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CLERK OF COURT

IN THE CHANCERY COURT OF SHELBY COUNTY
STATE OF TENNESSEE

BENJAMIN F. EDWARDS & COMPANY; BENJAMIN F. EDWARDS, IV; BRIAN TODD ERWIN; TIMOTHY GARRY FITZGERALD; JEFFREY LYNN GREEN; MALCOLM ANDY PEELER, Petitioners, v. STEPHENS INC., Respondent.	)))))))))))))))	Case No. _____ Petitioners' Motion to Vacate Arbitration Award

PETITIONERS' MOTION TO VACATE ARBITRATION AWARD

Benjamin F. Edwards & Company, Inc. ("BFE"), Benjamin F. Edwards, IV ("Mr. Edwards"), Brian Todd Erwin ("Mr. Erwin"), Timothy Garry Fitzgerald ("Mr. Fitzgerald"), Jeffrey Lynn Green ("Mr. Green") and Malcolm Andy Peeler ("Mr. Peeler") (collectively, "Petitioners" and Messrs. Erwin, Fitzgerald, Green, and Peeler referred to as the "Financial Advisors") hereby move this Court to vacate the Arbitration Award ("Award") entered in the case styled, *Stephens Inc. v. Benjamin F. Edwards & Company, Inc., Benjamin F. Edwards, IV, Brian Todd Erwin, Timothy Garry Fitzgerald, Jeffrey Lynn Green and Malcolm Andy Peeler*, Financial Industry Regulatory Authority ("FINRA") Office of Dispute Resolution Number 17-02378, attached as **Exhibit 1**, and in support, state as follows:

1. On January 21, 2022, a two-person majority of an arbitration panel sitting in Memphis, Tennessee, over a vigorous Dissent, entered an Award of more than $18 million,

including $5 million in punitive damages against Petitioners. The Award shocks the conscience. The tenets of fundamental fairness demand judicial intervention as authorized by 9 U.S.C.A. Section 10 of the Federal Arbitration Act (the "FAA") and 29-5-302(b) of the Tennessee Uniform Arbitration Act.

2. The Dissent found in favor of Petitioners on all counts and methodically repudiated each substantive finding of the majority's decision. Arbitrator Linda Harris, made, among others, the following findings:

a. With respect to the "Raiding" claim, the witness testimonies and numerous hearing exhibits established there was no "single plan" between BFE and the individual Financial Advisors to join BFE in May 2016, nor was there any agreement in advance of their hiring to stagger their departures;

b. Messrs. Peeler and Erwin were at-will employees, who terminated their employment with Stephens Inc. ("Stephens") for personal reasons, as opposed to leaving as a result of any improper influence of BFE;

c. The "overwhelming proof" was that Messrs. Fitzgerald and Green, who were at-will employees, terminated their employment with Stephens as a result of Stephens's decision to change the way it charged customers for retirement account services, as opposed to leaving as a result of any improper influence by BFE;

d. Messrs. Erwin, Fitzgerald and Green did not breach their contracts with Stephens;

e. Mr. Peeler did not cause Messrs. Fitzgerald or Green to terminate their employment with Stephens;

f. Stephens did not provide document preservation notices to their employees until after the arbitration was filed; and, therefore, no adverse inference should have been drawn regarding the deletion of any text messages before the arbitration was filed;

g. Messrs. Peeler, Erwin, Fitzgerald, and Green did not breach their duties of loyalty to Stephens in connection with their discussions among them and activities relating to BFE's recruitment of them. Further, that Stephens conceded similar conduct by financial advisors in connection with its recruitment of those advisors from Wachovia in 2008 did not constitute a breach of duty of loyalty;

h. The client account designations made by Messrs. Fitzgerald and Green while at Stephens did not constitute a breach of duty of loyalty. Indeed, Ms. Harris found

it "incredible" that Stephens could make such an assertion when the individuals responsible for supervising those designations at Stephens raised no "red flags" for months. She also noted that the issue was only raised after Messrs. Fitzgerald and Green had left and Stephens decided to pursue litigation;

i. Stephens did not allege that either Mr. Peeler or Mr. Erwin solicited clients to follow them to BFE before they left Stephens, nor did Stephens introduce reliable proof that they did so;

j. Stephens did not rebut the evidence BFE proffered that BFE's use of a third-party outside service, same-day mailings and emails, telephone calls, and personal client visits helped the accounts expeditiously transfer from Stephens to BFE;

k. Stephens did not adduce sufficient, reliable, or credible evidence that Messrs. Fitzgerald or Green solicited clients to follow them to BFE before they left Stephens; and

l. Stephens did not adduce sufficient, reliable, or credible evidence that Messrs. Peeler, Erwin, Fitzgerald or Green took impermissible information or business assets from Stephens in connection with their move to BFE.

