UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

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Clerk

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Filed: December 20, 2023

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Re: Case No. 23-5092/23-5095, *Thomas Buck v. Janice Compton*
Originating Case No. : 2:22-mc-00017

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Enclosed are the court's unpublished opinion and judgment, entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Ms. Wendy R. Oliver

Enclosures

Mandate to issue

APPENDIX A

UNITED STATES COURT OF APPEALS
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Enclosures

Mandate to issue

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 23-5092/5095

THOMAS JOSEPH BUCK,

Plaintiff - Appellant/Cross - Appellee,

v.

JANICE J. COMPTON,

Defendant - Appellee/Cross - Appellant.

FILED
Dec 20, 2023
KELLY L. STEPHENS, Clerk

Before: BATCHELDER, GRIFFIN, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the denial of Thomas Joseph Buck's motion to vacate and the grant of Janice J. Compton's motion to confirm are AFFIRMED. IT IS FURTHER ORDERED that the motion for sanctions is DENIED, and the case is REMANDED for consideration of Compton's requests for pre- and post-judgment interest consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0534n.06

Nos. 23-5092/5095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 20, 2023
KELLY L. STEPHENS, Clerk

THOMAS JOSEPH BUCK,
Plaintiff - Appellant / Cross - Appellee,

v.

JANICE J. COMPTON,
Defendant - Appellee / Cross - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

OPINION

Before: BATCHELDER, GRIFFIN, and LARSEN, Circuit Judges.

GRIFFIN, Circuit Judge.

Thomas Buck, a former financial advisor, defrauded several of his clients, including Janice Compton. Following Buck's criminal conviction for fraud, Compton sued Buck, and the parties submitted their dispute to binding arbitration through the Financial Industry Regulatory Authority. The arbitration panel found Buck liable and awarded damages to Compton. Buck then moved in federal court to vacate the arbitration award, alleging that the arbitrators "manifestly disregarded the law" in several different ways. The district court denied Buck's motion to vacate and granted Compton's motion to confirm the award. We affirm the denial of Buck's motion to vacate and the grant of Compton's motion to confirm, deny Compton's motion for sanctions, and remand for consideration of Compton's requests for pre- and post-judgment interest.

I.

A.

Buck's fraud against Compton. Thomas Buck and Janice Compton were longtime friends when Compton asked Buck—then a financial advisor at Merrill Lynch Fedder & Smith, Inc.—for help investing her money. From 2009 through 2015, Buck managed Compton's money in Merrill Lynch accounts.

During this time, Buck traded Compton's accounts excessively, generating commission income for himself on both purchases and sales, and entered trades without first obtaining Compton's authorization. While managing Compton's accounts, Buck placed over 1,100 trades, generating about $1.4 million in fraudulent commissions for Buck and Merrill Lynch. He also kept Compton's money in commission-based accounts despite knowing that she would have saved money by using accounts that charged only a management fee. This fraudulent management caused Compton's accounts to underperform the market by about $7 million.

Buck's fraudulent activity stopped in 2015 when Merrill Lynch fired him following an internal investigation. After he was fired, Buck surrendered his securities license to the Financial Industry Regulatory Authority (FINRA).

Two years later, the U.S. Attorney's Office for the Southern District of Indiana, charged Buck with securities fraud under 18 U.S.C. § 1348 via an information. Although the information did not mention Compton by name, it alleged that Buck engaged in a scheme to defraud "certain clients" through his investment advising. The information described Buck's fraud against several specific clients—identified as Clients A, B, and C—by way of "example." Buck pleaded guilty to securities fraud and, as part of his plea agreement, acknowledged that his criminal conduct involved ten or more victims. The government's sentencing memorandum identified Compton as

a victim—Client D—and discussed Compton's victim-impact statement, which the district court considered at sentencing. The court found that Buck's fraud harmed Compton, and ultimately sentenced Buck to 40 months in prison.

B.

The FINRA arbitration. A year and a half after Buck's sentencing, Compton filed a claim with FINRA, alleging several causes of action against Buck and Merrill Lynch. Five of those causes of action were against Buck: (1) violations of the Indiana Corrupt Business Influence Act (ICBIA), (2) violations of the federal Racketeering Influence and Corrupt Organizations Act (RICO), (3) civil recovery under Indiana's crime victim statute, (4) breach of fiduciary duty, and (5) fraud. The parties agreed to submit these claims to FINRA arbitration "in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." And they seemingly agreed to follow Indiana law for purposes of this dispute.[1] In advance of the arbitration hearing, Merrill Lynch settled Compton's claims against it for $5,500,000, and Compton received a payment from the SEC Victim's Fund in the amount of $946,868.

A three-person FINRA arbitration panel ultimately conducted a hearing and provided its unanimous decision in a signed award. The award document provided basic case information, summarized the pre-hearing case activity, and then described Compton's award. The "award" section stated as follows:

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

[1]Although Compton asserts that she did not agree to apply Indiana law to all claims, her pre-hearing brief to the arbitration panel stated that she "will thus forego any argument over choice of law and proceed under Indiana law." Notwithstanding, we analyze Buck's manifest-disregard arguments here by assuming Indiana law applies.

1. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $770,269.00 in compensatory damages.

2. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant interest on the well-managed damages amount of $5,812,948.80, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and including March 25, 2022. The total interest awarded is $1,860,144.00. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.

3. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $2,310,806.00 in treble damages pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

4. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $2,585,232.00 in attorneys' fees pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

5. Respondent Thomas Joseph Buck is liable and shall reimburse Claimant the sum of $375.00, which represents the non-refundable portion of the filing fee previously paid by Claimant to FINRA Dispute Resolution Services.

6. Any and all claims for relief not specifically addressed herein are denied.

Buck's total liability in damages and fees amounted to over $7.5 million.

C.

Federal court proceedings. Following the arbitration decision, Buck moved in federal court to vacate the arbitration award. Compton opposed and petitioned to confirm the award. In her petition, Compton also sought an order awarding pre- and post-judgment interest. The district court denied Buck's motion to vacate and granted Compton's petition to confirm. The order did not address Compton's requests for pre- or post-judgment interest.

The parties cross-appealed—Buck on the motion to vacate and Compton on her un-addressed requests for interest. After Buck appealed, Compton moved for sanctions, arguing that Buck's appeal was frivolous.

II.

A.

On appeal from a petition to vacate or confirm an arbitration award, we apply two standards of review—one for the district court's decision and the other for the arbitrators' decision. We review the district court's factual findings for clear error and its legal conclusions de novo. *McGee v. Armstrong*, 941 F.3d 859, 867 (6th Cir. 2019). But to review the arbitrators' decision, we apply "one of the narrowest standards of judicial review in all of American jurisprudence." *Samaan v. Gen. Dynamics Land Sys., Inc.*, 835 F.3d 593, 600 (6th Cir. 2016) (citation omitted). Under that narrow standard, we "must refrain from reversing an arbitrator simply because the court disagrees with the result or believes the arbitrator made a serious legal or factual error." *Id.*

This narrow review springs from the Federal Arbitration Act, which "expresses a presumption that arbitration awards will be confirmed." *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640, 643 (6th Cir. 2005) (citing 9 U.S.C. § 9). Under the Act, when a party seeks confirmation of an arbitration award in federal court, the district court "*must* issue an order confirming an arbitrator's award 'unless the award is vacated, modified, or corrected as prescribed in' 9 U.S.C. §§ 10 and 11." *Samaan*, 835 F.3d at 600 (quoting 9 U.S.C. § 9) (emphasis added).

Section 10(a) of the Act governs requests to vacate an arbitration award. That section enumerates four grounds on which a district court may vacate an award. 9 U.S.C. § 10(a)(1)–(4). As the Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the grounds listed in § 10(a) are the "exclusive" grounds on which a federal court may vacate an arbitrator's decision. 552 U.S. 576, 578 (2008).

B.

Buck claims the arbitrators' decision represented a "manifest disregard of the law," yet those words appear nowhere in § 10(a). Derived from dicta in *Wilko v. Swan*, 346 U.S. 427, 436 (1953), the manifest-disregard standard has been described both as a judicially created "alternative" to the Act's four grounds for vacatur, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995), and as a judicial gloss on § 10(a)(4)'s prohibition against arbitrators exceeding their powers, *see Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990). Our most recent published opinion on the matter appears to endorse, in dicta, the latter formulation, stating that the standard is "part and parcel of" § 10(a)(4). *In re Romanzi*, 31 F.4th 367, 375 (6th Cir. 2022).

The Supreme Court has declined to resolve whether the standard, in either formulation, survives *Hall Street. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010). We have repeatedly done the same, *see, e.g.*, *Samaan*, 835 F.3d at 600–01; *Schafer v. Multiband Corp.*, 551 F. App'x 814, 818–19 (6th Cir. 2014); *Hale v. Morgan Stanley Smith Barney LLC*, 2023 WL 2972572, at *3 (6th Cir. Apr. 17, 2023), and do so again here. Although the parties thoroughly briefed whether the manifest-disregard standard is a proper basis for vacatur following *Hall Street*, this case does not require a broad holding on the manifest-disregard standard's fate. Even assuming the standard survives *Hall Street*, Buck's claims of legal error do not amount to manifest disregard of the law.

C.

Although the standard's foundations are questionable, its high bar is well defined. To prove that arbitrators manifestly disregarded the law, the party moving for vacatur must prove two elements: "(1) the applicable legal principle is clearly defined and not subject to reasonable debate;

and (2) the arbitrators refused to heed that legal principle." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) (quoting *Jaros*, 70 F.3d at 421).

The first element requires that the relevant law be "clearly defined and not subject to reasonable debate." *Id.* At minimum, this element demands the existence of controlling legal authority on the issue. *See, e.g.*, *Jaros*, 70 F.3d at 421 (stating that, for there to be manifest disregard, "the decision must fly in the face of clearly established legal *precedent*") (emphasis added); *Gibbens v. OptumRx, Inc.*, 778 F. App'x 390, 394 (6th Cir. 2019) (holding no manifest disregard where the "arbitrator surveyed relevant caselaw and accurately determined that no authority *controls* the precise question") (emphasis added). Consequently, the challenging party cannot meet this element by citing to only non-controlling authorities. *See Schafer*, 551 F. App'x at 820 ("An arbitrator cannot reject the law, but can disagree with *nonbinding* precedent without disregarding the law.") (emphasis added).

