

2008

Hicks v. UBS Financial Services : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THOMAS G. HICKS, an individual,

Petitioner/Appellee,

v.

UBS FINANCIAL SERVICES, INC., a
Delaware corporation,

Respondent/Appellant.

Appellate Case No.: 20080950

BRIEF OF APPELLEE

Appeal from the Judgment of the Third Judicial District Court
for Salt Lake County, Judge Robert P. Faust
Civil No. 080901999 (Consolidated with Civil No. 080902321)

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JURISDICTION

This Court has jurisdiction over final judgments of the district courts pursuant to Utah Code Annotated § 78A-4-103(2)(j) (2008).

STATEMENT OF THE ISSUES

Whether the trial court properly granted Thomas G. Hicks' ("Hicks") motion to vacate the arbitration award on the basis that Hicks was denied his rights to present evidence and cross-examine witnesses as guaranteed by Utah statute.

Standard of Review: In reviewing a district court's order vacating an arbitration award, this Court reviews the district court's conclusions of law for correctness and reviews the district court's findings of fact under the clearly erroneous standard. *See, e.g., Softsolutions v. Brigham Young University*, 1 P.3d 1095, 1099 (Utah 2000).

DETERMINATIVE STATUTES, RULES, AND REGULATIONS

I. Utah Code Ann. § 78B-11-124 (2008) provides:

(1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

(a) the award was procured by corruption fraud, or other undue means;

(b) there was:

(i) evident partiality by an arbitrator appointed as a neutral arbitrator;

(ii) corruption by an arbitrator; or

(iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing

contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(d) an arbitrator exceeded the arbitrator's authority;

(e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78B-11-116(3) not later than the beginning of the arbitration hearing; or

(f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78B-11-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.

II. Utah Code Ann. § 78B-11-116 (2008) provides:

(1) An arbitrator may conduct an arbitration in a manner the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and, among other matters, determine the admissibility, relevance, materiality, and weight of any evidence.

....

(4) At a hearing under Subsection (3), a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

....

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings

This appeal arises from the district court's decision to vacate an arbitration award because Hicks' ability to present material evidence and cross-examine a key witness was substantially hindered by the arbitration panel's ("the Panel") denial of Hicks' request for certain information undisputedly in UBS's possession.

From July 2006 until November 2007, UBS Financial Services, Inc. (“UBS”) and Hicks arbitrated their dispute arising out of Hicks’ employment with UBS. UBS sought to recover under two promissory notes signed by Hicks at the time he accepted an offer to work for UBS. (*See* Statement of Claim, R. 189-246.) Hicks sought recovery of unpaid commissions from UBS for his referral to UBS of the companies Extra Space Storage, Inc. (“Extra Space”) and Infinite Energy Company (“Infinite Energy”). (*See* Hicks’ Answer to Statement of Claim and Statement of Counterclaim, R. 248-56.) After a hearing on the matter, the Panel awarded Hicks approximately \$161,000 in referral fees that UBS had failed to pay him and awarded UBS the principal amount of approximately \$647,000 under the promissory notes. (*See* Amended Award, R. 329.)

In February 2008, Hicks filed a petition and motion to vacate the Award and UBS filed a petition to confirm the Award. (*See* R. 6-21; R. 1-12 (Case No. 2321).) On July 8, 2008, the district court issued a memorandum decision (“Memorandum Decision”), wherein the district court addressed the question of “whether the arbitration panel’s denial of [Hicks’] request for certain discovery, including deposing a UBS corporate representative, constitutes a ground for vacating that panel’s arbitration award.” (Memorandum Decision, R. 373.) The district court granted Hicks’ petition to vacate, finding that “the panel’s decision hindered [Hicks’] ability to present material evidence and his ability to adequately cross-examine Ms. Weisman, who was clearly a key witness in the arbitration proceeding.” (*Id.*)

On September 30, 2008, the district entered an order and final judgment vacating the Award based on the reasons set forth in the Memorandum Decision. (*See* Order and

Judgment Vacating Arbitration Award and Directing Rehearing, R. 411-12.) On October 24, 2008, UBS filed a Notice of Appeal. (R. 413-15.)

