No.

In the Supreme Court of the United States

LAURENCE BONDAY,

Petitioner,

v.

NALCO COMPANY LLC,

Respondent.

On Petition for a Writ of Certiorari to The United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 9 U.S.C. § 10(a)(4), may a court independently, and without deference to the arbitrator's determination, decide what claims are presented in a party's arbitral pleadings and filings?

RELATED PROCEEDINGS

This case arises out of the following proceedings:

Nalco Company LLC v. Laurence Bonday, No. 1:22-cv-00727-JLB-NPM (M.D. Fla.) (motion to vacate arbitration award granted Sept. 22, 2021).

Nalco Company LLC v. Laurence Bonday, No. 13546 (11th Cir.) (grant of motion to vacate arbitration award affirmed on July 10, 2025; petition for rehearing en banc denied August 29, 2025).

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The District Court's opinion granting Respondent's motion to vacate is not reported in the Fed. Supp. but may be found at 2022 WL 4384450 and is reproduced at Pet.App. at 77a-100a.

The Eleventh Circuit's opinion affirming the District Court's decision vacating the arbitration award is reported at 142 F.4th 1336 and reproduced at Pet. App. at 1a-74a.

JURISDICTION

The Eleventh Circuit issued its decision in this case on July 10, 2025. It denied Petitioner's timely petition for rehearing en banc on August 29, 2025. This petition is timely because it is filed on November 26, 2025, within ninety days of that decision. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

9 U.S.C. § 10(a)(4) provides:

> 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—
>
> . . .
>
> (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.

INTRODUCTION

In enacting the Federal Arbitration Act ("FAA") in 1925, Congress recognized that arbitration offers "the promise of quicker, more informal, and often cheaper resolutions for everyone involved." *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 505 (2018). The FAA promotes the efficient and informal resolution of disputes in two ways: 1) by requiring courts to "enforce agreements to arbitrate . . . and enforce the parties' chosen arbitration procedures," *id.* at 506, and 2) by "limit[ing] judicial review" of arbitral awards in order to "maintain[] arbitration's essential virtue of resolving disputes straightaway." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013). Today, though, a number of courts, including the lower courts in this case, review *de novo* arbitrators' interpretations of the claims presented by individual parties in arbitration. As a result, a losing party in arbitration can now seek a court's independent interpretation of arbitral pleadings and filings, the kind of "full-bore legal and evidentiary appeals" that this Court has said that the FAA precludes. *Id.*

The question presented is thus whether, under 9 U.S.C. § 10(a)(4), a court may independently, and without deference to the arbitrator's determination, decide what claims are presented in a party's arbitral pleadings and filings. The courts of appeals are split on this question. *See HollyFrontier Cheyenne Refining, LLC, v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union Local 11-574*, 132 F.4th 1184, 1198 (10th Cir. 2025)(Phillips, J. dissenting)(characterizing the majority's decision that *de novo* review applies to the arbitrators'

determination of the claims submitted as "creating a circuit split on this issue.").

In the decision below, the Eleventh Circuit deepened that split by refusing to defer to the arbitrator's explicit determination—before any merits-related briefing, hearings, or other proceedings—of the claims submitted in the demand for arbitration. The Eleventh Circuit compounded that error by refusing to defer to the arbitrator's determination in the arbitral award ("the Award") that Petitioner Laurence Bonday had submitted evidence and witnesses in support of the claim on which the arbitrator awarded Bonday relief. In place of the normal deference to the arbitrator on procedural matters, the court of appeals treated Respondent's "motion to vacate practically as if Bonday's Demand was a complaint in a civil action and [Respondent] Nalco had moved to dismiss it for failure to state a claim" under Fed. R. Civ. Proc. 12(b)(6). Pet.Appx at 12a (Tjoflat, J. dissenting).

In reviewing without deference the arbitrator's determination of what claims Bonday presented in arbitration, the Eleventh Circuit adopted the same view as the Tenth Circuit: when reviewing a motion to vacate under 9 U.S.C. § 10(a)(4), courts' ordinary "deferential standard of review does not apply to cases where . . . the parties' submission of the issues for arbitration is clear" to a court reviewing arbitral submissions and filings, even when the court's view conflicts with the arbitrator's. *HollyFrontier Cheyenne Refining*, 132 F.4th at 1191. This approach embroils federal courts in burdensome review and inefficient second-guessing of arbitrators' decisions about the content of arbitral pleadings and submissions, including basic procedural determinations such as

whether a demand for arbitration states a claim. By contrast, the First, Third, Fourth, Fifth, Sixth, Ninth, and D.C. Circuits have all held that "[a]n arbitrator's view of the issues submitted to him for arbitration . . . receives the same judicial deference as an arbitrator's interpretation of a [contract]." *See Madison Hotel v. Hotel and Restaurant Employees, Local 25 AFL-CIO*, 144 F.3d 855, 858 (D.C. Cir. 1998); *El Dorado Tech. Servs., Inc. v. Union Gen. De Trabajadores de Puerto Rico*, 961 F.2d 317, 321 (1st Cir. 1992); *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 579 (3d Cir. 2005); *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc'ns Int'l Union*, 973 F.2d 276, 280 (4th Cir. 1992); *Waverly Min. Prods. Co. v. United Steelworkers of Am.*, 633 F.2d 682, 685 (5th Cir. 1980); *Lattimer-Stevens Co. v. United Steelworkers of Am.*, 913 F.2d 1166, 1170 (6th Cir. 1990); *Pack Concrete, Inc. v. Cunningham*, 866 F.2d 283, 285 (9th Cir. 1989).

The question presented is also critically important to enforcing the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). As this Court has explained, "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 562 U.S. 333, 344 (2011). Those terms include any specific rules the parties agreed shall govern their arbitration agreement. *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). Those rules, like the AAA Employment Arbitration Rules applicable to the parties' arbitration in this case, commonly grant the arbitrator authority to interpret the pleadings, decide what claims may be presented,

and resolve procedural matters. C.A.App. at 82-107.[1] Even in the absence of explicit agreement about procedural rules, courts presume that procedural questions—including questions about "whether a condition precedent to arbitrability has been fulfilled"—are for the arbitrator. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002).

Permitting *de novo* judicial review of arbitral pleadings and filings, including procedural questions as to whether a party has sufficiently stated a claim, invites losing parties in arbitration to seek a second bite at the apple in federal court. The efficiencies of arbitration are lost where losing parties seek to vacate arbitration awards on the hope that a federal court might read the pleadings or filings differently from the arbitrator.

This case presents an ideal vehicle to resolve the correct standard of review governing an arbitrator's interpretation of the claims raised in arbitral pleadings and filings. Here, the arbitrator clearly and expressly determined the claims she thought raised by the pleadings prior to any merits-related proceedings. In the Award, she also expressly recounted the evidence submitted in furtherance of those claims. The Agreement plainly states that the arbitration is to be governed by the AAA Rules, and those rules explicitly grant the arbitrator the authority to determine the claims that the parties may present. The only question is whether courts must defer to the arbitrator's explicit findings

[1] Citations to "C.A. App." are to Petitioner's appendix filed in the Eleventh Circuit. References to the AAA Employment Arbitration Rules are to the 2009 version that governed the arbitration in this dispute and is found in the Eleventh Circuit Appendix.

regarding the contents of the parties' submissions. Respectfully, certiorari should be granted.

STATEMENT

A. Background

Congress enacted the Federal Arbitration Act in 1925 in order to ensure the enforcement of arbitration agreements as an efficient and informal means of resolving disputes. The award that results from an arbitration "is no more than a contractual resolution of the parties' dispute." *Badgerow v. Walters*, 596 U.S. 1, 9 (2022). The FAA supplies mechanisms for enforcing such awards: motions to confirm an award, motions to vacate an award, and motions to modify or correct an award. 9 U.S.C. §§ 9-11. Applications for any of these orders "get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court." *Hall St. Assoc., L.L.C. v. Mattel, Inc*, 552 U.S. 576, 582 (2008). Section 9 provides that "a court 'must' confirm an arbitration award 'unless' it is vacated, modified, or correct 'as prescribed' in §§ 10 and 11." *Id.* at 583. These "statutory grounds are exclusive." *Id.* at 578.

The FAA also narrowly circumscribes courts' standard of review for arbitral awards. Under the FAA, "courts may vacate an arbitrator's decision only in very unusual circumstances." *Sutter*, 569 U.S. at 568 (internal quotations omitted). Such limited judicial review is necessary because "[i]f parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.* at 568-69 (internal quotations omitted).

One of the bases for vacating an award is "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)(4). The standard of review under this provision is "whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Sutter*, 569 U.S. at 569. Because an arbitrator's powers flow from the parties' agreement, a court may vacate an award under this provision "[o]nly if the arbitrator acts outside the scope of his contractually delegated authority." *Id.* The parties' agreement, in turn, includes "the parties' chosen arbitration procedures . . . and *the rules* under which that arbitration will be conducted." *Epic Systems*, 584 U.S. at 506.

The exception this Court has identified to this deferential standard of review is for gateway questions of arbitrability, which are presumptively for the court to decide. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). But this exception is itself narrow and can be overcome. First, parties may agree to submit a dispute about arbitrability to the arbitrator if they do so "clear[ly] and unmistakab[ly]." *Id.* at 944. Where there is clear and unmistakable agreement, "a court must defer to an arbitrator's arbitrability decision." *Id.* at 943.

Second, not every gateway issue is an issue of arbitrability. Arbitrability issues are about what the parties have *agreed* may be arbitrated, including whether a party is bound by an arbitration agreement or whether a particular claim falls within the scope of the arbitration agreement. *Howsam*, 537 U.S. at 84. But "procedural questions which grow out of the dispute and bear on its final disposition are

presumptively . . . for an arbitrator." *Id.* These procedural questions include "circumstance where parties would likely expect that an arbitrator would decide the gateway matter." *Id.*

B. Facts and Procedural History

1. From approximately 2015 until 2019, Petitioner Laurence Bonday was employed by Respondent Nalco as the Global Technical Director of Tissue, a part of Nalco's water and paper production business. C.A.App. at 38. During a 2019 reorganization, Nalco eliminated a number of Director positions, including Bonday's. *Id.* at 39. Nalco offered Bonday a lesser role as an Industry Technical Consultant, while Nalco offered other Directors whose roles were eliminated severance packages pursuant to the terms of Nalco's Severance Plan. *Id.* Over the course of 2019 and 2020, Bonday argued to Nalco that he was entitled to a severance package under the terms of the Severance Plan, as his colleagues had received. *Id.* When his requests were denied, he left Nalco's employ on June 1, 2020. *Id.*

2. As part of his employment, Bonday and Nalco entered into an arbitration agreement ("the Agreement"). *Id.* at 74-77. With certain exceptions, the Agreement requires the parties to arbitrate "any and all claims or controversies alleging violations of federal, state, local or common law . . . arising out of or in any way related to" Bonday's employment. *Id.* at 74, ¶ 2.E. The Agreement requires arbitration administered by the American Arbitration Association ("AAA") and subject to the AAA's Employment Arbitration Rules. *Id.* at 76, ¶ 10.B.

Bonday filed a *pro se* demand for arbitration with the AAA on December 29, 2020. *Id* at 36-40. Bonday's demand was filed on a two-page pre-printed form provided by the AAA. *Id*. The form provides three lines to "describe the nature of each claim." It provides that claimants may attach additional pages if necessary. *Id*. at 37.

Bonday attached three additional pages to his demand for arbitration, characterizing the dispute this way:

> My role as Global Director of Tissue was eliminated and I was demoted to Senior ITC (a role I had never held). I requested a package at the time, but was denied. I later (in early 2020) received a copy of the Ecolab Severance plan which (had it had been followed) I would have received a 36 week severance package. I recently discovered that Nalco HR/Legal did go back this year and did offer currently employs (who where [sic] demoted during the leveling event) severance packages per the Policy.

Id. at 38. Bonday requested that the arbitrator direct Nalco to "follow the Ecolab Severance Plan and award me 36 weeks salary per the policy." *Id*. He then recounted his employment history, how he was denied a severance package while similarly situated employees received one, and indicated that he sought relief for "the difference in treatment for severance packages." *Id*. at 39.

Believing that Bonday's demand did not raise any claims that fell within the scope of the Agreement, Nalco refused to participate in the arbitration. *Id*. at 191-93; Pet.App. at 107a-108a. As required by AAA

Rule 8, the arbitrator held a case management conference in August 2021, which Nalco declined to attend. Pet.App. at 108a. After the conference, the arbitrator set a discovery and briefing schedule and a hearing date for November 19, 2021. *Id.*

3. Rather than contest the arbitration, Nalco filed this case, initially seeking a declaratory judgment that the demand was non-arbitrable under the terms of the Agreement and a temporary restraining order or preliminary injunction preventing the arbitration from proceeding. C.A.App. at 11-29. In response, the arbitrator postponed the November hearing. Pet.App. at 109a. On November 12, 2021, the district court denied Nalco's motion under circuit precedent holding that respondents are not irreparably harmed by participating in arbitration and dismissed the complaint, with leave to amend, for lack of subject matter jurisdiction. C.A.App. at 48-54.

After being notified of the district court's decision, the arbitrator issued a procedural order clarifying the claims she believed raised by Bonday's demand. Pet.App. at 107a-111a. Specifically, the arbitrator found that:

> [A]s [Nalco's] jurisdictional arguments are likely to return with the filing of a new Complaint in federal court, and this is the first time the Arbitrator has been presented with [Nalco's] position regarding jurisdiction, a summary response is in order. [Nalco] has treated [Bonday's] Demand for arbitration solely as a breach of their Severance Agreement. . . . However, in doing so, Nalco has ignored the other possible claims raised by [Bonday], who has proceeded in this forum *pro se*. [Bonday] has repeatedly stated he was

> not treated the same as other similarly situated employees who were given the requested benefits. As noted by [Nalco] in its motion, the plan itself was created pursuant to Employee Retirement Income Security Act of 1974 ("ERISA"). As such, [Bonday] may be raising violations of ERISA for the disparate treatment.

Pet.App. at 109a-110a. In addition to claims for breach of Nalco's Severance Plan and discrimination in violation of ERISA, the arbitrator also found that Bonday stated a claim for age discrimination. *Id.* at 110a. Finally, the procedural order established a new discovery schedule and hearing date. *Id.* at 110a-111a. After receiving the arbitrator's order, Nalco once again informed the AAA that it would not participate in the arbitration. C.A.App. at 293-94.

4. The evidentiary hearing occurred on December 7, 2021, with Nalco once again declining to participate despite receiving appropriate notice. Pet.App. at 101a. The arbitrator issued her final award on December 31, 2021. *Id.* The arbitrator found that

> [a]t the hearing, [Bonday] submitted evidence through witness testimony and exhibits in support of his claims of age discrimination in violation of the federal Age Discrimination in Employment Act, breach of contract, and violation of the federal Employee Retirement Income and Security Act ("ERISA").

Pet.App. at 101a-102a. The arbitrator found that she was "without jurisdiction" to decide Bonday's claim for breach of the Severance Plan and denied his claim for age discrimination on the merits. *Id.* at 102a-103a.

But the arbitrator found for Bonday on the ERISA claim, concluding that Nalco's conduct discriminated against Bonday in violation of Section 510 of ERISA, 29 U.S.C. § 1140. Noting that "[t]hroughout the proceedings in this case, [Bonday] has steadfastly asserted he was treated differently than his peers," the arbitrator recounted the testimony of multiple witnesses on which she based her conclusion that similarly situated employees were given rights under the Severance Plan that Bonday was not granted. Pet.App. at 103a-104a. The arbitrator awarded Bonday $122,870 in equitable relief under ERISA Section 502 and an additional $6,595.50 in costs pursuant to provisions of the Agreement requiring Nalco to bear the AAA's expenses. Pet.App. at 105a.

5. Nalco timely moved to vacate the Award on January 25, 2022, arguing that the arbitrator had erred in addressing whether Bonday's demand was arbitrable. C.A.App. at 356. Nalco had initially filed a first amended complaint seeking declaratory relief and invoking the district court's jurisdiction under 28 U.S.C. § 1331 on November 16, 2021. C.A.App. at 60. On May 27, 2022, after this Court's decision in *Badgerow*, 596 U.S. 1, Nalco filed its second amended complaint invoking diversity jurisdiction under 28 U.S.C. § 1332(a). C.A.App. at 387.

Bonday, still *pro se*, moved to dismiss Nalco's complaint, *id.* at 123, 416, and opposed its motion to vacate, *id.* at 380. Quoting the arbitrator's decisions, he argued that the district court should respect the arbitrator's determination of the claims raised and their arbitrability. *Id.* at 382-83, 417-18. He argued that the Agreement bound Nalco "to the AAA Employment Rules for Arbitration. . ., AAA processes, and arbitrator rulings." *Id.* at 382. More specifically,

he argued that under AAA Rule 6, "the Arbitrator has sole authority to determine jurisdiction." *Id*. at 123; *see also id*. at 417 ("Per [the AAA Rules], the Arbitrator has authority to determine jurisdiction.").

The district court granted the motion to vacate on September 22, 2022, on the grounds that the arbitrator had exceeded her powers under 9 U.S.C. § 10(a)(4). Pet.App. at 78a. The district court held that "while the arbitrator may decide issues properly before him, it is the court's task to determine what issues were originally submitted to the arbitrator." *Id*. at 90a-91a (internal brackets and quotations omitted). The district court thus reviewed *de novo* whether Petitioner had raised a discrimination claim under ERISA Section 510 and concluded that Bonday "did not submit a Demand for the arbitration of any ERISA discrimination claim." Pet.App. at 94a. In the alternative, the district court held that it could review *de novo* whether Bonday's ERISA Section 510 claim fell within the scope of the Agreement and concluded that it did not. Pet.App. at 96a-97a.

6. Bonday (now represented by counsel) timely appealed the grant of the motion to vacate. He argued that, by incorporating the AAA Rules, the Agreement did clearly and unmistakably delegate issues regarding the scope of arbitrable claims to the arbitrator. Op. Br. at 22-23.

As relevant here, Bonday also argued that whether the arbitrator had acted within her powers in determining that Bonday's demand raised an ERISA claim was not an issue "of arbitrability, as it does not implicate the parties' Agreement, but rather the actual claims alleged in Mr. Bonday's demand." *Id*. at 28. As such, Bonday argued that the court should defer to the arbitrator's interpretation of the demand

under the standard of review set forth in *Sutter*, namely whether the arbitrator had "even arguably construed" the demand for arbitration. *Id.* at 37-38. Bonday further argued that the arbitrator's decision "was proper under AAA Rules." *Id.* at 45.

A divided panel of the Eleventh Circuit affirmed. Pet.App. at 6a. In light of circuit precedent holding that the incorporation of the AAA Rules commits issues of arbitrability to the arbitrator, the court declined to affirm the district court's holding that Bonday's demand raised claims that fell outside the scope of the arbitration agreement. *Id.* at 7a & n.1. But, reviewing the demand for arbitration without deference to the arbitrator's interpretation thereof, the majority concluded that Bonday "did not submit an ERISA discrimination claim to the arbitrator." *Id.* at 7a. The majority rested its conclusion on the fact that Bonday "didn't mention ERISA or discrimination anywhere in his arbitration demand." *Id.* The majority held that the arbitrator's determination that Bonday's demand raised an ERISA discrimination claim "rewrote Bonday's demand to include an ERISA discrimination claim." *Id.* at 9a. The majority did not discuss the Award itself, in which the arbitrator explicitly found that "[a]t the hearing, [Bonday] submitted evidence through witness testimony and exhibits in support of his claim[] of . . . violation of the federal Employee Retirement Income and Security Act," and which discussed that evidence in detail. Pet.App. 102a-105a.

In refusing to defer to the arbitrator's interpretation of the claims Bonday presented to the arbitrator, the majority did not cite or discuss a single one of this Court's decisions regarding the standard of review applicable to arbitrators' decisions. The

majority also dismissed the relevance of the AAA rules permitting claimants, with the leave of the arbitrator, to present claims not explicit in a demand for arbitration. Pet.App. at 9a-10a.

Judge Tjoflat dissented. He characterized the decision to vacate the Award as one with "no foundation in the law." Pet.App. at 12a (Tjoflat, J. dissenting). The district court, he wrote, treated Respondent's "motion to vacate practically as if Bonday's Demand was a complaint in a civil action and Nalco had moved to dismiss it for failure to state a claim for relief" under Fed. R. Civ. Proc. 12(b)(6). *Id*. Judge Tjoflat would have held that the correct standard of review is whether "the arbitrator (even arguably) interpreted the parties' contract, including the AAA Rules incorporated therein," as required by this Court's decision in *Sutter*, 569 U.S. at 572. Pet.App. at 11a-12a (internal quotations and citations omitted). He explained how AAA rules 5, 6, 8, and 48 permit the arbitrator to determine the claims submitted in arbitration. Pet.App. at 58a-60a. And he concluded that "[t]he decisions of the District Court and Majority here reflect none of the deference articulated in *Sutter*." Pet.App. at 21a.

REASONS FOR GRANTING THE PETITION

The court of appeals are split over the standard of review courts apply to an arbitrator's determination that a party has presented a particular claim in arbitration. At least seven circuits have concluded that an arbitrator's interpretation of the claims made in arbitral filings are due the same deference as other merits-related determinations. But the Tenth and Eleventh Circuits have held that courts may independently review the arbitrator's interpretation of a party's filings. In so doing, they have conflated

whether the parties *may* submit a claim to arbitration under the terms of the parties' arbitration agreement with the distinct issue of whether an individual party *did* present a claim to arbitrator in its pleadings and filings. This holding allows losing parties in arbitration to use judicial review of arbitral awards to receive a second airing of their dispute, a development that encourages a cascade of litigation over the enforceability of arbitral awards that undermines the speedy, efficient, and informal resolution of disputes via arbitration. The decision below is wrong. And this case is an ideal vehicle to address the standard of review question. This Court should grant certiorari.

