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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

In the Matter of the Arbitration Between: WILLIAM SMITH Petitioners, And WICKED BANK SECURITIES, LLC, EDDIE EVIL, an individual; Respondents.	Case No.: 37-2010-1010101010101 **MEMORANDM OF POINTS AND AUTHORITIES IN SUPPORT OF FIRST AMENDED PETITION TO VACATE ARBITRATION AWARD** Dept: 00 Judge: Hon. Earl Warren

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Petitioner respectfully submits the following Memorandum of Points and Authorities in Support of their First Amended Petition to Vacate the Arbitration Award.

STATEMENT OF FACTS

Petitioners William Smith and Michael Smith (father and son) were licensed brokers in the employ of Big Rock. Big Rock was taken over by Wicked Bank, LLC in 2006 (hereinafter referred to as Wicked Bank). William Smith began working for Big Rock in 1992. His son Michael began working for Big Rock in 2000. The Smiths had over 2,500 accounts, and over $400 million under their management.

On November 19, 2004, Wicked Bank, by and through their manager, Respondent Eddie Evil (Evil) fired William R. Smith. Michael Smith was constructively terminated a few days later.

On or about October 5, 2005, Petitioners filed a claim under the arbitration provisions of NASD as two separate cases, thereafter consolidated as case number 00-1234. In 2007, NASD changed its name to Financial Industry Regulatory Authority (FINRA).

Wicked Bank filed a counter-claim seeking return of retention bonuses paid to the Smiths during their employment.

After long and contentious discovery proceedings, the arbitration proceedings began on October 7, 2007 in San Diego, California. The arbitration panel consisted of Arthur Suess, Chairman, Gerald Goof, and James H. Jolly. The Smiths put on their case-in-chief for a two week period ending on October 19, 2007. Wicked Bank's case-in-chief was originally scheduled to begin in April, 2008, and was rescheduled to begin on May 1, 2008.

On October 20, 2007, Wicked Bank moved the panel for a motion for judgment. The Smiths filed their opposition to the motion. Wicked Bank filed a reply, and the Smiths a subsequent rebuttal. The hearing of the motion was to take place on February 6, 2008 at FINRA's headquarters in Los Angeles, California.

As is more fully set forth in the declaration of Charles Counsel, filed and served herewith, on the morning of the February 6, 2008 hearing date, Michael Smith and Charles Counsel traveled from San Diego, California, to Los Angeles, California, by train. As it

turned out, Respondent Eugene P. Evil [both a party to the subject arbitration and a FINRA arbitrator in other matters], and Arbitrator Jolly, also traveled to Los Angeles, California, from San Diego, California aboard that same train. Charles Counsel saw Evil and Jolly enter the same cab in front of Los Angeles' Union Station. Evil and Jolly shared that cab ride from Union Station to the FINRA headquarters where the motion to dismiss hearing was to take place.

As the hearing on the motion for judgment commenced, neither Evil or Jolly chose to reveal that they had ex parte contact by way of the shared cab ride from Los Angeles Union Station to FINRA headquarters. Charles Counsel, counsel for the Smiths put the matter on the record. Both Evil and Jolly denied anything improper happened during the subject taxi ride. Jolly's denial was particularly vehement, and Jolly appeared to take the discussion as a personal attack on him.

Jolly's behavior was particularly troubling. As set forth in the Declarations of the Petitioners and Charles Counsel, on more than one occasion during the hearing in the Petitioner's case-in-chief, Chairman Seuss made a particular point of telling the parties and their counsel to use separate elevators from the arbitrators, and that the parties and the attorneys should not remain alone in the hearing room with the arbitrators, so that ex parte contact could be avoided. At the outset, Chairman Seuss was particularly adamant about the ethical proprieties. Despite Chairman Seuss's wishes at the outset, Jolly and Evil apparently decided that riding in the cab with each other was not a big deal.

On February 12, 2008, the arbitral panel issued its ruling, and granted Wicked Bank's motion to dismiss with prejudice. On March 4, 2008, Petitioners filed a motion with the FINRA Director of Arbitration asking him to set aside the February 12, 2008 ruling on the basis of a violation of the NASD/FINRA Code of Ethics for Arbitrators, Canon IIIB, prohibiting ex parte communication between the arbitrator and a party, except for scheduling matters, and also moved for a change in the entire arbitral panel.

FINRA scheduled the opposition to the motion to be filed no later than March 18, 2008 On March 13, 2008, Wicked Bank filed its opposition. On March 17, 2008, before the

Smiths could file a reply, the Director of Arbitration, denied the Smith's application without explanation.

