No. 23-984

In the Supreme Court of the United States

JOSEPH DIXON,

Petitioner,

vs.

CHARLES SCHWAB & CO. INC.,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joseph Dixon
314 Hennepin Ave.
Apt. 503
Minneapolis, MN 55401
Email: jct.0001@yahoo.com
Phone: (612) 274-5116

Pro Se Petitioner

QUESTIONS PRESENTED

I. Whether the district court improperly denied Petitioner *pro se* due process and equal protection of law, when it denied Petitioner the right to appearance, the right to be heard, to testify before a tribunal, the court. Throughout the entire case there was no hearing - denying petitioner due process guaranteed by U.S. Const. Amend. I, IV, V, VI, and XIV.

II. Whether the district court improperly dismissed Petitioner's pro se FINRA arbitration appeal case to vacate award, pursuant to Fed. Arb. Rule 9, Stat. 10(a)? Whether their legal conclusions that Petitioner's appeal to vacate award was time barred, and barred by *res judicata*? Were these pretexts erroneous?

III. Whether the district court's legal conclusion dismissing as moot Petitioner's *pro se* African American minority's Motion for Summary Judgment, on grounds of Discrimination and Retaliation, was erroneous, wherein, the court entered judgment of "uncontested notion" for Summary Judgment when there was no genuine issue, and respondent had not filed an answer?

IV. Whether the judges of the Eighth Circuit Court of Appeals "committed errors of law and/or fact" and whether he abused his discretion or "acted in excess" of their jurisdiction?

LIST OF THE PARTIES

Respondent:	Charles Schwab & Co. Inc.
Represented by:	Devin Driscoll Sandra S. Smalley-Fleming Terrence J. Fleming FREDRIKSON & BYRON P.A. 200 South Sixth Street Suite 4000 Minneapolis, MN 55402
Petitioner:	Joseph Dixon 314 Hennepin Ave. Apt. 503 Minneapolis, MN 55401

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JURISDICTIONAL STATEMENT

Pursuant to subject matter Federal Court Jurisdiction. See 28 U.S.C. Stat. 1254(1).

CONSTITUTIONAL PROVISIONS

Summary Judgment, Rule Fed. R. Civ. P. 56.

Rule Fed. R. Civ p. 56(a) When there is no genuine issue of material facts exist, the movant is entitled to Summary Judgment as a matter of law. Mosholder v. Barnhardt, 679 F3d 443, 338 (6th Cir. 2012).

Burden, 42 U.S.C. Stat. 1981, Conduct Personally Liable for Compensatory and Punitive Damages.

Procedural Due Process Civil. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Retaliation Prohibition of 42 U.S. Code Stat. 1203.

Retaliation against a witness, 18 U.S.C. Stat. 1513 and Civil Rights Title VII.

U.S. Const. Amend. XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. Fed. Arb. Rule 9, Stat. 10(a).

STATEMENT OF CASE

Petitioner originally filed a complaint with the SEC Commission's FINRA Regulatory Enforcement Agency, for violations of fraud, stock market manipulation, false statements, mismanagement of account funds, and breach of fiduciary duties owed by Respondent Schwab. Petitioner alleged Respondent manipulated stock statements, altered, and devalued the stock after stocks market closed, failed to credit stocks to account, and at times failed to execute orders to buy or sell stocks. This was done in violation of SEC Commission and FINRA Regulatory rules and policy. See Fed. Arbitration 9 U.S.C. § 10(a)(3) and 10(a)(4), and FAA, 8 U.S.C. Stat. 10(a)(c).

Petitioner's FINRA arbitration was scheduled for two days. The arbitrator moved the two-day scheduled hearing to just one day, thus, depriving Petitioner of a full hearing. Petitioner submitted for Arbitration in excess of 5,000 pages of exhibits, but was denied the due process of time needed to present all the Exhibits. One day was not sufficient for Petitioner to present 5,000 pages of exhibits. The

arbitrator said it would review the exhibits submitted but the Arbitration Award does not reflect the arbitrator's review.

Respondent did not present any substantial evidence to grant dismissal. Respondent merely requested dismissal. Petitioner objected, but the objection was rejected by Arbitrator.

The arbitration proceeding was dismissed on August 15, 2022, and appealed to district court on September 8, 2022. The district court dismissed the complaint for deficiency, without prejudice, and denied Petitioner's IFP, on October 20, 2022. On November 11, 2022, Petitioner corrected the deficiency, refiled with district court, and paid the filing fee. The judge authorized service to be made by sheriff upon Respondent Charles Schwab, December 9, 2022. Petitioner filed this complaint as a victim of testifying as eye-witness against Schwab for security violations and fraud.

This Court reviews whether the district court applied the correct legal standard in exercising its discretion *de novo*. Sherman v. Winco Fireworks, Inc., 532 F. 3d 709, 716 (8th Cir. 2008). Courts have ruled historically in Arbitration appeals, that the trial is a *de novo* trial. Minnesota courts have ruled on appeal that Arbitration awards are a question of law, "which we review *de novo*." Minn. Stat. 572.19, sub.1 (1996). Frost Benco Elec. Ass'n v. Minnesota pub. Utility Comm'n, 358 N.W. 2d 639, 642 (Minn. 1984). An arbitration appeal is not *res judicata* - it is *de novo*. District court, in abuse, misapplied the law in Petitioner's case.

In district court, Petitioner alleged Respondent acted out of discrimination and retaliation; then Respondent closed all of the accounts of Petitioner's

shares of securities stocks managed by Charles Schwab & Co. Inc., on May 11, 2023.

Petitioner is an African American, indigent, *pro se* litigant, hereby appealing the district court's denial of his claim, and cannot get due process of law in a court of law because being African American, and being *pro se*, without representation in court. Attorneys have systematically targeted and denied representation of counsel to Petitioner due to race.

On December 19, 2023, the Eighth Circuit Court of Appeals ruled in favor of Respondent. The clerk directed Petitioner to refile his petition for rehearing with the Eighth Circuit Court of Appeals. Petition for rehearing by the full panel of the Eighth Circuit Court of Appeals was denied, and the mandate was issued January 25, 2024.

ARGUMENT

I. Petitioner has been denied due process and has faced discrimination and retaliation because of self-representation.

Constitutional questions exist in the Court of Appeal's and district court's decisions, and the way the arbitration was handled. Federal question jurisdiction requires that a well-pleaded complaint, is a substantial component of the right to petition the government for redress of grievances, Const. Amend. VI., and the right to a speedy and public trial, right to impartial jury trial of the state where the crime is committed, informed nature of the crime; to confront witnesses, and the right to assistance of counsel.

