No. 19-

IN THE

Supreme Court of the United States

JEREMY J. WALKER,

Petitioner,

v.

AMERIPRISE FINANCIAL SERVICES, INCORPORATED,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Financial Industry Regulatory Authority ("FINRA") requires that its members (such as Ameriprise) and associated persons (such as Walker) submit their disputes to arbitration. The mandatory arbitrations are governed by FINRA's Code of Arbitration Procedure for Industry Disputes ("Industry Code"). Industry Code Rule 13101 provides that, when a dispute is submitted to mandatory arbitration, the Code is incorporated by reference into arbitration agreement. Moreover, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82, 123 S. Ct. 588 (2002), this Court held that an agreement to arbitrate "in accordance with the NASD's 'Code of Arbitration Procedure'" (which is the predecessor to the FINRA Industry Code) "effectively incorporated the NASD Code into the parties' agreement." The Second, Fourth, Eighth, Ninth, and Eleventh Circuits also have held that the FINRA code or its predecessor National Association of Securities Dealers ("NASD") code provides the terms of a FINRA (or NASD) member's agreement to arbitrate.

Yet, in the opinion below, the Fifth Circuit held that FINRA Industry Code Rule 13504 is not a term of Walker's and Ameriprise's arbitration agreement. As a result, the Fifth Circuit refused to review whether FINRA arbitrators exceeded their powers under Rule 13504. The questions presented are:

1. Does the FINRA Industry Code supply the terms of the arbitration agreement governing a mandatory arbitration between a member (such as Ameriprise) and associated person (such as Walker)?

2. Is FINRA Industry Code Rule 13504 a term in such arbitration agreements, such that an award exceeding the arbitrator's powers under the rule is subject to review under 9 U.S.C. §10(a)(4)?

CORPORATE DISCLOSURE STATEMENT

This statement is provided in accordance with Rule 29.5 based on information provided by Ameriprise Financial Services, Inc. to the Securities and Exchange Commission:

Ameriprise Financial Services, Inc. is a wholly owned subsidiary of AMPF Holding Corp, which is a wholly owned subsidiary of Ameriprise Financial, Inc. Walker is unaware of any parent or publicly held company owning 10% or more of Ameriprise Financial, Inc.'s stock.

STATEMENT OF RELATED CASES

- *Walker v. Ameriprise Financial Services, Inc.*, Civil No. 3:18-cv-01675-M, U. S. District Court for the Northern District of Texas. Judgment entered Nov. 29, 2018.

- *Walker v. Ameriprise Financial Services, Incorporated*, No. 18-11641, U.S. Court of Appeals for the Fifth Circuit. Judgment entered Oct. 9, 2019. Rehearing (panel and en banc) denied Nov. 13, 2019.

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INTRODUCTION

To work in the securities industry, Walker and over 600,000 other financial advisors have traded their right to a jury trial for a mandatory FINRA arbitration. FINRA, *Current Registration Statistics for December 2019* (reporting 624,996 registered representatives), *available at* https://www.finra.org/media-center/statistics#currentmonth. To open an account with a brokerage firm, almost all customers must trade the same rights. FINRA, *Discussion Paper—FINRA Perspectives on Customer Recovery* at 12 & n.2 (Feb. 8, 2018), *available at* https://www.finra.org/sites/default/files/finra_perspectives_on_customer_recovery.pdf; Comments of Comm'r Luis A. Aguilar, *Outmanned and Outgunned: Fighting on Behalf of Investors Despite Efforts to Weaken Investor Protections*, Annual NASAA/SEC 19(d) Conference (Washington, D.C., April 16, 2013), *available at* https://www.sec.gov/News/Speech/Detail/Speech/1365171515400.

Agreements regarding mandatory FINRA arbitration incorporate the applicable FINRA rules. *See* Industry Code Rule 13101; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82 (2002). Incorporation of the rules as terms of the parties' agreement is critical in: (1) circumscribing the arbitrators' authority; and (2) affording due process through judicial review when the arbitrators exceed that authority.

When Walker tried to submit counterclaims in a FINRA arbitration initiated by Ameriprise, the arbitrators refused to adjudicate them. When Walker submitted those claims and additional claims in a

subsequent FINRA arbitration he initiated against Ameriprise, the arbitrators dismissed them, invoking a FINRA rule allowing dismissal of claims previously adjudicated on the merits. When Walker sought review of the district court's order confirming the arbitrators' dismissal, the Fifth Circuit refused to examine whether the arbitrators had exceeded their powers. The Fifth Circuit based its refusal on the erroneous conclusion that the FINRA rules are not incorporated into the parties' arbitration agreement.

The Fifth Circuit's decision deprives Walker of the review to which he is entitled under the Federal Arbitration Act, robs Walker of the certainty that the FINRA rules prescribe and circumscribe the arbitrators' powers, and denies Walker the opportunity to arbitrate the merits of his claims against Ameriprise. Applying the Fifth Circuit's decision to the mandatory arbitrations between FINRA members and any of the hundreds of thousands of financial advisors or millions of customers will magnify the injustices wrought in this case.

The Fifth Circuit's holding that the FINRA rules are not terms in the parties' arbitration agreement conflicts with opinions of this Court and the other circuit courts, recognizing that the FINRA rules *are* incorporated into the parties' arbitration agreement. The Fifth Circuit's holding injects uncertainty into the FINRA arbitration process, not only in the Fifth Circuit but in other circuits that have not yet addressed the issue. Subjecting financial advisors and customers to the risk that they will be deprived of important rights under FAA section 10(a)(4) to judicial review of FINRA arbitration awards is unacceptable. Those statutory rights are essential to

affording due process, particularly when the financial advisors and customers are required to arbitrate disputes before FINRA arbitrators under the FINRA arbitration rules.

When a circuit court creates a roadblock, even in an unpublished opinion, that deprives claimants of effective access to the courts and due process, this Court has exercised its jurisdiction to restore those rights and restore order to federal jurisprudence.[1] Having twice attempted to submit his claims to FINRA arbitration and having sought the limited judicial review available under the FAA, Walker faces a situation in which no arbitrator has ever adjudicated the merits of his claims against Ameriprise and no appellate court has ever reviewed whether the FINRA arbitrators exceeded their powers. The opinion below is wrong, depriving Walker of his statutory right to review is insupportable, and the resulting uncertainty inflicted on all those required to submit their disputes to FINRA arbitration is untenable.

OPINIONS BELOW

The Fifth Circuit's decision is available at 787 F. App'x 211 and reprinted at App.1a-7a. The orders denying rehearing (panel and *en banc*) are reprinted at App.18a-20a. The district court's opinion confirming the FINRA arbitrator's dismissal is reprinted at App.8a-17a.

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1. *See, e.g.*, *Hetzel v. Prince William Cty.*, 523 U.S. 208, 208-10 (1998) (*per curiam*); *Behrens v. Pelletier*, 516 U.S. 299, 302-05 (1996); *Ankenbrandt v. Richards*, 504 U.S. 689, 691-92 (1992); *McDonald v. City of West Branch*, 466 U.S. 284, 285-87 (1984); *Hughes v. Rowe*, 449 U.S. 5, 6-7 (1980) (*per curiam*); *Brown v. Felsen*, 442 U.S. 127, 128-31 (1979).

