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**FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF RIVERSIDE

**MAY 24 2004**

**I. Siracusa**

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9 Wells Fargo & Company,  
10 Wells Fargo Brokerage Services, LLC,  
11 Wells Fargo Securities, Inc.,  
12 Peter J. Evanecko, and  
13 Philip S. Loomis

9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
10 COUNTY OF RIVERSIDE

12 JOHN LISSBERGER, individually, and as Trustee  
13 of the JOHN LISSBERGER REVOCABLE  
14 TRUST,

14 Plaintiff

15 v.

16 WELLS FARGO & COMPANY, WELLS FARGO  
17 BROKERAGE SERVICES, LLC, WELLS FARGO  
18 SECURITIES, INC., FORTIS FINANCIAL  
19 GROUP, PETER J. EVANECKO, PHILIP S.  
20 LOOMIS, AND DOES 1-20, INCLUSIVE,

19 Defendant.

Case No.: INC 023394  
Assigned to Hon. C. J. Sheldon,  
Department 2H, For All Purposes

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

HEARING

Date: August 9, 2004  
Time: 8:30 a.m.  
Dept: 2H

Action Filed: June 15, 2001  
Trial Date: December 20, 2004

INTRODUCTION

22 The two defendants remaining in this action, Wells Fargo & Company and Wells Fargo  
23 Securities, Inc., bring this summary judgment motion to put an end – finally – to this litigation. This  
24 case arose out of a dispute between plaintiff John Lissberger and his brokerage firm over the purchase of  
25 a variable annuity. This Court ordered plaintiff to submit his claims to binding arbitration before the  
26 National Association of Securities Dealers (“NASD”) and stayed further proceedings pending  
27 arbitration. An NASD arbitration panel denied plaintiff’s claims “in their entirety,” and this Court  
28

1 confirmed the award and entered judgment in favor of the brokerage firm and its employees. Under  
2 Brinton v. Bankers Pension Services, Inc., 76 Cal. App. 4<sup>th</sup> 550 (1999), the doctrine of res judicata bars  
3 the claims alleged in this action against the two remaining defendants, the brokerage firm's corporate  
4 parent and affiliate. Summary judgment should be granted.

5 **UNDISPUTED MATERIAL FACTS AND PROCEDURAL HISTORY**

6 On June 15, 2001, plaintiff John Lissberger filed this action to recover damages arising  
7 from his purchase of a variable annuity in his brokerage account at Wells Fargo Brokerage Services  
8 ("WFBS").<sup>1</sup> He named as defendants WFBS; a sister brokerage firm, Wells Fargo Securities, Inc., and  
9 the brokerage firms' parent holding company, Wells Fargo & Company, as well as his stockbroker,  
10 Phillip Loomis, and Mr. Loomis's supervisor, Peter Evanecko.<sup>2</sup> He also named as a defendant Fortis  
11 Financial Group, allegedly the issuer of the annuity.

12 The Complaint alleged wrongdoing in three areas:

- 13 • First, plaintiff alleged that Mr. Loomis had fraudulently induced him to purchase the  
14 annuity by misrepresenting and failing to disclose material facts about the product, in  
15 particular that the annuity carried a 5% surrender charge.<sup>3</sup>
- 16 • Second, plaintiff alleged that, after he discovered the surrender charge, he  
17 "negotiated" with Mr. Loomis and his supervisor, Mr. Evanecko, to get them to  
18 "waive" the surrender charge, which they agreed -- and then failed -- to do.<sup>4</sup>
- 19 • Finally, plaintiff alleged that he and his wife gave instructions to Mr. Loomis and his  
20 partner, Julie Belton, to close his account, which they failed to perform in a timely  
21 manner.<sup>5</sup>

22 The Complaint alleged that, in committing these alleged wrongful acts, Messrs. Loomis and Evanecko

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24 <sup>1</sup> Separate Statement of Undisputed Material Facts ("Separate Statement"), Ex. A.

25 <sup>2</sup> Collectively, Wells Fargo & Company, WFBS, Wells Fargo Securities, Inc., and Messrs. Loomis and  
26 Evanecko will be referred to as the "Wells Fargo Defendants." Wells Fargo & Company is a bank  
27 holding company. At the time the Complaint was filed, Wells Fargo Brokerage Services, LLC and  
28 Wells Fargo Securities, Inc. were registered broker-dealers and affiliates of Wells Fargo & Company.  
Separate Statement ¶ 2.

