# EXHIBIT C

**Before The**
**FINANCIAL INDUSTRY REGULATORY AUTHORITY**
**CASE NUMBER 16-03454**

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

**Claimants,**

**-vs-**

**AXA ADVISORS, LLC,**

**Respondent.**

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

**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 Fitzpatricks' 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 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.

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); *Cmty. 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 Fizpatricks—whole.

**CONCLUSION**

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

Dated: February 4, 2019

/s/ *Jason J. Kane*

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