

MONROE COUNTY CLERK'S OFFICE

THIS IS NOT A BILL. THIS IS YOUR RECEIPT.

Receipt # 2054181

Book Page CIVIL

No. Pages: 61

Instrument: AFFIDAVIT

Control #: 201904260021

Index #: E2019003849

Date: 04/26/2019

Time: 6:19:28 AM

**Return To:
JASON JOSEPH KANE
1150-J Pittsford-Victor Road, 1st Floor
Pittsford, NY 14534**

**Fitzpatrick, James W.
Fitzpatrick, Sandra J.
The Fitzpatrick Family Life Insurance Trust**

AXA Advisors, LLC

Total Fees Paid: \$0.00

Employee:

State of New York

**MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS
ENDORSEMENT, REQUIRED BY SECTION 317-a(5) &
SECTION 319 OF THE REAL PROPERTY LAW OF THE
STATE OF NEW YORK. DO NOT DETACH OR REMOVE.**

ADAM J BELLO

MONROE COUNTY CLERK



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF MONROE

-----X
Application of JAMES W. FITZPATRICK :
and SANDRA J. FITZPATRICK, and THE :
FITZPATRICK FAMILY LIFE :
INSURANCE TRUST by KERRY :
FITZPATRICK in his capacity as :
TRUSTEE, :

Petitioners, :

For an Order Pursuant to Article 75 of the :
CPLR Confirming an Arbitration Award :

-against- :

AXA ADVISORS, LLC., :

Respondent. :
-----X

Index No.

**AFFIDAVIT IN SUPPORT OF
VERIFIED PETITION TO
CONFIRM ARBITRATION
AWARD**

STATE OF NEW YORK)
) ss.:
COUNTY OF MONROE)

JASON JOSEPH KANE, being duly sworn, deposes and says as follows:

1. I am a partner of Peiffer Wolf Carr & Kane, APLC.
2. I represent the Petitioners herein and have throughout the time their FINRA arbitration has been pending.
3. On November 28, 2016, the Petitioners filed their Statement of Claim against Respondent thereby initiating *James W. Fitzpatrick et al. v. AXA Advisors, LLC*; FINRA Arb. No. 16-03454 (“the Arbitration”).

4. Over the course of eight days from February 2018 to September 2018, a duly appointed FINRA arbitration panel (“the Panel”) reviewed the parties’ evidence and listened to their arguments.

5. On October 23, 2018, after the conclusion of the eighth hearing day and at the Panel’s request, both Petitioners and Respondent submitted 25-page post-hearing briefs.

6. On November 1, 2018, counsel for both Petitioners and Respondent gave their closing arguments to the arbitration panel.

7. On April 25, 2019, FINRA rendered the Final Award in the Arbitration dated April 25, 2019. Exh. A.

8. A copy of Petitioners’ post-hearing brief summarizing the evidence dated October 23, 2018 is attached hereto as exhibit B.

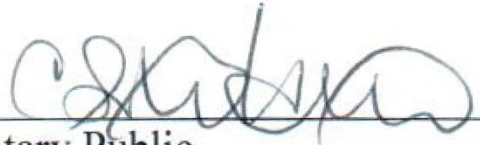
9. A copy of Petitioners’ post-hearing brief outlining the Panel’s authority to award attorneys’ fees dated February 4, 2019 is attached hereto as exhibit C.

10. Copies of the submission agreements submitted to FINRA Dispute Resolution by the parties, as attached hereto as exhibit D.



JASON J. KANE

Sworn to before me this
25th day of April, 2019.



Notary Public

CHRISTA MARIE HIBBARD
Notary Public, State of New York
Monroe County, No: 02HI6279032
Commission Expires: April 8, 2021

EXHIBIT A

Award
FINRA Office of Dispute Resolution

In the Matter of the Arbitration Between:

Claimants

James W. Fitzpatrick
Sandra J. Fitzpatrick
The Fitzpatrick Family Trust

Case Number: 16-03454

vs.

Respondents

AXA Advisors, LLC
Cambridge Investment Research, Inc.

Hearing Site: Buffalo, New York

Nature of the Dispute: Customers vs. Members

This case was decided by an all-public panel.

REPRESENTATION OF PARTIES

For Claimants James W. Fitzpatrick, Sandra J. Fitzpatrick, and The Fitzpatrick Family Trust: Jason Kane, Esq., Adam Wolf, Esq., and Joseph Peiffer, Esq., Peiffer Rosca Wolf Abdullah Carr & Kane, Pittsford, New York.

For Respondent AXA Advisors, LLC ("AXA"): Joseph S. Simms, Esq., Reminger Co., LPA, Cleveland, Ohio.

For Respondent Cambridge Investment Research, Inc. ("Cambridge"): Richard J. Babnick Jr., Esq., Sichenzia Ross Ference Kesner, LLP, New York, New York.

CASE INFORMATION

Statement of Claim filed on or about: November 28, 2016.

Amended Statement of Claim filed on or about: November 20, 2017.

Sandra J. Fitzpatrick signed the Submission Agreement: November 28, 2016.

James W. Fitzpatrick signed the Submission Agreement: November 28, 2016.

The Fitzpatrick Family Trust signed the Submission Agreement: April 22, 2019.

Respondent AXA filed Statement of Answer on or about: February 9, 2017.

Answer to Amended Statement of Claim filed on or about: January 2, 2018.

AXA Advisors, LLC signed the Submission Agreement: February 9, 2017.

FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 2 of 6

Respondent Cambridge filed Statement of Answer on or about: February 1, 2017.
Answer to Amended Statement of Claim filed on or about: January 3, 2018.
Cambridge Investment Research, Inc. signed the Submission Agreement: December 6, 2016.

CASE SUMMARY

Claimants asserted the following causes of action: negligence, violation of FINRA Rule 2111; violation of FINRA Rule 2110; negligent misrepresentation and omission of material facts; and breach of fiduciary duty. The causes of action relate to life insurance policies and variable annuities.

Unless specifically admitted in the Statement of Answer, Respondent AXA denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

Unless specifically admitted in the Statement of Answer, Respondent Cambridge denied the allegations made in the Statement of Claim and asserted various affirmative defenses.

RELIEF REQUESTED

In the Statement of Claim and Amended Statement of Claim, Claimants requested all loss of principal; interest; commissions and fees paid by Claimants; loss of income, non-pecuniary losses; attorneys' fees; costs and other expenses; pre-judgment and post-judgment interest; all other sums Claimants are entitled to at law or equity; and punitive damages.

In the Statement of Answer and Answer to Amended Statement of Claim, Respondent AXA requested Claimants' claims be denied in their entirety and that the Panel award AXA costs; attorneys' fees; assess forum fees against Claimants; include within the award a recommendation for a court order that all reference to this matter in the regulatory records be expunged; and such other and further relief as the Panel deems appropriate.

In the Statement of Answer and Answer to Amended Statement of Claim, Respondent Cambridge requested that the Panel deny Claimants' claims with prejudice and issue such other further relief that the Panel deems just, equitable, and proper.

In their post-hearing brief, Claimants requested \$13,228,038.00 plus post-award interest.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrators acknowledge that they have each read the pleadings and other materials filed by the parties.

FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 3 of 6

On November 20, 2017, Claimants filed a Motion to Amend the Statement of Claim. Respondents did not oppose the Motion to Amend. By Order dated December 12, 2017, the Panel granted Claimants' Motion to Amend the Statement of Claim.

By correspondence dated January 23, 2018, Claimants notified FINRA Dispute Resolution that they have settled their claims against Respondent Cambridge and dismissed their claims against Respondent Cambridge with prejudice.

The parties present at the hearing have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, and the post-hearing submissions, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Respondent AXA is liable for and shall pay to Claimants James W. Fitzpatrick, Sandra J. Fitzpatrick, and The Fitzpatrick Family Trust the sum of \$2,224,671.94 in compensatory damages.
2. Respondent AXA is liable for and shall pay to Claimants James W. Fitzpatrick, Sandra J. Fitzpatrick, and The Fitzpatrick Family Trust interest on the above-stated sum at the rate of 9% per annum from 30 days after the date of the award until the award is paid in full.
3. Respondent AXA is liable for and shall pay to Claimants James W. Fitzpatrick, Sandra J. Fitzpatrick, and The Fitzpatrick Family Trust the sum of \$67,293.64 in costs.
4. Respondent AXA is liable for and shall pay to Claimants James W. Fitzpatrick, Sandra J. Fitzpatrick, and the Fitzpatrick Family Trust the sum of \$889,868.78 in attorneys' fees. The Panel determined it is authorized to award attorneys' fees because both Claimants and Respondent AXA requested attorneys' fees in the pleadings.
5. Respondent AXA's request for specific performance/expungement is denied.
6. Any and all claims for relief not specifically addressed herein, including punitive damages, are denied.

FINRA Office of Dispute Resolution
 Arbitration No. 16-03454
Award Page 4 of 6

FEES

Pursuant to the Code of Arbitration Procedure, the following fees are assessed:

Filing Fees

FINRA Office of Dispute Resolution assessed a filing fee* for each claim:

Initial Claim Filing Fee =\$ 1,575.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firms that employed the associated person at the time of the events giving rise to the dispute. Accordingly, as parties, Respondents AXA and Cambridge are each assessed the following:

Member Surcharge =\$ 1,900.00
 Member Process Fee =\$ 3,750.00

Discovery-Related Motion Fee

Fees apply for each decision rendered on a discovery-related motion.

Three (3) decisions on discovery-related motions on the papers with one (1) arbitrator @ \$200.00/decision =\$ 600.00

Claimants submitted one discovery-related motion
 Respondent Cambridge submitted two discovery-related motions

Total Discovery-Related Motion Fees =\$ 600.00

The Panel has assessed \$400.00 of the discovery-related motion fees jointly and severally to Claimants.

The Panel has assessed \$200.00 of the discovery-related motion fees to Respondent Cambridge.

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

One (1) pre-hearing session with the Panel @ \$1,125.00/session =\$ 1,125.00
 Pre-hearing conference: April 17, 2017 1 session

FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 5 of 6

Seventeen (17) hearing sessions @ \$1,125.00/session = \$19,125.00

Hearing Dates:	February 20, 2018	2 sessions
	February 21, 2018	2 sessions
	February 22, 2018	2 sessions
	February 23, 2018	2 sessions
	September 13, 2018	2 sessions
	September 14, 2018	2 sessions
	September 15, 2018	2 sessions
	September 16, 2018	2 sessions
	November 1, 2018	1 session

Total Hearing Session Fees = \$20,250.00

The Panel has assessed the \$20,250.00 hearing session fee to Respondent AXA.

All balances are payable to FINRA Office of Dispute Resolution and are due upon receipt.