Because Petitioner is *pro se* and did not attend law school, and is an African American, the arbitrators and the trial courts, and the Eighth Circuit Court of

Appeals departed from the Federal Rules of Civil Procedure, departed from the long standard procedures and practices of the court to refuse to act accordingly, in contradiction of other court rulings in similar cases involving Respondent Schwab.

An extensive body of case law establishes the right to counsel for indigent criminal litigants and then denies that right to civil litigants who cannot afford counsel. Gideon vs. Wainwright, 372 US 335 (1963), is a landmark Supreme Court case that established the right to legal counsel for defendants in criminal trials who cannot afford counsel for hire. The U.S. Constitution guarantees the rights of citizens who are victims of the law and who cannot afford to hire an attorney representation of counsel.

Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789) provides that "the parties may plead and manage their own causes personally." For an extensive discussion of the historical origins of the right of self-representation, see Faretta v. California, 422 U.S. 806, 814-32 (1975). Although this reasoning arguably applies to civil litigants, the "non-constitutional right" side appears to have the stronger argument. Faretta based the constitutional right in the sixth amendment, which only applies to criminal defendants. See id. at 832; see also U.S. Const. Amend. I, VI, XIV.

Petitioner finds the FINRA handling of the matter was treated with a differentiation of rule and policies and standards used by FINRA when it brought cases of similar allegations, and even of the same Respondent, with the same securities violations, but got a different result. Petitioner alleges FINRA failed to investigate his complaint. FINRA failed to supervise the arbitration proceedings. FINRA failed to enforce its own rules, policies and enforcement of discovery rules.

Bias was evident in FINRA's handling and management of Petitioner's Arbitration case.

Federal rules of arbitration state, "...upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

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

(2) there was:

(A) evident partiality by an arbitrator appointed as a neutral;

(B) corruption by an arbitrator; or

(C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 572B.15, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under section 572B.15, subsection (c), not later than the commencement of the arbitration hearing; or..."

Petitioner experienced the same and similar widespread violations with Respondent in the district court. The district court never conducted a court appearance or hearing. A petitioner has the right to be heard in the court, and to testify in his own defense, and to hear what the defense is telling the court, or interrogate defense witnesses. There was never a hearing on Petitioner's motions filed with the district

court. Seven months elapsed *after the summons and complaint was served upon them*, and Respondent never filed a response - instead filing a motion for dismissal without a hearing.

The district court granted Respondent everything they wanted, irrespective of its violations and prohibition of the law. Petitioner alleges the court exhibited a double standard and imposed differential treatment of law, in contradiction of other courts ruling, ultimately entering judgment in favor of Respondent, who hired counsel.

A statute that prohibits intentional discrimination implicitly prohibits acts of retaliation for complaints about or opposition to discrimination. See Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969); CBOCS West, Inc. v. Humphries, 553 U.S. 442, 451 (2008) and Gomez-Perez v. Potter, 553 U.S. 474, 479 (2008).

II. Petitioner's case was dismissed as untimely in error.

The Federal Arbitration Act sets forth grounds for setting aside an arbitration award and often governs disputes. The district court has jurisdiction under 29 U.S.C. § 185, and we have appellate jurisdiction under 28 U.S.C. § 1291. The FINRA rules state any party wishing to challenge an award must make a motion to vacate the award in Federal court or state court of appropriate jurisdiction, pursuant to Federal Arbitration Act, 9 U.S.C. Stat. 10, or applicable state statute. The party must bring a motion to vacate within the time period specified by applicable statute. A motion to vacate must be filed and served on the adverse party within three months of the award being filed or delivered.

The Minnesota Arbitration Act provides that upon application by a party, the court shall vacate an award when the award is procured by corruption, fraud, or other undue means; there was prejudicial misconduct or corruption by the arbitrator or evident partiality of the neutral; substantial prejudice occurred through improper conduct of the hearing; or there was no arbitration agreement. Minn. Stat. § 572.19, subd. 1.

In violation of the rules of court, Respondent did not notify Petitioner of the Motion for Dismissal filed on December 30, 2023. The parties did not conduct the *Meet and Confer* with Petitioner before filing its Motion to Dismiss. Respondent's failure to comply with arbitration scheduling order is reversibly error.

The district court failed to abide by the rules and practices, and policies of the courts, and let Respondent write the laws for whatever defense counsel wanted. The trial court then copied and granted Respondent whatsoever it wanted. Wherein all courts in previous cases ruled that arbitration appeal cases are not *res judicata* case - it is a trial *de novo* appeal case. The district court inaccurately dismissed Petitioner's timely appeal. The district court failed to take in the factual evidence.

III. Petitioner's Motion for Summary Judgment was incorrectly ruled upon since at the time, there were no issues of genuine fact remaining.

In Petitioner's appeal arbitration case by the district court, Respondent never answered the summons and complaint, and did not file an answer to Motion for Summary Judgment - Discrimination

retaliation claim. When Respondent contacted the district court judge via a telephone conference, the judge wanted it stopped and that he was tempted to sanction the defense counsel for such improper conduct.

Wherein about a month later, Respondent filed a motion with the district court for sanctions on Petitioner, and filed a motion again for dismissal of the appeal to vacate award. Wherein, Petitioner was never served the December 30, 2022, Motion to Dismiss nor notice of motion filed. The evidence in the record also fully supports reprisal May 11, 2023, effective June 13, 2023, the closing of all 27,414,941 shares stocks. Indeed, the specific and unsupported reference to Petitioner's discrimination, retaliation, arbitration appeal to vacate award when no court hearing, appearance, trial, testimony, or appearance before a tribunal to testify, or defend, and no pretrial Rule 16 conference scheduling ever held but denied by the court, should be considered direct evidence of retaliation, denial of due process and of equal protection of law requiring trial.

Federal Rule of Civil Procedure 56(a) provides that summary judgment shall only be granted if there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law". The evidence must be viewed in the light most favored to Petitioner. Respondent had not responded to petitioner's Motion for Summary Judgment - the motion was undisputed, uncontested, and all inferences are to be drawn in Petitioner's favor, and the court should not weigh the evidence or make credibility determinations. See Walker v. Wanner Eng'g, Inc., 867 F. supp. 1050, 1053 (D. Minn. 2002), Citing Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 255, 106 S. Ct. 2505, 81 L. Ed.2d 202 (2002).

Summary judgment is thus "inappropriate when reasonable persons might draw different conclusions from the evidence presented." DLH Inc. v. Russ, 56 N.W. 2d. 60, 69 (Minn. 1997). See also First Nat. of Omaha v. Three Dimension sys. Prod. Inc., 289 F. 3d 542, 545 ("8th Circuit needed to resolve factual issues in close cases is the very reason we have juries.").

