No. _____

IN THE

Supreme Court of the United States

CHRISTOPHER MICHAEL WANKEN,
Petitioner,
v.
JOHN DWIGHT WANKEN, ET. AL.
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in affirming the lower court's order of summary judgment, disregarding unresolved issues of material fact directly related to the original motion for vacatur of the FINRA arbitration award on grounds that it was procured through fraud.

2. Whether the Fifth Circuit erred in affirming the lower court's ruling and in so doing, failed to liberally construe pleadings of Petitioner, a pro se, *in forma pauperis* litigant, violating Petitioner's due process rights.

3. Whether the circuit split regarding adequate judicial review of arbitration awards involving allegations the award was fraudulently procured will be resolved.

4. Whether the actions of the district court and Fifth Circuit so depart from normal judicial proceedings that supervisorial oversight from this Court is required.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fifth Circuit.

The petitioner here and appellant below is Christopher Michael Wanken.

The appellees below and respondents here are John Dwight Wanken and Raymond James Financial Services, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and reprinted in the Appendix to the Petition ("App.") at App. 1. The final judgment of the district court is unpublished and reprinted at App. 11. The Findings and Recommendation of the Magistrate is unpublished and reprinted at App. 15. The Denial of En Banc is unpublished and is reprinted at App. 45.

JURISDICTION

The Court of Appeals entered its judgment on September 29, 2011. Timely petitions for rehearing and rehearing en banc were denied on October 25, 2011, reprinted at App. 45. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Federal Arbitration Act, 9 U.S.C. §10, Amendment XIV to the United States Constitution and Federal Rules of

Civil Procedure Rule 56. The pertinent provisions are reproduced in the Appendix at App. 47-52.

STATEMENT OF THE CASE

There is likely no American untouched by binding arbitration – from credit card users to investors, car buyers, homeowners, bank account holders and employees.

While this case may appear to be filed by and affecting only one pro se litigant, this Court's decision will have significant consequences for millions of similarly situated individuals, including pro se litigants and arbitration participants.

The questions before the Court will determine whether statute and precedent regarding summary judgment and pro se filings can be capriciously disregarded.

This case presents a circuit split regarding confirmation of arbitration awards alleged to have been fraudulently procured and whether there will be adequate judicial review of such allegations of fraud.

Petitioner argued to the Fifth Circuit unresolved issues of material fact demanding the case be remanded to district court for a full review of evidence, including subpoena of documents from post-arbitration investigations and hearings of John Dwight Wanken ("Dwight") at which he gave testimony completely contradicting testimony he and

Co-Respondent, Raymond James Financial Services ("RJFS") gave at an arbitration conducted by the Financial Industry Regulatory Authority ("FINRA").

Petitioner argued the case couldn't be dismissed given unresolved issues of material fact and unreviewed evidence to support allegations of fraud. Petitioner argued to the Fifth Circuit that his district court briefs were sufficient to overcome a 12(b)(6) and district court's sua sponte conversion of Respondent's 12(b)(6) motions to motions to confirm and should have triggered review of evidence given Petitioner's allegations Dwight contradicted all his and RJFS's arbitration testimony in investigations conducted by the Texas Workforce Commission ("TWC") and Internal Revenue Service ("IRS").

The Fifth Circuit erred in affirming the lower court's flawed order confirming the award given the unresolved issues of material fact regarding whether the award was fraudulently procured. Precedent is clear that summary judgment **must** be denied if there are outstanding issues of material fact. See, e.g., *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986), *Celotex Corp. v. Catrett,* 477 U.S. 317, 326 (1986), *Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330* (5th Circuit 2001), *Ramsey v. Coughlin,* 94 F.3d 71, 74 (2nd Cir. 1996), *WSB-TV v. Lee,* 842 F.2d

1266, 1269 (11th Cir. 1988), *Sahu v. Union Carbide Corp.,* 548 F.3d 59 (2nd Cir. 2008).

Review is urgently needed given district court's and Fifth Circuit's radical departures from the accepted and usual course of judicial proceedings and contradiction of statute and precedent regarding summary judgment in cases with unresolved issues of material fact and failure to construe Petitioner's pleadings liberally and determine if there was any legal theory under which he could prevail.

If legal victory has a price, Respondents were happy to buy it. Respondents collectively have been represented by seven seasoned and accomplished attorneys.

At arbitration alone, Respondents spent nearly $300,000 against a pro se Claimant at which they thwarted virtually all discovery by spoliating evidence. Respondents were determined to make sure this case never got a fair hearing through legal maneuvering, including fraud, perjury, spoliation of evidence, subornation of perjury and fraud upon the court, conducted by some of the industry's finest hired guns.

Respondents had a motive in suppressing the facts. If Petitioner's allegations are correct, the attorneys involved would face disbarment, criminal prosecution and civil liabilities while the parties,

including a major broker-dealer, would face severe investigations and prosecution.

It begs the question of what Respondents had to hide and why they spent hundreds of thousands of dollars to keep those secrets.

Petitioner articulated unresolved issues of whether Respondents fraudulently procured the award. The Fifth Circuit erred in affirming the district court's flawed order, particularly when Petitioner's briefs stated unresolved issues of material fact relating to post-arbitration testimony of Dwight to TWC and IRS that no longer reconciles with Respondents' arbitration testimony.

That demanded the Fifth Circuit remand the case with instructions to review the TWC/IRS investigation materials to determine if Respondents committed fraud at arbitration.

Yet the Fifth Circuit denied justice and a fair hearing of these issues by disregarding Petitioner's well-articulated argument of unresolved issues of material fact.

This case is **more** than mere legal error. The precedent is bad policy and sends a message that fraud will be countenanced and condoned by our courts. The fraud the Fifth Circuit has countenanced involved not merely parties to a case,

it involved the **very officers of the court** sworn to uphold justice.

At arbitration, Respondents' and their attorneys' testimonies matched perfectly on **every** material issue. Yet during post-arbitration investigations conducted by the TWC and IRS ("TWC/IRS") between March 2010 and April 2011, Dwight and his lawyer, N. Henry Simpson ("Simpson") contradicted ***every*** material testimony he **and** RJFS made at arbitration. Dwight and Simpson have since contradicted their TWC/IRS testimony to the Fifth Circuit.

They are now under investigation by the TWC/IRS for perjury. While these investigations may yield criminal prosecution, they won't rectify the miscarriage of justice as a result of the district court's and Fifth Circuit's actions.

Petitioner averred there were documents from TWC/IRS investigations to substantiate his allegations that Respondents fraudulently procured a favorable award. Petitioner argued this to district court – but district court failed to resolve outstanding issues of fact. The evidence wasn't irrelevant. The district court, however, stated that it didn't care if Dwight contradicted **all** his arbitration testimony to the TWC/IRS and refused to order evidence production. App. 20-22.

There has been **no** judicial review of these documents to determine if Respondents committed fraud at arbitration.

Yet the Fifth Circuit determined the veracity and relevance of these documents without them ever being submitted as evidence or reviewed by **any court** but **based only on** Dwight's characterization of TWC/IRS evidence, wholly contraindicated for an appellate court and begging for this Court's supervisorial powers.

This case holds tremendous significance for those bound by mandatory arbitration clauses in consumer and employment contracts, particularly for those involving FINRA. FINRA arbitrations are industry-run and arbitrators are industry-selected. In recent years, there has been criticism of FINRA arbitrations and how they invariably favor industry, regardless of facts. App. 53-83.

Prior to arbitration, RJFS's lawyer, Erin Linehan-Reyes ("Linehan-Reyes"), told Petitioner she wasn't worried about arbitration even though her client had **no evidence** to support its position. She said the arbitrators would assign more weight to her oral testimony than Petitioner's evidence.

Simpson is a FINRA arbitrator and represents clients before FINRA. It appears Respondents knew they could get away with lying at FINRA based on

Simpson's and Linehan-Reye's experience as FINRA arbitrators and attorneys and the industry-friendly forum.

FINRA was notified of Respondents' alleged perjury and stated it will take **no** action in allegations of perjured testimony at FINRA arbitrations. "[Y]ou indicated that Mr. N. Henry Simpson…offered testimony and arguments that were later contradicted in a separate proceeding…Should you have concerns regarding Mr. Simpson's fitness to practice law, please consult the appropriate state bar association." App. 84-85.

This case **begs** for this Court's clarification whether fraud at arbitration will be tolerated and whether allegations of fraudulently obtained awards will be subject to adequate judicial review. There is a circuit split on this issue as other circuits have held allegations of fraud at arbitration will result in judicial review. *See e.g., Dogherra v. Safeway,* 679 F.2d 1293 (9th Cir. 1982)*, Int'l Bhd. Of Teamsters Local 519 v. UPS,* 335 F.3d 497, 503 (6th Cir. 2003).

The Fifth Circuit has split and held it will confirm arbitration awards – potentially fraudulently procured—and won't remand to resolve whether the award was fraudulently procured.

Left undisturbed, the Fifth Circuit's ruling contradicts precedent regarding pro se litigants and

summary judgment motions, which is contrary to precedent, dangerous policy and begs for this Court's review.

The ruling countenances fraud and denies judicial review, despite unresolved allegations and unreviewed evidence regarding fraud. Petitioner repeatedly averred there is evidence from investigations of Dwight post-arbitration in which he gave contradictory testimony from Respondents' arbitration testimony that demands review to resolve the issue of fraud.

Petitioner argued the only explanation of the contradictory testimony is Respondents conspired to introduce perjured testimony at arbitration and suppressed all evidence that would have contradicted their intended testimony. When Dwight was investigated by TWC/IRS, he got caught in his and RJFS's web of lies and contradicted **all** their arbitration testimony.

This Court is the last checkpoint to stop Respondents from getting away with fraud at arbitration. If the Supreme Court denies certiorari, Respondents have gotten away with their crime. Worse, Petitioner is denied justice despite fighting for it for more than four years and is irreparably harmed. Petitioner has already lost his home, his savings and his career.

As a matter of public policy, it's essential this Court clarify that fraud at arbitration won't be tolerated and courts **will** review arbitration cases involving legitimate allegations an award was fraudulently obtained.

A. Factual Background

Petitioner and Dwight worked together in the financial services industry beginning in 1997. In 1998, they affiliated with RJFS.

They mutually agreed to file as independent contractors with the IRS and function, represent and present themselves as a partnership.

They divided partnership responsibilities based on skills, education and experience. Victoria Wanken, Dwight's wife and Petitioner's mother, handled administrative functions. She was diagnosed with cancer in 2003, at which time Petitioner and Dwight divided her responsibilities.

During this time, they represented, presented and functioned as a partnership to clients, potential clients, colleagues and RJFS. They equally shared all business costs and equally shared in profits and losses.

They made all decisions together and neither had supervision over the other. Both regularly

worked from home and attended meetings at the branch office and at client's homes/offices as needed. During this time, the two verbally agreed to Succession and Split Agreements. They approached RJFS about virtual offices, whereby both partners would work at home with the exception of client meetings. RJFS was always aware they operated as a partnership, shared one client production number and made all decisions together.

In September 2007, Victoria died. Dwight and Petitioner decided to memorialize their oral agreements. They signed the Succession and agreed to terms of the Split Agreement.

Within weeks, Dwight told Petitioner he met a woman online and intended to marry her immediately. Dwight demanded Petitioner introduce his children to her, attend personal counseling with him at her counselor and visit socially with them. Dwight said his girlfriend, a preschool teacher, wanted to join their financial services firm.

Petitioner told Dwight he didn't agree with his new girlfriend joining the business, had no immediate intentions of meeting her and wouldn't introduce his young children to her when they just lost their grandmother. In December 2007, Dwight threatened Petitioner – if he didn't meet his personal

demands, he'd terminate Petitioner's financial services license, which he could do as branch manager.

Over the next several months, Dwight threatened Petitioner and tied the good-standing of his license to personal demands, each related to Dwight's girlfriend. Petitioner maintained his partnership responsibilities and virtually single-handedly acquired one of the firm's largest clients while Dwight was preoccupied with his girlfriend.

Petitioner reported Dwight's threats to RJFS. RJFS refused to take any action and stated Dwight could do anything he wanted as branch manager.

Dwight threatened a legal attrition fight and threatened to destroy Petitioner and his family.

On March 13, 2008, Dwight terminated Petitioner's license and wrote on Petitioner's FINRA U-5 that he was terminated for-cause.

In April 2008, Petitioner filed suit in state court against Dwight for breach of contract and breach of partnership. Dwight was represented by Simpson. Discovery was ongoing when Petitioner's attorney attempted to schedule depositions, but Simpson was evasive about scheduling. In July 2008, he attempted to secure a trial date but Simpson again was cagey. Simpson then filed a motion to compel arbitration to FINRA. A hearing

was held and the motion to compel was granted. The judge also granted Petitioner's motion for sanctions against Simpson and Dwight for participation in litigation with intent to delay justice. Petitioner had used almost all his limited resources and would now have to represent himself pro se before FINRA, which is exactly what Dwight threatened when he threatened a legal attrition fight to prevent Petitioner from getting relief.

