

# MICHIGAN LAWYERS WEEKLY

## Plaintiff wins shareholder oppression case

Remedy includes buyout, damages

By: Michigan Lawyers Weekly Staff in Verdicts & Settlements June 25, 2018

Plaintiff was the founder and 50 percent member of a valuable investment advisory firm. While plaintiff focused on marketing and guiding the firm's investment strategies, the defendant, who controlled the other 50 percent membership interest, oversaw the management of the business operations.

Plaintiff alleged that the defendant engaged in a series of oppressive actions beginning in the fall of 2015. Among other things, the plaintiff alleged the defendant eliminated distributions, paid himself an improper management fee, usurped plaintiff's intellectual property, and unfairly froze plaintiff out of the business.

After a four-day arbitration hearing, the arbitrators determined the defendant engaged in oppressive conduct under the Michigan Limited Liability Company Act. The arbitrators granted plaintiff his requested remedy of a buyout, as well as damages, interest, and attorney fees. The total value of the award is \$3,122,500, plus interest. On May 23, 2018, the Oakland County Circuit Court confirmed the arbitration award.

David F. Hansma, counsel for plaintiff, provided case information.

**Type of action:** Shareholder oppression

**Injuries alleged:** Financial

**Name of case:** Ferri et al. v. Portfolio Solutions et al.

**Court/Case no./Date:** Oakland County Circuit Court/18-165064-CB/May 23, 2018

**Tried before:** Arbitration

**Name of judge:** Hon. Wendy L. Potts

**Arbitration award:** \$3,122,500

**Attorney for plaintiff:** David F. Hansma

Tagged with: [HON. WENDY L. POTTS](#) [OAKLAND COUNTY CIRCUIT COURT](#) [SHAREHOLDER OPPRESSION](#)

ABOUT MICHIGAN LAWYERS WEEKLY STAFF



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865-3117



STATE OF MICHIGAN  
OAKLAND COUNTY CIRCUIT COURT

RICHARD FERRI, and  
RICK FERRI, LLC,

Plaintiffs,

v.

Case No. 18-165064-CB  
Hon. Wendy L. Potts

JAMES GLADNEY,  
LIBERTY PS HOLDINGS, LLC, and  
PORTFOLIO SOLUTIONS, LLC,

Defendants,

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SEYBURN KAHN  
David F. Hansma (P71056)  
Attorney for Plaintiffs  
2000 Town Center, Suite 1500  
Southfield, MI 48075-1195  
(248) 353-7620  
[dhansma@seyburn.com](mailto:dhansma@seyburn.com)

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BUTZEL LONG PC  
Kaveh Kashef (P64443)  
Attorney for Defendants  
41000 Woodward Ave.  
Bloomfield Hills, MI 48304-1433  
(248) 258-1433  
[kashef@butzel.com](mailto:kashef@butzel.com)

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**STIPULATED ORDER AND JUDGMENT CONFIRMING ARBITRATION AWARD**

At a session of said Court, held in the City of  
Pontiac, County of Oakland, State of Michigan,  
on 5/23/2018  
PRESENT: HON.: WENDY L POTTS  
CIRCUIT COURT JUDGE

On April 12, 2018, Plaintiffs filed a complaint to confirm the April 12, 2018 Final Award in *In the Matter of Arbitration between Richard Ferri et al. v. Portfolio Solutions, et al.*, AAA Case Number 01-17-0000-2754. Upon motion of the Plaintiffs and concurrence of the Defendants, the arbitrators issued a corrected Final Award on May 9, 2018 (“Award”). On May 22, 2018, the parties reached an email stipulation (“Stipulation”) resolving their disagreements over the interpretation of the Award and other outstanding issues.

The parties, by their counsel, have stipulated to entry of this Order and Judgment, and the Court is otherwise fully advised in the premises; therefore

IT IS HEREBY ORDERED that the Award and the Stipulation are confirmed and adopted as a Judgment of this Court. All terms of the Award and the Stipulation are adopted herein by reference and are made a part of this Order and Judgment.

This is a final order resolving all pending claims and closes this case.

/s/ Wendy L. Potts  
CIRCUIT COURT JUDGE JC

By: /s/ David F. Hansma  
David F. Hansma (P71056)  
Attorney for Plaintiffs

By: /s/ Kaveh Kashef  
Kaveh Kashef (P64443)  
Attorney for Defendants

# AMERICAN ARBITRATION ASSOCIATION

Commercial Arbitration  
Under AAA Commercial Rules and Mediation Procedures  
Amended and effective October 1, 2013

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## **In the Matter of Arbitration between:**

**Case No. 01-17-0000-2754**

**Richard Ferri; Rick Ferri, LLC,**

Claimants/Counter-Respondents,

Represented by David Hansma, Esq. of Seyburn Kahn, P.C.

v.