JURISDICTION

The Fifth Circuit issued its opinion on October 9, 2019. App.1a. Panel and *en banc* rehearing were denied on November 13, 2019 (App.19a-20a), making this petition due on February 11, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

FINRA Industry Code Rule 13504(a)(6)(C) is reproduced at App.21a-22a. In addition, FINRA Industry Code Rule 13101 provides:

> 13101. Applicability of Code and Incorporation by Reference
>
> (a) Applicability of Code
>
> The Code applies to any dispute that is submitted to arbitration under the Code pursuant to Rules 13200, 13201, or 13202.
>
> (b) Incorporation by Reference
>
> When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

This case also involves 9 U.S.C. § 10(a)(4), which provides:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

A. Legal background

Invoking the power to dismiss claims previously adjudicated on the merits as memorialized in an earlier award, FINRA arbitrators dismissed claims by Walker that had never been adjudicated on the merits and for which no adjudication had been memorialized. The

dismissal exceeded the arbitrators' powers and also contravenes guiding FINRA arbitration principles:

> Since arbitration is the primary means of resolving disputes in the securities industry, the public perception of its fairness is of paramount importance. Arbitrators appointed to resolve securities controversies must continue to meet the challenge of maintaining fair and orderly arbitration proceedings.

FINRA Office of Dispute Resolution Arbitrator's Guide at 9 (FINRA 2018), *available at* http://www.finra.org/sites/default/files/arbitrators-ref-guide.pdf.

Rules are essential to the orderly operation of a FINRA arbitration. And requiring the arbitrators to respect the rules' limits is essential to a FINRA arbitration's fairness.

Ameriprise, a FINRA member, is a broker-dealer providing wealth management and securities trading/sales. ROA.5. Walker, as a licensed stockbroker, was a registered representative with Ameriprise, *i.e.*, an "associated person." *Id.* Pursuant to FINRA Rule 13200 and his Associate Financial Advisor Agreement, Walker was required to arbitrate his claims against Ameriprise under the FINRA Industry Code. ROA.52, 59, 241.

FINRA Rule 13504(a)(6)(C) (the "Dismissal Rule") affords arbitrators the power to dismiss a claim that meets five required elements: (1) the non-moving party previously brought a claim; (2) regarding the same dispute; (3) against the same party; (4) that was fully and finally adjudicated

on the merits; and (5) the ruling was memorialized in an order, judgment, award, or decision. App.21a-22a. The Industry Code requires FINRA arbitrators to comply with the rules in conducting the arbitration and properly carrying out their duties. ROA.241.

B. Factual and procedural background

1. This case does not involve a typical motion to vacate an arbitration award. This case involves two arbitration proceedings and two distinct arbitration awards. Yet, as of this petition's filing, Walker has been allowed to present the merits of his claims in zero arbitrations.

2. After Walker resigned as a registered representative of Ameriprise, the Ameriprise Compliance Department certified to FINRA that Walker had not violated any rules or regulations, had not wrongfully taken any property, and had not violated any FINRA rules or regulations. ROA.68-69, 230-33, 523-25. However, Ameriprise, its franchise owner ("Miller"), and Walker later disputed whether 27 client files went missing the day Walker resigned or simply had been destroyed after conversion to electronic format. ROA.85-88, 108, 142. Ameriprise and Miller filed an arbitration seeking injunctive relief against Walker. ROA.86-88, 142. Miller also sought monetary damages and attorneys' fees. *Id.*

The panel in this first arbitration ("2015 Panel") held an injunction hearing and enjoined Walker from soliciting certain Ameriprise clients. ROA.21, 90-95. In connection with a later hearing to consider Miller's claims for monetary damages and attorneys' fees, Walker moved for leave to bring permissive counterclaims against Ameriprise for

civil conspiracy, fraud, and unjust enrichment. ROA.98, 117. Ameriprise opposed Walker's request. ROA.123-29. The 2015 Panel granted Ameriprise protection and denied Walker leave. ROA.131-33. FINRA refunded the filing fee Walker had paid in connection with the counterclaims he sought leave to file (ROA.267), depriving the 2015 Panel of any jurisdiction to decide them.

Having prohibited Walker from submitting his counterclaims against Ameriprise for adjudication, the 2015 Panel limited evidence in the second hearing to Miller's claims for monetary damages and attorneys' fees. ROA.133. The 2015 Panel allowed Walker to assert defenses in bar or mitigation. *Id.* But at the second hearing, Ameriprise had no pending claims for relief to which defenses could be asserted, and Walker did not seek actual damages (as opposed to attorneys' fees) against Ameriprise or Miller. ROA.212-14. In a sworn declaration, Ameriprise and Miller's lawyer described Walker's counterclaims as "now excluded" from the arbitration and cited her work excluding those counterclaims as justification for the requested fees. ROA.435-37. In its final award providing for monetary damages and attorneys' fees to Miller, the 2015 Panel confirmed that, although Walker could assert defenses to Miller's monetary damages claims, he was not permitted to assert counterclaims against Ameriprise (which had not sought any monetary damages or attorneys' fees) in the arbitration. ROA.144, 844.

3. In 2017, Walker filed a FINRA arbitration against Ameriprise. ROA.151-204. Walker asserted the three claims the 2015 Panel had excluded from the previous arbitration and added eleven new claims (together the "Walker Claims"). ROA.202. Walker sought from

Ameriprise $6,750,000.00 in compensatory and punitive damages that the 2015 Panel had refused to consider or address. *Compare id. with* ROA.144-45.

Ameriprise moved to dismiss the Walker Claims pursuant to Rule 13504(a)(6)(C). ROA.206-25. The 2017 Panel issued an award (the "2017 Award") dismissing all fourteen Walker Claims and imposing monetary sanctions on Walker. ROA.235-39. Not only did this dismissal exceed the arbitrators' powers under the Dismissal Rule, but also it required the 2017 Panel to rewrite the 2015 Award. The 2015 Award did not fully and finally adjudicate any of Walker's claims against Ameriprise on the merits, nor did it memorialize such an adjudication. App.21a-22a.

4. Walker filed a motion to vacate in the district court. ROA.5-10. The district court had jurisdiction under 28 U.S.C. § 1332 because there is complete diversity between the parties and the amount in controversy exceeds $75,000.00. ROA.5-6, 235. Walker contended the arbitrators exceeded their powers in dismissing the 2017 FINRA arbitration; he also asserted arbitrator misconduct. ROA.7-8. The district court denied Walker's motion to vacate and confirmed the 2017 Award. App.8a.

C. Circuit court decision

Walker appealed the confirmation of the 2017 Award. ROA.897-98. The Fifth Circuit had jurisdiction under 9 U.S.C. § 16(a)(1)(D) over the timely appeal from the district court's order denying vacatur of an arbitration award. ROA.882, 896-97. On appeal, the circuit court reviewed the merits of Walker's arbitrator-misconduct challenge under FAA section 10(a)(3). App.6a.