Petitioner filed a pro se FINRA arbitration claim in December 2008 against Dwight and RJFS. In March 2009, Dwight filed a petition seeking custody and conservatorship of Petitioner's children based on documents he received in the FINRA claim regarding Petitioner's unemployment and foreclosure. Petitioner borrowed money from his in-laws to retain a family law attorney to fight for his children. Dwight admitted impersonating Petitioner to his daughter's school and making false reports to CPS. Dwight's custody petition was denied and he was sanctioned for bringing the groundless lawsuit.

In August 2009, Christopher requested documents from RJFS and Dwight in the discovery phase of arbitration. Both respondents refused to produce **the exact same documents**, stating they didn't exist.

The panel issued four orders that all documents be produced and stipulated they'd severely sanction all discovery violations. Petitioner fully complied with the panel's orders; yet Respondents refused to produce thousands of documents ordered to produce.

On the first day of arbitration, Petitioner stated he didn't believe Respondents produced all documents and he couldn't make his case without them.

Respondents stated ***under oath*** they produced all documents. Petitioner stated he didn't believe Respondents and the arbitrators stated if it turned out documents hadn't been produced, they'd take action.

The hearing began and Petitioner was shocked at Respondents' testimony. Dwight testified Petitioner was his administrative employee, was paid a salary, didn't share in profits and losses, was a terrible employee, didn't do his job, Dwight constantly corrected his work, was required to work at the branch office, made no contributions to the business, Dwight supervised him, was terminated for-cause and they never had a partnership.

RJFS corroborated **every** statement Dwight made and testified it had conversations with Dwight over time during which he complained about

Petitioner's poor job performance and insubordination.

When Petitioner asked either Respondent if they had **any** evidence to support their testimony, both stated they just didn't keep records – though Respondents would have been required to keep records. When Petitioner presented **his evidence** demonstrating there was a partnership, Dwight dismissed it all as marketing and RJFS fully corroborated Dwight's testimony.

On the third day of the hearing, Dwight referenced a document Petitioner had requested in discovery that Respondents said didn't exist. Petitioner challenged Dwight and he admitted **he intentionally didn't produce thousands of documents** Petitioner requested in discovery.

RJFS admitted it intentionally didn't produce documents and Respondents admitted **discussing** not producing documents and intentionally suppressing them. The panel stated it wouldn't deal with discovery sanction motions until after arbitration, so the hearing continued.

During Petitioner's closing argument, he stated he didn't believe he was able to make his case, that Respondents lied, they suppressed every piece of evidence he could have used to rebut their lies and his due process rights were violated. The arbitration

chair refused to respond to his concerns and instructed him to finish his closing.

The panel issued its award, ruling against Petitioner on every issue. App. 39-44. The only relief granted was for travel and photocopying expenses, totaling $1,200. The panel assessed costs to Petitioner and RJFS, with no costs assessed to Dwight. The panel failed to order Petitioner's FINRA U-5 be corrected to reflect the truth.

Petitioner filed complaints with the TWC, IRS, Department of Labor and Texas State Securities Board. Each agency initiated an investigation of Dwight based on his FINRA testimony.

Between March 2010 and April 2011, Dwight, represented by Simpson, completely contradicted **every testimony** he and RJFS gave at arbitration in these investigations.

They stated to TWC/IRS that Petitioner **wasn't** an employee, they operated and presented themselves as a ***partnership***, shared equally in profits and losses, made all decisions together, were equals, divided partnership responsibilities, Dwight didn't supervise Petitioner, Petitioner wasn't required to work at the branch, they shared a production number, RJFS knew of the shared production number and knew Petitioner wasn't

required to work at the branch, Petitioner was the firm's Chief Investment Officer and wasn't terminated for-cause.

Petitioner filed a Motion to Vacate the Arbitration Award in March 2010, arguing the award was fraudulently procured. In his 12(b)(6) response and Amended Complaint, Petitioner argued Dwight's TWC/IRS testimony no longer matched Respondents' arbitration testimony and the only explanation was Respondents conspired on intended arbitration testimony to procure a favorable award; suppressed every discoverable document that would have contradicted their intended perjured testimony, witnesses offered perjured testimony and Respondents' attorneys orchestrated the entire fraud, committing fraud upon the court.

Dwight and Simpson have since submitted a brief to the Fifth Circuit that completely contradicted every piece of testimony they provided to TWC/IRS. As Petitioner argued to the Fifth Circuit, they agree to change their story depending on to whom they're testifying.

B. Proceedings Below

In March 2010, Petitioner filed a Motion to Vacate the Arbitration Award in the United States

District Court for the Northern District of Texas as a pro se litigant *in forma pauperis.* The case was assigned to Magistrate Jeff Kaplan who sent Petitioner "Interrogatories" to be completed before docketing. In March 2010, Dwight threated Petitioner on his Facebook page, threatening to violently harm Petitioner if he didn't drop the federal case.

Respondents filed 12(b)(6) Motions to Dismiss. Magistrate combined the motions and ordered Petitioner respond to them. Petitioner submitted his response and a Motion for Leave to Amend the Complaint and Amended Complaint regarding allegations of fraud committed by Respondents at arbitration in light of TWC/IRS investigations at which Dwight contradicted every material statement Respondents made at arbitration. The Magistrate stated he would accept no new filings until he ruled on the 12(b)(6), despite the outstanding Motion for Leave to Amend and Amended Complaint.

The district court took no action for nearly seven months. In January 2011, Magistrate issued his "Findings and Recommendations" ("Findings") and recommended the 12(b)(6) motions be sua sponte converted to motions to confirm. App. 26-27.

Petitioner objected to the Findings and argued there were issues demanding resolution to determine

whether Respondents committed fraud at arbitration. **Petitioner sufficiently argued issues of genuine material fact demanding resolution**. Petitioner referenced the TWC/IRS investigations and argued the evidence would prove Respondents lied at arbitration and the only way to determine if fraud was committed was to allow discovery.

Petitioner stated he couldn't obtain the TWC/IRS evidence without subpoena and that without those documents, the **court couldn't rule.**

Petitioner argued the case couldn't be dismissed given unresolved issues of material fact regarding whether the award was fraudulently obtained and demonstrated summary judgment wasn't proper given outstanding issues and unreviewed evidence directly related to allegations of fraud at arbitration.

In spite of Petitioner's well-pleaded allegations, district court affirmed the Findings, ordered the 12(b)(6) sua sponte converted to confirmation and denied Petitioner's Motion to Vacate. App. 11-12

Petitioner appealed to the Fifth Circuit Court of Appeals in February 2011. Petitioner stated unresolved issues of fact should have defeated a 12(b)(6) **AND** sua sponte conversion. Petitioner

averred unresolved issues demanding resolution and that district court erred in its ruling.

Petitioner argued **no court** reviewed the TWC/IRS evidence because the documents were unobtainable without subpoena. The district court **never** reviewed any of these documents. Petitioner had first-hand knowledge of the investigations and stated Dwight's contradictory TWC/IRS testimony related to ***every*** issue decided at arbitration and review would resolve questions of material fact directly related to allegations of Respondents' fraudulent procurement of the award—but if evidence **wasn't** reviewed, the questions would go unanswered.

Dwight's Fifth Circuit brief contradicted his TWC/IRS testimony. He again referred to Petitioner as his employee and stated Petitioner was terminated for-cause.

On September 29, 2011, the Fifth Circuit panel issued its Opinion affirming the lower court's order. App. 1. The Opinion was rife with erroneous statements of fact.

The holding was essentially a regurgitation of Dwight's brief. It was as though the Fifth Circuit **didn't even read** Petitioner's briefs.

Perhaps most egregiously, the Fifth Circuit determined the merits of evidence **never reviewed** by

any court – the TWC/IRS investigation materials. Dwight and Simpson argued to the Fifth Circuit that the evidence was irrelevant and only related to whether Petitioner was categorized as an independent contractor or employee. The Fifth Circuit **accepted** Dwight's and Simpson's assertions **without any court ever reviewing the evidence.**

The Fifth Circuit is to have **no role** in determining merits of unintroduced evidence other than remanding for review. Yet the Fifth Circuit was able to discern ***without any court's review, based solely on Dwight's assertions***, the evidence was irrelevant and didn't need to be reviewed.

If the Fifth Circuit had executed its responsibilities properly and remanded the case for review of evidence by **district court**, it would have learned the evidence contradicts ***every material statement*** Respondents made at arbitration and isn't limited to the independent contractor/employee issue. But the Fifth Circuit didn't do that. Because the Fifth Circuit exceeded its powers and acted as a trier of fact.

Petitioner filed Petitions for Rehearing and Rehearing En Banc on October 10, 2011. In both, Petitioner argued the court couldn't affirm the lower court's ruling in light of unresolved issues of material fact and unreviewed evidence. Petitioner

averred the panel exceeded its powers as an appellate court by determining the relevance and substance of evidence never submitted to **any court.** Petitioner argued the panel erroneously accepted Dwight's assessment of evidence and, based only on Dwight's characterization, determined relevancy.

The Fifth Circuit refused to correct its false summary and denied both Petitions on October 25, 2011.

REASONS FOR GRANTING THE PETITION

Recognizing that summary judgment should be denied if there are unresolved issues of material fact to ensure a fair and full hearing, this Court held in *Anderson,* 477 U.S. at 242, 248 and *Celotex Corp.,* 477 U.S. at 317, 326, that summary judgment is improper if there are unresolved issues of material fact. The courts of appeals and district courts have repeatedly agreed.

The public policy interest of ensuring pro se litigants receive a fair hearing was addressed by this Court in *Haines v. Kerner,* 404 U.S. 519, 520-21 (1971) when it held that pro se litigants' pleadings should be held to a less stringent standard than formal pleadings drafted by lawyers and should be liberally construed by the courts. The Eighth Circuit

further addressed this issue in *Bramlet v. Wilson,* 495 F.2d 714 (8th Cir. 1974) when it held if there is any theory entitling a pro se litigant to relief – even a theory not considered or known to the pro se litigant – the court ***cannot*** dismiss.

In conflict with those rulings, the Fifth Circuit's decision holds summary judgment may be granted and a case dismissed despite ***multiple*** unresolved issues of fact. These issues could have been resolved at district court with the admission of TWC/IRS evidence through subpoena.

The Fifth Circuit, however, affirmed the district court's flawed order of sua sponte conversion of 12(b)(6) to motions to confirm ***in spite*** of Petitioner's averment that there was unreviewed TWC/IRS evidence that would demonstrate Respondents fraudulently procured the award with participation of their attorneys.

Petitioner argued there was a duty to review that evidence, allow discovery and resolve the issue of whether Respondents fraudulently obtained the award. These conflicts regarding summary judgment and pro se litigant pleadings provide powerful reasons for this Court to grant review given the lower courts' departures from accepted judicial proceedings.

Also before the Court is the resolution of a circuit split on whether fraud at arbitration will be hastily confirmed or if allegations of fraud will merit judicial review to resolve allegations.

Millions of Americans are bound by mandatory arbitration clauses in contracts of which they may not be aware of at the time they purchase a product or enter into an employment relationship. When they discover they're bound by mandatory arbitration, many are unable to afford legal counsel to represent them at arbitration. Some arbitrations, like FINRA's, are industry-run. Many individuals represent themselves at arbitration against well-funded, well-represented opponents that are members of the industry coordinating the arbitration.

These arbitrations have presented problems in which industry suppresses evidence, challenges witness requests and commits perjury at arbitration to prevail, confident an industry-friendly panel will rule in their favor. App. 53-83.

That is exactly the situation in this case. FINRA knows Respondents likely perjured themselves and committed fraud at arbitration – yet FINRA has taken ***no*** action. App. 84-86. There have been congressional hearings and media coverage on FINRA's industry-run arbitrations, most of it

negative and calling for reform of FINRA arbitrations.

The Sixth and Ninth Circuits have held allegations of fraud at arbitration demand review at district court to resolve whether the award was fraudulently obtained. Yet in its ruling, the Fifth Circuit held that **confirming the award** is paramount, even if there are unresolved issues of fact and unreviewed evidence directly related to allegations of fraud.

It's critical for this Court to clarify whether the courts will serve as a backstop to ensure awards aren't fraudulently obtained. Consumers and employees already forfeit some of their due process rights when they are bound by mandatory arbitration agreements in consumer contracts and employee relationships. They shouldn't be further denied due process rights by companies that believe they can prevail at arbitration through fraud.

This is a pressing public policy issue that begs for review to protect the due process rights of arbitration participants. If arbitration is to remain a viable alternative to litigation, it must be fair, just, and ensure testimony is **truthful.** If courts are determined to confirm an arbitration award regardless of if it was won by hook or crook, a

message is sent that companies can walk into arbitration and commit fraud – and get away with it.

Leaving the Fifth Circuit's decision intact emboldens deceitful companies, particularly in financial services, as they know they can commit fraud at FINRA arbitrations with impunity. This is not only bad public policy, it's a license to lie and steal. This is untenable and will erode public confidence in arbitration.

I. THIS CASE RAISES THE CRITICAL QUESTION OF WHETHER SUMMARY JUDGMENT CAN BE GRANTED IF THERE ARE UNRESOLVED ISSUES OF MATERIAL FACT.