IV. Respondent misled the court and misrepresented Petitioner's claim. The court committed errors of law and/or fact" and abused its discretion or "acted in excess" of their jurisdiction.

The district court erroneously concluded that the discrimination and retaliation was moot. The district court did not conduct a hearing, and respondent had not responded to Petitioner's motion for summary judgment. The motion was unopposed and uncontested. The evidence of the far more favorable treatment of Schwab standing alone requires trial on all discrimination claims alleged. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977) 'Disparate treatment" is most easily understood type of discrimination. Where the employer treated some people less favorable than others because of their [protected status]," Lynn v. Deaconess methodical Center -West Campus, 160 F. 3d. 484, 487-88 (8th Cir. 1998). Lorenz v. Tyson Foods, Inc., 147 F. supp. 3d 792, 803 (N.D. Iowa 2015), single comparator is sufficient to deny summary judgment.

Respondent intended to defraud petitioner of financial profit and income gain. The closed account notice speaks for itself. Respondent wanted Petitioner to find another institution – discrimination,

differential treatment. Had Petitioner not filed his complaint against Respondent for securities violations and fraud with SEC Commission, they would not have closed all petitioner's securities investment accounts. Discrimination claim under MHRA and Title VII.

Petitioner objected to a letter sent to the court addressed to: The Honorable Judge Wright, which read:

> "Dear Judge Wright," "I represent defendant Charles Schwab & Co. Inc. in the above matter."
>
> "I am writing to make the court aware that this action - which is based on the same set of factual allegations and similar legal claims - is substantially related to the case that was dismissed without prejudice for failure to state a claim by Judge Brasel. 22-cv-2199 earlier this year. See Order of Dismissal. Served upon Plaintiff Joseph Dixon or about December 27, 2023..."

This letter was not a Motion to Dismiss. Petitioner timely filed his response to Defense Counsel's Letter to Judge Wright, and stated that respondent's letter was frivolous, deceptive, in bad faith and prejudicial and of malice and thus sanctionable, pursuant to Rule 11(c) and other applicable statutes rules and court cases.

The district court erroneously dismissed Petitioner's claim on the basis that Petitioner failed to establish a claim. Petitioner's properly filed Motion for Summary Judgment was dismissed as moot, without a hearing or appearance. Petitioner's Motion for Withdrawal of Defense Counsel from representation due to conflict of interest was ruled in favor of

Respondent through fraud and denial of due process and equal protection of the law.

Fed. Arb. Rule 9 Stat. 10(a) states: (1) where the award was procured by corruption, fraud, or undue means; where there was evident partiality or corruption in the arbitrators, or either of them; where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and ... wherein (b) if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

The district court with error and abuse of power, and bias, dismissed Petitioner's arbitration appeal to vacate award procured by fraud, corruption of arbitrators as *res judicata.* Other courts have ruled that appeals to vacate arbitration awards are *de novo* trial. A particularly clear argument in favor of *de novo* review exists. The Fifth Circuit, in reviewing a district court order confirming an award, held that the *de novo* standard should be used where the order is a mixed question of law and fact. The Seventh Circuit stated they were using a *de novo* standard, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). See 9 U.S.C. § 10 (1988 ed., Supp. V), regarding arbitration awards.

CONCLUSION

Although the Third Circuit sometimes used the words *"de novo"* to describe the standard, its opinion makes clear that it simply believes (as do all Circuits but one) that there is no *special* standard governing its review of a district court's decision in these circumstances. Rather, review of, for example, a district court decision confirming an arbitration award

on the ground that the parties agreed to submit their dispute to arbitration should proceed like review of any other district court decision finding an agreement between parties, *e. g.,* accepting findings of fact that are not "clearly erroneous" but deciding questions of law *de novo.*

Because federal policy favors arbitration, other courts have applied special lenient "abuse of discretion" standards (even as to questions of law) when reviewing district court decisions that confirm (*but not those that set aside*) arbitration awards. See, *e. g.,* Robbins v. Day, 954 F. 2d, at 681-682. First Option asks us to hold that the Eleventh Circuit's view is correct; the Eighth Court of Appeals instead should have applied an "abuse of discretion" standard. See *id* at 681-682 (Cal 1992).

For all the foregoing reasons, the District Court's judgments must be reversed, and this matter remanded for trial on all counts.

March 1, 2024

Joseph Dixon
314 Hennepin Ave.
Apt. 503
Minneapolis, MN 55401

Petitioner pro se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2494

Joseph Dixon,

Appellant,

v.

Charles Schwab & Co., Inc.,

Appellee.

Appeal from U.S. District Court for the District of Minnesota (0:22-cv-02933-JWB)

MANDATE

In accordance with the opinion and judgment of December 19, 2023, and pursuant to the provisions of Federal Rule of Appellate Procedure 41 (a), the formal mandate is hereby issued in the above-styled matter.

January 25, 2024

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2494

Joseph Dixon,

Appellant,

v.

Charles Schwab & Co., Inc.

Appellee.

Appeal from U.S. District Court for the District of Minnesota (0:22-cv-02933-JWB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton and Judge Kelly did not participate in the consideration or decision of this matter.

January 17, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 23-2494

Joseph O. Dixon,
Plaintiff- Appellant

v.

Charles Schwab & Co., Inc.
Defendant – Appellee.

Appeal from U.S. District Court for the District of Minnesota (0:22-cv-02933-JWB)

JUDGMENT

Before GRUENDER, ERICKSON, and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

December 19, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-2494

Joseph O. Dixon,
Plaintiff- Appellant,

v.

Charles Schwab & Co., Inc.,
Defendant – Appellee.

Appeal from United States District Court for the
District of Minnesota

Submitted: December 14, 2023
Filed: December 19, 2023
[Unpublished]

Before GRUENDER, ERICKSON, and STRAS,
Circuit Judges.

PER CURIAM.

Joseph Dixon appeals following the district court's[1] judgment denying his petition to vacate an adverse arbitration award under the Federal Arbitration Act and dismissing this civil action against Charles Schwab & Co., Inc. (Schwab).

[1] The Honorable Jerry W. Blackwell, United States District Judge for the District of Minnesota.

After careful review of the record and the parties' arguments on appeal, we conclude the district court did not abuse its discretion in denying Dixon's motion to disqualify the law firm representing Schwab, see A.J. by LB. v. Kierst, 56 F.3d 849, 859 (8th Cir. 1995) (reviewing for abuse of discretion determination whether to disqualify counsel); and Dixon did not identify any conduct warranting sanctions, see Adams v. USAA Cas. Ins. Co., 863 F.3d 1069, 1076-77 (8th Cir. 2017) (district court may impose sanctions on counsel for abusing judicial process or for filing paper for any improper purpose). In addition, there was good cause to delay a pretrial conference and scheduling order while Schwab's motion to dismiss was pending. See Fed. R. Civ. P. 16(b)(2) (judge must issue scheduling order within prescribed time period, unless judge finds good cause for delay).