3. The underlying facts involve everyday decisions that persons make during their careers – changing jobs, as they are free to do. However, the Award ignores the tenets of fundamental fairness, the law, the facts, and the reality of operating in the "real world" in a free economy where persons should be free to change their employment. Notably, as Ms. Harris stated in her well-reasoned, 20-page Dissent: "[M]ost of Claimant's contentions were based upon unreliable evidence, speculation and conjecture…"

4. Petitioners institute this special statutory proceeding under the FAA and section 29-5-302(b) of the Tennessee Uniform Arbitration Act against Stephens and respectfully request that this Court vacate the Award in its entirety and order a rehearing before a new arbitration panel.

5. This Court of Equity has the authority to vacate an Award that is based on proceedings before an arbitration panel that failed to follow the law, created its own law, and refused to provide Petitioners with a fair and full opportunity to be heard.

6. In accordance with the Local Rules of the Shelby County Chancery Court, Petitioners will supplement this Petition and Motion to Vacate Arbitration Award ("Petition and Motion") with a Memorandum further addressing the arguments raised in this Petition and Motion as well as the record of the arbitration proceeding after Stephens enters its appearance and a briefing schedule has been entered.

I. INTRODUCTION

7. Fundamental fairness and established legal precedent require that the Award of nearly $11 million in compensatory damages, $5 million in punitive damages, and $2.2 million in litigation expenses be vacated for at least the following reasons:

a. The FINRA arbitration panel (the "Panel") exceeded its powers and demonstrated a manifest disregard of the law by finding Petitioners liable for "raiding" –which is not a legally viable cause of action – while at the same time finding against Stephens on its "unfair competition" claim. In essence, the Panel created a cause of action that does not exist and awarded damages on that basis. While the term "raiding" is sometimes used as a synonym for a type of unfair competition (which is a recognized common law claim), it is not an independent cause of action. The Panel's affirmative ruling on the raiding claim is, therefore, irreconcilable with its finding of no liability on the unfair competition claim. In addition, the Panel's raiding ruling erroneously relied on the "Rittenhouse Report," which is nothing more than a report from a law-firm-sponsored conference collating opinions on securities industry hiring practices from attorneys attending the conference.

b. The Panel exceeded its powers and demonstrated evident partiality and a manifest disregard of the law by drawing an adverse inference against Petitioners following its pre-hearing Order against Petitioners on Stephens's Motion for Sanctions. The Panel arrived at the false premise that Petitioners had an alleged duty to preserve evidence triggered by correspondence sent by Stephens, which the majority found constituted a threat of litigation. Yet, the uncontroverted evidence later presented demonstrated that Stephens did not itself believe this correspondence constituted a threat of litigation because Stephens made no effort to preserve evidence. In sum, the Panel concluded that Petitioners had a duty to preserve, while Stephens did not, which is the definition of evident partiality.

c. The Panel is guilty of misconduct, exceeded its powers, and demonstrated evident partiality by refusing to postpone the hearing so that Petitioners could present their case in-person, as Stephens was allowed to do, which materially prejudiced

Petitioners' rights to fully present their evidence and witnesses and confront those testifying against them in-person.

d. The Panel exceeded its powers and demonstrated evident partiality and a manifest disregard of the law by finding against individual Petitioners Peeler, Erwin, Fitzgerald, and Green for violating the Protocol for Broker Recruiting[1] when Stephens had not even pleaded – much less proved – such a claim against them.

e. The Panel exceeded its powers, demonstrated a manifest disregard of the law, and made a determination in violation of public policy in rendering findings that effectively result in an illegal restraint of trade in the following respects: (i) the Panel's findings discourage, and in certain instances, effectively eliminate the ability of an at-will employee to seek alternative employment, in violation of state and federal law; and (ii) the Panel's findings improperly limit, and in certain instances, effectively eliminate employees from engaging in protected speech with one another regarding alternative employment opportunities, or even discussion regarding the fact that a better employment alternative exists, in violation of state and federal law.

f. The Panel is guilty of misconduct and exceeded its powers in refusing to allow Petitioners certain discovery pertaining to Stephens's hiring of the individual Petitioners from Wachovia Securities in 2008. Incongruously, the Panel found Stephens acted in accordance with industry standards when it hired the financial advisors, including Messrs. Peeler, Green, and Fitzgerald from Wachovia, but denied Petitioners the opportunity to obtain discovery on that very issue.

g. The Panel exceeded its powers and demonstrated a manifest disregard of the law by awarding nearly $11 million in speculative lost profits. The award was wholly unsupported by applicable law and irrational in that in awarding nearly $11 million in lost profits the majority effectively assumed, without factual basis, that Stephens would be unable to hire any financial advisors in Jonesboro for nearly a decade or more.

h. The Panel exceeded its powers, demonstrated a manifest disregard of the law, and violated public policy by awarding punitive damages in the collective amount of $5 million ($2 million against BFE, $2 million against Mr. Edwards, and $1 million against Mr. Peeler). Where the Panel acknowledged there was no recognized industry standard regarding the non-existent cause of action for "raiding," an award of punitive damages for conduct that violates a non-existent boundary is not only unsupported by the law and wholly irrational, but also creates an effective restraint of trade that will have an extreme chilling effect on

[1] The Protocol for Broker Recruiting ("Broker Protocol") is a voluntary agreement among various financial institutions formed in 2004 to help the transition of individual financial advisors from one firm to another. If certain guidelines are followed, the individual financial advisor and the firm that he or she joins would not have any monetary or other liability to the individual's former employer. The goal of the Broker Protocol is to further the clients' choice and freedom to transfer their accounts when their financial advisor changes employment.

the ability of employees to seek alternative employment in violation of state and federal law.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. THE PARTIES

7. Petitioner BFE is a dually registered broker-dealer and registered investment adviser based in St. Louis, Missouri, and member firm of FINRA.