However, the Fifth Circuit refused to review the merits of Walker's exceeded-their-powers challenge under FAA section 10(a)(4). App.7a. The court decided as a threshold matter that Rule 13504 was not a term of the parties' arbitration agreement. *Id.* The court concluded Walker failed to meet his burden to obtain vacatur under section 10(a)(4) because his Rule 13504 issue "fails to even argue that the panel violated the agreement to arbitrate…." *Id.*

REASONS FOR GRANTING THE PETITION

A. The FINRA Industry Code supplies the terms of the mandatory arbitration agreements governing hundreds of thousands of financial advisors.

FINRA arbitration is a unique construct, but it affects hundreds of thousands of financial advisors and other financial industry workers. The Fifth Circuit's treatment of the FINRA Industry Code as procedural, rather than a substantive part of the parties' arbitration agreement, is a mistake with serious and far-reaching implications, from inconsistency in the case law to deprivation of due process.

In order to work in the securities industry, hundreds of thousands of financial advisors[2] have forgone their right to a jury trial in favor of mandatory FINRA arbitration. Decisions of this Court and the Second, Fourth, Eighth, Ninth, and Eleventh Circuits have held that the Industry

2. FINRA, *Current Registration Statistics for December 2019* (reporting 624,996 registered representatives), *available at* https://www.finra.org/media-center/statistics#currentmonth (last visited Feb. 10, 2020).

Code (whether the current FINRA version or the predecessor NASD version) supplies the terms of the resulting arbitration agreement. The Fifth Circuit's contrary decision allows arbitrators to exceed their powers under the terms of FINRA arbitration agreements while depriving financial advisors (and broker-dealers, for that matter) of the judicial review expressly allowed by the FAA when arbitrators exceed their powers.

In *Howsam*, this Court addressed the predecessor NASD Code and Submission Agreement. 537 U.S. at 82. The Court held that the Submission Agreement, specifying that the "present matter in controversy" was submitted for arbitration "in accordance with the NASD's 'Code of Arbitration Procedure'" (*id.*) "effectively incorporated the NASD Code into the parties' agreement." *Id.* at 85. The FINRA Submission Agreement that Ameriprise and Walker signed specifies that "the present matter in controversy" is submitted for arbitration "in accordance with the FINRA By-Laws, Rules, and Code of Arbitration Procedure." ROA.864; *see also* ROA.235 (reciting agreements were signed).

Likewise, the Second, Fourth, Eighth, Ninth, and Eleventh Circuits have held that the FINRA code or its predecessor NASD code provides the terms of a FINRA (or NASD) member's agreement to arbitrate. *See Berthel Fisher & Co. Fin. Servs., Inc. v. Larmon*, 695 F.3d 749, 752 (8th Cir. 2012) (holding that the FINRA code constitutes an agreement to arbitrate); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 739 & n.1 (9th Cir. 2014) (holding that FINRA rule requiring member to arbitrate disputes constituted agreement in writing under the Federal Arbitration Act); *UBS Fin. Servs., Inc. v. W.V. Univ. Hosps., Inc.*, 660 F.3d 643, 649 (2d Cir. 2011) (holding

that FAA requires courts to enforce FINRA Code provisions as an agreement to arbitrate); *MONY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) (holding that the NASD Code constituted the arbitration agreement); *Washington Square Sec. Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (holding the NASD Code constitutes a binding, written arbitration agreement under the FAA). The Fifth Circuit's decision that the Dismissal Rule is not a term of the parties' arbitration agreement (App.7a) conflicts with *Howsam* and the opinions of other circuit courts to have addressed this issue.

Indeed, that decision conflicts with the FINRA Industry Code itself. Rule 13101(b) expressly provides that, "[w]hen a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement." And Rule 13101(a) makes clear that Rule 13101(b)—and the rest of the Code—applies to "any dispute that is submitted to arbitration under the Code" pursuant to FINRA's mandatory arbitration requirements. There is no question in this case that the claims dismissed by the 2017 Award were submitted to mandatory FINRA arbitration under the Code. Yet, the Fifth Circuit held that the Dismissal Rule is not incorporated into the parties' arbitration agreement. *Compare* App.7a *with Howsam*, 537 U.S. at 82, 85 *and Larmon*, 695 F.3d at 752 *and Goldman*, 747 F.3d at 739 & n.1 *and UBS*, 660 F.3d at 649 *and Bornstein*, 390 F.3d at 1342 *and Aune*, 385 F.3d at 435.

B. The circuit court opinion circumvents this Court's precedent and defies the FAA.

By holding that the Dismissal Rule is not incorporated as a term of a FINRA arbitration agreement, the Fifth

Circuit circumvented this Court's precedent and defied the FAA. In addition to *Howsam*'s specific holding that predecessor NASD rules are incorporated into the parties' arbitration agreement, this Court has held generally that, pursuant to the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms," including "'the rules under which that arbitration will be conducted . . . .'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). The Court has emphasized that "the FAA's primary purpose" is to "ensur[e] that private agreements to arbitrate are enforced according to their terms." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Accordingly, "the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). The Fifth Circuit's holding avoids rigorous enforcement of the parties' arbitration agreement, violates the FAA's primary purpose, and scuttles the parties' expectation that the Industry Code circumscribes the FINRA arbitrators' powers.

Moreover, the Fifth Circuit's holding deprives parties of even the narrow judicial review afforded by FAA section 10(a)(4) "where the arbitrators exceeded their powers . . . ." 9 U.S.C. §10(a)(4). Arbitrators' powers are circumscribed by the arbitration agreement terms. *See Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 672 (5th Cir. 2002); *cf. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671-72 (2010) (holding arbitration award may be vacated as exceeding arbitrator's powers when arbitrator strays from interpretation and application of arbitration agreement). In a FINRA arbitration, the arbitrators' powers are circumscribed by the rules in the FINRA Code, which are incorporated as terms in the parties' arbitration

agreement. *See Howsam*, 537 U.S. at 82, 85; *Larmon*, 695 F.3d at 752; *Goldman*, 747 F.3d at 739 & n.1; *UBS*, 660 F.3d at 649; *Bornstein*, 390 F.3d at 1342; *Aune*, 385 F.3d at 435; *but see* App.7a. But under the Fifth Circuit's holding, a challenge that FINRA arbitrators exceeded their powers under the Industry Code "fails to even argue that the panel violated the agreement to arbitrate" and will not support review under section 10(a)(4). App.7a.

C. Excluding FINRA Industry Code rules from the arbitration agreement deprives litigants of a right under FAA section 10(a)(4) to judicial review of FINRA arbitration awards.

