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

PETITION FOR REHEARING EN BANC

PLAINTIFF-APPELLANT's PETITION

Christopher M. Wanken
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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 OF ISSUES TO MERIT REHEARING EN BANC

This appeal involves three of questions of exceptional importance. The Opinion is contrary to decisions of the Supreme Court of the United States, this circuit and other courts of appeals such that consideration by the full court is necessary to secure and maintain uniformity of this court's decisions.

1. **Can a court affirm a district court's sua sponte conversion of 12(b)(6) motions to summary judgment despite affidavits of unresolved issues of material fact?**

2. **Can an appellate court act as a trier of fact in the absence of any evidence from the record to support its opinion? Can the court make its determination on statements made by a party regarding evidentiary documents never submitted to or reviewed by any court, including district court?**

3. **Does the Court's affirming a flawed lower court's order deny due process?**

The panel's decision as to these questions conflicts with the following **Supreme Court** decisions: *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986), *Celotex Corp. v. Catrett,* 477 US 317, 326 (1986), *Haines v.Kerner,* 404 US 519, 520-521 (1972) . It conflicts with the following decisions of **this court**: *Bayle v. Allstate Ins. Co.,* 615 F.3d 350, 355 (2010), *Aucoin v. Haney,* 306 F.3d 268, 271 (2002), *Gabarick v. Laurin* 10-30148 (2010)*, Tewari de-Ox Systems Inc. v. Mountain States/Rosen, L.L.C.*, 10-50137 (2011), *Don Wesley v. Gen. Drivers, et.*

*al.,*11-10120 (2011). Additionally, it conflicts with the authoritative decisions of a number of **other circuits**. See *Sahu v. Union Carbide Corp.,* 548 F.3d 59 (2nd Cir. 2008), *First Financial Ins. Co. v. Allstate Interior Demo. Corp.,* 193 F. 3d 109 (2nd Cir. 1999), *WSB-TV v. Lee,* 842 F.2d 1266, 1269 (11th Cir. 1988), *Gurary v. Winehouse,* 190 F.3d 37, 43 (2nd Cir. 1999), *Kopec v. Coughlin,* 922 F.2d 152, 154-155 (2nd Cir. 1991), *Ramsey v. Coughlin,* 94 F.3d 71, 74 (2nd Cir. 1996)

4. **Does the affirming of a district court's flawed order constitute countenance of fraud by the court and is it contrary to precedent and public policy?**

The panel's decision as to this question conflicts with the following **Supreme Court** decision: *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 US 328 (1944). It conflicts with the following decision of **this court**: *Rozier v. Ford Motor Co.,* 578 F.2d 871 (5th Cir. 1978). Additionally, it conflicts with the authoritative decisions of a number of **other circuits**. See *Dogherra v. Safeway Stores Inc.,* 679 F.2d 1293 (9th Cir. 1982), *Bonar v. Dean Witter Reynolds, Inc.,* 835 F.2d 1378, 1383 (11th Cir. 1988), *Cleveland Demolition Co.v. Azcon Scrap Corp.,* 827 F.2d 984, 986 (4th Cir. 1987), *HK Porter Co. v. Goodyear Tire & Rubber,* 536 F.2d 1115, 1119 (6th Cir. 1976), *In re Whitney Forbes*, 770 F.2d 692, 698 (7th Cir. 1985), *Int'l Bhd of Teamsters Local 519 v, UPS, Inc.,* 353 F.3d 497, 503 (6th Cir. 2003), *Karppinen v. Karl Kiefer Machine,* 187 F.2d 34-35 (2nd Cir.

1951), *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.,* 397 F.2d 594, 598 (3rd Cir. 1965), *Stridiron v. Stridiron,* 698 F.2d 204 (3rd Cir. 1983).

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PETITION FOR REHEARING EN BANC

Pursuant to Fed. R. App. P. 35 and 40, Petitioner respectfully petitions the full Court for rehearing en banc.

QUESTIONS PRESENTED

1. Can a court affirm a district court's sua sponte conversion of 12(b)(6) motions to summary judgment despite affidavits of unresolved issues of material fact?