The second element asks whether the arbitrators "refused to heed" the clearly defined legal principle or "consciously chose[] not to apply it." *Dawahare*, 210 F.3d at 669. Inherent in such conscious refusal is the need for proof that the arbitrators "were aware of some relevant law that they chose to ignore." *Romanzi*, 31 F.4th at 375–76 (alteration omitted) (quoting *Dawahare*, 210 F.3d at 671). There must be evidence that, during the arbitration proceedings, "one of the parties clearly stated the law and the arbitrators expressly chose not to follow it." *Dawahare*, 210 F.3d at 670. It would be "illogical to conclude that the arbitrator manifestly disregarded law that [the challenging party] never asked him to consider." *Gibbens*, 778 F. App'x at 395. Thus, the challenging party must demonstrate that the record "shows the arbitrators' awareness of the . . . law that he alleges to be applicable," *Dawahare*, 210 F.3d at 670, and a decision that "fl[ew] in the face of obviously applicable law," *Hale*, 2023 WL 2972572, at *4 (internal quotation

marks omitted) (quoting *Jaros*, 70 F.3d at 421). "When a reasonable judge could 'conceivably' reach the arbitrator's legal conclusion, a manifest-disregard challenge must fail even if we would have reached the opposite one." *Id.* (quoting *Jaros*, 70 F.3d at 421).

Because this element requires proof of conscious refusal to follow the law, evidence of the arbitrators' reasoning is key. After all, "[a]rbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law." *Dawahare*, 210 F.3d at 669.

D.

Buck asserts five claims of legal error. None amounts to manifest disregard of the law.

1.

Buck's first claim of error relates to the so-called "conviction exception" in the federal RICO statute under 18 U.S.C. § 1964(c). To recover under that statute, a plaintiff must show that her damages resulted from the defendant's "predicate acts." *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133 (6th Cir. 1994); 18 U.S.C. §§ 1962, 1964(a). And a plaintiff cannot cite instances of securities fraud as predicate acts unless the defendant was "criminally convicted in connection with the fraud." 18 U.S.C. § 1964(c). In other words, for Compton to recover under RICO for damages incurred by securities fraud, the conviction exception must apply.

Buck asserts that, for the conviction exception to apply, the defendant must have been criminally convicted of fraud "*against the plaintiff*." According to Buck, the conviction exception requires the RICO plaintiff to have been named in the information or indictment that led to the defendant's criminal conviction. Because the charging information did not mention Compton by name, Buck argues, the conviction exception does not apply, and the arbitrators should have dismissed Compton's RICO claim.

Buck's interpretation of the conviction exception, however, is not clearly defined by controlling legal authority. RICO's plain language does not resolve whether the plaintiff must be named in the information or indictment. *See* 18 U.S.C. § 1964(c) (defendant's conviction must be "in connection with the fraud" serving as the predicate acts). And the other authorities Buck relies on fare no better. Buck pointed the arbitrators to two district court cases that defined the conviction exception's scope narrowly. *See Krear v. Malek*, 961 F. Supp. 1065, 1077 (E.D. Mich. 1997); *Kaplan v. S.A.C. Cap. Advisors, L.P.*, 104 F. Supp. 3d 384, 389 (S.D.N.Y. 2015). But district court cases are not controlling. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). Moreover, district court decisions on this issue are not unanimous. At least one court has found that the conviction exception does not require the plaintiff to be named in the criminal indictment. *See Brooks v. Field*, 2015 U.S. Dist. LEXIS 33950, at *17 (D.S.C. Feb. 20, 2015), *report and recommendation adopted by* 2015 WL 1292775 (D.S.C. Mar. 18, 2015) (declining to "read the criminal conviction exception language so narrowly as to require the indictment to name all [victims of the fraud] by name"). Thus, Buck's argument fails under the first element of the manifest-disregard standard.

2.

Buck next asserts that, by awarding damages for Compton's claim under the Indiana Corrupt Business Influences Act (ICBIA), the arbitrators manifestly disregarded the two-year statute of limitations for such claims. Indiana law imposes a two-year statute of limitations on several types of actions, including those for "a forfeiture of penalty given by statute." Ind. Code § 34-11-2-4(a)(3). Buck argues that Compton's claim under the ICBIA is such an action and therefore subject to the two-year statute of limitations.

Buck again lacks clearly established legal authority for his position. In support of his theory, Buck pointed the arbitrators only to *Branham Corp. v. Newland Resources, LLC*, 17 N.E.3d

979, 987 (Ind. Ct. App. 2014). Yet *Branham* did not hold that the two-year statute of limitations applies to the ICBIA—the parties agreed to apply the two-year statute of limitations, and the court addressed only the question of when the claim started to accrue. *Id.* And in at least one other case, the Indiana Court of Appeals has observed that the statute of limitations applicable to an ICBIA claim is an open question, noting that it could be as long as ten years. *Walther v. Ind. Lawrence Bank*, 579 N.E.2d 643, 648 (Ind. Ct. App. 1991).

3.

Next, Buck contends that the arbitrators manifestly disregarded the law in denying his motion to dismiss based on FINRA's six-year eligibility period under FINRA Rule 12206(a). He claims that the arbitrators manifestly disregarded this rule because the award is based on occurrences that are more than six years old.

But no controlling legal authority prohibited the arbitrators from finding Compton's claims eligible. Although Buck is correct that the occurrences of fraud were more than six years old, Compton brought her claims within six years of discovering Buck's misconduct. FINRA's guidance to arbitrators states that the "occurrence or event giving rise to the [claim]" can be "continuing" due to, for example, "ongoing fraud." Financial Industry Regulatory Authority, *FINRA Dispute Resolution Services Arbitrator's Guide* 48, https://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf (last updated Nov. 2023). And the plain text of the rule itself empowers arbitrators to "resolve any questions regarding the eligibility of a claim under this rule." FINRA Rule 12206(a). That assignment of power tracks the Supreme Court's guidance in *Howsam v. Dean Witter Reynolds, Inc.*, which held that agency rules on time limitations for arbitration eligibility are "presumptively for the arbitrator, not for the judge" to interpret. 537 U.S. 79, 85 (2002).

Buck's argument to the contrary cites only non-controlling authorities, such as a pre-*Howsam* Seventh Circuit case, *PaineWebber Inc. v. Farnam*, 870 F.2d 1286, 1292 (7th Cir. 1989), and several arbitration awards, which lack precedential value, *see Equitable Res., Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO/CLC*, 621 F.3d 538, 553 (6th Cir. 2010). Accordingly, Buck fails to show that his preferred, narrow interpretation of FINRA Rule 12206(a) is clearly defined.

4.

Buck next argues the arbitrators impermissibly awarded Compton "quadruple damages," instead of the threefold damages allowed under the RICO and ICBIA statutes. *See* 18 U.S.C. § 1964(c) (stating that a claimant "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee"); Ind. Code § 34-24-2-6 (permitting several types of damages, including "an amount equal to three (3) times the person's actual damages").

Buck's argument focuses on paragraphs 1 and 3 of the award, which provide:

> 1. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of **$770,269.00 in compensatory damages**.
>
> . . .
>
> 3. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of **$2,310,806.00 in treble damages** pursuant to 18 U.S.C. 1964(c) – the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

(Emphases Added). Buck points out that the $2,310,806 awarded in paragraph 3 is almost three times the $770,269 already awarded as compensatory damages in paragraph 1. Thus, according to Buck, the arbitrators impermissibly awarded Compton a total of four times compensatory damages, or "quadruple damages."

Buck, however, forfeited this argument by failing to include it in his motion to vacate. He first made this argument in an undeveloped footnote in his reply brief in support of his motion to vacate. Such belated and cursory presentation did not "properly raise the issue . . . with the district court." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008); *see also Fifth Third Mortg. Co. v. Chicago Title Ins. Co.*, 692 F.3d 507, 513 (6th Cir. 2012). The district court, apparently recognizing that this argument was forfeited, did not address the argument when it denied Buck's motion to vacate. And "[i]ssues not examined by the district court are ordinarily not considered on appeal." *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 383 (6th Cir. 2016).

Seeking our review of this issue, Buck argues that he properly raised it before the district court for either of two reasons: (1) Compton responded to Buck's new quadruple-damages argument in a sur-reply brief, and (2) Buck separately briefed the quadruple-damages issue in response to Compton's petition to confirm. As to Buck's first argument, he cites no authority suggesting that his forfeiture should be excused where the opposing party files a sur-reply and the district court still declines to address the forfeited argument. Indeed, Compton's sur-reply asserted that Buck forfeited this new argument by first raising it in his reply brief and that the district court need not address it. Filing an extra brief noting that an argument is forfeited does not somehow excuse that very forfeiture. As to Buck's second argument, the manifest-disregard standard is used "only to vacate arbitration awards." *Grain v. Trinity Health, Mercy Health Servs. Inc.*, 551 F.3d 374, 380 (6th Cir. 2008). Consequently, to preserve this issue as a ground for vacatur, Buck needed to present it in his motion to vacate—his response brief to Compton's motion to confirm does not suffice.

Buck next argues that, if he did forfeit the issue, we should exercise our discretion to consider it. We make such a choice based on four factors:

> 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court.

Scottsdale Ins., 513 F.3d at 552 (citation omitted). Buck points out that, in *Coffee Beanery, Ltd. v. WW, L.L.C.*, we found that these factors favored considering the forfeited issue of whether arbitrators manifestly disregarded a statute. 300 F. App'x 415, 420 (6th Cir. 2008). That case, however, is an unpublished decision that we need not follow. *See Keene Grp., Inc. v. City of Cincinnati*, 998 F.3d 306, 314 (6th Cir. 2021). And these factors guide a decision "within the ambit of our discretion," which we rarely exercise to entertain issues not properly raised before the district court. *Trs. of Operating Eng'rs Loc. 324 Pension Fund v. Bourdow Contracting, Inc.*, 919 F.3d 368, 376 (6th Cir. 2019) (citation omitted).

These factors do not favor review here. First, the question before us is not purely legal. Whether arbitrators manifestly disregarded the law concerns facts of if and how the arbitrators considered and allegedly refused to heed the treble damages statutes. To prove that the arbitrators consciously chose not to follow those statutes, Buck has only the parties' filings and the bare-bones language of the unexplained award. He lacks a transcript or an explained decision to support his assumptions about how the arbitrators calculated damages.

Second, the proper resolution of the issue is not clear beyond doubt. Buck assumes the arbitrators arrived at their treble damages amount by multiplying the compensatory damages by three (a calculation that is one dollar off), but it is at least "conceivable" that the arbitrators might have made their damages calculation another way. *Hale*, 2023 WL 2972572, at *4 (quoting *Jaros*,

70 F.3d at 421). For instance, they might have awarded treble damages on some of the $6.4 million offset Buck enjoyed because of Compton's settlement with Merrill Lynch ($5,500,000) and payment from the SEC Victim's Fund ($946,868).

