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9 *Attorneys for Petitioner*
William J. Paynter

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF MARICOPA
12

13 WILLIAM J. PAYNTER,

14 Petitioner,

15 v.

16 UBS FINANCIAL SERVICES INC., a
Delaware corporation and UBS CREDIT
17 CORP.,

18 Respondents.

Case No: **CV2021-053810**

**PETITION TO VACATE
ARBITRATION AWARD**

**(Commercial Court Assignment
Requested)**

19
20 Petitioner William J. Paynter (“Paynter”), for his petition to vacate arbitration
21 award, alleges as follows:

22 **PRELIMINARY STATEMENT**

23 This petition arises from a securities arbitration proceeding before the Financial
24 Industry Regulatory Authority (“FINRA”) that involved multiple claims and counter-
25 claims between the parties, William J. Paynter (“Paynter”) and UBS Financial Services,
26 Inc. and UBS Credit Corp. (collectively “UBS”). In the underlying arbitration proceeding,
27 UBS filed the initial claim against Paynter seeking to enforce payment under certain
28 promissory notes (the “Notes”) executed pursuant to loans provided to Paynter. In turn,

1 Paynter filed counterclaims for constructive discharge, breach of contract, fraud, breach of
2 the implied covenant of good faith and fair dealing, and negligent misrepresentation,
3 among other claims. The allegations in his counterclaims also constituted the bases of his
4 affirmative defenses.

5 On September 27, 2021, after conclusion of the evidentiary hearing, the arbitration
6 panel (the “Panel”) issued its award (the “Award”) which is the subject of the present
7 Petition. In particular, the Panel made the following determinations that are at issue in this
8 Petition:

- 9 a. Paynter “is liable for and shall pay to Claimants the sum of \$1,897,662.34 in
10 damages for repayment of the Notes.”
- 11 b. Paynter “is liable for and shall pay to Claimants 75% of the accrued interest
12 on the Notes as set forth in the stipulation submitted on April 14, 2021. . .”¹
- 13 c. UBS is “jointly and severally liable for and shall pay to [Paynter] the sum of
14 \$200,000.00 in damages resulting from constructive discharge. This award
15 shall not be an offset.”
- 16 d. UBS is “jointly and severally liable for and shall pay to Respondent the sum
17 of \$100,000 in damages arising from negligent misrepresentation of the loan
18 program. This award shall not be an offset.”

19 A copy of the Award is attached hereto as Exhibit A.

20 The purpose of this Petition is to vacate the portion of the Award finding Paynter
21 liable to pay UBS any sums under the Notes for two principal reasons. First, it reflects a
22 manifest disregard of the law because, by UBS’ actions as reflected in the findings of
23 constructive discharge and negligent misrepresentation, UBS made Paynter’s performance
24 under the Notes impossible. As a result of the illegal actions UBS took as reflected in the

25
26 ¹ The April 14, 2021 Stipulation merely related to the amount of the loans received by
27 Paynter, the payments he made, and the remaining balances at the time he resigned from
28 UBS. At all times, Paynter reserved his defenses to the Notes and did not stipulate or agree
that such amounts were owed. These reservations of rights were made clear on several
occasions to the Panel and will be confirmed by the audio recordings of the hearing.

1 Award's determinations, UBS was precluded from seeking to enforce the Notes under
2 applicable law. Second, one of the arbitrators exhibited "evident partiality" throughout the
3 course of the evidentiary hearing which prejudiced Paynter's right to a fair hearing.

4 Accordingly, pursuant to the matters discussed herein as well as the other evidence
5 and argument Paynter intends to present to the Court, he seeks an Order from this Court to
6 vacate the Panel's determination that he owes any amounts under the Notes.

7 **PARTIES, JURISDICTION AND VENUE**

8 1. Paynter is an investment advisor registered with FINRA, who was formerly
9 employed as such by UBS Financial Services, Inc. Paynter resides in Maricopa County,
10 Arizona.

11 2. UBS Financial Services, Inc. is a registered broker-dealer incorporated in the
12 state of Delaware, with its principal place of business in Weehawken, New Jersey.

13 3. UBS Financial Services, Inc. does business in Maricopa County, Arizona.

14 4. UBS Credit Corp. is a Delaware corporation and an affiliate of UBS
15 Financial Services, Inc.

16 5. UBS Credit Corp. does business in Maricopa County, Arizona.

