IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-10219

CHRISTOPHER MICHAEL WANKEN,

Plaintiff - Appellant

v.

JOHN DWIGHT WANKEN,

Defendant - Appellee

and

RAYMOND JAMES FINANCIAL SERVICES INC.,

Defendant - Appellee

On Appeal from the United States District Court

For the Northern District of Texas

BRIEF OF CHRISTOPHER MICHAEL WANKEN, PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

CHRISTOPHER MICHAEL WANKEN,

Plaintiff-Appellant

v. No. 11-10219

JOHN DWIGHT WANKEN,

Defendant-Appellee,

and

RAYMOND JAMES FINANCIAL SERVICES INC.

Defendant-Appellee.

The undersigned pro se litigant certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Christopher Michael Wanken
2. John Dwight Wanken
3. N. Henry Simpson III
4. Busch Ruotolo & Simpson
5. Braden W. Sparks

6. Thomas M. Gregor
7. Linda J. Broocks
8. Ogden, Gibson, Broocks, Longoria & Hall
9. Raymond James Financial Services, Inc.
10. Raymond James and Associates
11. Erin Linehan-Reyes
12. Kirk Bell
13. Carter Financial Management

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STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff requests oral argument but defers to the discretion of the Court and will waive oral argument.

The district court, in dismissing Plaintiff's complaint alleging procurement of the arbitration award by fraud, failed to recognize the complaint states a claim under relevant case law. The district court further failed, as required on a motion to dismiss, to draw reasonable inferences from the complaint in Plaintiff's favor. Finally, in dismissing the complaint, the district court seemingly did so in spite of the well-pleaded facts in the amended pleading.

Oral argument may assist the Court in its consideration of these issues, particularly with regard to the fraud and perjury that Plaintiff alleged against the Defendants.

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STATEMENT OF JURSIDICTION

The district court had jurisdiction to hear Plaintiff's claims under the Federal Arbitration Act, 9 U.S.C. § 10. Final judgment of dismissal was entered for Defendants on February 9, 2011 and Plaintiff filed his notice of appeal on February 27, 2011. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

This is an appeal by Plaintiff, Christopher Wanken, from a final order in a motion to vacate an arbitration award alleging procurement of the award by fraud. The complaint alleged Defendants John Dwight Wanken (JD Wanken) and Raymond James Financial Services, Inc. (RJFS) procured the award by fraud through perjured testimony, subornation of perjury, spoliation of evidence that would have contradicted the perjured testimony entered by Defendants and their witnesses and fraud upon the court.

The complaint alleged Defendants introduced perjured testimony that matched perfectly during a Financial Industry Regulatory Authority (FINRA) arbitration hearing in December 2009. Plaintiff argued during arbitration that Defendants' testimony was false and requested ***any*** evidence to support their testimony. Both Defendants said they simply didn't have notes or records to

substantiate their testimony. There were, however, documents Plaintiff requested during discovery from Defendants which would have wholly contradicted their testimony – but which they refused to provide to Plaintiff, despite orders ruling they must produce. **RE 14h-14i, 14r-14w.** On the third day of arbitration, after testifying **under oath** they'd produced all documents, both Defendants admitted they hadn't produced all documents requested – and JD Wanken testified he'd ***intentionally and purposefully*** not produced thousands of documents.

Immediately after the hearing, Plaintiff filed requests with the Internal Revenue Service (IRS) and Texas Workforce Commission (TWC) to investigate statements JD Wanken made during arbitration as they contradicted Plaintiff's understanding of their business relationship, compensation and tax filings. **RE 14k-14l.**

In testimony before the IRS and TWC **after** arbitration, JD Wanken and his lawyer, N. Henry Simpson, III (Simpson), contradicted every material statement they made during arbitration regarding his business relationship with Plaintiff, Plaintiff's performance, their compensation structure, Plaintiff's title and responsibilities and the reason for termination of Plaintiff's financial services license. Simpson testified vociferously and passionately on material issues during

arbitration and TWC hearings. Yet his and his client's testimonies ***differed radically*** in the two venues. **RE 14q.**

It's Plaintiff's allegation that Simpson committed fraud upon the court, suborned perjury, he and his client entered perjured testimony in arbitration, obtained the award by fraud and obstructed justice through their determination to win at any cost, including lying.

After the TWC and IRS investigations, the testimonies that matched ***perfectly*** between JD Wanken and RJFS at arbitration now contradicted each other. Plaintiff alleged in his complaint that one or both of Defendants procured the award by fraud, it was intentional and planned between the Defendant(s) and counsel, there was spoliation of evidence based on their refusal to produce documents that would have contradicted their intended testimony, counsel for Defendant(s) suborned perjury and witness(es) entered perjured testimony that enabled them to procure a favorable arbitration award.

Plaintiff further alleged there was conspiracy and collusion between Defendants to procure the award by fraud given the ***exact*** match of their testimony – down to specific details for which Plaintiff asked for evidence but which neither party could produce. In advance of the hearing, Defendant RJFS's lawyer, Erin Linehan-Reyes (Linehan-Reyes), stated to Plaintiff in a phone call that she wasn't

concerned about the arbitration. When Plaintiff said the Defendants had no evidence to support their case, Linehan-Reyes stated confidently that the arbitrators gave more weight to oral testimony than to written evidence. While Plaintiff thought this was an unusual statement for Linehan-Reyes to make at the time, it became apparent in the hearing that Defendants intended to do exactly this – and apparently in concert.

Plaintiff repeatedly asked Defendants RJFS and JD Wanken during arbitration if they had any evidence to support their statements. JD Wanken assumed a pained expression and stated he just didn't think he needed to write such things down, given Plaintiff was his son. RJFS testified it simply didn't have the records. And Simpson took off on a dramatic tangent attacking Plaintiff's work history and performance – again, without any evidence to substantiate his attacks.

Plaintiff alleged Defendants conspired together to procure the award by fraud through spoliation of evidence, perjured testimony, subornation of perjury and fraud upon the court.

The district court dismissed the complaint on grounds that it failed to establish any grounds for vacating or modifying the arbitration award and that Plaintiff failed to adequately allege the arbitration award was procured by fraud. **RE 3, 6.**

The issues presented are:

1. Whether the district court erred and committed reversible error in granting Defendants' 12(b)(6) motions and dismissing Plaintiff's motion to vacate the arbitration award in its ruling that Plaintiff failed to establish ***any*** grounds for vacating the arbitration award.
2. Whether the district court erred and failed to adequately review Plaintiff's amended pleading to determine if there were grounds to vacate the arbitration award based on Plaintiff's allegations of fraud, perjured testimony and fraud upon the court;
3. Whether, in any event, Plaintiff's complaint sufficiently alleges Defendants procured the arbitration award by fraud, where the complaint alleges that (a) Defendants' testimonies and that of their attorneys matched ***perfectly*** at the FINRA arbitration hearing; (b) JD Wanken's and Simpson's testimonies to the IRS and TWC completely contradicted every material statement they made before FINRA arbitrators with regard to Plaintiff's causes of action and, as a result, no longer matched the testimony they gave at FINRA (which had matched RJFS's testimony ***exactly - but no longer did)***; (c) JD Wanken and RJFS intentionally didn't produce documents ***they were ordered to produce*** in advance of arbitration which Plaintiff argued were material to his case and causes of

action and which he needed – in effect, spoliation of evidence. Yet on the third day of the hearing, Defendants admitted to intentionally not producing the documents; and (d) Neither JD Wanken nor RJFS could produce ***a single*** document to substantiate their claims or testimonies and instead urged the panel to accept their testimonies and that they were telling the truth.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiff's complaint alleged JD Wanken, seemingly in collusion with RJFS, intentionally entered perjured testimony during the FINRA arbitration. Plaintiff's complaint further alleged JD Wanken and RJFS intentionally suppressed documents during discovery which would have contradicted the false testimony they intended to introduce during arbitration.

These documents would have demonstrated Plaintiff's role with the firm, Defendants' knowledge that Plaintiff and JD Wanken were partners and shared a client production number, the reasons for the wrongful termination were wholly personal and without cause and Plaintiff and JD Wanken functioned and operated as a partnership and had intentionally **not** filed a partnership return on the advice of their accountant.

The complaint further alleged JD Wanken and Simpson then changed their ***entire*** testimonies in investigations and hearings conducted by the IRS and TWC after Plaintiff filed requests with the agencies to determine if JD Wanken had intentionally misclassified him based on JD Wanken's own FINRA testimony. In signed affidavits, in-person investigations and hearings between April 2010 and April 2011, JD Wanken and Simpson contradicted ***every*** material fact that was at issue during the FINRA hearing with regard to the following:

a) Whether they represented and presented themselves as a partnership;
b) Whether they operated as a partnership;
c) Whether Plaintiff and JD Wanken shared in the business's profits and losses;
d) Whether Plaintiff was an employee or independent contractor;
e) Whether Plaintiff and JD Wanken equally divided business responsibilities;
f) Whether JD Wanken had supervisorial responsibilities over Plaintiff;
g) Whether Plaintiff and JD Wanken shared an RJFS client production number;
h) Whether RJFS was aware of the partnership, joint production number and division of responsibilities between JD Wanken and Plaintiff; and
i) Whether Plaintiff was terminated for personal reasons ***completely*** unrelated to the business. **RE 14q.**

The complaint alleged that after the TWC and IRS investigations, the testimonies of RJFS and JD Wanken no longer matched – despite the fact that they matched ***down to minute details*** during arbitration. Plaintiff alleged JD Wanken and Simpson devised a plan to procure the award by fraud, which necessitated the

participation of RJFS in corroborating testimony through perjury, working together to suppress production of discoverable documents – in effect, spoliation of evidence – and fraud upon the court by attorneys Simpson and Linehan-Reyes.

At minimum, Plaintiff alleged, Simpson and JD Wanken perjured themselves, committed fraud to obtain a favorable arbitration award, spoliated evidence and Simpson suborned perjury and committed fraud upon the court. At worst, both Defendants and their attorneys conspired and colluded on each of the allegations in an effort to obstruct justice and procure a favorable award.

