Pershing LLC v Rochdale Sec., LLC
2016 NY Slip Op 31779(U)
September 23, 2016
Supreme Court, New York County
Docket Number: 651604/2016
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMM. DIV. PART 39
---X
PERSHING LLC,

Petitioner,

- against -

ROCHDALE SECURITIES, LLC,

Respondent.
---X

Index No. 651604/2016
DECISION & ORDER
(Motion Seq. 001 & 002)

SALIANN SCARPULLA, J.:

Petitioner Pershing LLC brings this special proceeding, pursuant to CPLR Article 75 and section 10 of the Federal Arbitration Act (FAA), 9 USCA § 1 *et seq.*, for a judgment vacating the arbitration award entered on February 23, 2016, in *Rochdale Securities, LLC v Pershing LLC v Daniel Joseph Crowley*, FINRA Case No. 14-01061. Pershing contends that the arbitrators exceeded and/or imperfectly executed their powers, engaged in manifest disregard of the law, and issued an irrational award. Respondent Rochdale Securities, LLC (Rochdale) cross-petitions to confirm the award.

In motion sequence number 002, Rochdale moves, pursuant to 22 NYCRR § 130-1.1 et seq., for an award of sanctions against Pershing in the form of reasonable attorneys' fees and costs incurred in connection with this proceeding.

BACKGROUND

This dispute stems from the following events: On Thursday, October 25, 2012, Apple Inc. quarterly earnings were scheduled to be released after the closing bell. A

former Rochdale trader, David Miller, implemented a scheme contrived by a trader employed by another firm, Quad Capital, LLC (Quad), to buy 1,625,000 shares of Apple stock. Miller was instructed to purchase 125,000 shares of Apple every half hour, beginning at 9:30 a.m., but if earnings disappointed, Quad's trader would claim he had only instructed Miller to purchase 125 shares every half hour. Shortly after the market closed, Miller approached Rochdale's operations department for assistance in calculating the average price for the trades, which, in total, exceeded 1.6 million shares and cost approximately $1 billion. Miller immediately left the office, without identifying the customer account to which the trade was to be allocated or explain anything about this substantial trade.

By the time Rochdale contacted Quad, Apple's earnings, which failed to meet expectations, were released, and Quad denied knowledge of all but 1,625 of the Apple shares.[1] The three executing brokers who received Rochdale's buy orders routed the trades to Pershing for clearance through the National Securities Clearing Corporation (NSCC). On the evening of October 25, 2012, Rochdale informed its account executive at Pershing that the Apple trades had occurred.

According to Pershing, pursuant to NSCC rules, as well as Pershing's contractual relationships with the executing brokers, Pershing was obligated to clear the trades, i.e., accept the positions into a Rochdale firm account and pay for the Apple shares in the

[1] Mr. Miller was charged both civilly and criminally for his actions. On November 19, 2013, Miller was sentenced to 30 months' imprisonment, followed by three years of supervised release.

event Rochdale was unable to do so. Rochdale, however, contends that Pershing had the option to reverse the trades back to the executing brokers, because: (i) it knew the trades were either the product of fraud or a massive error; (ii) Rochdale did not have anywhere close to $1 billion to pay for the Apple position; and (iii) the Chairman of Pershing's credit committee believed that the executing brokers had executed the trades in violation of SEC Rule 15c3-5, the "market access rule."[2] On the evening of October 25th, after Apple's earnings were reported, the price of its shares dropped. A decision was made by Pershing sometime between Thursday evening and Friday morning to clear the trades into Rochdale's account.