The Fifth Circuit refused to review the 2017 Award under FAA section 10(a)(4) to determine whether the FINRA arbitrators exceeded their powers under the Dismissal Rule. *Id.* Applying the decision to other disputes would deprive other associated persons—and FINRA members, for that matter—of their right to seek vacatur under section 10(a)(4) when FINRA arbitrators exceed the limits of any Industry Code provisions that delineate their powers. Similarly, applying the decision to the analogous FINRA Consumer Code,[3] which governs disputes between a customer and a FINRA member or associated person, would deprive customers of their right to judicial review under FAA section 10(a)(4) when FINRA arbitrators exceed their powers under the Consumer Code.

Reviewing the 2017 Award under section 10(a)(4) will not require the Fifth Circuit to review the factual findings

3. FINRA Code of Arbitration Procedure for Customer Disputes, https://www.finra.org/arbitration-mediation/printable-code-arbitration-procedure-12000 (last visited Feb. 10, 2020).

and merits of the arbitrators' decision. If the 2017 Panel had the power to dismiss Walker's claims, that power was conferred by the Dismissal Rule. The Dismissal Rule conferred power to dismiss only claims for which the 2015 Award: (1) "fully and finally adjudicated on the merits" the "claim[s] regarding the same dispute against the same party"; and (2) "memorialize[s]" that adjudication. App.21a-22a.

Although the 2017 Panel purported to apply the Dismissal Rule, the 2015 Award contains no supportable basis for their determination that the 2015 Award adjudicated Walker's claims against Ameriprise. The 2015 Award lists all issues in controversy in the 2015 arbitration. ROA.143 ("Case Summary"). It does not list any claims by Walker against Ameriprise. *Id.* Although the 2015 Award confirms that Walker "asserted various affirmative defenses," it also confirms that the 2015 Panel prohibited Walker from asserting any counterclaims against Ameriprise in the 2015 arbitration. ROA.143-44. On its face, the 2015 Panel expressly and unambiguously excluded Walker's claims against Ameriprise (*i.e.*, "counterclaims") from the 2015 arbitration. ROA.144. On its face, the 2015 Award expressly and unambiguously *refused to adjudicate* Walker's claims against Ameriprise and memorialized that *refusal*. *Compare* ROA.143-44 *with* App.21a-22a.

Likewise, there is no supportable basis for the 2017 Panel to have concluded that the 2015 Award "memorializes" the adjudication of the Walker Claims against Ameriprise. *Compare* ROA.142-49 *with* ROA.236. Nowhere does the 2015 Award set forth what Walker's claims were or what adjudication was made of them. *See*

ROA.142-49. The 2017 Panel's statement that the 2015 Award memorialized the adjudication of Walker's claims is contrary to the 2015 Award's plain language and lacks a supportable basis.

The 2017 Panel's determination that the 2015 Award adjudicated Walker's claims against Ameriprise is not rational. It is "so unfounded in reason" as to demonstrate an "infidelity to the obligation of an arbitrator." *See Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 545 (5th Cir. 2016) (stating standard). The arbitrators' conclusion that the 2015 Award supports dismissal of the 2017 arbitration "utterly contort[s] the evident purpose and intent" of the Dismissal Rule. *Id.*

By basing the 2017 Award on an interpretation of the Dismissal Rule that is wholly baseless and completely without reason, the 2017 Panel acted beyond the terms of the parties' arbitration agreement, exceeding their powers. *See Muskegon Cent. Dispatch 911 v. Tiburon, Inc.*, 462 F. App'x 517, 524-25 (6th Cir. 2012). That the 2017 Panel purported to apply the standards in the Dismissal Rule does not preclude a conclusion that they exceeded their powers. *See Int'l Paper Co. v. United Paperworkers Int'l Union*, 215 F.3d 815, 817 (8th Cir. 2000). The standard the 2017 Panel applied to the 2015 Award was not susceptible to the arbitrators' interpretation. *Id.*

Because the 2015 Award provides no rational basis for the arbitrators to conclude that the Walker Claims were fully and finally adjudicated in the earlier arbitration, the 2017 Panel "effectively 'dispense[d] [their] own brand of industrial justice'" and their decision should be "vacated under §10(a)(4) of the FAA on the ground that the

arbitrator 'exceeded [his] powers . . . ." *See Stolt-Nielsen*, 559 U.S. at 671-72.

The 2017 Panel had no power to look behind the 2015 Award's express exclusion of all claims by Walker against Ameriprise. The Dismissal Rule does not empower a second set of FINRA arbitrators to conduct a *de novo* review and make an independent determination of whether a party is attempting to re-litigate issues raised in a previous arbitration. *See* App.21a-22a. Contrary to broader, common-law standards of *res judicata*, the Dismissal Rule limits the arbitrators' dismissal powers to claims that were fully and finally adjudicated on the merits in a prior arbitration where *that adjudication is memorialized in an order, judgment, award, or decision. Id.*

Ameriprise, not Walker, sought to re-litigate the issues in an arbitration and rewrite the 2015 Award. Although Ameriprise successfully convinced the 2017 Panel to do so under the guise of the Dismissal Rule, FAA section 10(a)(4) provided Walker with a right, albeit narrow, to judicial review of whether the arbitrators exceeded their powers. The Fifth Circuit's threshold determination that the FINRA Industry Code rules are not part of the parties' arbitration agreement deprived him of that statutory right and the due process it confers.

D. This Court has exercised its jurisdiction where, as here, a circuit court's holding obstructs access to justice by depriving a claimant of an adjudication on the merits.

The Fifth Circuit's holding immunizes FINRA arbitrators from judicial review of any claimant's

challenge that a FINRA arbitration award exceeds the powers delineated by FINRA rules. This holding also deprives Walker of any arbitral adjudication of the merits of his underlying claims against Ameriprise. When Walker tried to bring three counterclaims against Ameriprise in 2015, the FINRA arbitrators refused to adjudicate them, prohibiting him from asserting them and divesting themselves of jurisdiction to decide them. ROA.115, 144, 196, 267. But when he tried to bring those claims and 11 additional claims against Ameriprise in 2017, another set of FINRA arbitrators dismissed them as fully and finally adjudicated. ROA.202, 236. The merits of Walker's claims have never been decided by FINRA arbitrators. And the merits of Walker's section 10(a)(4) challenge will not be subjected to appellate review unless this Court exercises its jurisdiction, whether by authored opinion or *per curiam*.

Beyond the injustice to Walker, the Fifth Circuit's holding may discourage some associated persons and customers from even submitting their disputes to arbitration in the first place. In the course of exceeding their powers, the 2017 Panel absolved a billion-dollar FINRA member from having to defend itself against an associated person's claims and fined the associated person $15,000 in attorneys' fees as a sanction for simply filing the arbitration. ROA.237. If FINRA arbitrators are allowed to exceed their powers without any judicial oversight and sanction claimants in the process, it is reasonable to expect that industry personnel and customers will think twice before pursuing any relief against FINRA members, regardless of the merits.

