IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENE-TEA BLOOM, *et al*.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:19-CV-04666-LMM
CAPITAL FINANCIAL	:	
SERVICES, INC., *et. al.*,	:	
	:	
Defendants.	:	
	:	
	:	

MOTION TO VACATE ARBITRATION AWARD

Defendants, Capital Financial Services, Inc. ("**Capital Financial Services**" or "**CFS**"), Capital Financial Holdings, Inc. ("**Capital Financial Holdings**" or "**CFH**"), Gordon Douglas Dihle, and Bart James Bohrer hereby move, pursuant to 9 U.S.C. §§9-12, to vacate the award entered by a FINRA arbitration panel on October 29, 2021.

The arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter was not made. The arbitrators' decision reflects their own notions of economic justice and is a conscious disregard of the terms of the parties' agreements. The arbitrators further entered an award upon matters not submitted to them. Although grounds for

vacatur are limited under the Federal Arbitration Act, this case presents one of those rare situations where an arbitration award should not stand.

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STATEMENT OF FACTS

Procedural History and Plaintiffs' Allegations

1. This case was filed on October 17, 2019 on a six count complaint for (i) breach of fiduciary duties (against CFS), (ii) violations of the Georgia Uniform Securities Act, O.C.G.A. §10-5-58 (against all Defendants), (iii) breach of contract (against CFS), (iv) negligence (against all Defendants), (v) attorneys' fees pursuant to O.C.G.A. §13-6-11, and (vi) punitive damages.

2. An Amended Complaint was filed on December 12, 2019 [Docket 15] and the pleading added William Farrelly as a Plaintiff and Bart James Bohrer and Donald Robert Pollard as Defendants.

3. Plaintiffs alleged that they entered into contracts with CFS for the provision of investment advisory services whereby CFS would advise and assist Plaintiffs in making appropriate investments and Plaintiffs, in turn, would pay a fee for such advice and assistance. *Amended Complaint*, ¶1.

4. Plaintiffs alleged that instead of recommending appropriate investments for Plaintiffs' accounts, CFS placed money in the care of Sean Kelly and that Sean Kelly stole that money. *Id.* ¶¶1-2.

5. CFH was named for its role as the holding company of CFS. Plaintiffs alleged that CFH was the sole owner and corporate parent of CFS and therefore controlled CFS. *Id.* ¶19.

6. Gordon Douglas Dihle was alleged to have been the Chief Executive Officer of CFH since at least May of 2017 and, through his involvement with the holding company, also allegedly controlled CFS. *Id.* ¶20.

7. Bart James Bohrer was also alleged to be a control person of CFS based on various positions he held at the broker dealer over the years. *Id.* ¶21.

8. The U.S. Securities and Exchange Commission brought a civil enforcement proceeding against Sean Kelly in 2018. Mr. Kelly was also indicted and pleaded guilty in a parallel criminal proceeding. *Id.* ¶29.

9. Sean Kelly was associated with CFS and another broker dealer, Center Street Securities, Inc., during the relevant time. *Id.* ¶29.

10. Count II of the Amended Complaint asserts violation of O.C.G.A. §10-5-58(f), a general anti-fraud prohibition under the Georgia Securities Act for investment advisors. *Id.* ¶44.

11. Plaintiffs' breach of contract claim alleged that in exchange for good and valuable consideration, CFS promised to advise and assist each of its customers in making appropriate investments and abide by all FINRA rules. *Id.* ¶49.

12. Count IV, negligence, asserted that CFS had a duty to protect Plaintiffs against an unreasonable risk of harm and a duty to act in a careful and

prudent manner. *Id.* ¶52. The remaining Defendants allegedly had a duty to properly supervise and train Sean Kelly. *Id.* ¶53.

13. On April 17, 2020, this Court stayed the litigation and compelled arbitration. Docket 32.

14. A Statement of Claim was filed with FINRA on July 24, 2020. See Docket 46-2. Plaintiffs incorporated their Amended Complaint into the Statement of Claim before FINRA.

15. The following table provides a summary of Plaintiffs' alleged losses, in chronological order.

First	Last	Date	Amount
Kevin	Harden	5/20/2013	$8,500.00
William	Farrelly	7/9/2013	$67,306.30
Charles	Lumsden	9/11/2013	$40,000.00
William	Farrelly	9/11/2013	$2,000.00
Jane	Thompson	1/6/2014	$5,715.00
Kevin	Harden	2/19/2014	$24,500.00
Jane	Thompson	2/27/2014	$15,000.00
John and Dorothy	Crosbie	4/3/2014	$21,699.00
Aprile	Holland	4/3/2014	$25,000.00
John and Dorothy	Crosbie	4/28/2014	$9,262.56
Aprile	Holland	5/2/2014	$17,684.76
William	Farrelly	5/21/2014	$2,000.00
William	Farrelly	7/16/2014	$2,000.00
Kevin	Harden	9/1/2015	$12,000.00
Kevin	Harden	9/8/2015	$40,000.00
Ene-Tea	Bloom	10/12/2015	$25,000.00
Ene-Tea	Bloom	10/12/2015	$25,000.00
John and Dorothy	Crosbie	1/9/2016	$25,000.00
Kevin	Harden	2/19/2016	$10,000.00
William	Farrelly	9/16/2016	$6,500.00