Before the market opened on October 26, 2012, the price of Apple had recovered, and Rochdale commenced selling its Apple position. The selling moved ahead until approximately 10:17 a.m., by which time Rochdale had sold 1,242,791 shares of the Apple position at a small profit. During the next hour, the stock price dropped approximately $9 per share. Rochdale contends that that the price drop was temporary and the result of a rumor on Wall Street regarding the fraudulent Apple trade. Rochdale wanted to continue its trading strategy of selling the shares at cost or above, but Pershing insisted that Rochdale immediately sell the remaining shares to limit its exposure. Rochdale completed the sales within the next hour, by 12:28 p.m., but a final loss of $5,314,967 was incurred. Rochdale contends that immediately thereafter, Apple's price

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[2] Pershing had set Rochdale's Rule 15c3-5 credit limit at $35 million (Romney affirmation, Ex. K: 9/17/15 Hearing Tr. at 131-132).

began to rebound, and by 2:30 p.m., the price had risen back to the point that Rochdale could have sold its remaining position without incurring any loss.

Rochdale alerted the Financial Industry Regulatory Authority (FINRA) that it had a net capital violation as a result of the liquidation, and FINRA issued a cease and desist order. Rochdale ceased operating as a broker-dealer on October 26, 2012.

Rochdale had certain assets in Pershing's custody which were applied against the $5,314,967 debit balance in Rochdale's account. Rochdale also had an illiquid fixed income portfolio of 65 securities (the FI portfolio), which Pershing sold on the morning of October 29th for $3.3 million while New York City was being besieged by Superstorm Sandy and the entire city was essentially shut down. One of the securities in the FI portfolio was called the "Foxtrot" security. The proceeds of the sale were applied against the debit balance, reducing Rochdale's debit to Pershing to $513,157.

Rochdale filed a FINRA arbitration claim against Pershing on April 3, 2014. In its Statement of Claim, Rochdale contended that "Pershing's panicked, illegal and self-serving reaction [to Miller's fraud] inflicted unnecessary and devastating harm that destroyed Rochdale's business" (Romney affirmation, Ex. B: Statement of Claim at 2). Rochdale asserted claims for conversion, breach of the parties' Fully Disclosed Clearing Agreement dated March 10, 2006 (the FDCA), breach of the covenant of good faith and fair dealing, and commercially unreasonable and reckless liquidation of the FI Portfolio. Rochdale sought an award of damages for the loss of its business as a going concern, the loss it incurred as a result of the liquidation of the Apple position and the loss it incurred as a result of the sale of the FI portfolio at an allegedly inferior price.

Pershing filed an Answer and Counterclaim on June 16, 2014. In its counterclaim, Pershing alleged that Rochdale breached the FDCA and sought to recover the remaining $513,157 debit balance. Pershing also sought to recover its attorneys' fees pursuant to section 18.2.1 of the FDCA, which provides:

> "Broker Indemnification. In addition to any other obligations it may possess under other provisions of this Agreement, Broker shall indemnify, defend, and hold harmless Pershing from and against all claims, demands, proceedings, suits, actions, liabilities, expenses, and reasonable attorney's fees, and costs in connection therewith arising out of any negligent, reckless, dishonest, fraudulent, or criminal act or omission on the part of Broker's officers or employees . . ."

(Petition, Ex. A: FDCA at 31).

Rochdale filed for bankruptcy protection on September 23, 2014. By order dated April 14, 2015, the United States Bankruptcy Court for the District of Connecticut issued a consensual order granting Pershing relief from the automatic stay to pursue its breach of contract counterclaim against Rochdale.

The arbitration hearing took place over 15 days between September and December 2015 before a panel of three arbitrators. At the hearing, Rochdale requested the following relief:

--damages on the Apple position in the amount of $5,314,966.53;

--damages on the sale of the FI portfolio in the amount of $1,132,466;

--damages on the Foxtrot security in the amount of $600,000;

--damages on the loss of Rochdale's business in the amount of $25,702,307; and

--9% pre-judgment interest accruing from October 2012.

[* 6]

Pershing requested dismissal of the Statement of Claim in its entirety. On its counterclaim, Pershing requested damages in the amount of $513,157.00, pre- and post-judgment interest at the rate of 9%, costs, expenses, attorneys' fees and forum fees.

