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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN Justice

PART 5

Stephen Scintilla

- v -

Waddell & Reed Inc

INDEX NO. 115056/01

MOTION DATE 1/11/02

MOTION SEQ. NO. 002 restored

MOTION CAL. NO. 105

The following papers, numbered 1 to 3 were read on this motion to/for CAWD

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... (jt pet to CAWD; x m to vac / modify)	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is consolidated for joint disposition with mg 03 and

"is determined in accordance with the annexed memorandum decision and order."

SCANNED
JUN 06 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/31/02

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

HON. MICHAEL D. STALLMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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Stephen B. Sawtelle and Hackett Associates, Inc.,

Index No. 115056/01

Petitioner,

Decision and Order

-against-

Waddell & Reed, Inc., Torchmark Corporation, Robert L. Hechler, Robert Williams, Jr., Steven Anderson, Scott Uzzel, Estate of Larry Anderson, Edward Blonski, Andrew Kahn, Paula Levy, Richard Moro, Janet Dember Nichols, Dennis Ritchie, David J. Ross, and Robert Worrell,

Respondents.

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HON. MICHAEL D. STALLMAN, J.:

Petitioners Stephen B. Sawtelle and Hackett Associates, Inc. ("Hackett") jointly move, pursuant to CPLR 7510 and section 9 of the Federal Arbitration Act ("FAA"), 9 USC § 9, to confirm an arbitrators' award which, inter alia, granted Sawtelle compensatory damages of $1,827,499, plus attorney's fees in the amount of $747,000, against all the respondents, jointly and severally, and punitive damages of $25 million against respondents Waddell & Reed, Inc. ("Waddell") and its president, Robert L. Hechler. The award also granted Sawtelle interest on the $1,827,499 compensatory damages, from September 4, 2001, at the rate of 8% compound interest per annum. Respondents cross-move, pursuant to CPLR 7511 and sections 10(a) and 11(a) of the FAA, for an order vacating the award to Sawtelle in part, modifying it in part, and remanding the matter to a different panel of arbitrators. Respondents do not object to Hackett's motion to confirm the award dismissing

Waddell's claims against it. Non-party Securities Industry Association ("SIA") moves to file a memorandum of law amicus curiae.[1]

Background

Sawtelle is a mutual fund broker based in Connecticut, and a former registered representative of Waddell, which is a member of the National Association of Securities Dealers ("NASD"). On February 10, 1997, Waddell terminated Sawtelle's services. Sawtelle had been Waddell's most successful salesman in 1996, and, in the course of his 17-year career at Waddell, no customer had ever filed a complaint against him. Sawtelle claimed that Waddell had terminated him in retaliation for his testimony in a Securities and Exchange Commission ("SEC") investigation related to David Stevenson, a former Waddell broker, whom Sawtelle had supervised from 1989 through 1993. Sawtelle testified to the SEC that his superiors at Waddell had twice in that time overruled his recommendations that Stevenson be terminated for improper practices. Waddell fired Stevenson in July 1996, and Stevenson was subsequently convicted of embezzling millions of dollars from his clients. At the arbitration, Sawtelle presented evidence that, although as late as February 3, 1996, he had been receiving praise for his success as a salesman from high officers of Waddell, respondent Hechler decided to terminate Sawtelle within days after Waddell's counsel received the transcript of Sawtelle's testimony

[1] By stipulation dated August 21, 2001, claims against Torchmark Corporation, Waddell's former parent company, were voluntarily dismissed.

to the SEC. Waddell contended, however, that it had terminated Sawtelle because of suspicions that he was engaging in improper practices, and that, far from having recommended that Stevenson be fired, Sawtelle had tried to protect him.

