No. 101835-5

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.

# RESPONDENTS' ANSWER TO PETITION FOR REVIEW

One Union Square
600 University, 27th Fl.
Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC

Gregory J. Hollon
WSBA No. 26311
Timothy B. Fitzgerald
WSBA No. 45103
Theresa M. DeMonte
WSBA No. 43994

Attorneys for Leon Guerrero
Respondents

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## I. INTRODUCTION

This case involves an arbitration award in favor of twenty-six individual Customers who collectively lost millions of dollars in their retirement accounts due to their Brokers' errors and omissions. The Customers had an uphill battle, fighting against large and well-funded brokerage firms in their preferred venue of FINRA arbitration, but nevertheless prevailed on a portion of their claims after a lengthy liability hearing.

The trial court vacated the award, but the Court of Appeals correctly reversed that ruling and reinstated the award. In so doing, the appellate court correctly concluded the Brokers had failed to demonstrate "evident partiality" under the Federal Arbitration Act. That decision was consistent with well-established authority that violation of an arbitral forum's disclosure rules, by itself, does not demonstrate evident partiality. Instead, before an arbitrator's nondisclosure can rise to the level of evident partiality, the undisclosed information

must concern circumstances clearly evincing partiality, such as an undisclosed interest in the outcome of the arbitration or a substantial personal or professional relationship with a party or their attorney.

This Court should not be persuaded by the Brokers' attempt to manufacture grounds for review under RAP 13.4. Because the Brokers cannot satisfy the criteria of RAP 13.4, the Court should deny review and award the Customers fees and costs for answering the petition.

## II. RESTATEMENT OF ISSUES RAISED BY PETITIONERS

1. Did the Court of Appeals correctly conclude that an arbitrator's undisclosed litigation unrelated to and materially different from the arbitration fails to demonstrate evident partiality toward the Customers?

2. Did the Court of Appeals correctly conclude that an arbitrator's violation of FINRA's disclosure rules, in the absence of evident partiality, is not an independent ground for vacatur?

3. Did the Court of Appeals correctly award fees on appeal under the CPA where the arbitrators awarded fees under the CPA?

## III. RESTATEMENT OF FACTS

### A. The Brokers' Failure to Warn the Customers of their Financial Advisor's Reckless Trading Activity Leads to Financial Disaster

Respondents (the "Customers") are investors whose retirement savings were devastated by reckless and unauthorized trading strategies employed by their financial advisor ("Vita"), using brokerage and clearing services provided by the petitioners, Interactive Brokers ("IBKR") and Charles Schwab ("Schwab" and, together with IBKR, the "Brokers").

Vita's reckless conduct set off internal alarms at Schwab, causing Schwab to permanently kick Vita off its platform. CP 374. But Schwab said nothing to the Customers, allowing Vita to falsely inform the Customers that its termination from Schwab (and subsequent forced move to IBKR) was

"wonderful and exciting news." CP 1334.

After transitioning to IBKR, Vita lost over $42 million of its clients' money in just five months. CP 1377. As at Schwab, Vita's misconduct set off internal alarms at IBKR. And, like Schwab, IBKR never bothered to alert the Customers to any of the red flags Vita had triggered.

**B. The Customers Initiate Arbitration**

After learning of their catastrophic losses and the Brokers' failure to warn them about Vita's malfeasance, the Customers initiated arbitration against the Brokers with the Financial Industry Regulatory Association ("FINRA"), as required by the Brokers' mandatory arbitration clauses in their customer contracts. CP 372. The Customers' claims included common law claims and statutory claims based on Washington's Consumer Protection Act ("CPA") and Securities Act. CP 384–392.

FINRA rules include a process for selecting the three-arbitrator panel, including striking and ranking candidates and

reviewing their disclosure reports. CP 425, 644. The report for prospective arbitrator Pamela Bridgen disclosed the following information regarding "non-investment related lawsuits":

| | |
|---|---|
| Non-investment related lawsuit/charge | Plaintiff in suit involving consumer protection act misrepresentation in real estate, ongoing (2017) |

CP 1887. Although Bridgen disclosed her role as a plaintiff in an ongoing CPA case, and although the arbitration involved CPA claims, none of the parties struck her from their list of potential arbitrators. Bridgen's checklist confirmed she had not formed any opinions about the arbitration participants or their claims. CP 1146. She answered "no" when asked whether she had been involved in a dispute "involving the same or similar subject matter as the arbitration." CP 1146.