**Portfolio Solutions, LLC; Liberty PS Holdings, LLC;  
James Gladney,**

Respondents/Counter-Claimants.

Represented by Kaveh Kashef of Butzel Long, P.C., Gerald Petros of Hinckley Allen & Snyder, LLP, Joanne Mansolf of Hinckley Allen & Snyder, and Chelsea Gornbein of Clark Hill, PLC

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## **FINAL AWARD**

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We, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into between the above-named parties in the September 28, 2015 Amended and Restated Operating Agreement of Portfolio Solutions, LLC, and having duly heard the proofs and allegations of the parties, for good cause shown, make the determination and hereby AWARD as follows:

### **INTRODUCTION**

The procedural history of this matter is, briefly, as follows: The arbitration was commenced on January 12, 2017 by Claimants Richard Ferri and Rick Ferri, LLC (“Ferri”)

against Respondents James Gladney, Liberty PS Holdings, LLC, and Portfolio Solutions, LLC (“Gladney”)<sup>1</sup>. Ferri asserted claims for member oppression under MCL 450.4515, breach of fiduciary duty and breach of contract, as well as seeking over \$1 million in damages, together with declaratory relief, attorneys’ fees, costs and interest. On April 20, 2017, Gladney filed an answering statement and counterclaims against Ferri alleging breach of contract, breach of fiduciary duty, statutory and common law fraud, as well as seeking declaratory relief, attorneys’ fees, costs and interest. On August 11, 2017, all parties filed amended arbitration demands and counterclaims. The parties then engaged in discovery and motion practice, with the arbitrators making several preliminary determinations on motions seeking: (1) a declaration that the September 28, 2015 Operating Agreement was valid and enforceable (Arbitrators Determination Number 1); (2) the return of a lap top computer to Portfolio Solutions, LLC. (Arbitrators Determination Number 2); (3) to bifurcate the liability and damages portions of the arbitration proceeding (Arbitrators Determination Number 3); (4) the issuance of subpoena duces tecum for several potential witnesses (Arbitrators Determination Number 4); (5) to prohibit de bene esse subpoenas for Ms. Bruno (Arbitrators Determination Number 5); (6) to schedule certain depositions (Arbitrators Determination Number 6); and, (7) summary disposition of certain claims and counterclaims (Arbitrators Determination Number 7).

The arbitration hearing was held over four days, from February 19-22, 2018, with five witnesses testifying at the hearing along with the submission of expert valuation reports and deposition testimony of numerous other witnesses. Prior to the hearing, Ferri had withdrawn a claim for damages concerning the tax treatment of the so-called “service fee” of \$467,750 and Gladney taking a \$450,000 deduction relating to an earlier member’s non-compete, as well as

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<sup>1</sup> Throughout this determination, reference to Ferri shall be understood to include the entity, Rick Ferri, LLC, and reference to Gladney shall be understood to include the entity, Liberty PS Holdings, LLC.

any claim concerning the tax treatment of \$373,699.50 incurred in an earlier dispute. Similarly, Gladney had withdrawn counterclaims for damages previously identified in the August 11, 2017 statement of claims. (*See* January 2, 2018 email from Kaveh Kashef to William Chandler, Gerald Petros, and David Hansma). The arbitrators have considered all of the evidence and proofs introduced during the four day arbitration hearing concerning the remaining claims and counterclaims. In addition, we have considered the parties' pre-hearing and post-hearing written submissions on the issues remaining for disposition. This constitutes our determination and final award.

This is a dispute between the two members of Portfolio Solutions, LLC (the "Company"), a Michigan Limited Liability Company that was originally founded by Richard Ferri in 1999. The Company is a registered investment advisor regulated by the United States Securities Exchange Commission. It provides a range of wealth management and financial advisory services to its clients, employing a passive or low-cost investment philosophy. In 2015, James Gladney became a member of the Company following the resolution of an earlier dispute in 2014 between Ferri and a previous member of the Company. Gladney and his company (Liberty PS Holdings, LLC) became 50% members of the Company in February 2015, with Ferri and his company (Rick Ferri, LLC) as the other 50% member. Neither member disputes the validity and enforceability of the February 4, 2015 Restated and Amended Operating Agreement of Portfolio Solutions, LLC, under which this business relationship was initially launched. At the time of the February 4, 2015 Agreement, Gladney and Ferri were each 50% voting members and held the title of "Manager" of the Company. Between February 2015 and August 2015, a number of disputes and disagreements arose between Ferri and Gladney, all of which culminated in the execution of a replacement operating agreement—the September 28, 2015 Operating Agreement.

