**Before The**

**FINANCIAL INDUSTRY REGULATORY AUTHORITY**

**CASE NUMBER** 16-03454

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**SHIRLEY KERWIN,**

**Claimant,**

**-vs-**

**AXA ADVISORS, LLC,**

**Respondent.**

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**STATEMENT OF CLAIM FOR ARBITRATION**

This case involves a reprehensible broker, Francesco Puccio (CRD #3204237) (“Puccio”) and his brokerage firm’s failure to supervise him. Puccio was registered with AXA Advisors, LLC (CRD #6627) (“AXA” or “Respondent”) from March 1999 to August 2009 and then again from January 2011 to January 2014.

Claimant Shirley Kerwin (“Shirley” or “Claimant”) is an 81-year-old widow who was abused by Respondent AXA and Puccio throughout her relationship with them. At first, the abuse consisted of selling unsuitable and unnecessary life insurance policies and annuities that paid substantial commissions to Respondent AXA and Puccio. Later, the abuse turned criminal when Puccio devised a loan scheme to withdraw Shirley’s money from her AXA accounts and ultimately steal it from her.

In 2014, after Puccio was forced to tell Shirley that her money was gone, but blamed her for providing too much financial support to her brother with cancer, Shirley asked the authorities to investigate. On July 15, 2015, Puccio was charged with second-degree larceny and fourth-degree conspiracy, both felonies, for defrauding Shirley. According to criminal records, Puccio’s on-going fraud began in March 2011 (two months after he re-registered with AXA) and ended in April 2014 (three months after he left AXA). In January 2016, Puccio pled guilty to Felony Larceny. He is on probation and currently paying Shirley restitution. Shirley’s on-going investigation into Puccio’s conduct has revealed that prior to stealing her money, he also sold unsuitable annuities and life insurance policies to her. Puccio’s restitution payments do not and will never make Shirley whole. She survives on social security and Puccio’s restitution.

As discussed in greater detail below, Puccio used Shirley as a solution to a major problem in his life: Puccio could not pay his bills due to a life style that stretched beyond his means. AXA knew this before it re-hired him in 2011 and should have known this much before then. Despite Puccio’s obvious financial issues, AXA turned a blind-eye while Puccio sold high commission, high fee products to a large percentage of his clients, including Shirley. AXA’s failure to supervise its obviously troubled broker caused substantial harm to one of AXA’s most financially unsophisticated and vulnerable clients, Shirley. This is a clear case of elder abuse.

Having asked both the authorities and undersigned to investigate Puccio’s misconduct, Shirley has done her best to figure out the ways in which Puccio abused her. She knows about four annuities that Puccio sold to her, a life insurance policy that was sold to her and then switched into another life insurance policy, Puccio’s advice to purchase more life insurance after her husband died and, obviously, the felony theft. At the Final Hearing in this matter, she reserves her rights to include other misconduct that she has not yet discovered.

Pursuant to FINRA Rule 12213, Claimant requests that this arbitration hearing be in Buffalo, New York because Buffalo is the hearing location “closest to the customer’s residence at the time of the events giving rise to the dispute …”

Due to Shirley’s advanced age and serious health issues, Claimant ask that this proceeding be granted expedited hearing status.

**THE PARTIES**

1. **Shirley Kerwin**

Shirley Kerwin is an 81-year-old widow who lives alone in Scottsville, New York, a suburb of Rochester, New York. She is a retired janitor. Prior to his passing in 2004, her husband was a retired truck driver. Shirley does not have any children.

Shirley believes she invested approximately $400,000 with AXA which was the totality of her and her husband’s life savings. Over the course of her relationship with Puccio, he advised her to purchase an AXA Equi-vest variable annuity, an AXA Accumulator Plus IRA annuity, a Transamerica variable annuity and an American National annuity. The vast majority of her money was invested in annuities. After her husband passed away, Puccio advised her to purchase more life insurance. Other than his large commission, Shirley has no idea why Puccio advised her – a widow without any heirs or dependents – to buy more life insurance. Shirley also believes that Puccio switched her out of a dividend paying life insurance policy to purchase more life insurance.

