SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of LEON I. BEHAR,

Petitioner,

For an Order pursuant to Article 75 of the Civil Practice Law and Rules to vacate an arbitration award dated December 10, 2021

– against –

FINRA DISPUTE RESOLUTION SERVICES, INC., a wholly owned subsidiary of the Financial Industry Regulation Authority ("FINRA") [1], FINRA Regulation, Inc., and E-TRADE SECURITIES LLC ("E*Trade"),

Respondents.

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Index No. _____/2022

Date filed: February 4, 2022

VERIFIED PETITION TO VACATE ARBITRATION AWARD PURSUANT TO CPLR 7511

Petitioner Leon I. Behar ("Petitioner") by his attorneys, Miller Law Offices, PLLC, and Leon I. Behar, P.C, as co-counsel, as and for his Verified Petition, alleges as follows:

RELIEF REQUESTED

1. This is a special proceeding commenced pursuant to Civil Practice Law and Rules ("CPLR") 7511.

2. Petitioner seeks an Order vacating the entirety of the FINRA Dispute Resolution Services, Inc. ("FINRA")[1] arbitration award dated December 10, 2021 (the "Award"), for the reasons set forth herein, including *inter alia*, on the basis that the Award is unexplained, unreasoned, completely irrational and manifestly unjust. See Exhibit "B."

[1] FINRA Dispute Resolution Services, Inc.'s authorization to conduct business in New York was terminated on January 28, 2016. According to the Secretary of State of the State of New York, this corporation has been terminated, and thus not authorized to conduct business in New York. See Exhibit "A."

3. This special proceeding is properly commenced by Notice of Petition to bring before this Court this application arising out of the arbitration between the parties, which is not the subject of any pending action. CPLR 402, 7502(a).

PARTIES

4. At all times hereinafter mentioned, Petitioner is a resident 505 Stuart Drive, Woodmere, New York, 11598, which is located in Nassau County, NY.

5. Upon information and belief, FINRA Dispute Resolution Services, Inc. ("FINRA") is a wholly owned subsidiary of the Financial Industry Regulation Authority, with offices located at Brookfield Place, 200 Liberty St, 11th Floor, New York, NY 10281.

6. Upon information and belief, FINRA's authorization to conduct business in New York was terminated on January 28, 2016.

7. Thus, according to the records of Secretary of State of the State of New York, FINRA is not authorized to conduct business in New York.

8. Upon information and belief, FINRA Regulation, Inc. is a related entity that did not issue the decision of the arbitrators. See Exhibit "B."

9. The Financial Industry Regulation Authority is a self-regulatory organization that is registered with and subject to oversight by the United States Securities and Exchange Commission ("SEC") as a national securities association, and has regulatory power delegated by Congress and through the SEC pursuant to the Securities Exchange Act 1934, 15 U.S.C sec. 78(a) et. seq. ("the Exchange Act") over its member firms that are registered pursuant to section 15 of the Exchange Act.

10. Upon information and belief, E-Trade Securities LLC, is a wholly owned corporation of E*Trade Financial Corporation authorized to do business in New York and located at 200 Hudson Street, Jersey City, NJ 07311.

11. Upon information and belief, Howard J. Stiefel is an arbitrator and member of the bar of the State of New York, who was the presiding chairperson in the FINRA arbitration at issue, bearing number 2101080 (the "Arbitration").

12. Upon information and belief, Terrance J. Nolan is a member of the bar of the State of New York and was an arbitrator in the Arbitration.

13. Upon information and belief, Rajeev Suresh Shah was an arbitrator in the Arbitration. Stiefel, Nolan, and Shah may be referred to individually as "Arbitrator or collectively as "Arbitrators".

14. The Award was decided by the "majority-public panel" and was affirmed by the three Arbitrators pursuant to Article 7507 of the Civil Practice Law and Rules. See Exhibit "B." The Award further states that "any party wishing to challenge the award must make a motion to vacate the award in federal or state court of the appropriate jurisdiction pursuant to the Federal Arbitration Act 9 U.S.C. section 10 or applicable state statute."

15. Upon information and belief, Arbitrator Suresh Shah voted against the decision dismissing the claim. See Exhibit "B."

VENUE AND JURISDICTION

16. Pursuant to CPLR 503 and 7502(i), this Court has jurisdiction of this special proceeding under CPLR 7502 and 7511(3)(d).

17. Venue is proper in New York County because FINRA maintains a place of business in New York County, and the arbitration was held by virtual conference.

18. E*Trade is authorized to do business in New York County.

TIMELINESS OF THIS PROCEEDING

19. The Award is dated December 10, 2021 and therefore this Petition is timely brought within 90 days of that date. CPLR 7511(a). See Exhibit "B."

BACKGROUND FACTS

20. Petitioner began his investment trading activities when he opened an account with BrownCo in April of 2003. In May, 2006 E*Trade acquired certain open and active customer accounts from BrownCo.