Over the past three years, industry personnel and customers have filed an average of about 3,800 FINRA

arbitrations per year. FINRA, *Dispute Resolution Statistics*, https://www.finra.org/arbitration-mediation/dispute-resolution-statistics (last visited on Feb. 10, 2020). But in the future, the Fifth Circuit's decision may dissuade some industry personnel and customers from arbitrating claims against FINRA members at all, based on doubts about whether arbitrators will exceed their powers under the FINRA arbitration codes and uncertainty about whether courts will review such excesses under FAA section 10(a)(4).

When, as here, a circuit court erects a roadblock that erroneously deprives litigants of their right to an adjudication on the merits, this Court has exercised its jurisdiction to restore the litigants' access to justice. For example:

- In *Hetzel v. Prince William County.*, 523 U.S. 208, 208-10 (1998) (*per curiam*), the Court granted review from an unpublished Fourth Circuit order staying a jury trial and directing the district court to enter final judgment on damages. The Court determined that the claimant had a right to a new jury trial after rejecting remittitur. *Id.* at 211-12.

- In *Behrens v. Pelletier*, 516 U.S. 299, 302-05 (1996), the Court granted review of an unpublished Ninth Circuit order dismissing an appeal for lack of jurisdiction. The Court held that the order being appealed fell within a small class of immediately appealable orders, requiring the circuit court to review the merits. *Id.* at 305, 313.

- In *Ankenbrandt v. Richards*, 504 U.S. 689, 691-92 (1992), the Court granted review of an unpublished Fifth Circuit opinion affirming dismissal of a claim based on the "domestic relations" exception to diversity jurisdiction. The Court held that the exception did not bar claims such as those brought by Ankenbrandt. *Id.* at 704.

- In *McDonald v. City of West Branch*, 466 U.S. 284, 285-87 (1984), the Court granted review of an unpublished Sixth Circuit opinion reversing the district court's judgment on a jury verdict and holding the claims at issue were barred by a previous arbitration award under *res judicata* and collateral estoppel. The Court held that an award in a prior collective-bargaining arbitration does not bar section 1983 claims. *Id.* at 289-90.

- In *Hughes v. Rowe*, 449 U.S. 5, 6-7 (1980) (*per curiam*), the Court granted review of an unpublished Sixth Circuit order affirming a district court's dismissal of claims. The Court held that the regulation on which the district court relied did not justify dismissal of the plaintiff's civil rights claim. *Id.* at 11.

- In *Brown v. Felsen*, 442 U.S. 127, 128-31 (1979), the Court granted review of an unpublished Tenth Circuit opinion affirming a bankruptcy court's use of *res judicata* to determine dischargeability of a claim based

> solely on the record in a previous state-court lawsuit. The Court held that *res judicata* did not apply, the dischargeability issues had not been adjudicated in the state-court lawsuit, and the petitioner was entitled to a determination of those issues on the merits. *Id.* at 138.

The Court should grant this petition to restore judicial review of FINRA arbitration awards under section 10(a)(4) for excesses of the arbitrators' powers under FINRA rules. Judicial review of arbitration awards under FAA section 10 is essential to due process. *See Doscher v. Sea Port Group Secs., LLC*, 832 F.3d 372, 386 (2d Cir. 2016) (holding that Congress provided for vacatur and modification in FAA sections 10 and 11 on grounds "sounding in basic fairness and due process"); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003) (holding that FAA's narrow grounds for vacatur are "designed to preserve due process" without unnecessary public intrusion into private arbitrations); *cf. Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (explaining that FAA sections 9 through 11 substantiate a national policy favoring arbitration "with just the limited review needed" to maintain arbitration's virtue of resolving disputes straightaway). Without review under section 10(a)(4), a party has no recourse when an arbitrator acts contrary to the terms on which the party agreed to arbitrate in the first place. Depriving parties of their right to review under section 10 "frustrate[s] Congress's attempt to ensure a minimum level of due process" in arbitration. *See In re Wal-Mart Wage & Hour Employment Practices Litig.*, 737 F.3d 1262, 1268 (9th Cir. 2013).

Judicial review under FAA section 10(a)(4) is even more important to due process when, as here, an industry compels individuals to forgo their right to a jury trial as a condition of their work. The balance of interests reflected in the Industry Code is an important component of FINRA's self-regulatory framework. As the organization charged with comprehensive oversight of the securities industry, FINRA counts among its purposes both the "adjust[ment of] grievances between the public and members and between members" and the "adopt[ion], administ[ration], and enforce[ment of] rules of fair practice." *UBS*, 660 F.3d at 652. Allowing arbitrators to exceed their powers under those rules, without even the limited judicial oversight afforded by FAA section 10(a)(4), undermines those purposes and weakens confidence in the vibrant U.S. capital markets that those purposes promote.

Compelling parties to arbitrate their securities industry disputes under the FINRA Industry Code and Customer Code promotes investor confidence and market stability only when those arbitrations are conducted within the constraints of FINRA rules. Industry personnel and customers, FINRA arbitrators, and federal courts benefit from the certainty that these rules are terms of the mandatory arbitration agreement. Removing all doubt as to this basic principle will restore the judicial review afforded by FAA section 10(a)(4), and the resulting due process, in the thousands of forced FINRA arbitrations filed each year.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

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Counsel for Petitioner

February 11, 2020

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED OCTOBER 9, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11641

JEREMY J. WALKER,

Plaintiff-Appellant,

v.

AMERIPRISE FINANCIAL SERVICES, INCORPORATED,

Defendant-Appellee.

October 9, 2019, Filed

Appeal from the United States District Court
for the Northern District of Texas.
USDC No. 3:18-CV-1675.

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

Appendix A

PER CURIAM:*

Jeremy Walker appeals the district court's order denying his petition to vacate an arbitration ruling and granting Ameriprise's motion to confirm the ruling. We affirm.

I.

In 2015, Ameriprise Financial Services ("Ameriprise") and franchise owner Scott Miller sought a temporary restraining order against former employee Jeremy Walker to prevent him from utilizing confidential customer information. Pursuant to the parties' agreement, Ameriprise and Miller instituted a Financial Industry Regulatory Authority ("FINRA") arbitration proceeding. The 2015 FINRA panel arbitrated Ameriprise's claims against Walker for misappropriation of trade secrets, breach of contract, breach of fiduciary duty, conversion, unfair competition, and unjust enrichment.

During the 2015 arbitration, Walker sought permission to amend his answer and assert counterclaims against Ameriprise for civil conspiracy, fraud, and unjust enrichment. Ameriprise opposed Walker's request, asserting that Walker was using the amendments as a vehicle to re-litigate issues of liability dealt with at a prior hearing. The panel denied Walker's request to add

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

counterclaims and only allowed him to amend his answer to "assert claims or defenses ... including in bar or in mitigation of Claimants' claims." Walker nonetheless argued his "counterclaims" at an August 2015 hearing when the panel considered Ameriprise's request for a permanent injunction. The 2015 arbitration resulted in an award against Walker and in favor of Ameriprise for injunctive relief, compensatory damages and attorney fees. Walker sought review of the arbitrator's authority to award attorney fees in state court. He did not challenge any other aspects of the 2015 proceedings or final award.

