No. 101835-5

Court of Appeals No. 83396-1-I

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

CHARLES SCHWAB & CO., INC., and
INTERACTIVE BROKERS LLC,

Petitioners,

v.

IRENE and PETER LEON GUERRERO, et al.,

Respondents.

PETITION FOR REVIEW

K&L GATES LLP
Robert B. Mitchell, WSBA #10874
Philip M. Guess, WSBA #26765
Monica A. Romero, WSBA #58376
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158
(206) 623-7580

KEESAL, YOUNG & LOGAN
Christopher A. Stecher, WSBA #50064
Igor Stadnik, WSBA #49123
1301 Fifth Avenue, #3100
Seattle, Washington 98101
(206) 622-3790

Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

IDENTITY OF PETITIONERS

Charles Schwab & Co., Inc., and Interactive Brokers LLC (together, the "Brokers"), respondents below, jointly submit this petition for review.

COURT OF APPEALS DECISION

The Court of Appeals filed its opinion on December 27, 2022. A copy is in the appendix. The court denied the Brokers' motion to publish on February 23, 2023.

ISSUES PRESENTED FOR REVIEW

1. Does an arbitrator's deception about prosecuting a case similar to one she is adjudicating show evident partiality? [Yes.]

2. Where arbitrators work together for weeks and deliberate on a preliminary decision, does the evident partiality of one taint the panel? [Yes.]

3. Do the rules of the Financial Industry Regulatory Authority ("FINRA") limit the remedies available under the Federal Arbitration Act ("FAA")? [No.]

4. Are fees available under the Consumer Protection Act ("CPA") for prevailing in an FAA action? [No.]

STATEMENT OF THE CASE

A. Factual Background

In 2011, Irene and Peter Leon Guerrero and 24 other investors (collectively, "Claimants") retained Vita Intellectus, LLC ("Vita") to serve as their financial advisor. *See* CP 376–79. In that role, Vita managed and controlled Claimants' accounts at the Brokers. CP 379, 383, 395–405, 643, 660. Vita's investment and trading decisions resulted in significant losses in Claimants' accounts. CP 383–84.

Before opening their accounts, the Brokers had informed Claimants that they would not provide investment or trading advice but instead would only take direction from Vita as Claimants' authorized financial advisor. CP 367, 643, 660. Claimants allege, however, that the Brokers should be held responsible for the losses resulting from Vita's trading practices. CP 381–83. They filed a Statement of Claim with FINRA's Dispute Resolution Service pursuant to arbitration clauses in their customer account agreements. CP 384–91.

FINRA provides an arbitral forum for resolving securities-related disputes between and among investors, brokerage firms, and individual brokers. Parties receive a list of potential arbitrators, whom they strike and rank. CP 425. To help parties make informed decisions, FINRA has comprehensive disclosure requirements. *See, e.g.*, CP 424–32.

FINRA gives potential arbitrators a description of the case and requires them to disclose "any circumstances which might preclude [them] from rendering an objective and impartial determination in the proceeding." FINRA Rule 12405(a). This includes "all facts that could provide an appearance of bias": all relationships, experiences, background information, and legal proceedings to which they are a party that could affect or appear to affect their ability to render a fair decision. CP 415–27, 461, 1148. Potential arbitrators are specifically required to disclose "all relevant complaints, lawsuits, or arbitration claims" that involve "the same or similar subject matter" or "the same allegations or causes of actions as the assigned arbitration." *Id.*

Having made such disclosures, potential arbitrators must affirm them under oath. And after being impaneled but before the arbitration begins, arbitrators must again affirm that their disclosures are accurate. *See id.*

Pamela Bridgen was one of 35 potential arbitrators whose names were given to the parties in Claimants' arbitration against the Brokers. CP 1832. Ms. Bridgen's disclosure forms reported that she had taken part in a single lawsuit: a non-investment-related case arising from a real estate dispute. CP 1887. She did not identify any other cases to which she was a party. CP 1886–88. Lacking any reason to doubt the veracity of Ms. Bridgen's disclosures, the Brokers did not strike Ms. Bridgen, and FINRA assigned her as an arbitrator to hear Claimants' case. Following her selection as a panel member, Ms. Bridgen again affirmed under oath that she had nothing more to disclose. CP 1141–42.

Ms. Bridgen's sworn statements were false. In addition to the one non-investment-related lawsuit that she disclosed, Ms. Bridgen was a party to three other lawsuits that involved

investments and that raised the same kinds of claims as Claimants' action. *See* CP 491–551 (complaint for *Bridgen et al. v. Lee et al.*, No. 2:13-cv-02219-MMD-PAL (D. Nev. Dec. 5, 2013)); CP 553–83 (complaint for *Hal Blatman and Pamela Bridgen v. Connie Castellanos*, Adv. No. 6:16-ap-1217 SC (C.D. Cal. Bankr. Aug. 25, 2016)); CP 585–623 (complaint for *Pamela J. Bridgen and Valerie Ann Lee v. Gibraltar, LLC et al.*, No. 06-2-12167-8 SEA (Wash. Super. Ct. Apr. 10, 2006)).