21. On October 22, 2018, Petitioner opened the E*Trade account at issue pursuant to a "Portfolio Margin Brokerage Account Application, General Margin Provision, Disclosures and Agreements; Portfolio Marginal Risk Disclosure Statement and Customer Acknowledgement" dated October 22, 2018 (the "Agreement"). See Exhibit "C."

22. Pursuant to the Agreement, in the event of any margin deficiency E*Trade must give the customer to the end of the first business day or the beginning of the following day to bring the account out of deficiency status:

> A margin deficiency in the portfolio margin account, regardless of whether due to new commitments or the effect or the effect of adverse market movements on existing positions, must be met within one business day. While the account is in a portfolio deficiency, customers will be prohibited from entering any new orders, with the exception of orders that reduce the margin requirement. *Failure to meet a portfolio margin deficiency before the end of the first business day or the beginning of the following the date of the issuance will result in the prompt liquidation of positions by the end of that business day or the beginning of the following business day, to the extent necessary to eliminate the margin deficiency*.

Agreement, par. 6 (emphasis added).

The Events of March 8, 2021

23. At no point during the day of March 8, 2021, between the opening of the market at 9:30 a.m. and 3:55 p.m. did Petitioner receive any notification that his account was deficient in any way.

24. On March 8, 2021, Petitioner received an email at 3:55 p.m. for a "house maintenance call" for $22,897.98, due just five minutes later at 4:00 p.m. See Exhibit "D."

25. Petitioner immediately transferred E*Trade $11,000.00 by ACH wire at 3:56 p.m, the maximum ACH transaction possible with such short notice. The remaining balance of $11,897.98 would be sent the next day. See Exhibit "E."

26. However, at 3:57 p.m. on the same day, and before the end of the first business day, E*Trade (i) sold all of Petitioner's 24,000 shares of Apple (AAPL) stock at $116.50, which was the lowest price of the day; (ii) sold 280 puts of AAPL March 19 at $125, which was protecting his shares; and (iii) sold 100 calls of AAPL 01/22 $160 strike price. See Exhibit "F."

27. These transactions caused Petitioner a loss of $292,030.74, not including the equity in the AAPL stock, which was purchased at an average basis of $136.41. The equity was $982,178.38.

28. The following day, March 9, 2021, Petitioner wired an additional $35,000 to E*Trade. See Exhibit "G."

29. AAPL opened up three dollars higher on March 9, 2021 at 9:30 a.m., which meant that the house maintenance call that was issued would become a nullity.

30. The next day, on March 10, 2021, Petitioner wired to E*Trade an additional $15,000, even though it was not required. See Exhibit "H."

31. On April 23, 2021, Petitioner submitted a claim against E*Trade to FINRA. This claim was subsequently amended by a "First Amended Statement of Claim" filed on July 11, 2021, (see Exhibit "I") and further amended by a "Second Amended Statement of Claim" filed on October 22, 2021 (see Exhibit "J").

32. Petitioner signed a Submission Agreement on October 23, 2021. See Exhibit "K."

33. E*Trade filed a Statement of Answer of June 16, 2021 and signed the Submission Agreement on June 16, 2021. See Exhibit "L."

34. Pursuant to FINRA rules, both Petitioner and E*Trade were given a list of potential arbitrators and were required to select each of their priorities of arbitrators.

35. Pursuant to internal FINRA algorithms FINRA selected the Arbitrators.

36. Petitioner was led to believe, based upon the individual curriculum vitae of the Arbitrators, that the Arbitrators were competent and experienced in FINRA arbitration claims.

37. Petitioner had no reason to object or seek to disqualify for cause any of the individual Arbitrators.

38. However, despite the curriculum vitae of the individual Arbitrators, the Arbitrators were lacked knowledge of the application law, including New York contract law.

39. Throughout the hearing, Mr. Stiefel favored Respondent E*Trade by overruling many objections by Petitioner.

40. Throughout the hearing, neither Mr. Nolan nor Mr. Shah asked even just one question, but sat through the entire two-day hearing in complete silence.

41. Since this was a Microsoft Teams video trial, Petitioner had no way of knowing whether or not in fact Mr. Nolan and Mr. Shah were even listening to the testimony.

42. By way of example and by no means intending to be complete, the Arbitrators' incompetence and lack of knowledge of relevant New York law was evident by their decision dated November 16, 2021, ordering Petitioner to release his 2018, 2019, and 2020 tax returns. See Exhibit "O." See, also, letter dated September 10, 2021,wherein E*Trade requested Petitioner's tax returns, Exhibit "M", and letter dated October 18, 2021, wherein Petitioner objected to said request as privileged, confidential, and totally irrelevant to the claims asserted by Petitioner. See Exhibit "N." *See also Latture v. Smith* 304 A.D.2d 534 (N.Y. App. Div. 2003).