In 2017, Walker filed a FINRA arbitration against Ameriprise, primarily alleging he was improperly enjoined by the 2015 arbitration. He also sought to recover for the allegedly "false, fraudulent, and intentional conduct of Ameriprise." He set forth fourteen causes of action. A second FINRA arbitration panel was convened.

Ameriprise moved to dismiss the arbitration under FINRA Code of Arbitration Procedures for Industry Disputes Rule 13504(a)(6). Rule 13504(a)(6)(C) provides that dismissal may be granted when the arbitrators find the "non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision." Both parties submitted briefing and evidence, after which the panel held a hearing on Ameriprise's motion. The panel found the elements of Rule 13504(a)(6)(C) met and unanimously dismissed the arbitration. The panel ruling explained that dismissal was based on Walker's participation in the 2015 arbitration.

Walker then filed a motion to vacate the 2017 ruling in district court, arguing that vacatur was required because the 2017 panel was "guilty of misconduct" under 9 U.S.C. § 10(a)(3) and "exceeded [its] powers" under 9 U.S.C. § 10(a)(4). The district court disagreed, denied Walker's motion on both grounds, and granted Ameriprise's motion to confirm the arbitration ruling. Walker appeals.

II.

"Appellate review of an order confirming an arbitration award proceeds *de novo*, using the same standards that apply to the district court." *21st Century Fin. Servs., LLC v. Manchester Fin. Bank*, 747 F.3d 331, 335 (5th Cir. 2014). "We accept findings of fact that are not clearly erroneous." *Hughes Training Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).

Judicial review of an arbitration award is "exceedingly deferential." *Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, 687 F.3d 671, 674 (5th Cir. 2012). A party seeking vacatur of an arbitration award "must clear a high hurdle." *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 671, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010). "It is not enough . . . to show that the panel committed an error—or even a serious error." *Id.* "It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable." *Id.* (alterations and internal quotation marks omitted) (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S. Ct. 1724, 149 L.

Ed. 2d 740 (2001)). "[A] court may not decline to enforce an award simply because it disagrees with the arbitrator's legal reasoning." *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 637 (5th Cir. 2012), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2064, 186 L. Ed. 2d 113 (2013).

A court may vacate an arbitration award only for the reasons set out in 9 U.S.C. § 10(a). *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009). Under 9 U.S.C. § 10(a), vacatur is proper

> (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.

Walker seeks vacatur under § 10(a)(3) and (4) only. First, he argues that vacatur is appropriate under

§ 10(a)(3) because the panel was guilty of misconduct for failing to allow him to present evidence and testimony. We disagree. Walker asserts that "[i]t was incumbent on the 2017 Panel to schedule and then conduct a hearing to receive evidence and witness testimony on the merits of Ameriprise's Motion to Dismiss." And he claims to be aggrieved because he "reasonably expected the 2017 Panel to deny the Motion to Dismiss." But rather than point to specific instances of misconduct, Walker makes a cursory assertion that "the casual approach taken by the 2017 Panel . . . creates the impression that the universal sense of justice was violated."

Contrary to Walker's argument, the record shows that Walker was not prevented from presenting evidence or testimony. All parties and the three arbitrators attended an Initial Prehearing Conference where discovery deadlines, Rule 13504 briefing rules, and hearing dates were set. After Ameriprise filed for dismissal, Walker filed both a preliminary and a supplemental response. Ameriprise's motion was heard via telephone conference attended by the full arbitration panel and all parties and counsel, who presented evidence for approximately one hour. We see no indication that the panel refused to hear material evidence, engaged in any other misconduct, or otherwise deprived Walker of a fair hearing. "To constitute misconduct requiring vacation of an award, an error in the arbitrator's determination must be one that is not simply an error of law, but which so affects the rights of a party that it may be said he was deprived of a fair hearing." *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. 2006). Walker has not met his burden for vacatur under § 10(a)(3).

Second, Walker argues vacatur is appropriate under § 10(a)(4) because the 2017 panel "exceeded its powers" by dismissing his claims under Rule 13504(a)(6) as fully adjudicated by the 2015 panel. We again disagree. Walker's challenge rests on his assertion that the 2017 panel erred in determining that the elements of Rule 13504(a)(6) were met. But Walker's argument fails to implicate the standard for vacatur under section 10(a)(4). "An arbitrator exceeds his powers [under § 10(a)(4)] if he acts contrary to express contractual provisions." *YPF S.A. v. Apache Overseas, Inc.*, 924 F.3d 815, 818 (5th Cir. 2019) (internal quotation marks omitted). Walker does not argue that the panel violated any express provisions of the arbitration agreement, but only that it incorrectly applied Rule 13504. Even if that were true, however, "[s]uch [alleged] legal errors lie far outside the category of conduct embraced by § 10(a)(4)." *Cooper v. WestEnd Capital Mgmt., L.L.C.*, 832 F.3d 534, 547 (5th Cir. 2016) (internal quotation marks omitted) (quoting *Beaird Indus., Inc. v. Local 2297, Int'l Union*, 404 F.3d 942, 946 (5th Cir. 2005)). Because Walker fails even to argue that the panel violated the agreement to arbitrate, *see Petrofac*, 687 F.3d at 674-75, he fails to meet his burden for vacatur under § 10(a)(4).

In sum, Walker has not identified any reason why the district court erred in denying his motion to vacate and in confirming the arbitration ruling.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION FILED NOVEMBER 29, 2018

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

Civil No. 3:18-cv-01675-M

JEREMY J. WALKER,

Petitioner,

v.

AMERIPRISE FINANCIAL SERVICES, INC.,

Respondent.

ORDER

Petitioner Jeremy Walker requests that this Court vacate a 2017 arbitration award by a FINRA arbitration panel ("2017 Panel") in favor of Respondent Ameriprise Financial Services, Inc. Walker argues that the 2017 Panel is "guilty of misconduct" and "exceeded [its] powers" as described in 9 U.S.C. §§ 10(a)(3) and (4) of the Federal Arbitration Act ("FAA"). Because Walker fails to show that grounds for vacatur exist under §§ 10(a)(3) and (4), the Court denies his Petition to Vacate Arbitration Award and grants Ameriprise's Cross-Motion to Confirm Arbitration Award.

Appendix B

I. Background

In May 2015, Walker resigned from his position as an Associate Financial Advisor with Scott Miller, a franchisee of Ameriprise. (ECF No. 2 ¶¶ 1, 3). In June 2015, Ameriprise and Miller filed suit against Walker in state court, alleging that Walker had taken confidential customer information from Ameriprise when he resigned from Miller's business, and used it to solicit customers to a competing business. (ECF No. 2-2, Ex. A at 001). The state court entered a TRO, restraining Walker from using certain Ameriprise customer information and contacting specific Ameriprise customers. (*Id.*).

Pursuant to the parties' Associate Financial Advisor Agreement, Ameriprise and Miller instituted a FINRA arbitration proceeding ("2015 Panel"), requesting injunctive relief. After a hearing on June 22, 2015, the 2015 Panel entered an order enjoining Walker from using specific Ameriprise customer information. (ECF No. 2-7, Ex. F at 002). The order set a hearing for August 11, 2015, which was "limited to the parties' request for damages, costs, and attorneys' fees." (*Id.* at 003).