2. Can an appellate court act as a trier of fact in the absence of any evidence from the record to support its opinion? Can the court make its determination on statements made by a party regarding evidentiary documents **never** submitted to or reviewed by any court, including district court?

3. Does the Court's affirming a flawed lower court's order deny due process?

4. Does the affirming of a district court's flawed order constitute countenance of fraud by the court and is it contrary to precedent and public policy?

STATEMENT OF FACTS AND PROCEEDINGS

1. Petitioner and John Dwight Wanken (JDW) operated a financial services firm acting and presenting themselves as partners, affiliated with Raymond James Financial Services, Inc. (RJFS) since December 1998.

2. Petitioner and JDW made all business decisions together, shared equally in profits/losses and functioned as partnership. They shared a client production number for accounting purposes representing joint efforts. RJFS was always

aware they functioned and represented as partnership and the joint production number represented shared production. JDW and Petitioner agreed on succession agreement and split agreement should one partner retire or leave firm. Split Agreement paid two years of commissions over a declining term.

3. In September 2007, Petitioner's mother and JDW's wife died. Within six weeks of her death, JDW demanded Petitioner meet his new girlfriend who stated she intended to join their business. JDW then threatened, as branch manager, to terminate Petitioner's financial services license if he didn't meet JDW's demands of a) meeting his new girlfriend; b) introducing Petitioner's two small children to her; and c) attend ***personal*** counseling with JDW at her longtime counselor.

4. Petitioner refused to meet JDW's personal demands but maintained partnership responsibilities. In March 2008, JDW terminated Petitioner's license based on his refusal to meet JDW's personal demands. Yet on Petitioner's FINRA U-5, JDW stated reason for termination was job performance. JDW breached all agreements.

5. Petitioner filed suit in April 2008 for breach of contract and partnership, defamation and other causes of action. In July 2008, JDW filed a motion to compel arbitration. Motion was granted but JDW sanctioned for significantly participating in litigation with intent to delay to Petitioner's detriment.

6. Petitioner filed FINRA Statement of Claim in December 2008 and Defendants were served in January 2009. RJFS responded and JDW filed a counterclaim.

7. Discovery took place between August 2009 and December 2009.

8. During discovery, JDW and RJFS violated multiple discovery orders and suppressed documents Petitioner requested. Petitioner stated in telephonic hearings and at arbitration he believed Defendants intentionally suppressed critical documents. Defendants testified they produced all documents. Yet on the third day of arbitration, Defendants admitted a)intentionally violating discovery orders; b) colluding to suppress the same documents; and by extension c) falsely testifying in telephonic hearings and at arbitration.

9. At arbitration, Defendants offered what Petitioner alleged was perjury. JDW stated Petitioner was his employee, they never were partners, he was a bad employee, didn't do his work and hadn't for many years, didn't come to the office as required and was terminated for-cause because of his abysmal job performance. Defendants' stories ***matched perfectly.*** No statement was true or supported by any evidence. Petitioner stated Defendants were lying and intentionally suppressed documents that would have enabled him to prove they were lying. Defendants offered ***no*** evidence to support their testimony. Arbitrators found for Defendants except a slight modification to Petitioner's FINRA U-5.

10. Petitioner filed complaints with Texas Workforce Commission (TWC) and Internal Revenue Service (IRS) requesting investigations into JDW's arbitration testimony which he believed was perjured and given to procure a favorable award.

11. TWC and IRS began investigating JDW's arbitration testimony. JDW and his attorney submitted materials to and participated in recorded hearings with these agencies ***contradicting all of Defendants' material FINRA testimony.***

12. In March 2010, Petitioner filed a Motion to Vacate *pro se* and *in forma pauperis.* Defendants filed 12(b)(6) motions. Magistrate joined the motions.

13. Petitioner responded to 12b6s in June 2010 and stated unresolved issues of material fact regarding JDW's post-arbitration TWC/IRS testimony contradicting Defendants' material FINRA testimony which raised questions of whether award was procured through fraud, spoliation of evidence and fraud on court.