<sup>3</sup> Separate Statement, Ex. A ¶¶ 12-20.

<sup>4</sup> Separate Statement, Ex. A ¶¶ 21-25.

<sup>5</sup> Separate Statement, Ex. A ¶¶ 26-36.

1 and Ms. Belton were acting as agents of the corporate defendants, and all of the defendants were alleged  
2 to be the “agents, servants, and/or employees” of the other defendants.<sup>6</sup>

3 In August 2001, the Wells Fargo Defendants filed a Motion to Compel Arbitration,  
4 requesting that the Court issue an order compelling plaintiff to submit the claims alleged in the  
5 Complaint to arbitration before the NASD, as required by his written agreement to arbitrate disputes  
6 between him and his brokerage firm or its employees. After hearing argument and taking the matter  
7 under submission on September 13, 2001, this Court issued a minute order granting the motion. The  
8 Court subsequently entered a written order confirming its ruling and staying further proceedings pending  
9 arbitration.<sup>7</sup>

10 In June 2002, plaintiff initiated NASD arbitration proceedings by submitting a Statement  
11 of Claim and a Uniform Submission Agreement to the NASD.<sup>8</sup> The Statement of Claim named WFBS  
12 and Messrs. Loomis and Evanecko as respondents; it did not name Wells Fargo & Company or Wells  
13 Fargo Securities, Inc. In the Uniform Submission Agreement, plaintiff agreed to “submit the present  
14 matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all  
15 related counterclaims and/or third party claims which may be asserted, to arbitration” in accordance with  
16 the NASD rules.<sup>9</sup>

17 Substantively, the allegations of the Statement of Claim mirrored those in the Complaint,  
18 which was attached as an exhibit. Like the Complaint, the Statement of Claim alleged that Mr. Loomis  
19 fraudulently induced plaintiff to purchase the annuity;<sup>10</sup> that Messrs. Loomis and Evanecko agreed, then  
20 failed, to waive the surrender charge,<sup>11</sup> and that Mr. Loomis and Mr. Belton failed to perform the  
21 instructions given by plaintiff and his wife to close the account.<sup>12</sup> And, like the Complaint, the  
22 Statement of Claim alleged that the each of the respondents was acting as the agent, servant, or  
23  
24

25 <sup>6</sup> Separate Statement, Ex. A ¶ 10.

26 <sup>7</sup> Separate Statement, Ex. B.

27 <sup>8</sup> Separate Statement, Exs. C & D.

28 <sup>9</sup> Separate Statement, Ex. D.

<sup>10</sup> Separate Statement, Ex. C ¶¶ 12, 15, 17-22.

<sup>11</sup> Separate Statement, Ex. C ¶¶ 23-27.

<sup>12</sup> Separate Statement, Ex. C ¶¶ 28-36.

1 employee of the others.<sup>13</sup>

2 In March 2003, following submission of proposed arbitrator rankings by the parties,  
3 NASD Dispute Resolution appointed three arbitrators to hear and decide the dispute: Ernest L.  
4 Burnside, G. Thomas Fleming III, Esq., and Herbert Leslie Greenberg, Esq. The arbitration hearing was  
5 conducted before Messrs. Burnside, Fleming, and Greenberg in Los Angeles from January 20 through  
6 January 22, 2004. On February 2, 2004, the arbitrators issued their signed Award on plaintiff's claims.  
7 In the Award, the arbitrators found in favor of the WFBS and Messrs. Loomis and Evanecko  
8 and denied plaintiff's claims "in their entirety."<sup>14</sup>

9 WFBS and Messrs. Loomis and Evanecko then filed a motion with this Court to confirm  
10 the arbitrators' Award. Plaintiff opposed the motion and asked the Court to vacate the Award. After  
11 hearing argument on March 12, 2004, this Court granted the motion to confirm the Award and  
12 subsequently issued a written order to that effect. The Court also entered judgment dismissing the  
13 action against WFBS and Messrs. Loomis and Evanecko with prejudice.<sup>15</sup>

#### 14 ARGUMENT

#### 15 I. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE THE DOCTRINE OF 16 RES JUDICATA BARS PLAINTIFF'S CLAIMS AGAINST THE REMAINING 17 DEFENDANTS.