On March 19, 2008, the Smiths filed a motion for reconsideration of the Director of Arbitration's March 17, 2008 ruling. Wicked Bank filed its opposition, and the Smiths a reply to the opposition.

On April 7, 2008, the Director of Arbitration issued his ruling denying the motion for reconsideration, again without explanation.

On May 1 and 2, 2008, the second portion of the Arbitration was held. This hearing was on the Cross-Claim. On May 7, 2008, the panel rendered its decision on the Cross-Claim. William Smith was ordered to pay Wicked Bank the sum of $72,402.84, plus 5% interest. Michael Smith was ordered to pay Wicked Bank the sum of $4,000.00, plus 5% interest. The panel issued no ruling on the issue of attorneys fees and costs, but scheduled a hearing for June 11, 2008.

On May 22, 2008 Respondents filed their motion for attorneys fees and costs. At no time did the Respondents' counsel submit their detailed billing to the arbitrators. Respondents' counsel submitted brief declarations stating that their attorneys fees were approximately $500,000.00. Petitioners had no opportunity to challenge the veracity of the amount of attorneys fees.

On June 11, 2008, the arbitrators held a hearing on the attorneys fees issues. On September 4, 2008, the panel issued its final ruling at to attorneys fees and costs. William Smith was ordered to pay the sum of $372.094.00 to Wicked Bank pursuant to Government Code §12965, and $200.00 to FINRA in filing fees.

The Petitioners now bring the instant Petition to set aside the February 13, 2008 ruling of the arbitral panel based on Arbitrator Jolly violation of the NASD/FINRA Canon of Ethics prohibiting ex parte contact between an arbitrator and a party. The FINRA rulings of May 7, 2008 and September 4, 2008, should fail defacto.

LEGAL ARGUMENT

A. The Court has the Authority to Set Aside the FINRA Award.

The plain words of Code of Civil Procedure §1286.2 (a) state that the court shall vacate the award if "the award was procured by corruption, fraud or other undue means." Code of Civil Procedure §1286.2(a)(2) provides for vacation of the award if there was corruption in any of the arbitrators.

To construe a statute Courts begin with the probable intent of the Legislature. The goal of statutory interpretation is to ascertain the intent of the Legislature . . . to effectuate the purpose of the law. Dyna-Med, Inc. v. Fair Employment & Housing Com., 43 Cal.3d 1379, 1386 (1987). The Court's first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. People v. Valladoli, 13 Cal.4th 590, 597 (1996). The appellate courts follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act. People v. Weidert, 39 Cal.3d 836, 843 (1985), quoting Woodmansee v. Lowery, 167 Cal.App.2d 645, 652 (1959)

The interpretation of a statute . . . is a question of law . . . California Teachers Assn. v. San Diego Community College Dist., 28 Cal.3d 692, 699 (1981) Interpretation and applicability of a statute or ordinance is clearly a question of law. It is the duty of an appellate court to make the final determination from the undisputed facts and the applicable principles of law. Sutco Construction Co. v. Modesto High School Dist., 208 Cal.App.3d 1220, 1228 (1989)

The courts are to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable. Halbert's Lumber, Inc. v. Lucky Stores, Inc., 6 Cal.App.4th 1233, 1238-1240 (1992).

The statutes give the Court authority to set aside the FINRA award based on the corruption of the arbitrator.

Moncharsh v. Heily & Blasé, 3 Cal.4th 1 (1992) begins with the premise that the scope of arbitration is a matter of agreement between the parties and the powers of the arbitrator are

limited and circumscribed by the agreement or stipulation of submission. Id. at 8. Moncharsh continued, [b]y ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain. Id. at 10. In the instant matter, the Petitioners did not get the benefit of their bargain. Petitioners' bargain with FINRA was for a full, fair, and ethical arbitration panel. What Petitioners received was an arbitrator for whom the FINRA ethics rules was optional. How can the Petitioners have received the benefit of their bargain (with FINRA) if the arbitrators violate the FINRA ethical rules?

The Supreme Court recently decided Cable Connection, Inc. v. Directv, Inc., ___ Cal.4th ___ (2008), Supreme Court Docket Number D147767, decided August 25, 2008. There, the Supreme Court cited Vandenberg v. Superior Court, 21 Cal.4th 815, 831 (1999) with approval:

> Accordingly, policies favoring the efficiency of private arbitration as a means of dispute resolution must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed as the parties themselves have agreed. Cable Connection, Inc., *supra*, slip. at 13.

