

THE GATEKEEPER: A PRACTICAL GUIDE TO RESOLVING EVIDENTIARY DISPUTES AT HEARING¹

In Breakout Session #1, panelists will present participants with a series of evidentiary disputes that arise in a hypothetical arbitration between a policyholder and its insurer. Participants will then rule anonymously through live e-polling.

Panelists will presume participants are familiar with the attached hypothetical, which provides background facts necessary to make considered rulings on the evidentiary disputes. To simulate the speedy rulings arbitrators must make at hearing, the actual evidentiary disputes will not be presented in advance. The outline below provides guidance that participants may find useful in preparing to rule.

Following a review of voting results on the evidentiary disputes, panelists and participants will discuss how a court hearing a motion to vacate might consider challenges to participants' rulings.

I. IDENTIFY THE RULES

Chapter III: The Organizational Meeting

3.13, Comment D: The Panel should consider whether the relevant arbitration clause designates specified procedural rules (e.g., the American Arbitration Association Commercial Arbitration Rules, or the Procedures for the Resolution of U.S. Insurance and Reinsurance Disputes), whether particular rules apply to an international arbitration, and/or whether the parties have agreed to any other set of procedural rules.

ARIAS-U.S. Practical Guide, available at <https://www.arias-us.org/arias-us-dispute-resolution-process/practical-guide>.

A. Contract Language: Rules Not Specified

Sample Clause: The Arbitration Panel shall not be obligated to follow the strict rules of law or evidence.

Sample Clause: The Panel shall interpret this contract as an honorable engagement, and shall not be obligated to follow the strict rules of evidence. In making their decision, the Panel shall apply the custom and practice of the insurance and reinsurance industry, with a view to affecting the general purpose of this contract.

¹ These written materials, and any associated commentary as part of Breakout Session #1, are provided for general educational purposes. They are not intended to be, and should not be taken as, legal advice. Positions described in these materials or by the presenters during Breakout Session #1 are offered for discussion purposes, and do not necessarily reflect those of the presenters or their organizations or clients.

B. Contract Language: Rules Specified

1. **ARIAS-U.S. RULES FOR THE RESOLUTION OF U.S. INSURANCE AND REINSURANCE DISPUTES**, available at <http://www.arias-us.org/wp-content/uploads/2016/09/ARIASU.S.-Rules.pdf>

14. ARBITRATION HEARING

* * *

14.2 The Panel may decide whether and to what extent there should be oral or written evidence or submissions.

14.3 The Panel shall not be obligated to follow the strict rules of law or evidence.

* * *

14.4 Subject to the control of the Panel, the Parties may question any witnesses who appear at the hearing. Panel members may also question such witnesses.

* * *

14.6 The Panel shall require that witnesses testify under oath, unless waived by all Parties. The Panel shall have the discretion to permit testimony by telephone, affidavit, or recorded by transcript, videotape, or other means, and may rely upon such evidence as it deems appropriate. Where there has been no opportunity for cross examination by the other Party, such evidence may be permitted by the Panel only for good cause shown. The Panel may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

* * *

14.8 When the Panel decides that all relevant and material evidence and arguments have been presented, the Panel shall declare the evidentiary portion of the hearing closed.

2. **AAA COMMERCIAL ARBITRATION RULES**, available at <https://www.adr.org/sites/default/files/Commercial%20Rules.pdf>

R-32. Conduct of Proceedings

(a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses

for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

(b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

(c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute, and, when involving witnesses, provide an opportunity for cross-examination.

(d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-34. Evidence

(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default, or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

II. SEEK FAIRNESS AND EFFICIENCY

- A. **ARIAS-U.S. CODE OF CONDUCT**, available at <https://www.arias-us.org/arias-us-dispute-resolution-process/code-of-conduct>

CANON II

FAIRNESS: Arbitrators shall conduct the dispute resolution process in a fair manner and shall only serve in those matters in which they can render a just decision. If at any time the arbitrator is unable to conduct the process fairly or render a just decision, the arbitrator should withdraw.

CANON VII

ADVANCING THE ARBITRAL PROCESS: Arbitrators shall exert every reasonable effort to expedite the process and to promptly issue procedural communications, interim rulings, and written awards.

* * *

Comment 3. Arbitrators should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process.

Comment 4. Arbitrators should be patient and courteous to the parties, to their lawyers and to the witnesses, and should encourage (and, if necessary, order) similar conduct of all participants in the proceedings.