The district court granted Defendants' joined motions to dismiss based on the Magistrate's conclusion that Plaintiff's complaint failed to demonstrate the Defendants committed fraud. **RE 6 Pg.1343 ¶2.**

The Magistrate's January 2011 report, however, didn't include Plaintiff's amended pleadings, filed in June 2010, which included specific details about JD Wanken's conflicting testimony with agencies investigating him. These pleadings were immediately unfiled by the district court and all parties were prohibited from filing additional documents until the 12(b)(6) ruling. **RE 10 Pg.1312.**

Plaintiff objected to the Findings and Recommendations (Findings) and re-filed his amended pleadings with the district court in January 2011. **RE 4,5.** The district court then issued its order accepting the Magistrate's report and stated

Plaintiff failed to establish any grounds for vacating or modifying the award. **RE 3, Pg.1962.**

B. FACTS

On a motion to dismiss, the facts alleged in the complaint are accepted as true. The following factual account therefore is drawn from Plaintiff's complaint.

Plaintiff and JD Wanken presented and represented themselves as a partnership from 1997 - 2008, with the exception of a brief period when Plaintiff worked in the White House during and following graduate school.

During this time, they had orally agreed on a Split Agreement and Succession Agreement should a) one of the partners die; b) one of the partners retire; or c) one of the partners decide to leave the business for another reason. The Succession Agreement was signed and Plaintiff and JD Wanken had orally agreed to the final written draft of the Split Agreement in November 2007. **RE 4, Pg.1926-1927.**

While they operated as a partnership, they both received 1099s and didn't file a partnership return on their accountant's advice. They shared in profits and losses equally, made decisions together and divided business responsibilities based on skills, aptitude and experience.

RJFS was aware their business was a partnership and that they shared a client production number. RJFS knew the two partners often worked from their

home offices and were establishing virtual offices. **RE 4, Pg.1946 ¶2-3; RE 14 Pg.1798-1815.**

In September 2007, Plaintiff's mother and JD Wanken's wife died. In October 2007, JD Wanken demanded that Plaintiff meet his new girlfriend. He then demanded that Plaintiff introduce his two young children to her immediately after the death of their grandmother. He also demanded Plaintiff attend counseling at JD Wanken's girlfriend's counselor. **RE 4 Pg.1926 ¶5-9; RE 14a, 14p, 14q, 14z.**

On December 27, 2007, JD Wanken threatened Plaintiff on a phone call that he would terminate Plaintiff's financial services license if he didn't meet JD Wanken's personal demands regarding his new girlfriend. As of that time, JD Wanken and Plaintiff had orally agreed to the Split Agreement and had been acting under the terms of the agreement for several years. **RE 4 Pg.1927 ¶1-2; 14a Pg.168-171.**

Until JD Wanken spoke of his new girlfriend in October 2007, there were no significant conflicts between the partners and they operated in agreement for more than a decade, made day-to-day business decisions together and had positive business and personal relationships. **RE 4 Pg.1927 ¶3**

Between December 2007 and March 2008, JD Wanken continued to threaten Plaintiff if he didn't meet his personal demands. **RE 14a, 14o-14p, 14z.** Plaintiff

contacted Kirk Bell, the sales manager for their RJFS branch, to inform him that JD Wanken was threatening to terminate his license if he didn't meet his personal demands. Bell then contacted JD Wanken in March 2008 to discuss the matter. Bell took no further action and didn't involve any other personnel at RJFS to supervise or monitor JD Wanken's behavior and actions as the branch manager. **RE 4 Pg.1927 ¶ 1-6; RE 14b, 14aa.**

On March 13, 2008, JD Wanken terminated Plaintiff's financial services license. He then refused to pay Plaintiff his unpaid commissions, refused to honor their Split Agreement and went on to defame Plaintiff's FINRA U-5, writing that Plaintiff had been "uncooperative" and was terminated for cause. **RE 14e.** RJFS took no action, despite the fact that Bell was aware that JD Wanken threatened to terminate Plaintiff ***entirely*** for personal reasons. **RE 4 Pg.1927 ¶7.**

After the matter was moved to arbitration following several months in litigation, Plaintiff filed a FINRA arbitration claim in December 2008 against JD Wanken and RJFS. In discovery, Plaintiff requested material documents he ***knew*** RJFS and JD Wanken were required to maintain and had maintained with regard to the matters at issue in the arbitration. The panel ordered the production of the documents but RJFS and JD Wanken refused to produce them. During the hearing, the Defendants admitted intentionally not producing them, despite testifying at the

start of the hearing that they had produced all discoverable documents. **RE 4 Pg.1927 ¶8;Pg.1928 ¶ 1-5; RE 14r, 14t, 14v-14w.**

Two months prior to the hearing, Linehan-Reyes and Plaintiff were on a conference call. Plaintiff told Linehan-Reyes that the Defendants had bad facts and they effectively no evidence to support their position. Linehan-Reyes said she wasn't concerned about that because the arbitrators assigned more weight to oral testimony than they did to written evidence. **RE 4, Pg.1954 ¶1.** Plaintiff thought it odd at the time – but realized at arbitration that this must have been their coordinated strategy – lie and deny.

During the hearing, JD Wanken and Simpson offered testimony for which they didn't have any evidence and which Plaintiff argued was untrue. When Plaintiff pressed JD Wanken for evidence to support his testimony, JD Wanken would get a pained expression, sigh deeply and say he just never felt like he needed to document such things. **RE 4 Pg.1945 ¶4, Pg.1946 ¶1-3.**

JD Wanken and Simpson stated there had never been a partnership between JD Wanken and Plaintiff, Plaintiff was just a disgruntled employee terminated for insubordination and noncooperation, Plaintiff "wasn't cutting it," Plaintiff had a bad work ethic, Plaintiff wouldn't work at the branch office, JD Wanken had absolute supervisorial responsibility for Plaintiff, Plaintiff was just JD Wanken's employee and assistant, Plaintiff had absolutely no investment responsibilities or

participated in business decisions or profits and losses and Plaintiff was paid a flat salary. **RE 4 Pg.1946 ¶1-3.**

RJFS employee Bell testified he had a phone conversation with JD Wanken in spring 2008 and JD Wanken told him Plaintiff wasn't doing his job, Plaintiff was insubordinate and wouldn't come to the office and Plaintiff had to be fired. During Plaintiff's examination of Bell, he asked Bell why his notes consisted almost entirely of JD Wanken and Bell's discussion of JD Wanken's new girlfriend, how they had met through an online dating service, their marriage plans and romance – without any material discussion of Plaintiff. **RE 14b, Pg.193-194.** Bell said he simply didn't write it down but they'd discussed those items. Plaintiff asked Bell if he knew JD Wanken and he shared a production number. Bell was evasive in his testimony and said it was his understanding that Plaintiff had no client responsibilities and Plaintiff was JD Wanken's assistant. **RE 4 Pg.1927 ¶4-6; RE 14y.** Plaintiff asked Bell if he knew they worked out of their home offices. Bell again was evasive and said it was his understanding that Plaintiff worked at the branch office despite Plaintiff's significant evidence. **RE 4 Pg.1946 ¶2; RE 14y, 14aa.**

During arbitration, Plaintiff stated he didn't believe Defendants were being truthful but he didn't have the documents he'd requested to prove it. JD Wanken and Simpson stated all the documents Plaintiff had introduced were just marketing

materials and that reality was something else. When Plaintiff pressed for an explanation why Defendants couldn't produce any evidence, the arbitrators responded negatively and told Plaintiff to move on. **RE 4 Pg.1928 ¶3-5, 1945 ¶7, P.1946 ¶4.**

The arbitrators found for Defendants and denied all of Plaintiff's claims. The only relief granted was modifying the language to state Plaintiff was terminated for "Irreconcilable Differences. This wasn't accurate but was based on JD Wanken's and RJFS's testimony. **RE 4, Pg. 1928 ¶4.**

Shortly after arbitration, Plaintiff filed investigations with IRS, TWC and DOL based on JD Wanken's testimony during arbitration. **RE 14k-l.** It had been Plaintiff's understanding that he and JD Wanken were business partners, they shared equally in the profits and losses, were equals in the business, neither was an employee but both were partners and independent contractors for tax purposes, Plaintiff handled the investment analysis and JD Wanken prospected new business clients. Based on JD Wanken's testimony that contradicted each of the above items, Plaintiff asked these agencies to determine if JD Wanken had intentionally misclassified Plaintiff for tax and financial purposes. **RE 4 Pg.1932 ¶6.**

During TWC and IRS investigations between April 2010 and April 2011, JD Wanken and Simpson contradicted every material statement they made during arbitration. These material statements were the very testimony on which the

arbitrators made their decision to deny Plaintiff relief. **RE 4 Pg.1933 ¶2-3; RE 4, Pg.1948 ¶3-4; RE 13.**

JD Wanken and Simpson argued Plaintiff was just a disgruntled employee terminated for cause – for insubordination, noncooperation and nonproduction of clients. These were all perjured false statements Plaintiff knew were false and which he argued to the panel were false. When Plaintiff demanded proof of the statements, JD Wanken and Simpson said there just had been no need to document them – but they were true and the panel should accept them as such.

When the TWC found Plaintiff must have been an employee based on JD Wanken's own testimony during arbitration, JD Wanken then ***challenged their decision*** and continued to contradict his FINRA testimony.

Had JD Wanken and Simpson testified during arbitration in the same fashion they did to TWC and IRS, Plaintiff contends the panel would have found in Plaintiff's favor, awarded him damages and sanctioned Defendants. Plaintiff alleged to the district court that JD Wanken, Simpson, RJFS and Linehan-Reyes procured the arbitration award by fraud through perjured testimony and fraud upon the court. Plaintiff alleged to the district court that Defendants knew the **only** way to prevail in arbitration was to offer perjured testimony and suppress any documents that would have contradicted their intended testimony. **RE 4 Pg.1945 ¶4.**

Given that JD Wanken's and Simpson's testimony now no longer matches either a) the testimony they gave during the FINRA hearing and b) the testimony that RJFS, Bell and Linehan-Reyes gave during the FINRA hearing, Plaintiff alleged to the district court that **at least one** of the defendants procured the arbitration award by fraud, which would be grounds for vacating the arbitration award. **RE 4 P.1955 ¶1-5.**

C. PROCEEDINGS IN DISTRICT COURT

On March 16, 2010, Plaintiff filed a complaint against JD Wanken and RJFS seeking to vacate the arbitration award with allegations that they procured the arbitration award by fraud, had conspired in spoliation of evidence relevant to the material issues in advance of the hearing and that both parties entered perjured testimony during arbitration. Plaintiff alleged they had violated 9 USC 10(a)(1) by committing fraud to procure a favorable award.