18 Brinton v. Bankers Pension Services, Inc., 76 Cal. App. 4<sup>th</sup> 550 (1999), mandates that  
19 Wells Fargo & Company and Wells Fargo Securities, Inc. be granted summary judgment because the  
20 doctrine of res judicata bars plaintiff's claims against those defendants.

21 In Brinton, an investor alleged that a broker named Thon had fraudulently induced him to  
22 purchase five limited partnerships. He submitted a Statement of Claim to the NASD naming Thon and  
23 two corporations, Bankers Pension Services, Inc. ("Bankers Pension") and Titan/Value Equities Group,  
24 Inc. ("Titan") as respondents. The Statement of Claim alleged that, in selling the limited partnerships,  
25 Thon was acting as an agent for both corporate defendants.

26  
27 <sup>13</sup> Separate Statement, Ex. C ¶ 9.

28 <sup>14</sup> Separate Statement, Ex. E.

<sup>15</sup> Separate Statement, Exs. F & G.

1 Thon and Titan filed an Answer in the NASD arbitration proceeding, but Bankers  
2 Pension declined to participate. The NASD arbitration panel, by a 2-to-1 vote, entered an award  
3 denying all of plaintiff's claims. Thon and Titan petitioned to confirm the award. The court granted the  
4 petition and entered judgment in their favor.

5 Plaintiff then filed a Superior Court action against Bankers Pension based on the same  
6 facts as those underlying the NASD arbitration proceeding. In his Complaint, he alleged, as he had in  
7 his Statement of Claim, that Thon was acting as an agent for Bankers Pension.

8 Bankers Pension moved for summary judgment on the grounds that the doctrine of res  
9 judicata barred plaintiff's claims against it. The trial court granted the motion, and the Fourth District  
10 Court of Appeal affirmed.

11 The appellate court first considered the preclusive effect of arbitration awards under the  
12 rules recently laid down by the California Supreme Court in Vandenburg v. Superior Court, 21 Cal. 4<sup>th</sup>  
13 815 (1999). In that case, the Supreme Court held that an arbitration award should not be given collateral  
14 estoppel effect in favor of a third party unless the parties to the arbitration had so agreed. But the  
15 Supreme Court specifically stated that its holding was "narrowly circumscribed" and was not intended to  
16 "impos[e] or impl[y] any limitations on the strict res judicata, or 'claim preclusive,' effect of a  
17 California law private arbitration award." The Brinton court went on to hold that, under California law,  
18 a prior judgment confirming an arbitration award may indeed bar a subsequent lawsuit on the same  
19 cause of action. 76 Cal. App. 4<sup>th</sup> at 557.

20 The appellate court then held that the judgment confirming the arbitration award in favor  
21 of Thon and Titan barred the claims asserted in the Superior Court action because, under the "primary  
22 rights" doctrine, the arbitration and the suit involved the same cause of action:

23 Contrary to plaintiff's assertion, the record clearly establishes his NASD claim and the  
24 present lawsuit sought recovery for the same injury. The allegations of wrongful conduct  
25 contained in the two pleadings are virtually identical. Both the claim and the complaint  
26 alleged plaintiff suffered financial losses because of Thon's purported misrepresentations  
27 concerning the character of the investments. Each sought to hold Titan and defendant  
28 [i.e., Bankers Pension] liable based on the allegation Thon was acting as each entity's  
agent when he made the purported misrepresentations. Given this similarity in the  
respective pleadings, both the arbitration and the current lawsuit were based on alleged  
violations of the same primary right. In addition, the arbitration resulted in a final  
judgment on the merits against plaintiff.

1 76 Cal. App. 4<sup>th</sup> at 557.

