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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN FRANCISCO**

11 Elizabeth Adler, Conservator of the Person
and Estate of Marc Arsenault,

12 Plaintiff,

13 vs.

14 Eduardo Marcelino, Marc Rohrer,
15 Scott Williams, CitiCorp Investment Services,
Inc., CitiCorp Insurance Agency of California,
16 Citigroup Life Insurance Agency, LLC,
CitiCorp Life Agency, LLC, Citigroup, Inc.,
17 Allstate Life Insurance Company, and
Does 1 through 20,

18 Defendants.

20 Conservatorship of the Person and Estate of
21 Marc Arsenault,

22 Conservatee, PCN-07-290196

24 In the Matter of the Marc
Arsenault Trust,

PCN-07-290296

Case No. CGC-09-495267

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
DEFENDANTS' MOTION TO COMPEL
ARBITRATION AND STAY ACTION**

Date: April 14, 2010
Time: 9:30 AM
Dept: 301

Action filed: December 17, 2009
Trial date: Not yet scheduled

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1 **1. Summary of facts.**

2 Marc Arsenault is an 86 year old retiree and long-time resident of San Francisco. He was
3 born in Quebec, Canada, and his native language is French. He moved to San Francisco in 1963 and
4 became a naturalized U.S. citizen. Marc has limited formal education and worked primarily as a
5 cook. For many years, Marc lived with his wife, Adele, in an apartment on California Street. Adele
6 died in July, 2006, and Marc's closest relatives are an elderly sister, two nephews, and a niece, all of
7 whom live in Quebec.

8 Marc retired in October 1982, and thereafter received a small pension from the San
9 Francisco Culinary Bartenders and Service Employees Union. During the periods relevant to this
10 action, Marc's income (from Social Security, pensions, and interest) was as follows:

<u>Year</u>	<u>Income</u>
2002	\$10,358
2003	\$12,460
2004	\$10,702
2005	\$16,363
2006	\$20,340
2007	\$8,297

15 Marc and his wife, Adele, were quite frugal all of their lives and accumulated assets of
16 approximately \$480,000. These assets were held primarily in cash and consisted of certificates of
17 deposit and savings accounts.

18 Beginning as early as 2002, Marc began exhibiting serious cognitive impairment. During
19 this time, Marc was a Kaiser Permanente member and received medical treatment at its facilities in
20 San Francisco. His primary complaints were orthopedic relating to a serious hip disability for which
21 he underwent two surgeries. These surgeries were less than successful, and Marc experienced a fair
22 amount of discomfort. Marc also suffers from coronary heart disease. While his primary treatment
23 at Kaiser related to orthopedic problems, various health care personnel spontaneously noted his
24 declining cognitive function and need for intervention.

25 On July 3, 2006, Adele died; Marc continued to live alone in their apartment on California
26 Street. Over the next 12 months, Marc was the victim of at least three predatory exploitative
27 assaults by strangers. On July 7, 2006, October 19, 2006, and on June 19, 2007, Marc was accosted
28 by strangers who took Marc to his bank so that he might withdraw funds. In one incident, Marc

1 withdrew \$66,000; it is unclear whether all or only some of this money was delivered to this
2 predator. On another occasion, the bank teller became suspicious and called police. The predator
3 left the scene before the police arrived and the officers drove Marc home. Unfortunately, Marc was
4 incapable of recollecting the circumstances under which he had met this predator. During this
5 period, Marc also “lent” \$50,000 to the manager of his apartment building. This loan was unsecured
6 and improperly documented but these funds were eventually recovered.

7 On June 29, 2007, ten days after the third predatory assault and at the urging of Adult
8 Protective Services, this court appointed Elizabeth Adler, a private fiduciary, temporary conservator
9 of the person and estate of Marc. On September 20, 2007, the court appointed Adler permanent
10 probate conservator, and thereafter letters of conservatorship issued. On October 9, 2007, Marc was
11 relocated from his apartment to a licensed residential care facility with the capacity to care for his
12 special needs.