As noted above, in addition to the unsuitable annuity and life insurance advice, Puccio stole a substantial sum of money from Shirley. Having worked her entire life making an honest living, she is now destitute. She lives on social security and the $475 per month she receives based on Puccio’s restitution order. After Puccio told her she had run out of money, he set up a reverse mortgage for her. This has all had a negative impact on her home equity.

1. **Respondent AXA Advisors LLC**

AXA is a FINRA registered brokerage firm with its principal place of business in New York, New York. It is regulated by the Securities and Exchange Commission and FINRA. AXA employs registered representatives all over the country and does business in 53 U.S. states and territories.

In March 1999, AXA hired Puccio. This was Puccio’s first job as a FINRA registered representative. As a result, not only did AXA determine he was worthy of being held out to the investing public as a AXA registered representative, it also agreed to train him. In August 2009, Puccio left AXA after having an on-going disagreement with someone in his group or team.

In January 2011, after a 17-month period of employment with CCO Investment Services Corp., AXA re-hired Puccio, thereby determining that he was worthy of being held out to the investing public as an AXA registered representative. In so doing, AXA undertook the obligation of properly supervising Puccio. Prior to re-hiring Puccio in 2011, AXA knew that he was having trouble paying his bills. It hired him and failed to put him on heightened or enhanced supervision despite this knowledge.

**NON-PARTY FRANCESCO PUCCIO**

On July 15, 2015, after Shirley’s criminal complaint, Puccio was charged with two felonies, second-degree grand larceny and fourth-degree conspiracy for allegedly stealing an elderly woman’s life savings. According to New York State troopers, Puccio “cultivated the relationship” and “liquidated her retirement accounts and investments, then systematically transferred the money through a series of unsecured loans and distributions to accounts held individually by himself and [his co-conspirator].”

The fact that Puccio was tempted to take advantage of elderly clients should not come as a great surprise given his disclosed financial problems. In fact, roughly one and one-half years before his scheme to reap commissions and defraud Shirley began, Puccio paid out well over $10,000 to satisfy liens placed against him by Wells Fargo Financial Cards and HSBC Bank.

The credit card liens were modest compared to the issues Puccio was having with various tax authorities. On March 28, 2012, the IRS filed a $58,437 lien on Puccio’s assets. On March 11, 2014, the New York State Department of Taxation and Finance filed a $28,844 lien on Puccio’s assets. On April 1, 2014, the IRS filed a $124,754 lien on Puccio’s assets. Each of these liens were red flags that should have been followed up on by AXA.

On July 23, 2015, as a result of the criminal charges, FINRA sent Puccio a letter requesting documents and information. Puccio ultimately refused to respond to multiple requests for documents and information. On August 13, 2015, Puccio signed an AWC consenting to his permanent bar from the securities industry.

**FACTUAL BACKGROUND**

Shirley became a client of Puccio’s during his first period of employment with AXA. In 2013 or 2014 Puccio showed up at Shirley’s house unannounced and proceeded to tell her that she had run out of money. He attempted to blame the financial support that Shirley had been providing to her brother with cancer as his excuse, but Shirley knew those withdrawals could not have possibly accounted for such a severe loss in principal. Shirley was devastated, but after pulling herself together, she consulted with a friend who advised her to ask the New York State Police to investigate. Shirley later filed a criminal complaint.

Shirley was then asked to provide records to the authorities. That led her to contact AXA about her account statements. Shockingly, AXA told her that there was no file for her or any record of her being an AXA client.

On August 4, 2014, Puccio was confronted at Shirley’s home by a New York State Trooper. In his possession at the time were the deed to Shirley’s home, her will, social security card and car loan documents. According to Puccio, these documents were in his possession because he was facilitating a reverse mortgage and trying to minimize her recurring expenses.

A few months after this confrontation Puccio was arrested and charged with the crimes mentioned above. He later pled guilty to one count of grand larceny.

