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**

REPLY TO APPELLEE'S RESPONSE TO APPELLANTS/DEFENDANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES, REGULATIONS

REPLY TO MERRILL LYNCH'S "STATEMENT OF THE FACTS" (PAGES 6-11)

Merrill Lynch's "Statement of the Facts" (pages 6-11) should be stricken and not considered by this Court, because Merrill Lynch has failed to cite to the relevant portions of the record which support its "facts".[1] On November 1, 2010, the Whitney Parties filed Appellants' Motion to Strike the Response to Appellants'/Defendants' Opening Brief (Document 01018524835) and provided the reasoning for why the Court should strike this portion of Merrill Lynch's Brief. That Motion will be referred to herein as the "11/1 Motion to Strike", and is incorporated herein by reference as if fully set forth herein.

Within its "Statement of the Facts"[2] Merrill Lynch refers to the state court jury trial. This is irrelevant to the matters before this Court because that trial pertained to one account that is not at issue here. That Account has already been paid to Amber Callaway. The jury trial did not concern whether a beneficiary was named for the account. It is undisputed (and it was never challenged by the Whitney Parties) that Amber Callaway was the named beneficiary for Account No. 659-84028. Aplt. App.

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1 All page references herein to Merrill Lynch's Response Brief mean the page numbers assigned by the Court's ECF system and placed in the top right corner of each page.

2 Merrill Lynch's "Statement of the Facts" is addressed on pages 2-7 of the 11/1 Motion to Strike. All page references mean the pages assigned by the Court's ECF system and placed in the top right corner of each page.

Vol. 2, p. 278.[3]

Merrill Lynch contends that because the Whitney Parties pursued relief in both state and federal courts that Merrill Lynch was unnecessarily forced to address jurisdictional issues. This argument is without merit as both Courts have concurrent jurisdiction. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 739 (Tex. 2005) ("Federal and State Courts have concurrent jurisdiction to enforce the FAA.")

Merrill Lynch also takes issue with the Whitney Parties filing motions pursuant to Fed. R. Civ. P. 59 and 60. In response, within the District Court's Opinion and Order confirming the arbitration award, the District Court relied on many incorrect factual statements. Aplt. App. Vol. 2, p. 254, Section "I"; Vol. 2, p. 288, Section "I". Because this Court will only consider material that was before the District Court, those motions were necessary to preserve and correct the record for this appeal. Further, the District Court requires each request for relief to be asserted in a separate motion. The Whitney Parties were merely pursuing the remedies afforded them by law.

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3 All "Aplt. App." references herein refer to the page number in the Appendix filed by the Whitney Parties on 08/23/2010.

REPLY TO MERRILL LYNCH'S "SUMMARY OF THE ARGUMENT" (PAGES 12-13)

The Whitney Parties and Merrill Lynch both agree that an arbitration award may be vacated when the arbitrators exceed their powers pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A)(4).[4]

As set forth herein and in the Whitney Parties' opening brief, the award must be vacated because it is contrary to the express terms of the agreement entered into between Suzanne Whitney and Merrill Lynch; the arbitrators exceeded their powers by making public policy instead of applying the only relevant authority; and it is fundamentally unfair to award fees and costs when no evidence was presented to the arbitrators as to reasonableness and amount, and the Whitney Parties never had an opportunity to challenge the request.

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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.

"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.

REPLY TO MERRILL LYNCH'S ARGUMENT AND AUTHORITIES (PAGES 14-24)

I. REPLY TO "STANDARD OF REVIEW" (PAGES 14-15)

Merrill Lynch attempts to create an issue where one does not exist. The Whitney Parties have not argued that the award should be vacated based on the "manifest disregard of the law" theory. The Whitney Parties assert that the 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.

II. REPLY TO "THE ARBITRATION PANEL PROPERLY DETERMINED OWNERSHIP OF THE SUZANNE WHITNEY ACCOUNTS" (PAGES 15-17)

A. The Arbitrators Disregarded The Client Relationship Agreement

The arbitrators ignored the Client Relationship Agreement ("CRA") entered into between Suzanne Whitney and Merrill Lynch. No testimony is needed to interpret the CRA and the Court should disregard footnote 2 on page 16 of Merrill Lynch's Response.[5] The purported testimony was never provided to the District Court and there is no way to determine its accuracy.

