

**Award  
FINRA Dispute Resolution**

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In the Matter of the Arbitration Between:

Claimant  
Herbert Wallace Kava

Case Number: 12-01845

vs.

Respondent  
Wells Fargo Advisors, LLC  
f/k/a Wachovia Securities, LLC

Hearing Site: Boca Raton, Florida

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Nature of the Dispute: Customer vs. Member

The case proceeded under the Optional All Public Panel Rule/All Public Panel

**REPRESENTATION OF PARTIES**

For Claimant Herbert Wallace Kava: Stefan M. Apotheker, Esq., Sonn & Erez, PLC, Fort Lauderdale, Florida.

For Respondent Wells Fargo Advisors, LLC, f/k/a Wachovia Securities, LLC: Demian J. Betz, Senior Counsel, Wells Fargo Advisors, LLC, Charlotte, North Carolina.

**CASE INFORMATION**

Statement of Claim filed on or about: May 16, 2012.

Herbert Wallace Kava signed the Submission Agreement: May 17, 2012.

Statement of Answer filed by Respondent on or about: July 20, 2012.

Wells Fargo Advisors, LLC, f/k/a Wachovia Securities, LLC signed the Submission Agreement: July 20, 2012.

Motion to Compel and Motion for Sanctions filed by Claimant on or about: July 29, 2013.

Opposition to Motion to Compel and Motion for Sanctions filed by Respondent on or about: August 2, 2013.

Motion In Limine filed by Respondent on or about: August 7, 2013.

Opposition to Motion in Limine filed by Claimant on or about: August 15, 2013.

**CASE SUMMARY**

Claimant asserted the following causes of action: breach of fiduciary duty; negligence; negligent supervision; fraud; and breach of contract. The causes of action relate to Claimant's purchase of Fannie Mae and Freddie Mac preferred stock.

Unless specifically admitted in its Answer, Respondent denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

### **RELIEF REQUESTED**

In the Statement of Claim, Claimant requested: compensatory damages in the range of \$100,000.00 to \$500,000.00; punitive damages; interest; costs; and such other and further relief deemed just and proper by the Panel.

At the close of the hearing, Claimant requested attorneys' fees and reiterated his request for punitive damages.

In the Statement of Answer, Respondent requested: dismissal of all claims against Respondent with prejudice; an order of expungement of this claim from non-party Thomas Zinckgraf's ("Zinckgraf") Central Registration Depository ("CRD") records; and such other and further relief as deemed just.

### **OTHER ISSUES CONSIDERED AND DECIDED**

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

Claimant filed a Motion to Compel and Motion for Sanctions in which he asserted that Respondent failed to produce documents in accordance with the Panel's June 6, 2013 Order, constituting deliberate and impermissible abuse of the discovery process. In its Opposition, Respondent asserted that it was working on production in earnest since the issuance of the Order. On or about August 8, 2013, following a telephonic conference with the parties, the Panel issued an Order that, among other things, deferred ruling on Claimant's request for sanctions until the evidentiary hearing. Since the parties did not raise the outstanding sanctions issue at the evidentiary hearing, the Panel deemed the Motion to be moot.

Respondent filed a Motion In Limine in which Respondent requested that Claimant be precluded from presenting argument or evidence at the hearing pertaining to news articles, third-party analyst reports and other records on display in the Statement of Claim and in Claimant's Pre-Hearing Brief, including its exhibits, because they are falsely and misleadingly attributed to Respondent. In his Opposition, Claimant asserted that Respondent's Motion is untimely and fails under FINRA rules and the law. On or about August 22, 2013, following a telephonic conference with the parties, the Panel issued an Order that denied Respondent's Motion but provided that Respondent could raise the issue at the hearing by objections to evidence.

On or about August 23, 2013, an arbitrator withdrew from the Panel. The parties stipulated to proceed with the remaining two arbitrators.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

### **AWARD**

After considering the pleadings, the testimony and evidence presented at the recorded, in-person hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Claimant's claims are dismissed with prejudice.
2. The Panel recommends the expungement of all references to the above-captioned arbitration from non-party Zinckgraf's (CRD# 731242) registration records maintained by the CRD, with the understanding that pursuant to Notice to Members 04-16, non-party Zinckgraf must obtain confirmation from a court of competent jurisdiction before the CRD will execute the expungement directive.