Third, no miscarriage of justice would result. Buck could have asked for an explained decision that might have clarified how the arbitrators made their damages calculations, *see* FINRA Rule 12904(g), but he did not. He thus "has no one but himself to blame for our inability to assess his manifest-disregard argument." *Murray v. Citigroup Glob. Mkts., Inc.*, 511 F. App'x 453, 456 (6th Cir. 2013).

Fourth, the district court did not pass on this issue. And "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Accordingly, Buck forfeited this issue, and we decline to consider it.

5.

Buck asserts that the arbitrators manifestly disregarded the law in their award of interest. He complains that the arbitrators declined to award so-called "well-managed damages" (the difference between what the account made and what it reasonably could have made had it been properly managed) yet proceeded to award interest on those damages.

At the arbitration hearing, Compton presented evidence of market underperformance in support of her claim for well-managed damages. Although she requested both well-managed damages and pre-judgment interest on those damages, the arbitrators awarded only interest, not the well-managed damages themselves. The relevant paragraph of the award provides:

> 2. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant **interest on the well-managed damages amount of $5,812,948.80**, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and

> including March 25, 2022. **The total interest awarded is $1,860,144.00. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.**

(Emphases Added).

Buck asserts that "[i]t is Black Letter Law that interest cannot be assessed in the absence of a corresponding monetary judgment." In support, he cites Indiana Code § 34-51-4-7, which provides that "[t]he court may award prejudgment interest as part of a judgment." On its face, that statute merely permits an award of interest as part of a judgment, which is what the arbitrators did here. It does not contain the prohibitive language Buck suggests.

As with his other arguments, Buck again cites only non-binding authorities. Buck's closest authority on point for his interpretation of the Indiana pre-judgment interest statute is *Blinzinger v. Americana Healthcare Corp.*, 505 N.E.2d 449, 452 (Ind. Ct. App. 1987). That case, however, is distinguishable. There, the court rejected an award of interest that did not state a "fixed . . . amount for payment," and thus "could not be considered the equivalent of a money judgment." *Id.* at 452. Here, by contrast, the arbitrators "fixed an amount for payment"—$1,860,144.00. Under *Blinzinger*'s reasoning, this amount could "be considered the equivalent of a money judgment" and could "function as an order which permitted an award of interest." *See id.* *Blinzinger* thus is not clearly established legal authority supporting Buck's interpretation of Indiana's pre-judgment interest statute.

The only other Indiana case Buck cites for this argument affirms an award of pre-judgment interest and reinforces the discretionary nature of such decisions. *Hupfer v. Miller*, 890 N.E.2d 7, 10 (Ind. Ct. App. 2008). Other cases he cites—one from the Sixth Circuit and various cases from district courts in Illinois, Arkansas, and California—were not controlling on the arbitrators applying Indiana law. In sum, none of Buck's cited authorities prevented the arbitrators from

awarding damages based on interest without awarding the amount on which that interest calculation was based.

Further, the lack of an explained decision sinks Buck's argument. Without evidence of the arbitrators' reasoning, it is at least "conceivable" that the arbitrators arrived at this interest decision in a way that awarded interest on a monetary amount to which Compton was already entitled through her claims against Buck and his employer. *Hale*, 2023 WL 2972572, at *4 (quoting *Jaros*, 70 F.3d at 421). For instance, the arbitrators might have based their interest award partially on Compton's damages paid by Merrill Lynch and the SEC. Because of the $6.4 million in payments from those other parties, Buck essentially got a free ride by not having to pay all of Compton's compensatory damages. The arbitrators might have realized that Compton had been deprived of the use of that money for several years and could have reasonably required Buck to pay interest on $5,812,958.80 of that amount to fully compensate Compton.

III.

Having disposed of Buck's manifest-disregard arguments, we turn next to Compton's motion for sanctions.

There are two avenues by which we can impose sanctions. The first is under 28 U.S.C. § 1927, which provides that, "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." This standard is an objective one—it applies "when an attorney knows or reasonably should know that a claim pursued is frivolous." *Tareco Prop., Inc. v. Morriss,* 321 F.3d 545, 550 (6th Cir. 2003) (citation omitted). In other words, § 1927 sanctions "may be imposed without a finding that the lawyer subjectively

knew that his conduct was inappropriate." *Scherer v. JP Morgan Chase & Co.*, 508 F. App'x 429, 439 (6th Cir. 2012).

The second is under Federal Rule of Appellate Procedure 38, which allows us to "award just damages and single or double costs to the appellee" where the court "determines that an appeal is frivolous" and "after a separately filed motion or notice from the court and reasonable opportunity to respond." Fed. R. App. P. 38. The Rule 38 standard has both objective and subjective components: "An appeal is frivolous if it is obviously without merit *and* is prosecuted for delay, harassment, or other improper purposes." *Waldman v. Stone*, 854 F.3d 853, 854 (6th Cir. 2017) (order) (emphasis added).

Here, Compton argues that sanctions are appropriate because Buck's arguments for vacatur were "objectively meritless and had no reasonable basis for success." According to Compton, Buck's counsel "unreasonably and vexatiously multipl[ied] these proceedings by pursuing a frivolous appeal," rather than accepting the arbitrators' properly rendered decision. Compton's motion for sanctions echoes her request that we jettison the manifest-disregard standard altogether. As Compton's counsel asserted at oral argument, an appeal for manifest disregard amounts to nothing but "a litigation tactic" and "a frivolous attempt to grind down" the party that prevailed in arbitration.

But having a steep hill to climb on appeal does not make an appeal frivolous. Indeed, we have rejected motions for sanctions stemming from the "limited scope of judicial review of arbitration decisions." *Vic Wertz Distrib. Co. v. Teamsters Loc. 1038*, 898 F.2d 1136, 1144 (6th Cir. 1990) (denying motion for sanctions); *Dawahare*, 210 F.3d at 671 (same); *Uhl v. Komatsu Forklift Co.*, 512 F.3d 294, 308–09 (6th Cir. 2008) (same). And "[w]e do not wish to chill any appeal . . . which involves serious, controversial, doubtful, or even novel questions." *Wilton Corp.*

v. Ashland Castings Corp., 188 F.3d 670, 677 (6th Cir. 1999). Here, Buck's appeal presented several unresolved questions including how clear a statute must be before it is a "clearly established legal principle" that binds arbitrators to a particular application and whether an unexplained arbitration award that nevertheless cites to statutes is reasoned enough to permit a finding of manifest disregard. Further, much of the parties' briefing addressed the important and unresolved questions of whether the manifest-disregard standard remains viable and in what form.

Accordingly, Buck's appeal was not frivolous, and the motion for sanctions is denied.

IV.

Finally, on cross-appeal, Compton argues that we should remand for the district court to address her two requests for interest on her award. The district court was silent on Compton's requests for (1) pre-judgment interest running from the date of the award's issuance through its confirmation, and (2) post-judgment interest running from the date of confirmation through the time when the judgment is satisfied.

In diversity cases, such as this one, "state law governs awards of prejudgment interest." *F.D.I.C. v. First Heights Bank, FSB*, 229 F.3d 528, 542 (6th Cir. 2000). Here—regardless of whether the applicable pre-judgment interest statute is Tennessee's, Tenn. Code § 47-14-123, or Indiana's, Ind. Code § 34-51-4-7—the award of pre-judgment interest is within the trial court's discretion. *See, e.g.*, *Foster-Henderson v. Memphis Health Ctr., Inc.*, 479 S.W.3d 214, 226 (Tenn. Ct. App. 2015) (Under Tennessee law, "[a]n award of prejudgment interest is within the sound discretion of the trial court."); *Wormgoor v. State Farm Mut. Auto. Ins. Co.*, 203 N.E.3d 1092, 1095 (Ind. Ct. App. 2023) ("An award of prejudgment interest under [Indiana's pre-judgment interest statute] is discretionary."). When a district court, "without explanation, decline[s] to impose prejudgment interest," we can remand "with instructions to support an award or denial of

prejudgment interest with findings of fact incorporating its reasons for its decision." *Drennan v. Gen. Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992); *see also Bricklayers' Pension Tr. Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982) (remanding "for a determination of whether the facts of this case warrant an award of prejudgment interest").

As for post-judgment interest, federal law controls, and post-judgment interest is mandatory under 28 U.S.C. § 1961(a). We similarly can remand for entry of an award of post-judgment interest. *See, e.g., Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 590 (6th Cir. 2002).

Thus, we remand both interest requests here.

V.

For the reasons stated, we affirm the denial of Buck's motion to vacate and the grant of Compton's motion to confirm, deny the motion for sanctions, and remand for consideration of Compton's requests for pre- and post-judgment interest.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
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Filed: February 02, 2024

Thomas Joseph Buck
90 Beachside Drive
Apartment 202
Vero Beach, FL 32963

Re: Case No. 23-5092/23-5095, *Thomas Buck v. Janice Compton*
Originating Case No.: 2:22-mc-00017

Dear Mr. Buck,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. Alexander Rudman Bunn
Mr. James Robert Clapper
Mr. Timothy G. Harvey
Mr. Salvador M. Hernandez
Mr. Kyle Daniel Johnson
Mr. Nathaniel L. Prosser

Enclosure

APPENDIX B

Nos. 23-5092/5095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS JOSEPH BUCK,

Plaintiff-Appellant/Cross-Appellee,

v.

JANICE J. COMPTON,

Defendant-Appellee/Cross-Appellant.

ORDER

BEFORE: BATCHELDER, GRIFFIN, and LARSEN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THOMAS JOSEPH BUCK,	)	
	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**Case No. 2:22-mc-00017-JTF-tmp**
	)	
	)	
JANICE J. COMPTON,	)	
	)	
	)	
Defendant-Claimant.	)	

JUDGMENT

Decision by Court. This action came for consideration before the Court. The issues have been duly considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is Dismissed with Prejudice in accordance with the Order Denying Plaintiff's Motion to Vacate and Granting Defendant's Petition to Confirm entered on January 3, 2023.

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
UNITED STATES DISTRICT JUDGE

January 3, 2022
DATE

THOMAS M. GOULD
CLERK

s/Jarrod Nelson
(BY) LAW CLERK

APPENDIX C

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Janice J. Compton

Case Number: 20-02468

vs.