13 Erika Falk, Psy.D., is Director of Geriatric Assessment & Psychological Services at the
14 Institute on Aging in San Francisco. According to a comprehensive neuro-psychiatric evaluation
15 performed by Dr. Falk, Marc suffers from advanced and progressive dementia. It is Dr. Falk’s
16 opinion that Marc was of unsound mind and substantially unable to manage his financial resources
17 or resist fraud or undue influence at least as early as January 2004. (A true and correct copy of Dr.
18 Falk’s written report is attached as Exhibit 1 to the accompanying Declaration of Steven Riess.)

19 For many years, Marc and Adele did all of their banking at the CitiBank branch located at
20 1801 Van Ness Avenue in San Francisco. As a result of Marc’s frequent visits and friendly nature,
21 he became quite familiar with the CitiBank tellers. Located inside the CitiBank branch are life
22 agents and registered representatives who work for affiliated Citigroup financial services companies
23 and who seek to sell various investments and insurance products to CitiBank customers. To the
24 unsophisticated and unwary customer, this sales force appears to be merely an extension of
25 CitiBank’s banking operation. From May 1999 until October 2006, these agents sold Marc and
26 Adele at least seven separate insurance products. The combined premiums for these products
27 exceeded \$470,000 and consisted of five fixed and variable annuities and two single premium life
28 policies. The effect of these purchases was to lock up the available assets of Marc and Adele for

1 decades and to subject these funds to substantial penalties should the funds be withdrawn. Perhaps
2 most egregious was that as recently as October, 2006 – after a catatonic episode, at least two
3 incidents of predatory elder abuse assaults, and more than two years of documented dementia –
4 Marc was sold a sixth and seventh insurance product: a non-qualified flexible premium fixed
5 deferred annuity issued by AIG Insurance Company with a premium of \$220,000 that would mature
6 on January 24, 2028, when Marc would be 104 years old and a single payment life insurance policy
7 for \$10,000. In other words, the Citigroup agents not only cleaned-out Marc’s remaining funds for
8 the AIG annuity but they sold him a life insurance policy which paid benefits upon his death
9 notwithstanding that his wife had already predeceased him, that he had limited resources, that he at
10 times could not remember his own age or the names of his relatives, that he had no children or
11 dependents, and that his closest relatives were an elderly sister and three distant relatives who lived
12 in Quebec and were in no way in need of such minimal insurance protection.

13 Prior to commencing this action, AIG agreed to return all of Marc’s funds held in the AIG
14 annuity and agreed to waive all penalties and administrative fees. Unfortunately Allstate, the issuer
15 of the remaining insurance products would not similarly agree. Accordingly, this action was brought
16 principally against Allstate seeking the return of Marc’s money and secondarily against the
17 individual agents and their employers for their wrongful conduct in selling these products.

18 **2. This statutory action against Allstate is brought pursuant to Welfare &**
19 **Institutions Code § 15657.6.**

20 In 2008, Senate Bill 1140 substantially revised the Elder Abuse Act (Welfare & Institutions
21 15600 *et seq.*) and added new W & I Code § 15657.6. This section is entitled “Return of property to
22 elder or dependent adult lacking capacity” and provides:

23 A person or entity that takes, secretes, appropriates, obtains, or retains, or assists in
24 taking, secreting, appropriating, obtaining, or retaining the real or personal property of
25 an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to
26 Section 812 of the Probate Code, or is of unsound mind, but not entirely without
27 understanding, pursuant to Section 39 of the Civil Code, shall, upon demand by the elder
28 or dependent adult or a representative of the elder or dependent adult, as defined in
subdivision (d) of Section 15610.30, return the property and if that person or entity fails
to return the property, the elder or dependent adult shall be entitled to the remedies
provided by Section 15657.5, including attorney’s fees and costs.

