No. 19-

IN THE

Supreme Court of the United States

JOHN BUCSEK,

Petitioner,

v.

METROPOLITAN LIFE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the appellate court err by ignoring *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (U.S. Jan. 8, 2019) and barring arbitration based on its perceived view of the merits of Petitioner's claim as opposed to the actual arbitrability of the claim?

Suggested Answer: Yes.

2. By barring arbitration in this matter, did the appellate court ignore longstanding case law of this Court holding that (i) claims are arbitrable where they touch matters covered by the parties' arbitration agreement; and (ii) any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration?

Suggested Answer: Yes.

3. Did the appellate court err by requiring that "material events" underlying Petitioner's claim occur while Metropolitan Life Insurance Company ("MetLife") still was a member of the NASD as a condition of compelling arbitration, rather than simply enforcing the parties' clear and unmistakable arbitration agreement?

Suggested Answer: Yes.

4. Did the appellate court proceed to ignore that "material events" giving rise to the claim did in fact arise while MetLife still was a member of the NASD?

Suggested Answer. Yes.

5. Did the appellate court err by not permitting the arbitrators to rule on arbitrability where the parties' arbitration agreement evidenced a clear and unmistakable intent by the parties that they do so?

Suggested Answer: Yes.

PARTIES

As set forth in the case caption, the petitioner is John Bucsek ("Mr. Bucsek"), who was the defendant in the trial court proceeding and the appellant in the appellate court proceedings, and the respondent is MetLife, which was the plaintiff in the trial court proceeding and the appellee in the appellate proceedings.

RELATED CASES

There are no cases or proceedings relating to the current matter at hand in this or any other court.

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JURISDICTION

(1) Date of the judgment sought to be reviewed: March 22, 2019;

(2) The petitioner timely sought rehearing on April 5, 2019, which was denied on May 9, 2019 (Pet. App. 56a – 57a).

(3) The provisions of this Court's Rule 14.1(e)(iii), regarding cross-petitions for reargument, are not applicable here.

(4) Authority to review the decisions of a United States Court of Appeals is granted by 28 U.S.C. § 1254:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:. . . (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

(5) This petition does not challenge the constitutionality of any state or federal law, so the notice requirements of this Court's Rule 29.4(b) and 29.4(c) are inapplicable.

STATEMENT OF THE CASE

Mr. Bucsek joined MetLife in 2002 and signed a Form U-4. The Form U-4 signed by Mr. Bucsek in connection with his MetLife employment states in pertinent part: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my *firm* . . . that is required to be arbitrated under the rules, constitutions, or by-laws of the *SROs* [self-regulatory organizations] indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time...." The NASD is one of the SROs indicated in Section 4. Although MetLife terminated its NASD membership in July 2007, Mr. Bucsek remained employed with MetLife up until July 1, 2016.[1]

Rule 13200(a) of the FINRA Code of Arbitration Procedure for Industry Disputes ("FINRA Code"), entitled "Required Arbitration," states, in pertinent part: "[A] dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:.... Members and Associated Persons...." Rule 13100(o) of the FINRA Code defines "member" as "any broker or dealer admitted to membership in FINRA, *whether or not the membership has been terminated or cancelled*...." (emphasis added). Mr. Bucsek is an "associated person"

1. On July 30, 2007, due to its merger with the New York Stock Exchange, the NASD became known as FINRA.

within the meaning of the FINRA Code. MetLife, as a former member, is a "member" and, under Rule 13200(a), all disputes between them must be arbitrated.[2]

On July 8, 2016, in accordance with his Form U-4, Mr. Bucsek filed an arbitration against MetLife in FINRA, asserting various claims pertaining to his compensation.[3] In its July 15, 2016 correspondence serving Mr. Bucsek's Statement of Claim on MetLife, FINRA stated: "You are required by FINRA rules to arbitrate this dispute." In its follow-up letter dated September 16, 2016 re-serving the Statement of Claim on MetLife, FINRA again stated: "You are required by FINRA rules to arbitrate this dispute."

In accordance with its rules, FINRA subsequently sent the parties proposed arbitrators to select and rank. Counsel for MetLife asked Mr. Bucsek's counsel for a two-week extension to submit MetLife's arbitrator rankings, and counsel for Mr. Bucsek agreed to give MetLife a two-week extension, up until October 24, 2016.

On October 24, 2016, MetLife filed with FINRA a request to dismiss the arbitration because MetLife was no longer a member of FINRA. Despite having asked for a two-week extension to rank the arbitrators, MetLife submitted no rankings at all. After considering all of the arguments submitted by the parties, including the same ones subsequently raised by MetLife in these court

2. The FINRA Code can be accessed on FINRA's website at www.finra.org.

3. The FINRA Statement of Claim is attached as Exhibit A to the complaint filed by MetLife in the district court. Docket Entry 1-1.

proceedings, FINRA's Director of Arbitration denied MetLife's request to dismiss the arbitration.

After the panel was appointed in this matter, MetLife filed a request with FINRA to have the matter "re-paneled." In a letter dated December 8, 2016, FINRA denied MetLife's request to have the matter "re-paneled." Only after failing to submit its arbitrator rankings, and facing the prospect of proceeding before an arbitration panel with which it evidently was unhappy, did MetLife first file a complaint and motion in the United States District Court for the Southern District of New York in February 2017 seeking to enjoin the FINRA arbitration – approximately 6 months after MetLife had been served with Mr. Bucsek's Statement of Claim. Subject matter jurisdiction was based on 28 U.S.C. § 1332(a)(1).

MetLife also never sought from the arbitration panel a determination as to the arbitrability of Mr. Bucsek's claims. Instead, after the FINRA Director had rejected its argument as to arbitrability, MetLife filed its court action. The district court ruled in MetLife's favor. The United States Court of Appeals for the Second Circuit affirmed the decision, and Mr. Bucsek's petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE PETITION

In 2018 alone, over 4300 cases were arbitrated before FINRA. Tens of thousands of additional cases are arbitrated before other venues every year. This Court repeatedly has held that all doubts should be resolved in favor of arbitration. Not only is arbitration a highly efficient and cost-effective means of resolving disputes, it ensures

that the federal and state courts are not backlogged with disputes that parties have agreed to litigate elsewhere.

In affirming the district court's preliminary injunction enjoining the FINRA arbitration, the court of appeals erred in numerous respects and engaged in a literal assault against prior precedent of this Court, including a recent unanimous decision. First, the court of appeals allowed its view of the merits of the underlying claims to improperly influence and dictate its ruling on arbitrability. Second, the court of appeals ignored precedent of this Court requiring arbitration where the allegations touch matters covered by the parties' arbitration agreement. Third, the court of appeals simultaneously ignored clear precedent of this Court that all doubts be resolved in favor of arbitration.

Fourth, the court of appeals further erred because it ignored the parties' arbitration agreement explicitly requiring arbitration of all disputes involving "former members" of the NASD, finding instead that arbitration was required only if "material events" giving rise to the claim arose while MetLife still was a NASD member. The Form U-4 does not limit arbitration of disputes only to those involving "material events" arising prior to the termination of a member's registration. To the contrary, the Form U-4 contains broad and sweeping language mandating arbitration of virtually all disputes between an associated person like Mr. Bucsek and former members such as MetLife – irrespective of when the dispute arises. The court of appeals failed to enforce the parties' arbitration agreement as written; yet another fatal error.

Fifth, exacerbating its error even more, the court of appeals improperly concluded that no "material events" giving rise to the claim arose while MetLife still was a NASD member when precisely the opposite is true. Here again, in contravention of the Court's recent 9-0 decision in *Schein, supra*, the court of appeals improperly allowed its perception that Mr. Bucsek's claims were "groundless" to dictate its determination as to arbitrability. Indeed, Mr. Bucsek's FINRA claim is replete with allegations regarding MetLife's breach of contract, fraud, and other improper conduct occurring pre-July, 2007; allegations which the court of appeals wholly ignored in its ruling.

Lastly, the court of appeals never should have made a determination as to arbitrability at all. Under well-settled precedent, this was a determination to be made by the FINRA arbitrators.

In sum, the court of appeals' ruling is grievously wrong. It also displays a callous disregard for the pro-arbitration policies and prior (and very recent) precedent of this Court. The court of appeals' ruling opens the floodgates to potentially thousands of arbitrable claims clogging up the court system every year. The message should be sent to the court of appeals, and to other like-minded courts, that the pro-arbitration policies established by this Court cannot be flouted.

A) The Court of Appeals Improperly Based its Ruling on its View of the Underlying Merits of the Claim

In a recent 9-0 decision, this Court in *Henry Schein, Inc., et al. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (U.S. Jan. 8, 2019) rejected the exception previously

followed by a number of appellate courts pursuant to which, even where "clear and unmistakable evidence" existed that the parties intended for the arbitrator(s) to decide the issue of arbitrability, a court nonetheless could decide the issue if a party's request for arbitration was "wholly groundless." In *Schein*, the Supreme Court held: "We conclude that the 'wholly groundless' exception is inconsistent with the text of the [Federal Arbitration] Act, and with our precedent." 139 S. Ct. at 529.

In its opinion, however, the court of appeals expressly relied upon the supposed "groundlessness of Bucsek's claim of arbitrability" in affirming the trial court's injunction barring the arbitration. *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 196 (2d Cir. 2018); Pet. App. at 21a. This, by itself, is directly contrary to *Schein*.

Equally important, at oral argument, in connection with Mr. Bucsek's wage payment claim, one panelist remarked that "…Mr. Bucsek was a, obviously a sophisticated person involved in business. And it seems hard to imagine that if he was so, I know this gets to the merits which we aren't supposed to get to, but it seems hard to imagine that he would not have at least tried to get some sort of understanding about his pay, given that he was there for a number of years, and it sort of leaves one with the feeling that this is almost thrown in as a way of getting to possible claims before there was the withdrawal by MetLife." Court of Appeals Oral Arg. (Feb. 28, 2018) at 6:02-7:25.

The suggestion that one of Mr. Bucsek's claims was "thrown in" is tantamount to finding it to be groundless.

In fact, the court of appeals readily admitted that the merits of the claim are something "we aren't supposed to get to" but did so nonetheless. As this Court warned in *Schein:* "We have held that a court may not 'rule on the potential merits of the underlying' claim that is assigned by a contract to an arbitrator, even if it appears to the court to be frivolous." 139 S. Ct. at 529 (*quoting AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649-650 (1986)). As the Supreme Court held in *AT&T Technologies*: "A court has 'no business weighing the merits of the grievance'" because the "'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.* at 650 (*quoting Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960)).

Long after oral argument in this matter, upon the Court's ruling in *Schein*, the court of appeals itself recognized the significance of the decision and even asked the parties for supplemental briefing on the *Schein* decision. Pet. App. at 24a – 25a. The court of appeals, however, then simply ignored the principles of *Schein*, as it improperly "weigh[ed] the merits of the grievance" – both in regards to Mr. Bucsek's claim of arbitrability and the underlying merits of his claims. Certiorari is crucial to reinforce the message that a parties' arbitration agreement cannot be disregarded simply because a court may have a dim view of a party's claim.

B) Allegations in the Claim Touch Matters Covered by the Agreement

It is well-settled that, if the allegations underlying a party's claim "touch matters" covered by the parties'

arbitration agreement, arbitration is mandatory. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, *supra*, 473 U.S. at 624, n. 13. Mr. Bucsek's FINRA claim clearly "touches matters" covered by the parties' arbitration agreement, yet the court of appeals ignored this well-settled standard.

Desperate to prevent Mr. Bucsek from proceeding to arbitration on claims it deemed to be lacking in merit, rather than applying the proper standard enunciated by this Court, the court of appeals improperly "rewrote" Mr. Bucsek's FINRA Statement of Claim so as to limit its allegations only to the time period 2011-2016; post-dating MetLife's NASD (now FINRA) membership. According to the court of appeals, "[h]is claims relate to his employment by MetLife during the period from 2011 (four years after MetLife's 2007 withdrawal from the NASD) until the end of his employment at MetLife in 2016." *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 188 (2d Cir. 2019); Pet. App. at 4a. The court of appeals further stated: "Bucsek contends that his claims also challenge MetLife's dealings with him during the time of membership in the NASD, but this argument is meritless." *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 196, n.3 (2d Cir. 2019); Pet. App. at 12a.

The court of appeals' findings are squarely contradicted by the plain and unambiguous allegations in Mr. Bucsek's Statement of Claim, which date well before MetLife terminated its NASD membership and in fact originate with Mr. Bucsek's commencement of employment with MetLife in 2002.[4] Indeed, the Statement of Claim plainly

4. Importantly, while MetLife never became a FINRA member, as the court of appeals noted, "the parties and the District Count

states: "For many years, Mr. Bucsek has supervised one of the most successful and profitable agencies not only in his Region but in the entire MetLife system. Nevertheless, during this *entire* time, Met Life – without any objective or rational basis – has failed to compensate Ms. Bucsek accordingly."[5] The "Factual Background" section of Mr. Bucsek's Statement of Claim proceeds to state that MetLife had been "discriminately underpaying him for years," a reference which again includes the years MetLife was a NASD member.

The Statement of Claim is replete with allegations that "touch matters" covered the by the parties' arbitration agreement; *i.e.* relating to the 2002-2007 timeframe. In his breach of contract claim, Mr. Bucsek alleges: "MetLife's failure and refusal to compensate Mr. Bucsek similar to his peers is a blatant breach of the implied covenant of good faith and fair dealing. MetLife cannot possibly reconcile the compensation it has paid Mr. Bucsek with the revenues he has generated over the years and the approximately $100 million or more in profits Mr. Bucsek has earned the company." Crucially, this $100 million or more in profits figure is not what Mr. Bucsek generated at MetLife since 2011, or since MetLife ceased being a NASD member, but rather the profits he generated at MetLife *since 2002*.

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have assumed that the FINRA Code governs…" *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 189 (2d Cir. 2019); Pet. App. at 6a.

5. As previously noted, Mr. Bucsek's Statement of Claim is attached to MetLife's Complaint as Exhibit "A"; Docket Entry 1-1.

The ensuing sentence in Mr. Bucsek's breach of contract claim alleges that MetLife's "cloak and dagger" approach to compensating him is a "gross violation of MetLife's fundamental duty to 'act in good faith and deal fairly' with Mr. Bucsek." Once again, the "cloak and dagger" reference is to MetLife's failure to detail "his compensation in any type of manual and not appropriately recognizing and rewarding him for the revenues and profitability of his agency" throughout his *entire* tenure with MetLife.

In alleging MetLife violated New Jersey's Wage Payment Law, Mr. Bucsek similarly makes clear that MetLife "*never* provided him with a compensation manual detailing his rate of pay and, more significantly, how his pay would be calculated." The Statement of Claim proceeds to allege that "on an annual basis up until 2016" – which included the years 2002 through 2007 while MetLife was a NASD member – "Mr. Bucsek received a phone call advising that he would be paid a certain base, and be eligible to receive certain incentive compensation, but the base and compensation figures provided by MetLife were arrived at 'willy-nilly' and bear no reasonable correlation to the revenues and/or profitability of his agency."

The Statement of Claim then states that "MetLife has 'short-changed' Mr. Bucsek for years in direct violation of New Jersey's Wage Payment Law." The years in which MetLife "short-changed" Mr. Bucsek clearly include 2002-2007 and, therefore, this allegation likewise "touches matters" covered by the parties' arbitration agreement.

In his fraud claim, Mr. Bucsek alleges that "MetLife's failure to advise Mr. Bucsek that his compensation was so much lower than that of his peers is a material omission."

MetLife's failure to advise Mr. Bucsek in this regard commenced in 2002 and continued for years while MetLife remained a NASD member.

In his Answer filed in the district court, Mr. Bucsek also made clear at the outset that "[t]he Statement of Claim is premised, in very large part, on MetLife's failure to compensate him throughout his *entire* MetLife employment, which started five years before MetLife ceased being a member of FINRA's predecessor." The court of appeals ignored each and every one of these allegations of wrongdoing occurring while MetLife still was a NASD member. Instead, in a footnote, the Panel opined that "[w]hile it is true that Bucsek's claims make vague, passing references to his 'entire' employment at MetLife, all of the allegations of wrongdoing – primarily denials of requests for a raise and payment errors – are alleged to have occurred between 2011 and 2016, years after MetLife's withdrawal from the NASD." *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 196, n.3 (2d Cir. 2019); Pet. App. at 12a.

Mr. Bucsek's allegations of wrongdoing preceding MetLife's withdrawal from the NASD are anything but "vague" or "passing." Furthermore, nothing in the record supports the court of appeals' determination that Mr. Bucsek's allegations of wrongdoing related "primarily" to "denials of requests for a raise and payment errors." That said, the court of appeals' use of the word "primarily," as opposed to "exclusively" or "solely," makes clear that Mr. Bucsek alleged wrongdoing beyond just "denials of requests for a raise and payment errors." This wrongdoing, as the foregoing allegations from Mr. Bucsek's Statement of Claim vividly illustrate, include being underpaid

throughout the *entirety* of his employment and *never* being provided with pertinent information pertaining to how his pay was calculated.

Even more important, the court of appeals' finding that "it is true that Mr. Bucsek's claims make vague, passing references to his 'entire' employment at MetLife" – by itself – requires arbitration of this dispute. This Court in *Mitsubishi* required only that the factual allegations "touch matters" covered by the parties' arbitration agreement. The definition of "touch on/upon" includes to "*briefly* talk or write about (something)." (*See* Merriam-Webster Dictionary) (emphasis added). The definition of "touch on/upon" is virtually identical to that of "passing" used by the appellate court in its Opinion. (*See* Collins English Dictionary; "[a] passing mention or reference is *brief* and is made while you are talking or writing about something else.") (emphasis added). At a minimum, Mr. Bucsek's Statement of Claim "briefly" talks or writes about wrongdoing he sustained in the years 2002-2007 when MetLife was a NASD member.

Quite simply, the court of appeals let its view of the merits of Mr. Bucsek's claims infect its judgment in virtually every conceivable respect. This included "re-writing" the Statement of Claim so as to evade this Court's ruling in *Mitsubishi* that any dispute that "touches" the parties' arbitration agreement must be arbitrated.

C) It Cannot be Said with Positive Assurance that the Case is not subject to Arbitration

The court of appeals' ruling also runs afoul of the Supreme Court's decision in *Moses H. Cone Memorial*

Hospital v. Mercury Constr. Corp., 460 U.S. 1 (1983). As this Court made clear in *Moses Cone*, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25.

The court of appeals' refusal to apply *Moses Cone* makes clear that it did not merely issue its decision in error but that it *deliberately* defied this Court's prior ruling. Mr. Bucsek relied upon *Moses Cone* in both his opening and reply briefs. Tellingly, however, nowhere in its lengthy decision does the court of appeals address this decision. The reason is simple. Based on the allegations in the Statement of Claim, it cannot be said with positive assurance that this case is not subject to arbitration and, hence, under Supreme Court precedent, arbitration is required.

Significantly, the district court itself stated only that "Bucsek's claims *appear* to span the period beginning in 2011, when a new regional manager named Peter Nejad took over as Bucsek's director, and ending in 2016, when Bucsek filed his claim." Pet. App. at 42a. The use of the word "appear," on its face, leaves open the possibility that Mr. Bucsek's claims are subject to arbitration.

The court of appeals' finding that it is "true that Bucsek's claims make vague, passing references to his 'entire' employment at MetLife" likewise makes it impossible to say with positive assurance that this case is not subject to arbitration. It is readily apparent from its finding that Mr. Bucsek's Statement of Claim made "vague, passing references to his 'entire' employment at MetLife," that the court of appeals similarly harbored at least some doubt as to whether his claims were subject to

arbitration. But the court of appeals improperly proceeded to resolve those doubts in favor of enjoining – rather than compelling – arbitration; in direct contravention of longstanding precedent.

D) There is no Basis for Applying a "Material Events" Standard

Ultimately, the court of appeals determined that whether Mr. Bucsek's claims should proceed to arbitration depended on whether "material events" giving rise to his claim occurred while MetLife still was a NASD member. Nothing whatsoever in the Form U-4, however, limits arbitration only to those disputes where the "material events" arose prior to the termination of MetLife's NASD membership.

No court of appeals previously had applied or endorsed this "material events" analysis. In concluding that Mr. Bucsek's claims were not arbitrable, the court of appeals merely relied on various district court decisions. *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 184, 193 (2d Cir. 2019); Pet. App. at 15a. The court of appeals held that "Bucsek's proposed interpretation would mean that all persons or entities that were ever subject to FINRA's arbitration code would forever remain subject to it with regard to future disputes between them, even if the dispute concerned events that occurred years, decades, or even centuries after either of the parties to the dispute had ceased to have any connection with FINRA." *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 192 (2d Cir. 2019); Pet. App. at 13a.

This "parade of horribles" relied upon by the court of appeals in order to avoid arbitration is patently absurd. Under the Form U-4, arbitration only applies to matters arising out of Mr. Bucsek's employment with MetLife, which obviously would not last "centuries."

That said, MetLife itself vehemently argued that arbitration "is a matter of contract." The arbitration "contract" here, the Form U-4, in no way limits arbitration only to disputes involving material facts arising prior to the termination of MetLife's NASD membership. The FINRA rules likewise are completely bereft of any such limitation.

Indeed, MetLife has engaged in numerous FINRA arbitrations in the years since terminating its membership. *See, e.g., Storick v. Metropolitan Life Insurance Company, et al.,* FINRA No. 14-03315 (June 8, 2016); *Ghalilli v. Bernstein and Metropolitan Life Insurance Company*, FINRA No. 14-03223 (March 28, 2016); *Miller v. MetLife Securities, Inc. and Metropolitan Life Insurance Company*, FINRA No. 14-02160 (March 21, 2015); *Greenway v. Metropolitan Life Insurance Company, et al.*, FINRA No. 13-00827 (April 8, 2014).[6] MetLife also has sought *affirmative relief* of its own in one or more of these FINRA arbitrations. In *Storick*, *supra*, for instance, MetLife prevailed on a counterclaim against an associated person "for breach of contract for pre-paid unearned commissions." Mr. Bucsek's dispute against MetLife similarly relates to commissions/compensation. MetLife's attempt to evade FINRA arbitration of Mr. Bucsek's claims – after prevailing on its own counterclaim for "pre-paid

6. These arbitration awards can be accessed at www.finra.org.

unearned commissions" in another FINRA proceeding – is both hypocritical and totally at odds with the Form U-4.

Moreover, in each of these arbitrations MetLife was assessed with a "member surcharge." The reason MetLife was assessed a member surcharge by FINRA is quite simple. As a former member, MetLife is deemed to be a "member" and is expressly required under FINRA Rule 13100(o) to arbitrate its disputes with an "associated person." In fact, when MetLife initially contested FINRA jurisdiction – raising the identical arguments it ultimately raised in the district and appellate courts – *the Director of FINRA refused to decline jurisdiction*. The fact that MetLife first sought relief in FINRA, not court, and that the FINRA Director rejected its claim that arbitration of Mr. Bucsek's disputes was not required, is extremely illuminating.

Briefly stated, the plain language of Mr. Bucsek's Form U-4, incorporating the FINRA rules, requires arbitration of the disputes set forth in the Statement of Claim, regardless of whether the "material events" giving rise to Mr. Bucsek's claims occurred while MetLife still was a NASD member. This Court has repeatedly made clear that arbitration is a "matter of contract." Here, the court of appeals issued a ruling that the parties' arbitration agreement can be rewritten by a court so as to make otherwise arbitrable claims nonarbitrable. The court of appeals' ruling, again, is a direct assault on the many pro-arbitration decisions of this Court.[7]

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7. In any event, of course, as set forth in Heading B, *supra*, "material events" giving rise to Mr. Bucsek's claims did arise while MetLife was a NASD member. This serves as yet further evidence

E) The Panel Should Have Allowed the Arbitrators to Determine the Issue of Arbitrability

Lastly, the court of appeals also improperly usurped the FINRA panel's jurisdiction to determine if this dispute is subject to arbitration. As the *Schein* ruling makes clear, "[u]nder the [Federal Arbitration] Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms." 139 S.Ct. at 529 (*citing Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772 (2010)). This Court in *Schein* proceeded to hold: "Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.* (*citing Rent-A-Center*, 561 U.S. at 68-69).

In *Alliance Bernstein Investment Management, Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006) the former employee, like Mr. Bucsek here, signed a Form U-4. The court of appeals noted that the Form U-4 expressly incorporated the NASD (now FINRA) Code, and held that "*disputes over the interpretation of its provisions must be arbitrated.*" 445 F.3d at 127 (emphasis added).

In holding that the arbitration panel had jurisdiction to decide whether the matter was arbitrable, the court in *Alliance Bernstein* relied specifically on then-NASD Code Rule 10324, stating in part: "The arbitrators shall be empowered to interpret and determine the applicability

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that the court of appeals did not merely err but intentionally circumvented this Court's prior rulings.

of all provisions under this Code....Such interpretations... shall be final and binding upon the parties." 445 F.3d 127. Quoting the court of appeals: "[W]e hold that the [NASD] Code *unequivocally provides for the arbitrability dispute at issue in this case to be decided in arbitration rather than the courts*." *Id.* at 126 (emphasis added).

The current FINRA Code has a nearly identical provision, Rule 13413 (entitled "Jurisdiction of the Panel and Authority to Interpret the Code"), which states: "The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties." One of the rules which the arbitrators have jurisdiction to interpret is FINRA Rule 13200; *i.e.* whether a dispute is a "Required Submission."

Indeed, MetLife itself recognized that FINRA, not the court, was the proper entity to determine arbitrability. Only *after* losing its challenge to arbitrability before FINRA did MetLife seek a "second bite at the apple" in court.

In failing to follow *Schein* and *AllianceBernstein*, the court of appeals in its decision states: "Furthermore, we find nothing in the Code that clearly and unmistakably evidences a contractual intent to confer resolution of arbitrability on the arbitrators for a claim such as Bucsek's, which is based on facts long subsequent to the parties' involvement in FINRA." *Metropolitan Life Insurance Company v. Bucsek*, 919 F.3d 192, 196 (2d Cir. 2019); Pet. App. at 21a. Not only is the court of appeals' finding that Mr. Bucsek's claim is based "on facts long subsequent to the parties' involvement in FINRA" clearly wrong, under this Court's decision in *Schein* it was up to the arbitrators

to interpret FINRA Rule 13200 and, in particular, to determine if it requires arbitration of a dispute that is based on allegations setting forth a continuum of improper conduct commencing while MetLife still was a NASD member and extending thereafter.

CONCLUSION

Had the court of appeals simply erred, perhaps this might not be an appropriate case for certiorari. The court of appeals' ruling, however, evinces something far more troubling – an appellate court that re-wrote the parties' arbitration agreement, and ignored numerous precedents of this Court including a recent 9-0 decision, simply because it did not deem the claims to be meritorious. Indeed, one of the judges on the panel (the Chief Judge of the Second Circuit) admitted as much during oral argument, conceding that a court should not delve into the merits when deciding arbitrability but proceeding to do just that.

The pro-arbitration policies set forth in this Court's prior rulings cannot be assailed. Nor can a precedent be allowed to stand that a court can re-write a parties' arbitration agreement "willy-nilly," ignore the allegations in an arbitration claim which it finds inconvenient and stand in the way of its desired result, and decide questions of arbitrability not based on the parties' arbitration agreement but on its own view of the merits of the case.

Accordingly, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 7, 2019

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2017
Docket No. 17-881

METROPOLITAN LIFE INSURANCE CO.,

Plaintiff-Appellee,

v.

JOHN BUCSEK,

Defendant-Appellant.

February 28, 2018, Argued;
March 22, 2019, Decided

Before: KATZMANN, Chief Judge, LEVAL, Circuit Judge, and CARTER, District Judge.*

Defendant John Bucsek, a former employee of Plaintiff Metropolitan Life Insurance Company, appeals from an order of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *J.*) granting MetLife a preliminary injunction barring Bucsek from arbitrating his claims before the Financial Industry

* Judge Andrew L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

Regulatory Authority (FINRA). The district court held that 1) the question whether MetLife was obligated to arbitrate the dispute was to be decided by a court, rather than an arbitrator, and 2) MetLife was not required by the FINRA arbitration code to arbitrate claims arising out of events that occurred long after MetLife's withdrawal from FINRA's predecessor, the National Association of Securities Dealers. AFFIRMED.

LEVAL, *Circuit Judge*:

Defendant John Bucsek, a former employee of Plaintiff Metropolitan Life Insurance Company ("MetLife"), appeals from an order of the United States District Court for the Southern District of New York (Paul A. Engelmayer, *J.*) granting MetLife's motion for a preliminary injunction barring Bucsek from pursuing claims against MetLife in arbitration, rather than in court. Bucsek had instituted an arbitration before the Financial Industry Regulatory Authority ("FINRA"), the successor to the National Association of Securities Dealers ("NASD"). MetLife had been a member of the NASD during the early part of Bucsek's employment. MetLife argues that it has no obligation to arbitrate Bucsek's claims because they are based on events that occurred long after MetLife and Bucsek ceased to have any connection with the NASD. The District Court ruled in MetLife's favor, staying arbitration of Bucsek's claims. We affirm.

BACKGROUND

In 2002, Bucsek joined MetLife's retail distribution channel, which later became known as the MetLife Premier Client Group. He served as Co-Managing Partner

and was registered with the NASD as a securities industry representative of MetLife. During the first several years of Bucsek's employment at MetLife, until 2011, MetLife was a member of the NASD.

As an NASD member, MetLife was subject to the NASD Code of Arbitration Procedure ("NASD Code"), which required arbitration of disputes between members and "person[s] associated with a member." Rule 10201, NASD Code. Bucsek, then a registered representative of a member, was a "person associated with a member," as defined in the NASD Bylaws. *See* NASD Bylaws, Art. I (rr).

Bucsek, upon joining MetLife, was required to sign a Form U-4, "Uniform Application for Securities Industry Registration or Transfer," which contained an agreement to arbitrate. It provided:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules, constitutions, or by-laws of [the NASD] . . . as may be amended from time to time . . . .[1] App. 97-98.

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1. The arbitration clause does not specifically name the NASD, but rather expresses Bucsek's agreement to arbitrate any dispute "that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs [Self-Regulatory Organizations] indicated in Section 4 (SRO Registration) . . . ." App. 97. The parties agree that by signing the Form U-4, Bucsek registered with the NASD and agreed to arbitrate disputes before it. Accordingly, we conclude that Bucsek agreed to arbitrate disputes before the NASD pursuant to his Form U-4 arbitration clause.

Appendix A

On July 9, 2007, MetLife terminated its membership in the NASD. On July 30, 2007, the NASD merged with parts of the New York Stock exchange to form FINRA and the NASD code was replaced by the FINRA Code. MetLife never became a member of FINRA.

Bucsek's employment at MetLife continued for nine years after MetLife severed its connection with the NASD, until July 1, 2016, when Massachusetts Mutual Life Insurance Company acquired the MetLife Premier Client Group.

On July 11, 2016, Bucsek filed a Statement of Claim in arbitration before FINRA, asserting claims related to unfair compensation, including breach of contract, fraud, negligence, and violation of the New Jersey Wage Payment Law, N.J.S.A §§ 34.11-4.1 et seq. His claims relate to his employment by MetLife during the period from 2011 (four years after MetLife's 2007 withdrawal from the NASD) until the end of his employment at MetLife in 2016.

MetLife submitted a letter-motion to FINRA seeking dismissal of Bucsek's claims, arguing that it was not required by the Code to arbitrate this dispute. By order of the Director of the FINRA Office of Dispute Resolution on December 1, 2016, FINRA denied MetLife's application for dismissal.

On February 2, 2017, MetLife filed this this action in the United States District Court for the Southern District of New York seeking a preliminary and permanent injunction barring Bucsek from pursuing the

arbitration. The district court found that MetLife had shown probability of success on the merits and granted a preliminary injunction staying the arbitration. Bucsek brought this appeal.

DISCUSSION

Bucsek contends that the District Court erred both in finding that MetLife had shown probability of success as to the non-arbitrability of the dispute, and in ruling on the question of arbitrability, rather than leaving it to the arbitrators.[2]

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2. Grants (and denials) of preliminary injunctions are reviewed for abuse of discretion; the adjudication of questions of law in deciding whether to grant a preliminary injunction is reviewed de novo. *See Goldman Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 214 (2d Cir. 2014) ("When reviewing an order granting either a preliminary or a permanent injunction, we review the district court's legal holdings de novo and its ultimate decision for abuse of discretion."). A party seeking a preliminary injunction must establish 1) a likelihood of success on the merits, 2) a likelihood of irreparable harm absent relief, 3) that the balance of equities was in its favor, and 4) that an injunction is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Because Bucsek bore the burden of proof to show arbitrability of the dispute, MetLife's burden on its motion for a preliminary injunction barring the arbitration operates differently from the more conventional case in which the party seeking an injunction also bears the burden of proof on the issue in dispute. MetLife's burden accordingly was to show likelihood of success in showing that Bucsek could not succeed in showing entitlement to arbitrate. However, as the facts with respect to MetLife's obligation to arbitrate are substantially undisputed, and the issues in contention relate entirely to questions of law, the assignment of burdens of proof is of little or no consequence for the resolution of this appeal.

Appendix A

The provisions of the arbitration code are central to both of Bucsek's contentions. It is not entirely clear whether the governing code for this dispute is the NASD Code, to which MetLife and Bucsek were undoubtedly subject from the time Bucsek began his employment at MetLife until MetLife withdrew from membership, or the FINRA Code, which replaced the NASD Code when, subsequent to MetLife's withdrawal from the NASD, the NASD was replaced by FINRA. For purposes of this dispute at least, the main pertinent provisions of the two Codes are functionally identical, and, to the extent that they differ, the difference would not change our conclusions. We therefore find it unnecessary to decide which of the two Codes governs. Because the parties and the District Court have assumed that the FINRA Code governs, we will focus on its provisions, noting differences from NASD's Code where appropriate.

FINRA Rule 13200 (which is substantially identical for our purposes to NASD Code Rule 10101) provides:

> [A] dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.

For purposes of this provision, it is undisputed that, until MetLife withdrew from the NASD in 2007, it was a "member" and Bucsek was an "associated person."

FINRA Rule 13413 (which is substantially identical for our purposes to NASD Rule 10324) provides:

> The panel has the authority to interpret and determine the applicability of all provisions under the Code. Such interpretations are final and binding upon the parties.

FINRA Rule 13100 defines "member" as:

> [A]ny broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled. . . .

The first clause of this rule, defining a member as "any broker or dealer admitted to membership" is functionally identical to the NASD's definition of membership set forth in its Bylaws. *See* NASD Bylaws, Art. I (ee). The second clause (relating to survival of membership after termination or cancellation) was not a part of the NASD's definition of membership.

Bucsek contends the district court erred in undertaking to decide whether his dispute was subject to the arbitration agreement, rather than referring that issue to the arbitrator. In general, what is determinative for deciding whether the arbitrability of a dispute is to be resolved by the court or by the arbitrator is the arbitration agreement. Just as the parties may elect through their contract to have arbitrators (rather than a court) resolve categories of disputes between them, they may similarly contract to have arbitrators (rather than a court) decide whether a particular dispute is to be arbitrated under the terms of the contract. We refer to the latter issue as the question of "arbitrability" of the dispute. The Supreme Court

recently ruled in *Henry Schein Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 202 L. Ed. 2d 480 (2019), that, when the parties have contracted to submit the question of the arbitrability of a dispute to arbitrators, courts must respect and enforce that contractual choice. There are many reasons why the parties to a business relationship might wish to have the arbitrability question, as well as all aspects of future disputes between them, decided by arbitrators, rather than by the courts. They might regard court proceedings as too slow, too expensive, too burdensome, or too public. They might prefer to rely on arbitrators who are familiar with the habits and customs of their area of commerce. They might prefer to have the entire matter heard in one forum, rather than two. Regardless of their reasons (and even in the absence of reasons), parties are free to enter into a binding contract by which either party can compel the other to have every aspect of a future dispute between them, including its arbitrability, determined by arbitrators. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 66, 69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (finding that an arbitration agreement giving the arbitrators "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this contract" empowered the arbitrators to resolve arbitrability of an unconscionability claim).

On the other hand, persons involved in a dispute are ordinarily entitled to have access to a court for the resolution of the dispute. It is a fundamental tenet of law that only by agreeing to arbitrate does a person surrender the right of access to a court for the resolution of a legal

dispute that is subject to adjudication. *See AT & T Techs., Inc. v. Comms. Workers of America*, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." (internal quotation marks and citations omitted)). The right of access to courts is of such importance that courts will retain authority over the question of arbitrability of the particular dispute unless "the parties clearly and unmistakably provide[d]" that the question should go to arbitrators. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002). This rule is designed to guard against "the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.* at 83-84. Were the courts to cede to arbitrators resolution of the arbitrability of the dispute (absent the clear and unmistakable agreement of the parties to that effect), this would incur an unacceptable risk that parties might be compelled to surrender their right to court adjudication, without their having consented. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). In *Henry Schein*, the Supreme Court recently reaffirmed the proposition of *First Options* that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Henry Schein*, 139 S.Ct. at 531 (quoting *First Options*, 514 U.S. at 944). Accordingly, in the absence of an arbitration

agreement that clearly and unmistakably elects to have the resolution of the arbitrability of the dispute decided by the arbitrator, the question whether the particular dispute is subject to an arbitration agreement "is typically an issue for judicial determination." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010) (internal citation and quotation marks omitted).

The result of these principles is that, to determine whether the issue of arbitrability of this dispute should be resolved by an arbitrator rather than the court, we must examine the parties' agreement to determine whether they clearly and unmistakably agreed to have that issue resolved by arbitrators. If the parties so agreed, it is the obligation of the court to enforce their agreement. *See Henry Schein*, 139 S.Ct. at 530; *Rent-A-Center*, 561 U.S. at 69-70.

We therefore turn to the arbitration Code to determine whether, in either the NASD or the FINRA version, it reflects a clear and unmistakable agreement by the parties to have the question of arbitrability of this dispute determined by arbitrators rather than the court.

Neither version of the Code directly addresses the question. At least so far as reflected in the court opinions that have focused on this question, rarely do arbitration agreements directly state whether the arbitrator or the court will decide the issue of arbitrability. In the absence of language that directly addresses the issue, courts must look to other provisions of the agreements to see

what contractual intention can be discerned from them. Broad language expressing an intention to arbitrate all aspects of all disputes supports the inference of an intention to arbitrate arbitrability, and the clearer it is from the agreement that the parties intended to arbitrate the particular dispute presented, the more logical and likely the inference that they intended to arbitrate the arbitrability of the dispute. *See, e.g., Wells Fargo Advisors, LLC v. Sappington*, 884 F.3d 392, 394, 396 (2d Cir. 2018) (A clause expressing agreement "to arbitrate any dispute, claim or controversy that may arise between you and Wells Fargo Advisors, or a client, or any other person[, and] . . . giving up the right to sue Wells Fargo Advisors . . . in court concerning matters related to or arising from your employment" "demonstrate[d] the parties' clear and unmistakable intent to arbitrate all questions of arbitrability."); *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) (A contractual provision that "any and all controversies . . . concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement . . . shall be determined by arbitration" and that "the parties are waiving their right to seek remedies in court" was found to "evidence the parties' intent to arbitrate all issues, including arbitrability.") (emphases omitted).

In contrast, the clearer it is that the terms of the arbitration agreement reject arbitration of the dispute, the less likely it is that the parties intended to be bound to arbitrate the question of arbitrability, unless they included clear language so providing, and vague provisions as to whether the dispute is arbitrable are unlikely to

provide the needed clear and unmistakable inference of intent to arbitrate its arbitrability. Accordingly, what the arbitration agreement says about whether a category of dispute is arbitrable can have an important bearing on whether it was the intention of the agreement to confer authority over arbitrability on arbitrators.

1. *FINRA Rule 13100 and the Arbitrability of* Bucsek*'s claims*. The NASD/FINRA Code cannot reasonably be interpreted to provide for arbitration of Bucsek's claims. This is because his claims are based on events that occurred years after he and MetLife had ceased to have any connection with the NASD.[3] The claims relate to events for which the NASD and FINRA have no regulatory interest.

Bucsek contends this is irrelevant because FINRA Rule 13100 provides that a broker or dealer once admitted to membership continues to be a member "whether or not the membership has been terminated or canceled." According to his interpretation of this rule, an entity that was once a member remains a member subject to the arbitration Code forever as to any future dispute with a party against which it would have been required to

3. Bucsek contends that his claims also challenge MetLife's dealings with him during the time of MetLife's membership in the NASD, but this argument is meritless. While it is true that Bucsek's claims make vague, passing references to his "entire" employment at MetLife, all of the allegations of wrongdoing—primarily denials of requests for a raise and payment errors—are alleged to have occurred between 2011 and 2016, years after MetLife's withdrawal from the NASD.

arbitrate during its active membership. MetLife opposes his position on two grounds. First, it argues that it is not subject to FINRA Rule 13100 because it was never a member of FINRA, and this clause of FINRA Rule 13100 was not a part of the NASD Code to which it was subject. Second, MetLife argues that Bucsek's interpretation distorts this provision and produces preposterous results.

We need not decide whether MetLife is subject to a provision of the FINRA Code that was not a part of the NASD Code, because Bucsek's asserted interpretation of Rule 13100 is untenable and would produce absurd results that could not have been intended by FINRA or any of the contracting parties that subjected themselves to the FINRA Code.

Bucsek's proposed interpretation would mean that all persons or entities that were ever subject to FINRA's arbitration Code would forever remain subject to it with regard to future disputes between them, even if the dispute concerned events that occurred years, decades, or even centuries after either of the parties to the dispute had ceased to have any connection with FINRA.

Suppose, for example, that two business entities were FINRA members for the same brief period of time, and that each soon thereafter abandoned the securities business, withdrew from FINRA, and went on to conduct business in completely different areas of enterprise. Decades or centuries later, a new business dispute arose between them that had nothing to do with FINRA, with the securities business, or with the past experiences

of either of them during the brief, long-forgotten time when they were both members of FINRA. Bucsek's interpretation of Rule 13100 would mean that the dispute must be arbitrated because each entity had, in perpetuity, surrendered its right to have new disputes between them adjudicated by a court of law, and had instead committed itself in perpetuity to arbitrate any such disputes before FINRA.

Similarly, in the context of disputes between employer and employee, Bucsek's interpretation would mean that, if a registered representative entered the employ of an NASD member, in contemplation of the member and the representative immediately quitting the securities business and embarking together in a different unrelated field of business, then for as long as the employment relationship continued following their joint withdrawal from the securities business and NASD supervision, either could compel the other to surrender the right to court adjudication in favor of FINRA arbitration of any dispute relating to their future "business activities." That interpretation would be incompatible with the reasonable expectations of the parties to the arbitration agreement, and could not reasonably be inferred from their long prior acceptance of submission to the FINRA or NASD Code. Nor would it make any sense from the point of view of FINRA. FINRA would have no reason to arbitrate a dispute relating to business activities that had nothing to do with FINRA's regulatory interests merely because once, in the distant past, the disputants had briefly been under FINRA's supervision. As the district court put it, "it simply cannot be the case that any FINRA member

would have contemplated that its FINRA membership would perpetually subject it to FINRA's arbitration requirement, even for causes of action arising long after its membership ended." App. 194 (quoting *Metro. Life Ins. Co. v. Puzzo*, 1:13-cv-3858, 2014 U.S. Dist. LEXIS 62773, 2014 WL 1817636, at *2 (N. D. Ga. May 6, 2014) (internal quotation marks omitted)).

Other courts, encountering the argument here advanced by Bucsek, have sensibly rejected it. These courts have uniformly concluded that the Code's continuation of "member[ship]" following termination or cancellation means, as MetLife advocates, that if the material events that gave rise to a dispute occurred while a party was a functioning member, that party is bound by the Code for the purposes of that dispute, even if it has subsequently canceled its membership or been expelled. *See Christensen v. Nauman*, 73 F. Supp. 3d 405, 411 n.4 (S.D.N.Y. 2014) (concluding that a party whose FINRA membership terminated prior to the litigation was not precluded from pursuing FINRA arbitration, so long as it was still a member at the time of the "material events giving rise to the dispute" (quoting *Puzzo*, 2014 U.S. Dist. LEXIS 62773, 2014 WL 1817636, at *3)). We conclude that neither the NASD nor the FINRA Code can be reasonably interpreted as providing for arbitration of Bucsek's claims over events that occurred years after both he and MetLife had terminated their relationship with the NASD.

We conclude that, insofar as demonstrated on the motion for preliminary injunction, if the arbitrability of this dispute is to be determined by the court, it is not

arbitrable. We recognize that the non-arbitrability of the dispute does not determine whether the question of arbitrability is for the court or for arbitrators, as parties may consent to submit arbitrability to arbitrators even for disputes which clearly do not fall within the scope of their agreement to arbitrate. We therefore turn to Bucsek's argument that the arbitration code provides for arbitration of the question of arbitrability.

2. *FINRA Code Rule 13413 and Alliance Bernstein*. Bucsek argues that notwithstanding our conclusion that the dispute is not arbitrable, the FINRA Code calls for arbitration of arbitrability. He cites FINRA Rule 13413, which provides that the arbitration panel "has the authority to interpret and determine the applicability of all provisions of the Code." He further points out that in *Alliance Bernstein Investment Research and Management, Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006), we concluded that NASD Rule 10324, which is substantially identical to FINRA 13413, evidenced a clear and unmistakable intention in an arbitration agreement that incorporated the NASD Code to have the arbitrators decide arbitrability of a question that turned on interpretation of the Code. Bucsek contends that the *Alliance Bernstein* ruling compels us to rule that the Code clearly and unmistakably delegates the resolution of arbitrability to the arbitrators here. We are not persuaded. The claim in *Alliance Bernstein* was so different from Bucsek's claims that the holding in that case cannot reasonably govern this one.

In *Alliance Bernstein*, an NASD member's employee (an associated person) sought to arbitrate his claim of

wrongful termination. Unlike Bucsek's claim, the claim in *Alliance Bernstein* related entirely to events that occurred while the employer was an NASD member operating in the securities business and while the claimant was an "associated person," so that the dispute was indisputably subject to the provisions of the NASD Code. The employee claimed he had been terminated by reason of his cooperation in government investigations into the operations of the employer, and that his termination therefore violated § 806(a) of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (prohibiting an employer from discharging an employee "because of any lawful act done by the employee . . . to provide information . . . or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of [federal securities laws]"). *See Alliance Bernstein*, 445 F.3d at 123. Under the pertinent provisions of the NASD Code, disputes between a member and an associated person were arbitrable unless they fell within the terms of an explicit exception for claims of "employment discrimination." *Id.* at 124. Accordingly, the question whether the parties had agreed to arbitrate turned on whether the employee's claim that he had been discharged in retaliation for his cooperation with the government was a claim of "employment discrimination." If not, the claim was arbitrable. The NASD Code's Rule 10324, like FINRA Rule 13413, gave arbitrators authority "to interpret and determine the applicability of all provisions under [the] Code." *Id.* (quoting NASD Code Rule 10324).

We concluded that, in "empower[ing the arbitrators] to interpret and determine the applicability of all provisions

under this Code," *id.* at 124, the parties had delegated to the arbitrators, and not the court, the determination of the arbitrability of that dispute.

Given the fact that neither in our case nor in *Alliance Bernstein* does the arbitration agreement contain language directly addressing the question who should decide the arbitrability of the dispute, the courts are required in both cases to examine other provisions of the agreement to interpret the contractual intent of the parties on that issue. In *Alliance Bernstein*, it was beyond dispute that the controversy was generally covered by the NASD Code and a high likelihood furthermore that it was arbitrable. Because the dispute was based on business activities of a member in relation to an associated person while both were subject to NASD supervision, it was indisputably within the general scope of the arbitration Code. In addition, the asserted violation of law, the termination of an employee by reason of actions of the employee that are harmful to the interests of the employer, is sufficiently different from the conventional understanding of "discrimination," as to give strong support to arbitrability under the Code provisions. The rule empowering the arbitrators to interpret the Code therefore supported the conclusion that the agreement intended to give the arbitrators authority over the question of arbitrability, and there was nothing in the agreement to support a contrary interpretation.

Here, in contrast, the agreement cannot be reasonably interpreted to provide for arbitration of the dispute. While that fact does not preclude construing an agreement as providing for arbitration of arbitrability,

it is a substantial makeweight against such a conclusion unless counterbalanced by clear language contradicting the logical inference that parties who clearly agree not to arbitrate a particular type of dispute are unlikely to intend to arbitrate the arbitrability of such a dispute. The language of NASD Rule 10324, which was sufficient to support the inference of intent to arbitrate arbitrability in circumstances of a dispute between a current NASD member and associated person where there was no evidence pushing in the opposite direction, is not necessarily sufficient to support a clear and unmistakable inference of intent to arbitrate arbitrability when other aspects of the agreement argue powerfully against that inference. We think it extraordinarily unlikely that the *Alliance Bernstein* panel could have reached the same result if its claimant, like Bucsek, had been seeking arbitration of a dispute based on facts that occurred years after he and his employer had ceased to operate under the regulatory authority of the NASD. The *Alliance Bernstein* panel cannot have anticipated that its altogether reasonable holding in those circumstances would be applied to a far-fetched claim of arbitrability of a dispute based on facts that arose long after the parties had withdrawn from NASD supervision. Rule 13413's support for an inference of contractual intent to confer arbitrability on the arbitrators is only moderate. The provision empowering arbitrators "to interpret and determine the applicability of all provisions of the Code" makes clear that arbitrators do not lack authority to interpret the Code and determine the applicability of its provisions, but it does not suggest that this power belongs exclusively to arbitrators. In the context of a claim based on events

that occurred years after both parties to the dispute had severed all connections with the NASD, this provision fails to support a clear and unmistakable inference that the contract intended to confer the resolution of arbitrability on the arbitrator.

3. *Henry Schein*. Bucsek further argues that our reasoning is not compatible with the Supreme Court's holding in *Henry Schein*. He essentially construes *Henry Schein* to mean that a court considering whether the arbitration agreement confers authority over arbitrability on the arbitrators may not consider whether the agreement calls for arbitration of the dispute. That argument misunderstands the point of *Henry Schein*. Its meaning is quite different. The point of the *Henry Schein* opinion was that, where the parties *have agreed* to submit arbitrability to arbitration, courts may not nullify that agreement on the basis that the claim of arbitrability is groundless. The fault found by the Supreme Court in the lower court opinions was not that they failed to send the question of arbitrability to arbitrators. It was that the lower court, applying what the Supreme Court called a "wholly groundless exception," failed to make a finding on whether the arbitration agreement called for sending arbitrability to the arbitrator. The fact that a claim of arbitrability is groundless does not necessarily mean that the parties did not intend to have the question of arbitrability determined by arbitrators. The parties might nonetheless have agreed to submit arbitrability to arbitrators, and the court should not conclude otherwise without having explored the intentions of the contract on that question. Nonetheless, courts were warned not to "assume that the parties agreed to arbitrate arbitrability

unless there is clear and unmistakable evidence that they did so." *Id.* at 531 (quoting *First Options*, 514 U. S. at 944). The proposition that there is no valid "wholly groundless exception" to enforcing an arbitration agreement that gives the arbitrators authority over the question of arbitrability does not suggest that, in interpreting the agreement to discern whether it intended to confer the resolution of arbitrability on the arbitrators, the court should not consider all pertinent evidence. We reject Bucsek's claim for arbitration of arbitrability not because we view the claim of arbitrability is groundless. We reject it because, upon consideration of all evidence of the intentions of the arbitration agreement, including the groundlessness of Bucsek's claim of arbitrability, the agreement does not clearly and unambiguously provide for arbitration of the question of arbitrability. Our reasoning is based on the parties' contract, and not based on any exception to what the parties have contracted for.

In conclusion, so far as shown in the district court record, the arbitration code does not apply to a dispute based on events that occurred years after the parties had severed their connections with the NASD. Furthermore, we find nothing in the Code that clearly and unmistakably evidences a contractual intent to confer resolution of arbitrability on the arbitrators for a claim such as Bucsek's, which is based on facts long subsequent to the parties' involvement in the NASD. Finding no error, we affirm.[4]

4. As the district court's ruling was made on a motion for a preliminary injunction, we recognize that Bucsek retains the right to present additional evidence supporting his arguments at a trial of Metlife's demand for a permanent injunction.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MARCH 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 17-881

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of March, two thousand and nineteen.

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

JOHN BUCSEK,

Defendant-Appellant.

Before: Robert A. Katzmann,
Chief Judge,
Pierre N. Leval,
Circuit Judge,
Andrew L. Carter,
District Judge.*

* Judge Andrew L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B

JUDGMENT

The appeal in the above captioned case from an order of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the order of the district court is AFFIRMED.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

/s/

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 22, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of January, two thousand nineteen.

17-881

METROPOLITAN LIFE INSURANCE CO.,

Plaintiff-Appellee,

v.

JOHN BUCSEK,

Defendant-Appellant.

Present:

Robert A. Katzmann,
Chief Judge,
Pierre N. Leval,
Circuit Judge,
Andrew L. Carter, Jr.,
District Judge.[*]

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* Judge Andrew L. Carter, Jr., of the United States District Court for the Southern District of New York, sitting by designation.

Appendix C

By February 5, 2019, the parties shall submit letter briefs of no more than ten double-spaced pages arguing the effect, if any, of the Supreme Court's decision in *Henry Schein, Inc., et al v. Archer & White Sales, Inc.,* No. 17-1272, 2019 WL 122164 (U.S. Jan. 8, 2019) on this appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/_____

APPENDIX D — ORDER OF THE UNITED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 8, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 812 (PAE)

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff,

v.

JOHN BUCSEK,

Defendant.

ORDER

PAUL A. ENGELMAYER, District Judge:

For the reasons set forth on the record of today's conference, the Court grants MetLife's motion for a preliminary injunction. The Court enjoins Mr. Bucsek from pursuing his claims against MetLife in an arbitration before FINRA.

The parties are directed to submit a joint letter to the Court by **March 28, 2017**, stating whether Mr. Bucsek intends to contest MetLife's application for a permanent injunction with regard the arbitrability of his claims. In

the event further litigation is contemplated, the parties are directed to jointly submit a proposed case management plan.

SO ORDERED.

/s/_____
Paul A. Engelmayer
United States District Judge

Dated: March 8, 2017
New York, New York

APPENDIX E — TRANSCRIPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 7, 2017

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 CV 812 (PAE)

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff,

v.

JOHN BUCSEK,

Defendant.

New York, N.Y.
March 7, 2017
5:30 p.m.

Before:

HON. PAUL A. ENGELMAYER,

District Judge

[2]THE COURT: Good afternoon slash evening, everyone. Be seated.

Who do I have for the plaintiff MetLife?

Appendix E

MR. TURNBULL: Good afternoon, your Honor. Ken Turnbull with Morgan, Lewis & Bockius for Metropolitan Life Insurance.

THE COURT: Good afternoon, Mr. Turnbull.

MR. TURNBULL: Good afternoon.

MR. COSS: Good afternoon, your Honor. Christopher Coss with Coss & Momjion.

THE COURT: Good afternoon, Mr. Coss. Who are you joined by?

MR. COSS: This is Thomas Momjion, my law partner.

THE COURT: Very good. Good afternoon.

We're here on MetLife's application for preliminary relief. I've read through the materials carefully and I'm prepared to rule. I have a few questions which are more for context and background than anything. And let me just begin with you, Mr. Turnbull.

I'm curious. Supposing that the Court were to deny your application and you had to proceed in front of FINRA. Is there any further audience within FINRA to whom you would go in pursuing your claim of non-arbitrability? The director of arbitration has basically said no dice. What happens next?

MR. TURNBULL: Your Honor, we actually inquired of [3]FINRA about that, and they informed us that the

proper procedure was to make an application to the director, asking them to deny use of their forum for the reasons we set forth.

THE COURT: You've already done that and he said no.

MR. TURNBULL: Correct.

THE COURT: Would your next step be with the arbitrable panel that forms? Presumably, if the point is that the issue of arbitrability, if Mr. Bucsek is right, is committed to FINRA, it's then an issue that you would pursue before the arbitrator or arbitrators in FINRA.

Is there any other administrative step or do you essentially go right to the panel?

MR. TURNBULL: The only other administrative step would be to the panel itself.

THE COURT: I see. Do you have any insight or experience about whether FINRA panels are receptive or not to issues of claims of non-arbitrability, that there is no arbitrable agreement or the subject matters outside the scope of an agreement?

MR. TURNBULL: I do not, your Honor. I do know that FINRA is a for-profit organization, and so they are more likely to take claims than not as part of their dispute resolution procedures. The --

THE COURT: Does FINRA make money on having an arbitration before it?

[4]MR. TURNBULL: Because they can. I don't mean to impugn the reputation of FINRA, I'm just pointing out a fact. I'm not aware of any rulings by arbitrable panels on this issue.

THE COURT: The balance of equities and irreparable hardship appear to be undisputed elements here, but I would like to flesh them out a bit.

Supposing that you are obliged to pursue your claim of non-arbitrability in front of a FINRA panel. I think I get it, but I'd like you to articulate for me how it is that that causes hardship to MetLife.

MR. TURNBULL: Sure. Well, I think it causes hardship in a couple of ways. First, even being required to appear before an arbitration panel when it is our contention that there is no arbitration agreement in the first place, in and of itself constitutes irreparable harm, because we are having that decision made in the first instance by a deciding body that we, MetLife, did not agree should be deciding any dispute, this dispute that Mr. Bucsek raises.

THE COURT: Sure. But let's suppose that whoever decided it within FINRA, call it the panel, applied exactly the same legal standards as I would apply, and for argument's sake, were to conclude with you that the scope of whatever old arbitration commitment existed does not include these claims. What would have happened is you would have gone one further [5]step down the road in FINRA, only to prevail on the merits.

The issue is, in other words, what the harm to you is by having the issue of arbitrability litigated in front of FINRA, not, for the time being, assuming that the outcome would be decided differently on the same facts and law by the FINRA panel than by the Southern District of New York.

MR. TURNBULL: Right. The other point I wanted to make, your Honor, is that we believe that this is an issue to be reviewed de novo by the Court.

THE COURT: I understand that. I'm trying to understand the harm.

MR. TURNBULL: If the arbitrators ruled contrary to our position, the standard of review on an arbitration award is much more deferential.

THE COURT: I see. Okay. Thank you.

Who is going to be speaking for Mr. Bucsek? Do I have the pronunciation right?

MR. COSS: Yes.

THE COURT: As a recovering civil and securities litigator, I'm always intrigued by why people make the choices they do.

With all due respect, why do you want to be in front of FINRA?

MR. COSS: Because there is an arbitration agreement.

THE COURT: Putting aside the view that you are [6]properly there. As a strategic matter, with the other side having said we're happy to meet you in court, I'm just intrigued by the decision. I remember when I was in private practice, if there was any old saw out there, it went the other way, which is the institutions were happier to go to the indigenous arbitrators and the registered reps and others were trying to get into court. I'm just intrigued by the litigation choice.

MR. COSS: It is a more streamlined procedure. And in this particular case, Mr. Bucsek, rather than getting embroiled in a situation where there are depositions and motions and things of that sort, there are certain advantages to the arbitrable forum, even for registered representative like Mr. Bucsek.

THE COURT: Next question. I'm going to ask both of you this, but I'll just start with you, Mr. Coss, because you're on your feet.

For argument's sake, is there any difference here between a preliminary injunction and a permanent injunction? In other words, assuming for argument's sake you were to lose on the issue of a preliminary injunction, ordinarily, in the ordinary case, the case goes on and we would set a case management schedule, we would figure out what discovery was needed. It feels as if those two choices substantially collapse. Is there a difference between them?

[7]MR. COSS: Yes, there is. In this respect: We believe that the Court has everything in front of it now to deny the preliminary injunction.

THE COURT: Right.

MR. COSS: However, we don't believe, if the Court were inclined to consider entertaining the motion, we don't believe that it's ripe, because as we've stated in our papers, we've made multiple requests for -- we believe the U-4 covers this, and that's all that the Court needs. But that said, we would like to know whether or not there is another agreement that may operate here.

THE COURT: I see.

MR. COSS: And I would just note for the Court, in the arbitration process, FINRA, both the director or the staff attorney and the panel, made a determination that unless and until a Court issues an order, the arbitration goes forward. We served discovery months ago to get the personnel and licensing files for Mr. Bucsek, which would contain any additional agreements.

THE COURT: Let's suppose a preliminary injunction were to issue here that enjoined Mr. Bucsek from pursuing the arbitration. Presumably that then would be forwarded to FINRA, so it would understand why neither party was cooperating with the arbitration. Then the issue would be is there a difference between preliminary and permanent relief.

[8]I think what you're saying is you would want to reserve the right in this litigation to pursue discovery to see if, for example, even if the Court ruled against you based on the U-4, there was some follow-on agreement that independently justified FINRA arbitration, and therefore, whether or not I would order such discovery on the pleadings, you would at least want to take a stab at it, and therefore there is a difference between preliminary and permanent relief.

Am I reading that right?

MR. COSS: That's precisely correct. I have requested by e-mail twice in the last couple of weeks copies of the personnel licensing files, I received no response to either e-mail, so for the reasons I've stated --

THE COURT: In other words, if you lose here, while the FINRA arbitration would be enjoined, you would be reserving your rights to then in the four corners of this litigation argue that you are entitled to discovery, including of the sort you described, to allow you to determine whether other agreements or documents created an arbitration agreement that hypothetically the Court might not have found in granting MetLife preliminary relief.

MR. COSS: That's correct, and the other proviso I would add is just MetLife filed a reply brief. We have not had a chance to respond to that.

THE COURT: That's the nature of the reply brief.

[9]MR. COSS: I understand, but I would at least want there would be some sort of -- like, if the Court were to have come in today and just said here's the ruling, we would have said, well, there are actually things that the Court needs to consider.

THE COURT: I am going to give a ruling, but it is on the preliminary relief. All right.

And plaintiff, Mr. Turnbull, as to MetLife, for argument's sake, assuming that, first of all, the preliminary relief was granted, I take it you would agree that as a formal matter it doesn't have to equate to permanent relief. You might or might not oppose a bid for discovery, but as a formal matter, the back table has the right to try.

MR. TURNBULL: Actually, your Honor, I was a little surprised by Mr. Coss's position on this, only because he had asked -- he had called and said, look, do I need to answer, can we just push that out. In effect, the decision on this order to show cause is going to be the ultimate decision. And so that's how we view it, that the preliminary and the permanent collapse. That doesn't mean that --

THE COURT: But just because you view it that way, and just because you may turn out to be right, hypothetically, that there isn't a lot of daylight between the two, doesn't mean that the defense table doesn't have an opportunity to regroup, assess, determine whether or not there is a good-faith basis [10]for seeking discovery that would change the equation.

MR. TURNBULL: That's correct, your Honor. As a technical matter, they certainly could do that. I'd also say that they could also litigate this in court, if they were to discover an as-yet undiscovered agreement outside of the U-4 --

THE COURT: Your --

MR. TURNBULL: -- arbitration, then they could refile an arbitration.

THE COURT: As an officer of the court, can you proffer what efforts have been made to determine in fact whether there are any even arguable bases for arbitration here beyond the U-4? In other words --

MR. TURNBULL: Indeed, your Honor.

THE COURT: -- what have you done as an officer of the court to scour the files to see whether or not there is anything else either running to MetLife's relationship with FINRA, or MetLife's dealings with Mr. Bucsek that would supply an arguable independent basis for arbitration?

MR. TURNBULL: Indeed, your Honor. So we inquired of our client, MetLife Insurance Company, please go through every record that you might have, electronic, paper, otherwise. They conducted an exhaustive search for any agreement that would -- that might contain, might even arguably contain, an arbitration provision that would require arbitration of this dispute. The only document that the company has found is the form U-4 [11]document.

THE COURT: Obviously, in the event that a preliminary injunction were to issue along the lines you want, the defense would have the opportunity to formulate a differently put discovery request which might hypothetically have a potential to turn up more. Okay.

MR. TURNBULL: I just want to comment on your initial question to plaintiff or defendant, excuse me, about the strategic decision here. Because I would put it to the Court that this is truly a strategic decision to be in arbitration as opposed to court, because when you look at the underlying claim that Mr. Bucsek is asserting, it is in essence, your Honor, "I think I was worth more, I think I should have been paid more." And I submit that he does not want to assert that claim in court, because he knows it would be subject to a motion to dismiss. I would add on top of that --

THE COURT: Why do you assume that a FINRA arbitrable panel would not rigorously apply the law, if you're right that on the pleadings it is deficient?

MR. TURNBULL: As a matter of FINRA rules, they will not take a motion to dismiss on the pleadings. It is impermissible, they will not entertain it. In fact, it is sanctionable if somebody files a motion like that.

THE COURT: So that's your theory.

MR. TURNBULL: And, the arbitrators are, as they [12]frequently remind you when you go to hearing, we are not bound by the law, this is a forum of equity and we are here to do equity.

THE COURT: Got it. Why would your client pull out of NASD and why did your client not join FINRA?

MR. TURNBULL: Your Honor, I don't know the decision-making that went on back in 2007 underlying that decision. I just know that since July 9 of 2007, it has not been a member of the NASD, and has never been a member of FINRA.

THE COURT: What about customers? Do customers who do business with MetLife have arbitration agreements?

MR. TURNBULL: Customers who do business with MetLife Insurance Company, which is the plaintiff here and the named respondent in the arbitration, do not bring claims in FINRA.

THE COURT: What about, out of curiosity, MetLife securities customers?

MR. TURNBULL: MetLife securities customer who are buying securities absolutely would have the right to bring claims against the securities.

THE COURT: That's based on contract, not based on membership association. In other words, if I had an account at MetLife and I concluded that I was being overcharged for the for securities transaction, what would compel me to litigate that in arbitration is my customer agreement with MetLife, not [13]some associational identification that MetLife has.

MR. TURNBULL: No, I think both, your Honor. I think it is the customer agreement and I think MetLife Securities is a member of FINRA and --

THE COURT: This is the MetLife Insurance arm, that is the only part we're talking about. The rest --

MR. TURNBULL: Exactly. The other thing I would point out on the strategic decision, it has become even more compelling here because now we are currently proceeding before a FINRA panel that was appointed without any input or ranking or striking of potential arbitrators from MetLife. Because that arbitration appointment process went on while our request to deny use of the forum was pending.

THE COURT: I'm prepared to rule. And counsel, just for your benefit, I'm going to issue a bench decision now. I'm going to read it into the record. But there will not be a published decision that issues. Instead, all that will issue will be a summary order that incorporates by reference what I say here from the bench. So if the words I use are important, it will be necessary for you to order the transcript.

Mr. Coss, you want the last word?

MR. COSS: I would just make one request. If the Court is inclined to grant a preliminary injunction, I would like the opportunity to be heard for obviously if it's -- THE COURT: You've been heard in writing and here [14]today. I'm prepared to rule. I'm prepared to rule. I

appreciate that lawyers always would like to say more. But you've had an opportunity in writing and before the Court to address the relevant issue. The issues are in this case, if I may, are not unusually barnacled, it is a relatively straightforward question, which I'm prepared to resolve. So here it goes:

The Court will now rule on the motion by plaintiff Metropolitan Life Insurance Company, to whom I will refer as MetLife, for preliminary relief. MetLife seeks to enjoin defendant John Bucsek from pursuing certain claims against MetLife in an arbitration that Bucsek has initiated before the Financial Industry Regulatory Authority, or FINRA. Bucsek opposes that application. And FINRA, to date, has indicated its intention to move forward with the arbitration.

By way of background, Bucsek joined MetLife's retail distribution channel in 2002. He served, at all relevant times, as a co-managing partner of a MetLife agency with offices located in New York, New Jersey, and Connecticut. As a formal matter, the operations of MetLife for which Mr. Bucsek worked shifted, on July 1st, 2016, to Massachusetts Mutual Life Insurance Company, or Mass Mutual, when Mass Mutual acquired MetLife's retail distribution channel. Bucsek apparently remains an employee of Mass Mutual today.

Particularly relevant here is MetLife's association [15]with the National Association of Securities Dealers or NASD. At the time Bucsek joined MetLife, MetLife was a member of NASD. On July 9, 2007 MetLife terminated

its membership with the NASD. Three weeks later, on July 30, 2007, the NASD merged with parts of the New York Stock Exchange to form FINRA. MetLife, however, has never been a member of FINRA. As a result of MetLife's termination of its membership with the NASD, Bucsek's registration through the NASD, as a result of his employment with MetLife, terminated on July 9, 2007.

Notwithstanding this, on July 11, 2016, Bucsek initiated an arbitration against MetLife before FINRA. He did so by filing a statement of claim with FINRA. Bucsek brought several causes of action. These included violations of the New Jersey wage payment law, fraud, and negligence. Through these, Bucsek alleged in substance that although he had presided over a very profitable agency at MetLife, MetLife had significantly underpaid him relative to his peers. Based on his statement of claim, Bucsek's claims appear to span the period beginning in 2011, when a new regional manager named Peter Nejad took over as Bucsek's director, and ending in 2016, when Bucsek filed his claim.

On October 24, 2016, MetLife sent a letter to FINRA, explaining that it was not and never had been a member of FINRA. MetLife therefore objected to arbitration of Bucsek's case in that forum. On December 1, 2016, however, FINRA sent [16]MetLife's counsel a letter stating that FINRA's director of dispute resolution had denied MetLife's request to decline FINRA as the forum for the parties' dispute. Accordingly, the FINRA director wrote, "the case will proceed in this forum."

In response, MetLife filed this action before this Court. MetLife seeks a preliminary and a permanent injunction that would enjoin Bucsek from pursuing his claims before FINRA. MetLife argues that there is no agreement to arbitrate between the parties. It explains that it "ceased being a member of FINRA's predecessor nine years before Bucsek filed his arbitration claim, and four years before any of the alleged material events giving rise to defendant's claims purportedly occurred." Therefore, MetLife argues, FINRA has no jurisdiction over Bucsek's claims. Bucsek counters that his FINRA claims fall within the scope of the 2002 arbitration agreement that was part of his form U-4. And in light of that long-ago arbitration agreement, Bucsek argues the issue of whether arbitration before FINRA is appropriate is a question of arbitrable scope, which is properly resolved by the FINRA arbitrator or arbitrators and not this Court.

Under the familiar standard for granting a preliminary injunction, to enjoin the arbitration MetLife must establish (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of an injunction; (3) that the balance of equities tips in its favor; and (4) that an [17]injunction is in the public interest. Citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, if likelihood of success on the merits cannot be established, an injunction may issue if there are "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly" in the applicant's favor, MetLife's favor. Citing *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010).

The issue here turns on the first factor, the likelihood of success on the merits. Bucsek does not dispute that if it were found that MetLife did not consent to resolution of this dispute before a FINRA arbitrator, that the balance of equities, and, for that matter, the public interest, favor a preliminary injunction freeing MetLife from having to litigate in a forum to which it did not agree to participate. Bucsek also does not dispute that forcing MetLife to litigate a case in a forum to which it did not consent would cause it irreparable harm. Bucsek does not address these factors in his submission, and therefore has waived any claim to so argue. *See Guzman v. Macy's Retail Holdings, Inc.*, No. 09 CV 4472 (PGG), 2010 WL 222044, at *8 (S.D.N.Y. March 29, 2010). In any event, even had the matter been argued, it seems clear to the Court that the litigant who is forced to litigate in a non-judicial forum to which he did not consent of necessity [18] suffers material hardship, including likely financial. So, the only remaining issue before the Court, at least at the preliminary injunction stage, is whether or not there are sufficiently serious questions going to the merits and/or a likelihood of success on the merits.

The relevant background principles governing arbitrability are familiar. Where "the parties dispute not the scope of an arbitration clause but whether an obligation to arbitrate exists," the general presumption in favor of arbitration does not apply. *Applied Energetics, Inc. v. NewOak Capital Matters, LLC,* 645 F.3d 522, 526 (2d Cir. 2011) "Arbitrability questions are presumptively to be decided by the courts," and this presumption "can be rebutted only by 'clear and unmistakable evidence from

the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator.'" *Telenor Mobile Communications AS v. Storm, LLC*, 584 F.3d 396, 406 (2d Cir. 2009). That said, the Second Circuit has held that when "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

Here, Bucsek argues that the preliminary issue of [19]whether there is an agreement to arbitrate is for the arbitration panel, not the Court to decide. Under the governing precedent, that is wrong. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), the Supreme Court held that "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question for arbitrability' for a court to decide." In *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010), the Supreme Court elaborated. It noted that "it is well settled that when parties have agreed to 'submit a particular dispute to arbitration,' is typically an 'issue for judicial determination,'" and that "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute." *Id.* Therefore, the Supreme Court held, "to satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* Issues of this

nature, the Court stated, "typically concern the scope of the arbitration clause and its enforceability" and "always include whether the clause was agreed to, and may include when that agreement was formed." *Id.*

Here, the parties dispute just such an issue. The issue is whether the arbitration clause in Bucsek's 2002 form U-4 subject MetLife to arbitration of his present claims before [20]FINRA. That form stated, in pertinent part, as follows: "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, that is required to be arbitrated under the rules, constitutions, or bylaws of the NASD." Bucsek further notes that FINRA is the successor of NASD. Based on this 2002 form, Bucsek argues that the Second Circuit's decision in *Alliance Bernstein Investor Research & Management, Inc. v. Schaffran*, 445 F.3d 121 (2d Cir. 2006), is controlling, and compels the conclusion that the issue of arbitrability presented here falls within the sole jurisdiction of the arbitrable panel. Because MetLife's application is ostensibly not properly before the Court, Bucsek then argues, MetLife's motion for preliminary injunctive relief should be denied on this ground, and MetLife should be left to pursue before FINRA its claim of non-arbitrability.

Alliance, however, is inapposite. There, the issue was whether the plaintiff's whistleblower claims were of the type of "employment discrimination claims" within the scope of an admittedly extant arbitration agreement. This type of question is entirely different from the threshold question presented in this case of whether there was

a valid arbitration agreement that bound MetLife to arbitrate before FINRA any claims arising after its withdrawal from the NASD. That issue, which presents a question of whether the parties before the Court agreed to arbitrate, is a quintessentially judicial [21]question.

And the clear answer to that question is no. On the facts the parties have thus far put before the Court, MetLife had no agreement to arbitrate claims by Bucsek arising out of events long postdating MetLife's withdrawal from FINRA's predecessor, the NASD. Several courts to confront such questions have reached this unsurprising conclusion.

Most apposite is the 2014 decision by the Northern District of Georgia on facts that are materially indistinguishable, and indeed, involved MetLife. In finding no agreement to arbitrate, the Court there held that it simply cannot be the case "that any FINRA member would have contemplated that its FINRA membership would perpetually subject it to FINRA's arbitration requirement, even for causes of action arising long after its membership has ended." Citing *Metropolitan Life Insurance Co. v. Puzzo*, 2014 WL 1817636, at *2 (N.D. Ga. May six, 2014).

This Court encountered a similar situation in *Christensen v. Nauman*, 73 F.Supp. 3d 405 (S.D.N.Y. 2014). The Court there noted that the relevant inquiry to determine whether a former FINRA member is subject to FINRA's jurisdiction is whether the firm was a member during the "material events giving rise to the dispute."

Id. at 411 n.4. And that's because, as the Second Circuit held in *Coudert v. Paine Webber Jackson & Curtis*, 705 F.2d 78, 81 (2d Cir. 1983), [22]"it is the general law of this circuit that there is no duty to arbitrate a grievance arising after the termination of the agreement between the parties, even if the expired agreement included an arbitration clause."

Other authority is in accord. In *Haggerty v. Boylan*, No. 1:13 CV 0362 LEK/RFT, 2014 WL 148675, at *3 (N.D.N.Y. January 13, 2014), a district court enjoined the FINRA arbitration of the defendant's third-party claims against the plaintiff because the plaintiff "was not a member of FINRA at the time of the relevant transactions, nor was he an 'associated person' of a member." In *Greenberg v. Ameriprise Financial Services, Inc.*, No. 15 CV 3589 AD/SAYS, 2016 WL 3526025 at *6 (E.D.N.Y. March 31, 2016), a district court held that the relevant inquiry whether the party was "registered with FINRA at the time the material events giving rise to the dispute took place." That logic is controlling here, as Bucsek's claims arose years after MetLife had left NASD.

The Court has no occasion here to consider what the outcome would be if Bucsek had sued MetLife based on conduct that occurred in or before MetLife's withdrawal from the NASD in 2007. He has not done so. Such a claim would likely be time barred. In any event, FINRA Code of Arbitration Rule 12206(a) states that "no claim shall be eligible for submission to arbitration under the code where six years have elapsed from the occurrence or event giving rise to the claim."

[23]The relevant point here, however, is that Bucsek has brought no claim predicated on events that predate MetLife's withdrawal from the NASD.

Bucsek, finally, speculates that perhaps some other agreement exists that would mandate arbitration of his claims against MetLife. He seeks discovery as to that point. But at least on this application for preliminary relief, he has not shown entitlement to such discovery. As this Court held in *Begonja v. Vornado Realty Trust*, 159 F.Supp. 3d 402, 409 (S.D.N.Y. 2016), a party seeking to compel arbitration, a closely related circumstance, must make a prima facie initial showing that an agreement to arbitrate exists. To date, Bucsek has not made any such showing. He has not put forward any evidence whatsoever that he may have signed such an agreement, beyond the long-expired U-4 form from 2002. And MetLife has explicitly represented, both to Bucsek and to the Court, that no such agreement exists.

The Court therefore holds that MetLife is likely, if not all but certain, to be successful on the merits with respect to the issue of whether MetLife is required to arbitrate Bucsek's claims before FINRA. MetLife is subject, at least on the record at hand, to no such obligation. The Court therefore grants MetLife's motion for a preliminary injunction, and will enjoin Bucsek from proceeding with the FINRA arbitration. An order to this effect will follow. Therein [24]ends the ruling.

So the first question I have now, given the ruling, is I want to make sure that the words I use in the order that

incorporate this is by reference are equal to the task of communicating not only to Mr. Bucsek, but importantly to FINRA, that I've enjoined Bucsek from participating.

Mr. Turnbull, what language do you think will be needed to achieve that?

MR. TURNBULL: Your Honor, I think the conclusion of the opinion sets forth the language that would be necessary and effective, that is, Mr. Bucsek is hereby enjoined from pursuing his claim against MetLife in arbitration.

THE COURT: Nobody has sought to enjoin FINRA.

MR. TURNBULL: Correct.

THE COURT: You're not seeking that?

MR. TURNBULL: Correct, and FINRA has represented to us that they will adhere to any Court directives.

THE COURT: So we don't have an issue of rogue FINRA here.

MR. TURNBULL: At least we don't expect to.

THE COURT: So an order will issue tomorrow that incorporates by reference the reasons I've articulated from the bench, and essentially is consistent with the final paragraph of what I've read.

Now, I agree, though with defense counsel, that is to [25]say Mr. Bucsek's counsel, that all I needed to resolve and all I have resolved is the motion for preliminary relief. I think you have a pretty good sense of my current read on the law, and it is a pretty clear one. Nonetheless, the case has arisen with some dispatch, and I'm happy to allow the parties now to litigate this further if Mr. Bucsek thinks it is a good use of his lawyers' time and money.

So, defense counsel, my ordinary inclination would be to ask that lawyers to come together and to submit a case management plan that ideally provides a schedule for whatever factual discovery, if there is anything further, to be held consistent with my individual rules. You can find on the Southern District website a standard form.

This is an unusual case, and any discovery that's probably even sought is likely to be more modest than in the usual case.

I am also mindful that you and your client may decide that the handwriting on the wall, although not indelible, has so far been pretty clearly written, and therefore it may make more sense for your client simply to litigate rather than arbitrate his claims.

What I don't want to do is set a schedule that's so fast that in effect you and your client spend more time and money before you've had a chance to reflect on this together. How much time do you want to confer with your client [26]and think through what your choice of options are? In other words, you may conclude that the

better course here is simply to accede to the preliminary injunction, make it permanent, and pursue the case in court, and save money litigating in front of the Court, or you may conclude there's either facts or law that exists that might change my mind.

MR. COSS: In answer to your direct question, your Honor, I think we would probably need a week or less to confer with our client with respect to what our intention would be.

I think at a minimum, though, just to be candid with the Court, I think that we are at a minimum going to want to see what his files are, and going to want to seek discovery on that.

THE COURT: I appreciate that, and I'm not prejudging whether you're entitled or not to that discovery. It may be on that, this is the sort of thing that's resolved on the face of the complaint and without some pleading of facts and circumstances giving rise to a bona fide claim of arbitrability or a colorable claim, without besides the U-4, you may not be entitled to discovery. Or maybe MetLife will moot that by giving it to you anyway, because their spade work has shown there is nothing there, and they'd rather avoid a dispute about discovery in order to just move this along.

MR. COSS: I think there would be some additional discovery as well though, your Honor. It would be limited [27]discovery, but I think we would want some initial discovery as well.

Appendix E

THE COURT: At this point I realize I've given you a ruling and you need now to absorb it with your client. I'm not prejudging what, if any, discovery I would conclude would be appropriate.

What I am going to suggest is as follows. That, MetLife, if you in fact have combed the files here, and have found nothing, and if your goal is here terminate as soon as possible the bid for arbitration, might there be much wisdom in your informally giving a show-and-tell of the file to your adversary here, in the hope that it might lead them to stand down.

In other words, if Mr. Bucsek has no document besides the U-4 that justifies or could be said to justify arbitration, and if you found nothing, maybe walking them through the file will lead them to say, you know what, having heard the Court's assessment of the law, as applied to the U-4, this thing is going to be litigated in court, not in arbitration.

Can you do that?

MR. TURNBULL: Understood, your Honor. I'll certainly talk to my client about that. I understand what you're saying and I'll just need to talk to the client before making a representation.

THE COURT: Let me issue an order that simply says [28]this: The parties are to submit to me within, let's say, three weeks of tomorrow a joint letter that recites whether or not the plaintiff intends to pursue this litigation, meaning litigation over arbitrability.

MR. COSS: Okay.

THE COURT: And if so, how the parties propose that that litigation proceed. It may be that there is a gating issue of discovery dispute. Or alternatively, if you are choosing not to pursue it, whether you are consenting to the entry of a permanent injunction based on the same reasoning given in support of the preliminary one.

But, I am going to strongly encourage you, Mr. Turnbull, to have your client -- I'm saying this in really strong terms -- clients just want a preliminary injunction here. I'm not an unreasonable audience, but I'm trying to minimize everyone's cost. The smartest and surest way of getting this arbitrability issue wrapped up is for you to do an open kimono here, and show the other side what the files show. And at that point it may be that Mr. Bucsek can be persuaded that the Court has formed a pretty clear view about the U-4, if there is nothing else, this is destined to be litigate.

So I'm going to strongly encourage you posthaste to show that discovery informally, documentary discovery, so that hopefully Mr. Bucsek can make an enlightened decision.

MR. TURNBULL: Your words are clearly heard and your [29]instruction.

THE COURT: Good. That was the goal. Anything further from the plaintiff?

MR. TURNBULL: No, your Honor.

THE COURT: Anything further at this time for defendant?

MR. COSS: No, your Honor.

THE COURT: Thank you. I wish you and your clients well.

Please explain to Mr. Bucsek this is not a ruling on the merits of his claims against MetLife. It is simply a who decides the question. And the preliminary injunction represents my determination that on the materials brought to my attention, this is a dispute that gets resolved in court.

MR. COSS: Understood. I appreciate that.

APPENDIX F — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED MAY 9, 2019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 17-881

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of May, two thousand nineteen.

METROPOLITAN LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

v.

JOHN BUCSEK,

Defendant-Appellant.

ORDER

Appellant, John Bucsek, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix F

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/