I. The Circuits Are Split Over the Correct Standard of Review

The First, Third, Fourth, Fifth, Sixth, Ninth, and D.C. Circuits have all held courts owe an arbitrator's interpretation of the issues a party presents during an arbitration the same deference as other merits-related determinations, such as the interpretation of a contract. *See El Dorado Tech. Servs.*, 961 F.2d at 321; *Metromedia Energy*, 409 F.3d at 579; *Richmond, Fredericksburg & Potomac R.R. Co.*, 973 F.2d at 280; *Waverly Min. Prods. Co.*, 633 F.2d at 685; *Lattimer-Stevens Co.*, 913 F.2d at 1170; *Pack Concrete*, 866 F.2d at 285; *Madison Hotel*, 144 F.3d at 858. In reaching the conclusion that courts may independently review such determinations, the Tenth Circuit acknowledged this conflict and the more general confusion among the lower courts as to the correct standard of view. *HollyFrontier Cheyenne Refining*, 132 F.4th at 1191 ("The dissent's claim that our decision today will 'creat[e] a circuit split' ignores the plethora of authorities supporting—and in some cases, requiring—thorough judicial review of an arbitrator's

interpretation of the scope of the issues submitted."); *id.* at 1198 (Phillips, J., dissenting)(noting that the court's decision "creat[es] a circuit split"). Only this Court can resolve the conflict among the courts of appeals and provide much needed guidance on the appropriate standard of review applicable to arbitrators' interpretations of the claims presented by a party.

1. Consistent with the FAA's goal of promoting the informal and efficient resolution of disputes, and the generally deferential standard of review that applies to arbitrator decisions, the majority of circuits have held that the interpretation of a party's presentation of issues is owed the same deference as other types of arbitrator decisions.

a. In *Madison Hotel*, the D.C. Circuit held that "[a]n arbitrator's view of the issues submitted to him for arbitration . . . receives the same judicial deference as an arbitrator's interpretation of a" contract. 144 F.3d at 857. The court noted that "[a]s is commonplace in arbitration proceedings, the scope of the issues developed informally during the course of the parties' presentations." *Id.* at 858. The parties had not submitted a formal statement of the issues. *Id*. Rather, one party had made "an oral submission to the arbitrator which is set forth in his opinion." *Id*. at 858 n.2. Likewise, the court "place[d] no weight" on the claimant's initial grievance letter as limiting the scope of issues before the arbitrator: "the letter did not purport to encompass all the questions the parties intended to place before the arbitrator; its function was to set the informal arbitration process in motion." *Id*. at 858.

b. In *Metromedia Energy, Inc.*, the Third Circuit held that "[w]hen confronted with an allegation that

the arbitrators exceeded their authority by resolving an issue the parties did not intend to submit, we will review the arbitrator's interpretation of the parties' intentions under a 'highly deferential' standard." 409 F.3d at 579. The court applied this deferential standard to "the arbitrator's factual determinations concerning which issues were actually submitted by the parties." *Id.* The court looked to "the record as a whole, [which] provided an adequate basis upon which the arbitration panel could conclude that it was empowered to address" the issue that the appellant had argued was not properly presented. *Id.* at 581-82. In particular, although there did not appear to be a record of the evidentiary hearing itself, the contents of testimony presented at the hearing were recounted in other documents, allowing the court to conclude the arbitrators were "faced with a record in which one party had repeatedly presented evidence and arguments concerning" the disputed issue. *Id.* at 582 (noting based on post-hearing briefing that one party "apparently introduced testimony" during the course of the arbitration in support of the disputed issue). "In light of the highly deferential standard of review" applicable to "the arbitration panel's interpretation of the scope of the parties' submissions," the court held that the arbitrators had not exceeded their authority. *Id.* at 583.

c. The other circuits to apply the ordinary deferential standard of review to the arbitrator's interpretations of the parties' pleadings and filings have reached similar conclusions. The Fourth Circuit, for example, has held that "[t]he arbitrator's interpretation of the scope of the issue submitted is entitled to deference and must be upheld so long as it is rationally derived from the parties' submission." *Richmond, Fredericksburg & Potomac R.R. Co.*, 973

F.2d at 980. Similarly, the Fifth Circuit has held that "it was for the arbitrator to decide just what the issue was that was submitted to it and argued by the parties." *Waverly Mineral Products Co.*, 633 F.2d at 685. Such a determination is a "procedural question which grow[s] out of the dispute and . . . should be left to the arbitrator." *Id.* at 686 (quoting *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964).

2. The Tenth and Eleventh Circuits, by contrast, review the parties' submissions without deference to the arbitrator's interpretation thereof. In so doing, they do not ask whether there is some basis in the record for the arbitrator's interpretation. Instead, they interpret the record independently, allowing losing parties to relitigate the contents of the opposing party's filings and evidence.

a. In *HollyFrontier Cheyenne Refining*, the Tenth Circuit concluded that "our standard of 'great deference' applies only to an arbitrator's resolution of 'disputes that the parties agreed to submit to arbitration.'" 132 F.4th at 1188. The Tenth Circuit held that it "owe[s] no deference to any award that extends beyond those limitations" imposed by the scope of the parties' submissions. *Id.*

The Tenth Circuit went on to conclude that the arbitrator exceeded his powers because it thought that "the text of the parties' submission is clear." *Id.* at 1188. Reviewing the parties' briefs to the arbitrator "[u]nder longstanding precedent," the court recognized that "the parties did not use identical wording in their briefing . . . [and] each party framed its statement of issues to advocate for its own position." *Id.* at 1189. Nevertheless, it concluded that the arbitrator's "broad interpretation of the scope of

the issues submitted by the parties" was erroneous. *Id*. at 1190.

Judge Phillips dissented. In his view, "the district court erroneously treated this as an arbitrability question" that it then reviewed *de novo*. *Id*. at 1195. (Phillips, J., dissenting). But as he explained, "[q]uestions of arbitrability arise when the parties dispute whether a particular grievance *can* be submitted to arbitration in the first place." *Id*. (Phillips, J., dissenting)(emphasis added). By contrast, the question in the case was whether the parties *did* submit the issue to arbitration. *Id*. (Phillips, J., dissenting)("But the dispute here is the *scope* of the issues submitted to the arbitrator, based on the parties' submissions, not whether the issues were properly before him."). Recognizing the circuit split on the correct standard of review, Judge Phillips would have applied "the same level of deference to an arbitrator's interpretation of the scope of the issues submitted to him as is accorded the merits of his decision," like "most of our sister circuits have long" done. *Id*. at 1197 (Phillips, J., dissenting).

b. The Eleventh Circuit decision below applied the same standard of review as the Tenth Circuit. The district court in this case believed that the question of whether a party had in fact presented an issue to the arbitrator was a question of arbitrability that it should review *de novo*. Pet.App. at 93a-94a. And like the Tenth Circuit, the Eleventh Circuit affirmed upon its own independent review of the arbitral filings. *Id*. at 7a. Indeed, both the district court and the Eleventh Circuit focused their analysis on Petitioner's demand for arbitration, without reviewing the entire record, including the Award, and without regard to the powers that the AAA rules to which the parties agreed

conferred on the arbitrator to manage the arbitration and determine what claims the parties' had raised.

* * *

This Court should resolve this circuit split and restore the informality and efficiency of the arbitration process that Congress intended the FAA to protect.

II. The Decision Below is Wrong

Review is also warranted because the decision below contravenes this Court's precedents with respect to the standard of review under 9 U.S.C. § 10(a)(4) and the need to enforce the terms of the parties' agreement to arbitrate, including any procedures to which they have agreed.

1. This Court's precedents establish two basic standards of review for arbitrators' decisions. First, judicial review of "most arbitration decisions" is subject to "considerable leeway." *First Options of Chicago*, 514 U.S. at 948. More specifically, under 9 U.S.C. § 10(a)(4), the standard of review is whether the "arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Sutter*, 569 U.S. at 569. Second, the exception to this standard of review is for "questions of arbitrability," which are "an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *Howsam,* 537 U.S. at 83. Even then, where the parties do "agree to arbitrate 'gateway' questions of arbitrability," federal courts enforce such agreements. *Rent-a-Center, West Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).

As this Court has acknowledged, "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability.'" *Howsam*, 537 U.S. at 83. But this Court's precedents make clear that the phrase—and the associated *de novo* standard of review—"has a far more limited scope." *Id.* Questions of arbitrability are about the parties' *agreement to arbitrate*, which establishes the metes and bounds of what may be arbitrated in the future. Such questions include "whether the parties have *agreed to arbitrate* or whether their *agreement* covers a particular controversy." *Rent-a-Center, West*, 561 U.S. at 69 (emphasis added). The *de novo* standard of review seeks to avoid "the risk of forcing parties to arbitrate a matter that they may well not have *agreed to arbitrate*." *Howsam*, 537 U.S. at 83-84 (emphasis added). In particular, "the arbitrability of the merits of a dispute depends upon whether the parties *agreed to arbitrate* that dispute." *First Options of Chicago*, 514 U.S. at 943 (emphasis added).

By contrast, questions that arise *during a dispute* about whether an individual party has complied with the procedures necessary to arbitrate a claim on the merits are subject to the ordinary deferential standard of review applicable to arbitration. Procedural issues which "grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam*, 537 U.S. at 84. These procedural questions that are for the arbitrator include "whether a condition precedent to arbitrability has been fulfilled." *Id.* at 85. Whether a party has stated or submitted a claim to arbitration is surely a "condition precedent to arbitrability" and thus subject to the ordinary deferential standard of review courts give arbitrators' decisions.

Nevertheless, the Eleventh Circuit and the district court (as in *HollyFrontier Cheyenne Refining*) held that a court may review *de novo* whether an individual party has presented a claim. Pet.Appx at 90a-91a; *id.* at 7a. Both courts applied this standard to Bonday's demand for arbitration. On their independent review of Bonday's demand, both concluded that "Bonday did not submit an ERISA discrimination claim to the arbitrator." *Id.* at 7a; *id.* at 94a. The Eleventh Circuit effectively imposed a clear statement rule, finding that "Bonday didn't mention ERISA or discrimination anywhere in his arbitration demand." *Id.* at 7a.

This analysis wrongly conflates the question of what issues a party individually submitted to the arbitrator during a dispute with the distinct question of what issues the parties agreed *ex ante* may be submitted to the arbitrator. The latter question—did the parties' agree that a particular claim *may be* submitted to arbitration?—is a question of arbitrability because it goes to the scope of the parties' agreement to arbitrate. The former question, though, is not about the parties' agreement. It calls for an interpretation of the parties' individually-filed pleadings, briefs, and evidence. *De novo* review of such documents invites the type of "full-bore legal and evidentiary appeals" that this Court has said that the FAA precludes. *Sutter*, 569 U.S. at 568.

Under the proper standard of review, the motion to vacate should have been denied. That standard of review would direct the court to ask whether the arbitrator's determination of the claims presented had any basis in the record. And the arbitrator explained in detail the basis for her determination that Bonday had raised an ERISA discrimination

claim. In the procedural order of November 23, 2021, the arbitrator noted that Bonday "repeatedly stated he was not treated the same as other similarly situated employees" Pet.App. at 110a. The arbitrator went on to note that Nalco itself conceded in its filings that the benefits Bonday sought arose from a plan "created pursuant to [the] Employee Retirement Income Security Act of 1974." Pet.App. at 110a. The arbitrator also noted Bonday's *pro se* status in the arbitration as a reason to construe his pleadings liberally. *Id.*

Similarly, in the Award, the arbitrator specifically found as a factual matter that "[a]t the hearing, [Bonday] presented evidence through witness testimony and exhibits in support of his claim[] of . . . violation of the federal Employee Retirement and Income Security Act." Pet.App. at 101a. The arbitrator repeated her findings that Bonday "has steadfastly asserted that he was treated differently than his peers" during Nalco's restructuring. *Id.* at 103a]. She found that "[a]t the hearing, [Bonday's] assertions were verified by two witnesses who still work for [Nalco], but who were subpoenaed to testify for this case" and whose testimony she described in detail. *Id.* The arbitrator concluded that ERISA applied to the claims of disparate treatment because "[i]n prior pleadings, [Nalco] stated its plan was created and implemented pursuant to the requirements of ERISA." *Id.*

2. The Eleventh Circuit's holding also directly contradicts the rules to which the parties agreed. As this Court has repeatedly stated, in enacting the FAA Congress "specifically directed [courts] to respect and enforce the parties' chosen arbitration procedures." *Epic Systems*, 584 U.S. at 506. Those procedures that

courts must "rigorously enforce" include any arbitration rules that the parties incorporated into their arbitration agreement. *Volt Info.*, 489 U.S. at 479.

As Judge Tjoflat explained in dissent below, the AAA rules to which the parties agreed in their arbitration agreement provide the arbitrator ample authority to determine that claims that do not appear on the face of a demand for arbitration may be and have been submitted. Pet.Appx. at 58a-60a. AAA Rule 4 provides that "[t]he form of any filing in these rules shall not be subject to technical pleading requirements." C.A. App. at 93; Pet.App. at 23a n.3. AAA Rule 5 provides that "at the discretion of the arbitrator" a party "may offer a new or different claim or counterclaim." C.A. App. at 93; Pet.App. at 59a. Article 6(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." C.A. App. at 93; Pet.App. at 59a. And Article 8 provides a list of issues to be addressed at a Case Management Conference, including "the specification of undisclosed claims." C.A. App. at 94-95; Pet.App. at 60a. Article 8 goes on to say that "[t]he arbitrator shall issue oral or written orders reflecting his or her decisions on the above matters." C.A. App. at 95. The arbitrator followed these procedures, as detailed in her procedural order of November 23, 2021, Pet.App. at 107a, and the Award, *id*. at 101a.

3. Under this Court's precedents, this should have been an easy case. The interpretation of a party's filings and the evaluation of its evidence do not raise questions of "whether the parties agreed to arbitrate th[e] dispute." *First Options of Chicago*, 514 U.S. at 943. They raise an issue that is a "condition[] precedent to arbitrability," namely whether a party

has stated a claim. *Howsam*, 537 U.S. at 84. Moreover, courts are obligated to "rigorously enforce" the procedural rules to which the parties have agreed, *Volt Info.*, 489 U.S. at 479. Here, the arbitrator acted in accordance with those rules, which provide in multiple places that the arbitrator may determine what claims have been raised. Consequently, the court should have denied the motion to vacate.

III. The Question Presented is Important and Recurring

In passing the FAA, Congress aimed "to reverse the longstanding judicial hostility to arbitration *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991), and to secure "the promise of quicker, more informal, and often cheaper resolutions for everyone involved," *Epic Systems*, 584 U.S. at 505. The *de novo* standard of review applied in the Tenth and Eleventh Circuits, however, undermines those values and demonstrates the reemergence of a judicial hostility to the informality of arbitration. And the erroneous conclusion that courts may independently review arbitrators' interpretation of the contents of arbitral filings deprives parties of the benefits of their agreements to arbitrate in an increasingly wide range of cases.

1. In opting for arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). These benefits flow from "the informality of arbitral proceedings [which] is itself desirable, reducing the cost and increasing the speed

of dispute resolution." *Concepcion*, 563 U.S. at 345. Indeed, informality is "the principal advantage of arbitration." *Id*. at 348.

The decisions of the Tenth and Eleventh Circuits, however, severely compromise the informality and associated cost savings of arbitration. Although arbitral practice generally does not require formal pleading standards, *see, e.g.,* Pet.App. at 23a n.3 (Tjoflat, J., dissenting)(quoting AAA Rule 4(b)(i)(1)), the Tenth and Eleventh Circuits' decisions effectively impose such standards, *see* Pet.App. at 12a (Tjoflat, J., dissenting). In circuits that adopt this view, parties may not agree to the informal pleading and procedural rules that attend arbitration. Instead, in order to avoid vacatur of a possible award, they must plead their cases in accordance with the procedural rules with which federal courts are accustomed to dealing.

2. The significant costs associated with the Tenth and Eleventh Circuit's views flow from at least two more sources. First, the narrow standard of review that applies to arbitration decisions is designed to avoid "full-bore legal and evidentiary appeals" that make arbitration "merely a prelude to a more cumbersome and time-consuming judicial review process." *Sutter*, 569 U.S. at 568-69 (internal quotations omitted). The *de novo* standard of review that applies to pleadings and filings in the Tenth and Eleventh Circuits means that parties that lose in arbitration can relitigate their case in front of the courts. The courts can then substitute their interpretation of the pleadings, filings, and arguments the parties made for the arbitrators' interpretation, effectively giving losing parties a do-

over. But "[t]he potential for [arbitrator] mistakes is the price of agreeing to arbitration." *Id*. at 572-73.

Second, in vacating an award on the grounds that the court reads the parties pleadings and filings differently from the arbitrator, the courts simply restart the dispute. *See, e.g.*, 9 U.S.C. § 10(b)(authorizing remand to the arbitrator in the event an award is vacated). A motion to vacate does not resolve the underlying dispute between the parties. It merely wipes away the arbitrators' resolution of that dispute. The parties are thus left to re-arbitrate or relitigate their disagreement. That extraordinary expenditure of resources—the very kind of inefficiency which parties seek to escape when they bargain for arbitration—is the reason that "convincing a court of an arbitrator's error—even his grave error—is not enough" to justify vacating an award. *Sutter*, 569 U.S. at 572.

3. For these and similar reasons, this Court has regularly reminded the lower courts of the narrow standard of review that applies to most arbitrator decisions, *id.*; *First Options of Chicago*, 514 U.S. at 948, as well as the need to enforce the parties' chosen procedural rules, *Volt Info.*, 489 U.S. at 479; *Epic Systems*, 584 U.S. at 506. This Court should do so again here, granting certiorari to clarify that parties may not use judicial review to seek *de novo* review of arbitral pleadings and filings.

IV. This Case Is an Ideal Vehicle

Finally, this case presents an ideal vehicle to clarify the applicable standard of review. The sole basis for the Eleventh Circuit's decision to affirm the district court was its conclusion that "Bonday did not

submit an ERISA discrimination claim to the arbitrator." Pet.App. at 7a. The arbitrator, however, explicitly found that Bonday's demand for arbitration stated a claim for discrimination under ERISA. Pet.App. at 110a. The arbitrator entered that order prior to any merits-related briefings, hearings, or other proceedings. After receiving that order, Nalco affirmatively declined to participate in the arbitration. Pet.App. at 101a. In her Award, the arbitrator explicitly found that Bonday had presented evidence in support of his ERISA discrimination claim. *Id*. at 101a-102a. Given the clear record of the arbitrator's finding at multiple stages of the arbitration that Bonday did present a claim for ERISA discrimination, the only question is whether the district court was required to defer to that finding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 26, 2025

APPENDIX

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APPENDIX A

[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

[Filed July 10, 2025]

No. 22-13546

NALCO COMPANY LLC,
a Delaware Limited Liability Company,
Plaintiff-Appellee,

Versus
LAURENCE BONDAY,
Defendant-Appellant.

Appeal From the United States District Court for
the Middle District of Florida
D.C. Docket No. 2:21-cv-00727-JLB-NPM

Before BRANCH, LUCK, and TJOFLAT, Circuit Judges.

PER CURIAM:

Laurence Bonday, a former employee of Nalco Company LLC, filed an arbitration demand against Nalco, alleging it violated its severance plan by demoting him without offering him severance pay. Nalco responded that a court needed to determine the scope of the arbitration agreement between it and Bonday before the arbitration could proceed. But before a court could reach the arbitrability issue, the arbitrator concluded Bonday's severance claim fell outside the scope of the arbitration agreement and awarded him nothing on that claim. Instead, the arbitrator awarded Bonday $129,465.50 on a claim he never raised: that Nalco discriminated against him in violation of the Employee Retirement Income Security Act of 1974.

Nalco moved to vacate the arbitration award, arguing that the arbitrator "exceeded [her] powers" by deciding the scope of the arbitration agreement and "conjuring up claims that Bonday never made." The district court granted the motion vacating the arbitration award, concluding the arbitrator exceeded her powers by (1) interpreting the scope of the arbitration agreement and finding Bonday's claims arbitrable, and (2) awarding Bonday relief on an ERISA discrimination claim he never raised. Because we agree with the district court's second conclusion that the arbitrator ex-ceeded her powers by awarding Bonday relief on a claim he never raised, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Bonday began working for Nalco in 2005. When he joined the company, Bonday signed two agreements related to his right to seek severance pay—a severance plan and an arbitration agreement.

The severance plan—formed under ERISA—entitled Bonday to severance pay if his job at Nalco was eliminated. Under the plan, Bonday could file a claim with Nalco for severance pay if the company reorganized or eliminated his job. If Nalco denied the claim, Bonday could appeal the decision internally.

Bonday and Nalco's arbitration agreement, meanwhile, required him and the company to submit "all claims or controversies" between them that "alleg[ed] violations of federal, state, local[,] or common law" to arbitration before the American Arbitration Association. But there were two exceptions. "[C]laims related to . . . controversies over awards of benefits or incentives under the [c]ompany's . . . employee benefits plans or welfare plans that contain an appeal procedure" were not arbitrable under the agreement. And questions about "the enforceability, revocability[,] or validity" of the arbitration agreement "[could] only be resolved by a court."

The severance plan and the arbitration agreement came into play fourteen years later, in 2019, when Nalco eliminated Bonday's position and demoted him to a consultant. Bonday wasn't interested in the new consulting job, and he thought the demotion entitled him to severance pay. So, Bonday asked the company's human resources department if he could receive

severance pay and leave the company. The department denied Bonday's request. Bonday appealed the denial to the vice president of human resources, but the vice president upheld the denial. With his severance request denied, Bonday quit his job at Nalco.

Six months later, he filed an arbitration demand with the American Arbitration Association, alleging that Nalco violated its severance plan by not offering him severance pay after demoting him to a consultant. Bonday's arbitration demand requested only one form of relief: that Nalco "follow the . . . [s]everance p[lan]" and give him severance pay. To support his severance claim, Bonday alleged that Nalco offered severance pay to two similar employ-ees who were also demoted to the consultant position.

