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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MID-OHIO SECURITIES CORP.,

Plaintiff,

v.

THE ESTATE OF LAWRENCE D.  
BURNS,

Defendant.

2:10-CV-01975-PMP-GWF

ORDER

Presently before the Court is Plaintiff Mid-Ohio Securities Corp.’s Motion to Vacate Arbitration Award and to Stay Proceedings to Enforce Arbitration Award (Doc. #1), filed on November 10, 2010. Plaintiff Mid-Ohio Securities Corp. filed a Supplemental Memorandum (Doc. #20) on January 10, 2011. Defendant The Estate of Lawrence D. Burns filed an Opposition (Doc. #23) and Cross-Motion to Confirm FINRA Arbitration Award (Doc. #22) on March 11, 2011. Plaintiff filed a Reply (Doc. #25) and an Opposition to Defendant’s Cross-Motion (Doc. #26) on March 21, 2011. Defendant filed a Reply (Doc. #27) on March 31, 2011. The Court held a hearing on these motions on June 10, 2011. (Mins. of Proceedings (Doc. #30).)

**I. BACKGROUND**

Plaintiff Mid-Ohio Securities Corp. (“Mid-Ohio”) is a broker-dealer and was a passive custodian of self-directed individual retirement accounts (“IRAs”). (Pl. Mid-Ohio Securities Corp.’s Supplemental Memo in Support of its Mot. to Vacate Arbitration Award (Doc. #20) [“Supp. Memo”], Ex. 2 at 328.) In late February 2002, Lawrence Burns filled

1 out an application for a traditional IRA account with Mid-Ohio. (Supp. Memo., Ex. 3.)  
2 Lawrence Burns designated Epifania B. Burns (“Epifania”), his wife, as the primary  
3 beneficiary on the account. (Id.) That same date, Lawrence Burns filled out a Direction of  
4 Investment form, in which he directed that all of his funds be invested with Cumberland  
5 Enterprise Holding, LLC (“Cumberland”). (Supp. Memo., Ex. 5.) On March 5, 2002,  
6 Lawrence Burns wired over \$300,000 to Mid-Ohio. (Supp. Memo., Ex. 4.) Pursuant to  
7 Lawrence Burns’ instructions, Mid-Ohio invested the funds with Cumberland on March 6,  
8 2002. (Supp. Memo., Ex. 6.)

9 Lawrence Burns received periodic payments from Cumberland which Mid-Ohio  
10 distributed to Lawrence Burns per his instructions. (Supp. Memo, Ex. 2 at 369-70.)  
11 However, in July 2005, Lawrence Burns called Mid-Ohio and informed them the  
12 Cumberland investment was worthless. (Supp. Memo, Ex. 2 at 371-72.) Lawrence Burns  
13 passed away on July 7, 2007. (Supp. Memo., Ex. 9 at 98.)

14 In September 2009, a Statement of Claim was filed with the Financial Industry  
15 Regulatory Authority (“FINRA”), of which Mid-Ohio is a member, requesting arbitration of  
16 a dispute over Mid-Ohio’s handling of Lawrence Burns’ account. (Supp. Memo., Ex. 10;  
17 Def. Epifania Burns’ Mem. of P. & A. (Doc. #24) [“Opp’n”], Ex. 1.) The Statement of  
18 Claim identified the claimant as “The Estate of Lawrence D. Burns, By its Executor,  
19 Epifania B. Burns.” (Supp. Memo., Ex. 10.) The Statement of Claim asserted that Epifania  
20 Burns was “the executor of her deceased husband’s estate and she was also the sole  
21 beneficiary for his IRA.” (Id.) The Statement of Claim claimed that Mid-Ohio was  
22 required to perform basic due diligence with regard to its customers’ holdings, and that it  
23 failed to do so with respect to Lawrence Burns’ investment in Cumberland. (Id.) The  
24 Statement of Claim contended Mid-Ohio should have realized Cumberland was a fraud  
25 based on several red flags, and therefore asserted claims for negligence and breach of  
26 contract, and sought compensatory damages of approximately \$290,000, attorneys’ fees,

1 costs, interest, and punitive damages. (Id.)