In connection with an earlier 2014 dispute, Gladney was brought in to provide counseling and advice to Ferri. Ultimately, Gladney agreed to acquire the 40% interest of the departing member in the Company for \$1,444,173, while Ferri retained his 50% interest. In addition, Ferri agreed that the Company would issue to Gladney, for \$1, units amounting to 10% of the equity, thus resulting in each member owning 50% of the equity in the Company. In this regard, Gladney asserts that Ferri owes Gladney \$467,750 for certain consulting and advisory services Gladney provided to Ferri in the earlier dispute. Based on all of the evidence presented at the hearing, however, the arbitrators find and conclude that the additional 10% equity interest in the Company granted to Gladney was, in fact, in exchange for his consultation and advisory services. Accordingly, we determine that Gladney's claim for fees was extinguished through his receipt of the additional 10% equity.

When Gladney joined Ferri as an equal member and manager in early 2015, they executed an Amended and Restated Operating Agreement of Portfolio Solutions, dated February 4, 2015. The February 4 agreement was later superseded by the September 28, 2015 Amended and Restated Operating Agreement. The most significant change in the September 28, 2015 Operating Agreement was the provision in Article VII that made Gladney or his designee the sole manager of the Company. In his arbitration demand, Ferri challenged the September 28, 2015 Operating Agreement, asserting that it is invalid and unenforceable because it was the product of either (1) duress or (2) fraudulent inducement or fraudulent misrepresentations. Alternatively, even if the September agreement is valid and enforceable, Ferri contends that Gladney has taken a series of actions under it that are unfair, oppressive and injurious to Ferri's rights as a member and that substantially interfered with Ferri's membership interests. Ferri points, for example, to a course of conduct that enabled Gladney to enrich himself at Ferri's expense by limiting member distributions to Ferri, redirecting member distributions to himself

disguised as management fees, denying Ferri access to Company books and records, depriving Ferri of certain intellectual property and squeezing Ferri out of the Company. Gladney responds that he was made sole manager of the Company because Ferri agreed that it was in the best interest of the Company due to Ferri's uncooperative behavior within the Company. Gladney insists his actions were necessary to protect the Company and its employees from an ongoing pattern of Ferri's interpersonal conflicts and disruptive actions.

Having considered all of the testimony and proofs at the hearing, the pre-hearing and post-hearing written submissions of the parties, and all of the exhibits introduced during the hearing, the arbitrators conclude that the September 28, 2015 Operating Agreement is valid and binding on the parties. The evidence does not support Ferri's claim that he was fraudulently induced to enter into the September 28, 2015 Operating Agreement, and we have already rejected his duress claim. Both Ferri and Gladney were represented by sophisticated counsel who carefully negotiated the terms of the September 28, 2015 Operating Agreement. The evidence also demonstrates that Ferri was fully aware of the terms and provisions in the September 28, 2015 Operating Agreement and was not induced fraudulently, or otherwise, to enter into the agreement. We therefore determine that the September 28, 2015 Operating Agreement is valid and enforceable as written.

By virtue of becoming the sole manager of the Company under the September 28, 2015 Operating Agreement, however, Gladney assumed fiduciary responsibilities under Michigan law towards his fellow member (Ferri) as well as the Company. Based on all the proofs and testimony offered at the evidentiary hearing, the arbitrators conclude that the cumulative effect of Gladney's actions as sole manager—actions occurring between the dates of the September 28, 2015 Operating Agreement and the date Gladney unilaterally amended the agreement on April 8, 2016—amounted to oppression of Ferri. Gladney's oppressive actions included, but are not



necessarily limited to, his decision to (1) remove Ferri from the Company's email account, (2) limit Ferri's access to books and financial records of the Company, (3) limit Ferri's ability to communicate with employees at the Company, (4) eliminate regular distributions to members while Gladney simultaneously commenced payment of a \$500,000 per year management fee to himself as manager, and (5) Gladney's unilateral amendment of the September 28, 2015 Operating Agreement on April 8, 2016, purporting to thereby transfer Ferri's intellectual property to the Company and alter the terms of a buyout of Ferri in the event of member disassociation. The cumulative result of these series of actions, along with other actions not enumerated here, was to neutralize and isolate Ferri as a participating member of the Company which Ferri founded and to substantially interfere with his interests as a member. Relatedly, the arbitrators also determine, based on all of the evidence, that Gladney's purported option calls on Ferri's membership interests, exercised in April 2016 and again in November 2017, were inequitable and unfair efforts to further oppress and to squeeze out Ferri and, therefore, the option calls are invalid and will not be enforced according to their terms.

