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CIVIL DISTRICT COURT

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**CASE NO.** 19-4752 **DIVISION** M **NUMBER**

SECTION 13

**DENISE BADGEROW**

**v.**

**GREG WALTERS, THOMAS MEYER, AND RAY TROSCLAIR**

**ACTION TO VACATE ARBITRATION AWARD**

NOW INTO COURT, through undersigned counsel, comes plaintiff, Denise Badgerow, who petitions this court to vacate a final Financial Industries Regulation Authority (FINRA) arbitration award issued on December 28, 2018 dismissing claims of Plaintiff with prejudice against Defendants, on the grounds that such award was procured by means of fraud and undue means, a fact discovered by Plaintiff on April 8, 2019, all as more fully explained in the attached Memorandum in Support. Plaintiff does not seek to vacate the Award to the extent such FINRA Award dismisses Ameriprise Financial Services, Inc. and Ameriprise is not made a party hereto.

**PARTIES**

1. Plaintiff, **DENISE BADGEROW** is an individual domiciled in the Parish of Lafourche, Louisiana.

2. Defendant **THOMAS MEYER** is domiciled in the Parish of Lafourche, Louisiana.

3. Defendant **RAY TROSCLAIR** is domiciled in the Parish of Ascension, Louisiana.

4. Defendant **GREG WALTERS** is domiciled in the Parish of Lafourche, Louisiana.

**JURISDICTION AND VENUE**

Jurisdiction and venue proper are in this Court pursuant to La. Civ. Proc. Code Art, 2 and La. R.S. § 9:4210 because the FINRA arbitration occurred in Orleans Parish and the FINRA Award was made in Orleans Parish.

**WHEREFORE**, plaintiff, Denise Badgerow, moves this court for an order vacating the FINRA arbitration award, and for any and all other just and equitable relief that this Court deems appropriate, all as more fully briefed in the Plaintiff's attached Memorandum of Law in Support of her Action to Vacate.

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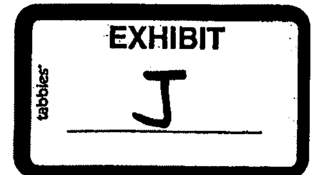
SERVICE COPIES TO SHERIFF ____
CARD WITH RULE DATE MAILED ____
COPY OF DOCUMENT MAILED ____
RULE DATE RECEIVED ✓

Respectfully Submitted:

BUSINESS LAW GROUP, LLC

By: [signature]



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Service shall be effectuated through private process service in accordance with the Motion filed:

**Gregory Walters**
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Thibodaux, LA 70301

**Thomas Meyer**
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**Ray TroscIair**
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CIVIL DISTRICT COURT

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**CASE NO. ____________ DIVISION ________ NUMBER___**

**DENISE BADGEROW,**

**v.**

**GREG WALTERS, THOMAS MEYER, RAY TROSCLAIR,**

**MEMORANDUM OF LAW**

Petitioner Denise Badgerow hereby moves this Court to vacate an arbitration award on the basis of fraud. *See* LA Rev Stat § 9:4210. Badgerow was employed as an Associate Financial Advisor by a franchise of Ameriprise Financial Services ("Ameriprise"). Badgerow was fired after she disclosed to her employer and then to her compliance officer that the franchise had been violating securities laws. In the arbitration of Petitioner's Whistleblower and related claims, the individual defendants argued repeatedly that Petitioner had not disclosed a violation of law but had merely disclosed something that was a failure by defendants to meet optional "best practices" in the securities industry or, at most, a failure to comply with Ameriprise "policy." Defendants claimed that they were completely ignorant of what he referred to as "best practices" until after an Ameriprise Compliance Officer informed him of Petitioner's disclosure on July 26, 2016.[1] It is indisputable that Defendants fired Badgerow the day after the Compliance Officer informed them of her disclosure to the Compliance Officer.

While arguing their successful motion to dismiss the arbitration, defendants and their counsel asserted over a dozen that the conduct at issue did not constitute a violation of law. In response to a subpoena issued in Petitioner's current federal employment discrimination lawsuit, a third party recently produced copies of two proposals that were sent to the franchise in 2014 and 2015. The proposals clearly state that SEC regulations *prohibit* the conduct at issue. See **Exhibit I** and **Exhibit J** ("***Ameriprise policies, in addition to FINRA/SEC regulations, prohibit the payment of securities based compensation to selling employees or AFAs via a non-registered legal entity.***"). Thus, contrary to witness and defense counsel statements, these documents conclusively prove not only that the conduct at issue was a violation of law, and that the individual defendants were aware that the conduct was a violation of law at least a year before Badgerow was terminated.

[1] See **Exhibit A**, August 28, 2018 FINRA Transcript at pg 19-23.

VERIFIED

Defendants successfully concealed their knowledge that their conduct violated the pertinent regulations, and they engaged in a persistent pattern of litigation fraud that undermined the validity of the arbitration. Even though Petitioner's motion to vacate has been served on defendants' counsel more than three months after the arbitration award was issued, the production of documents beyond the three-month time period that reveal the fraudulent concealment fully justifies Petitioner's current motion. Petitioner asks this Court to find that the three-month time period under LA Rev Stat § 9:4213 was equitably tolled due to defendants' persistent fraudulent representations during the arbitration.

## II. FACTUAL BACKGROUND

### A. The Franchise Violated Two Key Legal Restrictions in their Employment of Badgerow as an Assistant Financial Advisor

Badgerow was hired in 2014 as an Associate Financial Advisor ("AFA") by Walters, Meyer, Trosclair & Associates ("WMT"), a franchise of Ameriprise, comprised of three Financial Advisors – Walters, Meyer, and Trosclair. The three financial advisors received Gross Dealer Concession ("GDC") from Ameriprise, and then paid their AFAs a percentage of their GDC. Badgerow is a licensed AFA and she was compensated, in part, through payment of a portion of GDC, which is the revenue a brokerage firm earns when its registered representatives sell securities and other investment products. In addition, although there was an oral agreement regarding what Badgerow would be paid for her brokerage transactions, the franchise never provided Badgerow with a written compensation agreement.