We further conclude the district court did not err in denying Dixon's petition to vacate the arbitration award and granting the cross-motion to confirm the award, see Manion v. Nagin, 392 F.3d 294, 298 (8th Cir. 2004) (on review of confirmation of arbitration award, factual findings reviewed for clear error and questions of law reviewed de novo); or in dismissing the complaint as barred by res judicata, see Banks v. Int'l Union Elec. Workers, 390 F.3d 1049, 1052 (8th Cir. 2004) (dismissal on grounds of res judicata reviewed de novo).

Accordingly, we affirm. See 8th Cir. R. 47B.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Joseph O. Dixon, Plaintiff,	Civ. No. 22-2933 (JWB/DLM)
Charles Schwab & Co., Inc., Defendant.	MEMORANDUM OPINION AND ORDER AFFIRMING ARBITRATION AWARD AND GRANTING DEFENDANT'S MOTION TO DISMISS

Joseph O. Dixon, Pro Se.

Devin Driscoll, Esq., Sandra S. Smalley-Fleming, Esq., and Terrence J. Fleming, Esq., Fredrikson & Byron, P.A., counsel for Defendant.

This matter first came before the Court on Defendant Charles Schwab and Co., Inc. ("Charles Schwab")'s Motion to Dismiss Plaintiff Joseph Dixon's Complaint as barred by res judicata. (Doc. No. 12.)

After allowing time for Charles Schwab to properly serve its motion and for Mr. Dixon to consult with pro bono counsel, Mr. Dixon filed a second petition to vacate the underlying arbitration award. (See Doc. Nos. 76—78.)

Charles Schwab opposes the petition and seeks to affirm the award. (Doc. No. 100.)

Having reviewed the arbitration proceedings, the Court determines that Mr. Dixon has not shown a

basis to vacate the award. The Court therefore denies his petition and affirms the award. Accordingly, because Mr. Dixon's Complaint seeks to recover based upon the same alleged facts as his arbitration claims, the Court grants Charles Schwab's motion to dismiss and dismisses the Complaint with prejudice.

BACKGROUND

Mr. Dixon owned 27,414,941 shares of stock through brokerage firm Charles Schwab. (Doc. No. 1 at l, 41.) According to Mr. Dixon, the stocks were performing well and growing, to the tune of a $100,000.00 portfolio. (Id. 42.) However, in August 2021 Charles Schwab informed Mr. Dixon that he was barred from trading. (Id. ¶¶ 43—44.) Mr. Dixon claims his portfolio plummeted to $0 as a result of the blockade and other manipulation by Charles Schwab. (Id. ¶¶ 21, 33.) But for Charles Schwab's interference and meddling, Mr. Dixon believes he would have increased his shares' value to at least $1.00 per share, for a total portfolio value of $27,414,941.00. (Id ¶¶ 46—49, 61—63.)

Mr. Dixon submitted his claims to arbitration before the Financial Industry Regulatory Authority ("FINRA"), as required by his account agreements. (Doc. No. 14-1 at 87—88, 91.) The arbitration culminated in a hearing on July 27, 2022, where Mr. Dixon made his case to a three-arbitrator panel. (Id. at 96—97.) After Mr. Dixon's presentation, Charles Schwab moved to dismiss the claims. (Id at 97.) After reviewing briefs from both parties, the panel granted Charles Schwab's motion on August 15, 2022, ruling

that "there is no support for [Mr. Dixon]'s case under any possible theory of recovery." (Id.)

On September 8, 2022, Mr. Dixon sought to vacate the arbitration award. Dixon v. Charles Schwab & co. Inc., No. 22-cv-2199 (NEB/ECW), Doc. No. 1 (D. Minn. Sept. 8, 2022). His petition did not survive initial review. Judge Brasel dismissed it because Mr. Dixon failed to establish a statutory basis to vacate the award. See id., Doc. No. 5.

Mr. Dixon filed a civil Complaint a month later on November 17, 2022, seeking to recover the millions he claims he lost due to Charles Schwab's meddling. (See generally Doc. No. 1.) In late December 2022, Charles Schwab moved to dismiss Mr. Dixon's Complaint as barred by res judicata, since it asserts the same claims decided by the FINRA arbitration. (Doc. No. 12.) Following a series of letters to the court and a status conference regarding proper service of Charles Schwab's motion, the Court granted Mr. Dixon leave to respond to Charles Schwab's motion and to consult with pro bono counsel on the issue of vacating the arbitration award. (Doc. No. 76.)

On May 3, 2023, Mr. Dixon filed an affidavit and memorandum that the Court construed to be a second petition to vacate the arbitration award under 9 U.S.C. § 10(a). (Doc. No. 82.) Charles Schwab opposes Mr. Dixon's petition and seeks to affirm the arbitration award. (Doc. No. 100.) Because Mr. Dixon shows no basis to vacate the award, and because his Complaint seeks to recover on claims the FINRA panel already decided, this Court must deny his petition, affirm the award, and dismiss his Complaint.

DISCUSSION

1. The Court Denies Mr. Dixon's Petition to Vacate the Arbitration Award

Court review of arbitration awards is very limited. Great Am. Ins. Co. v. Russell, 914 F.3d 1147, 1150 (8th Cir. 2019) (quotation omitted). An award will not be vacated even if an arbitrator made a serious error while acting within their authority. See id (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)). Courts accord an extraordinary level of deference to the underlying award. Stark v. Sandberg,Phoenix & von Gontard, P.c., 381 F.3d 793, 798 (8th Cir. 2004).

A. Equitable tolling

As a threshold matter, Charles Schwab argues that Mr. Dixon's second petition to vacate the arbitration award is time-barred. (See Doc. No. 100 at 6—11) Indeed, a court cannot consider a petition that is filed and served more than three months after the award (see 9 U.S.C. § 12; Piccolo v. Dain, Kalman & Quail, Inc., 641 F.2d 598, 600 (8th Cir. 1981)). Here, the deadline expired on November 15, 2022, unless equitable tolling applies.[1]

[1] If the Court tolled the weeks that Mr. Dixon's first petition was being considered, his Complaint would have been filed (but not served) within the tolled three-month deadline. Viewing his petition and his Complaint as diligent attempts to pursue his rights with respect to the arbitration award, and considering the circumstances that have led to confusion over the substance and effect of filings in this case to be "extraordinary," the deadline could be tolled while Mr. Dixon's Complaint is under consideration.