The contract to which the Supreme Court refers is the contract to arbitrate. The arbitration contract is valid if the arbitration organization acted in good faith. FINRA breached the contract with the Petitioners by failing and refusing to enforce its own ethical rules. Petitioners assert that the FINRA ethical rules are not "optional." The acts of Jolly in taking the cab ride with Evil was improper ex parte contact. The acts of FINRA in failing and refusing to enforce their own ethical rules, together with Jolly's actions were fundamental breaches of the arbitration contract that FINRA had with Petitioners to conduct the arbitration fairly and ethically.

B. Reasons to Vacate the Award.

Courts may vacate the award where it violates a well-defined public policy. Department of Personnel Administration v. California Correctional Peace Officers Assn., 152 Cal.App.4th 1193, 1200 (2007). Here, that well-defined public policy is that of adherence to arbitrator ethics.

Jevene v. Superior Court, 35 Cal.4th 935 (2005), the Supreme Court was called on to decide whether Code of Civil Procedure §1281.85 (ethical standards for persons serving as neutral arbitrators) applies to arbitrations conducted by NASD. The Court noted that the NASD has its own ethical standards. The question faced by the Supreme Court was whether the NASD ethical rules had a preemptive effect on Code of Civil Procedure §1281.85.

Preemption is not the issue here. Jevene's extensive discussion of the place of ethical standards in arbitration shows the important and well-defined public policy. Additionally, the existence of NASD/FINRA's own code of ethics is another example of the well-defined public policy of arbitrator ethics.

Petitioners assert that the remedy for arbitrator misconduct lies in the vacation of the award. Lambert v. Carneghi, 158 Cal.App.4th 1120, 1136 (2008). In the instant matter, the arbitration was divided into three distinct sets of hearings. The first in October, 2007, which presented the Petitioners' case-in-chief, the second in May, 2008 in which Wicked Bank and Evil present their case-in-chief on their cross-claim, and third, the June, 2008 attorneys fees hearing.

Petitioners respectfully contend that the NASD/FINRA ethical rules, just as the ethical rules that apply to attorneys and judges do not have "de minimus" or "no big deal" exceptions. The ethical rules of NASD/FINRA, just as the Bar's ethical rules are designed to form and preserve the integrity of the system. Without adherence to the ethical rules, public confidence in the institutions will end. The question before the court is whether the ethical rules matter. Simply stated, the ethical rules must have consistent application. The text of the ethical rules do not provide for exceptions where it is easy or convenient for FINRA.

The two are separate, yet intertwined: if the Smiths prevail in their case-in-chief, Wicked Bank's cross-claim and the attorneys fees issues are moot.

C. Arbitrator Jolly Ethical Lapse.

There are two ethical problems in this case. First, is the shared taxi ride. Second, is FINRA's failure and refusal to enforce its own ethical rules. Evil and Jolly shared a cab from Los Angeles Union Station to the FINRA headquarters on the morning of the hearing for the

motion for judgment. In the transcript of the hearing, neither Evil nor Jolly placed the incident on the record. Petitioner's counsel did so. Both Evil and Jolly denied any wrongdoing during the cab ride. Obviously, only Evil and Jolly know what happened in that cab. That is why there are ethical rules regarding the appearance of impropriety.

The conduct of Mr. Jolly in sharing the cab ride with Mr. Evil is contrary to FINRA's own specific ethical rules. As a FINRA arbitrator himself, Mr. Evil was obliged to know of the FINRA ethics rules. Canon III of The Arbitrator's Manual specifically instructs an arbitrator to avoid impropriety or the appearance of impropriety in communicating with the parties. Subsection B of that Canon prohibits ex parte contact between the arbitrators and the parties, with certain exceptions not relevant here. Plainly, Messrs Jolly and Evil violated Canon III. Both knew better, but shared the cab anyway. The denials by Messrs Jolly and Evil are natural, and ring hollow. Both men knew better, but proceeded anyway.

FINRA's Canon III does not exist in a vacuum. Leading legal ethicists in the arbitration field, including JAMS and the American Arbitration Association have similar ethical guidelines regarding improper ex parte contact. The California Judicial Council has also promulgated rules regarding arbitrators conduct within the ambit of judicial arbitration. The ABA Model Rules of Professional Conduct, and the California Rules of Professional Conduct both prohibit these types of ex parte contacts. All of these leading ethicists and professional groups agree that ex parte contact, with certain exceptions regarding appointment and scheduling, are improper.