43. By Order dated November 16, 2021, Mr. Stiefel ordered Petitioner to release his 2018, 2019, and 2020 tax returns.

44. By letter motion request for reargument dated November 22, 2021, Petitioner moved for reconsideration and reargument. See Exhibit "P."

45. Despite overwhelming logical arguments legal precedents, the Chairperson denied the reconsideration and ordered Petitioner to release his tax returns, subject to a confidentiality stipulation.

46. That they were irrelevant (and at best fishing expedition) is best established by the fact that E*Trade did not bother to use them or cross-examine Petitioner at the hearing.

47. On November 30 and December 1, 2021, Petitioner presented overwhelming evidence that the Agreement clearly provided E*Trade customers with until at least the end of the first business day or the beginning of the following the date of the issuance to meet any margin call and that, on at least thirty-four (34) other occasions on which E*Trade sent Petitioner a margin call, some of which was for much more money than the subject margin call, E*Trade provided Petitioner with at least one full business day to send the required funds to E*Trade.

48. Despite the unambiguous contract and E*Trade's customary practice, on December 10, 2021, "FINRA Dispute Resolution"[2] issued a decision on behalf of the arbitrators, which dismissed Petitioner's claim in its entirety, without any explanation, causing Petitioner to lose over two million dollars. See Award, Exhibit "B."

49. By motion dated December 12, 2021, Petitioner requested an "explained decision" or a new trial *nunc pro tunc*, which was denied by letter dated December 14, 2021 by the Director of Dispute Resolution Services. See Exhibit "Q."

50. By letter December 21, 2021, Petitioner wrote a letter to Mr. Robert W. Cook, President, Mr. Robert L.D. Covey, Executive Vice President, and Ms. Jessica Hopper, Executive Vice President, requesting that the arbitrators be de-listed and never serve as arbitrators for FINRA ever again. See Exhibit "R."

51. On behalf of the board of FINRA, Mr. Christopher Cook (Associate Director of the Office of Ombudsman) informed Petitioner via email that "our staff will review the matter and take any action that we deem appropriate based on our finding. Such matters are confidential, thus will be unable to share our findings with you." See Exhibit "S."

52. As of the date hereof, Petitioner has not heard back from the ombudsman.

BASIS FOR RELIEF

53. Though the standards are exacting and the burden of proof on the Petitioner well beyond a mere preponderance, vacatur or modification have been granted in matters where justice and circumstance required such relief.

[2] FINRA Dispute Resolution Services, Inc.'s authorization to conduct business in New York was terminated on January 28, 2016. According to the Secretary of State of the State of New York, this corporation has been terminated, and thus not authorized to conduct business in New York. See Exhibit "A."

54. Petitioner respectfully submits this is precisely such an instance where vacatur is warranted.

The Award is Unenforceable Because FINRA Dispute Resolution, Inc. Is Not Authorized To Do Business In New York

55. Per the New York Secretary of State, FINRA Dispute Resolution, Inc. is an inactive and dissolved entity, and is thus not authorized to do business in New York.

56. Therefore, as explained fully below, the arbitration must be deemed null and void.

57. Firstly, FINRA Dispute Resolution, Inc. exceeded its corporate power when it made the Award.

58. Secondly, in the arbitration realm, which existence is predicated on the voluntary consent of the claimant, respondent **and** arbitrator(s), such a material misrepresentation and lack of authority must mean that the consent for arbitration was obtained by fraud and must therefore be vacated. See CPLR 7511(b)(1)(iii).

59. Thirdly, as a dissolved entity, FINRA Dispute Resolution, Inc. lacks legal existence for the purposes of bringing or enforcing a legal action. *When an entity has no legal existence* it cannot have standing. *Fund Liquidation Holdings LLC v. Bank of America Corporation*, 991 F.3d 370, 382 (2nd Cir. 2021).

60. The only exception to the foregoing is for dissolved corporate entities having some vestige of legal existence at the action's inception. Cases such as *Chicago Title & Trust Co. V. Forty-One Thirty-Six Wilcox Building Corp.*, held that the dissolved entity in question lacked capacity, but these cases also involved recently dissolved corporations winding up their business to settle ongoing affairs and accounts, a specific exception that grants continued legal existence for that purpose alone. 302 U.S. 120, 58 S.Ct. 125, 82 L.Ed. 147 (1937). Without this exception, a dissolved company lacks legal existence, and without it, standing to sue.

61. Here, FINRA Dispute Resolution, Inc. was dissolved in 2016, years prior to the events that gave rise to this action. As the winding up exception does not apply and FINRA Dispute Resolution, Inc. is a dissolved company without the legal existence necessary to bring or enforce legally binding actions, any decision brought under their name in the arbitration should be found void.