Kevin	Harden	9/22/2016	$10,000.00
Kevin	Harden	11/22/2016	$10,000.00
Kevin	Harden	12/20/2016	$10,000.00
Linda	Brooks	1/3/2017	$20,000.00
Linda	Brooks	1/21/2017	$15,000.00
John and Dorothy	Crosbie	2/14/2017	$20,000.00
Suzana	Williams	3/9/2017	$39,804.28
Suzana	Williams	3/9/2017	$1,200.00
Linda	Brooks	5/17/2017	$15,000.00
John and Dorothy	Crosbie	7/5/2017	$15,000.00

Plaintiffs' Hearing Testimony and the Evidence Presented

16. The Plaintiffs all acknowledged execution of the Customer Account Agreements appearing under Docket Numbers 20-4 to 20-12. *Test. of Jane Thompson,* pp.12:9-13:4; *Test. of Suzanna Williams*, pp.10:13-11:13; *Test. of Julianna Burrall, Representative of John Crosbie*, pp.8:13-9:12; *Test. of David Martin, Representative of William Crosbie,* pp.11:1-21; *Test. of Aprile Holland*, pp.15:9-19, 16:7-13; *Test. of Ene-Tea Bloom*, pp.7:2-8:17; *Test. of Kevin Harden*, pp.9:7-20; *Test. of Linda Brooks*, pp.9:11-10:17; *Test. of William Farrelly*, pp.32:15-33:24.

17. Paragraph 8 of the Customer Account Agreements designates the application of North Dakota law. *Test. of Jane Thompson,* pp.16:5-16; *Test. of Suzanna Williams*, pp.12:18-13:5; *Test. of Ene-Tea Bloom*, pp.9:7-15; *Test. of Kevin Harden*, pp.9:21-10:8; *Test. of Linda Brooks*, pp.10:18-11:6; *Test. of William Farrelly*, pp.34:10-21.

18. Plaintiffs did not rely upon CFS for custodial services and the Customer Account Agreements expressly disclaim any custodial responsibility. *Test. of Jane Thompson,* pp.13:5-14:8, 20:7-21, 26:13-21; *Test. of Suzanna Williams*, pp.11:15-12:17, 14:1-23, 17:21-18:1; *Test. of Aprile Holland*, pp.35:2-5; *Test. of Ene-Tea Bloom*, pp.9:18-10:1, 19:8-20:20; *Test. of Kevin Harden*, pp.19:2-16; *Test. of Linda Brooks*, pp.11:11-18, 13:19-14:19, 15:17-16:22; *Test. of William Farrelly*, pp.34:22-35:14.

19. Plaintiffs did not receive investment advisory services from Sean Kelly, did not pay an investment advisory fee, and did not provide discretionary trading authorizations. *Test. of Jane Thompson,* pp.11:18-24; *Test. of Suzanna Williams*, pp.9:9-10:8, 14:1-23; *Test. of Ene-Tea Bloom*, pp.5:4-8; *Test. of Kevin Harden*, pp.7:16-19, 11:25-12:3; *Test. of Linda Brooks*, pp.5:11-14, 15:17-16:22; *Test. of William Farrelly*, pp.30:24-31:20, 39:1-7.

20. Plaintiffs did not allege any fault as to the individual Defendants, Gordon Dihle and Bart Bohrer. *Test. of Jane Thompson,* pp.4:19-5:6; *Test. of Suzanna Williams*, pp.4:24-6:8; *Test. of Julianna Burrall*, pp.4:19-5:14; *Test. of David Martin,* pp.9:18-10:4; *Test. of Aprile Holland*, pp.13:8-14:3; *Test. of Ene-Tea Bloom*, pp.4:14-5:3, 36:25-37:15; *Test. of Kevin Harden*, pp.5:1-7; *Test. of Linda Brooks*, pp.5:3-110, 15:1-8; *Test. of William Farrelly*, pp.30:11-23. These Plaintiffs did not know who Messrs. Dihle and Bohrer were and most of the

Plaintiffs did not even recognize the names Capital Financial Services or Capital Financial Holdings. They instead understood that they were doing business with Sean Kelly and Lionshare.

The Testimony of Gordon Dihle

21. Mr. Dihle became a director of CFH on November 7, 2013. He was appointed Interim Chief Executive Officer of the holding company on May 22, 2017. His prior work with the parent company and subsidiaries was as an attorney. *Test. of Gordon Dihle*, pp.7:4-11:11. This included work with subsidiaries operating a mutual fund, a mutual fund advisor, a stock transfer agent, and two separate broker dealers.