28 The elements of a cause of action brought pursuant to W & I Code § 15657.6 are (1) that the

1 defendant “obtained” the property of the elder, (2) at a time when the elder lacked capacity or was
2 of unsound mind, (3) that the elder demanded the return of the property, and (4) that the defendant
3 failed to return the property. Plaintiff has alleged facts supporting each of these elements against
4 Allstate. Elements (1), (3), and (4) are not in dispute; the only factual matter potentially in dispute is
5 element (2) – whether Marc lacked capacity at the time he was sold the Allstate products. Civil
6 Code § 39(b) creates a presumption that a plaintiff is of unsound mind if it is demonstrated that he is
7 substantially unable to manage his financial resources or resist fraud or undue influence. This
8 evidence is provided by Dr. Falk’s report and the evidence of at least three elder abuse assaults;
9 accordingly, this presumption shifts the burden of proof to Allstate. Plaintiff anticipates that an
10 adjudication limited to this issue will resolve this action against Allstate.

11 **3. This motion of Citigroup seeks to stay this action and compel it to arbitration.**

12 The complaint also states five causes of action against the three agents and their employers:
13 (Count 1) Elder financial abuse; (Count 3) Breach of fiduciary duty; (Count 4) Negligence; (Count
14 5) Recovery of property pursuant to Probate Code § 850; and (Count 6) Wrongful taking of
15 property pursuant to Probate Code § 859. One of the agents (Marcelino) and several of the
16 Citigroup entities now contend that this action must be stayed and compelled to arbitration asserting
17 that Marc, and later his conservator, signed account agreements that contain mandatory arbitration
18 provisions.¹ Defendants’ motion should be denied for the following reasons:

19 (1) Marc lacked capacity to enter into the account agreements, and the conservator did
20 not enter into an account agreement with any of these defendants. Moreover, any agreement to
21 arbitrate signed by the conservator was ineffective absent prior court approval.

22 (2) Compelling arbitration in this action would subvert important public policies of the
23 State of California that were enacted specifically to protect elders from this type of economic
24 exploitation.

25 (3) Even if arbitration were compelled with regard to the moving parties, there is no
26 basis for including the claims against Allstate and the remaining unrepresented defendants. Severing

27 _____
28 ¹ While it is not clear from defendants’ moving papers, defendants apparently seek to stay the entire action, including
the action against Allstate and the currently unrepresented defendants.

1 plaintiff's claims into an arbitration and a court action could lead to inconsistent results, would
2 constitute an inefficient use of resources, and would prejudice plaintiff by exhausting his remaining
3 funds in the prosecution of two actions.

4 **4. Marc lacked capacity to enter into an account agreement, and the conservator**
5 **did not enter into an account agreement with any of these defendants. Moreover, any**
6 **agreement to arbitrate signed by the conservator was ineffective absent prior court approval.**

7 The declaration of Steven Victor submitted in support of this motion alleges that Marc
8 signed account agreements containing arbitration provisions with Citicorp Investment Services on
9 November 29, 2004, and again on October 6, 2006. The neuro-psychiatric evaluation demonstrates
10 that Marc lacked capacity and was of unsound mind at these times. Moreover, Civil Code § 39(b)
11 shifts the burden of proof to defendants that Marc had capacity. Defendants have not – and cannot –
12 offer any evidence contravening Dr. Falk's evaluation. If Marc lacked capacity at the time the
13 account agreements were signed, then consent was absent and the agreements are unenforceable.

14 Defendants also assert that this action must be abated and compelled to arbitration because
15 Ms. Adler, the conservator, signed an account agreement on July 23, 2007 on behalf of Marc. The
16 declaration of Ms. Adler states that she initially introduced herself to the Citigroup representatives
17 as the conservator of Marc's estate and presented them with Letters of Conservatorship. The
18 Citigroup representatives cursorily reviewed the documents but told her that they would not permit
19 her access to the accounts, nor provide her with any information regarding the accounts, unless she
20 signed their form establishing her as conservator of Marc's accounts. Ms. Adler insisted that
21 Citigroup was required to recognize the Letters of Conservatorship but the representatives would
22 not relent. In order to obtain the information she required, Ms. Adler signed their document. She
23 understood from her discussions with the representatives that these documents merely opened an
24 account recognizing her as the conservator of Marc's estate.

