

**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

EVAN K. HALPERIN REVOCABLE LIVING TRUST,	:	
	:	____ Civ. ____ (____)
Petitioner,	:	
	:	PETITION TO VACATE
vs.	:	ARBITRATION AWARD
	:	
CHARLES SCHWAB & CO., INC.	:	
Respondent	:	Oral Argument Requested

Petitioner, Evan K. Halperin Revocable Living Trust, by and through its attorneys, Schwartz & Blumenstein, respectfully moves this Honorable Court to vacate an arbitration award pursuant to statutory authority for the reasons that the panel of three (3) arbitrators (“**Panel**”) (i) excluded pertinent and material evidence, to the prejudice of Petitioner, and (ii) was partial to Schwab, to the prejudice of Petitioner.

I. PRELIMINARY STATEMENT

Petitioner, Evan K. Halperin Revocable Living Trust respectfully files this Petition pursuant to the Federal Arbitration Act (“**FAA**”), 9 U.S.C.A. §§ 1 et seq., to vacate the arbitration award dated August 30, 2021 (“**Award**”), attached hereto as Exhibit 1¹, decided for Respondent, Charles Schwab & Co., Inc.. A panel of arbitrators, governed by the rules of the Financial Industry Regulatory Authority (“**FINRA**”), issued the Award in *Evan K. Halperin Revocable Living Trust v. Charles Schwab & Co.*,

¹ All exhibits attached hereto are incorporated herein as though fully set forth, and are in text searchable format.

Inc., Case No. 19-03738 (“**Arbitration**”). FINRA does not require that its awards contain explanations unless both parties stipulate.²

II. THE PARTIES

1. Petitioner (“**Petitioner**” or “**Trust**”), Claimant in the Arbitration, is a revocable living trust formed under the laws of the State of New York with situs in Huntington, New York. Petitioner’s address is 4 Westwood Drive, Huntington, NY 11743. Evan K. Halperin is the settlor, trustee and beneficiary of the Trust. The Trust’s taxpayer identification number is Mr. Halperin’s social security number, xxx-xx-1948.

2. Respondent (“**Respondent**” or “**Schwab**”), respondent in the Arbitration, is a financial services firm, with an electronic trading platform, organized under the laws of California. At the time of the Arbitration, Schwab’s principal place of business and nerve center was, and upon information and belief, is, in San Francisco California, with address at 211 Main Street, San Francisco, CA 94105. Its federal employer identification number is xx-xxx7782.

III. JURISDICTION AND VENUE

The Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) as this is a civil action between a citizen of New York and a citizen California and the amount in controversy exceeds \$75,000, exclusive of interest and costs.³ Venue is proper in this federal district pursuant to 9 U.S.C.A. § 10 because the Award was made in Manhattan, New York City in the State of New York.

IV. THE FAA AUTHORIZES THE COURT TO VACATE THE AWARD

² Schwab would not stipulate, so the Award contains no factual findings, legal conclusions or reasons. FINRA Rule 12904(e) requires that an award include a summary of the issues. The Award does not even summarize the issues.

³ The FAA does not have a provision for jurisdiction.

The FAA⁴ is applicable to this Petition and authorizes the Court to vacate the Award on two grounds: (i) refusing to hear pertinent and material evidence; and (ii) evident partiality. Discovery procedures are applicable to Title 9 proceedings. *Andros Compania Maritima, S.A. Marc Rich & Co.*, 579 F. 2d 691, 702 (2nd Cir. 1978). Courts should order discovery and evidentiary hearings when there are disputed issues of fact. *National Cleaning Contractors v. Local 2B-321, Serv. Employees Int’l Union*, 833 F. Supp. 747 (S.D. N.Y. 1993). Therefore, if the facts in this case are disputed, the Court should order discovery and conduct an evidentiary hearing. The discovery proceedings, discussed below, establish the refusal to hear evidence and evident partiality.

First Authorization for Vacating the Award is Refusal to Hear Evidence

Section 10(a)(3) authorizes the Court to vacate an arbitration award when “the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy. . . .” *See Tempo Shain Corp. v. Bertek, Inc.*, 120 F. 3d 16, 20 (2d Cir. 1997); *Chevron Transport Corp. v. Astro Vencedor Companier, S.A.*, 300 F. Supp. 179, 181 (S.D. N.Y. 1969).