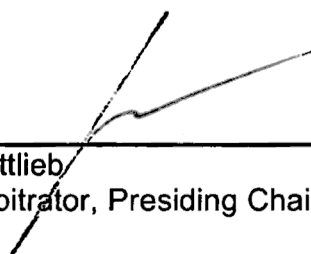
FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 6 of 6

ARBITRATION PANEL

- Krista Gottlieb - Public Arbitrator, Presiding Chairperson
- Jeffrey M. Bain - Public Arbitrator
- Thomas E. Webb, Jr. - Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures



 Krista Gottlieb
 Public Arbitrator, Presiding Chairperson

4-25-19

 Signature Date

 Jeffrey M. Bain
 Public Arbitrator

 Signature Date

 Thomas E. Webb, Jr.
 Public Arbitrator

 Signature Date

April 25, 2019

Date of Service (For FINRA Office of Dispute Resolution office use only)

FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 6 of 6

ARBITRATION PANEL

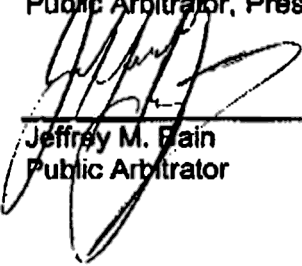
- Krista Gottlieb - Public Arbitrator, Presiding Chairperson
- Jeffrey M. Bain - Public Arbitrator
- Thomas E. Webb, Jr. - Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.

Concurring Arbitrators' Signatures

Krista Gottlieb
Public Arbitrator, Presiding Chairperson

Signature Date



Jeffrey M. Bain
Public Arbitrator

April 25, 2019
Signature Date

Thomas E. Webb, Jr.
Public Arbitrator

Signature Date

April 25, 2019

Date of Service (For FINRA Office of Dispute Resolution office use only)

FINRA Office of Dispute Resolution
Arbitration No. 16-03454
Award Page 6 of 6

ARBITRATION PANEL

- Krista Gottlieb - Public Arbitrator, Presiding Chairperson
- Jeffrey M. Bain - Public Arbitrator
- Thomas E. Webb, Jr. - Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm, pursuant to Article 7507 of the Civil Practice Law and Rules, that I am the individual described herein and who executed this instrument which is my award.


Concurring Arbitrators' Signatures

Krista Gottlieb
Public Arbitrator, Presiding Chairperson

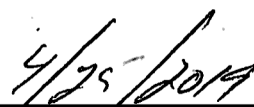
Signature Date

Jeffrey M. Bain
Public Arbitrator

Signature Date



Thomas E. Webb, Jr.
Public Arbitrator



Signature Date

April 25, 2019

Date of Service (For FINRA Office of Dispute Resolution office use only)

EXHIBIT B

Before The
FINANCIAL INDUSTRY REGULATORY AUTHORITY
CASE NUMBER 16-03454

JAMES W. FITZPATRICK and
SANDRA J. FITZPATRICK, and
THE FITZPATRICK FAMILY TRUST by
KERRY FITZPATRICK in his capacity as
TRUSTEE,

POST-HEARING BRIEF

Claimants,

-vs-

AXA ADVISORS, LLC,

Respondent.

Q: Do you think Mr. Puccio has a propensity for telling the truth?

A: At this point in the hearing, no.

- Elliott Server, AXA's Paid Expert Witness (Sept. 16, 2018), at 2185:7 - 9.

This arbitration illustrates what happens when AXA sends a felonious broker in desperate need of money to serve unsophisticated and elderly, but wealthy, clients, and then completely abdicates its supervisory obligations. AXA caused the Fitzpatrick's \$2,985,257 in compensatory damages. In order to be made whole, the Fitzpatrick's also ask this Panel for reimbursement of attorneys' fees according to their contingency contract and costs of \$92,908.26. Claimants' complete damages request is attached as Exhibit A.

Additionally, the Panel should award punitive damages. To this day, AXA contends that everything was "perfectly suitable" and "beyond reproach." AXA's Opening Statement (Feb. 20, 2018), at 64:14-16. This Panel should send AXA a message about the importance of telling the truth and acting with commercial honor. What happened to the Fitzpatrick's should never have occurred. But, after it happened, AXA certainly owed the Fitzpatrick's and this Panel the truth. It did not deliver. A punitive damages award is necessary to safeguard the integrity of the financial system and FINRA arbitrations. AXA must learn that it cannot lie to its elderly clients and then come into a hearing, say whatever it wants, and only have to make its clients whole again.

I. FRANCESCO PUCCIO IS AN UNETHICAL, DESPERATE, AND FELONIOUS FINANCIAL ADVISOR WHO REPEATEDLY LIED AT THE HEARING.

AXA assigned Francesco Puccio to the Fitzpatrick's. Puccio is a convicted felon who has been barred from the financial services industry for stealing money from an elderly AXA client. Puccio is a proven liar many times over, even before this hearing. But, in a first for undersigned counsel, even AXA's hired expert witness agreed that Puccio lied throughout the hearing.

Q: Do you think Mr. Puccio has a propensity for telling the truth?

A: At this point in the hearing, no.

E. Server (Sept. 16, 2018), at 2185:7-9. Prior to lying at the hearing, Puccio destroyed documents.¹

1. Puccio repeatedly perjured himself.

Puccio repeatedly lied to the Panel. He lied when he testified that the Fitzpatricks' accountant, Charlie Wheat, was aware of "the entire plan" and thought the Puccio-recommended transactions "were great ideas ... and that it needed to be done a long time ago."² To the contrary, Charlie Wheat was clear that he does not understand annuities or life insurance and offered no opinions to Puccio or the Fitzpatricks about the Puccio-recommended transactions.³

Puccio lied further when he testified that his meetings with the Fitzpatricks never lasted "less than two hours"⁴ and that he knew Jim Fitzpatrick understood all of his proposals because "[Jim] knew numbers very well."⁵ Puccio gave this testimony despite his admission that these transactions involve "complex products,"⁶ that Jim's pre-existing insurance policies were piled up in an egg carton box, and that Jim did not even know about some of those old policies.⁷ Moreover, both Sandra and Kerry Fitzpatrick testified that Jim's cognitive impairment was well underway by 2011.⁸ Meanwhile, the Fitzpatricks testified that they have limited understanding of finance, let alone variable annuities or life insurance; that the meetings were very quick; and that Puccio spent the bulk of those meetings chatting about family and other non-finance issues.⁹

¹ F. Puccio (Feb. 21, 2018), at 400:11-20 ("Q: But AXA would have access to your files, correct? ... A: Or I would have destroyed them."); *see also* F. Puccio (Feb. 21, 2018), at 406:14-18 ("Q: Did you destroy records of the notes you took during meetings? A: I might have.").

² F. Puccio (Feb. 21, 2018), at 738:7-10; F. Puccio (Feb. 20, 2018), at 510:21 – 511:2.

³ C. Wheat (Sept. 15, 2018), at 1674:9 – 1675:15, 1679:16 – 1680:7.

⁴ F. Puccio (Feb. 21, 2018), at 403:6.

⁵ F. Puccio (Feb. 21, 2018), at 561:14 – 15.

⁶ F. Puccio (Feb. 21, 2018), at 267:13 – 15.

⁷ F. Puccio (Feb. 21, 2018), at 335:1 – 7, 336: 1 – 9.

⁸ S. Fitzpatrick (Feb. 20, 2018), at 104:2 – 13, 126:16-25.

⁹ S. Fitzpatrick (Feb. 20, 2018), at 72:10 – 73:5, 74:9 – 16, 77:15 – 24, 128:2 – 10, 218:18 – 22.

Further, after AXA sprung a then-unproduced recording of what it thought was Kerry, Puccio was forced to admit that he lied to AXA when he impersonated Kerry to request information about a loan.¹⁰ (Kerry's signature on the loan request is clearly forged. *Compare* Clmnts. Arb. Exh. 109, *with* Clmnts. Arb. Exhs. 97, 99, 104, 105, 110.) Puccio also admitted to creating a fraudulent email address to appear as Jim's email "[b]ecause [my] name is not Fitzpatrick. I mean, they would not have sent it to me."¹¹ Puccio then testified that he did it because of Kerry's "medical issues ... [Kerry] didn't get around until 1 or 2 p.m. in the afternoon."¹² The Panel may recall that Kerry attended virtually every minute of the hearing. (Besides, a felon blaming his fraudulent conduct on Kerry's post-finasteride syndrome and hypogonadal condition is offensive.)

Puccio lied about why the loan on the life insurance policy was rushed when he said it "was needed for the [hotel] project."¹³ In fact, Jim Fitzpatrick wrote a large check to yet another life insurance company on the same day Puccio impersonated Kerry.¹⁴

Puccio even lied to the Panel about his vacation. Puccio testified that he was supposed to be out of town for a conference that "started on Tuesday."¹⁵ Puccio then was forced to admit that the conference did not start until the next week, that he had not even registered for the conference, and that he really was going on vacation with his family.¹⁶ Prior to that admission the undersigned was convinced to pay for the fees associated with changing Puccio's purported business travel arrangements. Claimants request that money back as part of their costs.

¹⁰ F. Puccio (Feb. 21, 2018), at 421:24 – 422:10.

¹¹ F. Puccio (Feb. 21, 2018), at 444:9 – 11.

¹² F. Puccio (Feb. 21, 2018), at 450:5 – 12.

¹³ F. Puccio (Feb. 21, 2018), at 462:18 – 24.

¹⁴ J. Duval (Sept. 14, 2018), at 1569:10 – 12.

¹⁵ F. Puccio (Feb. 22, 2018), at 670:10 – 12.

¹⁶ F. Puccio (Feb. 22, 2018), at 672:2 – 12.

Finally, the money Puccio stole from Shirley Kerwin was her retirement funds that she and her deceased husband had saved working decades as a janitor and truck driver. When Shirley asked Puccio where her money had gone, Puccio lied. He blamed her for loaning “too much” money to her brother with cancer.¹⁷ Shirley knew that was wrong and contacted the authorities.

2. Puccio sold the products at issue while his scheme to commit felony larceny upon another elderly AXA client was ongoing and while he was in a “desperate” and “low part” of his life.

Puccio committed Grand Larceny in the Second Degree “between May 19, 2011 and March 3, 2014.” Clmnts. Arb. Exh. 30, p. 2. While Puccio was committing felony larceny, he recommended the five transactions at issue here to the Fitzpatricks.

Puccio admitted that he “did something wrong” and “did something desperate” while he “was in a low part of [his] life.”¹⁸ Puccio lived in a \$500,000 house that was down to “\$360,000 at the time,” his monthly house payment was \$3,500, and his monthly car payment was an astounding \$2,000.¹⁹ He also paid “close to a hundred thousand dollars between federal and state” back taxes in “2011 or 2012.”²⁰ Despite that payment, he still owed money because “the desperation that [led Puccio to steal] was that New York State was freezing [his] accounts.”²¹

Puccio was struggling to pay his bills and had an obvious motive to sell high-commission products. He “made about \$240,000 selling these products to the Fitzpatricks,” which was “double the amount of money . . . he made stealing from Ms. Kerwin.”²²

¹⁷ S. Kerwin (Feb. 20, 2018), at 226:11 – 19.

¹⁸ F. Puccio (Feb. 21, 2018), at 264:17 – 18 and 265:3 – 4.

¹⁹ F. Puccio (Feb. 21, 2018), at 314:9 – 315:7.

²⁰ F. Puccio (Feb. 21, 2018), at 288:15 – 17, 289:7 – 12.