Before an arbitrator was appointed, Nalco appeared and asked the Association to dismiss Bonday's arbitration demand because his severance claim was a "claim[] related to . . . [a] con-trovers[y] over awards of benefits or incentives under" an "employee benefits plan[] or welfare plan[] that contain[ed] an appeal procedure," which Nalco argued placed it outside the scope of the arbitration agreement since the company's severance plan included an appeal procedure. The Association responded that Nalco would have to raise its arbitrability argument to the arbitrator once appointed—or, alternatively, to a court.

Nalco chose to go to federal court. The company sought a declaratory judgment that Bonday's severance claim was not arbitrable under the arbitration agreement. Nalco then appeared before the arbitrator and moved for a stay until the district

court determined whether Bonday's severance claim was arbitrable.

The arbitrator denied the stay motion and found that Bonday's demand raised arbitrable claims. The arbitrator assumed that Nalco was correct that Bonday's severance claim wasn't arbitrable under the arbitration agreement. Still, in the arbitrator's view, Bonday's demand raised "other possible claims." Specifically, the arbitrator read Bonday's demand as "possibl[y]" raising an ERISA dis-crimination claim. Bonday "possibl[y]" raised that claim, the arbitrator explained, because the severance plan was formed under ERISA, and Bonday alleged that other employees were offered severance pay when he wasn't. The arbitrator concluded that this "possible" ERISA discrimination claim was arbitrable under the arbitration agreement and decided the arbitration would proceed.

Proceed it did. The arbitrator held a hearing, and, at the end of it, she issued a final award on Bonday's possible ERISA discrimination claim. The arbitrator agreed with Nalco that Bonday's severance claim was not arbitrable. But the arbitrator awarded Bonday "$122,870 in equitable relief," along with $6,595.50 in fees and costs, based on the ERISA discrimination claim she read into the demand.

In response, Nalco returned to the district court and moved to vacate the award, arguing that the arbitrator "exceeded [her] powers" by deciding the scope of the arbitration agreement without waiting for the district court to decide whether Bonday's claims were arbitrable. Specifically, Nalco asserted that whether a claim was arbitrable was a question about the arbitration agreement's "enforceability, revocability[,] or validity[,]" which the agreement had

delegated to "a court" and not the arbitrator. And instead of waiting for the district court's arbitrability determination, Nalco argued, the arbitrator "decided the arbitrability issue by conjuring up claims that Bonday never made" and found those claims arbitrable.

For two reasons, the district court agreed that the arbitrator exceeded her powers and vacated the arbitration award. First, the district court concluded that the arbitrator exceeded her powers by ruling on the arbitrability of Bonday's demand because the arbitra-tion agreement reserved determinations on arbitrability issues to the court and not the arbitrator. And second, the district court explained that the arbitrator exceeded her powers by granting relief on a "possible ERISA discrimination claim" because Bonday "did not submit" one in his demand.

Bonday appeals the order vacating the arbitration award.

STANDARD OF REVIEW

When reviewing a "district court's decision on [a] motion to vacate [an] arbitration award, we accept the district court's findings of fact to the extent they are not clearly erroneous and review questions of law de novo." *Johnson v. Directory Assistants Inc.*, 797 F.3d 1294, 1298–99 (11th Cir. 2015) (cleaned up).

DISCUSSION

The district court gave two reasons for its conclusion that the arbitrator exceeded her powers: (1) she ruled on the scope of the arbitration agreement

even though the agreement reserved that determination for the court; and (2) she granted relief on a claim—ERISA discrimination—that Bonday did not raise in his demand for arbitration. Because we agree with the district court's second reason for vacating the arbitration award, we do not reach the first reason.[1]

The Federal Arbitration Act allows a district court to vacate an arbitration award when "the arbitrator[] exceeded [her] powers." See 9 U.S.C. § 10(a)(4). It is "well-established that an arbitrator 'can bind the parties only on issues that they have agreed to submit to h[er].'" *Butterkrust Bakeries v. Bakery, Confectionery & Tobacco Workers Int'l Union, AFL–CIO, Loc. No. 361*, 726 F.2d 698, 700 (11th Cir. 1984) (quoting *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Loc. No. 1*, 611 F.2d 580, 583 (5th Cir. 1980)). An arbitrator therefore exceeds her powers when she decides an "issue [that] was not submitted to" her for determination. *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186, 1195 (11th Cir. 1995) (citing 9 U.S.C. § 10(a)(4)).

Here, Bonday did not submit an ERISA discrimination claim to the arbitrator. Bonday's arbitration demand raised only one claim: that Nalco improperly refused his request for severance after demoting him to consultant. And Bonday asked for one form of relief on that claim: that Nalco "follow the

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[1] Although we have our doubts about the first reason. *See Attix v. Carrington Mortg. Servs.*, LLC, 35 F.4th 1284, 1298–1300 (11th Cir. 2022); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1331–32 (11th Cir. 2005).

. . . [s]everance p[lan]" and give him severance pay. He only referenced the fact that other demoted employees were allegedly offered severance pay in support of his contention that he too should be entitled to severance pay. But Bonday didn't mention ERISA or discrimination anywhere in his arbitration demand, and he didn't ask for damages as a result of any discrimination. Instead, his demand was directed to Nalco's refusal to pay him severance. By awarding Bonday relief on an ERISA discrimination claim that he did not submit to arbitration, the arbitrator exceeded her powers. *See id.*

We reached a similar conclusion in *Davis*. There, Davis filed an arbitration demand that requested "compensatory damages, punitive damages, recis[s]ion, prejudgment interest, and costs," but "did not [request] attorneys' fees" or raise the issue to the arbitration panel. *Id.* at 1187.[2] Even though Davis did not raise the attorneys' fees issue, the arbitration panel decided that the parties would "bear all of [their] . . . attorneys' fees." *Id.* After the district court confirmed the entire award, we vacated as to the portion that awarded attorneys' fees. *Id.* at 1195. The arbitration panel, we explained, exceeded its powers by deciding an "attorneys' fees issue [that] was not submitted to" it. *Id.*

We have the same problem here. The arbitrator exceeded her powers because the ERISA

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[2] *Davis* also involved a AAA arbitration. *See* 59 F.3d at 1187 ("Thus, in 1991, Davis initiated an arbitration before the AAA against PSI and Rukrigl, asserting claims for fraud, breach of fiduciary duty and negligence, and alleging violations of federal securities laws and Florida's Blue Sky Laws." (citation omitted)).

discrimination claim on which she granted relief "was not submitted to" the arbitrator. *See id.*

Bonday and the dissenting opinion resist this conclusion. First, they argue that, in *Davis*, "[t]he problem was that the parties never raised the issue of attorneys' fees during the arbitration." They contend that Bonday's case is different because he eventually raised the ERISA claim with the arbitrator during the arbitration proceedings, after the arbitrator had already read the ERISA discrimination claim into his demand. But Bonday can't point to anything in the record supporting his contention that he actually put forward an ERISA discrimination claim. And when asked at oral argument to do so, he admitted there was no record of him submitting this claim to the arbitrator. So Bonday's case is exactly like *Davis*—the arbitrator decided a claim that Bonday never submitted for arbitration.

Next, Bonday and the dissenting opinion assert that because Bonday appeared pro se in the arbitration, the arbitrator did not exceed her powers by liberally construing his demand to include an ERISA discrimination claim. Bonday is correct that in federal court"[p]ro se pleadings are . . . liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (cleaned up). But even if we were to apply that principle to Bonday's demand, it wouldn't help him because the "leniency" provided to pro se liti-gants "does not give a court license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading." *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014) (cleaned up). To "liberally construe" doesn't mean to make up. But that's what the arbitrator did here. After Bonday submitted a severance claim that the

arbitrator concluded was not arbitrable, she rewrote Bonday's demand to include an ERISA discrimination claim and concluded it was arbitrable. She exceeded her powers by doing so.

Finally, Bonday and the dissenting opinion note that the arbitrator could have allowed Bonday to amend his demand to include an ERISA discrimination claim even if his original demand didn't include one. So, they argue, the arbitrator did not exceed her powers by choosing instead to read an ERISA discrimination claim into his demand. They may be right that Bonday could have amended his demand, but the relevant question is not what claims he could have submitted to the arbitrator via an amended demand. Rather, the relevant question is what claims Bonday did submit to the arbitrator. *See Davis*, 59 F.3d at 1195–96 (concluding arbitration panel exceeded its powers in deciding attorneys' fees issue that plaintiff could have raised but did not include among his claims for arbitration). Again, *Davis* is controlling. *See id*. Even if Bonday could have amended his demand to include an ERISA discrimination claim, he didn't do so. And as noted above, the leniency afforded to pro se litigants does not give courts or arbitrators li-cense to serve as de facto counsel for a party. *See Campbell*, 760 F.3d at 1168–69. So the argument on this point also fails.

CONCLUSION

The district court correctly vacated the arbitrator's award granting Bonday relief on a claim he never submitted to the arbitrator. We therefore affirm the district court's order vacating the award.

AFFIRMED

TJOFLAT, Circuit Judge, dissenting:

Ecolab, the parent company of Nalco Company LLC, maintains a standard dispute resolution agreement with its employees, entitled the "Ecolab Mediation and Arbitration Agreement" ("Arbitration Agreement" or "Agreement"). The Agreement provides for the arbitration of disputes between Ecolab or Nalco and their respective employees and specifies that "[a]ll Disputes shall be finally and conclusively resolved by final and binding arbitration" con-ducted pursuant to the Employment Arbitration Rules of the American Arbitration Association ("AAA Rules"). This appeal concerns an arbitration conducted under the AAA Rules and the award a AAA arbitrator entered in favor of a former Nalco employee, Laurence Bonday.

After the award issued, Nalco moved the District Court below to vacate the award pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, on the ground that the arbitrator lacked jurisdiction under the Agreement to make the award. Nalco assumed a heavy burden. It would not be enough if Nalco established that the arbitrator committed an error—even a serious error—in making the award. Nalco would have to prove to the Court that the arbitrator, in conducting the arbitration and making the award, did not even arguably interpret the parties' Agreement, including the AAA Rules it incorporated. If Nalco failed, the arbitrator's decision would stand intact as a matter of law—even if the Court thought it was meritless. *See E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S. Ct. 462 (2000); *Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.

Ct. 364 (1987). So the sole question for the District Court was "whether the arbitrator (even arguably) interpreted the parties' [Agreement and the AAA Rules], not whether [she] got its meaning right or wrong." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, 133 S. Ct. 2064, 2068 (2013).

This burden was too much for Nalco to carry, so as if the burden did not exist, it persuaded the District Court to treat its motion to vacate practically as if Bonday's Demand was a complaint in a civil action and Nalco had moved to dismiss it for failure to state a claim for relief. *See* Fed. R. Civ. P. 12(b)(6). Nalco urged the Court to do that even though it was hornbook law that the Federal Rules of Civil Procedure have little application in a proceeding for vacatur of an arbitration award under 9 U.S.C. § 10.

The District Court did as Nalco requested. Ignoring the burden of proof the Supreme Court has placed on movants for § 10 vacatur, without considering the AAA Rules the Arbitration Agreement required the arbitrator to apply, and without fully considering this Court's and the Supreme Court's precedent, the District Court granted Nalco's motion and vacated the arbitrator's award. It did so in part by relying on a case, *Davis v. Prudential Sec., Inc.*, 59 F.3d 1186 (11th Cir. 1995), that is inapplicable to the present dispute.

The District Court handed down a lawless decision. It has no foundation in the law—in any law, anywhere but in Nalco's lawyers' imagination. Today, the Majority does the unthinkable. It affirms a trial court decision that cannot stand because it was handed down in defiance of the law. It requires no

subtle analysis to say that this Court cannot do that. I dissent. To quote Justice Alito, "I am stunned."[1]

This dissent proceeds as follows: Part I explains why Congress enacted the FAA and what it sought to achieve. Congress limited the courts' role in the arbitration process. Over time, in a series of decisions that culminated in *Sutter*, the Supreme Court circumscribed that limited role and with the Courts of Appeals addressed the issues Nalco raised here: who decides questions of arbitrability and what is the role of district courts in reviewing arbitral awards. The developments of this case are the focus of Part II. Part III addresses Nalco's failure to satisfy *Sutter*'s "even arguably" standard and the District Court's error in vacating the arbitral award. Part IV demonstrates *Davis*'s inapplicability. Part V concludes.

I. Arbitration Basics

The FAA's Purpose

Congress passed the FAA in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651 (1991). The FAA's provisions embody "a liberal federal policy favoring arbitration agreements." *Id.* at 25, 111

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[1] *Dep't of State v. AIDS Vaccine Advoc. Coal.*, 145 S. Ct. 753, 753 (2025) (Alito, J., dissenting from denial of application to vacate order).

S. Ct. at 1651 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

The FAA reflects Congress's view that arbitration boasts several advantages as an alternative to judicial dispute resolution. By agreeing to arbitrate, parties "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 3354 (1985).

The benefits of arbitration include "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 1775 (2010).

The "primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms." *Id.* at 682, 130 S. Ct. at 1773 (internal quotation marks omitted). When parties agree to arbitrate based on a set of specified rules, those rules become terms of the contract, and our courts must honor them. *See Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1256 (1989) (holding that parties who agree to arbitrate may "specify by contract the rules under which that arbitration will be conducted"). Often, parties will incorporate the rules of an arbitration organization by reference in their contract, as the parties did here by adopting the AAA Rules.

Agreements to Arbitrate

The FAA generally protects the right to enforce arbitration agreements. *See* 9 U.S.C. § 2. It preempts

state law rules that disfavor arbitration, directly or indirectly. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–44, 131 S. Ct. 1740, 1746–48 (2011). And it provides parties with judicial recourse when their counterparts try to circumvent their obligations to arbitrate. For instance, 9 U.S.C.§ 3 requires courts to stay pending suits or proceedings when the issues involved may be referred to arbitration. And 9 U.S.C. § 4 allows a party to apply for an order compelling another party to arbitrate. Together, these provisions ensure that parties receive the arbitration to which they agreed.

Of course, these remedies assume the existence of a valid, enforceable arbitration agreement between the parties. Because "arbitration is strictly a matter of consent," courts must apply contract-law principles to "decide any questions concerning the formation or scope of an arbitration agreement before ordering parties to comply with it." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 298, 130 S. Ct. 2847, 2857 n.6 (2010).

Broadly speaking, the question of "arbitrability" is the question of whether the parties have agreed to arbitrate a particular dispute. *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148, 144 S. Ct. 1186, 1192 (2024). This question is separate from the merits of the underlying dispute, and it is separate from the matter of who gets to decide which questions. The Supreme Court recently explained the distinctions as follows:

> A contest over "the merits of the dispute" is a first-order disagreement, the resolution of which depends on the applicable law and relevant facts. The parties may also have a second-order dispute—"whether they agreed to arbitrate the merits"—as well as a third-

> order dispute—"who should have the primary power to decide the second matter." Under contract principles, these second- and third-order questions are also matters of consent. "Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter."

Id. at 148–49, 144 S. Ct. at 1192–93 (citations omitted). In addition to these questions, parties may "specify by contract the rules under which th[e] arbitration will be conducted." *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256.

This all simply means that the parties' agreement dictates how disputes are resolved at every level of abstraction. By default, "a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute." *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942, 115 S. Ct. 1920, 1923 (1995). So one of the questions courts must ask is: "Did the parties agree to submit the arbitrability question itself to arbitration?" *Id.* at 943, 115 S. Ct. at 1923. To answer that question in the affirmative, a court must find "clear and unmistakable evidence that they did so." *Id.* at 944, 115 S. Ct. at 1924 (cleaned up). But there is no doubt that parties can agree to arbitrate arbitrability, and those agreements are as enforceable as any other. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 65, 139 S. Ct. 524, 527 (2019).

On several occasions, this Court has considered whether, by incorporating the rules of the American Arbitration Association into their arbitration

agreement, parties clearly and unmistakably agreed to arbitrate arbitrability. *See, e.g., Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327 (11th Cir. 2005); *Attix v. Carrington Mortg. Servs.*, LLC, 35 F.4th 1284 (11th Cir. 2022). In those cases, we have consistently held that the incorporation of such rules does suffice to vest the arbitrator with the authority to answer questions of arbitrability. *Terminix*, 432 F.3d at 1332; *Attix*, 35 F.4th at 1297–98. That is because these rules generally contain provisions explicitly granting each AAA arbitrator "the power to rule on his or her own jurisdiction," including with respect to "the existence, scope, or validity of the arbitration agreement." *Id.*

Judicial Review of Awards

As the Supreme Court has explained, the right to enforce arbitration agreements "would not be a right to arbitrate in any meaningful sense if generally applicable principles of state law could be used to transform traditional individualized arbitration into the litigation it was meant to displace through the imposition of procedures at odds with arbitration's informal nature." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651, 142 S. Ct. 1906, 1918 (2022) (cleaned up). The same is true regarding principles of federal procedural law. A court infringes on the right to arbitrate when it imposes unnecessary hurdles rooted in our more formal system of litigation.

Because public policy favors arbitration, judicial review of arbitration awards is quite limited. *Butterkrust Bakeries v. Bakery, Confectionary & Tobacco Workers Int'l Union, AFL-CIO, Loc. No. 361*, 726 F.2d 698, 699 (11th Cir. 1984). The FAA provides two key mechanisms for challenging arbitration

awards: vacation under 9 U.S.C. § 10 and modification or correction under 9 U.S.C. § 11. Relevant here, 9 U.S.C. § 10(a)(4) permits courts to vacate an award "where the arbitrators exceeded their powers, or so imperfectly ex-ecuted them that a mutual, final, and definite award upon the subject matter submitted was not made." Similarly, 9 U.S.C. § 11(b) permits courts to modify an award "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submit-ted." The court will consider an application for either order by a party's motion, without the need for a separate contract action. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582, 128 S. Ct. 1396, 1402 (2008).

But those provisions do not permit courts to second-guess every decision an arbitrator makes. Regarding § 10, the Supreme Court has explained:

> A party seeking relief under that provision bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen*, 559 U.S. at 671, 130 S. Ct. 1758. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp. v. Mine Workers*, 531
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> U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354
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> (2000) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 38,

> 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987); internal quotation marks omitted). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal*, 531 U.S., at 62, 121 S. Ct. 462 (quot-ing *Misco*, 484 U.S., at 38, 108 S. Ct. 364). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.

Sutter, 569 U.S. at 569, 133 S. Ct. at 2068 (alterations in original).

In *Sutter*, the Supreme Court considered a § 10(a)(4) challenge to an arbitrator's finding that the parties' contract permitted class arbitration. *Id.* at 566–67, 133 S. Ct. at 2067. The contract—between a pediatrician, John Sutter, and a health insurance company, Oxford Health Plans—contained a clause mandating the arbitration of all claims "arising under this Agreement , pursuant to the rules of the American Arbitration Association with one arbitrator." *Id.* After Sutter attempted to bring a class action against Oxford in state court, the court referred the dispute to arbitration on Oxford's motion to compel. *Id.* The appointed arbitrator then determined, based on a plain reading of the arbitration clause, that the parties' agreement permitted class arbitration. *Id.*

Oxford filed a § 10(a)(4) motion to vacate on the basis that the arbitrator "exceeded [his] powers." *Id.* (alteration in original). The district court denied the motion, and the Third Circuit affirmed. *Id.* While the

arbitration was pending, the Supreme Court decided *Stolt-Nielsen*, in which the Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 684, 130 S. Ct. at 1758).

Citing that case, Oxford asked the arbitrator to reconsider his decision regarding class arbitration, and the arbitrator declined. *Id.* at 567–68, 133 S. Ct. at 2067–68. In *Stolt-Nielsen*, the parties had stipulated that there was no agreement authorizing class arbitration. *Id.* Whereas in *Sutter*, the parties disputed the meaning of their contract. *Id.* Resolving the dispute, the arbitrator again "found that the arbitration clause unambiguously evinced an intention to allow class arbitration." *Id.*

The district court and Third Circuit again rejected Oxford's renewed effort to have the decision vacated under § 10(a)(4). *Id.* The Supreme Court granted certiorari "to address a circuit split on whether § 10(a)(4) allows a court to vacate an arbitral award in similar circumstances." *Id.* The Court emphasized that, "[u]nder the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances." *Id.* Applying the appropriate, limited standard of review under the FAA, the Court held that, "[s]o long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes under § 10(a)(4)." *Id.* at 572, 133 S. Ct. at 2070. The Court concluded:

> In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The

> arbitrator did what the parties re-quested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not 'exceed his powers,' we cannot give Oxford the relief it wants.

Id. at 573, 133 S. Ct. at 2071.

This Court's own cases have expressed the same sentiment. *See, e.g., S. Commc'ns Servs., Inc. v. Thomas*, 720 F.3d 1352 (11th Cir. 2013). In *Thomas*, we noted that 9 U.S.C. §§ 10 and 11 "together give 'substan[ce to] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.'" *Id.* at 1358 (alteration in original) (quoting *Hall St. Assocs.*, 552 U.S. at 588, 128 S. Ct. at 1405). We emphasized "the extraordinary deference with which arbitral decisions are treated under § 10(a)(4)." *Id.* at 1359. And we reiterated that, under Sutter, "if the arbitrator (even arguably) interpreted the parties' contract, a court must end its inquiry and deny a § 10(a) motion for vacatur." *Id.* (internal quotation marks omitted).

The decisions of the District Court and Majority here reflect none of the deference articulated in *Sutter* and *Thomas*. The District Court, in its order granting Nalco summary judgment and vacating the final award, never even acknowledged that its role was to ask "if the arbitrator (even arguably) interpreted the

parties' contract," *see id*., including the AAA Rules incorporated therein. If the Court had applied this limited scope of review, it would have encountered a host of rules—especially AAA Rules 5, 6, 8, and 48—bearing directly on the present dispute.

Even if the Court would have interpreted those rules differently, that still would not be enough to set aside the final award. The Court would have had to conclude that the arbitrator did not even arguably interpret those rules. In failing to consider the rules at all, the District Court effectively co-opted the arbitrator's role for itself. That is manifestly not what Congress intended when it enacted the FAA, and it is not the process the parties bargained for.

II. Procedural History

With this legal backdrop in mind, I turn to the facts of this case. To understand how far astray the District Court and the Majority have drifted from established law, I find it necessary to chronicle the history of this arbitration.