### C. After the Customers Win on Liability, the Brokers Seek to Replace the Panel

The arbitration was bifurcated into liability and damages phases. CP 368. The Brokers raised a "wrong party" defense, emphasizing that the Customers should have sued their financial advisor, Vita, instead of the Brokers. *E.g.*, CP 687

("Claimants are blaming the wrong party for any losses stemming from investments that Vita made at Schwab."). At the end of the 11-day liability hearing, the Brokers expressed their satisfaction with the panel's oversight of the arbitration. CP 1407 ("I've got to tell you how pleasing it is in a strange [Zoom] environment to have the kind of attention that we've received from the panel throughout. On behalf of [IBKR] it's very satisfying to resolve a matter through this process. And that's highly attributable to the attention of the arbitrators.").

The Brokers' tune quickly changed, however, after the panel issued its liability ruling finding them liable for breach of contract, negligence, and violations of the CPA. CP 1066. That evening, the Brokers took to the internet, and their Google searches revealed Bridgen had been involved in a federal case against a financial advisor. CP 347–48, 647–48, 2017. That case had resulted in a spin-off bankruptcy proceeding, which was dismissed in 2017. CP 348. Finally, Bridgen had been a co-plaintiff in a 2006 CPA case regarding real estate, which

concluded in 2008. CP 348, 648. Although Bridgen did not include these matters in her disclosures, there is no evidence or finding she intended to deceive (as discussed below, given the confusing nature of FINRA's disclosure rules, it is equally or more plausible the nondisclosure was inadvertent).

The next day, the Brokers complained to FINRA, seeking a do-over of the 11-day hearing they had just lost by demanding the entire panel be replaced. CP 1069. The FINRA director denied that request, instead removing Bridgen under FINRA Rule 12407(b), which provides for the removal of "an arbitrator" (not the entire panel) after the first hearing session has begun based "on information required to be disclosed under Rule 12405 that was not previously known by the parties." CP 1099.

The new arbitrator joined the panel. Following the damages hearing, the panel issued a final ruling awarding the Customers approximately half of what they sought in damages, along with an award of attorneys' fees and costs under the

CPA. CP 1122–23, 1424. The newly assigned arbitrator dissented without reasoning, so it is unclear whether he believed the award was too small or too large. CP 1126.

The Customers moved to confirm the award and the Brokers moved to vacate it in King County Superior Court. CP 82–92. The trial court vacated the award, ruling that Bridgen's nondisclosure, by itself, amounted to evident partiality, and that her removal and replacement was an insufficient remedy. CP 2191–93.

The Court of Appeals reversed in an unpublished opinion, concluding that the "only proper basis for vacatur of the arbitration award is evident partiality," and that the Brokers failed to establish that Bridgen's nondisclosure met that standard under the FAA. Slip op. at 6–8. The Court of Appeals further held that, in the absence of evident partiality, there was no basis under the FAA to second-guess FINRA's decision to replace Bridgen pursuant to its own internal rules. Slip op. at 8. The Court of Appeals awarded the Customers fees on appeal.

## IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

The Brokers fail to establish review is warranted under RAP 13.4(b). The Court of Appeals' decision does not conflict with this Court's decisions or its own published decisions and fails to raise significant constitutional questions. RAP 13.4(b)(1)–(3). And the unique factual circumstances here fail to raise "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4).

At the outset, it is important to note that the record contains no evidence supporting the Brokers' assertion that Bridgen was intentionally deceitful, and the trial court did not make such a finding. Given the confusing nature of FINRA's disclosure requirements regarding prior litigation, it is just as likely – if not more likely – that the nondisclosure was the product of inadvertence or confusion. *See* CP 1347–51.

For example, the Brokers relied below on FINRA Rule

12405.[1] But, consistent with well-established authority on evident partiality, that rule requires disclosure of circumstances or relationships like an arbitrator's personal or financial interest in the outcome of the arbitration or personal or professional relationships with the parties or their representatives (Bridgen had neither).