²¹ F. Puccio (Feb. 21, 2018), at 316:6 – 8.

²² E. Server (Sept. 16, 2018), at 2172:21 – 2173:16.

What happened to the Fitzpatrick is clear: Puccio sold them high-commission products because he could not pay his bills. As with Shirley, he did not care about his duties to the Fitzpatrick or the damage he was causing. Yet, AXA claims its conduct is “beyond reproach.”

II. TIMELINE OF EVENTS LEADING TO THIS ARBITRATION

AXA failed to protect its elderly clients before, during, and after the five transactions at issue in this arbitration. AXA’s conduct here – at every step – is worthy of punishment.

1. The Fitzpatrick had been AXA clients since the 1980s.

The Fitzpatrick were AXA clients for decades before AXA unilaterally assigned Puccio to the Fitzpatrick. The pre-Puccio AXA representative was Curtis Higgins, a Certified Financial Planner (CFP) who sold to the Fitzpatrick many of the “golden” life insurance policies that Puccio exchanged (Transactions 2 and 3). Higgins also recommended the American Funds that Puccio liquidated (Transaction 1). Unfortunately, health issues caused Higgins to leave the industry in 2011. Clmnts. Arb. Exh. 23, p. 1. AXA’s response was to send Puccio to service Jim and Sandra.

2. AXA hired Puccio and did not immediately put him on heightened supervision, despite its knowledge that Puccio had numerous credit problems.

Branch Manager Thomas Queri testified that Puccio was his “friend” whom he re-hired in 2011.²³ Queri testified there was nothing memorable about AXA’s pre-hire investigation of Puccio. This, despite AXA’s awareness at the time that Puccio had tax liens and credit card issues immediately prior to his re-hire.²⁴ Clmnts. Arb. Exh. 22, pp. 16-20; Exh. 114. Remarkably, AXA elected not to place Puccio on heightened supervision. Queri admitted that violated AXA policy:

Q: AXA’s policy is that so long as somebody was known to have credit issues, they should be put on heightened supervision, right? **A:** If - - if we hired them.

²³ T. Queri (Feb. 23, 2018), at 931:24 (“Yes, I would consider him a friend.”).

²⁴ T. Queri (Feb. 23, 2018), at 948:17 – 18 and 951:18 – 19.

T. Queri (Feb. 23, 2018) at 961:4-19.

3. Queri approved the transfer of the Fitzpatricks' accounts to Puccio.

Puccio admitted he has no estate planning credentials.²⁵ He also disclosed before his hiring that “life insurance and annuity contracts” would be his “principal business activity.” Clmnts. Arb. Exh. 117, Q.1(b). Despite Puccio’s lack of credentials, this disclosure, and the credit issues AXA knew about, in May 2011, Queri approved the transfer of the Fitzpatricks’ accounts to Puccio.²⁶ Not surprisingly, Puccio sold the Fitzpatricks annuities and life insurance.

Puccio and Queri testified that Puccio was a good fit for the Fitzpatricks because he would drive two hours to Whitesville—as if no other AXA advisor would drive two hours to the wealthy Fitzpatricks.²⁷ That is obviously false. For instance, Goorman, a CFP and AXA representative in Puccio’s branch office, testified he would have driven two hours to service such wealthy clients— if only AXA had given him that opportunity.²⁸ Instead, AXA sent Queri’s friend, Puccio.

4. Puccio’s Unsuitable Recommendations to the Fitzpatricks.

Puccio abruptly changed the Fitzpatricks’ assets and estate plan. He did so without consulting Bob Kessler, whom AXA knew to be the Fitzpatricks’ estate-planning attorney.

Kessler, a graduate of Cornell Law School, has 49 years of experience in trusts and estates. He was clear Puccio did not consult with him. He was equally clear that, had Puccio consulted him, these unsuitable transactions would not have occurred:

Q: Based on what you know of the Fitzpatricks and their estate plan, was there any good reason for the Fitzpatricks to have purchased more life insurance in 2011 and 2012? **A:** No.

²⁵ F. Puccio (Feb. 21, 2018), at 261:25 – 262:2.

²⁶ T. Queri (Feb. 23, 2018), at 992:3 – 25, 993:2 – 4.

²⁷ *Id.* See also F. Puccio (Feb. 21, 2018), at 506:14 – 15.

²⁸ K. Goorman (Feb. 22, 2018), at 771:4 – 15.

Q: Based on what you know of the Fitzpatricks and their estate plan, was there any good reason for the Fitzpatricks to have purchased variable annuities in 2011 or 2012? **A:** Not that I know of. R. Kessler (Feb. 22, 2018), at 582:14-23.

Despite Puccio’s listing “estate planning” or “estate tax protection” as a goal of transactions 1, 2, 3, and 4, Puccio did not vet these transactions with any estate-planning professional, let alone the Fitzpatricks’ long-time estate-planning attorney. Even AXA’s Goorman made initial findings that Puccio’s transactions were “troubling ... from an estate planning perspective.”²⁹

5. Puccio Is Hit with Yet Another Tax Lien in March 2012.

In March 2012, the IRS filed yet another lien against Puccio, this one for \$58,437.10. Clmnts. Exh. 22, p. 20. The timing is important: this lien was filed only four months after Puccio earned approximately \$25,000 selling Transaction 1, a few weeks before Puccio earned over \$25,000 selling Transaction 2, three months before he earned over \$100,000 selling Transaction 3, and nine months before Puccio earned approximately \$90,000 selling Transaction 4.

6. Puccio Was On the Phone With the Fitzpatricks During the Senior Call-Out.

On April 20, 2012, Queri held a call with the Fitzpatricks to supervise Transaction 2 (the “senior call-out”). Queri admitted the call lasted only 10 minutes.³⁰ It was the only conversation he had with any of the Fitzpatricks,³¹ it was the *only* time that an AXA employee other than Puccio spoke to the Fitzpatricks from 2011 until Puccio was arrested, and Puccio was on the call.

Queri testified that supervisors typically would not “have the person selling the annuity in the room with the person while you were talking to them on the phone.”³² Of course that makes

²⁹ K. Goorman (Feb. 22, 2018), at 817:3 – 6.
³⁰ T. Queri (Feb. 23, 2018), at 1051: 2 – 3.
³¹ T. Queri (Sept. 13, 2018), at 1372:15 – 18.
³² T. Queri (Sept. 13, 2018) at 1294:21 – 23.

sense, because supervision entails obtaining a client’s true understanding of a complex transaction, untainted by a selling agent about to make a large commission. And yet, that happened here: Puccio lurked in the background with the Fitzpatricks during Queri’s call.

Sandra signed a document presented to her by Puccio on April 20, 2012, at 11:30 a.m. Clmnts. Arb. Exh. 67, pp. 1, 4. Queri’s handwritten notes from the senior call-out indicate the call took place thirty minutes later. Clmnts. Arb. Exh. 44.

More directly, Puccio testified he was with the Fitzpatricks during the senior call-out:

Q: And who was on that phone call?

A: I think it was Tom or a compliance person. I can’t remember, but I was at their house, and - -

Arbitrator Gottlieb: At the Fitzpatricks’ house?

A: Yes, sorry. **And we used my cell phone** or maybe – maybe the landline, I can’t remember . . . but there was a phone call - - there are certain questions that they have to ask, not just notes. I think it’s a questionnaire.” F. Puccio (Feb. 21, 2018) at 390:22 – 391:10 (emphasis added).

In other words, the cornerstone of AXA’s defense to its negligent supervision of a complex transaction took place during a ten-minute call when Puccio was in the room with the clients.

7. In January 2013 AXA Learned of Puccio’s Ongoing Lien Issues When His Wages Were Garnished but Did Not Put Him on Heightened Supervision For 6 Months.

On January 7, 2013, AXA learned New York State filed a tax levy and wage garnishment against Puccio. Clmnts. Arb. Exh. 138. It placed Puccio on enhanced supervision *six months later*.

Queri could not explain the six-month delay, but he acknowledged it is concerning.³³ Four months into Puccio’s heightened supervision, Transaction 5 occurred—without *any* supervision, despite the heightened supervision policy that all transactions “had to be signed off by [Queri].”³⁴

³³ T. Queri (Feb. 23, 2018), at 998: 11 – 18.

³⁴ T. Queri (Feb. 23, 2018), at 964:7 – 8; *see also* T. Queri (Feb. 23, 2018) at 1032:7 - 15 (“[L]et’s go to transaction 5 . . . Have you seen any documents regarding this transaction with

8. The Fitzpatricks Followed Puccio to Cambridge, Where They Were Victims of Further Annuity and Life Insurance Abuses While Puccio's Criminal Issues Arose.

AXA elected not to tell the Fitzpatricks that Puccio was fined, reprimanded, and placed on heightened supervision for failing to disclose his significant credit issues. As a result, the Fitzpatricks remained Puccio clients after he left AXA.

On August 4, 2014, Puccio was confronted by a NYS Trooper at Shirley Kerwin's house. Clmnts. Arb. Exh. 30, p. 3/8. Two days later, Jackson received an application for Sandra to purchase an \$80,000 Jackson variable annuity. Duval binder, Tab 1. On March 12, 2015 (the same day Puccio impersonated Kerry), Jim wrote a large check to yet another life insurance company.³⁵ In April or May 2015, Puccio sold another variable annuity to the Fitzpatricks in which he netted a commission of at least \$80,000.³⁶ On June 8, 2015, Puccio advised Sandra to make another partial withdrawal from the AXA Equi-vest annuity and roll it over into an annuity. Duval binder, Tab 1. On July 15, 2015, Puccio was arrested. Clmnts. Arb. Exh. 22 at p. 10.

9. AXA Reached "Troubling" Initial Findings About Puccio's Advice to the Fitzpatricks But Did Not Communicate Those Findings to the Fitzpatricks.

Within a month of seeing Puccio's mugshot in the newspaper, the Fitzpatricks asked AXA to review "the totality of their portfolio" to determine "any improprieties, unsuitabilities, or any other issues with" Puccio-recommended transactions.³⁷ Koen Goorman conducted that review.

Goorman testified that he made "initial findings" about Puccio's transactions for the Fitzpatricks. His initial findings were "troubling."³⁸ Part of what animated those findings is that it

any notes to indicate that you personally supervised this transaction? A: No.").

³⁵ J. Duval (Sept. 14, 2018), at 1569:10 – 12.

³⁶ F. Puccio (Feb. 21, 2018), at 321:13 – 16.

³⁷ K. Goorman (Feb. 22, 2018), at 849:9 – 24.