Without any assistance from AXA, the brokerage firm that employed Puccio and earned money based on his relationship with Shirley, Shirley put together the documentation necessary to demonstrate to the New York State Police that she had been defrauded. Her documents also revealed that Puccio and AXA had sold to Shirley a National Integrity annuity, AXA Equivest variable annuity, AXA Acumulator Plus IRA annuity, Transamerica variable annuity, and AXA Equitable Flexible Premium variable life policy.

FINRA, and its predecessor, the NASD, has paid special attention to annuity abuses since the mid-1990s. Of particular concern is the long surrender periods. The surrender periods are structured by the annuity company to ensure it will recoup the large up-front commission it paid to the selling broker.

NASD Notice to Members 96-86 reminds brokers to consider if the customer is in a position to “fully appreciate how much of the purchase payment is allocated to cover insurance or other costs and the customer’s ability to understand the complexity of variable insurance products generally.”

NASD Notice to Members 99-35 reminds brokers that they should “discuss all relevant facts with the customer, including the liquidity issues such as potential surrender charges and IRS penalty fees, including mortality and expense charges …”

Puccio failed to do that in this instance. Puccio did not described the commission structure of the life insurance policies or the annuities, the long surrender periods or many of the relevant facts prior to soliciting the purchase of these policies and annuities. As a result, Shirley invested without knowing these salient details about these products.

Upon information and belief, large withdrawals were taken from these variable annuity products to fund Puccio’s fraud. A fraud perpetrated while he was registered with AXA, the allegations of which he has already admitted are true.

**JURISDICTION**

This case is arbitrable pursuant to the Federal Arbitration Act and the Arbitration clauses contained in (a) the Licensing Agreement between Respondent and FINRA, (b) the NASD Code of Arbitration, including Rule 12200 of the Code, and (c) the client agreement between Claimant and Respondent. Moreover, all of the arbitrability requirements are satisfied in this case. Respondent is a broker-dealer, FINRA member, and FINRA associated persons; Claimant was a customer of Respondent; and this dispute arises in connection with Respondent’s business activities. Therefore, Respondent is bound by the FINRA Code to arbitrate this dispute.

**LEGAL BASES UPON WHICH RELIEF CAN BE GRANTED**

* 1. **VIOLATIONS OF FINRA RULE 2111: RECOMMENDING AND SELLING SECURITIES WITHOUT A REASONABLE BASIS.**

Respondent violated FINRA Rule 2111 by recommending and selling the variable annuities and insurance policies to Shirley without first conducting adequate due diligence and gaining a reasonable basis to make such recommendations and sales. AXA also failed to supervise the “loan” or “loans” that Puccio sought and secured from Shirley. FINRA Rule 2111 mandates that securities broker dealers:

must have a *reasonable basis* to believe that a recommended transaction … involving a security … is suitable for the customer, based on the information obtained through the *reasonable diligence* of the member or associated person to ascertain the customer's investment profile. A customer's investment profile includes, but is not limited to, the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs, risk tolerance, and any other information the customer may disclose to the member or associated person in connection with such recommendation.

FINRA Rule 2111(a) (*emphasis supplied*).

            FINRA has admonished its members that their suitability duties are comprised of “three main obligations: reasonable-basis suitability, customer-specific suitability, and quantitative suitability.”  FINRA Rule 2111.05 (Supplementary Material).  It explained the three obligations as follows:

(a) The reasonable-basis obligation requires a member or associated person to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least *some* investors. In general, what constitutes reasonable diligence will vary depending on, among other things, the complexity of and risks associated with the security or investment strategy and the member's or associated person's familiarity with the security or investment strategy. A member's or associated person's reasonable diligence must provide the member or associated person with an understanding of the potential risks and rewards associated with the recommended security or strategy. The lack of such an understanding when recommending a security or strategy violates the suitability rule.

(b) The customer-specific obligation requires that a member or associated person have a reasonable basis to believe that the recommendation is suitable for a particular customer based on that customer's investment profile, as delineated in Rule 2111(a).

