seq.), but "State wage and hour laws" do not include the "New Jersey Prevailing Wage Act," P.L. 1963, c. 150 (C.34:11-56.25 et seq.), or "The Public Works Contractor Registration Act," P.L.1999, c. 238 (C.34:11-56.48 et seq.).

"Wages" means any moneys due an employee from the employer whether payable by the hour, day, week, semimonthly, monthly or yearly and shall include commissions, bonus, piecework compensation and any other benefits arising out of an employment contract.

N.J.S.A. 34:11-58.2

34:11-58.2. Joint and several liability for client employer and labor contractor; definitions

a. A client employer and a labor contractor providing workers to the client employer shall be subject to joint and several liability and shall share civil legal responsibility for any violations of the provisions of State wage and hour laws or State employer tax laws, or violations of the provisions of section 10 of P.L.1999, c. 90 (C.2C:40A-2) regarding compliance with State wage and hour laws or State employer tax laws, including provisions of those laws regarding retaliatory actions against employees for exercising their rights under any of those laws and provisions of those laws regarding the misclassification of workers, and both the client employer and the labor contractor may be subject to any remedy provided for violations of those laws. A client employer shall not shift to the labor contractor any legal duties or liabilities under the provisions of the "Worker Health and Safety Act," P.L.1965, c. 154 (C.34:6A-1 et seq.) or "The Worker and Community Right to Know Act," P.L.1983, c. 315 (C.34:5A-1 et seq.) with respect to workers supplied by the labor contractor. A waiver of the provisions of this section is contrary to public policy, and is void and unenforceable.

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N.J.S.A. 34:11-58.6

34:11-58.6. Crime of pattern of wage nonpayment; defense; penalty

a. A person commits the crime of pattern of wage nonpayment if the person knowingly commits an act that violates the provisions of N.J.S.2C:40A-2, N.J.S.2C:20-2 if the property stolen consists of compensation the employer failed to provide to an employee as required under the provisions of any State wage and hour law as defined in R.S.34:11-57, subsection a. of section 10 of P.L.1965, c. 173 (C.34:11-4.10), or subsection a. of section 25 of P.L.1966, c. 113 (C.34:11-56a24), if the person has, on two or more prior occasions, been convicted of a violation of the provisions of any of those laws. It shall not be a defense that the violations were not part of a common plan or scheme, or did not have similar methods of commission.

b. Pattern of wage non-payment is a crime of the third degree, except that the presumption of nonimprisonment set forth in subsection e. of N.J.S.2C:44-1 for persons who have not previously been convicted of an offense shall not apply. Notwithstanding the provisions of N.J.S.2C:1-8 or any other law, a conviction of pattern of wage non-payment shall not merge with a conviction of violation of N.J.S.2C:40A-2, N.J.S.2C:20-2, subsection a. of section 10 of P.L.1965, c. 173 (C.34:11-4.10), subsection a. of section 25 of P.L.1966, c. 113 (C.34:11-56a24), or any other criminal offense, nor shall such other conviction merge with a conviction under this section.

c. An employer found to be in violation of this section shall be deemed to have caused loss to the employees in the amount by which the employees were paid less than the full wages agreed upon or required by law and shall be subject to the provisions of N.J.S.2C:43-3 regarding fines and restitution to victims and be subject to other pertinent provisions of Title 2C of the New Jersey Statutes, including, but not limited to, N.J.S.2C:43-4, 2C:43-6 and 2C:44-1.