Respondents
Merrill Lynch Pierce Fenner & Smith Inc.
Thomas Joseph Buck

Hearing Site: Memphis, Tennessee

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Customer vs. Member and Associated Person

This case was decided by an all-public panel.

The evidentiary hearing was conducted partially by videoconference.

REPRESENTATION OF PARTIES

For Claimant Janice J. Compton: Niel Prosser, Esq., Rob Clapper, Esq. and Kyle Johnson, Esq., The Prosser Law Firm, PLC, Memphis, Tennessee.

For Respondent Merrill Lynch Pierce Fenner & Smith Inc. ("MLPFS"): Stephen Scotch-Marmo, Esq., Morgan, Lewis & Bockius LLP, Boston, Massachusetts.

For Respondent Thomas Joseph Buck ("Buck"): David E. Robbins, Esq. and Sam Silverstein, Esq., Kaufmann Gildin & Robbins, LLP, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: July 31, 2020.
Janice J. Compton signed the Submission Agreement: July 30, 2020.

Statement of Answer filed by Respondent MLPFS on or about: September 29, 2020.
MLPFS signed the Submission Agreement: September 29, 2020.

Statement of Answer filed by Respondent Buck on or about: October 15, 2020.
Thomas Joseph Buck signed the Submission Agreement: September 17, 2020.

CASE SUMMARY

In the Statement of Claim, Claimant asserted the following causes of action: violation of Indiana's Corrupt Business Influence Act - Operating An Enterprise Through A Pattern Of Racketeering; violation of Indiana Corrupt Business Influence Act - Use Of Racketeering Proceeds to Operate an Enterprise; violation of the Racketeer Influenced and Corrupt Organization Act - Operating An Enterprise Through A Pattern Of Racketeering; Civil Recovery Under Indiana's Crime Victim Statute; breach of fiduciary duty; fraud; and negligent supervision and ratification. The causes of action relate to overtrading of long-term securities and overcharging of commissions by Respondent Buck in Claimant's MLPFS accounts, and the alleged lack of supervision by Respondent MLPFS.

Unless specifically admitted in its Statement of Answer, Respondent MLPFS denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in his Statement of Answer, Respondent Buck denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim, Claimant requested: an amount equal to the returns Claimant lost due to Respondents' alleged failure to prudently manage her accounts (e.g. well-managed damages); disgorgement of the balance of the commissions Claimant had not recovered to date from the SEC's Victim's Fund; pre-judgement interest at the highest rate allowed by law; treble damages; attorneys' fees, costs and expenses; punitive/exemplary damages; and such other, different or additional relief and damages which the Panel deemed to be just and equitable.

In its Statement of Answer, Respondent MLPFS requested the denial of Claimant's claims in their entirety.

In his Statement of Answer, Respondent Buck requested: dismissal of all causes of action against him in their entirety; Claimant take nothing further by way of her Statement of Claim; an assessment of his portion of the forum fees against Claimant; an award for costs and expenses, including reasonable attorneys' fees and expert fees incurred in defending this arbitration; and any other relief that the Panel deemed just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

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

On October 11, 2021, Respondent Buck filed a Motion to Dismiss pursuant to Rule 12206 of the Code of Arbitration Procedure (the "Code"), in which he asserted, among other things, that Claimant's claims that arose out of transactions or occurrences prior to August 2014 were time-barred and ineligible for arbitration as they occurred over six years prior to Claimant's filing of her arbitration. In her November 12, 2021, Response to Motion to Dismiss Pursuant to Rule 12206 of the Code, Claimant argued, among other things, that FINRA recognizes that when appropriate, eligibility is measured from the date of discovery or from the last "occurrence or event" that makes the claim viable - not the date of the transaction, and that Claimant's claims arose at the earliest in

2015 with Respondent Buck's termination. In his November 19, 2021, Reply to Opposition to Motion To Dismiss Pursuant to Rule 12206 of the Code, Respondent Buck asserted, among other things, that Claimant was aware of Respondent Buck's transactions at issue and that there was no continuing wrongdoing.

On November 15, 2021, Respondent MLPFS filed a Motion to Dismiss Pursuant to Rule 12206 of the Code, in which it asserted that Claimant's claims that arose out of transactions or occurrences prior to October 5, 2013, were time-barred and ineligible for arbitration as they occurred over six years prior to Claimant's filing of her arbitration.

On December 22, 2021, Claimant filed a notice of voluntary dismissal with prejudice only as to her claims against Respondent MLPFS, which rendered Respondent MLPFS's Motion to Dismiss moot. Therefore, the Panel made no determination with respect to any of the relief requests against Respondent MLPFS contained in the Statement of Claim.

On January 19, 2022, the Panel conducted a recorded telephonic pre-hearing so the parties could present oral arguments on Respondent Buck's Motion to Dismiss. On January 20, 2022, the Panel issued an Order in which it denied Respondent Buck's Motion to Dismiss.

The Award in this matter may be executed in counterpart copies.

AWARD

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

1. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $770,269.00 in compensatory damages.

2. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant interest on the well-managed damages amount of $5,812,948.80, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and including March 25, 2022. The total interest awarded is $1,860,144.00. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.

3. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $2,310,806.00 in treble damages pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

4. Respondent Thomas Joseph Buck is liable for and shall pay to Claimant the sum of $2,585,232.00 in attorneys' fees pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).

5. Respondent Thomas Joseph Buck is liable and shall reimburse Claimant the sum of $375.00, which represents the non-refundable portion of the filing fee previously paid by Claimant to FINRA Dispute Resolution Services.

6. Any and all claims for relief not specifically addressed herein are denied.

FEES

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

Filing Fees
FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	=$ 1,575.00

*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(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent Merrill Lynch Pierce Fenner & Smith, Inc. is assessed the following:

Member Surcharge	=$ 1,900.00
Member Process Fee	=$ 3,750.00

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

February 25, 2022, postponement requested by Claimant and consented to by Respondent Buck	=$ 1,125.00
Total Postponement Fees	=$ 1,125.00

The Panel has assessed $562.50 of the postponement fees to Claimant.

The Panel has assessed $562.50 of the postponement fees to Respondent Buck.

Last-Minute Cancellation Fees
Fees apply when a hearing on the merits is cancelled within ten calendar days before the start of a scheduled hearing session:

February 25, 2022, cancellation requested by Claimant and consented to by Respondent Buck	=$ 1,800.00
Total Last-Minute Cancellation Fee	=$ 1,800.00

The Panel has assessed $900.00 of the last-minute cancellation fee to Claimant.

The Panel has assessed $900.00 of the last-minute cancellation fee to Respondent Buck.

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 Arbitrator(s), including a pre-hearing conference with the Arbitrator(s), which lasts four (4) hours or less. Fees associated with these proceedings are:

Four (4) pre-hearing sessions with a single Arbitrator @ $450.00/session			=$ 1,800.00
Pre-Hearing Conferences:	December 9, 2020	1 session	
	February 11, 2021	1 session	
	June 16, 2021	1 session	
	August 17, 2021	1 session	
Ten (10) pre-hearing sessions with the Panel @ $1,125.00/session			=$ 11,250.00
Pre-Hearing Conferences:	November 23, 2020	1 session	
	January 27, 2021	1 session	
	April 2, 2021	1 session	
	October 21, 2021	1 session	
	November 3, 2021	2 sessions	
	November 5, 2021	2 sessions	
	November 23, 2021	1 session	
	January 19, 2022	1 session	
Twenty-four (24) hearing sessions @ $1,125.00/session			=$ 27,000.00
Hearings:	February 17, 2022	2 sessions	
	February 18, 2022	2 sessions	
	February 21, 2022	2 sessions	
	February 22, 2022	3 sessions	
	February 23, 2022	2 sessions	
	February 24, 2022	2 sessions	
	March 21, 2022	2 sessions	
	March 22, 2022	3 sessions	
	March 23, 2022	3 sessions	
	March 24, 2022	2 sessions	
	March 25, 2022	1 session	
Total Hearing Session Fees			=$ 40,050.00

The Panel has assessed $6,412.50 of the hearing session fees to Claimant.

The Panel has assessed $5,512.50 of the hearing session fees jointly and severally to Respondents MLPFS and Buck.

The Panel has assessed $28,125.00 of the hearing session fees to Respondent Buck.

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

ARBITRATION PANEL

Gary E. Marcus	-	Public Arbitrator, Presiding Chairperson
Ian S. Greig	-	Public Arbitrator
Mollie Wagner Neal	-	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

Gary E. Marcus — **05/06/2022**
Gary E. Marcus — Signature Date
Public Arbitrator, Presiding Chairperson

Ian S. Greig — **05/06/2022**
Ian S. Greig — Signature Date
Public Arbitrator

Mollie Wagner Neal — **05/06/2022**
Mollie Wagner Neal — Signature Date
Public Arbitrator

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

May 06, 2022
Date of Service (For FINRA Dispute Resolution Services use only)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OFTENNESSEE,
WESTERN DIVISION

THOMAS JOSEPH BUCK

Plaintiff-Respondent,

} No. 2:22-mc-00017

JANICE J. COMPTON, }

Defendant-Claimant

MR. BUCK'S PEITION FOR A REHEARING PURSUANT TO RULES 35 AND 40 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Your Honors,

Writing to judges of a Federal Circuit Court is something I have never done. As a layman, I recognize this is not the normal channel for making a request of the Court. But, In my circumstance, it is all I can do for my family, and I believe justice demands that you consider this as though it came from my attorney representative instead of from me, pro se. I believe that, as you read this petition to its conclusion, you will understand why I am compelled to submit this petition for a rehearing. I understand that in making this request, I must state with

APPENDIX E

particularity each point of law or fact that I, as the petitioner, believe the court has overlooked or misapprehended and must argue in support of the petition. That is my goal in this petition.

It is my understanding that a petition for rehearing requires that the petition state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition and that the proceeding involves a question of exceptional importance. It is my further understanding that this petition must begin with a statement that either:

(A) The panel decision conflicts with a decision of the United States Supreme Court or of the court to which it is addressed (with citation to the conflicting case or cases) and consideration by the full court, therefore necessary to secure and maintain uniformity or the court's decisions; or

- as I believe applies with this petition -

(B) The proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions or other United States Courts of Appeals that have addressed the issue.