³⁸ See Clmnts. Arb. Exh. 52; K. Goorman (Feb. 22, 2018), at 817:3 – 6.

is “always” concerning “if elderly investors are buying variable annuities” and that “[t]he industry looks at that very closely.”³⁹ Further distancing himself, Goorman noted that of course he never “sold a \$2 million variable annuity to someone in their 70s.”⁴⁰ He agreed that assuming a \$750,000 cost basis and high dividend rates, Transaction 2 was “unsuitable.”⁴¹

Knowing that his initial findings were very bad for AXA, Goorman took some rather incredible positions at the hearing. For instance, he testified that “AXA clients aren’t entitled” to his initial findings, apparently even when, as here, those findings don’t change.⁴² He also stated implausibly that he could not complete his initial findings because he did not have access to the Fitzpatrick’s file. However, AXA had the file. Transaction 2’s cost basis (\$750,512.66) was easily established from a document produced by AXA dated April 4, 2013. Clmnt. Arb. Exh. 50. Transactions 1, 3, and 4 are all AXA proprietary annuities and life insurance policies, the documents for which would have been simple for Goorman to obtain in August 2015.

AXA’s refusal to finalize Goorman’s initial findings of “troubling” transactions was either shocking laziness or willful indifference toward the elderly Fitzpatricks.

10. AXA’s Sham Investigation and Denial of the Fitzpatricks’ Customer Complaint.

Goorman simply “stuck [his memo] in the file” and did not share it with anyone involved in AXA’s investigation of Puccio.

Q: So you stuck it in the file ultimately? **A:** Yeah.

Q: Did you share it with Miss Butkevitch? **A:** No. ...

Q: Did you ever mention to [Jackie Vanhoy] kind of what your initial findings were leading to? **A:** I don’t recall having specific conversations on that. **K.** Goorman (Feb. 22, 2018) at 806:13 – 807:10.

³⁹ K. Goorman (Feb. 22, 2018), at 811:10-13.

⁴⁰ K. Goorman (Feb. 22, 2018), at 811:14-18.

⁴¹ K. Goorman (Feb. 22, 2018), at 820:23 – 823:2.

⁴² K. Goorman (Feb. 22, 2018), at 803:15-19. *See also id.* at 805:1 – 4.

On September 23, 2015, the Fitzpatricks filed a complaint with AXA. On October 2, 2015 – only nine days later – AXA found “no basis to the customer complaint.” Clmnt. Arb. Exh. 22, p. 13. That is a lightning fast, remarkable conclusion to reach while Goorman’s initial findings of troubling transactions were “stuck” in the file.

Finally, Goorman testified that he could not finalize his findings because Julie Fitzpatrick would not return his phone calls or emails. He testified twice that he tried to set a meeting up around Julie’s school calendar for Thanksgiving or Christmas break.⁴³ That testimony strains credulity, given the *September* customer complaint and *October* denial. Furthermore, there are no emails in the record from Goorman to Julie.

III. SUMMARY OF THE TRANSACTIONS AND EXPERT TESTIMONY

There are five transactions at issue in this matter. John Duval testified that “[n]ot one of [the five transactions] were suitable.”⁴⁴ Rather, they were part of a “repetitive pattern of commission transactions that have no basis or reasoning,” other than generating commissions.⁴⁵ Moreover, “[t]here was no plan”; the five transactions were “simply transactions.”⁴⁶

John’s opinion was based in part on Puccio’s admission that “I didn’t do an estate plan. I’m not a credentialed estate planning attorney or anything like that”⁴⁷ Nor did Puccio “bring estate lawyers” or “CPAs into the immediate picture when he first met the Fitzpatricks, as a competent broker and supervising would almost demand.”⁴⁸ AXA, through Goorman, agreed that

⁴³ K. Goorman (Feb. 22, 2018), at 827:13 – 19, 850:12 – 14.

⁴⁴ J. Duval (Sept. 14, 2018), at 1402:7 – 9.

⁴⁵ J. Duval (Sept. 14, 2018), at 1402:14 – 15.

⁴⁶ J. Duval (Sept. 14, 2018), at 1402:5.

⁴⁷ F. Puccio (Feb. 21, 2018), at 343:18 – 20.

⁴⁸ J. Duval (Sept. 14, 2018), at 1401:23 – 1402:2.

should have occurred: “where there’s intricate estate planning like this, we would likely have met with the accountants, the attorneys, if any, and tried to put our heads together...”⁴⁹ Unfortunately, Puccio did not do that.

Despite the damaging testimony by Duval, Puccio and Goorman on this point, the basis of Respondent’s expert’s opinion nevertheless was that “*this is an estate planning case* that has some part of annuities to do with it.”⁵⁰ Claimants largely agree; this is an estate planning case. The problem for AXA is that its convicted felon admitted he did not do, and was not qualified to do, an estate plan and failed to involve others who could.

Additionally, in only approximately two hours of cross examination (compared to John Duval’s 2-day cross examination), Mr. Server admitted the following:

- “[Variable annuities] are not good investments to die with as - - to die with as - - to die with as they provide no stepped-up cost basis and thus get essentially taxed twice.” E. Server (Sept. 16, 2018) at 2163:12 – 18.
- “Variable annuities are not particularly good estate planning tools.” E. Server (Sept. 16, 2018) at 2163:19 – 22.
- “A variable annuity is not a great investment for someone who is really rich, who has no need for additional income, and who would like to pass on the maximum amount to his beneficiaries.” E. Server (Sept. 16, 2018), 2164:9-14.
- **Q:** Okay. So, then, you would agree with me that a variable annuity is not a great investment for the Fitzpatricks. **A:** I didn’t argue. I - - I don’t disagree with you. E. Server (Sept. 16, 2018) at 2166:14 – 18.

Transactions 1 and 2 were variable annuities. Transactions 3 and 4 were enormous life insurance policies with obvious estate planning implications. Against this backdrop, Claimants will briefly remind the Panel about some—but hardly all—of the problems with the transactions.

⁴⁹ K. Goorman (Feb. 22, 2018), at 825:17 – 20.

⁵⁰ E. Server (Sept. 16, 2018), at 2061:13 – 15.

1. Transaction 1 - Sandra's \$708,000 of American Funds transferred to AXA Equivest

The mutual funds were inexpensive, subject to capital gains taxes, and “actually outperformed the S&P 500” since Higgins had advised Sandra to invest in them.⁵¹ Moreover, if Puccio had not transferred them into the annuity, Sandra’s heirs would have been entitled to a stepped-up cost basis upon her death. These funds were marked for inheritance.⁵²

According to the opening documents, Sandra’s risk was “moderate-plus.” Clmnts. Arb. Exh. 35, AXA 3180. Making up only 3.5% of the Fitzpatrick’s combined \$19 million estate, the American Funds were properly allocated by Higgins as follows: 25% growth and income, 59% equity-income and 16% balanced. Clmnts. Arb. Exh. 37. There should have been no concern.⁵³

Giving up the mutual funds for the Puccio-recommended AXA annuity made no sense. Any tax deferral benefit is outweighed by the taxable income that Sandra will pay upon surrender or her estate will pay upon her death.⁵⁴ There is no advantage to the Fitzpatrick’s from a tax perspective, and there is now no way to undo the tax “ticking time bomb” that Puccio created through this transaction.⁵⁵

But doing the right thing here – nothing – would have meant \$0 for a broker who couldn’t pay his own taxes without generating a large commission from the Fitzpatrick’s.

⁵¹ J. Duval (Sept. 14, 2018), at 1425:8 – 9.

⁵² F. Puccio (Feb. 21, 2018), at 277:9 – 13; *see also* Clmnts. Arb. Exh. 43.

⁵³ J. Duval (Sept. 14, 2018), 1426:12-13 (“I would be happy to put her in that allocation today”).

⁵⁴ J. Duval (Sept. 14, 2018), at 11432:2 – 7 (“You just can’t make the math work. Tax deferral, for people this age, for this block of money, compared to a low tax basis mutual fund that has the advantages of capital gains and step-ups, does not offset the advantages in mutual funds.”).

⁵⁵ J. Duval (Sept. 14, 2018), at 1432:8 – 13.

Duval’s calculations on this transaction and others are based on a scenario where Puccio did nothing. Taking tax implications into account, the total compensatory damages for Transaction 1 are \$354,458. Duval Binder, Tab 1.

2. Transaction 2 - Jim’s paid-up, dividend producing life insurance policies 1035-exchanged into a \$1,300,000 Transamerica variable annuity

AXA’s Goorman did a fine job summarizing why Transaction 2 was unsuitable in his “initial findings” memo and in his testimony. According to Goorman:

In 2012, Francesco moved from LI [life insurance] policies on James into Transamerica VA. \$1,311,000 CV [current value], with \$1,820,000 death benefit

- 83 yr old
- 10 yr. surrender charge (it is actually 7)
- Policies were paid up with high dividend rates
- Lost D.B [death benefit] of \$510,000 tax free
- Likely created taxable gain to heirs (at ordinary income tax rates)
- Has GMIB rider (no need for this at all) Clmnts. Arb. Exh. 52

As Goorman notes, the 2012 death benefit of the four policies that were given up for the Transamerica variable annuity was approximately \$1.8 million. The 2012 death benefit of the Transamerica annuity that AXA sold was approximately \$1.3 million – an immediate loss of \$500,000 in insurance on elderly Jim’s life. Recall that Jim was uninsurable by then.

That’s not the only problem with this transaction. It created a taxable gain to heirs at ordinary income rates because the cost basis of the old policies was \$750,512.66. Clmnts. Arb. Exh. 50. Thus, on day 1 of this transaction this product carried a taxable gain of approximately \$550,000. The income taxes of such a gain will come due upon surrender of the annuity or at Jim’s death. It is unavoidable. Assuming a 40% income tax rate, that is a new and unnecessary tax liability of \$220,000 at the outset.

In other words, due to Puccio’s need for commissions, *Jim’s estate was worth at least \$720,000 less on April 28, 2012 than it was on April 27, 2012*. And because the old policies—the “golden treasures”—were producing dividends that covered the premiums and buying more life insurance, Jim’s future estate continues to lose money due to Puccio’s advice to 1035-exchange the old policies into the Transamerica annuity.

When confronted with his “troubling” initial notes and asked to assume a cost basis of \$750,000 (CImnts. Arb. Exh. 50), Goorman testified that this was not a suitable transaction.

Q: But let’s assume those four- the old policies were paid up with high dividend rates with a cost basis of \$750,000. Would this transaction have been suitable?
 . . .

A: Under those assumptions, with high dividend rates, no more premiums paid into it, I would say . . . **Unsuitable**. Koen Goorman (February 22, 2018), at 820:23 – 823:2 (emphasis added).

After failing to describe how this transaction met any of Jim’s goals, AXA was left to justify this absurd transaction by focusing on the Retirement Income Max rider. But nobody could explain why the Fitzpatricks possibly needed income. Numerous account opening documents indicated that the Fitzpatricks’ income at the time was \$1,000,000 per year. *E.g.*, CImnts. Exhs. 57 (AXA 2276), 73 (AXA 547). The Fitzpatricks owned commercial properties that generated \$500,000 of income per year.⁵⁶ They had \$9 million in CDs, savings and checking accounts. CImnts. Exh. 57, AXA 2276. This transaction was simply a commission grab.