8. Respondent Stephens is a dually registered broker-dealer and registered investment adviser based in Little Rock, Arkansas, and member firm of FINRA.

B. THE INDIVIDUAL PETITIONERS

9. Petitioner Benjamin F. ("Tad") Edwards IV is a resident of Missouri. He is the Chairman, CEO, and President of BFE. Mr. Edwards is a registered representative and investment adviser representative who began his financial services career at A.G. Edwards & Sons, Inc. ("AGE," which was later succeeded by Wachovia Securities and Wells Fargo Advisors) in 1977.

10. Petitioner Andy Peeler ("Mr. Peeler") is a registered representative and investment adviser representative at BFE, who began his financial services career at AGE in 1981.

11. Petitioner Jeff Green ("Mr. Green") is a registered representative and investment adviser representative who began his career at AGE in 1987.

12. Due to their time together at AGE/Wachovia, Messrs. Green and Peeler have known each other for more than 30 years.

13. Petitioner Tim Fitzgerald ("Mr. Fitzgerald") is a registered representative and investment adviser representative at BFE, who began his career at AGE in 1999.

14. Mr. Fitzgerald has worked with Messrs. Peeler and Green for nearly 20 years.

15. Petitioner Brian Erwin ("Mr. Erwin") is a registered representative and investment adviser representative with BFE, who began his career in the securities industry in 1998 at Ameriprise Financial Services.

16. Messrs. Peeler, Erwin, Green, and Fitzgerald are also collectively referred to as the "Financial Advisors."

17. It is notable that Messrs. Edwards, Peeler, Green, and Fitzgerald began their financial services careers at AGE, which was a national broker-dealer founded in 1887. AGE opened its office in Jonesboro, Arkansas in 1961, the office where Messrs. Peeler, Green, and Fitzgerald later worked together. BFE is considered the cultural successor to AGE, both having been established by the Edwards family.

C. STEPHENS RECRUITED THE FINANCIAL ADVISORS TO JOIN STEPHENS IN 2008.

18. Stephens did not have a branch office in Jonesboro, Arkansas until 2008. Mr. Peeler, while employed by Wachovia, communicated with Stephens about potentially transitioning to Stephens. Stephens then proceeded with an aggressive strategy of recruiting Wachovia employees: Stephens met with numerous Wachovia advisors in groups, it deputized one of the Wachovia employees to serve as a conduit of information between Stephens and the Wachovia advisors, and it made simultaneous offers of employment to nine Wachovia employees. Stephens hired the nine Wachovia employees along with their assistants on the same day in 2008. In so doing, Stephens took more than 50% of the Wachovia branch's commission and fee revenue. Stephens later recruited Mr. Erwin to join its Jonesboro office in 2013.

D. THE ADVISORS' EMPLOYMENT AGREEMENTS MANDATED ARBITRATION BEFORE FINRA.

19. FINRA is a self-regulatory organization operating under the oversight of the U.S. Securities and Exchange Commission ("SEC") to govern the activities of registered broker-

dealer firms and registered representatives in the United States. It also administers the resolution of disputes among member firms (including BFE and Stephens) through arbitration. This information is available at FINRA's website at www.finra.org/#/ (FINRA works under the supervision of the SEC) and www.finra.org/arbitration-mediation (FINRA operates the largest securities dispute resolution forum in the United States).

20. As part of their employment with Stephens, each of the Financial Advisors entered into an Employment Agreement, which provided for arbitration of any claims between them before FINRA.

21. The agreements also contained a non-solicit provision pertaining to other employees of Stephens that is overly broad and unenforceable under Arkansas law.

E. SEPTEMBER 2016: PEELER AND ERWIN JOIN BFE

22. In 2014, Messrs. Peeler and Erwin were a Stephens-approved Team, through which they managed their services together. Around that time, Mr. Peeler began to explore an opportunity with BFE because he was increasingly dissatisfied with Stephens.

23. Mr. Erwin also became dissatisfied with Stephens because he believed that promises were broken and that he had been misled about Stephens's technology, platform, and operations.

24. Messrs. Peeler and Erwin decided to leave Stephens and joined BFE in early September 2016.

25. On September 9, 2016, Stephens sent three different letters to BFE's in-house counsel and Messrs. Peeler and Erwin.

26. The letters did not threaten litigation, but rather reserved Stephens's rights.

27. The letters also did not ask BFE or Messrs. Peeler or Erwin to preserve documents of any kind.

F. AUGUST 2017: GREEN AND FITZGERALD JOIN BFE

28. Both before and after Messrs. Peeler and Erwin left to join BFE, Messrs. Fitzgerald and Green made Stephens aware of various issues and concerns relating to their work environment and in particular, how certain corporate decisions would negatively affect their clients.