Comment 5. Arbitrators may question fact witnesses or experts during the hearing for explanation and clarification to help them understand and assess the testimony; however, arbitrators should refrain from assuming an advocacy role and should avoid interrupting counsel's examination unless clarification is essential at the time.

- B. **ARIAS-U.S. PRACTICAL GUIDE**, available at <https://www.arias-us.org/arias-us-dispute-resolution-process/practical-guide>

Chapter V: Hearing and Award

5.1, Comment: The Panel should carefully consider any request to postpone a hearing, including whether a delay could unfairly disadvantage one party. The Panel and the parties should also endeavor to complete the testimony and argument within the allotted time. Requests to reconvene to hear additional testimony in the event the allotted time is not sufficient to complete the hearing should be granted selectively. The Panel, however, should afford the parties ample time to present their case and should allow continuances in appropriate cases.

- C. **FEDERAL RULES OF EVIDENCE**, available at <http://www.uscourts.gov/sites/default/files/rules-of-evidence.pdf>

RULE 102. These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

RULE 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

III. ASSESS THE RELEVANCE AND RELIABILITY OF EVIDENCE

A. RELEVANCE

RULE 401. Test for Relevant Evidence

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Advisory Committee Notes: “. . . The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. . .”

RULE 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

RULE 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Advisory Committee Notes: “The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. . . . While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of evidence. . . .”

RULE 406. Habit; Routine Practice

Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Advisory Committee Notes: “. . . It describes one’s regular response to a repeated specific situation. . . . The doing of the habitual acts may become semi-automatic.”

B. RELIABILITY

RULE 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony. This rule does not apply to a witness’s expert testimony under Rule 703.

Advisory Committee Notes: “[T]he rule . . . is a ‘most pervasive manifestation’ of the common law insistence upon ‘the most reliable sources of information.’”

RULE 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

RULE 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * *

- (c) **Hearsay.** "Hearsay" means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

* * *

RULE 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant Is Available as a Witness

* * *

- (5) **Recorded Recollection.** A record that:
 - (A) is on a matter the witness knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
- (6) **Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;
 - (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
 - (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

- (7) **Absence of a Record of Regularly Conducted Activity.** Evidence that a matter is not included in a record described in paragraph (6) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
 - (B) a record was regularly kept for a matter of that kind; and
 - (C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

RULE 807. Residual Exception

- (a) **In General.** Under the following circumstances, a hearsay statement is not excluded . . . :
- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
 - (2) it is offered as evidence of a material fact;
 - (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
 - (4) admitting it will best serve the purposes of these rules and the interests of justice.

* * *

IV. RULE ON EVIDENTIARY DISPUTES

- A. EVIDENTIARY DISPUTE HYPO #1**
- B. EVIDENTIARY DISPUTE HYPO #2**
- C. EVIDENTIARY DISPUTE HYPO #3**
- D. EVIDENTIARY DISPUTE HYPO #4**
- E. EVIDENTIARY DISPUTE HYPO #5**

V. UNDERSTAND THE IMPACT

Survey of decisions where challenges to award included evidentiary rulings:

Petroleum Separating Co. v. Interamerican Ref. Corp., 296 F.2d 124 (2d Cir. 1961) (affirming district court’s denial of motion to vacate award, explaining that arbitrators were entitled to accept hearsay evidence from both parties and cautioning that parties who “wish to rely on such technical objections . . . should not include arbitration clauses in their contracts”).

In re Compudyne Corp., 255 F. Supp. 1004 (E.D. Pa. 1966) (denying motion to vacate award, despite arbitrator’s exclusion of other project testimony as irrelevant and alleged

admission as hearsay, explaining that “[m]ere errors on points of evidence have never been considered adequate grounds for the vacation of an award”).

Harvey Aluminum v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 488 (C.D. Cal. 1967) (granting petition to vacate award because arbitrator’s preclusion of pertinent and material testimony as not proper rebuttal evidence reflected unfair hearing, in the absence of any warning by the arbitrator as to the evidentiary rules to be followed).

Barker v. Gov’t Emps. Ins. Co., 339 F. Supp. 1064 (Dist. D.C. 1972) (denying motion to vacate award, finding that party’s assertion that arbitrator abused his authority in admitting certain hospital records into evidence was “entirely lacking in merit”).

Hoteles Condado Beach, La Concha and Convention Ctr. v. Union de Tronquistas Local 901, 763 F.2d 34 (1st Cir. 1985) (affirming district court’s vacatur of award, where arbitrator accepted trial transcript into evidence but refused to give any weight to unquestionably relevant evidence, effectively denying the party an opportunity to present any evidence in the proceedings).