The complaint alleged Defendants conspired to enter perjured testimony – in effect, to corroborate each other's testimony and that they had conspired to procure the award by fraud through suppression of evidence and objections to witnesses who might contradict their intended testimony.

The magistrate judge ordered Plaintiff complete a questionnaire to determine the case's status. Plaintiff submitted it and on April 30, 2010, the case was docketed and Defendants served.

On May 27, 2010, JD Wanken moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. RJFS filed a 12(b)(6) motion on June 1, 2010 and the court ordered the motions joined and Plaintiff submit a single response. **RE 11,12.**

Beginning in April 2010, JD Wanken and Simpson provided testimony to the TWC that contradicted material statements they made during arbitration. It had been Plaintiff's contention throughout this time that they had intentionally made false statements – for which they had no documentation. In Spring 2010, Plaintiff participated in a conference call with JD Wanken, Simpson and the TWC during which JD Wanken and Simpson contradicted virtually every statement they made during arbitration regarding Plaintiff's work, their business relationship and Plaintiff's responsibilities. These were the statements, Plaintiff alleged, the arbitrators relied on in determining the award in Defendants' favor.

Plaintiff submitted his Response to the 12(b)(6) motion along with a Motion for Leave to Amend and an Amended Complaint on June 25, 2010. **RE 4,9.** The court unfiled the Amended Complaint on June 28, 2010 as it lacked a Certificate of Conference. **RE 10.** RJFS then tried to strike Plaintiff's 12(b) (6) response on its font size, which the court denied. Plaintiff attempted to secure a conference with Defendants but neither party made themselves available when Plaintiff could participate.

Plaintiff's amended complaint included specific examples and allegations of fraud committed by JD Wanken and Simpson, potentially with the collusion and participation of RJFS, Linehan-Reyes and Bell. The amended complaint demonstrated JD Wanken and Simpson had contradicted virtually every material statement they'd made during arbitration and that the testimonies of the two Defendants no longer matched. Plaintiff alleged ***that at least one, possibly both***, defendants committed fraud in order to obtain a favorable award.

The amended pleading demonstrated that all three elements required in a 10(a)(1) allegation of fraud were met and presented clear allegations against Defendants regarding fraud, subornation of perjury, fraud upon the court and perjured testimony related to the material facts at issue in arbitration. The allegations showed 1) convincing evidence of the fraud (JD Wanken's and Simpson's own testimonies before TWC and IRS that contradicted their FINRA testimonies); 2) the fraud materially related to issues involved in arbitration (Plaintiff's business relationship with JD Wanken, Plaintiff's responsibilities and participation in the business and the reason for termination of Plaintiff's financial services license); and 3) due diligence wouldn't have prompted discovery of fraud during arbitration (The testimonies of Defendants and their attorneys and witnesses ***matched perfectly***, despite the fact that they had no evidence to substantiate their testimonies.).

When Plaintiff challenged Defendants that their testimonies contradicted his evidence, Plaintiff's evidence was dismissed as mere marketing and Defendants claimed they just didn't have documentation – but the panel ***could certainly*** take them at their word. **RE 14x.** It was only ***after*** arbitration that JD Wanken and Simpson contradicted their arbitration testimony in investigations conducted by TWC and IRS – and the ***"perfectly matched"*** testimonies of Defendants no longer matched.

Since Simpson, JD Wanken's attorney, contradicted all of his and JD Wanken's FINRA testimonies, Plaintiff alleged that at minimum, there had been fraud upon the court, perjured testimony and subornation of perjury committed by Simpson and also alleged JD Wanken submitted perjured testimony and committed fraud to obtain the award. Plaintiff further alleged JD Wanken and Simpson intentionally participated in spoliation of evidence by purposely suppressing documents that would have contradicted the testimony they intended to introduce. Plaintiff further alleged RJFS, Linehan-Reyes and Bell were complicit and active participants in each allegation since their testimonies matched ***perfectly***, down to minute details, and Linehan-Reyes' statement that she wasn't concerned about arbitration since she believed the arbitrators would care more about oral testimony than written evidence.

The court ruled on July 1, 2010 that it wouldn't accept any further motions until after it issued a ruling on the 12(b)(6). On July 9, 2010, Defendants filed reply briefs. **RE 7,8.**

On January 13, 2011, the Magistrate Judge issued his Findings and Recommendations without considering Plaintiff's amended complaint. **RE 6.** On January 27, 2011, Plaintiff submitted his objection and re-submitted his motion for leave to amend and amended complaint. **RE 4,5.**

On February 7, 2011, the district court accepted the findings and recommendations while concurrently accepting Plaintiff's amended complaint. The court ruled Plaintiff failed to establish any grounds for vacating or modifying the arbitration award. **RE 3.**

SUMMARY OF ARGUMENT

Vacatur of an arbitration award may be ordered under very limited circumstances. One of those clear circumstances is when the arbitration award was procured by fraud, as fraud spoils the award. 9 U.S.C. 10(a)(1).

In Plaintiff's amended complaint, he clearly set forth allegations that, at minimum, JD Wanken procured the award by fraud and that the fraud likely involved RJFS in what appears to be a flagrant example of fraud upon the court,

perjured testimony, subornation of perjury, fraud and obstruction of justice. This amended complaint was **not** considered in the Findings and Recommendation.

Further, Defendants never answered the amended complaint's allegations. The initial complaint didn't contain detailed allegations of JD Wanken's and Simpson's contradictory testimonies to TWC and IRS ***because they hadn't yet occurred***. At the time Plaintiff filed the initial complaint, he alleged the award was procured by fraud and perjured testimony – but JD Wanken and Simpson hadn't yet ***completely changed the testimony they gave in arbitration***. That occurred after arbitration, during which time Plaintiff submitted his amended complaint with specific and extensive allegations of fraud.

The district court affirmed the Findings and Recommendations even as it concurrently accepted the amended complaint. In its order, the district court stated "[h]owever, even considering plaintiff's amended pleadings, plaintiff has failed to establish any grounds for vacating or modifying the arbitration award." **RE 3, Pg.1962 ¶2.** In so doing, the court erred as follows.

First, the district court concluded Plaintiff failed to establish **any** grounds for vacating the arbitration award. The district court erred in failing to consider the fraud Plaintiff alleged JD Wanken and Simpson committed, possibly in collusion

with RJFS, Linehan-Reyes and Bell vis-à-vis 9 USC § 10(a)(1), which states an award obtained by fraud is grounds for vacatur.

The complaint sufficiently alleged ***at least*** JD Wanken and Simpson committed fraud, entered perjured testimony, committed spoliation of evidence and obstructed justice and that Simpson, as an officer of the court, committed fraud upon the court and suborned perjury. The complaint also alleged RJFS, Linehan-Reyes and Bell took part in the fraud since their testimonies ***matched perfectly at the FINRA arbitration hearing*** and now did not match JD Wanken or Simpson's testimony.

It was only after JD Wanken and Simpson testified to TWC and IRS that they contradicted their FINRA testimony. Plaintiff's complaint alleged in detail the various allegations of fraud and perjured testimony which he believes Defendants relied on to procure a favorable arbitration award. Plaintiff further demonstrated this **must** have been an intentional, premeditated plan in which JD Wanken and Simpson had a meeting of the minds and intent to conspire to obtain a favorable award. Given RJFS's statement that it believed they'd prevail on "oral testimony" alone, Plaintiff alleged it's likely RJFS was a participant in the fraud.

Plaintiff met all elements required by 9 USC 10 (a)(1) and extensive case law to prevail in district court. The court committed reversible error in dismissing

the complaint and not considering Plaintiff's well-pleaded allegations containing extensive factual representations of the fraudulent conduct of JD Wanken, Simpson, RJFS, Linehan-Reyes and Bell. Plaintiff sufficiently demonstrated there was (1) clear, convincing evidence of fraud; (2) the fraud materially related to issues involved in arbitration; and (3) due diligence would not have prompted discovery of fraud during/prior to arbitration. See e.g., Int'l Bhd of Teamsters Local 519 v. UPS, Inc., 335 F.3d 497, 503 (6th Cir. 2003), Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988).

Secondly, the district court failed to consider the significant amended pleadings and exhibits regarding serious instances of extensive fraudulent conduct Plaintiff alleged JD Wanken and Simpson committed and which RJFS, Linehan-Reyes and Bell likely joined. Accepting the pleaded facts as true and viewing them in the light most favorable to Plaintiff, the district court erred in dismissing the complaint – and in so doing, neglected its duty to ensure the legal system is not abused by participants and officers of the court. Plaintiff sufficiently alleged the award was procured by fraud, at minimum by JD Wanken and Simpson. That award is contrary to public policy and the district court erred in dismissing the complaint and failing to determine if the award was indeed procured by fraud by proceeding with discovery and a hearing.

Third, Plaintiff's amended complaint ***clearly*** meets the standard required to overcome a 12(b)(6). Plaintiff stated enough facts to make it ***plausible*** he was entitled to relief. See Bell Atlantic v. Twombly., 127 S. Ct. 1955 (2007) Plaintiff stated a clear, defined claim upon which relief could be granted – the award was procured by fraud and JD Wanken and ***at least one of the attorneys*** was involved in the fraud.

The court ***may not*** dismiss a complaint **unless** "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 US 519, 520-521 (1972). Plaintiff overwhelmingly met the burden and stated facts supporting his claim which entitled him to relief – vacatur of the fraudulently procured award.