When the three franchise members were paid GDC from Ameriprise, they then paid Badgerow her securities-based compensation by depositing money into the account of an affiliated corporation called REJ Properties, Inc. ("REJ"). REJ would then issue Badgerow her paychecks. REJ is not an entity that is licensed with the SEC.

The securities industry is heavily regulated and the regulations that govern the conduct of licensed members serve to protect investing consumers. The two regulations at issue in Petitioner's Whistleblower claim are specifically designed to protect customers from the manipulation of commissions and to avoid conflicts of interest in the sale of securities.

#### 1. The SEC Requires that AFAs Work Pursuant to a Written Compensation Schedule or Agreement.

The first regulation at issue in Badgerow's Whistleblower claim is an SEC "Books and Records" requirement that provides that broker-dealers

> shall make and keep current the following books and records relating to its business . . .
>
> ***
>
> (19) A record
>
> ***
>
>> (ii) Of all agreements pertaining to the relationship between each associated person and the member, broker or dealer including a summary of each associated person's compensation arrangement or plan with the member, broker or dealer, including commission and concession schedules and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation is determined.

17 CFR § 240.17a-3. Thus, AFAs can only be employed pursuant to a written compensation agreement that provides how the AFA is to be paid any commissions on sales. Under the Books and Records regulations, the required documents are kept by brokers and are to be made available for inspection by representatives of the SEC. *See* § 17(a) of the 1934 Act, and Rules 17a-3(a), 17 C.F.R. §§ 240.17a-3(a). A failure to maintain the required books and records can result in SEC sanctions, such as disbarment and fines. *See, e.g.*, *Geman v. SEC*, 334 F.2d 1183 (10th Cir. 2003) (upholding SEC sanctions for conduct, including aiding and abetting the violations of SEC recordkeeping regulation; sanctions including disbarment for three years and $200,000 fine); *Sinclair v. SEC*, 444 F.2d 399 (2d Cir. 1971) (affirming SEC's permanent disbarment for willfully violating and aiding and abetting violations of the anti-fraud provisions of § 17(a) of the Securities Act of 1933, including duty to maintain records of actual executing brokers pursuant to Rule 17a-3(a) (6)).

Although the franchise maintained written compensation agreements for other AFAs, it failed to maintain any written commission schedule or written compensation agreement for Badgerow. *See* **Exhibit B**, CIR at pg. 2 (one franchise member apparently disagreed with the amount of the commission percentage that Walters wanted to pay Badgerow, and as a consequence, the franchise failed to document how Badgerow would be paid her commissions).

**2. The SEC Requires that GDC Compensation Only Be Paid to Registered Entities, Unless there is a Recognized Exception to the Rule.**

The SEC mandates that broker-dealers supervise the securities activity of their personnel, and payment of securities-based compensation through an unregistered entity undermines that requirement. The SEC prohibits routing commissions through an unregistered entity such as REJ

and NASD (predecessor to FINRA[2]), specifically adopted a rule that encompasses that prohibition. "Both the Securities and Exchange Commission ("SEC") and the Financial Industry Regulation Authority ("FINRA") have asserted that it is unlawful for registered representatives (like Plaintiff Schatski) to share securities-related commission with non-registered companies..." *Schatzki v. Weiser Capital Management, LLC*, No. 10 Civ. 4685 (S.D.N.Y. November 9, 2016).

FINRA Rule 2040 provides: "No member or associated person shall, directly or indirectly, pay any compensation, fees, concessions, discounts, commissions or other allowances to . . . any person that is not registered as a broker-dealer under Section 15(a) of the Exchange Act." FINRA Rule 2040.

The prohibition encompassed by Rule 2040 is enforced by the SEC, and the SEC has always interpreted it as a prohibition against the payment of securities-based compensation through the use of an unregistered entity such as REJ. "***We note that the Division has previously declined to grant no-action relief to the practice of routing commissions or other transaction-related compensation from a broker-dealer directly or indirectly to an unregistered entity for the benefit of the broker-dealer's registered representatives.***" See Exhibit C, Wolf Juall Investments SEC No Action Letter dated May 17, 2005. The SEC described the purpose of prohibiting licensed individuals from routing commission payments through affiliated, unlicensed entities:

> This [prohibition] is because the ability to control the compensation of registered representatives is a key mechanism by which registered broker-dealers exercise supervisory control over sales practices. Compensation schedules can create significant incentives that could undermine a firm's supervisory systems and thus investor protection. Therefore, in order to maintain adequate supervision by registered broker-dealers, registered broker-dealers, not unregistered entities, should determine compensation to natural persons associated with a registered broker-dealer. Accordingly, while there is an exemption from registration for natural persons associated with a registered broker-dealer, that exemption is not available to Wolf Juall Investments. The Division has also previously indicated that the receipt of transaction-related compensation is a key factor in determining whether a person or entity is acting as a broker-dealer, and that absent an exemption, an entity that receives commission or other transaction-related compensation in connection with securities-based activities that fall within the definition of "broker" or "dealer" contained in Sections 3(a)(4) and 3(a)(5), respectively, of the Exchange Act generally is required to register as broker-dealer under Section 15 of the Exchange Act.

[2] "FINRA" stands for the Financial Industry Regulatory Authority.

*Id.* (footnotes omitted).[3] Thus, the only way in which payments to Badgerow through REJ would be legal would be if REJ were registered as a broker-dealer. Any registered person who routes such commissions through unlicensed entities could face an enforcement action by the SEC.