Initiating Arbitration

The Arbitration Agreement between Bonday and Ecolab (Nalco's parent company) expressly adopts the AAA Rules as providing an alternative dispute resolution forum.[2] AAA Rule 4 dictates how a party to

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[2] Under AAA Rule 2, an employer seeking to make use of AAA's arbitration services must, "at least 30 days prior to the planned effective date" of its agreement, "notify the Association of its intention to do so and . . . provide the Association with a copy of the employment dispute resolution plan." Presumably, AAA was notified of Ecolab's (and thus Nalco's) adoption of the

an arbitration agreement may initiate arbitration. The party may do so by filing at any AAA office a written no-tice, i.e., a "Demand," of its intention to arbitrate the dispute. "The Demand shall set forth . . . a brief statement of the nature of the dispute; the amount in controversy, if any; the remedy sought; and requested hearing location."[3] Bonday, proceeding pro se, filed his Demand for arbitration on December 29, 2020.

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employment resolution plan at some time prior to the filing of Bonday's Demand.

[3] AAA Rule 4(b)(i)(1). The form of the Demand "shall not be subject to technical pleading requirements." *Id.* at 4(c). The respondent party "may file an Answer within 15 days," which should contain a "brief response to the claim and the issues presented." *Id.* at 4(b)(ii). If there is no Answer, "Respondent will be deemed to deny the claim," and the "[f]ailure to file an answering statement shall not operate to delay the arbitration." *Id.* Additionally, the respondent "[m]ay file a counterclaim with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the Demand." *Id.* at 4(b)(iii). Finally, under AAA Rule 6, "[a] party must object to the jurisdiction of the arbitrator or to the arbitrability of the claim no later than the filing of answering statement to the claim or counterclaim that gives rise to the objection."

Here, after the parties' Rule 8 management conference, the arbitrator provided additional time for Nalco to file its answer and counterclaims. *See infra*.

Following the conference on August 27, 2021, pursuant to AAA Rule 8, the arbitrator gave Nalco until September 10 and 24, 2021, to file an answer and any counterclaims. Nalco did not do so.

On January 8, 2021, following preliminary review of the notice Bonday filed, AAA's Employment Filing Team informed the parties by letter that the dispute would be arbitrated under the AAA Rules, requested that Nalco pay the $2,200 filing fee by January 22, and told the parties that if they had any questions, they should "email" the Employment Filing Team.[4]

Nalco filed no answer. Instead, on January 19, Nalco's attorney, René Thorne, sent AAA a letter via

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[4] The parties' Arbitration Agreement provided that Nalco would "pay any mediation or arbitration filing fee required by AAA." The Employment Filing Team's letter echoed this requirement:

> Per the agreement submitted with this filing, the employer is responsible for payment of the full filing fee, $2,200.00. Accordingly, we request that the employer submit payment in the amount of $2,200.00 on or before January 22, 2021. Upon receipt of the balance of the filing fee, the AAA will proceed with administration.

The letter informed the parties:

> The AAA's administrative fees are based on filing and service charges. Arbitrator compensation is not included in this schedule. The AAA may require arbitrator compensation deposits in advance of any hearings. Unless the employee chooses to pay a portion of the arbitrator's compensation, the employer shall pay all of the arbitrator's fees and expenses.

Further, the "employer's full share is due as soon as the employee meets his or her filing requirements." The letter "confirm[ed] that [the] employee's filing requirements ha[d] been met."

email stating that the parties' Arbitration Agreement did not provide for the arbitration of claims presented in Bonday's Demand.[5] The letter cited the Agreement's exclusion of disputes "related to . . . controversies over awards of benefits or incentives under [Nalco]'s stock option plans, employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controver-sies." Thorne asked AAA to terminate the arbitration.

In her January 19 letter, Thorne referred to Section 2.E of the parties' Arbitration Agreement, which provides that an arbitrable "'Dispute' does not include claims related to controversies over awards of benefits or incentives under the Company's stock

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[5] Thorne was a partner in the New Orleans office of Jackson Lewis P.C., a nationwide law firm. She served as counsel for Nalco throughout this controversy. I assume that before she wrote her January 19 letter to the AAA, she read, or was thoroughly informed by subordinates of, the following: the parties' Arbitration Agreement, the AAA Rules, Sections 2, 4, 6, 8, 9, 10 and 11 of the FAA, the decisions of the United States Supreme Court interpreting the FAA—including, in particular, the decisions in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S. Ct. 1396 (2008); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2011); and *Henry Schein v. Archer and White Sales,* 139 S. Ct. 524 (2019)—and the decisions of this Court bearing on the issues Thorne raised in the instant arbitration and in the District Court declaratory judgment action Thorne brought for Nalco against Bonday while this arbitration was underway. Any lawyer litigating those issues in a AAA arbitration in the Eleventh Circuit would have to be thoroughly familiar with this body of law.

option plans, employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controversies." Therefore, Thorne argued that the dispute Bonday's Demand presented was not arbitrable.

* * *

Under AAA Rule 6, "[a] party must object . . . to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection." Rule 6 plainly contemplates that the objection should be contained in the party's answer or in an earlier motion addressed to the arbitrator.[6] Nalco never filed an answer, and it improperly addressed its objection to AAA administrators. Nalco seemingly did everything it could to avoid initiating the arbitration process, knowing that it would give the arbitrator an opportunity to interpret the contract, triggering the heavy burden imposed by *Sutter* and *Thomas* when Nalco would inevitably have to challenge the final award under 9 U.S.C. § 10(a)(4). All of Nalco's subsequent tactics were likely calculated to try to avoid this burden of proof, hoping to have the arbitration administratively terminated before an arbitrator became involved.

* * *

On January 20, 2021, Larry Allston, a Finance Supervisor for AAA, emailed both parties, requesting comment from Bonday regarding Thorne's letter.

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[6] AAA Rule 6 also provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

Bonday responded in a January 22 email, copying Thorne, "requesting continuation of the arbitration process." So, on January 26, at 2:55 PM, Allston, responding to Thorne's January 19 email, sent Thorne (and Bonday) an email stating:

> As the parties are not in agreement, this matter will proceed forward since the claimant has met their filing requirements required in the rules.
>
> As a neutral administrative agency, it is not our role to interpret the parties' contract and determine arbitrability. Our role is only to determine whether or not the filing party met filing requirements contained in the Rules by filing a demand for arbitration accompanied by an arbitration clause providing for administration by the AAA under its Rules or by naming the AAA as the dispute resolution provider. Arbitrability issues are decided only by the arbitrator, once appointed, or a court of jurisdiction.
>
> Therefore, we ask the employer to please forward the $2200 outstanding fee by February 2, 2021.

* * *

This was Allston's way of informing Thorne (and Bonday) that the AAA, acting administratively, could not consider and rule on her objection to the arbitration of Bonday's Demand and that an arbitrator, once appointed, would do so. But that could not occur unless and until Nalco paid the agreed-upon $2200 fee.

* * *

Less than two hours later, at 4:35 PM, Thorne replied to Allston's 2:55 PM email with copy to Bonday, stating:

> Section 2.E of the Arbitration Agreement specifically provides that it "does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Such disputes can only be resolved by a court of competent jurisdiction." In light of this plain language, AAA does not have jurisdiction over this matter unless and until a court of competent jurisdictions makes a decision on arbitrability should Mr. Bonday continue to object to arbitration in a court. As such, we again respectfully request that the matter be dismissed.

* * *

By invoking Section 2.E of the Agreement, Thorne implicitly acknowledged its validity. It would make no sense to argue about the scope of the word "Dispute" in the Agreement if Nalco believed the Agreement was invalid or unenforceable. And because the Agreement adopted the AAA Rules, the arbitrator had jurisdiction under Rule 6 "with respect to [its] existence, scope or validity." If the Agreement concededly existed and was valid, Nalco could only argue that Bonday's claims were outside the Agreement's "scope." But the clause Nalco cited had nothing to do with that: it referred only to questions of "enforceability, revocability or validity." Indeed, that clause seemingly references Section 2 of the FAA, which provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy

> thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be *valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C. § 2 (emphasis added).

Assuming Thorne had consulted the AAA Rules, she would know that the AAA, acting administratively, lacked the authority to terminate the arbitration purely on the basis of her objection. The objection would have to be submitted to an arbitrator, and that could not happen unless and until Nalco paid the $2200 fee. Notwithstanding the inapplicability of the quoted Section 2.E provision, Thorne relied on it repeatedly in the hope that the AAA would somehow use it to stop the arbitration before it began.

* * *

On February 5, at 12:15 PM, Allston emailed the parties: "Payment from the employer was not received by the requested deadline as the employer has chosen not to recognize the AAA's jurisdiction based on their interpretation of the party's contract. We are unable to proceed forward without these fees. As a result, we have closed this matter." At 1:34 PM, Bonday responded:

> I must object to the closing of this case and request that it be kept open and that Ecolab make the required payment as soon as possible.

> It is my understanding that Ecolab must abide by the rules and ruling of the arbitration process, not only when they view it as advantages to themselves.
>
> M[s.] Thorne may argue the jurisdiction directly with the assigned arbitrator per the Rules and Meditation Procedures (Rule 6-Jurisdiction) pasted bellow [sic].

At 2:53 PM, Allston replied:

> Mr. Bonday,
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> We requested fees from the employer based on the fact that your filing requirements were met. Additionally, we stated that per our rules, their objection was an issue for the arbitrator to decide once appointed. The employer is expected to support the dispute res-olution process that it mandates in its dispute resolution plan. However, the employer continues to object and failed to pay the required fees. Therefore, the matter must be closed due to non-compliance by the employer.
>
> Absence [sic] a court order referring the matter back to arbitration, the matter will remain closed.

Bonday avoided the closure at 5:53 PM, emailing Allston and Thorne: "Must the employer pay the required fee; or may I submit full payment to advance the arbitration process forward?"

On February 19, Allston emailed the parties that Bonday was allowed to advance the fees so that the arbitration could begin. The case would be handled by AAA's Pro Se Arbitration Administration Team,

specifically "Pro Se Manager 3." But in a series of emails Thorne sent the Pro Se Manager on February 25, April 1, and July 7, Nalco maintained that AAA lacked jurisdiction and, for that reason, it would not be participating in the arbitration.[7]

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[7] The February email summed up Nalco's position according to Thorne:

> Mr. Allston,
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> I remind you again that Section 2.E of the Arbitration Agreement specifically provides that it "does not apply to disputes regarding the *enforceability*, revocability or validity of the Agreement or any portion of the Agreement. *Such disputes can only be resolved by a court of competent jurisdiction*." AAA does not have jurisdiction over this matter unless a court of competent jurisdiction makes a decision on arbitrability. We therefore ob-ject to your repeated suggestions that Respondent has any obligation whatsoever to pay fees or otherwise agree to move forward before AAA. If he so chooses, Mr. Bonday can pursue this matter in a court of law. Simply put, your repeated insinuations that AAA has jurisdiction over this matter are both le-gally incorrect and misleading to Mr. Bonday. As such, we again respectfully request that the matter be dismissed.

Thorne's April 1 email read: "In case it was not entirely clear from our numerous previous communications, AAA does not have jurisdiction over this claim. Accordingly, Ecolab [Nalco] will not be responding further." And in a July 7 email, Thorne did respond further to state: "As we have repeatedly and clearly informed AAA and Mr. Bonday, AAA does not have jurisdiction over this claim. Accordingly, Ecolab [Nalco] will not be participating in an arbitration."

Thorne's February 25 email to the Pro Se Manager repeated her email 4:35 PM message to Allston of January 26, again declaring that Section 2.E of the Arbitration Agreement barred arbitration of Bonday's Demand:

> Section 2.E of the Arbitration Agreement specifically provides that it "*does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Such disputes can only be resolved by a court of competent jurisdiction.*" AAA does not have jurisdiction over this matter unless a court of competent jurisdiction makes a decision on arbitrability. We therefore object to your repeated suggestions that Respondent has any obligation whatsoever to pay fees or otherwise agree to move forward before AAA. If he so chooses, Mr. Bonday can pursue this matter in a court of law. Simply put, your repeated insinuations that AAA has jurisdiction over this matter are both legally incorrect and misleading to Mr. Bonday. As such, we again respectfully request that the matter be dismissed.

As shown *infra*, in every subsequent email to AAA, the Pro Se Manager, and the arbitrator—and in every pleading they filed in the lawsuit against Bonday in federal court—Nalco's lawyers contended that Section 2.E of the Arbitration Agreement barred the arbitrator from exercising jurisdiction over Bonday's Demand.

Appointment of the Arbitrator and the Management Conference

The arbitration nevertheless proceeded without Nalco's involvement. AAA appointed an arbitrator on May 10.[8] On August 23, after seeking input from the parties as to their availability, AAA notified the parties that, pursuant to AAA Rule 8, the arbitrator would hold a "Management Conference" on August 27. AAA Rule 8 lists sixteen matters for the arbitrator and the parties to consider "without limitation" at the Conference. Among the matters are "i. the issues to be arbitrated" and "xiii. the specification of undisclosed claims." AAA's notice informed the parties that at the Case Management Conference, the arbitrator "will also address [Nalco's] objections to jurisdiction which will be treated by [the arbitrator] as a motion to dismiss."

AAA provided the parties with a "Management Conference Guide," a standardized form that identified some of the matters that would be considered during the Conference. They included the "Specification of Claims and Counterclaims" and dates for the "Initial Identification and Exchange of Witnesses," "Stipulations of Uncontested Facts (If Any)," the "Advanced Exchange of Identification of Exhibits and Witnesses," and the "Hearing on the Mer-its." The form provided spaces opposite each item for the entry of deadlines for the parties'

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[8] AAA appointed Cindy L. Anderson, an experienced employment lawyer, as the arbitrator. Anderson has served in various capacities as an arbitrator and mediator for AAA, as well as the Better Business Bureau, the National Association of Securities Dealers, and the Financial Industry Regulatory Authority.

performance.[9] As indicated *infra*, at some point, perhaps in considering the matter of "undisclosed claims," the arbitrator identified an ERISA claim that has become the focus of this appeal.

The Arbitration Management Conference was held on August 27 as scheduled. Nalco did not appear. The arbitrator therefore considered Nalco's jurisdictional arguments as waived and denied its "motion to dismiss for lack of jurisdiction" with an entry to that effect on the "Management Conference Guide." The entry included this statement: "Case to proceed pursuant to Arbitration Agreement and AAA Employment Rules." The arbitrator then gave Nalco until September 10 to answer Bonday's Demand and to specify any counterclaims it wished to bring.

Nalco Sues Bonday in Federal District Court

On October 1, Nalco, now represented by attorney Valerie Hooker,[10] sued Bonday in District Court.

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[9] The parties were given until September 10 to initially identify witnesses, until September 17 to make Discovery Requests, until October 8 to respond to discovery, until October 10 to complete depositions, and until October 22 to complete discovery. November 3 was the deadline for the identification of witnesses and exhibits. Any mediation had to be completed by November 8. The hearing on the merits would take place on November 22, 2021, via Zoom.

[10] Hooker was a lawyer in the Jackson Lewis P.C. Miami, Florida, office. She filed the lawsuit for Nalco as a stand-in for Thorne, who was not admitted to practice law in Florida. Two and a half months later, the District Court granted an unopposed motion for Thorne to appear in the case pro hac vice.

Nalco Co. LLC v. Laurence Bonday, No. 2:21-cv-00727 (M.D. Fla. 2021). Invoking the Declaratory Judgment Act, 28 U.S.C. § 2201, Nalco asked the District Court to "enter an order declaring that the claims in the Demand are not arbitrable under the Agreement and granting all such further and additional relief to Nalco as may be required, necessary or equitable." Bonday's Demand was not arbitrable, Nalco alleged, for three reasons. First, in the parties' Arbitration Agreement, the word

> "[d]ispute" does not include claims related to controversies over awards of benefits or incentives under the Company's stock option plans, employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controversies. The Ecolab Severance Plan that Defendant seeks to enforce falls under the category of an employee benefits plan under the Agreement and it provides an appeal procedure.[11]

Second,

> [w]hether the parties have submitted a dispute for arbitration is an exception to federal policy favoring arbitration agreements. "The question of whether the

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[11] Section 2.E of the Arbitration Agreement states in pertinent part: "'Dispute' does not include claims related to . . . (iv) controversies over awards of benefits or incentives under the Company's stock option plans, employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controversies. . . . "

> parties have submitted a particular dispute to arbitration, i.e., the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002), (quoting *AT&T Technologies, Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986) (emphasis added)).

And third, "the Agreement specifically states that it 'does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. *Such disputes can only be resolved by a court of competent jurisdiction*.'"

* * *

The first reason repeated practically verbatim what Thorne said to AAA in her January 19 letter (after receiving notice that Bonday had filed his Demand pursuant to the AAA Rules). The second reason accurately stated Supreme Court law but wrongly implied that the parties had not agreed to delegate to the arbitrator the power to decide questions of arbitrability. And the third reason, as already explained, was an utter non sequitur: there was no dispute whatsoever about the Agreement's enforceability, revocability, or validity.

* * *

Nalco's complaint sat idle for over a month. Then, on November 8, Nalco moved the arbitrator to stay the arbitration proceedings pending the District Court's ruling on Nalco's complaint for declaratory relief. Nalco's motion presented two reasons for the issuance of a stay. First, Bonday had "filed an Employment

Arbitration Rules Demand for Arbitration . . . , alleging that Nalco had failed to follow the Ecolab Severance Plan . . . when Nalco denied his request for severance benefits," and the Demand was not arbitrable because Bonday could "appeal" the denial of his request to "the Plan Administrator." And second, the Arbitration Agreement "does not apply to disputes regarding the *enforceability*, revocability or validity of the Agreement or any portion of the Agreement. *Such disputes can only be resolved by a court of competent jurisdiction*."

The next day, November 9, Nalco, through Hooker, moved the District Court for a temporary restraining order ("TRO") or preliminary injunction restraining Bonday from proceeding further in the ongoing arbitration. On November 12, the District Court, acting sua sponte, dismissed Nalco's complaint without prejudice for failure to allege a basis for the Court's subject-matter jurisdiction.[12] In the same order, it denied Nalco's request for injunctive relief.

Nalco requested a preliminary injunction because, "[i]n the absence of the requested injunction, the arbitrator would move forward with the evidentiary hearing set on November 22, 2021." Nalco said it

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[12] Nalco's complaint attempted to invoke the District Court's subject-matter jurisdiction pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. The complaint merely alleged, in conclusory fashion, that the "Court ha[d] jurisdiction over the claims . . . and [wa]s authorized to order declaratory relief." But the Declaratory Judgment Act provides a *remedy*, not a basis for federal district court jurisdiction. *See* 28 U.S.C. § 2201 (empowering a federal court to grant declaratory relief "[i]n a case of actual controversy within its jurisdiction").

"would be forced to expend time and resources arbitrating a claim arising out of the Plan, which is expressly excluded from the Agreement," and it "would also be forced to pay the arbitrator's fee of at least $2,400." Nalco argued that it would suffer irreparable harm as a result.

The District Court's order denying injunctive relief drew on our decision in *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092 (2004), since the procedural scenario it faced was materially identical to the one we faced in *Klay*. There, a class of physicians sued a group of health maintenance organizations, and the defendants promptly moved the district court to compel arbitration of the plaintiffs' claims. *Klay*, 376 F.3d at 1095. In the process, the district court held that certain claims were arbitrable and others were not. *Id.* When two of the defendants initiated arbitration, the plaintiffs dismissed all of the arbitrable claims and sought an injunction preventing further arbitration of any claims, arbitrable or otherwise. Id. The district court agreed, and it issued two injunctions pursuant to the All Writs Act, 28 U.S.C. § 1651(a). *Id.* at 1095–96.

We reversed. As to the nonarbitrable claims, we noted that the district court had misapplied the traditional criteria for granting an injunction. *Id.* at 1111–12. In particular, we "note[d] that the district court's conclusion regarding irreparable injury was patently wrong." *Id.* at 1112 n.20. We explained:

> Even if the defendants were permitted to proceed with arbitrating nonarbitrable claims, it is unclear how the plaintiffs would suffer any injury at all, much less irreparable injury. The plaintiffs would not have to participate in the defendants' arbitration

> proceedings. Even if the defendants obtained a default verdict against them, they would be unable to have it enforced in a district court because a district court is empowered to vacate arbitral awards where the "arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). If a dispute is nonarbitrable, then an arbitrator necessarily exceeds his powers in adjudicating it. Conse-quently, while the defendant is free to initiate whatever private arbitration proceedings he wishes, a plaintiff need not be troubled by them because they are essentially legal nullities from the start.

Id.

Like we did in *Klay*, the District Court here refused to issue a preliminary injunction because

> Nalco would have an adequate remedy at law for any arbitration award that may be entered against it if the claims were in fact outside the scope of the Arbitration Agreement. Namely, "under those circumstances, a district court could vacate the arbitration award (or refuse to enforce it) based on the arbitrators' manifest disregard of the law." *See Klay*, 376 F.3d at 1108–1109 (internal quotation marks omitted).

* * *

The standard by which we review motions to vacate pursuant to 9 U.S.C. § 10(a)(4) have changed somewhat since we decided *Klay*. In *Hall Street*, the Supreme Court held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification." 552 U.S. at 584, 128 S. Ct. at 1403. Since then, we have held "that our judicially-

created bases for vacatur [including 'manifest disregard of the law'] are no longer valid in light of *Hall Street*." *Frazier v. CitiFinancial Corp*., 604 F.3d 1313, 1324 (11th Cir. 2010). And in *Sutter*, the Supreme Court stated that, in deciding whether to grant a § 10(a)(4) motion, "the sole question . . . is whether the arbitrator (even arguably) interpreted the parties' con-tract, not whether he got its meaning right or wrong." 569 U.S. at 569, 133 S. Ct. at 2068. Nalco seemingly did not bring our *Klay* decision to the District Court's attention, forcing the Court to find it of its own initiative. That is how the Court realized, contrary to Nalco's motion, that there exists no cause of action for "wrongful arbitration." *See Klay*, 376 F.3d at 1098, 1112.