In a 12(b)(6), tie goes to Plaintiff when ***sufficient*** facts are pleaded and the court is duty-bound to view them in the light ***most favorable*** to Plaintiff. In his amended complaint, Plaintiff provided **detailed** examples of JD Wanken's and Simpson's fraudulent conduct and how they contradicted ALL their material FINRA testimony during TWC and IRS investigations after arbitration. This set of facts – 13 additional pages in the amended complaint – clearly laid out alleged fraudulent conduct of JD Wanken and Simpson during arbitration and adequately alleged RJFS, Linehan-Reyes and Bell were participants in the fraud.

STANDARD OF REVIEW

The grant of a motion to dismiss is reviewed de novo. See Harrington v. State Farm Fire & Gas Co., 563 F.3d 141, 147 (5th Cir. 2009). "Dismissal [is not proper] unless it appears beyond doubt that [the plaintiff] can prove no set of facts in support of her claim which would entitle her to relief." Heaney v. US Veterans Admin., 756 F.2d 1215, 1217 (5th Cir. 1985).

The plaintiff must "state enough facts to make it plausible that the plaintiff is entitled to relief." Bell Atlantic v. Twombly. The plaintiff is required to allege "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id.

Further, the facts must be accepted true as-pleaded by the plaintiff and the complaint itself must be viewed liberally in the plaintiff's favor, see e.g., Lowrey v. Tex. A&M Univ. Sys., 117 F.3d 242, 247 (5th Cir. 1997), Oliver v. Scott, 276 F.3d 736, 740 (5th Cir. 2002), Walker v. S. Cent. Bell Tel. Co., 904 F.2d 275, 276 (5th Cir. 1990), Mowbray v. Cameron County, Tex., 274 F.3d 269, 276 (5th Cir. 2001).

"Rule 12(b)(6) motions should not be granted unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Castro Romero v. Becken, 256 F.3d 349, 353 (5th Cir.

2001). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING PLAINTIFF FAILED TO ESTABLISH ANY GROUNDS FOR VACATING THE ARBITRATION AWARD.

Under 9 U.S.C. §10(a)(1), an arbitration award that is procured by fraud is grounds for vacatur because fraud has spoiled the award.

There must be three elements present in a **plausible** complaint alleging an arbitration award was procured by fraud. These include (1) clear and convincing evidence of fraud; (2)the fraud must materially relate to the issue involved in the arbitration; and (3) due diligence would not have prompted discovery of the fraud during or prior to the arbitration. See e.g., Int'l Bhd of Teamsters Local 519 v. UPS, Inc., Bonar v. Dean Witter Reynolds, Inc., and Paine Webber Group Inc. v. Zinsmeyer Trusts P'ship, 187 F.3d 988, 991 (8th Cir. 1999).

Plaintiff met the burden of alleging all three elements in his Amended Complaint, originally filed in June 2010 and then re-filed in January 2011. As a pro-se litigant, Plaintiff agrees the allegations may not have been artfully pleaded with the skill of an experienced lawyer, but they were well-pleaded nonetheless. Indeed, deference is to be shown to the pro-se litigant given the self-represented individual's considerable challenges in bringing suit against an experienced team of lawyers. "A pro se litigant's pleadings are to be construed liberally and held to

a less stringent standard than the formal pleadings drafted by lawyers." Hall v. Bellmon, 935 F.2d 1006, 1110 (10th Cir. 1991).

While "[t]he court may dismiss a claim when it is clear that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief," Jones v. Greninger, 188 F.3d 322, 324 (5th Cir. 1999), "the court must liberally construe the complaint in favor of the plaintiff and assume the truth of all pleaded facts." Oliver v. Scott, at 736, 740.

In Bell Atlantic v. Twombly, the Supreme Court held a complaint must "state enough facts to make it plausible that the plaintiff is entitled to relief." Bell Atlantic, at 540. The Supreme Court later ruled in another case that "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal at 1937.

Plaintiff's complaint sufficiently alleged that one – possibly both – Defendants committed fraud during arbitration to procure a favorable award. With well-pleaded facts that met the burden required to demonstrate fraud, Plaintiff's complaint alleged that, at minimum, JD Wanken and Simpson conspired to obtain the award through fraud, perjured testimony, fraud upon the court, subornation of perjury and obstruction of justice. Plaintiff alleged RJFS, Linehan-Reyes and Bell were participants in the fraud since JD Wanken's and Simpson's testimony to the

TWC and IRS no longer matched their co-defendants –which had **matched perfectly** during arbitration.

The district court thus erred in dismissing Plaintiff's well-pleaded complaint that more than plausibly alleged facts which, if liberally construed as true – as required of the court – clearly give rise to relief and vacatur of the award for fraud.

A. Plaintiff alleged sufficient grounds for vacating the award based on Defendants' fraudulent conduct during arbitration and contradictory testimony after arbitration.

Plaintiff sufficiently alleged JD Wanken and Simpson completely contradicted their arbitration testimonies during subsequent TWC and IRS investigations which demonstrates they committed fraud.

Plaintiff also sufficiently alleged RJFS was a participant in the fraudulent conduct.

Under 9 U.S.C. 10(a)(1), the district court may vacate the award when it was procured by corruption, fraud or undue means. Plaintiff met the required burden and sufficiently alleged grounds for vacating the award based on extensive fraud committed by Defendants during arbitration.

As Plaintiff alleged, a vacatur for fraud is unusual and may only be ordered in limited cases. **RE 4 Pg.1945 ¶1**. However, Plaintiff alleged ***this case is exactly the type*** that meets the necessary burden in the level and extent of fraud which Plaintiff alleged Defendant(s) committed during arbitration.

Plaintiff alleged JD Wanken entered perjured testimony regarding material facts related at issue in arbitration, JD Wanken procured the award by fraud, Simpson participated in the fraud through perjured testimony, Simpson committed fraud upon the court and suborned perjury and JD Wanken and Simpson crafted a plan to procure the award by fraud – the **only way** they could prevail in arbitration.

Plaintiff alleged RJFS, Linehan-Reyes and Bell were complicit in the fraud and participated in all of the aforementioned fraudulent activities. **RE 4 Pg.1945 ¶4.**

Plaintiff alleged JD Wanken and Simpson provided significant testimony on material facts in arbitration which they knew were false. Plaintiff repeatedly asked JD Wanken and Simpson for any evidence to support their statements. When pressed for evidence, JD Wanken replied he simply hadn't seen the need to keep notes or write such things down. **RE 4 Pg.1946 ¶1, 5.** When Bell was asked during the hearing why his notes from a call with JD Wanken regarding Plaintiff's termination didn't match his testimony, Bell said he simply hadn't written those parts of the conversation down. **RE 4 Pg.1946 ¶2, RE 14b.**

Plaintiff argued to the panel that the statements made by Defendants and their attorneys were false and they had **no** evidence to substantiate any of their outlandish testimony. Plaintiff showed the panel dozens of documents that he had **that contradicted** Defendants' testimonies. **RE 14 a, 14d, 14o-14p, 14x, 14z.** Yet in response, Simpson said all those documents – including emails with clients and RJFS employees – were just marketing materials and didn't reflect the truth.

JD Wanken and Simpson repeatedly testified Plaintiff was just a disgruntled employee, Plaintiff and JD Wanken were never partners, Plaintiff received a salary and didn't share in profits and losses, they never agreed to a Split Agreement,

Plaintiff was terminated for cause due to his insubordination, poor work ethic, refusal to work at the branch office and job performance. **RE 4 Pg.1946 ¶3.**

Plaintiff was shocked at JD Wanken's and Simpson's perjured statements and argued to the panel that their statements were completely false. Bell then corroborated JD Wanken's and Simpson's statements regarding Plaintiff's termination and the justification of his termination. Plaintiff alleged in his complaint this demonstrates a strong likelihood that Defendants conspired to develop and introduce perjured testimony that would guarantee they procured a favorable award – but only by fraud. **RE 4 Pg.1946 ¶ 2.**

As Plaintiff alleged, this was a two-pronged strategy involving both Defendants (a) submitting perjured testimonies that corroborated each other and (b) suppressing documents that would contradict their intended testimonies – constituting spoliation of evidence. **RE 4. Pg. 1947 ¶4.**

Critical to Plaintiff's case were thousands of pages of documents he requested during discovery and which the panel ordered **both** Defendants to produce – but which Defendants refused to produce. **RE 14h-14i, 14r-14w.** On the first day of the hearing, Defendants testified they produced all documents the panel ordered. Plaintiff stated he didn't believe Defendants and argued that they'd intentionally suppressed documents Plaintiff needed. On the third day, under

questioning by Plaintiff, JD Wanken ***admitted*** he intentionally hadn't provided the documents because **he didn't want to**. **RE 4 Pg.1931 ¶5, Pg.1935 ¶3-5.**

Plaintiff alleged Defendants suppressed these documents because they were relevant to the perjured testimony they intended to introduce and would have directly and irrefutably contradicted the perjured testimonies of both Defendants. "Indeed, during the course of the hearing Defendant Wanken made numerous false statements that would have been rebutted by both the production of evidence per the discovery order and the appearance of witnesses." **RE 4, Pg.1953 ¶2.**

Plaintiff alleged he sought the documents for three months during discovery and filed motions for sanctions against Defendants for their failure to produce the documents. **RE 4, Pg.1935 ¶3-4; RE 14h-14i, 14s, 14u.** The arbitration panel had **ordered** these documents be produced in multiple orders – but Defendants **refused** to produce them. **RE 14r, 14t, 14v-14w.** Plaintiff alleged Defendants intentionally and fraudulently hid the documents that Plaintiff could have used to challenge their intended perjured testimonies. These were documents that would ***directly*** contradict testimonies ***both Defendants*** and their attorneys gave.