It is also my understanding that this Court's Administrative Order 22-01 permits documents to be transmitted to the Court electronically by pro se litigants via the email box designated by the Clerk of Court on the Court's website and will be accepted as any other electronic filing. Fed. R. App. P. 25(a)(2)(B). It is my further understanding that entry on the docket by the clerk will be considered adequate service on other electronic filers under Fed. R. App. P. 25(c)(2). Sections 3.2(1) and 3.3 of this Court's Guide to Electronic Filing are suspended until December 31, 2023 in accordance a January 1, 2023 posting by this Court with a Notice Regarding Pro Se Filings: 6 Cir. R. 25 has been amended to permit non-prisoner pro se filers to submit filings via email at: CA06_Pro_Se_Efiling@ca6.uscourts.gov

As appellate Judges, I appreciate the fact that you are one step from the Supreme Court You are among the very best and brightest of our best and brightest. As such, you have been given extraordinary power and responsibility over the lives of ordinary citizens. The fate of peoples' lives is in your hands. And so, every word you put on paper must be done with the utmost care that it be of impeccable integrity and unassailable truth.

So, I hope you can understand my deep disappointment as I read false statement after false statement written about me under your signature. The decision determines my life and the lives of my ex-wife and daughters. And the easiest thing for you to do is to disregard or give short-

shrift to my plea, and, as is apparent from my reading of your decision, accepting as "fact" Defendant-Claimants accusations – despite the fact that, as the Court stated, there were no findings of fact by the arbitrators.

What follows is a list of the statements contrary to the facts presented to the arbitrators that are included in your decision. Your decision spent pages discussing the "facts" of the case. It appears to me that these "facts" had a major impact on your interpretation of the salient laws and precedents But the "facts" were serious misstatements. So, I am going to address them in this petition for a rehearing and tell you the truth. What I will tell you is well-documented in the record of the sentencing hearing and arbitration After you learn the truth, I believe you will grant my request for a rehearing.

1. **No Fraud Against Janice Compton** In the very first sentence of your decision, you state that I committed fraud against Ms. Compton despite the fact that the federal court before which I pled guilty did not render such a finding; nor did the arbitrators explain their decision (since they will only do so, under FINRA arbitration rules, when *both* parties request it, not just one). Since the spring of 2015, I have been living his nightmare (being discharged from the brokerage firm loved for over 30 years, being barred by FJNRA and the SEC, paying millions of dollars into a "victims' fund" that only Ms. Compton accessed and serving time in federal prison, during Covid, after pleading guilty to a crime not involving her) and at no time until your decision has anyone found that I committed fraud against Ms. Compton. (see the Arbitration Award, page 4)

2. **Presented to the Arbitrators** I was never accused by any regulator, charged, nor did I plead guilty to committing fraud against her. Merrill Lynch identified 21clients out of 59 who my actions caused to pay more in commissions- to Merrill Lynch and to me - than they would have in management fees. Ms. Compton was not one of them. She paid a commission rate of 1.04% of assets. The standard fee in those years was 2%. The average fee based client paid 1.3%. This data was reviewed extensively in the arbitration hearing and is part of the record. (see the Sentencing Hearing submission, paragraph 14.)

3. **No Management** - Your decision concluded that I managed Ms. Compton's accounts. I did not and the arbitrators were presented with that fact. I was never engaged, paid or authorized to manage her accounts. I was a financial advisor/ stockbroker to her charging commissions per trade. Nothing more. The documents she signed in opening her accounts made clear that I was an advisor, not a manager. This is also part of the record.

4. **Misstatement on Commissions Generated** – Your decision states that I generated excessive commissions. Again. Ms. Compton paid less in commissions than the average fee-based client, and less than the standard commission charged by Merrill Lynch at the time. This was documented by Merrill lynch and by independent analysts, and was

reviewed extensively at the arbitration. And as the arbitrators were shown. Merrill Lynch and the SEC's "victims· fund" rebated most or all of the commissions that Ms. Compton paid to Merrill Lynch.

5. **All Trades Authorized** – Your decision further states that I engaged in unauthorized tradlng, despite the fact that in its pre-sentencing memo, the FBI stated they could find no evidence that I did that with regard to Ms. Compton. And at the arbitration, she provided incomplete phone records to support her allegation One cannot "prove a negative" (that calls were not made) with incomplete phone records. Indeed, in the February 8, 2019 Stipulation of the Parties in the federal criminal proceeding, there is this important footnote on page 3 with regard to Ms. Compton:

> The FBI also interviewed Client D, referenced on pages 6-7 of the government's Sentencing Memorandum, who filed a Victim Impact Statement at Dkt. No. 64-1. In her interview, Client D stated that she believed the Defendant to have engaged in unauthorized trading on"numerous" occasions. The Government has not independently verified the claim in her Victim Impact Statement that trades were unauthorized.

6. **No Underperformance** - Your decision states that my fraudulent management caused the accounts to underperform the markets by $7,000,000. This is also contrary to the facts presented below.

- The arbitrators were shown that Ms. Compton directed me to maintain a moderately conservative to conservative profile for her stock portfolio.
- She also instructed me to put no money in stocks in 2009. And then 10% of her portfolio into tocks in 2010,and from 2011 forward, to invest about 35% of her assets into stocks.
- At the arbitration, she testified that I made written proposal after proposal after proposal to encourage her to invest more into the stock market. She testified under oath that she declined to accept my recommendations.
- At the arbitration, she had an individual who had never been retained or who ever testified as an expert testify that a "properly managed account" would have invested 50% of the account's assets in stocks from 2009 through 2011, and then increase the allocation to stocks to 75% of assets. He also chose an aggressive sector distribution for the stocks, even though Ms. Compton was a moderately conservative investor. (see arbitration proceeding record, claimant exhibit 6)
- As an advisor, I could not and would not have invested Ms. Compton money in this manner The newly-minted "expert witness" knew that, the arbitrator knew that, Ms. Compton knew that. And so, the arbitrators awarded her nothing on this speculative "expert" proposition.

- In other words, Ms. Compton refused to invest in stocks, and when the market thereafter rose, she wanted my family to pay her what she would have made if she *had* followed my recommendations to begin with. I had no authority. as her advisor, to put more of her money into stocks. The arbitration panel was well aware of this.
- Their judgement against me for interest on some speculative calculation that they found unfounded shows vividly how far they exceeded their authority.

7 **Not The Number of Trades You State** - Your decision states that I placed 1,100 trades for Ms. Compton, taking her assertion at face value, despite dear evidence to the contrary.

- Here is an example of what happened in the normal course of events for all clients: placed an order for a client to buy 1,000 shares of a given stock.
- That is one trade. It may take 10 x 100 share executions to complete the one trade of 1,000 shares Ihat was placed.
- You were given the total number of executions that were required to complete the trades. The record is clear on that.
- What is also implied here is that I was doing all of the trading, which is not at all true.
- As the arbitrators were shown, Ms. Compton did stock trading on her own, instructed me as to enter many of the bond purchases 1n her portfolio and directed me to aggressively seek tax saving opportunities to offset the S49 million in realized capital gains that she received In her accounts from 2009-2014. The arbitrators were shown that Ms. Compton requested that hundreds of trades be done.

8, **Commissions Paid**- Your decision states that Ms. Compton paid S1.4million in commissions. This is accurate.

- What needs to be understood, however, is that this amounted to 1.04% of her asset base, which was not excessive, and that Merrill Lynch received 55% of all commissions paid.
- Also, over $500,000 of this was the result of Ms. Comptoin's specific trading instructions.
- Further, as noted above, the SEC settlement fund was funded by me alone.
- The $948,000 Ms. Compton and her attorneys were paid from the SEC fund was to bring her commission rate down to 0.5%. (see the arbitration Award, page 4)
- At the time, the SEC fund had $2 million more in it. The SEC determined that Ms. Compton did not deserve any additional reimbursement, so she filed the arbitration. The arbitration panel was again fully aware of this. The remaining $2 million in the settlement fund went to the U.S. Treasury and was not returned

to me despite the fact that Ms. Compton was the only former customer to seek payment from the fund.

9. **Client D Not Part of My Sentencing** - Your decision states that Ms. Compton, identified by the Department of Justice as Client D, was included at sentencing as a victim of my fraud. This is also contrary to the fact that she was not so included. (see the sentencing memorandum, paragraph 14, and the above-quoted footnote to the parties' stipulation of February 8, 2019)

    - At my sentencing hearing, the Government's expert accountant testified that he had used only selected assets in selected accounts in client portfolios.
    - He also testified that he deliberately chose not to adhere to the contractual fee schedule that every Merrill lynch client must sign, when he did his calculations.
    - For Ms. Compton's account, the Government's expert only analyzed three out of her seven accounts, concealing the existence of the other accounts. and concealed money market balances of over $20 million on which Compton would have been subject to a fee.
    - Had the Government's accountant included all of Ms. Compton's asset at Merrill Lynch, his calculation would have shown conclusively that Ms. Compton was not over-billed in commissions.
    - The Government's accountant in his analysis of the client accounts and assets that he cherry-picked, calculated excess commission billing that would have required a sentence of 96 months in prison. The judge. understanding the unreliability of the Government's calculations, gave me 40 months.

While I believe that covers most of the unfounded assertions accepted as facts by the Court, permit me to address a few issues about the arbitration Award, because, if I had had any idea that three arbitrators could go so far afield of the law and disappear into the woodwork with no accountability, I would never have subjected myself and my family to the risk that our lives could be destroyed this way. I would have just filed for bankruptcy, as I was bereft orf funds.

There is no possible way that I could know of or analyze all of the cases to which you refer in your decision. Nor do I understand what controlling legal authority is. No citizen in our country could, except lawyers. As citizens, the controlling legal authority is the law asit is written. We can understand that and do our best to abide by It. So, you can analyze and make your theoretical judgement as to what some other judge's opinion means. But you must recognize, most respectfully, that there are lives at stake, real lives and real people.

I will never understand our legal system. But I do know right from wrong, and although I am certainly not perfect, what has happened here is wrong. It appears to me that your

conclusion is that no law governs an arbitrator and that an arbitrator can do whatever she or he wants, not explain it, and we have to live with it. All of us need to be accountable for our decisions. I certainly know that and thought about it every day of my incarceration.