22. As provided in the above-referenced table of claims, there was only one transaction that occurred after Mr. Dihle became CEO of the holding company.

23. Gordon Dihle never worked with Capital Financial Services in any role other than as an attorney. *Id.* pp.11:3-11.

24. Capital Financial Services and its holding company, Capital Financial Holdings, maintained separate books and records, had separate bank accounts, retained separate officers, employees, and directors, were each independently audited, maintained separate office space, and held separate board of director meetings, each with their own independent boards. *Id.* pp.12:5-16:21.

25. Mr. Dihle acquired 10% ownership of the holding company in April of 2013 and another 42% in May of 2014. *Id.* pp.16:16-18:2.

26. Mr. Dihle never met Sean Kelly, never visited his offices, and was not in charge of his supervision. *Id.* pp.22:21-23:4.

27. Mr. Dihle did not have any supervisory responsibility at Capital Financial Services and was never registered with the broker dealer. *Id.* pp.23:3-18.

The Testimony of Bart Bohrer

28. Bart Bohrer began working with CFS in 2002 and stayed with the company until its assets were acquired in a sale to Calton & Associates, another broker dealer. *Test. of Bart Bohrer*, pp.6:1-20.

29. Mr. Bohrer became Chief Compliance Officer in September of 2017. *Id.* pp.6:10-8:17.

30. Mr. Bohrer's appointment as CCO occurred after all of the Plaintiffs' alleged losses in this case. *Id.* pp.8:11-17.

31. During the relevant time, Mr. Bohrer, one of many principals at the firm, was primarily in charge of the investment advisory business. *Id.* pp.11:3-12, 12:11-13. Brett Nesdahl was the person in charge of supervising brokerage representatives. *Id.* pp.12:6-8.

32. Sean Kelly was never registered as an investment advisor with CFS. *Id.* pp.12:16-21.

33. Bart Bohrer would therefore ordinarily not review Sean Kelly's transactions. *Id.* pp.12:22-13:9.

34. Capital Financial Services had policies and procedures that prohibited accepting customer funds or securities. *Id.* pp.15:21-17:8.

35. CFS further had policies and procedures to conduct examinations of branch offices and inspected Sean Kelly's office on four separate occasions. *Id.* pp.24:1-34:4.

36. Not one of the inspections uncovered Sean Kelly's thefts. *Id.* pp.35:24-36:22.

37. Mr. Bohrer believes that he did everything possible. Capital Financial Services adopted and followed its supervisory procedures. *Id.* pp.37:19-38:5.

Discussion with the Hearing Panel

38. Chairman Manual acknowledged that Plaintiffs cited the wrong provision of the Georgia Securities Act in Count II as such only applies to investment advisors. The panel also acknowledged that North Dakota law applies to the controversy. The following dialogue occurred in closing arguments:[1]

> **STEGAWSKI**: But Mr. Bain's claim regards investment advisory services. And if the panel recalls, that was one of our other objections. And I raise that issue again now. Mr. Kelly was not actually working as an investment adviser for Capital Financial Services. So this Count 2, it's -- it has no merit. It just doesn't apply……

[1] *Closing Arguments*, pp.23:4-27:23.

CHAIRMAN MANUEL: Well, before you leave that point, if he -- if he listed the wrong subsection, is the Georgia securities act -- would the Georgia securities act apply to Mr. Kelly's actions as a registered representative?

STEGAWSKI: And that answer is no.

CHAIRMAN MANUEL: So there's no provision under the Georgia security act that would apply to Mr. Kelly?

STEGAWSKI: Let me respond in two ways, first of which the Georgia Uniform Securities Act does not apply entirely. And if you recall, Mr. Manuel, in the account Agreements, all of the claimants have agreed to application of North Dakota law.

CHAIRMAN MANUEL: Well, let's leave North Dakota law for a moment. I understand your forum selection clause. But what would be helpful to the panel, I believe, is: Are you contending that the Georgia securities act simply doesn't apply to a registered person who's affiliated with a broker-dealer?

STEGAWSKI: And let me correct one statement there. The paragraph 8 of the customer account agreements is not a forum or venue provision. It's a governing law provision.

CHAIRMAN MANUEL: No. I disagree with you. And it doesn't matter. We don't have to -- have to agree. I've been litigating forum selection clauses for many years. So that's what it looks like, smells like to me. It is a forum selection clause, slash, substantive law clause. And there's a lot of case law as to whether or not that should be applied here when the state of Georgia and these claimants, that I can perceive, have no relationship whatsoever to the state of North Dakota other than the fact that CFS happened to be headquartered there. They came to Georgia. They chose to do business in Georgia. So that will be up to the panel to decide whether to abide with that provision…….

CHAIRMAN MANUEL: Well, the first one is this. Have you supplied the panel, in any of your submissions, with the law of North Dakota that you contend applies?

STEGAWSKI: And in that regard, Mr. Manuel, I would submit we don't need to. My job here and my objection is that Georgia law doesn't.