The New York CPLR Governs Determination Of This Application

62. The threshold determination for the Court to make is whether its review is to be conducted under the provisions of Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16; or, under the New York counterpart to same, CPLR §§ 7501-7516. Petitioner contends that the provisions of the CPLR govern this application.

63. The FAA deems valid and enforceable an arbitration clause in a contract evidencing a transaction involving commerce. 9 U.S.C. § 2. The Supreme Court has found that Congress meant to define "involving commerce" "as the functional equivalent of the more familiar term 'affecting commerce' — words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003). Thus, any contract "affecting" commerce that contains an arbitration clause must be reviewed under federal law.

64. The instant arbitration was born out of a contract in the form of the Agreement that governs the use of the E*Trade platform, and submitted to arbitration the Petitioner's claims of damages due to alleged breach of the Agreement by Respondent E*Trade. This matter involves essentially resolution of state law claims and do not "affect commerce" in the sense used in the FAA.

65. Accordingly, the CPLR and New York law governs this Petition.

The CPLR Provides That Arbitration Awards May Be Vacated

66. As noted above, Petitioner respecify contends that the court need not even reach a determination on whether CPLR 7511 applies because the arbitration itself was an *ultra vires* act of a defunct corporate entity and therefore of no force and effect.

67. In any event, even on the merits the court should grant the instant petition.

68. The CPLR provides the grounds on which a FINRA arbitration award may be vacated. Pursuant to CPLR 7511(b)(1)(iii), such an award may be vacated on the grounds "… where the arbitrator exceeded his authority in making the award or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made…"

69. New York's appellate courts have held that an arbitrator's award will not be vacated unless it is clearly violative of some strong public policy, is totally irrational, or manifestly exceeds a specifically enumerated limitation on the arbitrator's power. *See, Matter of Board of Educ. of Arlington Cent. School Dist. v. Arlington Teachers Assn*., 78 N.Y.2d 33, 37, 574 N.E.2d 1031 (1991).

70. An award is irrational if there is "no proof whatever to justify the award;" *Matter of Peckerman v. D & D Assocs*., 165 A.D.2d 289, 296, 567 N.Y.S.2d 416 (1st Dept. 1991); and, *Henneberry v. ING Capital Advisors, LLC*, 10 N.Y.3d 278, 284 (2008), rearg. denied, 10 N.Y.3d 892 (2008); or, "the award gave a completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties." *Matter of National Cash Register Co*., 8 N.Y.2d 377, 383, 208 N.Y.S.2d 951,171 N.E.2d 302 (1960); *Matra Bldg. Corp. v Kucker*, 2 A.D.3d 732, 734, 770 N.Y.S.2d 367 (2d Dep't 2003); *Matter of Rockland County BOCES v BOCES Staff Assn.*, 308 A.D.2d 452, 453, 764 N.Y.S.2d 118 (2d Dep't 2003).

71. As further noted by the Court of Appeals in *Rochester City School District v. Rochester Teachers Association*, 41 N.Y.2d 578, 394 N.Y.S.2d 179, 362 N.E.2d 977 (1977):

> "...Although the courts will not disturb an arbitrator's award because of his failure to interpret documents literally or in accordance with substantive principles of law or rules of evidence (internal citations omitted) his power to fashion a remedy is not unlimited. *If the arbitrator's award is 'completely irrational' it may be considered misconduct on his part or it may be said that he exceeded his power*. The relief which he fashions is circumscribed by the bounds of the relationship between the parties...." 41 N.Y.2d at 582

72. Arbitrators are not required to provide reasons for their awards. *See*, *United Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 598, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960).

73. However, where the arbitrators have failed to document the reasoning behind their decision, courts must consider the facts and the law to determine whether the allegedly disregarded law was clearly applicable and ignored. *See*, *Areca, Inc. v. Oppenheimer &Co*., 960 F. Supp. 52, 57 (S.D.N.Y. 1997) citing *Colonial Penn Ins. Co. v. American Centennial Ins. Co*., 1997 U.S. Dist. LEXIS 133, No. 96 Civ. 6051, 1997 WL 10004 (S.D.N.Y. 1997) aff'd, 133 F.3d 906 (2d Cir. 1997) and *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 112 (2d Cir. 1993). Further, an arbitrator must provide at least a barely colorable justification for the outcome reached. *Whitney v. Perroti*, 164 A.D.3d 1601, 1602-03 (App Div 4th Dept, 2018).

74. Under these constraints, Petitioner sets forth below that the Arbitrator's Award is completely irrational, as the Arbitrator (i) gave a completely irrational construction to the relevant parts of the Agreement, (ii) fails to offer even a barely colorable justification for the outcome reached, and (iii) the outcome results in a decision that clearly violates New York law and is against public policy, thus warranting vacatur.

ARGUMENT

New York Has A Strong Public Policy Favoring Enforcement Of Contracts As Written

75. There is a "fundamental and well established public policy" in the United States "that a contract be applied and enforced as written." *See, United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 46 (1987); *Saint Mary Home, Inc. v. Service Employees Int'l Union*, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997).