The hearing concluded on December 15, 2015 with more than three hours of summation. At that time, counsel for Rochdale stated:

> "Pershing has taken the position that the cross indemnity provisions in the [FDCA] would entitle Pershing to attorney's fees if its counterclaims have been successful.
>
> Rochdale respectfully requests an award of reasonable attorney's fees, in an amount to be determined following additional proceedings after the Panel's award is rendered"

(Romney affirmation, Ex. B: 12/15/15 Hearing Tr. at 89). The chairperson requested that both parties submit, along with their post-hearing memoranda, an itemization of their claims and damages, including interest and attorney's fees, and clarified that the parties' request for attorneys' fees should be submitted in the form of an affidavit (*id.* at 174-175). Thereafter, the panel provided a list of six legal issues that they wished to have the parties brief. The following question was asked:

> "Did Pershing have the right to force a liquidation under the FDCA or under Reg T with respect to Apple or FI? Pay particular attention to Sections 13.4, 13.7, 17.0, and 20.2 of the FDCA"

(Romney affirmation, Ex. LL).

The parties each submitted their post-hearing memoranda on January 11, 2016. On January 29, 2016, the panel issued an order directing Pershing to submit an affidavit regarding its attorneys' fee request, and requested that both sides break down their attorneys' fee request to distinguish the time spent on prosecuting their respective claims

and defending against the other party's claims (Romney affirmation, Ex. MM). In response, Pershing's attorney submitted an affidavit in which he contended that Pershing had elected not to pursue an award of attorney's fees in its favor at the hearing, but was providing the breakdown requested by the panel for information purposes only (*see* Romney affirmation, Ex. T: Affidavit of Daniel R. Korb, Esq., ¶¶ 5, 13). Mr. Korb estimated that $113,719.32 in legal fees were incurred in prosecution of Pershing's affirmative claims against Rochdale (*id.*, ¶ 14).

Prior to the issuance of an award, Pershing had agreed to Rochdale's request that the panel break down any damage award in relation to each of the parties' claims in view of the bankruptcy proceeding, but stated that it "strongly object[ed] to a reasoned award" (Romney affirmation, Ex. RR). On February 23, 2016, the panel issued its award (Petition, Ex. L: Award). As is relevant to this proceeding, the award provides that Pershing must pay Rochdale compensatory damages:

> --on the Apple position in the amount of $2,030,527 plus 9% interest from October 26, 2012 (Award, ¶ 1);
>
> --on the FI portfolio in the amount of $1,132,466 plus 9% interest from October 29, 2012 (Award, ¶ 2);
>
> --on the Foxtrot position in the amount of $600,000 plus 9% interest from October 29, 2012 (Award, ¶ 3);
>
> --"on Claimant's business" in the amount of $2 million plus 9% interest from October 29, 2012.

(*id.* at 4). Pershing was also ordered to pay Rochdale's attorney's fees in the amount of $832,400. However, the arbitrators ruled in favor of Pershing on the counterclaim, finding that Rochdale was liable to Pershing for $513,157 plus 9% interest from October

30, 2012, and that Rochdale must pay Pershing's attorneys' fees in the amount of $113,719.32. Next to both awards of attorneys' fees, the award states: "All of the parties requested attorneys' fees" (*id.*). In sum the panel awarded more than $8.4 million to Rochdale and approximately $780,000 to Pershing, which translates to a net award in Rochdale's favor of approximately $7.6 million as of the date of the award.

Under FINRA's rules, Pershing had 30 days from receipt of the award, or until March 24, 2016, to make payment or move to vacate the award. On March 24, 2016, Rochdale's counsel received a wire from Pershing in an amount equal to the net amount due Rochdale under the award. On March 25, 2016, Pershing filed this proceeding seeking vacatur of the award. On April 1, 2016, Pershing filed a motion in the bankruptcy proceeding seeking an order requiring the debtor to segregate the award proceeds from its other assets and preclude Rochdale from using the same pending the outcome of the instant petition to vacate the award.