Similarly, while FINRA temporarily disqualifies arbitrators who are involved in securities-related litigation while such litigation is pending, CR 467, Bridgen had resolved her claims against her financial advisor in 2017, well prior to the Customers initiating this matter (although related claims against another non-financial advisor party remained pending), CP 1798–99. And while FINRA also disqualifies arbitrators who have filed two or more securities-related disputes within the prior 10 years, CP 343, 1350, Bridgen only had one such matter (although the Brokers have attempted to argue that the

[1] Cited FINRA rules are appended to this answer.

spin-off bankruptcy case should be treated as a separate matter). In short, there is no evidence suggesting that Bridgen intentionally attempted to mislead any of the parties.

Additionally, the Brokers argue that it was Bridgen's questioning at the end of the liability hearing that first triggered their concerns. Pet. 6–7. But before the trial court, the Brokers contended the panel treated them unfairly "throughout the proceeding," referencing earlier conduct of Bridgen's that allegedly led them to believe she might be partial. CP 112, 347, 368, 646. The Brokers fail to mention those incidents on appeal, knowing full well that actual knowledge of what they claimed to be biased treatment, as well as their constructive knowledge of information about Bridgen available on Google, required them either to "investigate the arbitrators as diligently *before*" an adverse ruling as after, or forfeit any objection. *Stone v. Bear, Stearns & Co. Inc.*, 872 F. Supp. 2d 435, 439 (E.D. Pa. 2012); *Goldman, Sachs & Co. v. Athena Venture Partners, L.P.*, 803 F.3d 144, 150 (3d Cir. 2015) ("[A] party

may not conduct a background investigation on an arbitrator after the award with the sole motivation to seek vacatur."). The Court of Appeals did not reach the actual/constructive knowledge issues presented to it, but its decision would easily be affirmed on that independent ground as well.

### A. The Determination that the Brokers Failed to Show "Evident Partiality" Does Not Conflict With Washington Cases

To merit discretionary review, a Court of Appeals decision must conflict with one of its own published cases or a decision of this Court.[2] RAP 13.4(b)(1), (2). In an attempt to manufacture such a conflict, the Brokers cite to only two cases: this Court's 1943 decision in *Home Insurance Co. of New York v. Northern Pacific Railway Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943), and the Court of Appeals' ruling in *Jensen v. Misner*, 1 Wn. App. 2d 835, 846, 407 P.3d 1183 (2017). Pet.

[2] The Brokers' petition references federal authority. While the Customers disagree with their characterization of purported "conflicts," conflicts with federal authority do not provide a basis for this Court's review under RAP 13.4(b)(1) or (2).

14–15. Neither case presents a conflict justifying this Court's intervention.

The Brokers claim the opinion conflicts with *Home Insurance* because it states that decisions of federal appellate courts are persuasive but not binding and thus "fail[s] to acknowledge" that the United States Supreme Court binds state courts on federal questions. Pet. 14 (citing slip op. at 4). While the Brokers appear to make this argument with a straight face, readers of their petition may be excused for rolling their eyes. It is clear the Court of Appeals well understands that decisions of the U.S. Supreme Court are binding on issues of federal law, and that it meant merely that decisions of *intermediate* federal appellate courts are persuasive but not binding. For this reason, it cited to *Feis v. King County Sheriff's Department*, 165 Wn. App. 525, 547, 267 P.3d 1022 (2011), which held exactly that. The Brokers have failed to show a conflict with this Court's decisions under RAP 13.4(b)(1).

Equally unavailing is the Brokers' citation to *Jensen*,

which held that an arbitrator's "evident partiality" was not established where undisclosed information was neither "a relationship or circumstance involving an interest in the outcome" nor "a relationship with a party." 1 Wn. App. 2d at 846. According to the Brokers, the Court of Appeals' decision here conflicts with *Jensen* by supposedly "suggest[ing] that only a relationship, and not a circumstance" can give rise to evident partiality. Pet. 15.

Far from conflicting with *Jensen*, the Court of Appeals' opinion is in harmony with it. The Court of Appeals' opinion never stated that "only a relationship," and no other circumstances, could give rise to evident partiality. Instead, it concluded that Bridgen's unrelated litigation was *not* such a circumstance. This straightforward conclusion does not conflict with *Jensen* under RAP 13.4(b)(2), and review is not warranted under this prong.