These lawsuits, had they been disclosed, would have automatically disqualified Ms. Bridgen from serving as an arbitrator in *any* FINRA case. *See* CP 467, 931. Further, because the undisclosed lawsuits involved "the same or similar subject matter" and "the same allegations or causes of actions as the assigned arbitration," FINRA's rules expressly required Ms. Bridgen to disclose them. CP 1148. For example, *Bridgen v. Lee* arose from losses due to trades in Ms. Bridgen's brokerage account. Like Claimants, she alleged wrongdoing by her financial advisor. *Compare* CP 492 *with* CP 379. Like Claimants,

she alleged that her financial advisor employed an inappropriate option trading strategy. *Compare* CP 501 *with* CP 380. Like Claimants, she alleged that her account suffered catastrophic losses as a result of the financial advisor's actions. *Compare* CP 505, 507 *with* CP 380–81. Her lawsuit—seeking over $1 million in damages—had been pending since 2013 and was still pending throughout the arbitration in this case. CP 1801–10.

The Brokers were unaware of Ms. Bridgen's nondisclosures and affirmative misstatements until after the arbitration was well underway. CP 369, 644. Two weeks into the three-week arbitration proceeding, Ms. Bridgen requested briefing on a legally complex question regarding Claimants' CPA claim. CP 368, 647, 1061. Ms. Bridgen's inquiry raised alarms with Schwab's counsel: her knowledge of the CPA seemed advanced for a non-lawyer. CP 646–47. The next day, Ms. Bridgen and the panel deliberated the issue of liability. The panel issued a written order holding the Brokers liable for negligence, breach of contract, and violation of the CPA, with

damages to be determined in the second step of a bifurcated proceeding. CP 1164.

Troubled by Ms. Bridgen's request for additional briefing, Schwab's counsel looked into her background on the evening of December 15, 2020. CP 647; *see* CP 2015–18. It was then that Schwab discovered, and shared with the other parties, Ms. Bridgen's three undisclosed lawsuits. *Id.*; *see* CP 369, 644.

The Brokers immediately raised objections to Ms. Bridgen's presence on the panel. CP 4, 28, 1078–90, 1167–74. They asked FINRA's Director of Dispute Resolution Services (the "Director") to adjourn the hearing on damages scheduled for the following day and to replace the panel. *See generally* CP 1167–74. The Brokers also asked all panelists to recuse themselves. CP 4, 28, 1078–90. None did so. *Id.* The Director, however, removed Ms. Bridgen from the panel, citing FINRA's rule allowing the Director to remove an arbitrator based "on information required to be disclosed . . . that was not previously known by the parties." CP 1099. The Director left the other two

panelists in place. *Id.* The Director refused to remove them despite renewed requests from the Brokers for an impartial hearing. CP 1099-2000; 1247-48.

The Director appointed Frederick Kaseburg to serve in Ms. Bridgen's place. CP 1268–76. The Chairperson permitted Mr. Kaseburg to review transcripts and exhibits, but she did not allow the liability finding to be revisited. CP 370. Mr. Kaseburg also did not have an opportunity to hear from or ask any questions of the 24 witnesses who had previously testified. *Id.*

During two additional days of hearings, held over the Brokers' continuing objections, the parties presented evidence and arguments on damages. CP 370. The two original panel members issued a damages ruling that awarded Claimants over $3.3 million in damages and $1.3 million in attorneys' fees. CP 1278–85. The panelist who was not exposed to Ms. Bridgen, Mr. Kaseburg, dissented from the award. CP 1285.

B. Procedural History

The Brokers moved in King County Superior Court to

vacate the arbitration award on the grounds that Ms. Bridgen should not have served as an arbitrator and that her participation in the proceedings irreparably tainted the Panel. CP 1–5, 24–30, 344–46, 1141–42. The court ruled in favor of the Brokers, finding that Ms. Bridgen's misstatements were material, her participation tainted the entire Panel, and the Director's remedy of replacing Ms. Bridgen was inadequate. RP 47:4–6.

The Court of Appeals reversed. It held that Ms. Bridgen's misrepresentations did not show evident partiality and that, even if they did, the Director's remedy was sufficient.

ARGUMENT

A. Ms. Bridgen's misrepresentations establish evident partiality. The Court of Appeals' contrary holding conflicts with precedent and the U.S. Constitution.

The FAA, which governs this case, authorizes courts to vacate awards "where there was evident partiality . . . in the arbitrators, or [any] of them[.]" 9 U.S.C. § 10(a)(2). To avoid evident partiality and protect parties to arbitration proceedings, arbitrators must disclose all facts and dealings that could reflect

on their impartiality. *See Commonwealth Coatings Corp. v. Cas. Co.*, 393 U.S. 145, 148, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) ("We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.").

As *Commonwealth Coatings* reflects, the test of "evident partiality" is objective: whether a reasonable person would have an impression of partiality or possible bias. *See, e.g.*, *Woods v. Saturn Distrib. Corp*., 78 F.3d 424, 427 (9th Cir. 1996) (a "reasonable impression of bias" establishes evident partiality). Evident partiality is broader than actual bias. In *Commonwealth Coatings*, the challenger did not claim bias, and the Court noted that it had no reason to suspect an arbitrator of improper motives apart from what he failed to disclose. *See* 393 U.S. at 147; *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1105 (9th Cir. 2007).

In a nondisclosure case, courts review arbitrator disclosure requirements to help determine whether withheld information is material and whether its nondisclosure gives a reasonable impression of bias. In *Commonwealth Coatings*, the Court stated:

> While not controlling in this case, § 18 of the Rules of the American Arbitration Association . . . is highly significant. It provided as follows: . . . "the prospective Arbitrator is requested to disclose any circumstances likely to create a presumption of bias or which he believes might disqualify him as an impartial Arbitrator."