The one potentially applicable exception to the prohibition against the types of payments to AFAs at issue here is where registered broker-dealers utilize a third-party payroll processing company to pay commissions to registered persons. *See* **Exhibit D**, ADP TotalSource, Inc. No-Action Letter dated December 4, 2007; *See also, e.g.,* Century Business No Action letter at pg.1 (describing exception where "the broker-dealer employer hires and supervises all aspects of the employees' work and *merely utilizes a payroll and benefits administrator as a means to centralize personnel services*") (emphasis added)[4]. REJ is not an independent payroll agency. One such independent payroll vendor is EmployShare, which was approved for use by Ameriprise and which Walters, Meyer, and Trosclair used to pay most of their AFAs during the period Badgerow was working for the franchise. Apparently, the only reason that the franchise failed to pay Badgerow her GDC-based compensation through EmployShare was because the franchise did not want to pay the additional cost of placing Badgerow on the franchise's EmployShare payroll package.

**B. <u>Badgerow was Terminated the Day After Defendants Learned that Badgerow had Reported the Violations to Ameriprise's Compliance Officer.</u>**

On July 13, 2016, Badgerow had her Annual Compliance Interview with Ameriprise's Compliance Officer, Marc Cohen, via telephone. In her annual compliance interview, Badgerow informed Cohen that payments to her through an unregistered entity (i.e., REJ) were out of compliance and that she similarly had no written compensation agreement. Badgerow's disclosure of her compliance concerns in her Annual Compliance Interview were documented in a Compliance Inspection Review ("CIR") report.[5] Cohen asked Badgerow to send him a copy of her

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[3] In another no action letter, the SEC further explained the prohibition against payments of commissions through unregistered entities: "*Persons who receive transaction-based compensation generally have to register as broker-dealers under the Exchange Act because, among other reasons, registration helps to ensure that persons with a "salesman's stake*" in a securities transaction operate in a manner consistent with customer protection standards governing broker-dealers and their associated persons."
1st Global No Action letter.

[4] *See* https://www.sec.gov/divisions/marketreg/mr-noaction/cbiz030102.htm

[5] In the CIR (attached as **Exhibit B**), Mr. Cohen described what Ms. Badgerow said as follows: "*I told her the only things I handle are compliance issues. She talked about that she gets a salary plus commissions and said it works like a draw. I told her I will see about her being on a 3rd party vendor. She said she has been paid like this since Oct 2014. She is a W2 employee and has been a W2 all the time. She was lined up to be on Paychex, since it is the rule. She said Greg's partner refused to sign it right before she left. She said her attestation is wrong on how she is paid and wants to get the compensation done properly done since she learned that it must go through Paychex. I told her I would look into the concerns that she was being paid GDC and not through one of the approved vendors,*" CIR at 2-3

paystub to verify that she was, in fact, being paid by an unregistered entity. Badgerow then sent Cohen her paystub.

On July 26, 2016, Cohen telephoned Greg Walters and Tommy Meyer separately, and explained the two compliance issues that had been raised by Badgerow. Regarding the failure to have a written compensation agreement, Cohen stated in his CIR: "*I asked Greg Walter if he had a contract for Denise and he answered no.*" **Exhibit B**, CIR at 2. Cohen similarly discussed the lack of a written compensation agreement with Meyer, a fact that Meyer confirmed: "*When I spoke with Tommy [Meyer] he told me he would not sign the new [Badgerow compensation] agreement because he did not agree with the payout raise that Greg was recommending for Denise.*" ***Id.*** at 2.

Cohen also recounted his July 26, 2016 discussion with Walters regarding the franchise's payment of AFA compensation through REJ, an unregistered entity:

> When I spoke with Greg on 7.26.16 he thought the issues Denise had were just related to Tommy, but I shared with him some concerns about him and how she has been paid in the past 9 months and not through employee share [sic]. She said that there were several advisors not being paid properly. I shared this with Greg. I told him that they needed to fix the compensation arrangement and run it through employee share [sic] for all advisors being paid GDC.

***Id.*** Cohen noted that in his phone conference with Meyer, "*Tommy also said he would fix the payroll issue immediately if any AFA's were not going through the approved system.*"

Cohen informed Walters in his July 26, 2016 conversation that, although there were other employment-related issues that Badgerow had described, "*the only thing I get involved with is compliance related matters which was the GDC payout.*" ***Id.*** Cohen noted: "*I did not mention to either of them consequence at this time. I was planning on doing it at the end of the week.*" ***Id.***

The day after his telephone conference with Cohen, Walters asked to meet with Badgerow. Badgerow testified to the meeting at the arbitration: "*Greg asked me . . . if I had spoken with Marc Cohen and why would I tell him anything that would ding his perfect compliance record.*" See **Exhibit E**, August 27 Transcript at 142. Walters then immediately fired Badgerow.

On August 3, 2016, one week after Badgerow was fired, Cohen sent a Letter of Deficiency to Walters.

> You are being issued this Letter of Deficiency for failure to follow Ameriprise Financial Services, Inc. company policy. Please be aware that any further violations

may result in more serious consequences per the Consequence Management process.

Ameriprise Financial expects all people in our organization to adhere to the policies and procedures instituted to protect the company, our clients and our registered representatives.

Specifically, you failed to compensate your AFA using one of the Ameriprise Financial approved vendors.

Please reference the current **Compliance Manual section 4.4 Hiring and Maintenance AFAs** which states:

> "If you pay the AFA a percentage of total GDC, the compensation will be paid to you first by Ameriprise and then be paid by you to the AFA through an Ameriprise Financial approved vendor."

Please read the entire section **4.4 in the Compliance Manual.**[6]

**C. Throughout the Arbitration, Defendants Denied the Existence of the Rules and Denied Any Knowledge of the Rules.**

As mentioned previously, the very existence of "law" and defendants' knowledge of applicable "law" became the central focus of the arbitration. This was not a mere disagreement between the parties regarding how to interpret the evidence. The arbitration included respondents' systematic portrayal of "law" as fiction and their knowledge of any problems with the conduct at issue as non-existent. Defendants' story was as follows: They knew nothing about the conduct until the day before they fired Badgerow and, once the Ameriprise Compliance Officer informed them that Badgerow had complained about the conduct, they swiftly corrected the conduct. They portrayed the conduct at issue in Plaintiff's Whistleblower Claim as merely a violation of Ameriprise's policies or a failure to meet "best practices."