The CRA assigned "Retirement Account for Client 1" to Account No. 659-71152, and "Retirement Account for Client 2" to Account No. 659-71155. Aplt. App. Vol. 1, p. 137. The CRA has two separate places to designate beneficiaries: one place

5 This footnote is addressed on page 9 of the 11/1 Motion to Strike.

to name beneficiaries for "Client 1" and a separate place directly below to name beneficiaries for "Client 2". Aplt. App. Vol. 1, p. 137. Merrill Lynch has never disputed that there are two separate places to designate beneficiaries.

Suzanne Whitney chose to designate beneficiaries for "Client 1" and chose not to designate beneficiaries for "Client 2". The space to designate beneficiaries for "Client 2" was left blank. The express wording of the CRA mandates that a beneficiary be designated for each account; otherwise the account without a beneficiary passes to the deceased's estate.

The CRA states:

> 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."[6]

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

In *DMA International, Inc. v. Qwest Communications International, Inc.*, 585 F.3d 1341 (10th Cir. 2009)[7], the case involved the interpretation of a contract and whether the party was to be paid by the hour, or based on each "completed" circuit.

> "The parties' dispute centers on the contract's fees provision, Section 4. 1, which states:

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

[7] This opinion was cited by Merrill Lynch at page 17 of its Response Brief.

> [F]ees for Services rendered hereunder are as follows:
>
> … Twenty-five dollars and twenty cents ($25.20) per circuit satisfactorily completed. (Fee is based on an hourly rate of forty-five dollars ($45) with 1.8 circuits completed per hour)."

DMA International, 585 F.3d at 1343.

The arbitrator determined this provision was ambiguous and stated:

> "I can not [sic] determine from a reading of … section 4.1 at what rate the parties intended that DMA be paid for its work. Was it to be paid per circuit or per hour? Consideration of other relevant portions of the contract only underscore the ambiguity…. When is a circuit "completed" and how does that relate to the work DMA was to perform as described at section 1.2 of the [Statement of Work]?"

DMA International, 585 F.3d at 1344.

In affirming the arbitration award, this Court stated:

> "This is a typical contractual dispute in which the parties disagree about the meaning of the terms of their agreement. There are arguments to be made on both sides of the contractual interpretation issue, and they were made to the arbitrator before being made to the district court and then to us."

DMA International, 585 F.3d at 1346.

DMA International is distinguishable because here the exact issue (i.e. what happens when a beneficiary is not designated for an account) is expressly contemplated by the CRA. Instead of enforcing the CRA (and awarding Client "2" to the deceased's estate), the arbitrators dispensed their own brand of justice by determining that a beneficiary for Client "1" also served as a beneficiary for

Client "2".

When an arbitrator disregards the parties' agreement and dispenses his own brand of industrial justice, the Court must refuse to enforce the award.

See United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960):

> "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem…The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. **When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.**"

United Steelworkers, 363 U.S. at 597 (emphasis added).

In *United Food and Commercial Workers, Local 1546 v. Illinois-American Water Co.*, 569 F.3d 750 (7th Cir. 2009)[8], the Court determined the arbitrator had not exceeded his powers (and the award should be affirmed), because the parties' agreement did not contemplate the scenario at issue.

> "The arbitrator did not disregard the contractual language and dispense his own brand of industrial justice, nor did he exceed his authority in rendering his decision. Instead, the arbitrator confronted a situation that was **not expressly contemplated by the parties**, interpreted the

8 This opinion is cited on page 16 of Merrill Lynch's Response Brief.

> agreement, and reached a conclusion. In short, he provided exactly what the parties bargained for. That is enough. The arbitrator's decision must stand.
>
> [6] The arbitrator was faced with a peculiar posture: IAWC's power to act under the terms of a contract, the validity of which the Union was challenging. [FN4] **The LCA, by its express provisions, did not contemplate such a scenario.**"

United Food, 569 F.3d at 755 (emphasis added).

Each of these opinions state that if the issue before the arbitrator was contemplated by the parties' agreement then the arbitrator must enforce that agreement.