393 U.S. at 149. Disclosure requirements give clear notice to prospective arbitrators and create reasonable expectations that the parties can rely on the completeness and truthfulness of the information that arbitrators disclose.

In this case, FINRA provides clear and detailed guidance to prospective arbitrators on what they must disclose. Among other things, they must disclose any litigation involving similar claims. Ms. Bridgen indisputably failed to do this. Moreover, she falsely swore that her statements about litigation matters were truthful and complete. Had she been truthful, she would have

been immediately disqualified. She was, in effect, an imposter in this arbitration. *See Move, Inc. v. Citigroup Glob. Mkts., Inc.*, 840 F.3d 1152, 1159 (9th Cir. 2016) (vacating FINRA award in light of chairperson's fraudulent conduct in representing himself as a licensed attorney, stating that "the parties received a hearing chaired by an imposter.").[1]

The Court of Appeals brushed aside Ms. Bridgen's deception, giving two reasons: first, she was suing her advisor, whereas Claimants were pursuing claims against the Brokers; and second, she failed to disclose litigation rather than a relationship or connection to a party. Neither of these purported distinctions is relevant to the question of whether a reasonable

---

[1] The court held in *Move*:

> Because [the parties] agreed to arbitrate their multi-million dollar dispute before a panel of three qualified arbitrators as provided by FINRA's rules and regulations, the parties' rights to such a proceeding were prejudiced by the inclusion of an arbitrator . . . who should have been disqualified from arbitrating the dispute in the first place.

Id.

person would see Ms. Bridgen as impartial in adjudicating the same kinds of claims that she was pursuing herself.

First, the identity of the defendant is immaterial to the claims and legal theories that Ms. Bridgen was pursuing in parallel litigation. A personal stake in the merits of those claims and theories is a far stronger indicator of evident partiality than a tangential connection to a party or party's counsel. Second, there is no authority for the proposition that partiality is evidenced only by undisclosed relationships. Both the failure to disclose similar litigation and lying about it demonstrate evident partiality. *See Citigroup Glob. Mkts., Inc. v. Berghorst*, No. 11-80250-CIV, 2012 WL 5989628, at *4 (S.D. Fla. Jan. 20, 2012) (vacating a FINRA award where an arbitrator was simultaneously engaged in similar litigation, as these "were . . . battles [he] was fighting during the very time he was serving as an arbitrator in this matter."); *Hagman v. Citigroup Glob. Mkts., Inc.*, No. BS128800, 2011 WL 975535 (Cal. Sup. Ct. Feb. 9,

2011) (vacating a FINRA award where an arbitrator failed to disclose personal involvement in two similar lawsuits).[2]

The Court of Appeals failed to address the majority opinion in *Commonwealth Coatings*, opting instead to cite only Justice White's concurrence. The Court of Appeals also stated that, in "analyzing a federal question, the court gives 'great weight' to decisions of federal appellate courts, but they are not binding." Slip op. at 4 (citing *Feis v. King Cnty. Sheriff's Dep't*, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011)). In failing to acknowledge that decisions of the U.S. Supreme Court are binding on all questions of federal law and in disregarding the majority opinion in *Commonwealth Coatings*, the Court of Appeals' opinion conflicts with the holding in *Home Ins. Co. of N.Y. v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943):

---

[2] Though unpublished, these holdings are consistent with FINRA's stated belief that arbitrators who fail to disclose "all relevant complaints, lawsuits, or arbitration claims" that involve "the same or similar subject matter," or "the same allegations or causes of actions as the assigned arbitration," raise "an appearance of bias." CP 1148; CP 427.

only "the construction placed upon a federal statute by the inferior federal courts" may be treated as not binding upon a state court.

The Court of Appeals' decision also conflicts with published decisions of the Court of Appeals. In *Jensen v. Misner*, 1 Wn. App. 2d 835, 846, 407 P.3d 1183 (2017), applying state law, the court held that arbitrators must "disclose a circumstance or relationship that bears on the question of impartiality *where that relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality*." (emphasis original). To suggest that only a relationship, and not a circumstance such as involvement in parallel litigation, can give rise to evident partiality is contrary to this holding.[3]

---

[3] Under state law, an arbitrator "who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality . . . ." RCW 7.04A.120(5). There are, of course, differences between the FAA and state law. For example, a party claiming evident partiality in a case arising under the FAA need not demonstrate prejudice. *Schreifels v. Safeco Ins. Co.*, 45 Wn. App. 442, 447 n.2, 725 P.2d

The Court of Appeals' decision on evident partiality raises significant questions under both the Due Process Clause and the Supremacy Clause. "The Due Process Clause entitles a person to an impartial and disinterested tribunal." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980). In *Commonwealth Coatings*, the U.S. Supreme Court considered "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." 393 U.S. at 145. The answer, the Court held, was no.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). Section 10 of the FAA reflects Congress's effort to preserve due process while promoting the goal of speedy dispute resolution. *In re Wal-Mart Wage & Hour Emp. Pracs.*

1022 (1986). And the FAA, unlike RCW 7.04A.250(3), does not authorize attorney's fees in an action to confirm or vacate an arbitration award. *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994).

Litig., 737 F.3d 1262, 1268 (9th Cir. 2013). It guarantees judicial review to prevent due process violations caused by arbitrator misconduct. *See Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997–98 (9th Cir. 2003). Avoiding erosion of the "evident partiality" standard is, therefore, a task of constitutional dimension.