**1. Testimony of Witnesses**

During the arbitration, Meyer testified that he was unaware that AFAs are required (by law) to have written compensation agreements.

> Q. Did you know that all associate financial advisors are required to have a written Compensation Agreement?
> A. No.
>
> Q. Did Ameriprise require employees to be put on Paychex or EmployShare?
> A. Associate financial advisors that generated commissions, I have since found out that we are required -- not necessarily required, but urged to have a third-party administrator.

[6] See **Exhibit F**, August 3, 2016 Letter of Deficiency, Marc Cohen to Gregory Walters (emphasis in original).

See **Exhibit A,** August 28, 2018 FINRA Transcript at 19. Meyer likewise testified that he did not believe there was any actual requirement to use a third-party administrator to pay AFAs instead of using the non-registered entity REJ to make payments.

> Q. I'm just trying to get to what you are really saying here. You are saying you have since decided to pay in this manner, but prior to this, your understanding is that the way you were paying AFAs was appropriate?
>
> A. I would say that based on the conversations that were had, that it was best practice to pay them through a third-party administrator.

**Id.** Meyer then testified that, even after his conversation with Ameriprise's Compliance Officer, his understanding that payments to AFAs through REJ was merely a breach of "best practices."

> Q. In your conversation with Marc Cohen, what specifically did he tell you about how you had to pay AFAs?
>
> A. Specifically, it would be hard for me to specifically say, but in summarization, Marc made me aware that it was best practice to use a third-party administrator to pay GDC.

*Id.* at 23-24 (emphasis added).

**2. <u>Statements of Defense Counsel.</u>**

In briefing and oral argument on their motion to dismiss, defense counsel reiterated the testimony of their witnesses and extrapolated from that testimony to argue repeatedly that there was no violation of law, Defendants were completely unaware of any violation of law, and Badgerow's Whistleblower claim should be dismissed because the conduct at issue only contravened "best practices" and "there was nothing wrong with it." The following statements are examples of such statements from Defendants' Supplemental Motion to Dismiss, attached as **Exhibit G**:

- "As long as she [Badgerow] is licensed REJ could pay her GDC; there is no legal issue."
- "the bottom line is that the use of a third party vendor was an Ameriprise policy and not the law."
- "Badgerow's counsel confuses the prohibition against comingling of funds with clients with the fungible nature of payments by Walters, Meyer and Trosclair, individually, into REJ to pay expenses of operation of their Ameriprise franchise. It is just cash at that point. There is no prohibition on that comingling of funds." *Id.*
- "REJ does not need to be licensed, but can serve as an entity to which licensed franchise advisors can deposit money in order to pay the expenses of their

practice, which can include legally paying licensed AFAs. That is what happened here, and there is nothing wrong with it." *Id.*

- "Ameriprise, in order to show compliance with the books and records requirements of Rule 17a has elected to use third party vendors, EmployShare and Paychex, which is perfectly appropriate, but not required by the law." *Id.*
- "Importantly, both legally and factually, Badgerow's presumed "smoking gun" revelation to Cohen is not smoking in the least. *It certainly does not rise to the level of a violation of law*, state or federal, subject to triggering the Louisiana whistleblower statute." *Id.* (footnote omitted; emphasis added)
- "[N]one of these purported violations contravene state or federal law." *Id.*

In a hearing on Defendants' motion to dismiss, defense counsel made similar arguments and even expressed outrage that Badgerow would assert that the conduct violated securities laws:

- "In essence, the Claimant is alleging that REJ Properties[,] because they paid Ms. Badgerow some commission-based compensation[,] would have to be a broker dealer. That is perhaps the biggest stretch of the Exchange Act that I've ever heard in my years of practice." See **Exhibit H**, Transcript from Hearing on Motion to Dismiss at pg. 7
- "[REJ is] neither a broker or a dealer, so they need not be registered for anything. Because there is no violation of 17(A), no violation of 15(A), there can be no whistleblower claim. You have to have the underlying violation before you can have a whistleblower claim." ***Id.*** at pg. 8
- "Badgerow was always registered when she was paid a commission-based transaction. There is no question about it. There is no contrary evidence. She admitted herself she was registered at the time that these things happened. So, again, I think that this notion that there is [sic] some securities law violations, particularly with respect to the Exchange Act, is just total and sheer fabrication for purposes of trying to bootstrap some whistleblower claim that doesn't exist." ***Id.*** at pg. 11.
- "I mean, this record is so devoid of any evidence of a violation that candidly I'm kind of surprised we are hearing this. This is -- I know it's an important issue. I'm not trying to minimize why we are here. . . . REJ was never a broker dealer, we concede. 15(A), do they need to be a broker dealer? No. No. They never effected a single securities transaction, never held themselves out to do any of that. So for those reasons you can't have a corresponding whistleblower violation because there is no underlying violation of any law. ***Id.*** at pg. 12.
- "I look at the whistleblower claim like peeling back an onion. . . . At the core of it is the fact that there is no violation of any law, federal or state. Mr. Thomas Roberts has articulated that. Whether it's REJ paying Ms. Badgerow directly and violating, allegedly, 17(A) or that REJ should be registered as a broker dealer, those are no violations of law. So at its very core, the onion goes away. It was rotten." ***Id.*** at pg. 14.

**D. <u>EmployShare's Production of Two Documents Containing Proposals to the Franchise.</u>**

In response to a subpoena directed to EmployShare in Plaintiff's federal employment discrimination case, in which Plaintiff sought insurance and other information, EmployShare produced two proposals that it sent to the franchise. Plaintiff had never seen the documents before they were produced.