DISCUSSION

Pershing argues that the award must be vacated and the matter remanded for a new hearing before a new FINRA panel, because the panel allegedly acted in manifest disregard of governing legal principles and exceeded their powers by: (a) ignoring the provisions of the parties' FDCA; (b) issuing an award that is fundamentally irrational and lacks any support in the record; and (c) issuing an award that is grossly disproportionate, punitive, and in contravention of public policy.

First, Pershing contends that the award of $2 million in damages for the loss of Rochdale's business violated sections 17.0 and 17.1 of the FDCA, which state as follows:

> "17.0 DAMAGES
> As between the parties, neither party shall be liable for special, indirect, incidental, consequential or punitive damages, whether such damages for incurred or experienced as a result of entering into or relying on this Agreement or otherwise, even if the parties have been advised of the possibility of such damages.
>
> 17.1 Allocation of Risks. Broker acknowledges and agrees that the fees charged by Pershing reflect the allocation of risks including, but not limited to, any limitation of liability set forth in this Agreement. A modification of the allocation of risks set forth in this Agreement would affect the fees charged by Pershing, and in consideration of such fees, Broker agrees to such allocation of risks"

(Petition, Ex. A: FDCA at 18). Pershing argues that it charged a grand total of $697 in fees for clearing the Apple trade,[3] and that it would have charged a lot more money if it knew it could be liable to its customers for consequential damages. Second, Pershing contends that the arbitrators awarded $600,000 to Rochdale for the loss on the Foxtrot security without any evidence to support a finding that the Foxtrot security was worth anything other than zero as of October 29, 2012. Third, Pershing takes issue with the award of attorney's fees to Rochdale, contending that the fee award was not authorized by their agreement, by statute or FINRA rule.

"Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances'" (*Oxford Health Plans LLC v Sutter*, _ US __, 133 S Ct 2064, 2068 [2013], quoting *First Options of Chicago, Inc. v Kaplan*, 514 US 938, 942 [1995]). An arbitration award will be set aside on the basis of manifest disregard of the law "'only [in] those exceedingly rare instances where some egregious impropriety on the part of the

[3] Pershing also charged Rochdale $170,000 in interest for financing the Apple trade.

arbitrators is apparent'" (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d 308, 310 [1st Dept 2004], quoting *Duferco Intl. Steel Trading v T. Klaveness Shipping A/S*, 333 F3d 383, 389 [2d Cir 2003]). The court must find that "the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether," and "the law ignored by the arbitrators must be 'well defined, explicit, and clearly applicable'" to the case (*Folkways Music Publs., Inc. v Weiss*, 989 F2d 108, 112 [2d Cir 1993]). "The award should be enforced even if a court 'is convinced that the arbitration panel made the wrong call on the law,' as long as there is a barely colorable basis for the decision (*Matter of Roffler v Spear, Leeds & Kellogg*, 13 AD3d at 310, quoting *Wallace v Buttar*, 378 F3d 182, 190 [2d Cir 2004]; *see also Matter of Grace Fin. Group, LLC v Dino*, 138 AD3d 644, 645 [1st Dept 2016]; *Sawtelle v Waddell & Reed*, 304 AD2d 103, 108 [1st Dept 2003]). Moreover, where the parties' dispute is focused on the terms of a contract, "the sole question for [the court] is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong" (*Oxford Health Plans LLC*, 133 S Ct at 2068).

A party seeking to vacate an award on the basis that arbitrators exceeded their powers pursuant to section 10 (a) (4) of the FAA, "bears a heavy burden" (*Oxford Health Plans LLC*, 133 S Ct at 2068). The question of whether they exceeded their authority "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue" (*DiRussa v Dean Witter Reynolds Inc.*, 121 F3d 818, 824 [2d Cir

1997], *cert denied* 522 US 1049 [1998]; *see also Frankel v Sardis*, 76 AD3d 136, 139 [1st Dept 2010]).