25 The account agreement offered by defendants is a two page document that indicates that the
26 agreement is between Ms. Adler, as conservator of Marc, and two entities: CitiGroup Global
27 Markets, Inc. ("CGMI") and Smith Barney. The agreement states:

28 "In consideration of Citigroup Global Markets, Inc. ("you") accepting an account for
me/us ("I") acknowledge that I have read and agree to the terms of the attached Client
Agreement. . . . Smith Barney requires your consent to the applicable provisions of this

1 Agreement in order to open and maintain your account.”

2 The names CGMI and Smith Barney do not appear anywhere other than on this document: they do
3 not appear in any of the interactions between Marc and the sales agents, they do not appear
4 anywhere in the documents by which these agents sold Marc the many insurance products, and they
5 were not named as defendants in this lawsuit. In other words, the names CGMI and Smith Barney
6 appear for the first and only time in the account agreement signed by Ms. Adler. Nevertheless,
7 defendants assert that by entering into this agreement with CGMI and Smith Barney, Ms. Adler
8 fundamentally altered the rights of Marc against agents Marcelino, Rohrer, and Williams and
9 against the entities that are identified in the sales documents and named in the complaint.

10 Paragraph two of Mr. Victor’s declaration asserts:

11 “CitiGroup Global Markets, Inc. (“CGMI”) and Citibank are affiliated companies under
12 the common control of Citigroup Inc. Smith Barney was a division and service mark of
13 CGMI. CGMI is a registered broker-dealer providing brokerage services to retail
14 customers, including individuals. Defendants CitiCorp Insurance Agency of California,
15 Citigroup Life Insurance Agency, LLC, and CitiCorp Life Agency, LLC, are part of
16 CGMI.”

17 Mr. Victor does not explain the significance of being “affiliated companies under common control,”
18 the significance of Smith Barney being “a division and service mark of CGMI,” nor the significance
19 that the named entities “are a part of CGMI.” An affiliated company commonly has a continuing
20 contractual relationship with another company, but a third party who enters a contract with one
21 company is not thereby bound to the affiliated company. Similarly, a division is normally an
22 internal organizational structure and has no legal significance with regard to third parties. A service
23 mark is not a legal entity. Being “part of CGMI” is equally meaningless. Accordingly, defendants
24 have offered no evidence that by opening an account with Smith Barney, Ms. Adler compromised
25 Marc’s rights against the individual agents or the entities named in the prior transactions.

26 Defendant CGMI appears to be the global corporate parent of a large number of both
27 existing and now defunct subsidiary corporations. Undoubtedly, CGMI has complex corporate
28 governance, risk management, and international tax avoidance reasons for creating this maze of
operating structures. However, it would be grossly unfair to impute knowledge of these

1 relationships where they are entirely undisclosed to the consumer.²

2 Even if it is assumed for the sake of argument that Ms. Adler's signature on the Smith
3 Barney account application consented to arbitrate Marc's claims against the agents and their
4 employers, it was ineffective to bind Marc because the agreement was never approved by the court.
5 Probate Code § 2406 provides that an agreement by a conservator to arbitrate is ineffective "unless
6 it has first been approved by the court and a copy of the approved agreement is filed with the court."
7 Ms. Adler believed that in signing the account agreement, she was merely satisfying Smith
8 Barney's requirement to open an account in her name as the conservator of Marc, not that she was
9 agreeing on his behalf to arbitrate existing claims. In any event, the agreement to arbitrate was not
10 "first" approved by the court and was never filed. Accordingly, it is ineffective to bind Marc to

11 _____
12 ² The following describes the various entity names associated with this action:

13 (1) CitiBank: The signs on the doors of the facility where the events occurred announce that it is operated by
14 CitiBank. At least one of the insurance products sold to Marc indicates the name CitiBank. The fictitious business name
15 index maintained by the Clerk of the City and County of San Francisco has no entry for CitiBank. The California
16 Department of Corporations indicates two corporate records for the name CitiBank; one is forfeited and the other is
17 dissolved.