Generally, a party seeking equitable tolling must establish: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. Johnson v. Hobbs, 678 F.3d 607, 610 (8th Cir. 2012). However, it is not clear that any "due diligence" exception applies to 9 U.S.C. § 12. Piccolo, 641 F.2d at 601.

Charles Schwab correctly points out that Mr. Dixon's current petition was filed and served in May 2023, nearly six months late. The Court recognizes Mr. Dixon's efforts to pursue his rights with respect to the validity of the FINRA award, and notes that the nature of these proceedings (including Mr. Dixon's apparent misunderstanding of Judge Brasel's order denying his first petition and the procedural hurdle that stands in the way of his Complaint) may amount to "extraordinary circumstances" warranting tolling. But the timeliness of his second petition is ultimately moot because it fails on its merits.

B. Mr. Dixon's petition does not establish a basis to vacate the award The Federal Arbitration Act permits a district court to vacate an arbitration award only in four limited circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

> controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1-4); see also Med. Shoppe Int'l, Inc. Turner Invs., Inc., 614 F.3d 485, 488-89 (8th Cir. 2010).

The party seeking to vacate an award bears a substantial burden, regardless of which of the four bases they claim warrants vacating the award. Fraud under § 10(a)(1) must be proved by clear and convincing evidence, must not have been discoverable by due diligence, and must have been materially related to an arbitration issue. MidAmerican Energy Co. v. Int'l Brotherhood of Elec. Workers Loc. 499, 345 F.3d 616, 622 (8th Cir. 2003). A party seeking to vacate under § 10(a)(2) "has a high burden of demonstrating objective facts inconsistent with impartiality." Brown v. Brown-Thill, 762 F.3d 814, 820 (8th Cir. 2014) (quotation omitted). Misconduct under § 10(a)(3) must be an error "which so affects the rights of a party that it may be said that he was deprived of a fair hearing." El Dorado Sch. Dist. No. 15 v. Cont '1 Cas. Co., 247 F.3d 843, 848 (8th Cir. 2001) (quotation omitted). A party seeking relief under § 10(a)(4) "bears a heavy burden" to show an arbitrator exceeded their powers. Indus. Steel Constr., Inc. v. Lunda Constr. Co., 33 F.4th 1038, 1041 (8th Cir. 2022) (quoting Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013)).

Mr. Dixon fails to carry his burden to show a statutory basis to vacate the award here.

Mr. Dixon's claims of fraud, corruption, partiality, and arbitrator misconduct are not sufficiently supported by the arbitration record. He agreed to be bound by the rules, process, and outcome of the FINRA arbitration. (Doc. No. 14-1 at 91.) He claims that Charles Schwab failed to file a pre-hearing brief, but such briefing was optional, not required. (See Doc. No. 101-7 at 7—8.) He claims the hearing was improperly limited to one day when it was originally scheduled for two, but he had expressly agreed that "the one day hearing and time is acceptable." (Doc. No. 101-9.) He claims that the panel was biased in admitting evidence, but FINRA rules authorized the panel to decide what evidence is admissible, and the panel confirmed with him at the hearing that he had fully presented his case. (See Doc. No. 101-1)

To the extent that Mr. Dixon claims the award was the result of the panel relying on fraudulent or fabricated evidence, he does not sufficiently support the claim with clear and convincing evidence. Finally, Mr. Dixon claims he was not given an opportunity to respond to Charles Schwab's motion to dismiss the arbitration, but he was given time to argue on the record at the hearing (see Doc. No. 101-1 at 175: 101—180: 10), as well as in writing while the panel considered the motion (see Doc. No. 101-3).

The only claim Charles Schwab does not directly refute is Mr. Dixon's complaint that Charles Schwab did not respond to his discovery requests. However, Mr. Dixon does not appear to have raised the issue before or during his arbitration hearing. It is also

not clear how the alleged discovery failures affected his ability to present his case or (more importantly) show corruption, partiality, or misconduct on the part of the arbitrators. As each claimed deficiency is either refuted by the record, falls within the FINRA panel's authority or discretion, or is not sufficiently shown, Mr. Dixon provides the Court no basis to vacate the FINRA panel's award.

II. The Court Grants Charles Schwab's Cross-Motion to Confirm the Arbitration Award

According to the Federal Arbitration Act, a court must confirm an arbitration award unless the award is vacated or modified. 9 U.S.C. § 9; Hall St. Assocs., L.L.C v. Mattel, Inc., 552 U.S. 576, 582 (2008); Beumer Corp. v. ProEnergy Servs., LLC, 899 F.3d 564, 565 (8th Cir. 2018). A party has one year to request confirmation. 9 U.S.C. § 9.

Here, Charles Schwab filed its motion on time—less than one year after August 15, 2022. Because Mr. Dixon has not established a basis to vacate the award, the Court must grant Charles Schwab's motion and confirm the award.

Having resolved the validity of the arbitration award, the Court turns to Charles Schwab's motion to dismiss Mr. Dixon's Complaint.

III. The Court Grants Charles Schwab's Motion to Dismiss

To survive a motion to dismiss, a plaintiff must provide "sufficient factual matter, accepted as true, to

state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); see also Bell Ad. Corp. v. Twombly, 550 U.S. 544, 555 (2007). For an affirmative defense such as res judicata to provide a basis for dismissal, the defense must be apparent on the face of the complaint, which includes public records and materials embraced by the complaint and materials attached to the complaint. A.H. ex rel. Hubbard v. Midwest Bus Sales, 823 F.3d 448, 453 (8th Cir. 2016).

A. Res judicata standard

"Res judicata applies to prevent repetitive suits involving the same cause of action." Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Engineers, 440 F.3d 1038, 1042 (8th Cir. 2006). In determining res judicata, the Court considers three elements: "(l) whether the prior judgment was entered by a court of competent jurisdiction; (2) whether the prior decision was a final judgment on the merits; and (3) whether the same cause of action and the same parties or their privies were involved in both cases." Id.

Under Minnesota law, the res judicata test includes four elements: "(l) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." Laase v. Cnty. of Isanti, 638 F.3d 853, 856 (8th Cir. 2011) (quoting Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004)). "The law of the forum that rendered the first judgment

controls the res judicata analysis." Laase, 638 F.3d at 856. Since the judgment at issue here is a FINRA arbitration award, arguably federal law should control. But since Mr. Dixon's Complaint could include both federal and state-law causes of action, and the tests are not substantially different, the Court will analyze both standards together.

B. All res judicata elements are present here

The federal and Minnesota res judicata tests can be distilled into three overlapping elements: (l) the prior judgment was a final decision on the merits; (2) the current case involves the same claims and the same parties; and (3) the previous decisionmaker was a court of competent jurisdiction and offered a full, fair opportunity to be heard. Because each of those elements is present here, res judicata applies to bar Mr. Dixon's Complaint.