Statement of Facts

1. On September 14, 2000, UBS hired Hicks as a financial advisor in the Salt Lake City, Utah branch office. (*See Hicks Declaration*, R. 23.)

2. UBS offered Hicks a substantial signing bonus if he would bring his significant book of business with him and accept an employment position at UBS. (*See id.*, R. 24.)

3. Upon accepting the offer, UBS required Hicks to sign certain contracts including two promissory notes (the “Notes”) that stated if he terminated his employment with UBS, he would be required to pay back the signing bonus. Hicks was told at the time that he needed to sign the Notes because that was how UBS handled the signing bonus for tax and accounting purposes. (*See id.*)

4. According to their terms, the Notes were forgivable if Hicks stayed working for UBS for at least ten years. (*See id.*)

5. On February 27, 2006, approximately six years after he was hired, Hicks left his employment with UBS. (*See id.*)

6. Upon Hicks leaving the firm, UBS took the position that he owed it roughly \$650,000 for his alleged breach of the Notes. UBS filed a claim for arbitration to recover money Hicks allegedly owed it. (*See id.*)

7. Hicks filed a counterclaim to recover unpaid commissions from UBS for his referral to UBS of the companies Extra Space and Infinite Energy, resulting in

millions of dollars of work. It was undisputed at arbitration that Hicks referred these companies to UBS; the only question at issue was how much money Hicks was entitled to as a result of the work he referred to UBS. (*See id.*)

8. During the arbitration proceedings, it became clear to Hicks that any amount he allegedly owed to UBS on the Notes would be more than fully offset by the amount he was owed for unpaid commissions for the Extra Space deals and any deals involving Infinite Energy. Hicks recognized that there most certainly would be documents evidencing UBS's business interactions with Extra Space and Infinite Energy. (*See id.*, R. 25.)

9. Accordingly, on December 28, 2006, Hicks requested to take the deposition of a corporate representative knowledgeable about the scope and content of requested documents regarding UBS's interactions with Extra Space and Infinite Energy. (*See id.*; *see also* Hicks's Request for Depositions, R.31-34.) The Panel denied Hicks's request. (*See* Discovery Order dated March 29, 2007, R. 36-38.)

10. Hicks also requested to take the deposition of Virginia Weisman, UBS Executive Director, Business Development Group, so that Hicks could better understand the details of the Extra Space and Infinite Energy deals, and UBS's referral policy. (*See* Hicks's Request for Depositions, R.31-34.) The Panel denied Hicks's request to take Ms. Weisman's deposition but did direct Ms. Weisman to appear and give testimony at the evidentiary hearing and to produce all documents in her custody pertaining to the unpaid commissions due and owing to Hicks. (*See* Hicks Decl., R. 25; Discovery Order dated March 29, 2007, R. 36-38.)

11. UBS informed Hicks that there were no documents responsive to his request regarding any Infinite Energy deals. (*See* Letter from Hicks to UBS dated Sept. 14, 2007, R. 40.) However, on September 7, 2007, Hicks was notified by Infinite Energy that it did have documents evidencing a deal between UBS and Infinite Energy. (*See* Hicks Decl., R. 25.)

12. The document produced by Infinite Energy evidences a Term Loan Facility Commitment Letter between UBS and Infinite Energy dated September 19, 2005 (the “Infinite Agreement”). (*See* Infinite Agreement, R. 42-64.) According to the Infinite Agreement, UBS entered into a financial transaction whereby it would finance Infinite Energy with seventy-five (75) million dollars to acquire another company. (*See id.*) The Infinite Agreement provided for certain fee terms and also provided that UBS would act as the sole and exclusive advisor, arranger and book manager for the term loan facility and would exclusively manage the syndication of the term loan facility. (*See id.*) The Infinite Agreement was signed by the president of Infinite Energy and by two officers of UBS: James P. Boland and Warren Jervey. (*See id.*; Hicks Decl., R. 25-26.)