When Defendants stated under oath they'd produced **all documents** Plaintiff requested – and then contradicted that testimony on the third day of the hearing and admitted they hadn't – Plaintiff argued to the arbitrators the Defendants *couldn't be trusted* since they'd already ***lied under oath once.*** **RE 4. Pg.1947 ¶1.**

Plaintiff alleged in his amended complaint and "Objection" that JD Wanken and Simpson ***knew*** they were offering perjured testimony to the panel during arbitration. Plaintiff knew JD Wanken's and Simpson's statements **weren't true** and a) showed the panel documents that contradicted JD Wanken's, Simpson's and RJFS's testimonies and b) challenged Defendants to produce **any** evidence to substantiate their testimonies. Defendants dismissed all of Plaintiff's evidence as "mere marketing." **RE 5, Pg.1356, ¶2.** When pressed for evidence or an explanation why their evidence and testimonies didn't match, Defendants said they just didn't need to write these items down or they didn't keep records of these conversations and actions. **RE 4 Pg.1928 ¶3, RE 4 Pg.1946 ¶ 1, RE 5 Pg.1353,1356.**

Shortly after arbitration, Plaintiff requested TWC, IRS and DOL investigate JD Wanken based on his testimony during the arbitration. **RE 14k-14l.** Plaintiff believed JD Wanken offered perjured testimony during arbitration and believed he and JD Wanken had been business partners, they'd agreed to Split and Succession Agreements and had operated under them. **RE 5 Pg.1353 ¶1-4.**

In investigations between April 2010 and April 2011, these agencies requested affidavits, reviewed documents and held hearings to determine if JD Wanken misclassified Plaintiff. **RE 14n.** Plaintiff had filed taxes as an independent contractor based on his understanding that he and JD Wanken were

business partners and both were independent contractors for tax purposes. Yet during the hearing, JD Wanken and Simpson called Plaintiff an employee paid a flat salary. Plaintiff asked the IRS and TWC to determine if JD Wanken had intentionally misclassified Plaintiff. **RE 14k-14l.**

> "Interestingly, Defendant Wanken gave the TWC an entirely different story when he was approached by the agency. In addition to Defendant Wanken changing his testimony from the arbitration hearing, his own attorney also changed his testimony…Both Defendant Wanken and Mr. Simpson proceeded to provide documents that completely contradicted their testimony during the arbitration, including statements that Plaintiff was an independent contractor, that he could freely work from his home office or wherever he chose, that he had control over his work product and determined his job duties…and that he was not an employee." **RE 4, Pg.1948, ¶3.**

Plaintiff argued in his "Objection" that "Defendant Wanken and his counsel have clearly and completely **contradicted** their testimony offered from the FINRA Arbitration Hearing during the course of the Texas Workforce Commission's investigation just five months after the FINRA Arbitration Hearing." **RE 5 Pg.1352 ¶y.** "So, Defendant Wanken wanted the Arbitration panel to believe that Plaintiff was an employee – but he wanted the TWC to believe that Plaintiff was an independent contractor." **RE 4 Pg.1357 ¶7.**

Plaintiff demonstrated in his "Objection" that JD Wanken's and Simpson's contradictions in testimonies were material, significant and had a direct impact on the arbitration's outcome. While they offered one story to FINRA, they offered a totally different story to TWC and IRS. Further, **all** of Defendants' testimonies

matched ***perfectly*** at arbitration. It was only **after** arbitration – when JD Wanken was investigated by TWC and IRS – that he and Simpson radically altered their testimonies.

> "The contradictions were not minor. They were major contradictions. Simpson had a plan to procure an arbitration award favorable to his client – and the only way to execute that plan was through perjured testimony, perjured testimony from witnesses, spoliation of evidence…Simpson testified on behalf of Defendant Wanken that Plaintiff was an employee, that he had always been an employee, that Plaintiff simply wasn't 'cutting it' in his position, that Defendant Wanken gave Plaintiff every opportunity to succeed in his job - but he finally had to terminate him, that Plaintiff met every definition of being an 'employee' and that Plaintiff and Defendant Wanken had never been partners. In his opening and closing arguments, Simpson spoke at length about how Plaintiff was just a disgruntled employee who had no real responsibilities and had to be terminated due to his poor work performance." **RE 5, Pg.1365, ¶5-6.**

In his complaint, Plaintiff fully alleged JD Wanken and Simpson committed fraud in two ways – (1) through fraudulent and perjured testimony on material issues and (2) through spoliation of evidence to ensure their perjured testimonies weren't contradicted. **RE 4 Pg.1945 ¶3.** Plaintiff alleged RJFS was a participant in the fraud since Defendants' stories matched perfectly at the hearing – but didn't after TWC and IRS investigations.

> "It would defy reality to accept that Defendant RJFS and Defendant Wanken did not plan this testimony in advance…Defendant RJFS affirmed the statements and assessments of Defendant Wanken with regard to Plaintiff's job performance, conversations between Bell and Defendant Wanken and the termination of Plaintiff's license – despite the fact that neither party could produce a single piece of paper to substantiate these claims or assertions…It is Plaintiff's assertion that Defendants RJFS and Wanken conspired together to procure the favorable arbitration award that would

> benefit both defendants. Plaintiff further asserts that both defendants were aware of the intentions of the other to submit false testimony during the arbitration hearing with the expectation that they would 'back each other up' and support the case of each other. Neither defendant submitted a piece of evidence to substantiate their positions – but it appears that both Defendants believed that they could prevail based solely on their oral testimony…" **RE 5 Pg.1368 ¶ 3, 5.**

Plaintiff alleged JD Wanken and Simpson committed fraud to obtain a favorable award through perjured testimony and spoliation of evidence. Plaintiff alleged Simpson suborned perjury and committed fraud upon the court. Finally, Plaintiff alleged RJFS was a participant in the fraudulent conduct based on Linehan-Reyes' statement that the arbitrators would consider oral testimony over written evidence and since their testimonies matched at the hearing – but that JD Wanken and Simpson contradicted that ***perfectly matching*** testimony in TWC and IRS investigations.

"It appears that Defendant RJFS was attempting to subvert justice and participate in the suppression of discoverable documents ordered to be produced by the panel as well as enable and encourage Defendant Wanken to enter perjured testimony before the arbitration panel." **RE 4 Pg.1954 ¶1.** Plaintiff alleged JD Wanken and Simpson – with RJFS's full participation – procured the award by fraud, spoiled the award – and that it should be vacated by the district court. **RE 4 Pg. 1933 ¶4.**

1. Procurement by fraud in an arbitration case requires three elements, each of which was alleged and well-pleaded by Plaintiff, thus reaching the required burden.

To prevail in a motion to vacate an arbitration award, a party must demonstrate there was 1) clear and convincing evidence of fraud; 2) the fraud materially relates to an arbitration issue; and 3) due diligence would not have prompted the discovery of the fraud before or during the arbitration. See Int'l Bhd of Teamsters Local 519 v, UPS Inc., Bonar v. Dean Witter Reynolds, PaineWebber Group v. Zinsmeyer.

Plaintiff's allegations more than met the burden of proving that each element was present and addressed each separately and comprehensively.

a. Clear convincing evidence of fraud

Plaintiff alleged Defendants committed fraud through perjured testimony, spoliation of evidence, subornation of perjury and fraud upon the court. Plaintiff alleged JD Wanken and Simpson crafted a plan to procure the award by fraud that involved perjured testimony, suppressing any documents that would contradict their intended testimony and deceiving the arbitration panel regarding the material facts at issue.

In the months following arbitration, JD Wanken and Simpson contradicted every material statement they made at arbitration during TWC and IRS investigations. Since Defendants' testimony matched perfectly at arbitration,

Plaintiff alleged in his complaint that he believed ***not only*** did JD Wanken and Simpson procure the arbitration award by fraud, but that RJFS ***was a participant*** in all of the fraudulent activities. Plaintiff alleged Defendants intentionally violated the panel's discovery orders and suppressed any documents that would have rebutted their intended testimony. Plaintiff alleged RJFS's Bell perjured himself when he corroborated JD Wanken's statements – which JD Wanken himself later contradicted before TWC and IRS. **RE 4 Pg.1945-1946.**

Lying to obtain a favorable arbitration award is fraud, plain and simple. Plaintiff alleged JD Wanken and Simpson wanted to convince the panel that Plaintiff and JD Wanken were never partners, there had never been a Split Agreement, Plaintiff was simply JD Wanken's employee and Plaintiff was terminated for cause for insubordination, job performance and not working at the office – as JD Wanken, Simpson and Bell ***all*** testified.

None of the Defendants' statements were true. But when Plaintiff tried to rebut them with evidence – including JD Wanken's and Bell's own emails – Defendants dismissed the evidence as mere marketing. **RE 14x.** When Plaintiff asked why they didn't have any evidence to substantiate their claims, Defendants all agreed they simply hadn't written such things down.

This isn't a case of the panel accepting one side's version over the other's. **This is simply a case of Defendants lying to obtain a favorable award.** These

weren't different opinions or recollections. These were flat-out, premeditated lies intended to deceive the arbitrators.

Lying is **not an option** – in a courtroom or arbitration hearing. When it's discovered a party lied to prevail in arbitration, it's grounds for vacatur if the lies are material to arbitration issues. These lies **directly related** to the arbitration issues.

The questions the arbitrators had to answer were:

1) Were Plaintiff and JD Wanken business partners?
2) Was Plaintiff a partner with or employee of JD Wanken?
3) Did Plaintiff and JD Wanken share in business profits and losses, responsibilities and management decisions?
4) Was Plaintiff wrongfully terminated?
5) Did JD Wanken and RJFS defame Plaintiff's FINRA U-5 with materially false information?
6) Had RJFS failed to supervise its branch manager and allowed him to threaten and retaliate against Plaintiff for failing to meet his personal demands?

On each issue, JD Wanken and Simpson lied to the arbitration panel. RJFS's Bell participated in the fraud and offered perjured testimony contrary to

RJFS's emails and correspondence. Defendants made false statements to prevail – and they prevailed **only** because of their false statements.