29. However, neither Mr. Fitzgerald nor Mr. Green had decided to leave Stephens when Messrs. Peeler and Erwin left BFE.

30. It was not until well into the next year that Messrs. Fitzgerald and Green decided to leave Stephens. They made the decision to leave because they disagreed with Stephens's response to the newly proposed Department of Labor ("DOL") rule, a response which they felt restricted their clients' choices, caused their clients to incur greater fees, and was simplistic and contrary to the position taken by many other firms. Messrs. Green and Fitzgerald did not leave because of any actions of Messrs. Peeler or Erwin.

31. Stephens did not change its position regarding its response to the DOL Rule, despite the concerns that Messrs. Fitzgerald and Green raised. In August 2017, nearly a year after Messrs. Peeler and Erwin joined BFE, Messrs. Fitzgerald and Green joined BFE.

32. BFE opened a separate, second office in Jonesboro to accommodate Messrs. Fitzgerald and Green.

G. THE DISPUTE

33. On September 1, 2017, Stephens filed a Statement of Claim with FINRA asserting a combination of claims, all relating to the allegation that BFE "raided" the Jonesboro office or otherwise acted improperly in hiring the Financial Advisors. The specific counts were: Corporate Raiding (Count I); Breach of Contract (Count II); Tortious Interference (Count III); Breach of Fiduciary Duty (Count IV); Inducement of Breach of Fiduciary Duty (Count V);

Business Slander and Libel (Count VI); Conspiracy (Count VII); Unfair Competition (Count VIII); Unjust Enrichment (Count IX); and Conversion and Misappropriation of Trade Secrets and Confidential Information (Count X).

34. In accordance with FINRA Rules, FINRA designated the hearing location as Memphis.

35. Neither party requested a different hearing location.

36. Petitioners filed a Counterclaim against Stephens for violation of the Broker Protocol on November 24, 2017.

H. THE PANEL DID NOT ALLOW PETITIONERS TO OBTAIN DISCOVERY REGARDING STEPHENS'S RECRUITMENT EFFORTS.

37. Stephens's own actions in hiring nine financial advisors from Wachovia in 2008 was relevant to the issue of the industry standard on hiring from competing firms. Petitioners served their first set of requests for production seeking information relating to Stephens's recruitment and hiring of those nine Financial Advisors. On March 9, 2018, Stephens served responses and refused to provide this information.

38. Petitioners filed a Motion to Compel on June 25, 2018 and specifically noted in their July 23, 2018 Reply in Support of that Motion that Stephens's recruiting practices (*e.g.*, hiring several employees from Wachovia on the same day in 2008) constituted a standard for the Panel to consider in assessing the facts of this case.

39. Petitioners filed a second Motion to Compel on August 27, 2018 regarding additional requests pertaining to Stephens's recruiting. Stephens clearly placed its practices at issue by alleging that Petitioners engaged in "raiding," "unfair competition," and misappropriation of "confidential information."

40. On August 31, 2018, the Panel denied Petitioners' first Motion to Compel regarding documents pertaining to Stephens's recruiting practices (Request Nos. 24, 28, 41, 42, and 78).

41. On October 22, 2018, the Panel also denied Petitioners' second Motion to Compel on the additional requests pertaining to Stephens's recruiting practices (Request Nos. 25, 44, 83, and 84).

42. Given these rulings, Petitioners were denied the opportunity to obtain this crucial discovery.

I. THE PANEL ISSUED AN ADVERSE INFERENCE AGAINST PETITIONERS FOR ALLEGED SPOLIATION EVEN THOUGH STEPHENS FAILED TO PRESERVE DOCUMENTS.

43. The Award draws an adverse inference against Petitioners relating to the discovery process and Petitioners' preservation of documents. As pointed out by the Dissent, this adverse inference was reached on the basis of a false premise that a duty to preserve had been triggered, when Stephens did not itself believe its correspondence constituted a threat of litigation and made no effort to preserve evidence. In addition, Stephens did not disclose until much later in the case that it had not taken steps to preserve documents.

44. On July 19, 2019, Stephens filed a Motion for Sanctions against Petitioners, arguing in essence that "[Petitioners] were legally required to preserve [documents] in 2016 and 2017" and had not preserved documents from 2016 and 2017 for the litigation. Importantly, Stephens did not disclose to the Panel or Petitioners that it had not taken steps to preserve documents.

45. Petitioners replied on July 29, 2019 and September 23, 2019. Petitioners explained to the Panel that the duty to preserve documents had not arisen. Stephens made no demand on Petitioners to preserve documents in its 2016 correspondence nor state that it

intended to file suit. Indeed, Stephens employed Messrs. Fitzgerald and Green for eleven months after Messrs. Peeler and Erwin left and did not instruct them to preserve documents, knowing that they were key employees with relevant information. Nor did Stephens instruct any other employee to preserve documents. Because of Stephens's failure to inform the Panel that it had not taken steps to preserve documents, the Panel was not aware of this crucial fact.