MANUEL: And this is your contention, that Georgia law doesn't because of your substantive law clause.

MR. STEGAWSKI: And if I may, Mr. Manuel, just to one sentence. "This agreement and all transactions made in my account shall be governed by the laws of the state of North Dakota".

CHAIRMAN MANUEL: Well, let us – let us assume this is a substantive law, the choice of law clause. Now, is it your contention that is the only reason the Georgia securities act does not apply to Mr. Kelly?

STEGAWSKI: Well, our contention is that the Georgia Uniform Securities Act does not apply because of this governing law provision, paragraph 8. Apart from that, the particular provision that Mr. Bain cited relates to investment advisory services. That doesn't apply in this case. I believe what the panel Chair was asking also is: Well, could there be another provision in the Georgia securities act or in North Dakota law that could apply? Well, we represent the respondents. That's Mr. Bain's obligation.

CHAIRMAN MANUEL: Well, I'm asking you in a discussion with the panel, not part of the proof, but a lawyer-panel discussion. From your review of the Georgia Uniform Securities Act, is there a provision that would apply to Mr. Kelly in his role as a registered person affiliated with a broker-dealer?

STEGAWSKI: Let me respond in this way. The Georgia Uniform Securities Act is broad. There are other provisions that apply to broker-dealer services and broker-dealer misconduct. But Mr. Bain has not cited those.

CHAIRMAN MANUEL: Well, that's fair. And I understand -- and I believe the panel does -- your fundamental contention is the Georgia securities act doesn't apply because of your substantive law choice

> contained in – I think you demonstrated, in each one of the customer agreements.

39. The panel was advised that a broker dealer's duty is generally contractual in nature. The elevated fiduciary standard applies when a broker receives discretionary trading authority. *Id.* pp.35-11-37:15, 38:16-23.

40. The panel was further advised that a private plaintiff does not have standing to allege a violation of FINRA rules. They must instead allege the breach of a contractual term. *Id.* pp.39:7-41:20.

41. The panel also recognized that Plaintiffs' claims failed as a matter of law. Chairman Manual instead communicated his disagreement with the law and intention to invoke his own notion of economic justice.[2]

> **CHAIRMAN MANUEL**: This is what keeps troubling me. I keep being left with the impression that the respondents' defenses are: No. This theory is wrong. No. This theory is wrong. No. That theory is wrong, till we get to the point that there is nothing we can do or fail to do where a client has any recourse. And that is extremely troubling to me, but I keep being left with that.
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> ———————————————————

> **STEGAWSKI:** So I understand the panel's frustration in trying to offer sympathy to the claimants. But the reality is these claims are deficient. They're -- they just don't have merit. In fact, a lot of them are just not applicable to this particular case.
>
> **CHAIRMAN MANUEL:** Well, Mr. Stegawski, is there any claim that could have been included that you would agree would be a legitimate ground for recovery against CFS?

[2] *Closing Argument*s, pp.54:1-9, 58:7-16.

ARGUMENT AND CITATION OF AUTHORITY

I. An Improperly Entered Arbitration Award can be Vacated.

9 U.S.C. §10(a) provides that a United States court in and for the district wherein the arbitration award was made may make an order vacating the award, upon the application of any party to the arbitration, …….. (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. The hurdle is high because showing that the panel committed an error, or even a serious error, is not enough.[3] Instead, a petitioner must demonstrate that the arbitrators strayed from interpretation and application of the agreement and effectively dispensed their own brand of industrial justice. *Stolt-Nielsen S.A. v. AnimalFeeds*

[3] The Georgia Arbitration Code supplements the federal bases for vacatur and recognizes a manifest disregard of law. See O.C.G.A. §9-9-13(b)(5); *Original Appalachian Artworks, Inc. v. Jakks Pac., Inc*., 718 F. App'x 776, 780 (11th Cir. 2017); *Nat'l Aerotech Aviation, Inc. v. Seaborne V.I., Inc*., 387 F. App'x 893, 895 (11th Cir. 2010). Manifest disregard of the law also serves as grounds for vacatur under the North Dakota Uniform Arbitration Act. See *Gratech Co. v. Wold Eng'g, P.C*., 2007 ND 46, ¶12, 729 N.W.2d 326, 330-31 (Mar. 27, 2007). Defendants further submit that recent 11th Circuit decisions no longer recognizing the manifest disregard of law standard, relying upon *Hall St. Assocs., LLC v. Mattel, Inc*., 552 U.S. 576, 584-587 (2008), are entered in error. *Montes v. Shearson Lehman Bros*., 128 F.3d 1456, 1460-1462 (11th Cir. 1997) is still or should still be controlling law. An arbitrator is not charged with making public policy. When he is informed of the law and simply elects to disregard it (as opposed to just committing error or misunderstanding the law), he exceeds the powers entrusted to him.