2 The Estate of Lawrence Burns and Mid-Ohio agreed to submit the matter to  
3 arbitration, and thereby agreed to be bound by the FINRA bylaws, rules, and code of  
4 procedure. (Opp'n, Ex. 16.) Mid-Ohio filed an Answer in which it asserted the claims  
5 were ineligible for arbitration under the FINRA rules because the claims were brought more  
6 than six years from the date the securities were purchased (the "eligibility issue"). (Opp'n,  
7 Ex. 17.) In its Answer, Mid-Ohio stated that Epifania was bringing the claims "in her  
8 capacity as Executor of her husband's estate and as the primary beneficiary." (Id. at 2; see  
9 also Opp'n, Ex. 22 at 2 (Mid-Ohio's Pre-Hearing Brief states "Claimant, in her capacity as  
10 Executor of her husband's estate and as the primary beneficiary, now sues Mid-Ohio  
11 . . . .").)

12 Mid-Ohio filed a motion to dismiss before the arbitration panel, raising the  
13 eligibility issue. (Supp. Memo., Ex. 12; Opp'n, Ex. 19.) The arbitration panel denied the  
14 motion to dismiss without comment. (Supp. Memo., Ex. 12.)

15 During the hearing before the arbitration panel, Epifania testified that following  
16 her husband's death, she did not file anything in probate court, there was no will, and no  
17 estate was created. (Supp. Memo., Ex. 9 at 98-99.) She was not appointed by any court to  
18 be the executor or legal representative of Lawrence Burns' estate. (Id. at 99-100.) Rather,  
19 she indicated she was the beneficiary of the IRA. (Id.) Upon hearing these facts,  
20 Mid-Ohio's counsel, Kenneth Bravo, moved to dismiss for lack of standing, arguing that the  
21 "case is brought supposedly in the name of the executor of the estate. I think we've just  
22 established there is no estate and no executor." (Id. at 100-01.) The following colloquy  
23 then took place:

24 CHAIRMAN LUM: Well, there's an IRA so she's the beneficiary if  
she is the beneficiary.

25 MR. BRAVO: Okay. But that's not how she's brought—  
26

1 CHAIRMAN LUM: But his mistake in labelling it, you know–

2 MR. OAKES: And Mr. Chairman, they even note in their  
3 answer, “Claimant in her capacity as the  
4 executor of her husband’s estate and as the  
5 primary beneficiary–

6 CHAIRMAN LUM: Well, I’m not going to rely on that, but just  
7 because she’s mislabelled, you know,  
8 everybody’s here. Let’s move forward with it,  
9 and your objection is noted.

10 (Id. at 101.) The hearing thereafter continued, and the panel heard testimony from  
11 Epifania’s expert that if Mid-Ohio had performed due diligence as it was supposed to, it  
12 may have uncovered the fraud at Cumberland and prevented Lawrence Burns from  
13 investing in it. (Opp’n, Ex. 8 at 176-77, 202, 237-38.)

14 In closing, Mid-Ohio raised both the standing and eligibility issues. (Opp’n, Ex.  
15 8 at 479-80.) Epifania Burns’ counsel responded by attempting to submit to the panel a new  
16 uniform submission agreement “in case the panel decides that they want to style the award  
17 in the name of Epifania Burns, both individually and as executor of the estate.” (Pl.’s Reply  
18 (Doc. #25), Ex. 22 at 498.) Mid-Ohio objected. (Id.) The following colloquy then took  
19 place:

20 CHAIRMAN LUM: I can call the NASD and have them decide that,  
21 but–

22 MR. OAKES: It’s for the panel’s consideration. You know, I  
23 don’t think it’s important, but I wanted the panel  
24 to have that.

25 (Id.) Later, the following exchange took place:

26 CHAIRMAN LUM: Mr. Bravo, in the event the panel does find for  
claimant, the award would be titled the way that  
this original submission was made, okay. That  
I’ll give, I’ll pass that on to the case  
administrator, and she will decide what to do  
with it as far as the renaming on the case.