(c) Quantitative suitability requires a member or associated person who has actual or de facto control over a customer account to have a reasonable basis for believing that a series of recommended transactions, even if suitable when viewed in isolation, are not excessive and unsuitable for the customer when taken together in light of the customer's investment profile, as delineated in Rule 2111(a). No single test defines excessive activity, but factors such as the turnover rate, the cost-equity ratio, and the use of in-and-out trading in a customer's account may provide a basis for a finding that a member or associated person has violated the quantitative suitability obligation.

FINRA Rule 2111.05 (*emphasis in the original*).

Thus, FINRA Rule 2111.05 makes clear that the first prong of the suitability analysis – *before a product* *is even presented to a customer* – requires a broker-dealer firm to conduct reasonable due diligence as to the product. *Id*. Only after the broker-dealer, following such reasonable due diligence, has acquired a reasonable basis to believe that the product “is suitable for at least *some* investors,” id., is the broker-dealer allowed to present that opportunity to its customer and proceed with the other steps of the suitability analysis. In other words, the first step of the suitability analysis – which must occur before the broker-dealer determines whether or not to present the product to the customer – is *focused on the product, not the customer*. The second and third steps of the suitability analysis are focused on the customer – i.e. on his or her investment risk profile and the appropriate concentrations of various investments in the customer’s portfolio.

Ignoring FINRA and SEC due diligence duties, AXA recommended the variable annuities and life insurance products to Shirley without conducting an adequate investigation to obtain reliable information about those investments and their sponsor, and without having a reasonable basis to make such recommendations based on Shirley’s objectives and goals, in violation of Rule 2111. AXA failed to adequately investigate the numerous red flags surrounding the investments and Puccio which pointed to violations of the securities rules and regulations. Respondent also ignored Shirley’s investment needs and best interests in recommending the sale of these products that provided enormous commissions to AXA and its broker, Puccio.

As a direct and proximate result of Respondent’s recommendations and sales of unsuitable investments to Shirley, Shirley has been damaged in an amount to be determined at the hearing of this cause, and is entitled to rescission.

* 1. **VIOLATIONS OF FINRA RULE 2110.**

Rule 2110 mandates that broker-dealers, in the conduct of their business, “observe high standards of commercial honor and just and equitable principles of trade.” NASD Rule 2110. FINRA has stated that broker-dealers:

have an obligation of fair dealing in actions under the general anti-fraud provisions of the federal securities laws. The Commission bases this obligation on the principle that when a securities dealer opens his business he is, in effect, representing that he will deal fairly with the public… Usually, any breach of the obligation of fair dealing as determined by the Commission under the anti-fraud provisions of the securities laws could be considered a violation of the Association’s Rules.

IM-2310-2(d) (Fair Dealing with Customers).

Securities industry regulators have warned that violations by broker-dealers of SEC or NASD rules or regulations are inconsistent with the just and equitable principles of trade and have found that such violations also constitute violations of NASD Conduct Rule 2110. *See Alvin W. Gebhart*, Exch. Act Rel. No. 53136, 2006 SEC LEXIS 93, at \*54 n.75 (2006), *rev’d and remanded in part on other grounds sub. nom* *Gebhart v. SEC*, 2007 U.S. App. LEXIS 27183 (9th Cir. 2007).

AXA’s conduct here was literally criminal. In addition, it sold to Shirley high commission and high fee annuities and life insurance policies that were the vehicles Puccio used to defraud Shirley. AXA then refused to help Shirley, even going so far as to deny the existence of a customer relationship with her. Obviously, this conduct is a far cry from “high standards of commercial honor and just and equitable principles of trade.”

As a direct and proximate result of Respondent’s conduct, Claimant has been damaged in an amount to be determined at the hearing of this case and is entitled to compensation.

* 1. **NEGLIGENCE**

Respondent was negligent in reviewing, agreeing to sell, recommending, and selling the annuities and life insurance policies to Shirley. Such negligence arose vicariously out of the unlawful sales to Shirley by Puccio. It also arose out of Respondent’s negligent supervision of Puccio, his sales practices and his outside business activities.