14. In January 2011, Magistrate issued Findings and Recommendations and sua sponte converted and granted 12b6s to summary judgment and confirmed arbitration award in spite of Petitioner's affidavits of outstanding issues of material fact that demanded further proceedings to resolve.

15. Petitioner filed Objection to Findings and averred **multiple** issues of material fact to be resolved through discovery. Petitioner stated there were TWC/IRS documents and recordings he couldn't obtain without subpoena that would resolve outstanding issues and support allegations Defendants procured award by fraud.

16. District court accepted Magistrate's Findings despite unresolved issues of fact.

17. Petitioner filed his appeal with this Court in February 2011 and averred that his pleadings/affidavits were sufficient to defeat **both** 12b6 and summary judgment.

18. JDW submitted a brief to this Court that **completely contradicted** his TWC/IRS testimony, didn't reconcile with FINRA testimony and is a ***new version*** and fourth iteration of conflicting facts he has submitted to tribunals and agencies.

19. JDW's brief stated TWC/IRS issues immaterial to arbitration and **only** concerned employee/independent contractor status. Petitioner stated that during TWC/IRS hearings, JDW contradicted ***every material*** statement he made at FINRA regarding their partnership, compensation, production number and reason for termination of Petitioner's license. Petitioner stated his affidavits were sufficient to defeat summary judgment in stating unresolved issues of material fact relative to TWC/IRS records that contradicted Defendants' FINRA testimony and the appellate court had ***no*** choice but vacate and remand to resolve those issues.

20. Panel affirmed the flawed district court's order on September 29, 2011

ARGUMENT AND AUTHORITIES

A.Opinion is contrary to precedent regarding standard for pro-se pleadings and orders involving non-movant parties.

Petitioner is a pro-se litigant and was the non-moving party in the 12b6 motions filed by Defendants. Extensive case law demands pleadings of a pro-se litigant be held to a less stringent standard than formal pleadings drafted by lawyers. Haines v. Kerner, 404 US 519, 520 (1971); Conley v. Gibson, 355 US 41, 45-46 (1957); SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992); US v.

Miller, 197 F.3d 644, 648 (3rd Cir. 1999); Bonner v. Circ. Ct. of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975); US v. Day, 969 F.2d 39, 42 (3rd Cir. 1992);

Defendants filed the 12b6s. Petitioner responded to them and raised **multiple** outstanding issues of material fact demanding further proceedings. District court was required to "construe all facts and inferences in the light most favorable to the nonmoving party." Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010); see also United Fire & Cas. Co. v. Hixson Bros. Inc., 453 F.3d 283, 285 (5th Cir. 2006), Aucoin v. Haney, 306 F. 3d 268, 271 (5th Cir. 2002). It did not.

In spite of Petitioner's well-pleaded affidavits regarding unresolved issues of material fact, district court ***sua sponte converted*** 12b6s to summary judgment, contradicting precedent demanding **denial** of summary judgment ***if*** there are unresolved issues of material fact. Petitioner sufficiently alleged unresolved issues of material fact on which the case would turn and which demanded resolution. District court disregarded Petitioner's affidavits, didn't construe them liberally and failed to view them in light most favorable to Petitioner, the non-moving party. It then sua sponte converted and granted Defendants' 12b6s to summary judgment. This is reversible error. Opinion affirming flawed order compounds the error.

B.Opinion disregards statute and precedent on summary judgment motions with unresolved issues of material fact. It begs for clarification.

Petitioner's pleadings defeated Defendants' 12b6s **and** sua sponte conversion to summary judgment vis-à-vis unresolved issues of material fact related to vacatur. Statutes regarding summary judgment are clear. "Summary judgment is appropriate if there is no genuine issue as to any material fact." Fed. R.Civ. P. 56c., 6 James W. Moore's Federal Practice. Case law is clear - summary judgment is to be denied if there are **any** unresolved issues of material fact.