17 6. The underlying arbitration hearing was filed with FINRA and took place in
18 Maricopa County, Arizona.

19 7. The Court has jurisdiction over the parties and the subject matter of this
20 action pursuant to A.R.S. §§ 12-122 and 12-123.

21 8. The Court is the proper venue for this action pursuant to A.R.S. § 12-401.

22 9. This matter is eligible for commercial court pursuant to Ariz.R.Civ.P. 8.1
23 because the primary issues of law and fact concern a business contract or transaction and
24 tortious misrepresentation.

25 **FACTUAL AND PROCEDURAL BACKGROUND**

26 **I. UBS' Improper Conduct.**

27 10. The arbitration, captioned *UBS Financial Services, Inc. and UBS Credit*
28 *Corp. v. William J. Paynter*, FINRA Case No. 17-02850, concerned claims brought by

1 UBS pursuant to the Notes and counterclaims brought by Paynter in connection with his
2 being forced to leave his employment with UBS. *See generally*, Exhibit B (UBS' Amended
3 Statement of Claim) and Exhibit C (Paynter's Answer to UBS' Amended Statement of
4 Claim and Counterclaims).

5 11. Paynter had been a successful wealth manager for more than twenty years by
6 the time UBS began to recruit him in the summer of 2014. The recruitment process
7 occurred over a period of several months and involved many conversations. Immediately
8 before joining UBS, Paynter had built his book of business to more than \$100 million.
9 When UBS completed its successful recruitment of Paynter in October 2014, the firm
10 celebrated his arrival and congratulated the managers responsible for luring him to the firm.

11 12. Upon joining UBS, Paynter was provided with several loans pursuant to
12 certain Notes and related Transition Agreements in accordance with the financial advisor
13 loan program UBS then had in place. In essence, the loan program involved the following
14 steps: (a) having Paynter execute a Note, (b) pursuant to the Note, UBS provided a loan to
15 Paynter to be repaid over a period of several years, (c) having Paynter execute a Transition
16 Agreement, and (d) pursuant to the Transition Agreement, UBS would pay an amount to
17 Paynter on an annual basis in the amount totaling the loan principal and accumulated
18 interest due under the associated Note.

19 13. During the course of his 2-1/2 year employment at UBS, Paynter experienced
20 significant decreases in the revenue he was generating. Paynter alleged and presented
21 evidence during the arbitration hearing that these decreases were tied directly to certain
22 misrepresentations that were made during his recruitment by UBS, as well as certain
23 actions taken by UBS during his employment that prejudiced Paynter's ability to maintain
24 and grow his book of business.

25 14. Principal among the evidence of UBS' wrongdoing presented during the
26 evidentiary hearing were certain misrepresentations and omissions of material facts made
27 by UBS to Paynter in connection with its loan program. Moreover, evidence was also
28 presented regarding the prejudicial manner that UBS maintained and operated its loan

1 program. Paynter presented evidence that UBS' misrepresentations, omissions, and
2 actions had such a serious, material and detrimental impact on his ability to remain
3 employed at UBS that he was forced to resign on April 26, 2017, which made it impossible
4 for him to have the loans retired or even repay them. Paynter asserted that his resignation
5 constituted constructive discharge.

6 **II. The Arbitration.**

7 15. On October 31, 2017, UBS filed its Statement of Claim asserting breach of
8 contract based on Paynter's non-payment of the balance of the Notes upon his forced
9 resignation.

10 16. On January 16, 2018, Paynter filed his Answer and Counterclaim.

11 17. On October 25, 2018, UBS filed a motion to amend its Statement of Claim
12 to add a claim seeking the return of certain original versions of documents Paynter
13 produced in discovery.

14 18. On November 21, 2018, the Panel granted UBS' motion to amend its
15 Statement of Claim. On December 11, 2018, Paynter filed his Answer to the Amended
16 Statement of Claim and Counterclaim.

17 19. On August 28, 2019, Paynter's present lead attorney, Laurence Landsman
18 ("Landsman"), filed his substitute appearance on behalf of Paynter in the FINRA
19 arbitration, replacing Paynter's prior counsel.

20 20. On October 31, 2018, Paynter filed a motion to compel seeking an order that
21 UBS produce documents and information, including, *inter alia*, records relating to the
22 firm's loan program. Also on October 31, 2018, Paynter filed a second motion to compel
23 addressing outstanding ESI-related discovery matters.