1. Final decision on the merits

Most res judicata cases treat arbitration awards as final decisions, but few specifically state that arbitration awards are final decisions on the merits for purposes of res judicata. See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon, 210 F.3d 814, 817 (8th Cir. 2000) ("We have specifically held that an arbitrator's award constitutes a final judgment for the purposes of collateral estoppel and res judicata. abrogated on other grounds by E.E.O.C v. Waffle House, Inc., 534 U.S. 279 (2002); see also Carlisle Power Transmission Prods., Inc. v. United Steel,

Paper & Forestry, Rubber, Mfg. ,Energy, Allied Indus. & Serv. Workers Int'l Union, Loc. Union No. 662, 725 F.3d 864, 867 (8th Cir. 2013) ("The 2007 arbitration decision constituted a final judgment on the merits, because the arbitrator decided the sole legal issue presented[.]").

The FINRA panel does seem to have ruled on the merits in Mr. Dixon's case. After a discovery period and a daylong evidentiary proceeding, the FINRA panel issued what amounts to a dismissal for failure to state a claim: "the Panel grants the Motion to Dismiss on the grounds that there is no support for Claimant's case under any possible theory of recovery." (Doc. No. 14-1 at 97.)

Fed. R. Civ. P. 41 (b) states that ' 'any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Accordingly, the Eighth Circuit has recognized that a court order granting a motion to dismiss for failure to state a claim constitutes a final decision on the merits for purposes of res judicata. Clark v. Callahan, 587 F. App' x 1000, 1002 (8th Cir. 2014) ("It is well-established that the dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits." (internal quotations omitted)); see also Micklus v. Greer, 705 F.2d 3 14, 317 (8th Cir. 1983).

The FINRA panel granted Charles Schwab's motion to dismiss because Mr. Dixon failed to prove his claims ("there is no support for Claimant's case"), not due to some jurisdictional or technical pleading defect. Combined with the caselaw holding that arbitration

awards are final decisions, that arbitration awards are "on the merits" when they resolve some legal question, and that orders dismissing for failure to state a claim are "on the merits," the Court considers the FINRA panel's award here to be a final decision on the merits for purposes of res judicata.

2. Same parties, same claims

Generally, "a claim is barred by res judicata if it arises out of the same nucleus of operative facts as the prior claim." Lane v. Peterson, 899 F.2d 737, 742 (8th Cir. 1990). Mr. Dixon's arbitration petition stemmed from the same wrongdoing he alleges in his Complaint: that Charles Schwab improperly precluded him from trading and fraudulently manipulated his portfolio in 2021. He makes the same claims against the same party.

Importantly, res judicata not only bars the claims actually brought in the first matter, it also bars any other claims that could have been brought based on the same alleged wrongdoing. See Ripplin Shoals, 440 F.3d at 1042. Even new claims against Charles Schwab arising from the 2021 events would be prohibited.

3. Court of competent jurisdiction; full and fair opportunity to be heard

Mr. Dixon agreed to follow the FINRA arbitration process and abide by the result when he submitted his arbitration petition. And at least one district court has expressly recognized a FINRA

arbitration panel as a court of competent jurisdiction for res judicata purposes. Lobaito v. Chase Bank, Civ. No. 11-6883 (PGG), 2012 WL 3104926, at *4 (S.D.N.Y. July 3 1, 2012) ("It is likewise clear that the FINRA arbitration panel is a court of competent jurisdiction for resjudicata purposes."). There is no basis to conclude that the FINRA panel lacked authority to decide Mr. Dixon's petition.

Likewise, the Court is not persuaded that Mr. Dixon did not have a full and fair opportunity to be heard. A party's presence and participation in arbitration satisfies the "full and fair opportunity" element. See Am. Fed'n of Television & Radio Artists Health & Ret. Funds v. WCCO Television, Inc., 934 F.2d 987, 991 (8th Cir. 1991). The "full and fair opportunity" question "generally focuses on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." State v. Joseph, 636 N.W.2d 322, 328 (Minn. 2001).

Disagreeing with a ruling does not mean a person did not have a full and fair opportunity to be heard. See id. at 329. Although Mr. Dixon got an unfavorable result, he was given a full process and an opportunity to prove his case before a panel of neutral decisionmakers who had proper authority to decide his claims.

Because all of the state and federal res judicata elements are present, Mr. Dixon can no longer seek relief based on the allegations he made in the FINRA

arbitration and repeats in his Complaint. The Court will dismiss this matter accordingly.

ORDER

IT IS HEREBY ORDERED as follows:

1. Plaintiff Joseph O. Dixon's Petition to Vacate the Arbitration Award (Doc. No. 78) is DENIED;
2. Defendant Charles Schwab & Co. Inc. 's Cross-Motion to Confirm the Arbitration Award (Doc. No. 100) is GRANTED, and the August 15, 2022 arbitration award is CONFIRMED;
3. Defendant's Motion to Dismiss (Doc. No. 12) is GRANTED;
4. Plaintiff's Complaint (Doc. No. 1) is DISMISSED WITH PREJUDICE as barred by res judicata; and
5. Plaintiff's Motion for Summary Judgment (Doc. No. 90), Motion for Trial Date, Place, and Time for Motion for Summary Judgment (Doc. No. 97), and Motion for Judgment Against Defendant (Doc. No. 98), and Defendant's Motion for Extension of Time to Respond (Doc. No. 1 1 1) are DENIED as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: June 14, 2023

s/Jerry W Blackwell
JERRY W. BLACKWELL
United States District Judge

UNITED STATES DISTRICT COURT
District of Minnesota

Joseph O. Dixon,
Plaintiff(s),

JUDGMENT IN A CIVIL CASE

Case Number: 22-cv-2933 JWB/DLM

Charles Schwab & Co., Inc.,
Defendant(s).

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiff Joseph O. Dixon's Petition to Vacate the Arbitration Award (Doc. No. 98) is DENIED;
2. Defendant Charles Schwab & Co. Inc. 's Cross-Motion to Confirm the Arbitration Award (Doc. No. 100) is GRANTED, and the August 1 5, 2022 arbitration award is CONFIRMED;
3. Defendant's Motion to Dismiss (Doc. No. 12) is GRANTED.
4. Plaintiff's Complaint (Doc. No. 1) is DISMISSED WITH PREJUDICE as barred by res judicata; and

5. Plaintiffs Motion for Summary Judgment (Doc. No. 90), Motion for Trial Date, Place, and Time for Motion for Summary Judgment (Doc. No. 97), and Motion for Judgment Against Defendant (Doc. No. 98), and Defendant's Motion for Extension of Time to Respond (Doc. No. 111) are DENIED as moot.