Second Authorization for Vacating the Award is Evident Partiality

Section 10(a)(2) authorizes the Court to vacate an arbitration award “where there was evident partiality or corruption in the arbitrators, or either of them” Evident partiality is found “when a reasonable person, considering all of the circumstances ‘would have to conclude that an arbitrator was partial to one side.’” *Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Benefits Funds*, 748 F. 2d 79, 84 (2d Cir. 1984). District courts are to consider the totality of circumstances and the petitioner

⁴ Hereinafter all references to Sections mean FAA sections.

need not prove actual bias. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150-51 (1968).

V. THE FACTS

3. Attached as Exhibit 2 is a true and correct copy of the Trust's Certification of Trust and Schwab One® Trust Account Application Agreement. Section 16 thereof provides, in relevant part, that arbitration will be conducted by, and according to, FINRA rules and regulations then in effect.

4. FINRA is a self-regulatory organization whose members are securities firms, operating in the United States, and pay dues. Schwab is a member of FINRA.

5. Petitioner filed a Statement of Claim on December 19, 2019, an Amended Statement of Claim on January 6, 2020, attached as Exhibit 3, and a Submission Agreement on January 6, 2020, attached as Exhibit 4. Petitioner alleged several causes of action, including breach of contract and the implied obligation of good faith and fair dealing.

6. Schwab filed its Statement of Answer on February 26, 2020 and a Submission Agreement on February 27, 2020, attached as Exhibit 5 and 6, respectively. Schwab's Statement of Answer contains general denials and affirmative defenses.

7. The case concerns interruptions the Trust experienced while trying to execute trades on Schwab's online trading platform known as "schwab.com" ("**Platform**"). The interruptions occurred after the Trust successfully logged into the Platform, causing the Trust to be logged off. Schwab's security systems, such as fraud detection systems, caused the interruptions.

8. On May 26, 2020, the Trust filed a Motion to Compel [Discovery] and Award Sanctions.⁵ On June 30, 2020, the Panel entered an Order, attached as Exhibit 7, requiring Schwab to provide outstanding discovery on or before July 30, 2020, but did not address Schwab's objections. The order, among other things, required compliance with mandatory FINRA Discovery List 1 and the Trust's Request for Production of Documents.

9. At a hearing concerning the May 26th motion, the Chair mischaracterized the Panel's authority to impose sanctions in discovery stating that FINRA does not allow motions for sanctions based on discovery disputes unless a discovery order has been violated. The Trust submitted a letter, attached as Exhibit 8, noting that this position is contrary to FINRA Rules ⁶12511 and 12212 and FINRA Discovery, Abuses & Sanctions Training & Exams, pp. 23-28.

10. On July 15, 2020, the Trust filed a letter as Claimant's Motion to Supplement and/or Clarify the June 30, 2020 Order ("**Motion to Clarify**"), attached as Exhibit 9. Rule 12508(a) requires the specific identification of documents to which the responding party objects and the reasons for the objections. Schwab repeatedly violated this rule and the Panel repeatedly refused to require Schwab to comply with the rule. There could be no doubt, based on Schwab's counsel's statements, that Schwab would not amend and restate its objections in responding to the June 30th order. In its Motion to Clarify, the Trust requested that the Panel supplement or clarify its order to require that Schwab amend and restate its objections that violated Rule 12508(a). The Trust stated that compliance with the rule is necessary and asked that the order be supplemented or clarified to require compliance.

⁵ In the interests of brevity, motions and related pleadings discussed herein do not include exhibits attached thereto.

⁶ Hereinafter "Rule" shall refer to FINRA rule.

11. On July 28, 2020, the Panel entered an order denying the Motion to Clarify, attached as Exhibit 10, which it mischaracterized as a motion to compel. The Panel admonished the Trust, stating that “Claimant’s Motion was frivolous and an abuse of the discovery process. Claimant can avoid sanctions by refraining from further frivolous and abusive practices. A *motion to compel* is without basis or justification when filed by a party before the date that the other party is required to produce documents and information.” (Emphasis supplied).

12. In a letter of October 18, 2020, attached as Exhibit 11, counsel for the Trust stated the Trust acted in good faith and the Motion to Clarify “was not, nor was it intended to be, a motion to compel. Claimant filed the Motion to Supplement [Clarify] solely as a retrospective matter, in good faith.”