1. **The Non-Arbitrability of the Claims Was Crystel Clear**

    - First and foremost is the unique FINRA rule of arbitrability - FINRA Rule 12206 -which is akin to a statute of repose and which, by its very language, is not impacted by when the Investor/Claimant allegedly learned of the misconduct. In other words, "discovery" is not a benchmark, yet the Court's decision likens it to a statute of limitation. Your decision state that over 6 years had elapsed from the date of my alleged fraud. But, as was shown to the arbitrators, the rule itself states: "The rule does not extend applicable statutes of limitations..."
    - Your decision states that the 6 year rule of arbitration eligibility can be ignored if there is any ongoing fraud. But as the arbitrators heard and saw in Ms. Compton's own complaints to Merrill lynch, there was no ongoing fraud The transactions complained of occurred more than 6 years before she filed her FINRA arbitration Statement of Claim.
    - No one alleged any malfeasance on my part within the 6 year time eligibility bar. Indeed, Ms. Compton's expert witness testified that all assets in her portfolio were suitable for her, appropriate for her, and had performed as expected
    - After your decision gives the one reason for doing away with the 6 year eligibility bar, we can simply look at the testimony from the arbitration hearing to know that that reason does not exist. So, the arbitrators clearly overstepped their boundaries.
    - Under the Court's logic, again respectfully: a trade I did in 1982 could be subject to the whim of an arbitrator in 2020 even ii there was no issue with the investment when made or within 6 years thereafter. Every claim made by Compton must be time barred under Rule 12206. (see document 1.7,motion to dismiss, filed with lower court on June 6, 2022)

2. **No Compensatory Damages/ No loss**

    - The arbitrators conjured up $770,000 on compensatory damages. They knew perfectly well that Ms. Compton had been paid $948,000 from my SEC settlement fund and over $5 million Merrill lynch. There was no other compensatory damage she could have been entitled to had she been defrauded.
    - The arbitrators addressed the supposed under-performance and legal fees. And, of course, we know that when they quadrupled the amount, they did so is in violation of the Indiana code. By the way, your decision's suggestion that the panel used some other factor for their quadrupling calculation was pure speculation.

- Finally on this point, you say that I cannot challenge the quadruple charge because I put It on a footnote to a reply instead of the primary brief. But it was still an argument put before the Court. (see exhibit 13.7)

3. Interest on Unawarded Damages

- The arbitrators ruled that I must pay Ms. Compton $1.8 million for interest on so-called well-managed damages. The arbitration panel knew perfectly well that I had not been hired to manage a penny of Ms. Compton's millions of dollars.
- I was not paid to manage her money; nor was I authorized to manage her money. I cannot be held liable for not doing what I was not hired to do.

4. More Attorney's Fees

- The Court's decision states that I must pay Ms. Compton $2.6 million in attorney's fees because Ms. Compton was in some way related to the fraud. Again, there was no finding by anyone of fraud against Ms. Compton. The FBI found no evidence of unauthorized trading and she offered no proof to back up her claims.
- The record is also clear that Ms. Compton paid a commission rate below the average fee based client and barely half of the Merrill lynch standard of the time.The arbitrators were shown that Ms. Compton was one of the 571 clients that Merrill Lynch determined had *not* been charged more in commissions that they would have paid in fees.

5. A Reasoned Award is Not Required to Determine Manifest Disregard of the Law

- Throughout the Court decision, you continually fall back on the fact that the arbitrators did not give any reasoned explanation for their decision.
- FINRA Arbitration Rule 12904{g) on Explained Awards states clearly that, "This paragraph applies only when all parties jointly request an explained decision [and that] an explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision Inclusion of legal authorities and damage calculations Isnot required."
- When you go to arbitration, you assume the arbitrators will follow the law and not be presented with the law, see that It applies squarely to the allegations and defenses and then choose to disregard It.

Thank you for reading this petition. As you can see, I have considerable angst about what has happened to my family and to me. I am now homeless and live entirely on my Social Security. You can therefore understand the distress that I am feeling about this,

The fact that the Sixth Circuit Court of Appeals would write a Judgement that states things about me that are indisputably false and contrary to the record is, I sincerely believe, reason enough to revisit the record and vacate this arbitration Award.

I will again assert in any way you wish that every word I have written in this petition is the truth. Everything I wrote can be corroborated in the record of the FINRA arbitration and/or the federal court sentencing hearing. Now that you know the truth, it is time for you, as the powerful judges that you are. to stop this horrible miscarriage of justice. There must be a time in which you decide that allowing lives to be destroyed for no good reason is unacceptable. I ask you in the most heartfelt way possible to do that now. My family deserves to be allowed to live in peace, without a person with $100,000,000 and powerful lawyers harassing them.

Respectively Submitted,

Dated December 31. 2023

Thomas Joseph Buck

Tomas Joseph Buck
Pro Se Party
90 Beachside Drive 202,
Vero Beach, Fl 32963

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
AT MEMPHIS

THOMAS JOSEPH BUCK,	)	
	)	
Plaintiff–Respondent,	)	
	)	
v.	)	**Case No.** _____
	)	
JANICE J. COMPTON,	)	
	)	
Defendant–Claimant,	)	

MOTION TO VACATE ARBITRATION AWARD

Pursuant to 9 U.S.C. § 10, Thomas Joseph Buck, Plaintiff–Respondent, moves the Court to vacate the May 6, 2022, arbitration award (the "Award") issued by the Financial Industry Regulatory Authority ("FINRA") in favor of Janice J. Compton, Defendant–Claimant.

As explained more fully in the accompanying memorandum in support, in awarding Ms. Compton $7,526,826, the "arbitrators exceeded their powers," 9 U.S.C. § 10(a)(4), and acted in "manifest disregard of the law," *In re Romanzi*, 31 F. 4th 367, 375 (6th Cir. 2022) (quotation omitted). The Panel did so in five ways.[1]

First, Ms. Compton's claims preceding July 31, 2014, were not eligible for arbitration under FINRA Rule 12206(a), which establishes a six-year, absolute time bar. The Panel had no authority to adjudicate Ms. Compton's claims arising from events which she admitted transpired prior to July 31, 2014, due to this arbitration rule that is tantamount to a statute of repose, as Mr. Buck advised the Panel. Thus, the Panel exceeded its authority and rendered the Award in manifest disregard of the law.

[1] The relevant documents from the arbitration proceeding are attached to Mr. Buck's contemporaneously filed Appendix, which is abbreviated as "App'x."

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Second, Ms. Compton's claim under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, fails as a matter of law because her claims do not fall within RICO's "conviction exception" for securities fraud, as Mr. Buck advised the Panel. The Panel thus exceeded its authority and rendered the Award in manifest disregard of the law.

Third, Ms. Compton's claim under the Indiana Corrupt Business Influence Act ("ICBIA"), Ind. Code § 34-2-2-6 *et seq.*, is time barred by the applicable two-year statute of limitations, as Mr. Buck advised the Panel. Thus, the Panel exceeded its authority and rendered the Award in manifest disregard of the law.

Fourth, the Panel awarded interest for well-managed damages, despite expressly deciding not to award any well-managed damages. (App'x 6, Award, p. 3.) That makes no sense. The law does not permit an award of interest on a non-existent monetary judgment as Mr. Buck advised the Panel. The Panel thus exceeded its authority and rendered the Award in manifest disregard of the law.

Fifth, the Panel failed to offset from the awarded damages the approximately $6.5 million that Ms. Compton *already received* from settlements with Merrill Lynch Pierce Fenner & Smith Inc. ("Merrill Lynch") and the Securities and Exchange Commission Victims Compensation Fund ("SEC Fund") prior to the arbitration hearings and as set forth in the damages calculation Claimant presented to the arbitrators. Ms. Compton and Mr. Buck advised the Panel of the amount of the offset. As conceded by Ms. Compton during the arbitration, well-established law required the Panel to offset those settlement amounts from the Award. Yet the Panel did not do so, thereby exceeding its authority and rendering the Award in manifest disregard of the law.

Mr. Buck therefore respectfully requests that the Court vacate the Award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served upon the following via the Court's ECF system, U.S. mail, and email:

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this 6th day of June 2022.

s/ Salvador M. Hernandez

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
AT MEMPHIS

THOMAS JOSEPH BUCK,	)	
	)	
Plaintiff–Respondent,	)	
	)	
v.	)	**Case No.** _____
	)	
JANICE J. COMPTON,	)	
	)	
Defendant–Claimant,	)	

MEMORANDUM IN SUPPORT OF MOTION TO VACATE ARBITRATION AWARD

Ms. Compton filed the underlying arbitration against Mr. Buck to recover damages for alleged securities fraud. The Panel awarded her an astronomical sum, $7,526,826, despite her having received approximately $6.5 million in settlement payments prior to the hearing.

For the purposes of this motion, Mr. Buck does not contest whether he engaged in the misconduct alleged by Ms. Compton. Given the narrow standard of review imposed by the Federal Arbitration Act ("FAA"), Mr. Buck understands this is not the time or place to re-arbitrate the merits of Ms. Compton's claims. And he does not do so here.

Nonetheless, the FAA does not permit arbitrators to do what they want with impunity, with no guardrails or standards (*i.e.*, to blatantly exceed their authority and to manifestly disregard well-established and applicable law). No arbitrator is permitted to disregard controlling law of which the parties make them aware. Here, the Panel awarded $7,526,826 by disregarding established law presented to it and exceeding its authority in the process.

The Panel disregarded the absolute six-year time bar of arbitrability (akin to a statute of repose) imposed by FINRA Rule 12206(a). The Panel awarded federal RICO damages despite Mr. Buck having never been criminally convicted of committing securities fraud against Ms.

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Compton. The Panel also acted contrary to the two-year statute of limitations for actions brought under Indiana's state-law version of RICO.

The Panel awarded interest on damages that it expressly stated, in the Award, that it did not award to Ms. Compton. The Panel also did not offset the $6.5 million Ms. Compton already received from prior settlements related to the conduct at the center of her arbitration, which—as the result of the Award—has the effect of giving her a multimillion dollar, double-recovery windfall.

As will be explained herein, the arbitrators repeatedly exceeded their authority and manifestly disregarded the law. Mr. Buck respectfully requests that the Court vacate the Award and order that a new FINRA panel be appointed to hear the case.

BACKGROUND

Thomas Joseph Buck was a broker at Merrill Lynch Pierce Fenner & Smith Inc. ("Merrill Lynch") from 1981 to early 2015. (App'x 2, Statement of Claim ¶ 6.) Janice J. Compton and her husband opened accounts with Merrill Lynch and Mr. Buck was assigned to those accounts beginning in 1999. (*Id.* ¶ 15.))