In addition to due process issues, this case raises significant questions under the Supremacy Clause. If the Court of Appeals' statement about federal appellate decisions not being binding on state courts reflects its understanding, that not only is contrary to this Court's precedent but also violates the holding in *James v. City of Boise*, 577 U.S. 306, 307, 136 S. Ct. 685, 193 L. Ed. 2d 694 (2016), that every state court "is bound by this Court's interpretation of federal law."

Figuring out the U.S. Supreme Court's interpretation of federal law is not always easy. For example:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may

> be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]'

Marks v. U.S., 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977). Division One has misapplied this rule in considering the holding in *Commonwealth Coatings*. *Compare St. Paul Ins. Cos. v. Lusis*, 6 Wn. App. 205, 212–13, 492 P.2d 575 (1972) (Division Two quotes the Court's "majority" opinion), *with Schreifels*, 45 Wn. App. at 445 (Division One refers to "a plurality opinion").

The court was right in *Lusis*; in *Schreifels* and (implicitly) this case, Division One was wrong. In *Commonwealth Coatings*, Justice Black delivered "the opinion of the Court," not an opinion of three justices. 393 U.S. at 145. Justice White began his concurrence (joined by Justice Marshall) by saying this: "I am glad to join my Brother BLACK's opinion in this case" before making "these additional remarks." *Id.* at 150. Justice Black's majority opinion, "the opinion of the Court," is binding and should have been applied here. *See Schmitz v. Zilveti*, 20 F.3d

1043, 1045–47 (9th Cir. 1994). This Court should accept review and correct the error.

B. Ms. Bridgen's evident partiality tainted the panel. The Court of Appeals' disregard of taint and refusal to vacate the award conflicts with precedent and raises significant constitutional issues.

The FAA authorizes vacatur "where there was evident partiality or corruption in the arbitrators, *or either of them*." 9 U.S.C. § 10(a)(2) (emphasis added). *Commonwealth Coatings* stands for the proposition that nondisclosure by one arbitrator is presumed to taint the entire panel. Undisputed case law so holds. *See, e.g.*, *Schmitz v. Zilveti*, 20 F.3d at 1049; *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 370–72, 133 Cal. Rptr. 775 (1976); *Thomas Kinkade Co. v. Hazlewood*, No. C 06 7034 MHP, 2007 WL 9812853 (N.D. Cal. June 6, 2007).

If ever there was a case where the evidence supported presumed taint, it is this one: Ms. Bridgen participated in 11 days of hearings with the other arbitrators; she actively questioned witnesses; and the arbitrators deliberated for a full day and rendered a tentative liability decision before her deception was

discovered. The only untainted arbitrator in the proceedings—the replacement arbitrator appointed after Ms. Bridgen was removed—dissented from the final award issued by the two tainted arbitrators.

The Court of Appeals, however, does not mention "taint." Instead, it holds that the Brokers waived any right to seek vacatur when they contracted for a FINRA arbitration, since FINRA rules provide for removal of individual arbitrators but not their fellow arbitrators unless the latter, too, are guilty of nondisclosure. Indeed, according to the Court of Appeals, because the Brokers "fail to allege evident partiality on the part of the FINRA Director as to the remedy decision, or the newly-constituted panel which issued the final award, they fail to meet their 'high hurdle,' and vacatur was improper." Slip op. at 8. This is an impossible standard and one that turns the concept of taint on its head.

The Court of Appeals' remedy analysis can be criticized on many levels. First, it presumes, wrongly, that the Brokers had

the ability to change FINRA's remedy rules.[4] Second, it treats FINRA's internal rules as "persuasive authority." Slip op. at 5. Third, it ignores the fact that rules are written to cover a variety of situations, from nondisclosures that are immediately corrected to those that come to light only after weeks of joint work by the arbitrators. It is a judicial function to determine whether, given the facts at hand, the remedy of vacatur is warranted.

Most relevant to RAP 13.4(b), the court's remedy analysis conflicts with published authority and raises significant constitutional questions. The Court of Appeals assumed that remedies provided under the FAA are subject to waiver by contract.[5] Federal courts have repeatedly rejected that argument,

---

[4] FINRA rules require arbitration clauses in contracts between brokers and customers to include FINRA's arbitral forum. FINRA rules also require FINRA member firms to arbitrate claims using FINRA's procedures if requested by their customers. Brokers have no power to modify FINRA's procedures. *See* FINRA Rule 12200; *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 92–94 (3d Cir. 2018).

[5] There is no evidence to support the Court of Appeals' view that the Brokers intentionally waived their right to seek vacatur of the

as have this Court and the Court of Appeals in the context of the state arbitration statute. The U.S. Supreme Court has held that the statutory grounds for review in the FAA are exclusive and may not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). The Ninth Circuit has held that parties may not agree to "binding, non-appealable arbitration" and thereby eliminate review under Section 10 of the FAA. *Wal-Mart*, 737 F.3d at 1264. The court explained:

> Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract.

Id. at 1267.

This Court, too, has rejected attempts to alter by contract statutory rights in arbitration cases. In *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001), for example, the

---

panel's decision on the basis of taint. But even if there were, any such agreement would be unenforceable as a matter of law.