The two proposals were an effort by EmployShare to expand the services that they were then providing to the franchise, and EmployShare detailed the benefits of using EmployShare to

handle payroll for all employees, including registered AFAs. In an October 6, 2014 document entitled "Proposal Details Document," EmployShare informed the franchise, explicitly, that the use of EmployShare to pay AFAs would ensure that the franchise was in compliance with "SEC regulations" and "federal and state law." *See* **Exhibit I.**

EmployShare explicitly informed the franchise that written "Employee Compensation Schedules for all licensed employees" would "comply with your broker dealer's book and records, in addition to federal and state regulations." **Exhibit I** at 4. In an identical proposal from EmployShare dated June 3, 2015, EmployShare repeated that written employee compensation schedules would comport with the franchise's legal obligations: "These schedules comply with your broker dealer's book and records, in addition to federal and state regulations." **Exhibit J** at 4.[7]

The EmployShare proposals also clearly state that the payment of AFAs through unlicensed entities, such as REJ, is illegal. Under the heading "Purpose," EmployShare's Proposals clearly alert the franchise to the illegality of using REJ to pay Badgerow:

> Ameriprise policies, in addition to FINRA/SEC regulations, prohibit the payment of securities based compensation to selling employees or AFAs via a non-registered legal entity.

**Exhibit I** at 1. EmployShare described to the franchise how it could help the franchise act in compliance with the law:

> GDC Based Compensation: In accordance with FINRA/SEC rules and Ameriprise policies, we will administer a separate payroll identity (GDC payroll) for paying GDC-based compensation to selling representatives (AFAs). This identity must be the same identity that is 'associated' with your broker dealer.

*Id.* EmployShare repeated these statements in the proposal dated June 3, 2015.

Plaintiff received the documents from EmployShare more than three months after the arbitration award was issued. Plaintiff was unaware that documents existed outlining the same violations of law at issue in her Whistleblower action prior to receiving them from EmployShare on April 8, 2019. These EmployShare proposals completely undermine the testimony and arguments defendants made during the arbitration proceeding.

[7] The second proposal from Employshare, dated June 3, 2015, was addressed to Denise Badgerow at Walters, Meyer, Trosclair & Associates. Badgerow never received the proposal or the accompanying letter, and assumes that it as mailed to Defendants' offices after Badgerow was tasked with contacting EmployShare to learn the cost of having her added to Defendants' payroll plan.

## III. LEGAL ARGUMENT

### A. Petitioner is Entitled to an Evidentiary Hearing on Her Motion to Vacate.

The specific grounds for setting aside an arbitration award are set forth in La. R.S. 9:4210. Where, as here, a party alleges fraud as a basis for vacating an arbitration award, the court must conduct a full review of the evidence that allegedly constitutes fraud.

> In cases where the claimant contends that an arbitration award was procured by fraud, including perjury, courts must necessarily review enough of the evidence submitted to the arbitrators to determine whether clear and convincing evidence exists that perjury was committed with respect to a material issue of consequence in the proceedings and that substantial rights of a party have been prejudiced thereby.

*Seattle Packaging Corp. v. Barnard*, 972 P.2d 577, 581 (Wash. App. 1999). *See also Low v. Minichino*, 126 Hawai'i 99, 267 P.3d 683, 686 (App. 2011) (finding that the trial court erred when it failed to hold evidentiary hearing on the issue of fraud as the basis to vacate arbitration award). *Cf Nathan v. Carter*, 372 So.2d 560 (La.1979) (overturning and remanding trial court's summary rejection of the doctrine of *contra non valentem* so that trial court can review the merits of plaintiff's fraud allegations).

### B. The Arbitration Award was Procured by Fraud

1. There is a Three-Prong Test for Determining Fraud Sufficient to Vacate an Arbitration Award.

The Eleventh Circuit summarized a widely-used test for vacating an arbitration award on the basis of fraud.

> In reviewing cases under § 10(a) [of the FAA], courts have relied upon a three part test to determine whether an arbitration award should be vacated for fraud. First, the movant must establish the fraud by clear and convincing evidence. Second, the fraud must not have been discoverable upon the exercise of due diligence prior to or during the arbitration. Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration. This last element does not require the movant to establish that the result of the proceedings would have been different had the fraud not occurred.

*Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988) (citations and footnote omitted).

In *Bonar*, the plaintiff's expert witness had lied about his credentials, including faking multiple degrees and prior employment positions. *Id.* at 1384. The Eleventh Circuit found that the perjury was material to the arbitration award because the only issue before the arbitrators was whether to award damages, and the only evidence before the panel on the issue of punitive damages was the testimony offered by the expert witness. *Id.* at 1384-85. The Eleventh Circuit concluded that if the expert "had not committed perjury by falsifying his credentials, it is extremely doubtful

that he would have been permitted to testify as an expert, and the arbitrators would have heard none of the . . . testimony" regarding punitive damages. *Id.* at 1385. Without the expert's testimony, then, there would have been no evidence to support an award of punitive damages. "Thus, by establishing the foundation that allowed the panel to hear influential expert testimony on the central issue of negligent supervision, the fraud materially related to an issue in the arbitration." *Id.*

a. There is Clear and Convincing Evidence that Defendants Committed Fraud.

"Obtaining an award by perjured testimony constitutes fraud." *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1297 (9th Cir.1982) (citation omitted). Not only did the witnesses here perjure themselves, but defense counsel relentlessly (and falsely) asserted that Plaintiff had failed to prove her Whistleblower claims based on that same testimony.

During the arbitration hearing, defense witnesses asserted that any concerns raised about the conduct at the center of Plaintiff's whistleblower claims were merely because of Ameriprise's "best practices" and not because of any legal requirements. The following is Meyer's testimony concerning Defendants' decision to pay AFAs through third-party administrators instead of paying AFAs through their unregistered entity, REJ:

> Q. . . . You are saying you have since decided to pay in this manner, but prior to this, your understanding is that the way you were paying AFAs was appropriate?
> A. I would say that based on the conversations that were had, that it was best practice to pay them through a third-party administrator.