Date: 6/15/2023 KATE M. FOGARTY, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Joseph O. Dixon,
Plaintiff,

vs.

Charles Schwab & Co., Inc.,
Defendant.

Case No. 22-cv-2933 (JWB/LIB)

ORDER

This matter comes before the undersigned United States Magistrate Judge, pursuant to a general assignment made in accordance with the provisions of 28 U.S.C. § 636, upon Plaintiff's Motion for permission to file a motion to disqualify defense counsel, [Docket No. 30]; his Motion to disqualify defense counsel, [Docket No. 24]; and his Motion seeking the issuance of a pretrial scheduling Order. [Docket No. 31]. Finding no hearing necessary, the Court issues the present Order.

For the reasons discussed herein, Plaintiff's Motion for permission to file a motion to disqualify defense counsel, [Docket No. 30], is DENIED as moot; Plaintiffs Motion to disqualify defense counsel, [Docket No. 24], is DENIED; and Plaintiffs Motion seeking the entry of a pretrial scheduling Order, [Docket No. 3 1], is DENIED.

I. Background

On November 17, 2022, Plaintiff initiated this action by filing his Complaint. [Docket No. 1]. In his Complaint, Plaintiff alleges that the Complaint's sole defendant, Charles Schwab & Co. Inc., devalued certain stocks Plaintiff owned; refused to execute certain trades and transactions Plaintiff attempted in his brokerage account; marked his stocks with a "death symbol"; improperly charged him certain commission and fees; discriminated against him; made false statements about its actions; and in doing so, violated several federal banking laws. (See Compl. [Docket No. l]). Plaintiff seeks $27,414,941.00 in monetary damages, which purportedly represents one dollar for each share of stocked previously owned by Plaintiff. (See Id.).

Defendant, through its counsel at Fredrikson & Bryon, P.A., responded to the Complaint on December 30, 2022, by filing a Motion to Dismiss. [Docket No. 12]. In support of its Motion to Dismiss, Defendant argues that the doctrine of res judicata bars Plaintiff from bringing the present action because the parties previously resolved this dispute at a binding arbitration proceeding. (Mot. [Docket No. 12]; Mem. [Docket No. 13]). Oral arguments on Defendant's Motion to Dismiss are presently scheduled to be heard on April 6, 2023, before the Honorable Jerry W. Blackwell, United States District Court Judge for the District of Minnesota. (Notice [Docket No. 68]).

On January 27, 2023, Plaintiff filed the three present Motions: his Motion for permission to file a motion to disqualify defense counsel, [Docket No. 30]; his Motion to disqualify defense counsel, [Docket No. 24]; and his Motion seeking the issuance of a pretrial

scheduling Order. [Docket No. 31]. Defendant has responded in opposition to Plaintiff's request to disqualify defense counsel.

II. Plaintiff's Motion to Disqualify Defense Counsel. [Docket No. 241.[1]

Plaintiffs Motion to Disqualify Defense Counsel, [Docket No. 24], seeks an Order of this Court disqualifying the law firm of Fredrikson & Byron, P.A. from representing Defendant in this matter. In support of this Motion, Plaintiff asserts that a conflict of interest exists between him and the law firm of Fredrikson & Byron.

"The Court has discretion to determine whether counsel should be disqualified." Shields v. Gen. Mills Inc., No. 16-cv-954 (MJD/KMM), 2017 WL 6520685, at *2 (D. Minn. Dec. 1, 2017), report and recommendation adopted, 2017 WL 6542035 (D. Minn. Dec. 20, 2017). "A party's right to select its own counsel is an important public right and a vital freedom that should be preserved; the extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." Macheca Transp. Co. v. Phila. Indem. Ins. Co., 463 F.3d 827, 833 (8th Cir. 2006) (quoting Harker v. Comm'r 82 F.3d 806, 808 (8th Cir.

[1] As observed above, Plaintiff also filed a Motion seeking permission to file a motion to disqualify defense counsel. [Docket No. 30]. A party does not, however, need this Court's permission to file a motion to disqualify counsel. Thus, Plaintiffs Motion seeking permission to file a motion to disqualify defense counsel, [Docket No. 30], is DENIED as moot.

1996)). "Because of the potential for abuse by opposing counsel, 'disqualification motions should be subjected to particularly strict scrutiny." Awnings v. Fullerton, 912 F.3d 1089, 1095 (8th Cir. 2019) (quoting Macheca Transp. Co., 463 F.3d at 833).

"The moving party bears the burden of proving that disqualification is required." Id. at 1096. "However, 'any legitimate doubts must be resolved in favor of disqualification. '" Residential Funding Co. v. Decision One Mortg. Co., No. 14-cv-1737 (MJD/JSM), 2015 WL 13657250, at *10 (D. Minn. Jan. 23, 2015) (quoting Olson v. Snap Prods., Inc., 183 F.R.D. 539, 542 (D. Minn. 1998)).

"Disqualification is an ethical, not a legal matter, and is in the public's, as well as the client's, interest." Residential Funding Co., 2015 WL 13657250, at *9 (quoting In re Potash Antitrust Litig., No. 3-93-197, 1993 WL 543013, at *16 (D. Minn. Dec. 8, 1993), amended, 1994 WL 2255 (D. Minn. Jan. 4, 1994)). Attorneys practicing in the District of Minnesota must comply with the Minnesota Rules of Professional Conduct. Local Rule 83.6(a). "A party seeking disqualification based on alleged violations of the Minnesota Rules of Professional Conduct has the burden of showing that disqualification is warranted." McGregor v. Uponer: Inc., No. 9-cv1 136 (ADM/JJK), 2010 WL 1 1646579, at *4 (D. Minn. Feb. 9, 2010).

Pursuant to Minnesota Rule of Professional Conduct 1.9(a):

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that

> person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Minn. R. Prof. Cond. 1.9(a). If one lawyer in a firm is prohibited from representing a former client under Minnesota Rule of Professional Conduct 1.9, the prohibition may be imputed to other lawyers in that firm through Minnesota Rule of Professional Conduct 1.10, which provides in part that:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. Minn. R. Prof. Cond. 1.10(a).