The prime reason these rules exist is to preserve the appearance of fairness to the parties, and to encourage public confidence in the arbitral process. The appearance of fairness and public confidence are certainly undermined by the conduct at issue here. The law and the arbitral process must not only be fair, but must appear to be fair. By not adhering to its own ethical rules, the appearance of fairness is now gone, to the manifest detriment of Petitioners.

Petitioners assert that the initial panel could not possibly proceed with any fairness. Petitioners were severely prejudiced by this same panel hearing and deciding the Cross-Claim and the attorneys fees issues. Simply stated, the entire process was tainted.

The facts of this case present a very unique problem: the violation of the NASD/FINRA canon of ethics by Arbitrator Jolly, and FINRA's refusal to enforce their own ethical standards. FINRA gave no reason for its refusal to enforce its ethical standards. Without judicial intervention, Petitioner is without a remedy, and were left to the devices of an organization and individuals for whom the ethical standards they have sworn to uphold have no meaning.

Petitioners assert that the ethical violation by Arbitrator Jolly is not simply a hypersensitivity to ethical nuance. This was a blatant violation of a well-known rule. The appearance of impropriety is required not only in the arbitration field, but in many areas of public life. The avoidance of an appearance of impropriety is an ethical assurance to the public of the fairness of the public official or other neutral. Klistoff v. Superior Court, 157 Cal.App.4th 469, 482 (2007). See also: Canon 2, California Code of Judicial Conduct.

The ethical rules regarding the appearance of impropriety are in place because human nature will compel the parties to the ex parte contact to deny that they said anything to each other. Other than the two people involved, the truth of their denial cannot be known. Simply because Evil and Jolly deny any substantive conversation during the cab ride, does not make it so. This is why the "appearance of impropriety" rules exist: to deter exactly the type of conduct at issue here.

Wicked Bank has previously referred to Petitioners' charges of ethical lapses as "gamesmanship." It is not gamesmanship to expect FINRA/NASD and its arbitrators to live up to its own Code of Ethics.

Once again, Petitioners return to their central points: does the FINRA/NASD Code of Ethics mean something, or is it just lip service?

Ethical rules that apply to arbitrators and lawyers must have meaning and force, or the system turns into a free-for-all where any conduct is acceptable. Legal scholars have labored over ethics rules for many years only to continue to conclude that ethical canons must be enforced, or the system will be perceived as unfair. Petitioners contend that FINRA/NASD cannot decide which ethical rules it will enforce and which ethical rules it will ignore.

If the FINRA/NASD Code of Ethics is not enforced, public confidence in the institution will be gone. Once it is gone, it cannot be reclaimed.

D. The Attorneys Fees Issue Was Wrongly Decided.

William Smith's claim alleges causes of action for wrongful discharge, breach of contract, breach of the covenant of good faith and fair dealing, discrimination based on age, interference with prospective economic advantage, RICO, civil conspiracy, and slander. Shortly after filing, Smith voluntarily dismissed the RICO cause of action.

As to the attorneys fees and costs, the panel stated:

> The Panel has duly met and considered all the material furnished to it by counsel re: attorneys' fees and costs and - in the absence of any convincing presentation by counsel as to how to make an apportionment of certain items between William Smith and Michael Smith - has determined to make the apportionments, when it is equitable to do so, on the basis of 80% to William Smith and 20% to Michael Smith. The Panel has also considered Respondents' claims for an award of the costs it incurred for 'experts' and for 'transcripts' and has concluded that, since neither the transcripts nor the experts were 'ordered' by the Panel, the claims would be denied. Further, the Panel has determined that William Smith's claim for 'age' discrimination was 'frivolous', and therefore it has made an award of attorneys' fees as against William Smith, as allowed under Cal. Govt. Code Section 12965(b) and the various authorities cited by Respondents in their May 22, 2008 Brief. The Panel noted that there was no contract to which Michael Smith was a party that called for any award of attorneys' fees and, after duly considering California Code of Civil Procedure 1033.5 and the other arguments advanced by counsel the Panel concluded that Michael Smith is not liable to Respondents for any of Respondents' attorneys' fees and related costs (except for 20% of the total filing fee incurred by Wicked Bank in connection with its Counterclaims).