* * *

The District Court also dismissed Nalco's complaint for its failure to invoke the Court's subject-matter jurisdiction. It dismissed the complaint without prejudice to allow Nalco a chance to cure the defect. On November 16, Nalco, still represented by attorney Hooker, filed an amended complaint alleging subject-matter jurisdiction under 28 U.S.C. § 1331 based on Bonday's claim for relief under ERISA. The amended complaint sought the same declaratory relief as the original, alleging that Bonday's Demand was not arbitrable for the two reasons stated in the complaint.

On November 19, Bonday, representing himself, filed an answer using the District Court's Pro Se form. The answer recited the facts supporting Bonday's Demand, denied the amended complaint's material allegations, and asserted Nalco's failure to state a claim for relief as a defense. The case was then put on

litigation management, and the parties scheduled a Rule 16 pretrial conference for January 27, 2022.

The Arbitration Continues

In an order dated November 23, 2021, the arbitrator observed that Nalco had been treating Bonday's Demand as presenting only one claim, a breach of the parties' Severance Agreement, and that Nalco had been ignoring the possibility that the Demand presented other claims. She noted that Bonday had stated "repeatedly" that he "was not treated the same as other similarly situated employees who were given the requested [severance] benefits" and that he "may be raising" claims that the "disparate treatment" vio-lated ERISA[13] and amounted to "age discrimination under state or federal law."[14] Since the parties' Arbitration Agreement would not "foreclose the arbitration of"

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[13] Section 510 of ERISA makes it "unlawful for any person to . . . discriminate against a . . . beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140. Section 502 permits civil actions to be brought "by a participant, beneficiary, or fiduciary" for injunctive or "other appropriate equitable relief." *Id.* § 1132(a)(3).

[14] Specifically, the Demand alleged that Bonday had served in a "Global Director" role for Nalco, but the company later attempted to demote him to the role of "Industry Technical Consultant." He requested a severance package, but Nalco told him that he was not eligible. However, Bonday discovered that Nalco had offered severance packages to *other* Directors who had been demoted to technical roles. This "discrepancy" led Bonday to believe that Nalco had ulterior motives for denying him a severance package.

such claims, the arbitrator stated in her November 23 order that "this process will continue." She accordingly denied Nalco's November 8 motion to stay the arbitration.

* * *

In identifying a potential ERISA claim in the factual statements of Bonday's Demand, the arbitrator interpreted and applied the parties' Arbitration Agreement, especially the AAA Rules incorporated therein. Specifically, Rule 6 empowered her to rule on the "scope . . . of the arbitration agreement," which includes the types of disputes the Agreement covered. And Rule 8 mandated that the matters considered at the Arbitration Management Conference "shall include, without limitation" topics such as "the specification of undisclosed claims." This requirement is also reflected in the AAA Management Conference Guide, which provides deadlines for the "Specification of Claims and Counterclaims."

In contrast, Nalco never cited any AAA Rules. Nalco's position was—and still is—that the arbitrator could not have identified an ERISA claim from Bonday's Demand, in spite of the fact that the AAA Rules charged her with the duty, under Rule 8, of identi-fying "the issues to be arbitrated" and "the specification of undisclosed claims." Nalco effectively insists that the arbitrator should be held to the same standards as a federal district court construing a plaintiff's complaint. And Nalco does so without having attended the Management Conference itself.

* * *

In a last-ditch effort to halt the arbitration proceedings, Thorne wrote Pro Se Manager 6 on November 24 about the arbitrator's November 23 order. Thorne accused the arbitrator of "manifest

disregard for the law," denied that the claims she identified in her November 23 order were arbitrable, and again requested that AAA stay the arbitration pending the outcome of Nalco's case in District Court. On November 29, Pro Se Manager 6 informed Thorne and Bonday that the arbitrator would not entertain Nalco's request for a stay and that the hearing on Bonday's Demand would occur as newly scheduled on December 7.

Nalco did not attend. At the hearing, two witnesses testified that they, like Bonday, had worked at the "Director level" and had been demoted to technical positions. Nalco offered them the option of taking their severance and leaving the company. But it refused to make the same offer to Bonday. The arbitrator concluded that this unrebutted evidence was sufficient to prove an ERISA claim.

* * *

Nalco's litigation strategy apparently called for the company to continue boycotting the AAA arbitration proceedings, perhaps in the hope of avoiding *Sutter*'s heavy burden. Instead, Nalco focused on its declaratory judgment action. The case's litigation track called for reciprocal discovery—which might have involved Nalco's lawyers deposing the arbitrator and the AAA administrative personnel Thorne had emailed—the disclosure of expert witnesses, and the preliminary and final pretrial conferences the District Court would hold in accordance with Rule 16 of the Federal Rules of Civil Procedure.

The Uniform Case Management Report Hooker and Bonday presented to the Court on December 29 called for a two-day bench trial in June 2023. In all likelihood, Nalco would have tried to call the

arbitrator as an adverse witness, subjecting her to leading questions on direct examination. Nalco's lawyer's might have hoped to accuse her of manifest disregard for the law and unethical conduct in construing Bonday's Demand. Nalco would try and make the experience as unpleasant as possible for everyone involved.

Although the District Court's November 12 order informed Nalco's lawyers that, under *Klay*, the company was not entitled to injunctive relief because it had an adequate remedy at law in the form of a §10(a)(4) motion to vacate the arbitrator's final award, that would prove to be no problem. The District Court's verdict following the trial on the claims in Nalco's amended complaint would carry the day. As it turned out, a trial was not necessary. The lawyers got the relief Nalco asked for when the Court granted the motion for summary judgment the lawyers filed on December 17, 2021.

* * *

On December 17, Nalco moved the District Court for summary judgment and requested declaratory relief—a judgment declaring that the claim in Bonday's Demand was not arbitrable on two grounds. First, the Demand described a dispute that "is related to" an "employee benefits plan with an appeal procedure." And second, the Arbitration Agreement "states that it 'does not apply to disputes regarding the *enforceability*, revocability or validity of the Agreement or any portion of the Agreement. *Such disputes can only be resolved by a court of competent jurisdiction*.'"

On December 29, the parties filed a Uniform Case Management Report in the District Court. The report, signed by Bonday, Thorne, and Hooker, indicated that

the parties had held a Federal Rule of Civil Procedure 26(f) planning conference on December 20.[15]

On December 31, while the motion was pending, the arbitrator issued the "Final Award of the Arbitrator." The award disposed of three claims the arbitrator identified in her November 23 order:

> [1] age discrimination in violation of the federal Age Discrimination in Employment Act, [2] breach of contract, and [3] violation of the federal Employee Retirement Income and Security Act ("ERISA"), all arising out of Respondent's refusal to give Claimant the option of accepting Respondent's severance plan ("the Plan") after his job was eliminated and he was placed in a demoted position.

The arbitrator denied the first claim because Bonday was unable to prove that Nalco "treated [him] differently due to his protected status—in this case, his age." She denied the second claim on the basis that she lacked jurisdiction because Bonday "failed to pursue his claims under the Plan pursuant to the appeal process required therein." The arbitrator granted Bonday's third claim under ERISA because "[Nalco] discriminated against [Bonday] for the purpose of interfering with his attainment of rights under the Plan to which he would have been entitled" and

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[15] Federal Rule of Civil Procedure 26(f) provides, in relevant part, that "parties must confer as soon as practicable" to "consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan."

awarded him equitable relief in the sum of $122,870.[16] The Award mandated that Nalco pay Bonday that sum no later than January 31, 2022.

Nalco Challenges the Final Award in the District Court

On January 25, 2022, while its motion for summary judgment was still pending in the District Court, Nalco moved the Court to vacate the Final Award pursuant to Section 10 of the FAA, 9 U.S.C. § 10.[17] The motion alleged that the Final Award should be vacated because "in manifest disregard for the law," the arbitrator "refused [to] stay the arbitration pending resolution of this [action], decided arbitrability (even though that issue was reserved for the Court), and proceeded with the arbitration before this Court made the decision on arbitrability" in violation of Section 10 of the FAA.

Nalco urged the District Court to find that the Arbitration Agreement reserved for the Court the authority to determine the arbitrability of the parties' disputes because (1) the Agreement did not "clear[ly] and unmistakabl[y]" evidence that the parties' dele-

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[16] In addition, the arbitrator awarded Bonday administrative fees of $2,950, the arbitrator's compensation of $3,262.50, and costs of $383.

[17] Such motions are filed in accordance with the provisions of 9 U.S.C. § 6. As the Supreme Court has explained, an application for § 10 relief "will get streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court." *Hall St.*, 552 U.S. at 582, 128 S. Ct. at 1402.

gated such authority to the arbitrator, *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924, and (2) Section 2.E of the Arbitration Agreement "specifically provides that it 'does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. *Such disputes can only be resolved by a court of competent jurisdiction*.'"

In the event the Court found the dispute in Bonday's Demand arbitrable, Nalco asked it to bear this in mind: the arbitrator "created, raised, and dismissed [Bonday's] ADEA and 'breach of contact' claims, but refused to dismiss her perceived ERISA Section 510 claim." "Even if legally correct, [the arbitrator's] decisions were irreversibly tainted by her lack of authority to make them."

> Indeed, under these circumstances, all of the decisions by AAA and the arbitrator (to appoint an arbitrator without Nalco's consent, to refuse to dismiss the matter, to refuse to stay the matter, to decide arbitrability, and to proceed with the arbitration) are contaminated by their refusal to recognize this Court's jurisdiction to decide arbitrability. Accordingly, if this Court in its independent judgment determines that any claims in Bonday's demand are arbitrable, Nalco is entitled to a new arbitration pro-ceeding, including appointment of a new arbitrator to which it agrees.

* * *

Nalco's motion to vacate is based on three theories, each purportedly warranting the vacatur of the Final Award. None has merit. I take them up in order.

Manifest disregard for the law. The arbitrator's conduct—in deciding that the parties' dispute was arbitrable and then resolving the dispute instead of staying the arbitration to enable the District Court to decide whether the dispute was arbitrable—constituted "manifest disregard for the law." Nalco supports its manifest disregard for the law theory with citations to cases including *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997), where this Court recognized "three non-statutory reasons for vacating arbitration decisions." 128 F.3d at 1459 n.5. Nalco claimed that "[a]n award may be vacated if it is (1) arbitrary and capricious; (2) if the enforcement of the award is contrary to public policy; or (3) if the award was made in manifest disregard of the law."

The problem with this theory is that it is no longer viable. In *Gheradi v. Citigroup Markets Inc.*, we recognized that with this statement:

> Like several of our sister circuits, we previously recognized a variety of non-statutory grounds for vacatur, including "manifest disregard of the law." *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998); *see Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997). But based on the Supreme Court's decision in *Hall Street*, we have since held that these judicially-created grounds violate the FAA. *See Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010) (applying *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586, 128 S. Ct. 1396, 170 L.Ed.2d254 (2008)).

975 F.3d 1232, 1236 n.3 (11th Cir. 2020).

The decision on arbitrability. Nalco claimed it was reserved for the Court. It said that the Arbitration Agreement does not "clear[ly] and unmistakabl[y]" evidence that the parties delegated to the arbitrator the authority to decide the arbitrability of a dispute, citing *First Options*, 514 U.S. at 944, 115 S. Ct. at 1994. The problem with this theory is that *Terminix International Co. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327 (11th Cir. 2005), forecloses it. There, the parties' arbitration agreement incorporated the AAA Commercial Arbitration Rules in the same way the parties incorporated the AAA Employment Arbitration Rules here. Rule 8 in Terminix—much like Rule 6 here—provided that

> "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid.

Id. at 1332 (citations omitted).

Disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Bonday did not challenge the enforceability, revocability, or validity of the Agreement. He sought its enforcement. So did Nalco, who wanted the District Court to interpret the Agreement to find that it did not apply to Bonday's Demand. In other words, there was simply no dispute here that could possibly have been implicated by the provision Nalco repeatedly cited.

In sum, Nalco's theories in support of vacatur were erroneous. Instead of its theories, Nalco's motion should have focused on the question the District Court had to decide: "whether the arbitrator (even arguably) interpreted the parties' contract, not whether [s]he got its meaning right or wrong." *Sutter*, 569 U.S. at 569, 133 S. Ct. at 2069.

* * *

On January 31, Bonday filed a document in opposition to Nalco's motion to vacate. He questioned Nalco's right to obtain a vacatur of the arbitrator's award given Nalco's repeated failures to participate in the arbitration. Nalco responded to Bonday's opposition on February 15 with a "Reply in Support of its Motion to Vacate Arbitration Award." The reply repeated what Nalco stated in its motion to vacate and addressed the merits of the ERISA claim the arbitrator had identified in the factual allegations of Bonday's Demand. The ERISA claim failed, the reply stated, because Bonday had not shown that "an *adverse* employment action was taken with the *specific intent* to deprive [him] of plan benefits."

On May 27, 2022, while its motions to vacate and for summary judgment were pending in the District Court, Nalco, having obtained leave of the Court, filed a second amended complaint. Like the first amended complaint, it sought "pursuant to 28 U.S.C. § 2201 a declaratory judgment that Nalco is not required to, and Defendant has no right to, arbitrate the claims in the Demand."[18]

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[18] The second amended complaint again sought the same declaratory relief as the original, alleging that Bonday's Demand was not arbitrable for the two reasons stated therein.

On June 3, Bonday, still proceeding pro se, filed a motion to dismiss the second amended complaint. Reduced to its essentials, the motion urged the District Court to uphold the arbitrator's decision on the three claims set out in her order of November 23, 2021, and to reject Nalco's argument that the arbitrator lacked jurisdiction to arbitrate the Demand. Nalco filed an opposition to the motion to dismiss on June 24. Nalco adhered to the two points it had been making throughout: (1) the arbitrator lacked jurisdiction to arbitrate the Demand because the severance pay claim it asserted did not present an arbitrable dispute, and (2) the Agreement "does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Such disputes can only be resolved by a court of competent jurisdiction."

The District Court's Dispositions

On September 22, 2022, the District Court issued a twenty-three page order granting Nalco's motion to vacate the arbitrator's award.[19] The Court granted the motion without a hearing, relying on a cold record: the AAA documents relating to the arbitration, the pleadings filed with the District Court in the declaratory judgment action, and Nalco's motion to vacate.[20]

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[19] In the same order, the Court denied Bonday's motion to dismiss.

[20] The Court expressed that the record was sufficient for it to rule dispositively on Nalco's motions without an evidentiary hearing in this statement:

The District Court addressed the arguments Nalco made in its motion. Then on its own initiative and without notice to the parties, the Court addressed issues the parties did not present.

Turning to Nalco's motion to vacate, recall that Nalco's first theory was that the award should be vacated because the arbitrator's conduct in handling the arbitration evidenced a manifest disregard for the law in violation Section 10 of the FAA, 9 U.S.C.§ 10. Nalco's second and third theories were that the Arbitration Agreement did not "clearly and unmistakably" evidence that the parties delegated to the arbitrator the authority to decide the arbitrability of disputes and therefore reserved all arbitrability

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The Court finds that there is sufficient evidence before it to address the grounds in Nalco's motion to vacate. *Cf. Legion Ins. Co. v. Ins. Gen. Agency, Inc*., 822 F.2d 541, 542–43 (5th Cir. 1987) (affirming district court's resolution of motion to vacate arbitration award "on the record submitted by the parties"). Thus, the Court need not conduct an evidentiary hearing and may resolve Nalco's motion to vacate on the evidence before it. *See O.R. Sec., Inc. v. Pro. Plan. Assocs., Inc*., 857 F.2d 742, 746 n.3 (11th Cir. 1988). The Court is also . . . mindful that it must liberally construe Mr. Bonday's filings given his pro se status. *Erickson v. Pardu*s, 551 U.S. 89, 94 (2007). Last, the Court's analysis turns solely on questions of law and there are no factual determinations to be made based on disputed evidence precluding summary judgment. *Cf. Artistic Ent., Inc. v. City of Warner Robins*, 331 F.3d 1196, 1202 (11th Cir. 2003) ("[W]here a legal issue has been fully developed, and the evidentiary record is complete, summary judgment is entirely appropriate.").

determinations for the court[21]; and that the Arbitration Agreement, in Section 2.E, "specifically provides that [the Agreement] 'does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Such disputes can only be resolved by a court of competent jurisdiction.'"

The District Court disregarded the first theory as inapplicable with this statement:

> Nalco incorrectly asserts that "[a]n award may be vacated if it is (1) arbitrary and capricious; (2) if the enforcement of the award is contrary to public policy; or (3) if the award was made in manifest disregard for the law." While several judicially-created bases for vacatur had developed in this circuit over the past few decades, such grounds are no longer valid in light of the Supreme Court's decision in *Hall St*. Thus, the grounds for vacatur listed in § 10(a) are exclusive." *Johnson [v. Directory Assistants Inc.*], 797 F.3d [1294,] 1299 (citing *Frazier v. CitiFinancial Corp.*, LLC, 604 F.3d 1313, 1324 (11th Cir. 2010)).

The District Court found merit in the second theory: "The plain and ordinary reading of the Arbitration Agreement . . . readily shows that the parties did not intend to arbitrate arbitrability." "The parties also limited the arbitrator's authority 'to the resolution of Disputes between the parties,' not the resolution and determination of what constitutes

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[21] Nalco based this theory on the decision in *First Options*, 514 U.S. at 944, 115 S. Ct. at 1924.

Disputes." In the Court's view, Nalco's actions constituted evidence that the parties did not intend that the arbitrator make that determination:

> Nalco's actions cannot support an inference that it agreed to have the arbitrator to [sic] decide the question of arbitrability. "To the contrary, insofar as [Nalco] [was] forcefully objecting to the arbitrator[] deciding [its] dispute with [Mr. Bonday], one naturally would think that they did not want the arbitrator[] to have binding authority over [it]." *First Options of Chicago, Inc.*, 514 U.S. at 946 (emphasis in original).

The District Court then expressed its conclusion about who should decide whether a dispute is arbitrable, the arbitrator or a court:

> Based on careful review of the entire record, the Court finds that the parties did not delegate the question of arbitrability (i.e., whether Mr. Bonday's Demand was arbitrable in the first instance) to the arbitrator. At the very least, there is no clear and unmistakable evidence of that delegation.

In other words, because the parties' Agreement did not clearly and unmistakably delegate to the arbitrator the authority to determine the arbitrability of their disputes, the Court would review the arbitrator's determinations as to Bonday's Demand "de novo." The Court cited *Sutter*'s second footnote, which reads, in relevant part:

> Those questions [of arbitrability]—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly

> binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[ ] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT & T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986).

Sutter, 569 U.S. at 569, 133 S. Ct. at 2068 n.2.

The District Court bypassed Nalco's third theory. The theory was plainly inapplicable because Bonday's Demand did not challenge the enforceability, revocability or validity of the Agreement or any portion of the Agreement.

After addressing the theories Nalco presented in support of its motion for vacatur, the District Court silently assumed that the arbitrator had the authority to arbitrate Bonday's Demand and turned to the questions of whether the Demand presented an arbitrable dispute and, assuming that it did, whether the dispute included the ERISA claim the arbitrator discerned. The Court found that the Demand was not arbitrable:

> Mr. Bonday's Demand—specifically, the grievance giving rise to the Demand—was nonarbitrable. The Arbitration Agreement expressly states that "Dispute[s] do[] not include claims related to . . . controversies over awards of benefits or incentives under [Nalco's] . . . employee benefits plans . . . that

> contain an appeal procedure." (Doc. 36-3 at ¶ 2.E.) Mr. Bon-day submitted his Demand because Nalco did not follow the Severance Plan and he requested "36 weeks salary per the [Severance Plan]." And the Severance Plan, which governs Mr. Bonday's entitlement to an award of employee benefits in the form of severance pay, unquestionably contains an appeal procedure. (Doc. 36-2 at 9.) For these reasons, Mr. Bonday's Demand was not a "Dispute," as that term is defined in the Arbitration Agreement, and therefore was not subject to arbitration.

Assuming the dispute was arbitrable, the Court found that it did not include the ERISA claim. The Court prefaced its finding with these statements:

> [T]he "language of arbitration demands should not be subjected to the same strict standards of construction that would be applied in formal court proceedings." *Kurt Orban Co. v. Angeles Metal Sys*., 573 F.2d 739, 740 (2d Cir. 1978). Indeed, "[f]ederal law . . . does not impose any requirements as to how specific a notice of arbitration must be." *Valentine Sugars, Inc. v. Donau Corp*., 981 F.2d 210, 213 (5th Cir. 1993). Be that as it may, once again, the "law is well-established that an arbitrator can bind the parties only on issues that they have agreed to submit to [arbitration]," and an arbitrator exceeds her power under section 10(a)(4) by deciding issues not submitted to her. *Davis*, 59 F.3d at 1194–95 (quotation omitted).

The Court therefore found

> that Mr. Bonday did not submit a Demand for the arbitration of any ERISA discrimination claim. *See Davis*, 59 F.3d at 1195 (holding that the issue of attorneys' fees was not submitted for arbitration, in part because a request for such fees was never made). And Mr. Bonday's *pro se* status during arbitration notwithstanding, "the mere fact that the [arbitrator] was aware of a statute that provides for an award of [equitable damages under ERISA] does not constitute a submission of the issue by the parties for determination." *Id*.

Finally, after addressing Nalco's grounds for vacatur, the Court assumed that Bonday's Demand submitted a claim for discrimination under ERISA, as the arbitrator construed the Demand, and concluded that the result would be no different. The "claim is inextricably intertwined with the Severance Plan, which is not a 'Dispute' subject to arbitration because it includes an appeals process."

* * *

Several matters of importance are missing from the District Court's review of the Final Award. The parties' Arbitration Agreement provides for the arbitration of disputes pursuant to the FAA and the AAA Rules. The Court's September 22 order acknowledges that but contains no mention at all of the relevant AAA Rules. None of the rules are mentioned because Nalco's motion to vacate is silent regarding the rules. These proceedings cast doubt on Nalco's lawyers' knowledge about arbitrating disputes pursuant to AAA's arbitration rules.