> "Before granting summary judgment sua sponte, the district court must assure itself that following the procedures set out in Rule 56 would not alter the outcome. Discovery must either have been completed, or it must be clear that further discovery would be of no benefit. The record must, therefore, reflect the losing party's inability to enhance the evidence supporting its position and the winning party's entitlement to judgment." Ramsey v. Coughlin, 94 F.3d 71, 74 (2nd Cir. 1996).

Petitioner stated he could enhance evidence supporting his position and he knew of unresolved issues of material fact. Case law is clear that summary judgment is improper if there are unresolved issues of material fact. See Chiu v. Plano Independent School District, 339 F. 3d 273, 282 (5th Cir. 2003), WSB-TV v. Lee, 842 F.2d 1266, 1269 (11th Cir. 1988), Gabarick v. Laurin Maritime, 10-30148 (5th Cir. 2010), Sahu v. Union Carbide Corp., 548 F.3d 59 (2nd Cir. 2008), Gurary v. Winehouse, 190 F.3d 37, 43 (2nd Cir. 1999), Kopec v. Coughlin, 922 F.2d 152, 154-155 (2nd Cir. 1991), First Fin. Ins. Co. v. Allstate Int. Demo. Corp., 193 F.3d 109 (2nd Cir. 1999), Ramsey, *supra*, Celotex Corp. v. Catrett, 477 US 317, 326

(1986), Anderson v. Liberty Lobby Inc., 477 US 242, 248 (1986), Tewari de-Ox Syst. Inc. v. Mtn. States/Rosen, 10-50137 (5th Cir. 2011)

Petitioner averred unresolved issues of material fact directly related to JDW's post-arbitration testimony regarding substantive issues decided at arbitration. Contradictory testimony raised issues of fraud, spoliation of evidence, perjured testimony and fraud upon the court. District court had a duty **not** to sua sponte convert and grant the 12b6s to summary judgment. It ***was required*** to resolve outstanding issues of material fact. It did not.

At issue was whether Defendants submitted perjured testimony at arbitration regarding material issues, intentionally spoliated evidence that would contradict intended perjured testimony and whether their attorneys committed fraud upon the court. These issues became apparent **after** arbitration, when JDW was investigated by TWC and IRS and **contradicted every material statement Defendants made at arbitration.** These were material issues **directly related** to arbitration. "An issue is material if its resolution could affect the outcome of the action." Weeks Marine Inc. v. Fireman's Fund Ins. Co., 340 F.3d 233, 235 (5th Cir. 2003) citing Anderson v. Liberty Lobby Inc., 477 US 242, 248 (1986). Petitioner stated TWC and IRS had investigation documents and recordings he couldn't get without subpoena. Petitioner averred documents and discovery **would resolve issues and affect the action's outcome.**

Summary judgment motion requires moving party demonstrate absence of genuine issue of material fact. Celotex, *supra*. Not only did Defendants **not** demonstrate absence of material facts, Petitioner's affidavits met standard required to defeat summary judgment by averring ***unresolved issues of material fact***.

Precedent has held "[a]n affidavit based on personal knowledge and containing factual assertions suffices to create a fact issue, even if the affidavit is arguably self-serving." Payne v. Pauley, 337 F.3d 767, 773 (7th Cir. 2003). This panel recently issued an opinion in line with statute and precedent on this exact matter. "Satisfying this initial burden shifts the burden to the non-moving party to produce evidence of the existence of a material fact requiring a trial." Don Wesley v. Gen. Drivers, et. al., 11-10120 (5th Cir. 2011) citing Bayle v. Allstate Ins. Co., 615 F.3d 350, 355 (5th Cir. 2010) citing Celotex. Petitioner's pleadings ***produced evidence*** of existence of material facts requiring discovery. This Court and district court erroneously disregarded those unresolved issues of genuine material fact.