13. Hicks never received a referral fee for his role in directing Infinite Energy to UBS. Under the referral structure that UBS applied to Hicks for his referral of Extra Space, he stood to receive a commission on the Infinite Agreement of at least \$750,000. (*See* Hicks Decl., R. 26.)

14. On October 23, 2007, Ms. Weisman submitted an Affirmation stating, among other things, that “[b]ased on the search [she] conducted, no responsive documents exist with respect to any deal involving UBS and Infinite Energy because no

such deal was ever completed.” (Weisman Affirmation, R. 66-68.) In her Affirmation, Ms. Weisman states that she spoke to Christopher Abbate regarding the Infinite Energy deal, yet she does not state that she even spoke with Mr. Boland or Mr. Jervey about Infinite Energy – the two UBS officers who signed the Infinite Agreement. (*See id.*)

15. In light of Infinite Energy’s production of the Infinite Agreement and Ms. Weisman’s failure to speak with Mr. Boland or Mr. Jervey about the Infinite Agreement, UBS most certainly possesses documents that reference the multi-million dollar Infinite Agreement – such as email and correspondence to, from, and between Mr. Boland, Mr. Jervey, and Infinite Energy. Other Infinite deals may have existed as a result of Hicks’ referral of the company to UBS but Hicks has no way of knowing this. (*See Hicks Decl.*, R. 26.)

16. The Panel’s decision denying Hicks’ request to take the deposition of a corporate representative knowledgeable about the scope and content of requested documents regarding UBS’s interactions with Infinite Energy prevented Hicks from discovering documents that, in light of the above, are more than likely in the possession of UBS. And having been denied access to such documents, Hicks was also denied of the opportunity to use such relevant documents to cross-examine Ms. Weisman regarding her Affirmation. (*See id.*, R. 27.)

17. Hicks also requested UBS to produce documents evidencing exactly how much was made in fees on at least four deals for Extra Space. Some documents were produced but not all. (*See id.*)

18. The Panel's decision denying Hicks's deposition requests also denied Hicks the opportunity to determine exactly how much money UBS had received in the business transactions with Extra Space that UBS alleges to have consummated. If there was more money received as a result of transactions between UBS and Extra Space, Hicks would be entitled to a referral fee based on that money. (*See id.*)

19. During the arbitration proceeding, UBS alleged to have provided Hicks with a policy presentation in 2003 that outlined the referral fees that he could expect to obtain when referring clients to UBS. Hicks never received this policy presentation. Consequently, Hicks requested the Software Metadata for this 2003 document to determine whether the document was even created in 2003. UBS never produced this information even though it was repeatedly requested. (*See id.*)

20. Although Hicks had been paid some fees for his referral of Extra Space while he was employed by UBS, he was not paid what he was rightfully owed; Hicks was entitled to more fees. (*See id.*, R. 28.) For instance, Hicks was not aware of two other deals between UBS and Extra Space that UBS admitted at arbitration had in fact taken place. Moreover, Hicks cannot determine exactly how much he was owed for the first three deals because he did not have an opportunity to determine what documents existed relating to fees received by UBS for those deals and simply had to rely upon UBS to provide piecemeal parts of documents relating to those deals. Hicks was not afforded the opportunity to depose the agent for UBS who had knowledge of where all of the documents relating to these deals existed. (*See id.*)

21. The Arbitration Panel agreed that Hicks was entitled to more fees than UBS originally paid him. On January 3, 2008, the Arbitration Panel awarded Hicks \$54,445.31 plus interest as compensatory damages for the Extra Space IPO deal, and \$106,682.40 plus interest as compensatory damages on the Extra Space Private Equity deal. Had Hicks been afforded full opportunity to receive all documents relating to these deals, he would have received more money from the Panel. (*See* Panel’s Amendment to Award, R. 70-77; Hicks Decl., R. 28.)

22. Including interest, the Panel awarded UBS damages in the amount of approximately \$766,000. (*See* Panel’s Amendment to Award, R. 70-77.) The amounts that UBS was directed to pay Hicks – approximately \$161,000, plus interest – are to be off-set against the amounts Hicks owes UBS. (*See id.*, R. 73-74.)