III. Correcting the Courts' Missteps

In granting Nalco's motion to vacate the arbitration award, the District Court failed in its duty to identify and apply the proper standard of review articulated in *Sutter*. If it had, it would have considered the AAA Rules and asked whether the arbitrator had *even arguably* interpreted them. The District Court would have quickly realized that the arbitrator did exactly what she was hired to do: she consulted the AAA Rules and the parties' contract, and she explicitly interpreted them throughout the arbitration proceeding. That should have resolved the case, and the District Court should have denied Nalco's attempt at vacatur. On appeal, the Majority simply repeats the District Court's errors.

The most fundamental flaw in the District Court's order is the Court's failure to identify—much less apply—the appropriate standard of review on a 9 U.S.C. § 10(a)(4) motion. Under *Sutter*, the "sole question" before the Court was "whether the arbitrator (even arguably) interpreted the parties' contract, not whether [s]he got its meaning right or wrong." *Sutter*, 569 U.S. at 569, 133 S. Ct. at 2068. To answer that question, the Court was required to consider more than just two provisions in the parties' Agreement—it was required to consider the AAA Rules incorporated therein. Had the Court done so, this would have been an easy case. The Court would have realized that the arbitrator faithfully performed her role, and Nalco's motion to vacate would have been denied.

The analysis might have proceeded as follows: The parties' Agreement calls for all "Disputes" to "be finally and conclusively resolved by final and binding

arbitration before a neutral third party." In this case, the "neutral third party" is an arbitrator for the American Arbitration Association. Indeed, the Agreement provides that arbitration "will be conducted in accordance with the AAA Employment Arbitration Rules."

Naturally, the Court consults the AAA Rules and discovers several relevant provisions. AAA Rule 48 makes clear that "[t]he arbitrator shall interpret and apply these rules as the relate to the arbitrator's powers and duties." AAA Rule 4 dictates how parties may initiate arbitration. The District Court notices that Bonday filed his Demand in compliance with the rule and that Nalco did not answer. Still, Nalco's "[f]ailure to file an answering statement shall not operate to delay the arbitration," so it was proper for the arbitration to proceed. AAA Rule 5 explains, in broad terms, whether and how parties may change their claims before or after the appointment of an arbitrator. It explains that "[a]fter the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator." So even if the Court believes that the arbitrator granted Bonday relief on "a new or different claim," it realizes that this relief was within the arbitrator's discretion.

Next, AAA Rule 6 provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any ob-jection with respect to the existence, scope or validity of the arbi-tration agreement." The Court cross-references this provision with the one cited by Nalco, Section 2.E of the parties' Agreement. Section 2.E only addresses "disputes regarding the enforceability, revocability or validity of the Agreement." The Court realizes that this

disclaimer says nothing of the Agreement's "scope," so Nalco's argument is baseless. The Court concludes that the question of scope—what the parties refer to as *arbitrability*—was properly before the arbitrator. And that becomes especially clear when the Court consults *Terminix* and *Attix*, discussed below.

Then, all that is left is for the Court to determine whether the arbitrator could arguably construe Bonday's Demand to include the ERISA claim. Multiple AAA Rules bear on this question. AAA Rule 8 describes the Arbitration Management Conference, during which the arbitrator must consider sixteen matters. Among them are "i. the issues to be arbitrated" and "xiii. the specification of undisclosed claims." The Court acknowledges that a conference was held and that Nalco did not attend. Still, Nalco's absence did not prevent the arbitrator from either construing Bonday's Demand to contain the ERISA claim or permitting Bonday to specify it as an undisclosed claim.

Either way, the Court sees that the arbitrator at least arguably complied with the AAA Rules—and therefore the parties' contract—and so it denies Nalco's motion to vacate under § 10(a)(4). Unfortunately, the District Court's failure to follow this process, explained time and again by our Court and the Supreme Court, has twisted this case beyond recognition. And worse, the Majority now repeats the District Court's error.

Essential to any arbitration agreement are the choices of *who* will arbitrate and *how* they will do so. *See Stolt-Nielsen*, 559 U.S. at 683–84, 130 S. Ct. at 1774. These choices must be respected just as we would respect any other contract provisions between consenting parties. Implicit in these choices is the

understanding that arbitrators themselves will know best how to interpret their association's rules. *See Howsam*, 537 U.S. at 85, 123 S. Ct. at 593 ("[A]rbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it. In the absence of any statement to the contrary in the arbitration agreement, it is reasonable to infer that the parties intended the agreement to reflect that understanding."). Indeed, AAA Rule 48 explicitly provides that "[t]he arbitrator shall interpret and apply these rules as they relate to the arbitrator's powers and duties."

The AAA Rules establish procedures that are foreign to our own Federal Rules of Civil Procedure, but they are the rules that the parties have contracted to use, and the FAA mandates that we treat them accordingly. Notably, the Majority does not engage with these rules at all. Rather, it explicitly invites comparisons to how *courts* conduct their business.

For instance, the Majority analyzes this pro se *arbitration* as if it were a pro se *litigation* taking place in court. True, as the Majority notes, "the 'leniency' provided to pro se litigants 'does not give a *court* license to serve as de facto counsel for a party, or to rewrite an otherwise deficient pleading.'" Maj. Op. at 10 (quoting *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014)) (emphasis added). But arbitration is not a court proceeding, and an arbitrator is not a judge.

If an arbitrator oversteps and demonstrates "evident partiality," we may vacate an award on that basis. 9 U.S.C. § 10(a)(2). Otherwise, we have no grounds to interfere. Perhaps Bonday's pro se status affected how the arbitrator parsed his Demand, but

nothing in the AAA Rules forbids that. And I am not convinced that the arbitrator would have erred even if Bonday had been represented by counsel.

AAA Rule 4 dictates how parties may initiate arbitration. Where, as here, a party requests arbitration unilaterally, Rule 4(b)(i)(1) requires that the party file a written notice in the form of a Demand. The same rule provides that the Demand should contain, among other things, "a brief statement of the nature of the dispute; the amount in controversy, if any; [and] the remedy sought." Nothing in the rule's text suggests that a claimant must go issue by issue, separating the claims for relief into different counts and citing applicable law.

Unsurprisingly given the informal nature of arbitration, AAA's notice requirements appear even less demanding than the "short and plain statement" required by our equivalent Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8(a)(2) (requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). AAA Rule 4 requires a statement of the *nature of the dispute*; it does not require that the claimant puts forth any particular legal theories.

The Majority nevertheless insists that, at some point during arbitration, Bonday had to affirmatively declare his intent to pursue the very claims that had already been identified by the arbitrator. Maj. Op. at 9. As support for that proposition, the Majority does not cite any provision of the AAA Rules. Instead, it places undue reliance on one of our earlier cases, *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186 (11th Cir. 1995).

IV. Distinguishing *Davis*

In an effort to avoid *Sutter*, and in violation of the party presentation principle, both the District Court and the Majority rely on *Davis*, a case that neither party cited in the District Court or on appeal. That case, which we decided in 1995, predates many of our Court's and the Supreme Court's later cases refining the appropriate standard of review on a § 10(a)(4) motion, including *Sutter*. But even if we assumed, for the sake of argument, that some of *Davis* is still good law, the District Court and Majority were wrong to apply it under these circumstances, which so significantly differ from the facts of that case.

In *Davis*, the arbitration panel, applying the AAA Security Arbitration Rules, issued an award giving the claimant, Davis, compensatory and punitive damages and ruling that "each party was to bear its own attorneys' fees.' *Id*. at 1187. The district court confirmed the award, and the respondent appealed the punitive damages issue. Davis cross-appealed the attorneys' fees issue, "contend[ing] that the district court erred in refusing to modify, vacate or correct the arbitrators' award to the extent that it denied Davis his attorneys' fees." *Id*. at 1194. Davis argued that the arbitration panel erred in ruling on the attorneys' fees issue because he had not submitted a claim for attorneys' fees in his demand for arbitration.

In considering Davis's argument, we noted that the FAA provided for the vacation of an award under 9 U.S.C. § 10(a)(4) "[w]here the arbitrators exceeded their powers" and for the modification or correction of an award under 9 U.S.C. § 11(b) "[w]here the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted."

Id. We held "that the arbitrators' decision on attorneys' fees exceeded the scope of their powers and that the district court erred in confirming that portion of the award." *Id*. at 1196.

The Majority reads *Davis* as setting aside the attorneys' fees portion of the arbitration award on the ground that the arbitrators exceeded their powers in violation of § 10(a)(4) in using the award to resolve the attorneys' fees issue. But the *Davis* Court lacked the authority to grant partial relief under § 10(a)(4) because § 10(a)(4) only authorized the district court, and thus this Court on appeal, to vacate the entire arbitral award, not just a portion of the award. *See NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995) ("Vacating an award 'in-part' . . . is synonymous with modifying an award and is, therefore, governed by § 11."). The arbitration panel violated § 11(b) because, in the language of that provision, the panel "awarded upon a matter not submitted" to it. *See* 9 U.S.C.§ 11(b).

Furthermore, the facts of *Davis* bear little resemblance to this case. At no point in the arbitration did Davis indicate that he was seeking attorneys' fees, and neither party presented any evidence or argument on that issue. 59 F.3d at 1187. Nevertheless, the final award purported that "each party [was] to bear all of its own additional cost [sic] and attorneys' fees." Id. (alterations in original).

On appeal, the claimant *himself* argued that he never submit-ted such a claim for arbitration. *Id*. at 1194. A close review of the case explains why: then-existing Florida law allowed attorneys' fees to be granted only by trial courts in award-confirmation proceedings. *Id*. at 1194 n.10. We agreed that Davis never submitted the issue and vacated the relevant

part of the district court's judgment confirming the final award. *Id.* at 1195.

The Majority misreads *Davis* by isolating half of one sentence contained therein. The *Davis* Court noted that Davis's demand "ma[de] no request for attorneys' fees, *and neither party presented evidence or argument on the issue*." *Id.* (emphasis added). In that case, the only possible basis for the arbitrators' decision was that they were made "aware of a statute that provides for an award of attorneys' fees." *Id.* And *Davis* held that was plainly insufficient to consider the issue "submitted." *Id.*

Citing *Davis*, the Majority nevertheless holds that the arbitrator exceeded her powers here by entertaining and deciding "an 'issue [that] was not submitted to' her for determination." Maj. Op. at 8 (alteration in original) (quoting *Davis*, 59 F.3d at 1195). That Bonday "eventually raised the ERISA claim with the arbitrator during the arbitration proceedings, after the arbitrator had already read the ERISA discrimination claim into his demand" is irrelevant according to the Majority. *Id.* at 9. What is relevant is that "Bonday didn't mention ERISA or discrimination anywhere in his arbitration *demand*, and he didn't ask for damages as a result of any discrimination." *Id.* at 8 (emphasis added).

As the Majority sees it, the arbitrator, "serv[ing] as de facto counsel" for Bonday, "rewrote Bonday's demand to include an ERISA discrimination claim and concluded it was arbitrable." *Id.* at 10. The Majority says that Bonday, when asked at oral argument for evidence that he actually put forward an ERISA discrimination claim, "admitted there was no record of him submitting this claim to the arbitrator." *Id.* at 9. "So Bonday's case is exactly like *Davis*— the

arbitrator decided a claim that Bonday never submitted for arbitration." *Id.*

What Bonday should have done in order to avoid the Majority's disposition of his ERISA claim, I suppose, was move the arbitrator to amend his Demand pursuant to AAA Rule 5.[22] The Majority seems to insist that this was the only way the arbitrator could adjudicate the claim. Otherwise, says the Majority, the arbitrator would be serving as the claimant's de facto counsel. But that is simply not so.

By alluding to a lack of record evidence, the Majority seemingly tries to evade the possibility that the arbitrator noticed Bonday's ERISA discrimination claim at least at the Arbitration Management Conference held pursuant to AAA Rule 8 on August 27, 2021. The Conference was among the parties' first opportunities to interact with the arbitrator. Nalco rejected that opportunity. It refused to participate in the arbitration of Bonday's Demand because it was convinced that the arbitrator, contrary to AAA Rule 6, lacked jurisdiction to pass on the issue of arbitrability. Nalco should not now receive the benefit of the doubt

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[22] AAA Rule 5 states in relevant part: "After the appointment of arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator." The Majority seems to presume that a party offering a new or different claim after the arbitrator is appointed must do so in writing. But there is no evidence for that requirement in the plain text of Rule 5, and AAA Rule 48 confers on the arbitrator the power to "interpret and apply these rules as they relate to the arbitrator's powers and duties."

on a record that makes eminently clear what was discussed that day.

What the arbitrator and Bonday said to one another during the Conference, the words actually spoken, is not in the record because the Conference was not transcribed. But we know what took place by reference to the AAA Rules. AAA Rule 8 lists "the matters to be considered" at the Management Conference, "includ[ing], without limitation: i. the issues to be arbitrated . . . [and] xiii. the specification of undisclosed claims." We can safely presume that the arbitrator's discussion of these two matters with Bonday led her to state in her November 23 order that Bonday's Demand "may be raising" claims that the "disparate treatment" he received violated ERISA and amounted to "age discrimination under state or federal law."[23]

Matter "xiii" of AAA Rule 8 required the arbitrator to discuss with Bonday whether he had any unspecified claims to raise. As the arbitrator wrote in her November 23 order, Bonday "repeatedly stated he was not treated the same as other similarly situated em-ployees who were given the requested [Severance Plan] benefits." As I read the Majority's opinion, if Bonday, without any prompting by the arbitrator, told the arbitrator that his disparate treatment may have violated ERISA, he would be home free. The Majority would hold that the District Court erred in vacating the arbitrator's Final Award. But because the

[23] AAA Rule 8 further provides that "[t]he arbitrator shall issue oral or written orders reflecting his or her decisions on the [sixteen listed] matters and may conduct additional conferences when the need arises."

arbitrator was seemingly the first to utter the word "ERISA," Bonday loses.

The Majority would be wrong even if we accepted its flawed premise that Bonday did not submit an ERISA claim as early as his initial Demand. After all, the arbitration was assigned to one of AAA's pro se managers for a reason: Bonday is not a lawyer. If he was, his Demand might have labeled the ERISA claim the arbitrator noted in her November 23 order. But the arbitrator, as a lawyer, recognized in the factual allegations of Bonday's Demand the elements of the ERISA and age discrimination claims described in her November 23 order. If the claims were not technically submitted in Bonday's Demand, that would make them "undisclosed claims" in the language of AAA Rule 8.

The relevant question, then, would be whether the arbitrator exceeded her powers in noticing an ERISA discrimination claim during the Management Conference—presumably during the discussion of matter "xiii. the specification of undisclosed claims." AAA Rule 8 required her to ask Bonday whether he had any undisclosed claims. If the ERISA claim came to light then, did the arbitrator thereafter "serve as de facto counsel for [Bonday] or rewrite an otherwise deficient pleading"? The Majority thinks so.

Even in federal court, the rewriting of pleadings sometimes occurs while a district judge is conducting a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure or the judge's inherent power to manage pending litigation. Rule 16(c)(2), which lists the "Matters for Consideration" at a pretrial conference, states:

> At any pretrial conference, the court may consider and take appropriate action on the following matters:
>
> (A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;
>
> (B) amending the pleadings if necessary or desirable
>
> . . . .

Many district judges draw on this aspect of Rule 16 and their inherent power in managing the litigation before them—specifically, to simplify the parties' controversy. In this day and age of multi-count shotgun pleadings and answers asserting scores of affirmative defenses, a pretrial conference is convened early on—much like how arbitrators convene a AAA Rule 8 Arbitration Management Conference—to narrow the issues to be tried, or to squeeze them down. Not infrequently, in the give and take between the court and counsel, the district judge winds up effectively "rewriting" a deficient pleading or granting a litigant leave to amend its pleadings to reflect what occurred during the conference. In the Majority's words, is the judge "serving as de facto counsel for a party"? Or is the judge serving the public—saving time and resources for the benefit of litigants queued up to be heard—and maintaining the stability of the rule of law? I say it is the latter, and the arbitrator's conduct was fully consistent with both the AAA Rules *and* the prevailing law. It is the *Majority* that rewrites the AAA Rules, and that is not our role.

Here, unlike in *Davis*, both parties had notice and a full opportunity to be heard on the disputed claim. In her November order, before any hearings on the merits, the arbitrator informed Nalco that Bonday

had raised claims possibly including ERISA and age discrimination. Nalco acknowledged this notice but still refused to participate in the arbitration. It did so at its own peril.

V. Conclusion

The Majority insists that Bonday never raised the ERISA issue himself, so he could not have submitted it for arbitration, but that reasoning is wrong twice over. First, regardless of whether the Majority would have done the same, the arbitrator construed Bonday's Demand to include the ERISA claim. In other words, Bonday *did* raise the claim as early as his initial Demand, yet the Majority insists he should have done so again. And second, the Majority completely ignores the fact that Bonday *did* present evidence of both age discrimination and the ERISA violation at the hearing that Nalco refused to attend. It is hard to imagine how Bonday could have presented a fuller case, yet the Majority insists he never submitted the claim.

The Majority also mischaracterizes the relief sought in Bonday's initial Demand. It is true, as the Majority notes, that Bonday styled his Demand largely as a request that Nalco "follow the . . . Severance Policy." But the relief he requested was money, plain and simple. In the part of the Demand form titled "Amount of Claim," he wrote "$129,461," which he calculated based on "36 weeks salary per [the] Ecolab Severance Policy" for qualifying employees. He wanted $129,461, and the arbitrator awarded him $122,870. To override that award would again require us to override a perfectly reasonable interpretation of AAA Rule 4, which requires notice

only of the "amount in controversy, if any; [and] the remedy sought."

Finally, the Majority seemingly acknowledges that Bonday could have amended his Demand to more clearly state an ERISA discrimination claim. Maj. Op. at 10. AAA Rule 5 provides that "[a]fter the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator." So Bonday probably could have amended his Demand to comply with the Majority's holding, but nothing in the AAA Rules *required* him to do so. That is partly because Bonday never offered a new or different claim. Again, the arbitrator addressed only those claims that she understood to have already been raised in Bonday's initial Demand. But even assuming he did offer new claims, nothing in AAA Rule 5 suggests he could do so only by amending his Demand. Simply put, the arbitrator did not have to follow rules that do not exist.[24]

Under the relevant AAA Rules, Bonday's ERISA discrimination claim was submitted and decided.

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[24] The Court's opinion also calls into question the validity of AAA Rule 8, which requires that the parties and the arbitrator hold an arbitration management conference. The rule lists various "matters to be considered" at the conference, including "the specification of undisclosed claims." I find this rule hard to square with the Court's opinion, which seems to insist that any arbitrable claim must arise directly from the claimant's demand. *See* Maj. Op. at 8. This is but one example of how today's holding could upend AAA's carefully designed rules, forcing parties into a procedural minefield where court formalities override arbitrators' explicit guidance.

Arbitration is not a second-tier courtroom; it is a forum shaped by the parties' own choices and designed to avoid the rigidities of judicial procedure. The Majority's approach does the opposite, wrapping arbitration in procedural red tape that the FAA was meant to cut. Nalco got the arbitration it signed up for. It should not be allowed to back out now. I dissent.

* * *

At all times during the prosecution of Nalco's lawsuit against Bonday and its motion for vacatur of the arbitrator's final award, Nalco's lawyers—Jackson Lewis PC, René Thorne, and Valerie Hooker—had to have been aware of the decisions of the United States Supreme Court and this Court cited in this dissent regarding the FAA and the arbitration of disputes under the AAA Rules. They were also aware, as officers of the court, of their duty to inform the District Court of those decisions, especially those adverse to positions they were taking in the lawsuit and in moving for vacatur of the award.[25] But they failed to discharge that duty.

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[25] The American Bar Association's Model Rules of Professional Conduct pro-vide that lawyers must exhibit candor toward courts. Specifically, Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribu-nal by the lawyer; [or]
>
> (2) fail to disclose to the tribunal legal authority in the controlling ju-risdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Rule 11 of the Federal Rules of Civil Procedure codifies this duty of candor to the tribunal. It provides, in subsection (b) "Representations to the Court":

> By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submit-ting, or later advocating it—an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Fed. R. Civ. P. 11(b)(2).

Subsection (c), "Sanctions," authorizes district courts to determine, on their own initiative, whether a lawyer should be sanction for misrepresenting the

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The same principle is codified in the Rules Regulating The Florida Bar. Rule 4-3.3 provides:

> (a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . [or]
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

status of existing law to the district court. It provides in subpart (1):

> If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Id. 11(c)(1).

I would instruct the District Court, on receipt of our man-date in this case, to enter an order in conformance with subsection (c)(1) and determine whether Jackson Lewis PC, Thorne, and Hooker misinformed the Court as to the state of the relevant law in prosecuting Nalco's lawsuit against Bonday and Nalco's motion for vacatur

APPENDIX B

In the
United States Court of Appeals
For the Eleventh Circuit

[Filed August 29, 2025]

No. 22-13546

NALCO COMPANY LLC,
a Delaware Limited Liability Company,
Plaintiff-Appellee,

Versus
LAURENCE BONDAY,
Defendant-Appellant.

Appeal From the United States District Court for
the Middle District of Florida
D.C. Docket No. 2:21-cv-00727-JLB-NPM

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BRANCH, LUCK, and TJOFLAT, Circuit Judges. PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Rehear-ing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 40, 11th Cir. IOP 2.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

NALCO COMPANY LLC,
a Delaware Limited Liability Company,

Plaintiff,

v. Case No: 2:21-cv-727-JLB-NPM

LAURENCE BONDAY,

Defendant.

ORDER

This dispute involves the result of an arbitration proceeding between Plaintiff Nalco Company LLC ("Nalco") and its former employee, pro se Defendant Laurence Bonday. When Mr. Bonday began at Nalco, he executed an arbitration agreement along with a severance policy agreement. After Nalco downsized and eliminated his position, Mr. Bonday requested a severance package under that severance policy agreement. Nalco refused his request and Mr. Bonday filed a demand for arbitration with the American Arbitration Association ("AAA"). The

exclusive remedy he sought from the outset of the arbitration proceedings was severance pay. Nalco, also from the outset, maintained that Mr. Bonday's demand for severance pay was nonarbitrable and refused to participate in the AAA proceedings.