The parties' agreement is the source of the arbitrator's power. *See Sooner Builders & Investments, Inc. v. Nolan Hatcher Construction Services, LLC*, 164 P.3d 1063 (Okla. 2007):

> "**The parties' agreement is the source of the arbitrator's power.** *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53, 94 S.Ct. 1011, 1022, 39 L.Ed.2d 147 (1974). The parties' agreement may give the arbitrator broad power, and it may confine and limit the arbitrator's power. The arbitrator serves as the proctor of the parties' agreement and has the obligation to effectuate the intent of the parties' agreement. *Id.* **When the arbitrator's award manifests an infidelity to the parties' agreement, the courts must refuse to enforce the award.** *Id.*
>
> [20] ¶ 25 Here, **the parties' agreement mandates the arbitrator to award attorney fees and expenses to the prevailing party. It leaves no discretion to the arbitrator to deny attorney fees to the prevailing party.** In ruling on Sooner's motion to modify, the arbitrator ignored the parties' agreement and fashioned his own rule that no prevailing ***1072** 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)."

Sooner Builders, 164 P.3d at 1071-1072 (emphasis added).

"The arbitrator may not ignore the plain language of the contract." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).[9] *See also Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1767 (2010) ("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.")

The dispute between the Whitney Parties and Merrill Lynch is specifically addressed in the CRA. When no beneficiary is designated for an account, that account must pass to the deceased's estate. Aplt. App. Vol. 2, p. 210 (1st 2 highlighted passages).

Title 9 U.S.C. §10 and 12 O.S. §1874 were enacted to limit the power of an arbitrator. Here, 9 U.S.C. §10(a)(4)[10] and 12 O.S. §1874(A)(4)[11] mandate that the

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9 This opinion is cited on page 16 of Merrill Lynch's Response Brief.

10 "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.

arbitration award be vacated because the arbitrators exceeded their powers by disregarding the parties' agreement (CRA).

III. REPLY TO "THE ARBITRATION PANEL DETERMINED THAT SUZANNE WHITNEY HAD THE AUTHORITY TO NAME A BENEFICIARY" (PAGES 17-20)

This is a matter of first impression. Other than stating that the Whitney Parties claims were denied, the arbitration award nor the District Court addressed this issue.[12]

Publication 590 states that for tax purposes, a person who inherits an IRA from someone other than their spouse is treated the same as the "owner" of the account. In other words, if the "beneficiary" (Suzanne Whitney here) elects not to receive a distribution, and instead opts to keep the account titled in the name of the "owner" (Mary Whitney), the beneficiary keeps her "beneficiary" status, and is not taxed on the account.

> "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)."

Aplt. App. Vol. 1, p. 116 "What if You Inherit an IRA?" (emphasis added).

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11 "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.

12 Footnote 3 on page 18 should be disregarded. No transcript testimony was provided to the District Court and the purported testimony has not been authenticated. This footnote is addressed on page 9 of the 11/1 Motion to Strike.

> "**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**."

Aplt. App. Vol. 1, p. 117 "Inherited from someone other than spouse" (double border box) (emphasis added).

The phrase "[l]ike the original owner, you generally will not owe tax on the assets in the IRA until you receive distributions from it" only means that the beneficiary will not be taxed until she elects to receive a distribution. The IRS provides the option for the beneficiary (Suzanne Whitney) to "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."

Here, Account Nos. 659-71152 (Client "1") and 659-71155 (Client "2") were both set up in the name of Mary Whitney as the "owner" for the benefit of Suzanne Whitney as the "beneficiary". The accounts are titled "MLPF&S FBO Mary Whitney Decd IRA FBO Ms Suzanne Whitney". Aplt. App. Vol. 1, pp. 140-141.

Merrill Lynch admitted 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).

The State of Oklahoma has interpreted IRS regulations and also treats an "owner" and a "beneficiary" differently. *See In re Estate of Wellshear*, 142 P.3d 994 (Okla. Ct. App. 2006):

> "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).

See also 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."

The arbitrators disregarded the law which states that only the "owner" of an IRA may designate a "beneficiary". Instead, the arbitrators imposed their own policy choice and determined that a beneficiary of an inherited IRA can name a subsequent

beneficiary. The award must be vacated pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A)(4). *See Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 130 S.Ct. 1758, 1770 (2010) (Because arbitrators failed to follow the applicable authority and instead imposed their own policy choice, the arbitrators exceeded their powers and the award must be vacated.)