Int'l Corp., 559 U.S. 662, 671-72 (2010). An arbitrator's task is to interpret and enforce a contract, not to make public policy. *Id.*

9 U.S.C. §11(b) permits modifying or correcting the award upon the application of any party to the arbitration…… (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. *Davis v. Prudential Sec*., 59 F.3d 1186, 1195 (11th Cir. 1995)(holding that arbitrators exceeded their powers by awarding attorneys' fees where the statement of claim did not request them and neither party presented evidence or argument on the issue).

II. The Arbitrators Exceeded their Authority by Applying Georgia Law when the Parties' Agreements Designated North Dakota Law.

Arbitrators derive their power from the parties' agreement and they exceed their authority if they fail to comply with contractual provisions in the arbitration agreement, including a choice of law provision. *Firstman v. Credit Suisse Sec. United States*, No. 1:19-CV-04025-CAP, 2020 U.S. Dist. LEXIS 257172, at *17 (N.D. Ga. Nov. 20, 2020)(finding that panel exceeded its grant of authority by awarding interest and fees pursuant to Georgia Statutes when the parties selected the application of New York law and vacating all awards made pursuant to Georgia law). An arbitrator may not ignore the plain language of the contract and this means that an arbitrator may not issue an

award that contradicts the express language of the agreement and may not modify clear and unambiguous contract terms. *Id.* at 18. The Federal Arbitration Act requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms. *Id.*

Any award under Count II, Violations of the Georgia Uniform Securities Act, O.C.G.A. §10-5-58, and Count V, Attorneys' Fees under O.C.G.A. §13-6-11, must be vacated because these claims rely upon the application of Georgia law. All versions of the account agreements with Plaintiffs provide:

> **8. This agreement and all transactions made in my account shall be governed by the laws of the State of North Dakota (regardless of the choice of rules thereof).**

Firstman v. Credit Suisse Sec. is directly on point. The arbitration panel was not permitted to ignore the plain language of the Customer Account Agreements and therefore could not issue an award that contradicted the express language of the contracts. The choice of law provision is clear and unambiguous. Despite this, the panel chair expressly indicated his intention to disregard North Dakota law.

Three important conclusions can be reached:

1. The "control person" theory and award to impose liability upon the holding company defendants, CFH and Mr. Dihle, as well as Bart Bohrer must be vacated. The panel exceeded their authority in relying upon a Georgia securities statute.

2. The award of attorney's fees under the Georgia Uniform Securities Act is improper. See *Award* p.5, ¶19, Docket 53-1. The statute is not applicable because this matter is governed by North Dakota law.

3. The panel exceeded their authority in awarding prejudgment interest to Plaintiffs under Georgia law, as provided in *Firstman v. Credit Suisse Sec. United States.*

All that remains is Counts I & III, breach of fiduciary duties and breach of contract against CFS and Count IV, negligence, against all Defendants.

III. CFS was not Contracted to Provide Custodial Services for Plaintiffs' Funds or Securities.

Counts I, III, and IV, breach of fiduciary duty, breach of contract, and negligence, must be dismissed or denied because CFS was not the designated custodian of Plaintiffs' funds or securities. None of the Plaintiffs alleged that they lost funds which were on deposit in accounts with CFS because those funds were not. In accordance with Plaintiffs' account agreements, they were advised of the fact that CFS would not serve as a custodian.

> **CFS has an agreement with Clearing Firm whereby clearing firm provides certain clearing services for us……. Clearing Firm will be responsible for (2) receiving and delivering securities and (6) safeguarding funds and securities. *Customer Account Agreements*, ¶¶4, 18.**

Notably, Plaintiffs' breach of contract claim is based upon the allegation that "Capital Financial, in exchange for good and valuable consideration from each Plaintiff, promised to advise and assist each of its customers in making appropriate investments and abide by all FINRA rules." This type of allegation was expressly rejected by the Court in *Curry v. TD Ameritrade, Inc*., No. 1:14-CV-1361-LMM, 2015 U.S. Dist. LEXIS 191684, at *27 (N.D. Ga. June 29, 2015)(held that the breach of contract claims against Ameritrade and Schwab failed because plaintiffs failed to identify the contract term allegedly breached and the account agreements expressly indicated that Ameritrade would not provide the services at issue). *Aff'd* in *Curry v. TD Ameritrade, Inc*., 662 F. App'x 769 (11th Cir. 2016). CFS similarly could not possibly have breached any duty by failing to supervise without an underlying duty to provide custodial services in the first instance. When reading the Amended Complaint and the FINRA Statement of Claim in their entirety, Plaintiffs do not allege that any particular investment recommendation was unsuitable, but rather that Sean Kelly stole client funds. This is a custodial issue and dispute.