Specifically, Nalco argued that claims related to the severance policy agreement were nonarbitrable under the parties' arbitration agreement. Nevertheless, relying on Mr. Bonday's pro se status during the arbitration proceedings, the AAA arbitrator liberally construed his demand for severance pay and morphed it into a claim for discrimination under section 510 of the Employee Retirement Income Security Act ("ERISA"). And despite Mr. Bonday's exclusive damages request of severance pay under the severance policy agreement, the arbitrator awarded Mr. Bonday $129,465.50 in equitable relief, plus costs and fees, for an ERISA violation that the arbitrator opined was implicitly present in Mr. Bonday's demand for arbitration.

Nalco now seeks summary judgment in the form of a declaration that Mr. Bonday's demand is nonarbitrable and also moves to vacate the arbitration award. (Docs. 18, 25.) The Court agrees with Nalco that the arbitrator exceeded her authority by deciding a nonarbitrable issue. And because the parties did not agree to arbitrate the question of which issues are arbitrable, whether Mr. Bonday submitted an arbitrable issue is for this Court to decide, not the arbitrator. Thus, Nalco's motions (Docs. 18, 25.) are **GRANTED**, the Court declares that Mr. Bonday's demand was nonarbitrable, and the arbitration award (Doc. 25-1) is **VACATED**.

BACKGROUND[1]

The following background is pulled from Mr. Bonday's Demand for Arbitration ("Demand"). (Doc. 36-1.) Mr. Bonday began working for Nalco—a subsidiary of Ecolab, Inc.—sometime around 2005. (Id. at 6.) Relevant here, Mr. Bonday executed two agreements that governed his employment with Nalco. (Docs. 36-2, 36-3.)

The first is the Ecolab Severance Plan ("Severance Plan") formed under ERISA. (Doc. 36-2.) The stated "purpose of [the Severance Plan] is to provide severance benefits in certain situations to Eligible Employees who are involuntarily terminated."

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[1] The Court finds that there is sufficient evidence before it to address the grounds in Nalco's motion to vacate. Cf. Legion Ins. Co. v. Ins. Gen. Agency, Inc., 822 F.2d 541, 542–43 (5th Cir. 1987) (affirming district court's resolution of motion to vacate arbitration award "on the record submitted by the parties"). Thus, the Court need not conduct an evidentiary hearing and may resolve Nalco's motion to vacate on the evidence before it. See O.R. Sec., Inc. v. Pro. Plan. Assocs., Inc., 857 F.2d 742, 746 n.3 (11th Cir. 1988) The Court is also mindful that it must liberally construe Mr. Bonday's filings given his pro se status. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Last, the Court's analysis turns solely on questions of law and there are no factual determinations to be made based on disputed evidence precluding summary judgment. Cf. Artistic Ent., Inc. v. City of Warner Robins, 331 F.3d 1196, 1202 (11th Cir. 2003) ("[W]here a legal issue has been fully developed, and the evidentiary record is complete, summary judgment is entirely appropriate.").

(Id. at 3) A Nalco employee may be eligible for severance pay if he or she is "terminated for reasons determined by the Plan Administrator to be beyond the Employee's control, such as . . . [r]eorganization or job elimination." (Id.) The amount of severance pay that an employee may be entitled to depends on how long the employee worked for Nalco. (Id. at 5) Critical to this dispute, the Severance Plan provides that an "Employee may appeal a determination of his or her eligibility for benefits or the amount of the benefit by filing a written appeal with the Plan Administrator within 60 days after the initial benefit determination." (Id. at 9) "If the Employee does not file an appeal within 60 days, the initial determination will be final." (Id.)

The second relevant agreement is the Ecolab Mediation and Arbitration Agreement ("Arbitration Agreement"). (Doc. 36-3) Mr. Bonday does not dispute that he and Nalco are "bound under" the Arbitration Agreement. (Doc. 37 at ¶ 1.) The Arbitration Agreement "is intended to create a procedural mechanism for the final resolution of all Disputes falling within its terms." (Doc. 36-3 at ¶ 1.) It provides that "[a]ll Disputes shall be finally and conclusively resolved by final and binding arbitration before a neutral third party." (Id. at ¶ 3.) "To initiate arbitration, either the [employee] or [Nalco] must file a written Demand for arbitration with the [AAA]." (Id. at ¶ 10.B.) "Arbitration will be conducted in accordance with the AAA Employment Arbitration Rules To the extent there is any conflict between the AAA Rules and [the] Agreement, the terms of [the] Agreement shall control." (Id.)

The Arbitration Agreement also establishes that the "arbitrator's authority shall be limited to the resolution of Disputes between the Parties." (Id. at ¶

10.B.(5).) The Arbitration Agreement defines a "Dispute" as follows:

> "Dispute" means any and all claims or controversies alleging violations of federal, state, local or common law between an Associate and the Company (and vice versa) arising out of or in any way related to the application for employment, employment or cessation of employment with the Company, including all previously unasserted claims prior to the date of this Agreement. The term "Dispute" includes, without limitation, claims, demands or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963 and all amendments thereto and any other federal, state or local statute, regulation or common law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, overtime, breach of contract, retaliation, whistleblowing, defamation or employment-related tort.

(Id. at ¶ 2.E.) But the Arbitration Agreement also expressly carves out certain claims that do not constitute a "Dispute" as follows:

> "Dispute" does not include claims related to: (i) workers' compensation benefits; (ii) unemployment compensation benefits; [and]

> ([iii]) controversies over awards of benefits or incentives under the Company's stock option plans, employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controversies. . . .

(Id.) Further, the Arbitration Agreement "does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement. Such disputes can only be resolved by a court of competent jurisdiction." (Id.)

Around 2014, Nalco began "re-organizing, downsizing," and offering its employees severance packages. (Doc. 36-1 at 4.) "In 2015/2016," Mr. Bonday transitioned from his position with Nalco into the role of "Global Technical Director – Tissue Segment." (Id.) "In 2018," Mr. Bonday's employment group experienced further reorganization. (Id.) And, "[i]n September 2019, . . . another change in structure" resulted in "numerous people [being] demoted to a lower management level and or retir[ing] early with severance packages." (Id.) Presumably, it was during this time period when Mr. Bonday's "Director role . . . [was] eliminated and consolidated into one new Director role," and Mr. Bonday was demoted from "Director of Technology" to an "Industry Technical Consultant." (Id. at 5.) This position came with an increase in salary but decrease in bonus compensation. (Id.) Mr. Bonday emailed his "manager at the time stating [that he] was not interest[ed] in the low level role . . . and asked for [a] severance package." (Id.) He was informed that if he "was not interested in the" new role, Mr. Bonday "would have to apply for [a] new Director position." (Id.)

Mr. Bonday indeed applied for a "Technical Director" position in October 2019 but did not get that position. (Id.) In February 2020, a co-worker who had already received a severance package forwarded Mr. Bonday a copy of the Severance Plan. (Id.) Believing he was entitled to a severance package under the Severance Plan, Mr. Bonday contacted Nalco "in February and March of 2020," inquiring why, despite his requests, he did not receive a severance package. (Id.) Nalco's Human Resources thereafter advised Mr. Bonday that he "did not warrant a severance package because [his] total salary compensation did not change by any significant amount." (Id.) Disagreeing with that decision, Mr. Bonday "challenged this" to a Human Resources Vice President, who upheld the denial of severance benefits. (Id.) Thus, "[w]ith options for severance closed," Mr. Bonday left the company "by June 1, 2020." (Id.)

Mr. Bonday discovered in September 2020 that Nalco had provided severance packages to two employees who were "leveled down" from their Director positions to Senior Industry Technical Consultant roles. (Id.) Mr. Bonday again contacted Nalco's Human Resources, this time "regarding the difference in treatment for severance packages." (Id.) Mr. Bonday was told that he "was never really a Director and was always just a [consultant] so [he] therefor[e] did not merit a severance award." (Id.)

Mr. Bonday subsequently filed his pro se Demand with the AAA on December 29, 2020. (Id. at 3.) Mr. Bonday's Demand is a standard AAA form that he completed, including additional pages he prepared explaining the facts that the Court has set forth above. (See Doc. 36-1.) In the section of the Demand

asking that he "describe the nature of each claim," Mr. Bonday wrote:

> My role as Global Director of Tissue was eliminated and I was demoted to Senior ITC (a role I had never held) during a headcount reduction & reorganizing "leveling" event. I requested severance at the time, but was denied. I am requesting arbitration for Nalco Water to follow the Ecolab Severance Policy and award me 36 weeks salary per the policy. Please see attached additional pages for details.

(Id. at 3. (emphasis added).)

On January 19, 2021, in response to Mr. Bonday's Demand, Nalco's counsel informed the AAA that the Arbitration Agreement "between the parties does not provide for the arbitration of the claims raised in Mr. Bonday's Demand." (Doc. 18-1 at 161.) Specifically, Nalco explained that "the definition of 'Dispute' in the [Arbitration] Agreement . . . 'does not include claims related to . . . controversies over awards of benefits or incentives under'" Nalco's "'employee benefits plans . . . that contain an appeal procedure.'" (Id. (quoting Doc. 36-3 at 2).) Nalco pointed out that the Severance Plan "provides an appeal procedure" and, therefore, asserted that "this matter cannot proceed in arbitration." (Id.) The AAA sought comments on the matter from Mr. Bonday and, noting the parties' disagreement, determined that "this matter will proceed forward since [Mr. Bonday] has met their filing requirements required in the [AAA's] rules" and "it is [not the AAA's] role to interpret the parties' contract and determine arbitrability." (Id. at 191–92.)

The AAA also noted that "[a]rbitrability issues

are decided only by the arbitrator, once appointed, or a court of jurisdiction." (Id. at 192.)

Nalco subsequently emailed the Arbitration Agreement to the AAA, this time positing that the Arbitration Agreement "does not apply to disputes regarding the enforceability, revocability or validity of the [Arbitration] Agreement or any portion of the Agreement" and that "[s]uch disputes can only be resolved by a court of competent jurisdiction." (Id. at 191.) Thus, Nalco concluded that the AAA "does not have jurisdiction over this matter unless and until a court of competent jurisdiction[] makes a decision on arbitrability." (Id.) Notwithstanding Nalco's contentions, the AAA appointed an arbitrator who conducted a case management conference on August 27, 2021. (Doc. 37-5 at 3.) Nalco did not attend that case management conference, and the arbitrator deemed Nalco's "allegations of lack of jurisdiction as waived." (Id.) Thereafter, Nalco filed a complaint for declaratory judgment with this Court on October 1, 2021. (Doc. 1.)

About a month later, seeking to enjoin Mr. Bonday from pursuing arbitration, Nalco filed a Time-Sensitive Motion for Temporary Restraining Order, or Alternatively, for Preliminary Injunction with this Court.(Doc. 10.) This Court denied Nalco's motion on November 11, holding that Nalco had not shown it would suffer irreparable harm because any monetary award from the arbitrator based on a nonarbitrable issue would be subject to vacatur upon final judgment of this case. (Doc. 11 at 5–6.) The Court also dismissed Nalco's complaint without prejudice because it did not allege subject matter jurisdiction, instead citing the Declaratory Judgment Act as the sole basis for subject matter jurisdiction.(Id. at 6–7.) A few days later, Nalco filed with the AAA a motion to stay the

arbitration proceedings until this Court determined the issue of arbitrability. (Doc. 37-5 at 3.) Relying on this Court's November 12 dismissal of Nalco's original complaint, which was without prejudice and with leave to include jurisdictional allegations, (id. at 6–7), the arbitrator denied Nalco's motion to stay as moot, (id. at 3).

Despite denying the motion, the arbitrator nonetheless addressed Nalco's jurisdictional argument and determined arbitration would continue. (Id.) Specifically, the arbitrator determined that she had the authority to arbitrate the submitted issue because, as the arbitrator saw it, Mr. Bonday's Demand potentially included ERISA and age discrimination claims alongside his request for severance pay under the Severance Plan. The arbitrator explained her reasoning as follows:

> [Nalco] has treated [Mr. Bonday's] Demand for arbitration solely as a breach of their Severance Agreement[.] As such Nalco has referred to the language in that agreement regarding a stated appeal process which, according to the separate Arbitration Agreement between the parties, would preclude its arbitrability. However, in doing so, Nalco has ignored the other possible claims raised by [Mr. Bonday], who has proceeded in this forum pro se. [Mr. Bonday] has repeatedly stated he was not treated the same as other similarly situated employees who were given the requested benefits. As noted by [Nalco] in its motion [to stay], the plan itself was created pursuant to [ERISA]. As such, [Mr. Bonday] may be raising violations of ERISA for the disparate treatment. [Mr. Bonday] also recited his age, so he may also be claiming age

> discrimination under state or federal law. Therefore, even assuming, arguendo, [Nalco] is correct as to a breach of contract claim, it does not foreclose the arbitration of other claims raised by [Mr. Bonday], which are covered by the parties' arbitration agreement. Therefore, this process will continue.

(Doc. 37-5 at 3–4) (emphasis added.))

On November 16, 2021, while arbitration was pending, Nalco amended its complaint before this Court to include a basis for subject matter jurisdiction, (Doc. 12 at 2), Mr. Bonday answered a few days later, (Doc. 13), and subsequently moved to dismiss Nalco's complaint (Doc. 15). Nalco subsequently moved for summary judgment on Count I of its pleading. (Doc 18.) Specifically, Nalco sought a declaration that Mr. Bonday's Demand "is not arbitrable." (Id. at 11.) On December 31, while the motions to dismiss and for summary judgment were pending before this Court, the arbitrator conducted a trial on Mr. Bonday's Demand and entered an award for $129,465.50 plus interest in Mr. Bonday's favor ("Award"). (Doc. 25-1.)

First, the arbitrator denied relief under what she had liberally construed as an age discrimination claim because Mr. Bonday could not prove he was treated differently to others younger than him. (Doc. 25-1 at 3.) Second, the arbitrator found that Mr. Bonday's "breach of contract claim arose from his allegations that [Nalco] failed to pay him severance pursuant to the terms of the [Severance] Plan" and that the Severance Plan contained an appeal process which meant "according to the parties' Arbitration Agreement, . . . the [a]rbitrator is without jurisdiction to decide the breach of contract claim." (Id. at 4.) Last,

the arbitrator found that Nalco violated ERISA when it interfered with Mr. Bonday's right to severance benefits because he was critical to Nalco, and the company had wanted him to continue his employment rather than claim the severance pay to which he was entitled and leave. (Id. at 4–6.) Thus, the arbitrator awarded Mr. Bonday $122,870 in equitable relief under ERISA, plus fees and costs. (Id. at 6.)

Nalco moved to vacate the Award in this Court on January 25, 2022. (Doc. 25.) It then sought leave to amend its first amended complaint to add diversity as a basis for this Court's subject matter jurisdiction, which this Court granted. (Docs. 34, 36.) It is important to note that the requested relief in Nalco's operative pleading is materially identical to its original and first amended complaints seeking declaratory judgment—namely, that Mr. Bonday's Demand is nonarbitrable as submitted. (Compare Docs. 1, 12 with Doc. 36.) On June 3, 2022, Mr. Bonday moved to dismiss Nalco's second amended complaint because of "improper venue under Rule 12(b)(3) and or failure to state a claim upon which relief can be granted under Rule 12(b)(6)." (Doc. 37 at 1.)

Liberally construing Mr. Bonday's pro se filing, as this Court must, he appears to argue that the AAA's Employment Arbitration Rules and Mediation Procedures preclude Nalco from seeking relief in this Court. (See Doc. 37 at ¶¶ 1–3.) Mr. Bonday also argues across his filings that Nalco's requested relief is moot because the arbitrator found she was without jurisdiction to decide his claim for "Breach of contract of Employee Severance Plan." (See, e.g., id. at ¶¶ 5–6.) In sum, Mr. Bonday maintains that "[Nalco's] claim for relief [is] not valid (moot) and cannot be granted as [the] AAA arbitrator . . . has already ruled in favor of [Nalco] regarding lack of jurisdiction" and "the

proper venue for this dispute has been and still is the [AAA]." (Id. at 4.)

Contrastingly, Nalco urges the Court to vacate the Award under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. (Doc. 25 at 10.) It does so primarily on the grounds that the arbitrator impermissibly determined Mr. Bonday's Demand was subject to arbitration because the parties did not agree to arbitrate that separate issue. (Id. at 11–14.)

LEGAL STANDARD

It is well-established that "review of an arbitration decision itself is extremely limited, among the narrowest known to the law." Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A., 34 F.4th 1290, 1293 (11th Cir. 2022) (quotation omitted). An arbitration award may therefore be vacated only on one of the four statutory grounds in section 10(a). Johnson v. Directory Assistants Inc., 797 F.3d 1294, 1299 (11th Cir. 2015) (citing Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 586 (2008)).[2] One such ground is "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

[2] Nalco incorrectly asserts that "[a]n award may be vacated if it is (1) arbitrary and capricious; (2) if the enforcement of the award is contrary to public policy; or (3) if the award was made in manifest disregard for the law." (Doc. 25 at 10 (citing cases).) "While several judicially-created bases for vacatur had developed in this circuit over the past few decades, . . . such grounds are no longer valid in light of the Supreme Court's decision in Hall St. Thus, the grounds for vacatur listed in § 10(a) are exclusive." Johnson, 797 F.3d at 1299 (citing Frazier v. CitiFinancial Corp., LLC, 604 F.3d 1313, 1324 (11th Cir. 2010)).

definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4).

It is also axiomatic that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (quotation omitted). "This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." Id. at 648–49 (citing Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 374 (1974)). Stated differently, "only those disputes . . . that the parties have agreed to submit" to arbitration are arbitrable. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Thus, an arbitrator exceeds his or her power by deciding an issue "not submitted to the arbitrator[]." Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1195 (11th Cir. 1995) (citing 9 U.S.C. § 10(a)(4)).

Along those lines, "the question of arbitrability–whether [an arbitration agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination . . . [u]nless the parties clearly and unmistakably provide otherwise, . . . not the arbitrator." AT & T Techs., Inc., 475 U.S. at 649. While courts "should give considerable leeway to the arbitrator" when the parties have so agreed, if "the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently." First Options of Chicago, Inc., 514 U.S. at 943 (emphasis in original). And federal courts "apply ordinary state-law principles that govern the

formation of contracts" to guide their interpretations of arbitration agreements. Id. at 944.

It follows, then, that while "the arbitrator [may decide] issues properly before him, it is the court's task to determine what issues were originally submitted to the arbitrator." Bakery, Confectionery & Tobacco Workers Loc. Union No. 362-T, AFL-CIO-CLC v. Brown & Williamson Tobacco Corp., 971 F.2d 652, 655 (11th Cir. 1992); see also Iron Workers Loc. No. 272 v. Bowen, 624 F.2d 1255, 1264 (5th Cir. 1980) ("[A]n arbitrator can only decide issues submitted to him, . . . [but] determining just what issues were submitted to an arbitrator is a task for the court.").

In sum, "a district court is empowered to vacate arbitral awards where the 'arbitrators exceeded their powers.' If a dispute is nonarbitrable, then an arbitrator necessarily exceeds his powers in adjudicating it." Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1112 n.20 (11th Cir. 2004) (quoting 9 U.S.C. § 10(a)(4)). When the parties "have actually submitted an issue to an arbiter, [courts] must look both to their [arbitration agreement] and to the submission of the issue to the arbitrator to determine his authority." Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Loc. No. 1, 611 F.2d 580, 584 (5th Cir. 1980). But courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clea[r] and unmistakabl[e]" evidence that they did so. First Options of Chicago, Inc., 514 U.S. at 944.

Ultimately, therefore, the "question of whether a party can be compelled to arbitrate, as well as the question of what issues a party can be compelled to arbitrate, is an issue for [this Court] rather than the arbitrator to decide." Executone Info. Sys., Inc. v. Davis, 26 F.3d 1314, 1321 (5th Cir. 1994).

DISCUSSION

To begin, the Court finds that the parties did not clearly and unmistakably agree to let the arbitrator determine whether Mr. Bonday's Demand was arbitrable in the first instance. Questions of arbitrability "include questions such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Bamberger Rosenheim, Ltd., (Israel) v. OA Dev., Inc., (United States), 862 F.3d 1284, 1288 (11th Cir. 2017) (quotation omitted). "Some arbitrability questions are about the 'scope' or 'applicability' of the parties' arbitration agreement—i.e., what set of disputes the arbitration agreement covers, and whether it governs the particular dispute at hand." Attix v. Carrington Mortg. Servs., LLC, 35 F.4th 1284, 1299 (11th Cir. 2022). In Florida, "the intent of the parties to a contract, as manifested in the plain language of the arbitration provision and contract itself, determines whether a dispute is subject to arbitration." Jackson v. Shakespeare Found., Inc., 108 So. 3d 587, 593 (Fla. 2013).

The plain and ordinary reading of the Arbitration Agreement here readily shows that the parties did not intend to arbitrate arbitrability. The Arbitration Agreement first delineates what constitutes a "Dispute" subject to arbitration. (Doc. 36-3 at 2, ¶ 2.E.) Then it discusses what types of claims a "Dispute" does not include. (Id.) And, immediately after these exclusions, the Arbitration Agreement expressly states that it "does not apply to disputes regarding the enforceability, revocability or validity of the Agreement or any portion of the Agreement." (Id. (emphasis added).) The enforceability, revocability, or

validity of the Arbitration Agreement concerns "whether the parties have entered into a legally operative arbitration agreement that is enforceable under law." Attix, 35 F.4th at 1299. But the parties also clarify in the Arbitration Agreement that it "does not apply to disputes regarding . . . any portion of the Agreement." (Doc. 36-3 at ¶ 2.E.) Rather than agreeing to arbitrate those issues, "[s]uch disputes can only be resolved by a court of competent jurisdiction." (Id.)