Under CPLR Article 75, "[e]ven where the arbitrator makes a mistake of fact or law, or disregards the plain words of the parties' agreement, the award is not subject to vacatur 'unless the court concludes that it is totally irrational or violative of a strong public policy' and thus in excess of the arbitrator's powers (*Hackett v Millbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-55 [1995], quoting *Maross Constr. v Central N. Y. Regional Transp. Auth.*, 66 NY2d 341, 346 [1985]). "Unless the arbitration agreement provides otherwise, an arbitrator is not bound by principles of substantive law or by rules of evidence but 'may do justice as he sees it, applying his own sense of law and equity to the facts as he [or she] finds them to be'" (*GFI Sec., LLC. v Levin*, 23 Misc 3d 1135[A], 2009 NY Slip Op 51104[U] *7 [Sup Ct, NY County 2009]), quoting *Matter of Silverman (Benmor Coats)*, 61 NY2d 299, 308 [1984]). "Even where an arbitrator makes errors of law or fact, a court may not undertake to conform the award 'to [its] sense of justice.' . . . An arbitrator's award will be confirmed 'if any plausible basis exists for the award'" (*id.*, quoting *Graniteville Co. v First Natl. Trading Co.*, 179 AD2d 467, 469 [1st Dept 1992]).

Here, Pershing has not submitted any competent evidence to show that the arbitrators exceeded their powers and manifestly disregarded the law by awarding Rochdale consequential damages. Rochdale never disputed that section 17.0 of the FDCA purported to bar consequential damages between the parties, but argued to the arbitration panel that under New York law such a limitation on liability is not enforced where the party seeking its enforcement has acted willfully, recklessly or in a grossly

negligent manner. In support of its argument, Rochdale properly cited *Kalisch-Jarcho, Inc. v City of New York* (58 NY2d 377, 384-85 [1983]), where the Court of Appeals stated that "an exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party . . . [from] willful or grossly negligent acts."[4]

In support of its argument that Pershing's conduct was willful, grossly negligent and/or reckless, Rochdale argued to the arbitration panel that the evidence established that Pershing: (i) initially made the decision to "DK," reverse or cancel the Apple trades; (ii) nevertheless cleared the trades into Rochdale's error account, even though it believed the executing brokers had violated SEC Rule 15c3-5; (iii) was concerned about harming its relationship with two of the executing brokers, Morgan Stanley and Dash Financial; (iv) cleared the trades only because Apple's price had recovered to Rochdale's cost; (v) requested a copy of the FDCA when Apple's price began to temporarily decline, but then panicked and forced the liquidation minutes later—before it received a copy of the FDCA; (vi) undertook these actions while knowing they were putting Rochdale out of business; (vii) sold the FI Portfolio during Superstorm Sandy to its friend and partner, who Pershing claimed had provided an independent valuation; and (viii) ultimately

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[4] *See also Gold Connection Discount Jewelers, Inc. v American Dist. Tel. Co.*, 212 AD2d 577, 578 [2d Dept 1995]("Although [limited liability] clauses in commercial contracts are enforceable to limit recovery for claims based on ordinary negligence, they will not preclude recovery in tort or breach of contract where the losses are the result of gross negligence"); *Soroof Trading Dev. Co. Ltd. v GE Fuel Cell Sys. LLC*, 842 F Supp 2d 502, 516 [SD NY 2012] ("[A]n exculpatory agreement, no matter how flat and unqualified in terms, will not exonerate a party from liability . . . [for its] willful or grossly negligent acts").

described the entire "saga" as "hilarious" because Rochdale was "officially Too Little To Fail" (*see* Romney affirmation, Ex. OO: Rochdale Post-Hearing Brief at 18-19).

