No. 20-1143

In the Supreme Court of the United States

DENISE A. BADGEROW, PETITIONER

v.

GREG WALTERS, ET AL., RESPONDENTS

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EVE B. MASINTER
Counsel of Record
E. FREDRICK PREIS, JR.
MATTHEW M. MCCLUER
BREAZEALE, SACHSE & WILSON, L.L.P.
909 Poydras St., Ste. 1500
New Orleans, LA 70112
(504) 584-5468
eve.masinter@bswllp.com
efp@bswllp.com
matthew.mccluer@bswllp.com

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QUESTION PRESENTED

Should this Court grant certiorari to decide whether federal question jurisdiction exists over a removed state court action for vacatur of an arbitral award, where (i) substantial issues of federal law are present both on the face of the pleadings and in the underlying arbitration claims, and (ii) resolution of whether to apply *Vaden*'s "look-through" analysis to an action to vacate an arbitral award implicates no broad federal interest and will not alter the outcome of this case or future cases?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, Gregory Walters, Thomas Meyer, and Ray Trosclair, respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari ("Writ") by Petitioner, Denise A. Badgerow.

INTRODUCTION

Petitioner asks this Court to review whether the federal district court held subject matter jurisdiction over her action to vacate an arbitration award, despite the undisputed facts that her claims in the underlying arbitration involved significant questions of federal employment and securities law, and that her action to vacate was facially reliant on federal securities laws to adjudicate her claim that the arbitration award was procured through fraud.

There are no exigent circumstances necessitating this Court's review, no significant federal policies at

issue, and multiple compelling reasons the Writ should be denied.

First, review is premature. Circuit courts have only split four-to-two on the question of whether this Court's decision in *Vaden*—holding that courts may "look through" a petition to compel arbitration under § 4 of the Federal Arbitration Act to the underlying claims in the arbitration in determining whether federal question jurisdiction exists—should apply with equal force to petitions to confirm, vacate, or modify arbitration awards under §§ 9–11 of the Act. As such, there is a need for further deliberation and analysis at the circuit court level before this Court resolves the conflict.

Second, review will not alter the result reached below and would amount to an advisory opinion by this Court because the action to vacate, whether reviewed by a state or federal court, must inevitably be dismissed based on multiple procedural and substantive grounds. For example, there is a parallel suit currently pending in which the arbitration award has already been confirmed by the same district judge, which will not be undone regardless of what action is taken in response to the Writ.

Third, review would undermine the district court's continuing jurisdiction and could lead to conflicting rulings between the district court's final judgment confirming the award and a state court's consideration of the vacatur request if this case is remanded.

Accordingly, intervention by this Court would be premature, moot, and inappropriate given the nature of the legal issue presented, along with distinct factual and procedural intricacies of the case that make it an extremely poor vehicle for review.

STATEMENT OF THE CASE

A. Statutory Background

The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1, *et seq.*, was passed by Congress as a remedy for a general "judicial indisposition to arbitration[,]" *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 581 (2008), for the purpose of establishing "a national policy favoring arbitration[.]" *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

The FAA declares all arbitration agreements in contracts "involving commerce" as "valid, irrevocable, and enforceable," 9 U.S.C. § 2, establishing a judicial policy toward enforcement of such agreements that "is equally binding on state and federal courts." *Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009). The Act "bestows no federal jurisdiction" over private arbitration agreements, but instead authorizes federal courts to order arbitration as a remedy when there is otherwise "an independent jurisdictional basis over the parties' dispute." *Vaden*, 556 U.S. at 59 (quotations and alterations omitted).

Vaden establishes that while the "well-pleaded complaint rule" normally authorizes the exercise of federal-question jurisdiction only where the federal question is raised on the face of the initial pleading, *see, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908), § 4 of the Act provides an exception allowing a federal court to adjudicate a dispute over enforcement of an arbitration agreement when the substantive matter to be arbitrated involves a federal question. In other words, "a federal court should determine its jurisdiction by 'looking through

the petition to the parties' underlying controversy." *Vaden*, 556 U.S. at 62. If "looking through" a petition to compel arbitration to examine the claims in the underlying arbitration demonstrates that the dispute itself could have been brought in federal court, then federal jurisdiction lies under 28 U.S.C. § 1331. *Id.*

In addition to federal courts' remedial powers to compel arbitration under FAA § 4, federal courts also maintain the right to review the arbitrator's decision and, for specified reasons set forth in the Act, to confirm, vacate, or modify the award under §§ 9–11 of the Act. *See Hall St.*, 552 U.S. at 588. Similar to a FAA § 4 petition to compel arbitration, a petition to confirm, vacate, or modify an award requires an independent jurisdictional basis before the court may exercise such powers. *See Vaden*, 556 U.S. at 59.

Circuit courts have diverged on the issue of whether federal courts may "look through" a petition to confirm, vacate or modify an arbitral award and examine whether the underlying arbitration claims involve substantial questions of federal law conferring jurisdiction under 28 U.S.C. § 1331. Four circuits—including the First, Second, Fourth, and Fifth (from which this case arises)—have extended *Vaden* and held that federal questions in an underlying arbitration that would otherwise satisfy the "substantiality" test are sufficient to vest federal courts with jurisdiction over an action to vacate or modify, regardless of whether such federal question is actually stated on the face of the petition. Only the Third and Seventh Circuits have held that the look-through analysis should not extend to petitions to vacate or confirm, and both have done so based on an

overly restrictive interpretation of the language of FAA § 4 versus that of §§ 9–10.

B. Factual Background

Petitioner is a licensed financial advisor and a registered member of the Financial Industry Regulatory Authority (FINRA) who worked for Walters, Meyer, Trosclair & Associates ("WMTA"), a financial advising group operated by Respondents, from January 6, 2014 until her termination on July 26, 2016.[1] Pet'r's App. 2a; *Badgerow v. REJ Props., Inc.*, 383 F. Supp. 3d 648, 651–52 (E.D. La. 2019). Respondents are likewise licensed financial advisors and, during Petitioner's employment, operated as franchisees of Ameriprise Financial Services, Inc. ("Ameriprise") working together under the practice name WMTA in order to market their services as a team. *Id.* Two of the Respondents, Gregory Walters and Thomas Meyer, also owned and operated REJ Properties, Inc. ("REJ"), an entity that employed Petitioner and paid her compensation, as well as the other operating expenses of WMTA. *Id.* at 652.

Petitioner signed two employment agreements, one upon hiring and the second after she became licensed as an Associate Financial Advisor ("AFA") in March 2014. Pet'r's App. 3a; ROA.19-30766.195–196, 151–166. Both agreements included provisions

[1] Petitioner was terminated from WMTA in July 2016 based on a pattern of behavior that demonstrated to Respondents that her personality was not compatible with other employees of the practice group and that the controversies she instigated were causing distraction in the workplace and fostering a less-functional work environment. *Badgerow*, 383 F. Supp. 3d at 656, 659–60.

requiring arbitration of any claim against Ameriprise or Respondents arising out of her employment, and stating that any arbitration would be conducted pursuant to the FAA. Pet'r's App. 3a; ROA.19-30766.157–158, 165. Petitioner also signed a standard form known as a "U4" required by FINRA before a licensed advisor can conduct business in a specific jurisdiction, which further required arbitration of any dispute between her and her firm. ROA.19-30766.223–237.

C. Procedural Background

In October 2016, Petitioner commenced an arbitration proceeding against Respondents and Ameriprise through FINRA. Pet'r's App. 3a; ROA.19-30766.1534–1542. Petitioner alleged, *inter alia*, that Respondents violated bookkeeping and other requirements of the Securities and Exchange Act of 1934 ("Exchange Act"), SEC regulations and FINRA rules, breached and/or contractually interfered with the terms of her employment agreement with WMTA, and terminated her in violation of the Louisiana Whistleblower Protection Act (LWPA), La. Rev. Stat. § 23:967, and the Louisiana Unfair Trade Practices Act (LUTPA), La. Rev. Stat. § 15:1401, *et seq.* Pet'r's App. 3a; ROA 1534–1542.

In September 2017, while the FINRA arbitration was pending, Petitioner filed suit in the Eastern District of Louisiana against REJ as her former employer and Ameriprise as an alleged joint employer, in the matter *Badgerow v. REJ Properties, Inc. d/b/a Walters Meyer Trosclair & Associates, et al.,* E.D. La., Civ. No. 2:17-cv-09492 ("REJ Suit"). ROA 19.30584.23–36. In the REJ Suit, Petitioner brought

individual and class claims for discrimination, harassment, unequal pay, and retaliation under Title VII, the Equal Pay Act, and Louisiana employment statutes. ROA.19-30584.30–35.

Ameriprise moved, pursuant to FAA § 4, to compel arbitration of the joint employer claims and REJ moved to compel arbitration of the claims against it. ROA.19-30584.101–128, 160–184. On January 10, 2018, the district court granted Ameriprise's motion to compel arbitration but denied REJ's motion, finding that REJ was not a signatory to the arbitration agreements. As mandated by FAA § 3, the district court stayed the claims against Ameriprise in the REJ Suit pending the arbitration. Resp't's App. 1a–10a.