Court refused to enforce a contract term that permitted a party to demand a trial de novo after arbitration. It held: "While the parties are free to decide by contract whether to arbitrate, and which issues are submitted to arbitration, once an issue is submitted to arbitration," the state act governs. *Id.* at 894. In *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992), the Court rejected "the parties' effort to define the nature and scope of review" in an arbitration proceeding. And in *S&S Const., Inc. v. ADC Props.*, 151 Wn. App. 247, 256–57, 211 P.3d 415 (2009), the Court of Appeals rejected an argument that the AAA Construction Industry Association rules on impartiality take precedence over the statutory standard of "evident partiality."

A key reason why the right to independent judicial review provided in 9 U.S.C. § 10 is not subject to waiver by contract or by rule of the arbitral forum is that it provides constitutional due process:

> Through § 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution. . . . If

> parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse.
>
> In light of the above, we hold that 9 U.S.C. § 10(a), the statutory grounds for vacatur in the FAA, may not be waived or eliminated by contract.

Wal-Mart, 737 F.3d at 1268.

As *Commonwealth Coatings* demonstrates, Section 10 requires courts to evaluate not just the conduct of individual arbitrators but also the impact that such arbitrators can have on their fellow arbitrators. Replacing a single arbitrator for evident partiality but allowing the remaining members of the panel to adjudicate the matter risks violating due process rights. *Stivers v. Pierce*, 71 F.3d 732, 748 (9th Cir. 1995); *Hicks v. City of Watonga, Okl.*, 942 F.2d 737, 748 (10th Cir. 1996) (presence of biased panel member "tainted the tribunal and violated [the plaintiff's] due process rights.").

In *Stivers*, the court observed: "Particularly on a small board, . . . it is difficult if not impossible to measure the impact that one member's views have on the process of collective

deliberation. Each member contributes not only his vote but also his voice to the deliberative process." 71 F.3d at 747. *Accord Move, Inc.*, 840 F.3d at 1159. The court held in *Stivers* that bias by one member of a small deliberative body "is likely to have a profound impact on the decisionmaking process." 71 F.3d at 747. It continued:

> We therefore hold that where one member of a tribunal is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process. The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. Whether actual or apparent, bias on the part of a single member of a tribunal taints the proceedings and violates due process.

Id. at 748. The same conclusion follows under the Supreme Court's holding in *Commonwealth Coatings*. This Court should accept review and correct the Court of Appeals' errors.

C. Whether an arbitrator's deception merits judicial relief is an issue of substantial public interest.

An opinion that determines when nondisclosures and misrepresentations by an arbitrator merit judicial relief has broad implications. Many if not most Washington residents are subject

to arbitration provisions. As this Court observed in *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d. 293, 301, 103 P.3d 753 (2004), the FAA applies to all employment contracts other than those of certain transportation workers. Arbitration provisions can also be found in many consumer contracts. "Washington policy favors arbitration." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 46, 470 P.3d 486 (2020).

If parties are not entitled to rely upon the truthfulness of arbitrator disclosures, the integrity of arbitrations everywhere in the state will be in doubt. If evident partiality can be shown only by relationships, not by circumstances, litigants who learn that an arbitrator lied about participating as a plaintiff or defendant in identical litigation will have no recourse. And if taint has no meaning, the most egregious misbehavior by an arbitrator will be disregarded so long as that person did not act alone. In short, the issues involved in this case are of substantial public interest and should be determined by this Court.

D. The Court of Appeals' fee award conflicts with this Court's rule.

"Reasonable attorney fees are recoverable on appeal only if allowed by statute, rule, or contract and RAP 18.1(a)." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). The FAA does not provide for an award of attorney's fees. *Menke v. Monchecourt*, 17 F.3d 1007, 1009 (7th Cir. 1994) (superseded on other grounds); *cf. In re Arb. Between: Trans Chemical Ltd. and China Nat. Machinery Import and Export Corp.*, 978 F. Supp. 266, 311 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998) ("[t]he FAA does not provide for attorney's fees to a party who is successful in confirming an arbitration award . . .").

Claimants' motion to confirm, like the Brokers' motion to vacate, was brought under the FAA. Neither motion raised any issue under the CPA. Claimants' appeal raised no CPA issue, either. Nevertheless, the court awarded fees under the CPA. The CPA does not authorize an award of fees in an action brought under a different statute. Cases that award fees to CPA claimants

on appeal all involve determination of the merits of the CPA claim, the reasonableness of the fees awarded under that statute, or both. *See, e.g.*, *Ewing v. Glogowski*, 198 Wn. App. 515, 394 P.3d 418 (2017).

In *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 386, 292 P.3d 108 (2013), the prevailing party sought fees under RCW 19.86.090, RCW 19.100.190(3), and RCW 7.04A.250(3). The case turned on interpretation of the Franchise Investment Protection Act (Chap. 19.100 RCW) and application of the Washington Arbitration Act (Chap. 7.04 RCW). The court granted the franchisees their fees under those two statutes, *not* the CPA. The CPA does not authorize a fee award in this case, either.[6]

[6] The Court of Appeals sought to distinguish *Menke*, 17 F.3d 1007, on the basis that this case is more complex than most brought under the FAA. The Brokers are aware of no case supporting the proposition that the magnitude of a potential fee claim justifies an award of fees.

CONCLUSION

This case meets all of the criteria for review set forth in RAP 13.4(b). The Brokers ask this Court to accept review, reverse the Court of Appeals, and—like the trial court—direct the parties to have their case heard before a panel of neutral arbitrators who are free of the taint caused here by an untruthful, disqualified member.

Pursuant to RAP 18.17, I certify that the foregoing contains 4,985 words.