76. It is imperative that parties can be confident that, in general, the contracts that they enter into, particularly when "the parties set down their agreements in a clear, complete document" will "be enforced according to [their] terms". *159 MP Corp. v. Redbridge Bedford, LLC*, 33 N.Y.3d 353, 358 (2019) (citations and internal quotation marks omitted). This is consistent with the notion that "[i]n New York, agreements negotiated at arm's length by sophisticated, counseled parties are generally enforced according to their plain language pursuant to our strong public policy favoring freedom of contract." *159 MP Corp.*, 33 N.Y.3d at 356. Rules regarding the certainty of contracts have "special import in the context of real property transactions, where commercial certainty is a paramount concern…." *159 MP Corp.*, 33 N.Y.3d at 360 (citation omitted).

77. Despite the foregoing, the Arbitrator inexplicably and irrationally chose to ignore plain provisions of the Agreement which unquestionably requires E*Trade to provide Petitioner with at least until the end of the first business day or the beginning of the next before liquidating Petitioner's account. See Agreement, par. 6.

The Arbitrators Dismissed Petitioner's Claims Even Though E*Trade's Conduct Undoubtedly Constitutes A Breach Of Contract

78. The relevant provision in the Agreement is again reproduced below:

> A margin deficiency in the portfolio margin account, regardless of whether due to new commitments or the effect or the effect of adverse market movements on existing positions, must be met within one business day. While the account is in a portfolio deficiency, customers will be prohibited from entering any new orders, with the exception of orders that reduce the margin requirement. *Failure to meet a portfolio margin deficiency before the end of the first business day or the beginning of the following the date of the issuance will result in the prompt liquidation of positions by the end of that business day or the beginning of the following business day, to the extent necessary to eliminate the margin deficiency.*

Agreement, par. 6 (emphasis added), Exhibit "B."

79. Here, E*Trade liquidated Petitioner's positions at 3:57 p.m. on the same day of the margin call, which is well before the end of the first business day.

80. E*Trade's primary argument in arbitration was that it did not breach the Agreement because the Agreement permitted E*Trade to liquidate Petitioner's account at any time without prior notice of any sort. See Agreement.

81. E*Trade, however, ignores the critical fact that it had indeed provided notice of a margin call to Petitioner.

82. By providing notice of a margin call, E*Trade undertook a contractual obligation to permit Petitioner time, specifically until "the end of the first business day or beginning of the following date," to wire sufficient funds. See Agreement, par. 6.

83. E*Trade emphasized the provision of the Agreement that contemplate it taking action "without prior notice." ("E*Trade has no duty of notice and may liquidate the subject securities at its sole discretion.").

84. However, both E*Trade and the Arbitrator conveniently ignored altogether the provisions of the Agreement that control when E*Trade elects to make a margin call on its client, as actually took place here. The Agreement provides that when a margin call is actually made

E*Trade is to provide its client until "the end of the first business day or beginning of the following date" to meet the margin call. Under that clause, E*Trade was contractually bound to allow that specified amount of time to wire the funds.

85. The without-prior-notice provisions are not a preternatural contractual force that render the reasonable-period provision moot. The parties entered a contract for the buying and selling of securities and derivatives. Securities and derivatives markets can encounter periods of extreme volatility that may be accompanied by substantial gains or losses in a trader's account.

86. A broker like E*Trade may decide that it wants to be able to protect itself and the markets if things really go sideways (that is, horribly bad) in a customer's account. Hence, the provisions to liquidate "without prior notice." Brokerages, however, are not in the business of liquidating accounts without notice at the first sign of volatility, or they would not be in business for long. Thus, brokers must regularly exercise their professional judgment and discretion to decide whether to make a margin call on a customer.

87. E*Trade exercised a choice here by actually making a margin call rather than liquidating Petitioner's position without notice. Once E*Trade headed down that path, it could not simply ignore that decision. It was required to give Petitioner the one to two business days to wire the funds in response to the margin call as promised in the Agreement.

88. The Agreement plainly provides until the end of the first or beginning of the second business day for the customer to provide funds. To the extent that E*Trade claims that term is at odds with the liquidation provision, there is a patent contractual ambiguity of E*Trade's own making, which must be construed against it, as the drafter. "[I]n cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it, and favorably to a party who had no voice in the selection of its language." *Jacobson v. Sassower*, 66

NY2d 991, 993 (1985); *see also William A. White/Tishman East, Inc. v. Banko*, 171 AD2d 401, 402 (1st Dept) ("any ambiguit[y] in an agreement [is] to be interpreted 'most strongly against the draftsman' as long as the particular interpretation would not lead to an absurd result."), app. den. 78 NY2d 857 (1991).