46. Nevertheless, on October 10, 2019, the Panel issued an order against Petitioners and found that a spoliation had occurred. The Panel issued the sanction of "infer[ring] that the destroyed material was relevant, admissible evidence and that the evidence was unfavorable to the parties involved in the destruction of said evidence."

47. As later revealed in the hearing, the Panel's decision to issue sanctions was based on a false premise. Despite claiming that Petitioners had a duty to preserve documents prior to the lawsuit, Petitioners obtained uncontroverted admissions from Stephens that Stephens failed to issue a written legal hold notice to preserve documents at any time – even after it filed the lawsuit.

48. Petitioners also informed the Panel that Stephens's own witness, Ashley Palermo, admitted during testimony that she was destroying relevant documents in the spring and summer of 2017.

J. THE ARBITRATORS DEMONSTRATED EVIDENT PARTIALITY AND BIAS AGAINST PETITIONERS BY DENYING PETITIONERS' REQUEST FOR A CONTINUANCE SO THAT PETITIONERS COULD PRESENT THEIR CASE IN PERSON.

49. The arbitration hearings were held in-person in Memphis from May 21, 2019 until January 2020. The arbitration hearings were then held on Zoom for the remainder of the time through November 2021. Stephens presented the overwhelming majority of its case in-person before the Panel.

50. FINRA postponed all in-person hearings beginning in March 2020 due to the global pandemic.

51. Later in 2020, FINRA directed that arbitrations could be conducted via Zoom and the parties were advised to proceed to hearing in November 2020 via Zoom. On September 16, 2020, Petitioners objected to proceeding with the November 2020 hearing dates via Zoom given the fundamental unfairness of Stephens being able to present its case in-person and Petitioners being relegated to Zoom.

52. On September 17, 2020, the Panel entered an Order that the hearing would proceed on November 9-13, 2020 via Zoom.

53. On November 4, 2020, Petitioners filed their Objection to Zoom Hearings. Petitioners submitted that in-person sessions began over a year earlier, in May 2019, and a total of 19 in-person days of hearing had already occurred. These days were spent exclusively on the witnesses Stephens called in its case in chief.

54. The refusal to postpone the hearing was extraordinary and fundamentally unfair to Petitioners because the Panel permitted Stephens to present nearly all of its evidence in-person, while it required Petitioners to present their entire case on Zoom. The Panel did not treat the parties equally, reflecting evident bias on the part of the Panel. The Panel continued to require Petitioners to present their case on Zoom even after FINRA began permitting in-person hearings in August 2021. Petitioners' case had not even begun and, accordingly, the inequity and prejudice of holding Zoom hearings fell primarily on Petitioners. Petitioners were denied the right to be present and examine the witnesses in-person, which is crucial to establish the witnesses' demeanor and truthfulness.

55. Despite Petitioners' objection, the Panel ordered that the February 2021 hearing dates proceed via Zoom. The Panel also ordered that the remaining hearing dates in March, May, June, and November 2021 – when Petitioners presented their entire case – were all to be held via Zoom.

56. Furthermore, FINRA issued a directive on or about August 2, 2021 that in-person hearings could commence. The Parties were prepared to attend in-person and accepted the opportunity to do so. However, the Chairman of the Panel ruled to the contrary and required that the hearing proceed via Zoom.

57. The hearing concluded on November 10, 2021.

K. THE ARBITRATION AWARD

58. On January 21, 2022, the Panel issued its split Award, which included a 10-page opinion of the two-person majority. The Award included a 20-page Dissent from Arbitrator Linda Harris.

59. The Majority awarded nearly $11 million in compensatory damages to Stephens and found BFE, Messrs. Edwards, Peeler, Erwin, Green, and Fitzgerald jointly and severally liable.

60. The Majority also awarded $5 million in punitive damages to Stephens and found BFE liable for $2 million, Mr. Edwards liable for $2 million, and Mr. Peeler liable for $1 million.

61. In addition, the Majority awarded $2.2 million in litigation expenses to Stephens and found all Petitioners jointly and severally liable.

III. JURISDICTION AND VENUE

62. The Tennessee Uniform Arbitration Act provides that the Chancery Court of Shelby County, Tennessee has jurisdiction to vacate the Award: "The making of an agreement

described in this section *providing for arbitration in this state* confers jurisdiction on the court to enforce the agreement under this part and to enter judgment on an award thereunder."[2] *See* Tenn. Code Ann. § 29-5-302(b) (emphasis added).

63. Because FINRA required that the arbitration be held in Memphis, to which no parties objected, this Court has jurisdiction to hear this Petition and Motion to Vacate. By way of background, the individual Financial Advisors' Employment Agreements are silent as to the state in which the arbitration should take place. However, those agreements require that all claims between Stephens and the individuals must be arbitrated in accordance with FINRA Rules.

64. The FINRA Code of Arbitration Procedure for Industry Disputes (the "Code") "applies to any dispute that is submitted to arbitration under the Code." It requires that "a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among members and associated persons." *See* FINRA Rule 13101(a) & 13200(a). Under FINRA Rules, "[w]hen a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, *the Code is incorporated by reference into the agreement*." *See* FINRA Rule 13101(b) (emphasis added).