DATED this 24th day of March 2023.

Respectfully submitted,

K&L GATES LLP

By: */s/ Robert B. Mitchell*

Robert B. Mitchell, WSBA #10874
rob.mitchell@klgates.com
Philip M. Guess, WSBA #26765
philip.guess@klgates.com
Monica A. Romero, WSBA #58376
monica.romero@klgates.com
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104-1158

KEESAL, YOUNG & LOGAN

By: */s/ Christopher A. Stecher*

Christopher A. Stecher, WSBA #50064
christopher.stecher@kyl.com
Igor Stadnik, WSBA #49123
igor.stadnik@kyl.com
1301 Fifth Avenue, #3100
Seattle, Washington 98101

Attorneys for Petitioners

APPENDIX

FILED
12/27/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES SCHWAB & CO, INC., a California Corporation, and INTERACTIVE BROKERS LLC, a Connecticut limited liability company

Respondents,

v.

IRENE and PETER LEON GUERRERO, a married couple, JOANN and ROBERT LACANFORA, a married couple, BRANDON and NATASHA EHRLICH, a married couple, GARY and MARTHA WYATT, a married couple, CAROL and IAN HILTON, a married couple, TONY and CHRISTINE EASON, a married couple, DAVID and CARRIE MILLER, a married couple, EMILIE and BRYCE J. DAWSON, a married couple, NADINE DAWSON, a single person, HOLLY ROBINSON and BENJAMIN CAPDEVIELLE, a previously married couple, STEPHEN and DIANA NARAMORE, a married couple, EUGENE T. ROGERS and SHANNON A. MCQUERY, a married couple, PATRICIA HAMILTON, a single person, STEPHEN W. and PAMELA N. APT, a married couple,

Appellants.

No. 83396-1-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, J. — A group of retirement account holders, under the named plaintiffs Irene and Peter Leon Guerrero, appeal vacatur of their arbitration award by the superior court. Because Charles Schwab & Co., Inc. and Interactive Brokers LLC failed to demonstrate evident partiality on the part of one of the arbitrators, the panel, or the FINRA Director in terms of the remedy applied, we reverse.

FACTS

Irene and Peter Leon Guerrero are named plaintiffs representing a class of customers (collectively, the Customers) holding retirement accounts through investment firm Vita Intellectus, LLC (Vita).[1] Vita, on behalf of the Customers, opened brokerage accounts through Charles Schwab & Co., Inc. and Interactive Brokers LLC (collectively, the Brokers)[2]. After their accounts suffered "catastrophic losses," the Customers brought an arbitration action against the Brokers through Financial Industry Regulatory Authority (FINRA) Dispute Resolution Services pursuant to mandatory arbitration clauses in their agreements with the Brokers.

Based on FINRA procedure, the parties were provided with 35 arbitrator candidate disclosure reports in order to eliminate and rank candidates. The selected panel consisted of Katherine O'Neil, Pamela Bridgen, and David Gonzalez. Bridgen noted in her disclosure report that she was a plaintiff in an

[1] Vita was not a party to the arbitration.

[2] The Brokers' names alternatively appear on documents in the record as, "The Charles Schwab Corporation," "Charles Schwab Institutional," and "Interactive Brokers Group." As the record is unclear, we use the company names as contained in the plaintiffs' respective pleadings.

ongoing Consumer Protection Act (CPA)[3] claim related to real estate. The date when the disclosure report was first submitted pursuant to FINRA rules is unclear from the record, but it contains a statement in the header that the accuracy of its contents was last affirmed by Bridgen on December 5, 2019. After Bridgen was selected as an arbitrator for the Leon Guerrero dispute, she was required to review and sign an Arbitrator Disclosure Checklist, which she completed on March 13, 2020. In the section titled, "Disclosures about the subject of the case," item 4.a of the checklist asked, "Have you, your spouse, or an immediate family member been involved in a dispute involving the same or similar subject matter as the arbitration?" Bridgen selected, "No." Item 4.b asked, "Did the dispute assert any of the same allegations or causes of action as the assigned arbitration, even if the dispute was not securities-related?" Bridgen again selected, "No."

The arbitration was bifurcated into a liability phase and damages phase. The panel issued a liability ruling on December 15, 2020, finding the Brokers breached their respective contracts, were negligent, and violated Washington's CPA. The next day, the Brokers requested that FINRA remove and replace the panel, alleging they discovered a conflict Bridgen had failed to disclose. The Brokers testified they learned of the conflict the evening after the liability order was issued, but that their investigation was spurred by a comment Bridgen made the day before. The Customers did not oppose the request to replace Bridgen. The Director of FINRA Dispute Resolution Services granted the Brokers' request

[3] Ch. 19.86 RCW.

to remove Bridgen, pursuant to FINRA Rule 12407(b), but did not order removal of the rest of the panel after they declined to recuse themselves. The replacement arbitrator, Frederick Kaseburg, reviewed the record from the liability phase and joined the original two arbitrators for the damages phase. O'Neil and Gonzalez concurred in the award, but Kaseburg dissented from the damages award without explanation.

The Brokers filed a petition in King County Superior Court requesting vacatur of the arbitration award based on Bridgen's conflict and failure to disclose, and the Customers filed a counter-petition to confirm the award. The petitions were consolidated and, after oral argument, the trial court granted the Brokers' motion, vacating the award, and denied the Customers' petition to confirm the award. The Customers appeal.