Within 24 hours of his termination by Waddell, Sawtelle was hired by Hackett, a competitor of Waddell. Both Waddell and Sawtelle made efforts to retain the approximately 2,800 customers for whom Sawtelle had performed brokerage services while he was employed by Waddell. On July 22, 1997, Sawtelle filed a Statement of Claim ("Claim") against Waddell with the NASD.[2] He filed an amended Claim on September 5, 1997. The Claim contended that, after terminating Sawtelle, Waddell had improperly interfered with his business as a securities broker, by making intentional misrepresentations to the customers for whose business Waddell and Sawtelle were competing, both about Sawtelle, and about the terms of transferring investments from Waddell to Hackett, and by soliciting baseless customer complaints against Sawtelle. The Complaint charged that this alleged activity constituted tortious interference with Sawtelle's business expectancy, and a violation of the Connecticut Unfair Trade Practice Act ("CUTPA"), Connecticut General Statutes §§ 42-110a, et seq., which provides that "[n]o person shall engage in unfair methods of competition and unfair or

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[2] In order to work as a mutual fund broker for Waddell, Sawtelle was required to become licensed with the NASD through Waddell, by signing a Form U-4 Uniform Application for Securities Industry Registration, on which he was required to arbitrate any disputes with Waddell under the NASD's Code of Arbitration Procedure.

deceptive acts or practices in the conduct of any trade or commerce." On or about November 24, 1999, Waddell filed a Statement of Claim alleging claims against Hackett, based on actions taken by Sawtelle. The two arbitration proceedings were consolidated.

On September 11, 2000, the Panel granted Hackett's motion to dismiss all claims against it. On August 7, 2001, after more than 50 days of hearings, held over a two-and-a-half year period, the Panel issued its award. Although the award does not specify the basis for the compensatory damages awarded, it specifies that the punitive damages are awarded under CUTPA. The Panel:

> found that Respondents Waddell & Reed and Heckler [sic] through agents of Waddell & Reed demonstrated reprehensible conduct that warrants an award of punitive damages. The Panel further found that after Claimant was terminated Respondents orchestrated a campaign of deception which included, among other things, giving the impression to clients that: Claimant had mishandled their investments, Claimant was untrustworthy, Claimant was no longer in business, Claimant was not authorized to do business, and Claimant was in some way involved with the embezzling of client funds. The Panel also found that Waddell & Reed, through its agents, re-routed Claimant's mail and his telephone lines [and that], as a result, telephone calls and mail intended for Claimant were received by Waddell & Reed and its agents.

Schwartz Aff., Exh. 2, at 6. In addition to awarding damages to Sawtelle, the award directed that certain entries that Waddell had made on Sawtelle's Form U-5 "Uniform Notice of Termination" be changed, notably that the Reason for Termination be changed from "Discharged" to "Voluntary."[3]

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[3] The NASD requires a member firm to file a Form U-5 when it terminates a licensed representative, explaining thereupon the reason for the termination.

Although respondents moved to have the Panel recuse itself, which motion was denied, and although respondents' counsel stated in his summation to the Panel that he believed the arbitrators to be biased in favor of Sawtelle (see, Exh. 57, at 10681-10687), respondents make no such claim here. Rather, they contend that the award of punitive damages was completely irrational and made in manifest disregard of the law; that the award of compensatory damages was clearly erroneous because it included Sawtelle's attorney's fees, although those were also awarded as a separate item, and because it failed to take account of Sawtelle's earnings at Hackett; and because the portion of the award requiring Waddell to amend its Form U-5 disclosure was wholly irrational.

Discussion

Standard of Review

Arbitrations concerning employment in the securities industry are governed by the Federal Arbitration Act ("FAA"), 9 USC § 1 et seq. Salvano v Merrill Lynch, Pierce, Fenner & Smith, Inc., 85 NY2d 173 (1995); Fletcher v Kidder, Peabody & Co., 81 NY2d 623, cert denied 510 US 993 (1993). Under the FAA, the court has an "extremely limited" power of review (Wall St. Assocs., L.P. v Becker Paribas, Inc., 27 F3d 845, 849 [2d Cir 1994] [quoting Fahnenstock & Co. v Waltman, 935 F2d 512, 516 [2d Cir], cert denied 502 US 942 [1991]), which is "among the narrowest known to the law." Bowen v Amoco Pipeline Co., 254 F3d 925, 932 (10th Cir 2001). Section 9 of the FAA provides that, upon timely application of any party, a court must confirm the award unless the award is

vacated, modified, or corrected, pursuant to sections 10 and 11. Section 10(a) provides, in relevant part, that a court may vacate the award:

> (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.
> (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.