The parties also limited the arbitrator's authority "to the resolution of Disputes between the parties," not the resolution and determination of what constitutes Disputes. (Id. at ¶ 10.B.(5).) And Nalco's actions cannot support an inference that it agreed to have the arbitrator to decide the question of arbitrability. "To the contrary, insofar as [Nalco] [was] forcefully objecting to the arbitrator[] deciding [its] dispute with [Mr. Bonday], one naturally would think that they did not want the arbitrator[] to have binding authority over [it]." First Options of Chicago, Inc., 514 U.S. at 946 (emphasis in original). Based on careful review of the entire record, the Court finds that the parties did not delegate the question of arbitrability (i.e., whether Mr. Bonday's Demand was arbitrable in the first instance) to the arbitrator. At the very least, there is no clear and unmistakable evidence of that delegation. Thus, that determination is for this Court, which therefore reviews the arbitrator's determination of whether Mr. Bonday's Demand was arbitrable "de novo." Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 n.2 (2013) (quotation omitted).

Still, the "language of arbitration demands should not be subjected to the same strict standards of construction that would be applied in formal court

proceedings." Kurt Orban Co. v. Angeles Metal Sys., 573 F.2d 739, 740 (2d Cir. 1978). Indeed, "[f]ederal law . . . does not impose any requirements as to how specific a notice of arbitration must be." Valentine Sugars, Inc. v. Donau Corp., 981 F.2d 210, 213 (5th Cir. 1993). Be that as it may, once again, the "law is well-established that an arbitrator can bind the parties only on issues that they have agreed to submit to [arbitration]," and an arbitrator exceeds her power under section 10(a)(4) by deciding issues not submitted to her. Davis, 59 F.3d at 1194–95 (quotation omitted).

Here, the Court finds Mr. Bonday's Demand asserts "claims related to. . . unemployment compensation benefits" or "controversies over awards of benefits or incentives under [Nalco's] . . . employee benefits plans or welfare plans that contain an appeal procedure or other procedure for the resolution of such controversies." (Doc. 36-3 at ¶ 2.E.) Mr. Bonday specifically requested "arbitration for [Nalco] to follow the [Severance Plan]" and for the arbitrator to "award [him] 36 weeks salary per the policy." (Doc. 36-1 at 3.) The only time Mr. Bonday referenced a "difference in treatment for severance packages" was in explaining why he contacted Nalco again attempting to secure severance pay under the Severance Plan. (Id. at 5.) Mr. Bonday also made a specific request for damages in the form of severance pay, not a broad request for damages stemming from general employment grievances.

The Court therefore finds that Mr. Bonday did not submit a Demand for the arbitration of any ERISA discrimination claim. See Davis, 59 F.3d at 1195 (holding that the issue of attorneys' fees was not submitted for arbitration, in part, because a request for such fees was never made). And Mr. Bonday's pro

se status during arbitration notwithstanding, "the mere fact that the [arbitrator] was aware of a statute that provides for an award of [equitable damages under ERISA] does not constitute a submission of the issue by the parties for determination." Id. Simply put, it was "anomalous for the [arbitrator] to award an unrequested item of damages . . . supported with an argument that the awarded item was naturally intertwined within the scope of the arbitration." Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 651 (5th Cir. 1979) (vacating arbitrator's award based on an issue not submitted to arbitration).

With the issue submitted to arbitration decided, all that is left is for the Court to determine whether Mr. Bonday's Demand was arbitrable in the first instance. When reviewing the scope of an arbitration agreement, "there is a presumption of arbitrability in the sense that" a "particular grievance" is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 314 (2010) (quotation omitted). For example, when deciding whether to compel arbitration, courts are mindful that "[w]hether a claim falls within the scope of an arbitration agreement turns on the factual allegations in the complaint rather than the legal causes of action asserted." Gregory v. Electro-Mech. Corp., 83 F.3d 382, 384 (11th Cir. 1996).

With respect to contractual language about whether an issue is arbitrable, the "addition of the words 'relating to' broadens the scope of an arbitration provision to include those claims that are described as having a 'significant relationship' to the contract."

Jackson, 108 So. 3d at 593 (quoting Seifert v. U.S. Home Corp., 750 So. 2d 633, 638 (Fla. 1999) (emphasis added)). "[A] significant relationship is described to exist between an arbitration provision and a claim . . . if it emanates from an inimitable duty created by the parties' unique contractual relationship." Id. Thus, an arbitration provision including claims "relating to" a contractual relationship necessarily encompasses those claims that are "inextricably intertwined with both the circumstances that surrounded the transaction from which the contract emanated and the contract itself." Id. at 595.

Based on the above principles, Mr. Bonday's Demand—specifically, the grievance giving rise to the Demand—was nonarbitrable. The Arbitration Agreement expressly states that "Dispute[s] do[] not include claims related to . . . controversies over awards of benefits or incentives under [Nalco's] . . . employee benefits plans . . . that contain an appeal procedure." (Doc. 36-3 at ¶ 2.E.) Mr. Bonday submitted his Demand because Nalco did not follow the Severance Plan and he requested "36 weeks salary per the [Severance Plan]." (Doc. 36-1 at 3.) And the Severance Plan, which governs Mr. Bonday's entitlement to an award of employee benefits in the form of severance pay, unquestionably contains an appeal procedure. (Doc. 36-2 at 9.) For these reasons, Mr. Bonday's Demand was not a "Dispute," as that term is defined in the Arbitration Agreement, and therefore was not subject to arbitration.

Additionally, even assuming Mr. Bonday submitted a claim for discrimination under ERISA as the arbitrator construed, the result would be no different because that claim is inextricably intertwined with the Severance Plan, which is not a "Dispute" subject to arbitration because, again, it

includes an appeals process. Jackson, 108 So. 3d at 595. Turning to the Award, the arbitrator determined that Nalco had violated section 510 of ERISA. This anti-retaliation provision of ERISA provides that an employer may not "discriminate against" an employee "for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such [employee] may become entitled under the plan." 29 U.S.C. § 1140 (emphasis added). Mr. Bonday's entitlement to any severance pay, and indeed damages for an ERISA violation, "emanates from the . . . execution and existence of the [Severance Plan] itself." Jackson, 108 So. 3d at 595. The arbitrator's decision demonstrates just why the construed ERISA claim arises from a nonarbitrable dispute as set forth in the Arbitration Agreement. In discussing why Mr. Bonday may be bringing claims not on the face of the Demand, the arbitrator reasoned that the Severance Plan "itself was created pursuant to [ERISA]." (Doc. 37-5 at 3.) Then, the arbitrator determined that Nalco "denied [Mr. Bonday] his right to take the [Severance] Plan." (Doc. 25-1 at 4–5 (emphasis added).) The arbitrator even discussed Mr. Bonday's "appeal" to Nalco's Human Resources, which is difficult for the Court to reconcile. (Id. at 5.)

Ultimately, the arbitrator issued the Award by finding that Nalco had "interfere[ed] with [Mr. Bonday's] attainment of rights under the [Severance] Plan to which he would have been entitled." (Id. at 6.) This plainly constitutes a claim related to "controversies over awards of benefits or incentives under [Nalco's] . . . employee benefits plans . . . that contain an appeal procedure"—a nonarbitrable claim, in other words. (Doc. 36-3 at ¶ 2.E.) Further, Mr.

Bonday's entitlement to any such benefits is contingent on him being an "Eligible Employee" and not an "Excluded Employee[]" or an "Employee who loses employment with [Nalco] . . . in an 'Ineligible Termination'" as those terms are defined in the Severance Plan. (Doc. 36-2 at 3–4.)[3] Thus, regardless of the legal label that the arbitrator attached to Mr. Bonday's Demand, his grievance simply does not constitute a "Dispute" under the parties' Arbitration Agreement, and the Award is therefore due to be vacated.[4]

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[3] For these reasons, the Court rejects any argument that the ERISA claim "pertains to the breach of a duty otherwise imposed by law," thereby suggesting that Mr. Bonday's construed Demand has no nexus to the Severance Plan. Jackson, 108 So. 3d at 593.

At bottom, the grievance supporting that Demand has a significant relationship to the Severance Plan and is therefore within the scope of the Arbitration Agreement's provision delineating which claims do not constitute an arbitrable "Dispute." Indeed, the sole remedy sought from Mr. Bonday was severance pay under the Severance Plan.

[4] For the same reasons that the Award is due to be vacated, Nalco is entitled to summary judgment on its Second Amended Complaint. (Docs. 18, 36.) While Nalco amended its pleading after moving for summary judgment, the relief it seeks has not changed. (Compare Doc. 36 with Doc. 12.) Accordingly, to delay resolution of Nalco's motion would serve no purpose other than "exalt[ing] form over substance." 6 C. Wright & A. Miller, Federal Practice & Procedure § 1476 (3d ed. 2020). And though Mr. Bonday has not specifically responded to Nalco's motion for summary judgment, that motion raises the same arguments in Nalco's pleadings and motion to vacate arbitration to which Mr. Bonday has responded. (Compare Doc. 18 with Doc. 26.) Accordingly, the Court is "convinced that [it has] before [it] . . .

CONCLUSION

Ultimately, "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." First Options of Chicago, Inc., 514 U.S. at 945. Based on the plain and ordinary language of the Arbitration Agreement, Nalco and Mr. Bonday did not agree to allow the arbitrator to determine whether Mr. Bonday's Demand was arbitrable in the first place. And the Court finds that Mr. Bonday submitted, and the arbitrator decided, a nonarbitrable issue. In doing so, the arbitrator exceeded her power under the Arbitration Agreement and Mr. Bonday's Demand. Therefore, the arbitrator's award must be vacated and Nalco is entitled to declaratory judgment.

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all of the facts and arguments that [Mr. Bonday] would have or could have presented had [Mr. Bonday]" responded to Nalco's summary judgment motion. Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1213 (11th Cir. 1995). Thus, "permitting [Mr. Bonday] to respond [specifically] to the motion for summary judgment in light of [Nalco's] second amended complaint would not [affect] [this] [C]ourt's decision on the motion for summary judgment." Cf. Reflectone, Inc. v. Farrand Optical Co., 862 F.2d 841, 845 (11th Cir. 1989) (holding that "the district court [did not err] when it carried over appellee's pending motion for summary judgment to [appellant's] second amended complaint").

Accordingly, it is **ORDERED**:

1. Mr. Bonday's motions to dismiss (Docs. 15, 37) are **DENIED** for the reasons stated in this Order.

2. Nalco's Motion to Vacate Arbitration Award (Doc. 25) is **GRANTED**, and the Final Award of the Arbitrator (Doc. 25-1) is **VACATED**.

3. Nalco's motion for summary judgment (Doc. 18) is **GRANTED**.

4. Nalco is entitled to declaratory judgment on its Second Amended Complaint (Doc. 36) and the Court decrees as follows: Mr. Bonday's Demand (Doc. 36-1) was and is not arbitrable under the parties' Arbitration Agreement (Doc. 36-3).

5. The Clerk is **DIRECTED** to enter judgment accordingly, terminate any pending motions and deadlines, and close the file.

ORDERED at Fort Myers, Florida, on September 22, 2022.

/s/ John L. Badalamenti

John L. Badalamenti

United States District Judge

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION RULES

In the Matter of the Arbitration between

Laurence Bonday,

Claimant,

AAA Case no. 1-20-0019-3732

and

Nalco Water, LLC, a subsidiary of

Ecolab Inc.

Respondent

FINAL AWARD OF THE ARBITRATOR

I, Cindy L. Anderson, THE UNDERSIGNED ARBITRATOR, having been duly sworn and having heard the proofs and arguments presented by the Claimant in a hearing conducted on December 7, 2021, via videoconference, (for which appropriate notice was provided to Respondent), here make a FINAL AWARD as follows:

Claimant Laurence Bonday (hereafter "Claimant" or "Bonday") appeared at the hearing. Respondent, Nalco Water Inc., (hereafter "Nalco" or "Respondent") was duly notified of the hearing, but declined to appear through its record representative, attorney Rene E. Thorne. At the hearing, Claimant presented evidence through witness testimony and exhibits in

support of his claims of age discrimination in violation of the federal Age Discrimination in Employment Act, breach of contract, and violation of the federal Employee Retirement Income and Security Act ("ERISA"), all arising out of Respondent's refusal to give Claimant the option of accepting Respondent's severance plan ("the Plan") after his job was eliminated and he was placed in a demoted position. All of Claimant's evidence was unrebutted, although Respondent steadfastly argued to AAA since the beginning of these proceedings (and in an action pending in federal court) the Arbitrator was without jurisdiction to hear any of the claims raised by Claimant. This was based on its argument that Claimant failed to follow the process outlined in the Plan for appealing a denial of benefits of the Plan (although no sworn or documentary evidence was submitted by Respondent supporting these allegations). After the presentation of the evidence at the hearing, the hearing was closed.

CLAIMANT's ASSERTED BASES FOR HIS CLAIM

Age Discrimination-

The ultimate requirement for any claim of discrimination is that the individual was treated differently due to his protected status- in this case, his age. Claimant was unable to do this. To the contrary, one of his witnesses adamantly disagreed that the company ever made any decisions based on age, due to their sensitivity to the requirements of the law. Moreover, although Claimant was able to prove he was treated differently, it wasn't due to age. The comparators presented were close to Bonday's own age, and his own testimony and that of another witness pointed to a different reason for the denial of

the Plan benefits. Based on the evidence presented, Claimant's claim of age discrimination is **DENIED.**

Breach of Contract-

Claimant's breach of contract claim arose from his allegations that Respondent failed to pay him severance pursuant to the terms of the Plan. However, after testimony at the hearing and admission by the Claimant, the Arbitrator finds that Claimant failed to pursue his claims under the Plan pursuant to the appeal process terms required therein. Therefore, according to the parties' Arbitration Agreement, by which Claimant submitted this dispute to AAA, the Arbitrator is without jurisdiction to decide the breach of contract claim, so it is therefore **DENIED.**

ERISA Violation-

Throughout the proceedings in this case, Claimant has steadfastly asserted he was treated differently than his peers when Respondent decided to undergo a "leveling" process at the end of 2019 (abolishing positions at a certain level, and demoting those in the positions to a lower level job). His peers at the same level ("Director" positions) were offered the option of accepting the Plan, he was not. In prior pleadings, Respondent stated its plan was created and implemented pursuant to the requirements of ERISA. At the hearing, Claimant's assertions were verified by two witnesses who still work for the Respondent, but who were subpoenaed to testify for this case. Both men were, like Claimant, working at a Director level, and then told their positions were being abolished and they would be demoted in position and benefits, although their salaries would remain the same. Both testified that a few weeks later they were each contacted verbally and informed that the demotion entitled them to opt for the severance package

contained in the Plan, but both decided to stay with the company instead. Claimant on the other hand was never given this option.

Even though he occupied the same level position—Director—and he was demoted to the same level position—Senior Technical Consultant—the Respondent denied him his right to take the Plan. This occurred despite his repeated efforts to bring the disparity to Respondent's attention: first with his supervisor, then with the Human Resources department, then the company ombudsmen, and further up the HR chain of command. When Claimant's efforts to work with Respondent's representatives were rebuffed in his last appeal in May, 2020, he made the decision to leave the company. However, in September of 2020, he learned of the disparate treatment received by others, and so renewed his efforts to receive the severance benefits under the Plan by contacting Respondent's representatives again. When Respondent again refused to treat him like the others, he filed a demand for Arbitration pursuant to the parties' Arbitration Agreement.

The reason for the disparate treatment of Claimant was his perceived value to Respondent's operations. Both Bonday and his former boss testified the company considered him "critical" to their operations. So instead of allowing Claimant to take the Plane when Claimant complained, Respondent increased his salary (despite the fact that it was already was above the pay band for his position). This latter action lent further credence to Claimant's position that he was prevented from taking the plan so he wouldn't leave.

Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or **for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan,** *29 USC Section 1140 (emphasis added)*

Enforcement of the above by a plan beneficiary is allowed pursuant to Section 502 of the same act. The undisputed evidence presented at the hearing was Respondent discriminated against Claimant for the purpose of interfering with his attainment of rights under the Plan to which he would have been entitled. Therefore, Claimant's claim of discriminatory treatment in violation of Section 510 of ERISA is **GRANTED**.

"Appropriate equitable relief" is available to right the wrong perpetrated pursuant to Section 502(a)(3) of the Act. Therefore, Claimant is awarded $122,870.00 in equitable relief. Additionally, the administrative fees of the American Arbitration Association totaling $2,950.00, the arbitrator's compensation totaling $3,262.50, and legal costs of $383.00 are likewise awarded to Claimant, and payable to him by Respondent pursuant to the terms of the parties' Arbitration Agreement. Therefore, Respondent shall pay to Claimant $129,465.50. Said Award in its entirety shall be due and payable no later than January 31, 2022, with interest accruing thereafter at six percent (6%) annually, or Florida's

statutorily established interest rate, whichever is higher. Any other motions or claims not expressly addressed herein are hereby **DENIED.**

This AWARD is in full settlement of all claims submitted to this arbitration.

Dated this 31st day of December, 2021.

/s/ Cindy L. Anderson

Cindy L. Anderson, Arbitrator

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

Laurence Bonday,

Claimant,

and

AAA Case no. 1-20-0019-3732

Nalco Water, LLC, a subsidiary of

Ecolab Inc.

Respondent

ORDER

This case is presently before the Arbitrator on a Motion to Stay filed by Respondent Nalco Company LLC ("Nalco") on November 14, 2021. Claimant timely filed his response to the motion on November 19, 2021, and Nalco responded on the same date.

Before turning to the substance of the motion, some context provided by the history of this case is in order. Claimant filed his *pro se* demand for arbitration on December 29, 2020, alleging, *inter alia*, Respondent refused to provide him with a severance allowance although others in similar circumstances as his had received one. After entering an appearance, on January 20, 2021, Nalco filed its response to the demand denying the applicability of the Arbitration Agreement between the parties and asking AAA to

dismiss the Demand. On April 8, 2021, it sent an email AAA stating:

"AAA does not have jurisdiction over this claim. Accordingly, Ecolab will not be responding further." (emphasis added)

Nevertheless, an arbitrator was appointed on May 10, 2021. Thereafter, the parties were notified a Case Management Conference would be scheduled to address discovery and any other issues the parties wished to address. After seeking input from the parties regarding availability, AAA notified both parties on August 23, 2021, the conference would take place on August 27, 2021. In the notification to the parties regarding the conference issues to be addressed, AAA stated:

> "Enclosed is the Management Conference Guide which covers items to be discussed during the Arbitration Management Conference. **Arbitrator Anderson will also address Respondent's objections to jurisdiction which will be treated by Arbitrator Anderson as a motion to dismiss.** (emphasis in original."

The management conference was held as scheduled. **Nalco did not appear**. No reason was given. **As no argument was presented by Respondent at the scheduled conference, the Arbitrator treated the Respondent's allegations of lack of jurisdiction as waived, and therefore dismissed the motion**. A discovery schedule was established, as well as a filing deadlines and a hearing date, three months later (November 19, 2021). After the conference, the Arbitrator issued an Order distributed to both parties, setting out the time

deadlines for the litigation and the date set for the hearing.

Two months later (October 10, 2021), Nalco filed a Complaint for Declaratory Judgment in the Middle District of Florida. Therein, it presented its view of the claims in issues and then stated, "AAA has refused to dismiss the matter, despite being notified numerous times that the Agreement provides that issues of arbitrability can only be resolved by a court," failing to mention the decision of the Arbitrator, or that a hearing on the merits was scheduled. On November 8, 2021, it then filed a motion for a temporary restraining order or injunctive relief with the same court, citing the impending hearing as it basis therefore. On November 12, 2021, that court issued an Order denying the motion and dismissing the Complaint.

On November 15, three days after the court's dismissal, the Respondent's Motion to Stay was filed with AAA, for the first time addressing its jurisdictional concerns to the arbitrator, asking the arbitrator for a stay pending the resolution of its complaint in federal court. Because the arbitrator was unaware of the court's Order, until Claimant provided a copy, the previously scheduled hearing (which had been pending for 3 months) had to be postponed while the motion and response were received and considered. However, **as the court dismissed the original Complaint, Respondent's motion is moot**, and therefore **DENIED.**

Nevertheless, as the Respondent's jurisdictional arguments are likely to return with the filing of a new Complaint in federal court, and this is the first time the Arbitrator has been presented with Respondent's position regarding jurisdiction, a summary response

is in order. Respondent has treated Claimant's Demand for arbitration solely as a breach of their Severance Agreement. As such Nalco has referred to the language in that agreement regarding a stated appeal process which, according to the separate Arbitration Agreement between the parties, would preclude its arbitrability. However, in doing so, Nalco has ignored the other possible claims raised by Claimant, who has proceeded in this forum *pro se*. Claimant has repeatedly stated he was not treated the same as other similarly situated employees who were given the requested benefits. As noted by Respondent in its motion, the plan itself was created pursuant to Employee Retirement Income Security Act of 1974 ("ERISA"). As such, Claimant may be raising violations of ERISA for the disparate treatment. Claimant also recited his age, so he may also be claiming age discrimination under state or federal law. Therefore, even assuming, *arguendo*, Respondent is correct as to a breach of contract claim, it does not foreclose the arbitration of other claims raised by Claimant, which are covered by the parties' arbitration agreement. Therefore, this process will continue.

Nalco has requested "all deadlines be reset" if the court "determines that this matter may be arbitrated." This matter has been pending with AAA for almost a year now. Until now Respondent has intentionally chosen not to participate in this process. Respondent did not meet any of the deadlines previously set for this case. When Respondent was ordered to provide availability for alternative dates for a new evidentiary hearing no later than November 19, 2021, it did not (although it filed a response to Claimant's brief on that date). Then three days later, on November 22, 2021 it stated it had "work conflicts"

for the tentative dates suggested without further explanation.

To further delay for the Respondent's benefit at this point would be unfair to Claimant. However, Respondent is allowed to have until Friday, November 26, 2021, to provide its witness list and exhibits to Claimant, despite its failure to provide either on November 2, 2021, as directed by the Arbitrators Order of August 27, 2021. Failure to provide both lists to Claimant will likely result in adverse action and/or inference by the Arbitrator at the evidentiary hearing.

DONE AND ORDERED this 23d day of November 2021.

s/ Cindy L. Anderson

Arbitrator