ANALYSIS

I. Vacatur of the Arbitration Award

The parties agree that the Federal Arbitration Act (FAA)[4] governs their dispute as it pertains to securities transactions involving interstate commerce. In analyzing a federal question, this court gives "'great weight'" to decisions of federal appellate courts, but they are not binding. Feis v. King County Sheriff's Dep't, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011). Review of an arbitration award is limited under the FAA. Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 640 (9th Cir. 2010). An appellate court reviews the vacatur of an arbitration award de novo. Id. To obtain vacatur, a party "must

[4] 9 U.S.C. §§ 1-16.

clear a high hurdle. It is not enough for petitioners to show that the panel committed an error—or even a serious error." Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). Rather, a court may only vacate an award under certain circumstances, including "where there was evident partiality or corruption in the arbitrators." Lagstein, 607 F.3d at 640 (quoting 9 U.S.C. § 10(a)(2)). The party seeking vacatur bears the burden to demonstrate the award should be set aside. UBS Fin. Servs., Inc. v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 997 F.3d 15, 17 (1st Cir. 2021).

"Arbitration under the FAA is contract-driven and principally 'a matter of consent.'" Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co., 748 F.3d 708, 717 (6th Cir. 2014) (quoting EEOC v. Waffle House, Inc., 534 U.S. 279, 294, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002)). Parties are given discretion to design the framework of their arbitration process "'to allow for efficient, streamlined procedures tailored to the type of dispute.'" Id. (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)). Additionally, we give weight to the rules regulating arbitrations as contracted for and relied on by the parties. See York Research Corp. v. Landgarten, 927 F.2d 119, 123 (2d Cir. 1991). Both of the Brokers urge this court to consider FINRA rules on disclosure as persuasive authority. In doing so, we would be remiss to not also consider FINRA rules as to the remedy for a disclosure violation as similarly persuasive authority.

By vacating the arbitration award, the trial court found that FINRA's remedy of removing Bridgen from the arbitration panel was insufficient. The only proper basis for vacatur of the arbitration award is evident partiality; either of the panel, as a whole or in part, or as to the FINRA Director's decision on a remedy. The Brokers sought a remedy within the contracted framework of arbitration and later sought to vacate the award, despite that earlier strategic choice. Thus, the Brokers are required to demonstrate evident partiality. By submitting a dispute to arbitration, instead of traditional litigation, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Stolt-Nielsen S.A., 559 U.S. at 685. Courts are generally required "'to enforce the bargain of the parties to arbitrate,'" and judicial review is narrow "to prevent arbitration from becoming 'merely a prelude to a more cumbersome and time-consuming judicial review process.'" In re Sussex, 781 F.3d 1065, 1072 (9th Cir. 2015) (internal quotation marks omitted) (first quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985); and then quoting Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 568-69, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013)). Parties often select arbitration because the arbitrators are experts in their field. Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 150, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (White, J., concurring). Their experience in the marketplace makes them "effective in their adjudicatory function." Id. (White, J., concurring). The choice to pursue arbitration for dispute

resolution, based at least in part on the arbitrators' expertise in the field, necessarily includes a choice to follow the arbitrators' decisions about remedies and procedures within the framework of the parties' contracted-for arbitration.

The Brokers negotiated for FINRA rules and remedies in the event of a dispute with investors. FINRA Rule 12407(b) expressly states:

> After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 12405 that was not previously known by the parties. The Director may exercise this authority upon request of a party or on the Director's own initiative. Only the Director may exercise the authority under this paragraph (b).

The issue the Brokers took with Bridgen was her nondisclosure and affirmative misrepresentation of her role in ongoing litigation of a similar subject to the dispute between the Customers and Brokers. Bridgen's suit was somewhat comparable to the controversy here; a customer brought a claim against a financial advisor for marketing an investment strategy as low risk, but which resulted in significant losses. However, a key distinguishing fact was that Bridgen filed suit against her financial advisor, not a brokerage firm. Additionally, unlike other cases where vacatur was upheld based on evident partiality, Bridgen did not have a relationship or connection to the Customers, Brokers, or firms representing them in arbitration. See, e.g., Monster Energy Co. v. City Beverages, LLC, 940 F.3d 1130, 1135-36 (9th Cir. 2019) ("under our case law, to support vacatur of an arbitration award, the arbitrator's undisclosed interest in an entity must be substantial, and that entity's business dealings with a party to the arbitration must be nontrivial"); Ploetz for Laudine L. Ploetz, 1985 Tr. v. Morgan Stanley Smith Barney LLC, 894 F.3d 894, 899 (8th Cir. 2018) (a decision on

vacatur on this basis turns "on whether the undisclosed relationship demonstrates that the arbitrator had evident partiality"); Positive Software Sol., Inc. v. New Century Mortg. Corp., 476 F.3d 278, 283 (5th Cir. 2007) ("in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding"). In the absence of authority establishing that vacatur is proper where the sole basis for the claim of evident partiality is that an arbitrator has been involved in similar litigation, we decline to so hold.

FINRA applied the remedy of removing Bridgen for nondisclosure in violation of its rules and reconstituting the arbitration panel. This remedy was precisely one for which the Brokers negotiated by selecting arbitration under FINRA as part of the express terms of the contract. While they assert that Bridgen's participation in the liability stage of the arbitration tainted the panel, offering only Kaseburg's dissent in support of this claim, that is not the standard for vacatur of the arbitration award. Because the Brokers fail to allege evident partiality on the part of the FINRA Director as to the remedy decision, or the newly-constituted panel which issued the final award, they fail to meet their "high hurdle," and vacatur was improper. As such, we reverse and remand for entry of an order confirming the arbitration award.