This case arises against the backdrop of a well-developed body of law regarding summary judgment and dismissal involving unresolved issues of material fact.

The Fifth Circuit's actions so far depart from the accepted course of judicial proceedings and sanction such a departure from the lower court regarding summary judgment, pro se pleadings and fraud at arbitration that they call for an exercise of this Court's supervisory powers.

Petitioner ***fully*** articulated there was unreviewed evidence from IRS/TWC investigations requiring a court order to obtain that would **prove** Respondents committed fraud at arbitration vis-à-vis Dwight's contradictory post-arbitration testimony.

Yet the district court sua sponte converted 12(b)(6) motions – in spite of Petitioner's averment of unresolved issues of material fact and unreviewed evidence that would resolve the issues.

The Fifth Circuit affirmed the flawed order, despite Petitioner's averment that unresolved issues of material fact defeat ***both*** summary judgment and 12(b)(6) dismissal.

The flawed holdings are contrary to statute regarding summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact

and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Summary judgment **must** be denied if there are unresolved issues of material fact. There ***were*** unresolved issues of material fact that Petitioner presented to district court and the Fifth Circuit. Summary judgment **had** to be denied.

The Fifth Circuit's decision conflicts with statute and settled law regarding summary judgment. The Fifth Circuit violated Petitioner's due process rights and rewrote precedent regarding summary judgment, issuing an edict that allows for summary judgment ***in spite*** of **multiple** unresolved issues of fact. This is bad law and bad policy. It begs for review and clarification by this Court for the sake of Petitioner's due process rights and those of other litigants.

A. This Court Held in *Anderson* and *Celotex Corp.* that Summary Judgment Must Be Denied if There Are Unresolved Issues of Material Fact.

This Court rested its decisions in *Anderson* and *Celotex* on the distinction that summary judgment is appropriate when there are no unresolved issues of material fact. The Fifth Circuit's holding disregards that distinction and has

rewritten decades of precedent regarding summary judgment.

"Under Rule 56(c), 'summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Celotex Corp.,* 477 U.S. at 322 quoting Fed. R. Civ. P. 56(c).

In *Anderson*, this Court held "[m]ore important for present purposes, summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

The Court concluded "it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* at 249.

It is undisputed Petitioner averred genuine issues for trial. The unresolved issues would have been supported by evidence obtainable from TWC/IRS ***only*** with a court order.

The district court was required to deny summary judgment and the Fifth Circuit should have remanded for further proceedings. Neither court fulfilled its responsibilities and both defied statute and precedent.

The Fifth Circuit further violated Petitioner's due process rights by ***acknowledging unreviewed evidence*** supporting Petitioner's allegations of fraud at arbitration – ***an unresolved issue of genuine material fact – and then decided the relevance of the UNREVIEWED evidence*** *and its nexus to unresolved issues.*

The Fifth Circuit repeatedly has stated summary judgment **must be denied** for unresolved issues of material fact. *See, e.g., Chiu,* 260 F.3d at 330 and *Sauquoit Fibers Co. v. Leesona Corp.,* 498 F.2d 271 (5th Cir. 1974).

The Fifth Circuit has held "[w]e will only affirm a summary judgment if we conclude that 'there is no genuine issue of as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995) quoting Fed. R. Civ. P. 56(c).

It also vacated a judgment for questions of whether summary judgment was proper and remanded for further proceedings. "Unfortunately,

we are unable to determine whether the district court's grant of summary judgment was appropriate, as no discovery had been conducted in this case and the record is fragmentary as a result." *Dillon v. Rogers,* 596 F.3d 260, 266 (5th Cir. 2010).

Sister circuits have similarly ruled summary judgment must be denied if there are unresolved issues of material fact and have rejected sua sponte conversion without adequate record and resolution of all issues of fact.

"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 Interior Demolition Corp.,* 193 F.3d 109 (2nd Cir. 1999). *See also Sahu,* 548 F.3d at 59.

"Before granting summary judgment sua sponte…Discovery must either have been completed, or…further discovery would be of no benefit. The record must, therefore, reflect the losing party's inability to enhance the evidence…and the winning party's entitlement to judgment." *Ramsey,* 94 F.3d at 74.

The Eleventh Circuit has held, "[T]he common denominator is the Court's caveat that summary

judgment may only be decided upon an adequate record." *WSB-TV,* 842 F.2d at 1269.

The Fifth Circuit disregarded precedent and statute, presenting a powerful reason for this Court to review. In this case, there was minimal record – no discovery had taken place. There were unresolved issues of material fact **and** unreviewed evidence.

B.The Fifth Circuit Knew of and Disregarded Petitioner's Allegations of Unresolved Issues of Material Fact Regarding Respondents' Fraudulent Procurement of the Arbitration Award.

The Fifth Circuit's decision is unmoored from law and logic, threatens the integrity of arbitration and leaves unanswered whether there will be adequate judicial review of arbitration awards allegedly fraudulently procured.

The question of whether the award was fraudulently obtained **would be answered** by the TWC/IRS evidence. ***If there was fraud***, as Petitioner avers, the award **would have to be vacated**. §10(a)(1) states a fraudulently obtained arbitration award is cause for vacatur.

It is inexplicable that district court sua sponte converted the 12(b)(6) motions given Petitioner's

briefs stating unreviewed evidence from TWC/IRS investigations supporting allegations Respondents fraudulently procured the award.

The Fifth Circuit stated the record didn't reflect the award was fraudulently obtained. Yet the record **did** reflect Petitioner said he could **supplement the record** with TWC/IRS evidence and ***prove the award was fraudulently procured by Respondents and their lawyers.***

This case could have been resolved if district court or Fifth Circuit made sure the record was complete and all evidence that ***could be*** introduced ***was*** introduced. The lower courts failed to do just that.

What the Fifth Circuit did next failed in its role as an appellate court, and **completely exceeded its powers**.

C. The Fifth Circuit Exceeded Its Powers and Acted as a Trier of Fact by Determining Relevance of Unproduced, Unreviewed Evidence.

The Fifth Circuit acknowledged unresolved issues of fact regarding Respondents' alleged fraud – and then exceeded its powers by acting as a trier of fact, determining the substance of evidence no court has ever reviewed.

Petitioner averred TWC/IRS evidence would prove the award was fraudulently procured based on Dwight's contradiction of **every material testimony Respondents gave at arbitration**.

The district court restated Petitioner's averment there **was** post-arbitration contradictory TWC/IRS evidence from investigations of Dwight– but somehow determined the investigations were irrelevant, despite never reviewing evidence. App. 5-6.

Petitioner averred to the Fifth Circuit the TWC/IRS evidence would ***prove*** Respondents fraudulently procured the award. Petitioner averred district court failed to review the evidence to resolve the material issues and remand was necessary to resolve.

Dwight argued to the Fifth Circuit the TWC/IRS evidence had nothing to do with the arbitration – despite Petitioner's statements of **firsthand knowledge** of the investigations.

The Fifth Circuit **literally took Dwight's word on what the evidence contained – despite no court ever reviewing it.**

Yet Dwight is accused of ***committing fraud*** to get a favorable arbitration award. That the Fifth Circuit a) determined the contents of evidence **never reviewed by any Court** and b) took the **"word"** of an

individual alleged to have committed **perjury** is of significant concern.

In his Reply Brief, Petitioner pointed out Dwight's Fifth Circuit brief **now contradicted his TWC/IRS testimony.**

That should have been a red flag that Dwight couldn't be trusted. Considering that documents submitted to the Fifth Circuit are supposed to be truthful under penalty of perjury, **it begs the question of why the Fifth Circuit took NO action regarding allegations Dwight's testimony to it was perjured.**

The Fifth Circuit erred in acting as a trier of fact. Its actions are irreconcilable with its role in the judicial system, depart from the usual course of judicial proceedings and beg for this Court's supervisory powers.

II. THIS DECISION CANNOT BE RECONCILED WITH THIS COURT'S HOLDING IN *HAINES V. KERNER* FOR PRO SE PLEADINGS

A. The Fifth Circuit Failed to Liberally Construe Petitioner's Pleadings as a Pro Se Litigant, as Required by *Haines.*

Petitioner is a pro se litigant that has appeared pro se before FINRA, district court and Fifth Circuit *in forma pauperis*.

The district court and Fifth Circuit were required to construe Petitioner's pleadings liberally. They didn't.

Petitioner clearly stated summary judgment must be denied due to unresolved issues of material fact and unreviewed TWC/IRS evidence that would resolve the issues. Yet district court and Fifth Circuit held Petitioner to an erroneous standard requiring he use legalese, expected from a trained lawyer, but not a pro se litigant.

The holding below is contrary to and inexplicably ignored this Court's ruling in *Haines v. Kerner*. The district court and Fifth Circuit have effectively created a "Members-Only" access to the judicial system in their holdings by demanding a pro se litigant produce the same pleading as an experienced lawyer. This violates the law and spirit of *Haines*.

As this Court held, "[t]he only issue now before us is petitioner's contention that the District Court erred in dismissing his *pro se* complaint without allowing him to present evidence….[a]llegations such as those asserted by petitioner, however inartfully pleaded, are sufficient

to call for the opportunity to offer supporting evidence." *Haines,* 404 U.S. at 519.

Petitioner ***may have*** inartfully pleaded his allegations. Yet his pleadings ***were*** sufficient for district court and Fifth Circuit to determine there were unresolved issues of fact and unreviewed evidence to resolve those issues.

In *Haines,* this Court held a pro se litigant was "entitled to an opportunity to offer proof" and remanded for further proceedings. *Id.* at 521. Inexplicably, despite Petitioner's statement that, if given the opportunity through evidence produced with a court order, he could offer proof of his allegations, the district court and Fifth Circuit refused him the **very opportunity** this Court has determined is due a pro se litigant.

The Fifth Circuit's decision ignores and contradicts precedent regarding how pro se litigants' pleadings are treated by courts and calls for review.

B.The Lower Courts Were Required to Liberally Construe Petitioner's Pleadings and Deny Summary Judgment if There Was Any Legal Theory Under Which Petitioner Could Prevail.

The Fifth Circuit's holding diverges from well-established precedent and is at tension with holdings of this Court and circuit courts.

"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 1106, 1110 (10th Cir. 1991).

The Eighth Circuit has held "[a] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. *Bramlet,* 495 F.2d at 714.

The district court was **required** to consider Petitioner's allegations of unresolved issues of fact that could be resolved through TWC/IRS evidence. The district court should have denied the 12(b)(6) and sua sponte conversion to allow Petitioner to obtain evidence for review. The district court and Fifth Circuit were ***required*** to determine if Petitioner's allegations of unresolved issues of fraud would allow for relief. They did not. The lower courts' actions violate Petitioner's constitutionally protected due process rights.

C. The Fifth Circuit's Decision Creates Tiers of Access to the Judicial System and Negatively Impacts Pro Se Litigants.

This case presents the important question of whether access to justice is contingent on the presence of legal representation. The number of Americans representing themselves in legal proceedings is high and continues to rise.

The Fifth Circuit's holding advocates that those with access to the best legal representation money can buy should prevail - but not based on the merits. This is unconscionable. Our justice system is not a country club. Access and due process are constitutional rights, not platinum credit card benefits for the affluent.

The district court and Fifth Circuit were aware of evidence Petitioner couldn't obtain without court order which Petitioner averred would prove Respondents committed fraud at arbitration. That the district court sua sponte converted the 12(b)(6) motions, confirmed the award and the Fifth Circuit confirmed the flawed order is bad law and bad policy.

Rather than ensuring Petitioner's pleadings were liberally construed and every opportunity for a full and fair hearing was given, the lower courts

were all too eager to dispose of this case and find for Respondents – not on the merits, but because Petitioner couldn't afford legal representation and didn't speak the court's "legalese."

However, "[j]udges are charged with ascertaining the truth, not just playing referee... A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits." John Greacen, *"Ethical Issues for Judges in Handling Cases With Self-Represented Litigants."* Judicial Council of California (2007) quoting *Gamet v. Blanchard,* 91 Cal. App. 4th 1276 (2001).

III. THE DECISION BELOW CREATES A DIRECT AND SUBSTANTIAL CIRCUIT SPLIT REGARDING FRAUD AT ARBITRATION.

A.The Holding is Contrary to Statute and Sister Circuits' Holdings, Presenting a Conflict Calling for this Court's Clarity Regarding Judicial Review of Allegations of Fraudulently Procured Arbitration Awards.

This Court has articulated there is a national policy favoring arbitration as an alternative dispute resolution process. *Hall Street Assoc. v. Mattel, Inc.,* 552 U.S. 576 (2008).

As such, it's in the best interest to ensure arbitration is fair and just. Perjured testimony shouldn't be tolerated at arbitration or in a courtroom. Yet that's exactly what Petitioner alleged happened in this case – Respondents and their attorneys executed a calculated plan of fraud at arbitration.

FINRA arbitrations are notorious for favoring industry and ignoring industry misconduct. App. 71-83. FINRA arbitrators are selected, trained and paid by the very firms that comprise FINRA and who regularly appear before FINRA arbitrators. Arbitrators have been removed from lists of eligible arbitrators **specifically** for finding **against industry** participants in FINRA arbitrations. App. 67-70.

Experts have testified before Congress that FINRA arbitrations are fundamentally unfair and unjust and have called for reform of FINRA arbitrations to protect rights of non-industry parties. App. 53-66.

Petitioner suggests Linehan-Reyes' assertion that she wasn't worried about arbitration was because she knew she could commit fraud to win at FINRA. There simply is **no other explanation for Linehan-Reyes'** statement.

When Petitioner asked Respondents for a **single** piece of evidence to support their testimonies,

both parties stated they just didn't have any records. **Not a single piece of evidence to support any of their testimony.**

Yet their testimony matched ***perfectly***. Down to specific details and recollections. Even though they didn't have any documents to support their testimony.

Yet when Dwight was investigated by TWC and IRS, he contradicted ***his and RJFS' entire*** FINRA testimony. **Not one** piece of Dwight's TWC/IRS testimony matched Respondents' arbitration testimony.

There are benefits to arbitration. Yet when it's used to perpetrate fraud, there **must be** adequate judicial review of awards. §10(a)(1) clearly calls for judicial review in cases alleging procurement by fraud. **Quite simply, fraud spoils the award.** Other circuits have held fraud at arbitration is grounds for vacatur. Yet the Fifth Circuit has stated it will countenance and condone fraud and that **an award must be confirmed at all costs**, even when fraudulently procured.

If arbitration is to continue as a viable litigation alternative, it's critical this Court clarify the issue of judicial review of vacatur for fraud to ensure due process rights aren't violated and ill-gotten gains aren't hastily confirmed by arbitration-

favoring courts. A balance must be struck between the benefits of arbitration and the due process rights of parties.

Granting review, this Court can offer guidance regarding judicial review in cases involving allegations of fraud at arbitration to ensure uniformity in the application of §10(a)(1).

This matter has percolated and there is conflict between the Fifth Circuit and the other circuits regarding confirmation of arbitration awards, hence the urgent need for review.

There must be a strong public policy favoring ***sufficient*** – not cursory – review of arbitration cases involving allegations an award was fraudulently obtained. Anything less destroys the integrity of arbitration and makes it an unjust litigation alternative.

The Fifth Circuit was incorrect in stating there was no cause for remand. Petitioner averred there were TWC/IRS documents ***not in the record*** only obtainable through subpoena ***not reviewed by any court*** that would **indisputably** show Respondents committed fraud at arbitration. This demanded judicial review, not the Fifth Circuit's condoning deceit and fraud.

The need for immediate review is pressing to resolve this conflict.

B.Arbitration Already Limits Due Process Rights of Parties. Disregarding Allegations of Fraud is Bad Law and Policy.

The Fifth Circuit's unprecedented leap has encouraged participants at arbitration to commit fraud through its tacit approval of fraud as a quasi-legitimate means of procuring a favorable arbitration award.

Yet the statutory text and public policy underlying §10(a)(1) strongly suggest Congress intended fraudulently obtained arbitration awards to be subject to judicial review.

Inexplicably, however, the Fifth Circuit refused to apply §10(a)(1) as it is written. The panel writes in its opinion:

"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." App. 6.

Yet Petitioner didn't aver conclusional allegations. **Petitioner averred TWC/IRS documents**

he couldn't obtain without court order that would prove Respondents committed fraud.

Petitioner averred to district court and the Fifth Circuit that Dwight contradicted **every** piece of testimony on **every material issue** that he **and** RJFS gave at arbitration during investigations conducted by TWC/IRS between March 2010 and April 2011. Those are not vague allegations. Those are facts demonstrating Respondents committed fraud at arbitration.

The Fifth Circuit was duty-bound to remand with instructions ordering production of TWC/IRS evidence to determine if the award was fraudulently procured. Based on statute, precedent and public policy, this was the **only choice** the Fifth Circuit could have made. This wasn't the choice it did make, however, which puts it at odds with sister circuits and calls for this Court's review and clarification.

C.The Sixth and Ninth Circuits Have Held Contrary to the Fifth Circuit. There is Urgent Need for This Court's Clarification Regarding Judicial Review of Fraudulently Procured Awards.

The circuit conflict between the Fifth Circuit and sister circuits regarding the validity of a fraudulently procured arbitration award is

compelling and begs for this Court's immediate review to clarify the issue, particularly given the millions of Americans bound by mandatory arbitration clauses. If this issue is allowed to remain unresolved, untold Americans may be harmed if they find themselves in an arbitration against a party willing to commit fraud to procure a favorable award.

The lower courts were aware of Petitioner's allegations that Respondents procured the award through fraud and unreviewed TWC/IRS evidence supporting Petitioner's allegations.

Yet in their advocacy for arbitration at the expense of due process and justice, they violated statute and precedent in confirming an award in a case in which there were unresolved issues of fact supporting Petitioner's allegations of Respondents' fraud at arbitration.

The Ninth and Sixth Circuits have held that fraud at arbitration will be resolved through remand to district court to review evidence and conduct hearings regarding the alleged fraud. In *Dogherra v. Safeway*, a manager lied about the cause for an employee's termination and falsely testified at arbitration regarding the employee's return from a leave of absence. The lie was only proven **after** arbitration concluded and wasn't discoverable during

arbitration. The Ninth Circuit held the manager's lie "thwarted and subverted Plaintiff's efforts to arbitrate her agreement." *Dogherra,* 679 F.2d at 1293. The Ninth Circuit remanded the case with instructions that if it determined there **was** fraud at arbitration, the district court was to enter a judgment on the merits **without any further testimony from defendants.**

The Sixth Circuit ruled similarly regarding fraud at arbitration in a case involving lies told at arbitration by defendants.

"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…Local 519's allegations of fraud would demonstrate Cole's investigation was…an effort to manufacture a story." *Int'l Bhd of Teamsters Local 519,* 335 F.3d at 497, 503.

The Fifth Circuit has adopted a sharply divergent legal standard regarding fraud at arbitration and the courts' role in judicial review of arbitrations involving allegations of a fraudulently procured award from sister circuits, presenting a circuit split begging for clarity.

Arbitration **can be** a fair and just process and alternative to litigation. Yet given the propensity for

firms to do anything to win, evidenced by this case, courts must ensure that if a party commits fraud at arbitration, the award will be subject to judicial review. The circuit split calls for this Court's intervention regarding basic standards of judicial review in awards where there are genuine allegations of fraud at arbitration.

The Fifth Circuit's opinion seems to **favor** fraud at arbitration, in spite of §10(a)(1)'s clear purpose to deter fraud at arbitration, ensure arbitration is a viable and just alternative to litigation and protect participants' due process rights. This is such a departure from normal judicial proceedings that it begs for this Court's supervisorial powers.

IV. THE FIFTH CIRCUIT'S DECISION COUNTENANCES FRAUD AND BEGS FOR THIS COURT'S SUPERVISORY POWERS

A denial of review emboldens and insulates arbitration participants considering fraudulent testimony as a means to prevail. Denial or delay multiplies the irreparable harm the Fifth Circuit's decision legitimizes. Millions of Americans are bound by mandatory arbitration clauses. The judicial system must ensure these individuals' due

process rights aren't violated by the courts' countenance of fraud at arbitration.

At minimum, Respondents' and counsels' fraudulent activity includes perjured testimony, subornation of perjury, spoliation of evidence, collusion, conspiracy, obstruction of justice and fraud upon the court. Individually, any is sufficient to vacate the award. Collectively, they're enough to warrant criminal prosecution, as Petitioner argued to the Fifth Circuit. *See, e.g., regarding perjury and spoliation of evidence, Rozier v. Ford Motor Co.,* 578 F.2d 871 (5th Cir. 1978), *Karppinen v. Karl Kiefer Machine,* 187 F.2d 32 (2nd Cir. 1951), *Newark Stereotypers Union No. 18 v. Newark Morning Ledger Co.,* 397 F.2d 594, 598 (3rd Cir. 1968), *Stridiron v. Stridiron,* 698 F.2d 204 (3rd Cir. 1983). *See e.g., regarding fraud upon the court, Cleveland Demolition Co. v. Azcon Scrap Corp.,* 827 F.2d 984 (4th Cir. 1987), *In Re Whitney Forbes*, 770 F.2d 692 (7th Cir. 1985), *H.K. Porter Co. v. Goodyear Tire & Rubber,* 536 F.2d 1115 (6th Cir. 1976).

This Court held that courts must take action against fraud when it stated, "[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 US 238 (1944).

The Respondents' actions are **exactly the type of** fraud and deception this Court was referring to in that holding. The Fifth Circuit's actions demonstrate bad law, bad policy, a sharp circuit split regarding fraud at arbitration and an unusual departure from judicial proceedings.

V. IMMEDIATE REVIEW IS URGENTLY NEEDED

This Court's review is urgently needed. For Petitioner, everything is on the line. Petitioner has sought relief and had his due process rights abridged and violated by FINRA and the courts.

As a practical matter, a denial of review insulates Respondents from any liability or consequences from an elaborate strategy of fraud executed at arbitration by Respondents and their attorneys, constituting not just fraud, but fraud upon the court. While the IRS and TWC are investigating Dwight and Simpson for perjury, this will result in **no relief** for Petitioner, despite the fact that he's been the victim of Respondents' fraud at arbitration. Respondents have become emboldened that they've gotten away with fraud and continue to

commit further fraud in their testimony on this matter. The Fifth Circuit has communicated parties can commit wrongdoing, suppress discoverable documents, lie about it at an industry-managed arbitration and **even lie about facts to a judge** when the arbitration is reviewed in a vacatur motion. Respondents' behavior ***should have been*** shocking and unacceptable to the lower courts. Inexplicably, they have tolerated and condoned fraud, even in Respondents' briefs submitted to the courts.

Further delay multiplies irreparable harm to Americans bound by mandatory arbitration clauses. While there is a national priority in arbitration as an alternative dispute resolution process, it must be balanced with the commitment to truthful testimony and guarantee of adequate judicial review in allegations an award was fraudulently procured.

Immediate review is manifestly appropriate in light of the circuit split on the issue of judicial review of arbitration awards involving allegations of fraudulent procurement, violation of Petitioner's due process rights as a pro se litigant, premature summary judgment in spite of unresolved issues of material fact, district court's departure from usual judicial proceedings and the Fifth Circuit's sanctioning of such a departure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

(September 29, 2011)

Before REAVLEY, SMITH, and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge: *

Christopher Wanken ("Wanken") appeals the denial of his motion to vacate 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) Were 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, exemplified 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 Wanken 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 resolved 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 judge 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.

*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

FOOTNOTES

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).

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

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER MICHAEL WANKEN)
Plaintiff,)
Vs.)
JOHN DWIGHT WANKEN, ET. AL.)
Defendants.

No. 3:10-CV-0556-K

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED AND DECREED that:

1. Defendant's Rule 12(b)(6) motions are construed as motions to confirm the arbitration award. Both motions [Docs. #18,23] are granted.
2. Plaintiff's motion to vacate or modify the arbitration award [Doc.#1] is denied.

3. Plaintiff's motion to file amended complaint [Doc.#41] is granted.
4. The Clerk shall transmit a true copy of this Judgment and the Order adopting the Findings and Recommendation of the United States Magistrate Judge to Plaintiff.

SIGNED this 7th day of February 2011

/s/
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER MICHAEL WANKEN	)
Plaintiff,	)
Vs.	)
JOHN DWIGHT WANKEN, ET. AL.	)
Defendants.	)

No. 3:10-CV-0556-K

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made findings, conclusions and a recommendation in this case. Plaintiff filed objections [Doc. #40], and the District Court has made a *de novo* review of those portions of the proposed findings and recommendation to which objection was made. The objections are overruled, and the Court ACCEPTS the Findings, Conclusions and Recommendations of the United States Magistrate Judge.

On January 27, 2011, plaintiff filed a motion for leave to file an amended complaint [Doc. #41].

That motion is **GRANTED.** However, even considering plaintiff's amended pleadings, plaintiff has failed to establish any grounds for vacating or modifying the arbitration award.

SO ORDERED.
SIGNED this 7th day of February 2011.

/s/
ED KINKEADE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHRISTOPHER MICHAEL WANKEN	§
Plaintiff,	§
VS.	§
JOHN DWIGHT WANKEN, ET. AL.	§
Defendants.	§

NO. 3-10-CV-0556-K-BD

FINDINGS AND RECOMMENDATION OF THE
UNITED STATES MAGISTRATE JUDGE

Defendants John Dwight Wanken ("Dwight") and Raymond James Financial Services, Inc. ("Raymond James") have filed separate Rule 12(b)(6) motions to dismiss this *pro se* civil action brought by plaintiff to vacate or modify an arbitration award. For the reasons stated herein, the court should treat the Rule 12(b)(6) motions as cross-motions to confirm the award, both of which should be granted. Plaintiff's motion to vacate or modify the award should be denied.

I.

As best the court can decipher the prolix pleadings and exhibits submitted by the parties, it appears that plaintiff worked as a registered sales associate for a Raymond James brokerage business owned by his father, Dwight. (See Plf. Mot. At 14 ¶6). On March 13, 2008, Dwight terminated plaintiff's financial services license, which effectively ended his association with Raymond James. (*Id.* at 16 ¶16). That action prompted plaintiff to sue his father and Raymond James in Texas state court. (*Id.* at 16 ¶17). After the state court granted a motion to compel arbitration, [1] plaintiff filed a statement of claim with a FINRA Dispute Resolution Panel seeking nearly $400,000 in actual damages and more than $10 million in punitive damages for: (1) breach of contract, (2) breach of partnership, (3) failure to pay compensation, commissions, and partnership benefits, (4) wrongful termination, (5) libel and slander on a Form U-5 statement of termination, [2] and (6) defamation. (*See* Mag. J. Interrog. #5(d), attch. at Page ID 144-45). Dwight counterclaimed for costs incurred in defending what he characterized as a groundless and frivolous proceeding. (*Id.* at Page 145). Following extensive discovery, six pre-hearing sessions, and a four-day hearing, a panel of three arbitrators ordered the

expungement of a comment about plaintiff from the Form U-5, but denied all other relief. (*Id.* at Page ID 147). Costs in the amount of $1,200 were taxed against Raymond James. (*Id.).* Plaintiff then filed this action in federal district court.

As grounds for vacating the arbitration award, plaintiff contends that:

- the award was procured by fraud;
- the arbitration panel failed to assure complete discovery, enforce its own discovery orders, and coordinate the presence of key witnesses;
- the arbitrators refused to consider material evidence;
- the panel exceeded and improperly exercised its powers; and
- defendants and their attorneys engaged in misconduct both during and following the arbitration.

(See Plf. Mot at 2-9; Mag. J. Interrog. #1) [3] In separate motions, Dwight and Raymond James move to dismiss this case for failure to state a claim upon which relief can be granted. Dwight also contends that plaintiff's motion is untimely because it was not properly served within three months of the date the arbitration award was filed or delivered. The issues have been briefed by the parties and this matter is ripe for determination.

II.

The court initially observes that the Federal Rules of Civil Procedure, including responsive motion practice under Rule 12(b), do not apply to the judicial review of arbitration decisions. *See Alstom Power, Inc. v. S&B Engineers & Constructors, Ltd.,* No. 3-04-CV-2370-L, 2007 WL 1284968 at *3-4 (N.D. Tex. Apr. 30, 2007) (citing cases). Instead, an application to vacate an arbitration award "is to be treated procedurally in the manner of a motion." *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1258 (7th Cir. 1992) (citing cases). Plaintiff initiated this civil action by filing a motion to vacate or modify the arbitration award. The court therefore treats the Rule 12(b)(6) motions filed by Dwight and Raymond James as cross-motions to confirm the award.

Under the Federal Arbitration Act ("FAA"), which generally governs arbitration issues in federal court, review of an arbitration decision is "exceedingly deferential." *Brabham v. A.G. Edwards & Sons, Inc.,* 376 F.3d 377, 380 (5th Cir. 2004). A district court can vacate an arbitration award only:

(1) where the award was procured by corruption, fraud or undue means;

(2) where there was evidence 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); *see also Citigroup Global Markets, Inc. v. Bacon,* 562 F.2d 349, 353, 358 (5th Cir. 2009) (grounds for vacating or modifying arbitration award are restricted to those set forth in the FAA). This standard "has been described as 'among the narrowest known to the law.'" *Mantle v. Upper Deck Co.,* 956 F.Supp. 719, 726 (N.D. Tex. 1997), *quoting ARW Exploration Corp. v. Aguirre,* 45 F.3d 1455, 1462 (10th Cir. 1995). The party seeking to vacate an arbitration award has the burden of proof. *See Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 455 F.Supp.2d 545, 549 (N.D. Tex. 2006) (citing cases). Any doubts or uncertainties must be resolved in favor of upholding the award. *Id.*

A.

Plaintiff contends that the arbitration decision was procured by fraud in two ways. First, he alleges that Dwight gave "fraudulent and erroneous testimony regarding numerous matters during the course of arbitration," including (1) the professional relationship between the parties, (2) the duties performed by the plaintiff, (3) his role in the business, and (4) the reason plaintiff was terminated. (*See* Plf. Resp. Br. At 12). Second, plaintiff accuses Dwight of concealing "thousands of pages of documents," which denied him the opportunity to review material evidence, question witnesses, and fully present his claims to the arbitration panel. (*See* Plf. Mot. At 22-26).

Neither allegation justifies vacating the arbitration award. Although obtaining an award by false or perjured testimony may constitute fraud, *see e.g., Red Apple Supermarkets/Supermarkets Acquisitions v. Local 338 RWDSU,* No. 98-CV-2303, 1999 WL 596273 at *6 (S.D.N.Y. Aug. 9, 1999) (citing cases), a party seeking relief on that ground must prove, *inter alia*, that the fraud could not have been discovered through the exercise of due diligence

prior to or during the arbitration. *See Halliburton Energy Services, Inc. v. NL Industries,* 618 F.Supp.2d 614, 635 (S.D. Tex. 2009), *citing Bonar v. Dean Witter Reynolds Inc.,* 835 F.2d 1378, 1383 (11th Cir. 1988). 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. "Mere conflicting versions of the facts at an arbitration hearing cannot constitute fraud for purposes of vacatur without every arbitration award being vacated for this reason." *In re Goldbronn,* 263 B.R. 347, 358 (Bankr. M.D. Fla. 2001). Indeed, "[f]actual conflicts are the stuff of contested proceedings and determining the facts is the charge of every arbiter who sits as a trier of fact." *Williams v. Mexican Restaurant, Inc.,* No. 1-05-CV-841, 1009 WL 531859 at *10 (E.D. Tex. Feb. 27, 2009) (citing cases), *rec. adopted,* 2009 WL 747141 (E.D. Tex. Mar. 18, 2009). This court cannot vacate the arbitration award merely because the arbitrators chose to believe Dwight's testimony over plaintiff's. *See Int'l Brotherhood of Firemen & Oilers, Local 261 v. Great Northern Paper Co.,* 765 F.2d 295, 296 (1st Cir. 1985) (citing cases) (courts are precluded from

interfering with arbitration awards for mere errors in assessing the credibility of witnesses).

Nor has plaintiff shown that Dwight committed fraud by concealing "thousands of pages of documents." The arbitrators considered this issue, ordered the production of certain documents, and refused to sanction defendants or order additional production. (*See* RJ Mot. App. at 273-82). Even if that decision is incorrect, plaintiff has not established a nexus between the alleged fraud and the basis for the panel's decision. *See Forsythe International, S.A. v. Gibbs Oil Co. of Texas,* 915 F.2d 1017, 1022-23 (5th Cir. 1990) (where arbitration panel hears the allegation of fraud and then rests its decisions on grounds clearly independent of the issues connected to the alleged fraud, there is no statutory basis for vacating the award). The court finds no basis for vacating the arbitration award under section 10(a)(1).

B.

Plaintiff further alleges that the arbitrators were biased against him. In order to establish evident partiality based on actual bias, "the party urging vacatur must produce specific facts from which 'a reasonable person would have to conclude that the arbitrator was partial to one party.'"

Householder Group v. Caughran, 354 Fed. Appx. 848, 852, 2009 WL 4016450 at *3 (5th Cir. Nov. 20, 2009), *quoting Weber*, 455 F. Supp.2d at 550. Plaintiff does not come close to meeting this onerous burden. Instead, his bias claim is supported only by conclusory assertions that the arbitration panel excluded certain evidence, made unfavorable discovery rulings, and did not assist in coordinating the appearance of witnesses. (*See* Plf. Mot. At 24-29). These allegations are wholly insufficient to establish "evident partiality or corruption" under section 10(a)(2). *See Householder Group,* 2009 WL 4016450 at *3 (party seeking to vacate arbitration award must demonstrate that alleged partiality is "direct, definite, and capable of demonstration rather than remote, uncertain or speculative").

In a related argument, plaintiff accuses the arbitrators of misconduct by refusing to hear evidence "pertinent and material to the controversy." (*See* Plf. Mot. at 32-33). The Fifth Circuit has made clear that "[a]rbitrators are not bound to hear all of the evidence tended by the parties[.]" *See Prestige Ford v. Ford Dealer Computer Services, Inc.,* 324 F.3d 391, 395 (5th Cir. 2003), *overruled on other grounds by Hall Street Associates, L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 584-85, 128 S. Ct. 1396, 1403, 170 L.Ed.2d 254 (2008). However, "they must give each

of the parties to the dispute an adequate opportunity to present its evidence and arguments." *Id.* Here, plaintiff was permitted to call seven witnesses and introduce hundreds of pages of exhibits during a 32-hour arbitration hearing. (*See* Plf. Resp. Br. at 16, 19). Prior to the hearing, plaintiff engaged in extensive discovery, including propounding 170 requests for production to defendants. (*See* RJ Mot. App. at 238-58). The arbitrators heard multiple discovery motions filed by plaintiff, and issued at least two orders requiring defendants to produce additional documents. (*Id.* at 273-282). Although plaintiff alleges that most of the 6,000 pages of documents produced by defendants were "non-responsive" to his discovery requests, (*see* Plf. Resp. Br. at 16), he does not further elaborate on that claim. Nor does plaintiff identify any witnesses who were not permitted to testify at the arbitration hearing, or explain how their excluded testimony was material to his case. With respect to his allegation that the arbitration panel failed to "coordinate" the appearance of witnesses (*see id.* at 19-20), plaintiff cites no authority imposing such a duty on the arbitrators. In sum, plaintiff has failed to carry his burden of demonstrating that vacatur is warranted under section 10(a)(2) or (3).

C.

Plaintiff argues that the arbitrators exceeded their powers, or imperfectly executed them, by: (1) failing to enforce their own discovery orders, (2) issuing contradictory orders regarding witness subpoenas, (3) refusing to reconsider a discovery ruling, (4) not informing plaintiff that he was entitled to a continuance, (5) preventing plaintiff from communicating with the media through a "gag" order, and (6) making an "ambiguous and contradictory" award. (*See id.* at 22-23). None of these arguments suggest that the arbitrators acted contrary to the express contractual provisions of the arbitration agreement, or the plain limitations on their powers as stated in the agreement. *Cf. Apache Bohai Corp. LDC v. Texaco China BV,* 480 F.3d 397, 401 (5th Cir. 2007). Plaintiff does not allege, much less prove, that the arbitrators were not authorized by the express terms of the arbitration agreement to make any of the rulings he challenges in his motion. Instead, plaintiff criticizes the substance of those rulings and the final decision of the arbitration panel. "[I]f an arbitrator is even arguably construing or applying the contract acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." *Major League Baseball Players Ass'n v.*

Garvey, 532 U.S. 504, 509, 121 S. Ct. 1724, 1728, 149 L.Ed.2d 740 (2001) (citations and internal quotes omitted). There simply is no basis for vacating the arbitration award under section 10(a)(4)

D.

Finally, plaintiff accuses defendants and their attorneys of engaging in misconduct both during and following the arbitration. (*See* Plf. Mot. at 34-36; Plf. Resp. Br. at 14-15). "The [FAA] does not provide for vacatur in the event of any fraudulent conduct, but only 'where the *award was procured by corruption, fraud or undue means.*'" *Forsythe,* 915 F.2d at 1022, *quoting* 9 U.S.C. §10(a) (emphasis in original). None of the accusations of misconduct on the part of defendants, which primarily involve filing a motion for injunctive relief in an attempt to bias the arbitrators against plaintiff, and providing "contradictory testimony and evidence" to state and federal agencies following the arbitration hearing, (*see* Plf. Resp. Br.at 14-15), are grounds for vacating the arbitration award.

RECOMMENDATION

The Rule 12(b)(6) motions to dismiss filed by defendants should be treated as cross-motions to

confirm the arbitration award. Both motions [Docs. # 18, 23] should be granted. [4] Plaintiff's motion to vacate or modify the award [Doc. #1] should be denied.

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. §636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1416 (5th Cir. 1996).

Dated: January 13, 2011

/s/
Jeff Kaplan
United States Magistrate Judge

Footnotes

1 Defendants moved to compel arbitration under the rules established by the Financial Industry Regulatory Authority ("FINRA"), which provide for the mandatory arbitration of disputes arising out of the business activities of a "member" or "associated person." See FINRA Manual R. 13200(a).

2 FINRA requires member firms to complete and file a Form U-5 within 30 days of terminating an agent's employment. The Form U-5 contains the reasons for termination and a number of questions that address whether the agent had been subject to criminal charges, customer complaints, or an internal review for violating investment rules. *See Wang v. Prudential Ins. Co. of America,* No. 3-09-CV-1309-O-BF, 2010 WL 1640182 at *3n.1 (N.D. Tex. Apr. 2, 2010), *rec.*

adopted, 2010 WL 1628991 (N.D. Tex. Apr. 20, 2010), *and* 2010 WL 2000521 (N.D. Tex. May 18, 2010), *appeal filed* July 19, 2010 (No. 10-10731). Once filed, the Form U-5 becomes available to the investing public for review.

3 Although plaintiff also asks the court to modify the arbitration award, such relief is appropriate only:

(a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

(b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; or

(c) where the award is imperfect in matter of form not affecting the merits of the controversy.

See 9 U.S.C. §11. Plaintiff does not cite this statute or argue these grounds in his written submissions.

4 In view of the recommended disposition of these motions, the court need not consider Dwight's alternative argument that he was not timely or properly served with plaintiff's motion.

FINANCIAL INDUSTRY REGULATORY AUTHORITY

AWARD
FINRA Dispute Resolution
(December 21, 2009)
In the Matter of the Arbitration Between:

Name of Claimant
Christopher Michael Wanken
Vs.

Names of Respondents
Raymond James Financial Services, Inc.
and John Dwight Wanken

Case Number: 08-04793

Hearing Site: Dallas, Texas

NATURE OF THE DISPUTE

Associated Person vs. Member and Associated Person

REPRESENTATION OF PARTIES

Christopher Michael Wanken ("Claimant" or "Chris Wanken") appeared pro se.
Raymond James Financial Services, Inc. ("RJFS") was represented by Erin Linehan, Esq., Raymond James Financial Services, Inc., St. Petersburg, Florida.

John Dwight Wanken ("Dwight Wanken") was represented by N. Henry Simpson, Esq., Simpson Wooley, LLP, Dallas, Texas.

CASE INFORMATION

The Statement of Claim was filed on or about December 15, 2008. The Submission Agreement of Claimant, Christopher Michael Wanken, was signed on or about December 11, 2008. On or about March 25, 2009, Claimant filed a Response to Dwight Wanken's Counterclaim.

The Statement of Answer was filed by Respondent, Raymond James Financial Services, Inc. on or about March 3, 2009. The Submission Agreement of Respondent, Raymond James Financial Services, Inc., was signed on or about January 15, 2009.
The Statement of Answer and Counterclaim was filed by Respondent, John Dwight Wanken, on or about March 2, 2009. The Submission Agreement of

Respondent, John Dwight Wanken, was signed on or about January 14, 2009.

CASE SUMMARY

Claimant asserted the following causes of action: breach of contract; breach of partnership; failure to pay commissions; failure to pay compensation; libel and slander on Form U5; wrongful termination; and defamation. The causes of action related to the Claimant's allegation that he was a partner with Dwight Wanken at Beacon Financial Advisors ("Beacon") and that Dwight Wanken terminated his employment without paying compensation, commissions, and partnership benefits due. Claimant alleged that Dwight Wanken misstated the reason for termination on his Form U5 and that Dwight Wanken disparaged and defamed Claimant's good name to customers and clients of Beacon. Claimant alleged that Beacon was affiliated with RJFS and that his registration was with RJFS; therefore it was through RJFS that the alleged defamatory reason for termination was published on his Form U5. Claimant alleged that the actions of Respondents have caused significant financial hardship to him and have hindered his ability to find employment elsewhere.

Unless specifically admitted in its Answer, Respondent RJFS denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: RJFS has no liability in this dispute and has been named merely in an effort to harass; RJFS is not a partner, officer, or shareholder with Chris Wanken; RJFS does not have any obligation to pay commissions to Christ Wanken; when Dwight Wanken terminated Chris Wanken, RJFS had no choice but to terminate Chris Wanken's registration with RJFS, as he was no longer affiliated with a branch and not supervised by a series 24 licensed branch manager; RJFS has no involvement with how its independent contractors run their businesses outside of how it relates to RJFS' clients needs; RJFS has no knowledge of any arrangement between Dwight Wanken and Chris Wanken; and RJFS cannot be held liable for reporting "job performance" on Chris Wanken's Form U5.

Unless specifically admitted in his Answer, Respondent Dwight Wanken denied the allegations made in the Statement of Claim and asserted affirmative defenses including the following: Dwight Wanken says that no communications or acts on his part have resulted in any of the injuries or damages

which Claimant alleges; Claimant's alleged injuries or damages, if any, arise in fact from his own misconduct, acts or omissions to act; Chris Wanken failed to mitigate his damages, if any; Chris Wanken was not at any time a "partner" in the business of Beacon, and Beacon was not at any time a partnership; and Beacon is, and was at all relevant times, an assumed name for a sole proprietorship with Dwight Wanken as its sole proprietor.

In his Counterclaim, Dwight Wanken asserted that Claimant's claims are without merit and groundless and were brought by Claimant to vex and harass Dwight Wanken.

Unless specifically admitted in his Response to the Counterclaim, Chris Wanken denied the allegations made in the Counterclaim and asserted that any vexation and harassment is on the part of Dwight Wanken.

RELIEF REQUESTED

Claimant requested an award in the amount of:

Actual/Compensatory Damages	$397,405.95
Exemplary/Punitive Damages	$10,771,038.00
Interest	Unspecified

Other Costs	Unspecified
Other Monetary Relief	Unspecified
Other Non-Monetary Relief	Injunctive Relief
Expungement	

Respondent RJFS requested that the claims asserted against it be denied in their entirety and that it be awarded its costs and attorneys' fees.

Respondent Dwight Wanken requested that the claims asserted against him be denied in their entirety and that he be awarded his costs and attorneys' fees.

At the close of the hearing Claimant requested:

Actual/Compensatory Damages	$397,405.95
Exemplary/Punitive Damages	$10,771,038.00
Interest	Unspecified
Other Costs	$23,200
Other Monetary Relief	Unspecified
Other Non-Monetary Relief	Injunctive relief
Expungement	

In his Counterclaim, Dwight Wanken requested an award in the amount of:

Attorneys' Fees	Unspecified
Other Costs	Unspecified

Other Monetary Relief	Unspecified

Claimant requested that the counterclaims asserted against him be denied in their entirety and that he be awarded his costs and sanctions.
At the hearing, Dwight Wanken requested:

Attorneys' Fees	$264,272.00
Other Costs	Unspecified
Other Monetary Relief	Unspecified

OTHER ISSUES CONSIDERED & DECIDED

The Panel acknowledges that they have each read the pleadings and other materials filed by the parties.

On or about September 23, 2009, Claimant filed a Motion for Sanctions in Connection with Dwight Wanken's filing of a Custodial Lawsuit. On or about October 2, 2009, Dwight Wanken filed a Response to the Motion for Sanctions. On or about October 2, 2009, RJFS filed a Response to the Motion for Sanctions.

On or about October 14, 2009, Dwight Wanken filed a Motion for Sanctions. On or about October 16, 2009, Claimant filed a Response to Dwight Wanken's

Motion for Sanctions. On or about October 23, 2009, Dwight Wanken filed a Reply in Support of His Motion for Sanctions.
On or about October 29, 2009, Claimant filed a Motion in Support of His Motion for Outstanding Issues and Sanctions.

In its Order dated November 3, 2009, the Panel reiterated that all sanction motions will be heard and decided at the close of the full hearing on the merits.

On or about November 6, 2009, Dwight Wanken filed a Motion for Permanent Injunction concerning Claimant's blog. On or about November 10, 2009, Dwight Wanken filed a Supplement to His Motion for Permanent Injunction. On or about November 17, 2009, Claimant filed a Response to Dwight's Motion for Permanent Injunction. At the hearing, the parties stipulated that the Panel has the authority to hear and rule on the Motion. The Panel determined to take up the Motion at the close of the full hearing on the merits.

At the close of Claimant's case-in-chief, RJFS made a Motion for Directed Verdict. The Panel took the Motion under advisement.

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After consider the pleadings, the testimony, and the evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1) The Panel orders the expungement of the Termination Comment from Section 3 of Claimant Christopher Michael Wanken's (CRD #2443512) Form U5, filed by Raymond James Financial Services, Inc. on March 17, 2008 and maintained by the Central Registration Depository (CRD). The current Termination Comment, "Job Performance," should be deleted in its entirety based on the defamatory nature of the information. The Termination Comment should be replaced with "No fault, non-investment related irreconcilable differences with branch office." The current Reason for Termination, "Discharged," should remain.

   The Form U5 is not automatically amended to include the changes indicated above.

Claimant Christopher Michael Wanken must forward a copy of this Award to FINRA's Registration and Disclosure Department for the amendments to be incorporated into the Form U5.

2) Respondent, Raymond James Financial Services, Inc., is liable for and shall pay to Claimant, Christopher Michael Wanken, the sum of $1,200.00 in costs;
3) Claimant's claim for injunctive relief is denied without prejudice;
4) All others claims of Claimant are hereby denied and dismissed with prejudice;
5) The Counterclaim of John Dwight Wanken is denied and dismissed with prejudice;
6) John Dwight Wanken's Motion for Permanent Injunction Concerning Claimant's Blog is denied without prejudice;
7) Any relief not specifically enumerated, including punitive damages, and sanctions is hereby denied with prejudice.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

FINRA Dispute Resolution will retain the non-refundable filing fees* for each claim:

Initial Claim filing fee	Waived
Counterclaim filing fee =	$1,250.00

*The filing fee is made up of a non-refundable and a refundable portion.

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm that employed the associated persons at the time of the events giving rise to the dispute. Accordingly, as a party, Raymond James Financial Services, Inc. assessed the following:

Member surcharge	=	$3,750.00
Pre-hearing process fee	=	$ 750.00
Hearing process fee	=	$5,500.00

Adjournment Fees

Adjournment granted during these proceedings:

October 12, 2009 adjournment requested by Raymond James Financial Services, Inc. Waived

Hearing Session Fees and Assessments

The Panel has assessed hearing session fees for each hearing session conducted. A session is any meeting between the parties and the arbitrators, including a pre-hearing conference with the arbitrators, that lasts four (4) hours or less. Fees associated with these proceedings are:

Six (6) Pre-hearing sessions with Panel
x $1,200.00 = $7,200.00

Pre-hearing conferences:

July 20, 2009	1 session
August 27, 2009	1 session
September 25, 2009	1 session
October 8, 2009	1 session
October 12, 2009	1 session
November 16, 2009	1 session

Eleven (11) Hearing sessions x $1,200.00
= $13,200.00

Hearing Dates:

December 8, 2009	3 sessions
December 9, 2009	3 sessions
December 10, 2009	2 sessions
December 11, 2009	3 sessions

Total Hearing Session Fees

$20,400.00

The Panel has assessed $5,100.00 of the hearing session fees to Christopher Michael Wanken.

The Panel has assessed $15,300.00 of the hearing session fees to Raymond James Financial Services, Inc.

All balances are payable to FINRA Dispute Resolution and are due upon receipt.

ARBITRATION PANEL

Maryanne M. Esser – Public Arbitrator,
Presiding Chair
Michael E. Rohde – Public Arbitrator

Thomas Richard Delaney, II – Non-Public Arbitrator

Concurring Arbitrators' Signatures:

/s/ Maryanne M. Esser December 18, 2009
Public Arbitrator, Presiding Chair

/s/ Michael E. Rohde December 18, 2009
Public Arbitrator

/s/ Thomas Richard Delaney, II
December 18, 2009
Non-Public Arbitrator

December 21, 2009
Date of Service (For FINRA office use only)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

11-10219

CHRISTOPHER MICHAEL WANKEN,
Plaintiff-Appellant

v.

JOHN D WANKEN; RAYMOND JAMES FINANCIAL SERVICES INC,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion September 29, 2011, 5 Cir., _____, _____, F.3d_____)

(October 25, 2011)

Before REAVLEY, SMITH, AND PRADO, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this case en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/_____

Justice Jerry E. Smith

United States Circuit Judge

STATUTES INVOLVED

9 USC § 10

"(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(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.
(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of Title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of Title 5."

XIV AMENDMENT TO THE UNITED STATES CONSTITUTION

SECTION 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FEDERAL RULES OF CIVIL PROCEDURE
RULE 56

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that

an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an

assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c) the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Testimony of William Francis Galvin
Secretary of the Commonwealth of Massachusetts
Before the U.S. House
Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises
A Review of the Securities Arbitration System
Thursday, March 17, 2005

Chairman Baker, Ranking Member Kanjorski and members of the subcommittee, I am Bill Galvin, Secretary of the Commonwealth and chief Securities Regulator in Massachusetts. Thank you for the opportunity to be here today to testify about arbitration in the securities industry – from the point of view of investors on Main Street.

I can speak to the concerns of small investors because they call or visit my office in Massachusetts all the time. Small investors, let's not forget, are the life blood of our securities markets. Without their faith and trust – and their hard-earned money—our markets couldn't function.

Unfortunately, in recent years their faith has been badly shaken. They've watched as giant companies, some with household names, were looted and run into the ground by corrupt management. They've seen respected Wall Street firms hype technology stocks using corrupt research reports —

research that, we now know, was designed not to paint a true picture of the company or its prospects but to curry favor with a client in order to win lucrative investment banking business.

Corporate scandals and the collapse of the high-tech bubble have hurt countless Main Street investors. That's bad enough. What's worse in my opinion, is the rigged system we now have to help harmed investors seeking a measure of justice.

Every year thousands of investors file complaints against their brokers. If these disputes aren't settled, they end up in mandatory arbitration, a system that I believe is fundamentally flawed and stacked against the individual investor. The sad thing is, industry-sponsored arbitration is the only game in town.

When an investor opens a brokerage account, in almost all cases he or she must sign away their right to a day in court should a dispute arise. Instead, they agree to have their claim heard by a panel of three arbitrators picked from a list compiled by the NASD, the so-called industry self-regulator.

The term "arbitration" as it is used in these proceedings is a misnomer. Most often, this process is not about two evenly matched parties to a dispute seeking the middle ground and a resolution to their conflict from knowledge, independence and unbiased

fact finders. Rather what we have in America today is an industry sponsored damage containment and control program masquerading as a juridical proceeding.

Of the three arbitrators on the panel, there is one with ties to the securities industry and two supposedly without ties to the industry. I believe the truth about the independence of these other arbitrators will reveal a troubling pattern and I invite your review.

Is it fair? The industry would say "yes." But let's think about it for a minute.

The NASD, the industry group, gets to decide who is qualified to be an arbitrator and who isn't. They and only they—the NASD, that is—select the pool of arbitrators. There is no state in this union that gives one party to litigation the unilateral right to choose the finding of fact or jury that will decide their case without regard to the other party's choice. Would anyone seriously suggest that we apply this approach to any other industry?

For instance, would anyone here seriously suggest that in all future disputes between automobile manufacturers and their customers relating to defects that those who purchase an automobile can only bring their complaints and

claims before a panel selected by GM, Ford or Chrysler? -- I don't think so.

Are not the financial futures of our citizens entitled to at least as much protection as in cars?

As further proof of this rigged system, I offer one example that I happen to be personally familiar with—John J. Mark, a former NASD arbitrator from Massachusetts.

Mark was an arbitrator with the Commonwealth of Massachusetts for many years, and an adjunct professor at Harvard and Boston University. As far as I know he's a man of impeccable credentials. And yet he was dropped from the NASD's pool of arbitrators.

Why? As he told a meeting of state securities regulators last summer, (and I quote): "the word on the street is if you rule against the (brokerage) houses, you will be removed from the list." (end quote).

To be sure, lately the NASD has been working on this arbitration process.

About nine months ago, for example, the NASD fined three large Wall Street firms – Merrill Lynch, Morgan Stanley and Smith Barney – $250,000 each for failing to produce documents in some 20 arbitration cases between 2002 and 2004. That was an overdue step in the right direction.

Foot-dragging by Wall Street firms involved in disputes with investors must be punished.

But these fines are so small, they hardly operate as a deterrent to further stonewalling. Automatic default and treble damages on claims would be a far more effective remedy.

More recently, the NASD after deliberation has passed another milestone. Arbitrators may be required to put their decision in writing – for a fee. But no fine or other regulatory tinkering will address the more fundamental flaw of the so-called arbitration process—namely that it's run by the industry and for the industry.

The system is unfair.

Consider this statistic. While the NASD asserts that in more than half the cases arbitration panels award money to investors the number of so-called investor "victories" does not tell the true story of how investors really fare in arbitration.

The NASD cites cases where the arbitrators make any cash award as a "victory" for the investor. But in fact, many of those awards are for only a fraction of the amount claimed. Under this method of reckoning, a claimant who had $5 million losses but was awarded just $5.00 in restitution has received an "arbitration award." This is a pyrrhic victory, at best.

The arbitration system should be reformed to put investors' interests on the same level as those of Wall Street.

How can we do that?

Given that investors, by law today, have no choice but arbitration, we need to make the system more fair. The best way to do that is to take it out of the hands of the industry—put someone besides the NASD in charge. That's the best solution.

In the short-term, we need to increase oversight of the arbitration process. The S.E.C., state securities regulators—and perhaps even Congress—need to take a hard look at arbitration.

State securities regulators have begun this process by creating a task force to look at issues involving arbitration. These issues include how arbitrators are selected, trends in arbitration awards, and how cumbersome and expensive the system is for investors.

This is not a small thing.

We have almost 100 million investors in this country. In recent years we have made reforms to make sure Main Street investors get a better shake in the marketplace.

We now need to focus on reforming the dispute-resolution system. It's the right thing to

do—right for investors and right for our markets. It's time to act.

Again, I am grateful for the chance to be here today to share some of my thoughts and I look forward to your questions.

TESTIMONY OF DANIEL R. SOLIN
U.S. House Subcommittee on Capital Markets, Insurance and Government Sponsored Entities
March 17, 2005

Chairman Baker, Ranking Member Kanjorski and members of the subcommittee, thank you very much for the opportunity to share my experiences with you. I am an attorney representing investors who are victims of broker misconduct. My extensive first-hand experience inspired me to write a book, *"Does Your Broker Owe You Money?"* to educate investors about the industry's mandatory arbitration system and to help them avoid becoming victims of broker misconduct. I am also in the process of completing a detailed statistical analysis of all awards issued by NASD and NYSE arbitration panels for the past ten years.

Mandatory arbitration in the securities industry is a system that takes away two fundamental rights of American citizens: access to the courtroom and trial by a jury of their peers. This is a system that has neither the appearance nor the reality of impartiality since it requires that a victim of misconduct must submit his or her claim to a tribunal administered by the very industry that he or she is suing. Worse, the arbitration rules insist

on a stacked jury: one of three arbitrators deciding the case must be from within the industry, and the other two "public" arbitrators often have some past association with it.

The panel of potential arbitrators, which is carefully screened by the NASD and the NYSE, is a demographic that is hardly representative of the hapless investors who appear before them. A 1994 study conducted by the U.S. General Accounting Office found that 97 percent of the arbitrators were white, 0.9 were black and 0.6 were Asian. The same study found that 89% were white men over the age of 60.

This lack of racial, gender, age and ethnic diversity stands in stark contrast to our jury system. Our laws require that juries be drawn from all demographics, representing a cross section of the communities in which they serve. The fact that the industry-administered tribunals are so homogenous in their make-up leads to both the perception and the reality of a pro-industry bias.

The 1982 and 2000 Reports by the General Accounting Office on the fairness of the mandatory arbitration system shed little light on this issue and were very misleading. While the methodology in the Reports was accurate, the findings were fatally incomplete. The GAO Reports did not:

- Differentiate between cases where the arbitrators award only a small fraction of an investor's losses and those in which the investor is fully compensated for his or her losses. Instead, the GAO Reports treated both results as a "win";
- Analyze the records of arbitrators appointed by the SRO's to sit on panels, as contrasted with those selected by the respective parties. There is anecdotal evidence that appointed arbitrators are rewarded for their pro-industry awards by receiving more appointments to sit as panelists on additional cases;
- Analyze the record of any particular arbitrator; and
- Analyze or compute the likelihood of a Claimant prevailing on any particular type of claim or the likelihood of any particular arbitrator issuing an award in favor of a Claimant, in whole or in part.

My experience, the experience of many of my colleagues who represent investors before these tribunals, and the limited statistical analysis I have completed to date, all support my view that investors have an exceedingly small statistical possibility of

receiving any meaningful award from these tribunals, regardless of the merit of their claims.

The case of Mary Jane Schwartz provides a perfect example. Ms. Schwartz is a 62 year-old, divorced, retired nurse, living in Massachusetts. She had nearly her entire life savings – approximately $1.3 million dollars – invested with her broker. Orally and in writing, Ms. Schwartz advised her broker that she wanted her investments to achieve capital preservation and income because she needed to live on that money for the rest of her life. She clearly stated that she did not want a risky portfolio. Ignoring Ms. Schwartz's objectives and without disclosing the risks, the broker inappropriately invested as much as 98% of Ms. Schwartz's portfolio in aggressive equity investments, including volatile technology stocks. The portfolio had no diversification. As a result of the broker's completely unsuitable investment decisions, Ms. Schwartz lost more than $915,000.

I represented Ms. Schwartz who pursued her claim for damages against the brokerage firm through mandatory arbitration, as she was required to do (NASD Dispute Resolution Arbitration Number 03-07760). After a week of hearings, the NASD panel technically found in favor of Ms. Schwartz, while in reality handing her a devastating loss. The

NASD panel awarded Ms. Schwartz only $4,994.77 and then assessed $5,625.00 in NASD forum fees against her. While the NASD and the GAO Reports would count the Schwartz case as a "win" for her, Ms. Schwartz did not even recover the pathetically small amount of her award, because she ended up owing the NASD more money than she actually was awarded.

From the very beginning of her case, Ms. Schwartz never had a chance of getting justice at the NASD. The pool of potential arbitrators for her case, which had been screened and provided by the NASD, had an abysmal record of awards to aggrieved investors.

The 15 arbitrators in her pool had presided over 27 cases in which investors requested damages greater than $100,000. Claimants "won" only 8 of those 27 cases. More telling is the fact that in those cases "won" by Claimants, the potential arbitrators in the Schwartz case awarded only 16.8% of the damages claimed by the prevailing Claimants. When you factor in the 19 cases that Claimants lost with the arbitrators in Ms. Schwartz's NASD pool, Ms. Schwartz had a statistical possibility of recovering only 7.1% of her damages.

Under the current securities industry mandatory arbitration system, the "deck is stacked"

against investors. This appalling situation yields only one rational conclusion: The only appropriate course of action is to eliminate the role of the securities industry entirely from adjudicating disputes involving the misconduct of its members.

This could be easily accomplished by requiring that a completely impartial organization (like the American Arbitration Association or any number of private dispute organizations) administer securities arbitration cases and by requiring that these impartial organizations appoint a panel of arbitrators that is neutral, unbiased and totally unaffiliated with either party to the dispute. In addition, investors should be given the option of bringing their claims in court, before juries, as is their constitutional right.

The securities industry, whose blatant misconduct has caused trillions of dollars of losses to investors from all walks of life, is hardly worthy of the free pass that the cozy mandatory arbitration system, administered by its brethren at the NASD and the NYSE, presently gives it. I entitled the chapter in my book on this subject: *Mandatory Arbitration – A National Disgrace*. I stand by that description of this shameful process.

I urge this Committee to give investors the right to a fair and impartial hearing by reforming this system without delay.

The Real Arbitration Nightmare

By: Greg Bailey

September1, 2005

Registered Rep

Henry Ford famously offered to deliver his Model T in any color, so long as it was black. Customers in the securities industry have roughly the same amount of choice when it comes to settling disputes — it's arbitration or nothing.

This is significant because the industry's arbitration process is fundamentally flawed, and this situation could end up undermining client confidence in the industry if it persists. The basic flaw is this: NASD member firms frequently wield far too much influence in arbitration proceedings. I've seen the effects of the firms' influence firsthand. Until recently, I worked as an NASD panel arbitrator in St. Louis, serving as the “public member” portion of a three-person team that also included an “industry member” and a chairperson. My arbitration career, if you could call it that, was relatively uneventful until a case in September 2004 opened my eyes to the underbelly of the arbitration process.

The Case at Hand

The case involved a broker for a large regional firm who sold a retiree a variable annuity. Soon after

the sale, the investment went south, and the investor hit the broker with an unsuitability claim. The NASD-member firm's counsel agreed to represent the broker.

At the hearing, the evidence clearly showed that the firm and its broker were at best cavalier and at worst negligent in selling the annuity to this client. The rep bolstered this opinion; when I asked him what, in practical terms, a certain SEC disclosure regulation meant to him, he replied, "Nothing."

Our panel found for the petitioner. During the process of arriving at an award, I pushed for a figure one-tenth of the one my other panel members wanted. We eventually settled on a relatively high award, and submitted our decision to the NASD.

Shortly thereafter, while working on my expense reimbursements, I called a staffer in NASD's Chicago office to obtain a mileage voucher. When I mentioned the name of the case I had worked on, it was made clear to me that the case had acquired a certain amount of notoriety in the office — presumably because of the size of the award. It came as no surprise, then, when, a few weeks later, I received a form letter informing me I had been removed from NASD's list of arbitrators for unspecified reasons. I called the NASD official in

New York whose signature appeared at the bottom of the letter, but her secretary refused to put me through or to tell me why I was canned (even though the reason was probably sitting in front of her on her computer screen.)

You're Fired!

I've got a pretty good idea why I was dropped as an arbitrator: I ruled in a very decisive way against an NASD member firm, and I was part of the panel that — gasp! — refunded a defrauded customer's money.

I am not alone in intuiting these and other abuses at the NASD. Attorney and arbitrator Les Greenberg of Culver City, Calif. is waging a one-man crusade against the abuses in NASD dispute resolution system. In a series of emails to NASD arbitrators and on his Web site www.lgesquire.com, Greenberg is both pedantic professor and passionate muckraker. His blog is a forum where anonymous arbitrators can post opinions on NASD policies and practices and to air grievances. There's no shortage of participants. Some complain of attempts to influence their decisions.

"If an argument is stupid or not based on the facts in the case and I say so as a panel member, does that make me biased?" one poster asked. Another accused the dispute office of "stonewalling,"

preferring panel members "to just be there, be quiet and not ask for anything." Arbitrators, another said, are treated like the "downstairs help."

The point is this: An increasingly loud chorus of people is calling attention to a broken process — one that William Galvin, Massachusetts secretary of state, called "an industry-sponsored damage containment and control masquerading as a juridical proceeding." It's time for the NASD to open its ears and listen.

"FINRA Puts Lipstick On a Pig"

By: Dan Solin

August 5, 2008

I have a wealthy investment client who was familiar with my background as a securities arbitration lawyer representing investors in claims against their brokers. He had purchased a large amount of auction rate bonds. He was told by his broker (who calls himself a "financial consultant") that these bonds were "as good as cash."

You know the rest of the story. There is no market for these bonds. Some of his holdings are on the verge of default. A significant portion of his wealth is now at risk.

He asked me if he had any legal redress. My advice: Lick your wounds and do your best to cut your losses. He was appalled.

Like most investors, he did not realize that when he opened up an account with his brokerage firm, the account opening statements required him to give up his constitutional right to access to the courts and to a trial by jury. Instead, all disputes with his broker had to be submitted to "mandatory arbitration."

It gets worse. This arbitration is run by FINRA, the Financial Industry Regulatory Authority. Virtually all brokers are members of

FINRA and they all require their customers to submit to mandatory arbitration.

FINRA, which is really the securities industry, promulgates and administers the rules governing the arbitration process. It picks the arbitrators who serve on the panels that hear disputes. One of its more intriguing rules is that an arbitrator affiliated with the securities industry *must* sit on every panel.

The fairness of these panels has been a subject of intense debate. William Galvin, the highly respected Secretary of the Commonwealth of Massachusetts, characterized the process as "...an industry-sponsored damage containment and control masquerading as a juridical proceeding," in testimony before a House sub-committee.

Some arbitrators who have participated in cases where a large award was rendered against a major brokerage firm have reported that they were removed from consideration as arbitrators on future panels.

A study I co-authored of more than 14,000 arbitration awards over a ten year period found that investors with significant claims suing major brokerage firms could expect to recover only 12% of the amount claimed.

FINRA has been stung by these accusations, but it still refuses to take the right course: Drop the pretense of administering a fair and impartial dispute resolution system and permit customers of brokerage firms to resolve their disputes either before a totally impartial tribunal, under rules administered by an unaffiliated entity (like the American Arbitration Association) or by a jury of their peers. Instead, it has announced a new pilot program, where it will permit a small number of cases to be heard by a panel that will exclude the industry arbitrator.

The North American Securities Administrators Association (NASAA), a group of state securities administrators, was not impressed. NASAA issued a statement noting that this program affected only a relatively few cases and asserted that all investors should be given that choice "immediately."

What does all this mean for investors like my client who were induced to buy auction rate bonds?

FINRA wants to make it appear like it is doing something constructive with its new pilot program. However, it has no intention of really leveling the playing field. In a stunning development, FINRA announced that panelists on

these cases could include employees of brokerage firms that originated or sold auction rate securities!

That was the final straw. Investors are unlikely to get justice from a panelist whose own firm engaged in similar behavior.

All is not lost. It is possible that a Court will refuse to enforce mandatory arbitration agreements on the grounds that these agreements violate public policy. Or pending legislation in Congress may pass which would forbid the imposition of mandatory arbitration clauses in consumer disputes altogether.

Until then, let's be practical. You can avoid these problems and increase your returns by not using the services of any broker or advisor who tells you she can beat the markets (which includes most of them). However, if you ignore this advice, be aware that you will have no effective redress for their misconduct.

FINRA has every right to put lipstick on a pig. But let's not kid ourselves. It is still a pig.

"Why Don't You Just Give Your Broker a Gun and Tell Him to Shoot You?"

By: Dan Solin

July 14, 2009

A reader of my blogs sent me an e-mail with a Customer Agreement from a major brokerage firm. She asked me to look it over and tell her if she should sign it.

The first thing that struck me was this clause:

"Brokerage activities are regulated under different laws and rules than advisory activities and generally do not give rise to the fiduciary duties that an investment adviser has to its clients."

The agreement pointed out that the brokerage firm "...may face certain conflicts of interest and as such, its interests may differ from yours."

These statements are typically inserted in account opening agreements.

I asked the reader this question: Why would you entrust your assets to a firm that tells you it does not have to act in your best interests and further that it may have conflicts of interest with you which it will resolve in *its* favor?

It gets worse:

The agreement also provided that all disputes must be resolved by mandatory arbitration. Not before an impartial panel, but one appointed by

FINRA, which is essentially a trade group for the securities industry.

William Galvin, the highly respected Secretary of the Commonwealth of Massachusetts aptly described FINRA's arbitration process in testimony before a congressional sub-committee as "an industry sponsored damage-containment and control program masquerading as a juridical proceeding."

Taken together, these clauses are a sucker punch for the unwary investor. The brokerage firm is telling you straight up that they will not act in your best interest. By consigning you to FINRA's mandatory arbitration, it is unlikely that you will get justice when you try to recover for their misconduct.

Why don't you just give them a gun and tell them to shoot you?

What's your option?

Don't play by their rules. Instead, if you need investment advice, retain a Registered Investment Advisor. They are required by law to be fiduciaries. If their agreements provide for arbitration, it will not be FINRA arbitration and you can often negotiate the removal of the arbitration clause altogether.

Just be sure the advisor focuses on your asset allocation and limits your investments to a globally diversified portfolio of low cost index funds, Exchange Traded Funds or passively managed funds.

The reader sent me this note: "Amazing how 90% of the public does not understand that they are the investor sheep heading to the Wall Street butcher shop."

My sentiments exactly.

Wall Street Justice System Is A Kangaroo Court

By: William D. Cohan

San Francisco Chronicle – Bloomberg View

January 15, 2012

There has been a fair amount written recently about various institutional cartels that are thriving in the U.S. despite antitrust laws designed to prevent their existence.

My previous column compared Wall Street's few remaining investment banks to a cartel, with explicit pricing power over its hundreds of thousands of customers, an advantage that will only grow greater as the economy improves and the number of thriving banks continues to diminish.

Likewise, Joe Nocera, a columnist for the New York Times, has been on a crusade about the powerful grip the National Collegiate Athletic Association exerts on college sports. Nocera has argued eloquently -- if not entirely persuasively -- that college athletes should be paid to play. On Jan. 6, Nocera dubbed the NCAA's system of justice a "Star Chamber" and shared the sad story of how Devon Ramsay, a fullback on the University of North Carolina's football team, suffered needlessly from NCAA-imposed penalties.

Well, it turns out, Wall Street has its own version of a Star Chamber, and it is every bit as unfair and debilitating as the NCAA's.

Price of Admission

Probably unbeknownst to the millions of people who interact with Wall Street every day -- either as brokerage customers or as employees of Wall Street firms -- there is a price of admission to this world tucked deep inside the boilerplate documents that one must sign to open an account or to get hired. This catch is a nonnegotiable agreement for when disputes arise, say, about a bonus promised but not paid, or about a rogue broker who sticks his client's money in a synthetic collateralized debt obligation that goes bust. Under the deal, the only venue to litigate the claim is a mediation or arbitration process overseen and administered by the Financial Industry Regulatory Authority, Wall Street's powerful self- regulatory organization.

Finra oversees some 4,460 brokerage firms and 630,000 registered representatives, mostly brokers, traders and bankers. By signing the initial agreements -- and if you don't, you can forget about working on Wall Street or having a brokerage account with a Wall Street firm -- you agree not to pursue any future monetary claim against Wall Street in the U.S. court system.

This requirement, which affects millions of people, may be the largest ongoing abdication of legal rights in America today. And there is not even the slightest effort being made to change this injustice, although there certainly should be.

So how does arbitration work? Once a grievance has been filed with Finra, generally speaking, a three-member panel is convened in downtown Manhattan or other selected cities to hear the facts and circumstances around the dispute over a period of months. Unlike in a court setting, the hearing is not continuous until completion, but proceeds in fits and starts and can take longer than a year to be resolved.

The arbitrators are often retired Wall Street brokers -- although anyone can become one with Finra's approval. They are paid an "honorarium" that can run into thousands of dollars per case. (No one is getting rich being a Finra arbitrator.)

Of course, most of Finra's almost $1 billion in annual revenue comes from fees paid by its Wall Street members related to regulatory, contract and dispute-resolution matters. In brief, Finra exists for the benefit of Wall Street and to advance Wall Street's complex agenda -- one component of which is disposing of nasty financial claims against it as painlessly as possible.

Impartial in Theory

The arbitration process is designed to resolve disputes in a theoretically impartial way, as long as those forced into the process -- as I was once, almost a decade ago -- recognize that normal rules of evidence and procedure that exist in a courtroom are not allowed and that the arbitrator's judgment is final and binding (except in highly unusual circumstances).

All this is a point of pride to Finra.

"Arbitration of disputes with broker/dealers has long been used as an alternative to the courts because it is devised as a prompt and inexpensive means of resolving complicated issues," its website says. "Most importantly, perhaps, is the fact that an arbitration award is final and binding, subject to review by a court only on a very limited basis. Parties should recognize, too, that in choosing arbitration as a means of resolving a dispute, they generally give up their right to pursue the matter through the courts."

Left unsaid is that monetary disputes generally must be arbitrated, leaving few other matters -- such as sexual or age discrimination -- to be resolved by the court system.

So, say you bring a complaint, what are the odds of success? From January through November

2011, a total of 4,359 cases came before Finra's arbitrators, down from 6,601 in 2009. On average these arbitrations, if there was an actual hearing, took almost 16 months to resolve. Of the 629 cases of broker malfeasance arbitrated in 2011, Finra says 279, or 44 percent, resulted in "monetary or non-monetary recovery for the investor." (It is not at all clear what a "non-monetary recovery" is.)

According to Jeffrey Liddle, a New York lawyer who represents plaintiffs in their battles against Wall Street, the success rate for former Wall Street employees in arbitration against their firms has been declining in recent years, with arbitrators now awarding a recovery in only about 37 percent of cases. Of those who win, says Liddle, arbitrators only award around 13 percent of the damages sought. The majority of the cases, he says, end in no recovery whatsoever for the plaintiff. (Meanwhile, he noted, when a member firm sues an employee -- for, say, recovery of a loan made to finance a stake in an in-house private-equity fund, arbitrators have been rewarding more than 100 percent of the money sought, by including legal fees and overdue interest.)

Few Americans today are going to shed a tear for fired Wall Street bankers and traders. But it just isn't right that the only way the millions of people who work at banks or do business with them can

resolve their disputes is through a kangaroo arbitration system overseen by Wall Street itself.

December 20, 2011

Chris Wanken
PO Box 202611
Austin, TX 78720

Mr. Wanken:

FINRA's Enforcement Department referred your concerns regarding Mr. N. Henry Simpson and Mr. Maxwell "Bud" Silverberg from your May 19, 2011 letter to FINRA's Office of the Ombudsman for further review. By way of background, the Office of the Ombudsman was created as an independent, informal, neutral and confidential office to receive and address concerns and complaints from any source concerning operations, enforcement, or other FINRA activities. The Ombudsman's Office does not have the authority to overturn any decisions of existing dispute resolution or appellate bodies and does not replace already existing FINRA regulatory programs or formal complaint or dispute resolution channels. The Ombudsman's Office, as an informal mechanism, does not conduct formal investigations or issue reports of reviews undertaken.

In your letter, you indicated that Mr. N. Henry Simpson, respondent's counsel in arbitration

proceeding 08-04793, offered testimony and arguments that were later contradicted in a separate proceeding. You requested that Mr. Simpson be removed from FINRA's roster of arbitrators and be restricted from representing parties before FINRA. Our review determined that Mr. Simpson was not a member of the arbitration roster at the time of your arbitration nor is he a member of the roster at this time. Individuals using the Dispute Resolution forum may be represented by an attorney admitted to practice and in good standing. Should you have concerns regarding Mr. Simpson's fitness to practice law, please consult the appropriate state bar association.

Second, you noted that Maxwell "Bud" Silverberg, initial chair of arbitration proceeding 08-04793, withdrew from participation before a hearing and did not disclose that he was sitting on a separate arbitration panel in which Mr. Simpson was representing a party. You believe this to be a violation of FINRA's disclosure rules. Our review demonstrated that Mr. Silverberg, who was appointed to the panel on May 5, 2009, disclosed per FINRA Rule 13408 that he was serving on an unrelated arbitration involving Mr. Simpson, that both were attorney-mediators in Dallas, TX and that both were members of a professional association for

attorney-arbitrators. These disclosures were shared with you on May 15, 2009, and you confirmed your receipt by correspondence to Dispute Resolution on June 11, 2009. We do not believe these disclosures made by Mr. Silverberg automatically disqualified him from serving as an arbitrator in your case. Mr. Silverberg withdrew from the arbitration before the evidentiary hearing on September 25, 2009, and all parties were notified of the withdrawal via correspondence the same day. An arbitrator may withdraw from the arbitration for a variety of reasons and is not required to inform FINRA of the particular reason.

We have reviewed and responded to the concerns referred to this Office and in this regard, the Office considers the matter closed and this response to be final.

/s/
Cindy D. Foster
Ombudsman
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