Left grasping for anything else to justify this absurd transaction, Queri (he of the 10-minute senior call out and no other conversations with the Fitzpatricks) testified that either Kerry’s hotel

⁵⁶ E. Server (Sept. 16, 2018), at 2165:6 – 9.

project or the Fitzpatricks' lifestyle was creating a concerning "burn rate." Regarding the former, Puccio admitted that the hotel project had *nothing* to do with any of the 2011 or 2012 transactions:

Q: At the time, that you were discussing these transactions ... did you know that Kerry Fitzpatrick was going to ultimately have his dad personally guarantee the \$16 million loan ... or did that happen after these transactions? **A:** That was after, that was after ... **Q:** So this loan had absolutely nothing to do with your advice in 2011 or 2012, correct? **A:** No, sir. F. Puccio (Feb. 22, 2018), at 657:6 – 658:6

(After all, the loan for the hotel was not signed until 2015.)⁵⁷ Regarding the Fitzpatricks' lifestyle, they still live in their \$150,000 house, do not drive fancy cars, and took vacations only when the feed company would sponsor a trip.⁵⁸

Duval's calculations on this transaction is based on a scenario where Puccio did the right thing. Like Transaction 1, that would have been *nothing*. Because the old life insurance policies were paid-up and producing dividends, had Puccio done nothing, every year that Jim survives would have meant an increase in life insurance. Today, the unnecessary income taxes are over \$290,000. Had Puccio done nothing, there would be approximately \$1 million more in the estate when Jim dies. Duval Binder, Tab 2, Damage Analysis.

3. Transaction 3 – Sandra's 4 life insurance policies (one with a large loan) and cash exchanged into a \$5,000,000 life insurance policy

Transaction 3 is very complicated. Puccio testified that this was the largest life insurance policy he ever sold.⁵⁹ Given this transaction's complexity, it should have never been sold to elderly people, let alone by a broker without any estate planning credentials and in desperate need of commissions. Puccio made over \$100,000 from this transaction alone.⁶⁰

⁵⁷ K. Fitzpatrick (Feb. 20, 2018), at 194:22-24.

⁵⁸ S. Fitzpatrick (Feb. 20, 2018), at 71:16 – 72:6.

⁵⁹ F. Puccio (Feb. 21, 2018), at 391:12 – 14.

⁶⁰ F. Puccio (Feb. 21, 2018), at 392:6 – 8.

The pre-existing Lincoln policy was problematic. The Fitzpatricks had two or three years before it would lapse, causing a taxable gain of approximately \$1,100,000.⁶¹ Puccio's advice was to roll this Lincoln policy and three other very good, stable policies into a VUL insurance policy. Puccio did so without having studied the Lincoln policy or the three good policies.⁶²

Notably, *in 2012 alone*, this VUL policy cost Sandra \$157,000 – which is approximately 40% of what she would have owed the IRS had Puccio advised her to keep the three good policies and surrender the Lincoln.⁶³ Also, in 2012, Puccio advised the Fitzpatricks to pay \$265,000 of premiums into Transaction 4. *Therefore, in 2012, Puccio's life insurance advice cost the Fitzpatricks \$422,000. But they could have lapsed the Lincoln and had a net cost of only \$389,000.* However, Puccio would have earned nothing if he had advised them to do that.

This new policy is troublesome and bound to lapse. Despite the recent bull market, its high costs and non-existent management have caused it to break even.⁶⁴ According to the in-force “solve” illustration John requested from AXA, if this policy magically begins to consistently earn 4% per year (unimaginably good returns based on performance thus far) and Sandra begins paying \$55,097 per year, this policy will terminate (*i.e.*, have zero value) when Sandra is 91 years old. Duval Binder, Tab 3E, Fitz 3493 (Recall that the women in Sandra's family tend to live well past 91 years old.) This result, despite initially contributing \$32,000 in cash and 3 life insurance policies with \$1,000,000 of face value, and then \$661,164 (55,097 x 12) in new premiums! At that

⁶¹ J. Duval (Sept. 14, 2018), at 1414:17 – 21; Duval Binder Tab 3A.

⁶² J. Duval (Sept. 14, 2018), at 1507:13 – 19 (“Q: Have you seen any evidence in the record that Mr. Puccio was studying the Lincoln figuring out how to make - - how to address it? A: No. The only thing I saw was that - - the decision, obviously, to recommend to put the Lincoln in with the other three, which was a terrible idea.”).

⁶³ J. Duval (Sept. 14, 2018), at 1521:2 – 6; Duval Binder, Tab 3D.

⁶⁴ J. Duval (Sept. 14, 2018), at 1526:12-17; Duval Binder Tab 3, Damage Analysis.

point, Sandra will get hit with a huge 1099. All the while, AXA will have had the time value benefit of Sandra's money and a self-enrichment of a huge commission.⁶⁵

The fairest damage measure for this transaction is to start by recognizing that the face value of everything that was put into Transaction 3 was \$594,116. Duval Binder, Tab 3, Damage Analysis. This number includes a deduction of \$459,648 (the tax bill on the Lincoln). *Id.* Today, if Sandra were to surrender life insurance policy '248 she would receive \$196,220 and a tax liability of \$578,036 – a loss of \$381,816. *Id.* John's compensatory damage number for this transaction is \$975,932 (\$594,116 – (\$381,816)). *Id.*

4. Transaction 4 - \$5,000,000 second to die life insurance policy funded with \$530,000

Like Transaction 3, this was the largest life insurance policy Puccio ever sold,⁶⁶ with an annual planned premium of \$265,000 – the largest annual planned premium payment the undersigned have ever seen. Bob Kessler was not consulted by Puccio but testified that there was no need for it. While it was needless for the Fitzpatricks, it was necessary for Puccio, who made almost \$90,000 on this transaction. The Fitzpatricks have paid \$535,000 and were advised by Puccio to take a loan so that more life insurance could be sold.

This policy is also in trouble. According to the illustrations John requested, this policy will lapse in approximately three years if *substantial* cash is not infused into this policy. Duval Binder, Tab 4, Fitz. 3301, Fitz. 20 Day 0056. Like Transaction 3, this dire situation is based very generously on a hypothetical interest rate that is higher than history would indicate is reasonable.

⁶⁵ J. Duval (Sept. 14, 2018) at 1528:16-1529:4.

⁶⁶ F. Puccio (Feb. 21, 2018), at 391:12 – 14.

This money could have been—and should have been—managed. Had it been managed reasonably, instead of put into this policy, Claimants would have \$610,000 - \$424,000 more, even including the withdrawal for the loan. Duval Binder, Tab 4A.

5. Transaction 5 - \$60,000 American National fixed annuity

Transaction 5 was Puccio’s last commission grab—while at AXA—against the Fitzpatrick’s. There is simply no reason why Sandra would want or need a fixed annuity. John’s opinion of this transaction was crystal clear:

Here we’ve got Mr. Puccio, on heightened supervision, selling a fixed annuity with the - - to Sandra with grandchildren as beneficiaries. Now, the grandchildren are 17 and 19, 17 and 21. And to put them in a fixed annuity is unconscionable. I mean, the grandchildren have windows of time to have it all equity fund, and should have. And the grandchildren, upon Sandra death, will get hit with 1099’s for build up. Are you kidding me? This is terrible planning. And AXA just rubber - - let it happen. J. Duval (Sept. 16, 2018) at 1418:15 – 1419:1.

Had Puccio done the appropriate thing with this money—actually manage it—Sandra would have \$32,786 more than she currently does. Duval Binder, Tab 5E.

IV. AXA’S LAXADAISACAL CULTURE OF NEGLIGENT SUPERVISION AND SPECIFIC INSTANCES OF ITS FAILURE TO SUPERVISE TRANSACTIONS.

Puccio’s producing branch manager, Queri, testified to AXA’s supervision in this arbitration. Queri oversaw the hiring process, but he did not even remember Puccio’s then-existing credit issues. He nevertheless testified that anyone hired by AXA with credit issues should be put on heightened supervision upon hiring.⁶⁷ But that did not happen here.

Queri even struggled to explain why it is important to know if one of his supervisees was having trouble paying his or her bills:

⁶⁷ T. Queri (Feb. 23, 2018) at 961:4-19.

Q.: Does it matter if you're hiring somebody if they have tax liens? **A.** Would I want to know that? Yes. **Q.** Okay. Why? **A.** Because it's a discretion that I'm going to have with any candidate if they have, you know, poor credit. **Q.** Okay. So why does that matter? **A.** Because I want to know about the – the issues at hand. If there's a tax lien . . . it's something that I would talk to the candidate about. . . . **Q:** Let me contrast it with something that is totally irrelevant. Whether that candidate likes basketball, right? That's irrelevant to you, correct? **A:** I actually like basketball so that would mean something to me. Sports are important to me. **Q:** Is it more important to you for you to know whether your broker likes basketball or has a tax lien? **A:** Tax lien. **Q:** Perfect. Why? **A:** It's relevant to our business compared to basketball. **Q:** Why is it relevant to your business? It's okay if you don't know. I just want -- **A:** If they have - - if they have past debt or are they on time with any - - you know, with any past debt, are they making payments. T. Queri (Feb. 23, 2018), at 938:13 – 939:7.

The answer is obvious: a broker struggling to pay his or her bills would have motive to sell high-commission products that are not in his or her client's interest.

Queri could then not explain why it took 6 months to put Puccio on heightened supervision after AXA learned that Puccio had major tax liens that were not disclosed to AXA in violation of FINRA and AXA rules.⁶⁸ During this time, Puccio was stealing from Shirley Kerwin.

Additionally, there are demonstrable failures of supervision for each specific transaction in this case. Queri testified that he personally supervised Transaction 1, but there are blank managerial signatures on forms for that transaction, and there is no evidence that he ever even touched that transaction.

AXA is quite proud of Queri's senior call-out on Transaction 2. But Puccio remembers that he was with Jim Fitzpatrick when Queri "satisfied himself" that Jim understood this very complex transaction. Nobody believes that a ten-minute call between Queri and elderly farmer Jim could lead to the conclusion that Jim understood the transaction.

⁶⁸ T. Queri (Feb. 23, 2018), at 998: 11 – 18; Clmnt. Arb. Exh. 28, pp. AXA 2112 – 2113.

Arbitrator Gottlieb: At this moment, do you believe I understand what you're telling me [about Transaction 2]? **A:** No. **Arbitrator Bain:** Is it fair to say that these products that we've been discussing here are complicated products? **A:** Yes. **Arbitrator Bain:** And not easy to understand? **A:** Correct. **Arbitrator Bain:** And - - okay. We're three arbitrators. We're three lawyers, okay? And you can see the challenges. Would it be even more difficult for lay people to understand this? Fair characterization? **A:** Depending on the layperson, sure. T. Queri (Feb. 23, 2018), at 1084:14 – 1085:6.

As for Transaction 3, very important disclosure documents were signed *six months after* Transaction 3 was issued. The failure to supervise Transactions 4 and 5 are very simple: There is no evidence *anyone* at AXA supervised these transactions for suitability, despite the facts that: (1) Transaction 4 was the largest life insurance policy Puccio ever sold, and (2) Transaction 5 was sold while Puccio was purportedly on enhanced supervision. Despite heightened supervision, there is no evidence that Queri was even aware of Transaction 5, never mind supervised it as he should have with a broker on heightened supervision.