*See* **Exhibit A** at 22-23 *See, e.g., Id.* at 24 ("Marc made me aware that it was best practice to use a third-party administrator to pay GDC"); *Id.* at 24 (testimony of Meyers, denying that he knew that all associate financial advisors are required to have a written Compensation Agreement). *But see* **Exhibit I** and **Exhibit J** at 1 (EmployShare proposal to Defendants dated October 2014 and June 3, 2015, informing Defendants that "*Ameriprise policies, in addition to FINRA/SEC regulations, prohibit the payment of securities based compensation to selling employees or AFAs via non-registered legal entity*"). In their arguments to the arbitration panel, defense counsel reiterated and extrapolated from this false testimony on more than a dozen occasions. *See, e.g.,* **Exhibit G and Exhibit H** ("the bottom line is that the use of a third-party vendor was an Ameriprise policy and not the law"); *See* **Exhibit G** at 20 ("none of these purported violations contravene state or federal law"); *See* **Exhibit H** at 14 ("At the core of [the Whistleblower claim] is the fact that there is no violation of any law, federal or state"). Defendants' entire theme was

repeatedly to deny both the illegality of the conduct and any knowledge of the illegality of the conduct.

An arbitration award that failed to take into account the fact that defendants knew that the conduct violated the law, as evidenced by their receipt of the two EmployShare proposals that clearly stated that the conduct violated the law, amounted to a fundamentally unfair arbitration for Plaintiff.

The perjury at issue here is similar to the perjury at issue in *Low v. Minichino*, 267 P.3d 683 (2011). In *Low v. Minichino*, the plaintiff (Low) filed an arbitration claim against the defendant (Minichino) for breach of a real property purchase agreement, asserting that the defendant had failed to cancel the agreement in advance of the closing and that the defendant was liable for breach of contract. Minichino testified during the arbitration that she had in fact timely notified Low both orally and via email that she was cancelling the contract. Low testified that he never received notice of the cancellation. The arbitrator sided with Low and issued an award in favor of Low.

Following the arbitration, Minichino was able to find copies of the emails, proving that she had provided early cancellation notice to Low. Low moved for confirmation of the award and Minichino then moved to vacate the arbitration award on the basis of fraud, citing Low's perjury.

> Minichino presented uncontroverted evidence that, if taken as true, establishes that Low committed fraud by presenting perjured testimony to the arbitrator. Minichino's declaration states, inter alia: "I testified that I gave both oral and written notice to the Seller prior to June 25, 2002, but the Arbitrator accepted the contrary testimony of the seller" and "[k]nowing that his testimony at the arbitration hearing was false, [Low] lied before the Arbitrator[.]" Minichino also submitted copies of dated emails that appear to evidence or at least raise a strong inference of Low's alleged perjury regarding Minichino's notification to Low that she could not obtain the financing necessary to close the transaction.

*Id.* at 693.

The court in *Low v. Minichino* reversed the trial court's denial of the motion to vacate and remanded for an evidentiary hearing on the issues of fraud in the arbitration. The court noted that "[t]he e-mails submitted by Minichino would directly contradict any testimony by Low denying his receipt of notice of termination." *Id.* Similarly, the EmployShare proposals submitted by Badgerow here directly contradict testimony by Defendants that the conduct at issue was merely "best practices" and not violations of law. The basis for vacating here is even stronger than the basis in *Low v. Minichino* because the proposals proving that Defendants were lying are documents that Badgerow had never seen and that were never in Badgerow's possession, but only in the

possession of EmployShare and Defendants. The testimony and misrepresentations to the arbitration panel constitute fraud which deprived Plaintiff of a fair arbitration.

b. The Fraud was not Discoverable Prior to or During the Arbitration.

As indicated previously, Badgerow had never seen the proposals that were produced by EmployShare until more than three months after the arbitration award was delivered. Thus, the fraud was not discoverable until after the time period for filing a motion to vacate had elapsed. While there was a cover letter attached to one of the proposals which was addressed to Denise Badgerow, Denise Badgerow never received a copy of the Proposal.

c. The Fraud Materially Related to a Key Issue in the Arbitration.

The arbitration award does not contain the arbitration panel's rationale for dismissing Badgerow's claim. Nevertheless, the focus of defendants' successful motion to dismiss was an attempt to show that the termination of Badgerow could not have been retaliation for her notification of violations of law *because there was no legal violation and defendants were unaware of any legal violation*. The question of whether Defendants knew their conduct was illegal was not a collateral issue. When defendants furnished perjured testimony to the arbitration panel, their efforts were directed to a fundamental issue in the arbitration. The materiality of the issue is evident from the number of times defense counsel used the testimony as a basis for arguing that the arbitration should be dismissed, which is precisely what the arbitration panel did.

**C.** The Arbitration Award was Procured by Undue Means.

Even if, assuming *arguendo*, the conduct at issue here does not rise to the level of fraud, this Court should vacate the arbitration award because it was procured by "undue means." LA Rev Stat § 9:4210.A. According to the Louisiana Supreme Court, "undue means" denotes "the use of misconduct or other gross deviation from normal arbitration to procure an award." *Firmin v. Garber*, 353 So.2d 975, 977 (La. 1977). *See also Nat'l Cas. Co. v. First State Ins. Grp.*, 430 F.3d 492, 499 (1st Cir. 2005) ("[t]he best reading of the term `undue means' ... is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either"); *Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d 804, 809 (S.D. 2004) (concluding that "undue means" is "bad faith behavior equivalent to fraud or corruption on the part of the winning party"); *A.G. Edwards & Sons, Inc. v. McCollough*, 967 F.2d 1401, 1403 (9th Cir.1992) (undue means "connotes behavior that is immoral if not illegal"), *cert. denied*, 506 U.S. 1050, 113 S.Ct. 970, 122 L.Ed.2d 126 (1993). Unlike proof of

fraud, a party seeking to vacate an arbitration for "undue means" need only prove the conduct by a preponderance of the evidence. *See Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 678 N.W.2d at 807.

The *Spiska Engineering, Inc.* case is instructive. At issue in the arbitration in *Spiska Engineering, Inc.* was Thermo-Shield's cancellation of a contract with Spiska based on Spiska's alleged material breach of the agreement. During the arbitration, Spiska tried to prove that Thermo-Shield had used a pretextual basis for cancelling the parties' contract so that Thermo-Shield could obtain a more favorable contract price from one of Spiska's competitors. *Id.* at --. "Spiska presented various documents during arbitration which indirectly and circumstantially indicated Thermo-Shield's favorable dealings with Spiska's competitors. There was no proof, however, that the dealings materialized into actual agreements; nor was there evidence of the time frame any dealings occurred." *Id.* at 808. The arbitrator issued an award in favor of Thermo-Shield.