24 21. On December 13, 2019, the Chairperson granted in part and denied in part
25 Paynter's first motion to compel as it related to Paynter's First Set of Discovery Requests.
26 The Order also required the parties to meet-and-confer on the issues raised in the same
27 motion to compel relating to the remaining discovery requests served by Paynter.
28

22. On March 19, 2020, Paynter filed a supplemental motion to compel after the parties engaged in meet-and-confer efforts. On April 22, 2020, after briefing by the parties, the Chairperson issued an Order granting in part and denying in part the supplemental motion to compel.

23. On April 30, 2020, the Chairperson issued a detailed decision on Paynter's second motion to compel relating to ESI discovery issues.

24. The evidentiary hearing was conducted in two phases, one that focused on UBS' claims and the other that focused on Paynter's defenses and his counterclaim. The first phase commenced on April 19, 2021, when UBS presented its case-in-chief on the claims asserted in its Amended Statement of Claim. The second phase commenced on August 10, 2021, when Paynter presented his defenses to UBS' claims and presented the evidence in support of his counterclaims.

25. The evidentiary hearing concluded on August 25, 2021.

26. On September 27, 2021, the Panel issued its Award (Exhibit A) which: (a) awarded UBS the outstanding principal balance on the Notes, (b) awarded UBS only 75% of the accrued interest on the Notes, (c) found that Paynter was constructively discharged and awarding him \$200,000 in damages, and (d) found that UBS had negligently misrepresented the loan program and awarded Paynter an additional \$100,000 damages as a result.

LAW AND ARGUMENT²

27. While the arbitration was conducted in Phoenix, Arizona, the Notes provide that New Jersey law governs:

Employee and UBS agree that, unless prohibited by applicable law, any disputes between Employee and UBS, including any related entities, including claims concerning compensation, benefits or other terms or conditions of employment and

² Certain facts and evidence submitted during the Arbitration were done so pursuant to confidentiality requirements and thus cannot be placed in a public filing. Accordingly, at the appropriate time, Paynter will seek to submit this additional information to the Court under seal.

1 termination of employment. . .will be determined by
2 arbitration as authorized and governed by the arbitration law
3 of the state of New Jersey.

4 See Exhibit D, p.4. Similarly, the Transition Agreement, which accompanied the Notes
5 pursuant to UBS' loan program, provided:

6 Employee and UBS agree that any Covered Claims (defined
7 below) will be resolved by final and binding arbitration as set
8 forth in this paragraph 21 and its sub-paragraphs a through h
9 (collectively, "Arbitration Agreement"). The Arbitration
10 Agreement shall be governed by and interpreted in accordance
11 with the Federal Arbitration Act ("FAA") and the law of the
12 State of New Jersey to the extent New Jersey law is not
13 inconsistent with the FAA . . .

14 See Exhibit E, ¶ 3(a).

15 28. New Jersey law on vacating or modifying arbitration awards is patterned
16 after the Uniform Arbitration Act and the Federal Arbitration Act. *Cybul v. Atrium Palace*
17 *Syndicate*, 272 N.J. Super. 330, 334 (App. Div. 1994). New Jersey Revised Statutes
18 provide for vacating arbitration awards under the following circumstances:

19 Upon filing of a summary action with the court by a party to
20 an arbitration proceeding, the court shall vacate an award made
21 in the arbitration proceeding if: (1) the award was procured by
22 corruption, fraud, or other undue means; (2) the court finds
23 evident partiality by an arbitrator, corruption by an arbitrator,
24 or misconduct by an arbitrator prejudicing the rights of a party
25 to the arbitration proceeding, (3) an arbitrator refused to
26 postpone the hearing upon showing of sufficient cause for
27 postponement, refused to consider evidence material to the
28 controversy, or otherwise conducted the hearing contrary to
section 15 of the act, so as to substantially prejudice the rights
off a party to the arbitration proceeding; (4) an arbitrator
exceeded the arbitrator's powers; (5) there was no agreement
to arbitrate, unless the person participated in the arbitration
proceeding without raising an objection pursuant to subsection
c of section 15 of this act not later than the beginning of the
arbitration hearing; or (6) the arbitration was conducted
without proper notice of the initiation of an arbitration as

required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

NJ Rev. Stat. § 2A:23B-23 (2013). In addition to the statutory grounds, New Jersey case law recognizes the additional basis of manifest disregard of the law. As stated in *Liberty Mutual Insurance Co. v. Open MRI of Morris & Essex, L.P.*:

Manifest disregard of the law is the seminal non-statutory ground for vacatur of commercial arbitration awards. A party seeking to vacate an arbitration award on the ground of manifest disregard of the law may not proceed by merely objecting to the results of the arbitration. Manifest disregard of the law clearly means more than an arbitral error or misunderstanding with respect to the law. It has two constituent elements. One element looks to the result reached in arbitration and evaluates whether it is clearly consistent or inconsistent with controlling law. For this element to be satisfied, a reviewing court must conclude that the arbitrator misapplied the relevant law touching upon the dispute before her in a manner that constitutes something akin to a blatant, gross error of law that is apparent on the faces of the award. The other element of the manifest disregard of the law standard requires a reviewing court to evaluate the arbitrator's knowledge of the relevant law. Even if a reviewing court finds a clear error of law, vacatur is warranted under the manifest disregard of the law ground only if the court is able to conclude that the arbitrator knew the correct law but nevertheless made a conscious decision to ignore it in fashioning the award.

356 N.J. Super. 567, 583–84 (2002).

29. In the present case, vacatur of the portion of the Award that determined Paynter should repay the balance of the principal of the Notes in addition to 75% of the accrued interest is appropriate because: (a) the determination constitutes a manifest disregard of the law, and (b) one of the arbitrators, Dean Call, exhibited an inappropriate evident partiality against Paynter throughout the course of the hearing.

A. Manifest Disregard of the Law

30. An inherent and fundamental contradiction exists between the Panel's determination that Paynter should repay the balance of the principal amounts under the

1 Notes and its determination that Paynter was constructively discharged and that the loan
2 program – pursuant to which the Notes were issued – was misrepresented to him. This
3 paradox constitutes a manifest disregard of the law by the Panel that requires vacatur of
4 that portion of the Award granted in favor of UBS.

5 31. Pursuant to the individual Notes, Paynter was given various “loans” by UBS
6 pursuant to its then-existing loan program. The loans were to be repaid on an annual basis
7 over a period of several years. For example, on November 4, 2014, Paynter received a loan
8 of \$1,190,468 pursuant to a Note that was to be repaid annually from October 17, 2015
9 through October 17, 2025. *See* Exhibit D. At the same time Paynter executed each Note,
10 he also executed a related Transition Agreement that provided annual payments to Paynter
11 in the amount of the annual principal and interest due under the Note over the same period
12 of time that the Note was to be repaid. The purported purpose of the Transition Payments
13 under the Transition Agreement was to help defray the repayment of the Notes. However,
14 Paynter presented evidence of certain significant deficiencies relating to the loan program,
15 and as mentioned above, the panel determined that UBS had negligently misrepresented
16 the loan program to Paynter.

17 32. The Panel manifestly disregarded the law by awarding UBS the unpaid
18 principal, and reduced accrued interest, under the Notes despite finding that Paynter was
19 constructively discharged and that the loan program was misrepresented to him. Indeed,
20 the evidence presented established that the principal basis of the constructive discharge
21 was directly tied to the manner by which UBS managed its loan program. The
22 determination that Paynter had to repay the balance of the Notes despite being
23 constructively discharged due to misrepresentations and mismanagement of the loan
24 program are completely irreconcilable because UBS’ illegal actions, as found by the Panel,
25 made it impossible for Paynter to comply with the terms of the Notes and remain at UBS
26 until the entirety of the Notes were repaid using the annual transition payments. UBS’
27 illegal actions also made it subsequently impossible for Paynter to repay the loans even
28 after his constructive discharge.

33. “Impossibility or impracticability of performance are complete defenses to breach of contract where a fact essential to performance is assumed by the parties but does not exist at the time for performance. The inquiry, therefore, is whether the condition is of such a character that it can reasonably be implied to have been in the mutual contemplation of the parties at the date when the contract was made.” *State v. Mungia*, 446 N.J. Super. 318, 337 (App. Div. 2016) (quotation omitted); *see also Connell v. Parlavecchio*, 255 N.J. Super. 45, 49 (App. Div. 1992) (“Impossibility or impracticability of performance are complete defenses where a fact essential to performance is assumed by the parties but does not exist at the time for performance”). Additionally:

Even if a contract does not expressly provide that a party will be relieved of the duty to perform if an unforeseen condition arises that makes performance impracticable, ‘a court may relief him of that duty if performance has unexpectedly become impracticable as a result of a supervening event.