As a remedy for minority oppression, the arbitrators further determine that the Respondents shall be obligated, jointly and severally, to purchase Ferri's 50% membership interest. MCL 450.4515(1)(d). The purchase price shall be based on the Respondents' expert (Cherfoli) valuation of the Company at \$5,054,000 as of September 30, 2017. That is, Respondents shall be liable, jointly and severally, for paying Ferri the sum of \$2,527,000, which is one-half of the Cherfoli valuation. Respondents shall choose one of the three following payment options: (1) Respondents can elect to pay Ferri the full amount of \$2,527,000 for his 50% membership interest within 120 days of the arbitration award and, if full payment is made within 120 days, no interest shall be added to the payment amount; (2) Respondents can elect to make payment to Ferri for his 50% interest over the next 12 months from the date of this award,

with payments to be made in equal quarterly amounts and with interest accruing on the outstanding balance at a rate of 5%, compounded quarterly from the date of the Award; (3) Respondents can elect to make payment to Ferri for his 50% interest over the next 24 months from the date of this award, with payments to be made in equal quarterly amounts and with interest accruing on the outstanding balance at a rate of 7.5%, compounded quarterly from the date of the Award. Respondents shall, within 30 days from the date of this Award, make an irrevocable election, and notify claimants thereof in writing, as to which payment option (identified above) they have selected. Respondents also may elect to prepay the outstanding amount of the Award at any time.

In addition to the purchase of Ferri's membership interest that the arbitrators award as a remedy for oppression, the arbitrators further award Ferri an amount equal to one-half of the management fees actually received by Respondents Liberty/Gladney. This award amounts to \$312,500, or one-half of the total management fees (\$625,000) actually received by Liberty/Gladney.

Next, the arbitrators were advised during the hearing that the parties reached agreement on claims regarding Ferri's intellectual property. Specifically, the parties have acknowledged the validity of Ferri's claim to his intellectual property, all of which will be restored to Ferri within 30 days of the date of this award, if it has not already been restored. Accordingly, the arbitrators determine that Ferri is the owner of: (1) the domain name [www.RickFerri.com](http://www.RickFerri.com) and other websites identified in Hearing Exhibit J-194; (2) the intellectual property identified in Hearing Exhibit J-194, (3) the Rick Ferri LinkedIn page; (4) the @Rickferri twitter account; (5) the Rick Ferri "author" Facebook account; and (6) the RickFerri user name on Bogleheads.org. Respondents shall provide to Ferri all necessary and appropriate login and password information

for the Facebook account and for all websites to Ferri within 30 days of this award (if it has not already been provided).

In light of the determinations that (1) the September 28, 2015 Operating Agreement is valid and enforceable and (2) actionable oppression occurred between September 28, 2015 and April 8, 2016, the arbitrators further conclude that the noncompete covenants (as set forth in Section 11.01(B) of the September 28, 2015 Operating Agreement) continue in effect, as written, until April 7, 2019. Section 11.02's confidentiality provision also remains binding on a member after the member's interests have been purchased.

Finally, both Ferri and Gladney have sought an award of attorneys' fees and costs incurred during the course of the arbitration. Because the arbitrators have found in favor of Ferri as a result of oppression that substantially impaired his interests and rights as a member in the Company, but neither party has prevailed in full, we also conclude that the most reasonable and fair determination is to award one-half of the fees and costs Ferri requested, and that amount is \$283,000. The awarded fees and costs (\$283,000), together with the award of one-half of the management fees actually paid to Liberty/Gladney (\$312,500), results in a combined monetary award of \$595,500, which Respondents shall pay in full to Ferri within 30 days from the date of this final award (without interest). The arbitrators deny the Respondents' request for attorneys' fees and costs.

The Administrative fees and expenses of the AAA totaling \$25,900.00 are to be borne as incurred. The Compensation and expenses of Arbitrators totaling \$270,088.83 are to be borne as incurred.

This final determination and award is intended to fully and completely decide and resolve all claims and counterclaims submitted in this arbitration proceeding. All claims and counterclaims not expressly granted in this award are denied. The award may be executed in any

number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

5/2/18  
Date

William B. Chandler III  
William B. Chandler III, panel chair

I, William B. Chandler III, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument that is my Award.

5/2/18  
Date

William B. Chandler III  
William B. Chandler III, panel chair

5/8/18  
Date

E. Powell Miller  
E. Powell Miller

I, E. Powell Miller, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument that is my Award.

5/8/18  
Date

E. Powell Miller  
E. Powell Miller

5-2-18  
Date

Keefe A. Brooks  
Keefe A. Brooks

I, Keefe A. Brooks, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument that is my Award.

5-2-18  
Date

Keefe A. Brooks  
Keefe A. Brooks