65. Furthermore, each party signed a Uniform Submission Agreement, whereby they agreed to arbitrate in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure; and that if a hearing were necessary, it would be held at the location designated by FINRA or the arbitrators.

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[2] The FAA does not provide an independent basis for federal subject matter jurisdiction. *See Ford v. Hamilton Investments, Inc.*, 29 F.3d 255, 257 (6th Cir. 1994) ("It is well established…that § 10 of the Arbitration Act does not constitute a grant of subject matter jurisdiction."); *see also Hale v. Morgan Stanley*, 2020 WL 1233772, at *2-3 (S.D. Ohio, March 13, 2020) ("'The [FAA] is something of an anomaly in the field of federal-court jurisdiction….[I]t does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331…or otherwise.'").

66. Stephens, Mr. Edwards, and BFE are also subject to the FINRA Rules and must arbitrate these types of claims pursuant to the Code. *See* FINRA Rule 13101(a) & 13200(a). Mr. Edwards is an "associated person" with BFE and an associated person of FINRA. *See* FINRA Rule 13100(b). In addition, both Stephens and BFE are member firms of FINRA. *See* FINRA Rule 13100(q).

67. FINRA decides where hearings will be held, at the direction of the Director of FINRA Dispute Resolution Services. *See* FINRA Rule 13213(a)(1). In accordance with this Rule, FINRA sent a letter on September 11, 2017 designating the hearing location for this case as Memphis. No parties objected.

68. The parties arbitrated the matter in Memphis and the Panel issued the Award from Memphis. Accordingly, the Chancery Court of Shelby County, Tennessee has jurisdiction of this Petition and Motion to Vacate. In addition, venue is proper because the hearing was held in Shelby County, Tennessee. *See* Tenn. Code Ann. § 29-5-318.

IV. STANDARD OF REVIEW

A. THE FAA APPLIES

69. The FAA applies to this matter, as it applies to all state and federal cases in which the contract at issue requiring arbitration involves or affects interstate commerce. *See* 9 U.S.C.A. § 1 ("commerce", as herein defined, means commerce among the Several States…") "Securities transactions clearly involve interstate commerce." *See Harvey ex rel. Gladden v. Cumberland Trust and Investment Co.*, 532 S.W.3d 243, 265 at n.35 (Tenn. 2017)

(finding that the FAA applied to the pre-dispute arbitration agreement between the trustee of a trust and a broker because the transactions involved interstate commerce).

70. The underlying dispute here involved interstate commerce because the Financial Advisors were registered representatives and investment adviser representatives who conducted business and affected securities transactions for clients who live in various states.

71. The Employment Agreements for Messrs. Peeler, Fitzgerald, and Green specified that: "Employee further agrees to strictly adhere to the rules and regulations of the SEC, FINRA, NYSE, state securities regulators, and all other applicable rules and regulations."

72. Mr. Erwin's Employment Agreement also specified that he was to "strictly adhere to the rules and regulations" of the SEC, FINRA, NYSE, state securities regulators, and all other applicable rules and regulations.

B. ARKANSAS SUBSTANTIVE LAW APPLIES

73. Arkansas substantive law governs this dispute. *See Mid-South Maint. Inc. v. Paychex Inc.*, 2015 WL 4880855, *5 (Tenn. Ct. App., Aug. 14, 2015). In *Mid-South*, the Tennessee Court of Appeals held: "[E]ven in arbitrations governed by the FAA, 'parties may choose the arbitration law by which they intend to be governed…'" and "parties may choose, through a choice of law contractual provision, the law upon which the arbitration at issue will be conducted." *Id.*

74. The Employment Agreements for Messrs. Peeler, Fitzgerald, and Green contain Arkansas choice of law provisions: "This Agreement shall be governed by and construed in accordance with the provisions of the internal laws of the State of Arkansas, without giving effect to the conflict of law provisions thereof."

75. The Panel also applied Arkansas substantive law in its Award without objection from any of the parties.

C. VACATUR UNDER THE FAA

76. Under the FAA, the Court may vacate an arbitration award upon the application of any party to the arbitration:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(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."

See 9 U.S.C.A. § 10(a)(1) – (4).

77. In vacating the Award, the Court may also direct a rehearing by the arbitrators. *See* 9 U.S.C.A. § 10(b): "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 hearing by the arbitrators."

D. EXCEEDED POWERS AND MANIFEST DISREGARD OF THE LAW

78. Vacating an award is appropriate "where the arbitrators exceeded their powers." 9 U.S.C.A. § 10(a)(4). The arbitrator may "not 'dispense his own brand of industrial justice.'" *See Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (noting that the arbitrator was confined to interpretation and application of the agreement at

issue)). Arbitrators exceed their authority when they display a manifest disregard of the law. *Id.* (articulating the standard for determining when an award may be vacated under section 10(a)(4) of the FAA).