13. Schwab produced some documents, purportedly in response to the June 30th order, and continued to withhold important evidence. Rather than comply with Rule 12508(a), Schwab merely identified where the Trust could find Schwab’s documents produced, thereby continuing its pattern of violating the rule.

14. On September 9, 2020, the Trust filed motions to (i) compel Schwab to produce documents required by mandatory FINRA Discovery Production List 1, (ii) compel Schwab to produce documents required by the Trust’s Request for Production of Documents, and (iii) sanction Schwab, attached as Exhibits 12, 13 and 14, respectively (collectively “**Motions**”).

15. The Panel entered an Order on December 22, 2020, attached as Exhibit 15, pertaining to the Motions, requiring Schwab to produce some, but less than all, requested documents. Schwab clearly violated the December 22 order and, in particular, continued to withhold documents, information,

reports and electronically stored information (“**ESI**”) from security systems that monitor and effect user sessions after login.

16. On March 12, 2021, the Trust filed a Motion to Enforce the Panel’s Order of December 22, 2020, attached as Exhibit 16. On April 21, 2021, the Panel denied the Trust’s request for oral argument and entered an Order, attached as Exhibit 17, denying the motion to enforce without explanation.

17. On May 7, 2021, Claimant filed a Motion for an Order of Production, attached as Exhibit 18, with a proposed order that would require Schwab to produce the custodians of record who must bring to the hearing vital evidence withheld. The Panel denied this motion in an Order dated June 24, 2021, attached as Exhibit 19, and instead required that Schwab provide a Declaration/Affirmation that “fraud parameter reports related to activity within a session do not exist.”

18. Schwab produced a Declaration/Affirmation that did not comply with the requirement of the June 24th order. On July 8, 2021, the Trust submitted a letter motion, attached as Exhibit 20, asking that the Panel determine on the first scheduled hearing day that Schwab did not comply with its order and requested that the Panel require Schwab to produce user session information. The Panel denied the Trust’s request for a hearing, announced that it would take the motion under advisement, and later announced during the arbitration hearing that it decided to deny the motion.

19. In many responses to the Trust’s motions to compel, Schwab stated that it produced relevant documents. The Trust objected to this response because Schwab did not state that it produced *all* relevant documents. The Panel refused to require Schwab to state *all*. The Panel’s refusals to order Schwab to produce relevant and material evidence and its refusals to sanction Schwab and enforce its

orders denied the Trust pertinent and material evidence, much of which was vital to the Trust's case, and prejudiced the Trust.

VI. LEGAL ARGUMENT

A. First Ground for Vacating Award: Refusal to Hear Evidence

Schwab withheld relevant and material documents, information and reports, including, but not limited to, ESI from security systems that monitor and effect user sessions after login, such as logoff information. User session information was vital to the Trust's ability to present its case. The Panel refused to grant the Trust's motions to compel in full and refused to grant the Trust's motions for sanctions and enforce its order. As a result, the Panel enabled Schwab's continual discovery abuses, upheld Schwab's withholding of material and relevant evidence, and thereby did not hear pertinent and material evidence, all to the Trust's prejudice. The Panel thereby denied Petitioner a full and fair opportunity to present its case.

B. Second Ground for Vacating the Award: Evident Partiality

The basis for the Panel's refusal to hear evidence also demonstrates the Panel was partial to Schwab. The Panel, enabled Schwab to continue its pattern of discovery abuses, upheld Schwab's withholding of material and relevant evidence, refused to hear material and relevant evidence, including evidence vital to the Trust's case, refused to sanction Schwab and enforce its orders, and enabled Schwab to produce only what Schwab wanted to produce. Moreover, the Panel mischaracterized the Trust's Motion to Clarify as a motion to compel and warned that the Panel would sanction the Trust for filing frivolous discovery motions. The Panel never warned Schwab that it would sanction Schwab.

VII. CONCLUSION

In conclusion, the Award should be vacated under 9 U.S.C. §§ 10(a)(3) and 10(a)(2).

WHEREFORE, Petitioner respectfully requests that this Court (i) set this Petition/Motion to Vacate the Award for oral argument; (ii) vacate the Award in its entirety; and (iii) grant all further and other relief, whether in law or in equity, to which Petitioner is justly entitled.

Respectfully submitted,

SCHWARTZ & BLUMENSTEIN

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Dated: _____