Section 11 provides, in relevant part, that a court may modify or correct an award:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

Moreover, the Federal courts have held that an arbitral award may be vacated on one of the following three non-statutory grounds: if the arbitrators "manifest[ly] disregard[ed] ... the law" in reaching their decision (First Options of Chicago, Inc. v Kaplan, 514 US 938, 942 [1995]), if the award is "completely irrational" (I/S Stavborg v Natl. Metal Converters, Inc., 500 F2d 424, 430 [2d Cir 1974]), or if implementation of the award would violate a public policy.

An award is made in manifest disregard of the law only if "(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." DiRussa v Dean Witter Reynolds, Inc., 121 F3d 818, 821 (2d Cir 1997), cert denied 522 US 1049 (1998); see also, Halligen v Piper Jaffrey, Inc., 148 F3d 197 (2d Cir 1998), cert denied 526 US 1034 (1999). An award may not be vacated merely because of an error of law. International Telepassport Corp. v USFI, Inc., 89 F3d 82 (2d Cir 1996).

An award is "completely irrational" where the reviewing court is "'unable to infer a ground for the arbitrators' decision from the facts of the case' such that the award can only represent "evident partiality" on the part of the arbitrators.'" Matter of Arbitration between Red Apple Supermarkets/Supermarkets Acquisitions and Local 338 RWDSU, 1999 WL 596273,*8 (SD NY 1999), quoting Tinaway v Merrill Lynch & Co., Inc., 658 F Supp 576, 579 (SD NY 1987).

Finally, although a court may refuse to confirm an arbitral award on grounds of public policy (see, UBS Warburg LLC v Auerbach, Pollack & Richardson, Inc. Sup Ct, NY County 2001, Index No. 119163), it may do so only "when enforcement of the award would be directly at odds with a well defined and dominant public policy resting on clear law and legal precedent." St Mary Home, Inc. v Service Empls. Intl. Union, 116 F3d 41, 46 (2d Cir 1997); see also, Greenberg v Bear, Stearns & Co., 220 F3d 22, 27 (2d Cir 2000). An

award may not be vacated on the basis of "general considerations of supposed public interests." St. Mary Home, Inc., 116 F3d, at 45.

Compensatory Damages

The Panel awarded Sawtelle compensatory damages in the lump sum of $1,827,499. Respondents have persuasively shown that this amount is precisely the sum of the amount that Sawtelle claimed as net damages for the balance of 1997 and the sum that the Panel awarded separately in the form of attorney's fees. See, Exh. 58, at 10938 (Sawtelle's counsel's calculation of damages). Sawtelle contends that the Panel may have awarded Sawtelle damages not only for 1997, but also for the following three-and-a-half years, or for emotional distress, or as general damages, both of which were requested by Sawtelle, and both of which are authorized by CUTPA (See, Exh. 58, at 10797, 10800, 10803-04; Cole v Federal Hill Dental Group, P.C., 2000 WL 1227302 (Conn Super Ct 2000); Criscuolo v Shaheen, 46 Conn Super 53, 736 A2d 947 (1999). In addition, he points out that arbitrators may grant an award that exceeds the relief requested by the claimant. See, Silverman v Benmor Coats, Inc., 61 NY2d 299 (1984). However, Sawtelle introduced no evidence of damages, post 1997; he did not quantify his claim for general damages; and the only testimony that he presented as to emotional distress pertained to his pre-termination involvement in Waddell's investigation of Stevenson. See, Exh. 5, at 411. Where, as here, an award "otherwise matches the flawed amount to the dollar, it must be modified to ... the amount yielded when these flaws are corrected. Asturiana De Zinc Marketing, Inc. v Lasalle Rolling

Mills, Inc., 20 F Supp2d 670, 673 (SD NY 1998). Accordingly, pursuant to 9 USC § 11(a), the Panel's award of compensatory damages must be reduced by $ 747,000.

In addition, respondents contend, as they did to the Panel, that, pursuant to Connecticut law, the $450,000 that Sawtelle earned from Hackett in 1997 should be offset against the compensatory damages awarded. See, Torosyan v Boehringer Ingelheim Pharm. Inc., 234 Conn 1, 662 A2d 89 (1995); Coppola v Personnel Appeal Bd., 174 Conn 271, 386 A2d 228 (1978). Although Sawtelle argues, as he did to the Panel, that failure to mitigate damages is an affirmative defence, that must be pled and proven, there was no question either as to the fact of mitigation, or as to its extent. It is undisputed that Sawtelle began working for Hackett within 24 hours of having been fired by Waddell, and that, in 1997, he earned $450,000, in addition to the $250,000 that he earned from Waddell between January 1st and February 10th of that year. However, the Panel's refusal to agree with respondents' position on this matter, if it was error, was an error of law, and not an adequate ground to modify the award. International Telepassport Corp. v USFI, Inc., 89 F3d 82, supra.