23. On February 4, 2008, Hicks filed an amended petition and motion to vacate the Award on the basis that he was denied his rights to present material evidence and cross-examine witnesses as guaranteed by Utah statute. (*See* Mem. Supp. Am. Pet. and Mot. to Vacate Arbitration Award, R. 8-21.)

24. On July 8, 2008, Judge Faust issued the Memorandum Decision, wherein he addressed the question of “whether the arbitration panel’s denial of [Hicks’] request for certain discovery, including deposing a UBS corporate representative, constitutes a ground for vacating that panel’s arbitration award.” (Memorandum Decision, R. 373.) Judge Faust stated that “[t]he Court is convinced that in reading the various arbitration statutes together, discovery decisions which result in the denial of a participant’s rights to present material evidence, thereby substantially prejudicing that individual, **can** provide

the grounds for vacatur. [UBS's] reliance on the *Buzas* case as somehow suggesting otherwise is misplaced.” (*Id.*, R. 374.)

25. Judge Faust granted Hicks' petition to vacate, finding that “the panel's decision hindered [Hicks'] ability to present material evidence and his ability to adequately cross-examine Ms. Weisman, who was clearly a key witness in the arbitration proceeding.” (*Id.*, R. 373.)

26. On September 30, 2008, the district entered an order and final judgment vacating the Award based on the reasons set forth in the Memorandum Decision. (*See* Order and Judgment Vacating Arbitration Award and Directing Rehearing, R. 411-12.) The district court directed that “[t]he rehearing shall be conducted in a manner that will not again prejudice Hicks' rights and otherwise comports with Utah Code Ann. § 78B-11-116 (formerly 78-31a-116).” (*Id.*, R. 412.) Accordingly, at a minimum, the arbitration panel on rehearing should allow Hicks to depose a UBS corporate representative so that he could determine who would have documents regarding the Infinite Agreement—such as the two officers who signed the agreement—and then follow-up with additional discovery so that he could fairly present his case. (*See id.*, R. 411-12; Memorandum Decision, R. 373-74.)

SUMMARY OF ARGUMENT

In its brief to this Court, UBS does its best to ignore the heart of the issue in this case. Namely, UBS fails to adequately discuss the \$75 million term loan facility commitment letter between UBS and Infinite Energy (the “Infinite Agreement”)—an agreement signed by two UBS officers that was produced during the arbitration by third-

party, Florida company, Infinite Energy. During the arbitration, UBS failed to produce this decisive document or any other document or email regarding the Infinite Agreement. It is undisputed that if the Infinite Agreement was indeed consummated, Hicks would be entitled to a referral fee for his work in directing Infinite Energy, Inc. to UBS—a referral fee which would have exceeded the total amount awarded to UBS at arbitration. Instead of producing critical evidence, Ms. Virginia Weisman, a UBS employee, signed an affirmation stating that there were no deals consummated between UBS and Infinite Energy and that UBS had no documents in its possession regarding the Infinite Agreement (an astonishing suggestion given the production of the document by Infinite Energy, the value of the agreement, and the use of email in today’s business world). Ms. Weisman, however, admittedly failed to even talk to the two UBS employees *who signed the multi-million dollar Infinite Agreement*. Hicks expressly requested the Panel to require UBS to produce all evidence regarding Infinite Energy and to allow Hicks to depose a UBS corporate representative so that he could determine who would have documents regarding the Infinite Agreement—such as the two officers who signed the agreement—and then follow-up with additional discovery so that he could fairly present his case. The Panel denied Hicks’ request. For this and other reasons, Hicks was denied of his rights to present evidence and adequately cross-examine Ms. Weisman with controverting documents. The only evidence at the arbitration regarding whether the Infinite Energy deal was consummated was Ms. Weisman. Hicks had no way of presenting any other evidence on this critical issue because UBS stonewalled Hicks and the Panel regarding this evidence.