In December 2018, after a two-day arbitration hearing before a panel of three FINRA arbitrators that involved extensive presentation of witnesses and evidence, the FINRA arbitrators issued an award finding no violations of federal securities laws, no joint employer liability as to Ameriprise, and dismissing all of Petitioner's claims with prejudice. Pet'r's App. 3a, 12a; Resp't's App. 11a; ROA.19-30584. 128–137.

After the arbitration award was issued, Ameriprise moved to confirm the award in April 2019. ROA.19-30584.5507–5564. In May 2019, while Ameriprise's motion to confirm was pending in the REJ Suit, Petitioner filed a separate action in Louisiana state court for Orleans Parish against Respondents, seeking to vacate the arbitration award based on her unsupported claim that the award was procured through fraud or undue means. Pet'r's App. 13a; ROA.19-30766.21–42. In a blatant attempt to avoid removal to federal court, Petitioner artfully pleaded her state-court action to vacate in order to

reference only the Louisiana arbitration statute, rather than the FAA, and she alleged fraud solely in connection with her state law whistleblower claim under the LWPA. Pet'r's App. 15a–16a.

Respondents removed the state court action to the Eastern District of Louisiana in May 2019 based on federal question jurisdiction, citing the multiple, significant issues of federal securities law that formed the bases of Petitioner's whistleblower claim that was heard in the arbitration, as well as her securities-based fraud allegations on the face of the state court pleadings. ROA.19-30766.7–19. The suit was transferred to the same district judge presiding over the REJ Suit as a related case.[2] Respondents filed a motion to confirm the arbitration award, and Petitioner moved to remand the case to state court, arguing that the district court lacked subject matter jurisdiction. ROA.19-30766.193–200, 1195–1224.

On June 12, 2019, the district court granted Ameriprise's motion to confirm the arbitration award in the REJ Suit and held that "[t]he arbitration award is confirmed as to all parties to that proceeding" in accordance with the dictates of FAA § 9. ROA.19-30584.5851. This significant ruling is conspicuously absent from Petitioner's recitation of the factual background, and instead the existence of the REJ Suit

[2] Petitioner also filed a separate Louisiana state court suit in Lafourche Parish against Respondents, alleging the same claims dismissed in the FINRA arbitration. Pet'r's App. 13a. That court dismissed those claims with prejudice as *res judicata*, which ruling is currently on appeal to the Louisiana First Circuit Court of Appeal. That separate state action is styled *Denise Badgerow v. REJ Properties, Inc., et al.,* 17th Jud. Dist. Ct., Docket No. C-128185; La. App. 1 Cir., Docket No. 138,185.

is merely noted in the "related proceedings" section of the Writ.

On June 26, 2019, the district judge denied Petitioner's motion to remand, dismissed her action to vacate the arbitration award with prejudice, and granted Respondents' motion to confirm the award. ROA.19-30766.1457–1462. The district court held that under *Vaden*'s look-through analysis—which at the time had not been extended by the Fifth Circuit for §§ 9–11 petitions, as the district judge noted in his ruling—federal question jurisdiction existed based on the federal employment claims discussed in the arbitration award.[3] ROA.19-30766.1459–1461.

As a result, the district court held that federal claims were manifest in the underlying arbitration, that those federal claims were included in the award, and thus, her attempts to artfully plead around federal jurisdiction were unavailing under *Vaden*. Pet'r's App. 15a–16a. The district judge reiterated his previous ruling, in confirming the arbitration award in favor of Ameriprise, that there was no factual support for Petitioner's claim that the award was procured by fraud or undue means and that her arguments on this point were "legally frivolous" and

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[3] In 2012, the Fifth Circuit first formally applied the *Vaden* look-through analysis to a motion to compel arbitration under FAA § 4. *See Volvo Trucks North America, Inc. v. Crescent Ford Truck Sales, Inc.*, 666 F.3d 932 (5th Cir. 2012). There, the Fifth Circuit held that in determining whether federal jurisdiction exists over a petition to compel arbitration, "the district court must look to the 'actual 'controversy between the parties,' as they have framed it." *Id.* (citing *Vaden*, 129 S. Ct at 1275). Notably, the court further held that "[t]he relevant question is whether the whole controversy between the parties—not just a piece broken off from the that controversy—is one over which federal courts would have jurisdiction." *Id.* (citing *Vaden*, 129 S. Ct. at 1276).

"utterly absurd." Pet'r's App. 13a; Resp't's App. 14a. In September 2019, Petitioner noticed her appeal of that decision to the Fifth Circuit, yet she appealed only the district court's jurisdiction over the removed action to vacate and not the dismissal on the merits of her vacatur request or the confirmation of the arbitration award. Pet'r's App. 2a, 4a.

In an opinion issued on September 25, 2020, a three-judge panel of the Fifth Circuit unanimously affirmed the district court's ruling and held that the decision to apply the look-through analysis was proper, relying on *Quezada v. Bechtel OG & C Construction Services, Inc.*, 946 F.3d 837, 843 (5th Cir. 2020), in which the Fifth Circuit had recently joined the First, Second, and Fourth Circuits in extending *Vaden*'s rationale to petitions to confirm, vacate or modify arbitration awards brought under FAA §§ 9–11.[4] Pet'r's App. 1a–10a. The Fifth Circuit further held that Petitioner's joint employer claim against Ameriprise was based on federal employment laws, which conferred federal-question jurisdiction over her action to vacate the award and supplemental jurisdiction over all of her related state-law claims. Pet'r's App. 9a–10a. Finally, the Fifth Circuit determined that as Petitioner only challenged the district court's subject matter jurisdiction and not the merits of the order denying vacatur, confirming the award, and dismissing Petitioner's claims with

[4] Despite Petitioner's reliance on a brief dissent by Judge James Ho in *Quezada*—notably, there was no dissent in the Fifth Circuit's ruling below—Judge Ho's dissent merely adopted the minority view of the Third and Seventh Circuits that FAA § 4 petitions should be treated differently for jurisdictional purposes than petitions under §§ 9–11, which arguments were cogently analyzed and rejected by the majority in *Quezada*.

prejudice, the district court's judgment was affirmed in all respects. Pet'r's App. 10a.

SUMMARY OF THE ARGUMENT

The Writ should be denied because this suit is not the proper vehicle for resolution of the current circuit split on the issue of application of *Vaden*'s look-through analysis to motions to vacate, modify, or confirm arbitration awards under the FAA. This is true for three reasons.

1. The issue raised in the Writ has not been subject to sufficient analysis and opinion at the circuit court level. Only six of the twelve circuits and a small collection of federal district courts have ruled on the propriety of extending *Vaden*—which expressly applies to motions to compel under FAA § 4—to motions to confirm, vacate, or modify under §§ 9–11 of the FAA. This Court previously denied review of this exact question in *Goldman v. Citigroup Global Markets Inc.*, 834 F.3d 242 (3d Cir. 2016). Since *Goldman*, the only three circuit courts to consider this as an issue of first impression have sided with the decision below. *See Quezada*, 946 F.3d 837; *Ortiz-Espinosa v. BBVA Securities of Puerto Rico*, 852 F.3d 36 (1st Cir. 2017); *McCormick v. America Online, Inc.*, 909 F.3d 677 (4th Cir. 2018). In light of this trend—which currently yields a four-to-two circuit split of post-*Vaden* decisions in favor of applying look-through to petitions to confirm, vacate or modify—further percolation is warranted to see whether the conflict resolves itself without this Court's intervention.

2. Resolution of the issues posed in the Writ would not be outcome-determinative on the question of whether the district court properly exercised federal question jurisdiction over this suit. Regardless of whether this Court decides the propriety of "looking through" Petitioner's state-court action to her claims in the underlying arbitration, there are substantial issues of federal law present on the face of the award that was attached to and formed part of the state court pleadings. Thus, even under a facial analysis of the four corners of the pleadings, there are federal questions supporting the district court's jurisdiction.

Moreover, the district court has twice confirmed the arbitration award—first in the REJ Suit and second in the proceedings below—and the former ruling would operate as a bar to relitigation of Petitioner's vacatur petition, even if this Court were to reverse and hold that the look-through analysis should not have been applied by the lower courts in determining whether there was federal jurisdiction over this case.

The district court held that Petitioner's sole argument for vacatur—her allegation that the award was procured through fraud or undue means—was frivolous and factually baseless. That determination was made both in the suit below and in the REJ Suit, where the district court's jurisdiction was never challenged and the confirmation of the award never appealed. Consequently, the confirmation of the award is final and bars relitigation on the issue of fraud, making this case a poor vehicle for review since reversal would not alter the district court's confirmation of the award and rejection of Petitioner's fraud and undue means allegations in her action to

vacate, and thus would amount to an advisory opinion by this Court.

3. There are also distinct policy reasons why the Writ should be denied based on the predicate facts of the proceedings below. Petitioner originally brought her federal employment claims in federal court in the REJ Suit—before the same district court and judge—and the district court ordered arbitration of her Title VII and EPA joint employer claims upon the motion of Ameriprise. Pursuant to FAA § 3, the suit was stayed as to the claims against Ameriprise pending the outcome of the arbitration. Because the district court compelled arbitration of the federal employment law claims, it had continuing jurisdiction over any post-award relief emanating from the arbitration, including authority to confirm, vacate or modify the award. *See Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000) (citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932)); *McCormick*, 909 F.3d 677; *Ortiz-Espinosa*, 852 F.3d 36l; *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 382 (2d Cir. 2016); *American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 714 (5th Cir. 2002) (Dennis, J., concurring).

After the arbitration panel dismissed all of Petitioner's claims, instead of moving to vacate the award before the district court that had ordered the joint employer claims to arbitration and before which a motion to confirm the award was pending, Petitioner filed an action in state court seeking to vacate the arbitration award. As exhibited by the proceedings below, Petitioner attempted to divest the district court's authority to adjudicate federal law claims that were originally brought there and compelled to arbitration, simply because Petitioner disagreed with

the decisions reached by the FINRA arbitration panel in dismissing her claims and the district court in confirming the award.

Through the Writ, Petitioner seeks to remediate her failures to appeal the merits of the district court's two rulings confirming the arbitration award in the REJ Suit and in the proceedings below. Petitioner's legal gamesmanship and forum shopping intended to overturn the well-reasoned rulings of the arbitration panel in dismissing her claims against Respondents, and of the district court in rejecting her vacatur arguments and confirming the arbitration award, should not be rewarded.

Additionally, if this Court were to reverse and find a lack of subject matter jurisdiction, the action to vacate would be remanded to state court, thus fostering a collateral attack on a final federal court judgment confirming the award and finding no valid ground for vacatur in the REJ Suit. Alternatively, even if the state court agreed that it was bound by the *res judicata* effect of the district court's judgment, all that would be accomplished by this Court's reversal would be further protracted proceedings in state court leading to an identical result of dismissal of the action to vacate. Reversal would also lead to further protracted litigation in federal and state court, as Respondents would be forced to move the district court in the REJ Suit to enjoin the state proceedings under 28 U.S.C. § 2283 to prevent relitigation of matters addressed by its final judgment confirming the award. The Writ should be denied in order to avoid contributing to the existing legal and procedural quagmire that Petitioner has continued to perpetuate in multiple fora.

REASONS FOR DENYING THE PETITION

A. Review is premature as to whether the look-through analysis applies to petitions to confirm, vacate, or modify an arbitration award

In *Vaden*, this Court held that federal question jurisdiction under 28 U.S.C. § 1331 exists over a motion to compel arbitration under FAA § 4 where "the entire, actual controversy between the parties, as they have framed it, could be litigated in federal court." *Vaden*, 556 U.S. at 66. Thus, federal courts have subject matter jurisdiction over a motion to compel arbitration when it states a claim "arising under" federal law—which has been interpreted broadly to encompass "all cases in which a federal question is 'an ingredient' of the action." *See Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (additional citation omitted).

After *Vaden*, a majority of the circuits have concluded that the look-through analysis should be extended to motions to confirm, vacate, or modify arbitration awards under FAA §§ 9–11. *See Quezada v. Bechtel OG & C Constr. Servs., Inc.*, 946 F.3d 837, 843 (5th Cir. 2020) (applying look-through analysis to cross motions to confirm and vacate arbitration award); *Landau v. Eisenberg*, 922 F.3d 495, 498 (2d Cir. 2019) (motion to confirm); *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 682 (4th Cir. 2018) (motion to vacate or modify); *Ortiz-Espinosa v. BBVA Sec. of Puerto Rico, Inc.,* 852 F.3d 36, 47 (1st Cir. 2017) (motion to vacate or modify); *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 382 (2d Cir. 2016) (motion to vacate or modify).

In *Doscher,* as in the case *sub juris*, the underlying arbitration included claims under the Exchange Act and SEC rules. *Doscher*, 832 F.3d at 380–81 (*quoting Vaden*, 556 U.S. at 65). The Second Circuit extended *Vaden* based on the federal interest in maintaining a consistent jurisdictional framework across different statutory provisions and avoiding the "curious practical consequences" of permitting a federal court's jurisdiction over an action to vacate or modify an arbitration award only where a federal question is presented on the face of the pleadings. *Id.*

After holding that the look-through analysis applied to the motion to vacate at issue, the Second Circuit remanded the case to the district court. *Id.* On remand, the trial court exercised federal question jurisdiction and denied the motion to vacate or modify. *Doscher v. Sea Port Grp. Sec., LLC*, No. 15-CV-384, 2017 WL 6061653, at *6 (S.D.N.Y. Dec. 6, 2017), *aff'd,* 752 F. App'x 102 (2d Cir. 2019). The Second Circuit then affirmed the trial court's decision on February 12, 2019. *Doscher v. Sea Port Grp. Sec., LLC*, 752 F. App'x 102, 103 (2d Cir. 2019).[5]

In *Ortiz-Espinosa*, the First Circuit considered a motion to vacate or modify a FINRA arbitration award that had dismissed claims arising under § 10(b) of the Exchange Act, SEC Rule 10b-5, and Puerto Rico securities laws. *Ortiz-Espinosa*, 852 F.3d at 40. The First Circuit utilized the look-through approach to examine the claims in the arbitration and concluded

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[5] In a 2019 decision, the Second Circuit further extended *Vaden*'s look-through analysis to a motion to confirm an arbitration award and found that the federal trademark claims in the underlying arbitration conferred federal question jurisdiction to rule on the motion to confirm. *Landau*, 922 F.3d at 498.

that "there is no question that claimants' claims involving federal securities laws arise under federal law." *Id.* at 47.

While acknowledging the earlier rulings of the Seventh Circuit in *Magruder v. Fidelity Brokerage Services, LLC*, 818 F.3d 285 (7th Cir. 2016) and the Third Circuit in *Goldman v. Citigroup Global Markets, Inc.*, 834 F.3d 242 (3d Cir. 2016), both of which held that look-through does not apply to petitions to confirm or vacate, the court in *Ortiz-Espinosa* concluded that the slight differences in the text of FAA § 4 and §§ 9–11 were not a sufficient basis to interpret the statutes differently. *Id.* at 45. The textual variation arises from the presence of the phrase "save for such [arbitration] agreement" in § 4, which is not replicated in §§ 9-11. In rejecting the analyses of *Magruder* and *Goldman*, the court cited this Court's holding in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016), which construed "completely different language" in § 27 of the Exchange Act and 28 U.S.C. § 1331 to have identical meanings for purposes of establishing federal jurisdiction. *Id.* at 45.

Further, the First Circuit noted that Congress clearly intended federal jurisdiction over motions to confirm, vacate, or modify because Congress added these post-award remedies to the statutory text of the FAA. *Ortiz-Espinosa*, 852 F.3d at 46. Finally, the First Circuit found that its ruling fostered a "unitary jurisdictional approach to the FAA" and comported with *Vaden*'s focus on avoiding inconsistent jurisdictional decisions, which would surely result if a federal court were to hear a motion to compel arbitration but subsequent motions to confirm, vacate

or modify the award were required to be brought in state court. *Id.* at 47.

Following *Ortiz-Espinosa*, the Fourth Circuit also extended *Vaden*'s look-through analysis to a motion to vacate an arbitration award in *McCormick v. Am. Online, Inc.*, 909 F.3d 677, 682 (4th Cir. 2018), holding that this result supported the policy goals of the FAA and the overriding judicial interest in avoiding inconsistencies in litigation: "[a]pplying the 'look through' approach to § 4 but not to § 10 or § 11 would create just such a tension by subjecting the Act's pre-award and post-award remedies to different jurisdictional inquiries, potentially by different courts, during different stages of the same arbitration." *See McCormick*, 909 F.3d at 684. As a result, the Fourth Circuit held that the pre-award and post-award provisions of the FAA should be interpreted consistently in order to give proper effect to the statute and promote its purpose of favoring arbitration. *Id.* Applying the look-through analysis, the Fourth Circuit determined that the arbitration claims arose under the Stored Communications Act, clearly requiring resort to federal law and vesting the court with federal question jurisdiction. *Id.*

Only two circuit courts have declined to extend the look-through analysis to petitions under FAA §§ 9–11, and both did so based on an overly textual reading of the Act and *Vaden.*[6] *See Magruder,* 818 F.3d at 288;

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[6] Petitioner refers to two additional circuit decisions in support of the minority view, *see Luong v. Circuit City Stores, Inc.*, 368 F.3d 1109 (9th Cir. 2004) and *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243 (D.C. Cir. 1999), but as these cases were issued prior to this Court's ruling in *Vaden*, their holdings have arguably been abrogated, have little weight on the issue, and have not been addressed in depth in any of the cited post-

Goldman, 834 F.3d at 254. As the Fourth Circuit stated in *McCormick*:

> While some courts have reasoned that the FAA's policy of enforcing valid agreements to arbitrate suggests that the federal interest in compelling arbitration under § 4 is greater than the federal interest in confirming, vacating, or modifying awards under §§ 9–11 . . . we do not agree. The issues addressed by § 4 and §§ 9–11 are completely intertwined in carrying out Congress's decision to provide a set of federal rules governing the arbitration process. Privileging § 4 petitions over § 10 and § 11 motions for jurisdictional purposes thus reflects too narrow a view of the FAA's comprehensive role with respect to arbitration.

McCormick, 909 F.3d at 683–84.

Most recently, in *Quezada v. Bechtel OG & C Construction Services, Inc.*, 946 F.3d 837 (5th Cir. 2020), the Fifth Circuit followed the First, Second, and Fourth Circuits' majority view that look-through should be applied with equal force to petitions to compel under § 4 and to petitions to confirm, vacate, or modify under §§ 9–11, and expressly rejected the minority view that the text of the FAA prescribes a different result. The Fifth Circuit opined that while the "save for such [arbitration] agreement" language

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Vaden decisions. Most significantly, these circuits have not reaffirmed their pre-*Vaden* rulings, and thus *Luong* and *Kasap* are not properly part of the post-*Vaden* circuit split on the look-through issue.

is absent from FAA §§ 9–11, this does not compel a contrary interpretation because the FAA is to be interpreted as "a single, comprehensive statutory scheme" and "this principle of uniformity dictates using the same approach for determining jurisdiction under each section of the statute." *Id.* at 842 (quoting *Commercial Metals Co. v. Balfour, Guthrie, & Co., Ltd.*, 577 F.2d 264, 268–69 (5th Cir. 1978). Further, the Fifth Circuit noted that the rule that the FAA neither provides an independent basis for federal jurisdiction, nor does it expand existing grounds for jurisdiction, further militates against the minority view restricting the use of look-through to petitions to compel arbitration. *Id.* at 842–43.

Echoing the Second Circuit's analysis from *Doscher*, the Fifth Circuit opined that the minority view conflicts with traditional uniform interpretation and non-expansion principles under the FAA by providing for a different, more expansive view of federal court jurisdiction under § 4 versus other provisions of the Act. *Id.* at 843. The Fifth Circuit thus concluded that "the Supreme Court's guidance in *Vaden* and the background principles animating its jurisdictional analysis under the FAA require the use of the same look-through approach for post-award motions as those brought pre-award under section 4." *Id.* at 842.[7]

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[7] In dissent in *Quezada*, Judge Ho recited the same hyper-textual justifications from the Third and Seventh Circuit rulings for limiting federal jurisdiction over motions to confirm, vacate, or modify, arguing that look-through should not apply to such motions due to the missing "save for" language that is present in FAA § 4. *Id.* at 846. He dismissed out-of-hand the majority's concern that his narrow reading of §§ 9–11 could create a "perverse incentive for cautious practitioners to first file in

This limited jurisprudence simply has not provided sufficient opportunity for judicial development and divergence on the issue presented in the Writ to create an entrenched split among the circuits meriting this Court's intervention and review.[8] Only half of the circuits have weighed in on whether *Vaden* should be extended to petitions to confirm, vacate, or modify arbitration awards, and further percolation and deliberation is needed to ascertain whether this issue is worthy of this Court's review or if the split will naturally resolve itself.

Notably, in the past four years the First, Fourth and Fifth Circuits have adopted the rationale of the Second Circuit in *Doscher* to form the current majority viewpoint, while no circuit has taken the alternative position since the 2016 decisions in *Goldman* and *Magruder* from the Third and Seventh Circuits, respectively.[9] If the present trend continues,

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federal court and be referred or compelled to arbitration, all for the sole purpose of preserving federal jurisdiction to later review the award." *Id.* at 843 (citing *Doscher*, 832 F.3d at 387).

[8] To this point, the Eleventh Circuit has not issued any post-*Vaden* decision addressing whether look-through should be applied to petitions to confirm, vacate or modify arbitration awards under the FAA. Yet, two years prior to *Vaden*, that court "approved the 'look through' approach as advanced in Circuit precedent" but the judge authoring the unanimous opinion stated in a special concurrence that "were he writing on a clean slate, he would reject the 'look through' approach." *See Vaden*, 556 U.S. at 57 n.6 (citing *Community State Bank v. Strong*, 485 F.3d 597 (605–06 (11th Cir. 2007)). The lack of definition and certainty on the look-through question, even within individual circuits, demonstrates that this issue is not ripe for review.

[9] The Third Circuit in *Goldman* summarily rejected an earlier Third Circuit decision that actually utilized the look-through analysis to find federal question jurisdiction over a petition to vacate under FAA § 10. *See Goldman*, 834 F.3d at 251 (citing

any split among the circuits may be eradicated as more jurists come to agree with the well-reasoned majority rule established in *Doscher*, *Ortiz-Espinosa, McCormick*, and *Quezada*. Thus, review by this Court is premature.

Review is further unwarranted because the question presented will not meaningfully impact how petitions to compel, vacate or modify arbitration awards are adjudicated in future cases. The question of whether *Vaden* applies to this type of case affects only which courts—state or federal—may hear petitions to confirm, vacate or modify an arbitration award based on the existence of substantial federal questions in the underlying arbitration.

Regardless of whether look-through applies, state courts generally apply the same substantive review standards that apply in federal court under the FAA, with most states (including Louisiana) having adopted some version of the Uniform Arbitration Act, which prescribes standards for vacatur identical to those set forth in § 10. As a result, resolving the question presented here would have little or no practical significance, as the Fifth Circuit itself noted below: "[E]ven if the Louisiana Arbitration Law were to apply, 'Louisiana courts look to federal law in interpreting the Louisiana Arbitration Law because it is virtually identical to the [FAA.]' *Chevron Phillips Chem. Co., LP v. Sulzer Chemtech USA, Inc.*, 831 So. 2d 474, 476 (La. App. 2002)." Pet'r's App. 10a.

Goldman, Sachs & Co. v. Athena Venture Partners, LP, 803 F.3d 144, 147 n.5 (3d Cir. 2015)). It is quite possible that as the issue continues to percolate—as it should—the Third Circuit may reverse itself again and join the post-*Vaden* majority extending look-through to FAA §§ 9–11 petitions.

B. Review will not be outcome-determinative as dismissal of the action to vacate is inevitable

Irrespective of any circuit split on the issue of look-through, there are clear and unavoidable defects in Petitioner's arguments, from both substantive and procedural perspectives, that make this case an exceedingly poor candidate for certiorari.[10]

First, regardless of whether look-through applies, Petitioner's state court pleadings *on their face* raise multiple substantial questions of federal law that create jurisdiction under 28 U.S.C. § 1331. As the district court and Fifth Circuit held, Petitioner's joint employer claim against Ameriprise required the application and interpretation of federal employment laws, including Title VII and the EPA. ROA.19-30766.1457–1462. While the district court analyzed this claim under the rubric of looking through Petitioner's state court action, Respondents posited in their briefing at the district court and appellate levels that the arbitration award was attached to and incorporated into Petitioner's state court petition, and therefore those same federal questions were present on the face of the pleadings. ROA.19-30766.985–992.

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[10] In addition to the substantive flaws discussed in this section, review is unnecessary since it will not alter the district judge's determination in his June 12, 2019 order in the REJ Suit that the action to vacate the arbitration award was facially untimely under FAA § 12 since it was not filed and served within three months after the award was issued by the FINRA arbitrators. Resp't's App. 16a. Petitioner did not appeal this determination and it is therefore final. Given Petitioner's failure to file within the deadline under the FAA, it is highly unlikely any state court would consider the merits of her untimely petition, even if it was determined that the district court lacked subject matter jurisdiction.

Second, Petitioner's sole argument for vacatur of the arbitration award—that it was procured through fraud or undue means because Respondents allegedly falsely represented to the FINRA panel that their method of compensating AFAs through a non-broker-dealer entity complied with the Exchange Act and FINRA Rule 2040—is present on the face of the state-court action and does not require resort to a look-through approach. ROA.19-30766.21–41.

Third, the action to vacate, while artfully pleaded, necessarily relies on an interpretation and application of federal securities laws. Petitioner alleged that Respondents committed fraud with regard to Petitioner's state-law whistleblower claim in the arbitration. Resp't's App. 15a; ROA.19-30766.33–37. Specifically, she claimed that Respondents violated § 15 of the Exchange Act, SEC Rule 17a-3, and FINRA Rule 2040 governing payments by registered members of FINRA to unregistered persons or entities. ROA.19-30766.24–25. She also argued that Respondents violated record-keeping requirements under § 17 of the Exchange Act because she had no written employment agreement. ROA.19-30766.25–27. The FINRA panel of arbitrators addressed these alleged violations in its award and obviously analyzed and considered the requirements of these federal securities laws in reaching their decision. ROA.19-30766.129–132.

The claimed violations of FINRA Rule 2040 and SEC Rule 17a-3 (17 C.F.R. § 240.17a-3)—both of which were integral to Petitioner's whistleblower claim and, by extension, her fraud allegation in the action to vacate—derive directly from the Exchange Act's provisions regarding the manner in which

broker-dealers pay commissions and maintain records. *See Dervan v. Gordian Grp. LLC*, No. 16-CV-1694, 2017 WL 819494, at *9 (S.D.N.Y. Feb. 28, 2017) ("Whether a payment to an unregistered individual runs afoul of FINRA Rule 2040 turns, by the plain terms of the Rule, on whether that individual, 'by reason of receipt of any such payment[ ] and the activities related thereto,' is 'required' to be 'registered as a broker-dealer under Section 15(a) of the Exchange Act.'" (*citing* FINRA Rule 2040; 15 U.S.C. § 78c(a)(4)(A), (5)(A)).

Numerous federal courts have held that §§ 15 and 17 of the Exchange Act and FINRA Rule 2040 constitute substantial questions of federal law supporting federal question jurisdiction. *See Turbeville v. Fin. Indus. Regulatory Auth.*, 874 F.3d 1268, 1275 (11th Cir. 2017) (holding that § 15 of the Exchange Act and FINRA rules constituted substantial federal questions meriting the exercise of federal question jurisdiction); *see also Citadel Sec., LLC v. Chicago Bd. Options Exch., Inc.*, 808 F.3d 694, 702 (7th Cir. 2015); *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 101 (2d Cir. 2001); *Sparta Surgical Corp. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998), *abrogated on other grounds by Merrill Lynch*, 136 S. Ct. 1562 (all finding federal subject matter jurisdiction of claims of failures to exercise duties established by the Exchange Act).

By alleging that Respondents fraudulently misrepresented the scope of their duties and responsibilities under federal securities laws to the arbitration panel, Petitioner turned those same federal laws into a necessary ingredient of her action to vacate and removed any doubt that her action to

vacate was both premised and dependent on interpretation of federal law.

This Court has held that in cases involving alleged violations of the Exchange Act, for purpose of determining federal question jurisdiction, courts must apply the traditional "arising under" to determine whether federal law is "an ingredient of the action." *Merrill Lynch*, 136 S. Ct. at 1570. In *Merrill Lynch*, this Court held that if "a state-law action necessarily depends on a showing that the defendant breached the Exchange Act, then that suit could also fall within § 27's compass" in reference to the provision of the Exchange Act vesting federal courts with exclusive jurisdiction over its provisions. *Id.* at 1569. The Court held that such a case, "even though asserting a state-created claim, is also 'brought to enforce' a duty created by the Exchange Act." *Id.*

Moreover, courts will pierce artfully pleaded petitions where the "resolution of the state law cause of action 'necessarily turn[s] on some construction of federal law.'" *See Harrison v. Christus St. Patrick Hosp.*, 432 F. Supp. 2d 648, 650–51 (W.D. La. 2006). In *Harrison*, the district court denied a motion to remand after holding that plaintiff's artful pleading to avoid removal by omitting references to federal healthcare laws that were required to resolve the state law claims amounted to forum manipulation. *Id.* at 651; *see also Merrill Lynch*, 136 S. Ct. at 1569 (finding federal question jurisdiction existed where "a state-law action necessarily depends on a showing that the defendant breached the Exchange Act[.]"); *Bobo v. Christus Health*, 359 F. Supp. 2d 552, 556 (E.D. Tex. 2005) (holding a state law claim necessarily raises a federal question supporting federal

jurisdiction if the "federal right or obligation, as incorporated within a state law claim or claims, is 'such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.'") (*quoting Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of Am., Div. No. 1127 v. S. Bus Lines*, 189 F.2d 219, 222 (5th Cir. 1951), and *Gully v. First Nat'l Bank*, 299 U.S. 109, 112 (1936)).

In exactly the same way, the Exchange Act provisions, SEC Regulations and FINRA rules cited in the action to vacate are an integral part of and underpin Petitioner's state law whistleblower claim that was the central focus of her action to vacate.[11] As in *Merrill Lynch*, Petitioner's allegations that Respondents violated the Exchange Act were the cornerstone of her claim for vacating the arbitration award and required interpretation and analysis of federal securities laws.

In *Turbeville*, the Eleventh Circuit held that the plaintiff's state law claims were rooted in federal securities law and affirmed the denial of a motion to remand the suit to state court, stating: "[B]ecause those rules and regulations are promulgated according to the Exchange Act's mandates, their interpretation unavoidably involves answering federal questions." *Id.* at 1275. The court further held that permitting state court jurisdiction over FINRA rules and the Exchange Act "would undercut the

[11] As the district judge aptly noted, Petitioner's reliance on the Louisiana arbitration statute and her attempt to limit her vacatur arguments to the state law whistleblower claim was nothing more than artful pleading in order to avoid removal. Pet'r's App. 15a–16a.

distinctly federal nature of the Exchange Act," and federal courts' "front-line role in enforcing federal securities laws[.]" *Id.* at 1277.

As the Fifth Circuit correctly held in its ruling below, the "look-through analysis here shows that Badgerow's claims against Ameriprise and the principals all arose from the same common nucleus of operative fact," including "her state law . . . whistleblower claims, the subject of her Louisiana motion to vacate." Pet'r's App. 9a.

A fitting illustration of this "common nucleus" rationale is that Petitioner's claims against Respondents resemble a Russian nesting doll, with her federal securities and employment claims in the center, surrounded by the state-law whistleblower claim alleged in the arbitration, further encased by the fraud claim raised in the action to vacate, which Petitioner argues is not subject to a federal court's jurisdiction. In order to assess the fraud claim, it is necessary to open the doll and determine whether the Respondents in fact violated federal securities laws or misrepresented their duties under those federal laws in the arbitration proceeding. It would be impossible for any court—state or federal—to adjudicate the action to vacate without analyzing the federal laws contained within.

C. Review is inappropriate as the district court had continuing jurisdiction over the action to vacate, despite Petitioner's forum shopping and attempts to relitigate dismissed claims

This Court previously held that "a court with the power to stay an action under [FAA] § 3 also has the power to confirm any ensuing arbitration award[.]"

Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co., 529 U.S. 193 (2000) (citing *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932)). The Court's earlier decision in *Marine Transit* went further: "We do not conceive it to be open to question that, where the court has authority under the statute . . . to make an order for arbitration, the court also has authority to confirm the award or to set it aside for irregularity, fraud, ultra vires, or other defect." *Marine Transit*, 284 U.S. at 275–76.

The Second Circuit in *Doscher* referred to this continuing jurisdiction concept in stating that the FAA requires a federal court to stay and not dismiss a case that is referred to arbitration, which thereafter confers "an independent jurisdictional basis sufficient to permit the federal court to entertain, for example, petitions under §§ 7 and 9–11." *Doscher*, 832 F.3d at 386 (*citing Vaden*, 556 U.S. at 65).

This rationale was also explicitly recognized by the Fourth Circuit in *McCormick*, where the court stated:

> [I]f the federal court has jurisdiction to compel the arbitration, it also has jurisdiction to compel the attendance of witnesses at the arbitration under § 7, despite the lack of any "save for" language in that section. And the same conclusion can be reached for jurisdiction over motions to review arbitration awards under §§ 10 and 11. There is no indication that Congress intended to allow a *federal* court to compel arbitration under § 4 on the basis that the underlying claim arose under federal law and then to require

> the parties to go to *state* court to review the arbitration's procedures or to enforce its awards.

McCormick, 909 F.3d at 682 (emphasis in original). Citing to this Court's decision in *Marine Transit Corp v. Drefus*, 284 U.S. 263, 275–76 (1932), the Fourth Circuit thus opined that "the court that has jurisdiction to compel arbitration under § 4 also has jurisdiction to supervise the arbitration procedures and to confirm, vacate, modify, and enforce the resulting arbitration award." *McCormick*, 909 F.3d at 683; *see also American Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 714 (5th Cir. 2002) (Dennis, J., concurring) ("It is not uncommon for district courts to compel arbitration but also retain jurisdiction pending the arbitration for the purpose of addressing any subsequent motions to confirm, modify, or vacate the award.") (additional citations omitted).[12]

After the district court compelled arbitration and stayed the litigation of the claims against Ameriprise in the REJ Suit until the conclusion of the arbitration pursuant to FAA § 3, the district court retained jurisdiction over the arbitration process, including any action to confirm, vacate or modify the award. The district court exercised this jurisdiction when it

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[12] Unlike here, none of the cases in the current circuit split on the look-through question emanated from a motion to compel arbitration under FAA § 4 followed by an action to confirm, vacate or modify the ensuing arbitration award. While several of the circuits opined that, in such a scenario, a federal court would maintain jurisdiction, that situation was not squarely before those courts. This is yet another significant distinction showing that this case is not appropriate for review.

granted Ameriprise's motion to confirm the award in the REJ Suit. Preserving a federal court's continuing jurisdiction is vital from a policy perspective since the district court had a firm understanding of the federal issues involved in the FINRA arbitration and was in the best position to exercise jurisdiction over any post-award motions.

While Ameriprise's motion to confirm was under consideration by the district court, Petitioner filed the untimely action to vacate the arbitration award in state court in circumvention of the district court's jurisdiction, and despite the obvious conflict this could create between state and federal courts. This was the same type of conscious "forum manipulation" exhibited in *Harrison*, 432 F. Supp. 2d at 651, intended by Petitioner to undercut the district court's jurisdiction over claims originally brought there and compelled by the district judge to arbitration. The district judge noted this in his ruling below in stating that "having obtained no relief in either the arbitration or in this Court, which was Badgerow's chosen forum in 2017 when she first filed suit, Badgerow moved to the state courts." Pet'r's App. 13a.

In its order confirming the arbitration award in the REJ Suit, the district court considered and rejected Petitioner's fraud claim, finding it to be entirely unfounded and primarily based on an irrelevant marketing proposal from a third-party vendor with no legal authority, any reliance on which was unreasonable as a matter of law. Resp't's App. 13a–15a. The district court thus rejected Petitioner's arguments and confirmed the arbitration award. Resp't's App. 16a. The district court's confirmation of the arbitration award and dismissal of the fraud claim

were not appealed to the Fifth Circuit. *See Badgerow*, 974 F.3d at 614. Thus, the confirmation of the award became and remains final.[13]

The Writ is nothing more than an effort to remediate Plaintiff's failures to appeal the confirmation of the arbitration award and rejection of her fraud claim in both this action and the REJ Suit. If avoiding forum shopping and manipulation of FAA procedure for post-award relief were not sufficient reasons to deny review, then there is also the palpable threat of conflicting state and federal rulings.

If remanded, the state court would be tasked with reviewing and ruling on a request to vacate the arbitration award despite the federal district court's previous confirmation of that same award in the REJ Suit. Since the arbitration award was confirmed by the district court in the REJ Suit and the ruling that Petitioner's fraud claim was legally frivolous is final, review by this Court would amount to an advisory opinion on jurisdiction with no effect on the ultimate disposition of the action to vacate. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 180 (2016) (explaining this Court's prohibition on advisory opinions: "[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in

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[13] Petitioner suggests that the FINRA arbitrators' award was "not binding" on or enforceable by Respondents because they were not individually named in the REJ Suit. *See* Writ at 9, n.2. This position entirely ignores that Respondents *were* parties to the arbitration in which the award was issued, which the district judge noted in his June 26, 2019 order, stating "[t]he arbitration award is confirmed as to all parties to that proceeding." Resp't's App. 16a.

issue in the case.") (quoting *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893)).

Remand would threaten to create a quagmire of conflicting state and federal decisions, precise concerns that *Vaden*, *Doscher* and *McCormick* advised against. Any further attempt to vacate the arbitration award would be in derogation of the district court's final judgment and would force Respondents to seek an injunction or other order enforcing the federal judgment. *See Aptim Corp. v. McCall*, 888 F.3d 129 (5th Cir. 2018) (the "relitigation exception" to federal Anti-Injunction Act "allows an injunction where state proceedings threaten to undermine a federal judgment having preclusive effect under the 'well-recognized concept' of collateral estoppel") (citing *Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 828 (5th Cir. 2006); *see also G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096 (9th Cir. 2003) (citing *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)). Such a collateral attack on a federal court's final judgment confirming the arbitration award, after the same court compelled the underlying claims to arbitration, should not be countenanced by this Court.

CONCLUSION

Even if this Court were to grant certiorari, it would not and could not affect the final judgment in the REJ Suit— where no jurisdictional challenge was raised— confirming the arbitration award and rejecting Petitioner's fraud claim. Regardless of the application of look-through, subject matter jurisdiction existed in this suit based on the federal questions on the face of the state court pleadings and the district court's continuing jurisdiction over post-award requests for relief. As such, review by this Court would be moot and a waste of judicial resources.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EVE B. MASINTER
Counsel of Record
E. FREDRICK PREIS, JR.
MATTHEW M. MCCLUER
BREAZEALE, SACHSE &
WILSON, L.L.P.
909 Poydras St., Ste. 1500
New Orleans, LA 70112
(504) 584-5468
eve.masinter@bswllp.com
efp@bswllp.com
matthew.mccluer@bswllp.com

March 24, 2021

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENISE A. BADGEROW	CIVIL ACTION
VERSUS	NO: 17-9492
REJ PROPERTIES, INC., ET AL.	SECTION: "A"(2)

ORDER AND REASONS

The following motions are before the Court: **Motion to Dismiss for Failure to State a Claim and to Compel Arbitration (Rec. Doc. 27)** filed by defendant Ameriprise Financial Services, Inc.; **Motion to Dismiss Class Claims and Motion to Compel Arbitration, Dismiss Action, and Strike Jury Demand (Rec. Doc. 26)** filed by defendant REJ Properties, Inc. d/b/a Walters, Meyer, Trosclair & Associates. Plaintiff Denise A. Badgerow opposes the motions. The motions, noticed for submission on December 13, 2017, are before the Court on the briefs without oral argument.[1]

I. Background

Plaintiff Denise Badgerow has filed this action against REJ Properties, Inc. d/b/a Walters, Meyer, Trosclair & Associates ("WMT") and Ameriprise Financial Services, Inc. WMT is domiciled in Lafourche Parish; Ameriprise's principal place of business is located in Minneapolis, Minnesota.

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[1] Defendants have requested oral argument but the Court is not persuaded that oral argument would be helpful.

Badgerow's complaint alleges eleven causes of action arising out of her employment with WMT.

Ameriprise is a registered broker dealer that offers financial products and services to customers through several models, including through a franchisee-based platform of independent advisors who own and operate their own businesses, as franchises. (Rec. Doc. 27-2, Odash decl. ¶ 3). The principals of WMT—Gregory Walters, Thomas Meyer, and Roy Trosclair—were independent franchise advisors for Ameriprise during the period of Badgerow's employment. (*Id.* ¶ 4). Ameriprise did not have a franchise agreement with REJ Properties, Inc. (*Id.* ¶ 5).[2]

After completing a 90-day probationary period with WMT, Badgerow was promoted to Associate Financial Advisor ("AFA") on January 1, 2014. (Rec. Doc. 1, Complaint § 12). Her work as an AFA was supervised by Gregory Walters, one of three directors at WMT. (*Id.* ¶ 12).

Badgerow contends that she had an oral agreement with WMT that she would receive a base salary of $30,000 per year plus commissions.

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[2] Ameriprise alludes to the rule that when considering a motion to dismiss, the district court generally must limit itself to the contents of the pleadings and the attachments thereto. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). The declaration of Karen Odash, Senior Manager—Legal Affairs for Ameriprise's parent entity, is not part of the pleadings and is neither referred to in the complaint nor central to Badgerow's claims. *See id.* at 499) (citing *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 249, 431 (7th Cir. 1993)). Plaintiff has not objected to any of the documents attached to either motion to dismiss. Nonetheless, the Court remains mindful when considering extraneous documents that discovery is not complete. Thus, the Court includes the foregoing information from Odash's declaration merely as helpful background information and not as established fact.

Badgerow was not provided a written compensation agreement. (*Id.* ¶ 14). Badgerow complains that WMT retroactively changed her compensation structure in October 2014 after she made a large commissioned sale. (*Id.* ¶ 15). Badgerow alleges that the new compensation structure was enforced only against her and not against similarly situated male employees. (*Id.* ¶ 17). She also alleges that she was earning quarterly bonuses that were half the amount of her male counterparts. (*Id.* ¶ 24).

Badgerow also alleges that she was subjected to constant office harassment after she declined to work as Walters' assistant. The harassment was instigated by Tommy Meyer, another director at WMT, and his team, including other females. (*Id.* ¶¶ 20-21). Even though Badgerow was promoted to the role of Financial Advisor ("FA"), Meyer determined that all FAs would keep the title of "associate" until they attained five years of service with WMT. (*Id.* ¶ 23). In December 2015, after complaining constantly to Walters, Badgerow was moved to a separate office to avoid any further distress to Meyer, segregating her from the rest of the WMT team and putting her in an office all by herself. (*Id.* ¶ 25).

On July 26, 2016, Walters terminated Badgerow after she refused to resign. (*Id.* ¶ 29). According to the Complaint, Walters fired Badgerow in retaliation for speaking with Marc Cohen, a compliance officer with Ameriprise.[3] (*Id.* ¶ 29).

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[3] The first element of a prima facie case of Title VII retaliation is that the employee engaged in activity protected by Title VII. *Porter v. Houma Terrebonne Housing Auth. Bd.*, 810 F.3d 940, 945 (5th Cir. 2015) (citing *Hernandez v. Yellow Trans., Inc.*, 670 F.3d 644, 657 (5th Cir. 2012)). The Court notes from reading Badgerow's FINRA Arbitration Statement of Claim that Cohen is not an EEO compliance officer but rather works for Ameriprise

Badgerow filed a Charge of Discrimination against WMT on September 8, 2016, claiming gender discrimination and retaliation. (Rec. Doc. 27-3 at 5). On October 6, 2016, she amended the charge to include class allegations. (*Id.* at 8). On June 27, 2017, the EEOC issued a dismissal and notice of rights (*Id.* at 13).

Badgerow filed the instant action and jury demand on September 22, 2017, against WMT and Ameriprise. Badgerow's Complaint, which ostensibly alleges eleven causes of action, asserts claims for violations of Title VII (gender-based hostile work environment and retaliation), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (disparate pay based on gender).[4] Badgerow's third cause of action is for

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as a compliance officer with respect to its Compliance Financial Manual. (Rec. Doc. 27-2 at 2). In fact, Badgerow alleges in her Complaint that Cohen had told her on several occasions that neither he nor Ameriprise could help her with respect to discrimination issues at WMT. (Complaint ¶ 27). In her Arbitration Statement Badgerow links her termination to reprisal based on her statements to Cohen about the payment source of her commissions. Retaliation on this basis is not actionable under Title VII because reporting non-compliance with Ameriprise's Financial Manual is not a protected Title VII activity. To the extent that Badgerow is alleging that she was fired in retaliation for reporting sexual discrimination to Cohen, the question of whether this activity is "protected activity" for purposes of Title VII is not currently before the Court.

[4] These claims are also asserted under state law, Louisiana's Employment Discrimination Law, La. R.S. § 23:301, *et seq.* Louisiana courts rely upon Title VII standards when addressing liability for LEDL claims, *see Plummer v. Marriott Corp.*, 654 So. 2d 843 (La. App. 4th Cir. 1995), but the Louisiana legislature chose to deviate from Title VII when defining the term "employer." The definition of an "employer" for purposes of an LEDL claim is far narrower than the Title VII definition. This Court has no doubt that Ameriprise will not satisfy the state law definition of "employer" because there are no allegations

disparate treatment based on gender and she purports to bring that claim on behalf of a class of similarly-situated females. For purposes of the foregoing discrimination claims, Badgerow alleges that WMT and Ameriprise were joint employers. Badgerow's eleventh cause of action is for breach of contract against WMT.[5]

WMT and Ameriprise now move separately to dismiss the case for failure to state a claim and to compel arbitration.

II. Discussion

The Court begins with Ameriprise's motion to compel arbitration.[6] The threshold determination that

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suggesting that Ameriprise received services from Badgerow or paid her compensation. *See* La. R.S. § 23:302(2); *Dejoie v. Medley*, 9 So. 3d 826 (La. 2009).

[5] Two other causes of action fail as a matter of law. First, Badgerow's eighth cause of action is for a federal civil rights conspiracy under 42 U.S.C. § 1985(3). This statute, which requires racial animus as an element, is inapplicable to Badgerow's gender-based discrimination claims.

Second, Badgerow's ninth cause of action is for conspiracy under state law pursuant to Louisiana Civil Code article 2324. Civil conspiracy is not an actionable claim under Louisiana law. *Crutcher-Tufts Res., Inc. v. Tufts*, 992 So. 2d 1091, 1094 (La. App. 4th Cir. 2008) (citing *Ross v. Conoco, Inc.*, 828 So. 2d 546 (La. 2002) (explaining that it is the tort that the conspirators agreed to perpetrate and which they actually commit that constitutes the actionable elements of the claim)). Article 2324 expressly pertains to intentional torts under Louisiana law. No state law intentional tort is alleged in this case.

[6] Ameriprise's preference is to have this Court dismiss all of Badgerow's claims pursuant to Rule 12(b)(6), and failing a dismissal of all claims, to compel arbitration as to any surviving claims. While it is perfectly acceptable to move for dismissal as an alternative to a motion to compel arbitration, Ameriprise cannot have it both ways without risking a waiver of its arbitration rights. In short, since Ameriprise has moved to

the Court must make is whether the parties entered into "any arbitration agreement at all." *Archer & White Sales, Inc. v. Henry Schein, Inc.*, No. 1641674, -- F.3d -- , 2017 WL 6523680 (5th Cir. Dec. 21, 2017) (quoting *Kubala v. Supreme Prod. Servs., Inc.*, 830 F.3d 199, 201 (5th Cir. 2016)). This inquiry is one of pure contract formation, and it looks only at whether the parties formed a valid agreement to arbitrate some set of claims. *Id.* (citing *IQ Prods. Co. v. WD-40 Co.*, 871 F.3d 344, 348 (5th Cir. 2017)).

It is beyond dispute that Badgerow and Ameriprise have an agreement to arbitrate. In fact, the record contains three agreements to arbitrate by Badgerow in favor of Ameriprise. The first is contained in a FINRA Form U4 that Badgerow executed in conjunction with her employment. (Rec. Doc. 27-2). Part 15A(5) of that document provides that Badgerow will arbitrate any dispute, claim, or controversy that may arise between her and her firm. The "firm" identified in the U4 is Ameriprise Financial Services, Inc.[7]

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compel arbitration without agreeing to waive arbitration as to any specific claims, this Court will not act on Ameriprise's merits-based arguments and instead leaves all of them for the arbitration.

[7] FINRA is "a quasi-governmental agency responsible for overseeing the securities brokerage industry." *McCune v. United States Sec. & Exch. Comm'n*, 672 F. App'x 865, 866 (10th Cir. 2016) (quoting *ACAP Fin., Inc. v. United States SEC*, 783 F.3d 763, 765 (10th Cir. 2015)). FINRA requires any person who works in the investment banking or securities business of a FINRA member firm to register as a securities representative (*e.g.,* a stockbroker) or principal, among other categories. *Mathis v. United States S.E.C.*, 671 F.3d 210, 211 (2nd Cir. 2012). To register, applicants must complete a Form U4, in which they provide detailed information about their personal, employment, disciplinary, and financial background. *Id.*

The second is contained in Part 9A of an AFG Registered Staff Agreement between Ameriprise and Badgerow. (Rec. Doc. 26-2 at 4). Pursuant to this arbitration provision, unless otherwise agreed to in writing by both parties, Badgerow agreed to arbitrate any claim that may arise between her and Ameriprise.

The third is contained in Part 9A of an Associate Financial Advisor Agreement between Ameriprise and Badgerow. (Rec. Doc. 26-3 at 5). Pursuant to this arbitration provision, unless otherwise agreed to in writing by both parties, Badgerow agreed to arbitrate any claim that may arise between her and Ameriprise.

The Court is persuaded that Badgerow's claims against Ameriprise must be arbitrated. Ameriprise's motion to compel arbitration is GRANTED in that all of Badgerow's claims against Ameriprise will be decided in the FINRA arbitration (and if not FINRA, AAA)[8] and shall be stayed in this Court.[9]

The Court now turns to WMT's motion which seeks various elements of relief from the Court—dismiss

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[8] The AFG Registered Staff Agreement and the Associate Financial Advisor Agreement both provide that claims not subject to FINRA arbitration will be subject to arbitration by the American Arbitration Association.

[9] Regarding the Form U4 arbitration clause, Badgerow points out that FINRA Rule 2263 requires that a written statement be provided when a person is asked to sign an amended Form U4, and that Ameriprise has not included in its exhibits any evidence that such a statement was given to Badgerow. Badgerow's argument in this vein is confusing for several reasons, the most obvious being that she does not suggest that the factual predicates necessary to trigger Rule 2263 were satisfied. And Badgerow cites no controlling authority for the proposition that she can escape the otherwise valid agreement to arbitrate based on FINRA Rule 2263.

Badgerow's class claims, strike Badgerow's jury demand, compel arbitration for individual claims—all based on the second and third arbitration agreements (the AFG Registered Staff Agreement and the Associate Financial Advisor Agreement) *between Badgerow and Ameriprise* referred to above when the court addressed Ameriprise's motion. In other words, unlike Ameriprise, WMT and Badgerow have not entered into an agreement to arbitrate their claims.

WMT makes two arguments that it has standing to enforce the Ameriprise arbitration agreements against Badgerow. First, WMT points out that Gregory Walters, one of its principals, signed the agreements. While Walters did sign the agreements, he did so in his capacity as "independent advisor," not as a principal of REJ Properties/WMT, the defendant entity that actually employed Badgerow. (Rec. Doc. 262, 26-3). According to Ameriprise, and this point is undisputed, it had no contractual relationship with an entity called REJ Properties much less WMT, which again is the defendant in this case.[10] Neither Walters nor any of the other WMT principals have suggested that they should have been sued personally as Badgerow's employer. Nonetheless, the Ameriprise agreements that contain the arbitration clauses could not be clearer in that the only two parties to those agreements are Badgerow and Ameriprise. Neither Walters nor REJ Properties nor WMT are parties to those agreements.

Second, WMT argues that it was a third-party beneficiary of the AFG Registered Staff Agreement and the Associate Financial Advisor Agreement, again

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[10] WMT attached a copy of the franchise agreement with American Express Financial Advisors, Inc., presumably Ameriprise's predecessor, but WMT is not a party to that agreement. (Rec. Doc. 26-4).

two contracts between Ameriprise and Badgerow. WMT argues that it agreed to indemnify Ameriprise for employment claims in consideration of being a beneficiary of the arbitration clauses.

This argument misses the mark because it focuses solely on agreements between Walters, as an independent advisor, and Ameriprise. The issue is whether any contract to arbitrate exists between Badgerow and REJ Properties/WMT. Simply, there is none. And none of Badgerow's claims against WMT in this case are grounded on obligations arising out of her agreements with Ameriprise. WMT's motion, which relies solely on terms in agreements that Badgerow had with Ameriprise, is DENIED in all respects.

Accordingly, and for the foregoing reasons;

IT IS ORDERED the **Motion to Dismiss for Failure to State a Claim and to Compel Arbitration (Rec. Doc. 27)** filed by defendant Ameriprise Financial Services, Inc.is **GRANTED** insofar as all of Badgerow's claims against Ameriprise in this action are stayed pending arbitration;[11]

IT IS FURTHER ORDERED that the **Motion to Dismiss Class Claims and Motion to Compel Arbitration, Dismiss Action, and Strike Jury Demand (Rec. Doc. 26)** filed by defendant REJ Properties, Inc. d/b/a Walters, Meyer, Trosclair & Associates is

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[11] The Court has no concerns in essentially severing the claims against the two defendants even though Badgerow has alleged joint employer status between them. The primary focus of the joint employer test is to hold accountable the entity that actually discriminated against the plaintiff. *See Skidmore v. Precision Printing & Pkg.*, Inc. 188 F.3d 606, 617 (5th Cir. 1999) (citing *Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983)). Badgerow's own factual allegations that recount the specific treatment that she believes to be discriminatory occurred at the hands of WMT and its staff, not Ameriprise.

DENIED in all respects except that Badgerow's eighth (federal civil rights conspiracy under 42 U.S.C. § 1985(3))and ninth (conspiracy under state law pursuant to Louisiana Civil Code article 2324) causes of action are dismissed for failure to state a claim.

January 10, 2018

/s/ Jay C. Zainey

JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

DENISE A. BADGEROW CIVIL ACTION

VERSUS NO: 17-9492

REJ PROPERTIES, INC., ET AL. SECTION: "A"(2)

ORDER AND REASONS

The following motion is before the Court: **Motion to Confirm Arbitration Award (Rec. Doc. 146)** filed by Defendant Ameriprise Financial Services, Inc. Plaintiff, Denise Badgerow, has filed an opposition to the motion. The motion, noticed for submission on May 15, 2019, is before the Court on the briefs without oral argument.

The claims against Ameriprise in this action had been stayed pending arbitration. On December 28, 2018, the FINRA arbitrators issued their award which dismissed all of Badgerow's claims against Ameriprise, Thomas Meyer, Ray Trosclair, and Gregory Walters with prejudice. The latter three individuals were the principals of WMT d/b/a REJ Properties, Inc. and are not parties to this litigation.[1]

[1] On January 10, 2018, the Court entered its Order and Reasons staying all claims against Ameriprise pending arbitration. (Rec. Doc. 47). On May 29, 2019, the Court entered an extensive opinion addressing Badgerow's discrimination, Equal Pay Act, and breach of contract claims against WMT d/b/a REJ Properties, Inc. (Rec. Doc. 159). Throughout this Order and Reasons the Court will assume the reader's familiarity with both of those prior opinions.

Ameriprise now moves to confirm the arbitration award, which again was issued in favor of not only Ameriprise but also the three principals (Thomas Meyer, Ray Trosclair, and Gregory Walters) who are not parties to this action. In her opposition Badgerow advises that she does not object to confirmation of the arbitration award insofar as it applies to Ameriprise but she opposes any effort by Ameriprise to have the award confirmed in favor of Greg Walters, Thomas Meyer, and Ray Trosclair. Badgerow contends that Ameriprise lacks standing to confirm the award as to Walters, Meyer, and Trosclair. Badgerow also contends that the award should be vacated as to these individuals because of fraudulent conduct during the arbitration proceedings.[2]

As to the standing argument, in a prior Order and Reasons, the Court held that REJ Properties, Inc., which was not a party to the arbitration proceeding, lacked standing to seek enforcement of the award. (Rec. Doc. 109). Contrary to what Badgerow suggests, Ameriprise's motion to confirm the award without qualification is not analogous to the motion that REJ Properties filed. Ameriprise was a party to the arbitration and the whistleblower claim that Badgerow is determined to pursue against the individual defendants involves Ameriprise and one of its employees. Ameriprise is entitled to have full repose as to the claims that Badgerow litigated and lost in the arbitration. To be sure, the non-party individual defendants will benefit indirectly from the

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[2] Badgerow filed a petition to vacate the arbitration award on the basis of fraud in state court. She named Walters, Meyer, and Trosclair as defendants. These defendants removed the case to the Eastern District of Louisiana, and it was allotted as Civil Action 19-10353. The individual defendants have filed a motion to confirm the award in that action and Badgerow has filed a motion to remand.

relief that Ameriprise seeks but it does not follow that Ameriprise is seeking direct relief on their behalf.[3] Badgerow's standing argument lacks merit.

As to the fraud argument,[4] Badgerow contends that the individual defendants engaged in fraud as to her whistleblower claim, which was brought under state law, La. R.S. § 23:967. By way of background, the crux of the whistleblower claim is that Greg Walters fired Badgerow for reporting to Ameriprise's Marc Cohen that she had been paid commissions directly from REJ Properties' operating account instead of through a third-party commission-paying software system. Badgerow had also mentioned to Cohen that she did not have a written compensation agreement with WMT. Badgerow argued that this non-compliant manner in which WMT paid commissions and compensated her was a violation of

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[3] The individual defendants will be indirect beneficiaries if Ameriprise obtains confirmation of the award because Badgerow's petition to vacate in Civil Action 19-10353 will surely be met with a collateral estoppel or issue preclusion defense. In other words, having been provided the opportunity in this action to fully and fairly litigate the validity of the award vis à vis the fraud allegation, Badgerow will likely be precluded from having a second opportunity to litigate the same issue in Civil Action 19-10353, whether the case remains here or ends up back in state court.

[4] Section 10 of the Federal Arbitration Act provides the exclusive grounds for vacatur of an arbitration award: 1) where the award was procured by corruption, fraud, or undue means; 2) where there was evidence of partiality or corruption in the arbitrators, 3) where the arbitrators were guilty of misconduct, or 4) where the arbitrators exceeded their powers. *Cooper v. WestEnd v. Capital Mgt., LLC*, 832 F.2d 534, 544 (5th Cir. 2016) (citing 9 U.S.C. § 10(a)). The burden of proof is on the party seeking to vacate the award, and any doubts or uncertainties must be resolved in favor of upholding it. *Cooper*, 832 F.3d at 544 (citing *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 & n.9 (5th Cir. 2004)).

SEC and/or FINRA regulations and that she was fired right after telling Cohen about it.

The individual defendants and their counsel took the position during the arbitration that the foregoing "non-compliance" was not a violation of any law but rather was simply a violation of Ameriprise's policies and procedures.[5] Badgerow claims that this line of argument has been revealed as being fraudulent because a non-party recently responded to discovery that conclusively proves that the individual defendants not only violated SEC requirements but that they knew this during the arbitration.

Badgerow's fraud defense to confirmation of the award is legally frivolous. The Court begins by noting that the "smoking gun" that Badgerow recently received in discovery is actually a marketing or sales document produced by a vendor that sells commission paying software/services to companies like WMT. (Rec. Doc. 153-1 Exhibits I & J). The whistleblower statute requires proof of an *actual* violation of law; even a good faith belief that a violation occurred is insufficient. *Causey v. Winn-Dixie Logistics, Inc.*, 186 So. 3d 185, 187 (La. App. 1st Cir. 2015) (citing *Accardo v. La. Health Servs. & Indem. Co.,* 943 So.2d 381, 386 (La.App. 1st Cir. 2006)); *Wilson v. Tregre*, 787 F.3d 322, 326 (5t[h] Cir. 2015) (citing *Ross v. Oceans Behavioral Hosp.*, 165 So. 3d 176 (La. App. 5th Cir. 2014); *Mabry v. Andrus*, 34 So. 3d 1075, 1081 (La. App. 2nd Cir. 2010)). It is utterly absurd to suggest that a marketing proposal that contained legal opinions formed by marketers trying to persuade companies to buy their product established an actual

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[5] Notably, in correspondence from Ameriprise's Cohen that predates this lawsuit, Cohen characterized the non-compliance as failure to follow company policy and procedure not as a violation of any law. (Rec. Doc. 153-1 Exhibit F).

violation of law. Badgerow presented the facts of her case to the arbitrators and her attorneys argued the specific violations of the law that allegedly occurred. Badgerow did not prove her case. It is ludicrous of Badgerow to suggest that she failed to prove her claim because the arbitrators did not have the benefit of the assertions contained in a vendor's sales pitch or that those assertions establish that an actual violation of the law occurred. The documents upon which Badgerow hinges her fraud theory are irrelevant to any element of her whistleblower claim.

In that vein, even if Badgerow had established untoward conduct that rose to the level of fraud, she does not tether that conduct in any way to the failure on the merits of the whistleblower claim itself. In other words, Badgerow cannot establish a causal nexus between the fraud that she alleges and the basis of the panel's decision. *See Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990). Badgerow's opposition does not even cite the whistleblower statute much less address the substantive requirements of a claim.[6]

The whistleblower statute requires a violation of state law not federal law. La. R.S. § 967(A)(1); *Wilson*, 787 F.3d at 327. Badgerow's whistleblower claims were grounded on violations of SEC/FINRA regulations which are not state law. Thus, Badgerow's whistleblower claim failed as a matter law without even considering the evidence that was offered in support of it. Furthermore, the statute grants a cause of action against the "employer" and the individual

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[6] In conjunction with this ruling the Court has considered the 30 page memorandum in opposition that Badgerow is seeking leave to file in Civil Action 19-10353. Notwithstanding its length, that document suffers from the same deficiencies as the opposition filed in this case.

defendants were not Badgerow's employer.[7] Simply, the reasons that Badgerow's whistleblower claim failed are numerous and none of those reasons involve fraud by any of the defendants.[8]

Finally, Badgerow's attempt to attack the award is untimely. Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. 9 U.S.C. § 12. Badgerow did not file any such motion within the three months limitation period. And because her allegation of fraud is legally frivolous, she presents no basis to escape the limitations problem.

Accordingly;

IT IS ORDERED that the **Motion to Confirm Arbitration Award (Rec. Doc. 146)** filed by Defendant Ameriprise Financial Services, Inc. is **GRANTED.** The arbitration award is confirmed as to all parties to that proceeding. A final judgment will be entered in favor of Ameriprise.

June 11, 2019

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES DISTRICT JUDGE

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[7] Badgerow's pursuit of Meyer and Trosclair on the whistleblower claim is especially perplexing because it is undisputed that Walters alone made the decision to terminate Badgerow. In any case, Walters in his individual capacity was not Badgerow's employer.

[8] Of course, aside from the problems mentioned above, the arbitrators could very well have been unconvinced that Walters terminated Badgerow in reprisal for telling Marc Cohen about the manner in which WMT was paying her commissions. As the Court explained in its Order and Reasons granting summary judgment in favor of REJ Properties, Badgerow has no evidence to impugn Walters' testimony explaining the legitimate non-retaliatory reasons that he terminated her employment.