When Spiska moved to vacate the arbitration award, it presented newly-discovered documents that Spiska obtained in other litigation, showing that Thermo-Shield had, in fact, entered into a more lucrative agreement with one of Spiska's competitors. The basis for Spiska's motion to vacate was "undue means," identical to the language permitting vacation of an arbitration award under LA Rev Stat § 9:4210.A. The South Dakota Supreme Court reversed the trial court's decision to confirm the arbitration award and remanded: "The trial court should determine in light of the new documents whether Thermo-Shield acted in bad faith in withholding the evidence; and if so, whether there is a nexus between the bad faith behavior and the procurement of the arbitration award." *Id.*[8]

**D.** <u>The Time Period for Serving a Motion to Vacate was Equitably Tolled by Defendants' Misconduct.</u>

Louisiana's Arbitration Law contains a three-month period for serving motions to vacate.

> Notice of a motion to vacate, modify, or correct an award shall be served upon the adverse party or his attorney within three months after the award is filed or delivered, as prescribed by law for service of a motion in an action. For the purposes of the motion any judge, who might issue an order to stay the proceedings in an action brought in the same court may issue an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

LA Rev Stat § 9:4213. The arbitration award was delivered on December 27, 2018.

[8] The evidence the trial court was directed to consider on remand included documents Spiska obtained while its appeal was pending, including a memorandum of understanding between Thermo-Shield and a competitor of Spiska, executed prior to Thermo-Shield's cancellation of its contract with Spiska.

Even though Petitioner's motion to vacate is being served more than three months after the delivery of the arbitration award, this Court should grant Petitioner's motion. Petitioner was unaware of the proposals contradicting witness testimony until after the three-month period had expired. The documents are conclusive evidence that: 1) defendants knew that the conduct at issue in the Whistleblower Act claim violated "FINRA/SEC regulations" and; 2) defendants knew the conduct was illegal at least one year *before* the Ameriprise Compliance Officer contacted them about Badgerow's complaint. The EmployShare proposals indicate that defendants engaged in a pattern of misrepresentation throughout the arbitration hearing and the motion to dismiss proceedings, during which they repeatedly discounted the import of the conduct at issue in the claim and disclaimed any knowledge of the illegality of the conduct. The proposals directly contravene false testimony: 1) that the conduct at the center of Badgerow's Whistleblower action was only a violation of "best practices;" and 2) that Defendants first learned of the so-called "best practices" from Ameriprise's Compliance Officer. Defendants were notified on at least two occasions prior to Plaintiff's notification to the Ameriprise Compliance Officer that it was illegal to pay an AFA using an unregistered entity and that SEC laws required them to have a written compensation agreement with Badgerow. *See* Exs. 1, 2.

At least one Louisiana court has applied notions of equity and fairness in holding that the three-month prescription applicable to motions to vacate can be tolled. *See Cole v. Hiller*, 715 So. 2d 451 (La. App. 2d Cir. 1998). In *Cole v. Hiller*, the arbitrator issued an award, and the parties jointly requested that the arbitrator amend the award based on a mathematical error. The arbitrator denied the parties' request for modification. Plaintiff filed his motion to modify or correct the award within three months after the arbitrator denied the joint request for modification but more than three months after the award was "filed or delivered." The Second Circuit described the trial court's decision to permit modification of the arbitration award, even though the motion to modify had been filed late:

> Noting the strong public policy favoring arbitration as an alternative to litigation of disputes, and the general rule that prescriptive statutes are to be strictly construed against prescription, the trial court concluded that the three-month period for seeking judicial modification of the October 31, 1996 award did not commence until January 24, 1997, when the arbitrator denied the joint request to amend the award for mathematical reasons. Considering that the Hillers "acted in concert with Cole to seek clarification and correction of [the award] ... in their favor," *the court found it would be "patently unfair to now prevent Cole from seeking judicial relief."*

*Id.* at 454 (emphasis added).

The Second Circuit affirmed the trial court's decision to allow the modification of the arbitration award even though the motion had been served more than three months after the award was issued. Although the court in *Cole v. Hiller* did not identify the doctrine under which it granted relief, it was clearly applying equitable principles.

> The arbitrator's award as initially made contained what appeared to both parties to be an "evident material miscalculation of figures," one of the grounds for judicial modification of the award under § 4211. *The Hillers, who would have benefitted from the apparent error, joined with Cole in requesting correction of the error by the arbitrator. Had that request been granted, Cole's motion for judicial modification of the award to correct the apparent mathematical error would have been unnecessary.* Cole filed his motion within three months after the joint request was denied. Under the circumstances of this record, we cannot say the trial court erred in finding Cole's motion timely under § 4213.

*Id.* at 455 (emphasis added).

In a 2016 case concerning the FAA's identical three-month limitation period, the Ninth Circuit allowed a party to proceed with a motion to vacate four years after the arbitration award was issued. *See Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152 (9th Cir. 2016). In *Move, Inc. v. Citigroup Global Markets, Inc.*, the losing party learned from a magazine article that the chairman of the FINRA arbitration panel had lied about being a licensed attorney. Even though the FAA requires that notice of a motion to vacate an arbitration award be served within three months after the award is delivered, Move argued the deadline should be equitably tolled because of the arbitrator's fraud.

The Ninth Circuit held that Move, Inc's motion to vacate "was not untimely because the FAA is subject to equitable tolling." *Id.* at 1154. In affirming the vacation of the award, the court reviewed the history of the FAA and whether anything in the statute prevented the application of equitable tolling.