Punitive Damages

The linchpin of respondents' arguments as to the award of punitive damages is that such an award is governed by the standards that the United States Supreme Court set forth in BMW of N. America, Inc. v Gore, 517 US 559 (1996). In Gore, the Court held that a remittitur award of $2 million in punitive damages, which

was imposed because BMW sold, as new, cars that had needed to be repainted, or to have minor repairs performed, violated BMW's right to due process. The Court explained that notice of potential liability is a fundamental requirement of due process, and that BMW could not reasonably have had notice that it might become liable for punitive damages that were not related to (1) the degree of reprehensibility of its conduct, (2) the extent of actual or potential damage caused by its conduct, or (3) penalties that had been, or could be, imposed for similar misconduct in analogous cases. However the Constitutional protection of due process does not attach absent state action, and it has been held that private arbitrations, such as NASD's, do not involve state action. Davis v Prudential Secs., Inc., 59 F3d 1186 (11th Cir 1995); Sanders v Gardner, 7 F Supp2d 151 (ED NY 1998); Porush v Lemire, 6 F Supp2d 178 (ED NY 1998); Glennon v Dean Witter Reynolds, Inc., 1994 WL 757709 (MD Tenn 1994), affd on other grounds 83 F3d 132 (6th Cir 1996); see also, Desiderio v NASD, Inc., 191 F3d 198 (2d Cir 1999) (due process clause inapplicable to NASD's requirement that licensed personnel arbitrate their disputes).

Respondents argue that "Gore is now an established guide for determining the rationality of a punitive damages award," whether or not the award results from state action. Reply Mem., at 9 (emphasis in original). However, none of the cases that they cite for this proposition supports it. In Sanders v Gardner (7 F Supp2d 151, supra), the court discussed Gore solely in the context of "[t]he Petitioners' challenge [to] the punitive damage award as so

excessive as to be constitutionally impermissible." Id. at 176. The Sanders Court appeared to believe that there is (an unspecified) Constitutional basis, independent of the Due Process Clause (which it held does not apply to private arbitrations), on which to challenge the "excessiveness" of a an arbitrators' punitive damages award. Similarly, in Acciardo v Millenium Sec. Corp. (83 F Supp2d 413 [SD NY 2000]), the Court discussed Gore in the context of a due process challenge. Id. at 422. The Acciardo Court rejected the challenge, without discussing whether the Due Process Clause was applicable. In Park v First Union Brokerage Servs., Inc. (926 F Supp 1085 [MD Fla 1996]), the Court merely cited Gore in relation to the Eleventh Circuit "arbitrary and capricious" standard, stating that the case before it was not "representative of a 'grossly excessive' award that cries out for vacatur." Id. at 1090. Finally, in Mathie v Fries (121 F3d 808 [2d Cir 1997]), the Court stated that "[t]he Supreme Court's guideposts in Gore, though marking outer constitutional limits, counsel restraint even as to the nonconstitutional standard of excessiveness." Id. at 817. The standard to which the Court referred, however, is that which inheres in the responsibility of the Federal appellate courts to review punitive awards in applying Federal statutes. Id at 816-817. No case has applied the Gore standards to private arbitrations. But see, Aguilera v Palm Harbor Homes, Inc., 34 P3d 617 (NM App 2001) (stating in dicta that arbitrations are subject to the Due Process Clause, and that, therefore, Gore would bar a "grossly excessive" award of punitive

damages).