Ms. Compton and her husband divorced in 2009. (*Id.* ¶ 17.) Following a division of assets, Ms. Compton opened Merrill Lynch accounts worth approximately $7 million. (*Id.*) Mr. Buck was assigned to Ms. Compton's accounts. (*Id.*)

In 2015, Merrill Lynch investigated Mr. Buck for possible misconduct. (*Id.* ¶ 7.) Mr. Buck was primarily alleged to have kept certain clients in commission-based accounts (*i.e.*, Merrill Lynch and Mr. Buck received a commission for each trade), when those clients would have been charged less in fee-based accounts (*i.e.*, Merrill Lynch and Mr. Buck received a flat percentage, typically a small percentage of the assets, for managing the account). (*Id.*) Merrill Lynch

terminated Mr. Buck on March 4, 2015, and he became associated with another brokerage firm for a brief period. (*Id.* ¶¶ 7, 39.)

The United States Securities and Exchange Commission ("SEC") initiated a civil-enforcement action against Mr. Buck in October 2017. (*Id.* ¶ 45.) In December 2017, Mr. Buck settled that action for approximately $5.1 million. (*Id.*) The SEC used approximately half of that money to establish a Victims Compensation Fund (the "Fund").[1] (*Id.*) Through a settlement with the Fund, Ms. Compton, the only former customer of Mr. Buck's to apply for payment from the SEC fund, received $946,868. (*Id.*)

In September 2017, the Department of Justice charged Mr. Buck with securities fraud under 18 U.S.C. § 1348 via an Information. (*Id.* ¶ 44; App'x 1, Information.) Ms. Compton was not a named victim of the Information. (*See generally* App'x 1, Information; App'x 5, Claimant's Prehearing Brief p. 31-32 (admitting Ms. Compton was not Client A, B, C, as referenced in the Information, and instead was identified as "Client D" during sentencing proceedings).) Mr. Buck pled guilty on January 18, 2018 with regard to Clients A, B, and C only. (App'x 2, Statement of Claim ¶ 44.)

On July 31, 2020, Ms. Compton filed a Statement of Claim with the Financial Industry Regulatory Authority ("FINRA") against Merrill Lynch and Mr. Buck. (*See generally id.*) Ms. Compton alleged that, from 2009 through 2014, Merrill Lynch and Mr. Buck made specific unauthorized, unsuitable, and excessive trades that constituted securities fraud. (*Id.* ¶¶ 22-29 (Ms.

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[1] "When the SEC brings a successful enforcement action, the court or the SEC may order a wrongdoer to disgorge (give up) the ill-gotten gains resulting from the illegal conduct. The disgorged funds may be distributed to investors who were harmed by securities law violations." *U.S. Securities and Exchange Commission*, available at https://www.sec.gov/oiea/investor-alerts-bulletins/ib_recovermoney.html (last accessed May 27, 2022.)

Compton listing allegedly specific fraudulent trades); App'x 4, Mot. to Dismiss, Ex. 3 (Ms. Compton identifying allegedly fraudulent trades).

In her FINRA arbitration, Ms. Compton alleged five causes of action against Merrill Lynch and Mr. Buck: violation of the Indiana Corrupt Business Influence Act ("ICBIA") through a pattern of racketeering, Ind. Code § 34-2-2-6 *et seq.*;[2] violation of the federal Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; civil recovery under Indiana's Crime Victim Statute; breach of fiduciary duty; and fraud. (App'x 2, Statement of Claim ¶¶ 46-53, 61-86.) Ms. Compton also alleged a cause of action against Merrill Lynch for negligent supervision, asserting, in essence, that it knew, or should have known, of Mr. Buck's purported misconduct, did not stop it, and benefitted from it. (*Id.* ¶¶ 46-91.)

Before the arbitration hearing began, Mr. Buck moved to dismiss, as untimely, Ms. Compton's claims that predated the six-year arbitration eligibility bar established by FINRA Rule 12206(a), (*i.e.*, claims based on trades occurring prior to July 31, 2014). (App'x 4, Mot. to Dismiss, Ex. 3.) The Panel denied the motion just a day after a prehearing conference on the motion. (App'x 6, Award, p. 3.)

Ms. Compton and Merrill Lynch settled prior to the arbitration hearing. (App'x 5, Claimant's Prehearing Brief, p. 40.) Merrill Lynch paid Ms. Compton $5,500,000 and excluded Mr. Buck from the mediated settlement. (*Id.*)

The Panel conducted an in-person arbitration hearing in Memphis and entered the Award on May 6, 2022. (App'x 6, Award.) The Panel awarded Ms. Compton $7,526,826. (*Id.*, p. 3.) That amount consisted of four components, as follows:

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[2] The parties agreed that Indiana law governed their dispute (*See* App'x 2, Statement of Claim ¶¶ 46-60, 67-71 (bringing claims under Indiana law); App'x 5, Claimant's Prehearing Brief, p. 23 n.18 (stating Ms. Compton "will be traveling under Indiana law at the hearing").)

- $770,269 in "compensatory damages."
- $1,860,144 of "interest" on "well-managed damages," but without an actual monetary judgment for well-managed damages:

> Respondent Thomas Joseph Buck is liable for and shall pay to Claimant interest on the well managed damages amount of $5,812,948.80, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and including March 25, 2022. The total interest awarded is $1,860,144.00. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.

- $2,310,806 in "treble damages" under the ICBIA and federal RICO; and
- $2,585,2320 in "attorneys' fees" under the ICBIA and federal RICO.

(*Id.*)

Mr. Buck timely filed and served this motion to vacate the Award. 9 U.S.C. § 12 (requiring filing and service of motion to vacate "within three months after the award is filed or delivered").

JURISDICTION AND VENUE

The Court has diversity jurisdiction over this proceeding pursuant to 28 U.S.C. § 1332(a). The amount in controversy, exclusive of interest and costs, exceeds $75,000. Mr. Buck is a citizen of Indiana, and Ms. Compton is a citizen of Tennessee, so the parties are completely diverse. Pursuant to 9 U.S.C. § 9, venue lies in this district because the award was made here.

LEGAL STANDARD

The Federal Arbitration Act ("FAA") controls the review of the Award because the arbitration provision between the parties involves interstate commerce. 9 U.S.C. §§ 1-3. Under the FAA, a court may vacate an arbitration award when, among other reasons, "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." *Id.* § 10(a)(4).

An arbitrator exceeds his or her powers if "the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (cleaned up). "[A]n award must be vacated if it is based upon 'general considerations of fairness and equity rather than the exact terms of the agreement.' " *Farley v. Eaton Corp.*, 701 Fed. App'x 481, 486 (6th Cir. 2017) (quoting *Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local No. 7*, 114 F.3d 596, 599 (6th Cir. 1997)).

Further, § 10(a)(4) "allows an arbitration award to be vacated if it was made in manifest disregard of the law." *In re Romanzi*, 31 F.4th 367, 375 (6th Cir. 2022) (quotation omitted). "An arbitration panel acts with manifest disregard if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000).

ARGUMENT

I. The Panel exceeded its authority and manifestly disregarded the law by hearing claims that predate the six-year eligibility bar established by Rule 12206(a).

The Panel exceeded its authority by denying Mr. Buck's motion to dismiss and hearing claims based on transactions that, by Ms. Compton's own admission, occurred prior to July 31, 2014 (six years before Ms. Compton filed her statement of claim on July 31, 2020) (App'x 4, Mot. to Dismiss, Ex. 3). FINRA Code of Arbitration Rule 12206(a) establishes a six-year limitation on eligibility: "No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim."

The Sixth Circuit has held that Rule 12206(a)[3] "is a substantive temporal limitation on the parties' agreement to contract and as such is not subject to tolling." *Ohio Co. v. Nemecek*, 98 F.3d 234, 237 (6th Cir. 1996). The six-year limitation is jurisdictional. *Id.* at 238. Equitable doctrines such as fraudulent concealment and the discovery rule therefore do not apply. *Id.* at 235 & 238 (rejecting argument that "the running of the six-year eligibility period was tolled until discovery of the misconduct"); *see also Dean Witter Reynolds, Inc. v. McCoy*, 853 F. Supp. 1023, 1030–31 (E.D. Tenn. 1994), *aff'd*, 70 F.3d 1271 (6th Cir. 1995) ("The date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered a financial loss.").[4] Consistent with the Sixth Circuit's holding in *Nemecek*, in 2017 a FINRA arbitration panel held the rule

> serves as an absolute bar to claims submitted for arbitration more than six years after the event which gave rise to the dispute. As an absolute bar, [Rule 12206(a)] does not depend on when Claimant supposedly became aware of his claims, as the date of the occurrence or event does not under any circumstances depend on the date when the aggrieved investor first discovers that he or she has suffered a financial loss.

(App'x 3, Ans. to Statement of Claim, Ex. 1, *Cordero v. Merrill Lynch, et al.*, FINRA Case No. 17-00449, at p. 3 (Sept. 2017).)

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[3] The Sixth Circuit interpreted New York Stock Exchange Rule 603, which is a predecessor rule to FINRA's Rule 12206(a).

[4] In *Nemecek*, the Sixth Circuit decided in the first instance whether the plaintiff's claims were time barred under the predecessor to Rule 12206(a). *Id.* Since *Nemecek*, the Sixth Circuit has held that the authority to make that decision regarding eligibility rests, in the first instance, with the arbitrator. *See Smith v. Dean Witter Reynolds, Inc.*, No. 02-6158, 2004 WL 1859623, at *1 (6th Cir. Aug. 18, 2004) (holding that gateway question of whether predecessor to FINRA Rule 12206 time bars claims lies with the arbitrator). However, *Nemecek's* holding that Rule 12206(a) is not subject to equitable tolling has never been overruled and remains controlling law.

Prior to rendering its decision on Mr. Buck's motion to dismiss, the Panel was presented with applicable law, which was repeated during a prehearing conference with the arbitrators. (*See generally* App'x 4, Mot. to Dismiss.) By allowing Ms. Compton to pursue claims predating July 31, 2014, the Panel ignored controlling law. The Award should be vacated.

II. The Panel exceeded its authority and manifestly disregarded the law because Ms. Compton's claims do not fall within RICO's "conviction exception" for securities fraud.

The Panel exceeded its authority and manifestly disregard the law because Ms. Compton's RICO claims do not fall within the "conviction exception" for securities fraud.

To prove RICO liability, a plaintiff must prove, *inter alia*, the existence of sufficient "predicate acts." *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133 (6th Cir. 1994). Through the Private Securities Litigation Reform Act of 1995 ("Reform Act"), Congress eliminated securities fraud as a RICO predicate act except where the defendant has been criminally convicted for securities fraud based on the same conduct that formed the basis for the conviction. 109 Stat. 737, 758 § 107 (Dec. 22, 1995); *see also Rowe v. Marietta Corp.*, 955 F. Supp. 836, 844 (W.D. Tenn. 1997) ("Clearly, Congress intended § 107 to remove as a predicate to RICO conduct that would otherwise be actionable as fraud in the purchase or sale of securities.")). RICO thus now provides that

> no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c).