Plaintiff argues that the entire Fredrikson & Byron firm should be disqualified under Minnesota Rules of Profession Conduct I .9 and I .10 because a conflict of interest exists between Plaintiff and the law firm. Plaintiff argues that a conflict of interest exists because Fredrikson & Byron previously represented Plaintiff in certain legal matters.[2]

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[2] Plaintiff also conclusorily asserts that he, at some unspecified time, contacted an unidentified individual at Fredrikson & Byron seeking representation in the present case and during said contact he shared the "substance of the case," as well as, personal, private, and confidential information. (Plf.'s Mot. [Docket No. 24] at 2). The Court finds these conclusory assertions to be unpersuasive. Plaintiff fails to offer any evidence or specific factual allegations

The resolution of a motion to disqualify counsel requires the consideration of a three-part test. FCA Constr. co. v. Singles Roofing co., No. 9-cv-3700 (ADM/AJD), 2011 WL 13228121, at *2 (D. Minn. Aug. 2, 201 1) (quoting Bieter co. v. Biomquist, 132 F.R.D. 220, 223 (D. Minn. 1990)). The party seeking disqualification must show that "l) the moving party and the opposing counsel actually had a prior attorney client relationship; 2) the interests of opposing counsel's present client are adverse to the movant; and 3) the matters involved in the present underlying lawsuit are substantially related to the matters for which the opposing counsel previously represented the moving party." All three elements are required. FCA Constr. co. v. Singles Roofing co., No. 9-cv-3700 (ADM/AJD), 201 1 WL 13228121, at *2 (D. Minn. Aug. 2, 2011) (quoting Bieter Co. v. Blomquist, 132 F.R.D. 220, 223 (D. Minn. 1990)).

In the present case, there is no dispute that Plaintiff and Fredrikson & Byron had a previous attorney-client relationship. Both Plaintiff and defense counsel acknowledge that such a relationship previously existed. Similarly, there is no dispute that Defendant's interest in the present case is adverse to Plaintiffs interest. Thus, the only question before the Court in consideration of Plaintiffs request to disqualify defense counsel is whether the matters

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as to his communications with this unidentified individual. Moreover, even assuming solely for the sake of argument that a discussion did occur between Plaintiff and a representative of Fredrikson & Byron regarding Plaintiff seeking legal representation in the present matter, Plaintiff affirmatively acknowledges that defense counsel specifically informed him that Fredrikson & Bryon would not be representing him in this matter.

underlying the present action are substantially related to the matters in which defense counsel previously represented Plaintiff

Although Plaintiffs relevant, factual allegations are sparse regarding the specifics of his attorney-client relationship with defense counsel, he asserts that the Fredrikson & Byron firm represented his interest in submitting copyright registrations for music created by Plaintiff. (Plf 's Mot. [Docket No. 24] at 1). Defense counsel confirms that it previously represented Plaintiff in preparing and submitting four copyright registrations. (Def. 's Mem. [Docket No. 37] at l). The first time Fredrikson & Byron presented Plaintiff was in 1994, and the most recent instance was in 2013, although the 2013 copyright registration was ultimately not submitted because Plaintiff failed to sign the copyright registration. (West Dec. [Docket No. 39] ¶¶ 3—9).

Between 1994 and 2013, Plaintiff made unannounced visits to the offices of Fredrikson & Bryon during which he described various lawsuits he wished to bring against various parties. (Id..'1 5). [3] Fredrikson & Byron declined to represent Plaintiff in any of these actions. (Id.).4

On the record now before it, the Court finds that the only capacity in which Fredrikson & Byron previously represented Plaintiff's legal interest was the preparation and submission of copyright

[3] These discussions did not involve the present action or Defendant Charles Schwab & Co. in any manner. (Id. 9). 4 Plaintiff acknowledges that when he described these various lawsuits to an individual at Fredrikson & Byron, the firm declined to represent Plaintiff in any of these actions. (Plf.'s Mot. [Docket No. 24] at 2).

registrations for Plaintiff's musical creations. Defense counsel is thus only subject to disqualification if Plaintiff demonstrates that his previous attorney-client relationship with defense counsel, involving copyright registrations, is substantially related to the present action.

The present action involves Plaintiffs allegations that Defendant violated several federal banking laws when it devalued certain stocks Plaintiff owned; refused to execute certain trades and transactions Plaintiff attempted in his brokerage account; marked his stocks with a "death symbol"; improperly charged him certain commission and fees; discriminated against him; and made false statements about its actions. (See Compl. [Docket No. 1]). Plaintiff fails to proffer any argument as to how the previous preparation and submission of copyright registrations is substantially related to the present action.

The Court's review of the record finds that the previous attorney-client relationship between defense counsel and Plaintiff, involving only copyright registrations, is not substantially related to the present action. This action does not involve copyrights in any manner. Thus, Plaintiff has failed to meet his burden of demonstrating that disqualification is required.

Therefore, Plaintiff's Motion to disqualify defense counsel, [Docket No. 24], is DENIED.

III. Plaintiff's Motion for a Pretrial Scheduling Order. [Docket No. 311.

At only one sentence in length, Plaintiffs Motion for a Pretrial Scheduling Order, [Docket No. 31], is sparse. The Motion provides only that Plaintiff requests "discovery schedule and time table, pursuant to LR 26-1, discovery plan and mandatory disclosures, trial scheduled and time table." (PIE 's Mot. [Docket No. 31]) (capitalization corrected). Liberally construing the Motion in his favor, Plaintiff seeks an order of this Court convening a Rule 16 conference and the issuance of a pretrial scheduling order so that the parties may begin the discovery process.

The issuance of pretrial scheduling orders and their corresponding conferences are governed by Rule 16 of the Federal Rules of Civil Procedure. Rule 16 provides that, "unless the judge finds good cause for delay," the Court must issue a scheduling order "within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared." Fed. R. Civ. P. 160.

In the present case, good cause supports delaying the initial Rule 16 conference in the present case and the resulting delay in the issuance of a pretrial scheduling order. As observed above, Defendant has responded to Plaintiff's Complaint with a Motion to Dismiss. Defendant's Motion to Dismiss seeks an Order of this Court dismissing Plaintiff's Complaint in its entirety based on the doctrine of res judicata. Beginning the Rule 16 procedures now may result in the unnecessary expenditure of resources by the parties and the Court if Defendant's Motion to Dismiss is subsequently granted. If on the other hand, any portion of Plaintiff's Complaint survives Defendant's Motion to Dismiss, the Court can

promptly begin the Rule 16 process at that time.

Therefore, Plaintiff's Motion for a Pretrial Scheduling Order, [Docket No. 31], is DENIED. If necessary, the Court will issue a pretrial scheduling order after the disposition of Defendant's Motion to Dismiss.

IV. Conclusion

Therefore, for the foregoing reasons, and based on all the files, records, and proceedings herein, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion to disqualify defense counsel, [Docket No. 24], is DENIED.
2. Plaintiffs Motion for permission to file a motion to disqualify defense counsel, [Docket No. 30], is DENIED as moot; and
3. Plaintiffs Motion seeking the entry of a pretrial scheduling Order, [Docket No. 31], is DENIED.

Dated: March 15, 2023

s/Leo I. Brisbois
Hon. Leo I. Brisbois
U.S. MAGISTRATE JUDGE