Westvaco Corp. v. Local 579, United Paperworkers, Int’l Union, No. 90-30091-F, 1992 WL 121372 (D. Mass. Mar. 5, 1992) (adopting magistrate judge’s recommendation to vacate award where arbitrator seeking to decrease disputes between the parties decided to accept contract interpretation of arbitrator in prior proceeding as long as it was not clearly erroneous, but then excluded evidence offered by party as to whether that prior interpretation was clearly erroneous).

Farkas v. Receivable Fin. Corp., 806 F. Supp. 84 (E.D. Va. 1992) (enforcing arbitration award, holding that “as a matter of law, the arbitrators did not exceed their power by considering hearsay evidence”).

Warnes, S.A. v. Harvic Int’l, Ltd., No. 92 Civ. 5515(RWS), 1995 WL 261522 (S.D.N.Y. May 4, 1995) denying motion to vacate award, where party failed to show that arbitrator’s refusal to hear rebuttal testimony resulted in fundamentally unfair trial).

Areca, Inc. v. Oppenheimer & Co., 960 F. Supp. 52 (S.D.N.Y. 1997) (denying motion to vacate award for refusal to permit CFO’s testimony, because testimony would have been either cumulative of other evidence or documentary evidence or simply irrelevant and scope of inquiry afforded petitioners was sufficient to enable the arbitrators to make an informed decision and to provide petitioners a fundamentally fair hearing).

Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (vacating award, finding that panel’s refusal to continue the hearings to allow testimony of former president, temporarily unavailable due to wife’s illness, amounted to fundamental unfairness and misconduct where there was no reasonable basis for the panel to determine that omitted testimony would be cumulative).

Nationwide Mut. Ins. Co. v. First State Ins. Co., 213 F. Supp. 2d 10 (D. Mass. 2002) (denying petition to vacate, finding that cedent had received a full and adequate hearing on aggregation issue following two years of discovery, briefing and three days of evidence, and panel’s denial of motion to reopen discovery was reasonable).

Commercial Risk Reinsurance Co. v. Sec. Ins. Co. of Hartford, 526 F. Supp. 2d 424 (S.D.N.Y. 2007) (denying motion for reconsideration of court’s order denying motion to vacate award, where party argued panel improperly excluded testimony and related documents of damages witness).

OneBeacon Am. Ins. Co. v. Swiss Reinsurance Am. Corp., No. 09-CV-11495-PBS, 2010 WL 5395069 (D. Mass. Dec. 23, 2010) (denying motion to vacate award where party had “had plentiful opportunities to present evidence, and what limitations the Panel did place on witness testimony were entirely within the bounds of its discretion”).

Century Indem. Co. v. AXA Belgium, No. 11 Civ. 7263(JMF), 2012 WL 4354816 (S.D.N.Y. Sept. 24, 2012) (denying motion to vacate award, finding that “[t]he fact that respondent declined to call certain witnesses or present certain evidence within the time allotted . . . did not constitute fundamental unfairness”).

Rubenstein v. Advanced Equities, Inc., No. 13 Civ. 1502(PGG), 2014 WL 1325738 (S.D.N.Y. Mar. 31, 2014) (denying motion to vacate award, where panel reasonably concluded that additional evidence concerning common scheme argument was not pertinent and petitioners had not shown that they were unfairly prejudiced by panel’s refusal to hear evidence).

Amerisure Mut. Ins. Co. v. Everest Reinsurance Co., 109 F. Supp. 3d 969 (E.D. Mich. 2015) (granting motion to confirm award, where reinsurer failed to show that any evidentiary and procedural errors deprived it of a fair arbitration hearing, explaining that “evidentiary decisions of arbitrators should be viewed within unusual deference”).

ADDITIONAL ARIAS-U.S. RESOURCES

The ARIAS-U.S. Quarterly, available at <https://www.arias-us.org/publications/quarterly-archives>, has published articles addressing evidentiary issues of interest to arbitrators and arbitrating parties, including:

- Ronald S. Gass, *Panel Limits on Depositions and Hearing Testimony Did Not Amount to Arbitral Misconduct*, ARIAS-U.S. Quarterly, First Quarter 2011, Vol. 18, No. 1, at 25-26.
- Patricia Taylor Fox and Wm. Gerald McElroy, Jr., *Evidentiary Rules in Reinsurance Arbitrations*, ARIAS-U.S. Quarterly, Second Quarter 2009, Vol. 16, No. 2, at 2-7.
- Robert M. Hall, *Late Named Witnesses: What’s a Panel to Do?*, ARIAS-U.S. Quarterly, Second Quarter 2008,

- Vol. 15, No. 2, at 28-29.
- John M. Nonna, *The Power of Arbitrators*, ARIAS-U.S. Quarterly, Winter 1997, Vol. 3, No. 5, at 1, 3-5.