IV. REPLY TO "THE ARBITRATION PANEL HAD THE AUTHORITY TO AWARD ATTORNEY FEES IN FAVOR OF MERRILL LYNCH" (PAGES 20-21)

At the conclusion of the arbitration hearing, and at the request of the arbitration panel, Merrill Lynch submitted an affidavit which contained a number for attorney fees ($86,993) and a separate number for costs ($6,302). No testimony or other support was provided for the arbitration panel to rely on in awarding fees or costs. Aplt. App. Vol. 2, p. 207.

Although arbitrators are not required to explain their decision, they must have something to base that decision on. It would be fundamentally unfair to uphold an award for fees and costs when no support was provided and the opposing party never had an opportunity to challenge the request. This is presumably the reason this Court, the U.S. Supreme Court and the Oklahoma Supreme Court each require an attorney to submit time records with a fee request.

See Roth v. Spruell, 2010 WL 2881532, 7 (10th Cir. July 22, 2010), unreported:

"Both the Cortez and Buffington Defendants submitted detailed time

> sheets reflecting the fees and costs for the relevant time period… **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.**"
>
> "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.**"

Roth, 2010 WL 2881532 at 7.

See also 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) (emphasis added):

> "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."

Contrary to Merrill Lynch's assertion, *Conti v. Republic Underwriters Insurance Co.*, 782 P.2d 1357 (Okla. 1989) does not stand for the proposition that fees may be awarded when no support is provided. In *Conti*, the issue was whether the "Burk" factors were mandatory. The parties who were awarded fees and costs in *Conti*

provided hours and detailed time sheets in support of their requests and thus the award was upheld. *Conti*, 782 P.2d at 1362.

For the reasons set forth above, the award for fees and costs must be vacated pursuant to 9 U.S.C. §10(a)(4) and 12 O.S. §1874(A)(4).

V. REPLY TO "MERRILL LYNCH IS ENTITLED TO APPELLATE ATTORNEY FEES AND COSTS" (PAGES 22-24)

Merrill Lynch's request for appellate attorney fees and costs pursuant to 28 U.S.C. §1927 and/or Fed. R. App. P. 38 must be denied. The Whitney Parties brought this appeal after their motions pursuant to Fed. R. Civ. P. 59 and 60 were denied. There is nothing in the record to support Merrill Lynch's request.[13] Merrill Lynch did not seek fees and/or costs from the District Court, nor did Merrill Lynch present a Rule 11 motion.

The Whitney Parties brought this appeal because the arbitration panel exceeded their powers, as set forth herein as well as in Defendants/Appellants' Opening Brief. Contrary to Merrill Lynch's assertion, the relevant authority supports the Whitney Parties' belief that the arbitrators exceeded their powers.

Merrill Lynch's assertion that these issues have been decided by anyone other than the arbitration panel and the District Court is unsupported by the record. Throughout its brief, Merrill Lynch makes allegations which are incorrect and/or

unsupported by the record.

No argument can be made that the issues raised in this appeal are frivolous. The relevant authority shows that if a parties' agreement specifically contemplates the issue before the arbitrator, then the arbitrator must enforce the agreement.

Additionally, this appeal involves matters of first impression. There is no way to determine how the Court will decide these issues. *See U.S. v. Ochs*, 842 F.2d 515, 521 (1st Cir. 1988) (referring to the U.S. Supreme Court's opinion in *McNally v. U.S.*, 483 U.S. 530 as "blockbusting" and a "total surprise".)

CONCLUSION

Based upon the above arguments and authorities, the Whitney Parties move the Court to deny all relief requested by Merrill Lynch, 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;

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13 Footnote 5 on page 23 should be disregarded. Merrill Lynch has not provided any support for the statement. This is addressed on page 10 of the 11/1 Motion to Strike.

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 1st day of November, 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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/s/ S. Max Harris
S. Max Harris

1507-6.Whitney Reply Brief:lj

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,768 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/ S. Max Harris
S. Max Harris

CERTIFICATE OF DIGITAL SUBMISSIONS

I hereby certify, in accordance with this Court's March 18, 2009 General Order regarding electronic submission of Documents at Section V-B, I hereby certify that: (1) all required privacy redactions have been made, (2) the electronically-submitted documents are identical to those written documents filed with the Clerk, and (3) that the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program (Norton Antivirus Version most recently updated on April 12, 2010) and, according to the scanning program, are free from viruses.

/s/ S. Max Harris
S. Max Harris