II. Attorney Fees

The Customers request attorney fees and costs incurred in connection with this appeal. Under RAP 18.1(a), a party may be awarded attorney fees "[i]f applicable law grants" the party the right to recover such fees. The Customers

contend they are entitled to attorney fees under the language of the contract and under the CPA, as two independent bases.

Charles Schwab counters that attorney fees are not available under the FAA and, therefore, there is no basis to recover fees. While it is correct that fees are not available under the FAA,[5] Charles Schwab ignores the Customers' request under the language of the contract and the CPA, and does not challenge either of those alternate bases.

Interactive Brokers argues that the Customers' claim is not an action "on a contract or lease," and therefore does not fall under the language of RCW 4.84.330, or, alternatively, that the contract provides only for indemnification rather than attorney fees. It additionally contends that the Customers did not receive a valid CPA award, or, if it was a valid CPA award, an action to confirm or vacate an arbitration award is not an appeal under the CPA. It provides no authority or analysis for the arguments against a fee award under the CPA, only presenting conclusory statements.

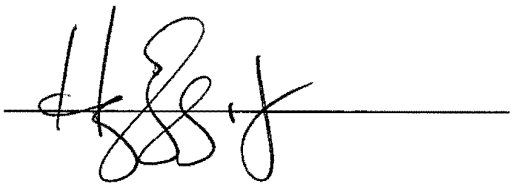
A party who is injured by a violation of RCW 19.86.020 may recover attorney fees, including fees on appeal. Ewing v. Glogowski, 198 Wn. App. 515, 526, 394 P.3d 418 (2017) (citing RCW 19.86.090). Interactive Brokers cites to Menke v. Monchecourt in support of its contention that the Customers are not entitled to fees under the CPA. See 17 F.3d 1007, 1009 (7th Cir. 1994). There, the court distinguished between a traditional civil appeal and a proceeding to confirm an arbitration award, holding that the party confirming the award was not

[5] See Toddle Inn Franchising, LLC v. KPJ Assoc., LLC, 8 F.4th 56, 66-67 (1st Cir. 2021) (holding that, while attorney fees are not generally available under the FAA, this does not necessarily preclude attorney fees under a contract provision or other statutory provision).

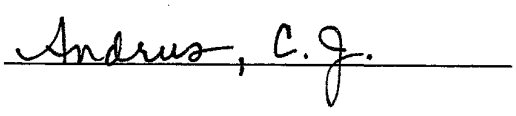
entitled to fees because of these distinctions. Id. It noted that, "Unlike the usual civil appeal, where the successful party is usually defending the lower court's decision on the merits, an action for confirmation under 9 U.S.C. § 9 is intended to be a summary proceeding that merely makes the arbitrators' award a final, enforceable judgment of the court." Id. The proceeding here, however, is distinct because the Customers defended against vacatur below and have now prevailed on appeal. Because this proceeding was more than "a summary proceeding that merely makes" the award final, and, because Menke is a nonbinding federal decision interpreting an Illinois state statute, we decline to follow its reasoning.

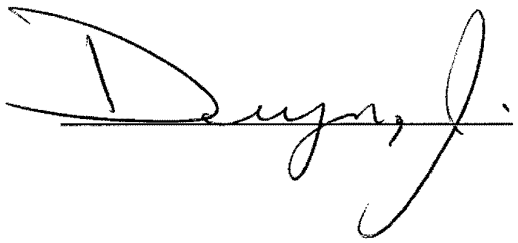
Here, the arbitration panel found the Brokers had violated the CPA. Because the Customers have demonstrated an entitlement to fees under the statute, we award fees pursuant to RAP 18.1.

Reversed and remanded for entry of an order confirming the arbitration award.[6]



WE CONCUR:





[6] The Customers requested this court remand with instructions for the trial court to determine fees incurred in connection with the trial court proceedings; that request may be made to the trial court upon remand. Similarly, the trial court may determine the amount of fees on appeal.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

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

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

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

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Article VI, ¶ 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

K&L GATES LLP

March 24, 2023 - 10:31 AM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	83396-1
Appellate Court Case Title:	Charles Schwab & Co., Inc, Respondent v. Irene Guerrero, et al, Appellants

The following documents have been uploaded:

- 833961_Petition_for_Review_20230324102302D1641508_0746.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- JHickman@mcnaul.com
- John@bender-law.com
- KDhaliwal@duboislaw.net
- christopher.stecher@kyl.com
- ghollon@mcnaul.com
- igor.stadnik@kyl.com
- kwalker@mcnaul.com
- lara.joel@kyl.com
- laura.white@klgates.com
- lnelson@mcnaul.com
- menchie.garcia@kyl.com
- monica.romero@klgates.com
- pallavi.wahi@klgates.com
- philip.guess@klgates.com
- suzanne.petersen@klgates.com
- tdemonte@mcnaul.com
- tdo@mcnaul.com
- tfitzgerald@mcnaul.com

Comments:

Sender Name: Robert B. Mitchell - Email: rob.mitchell@klgates.com
Address:
925 4TH AVE STE 2900
SEATTLE, WA, 98104-1158
Phone: 206-623-7580 - Extension 7640

Note: The Filing Id is 20230324102302D1641508