The Panel specifically awarded punitive damages under CUTPA. CUTPA authorizes an award of punitive damages, but does not, by its terms, place a limit on such an award. Respondents' argue, however, that the award was made in manifest disregard of the law, and that counsel for all parties had informed the Panel that Connecticut law would not support a punitive award that was three times the award for compensatory damages. In response to a question from the Panel's Chairperson, as to whether, under Connecticut law, punitive damages could be trebled, respondents' counsel stated, "[t]he best I understand it, the answer is no. ... I haven't seen anything to suggest, your Honor, that it ought to be trebled. ... I don't think--I haven't seen anything, your Honor, to suggest that it is a triple damages type of approach." Exh. 57, at 10700-10701. The following day, Sawtelle's counsel addressed the same point:

> In general it has been held, at the level of the Supreme Court in Connecticut, that punitive damages under Connecticut law, under CUTPA, can be awarded in a proportion that will not offend their constitution in the portion [sic] of two to one, that is, in essence, the trebling that was in the subject of the question that was asked yesterday.
>
> But in addition to that, the Connecticut courts, and particularly in a case called Bristol Technology, have decided that even if only nominal damages are awarded, the punitive damages may be awarded[. ... In Bristol,] only nominal damages of one dollar was awarded, but the court upheld an award of $ 1 million versus that one dollar nominal award in punitive damages.

Exh. 58, at 10802-10803. Thus, it cannot be said that the parties' counsel informed the Panel that, punitive damages, under CUTPA can not reach an amount triple that of the compensatory damages that

are awarded. But had they so informed the Panel, they would have been incorrect. There simply is no two-to-one, or even three-to-one, maximum under CUTPA. "CUTPA neither sets out any formula for arriving at the amount nor sets a maximum of double or treble damages for the punitive damages awarded to deter future conduct." Bristol Tech. v Microsoft Corp., 114 F Supp2d 59, 79 n.30 (D Conn 2000), order vacated on other grounds 250 F3d 152 (2d Cir 2001) quoting Lenz v CAN Assur. Co., 42 Conn Super 514, 630 A2d 1082, 1083 (1993); see also, Perkins v Colonial Cemeteries, Inc., 53 Conn App 646, 648, 734 A2d 1010, 1011-1012 (1999) (under CUTPA, courts generally award punitive damages "in amounts equal to actual damages or multiples of the actual damage"); Lawson v Whitey's Frame Shop, 42 Conn App 599, 682 A2d 1016 (1996) (upholding more than 20-1 ratio under CUTPA); Nielsen v Wisniewski, 32 Conn App 133, 136, 628 A2d 25 (1993) (upholding four to one ratio under CUTPA). Indeed, "[a]warding punitive damages and attorney's fees under CUTPA is discretionary ... and the exercise of such discretion will not ordinarily be interfered with on appeal unless the abuse is manifest or injustice appears to have been done." Id., at 28, quoting Gargano v Heyman, 203 Conn 616, 622, 525 A2d 1343, 1347 (1987) (internal quotation marks and citation omitted). Thus, the law on either the maximum ratio, or the maximum amount, of punitive damages that can be awarded under CUTPA is by no means "well defined [and] explicit" (DiRussa v Dean Witter Reynolds, Inc., supra, 121 F3d, at 821); an error in applying such law would not have been "obvious and capable of being readily and instantly

perceived by the average person qualified to serve as an arbitrator" (Merrill Lynch, Pierce, Fenner & smith v Bobker, 808 F2d 930, 933 [2d Cir 1986]); and the Panel did not manifestly disregard the law.

Nor was the award of punitive damages wholly irrational. This is not a case where arbitrators have failed to explain their award, and the reviewing court must infer a ground for the arbitrator's decision from the facts of the case. See, Tinaway v Merrill Lynch & Co., Inc., 658 F Supp 576, supra. As quoted above, the Panel:

> found that after Claimant was terminated Respondents orchestrated a campaign of deception which included, among other things, giving the impression to clients that: Claimant had mishandled their investments, Claimant was untrustworthy, Claimant was no longer in business, Claimant was not authorized to do business, and Claimant was in some way involved with the embezzling of client funds. The Panel also found that Waddell & Reed, through its agents, re-routed Claimant's mail and his telephone lines [and that], as a result, telephone calls and mail intended for Claimant were received by Waddell & Reed and its agents.