## B. The Evident Partiality Ruling Does Not Involve a Constitutional Question

In an attempt to secure discretionary review under RAP 13.4(b)(3), which requires the involvement of "a significant question of law under the Constitution," the Brokers first claim the FAA "guarantees judicial review to prevent due process violations caused by arbitrator misconduct."[3] Pet. 17. However, the Due Process Clause applies only against state actors. Thus, a private arbitrator cannot violate a party's due process rights. As the Seventh Circuit put it, "since constitutional rights are in general rights against government officials and agencies rather than against private individuals and organizations, the fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due

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[3] For this dubious proposition, the Brokers cite *Kyocera Corp. v. Prudential-Bache Trade Services, Inc*., 341 F.3d 987, 997–98 (9th Cir. 2003). *Kyocera* does not support the Brokers' contention that arbitrator misconduct is a due process violation; instead, it stands for the more limited proposition that the FAA's *judicial review provisions* preserve some due process. *See id.*

process of law' cannot give rise to a constitutional complaint." *Elmore v. Chicago & Ill. Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986). Indeed, "every court to examine the issue has held that FINRA is not a state actor." *Weber v. PNC Invs.*, 844 F. App'x 579, 586 (3d Cir. 2021). And while the FAA's limited and narrow judicial review provisions provide for some level of due process, that simple reality does not create a significant question of constitutional law under RAP 13.4.

In trying to constitutionalize this case, the Brokers also claim that because the Court of Appeals supposedly failed to properly apply the *Marks* rule to determine the Supreme Court's holding in *Commonwealth Coatings*, its decision involves a significant constitutional question under RAP 13.4(b)(3). This reasoning is faulty.

Of course Washington courts must apply federal law with fidelity, and federal law trumps conflicting state law under the Supremacy Clause. *See, e.g.*, *Goodwin v. Bacon*, 127 Wn.2d 50, 57, 896 P.2d 673 (1995). But this does not mean that every

purported error in applying federal law raises a significant federal constitutional question within the meaning of RAP 13.4(b)(3), any more than purported errors in applying Washington statutes or regulations rise to the level of state constitutional error. Such a broad conception of "constitutional error" would encompass *every* error. If RAP 13.4 was intended to promote review of all purported errors, or even only all purported federal errors, it would say so.

Moreover, the Court of Appeals' decision in this case did not implicitly apply (or misapply, as the Brokers contend) *Marks* to determine the holding in the plurality decision of *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968). In *Commonwealth Coatings*, Justice Black's opinion reasoned that arbitrators should disclose "any dealings that might create an impression of possible bias." 393 U.S. at 149.

But the majority of appellate courts considering the issue have concluded that the controlling holding is Justice White's

concurring opinion endorsing "a cautious approach to vacatur for nondisclosure" unless the relationship with a party is direct and substantial. *See Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 282 (5th Cir. 2007) (collecting cases from the Second, Fourth, Sixth, and Seventh Circuits concluding Justice Black's "appearance of bias" standard is not controlling); *Republic of Argentina v. AWG Grp. Ltd.*, 894 F.3d 327, 334 n.2 (D.C. Cir. 2018) (adopting Justice White's concurring opinion as narrowest grounds under *Marks*); *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 252 (3d Cir. 2013) (same); *Schreifels v. Safeco Ins. Co.*, 45 Wn. App. 442, 445, 725 P.2d 1022 (1986) (observing that federal courts have "persuasively challenged" whether Justice Black's "appearance of bias" standard controls). This interpretation best honors the plurality ruling, the *Marks* principle, and the statutory requirement that partiality must be "evident" (not "potential") to support vacatur under the FAA. *See* 9 U.S.C. §10(a)(2).

But none of this matters to the question of whether this Court should accept review, for the simple reason that the Court of Appeals in this case never contended that Justice White's formulation was correct. The decision therefore did not surface any purported split of authority between *Lusis* or *Schreifels* – not even, as the Brokers anemically urge, "implicitly."[4] Pet. 18 (comparing *St. Paul Ins. Cos. v. Lusis*, 6 Wn. App. 205, 212–13, 492 P.2d 575 (1971), with *Schreifels*, 45 Wn. App. at 445). The Brokers failed to meet their heavy burden to demonstrate evident partiality under *either* Justice Black's or Justice White's formulation. In sum, this case does not involve a "significant question" of constitutional law (or, for that matter, even a trivial question of constitutional law) under RAP 13.4(b)(3).