In light of these facts, it is absolutely no surprise that Judge Faust found that Hicks' rights were not respected at the arbitration. Hicks was denied his rights to present evidence and cross examine witnesses as guaranteed by Utah Code Ann. § 78B-11-124(1)(c) and § 78B-11-116. Such a denial of rights unequivocally supports vacating the Award. But instead of agreeing to return to arbitration where the parties could quickly resolve the unaddressed issues surrounding the Infinite Agreement, UBS continues to refuse to recognize Hicks' rights to fairly present his case.¹

This case presents a perfect example of why the district courts have authority under specific state statutes to vacate arbitration awards when an aggrieved party is not allowed to present evidence and cross examine witnesses. Hicks respectfully requests the Court to deny UBS's appeal.

ARGUMENT

I. THE TRIAL COURT PROPERLY FOUND THAT HICKS WAS DENIED THE OPPORTUNITY TO PRESENT EVIDENCE AND ADEQUATELY CROSS EXAMINE WITNESSES DURING THE ARBITRATION

The trial court correctly found that the Panel denied Hicks of his rights under Utah statute to present evidence and cross examine witnesses. The Panel denied Hicks' request to require UBS to produce all evidence regarding Infinite Energy and to allow Hicks to depose a UBS corporate representative so that he could determine who would have documents regarding the Infinite Agreement. Accordingly, Hicks was denied of his rights to present evidence and adequately cross-examine Ms. Weisman with controverting documents. At the hearing, Hicks had no way of presenting any other

¹ UBS's continued and repeated resistance suggests that there is evidence in its possession that UBS is trying desperately not to provide to Hicks.

evidence on this critical issue because UBS stonewalled Hicks and the Panel regarding this evidence. And in light of the Infinite Agreement and the flawed affirmation of Ms. Weisman, UBS possesses evidence that would significantly impact, if not entirely negate, the Award. Judge Faust's order was correct for all of these reasons.

A. Discovery Decisions Which Result in the Denial of a Participant's Rights to Present Evidence or Cross-Examine Witnesses Provide Grounds for Vacatur

Utah courts can and should vacate an arbitration award if the substantial rights of the parties were not respected. *See Buzas Baseball v. Salt Lake Trappers, Inc.*, 925 P.2d 941 (Utah 1996). The *Buzas* court noted that a court's review of an arbitration award "should be limited to the statutory grounds and procedures for review." *Id.* at 947. Utah Code Ann. § 78B-11-124(1)(c) provides that a court shall vacate an award made in the arbitration proceeding if an arbitrator "refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78B-11-116, so as to substantially prejudice the rights of a party to the arbitration proceeding." Section 78B-11-116(4) dictates that "a party to the arbitration proceeding has a right to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing."

As was explained by Judge Faust in the Memorandum Decision, when "reading the various arbitration statutes together, discovery decisions which result in the denial of a participant's rights to present material evidence, thereby substantially prejudicing that individual, **can** provide the grounds for vacatur." (Memorandum Decision, R. 374.) The plain language of Utah Code Ann. §§ 78B-11-124(1)(c) and 78B-11-116 strongly

supports such a statement. A party to an arbitration is guaranteed the rights to present material evidence and cross-examine witnesses. *See* Utah Code Ann. §§ 78B-11-124(1)(c) and 78B-11-116. These statutes make no distinction and provide no carve-outs regarding the means by which a party was denied his or her rights to present material evidence or cross-examine witnesses. *See id.* A party's rights under these statutes are either respected, or they are not. *See Buzas Baseball*, 925 P.2d at 946-48.

UBS contends that Utah Code Ann. § 78B-11-118, regarding an arbitrator's discretion with respect to discovery, somehow bars any possible vacatur based on the denial of discovery, even if the discovery decision resulted in the denial of a participant's rights to present material evidence or cross-examine witnesses. (*See* Appellant's Br. at 23-24.) This argument is misplaced. Under UBS's proposed theory, an arbitration panel could prohibit any and all discovery to one party, while granting broad discovery to the other party, and the party who was denied any and all discovery would have no basis for vacating an award against him. Clearly, such a denial of discovery would prejudice the aggrieved party, and such a process could hardly be deemed fair. Furthermore, a party who is denied such discovery would likely be denied the opportunity to present material evidence and adequately cross-examine witnesses. *See* Utah Code Ann. § 78B-11-116. An arbitrator's discretion regarding discovery matters is not and cannot be unchecked, otherwise, the due process protections under Utah law would be critically undermined.