Count I also fails because CFS did not have a fiduciary (or any other) duty for the safekeeping of Plaintiffs' funds. To state a claim for breach of fiduciary duty under Georgia law, a plaintiff must establish three elements: (1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damages proximately caused by

the breach. *Curry v. TD Ameritrade, Inc*., 2015 U.S. Dist. LEXIS 191684, at 29-30 (holding that neither TD Ameritrade nor Charles Schwab owed fiduciary duty to brokerage customers). A broker's duties differ based upon the type of service performed. *Id.* at 31-32. For non-discretionary accounts, including custodial services, brokers generally do not owe a fiduciary duty to clients. *Id*.; *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1338-39 (11th Cir. 2010)(holding that the terms of the parties' account agreement control and that BOA could not be held liable where the agreement disclaimed liability for acting on the customer's or his agent's instructions). CFS was an introducing broker dealer and, by the express terms of the contracts entered into with Plaintiffs, identified a third party financial institution for custodial functions. A broker does not have a general fiduciary duty to his clients, but rather takes on that duty when soliciting investments and taking discretionary authority in accounts. The custodial functions of a broker dealer are instead governed by contract. In this case, CFS had no contractual duty and Plaintiffs' testimony at the arbitration hearing provided that they entrusted their funds and securities to Sean Kelly and Lionshare. Similar to the North Dakota choice of law provision, the contract is clear and unambiguous that CFS would not serve as a custodian for Plaintiffs. Absent some contractual, fiduciary, or other duty to provide that service, Defendants cannot be held liable for the loss. The arbitration panel was not

permitted to create a fiduciary duty where none existed under the parties' agreements because the panel's function was to enforce the contracts in accordance with their terms.

Defendants further could not possibly have been negligent in safekeeping Plaintiffs' funds or securities because they did not have custody and therefore, any duty to guard those. See *Karitanyi v. Seterus Inc*., No. 1:17-CV-03432-TWT-JFK, 2018 U.S. Dist. LEXIS 65333, at *17-18 (N.D. Ga. Feb. 5, 2018)(the essential elements of a negligence claim are the existence of a legal duty, breach of that duty, a causal connection between the defendant's conduct and the plaintiff's injury, and damages) and *Boller v. Robert W. Woodruff Arts Ctr., Inc*., 311 Ga.App. 693, 695-96 (2011). The analysis is even easier with respect to CFH and Messrs. Dihle and Bohrer because they were neither in contractual privity with Plaintiffs nor had any supervisory duty over Sean Kelly. These Defendants are not parties to the Customer Account Agreements. CFH was simply a parent, holding company of CFS. Mr. Dihle served as a director of the holding company and, beginning on May 22, 2017, as the holding company's Interim Chief Executive Officer. Bart Bohrer, although a principal at CFS, was not Sean Kelly's supervisor and did not have the assigned duties to supervise Mr. Kelly's work. In summary, the arbitration panel had to have had some basis to impose a duty upon Defendants in order to hold them liable for negligence.

IV. Defendants did not Receive any Consideration for Advisory Services to Support a Claim under O.C.G.A. §10-5-58(f).

O.C.G.A. §10-5-58(f) provides for liability where (i) a person receives, directly or indirectly, any consideration for providing investment advice to another person and (ii) that person employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit.[4] Subparagraph (2) provides an exclusion to broker dealers who provide investment advice, but receive no special compensation. See *Dorosh v. Waddell & Reed, Inc*., No. 27-cv-11-24884, 2013 Minn. Dist. LEXIS 115, *22-25 (D. Minn. Sept. 20, 2013)(holding that plaintiff failed to state a claim under §502 of the uniform securities act where broker only received its regular, transaction-based compensation and not an advisory fee) and *Byrd v. Visalus, Inc*., No. 17-cv-12626, 2018 U.S. Dist. LEXIS 57826, at *35 (E.D. Mich. Apr. 5, 2018)(held that plaintiffs failed to state a claim because they did not allege that defendants received any consideration for providing investment advice).[5]

[4] In 2008, Georgia replaced its existing blue sky laws with the 2002 version of the Uniform Securities Act. *Curry v. TD Ameritrade, Inc*., 662 F. App'x 769, 772-73.

[5] Both Minnesota and Michigan adopted the Uniform Securities Act (2002).

The undisputed evidence and testimony is that Sean Kelly was never registered as an investment advisor with CFS and Plaintiffs never paid for or received investment advice from him. Instead, Sean Kelly marketed various banking, insurance, and securities products to Plaintiffs, requested that Plaintiffs deposit their funds into Lionshare, and then stole from them. Most of the Plaintiffs could not even identify what Capital Financial Services was or its role in the controversy. The award under Count II must be vacated because, as plead, it requires the provision of investment advice.

During the course of the hearing, the arbitration panel was informed and recognized that Count II was deficient as plead. Despite this deficiency, the panel proceeded to award based on some other, unspecified provision of the Georgia Uniform Securities Act that could apply to broker dealers. The problem is that 9 U.S.C. §11(b) prohibits entry of an award on matters not submitted. Count II was plead as a violation of the investment advisors provisions of the Uniform Securities Act. Defendants refuted the allegations with Plaintiffs' own testimony. Sean Kelly was never registered as an investment advisor and Plaintiffs did not receive advisory services from him.