MR. BRAVO: I just want the record to note my objection. I  
think it’s far too late–

1 CHAIRMAN LUM: Correct, and that's why I'm passing it on to the  
2 case administrator. So in the event we do find  
3 for claimant, then it will be exactly worded as  
they brought the suit.

4 (Pl.'s Reply, Ex. 23 at 505.)

5 The arbitrators awarded Estate of Lawrence Burns \$280,683.50 in compensatory  
6 damages, but denied the request for punitive damages. (Pet. for Judicial Review, Ex. 1 at  
7 2.) Following issuance of the award, Epifania requested clarification of the award by  
8 altering the styling of the case to reflect Epifania brought the claims in her capacity as sole  
9 beneficiary of the IRA. (Pl.'s Reply, Ex. 24.) Mid-Ohio objected, contending that rather  
10 than making a clarification, Epifania was attempting to change the identify of the claimant  
11 to a different party after the hearing was completed. (Id.) The arbitrators did not respond to  
12 the request, and under FINRA rules, their failure to act after a certain period of time  
13 constituted a denial of the request. (Pl.'s Reply, Ex. 25.)

14 Mid-Ohio now moves to vacate the award. Mid-Ohio argues that the party that  
15 brought the action, The Estate of Lawrence Burns through its Executor Epifania Burns, did  
16 not exist, as Epifania did not open an estate for her late husband and was not appointed as  
17 her husband's estate administrator. Mid-Ohio argues that because the party in whose name  
18 the action was brought did not exist, the purported claimant had no standing. Mid-Ohio  
19 argues the arbitration panel manifestly disregarded the law when it refused to dismiss the  
20 action after these facts were brought to the panel's attention.

21 Mid-Ohio also contends the panel manifestly disregarded the law by ignoring  
22 FINRA Rule 12206 which provides that to be eligible for arbitration, claims must be  
23 brought within six years from the event or occurrence giving rise to the claims. Mid-Ohio  
24 contends that because all relevant conduct by Mid-Ohio occurred in March 2002, the  
25 claimant had to bring a claim by March 2008 or such a claim is barred. Mid-Ohio contends  
26 it brought this defect to the arbitration panel's attention, but the panel did not dismiss.

1           Epifania responds by opposing the motion to vacate and by cross-moving to  
2 confirm the award. Epifania argues that Mid-Ohio stated in its own Answer and brief that  
3 Epifania was the claimant in both her capacity as executor and as primary beneficiary of the  
4 IRA, and regardless of whether the award went to her or her husband's estate, she was the  
5 person entitled to the funds. With respect to timeliness under FINRA rule 12206, Epifania  
6 argues the panel was free to use the discovery rule, when damages occurred, or when the  
7 claim accrued as the event or occurrence triggering the clock for the six-year period.  
8 Epifania contends that because Lawrence Burns did not discover Cumberland was a fraud  
9 until 2005, the panel was within its discretion to toll the eligibility period. Epifania also  
10 contends that whether a claim is eligible for arbitration is itself a question for the arbitration  
11 panel, and is not reviewable. Epifania argues that even if the arbitration panel erred with  
12 respect to standing or eligibility, Mid-Ohio cannot show the panel's ruling resulted in  
13 substantial injustice.

## 14 **II. DISCUSSION**

15           Pursuant to Section 9 of the Federal Arbitration Act ("FAA"), if the parties have  
16 agreed "that a judgment of the court shall be entered upon the award made pursuant to the  
17 arbitration," then "any party to the arbitration may apply to the court . . . for an order  
18 confirming the award, and thereupon the court must grant such an order unless the award is  
19 vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C.  
20 § 9. Section 10 of the FAA sets forth the circumstances under which a court may vacate an  
21 arbitration award:

- 22           (1) where the award was procured by corruption, fraud, or undue  
23           means;
- 24           (2) where there was evident partiality or corruption in the arbitrators,  
25           or either of them;
- 26           (3) where the arbitrators were guilty of misconduct in refusing to  
              postpone the hearing, upon sufficient cause shown, or in refusing to  
              hear evidence pertinent and material to the controversy; or of any other  
              misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly

1           executed them that a mutual, final, and definite award upon the subject  
2           matter submitted was not made.