At issue was whether JD Wanken breached a Split Agreement – which would have required him to pay Plaintiff a portion of fees and commissions over a tiered period following the partnership termination. Further, since JD Wanken and RJFS wanted to demonstrate Plaintiff was just a disgruntled, insubordinate employee to defeat Plaintiff's claims of wrongful termination, breach of contract and partnership, defamation of FINRA U-5 and failure to supervise, they falsely testified regarding the cause for termination and both Defendants claimed the termination was justified due to Plaintiff's poor performance. These were lies for which Defendants had no documentation or evidence. Yet when Plaintiff asked for evidence, Defendants both said they hadn't written anything down – time and again on every material fact. Defendants' stories corroborated each other ***perfectly***. Yet months later, JD Wanken contradicted every material statement he made in arbitration regarding Plaintiff's work, their business relationship, their operations, Plaintiff's compensation – and even whether they had a partnership.

Case law clearly supports Plaintiff's allegations that material lies told in arbitration constitute fraud and are grounds for vacatur. In Dogherra v. Safeway Stores, Inc., a manager lied about the cause for an employee's termination and falsely testified the employee hadn't reported back at the end of a leave of absence.

In fact, the employee **had** reported back – but the manager lied and said the employee hadn't. The lie was only proven ***after*** arbitration concluded and wasn't discoverable during arbitration. The court held that the manager's lie "thwarted and subverted Plaintiff's efforts to arbitrate her agreement." Dogherra v. Safeway Stores, Inc., 679 F.2d 1293 (9th Cir. 1982). In Dogherra, the court found that, as in the present case, the lies materially affected the proceeding's outcome. The court further ordered that if it was determined there ***was*** fraud during the proceedings, the district court was to enter a judgment on the merits ***without any further testimony from the defendants.*** Dogherra at 1293.

Perjured testimony in arbitration, as Plaintiff alleged, is grounds for vacatur. The false testimony, as it does in this case, must materially affect the outcome in question and be of substantive matters. Karppinen v. Karl Kiefer Machine, 187 F.2d 34-35 (2nd Cir. 1951). If an award is obtained by fraud, that award must be set aside. Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co., 397 F.2d 594, 598 (3rd Cir. 1965). And, in cases like the present, "[a] verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony." Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987).

b. Fraud materially relates to an issue involved in arbitration

The Plaintiff fully alleged the fraud committed by Defendants in arbitration materially related to the issues on which the arbitrators were charged with ruling. JD Wanken and Simpson repeatedly offered perjured testimony – testimony Plaintiff alleges ***they knew to be false*** – and when asked for evidence in support, simply stated there wasn't a need to record such things. In addition, RJFS corroborated the perjured testimony and testified that JD Wanken and Bell had conversations regarding Plaintiff's poor job performance, insubordination and lack of client production – though again, there were no documents to support these conversations. Plaintiff alleged these conversations ***never occurred*** and that the only conversations the Defendants had involved plans to enter corroborating perjured testimony in arbitration.

The lies JD Wanken and Simpson told ***directly and completely*** affected the award. JD Wanken and Simpson told the panel Plaintiff was just a disgruntled employee who had a poor work ethic, failed to meet responsibilities, was lazy, unmotivated, clients disliked him and he had no investment responsibilities. When Plaintiff showed the panel emails in which JD Wanken himself referred to Plaintiff as the firm's Chief Investment Officer, JD Wanken stated Plaintiff was the master of investment strategy, JD Wanken stated they were a partnership and every

decision was made together, Defendants dismissed the emails and documents as mere marketing that didn't reflect reality. **RE 14x.**

Whether Plaintiff was an employee of JD Wanken or a partner with JD Wanken was one of the fundamental issues to be resolved at arbitration. If Plaintiff was a partner, then the panel had to determine if the Split Agreement, that Plaintiff alleged they had agreed to and operated under, was in-force. If they weren't partners, then there were no issues as to breach of partnership and contract and Plaintiff wouldn't be entitled to any relief based on those causes.

Further, the panel had to determine if Plaintiff was terminated for cause or if he had been wrongfully terminated because Plaintiff refused to meet JD Wanken's demands regarding his new girlfriend. If Defendants showed Plaintiff was terminated for cause, then Plaintiff wouldn't be entitled to relief on his other causes, including wrongful termination and defamation on the FINRA U-5. **RE 14e.** Plaintiff showed the panel document after document in which JD Wanken threatened to terminate Plaintiff's financial services license if Plaintiff didn't meet JD Wanken's personal demands regarding his new girlfriend. Plaintiff showed the panel documents in which JD Wanken stated it didn't have to end like this – ***if Plaintiff would simply meet JD Wanken's demands and a) meet his new girlfriend, b) introduce his two young children to her; and c) attend personal counseling with him at her personal counselor.*** **RE 14a, 14 d, 14o-14p, 14z.**

Yet in response to all of these, JD Wanken, Simpson and Bell testified Plaintiff was terminated **only for cause** – and that the causes were extensive and involved insubordination, lack of client production, refusing to work in the branch office and being uncooperative.

> "Indeed, Defendant Wanken and Simpson had relied primarily on testimony that Plaintiff was an employee in the presentation of their case before FINRA. Defendant Wanken sought to persuade the arbitration panel that the Plaintiff was not entitled to any relief from the FINRA forum and that he was merely an 'at-will employee' who could be terminated, in Defendant Wanken's own words, 'for the color of his tie.' Defendant Wanken and Simpson relied on this perjured testimony provided to the arbitration panel to deny the Plaintiff any relief in the FINRA arbitration, which he successfully did. Concurrently with the perjured testimony, Defendant Wanken intentionally suppressed discoverable documents…Plaintiff believes that there is a causal nexus between both the perjured testimony and the intentional suppression of documents as well as between both of these issues and the ultimate award issued by the arbitration panel." **RE 5, Pg. 1350 ¶5-7.**

During TWC and IRS investigations in the months following arbitration, JD Wanken and Simpson contradicted ***every single*** material statement they made in the hearing regarding Plaintiff's role in the business, his responsibilities, compensation, the existence of a partnership and the reason for Plaintiff's termination. **RE 14n.**

> "Five months later, in an investigation by the Texas Workforce Commission, both Simpson and Defendant Wanken ***completely contradicted their testimony*** regarding Plaintiff. While they both stated hundreds of times during the arbitration that Plaintiff was **an employee**, during the TWC investigation, both Simpson and Defendant Wanken stated and testified under oath that Plaintiff was and always had been **an independent contractor." RE 5 Pg.1352 ¶t.**

Plaintiff clearly alleged in his complaint these were material issues ***directly*** related to the causes of action in arbitration and that Defendants entered perjured testimony on these material issues to procure the award by fraud. Through the combination of spoliation of evidence and perjured testimony, Defendants sought to procure the award by fraud – the only way they ***could*** obtain a favorable award. "[T]he plaintiff sought to obtain these documents in order to present his case. The defendants refused to give him the documents and it appears they did so with the intent to prevent him from challenging the perjured testimony they intended to provide to the panel. If the Plaintiff had these documents – which he had tried to obtain in the months prior to the hearing – he would have been able to challenge the case presented by the defendants. The evidence was material to the issues involved and probably would have changed the outcome." **RE 4 Pg.1952 ¶3**

> "These issues were clearly material to the arbitration as they had to do with the cause for termination, the relationship between Plaintiff and Defendant Wanken and the history of the case…Yet Defendant Wanken chose to submit perjured testimony to the panel. Defendant Wanken made numerous statements that constitute perjured testimony – and each of these statements were made by Defendant Wanken knowing full well that they were false." **RE 4 Pg.1946 ¶3.**

c. Due Diligence would not have prompted discovery of the fraud during/prior to arbitration

As Plaintiff alleged, there was no way for him to discover the fraud until after arbitration was concluded and TWC and IRS conducted investigations of JD

Wanken, during which time JD Wanken and Simpson contradicted all their material testimony – and as a result, contradicted the testimony that their Co-Defendant RJFS offered during arbitration.

It wasn't until the TWC investigation began, four months after the hearing concluded, that JD Wanken and Simpson contradicted all their material testimony. **RE 4 Pg.1932 ¶ 6.** During TWC and IRS investigations, Simpson actively participated in contradicting all the material testimony and went so far as to advocate his client's contradictions of FINRA testimony as being the truth now – regardless of what he said in arbitration. **RE 4 Pg. 1933 ¶2; RE 14n.**

At the beginning of the FINRA hearing, Plaintiff told the panel he didn't believe Defendants had given all the documents they were ordered to produce. Defendants testified they produced all the documents and the arbitrators said they would begin the hearing – but if they determined Defendants ***hadn't*** produced ordered documents, they would take action against them. On the third day, Defendants admitted intentionally not producing thousands of pages of documents – and JD Wanken admitted he hadn't because he didn't want to – even though he had enough documents to fill a U-Haul truck. **RE 4 Pg.1937 ¶1, Pg.1950-1951.** The panel took no action against Defendants and instead pressured Plaintiff to continue the hearing ***without*** the documents – since Defendants claimed it would now be cumbersome and time-consuming to produce the documents.

"Plaintiff had exercised absolute due-diligence to obtain these documents, but they were not provided by either defendant and the discovery process was hindered by both defendants." **RE 4 Pg.1947 ¶1.** Since the panel refused to enforce its own orders regarding discovery production, Plaintiff was denied hundreds of documents that would have disproved the testimony of JD Wanken, Simpson, Bell and Linehan-Reyes and demonstrated there was a partnership, there was an in-force Split Agreement, JD Wanken and Plaintiff represented and presented themselves as partners, that they shared in the profits and losses equally, they made decisions together, the only cause for termination was because Plaintiff wouldn't meet JD Wanken's personal demands, JD Wanken and RJFS defamed and slandered Plaintiff's FINRA U-5 and RJFS flagrantly failed to supervise its branch manager, to Plaintiff's detriment. **RE 14r, 14t, 14v-14w.**

It was only during TWC and IRS investigations that JD Wanken **told the truth** and admitted Plaintiff and he operated as a partnership, they shared in the business's profits, losses and responsibilities, Plaintiff ***wasn't*** JD Wanken's employee, Plaintiff wasn't terminated because he refused to come into the office, and they made decisions together.