[4] The Brokers try to make hay of the fact that the decision cited Justice White's concurring opinion. Pet. 14. But it did so only for the noncontroversial proposition that parties often choose to arbitrate because arbitrators may have subject matter expertise and can be effective adjudicators. Slip op. at 6.

### C. The Petition Does Not Involve an Issue of Substantial Public Interest

The Brokers give the "substantial public interest" prong of RAP 13.4(b)(4) only glancing treatment, arguing that, without discretionary review, "litigants who learn that an arbitrator lied about participating as a plaintiff or defendant in identical litigation will have no recourse." Pet. 26. That argument misrepresents the applicable facts and law.

Factually, the assertion that Bridgen "lied" is unsupported – the trial court never found that Bridgen intentionally lied, CP 2191–93, and because the Brokers conducted no discovery, the reasons for Bridgen's nondisclosures are unknown. As discussed above, the FINRA disclosure rules concerning prior litigation are confusing at best. *See supra* pages 9–11. The questionnaire asked only if she had been involved in a case involving "the same or similar subject matter as the arbitration." CP 1146. Bridgen – herself a non-lawyer – never sued a broker like Schwab or IBKR, and it is entirely plausible that she believed her case against a

financial advisor was fundamentally different. CP 2159. Yet, in a meritless effort to create the impression that there has been a miscarriage of justice, the Brokers drum their "deception" theme throughout their petition, claiming Bridgen "falsely swore" to the truth of her statements about litigation and deliberately misrepresented the facts. Pet. 4, 11, 25.[5]

Equally inaccurate is the Brokers' argument that Bridgen's prior lawsuit was "identical." Far from being "identical," Bridgen's claims against her financial advisor were consistent *with the Brokers' defense theory* that the Customers' financial advisor – and not the Brokers – was the liable party. *See, e.g.,* CP 687.

This fact, which the Court of Appeals noted, slip op. at 7, underscores the lack of merit in the Brokers' argument that, without discretionary review, arbitration participants will lack

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[5] To be clear, there was no miscarriage of justice. To the contrary, the arbitration panel appropriately held the Brokers responsible for their serious and damaging missteps.

any recourse in nondisclosure cases. To the contrary, whenever nondisclosure evinces evident partiality, vacatur will be warranted. But, in accord with the important policy of avoiding endless appeals of arbitration decisions, not every nondisclosure meets the test – "evident" partiality under the FAA is a high standard, and the party asserting its existence bears a heavy burden. *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. Irrevocable Trust*, 729 F.3d 99, 105–06 (2d Cir. 2013) (concluding the party seeking vacatur must prove evident partiality by clear and convincing evidence).

Consistent with that burden, "[t]he alleged partiality must be 'direct, definite, and capable of demonstration rather than remote, uncertain, or speculative.'" *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993) (citation omitted). Put differently, "[e]vident partiality may be found only 'where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.'" *Scandinavian Reinsurance Co. v. Saint Paul Fire & Marine Ins.*

*Co.*, 668 F.3d 60, 64 (2d Cir. 2012) (citation omitted).

This standard is not met here. It is pure speculation that Bridgen's participation in unrelated litigation raising claims against a different type of defendant might make her partial in any way.[6] Moreover, the direction of any alleged partiality is similarly speculative. It is just as plausible that Bridgen would agree with the Brokers that the Customers should have sued their financial advisor – after all, that's what she did – and be more favorably disposed toward the Brokers (or have some other reason to believe the Customers' claims, unlike her own, lacked merit).

These circumstances clearly do not rise to the level of "evident partiality," which requires that "the arbitrator's bias must be sufficiently obvious that a reasonable person would

[6] Nor could Bridgen's undisclosed 2006 CPA case (long since resolved by the time of the arbitration) show "evident partiality," and the Brokers' argument on this score strains credulity, since Bridgen *did* disclose her *pending* CPA case. CP 1887.

easily recognize it." *See Freeman*, 709 F.3d at 253 ("[T]he conclusion of bias must be ineluctable, the favorable treatment unilateral."). Nor do these circumstances lead a reasonable person (as opposed to a hypersensitive or paranoid person) to perceive potential bias.[7]