V. AXA'S FIDUCIARY DUTY TO THE FITZPATRICKS

Mr. Bain asked the Parties if AXA and Puccio had a fiduciary duty to the elderly Fitzpatricks. Both Puccio and AXA's expert, Mr. Server, admitted a fiduciary relationship.

Puccio could not have been more clear: "**Q:** So do you acknowledge that you were my clients' fiduciary? **A:** Yes."⁶⁹ Mr. Server agreed:

"**Q:** Do you believe that - - do you agree with Mr. Puccio that he was a fiduciary in this case? **A:** In terms of the transaction itself, he has a fiduciary duty. **Q:** And - - thank you. And in terms of the overall plan, did he have a fiduciary duty? **A:** In terms of each transaction as it was happening, he had the obligation to be doing that which, if it were his own money and he were in the same situation, he would recommend for himself. **Q:** In other words, he had a duty to put the client's interests in having a good estate plan over his own interests in making commission, correct? **A:** Absolutely." E. Server (Sept. 16, 2018), at 2171:11 – 2172:1.

⁶⁹ F. Puccio (Feb. 21, 2018), at 310:24 – 311:1.

Under New York law, there is no general fiduciary duty inherent in an ordinary broker/customer relationship. However, a relationship between a customer and broker-dealer founded on trust, confidence and past business dealings can evolve into a fiduciary relationship. *Apple Records v. Capitol Records*, 137 A.D.2d 50, 57 (1st Dept 1988). The “‘exact limits’ of such relationship are impossible of statement,” *Penato v. George*, 52 A.D.2d 939, 942 (2d Dept. 1976), *app. dism.* 42 N.Y.2d 908 (1977), and are “fact specific,” *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 115 (1st Dept 1998).

Here, the Fitzpatricks were elderly, financially unsophisticated clients who grew to trust AXA over the course of their 30-year relationship. That relationship was through Higgins, an AXA-registered CFP. Based on that trust and relationship, the Fitzpatricks trusted Puccio—the broker AXA sent them to service their financial needs. In fact, Puccio was serving—whether qualified or not—as an estate planning professional. Estate planning, by its very nature, is that of a fiduciary. Moreover, these are complex transactions that are not easily understood by accountants and lawyers, not to mention elderly chicken farmers.

Based on all of the above, Mr. Server and even Puccio admitted that AXA owed a fiduciary duty to the Fitzpatricks. These high-commission products should never have been sold to the Fitzpatricks by anyone, let alone by a fiduciary. And AXA, as the Fitzpatricks’ fiduciary, should have helped the Fitzpatricks after Puccio’s arrest.

VI. AXA’S MATH TRICK

On the last day of the hearing, AXA attempted its desperate “math trick.” Resp. Exh. ZZZZ-2. The fundamental premise of the math trick is that so long as either (1) Sandra and Jim both die very soon (contrary to the actuarial tables and family history for Sandra), or (2) they pay

AXA *hundreds of thousands* of dollars *every year* they live, the Fitzpatricks' estate will be in a better position post-Puccio than pre-Puccio.

There are a multitude of problems with AXA's "math trick." Here are a few of the more glaring problems: First, it fails to account for numerous investments and expenses that the transactions required, as well as new tax liabilities that were completely unnecessary. Second, it ignores the actual performance of these policies over the past 6 years, and instead is based on unrealistic scenarios from 2011 and 2012 in which these policies saw a performance *far* greater than Puccio's management actually yielded. It is not based on real-world, actual performance. Whereas all FINRA arbitrations involve an analysis of how products have performed since they were recommended, AXA's math trick deliberately refuses to do so. Third, it fails to account for the incredible gains that the extraordinarily large annual premiums could realize, if the money were invested (even conservatively), rather than given to AXA every year. Relatedly, it asks the Panel to ignore the fact that AXA is continuing to attempt to profit from Puccio's fraud.

Once more, Claimants put the lie to the test: If AXA actually believes the Fitzpatricks' portfolio is worth what AXA claims in this arbitration, then it should have no problem transferring that sum of money to the Fitzpatricks and taking the Fitzpatricks' policies in return. Claimants again make that offer. If AXA agrees to this, there will be no need to finish this arbitration; if we proceed to closing argument, AXA is revealing again that its math trick is just that—a trick to make it seem that Puccio's transactions are less disastrous than they are.

VII. DAMAGES

Compensatory Damages

The total compensatory damages are \$2,985,257. Duval Binder, Tab 1.

Attorneys' Fees

Both parties asked for attorneys' fees. As such, the Panel can award them. FINRA, Neutral Corner at 1 (2014, vol. 4); *Coutee v. Barington Cap. Group*, 336 F.3d 1128, 1136 (9th Cir. 2003) ("An arbitration panel may award attorney's fees, even if not otherwise authorized by law to do so, if both parties submit the issue to arbitration."); *WMA Secs., Inc. v. Wynn*, 32 Fed. Appx. 726, 730 (6th Cir. 2002) ("In this arbitration, both parties requested attorneys' fees. Thus, the panel was conferred with the authority to include such fees as part of any award.").

It is important to note that the Fitzpatricks gave AXA every opportunity to avoid this arbitration (and thus to avoid the imposition of fees). AXA knew in August 2015 that these were unsuitable transactions sold by a broker who did not disclose large liens against him and who was being prosecuted for stealing money from another elderly AXA client. Despite this knowledge, AXA made the Fitzpatricks hire a law firm to prosecute this case for two years.

The Fitzpatricks ask the panel to award attorney fees in the amount of 40% of the damages award, which is the contingency fee for the Fitzpatricks' counsel. Awarding this fee will help make the Fitzpatricks whole; the Fitzpatricks should not receive only 60% of the amount that Puccio injured them during his time at AXA.

Punitive Damages

The conduct here is egregious. The transactions were perpetrated by a felon whom AXA knew was a risk. And despite that knowledge, AXA's supervision was virtually non-existent. AXA and its representatives should not take advantage of elderly and financially unsophisticated clients.

To add insult to injury, when confronted with the obvious issues after Puccio's arrest, AXA turned a blind eye. To this day, AXA continues to defend the indefensible, claiming that its conduct

was “beyond reproach.” AXA’s continued argument that its behavior represents its “A” game cries out for correction. It should be taught a lesson. Claimants respectfully suggest the imposition of punitive damages that is three times the compensatory damages award that the Panel issues.

Costs

The Fitzpatricks’ litigation costs are \$92,908.26. In order to make the Fitzpatricks whole, they respectfully ask that the Panel award them these costs.⁷⁰

CONCLUSION

Claimants thank the Panel for their time and attention. We are well aware that introducing some of the evidence—particularly regarding these complex transactions—was not simple. While it may have taken Queri only ten minutes to explain to Jim Fitzpatrick, it took the parties and the Panel nearly two weeks to analyze this material. The Fitzpatricks and their counsel appreciate the Panel’s hard work on this matter.

Dated: October 23, 2018

Respectfully submitted,

PEIFFER WOLF
CARR & KANE, APLC

/s/ Jason Kane

Jason Kane
Adam Wolf
Joseph Peiffer

Counsel for Claimants

⁷⁰ Claimants and AXA agree that AXA will not object to \$66,529.96 in costs. Amazingly, AXA takes issue with the remaining \$26,378.30 for the Claimants’ portion of hearing transcript costs and the mediator’s fee, not because it believes that amount to be inaccurate, but because Claimants (as is usual) agreed to pay for half of the costs of the transcript and mediator. Such costs were necessary, routine and expended as a direct result of this arbitration.

EXHIBIT A

Before The
FINANCIAL INDUSTRY REGULATORY AUTHORITY
CASE NUMBER 16-03454

JAMES W. FITZPATRICK, et al.,

Claimants,

-vs-

AXA ADVISORS, LLC,

Respondent.

SUMMARY OF CLAIMANTS' REQUESTED DAMAGES

COMPENSATORY DAMAGES	\$2,985,257
ATTORNEYS' FEES	\$1,194,102 - 40% Contingency Fee on Compensatory Damages
COSTS	\$92,908
PUNITIVE DAMAGES	\$8,955,771 – 3x of Compensatory Damages
POST AWARD INTEREST	NYS Rate of 9%
TOTAL	\$13,228,038 + post award interest

EXHIBIT C

Before The
FINANCIAL INDUSTRY REGULATORY AUTHORITY
CASE NUMBER 16-03454

JAMES W. FITZPATRICK and
SANDRA J. FITZPATRICK, and
THE FITZPATRICK FAMILY TRUST by
KERRY FITZPATRICK in his capacity as
TRUSTEE,

Claimants,

CLAIMANTS' REPLY TO
AXA'S OPPOSITION TO
ATTORNEYS' FEES
INFORMATION

-vs-

AXA ADVISORS, LLC,

Respondent.

Chair: Do you believe we are empowered to grant attorneys' fees to either/or both of the parties?

AXA's counsel: Yes. Under the law, I think an award of attorneys' fees is a permissible component of any award you may render.

- Closing Argument (Nov. 1, 2018), at 25:27-30.

If one were wondering how and why Claimants' counsel have \$1.2 million in lodestar for this matter, look no further than AXA's opposition brief. In response to Claimants' two-page statement that answered the Panel's three straightforward questions, AXA submitted an 18-page brief (and 450 pages of exhibits) to which Claimants must now respond.

Claimants will not take AXA's bait to re-litigate liability and damages once more. After eight hearing sessions, 25-page post-hearing briefs and closing arguments, that train has left the station. Instead, Claimants focus this brief solely on responding to the fees issues that AXA raised in its opposition.*

Tellingly, having insisted for three years that AXA representative Mr. Puccio's transactions and conduct were "perfectly suitable" and "beyond reproach," AXA has finally changed tactics—albeit only with the writing on the wall—and now claims that Puccio was a "rogue broker." AXA Opp., p. 3. If AXA had simply acknowledged that from the beginning, the Fitzpatricks would not have needed counsel at all, and they would have incurred no attorneys' fees. Instead, AXA stridently and disingenuously defended its conduct, prompting the Fitzpatricks to obtain counsel—and pay that counsel 40% of their award from this Panel.

In fact, AXA repeatedly asked this Panel to award attorneys' fees in its favor. Based on that fact and the fact that AXA's counsel admitted (even after the trial of this matter) that the Panel has authority to award fees to Claimants, the undersigned thought that issue had been resolved. Unfortunately, AXA now recants, and cloaks its about-face on a blatant misreading of FINRA

* Claimants separately responded to the Chair's request for information on hourly rates in the Western District of New York, by the deadline for that submission of January 31, 2019. This brief will not re-hash that issue, which addresses AXA's arguments concerning hourly rates, including AXA's incorrect understanding of *In re Eastman Kodak ERISA Litig.*, 213 F. Supp. 3d 503 (W.D.N.Y. 2016).

guidance on the issue of attorneys’ fees. The undersigned are thus compelled yet again to provide to the Panel its clear authority to award fees.

Perhaps most importantly, AXA did not take issue with Claimants’ contingency fee contract from which the fee request is derived. Of course, as described below, AXA cannot take issue with the Fitzpatricks’ contract because it is reasonable and standard in securities cases. Based on the contract, undersigned has expended approximately \$93,000 throughout this three-year process and charged the Fitzpatricks \$0 in fees to date. As Justice Brennan noted in *Hensley v. Eckerhart*, 461 U.S. 424, 488 (1985):

Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive *far more* in winning cases than they would if they charged an hourly rate. (emphasis added).

Claimants’ request for an award of attorneys’ fees—in the amount of their contingency fee, so as to make the Fitzpatricks whole—is reasonable.

I. THE PANEL HAS THE AUTHORITY TO SHIFT THE FITZPATRICKS’ OBLIGATION TO PAY ATTORNEYS’ FEES TO AXA.

For the first 24 months of this 25-month long arbitration, AXA agreed that this Panel may award attorneys’ fees both as a matter of New York law and FINRA guidance. It requested these fees throughout the hearing. It admitted in closing arguments that the Panel had the authority to award fees. It only now abruptly reverses course (in the final brief filed with this Panel) because it seeks to avoid the imposition of attorneys’ fees at all cost.

A. New York Law Plainly Allows the Panel to Award Attorneys’ Fees When, as Here, Both Parties Requested Such Fees in Their Pleadings.

Desperate to escape from its admission that the Panel has the authority to award fees, AXA now mischaracterizes its repeated requests that the Fitzpatricks pay its fees as merely a

“boilerplate” prayer in its Answer. AXA Opp. at pp. 1, 4, and 5 n.3. That characterization is not close to reality, where AXA repeatedly requested fees at this arbitration. Even if it were, the Panel has clear authority to shift the Fitzpatrick’s fee obligation to AXA, as AXA’s counsel admitted at the closing argument in this matter.

The parties acknowledge they both sought fees multiple times in their pleadings, and throughout this case. AXA’s answer to the original Statement of Claim demanded relief that included Claimants to pay AXA’s fees. Answer, p. 16 (“That AXA Advisors be awarded the costs of this proceeding, including all reasonable attorneys’ fees”). Months later, AXA reaffirmed its request for attorneys’ fees in its Answer to the Amended Statement of Claim, reiterating that it be should be awarded “the costs of this proceeding, including all reasonable attorneys’ fees.” Amended Answer, p. 17.

After eight hearing sessions that spanned seven months, the parties submitted post-hearing briefs pursuant to the Panel’s request. Like Claimants’ Statement of Claim, Amended Statement of Claim, and Pre-Hearing brief, their Post-Hearing brief again requested attorneys’ fees:

Both parties asked for attorneys’ fees. As such, the Panel can award them. FINRA, *Neutral Corner at 1* (2014, vol. 4); *Coutee v. Barington Cap. Group*, 336 F.3d 1128, 1136 (9th Cir. 2003) (“An arbitration panel may award attorney’s fees, even if not otherwise authorized by law to do so, if both parties submit the issue to arbitration.”); *WMA Secs., Inc. v. Wynn*, 32 Fed. Appx. 726, 730 (6th Cir. 2002) (“In this arbitration, both parties requested attorneys’ fees. Thus, the panel was conferred with the authority to include such fees as part of any award.”).

It is important to note that the Fitzpatrick’s gave AXA every opportunity to avoid this arbitration (and thus to avoid the imposition of fees). AXA knew in August 2015 that these were unsuitable transactions sold by a broker who did not disclose large liens against him and who was being prosecuted for stealing money from another elderly AXA client. Despite this knowledge, AXA made the Fitzpatrick’s hire a law firm to prosecute this case for two years.

The Fitzpatricks ask the panel to award attorney fees in the amount of 40% of the damages award, which is the contingency fee for the Fitzpatricks' counsel. Awarding this fee will help make the Fitzpatricks whole; the Fitzpatricks should not receive only 60% of the amount that Puccio injured them during his time at AXA.

AXA's Post-Hearing brief, too, concluded by reiterating its request for fees. That was its third request for attorneys' fees. Despite having witnessed its convicted felon continuously lie and its own paid expert witness admit that "a variable annuity is not a great investment for the Fitzpatricks," AXA's apparent position as of October 23, 2018, was that this Panel could and should order the Fitzpatricks to pay AXA's attorneys' fees, costs and expenses.

Only at the closing argument, in November 2018, when the writing clearly was on the wall, AXA finally said that it was not seeking its fees "at this point." Closing Argument Tr. at 25:18. But even thereafter, upon being asked by the Chair whether the Panel was authorized to award fees to Claimants, AXA admitted that the Panel had the authority to award such fees:

Yes. Under the law, I think an award of attorneys' fees is a permissible component of any award you may render. *Id.* at 25:28-29.

AXA's admission, like Claimants' position all along, is grounded in well-settled New York law. In New York, when both parties request attorneys' fees the Panel has clear jurisdiction to award them. *In re U.S. Offshore, Inc.*, 753 F. Supp. 86, 92 (S.D.N.Y. 1990). This is well-accepted, not only in New York, but throughout the country. *See also, e.g., Coutee v. Barington Cap. Group*, 336 F.3d 1128, 1136 (9th Cir. 2003) ("An arbitration panel may award attorneys' fees, even if not otherwise authorized by law to do so, if both parties submit the issue to arbitration."); *WMA Secs., Inc. v. Wynn*, 32 Fed. Appx. 726, 730 (6th Cir. 2002) ("In this arbitration, both parties requested attorneys' fees. Thus, the panel was conferred with the authority to include such fees as part of any award."); *CF Global Trading, LLC v. Wassenaar*, No. 13 Civ.

766 (KPF), 2013 U.S. Dist. LEXIS 145588, at *27-28 (S.D.N.Y. October 8, 2013) (confirming arbitration award and noting even had the panel erred by applying Ontario rather than New York law, the panel would have been vested with authority to award attorneys' fees consistent with New York state law because both parties had requested them); *Schaad v. Susquehanna Capital Group*, No. 08 Civ. 9902 (LTS)(DFE), 2004 U.S. Dist. LEXIS 15772, at *19 (S.D.N.Y. August 10, 2004) (denying respondent's petition to vacate the attorneys' fees award where respondent requested attorneys' fees in its pre-hearing submissions); *First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105, 112 (S.D.N.Y. 1994); *Marshall & Co. v. Duke*, 941 F. Supp. 1207, 1214-1215 (N.D. Ga. 1995); *Skip Kirchdorfer, Inc. v. Fed. Ins. Co.*, 869 F. Supp. 387, 392-393 (E.D. Va. 1994); FINRA, Neutral Corner at 1 (2014, vol. 4).

AXA's conduct here is similar to that described in *Matter of Bear, Stearns & Co., Inc. v. Int'l Cap. & Mgt. Co. LLC*, 99 A.D.3d 402, 402-403 (N.Y. App. Div. 2012). In *Matter of Bear Stearns*, the court upheld an award of attorneys' fees issued by a FINRA panel where respondent sought fees in its pleadings and amended pleadings. *Id.* The court recognized that respondents' counsel waited until its closing statement at the end of the proceedings—at which time it was apparent the Panel would award the other party fees—before withdrawing its own claim. *Id.* at 403. The court upheld the fee award because both parties requested fees in their pre-trial pleadings. *Id.* at 402-03.

Here, AXA submitted a fee request three times (in its original Answer, Answer to Amended Statement of Claim, and post-hearing brief). It agreed to arbitration pursuant to FINRA rules and submitted "all" issues to the Panel. It then withdrew its own request for fees "at this time," but only after the Panel's first question during closing arguments pertained to attorneys' fees. AXA

later *unequivocally affirmed* the Panel's authority to award attorneys' fees. As a matter of settled New York law, all parties' mutual request—numerous times—for attorneys' fees vested this Panel with discretion to award fees to Claimants.

B. FINRA Guidance Buttresses Case Law That the Panel Can Award Fees.

FINRA guidance is no different from the New York law described above. The FINRA Arbitrator's Guide is clear: “[y]ou may award attorneys’ fees when, for example ... the governing law provides for attorneys’ fees when all of the parties request or agree to such fees.” AXA Opp. Exh. C at p. 70. Here, the governing law authorizes attorneys’ fees when both parties request them, which is exactly what happened in this matter. AXA cannot twist this guidance to produce any contrary result. Its attempt to do so is incredible.

Claimants have now provided myriad cases conferring authority to award fees when both parties have asked for them. As Mr. Bain noted in *Culbertson v. J.J.B. Hilliard, W.L. Lyons, LLC*, FINRA Case No. 11-03226, the Panel can simply cite a case and award attorneys’ fees.

AXA relies on the Securities Arbitration Commentator to inform the Panel that panels award fees in only one-fifth of FINRA cases. AXA Opp., pp. 6-7. While this case is certainly within the top 20% of FINRA cases that should warrant an award that includes attorneys’ fees, it is noteworthy that AXA—once again—failed to inform the Panel of an important sentence that materially qualified its argument. The entire quote is as follows:

Panels awarded attorney fees in 464 of the cases or about 19% of the 2,423 instances where the request was made. Now, we presume that attorney fee awards are generally received only when the Claimant is otherwise victorious and our double-checks on this proposition confirm this to be a valid assumption. ***So, when one considers that these 2,423 instances, where fees were requested, include the losers as well as the winners, one realizes that the incidence of attorney fee awards in winning cases is considerable higher than 19%.***

Attorney Fee Award Survey, Sec. Arb. Commentator, Vol XI, No. 3 at 8 (Exh. G to AXA's Opp. at p. 156 of 494 of PDF) (emphasis added). Far from seldomly given, attorneys' fees are often awarded by FINRA panels that award compensatory damages. This matter should be no different.

II. THE PANEL SHOULD SHIFT THE FITZPATRICKS' OBLIGATION TO PAY ATTORNEYS' FEES TO AXA, SEPARATE FROM, AND IN ADDITION TO, AN AWARD OF PUNITIVE DAMAGES.

AXA next devotes five pages to an unfounded argument that well-managed damage awards are inherently punitive, and thus the panel should not double-punish AXA by awarding either attorneys' fees or punitive damages.

As noted above, Claimants will resist the urge to re-hash here issues other than attorneys' fees, including liability and punitive damages. We pause only to remind the Panel that this is the rare arbitration that involves: (1) a convicted financial felon, (2) elder abuse, (3) a pre-arbitration internal memo highly critical of the advice said convicted financial felon gave to his elderly clients, (4) a pre-arbitration request for help from the customer and a separate customer complaint from those elderly clients, (5) a pre-arbitration denial of the customer complaint despite said internal memo, and (6) a brokerage firm willing to insist for two years that the elder abuse victims pay the firm's fees and costs associated with defending its conduct pertaining to the convicted felon.

Moreover, while AXA's views on punitive damages are wrong legally and factually, we do agree on one issue: punitive damages may be awarded when the broker-dealer "ratifies the outrageous conduct." AXA Opp. at 11 (quoting cases). There is no better example of ratification, where the broker-dealer states on numerous occasions that its representative's advice was "perfectly suitable" and that its own conduct was "beyond reproach." AXA's Opening Statement (Feb. 20, 2018), at 64:14-16.

Returning to the fee issue about which the Panel inquired, Claimants wish to make two general points in response to AXA's suggestion that an award of fees would be "punitive" because it believes that well-managed damages models are punitive.

First, well-managed damages are compensatory, not punitive. The FINRA Arbitrator Manual explicitly allows well-managed damages as a "Type[s] of Remed[y]" within the subsection entitled "Actual Damages and/or Statutory Damages," which FINRA explains are "sometimes called compensatory damages . . . a sum required to compensate a party for their loss." Arbitrator Training Manual, pp. 65-66.

AXA's *ipse dixit* that an award of attorneys' fees would be "excessively punitive" with "no basis in 'the governing [i.e., New York] law'" (AXA Opp, p. 8), is contrary to the above-referenced FINRA guidance and New York law. In fact, New York courts, like FINRA, do not equate well-managed damages awards with punitive damages (or attorneys' fees awards). *Frame v. Maynard*, 83 A.D.3d 599, 604 (N.Y. App. Div. 2011) (award of "appreciation damages" was compensatory, not punitive); *Matter of Witherill*, 37 A.D.3d 879, 881 (N.Y. App. Div. 2007) (lost profit or lost appreciation damages awarded for compensatory damages); *Scalp & Blade v. Advest, Inc.*, 309 A.D.2d 219, 232 (N.Y. App. Div. 2003) (general market performance was calculated to award compensatory damages, not punitive damages).

Driving home this point, the United States District Court for the Southern District of New York has previously awarded "lost profit" damages (*i.e.*, well-managed damages) in addition to both treble damages and attorneys' fees. *River Light V., L.P. v. Lin & J. Int'l, Inc.*, No. 133cv3669 (DLC), 2015 U.S. Dist. LEXIS 82940 (S.D.N.Y. June 25, 2015). Multiple other jurisdictions also have permitted awards of well-managed damages in addition to both punitive damages *and*

attorneys' fees in securities cases. *See, e.g., Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767 (9th Cir. 1984) (affirming award of well-managed damages, punitive damages, and attorneys' fees); *Cnty. Hosp. of Springfield & Clark County, Inc. v. Kidder, Peabody & Co.*, 81 F. Supp. 2d 863 (S.D. Ohio 1999) (confirming FINRA award of well-managed damages and punitive damages). There is nothing "punitive" about well-managed damages. Thus they can be—and often have been—awarded in conjunction with both punitive damages and attorneys' fees.

Second, an award of attorneys' fees is not intended to "punish" AXA. Rather, unlike the request for punitive damages, the request for attorneys' fees is intended solely to make the Fitzpatricks whole. As documented in prior submissions, the Fitzpatricks' fee agreement with their counsel requires the Fitzpatricks to pay 40% of any recovery to their counsel. That is why they requested a fee award of 40% of the compensatory damages award—to make them whole.

III. THE FITZPATRICKS' REQUEST FOR FEES IS REASONABLE.

The Fitzpatricks' fee request is reasonable. It is the actual amount that they will pay out of the recovery of their compensatory damages.

AXA does not take issue with the contingency contract that is the foundation of the Fitzpatricks' fee request. It neither contests the fact of contingency nor attacks the contingency percentage, which is a typical percentage for counsel who represent claimants in FINRA matters.

Instead, AXA mounts an attack on the estimated lodestar of counsel. It claims that counsel cannot estimate their hours and contends that the hourly rates that counsel's clients pay are too high. Because the Fitzpatricks will need to pay a contingency percentage, the lodestar is a bit beside the point, but AXA's criticism is also unfounded.

First, it is understandable that the undersigned did not track their hours, as defense counsel frequently do, because claimants' counsel in securities cases almost always are paid by contingency, not hourly. While AXA cites various cases where contemporaneously tracked hours are important in setting fees in fee-shifting cases for which counsel may be reimbursed based on lodestar, here, where a contingency fee agreement is in place, it would have been silly for counsel to do so. The undersigned never contemporaneously memorialize their hours devoted to a FINRA matter; it is not common practice in the claimants' FINRA bar. *Cf. In re Prudential-Bache Energy Income P'ships Sec. Litig.*, No. 888, 1994 U.S. Dist. LEXIS 6621, at *16 (E.D. La. 1994) (stating that "[c]ounsel's contingent fee risk is an important factor in determining the fee award. Success is never guaranteed and counsel faced serious risks. . . Counsel advanced all of the costs of litigation, a not insubstantial amount, and bore the additional risk of unsuccessful prosecution."); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010) ("There was significant risk of non-payment in this case, and Plaintiffs' Counsel should be rewarded for having borne and successfully overcome that risk."); *In re Lupron Mktg. & Sales Practices Litig.*, 2005 U.S. Dist. LEXIS 17456, 2005 U.S. Dist. LEXIS 17456, 2005 WL 2006833, at *15 (D. Mass. 2005) ("Many cases recognize that the risk [of non-payment] assumed by an attorney is perhaps the foremost factor in determining an appropriate fee award."); *In re Union Carbide Corp. Consumer Products Business Sec. Litigation*, 724 F. Supp. 160, 164 (S.D.N.Y. 1989) (recognizing that contingency risk is "the single most important factor in awarding a multiplier" of actual hours worked).

Second, AXA's challenge to hourly rates fares no better. AXA cannot disclaim that the hourly rates cited by the undersigned are the hourly rates that cash-paying clients in fact pay for their services. These counsel are known to take on complex cases, and to win them. As their

declarations show, they have argued in the United States Supreme Court and various courts of appeals around the country, have been the past President of the FINRA claimants' bar, and have a wealth of experience trying matters successfully before FINRA panels. Respectfully, it took some degree of skill to make AXA retreat from its position that Mr. Puccio offered "perfectly suitable" transactions to Mr. Puccio's being a "rogue" agent.

After three years, thousands of hours and nearly \$100,000 of out-of-pocket expenses incurred by counsel, the undersigned has received \$0 thus far. Awarding their 40% contingency would reward their hard work, but more importantly, make their clients—the Fitzpatricks—whole.

CONCLUSION

The Fitzpatricks and undersigned counsel again thank the Panel for its time and consideration.

Dated: February 4, 2019

/s/ Jason J. Kane

Jason J. Kane
Adam B. Wolf
Joseph C. Peiffer
Counsel for Claimants

EXHIBIT D

FINRA ARBITRATION Submission Agreement

In the Matter of the Arbitration Between

Name(s) of Claimant(s)

James W. Fitzpatrick
Sandra J. Fitzpatrick

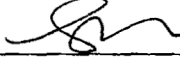
16-03454

Name(s) of Respondent(s)

AXA Advisors, LLC
Cambridge Investment Research, Inc.

1. The undersigned parties ("parties") hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure.
2. The parties hereby state that they or their representative(s) have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules.
3. The parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of FINRA Office of Dispute Resolution or the arbitrator(s). The parties further agree and understand that the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure.
4. The parties agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement. The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

5. The parties hereto have signed and acknowledged the foregoing Submission Agreement.



2/9/2017

AXA Advisors, LLC

Date

State Capacity if other than individual (e.g., executor, trustee, corporate officer)

Allie Lin, Senior Director & Counsel, AXA Equitable Life Insurance Company,
an affiliate of AXA Advisors, LLC

LC43A: SUBMISSION AGREEMENT

idr: 06/13/2016

RECIPIENTS:

Pamela Rosado, AXA Advisors, LLC

AXA Advisors, LLC, 1290 Avenue of the Americas, 16th Floor, New York, NY 10104

FINRA Arbitration Submission Agreement

In the Matter of the Arbitration Between

Names of Claimants

Mr. James W. Fitzpatrick
Mrs. Sandra J. Fitzpatrick

and

Names of Respondents

AXA ADVISORS, LLC
CAMBRIDGE INVESTMENT RESEARCH, INC.

The undersigned parties ("parties") understand that an electronic signature below means that the party certifies that the information entered on the form is true and accurate, and that the party agrees to the terms of the following Submission Agreement.

The parties hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, and all related cross claims, counterclaims and/or third-party claims which may be asserted, to arbitration in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure.

The parties hereby state that they or their representative(s) have read the procedures and rules of FINRA relating to arbitration, and the parties agree to be bound by these procedures and rules. The parties further agree and understand that the arbitration will be conducted in accordance with the FINRA Code of Arbitration Procedure.

The parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director of Arbitration or the arbitrator(s).

The parties agree to abide by and perform any award(s) rendered. The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.

Electronic Signatures

By entering your electronic signature below, you are one of the following: (1) the claimant; or (2) a person with legal authority to bind the claimant; or (3) a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the claimant; or (4) an attorney who has actual or implied written or verbal power of attorney from the claimant to sign on the claimant's behalf and thus, bind the claimant to the terms of the Submission Agreement as if the claimant signed the form personally.

Claimant	Signature	Capacity	Date
Mr. James W. Fitzpatrick	/s/ Jason J. Kane, Esq.	Legal Counsel	11/28/2016
Mrs. Sandra J. Fitzpatrick	/s/ Jason J. Kane, Esq.	Legal Counsel	11/28/2016

SUBMISSION AGREEMENT FOR CLAIMANTS Case No. 16-03454

FINRA Arbitration [UNIFORM] SUBMISSION AGREEMENT

Claimant(s)

In the Matter of the Arbitration Between

Name(s) of Claimant(s) James W. Fitzpatrick, Sandra Fitzpatrick and the Fitzpatrick Family Trust by Kerry Fitzpatrick in his capacity as Trustee

and

Name(s) of Respondent(s) AXA Advisors, LLC and Cambridge Investment Research, Inc.

- 1. The undersigned parties ("parties") hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, [cross claims] and all related cross claims, counterclaims and/or third-party claims which maybe asserted, to arbitration in accordance with the [Constitution,] FINRA By-Laws, Rules, [Regulations,] and[/or] Code of Arbitration Procedure [of the sponsoring organization].
2. The [undersigned] parties hereby state that they or their representative(s) have read the procedures and rules of [the sponsoring organization] FINRA relating to arbitration and the parties agree to be bound by these procedures and rules.
3. The [undersigned] parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as maybe designated by the Director of Arbitration or the arbitrator(s). The [undersigned] parties further agree and understand that the arbitration will be conducted in accordance with the [Constitution, By-Laws, Rules, Regulations, and/or] FINRA Code of Arbitration Procedure [of the sponsoring organization].
4. The [undersigned] parties [further] agree to abide by and perform any award(s) rendered pursuant to this Submission Agreement. [and] The parties further agree that a judgment and any interest due thereon, may be entered upon such award(s) and, for these purposes, the [undersigned] parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment.
5. The parties hereto have signed and acknowledged the foregoing Submission Agreement.

The Fitzpatrick Family Trust by Kerry Fitzpatrick in his capacity as Trustee

Claimant Name (please print)

[Handwritten Signature]

4/22/19

Claimant Signature

Date

State Capacity if other than individual (example: Executor, Trustee, Corporate Officer) as Attorney

Claimant Name (please print)

Claimant Signature

Date

State Capacity if other than individual (example: Executor, Trustee, Corporate Officer)

If needed, copy this page.