Mr. Buck has never been criminally convicted "in connection with the [alleged] fraud" against Ms. Compton. Ms. Compton was not a named victim of the Information. (*See generally*

App'x 1, Information.) Mr. Buck pled guilty only in connection with his alleged criminal conduct pertaining to three persons *other* than Ms. Compton.

While the securities fraud to which Mr. Buck pled guilty against other persons may have been similar in nature to the alleged conduct involving Ms. Compton, that does not mean Ms. Compton's claims fall within the conviction exception. Pursuant to the plain language of § 1964(c), the conviction exception applies only to a person criminally convicted "in connection with *the* fraud"—that is, the fraudulent conduct for which the defendant was actually convicted.

As mandated by the plain language of the statute, courts apply the statute in this manner. *See Krear v. Malek*, 961 F. Supp. 1065, 1077 (E.D. Mich. 1997) ("Unless the plaintiffs are named victims of the scheme to defraud in the information, this court cannot find that they have been criminally defrauded and are thereby entitled to invoke the 'conviction exception.' To hold otherwise would allow the anomalous situation of permitting a plaintiff who was not criminally defrauded and who would not otherwise be entitled to bring a civil RICO action to, in fact, bring such an action simply because he claims to be part of an alleged [securities fraud] scheme."); *In re Enron Corp. Sec. Deriv. & ERISA Litig.*, 284 F. Supp. 2d 511, 623 (S.D. Tex. 2003) (agreeing with the court in *Krear* that only plaintiffs who have been found to be criminally defrauded may make use of the exception); *Rogers v. Nacchio*, No. 05 Civ. 60667, 2006 WL 7997562, at *4 (S.D. Fla. June 6, 2006) (agreeing with the analysis in *Krear* that the exception is available only "to those plaintiffs against whom a defendant has specifically been convicted of criminal fraud"), *aff'd in part, appeal dismissed in part*, 241 Fed. App'x 602 (11th Cir.2007); *Kaplan v. S.A.C. Cap. Advisors, L.P.*, 104 F. Supp. 3d 384, 391 (S.D.N.Y. 2015) (holding that discussion of a victim during a sentencing proceeding is irrelevant to analysis under conviction exception because "a sentencing court may consider any information concerning the background, character and conduct

of the defendant, including uncharged or acquitted conduct" (citing 18 U.S.C. § 3661; U.S.S.G. § 1B.4 cmt; *United States v. Watts*, 519 U.S. 148, 153-55 (1997)).

Simply put, Mr. Buck never pled that his actions with respect to *Ms. Compton* were a crime. His arbitration answer, submitted to the Panel and made part of the record, explained how "the criminal exception" was inapplicable to Ms. Compton's claim. (App'x 3, Ans. to Statement of Claim, pp. 11-12.) The Panel's award of treble damages and attorneys' fees under RICO therefore should be vacated.

III. The Panel exceeded its authority and manifestly disregarding the law because the applicable statute of limitations bars Ms. Compton's ICBIA claim.

The Panel exceeded its authority and manifestly disregarded the law the applicable two-year statute of limitations bars Ms. Compton's ICBIA claims.

Indiana Code Annotated § 34-11-2-4(a)(3) provides that "[a]n action for . . . injury to personal property must be commenced within two (2) years after the cause of action arose." A claim brought under the ICBIA is an action for injury to personal property. *Branham Corp. v. Newland Res., LLC*, 17 N.E.3d 979, 987, 991-92 (Ind. Ct. App. 2014) (applying two-year statute of limitations to ICBIA claim and affirming grant of summary judgment because claims "could have been timely pursued" but "were not").[5]

"Under Indiana's discovery rule, a cause of action accrues, and the limitation period begins to run, when a claimant knows or in the exercise of ordinary diligence should have known that an injury had been sustained as a result of the tortious act of another." *Branham*, 17 N.E.3d at 987

[5] Before the Panel, Ms. Compton argued that the *Branham* court's application of the two-year statute of limitation is nonbinding dicta because "[t]he parties agree[d] that the two-year statute of limitation" was applicable, *Branham*, 17 N.E.3d at 987. Ms. Compton is incorrect, however, because the *Branham* court held that the plaintiff's claims were not "timely pursued" and "the trial court properly granted summary judgment to the defendants on statute of limitations grounds." *Id.* at 991.

(Ind. Ct. App. 2014). Ms. Compton asserted she discovered Mr. Buck's alleged misconduct shortly after March 2015 when Merrill Lynch terminated his employment. (App'x 2, Statement of Claim ¶ 96 ("[Ms. Compton] did not and could not reasonably have discovered her claims until sometime after Buck's termination."); *id.* ¶ 97 ("Here, the earliest event/occurrence giving rise to all but one of Janice's own claims was her discovery of Buck's fraud following his termination in March of 2015.").)

Under Indiana law, Ms. Compton's claims therefore arose, at the latest, in 2015. Indiana law required Ms. Compton to bring her ICBIA claim within two years (i.e., no later than 2017). She filed her arbitration statement of claim three years too late—in 2020. Mr. Buck's arbitration answer, submitted to the arbitration panel and made part of the record, clearly set forth the applicable statute of limitations. (App'x 3, Ans. to Statement of Claim, pp. 10-11.) The Panel's award of treble damages and attorneys' fees under the ICBIA therefore should be vacated.

IV. The Panel exceeded its authority and manifestly disregarded the law by awarding interest on a nonexistent monetary judgment.

The Panel awarded $1,860,144.00 of "interest on the well-managed damages amount of $5,812,948.80." (App'x 6, Award, p. 3.) The Panel, however, expressly stated it "is not awarding the well-managed damages amount of $5,812,948.80." (*Id.*) In other words, the Panel awarded prejudgment interest on a nonexistent monetary judgment.

By definition, interest cannot be assessed in the absence of a corresponding monetary judgment. Ind. Code Ann. § 34-51-4-7 ("The court may award prejudgment interest as part of a judgment."); *Blinzinger v. Americana Healthcare Corp.*, 505 N.E.2d 449 (Ind. Ct. App. 1987) (reversing interest reward because there was no "money judgment" by the trial court on which to award interest); *Lincoln Diagnostics, Inc. v. Panatrex, Inc.*, 2009 WL 3010840, at *12 (C.D. Ill. Sept. 16, 2009) ("Because no damages have been awarded, there is also no basis for awarding

prejudgment interest."); *Olivares v. Brentwood Indus.*, 2015 WL 13658070, at *2 (W.D. Ark. Apr. 13, 2015) ("Olivares is not entitled to any other compensatory damages, so there is no damages award upon which to base an award of prejudgment interest."); *Davis v. Standefor*, No. CV088056PSGJTLX, 2009 WL 10672743, at *2 (C.D. Cal. July 30, 2009) ("As no damages were awarded on the state law causes of action, there is no prejudgment interest to be had on these claims.").

What the Panel did is akin to a court awarding interest despite the jury having returned a verdict of $0. That makes no sense on its face. There can be "no reasonable debate" on this point. *See Dawahare*, 210 F.3d at 669. It is precisely the kind of "outrageous circumstance" that warrants vacating the Award. *In re Romanzi*, 31 F.4th at 375.

V. The Panel exceeded its authority and manifestly disregarded the law by not offsetting the approximately $6.5 million in settlement payments Ms. Compton already received.

The Panel failed to offset from the awarded damages the $6,446,868 that Ms. Compton already received from settlements with Merrill Lynch and the SEC Fund. (App'x 2, Statement of Claim ¶ 45; App'x 5, Claimant's Prehearing Brief, p. 40.) During the arbitration, Ms. Compton expressly conceded that the $6,446,868 in prior settlement payments should be offset from any award: "Ms. Compton recognizes that these settlements should be deducted out of her claim for compensatory damages." (App'x 5, Claimant's Prehearing Brief, pp. 3, 40; *see also* App'x 2, Statement of Claim, ¶ 45 n.19 (Ms. Compton stating her damages sought are subject to "a credit for the amount she has already recovered from the SEC Victim's Fund").)

Ms. Compton's concession was consistent with Indiana law, which mandates offset to account for prior settlement payments. *See Shelton v. Kroger Ltd. P'ship I*, 58 N.E.3d 229, 232 (Ind. Ct. App. 2016) ("Indiana courts have traditionally followed the one satisfaction principle.

By this we have meant that courts should take account of settlement agreements and credit the funds received by the plaintiff through such agreements, *pro tanto*, toward the judgment against a co-defendant."); *Palmer v. Comprehensive Neurologic Servs., P.C.*, 864 N.E.2d 1093, 1100 (Ind. Ct. App. 2007) ("A trial court has the power and duty to reduce jury verdicts by amounts received in settlement to ensure that a plaintiff not receive more than a full recovery."). In the absence of an offset, Ms. Compton would receive more than a full recovery of her damages, which Indiana law does not permit.

Here, the Panel did not follow the clearly defined legal principle requiring that the prior settlements be offset from Ms. Compton's damages. The Panel failed to offset the SEC Fund and Merrill Lynch settlement payments despite Ms. Compton's concession that these settlements should be deducted out of her claim for compensatory damages. (App'x 5, Claimant's Prehearing Brief, p. 3, 40.)

VI. The proceedings should be remanded to a new arbitration panel.

If the Court vacates any part of the Award, which was a final award resolving all issues presented for adjudication, it should remand the proceedings to a new arbitration panel.

The Panel that issued the final Award no longer exists under the doctrine of *functus officio* and is not allowed under law to have any further role in relation to the dispute. *See In re Romanzi*, 31 F.4th at 376 ("The doctrine of *functus officio* prohibits an arbitrator from reopening a case after 'having performed his or her office'—hence the name." (quoting BLACK'S LAW DICTIONARY 815 (11th ed. 2019)); *Am. Intl. Specialty Lines Ins. Co. v. Allied Cap. Corp.*, 35 N.Y.3d 64, 71 (2020) ("Functus officio, Latin for "having performed one's office" (BLACK'S LAW DICTIONARY 11th ed 2019, *functus officio*), has operated historically as a restriction on

the authority of arbitrators, precluding them from taking additional actions after issuing a final award." (cleaned up)).

CONCLUSION

For the foregoing reasons, Mr. Buck respectfully requests that the Court vacate the Award and remand this case to a new arbitration panel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been served upon the following via the Court's ECF system, U.S. mail, and email:

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