UBS is asking the Court to ignore the controlling Utah statutes and reverse the district court. The facts and relevant statutes, however, cannot be ignored. Discovery decisions which result in the denial of a party's rights to present material evidence and

cross-examine witnesses provide the grounds for vacatur. *See Buzas Baseball*, 925 P.2d at 946-48; Utah Code Ann. §§ 78B-11-124(1)(c) and 78B-11-116; Memorandum Decision, R. 373-74. And in this case, there is no question that Hicks was substantially prejudiced by the Panel’s denial of his rights to present material evidence and cross-examine a key witness.

B. Hicks Was Denied His Rights to Present Evidence and Cross-Examine a Key Witness, Resulting in Substantial Prejudice

Hicks was wrongfully denied access to critical evidence regarding Infinite Energy. On October 23, 2007, Ms. Weisman submitted an Affirmation stating, among other things, that “[b]ased on the search [she] conducted, no responsive documents exist with respect to any deal involving UBS and Infinite Energy because no such deal was ever completed.” (Weisman Affirmation, R. 68.) Directly contradicting that Affirmation, however, is the Infinite Agreement produced by Infinite Energy. (*See* Infinite Agreement, R. 42-64.) The \$75 million Infinite Agreement was not only signed by the president of Infinite Energy, but was also signed by two UBS officers—James P. Boland and Warren Jervey. (*See id.*) Further casting doubt on the validity of Ms. Weisman’s Affirmation is the fact that Ms. Weisman spoke to Mr. Abbate, and only Mr. Abbate, regarding the Infinite Energy deal. (Weisman Affirmation, R. 67.) In other words, Ms. Weisman failed to even speak with the two UBS officers who actually signed the Infinite Agreement. Common sense establishes that a company that signs a contract worth around \$75 million is likely to have at least some emails, letters, or other written correspondence addressing such a deal, even if the contract or transaction was never “finalized” as alleged by Ms. Weisman. The fact that UBS failed to produce a single

email or correspondence regarding the deal suggests that UBS is hiding facts.

By denying Hicks access to information that, in light of the above, almost certainly would lead to the discovery of relevant documents, Hicks was unable to discover and present material and decisive evidence and adequately cross-examine Ms. Weisman with controverting documents. *See* Utah Code Ann. 78B-11-116(4). And because Hicks would have been entitled to a substantial referral fee for his work in directing Infinite Energy to UBS, the Panel's denial substantially prejudiced Hicks. (*See* Hicks Decl., R. 26.) Consequently, the Award was rightfully vacated by the trial court.

Hicks was also denied his substantial rights with respect to his request of the Metadata of a referral fee policy presentation. During the Arbitration proceeding, UBS alleged to have provided Hicks with a policy presentation in 2003 that outlined the referral fees that he could expect to obtain when referring clients to UBS. Hicks never received this policy presentation. (*See* Hicks Decl., R. 27.) Consequently, Hicks requested the Software Metadata for this 2003 document to determine whether the document was even created in 2003. Hicks made repeated requests for this information. Despite these requests, both to UBS as well as to the Panel, UBS never produced this information. (*See* Hicks Decl., R. 27.)

Hicks was denied information that could completely change the outcome of the arbitration proceeding, and in light of the Infinite Agreement and the flawed affirmation, there is strong reason to believe that granting Hicks access to the requested information and allowing him to present that evidence and adequately cross-examine witnesses would drastically change the Award. In other words, these denials substantially prejudiced

Hicks. Accordingly, this Court should deny UBS's appeal.