To be sure, respondents vigorously dispute these findings, arguing, for example, that the communications that Waddell had with the clients for whom Sawtelle and Waddell were competing were truthful; that those clients had been Waddell's clients, not Sawtelle's; and that the phone lines and the business address, from which Waddell had mail rerouted, belonged to Waddell, not to Sawtelle. Notwithstanding respondents past and present contentions, the parties agreed in their Uniform Submission Agreements, which submitted their dispute to arbitration, "to abide by and perform any award(s) rendered" (Exhs. GG and HH), and NASD Rule 10330 provides that "[u]nless the applicable law directs otherwise, all

awards rendered pursuant to this Code shall be deemed final and not subject to review or appeal."

Accordingly, this Court may not permit a relitigation of the matters that were litigated or that could have been litigated before by the Panel. See, International Telepassport Corp. v USFI, Inc., 89 F3d 82, supra. Suffice to say, the Panel's findings find support in the record. For example, there was evidence before the Panel that Waddell representatives implied to certain customers that Sawtelle had been fired because, like Stevenson, he had embezzled client funds. See, e.g., Exh. 6, at 627-630, 632-7; Exh. 8, at 949; Exh. 36, at 7255-64.[4] In light of the Panel's findings, it was not unreasonable for the Panel to impose punitive damages in an amount that would, in fact, be punitive.[5]

Although, in some circumstances, it might be completely irrational, absent misconduct aimed at, or dangerous to, the public in general, to impose such drastic penalties on a company as would cause it to go out of business, respondents failed to present any evidence of their financial condition to the Panel. There is

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[4] This testimony consisting of double hearsay would, of course not have been admissible in a court of law. Arbitrators, however, are not required to comply with the laws of evidence. Petroleum Separating Co. v Interamerican Refining Corp., 296 F2d 124 (2d Cir 1961); Farkas v Receivable Financing Corp., 806 F Supp 84 (ED Va 1992).

[5] The Court notes that the punitive damages awarded here are dwarfed by a recent award by a New York Stock Exchange panel of $208,700,000 in punitive damages against an individual broker (see, Liddle Aff. [1/9/02], Exh. D), and that the ratio of punitive damages to compensatory damages here is dwarfed by the million to one ratio upheld in Bristol Tech. v Microsoft Corp., 114 F Supp2d 59, supra.

simply nothing in the record before this Court that would support a finding that such disproportion as there may be between the respondents' misconduct, as found by the Panel, and the effect of the award on the respondents, is so great as to render the award completely irrational.

Finally, respondents contend that the award of punitive damages violates public policy, inasmuch as it punishes them for having dutifully referred to the NASD customer complaints that were made against Sawtelle after he was fired by Waddell. However, Sawtelle argued to the Panel that those complaints were set-ups, jobs, solicited by Waddell as part of its campaign to defame Sawtelle, and to distract him from competing with Waddell. Moreover, Sawtelle presented undisputed evidence that the NASD found, with regard to those complaints, that it had no reason to act. Evidently, the Panel believed Sawtelle's testimony. It is not the province of the court to question the Panel's explicit or implicit credibility determination.

The Form U-5

The award directed that four changes be made on Sawtelle's Form U-5, including changing the notation that he had been discharged to one indicating that he had resigned voluntarily. The provision of information in a Form U-5 is designed "to facilitate supervision" of securities professionals and serve as part of the "comprehensive system of oversight" by securities exchanges. Brenner v Nomura Sec. Intl., 228 AD2d 67, 71 (1st Dept 1996) (citations omitted). Respondents contend that the Panel's

direction, to place information that is indisputably incorrect on a Form U-5, is wholly irrational; nevertheless, as long as an arbitrator's "remedy represents a fair solution to the dispute, the remedy awarded should be affirmed." Willoughby Roofing & Supply v Kajima Intl., Inc., 598 F Supp 353, 357-358 (AND Ala 1984), affd 776 F2d 269 (11th Cir 1985). "[A]n arbitrator is not bound by principles of substantive law ... . He may do justice as he sees it, applying his own sense of law and equity... ." Silverman v Benmore Coats, Inc., 61 NY2d 299, 308 (1984). Inasmuch as it appears that the Panel believed Sawtelle's contention that he had been fired in retaliation for his testimony to the SEC, the Panel's direction was not wholly irrational.

The SIA's Motion

The SIA's motion for leave to file an amicus brief is granted. The SIA, which has long opposed any award of punitive damages in securities arbitrations, invites this Court to break with all applicable precedents, and to hold that NASD arbitrations constitute state action. The Court declines the invitation.