Quite simply, JD Wanken and Simpson only told the truth when they were facing TWC and IRS. Plaintiff alleged RJFS was involved in the fraud and perjured testimony – and that only a full hearing before the court would get to the

bottom of the alleged perjury and fraud. Plaintiff did everything he could to demonstrate to the panel that JD Wanken and Simpson were lying about material issues. Yet, JD Wanken and Simpson rebuffed Plaintiff's challenges that they had no documentation by saying JD Wanken just hadn't written it down. And they dismissed all of Plaintiff's evidence by saying it was just marketing materials – despite the fact that they were emails and communications written by JD Wanken, Bell and senior RJFS employees. **RE 14y.**

Plaintiff's complaint demonstrated that document suppression constituted spoliation of evidence and was part of Defendants' strategy to procure the award by fraud. In Rozier v. Ford Motor Co., the defendant knew of a document that would contradict defendant's intended testimony – and intentionally suppressed it.

> "The record in this case establishes that defendant Ford was aware of a document in its files relevant to the plaintiff's case, sought by the plaintiff through interrogatories and included within a discovery order, but that it failed to disclose the document or amend its response to an interrogatory, falsely stating that it was unable to locate such a document. Ford's misconduct prejudiced the plaintiff by denying her information which might well have reshaped the case she ultimately presented to the jury." Rozier v. Ford Motor Co., 578 F.2d 871 (5th Cir. 1978)

Suppression of documents stymies a party's efforts at due diligence by circumventing discovery orders and constitutes spoliation of evidence. That is precisely what Plaintiff alleged in his complaint as he demonstrated he had attempted to get these documents – but Defendants intentionally violated multiple discovery orders. **RE 14h-14i, 14u.** As Plaintiff alleged, it was only during TWC

and IRS investigations that JD Wanken and Simpson admitted they lied during arbitration. Plaintiff could have done no greater due diligence than he did through repeated discovery motions, letters to FINRA, offering his own evidence – which was summarily rejected by Defendants as "marketing materials" and demanding proof of Defendants' evidence – which they simply dismissed and said they had no evidence because they didn't write it down. Defendants, Plaintiff alleged, walked into arbitration with intent to offer perjured testimony. Plaintiff did everything he could in advance of the hearing to obtain documents – but Defendants did everything they could to ensure Plaintiff never got his hands on those documents.

In a family law case, the court ruled that lying and suppressing critical and relevant facts and documents could materially affect the case's outcome. In Stridiron v. Stridiron, the plaintiff lied about a previous marriage and failed to provide requested documents prior to the hearing. The court found the lie and suppression of evidence materially affected the case's outcome.

> "The inconsistency of plaintiff's response cannot be dismissed without consequence. The record as it stands shows that defendant was forced to spend the discovery period and longer obtaining evidence that would have been established by plaintiff's truthful answer to interrogatory. Thus plaintiff's failure to provide information uniquely within his knowledge effectively foreclosed defendant from presenting her claim for annulment at trial. A court should not lightly countenance such an abuse of the discovery process." Stridiron v. Stridiron, 698 F.2d 204 (3rd Cir. 1983).

As Plaintiff alleged, "Plaintiff only discovered the fraud of Defendant Wanken after the hearing when Defendant Wanken made statements to the TWC

that directly contradicted the testimony he provided during the arbitration proceedings. If Plaintiff had these documents, he would have been able to rebut and challenge the case presented by the defendants." **RE 4 Pg.1952 ¶3.**

As Plaintiff alleged, Defendants' fraud at arbitration was extensive and pervasive. It included intrinsic and extrinsic fraud – perjured testimony, subornation of perjury, fraud upon the court and spoliation of evidence. Defendants' conduct was so egregious and heinous that the district court clearly erred in granting the dismissal.

> "Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." Hilton Head Ctr. of SC v. Public Serv. Comm'n, 294 S.C. 9,11; 362 S.E.2d 176,177 (1987).

> "The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. Contrary to perjury by a witness or a party's failure to disclose requested materials, conduct which constitutes intrinsic fraud, where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court. These actions by an attorney constitute extrinsic fraud." Chewning v. Ford Motor Co., 346 S.C. 28; 550 S.E.2d 584 (Ct. App. 2001)

B. Plaintiff's pleadings and exhibits sufficiently alleged serious causes of action, including fraud, fraud upon the court, perjury, obstruction of justice, collusion, conspiracy and subornation of perjury.

1. These facts, when accepted as true, and the pleadings, when construed liberally, both required of the court, demand the 12(b)(6) be denied and the court determine if Plaintiff is entitled to relief through discovery and a hearing. The court erred in dismissing Plaintiff's complaint in light of Plaintiff's well-pleaded allegations.

The district court was required to both accept the facts as true and construe the pleadings liberally in Plaintiff's favor. Had the district court done that, it would have had **no** choice but to deny the 12(b)(6) and proceed with discovery and a full hearing to determine if Defendants committed fraud, as Plaintiff alleged with particularity and specificity. Plaintiff demonstrated he had a set of facts, which if given the opportunity, he could prove and show Defendants procured the award through extensive fraud – including perjured testimony, spoliation of evidence, subornation of perjury and fraud on the court.

In Haines v. Kerner, the Supreme Court ruled "[W]e may not uphold the dismissal unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 US 519, 520-521 (1972). Plaintiff demonstrated he had a **significant set of facts** on ***each*** allegation of fraud – subornation of perjury, fraud upon the court, perjured testimony, collusion, conspiracy, fraudulent testimony, spoliation of evidence and obstruction of justice. Plaintiff alleged with specific factual accounts

demonstrating Defendants and their attorneys participated in the fraud and the fraud was part of a larger plan to subvert justice and procure the award by fraud.

Each allegation of fraud was well-pleaded and had substantive facts. Plaintiff alleged JD Wanken and Simpson offered one story in arbitration – in collusion with RJFS's matching story – but offered an **entirely** different story to TWC and IRS. Plaintiff alleged JD Wanken and Simpson committed perjury in arbitration – but were fearful of committing perjury before two governmental agencies, especially when Plaintiff had thousands of pages to contradict their testimonies. While they could dismiss the evidence as "mere marketing" to FINRA, that wasn't going to fly with TWC and IRS. **RE 4 Pg.1933 ¶3 -4.**

That RJFS's and JD Wanken's stories matched ***perfectly*** – down to minute details – was pleaded by Plaintiff as an allegation that they'd colluded and conspired to introduce corroborating testimony at FINRA – but that JD Wanken and Simpson diverged from that agreed-upon testimony before TWC and IRS. **RE4 Pg.1947 ¶3-4**; **Pg.1949 ¶2-4**.

2. As a matter of public policy, it's essential the court determine if these well-pleaded allegations are true. The district court erred in disregarding the well-pleaded allegations of fraud, which clearly demonstrate grounds upon which relief can be granted.

As Plaintiff alleged, each of the allegations of fraud ***on their own*** is egregious, heinous and grounds for vacatur. Yet when coupled with subornation of perjury and fraud upon the court committed ***at minimum*** by Simpson, and likely

participated in by Linehan-Reyes, ***the district court committed reversible error in dismissing the complaint.***

> "Plaintiff asserts that the court must determine the role of counsel in the potential perjury perpetrated by JD Wanken. Ms. Linehan, counsel for Defendant RJFS, indicated that she believed that oral testimony would trump evidentiary documents during the hearing in an on-the-record call with Plaintiff following a telephonic hearing with the entire panel. It appears that Defendant RJFS was attempting to subvert justice and participate in the suppression of discoverable documents ordered to be produced by the panel as well as enable and encourage Defendant Wanken to enter perjured testimony before the arbitration panel…Plaintiff contends that the involvement of the attorneys in the potential perjury and document suppression constitutes fraud upon the court." **RE 4 Pg. 1954 ¶1, 3.**

As a matter of public policy, the district court had a duty to deny the 12(b)(6), allow parties to conduct discovery and hold a hearing to determine the veracity of Plaintiff's allegations. Fraud upon the court is ***clearly fraud – and clearly grounds for vacating the award*** and demands disciplinary measures, including referral to law enforcement for perjury and obstruction of justice.

As Plaintiff argued in his complaint, every level of the judiciary has determined allegations of attorney fraud are to be taken seriously given the role an attorney has as an officer of the court. In Evans v. Gunter, the court ruled that fraud on the court was "that species of fraud which does, or attempts to, subvert the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its task of adjudging

cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529; 366 S.E. 2d 44, 46 (Ct. App. 1988).

Fraud upon the court is "a serious allegation…involving corruption of the judicial process itself." Cleveland Demolition Co. Inc. v. Azcon Scrap Corp., F2d at 986 quoting In re Whitney Forbes, 770 F.2d 692, 698 (7th Cir. 1985). In H.K. Porter Co. v. Goodyear Tire & Rubber, the court held "since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court." H.K. Porter Co. v. Goodyear Tire & Rubber, 536 F.2d 1115, 1119 (6th Cir. 1976). When it's found there has been subornation of perjury and fraud upon the court, "a verdict may be set aside for fraud if an attorney and a witness have conspired to present perjured testimony." Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987).

As an officer of the court, an attorney has a duty to operate honestly and with integrity. If an officer of the court commits fraud, it destroys the fairness of the judicial process – which the court cannot countenance.

In Chewning v. Ford Motor Co., the plaintiff alleged defendant intentionally withheld unfavorable documents to conceal adverse evidence. The plaintiff argued if he had full access to these documents, he could have attacked the defendant's

statements. The court found that there was sufficient evidence of fraud – ***and that the attorney's behavior was sufficient to constitute fraud.***

> "The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud…Where an attorney – an officer of the court – suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court…Attorney fraud calls into question the integrity of the judiciary and erodes public confidence in the fairness of our system of justice. Accordingly, where an attorney embarks on a scheme to either suborn perjury or intentionally conceal documents, extrinsic fraud constituting fraud upon the court occurs." Chewning v. Ford Motor Co., 346 S.C. 28; 550 S.E.2d 584 (Ct. App. 2001)

As Plaintiff alleged, both Defendants made materially false statements in arbitration regarding the cause for Plaintiff's termination. In his complaint, Plaintiff referenced Int'l Bhd of Teamsters Local 519 v. UPS during which there had been allegations of fraud at arbitration.