89. If E*Trade wanted the unfettered right to liquidate its customers' accounts without allowing a reasonable period to provide funds, it could have said so in the contract it drafted and required customers to sign. It did not. Instead—likely because it realized no customer would sign on to a contract that granted E*Trade such a right—it drafted a contract that permitted a customer like Petitioner end of the first or beginning of the second business day to provide funds after a margin call. The one to two business days provision is unambiguous, but to the extent the liquidation provisions create a contractual ambiguity, E*Trade cannot now claim the benefit of that ambiguity.

90. On March 8, 2021, E*Trade disregarded the plain language of the Agreement when it failed to provide Petitioner until the end of the first or beginning of the second business day to meet the margin call, and any ambiguity created by the liquidation provisions must be construed against E*Trade, as the drafter of the Agreement.

91. Despite the foregoing, the Arbitrator inexplicably and irrationally dismissed Petitioner's claims.

The Arbitrator Dismissed Petitioner's Claims Even Though The Course Of Performance Supports Petitioner's Claims

92. Prior to March 8, 2021, E*Trade acted generally in accordance with its contractual obligations to carry out Petitioner's instructions for trades account and to allow for a reasonable period to satisfy margin calls. E*Trade knew or should have known that Petitioner to be an active trader that regularly had open positions allowing for risk depending on market

fluctuations. Taking such risk/reward positions meant that if a market swung strongly against Petitioner's position, its account could temporarily become "under margined," and in need of funds to cover any potential losses.

93. For over two years, E*Trade addressed such under-margined situations by requesting that Petitioner wire additional funds to E*Trade via a margin call notice. After making a margin call, E*Trade provided a reasonable amount of time for Petitioner to satisfy it, and Petitioner never failed to meet the calls.

94. Specifically, on at least thirty-four (34) prior instances of house maintenance calls, E*Trade gave Petitioner notice of the deficiency in his margin account, sometimes in amounts much greater than the margin call at issue here, and provided Petitioner with at least one (1) full business day to meet the call.

95. In short, the parties established a course of conduct consistent with paragraph 6 of the Agreement.

96. "Once a contract is formed, the parties may of course change their agreement by another agreement, by course of performance, or by conduct amounting to a waiver or estoppel." *CT Chems. [US.A.] v Vinmar Impex*, 81 NY2d 17 4, 179 (1993).

97. The parties' multi-year course of performance supports Petitioner's claims here. E*Trade invariably gave Petitioner sufficient time to fund a margin call during the period before the breach at issue in this case.

98. In no event did E*Trade simply liquidate Petitioner's position with no notice, and without cause, as it alleged it had the unconstrained right to do. That course of performance is clear interpretive evidence of the parties' intent as expressed in the Agreement. Moreover, it also

provides a basis for a modification of the Agreement to the extent that such a modification is necessary to support Petitioner's position.

99. Course of performance evidence is widely used to interpret ambiguous contracts—like the Agreement in this case—to explain the parties' true intent. *See e.g. China Privatization Fund (Del.), L.P. v. Galaxy Entertainment Group Ltd.*, 2020 NY Slip Op. 06010 (App. Div. 1st Dept., 2020).

100. That is true regardless of whether the contract contains a term providing that all modifications must be made in writing rather than orally or by conduct. *See*, *e.g.*, U.S. *Neurosurgical, Inc. v. City of Chicago*, 572 F.3d 325, 332 (7th Cir. 2009).

101. This Petition alleges ample evidence of a course of performance sufficient to explain or to modify the Agreement between the parties. Over a nearly three-year period, when Petitioner's account required additional margin (1) E*Trade would communicate the need for additional funds to Petitioner; (2) E*Trade would allow up to several days for the funds to be sent; and (3) Petitioner always satisfied the margin call within that period.

102. This established a course of conduct that led Petitioner to reasonably expect that E*Trade would permit sufficient time to satisfy a margin call once a call was made.

103. On March 8, 2021, E*Trade upended the parties' course of conduct, and in doing so breached the Agreement.

104. When Petitioner received E*Trade's margin call, Petitioner immediately began to wire funds to E*Trade. Due to the time and ACH limits, Petitioner planned, and sent, the remaining balance to E*Trade the following day, which was consistent with the parties' prior course of conduct.

105. In deviation from its prior conduct, E*Trade refused to allow a reasonable period to satisfy the margin call, and hastily liquidated Petitioner's positions just a ridiculous two minutes after making the margin call.

106. E*Trade's rash actions breached not only the express provisions of the Agreement, but also the parties' intentions and the implied modification to the Agreement that had been acquiesced to and affirmed by the parties based on their course of conduct for nearly three years.