Pershing, in turn, argued in its post-hearing memorandum that Pershing's claim for "loss of business" damages is a form of consequential damage, and therefore barred by section 17 of the FDA (*see* Romney affirmation, Ex. QQ at 17-18). However, Pershing explicitly recognized "that in rare circumstances Courts may choose not to enforce such clauses in the face of grossly negligent conduct that is 'so careless as to show complete disregard for the rights and safety of others,'" citing *Gentile v Garden City Alarm Co.* (147 AD2d 124, 131 [2d Dept 1989]) (*see id.* at 18-19). Pershing argued to the panel that it exercised sound business judgment and acted in accordance with the FDCA and the financial industry's rules and regulations at all times. Pershing also argued that the reason the Apple trade got into the securities market in the first place was because Rochdale abdicated its regulatory responsibilities under FINRA's "know its customer" rule, failed to properly supervise its employee and failed to monitor the risks of its business. Pershing further argued that it could not reverse the trade, because the trade was not an "error," and that Rochdale's argument that it actually had five business days under the FDCA to liquidate the Apple position was an incorrect interpretation of their contract. Apparently, however, the arbitrators accepted Rochdale's version of the facts and law.

In both its pre-hearing and post-hearing memoranda, Pershing cited *Metropolitan Life Ins. Co. v Noble Lowndes Intl.* (84 NY2d 430 [1994]). In this case, the Court of Appeals ruled that a contractual bar on consequential damages except "for intentional

misrepresentations, or damages arising out of [defendant's] willful acts or gross negligence" (*id.* at 433) would be upheld even though the defendant's breach was motivated exclusively by its own economic self-interest in divesting itself of a highly unprofitable contractual undertaking in order to promote the sale of a division to a competitor (*id.* at 439). Pershing now argues to this court that, because the sole motivation for all of Pershing's actions vis-à-vis the Apple trades and Rochdale was economic self-interest, the arbitrators were without power to award consequential damages to Rochdale for the loss of its business.[5] However, the panel obviously concluded from the testimony and evidence presented that Pershing's conduct rose to a higher level of misconduct than mere intentional nonperformance of a contract motivated by financial self-interest. Whether this court agrees or disagrees with the panel is irrelevant. The panel's award of $2 million plus interest from October 29, 2012 for the loss of Rochdale's business is not irrational nor does it manifestly disregard the law of contracts.

Pershing's second challenge to the panel's decision is the award of $600,000 to Rochdale for the loss on the Foxtrot security. Pershing contends that Rochdale never included a claim for damages with respect to this security in its Statement of Claim. However, Rochdale sought damages for what it claimed was Pershing's unreasonable and reckless liquidation of the entire FI Portfolio which was itemized in exhibit D to its Statement of Claim (*see* Romney affirmation, Ex. SS). The Foxtrot security appears on

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[5] Pershing did not articulate this exact argument to the panel in either of its pre-hearing or post-hearing memoranda.

the second page of this list. Indeed, none of the individual securities listed in exhibit D to the Statement of Claim had monetary values assigned to them. Contrary to Pershing's argument, there was some evidence in the record regarding its value in October 2012 (Ellis reply affirmation, Ex. Q [Testimony of Michael Glover]).

Pershing's final challenge to the award is the $832,400 attorney fee award to Rochdale. Pershing argues that this violates the "American Rule," whereby attorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by contract, statute or court rule. Rochdale contends that the panel correctly awarded attorneys' fees, because FINRA arbitration panels may award attorneys' fees and costs when both sides request them, citing *Matter of Bear, Stearns & Co., Inc. v International Capital & Mgt. Co. LLC*, 99 AD3d 402 [1st Dept 2012]). Rochdale also contends that section 18.1.2 of FDCA authorizes the attorney fee award in Rochdale's favor. This section provides as follows:

> "Pershing Indemnification. In addition to any other obligations it may possess under other provisions of this Agreement, Pershing shall indemnify, defend, and hold harmless Broker from and against all claims, demands, proceedings, suits, actions, liabilities, expenses, *and reasonable attorney's fees*, and costs in connection therewith arising out of any negligent, reckless, dishonest, fraudulent, or criminal act or omission on the part of Pershing's officers or employees with respect to the services provided by Pershing under this Agreement [emphasis added]"

(Petition, Ex. A: FDCA at 19).