To recover for negligence, plaintiffs must prove the existence of a duty, breach of that duty, injury, and a causal connection between the duty breached and the injury suffered.

AXA owed Shirley a duty to act as a reasonable broker-dealer and/or registered representative would do under the same or similar circumstances, in connection with its review, recommendation, supervision and sales of all of the advice it gave to Shirley. The duties set forth herein, and more fully alleged elsewhere in this Statement of Claim, arise from common law, the fiduciary nature of the broker-customer relationship; the regulations, customs and usage of the brokerage trade; Respondent’s internal policies and procedures; and state and federal statutes.

As a direct and proximate result of AXA’s negligence, Shirley has been damaged in an amount to be determined at the hearing of this case.

* 1. **MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACTS**

As stated above, AXA made numerous misrepresentations and omissions of material fact to Shirley regarding its sale of the annuities, life insurance policies, lack of reasonable basis to recommend such products as well as the felony fraud that was perpetrated upon her.

The Restatement (Second) of Torts has described the claim of misrepresentation as follows:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552(1), (2) (1977).

AXA served as Shirley’s broker-dealer and investment advisors. Respondent understood and accepted the trust and reliance reposed in them by Shirley and specifically understood that Shirley looked to them to select suitable investments. Shirley justifiably relied on AXA material omissions and negligent misrepresentations when she purchased the annuities, life insurance investments and transferred money to Puccio in furtherance of his fraud as recommended by Respondent.

As a direct and proximate result of her reliance upon AXA’s misrepresentations in connection with Shirley’s investments, Shirley has been damaged in an amount to be demonstrated at the hearing.

* 1. **BREACH OF FIDUCIARY DUTY**

AXA, who was Shirley’s financial advisor, breached its fiduciary duties. Brokers who approach their customer and recommend that the customer purchase an investment have a fiduciary duty to independently investigate that investment before recommending it. *See SEC v. Glt Dain Rauscher, Inc.*, 254 F.3d 852, 857-858 (9th Cir. 2001) (stating that a financial professional “had a duty to make an investigation that would provide him with a reasonable basis for a belief that the key representations in the statements provided to the investors were truthful and complete.”). Shirley’s relationship with AXA was one of a fiduciary based on contract, her relationship with AXA and the reliance she placed on AXA and Puccio to offer sound, unconflicted financial advice.

Respondent held the entire trust and confidence of Shirley on the subject of investments. Respondent failed to adequately investigate the annuities and life insurance policies, recklessly ignored a plethora of red flags and problems surrounding Puccio, concealed from Shirley material information regarding the investments, and actively, unreasonably, and illegally induced Shirley to invest her money in a way that has left her destitute.

As a direct and proximate result of AXA’s breaches of the fiduciary duties owed to Shirley in connection with its investment recommendations, Shirley has been damaged in an amount to be determined at the hearing.

* 1. **FRAUD**

AXA’s misrepresentations and omissions, made primarily through Puccio, were false and made for the purpose of inducing Shirley to make unsuitable investments. As a long-standing client, AXA knew that Shirley trusted it and that she would justifiably rely on those misrepresentations and omissions. Shirley’s reliance on AXA caused her to make unsuitable investments, including but not limited to the loan scheme Puccio devised for which he is now a convicted felon.

As a direct and proximate result of AXA’s fraudulent conduct, Shirley has been damages in an amount to be determined at hearing.

**RELIEF REQUESTED**

As a result of the course of conduct outlined above, AXA is liable to Shirley as follows:

(1) for all losses of principal suffered by Shirley;

(2) for all interest, commissions and fees paid by Shirley;

(3) for the loss of income that would have been received had Shirley’s accounts been managed properly, as well as other losses, foreseeable or not, that Shirley has suffered, including non-pecuniary losses;

(4) for attorneys’ fees, costs and other expenses;

(5) for interest, both pre-judgment and post-judgment;

(6) for all other sums Shirley is entitled to at law or equity; and

(7) for punitive damages.

Dated: April 18, 2018 Respectfully submitted,

\_\_\_/s/ Jason J. Kane

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