79. In interpreting Section 10 of the FAA, the United States Supreme Court has continued to recognize manifest disregard as a ground for vacating an award. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008) the Court held:

> Maybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the §10 grounds collectively, rather than adding to them….Or, as some courts have thought, 'manifest disregard' may have been shorthand for § 10 (a)(3) or § 10 (a)(4), the paragraphs authorizing vacatur when the arbitrators were 'guilty of misconduct' or 'exceeded their powers.'

80. In addition, the Sixth Circuit has since interpreted the United States Supreme Court's decision in *Hall Street* and concluded that the Court "may also vacate an award found to be in manifest disregard of the law."[3] *See Coffee Beanery Ltd. v. WW LLC*, 300 F. App'x 415, 418 (6th Cir. 2008) (ordering the arbitration award vacated because "the Arbitrator ignored undisputed evidence that it was misled about certain promotions and contracts, that [an officer of the company] made false representations about potential earnings, and that [an officer of the company] failed to disclose his prior felony conviction for grand larceny."). Further, the Sixth Circuit has specified the standard by which the moving party establishes that an award should be

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[3] While the Tennessee Court of Appeals declined to adopt manifest disregard of the law as a ground for vacating an arbitration award under the FAA, that decision was prior to the United States Supreme Court's 2008 decision in *Hall Street* in which the Court continued to recognize manifest disregard as a ground. *Compare Warbington Const., Inc. v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001) *with Hall Street Associates, L.L.C.*, 552 U.S. at 584.

In addition, while the Tennessee Court of Appeals also declined to adopt public policy as a ground for vacating an arbitration award in the same 2001 decision, the Sixth Circuit has since issued a 2010 decision that delineated the grounds upon which an arbitration award may be vacated for violation of public policy. *Compare Warbington Const., Inc.*, 66 S.W.3d at 859 *with Equitable Resources, Inc. v. United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union, AFL-CIO/CLC; Local 8-512*, 621 F.3d 538, 551 (6th Cir. 2010).

vacated for manifest disregard of the law. *Id.* The moving party must clearly define the applicable legal principle that he claims has been violated, show that the principle is not subject to reasonable debate and demonstrate that the arbitrators refused to heed that legal principle. *Id.*

81. The Sixth Circuit's decision in *Coffee Beanery* is consistent with other decisions that have since vacated arbitration awards when an arbitration panel demonstrates a manifest disregard of the law. *See Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 330 F.3d 843, 849 (6th Cir. 2003) ("it is in manifest disregard for the legal principle that an arbitration may not assert jurisdiction over non-parties to the arbitration"); *Henson v. Morgan Stanley DW, Inc.*, 2005 WL 1806426, at * (M.D. Tenn. 2005) ("The panel's finding of damages…is inexplicable and is not supported by the evidence in the arbitration record and the controlling law. The Court concludes the panel's award is arbitrary and capricious, it is in manifest disregard of the law because it 'flies in the face' of a clearly established state statute, and the award must be modified.").

E. PUBLIC POLICY

82. In addition, an award must be vacated when it violates public policy. To establish the Award is unenforceable, the moving party must show that the Award is "contrary to an explicit, well defined, and dominant public policy." *See Equitable Resources, Inc. v. United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union, AFL-CIO/CLC; Local 8-512*, 621 F.3d 538, 551 (6th Cir. 2010) (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983) (internal quotations omitted)). The Sixth Circuit has stated that it must "take the facts as found by the arbitrator" in determining whether the Award is in violation of public policy. *Id.* (citing *Int'l Union, UAW v. Dana Corp.*, 278 F.3d 548, 558 (6th Cir. 2002)).

F. DUE PROCESS RIGHTS

83. The Award must also be vacated when the arbitrators demonstrate evident partiality, engage in misconduct by refusing to postpone the hearing, and exceed their powers by violating a party's due process rights, which demonstrates a manifest disregard of the law. *See* 9 U.S.C.A. §10(a)(2) – (4). The Majority Award was rendered following an unfair procedure, which this Court has the authority to vacate.

84. Because the Panel compelled Petitioners to arbitrate via Zoom and did not grant a continuance, Petitioners did not have the opportunity to confront and cross-examine adverse witnesses in order to receive proper due process. *See Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (determining that due process rights may apply in a broad variety of contexts involving governmental action).

85. In addition, a civil proceeding must be fundamentally fair. *See Turner v. Rogers*, 131 S.Ct. 2507, 2517 (2011) (outlining the "specific dictates of due process" that the Court examines to determine what "specific safeguards" are required by the Constitution's Due Process Clause in civil proceedings). To determine whether a civil proceeding is fundamentally fair, the court may consider the nature of the private interest affected, the comparative risk that the interest will be deprived with or without additional procedural safeguards, and the nature and magnitude of any countervailing interest. *Id.* at 2517-18.

86. In this case, Petitioners were required to appear via Zoom for the entire presentation of their case. They were not granted a continuance, nor did the Panel permit an in-person hearing even after FINRA permitted them to do so. This evident partiality in favor of Stephens was apparent, especially where Stephens presented its entire case in-person, and when it was Petitioners' turn, the Chair ordered a remote hearing even after FINRA permitted in-person hearings.