The Brokers' claim that the nondisclosure violated FINRA rules is of no moment. It is well established that the mere fact that information was not disclosed in violation of an arbitral forum's rules is insufficient to create a reasonable impression of partiality. *See Ploetz for Laudine L. Ploetz, 1985 Trust v. Morgan Stanley Smith Barney LLC*, 894 F.3d 894, 899 (8th Cir. 2018) (arbitrator's violation of FINRA disclosure rules

[7] The two unpublished cases on which the Brokers rely do not alter this conclusion. Pet. 13. The *Hagman* case was not an FAA case; it involved California law not modeled after the FAA. *See Hagman v. Citigroup Glob. Mkts., Inc.*, No. BS128800, 2011 WL 975535 (Cal. Sup. Ct. Feb. 9, 2011). And the *Berghorst* case – which had dramatically different facts from those present here – has been described by the Court of Appeals as "not persuasive." *Jensen*, 1 Wn. App. 2d at 848 (citing *Citigroup Global Mkts, Inc. v. Berghorst*, No. 11-80250-CIV, 2012 WL 5989628, at *4 (S.D. Fla. Jan. 20, 2012)).

"d[oes] not provide the court with any basis to conclude that [the arbitrator] was evidently partial"); *see also Scandinavian Reinsurance*, 668 F.3d at 76–77. Nor does Bridgen's nondisclosure somehow turn her into an "imposter," as the Brokers hyperbolically claim in citing to *Move, Inc. v. Citigroup Global Mkts., Inc.*, 840 F.3d 1152, 1155 (9th Cir. 2016), a case in which the arbitrator lied about his qualifications, fraudulently posing as a retired attorney. Moreover, in *Move*, vacation was based not on evident partiality but on misconduct – a different statutory ground the Brokers do not and cannot press here. *Id.* at 1158.

In sum, the Court of Appeals' decision was fully consistent with persuasive federal authority. Bridgen's conduct did not establish "evident partiality," and the Brokers' "taint" arguments are thus unavailing. The Brokers have failed to demonstrate an issue of substantial public interest.

### D. The Court of Appeals' "Remedy Analysis" Does Not Provide Grounds for Discretionary Review

What the Brokers refer to as the "remedy analysis" also

does not merit review under RAP 13.4.[8] According to the Brokers, the appellate court held that they "waived any right to seek vacatur when they contracted for a FINRA arbitration." Pet. 20. But the Court of Appeals did not find the Brokers waived their right to seek vacatur. Instead, it held they had not established evident partiality. *See* slip op. at 8 ("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.").

As the Court of Appeals observed, "FINRA applied the remedy of removing Bridgen for nondisclosure in violation of its rules and reconstituting the arbitration panel." Slip op. at 8.

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[8] While the Brokers complain they could not change FINRA's rules, they chose to include arbitration clauses in their contracts of adhesion with their customers because they deemed it in their own best interest. *See* FINRA Rule 12200. Having done so, they are of course bound by the rules governing FINRA arbitrations – rules promulgated by a self-regulatory organization of which both Brokers are significant members. *See Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 92–93 (3d Cir. 2018).

This remedy was precisely what was required by the FINRA rules, which – in the absence of evident partiality – were the proper source for a remedy. *See AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.") (internal quotation marks and citations omitted).

Nor, as the Brokers contend, did the "Court of Appeals assume[] that remedies provided under the FAA are subject to waiver by contract." Pet. 21. Instead, the Court of Appeals took issue with the *trial court's* ruling, which (incorrectly) concluded that the relevant question "is not whether Ms. Bridgen's participation caused evident partiality," but rather "whether the remedy imposed by FINRA was sufficient." CP 2192.

The Court of Appeals correctly rejected this framing. It instead properly re-centered the analysis on the FAA's evident partiality standard:

> 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 . . . . the Brokers are required to demonstrate evident partiality.

Slip op. at 6. In conducting its analysis, the Court of Appeals properly considered whether the Brokers had met their high burden to show evident partiality.