II. UBS PROVIDES NO LEGAL OR FACTUAL BASIS FOR OVERTURNING THE ORDER VACATING THE ARBITRATION AWARD

In addition to the arguments addressed above, UBS asserts arguments for overturning the appeal based on the limited discovery in arbitrations, the alleged strength of Ms. Weisman's affirmation, and Utah's public policy favoring arbitration. These arguments all fail.

First, UBS emphasizes the fact that depositions are discouraged at arbitration and that FINRA arbitrators may permit depositions only in limited circumstances. (*See* Appellant's Br. at 26.) The fact there is generally limited discovery in arbitrations and the fact that discovery matters rest with the arbitrator is mostly irrelevant to this dispute, and UBS' focus on "discovery" is simply misplaced. *See Buzas*, 925 P.2d at 947; Utah Code Ann. § 78B-11-124(1)(c). The issue before this Court is whether the Panel failed to respect Hicks' substantial rights under Utah law. *See Buzas*, 925 P.2d at 947; Utah Code Ann. § 78B-11-124(1)(c). As explained above, Hicks was denied the opportunity to present evidence and cross examine witnesses—rights that are afforded to parties in an arbitration. *See* Utah Code Ann. § 78B-11-116. There is no dispute that the Panel had the authority to grant Hicks' request to depose a UBS representative. And in light of the Infinite Agreement and the subsequent and questionable affirmation of Ms. Weisman, the Panel not only had the authority to allow for such a deposition, but the obligation. (*See* Infinite Agreement, R. 42-64; Weisman Affirmation, R. 66-68.)

Second, UBS's argument that Ms. Weisman's testimony and affirmation somehow erases all doubt as to whether there was a consummated deal between UBS and Infinite

Energy fails because (1) there is a signed document between UBS and Infinite Energy purportedly demonstrating a \$75 million deal and (2) Ms. Weisman *did not even speak to the two UBS representatives who signed the document* to determine whether there was a deal consummated. (See Infinite Agreement, R. 42-64; Weisman Affirmation, R. 67-68.) Common sense establishes that a company that signs a contract worth around \$75 million is likely to have at least some emails, letters, or other written correspondence addressing such a deal, even if the contract or transaction was never “finalized” as alleged by Ms. Weisman. (Weisman Affirmation, R. 66-68.) UBS has provided no factual or legal arguments that would support overturning Judge Faust’s thoughtful decision in this case.

Finally, UBS’s arguments based on Utah’s public policy favoring arbitration rings hollow when compared to the bedrock principle of due process. (See Appellant’s Br. at 27-30.) It is true that Utah has a public policy favoring “speedy and inexpensive methods of adjudicating disputes.” *Allred v. Educators Mut. Ins. Ass’n of Utah*, 909 P.2d 1263, 1268 (Utah 1996). But this public policy in no way trumps a party’s fundamental right to be heard and present evidence. See *Lindon City v. Engineers Const. Co.*, 636 P.2d 1070, 1075 (Utah 1981) (recognizing that an arbitration must meet the requirements of due process). The Utah Legislature recognized this fact and provided express statutes guaranteeing a party to an arbitration the “right to be heard, to present evidence material to the controversy, and to cross-examine witnesses” Utah Code Ann. § 78B-11-116.

Hicks was denied his rights to present evidence and cross examine witnesses as guaranteed by Utah Code Ann. § 78B-11-124(1)(c) and § 78B-11-116. Hicks obtained a piece of critical evidence from a third-party that, on its face, dictates that Hicks should

have received \$750,000 from UBS for referring Infinite Energy to UBS. (*See* Infinite Agreement, R. 42-64; Hicks Decl., R. 25-26.) Such a fee completely negates the Award and may result in Hicks receiving an award against UBS at the rehearing of this matter. To deny Hicks the opportunity to access and then present documents and depositions testimony evidence is patently unfair and denies Hicks of his rights as guaranteed under Utah statute. Such a denial of rights unequivocally supports affirming the trial court's vacatur of the Award.

CONCLUSION

For the foregoing reasons, this Court should affirm the rulings of the district court in this matter.

DATED this _____ day of April 2009.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postage prepaid, on this ____ day of April 2009, to:

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