V. ARGUMENT

87. As Petitioners will address in greater detail, the Tennessee Chancery Court must vacate the Panel's Award on the following grounds:

a. The Panel exceeded its powers and demonstrated a manifest disregard of the law by finding Petitioners liable for "raiding" – which is not a legally viable cause of action – while at the same time finding against Stephens on its "unfair competition" claim. In essence, the Panel created a cause of action that does not exist and awarded damages on that basis. While the term "raiding" is sometimes used as a synonym for a type of unfair competition (which is a recognized common law claim), it is not an independent cause of action. The Panel's affirmative ruling on the raiding claim is, therefore, irreconcilable with its finding of no liability on the unfair competition claim. In addition, the Panel's raiding ruling erroneously relied on the "Rittenhouse Report," which is nothing more than a report from a law-firm-sponsored conference collating opinions on securities industry hiring practices from attorneys attending the conference.

b. The Panel exceeded its powers and demonstrated evident partiality and a manifest disregard of the law by drawing an adverse inference against Petitioners following its pre-hearing Order against Petitioners on Stephens's Motion for Sanctions. The Panel arrived at the false premise that Petitioners had an alleged duty to preserve evidence triggered by correspondence sent by Stephens, which the majority found constituted a threat of litigation. Yet, the uncontroverted evidence later presented demonstrated that Stephens did not itself believe this correspondence constituted a threat of litigation because Stephens made no effort to preserve evidence. In sum, the Panel concluded that Petitioners had a duty to preserve, while Stephens did not, which is the definition of evident partiality.

c. The Panel is guilty of misconduct, exceeded its powers, and demonstrated evident partiality by refusing to postpone the hearing so that Petitioners could present their case in-person, as Stephens was allowed to do, which materially prejudiced Petitioners' rights to fully present their evidence and witnesses and confront those testifying against them in-person.

d. The Panel exceeded its powers and demonstrated evident partiality and a manifest disregard of the law by finding against individual Petitioners Peeler, Erwin, Fitzgerald, and Green for violating the Protocol for Broker Recruiting when Stephens had not even pleaded – much less proved – such a claim against them.

e. The Panel exceeded its powers, demonstrated a manifest disregard of the law, and made a determination in violation of public policy in rendering findings that effectively result in an illegal restraint of trade in the following respects: (i) the Panel's findings discourage, and in certain instances, effectively eliminate the ability of an at-will employee to seek alternative employment, in violation of state and federal law; and (ii) the Panel's findings improperly limit, and in certain

instances, effectively eliminate employees from engaging in protected speech with one another regarding alternative employment opportunities, or even discussion regarding the fact that a better employment alternative exists, in violation of state and federal law.

f. The Panel is guilty of misconduct and exceeded its powers in refusing to allow Petitioners certain discovery pertaining to Stephens's hiring of the individual Petitioners from Wachovia Securities in 2008. Incongruously, the Panel found Stephens acted in accordance with industry standards when it hired the financial advisors, including Messrs. Peeler, Green, and Fitzgerald from Wachovia, but denied Petitioners the opportunity to obtain discovery on that very issue.

g. The Panel exceeded its powers and demonstrated a manifest disregard of the law by awarding nearly $11 million in speculative lost profits. The award was wholly unsupported by applicable law and irrational in that in awarding nearly $11 million in lost profits the majority effectively assumed, without factual basis, that Stephens would be unable to hire any financial advisors in Jonesboro for nearly a decade or more.

h. The Panel exceeded its powers, demonstrated a manifest disregard of the law, and violated public policy by awarding punitive damages in the collective amount of $5 million ($2 million against BFE, $2 million against Mr. Edwards, and $1 million against Mr. Peeler). Where the Panel acknowledged there was no recognized industry standard regarding the non-existent cause of action for "raiding," an award of punitive damages for conduct that violates a non-existent boundary is not only unsupported by the law and wholly irrational, but also creates an effective restraint of trade that will have an extreme chilling effect on the ability of employees to seek alternative employment in violation of state and federal law.

VI. CONCLUSION

88. The powers of arbitrators are not limitless. An arbitral award is not entitled to a "rubber stamp" by a reviewing court. *See Int'l Union of Electronic, Electrical, Technical, Salaried, Machine and Furniture Workers v. Hurd Corp.*, 7 F. App'x 329, 333 (6th Cir. 2001) ("[C]ourts must not act as mere rubber stamps of approval on all arbitration awards."); *Federated Dep't Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) (the arbitrator may "not 'dispense his own brand of industrial justice'"); *Leed Architectural Prods., Inc. v. United Steelworkers of Am., Local 6674*, 916 F.2d 63, 64 (2d Cir. 1990) ("The deference owed to arbitration awards 'is not the equivalent of a grant of limitless power.'").

Wherefore, Petitioners respectfully ask this Court to grant their Petition and Motion to Vacate Arbitration Award, vacate the Award, and remand for a new hearing in front of a new panel of arbitrators.

Dated: February 18, 2022

Respectfully submitted,

BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ

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