The Court of Appeals' conclusion that evident partiality was not present does not conflict with the Brokers' cited Washington cases, none of which involve the FAA. Those cases stand for the different propositions that Washington's arbitration act governs judicial review, and that arbitral standards do not govern whether evident partiality warranting vacatur is present. *See* Pet. 22–23 (citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); *Barnett v. Hicks*, 119 Wn.2d 151, 161, 829 P.2d 1087 (1992); *S&S Const., Inc. v. ADC Props.*, 151 Wn. App. 247, 256–57, 211 P.3d 415 (2009)). Those cases do not conflict with the Court of Appeals'

decision that, *in the absence of evident partiality*, vacatur is not warranted based on FINRA's application of the remedy set forth in its rules – the remedy the Brokers elected by mandating FINRA arbitration in their customer contracts. Slip op. at 8.

The Court of Appeals' remedy analysis does not conflict with Washington cases, does not raise a constitutional question, and does not raise an issue of substantial public interest. Thus, review is not warranted under RAP 13.4.

**E. The Fee Award Does Not Merit Discretionary Review**

The Brokers argue the Court of Appeals' fee award conflicts with *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003), and *Saleemi v. Doctor's Assocs. Inc.*, 176 Wn.2d 368, 386, 292 P.3d 108 (2013). It does not.

*Malted Mousse* concluded that attorneys' fees on appeal may be recovered if allowed by statute and RAP 18.1. 150 Wn.2d at 535. Here, the Court of Appeals correctly determined that fees *were* permitted by statute; specifically, by RCW 19.86.090. Slip op. at 9–10.

Nor does the Court of Appeals' ruling conflict with *Saleemi*. There, it appears the underlying arbitration award found liability under the Franchise Investment Protection Act ("FIPA"), not the CPA. 176 Wn.2d at 374. In affirming confirmation of the arbitration award, this Court did award attorneys' fees under FIPA. *Id.* at 386. Far from conflicting with *Saleemi*, the appellate court's fee award aligns with it.

The CPA, which exists "to protect the public," is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. The Legislature's directive fully supports the Court of Appeals' award of fees. The Customers' efforts to confirm their award are inextricably intertwined with recovering on their successful CPA claims, CP 1123, and the Court of Appeals correctly held that the Customers should recover those fees. The Court of Appeals' ruling does not conflict with this Court's cases or its own published rulings.

### F. This Court Should Award the Customers Fees for Answering the Petition

The appellate court awarded the Customers fees on appeal under RCW 19.86.090. Slip op. at 9–10. This Court should deny the petition and award the Customers fees and costs incurred in answering the petition. RAP 18.1(j).

## V. CONCLUSION

This Court should deny review and award the Customers costs and fees.

I certify that this brief contains 4,991 words, in compliance with RAP 18.17.

DATED this 4th day of May, 2023.

McNAUL EBEL NAWROT & HELGREN PLLC

By: *s/Theresa M. DeMonte*
Gregory J. Hollon, WSBA No. 26311
Timothy B. Fitzgerald, WSBA No. 45103
Theresa M. DeMonte, WSBA No. 43994

600 University Street, Suite 2700
Seattle, Washington 98101
Phone: (206) 467-1816
Email: ghollon@mcnaul.com
tfitzgerald@mcnaul.com
tdemonte@mcnaul.com
*Attorneys for Leon Guerrero Respondents*

And

BENDER LAW PLLC

By: *s/John A. Bender, Jr.*
John A. Bender, Jr., WSBA No. 19540

4634 East Marginal Way, Suite C-150
Seattle, Washington 98134
Phone: 206-390-9676
Email: john@bender-law.com

*Attorneys for Naramore Respondents*

No. 101835-5

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Seattle, WA 98101-3143
(206) 467-1816

McNAUL EBEL NAWROT &
HELGREN PLLC

Gregory J. Hollon
WSBA No. 26311
Timothy B. Fitzgerald
WSBA No. 45103
Theresa M. DeMonte
WSBA No. 43994

Attorneys for Leon Guerrero
Respondents

# INDEX TO APPENDIX

# 12200. Arbitration Under an Arbitration Agreement or the Rules of FINRA

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
(1) Required by a written agreement, or

(2) Requested by the customer;

- The dispute is between a customer and a member or associated person of a member; and

- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

# 12405. Disclosures Required of Arbitrators

(a) Before appointing arbitrators to a panel, the Director will notify the arbitrators of the nature of the dispute and the identity of the parties. Each potential arbitrator must make a reasonable effort to learn of, and must disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, including:

(1) Any direct or indirect financial or personal interest in the outcome of the arbitration;

(2) Any existing or past financial, business, professional, family, social, or other relationships or circumstances with any party, any party's representative, or anyone who the arbitrator is told may be a witness in the proceeding, that are likely to affect impartiality or might reasonably create an appearance of partiality or bias;

(3) Any such relationship or circumstances involving members of the arbitrator's family or the arbitrator's current employers, partners, or business associates; and

(4) Any existing or past service as a mediator for any of the parties in the case for which the arbitrator has been selected.