Petitioner's affidavits stated he had first-hand knowledge of TWC and IRS investigations during which JDW **fully** contradicted all his and RJFS's FINRA testimony. These contradictions **weren't** inconsequential. They directly related to Defendants' material testimony. Based on Petitioner's affidavits, district court was **required** to continue proceedings to resolve outstanding issues. It couldn't grant

summary judgment in light of Petitioner's affidavits regarding JDW's contradictory testimony relative to the vacatur motion. *See* Fed. R. Civ. P. 56(d)

Petitioner averred outstanding issues of material fact sufficient to defeat **even** the district court's sua sponte converted summary judgment motion. Petitioner stated there were documents supporting his affidavits that must be considered by district court which he couldn't obtain ***without subpoena***. Precedent has held such affidavit **is** sufficient to defeat summary judgment. "[A]n affidavit based on personal knowledge and containing factual assertions suffices to create a fact issue, even if the affidavit is arguably self-serving." C.R. Pittman Const. Co., Inc. v. Nat. Fire Ins. Co. of Hartford, 10-30950 (5th Cir. 2011) citing Payne v. Pauley, 337 F.3d 767, 773 (7th Cir. 2003).

> "A party's own affidavit, containing relevant information of …first-hand knowledge, may be self-serving but nonetheless competent to support or defeat summary judgment." Harris v. J.B. Johnson Jewelers, 627 F.3d 235, 239 (6th Cir. 2010) *quoting* Cadle Co. v. Hayes, 116 F.3d 957, 961 n.5 (1st Cir. 1997).

> "Provided …the evidence meets the usual requirements for evidence presented on summary judgment…a self-serving affidavit is an accepted method for a non-moving party to present evidence of disputed material facts." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000).

Given Petitioner's identification of issues of unresolved material fact, district court committed reversible error in sua sponte converting 12b6s to summary judgment. The Second Circuit properly decided a similar case.

> "We agree that the district court's sua sponte grant of summary judgment was improper. We therefore vacate that order and remand so that discovery may

continue and the action be adjudicated in due course." First Fin. Ins. Co. v. Allstate Int. Demo. Corp., *supra.*

This Court compounded district court's error by affirming its order and **then** wrongly acted as a trier of fact. "Questions of credibility should not normally be decided by means of summary judgment but should be left for trier of fact." C.R.Pittman Const Co. v. Nat. Fire Ins. Co. of Hartford, *supra* quoting Sauquoit Fibers Co. v. Leesona Corp., 498 F.2d 271, 281 (5th Cir. 1974).

This Court is the first tribunal to which Defendants submitted **any** response regarding Petitioner's allegations that JDW's post-arbitration testimony **completely** contradicted **Defendants'** FINRA testimony. This Court acted as a trier of fact by issuing judgment on the merits of Petitioner's pleadings of unresolved issues of material fact and Defendants' statements they were immaterial. Opinion indicates ***this Court decided a matter of fact*** and determined post-arbitration testimony irrelevant – ***despite never reviewing any evidence regarding post-arbitration testimony***. There has **never** been a review of post-arbitration testimony **by ANY COURT**. Documents remain unreviewed and the outstanding issues of material fact remain unresolved.

C. Opinion Contradicts Precedent Demanding Summary Judgment be Decided on Sufficient Record

Summary judgment must be decided on sufficient record. District court failed to ensure summary judgment was only granted on sufficient record. Opinion

compounded that by affirming. It defies statute and precedent to sua sponte convert and grant summary judgment in light of Petitioner's affidavits regarding unresolved issues of material fact. In Celotex, the Supreme Court held that:

> "In our view, Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex, *supra.*

As the Eleventh Circuit ruled,"[t]he common denominator is the Court's caveat that summary judgment may only be decided on an adequate record." WSB-TV v. Lee, *supra.* Yet there **wasn't** adequate record in this case. **No discovery took place and Defendants NEVER** responded to Petitioner's allegations of fraud, perjury, spoliation of evidence and fraud upon the court.

D. Opinion disregards precedent regarding vacatur of arbitration awards when the award is fraudulently obtained.

District court converted and granted 12b6s to summary judgment **in spite** of Petitioner's affidavits of unresolved issues demanding discovery. District court contradicted precedent and statute in granting summary judgment in light of unresolved issues of fraud, perjury, spoliation of evidence and fraud on the court. This Court compounded the error in affirming a flawed decision. Both have countenanced fraud in their decisions, a fundamental abdication of duties.