The Panel's ruling on attorneys fees fails on several counts. First, the Panel's only basis for attorneys fees was Government Code §12965(b) which provides attorneys fees in certain situations for age discrimination matters. Second, Smith's claim asserted a variety of other causes of action which, except for RICO were all litigated by Smith in his case-in-chief. Second, the Panel stated that its basis was not only Government Code §12965(b), and the various authorities cited by Respondents in their May 22, 2008 brief . In Wicked Bank's May 22, 2008, Wicked Bank sited a variety of theories including RICO (which was dismissed by Smith before the hearing), Code of Civil Procedure Code §1032(b), and Civil Code §1717.

Petitioner should not have to guess at what theory applies. Apparently, based on Wicked Bank's briefs (Exhibits R and T), Wicked Bank's focus was on Government Code §12965(b). The Panel's decision lacks specificity as to its own theory. Third, counsel for Respondents did not and would not provide detailed billing records for an impartial determination of whether the amounts charged were accurate, not duplicative, onerous, or otherwise improper. The Panel did not ask for detailed billing records. Fourth, all Smith had to prove was that HIS employment was terminated because of age. Fifth, in order to attempt to recover attorneys fees, Wicked Bank focused its basis on Government Code §12965(b) rather than the other causes of action Wicked Bank had to litigate. The same panel who heard the entire matter, assessed 80% of the attorneys fees based on the age discrimination cause of action.

FEHA Attorneys Fees.

Both California and federal law prohibit employers from unlawfully discriminating against employees on the basis of their age. (Government Code §12941(a); 29 U.S.C. §621, et.seq.) The language of the state and federal antidiscrimination statutes is different in some respects; however, because their objectives are the same, California courts have relied upon federal law interpreting Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et.seq.) and the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. §621, et.seq.) to interpret the FEHA. Linsley v. Twentieth Century Fox Film Corporation, 75 Cal.App.4th 762, 766 (1999).

In Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978), the United States Supreme Court set forth the standard for determining when attorney fees should be awarded to a prevailing defendant in a Title VII case as distinguished from a successful plaintiff. The Supreme Court held: "[A] prevailing plaintiff ...'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " Id. at 416-7. By contrast, a defendant who prevails in a discrimination claim is not necessarily entitled to an award of fees. Linsley, *supra*, at 766. Christiansburg went on to hold: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not

brought in subjective bad faith." "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." Id. at 421. "In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the court of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. at 422.

This post hoc reasoning is precisely the acts in which Wicked Bank and the panel engaged. Wicked Bank took one out-of-context sentence out of William Smith's testimony, and parlayed it into an argument that the age discrimination was frivolous, thus justifying an award of attorneys fees. (See Exhibit S, pages 6-7.) Respondents' argument was so factually devoid of factual support, that Wicked Bank felt compelled to misrepresent Bill's testimony.

Legal Evaluation of "Frivolous" in This Context.

Wicked Bank's premise was that Bill's cause of action under FEHA was "unreasonable, frivolous, and meritless," based on one out-of-context snippet of Bills' testimony. Wicked Bank then ignores the remainder of the causes of action in Smith's claim, and the remainder of the 10 days of testimony in Smith's phase of the arbitration. This, together with the Panel's failure to make express written findings that are necessary to support an attorneys fees award against Smith makes the award manifestly improper.

The Court of Appeal in Cummings v. Benco Building Services, 11 Cal.App.4th 1383 (1992) held that FEHA attorneys fees should not be awarded to Defendants only where the action is brought is found to be unreasonable, frivolous, meritless, or vexatious. Id. at 1387.

Here, Respondent Evil's own testimony shows that Smith's book of business was distributed to much younger brokers. Moreover, Smith also presented evidence as to all the other causes of action in his claim.

To show lack of merit sufficient for the award of attorneys fees, the trier of fact (the arbitrators) must make express findings to support such an award Id. at 1388. The requirement of specific findings to support an attorneys fees award is not waivable, and must be made in every case where attorneys fees are awarded in FEHA cases. Villanueva v. City of Colton, 160 Cal.App.4th 1188, 1201 (2008).

The award, Exhibit X, does not make any express findings as to the FEHA cause of action. The only mention was the boilerplate statement: "Further, the Panel has determined that William Smith's claim for 'age' discrimination was 'frivolous', and therefore it has made an award of attorneys' fees as against William Smith, as allowed under Cal. Govt. Code Section 12965(b) and the various authorities cited by Respondents in their May 22, 2008 Brief." (Exhibit X, page 10 of the ruling.) Smith asserts that the FEHA claim was properly brought, and that evidence presented by him supported it.