2 Finally, the appellate court held that the doctrine of res judicata barred the claims asserted  
3 against Bankers Pension in the Superior Court action even though it was not a party to the arbitration  
4 proceeding: “[S]ince defendant’s liability is merely derivative of Thon’s, it is unnecessary for defendant  
5 to have been a party to the prior action to assert a claim preclusion defense.” 76 Cal. App. 4<sup>th</sup> at 557-  
6 558, citing Sartor v. Superior Court, 136 Cal.App.3d 322, 326-328 (1982) (confirmed arbitration award  
7 finding corporation liable only for defective solar panel gaskets barred subsequent action against  
8 corporation's employees alleging fraud and negligence for other alleged construction defects); City of  
9 Los Angeles v. Superior Court, 85 Cal.App.3d 143, 154-155 (1978) (prior judgment in favor of county  
10 and city employees in federal civil rights action barred action against both employees and the county and  
11 city seeking damages for conversion); Loughran v. Reynolds, 70 Cal.App.2d 241, 244-245 (1945) (prior  
12 judgment in bankruptcy limiting plaintiff's recovery against corporation barred subsequent action against  
13 individual alleged to be corporation's alter ego).

14 Brinton mandates summary judgment in this case. Here, as there, both the NASD  
15 arbitration proceeding and the Superior Court suit were based on the allegation that a broker, acting as  
16 the agent of multiple corporate defendants, defrauded an investor. Here, as there, the NASD arbitration  
17 panel found in favor of the broker. Here, as there, the arbitration award was confirmed by the court and  
18 judgment was entered thereon. And here, as there, the liability of the corporate defendant(s) in the  
19 Superior Court action is “merely derivative” of the liability of a party to the arbitration. The doctrine of  
20 res judicata thus bars plaintiff’s claims against Wells Fargo & Company and Wells Fargo Securities, Inc.

21 Given the clear holding of Brinton, citation of additional authorities would seem  
22 unnecessary. Nevertheless, the Court should know that the federal courts have held that the doctrine of  
23 res judicata bars claims against a corporate defendant where a securities industry arbitration panel has  
24 denied plaintiff’s claims against an affiliated entity or individual based on the same facts. For example,  
25 in Iwachiw v. General Electric Corp., 2000 WL 1141086 (E.D.N.Y. 2000), the court held that an NASD  
26 arbitration award in favor of a brokerage firm barred fraud and contract claims asserted in a suit against  
27 the firm’s parent corporation:

28 However couched, and whatever statutes referred, there is simply no question but that

1 Plaintiff seeks only to litigate in this federal forum matters already litigated in the context  
2 of the Arbitration. This, he may not do. Put simply, such re-litigation is barred by the  
principles of res judicata and collateral estoppel.

3 2000 WL 1141086 at \*3. Likewise, in Siegel v. Daiwa Securities Co., Ltd., 842 F. Supp. 1537

4 (S.D.N.Y. 1994), the court held that an NASD arbitration award in favor of brokerage firm barred

5 discrimination claims in suit filed against its parent corporation and one of its officers:

6 It would seem a matter of elementary common sense that, if the arbitrators found that  
7 plaintiff had failed to prove the wrongs alleged against Daiwa America [the brokerage  
8 firm], this would leave no room to bring a lawsuit charging Daiwa Japan [the parent] with  
9 causing those wrongs. Whether this results, as a technical matter, from the application of  
res judicata or collateral estoppel is a matter of possible theoretical interest. However,  
the result is clear, and that is that the claims in the lawsuit are barred.

10 842 F. Supp. at 1542. See also JSC Securities, Inc. v. Gebbia, 4 F. Supp. 2d 243 (S.D.N.Y. 1998)

11 (New York Stock Exchange arbitration award in favor of corporation and two of its officers/directors

12 barred fraud claims in suit filed against subsidiary corporation and other officers and directors).

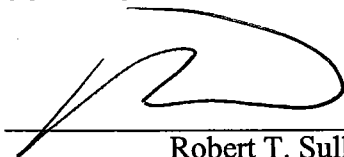
13 These decisions likewise compel summary judgment in favor of Wells Fargo & Company  
14 and Wells Fargo Securities, Inc., respectively the parent and sister corporations of WFBS, the victorious  
15 corporate respondent in the NASD arbitration proceeding.

16 **CONCLUSION**

17 This Court sent plaintiff's claims arising out of his purchase of a variable annuity to  
18 binding arbitration before the NASD. Plaintiff tried those claims in that forum, and he lost. The  
19 arbitration award has been confirmed, and judgment entered thereon. It is time for this litigation finally  
20 to end. The motion for summary judgment should be granted.

21 DATED: May 21, 2004

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