V. A Parent Company and its Management are not Liable for the Acts of a Subsidiary.

It is a general principle of corporate law, deeply ingrained in our economic and legal systems, that a parent corporation is not liable for the acts of its subsidiary. *Pippen v. Ga.-Pacific LLC,* No. 1:07-CV-1565, 2009 U.S. Dist. LEXIS 137587, at *8 (N.D. Ga. Jan. 8, 2009); citing *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) and *Vogt v. Greenmarine Holding, LLC*, No. 1:01-CV-0311, 2002 U.S. Dist. LEXIS 21013, at *25-26 (N.D. Ga. Feb. 20, 2002). The parent / subsidiary relationship does not, in and of itself, establish the subsidiary as an alter ego of the parent or establish the subsidiary as an apparent or actual agent. *Pippen v. Ga.-Pacific LLC* at 8. Subsidiaries and parent corporations are designed to be legally separate from one another and the corporate fiction should not be disregarded simply because of identity of corporate names, stockholders and officers, and ownership of capital stock by one corporation over another. *Id.*; See also *Lampkin v. UBS Painewebber, Inc.*, 238 F. Supp. 3d 799 (S.D. Tex. 2017)(denying disregard of corporate entities between UBS Securities, LLC, UBS Financial Services, Inc., and the parent company, UBS AG, in connection with sales of Enron securities where plaintiffs solely presented conclusory allegations). To prevail, a plaintiff must demonstrate that in all aspect of the business, the two corporations actually functioned as a single entity. *Id.* at 899.

Ownership in a broker dealer does not constitute "control" for purposes of control person liability under the securities laws. *Pictet Overseas Inc. v. Helvetia Tr.*, 2017 U.S. Dist. LEXIS 226256 at 18-19 (S.D. Fla. Apr. 14, 2017)(12.5% ownership interest listed on Form BD in parent company held not to constitute control of a broker dealer subsidiary). Holding executive positions with a parent company, sitting on its board of directors, and being an indirect majority owner of a broker dealer also do not constitute control for purposes of "control person" liability. *Sykes v. Escueta*, No. 10-3858 SC, 2010 U.S. Dist. LEXIS 131174 (N.D. Cal. Nov. 29, 2010)(noting that Sykes never held an officer position with the broker dealer subsidiary, GunAllen Financial, Inc., but did serve as the CEO, nonexecutive chairman, and on the board of directors of the parent company, GunAllen Holdings, Inc., and was also an indirect majority owner). An allegation of mere affiliation does not suggest or prove control such that a parent company or its management are liable for a subsidiary's actions. *Variable Annuity Life Ins. Co. v. Dull*, No. 09-80113, 2009 U.S. Dist. LEXIS 86555 at 12-13 (S.D. Fla. Sep. 21, 2009).

CFH and CFS are separate and distinct legal entities. CFS was a registered broker dealer and a FINRA member firm. CFH serves as the parent company of CFS in addition to various, other companies. Both CFH and CFS are or were subject to strict, public company auditing requirements and, in the case of CFS,

rigorous oversight and regulation by FINRA. They maintained separate books and records and separate offices. The entities were structured and continually reviewed for corporate separation. To overcome this presumption, Plaintiffs would have had to allege and prove that (i) CFH and CFS were alter egos and that the entities' legal distinction should be disregarded to prevent fraud or injustice or (ii) that CFH participated in the operations of CFS and these particular fraudulent transactions. However, Plaintiffs did not and could not possibly have made such a showing. This is because Plaintiffs' theory of liability is that CFS failed in its duty to supervise a rogue broker who engaged in an intentional tort (ie. theft). These thefts, and Mr. Kelly's actions, as noted by both the U.S. Attorney's Office and the SEC, were designed to evade detection and Kelly used such measures as depositing funds in entities controlled by him and fabricating account statements to steal investors' funds. CFH could not possibly have been involved in those transactions because, understandably, not even CFS was aware of the transactions' existence.

Established precedent ranging from the Northern District of Georgia up to and through the Supreme Court soundly rejects extension of liability to parent holding companies due to mere ownership. In entering an award against CFH and Mr. Dihle, the arbitration panel exceeded their authority in violation of 9 U.S.C. §10(a)(4). The award of joint and several liability is a reflection of the panel's own notions of economic justice. Recognizing that CFS, which has since wound

down its business operations as a broker dealer, would not be able to pay an award in full, the panel created their own public policy and effectively pierced the corporate veil of a parent holding company. There was no evidentiary basis to do so and the Statement of Claim does not even allege any alter ego or veil piercing theories. The panel was not permitted to simply disregard the law regarding corporate separation and the limited liability offered through the use of fictitious entities. 9 U.S.C. §11(b) further prohibited the panel from ruling upon matters not submitted to them.

VI. Bart Bohrer was not a Control Person because he did not have Supervisory Responsibility over Sean Kelly or the Corporate Policy which Resulted in the Primary Liability.