Other cases have discussed the types of action where FEHA attorneys fees awards to a Defendant are warranted. One where evidence is fabricated. Daramola v. Westinghouse Electric Corporation, 872 F.Supp 1418 (E.D.PA 1995). Prosecuting a case where the cause of action was obviously contrary to undisputed facts or well established legal principles specifically precluding recovery for the type of injury alleged. Cummings, *supra*, at 1390. Continuously seek to avoid adverse legal rulings by intentionally submitted renewed motions which disguised the subject matter of previously denied motions. National Organization for Women v. Bank of California, 680 F.2d 1291 (9th Cir. 1982). See also: cases collected in Cummings, *supra*, at 1389-90. The instant matter does not fall within any of these categories.

The opinion in Jersey v. John Muir Medical Center, 97 Cal.App.4th 814 (2002) provides valuable insight. First, the Jersey court again set forth the requirement that the trier of fact must make express written findings to support the attorneys fees award. This requirement is non-waivable, and requiring such findings will go a long way towards limiting

defendants' receipt of attorney fee awards to extreme cases envisioned by Cummings and Christiansburg.

The Jersey court continued:

> While plaintiff failed to adduce any evidence of sex discrimination or of the other motivations to which her counsel has adverted in defending the second cause of action, it is apparent that this cause of action was merely an attempt to articulate a different legal theory to support her contention that defendant acted wrongfully in discharging her for proceeding with her sexual battery claim against the hospital patient. ***Whether plaintiff's claim was so groundless as to warrant attorney fees against her must be evaluated with respect to her entire complaint, not simply the FEHA cause of action. [even though it had "long been the law in California" that plaintiff could not prevail on FEHA claim, no abuse of discretion to deny attorney fees to defendant since plaintiff sought relief under other theories, and "[a] civil action is based upon the injury to the plaintiff, and not any particular legal theory"].)*** The single case cited by defendant to justify awarding fees against the plaintiff based upon consideration of only the second cause of action is inapposite. In Moss v. Associated Press, 956 F.Supp. 891, 896 (C.D.Cal. 1996), the court awarded fees to the defendant from the date on which it found the plaintiff should have realized that continued litigation was unreasonable; ***it did not distinguish between any of the three causes of action on which the action had been based. As the principal discussion above makes clear, plaintiff's action, while ultimately failing, can hardly be considered as frivolous***, and the trial court did not consider it such. Therefore, it was an abuse of discretion to have imposed attorney fees on plaintiff. Jersey, *supra*, at 831-2 (emphasis added)

Smith contends that there was no basis for the assessment of attorneys fees.

Wicked Bank's Attorney Fees Evidence Insufficient

In their moving papers, Wicked Bank submitted two declarations from counsel supporting attorneys fees. Counsel for Respondents failed and refused to supply detailed time records. The party seeking fees should submit evidence supporting the hours worked and the rates claimed. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Conclusory factual assertions are insufficient. Asbestos Claims Facility v. Berry & Berry, 219 Cal.App.3d 9, 24 (1990), disapproved on other grounds in Kowis v. Howard, 3 Cal.4th 888, 896 (1992). It should be

noted that the preferred practice in attorneys fees motion is to submit contemporaneous records. PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084, 1096 fn4 (2000).

In the instant case, all Respondents' counsel submitted were conclusory factual assertions. Smith had no method of considering the necessity of the work done, the reasonableness of the time spent, or on what the time was spent. Even if Wicked Bank's counsel believes that their billing information is somehow privileged, this privilege must be given up in favor of full disclosure and fundamental fairness. Steiny & Co v. California Electric Supply Co., 79 Cal.App.4th 285, 292 (2000). See also: Wellpoint Health Networks, Inc. v. Superior Court, 59 Cal.App.4th 110, 128 (1997).

Smith contends that a fee request such as this should be documented in great detail. Weber v. Langholz, 39 Cal.4th 1578, 1587 (1995). Here, the fee request was a conclusory and self-serving declaration by counsel. (Exhibit R, Declarations of Moe and Curley) With an initial fee request of nearly $500,000.00, Smith and their counsel are certainly entitled to see the billing records, and the arbitrators should have insisted on seeing the billing records. The statute allowing the FEHA fees requires it, and fundamental fairness demands it.

CONCLUSION

Petitioners respectfully submit that the February 13, 2008, May 7, 2008, and the September 4, 2008 awards should be set aside.

Dated: September __, 2008

Respectfully submitted,

_____

Charles Counsel
Attorney for Petitioners