It is clear from the panel's January 29, 2016 order that the panel believed that Pershing was still pursuing an attorney fee award in its favor following the conclusion of the hearing. If Pershing had made a conscious decision at the closing not to ask for legal

fees in pursuing its counterclaim, as its counsel later contended (*see* Romeny affirmation, Ex. T: Affidavit of Daniel R. Korb, Jr., ¶ 5), that was not made clear to the arbitrators on December 15, 2015. Notably, Pershing's counsel did not object to the request for attorneys' fees made by counsel for Rochdale at the conclusion of the hearing (*see* Romney affirmation, Ex. B: 12/15/15 Hearing Tr. at 88). The first time Pershing clearly indicated that it was *not* seeking an award of attorneys' fees was in its February 8, 2016 response to the January 26, 2016 order, although the fee request was omitted from its post-hearing memorandum (*compare* Romney affirmation, Ex. PP at 14 to Ex. QQ at 20).

In *Matter of Bear Stearns & Co. v International Cap. & Mgt. Co. LLC* (99 AD3d at 402-403), the First Department ruled that a party to a FINRA arbitration, who previously demonstrated its consent to the imposition of attorneys' fees during the arbitration, could not withdraw that consent at the last minute after it became apparent that the panel would award fees to the other side, which is apparently what Pershing tried to do herein. In any event, section 18.1.2 of the FDCA provides a separate basis for the award in Rochdale's favor.

Pershing's final point is that it was completely irrational for the panel to find Rochdale liable for the full amount of Pershing's counterclaim, while, at the same time, finding Pershing liable to Rochdale for the same transactions. I disagree. It does not appear that Rochdale ever disputed that the Pershing loan to finance the Apple position created a debit balance in the amount of $513,157 which remained in Rochdale's account with Pershing. There is nothing irrational about Pershing recovering the money it advanced on Rochdale's account to clear the Apple trades, while simultaneously holding

Pershing accountable for what the panel believed was Pershing's own willful misconduct vis-à-vis those trades and the subsequent sale of Rochdale's assets.

Rochdale's motion (seq. no. 002) for sanctions, pursuant to 22 NYCRR 130-1.1, is denied (*see* June 30, 2016 Tr. of Oral Argument at 13). The court does not find that Pershing's petition to vacate the award is "completely without merit in law," particularly its objection to the panel's award of $2 million in consequential damages for the loss of Rochdale's business in view of sections 17.0 and 17.1 of the FDCA. Pershing's voluntary payment of the net amount of the award due Rochdale the day before filing this petition to vacate the award is also not sanctionable behavior. Payment of the arbitration award on March 24, 2016 was a means to stop the running of pre-judgment interest and does not impair Pershing's right to seek judicial review of the award (*see Alstom Power, Inc. v S&B Engineers & Constructors, Ltd.*, 2006 WL 1284968, *7, 2006 US Dist LEXIS 73749, *22-24 [ND Texas, Oct. 2, 2006, No.3:04-CV-2370-L (SAL)]), and also avoid the risk of its license being suspended by FINRA. As for Pershing filing of a motion to segregate the award proceeds, that is strictly a matter for the Bankruptcy Court for the District of Connecticut. Nor can I be the judge of the conduct of Pershing or its counsel during the arbitration.

For the foregoing reasons, it is hereby

ORDERED AND ADJUDGED that the petition (seq. no. 001) to vacate the arbitration award entered on February 23, 2016 in *Rochdale Securities, LLC v Pershing LLC v Daniel Joseph Crowley*, FINRA Case No. 14-01061 is denied and respondent's

cross-petition to confirm the award is granted, and this arbitration award is confirmed in all respects; and it is further

ORDERED that respondent's motion (seq. no. 002) for sanctions is denied.

Dated: September 23, 2016

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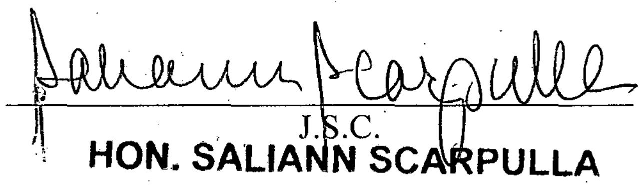

J.S.C.

HON. SALIANN SCARPULLA