Facto v. Pantagis, 390 N.J. Super 227, 231 (App. Div. 2007) (quoting Restatement (Second) of Contracts § 261 cmt. a (1981)).

34. Relatedly, “[r]elief from performance of contractual obligations” on the theory of frustration of purpose is appropriate where the factors establishing the requirements are “clear, convincing and adequate.” *JB Pool Mgmt., LLC v. Four Seasons at Smithville Homeowners Ass’n*, 431 N.J. Super. 233, 248 (App. Div. 2013) (quotations omitted). Moreover, the concepts of impossibility of performance and frustration of purpose “may apply to certain situations in which a party’s obligations under a contract can be excused or mitigated because of the occurrence of a supervening event.” *Id.* at 245. “The supervening event must be one that had not been anticipated at the time the contract was created, and one that fundamentally alters the nature of the parties’ ongoing relationship.” *Id.* Fundamentally:

A successful defense of impossibility (or impracticability) of performance excuses a party from having to perform its contract obligations, where performance has become literally

impossible, or at least inordinately more difficult, because of the occurrence of a supervening event that was not within the original contemplation of the contracting parties.

Id. at 246 (citing *Facto*, 390 N.J. Super. at 231).

35. As for frustration of purpose:

So defined, frustration of purpose deals with the problem that arises when a change of circumstances makes one party's performance worthless to the other, frustrating his purpose in making the contract. The frustration must be so severe that it is not fairly to be regarded as the risks that [the party invoking the doctrine] assumed under the contract.

Id. at 246–47 (quotation and citation omitted).

36. In the present case, Paynter had absolutely no idea that UBS had made misrepresentations or omissions of material fact regarding the loan program. Indeed, evidence shows that UBS took affirmative steps to conceal certain relevant truths about the loan program from its financial advisors, including Paynter. These deficiencies by UBS played a seminal role in Paynter's constructive discharge and made his performance under the Notes and Transition Agreements impossible and, alternatively, frustrated their purpose. Specifically, each Note accompanying a loan had to be repaid on an annual basis over the course of a predetermined number of years. At the end of a respective Note's term, as long as Paynter remained employed by UBS throughout that period, he would have paid off the Note in full. At the same time, at the end of the same period of time, Paynter would have received all of the annual transition payments from UBS pursuant to the Transition Agreement to assist in repaying the Notes.

37. Throughout his employment at UBS, Paynter had every intention to remain employed with the firm through the entire period of all the Notes and the Transition Agreements. However, the circumstances of his constructive discharge—a finding that confirms UBS' accountability for wrongfully forcing Paynter to leave—made it impossible for Paynter to remain at UBS and complete the terms of the loan program.

1 38. The Panel’s finding of constructive discharge constitutes an adjudication
2 akin to wrongful termination, and confirms that UBS is singularly responsible for Paynter
3 being forced to leave UBS and caused the conditions of him not repaying the Notes and
4 receiving the transition payments under the Transition Agreements

5 39. To prevail on a claim for constructive discharge, “an employee must prove a
6 common law or statutory claim for wrongful termination.” *Petersen v. City of Surprise*,
7 244 Ariz. 247, 250, ¶ 9, 418 P.3d 1020, 1023 (App. 2018); *see also City of Fairbanks v*
8 *Rice*, 20 P.3d 1097, 1102, n.7 (Alaska 2000) (Constructive discharge “satisfies the
9 discharge element in a wrongful discharge claim”). Additionally, in order to establish
10 constructive discharge, the employee must show a breach of contract or tort in connection
11 with the employment termination in order to obtain damages. *See Turner v. Anheuser-*
12 *Busch, Inc.*, 7 Cal. 4th 1238, 32 Cal. Rptr.2d 223, 876 P.2d 1022, 1030 (1994).

13 40. The standard to determine whether a brokerage firm’s actions rise to the level
14 of constructive discharge was articulated in *Morris v. Shroder Capital Management*, 7
15 N.Y.3d 616, 859 N.E.2d 503 (2006). There, the court, in a case involving deferred
16 compensation and a non-solicitation provision, stated:

17 Constructive discharge occurs “when the employer, rather than
18 acting directly, deliberately makes an employee’s working
19 conditions so intolerable that the employee is forced into a
20 voluntary resignation.” [Citation.] In order to meet this
21 threshold, “the trier of fact must be satisfied that the . . .
22 working conditions [were] so difficult or unpleasant that a
reasonable person in the employee’s shoes would have felt
compelled to resign.”