In addition, the SIA argues that an award that is "grossly excessive" under BMW of N. America, Inc. v Gore, 517 US 559, supra, is irrational and violates public policy, and that an arbitrator who makes such an award has exceeded his or her powers.

For the reasons given above, this Court does not believe that the award that is at issue here is completely irrational, or that enforcement of the award would violate "a well defined and dominant public policy resting on clear law and legal precedent." St Mary

Home, Inc. v Service Empls. Intl. Union, supra, 116 F3d, at 46. The SIA has cited no authority to support the proposition that an arbitral award that is not held to be otherwise irrational, or violative of public policy, becomes such, solely by virtue of failing the tests set forth in Gore. Moreover, this Court is not persuaded that, even were Gore applicable here, a brokerage firm that deliberately misappropriates a former broker's mail and telephone messages, implies to his former clients that he has embezzled their funds, claims falsely that it does not know how he can be reached, and solicits false accusations against him, all of which the Panel appears to have believed Waddell to have done, is not on notice that it is risking a very substantial award against it.

Finally, Section 10(a)(4) of the FAA, which provides that an award may be vacated where the arbitrators exceeded their powers in making the award, applies, for example, where arbitrators have ruled on issues not submitted to them. See, e.g., Matteson v Ryder System, Inc., 99 F3d 108 (3d Cir 1996); Matter of the New York Stock Exchange Arbitration between Fahnenstock & Co., Inc. v Walton, 935 F2d 512, 515 (2d Cir 1991), cert denied 502 US 1120 (1992). It does not apply to a claim that an arbitrator did not decide an issue correctly. DiRussa v Dean Witter Reynolds, 121 F3d 818, supra.

Accordingly, it is hereby

ORDERED that the motion of the Securities Industry Association for leave to file a brief amicus curiae is granted; and it is

further

ORDERED AND ADJUDGED that the petition of Hackett Associates, Inc. is granted and the award rendered in favor of said petitioner is confirmed; and it is further

ORDERED AND ADJUDGED that the petition of Stephen B. Sawtelle is granted to the extent that the award granted to said petitioner is modified, to reduce the compensatory damages awarded, by the sum of $747,000, and, as so modified, the award to said petitioner is confirmed; and it is further

ORDERED AND ADJUDGED that petitioner Sawtelle have judgment and recover against respondents Waddell and Reed, Inc., Robert L. Hechler, Robert Williams, Jr., Steven Anderson, Scott Uzell, Estate of Larry Anderson, Edward Blonski, Robert Gjerlow, Andrew Kahn, Paula Levy, Richard Moro, Janet Dember Nichols, Dennis Ritchie, David J. Ross, and Robert Worrell, jointly and severally, in the amount of $1,080,499 plus interest at the rate of 8% compound interest per annum from the date of September 4, 2001, together with costs and disbursemenents as taxed by the Clerk, for the total amount of $_____, and that petitioner Sawtelle have execution therefore; and it is further

ORDERED AND ADJUDGED that petitioner Sawtelle have judgment and recover against respondents Waddell and Reed, Inc., Robert L. Hechler, Robert Williams, Jr., Steven Anderson, Scott Uzell, Estate of Larry Anderson, Edward Blonski, Robert Gjerlow, Andrew Kahn, Paula Levy, Richard Moro, Janet Dember Nichols, Dennis Ritchie, David J. Ross, and Robert Worrell, jointly and severally, in the

amount of $747,000, plus interest at the legal rate from the date of September 4, 2001, together with costs and disbursements as taxed by the Clerk, for the total amount of $_____, and that petitioner Sawtelle have execution therefore; and it is further

ORDERED AND ADJUDGED that petitioner Sawtelle have judgment and recover against respondents Waddell and Reed, Inc. and Robert L. Hechler, jointly and severally, in the amount of $25,000,000, plus interest at the legal rate from the date of September 4, 2001, together with costs and disbursements as taxed by the Clerk, for the total amount of $_____, and that petitioner Sawtelle have execution therefore, and it is further

ORDERED AND ADJUDGED that the cross-petition of the respondents is granted to the extent that the award is modified as set forth above, and the cross motion is otherwise denied.

This constitutes the decision, order and judgment of the Court.

Dated: May 31, 2002

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN