NO. 10-5072

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.

Plaintiff/Appellee,

vs.

PAMELA WHITNEY, THE ESTATE OF
SUZANNE WHITNEY AND THE ESTATE OF MARY WHITNEY

Defendants/Appellants,

AMBER CALLAWAY,

Defendant in District Court

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA,
THE HONORABLE GREGORY K. FRIZZELL PRESIDING
CASE NO. 09-CV-78-GKF-FHM**

DEFENDANTS/APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

1. The motions below to confirm or vacate an arbitration award were commenced pursuant to 9 U.S.C. §9. The District Court had jurisdiction pursuant to 28 U.S.C. §1331. Merrill Lynch filed a motion to confirm and Pamela Whitney ("Whitney") and the Estate of Suzanne Whitney (the "Estate) filed a motion to vacate an arbitration award. The District Court had jurisdiction to confirm the arbitration award pursuant to 9 U.S.C. §9.

2. The Court of Appeals for the Tenth Circuit has jurisdiction over this appeal because this is an appeal of a final decision of the United States District Court for the Northern District of Oklahoma. 28 U.S.C. §1291.

3.

(a) On January 28, 2010, the District Court entered Judgment confirming the arbitration award.

(b) On February 8, 2010, Whitney and the Estate filed a motion for a new trial (Aplt. App. Vol. 2, p. 249) pursuant to Fed. R. Civ. P. 59. Also on February 8, 2010, Whitney and the Estate filed a motion for relief pursuant to Fed. R. Civ. P. 60 (Aplt. App. Vol. 2, p. 283), within 28 days after the Judgment (Aplt. App. Vol. 2, p. 248) was entered. These motions extended the time for Whitney and the

Estate to file an appeal. Fed. R. App. P. 4(a)(4)(A).[1]

(c) On May 20, 2010, the District Court entered its Opinion and Order denying the Fed. R. Civ. P. 59 and 60 motions. Aplt. App. Vol. 2, pp. 358-365.

(d) This appeal was commenced by filing a Notice of Appeal with the District Court on June 1, 2010 (District Court Doc. No. 103), within thirty (30) days of the order disposing of the Rule 59 and 60 motions, as required by Fed. R. App. P. 4(a)(1)(A) and Fed. R. App. P. 4(a)(4)(A). Aplt. App. Vol. 2, pp. 366-367.

4. Whitney and the Estate appeal from a final Judgment in a 9 U.S.C. §9 proceeding which resolved all issues/claims as to all parties in that proceeding.

[1] All "Aplt. App." references herein refer to the page number in the Appendix filed herewith.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court commit reversible error by failing to find that the arbitrators exceeded their powers (by failing to enforce the explicit terms of the contract at issue) and instead confirming the arbitration award?

2. Did the District Court commit reversible error by failing to find that the arbitrators exceeded their powers (by failing to enforce the terms of the contract at issue) and failing to vacate the arbitration award?

3. Did the District Court commit reversible error by failing to award Account Nos. 659-71152 and/or 659-71155 to Pamela Whitney ("Whitney") or the Estate of Suzanne Whitney (the "Estate") pursuant to the terms of the contract at issue and applicable law?

4. Did the District Court commit reversible error by confirming the arbitration award, which awarded attorney fees and costs in favor of Merrill Lynch, Pierce, Fenner & Smith, Inc ("Merrill Lynch")?

5. Did the District Court commit reversible error by failing to grant the Fed. R. Civ. P. 59 motion because the arbitrators exceeded their powers, and the Court should have granted a new trial and/or amended the Court's Judgment?

6. Did the District Court commit reversible error by failing to grant the Fed. R. Civ. P. 60 motion because the arbitrators exceeded their powers, and the Court should have awarded relief from the Judgment?

7. Did the District Court commit reversible error by failing to vacate the arbitration award and confirming the award which determined non-ownership of Account No. 659-71155 as to the Estate?

8. Did the District Court commit reversible error in confirming the arbitration award, which was contrary to the explicit terms of the Suzanne Whitney/Merrill Lynch Client Relationship Agreement?

9. Did the District Court commit reversible error by failing to vacate the arbitration award pursuant to 12 O.S. §1874 because the arbitrators exceeded their powers?

10. Did the District Court commit reversible error by failing to vacate the arbitration award pursuant to 9 U.S.C. §10 because the arbitrators exceeded their powers?

STATEMENT OF THE CASE

On July 9, 2008, Pamela Whitney (sole heir and sister of Suzanne Whitney) filed a Statement of Claim in an arbitration proceeding and asserted claims concerning her rights to two separate "inherited" IRA Accounts (Account Nos. 659-71152 and 659-71155). Subsequently, in the same arbitration proceeding the Estate of Suzanne Whitney (the "Estate") asserted its rights to the same accounts. The issues to be determined in arbitration were (1) whether Suzanne Whitney declined to name a beneficiary for Account No. 659-71155 (resulting in the account passing to her estate upon her death) and (2) whether Suzanne Whitney (in her capacity as a beneficiary) could name a successor beneficiary for herself (i.e. name a "beneficiary of a beneficiary").

The arbitration panel ruled in favor of Merrill Lynch, denying the claims of Pamela Whitney and the Estate with prejudice (effectively holding that neither Pamela Whitney nor the Estate had any rights to the accounts). Merrill Lynch filed a motion with the District Court to confirm. Whitney and the Estate filed a motion to vacate the arbitration award.

On January 28, 2010, the District Court entered Judgment confirming the arbitration award. On February 8, 2010, Pamela Whitney ("Whitney") and the Estate filed motions for relief pursuant to Fed R. Civ. P. 59 and 60. These motions were denied on May 20, 2010. This appeal followed.

STATEMENT OF FACTS RELEVANT TO THE ISSUES SUBMITTED FOR REVIEW

1. Mary Whitney (deceased) owned two IRA accounts (the "Mary Whitney IRAs") held by Merrill Lynch under account numbers 659-87628 and 659-86343. These accounts designated Mary Whitney's daughters, Suzanne Whitney and Pamela Whitney, as beneficiaries with each to receive 50% of the assets of each IRA account. Aplt. App. Vol. 1, pp. 138-139; p. 144.

2. After Mary Whitney's death, Suzanne Whitney elected not to receive a distribution of her share of the Mary Whitney IRA's but instead requested that Merrill Lynch (as custodian) create two new IRA accounts in the name of her deceased mother with Suzanne Whitney as beneficiary. The accounts were titled: "MLPF&S Cust FBO Mary Whitney Decd IRA FBO Ms. Suzanne Whitney". The new "Mary Whitney Decd" account numbers became 659-71152 and 659-71155. Aplt. App. Vol. 1, p. 137; pp. 140-141.

3. Account No. 659-71152 is an Inherited IRA. Account No. 659-71155 is an Inherited Roth IRA. Aplt. App. Vol. 1, p. 137; Aplt. App. Vol. 2, p. 232.

4. The two new inherited IRA accounts were created in compliance with IRS regulations for tax purposes and were required to remain in the name of the deceased (Mary Whitney) because Suzanne Whitney had elected not to receive an immediate distribution of her share of the Mary Whitney IRAs. Aplt. App. Vol. 2, pp. 229-231.

5. Merrill Lynch's Account Relationship Agreement and beneficiary designation form contains two separate beneficiary sections. One section of the form has a space to allow designation of a beneficiary for an account identified as "Retirement Account for Client 1". A second section has a space to allow for the designation of a beneficiary for an account identified as "Retirement Account for Client 2". Aplt. App. Vol. 1, p. 137.

6. Suzanne Whitney designated Amber Callaway as the primary beneficiary and Phyllis Dorian as the contingent beneficiary for account "Client 1". Aplt. App. Vol. 1, p. 137.

7. Suzanne Whitney made no beneficiary designation for account "Client 2". The beneficiary section for account "Client 2" was left blank. Aplt. App. Vol. 1, p. 137.

8. Merrill Lynch's Client Relationship Agreement ("CRA") governs Account Nos. 659-71152 and 659-71155. Aplt. App. Vol. 1, p. 119.

9. The CRA requires that when multiple accounts are created, the customer (Suzanne Whitney here) must complete the beneficiaries sections for each account.

> "If you are opening one or more retirement accounts at this time, please check the appropriate box to designate the type of retirement account and holder for each retirement account to be opened. . .
>
> If you are opening retirement account(s), you can name one or more primary and contingent beneficiaries by completing the Beneficiaries section **for each retirement account**."

(Aplt. App. Vol. 2, p. 210 (4th bold hearing "Retirement") (Emphasis added).

10. The CRA states that if no beneficiary is named for an account, the account will pass to the deceased's estate.

> "If no primary or contingent beneficiaries survive you, or if no beneficiary designation is in effect at your death, the balance will be paid to your spouse. If you are not survived by a spouse, we will pay the balance to your estate."

Aplt. App. Vol. 2, p. 210 (2nd highlighted passage).

11. Suzanne Whitney died intestate on October 25, 2007. Aplt. App. Vol. 1, p. 128 (last 4 lines).

12. At the time of her death, Suzanne Whitney's place of domicile/residence was Tulsa County, State of Oklahoma. Aplt. App. Vol. 1, p. 128 (last 4 lines).

13. Pamela Whitney is Suzanne Whitney's sole heir. Aplt. App. Vol. 1, p. 128 (last 4 lines).

14. Although no beneficiary was designated for Account No. 659-71155, Merrill Lynch refused to pay this account to the Estate of Suzanne Whitney.

15. An Arbitration Hearing occurred on August 4-6, 2009. On October 22, 2009, the Arbitrators issued an Award and denied the claims of Pamela Whitney (sole heir of Suzanne Whitney) and the Estate. The award stated:

> "After considering the pleadings, the testimony, the 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.) Claimant's claims, each and all, are hereby denied and dismissed with prejudice;
>
> 2.) Pamela Whitney, The Estate of Suzanne Whitney, and The Estate of Mary Whitney, are jointly and severally liable for and shall pay to Merrill Lynch, Pierce Fenner & Smith, Inc. the sum of $93,295.00 in attorneys' fees and costs pursuant to Oklahoma common law and the panel's equitable authority;
>
> 3.) Other than Hearing Session Fees which are specified below, the parties shall each bear their own costs and expenses incurred in this matter; and
>
> 4.) Any relief not specifically enumerated, including sanctions, is hereby denied with prejudice."

Aplt. App. Vol. 2, p. 223.

16. On November 2, 2009, Merrill Lynch filed its motion to confirm the arbitration award. Aplt. App. Vol. 1, p. 16.

17. On November 20, 2009, Whitney and the Estate filed a motion to vacate the award. Aplt. App. Vol. 1, p. 67.

18. On January 26, 2010, the District Court entered its Opinion and Order granting Merrill Lynch's motion to confirm the arbitration award, and denying the motion of Whitney and the Estate to vacate. Aplt. App. Vol. 2, p. 247 "Conclusion". On January 28, 2010, Judgment was entered confirming the award and confirming the arbitrators' award of attorney fees and costs in favor of Merrill Lynch against Pamela Whitney. Aplt. App. Vol. 2, p. 248.

19. On February 8, 2010, Whitney and the Estate filed motions for relief pursuant to Fed R. Civ. P. 59 and 60. Aplt. App. Vol. 2, pp. 249 and 283. These motions were denied on May 20, 2010. Aplt. App. Vol. 2, p. 365.

SUMMARY OF THE ARGUMENT

The District Court failed to vacate the arbitration award, and failed to grant relief pursuant to Fed R. Civ. P. 59 and 60. The District Court committed reversible error for the following reasons:

1. The Court had a duty to vacate the arbitration award because the arbitrators exceeded their powers, by entering an award which was contrary to the explicit terms of the Suzanne Whitney/Merrill Lynch Client Relationship Agreement.

2. The Court had a duty to vacate the arbitration award because the arbitrators exceeded their powers by dispensing their own brand of industrial justice, and effectively making public policy. The arbitrators disregarded the only existing authority which states that only an "owner" of an IRA may designate a beneficiary. The accounts at issue were established in the name of Mary Whitney (deceased) as owner, and Suzanne Whitney as beneficiary.

3. The Court had a duty to vacate the arbitration award because the arbitrators exceeded their powers by awarding attorney fees and costs in favor of Merrill Lynch, when Merrill Lynch provided nothing in support of its request. The fee award should also have been vacated had the District Court vacated the arbitration award as to the two IRA accounts.

STANDARD OF REVIEW

"In reviewing a district court's confirmation of an arbitration award, we review factual findings for clear error and legal determinations de novo." *DMA Int'l, Inc. v. Qwest Communications Int'l, Inc.*, 585 F.3d 1341, 1344 (10th Cir. 2009). "An arbitration award will only be vacated for the reasons enumerated in the FAA, 9 U.S.C. §10, or for 'a handful of judicially-created reasons.'" *Id.*

9 U.S.C. §10 states:

> "**(a)** In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> **(4)** where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> **(b)** If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The arbitration was conducted in the State of Oklahoma and the arbitrators awarded attorney fees and costs pursuant to Oklahoma common law and the Panel's equitable authority.

Title 12, Oklahoma Statutes, Section 1874 states:

> "A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:
>
> 4. An arbitrator exceeded the arbitrator's powers;

C. If the court vacates an award on a ground other than that set forth in paragraph 5 of subsection A of this section, it may order a rehearing. If the award is vacated on a ground stated in paragraph 1 or 2 of subsection A of this section, the rehearing must be before a new arbitrator. If the award is vacated on a ground stated in paragraph 3, 4 or 6 of subsection A of this subsection, the rehearing may be before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in subsection B of Section 20 of this act for an award.

D. If the court denies a motion to vacate an award, it shall confirm the award unless a motion to modify or correct the award is pending."

ARGUMENT

I. THE ARBITRATORS EXCEEEDED THEIR POWERS BY DISREGARDING THE TERMS OF THE CLIENT RELATIONSHIP AGREEMENT BETWEEN SUZANNE WHITNEY AND MERRILL LYNCH

The District Court committed reversible error by confirming the arbitration award and overruling the Whitney Parties' motion to vacate the award, and motions for relief pursuant to Fed. R. Civ. P. 59 and 60.[2] Aplt. App. Vol. 1, pp. 238-248; pp. 358-365. The Client Relationship Agreement ("CRA") between Merrill Lynch and Suzanne Whitney mandates that if there is no named beneficiary for an account, upon the death of the account holder, the account will be paid to the deceased's estate (Estate of Suzanne Whitney here). Aplt. App. Vol. 1, pp. 69-70, St. No. 12.

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[2] "(a) In General.
(1) **Grounds for New Trial.** The court may, on motion, grant a new trial on all or some of the issues-and to any party- as follows: (A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or (B) after a nonjury trial, for any reason for which a hearing has heretofore been granted in a suit in equity in federal court…" Fed. R. Civ. P. 59.

"(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovery evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief…" Fed R. Civ. P. 60.

A. The Suzanne Whitney/Merrill Lynch Client Relationship Agreement States That If No Beneficiary Is Named For An Account, The Account Must Be Paid To The Deceased's Estate

The CRA states:

> "If you are opening one or more retirement accounts at this time, please check the appropriate box to designate the type of retirement account and holder for **each** retirement account to be opened. . .
>
> If you are opening retirement account(s), you can name one or more primary and contingent beneficiaries by completing the **Beneficiaries section** for **each** retirement account . . . if no beneficiary designation is in effect at your death, the balance will be paid to your spouse. If you are not survived by a spouse, we will pay the balance to your estate."[3]

Aplt. App. Vol. 2, p. 210 (1st 2 highlighted passages).

Suzanne Whitney opened two retirement accounts with Merrill Lynch on June 27, 2007. Aplt. App. Vol. 1, p. 137. The CRA between Suzanne Whitney and Merrill Lynch named the two retirement accounts: "Retirement Account for Client 1" and "Retirement Account for Client 2". Aplt. App. Vol. 1, p. 137; Vol. 2, p. 232. The CRA identified "Retirement Account for Client 1" as an "Inherited IRA" and corresponds to "659-71152". "Retirement Account for Client 2" is identified as an "Inherited Roth IRA" and corresponds to "659-71155". Aplt. App. Vol. 1, p. 137.

The CRA provides two separate beneficiary sections – one titled "Client 1 Beneficiaries" and the second titled "Client 2 Beneficiaries". Aplt. App. Vol. 1, p. 137.

[3] Suzanne Whitney died intestate and unmarried. Aplt. App. Vol. 1, p. 128 (last 4 lines).

"Client 1 Beneficiaries" shows Suzanne Whitney specified Amber Nicole Callaway as the primary beneficiary and Phyllis J. Dorian as the contingent beneficiary for "Retirement Account for Client 1". Aplt. App. Vol. 1, p. 137.

Suzanne Whitney made no beneficiary designation for "Retirement Account for Client 2". (Beneficiary section titled "Client 2 Beneficiaries" was left blank.) Aplt. App. Vol. 1, p. 137. Suzanne Whitney's election not to designate a beneficiary for "Retirement Account for Client 2" is consistent with her treatment of her checking account with Merrill Lynch. Suzanne Whitney held a checking account with Merrill Lynch. She did not name a beneficiary for the checking account. Aplt. App. Vol. 2, p. 232.

The CRA between Suzanne Whitney and Merrill Lynch mandates that in order for the client to designate beneficiaries for multiple accounts (multiple accounts were opened here), the client must designate beneficiaries for each account separately. Aplt. App. Vol. 2, p. 210 (1st highlighted passage). The CRA also informed Suzanne Whitney that if she elected not to name a beneficiary for an account, upon her death the account would be paid to her Estate.

> "If you are opening retirement account(s), you can name one or more primary or contingent beneficiaries by completing the **Beneficiaries section** for each retirement account. . . if no beneficiary designation is in effect at your death, the balance will be paid to your spouse. If you are not survived by a spouse, we will pay the balance to your estate."

Aplt. App. Vol. 2, p. 210 (1st 2 highlighted passages) (emphasis added).

Instead of enforcing the CRA, the arbitrators determined that a beneficiary designation made as to one account ("Client 1") functioned as the beneficiary for the second account ("Client 2"). The CRA language specifically precludes this. The arbitrators denied the claim of the Estate of Suzanne Whitney to the "Client 2" account despite the absence of a named beneficiary for the account.

B. The Award Must Be Vacated Pursuant To 9 U.S.C. §10 And 12 O.S. §1874

9 U.S.C. §10 and 12 O.S. §1874 provide the basis for vacating an arbitration award. Here, 9 U.S.C. §10(a)(4)[4] and 12 O.S. §1874(A)(4) [5] apply because the arbitrators exceeded their powers, by rendering a decision/award beyond the scope and permissible limits of the CRA. Aplt. App. Vol. 1, p. 70, St. No. 13.

> "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." *Major League Baseball Players Assn. v. Garvey,* 532 U.S. 504, 509, 1015, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) *(per curiam)* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424

[4] "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."
9 U.S.C. §10.

[5] "Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: . . . (4) An arbitrator exceeded the arbitrator's powers." 12 O.S. §1874.

> (1960)). In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator "exceeded [his] powers," for the task of an arbitrator is to interpret and enforce a contract, not to make public policy."

Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 130 S.Ct. 1758, 1767 (U.S. 2010).

In *Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, LLC*, 164 P.3d 1063 (Okla. 2007), the arbitrator refused to award attorney fees despite a written mandatory fee provision within the parties' agreement. The district court rejected the arbitrators' failure to award fees because the award was contrary to the express terms of the contract and modified the award to include fees. *Id*. at 1067.

On appeal the Oklahoma Supreme Court held that the arbitrator had ignored the parties' agreement and therefore exceeded his powers. *Id*. at 1073. "An arbitrator's powers stem from the parties' agreement." *Id*. at 1072. "[T]he arbitrator ignored the parties' agreement and fashioned his own rule that no prevailing party attorney fees will be awarded if any fault is attributable to each of the parties. The arbitrator's ruling is contrary to the parties agreement, it exceeds the arbitrator's power, and the award may be properly vacated under §1874(A)(4)." *Id*. at 1071-1072. "When the arbitrator's award manifests an infidelity to the parties' agreement, the courts **must** refuse to enforce the award." *Id*. at 1071. *See also In re Arbitration Between Riverbay Corp. and Local 32-E*, 91 A.D.2d 509, 510 (N.Y. Sup. Ct. 1982) ("An arbitrator does exceed his power when he gives a totally irrational construction to the contractual provisions in

dispute and, thus, makes a new contract for the parties.") *See also Jenkins v. Prudential-Bache Securities*, 847 F.2d 631, 634 (10th Cir. 1988) (In reviewing an arbitrator's interpretation of a collective bargaining agreement, the Court stated "[a]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . his award is legitimate only so long as it draws its essence from the collective bargaining agreement.")

The CRA here mandates that Suzanne Whitney must specify a beneficiary for each account being opened. If the account holder wishes the account to pass to his/her estate, then the account holder may leave the beneficiary space "blank". Suzanne Whitney only specified a beneficiary for one account ("Client 1"). The CRA mandates that when an account has no specified beneficiary, the account passes to the deceased's estate (Suzanne Whitney's Estate here). The arbitrators here do not have the power to create a new contract by disregarding Suzanne Whitney's decision not to designate a beneficiary for "Client 2", and have the account pass to her Estate. Thus the award must be vacated pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A)(4).

"[A]n arbitration decision may be vacated under §10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers, for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1767 (U.S. 2010) (emphasis added); *see also*

In re Arbitration Between Riverbay Corp. and Local 32-E, 91 A.D.2d 509, 510 (N.Y. Sup. Ct. 1982) ("An arbitrator does exceed his power when he gives a totally irrational construction to the contractual provisions in dispute and, thus, makes a new contract for the parties.")

II. SUZANNE WHITNEY, IN HER CAPACITY AS A BENEFICIARY OF MARY WHITNEY, LACKS THE LEGAL POWER TO NAME A BENEFICIARY FOR HERSELF RELATIVE TO AN INHERITED IRA ("BENEFICIARY OF A BENEFICIARY")

Pamela Whitney and the Estate of Suzanne Whitney requested declaratory relief on the question of law whether a person acting in their capacity as a beneficiary of an **inherited** IRA can legally name a successor beneficiary. Aplt. App. Vol. 1, p. 76 "B" to p. 77 "C". This specific issue is a matter of first impression.

Merrill Lynch conceded in its account documentation that a beneficiary of an inherited IRA may or may not be able to designate another beneficiary and instructs its clients to seek the advice of an attorney or other tax professional on this issue:

> "If you maintain an **inherited** IRA, you may, depending on the state in which you reside, name one or more beneficiaries by completing the Beneficiaries section. We urge you to consult your attorney or tax advisor before completing this section."

Aplt. App. Vol. 2, p. 210 (last highlighted passage) (emphasis added).

When Merrill Lynch created accounts "Client 1" (659-71152) and "Client 2" (659-71155) the accounts were **not** set up in Suzanne Whitney's name. Instead, they

were established in the name of Mary Whitney (deceased). Aplt. App. Vol. 1, pp. 140-141 (name of account is in top left corner of each page). Because the name on the account is prima facie evidence of who the account "owner" is, Mary Whitney's estate remained the "owner" of these accounts. *See Taliaferro v. Reirdon*, 99 P.2d 500, 503 (Okla. 1940) ("The account being in the name of Mary Byrd Taliaferro, she was prima facie the owner thereof.")

As noted by the District Court in its January 26, 2010 Opinion and Order, the CRA states: "except for determining the interests of beneficiaries, which shall be governed by the laws of the state of your domicile[6] at your death, the laws of the State of New York and federal law applicable to individual retirement accounts (IRAs) shall govern this agreement…" Aplt. App. Vol. 2, p. 245 (last quote on page).

IRS Publication 590 (for use with 2007 tax returns)[7] makes clear that a beneficiary of an IRA may only be selected and named by the owner of the IRA and draws a clear distinction between taking ownership of an IRA and remaining a beneficiary of an IRA. Because the two accounts in controversy ("Client 1" and "Client 2") were created in the name of Mary Whitney, only the Estate of Mary

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[6] At the time of her death, Suzanne Whitney's state of domicile was Oklahoma. "Suzanne Whitney, Deceased, died intestate on October 25, 2007, a resident of Tulsa County, State of Oklahoma…"

Aplt. App. Vol. 2, p. 234 (last 4 lines).

Whitney could designate a new successor beneficiary. Aplt. App. Vol. 1, pp. 140-141 (name of account is in top left corner of each page). The Estate of Mary Whitney made no such designation.

An IRA inherited from a spouse is treated differently from an IRA inherited from anyone else.

> "If you inherit a traditional IRA, **you are called a beneficiary**. A **beneficiary** can be any person or entity the **owner** chooses to receive the benefits of the IRA after he or she dies. Beneficiaries of a traditional IRA must include in their gross income any taxable distributions they receive. (emphasis added)."
>
> **Inherited from spouse.** If you inherit a traditional IRA from your spouse, you generally have the following three choices. You can:
>
> 1. Treat it as your own IRA by designating yourself as the account owner.
>
> 2. Treat it as your own by rolling it over into your traditional IRA, or to extent it is taxable, into a…
>
> 3. Treat yourself as the beneficiary rather than treating the IRA as your own…"
>
> **Inherited from someone other than a spouse.** If you inherit a traditional IRA from anyone other than your deceased spouse, **you cannot treat the inherited IRA as your own**. This means that you cannot make any contributions to the IRA. It also means you cannot roll over any amounts into or out of the inherited IRA. However, you can make a trustee-to-trustee transfer as long as the IRA into which amounts are being moved is set up and maintained in the name of the deceased IRA **owner** for the benefit of you as **beneficiary**.
>
> Like the original owner, you generally will not owe tax on the assets in the IRA until you receive distributions from it. You must begin receiving distributions from the IRA under the rules for distributions that apply to **beneficiaries**.

[7] Aplt. App. Vol. 2, p. 229.

Aplt. App. Vol. 2, p. 116 ("What if You Inherit an IRA?") to p. 117 ("IRA with basis"); Aplt. App. Vol. 2, p. 230 ("What if You Inherit an IRA?") to p. 231 ("IRA with basis").

In re Estate of Wellshear, 142 P.3d 994 (Okla. Ct. App. 2006), the Oklahoma Court of Appeals interpreted IRS regulations regarding IRAs and reached the same conclusion, namely that an "owner" and "beneficiary" of an IRA are treated differently.

> "Federal law extends tax benefits to IRAs that meet the requirements of 26 U.S.C. §408. The parties agree that the IRA in question meets the requirements of §408. Internal Revenue Service regulations that govern such IRAs expressly provide for distributions of the IRA to beneficiaries upon the death of the owner and define "beneficiaries" to include "**any person designated by the [owner] to share in the benefits of the account after death of the [owner].** 26 C.F.R. Internal Revenue Service §1.408-2(b)(7) and (8). Neither federal statutory law nor federal regulations prescribe the manner in which a beneficiary is to be designated."

Estate of Wellshear, 142 P.3d at 995-996 (emphasis added). In other words, only the "owner" of the account can specify a beneficiary.

Here, Suzanne Whitney inherited IRA accounts from her mother. Suzanne Whitney elected to retain her "beneficiary" status and not become the "owner" of the accounts. Thus the two inherited accounts were established in the name of Mary Whitney "deceased" and not in the name of Suzanne Whitney. Aplt. App. Vol. 1, pp. 140-141 (name of account is in top left corner of each page). The only law available on this issue makes clear that a beneficiary may only be designated by the "owner" of the

IRA, and thus Suzanne Whitney could not legally name a successor beneficiary to herself for "Client 1" or "Client 2" (because she elected to maintain her "beneficiary" status by opening the accounts in the name of her deceased mother). Therefore, the accounts must pass to her estate.

In *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758 (U.S. 2010), the parties requested that an arbitrator determine whether a class action could be arbitrated. The parties agreed their contract was silent as to class treatment and requested that the arbitrators make this determination. *Id*. at 1766. Authority was set forth that stated at the time the parties entered into their contract, class arbitration was not permitted. *Id*. at 1768-1769. Rather than applying the applicable law, the arbitrators determined as a matter of public policy that class arbitration was permissible. *Id*. at 1769.

In vacating the arbitration award, the U.S. Supreme Court stated:

> "In sum, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law, the arbitration panel imposed its own policy choice and thus exceeded its powers. As a result, under §10(b) of the FAA, we must either 'direct a rehearing by the arbitrators' or decide the question that was originally referred to the panel. Because we conclude that there can be only one possible outcome on the facts before us, we see no need to direct a rehearing by the arbitrators."

Id. at 1770.

Here, the CRA is silent regarding whether a beneficiary of an inherited IRA may name a beneficiary.

> "If you maintain an **inherited** IRA, you may, depending on the state in which you reside, name one or more beneficiaries by completing the Beneficiaries section. We urge you to consult your attorney or tax advisor before completing this section."

Aplt. App. Vol. 2, p. 210 (last highlighted passage).

Rather than following the only applicable law (which states only the "owner" of an IRA may designate a "beneficiary"), like the arbitrators in *Stolt-Nielsen*, by denying all claims of the Estate of Suzanne Whitney and all claims of Pamela Whitney (sole heir to Suzanne), the arbitrators here determined as a matter of public policy that a beneficiary of an inherited IRA can name a subsequent beneficiary. The arbitration award here must be vacated pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A(4) because the arbitrators exceeded their powers.

III. THE COURT ERRED BY NOT VACATING THE ARBITRATORS' ATTORNEY FEE AND COST AWARD (Aplt. App. Vol. 2, p. 248)

The arbitrators awarded fees and costs pursuant to Oklahoma common law and the Panel's equitable authority. Aplt. App. Vol. 2, p. 223. This was an abuse of their powers as Merrill Lynch provided nothing in support of its request for fees and costs, except an affidavit which merely contained the amount requested. Aplt. App. Vol. 2, p. 266 "E".

A. Merrill Lynch Did Not Provide Anything In Support Of Its Fee Request (Aplt. App. Vol. 2, p. 266 "E")

At the close of the arbitration hearing, Merrill Lynch submitted "Respondent's

Affidavit of Fees and Costs." Aplt. App. Vol. 2, p. 207. Within the Affidavit, Merrill Lynch requested fees and costs in the amount of $93,295 ($86,993 in attorney fees and $6,302 in costs) but provided nothing in support (i.e. no billing statements, hourly rates or evidence of time expended). Aplt. App. Vol. 2, p. 207.

B. Detailed Support Must Be Provided To Sustain A Fee And Cost Award (Aplt. App. Vol. 2, p. 266 "E")

In *Roth v. Spruell*, 2010 WL 2881532, 7 (10th Cir. July 22, 2010), this Court addressed whether submitting an affidavit with only the amount requested is sufficient to award fees.

> "Both the Cortez and Buffington Defendants submitted detailed time sheets reflecting the fees and costs for the relevant time period. The Durango Defendants submitted time sheets through December 31, 2002, but they did not submit any time sheets for 2003, which is the time period for which the district court ultimately awarded fees and costs. **Instead of submitting time sheets, the Durango Defendants submitted an affidavit that summarily stated that they incurred fees from February 3, 2003, in the amount of $7,218.50 and costs in the amount of $1,647.34.**
>
> The district court's task was to make "specific findings" that "sufficiently express the basis for the sanctions imposed to identify the excess costs reasonably incurred by the party to whom they will be due." *Hamilton,* 519 F.3d at 1203-04 (quotation omitted). This task could not be accomplished without reviewing the actual billing sheets that detailed the fees and costs allegedly incurred by defendants. *Cf. Ramos v. Lamm,* 713 F.2d 546, 553 (10th Cir.1983) (explaining that "[t]he first step in calculating fee awards is to determine the number of hours reasonably spent by counsel" and that lawyers should "keep meticulous, contemporaneous time records to present to the court" if they intend to seek sanctions under 42 U.S.C. § 1988), *overruled on other grounds by Pennsylvania v. Del. Valley Citizens' Council for Clean Air,* 483 U .S.

711 (1987).

. . . . . .

Accordingly, **we conclude that the district court abused its discretion in awarding fees and costs to the Durango Defendants without reviewing their detailed time sheets.**"

The U.S. Supreme Court and Oklahoma Supreme Court reach the same conclusion. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (U.S. 1983) ("Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates…Plaintiff's counsel, of course is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures."); *See also Oliver's Sports Center, Inc. v. National Standard Insurance Co.*, 615 P.2d 291, 295 (Okla. 1980) ("In *Burk*, this Court established that after the date of promulgation, January 24, 1979, attorneys would be required to present detailed time records to the court and to offer evidence of the reasonable value for the services performed, predicated on the standards within the local legal community.") *See also Usrey v. Wilson*, 66 P.3d 1000, 1002-1003 (Okla. Ct. App. 2002) (Addressing this same issue, the Court stated "If *Burk's* requirement of *detail* is to mean anything, we must conclude that such vague testimony is insufficient to satisfy that requirement. The trial court would have abused its discretion if it had

awarded attorney fees based on such evidence.")[8]

Within the District Court's Opinion and Order denying the relief requested pursuant to Fed. R. Civ. P. 59 and 60, the Court stated:

> "Whitney contends that under *Burk v. City of Oklahoma City*, 598 P.2d 659, 663 (Okla. 1979), Merrill Lynch can only recover attorney fees if it submitted detailed time records showing the work performed and offered evidence as to the reasonable value for the services performed. However, in *Conti v. Republic Underwriters Insurance Company*, 782 P.3d 1357, 1362 (Okla. 1989), the Oklahoma Supreme Court held the trial court did not abuse its discretion in awarding attorney fees where the prevailing party did *not* follow the *Burk* guidelines. In so ruling, the court stated, 'The appellant's argument is based on the perception that the guidelines set out in…*Burk*…are mandatory, and that failure of counsel to follow those documentation guidelines prohibits an award of attorney fees.' *Id.* The court made it clear that the guidelines were not mandatory. *Id.* Here, the award of fees had a basis in law and fact and the court finds no reason to vacate the Panel's decision."