In a case before another circuit involving fraud at arbitration, it held that material lies in arbitration constitute fraud and are grounds for vacatur. The lie

was **only proven** after arbitration concluded. The circuit court held 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). The Ninth Circuit held that the lies materially affected the proceeding's outcome, vacated and remanded the case and ***ordered*** that if it was determined there was fraud, district court was to enter judgment on the merits ***without any further testimony from the defendants.***

This issue of perjury and spoliation of evidence in discovery is clear in statute and case law. See 9 USC §10(a)(1), Karppinen v. Karl Kiefer Machine, 187 F.2d 34-35 (2nd Cir. 1951), Newark Stereotypers Union No. 18 v. Newark Morn. Ledger Co., 397 F.2d 594, 598 (3rd Cir. 1965), Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988), Int'l Bhd of Teamsters Local 519 v. UPS, Inc., 353 F.3d 497, 503 (6th Cir. 2003), Rozier v. Ford Motor Co., 578 F.2d 871 (5th Cir. 1978), Stridiron v. Stridiron, 698 F.2d 204 (3rd Cir. 1983).

The involvement of attorneys in fraud, perjured testimony and spoliation of evidence has extensive precedent designed to protect the integrity of the legal system and ensure that officers of the court aren't committing fraud upon it. See Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987), In re Whitney Forbes, 770 F.2d 692, 698 (7th Cir. 1985), HK Porter Co. v. Goodyear Tire & Rubber, 536 F.2d 1115, 1119 (6th Cir. 1976).

That this Court and district court turned blind eyes to Petitioner's allegations of fraud and this Court affirmed district court's flawed order in light of Petitioner's affidavits of unresolved issues of material fact is contradictory to precedent and statutes, an abdication of duty and an overreaching of this Court in acting as trier of fact. Whether there was fraud at arbitration was a question district court was required to resolve. It didn't. This Court was called to review district court's flawed order, not serve as trier of fact on unresolved issues lacking evidence.

E. Opinion Countenances Fraud and Abdicates Court's Duties

Opinion affirming district court's order is an abdication of duties. The Supreme Court held 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 v. Hartford, 322 US 238 (1944).

In turning a blind eye to Petitioner's pleadings that Defendants procured the award by extensive fraud involving their attorneys – which demanded discovery and trial – district court committed reversible error and failed to fulfill its duties. In affirming, this Court ignored precedent and countenanced fraud and deceit.

F.Opinion Violates Petitioner's Constitutionally Protected Due Process Rights

Petitioner averred unresolved issues of material fact that **must** be resolved to establish a record and answer question of whether award was fraudulently obtained. District court committed reversible error in sua sponte converting and

granting Defendants' 12b6s to summary judgment despite unresolved issues of material fact. Petitioner appealed to this Court to vacate and remand. Yet this Court affirmed flawed order, further violating Petitioner's due process rights.

There has been **no** review of **any evidence** regarding allegations of Defendants' fraud. Rather than allowing this case to go to discovery and trial, district court and this Court ignored Petitioner's affidavits of issues of material fact demanding resolution. This Court wrongly acted as trier of fact in deciding the relevance of JDW's post-arbitration testimony *without any evidence.* It took JDW's false statement that post-arbitration testimony was irrelevant to FINRA testimony and accepted it as true and factual without any review. ***No court has reviewed JDW's post-arbitration testimony*** **to resolve that issue.** Yet this Court issued an Opinion deciding a matter of fact that must be resolved at district court.

CONCLUSION

Based upon foregoing, Court should grant petition for rehearing en banc.