In the Matter of the Arbitration Between WidgetKicks and ACME Insurance Company

WidgetKicks is an emerging online athletic shoe retailer founded by Chase Hollywood, a former child actor and husband of heiress and acclaimed humanitarian, Allota Fortune. WidgetKicks' online-only platform is "the" destination for must-have, celebrity-designed footwear, ranging in price from \$1,000 to \$5,000 per pair. Each year on New Year's Day, WidgetKicks announces three A-list celebrities who have created portfolios, or limited edition shoe designs, in exchange for WidgetKicks' donation of a share of the sales to their chosen charity. Through a massive public relations campaign at year end, WidgetKicks builds consumer excitement in anticipation of its New Year's Day announcement, and WidgetKicks' customers race to be the first to buy the latest releases before a portfolio sells out. The footwear has both artistic and celebrity memorabilia appeal among high-end collectors, and successful purchasers have been able to resell the footwear for two or three times the original sales price. In 2015, 60% of WidgetKicks \$30 million annual revenue was generated in the first week of the calendar year.

Due to exploding sales growth, Patrick Pushover, WidgetKick's Executive Vice President (and a childhood friend of Fortune), asked broker, Justin Between, to review WidgetKicks' insurance program and obtain robust coverage for the 2016 renewal. On Between's recommendation, WidgetKicks purchased a specialty risk policy issued by ACME Insurance Company, including first party computer security coverage, for the period from June 1, 2016 to June 30, 2017. The declaration page listed a policy aggregate limit of \$10 million and a sublimit for cyber extortion loss of \$1,000,000 each threat and in the aggregate.

The ACME policy included the following provisions under Insuring Agreements:

First Party Network Business Interruption

To indemnify WIDGETKICKS for the actual business interruption loss, in excess of the applicable retention, WIDGETKICKS sustains during the period of restoration as a direct result of an actual and necessary interruption of computer systems caused directly by a failure of computer security to prevent a security breach, provided that such security breach first take place on or after the policy effective date and before the end of the policy period.

Cyber Extortion Threat

To indemnify WIDGETKICKS for loss incurred by WIDGETKICKS as a direct result of a Cyber Extortion Threat first made against WIDGETKICKS during the policy period. We will reimburse you for a Payment made under duress by or on behalf of WIDGETKICKS with ACME's prior written consent to prevent or terminate a Cyber Extortion Threat and resulting from a Cyber Extortion Threat that first occurs during the policy period.

The ACME policy contained the following definitions:

“Business Interruption Loss” means the actual income loss and expense incurred during restoration, and shall not include loss arising out of liability to a third party, legal expenses, or loss resulting from unfavorable business conditions.

“Cyber Extortion Threat” means any threat or related series of threats to intentionally attack a computer system for the purpose of coercing an Insured into a Payment. A related series of threats, or a continuing threat, shall be considered a single Cyber Extortion Threat and deemed to have occurred at the time of the first Cyber Extortion Threat.

The ACME policy contained the following exclusion:

Any Loss arising out of:

- (a) any intentional act or omission committed, approved, participated in, or acquiesced in by:
 - (1) a current or former director, officer or principal (or the equivalent positions) of WIDGETKICKS; or
 - (2) any current or former employee of WIDGETKICKS other than those persons referenced in subparagraph (a)(1), if any person referenced in subparagraph (a)(1) knew or had reason to know of the intentional act or omission causing the Loss prior to that intentional act or omission.

WidgetKicks’ staff worked at a fever pitch throughout the 2016 holiday season in a buildup to the 2017 Portfolio Reveal, scheduled to go live online at 12:17 a.m, Eastern, on January 1, 2017. Then, at 10:00 p.m., Eastern, on December 31, 2016, WidgetKicks’ computer systems froze. Access to internal files and customer access to the online store was blocked. Hollywood received a panicked call from Pushover, who told Hollywood he didn’t know what was wrong with the network, but that he was trying to reach WidgetKick’s brilliant, if odd, Technology Specialist, Ima Hacker.