Before the date of the scheduled August hearing, Walker requested that the 2015 Panel allow Walker to amend his Answering Statement to assert counterclaims against Ameriprise for unjust enrichment, fraud, and civil conspiracy ("2015 Counterclaims"). (ECF No. 2-8, Ex. G at 019). Ameriprise filed a Motion for Protection, asking the 2015 Panel to confirm that the August hearing would be limited to issues of damages and attorneys' fees related to the injunction. (ECF No. 2-9, Ex. H at 002). Ameriprise

argued that Walker's 2015 Counterclaims were an attempt to "re-characterize" and "re-litigate" issues and defenses already heard and decided at the injunction hearing. (*Id.*).

The 2015 Panel conducted a telephonic hearing, and then entered an order (1) stating that the August hearing would be "limited to evidence and argument relevant to [ ] damages," (2) granting Walker leave to "amend his Answering Statement and assert claims or defenses as set out therein including in bar or in mitigation of [Ameriprise and Miller's] claims," and (3) denying Walker leave to amend his Answering Statement to include the 2015 Counterclaims. (ECF No. 2-10, Ex I at 002).

After the August hearing, the 2015 Panel awarded Miller damages and attorneys' fees. (ECF No. 2-13, Ex. L). The 2015 Award confirms that "[Walker] was permitted to amend his Answer to assert claims or defenses in bar or in mitigation of [Ameriprise and Miller's] claims. [Walker] was not permitted to amend his Answer to assert counterclaims." (*Id.* at 003).

In May 2017, Walker filed a FINRA arbitration proceeding asserting fourteen claims against Ameriprise, including claims for unjust enrichment, fraud, and civil conspiracy ("2017 Claims"). (ECF No. 2-14, Ex. M at App. 052). Because the 2015 Arbitration was closed, FINRA empaneled three new arbitrators to hear Walker's 2017 Claims.

Ameriprise filed a Motion to Dismiss under FINRA Rule 13504(a)(6)(C), which allows for dismissal if "the non-moving party previously brought a claim regarding the

same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision." (ECF No. 2-15, Ex. N). The 2017 Panel held a telephonic hearing on the Motion to Dismiss on March 22, 2018. (ECF No. 2 ¶ 19; ECF No. 9-1, Ex. 6). On April 6, 2018, the 2017 Panel entered an award dismissing all fourteen of Walker's 2017 Claims under Rule 13504(a)(6)(C). (ECF No. 2-18, Ex. Q at 002).

On June 26, 2018, Walker filed the instant Petition to Vacate Arbitration Award, requesting that the Court vacate the 2017 Award and remand the case to a new FINRA arbitration panel. (ECF No. 2 at 7). Walker argues that vacatur is required because the 2017 Panel is "guilty of misconduct" under 9 U.S.C. § 10(a)(3) and "exceeded [its] powers" under 9 U.S.C. § 10(a)(4). In its Response, Ameriprise requests that the Court confirm the 2017 Award and grant Ameriprise's request for attorneys' fees and costs incurred as a result of defending Walker's Petition to Vacate Arbitration Award. (ECF No. 5). On November 27, 2018, the Court held a hearing on Walker's Petition to Vacate Arbitration Award and Ameriprise's Cross-Motion to Confirm Arbitration Award.

II. Legal Standard

Under the FAA, a reviewing court must confirm an arbitration award unless grounds exist to vacate, modify, or correct its terms. 9 U.S.C. § 9. A court may only vacate an arbitration award:

> (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.

Id. § 10(a)(1)–(4). See *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) (holding there are no longer nonstatutory grounds for vacating arbitration awards).

Courts are not to conduct a review of the merits of an arbitrator's decision. *Householder Grp. v. Caughran*, 354 F. App'x 848, 851 (5th Cir. 2009); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671 (2010) ("It is not enough for [a party seeking vacatur] to show that the [arbitration] panel committed an error—or even a serious error."); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 637 (5th Cir. 2012) ("[A] court may not decline to enforce an award simply because it disagrees with the arbitrator's legal reasons."); *Pfeifle v. Chemoil Corp.*, 73 F. App'x 720, 722–23 (5th Cir. 2003) ("[A]n arbitrator's

erroneous interpretation of law or facts is not a basis for vacatur of an award.").

Judicial review of an arbitration award is "exceedingly deferential." *Petrofac, Inc. v. DynMcDermott Petrol. Operations Co.*, 687 F.3d 671, 674 (5th Cir. 2012) (internal citation omitted); *Stolt.Nielsen S.A.*, 559 U.S. at 671 (A party seeking vacatur of an arbitration award "must clear a high hurdle."). Courts consistently describe the scope of judicial review of arbitration awards as "among the narrowest known to the law." *Pfeifle*, 73 F. App'x at 723 (internal citation and quotation omitted). The party seeking to vacate an arbitration award has the burden of proof, and the court must resolve any doubts or uncertainties in favor of upholding the award. *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 549 (N.D. Tex. 2006); *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 385 (5th Cir. 2004).

III. Analysis

A. Petition to Vacate Arbitration Award and Cross-Motion to Confirm Arbitration Award

Throughout his briefing and at the hearing before this Court, Walker argued that because neither the 2015 nor the 2017 Panels adjudicated the merits of his 2015 Counterclaims or his 2017 Claims, he was denied his "day in court." *See, e.g.*, (ECF 2 at 11, 17). However, Walker did not provide the Court with a transcript of the June 2015 hearing on Ameriprise's request for injunctive relief. Thus, there is no factual evidence that the facts underlying

Walker's 2015 Counterclaims and 2017 Claims were not actually adjudicated by the 2015 Panel.

In any case, Walker has not met his burden to show that the 2017 Award should be vacated under §§ 10(a)(3) or (4) of the FAA. Walker asserts that the 2017 Panel is "guilty of misconduct" under § 10(a)(3) because it "refused to hear evidence pertinent and material to the controversy," and did not allow Walker to have a "fundamentally fair hearing." (ECF No. 2 at 12, 20). The record shows that the Scheduling Order for the 2017 Arbitration required the parties to respond to discovery no later than March 15, 2018. (ECF No. 6 at APP 120). Though Ameriprise's Motion to Dismiss was filed on January 1, 2018, the 2017 Panel held a telephonic hearing on the Motion to Dismiss on March 22, 2018, which allowed Walker sufficient time to conduct discovery related to his 2017 Claims. Walker also filed a Preliminary Reply in Opposition to the Motion to Dismiss (*Id.* at APP 125–47) and a Supplemental Reply to the Motion to Dismiss (*Id.* at APP 148–414). Walker presented no evidence that the 2017 Panel failed to consider his pleadings or arguments regarding the Motion to Dismiss. The Court finds that the 2017 Panel was not guilty of misconduct or any other misbehavior as described by § 10(a)(3).