3           9 U.S.C. § 10(a).

4           The Court may vacate an award where the arbitrators' decision is in manifest  
5           disregard of the law. Johnson v. Wells Fargo Home Mortg., Inc., 653 F.3d 401, 414-15 (9th  
6           Cir. 2011). "Although the words 'manifest disregard for law' do not appear in the FAA,  
7           they have come to serve as a judicial gloss on the standard for vacatur set forth in FAA  
8           § 10(a)(4)." Id. Manifest disregard of the law means "something beyond and different  
9           from a mere error in the law or failure on the part of the arbitrators to understand and apply  
10          the law." Collins v. D.R. Horton, Inc., 505 F.3d 874, 879 (9th Cir. 2007) (quotation  
11          omitted). Rather, "[i]t must be clear from the record that the arbitrator [ ] recognized the  
12          applicable law and then ignored it." Comedy Club, Inc. v. Improv West Assocs., 553 F.3d  
13          1277, 1290 (9th Cir. 2009) (quotation omitted). "Moreover, to rise to the level of manifest  
14          disregard [t]he governing law alleged to have been ignored by the arbitrators must be well  
15          defined, explicit, and clearly applicable." Collins, 505 F.3d at 879-80 (quotation and  
16          emphasis omitted).

17          The Court's review of an arbitration award is highly deferential. Poweragent Inc.  
18          v. Elec. Data Sys. Corp., 358 F.3d 1187, 1193 (9th Cir. 2004). The arbitrator need not  
19          explain his rationale for an award, and the Court should confirm an award if "a ground for  
20          the arbitrator's decision can be inferred from the facts of the case." D.H. Blair & Co., Inc.  
21          v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006) (quotation omitted). "Only a barely  
22          colorable justification for the outcome reached by the arbitrators is necessary to confirm the  
23          award." Id. (quotation omitted). The party moving to vacate the award bears the burden of  
24          proof. Id.; Collins, 505 F.3d at 879.

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1           **A. Standing**

2           Mid-Ohio argues the panel manifestly disregarded the law because Mid-Ohio  
3 established that the entity which brought the claims did not exist, and therefore lacked  
4 standing. Mid-Ohio contends that because Epifania never created an estate for her late  
5 husband and was not a court-appointed executor or administrator, the claimant Estate of  
6 Lawrence D. Burns did not exist, Epifania lacked legal authority to pursue claims on its  
7 behalf, and she therefore lacked standing.

8           Epifania responds that Mid-Ohio knew and recognized that Epifania was the  
9 primary beneficiary of the IRA and, as such, she had standing to pursue the claim in her  
10 own right. Epifania contends that when she filed the claim, she was unsure whether she  
11 was designated as the sole beneficiary on the IRA and that is why she styled the case as she  
12 did. But, through discovery and by the time of the hearing, it was clear Epifania was the  
13 beneficiary and had standing to bring the claim. Epifania argues that even if the panel erred  
14 by not granting Mid-Ohio’s oral motion to dismiss, Mid-Ohio has failed to show it provided  
15 the panel with the applicable law and the panel then ignored that law. Epifania contends  
16 that at best, Mid-Ohio has shown an error, not manifest disregard. Epifania argues that the  
17 styling of the case and award will have no effect on who receives the fund as she is the  
18 primary beneficiary, the executor of Lawrence Burns’ will, the court-appointed executor,  
19 and the trustee of his trust.

20           Nevada law provides that “when a person who has a cause of action dies before  
21 judgment, the damages recoverable by the decedent’s executor or administrator include all  
22 losses or damages which the decedent incurred or sustained before the decedent’s death.”  
23 Nev. Rev. Stat. § 41.100(3); see also id. § 41.100(1) (providing that “no cause of action is  
24 lost by reason of the death of any person, but may be maintained by or against the person’s  
25 executor or administrator”). Both an executor and an administrator must be appointed by a  
26 court to exercise the authority to administer the decedent’s estate. Id. §§ 132.040, 132.130.