Aplt. App. Vol. 2, p. 363 (last 5 lines) to p. 364 "C".

Conti only held that the Burk factors were not mandatory. *Conti* does not support the Court's implication that fees may be awarded when no support at all is set forth in support of a fee request.

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[8] The *Burk* factors are: (1) Time and labor required; (2) The novelty and difficulty of the questions; (3) The skill requisite to perform the legal service properly; (4) The preclusion of other employment by the attorney due to acceptance of the case; (5) The customary fee; (6) Whether the fee is fixed or contingent; (7) Time limitations imposed by the client or the circumstance; (8) The amount involved and the results obtained; (9) The experience, reputation and ability of the attorneys; (10) The 'undesirability' of the case. [i.e. risk of non-recovery]; (11) The nature and length of the professional relationship with the client; (12) Awards in similar cases.

In *Conti* the parties who were awarded fees provided hours and detailed time sheets in support of their requests. In addressing whether the *Burk* factors were mandatory the Court stated:

> The precise language from *Burk* is that: 'Attorneys in this state *should* be required to present ... detailed time records ..." and that "lawyers who seek an award of attorney fees *should* offer evidence relating to one or more of the criteria ...' set forth in the Code of Professional Responsibility. 598 P.2d at 663 (emphasis added).
> One of the reasons behind our statement in *Burk* was to ensure that a trial court, and later the reviewing court, have an adequate record upon which to judge the reasonableness of an attorney fee award. Given such a record, the limited issue on appeal is whether or not the trial court abused its discretion in allowing a clearly excessive award or refusing an award. *Burk,* supra, at 663. Here, Ransdell provided a recapitulation of his hours, based upon notes included in his trial notes. Co-counsel Johnson, on the other hand, provided daily, detailed, time sheets. Testimony showed that Ransdell's recap did not include all of the time spent in this matter, while Johnson's sheets reflected some duplication. The court made the proper adjustments and awarded Johnson a reduced amount."

Here, whether the *Burk* factors are mandatory or not, submitting an affidavit with only the amount requested is insufficient to award fees and costs. *See Roth v. Spruell*, 2010 WL 2881532, 7 (10th Cir. July 22, 2010).

Merrill Lynch did not submit its affidavit until the close of the arbitration hearing. Although not required to provide the reasoning in support of their decision, it would be fundamentally unfair to uphold the arbitrators' award for fees and costs, when no opportunity to challenge the amount requested was provided. It is equivalent to

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Taylor v. Chubb Group Insurance Companies, 874 P.2d 806, 808 (Okla. 1994)

allowing a plaintiff to present its own evidence and witnesses while not permitting the opposing party to challenge same.

Merrill Lynch did not meet its burden in order to obtain a fee and cost award and the attorney fee and cost award must be vacated pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A)(4) because the arbitrators exceeded their powers.

CONCLUSION

Based upon the above arguments and authorities, this Court should reverse the District Court's rulings and:

1. Vacate the arbitration award in its entirety;

2. Reverse and vacate the Court's Opinion and Order confirming the arbitration award in which attorney fees and costs were awarded in favor of Merrill Lynch;

3. Reverse and vacate the Court's Judgment confirming the arbitration award in which attorney fees and costs were awarded in favor of Merrill Lynch;

4. Reverse and vacate the Court's Opinion and Order denying the relief requested pursuant to Fed. R. Civ. P. 59 and 60, and award relief by reversing and vacating the Court's Opinion and Order and Judgment which confirmed the arbitration award.

5. Award Account No. 659-71155 ("Client 2") to the Estate of Suzanne Whitney because there is no beneficiary named for the account;

6. Award Account No. 659-71152 ("Client 1") and Account No. 659-71155 ("Client 2") to the Estate of Suzanne Whitney because Suzanne Whitney could not legally designate a beneficiary for the accounts;

7. Remand for a hearing before an arbitration panel based on Pamela Whitney and the Estate of Suzanne Whitney being entitled to an award of attorney fees and costs, wherein Pamela Whitney and the Estate of Suzanne Whitney will set forth detailed records in support.

ORAL ARGUMENT REQUESTED

Oral argument is requested in this matter due to the importance of the issues involved related to Oklahoma law, Federal law and the laws applicable to arbitration and to address any questions the Panel may have after reviewing the briefs and record submitted. Some of the issues set forth herein are issues of first impression.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on the 23rd day of August, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,951 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The name and version of the word processing software used to prepare the brief is Word 2003.

/s/ Steven M. Harris