23 *Id.* at 621–22, 859 N.E.2d at 507 (citation omitted); *cf. MacLean v. State Dept. of Educ.*,
24 195 Ariz. 235, 245, ¶¶ 35–36, 986 P.2d 903, 913 (App. 1999) (constructive discharge
25 occurs where an employer creates conditions so difficult or unpleasant that a reasonable
26 employee would feel compelled to resign, and the employee does in fact resign, the
27 employer has committed constructive discharge).

1 41. In the present case, the Panel determined that UBS constructively discharged
2 Paynter, meaning it breached contracts and common law tort principles, and negligently
3 misrepresented the loan program, in such a serious manner that it wrongfully forced
4 Paynter to leave. By doing so, UBS made it impossible for Paynter to perform under the
5 Notes and Transition Agreements – *e.g.*, for him to remain employed as was his intention,
6 plan and strategy. By such actions, they made it impossible and impracticable and
7 frustrated Paynter’s purpose of remaining employed and repaying the loans through the
8 conclusion of the Notes’ terms. That had been Paynter’s intention from the time his
9 employment began, and remained his intention until UBS’ actions in breaching its
10 contractual obligations as well as engaging in common law torts forced his resignation.

11 42. The basis of Paynter’s constructive discharge is directly related to UBS’ loan
12 program pursuant to which the firm sued him for not repaying the balance of the Notes
13 upon his forced resignation.

14 43. UBS’ misrepresentations and omissions of material facts were extremely
15 prejudicial to Paynter whose ability to manage loan repayments became seriously impacted
16 by decisions and actions of UBS. The final straw causing Paynter’s constructive discharge
17 was when he made financial arrangements to ensure repayment of the loans and continue
18 remaining employed at UBS, which were conditions of his agreements. However, UBS,
19 which was aware of and approved of Paynter’s plan, nonetheless took action to thwart his
20 ability to repay the loans pursuant to the terms of the Notes and Transition Agreements.

21 44. As a direct and proximate result of UBS’ actions, misrepresentations, and
22 omissions of material fact, Paynter was left with no choice but to resign from UBS with an
23 inability to repay the loans.

24 45. By virtue of the Panel’s express findings of UBS’ misconduct, the decision
25 on repayment of the Notes constituted a manifest disregard of the law.

26 **B. Evident Partiality by an Arbitrator**

27 46. A second ground exists for vacating the Award’s determination on
28 repayment of the Notes. Throughout the evidentiary hearing, one of the arbitrators, Dean

1 Call, exhibited repeated and disturbing instances of evident partiality against Paynter and
2 his claims.

3 47. Due to COVID-19-related restrictions, the evidentiary hearing was
4 conducted via Zoom. During the hearing, each participant, including the arbitrators, could
5 be observed in his or own “box” on the Zoom screen. Thus, all parties and arbitrators were
6 observable throughout the entirety of the hearing.

7 48. Arbitrator Call’s conduct during the evidentiary hearing was prejudicial in
8 that it interfered with Paynter’s attorney’s examination of adverse witnesses, caused
9 significant concern by Paynter that Arbitrator Call had predetermined the outcome of the
10 case, and likely emboldened the adverse witnesses. Essentially, throughout the hearing,
11 and particularly when Paynter’s counsel was making argument or examining witnesses,
12 Arbitrator Call routinely and vigorously shook his head as if rejecting testimony or
13 argument being presented, made faces of disgust, and occasionally walked away from the
14 hearing itself.

15 49. Arbitrator Call’s conduct constituted a clear and unambiguous expression of
16 his disagreement with the arguments made by Paynter’s counsel and/or the legal theories
17 that formed the basis of Paynter’s counsel’s examination of witnesses. Most disturbing
18 was Arbitrator Call’s expressions of rejection before Paynter had the opportunity to present
19 the entirety of related evidence on the issues at hand.

20 50. Arbitrator Call’s behavior was disruptive and caused significant
21 consternation by Paynter and his attorney on a near daily basis. It also placed Paynter and
22 his attorney in a nearly impossible situation of how to handle a rogue arbitrator. If
23 Paynter’s counsel called-out Arbitrator Call publicly for his conduct, it posed a significant
24 risk of alienating him further than he already appeared. It also posed a risk of potentially
25 alienating the other arbitrators if they considered Paynter’s attorneys’ complaint to be a
26 sign of disrespect.