18 (2) CalFed Financial and Insurance Services: At least one of the insurance products sold to Marc indicates the
19 name CalFed Financial and Insurance Services. According to the Department of Insurance, this entity is an "inactive"
20 licensee. According to the Department of Corporations, no such entity exists.

21 (3) CitiCorp Investment Services, Inc.: Two of the insurance products sold to Marc indicate the name CitiCorp
22 Investment Services, Inc. This entity is an existing California corporation.

23 (4) CitiCorp: Two of the insurance products sold to Marc indicate the name CitiCorp. According to the
24 Department of Corporations, there are 54 entities with the name CitiCorp: 23 are surrendered; 20 are forfeited; 2 are
25 dissolved; 1 is suspended; and 8 are active.

26 (5) CitiCorp Insurance Agency of California: At least one of the insurance products sold to Marc indicates the
27 name CitiCorp Insurance Agency of California. According to the Department of Insurance, this entity is an "inactive"
28 licensee. According to the Department of Corporations, this corporation was surrendered in 1992.

(6) Citigroup Life Insurance Agency, LLC: According to the Department of Insurance, this entity is an "active"
licensee. However, according to the Department of Corporations, no such entity exists.

(7) CitiGroup Life Agency, LLC: The California Department of Insurance indicates that Eduardo Marcelino is
licensed to transact insurance business on behalf of CitiGroup Life Agency, LLC. According to the Department of
Corporations, this is an active entity.

(8) CitiCorp Life Agency, LLC: According to the Department of Insurance, no such licensee exists. According
to the Department of Corporations, no such entity exists.

(9) CitiCorp Insurance Agency, Inc.: The California Department of Insurance indicates that Scott Williams is
licensed to transact insurance business on behalf of CitiCorp Insurance Agency, Inc. The California Department of
Corporations indicates that CitiCorp Insurance Agency, Inc. is a dissolved corporation.

(10) Smith Barney: The California Department of Corporations indicates eight entries for the name Smith
Barney. Six of these entries are either dissolved or surrendered; the remaining two are "Morgan Stanley Smith Barney
Global Impact Funding Trust, Inc." and "Smith Barney Realty, Inc." According to the Department of Insurance, no such
licensee exists.

(11) CitiGroup Global Markets, Inc.: According to the Department of Insurance, no such licensee exists.

(12) Citigroup, Inc.: According to the Department of Insurance, no such licensee exists. According to the
Department of Corporations, there are 15 entities with the name Citigroup: 2 are suspended; 4 are forfeited; 1 is
dissolved; and 8 are active.

1 arbitration.

2 **5. Enforcing defendants' arbitration agreement would subvert important public**
3 **policies of the State of California that were enacted specifically to protect elders from this type**
4 **of economic exploitation.**

5 In creating the Elder Abuse Act, the Legislature expressly recognized that elders and
6 dependent adults are particularly vulnerable, are targeted for abuse, and constitute a "disadvantaged
7 class" that the State has a responsibility to protect. (W & I Code § 15600.) The public policies
8 advanced by the Act include protecting elders from gross mistreatment – physical, psychological,
9 and economic – (*Covenant Care v. Superior Court* (2004) 32 Cal.4th 771, 786-87) as well as
10 providing effective remedies that promote recovery from the effects of exploitation (*Delaney v.*
11 *Baker* (1999) 20 Cal.4th 23). The important public policies advanced by the Elder Abuse Act
12 justify, among other things, authorizing prevailing elders to recover mandatory attorney's fees while
13 not permitting prevailing defendants to recover their fees. (*Wood v. Santa Monica Escrow Company*
14 (2007) 151 Cal.App.4th 1186, citing *Carver v. Chevron* (2004) 119 Cal.App.4th 498.) The Act
15 provides elders with an array of special protections and remedies – unavailable to other litigants –
16 that include:

- 16 (1) Mandatory reporting by private persons and investigation of suspected incidents of
17 abuse by public agencies. (Articles 3, 5, and 7.)
- 17 (2) Criminal prosecution of abuse together with victims' rights of restitution. (Article 8.)
- 18 (3) Right to attach orders and other provisional civil remedies. (W & I Code §
15657.01.)
- 19 (4) Protective orders specific to elder abuse. (W & I Code § 15657.03.)
- 20 (5) Concurrent jurisdiction of Probate and general civil courts. (W & I Code § 15657.3.)
- 21 (6) Compensatory damages, survival of general damages after the death of the plaintiff,
and punitive damages. (W & I Code § 15657.5.)
- 22 (7) Mandatory "one-way" attorney's fees. (W & I Code § 15657.5; *Wood v. Santa*
Monica Escrow Company (2007) 151 Cal.App.4th 1186.)
- 23 (8) Civil remedies and mandatory attorney's fees for failure to return property taken
from an incapacitated elder. (W & I Code § 15657.6.)
- 24 (9) Four year statute of limitations which runs from the date of discovery. (W & I Code
§ 15657.7.)
- 25 (10) Treble damages for particularly egregious conduct. (Civil Code § 3345.)

26 A law established for public purposes cannot be contravened by a private agreement (Civil
27 Code § 1668), and an agreement to arbitrate a controversy arising out of an alleged statutory
28 violation may not subvert the policies advanced by that statute. (*Armendariz v. Foundation Health*
Psychcare Services, Inc. (2000) 24 Cal.4th 83.) In *Armendariz*, an employee sued his employer for

1 wrongful termination alleging violations of the California Fair Employment and Housing Act
2 (FEHA). The employer sought to compel arbitration under an arbitration agreement limiting
3 recovery to back-pay, and the trial court held the entire arbitration agreement unenforceable. The
4 Court of Appeal reversed, holding that while the limitation of recovery to back-pay was contrary to
5 public policy, the remainder of the agreement could be enforced. The Supreme Court reversed the
6 decision of the Court of Appeal and ruled that the entire agreement to arbitrate violated public
7 policy and was therefore unenforceable. In so holding, the Supreme Court imposed “five minimum
8 requirements for the lawful arbitration” of non-waivable statutory rights. To be enforceable, the
9 arbitration agreement must: (1) provide for qualified neutral arbitrators; (2) provide an opportunity
10 for more than minimal discovery; (3) render a written award; (4) authorize all of the types of relief
11 available in a court proceeding; and (5) not impose burdensome expenses that would not be incurred
12 in a court proceeding. (*Armendariz*, 24 Cal.4th at 102.) The arbitration agreement in this case fails
13 to meet each of these minimum requirements and accordingly is unenforceable.

14 (1) Arbitration in this matter would not provide qualified neutral arbitrators. FINRA
15 rules of procedure would provide a panel of three arbitrators: one “non-public arbitrator” and two
16 “public arbitrators.” (Rules 12401(c) and 12402(b).) A non-public arbitrator is a securities industry
17 representative (Rule 12100(p)); a public arbitrator is a non-attorney who is not a securities industry
18 representative (Rule 12100(u)). A qualified neutral arbitrator is a person who “knows the laws in
19 question and understands the concerns of the parties.” (*Armendariz*, 24 Cal.4th at 104.) W & I Code
20 § 15657.3 provides for concurrent jurisdiction for Probate and general civil courts in elder financial
21 abuse actions. The Probate court has particular experience with issues involving elders, capacity,
22 conservatorship, and Probate Code remedies for the wrongful taking of property (Probate Code §§
23 850 and 859). General civil courts have particular experience with undue influence, fraud, breach of
24 fiduciary duty, and statutory remedies. An arbitration panel consisting of one securities industry
25 representative and two lay persons is unqualified to evaluate the capacity of plaintiff or adjudicate
26 these statutory claims for elder financial abuse. For this reason alone, the arbitration agreement in
27 this case does not pass muster under *Armendariz* and is unenforceable.