> It is hornbook law that limitations periods are customarily subject to equitable tolling .... unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002) (internal citations and quotation marks omitted). Accordingly, "Congress must be presumed to draft limitations periods in light of this background principle," *id.* at 49-50, 122 S.Ct. 1036, and the rebuttable presumption that limitations periods are subject to equitable tolling must be overcome by the text or purpose of a statute, *see, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 138, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). We agree with the district court and conclude that neither the text, nor the structure, nor the purpose of the FAA is inconsistent with equitable tolling.

*Id.* at 1156-57.[9]

[9] The text of LA Rev Stat § 9:4213 is identical to the FAA, the structure is similar to the FAA, and the purpose of Louisiana's Arbitration Act is nearly identical to the federal statute. See (case re arbitration finality). Thus there is

The Ninth Circuit weighed the policy favoring arbitration against the whether a specific arbitration is fundamentally fair, in the same way that the court evaluated the issues in the *Cole v. Hiller* case.

> While the FAA reflects the "national policy favoring arbitration with just the limited review" necessary to maintain finality in arbitral proceedings, *Hall Street*, 552 U.S. at 581, 128 S.Ct. 1396, "[t]he general pro-arbitration policy relies on the assumption that the forum is fair, and therefore cannot justify special deference to arbitration out-comes in the face of a colorable claim that the forum was unfair in a particular case." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 Fed.Appx. 243, 246 (6th Cir. 2004) (unpublished). Thus, although Citigroup argues that equitable tolling would undermine the FAA's goal of finality, § 10's limited grounds for review were still "designed to preserve due processEx," *Kyocera Corp. v. Prudential-Bache Trade Servs.*, Inc., 341 F.3d 987, 998 (9th Cir. 2003). Balancing the needs for both finality and due process, the arbitral process will not be disrupted if parties are permitted to satisfy the high bar of equitable tolling in limited circumstances. More importantly, permitting equitable tolling will enhance both the accuracy and fairness of arbitral outcomes.

*Id.* at 1157-58. *See also Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 477 F.3d 1155, 1158 (10th Cir. 2007) (noting that "equitable tolling suspends the running of a statute, and it should be applied unless Congress provides to the contrary," but holding that equitable tolling was inapplicable because the movant had learned of the basis for moving to vacate within three months of the issuance of the arbitration award). The court in *Move, Inc. v. Citigroup Global Markets, Inc.* concluded that the plaintiff should not be held to the three-month limit "because [the arbitrator's] fraudulent conduct was revealed only after the arbitration panel issued its award in favor of Citigroup, [and] the parties received a hearing chaired by an imposter." *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d at 1159.

In Louisiana, the doctrine of *contra non valentem* is the means by which prescription may be suspended and it is the equivalent of equitable tolling. "The principles of equity and justice which form the mainstay of the doctrine [of *contra non valentem*] . . . demand that under certain circumstances, prescription be suspended because plaintiff was effectually prevented from enforcing his rights for reasons external to his own will." *Wimberly v. Gatch*, 635 So.2d 206, 211 (La. 1994) (citations omitted). The *contra non valentem* doctrine is "an application of the long-established principle of law that one should not be able to take advantage of one's own wrongful act." *Id.* at 212 (citation omitted). There are four categories of *contra non valentem*, including the third category "where the debtor himself has done some act effectually to prevent the creditor from

nothing in Louisiana's act that is inconsistent with the application of equitable tolling or the application of Louisiana's comparable doctrine, *contra non valentem*.

availing himself of his cause of action." *Id.*[10] The third category encompasses fraud: "This equitable doctrine has been applied to cases wherein defendant has concealed the fact of the offense or has committed acts (including concealment, fraud, misrepresentation, or other 'ill practices') which tend to hinder, impede, or prevent the plaintiff from asserting his cause of action, as long as plaintiff's delay in bringing suit is not willful or the result of his own negligence." *Nathan v. Carter*, 372 So.2d 560, 562 (La.1979) (citations omitted). *See also Johnson Controls, Inc. v. Lynch*, 633 So. 2d 212, 216 (La. App. 1st Cir. 1993) ("The use of *contra non valentem*, based on the factual situation envisioned by the third category, requires a finding of fraudulent or intentional concealment or misrepresentation.").

A court must evaluate the equitable nature of the circumstances in each individual case to determine the applicability of the doctrine. Here, fraud permeated Defendants' testimony and presentation to the arbitration panel, and Defendants should not benefit from their fraud and misrepresentations. "'No law was ever enacted which contemplated the defeat of its purpose by fraud, and no court was ever organized which would knowingly permit a litigant to profit by his own wrong.'" *Plaquemines Parish Com'n Council v. Delta Development Co., Inc.*, 502 So.2d 1034, 1060 (La.1987) (quoting *Hyman v. Hibernia Bank & Trust Co.*, 139 La. 411, 71 So. 598, 606 (La.1916)) (concurring opinion of Chief Justice Monroe).

## CONCLUSION

Plaintiff requests that this Honorable Court issue an order vacating the arbitration award since such award was procured through fraud or undue means.

[10] The court in *Wimberly v. Gatch*, 635 So.2d 206, 211 (La. 1994) identified the four circumstances where *contra non valentem* applies to toll a prescriptive period:

> 1. Where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action;
> 2. Where there was some condition coupled with a contract or connected with the proceedings which prevented the creditor from suing or acting;
> 3. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action; and
> 4. Where some cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.

FILED
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CIVIL DISTRICT COURT

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

**STATE OF LOUISIANA**

**CASE NO.** ____________ **DIVISION** ________ **NUMBER**___

**DENISE BADGEROW**

**v.**

**GREG WALTERS, THOMAS MEYER, AND RAY TROSCLAIR,**

**RULE TO SHOW CAUSE**

IT IS ORDERED BY THE COURT, that the Defendants, Greg Walters, Thomas Meyer, Ray Trosclair show cause on the 13th day of June, 2019, at 9:00 o'clock A.m. why the Plaintiff's Action should not be maintained.

New Orleans, Louisiana, this 6th day of MAY 0 6 2019, 2019.

JUDGE

Sgd, Paulette R. Irons
Judge, Division M, Section 13

4852-2203-4068, v. 1

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