107. Despite the foregoing, the Arbitrators inexplicably and irrationally dismissed all of Petitioner's claims.

E*Trade's Conduct Violates The Implicit Duty Of Good Faith And Fair Dealing

108. As a matter of black letter law, parties to a contract have an implicit duty of good faith and fair dealing. *See Whitestone Construction Corp. v. F.J. Sciame Construction Co.*, 194 A.D.3d 532 (App. Div. First Dept. 2021) and *Emmet & Co., v. Catholic Health East*, 49 Misc.3d 1058 (Sup. Ct. NY County 2015) (Which delineates the scope and utility of the implied duty of good faith and fair dealing.

109. Here, on March 8, 2021 at 3:55 p.m., E*Trade emailed Petitioner about the need to deposit additional funds in his margin account. Just two minutes later, at 3:57 p.m. E*Trade had already liquidated the subject securities even though it had knowledge that Petitioner already fulfilled half of the margin call requirements by depositing $11,000.00 into the account.

110. Additionally, parties to a contract have a duty not to prevent each other from fulfilling their duties under the contract. *See Greenspan v Amsterdam* 145 A.D.2d 535 (App. Div. 1988); see also NYPRAC-CONT § 17:10. E*Trade, by liquidating Petitioner's positions

prior to giving Petitioner a reasonable opportunity to meet the margin call, prevented Petitioner from fulfilling his duties under the Agreement.

111. Despite this behavior by E*Trade, which are clear breaches of its implied duties under New York law, the Arbitrator dismissed Petitioner's claims.

E*Trade's Conduct Constitutes Fraudulent Misrepresentation and also violates General Business Law Section 349

112. Furthermore, E*Trade fraudulently misrepresented its intention to give Petitioner sufficient time to act upon the notice given.

113. "To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the Defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the Plaintiff; that the Plaintiff reasonably relied on the misrepresentation; and that the Plaintiff suffered damage as a result of its reliance on the Defendant's misrepresentation." P.*T. Bank Central Asia v. ABN AMRO Bank N.V.* 301 A.D.2d 373 (App. Div. 1st Dept 2003).

114. Here, E*Trade made a material misrepresentation of fact as to its intent to give Petitioner sufficient time to act upon the notice given.

115. The conflicting paragraphs in the Agreement also constitute deceptive practices under the General Business Law sec. 349 as it is plainly obvious that its intent is to mislead customers such as Petitioner. The one-day notice provision in the margin agreement can reasonably mislead a customer such as Petitioner that their account cannot be immediately liquidated without notice.

116. More than being confusing, the contract appears to objectively incline reasonable customers such as Petitioner to read the contract as offering more services (e.g. one-day notice) than the Respondent E*Trade actually provides.

117. This is manifestly misleading and deceptive on its face. It is obvious that Petitioner, under General Business Law sec. 349 has sustained monetary injuries in excess of $2,000,000.00. This is not even considered by the Arbitrators in its unexplained decision dismissing the claim.

118. E*Trade's intent is material to the transaction as otherwise Petitioner's transfer of funds would be pointless. It is highly unlikely that E*Trade emailed Petitioner at 3:55 p.m. with the intent to give Petitioner sufficient time to act upon then notice, and then changed its mind two minutes later.

119. Thus, E*Trade's purpose in emailing Petitioner at 3:55 PM could only be to mislead Petitioner into sending the requested funds. If E*Trade had liquidated the securities without giving Petitioner notice not in accord with its prior behavior, it is highly unlikely that Petitioenr would have continued to send funds to E*Trade, and instead, would have terminated its relationship with E*Trade. As such E*Trade gave Petitioner notice as means to induce him into sending the funds.

120. Petitioner's reliance on E*Trade as to his intent to give sufficient time to act upon the notice was reasonable. E*Trade's prior behavior of giving notice and allowing sufficient time to deposit funds logically results in this conclusion. There were thirty-four (34) instances in the past where E*Trade had given Petitioner notice of a margin call, many of which requested larger sums, which put E*Trade at a greater risk, than the March 8, 2021 margin call.

121. In all those instances, E*Trade gave Petitioner sufficient time to fulfill the margin calls. As such Plaintiff was justified in relying on Defendant's implied intent to give it sufficient time to act upon the notice where the amount of money requested was less than that requested in past.

122. Petitioner suffered damages as a result of its reliance on E*Trade's misrepresentation of its intent to allow sufficient time to act upon the notice given.

The Arbitrator's Award Was Irrational In That It Yields A Result That Is Inequitable While Re-Writing The Parties' Agreement

123. As was heretofore noted, an Arbitrator is afforded a breathtaking degree of latitude in construing an agreement, and can even misconstrue one and still have his determinations sustained. Wide though an Arbitrator's latitude be, it has never been held to extend to being able to re-write contract law or find them inapplicable to a matter being arbitrated, and should not be permitted to do so in this matter.

124. The Arbitrator's decision to utterly disregard the law in determining the award can only be said to be completely irrational. *See Matter of National Cash Register Co.*, 8 N.Y.2d 377, 38 (1960), Matra Bldg. Corp. v Kucker, 2 A.D.3d 732, 734 (2d Dep't 2003); and *Matter of Rockland County BOCES v BOCES Staff Assn*., 308 A.D.2d 452, 453, 764 N.Y.S.2d 118 (2d Dep't 2003).

