No. 11-939

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

PETITIONER'S PETITION FOR REHEARING

Christopher Michael Wanken
Pro Se Litigant
PO Box 202611
Austin, TX 78720
(214) 770-9087

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

By Supreme Court Rule 44(2), the grounds of this petition "shall be limited to intervening circumstances of a substantial or controlling effect."

Since the time this petition was filed, Respondent John Dwight Wanken ("Dwight") has submitted a Texas Workforce Commission (TWC) report in a separate and distinct state case that proves there is TWC evidence that must be reviewed that will prove that the FINRA arbitration award was fraudulently procured through collusion and conspiracy by Dwight and Raymond James Financial Services, Inc. ("RJFS").

The TWC report will further show that summary judgment was improper in light of the unresolved issue of material fact regarding the fraud and the unreviewed TWC evidence. The TWC evidence includes audiotaped recordings of hearings at which defendant Dwight and N. Henry Simpson ("Simpson") testified – and in so doing, contradicted all of both their and RJFS's FINRA arbitration testimony **regarding every material issue decided at arbitration**. The unreviewed TWC evidence also includes signed affidavits submitted by Dwight and Simpson and notes from TWC employees and hearing officers showing that Dwight contradicted

all his and RJFS's FINRA testimony on every issue decided at arbitration.

The report submitted by Dwight demonstrates that he and Simpson testified repeatedly – in at least three separate hearings and/or investigations – the following:

- Petitioner and Dwight **functioned, operated and represented themselves as a PARTNERSHIP;**
- Petitioner was never his employee;
- Dwight did not supervise Petitioner;
- The two split all partnership responsibilities based on experience and skills;
- Petitioner's work at the firm was not administrative;
- Petitioner was never required to work at the branch office;
- Petitioner was the firm's Chief Investment Officer;
- All clients were shared, secured and retained equally by Dwight and Petitioner and represented in a joint client production number;
- Petitioner was not terminated for-cause;

- Petitioner was not terminated for not working at the branch office;
- Petitioner was not terminated for insubordination or being uncooperative.

Dwight's testimony to the TWC contradicted both his and RJFS's FINRA testimony completely – **on every material issue**.

At FINRA arbitration, Dwight and RJFS both testified to the following:

- Petitioner was Dwight's administrative employee;
- Dwight supervised Petitioner;
- Petitioner had no investment responsibilities;
- Petitioner was a horrible employee that would not take direction, was insubordinate and uncooperative;
- Petitioner had to be terminated for his horrible job performance;
- Petitioner was required to work at the branch office – and refused to do so;
- Petitioner was terminated for refusing to work at the branch office;
- Petitioner and Dwight were never partners;

- All clients were Dwight's alone – Petitioner had no role in securing or retaining any clients;
- Dwight and RJFS had conversations regarding Petitioner's horrible performance and refusal to do his job over an extended period of time.

However, neither Dwight nor RJFS **had a single piece of paper that they entered as evidence to substantiate their testimony** at FINRA arbitration.

All of Petitioner's hundreds of documents demonstrating their partnership and the real cause for termination – because Petitioner wouldn't meet Dwight's personal demands – were dismissed as "mere marketing" at the FINRA arbitration.

Yet within months, Dwight contradicted every single perfectly corroborating testimony that he and RJFS entered at the FINRA arbitration during TWC and IRS investigations.

The only way that they could have had perfectly matching testimony at the FINRA arbitration – only to be completely contradicted by Dwight just months later – was through collusion and conspiracy.

Dwight and RJFS had to have colluded and conspired to commit fraud at the FINRA arbitration. There is no other way to explain their perfectly

matching testimony at FINRA arbitration – with absolutely no evidence. Testimony that Dwight and Simpson completely contradicted in TWC investigations that were conducted just months after the conclusion of the arbitration.

The unreviewed TWC evidence will thus show that Dwight, Simpson and Brady Sparks ("Sparks") perjured themselves in their brief to the Fifth Circuit Court of Appeals.

In their brief to the Fifth Circuit, Dwight and his attorneys stated – under penalty of perjury – that the testimony that Dwight and Simpson provided at the TWC hearings **was only related to** the issue of whether Petitioner was an employee or independent contractor for issues related to unemployment compensation.

Indeed, to the Fifth Circuit, Dwight **again** stated that Petitioner was his employee – **despite the fact that he had just testified to the Texas Workforce Commission that Petitioner WAS NOT AND NEVER HAD BEEN his employee.**

Note the following from their brief to the Fifth Circuit, bold italics added.

> "Due to an untenable relationship, Dwight terminated Christopher's ***employment*** relationship on March 13, 2008. (Id.). Christopher alleges that an oral partnership

agreement existed between himself and Dwight, and that his termination was based on personal issues rather than any lack of competence. (Id.). Prior to Christopher's termination, including the untimely passing of Christopher's mother and Dwight's wife, created sustained emotional turmoil within the family. (*Id.).* In Dwight's opinion as Christopher's ***employer***, these personal issues hindered and ultimately destroyed their working relationship, and he felt compelled to terminate the ***employment*** of Christopher from Beacon. (*Id.)*…Finally, his claims concerning testimony given by Dwight to the Texas Workforce Commission ("TWC") and the Internal Revenue Service ("IRS") on ***unrelated matters***, *after* the arbitration hearing, present no grounds for vacating the award….

Christopher relies on testimony given to the TWC and IRS after the arbitration hearing for his claim of fraud. ***These proceedings involved claims that were separate and distinct from the claims in arbitration. The TWC matter dealt with liability for state unemployment taxes and the IRS issue dealt***

> ***with possible employer tax liability. Neither related to his claims of partnership or subsequent breach.***" [1]

Dwight, Simpson and Sparks perjured themselves in their brief to the Fifth Circuit. Dwight and Simpson both participated in **each** of the TWC hearings, including the final hearing in March 2011 at which Dwight testified that he and Petitioner functioned, represented and operated as partners, that Petitioner was **not** his employee and that Petitioner **was not terminated for cause**. This is just one more example of the relentless fraud, perjury and fraud upon the court that Dwight and his attorneys continue to commit.

The Fifth Circuit **exclusively relied** on Dwight's and his attorneys' testimony in determining whether to remand the case back to the district court. The Fifth Circuit Opinion **essentially regurgitated** Dwight's brief in stating the following

> "Wanken (Plaintiff) 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.***" [2]

Yet Petitioner pointed out in his **Petition for Rehearing** that the TWC evidence **did not just** concern employee/independent contractor issues. Petitioner further pointed out that the evidence has never been reviewed by **any Court** – and the Fifth Circuit erred in determining the contents of unreviewed evidence **that no court** has ever subpoenaed or reviewed.

"**JDW'S TWC/IRS Testimony Wasn't Just About Employee Status.** In interviews and affidavits to TWC and IRS, JDW contradicted **all his and RJFS's material FINRA testimony**. This issue must be resolved and is why this case demands remand. While JDW wants the Court to believe it was simply testimony regarding Petitioner's employee or independent contractor status, JDW's TWC and IRS testimony contradicted **each** material issue before FINRA. TWC and IRS documents and recordings **aren't available without subpoena.** As Petitioner testified in affidavits, JDW and Simpson contradicted **every material issue decided at arbitration**, which supports Petitioner's allegation the award was fraudulently procured…

This Court is the first tribunal to which Defendants submitted **any** response regarding Petitioner's allegations that JDW's post-arbitration testimony completely contradicted **Defendants'** FINRA testimony. This Court acted as a trier of fact by issuing judgment on the merits of Petitioner's pleadings of unresolved issues of material

> fact and Defendants' statements they were immaterial. Opinion indicates ***this Court decided a matter of fact*** and determined post-arbitration testimony irrelevant – ***despite never reviewing any evidence regarding post-arbitration testimony***. There has **never** been a review of post-arbitration testimony **by ANY COURT**. Documents remain unreviewed and the outstanding issues of material fact remain unresolved." [3]

The Fifth Circuit affirmed a flawed district court sua sponte summary judgment order – ***in spite of unresolved issues of genuine material fact and unreviewed evidence***.

The Fifth Circuit then acted as a **trier of fact** and determined the contents of the TWC evidence based **exclusively on the affidavits submitted by Dwight, Sparks and Simpson**.

The TWC Final Report that Dwight, Sparks and Simpson have submitted in the state case from the TWC hearing prove that they perjured themselves to the Fifth Circuit with regard to the nature of the TWC and IRS hearings, the issues discussed and decided at the hearings and Dwight's and Simpson's testimony to those agencies.

Additionally, the TWC Final Report demonstrates the existence of extensive affidavits, documents, investigation notes and audio recordings of the hearings and investigations that the TWC conducted of Dwight between March 2010 and April 2011.

Petitioner has argued **since this case was before the district court in 2010** that Dwight and Simpson had offered testimony to the TWC and IRS that **completely contradicted** all of their and RJFS's FINRA arbitration testimony.

Given that contradiction, Petitioner has argued that **at minimum**, the evidence must be subpoenaed so a court can review the contradictory testimony. Petitioner has further argued that this evidence will prove his allegations that the Respondents procured a favorable arbitration award by fraud through a complex plan of perjury, spoliation of evidence, subornation of perjury and fraud upon the court.

Petitioner has also argued that the evidence – showing Dwight's contradiction of all of his and RJFS' perfectly matching testimony from FINRA arbitration – will demonstrate that ***they colluded and conspired to commit fraud.*** Petitioner has repeatedly stated that neither Respondent submitted **a single piece of evidence** to support their testimony

– yet their testimonies matched each other perfectly. The **only explanation is that they colluded and conspired to commit fraud in order to win a favorable arbitration award at the FINRA arbitration**.

While Dwight and his lawyers perjured themselves to the Fifth Circuit regarding the nature of the TWC evidence, the TWC Final Report demonstrates that Dwight's testimony **completely contradicted** his and RJFS's FINRA arbitration testimony. This simply compounds the fraud and fraud upon the court given the fact that Dwight and his lawyers **once again lied to a court in order to prevail** through their perjured testimony to the Fifth Circuit.

This newly released TWC report supports Petitioner's allegations to the district court, the Fifth Circuit and to this Court regarding the need for remand to review the evidence and determine whether the Respondents colluded and conspired to procure the favorable FINRA arbitration award through fraud, including perjury, spoliation of evidence, subornation of perjury and fraud upon the court.

The actions of the Respondents are egregious and heinous. The TWC report – and the additional evidence and recordings – will prove that they

colluded and conspired to procure a favorable arbitration award through fraud. Petitioner alleges that the actions of Dwight, RJFS and their lawyers will amount to some of the worst conspiracy, collusion, fraud and fraud upon the court in an arbitration case in recent history. Their blatant and shameless fraud, conspiracy and fraud upon the court should give this Court pause.

Equally as egregious are the actions of the Fifth Circuit in which the panel acted as a trier of fact and determined the contents of unreviewed evidence. The panel relied on the Respondent's assessment of the unreviewed evidence directly related to the unresolved issues of material fact. The panel's actions are such a radical departure from the accepted and usual course of judicial proceedings that they ***beg*** for this Court's review.

On any of these issues, the lower courts in this case have violated statute and precedent with regard to summary judgment motions in light of unresolved issues of material fact *(See, e.g.,* Fed. R. Civ. P. Rule 56*, Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 325-26 (1986), how a court treats a pro se litigant's pleadings (*See, e.g., Haines v. Kerner,* 404 U.S. 519, 520-21 (1971), how the lower courts will treat arbitration awards and sua sponte summary

judgment conversions when there are unresolved issues of material fact and the circuit split regarding confirmation of arbitration awards *(See e.g.,* 9 U.S.C §10(a)(1).

The TWC Final Report proves that Dwight, Sparks and Simpson committed fraud upon the court in submitting a perjured brief to the Fifth Circuit regarding the TWC investigations – and did so in an attempt to mislead the Fifth Circuit regarding the unreviewed evidence and its connection to the unresolved issue of material fact. Simpson and Dwight participated in **every single TWC hearing**. They couldn't **have NOT KNOWN** that their testimony to the Fifth Circuit was false and perjured. **They did know.** And they intentionally lied to the Fifth Circuit in their effort to abuse the judicial system, abuse the courts and deprive Petitioner of justice.

This Court held that the "'historic power of equity to set aside fraudulently begotten judgments' is necessary to the integrity of the courts, for 'tampering with the administration of justice…involves far more than an injustice to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991)

quoting *Hazel Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238 (1944).

In addition, the Fifth Circuit's actions constitute **a radical departure from usual judicial proceedings** in simply accepting the Respondent's assessment of what would be found in the TWC evidence -- **evidence that has never been subpoenaed or reviewed by any court EVER**.

Accordingly, this Court should grant certiorari to review the lower courts' actions. In light of the newly released TWC report vis-à-vis the issues presented in the petition for a writ of certiorari and supplemental materials submitted, this Court has the opportunity to reconsider its denial of certiorari to ensure the integrity of arbitration as well as to review the actions of judges that clearly depart from the usual and accepted course of judicial proceedings.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for rehearing of the petition for a writ of certiorari should be granted.

Respectfully submitted,

Chris Wanken
Pro Se Litigant
PO Box 202611
Austin, TX 78720
214-770-9087

End Notes

1 Appellee John Dwight Wanken's brief to the Fifth Circuit Court of Appeals.

2 Opinion of the Fifth Circuit Court of Appeals, September 29, 2011.

3 Appellant Christopher Michael Wanken's Petition for Rehearing.

CERTIFICATION OF COUNSEL

Pursuant to Rule 44, Rules of the Supreme Court, Petitioner hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44(2), and is being presented in good faith and not for delay.

Christopher M. Wanken