With Pushover screaming into the phone (“We’re gonna lose millions! We’ve got to get back online! The press is gonna have a field day! We’ll never recover! No celeb will touch us after this, if we lose the reveal! AHHH!”), Hollywood received a text at 11:15 p.m., Eastern, from an unknown number that read:

STRESSED ABOUT WORK, CHASE? GOOD THING YOU TALKED ALOTTA INTO BUYING BITCOIN, BECAUSE I’VE DECIDED CHARITY STARTS AT HOME – MY HOME. STAND BY. I’LL BE IN TOUCH.

Distracted by Pushover’s screaming, and confused by the text, Hollywood told Pushover to try again to reach Hacker, then hung up and paced the floor, waiting for an update. At 12:01 a.m.,

Eastern, Hollywood got a call from another unknown number. Hollywood later explained that he answered and heard a computerized voice say:

WIDGETKICKS' NETWORK IS MINE. YOU HAVE EXACTLY ONE HOUR TO TRANSFER \$1M IN BITCOIN TO 17VZNX1SN5NtKa8UQFxfwQbFeFc3iqRYhem. THIS IS YOUR ONLY CHANCE. PAY AND I'LL RELEASE YOUR SYSTEM. CALL ANYONE AND WIDGETKICKS IS OVER. I WILL KNOW. DO NOT DOUBT ME. THERE WILL BE NO FURTHER COMMUNICATIONS.

As soon as Hollywood hung up, Pushover called with an update, explaining that he had gotten ahold of Hacker, and Hacker was heading up WidgetKicks' efforts to get the system up and running in time for the 2017 Portfolio Reveal. Pushover said Hacker thought it could be a cyber ransom attack, but was telling Pushover not to pay any ransom demanded, because "once you pay once, they won't stop." Hollywood told Pushover about the call demanding the bitcoin transfer. Pushover told Hollywood: "Just do it! Pay it fast! We've only got moments until the Reveal!" Reeling at the thought of the financial loss WidgetKicks was facing (and of explaining this PR nightmare to his wife's publicist), Hollywood raced to his laptop and transferred \$1 million in bitcoin at 12:10 a.m., Eastern.

Hollywood waited. Finally, at noon on New Year's Day, Pushover called to tell Hollywood that the system was operational again. WidgetKick's 2017 Portfolio Reveal went live moments later. Exhausted, the Pushover and Hacker headed home to sleep.

Meanwhile, Alotta Fortune's publicist had finally located her at an "off-the-grid" glamping resort and think tank. He alerted her that, last night, comedian Johnny Cimmel had interviewed action film megastar Ashley Terrick (one of the 2016 celebrity designers to be "revealed") on his late night talk show. Terrick, who appeared intoxicated, launched into a profanity-laden rant against baseball and apple pie, and boasted of hunting endangered wildlife with an infamous foreign dictator. Alotta Fortune immediately and publicly distanced herself from WidgetKicks, which she described in the press as "Chase's little hobby," noting that the couple had "different interests" and she was focused on her charitable endeavors.

WidgetKicks' January 2017 sales were 10% of its January 2016 sales.

Hacker never returned to work. The FBI considers Hacker a person of interest, but has yet to locate him.

WidgetKicks gave timely notice of a claim to ACME and submitted a statement of loss. After its claim investigation, ACME denied WidgetKicks' claim. Business personnel at WidgetKicks and ACME were unable to resolve the coverage dispute. Eager to avoid publicity that would follow a court case, WidgetKicks and ACME agreed to arbitrate under the following terms:

Arbitration shall be conducted before a three-person Arbitration Panel appointed as follows. Each party shall appoint one arbitrator, and the parties shall then appoint the Umpire pursuant to the ARIAS-U.S. Umpire Selection Procedure. The arbitrators and umpires shall be ARIAS-U.S. certified, shall not be under the control of either party, and

shall have no financial interest in the outcome of the arbitration. The parties shall execute an ARIAS-U.S. Form Confidentiality Agreement, and the Arbitration Panel shall not be obligated to follow the strict rules of law or evidence. The decision of a majority of the Arbitration Panel shall be final and binding, except to the extent otherwise provided by the Federal Arbitration Act. The Arbitration Panel shall issue its award in writing. Judgment upon the award may be entered in any court having jurisdiction, pursuant to the Federal Arbitration Act.

The parties accepted the panel at the Organizational Meeting, and engaged in document and deposition discovery over the next six months. The hearing is scheduled for November 2, 2017.

547912