(b) The obligation to disclose interests, relationships, or circumstances that might preclude an arbitrator from rendering an objective and impartial determination described in paragraph (a) is a continuing duty that requires an arbitrator who accepts appointment to an arbitration proceeding to disclose, at any stage of the proceeding, any such interests, relationships, or circumstances that arise, or are recalled or discovered.

(c) The Director will inform the parties to the arbitration of any information disclosed to the Director under this rule unless the arbitrator who disclosed the information declines appointment or voluntarily withdraws from the panel as soon as the arbitrator learns of any interest, relationship or circumstance that might preclude the arbitrator from rendering an objective and impartial determination in the proceeding, or the Director removes the arbitrator.

# 12407. Removal of Arbitrator by Director

**(a) Before First Hearing Session Begins**

Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.

(1) The Director will grant a party's request to remove an arbitrator if it is reasonable to infer, based on information known at the time of the request, that the arbitrator is biased, lacks impartiality, or has a direct or indirect interest in the outcome of the arbitration. The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer.

(2) The Director must first notify the parties before removing an arbitrator on the Director's own initiative. The Director may not remove the arbitrator if the parties agree in writing to retain the arbitrator within five days of receiving notice of the Director's intent to remove the arbitrator.

**(b) After First Hearing Session Begins**

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).

**DECLARATION OF SERVICE**

On May 4, 2023, I caused to be served a true and correct copy of the foregoing document to be served on counsel of record stated below, via the Washington Courts E-Portal:

John A. Bender Jr.
Bender Law PLLC
4634 East Marginal Way, Suite C-150
Seattle, WA 98134
Phone: 206-390-9676
Email: john@bender-law.com
atharshna@bender-law.com (asst.)
*Attorney for Naramore Respondents*

Christopher A. Stecher and Igor Stadnik
Keesal, Young & Logan
1301 5th Ave #3100
Seattle, WA 98101
Phone: (206) 622-3790
Email: christopher.stecher@kyl.com
igor.stadnik@kyl.com
sarah.yong@kyl.com (asst.)
*Attorneys for Petitioner Charles Schwab & Co., Inc.*

Robert B. Mitchell, Philip M. Guess,
Monica M. Guess
K&L Gates LLP
925 4th Avenue, Suite 2900
Seattle, Washington 98104
Phone: (206) 370-7580
Email: rob.mitchell@klgates.com
philip.guess@klgates.com
monica.guess@klgates.com
Suzanne.Petersen@klgates.com (asst.)
*Attorneys for Petitioner Interactive Brokers LLC*

I declare under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 4th day of May, 2023, at Tukwila, Washington.

*s/Thao Do*
Thao Do, *Legal Assistant*

## MCNAUL EBEL NAWROT AND HELGREN PLLC

## May 04, 2023 - 4:12 PM

## Transmittal Information

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|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 101,835-5 |
| **Appellate Court Case Title:** | Charles Schwab & Co., Inc, et al. v. Irene Guerrero, et al. |

**The following documents have been uploaded:**

- 1018355_Answer_Reply_20230504161136SC923952_8833.pdf
  This File Contains:
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- John@bender-law.com
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- ghollon@mcnaul.com
- igor.stadnik@kyl.com
- kwalker@mcnaul.com
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- monica.romero@klgates.com
- pallavi.wahi@klgates.com
- philip.guess@klgates.com
- rob.mitchell@klgates.com
- suzanne.petersen@klgates.com
- tfitzgerald@mcnaul.com

**Comments:**

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Sender Name: Thao Do - Email: tdo@mcnaul.com
**Filing on Behalf of:** Theresa Demonte - Email: tdemonte@mcnaul.com (Alternate Email: tdo@mcnaul.com)

Address:
600 University Street
Suite 2700
Seattle, WA, 98101
Phone: (206) 467-1816 EXT 362

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