125. The foregoing establishes, without having required re-determination of any facts found in the arbitration, and without reference to the Arbitrator's possible motives or thought processes, that despite having found the existence of the very facts which required the application of New York contract law in the parties' Agreement, the Arbitrator indisputably failed to apply those laws to the determination.

126. By doing so, the Arbitrator improperly, irrationally, and inequitably caused Petitioner the loss of over $2,000,000.00, without authority to do so and with no explanation. Furthermore, by providing no explanation, the Arbitrator irrationally and inequitably subverted the ability of the Petitioner to challenge the ill effects of the Arbitrator's determination.

VACATUR AND RE-HEARING

127. Should this Court determine Petitioner has established a basis for *vacatur* of the Arbitrator's Award, there remains determinations of what follows.

128. If the Court were to determine that the Arbitrator manifestly disregarded the law in making his decision, it may vacate the award, either in whole or in part. *See, D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006).

129. To the extent the award is vacated, CPLR 7511(d) provides: "the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article." Based on the express language of the statute, remand for rehearing lies within the Court's discretion.

130. In *Sawtelle v. Waddell & Reed, Inc*., 21 A.D.3d 820 (1st Dep't 2005), the Appellate Division, First Department, vacated an arbitral award for a second time and remanded to a new arbitral panel, where the original award was vacated on the ground that it was in manifest disregard of the law and on remand, the arbitral panel made essentially the same finding, with the Court noting that the "arbitral prerogative does not permit a panel to ignore the ruling and obdurately issue an identical determination." 21 A.D.3d at 821.

131. On the basis of the foregoing, it would appear that this Court should find the Arbitrators had manifestly disregarded New York law and had exceeded his authority, by utterly ignoring black letter contract law and the rules of evidence, such determination renders the award null and void, and requires a new hearing be held, before a different panel of arbitrators, as the grounds on which vacatur was granted strongly suggest the former panel of arbitrators cannot be counted on to reach a proper determination.

CONCLUSION

132. Despite the exceedingly difficult showing required to vacate an arbitral award, and the infrequency with which it is actually granted, Petitioner respectfully submits, based on the detailed showing above, theirs is one of the few that warrant such relief be granted, particularly because of the contracts policy issues raised and absence of any possibility the Arbitrator misapprehended or misconstrued same in making the award.

133. Granting the requested relief will do justice to the adversely affected party, yet not open the floodgates to innumerable similar applications as the facts of this matter are constrained to a single, yet familiar notion, to wit, the laws of contracts and waiver are to be enforced, particularly when expressly invoked by parties in their agreements.

134. Petitioner has no adequate remedy at law.

135. No prior application for the relief requested in this special proceeding has been made in this or any other court.

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WHEREFORE, Petitioner respectfully requests that the Court grant the relief requested in the Verified Petition and issue an order vacating the Award, together with such other and further relief as may be just and proper.

Dated: New York, New York
February 4, 2022

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VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NASSAU)

LEON I. BEHAR, being duly sworn, deposes and says:

1. I am the Petitioner in the within Proceeding.

2. Deponent has read the Notice of Petition and Verified Petition and knows the contents thereof; and the same is true to Deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters, Deponent believes them to be true.

3. This Verification is made by Deponent because the essential facts in the pleadings are within the personal knowledge and/or belief of the Deponent.

LEON I. BEHAR

Sworn to before me this
4th day of February, 2022

Notary Public

Nicole Alexandra Ausubel
NOTARY PUBLIC. STATE OF NEW YORK
Registration No. 02AU6236609
Qualified in Nassau County
Commission Expires February 28, 2023

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of LEON I. BEHAR,

Petitioner,

For an Order pursuant to Article 75 of the Civil Practice Law and Rules to vacate an arbitration award dated December 10, 2021

– against –

FINRA DISPUTE RESOLUTION SERVICES, INC., a wholly owned subsidiary of the Financial Industry Regulation Authority ("FINRA"), FINRA Regulation, Inc., and E-TRADE SECURITIES LLC ("E*Trade"),

Respondents.

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Index No. _____/2022

Date of filing: February 4, 2022

NOTICE OF PETITION AND VERIFIED PETITION TO VACATE ARBITRATION AWARD PURSUANT TO CPLR 7511

NOTICE OF PETITION AND VERIFIED PETITION TO VACATE ARBITRATION AWARD PURSUANT TO CPLR 7511

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney duly admitted to the Courts of the State of New York, hereby certifies that, upon information and belief, and reasonable inquiry, the contentions stated in the annexed documents are not frivolous.

Dated: February 4, 2022

Leon I. Behar, Esq.

Jeffrey H. Miller, Esq.