Respectfully submitted,

Christopher Michael Wanken
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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 October 10, 2011, a copy of the Petition for Rehearing En Banc for Christopher Michael Wanken, Plaintiff-Appellant was sent through the United States Postal Service by First Class Mail to:

N. Henry Simpson
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100 Crescent Court
Suite 250
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Braden W. Sparks
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1900 Pennzoil South Tower
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and twenty copies of the Petition for Rehearing En Banc for Christopher Michael Wanken, Plaintiff-Appellant, and an electronic version were sent by Federal Express to:

Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place

New Orleans, LA 70130-3408

_____

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Appendix
11-10219 Order

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 29, 2011
Lyle W. Cayce
Clerk

No. 11-10219
Summary Calendar

CHRISTOPHER MICHAEL WANKEN,

Plaintiff-Appellant,

versus

JOHN DWIGHT WANKEN;
RAYMOND JAMES FINANCIAL SERVICES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:10-CV-556

Before REAVLEY, SMITH, and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Christopher Wanken ("Wanken") appeals the denial of his motion to vacate

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

an arbitration award and the grant of defendants' motions to confirm the award. Finding no error, we affirm.

I.

Wanken was terminated from his employment as a registered sales associate at Beacon Financial Advisors, a firm owned by his father, John Wanken, and operated as an independent branch office of Raymond James Financial Services, Inc. ("Raymond James"). Wanken filed for arbitration with the Financial Industry Regulatory Authority, claiming that he was a partner in Beacon Financial and accordingly deserved additional compensation as a result of his wrongful termination. He also said that John Wanken and Raymond James had defamed him by listing, on a publicly available document, "Job Performance" as the basis for his termination. John Wanken counterclaimed, alleging that the arbitration was filed to harass him.

After extensive discovery and argument, the arbitration panel rejected the majority of Wanken's claims but granted him $1,200 in costs from Raymond James and ordered that the basis for his termination be changed to "no-fault." The panel also rejected all of John Wanken's counterclaims and assigned the costs to John Wanken and Raymond James.

Wanken sued under 9 U.S.C. § 10(a) to vacate and modify the arbitration award, claiming that (1) the award was procured by fraud; (2) the arbitration panel did not allow him to complete his discovery requests; (3) the panel failed to enforce its discovery orders; (4) the panel refused to consider material evidence; (5) the panel was improperly biased; (6) the panel exceeded and improperly exercised its powers; and (7) John Wanken, Raymond James, and their attorneys engaged in fraud and misconduct in the arbitration proceedings.

John Wanken and Raymond James filed motions to dismiss, which the magistrate judge recommended be treated as motions to confirm the arbitration

award and be granted. Wanken filed objections to the recommendation and an amended motion to vacate. The district court, after *de novo* review, accepted the recommendation and confirmed the award.

II.

We review the confirmation of an arbitration award *de novo*, using the same standards as did the district court. *See Wartsila Finland Oy v. Duke Capital, LLC*, 518 F.3d 287, 291 (5th Cir. 2008) (citation omitted). The review of an award is "exceedingly deferential." *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 380 (5th Cir. 2004). We may vacate an award only

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).[1] The burden of proof is on the party seeking to vacate the award, and any doubts or uncertainties must be resolved in favor of upholding it. *Brabham*, 376 F.3d at 385 n.9 (citations omitted).

Wanken argues that we should instead review the district court's order under the motion-to-dismiss standard. That is incorrect; the court plainly treated the relevant motions as motions to confirm the arbitration award, exem-

[1] *See also Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (stating that the grounds for vacating an arbitration award are restricted to those set forth in the Federal Arbitration Act, specifically in 9 U.S.C. § 10).

plified by the fact that the court considered all the evidence in the record before confirming the award.

III.

Wanken's argument that the arbitration award is not supported by the evidence is irrelevant. We have no authority to review the merits of the award; our inquiry is limited to determining whether any of the statutory conditions for vacating it have been met.[2] On that score, Wanken has not provided sufficient evidence to satisfy any of those conditions.

A.

Wanken contends that the award was procured by fraud. Specifically, he argues that John Wanken gave fraudulent testimony during the arbitration proceedings and concealed documents to deny him the opportunity to present his claims fully to the panel. Wanken also contends that John Wanken, Raymond James, and their attorneys generally engaged in fraud and misconduct during the proceedings. None of these arguments is supported by the record.