Unless specifically waived in writing by FINRA, parties seeking judicial confirmation of an arbitration award containing expungement relief must name FINRA as an additional party and serve FINRA with all appropriate documents.

Pursuant to the Rule 12805 of the Code of Arbitration Procedure (the "Code"), the Panel has made the following Rule 2080 affirmative finding of fact:

The claim, allegation, or information is false.

The Panel has made the above Rule 2080 finding based on the following reasons:

The Panel reviewed the parties' post-hearing briefs regarding the application of Rule 2080. Based on the testimony of non-party Zinckgraf and Claimant, the Panel believes that non-party Zinckgraf shared information regarding Fannie Mae and Freddie Mac with Claimant that non-party Zinckgraf believed to be factual rather than spreading rumor. Thereafter, Claimant remained as non-party Zinckgraf's client for four years after the loss was incurred. Additionally, the Panel believes that non-party Zinckgraf was not aware of the actions of Respondent's sister company which divested itself of its Freddie Mac and Fannie Mae holdings. Finally, the Panel notes that Claimant did not name non-party Zinckgraf as a Respondent in this matter.

3. Any and all claims for relief not specifically addressed herein, including Claimant's requests for attorneys' fees and punitive damages, are denied.

### **FEES**

Pursuant to the Code, the following fees are assessed:

#### **Filing Fees**

FINRA Dispute Resolution assessed a filing fee\* for each claim:

Initial Claim Filing Fee

= \$ 1,425.00

*\*The filing fee is made up of a non-refundable and a refundable portion.*

**Member Fees**

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, Respondent is assessed the following:

Member Surcharge	= \$ 1,700.00
Pre-Hearing Processing Fee	= \$ 750.00
Hearing Processing Fee	= \$ 2,750.00

**Hearing Session Fees and Assessments**

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s) that lasts four (4) hours or less. Fees associated with these proceedings are:

Two (2) Pre-hearing sessions with a single arbitrator @ \$450.00/session = \$ 900.00  
Pre-hearing conferences: May 29, 2013 1 session  
June 6, 2013 1 session

Four (4) Pre-hearing sessions with the Panel @ \$1,125.00/session = \$ 4,500.00  
Pre-hearing conferences: October 3, 2012 1 session  
August 8, 2013 1 session  
August 22, 2013 1 session  
August 23, 2013 1 session

Nine (9) Hearing sessions @ \$1,125.00/session = \$10,125.00  
Hearing Dates: August 26, 2013 3 sessions  
August 27, 2013 2 sessions  
August 28, 2013 3 sessions  
August 29, 2013 1 sessions

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Total Hearing Session Fees = \$15,525.00

The Panel has waived the \$1,125.00 fee in connection with the hearing session conducted on August 23, 2013.

The Panel has assessed \$2,880.00 of the hearing session fees to Claimant.

The Panel has assessed \$11,520.00 of the hearing session fees to Respondent.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

**ARBITRATION PANEL**

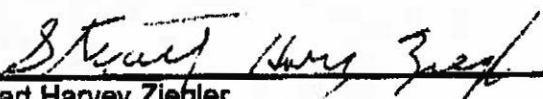
Stuart Harvey Ziegler  
Scott Manker

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Public Arbitrator, Presiding Chairperson  
Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument which is my award.

**Concurring Arbitrators' Signatures**

  
\_\_\_\_\_  
Stuart Harvey Ziegler  
Public Arbitrator, Presiding Chairperson

10/4/13  
Signature Date

\_\_\_\_\_  
Scott Manker  
Public Arbitrator

\_\_\_\_\_  
Signature Date

10/4/13  
\_\_\_\_\_  
Date of Service (For FINRA Dispute Resolution office use only)

**ARBITRATION PANEL**

Stuart Harvey Ziegler  
Scott Manker

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Public Arbitrator, Presiding Chairperson  
Public Arbitrator

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**Concurring Arbitrators' Signatures**

\_\_\_\_\_  
Stuart Harvey Ziegler  
Public Arbitrator, Presiding Chairperson



\_\_\_\_\_  
Signature Date

10/3/2013

\_\_\_\_\_  
Scott Manker  
Public Arbitrator

\_\_\_\_\_  
Signature Date

10/4/13

\_\_\_\_\_  
Date of Service (For FINRA Dispute Resolution office use only)