Walker claims that the 2017 Panel "exceeded [its] powers" under § 10(a)(4). Arbitrators exceed their powers if they act contrary to express contractual provisions governing the arbitration. *21st Fin. Services, L.L.C. v. Manchester Fin. Bank*, 747 F.3d 331, 336 (5th Cir. 2014). Walker does not dispute that the 2017 Panel had

the authority to consider his 2017 Claims and to decide Ameriprise's Motion to Dismiss. Instead, Walker argues that (1) his 2017 Claims were not brought before the 2015 Panel; (2) there was never a full and final adjudication on the merits of Walker's 2017 Claims; and (3) the full and final adjudication on the merits of Walker's 2017 Claims have not been memorialized in any order, judgment, award, or decision. (ECF No. 2 at 14–18). At its core, Walker's argument is that the 2017 Panel exceeded its authority because it incorrectly applied Rule 13504(a)(6)(C) in dismissing the 2017 Claims. This type of challenge does not fall within § 10(a)(4) and does not otherwise constitute a basis for vacatur, as it essentially argues that the Court should review the merits of the 2017 Panel's decision. *Householder Grp.*, 354 F. App'x at 851; see also *Stolt-Nielsen S.A.*, 559 U.S. at 671; *Reed*, 681 F.3d at 637; *Pfeifle*, 73 F. App'x at 722–23.

Because Walker has failed to establish any legitimate grounds for vacating the 2017 Award, the Court DENIES Walker's Petition to Vacate Arbitration Award and GRANTS Ameriprise's Cross-Motion to Confirm Arbitration Award.

B. Attorneys' Fees

Ameriprise seeks attorneys' fees and expenses incurred as a result of defending against Walker's Petition to Vacate Arbitration Award.

"[W]hen a refusal to abide by an arbitration decision is without justification, and judicial enforcement is

necessary, the court should award the party seeking enforcement reasonable costs and attorneys' fees incurred in that effort." *Int'l Ass'n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 639 F.2d 279, 284 (5th Cir. 1981); see also *Bruce Hardwood Floors, Div. of Triangle Pac. Corp. v. UBC, S. Council of Indus. Workers, Local Union No. 2713*, 103 F.3d 449, 453 (5th Cir. 1997) ("An award of attorneys' fees is permitted when a party has refused to abide by an arbitration decision 'without justification.'"); *NetKnowledge Techs., L.L.C. v. Rapid Transmit Techs.*, 2007 WL 518548 at *9 (N.D. Tex., Feb. 20, 2007) (Lynn, J.) ("A district court may award attorney's fees against a party making challenges to arbitration awards that are not cognizable under the FAA, are frivolous, or are without legal justification."). A challenge is without justification if it "go[es] to the 'intrinsic merits' of a dispute." *Delek Ref., Ltd. v. Local 202, United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFLCIO*, 891 F.3d 566, 573 (5th Cir. 2018). "[W]hen parties have agreed to arbitrate a dispute, a subsequent court challenge to the merits is not justified even when that question is close because going to court is at odds with the parties' agreement to be bound by the arbitrator's decision." *Id.* at 573–74.

Because Walker challenged the merits of the 2017 Panel's decision to grant Ameriprise's Motion to Dismiss, the Court finds that Ameriprise is entitled to reasonable and necessary attorneys' fees and costs. Ameriprise's counsel, Dayna Blair, filed a declaration stating that she spent 29.6 hours at a rate of $345 per hour defending Walker's Petition to Vacate Arbitration Award, for a total of $10,212. (ECF No. 11 ¶ 4). Ms. Blair also states that

Ameriprise would incur $3,450 in attorneys' fees (10 hours of Ms. Blair's time at $345 per hour) and additional airfare and ground transportation expenses in connection with Ms. Blair's attendance at the hearing before this Court. (*Id.* ¶ 8).

The Court finds that Ms. Blair's rate is fair and reasonable in Dallas County, Texas. The Court finds that $13,662 in attorneys' fees is fair, reasonable, and necessary based on the hourly rate applied and the nature of the services described in Ms. Blair's declaration. Because Ameriprise provides no legal support for its request for transportation expenses, that request is denied.

IV. Conclusion

For the reasons stated above,

IT IS ORDERED that Walker's Petition to Vacate Arbitration Award (ECF No. 1) is DENIED and Ameriprise's Cross-Motion to Confirm Arbitration Award (ECF No. 5) is GRANTED.

SO ORDERED.

November 29, 2018.

/s/
BARBARA M. G. LYNN
CHIEF JUDGE

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 13, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11641

JEREMY J. WALKER,

Plaintiff- Appellant,

v.

AMERIPRISE FINANCIAL
SERVICES, INCORPORATED,

Defendant - Appellee.

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

**ON PETITION FOR REHEARING
AND REHEARING EN BANC**

(Opinion October 9, 2019, 5 Cir., _____, _____
F.3d _____)

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

Appendix C

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Bane, (Fed. R. App. P. and 5TH Cir. R. 35) the Petition for Rehearing En Bane is also DENIED.

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

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

ENTERED FOR THE COURT

/s/_____
UNITED STATES CIRCUIT JUDGE

Appendix C

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE **TEL. 504-310-7700**
CLERK **600 S. MAESTRI PLACE, Suite 115**
NEW ORLEANS, LA 70130

November 13, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-11641 Jeremy Walker v. Ameriprise Fincl Svc Inc.
USDC No. 3:18-CV-1675

Enclosed is an order entered in this case.

See FRAP and Local Rules 41 for stay of the mandate.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Peter A. Conners, Deputy Clerk
504-310-7685

Ms. Danya Wayland Blair
Ms. Kirsten Marisol Castaneda
Mr. Brian Esenwein
Mr. Andrew DeRoy Lewis
Mr. Nicholas David Stepp

APPENDIX D — RELEVANT STATUTORY PROVISIONS

13504. Motions to Dismiss

(a) Motions to Dismiss Prior to Conclusion of Case in Chief

(1) Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.

(2) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(3) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.

(4) Motions under this rule will be decided by the full panel.

(5) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 13606.

(6) The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:

(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release;

(B) the moving party was not associated with the account(s), security(ies), or conduct at issue; or

(C) The non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

(7) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(8) If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.

(9) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(10) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(11) The panel also may issue other sanctions under Rule 13212 if it determines that a party filed a motion under this rule in bad faith.

(b) Motions to Dismiss After Conclusion of Case in Chief

A motion to dismiss made after the conclusion of a party's case in chief is not subject to the procedures set forth in paragraph (a).

(c) Motions to Dismiss Based on Eligibility

A motion to dismiss based on eligibility filed under Rule 13206 will be governed by that rule.

(d) Motions to Dismiss Based on Failure to Comply with Code or Panel Order

A motion to dismiss based on failure to comply with any provision in the Code, or any order of the panel or single arbitrator filed under Rule 13212 will be governed by that rule.

(e) Motions to Dismiss Based on Discovery Abuse

A motion to dismiss based on discovery abuse filed under Rule 13511 will be governed by that rule.