Wanken claims that John Wanken gave fraudulent testimony by taking a position in the arbitration proceeding that were inconsistent with those taken in proceedings before the Texas Workforce Commission—the inconsistent position being whether Wanken was an employee or independent contractor at Beacon Financial. Even assuming, however, that John Wanken did take inconsistent positions—the evidence of which is nothing more than Wanken's assertions—this particular issue had no bearing on the arbitration proceedings. During arbitration, the issue was whether Wanken was a partner at Beacon Financial. John Wanken said he was not, and the arbitration panel agreed. Whether Wan-

[2] *See Kergosien v. Ocean Energy, Inc.*, 390 F.3d 346, 357 (5th Cir. 2004), *overruled on other grounds by Citigroup Global Markets Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009).

ken was an employee or independent contractor is not relevant to whether he was a partner—and John Wanken has consistently maintained that Wanken was not a partner at Beacon Financial. Moreover, we cannot vacate an award merely because the arbitrators chose to credit one witness's testimony over another's.

Wanken provides no support in the record, beyond his conclusional allegations, that John Wanken has concealed documents. He also provides no credible evidence supporting his vague allegation that John Wanken, Raymond James, and their attorneys engaged in fraud and misconduct in the arbitration. Accordingly, Wanken's argument that the award should be vacated for fraud fails.

B.

Wanken maintains that the award should be vacated because the panel did not allow him to complete his discovery requests, failed to enforce its discovery orders, and did not consider material evidence. The record does not support any of those contentions.

The defendants produced over 6000 pages of documents in response to over 250 discovery requests. The panel, after conducting extensive hearings to resolve discovery issues, ordered the production of additional documents. The panel did not, however, order the production of all the documents Wanken requested, on the grounds that the requests were cumbersome and that some of the requests were irrelevant or not critical to the claims at issue. The panel's decision on that score was eminently reasonable and does not amount to "misbehavior" or refusal to "hear evidence pertinent and material to the controversy."

Nor is it accurate to characterize the panel's decision not to sanction John Wanken or Raymond James as a failure to enforce its discovery orders—the decision to sanction is discretionary, and Wanken has not shown any evidence to suggest that the panel's exercise of that discretion was in error. Similarly, there

is no evidence in the record to support Wanken's claim that the panel failed to consider material evidence in rendering its decision.

C.

Wanken contends that the arbitration panel was improperly biased against him. He does not, however, submit any evidence—beyond the fact that the panel did not grant him the relief he sought—supporting that allegation, nor is there any in the record.

D.

Wanken claims the panel exceeded and improperly exercised its powers. Specifically, he asserts that it (1) failed to enforce its discovery orders; (2) issued contradictory orders regarding witnesses; (3) refused to reconsider a discovery ruling; (4) did not inform him he was entitled to a continuance; (5) issued a "gag" order that prevented him from communicating with the media; and (6) made an "ambiguous and contradictory" award.

We have essentially addressed arguments (1), (2), (3), and (6), above. As to the others, Wanken offers no explanation as to how those occurrences violate the Federal Arbitration Act. Even assuming, *arguendo*, that the arguments have factual merit, they do not amount to an excessive or improper exercise of the panel's powers.

IV.

Wanken avers that the district court failed to consider his amended motion to vacate. That claim has no merit. The court explicitly stated that, "*even considering plaintiff's amended pleadings*, plaintiff has failed to establish any grounds for vacating or modifying the arbitration award." (Emphasis added.)

V.

Wanken maintains that he was entitled to notice before the magistrate judge recommended converting the motions to dismiss to motions to confirm the arbitration award. Even assuming, *arguendo*, that notice was required and not given before the magistrate judge made the recommendation, Wanken was given a chance to object—an opportunity he used—before the district court conducted a *de novo* review of the motions. Accordingly, Wanken was provided more than sufficient notice that the motions to dismiss could be treated as motions to confirm.

AFFIRMED.