1 Because Nevada statutorily has provided that only the executor or administrator may bring a  
2 claim which survives the decedent's death, the heirs or family members may not bring such  
3 a claim on the decedent's behalf. Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d  
4 365, 369-70 (9th Cir. 1998).

5 Mid-Ohio has not met its burden of establishing the panel manifestly disregarded  
6 the law. Mid-Ohio has not presented to this Court evidence that it provided the panel with  
7 the above-cited law or that the panel otherwise recognized this law. Rather, Mid-Ohio  
8 made an oral motion to dismiss regarding the standing issue, but it did not cite to the above  
9 law in support. Consequently, it is not clear from the record that the panel recognized the  
10 applicable law and then ignored it.

11 Moreover, it can be inferred from the record that the panel viewed the issue as a  
12 mistake in the caption or style of the case, rather than as a question of standing. The name  
13 of the case is The Estate of Lawrence D. Burns, By its Executor, Epifania B. Burns, but in  
14 the body of the Statement of Claim, it referred to Epifania as both executor and as primary  
15 beneficiary. Thus, the substance of her claims in her own right were set forth in the initial  
16 Statement of Claim, and it can be inferred from the record that the arbitration panel declined  
17 to elevate form over substance to find a lack of standing based on a mistake in the caption.  
18 The panel referenced the fact that Epifania was the primary beneficiary and could bring the  
19 claims in her own right, and that a mistake in styling the case should not preclude the  
20 arbitration from proceeding. Mid-Ohio stated in its own filings that Epifania was bringing  
21 the claims as executor and as primary beneficiary. The panel's refusal to find a lack of  
22 standing due to a discrepancy between the caption and the substance of the claims in the  
23 Statement of Claim is not a manifest disregard of the law. The Court therefore will not  
24 vacate the arbitration award on this basis.

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1           **B. Eligibility**

2           Mid-Ohio argues the panel manifestly disregarded the law because it allowed the  
3 claims to proceed even though they were ineligible for arbitration under FINRA Rule  
4 12206. That rule makes ineligible for arbitration any claim for which six years have elapsed  
5 since the occurrence or event giving rise to the claim. (Supp. Memo., Ex. 11.) Mid-Ohio  
6 contends that the facts show all of its conduct occurred in February and March 2002. Mid-  
7 Ohio therefore asserts any claim related to that conduct became ineligible for arbitration in  
8 March 2008. As Epifania did not file until September 2009, Mid-Ohio contends her claims  
9 were ineligible for arbitration and the panel disregarded the FINRA rule by letting the  
10 arbitration proceed.

11           Epifania responds that whether a claim is ineligible under Rule 12206 is a  
12 question for the arbitrators and is not reviewable by this Court. Further, Epifania contends  
13 that the event or occurrence giving rise to the claim does not necessarily have to be the date  
14 of the purchase of the securities, and the panel was free to consider other events or  
15 occurrences, such as when Lawrence Burns discovered Cumberland was a fraud, when the  
16 damages occurred, or when the claim accrued. Epifania also argues the panel could apply  
17 tolling principles to Rule 12206.

18           FINRA Rule 12206(a) provides:

19           No claim shall be eligible for submission to arbitration under the Code  
20 where six years have elapsed from the occurrence or event giving rise  
21 to the claim. The panel will resolve any questions regarding the  
22 eligibility of a claim under this rule.

23 Although the present rule clarifies that the panel will resolve any questions regarding  
24 eligibility, other versions of this and similar eligibility rules did not make that clear. Courts  
25 thus had to resolve the question of whether the court or the arbitrator decided eligibility.  
26 When that was the case, several courts held that because the rule referred to “eligibility” for  
arbitration, it was a question for the court. See Prudential Sec., Inc. v. Yingling, 226 F.3d