28 (2) Arbitration in this matter would not provide for more than minimal discovery: This

1 requirement is particularly important here where it is defendants who have most of the relevant
2 information in their possession. FINRA discovery procedures are limited primarily to the exchange
3 of documents. (Rule 12506.) But the primary evidence in this case involves the oral
4 misrepresentations made by the three agents to Marc, who of course lacks capacity and is unable to
5 testify. FINRA procedures do not authorize interrogatories or requests for admissions (Rule 12507),
6 and depositions are “strongly discouraged” and are available only in extremely limited
7 circumstances (Rule 12510). Disclosure of expert witnesses and their subsequent depositions are not
8 permitted. Plaintiff would be unable to adequately prepare this case in the absence of normal civil
9 discovery tools. Defendants can testify at the arbitration hearing to virtually anything without fear
10 of effective cross-examination. “Trial by ambush” would thus once again control the outcome.
11 While this procedure might be tolerated in a document intensive securities case, it would be
12 intolerable in a statutory elder abuse action. Applying FINRA procedures in this case would provide
13 for only minimal and ineffective discovery; for this reason alone, it does not pass muster under
14 *Armendariz* and is unenforceable.

15 (3) Arbitration in this matter would not provide for a written award: FINRA procedures
16 require that the decision of the arbitrators be in writing but any statement of the factual bases
17 supporting the award or the legal principles applied are optional. (Rule 12904(f).) There is also no
18 right to review. (Rule 12904(b).) Since the arbitration panel may simply announce a final result, it
19 may ignore with impunity, and thereby subvert, the public policies established by the Legislature in
20 the Elder Abuse Act. For this reason alone, it does not pass muster under *Armendariz* and is
21 unenforceable.

22 (4) The arbitration agreement does not authorize the types of relief available under the
23 Elder Abuse Act: The Supreme Court in *Armendariz* was particularly concerned with ensuring that
24 the plaintiff not lose in arbitration the rights to relief provided by the Legislature under FEHA. The
25 same concern exists here. The Elder Abuse Act provides exploited elders with an array of remedies,
26 including compensatory damages, survival of pain and suffering damages, punitive damages,
27 trebling of damages, mandatory “one-way” attorneys’ fees, and provisional remedies of attachment.
28 None of these remedies are provided by FINRA’s rules and procedures nor under the laws of the

1 State of New York.³ Defendants seek to force plaintiff to arbitrate his elder financial abuse claims in
2 a forum that would strip him of the statutory remedies expressly conferred by the Legislature to
3 promote important public policies. A law established for a public reason cannot be contravened by a
4 private agreement. (Civil Code § 3513.) Because this agreement does not satisfy the requirement
5 under *Armendariz* that the statutorily mandated remedies be available, this arbitration provision is
6 unenforceable.