27 51. Under relevant law, the standard to vacate an arbitration award based on
28 evident partiality is met by establishing either actual partiality or merely the appearance of

1 partiality. *Barcon Assocs., Inc. v. Tri-County Asphalt Corp.*, 86 N.J. 179, 191, 430 A.2d
2 214 (1981). The *Barcon* court recognized the need to prohibit “any appearance of bias
3 sufficient to discredit [arbitration].” *Id.* at 182–83.

4 52. Paynter’s concerns were so significant that his attorney took the
5 extraordinary step of submitting a written, confidential complaint to FINRA Dispute
6 Resolution regarding Arbitrator Call immediately upon the conclusion of the hearing.

7 53. In particular, on August 26, 2021, Paynter’s counsel submitted a detailed
8 letter to FINRA regarding his objections to Arbitrator Call’s behavior. *See* Exhibit F. In
9 the letter, Paynter’s counsel expressed his concerns, in part, as follows:

10 Mr. Call’s behavior during the hearing was utterly
11 unprofessional, distracting, and at times disheartening, as it
12 appeared, repeatedly, that he was prejudging evidence as it was
13 being introduced and before presentation of all relevant
14 documentary and testimonial evidence presented by Mr.
15 Paynter. Throughout the hearing, Mr. Call indicated what I,
16 and my client, interpreted as a rejection of the evidence and
17 arguments being presented in real time as witnesses were
18 testifying during Mr. Paynter’s case-in-chief. Time and time
19 again, during actual testimony as well as argument regarding
20 objections, Mr. Call (who was not the Chairman and was not
21 empowered to rule on any objections) would obviously and
22 vigorously shake his head and make faces (literally) reflecting
23 his apparent disagreement with my questions, or a witness’s
24 answer to my questions, or my argument. It was unmistakable,
25 and it was a frequent occurrence, and at a minimum it was
26 incredibly distracting to say the least.

27 *See* Exhibit F. Mr. Paynter’s attorney’s written complaint provided additional details
28 regarding Arbitrator Call’s conduct and concluded:

29 To be clear, my complaint against Mr. Call is not dependent on
30 the outcome of this case, which has not yet been issued. I
31 remain hopeful that the facts and the evidence will persuade
32 the Panel to rule in Mr. Paynter’s favor. Nonetheless,
33 Arbitrators must present themselves as neutral fact-finders who
34 are willing to listen to all the evidence and all the arguments
35 before making the ultimate decision about the case, and

certainly before expressing an indication as to how they view the evidence as it is being introduced. Regardless of how the Panel decides this case, Mr. Call failed in this regard.

See Exhibit F (emphasis in original).

54. Additionally, after the hearing, Landsman also sent a written request to FINRA to preserve the video recording of the hearing in the event Arbitrator Call's evident partiality would need to become an issue in any post-hearing proceedings. FINRA responded to Landsman that FINRA only records the audio of the hearing and does not record or maintain the video.

55. While the Award was unanimously agreed to by the Panel, that fact in and of itself does not absolve Arbitrator Call from his partiality. The deliberations of the Panel are confidential and, as a result, there is no method to determine the impact Arbitrator Call's evident partiality on the ultimate decision. However, such effect is unnecessary for evident partiality to justify vacatur. Nonetheless, it is apparent that the manifest disregard of the law of impossibility, impracticability and frustration of purpose, discussed *supra*, is a likely consequence.

COUNT ONE

Vacatur of Arbitration Award

In Favor of UBS on the Notes

56. Paynter repeats and realleges the preceding paragraphs, as if fully set forth herein.

57. The Panel's decision to award UBS any amounts under the Notes was completely irrational and in manifest disregard of the law.

58. Arbitrator Call acted with evident partiality during the evidentiary hearing, further emphasizing the complete lack of rationale for awarding UBS the outstanding loan balances with a reduced interest rate despite the firm's conduct making it impossible for Paynter to complete the terms of the Notes and related Transition Agreements.

PRAYER FOR RELIEF

WHEREFORE, Petitioner William J. Paynter requests the following relief:

A. Issue an order vacating the arbitration award attached hereto as Exhibit A, dated September 27, 2021, as it pertains to the award in favor of UBS.

B. Award Mr. Paynter such other and further relief as this Court deems just and proper.

A proposed form of order is lodged herewith.

RESPECTFULLY SUBMITTED this 26th day of October, 2021.

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By: /s/ Alan Baskin

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