1 668, 672 (6th Cir. 2000) (National Association of Securities Dealers (“NASD”) Code of  
2 Arbitration Procedure § 10304); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith Inc.,  
3 78 F.3d 474, 477-78 (10th Cir. 1996) (NASD Code of Arbitration Procedure § 15); Merrill  
4 Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383 (11th Cir. 1995) (same);  
5 Painewebber Inc. v. Hofmann, 984 F.2d 1372, 1381 (3d Cir. 1993) (same); Edward D.  
6 Jones & Co. v. Sorrells, 957 F.2d 509, 512 (7th Cir. 1992) (same). Further, these courts  
7 went on to hold that the rule was not a statute of limitations subject to tolling; rather, it was  
8 a question of what the parties contractually had agreed was eligible for arbitration, and thus  
9 was not subject to tolling. Prudential Sec., Inc., 226 F.3d at 672 n.4; Merrill Lynch, 62 F.3d  
10 at 385 at n.4; Painewebber Inc., 984 F.2d at 1381-82; Sorrells, 957 F.2d at 512-13. Some  
11 courts also held that the event or occurrence was the purchase or sale of securities, not when  
12 the investor discovered the loss. Dean Witter Reynolds, Inc. v. McCoy, No. 94-5779, 70  
13 F.3d 1271, 1995 WL 699619, at \*2 (6th Cir. Nov. 27, 1995) (unpublished) (“There is no  
14 merit in the Investors’ allegations that their injury did not occur until the investments turned  
15 sour. Adopting the Investors’ interpretation would clearly undermine the intention of § 15  
16 calling for a six-year time limit on the arbitrability of claims, and would enable the  
17 Investors to control the running of the time limit while they reaped the benefits of the  
18 investments about which they would later complain”); Lindell v. Waddell & Reed, Inc., 962  
19 F. Supp. 103, 106-07 (W.D. Mich. 1997) (same).

20 Other courts, however, concluded time limitation rules are procedural matters for  
21 the arbitrator to decide. For example, the Ninth Circuit concluded that whether a NASD  
22 rule requiring submission to arbitration within five years barred the claims was a question  
23 for the arbitrators, and it “specifically renounce[d] the contention that the defense of the  
24 statute of limitations goes to jurisdiction of the tribunal, whether it be judicial or  
25 arbitration.” O’Neel v. Nat’l Ass’n of Sec. Dealers, Inc., 667 F.2d 804, 807 (9th Cir. 1982);  
26 see also Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 753-54 (5th Cir. 1995)

1 (holding that similar American Stock Exchange rule 605 was a “timeliness” issue of  
2 “procedural arbitrability and must be decided by the arbitrator”); FSC Sec. Corp. v. Freel,  
3 14 F.3d 1310, 1312-13 (8th Cir. 1994) (holding application of NASD § 15 was a question  
4 for arbitrators, not court). Some courts also have ruled that the rule is subject to tolling.  
5 PaineWebber, Inc. v. Landay, 903 F. Supp. 193, 202 (D. Mass. 1995) (finding “nothing  
6 either in the terms of the parties’ agreement or in Section 15 itself which compels the  
7 conclusion that issues of ‘tolling’ are precluded from consideration under Section 15’s  
8 six-year eligibility requirement”). And courts have recognized that the relevant event or  
9 occurrence from which the time period begins to run is not necessarily the purchase or sale  
10 of securities. Merrill Lynch, 62 F.3d at 385 (“If the Cohens prove that Merrill Lynch  
11 reported false values for their investments through bogus statements,[] then Merrill Lynch’s  
12 act of sending the false statements, rather than the initial purchase of the investments, may  
13 be the occurrence or event giving rise to their claims.” (footnote omitted)); FSC Sec. Corp.  
14 v. Freel, 811 F. Supp. 439, 444 (D. Minn. 1993) (“The ‘occurrence or event’ triggering the  
15 claim could be the date of purchase; it could just as plausibly be some other occurrence or  
16 event.”).

17           The United States Supreme Court ended at least part of the controversy in 2002  
18 when it ruled that the applicability of NASD Code of Arbitration Procedure § 10304, a  
19 similar eligibility rule, was “a matter presumptively for the arbitrator, not for the judge. The  
20 time limit rule closely resembles the gateway questions that this Court has found not to be  
21 questions of arbitrability.” Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002)  
22 (quotation omitted). The Supreme Court noted that the “NASD arbitrators, comparatively  
23 more expert about the meaning of their own rule, are comparatively better able to interpret  
24 and to apply it.” Id.