Control person provisions of federal and state securities laws impose derivative liability on those who control primary violators of those laws. *Curry v. TD Ameritrade, Inc*., 2015 U.S. Dist. LEXIS 191684, at 51-53; citing *Mizzaro v. Home Depot, Inc*., 544 F.3d 1230, 1237 (11th Cir. 2008). To state a claim, a plaintiff must allege: (1) a primary violation of the securities laws, (2) that defendants had the power to control the general business affairs of the primary violator, and (3) that defendants had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in primary

liability. *Curry v. TD Ameritrade, Inc*., 2015 U.S. Dist. LEXIS 191684 at *51-53;[6] citing *Mizzaro v. Home Depot, Inc*., 544 F.3d 1230, 1237. Control for purposes of the Georgia Uniform Securities Act is interpreted similar to the federal control person statute because the liability provisions are nearly identical. *Curry v. TD Ameritrade, Inc*., 662 F. App'x 769, 772 n.5 (affirming dismissal on appeal because the custodian did not control the investment advisor, the general business affairs of the advisor, or the specific policies resulting in the fraud and therefore, was not a control person).

Bart Bohrer was not a control person because he was not responsible for and did not directly or indirectly induce Sean Kelly's acts. The fraudulent acts occurred through Sean Kelly's outside business activity known as Lionshare. CFS was not even aware of the transactions' existence because Sean Kelly directed his clients to deposit funds in the Lionshare accounts and then created false statements to cover his scheme. Bart Bohrer is even one step further removed because he was not even Sean Kelly's supervisor and did not supervise the broker dealer's transactions during the relevant time. Mr. Bohrer just happened to be employed as

[6] Section 20(a) of the Exchange Act provides that "[e]very person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. 15 U.S.C. §78t.

one of many principals with CFS, a firm with over two hundred representatives, during the relevant time.

This is not a situation where the panel made an error, or even a serious error, but rather exceeded their powers by creating their own "strict liability" standard for every officer, director, and beneficial owner, direct or indirect. Mr. Bohrer is now a victim of the panel's irrational public policy decision and is the subject of a FINRA suspension proceeding. See Exhibit "13". This innocent man faces a permanent bar from associating with a FINRA member firm following twenty years in the business. He is being stripped of his livelihood over a matter that he had no personal involvement in and over a stockbroker that Mr. Bohrer had no duty to supervise.

VII. The Court should either Enter a Final Decision or Direct the Matter for Rehearing before FINRA.

9. U.S.C. §10(b) provides that if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators. See *Schatt v. Aventura Limousine & Transp. Serv.*, No. 10-22353-Civ-COOKE/TORRES, 2014 U.S. Dist. LEXIS 185970 (S.D. Fla. Apr. 8, 2014), *revs'd on other grounds*. However, where there is only one possible outcome, the Court may enter a final order. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 676-677 (2010).

Defendants submit that the claims, as pleaded, fail as a matter of law and that no arbitrator, properly acting within his or her powers, could possibly enter an award in favor of Plaintiffs. The Court should therefore vacate the arbitration award entirely and enter judgment in favor of Defendants. However, if the Court elects to vacate only portions of the award, a rehearing may be required because the panel did not issue a reasoned decision. This Court will accordingly have difficulty partially modifying or correcting the award or vacating only portions of it. For example, the panel awarded joint and several liability against Capital Financial Holdings and Messrs. Dihle and Bohrer, but did not specify whether that award was based upon control person liability or negligence (the breach of fiduciary duty and breach of contract claims were raised solely against CFS). While both legal theories are deficient as provided above, vacating only one claim will leave the Court speculating as to what the arbitrators' decision would have been. Similarly, it is unclear whether an award was entered against Capital Financial Services based upon breaches of fiduciary duties, breaches of contractual duties, negligence, or control person liability.

CONCLUSION

The present case presents one of those rare situations where an arbitration award should not stand. The arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter was not made. The arbitrators' decision reflects their own notions of economic justice and is a conscious disregard of the terms of the parties' agreements. The arbitrators further entered an award upon matters not submitted to them. The October 29, 2021 award should be vacated and a final order entered in favor of Defendants or this matter should be directed for rehearing before a new arbitration panel.

This 27th day of January, 2022.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENE-TEA BLOOM, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO.
	:	1:19-CV-04666-LMM
CAPITAL FINANCIAL	:	
SERVICES, INC., *et. al.*,	:	
	:	
Defendants.	:	
	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January, 2022, I electronically filed the within and foregoing with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notice of Electronic Filing.

/s/ Michael Stegawski
Michael Stegawski, Esq.

SERVICE LIST

Bloom, et. al. v. Capital Financial Services, Inc., et. al.,
Case No. 1:19-CV-04666-LMM
United States District Court, Northern District of Georgia

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CERTIFICATE OF COMPLIANCE – LR 7.1(D), NDGa.

I hereby certify that this brief has been prepared with one of the font and point selections approved by the court in LR 5.1.

/s/ Michael Stegawski
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