7 (5) The agreement can not impose burdensome expenses that would not be incurred in a
8 court proceeding: Equally condemned in *Armendariz* was the imposition of arbitration fees not
9 imposed for access to the courts. The Supreme Court recognized that a mandatory arbitration
10 agreement can place the plaintiff “between the proverbial rock and a hard place – it prohibit[s] use
11 of the judicial forum, where a litigant is not required to pay for a judge’s services, and the
12 prohibitive cost [of arbitration that] substantially limit[s] use of the arbitral forum.” (*Armendariz*, 24
13 Cal.4th at 102.) The initial arbitration fee for plaintiff would be at least \$1,425 (Rule 12902(a).) In
14 addition, “hearing session fees” of at least \$1,125 per day are required. (Rule 12902(a).) Although
15 FINRA rules allow the award to later allocate arbitration expenses between the parties (Rule
16 12904(e)), plaintiff must still advance these expenses in order to proceed; these substantial expenses
17 are of course not required to proceed with this case in court. “[If] it is possible that [plaintiff] will be
18 charged substantial forum costs, it is an insufficient judicial response to hold that . . . that [he] may
19 be able to cancel these costs at the end of the process. . . .” (*Armendariz*, 24 Cal.4th at 110.) Marc
20 was stripped of his limited resources by the conduct of defendants. Defendants now seek to compel
21 Marc into arbitration with the consequence that he must pay substantial fees out of his remaining
22 resources. Not only is such a tactic grossly unfair, it does not pass muster under *Armendariz* and is
23 unenforceable.

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28 ³ Paragraph 7 of the Account Agreement provides that the agreement “shall be governed and construed in accordance with the laws of the State of New York.

1 **6. Even if arbitration were compelled with regard to the moving parties, there is**
2 **no basis for including the claims against Allstate and the remaining unrepresented**
3 **defendants. Severing plaintiff's claims into an arbitration and a court action could lead to**
4 **inconsistent results, would constitute an inefficient use of resources, and would exhaust**
5 **plaintiff's remaining funds needed for his maintenance.**

6 This motion to compel arbitration is brought by only one of the three individual defendants
7 (Marcelino but not Rohrer and Williams) and four of the six named entity defendants (Citigroup,
8 Inc., Citicorp Insurance Agency of California, Citigroup Life Insurance Agency, LLC, and Citicorp
9 Life Agency, LLC, but not Allstate Insurance Company or Citicorp Investment Services, Inc.).
10 Allstate has answered the complaint, Rohrer and Williams are being served by publication, and
11 Citicorp Investment Services, Inc. has been served but has not answered.

12 Where some, but not all, parties to a pending action are subject to arbitration, the court has
13 discretion to refuse to enforce the arbitration agreement so as to avoid conflicting determinations of
14 factual and legal issues. (Code of Civil Procedure § 1281.2(c); *Cronus Investments, Inc. v.*
15 *Concierge Services* (2005) 35 Cal.4th 376, 393.) The contractual right to arbitration should “yield if
16 there is an issue of law or fact common to the arbitration and a pending action.” (*Mercury Ins.*
17 *Group v. Sup. Ct.* (1998) 19 Cal.4th 332, 348.)

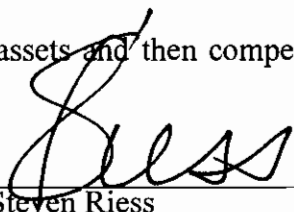
18 Forcing Marc to arbitrate his claims against these moving parties would result in two
19 proceedings. The conservator is currently attempting to provide for Marc's personal and medical
20 needs out of very limited resources, and Marc's assets are limited because of defendants' wrongful
21 conduct. Marc's remaining resources would be exhausted if he were required to prosecute two
22 separate actions to recover his funds.

23 **7. Conclusion.**

24 This is not a securities dispute, and a FINRA arbitration would be both inappropriate and
25 inequitable. This is a suit for elder financial abuse, a statutory action, arising from the systematic
26 and serial economic exploitation of an extremely vulnerable elder by licensed agents of a multi-
27 billion dollar financial services company. There is no evidence before this court of a valid and
28 enforceable agreement to arbitrate: Marc did not have capacity to consent to arbitration and any
agreement signed by Ms. Adler was not with the moving parties and, in any event, was ineffective
without prior court approval. Even if there was an arbitration agreement, it fails to meet the

1 minimum requirements imposed by the California Supreme Court in *Armendariz*. Finally, it would
2 be grossly unfair to allow defendants to strip Marc of his assets and then compel him to fight to
3 recover them in two separate forums.

4 Dated: March 29, 2010



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