25           Although Mid-Ohio concedes that the question of eligibility was for the  
26 arbitrators, it argues the arbitrators ignored the law that Rule 12206 is not subject to tolling

1 and the limitations period runs from the purchase of the investment in this case, because  
2 that was the only triggering event. The arbitrators did not manifestly disregard the law for  
3 several reasons. First, Howsam undermined the basic premise which courts relied upon to  
4 determine eligibility rules like Rule 12206 were not subject to tolling. Those courts relied  
5 on the premise that the eligibility rule was a substantive limit on the agreement to arbitrate,  
6 not a statute of limitations. Thus, the time period was not subject to tolling. However,  
7 Howsam eviscerated that premise, finding that the eligibility time limit was not a question  
8 of arbitrability, but a gateway procedural matter for the arbitrator. Thus, the entire line of  
9 cases that suggest Rule 12206 is not subject to tolling is undermined. Therefore, it would  
10 not be manifest disregard of the law not to follow this line of cases post-Howsam.

11 Further, even before Howsam, there was a split of authority on the question of  
12 whether eligibility rules like Rule 12206 were questions of arbitrability for the court to  
13 decide or akin to statutes of limitations for the arbitrators to decide. To the extent the Ninth  
14 Circuit addressed the issue, it treated such rules as akin to statute of limitations, and had not  
15 held that eligibility rules like Rule 12206 were not subject to tolling. Thus, Mid-Ohio has  
16 not established that the law it alleges the panel ignored was well defined, explicit, and  
17 clearly applicable.

18 Because Rule 12206 is not a strict rule of eligibility, but a question for the  
19 arbitrators more akin to a statute of limitations, the arbitrators were free to interpret the rule  
20 as they saw fit, including adding in tolling provisions or a discovery rule. Lawrence Burns  
21 first discovered the fraud at Cumberland, and hence the possible failure of Mid-Ohio to  
22 conduct due diligence, in 2005. If the arbitrators adopted tolling or discovery principles and  
23 used the 2005 date as the triggering event, that would be within the six-year period in Rule  
24 12206. The FINRA panel had comparatively more expertise about the meaning of its own  
25 rule, and it therefore could weigh the propriety of tolling or the discovery rule in any  
26 particular case. The Court therefore will deny the motion to vacate based on FINRA Rule

1 12206.

2 Mid-Ohio has failed to meet its burden of establishing the arbitration panel  
3 manifestly disregarded the law. The Court therefore will deny Mid-Ohio's motion to vacate  
4 the award, and will grant Defendant's cross-motion to confirm the award.

5 **III. CONCLUSION**

6 IT IS THEREFORE ORDERED that Plaintiff Mid-Ohio Securities Corp.'s  
7 Motion to Vacate Arbitration Award and to Stay Proceedings to Enforce Arbitration Award  
8 (Doc. #1) is hereby DENIED.

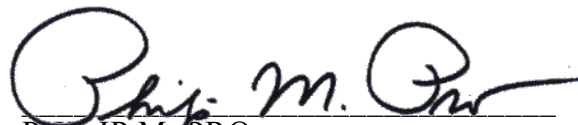
9 IT IS FURTHER ORDERED that Defendant The Estate of Lawrence D. Burns'  
10 Cross-Motion to Confirm FINRA Arbitration Award (Doc. #22) is hereby GRANTED.

11 IT IS FURTHER ORDERED that the arbitration award is hereby CONFIRMED.

12 IT IS FURTHER ORDERED that the Clerk of the Court shall seal Defendant  
13 Epifania Burns' Memorandum of Points and Authorities (Doc. #24), as it contains  
14 unredacted social security numbers in violation of Special Order 108 and the E-Government  
15 Act of 2002.

16 IT IS FURTHER ORDERED that Defendant The Estate of Lawrence D. Burns  
17 shall file a redacted version of Epifania Burns' Memorandum of Points and Authorities  
18 (Doc. #24) within twenty-one (21) days.

19  
20 DATED: June 14, 2011

21   
22 PHILIP M. PRO  
23 United States District Judge  
24  
25  
26