> "In a case also involving a potential wrongful termination, it was found that there had been fraud committed in perjured testimony and material false statements made to the arbitration panel and investigators. The matter was remanded to the district court to determine if the defendant did in fact commit fraud during the course of the arbitration hearing." **RE 4 Pg.1955 ¶3.**

Bell testified – and corroborated JD Wanken's and Simpson's testimony – that Plaintiff was terminated for insubordination, lack of production and refusing to work at the branch office. As an RJFS employee, Bell had a duty to supervise its branch manager and determine if JD Wanken was wrongfully terminating Plaintiff.

Instead, Bell allowed JD Wanken to terminate Plaintiff – and then worked with JD Wanken to corroborate testimony for arbitration to justify the termination and enter perjured testimony regarding Plaintiff's title, role, job performance, responsibilities and termination so that both Defendants could procure a favorable award by fraud.

The perjured testimony of Bell, JD Wanken and Simpson likely had an effect on the award and arbitrators' decisions. That perjured testimony was part of the strategy of fraud employed by Defendants to get a favorable arbitration award,

> "The fraud alleged by Local 519 may have impacted not only on the arbitrator's ultimate decision to grant or deny relief to Loftis, but also may have directly affected the arbitrator's factual findings. The arbitrator relied heavily on Cole's testimony: The testimony of the Supervisor of Security carries great weight as it is his responsibility to investigate matters of this nature in an impartial manner…The arbitrator essentially deferred to Cole's findings, while explicitly conditioning his deference on those findings not being arbitrary, biased or capricious. If true, Local 519's allegations of fraud would demonstrate that Cole's investigation was both arbitrary and biased because it was less an investigation than an effort to manufacture a story." Int'l Bhd of Teamsters Local 519 v. UPS, 335 F.3d 497, 503 (6th Cir. 2003)

Plaintiff alleged the fraud on the court was committed at minimum by Simpson – and that it appeared Linehan-Reyes was a participant in the fraud and subornation of perjury.

> "It is thus incumbent on this court to determine the extent of counsels' involvement in the perjured testimony of Defendant Wanken and the intentional suppression of documents by both defendants to determine if this was in fact a planned, coordinated and conspiratorial scheme to which the

> attorneys were complicit and active participants with Defendant Wanken. At this point, all evidence points to counsel for both defendants committing fraud upon the court with the intent to defraud the Plaintiff of his right to present his case by suppressing adverse evidence and coordinating perjured testimony by witnesses and parties of the case." **RE 4 Pg.1955 ¶ 5.**

Plaintiff detailed the alleged fraud to the district court and begged the court deny the 12(b)(6) and determine if Defendants committed multiple acts of fraud during arbitration, which would be grounds for vacatur.

"In Hazel-Atlas Glass Co. v. Hartford Empire Co., another 'sordid' case also involving perjury in which a party intended to scheme and defraud the tribunal, the Supreme Court found that '[T]he public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944).

Had the district court liberally construed the pleadings in Plaintiff's favor and accepted Plaintiff's facts as true – as required to do – it would have had no option ***but*** to deny the 12(b)(6) motions and proceed with discovery and a trial to determine the extent of fraud committed by Defendants in their efforts to procure the award by any means necessary, including as Plaintiff alleged, by fraud, subornation of perjury, perjured testimony, spoliation of evidence and fraud upon the court.

C. Plaintiff successfully met the burden of sufficiently alleging the award was procured by fraud through at least one Defendant, and likely with participation of both Defendants and counsel.

1. The Findings and Recommendations <u>didn't</u> consider Plaintiff's amended complaint. Plaintiff's amended complaint contained extensive well-pleaded allegations of fraud committed by one or both Defendants and their attorneys.

Plaintiff's amended complaint wasn't considered by the Magistrate Judge in his consideration of the 12(b)(6) motions. Plaintiff filed the amended complaint concurrently with his response to the 12(b)(6), but the court unfiled the pleading for lack of certificate of conference. Plaintiff tried to confer with Defendants immediately after, but they couldn't agree on a time. Within days, the court ordered no further filings until it decided the 12(b)(6) motions. It wasn't until ***after*** the district court ruled that Plaintiff was able to submit his amended complaint, which included specific details regarding Defendants' fraudulent conduct and demonstrated the fraud was undiscoverable until ***after*** the arbitration.

Plaintiff alleged in his amended complaint – not considered in the Findings – that Defendants conspired and colluded to introduce corroborating testimony in arbitration. While Plaintiff attempted to show the FINRA panel that Defendants' testimony was false, Defendants dismissed his evidence as "mere marketing" and stated they just didn't have documents to substantiate their case. The Defendants ***corroborated each other's testimonies <u>perfectly</u>***. There was no daylight between any of the Defendants or their witnesses – they had the most unified testimony

possible. The Magistrate Judge hadn't considered the amended pleadings when he ruled:

> "If Dwight testified falsely at the arbitration hearing, Plaintiff certainly was aware of that at the time. Plaintiff does not contend otherwise. Instead, he appears to fault the arbitrators for crediting Dwight's testimony over his own…This court cannot vacate the arbitration award merely because the arbitrators chose to believe Dwight's testimony over plaintiff's." **RE 6 Pg.1343 ¶2.**

It wasn't just that the panel accepted one version of events over another as the Findings and Recommendations stated. **It was that Defendants committed extensive fraud to procure a favorable arbitration award – fraud which clearly *is grounds* for vacatur**. The court ***can – and must*** vacate the arbitration award when it's been procured by fraud.

Plaintiff submitted his amended complaint with his "Objection" and argued the court hadn't considered the amended complaint in granting the 12(b)(6). The district court then accepted the amended complaint – but ruled "even considering plaintiff's amended pleadings, plaintiff has failed to establish any grounds for vacating or modifying the arbitration award." **RE 3 Pg.1962 ¶.**

Plaintiff ***did*** meet the burden of establishing grounds for vacating the award in his amended complaint in which he demonstrated extensive allegations of fraud committed by Defendants, including fraud, perjured testimony, subornation of perjury, obstruction of justice, collusion, conspiracy and fraud upon the court.

Each of these ***on its own*** would be grounds for vacatur. Combined, they constitute ***undeniable*** grounds for vacatur.

2. The district court was required to accept these facts as true and to construe the pleadings liberally in Plaintiff's favor when considering the 12(b)(6). The district court erred in its dismissal because it failed to accept the facts as true and view the pleadings liberally in favor of Plaintiff.

The district court was required to view the allegations in the light most favorable to Plaintiff and grant Plaintiff reasonable inferences from the allegations. By concluding the allegations were insufficient, however, the district court effectively concluded it was ***unreasonable*** to infer from the allegations that Defendants committed ***any type of fraud*** during arbitration.

This was reversible error. The district court reached its conclusion – that Plaintiff didn't allege any facts regarding the fraud – in favor of Defendants rather than in Plaintiff's, as it's duty-bound to do.

Plaintiff's amended complaint contained multiple specific and detailed allegations of fraud committed by both Defendants during arbitration as part of what he alleged was a well-thought out scheme to procure the award by fraud. The court was ***required*** to accept the pleaded facts as true and view the pleadings liberally ***in favor of the Plaintiff***. See Ashcroft v. Iqbal, Oliver v. Scott, Lowrey v. Tex A&M Univ. Sys, Harrington v. State Farm, Walker v. S. Cent Bell Tel. Co., Mowbray v. Cameron County, Gregson v. Zurich American Ins. Co. 322 F.3d 883,

885 (5th Cir. 2003), House v. Hurley, 983 F.2d 1061 (5th Cir. 1993), SEC v. Cuban, 620 F.3d 551 (5th Cir. 2010).

"The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved on his behalf, the complaint states any valid claim for relief." 5 Charles A. Wright and Arthur R. Miller Federal Practice and Procedure §1353 at 601 (1969).

Plaintiff clearly established a set of facts upon which he could prevail, including allegations of fraudulent conduct, an apparent agreement between Defendants to commit fraud, fraud upon the court, perjured testimony and the subornation of perjury. Plaintiff detailed the extensive facts with specificity and particularity and clearly established facts upon which he could prevail in his request for relief. See Bell Atlantic v. Twombly, Jones v. Greninger, Haines v. Kerner, Jones v. Greninger, Heaney v. U.S. Veterans Administration, Castro Romero v. Becken, Blackburn v. City of Marshall, 42 F.3d 925, 931(5th Cir. 1995)

While Plaintiff's pro se pleadings may not have been as artfully written as an attorney's, they were detailed, clearly established a set of facts alleging extensive and intentional fraud committed by Defendants and outlined how Defendants' fraudulent conduct procured the award to Plaintiff's detriment. Plaintiff outlined how Defendants successfully suppressed any evidence that would have contradicted their intended testimony through spoliation of evidence, conspired to

introduce corroborating testimonies, the attorneys were directly and personally involved in the fraud – including subornation of perjury and fraud upon the court – and the documents demonstrating the fraud were only obtainable ***after*** arbitration when JD Wanken and Simpson provided sworn affidavits and testimony to the IRS and TWC that wholly contradicted their FINRA testimony.

While the pro se pleadings may not be as refined as an experienced attorney's, they sufficiently alleged a set of facts upon which Plaintiff could prevail, specified Defendants' fraudulent activity and established grounds for vacatur based on the Defendants' fraudulent conduct.

The court was bound to accept these facts as true and view them liberally in Plaintiff's favor. In failing to do that, the district court committed reversible error.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Christopher Michael Wanken v. John Dwight Wanken and Raymond James Financial Services Inc. (11-10219)

I hereby certify that on May 3, 2011, a copy of the brief for Christopher Michael Wanken, Plaintiff-Appellant, an electronic version and a copy of the record excerpts were sent through the United States Postal Service by Priority Mail to:

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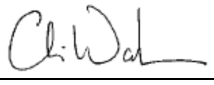
Christopher Michael Wanken v. John Dwight Wanken and Raymond James Financial Services Inc. (11-10219)

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 13,981 words, excluding the parts of the brief exempted by FED R. APP. P. 32(a)(7)(B)(iii).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman type.



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